STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2096

Michael Stacken, et al.,
Respondents,

vs.

Daniel Bona,
Appellant,

Crow Wing Power Credit Union,
Respondent.

Filed September 23, 2008
Affirmed in part, reversed in part, and remanded
Toussaint, Chief Judge

Crow Wing County District Court
File No. 18-C5-05-003063

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Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and Stoneburner, Judge.

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

TOUSSAINT, Chief Judge

Appellant Daniel Bona, a landowner, challenges the district court's award of disputed property to respondents Michael and Jodie Stacken on the ground of adverse possession. Because the district court did not abuse its discretion in the reliance it placed on various exhibits or in denying Bona's motion to amend the findings and because it made sufficient factual findings that are not clearly erroneous and that support its conclusions of law, we affirm the award. Because some property south of a tree line was awarded to the Stackens and this was not the intent of the district court, we remand for a legal description that awards the Stackens only property north of the tree line. Appellant also challenges the award of disbursements. Because the district court did not abuse its discretion in awarding the Stackens disbursements for deposition costs, survey fees, and expert fees, we affirm those disbursements. Because the district court abused its discretion in awarding the Stackens a disbursement for abstract fees, we reverse that disbursement.

D E C I S I O N

I.

Bona claims that the district court abused its discretion by relying upon trial exhibits 37 and 7 and in not relying on exhibit 38. We defer to the factfinder's "ability to weigh the evidence," and we do not reweigh the evidence on review. *Whitehead v. Moonlight Nursing Care, Inc.*, 529 N.W.2d 350, 352 (Minn. App. 1995).

Bona argues that the district court should not have relied upon exhibit 37 because it contained inaccurate superimposed lines.[1] The district court stated that exhibit 37 did "not include superimposed survey lines" and was "useful for the purpose of determining the southern boundary of the disputed area." In light of the second statement, it appears that the district court inadvertently omitted the word "not" before the word "useful." This omission constitutes harmless error. *See* Minn. R. Civ. P. 61. It appears that the district court did not actually rely upon exhibit 37, and we must defer to its weight-of-the-evidence determination.

Bona claims that the district court abused its discretion in relying upon exhibit 7 because it was not admitted into evidence, but introduced only for illustrative purposes, and its markings were not made by surveyors. The district court stated that exhibit 7 was prepared by surveyors; while this was accurate, the markings made on the survey were not made by surveyors. Any error in the district court's statement constitutes harmless error. *See* Minn. R. Civ. P. 61. Moreover, to be admissible, illustrative evidence must be substantially similar to the aspects being illustrated. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*,715 N.W.2d 458, 481 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006). The district court concluded that exhibit 7 was "consistent with [two witnesses'] testimony at trial." The district court did not abuse its discretion in relying on exhibit 7, particularly in light of its reliance on both testimony and other land-

[1] Exhibit 37 does not appear to contain any of the lines of the surveys done on behalf of the parties. The lines on exhibit 37 may come from the county's section maps, on which it is specifically noted: "This half section map is to be used for reference only!! It is not intended to be an accurate boundary survey."

usage evidence as to information conveyed by exhibit 7.

Bona also claims that the district court abused its discretion in not relying upon exhibit 38, which the court stated "was admitted solely for demonstrative purposes and with the understanding that the survey lines may not be accurately reflected on the photograph." While Bona correctly asserts that Exhibit 38 was not admitted only for demonstrative purposes, the district court's statement to the contrary again constitutes harmless error. *See* Minn. R. Civ. P. 61. Moreover, nothing in the record explains what Exhibit 38 shows or how it establishes any boundary lines; Bona did not provide any testimony specifically regarding exhibit 38. Therefore, the district court did not abuse its discretion in not relying on Exhibit 38. Neither the district court's failure to rely on exhibit 38 nor its reliance on exhibits 37 and 7 was an abuse of discretion.

II.

Bona contends that the district court erred in denying his motion to amend its June 11, 2007 adverse-possession order by adding precise findings as to the elements of adverse possession. "This court reviews denials of such motions under an abuse-of-discretion standard." *Zander v. Zander*, 720 N.W. 2d 360, 364 (Minn. App. 2006).

