

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0758**

In re the Matter of the Petition of Kim Robert Jacobsen
and Rebecca Antone Jacobsen For an Order Determining
Boundary Lines and Determining that Petitioners
are the Fee Owners of Certain Lands.

**Filed November 4, 2013
Affirmed
Cleary, Chief Judge**

Hennepin County District Court
File No. 27-ET-CV-10-507

Clinton McLagan, Clinton McLagan Attorney at Law, PA, Eagan, Minnesota (for appellants Kim Jacobsen and Rebecca Jacobsen)

Arlo H. Vande Vegte, Arlo H. Vande Vegte, P.A., Plymouth, Minnesota (for respondents Jennifer Strom and Colin Brown)

Sarah J.B. Adam, Reiter & Schiller, P.A., St Paul, Minnesota (for respondent Wells Fargo Bank, N.A.)

Jared M. Goerlitz, Peterson, Fram & Bergman, PA, St. Paul, Minnesota (for respondent CitiMortgage, Inc.)

Mychal A. Bruggeman, Mackall, Crouse & Moore PLC, Minneapolis, Minnesota (for respondent First National Bank)

Katherine M. Melander, Coleman, Hull & Van Vliet, PLLP, Minneapolis, Minnesota (for respondents Bank of America, N.A. and Mortgage Electronic Registration Systems, Inc.)

Considered and decided by Cleary, Presiding Judge; Kirk, Judge; and Smith,
Judge.

UNPUBLISHED OPINION

CLEARY, Judge

In this boundary dispute between adjacent property owners, appellants challenge the district court's grant of summary judgment in favor of respondents holding that the record did not support appellants' claim for boundary by practical location over respondents' registered property. We affirm.

FACTS

On August 10, 1992, appellants Kim and Rebecca Jacobsen acquired unregistered property adjacent to the presently disputed boundary. Appellants' property shares its northwestern border with the registered property of respondents, Jennifer Strom and Colin Brown, which respondents acquired in 2004. Sections of appellants' driveway and decorative fence, along with the cable, septic, and gas lines connected to appellants' home, all encroach on the southeastern portion of respondents' property. Appellants claim that when they purchased their property, they believed the northwestern boundary of their property included the land on which all of the present encroachments are located.

One of the appellants, Kim Jacobsen, submitted by affidavit his belief as to when the various encroachments were completed. Jacobsen asserts that the encroaching driveway and decorative fencing were completed in the early 1980s prior to appellants' ownership. Additionally, Jacobsen stipulates that the city installed a sanitary system in 1985 or 1986, which the city later updated in 1994. Lastly, he states that the city installed an apron for the driveway in 1988 and that appellants installed cable over respondents' property in 2009.

Appellants offer two seller's affidavits from prior owners of respondents' property. The first is a seller's affidavit received by respondents' predecessors in title, the Langs, upon purchasing the property. The affidavit contains a handwritten statement that "neighbor's driveway crosses the edge of property." Appellants also present a seller's disclosure from the Langs to respondents that states, "Neighbor's [d]riveway may encroach over SE tip of [t]he property."

The record contains a title examiner's report filed on June 5, 1984, in connection with the registration application of certain previous owners of respondents' property, the Skarnes. In the report, the title examiner states that a gravel driveway and a cedar rail fence claimed by the southern adjoining lot encroach on respondents' property. The title examiner assumed that evidence would be presented at the subsequent hearing to determine whether the encroachments were maintained by right or at sufferance, however nothing related to the encroachments was memorialized in the certificate of title resulting from the registration proceeding.

On December 10, 2009, respondents commenced a lawsuit against appellants, separate from the current case on appeal, alleging trespass, nuisance, ejectment, and assault. Appellants then filed the present case against respondents in proceedings subsequent to initial registration. In bringing this action, appellants seek to revise appellants' and respondents' respective certificates of title so that appellants' certificate of title includes the land on which appellants currently encroach on respondents' property. Respondents sought summary judgment, and the district court determined that appellants had failed to present evidence demonstrating that respondents or their

predecessors in title silently watched as appellants incurred expenses on improvements. Additionally, the court determined that appellants had failed to show that they lacked knowledge of the true boundary line. As a result, the district court held that appellants had failed to present competent evidence to support a claim for boundary by practical location and dismissed their claim with prejudice. Appellants now appeal.

D E C I S I O N

I. Did the district court err in granting summary judgment to respondents in denying appellants' claim of boundary by practical location?

A district court's grant of summary judgment is reviewed de novo to determine whether the district court properly applied the law and whether there are genuine issues of material fact precluding summary judgment. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). Evidence is reviewed in the light most favorable to the party against whom summary judgment was granted. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76–77 (Minn. 2002). No genuine issue of material fact exists “when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). “[S]ummary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions.” *Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 507 (Minn. 2006).

