STATE OF MINNESOTA
IN COURT OF APPEALS
A09-492

Larry Schwarz, et al.,
Respondents,

vs.

Bjorne Finseth, et al.,
Appellants.

Filed December 22, 2009
Affirmed
Peterson, Judge

Otter Tail County District Court
File No. 56-C5-05-002347

Gregory J. Larson, Svingen, Karkela, Cline, Haugrud, Hunt, Larson & Jensen, P.L.L.P., 424 East Mill Avenue, P.O. Box 338, Pelican Rapids, MN 56572 (for respondents)

Charles A. Krekelberg, Mathew A. Sobert, Krekelberg, Skonseng & Hastings, P.L.L.P., 10 North Broadway, P.O. Box 353, Pelican Rapids, MN 56572 (for appellants)

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

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

PETERSON, Judge

On appeal from the district court's resolution of this boundary dispute, appellants argue that the district court erred in awarding disputed property to respondents by adverse

possession because the record does not support the district court's findings of fact regarding respondents' use of the disputed property. We affirm.

FACTS

Respondents Larry and Mary Jo Schwarz brought this action against appellants Bjorne and Barbara Finseth, alleging that they had acquired title to property under the doctrines of adverse possession and boundary by practical location. Appellants and respondents are neighbors; appellants' property (Finseth property) is north of respondents' property (Schwarz property). The disputed property is south of a fence line and is bordered on the east by the Otter Tail River and extends beyond the western edge of Government Lot 3. Respondents acquired their property from respondent Larry Schwarz's mother, Meta Schwarz, in 1990. Appellant Bjorne Finseth bought the Finseth property from Alfredo and Ernest DiLorenzo in 1999.

In 1960, Meta Schwarz and her husband Gilbert Schwarz entered into a contract for deed to buy the Schwarz property and began living on it. Larry Schwarz was three years old in 1960 and has lived on the Schwarz property continuously since then. Larry Schwarz testified that his parents used the property south of the fence line for pasturing cattle. He testified that the fence line shown on exhibit one was consistent with the property line that he recalled from the 1960s and 1970s. Larry Schwarz testified that the Schwarzes also used the disputed area for duck hunting and deer hunting and that he played back there all the time when he was a child. The Schwarzes maintained the fence and sprayed the area for weeds. Except for seeing Barbara Finseth walking her dog one

evening, Larry Schwarz never saw appellants or their predecessors-in-interest use the disputed property.

Mary Jo Schwarz began living on the Schwarz property in 1983 when she married Larry Schwarz. Mary Jo Schwarz testified that there were always cattle on the eastern half of the disputed area. Mary Jo Schwarz testified that in the disputed area, she picked plums from plum trees, watched her children play, used part of it as her backyard, laid mulch, sprayed for weeds, grazed cattle, and hunted deer.

Bradley Meder testified that from 1977 to 1979, when he was 19 to 20 years old, he hunted ducks with Larry Schwarz on the disputed property and that Larry Schwarz pastured cattle there throughout the 1970s until 2000. He testified that the fence line shown on exhibit one was where he recalled a fence being located from 1977 through 1979 and that from 1977 through the 1980s, the Schwarzes used the property south of the fence line to pasture hogs and beef cattle. Meder also testified that the fence continued beyond the pasture area to a trailer house, which was located where the house is now.

Dwight Hintermeister testified that during the 1980s, when he was in college, he often hunted with Larry Schwarz. Hintermeister testified that during that time, there was a fence along the fence line and that he helped the Schwarzes maintain the fence. He testified that the Schwarzes used the disputed area east of where the parties' residences are now located (eastern half) for pasturing cattle. Hintermeister testified that after crops were harvested, the Schwarzes also used the disputed area west of where the parties' residences are now located (western half) for pastureland.

Kenneth Hintermeister married Larry Schwarz's sister in 1958. He testified that Larry Schwarz's father pastured cattle on the eastern half of the disputed property every year until his father-in-law's death in 1974 and that Larry Schwarz continued pasturing cattle there after his father's death. Kenneth Hintermeister recalled Gilbert and Meta Schwarz storing machinery on the western half of the disputed property.