Bona correctly asserts that there "should be a precise finding by the trial court that the factual elements necessary for [adverse possession] have been established by the party making such a claim." *Konantz v. Stein,* 283 Minn. 33, 37, 167 N.W.2d 1, 5 (Minn. 1969) (remanding for new trial because "evidence appearing in the record is vague and equivocal with respect to the relevant characteristics of the possession which had allegedly ripened into title"). "Unless there are adequate findings, this court cannot

conduct a proper review." *Nash v. Mahan*, 377 N.W.2d 56, 58 (Minn. App. 1985).

But Minn. R. Civ. P. 52.01 provides: "It will be sufficient if the findings of fact and conclusions of law . . . appear in an opinion or memorandum of decision filed by the court or in an accompanying memorandum." Rule 52.01 "prescribes no specific format, and expressly allows a written opinion or memorandum of decision to stand as findings of fact and conclusions of law." *Transit Team, Inc. v. Metro. Council*, 679 N.W.2d 390, 398 (Minn. App. 2004) (citing Minn. R. Civ. P. 52.01, 1985 advisory comm. note). "It is not necessary that the findings of fact be identified in separately numbered paragraphs or that the conclusions of law be similarly stated." *Id.* (holding that district court's findings were sufficient when ten-page memorandum attached to order provided factual and procedural background and extensive analysis).

Here, the district court's eleven-page memorandum contains adequate fact and legal-analysis sections. The district court was not required to specifically label each factual finding or legal conclusion, and it did not abuse its discretion in denying Bona's motion to amend.

III.

Bona argues in the alternative that the evidence does not support the district court's findings on the elements of adverse possession. Whether a claimant proves the elements of adverse possession is a question of fact. *Denman v. Gans*, 607 N.W.2d 788, 793 (Minn. App. 2000), *review denied* (Minn. June 27, 2000). We uphold a district court's findings of fact unless they are clearly erroneous. Minn. R. Civ. P. 52.01. "But whether the findings of fact support a district court's conclusions of law and judgment is a

question of law, which we review de novo." *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 108 (Minn. App. 2002). We review the record in the light most favorable to the district court's judgment. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999).

To show adverse possession, the claimant must prove, by clear and convincing evidence, an actual, open, hostile, continuous, and exclusive possession for the statutory 15-year period. *Rogers*, 603 N.W.2d at 657 (reciting adverse-possession elements); *Ehle v. Prosser*, 293 Minn. 183, 189, 197 N.W.2d 458, 462 (1972) (establishing clear-and-convincing-evidence standard); Minn. Stat. § 541.02 (2006) (establishing 15-year statute of limitations for recovery of real estate). "These fact-intensive adverse-possession determinations rely largely on the credibility of witnesses and the weight, if any, to be given to their testimony." *Ganje v. Schuler*, 659 N.W.2d 261, 269 (Minn. App. 2003). We show great deference to the district court's credibility determinations. Minn. R. Civ. P. 52.01.

The Stackens established actual and open possession of the disputed land. An adverse possessor's use of disputed property 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). The 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 statute." *Ganje*, 659 N.W.2d at 267 (holding that adverse possessor "need not have constructed tangible structures on the disputed property" to prove open element of adverse possession) (quotation omitted).

The record indicates that both the Stackens and the previous owners, Melvin and Lorraine Doucette, visibly used the disputed land as an actual owner would use it and in the belief that they were the actual owners. The erection of a fence by an adverse possessor has "little significance on the issue of adverse possession unless [he or she] uses and occupies the land up to the line established by the fence." *Engquist v. Wirtjes*, 243 Minn. 502, 505, 68 N.W.2d 412, 415 (1955). Melvin Doucette erected a fence along the tree line for his sheep when he owned the property, and the record shows that both he and the Stackens farmed the land up to that fence.

Bona claims that certain portions of the disputed land were left in their wild and natural state. *See Nash* , 377 N.W.2d at 58 (holding that one who leaves land in "wild and natural state" cannot acquire title by adverse possession). Some of the property could not be farmed because it was wooded, but the remainder was farmed according to its intended use. No evidence indicates that a farmer using similar land would have farmed the wooded portions.

Bona also asserts that the use of the disputed area was not open because it could not be seen from some of the lake lots where witnesses resided. But Bona provides no support for his argument that adverse possessors' use of land must be visible from neighboring properties. The record indicates that witnesses driving by on an adjoining road often saw that the land was being used.

The Doucettes' and the Stackens' uses of the land constituted visible and notorious acts of ownership, and the district court's finding that the actual and open elements of adverse possession were met is not clearly erroneous.

