

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP429

Cir. Ct. No. 2004CV10

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WAYNE L. KOENIG AND SHARON J. KOENIG,

PLAINTIFFS-APPELLANTS,

V.

DONALD ALDRICH, ARLENE ALDRICH, AND TIMOTHY ALDRICH,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Wayne and Sharon Koenig appeal a judgment denying their claim for adverse possession of a four-acre parcel of land owned by Donald, Arlene and Timothy Aldrich. The Koenigs argue they presented

sufficient evidence to establish adverse possession. Alternatively, the Koenigs argue that the circuit court erroneously exercised its discretion by failing to make findings of fact when the testimony conflicted. We agree with the Koenigs' second contention and reverse and remand the judgment for the court to make findings.

BACKGROUND

¶2 This dispute involves the location of an east-west quarter line, which divides the northeast quarter and the southeast quarter of a parcel of land in Eau Claire County. The Aldrichs own the northeast quarter; the Koenigs own the southeast quarter. The land was originally surveyed in 1849. Over time, the monument marking the corner was lost and had to be reconstructed. The disputed corner was reset in 1981 and again in 2003. The 2003 corner is located south of the 1981 corner, resulting in additional land being included in the Aldrichs' parcel. Both parties claim to own the land that lies between the line corresponding with the 1981 corner and the line corresponding with the 2003 corner, amounting to approximately four acres.

¶3 The Koenigs commenced this action on January 8, 2004. As relevant to this appeal, the Koenigs alleged they acquired title to the disputed land by adverse possession under color of title for a ten-year period, pursuant to WIS. STAT. § 893.26.¹ The case was tried to the court on October 8, 2004.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶4 The Koenigs introduced evidence at trial as follows. Martin Rood, a registered land surveyor, testified that he was hired by the Aldrichs to conduct a boundary survey in the mid-1990s. He located the 1981 corner monument and marked the boundary with some posts. He noticed orange flags “here and there” as he did his work.

¶5 Wayne Koenig testified that he and his wife, Sharon, purchased their parcel in 1990. The agent selling the property indicated there was a partial fence at the northern boundary of the property. The fence was approximately one hundred feet long and in poor condition. In the spring of 1991, Wayne marked what he believed was the boundary of the property with orange flags, extending the fenceline, by using a compass and the 1981 corner.² In 1994 or 1995, the Aldrichs put a new fence in the same location as the old fence.

¶6 Wayne also testified about his use of the disputed property. During the 1990 hunting season, he put up two tree stands approximately fifty feet south of the 1981 line, one of which was removed by someone else. He hunted deer in the disputed parcel every year from the time of purchase in 1990. He had three or four deer stands there. The property was used for rifle and bow hunting. Wayne took his grandchildren four-wheeling on the property. He made a trail for his daughter, a cross-country runner. He cut dead trees for firewood. He hunted rabbits a few times and allowed others to hunt on the property.

¶7 Shaun Koenig, Wayne and Sharon’s son, testified that he used the disputed parcel every year from 1990 to 2003. Shaun saw Timothy Aldrich repair

² Wayne testified his flags were within a few feet of Rood’s line.

and extend the existing fence in 1996 or 1997. After Rood's survey, Timothy moved the fence to the northwest.

¶8 Shaun hunted on the land, drove his four-wheeler and snowmobile on it, and cut wood. He had three tree stands on the disputed parcel, erected in 1990, 1995 and 2000. Shaun moved his stands out of the disputed parcel after the corner was reset in 2003.

¶9 Shaun gave permission to other individuals to hunt on the property. This testimony was corroborated by Andrew Anton, a friend of Shaun's. Anton testified he hunted on the disputed parcel each year from 1995 until 2002.

¶10 The Aldrichs introduced evidence at trial as follows. Donald Aldrich testified that, when he purchased the northern parcel in 1987, there was no fence dividing his northeast quarter from the southeast quarter. He put up a fence in 1995 or 1996 approximately thirty feet north of the line corresponding with the 1981 corner monument. After Rood conducted his boundary survey in the mid-90s, Donald moved the fence approximately thirty feet to the south. Donald hunted on his land every season from purchase until 2000.³ He never saw anyone hunting on the disputed parcel, but he never walked close enough to the fenceline to see any deer stands.

¶11 Timothy Aldrich, Donald and Arlene's son, testified there was no fence separating the properties until he erected one in 1995 or 1996. That fence

³ Donald answered "yes" to the question, "During the 1990s, did you still go out and hunt your land that's north of there?" It is unclear what land this question references: Donald's land to the north of the Koenig parcel, as opposed to the land he owns to the west of the Koenig parcel; the land north of the fence; or the land north of the 2003 line. Only the latter would implicate the disputed parcel.

was knocked down in 1997 or 1998, and he repaired the damage. The fence was never meant to be a boundary fence. The fence was moved in 1999 after Rood's survey.

