COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP424 **Cir. Ct. No. 2009CV39**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

ROBERT KEES AND HELEN KEES,

PLAINTIFFS-APPELLANTS,

V.

NORTHERN STATES POWER COMPANY, A/K/A XCEL ENERGY, INC. AND CHIPPEWA VALLEY MOTOR CAR ASSOCIATION LTD.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Pepin County: THOMAS E. LISTER, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Robert and Helen Kees appeal a judgment granting Northern States Power Company fee title to a strip of land on which a railroad was

constructed in 1882. They contend the land was granted for railroad purposes by the federal government in the 1850s, and they are entitled to exercise a reversionary interest in the property because it was abandoned in the late 1970s. They also argue, in the alternative, that they have adversely possessed the land. We reject these arguments and affirm.

BACKGROUND

¶2 The Chippewa Valley and Superior Railway Company ("Superior Railway") constructed a railroad in western Wisconsin in 1882. It passed through Pepin County and over certain sections of land now owned by the Keeses. The Keeses obtained their interest in the property under a 1995 land contract.[1] The disputed portion of the railroad, which is essentially a 100-foot-wide strip of land, has become known as "the Railway."

¶3 In 1881, the Railway was owned by various individuals and entities. Between 1881 and 1882, they each conveyed to Superior Railway fee title to their portion of the 100-foot-strip.[2] The Railway was then acquired by various

[1] The Keeses obtained a deed of title in 2007.

[2] In their reply brief, the Keeses assert the inclusion of damages clauses in the pertinent private conveyances definitively proves that the conveyances were not grants in fee, but merely clarified rights already existing under an 1852 federal law. *See* ***California N. R.R. Co. v. Gould***, 21 Cal. 254 (1862) (railroad companies entitled to enter land by virtue of 1852 law must provide compensation to possessor for damages done during course of entry). Whatever merit this argument might have, the Keeses have forfeited it by waiting until the final briefing stage to make it. *See* ***State v. Mata***, 230 Wis. 2d 567, 576 n.4, 602 N.W.2d 158 (Ct. App. 1999) (We do not address issues raised for the first time in a reply brief.). And they apparently did not present it to the circuit court either, for the Keeses stipulated that the owners conveyed fee title, although they did assert, as they do on appeal, that the railroad already owned whatever interests were acquired from the private landowners.

companies until it eventually wound up in the hands of an entity the parties call "Milwaukee Road."

¶4 Milwaukee Road used the Railway as a railroad until sometime in 1977 or 1978. Milwaukee Road then filed for bankruptcy, and the Railway was sold during those proceedings to Northern States. Neither Northern States nor its successors in interest have removed the railroad tracks. In 1995, Northern States agreed to lease the tracks to the Chippewa Valley Motor Car Association. The Association has since rehabilitated and used certain segments of the Railway for transportation services.

¶5 After chasing Association members off the Railway several times, the Keeses filed suit, seeking a declaration that they, not Northern States, were the rightful owners of the Railway. They asserted the Railway was constructed pursuant to a right-of-way granted by the federal government; the right-of-way, in their view, was subsequently abandoned during Milwaukee Road's bankruptcy and reverted to them under 43 U.S.C. § 912.[3] In the alternative, the Keeses claimed they obtained title by adverse possession pursuant to WIS. STAT. § 893.26.[4]

¶6 The circuit court granted Northern States' motion for summary judgment on both the Keeses' reverter and adverse possession claims. The court determined the Railway was constructed pursuant to state versus federal law, that it was never abandoned, and that no reversionary rights under 43 U.S.C. § 912

[3] All references to the United States Code are to the 2006 version unless otherwise noted.

[4] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

were applicable. As for the Keeses' adverse possession claim, the court determined that the applicable possession period was the longer twenty-year period under WIS. STAT. § 893.25, not the shorter "color of title" period under WIS. STAT. § 893.26. The court further determined that the allegedly adverse acts were insufficient as a matter of law. The final judgment granted Northern States fee title to the Railway. The Keeses now appeal.

DISCUSSION

¶7 We review a grant of summary judgment de novo. ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶32, 309 Wis. 2d 365, 749 N.W.2d 211. The summary judgment methodology is well established. *See* ***Hoida, Inc. v. M&I Midstate Bank***, 2006 WI 69, ¶16, 291 Wis. 2d 283, 717 N.W.2d 17. A party is entitled to summary judgment if there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We conclude summary judgment was appropriate on both the Keeses' abandonment and adverse possession claims.

