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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1479**

Patricia Klug, et al.,
Respondents,

vs.

Robert Ellenz, et al.,
Appellants.

**Filed June 1, 2021
Affirmed
Reilly, Judge**

Houston County District Court
File No. 28-CV-17-480

Dwight D. Luhmann, Luhmann Law, LLC, Preston, Minnesota (for respondents)

Thomas M. Manion, Manion O’Koren Law Firm, LLC, Lanesboro, Minnesota (for appellants)

Considered and decided by Frisch, Presiding Judge; Reilly, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

In this adverse-possession action, the district court conducted a bench trial and determined that respondents failed to prove that they adversely possessed portions of the disputed property. Respondents filed a combined motion for a new trial or amended findings of fact and conclusions of law, and submitted additional evidence in support of

their motion. The district court issued amended findings of fact and conclusions of law, determining that respondents proved adverse possession of the entire disputed property. Appellants raise four arguments on appeal: (1) the district court erred by allowing respondents to present new evidence in support of their posttrial motion, in violation of the Minnesota Rules of Civil Procedure; (2) the district court failed to honor a stipulation to which the parties agreed at trial; (3) the district court erred by not rejecting respondents' new evidence for failure to timely serve appellants, in violation of the Minnesota General Rules of Practice; and (4) the district court clearly erred by finding that respondents adversely possessed a portion of the disputed property. We affirm.

FACTS

This is a dispute between two families over possession of farmland in Houston County. In June 2017, respondents Patricia and Gregory Klug sued appellants Robert and Lori Ellenz claiming a parcel of real estate purportedly owned by appellants. The two families own parcels of land next to each other, with appellants' farm bordering respondents' farm to the north and west. The complaint alleged that respondents had adversely possessed narrow portions of appellants' real estate along the border of the properties for more than 15 years. The complaint asked the district court to declare respondents the owners of that real property and to establish a boundary line between the two properties consistent with respondents' claims.

The case proceeded to a bench trial over five days in December 2019.¹ The district court issued findings of fact and conclusions of law in April 2020. The district court determined that respondents had proven by clear and convincing evidence that they adversely possessed the disputed property along the north-south boundary. But the district court found that there was not clear and convincing evidence of adverse possession of the disputed property along the west-east boundary, or in an area of unworked vegetation in the northwest corner, which the parties called the “green triangle.” In reaching this conclusion, the district court reasoned that respondents had never farmed within the green triangle. As a result, the district court declared respondents to be the owners of only part of the disputed real property.

Respondents moved for a new trial or, alternatively, for amended findings of fact and conclusions of law. Respondents argued that a new trial or amended findings were necessary because the district court’s findings were not supported by the evidence, the district court committed errors of law, and the district court deprived respondents of a fair trial by admitting certain exhibits at trial over respondents’ objection. In support of the motion, respondents submitted an affidavit from Gregory Klug, along with four photographs of aerial images that purported to show that a fence between the properties had not been moved between 2008 and 2017, which respondents alleged contradicted Robert Ellenz’s testimony.

¹ The trial began as a jury trial, but on the third day of trial, the parties agreed to dismiss the jury and submit the issues to the court for decision.

Following a motion hearing, the district court in September 2020 denied respondents' request for a new trial, but granted their request for amended findings and conclusions of law. In an order accompanying the amended order and judgment, the district court explained the reasons for its amended findings. The district court determined that "[u]pon further review of the testimony . . . while [respondent] did not actively work the ground in the Green Triangle, he considered the Green Triangle part of his property" and farmed that corner of the property "consistent with standard farming practices." The district court also found that, "[u]pon further review of the evidence, and with the arguments and evidence presented at [the motion] hearing," Robert Ellenz's testimony and two exhibits appellants introduced at trial lacked credibility. The district court then found that the testimony and exhibits instead supported respondents' assertion about the position of the west-east boundary of the property.

Thus, the district court in its amended findings of fact and conclusions of law determined that respondents proved adverse possession of all the disputed property by clear and convincing evidence, including the portion along the west-east boundary and the green triangle. The district court declared respondents the owners of the real property in dispute and entered judgment accordingly.

This appeal follows.

DECISION

I. The district court did not commit reversible error by considering respondents' new evidence in support of their posttrial motion.

Appellants argue that the district court erred by allowing respondents to present new evidence in support of their posttrial motion. The new evidence in question is the affidavit from Gregory Klug and the aerial photographs of the boundary between the properties, which respondents filed to support their motion for a new trial or amended findings of fact and conclusions of law. Because of the alleged error by the district court in considering this new evidence, appellants urge us to reverse the amended order and judgment, and to reinstate the original order and judgment.

