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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1568**

In the Matter of the Petition of Melvin J. Cummins
for an Order Determining Boundary Lines

**Filed May 7, 2018
Reversed
Ross, Judge**

Hubbard County District Court
File No. 29-CV-11-1453

Paul R. Haik, Krebsbach & Haik, Ltd., Eden Prairie, Minnesota (for appellants)

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Considered and decided by Worke, Presiding Judge; Peterson, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

Resolving a property-line dispute filed in 2011, the district court found that the remnants of an old wire fence had established a boundary by practical location back in 1977. The district court then reasoned that a title-transferring event occurred in 1977 even though the 1977 property owners (who ceased to be owners long before 2011) never asked the court to so define the boundary or otherwise unsettle the legal boundary, which is about 40 feet east of the fence. But Minnesota Statutes, section 508.671 (2016), allows a

landowner merely to “apply” to the district court “to have all or some of the common boundary lines judicially determined,” and no judicial determination occurred in 1977. We hold that the evidence that the former owners acquiesced in the fence line as the boundary line is not clear and convincing. We therefore reverse the district court’s order determining the boundary based on the fence, and we need not reach the various challenges to the district court’s legal theories that underlie its decision.

FACTS

This case concerns a property-line dispute that will determine whether a landlocked parcel will expand into neighboring lots to access Sixth Crow Wing Lake in Nevis Township. Melvin Cummins purchased a landlocked, 57-acre parcel that sits about 550 feet north of the lake in 2001. Anthony and Jill Urdahl own a row of three parcels. The northernmost Urdahl parcel sits immediately to the west of the Cummins parcel and is similarly 550 feet north of the lake. The Urdahls’ middle parcel sits just to the south of their first parcel, and it is also landlocked. But the Urdahls’ third and southernmost parcel reaches the lakeshore. Neither the Urdahls’ middle nor southernmost parcel shares a boundary with the Cummins parcel.

At the heart of this case are the remnants of an old barbed-wire fence running parallel to and 39 feet west of the actual north-south boundary between the Cummins parcel and the Urdahls’ northernmost parcel. The fence line runs south through the Urdahls’ middle and southern parcel to the lake. Cummins intends for that fence line to replace the legal boundary so that his parcel would be extended west by 39 feet into the Urdahls’ northern parcel and then south through the Urdahls’ other two parcels 550 feet to the lake.

Cummins petitioned the district court in 2011 to declare the fence line the boundary by practical location. When land surveyors observed the fence around the time of the petition, the wire composing it was not continuous, the fence had fallen over and was broken in many places, and the posts had rotted out. The district court granted the petition, finding that the fence had served as the boundary by practical location from 1962 to 1977, decades before either the Urdahls or Cummins owned their parcels.

The history of the barbed-wire fence is sketchy. The Urdahls' three parcels were once a single lot owned by Emma Knutson from about 1950 until the mid-1980s. The fence was already on the property when Emma Knutson bought it. No one knows who built it or why. The Knutsons lived on the land and operated a small farm. Son Don Knutson testified that he visited his parents "quite often" in the 1950s and 60s, and he remembers the fence. At that time, it ran from the northern end of the property southward all the way to the lake, paralleled by a path on the east side that people walked to reach the lake for fishing. Don testified that his family believed that the fence was the property line, and they planted no crops to the east of it. Craig Knutson, Don's son, visited his grandparents' farm "pretty close to once a month" during his childhood. He also believed that the fence line was the boundary. He recalled seeing "No Trespassing" signs on the east side of the fence facing the path. On one occasion, when snowmobiles knocked down part of the fence, Craig and his father repaired it and placed a "No Trespassing" sign on it. This activity occurred between 1962 and 1977.

Emma Knutson platted the lot as “North Oaks” and subdivided it into multiple lots, some abutting the lake and some not. She sold the lots in the mid-1980s and, after another conveyance in 1997, the Urdahls purchased their three lots in 2005.

