

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0705**

James A. Compart, et al.,
Appellants,

vs.

Justin J. Wolfstellar, et al.,
Respondents,

Bank of West,
Defendant.

**Filed January 16, 2018
Reversed and remanded
Hooten, Judge**

Sherburne County District Court
File No. 71-CV-16-513

Matthew C. Berger, Dean M. Zimmerli, Gislason & Hunter, LLP, New Ulm, Minnesota
(for appellants)

Jeffrey A. Scott, Brian W. Varland, Heley, Duncan & Melander, PLLP, Minneapolis,
Minnesota (for respondents)

Considered and decided by Larkin, Presiding Judge; Hooten, Judge; and Smith, T.,
Judge.

S Y L L A B U S

I. An adverse claimant's acceptance of a conveyance of real property from the record title holder, before the statutory period has run, only interrupts his adverse possession if the adverse claimant acknowledges the grantor's superior title in the conveyed interest.

II. A purchaser who obtains title at a mortgage foreclosure sale takes title subject to a prior adverse possession unless, within the applicable statutory period, either the adverse claimant abandons its possession or one with a superior right to possess the real property ejects the adverse claimant.

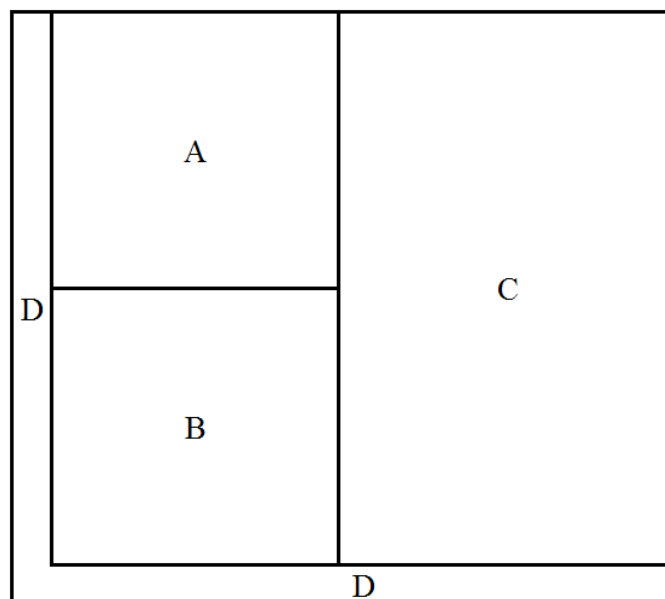
OPINION

HOOTEN, Judge

Appellants contend that the district court erred by granting summary judgment in favor of respondents on appellants' adverse possession claim and on respondents' quiet title counterclaim. Appellants argue that their possession of the disputed real property was hostile for the required 15 years, and that their interest is superior to respondents' interest. We reverse and remand.

FACTS

This case focuses on real property in Sherburne County, Minnesota, which is divided into four parcels: A, B, C, and D.



Parcels A and B are each square-shaped and approximately 5 acres, with Parcel A immediately north of Parcel B. Parcel C is approximately 12 acres and is immediately east of Parcels A and B, with the same northern boundary as Parcel A and the same southern boundary as Parcel B. Parcel D is the disputed parcel. It is an approximately 3-acre L-shaped parcel running along the western boundary of Parcels A and B and along the southern boundary of Parcels B and C. Parcels A and B are separate tax parcels, but Parcels C and D together form one tax parcel.

Appellants James Compart and Diana Compart own Parcels A and B, and respondents Justin Wolfsteller¹ and Janeen Wolfsteller own Parcel C.² Both the Comparts and the Wolfstellers claim an ownership interest in Parcel D.

For the purpose of this summary judgment appeal, the following facts are not disputed. In 1992, Philip and Donna Larson acquired an interest in Parcels A, B, C, and D by entering into a contract for deed for the purchase of the parcels with Berlinson Associates, the title owners of the parcels. Five years later, the Comparts entered into a purchase agreement to buy “13.03+/-acres” from the Larsons for \$71,775. On September 15, 1997, the Larsons delivered a quitclaim deed, and Berlinson Associates delivered a warranty deed, to James Compart for Parcels A and B, which included the grant of “an

¹ The case title incorporates the spelling of respondents’ last name, Wolfstellar, from the district court’s order. See Minn. R. Civ. App. P. 143.01. But because he spelled his last name as Wolfsteller in his deposition, we use his spelling throughout this opinion.

