

APPELLATE COURT CASE NUMBER A10-1002

STATE OF MINNESOTA
IN COURT OF APPEALS

Glenn R. Britney and Charlotte Britney,

Plaintiffs-Respondents,

v.

Swan Lake Cabin Corporation, a Minnesota Corporation,

Defendant-Appellant.

RESPONDENTS' BRIEF

Sellman Law Office
Richard K. Sellman, #99004
1907 Third Avenue East, Suite 1
P.O. Box 37
Hibbing, Minnesota 55746
(218) 262-5501

Attorney for Appellant

Kent E. Nyberg Law Office, Ltd.
Kent E. Nyberg, #80159
20 NE Fourth Street, Suite 101
Grand Rapids, MN 55744
(218) 326-9626

Attorney for Respondent

TABLE OF AUTHORITIES

Minnesota Statutes	page
MINN. STAT. § 508.671.....	4,5,6,9,10,11,16
MINN. STAT. § 508.71.....	4,5
MINN. STAT. § 508.02.....	5,6,11,15
MINN. STAT. § 508.22.....	10
MINN. STAT. § 508.25.....	8
MINN. STAT. § 508.06(3).....	10
Minnesota Court Cases	page
<u>Beardsley v. Crane</u> , 54 N.W. 740 (Minn. 1893).....	11,12
<u>Benz v. City of St. Paul</u> , 93 N.W. 1038 (Minn. 1903).....	12
<u>Simms v. Fagan</u> 12 N.W.2d 783 (Minn. 1943).....	15
<u>Minneapolis & St. Louis Ry. Co. v. Ellsworth</u> , 54 N.W.2d 800, 803-04 (Minn. 1952).....	5,8,10
<u>Moore v. Henricksen</u> , 165 N.W.2d 209, 218 (Minn. 1968).....	8,10
<u>Konantz v. Stein</u> , 167 N.W.2d 1, 5 (Minn. 1969).....	8
<u>Estate of Koester v. Hale</u> , 211 N.W.2d 778 (1973).....	10
<u>C.S. McCrossan, Inc. v. Builders Fin. CO.</u> , 232 N.W.2d 15 (Minn. 1975).....	10
<u>Theros v. Phillips</u> , 256 N.W.2d 852 (Minn. 1977).....	11,15
<u>Wojahn v. Johnson</u> , 297 N.W.2d 298 (Minn. 1980).....	13,15
<u>Allred v. Reed</u> , 362 N.W.2d 374 (Minn. App. 1985).....	13
<u>Park Elm Homeowner's Ass'n v. Mooney</u> , 398 N.W.2d 643 (Minn. App. 1987).....	10
<u>In re Zahradka</u> , 472 N.W.2d 153 (Minn. App. 1991).....	8
<u>In re Building D, Inc.</u> , 502 N.W.2d 406 (Minn. App. 1993).....	9
<u>Petition of McGinnis</u> , 536 N.W.2d 33 (Minn. App. 1995).....	7,8
<u>In re Geis</u> , 576 N.W.2d 750 (Minn. App. 1998).....	5,9,10

Pratt Investment Co. v. John D. Kennedy, 636 N.W.2d 849
(Minn. App. 2001).....14

In re Hauge, 766 N.W.2d 50 (Minn. App. 2009).....5

Eric J. Slindee, et al v Fritch Investments, LLC,
A08-303, 2009 WL 366623 (Minn. App. 2009)..... 11,13,14

LEGAL ISSUES

- I. THE DISTRICT COURT WAS CORRECT IN ITS CONCLUSION THAT DEFENDANT SWAN LAKE WAS REQUIRED TO FOLLOW THE PROCEDURES ESTABLISHED BY MINNESOTA STATUTES §§ 508.671, 508.71 WHEN PLAINTIFFS BRITNEY COMMENCED THE PRESENT ACTION.

- II. THE DISTRICT COURT WAS CORRECT IN CONCLUDING THAT DEFENDANT SWAN LAKE DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE ITS BOUNDARY LINE BY THE THEORY OF PRACTICAL LOCATION.