On the other side of the disputed boundary, Vernon and Joanne Vogt owned what is now the Cummins lot from 1962 to 1983. Although neither was alive by the time of trial in this case, the record establishes through Vernon Vogt’s deposition testimony that the Vogts bought the property purely as an investment and did not occupy, use, or regularly visit it. Vernon never knew, met, or spoke to the Knutsons or any other abutting property owner. Some testimony suggests that, shortly before Vernon agreed to purchase the land, he visited the property and assumed the fence line was its western border. But his testimony establishes that he “didn’t know about the legal description yet until later on.” And instead of relying on the fence as the boundary, he clarified, “I went by the legal description after we -- after I made the deal.” After the Vogts bought the land, they did not use it to access the lake for any purpose, and they never asserted any claim to any land beyond its legal description, which did not include the now-disputed strip just east of the fence line.

The Vogts conveyed the land to John and Carol Raun in 1983 using a legal description that again did not include the now-disputed strip. The Rauns then conveyed the property to Gene Rugroden in 1993, under a legal description that also did not include the now-disputed strip. And Rugroden in turn conveyed the land to Cummins in 2001, likewise under a legal description that included no reference to the now-disputed strip. In sum, the legal description in none of the post-1977 conveyances included the now-disputed 550-foot strip to the lake. The district court nevertheless declared the fence line as the boundary

by practical location because it found that “Vernon Vogt acquired the disputed strip of land by acquiescence in 1977 and the strip of land passed by deed to his successors, including [Cummins].” The district court appears to have been persuaded primarily by the evidence about the Knutsons’ behavior, since the abutting owners at that time—the Vogts—did nothing to claim or treat the now-disputed strip as their own.

The Urdahls appeal.

DECISION

The Urdahls argue that the district court wrongly determined that the remains of the wire fence establish the boundary by practical location. When we review a district court’s placement of a boundary, we consider whether the district court’s factual findings are clearly erroneous and whether its legal conclusions are erroneous. *Ruikkie v. Nall*, 798 N.W.2d 806, 814 (Minn. App. 2011). “An owner of registered land having one or more common boundaries with registered . . . land . . . may apply . . . to the court to have all or some of the common boundary lines judicially determined.” Minn. Stat. § 508.671 (2016). A district court may designate a boundary by practical location if the claimant establishes the boundary by acquiescence long enough to bar a right of entry under the statute of limitations, by the acquiescence in a boundary expressly agreed upon between the abutting owners, or by estoppel. *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977). The claimant has the burden of establishing the boundary using clear, positive, and unequivocal evidence. See Minn. Stat. § 541.02 (2016). Cummins asserted, and the district court accepted, that clear, positive, and unequivocal evidence proves that the boundary line was acquiesced in for the statutory period of 15 years. We must decide whether the district court

properly based its determination on the alleged boundary-line acquiescence between the Vogts and the Knutsons for a period of 15 years from 1962 until 1977.

We conclude that the district court erred. Three primary reasons drive this conclusion.

First, the record does not support the notion that the Vogts and the Knutsons acquiesced in the fence as their common boundary for 15 years leading up to 1977. The record includes no clear, positive, and unequivocal evidence of acquiescence. Relying on a fence to establish a boundary usually requires evidence proving that the purpose of erecting the fence was to mark the boundary: “When a fence is claimed to represent a boundary line under an acquiescence theory, one of the most important factors is whether the parties attempted and intended to place the fence as near the dividing line as possible.” *Wojahn v. Johnson*, 297 N.W.2d 298, 305 (Minn. 1980). This case includes no evidence of the motive or circumstances concerning the fence’s placement. This undermines the district court’s characterization that “the fence . . . was the specific demarcation of a property line.” The evidence does not reveal whether the fence was intended to mark the boundary or instead merely to contain cattle within part of the property. The evidence does not answer the question and provides only grounds to speculate.