² Respondent Alerus Financial, N.A., holds a mortgage on Parcels C and D, as does Defendant Bank of West. Both Alerus and Bank of West played no role in the underlying facts because the events at dispute occurred before either party had an interest in the disputed land. And, Bank of West is not a party to this appeal.

easement for ingress and egress and utility purposes” over Parcel D. The Comparts argue the deeds were in error because their purchase from the Larsons also included Parcel D and the deeds should have conveyed title to the Comparts for Parcel D, with an easement granted in favor of the Larsons. Before September 15, 1997, the Comparts leased Parcels A, B, and D for farming purposes, and they farmed these parcels since the 1997 purchase.

The Larsons fully paid their contract for deed for Parcels C and D, and Berlinson Associates conveyed a warranty deed to the Larsons for those parcels on August 16, 2000. In 2008, the Larsons granted a mortgage encumbering Parcels C and D. Then, on March 5, 2012, the Comparts granted the Larsons an easement over Parcels B and D in a Road Agreement and Easement.³ The agreement, signed by the Comparts and the Larsons, recognized the Comparts as owners of Parcel D, and the Larsons as owners of only Parcel C. Nine days later, on March 14, the Larsons conveyed Parcel D by quitclaim deed to the Comparts. The deed states it was “given to correct an error in the legal description set forth in” the August 16, 2000 warranty deed.

The Wolfstellers claim ownership of Parcels C and D through a chain of title going back to the Larsons’ 2008 mortgage. In 2012, that mortgage was foreclosed, Parcels C and D were sold at a sheriff’s sale, and, after a conveyance between financial institutions, the Wolfstellers purchased Parcels C and D from Wells Fargo.

The Comparts brought this lawsuit in 2016, alleging adverse possession of Parcel D and two boundary-line claims. In their answer, the Wolfstellers filed a quiet title

³ There is a road traversing Parcels B and D that connects Parcel C to Highway 169.

counterclaim. The Wolfstellers moved for summary judgment on all claims, and the district court granted the motion in favor of the Wolfstellers on all three of the Comparts' claims, but set the Wolfstellers' quiet title counterclaim for trial. Both parties filed motions for reconsideration. The district court denied the Comparts' reconsideration motion, granted the Wolfstellers' reconsideration motion, declared that the Comparts "have no right, title, or interest in Parcel D," and granted summary judgment to the Wolfstellers on their quiet title counterclaim. The Comparts appeal the summary judgment decisions on their adverse possession claim and the Wolfstellers' quiet title counterclaim.

ISSUES

- I. Did the district court err in determining that the Comparts' possession of Parcel D was not hostile for the 15-year statutory period and, on that basis, granting summary judgment to the Wolfstellers on the Comparts' adverse possession claim?**
- II. Did the district court err in granting summary judgment to the Wolfstellers on their quiet title counterclaim?**

ANALYSIS

I. Adverse Possession

The Comparts contend that the district court erred in granting summary judgment to the Wolfstellers because their possession of Parcel D was hostile for the required 15-year period. "On appeal from summary judgment, [appellate courts review] de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law to the facts." *Harmon v. Comm'r of Revenue*, 894 N.W.2d 155, 159 (Minn. 2017) (quotation omitted). In doing so, appellate courts "view the evidence in the light most favorable to the party against whom summary judgment was granted,"

Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995), and resolve all doubts and factual inferences against the moving party, *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 661 (Minn. 2015). But, “a ‘metaphysical doubt’ as to a factual issue will not defeat a summary judgment motion.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

To succeed on an adverse possession claim, a plaintiff must prove, “by clear and convincing evidence, an actual, open, hostile, continuous, and exclusive possession for the requisite period of time which, under our statute, is 15 years.” *Ehle v. Prosser*, 293 Minn. 183, 189, 197 N.W.2d 458, 462 (1972); *see also* Minn. Stat. § 541.02 (2016) (providing that statutory period is 15 years). It is the adverse claimant’s burden “to come forward with the essential facts establishing the elements of adverse possession. The evidence must be strictly construed and amount to clear and positive proof before title by adverse possession will be granted.” *Stanard v. Urban*, 453 N.W.2d 733, 735 (Minn. App. 1990) (citation omitted), *review denied* (Minn. June 15, 1990). There is also a statutory requirement that, in certain instances, the adverse possessor must pay property taxes on the disputed parcel for “at least five consecutive years” during the period of adverse possession. Minn. Stat. § 541.02.