On appeal, appellants argue that the district court erred in granting summary judgment to respondents by denying appellants' claim for the establishment of boundary by practical location. Title to registered land may not be acquired from the registered owner by prescription or by adverse possession. Minn. Stat. § 508.02 (2012). However, registered land is not protected from the common law doctrine of boundary by practical location. *Id.*

Boundary by practical location can be established by three methods: (1) acquiescence, (2) agreement, and (3) estoppel. *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977). Both the parties and the district court agree that the present case should be analyzed under the estoppel method. Boundary by estoppel is established by showing that “[t]he party whose rights are to be barred . . . silently looked on with knowledge of the true line while the other party encroached thereon or subjected himself to expense which he would not have incurred had the line been in dispute.” *Id.* “[E]stoppel requires knowing silence on the part of the party to be charged and unknowing detriment by the other.” *Id.* at 859. “Because the effect of a practical location is to divest one party of property that is clearly and concededly his by deed, the evidence establishing the practical location must be clear, positive, and unequivocal.”¹

¹ Respondents cite *Phillips v. Blowers* for the proposition that boundary by practical location must be established 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.” See 281 Minn. 267, 269–70, 161 N.W.2d 524, 527 (1968) (quotation omitted). In reciting this standard, *Phillips*, which involved practical location of boundaries, quoted *Village of Newport v. Taylor*, 225 Minn. 299, 303, 30 N.W.2d 588, 591 (1948), which involved adverse possession, rather than practical location of boundaries. One year after *Newport*, however, the Minnesota

Id. at 858. Appellants claim that boundary by estoppel was established either when they purchased their home or at some point prior to their purchase.

Appellants assert that boundary by estoppel was established when they purchased their home. Estoppel requires encroachment or that the party “subjected himself to expense which he would not have incurred had the line been in dispute.” *Id.* There is no Minnesota caselaw expressly holding that purchasing property satisfies the detriment element of a boundary-by-estoppel claim. Courts have held that an adjoining landowner may be estopped from denying a boundary line after making representations as to that line to a purchaser of the adjoining property. *See Thompson v. Borg*, 90 Minn. 209, 213, 95 N.W. 896, 898 (1903) (stating that “[a] party is estopped to deny that a division line between his own and adjoining land is the true boundary line, as against a purchaser of the adjoining land, if he induced him by his representations as to the line to purchase with reference to such line and up to it”). However, appellants have not asserted that respondents or any of their predecessors in title made any affirmative representations as to the boundary line.

In support of their assertion that the purchase of their property satisfies the detriment element of boundary by estoppel, appellants point to the specific language in

Supreme Court, in *Alstad v. Boyer*, had limited the *Newport* rule to its facts. 228 Minn. 307, 311, 37 N.W.2d 372, 375 (1949). *Alstad*’s limitation of *Newport* is not addressed in *Phillips*, and more recently, in *Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999), the Minnesota Supreme Court rejected the argument that *Newport* created a higher standard of proof for prescriptive easements by requiring “strict construction” of the evidence, reiterating that *Alstad* limited the *Newport* rule to its facts. For this reason, we decline to extend the applicability of language originating in *Newport*’s adverse-possession discussion, via *Phillips*, to this practical-location-of-boundaries case.

the definition of boundary by estoppel. On its face, the definition allows for the proponent of a boundary-by-estoppel claim to show either encroachment or expense that would not have been incurred had the boundary line been in dispute. *See Theros*, 256 N.W.2d at 858. Appellants propose that purchasing their home constitutes an expense under this language. However, appellants cite no Minnesota law supporting this proposition. Relevant Minnesota caselaw on boundary by estoppel only addresses improvements to property or other incurred expenses while in possession of property. *See, e.g., Halverson v. Vill. of Deerwood*, 322 N.W.2d 761 (Minn. 1982) (holding that boundary by estoppel was supported by evidence the property owners had remodeled and improved cabins on the disputed property, along with having maintained and paid property taxes for buildings located on the disputed property); *Theros*, 256 N.W.2d at 859 (reviewing a boundary-by-estoppel claim involving paving, snowplowing, and other maintenance expenses over the disputed property).

Boundary by estoppel also requires knowing silence on behalf of the party to be charged. *Theros*, 256 N.W.2d at 858. The respondents did not own the adjacent property when appellants purchased their property in 1992, and thus respondents' knowledge of the true boundary is irrelevant as to establishing boundary by estoppel at the time of appellants' purchase. Appellants stipulate that the Langs, respondents' predecessors in title, knew of the true boundary when appellants purchased the adjacent property. Assuming appellants were able to establish that the Langs knew of the encroachments and true boundary line, appellants' argument would require this court to hold that respondents' predecessors in title had an affirmative duty to insert themselves into the

transaction between appellants and their predecessors in title prior to the conveyance, or risk forfeiting the disputed property to appellants. Appellants have cited no authority to support holding that such an affirmative duty is recognized in Minnesota. They have therefore failed to show that the district court misapplied the law in granting summary judgment to respondents by rejecting appellants' claim that boundary by estoppel was established when they purchased their property.