TABLE OF CONTENTS

	<u>page</u>
Table of Authorities	i, ii
Legal Issues.....	iii
Statement of Facts	1.
Argument	
I. The District Court was correct in its conclusion that Defendant Swan Lake was required to follow the procedures established by Minnesota Statutes §§ 508.671, 508.71 when Plaintiffs Britney commenced the present action.....	4.
II. The District Court was correct in concluding that Defendant did not prove by clear and convincing evidence its boundary line by the theory of practical location.....	7.
Conclusion	16.

STATEMENT OF FACTS

Plaintiffs, Glenn R. Britney and Charlotte J. Britney, husband and wife, are the owners in fee simple, as joint tenants, of Lot Five (5), Block Two (2), Plat of Swan Lake. Their title is evidenced by Certificate of Title No. 16,169. Their title derived from the parents of Charlotte Britney, to wit, George W. Hill and Esther C. Hill. Their title was evidenced by Certificate of Title No. 4924, dated September 23, 1950. Memorialized against said title are two documents: 1) Affidavit of Survivorship evidencing death of George W. Hill; and 2) Warranty Deed running in favor of the Britneys, dated May 1, 1990, filed May 30, 1990. The property is registered or Torrens property. The Hills and the Britneys have used the premises as their homestead.

Defendant, Swan Lake Cabin Corporation, is a Minnesota Corporation, and record owner of Lot Four (4), Block Two (2), Plat of Swan Lake. Its title is evidenced by Certificate of Title No. 16,031. Its ownership is derived from the "Johnston" family and the prior Certificate of Title No. 6946 reflects the same. Ownership has been in the Johnston family since before the 1930's.

Charlotte Britney moved to the property in approximately 1950, attended local schools and subsequently moved to the Twin Cities returning to the property in 1990 when purchasing the same from her mother; at that time the Britneys removed the Hills' original house and constructed a new log home. She recalled having received trees in the mid-1950's at school as part of an Arbor Day program. She testified that she and her father planted them in random fashion in

an area near the lake and the boundary with the Defendant. A forester opined upon coring that the age of the trees was consistent with the planting in the 1950's.

Defendant's predecessors in title hired Registered Land Surveyor, Les Hartman, to complete a survey of the parties common boundary in the mid-1970's, which resulted in a survey dated January 15, 1977. The Plaintiffs were unaware of this survey until they commissioned their own survey by Northern Lights Surveying and Mapping in 2007 resulting in a survey dated November 21, 2007. The survey was the result of a letter sent by Defendant to Plaintiffs dated August 20, 2004 objecting to the Plaintiffs trimming trees on what the Defendants perceived to be their property. The Plaintiffs previously had "topped" or trimmed the trees in the early 1990's, with no objection from the Johnstons.

The "Hartman" survey showed the line between the parties' properties to lay several feet to the north and east of a "fence" located between the parties. The testimony at the trial showed the fence was currently in disrepair, was barely visible, and did not represent the "true line" between the parcels. It was barely evident in the pictures submitted to the Court by both sides. The fence did not represent the line to the Defendants. The "Hartman" survey did not show the starting points used to establish the boundaries and was flawed. The "Northern Lights" survey represented the "true line" as platted. Mr. Britney was aware of only one "iron pin" remaining as depicted in the Hartman survey; it did not contain any of the usual surveyor's information. He did not know what it represented.

He only became aware of a second pin by Jefferson Boulevard after the "Northern Lights" survey. The "Hartman" survey depicted the Johnstons original cabin, sauna, shed by the lake and shed by Jefferson Boulevard. Part of the original cabin has been moved after its replacement, and the shed shown near the midpoint has been moved to the other side of the property. The sauna by the lake and the shed by Jefferson Boulevard remain and encroach upon the Britneys' tract as shown by the "Northern Lights" survey. The pictures submitted to the Court by the Britneys, which depict by colored tape the two survey lines, showed that maintenance of the Johnston yard does not extend into the Britneys' property except in two areas; they are the shed by Jefferson Boulevard and the sauna by the lake. The Britney photographs depict use of the disputed area by Britney near their log home both for storage of materials and the base for a road access to the lake. The Johnstons' current use of the disputed premises consists solely in an area by the shed and sauna. Pictures of the trees near the lake show the "Northern Lights" line running through the middle. They do not define a "line" in and of themselves. But for the sauna and shed, the area between the "Northern Lights" survey and the "Hartman" survey consists of brush and trees. Again, the use and maintenance by the Johnstons does not extend into the disputed area except in the two aforementioned areas, the shed and sauna. The platted line between the two lots is a straight line. The Johnstons use of the disputed tract is irregular at best.