The district court determined that the Comparts did not have hostile possession of Parcel D for the required 15 years. It reasoned that because the Comparts had a permissive easement from 1997 until March 2012, and held title via a quitclaim deed granted by the Larsons from March 2012 until the July 26, 2012 mortgage foreclosure, any possession during that timeframe was not hostile and therefore did not count toward the period of

adverse possession. For the purposes of this appeal, the Wolfstellers do not dispute that the Compart's possession was actual, open, and exclusive or that the Compart's were in possession of Parcel D for the required 15 years.⁴ But, the Wolfstellers argue that the Compart's possession of Parcel D was not continuously hostile for the required 15 years and that, as an alternative ground to defeat their adverse possession claim, the Compart's failed to pay property taxes as required by Minn. Stat. § 541.02.

Hostile possession “does not refer to personal animosity or physical overt acts against the record owner of the property.” *Ehle*, 293 Minn. at 190, 197 N.W.2d at 462. Rather, hostility only requires that one “enter and take possession of the lands as if they were his own, and with the intention of holding for himself to the exclusion of all others.” *Thomas v. Mrkonich*, 247 Minn. 481, 484, 78 N.W.2d 386, 388 (1956) (quotation omitted).

⁴ The Compart's argue that when the other four elements of an adverse possession claim are met, hostility can be presumed and the burden shifts to the defendant to show that the use was permissive. This argument is supported by caselaw on prescriptive easements, but has not been squarely addressed in the adverse possession context. See *Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000) (“A prescriptive easement claim involves the same elements of proof as an adverse possession claim . . . [and] [w]here the claimant of an easement by prescription has shown open, visible, continuous, and unmolested use for the statutory period, inconsistent with the rights of the owner of the servient estate . . . the use will be presumed to be under claim of right and adverse, so as to place on the owner of the servient estate the burden of rebutting the presumption by evidence that the use was permissive.” (quotation omitted)). Because we have determined for purposes of reviewing this summary judgment that the Wolfstellers have not identified any events that interrupted the hostility period, we decline to decide whether the presumption of hostility applies in the adverse possession context. Cf. *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 110 n.2 (Minn. App. 2002) (analyzing *Boldt* and stating that supreme court “has at least implicitly suggested that this presumption applies in adverse-possession cases,” but declining to address issue because appellants did not argue they were entitled to presumption).

On appeal, the Wolfstellers do not defend the district court’s reasoning that the grant of an easement interrupted the period of hostility. The Comparts’ use of Parcel D was hostile because their use exceeded the express grant of the easement, which was “for ingress and egress and utility purposes over, under and across” Parcel D. “It is well settled that the extent of an easement should not be enlarged by legal construction beyond the objects originally contemplated or expressly agreed upon by the parties.” *Minneapolis Athletic Club v. Cohler*, 287 Minn. 254, 258, 177 N.W.2d 786, 789–90 (1970). Here, the Comparts argue that they have farmed the property consistently since purchasing the property in 1997. Because farming is a use other than entering and exiting property, and is not a “utility purpose,” the Comparts’ farming of Parcel D was hostile.⁵ See *Ebenhoh*, 642 N.W.2d at 111–12 (holding that cultivating crops and grazing cattle was hostile because it constituted entering “the disputed tract and [taking] possession as if the tract was their own”); cf. *Nordin v. Kuno*, 287 N.W.2d 923, 927 (Minn. 1980) (noting that “an easement for ingress and egress . . . is not an easement for parking or picnicking”). Moreover, there is nothing in *Ganje v. Schuler*, 659 N.W.2d 261 (Minn. App. 2003), the case relied upon by the district court, which suggests that an easement for ingress, egress, and utility purposes makes the Comparts’ farming of the land a permissive use.

Instead, the Wolfstellers argue that the 2012 quitclaim deed, the 2008 mortgage, and the 2012 foreclosure and sheriff’s sale interrupted the hostility period, and that,

⁵ Because the Wolfstellers, for purposes of this appeal, do not challenge that the Comparts were farming the land, we treat as fact that the Comparts farmed Parcel D openly and exclusively and only decide the legal effect of that fact if it is established at trial.

alternatively, the Comparts failed to comply with a statutory requirement to pay certain real estate taxes while in hostile possession of Parcel D.

