STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2265

Earl E. Wagner,
Respondent,

vs.

Samuel McPhaill, et al.,
Defendants,

Karen Rice Hagerott, et al.,
Appellants.

Filed November 18, 2008
Affirmed as modified
Connolly, Judge

Houston County District Court
File No. 28-CV-05-476

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Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Peterson, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

The district court ruled that respondent Earl Wagner adversely possessed certain land titled in the names of appellants Karen Rice-Hagerott and her husband Jon Hagerott (Hagerotts). On appeal, Hagerotts argue that (a) Wagner's failure to pay property taxes on the disputed parcel precluded adverse possession; (b) the district court considered the wrong time period when addressing whether adverse possession occurred; (c) certain findings of fact are not supported by the record; (d) Wagner is equitably estopped from claiming adverse possession; and (e) the district court should not have awarded Wagner a prescriptive easement over other land owned by Hagerotts. We affirm as modified.

FACTS

The Wagner Insurance Agency was located in a building covering the entirety of the east 16 feet of the south 50 feet of Lot 4 Block 6 of the original plat of the Village of Caledonia, Minnesota. The building and land are both owned by respondent Earl Wagner. The east and west walls of the building abut a shop located on Lot 3, Block 6, and respondent's pharmacy, respectively. All three buildings face a street south of the buildings. The disputed parcel is a 16-foot-wide strip of land running north from Wagner's building to a private alley, which runs east-west, and, including the alley, is 70 feet long. Since 1934, Wagner, his father, or an agency employee, have parked on the disputed parcel, accessing it from the alley.

After a bench trial, the district court ruled that Wagner adversely possessed the disputed parcel from appellants Karen Rice-Hagerott and her husband Jon Hagerott, and

awarded Wagner a prescriptive easement over other Hagerott land. In posttrial proceedings, the district court ruled that because the disputed parcel was not separately assessed for tax purposes, Wagner did not have to pay taxes on it to adversely possess it, denied Hagerotts' motions for a new trial or amended findings, and adopted a stipulation limiting any easement Wagner had to the north 20 feet of Hagerotts' land. This appeal follows.

D E C I S I O N

I

Adverse possession does not require a disseizor to pay property taxes on disputed land if it is not "assessed as tracts or parcels separate from other real estate[.]" Minn. Stat. § 541.02 (2006)[1]. Here, the disputed parcel is not separately assessed for tax purposes and the district court cited *Ehle v. Prosser*, 293 Minn. 183, 197 N.W.2d 458 (1972) to rule that Wagner, who had paid no property taxes on the disputed parcel, did not have to do so to adversely possess it. Hagerotts argue that the district court misread the statute and that, under *Grubb v. State*, 433 N.W.2d 915 (Minn. App. 1988), *review denied* (Minn. Feb. 22, 1989), the statute's separate-parcel language refers to land "separate from the disseizor's other real estate—not the record owner's real estate."

A district court's reading of a statute is reviewed de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 609 N.W.2d 868, 874 (Minn. 2000). A plain reading of "assessed as tracts or parcels separate from other real estate" requires that the disputed

[1] The district court did not cite, the parties do not argue to this court, and we do not address Minn. Stat. § 559.01 (2006), regarding adverse claims to real estate.

parcel be separately assessed rather than merely separate from the disseizor's land. Hagerotts' argument seeks to recast the statute's language from "assessed as tracts or parcels separate from other real estate" to "assessed as tracts or parcels separate from [the disseizor's] real estate." Recasting the statute's language would be inconsistent with the statutory and caselaw rules for construing statutes, and we decline to do so. *See Toth v. Arason*, 722 N.W.2d 437, 440 (Minn. 2006) (stating that "if the plain language of the statute is 'clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit'" (quoting Minn. Stat. § 645.16 (2004))).

Also, *Grubb* is distinguishable. It involved the attempted adverse possession of 13 acres of a 16-acre parcel and an argument that, because the 13 acres was not separately assessed for tax purposes, the disseizor did not have to pay taxes on that land. The *Grubb* district court adopted this argument, and we reversed, stating that "the legislature intended the tax-payment requirement to apply to actions where the disseizor claims all or substantially all of an assessed tract or parcel." 433 N.W.2d at 920. The disputed parcel here, however, is nowhere near "all or substantially all" of Hagerotts' land. Therefore, this aspect of *Grubb* does not apply.[2]

Hagerotts also argue that because *Ehle* ruled that no boundary-line dispute existed, *Ehle* "did not need to analyze the [separate-parcel question,]" and hence that the district court should not have cited *Ehle* in ruling that this case involved separate parcels. *Ehle*

