

NO. A10-1339

State of Minnesota
In Court of Appeals

In the Matter of the Verified Petition of
 Robert L. Ruikkie and Karen Ann Ruikkie for Certain Relief
 Pursuant to Minnesota Statutes Section 508.671, petitioners,
Appellants,

v.

George P. Nall; Leslie S. Nall; Mitchell Shores Homeowners'
 Association, Inc.; Anthony Stolfe; Penny Stolfe; Charles W. Carroll;
 Lois J. Geist; Gary E. Peterson; Susan L. Peterson; James P. Ritchart;
 Judith R. Ritchart; and all other persons or parties unknown claiming
 any right, title, estate, lien or interest in the real estate described in the
 Petition therein,

Respondents,

v.

Mark Monacellie, as St. Louis County Registrar of Titles;
 Thomas J. O'Malley, as St. Louis County Surveyor; Mike Forsman, as
 Chairman of the Board of Commissioners for St. Louis County;
 Tom Hansen, as Custodian of the State Torrens Assurance Fund; and
 each of their successors, third party defendants,

Respondents.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities.....i
Arguments.....1

I. THE NALL’S MADE NUMEROUS ERRORS IN THEIR STATEMENT OF THE FACTS
THAT MISREPRESENTED THE FACTS OF RECORD.....1

II. THE NALL’S ARGUMENT THAT THE RUIKKIE’S PETITION IS AN IMPERMISSIBLE
ATTACK ON THE NALL’S EXISTING CERTIFICATES OF TITLE IS INCORRECT4

III. THE LAND SWAP WAS NOT AN EXPRESS AGREEMENT TO DETERMINE
A BOUNDARY LINE BETWEEN GOVERNMENT LOT 1 AND 6
AS THE NALL’S CLAIM.....5

IV. THE CLAIM OF 15 YEARS OF ACQUIESCENCE TO THE NALL’S CLAIMED
BOUNDARY LINE IS CLEARLY ERRONEOUS.....7

V. THE NALL’S ARGUMENTS AS TO WHY THE COURTS BOUNDARY
DETERMINATION WAS FAIR AND JUST IS FALSE.....9

Conclusion.....12

TABLE OF AUTHORITIES

Statutes

Minn. Stat. § 508.028
Minn. Stat. § 508.224

Cases

Benz v City of St. Paul 89 Minn.31, 93 N.W. 1038 (1903).....7
Bjerketvedt v. Jacobson, 232 Minn. 152, 156, 44 N.W.2d 775, 777 (1950).....12
Howe v Hauge (2009) 766 NW 2d 50.....4
In re Willmus C0-9-1136, 1996 WL 33095 (Minn. App. Jan. 30, 1996).....5
In the Matter of the Petition of Joshua S. Collier, Minn. Supreme Court (2007).....5
Murphy v. Borgen, 148 Minn. 375, 377, 182 N.W. 449, 450 (1921).....4
Phillips v. Blowers, 281 Minn. 267, 269-70, 161 N.W.2d 524, 527 (1968).....4
Theros v. Phillips,256 N.W.2d at 859 (Minn. 1977).....8, 12
Shevlin-Mathieu Lumber Co. v. Fogarty, 130 Minn. 456, 461, 153 N.W. 871, 873
(1915).....4