A. 2012 Quitclaim Deed

The Wolfstellers argue that the Comparts' acceptance of the March 2012 quitclaim deed from the Larsons is an acknowledgment by the Comparts that the Larsons held superior title, interrupting the hostility period and the continuity of their adverse possession. See *Olson v. Burk*, 94 Minn. 456, 458, 103 N.W. 335, 336 (1905) ("An acknowledgment by the adverse claimant of the owner's title before the statute has run in his favor breaks the continuity of his adverse possession . . ."). The Comparts counter by relying on *Dozier v. Krmpotich*, 227 Minn. 503, 509, 35 N.W.2d 696, 700 (1949), which states that "[t]he continuity of adverse possession is not broken by the adverse claimant's taking a written conveyance of the interest claimed by him from parties claiming ownership of the property or some interest therein."

In evaluating the significance of the quitclaim deed, the key question is whether the adverse claimant obtained title as a way "to get rid of the outstanding title and unite it to the one under which he has been holding," or if instead he attempted a "purchase of the land from the owner." *Id.*; *Olson*, 94 Minn. at 458, 103 N.W. at 336. An attempt to purchase the real property from the record owner acknowledges that superior title rests with the record owner and interrupts adverse claimant's continuous, hostile possession because he is no longer holding the real property out as his own. See *Olson*, 94 Minn. at 458, 103 N.W. at 336–37. But, an adverse claimant who takes "a conveyance from the owner of record does not defeat his claim by right of adverse possession. A disseizor may

strengthen his adverse claim by taking as many conveyances from those claiming or having an interest in the land as he sees fit.” *Skala v. Lindbeck*, 171 Minn. 410, 413, 214 N.W. 271, 272 (1927); *see also Dozier*, 227 Minn. at 509, 35 N.W.2d at 700 (“[T]aking a written conveyance admits, and admits only, that the occupant deems it worth while to get rid of the outstanding title and unite it to the one under which he has been holding. It does not prove, and alone it does not even tend to prove, a change in the character of the possession or the recognition of a title paramount.” (quotation omitted)). Thus, if the adverse claimant merely accepts a written conveyance, instead of purchasing or attempting to purchase the land, accepting that conveyance is not an acknowledgement of superior title and the adverse possession claim continues to run.

Based on these undisputed facts the Comparts did not purchase Parcel D as part of the 2012 transaction, and their acceptance of the quitclaim deed was not an acknowledgement that the Larsons held superior title.

The Larsons sent the Comparts an email relating to the 2012 quitclaim deed, which shows the Larsons acknowledging that superior title rests with the Comparts, and does not support the argument that the Comparts acknowledged the Larsons as superior title holders. In the email, Donna Larson told the Comparts that the Larsons had “done some calculating on the property taxes on the 2.98 acres that should be in your name since the sale (way back in 1996!).” The Comparts paid the Larsons \$754 as reimbursement of the property taxes, and the Wolfstellers argue that this payment makes the conveyance a purchase acknowledging superior title in the Larsons.

But the fact that money changed hands is not dispositive in this case. First, under *Dozier*, the payment of money to obtain a written conveyance is not dispositive of whether the conveyance was a purchase. See 227 Minn. at 506, 35 N.W.2d at 698. In *Dozier*, the defendant obtained, “for a consideration of one dollar and other considerations, . . . an easement to use the driveway in question,” and the court concluded that the conveyance did not break the defendant’s continuous, hostile use of the driveway. *Id.*

Second, the spreadsheet attached to the email shows that the \$754 the Comparts paid the Larsons was the parties’ estimate of the property tax on Parcel D that the Larsons had been paying, and was paid to the Larsons as reimbursement for those tax payments. Reimbursing the Larsons for the property tax paid on Parcel D recognizes that the Comparts, as the party having superior title, owed those taxes, not the Larsons. And, based on the Comparts’ original purchase price of \$71,775 for 13 acres, approximately \$5,500 an acre, the Wolfstellers’ assertion that the \$754 was the purchase price for 3 acres of farm land is insufficient to create a fact issue.

Third, the deed itself states that it is a corrective deed, which is also evidence that it was not a purchase by the Comparts, but a recognition by the Larsons that the Comparts held the rightful claim to Parcel D.⁶ Fourth, the Road Agreement and Easement—signed by the Larsons and the Comparts only nine days before granting the quitclaim deed—

⁶ We reject the Comparts’ argument that this deed has any actual effect as a corrective deed because this deed did not include the original grantor. However, the fact that the deed—signed by both the Comparts and the Larsons—states that it is an attempt to correct an earlier error is evidence supporting the conclusion that the Comparts’ acceptance of the 2012 quitclaim deed was not an acknowledgement of superior title in the Larsons.

recites that the Comparts are the owners of Parcel D. These events in March 2012 show the Larsons acknowledging the Comparts' superior title, not the Comparts acknowledging the Larsons' superior title.