I. Abandonment

¶8 The Keeses believe they are entitled to ownership of the Railway by virtue of 43 U.S.C. § 912. This statute, known as the "Abandoned Railroad Right of Way Act," was designed to dispose of abandoned railroad lands to which the United States holds a right of reverter. ***Avista Corp. v. Wolfe***, 549 F.3d 1239 (9th Cir. 2008). "In short, § 912 requires that public lands given by the United States for use as railroad rights of way be turned into public highways within one year of

their abandonment or be given to the owners of the land traversed by the right of way."[5] ***Id.***

¶9 For an underlying landowner to lay claim under 43 U.S.C. § 912, he or she must show that an initial interest was granted by the federal government and subsequently abandoned. The former requirement is evident from the very first words of the statute: only "public lands of the United States" that "have been or

[5] In full, 43 U.S.C. § 912 provides:

> Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: *Provided*, That this section shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance be among those which have been or may after March 8, 1922, and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this section affect any public highway on said right of way on March 8, 1922: *Provided further*, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

may be granted to any railroad company for use as a right of way" qualify for reverter. *See* ***Avista Corp.***, 549 F.3d at 1246. Hence, as a threshold matter, the Keeses must establish that the disputed land was the subject of a conveyance from the federal government. They then must show that the railroad's interest was abandoned, and that abandonment was confirmed by Congress or the courts.

A. The Railway was not the subject of a valid grant from Congress

¶10 The Keeses claim the Railway was a grant of public land pursuant to an 1852 federal law. This law, part of a 19th century congressional effort to subsidize railroad construction through "lavish [land] grants from the public domain," *see* ***Great N. R.R. Co. v. United States***, 315 U.S. 262, 273 (1942), gave any railroad company chartered at the time or within ten years a 100-foot right of way through public lands, *see* Right of Way Act of 1852, ch. 80, § 1, 10 Stat. 28, 28 (the "1852 Act").

¶11 Rights of way granted under the 1852 Act came with several conditions. In addition to the threshold eligibility criteria—a timely charter—the company also had to perfect the grant by providing the commissioner of the General Land Office with a correct plat of the survey showing the proposed route. ***Id.***, § 3, 10 Stat. at 28. The railroad had to be "begun"—a term whose meaning is disputed by the parties—within ten years from the date of the Act's passage, and needed to be completed within fifteen years. ***Id.*** These deadlines, as well as the deadline for chartering a railroad company, were extended by five years in 1862. *See* Act of July 15, 1862, ch. 179, 12 Stat. 577, 577. We now turn to each of these requirements.

i. The grant is not traceable to a timely chartered company

¶12 As a threshold matter, the 1852 Act grants an interest in land only to companies chartered within fifteen years of its passage. The Keeses concede Superior Railway, formed in 1881, was not eligible to receive any interest in federal land under the 1852 Act, but they assert a predecessor company chartered within the relevant period was. Specifically, they contend the Chippewa Valley Railroad Co. ("Chippewa Valley"), chartered in 1857, took advantage of this federal grant.

¶13 The Keeses claim the interest obtained through this initial grant to Chippewa Valley was then transferred through five different companies before finally resting with Northern States today. According to the Keeses' chronology, the Chippewa Valley and Lake Superior Railway Co. ("Lake Superior") was formed in 1870. However, it did not acquire the right-of-way until 1881, when it succeeded to the interests of a company formed that same year upon the merging of Chippewa Valley and the Wabasha and Lake Superior Railway Co. ("Wabasha"). At some point in 1881, Lake Superior apparently transferred the right-of-way to a new company, Superior Railway, which purchased fee title to the Railway. The following year, Superior Railway, which had by then laid track on the Railway, was sold to the Chicago, Milwaukee, and St. Paul Railway Co. ("St. Paul"). St. Paul was the predecessor of the entity the parties call "Milwaukee Road." Milwaukee Road allegedly obtained the right-of-way in 1927 when it purchased St. Paul's assets. Milwaukee Road then conveyed the right-of-way to Northern States in 1979.

