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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0661**

David R. Towley, et al.,
Appellants,

vs.

Douglas S. Wick, et al.,
Respondents.

**Filed December 23, 2019
Affirmed
Jesson, Judge**

Hubbard County District Court
File No. 29-CV-17-549

Jeremy A. Klinger, Drahos Kieson & Christopher, P.A., Bemidji, Minnesota (for appellants)

Brian C. Bengtson, Lano, O'Toole & Bengtson, Ltd., Grand Rapids, Minnesota (for respondents)

Considered and decided by Ross, Presiding Judge; Rodenberg, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

JESSON, Judge

Appellants David and Kathleen Towley and respondents Douglas and Carol Wick disagree on the location of the boundary line between their properties located on Lake Plantagenet. Although previous owners of the properties attempted to mark the boundary

line using iron pipes, a subsequent professional survey revealed that the pipe boundary line was incorrect by roughly 14.7 feet near the lake. The Towleys asked the district court to declare the pipe boundary line to be the actual boundary based on the doctrine of boundary by practical location. The district court denied the Towleys' claim, a decision they now challenge. Because we conclude that the record supports the district court's determination that the Towleys failed to establish a boundary by practical location, we affirm.

FACTS

To understand this boundary dispute between neighbors, we first provide some historical background on the property. In 1955, the previous owners decided to sell their land, dividing it into three equal parts: the north, middle, and south parcels. Each parcel was bounded on the western edge by a public road and by Lake Plantagenet on the eastern edge. And each property included 110 feet of shoreline. Respondent Douglas Wick's parents purchased the north parcel, and appellant Kathleen Towley's parents purchased the south parcel. Douglas Wick's uncle, Harold Wick Sr., purchased the middle parcel. All of the families were close friends.

Although the previous landowners divided their land into three parcels, there were no marked boundary lines separating the new properties. In the summer of 1955, representatives from each of the families—including Douglas Wick's father, Kathleen Towley's father, Harold Wick Sr., and his son Harold Wick Jr.—worked together to attempt to mark their best estimation of the deeded boundaries. None of the men were professional land surveyors, and thick vegetation hindered their efforts and preciseness. The group used surveyor notes to locate a tree on the western edge of the property and used

that tree to mark the properties' lot corners in three, 110-foot sections. Using a borrowed surveying tool, they then projected lines east from the lot corners toward Lake Plantagenet. Based on those projection lines, they marked 110-foot sections of lake shoreline.

To mark the west-to-east horizontal lines dividing each property, the men used iron pipes.¹ The pipes varied in size and type and were placed vertically—similar to fence posts—along their best estimation of the deeded boundaries at uneven intervals. Due to thick vegetation, some of the pipes were clearly visible while others were difficult to see. According to Harold Wick Jr., the only person present for the amateur survey who is still living, the men were trying to mark the deeded boundaries rather than attempting to create new boundary lines. Further, all of the families had an unwritten understanding that they would not contest the boundary lines between the parcels and that any transfers of property between family members would not require a professional survey. But if an outside party wanted to purchase one of the parcels, the families understood that a formal survey would be necessary.

Over the next several decades, the owners made various improvements to the properties. The owners of the north parcel built an outhouse, and the owners of the middle parcel constructed a cabin and a well house. The owners of the middle parcel also later constructed a house and a detached garage on the property, and installed a propane tank, clothes line, and HAM radio tower. On the south parcel, the owners added a cabin. All of these improvements were located near, but not over, the 1955 pipe boundaries.

¹ The group placed iron pipes on four lines: the north line of the north parcel, the north line of the middle parcel, the north line of the south parcel, and the south line of the south parcel.

Turning to the current dispute, respondents Douglas and Carol Wick obtained the north parcel in 1999 from his parents.² Appellants David and Kathleen Towley purchased the middle parcel in 2006. According to Harold Wick Jr., acting as power of attorney for his father, he was happy that the Towleys purchased the middle parcel because he considered them family, negating the need for a formal land survey. He also testified that, at the time of purchase, he never made any representations to the Towleys about the boundary lines of the middle parcel.

In 2014, the Wicks sought to sell the north parcel to a non-family buyer who requested a professional survey of the land. The 2014 survey revealed that the pipe boundary line separating the north and middle parcels was 14.7 feet north of the deeded boundary line on the eastern border of the property near the lake. Based on the survey, several structures from the middle parcel (owned by the Towleys)—including the HAM radio tower, clothesline, propane tank, and foundation of the old cabin—encroached on the north parcel.

After the Wicks communicated the results of the land survey to their neighbors, the Towleys filed a complaint with the district court in 2017. In their complaint, the Towleys asked the district court to determine that, under the theory of boundary by practical location, the 1955 pipe boundary was the true boundary line between the parcels. The case proceeded to a court trial in May 2018. At trial, Harold Wick Jr. testified about the 1955 surveying effort, including that it was their “best effort” and that they created a “working

² The Wicks moved to Washington in 1967, and only sporadically visited the north parcel after their move.

line, subject to survey.” Both of the Towleys and Douglas Wick also testified. In addition to hearing testimony and receiving exhibits, the district court personally viewed the property.

Following the trial, the district court issued a written decision, concluding that the Towleys established by “clear, positive, and unequivocal evidence” that they and their predecessors in interest intended the 1955 pipe boundary to be the boundary between the properties. In reaching this conclusion, the district court relied on the actions of the Towleys’ and Wicks’ predecessors in interest in constructing various structures and fixtures based on the 1955 pipe boundary. But the district court denied the Towleys relief on the basis that they “brought the current matter with unclean hands” because they had knowledge, prior to purchasing the middle parcel, that the pipe boundary was not the true boundary of the property.