The Defendants have submitted a metes and bounds description of that portion of Lot Five (5), Block Two (2), Plat of Swan Lake, now titled in the Britneys, which they claim by the doctrine of practical location. It is purportedly consistent with the common line established by Hartman. It is interesting to note that Johnstons' claim is not to the fence but beyond it to the Hartman line.

The Plaintiffs' claim is one for ejectment or removal of the Defendants' improvements which encroach upon Plaintiffs' property. The Defendant's claims an establishment of a common line consistent with the "Hartman" survey, damages for trespass and the damages for the allegedly wrongful topping of the trees. No testimony was provided by Defendant on its Counterclaim for damages.

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN ITS CONCLUSION THAT DEFENDANT SWAN LAKE WAS REQUIRED TO FOLLOW THE PROCEDURES ESTABLISHED BY MINNESOTA STATUTES §§ 508.671, 508.71 WHEN PLAINTIFFS BRITNEY COMMENCED THE PRESENT ACTION.

Defendant in its appeal raises as its first issue whether or not it was obligated under Minnesota law to follow the procedure set forth in MINN. STAT. §§ 508.671, 508.71 (2009). Defendant argues Plaintiffs too failed to comply with the required statutory procedure. An important distinction, however, is that Plaintiffs did not attempt or request the court to alter in any way the legal description contained in their Certificate of Title. Plaintiffs did not seek any other relief other than a determination that they were owner in fee of the entirety of Lot 5, Block 2, Plat of

SWAN LAKE. (See Complaint, Request for Relief ¶ 1). The proceeding commenced by the Plaintiffs was not an action under MINN. STAT. § 508.671 or under MINN. STAT. § 508.71. They did not seek to establish a boundary line different than that as shown on the Northern Lights Survey. They did not seek to alter the legal description on their Certificate of Title. The Counterclaim raised by Defendant is that they are the owners of a portion of Plaintiffs property, as described in Plaintiffs' Certificate of Title. This is a direct attack upon the face of the Certificate of Title, and the procedural requirements of MINN. STAT. § 508.671 must be followed. Defendant cites the case of In re Hauge, 766 N.W.2d 50 (Minn. App. 2009) as setting forth the applicable law. It is admitted by the Plaintiffs that the procedural requirements cited in In re Hauge at 57 must be followed. However, it is submitted that the Plaintiffs complaint does not constitute a collateral attack on the original decree of registration. Therefore, the requirements of MINN. STAT. § 508.671 do not apply. The court in In re Hauge cites the case of In re Geis, 576 N.W.2d at 750 (Minn. App. 1998) which held that the finding of the location of a property line between torrens registered property and another property does not constitute an attack on the torrens decree. See also Minneapolis & St. Louis Ry. Co. v. Ellsworth, 237 Minn. 439, 444-45, 54 N.W.2d 800, 803-04 (1952) (concluding trial court's findings in action to determine boundary lines not erroneous because finding of location of boundary line does not attack torrens certificate and judgment does not attack torrens decree). The only attack upon the torrens decree is that of the Defendant.

Defendant's counterclaim can only be based upon MINN. STAT. § 508.671 or MINN. STAT. § 508.71. Prior to August 1, 2008, the relevant portion of MINN. STAT. § 508.02 read simply as follows, "no title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession." Prior to August 1, 2008, the relevant portion of MINN. STAT. § 508.671 read as follows:

"An owner of registered land may apply by a duly verified petition to the court to have all or some of the boundary lines judicially determined."

Subsequent to August 1, 2008, the first sentence of MINN. STAT. § 508.671 was amended to read as follows:

"An owner of registered land having one or more common boundaries with registered or unregistered land or an owner of unregistered land having one or more common boundaries with registered land may apply by a duly verified petition to the court to have all or some of the common boundary lines judicially determined."

Section 508.02 was also amended in part to include the following language:

". . . the common law doctrine of practical location of boundaries applies to land whenever registered. Section 508.671 shall apply in proceedings subsequent to establish a boundary by practical location for registered land."