In response, the Wolfstellers point to James Compart's affidavit, arguing:

James Compart testified in his Affidavit opposing summary judgment about negotiations with the Larsons in early 2012 to obtain a "Quit Claim Deed" "to settle the adverse interest claim" over "the disputed Parcel D tract." James Compart also testified to his agreement to pay the Larsons "for real estate taxes paid on what was Parcel D dating back from when [the Comparts] *should have received ownership . . .*" James Compart further testified to the veracity of email communications from Donna Larson from that timeframe in which the Larsons stated: "*As soon as that agreement is reached and money is ready to be paid, we'll sign the papers and this should be able to [be] completed!!*"

The statement that the deed was to settle the adverse possession claim supports the Comparts' argument that they were not purchasing Parcel D, but obtaining record title to property that they were possessing as their own and to which they had a rightful claim. Additionally, James Compart's claim that he "should have received ownership" in 1997 is not an acknowledgement that the Larsons had superior title. Rather, the affidavit states, "That your affiant in 2012 when agreeing to settle the matter with [the] Larsons, agreed to reimburse them for real estate taxes paid on what was Parcel D dating back from when [the Comparts] should have received ownership *and took possession as an owner* in 1996 to 1997." (Emphasis added.) None of this evidence supports the conclusion that the Comparts' acceptance of the quitclaim deed acknowledges superior title in the Larsons.

Finally, the cases upon which the Wolfstellers rely are distinguishable. In *Olson*, the adverse claimant entered into multiple contracts to purchase the contested real property from the record owner. 94 Minn. at 458–59, 103 N.W. at 336–38. The adverse claimant in *Cluss v. Hackett*, 127 Minn. 397, 398, 149 N.W. 647, 648 (1914), “entered into negotiations with the holder of the record title for the purchase of the property.” And, in *Stanard*, the adverse claimant “testified that he instructed a realtor . . . to approach [the record title holder] and see if he would sell the disputed property to [the adverse claimant].” 453 N.W.2d at 736. All of these cases relied on facts showing an attempt to purchase the disputed property. Here, the facts in the record show that the Comparts were not purchasing or attempting to purchase Parcel D.

Moreover, if the Comparts had not accepted the quitclaim deed, their adverse possession claim would have continued to run and, assuming they prove the other elements of adverse possession at trial, they would be entitled to fee title. We will not deem acts undertaken to strengthen the Comparts’ adverse possession claim to have the effect of abandoning it—at least not where the evidence shows that they did not acknowledge superior title in the Larsons.

We hold, based upon these undisputed facts and the caselaw, that the Comparts’ acceptance of the 2012 quitclaim deed was not an acknowledgement of superior title in the Larsons and therefore did not interrupt the hostility or continuity of their adverse possession claim.

B. 2008 Mortgage, Foreclosure, and Sheriff's Sale

The Compart's continuous, hostile possession of Parcel D, which predates the mortgage granted by the Larsons in 2008, was not interrupted by the grant of the mortgage or the mortgage foreclosure sale. The purchaser at the foreclosure sale and all subsequent purchasers took title to Parcel D subject to the Compart's possession. "It is well settled by the decisions in this state that actual possession and occupancy of land by a party, other than the [seller] thereof, is notice sufficient to put a purchaser on inquiry as to the particulars of the occupant's claim of title." *Nellas v. Carline*, 161 Minn. 157, 159, 201 N.W. 299, 300 (1924). One who purchases or takes an encumbrance on land, while that land "is in the actual possession" of one other than the seller, "is bound to make inquiries of the occupants, and to ascertain the nature and extent of their interests." *Morrison v. March*, 4 Minn. 422, 429–30, 4 Gil. 325, 331 (1860) (quotation omitted). If there is a dispute on this point, it is whether the Compart's had "actual possession and occupancy" of Parcel D, and that is a question for the trier of fact. *See Sage v. Morosick*, 69 Minn. 167, 169–70, 71 N.W. 930, 931 (1897) ("The question whether there has been actual possession for the purpose of establishing title by adverse possession under the statute of limitations is usually one of fact for the jury."); *see also Skala*, 171 Minn. at 413, 214 N.W. at 272 ("The law prescribes no particular manner in which possession shall be maintained or made manifest. It must be of such a character as to be unequivocal notice to the true owner that someone is in possession in hostility to his title. Much depends on the nature and situation of the land and the uses to which it is adapted."); *Murphy v. Doyle*, 37 Minn. 113, 115, 33 N.W. 220, 221 (1887) ("[T]o constitute adverse possession there need not be a fence or a

building . . . it is sufficient if visible and notorious acts of ownership have been exercised over the premises for the time limited by statute.”).

