

State of Minnesota  
In Court of Appeals

OFFICE OF  
APPELLATE COURTS

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PETER H. LANPHER, et al.,

vs. Respondents,

JAY T. NYGARD,

Appellant,

KENDALL M. NYGARD,

Defendant.

APPELLANT'S BRIEF, ADDENDUM AND APPENDIX

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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                            | 2     |
| Legal Issues                                    | 3     |
| Statement of Case                               | 4     |
| Statement of Facts                              | 5     |
| Argument  | 9     |
| Conclusion                                      | 17    |
| Certificate of Compliance                       | 18    |
| APPENDIX AND INDEX                              |       |
| Findings of Fact, Conclusions of Law, and Order | A-1   |
| Defendant's Exhibit 2                           | A-6   |
| Notice of Appeal                                | A-7   |
| ADDENDUM  |       |
| Findings of Fact, Conclusions of Law, and Order | ADD-1 |
| Transcript Excerpts                             | ADD-6 |

## TABLE OF AUTHORITIES

| <u>Statutes</u>   | Page  |
|---|-------|
| Minn. Stat. Chapter 344   | 5-10  |
| Minn. Stat. § 344.01  | 9     |
| Minn. Stat. § 344.03  | 10    |
| Minn. Stat. §344.04   | 8     |
| Iowa Code § 113.17  | 10    |
| <br><u>Cases</u>  |       |
| <u>Brom v. Kalmes</u> , 304 Minn. 244, 230 N.W.2d 69 (Minn. 1975).<br>10, 13  |       |
| <u>Kundel Farms v. Vir-Jo Farms</u> , 467 N.W.2d 291 (Iowa Ct. App. 1991)<br>10, 11                                 |       |
| <u>Oxborough v. Boesser</u> , 30 Minn. 1, 13 N.W. 906 (Minn., 1882)<br>11   |       |
| <u>Rice v. Kringler</u> , 517 N.W.2d 606 (Minn. App. 1994)  | 8, 10 |
| <u>Youngman v. Ahrens</u> , 104 Minn. 531, 116 N.W. 1135 (Minn., 1908).<br>11                                       |       |
| <br><u>Secondary Authorities</u>  |       |
| <u>Minnesota Partition Fence Law</u> , Information Brief of the Minnesota House of Representatives, December, 1998. | 8     |

## LEGAL ISSUE

1. THE TRIAL COURT ERRED IN RULING THAT THE FENCE IN DISPUTE WAS NOT A PARTITION FENCE AND RULING AGAINST THE APPELLANTS.

## STATEMENT OF CASE

Respondents commenced this action in Conciliation Court on September 26, 2011, to recover money for alleged damages done to their fence by Appellant's painting of the fence. A-1. Respondents claimed Appellant's painting of the fence was done with clear malice. A-1. Respondents requested an award of damages in the amount of \$5,071.86, claimed to be the estimated cost to repair the fence. A-1.

The Appellant and Defendant Nygard filed a counter-claim on October 25, 2011, arguing that the fence in question was a common [partition] fence along the property line. A-1. Appellant asserted they maintained and repaired the fence, consistent with a partition fence, and were entitled to reimbursement for their efforts in the amount of \$920.00. A-1.

The parties appeared and a hearing was held in Conciliation Court on December 7, 2011. A-2. The Court ruled in favor of the Respondents and awarded judgment against the Appellant and Defendant Nygard in the amount of \$2,000.00 plus the \$70.00 court filing fee. A-2. On December 22, 2011, the Appellants filed a Demand for Removal to District Court, requesting a court trial and a de novo review of the matter. A-2. The matter was set on for trial on May 3, 2012 in district court. A-2.