It is not enough that the Knutsons discovered the fence and unilaterally assumed that it was the boundary. We have said that “[a]cquiescence entails affirmative or tacit consent to an action by the alleged disseizor, such as construction of a physical boundary or other use, which tends to establish the visual to boundary.” *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. App. 1987); *see also Phillips Petroleum Co. v. Selnes*, 223 Minn. 518,

521, 27 N.W.2d 553, 554 (1947) (“The evidence seems quite clear that for a period of more than 30 years defendant and her predecessor acquiesced in the claim of plaintiff and its predecessors to 110 feet frontage on the Fourth avenue side.”). Not only does the record show that the Vogts did not erect the fence, it shows that the Vogts never expressly nor implicitly asserted that the fence was the boundary. It also shows that the Vogts never even considered the fence to be the boundary at any point while they owned the parcel. Vernon Vogt testified specifically that he believed that the fence was *not* his. The district court’s statement that “Mr. Vogt’s understanding was that the path [along the east of the fence] was on his property” refers specifically to his preliminary understanding before he purchased the land, not his understanding after he purchased it, when he said he relied only on the legal description to define the boundary. We therefore must reject as clearly erroneous the district court’s characterization that “both predecessors in title acquiesced to the fence as being the boundary between the properties” and that “the landowners recognized the boundary.” The evidence contradicts these findings.

Second, clear precedent argues strongly for reversing even if the evidence had supported the conclusion that the Vogts and the Knutsons mutually acquiesced in the fence line as the boundary. This case strikingly resembles the 125-year-old first case of boundary by practical location in Minnesota—a case in which the supreme court reversed the district court’s boundary determination, declaring that the record “[c]ertainly” lacked sufficient evidence of acquiescence. In *Beardsley v. Crane*, the court considered a landowner’s boundary-by-practical location claim that was based on a wire fence built and relied on by the disputing parties’ predecessors as the actual boundary line and that would have

extended the claimant's parcel to include a narrow strip to connect his property to a lake. 52 Minn. 537, 542, 544–45, 54 N.W. 740, 741–42 (1893). That case included far more compelling evidence in favor of establishing a boundary than this case. The evidence in *Beardsley* demonstrated that the previous coterminous owners had erected a fence intending to reflect the boundary line, that both treated the fence as the boundary, and that the successive owners of both properties also treated the fence as the boundary. *Id.* But the fence was not the actual boundary and had resulted from an errant survey, misleading the owners, who had intended the fence to track the accurate legal boundary. *Id.* at 546–47, 54 N.W. at 742–43. After the supreme court announced the Minnesota legal standard for boundary by practical location (the standard we still follow today), it flatly rejected the claim of boundary by practical location:

The most that can be urged in defendant's behalf in support of his claim to a practical location, which will conclude the parties, is that, misled by Gould's inaccurate survey, and in ignorance of his mistake, the then coterminous owners of the land united in building a fence upon the supposed boundary, and for some nine years afterwards, still in ignorance of the mistake, they and their grantees acquiesced in treating and considering this fence as on the division line between their respective holdings. Certainly these acts did not conclude the parties. Order reversed.

Id.

Because the *Beardsley* claim of boundary by practical location failed on stronger evidence of acquiescence, so must Cummins's claim. The *Beardsley* claimant proved that the reason for the wire fence's erection was exactly to track the boundary. *Id.* at 544–45, 54 N.W. at 742. Cummins did not. The *Beardsley* claimant proved that the coterminous

original owners on both sides of the fence treated the fence as the boundary. *Id.* at 546–47, 54 N.W. at 742–43. Cummins did not. And the *Beardsley* claimant established that the successive owners on both sides had also treated the fence as the boundary. *Id.* at 544–45, 54 N.W. at 741–42. Cummins did not. Cummins points to no caselaw supporting the idea that a boundary can be practically located based on the unearthing of a decades-old mistake that was never previously given any legal effect and that, as far as can be known, has not been repeated by all the successive owners.