The Wolfstellers argue that because the Comparts accepted a quitclaim deed from the Larsons, they had an obligation to redeem their interest in Parcel D at the mortgage foreclosure sale, and that the Comparts’ failure to redeem the interest they obtained through the quitclaim deed would extinguish not only that interest, but would also end the hostility of their adverse possession claim. *See* Minn. Stat. § 580.23, subd. 1(a) (2016) (“When lands have been sold in conformity with the preceding sections of this chapter, the mortgagor, the mortgagor’s personal representative or assigns, within six months after such sale . . . may redeem such lands, as hereinafter provided, by paying the sum of money for which the same were sold”); *see also* Minn. Stat. § 580.12 (2016) (“[U]pon expiration of the time for redemption, the [sheriff’s certificate of sale] shall operate as a conveyance to the purchaser or the purchaser’s assignee of all the right, title, and interest of the mortgagor in and to the premises named therein at the date of such mortgage”). We disagree.

First, the Wolfstellers’ argument about the effect of a mortgage sale without redemption is irrelevant. The rule as stated in *Dozier* is that

[w]here land in the possession of an adverse claimant is purchased by another at a foreclosure sale of the mortgagor’s estate, the sale does not interrupt the continuity of the adverse possession of one not a party to the proceedings, and the purchaser succeeding only to the estate of the mortgagor must bring his action to recover the land within the period of the adverse possession.

227 Minn. at 510, 35 N.W.2d at 700 (quotation omitted). The foreclosure sale did not preclude the Comparts' adverse possession claim because the Comparts were still in possession of Parcel D. *See id.*; *see also* Minn. Stat. § 580.12 (“[T]he [sheriff’s certificate of sale] shall operate as a conveyance to the purchaser or the purchaser’s assignee of all the right, title, and interest of the mortgagor in and to the premises named therein *at the date of such mortgage . . .*” (emphasis added)). The Larsons, as mortgagors, were at risk of losing title to Parcel D, unless either the Comparts abandoned their adverse possession of Parcel D or the Larsons or their assigns ejected the Comparts. Unless one of those events were to happen within the statutory period, the title obtained at the mortgage sale was subject to the same risk.

A mortgagor, before the expiration of the statutory period of adverse possession, holds the right to eject parties in possession. *See Levine v. Twin City Red Barn No. 2, Inc.*, 296 Minn. 260, 263, 207 N.W.2d 739, 741 (1973) (“Ejectment can be maintained only against a person in possession by one having a present exclusive right to possession.”). If the Comparts adversely possessed the property for 15 years, they acquired title to the property and neither the mortgagor nor their successors in interest could eject them. *See Ross v. Cale*, 94 Minn. 513, 515, 103 N.W. 561, 561 (1905) (“[T]itle acquired by adverse possession is a title in fee simple, and is as perfect as a title by deed.”). As the Michigan Supreme Court succinctly explained, a mortgagee cannot “assert a right against one in possession of land holding adversely that could not be asserted by the mortgagor if the mortgage had not been made.” *Schafer v. Hauser*, 111 Mich. 622, 625, 70 N.W. 136, 137 (1897); *see also Dozier*, 227 Minn. at 509–10, 35 N.W.2d at 700 (adopting that principle).

The mortgagor, after the Comparts perfected their adverse possession claim, could not assert a superior right, and the same is true for the mortgagor's assigns. Because no one with the right to possess Parcel D acted to eject the Comparts before or after the mortgage foreclosure sale, the 15-year period continued to run.

Second, even assuming the Wolfstellers are correct that the mortgage foreclosure sale had the power to extinguish the Comparts' interest in Parcel D, there is no evidence in the record that the Comparts received actual notice of the mortgage foreclosure sale. The mortgage foreclosure sale statute requires that, "at least four weeks before the appointed time of sale a copy of such notice shall be served in like manner as a summons in a civil action in the district court upon the person in possession of the mortgaged premises, if the same are actually occupied." Minn. Stat. § 580.03 (2016). The record reflects that actual notice was provided to the Larsons, but not to the Comparts. As the Minnesota Supreme Court has explained:

The purpose of requiring this notice [is] . . . to prevent a wrong which might result if no notice was required to be given to persons not only in possession, but also in actual occupation. "Actual occupancy" is defined as an open, visible occupancy, as distinguished from the constructive possession which follows the legal title. "Actual possession" has practically the same meaning. It means possession in fact, effected by actual entry upon the premises and actual occupancy. The word "actual" is usually used in a statute in opposition to "virtual" or "constructive," and calls for an open, visible occupancy.