The parties appeared for trial on May 3, 2012 in district court before the Honorable Judge Susan M. Robiner, and a trial commenced. A-1-3. At the close of trial the Court issued Findings of Fact, Conclusions of Law, and an Order. A-1. In the Conclusions of Law the Court ruled that the parties had stipulated that the

fence was entirely on the Respondents' property, even though it was only by three inches in some places and a no more than a foot at the furthest point from the property line. A-4. From this stipulated fact the Court concluded that the fence in question was not a partition fence, and Minnesota Statute Chapter 344 did not apply. A-4. From these Conclusions of Law the Court ruled that the Respondents were the prevailing party and awarded judgment against the Appellant and Defendant Nygard in the amount of \$5,071.86, plus \$70.00 for the filing fee, plus \$50.00 in mandatory court costs. A-4-5. From that Order the Appellant appealed. A-7.

#### STATEMENT OF FACTS

The Appellant and the Respondents are neighbors in Orono, Minnesota with adjoining properties on Rest Point Road. A-1-3. Appellant and Defendant Nygard reside at Rest Point Road, where their property is bounded by fence lines on the side adjoining Respondents' property and the opposite side, and the property is bounded by shoreline on the back of the property and the road on the front. Respondents reside at Rest Point Road, where their property is bounded by a fence line on the property line adjoining Appellant's property, the front of the property by a white fence, and the back of the property by shoreline.

This dispute arose when the fence between the properties running along the property line fell into disrepair. Tr.22. The parties stipulated at trial that the fence lies entirely on Respondents' property, but the fence is only inside their property line by three inches at one point, and is off the property line by no more than a

foot at its furthest point. Tr.9-10. In addition, the fence runs along the property line on the crest of a hill that rises from Appellant's property, cresting just over the property line on Respondents' property as observed in Defendant's Exhibit 2. A-6. A fence that stood directly on the property line would have to be driven into the side of the hill, midway up the rise in the hill at varying points along the hill.

From the original counter-claim of Appellant the Court noted that the Appellant's primary claim and argument "was that the fence was a common (or partition) fence." Throughout 2011 the Appellant and Defendant Nygard observed the fence growing mold that was aggravating Mrs. Nygard's allergies, leaning toward their side of the property, and pulling apart in areas where trees and shrubs were growing into and through the fence. Due to prior disputes with the Respondents, Appellant had been asked by Respondents' attorney not to have contact with the Respondents. Tr.21-25. Therefore Appellant had no recourse to contact Respondents to address the issue of repairs on the fence.

Understanding the fence was a common (partition) fence, Appellants attempted to follow the procedures of Minnesota Statutes Chapter 344, Minnesota fence law, for obtaining repair and maintenance for the fence. Tr.22-25. Appellants contacted the city of Orono to obtain the services of the local "fence viewer" in accordance with Minnesota Statutes to evaluate the fence and any need for repairs or maintenance. The city of Orono did not know what "fence viewers" were, and although they initially agreed to provide the city inspector, the city

subsequently refused to meet their obligation to provide a fence viewer to handle Appellants' request regarding the disputed fence. Tr.35-38.

As Appellant was denied access to his legal recourse regarding the fence repairs, on July 29, 2011 Appellant proceeded to provide, at his own cost, repairs to the fence to prevent it from falling down and painted the fence to cover the mold. Tr.22-24. He attempted to finish the repairs on September 25, 2011. A-1-3. The Respondents' subsequently brought this action against the Appellants. At trial in the district court both sides presented testimony to support their arguments. A-1-3.

At the close of trial the Court issued Findings of Fact, Conclusions of Law, and an Order. In the Conclusions of Law the Court ruled that the parties had stipulated that the fence was entirely on the Respondents' property, even though it was only by three inches in some places and a no more than a foot at its furthest point, and the fence ran along the property line. A-1-4. From this stipulated fact the Court concluded that the fence in question was not a partition fence, and Minnesota Statute Chapter 344 did not apply. A-1-4. The Court provided no further analysis, nor did it make any further inquiry in evaluating whether the fence in question was a partition fence. The Court ruled that the fact that the fence did not actually touch the property was dispositive of whether the fence was a partition fence. A-3-4.

