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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0448**

John Aydt, et al.,
Appellants,

vs.

Steven A. Hensel, et al.,
Respondents,

City of St. Michael,
Defendant.

**Filed December 18, 2017
Affirmed in part, reversed in part, and remanded
Ross, Judge**

Wright County District Court
File No. 86-CV-15-2072

John T. Peterson, Johnson, Larson & Peterson, P.A., Buffalo, Minnesota (for appellants)

John P. Brendel, Brendel and Zinn, Ltd., Lake Elmo, Minnesota (for respondents)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Schellhas,
Judge.

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

ROSS, Judge

Steven and Lois Hensel built a shed about a foot away from the boundary that divided their property from John and Sheila Aydt's property, mistakenly believing the shed was ten feet away. When the Hensels arranged to sell their home 15 years later, a survey

revealed the correct boundary. The Aydts disrupted the sale by filing a notice of *lis pendens* to represent that they had an interest in the Hensels' property. After a bench trial between the Hensels and the Aydts over ownership of the ten-foot swath and the propriety of the Aydts' notice of *lis pendens*, the district court found in favor of the Hensels. Because the evidence supports the district court's finding that the Hensels adversely possessed the disputed land for the requisite adverse-possession period and because it acted within its discretion by awarding punitive damages, we affirm in part. But because the district court miscalculated special damages, we reverse in part.

FACTS

Steven and Lois Hensel own property that abuts the lot of neighbors (and relatives) John and Sheila Aydt in St. Michael. (John is Lois's nephew.) The Hensels own a 2.5-acre lot with a northern border that edges the Aydts' 77.5-acre lot. The Hensels bought the property from Lois Hensel's parents (John Aydt's grandparents) in 1993 after a 1992 survey defined the boundaries. In 1996 the Hensels obtained a variance to the city's 30-foot setback requirement to build a large storage shed at the northern end of their property. Based on the survey, they believed that the shed's planned location would barely meet the variance's ten-foot setback requirement. They built the shed, and for 15 years all was well.

But in 2012 the Hensels tried to sell their property, and trouble began. John Aydt intimated that the shed was closer to the boundary than ten feet. A new survey revealed that the 1992 survey had been wrong and that the Hensels' northern border sat ten feet south of where they had thought. This meant that the shed sat only one foot, not ten feet, from the Aydts' property. And it meant that the Hensels had been mistakenly using the ten-

foot swath just north of the actual boundary as their own. They had been using the 10-by-545-foot portion for different things, depending on its varying topography. For example, the district court found that they had planted a vegetable garden and raspberry bushes. They planted evergreen trees. They ran a discharge pipe from their swimming pool into the area. They occasionally backed their “travel trailer” onto the strip. Their children rode all-terrain vehicles, snowmobiles, and dirt bikes on it. They piled snow onto it to create a snow fence. And they grew and maintained grass on its flat portion.

When the Aydts learned of the 2012 survey results, this dispute erupted. The Aydts sued the Hensels for trespass and nuisance for the Hensels’ use of the ten-foot portion. The Hensels countered by securing a new variance from the city, which allowed the shed to have no setback at all. The Aydts then sued the city for issuing this variance (but that suit was dismissed and presents no direct issue in this appeal). The Hensels found a buyer and scheduled a closing, but the Aydts filed a notice of *lis pendens* against the Hensel property on the eve of closing, jeopardizing the sale. The Hensels’ attorney wrote to the Aydts’ attorney. He protested that the Aydts had no legal basis to file the notice of *lis pendens*, demanded that the Aydts discharge the notice, and warned that their failure to discharge the notice would result in their liability for slander of title and damages arising from the likely loss of the sale. The Aydts’ attorney all but acknowledged that the Aydts’ notice of *lis pendens* lacked merit, saying, “My clients understand . . . that they do not have a protectable property interest or property right in your client’s *property*.” But he nevertheless refused to discharge it. Instead, he attempted to leverage a land swap.