[2] Based on language in *Grubb*, Hagerotts also express concern about whether there would be adequate notice of attempted adverse possession without payment of taxes. *See Grubb*, 433 N.W.2d at 920. Notice concerns are generally addressed by the requirements that the conduct constituting adverse possession be "open" and "hostile." *See Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999) (listing elements of adverse possession).

involved two abutting parcels, where the owners of one parcel acted as owners of land 37 feet beyond their property line. 293 Minn. at 185-86, 197 N.W.2d at 460. Regarding whether the disseizors' failure to pay property taxes precluded adverse possession, *Ehle* states: "Claims relating to boundary lines of lands and claims to lands not assessed for taxation as separate tracts—both of which are presented in this case—are clearly exempt from the statutory provisions requiring the payment of taxes." 293 Minn. at 189, 197 N.W.2d at 462. Thus, *Ehle* addressed the separate-parcel question and resolved it in a manner contrary to Hagerotts' argument.[3]

Hagerotts also cite *Bryant v. Gustafson*, 230 Minn. 1, 40 N.W.2d 427 (1950) to argue that Minn. Stat. § 541.02 requires that the disputed parcel be separate from the disseizor's land but need not be separate from the titleholder's land. *Bryant* involved a road which was a separately assessed tract of land and which had been dedicated to the use of local lot owners rather than the public at large. 230 Minn. at 5, 197 N.W.2d at

[3] The district court also cites *Kelley v. Green*, 142 Minn. 82, 170 N.W. 922 (1919) to support its separate-parcel ruling. Like *Ehle*, *Kelley* involved abutting property owners, one of whom acted as the owner of land beyond the property line. 142 Minn. at 83-84, 170 N.W. at 923. Also like *Ehle*, *Kelley* rejected an argument that a failure to pay taxes on the land beyond the property line precluded adverse possession of that land:

> [The tax-payment requirement] applies only to land 'assessed as tracts or parcels separate [and apart] from other real estate,' and it does not apply 'to actions relating to the boundary lines of lands, which boundary lines are established by adverse possession, or to actions concerning lands included between the * * * platted line and the line established by such adverse possession.' It is plain that the proviso as to payment of taxes has no application to this case.

Kelley, 142 Minn. at 85, 170 N.W. at 923 (quoting G.S. 1913 § 7696).

431. The owners of certain lots abutting the road alleged that they had adversely possessed the parts of the road that they abutted. *See id.* In rejecting the assertion that the disputed parts of the road had been adversely possessed, the supreme court cited the statute and *Skala v. Lindbeck*, 171 Minn. 410, 214 N.W. 271 (1927), and rejected adverse possession, ruling that the purported disseizors had not asserted their rights for a 15-year period and had not paid taxes on "the strip of land constituting [the road]." *Bryant*, 230 Minn. at 10, 40 N.W.2d at 433-34.

Based on language in *Grubb*, Hagerotts argue that "[n]owhere in [*Bryant*] did the Minnesota Supreme Court state that the portion of the roadway the disseizor claimed had to be separately assessed." *See Grubb*, 433 N.W.2d at 921. But *Bryant*'s ruling was based on the statute, the language of which we addressed above, and on *Skala*. And *Skala* does not support Hagerotts' argument. In that case, the land sought to be adversely possessed was 6.2 acres south of a fence purportedly separating two parcels of land, but the district court found that only 4.7 acres of that land had been adversely possessed. 171 Minn. at 411, 214 N.W. at 271. Regarding taxes, *Skala* states:

> The fact that defendant paid no taxes on the 4.7 acres is of no importance. There is no proof, and it is not to be supposed, that this land was separately assessed. Presumably the assessor, as well as the parties, considered the fence to be the boundary line between the two [parcels] and valued the south [parcel] on the assumption that the improved land south of the fence was part thereof.

Skala, 171 Minn. at 413-14, 214 N.W. at 272 (citations omitted). Thus, in *Skala*, the disseizor's failure to pay taxes on the portion of the disputed land that was adversely

possessed was "of no importance" because that portion of the disputed land had not been separately assessed.

Because the disputed parcel is not separately assessed for tax purposes and because Hagerotts have not shown that the district court erred by misreading or misapplying the portion of Minn. Stat. § 541.02 regarding the payment of taxes, we affirm the determination that Wagner did not have to pay property taxes on the disputed parcel to adversely possess it, and we need not address the parties' disputes about the statutory mechanism for paying taxes or whether this case involves a boundary dispute.