After concluding the fence was not a partition fence, the Court ruled that the Appellants' had no valid legal theory to justify their actions. A-3-4. From these

Conclusions of Law the Court ruled that the Respondents were the prevailing party and awarded judgment against the Appellants in the amount of \$5,071.86, plus \$70.00 for the filing fee, plus \$50.00 in mandatory court costs. A-3-4.

## ARGUMENT

The trial court erred in ruling that the fence in dispute was not a partition fence and ruling against Appellant and Defendant Nygard. The issue of whether a fence lies wholly on a party's property is not dispositive in the determination of whether a fence constitutes a partition fence. Fences can still be partition fences even when standing wholly on one party's property. Appellant proceeded in attempting to obtain repairs for the fence in accordance with the requirements for partition fences, and was only unable to proceed under Minnesota fence law because the city of Orono refused them process. If the fence in dispute was legally a partition fence then the Appellant and Defendant Nygard were legally justified in proceeding with making repairs on the fence and were not liable for damages. Therefore, upon de novo review, the matter should be reversed and remanded for finding in favor of Appellant and Defendant Nygard, or further consideration of whether the disputed fence legally constituted a partition fence.

Minnesota partition fence law, Minnesota Statutes, chapter 344, established rules governing the construction and upkeep of partition fences. "A partition fence is a fence on or very near the boundary line separating adjoining properties." Minnesota Partition Fence Law, Information Brief of the Minnesota House of Representatives, December, 1998. Minnesota partition fence law requires neighboring owners or occupants of "improved and used" land to each contribute to the cost of building and maintaining a partition fence between their lands.

The partition fence law also provides for local enforcement. If a controversy arises with respect to an occupant's obligations to maintain a partition fence, either party may complain to the fence viewers. Minn. Stat. §344.04; Rice v. Kringler, 517 N.W.2d 606 (Minn. App. 1994). The law is administered and enforced by "fence viewers," local officials designated by law to serve as referees to resolve controversies between neighbors about partition fences. The law designates fence viewers based on the type of governmental unit in which the neighboring properties are located. Minn. Stat. §344.01. When neighboring landowners cannot reach agreement, the fence viewers will investigate and assign to each owner the portion of a fence to be maintained or repaired. See Minn. Stat. Chap. 344.

The duties of fence viewers are judicial in nature and notice to the parties is necessary to give the fence viewers jurisdiction in the proceedings. Minn. Stat. § 344.03-04. Failure of the fence viewers to give required notice to the parties voids the proceedings. The decision of fence viewers on questions within their jurisdiction, in the absence of fraud or mistake, is conclusive unless set aside on appeal. Id. Failure to comply with an order issued by the fence viewers can result in the non-compliant landowner being responsible for the full cost of a partition fence. Further, an order under the law to maintain a partition fence "runs with the land" and is binding on subsequent owners, if and when the order is filed with the county recorder. Id. If a person fails to build, repair, or rebuild a partition fence as required by an order of the fence viewer(s), and the adjoining property owner

proceeds with the work, the person actually doing the building or repair work may recover from the adjoining landowner double the amount of the expenses or costs that would have been the adjoining landowner's share of the fence. The fence viewers determine the cost or value of the fence.

Despite Minnesota fence law dating back hundreds of years, there are only few court cases regarding the law from the Court of Appeals to give clarity to the matter. In addition, neither Minnesota statute nor case law provides a clear definition of what constitutes a partition fence. Therefore, it becomes necessary to consult other jurisdictions for insight and support on the matter. In addition to the above noted definitions of a partition fence, a partition fence can still exist even if it is "wholly on one side of the [properties'] division line," as long as the fence in question remains in close proximity to the division line, described as "if the fence is located a few feet or so within the border of one of the landowners' property." Kundel Farms v. Vir-Jo Farms, 467 N.W.2d 291 (Iowa Ct. App. 1991); citing Iowa Code section 113.17.