To show hostility, the third element of adverse possession, the adverse possessor "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). Hostility requires a possessor to enter and take possession of the land "as if it were [his or hers] and owning it with the intention of excluding all others." *Ganje*, 659 N.W.2d at 268. Hostile possession does not refer to personal animosity or physical overt acts against the record owner. *Ehle*, 293 Minn. at 190, 197 N.W.2d at 462. "Hostility is flexibly determined by examining the character of the possession and the acts of ownership of the occupant." *Ebenhoh*, 642 N.W.2d at 110-11 (quotation omitted).

The record establishes that Melvin Doucette posted 'no trespassing' signs on his hay barn and on the land surrounding it. By posting such signs, an adverse possessor indicates the hostility of the possession.[2] The Doucettes' possession was also hostile because they used it as if it were their own, to the exclusion of others. The record shows that the Doucettes gave Bona and others permission to hunt the land and gave Bona permission to use the land for target practice. Nothing in the record establishes that the Doucettes did not intend to exclude others' claims of ownership.

The record also reflects that, like the Doucettes before them, the Stackens used the land in a hostile manner. They Stackens did not remove the 'no trespassing' signs, they

[2] Minnesota "has never required the affirmative denial of a true owner's title by 'no trespassing signs.' Although such signs might signal that the adverse-possession requirement of *openness* of possession was satisfied, there is no requirement under Minnesota law that mandates use of no trespassing signs." *Ganje*, 659 N.W.2d at 269.

continued to use the property as their own, and they asserted numerous times to the authorities and to Bona that they were the rightful owners of the disputed property. The district court's finding that the "hostile" element of adverse possession was met is not clearly erroneous.

The fourth requirement of adverse possession is continuity of use for 15 years. *Ganje*, 659 N.W.2d at 268. "The possession of successive occupants, if there is privity between them, may be tacked to make adverse possession for the requisite period." *Fredericksen v. Henke*, 167 Minn. 356, 360, 209 N.W. 257, 259 (1926). "A bright-line test for how much activity constitutes continuous possession of a property for adverse-possession purposes does not exist. Instead, 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." *Ganje*, 659 N.W.2d at 268 (holding adverse possessor's sporadic use of disputed area was reasonable given nature of property). When the use of the land is seasonal in character, the fact that it is not continuously occupied does not frustrate a finding of continuity, as long as the use is exclusive. *See Marsh v. Carlson*, 390 N.W.2d 897, 900 (Minn. App. 1986) (citing Wisconsin case for use required of seasonal property; *see also 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").

The use of the land, farming, was seasonal. The Doucettes farmed the disputed area up to the tree line from at least 1976 to 2001.[3] The Stackens also used the property continuously after they purchased it in 2001 by using the hay barn and the field road, farming, and making improvements.

The law simply requires that the continuous uses of the land be consistent with uses of similar land in the area; the exact manner in which the land was used during each year is irrelevant. The district court's finding that the continuous element of adverse possession was met is not clearly erroneous.

The fifth element of adverse possession, exclusivity, is met if the adverse possessor possesses "the land as if it were his own with the intention of using it to the exclusion of others." *Ebenhoh,* 642 N.W.2d at 108 (quotation omitted). The record indicates that, when neighbors used the Doucettes' land, they had permission. Although Bona alleges that he frequently used the disputed land without permission, nothing in the record corroborates his allegations.

The district court's findings as to the five elements of adverse possession are not clearly erroneous.

IV.

Bona argues that, even if the district court did not err in determining that the Stackens were entitled to some land through adverse possession, it erred in awarding

[3] The district court determined that the Doucettes farmed the property for 27 years. Even if they could have farmed up to the tree line only from 1976, after the trees were planted, until 2001, they still used the disputed area for a period of 25 years, which fulfilled the 15-year statutory period.

them land south of the tree line. The district court adopted the legal description of the awarded land that was proposed by the Stackens' surveyors, but the district court also defined the "Disputed Area" as a somewhat smaller area "north of the tree line."

The Stackens' survey indicates that the proposed boundary line goes through the tree line. It appears that the Stackens were awarded a slight amount of property south of the tree line, while the district court intended to award only property north of the tree line. We remand to the district court for a legal description that awards the Stackens only property north of the tree line.

V.