II

Adverse possession requires the district court to find that the disputed parcel "has been used [by the disseizor] in an actual, open, continuous, exclusive, and hostile manner for 15 years," and the relevant findings be supported by "clear and convincing evidence." *Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999). Clear and convincing evidence is present "when the truth of the fact to be proven is highly probable." *Rogers*, 603 N.W.2d at 657 (internal quotations omitted). In deciding whether evidence is clear and convincing, "circumstantial evidence is entitled to as much weight as any other evidence" and, "if there is reasonable evidence to support the district court's findings of fact, [appellate courts] will not disturb those findings." *Rogers*, 603 N.W.2d at 657-58. On appeal, findings of fact are reviewed for clear error. Minn. R. Civ. P. 52.01. In reviewing findings of fact, appellate courts

> view the record in the light most favorable to the judgment of the district court. The decision of a district court should not be reversed merely because the appellate court views the

> evidence differently. Rather, the findings must be manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole. As we noted recently, findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made. If there is reasonable evidence to support the district court's findings, we will not disturb them.

Rogers, 603 N.W.2d at 656 (citations and quotations omitted).[4]

A. Fifteen-Year Period

"No action" for possession of real estate shall be maintained "unless it appears that the plaintiff, the plaintiff's ancestor, predecessor, or grantor was seized or possessed of the premises in question within 15 years before the beginning of the action." Minn. Stat. § 541.02. Hagerotts argue that this language requires adverse-possession claims to be decided by examining the 15 years immediately preceding the initiation of the action. But the plain meaning of the statutory language requires that an action for possession of land be maintained within 15 years of the plaintiff or the plaintiff's predecessor having possessed the land, not that the decision be based on only the 15 years before the suit. Nor has caselaw read the statute as Hagerotts propose. *See Kelley v. Green*, 142 Minn. 82, 84, 170 N.W. 922, 923 (1919) (stating that "[a]dverse possession for any consecutive period of 15 years is sufficient to sustain the decision"); *Fredericksen v. Henke*, 167

[4] *Village of Newport v. Taylor*, 225 Minn. 299, 303, 30 N.W.2d 588, 591 (1948), states that "adverse possession may be established only by clear and positive proof based on a strict construction of the evidence, without resort to any inference or presumption in favor of the disseizor, but with the indulgence of every presumption against him." Our review of whether the record supports the district court's findings regarding adverse possession need not satisfy *Village of Newport* and its progeny. The applicability of that analysis is restricted and not applicable here. *See Rogers*, 603 N.W.2d at 657 (addressing restriction); *Alstad v. Boyer*, 228 Minn. 307, 311, 37 N.W.2d 372, 375 (1949) (same).

Minn. 356, 361, 209 N.W. 257, 259 (1926) (holding that "[t]o maintain a title, acquired by adverse possession, it is not necessary to continue the adverse possession beyond the time when title is acquired" and that once title is adversely possessed it "is not lost by a cessation of possession, and continued possession is not necessary to maintain it"); *Todd v. Weed*, 84 Minn. 4, 6, 86 N.W. 756, 757 (1901) (noting that if that disseizor acquired title by adverse possession, he could only be divested of that title "in the manner or by the means other titles are transferred or devested by operation of law").[5] Therefore, we do not address Hagerotts' argument that Wagner's conduct during the 15 years before this suit fails to satisfy the requirements of adverse possession.

B. *Todd v. Weed*

Hagerotts argue that under *Todd*, 84 Minn. at 5, 86 N.W at 756, Wagner did not make his intent to adversely possess the disputed parcel manifest and hence that he could not adversely possess the disputed parcel. This argument was not made to the district court separately from an argument that Wagner's possession was not "actual" and "open" for adverse-possession purposes. Therefore, it is not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Also, the district court found that

[5] The district court did not identify when Wagner adversely possessed the disputed parcel, but it did rule that he did so before Hagerotts' predecessor acquired his interest in 1976. This fact, combined with the fact that an adverse possessor cannot be divested of title except "by the means other titles are transferred or devested by operation of law[,]" *Todd*, 84 Minn. at 6, 86 N.W. at 757, addresses Hagerotts' argument that Wagner's offers to buy the disputed parcel from Hagerotts or their predecessor preclude Wagner from adversely possessing the disputed parcel. Because Wagner adversely possessed the disputed parcel before Hagerotts' predecessor acquired his interest, Wagner could not lose that title by unsuccessfully offering to buy the land from Hagerotts or their predecessor, especially where Wagner may have been trying to avoid costly litigation.

