STATE OF MINNESOTA
IN COURT OF APPEALS
A09-874

Carol A. Holz-Kinney,
Appellant,

vs.

James D. Thaler,
Respondent.

Filed November 24, 2009
Affirmed
Bjorkman, Judge

Cass County District Court
File No. 11-CV-07-3223

John E. Valen, Fifth & Michigan, P.O. Box 1105, Walker, MN 56484 (for appellant)

James B. Wallace, 201 East 1st Street, P.O. Box 27, Park Rapids, MN 56470 (for respondent)

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

BJORKMAN, Judge

Appellant Carol Holz-Kinney challenges the district court's decision granting land to respondent James D. Thayer through adverse possession and boundary by practical location, and awarding damages for trees appellant removed from the land. Because the district court's findings are not clearly erroneous, we affirm.

FACTS

Respondent has owned a plot of land near Backus since 1973. In his first year of ownership, he cleared the land and planted rows of trees along the north and east borders. Shortly thereafter, respondent constructed a home on the property. Over time, the line of trees became so thick as to serve as a privacy barrier between respondent's property and the adjoining properties.

In 1977, the owner of the property directly to the east of respondent (appellant's predecessor-in-interest) told respondent that there was a problem with the boundary line. The neighbor indicated that he needed a portion of respondent's land to construct a driveway. Respondent deeded a 19-foot wedge-shaped section to his neighbor, believing that it did not include the area west of and including the tree line. But the terms of the deed actually conveyed land several feet west of the tree line. Respondent continued to use the land up to and including the tree line as though he owned it. He maintained both the trees and the grass and at all times treated the tree line as the eastern edge of his property.

At some point prior to appellant's purchase of the neighboring property, a six-foot-wide walkway easement was created along the western edge of that property. The purpose of the easement was to allow the owners of the parcels located to the north of the parties to have walking access to a nearby lake to the south. The record shows that the easement holders have regularly used a portion of appellant's property just east of the tree line.

In 2000, appellant and her husband purchased the neighboring property. Respondent told appellant's husband that the tree line was the boundary between the two properties and that so long as they stayed on the east side of the trees and he on the west, there would be no problems between them. But appellant asked the easement holders to walk on the west side of the tree line.

In 2003, respondent saw appellant's husband removing trees from the tree line. Respondent had a brief oral confrontation with appellant's husband who then contacted the local sheriff's office. The responding deputy told appellant's husband to stop cutting the trees. However, appellant and her husband later continued to thin the tree line. That summer, appellant's husband removed four trees from the tree line. Appellant also constructed a drain field and built a garage near the tree line.

Appellant commissioned a survey in 2006 to determine the actual boundaries of her property. The surveyor concluded that the property line is more than six feet west of the tree line.

Appellant commenced this trespass action in December 2007. Respondent claimed ownership of the disputed property on the grounds of adverse possession and boundary by practical location, and counterclaimed for trespass based on appellant's destruction of the trees. The parties tried the case to the district court. Both parties testified along with other witnesses including the surveyor and neighboring property owners. Respondent testified that each of the trees appellant removed was worth $300.

The district court found that respondent owned the disputed property through adverse possession and boundary by practical location, that appellant committed a

trespass on respondent's property by removing the trees, and that respondent sustained damages of $1,200 as a result of the trespass. The district court's finding of facts describe the new boundary line as running "up to and including the tree line" and establish a new legal description. This appeal follows.

D E C I S I O N

I. Clear and convincing evidence supports the district court's findings that respondent owns the disputed property by adverse possession and boundary by practical location.

Appellant argues that the district court clearly erred in finding that respondent owns the disputed property by adverse possession and boundary by practical location. Specifically, appellant contends that the district court's factual findings as to both adverse possession and boundary by practical location are contrary to the evidence. We address each argument in turn.

A. Ownership by adverse possession

Whether the elements of adverse possession have been met 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 of fact will not be reversed unless they are clearly erroneous, giving deference to the district court's credibility determinations. *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 108 (Minn. App. 2002). "But whether the findings of fact support a district court's conclusions of law and judgment is a question of law," which is subject to de novo review. *Id.*

To establish ownership by adverse possession, a party must show actual, open, hostile, exclusive, and continuous possession for the statutory period of 15 years. Minn.