Appellants argue that the district court's consideration of respondents' new evidence was improper on three grounds: (1) Minnesota Rule of Civil Procedure 52.02, (2) the parties' stipulation at trial, and (3) Minnesota General Rule of Practice 115.03. We note at the outset that appellants did not object to respondents' new evidence before the district court, nor did they raise any of these arguments in either their written submissions to the district court or at the motion hearing. And we rarely consider issues that were not presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Despite appellants' failure to raise the arguments below, even if we consider the arguments on their merits, we conclude that none dictate reversal.

A. Minnesota Rule of Civil Procedure 52.02

Appellants first argue that the district court could not consider respondents' new evidence because the Minnesota Rules of Civil Procedure do not allow the district court,

when deciding a motion for amended findings, to consider evidence that was not a part of the trial record. We review a district court's decision on a motion for amended findings for an abuse of discretion. *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *review denied* (Minn. Nov. 14, 2006). A district court abuses its discretion when "its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Landmark Cmty. Bank, N.A. v. Klingelhutz*, 927 N.W.2d 748, 754 (Minn. App. 2019).

Appellants correctly note that a district court typically may not consider new evidence on a motion for amended findings. The rules of civil procedure provide that a motion for amended findings "may be made on the files, exhibits, and minutes of the court." Minn. R. Civ. P. 52.02. The purpose of a motion for amended findings is to allow the district court to review its exercise of discretion. *Johnson v. Johnson*, 563 N.W.2d 77, 78 (Minn. App. 1997), *review denied* (Minn. June 30, 1997). The supreme court has explained that "[i]n considering the motion for amendment of its findings, the [district] court must apply the evidence as submitted during the trial of the case. It may neither go outside the record, nor consider new evidence." *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641, 651 (Minn. 1974); *see also Otte v. Otte*, 368 N.W.2d 293, 299 (Minn. App. 1985) (providing that a motion for amended findings "must be based upon the files, exhibits and minutes of the court, not upon newly discovered evidence which is not a part of the record").

Although the rules prohibit a district court from considering new evidence when deciding a motion for amended findings by itself, respondents here filed a *combined* motion for amended findings and a new trial. And the rules allow a district court to consider new

evidence on a motion for a new trial: “On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct entry of a new judgment.” Minn. R. Civ. P. 59.01. While a new-trial motion “shall be made and heard on the files, exhibits, and minutes of the court,” “[p]ertinent facts that would not be a part of the minutes may be shown by affidavit.” Minn. R. Civ. P. 59.02.

We note that this case is unusual because, while respondents made a combined motion for amended findings and a new trial, the district court issued amended findings *without* granting a new trial. Appellants maintained, at oral argument, that this was improper and that if the district court does not grant a new trial when deciding a combined motion, it cannot consider the new evidence when issuing amended findings. Respondents counter that the district court may consider new evidence in this situation, as long as the motion for amended findings was made in conjunction with a proper motion for a new trial.

There is very little caselaw that has addressed this issue, and we are aware of only one precedential authority on point. In *Chin v. Zoet*, the appellants challenged the district court’s grant of summary judgment against them, and they submitted affidavits in support of their motion for amended findings or a new trial. 418 N.W.2d 191, 195 (Minn. App. 1988). This court determined that the district court erred by refusing to consider the affidavits when making its decision, and we reasoned that the district court had a right to do so because the appellants moved for a new trial and for amended findings at the same time. *Id.* at 195 n.2. This court’s decision in *Chin* suggests that it is proper for the district

court to consider evidence that was not part of the record when the district court considers a combined motion, even if it ultimately chooses not to grant a new trial.²

We need not decide whether the district court properly considered respondents' new evidence without granting a new trial, because we are satisfied that any prejudice to appellants was minimal. We will not reverse if a district court's error "does not affect the substantial rights of the parties." Minn. R. Civ. P. 61. Here, the district court relied on respondents' new evidence—a two-page affidavit from Gregory Klug and four aerial photographs—to support its determination that two exhibits appellants introduced at trial and a part of Robert Ellenz's testimony lacked credibility. According to the affidavit, the purpose of the aerial photographs was to show that a fence was not moved between 2008 and 2017, which contradicted Robert Ellenz's testimony at trial. And at the motion hearing, respondents explained that the photographs went solely to the issue of Robert Ellenz's