¶12 Timothy testified that he hunted on the parcel north of the Koenigs' parcel. Timothy also testified about the uses he had seen others make of the property. In 1991, he saw a bait pile north of the 1981 line and a tree stand right on the line. That stand was later removed. He also saw a tree stand in 2003, which he took down. He saw no other evidence of hunting on the disputed parcel, although he did see stands south of the disputed land. The only time he saw anyone on the property was Shaun in 1999. He told Shaun to move his tree stand, and Shaun complied.

¶13 The court began its decision by reciting the ten-year adverse possession statute. It noted the Koenigs "claim this is hunting-type property and they used it for hunting and other recreational activities, such as four-wheeling and snowmobiles. Under the law, seasonable use is acceptable." The court issued its decision as follows:

All of the testimony in this case has been credible. In other words, I didn't really find anybody that wasn't sincere in the testimony that they offered.

Mr. Wayne Koenig testified they purchased the property in 1990, that he walked and marked the northern boundary from what he perceived to be the northeast quarter post marking that with some flags, that he used his property, although not specifically this area a lot, he used all of his property for hunting.

Shaun Koenig testified that in several years he had one or more deer hunting stands there, had disputes in the recent past with Tim Aldrich about where they were and, in fact, on one occasion Tim Aldrich removed one of these stands and on another occasion Shaun moved one himself.

Mr. Anton testified that since 1995 through, I think, 2003, he had been out to that property hunting and corroborated some of Shaun's testimony, although he testified they hunted on other parts of the property, including the county land which is adjacent.

Mr. Donald Aldrich testified that he didn't recollect seeing anybody using the disputed property, although he didn't go down there very much.

And Tim Aldrich testified that it was in recent years that the problems had arisen between he and Shaun regarding use of that property.

Historically, the property line was one established in '81, but that was changed in 2003 by the county. The methods the county used were questioned by Surveyor Rood.

The court has listened to the testimony and, as I indicated, I find it all credible. However, even if I look at this testimony in the light most favorable to plaintiffs, I cannot find, as a matter of law, that they have met the burden of proof in order to establish the previously described standard, open, notorious, exclusive and continuous use of this property for at least ten years under written title. There is insufficient evidence to support the claim and, consequently, the Complaint is dismissed.

The court further clarified,

Well, what I'm saying is [the Koenigs] have to carry the burden of proof, and I don't find that [they] did. In other words, even if I look at it in [the Koenigs'] favor, I think it's still fifty-fifty and that is not meeting the burden. Putting up flags—I think the [*Droege v. Daymaker Cranberries, Inc.*, 88 Wis. 2d 140, 276 N.W.2d 356 (Ct. App. 1979)] case even says putting up flags doesn't meet the standard.

DISCUSSION

¶14 To establish adverse possession, the Koenigs must show they were “in actual continued occupation of all or a material portion of the real estate” for a period of ten years. *See* WIS. STAT. § 893.26(1) and (2). Facts that constitute “possession and occupation of real estate” include where the land is used “for the

ordinary use of the occupant.” WIS. STAT. § 893.26(4)(c). Where the property is recreational and seasonal in character, “the fact that it is not continuously occupied does not militate against such occupation being sufficient to constitute adverse possession so long as it is exclusive.” *Laabs v. Bolger*, 25 Wis. 2d 17, 23, 130 N.W.2d 270 (1964).

¶15 Adverse possession issues raise mixed questions of fact and law. *Klinefelter v. Dutch*, 161 Wis. 2d 28, 37, 467 N.W.2d 192 (Ct. App. 1991). We sustain a circuit court’s findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Whether those facts meet the standard for adverse possession is a question of law we review independently. *Klinefelter*, 161 Wis. 2d at 33. As applied, “what the parties did, and how the land appeared, are facts. Whether, given those facts, the [Koenigs] adversely possessed the disputed strip is a question of law.” *Id.*

¶16 Both parties argue how the facts presented at trial meet or fail to meet the requirements the Koenigs needed to establish to obtain title by adverse possession. However, in order to determine whether the facts constitute adverse possession, we need to determine what the facts are. Accordingly, we turn first to the Koenigs’ argument that the circuit court erroneously exercised its discretion by failing to resolve the conflicting testimony.