¶14 Noteably, the alleged transfers between Wabasha, Lake Superior, and Superior Railway did not involve direct asset acquisitions.[6] This severely compromises the Keeses' theory of corporate succession. Unlike an appurtenant easement, interests granted under the 1852 Act did not initially run with the land; as we shall explain, they were inchoate interests that required perfection by submitting to the proper authorities a correct plat of the railroad route. This inchoate interest was a corporate right, and documentation of the transfer is necessary. The Seventh Circuit Court of Appeals has held that, absent evidence of a "corporate relationship," which the court specifically defined as an "asset or stock acquisition that might have made the [tardy company] a successor to the [timely chartered company]," the former company has not satisfied the condition precedent to obtaining a right-of-way under the 1852 Act. ***Samuel C. Johnson 1988 Trust v. Bayfield Cnty.***, 649 F.3d 799, 802 (7th Cir. 2011).

¶15 Instead, the Keeses maintain the transfer of rights occurred by operation of 1868 Wis. Laws, ch. 331, § 9.[7] That section states that, in all cases "where any franchise or privilege has been or shall be granted by law to several persons, the grant shall be deemed several as well as joint, so that one or more may accept and exercise the franchise as though the same were granted to him or them alone." According to the Keeses, there was a "corporate relationship [between Chippewa Valley and Lake Superior] insofar that the two companies

[6] Or at least the Keeses do not argue any such acquisitions were involved. We therefore deem the matter conceded. *See* ***Tatur v. Solsrud***, 167 Wis. 2d 266, 269, 481 N.W.2d 657 (Ct. App. 1992), *aff'd*, 174 Wis. 2d 735, 498 N.W.2d 232 (1993).

[7] All future citations to ch. 331, § 9, are to 1868 Wis. Laws.

shared common directors." In their view, this shared governance was sufficient to trigger ch. 331, § 9, and pass the right-of-way between the business entities.

¶16 As the lynchpin of their corporate succession argument, one would expect the Keeses to devote a considerable portion of their brief to analyzing ch. 331, § 9. However, they mention the statute only twice, each time merely in passing. On neither occasion do they explain what the statute means or how it applies to this case. Thus, their argument is unexplained and undeveloped, and we need not consider it further. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶17 In any event, the factual basis for the Keeses' legal assertions is insufficient. The Keeses maintain that William Wilson, a corporator of both Chippewa Valley and Lake Superior, transferred the right-of-way by virtue of 1868 Wis. Laws, ch. 331, § 9.[8] *Compare* 1857 Wis. Laws, ch. 265, § 1, *with* 1870 Wis. Laws, ch. 513, § 1 (chartering acts identifying Wilson as a corporator). But this merely establishes that the companies had a common official; the Keeses have not directed our attention to any evidence of a transfer of rights between the companies. Further, they have not explained how Lake Superior's interest in the right-of-way (assuming it had any) passed to the newly formed Superior Railway in 1881. We may decline to review undeveloped and inadequately briefed issues. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

[8] In 1858, T.C. Pound was added as a corporator of Chippewa Valley. 1858 Wis. Laws, ch. 52, § 1. Pound was also a corporator of Lake Superior. 1870 Wis. Laws, ch. 513, § 1. However, the Keeses curiously omit references to Pound in their argument.

¶18 Perhaps recognizing the lack of evidence for their claim, the Keeses, in a footnote, cite several books purportedly describing Wilson's efforts to use ch. 331, § 9, to convey franchise rights from one company to another. These books only briefly discuss the legislative landscape surrounding the enactment of the statute. Apparently, § 9 was "tucked away" in chapter 331, an otherwise unrelated law incorporating the Portage City Gas Light Company, in a subversive effort by the Beef Slough Logging Company to resolve a waterway dispute with Chippewa Valley mill owners. *See* JAN M. LONG, THE FOOTPRINTS OF A WISCONSIN LUMBER EXECUTIVE: THE LIFE OF WILLIAM WILSON, HIS FAMILY, & THE COMPANY HE FOUNDED, 98-99 (2001); *see also* FREDERICK MERK, ECONOMIC HISTORY OF WISCONSIN DURING THE CIVIL WAR DECADE, 93 (1916). William Wilson is not so much as mentioned in the cited pages.