The Aydts did not discharge their notice of *lis pendens*, the sale agreement crumbled, and the Hensels filed a counterclaim alleging slander of title. The litigation percolated for two years, during which time the district court discharged the notice of *lis pendens*, the Aydts appealed, and we affirmed. *See Aydt v. Hensel*, No. A15-1406 (Minn. App. Mar. 21, 2016). The Hensels added counterclaims for adverse possession and sought punitive damages, and both parties attempted, mostly unsuccessfully, to prevail by summary judgment. The dispute culminated in a bench trial after which the district court found that the Hensels had adversely possessed the disputed land for the requisite period and that the Aydts had slandered their title. The court awarded the Hensels \$132,149 in special damages for slander of title based on the Aydts' false *lis pendens* filing and an additional \$5,000 in punitive damages for refusing unreasonably to discharge the filing after acknowledging that they had no legal or factual basis to maintain it. It also dismissed the Aydts' trespass and nuisance claims.

The Aydts appeal.

DECISION

The Aydts argue that the district court erred in three respects. They first maintain that the district court abused its discretion by concluding that the Hensels proved the adverse- possession claim. They next maintain that the district court erroneously found that the Aydts acted maliciously by filing their notice of *lis pendens* and that the Hensels proved special damages. And they maintain finally that the district court improperly awarded punitive damages. We address each argument.

I

The Aydts challenge the district court’s determination that the Hensels became the owners of the disputed ten-foot stretch by adverse possession. Whether a plaintiff proves adverse possession is a question of fact. *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. App. 2003) (citing *Wortman v. Siedow*, 173 Minn. 145, 148, 216 N.W. 782, 783 (1927)). We will not reverse a district court’s findings of fact unless we identify a clear error. Minn. R. Civ. P. 52.01 (2017). And we will not identify a clear error unless our review leaves us “with the definite and firm conviction that a mistake has been made.” *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). Persons claiming ownership by adverse possession must show by clear and convincing evidence that they possessed the land of another actually, openly, continuously, exclusively, and hostilely for 15 years. *Ehle v. Prosser*, 293 Minn. 183, 189, 197 N.W.2d 458, 462 (1972). The Aydts argue that the district court wrongly decided each of these elements.

Whether the Hensels “actually” possessed the disputed land is not controlled by any precise test. Which uses establish actual use will depend on the purpose for which the land “may be ordinarily fit and adapted, and reasonably used.” *Dean v. Goddard*, 55 Minn. 290, 299, 56 N.W. 1060, 1063 (1893). For example, a portion of an agricultural field might be actually possessed by someone who is farming the land. *See Dean*, 55 Minn. at 298–99, 56 N.W. at 1063. By contrast, a small wooded area in the corner of a residential yard might be actually possessed by someone removing wood, dumping compost, and planting wildflowers. *See Ganje*, 659 N.W.2d at 264, 267–68. Another component to actual possession is the constancy of the use, as uses that are merely sporadic or occasional do

not satisfy the element. *Romans v. Nadler*, 217 Minn. 174, 179–180, 14 N.W.2d 482, 485–86 (1944). We apply these principles here.

We are satisfied that the district court had a sufficient evidentiary basis to conclude that the Hensels actually possessed the disputed land. Although the Aydts argue over some of the details, the trial testimony sufficiently supports the district court’s findings that the Hensels planted a vegetable garden, planted raspberry bushes, planted trees, installed a discharge pipe from their swimming pool, parked their trailer, rode all manner of recreational vehicles, piled snow, and maintained a lawn in various areas of the disputed 10-by-545-foot parcel. We agree with the Aydts that some of these uses are merely “sporadic and occasional” and therefore do not demonstrate actual possession. But although the occasional recreational uses do not establish actual possession, the same cannot be said of the garden placement, the tree planting, and the raspberry bush planting. And although mowing grass over a boundary from one lawn into a neighboring lawn will not, in most circumstances, amount to anything more than an occasional use, *see Romans*, 217 Minn. at 180–81, 14 N.W.2d at 486 (“It is a well-known fact that many thousands of hom[e]owners have no boundary fences and that adjoining owners occasionally trespass on their neighbors’ lands in cutting grass”), here the record implies that the Hensels planted and maintained their lawn adjacent to the Aydts’ readily distinguishable agricultural use, supporting a finding that the establishment of the lawn evidences actual possession.

