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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1725**

Jerry M. Gelao, et al.,
Respondents,

vs.

Jordan R. Coss,
Appellant.

**Filed September 1, 2009
Affirmed
Johnson, Judge**

Wabasha County District Court
File No. 79-CV-07-675

Peter D. Ekstrand, Ekstrand Law Office, PLC, 100 Main Street West, Wabasha, MN 55981 (for respondents)

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Considered and decided by Larkin, Presiding Judge; Schellhas, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Jerry and Patricia Gelao own lakeshore property in Wabasha County that is adjacent to lakeshore property owned by Jordan R. Coss. After disputes arose concerning the two properties, the Gelaos brought this lawsuit to establish their ownership of

disputed areas. After a bench trial, the district court entered judgment in favor of the Gelaos, concluding that they are entitled to a boundary by practical location and that they adversely possessed a small parcel of land. We affirm.

FACTS

The properties belonging to the parties are located on the eastern shore of Lake Zumbro. The Gelaos have approximately 145 feet of shoreline. To the south, Coss has approximately 50 feet of shoreline. The parties' respective properties run roughly 200 feet to the east, where they are bounded by a public road.

Patricia Gelao acquired the Gelaos' property, Lots 1 and 2 in Hexum's Subdivision, in 1989, from Patricia Anderson. Coss purchased the property to the south of the Gelao lots in 1993. Patricia Gelao married Jerry Gelao in 2002 and thereafter deeded the property to herself and her husband in joint tenancy. The couple lived at the property part-time until 2003, when they moved to the property on a full-time basis.

Two parcels of property are in dispute. First, a parcel that the parties have labeled Tract A lies between the Gelaos' property and the Coss property. At the lakeshore, it is approximately 18 feet wide, and it tapers to a point near the public road on the eastern edge of the parties' properties. Second, a parcel labeled Tract B is a small triangular parcel, approximately 45 feet long and 7 feet wide, which is located at the eastern end of Tract A, near the public road. The deed for Coss's property includes both Tract A and Tract B.

A. Tract A

At the time of her purchase, Patricia Gelao believed that the southern boundary of Lot 1, the boundary she shared with the lot now owned by Coss, was defined by a barbed-wire fence that ran from east to west, from the lake to the public road. Patricia Gelao held this belief because, she testified, Anderson had planted flowers, “mowed up to that area, [and] took care of it.” Shortly after moving to the property in 1989, Gelao removed the barbed wire for the safety of her grandchildren and pets, but fence posts and remnants of the barbed wire wrapped around trees remain. In 1990, Gelao built an addition to the cabin on her property. A photograph of the construction shows that the soil had been graded for the project up to an oak tree that marks the southern boundary of Tract A. Prior to 2006, no one in the Gelao family received complaints from Coss or saw him occupy, maintain, or improve Tract A or B.

Coss testified that Tract A was not maintained when he moved to the property. He also testified that he leveled some of the soil in Tract A and planted grass seed in 1999 and 2000, that he drove his snowmobile on Tract A during the winters, and that he never saw the Gelaos assert ownership over Tracts A and B. Although Coss initially testified that he had built a rock wall within Tract A, he later admitted that the rock wall was outside of Tract A.

Coss’s former wife testified that she lived on the Coss property from 1993 to 2001 and that she helped Coss maintain Tract A by clearing brush, mowing, and planting flowers. She testified that she saw the Gelaos plant flowers and asked them to stop. She testified that she and Coss planted several pine trees along the southern boundary of Lot

1. However, on rebuttal, Travis Martin, who owns non-adjoining property but accesses the lake by an easement over Coss's property, testified that he examined the location of the trees after hearing Coss's ex-wife's testimony and that the trees are actually located along the southern boundary of Tract A.

Several friends who visited Coss's property during the 1990s testified that portions of Tract A remained undeveloped from 1993, when Coss purchased the land, until the late 1990s, when Coss unsuccessfully attempted to level the soil on Tract A to provide boat trailer access to the lake.

B. Tract B

Patricia Gelao testified that, after acquiring Lots 1 and 2, she believed that Tract B also was part of her property because Anderson had mowed that area. In 1992, Gelao placed a canoe on Tract B to serve as a decorative planter for flowers. Sometime later, she replaced the canoe with a vegetable garden. In 2003, she also placed a large boulder on Tract B to prevent cars from driving over the edge of a retaining wall.

Both Anderson and the owner who preceded Anderson informed Patricia Gelao that Lot 1 included Tracts A and B. According to the testimony of Patricia Gelao, Jerry Gelao, and Patricia Gelao's daughter and son, the Gelao family has, at all times relevant to this case, maintained and improved Tracts A and B by planting grass, mowing, clearing brush, planting wildflowers, and trimming trees.