Bona challenges the district court's order awarding the Stackens' deposition costs, survey costs, expert fees, and abstract costs. We review an award of disbursements under an abuse of discretion standard. *Kellar v. Von Holtum*, 605 N.W.2d 696, 703 (Minn. 2000). Minn. R. Civ. P. 54.04 provides: "Costs and disbursements shall be allowed as provided by statute." Minn. Stat. § 549.04 (2006) states that a "prevailing party . . . shall be allowed reasonable disbursements paid or incurred." The district court "is in the best position to judge what is truly necessary and what is only useful." *Dahlbeck v. DICO, Inc.*, 355 N.W.2d 157, 166 (Minn. App. 1984) (quotation omitted), *review denied* (Minn. Feb. 6, 1985).

Bona claims that the Stackens' deposition costs were unnecessary because the depositions were not later used at trial. The burden lies on the Stackens, as the prevailing party, to show that "the depositions and copies were necessary to the conduct of the litigation and that they were effectively and pertinently used." *Id.*

A district court does not abuse its discretion in awarding the costs of discovery depositions not used at trial. *See Striebel v. Minn. State High Sch. League*, 321 N.W.2d 400, 403 (Minn. 1982). "Use of the discovery deposition is commonplace today. In many cases, conscientious counsel can prepare for trial in no other way. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Romain v. Pebble Creek Partners, Inc* 310 N.W.2d 118, 123 (Minn. 1981) (quotation omitted).

The Stackens took the discovery depositions of Melvin Doucette, Bona, and Bona's predecessor in interest, Maryann Kuhn, for a total cost of $1,251.50. As the district court noted, the Stackens' "counsel could not fully and properly advise [the Stackens] of their legal claims, engage in settlement discussions, or prepare for trial without knowing [Bona's] position on the underlying facts." Because of Melvin Doucette's advanced age and the distance he had to travel to trial, his deposition testimony could serve as trial testimony in the event that he would not be available for trial. It was reasonable for the Stackens to take the deposition of Bona's predecessor in interest. The district court did not abuse its discretion in awarding the Stackens a disbursement for their discovery deposition costs.

Bona challenges the district court's award of survey costs in the amount of $3,010.08, claiming that the Stackens' survey was duplicative, unnecessary, and excessively costly. But it was reasonable for the Stackens to support their adverse-possession claim by hiring their own surveyors and not relying on their adversary's survey. Furthermore, the Stackens' survey was relied upon by the district court and is

consistent with the record. The district court did not abuse its discretion in awarding the Stackens a disbursement for their survey costs because their survey was reasonable and necessary, and nothing in the record indicates that it was excessively costly.

Bona also challenges the district court's award of $1,000 to the Stackens for the expert testimony of their surveyor, arguing that it was unnecessary because Bona had stipulated to the foundation of the Stackens' survey prior to trial. "The judge of any court of record, before whom any witness is summoned or sworn and examined as an expert in any profession or calling, may allow such fees or compensation as may be just and reasonable." Minn. Stat. § 357.25 (2006). A district court may also allow compensation for an expert's preparation outside the courtroom which is necessary for the expert's testimony. *Quade & Sons Refrigeration, Inc. v. Minn. Min. & Mfg. Co.*, 510 N.W.2d 256, 260-61 (Minn. App. 1994), *review denied* (Minn. Mar. 15, 1994).

In awarding the expert witness fee, the district court concluded that the surveyor's "testimony was useful in understanding the historical development of the lot lines in the area, the topography of the Disputed Area, and corresponding Doucette's 'use' testimony to the actual geography of the Disputed Area." The record supports this finding, and the district court did not abuse its discretion in awarding the Stackens their expert's fee.

Finally, Bona contends that the district court abused its discretion when it concluded that "the [$160] costs allocated to the Crow Wing County Abstract Company were for the reproduction of various trial exhibits, including the Crow Wing County Half Section map," when in fact these costs paid for a title search of Bona's property to determine if there were others with adverse interests. Because the costs were incorrectly

identified by the district court, we reverse the abstract-costs disbursement.

VI.

In his reply brief, Bona asks that we strike portions of the Stackens' brief. Bona did not file a motion to strike. In this court, "an application for an order of other relief shall be made by serving and filing a written motion for the order or relief." Minn. R. Civ. App. P. 127. Therefore, Bona's request is not properly before us, and we do not address it.

Affirmed in part, reversed in part, and remanded.