In 1979, when the DiLorenzos bought the Finseth property from Vernon Jensen, they entered into an agreement stating that "the existence of a fence makes the boundary line and acreage uncertain." The agreement provided that the DiLorenzos would pay $17,000 for the Finseth property and an additional $3,000 upon receipt of a quit-claim deed establishing the section line as the boundary line between the Finseth and Schwarz properties. Alfredo DiLorenzo testified that he never paid the $3,000 contemplated by the agreement.

Alfredo DiLorenzo testified that when he looked at the Finseth property before buying it, the fence along the eastern half was in very poor condition, sagging, twisted, covered with branches and brush, and "not maintained at all." According to DiLorenzo, fence posts had fallen over and were rotting. During the 20 years DiLorenzo owned the property, he went there on at least a weekly basis to cut wood, clear paths, and exercise. DiLorenzo testified that he only saw animals on the eastern half once and that it was only two animals, possibly horses or cows.

Appellants' predecessors-in-interest filed two notice-of-claim-of-title documents, one in 1982 by Jensen and the second in 1999 by Alfredo DiLorenzo. In 1992, the DiLorenzos began a quiet-title action against respondents to extinguish any rights that

respondents had to the disputed property. The quiet-title action was never filed in district court and was disposed of by a district court order filed July 18, 2007.

Bjorne Finseth testified that when he looked at the property before buying it, he noticed a fence and pieces of fence and was told by Alfredo DiLorenzo that DiLorenzo had started a lawsuit to have the fence removed. When Bjorne Finseth bought the property, the lawsuit was assigned to him. According to Bjorne Finseth, in 1979 and 1980, only pieces of the fence remained on the eastern half and there were short pieces of fence but no fence posts on the western half. Bjorne Finseth denied that respondents made any improvements to the fence, except for trying to put up a section of electric fence that Barbara Finseth tore down.

Barbara Finseth went to the Finseth property for the first time in July 2000. Barbara Finseth testified that there was a fence line on the eastern half but that it was overgrown with brush and fallen trees. Barbara Finseth called the sheriff when she saw Larry Schwarz putting up a section of electric fence, but the sheriff told her that he could not do anything because of the boundary dispute. Barbara Finseth removed the fence herself.

The parties filed cross-motions for summary judgment. The district court denied the motions, and the case was tried to the court. The district court determined that the fence line had been established as the boundary line under the doctrines of boundary by practical location and adverse possession. The district court explained:

> The evidence clearly establishes that [respondents'] predecessors in interest utilized the disputed property as they wished for the purpose of grazing animals, hunting, and such

> other uses they desired for the 15 years prior to 1977. However, the evidence does not establish clear usage of the disputed property beyond the westerly edge of Government Lot 3, Section 32.

This appeal followed.

D E C I S I O N

> Because a boundary determination involves a fact issue, we give the district court's determination "the same deference" that we extend to other factual determinations, reviewing the boundary determination for clear error. Determining whether these factual determinations support the district court's legal conclusion is a question of law, which we review de novo.

Slindee v. Fritch Invs., LLC, 760 N.W.2d 903, 907 (Minn. App. 2009) (citations omitted).

"Mere possession is not enough to establish title to land by adverse possession." *Johnson v. Raddohl*, 226 Minn. 343, 345, 32 N.W.2d 860, 861 (1948). To establish adverse possession, the disseisor must show, by clear and convincing evidence, that the property was used in an actual, open, continuous, exclusive, and hostile manner for at least 15 years. *See* Minn. Stat. 541.02 (2008) (stating that an adverse-possession claim cannot be made until after 15 years of possession); *Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999) (stating the elements necessary for adverse possession); *Ehle v. Prosser*, 293 Minn. 183, 189, 197 N.W.2d 458, 462 (1972) (establishing clear-and-convincing-evidence standard). "Failure to establish any one of the five essentials is fatal to the validity of the claim." *Johnson*, 226 Minn. at 345, 32 N.W.2d at 861.