¶19 To the extent the Keeses argue that a corporate participant's mere involvement in a subsequent endeavor endows the latter company with the former's interests, their own reference materials actually refute this assertion. As one of the Beef Slough Logging Company's members was formerly an incorporator of the Chippewa millmen, "[i]t was but a matter of form for him to assign to his new associates the rights and privileges that the secret joker in the Portage City bill had given him." MERK, *supra*. This suggests some overt act—even if *pro forma*—was necessary to convey the pertinent interests. The Keeses have not directed us to proof of such an act, and without some evidence linking the Railway to a properly chartered railroad company, the Keeses cannot show Northern States' interest was derived from the 1852 Act. Hence, there is nothing to revert to the underlying landowners pursuant to 43 U.S.C. § 912.

ii. No correct plat was submitted, so the grant was not perfected

¶20 In addition to a timely charter, the 1852 Act requires railroad companies to notify the government of their designated routes. The Act expressly authorizes companies to "survey and mark through the said public lands, to be held by them for the track of said road, one hundred feet in width." In addition, "when a location for either of said railroads … or sites for depots on the line of such road or roads shall be selected, the proper officers of such road or roads shall transmit to the Commissioner of the General Land-Office a correct plat of the survey of said road … before such selection shall become operative."

¶21 Northern States contends that, as it pertains to the actual location of the railway, this requirement to file a map of the railroad's intended route was not satisfied. This argument is based on the circuit court's observation that "[t]he only map showing a proposed location of the railway does not comport with the rail line at issue in this case …. The line shown in the early map is located approximately 10 miles from where the railway at issue here[] is, in fact, located."

¶22 The Keeses, for their part, do not contest that the railway was not actually located along the designated route. Instead, they maintain that mapping was a condition subsequent to the grant, such that noncompliance did not deprive the railroad of the right-of-way. In their view, "when it comes to mapping rights of way over public lands[,] … if the railroad as finally constructed differs from the railroad as mapped, then only the United States has the power and the right to rescind the grant …."

¶23 We are not persuaded that a railroad is entitled to benefit from a right-of-way granted under the 1852 Act regardless of whether it has submitted an accurate plat of the route. When construing a similar qualification involving a

grant of land in fee to a railroad, the Supreme Court has stated that the "sections granted could be ascertained only when the routes were definitely located." ***St. Joseph & Denver City R.R. Co. v. Baldwin***, 103 U.S. 426, 429 (1880). Similarly, the right to use public lands for a railroad could be perfected only once the proposed route was definitely located. The 1852 Act recognizes the amorphous nature of the grant by specifying that a correct plat must be submitted "before such selection shall become operative."

¶24 The Keeses attempt to distinguish ***Baldwin*** because it purportedly "addressed a dispute involving a land grant and not a right of way." That is not entirely accurate. The ***Baldwin*** Court was construing an 1866 law that did two things: it granted lands in fee to Kansas for the benefit of a railroad company, and also granted a right-of-way directly to the company. ***Baldwin***, 103 U.S. at 429. The land grant was subject to a mapping requirement, while the right-of-way grant was not. ***Id.*** This prompted the Supreme Court to conclude that the right-of-way grant was unconditional:

> The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists.

Id. at 430.

¶25 The 1852 Act, unlike the 1866 Act at issue in ***Baldwin***, explicitly qualifies the right-of-way grant. Logic dictates that the granted interest cannot be perfected until the proposed route is identified, and the law specifies that this occurs when a correct plat of the route is submitted to the designated federal

authorities. *See* ***Schulenberg v. Harriman***, 88 U.S. 44, 60 (1874).[9] The Keeses apparently concede—or, at a minimum, do not dispute—that an accurate plat was not submitted.

¶26 Rather, the Keeses assert that "when it comes to mapping rights of way over public lands ... if the railroad as finally constructed differs from the railroad as mapped, then only the United States has the power and the right to rescind the grant …." They cite ***Northern Pacific Railroad Co. v. Smith***, 171 U.S. 260 (1898), for this proposition. ***Smith***, however, is inapposite. The question here is not whether the United States, or anyone else, has expressed an intention to rescind the right-of-way based on failure of a condition subsequent. The question here is whether, based on the language of the 1852 Act, the grant was perfected in the first instance. We conclude it was not.

iii. Only the federal government can enforce the failure of a condition subsequent, such as the construction deadlines

¶27 Aside from the failure of both the timely charter and mapping conditions precedent, Northern States argues any grant was void for failure to timely begin construction. Ultimately, this is a moot point given our conclusion that neither Superior Railway nor its alleged predecessors received any interests

[9] The rule of ***Schulenberg v. Harriman***, 88 U.S. 44, 60 (1874), a case involving a congressional land grant for railroad purposes, is instructive:

> It is true that the route of the railroad, for the construction of which the grant was made, was yet to be designated, and until such designation the title did not attach to any specific tracts of land. The title passed to the sections, to be afterwards located; when the route was fixed their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the land.

granted under the 1852 Act. However, given the thorough briefing of this issue by the parties, we take a moment to touch upon it.