We also find support for the district court’s conclusion that the Hensels’ use constituted “open possession.” “Open possession” includes possession that 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). Not only would a hypothetical reasonable landowner have discovered the Hensels’ possession, John Aydt actually did. He observed the length of the ten-foot strip as he farmed, and he said that he knew the Hensels installed the pipe to discharge water from their pool. The trees and garden were likewise openly visible.

The Aydts dispute the district court’s determination that the Hensels “continually and exclusively” possessed the strip for the requisite 15-year period. They argue that the district court could not eliminate the possibility that John Aydt farmed some portion of the ten-foot strip between 1996 and 2002 because the evidence did not show where the trees were planted and Lois Hensel could not definitively say that the Aydts never farmed the strip. Evidence establishing the beginning of the Hensels’ possession is sketchy, but on our deferential review of district court factual findings, we cannot say the district court clearly erred. The record includes photographs of the evergreen trees and the raspberry bushes the Hensels say they planted, and both Lois and Steven Hensel testified about when and where they planted the trees. An exhibit includes an aerial perspective of the property with hand-drawn lines by one of the Hensels’ children marking the location of the garden and bushes. And John Aydt testified acknowledging the trees and bushes in the area. The district court weighed this evidence and found that the Hensels planted the trees and bushes in the disputed portion in 1996. A district court that sits without a jury “is the sole judge of the credibility of witnesses and may accept all or only part of any witness’[s] testimony.” *Roy Matson Truck Lines, Inc. v. Michelin Tire Corp*, 277 N.W.2d 361, 362 (Minn. 1979). The

district court believed the Hensels, not the Aydts, and the Aydts do not demonstrate on appeal that the district court's findings were clearly erroneous.

We turn to the disputed finding that the Hensels established “hostile” possession. The issue here is whether the Hensels’ use was hostile, as opposed to merely permissive. To show hostility in possession, the possessor must “enter and take possession of [the land] as if [it] were his own with intent to hold [it] for himself to the exclusion of all others.” *Thomas v. Mrkonich*, 247 Minn. 481, 481, 78 N.W.2d 386, 386 (1956). Competing presumptions were arguably at play here—one that favors hostility and one that opposes it. On one hand, hostility is presumed where, as here, all other elements of adverse possession are satisfied. *Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000). But on the other hand, a “close family relationship between the claimant of land and the record owner [creates] an inference, if not [a] presumption” that the possession was merely permissive. *Norgong v. Whitehead*, 225 Minn. 379, 383, 31 N.W.2d 267, 269 (1948). We must decide whether the district court applied the right presumption.

The district court refused to presume permissive use based on a close familial relationship because it found that “the Hensels and the Aydts were relatives in name only.” Whether family members have a sufficiently close familial relationship is a question of fact for the trial court. *See Adams v. Johnson*, 271 Minn. 439, 443–44, 136 N.W.2d 78, 81–82 (1965) (affirming district court’s conclusion that family relationship was too distant to raise the inference of permissive occupation). The Aydts insist that the evidence undermines the district court’s finding here, pointing to statements that Lois Hensel made when the Hensels applied for the zero-lot-line variance in 2012. She had explained to the board that her family

should have resolved the boundary dispute with the Aydts directly, and she “apologize[d] to the board on behalf of both parties.” She added that they had not addressed the issue immediately because “we figured if our family wanted to farm close to our shed, we didn’t think [it was] any big deal.”