It should be pointed out that Defendant has failed to strictly comply with the requirements of MINN. STAT. § 508.671. Subdivision of the Statute requires in part as follows:

"The owner shall have the premises surveyed by a licensed

land surveyor and shall file in the proceedings a plat of the survey showing the correct location of the boundary line or lines to be determined. There also shall be filed with the court administrator a memorandum abstract, satisfactory to the examiner, showing the record owners and encumbrancers of the adjoining lands which are in any manner affected by the boundary line determination. The petition shall be referred to the examiner of titles for examination and report in the manner provided for the reference of initial applications for registration. Notice of the proceeding shall be given to all interested persons by the service of a summons which shall be issued in the form and served in the manner as in initial applications.”

In this instance, Defendant failed on two counts. Defendant did not obtain a registered land survey of the property claimed and file it with the court. They had a licensed surveyor draft a description of the land claimed based upon the “Northern Lights” survey and the purported Hartman pins as recovered by Northern Lights. This is not a survey prepared by a licensed land surveyor as required by Statute. No survey comporting with the Statute existed up to and including the trial. Secondly, Defendant failed to submit a memorandum abstract noting encumbrances for review by the Examiner of Titles. This is necessary so all parties having an interest in the land may be given the opportunity to litigate. Plaintiffs’ Certificate of Title clearly shows a mortgage memorialized thereon in the amount of \$100,000.00 running in favor of U.S. Bank National Association, dated August 29, 2007, filed September 25, 2007, as Document No. 51566. U.S. Bank’s lien may be affected by these proceedings. As a result of these statutory requirements, Defendant’s Counterclaim must be dismissed with prejudice.

II. THE DISTRICT COURT WAS CORRECT IN CONCLUDING THAT DEFENDANT DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE ITS BOUNDARY LINE BY THE THEORY OF PRACTICAL LOCATION.

A historical review of the doctrine of practical location as it was applied to registered property is necessary. For many years practical location did apply to registered property, but its scope was limited. The Ninth Judicial District Court of Minnesota was sustained by the Court of Appeals in the case of Petition of McGinnis, 536 N.W.2d 33 (Minn. App. 1995), when it reviewed the doctrine of practical location as it applied to Registered Property. The Appellate Court reviewed the law of Torrens and claims against Registered titles:

“[1,2] The purpose of the Torrens law is to establish an indefeasible title which is immune from adverse claims not registered with the registrar of titles and to assure that the property can become encumbered only with registered rights and claims.

Every person receiving a certificate of title pursuant to a decree of registration and every subsequent purchaser of registered land who receives a certificate of title in good faith and for a valuable consideration shall hold it free from all encumbrances and adverse claims, excepting only the estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar * * *

Minn.Stat. § 508.25 (1994); *see also* Konantz v. Stein, 238 Minn. 33, 37, 167 N.W.2d 1, 5 (1969). Title to registered property cannot be gained by adverse possession, as this would contradict the very purpose of the Torrens law, to assure marketable title. “No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession.” MINN. STAT. § 508.02; *see also* Konantz, 283 Minn. At 37, 167 N.W.2d at 7 (registered land cannot be acquired by adverse possession);

Moore v. Henricksen, 282 Minn. 509, 519, 165 N.W.2d 209, 218 (1968).” Petition of McGinnis, 536 N.W.2d 35 (Minn. App. 1995).

Petitioner claimed title to a portion of the Registered title by doctrine of practical location. The court reviewed practical location as a basis for a claim to registered property and wrote as follows:

“[4] The doctrine of boundary by practical locations has been applied in limited instances to determine boundaries to registered property. See Minneapolis & St. Louis Ry. v. Ellsworth, 237 Minn. 439, 444-45, 54 N.W.2d 800, 804 (1952) (doctrine applied where original registration proceeding did not determine boundary lines, basis for boundary dispute existed at time of registration, and dispute is not collateral attack on Torrens proceeding); In re Zahradka, 472 N.W.2d 153, 155-56 (Minn. App.1991) (doctrine applied to resolve conflict between two certificates of title with ambiguous property descriptions that could include same property), *pet. for rev. denied* (Minn. Aug. 29, 1991). In a recent case, this court recognized that adverse claims have only affected registered property where there was an ambiguous description in the certificate of title or the dispute existed at the time the property was registered. In re Building D, Inc., 502 N.W.2d 406, 408 (Minn.App.1993), *pet. For rev. denied* (Minn. Aug. 24, 1993).” Petition of McGinnis, 536 N.W.2d 35 (Minn. App. 1995).