Appellants argue that the only evidence of continuous use of the disputed property during the 15 years before 1977 was the testimony of Kenneth Hintermeister and that use of the property during and after 1977 cannot be relied on to support the district court's

determination that respondents' predecessors-in-interest acquired the disputed area by adverse possession from 1962 until 1977.[1] Kenneth Hintermeister's testimony establishes that respondents and their predecessors-in-interest used the eastern half of the disputed area during the 15 years preceding 1977 to pasture cattle and the western half to store machinery. Contrary to appellants' assertion, Larry Schwarz also testified about his family's use of the disputed area beginning in 1962, and his testimony establishes use of the entire disputed area by the Schwarz family during the 15 years preceding 1977.

While events occurring in 1977 and later cannot by themselves establish acquisition by adverse possession during an earlier time period, the use of the disputed property by respondents during the later time period, including using part of the western half as a back yard, corroborates the testimony of Larry Schwarz and Kenneth Hintermeister regarding use of the disputed property during the statutory time period. Evidence regarding the uncertainty of title to the disputed area when the DiLorenzos bought the Finseth property from Jensen in 1979 also corroborates the testimony of Larry Schwarz and Kenneth Hintermeister.

The use of the property by respondents' predecessors-in-interest was appropriate given the property's rural character and, therefore, sufficient to establish continuity. *Application of Ganje v. Application of Schuler*, 659 N.W.2d 261, 268 (Minn. App. 2003)

[1] Appellants also cite deposition testimony by Meta Schwarz. Although it appears that both parties believed the depositions of Meta Schwarz and Vernon Jensen were part of the record, neither deposition was filed in the district court or admitted as an exhibit at the summary-judgment hearing. We, therefore, do not consider them on appeal. *See* Minn. R. Civ. App. P. 110.01 ("The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases.").

(stating that "bright-line test for how much activity constitutes continuous possession of a property for adverse-possession purposes does not exist" and that "the rule of thumb used is that the [adverse possessor] must be using the property as his or her own, i.e., regularly and matched to the land's intended use").

Appellants do not dispute that respondents' adverse-possession claim can be established through use by respondents' predecessors-in-interest. *See Burns v. Plachecki*, 301 Minn. 445, 448, 223 N.W.2d 133, 136 (1974) (stating that all parties to be "tacked" together must have been using property adversely); *Kelley v. Green*, 142 Minn. 82, 85, 170 N.W. 922, 923 (1919) (stating that possession of several successive holders may be tacked together if there is privity between them).

Regarding the remaining elements of adverse possession, to prove that possession was exclusive, it is necessary to show that the adverse claimant intended to claim the land occupied to the exclusion of all others. *Wortman v. Siedow*, 173 Minn. 145, 148, 216 N.W. 782, 783 (1927).

> Similarly, the requirement of "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 190, 197 N.W.2d at 462. The use of the disputed property by respondents' predecessors-in-interest was consistent with ownership of rural property, and the record contains no evidence that appellants' predecessors-in-interest consented to that use.

The use of the property by respondents' predecessors-in-interest was sufficient to satisfy the actual and open elements of adverse possession. *See Skala v. Lindbeck*, 171 Minn. 410, 413, 214 N.W. 271, 272 (1927) (stating that use of disputed property must give "unequivocal notice to the true owner that someone is in possession in hostility to his title"); *Ganje*, 659 N.W.2d at 267 (stating that adverse possessor's use is considered open if "visible and notorious acts of ownership have been continuously exercised over the land for the time limited by the statute") (quoting *Young v. Grieb*, 95 Minn. 396, 397, 104 N.W. 131, 131 (1905).

The district court did not err in determining that respondents' predecessors-in-interest acquired title to the disputed area under the doctrine of adverse possession during the 15 years preceding 1977.

Affirmed.