Although this evidence might have supported a finding of a close family relationship, other evidence countered it. For example, the district court emphasized that the Hensels had visited the Aydts’ home only once in the 15 years after the Hensels built their shed. It observed that the Hensels did not inform the Aydts that they were selling their property, leaving the Aydts to learn of it only when they saw the “for sale” sign in the Hensels’ front yard. Lois Hensel testified that the Hensels and Aydts had a strained relationship. In this circumstance of conflicting evidence, it is within the district court’s province to decide between competing factual conclusions. Our role on appeal is limited; we examine the record for any reasonable evidence that supports the district court’s finding. *See Rasmussen*, 832 N.W.2d at 797. The evidence is not overwhelming, but it is enough to establish that the district court did not clearly err by finding that the Aydts and Hensels maintained a family relationship that was too chilly to presume that the Aydts had merely permitted the Hensels to use the land. We are in no position to substitute our interpretation of the competing evidence for the district court’s. We therefore do not disturb the district court’s presumption that the Hensels’ use was hostile, as the Aydts identify nothing in the record that required the district court to treat that presumption as rebutted.

Because the record supports the district court’s factual determinations about the nature and timing of the Hensels’ use of the disputed land, we affirm its adverse-possession holding. We turn to the Aydts’ challenge to the district court’s slander-of-title conclusions.

II

The Aydts contest the district court’s determination that the Hensels proved all the elements of their slander-of-title claim. A plaintiff proves a slander-of-title claim by establishing that the defendant (1) made a false statement about the plaintiff’s ownership of real property, (2) published the false statement, (3) acted with malice in making the false statement, and (4) caused special damages. *Paidar v. Hughes*, 615 N.W.2d 276, 279–80 (Minn. 2000); *see also Kelly v. First State Bank of Rothsay*, 145 Minn. 331, 332, 177 N.W. 347, 347 (1920). The Aydts concede that their filing of the notice of *lis pendens*, which had no factual or legal support, establishes the first two elements. They challenge the district court’s finding that they acted with malice and caused special damages. For the following reasons, we believe the record partly, but not entirely, supports the district court’s conclusions.

A

We first address the Aydts’ challenge to the district court’s finding that they published their notice of *lis pendens* with malice. Malice, in slander-of-title actions, is a reckless disregard for the truth or falsity of a matter “despite a high degree of awareness of probable falsity or entertaining doubts as to its truth.” *Brickner v. One Land Dev. Co.*, 742 N.W.2d 706, 711–12 (Minn. App. 2007) (quotation omitted). Malice is presumed when the publication is false and made by someone who has no ownership or possessory interest in

the subject property. *Virtue v. Creamery Package Mfg. Co.*, 123 Minn. 17, 46, 142 N.W. 1136, 1136 (1913). Without dispute here, the Aydts' notice of *lis pendens* was false, and they had no interest in the Hensels' titled property. But defendants can overcome the presumption of malice by showing good faith in their publication of the false statement, *id.* at 47, 142 N.W. 1136, and the Aydts attempt to rebut the presumption of malice by pointing to evidence of their good faith. The difficulty with the Aydts' argument is that the district court found, as a matter of fact, that their good-faith assertion lacked credibility, and the finding has sufficient evidentiary support.

The district court's credibility finding rejecting the Aydts' good-faith argument is not clearly erroneous. The district court heard all the evidence and, summarizing the issue, explained its reasoning for rejecting the Aydts' claim of good faith:

Sheila Aydt made it clear that she was unhappy with the sale of the property outside of the family and she was willing to use any means necessary to stop the sale of the property. In her deposition, Mrs. Aydt answered the question "did you care what means you used to thwart [the Hensels'] sale of their property?" with "No, I did not." On the second day of the trial, Mrs. Aydt indicated that she knew the *lis pendens* would prevent the Hensels from selling their property but that she did not care if the house did not sell.

The notice of *lis pendens* was recorded only days before the closing on the property. The Aydts personally received specific notice of the inappropriate *lis pendens* and the potential for a slander of title claim prior to the closing on the property. Instead of rescinding or discharging the notice, the Aydts' attorney acknowledged the Aydts' lack of a property interest in the Hensels' property and attempted to coerce a settlement in the form of a land swap. The sale of the property was held hostage by the Aydts.

