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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2237**

Del Schnabel, et al.,
Appellants,

vs.

David Lyle Rask,
Respondent,

Richard Alan Rask,
Respondent,

James H. Rask,
Respondent.

**Filed July 23, 2012
Affirmed
Connolly, Judge**

Norman County District Court
File No. 54-CV-07-607

Robert Manly, Michael S. Raum, Vogel Law Firm, Fargo, North Dakota (for appellants)

Richard M. Dahl, Jon R. Steckler, Madigan, Dahl & Harlan, P.A., Minneapolis,
Minnesota (for respondents)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Collins,
Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CONNOLLY, Judge

In this boundary dispute, appellants argue that (1) the record does not support the district court's determination that respondents adversely possessed appellants' land; and (2) even if adverse possession occurred, the record does not support the district court's location of the new boundary line. Because the record supports the district court's finding of adverse possession and the district court's location of the boundaries between the two properties, we affirm.

FACTS

This appeal arises from a dispute over the location of the property line between two adjacent parcels of real property located in Norman County. Appellants Del and Clarinda Schnabel own property that is surrounded on the north, east, and west by property owned by respondents David, Richard, and James Rask. The parcel of land now owned by appellants was originally part of the 400-acre, 135-year-old family farm owned by respondents. Respondents have never lived on or near their property and do not farm their property themselves, but David Rask manages the property and visits the farm approximately five times per year. Appellants' property is a homestead, surrounded by a ring dike to protect the home from flooding. Appellants also do not live on the property, but rent the land to a tenant. On the west side of appellants' property is a gravel driveway (west gravel driveway), which is on top of a portion of the ring dike. West of this gravel driveway is a wooded area (wooded area) and a gravel road (the low road).

In 1971, the Rask family sold the property now owned by appellants to “Swede” Opgrand. Opgrand, in turn, sold the property to David and Marlys Tommerdahl in 1972. In the summer of 1975, Mr. Tommerdahl built a low dike around the property to protect it from flooding. In 1976, the Tommerdahls sold the property to Gary and Elaine Charlson. At the bench trial, Mr. Charlson testified that Mr. Tommerdahl told him that the north boundary line of the property included the ring dike and that the western boundary line was to the west gravel driveway and did not include the low road. The court found that the dike surrounding the property has been in existence since the time the Tommerdahls lived on the property.

In the late 1970’s, Mr. Charlson contacted Mildred Rask-Hall, the then-owner of respondents’ property, about the west gravel driveway. Mr. Charlson wanted to build up the driveway because it was over a portion of the ring dike and had been flattened by farm vehicles and other vehicles using the road. At the time, Mr. Charlson and Rask-Hall believed that they each owned half of the driveway, and Rask-Hall offered to assist Mr. Charlson with the driveway repairs. Because he believed that the property line ended at the west gravel driveway, Mr. Charlson testified that he did not make any claim to the wooded area or low road to the west of the gravel drive.

In 1984, the Charlsons sold the property to James and Kathryn Storsved. Mrs. Storsved testified that the dike was in existence the entire time she lived on the property, from 1984-2002. She also testified that during that time, she and her husband made no claim to the land west of the gravel driveway. She noted that farmers who rented from the Rasks used the low road to reach the Rask farmland, and testified “that

the Rask family trimmed trees near the low road, dug a deeper ditch in [that] area, and put in a culvert.” In 2003, the Storsveds sold the property to Leo and Jamie Grosz. The Groszes and respondent David Rask had several disputes over the property boundary. Eventually, the Groszes lost the property in foreclosure, and the property was purchased by appellants in 2005.

The parties began arguing over the boundary location shortly after appellants purchased the property. The dispute came to a head in 2007 when appellants hired a company to survey their property. The survey revealed that a large portion of the ring dike north of appellants’ property is actually on respondents’ property. Conversely, the low road and wooded area are actually on appellants’ property.

