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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1354**

Michael Roehrs,
Respondent,

vs.

Melvin Rasmussen, et al.,
Appellants.

**Filed May 11, 2010
Reversed and remanded
Ross, Judge**

Jackson County District Court
File No. 32-CV-08-73

Patrick G. Compton, Lindquist & Vennum, PLLP, Minneapolis, Minnesota (for respondent)

J. Brian O'Leary, O'Leary & Mortiz, Chartered, Springfield, Minnesota (for appellants)

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

ROSS, Judge

This appeal concerns a farmer's two property-line disputes, one with his northern neighbor and the other with his western neighbor. After a survey of Michael Roehrs's farm revealed that his neighbors, the appellants, had been encroaching on his deeded land

by growing crops over their common border with his field, Roehrs sued them for trespass. The neighbors answered with a counterclaim, charging that they had acquired the disputed land through boundary by practical location. The district court conducted a bench trial and concluded that because the only physical demarcations of the division between Roehrs's field and his neighbors' fields were plow lines that varied from year to year, the appellants had not established the boundaries' location by clear and unequivocal evidence. We hold that the undisputed testimony of knowledgeable witnesses establishes that the parties and their predecessors treated the plow lines as the boundaries for more than 20 years and that the lines are ascertainable and never varied to a legally significant degree. We therefore reverse and remand.

FACTS

Respondent Michael Roehrs purchased farmland in Jackson County in December 2006. Roehrs's northern neighbor is appellant Nasby Family Farms, LLC. His neighbors immediately to the west are Melvin Rasmussen and appellant Earl Tusa. Tusa's field abuts the northern part of Roehrs's western border, while Rasmussen's field abuts the southern part of that border. A fence separates Roehrs's field from Rasmussen's. But no fence, hedge, or other physical partition separates Roehrs's property from Nasby's or Tusa's field. The only demarcation between each of those fields and Roehrs's is a "plow line," the line at which each party stops plowing his own field. The plow line is visible because the parties plant different crops in their abutting fields.

Before purchasing his property, Roehrs had it surveyed. The survey revealed that Nasby had been farming approximately 4 acres of Roehrs's property along its northern

border, and that Tusa had farmed approximately .4 acres on the west. The plow line between the Roehrs and Nasby fields lies south of and nearly parallel to Roehrs's northern deed line, while the plow line between the Roehrs and Tusa fields lies just east of and nearly parallel to Roehrs's western deed line. The Nasby–Roehrs plow line runs east and slightly south from a steel post situated near the northwest corner of Roehrs's property. That plow line ends near the northeast corner of Roehrs's property at a field driveway that runs perpendicular to and connects to that boundary. The Tusa–Roehrs plow line begins at the same steel post and runs south and slightly east, terminating near a rock pile by the southeast corner of Tusa's field. There are no other landmarks on the border between Roehrs's field and the fields of Nasby and Tusa.

Roehrs sued Nasby and Tusa for trespass. They filed counterclaims, arguing that the plow lines had established the boundaries of Roehrs's field by practical location. Testimony at trial established that Roehrs's predecessors in title had accepted the plow lines as the field's boundaries for more than 20 years.

David Nasby testified that he has been familiar with the boundary between his land and the parcel now owned by Roehrs since 1949, that the boundary runs from the steel post at the southwest corner of Nasby's property to a field driveway at the southeast corner of his property, and that the boundary, which is reflected in the plow line, has not changed in the last 20 years. According to Nasby, there had never been any dispute over the property line until Roehrs's lawsuit. Nasby conceded that “over the years the division has changed, but I think that has to do with equipment and so forth.” His testimony

implies that despite some occasional variation along the plow line, the end points of the plow line at the post and driveway have remained constant.

Tusa testified that he purchased his parcel in 1984 and that he has always plowed along a line running south from the steel post toward and in line with the fence that separates Roehrs's field from Rasmussen's. According to Tusa, he and Roehrs's predecessor had always farmed based on this boundary.

Nasby's tenant, Steven Williams, testified that he has farmed the Nasby parcel since 1986, that the Nasby–Roehrs plow line runs eastward from the steel post to the south edge of the field driveway that serves Nasby's parcel on the east boundary, and that the plow line has not varied in more than 20 years. Williams stated that there was never any dispute about the location of the Nasby–Roehrs plow line, which traced the property line, until Roehrs bought his field.

Mike Stade also testified. Stade farmed what is now the Roehrs parcel from 1982 to 2006 for the Cernoch family, who sold the land to Roehrs. Stade testified that the Nasby–Roehrs plow line runs from the steel post eastward to the south edge of the field-driveway of Nasby's farm, and that it has never changed. Stade was aware of no discussions with Nasby contesting the line. He acknowledged that the line's location fluctuated through the years, but only slightly: “[T]here never was a big switch. And pretty much that line stayed the same.” He stated that it is a “pretty common practice” for farmers not to use fences to separate their abutting fields.