ARGUMENTS

I. THE NALL'S MADE NUMEROUS ERRORS IN THEIR STATEMENT OF THE FACTS THAT MISREPRESENTED THE FACTS OF RECORD.

1. The Nall's claim on page 17 and 20 of Brief Of Respondents George and Leslie Nall, ET AL, hereafter, (Nall's Brief), that the Ruikkie/Nall land swap was used by the Nall's surveyor Mr. Chernak to create and confirm his boundary line between Government Lot 1 and 6. This is not supported by the evidence and testimony of record. Chernak determined and set that boundary during his ALTA survey in 2003, which was the year before the land swap occurred. Chernak clearly testified that he set that boundary during the Nall's ALTA Survey and in his words "hung his hat on it", (Trial Testimony, (hereafter (TT.) 409, 20 thru 410, 1), (Trial Ex. 73), (TT. 433, (8 thru 438 (7)), (TT. 414, (15-21)). Chernak testified that he used "Proprietary" information from his predecessor's in business, Cal lindbeck and Dick Floyd to determine the boundary between Government Lot 1 and 6, (TT. 490, (6 thru 492, (10)). Chernak did not use the Original Government survey as authority, (TT. 521, (7-22)). Chernak believed that his predecessor Dick Floyd "Severed" the Riparian Rights for Government Lot 6 during his platting of Government Lot 5 for Homer, (TT. 413, (23 thru 414, (10)), (TT. 490, (18 thru 492, (5)). However the Trial Court correctly found that the platting of Government Lot 5 did not in any way affect the boundary between Government Lot 1 and 6, (Trial Courts Finding of Facts number 7), (Appellants Brief Addendum A-8, (7)). Chernak knew and understood that he could be liable to the Nall's if the ALTA survey that he created for the

Nall's was incorrect, (TT. 400, (21 thru 401, (4)). Chernak in his 2003 ALTA Survey determined the SW corner of Government Lot; Chernak then used that same position in his survey work for the Ruikkie/Nall land swap, (Trial EX 73), (Trial EX 4).

The evidence of record shows the opposite of the Nall's statement regarding this fact, Chernak did not rely on the land swap for any determination regarding the boundary line between Lot 1 and 6. It was in fact his ALTA survey that set his boundary line determination and he continued to rely on that boundary throughout his work in this area.

3. Nall's Brief pg 18, the Nall's claim that the Ruikkie's and Nall's "actually walked the boundaries of the land that they were contemplating for the land exchange", (TT. 546-547). However, the record shows as Mr. Nall testified they could not walk the boundary line because of the trees, and because of the trees it was hard to know where the boundary line was, (TT. 547, (15 thru 548, (15)).

4. Nall's Brief pg 20, the Nall's claim that the Ruikkie's and Nall's agreed upon and established a boundary line, (implying the boundary line between Government lot 1 and 6). However, no evidence or testimony exists that the Ruikkie's and the Nall's agreed to establish any Government Lot boundary line. The establishment of that boundary line was done only by Surveyor Chernak. The Ruikkie's and the Nall's are not surveyors; the record clearly shows that they both relied on Mr. Chernak to survey the property correctly, (TT. 547, (13 thru 554 (3)), (TT. 234, (12 thru 242, (15)), (TT. 223, (9-13)).

5. Nall's Brief pg 23, the Nall's claim that Ruikkie told Nall, "that he (Ruikkie) had been aware of this riparian rights issue long ago, shortly after he purchased his property, and that, at that time, they had decided to resolve the issue through other means (by purchasing lake frontage from neighboring property owners) instead of attempting to obtain lake frontage through a legal action. Tr. 564-565". However, Mr. Nall's testimony does not state anything regarding Ruikkie stating he knew he had riparian rights, it states only that Ruikkie told Nall that he learned early on that his property was not connected to the Lake, (TT. 565, (5 thru 13)). Ruikkie testified that it was only after he received the Nall's Waiver and Release document that he began to learn about riparian rights and how it meant determining a boundary line, (TT.218, (7 thru 228, (25))).

6. Nall's Brief pg 26, the Nall's state Bill Defenbaugh worked with the Ruikkie's attorney Huck Andresen on a resolution of the "buildable parcel" (Nall's Brief pg 26 paragraph 1), "As a result of these efforts, George Nall was able to obtain for the Ruikkies a letter dated June 30, 2005 from St. Louis County Planning Staff person, James Plummer, in which Mr. Plummer confirmed, on behalf of St. Louis County, that the Ruikkies' property is recognized by St. Louis County as a buildable parcel and that no variance would be required to build on government lot 6, only a standard Land use permit would be required. Tr. 569-570; Trial Ex. 63". However, that letter was dated June 30th 2005, the Ruikkie's had only received the Nall's Waiver and Release the day before that on June 29th, (TT. 219, (13-19)), (TT. 40, (5 thru 8)). On June 30th the Ruikkie's had not contacted any attorney. Mr. Defenbaugh alone made a call to Mr. Plummer and Mr.