On October 30, 2007, appellants filed a complaint, seeking a prescriptive easement or an easement implied by necessity, and fee title by adverse possession or by practical location over the dike and all of the land within the dike. In their answer, respondents denied appellants’ claims and counterclaimed, seeking a prescriptive easement or fee title by adverse possession to the low road, as well as a prescriptive easement for the existing gravel driveway.

The bench trial began on December 16, 2008, was continued, and concluded on February 3, 2009. In an order filed on September 14, 2009, the district court held that appellants had “established adverse possession of the land encompassing the northerly portion of the ring dike and all the property contained inside of the ring dike (including the yard and driveways)” and “a prescriptive easement to maintain the ring dike itself.” The district court also held that respondents had “established adverse possession of the

land to the west of [the low road].” The district court then directed the parties to submit legal descriptions of the land within 90 days and dismissed all of the parties’ other claims.

The parties disputed the legal descriptions regarding appellants’ prescriptive easement and respondents’ grant of land through adverse possession. A post-trial evidentiary hearing was conducted to determine where the boundary lines between the properties should be drawn. After taking the matter under advisement, the district court issued an order on July 15, 2010 granting appellants the north ring dike area and a ten-foot prescriptive easement on respondent’s property to repair and maintain the dike. The district court also granted respondents the low road, subject to appellants’ prescriptive easement, which was to extend from the eastern boundary of the low road to the western edge of the dike slope. Finally, the district court directed appellants to submit a legal description of the easement within 90 days.

On September 22, 2011, the parties submitted a stipulation for partial judgment with legal descriptions of the property implementing the district court’s order, but retained all other post-trial rights. On October 18, 2011, appellants filed an appeal with this court challenging the district court’s July 15, 2010 and September 14, 2009 orders. The court entered final judgment on October 26, 2011, adopting the parties’ stipulated legal description of the property and boundaries. On November 4, 2010, respondents filed a notice of related appeal. This court dismissed the appeal, finding that neither district court order was a final judgment.

Appellants filed this appeal, of the October 26, 2011 judgment, on December 8, 2011, challenging the district court's determination that respondents adversely possessed the low road and the surrounding wooded property, and the district court's location of the new boundary line. Respondents do not appeal the district court's decision to grant appellants the north ring dike area.

D E C I S I O N

I. Adverse Possession

Appellants challenge the district court's conclusion that respondents established their ownership of the wooded area and low road by adverse possession. Whether the elements of adverse possession are satisfied is a question of fact. *Wortman v. Siedow*, 173 Minn. 145, 148, 216 N.W. 782, 783 (1927); *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. App. 2003). We review the district court's findings of fact for clear error and give due regard to the district court's opportunity to judge witness credibility. Minn. R. Civ. P. 52.01. In doing so, we view the evidence in the light most favorable to the district court's judgment. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). Findings are not clearly erroneous if there is reasonable evidence supporting them. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). "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. *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 108 (Minn. App. 2002).

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 (2010); *Ehle v. Prosser*, 293 Minn. 183, 189, 197 N.W.2d 458, 462 (1972). The disseizor, the landowner seeking title, must prove the elements of adverse possession by clear and convincing evidence. *Ehle*, 293 Minn. at 189, 197 N.W.2d at 462. “Failure to establish any one of the five essentials is fatal to the validity of the claim.” *Johnson v. Raddohl*, 226 Minn. 343, 345, 32 N.W.2d 860, 861 (1948).

The district court found that respondents had actual, open, hostile, continuous, and exclusive possession “of the land to the west of the gravel driveway (the ‘low road’ area)” for more than 15 years. As determined by the district court, the disputed area extends from the western edge of appellants’ dike and west gravel driveway and includes the low road and a strip of woods to either side of the road. The low road has long been used by respondents’ tenant farmers to access respondents’ property.

Appellants argue that the evidence in the record does not support the district court’s conclusion that respondents acquired the disputed property by adverse possession because respondents’ use was “sporadic, occasional, and minor, with no permanent improvements.” Appellants contend that the only facts the district court found to show respondents’ possession “were their occasional . . . use of the road (along with the public), removing trees, installing a culvert, and digging a ditch. . . . There are no findings of permanent improvements, such as fences.”