The district court acknowledged that Nasby and Tusa had offered testimony that the plow lines had been the accepted boundaries for more than 25 years. But it concluded

that they had failed to meet their burden of producing clear, positive, and unequivocal evidence establishing the practical location of the boundaries because they had not demonstrated that the plow lines had been consistent over time.

Nasby and Tusa appeal, arguing that the district court erred by determining that they failed to establish the field boundaries by practical location.

D E C I S I O N

Nasby and Tusa challenge the district court's boundary determinations. Because this determination involves a fact issue, it is due the same deference on appeal as other factual determinations and is reviewed for clear error. *Wojahn v. Johnson*, 297 N.W.2d 298, 303 (Minn. 1980); *see* Minn. R. Civ. P. 52.01 (stating that district court's factfindings will not be set aside unless they are clearly erroneous and that its findings should receive due regard because district court could evaluate witnesses' credibility). But whether a district court's fact findings support its legal conclusions is a legal question, and we review legal questions de novo. *Gabler v. Fedoruk*, 756 N.W.2d 725, 730 (Minn. App. 2008).

Under the doctrine of boundary by practical location, an encroaching neighbor may establish that the parties have mutually relocated the boundary between their properties somewhere other than the deed-based property line. *See Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977). The encroaching neighbor, or disseizor, must present evidence that establishes the boundary's practical location clearly, positively, and unequivocally. *Slindee v. Fritch Investments, LLC*, 760 N.W.2d 903, 907 (Minn. App. 2009). Unless the disseizor can prove a boundary by practical location, the actual

boundary as established by the original survey and plat controls. *Benz v. City of St. Paul*, 89 Minn. 31, 36, 93 N.W. 1038, 1039 (1903).

The district court concluded that Nasby and Tusa had not established the practical location of the respective boundaries between their properties and Roehrs's property by clear, positive, and unequivocal evidence. This conclusion appears to rest on two key determinations. First, the district court held that the plow lines could not serve as the boundaries because it found that they are determined by plantings whose edges fluctuate year to year. Second, it found that the evidence was insufficient to prove that the steel post near the northwest corner of Roehrs's field, which is an endpoint of both the Nasby–Roehrs and the Tusa–Roehrs plow lines, was a permanent marker. We conclude that both determinations are infirm.

Because the uncontested trial testimony established that the plow lines have always run directly from the field driveway to the post and from the post to the fence line, we deem the fact that the plow lines might have varied slightly from year to year to be legally inconsequential. The plow lines can establish the practical location of the boundaries between the fields because they reflect the abutting owners' consistent intent to trace the two presently disputed boundary lines directly between the accepted endpoints of each. This overcomes Roehrs's otherwise persuasive objection that the fields "just flow[] into each other" without any permanently visible lines and that the plow lines may be transitory from year to year because of operator imprecision or equipment variations.

And because each plow line has fixed and ascertainable end points, it is not necessary for the line always to have been perfectly straight or in precisely the same position at every point in every year. *See Nash v. Mahan*, 377 N.W.2d 56, 58 (Minn. App. 1985) (stating, in adverse-possession case, that two stakes could establish boundary between properties if adverse possessor actually used and occupied land up to stakes); *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 806 (Iowa 1994) (affirming boundary by practical location between two fields when line was marked by three posts and “crop residue line” that did not run perfectly straight each year); *cf. Slindee*, 760 N.W.2d at 907–08 (holding that curving and meandering “mow line” between residential lots that did not appear intended to follow the claimed straight boundary could not establish practical location of straight boundary). It is clear to us from our review of the record that the parties intended to plow along a line between the south edge of the field-driveway and the steel post, reflecting Roehrs’s disputed northern boundary, and also along a line between the post and the Rasmussen–Roehrs fence line, reflecting Roehrs’s disputed western boundary. Given the fixed end points of each plow line and the owners’ intent to plow along the straight boundary from point to point, the boundary is sufficiently known and capable of ascertainment.

Roehrs argues that documentary evidence supports the finding that the plow lines varied too significantly to establish the boundaries. Roehrs’s argument rests on two documents with differing estimates of his field’s “crop equivalency rating.” According to Roehrs, a field’s crop equivalency rating is directly related to the field’s size. The auction bill for Roehrs’s property shows that an evaluator estimated its crop equivalency

rating to be 88.27, while a November 2006 report estimates the rating to be 88.12. Roehrs argues that because his field is surrounded by a fence, hedge, or road except where it borders Nasby and Tusa's fields, the variation in crop equivalency ratings as stated differently in these two documents must indicate movement of the crop lines over the years. Roehrs's contention pulls but fails to peel the onion.

