

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1519**

Joseph E. Mauer, et al.,
Appellants,

vs.

Otter Tail Power Company,
Respondent,

Jon M. Opatz, et al.,
Respondents.

**Filed July 28, 2009
Affirmed
Worke, Judge**

Otter Tail County District Court
File No. 56-C1-05-001129

Zenas Baer, Zenas Baer & Associates, 331 Sixth Street, P.O. Box 249, Hawley, MN 56549 (for appellants)

Greg J. Larson, R. Kristian Svingen, Svingen, Karkela, Cline, Haugrud, Hunt, Larson & Jensen, PLLP, 125 South Mill Street, P.O. Box 697, Fergus Falls, MN 56538 (for respondent Otter Tail Power Company)

Robert W. Bigwood, P.O. Box 866, 110 North Mill, Fergus Falls, MN 56538 (for respondents John M. Opatz, et al.)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Muehlberg, 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UNPUBLISHED OPINION

WORKE, Judge

Appellants challenge the district court's grant of summary judgment in favor of respondent Otter Tail Power Company, arguing that the district court erred by (1) finding that adverse possession had not occurred, and (2) failing to determine that the boundary by practical location was the river's edge. We affirm.

FACTS

Respondent Otter Tail Power Company (OTP) operates a water-powered generating station at the Taplin Gorge Dam on the Otter Tail River near Fergus Falls. In 1926, OTP acquired fee title to 4.09 acres of land located within "Government Lot 9 in Section 29, Township 134 North, Range 42 West" to accommodate the dam's construction. As a result of the dam's operation, approximately only one-half of an acre of OTP's 4.09 acre tract is above water.

In 1971, appellants Joseph E. and Sharon D. Mauer entered into a contract for deed to purchase the property described as "Government Lot 9 in Section 29, Township 134 North, Range 42 West." The contract expressly excluded "that parcel of land heretofore conveyed to [OTP] which description is set forth in the instrument filed at Book 168 of Deeds, page 627 in the office of the Register of Deeds." In 1983, appellants acquired fee title to the property that was the subject of the 1971 contract for deed. The northern boundary of appellants' property is adjacent to the southern boundary of OTP's 4.09 acres. Appellants believed they were allowed to use OTP's 4.09 acre tract, and appellants attempted to negotiate several times with OTP to purchase the 4.09 acres.

In 1999, OTP conveyed the 4.09 acres by warranty deed to respondents Jon M. and Debra K. Opatz, but reserved the right to raise or lower the level of the river.

In March 2005, appellants initiated this action seeking to reform the 1999 deed between OTP and Opatz to designate that the interest Opatz obtained was limited to flowage rights. In the alternative, appellants first argued that they had acquired the 4.09 acre tract through adverse possession. Second, they argued that the district court should determine that the boundary by practical location between the two properties was the river's edge. The parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of OTP on the adverse possession and boundary-by-practical-location claims, but denied OTP's motion for summary judgment on the reformation-of-deed claim. A bifurcated trial was held on the remaining issues. This appeal follows.

DECISION

Appellants challenge the district court's grant of summary judgment in favor of OTP. "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.

Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted). No genuine issue of material fact exists “when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

Adverse possession

Appellants argue that the district court erred in granting summary judgment to OTP because their use of the land satisfies the elements of adverse possession. “[T]o establish title by adverse possession the disseizor . . . must show by clear and convincing evidence an actual, open, hostile, continuous, and exclusive possession of the property for 15 years.” *Stanard v. Urban*, 453 N.W.2d 733, 735 (Minn. App. 1990), *review denied* (Minn. June 15, 1990); *see also* Minn. Stat. § 541.02 (2008) (establishing 15-year recovery period). The disseizor bears the burden of presenting the essential facts establishing the elements of adverse possession. *Id.* “Failure to establish any one of the five essential[] [elements] is fatal to the validity of the claim.” *Johnson v. Raddohl*, 226 Minn. 343, 345, 32 N.W.2d 860, 861 (1948).

Actual and open possession means that the disseizor must openly possess the property by exercising “visible and notorious acts of ownership” over the land. *Ganje v. Schuler*, 659 N.W.2d 261, 267 (Minn. App. 2003) (quotation omitted). To establish hostility, which does not mean personal animosity or physical violence, the disseizor must “enter and take possession of the lands as if they were his own . . . with the intention

of holding for himself to the exclusion of others.” *Id.* at 110; *Ehle v. Prosser*, 293 Minn. 183, 190, 197 N.W.2d 458, 462 (1972). The disseizor’s actions must provide “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). “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). Continuity requires 15 consecutive years of possession, although it can include the possession of successive occupants in the land. *Id.* at 109. Exclusivity means that “the disseizor takes possession of 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).

If a party uses another’s property with permission, adverse possession does not arise; but if a property owner acquiesces in the use of the property without asserting ownership, a claim of adverse possession is supported. *Ehle*, 293 Minn. at 190-91, 197 N.W.2d at 463.

‘Acquiescence’ . . . means . . . passive conduct on the part of the owner of the servient estate consisting of failure on his part to assert his paramount rights against the invasion thereof by the adverse user. ‘Permission’ means more than mere acquiescence; it denotes the grant of a permission in fact or a license.