A. Actual and Open

“‘Actual possession’ means the corporeal detention of the property when used in relation to adverse possession.” *Wallace v. Sache*, 106 Minn. 123, 124, 118 N.W.2d 360, 361 (1908). Open possession must be “visible to one seeking to exercise his rights.”

Hickerson v. Bender, 500 N.W.2d 169, 171 (Minn. App. 1993). The law does not prescribe a particular manner in which an adverse party must possess a disputed tract of property. *Ganje*, 659 N.W.2d at 266. The law requires only that the possession must give “unequivocal notice to the true owner that someone is in possession in hostility to his title.” *Id.* (quotation omitted).

Appellants contend that because the wooded area “is in its wild and natural state,” the actual and open possession requirement is not met. *See Nash v. Mahan*, 377 N.W.2d 56, 58 (Minn. App. 1985) (“One who leaves land in a wild and natural state cannot acquire title by adverse possession”). Appellants argue that “imperceptible” acts by respondents such as clearing out brush and occasional trespassing to hunt or clear trash are insufficient to show possession. *See Ganje*, 659 N.W.2d at 265-67 (rejecting claim of adverse possession to portion of wooded area where claimants hauled away a few dead trees, dead brush, and occasionally operated a wood chipper); *Stanard v. Urban*, 453 N.W.2d 733, 735 (Minn. App. 1990) (concluding that entries solely to cut grass, store lake equipment, and allow children to play are insufficient to establish adverse possession).

However, this ignores the fact that the wooded area surrounds a road and that the disputed area is quite small—a little over an acre of land, and consists of a road with rows of trees to either side. These are not woods that are part of an indistinct wooded area. Instead, the disputed boundary is well defined by appellants’ western gravel drive on one side, and respondents’ farm property on the other. Moreover, there was testimony that the trees were planted in rows by a member of the Rask family many years ago.

The requirement of actual possession is based on the actions an actual owner would take under the circumstances. *See Skala v. Lindbeck*, 171 Minn. 410, 413, 214 N.W. 271, 272 (1927) (stating that the manner in which a disseizor establishes his or her right to property by adverse possession “depends on the nature and situation of the land and the uses to which it is adapted”). “It is sufficient if visible and notorious acts of ownership have been continuously exercised over the land” *Ganje*, 659 N.W.2d at 267 (quotation omitted). The evidence shows that the disputed area was used in a way consistent with the normal usage of a gravel road and a surrounding wooded area. Mrs. Storsved, who lived on appellants’ property for 18 years, from 1984 to 2002, testified that respondents maintained the area. The district court specifically found “that the Rask family trimmed trees near the low road, dug a deeper ditch in this area, and put in a culvert.” Additionally, Rask-Hall, appellants’ predecessor-in-interest, worked with Mr. Charlson in the late 1970’s to repair the west driveway because they both believed that she owned half of the driveway. The Tommerdahls, Charlsons, and Storsveds all acknowledged that they believed the Rasks owned the disputed property, so the Rask’s possession of the disputed property was actual and open from at least the early 1970s until 2002.¹

¹ Appellants contend that the district court erred by considering information about where previous landowners believed the boundary line to be, arguing that doing so improperly placed the burden of proof on the appellants to show that they used and possessed the land. However, the information is properly considered because it goes to the elements of actual, open, exclusive, continuous, and hostile possession.