For two independent reasons, the second of which requires thorough explanation, we reject Roehrs's argument that "the only reasonable explanation for the change in the Roehrs [p]roperty's 'crop equivalency rating' from year to year was a change in the . . . 'plow lines' from year to year." First, the two documents do not purport to describe the property "from year to year" as Roehrs contends; both documents instead seem on their face to describe the property at the same stage of the 2006 planting cycle: on "11-20-2006" and one month later on "December 19, 2006." While our review of the record suggests that one of the documents might reflect the rating of Roehrs's field during a previous planting cycle,¹ no testimony was introduced to establish when either rating actually occurred. Second, Roehrs's theory that changes to his field's crop equivalency rating necessarily reflect fluctuating crop lines conflicts with our understanding of what crop equivalency ratings actually measure and how they are computed.

Supreme court caselaw and the documentary evidence in this case suggest that a crop equivalency rating is only indirectly related to a field's size. The supreme court has

¹ Some of the field-productivity data listed in the December 19 auction bill appears to correspond to a U.S. Department of Agriculture farm record for Roehrs's field dating from 2004. But no overall crop equivalency rating is indicated in the 2004 farm record, making it unclear whether the crop equivalency rating listed on the auction bill was computed based on 2004 data.

previously reviewed the professional literature and explained that a crop equivalency rating is a “per acre” estimate that measures a soil’s greatest likely yield. *Lamping v. County of Freeborn*, 374 N.W.2d 169, 171 (Minn. 1985) (quotation omitted). So the ratings that Roehrs highlights appear to reflect slightly different assessments of the overall productive quality of Roehrs’s entire field, not its overall size. If Roehrs had presented testimony and evidence sufficient to support a contrary fact finding, we would of course have been bound by that testimony and evidence. As the record stands, however, the documentary evidence and the testimony that Roehrs introduced does not sufficiently support his field-size-variation theory.

A careful analysis of the November 2006 crop equivalency report satisfies us that Roehrs’s theory fails to account for the complexity of the crop equivalency calculation. While the auction bill states only a bare crop equivalency rating, the November 2006 report includes enough additional details for us to ascertain how its rating was calculated despite a lack of any foundational testimony. The report shows that Roehrs’s field contains eight distinct soil types. The various soils rest in uneven segments throughout the field, which is illustrated in an accompanying map that somewhat resembles a jigsaw puzzle. Each segment receives an individual crop equivalency rating based on its soil type, and the field’s overall rating is the weighted average of the individual segments’ ratings, taking account of the percentage of each soil type in the entire field. It is therefore possible that a change in the field’s boundaries could affect its crop equivalency rating: Because the field’s rating increases as the percentage of high-rated soils in the field increases, a boundary fluctuation that severs low-rated soils from the field would

increase the field's overall rating, and, similarly, a boundary fluctuation that severs high-rated soils from the field would decrease the field's overall rating. It is also possible that a boundary fluctuation would sever high- and low-rated soils equally, leaving the field's overall crop equivalency rating unchanged despite reducing the field's size. Roehrs's one-dimensional rating-follows-size presumption ignores these complexities.

More importantly, Roehrs's theory also does not account for the other variables that affect his field's overall rating. Even if he had established that the field's rating changed significantly between two planting years, Roehrs has not eliminated the possibility that the change was due to an evaluator's assignment of a higher or lower rating to one or more of the soils comprising the field or to a recalculation of the relative size of soil segments within the field. While Roehrs relies on one possible explanation for the different crop equivalency ratings (a change in field size), his theory fails to account for the many nuances that may have contributed to the rating.

Not only has Roehrs failed to establish that the different ratings are attributable to fluctuating boundaries, but a comparison of the November 2006 report with the results of the January 2007 survey that Roehrs commissioned supports our belief that crop equivalency is only a rough measurement of a field's productive capacity; equivalency ratings do not appear to be intended to closely reflect a property's precise boundaries. The report suggests that Roehrs's field has 159.49 acres of tillable land, derived by adding together the areas of the component soil segments. By contrast, the surveyor computed a net tillable acreage of only 156.61, accounting for land dedicated to roads and a building site. And according to the survey, if the disputed land is excluded,

Roehrs's net tillable acreage decreases to approximately 152. This tillable-land discrepancy between the crop equivalency report and the survey results, apparently reflecting the same period, suggests strongly that whoever authored the equivalency report simply assumed that the field was approximately its 160-acre platted size, without trying to determine the precise conditions on the ground. Roehrs's reliance on a rough measurement of his field's productivity to prove slight variations in his field's size is therefore misplaced.

