STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0784

Steven William Kaukola,
Respondent,

vs.

Steven J. Menelli,
Appellant,

Scott K. Lundgren,
Respondent.

Filed May 19, 2009
Affirmed
Connolly, Judge

St. Louis County District Court
File No. 69VI-CV-06-115

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

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

CONNOLLY, Judge

Respondent brought an action under Minn. Stat. § 559.23 (2008) seeking a judicial determination of his property's boundary lines. Appellant filed a counterclaim, alleging that their properties' common boundary should be established by the doctrine of boundary by practical location. The district court rejected this argument and adopted the boundaries as they were determined by a survey that was entered into evidence by respondent. Because appellant waived his practical location by acquiescence claim, and because the district court's findings regarding the boundaries of the parties' parcels of land are not manifestly and palpably contrary to the evidence, we affirm.

FACTS

Respondent Steven W. Kaukola owns a parcel of land[1] on Myrtle Lake that is bordered to the west by a parcel of land[2] owned by Scott K. Lundgren and to the east by a parcel of land[3] owned by appellant Steven J. Menelli. For ease of reference, the

[1] This parcel's legal description is: The easterly 200 feet of government lot 3, section 32, township 65 north, range 18 west of the fourth principal median, according to the United States Government survey thereof, lying between the north boundary of county highway number 23 and the south shoreline of Myrtle Lake.

[2] This parcel's legal description is: The west 200 feet of the easterly 400 feet of government lot 3, section 32, township 65 north, range 18 west, lying between the north boundary of county highway 23 and the south shore of Myrtle Lake, excepting an easement for roadway purpose, over and across the aforesaid premises, along the existing roadway for ingress and egress from said county highway to the east 400 feet of said government lot No. 3.

[3] This parcel's legal description is: The westerly 200 feet of that portion of government lot 2, and that portion of the southwest quarter of the northeast quarter, section 32, township 65, range 18 which lies north of the Crane Lake road.

boundary separating appellant and respondent's parcels of land will be referred to as the "Menelli" line, while the boundary separating Lundgren and respondent's parcels of land will be referred to as the "Lundgren" line.

All parties have owned their properties for over 20 years. Prior to 1999, no formal survey of the properties had been conducted to determine the location of the Menelli and Lundgren lines. In the 1960s, respondent's grandfather, who was a forester, ran a line to approximate the Lundgren line's location. There were no permanent monuments put into place to memorialize this line, although respondent located a pin on the shore of Myrtle Lake in a location that he assumed was the northwest corner of his parcel. In 1975, Jeff Elliot, another forester, ran a line (Elliot line) to approximate the Menelli line's location. Elliot used blaze marks and ribbons to memorialize what he determined to be the Menelli line's location. He did not set any pins to represent his work because he indicated that only surveyors set pins, and, as Elliot admitted, he is not a licensed land surveyor.[4]

In 1999, respondent commissioned Wayne Spragg, a licensed land surveyor, to conduct a survey to determine the location of the Lundgren line. The results of this survey indicated that the parties' historical understanding of their properties' boundaries was inaccurate. In 2001, Spragg finished his survey by determining the Menelli line's location. Spragg's survey indicated that the line run by Elliot was inaccurate, and that adoption of the Elliot line would result in a loss of 245 feet of respondent's shoreline. Spragg's survey was the only survey entered into evidence by the parties.

[4] There was a pin found where the Menelli line alleged by appellant met Myrtle Lake, but it is unclear who set this pin. Respondent testified that he never recognized this as establishing the Menelli line as it was alleged by appellant.

In 2004, respondent brought an action under Minn. Stat. § 559.23, seeking a judicial determination of his property's boundary lines. In response, appellant filed a counterclaim seeking to enforce the Elliot line, claiming that this established the Menelli line pursuant to the parties' "express agreements." The district court disagreed, finding that (1) "[b]ased upon the testimony of the parties, there was no commonality in reference to the historical boundary;" (2) "[t]here is no evidence that there was an agreement or assent to the proposed boundary as measured by Mr. Elliot;" and, (3) "[e]ach party had general beliefs as to the boundary, but at no time was there any monument or proof of where the boundary was actually located and there was never a survey performed until Mr. Spragg completed his work." The district court then concluded that "[t]he survey prepared by Wayne Spragg is the only conclusive establishment of the boundaries of [respondent's] property." The district court went on to explain that

> [n]o survey demonstrating the historical boundary as the true boundary was presented and all other evidence cannot achieve the burden of proof that it is the true boundary. In total, it cannot be demonstrated that the historical boundary is one that should be determined via practical location by clear and convincing evidence.

It went on to adopt the Menelli line as it was determined by Spragg and deny appellant's counterclaim. This appeal follows.[5]

[5] The focus of this appeal is the dispute between appellant and respondent. Lundgren owns land further east than he anticipated and is unlikely to be affected by the resolution of this appeal.

D E C I S I O N

I.

The practical location of a boundary line can be established in only 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. 1977).

Appellant now argues that the Menelli line should be determined by boundary by practical location by acquiescence; however, because he failed to raise this issue below, we consider it waived on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts will generally not consider matters not argued and considered in the court below).

Here, appellant pled only practical location by agreement in his counterclaim: "The parties to this proceeding are the parties to *express agreements* which established their common boundaries and their ownership rights to the property within those boundaries resulting from their reliance on these boundaries for more than 15 years." This is reiterated in appellant's request for judgment, which refers to the "parties' agreed upon common boundaries." There is another reference to the "parties' agreed upon boundary lines" in paragraph two of appellant's answer. Further, in appellant's motion to amend the district court's findings of fact and conclusions of law, appellant again refers

to the parties' agreed upon boundaries. Appellant did not, in either his answer and counterclaim or motion to amend, expressly claim that the parties' boundaries were established through acquiescence. It is clear from our reading of the record below that appellant only argued practical location by agreement, an argument he has since abandoned on appeal. As a result, he may not raise practical location by acquiescence now.