In the present case, the descriptions are not ambiguous and were created by the platting of Swan Lake.

The limited scope of practical location as it applied to registered property was effectively later eliminated by the Court of Appeals in a later decision, In re: Geis, 576 N.W.2d 747 (Minn. App. 1998). The court held as follows:

“[2] Appellants argue the trial court erred by refusing to order judicial landmarks placed on the boundary common to government lots 3 and 4 pursuant to Minn.Stat. § 508.671. We disagree.

Boundary line determinations in proceedings subsequent are authorized and governed by Minn.Stat. § 508.671, which provides in pertinent part:

Subdivision 1. Petition. An owner of registered land may apply by a duly verified petition to the court to have all or some of the boundary lines judicially determined. The petition shall contain the full names and post office address of all owners of adjoining lands which are in any manner affected by the boundary determination. * * * The owner shall have the premises surveyed by a registered land surveyor and shall file in the proceedings a plat of the survey showing the correct location of the boundary line or lines to be determined. * * *

Subd. 2. Order. Before the issuance of any final order determining the location of the owner's boundary lines, the court shall fix and establish the boundaries and direct the establishment of judicial landmarks in the manner provided by section 559.25. The final order shall make reference to the boundary lines that have determined and to the location of the judicial landmarks that mark the boundary lines.

MINN. STAT. § 508.671 (1996). While MINN. STAT. § 508.671 provides for the determination of boundary lines after land has been registered, courts may only determine the boundary lines to land actually registered and described in the certificate of title. See MINN. STAT. § 508.06(3) (1996) (providing application for registration of land shall set forth substantially correct description of land); MINN. STAT. §508.22 (1996) (providing every decree of registration *shall bindland described in it*, forever quiet title to it, and be forever binding and conclusive upon all persons) (emphasis added); see, e.g., Moore, 165 N.W.2d at 217 (concluding failure to note prescriptive easement in registration decree is conclusive against easement).

[3] Moreover, a court may not, in a proceeding subsequent to initial registration of land, determine boundary lines, if that determination alters the legal description of the land as stated in the certificate of title, and thereby attacks the torrens certificate. See Minneapolis & St. Louis Ry. Co. v. Ellsworth, 237 Minn. 439, 444-45, 54 N.W.2d. 800, 803-04 (1952) (concluding trial court's findings in action to determine boundary lines not erroneous because finding of location of boundary line does not attack

torrens certificate and judgment does not attached torrens decree); Park Elm Homeowner's Ass'n v. Mooney, 398 N.W.2d 643, 647 (Minn. App. 1987) (concluding appellant's title extended to low water mark, as indicated by certificate of title, and plat of property, and therefore trial court lacked authority to grant respondent ownership rights in part of appellant's property in derogation of torrens act). To allow courts to do so would be contrary to the underlying purposes of the torrens act. See C.S. McCrossan, Inc. v. Builders Fin.Co., 304 Minn. 538, 544, 232 N.W.2d 15, 19 (1975) (concluding purpose behind torrens registration is that certificate of title, including memorials thereon, be made conclusive evidence of all matters contained therein); Estate of Koester v. Hale, 297 Minn. 387, 393, 211 N.W.2d 778, 781-82 (1973) (concluding plain meaning of torrens provisions is that they are intended to prevent unjust enrichment that otherwise would necessarily result if purchaser of registered land obtained more land than was owned, claimed, or possessed by predecessor in title who registered land)." Petition of Geis, 576 N.W.2d 750, 751 (Minn.App. 1998).

The legislature apparently took umbrage at the courts removal of the Doctrine of Practical Location and set about to correct this perceived miscarriage of justice by passing a law in 2008 amending MINN. STAT. § 508.02 and MINN. STAT. § 508.671 thereby applying the doctrine to "registered land whenever registered, Laws of Minnesota, Chapter 341, Article 3, Sections 2 and 4. The amended Statutes are cited in part above.

