STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1846

Dennis Winskowski, et al.,
Appellants,

vs.

Kenneth J. Bruss, et al.,
Respondents.

Filed July 29, 2008
Affirmed
Collins, Judge[*]

Becker County District Court
File No. 03-C8-05-000937

Carl E. Malmstrom, Thorwaldsen, Malmstrom, Sorum & Majors, 1105 Highway 10 East, P.O. Box 1599, Detroit Lakes, MN 56501 (for appellants)

Robert G. Manly, Vogel Law Firm, 215 30th Street North, P.O. Box 1077, Moorhead, MN 56561-1077 (for respondents)

Considered and decided by Toussaint, Chief Judge; Johnson, Judge; and Collins, Judge.

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

COLLINS, Judge

On appeal from the resolution of this property dispute in respondents' favor, appellants argue that the district court incorrectly determined the intent of the parties'

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

predecessors-in-interest at the time that they platted the land in question. Appellants also challenge the district court's alternative analysis that respondents acquired the disputed land by adverse possession. We affirm.

FACTS

Sugar Bush Heights First Subdivision is located in Becker County on Big Sugar Bush Lake and includes a number of lots, including Lot 42, which is a lake-front lot. The subdivision was created out of a portion of Government Lot 13 by Sugar Bush, Inc., a predecessor-in-interest of the parties to this litigation. The plat map for the subdivision was filed with the Becker County Recorder in 1969. It shows the north line of Government Lot 13, as well as the north line of Lot 42, to coincide with the south line of Government Lot 12. Similarly, the written description of Sugar Bush Heights First Subdivision identifies the north line of Lot 42 as the shared boundary of Government Lots 12 and 13:

> [T]hence N. 20° 44' W. a distance of 86.35 ft. to a Point of Intersection with the N. line *common to Gov't. Lots 12 and 13* in Sec. 17, Twp. 141N., Rge. 40 West of the 5th P.M.; thence N. 89° 10' E. *along said common Gov't. Lot line a distance of 403.10 ft., more or less, to a Point of Intersection with the West Shore Line of Big Sugar Bush Lake.*

(Emphasis added.)

In 1980, respondents Kenneth J. and Mary E. Bruss purchased Lot 42. The deed that they received for Lot 42 states that Lot 42 is described by "the certified plat thereof on file and of record in the office of the County Recorder in and for Becker County, Minnesota." In the summer of 1980, the Brusses received a letter from R.C. Blanding,

the owner of Government Lot 12. The letter stated: "According to records in the Becker County courthouse, you are the owner of Lot 42 on Big Sugar Bush Lake. I own 50 feet X 750 ft directly on your north line. Would you have any interest in buying this from me?" The Brusses, without having a survey done to locate the boundaries of Lot 42 or the south 50 feet of Government Lot 12, bought from Blanding land described as "[t]he South Fifty (50) feet, front and rear, Government Lot numbered twelve (12), Section 8, Township 141 North, Range 40 West of the 5th P.M. in Becker County."

In 2002, appellants Paul Thorwaldsen, Curt Bloomquist, and Dennis Winskowski bought the unplatted remainder of Government Lot 13. Based on a survey of their part of Government Lot 13 done by Landecker & Associates, appellants informed the Brusses of a gap between the north line of Lot 42 and the shared boundary of Government Lots 12 and 13. The Brusses then had their property (Lot 42 and the south fifty feet of Government Lot 12) surveyed by Meadowland Surveying. The Landecker and Meadowland surveys disagreed about the location of the shared boundary of Government Lots 12 and 13, but both surveys showed that line to be north of, not coinciding with, the north line of Lot 42. The parties later agreed that the Meadowland survey, which was based on iron plat monuments located by the Meadowland surveyor, accurately establishes the boundaries of Lot 42 and the south 50 feet of Government Lot 12. The gap between the north line of Lot 42 and shared boundary of Government Lots 12 and 13 (the "Disputed Parcel") is "16.5 feet wide at the northwesterly corner of Lot 42 narrowing to 10.0 feet about two/thirds of the way to the lake and then down to about 6 feet at the lake."