Stat. § 541.02 (2008); *Ehle v. Prosser*, 293 Minn. 183, 189, 197 N.W.2d 458, 462 (1972). The disseizor must prove the elements of adverse possession by clear and convincing evidence. *See, e.g.*, *Gandy Co. v. Freuer*, 313 N.W.2d 576, 578 (Minn. 1981); *Ehle*, 293 Minn. at 189, 197 N.W.2d at 462.

1. Actual and Open

There is no particular manner in which an adverse party must possess a disputed tract of property, but the possession must give "unequivocal notice to the true owner that someone is in possession in hostility to [their] title." *Ganje*, 659 N.W.2d at 266 (quoting *Skala v. Lindbeck*, 171 Minn. 410, 413, 214 N.W. 271, 272 (1927)). The disseizor must not only possess the property, he or she must make that fact known by keeping their "flag flying" and ensuring that the true owner has sufficient notice that the disseizor's actions are more than mere trespass. *Romans v. Nadler*, 217 Minn. 174, 178, 14 N.W.2d 482, 485 (1944).

The pertinent time period for assessing respondent's adverse-possession claim commenced in 1977, when respondent inadvertently deeded the disputed property to appellant's predecessor-in-interest. From that time forward, the evidence demonstrates that respondent mowed up to the tree line, trimmed and maintained the trees, and treated the tree line as the boundary between his property and the parcel to the east. Respondent testified and presented other evidence that he openly possessed the land up to and including the tree line. The owner of the property located north of respondent's land testified that respondent had treated the tree line as the eastern border of his property, and that respondent's neighbors and appellant's predecessors-in-interest had recognized that

boundary. Respondent did not conceal his possession of the disputed property from appellant. Rather, respondent specifically pointed the tree-line boundary out to appellant's husband in 2000. The evidence supports the district court's determination that respondent's possession of the disputed property was both actual and open.

2. Hostile and Exclusive

The element of hostility does not imply any type of "personal animosity or physical overt acts against the record owner." *Ganje*, 659 N.W.2d at 268 (quoting *Ehle*, 293 Minn. at 190, 197 N.W.2d at 462). Rather, to satisfy this requirement, a disseizor must possess the land "as if it were his own with the intention of using it to the exclusion of others." *Ganje*, 659 N.W.2d at 267 (quoting *Ebenhoh*, 642 N.W.2d at 108).

Appellant argues, citing *Stanard v. Urban*, 453 N.W.2d 733 (Minn. App. 1990), *review denied* (Minn. June 15, 1990), that respondent's only act of possession after 1977 was his mowing of the grass in the disputed area and that this does not satisfy the hostility requirement. In *Stanard*, this court concluded that a seasonal property owner's acts of mowing grass across the property line, storing a dock on his neighbor's property during the winter, and allowing children to play there were insufficient to support a finding of adverse possession. 453 N.W.2d at 735–36. We reasoned, on those facts, that the disseizor's incursions onto the neighboring property were "best classified as occasional and sporadic" and that it was not until the disseizor built an encroaching storage shed that the statutory period of possession commenced. *Id*; *see also Romans*, 217 Minn. at 178, 14 N.W.2d at 485 (noting the distinction between occasional trespass and intent to claim a property through adverse possession).

Here, the evidence shows more than sporadic or unintended use of the disputed property. Respondent did more than inadvertently cut grass on the disputed property; between 1977 and 2000, respondent maintained the property in all respects and both he and appellant's predecessors-in-interest treated the tree line as the boundary between their properties. In 2000, respondent told appellant and her husband that respondent owned the property up to the tree line. Moreover, respondent told appellant's husband that there would be no problem as long as appellant stayed on the east side of the tree line. The record amply supports the district court's finding that respondent's use of the disputed property was both hostile and exclusive.

3. Continuous

A claim for adverse possession fails if there have not been 15 years of uninterrupted possession. *Ganje*, 659 N.W.2d at 266. Appellant argues that respondent only occupied the property "infrequently" from 1977 until 2003. This contention is unavailing. Constant occupancy is not required to establish continuity. *See Costello v. Edson*, 44 Minn. 135, 137, 46 N.W. 299, 300 (1880) (stating that constant occupancy of house by adverse possessor was not necessary when "all the conditions show a continuance of his established dominion"). It is undisputed that respondent has always used his property as his primary residence. And from 1977 until the commencement of this action, a period longer than 15 years, respondent has maintained the area, including and west of the tree line, and otherwise treated the property as his own. The fact that respondent's work schedule required him to be away from home for significant periods of time does not defeat the element of continuity.