C. The Parties' Disputes

In 2003, the Gelaos installed a retaining wall that roughly follows the southern boundary of Lot 1, essentially outlining the outer edges of Tract A and Tract B. The part

of the wall closest to the lake (approximately 13 feet of the wall) is located to the south of the southern boundary of Lot 1, within the area of Tract A.

The Gelaos began construction of a new home on the property in October 2005 and completed construction in May 2006. Prior to the completion of construction, the Gelaos family had not received any complaints from Coss about their use of either Tract A or Tract B, nor had the Gelaos seen Coss occupy, maintain, or improve either Tract A or B.

In July 2006, however, Coss expressed concern about the boundary between the Gelaos' property and his own property. Coss accused the Gelaos of moving boundary stakes. Jerry Gelaos responded by saying that he was unaware that such stakes existed and that the retaining wall had been built a few years earlier.

In November 2006, based on his survey of the property, Coss began constructing a fence along the southern boundary of Lot 1 by installing thick steel posts. According to Patricia Gelaos, Coss also excavated the soil in Tract B at this time.

In January 2007, when the Gelaos returned from a vacation, they discovered that part of their retaining wall -- specifically, the part nearest the lake, which is within Tract A -- had been pushed over, causing the bricks to fall onto their property. Although Coss denied that he had damaged the wall, Martin testified that Coss had expressed frustration about the retaining wall after the Gelaos finished building their new home in 2006 and had said that the wall "needed to be gone."

In April 2007, the Gelaos obtained a survey, which identified a strip of land between the southern boundary of Lot 1 and the former location of the barbed-wire fence, the area now known as Tract A.

D. District Court Proceedings

The Gelaos commenced this action in June 2007, alleging that they had acquired fee ownership of Tract B by adverse possession and that the boundary between their properties had been established by practical location as the southern boundary of Tract A. The Gelaos also alleged that Coss was liable for the damage to their retaining wall and that the fence posts Coss had installed constituted a private nuisance.

The case was tried before the district court on two days in June 2008. During the trial, the Gelaos and Coss presented conflicting testimony regarding whether the Gelaos had maintained and occupied Tracts A and B. In July 2008, the district court issued findings of fact, conclusions of law, and an order for judgment. The district court credited the Gelaos' testimony, finding it to be "more credible and more consistent with all other evidence produced in this case than that of the defendant and his ex-wife." The district court found "the true boundary line between defendant's 50 foot strip of land and [the Gelaos' property] is the south line of Tract A." The district court also found that the Gelaos are "the owners of Tract B by reason of adverse possession." Finally, the district court found that Coss was liable for damaging the Gelaos retaining wall in January 2007 and that Coss's metal fence posts constitute a private nuisance under Minn. Stat. § 561.02 (2008). Coss appeals.

DECISION

Coss challenges each part of the district court's judgment. With respect to each part, he argues generally that the district court's "findings are not supported by the evidence and its conclusions of law are not supported by the findings." In addition, Coss frequently argues that the district court failed to make findings of fact that are necessary to its conclusions and to the judgment.

With respect to the latter argument, the rules of civil procedure require a district court sitting without a jury to "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." Minn. R. Civ. P. 52.01. But if a district court fails to make required findings of fact, "the burden is on the parties to alert the court by a motion for amended finding under Minn. R. Civ. P. 52.02." *Frank v. Illinois Farmers Ins. Co.*, 336 N.W.2d 307, 311 (Minn. 1983). A motion for amended findings serves to either "eliminate the need for appellate review" or, "if appellate review is sought," to "facilitate development of 'critical aspects of the record.'" *Alpha Real Estate Co. v. Delta Dental Plan*, 664 N.W.2d 303, 309 (Minn. 2003) (discussing motion for new trial) (quoting *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986)). The implication of *Frank* is that a party's failure to move for amended findings results in a forfeiture of the argument that the district court's findings are incomplete or inadequate. See *Anderson v. Peterson's N. Branch Mill, Inc.*, 503 N.W.2d 517, 518-19 (Minn. App. 1993) (declining to review adequacy of findings and conclusions of law because appellant did not move for amended findings); *Pacific Mut. Door Co. v. James*, 465

N.W.2d 696, 701 (Minn. App. 1991) (same); *Love v. Amsler*, 441 N.W.2d 555, 560 (Minn. App. 1989) (same), *review denied* (Minn. Aug. 15, 1989).