² We observe that this position also appears to follow the explanation in *Minnesota Practice* about the district court's consideration of new evidence on a motion for amended findings and a new trial:

Rule 52.02 permits a motion for amended findings to be combined in the alternative with a motion for a new trial. Both motions require the court to perform similar although different functions in reviewing the propriety of the original decision. The motion for amended findings restricts the court to consider the evidence submitted during the trial. A motion for a new bench trial permits the court to take additional testimony and then amend the findings of fact and conclusions of law or make new findings and conclusions and direct the entry of the new judgment. . . . *A combined motion provides the court with the opportunity to review the former evidence and consider any new evidence.*

David F. Herr & Roger S. Haydock, *Minnesota Practice* § 52.20 (6th ed. 2020) (emphasis added).

credibility and that the location of the fence depicted in the photographs was immaterial. In other words, the district court did not rely on the affidavit or the photographs themselves to determine the location of the boundary between the two properties. The new evidence thus connected to an issue of witness credibility, not a substantive issue.

We add that the district court reached its credibility determination based not only on the new evidence, but also “[u]pon further review of the evidence” presented at trial. The district court had the opportunity to judge the witnesses’ credibility over the course of multiple days at trial. Even if the district court should not have considered respondents’ new evidence, any error was harmless because the district court could reach the same conclusion by considering only the evidence that was part of the trial record. In sum, we reject appellants’ argument that the district court’s consideration of respondents’ new evidence constituted reversible error under the rules of civil procedure because any error did not affect appellants’ substantial rights.

B. The Parties’ Stipulation

Appellants also argue that the district court should not have considered respondents’ new evidence because this conflicted with a stipulation to which the parties agreed at trial. On the third day of trial, the parties agreed to dismiss the jury and submit the issues to the court. At that time, the parties reached a stipulation and read the stipulation into the record. The stipulation provided in part: “[T]here would be a further understanding that neither party following both parties resting in their cases in chief, would be able to submit any further evidence to the court.” Appellants argue that the district court’s consideration of respondents’ new evidence in support of their posttrial motion “was in direct contradiction

to the [p]arties' stipulation placed on the record." Respondents disagree with this characterization and insist that the stipulation "was simply a reference to the bifurcated nature of the parties['] claims" and was not meant to prevent the parties from introducing evidence in support of a posttrial motion.

We think that respondents' understanding of the stipulation is more persuasive. We reach this conclusion given the full context in which the parties made the stipulation. The parties agreed to the stipulation to decide how the presentation of evidence was to proceed in light of their decision to now try the case before the court rather than a jury. Counsel read the stipulation into the record, which included provisions that the parties would "submit the issues of adverse possession and boundary by practical location to the court for decision," that appellants would "put in [their] case in chief on both adverse possession and boundary," and that appellants would "defer further evidence on any counter claim damages pending the court's decision on adverse possession and boundary by practical location." Counsel explained the reasoning behind this stipulation: "If [respondents] prevail, there would be no need for the damages evidence. If [appellants] prevail, there would be a damages trial to the court without a jury." It was at that point that counsel referenced the provision that neither party would submit more evidence after both parties rested their cases in chief.

The stipulation, viewed in its entirety, supports respondents' contention that the provision simply reflected the parties' understanding that they would separately try the issues of adverse possession and damages. In other words, the purpose of the stipulation was to prevent the parties from presenting evidence of adverse possession once the case

proceeded to a trial on damages. The stipulation focused on the parties' presentation of evidence *at trial*; it did not refer to the parties' ability to make posttrial motions. Nothing in the stipulation suggests that it was intended to preclude the parties from submitting more evidence in a motion for a new trial.

For these reasons, we conclude that the district court did not act contrary to the parties' stipulation by considering respondents' new evidence in their posttrial motion.

C. Minnesota General Rule of Practice 115.03

Finally, appellants argue that the district court should have rejected respondents' new evidence because respondents failed to timely serve the affidavit and exhibits on appellants in accordance with Minnesota General Rule of Practice 115.03. Under the rule, a district court will not hear a motion until the moving party serves the motion, and any affidavits and exhibits submitted along with the motion, "at least 28 days before the hearing." Minn. R. Gen. Prac. 115.03(a). Appellants argue that respondents violated rule 115.03(a) because they did not serve on appellants the affidavit and exhibits accompanying their posttrial motion until June 16, 2020, which was only six days before the motion hearing.