Our review of the record reveals that ample evidence supports the district court's findings as to all the required elements of adverse possession. The district court's factual findings are not clearly erroneous and the court did not err in applying the law.

B. Boundary by practical location

The practical location of a boundary line can be established in three ways:

> (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 v. Phillips, 256 N.W.2d 852, 858 (Minn. 1997). A district court's findings of fact in a boundary-line dispute "will not be reversed on appeal unless they are manifestly and palpably contrary to the evidence." *Gifford v. Vore*, 245 Minn. 432, 434, 72 N.W.2d 625, 627 (1955). "Upon appeal the burden is on the appellant to show that there is no substantial evidence reasonably tending to sustain the trial court's findings." *Id.*

Practical location by acquiescence can be established where the disseizor unilaterally marks a boundary line and the adjoining property owner treats that line as the actual boundary. *Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844, 851 (Minn. App. 2001); *Allred v. Reed*, 362 N.W.2d 374, 376 (Minn. App. 1985), *review denied* (Minn. Apr. 18, 1985). Markers, fences, and other physical barriers may establish a practical

location so long as they are intended to identify boundaries. *See Neill v. Hake*, 254 Minn. 110, 120, 93 N.W.2d 821, 828–29 (1958) (affirming that a boundary had been located by acquiescence when conveyances confirmed that an alley had served as a boundary for platted land for more than 30 years); *Fishman v. Nielson*, 237 Minn. 1, 9, 53 N.W.2d 553, 557 (1952) (holding that the parties had acquiesced to a fence line that they had recognized as their common boundary for almost 20 years); *see also Sage v. Morosick*, 69 Minn. 167, 168–69, 71 N.W. 930, 931 (1897) (observing that it is not necessary to construct a fence to establish a boundary). Here, the district court found that appellant's predecessors-in-interest acquiesced to the tree line as a boundary for the required 15 years. Minn. Stat. § 541.02 (2008) (establishing 15-year statute of limitations).

Appellant argues that the tree line is too wide and imprecise to serve as a boundary by practical location. Respondent contends that the tree line was the equivalent of a fence line and that it clearly marked the border between his property and that of his neighbor to the east. We agree. The 2006 survey, photographs, and testimony demonstrate that the tree line was clearly identifiable. Respondent planted trees along the east and north edges of his property with the intent of marking his property lines. Even after 1977, when respondent deeded land to appellant's predecessor-in-interest, respondent, the owner of the neighboring property to the east, and the easement holders treated the tree line as the eastern border of respondent's property. It was not until appellant purchased the neighboring land, well after the statutory period had expired,

that anyone asserted that the tree line marked anything other than the eastern boundary of respondent's land.

Appellant contends that the district court erred by relocating the boundary without joining the easement holders as parties. We disagree. Establishment of the boundary at the tree line does not extinguish the walkway easement and the easement holders maintain their easement rights.[1] The easement holders are entitled to exercise their rights as they have done for years, by walking to the east of the tree line.

Based on our review of the record, we conclude that the district court's findings with respect to the establishment of a boundary by practical location have substantial support and are not manifestly and palpably contrary to the evidence.

II. Sufficient evidence supports the award of trespass damages for the removal of trees.

Appellant contends that the district court erred by awarding damages for trespass to trees, finding that appellant cut four maple trees and trimmed others within the tree line. The district court determined damages resulting from this trespass in the amount of $1,200. Appellant does not appear to challenge the evidentiary basis for the damage award, disputing only the finding that a trespass occurred.

Minnesota law permits a landowner to recover trespass damages for removal of or other damage to trees. Minn. Stat. § 561.04 (2008). Appellant argues that because the

[1] Neither the parties nor the district court addressed whether the easement holders are necessary parties under Minn. R. Civ. P. 19.01. Since that issue was not raised in the district court, it is not analyzed here. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1998) (court of appeals will generally not consider matters not argued before and considered by the district court).

ownership of the property was disputed at the time, she cannot be held liable for trespass. But the statute does not require that the trespasser know that the property belongs to another. *Id.* (noting that treble damages may not be assessed, but trespasser is still liable even if trespasser "had probable cause to believe that the land on which the trespass was committed was [theirs]."). Sufficient record evidence supports the district court's findings that appellant committed a trespass and that respondent was damaged in the amount of $1,200. Appellant's belief that she was not committing a trespass because she owned the land on which the trees were located does not preclude liability under the statute.

Affirmed.