Cutting v. Patterson, 82 Minn. 375, 380, 85 N.W. 172, 173 (1901). "Whether land is 'actually occupied' is primarily a question of fact." *Pipkorn v. Dunn*, 408 N.W.2d 705, 707 (Minn. App. 1987), *review denied* (Minn. Sept. 30, 1987). Under these facts the

Comparts occupied Parcel D by farming it, and therefore were required to be served with actual notice of the foreclosure proceedings. *See Cutting*, 82 Minn. at 381, 85 N.W. at 173 (holding that where “[t]he mortgaged tract was inclosed with a substantial fence, and in the growing season was under cultivation as a garden the mortgagor was in actual occupation of the premises, within the meaning of the statute, and was entitled to notice of the proceedings”).

Viewing the record in the light most favorable to the non-moving party, including the lack of evidence that the Comparts received notice of the foreclosure or otherwise participated in the foreclosure action, we conclude that the Wolfstellers have failed to show that the mortgage foreclosure sale interrupted the Comparts’ continuous, hostile possession of Parcel D.

C. Tax Payment

The Wolfstellers argue in the alternative that the Comparts failed to pay the required real estate taxes on Parcel D for “at least five consecutive years” during the time that the Comparts claim they adversely possessed Parcel D. *See* Minn. Stat. § 541.02. The statute reads as follows:

No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff, the plaintiff’s ancestor, predecessor, or grantor was seized or possessed of the premises in question within 15 years before the beginning of the action.

Such limitations shall not be a bar to an action for the recovery of real estate assessed as tracts or parcels separate from other real estate, unless it appears that the party claiming title by adverse possession or the party’s ancestor, predecessor, or grantor, or all of them together, shall have paid taxes on the

real estate in question at least five consecutive years of the time during which the party claims these lands to have been occupied adversely.

Id. The Comparts argue that Parcel D is not “real estate assessed as tracts or parcels separate from other real estate,” and thus it was not necessary for them to have paid the real estate taxes in order to prevail on their adverse possession claim. *See id.* It is undisputed that Parcel D is not a separate parcel for tax purposes. Parcels A and B are separate tax parcels, but Parcels C and D together form one tax parcel.

The supreme court’s interpretation of Minn. Stat. § 541.02 is inconsistent with the Wolfstellers’ argument but consistent with the Comparts’ argument. In *Ehle*, there were two separate tax parcels adjacent to each other, and the plaintiffs were attempting to acquire title to 37 feet of the defendants’ parcel immediately adjacent to the plaintiffs’ parcel. 293 Minn. at 186–89, 197 N.W.2d at 460–62. The disputed portion was not separately assessed, and the court held that the plaintiffs were exempt from the requirement to pay taxes because the disputed land was not assessed separately for tax purposes. *Id.* The Wolfstellers argue that this court expanded on *Ehle* in *Grubb v. State*, 433 N.W.2d 915, 920 (Minn. App. 1988), *review denied* (Minn. Feb. 22, 1989), and that *Grubb* requires the Comparts to meet the tax-payment requirement.

While the Wolfstellers are correct that *Grubb* goes further than *Ehle*, *Grubb* does not support their position. In *Grubb*, the adverse claimant was attempting to obtain title to “approximately 13 acres of his neighbor’s 16-acre parcel.” 433 N.W.2d at 919. We concluded that “the legislature intended the tax-payment requirement to apply to actions where the disseizor claims *all or substantially all* of an assessed tract or parcel” because

“if such were not the legislative intent, a disseizor could always avoid the tax-payment requirement and consequent notice to the owner by claiming anything less than all of the assessed tract or parcel.” *Id.* at 920 (emphasis added). We held that the adverse claimant in *Grubb* was required to have met the tax-payment requirement because the disputed real property made up “approximately 80% of a separately assessed parcel.” *Id.* at 920–21. Here, however, Parcel D is about 3 acres out of the approximate 15-acre separately assessed tax parcel consisting of Parcels C and D, or around 20% of the tax parcel. There is no reasonable argument that 20% is “substantially all” of the tax parcel at dispute in this case.