Because of this statutory amendment, we must look at the common law Doctrine of Practical Location as defined by our appellate courts. The longstanding standard of proof in establishing a boundary line by practical location is set forth in Beardsley v. Crane, 54 N.W. 740, 742 (1893):

"to establish a practical location which is to divest one of a clear conceded title by deed, the extent of which is free from ambiguity or doubt, the evidence establishing such location

should be clear, positive, and unequivocal.” “There should be an express agreement made between the owners of the land between them, and the acquiescence for a considerable time, or, in the absence of proof of such agreement, it should be as clearly and distinctly shown that the party claiming has had possession of the premises claimed up to a certain, visible and well known line, with the knowledge of the owner of the adjoining land, and his acquiescence for a considerable period of time.”

A boundary line by practical location may be established in three manners.

These are set forth in the recent case of Eric J.Slindee, et al v. Fritch

Investments, LLC:

A party can establish a boundary by practical location three ways: (1) by acquiescing in the boundary for a sufficient period of time to bar a right of entry under the statute of limitations; (2) by expressly agreeing with the other party on the boundary and then by acquiescing to that agreement; or (3) by estoppel. Theros v. Phillips, 256 N.W.2d 852, 858 (Minn. 1977). The party considered the disseizor of the land must present evidence that establishes the boundary’s practical location clearly, positively, and unequivocally. Id. If the disseizor cannot 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). To establish a boundary by practical location through express agreement, Fritch had the burden to prove that an express agreement Between the landowners set an “exact, precise line” between His parcel and the Slindees’ parcel and that the agreement had Been acquiesced to “for a considerable time.” Beardsley v. Crane, 52 Minn. 537, 546, 54 N.W. 740, 742 (1893)” Eric J. Slindee, et al v. Fritch Investments, LLC, A08-303, 2009 WL 366623 (Minn. App. 2009).

Defendant failed to present sufficient evidence that clearly, positively and unequivocally establishes their claimed boundary’s practical location. It is not disputed that the line between the Plaintiffs parcel and the Johnston parcel was a

straight line in the Plat of Swan Lake. In this case, Defendant's claim the line to be north and east of a fence line which is in such disrepair it is barely visible in Defendant's photographs. The mow line, however, is consistent with the 'Northern Lights' survey as the disputed area consists of brush and trees, save for the shed and sauna area. The Defendants found it necessary to draw lines and arrows on their photographs to discern the remnants of the fence, further demonstrating the fence's poor condition.

The first basis to establish a boundary line by practical location is to demonstrate the parties acquiesced in the boundary for a sufficient period of time to bar a right of entry under the statute of limitations. There certainly there was no acquiescence by Plaintiffs in this instance to Defendant's claimed boundary. Plaintiffs have:

- 1) stored construction materials on the claimed tract;
- 2) built access to the lake with base of the same extending to the Northern Lights line; and
- 3) topped trees by the lake.

Only the latest tree trimming has brought a response from the Defendant. An important element in acquiescence is the intent of the parties in recognizing a fence as the boundary. Defendant claimed their "line" goes beyond the fence onto the Plaintiffs' deeded property. In the case of Allred vs. Reed, 362 N.W.2d 374 (Minn. App. 1985) the court cited Wojahn v. Johnson, 297 N.W.2d. 298 (Minn. 1980):

“One of the most important factors is whether the parties attempted and intended to place the fence as near as possible to the boundary line.”

Here, Defendant does not claim the fence as the mutual boundary. While the fence may have existed for more than 70 years, its state of disrepair suggests that defendants did not maintain it as the line. It is difficult to acquiesce to a line that is not visible and not maintained; the growth of trees and brush within the claimed area is consistent with a lack of acquiescence on the part of plaintiffs.

The second basis of establishing a boundary line by practical location is to demonstrate the parties expressly agreed with the other on the boundary, and then acquiesced to that agreement. There was no evidence presented of an express agreement pertaining to the boundary between the parties. The Slindee court held:

“... an “express agreement” requires more than unilaterally assumed, unspoken and unwritten “mutual agreements” corroborated by neither word nor act. ... Without a specific discussion identifying the boundary line or a specific boundary-related action clearly proving that the parties or their predecessors in interest had agreed to a specific boundary, a boundary is not established by practical location based upon express agreement.”
Eric J. Slindee, et al v. Fritch Investments, LLC,
A08-303, 2009 WL 366623 (Minn. App. 2009).