In 2004, appellants sued the Brusses, claiming that the Disputed Parcel did not belong to the Brusses because it was part of the unplatted portion of Government Lot 13 and hence was appellants' property. The parties later stipulated to the dismissal of Dennis Winskowski, the named plaintiff in this matter, after he deeded his interest in the unplatted portion of Government Lot 13 to Thorwaldsen and Bloomquist.

In July 2007, after a bench trial, the district court issued findings of fact, conclusions of law, and order for judgment, concluding that "when the Sugar Bush Heights First Subdivision was created, the north line of Lot 42 was intended to connect to and run along the shared line of Government Lot 12 and Government Lot 13." In an alternative analysis, the district court ruled that the Brusses had acquired the Disputed Parcel by adverse possession. Appellants moved for a new trial and for amended findings, the district court denied the motions, and this appeal follows.

D E C I S I O N

I. The record supports the finding that the platter of the Sugar Bush Heights First Subdivision intended the north line of Lot 42 to be the shared boundary of Government Lots 12 and 13.

The district court found that Sugar Bush, Inc., the platter of the Sugar Bush Heights First Subdivision and the original grantor of the land involved in this litigation, intended the north line of Lot 42 to be the shared boundary of Government Lots 12 and 13. Appellants argue that this finding is clearly erroneous because the monuments that were established when the subdivision was platted are south of what was later determined to be that shared boundary line.

The Brusses' deed to Lot 42 describes the lot by referring to the plat map and legal description of the Sugar Bush Heights First Subdivision. "[W]here a map or plat is referred to in a conveyance, it becomes, for the purpose of the description and identification of the land, a part of the deed. . . ." *Nicolin v. Schneiderhan*, 37 Minn. 63, 64, 33 N.W. 33, 33 (1887). In construing a deed to determine the location of real property, "[t]he cardinal rule is to ascertain and give effect to the intention of the parties." *Dittrich v. Ubl*, 216 Minn. 396, 406, 13 N.W.2d 384, 390 (1944); *see also Cannon v. Emmans*, 44 Minn. 294, 298, 46 N.W. 356, 358 (1890) ("[W]hen the intention is manifest, it will control in the construction of the deed . . . ."). And intent is a question of fact, which will not be disturbed unless clearly erroneous. *Brown v. Cannon Falls Twp.*, 723 N.W.2d 31, 44 (Minn. App. 2006).

To discover the intention of a grantor of land, the district court may consider, among other things, "the facts and circumstances attending the execution of the deed, the practical construction of the deed by the parties and their grantees, and the preliminary negotiations of the parties." *Sandretto v. Wahlsten*, 124 Minn. 331, 334, 144 N.W. 1089, 1090 (1914); *see also Cannon*, 44 Minn. at 298, 46 N.W. at 358 (stating that the district court may "place itself in [the grantor's] place, and then consider how the terms of the instrument affect the subject-matter").

On this record, the district court's finding that Sugar Bush, Inc., the entity that commissioned the plat including Lot 42, intended that the north line of Lot 42 be the shared boundary of Government Lots 12 and 13 is not clearly erroneous. The finding is supported by the legal description of the Sugar Bush Heights First Subdivision that was

filed with the plat in 1969, which states that Lot 42 extends to the line that is the shared boundary of Government Lots 12 and 13. Similarly, the plat map filed for the Sugar Bush Heights First Subdivision shows that the north line of Lot 42 coincides with the shared boundary of Government Lots 12 and 13. Further, the record includes the written report of Roy Smith, the surveyor who prepared the Meadowland survey that the parties agree is accurate, who stated that "[w]hen the plat of Sugar Bush Heights First Addition was surveyed and created, the northerly line of Lot 42 was intended to be on the north line of Government Lot 13." Finally, even the title abstract for *appellants'* property contains a plat map and legal description of Lot 42 as extending to the shared boundary of Government Lots 12 and 13.