II.

Even if we were to address the merits of appellant's appeal, our decision would remain unchanged. 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.*

Appellant argues that the doctrine of boundary by practical location by acquiescence should determine the boundary between his land and respondent's land rather than the boundary line established by a licensed surveyor. "To acquire land by practical location of boundaries by acquiescence, a person must show by evidence that is clear, positive, and unequivocal that the alleged property line was 'acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations.'" *Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844, 849 (Minn. App. 2001) (quoting *Theros*, 256 N.W.2d at 858). The statute of limitations is 15 years. Minn. Stat. § 541.02 (2008); *see Allred v. Reed*, 362 N.W.2d 374, 376 (Minn. App. 1985) (citing Minn. Stat. § 541.02 in

practical-location case), *review denied* (Minn. Apr. 18, 1985). The burden of proof in boundary cases is on the party asserting the practical boundary. *Bjerketvedt v. Jacobson*, 232 Minn. 152, 156, 44 N.W.2d 775, 777 (1950).

The acquiescence required is not merely passive consent, but conduct from which assent may be reasonably inferred. *Engquist v. Wirtjes*, 243 Minn. 502, 507-08, 68 N.W.2d 412, 417 (1955) (affirming no practical location finding absent evidence that disseized or predecessors recognized or treated a fence as a division line, or that disseizor or predecessors used the disputed land); *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. App. 1987) (no practical location by acquiescence when disseizor does not use disputed area for statutory period, even though disseized "tacitly consented" to boundary by failing to dispute a sightline). Typically, practical location by acquiescence "occurs when neighbors attempt to establish a fence as close to the actual boundary as possible, or when the disseizor unilaterally marks the boundary, and the disseized neighbor thereafter recognizes that line as the actual boundary." *Pratt*, 636 N.W.2d at 851; *see also Fishman v. Nielsen*, 237 Minn. 1, 5-6, 53 N.W.2d 553, 555-56 (1952) (finding practical location by acquiescence when parties and their predecessors in title built dividing fence as close as possible to actual boundary and remained satisfied with fence's location for statutory period); *In the Matter of Zahradka*, 472 N.W.2d 153, 156 (Minn. App. 1991) (finding practical location by acquiescence when disseizor builds parking lot on disseized's land and disseized makes no claim to ownership of land for 40 years), *review denied* (Minn. Aug. 29, 1991); *Allred*, 362 N.W.2d at 376-77 (finding practical location by acquiescence

when disseizor built fence with intent to be as close to boundary as possible and when disseized treated fence as boundary).

Although a boundary established by practical location may prevail over the results of a survey, when the boundary allegedly established by practical location "may be seriously incompatible with the beneficial use of [valuable] land and where such boundary is substantially at variance with the original boundary, evidenced by a technically competent survey, a disputed boundary should not be deemed established by practical location except upon evidence that is truly clear and convincing." *Phillips v. Blowers*, 281 Minn. 267, 275, 161 N.W.2d 524, 530 (1968).

Appellant argues that he is entitled to judgment because respondent had acquiesced to appellant's understanding of the Menelli line's location. This argument is unavailing. At trial, only one technically competent survey was entered into evidence. This survey placed the Menelli line at a location that substantially differed from the location appellant alleged was established by practical location. As a result, appellant had the burden in district court of proving, by evidence that was "truly clear and convincing," that the Menelli line should be established by practical location. *Id.* The district court concluded that he did not meet this burden. Thus, appellant now has the burden of proving that the district court's conclusion that there was not clear and convincing evidence that the Menelli line was established by practical location is "manifestly and palpably contrary to the evidence." *Gifford*, 245 Minn. at 434, 72 N.W.2d at 627. Appellant has not met this burden.

Simply put, there is nothing in the record to support the claim that respondent acquiesced or in any way accepted the Menelli line. Even the testimony quoted at length by appellant in his brief establishes that the parties' understanding of the Menelli line prior to the Spragg survey was amorphous at best. There is no dispute that by the time this litigation was initiated almost all of the blaze marks and ribbons used by Elliot to estimate the location of the Menelli line were obliterated. There certainly was no fence or similar structure placed along the line that Elliot estimated was the Menelli line. At a minimum, caselaw requires that a boundary line established by practical location by acquiescence must have some type of physical demarcation. Given that even appellant failed to maintain the line that he claimed was established by practical location by acquiescence, we cannot accept the claim that respondent provided even his tacit assent to Elliot's estimation of the Menelli line.

In this case, the evidence supports the district court's finding. Appellant and respondent own lakeside property that shares a common border. This border is located on land that is wooded and rocky. No survey of this land was completed until 2001. This survey establishes the boundary line accepted by the district court. Prior to this survey the parties had a very general understanding of where the border was located. Appellant claims that respondent acquiesced to the border estimated by Elliot, but fails to point to any evidence that establishes the parties even had a clear understanding of where this line was prior to the commencement of this suit. There is not any evidence in the record that establishes that respondent acted in a way from which his assent to the boundary line alleged by appellant could be reasonably inferred. At best, the evidence supports the

district court's conclusion that "each party had general beliefs as to the boundary." This is insufficient to establish a boundary by practical location.

Affirmed.