The Wolfstellers also rely on *Bryant v. Gustafson*, 230 Minn. 1, 40 N.W.2d 427 (1950), or—more specifically—on *Grubb*’s explanation of what *Bryant* held, to support their position. *Bryant* involved a separately assessed road that was dedicated to the use of the local lot owners. *See id.* at 4–5, 40 N.W.2d at 430–31. The Wolfstellers argue that *Bryant* held that the tax-payment requirement applied even when only a portion of a separately assessed parcel was being claimed under a theory of adverse possession. *Grubb* states:

Nowhere did the court indicate that the portion of the roadway the respondent disseizors claimed must also be separately assessed. Rather, the entire roadway was separately assessed for taxes, and the adverse claim to a portion of that roadway was defeated because the disseizor had not paid such taxes, as required under Minn. Stat. § 541.02.

Grubb, 433 N.W.2d at 921 (emphasis added). This language goes further than the actual holding of *Grubb*, and goes further than *Bryant*.

First, *Bryant* relied on *Skala*, and *Skala* does not support the Wolfstellers’ argument. See *Bryant*, 40 N.W.2d at 433–34. This court in *Wagner* analyzed *Skala* and stated that the land at issue in *Skala* “was 6.2 acres south of a fence purportedly separating two parcels of land, but the district court found that only 4.7 acres of that land had been adversely possessed.” *Wagner v. McPhaill*, No. A07-2265, 2008 WL 4909420, at *2–3 (Minn. App. Nov. 18, 2008) (citing *Skala*, 171 Minn. at 411, 214 N.W.2d at 271), review denied (Minn. Feb. 17, 2009).⁷ Resolving the tax dispute, the *Skala* court stated that “[t]he fact that defendant paid no taxes on the 4.7 acres is of no importance. There is no proof, and it is not to be supposed, that this land was separately assessed.” *Skala*, 171 Minn. at 413–14, 214 N.W. at 272. “Thus, in *Skala*, the disseizor’s failure to pay taxes on the portion of the disputed land that was adversely possessed was ‘of no importance’ because that portion of the disputed land had not been separately assessed.” *Wagner*, 2008 WL 4909420, at *3.

Second, the applicable syllabus point from *Bryant* states, “Where the land in question is separately assessed, the payment of taxes by a disseizor—or his predecessors in adverse possession—for a period of five consecutive years during the period of adverse occupancy is a prerequisite to the acquisition of title by adverse possession.” 230 Minn. at 2, 40 N.W.2d at 429. And while *Bryant* implies that the adverse claimant in that case was required to pay the real estate taxes on the road, that implication is not controlling because the court first held that the adverse claimants had not satisfied the 15-year requirement,

⁷ While *Wagner* is unpublished and not precedential, Minn. Stat. § 480A.08, subd. 3 (2016), we adopt its reasoning here because we find it persuasive and it explains the error in the Wolfstellers’ argument.

making it irrelevant whether they had paid taxes. *Id.*, 230 Minn. at 10, 40 N.W.2d at 433–34. Finally, it also appears from the relevant portion of the plat map, included in the *Bryant* opinion, that the adverse claimant in *Bryant* was attempting to acquire title to approximately greater than 50% of the separately assessed roadway, while here the attempted acquisition is approximately 20% of the separately assessed parcel. *See id.*, 230 Minn. at 4–5, 40 N.W.2d at 430–31. Thus, the Comparts were not required to pay the real estate taxes on Parcel D and any lack of such payment does not bar their adverse possession claim.⁸

II. Quiet Title

Because we hold that the district court erred in granting summary judgment against the Comparts on their adverse possession claim, we also hold that the district court erred in granting summary judgment in favor of the Wolfstellers on their quiet title counterclaim because there are material disputes of fact over whether the Comparts obtained title to Parcel D through adverse possession.

D E C I S I O N

Because we hold that the Comparts’ acceptance of the 2012 quitclaim deed was not an acknowledgement of superior title in the Larsons, that neither the execution of the mortgage nor the foreclosure sale interrupted the continuity or hostility of the Comparts’ adverse possession claim, and that the tax-payment requirement of Minn. Stat. § 541.02

⁸ The Comparts also argue that they met the tax-payment requirement by reimbursing the Larsons for the taxes paid by the Larsons. Because we hold that the Comparts were not required to meet this requirement, we do not address whether their payment to the Larsons satisfies the requirement.

does not apply to the Comparts, we reverse the district court's grant of summary judgment in favor of the Wolfstellers on the Comparts' adverse possession claim. Because there are material disputes of fact over whether the Comparts obtained title to Parcel D by adverse possession, we reverse the district court's grant of summary judgment in favor of the Wolfstellers on their quiet title counterclaim.

Reversed and remanded.