¶28 The parties agree Superior Railway did not begin constructing the railroad until 1881, well after the 1867 deadline set by the 1852 Act. However, the Keeses emphasize the 1852 Act's use of the word "begun" as opposed to "construction."[10] They claim the railroad was actually "begun" sometime in the 1850s or 1860s when Chippewa Valley was chartered and initial route planning took place.

¶29 While we are skeptical of the Keeses' interpretation, we need not dwell on this linguistic dispute. Any construction deadline was a condition subsequent that could not divest Superior Railway of its interest without federal intervention. *See* ***Schulenberg***, 88 U.S. at 63. In ***Schulenberg***, the Supreme Court considered a law in which Congress granted a present interest in lands to Wisconsin for railroad purposes, and specified that, if a railroad was not constructed within a specified time, all unsold land would revert to the federal government. ***Id.*** at 47. The Court construed the latter portion of the law as "no more than a provision that the grant shall be void if a condition subsequent be not performed." ***Id.*** at 62.

¶30 However, "no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs … and if they do not see fit to assert their right to enforce a forfeiture …, the title

[10] The 1852 Act, ch. 80, § 3, states that "the said grants herein contained, as well as the use of the public lands, as of the materials for the construction of said road or roads shall cease and determine, unless the road or roads be begun within ten years from and after the passage of this act …."

remains unimpaired in the grantee."[11] ***Id.*** at 63. Or, as the Seventh Circuit Court of Appeals has so eloquently put it, "if the government isn't interested in [rescinding the grant], no one can butt in." ***Samuel C. Johnson 1988 Trust***, 649 F.3d at 803; *see also* ***Bybee v. Oregon & C. R. Co.***, 139 U.S. 663, 675 (1891) ("lands granted by congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States").

¶31 The 1852 Act's right-of-way grant was perfected once a timely chartered company submitted an accurate plat of the rail route. After that, only the federal government could "butt in" to rescind the grant. It did not do so here; indeed, it could not, as there were no interests granted to Superior Railway under the 1852 Act in the first instance.

B. The Railway was not abandoned

¶32 To take advantage of the reversionary rights granted by 43 U.S.C. § 912, the Keeses must show, in addition to a valid grant from the government, that the Railway has been abandoned. "[F]or any reversionary property rights to vest, the use and occupancy of the land must have ceased by abandonment or forfeiture *and* the abandonment or forfeiture must have been declared by Congress

[11] This rule applies equally to lesser interests like rights of way. *See* ***Bybee v. Oregon & C. R. Co.***, 139 U.S. 663, 675 (1891).

or a court of competent jurisdiction."[12] ***Avista Corp.***, 549 F.3d at 1246-47 (emphasis added).

¶33 In 1977, before filing for reorganizational bankruptcy, Milwaukee Road filed with the Interstate Commerce Commission (ICC) notices of intent to file applications for certificates of public convenience permitting abandonment of the Railway. On December 29, 1977, the bankruptcy court issued Order no. 2, which authorized Milwaukee Road to file the necessary applications. Northern States opposed the applications, citing its plans to build a nuclear power plant nearby. The ICC issued the certificates on February 28, 1978, and suggested that Northern States "make an offer [of] financial assistance for the operation or acquisition of the subject line …." On May 8, 1978, the bankruptcy court issued Order no. 43, granting the Milwaukee Road trustee authority to abandon certain lines of railroad, including the Railway.

¶34 The Keeses contend Order no. 43 was effective as a judicial declaration that the Railway was abandoned. In essence, they assert the order must be viewed as the final act effectuating abandonment for purposes of 43 U.S.C. § 912. As support for this argument, they cite an old bankruptcy statute, 11 U.S.C. § 205(o) (1976).[13] However, their entire argument is that this statute

[12] The Keeses do not directly advance a forfeiture argument, but instead hint at a hybrid argument that appears to meld forfeiture and abandonment theories. In essence, the Keeses ask that we give significant weight to what they describe as a "confirmation letter of abandonment" from Milwaukee Road to the Interstate Commerce Commission. First, this letter was not "confirmation of abandonment;" it was sent after the Railway was sold to Northern States and merely stated that Milwaukee Road had discontinued service and cancelled applicable tariffs. Second, as we shall see, the carrier's declarations are not what counts; only Congress or a court of competent jurisdiction can declare a line forfeited or abandoned.

