

NO. A12-1419

State of Minnesota
In Court of Appeals

Peter H. Lanpher, et al.,

Respondents,

vs.

Jay T. Nygard,

Appellant,

Kendall M. Nygard,

Defendant.

RESPONDENTS' BRIEF AND ADDENDUM

JAY T. NYGARD
1386 Rest Point Road
Orono, MN 55364
(952) 334-6400

HEUER, LUND & FLORES, P.A.
Mark A. Lund (#0203178)
James A. Heuer, Jr. (#44787)
10 South Fifth Street, Suite 950
Minneapolis, MN 55402
(612) 236-0055

Pro Se Appellant

Attorneys for Respondents

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Legal Issues	1
Statement of Facts	2
Argument.....	3
I. Did the district court err in finding that the parties had stipulated that the involved fence was not a common fence?.....	3
II. Did the district court err by interpreting Minn. Stat. Ch. 344, which applies to partition fences only, did not apply to the issues before the district court?	4
Conclusion.....	7
Certificate of Compliance	9
Addendum	
<i>Gerald Feldmann, et al., vs. Gary Bailey et al.,</i> (April 13, 2003 Minn. App.) (<i>unpublished</i>).....	R. ADD. 1
<i>Leonard Miles et al. v. Peter J. Althoff,</i> 373 N.W.2d 655 (Minn. Ct. App. 1985)	R. ADD. 10

TABLE OF AUTHORITIES

STATE CASES

	Page(s)
<i>Alva R. Hunt v. Meeker County Abstract & Loan Company</i> , 128 Minn. 207, 150 N.W. 798 (1915 Minn.)	2
<i>Fletcher v. St. Paul Pioneer Press</i> , 589 N.W. 2d 96, 101 (Minn. 1999)	3
<i>Gerald Feldmann, et al., vs. Gary Bailey et al.</i> , (April 13, 2003 Minn. App.) (<i>unpublished</i>)	3
<i>Hibbing Educ. Ass’n v. Public Employment Relations Bd.</i> , 369 N.W.2d 527, 529 (Minn. 1985)	4
<i>John B. Cook v. Isaac W. Webb</i> , 19 Minn. 167 (1872 Minn.)	2
<i>Leonard Miles et al. v. Peter J. Althoff</i> , 373 N.W.2d 655 (Minn. Ct. App. 1985)	5, 6
<i>Rice Lake Contracting Corp. v. Rust Env’t & Infrastructure, Inc.</i> , 549 N.W.2d 96, 98-99 (Minn. App. 1996), <i>rev. denied</i> (Minn. Aug. 20, 1996)	3
<i>Rogers v. Moore</i> , 603 N.W.2d 650, 656 (Minn. 1999)	3
<i>Tollefson Development, Inc. v. Patrick McCarthy, et al.</i> , 668 N.W.2d 701 (2003 Minn.)	2

STATUTES AND RULES

Minn. Stat. Ch. 344	1, 3, 4, 7, 8
Minn. Stat. § 344.02 Subd. 1	4, 5
Minn. Stat. § 344.03	4, 6, 7
Minn. Stat. § 344.04	5

Minn. Stat. § 558.012

Minn. R. Civ. P. 52.013

MISCELLANEOUS AUTHORITIES

Black's Law Dictionary 1119-1120 (6th ed. 1991)2

LEGAL ISSUES

- I. DID THE DISTRICT COURT ERR IN FINDING THAT THE PARTIES HAD STIPULATED THAT THE INVOLVED FENCE WAS NOT A COMMON FENCE?

- II. DID THE DISTRICT COURT ERR BY INTERPRETING MINN. STAT. CH. 344, WHICH APPLIES TO PARTITION FENCES ONLY, DID NOT APPLY TO THE ISSUES BEFORE THE DISTRICT COURT?

STATEMENT OF FACTS

Respondent agrees with the Statement of Facts as set forth in Appellant's Brief with the following additions.

At the commencement of this action in the district court, counsel for the Appellant, Milton Nordmeyer, asked that the district court take judicial notice of certain statutes and ordinances to which the Respondent objected, but were allowed to be provided to the district court. Transcript 3-4¹. The Respondents provided the district court with case law (*John B. Cook v. Isaac W. Webb*, 19 Minn. 167 (1872 Minn.); *Tollefson Development, Inc. v. Patrick McCarthy, et al.*, 668 N.W.2d 701 (2003 Minn.); and *Alva R. Hunt v. Meeker County Abstract & Loan Company*, 128 Minn. 207, 150 N.W. 798 (1915 Minn.)), relevant statutes (Minn. Stat. § 558.01), and the dictionary definition of "partition" (*Black's Law Dictionary* 1119-1120 (6th ed. 1991)). At the commencement of the district court trial, Appellant's counsel indicated that they would "make a stipulation that this property is on or the fence is on the Plaintiff's property..." Transcript 6.