Wagner maintained, improved, and, on a daily basis, used the disputed parcel. How maintenance, improvement, and daily use would not make Wagner's intent manifest to Hagerotts' predecessors is not explained by Hagerotts. Further, while Hagerotts assert that "[t]he question in *Todd* was 'whether the [disseizor's] continued possession and occupancy of the land was under a claim of right and title, and with an intention to hold [it] adversely to the true owner[,]'" (quoting *Todd*, 84 Minn. at 5, 86 N.W. at 756), that was the question presented to the *Todd* district court. On appeal, the supreme court stated both that "[t]he only question presented" was whether the finding that the disseizor did not adversely possess the parcel in question is "sustained by the evidence" and held that "based upon the whole record, . . . the findings of the trial court cannot be disturbed." *Todd*, 84 Minn. at 7, 86 N.W. at 757. Thus, the crux of the *Todd* holding was that the relevant findings of fact were not clearly erroneous.

Hagerotts similarly argue that Wagner's conduct was not sufficiently open as to suggest to the record title owner that Wagner was asserting ownership of the land. "To constitute adverse possession it is not essential that the adverse possessor actually live upon the land which he claims[,] [i]t is enough that it is occupied and applied to the uses for which it is fit." *Fredericksen*, 167 Minn. at 359, 209 N.W. at 258. Here, the disputed parcel is sought for parking purposes and Wagner, his father, or an employee, have parked on the disputed parcel daily since 1934. Also, Wagner has maintained the disputed area since 1959 by shoveling snow, weeding, and trimming, and Wagner improved the disputed parcel by putting gravel on it to make it serviceable for parking purposes. Hagerotts argue that, under *Ehle*, adverse possession cannot have occurred

because there "the disseizor landscaped the disputed property, put a clothes line on it, established a parking area with a stone path on part of the disputed property and even went so far as to put [up] a 'Private – Keep Out' sign." Here, however, the loads of gravel Wagner put on the property are analogous to landscaping, Wagner used the land for parking, and a clothes line would have been inappropriate. Also, the other cases that Hagerotts cite to support their argument are distinguishable because they involve parcels that are much larger and appropriate for very different uses.

C. Estoppel

Hagerotts equate an equitable-estoppel argument that they make to this court with the affirmative defense of laches that they raised in district court, and they argue that Wagner is estopped from bringing this action because Hagerotts did not have notice of Wagner's claim until 2005, and because witnesses had died by the time Wagner brought his action. *Hanson v. Sommers*, 105 Minn. 434, 117 N.W. 842 (1908) does not, as Hagerotts allege, equate equitable estoppel and laches. Therefore, we doubt whether the estoppel argument is properly before this court. *See* Minn. R. Civ. P. 8.03 (requiring pleading of affirmative defenses); *Rehberger v. Project Plumbing Co., Inc.*, 295 Minn. 577, 578, 205 N.W.2d 126, 127 (1973) (stating that a failure to plead an affirmative defense waives the defense); *Leisure Hills of Grand Rapids, Inc. v. Mn. Dept. of Human Services*, 480 N.W.2d 149, 151 (Minn. App. 1992) (distinguishing laches from equitable estoppel). In any event, this equitable-estoppel argument is not persuasive. The district court ruled that Wagner adversely possessed the land before Hagerotts' predecessor acquired his interest in 1976. Therefore, Hagerotts' alleged lack of notice of Wagner's

claim is not relevant to whether Wagner adversely possessed the disputed parcel. Also, a party seeking to equitably estop another must show detrimental reliance on promises or inducements by the one to be estopped. *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 919 (Minn. 1990). Hagerotts have not shown or asserted conduct by Wagner that is or constitutes a promise, nor that they relied on any purported promise by Wagner.

D. Hostile Possession

Noting that if a party enters land with the owner's permission, the party's presence on the land is not hostile to the owner's title, Hagerotts challenge the determination that Wagner's occupancy of the disputed parcel was hostile. Hagerotts state that because Wagner would shovel snow and trim weeds, his actions were "consistent" with those expected of someone permissively using the disputed parcel to park. But for adverse possession purposes, "'[p]ermission' means more than mere acquiescence; it denotes the grant of a permission in fact or a license." *Ehle*, 293 Minn. at 191, 197 N.W.2d at 463 (quoting *Dozier v. Krmpotich*, 227 Minn. 503, 507, 35 N.W.2d 696, 699 (1949)). Here, as the district court noted, Hagerotts submitted "no evidence of permission being directly granted to [Wagner] to use the disputed [parcel.]" Further,

> 'hostile' possession does not refer to personal animosity or physical overt acts against the record owner of the property but to the intention of the disseizor to claim exclusive ownership as against the world and to treat the property in dispute in a manner generally associated with the ownership of similar type property in the particular area involved.