¶17 WISCONSIN STAT. § 805.17(2) provides “the court shall find the ultimate facts and state separately its conclusions of law thereon.” A circuit court’s failure to make specific findings of facts is not necessarily reversible error. *Jacobson v. American Tool Cos.*, 222 Wis. 2d 384, 394, 588 N.W.2d 67 (Ct. App. 1998). “In such situations we may adopt one of three courses: (1) Affirm the judgment if clearly supported by the preponderance of the evidence, (2) reverse if

not so supported, or (3) remand for the making of findings and conclusions.” *Id.* (internal quotations omitted).

¶18 Here, the court made no explicit findings of fact. The court found all the evidence credible, which it also characterized as finding all witnesses’ testimony “sincere,” despite conflicts in the testimony. The court also failed to articulate how the facts supported its conclusion of law that the Koenigs had not obtained title by adverse possession. Instead, it found that even if it construed the facts most favorably for the Koenigs, they did not meet their burden of proof.⁴ Accordingly, while the court’s conclusion is clear, the factual basis for that conclusion and the reasoning supporting it is not.

¶19 The Aldrichs argue that the court’s failure to resolve the conflicting testimony actually benefited the Koenigs because the court viewed the testimony

⁴ It is also unclear whether the circuit court applied the proper legal standard when it concluded the Koenigs did not meet their burden of proof. While the court recited the proper standards at the beginning of its decision, it later noted that “putting up flags doesn’t meet the standard,” relying on *Droege v. Daymaker Cranberries, Inc.*, 88 Wis. 2d 140, 276 N.W.2d 356 (Ct. App. 1979). The Koenigs argue the court’s reliance on *Droege* is misplaced. We agree. *Droege* involved a claim of adverse possession pursuant to the twenty-year statute. Accordingly, adverse possession could be established only if the land was protected by a substantial enclosure or was usually cultivated or improved. *Id.* at 144; *see also* WIS. STAT. § 893.25. The *Droege* court concluded that planting several stakes with flags around a five hundred-foot border was insufficient to constitute a substantial enclosure. *Droege*, 88 Wis. 2d at 145. It also concluded that neither the stakes nor hunting the property constituted usual improvement of the land. *Id.* Because the evidence did not support either substantial enclosure or usual improvement, the adverse possession claim failed.

Here, the Koenigs claim adverse possession under the ten-year statute. Evidence of usual improvement or substantial enclosure can be used to support an adverse possession claim under the statute. *See* WIS. STAT. § 893.26(4)(a)-(b). However, neither usual improvement nor substantial enclosure is required under the ten-year statute. The Koenigs rely on an additional factor, not included in the twenty-year statute, to support their adverse possession claim: that the land was used “for the ordinary use of the occupant.” *See* WIS. STAT. § 893.26(4)(c). Thus, the *Droege* holding is irrelevant here.

in the Koenigs' favor. *See Pierz v. Gorski*, 88 Wis. 2d 131, 136, 276 N.W.2d 352 (Ct. App. 1979) ("The finder of fact must strictly construe the evidence against the adverse possessor and apply all reasonable presumptions in favor of the true owner."). Therefore, the Aldrichs contend the Koenigs were not prejudiced by the court's failure to resolve credibility and make factual findings. However, whether the Koenigs met their burden turns on the manner in which the conflicting testimony is resolved. The record contains evidence that could support a finding in either party's favor.

¶20 Viewed most favorably to the Koenigs, the evidence establishes the following. They flagged the boundary line in accordance with the 1981 monument and an existing boundary fence. Rood's survey confirmed that boundary. The Koenigs used their land up to that line every hunting season from 1990 until 2003. They erected deer stands and placed bait piles in the disputed parcel. Some of this activity was observed by the Aldrichs. The Koenigs also constructed a cross country trail, cut firewood, hunted rabbits and gave others permission to use the property for hunting. They drove four-wheelers and snowmobiles on the land. No one else used the property. Taken together, this evidence constitutes an actual continued occupation of the disputed parcel for a period of ten years and, thus, meets the standard for adverse possession pursuant to WIS. STAT. § 893.26.

¶21 On the other hand, viewed most favorably to the Aldrichs, the evidence supports a verdict in their favor. No fence existed until the late-90s, and the fence was not a boundary fence. The Koenigs' use was not open, notorious or continuous and, because the Aldrichs also used the disputed parcel, the Koenigs' use was not exclusive.

¶22 Given the lack of factual findings and reasoning, we can neither conclude that the judgment is either clearly supported or unsupported by the preponderance of the evidence. See *Jacobson*, 222 Wis. 2d at 394. The circuit court's decision fails to explain why, if the Koenigs' testimony is believed, they nonetheless failed to establish adverse possession. Accordingly, we remand to the circuit court to make findings of fact and conclusions of law.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