## BASIC REQUIREMENTS OF PARTITION FENCE

The basic statutory requirements for a partition fence that invokes Minn. Stat. §344.03 only requires that adjoining lands of one or both of the owners are "used and improved." See Rice, *supra*, 517 N.W.2d 606; see also Brom v. Kalmes, 304 Minn. 244, 248-249, 230 N.W.2d 69, 73 (Minn. 1975). In these circumstances a fence running along the property line of used and improved lands meets the basic requirements of a partition fence. The parties in this matter both used and

improved their properties, as they were residential properties with each party's home. The parties both noted that the disputed fence does in fact run the length of the adjoining properties along the property line. Therefore, the disputed fence did in fact meet the basic statutory requirements of a partition fence sufficient to invoke the applicability of Minnesota Statutes Chapter 344.

#### LOCATION OF A FENCE NOT DISPOSITIVE OF PARTITION FENCE

The Court ruled the issue of whether the fence was wholly on one party's property as dispositive on the issue of whether or not a fence is a partition fence. A-1-3. Minnesota statutes and case law do not directly address the issue of a partition fence and its proximity to the property line. However, Minnesota fence law provides that "fence viewers" do not determine exactly where on or near a property line a partition fence should be located, contemplating partition fence locations off of the property line. See Minn. Stat. Chap. 344. In addition, Minnesota case law has shown that the fact that a fence was not built on the actual property line is not dispositive of the classification of the fence as a partition fence or not. See Oxborough v. Boesser, 30 Minn. 1, 13 N.W. 906 (Minn., 1882); See Youngman v. Ahrens, 104 Minn. 531, 116 N.W. 1135 (Minn., 1908).

In reviewing the matter in the Iowa jurisdiction, both statute and case law have provided that a partition fence can still exist even if it is "wholly on one side of the [properties'] division line," as long as the fence in question remains in close proximity to the division line, described as "if the fence is located a few feet or so within the border of one of the landowners' property." Kundel Farms, supra, 467

N.W.2d 291; citing Iowa Code section 113.17. In Kundel Farms, the fence in dispute lay entirely on one party's property with no proximity to a property line and no relation to a property line. The Court held the fence was not a partition fence because it bore no relation or proximity to a property line, but affirmed the statutory language which specifically provided a partition fence can still exist if "wholly on one side of the division line." Id. The Court qualified this statute as only applicable "if the fence is located a few feet or so within the border of one of the landowners' property." Kundel, supra, 467 N.W.2d at 291-295.

The fact that the fence did stand wholly on Respondents' property is not disputed. Tr.9-10. It is also not disputed that the fence ran along the property line, coming within three inches of the property line and never going more than a couple feet from the property line. Tr.9-10. Defendant's Exhibit 2 at trial provided a clear picture of the location of the fence on the crest of the hill rising up from the Appellant's property and cresting just over the property line on Respondents' side. See A-6. The terrain of the property line with the hill between the properties indicates that the fence was placed as close to the property line as reasonably possible without actually placing the fence on the side of the hill.

Minnesota statute and case law does not clearly require a partition fence to stand on the property line or on both parties' property to constitute a partition fence, and a fence's existence on one party's property has not proven fatal to its classification as a partition fence. Other jurisdictions have specifically contemplated and provided that a fence in close proximity to a property line, even

if wholly on one side of the property line, can still constitute a partition fence.

Therefore, it was error for the Court to rule that the issue of whether the fence was wholly on Respondents' property was dispositive of the issue of whether the fence constituted a partition fence. Further inquiry is required to make the final determination of whether this fence constituted a partition fence.

#### OTHER EVIDENCE INDICATIVE OF PARTITION FENCE

The issue of whether a fence constitutes a partition fence exists greatly in the treatment of the fence by both parties. Both parties' actions and testimony indicate that the fence was in fact viewed as a partition fence and treated as such, providing further support for the classification of the fence as a partition fence.