Id. at 191, 197 N.W.2d at 463 (quotation omitted). Silently acquiescing in acts of ownership can be “sufficient to establish title by adverse possession.” *Id.*

The record shows that (1) appellants knew that OTP owned the adjacent 4.09 acres when they purchased the property in 1971; (2) appellants believed that OTP permitted adjoining landowners to use its land along the river; (3) appellants used the land for recreation, fishing, boat landings, bonfires, pitching tents, haying, irrigation pumps, and cattle pastures; (4) OTP patrolled the shoreline to find out what use the property was being put to because OTP was concerned for the safety of the adjoining landowners and trespassers; and (5) OTP did not object to cattle grazing, placement of docks, and boat launching on any of its property along the river, but objected to certain uses such as building a fence into the water, obstructing the shoreline, or installing a pier.

Appellants' adverse possession claim fails as a matter of law. First, appellants contend that their predecessors in title used the property in a manner sufficient to satisfy the elements of adverse possession, and that they may tack their predecessors possession on to their own to satisfy the elements of adverse possession. In the alternative, appellants argue that they do not need to tack their predecessors' interest because they have satisfied the 15-year continuity requirement. But appellants' contention that the continuity element is satisfied is flawed. Appellants are correct that continuity may be maintained by tacking the possession of successive occupants, if there is privity between them. *Fredericksen v. Henke*, 167 Minn. 356, 360, 209 N.W. 257, 259 (1926). But appellants did not present any evidence that appellants' predecessors in title used the land without permission. Thus, appellants' contention that their predecessors acquired title to the property by adverse possession is unavailing and appellants are unable to satisfy continuity through tacking. Furthermore, appellants cannot meet the continuity

requirement on their own. Appellants purchased the property in the summer of 1971, and they attempted to negotiate with OTP to purchase the 4.09 acres in the spring of 1986, thereby acknowledging OTP's title a few months short of the required 15-year period. Because "[c]ontinuity is broken by an acknowledgement of the owner's title by the adverse possessor before the statute has run in [appellant's] favor," they failed to satisfy the 15-year continuity requirement. *Stanard*, 453 N.W.2d at 736.

Second, appellants' contention that their possession was hostile is meritless. Once it has been established that the disseizor's use of the property was initially permissive, the use continues to be permissive until it is conclusively shown that the nature of the use has changed and become hostile. *Wojahn v. Johnson*, 297 N.W.2d 298, 306 (Minn. 1980). Appellants testified that they understood that they had permission from OTP to use the land up to the water's edge. Appellants' belief that they had permission to use the property is bolstered by their testimony that they stopped using the property after OTP conveyed it to the Opatzs. Because appellants' use was initially permissive and there is no evidence that their use changed or became hostile, there is no genuine issue of material fact as to whether appellants satisfied the hostility element of adverse possession.

Appellants have failed to show the existence of a genuine issue of material fact regarding whether their possession of OTP's land was hostile or continuous for at least 15 years; therefore, the district court did not err in granting summary judgment in favor of OTP.

Boundary by practical location

Appellants also argue that the district court erred in granting summary judgment to OTP on the boundary-by-practical-location claim. Boundary by practical location, like adverse possession, is a title-transferring event. *Gabler v. Fedoruk*, 756 N.W.2d 725, 728-29 (Minn. App. 2008).

A party can establish a boundary by practical location in three ways: (1) by acquiescing in the boundary for a sufficient period of time to bar a right of entry under the 15-year statute of limitations; (2) by expressly agreeing with the other party on the boundary and then by acquiescing to that boundary; or (3) by estoppel. *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977). If the disseizor cannot prove a boundary by practical location, the actual boundary is established by the original survey and plat. *Benz v. City of St. Paul*, 89 Minn. 31, 36, 93 N.W. 1038, 1039 (1903).

Appellants argue that the practical boundary is the river's edge because OTP acquiesced to their use of the land up to the river's edge. "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). When determining a boundary by practical location by acquiescence, no inferences or presumptions are made in favor of the disseizor, but rather, all inferences are made against the disseizor. *Phillips v. Blowers*, 281 Minn. 267, 269-70, 161 N.W.2d 524, 527 (1968). "The acquiescence required is not merely passive consent, but conduct from

which assent may be reasonably inferred.” *Pratt*, 636 N.W.2d at 850. 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 [] thereafter recognizes that line as the actual boundary.” *Id.* at 851.

The district court found that appellants did not present evidence of genuine issue of material fact because appellants did not believe there was any precise location of the boundary line. Appellants characterize this finding as a misstatement of the law because a party does not need to know the boundary’s location. While appellants may not need to know where the boundary is, the burden of proof in this case rests with appellants. The record establishes that appellants were uncertain where the boundary was, but understood that OTP owned 4.09 acres adjacent to the northern boundary of their property. Appellants’ argument is frustrated by their deposition testimony that they used OTP’s property to access the river. In addition, appellants presented no evidence that shows OTP acquiesced in the boundary being the river’s edge.

Because appellants acknowledged that they crossed OTP’s property to access the river, and appellants failed to show the existence of a fact question regarding whether OTP acquiesced to the river’s edge as the boundary, the district court did not err in granting summary judgment in favor of OTP.

Affirmed.