The Towleys moved for amended findings on the unclean-hands determination and filed a motion for a new trial. Although the district court denied the motion for a new trial, it issued amended findings. In the amended findings, the district court—reversing its previous determination—concluded that the Towleys did *not* establish a boundary by practical location by clear, positive, and unequivocal evidence. Based on the record, the district court concluded that the 1955 pipe boundary was a “rough estimate” of the deeded boundary that would be superseded by any future survey showing a different boundary line.³ Accordingly, the district court held that the Towleys have no right to the land

³ The district court affirmed its prior determination that the doctrine of unclean hands precluded the Towleys from obtaining relief.

between the deeded boundary and the pipe boundary line and ejected them from that 14-foot area. The Towleys appeal.

DECISION

The Towleys argue that they established a boundary by practical location because the 1955 pipe boundary is certain, visible, and well-known and because the predecessors in title acquiesced to the pipe boundary as the boundary line. Boundary determination is a factual issue, which we will not set aside unless clearly erroneous. *Slindee v. Fritch Investments, LLC*, 760 N.W.2d 903, 907 (Minn. App. 2009). But whether the factual determinations support the district court’s legal conclusions is a question of law, which we review de novo. *Gabler v. Fedoruk*, 756 N.W.2d 725, 730 (Minn. App. 2008).

Boundary by practical location, like adverse possession, carries a significant consequence: it transfers title between property owners. *Slindee*, 760 N.W.2d at 907. As a result, the burden of proof is high: the party attempting to establish a boundary by practical location must do so by clear and convincing evidence. *Phillips v. Blowers*, 161 N.W.2d 524, 526–27 (Minn. 1968).

A party can unequivocally establish a boundary by practical location in one of three ways: acquiescence, express agreement, or estoppel. *Slindee*, 760 N.W.2d at 907. The Towleys assert only one manner by which a boundary by practical location was established: acquiescence. Acquiescence requires “affirmative or tacit consent” to some action by a disseizor, like construction of a physical barrier, and acknowledgement of that barrier by the disseized. *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. App. 1987). To demonstrate acquiescence, a boundary line must be “*certain, visible, and well-known*,” and

the practical boundary must be “known, definite, certain, and capable of ascertainment.” *Ruikkie v. Nall*, 798 N.W.2d 806, 819 (Minn. App. 2011) (emphasis added) (quotations omitted), *review denied* (Minn. July 19, 2011). Further, acquiescence must be “for a sufficient length of time to bar a right of entry under the statute of limitations,” which is 15 years. *Id.*; Minn. Stat. § 541.02 (2018).

Here, in its amended order, the district court concluded that the Towleys failed to establish a boundary by practical location for two reasons. First, the district court found that the record did not support a finding that the 1955 pipe boundary was “certain, visible, and well-known.” The court observed that the record did not contain enough information to conclude the pipes in 2019 were the same as they were in 1955. It also found that the pipes were “irregularly spaced and variously sized.” Additionally, the court found that, given the thick vegetation, the pipe boundary was not “patently visible” nor “capable of certain ascertainment as boundary markers.” Second, the district court found that the parties intended the boundary line to be approximate, and they agreed that any future survey would supersede the pipe boundary.

The district court’s factual determinations are supported by the record. Photographs in the record show that the vertical pipe markers are indeed “irregularly spaced and variously sized.” Further, because of thick vegetation, some of the markers are not clearly visible, supporting the district court’s determination that they were not “capable of certain ascertainment as boundary markers.” We also note that the district court had the opportunity to observe the pipe markers in person. It is the Towleys’ burden to establish that an alleged boundary is “certain, visible, and well-known.” *Ruikkie*, 798 N.W.2d at

819. And based on the record, the district court did not clearly err by determining that the Towleys did not meet their burden.

Second, the record supports the district court's determination that the parties intended the 1955 pipe boundary to be an approximate boundary, superseded by any future survey. Harold Wick Jr. testified that, in 1955, the parties were attempting to mark estimated boundary line locations, not attempting to create a boundary line. It is clear from testimony that the involved parties understood that while the pipes would suffice as an estimation of the boundary, a future survey may reveal a different location of the deeded boundary line.

Still, the Towleys argue that the record proves that the pipe boundary is certain, visible, and well-known. They note that professional land surveyors were able to locate the pipe markers in their surveys, contend that the pipes traverse the entire parcel, and point to numerous photographs submitted to the district court. And, according to the Towleys, the record demonstrates that the predecessors in title acquiesced to the 1955 pipe boundary. In support of this assertion, the Towleys note that the predecessors in title to both parcels obtained survey equipment and attempted to place the pipe markers as close to the deeded boundary line as possible. Further, they draw our attention to the fact that the owners of the properties each built structures based on the 1955 pipe boundary.

We acknowledge that, based on the record before it, the district court could have reached a conclusion either way regarding boundary by practical location, as evidenced by its two different determinations on the issue. But we defer to a district court's ultimate factual determinations unless they are clearly erroneous. And the determination before

us—that the Towleys failed to establish a boundary by practical location—is supported by the record. Because the district court’s findings that the pipe boundary is not certain, visible, and well-known and that the parties did not truly acquiesce to the 1955 pipe boundary are supported by the record, they are not clearly erroneous.⁴ See *Wojahn v. Johnson*, 297 N.W.2d 298, 305 (Minn. 1980) (concluding that the evidence was insufficient to establish a boundary by practical location where a fence was, at various points during the statutory period, in disrepair or deteriorating).

Because it is the Towleys’ burden to establish a boundary by practical location by clear, positive, and unequivocal evidence, we affirm the district court’s conclusion that the Towleys failed to meet that burden. See *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977).

Affirmed.

⁴ Because we affirm the district court’s conclusion that the Towleys did not establish a boundary by practical location, we do not reach their argument regarding whether the district court erred in finding that they acted with unclean hands.