The Appellant from the beginning argued and asserted that the disputed fence was a partition fence (or common fence as Appellants referred to it). Tr.5-8. When Appellant was initially painting and repairing the fence in July, 2011 Respondent Rogers testified that Appellant asserted that he had a right to paint the fence as it was a common fence [partition fence]. Tr.86-87.

When Appellant sought to repair the fence because it was in disrepair, molding, and was threatening to fall on to the Nygard property he proceeded under belief that the fence was a partition fence. Tr.22. Appellant tried to proceed according to Minnesota fence law by requesting a fence viewer from the statutory "fence viewer" provisions. Tr.7-8; 35-38. Appellant contacted the city of Orono to request a fence viewing. After initially being unaware of their obligations, the city finally agreed that they would send the city inspector to proceed with the fence

viewing. However, after their initial agreement, the city subsequently declined to go forward with a fence viewing and refused any further involvement in the matter. Tr.7-8; 35-38. Throughout the process Appellant sought to proceed and act consistent with the fence being a partition fence.

When Appellant was denied process and recourse from the city of Orono, Appellant accepted his obligation to help maintain and repair the fence as he had screws placed into the fence to tighten the fence and prevent it from falling down, and he painted the fence to cover the mold and rotting. Tr.25. He believed he had both an obligation and right to maintain the fence, consistent with his view of it as a partition fence.

Even the Respondents acted consistent with a view that the fence was in fact a partition fence. Respondents testified that they had been down to inspect the Appellants' side of the fence. Tr.92-93; 99. Given the physical layout of the fence in proximity to the Appellant's property the Respondents obviously held a belief of a privilege to enter Appellant's property to review the fence. See Brom, supra, 230 N.W.2d 69. If the fence in question was in fact a division fence and not a partition fence, then the Respondents held no privilege to enter the Appellant's land to perform inspections of the fence, and as such, all entrances onto the Appellant's land were trespasses.

Appellant, on direct examination, at one point declined to state that the disputed fence was a partition fence when questioned, but rather he repeatedly classified it as a "common fence." Tr.21. Given the Appellant's arguments and

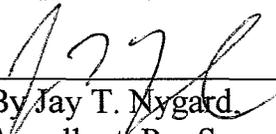
testimony it is evident his classification of the fence as a “common fence” coincides with the definition of partition fence, and rather he misunderstood the official definition of partition fence. Tr.21.

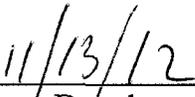
The actions and statements of both parties indicate a viewpoint consistent with a classification of the fence as a partition fence. Therefore, it cannot be clearly determined from the record that the disputed fence was not a partition fence. Rather the matter requires further consideration to determine whether the fence was a partition fence or not.

## CONCLUSION

The trial court erred in ruling that the disputed fence was not a partition fence based solely on the fact that it was wholly on Respondents' property. This fact alone is not dispositive on the issue of whether a partition fence exists. The disputed fence meets the basic requirements of a partition fence. It is close enough to the property line to constitute a partition fence, and it could not have reasonably been built on the actual property line. In addition, the parties both acted according to a belief that the fence was in fact a partition fence. Therefore, the court's ruling should be reversed, or the matter remanded for further consideration by the court on the issue of whether the fence is a partition fence.

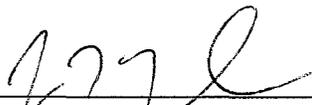
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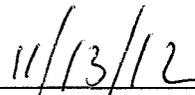
  
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**CERTIFICATE OF COMPLIANCE**

The undersigned pro se Appellant Jay T. Nygard, certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 12 point, proportionately spaced typeface utilizing Microsoft Word, and contains 3,300 word count words, including headings, endnotes, and quotations.

  
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