B. Exclusive

To satisfy the exclusivity requirement of adverse possession, a disseizor must possess the land “as if it were his own with the intention of using it to the exclusion of others.” *Id.* (quotation omitted). The district court found that respondents used the disputed tract exclusively. The evidence supports this finding. Mr. Tommerdahl, Mr. Charlson, and Mrs. Storsved, owners of appellants’ property from 1972 to 2002, all believed that their property line ended at the west gravel driveway and made no claim to the wooded area or the low road. There was no evidence that any of appellants’ predecessors-in-interest used or maintained the disputed property. In contrast, the Rask family and their tenants regularly used the low road to access their property and maintained and improved the tract by installing a culvert, trimming trees, and digging a ditch. Such actions support a finding of possession with “the intention of using it to the exclusion of others.” *Id.*

C. Hostile

Hostile possession means possession “with an intention to claim the property adverse to the true owner. *Id.* at 269. “[H]ostility does not imply any type of personal animosity or physical overt acts against the record owner.” *Id.* (quotation omitted). Rather, hostility means that the disseizor enters and takes possession of the land as if it were his or her own, and with the intention of excluding all others. *Id.* The district court found that respondents’ possession of the land was hostile. The evidence supports this finding as well. The Rask family’s acts of maintaining and using the low road, trimming

trees, installing a culvert, and digging a ditch on the disputed property demonstrate that they entered the land as if it belonged to them.

D. Continuous

Finally, to acquire title to a disputed tract of property by adverse possession, the disseizor must use the property continuously for a period of 15 years. *Id.* at 268. The district court found that appellants' and their predecessors-in-interest had possessed the disputed property continuously for at least 15 years, and the evidence supports this conclusion. While appellants argue in their brief that respondents' use of the low road was "occasional" and "sporadic," appellants specifically state in their brief that they "do not dispute that the respondents have shown continuous use of the road through the Wooded Area by the tenants." In an adverse-possession action, a tenant's possession or use is deemed to be that of his or her landlord. *See Kelley v. Green*, 142 Minn. 82, 85, 170 N.W. 922, 923 (1919) ("The possession of a tenant is, as to third parties, the possession of the landlord"). Moreover, as discussed above, the owners of appellants' property from the 1970s to at least 2002 all believed that respondents possessed the property, and respondents actively used and maintained the property during that time.

Despite admitting that respondents' tenants have "continuously" used the low road, appellants argue that respondents should be granted an easement rather than adverse possession over the low road. However, "once the elements [of adverse possession, boundary by practical location, or similar title-divestment claims] have been established, application of the land-transfer remedy has been uniform and plainly nondiscretionary, despite the generally equitable nature of the overall action." *Gabler v. Fedoruk*, 756

N.W.2d 725, 731 (Minn. App. 2008). Thus, because the district court did not err in granting respondents title of the low road by adverse possession, the court was required to enter judgment recognizing the boundary and could not elect to grant appellants a prescriptive easement.

II. Boundary Line

In the alternative, appellants argue that this court should “remand to the district court with instructions to set a new boundary line between the properties that does not award Respondents any part of the Appellants’ dike.” Appellants do not cite any caselaw to support their contention that this court should second-guess the district court’s detailed findings regarding the boundary line. The location of a disputed boundary is a question of fact. *Wojahn v. Johnson*, 297 N.W.2d 298, 303 (Minn. 1980). “[W]hen two competent surveyors disagree as to where a boundary line should be, the [district] court’s determination as to which surveyor is correct depends mainly on each surveyor’s credibility and will not be reversed if there is reasonable support in the evidence for such determination.” *Id.*

Here, the district court held a special evidentiary hearing post-trial to determine where the boundary lines should be drawn. At the hearing, the district court took testimony and received evidence from the two competing surveyors regarding the boundary line. The court noted that between the time of the initial order and the special evidentiary hearing, appellants had “modified the dike and gravel road on top of the dike.” However, the district court found that “the remaining disputed issues in this case must be decided based upon the status of the dike *at the time of trial.*” The district court

went on to consider the extent of appellants' easement for the northerly ring dike, a small disputed area on the northwesterly portion of the ring dike, and the ownership of the low road area near the westerly portion of the dike. It is this last boundary that appellants dispute. However, the district court made detailed findings and ultimately adopted the survey introduced by the surveyor for respondents. Because the district court's boundary location is reasonably supported by evidence in the record, we affirm.

Affirmed.