Appellants also assert that respondents' predecessors in title knew that appellants' driveway encroaches on respondents' property and that this should support their boundary-by-estoppel claim. Appellants present a seller's affidavit received by respondents' predecessors in title, the Langs, upon purchasing the property to support their assertion that the Langs and their predecessors in title, the Seabolds, knew that the driveway encroached over respondents' property. The affidavit contains a handwritten statement that "neighbor's driveway crosses the edge of property." Appellants also present a seller's disclosure from the Langs to respondents that states, "Neighbor's [d]riveway may encroach over SE tip of [t]he property." Lastly, appellants submit a report from the title examiner prior to registering respondents' property in 1984, which observed that "a gravel driveway and a cedar rail fence," claimed by the adjacent property owner to the south, encroach on respondents' property. No evidence has been presented as to what occurred at the registration hearing regarding the driveway and fence encroachments, except for the resulting legal description of respondents' registered property, which includes the disputed area containing portions of the driveway and fence.

Although appellants offer evidence directed at respondents' knowledge of the driveway encroachment, there is little evidence in the record as to when the driveway and fence were constructed and as to the knowledge of the true boundary possessed by appellants' predecessors in title responsible for constructing the driveway and fence. To satisfy the requirements of boundary by estoppel as related to the driveway and fence, appellants must show more than that respondents' predecessors in title were aware that the driveway and fence encroached over the true boundary. To survive summary judgment, appellants must offer evidence that presents a genuine issue of material fact as to whether the party responsible for building the driveway and fence did so without knowledge of the true boundary. The only offered evidence is appellant Kim Jacobsen's unsubstantiated assertion that the driveway and decorative fencing were installed in the early 1980s. This is not sufficient evidence such that reasonable persons could draw differing conclusions as to whether appellants' predecessors in title unknowingly incurred detriment with regard to the fence and driveway, as is required under a claim for boundary by estoppel. Appellants have not alleged or presented evidence that they have incurred expense as to the fence and driveway for maintenance or repair. Therefore, appellants' lack of knowledge as to the true boundary line has no bearing on determining whether the driveway and fence encroachments provide foundation for establishing boundary by estoppel.

Because appellants have failed to offer evidence as to whether their predecessors in title unknowingly incurred expenses, appellants may only rely on their own lack of knowledge as to the true boundary for those improvements that have been placed during

their own property ownership. Appellants allege that, since 1992 when they purchased their property, the city upgraded the sewer system connected to their home in 1994 and they installed a cable line in 2009. The only evidence proffered as to either of these improvements is Kim Jacobsen's affidavit stating the years these improvements were made. Appellants do not allege or provide evidence that they incurred any expense related to the upgraded sewer system, but rather assert that the city made the improvements. The upgraded sewer system therefore does not provide a basis for their boundary-by-estoppel claim.

Appellants have also failed to allege or provide evidence that they lacked knowledge of the true boundary when the sewer system and cable were installed. Kim Jacobsen's affidavit does claim that appellants were unaware of the true boundary when they purchased their home, but it does not state any facts relevant to appellants' knowledge of the true boundary in either 1994 or 2009. Appellants did not present evidence establishing when in 2009 the cable line was installed. Respondents commenced their ejectment action against appellants in 2009, thus creating a concrete dispute as to the boundary line. Because appellants have failed to show that the district court erred in applying the law or that there are genuine issues of material fact, appellants have not established that the district court erred in granting summary judgment.

II. Did the district court err in failing to balance the equities?

Appellants argue for the first time on appeal that the district court should have balanced the equities and considered the relative value of the land to each party. An appellate court will generally not consider matters not argued to and considered by the

district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Appellants' balancing-of-the-equities argument was not presented to and considered by the district court. Since appellants have cited no legal authority for an exception to the general rule, appellants have waived this issue.

III. Did the district court err in failing to rule on respondents' assertion that appellants are required to show a visible line to succeed in their claim of boundary by practical location?

Respondents argue that the district court should have held that appellants were also required to present evidence of an established visible boundary line to succeed in their claim for boundary by estoppel. However, no caselaw is cited holding that a visible boundary line is required in a claim for boundary by estoppel. Respondents only cite boundary-by-estoppel cases in which a visible boundary was present. It is not necessary for the disposition of this case that we determine whether a boundary-by-estoppel claim requires evidence of a visible boundary line. The court of appeals is limited to identifying errors and correcting them. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Affirmed.