Plummer sent the Letter (Trial Exhibit 63), before the Ruikkie's ever contacted either Attorney Eldon Hall or Huck Andresen, (TT. 279, (4-19)),(TT. 224, (7 thru 26, (14))). Also Mr. Ruikkie testified that he was not aware of any work that Mr. Defenbaugh was doing with Huck Andresen, (TT. 242, (16 thru 25)). Mr. Ruikkie also testified that any communication with the County regarding the Ruikkie's ability to build on the 90 foot parcel purchased out of the Homers Lots plat was put on hold until after the Nall's Proceeding Subsequent against them was completed, (TT. 243, (1 thru 244, (2))). Ruikkie further testified that he believed that his attorney Huck Andresen and the Nall's attorney Bill Defenbaugh were having discussions about a possible settlement, (TT. 303, (5 thru 25))).

II. THE NALL'S ARGUMENT THAT THE RUIKKIE'S PETITION IS AN IMPERMISSIBLE ATTACK ON THE NALL'S EXISTING CERTIFICATES OF TITLE IS INCORRECT.

The Nall's correctly state that the Minnesota Torrens act is designed to provide the holder of a Certificate of Title "an absolutely perfect and indefeasible title free from all claims of every kind and nature except those expressly noted upon the certificate, and to put such title beyond attack" *Shevlin-Mathieu Lumber Co. v. Fogarty*, 130 Minn. 456, 461, 153 N.W. 871, 873 (1915). However, the Nall's fail to understand that the conclusiveness and indefeasibility relates only to the land as described in the original decree of registration or determined in a Proceeding Subsequent. "A central purpose of the Torrens Act is conclusiveness and indefeasibility of title once adjudicated". *Murphy v. Borgen*, 148 Minn. 375, 377, 182 N.W. 449, 450 (1921), see, Minn.Stat. § 508.22. also

see *Howe v Hauge* (2009) 766 NW 2d 50. Any of the Nall's existing certificates of titles that include any part of Government lot 6 that was not included on the Certificate of Title that they received from the Ruikkie's, (Trial Ex. 30), constitutes an impermissible attack on the Ruikkie's Government lot 6 Certificate of Title number, 301384 (Trial Ex. 31).

Also, The Nall's were not Good Faith purchasers when they applied to convert their held certificates of title to reflect their CIC 76 plat as they had actual notice of the Ruikkie's property rights to some of the property included in said CIC, (TT. 591, (21-24)), (TT. 599, (5-14), (Trail Ex 54). "In *In re Willmus*, the court of appeals also concluded that actual notice of an interest in Torrens property can be determinative of the status of title. C0-9-1136, 1996 WL 33095 (Minn. App. Jan. 30, 1996), rev. denied (Minn. Mar. 28, 1996)", *In the Matter of the Petition of Joshua S. Collier*, Minn. Supreme Court (2007).

III. THE LAND SWAP WAS NOT AN EXPRESS AGREEMENT TO DETERMINE A BOUNDARY LINE BETWEEN GOVERNMENT LOT 1 AND 6 AS THE NALL'S CLAIM.

The Nall's now claim, "the Nall's worked with the Ruikkie's to determine the location of the boundary between their property and the Ruikkie's property", (Nall's Brief pg. 41). However, no evidence or testimony exists to support that statement of fact. All evidence and testimony presented during the three day trial show that both parties believed and acted upon the belief that the Government lot line between their two Government Lots as set by Surveyor Chernak during his 2003 ALTA survey was correct

and true, (TT. 592, (2 thru 593, (6)), (Tr. Ex 73). Never during the land swap did either the Ruikkie's or the Nall's question or understand that Chernak position for the SW corner of Government Lot 1 was erroneous, (TT. 240, (15 thru 242, 7)), (TT. 547, (13 thru 554, (14)), (TT. 202, (15-22)).