Because Coss did not move for amended findings, we will not review the adequacy of the district court's findings. Rather, to the extent that Coss contends that the district court failed to make findings on a particular factual issue, our review will be limited to whether the evidence relevant to that factual issue is sufficient to support the district court's conclusions of law. *See* Minn. R. Civ. P. 52.02 (providing that party may challenge sufficiency of evidence after bench trial regardless whether party has made motion to amend findings).

I. Tract A -- Boundary by Practical Location

Coss first challenges the district court's findings and conclusion on the Gelaos' claim of boundary by practical location, which relates to the southern boundary of Tract A. A district court's determination regarding a disputed boundary is a question of fact and is afforded the same deference as factual determinations in other cases. *Wojahn v. Johnson*, 297 N.W.2d 298, 303 (Minn. 1980). A district court's findings will not be reversed unless they are clearly erroneous, keeping in mind our deference to the district court's opportunity to evaluate witness credibility. *Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008); *Theros v. Phillips*, 256 N.W.2d 852, 857 (Minn. 1977); Minn. R. Civ. P. 52.01. Findings of fact are clearly erroneous if an appellate court "is left with the definite and firm conviction that a mistake has been made." *Goldman*, 748 N.W.2d at 284 (quotation omitted).

A party may establish boundary by practical location under any one of three theories:

(1) Acquiescence: The location relied upon must have been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations.

(2) Agreement: The line must have been expressly agreed upon by the interested parties and afterwards acquiesced in.

(3) Estoppel: The party whose rights are to be barred must have 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.

Theros, 256 N.W.2d at 858. The Gelaos rely on the first and third types of boundary by practical location: acquiescence and estoppel.

A. Acquiescence

To establish boundary by practical location by acquiescence, a party must demonstrate by clear and convincing evidence that the title holder “affirmatively or tacitly consented to the placement and maintenance of [a boundary] for at least 15 years.” *Gabler v. Fedoruk*, 756 N.W.2d 725, 729 (Minn. App. 2008); *see also Bjerketvedt v. Jacobson*, 232 Minn. 152, 156, 44 N.W.2d 775, 777 (1950) (referring to period of time in “statute of limitations to bar right of entry”); Minn. Stat. § 541.02 (2008) (providing for 15-year statute of limitations for actions to recover real estate).

The district court found that “the plaintiffs never had anyone including Jordan Coss question their occupancy of Tract A” from the time of Patricia Gelao’s purchase in 1989 until 2006. But neither this finding nor the evidence presented at trial are sufficient

to support the legal conclusion that Coss acquiesced to the southern boundary of Tract A for the required 15-year period. Coss purchased the land adjacent to the Gelaos' property in June 1993. The Gelaos commenced this action 14 years later on June 2007. *See LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. App. 1987) (holding that period for acquiescence may run until commencement of action in district court). Thus, the Gelaos' claim for boundary by practical location by acquiescence fails as a matter of law. *See Phillips v. Blowers*, 281 Minn. 267, 271 & n.4, 161 N.W.2d 524, 528 & n.4 (1968) (holding that evidence was insufficient to establish practical location of boundary in part because acquiescence existed for no more than eight years).

B. Estoppel

Boundary by practical location by estoppel requires “knowing silence on the part of the party to be charged and unknowing detriment to the other.” *Halverson v. Village of Deerwood*, 322 N.W.2d 761, 769 (Minn. 1982) (quoting *Theros*, 256 N.W.2d at 859). To establish the knowledge requirement, the estopped party must have knowledge of the “true line.” *Id.* at 768 (quoting *Theros*, 256 N.W.2d at 858). To establish the detriment requirement, the party in possession must have “subjected himself to expense which he would not have incurred had the line been in dispute.” *Id.* (quoting *Theros*, 256 N.W.2d at 859).

1. Knowing Silence by Coss

Coss argues that he “did not know of the true line until his 2006 survey.” But this argument is inconsistent with his testimony at trial. Coss testified that, upon purchasing his property in 1993, he surveyed the entire property “all the way over to the Gelao

property” and that, based on the location of survey markers, he “knew exactly where [his] property line was at.”

Coss also argues that he “did not silently look on.” The district court found that no one questioned the Gelaos’ occupancy of Tract A “until after [the Gelaos’] new home was built in 2006.” The evidence supports the district court’s finding. Several members of the Gelao family testified at trial that no one in the Gelao family received complaints from Coss before 2006. Coss’s wife testified that she saw the Gelaos planting flowers in Tract A and asked them to stop, but she did not testify when that occurred. Coss initially testified that he had built a rock wall within Tract A, but he later admitted that the rock wall was outside of Tract A. Nonetheless, the district court found the testimony of the Gelaos’ witnesses “more credible and more consistent with all other evidence produced in this case than that of [Coss] and his ex-wife.”