[13] The Keeses cite the 1977 version of this statute, but the official United States Code is only re-issued in a new edition every six years. The Code was re-issued in 1976, and we therefore use that version of the statute.

designated a judicial abandonment order a final order for purposes of appeal. Even if true, this does not speak to their central argument: that Order no. 43 constituted an abandonment decree.

¶35 We cannot accept the Keeses' construction of Order no. 43. By its terms, the order did not declare the Railway abandoned; it merely gave the Milwaukee Road trustee authority to accomplish that task. By authorizing the trustee to abandon, the court clearly recognized that further action would be necessary to effectuate abandonment.[14] *See* ***Samuel C. Johnson 1988 Trust***, 649 F.3d at 807 (railroad completes act of abandonment by pulling up tracks after obtaining the ICC's permission).

¶36 Our interpretation of the order is consistent with the events surrounding the order's issuance. In April 1978, Northern States filed an offer of financial assistance to allow continued service along the track proposed for abandonment. Among other things, the offer included a bid to purchase the line of track, and the ICC determined that this offer was "likely to cover the acquisition cost of all of such line of railroad." On May 3, just days before Order no. 43 was entered, the ICC stayed its February 28 order of abandonment so that Northern States could negotiate the railroad's purchase.

¶37 The ICC's decision to stay its abandonment order effectively deprived the bankruptcy court of authority to issue an abandonment declaration.

[14] After entry of a judicial order authorizing abandonment, 11 U.S.C. § 205(o) (1976), required the trustee to take all necessary steps to consummate the abandonment. Based on this, the Keeses argue that a judicial order authorizing abandonment should be construed as an abandonment decree. However, the statutory directive does not alter our analysis, for it also contemplates further action by the trustee.

See ***Thompson v. Texas Mexican Ry. Co.***, 328 U.S. 134, 148-49 (1946) ("Operations may not be discontinued until a certificate of abandonment is obtained. … Once the [ICC] has acted, the court may then proceed to enter judgment in conformity with the terms and conditions specified by the [ICC]."); *see also* ***Phillips Co. v. Denver & Rio Grande W. R.R. Co.***, 97 F.3d 1375, 1377 (10th Cir. 1996) (deferring to ICC's interpretation of § 912 requiring ICC authorization prior to a judicial declaration of abandonment); ***Samuel C. Johnson 1988 Trust***, 649 F.3d at 806 (even in the absence of a judicial declaration of abandonment, regulatory permission to abandon still necessary).[15] The ICC did not lift the stay until January 2, 1979, and then made its abandonment decision retroactive only to November 20, 1978. Thus, even assuming Order no. 43 *could* be construed as an abandonment declaration, it was premature at a minimum by over eight months.

¶38 Also, the Keeses suggest the circuit court erred in its construction of Order no. 43. They contend the court's interpretation of Order no. 43 as permitting the trustee to pursue abandonment rendered it duplicative of Order no. 2. However, Northern States presents an alternative construction that harmonizes these orders, one which the Keeses do not refute. *See* ***Charolais***

[15] Curiously, the Seventh Circuit chose to read the requirement of a judicial or Congressional declaration completely out of the statute, concluding it was an "empty" requirement when ICC approval had been obtained and the tracks had already been removed. *See* ***Samuel C. Johnson 1988 Trust v. Bayfield Cnty.***, 649 F.3d 799, 808 (7th Cir. 2011). Although Northern States addresses this holding, the Keeses have not, and therefore have forfeited any argument that a judicial declaration of abandonment was unnecessary. In any event, we observe that the Seventh Circuit's holding is contrary to the statute's plain language. ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 ("If the meaning of the statute is plain, we ordinarily stop the inquiry.").

Breeding Ranches, Ltd. v. FPC Secs. Corp., 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). Order no. 2 permitted Milwaukee Road to file ICC applications for abandonment and "prosecute said applications until such time as one or more trustees are appointed …." On February 21, 1978, the trustee requested authority to join the ICC proceedings and prosecute the applications to their final disposition. Order no. 43, issued just over two months later, authorized the trustee to continue abandonment efforts. Thus, the orders were not duplicative; they were directed to different individuals, and reflected the progress of the bankruptcy proceedings.