Here, the old fence line was in disrepair, barely visible, and did not run the full length of the property. Furthermore, Defendant cannot argue they viewed the fence line as the boundary because they are seeking title beyond the same. The

actual mow line, save for the shed and sauna, is consistent with the Northern Light's line. The court in Slindee stated, "an incomplete boundary line is too ambiguous to rely on to prove an expressly agreed boundary." The use of the disputed tract is limited to the shed and the sauna. This restricted use of the disputed property does not establish a boundary line by agreement. Defendant failed to put forth sufficient evidence demonstrating there was an express agreement between the parties as to the boundary's location, nor did Defendant establish clearly, positively and unequivocally the parties acquiesced to any alleged agreement.

The third and final basis for boundary line by practical location is "estoppel." One must look at the actions of the Defendant in their visible use and improvement of the disputed tract. This is concentrated in two areas only, the shed by Jefferson Boulevard and the sauna. It should be pointed out that the "Northern Lights" survey shows the common boundary between Lots Four (4) and Five (5) have a distance of approximately 371 feet from the Boulevard to the lake. The theory of estoppel is discussed in detail in Pratt Investment Co. v. John D. Kennedy, 636 N.W.2d 849 (Minn. App. 2001), there the court stated:

"if the appellant or his predecessor never substantially used or possessed the disputed territory, appellant can hardly claim that he has "relied" upon any supposed boundary for purposes of the practical location doctrine."

In a footnote set forth in Wojahn v. Johnson, the appellate court stated:

"The plaintiffs also argue that the trial court was incorrect in not considering the "agreement" or "estoppel" theories

of practical location. There was, however, no evidence of an express agreement between the parties or their predecessors as to a boundary line. Nor was there any evidence that defendants stood by *in knowledge of the true boundary line* while plaintiffs constructed improvements to their property as is required by the third or estoppel theory of practical location. Ronald Johnson testified repeatedly that he did not know the location of the true boundary until the applicable surveys were complete. We have never indicated that knowledge of this true boundary line by the one sought to be estopped was not a necessary element under the estoppel theory of practical location. See, e.g., Theros v. Phillips, N.W.2d at 859, Simms v. Fagan, 12 N.W.2d 783, 786 87 (1943). We thus conclude that the trial court was correct in not addressing the issues of estoppel and agreement.”

There has been no evidence presented that anyone knew the true boundary between Lots Four (4) and Five (5) when Defendant’s predecessors constructed the shed and sauna. Plaintiffs did not know of the “Hartman” survey until the completion of their own. The Defendant’s two structures constituted a use of only a minor portion of the disputed tract. Their claim is in the nature of adverse possession as their encroachment on the Plaintiffs’ property is minimal when looking at the extent of the disputed land. The Defendant’s lack of maintenance of the two structures is also consistent with their minimal seasonal use of the parcel. Because of MINN. STAT. § 508.02 is controlling in this situation, Defendant’s claim based upon adverse possession must fail.

CONCLUSION

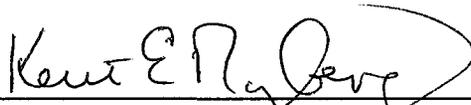
In conclusion, it is Plaintiffs' position that the Counterclaim of the Defendant must fail for its noncompliance with the statutory requirements as set forth in MINN. STAT. § 508.671. As Plaintiffs' Complaint does not constitute a collateral attack on Defendant's Certificate of Title, they are not subject to the requirements of MINN. STAT. § 508.671. Plaintiffs' survey located the common line between the parties' property. No contrary survey was submitted.

Additionally, while not required, the court determined the claims of Defendant against Plaintiffs. The court concluded that no boundary line by practical location was established. At best, the court found Defendant could establish adverse possession to minimal portions of Plaintiffs' property, a doctrine that does not provide Defendant a right to relief under the registration act. The court must sustain, and affirm, the lower court's findings of fact and conclusions of law.

Dated: 9-7, 2010.

Respectfully submitted,

KENT E. NYBERG LAW OFFICE, LTD.



Kent E. Nyberg #80159
Attorney for Plaintiffs
20 NE 4th Street, Suite 101
Grand Rapids, MN 55744
(218) 326-9626