Thus, the evidence supports the finding that Coss “silently looked on with knowledge of the true line.” *Halverson*, 322 N.W.2d at 768 (quotation omitted).

2. *Detriment to the Gelaos*

The record demonstrates that the Gelaos relied to their detriment on their belief that the true property line for Lot 1 was the southern boundary of Tract A. In 2003, the Gelaos installed a retaining wall that roughly follows the eastern and southern boundaries of Lot 1 but extends into part of Tract A. The Gelaos began construction of a new house in October 2005 and completed construction in May 2006. The south side of the house is situated less than ten feet from the south line of Lot 1. Jerry Gelao testified that he was unaware when building his retaining wall and home that they were so close to the

property line for Lot 1 because there were no visible markers and Coss had not indicated otherwise. He testified that he “wouldn’t have built that close to the line” if he had known its actual location. This evidence would support a finding that the Gelaos relied to their detriment on Coss’s silence.

In sum, the evidence supports the district court’s conclusion that the boundary between the Gelaos’ property and Coss’s property is established by estoppel.

II. Tract B -- Adverse Possession

Coss next challenges the district court’s findings and conclusions on the Gelaos’ claim of adverse possession, which relates to Tract B. Whether the adverse possession elements have been established is a question of fact. *Wortman v. Siedow*, 173 Minn. 145, 148, 216 N.W. 782, 783 (1927); *see also Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. App. 2003). A district court’s findings will not be reversed unless they are clearly erroneous, giving deference to the district court’s credibility determinations. *Goldman*, 748 N.W.2d at 284.

To prove a claim of adverse possession, a plaintiff must demonstrate by clear and convincing evidence that “the property has been used in an actual, open, continuous, exclusive, and hostile manner for 15 years.” *Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999). “The clear and convincing standard requires more than a preponderance of the evidence but less than proof beyond a reasonable doubt.” *State v. Miller*, 754 N.W.2d 686, 701 (Minn. 2008) (quotation omitted).

Coss contends that the district court failed to make the required findings with respect to each of the elements of adverse possession. We do not believe that contention

accurately describes the district court's findings. Even if Coss's contention were accurate, however, it would be irrelevant because, as stated above, Coss did not move for amended findings. *See Frank*, 336 N.W.2d at 311; *Anderson*, 503 N.W.2d at 518-19; *Pacific Mut. Door Co.*, 465 N.W.2d at 701; *Love*, 441 N.W.2d at 560.

A. Actual and Open

The law does not prescribe a particular manner in which an adverse party must possess a disputed tract of property, only that possession must give “unequivocal notice to the true owner that someone is in possession in hostility to his title.” *Ganje*, 659 N.W.2d at 266 (quoting *Skala v. Lindbeck*, 171 Minn. 410, 413, 214 N.W. 271, 272 (1927)). The district court found that the Gelaos “openly occupied” Tract B by placing a canoe, vegetable and flower gardens, and a large boulder on it. The evidence supports the district court's finding. The Gelaos' possession and occupation of Tract B was not concealed from public view. Photographs and surveys demonstrate that Tract B is immediately adjacent to and visible from a public access road. Photographs of Tract B show that Patricia Gelao placed a canoe on Tract B in 1992, which she later replaced with a vegetable garden and boulder. These acts constitute “unequivocal notice” to Coss that Patricia Gelao treated Tract B as her own. *Ganje*, 659 N.W.2d at 266 (quotation omitted).

B. Exclusive

To satisfy the exclusivity requirement, a disseizor must possess the land “as if it were his own with the intention of using it to the exclusion of others.” *Id.* (quoting *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 108 (Minn. App. 2002)). The district court

found that the Gelaos occupied Tract B “exclusively.” The evidence supports this finding. Prior to 2006, no one in the Gelao family received complaints from Coss or saw him occupy, maintain, or improve Tract B. Furthermore, the Gelaos’ actions of mowing the grass, planting flowers, and placing a canoe planter, vegetable garden, and boulder on Tract B indicate possession with “the intention of using it to the exclusion of others.” *Id.* (quotation omitted).

C. Hostile

The concept of hostility does not imply any type of “personal animosity or physical overt acts against the record owner.” *Id.* at 268 (quoting *Ehle v. Prosser*, 293 Minn. 183, 190, 197 N.W.2d 458, 462 (1972)). Rather, it requires that the disseizor enter and take possession of the land as if it were the disseizor’s. *Id.* The district court found that the Gelaos maintained and occupied Tract B “as their own.” The evidence supports this finding as well. The Gelaos’ acts of mowing the grass, planting flowers, and placing a canoe planter, vegetable garden, and boulder on Tract B demonstrate that they entered the land as if it belonged to them.