II. Adverse Possession

¶39 The Keeses also claim title to the Railway under the ten-year adverse possession statute, WIS. STAT. § 893.26. This "color of title" statute requires, among other things, that the adverse possessor "originally entered into possession of the real estate under a good faith claim of title, exclusive of any other right …." Under § 893.26, the first question is whether the land in dispute is included in the description in the adverse possessor's deed. ***Perpignani v. Vonasek***, 139 Wis. 2d 695, 720, 408 N.W.2d 1 (1987) (citing a predecessor statute to § 893.26). If the land is not in the written description, the twenty-year statute, WIS. STAT. § 893.25, applies instead. ***Beasley v. Konczal***, 87 Wis. 2d 233, 241, 275 N.W.2d 634 (1979) (citing § 893.25's predecessor).

¶40 Thus, to bring their claim within WIS. STAT. § 893.26's ambit, the Keeses must initially show that they possessed the Railway under color of title. This they cannot do. The 1995 land contract specifically excludes "existing highways, easements and rights of way of record" from the grant. Further, the attached legal descriptions repeatedly mention Milwaukee Road's right-of-way.

Thus, the circuit court did not err when it applied the twenty-year statute because the Keeses failed to show possession under color of title.

¶41 The Keeses also recite a litany of concerns with the circuit court's summary judgment procedure, but these essentially amount to an objection that their claim was not permitted to proceed to trial. Among the Keeses' concerns are conflicting oral statements by the circuit court about whether it would grant summary judgment, the court's failure to ask questions about adverse possession at a hearing, and its failure to request additional briefing on the adverse possession issue before granting summary judgment. The Keeses do not explain why any of their procedural grievances require reversal, though. They simply complain that the court deprived them of "the ability to tell their story by direct examination at trial and without having given [their] counsel an opportunity to cross-examine [Northern States'] witnesses regarding the adverse possession claims …." The purpose of summary judgment is to avoid trials when there is nothing to try. ***Rollins Burdick Hunter of Wis., Inc. v. Hamilton***, 101 Wis. 2d 460, 470, 304 N.W.2d 752 (1981).

¶42 The Keeses also contend a factual dispute exists as to their use and occupation of the Railway. Specifically, they argue the circuit court failed to consider that they used the Railway for "harvesting of firewood," which they contend may constitute use of the land for the supply of fuel. This argument appears tailored to address the ten-year statute, which we have already concluded does not apply. *See* WIS. STAT. § 893.26(4)(c) (facts constituting possession and occupation of real estate include the use of unenclosed land for the supply of fuel). To the extent the Keeses' alleged use of the land may be relevant to a claim under the twenty-year statute, *see* ***Perpignani***, 139 Wis. 2d at 735 n.19 (citing ***Calhoun v. Smith***, 387 So. 2d 821, 823 (Ala. 1980)) (elements of proof for ten- and

twenty-year statutes are similar), they do not develop this argument and it is therefore forfeited, *see* ***Pettit***, 171 Wis. 2d at 646.

¶43 We also observe that, although the Keeses' statement of facts includes a lengthy recitation of their supposed use of the Railway, they do not integrate these supposed facts into a cognizable legal argument. Under WIS. STAT. § 893.25, the Keeses must show that they were in actual continued occupation of property that was protected by a substantial enclosure or usually cultivated or improved. *See* ***Peter H. & Barbara J. Steuck Living Trust v. Easley***, 2010 WI App 74, ¶13, 325 Wis. 2d 455, 785 N.W.2d 631. In addition, the use of the land must be open, notorious, visible, exclusive, hostile, and continuous, "such as would apprise a reasonably diligent landowner and the public that the possessor claims the land as his own." ***Id.***, ¶14. The Keeses do not even attempt to tailor their claimed use of the land to these legal standards. Accordingly, we deem their argument undeveloped. *See* ***Pettit***, 171 Wis. 2d at 646.