The Nall's argue that the Ruikkie's claim that Chernak's survey work in determining the SW corner of Government Lot 1 was erroneous is "fundamentally flawed", (Nall's Brief pg. 42). However, it was not the Ruikkie's that determined that Chernak's survey work was erroneous, it was the St. Louis County Surveyor's Office that rejected Chernak's Boundary line and determined that Chernak's Survey "misrepresented the boundary" between Government lot 1 and 6 and misrepresented the riparian rights for Government Lot 6, (Tr.Ex. 56, (3)) (Tr.Ex. 60). As a result County Surveyor Thomas O'Malley refused to accept Chernak's placement of the boundary between the Ruikkie's Government Lot 6 and the Nall's Government Lot 1, (TT. 64, (20 thru 67, (6)). County Surveyor Thomas O'Malley stated regarding the boundary between Government Lot 1 and 6, "It is my opinion that the boundary between Lots 1 and 6 deflects at (the meander line) this point and goes in a northwesterly direction, perpendicular to the shoreline, to the shore of the lake. This would be somewhere through Unit 6 on the CIC Plat" (Tr.Ex. 60). This was the exact methodology used by Surveyor LaVerne Leuelling for the Ruikkie's petition Certificate of Survey of Government Lot 6, (Tr. Ex 7). David Adams the St. Louis County Examiner of Titles in his Examiner's Report for the Ruikkie's Verified Petition dated May 2nd 2007 stated that the methodology used in the Leuelling survey is "often referred to as the state riparian solution", (Appellants Appendix (AP-10

(3)), (Tr. Ex 7). Surveyor Norm Livgard (the former St. Louis County Surveyor), also depicted in his Aerial Survey of the Ruikkie's Government lot 6, the same "state riparian solution" methodology with the same riparian rights results, (Appellants Brief Addendum A-35).

The record clearly shows that the 2004, Ruikkie/Nall Land swap was not an agreement to determine a boundary, it was a conveyance based upon a mistaken survey performed by Chernak. Minnesota case law clearly states that a conveyance based upon a mistaken survey is not an agreement to create a boundary. "The authorities are very uniform that under such circumstances parties are not bound by an agreement fixing a boundary line between their lands", *Benz v City of St. Paul* 89 Minn.31, 93 N.W. 1038 (1903). The Nall's attempts to discredit the significance of *Benz* in the instant matter are groundless, lacking both case law and fact.

IV. THE CLAIM OF 15 YEARS OF ACQUIESCENCE TO THE NALL'S CLAIMED BOUNDARY LINE IS CLEARLY ERRONEOUS.

The Nall's claim (Nall's Brief pg. 43), "Moreover, the established boundary between Government Lots 1 and 6 has been acquiesced in (for more than 15 years) by the prior owner of Government Lot 6 and by the Ruikkies since they purchased Government Lot 6 in 1992". From the Nall's brief it appears that the Nall's are now trying to claim that the old cabin which the Ruikkie's discovered in May of 1993 somehow set a boundary line, (TT.198, (19 thru 200, (7))). First, that cabin is not on or near the boundary line that the Nall's have been claiming as a boundary by practical location.

“There can hardly be an acquiescence in a boundary line that is claimed to be located in several different places.” *Theros v. Phillips*, 256 N.W.2d at 859 (Minn. 1977). Secondly, if Government Lot 6 was abstract property, a claim for adverse possession could possibly be made for the small area on which the cabin and any other structures are situated, but pursuant to Minn. Stat. § 508.02, Torrens property is not subject to adverse possession. Further, the Nall’s falsely claim that the Ruikkie’s predecessor in title Mr. Homer, acquiesced to the Cabin or to the boundary line being claimed by the Nall’s, that claim is clearly erroneous. No evidence or testimony exists that Mr. Homer ever knew that the cabin existed, or that the owners of Government Lot 1 were claiming any boundary line. There was no testimony or evidence presented that anyone had ever met with or spoke with Mr. Homer other than the Ruikkie’s and their attorney at that time, Bill Defenbaugh (EX 58 and 59). The Record clearly shows that Mr. Homer believed that the property he sold to the Ruikkie’s (Gov Lot 6) went down to Mitchell Lake, the Trial Courts Findings on this issue are correct, (Appellants Brief Addendum (A-9 (10), (A-10 (16)), ((TT. 302, (5-16)). To assert otherwise is absurd and pure speculation.