Appellants claim that, despite this evidence of the grantor's intent, the district court's finding is clearly erroneous because the plat map and legal description cannot "take precedence over the monuments of the plat." Appellants rely on caselaw and commentators stating that plat monuments are the "best evidence" of the boundary line. *See generally Dittrich*, 216 Minn. at 401, 13 N.W.2d at 388 (stating that monuments are the "best evidence" of a line and, when located, "are satisfactory and conclusive evidence of the location of the lines as originally run"); *see also* Joyce Palomar, *Patton and Palomar on Land Titles* § 152 (3d ed. 2003) (noting the general rule that survey monuments prevail over a plat description). But these authorities do not alter the "cardinal rule" that the intention of the grantor governs, nor does appellants' argument acknowledge that conflicts between a grantor's intent and a monument-based line can be resolved in favor of the grantor's intent. *See Cannon*, 44 Minn. at 298, 46 N.W. at 358

(noting that "technical or artificial" rules of construction yield to the grantor's intent); *see also* Palomar, *supra*, § 153 (stating that a monument does not control when it is in "obvious conflict with the intent of the parties"). On this record, we will not use the monument-based rules invoked by appellants to infer a platters' intent that is manifestly contrary to the intent so clearly indicated by the other facets of this record.

Appellants also contend that the district court improperly discounted the surveys and that "[t]he Landecker survey and particularly the [Meadowland survey] are in fact competent evidence of the true lines fixed by the original plat of Sugar Bush Heights First Subdivision." But the record shows that (1) the parties agreed that the Meadowland survey identified the correct plat monuments; (2) the district court considered the plat monuments identified by the Meadowland survey; and (3) the district court found that the monuments were not "reliable evidence" of the intent of the parties' predecessors-in-interest. *See Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004) (deferring to the fact-finder's ability to weigh evidence).

Although appellants concede that the district court did not "specifically address reformation of deeds," appellants nevertheless claim that the effect of the district court's decision is to reform the original conveyance of Lot 42 and the conveyance of the unplatted portion of Government Lot 13.

But appellants' assertion that the district court "reformed" these deeds presupposes that the platter of the Sugar Bush Heights First Subdivision intended to create the Disputed Parcel, a narrow strip of land only six-feet wide at the lake shore, between Lot 42 and Government Lot 12. Because the district court found that the platters did not

intend to create the Disputed Parcel, and because that finding is not clearly erroneous, the district court's ruling did not reform a deed. Rather, the district court construed a deed in a manner consistent with the intent of the grantor, Sugar Bush, Inc. Appellants' argument that the district court improperly reformed two deeds, therefore, is meritless.

II. The record supports the district court's determination that the Brusses acquired the Disputed Parcel by adverse possession.

Appellants also contend that the evidence is "insufficient as a matter of law" to support the district court's alternative determination that the Brusses acquired the Disputed Parcel by adverse possession. Our affirmance of the district court's recognition of the north line of Lot 42 to be the shared boundary of Government Lots 12 and 13 means that we need not address this issue, but we will do so briefly.

To establish adverse possession, a disseizor must show, by clear and convincing evidence, actual, open, hostile, continuous, and exclusive possession of the land in question for 15 years. *Ehle v. Prosser*, 293 Minn. 183, 189, 197 N.W.2d 458, 462 (1972); *see* Minn. Stat. § 541.02 (2006) (reciting requirement of 15 years of possession). Whether the elements of adverse possession have been shown is a finding of fact. *Wortman v. Siedow*, 173 Minn. 145, 148, 216 N.W. 782, 783 (1927); *Denman v. Gans*, 607 N.W.2d 788, 793 (Minn. App. 2000), *review denied* (Minn. June 27, 2000). And findings of fact are not set aside unless clearly erroneous. Minn. R. Civ. P. 52.01.

There is no particular manner by which a disseizor must actually possess a disputed property. *See Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. App. 2003). The possession, however, must give "unequivocal notice to the true owner that someone is in

possession in hostility to his title." *Skala v. Lindbeck*, 171 Minn. 410, 413, 214 N.W. 271, 272 (1927); *see Romans v. Nadler*, 217 Minn. 174, 178, 14 N.W.2d 482, 485 (1944) (requiring a disseizor to make his possession known by keeping his "flag flying").

Here, it is undisputed that the Brusses, for more than 20 years, routinely traversed the Disputed Parcel to access their lake dock. Also, the district court's finding that the Brusses "cared for the Disputed Parcel in the same manner they have cared for Lot 42 and the South 50 feet" is supported by Kenneth Bruss's testimony that he mowed, cleared brush from, and removed trees from the front, or easterly, portion of the Disputed Parcel for 20 years and that, by usage, he wore a foot path from Lot 42 across the Disputed Parcel to the south 50 feet of Government Lot 12.