The district court's reasoning is unassailable. The Aydts' reckless disregard of the fact that they lacked any legitimate property interest in the Hensels' land preceded their notice of *lis pendens* despite knowing that their notice would probably derail the Hensels' pending sale. This defeats the Aydts' claim of good faith and leaves them unable to avoid the presumption of malice. We hold that the district court did not clearly err by finding that the Aydts published their notice of *lis pendens* maliciously.

B

The Aydts' challenge to the district court's finding of \$132,149 in special damages, however, is compelling. "Special damages are those [that] 'are the natural, but not the necessary and inevitable result of a wrongful act.'" *Paidar*, 615 N.W.2d at 277 n.1. In slander-of-title actions, special damages frequently manifest in the form of a lost sale. And in *Paidar*, the supreme court included attorney fees as special damages. 615 N.W.2d at 281. The Aydts urge us to reverse based on three arguments. They argue first that the district court improperly included as special damages the attorney fees the Hensels accrued while prosecuting their adverse possession claim and defending against the Aydts' trespass and nuisance claims. They argue second that special damages cannot include any loss after the Aydts discharged their notice of *lis pendens*. They argue third that the special damages award should be reduced because the Hensels failed to mitigate their losses.

Special Damages Award for Collateral Litigation

The district court awarded special damages of \$35,511.92 for attorney fees charged by Barna, Guzy & Steffen, Ltd., and \$33,491.76 charged by Brendel and Zinn, Ltd. The

district court made an ambiguous finding to explain its award of attorney fees as special damages:

The attorneys' fees expended by the Hensels were appropriate and necessary to defend against the Aydts' [trespass and nuisance] claims as well as assert the [adverse possession, prescriptive easement, slander of title, and punitive damages] counterclaims in this matter. Because the pending litigation cast a pall over the property and because the litigation needed to be resolved prior to being able to sell the property, the attorneys' fees incurred by the Hensels even after the discharge of the *lis pendens* are damages suffered by the Hensels.

While the district court found a causal connection linking the attorney fees and “the litigation,” it failed to account for any distinction between “the litigation” over the Hensels’ slander-of-title claim, the Aydts’ trespass and nuisance claims, and the Hensels’ adverse-possession claim. Although the Hensels’ slander-of-title claim arose from the Aydts’ *lis pendens* filing, the other claims did not. We agree with the Aydts that the Hensels’ legal fees accrued to defend against the Aydts’ trespass and nuisance claims were not a direct consequence of the Aydts’ notice of *lis pendens*. In fact the Aydts brought these claims, and the Hensels began defending against them, even before the Aydts filed their notice of *lis pendens*. The district court suggests instead that virtually all the legal fees accrued by the Hensels directly resulted from the false *lis pendens* notice.

The record reveals that the district court carefully reviewed the attorney fees owed to Barna, Guzy & Steffen to assess any relationship between those fees and the notice of *lis pendens*. But the record does not indicate that the district court similarly scrutinized the fees generated by Brendel and Zinn. This omission is especially problematic given that each of the Brendel firm’s invoices includes an entry at the top indicating, “Total Billed to

Date,” and the latest of these invoices designates the accumulated total to be \$33,491.76—the precise amount awarded by the district court as special damages for the Brendel firm’s work. It is apparent that not all of that firm’s work addressed the *lis pendens* filing. One of the invoices, for example, includes an itemized charge to “Draft Amended Counterclaim to include Count for Adverse Possession.” And another entry covers “Legal research regarding motion for summary judgment on issues of trespass and nuisance.” To the extent the district court legally erred by treating all components of the litigation as caused by slander of title, or it factually erred by failing to accurately calculate and limit special damages only to compensate for fees incurred to address the slander of title, we must reverse. We remand for the district court to recalculate special damages and to award as special damages only those attorney fees that the Hensels accrued as a direct consequence of the Aydts’ notice of *lis pendens*.