During direct examination, Mr. Nygard (Appellant) admitted that he did not own any part of Mr. Lanpher or Ms. Rogers (Respondents) land or property and that Mr. Lanpher or Ms. Rogers (Respondents) did not own any part of Mr. Nygard's (Appellant) property. Transcript 9-10.

¹ Respondents' Brief refers to Transcript of Proceedings provided to the Court as "Transcript".

ARGUMENT

I. DID THE DISTRICT COURT ERR IN FINDING THAT THE PARTIES HAD STIPULATED THAT THE INVOLVED FENCE WAS NOT A COMMON FENCE?

The district court did not err when it held that the parties had stipulated the involved fence was not a common fence.

In *Gerald Feldmann, et al., vs. Gary Bailey et al.*, (April 13, 2003 Minn. App.) (unpublished) the Court of Appeals finds:

“On Appeal, we give great deference to the district court’s findings of fact and will not set them aside unless clearly erroneous. *Minn. R. Civ. P. 52.01*. “Findings of facts are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W. 2d 96, 101 (Minn. 1999) (quotation omitted). If there is reasonable evidence to support the district court’s findings, this court will not disturb them. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). We review the district court’s determination of questions of law de novo. *Rice Lake Contracting Corp. v. Rust Env’t & Infrastructure, Inc.*, 549 N.W.2d 96, 98-99 (Minn. App. 1996), review denied (Minn. Aug. 20, 1996).”

Id. at 4. R. Add. 4².

The district court, held that “based upon the parties’ stipulation, this is not a common fence and Minn. Stat. Ch. 344 which applies to partition fences only does not apply. Plaintiffs are the sole owners of the fence.” A. Add. 4³.

There is no rational basis to set aside the district court’s findings of fact in this case. The parties’ stipulation is binding and not clearly erroneous.

² Respondents Brief refers to its own Addendum as “R. Add.”

³ Respondents’ Brief refers to Appellant’s Addendum as “A. Add.”

Additionally, Appellant admitted that the fence was wholly on Respondents' property and that Appellant did not own any part of Respondents' property.

II. DID THE DISTRICT COURT ERR BY INTERPRETING MINN. STAT. CH. 344 WHICH APPLIES TO PARTITION FENCES ONLY, DID NOT APPLY TO THE ISSUES BEFORE THE DISTRICT COURT?

“Statutory interpretation is a question of law that we review de novo.”
Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527,529 (Minn. 1985).

The district court ruled that as a conclusion of law, the fence involved herein was not a partition fence. This was the correct and appropriate decision based upon the stipulation of the parties and the arguments presented at the district court. A. Add. 4.

Minnesota Statutes, Chapter 344 deals with partition fences:

There are two methods under the law that a partition fence comes into existence. The first methodology is when adjoining land owners, desiring the land to be partially or totally fenced, agrees to build and maintain a partition fence between their lands in equal costs and equal shares. Minn. Stat. § 344.03.

But this methodology was not used in this case. The involved fence between the Respondents and the Appellant existed prior to their ownership of the lands. Thus, the only method provided under the law for determining that this division fence has transformed into a partition fence is for a fence viewer to evaluate the fence in accordance with Minn. Stat. § 344.02 Subd. 1 (e).

Minn. Stat. § 344.02 Subd. 1, details what types of fences can be determined to be partitioned fences. Minn. Stat. § 344.02 Subd. 1 (a), (b), (c), (d) all define a partition fence as being some type of a wire fence. Minn. Stat. § 344.02 Subd. 1 (e) indicates that a partition fence can be “fences consisting of rails, timbers, wires, boards, stonewalls... which are considered by the fence viewers as equivalent to any of the fences listed in this subdivision.”

The facts in this case were clear. There was no evaluation by a fence viewer to indicate that the involved fence was a partition fence. Transcript 35-38.

The facts in this case clearly indicate that this fence, consisting of natural cedar boards, would only qualify as a partition fence if under Minn. Stat. § 344.02 Subd. 1 (e), a fence viewer had evaluated the fence and made a decision to designate the fence as a “partition” fence.

In *Leonard Miles et al. v. Peter J. Althoff*, 373 N.W.2d 655, (Ct. App. 1985), the Respondent was dissatisfied with the upkeep of a division line fence between his property and the Appellants. In *Miles*, the Respondent properly complained to the township board which appointed a fence viewer to evaluate, examine, and make decision concerning the fence. *Id.* at 656.