Roehrs did no more to address these complexities during trial than he has on appeal. Roehrs offered insufficient testimony to support his theory that the different crop equivalency ratings reflect changes in his field's size. Roehrs's attorney elicited from farmer Royal Larson two acknowledgments that fall far short of the field-size-variation point that Roehrs insists upon. Larson first acknowledged with simple affirmative replies that "crop equivalency ratings change as farm acres change" and that the auction bill and November report reflect slightly different ratings. As our preceding discussion demonstrates, these acknowledgments cannot make the case for Roehrs's theory. Larson had just explained that crop equivalency ratings mark a different level for "each soil *type*." Then he simply said "correct" after he was asked the vague question whether the ratings "change as farm acres change." In context with the balance of his testimony, it appears that Larson meant that the ratings change as the acres change *in quality*, not as they change *in number*. His actual intent is unknown, because Roehrs's attorney immediately ended his questioning of Larson as soon as he heard the obvious answer "correct" to the question of whether the two documents reported different ratings. Larson

was never asked to expound on how the different ratings applied to Roehrs's property or even whether the difference in this case has anything to do with property size.

Roehrs cites no other document or testimony attempting to support the district court's finding that his property had varied in size from year to year reflecting material variations in the plow lines. We hold that the finding is not supported by the evidence.

The district court's failure to find that the steel post has remained in its current position is also erroneous. Although no witness testified to exactly when the post was installed, all of the witnesses familiar with the location of the plow lines testified that the post has marked the boundary for many years. And Mike Stade testified that it had been in its same place since 1981 or 1982. So although the district court found that the broken condition of the earth surrounding the post suggested a lack of permanency, that perception does not overcome the consistent testimony of the four witnesses with personal knowledge of the plow lines' location through time—Nasby, Tusa, Williams, and Stade. The district court relied only on a recent photograph of the post to overshadow the relevant witnesses' testimony. The district court decides facts, but we defer to district court fact finding only when we see no clear error. Even if the district court correctly interpreted from the photograph that the earth was loose at the immediate base of the post, the testimony establishes that the post was never removed from its original location before the survey. The district court's observation can be reconciled with the testimony only if all of the uncontradicted testimony was unbelievable—a credibility finding not suggested by the district court. The consistent and unequivocal

testimony allows only one conclusion: the post remained in the same location and had been the shared end point to both plow lines for at least 25 years.

Our analysis requires one more step. Once a would-be disseizor has established a boundary's practical location, he must then show that the landowner or his predecessors have acquiesced in that boundary, have expressly agreed to it, or are estopped from denying the practical boundary because they "silently looked on with knowledge of the true line" while the disseizor encroached. *Theros*, 256 N.W.2d at 858. Having determined that clear, positive, and unequivocal evidence requires a finding that the appellants established each boundary's practical location, we must therefore address whether Roehrs's predecessor demonstrated acquiescence in, agreement to, or behavior giving rise to estoppel respecting the boundaries.

To establish a boundary through acquiescence, the disseizor must demonstrate by clear and convincing evidence that the title holder "affirmatively or tacitly consented to the placement and maintenance of [the boundary] for at least 15 years." *Gabler*, 756 N.W.2d at 729; *see* Minn. Stat. § 541.02 (2008) (providing 15-year limitations period for actions to recover real estate). "The acquiescence required is not merely passive consent, but conduct from which assent may be reasonably inferred." *Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844, 850 (Minn. App. 2001). Often, practical location by acquiescence "occurs when neighbors attempt to establish a fence as close to the actual boundary as possible, or when the disseizor unilaterally marks the boundary, and the . . . neighbor [whose property is disseized] thereafter recognizes that line as the actual boundary." *Id.* at 851. The appellants offered consistent testimony that the same two plow lines had

been the accepted boundaries by Roehrs's predecessor for more than 20 years. The testimony was uncontradicted. This testimony establishes acquiescence.

Roehrs counters that his predecessors, the Cernochs, did not necessarily acquiesce in the plow lines *as boundaries* because they and the appellants did not establish the lines with the specific intent to mark the boundaries. The contention overlooks the fact that property-line determination between farmers is a zero-sum game in which the competitors have a significant stake. Roehrs offers no reason other than boundary recognition that the Cernochs would consistently stop short of farming their entire parcel. The Cernochs' inaction in the face of Nasby and Tusa's use of the disputed acreage to raise crops for profit is conduct from which their assent to the boundaries must be inferred.

Nasby and Tusa also argue that the plow lines are boundaries established by estoppel. Because we conclude that they have proven acquiescence, we do not reach this issue. We reverse and remand with instructions to the district court to enter judgment recognizing the two relocated boundaries consistent with this opinion.

Reversed and remanded.