Special Damages Award For Costs Incurred After Lis Pendens Discharge

The Aydts also maintain that no special damages can be awarded for costs incurred after they discharged their notice of *lis pendens* because the Hensels’ property became transferable again. Whether certain damages may be recovered as “special damages” is a question of law that we review de novo. *Paidar*, 615 N.W.2d at 279. The district court found the Aydts’ argument “technically accurate” but practically flawed. It awarded damages incurred after the discharge up to the conclusion of the prior appeal to this court because of the “reality that real estate agents did not want to engage in a sale/purchase of the property while the discharge of the notice of *lis pendens* was on appeal.” The district court’s explanation is well reasoned.

The Aydts rely on Minnesota Statutes section 557.02 (2016) to support their argument that damages accrued after the notice was discharged cannot be counted as special damages. That statute provides that a discharged notice of *lis pendens* is “void and of no force or effect.” We do not read this statute as establishing the standard for special damages but, rather, as explaining the legal effect of a discharge. And whether a loss qualifies as a special damage arising from slander of title depends not on the false statement’s legal effect but on whether the loss directly resulted from the statement. *See Paidar*, 615 N.W.2d at 281 (permitting recovery of attorney fees even though plaintiff sold his land while it was encumbered by the false statement). It appears that the district court operated with this understanding when it determined that the Hensels still suffered special damages that were a direct result of the false statement even after the false statement had been discharged. We see no error in the district court’s reasoning.

Special Damages Award and Duty to Mitigate

The Aydts argue next that the district court erred when it failed to reduce the Hensels’ special-damages award because the Hensels failed to mitigate their losses. Wronged parties generally must use “reasonable diligence and good faith” to mitigate their damages. *Wavra v. Karr*, 142 Minn. 248, 251, 172 N.W. 118, 120 (1919). Whether a party used reasonable diligence and good faith is a question of fact, reviewed only for clear error. *See id.* at 251, 172 N.W. at 119. The district court found that the Hensels did contact real estate agents to relist the property after their sale fell through. And it also found that agents avoided becoming involved because the notice of *lis pendens* was being disputed on appeal. The Aydts argue that the Hensels ruined other opportunities to sell by telling prospective

buyers about the litigation. The Aydts do not (and we presume cannot) cite any authority for the peculiar notion that sellers who inform potential buyers that they have sued to remedy a false claim of ownership that a third party has filed against the property thereby lose their right to recover special damages caused by the false claim. We see no clear error in the district court's factual finding that the Hensels used reasonable diligence and good efforts to mitigate the losses they suffered from the Aydts' unjustified filing against the Hensels' property.

III

The Aydts finally challenge the district court's award of punitive damages. We review a challenge to an award of punitive damages for an abuse of discretion. *Ray v. Miller Meester Advert. Inc.*, 664 N.W.2d 355, 371 (Minn. App. 2003) (citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433, 121 S. Ct. 1678, 1684 (2001)). The district court may award punitive damages if it finds by clear and convincing evidence that the defendant acted with a "deliberate disregard for the rights or safety of others." Minn. Stat. § 549.20 (2017). A plaintiff makes this showing by establishing that the defendant knew of facts creating "a high probability of injury to the rights or safety of others" and consciously, deliberately, or indifferently acted in a manner that disregarded this high probability of injury. *Id.*, subd. 1(b).

The Aydts argue that because they filed their notice of *lis pendens* in good faith, the district court could not rightly conclude that the filing was in "deliberate disregard" of probable harm to the Hensels' rights. We have already affirmed the district court's finding that the Aydts did not file the notice in good faith, and this affirmation defeats the Aydts'

argument here. But we still must reverse. The district court decided to award punitive damages and determined the amount in part by “consider[ing] the substantial compensatory damages being awarded.” Because we are reversing and remanding the special damages determination for recalculation for the reasons we have identified, and because the district court rested its punitive-damages award in part on the amount of those damages, on remand the district court should also reconsider what, if any, punitive damages to award.

Affirmed in part, reversed in part, and remanded.