Under Minn. Stat. § 344.04, the fence viewer is required to give notice to the parties as to when the examination will take place and when a hearing will take place concerning the complaints of the adjoining land owner. In *Miles*, the only testimony was that the Appellant had not received notice. The Respondent in *Miles*, commenced the action to force the Appellant to pay a portion of the

costs for the repair of the fence. The *Miles* trial court held that there was sufficient notice to justify assessing the costs against the Appellant.

The Court of Appeals reversed noting that “Respondents failed to meet their burden to prove that notice was given as required by statute.” *Id.* at 657. R. Add. 12. The Court of Appeals went on to hold that without notice to the Appellant, the fence viewers did not have jurisdiction to make their findings and assess an amount that Appellant was compelled to pay. *Id.* at 658.

During the district court trial, Appellant had the burden to present evidence that there had been notice given to Respondents that a fence viewer had been requested or that a fence viewer had evaluated the fence involved in this action. There was no evidence presented at the district court level that a fence viewer had evaluated the fence, no notice that a fence viewer was having a hearing to decide if the fence was a “partition” fence and no notice of a hearing by the fence viewer for the complaints of the Appellant. Therefore, as was no notice for any hearings, no notice of a determination by a fence viewer, and no finding by a fence viewer that the fence involved was a partition fence, then Appellant is not allowed to take matters in to his own hands and vandalize his neighbor’s fence. Accordingly, the district court’s decision that this case does not involve a partition fence was appropriate.

Appellant claims that it is the statutory requirements of Minn. Stat. § 344.03 which requires a finding in this case that there exists a partition fence. Appellant ignores the clear language of Minn. Stat. § 344.03 where it states that

“the land owners or occupants shall build and maintain a partition fence between their lands in equal shares.” Minn. Stat. § 344.03 contemplates the creation of a fence where no fence had previously existed. There was no evidence at the district court level concerning when this fence was created. However, the Appellant had stipulated that the fence wholly belonged to the Respondents.

The Appellant maintains that the parties acted in a manner consistent with treating the fence as a partition fence. There is no case law provided as authority to justify this position.

To the contrary, Respondents have steadfastly maintained that they are the owners of the fence involved and that the fence is on their property and that they did not trespass on the property of Appellant to view the side of the fence towards the Appellant’s property. Accordingly, this factual dispute was decided properly by the district court in determining that the fence belonged solely to the Respondents and that the fence involved was not a partition fence.

CONCLUSION

The only issue raised on Appeal is if the district court erred in ruling that the involved fence was not a partition fence. There was no error by the district court in its finding and order that this fence was not a common fence and Minn. Stat. Ch. 344 did not apply.

The remainder of Appellant’s brief is devoted to arguments that may apply if the district court had held that the fence was a partition fence. **Only upon a determination by a fence viewer, can a division fence be transformed into a**

partition fence. Appellant failed to apply the proper procedure to obtain an opinion by a fence viewer that would change the status of this fence.

The district court correctly recognized that the parties felt the fence was solely owned by the Respondents and that without a determination by a fence viewer, then Minn. Stat. Ch. 344 did not apply.

Since there was no partition fence, then the actions of Appellant to trespass and damage the fence were improper, illegal and “the Court cannot allow this type of self-help remedy to occur without consequences.” A. Add. 3.

Lastly, there was no legal theory that was presented by Appellant to justify their damage of Respondent’s fence and the Appellant failed to meet their burden of proving justification for their actions. For the foregoing reasons and arguments, the Respondents request this Court to deny the appeal in its entirety and to award appropriate costs.

HEUER, LUND & FLORES, P.A.

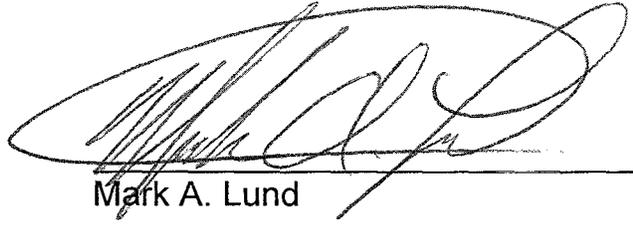


Mark A. Lund, #0203178
James A. Heuer, Jr. #44787
Attorneys for Respondents
10 South Fifth Street, Suite 950
Minneapolis, Minnesota 55402
Telephone: (612) 236-0055

Dated: December 11, 2012

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the requirements of Minn. R. App. P.132.01(3)(b)(1) in that it is proportionally spaced, as a typeface of 13 points utilizing Microsoft Word 2003 and contains 1,885 words, including headings, endnotes, and quotations.



Mark A. Lund