D. Continuous

A claim for adverse possession fails if there has not been 15 years of uninterrupted possession. *Id.* “The possession of successive occupants, if there is privity between them, may be tacked to make adverse possession for the requisite period.” *Ebenhoh*, 642 N.W.2d at 109 (quotation omitted). The district court found that the Gelaos maintained and occupied Tract B “for more than 15 years continuously without interruption.” The evidence supports this finding. Patricia Gelao’s testimony and the accompanying

photographs demonstrate that she placed a canoe on Tract B as early as 1992. Patricia Gelao also testified that the previous owners maintained Tract B by mowing that area and that she continued maintaining Tract B after purchasing the property in 1989. Thus, the evidence demonstrates continuous possession for more than 15 years.

E. Summary

The evidence in the trial record supports the district court's findings and its conclusion that the Gelaos possessed Tract B in an open, exclusive, hostile, and continuous manner for the required length of time. Although Coss presented conflicting testimony, the district court stated that it found "the testimony of the plaintiffs to be more credible and more consistent with all other evidence produced in this case than that of the defendant." In light of the deference owed to the district court's credibility determinations, the district court's findings are not clearly erroneous. *See Goldman*, 748 N.W.2d at 284.

III. Private Nuisance

Coss next challenges the district court's conclusion that Coss created a private nuisance by installing steel posts along the survey line, the northern edge of Tract A. Coss argues that the district court's conclusion is erroneous because there is no finding that Coss erected the posts "maliciously."

The claim of private nuisance is based on a statute that provides, "Any fence, or any other structure, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property shall be deemed a private nuisance." Minn. Stat. § 561.02. Because Coss did not bring a motion in the district court for amended

findings, he cannot now argue that the district court erred by failing to make a necessary finding. *See Frank*, 336 N.W.2d at 311; *Anderson*, 503 N.W.2d at 518-19; *Pacific Mut. Door Co.*, 465 N.W.2d at 701; *Love*, 441 N.W.2d at 560. Thus, our review is limited to the question whether the evidence would support such a finding, *i.e.*, whether the evidence satisfies the statutory requirement that the posts were “maliciously erected or maintained.” Minn. Stat. § 561.02.

The evidence demonstrates that, in July 2006, after Coss had conducted a survey and discovered that his property line was on the north side of Tract A, he erected steel fence posts along the survey line and connected them with a string. At approximately the same time, Coss destroyed flowers planted by the Gelaos within Tract A. On Thanksgiving Day in 2006, Coss erected steel pipes along the length of the survey line that are six feet tall and four inches in diameter. When Jerry Gelao asked Coss how he planned to use the pipes, Coss answered, “It depends on how much trouble you give me about it.” In January 2007, the Gelaos returned home from vacation to find that part of their retaining wall had been pushed over, causing the bricks to fall onto their property. Martin testified that Coss had expressed frustration about the retaining wall after the Gelaos finished building their new home in 2006 and had said that the wall “needed to be gone.”

In light of the context of Coss’s actions, this evidence would support a district court finding that Coss erected the fence maliciously, thereby creating a private nuisance.

IV. Retaining Wall

Coss last challenges the judgment of \$2,400 for the destruction of part of the Gelaos' retaining wall, which the district court found was caused by Coss. On appeal, Coss challenges only the amount of damages.

The district court found that the value of the necessary repairs to the retaining wall is \$2,400. This finding is based on a written estimate provided to Jerry Gelao by Lake Shady Landscaping, which was introduced as an exhibit. Coss contends that the exhibit is inadmissible hearsay and, thus, that the evidence of damages is insufficient. Evidentiary rulings are subject to an abuse-of-discretion standard of review. *Jacobson v. \$55,900 in U.S. Currency*, 728 N.W.2d 510, 525 (Minn. 2007).

As a general rule, an out-of-court statement is inadmissible to prove the truth of the matter asserted. Minn. R. Evid. 801, 802. But one exception to the hearsay rule is the business-records exception. *See* Minn. R. Evid. 803(6). The written estimate provided to Jerry Gelao is well within the scope of the business-records exception. *See, e.g., Byers v. Commissioner of Revenue*, 741 N.W.2d 101, 107 (Minn. 2007). Coss has not argued that the "source of information or the method or circumstances of preparation indicates lack of trustworthiness." Minn. R. Evid. 803(6). Thus, the district court did not abuse its discretion by admitting the exhibit over Coss's hearsay objection. Consequently, the evidence supports the district court's finding concerning the amount of damages.

Affirmed.