For two reasons, we reject appellants' argument that, under *Stanard v. Urban*, 453 N.W.2d 733 (Minn. App. 1990), *review denied* (Minn. June 15, 1990), the Brusses' conduct is insufficient to show actual possession of the Disputed Parcel. First, *Stanard*, unlike this case, was a boundary-line dispute between owners of adjoining land; here the Disputed Property is a narrow gore of land dividing an otherwise regularly-shaped contiguous parcel wholly owned by the same persons. That the Brusses own the land abutting both sides of the Disputed Parcel, coupled with their acts of ownership on the Disputed Parcel, shows actual possession of that land. *See Skala*, 171 Minn. at 413, 214 N.W. at 272 (noting that the acts of ownership required to show actual possession depend on the character of the land). Second, the *Stanard* court based its decision on the "irregular and minimal" use of the disputed property. 453 N.W.2d at 735-36 n.1. Here, the disputed parcel was maintained by the Brusses and was the exclusive access to their

dock. Therefore, their use of that parcel went beyond the occasional casual trespass in *Stanard*.

"Open" possession is "visible from the surroundings, or visible to one seeking to exercise his rights." *Hickerson v. Bender*, 500 N.W.2d 169, 171 (Minn. App. 1993). Here, the district court found that the Brusses' possession of the Disputed Parcel was open, noting that "to an outsider, the three parcels (Lot 42, the Disputed Parcel, and the South 50 feet) appear as one lake cabin property, with no area less maintained than others." The record supports this finding; the property looks like one parcel of lake-front property and Kenneth Bruss testified that his maintenance of the Disputed Parcel was "consistent with the maintenance of other similarly situated properties in the area."

Regarding the requirement of 15 years of continuous possession, there is no bright-line test to define how much activity qualifies as continuous possession, but the "rule of thumb used is that the disseizor must be using the property as his or her own, i.e., regularly and matched to the land's intended use." *Ganje*, 659 N.W.2d at 268. Here, the district court found that the Brusses "have used the property located on Lot 42 and extending into the South 50 Feet for more than 20 years." This finding is not clearly erroneous; Kenneth Bruss testified that he used the Disputed Parcel for access to his dock for more than 20 years.

The exclusivity requirement of adverse possession is satisfied if the disseizor possesses the land "as if it were his own with the intention of using it to the exclusion of others." *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 108 (Minn. App. 2002) (quotation omitted). The district court found that:

> The Disputed Parcel, located between Lot 42 and the south line of government Lot 12 . . . has been exclusively used by the [Brusses] over the past 23 years. No evidence has been presented to indicate use or enjoyment of this property by anyone other than the [Brusses] over that period of time.

This finding is not clearly erroneous. Kenneth Bruss testified that he (1) did not believe that anyone else had an interest in the Disputed Parcel, (2) did not intend for anyone else to use the Disputed Parcel, and (3) "exclusively" exercised responsibility for the maintenance of the Disputed Parcel for 27 years.

To meet the requirement of hostility, a disseizor "must intend to exclude the world and treat the disputed property in a manner generally associated with the ownership of a similar type of property in the particular area involved." *Grubb v. State*, 433 N.W.2d 915, 918 (Minn. App. 1988), *review denied* (Minn. Feb. 22, 1989); *see Ganje*, 659 N.W.2d at 268 (addressing hostility requirement). Here, the district court's finding that the Brusses treated the Disputed Parcel as their own to the exclusion of others is supported by the record. Kenneth Bruss testified that he did not intend for anyone else to use the land and that his family used the Disputed Parcel as though it was their own for 27 years. Moreover, hostile intent may be inferred from the character of the possession, as shown by the other elements of adverse possession discussed above. *See Fredericksen v. Henke*, 167 Minn. 356, 359, 209 N.W. 257, 258 (1926). Because the record establishes the other elements of adverse possession, the district court did not clearly err by inferring the Brusses' hostile intent. *See id.*

Affirmed.