The record clearly shows that the Ruikkie’s did not and could not have acquiesced to any boundary line for the Statutory 15 year period. Also the evidence of record shows the Ruikkie’s could not have acquiesced at all, as argued in the Ruikkie’s Appellants Brief there has never been a visible boundary line that the Ruikkie’s could have acquiesced to. As the Nall’s state in their Brief (Nall’s Brief pg. 9) and as the record shows it was not until May of 1993 that the Ruikkie’s discovered the old cabin, which was also the first time they learned that the owner of Government Lot 1 believed the

Ruikkie's boundary was different than what the Ruikkie's believed and were told by Mr. Homer when they purchased the property, (TT. 269, (18-20)). The trail that the Nall's speak of in, Nall's Brief pg. 44 and 45 was the trail that the Ruikkie's made after their purchase in 1998 of a 50 foot parcel from Homers lots, (TT.212, (25 thru 214, (11))). In 2005 the Ruikkie's refused to agree to sign the Nall's Waiver and Release which was designed to remove the very property rights that the Nall's now claim the Ruikkie's acquiesced to, (TT. 226, (6-22)). That act and all subsequent acts as listed in the Ruikkie's Appellants Brief describing the Ruikkie's refusal to accept the Nall's CIC plat are proof that the Ruikkie's were not acquiescing or agreeing with the Nall's as to the boundary line between Government Lot 1 and 6, (TT. 385, (21 thru 387, (9))).

V. THE NALL'S ARGUMENTS AS TO WHY THE COURTS BOUNDARY DETERMINATION WAS FAIR AND JUST IS FALSE.

The Nall's claim (Nall's Brief pg.46), "the prior owner defined the boundaries of Government Lot 6 to exclude frontage or a point of contact on Mitchell Lake". The Nall's incorrectly claim that when Mr. Homer platted Government Lot 5 and when he created a road easement through Government Lot 6 that he somehow defined Government Lot 6's boundary to exclude frontage on Mitchell Lake. These statements are completely false. The Platting of Government Lot 5 did not remove Government Lot 6 from having riparian rights and did not affect its boundary between Government Lot 1 in any way, (Appellants Brief Addendum A-8, (7)), (TT.343, (15 thru 345, (20))). The drawing depicting a road easement (part of Trial Exhibit 12), across Government Lot 6

does not in any way attempt to create or legally depict the North line of Government Lot 6. Surveyor La Verne Leuelling testified regarding the drawing and the lines depicted on it, stating “that line is essentially irrelevant and might be just kind of shown on here for general information”. Leuelling further stated that the dashed lines are not surveying lines and are not relevant to determining a boundary, (TT. 344, (3 thru 345, 3)).

The facts of record in this case that show that Mr. Homer believed and represented that Government Lot 6 had lake frontage on Mitchell Lake are too numerous to list, the Trial Courts own Findings clearly state that this fact is true, (Appellants Brief Addendum (A-9 (10), (A-10 (16))).

Equity and fairness do not favor the Nall’s in this action; in fact the opposite is true. The Nall’s surveyor Mr. Chernak testified that he did not believe it was his job to determine the riparian rights for Government Lot 6 even though the Nall’s Government Lot 1 shares a common boundary with the Ruikkie’s Government Lot 6. Chernak’s reasoning for this belief was that he was being paid by the Nall’s not the Ruikkie’s, (TT. 399, (4 thru 400, (3))). The Ruikkie’s were never given information prior to the land swap that their property had Riparian Rights to Mitchell Lake, had they understood that fact correctly they would not have given the Nall’s 3.7 acres of their land for something they already owned, (TT. 234, (5-22)), (TT. 240, (2-6)).