Appellants' reliance on rule 115.03 is misplaced. The rules governing motion practice specifically provide, "The timing provisions of sections 115.03 and 115.04 of this rule do not apply to post-trial motions." Minn. R. Gen. Prac. 115.01(c). Thus, rule 115.03 does not apply to respondents' motion and is not a basis for us to reverse the district court's amended order and judgment.

II. The district court did not clearly err by finding that respondents had proven adverse possession of the green triangle by clear and convincing evidence.

Appellants also argue that, even if the district court could properly consider respondents' new evidence submitted with their posttrial motion, this evidence and the evidence presented at trial was not sufficient to allow the district court to conclude that respondents adversely possessed the green triangle.³

To prevail on an adverse-possession claim, a party “must show, by clear and convincing evidence, an actual, open, hostile, continuous, and exclusive possession for the requisite period of time,” which is 15 years in Minnesota. *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. App. 2003) (quoting *Ehle v. Prosser*, 197 N.W.2d 458, 462 (Minn. 1972)). Whether the elements of adverse possession are present is a question of fact. *Id.* We will not set aside the district court's factual findings unless they are clearly erroneous. *Denman v. Gans*, 607 N.W.2d 788, 794 (Minn. App. 2000), *review denied* (Minn. June 27, 2000).

Here, appellants challenge the district court's finding of the existence of just one element of adverse possession—openness. The openness requirement means that the party's possession must be “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). The nature of the possession “must give unequivocal notice to the true owner that [someone] is in possession in hostility to his title.” *Ganje*, 659 N.W.2d at 266 (quotation omitted).

³ Appellants challenge only the district court's finding of adverse possession related to the green triangle and do not dispute the findings of adverse possession about any other portions of the disputed area.

In its original order and judgment, the district court determined that respondents had not proven adverse possession of the green triangle by clear and convincing evidence. In reaching this decision, the district court pointed to the fact that Gregory Klug had never farmed within the green triangle and that certain markers within the area were located on appellants' farm. In its amended order and judgment, the district court reached a different conclusion, determining that respondents had presented clear and convincing evidence to prove adverse possession of the green triangle. The district court reasoned that, despite not farming within the green triangle, respondents had used the green triangle "in a manner consistent with how any other farmer would have used it" by "farm[ing] into the corner as close as they could." Appellants argue that the district court's finding was not supported by clear and convincing evidence showing that respondents' possession of the green triangle was open. We disagree.

Respondents introduced testimony and exhibits at trial to show that their possession of the green triangle was open. Gregory Klug testified that he regularly farmed along the northern boundary of his property but did not farm in the northwest corner. He explained that the green triangle was "land that [he] was never able to till" because he could not "get into that corner with tillage equipment" because of having to make a 90-degree turn when moving from the northern boundary to the western boundary. According to Gregory Klug, appellants farmed alongside the north and west sides of the green triangle, as this was part of their property. Aerial photos of the property, which respondents introduced at trial, support his description of the green triangle. Gregory Klug said that he remembered the green triangle being in that location for as long as he could remember, at least since his

grandfather had owned the property. This evidence supports the district court's finding that respondents used the green triangle consistent with how other farmers would have used it and farmed into the northwest corner of the property as close as they could.

Appellants, however, argue that respondents' possession of the green triangle was not open because, based on the lack of farming activities within the triangle, respondents' possession would not have been visible to appellants. But Gregory Klug's testimony and the aerial photo show that, even if respondents were not actively farming within the green triangle, the triangle itself would have been visible to appellants. As evidenced by the aerial photo, the green triangle—with its unusual shape and uncultivated nature—stood in sharp contrast to the surrounding farmland. The north and west boundaries of the green triangle ran even with the northern and western edges of respondents' property, and respondents farmed along those edges of their property up to the green triangle. And appellants did not farm within the green triangle either, as they farmed along the northern and western boundaries of the triangle. This evidence supports respondents' contention that they claimed the property up to the spot where the northern and western boundaries intersected (i.e., the very northwest corner of the green triangle), but did not farm within the green triangle because it was not feasible. As respondents summed it up in their brief, "The mere existence of the green triangle was unequivocal notice to the [a]ppellants and their predecessors that the [r]espondents were possessing the land up to the north and west sides of the green triangle." Respondents presented sufficient evidence for the district court to find that they met the openness requirement.

Because there is ample evidence in the record to support the district court's finding that respondents' possession of the green triangle was open, we conclude that the district court did not clearly err by finding that respondents had proven by clear and convincing evidence that they adversely possessed the green triangle.

Affirmed.