Third, we believe the district court wrongly treated the current boundary dispute as being resolved by hypothetical, successive, retroactively-applied title-transferring events down the line from the Knutsons to the Urdahls and from the Vogts to Cummins. Cummins attempts to support the district court’s rationale that a title-transferring event occurred in 1977, even though no one in 1977 nor any of Cummins’s predecessors petitioned for an order determining the boundary. Cummins does so mostly by relying on our holding in *Gabler v. Fedoruk*, 756 N.W.2d 725, 732 (Minn. App. 2008). *Gabler* does not sustain Cummins’s argument.

It is true that we said in *Gabler* that “[a]n action for the establishment of a boundary by practical location, like the closely related action for adverse possession, is a title-transferring event that relies in substantial part on the deed holder’s conduct.” *Id.* at 728–29. But there we were deciding only whether a district court has discretion to refuse to order a title transfer after establishing a boundary by practical location. *Id.* at 735. *Gabler* does not suggest that, by presently finding that coterminous owners 34 years ago acquiesced in a boundary, a district court may declare that a title-transferring event

occurred 34 years ago and apply it to alter the property rights of the successive owners. To the contrary: we specifically observed that an “*action* for the establishment of a boundary by practical location . . . is a title-transferring event” and that any “divestiture . . . *follows a finding* that a boundary has been established by practical location.” *Id.* at 728–29 (emphases added).

Cummins’s argument that a title-transferring event can occur years before a landowner petitions the district court for an order determining boundary lines finds support only in the adverse-possession context. In *Fredericksen v. Henke*, the supreme court said,

To maintain a title, acquired by adverse possession, it is not necessary to continue the adverse possession beyond the time when title is acquired. The title once acquired is a new title; a legal title though not a record title is not lost by a cessation of possession, and continued possession is not necessary to maintain it.

167 Minn. 356, 361, 209 N.W. 257, 259 (1926). In the context of adverse possession, a disseizor’s title to land vests when the requirements for adverse possession are met even if no judicial action is taken. *Id.* We are aware of no case that applies this principle in the boundary-by-practical location context, and we assume this rests on an obvious distinction between the different legal theories. As in *Fredericksen*, one claiming adverse possession must actually and openly possess the disputed land adversely to acquire legal right to the land, and the *Fredericksen* holding protects an adverse possessor who has openly asserted his right for the statutory period. *Id.* But a boundary-by-practical-location claimant, by contrast, need not allege possession of any kind, because possession is not an element of the claim. *Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844, 849 (Minn. App. 2001). Accepting

Cummins's position would require us to hold that a present landowner can obtain title to land that neither the landowner nor his predecessors ever possessed if only one predecessor of an abutting property mistook a boundary and used less of her land than she had a right to use. We have no reason to import the adverse-possession feature into a case of boundary by practical location. We hold that no boundary-modifying, title-transferring event occurred in 1977 granting Cummins title to the disputed strip.

In sum, for these reasons we hold that the evidence does not support the district court's finding that Cummins met his heavy burden to establish a boundary by practical location. We need not consider the Urdahls' other arguments for reversal, including their contention that the district court cannot establish a boundary between Cummins's parcel and the Urdahls' middle and southern parcels because the Cummins property does not share a common boundary with them. We do add, however, that our holding is consistent with our understanding that "[a]ctions to quiet title and determine adverse claims are equitable actions." *Gabler*, 756 N.W.2d at 730. Cummins acquired his parcel in 2001 based on a plat and legal description that reveals unmistakably to any objective purchaser that the parcel is landlocked, sitting about 550 feet north of the lakeshore. We can infer that he therefore did not pay a lake-front premium for his property, while the Urdahls must have paid a lake-front premium price when they purchased their parcels in 2005 based on the plat and legal description showing part of their southernmost parcel touching the lake. Confiscating the requested 39-by-550-foot lake-reaching swath from the Urdahls and giving it to Cummins in this situation does not have an equitable flavor.

Reversed.