¶44 In any event, many of the claimed uses would not constitute adverse possession. Most are transitory or recreational activities, like walking, skiing, horseback riding, and flower cultivation. These are "sporadic occurrences" that do not establish exclusive possession. *See* ***Zeisler Corp. v. Page***, 24 Wis. 2d 190, 196-98, 128 N.W.2d 414 (1964) (use of area as playground for children, maintenance of a garden, and placement of a makeshift dock insufficient evidence of adverse possession). Helen Kees also averred that she would harvest firewood and naturally occurring fauna, but this too is insufficient. *See* ***id.*** at 196 (cultivation of area by pulling weeds and cutting willows for firewood deemed insufficient). Indeed, based on the Keeses' asserted activities, much of the disputed area appears to be "wild land" that has not been visibly improved. *See* ***Pierz v. Gorski***, 88 Wis. 2d 131, 137-38, 276 N.W.2d 352 (Ct. App. 1979).

¶45 The Keeses also claim they pastured cattle on the Railway. If done with sufficient frequency, this activity can give rise to an adverse possession claim. *See* ***Northwoods Dev. Corp. v. Klement***, 24 Wis. 2d 387, 390, 129 N.W.2d 121 (1964) (affirming adverse possession finding where plaintiff pastured cattle in fenced area in connection with a dairy farm operation for forty-five years). However, the Keeses do not describe how often they pastured cattle on the railway, or give any other facts sufficient to permit a fact-finder to conclude that they adversely possessed the land on this basis.

¶46 Next, Helen Kees averred that the Keeses occasionally mowed the right of way and used it for vehicle parking. In the past, we have held that these activities can be indicative of adverse possession. *See* ***Leciejewski v. Sedlak***, 110 Wis. 2d 337, 344, 329 N.W.2d 233 (Ct. App. 1982), *aff'd*, 116 Wis. 2d 629, 342 N.W.2d 734 (1984); ***Keller v. Morfeld***, 222 Wis. 2d 413, 421, 588 N.W.2d 79 (Ct. App. 1998). In ***Leciejewski***, though, the mowing was accompanied by the placement of substantial structures, like a shed, horse barn, fence, and boathouse. ***Leciejewski***, 110 Wis. 2d at 344. In ***Keller***, in addition to mowing, the adverse possessor regularly parked numerous personal and business vehicles and stored building materials and equipment on the disputed property. ***Keller***, 222 Wis. 2d at 421. Here, the Keeses' mowing and parking activities were unaccompanied by other significant adverse uses, and, in any event, are insufficient because the Keeses fail to describe their frequency.

¶47 The Keeses also place significant emphasis on maintenance activities they claim to have performed in the disputed area. These included maintenance and repair of fences and drainage lines. However, Helen Kees conceded at deposition that the fencing and drainage lines were originally installed by the railroad companies. The Keeses removed and repaired certain sections of

fencing for the benefit of their other property. With respect to the drainage lines, Kees stated they merely cleaned out the existing lines to prevent their home and farm from flooding. Maintenance of these existing structures was legally insufficient to raise a red flag of warning to Northern States of the Keeses' adverse claim.

¶48 The Keeses also mention they erected various barriers over the Railway. However, at deposition Helen Kees admitted these were merely two driveway surfaces utilized for access, not to keep anyone off the Railway. One driveway, which does not even serve the Keeses' property, was constructed around 1980. The other has been in place since at least 1974, several years before Northern States acquired the Railway. The Association has continued to use the Railway despite the presence of the driveways.[16] Thus, the Keeses have failed to show their use was exclusive.

¶49 Finally, Helen Kees averred she removed a portion of the tracks to make industrial tools. At deposition, she clarified that she and her father-in-law removed one rail segment and welded a shovel to the end to dredge a culvert. This occurred only once, and Kees presumed her father-in-law had replaced the missing rail. This singular act is plainly insufficient to "apprise a reasonably diligent landowner and the public that the possessor claims the land as his own." ***Easley***, 325 Wis. 2d 455, ¶14.

[16] The Keeses stipulated in the circuit court proceedings that driveway material "is piled over the existing railroad tracks and must be scraped down below the level of the tracks to allow safe passage of the Association's rail cars."

CONCLUSION

¶50 In sum, we conclude the Keeses' abandonment and adverse possession claims are legally insufficient. There has been no valid property interest granted by the federal government, nor abandonment, and hence there is nothing to revert to the Keeses under 43 U.S.C. § 912. With respect to their adverse possession claim, their claimed use of the property is insufficient to establish their right to the Railway under the correct twenty-year statute, WIS. STAT. § 893.25.

By the Court.—Judgment affirmed.

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