Ehle, 293 Minn. at 189, 197 N.W.2d at 462. Here, Wagner, his father, or his employees have parked on the disputed parcel daily since 1934, and Wagner has maintained the

disputed area since 1959 by shoveling, weeding, and trimming, as well as putting rock on the disputed parcel. *Cf. Roemer v. Eversman*, 304 N.W.2d 653, 653 (Minn. 1981) (stating that "[w]e have stated that hostile possession 'is manifested by [the disseizor's] acts in improving and occupying it under such apparent claim'" (quoting *Seymour, Sabin & Co. v. Carli*, 31 Minn. 81, 84, 16 N.W. 495, 496 (1883))). That anything else could have been done to land that is used for parking purposes is unclear. *See Fredericksen*, 167 Minn. at 360, 209 N.W. at 258 (stating that "[t]o constitute adverse possession it is not essential that the adverse possessor actually live upon the land which he claims[,] [i]t is enough that it is occupied and applied to the uses for which it is fit").

Alleging a close relationship between their predecessor and Wagner, Hagerotts argue that an inference arises that Wagner's use of the land was permissive. But the district court ruled that Wagner adversely possessed the disputed parcel before Hagerotts' predecessor acquired his interest in 1976. Therefore, even if Hagerotts' predecessor intended to permit Wagner to use what the predecessor believed was his land, that intent was irrelevant because Hagerotts' predecessor misunderstood who owned the land. Further, because Hagerotts' predecessor and Wagner were not related, it is not clear that caselaw allows an inference of permissive use. *See Nordin v. Kuno*, 287 N.W.2d 923, 927 (Minn. 1979) (stating that "[t]his court has inferred permission where a close family relationship exists. However, the court has refused to infer permission between three unfriendly sisters, and [between] friendly neighbors" (citations omitted)).

III

Wagner's posttrial memorandum admits that he "satisfied the requirements of adverse possession for the area lying north of his building except for the northerly 20 feet." His posttrial memorandum also asserts that "[t]he northerly 20 feet were used only for ingress and egress purposes" and that he "satisfies the requirements for an easement as to the use of the north 20 feet[.]" Wagner's attorney made a parallel statement at the posttrial hearing. Consistent with Wagner's admission, the district court's posttrial order states that

> [n]otwithstanding the Court's previous order [seemingly awarding Wagner both title to all of the land north of his building and an unrestricted easement over all of Hagerotts' land], at the motion hearing held in this matter, [Wagner] agreed that the easement could be more specifically described as an easement for ingress and egress across the north twenty feet of [Hagerotts'] property.

The posttrial order then grants Wagner a "stipulated" prescriptive easement over the northerly 20 feet of Hagerotts' land to allow Wagner ingress to and egress from the adversely-possessed land. The posttrial order did so, however, without explicitly altering the determination that Wagner had adversely possessed all of Hagerotts' land north of his building. On appeal, Hagerotts challenge the grant to Wagner of the easement.

Except for the differences inherent in possessing land for ownership purposes and using it for easement purposes, a party claiming a prescriptive easement must show the same elements required for adverse possession. *Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000). In claiming a prescriptive easement, the hostile nature of the claimant's use of the land is presumed if the other elements are shown for the relevant period, and

upon a showing of those elements, the burden "shifts to the owner of the servient estate to prove permission." *Id*.

Hagerotts argue that no testimony addressed the use of the land covered by the easement, that Hagerotts and their predecessors periodically barricaded the alley from the public street, and that the street in front of Wagner's building provides access to the building. But Wagner testified that, since 1934, he regularly used the easement land. And another witness testified that Hagerotts' predecessor said that the reason for barricading the alley was to avoid the private alley becoming public, not to exclude Wagner. Further, a prescriptive easement is based on use of the servient estate. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 230 n.3 (Minn. 2008). Here, because it is undisputed that Wagner used the easement land to access his parking spot, the fact that the street in front of the property provided access to the building does not preclude the existence of an easement.

This record supports the district court's determination that Wagner adversely possessed part of Hagerotts' land. It also supports the award to Wagner of a prescriptive easement over the land that he admitted that he did not adversely possess, which is the northerly 20 feet of the strip of land behind his building. Therefore, we modify the district court's award to grant Wagner title, based on adverse possession, to Hagerotts' land north of the building, except the northerly 20 feet, and to award Wagner a prescriptive easement over the northerly 20 feet of Hagerotts' land.

Affirmed as modified.