There can be no question that the Nall’s did not have title to all of the property which they included in their CIC 76 plat. The Nall’s not only acknowledged the Ruikkie’s property rights, they knowingly and deliberately ignored those same rights, (Tr. Ex. 54), (Tr. Ex.6), (Tr. Ex. 17). After the Ruikkies refused to sign the Nall’s Waiver and

Release, Nall told the Ruikkie's that he was going to sue them in a Proceeding Subsequent. George Nall testified that he was informed of the need for a Proceeding Subsequent Petition. However, Nall testified that because he needed to begin to sell units in his hoped for CIC he could not wait the time necessary to complete that Proceeding Subsequent. Based on that business decision, Nall submitted a revised survey to plat that included the same property as the rejected plat but removed the boundary line information between Government Lot 1 and 6. Nall did not inform the Ruikkie's that he had submitted this new revised survey to plat. When the Nall's submitted the revised Survey to Plat CIC 76 the record shows they knew the Ruikkie's had a competing claim to some of the property in that plat. The Nall's then submitted an Ex Parte, Petition Subsequent to the Examiner of Titles, in it they stated and submitted an affidavit from their Surveyor Mr. Chernak stating that there were no gaps or overlaps with neighboring property. The record shows this was done with full knowledge of the Ruikkie's property rights to some of the land that they included in their CIC 76 plat. The Nall's were issued Certificates of title that included property owned by the Ruikkie's, those certificates were issued to the Nall's without due process to the Ruikkie's as the Ruikkie's were never informed the Nall's submitted an Ex Parte, Petition Subsequent to the Examiner of Titles.

If in July of 2005 the Nall's believed they had a claim of Practical location against the some of the Ruikkie's property, they were required to prove that in a court of law through a Proceeding Subsequent prior to Platting and selling that same property. They chose not to do that, there was no due process for the Ruikkie's, instead they went forward with questionable tactics and left the Ruikkie's to bear the expense of bringing

this petition to trial after they themselves have profited through the sale of property included in CIC 76.

CONCLUSION

The taking of property by Practical location is not looked upon lightly nor is it favored by the courts. The burden of proof in boundary cases is on the party asserting the practical boundary, *Bjerketvedt v. Jacobson*, 232 Minn. 152, 156, 44 N.W.2d 775, 777 (1950). And a trial court must strictly construe the evidence “without resort to any inference or presumption in favor of the disseizor, but with the indulgence of every presumption against him.” *Phillips v. Blowers*, 281 Minn. 267, 269-70, 161 N.W.2d 524, 527 (1968). Also, “the evidence establishing the practical location must be clear, positive, and unequivocal.” *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977). The facts of record in the instant matter clearly show that the Trial Court erred in both fact and law.

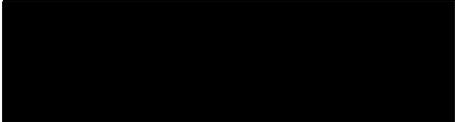
The facts of record in this case clearly show that the following statements are correct and true:

1. The Ruikkie’s own all of that part of Government Lot 6 listed on their Certificate of Title Number 301384, (Tr. Ex 31).
2. The Trial Court erred in finding and ruling that the 2004 land swap was an express agreement to determine the boundary line between Government Lots 1 and 6.

3. The Trial Court erred in ruling that the Ruikkie's acquiesced in or to any alleged boundary line.
4. The Trial Court erred in ruling that the boundary line between Government Lot 1 and 6 is as depicted in the Nall's CIC 76.
5. The true boundary line between the Ruikkie's Government Lot 6 and the Nall's Government lot 1 is as depicted on Surveyor La Verne Leuelling Certificate of Survey of Government Lot 6, Trial Exhibit 7.

Accordingly, the Ruikkie's respectfully request that this Court reverse and remand this matter to the Trial Court ordering it to Judicially determine the boundary line between the Ruikkie's Government Lot 6 and the Nall's Government Lot 1 as depicted in the Leuelling Certificate of Survey of Government Lot 6, (Tr.Ex. 7). The Leuelling Survey was the only riparian solution Certificate of Survey for the properties in question that was presented to the Trial Court as evidence during the three day trial and the only Certificate of Survey of record that exits for Government Lot 6 that identify more than one of its corners, excepting the Original Government Survey of 1885, (Tr. Ex 1). The Ruikkie's also request that this court reverse the Trial Courts Judgment on taxation that was in favor of the Nall's, dated June 23,th 2010.

Respectfully submitted,
Robert Ruikkie
Karen Ruikkie
Pro se Appellants



Robert Ruikkie 11-21-2010

Karen Ruikkie 11-21-10