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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-2009**

The LeBlanc Brothers,  
Respondent,

vs.

Paul D. Fish,  
Appellant,

Kandise D. Garrison,  
Appellant,

Park State Bank,  
Defendant.

**Filed July 23, 2012  
Affirmed  
Kalitowski, Judge**

St. Louis County District Court  
File No. 69DU-CV-09-3071

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Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and  
Chutich, Judge.

## UNPUBLISHED OPINION

**KALITOWSKI**, Judge

This case arises out of a boundary dispute between appellants Paul Fish and Kandise Garrison and respondent The LeBlanc Brothers, a Minnesota general partnership owned by Mark and Wade LeBlanc. After a court trial, the district court granted respondent title to three parcels of land by adverse possession and dismissed all remaining claims and counterclaims. Appellants argue that (1) the district court improperly tacked respondent's possession of the disputed parcels together with its predecessor's to constitute adverse possession for the requisite period; (2) the evidence does not support the district court's findings regarding the elements of adverse possession; and (3) the district court failed to make certain required findings. We affirm.

### DECISION

Appellants are the owners of residential property (the Halvorson property) at the intersection of Highway 2 and Midway Road near Hermantown, Minnesota. Respondent is the owner of commercial property (gas-station property) that is bounded by the Halvorson property to the west and north and Highway 2 to the south. Respondent operates a gas station, restaurant, and service station on the gas-station property. The two properties were once part of a common parcel owned and occupied by David Halvorson, Sr. and Virginia Halvorson.

Halvorson, Sr. predeceased Virginia, and in 1996, Virginia sold the Halvorson property to her son, David Halvorson, Jr. and his wife Evelyn. Halvorson, Jr. and Evelyn

periodically resided on the Halvorson property until May 7, 2004, when they sold it to appellants.

In 1960, Halvorson, Sr. constructed the gas-station building along Highway 2 and then subdivided the property and sold the gas-station property to Victor Turk. The conveyance reserved a 20-foot-wide strip of land along the western boundary of the gas-station property as an exclusive easement for the Halvorsons to access Highway 2 from their property. Turk operated the gas station until September 1, 1972, when he sold the gas-station property to Marvin Melanson and his wife Beverly under a contract for deed. Melanson operated the gas station continuously until he sold it to respondent under a contract for deed executed on December 3, 1998.

This dispute centers on three separate parcels on the Halvorson property onto which activity from the gas-station property encroaches. These areas are shown in detail with legal descriptions on a May 27, 2011 drawing created for this litigation by Ronald Krueger of Alta Survey Company Inc. The first area described in the Krueger survey is Parcel A (the rainbow parcel), an area along the northern boundary of the gas-station parcel beginning from the northwest at a utility pole with security lights that appears to be approximately five feet north of the property line, curving east around a rainbow-shaped, paved driveway surrounded by a gravel border and grass, and then extending farther east to a second utility pole with security lights that appears to be approximately eight feet north of the property line.

Parcel B (the swale parcel), is a vaguely triangular area on the western boundary of the gas-station property. This parcel includes a corner of a concrete cap that covers the

gas station's underground petroleum tanks, a product sign standing just south of the southwest corner of the concrete cap, and fuel-tank vent pipes that emerge from the ground near the product sign. In addition, the parcel encompasses a swale that drains water off to the west of the concrete cap.

Parcel C (the berm parcel) is a small, rectangular area along the northeastern boundary of the gas-station property that includes the northwestern corner of a soil berm surrounding several large, above-ground petroleum tanks that are no longer in service and the utility pole that serves as the northeastern corner of the rainbow parcel.

## I.

Appellants contend that the district court erred as a matter of law when it concluded that respondent's possession of the disputed parcels could be tacked together with Melanson's. We review the district court's factual findings for clear error. Minn. R. Civ. P. 52.01. And we review de novo the district court's legal conclusion as to whether privity exists between subsequent possessors. *See Ebenhoh v. Hodgman*, 642 N.W.2d 104, 109-10 (Minn. App. 2002) (applying de novo review to legal conclusion regarding continuity of possession).

“Adverse possession of real property ripens into title in the adverse possessor or disseizor where it continues for the period allowed for the recovery of real estate, which is 15 years.” *Romans v. Nadler*, 217 Minn. 174, 177, 14 N.W.2d 482, 485 (1944); *see* Minn. Stat. § 541.02 (2010) (establishing limitations period). “The possession of successive occupants, if there is privity between them, may be tacked to make adverse possession for the requisite period.” *Fredericksen v. Henke*, 167 Minn. 356, 360, 209

N.W. 257, 259 (1926). “Such privity exists between two successive holders, when the later takes under the earlier by descent, will, or grant, or by a voluntary possession.” *Marek v. Holey*, 119 Minn. 216, 219, 137 N.W. 969, 970 (1912). The Minnesota Supreme Court explained the privity rule with greater precision in *Vandall v. St. Martin*, 42 Minn. 163, 166-67, 44 N.W. 525, 526 (1889).

The possession must be connected as well as continuous, so that the possession of the true owner shall not constructively intervene between them; but such continuity and connection may be effected by any conveyance or understanding which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of his possession in fact.

*Id.*

The earliest date respondent could have entered onto the land was December 3, 1998, when it purchased the gas-station property from Melanson. Respondent commenced this quiet-title action in October 2009, nearly 11 years after the earliest date of entry. Consequently, for respondent to prevail on its theory of adverse possession, its possession must be tacked together with its predecessor, Melanson. The district court found that possession of the disputed parcels “continued uninterrupted beginning with [Melanson’s] purchase of [the gas-station property] through the date of trial,” and therefore concluded that respondent and Melanson are in privity.

Appellants’ challenge this conclusion based on their reading of *Vandall*. Specifically, they argue that the *Vandall* court’s use of the phrase “conveyance or understanding” is ambiguous and this court should “explicate [this] important and under-developed point of state law.” Appellants suggest we adopt the Michigan privity rule,

which permits tacking only if the instrument of conveyance includes a description of the disputed property or if there is evidence of parol statements made at the time of conveyance indicating a clear intent to transfer possession of the disputed property. *See Siegel v. Renkiewicz' Estate*, 129 N.W.2d 876, 879 (Mich. 1964) (holding that no privity existed where there was “no reference to the claimed property in any of the instruments of conveyance” and no proof of “a parol reference . . . made at the time” of conveyance). Appellants contend that no privity exists here because the contract for deed between Melanson and respondent does not describe the disputed parcels and there is no evidence in the record of parol statements indicating Melanson’s intent to specifically transfer to respondent the disputed parcels. We disagree.

Minnesota caselaw establishes that, for tacking purposes, “[i]t is not necessary that the deed from the one to the other should describe the tract adversely occupied.” *Kelley v. Green*, 142 Minn. 82, 85, 170 N.W. 922, 923 (1919). A successive holder need only “take[] under the earlier by voluntary transfer of possession.” *Id.*

The facts in *Kelley* are analogous to this case, and the court’s holding in *Kelley* supports the district court’s ruling that respondent and Melanson are in privity. There, the original owner of lot 9 occupied a strip of land belonging to lot 10 by constructing a home with eaves overhanging the property line, planting a row of trees on lot 10, and installing a lawn and garden between the trees and the house. *Id.* at 84, 170 N.W. at 923. The mortgagee of lot 9 obtained possession by foreclosure, then rented the property before selling it to the tenant. *Id.* The tenant-owner ultimately sold to the plaintiff. *Id.* “In each case of transfer in defendant’s chain of title, the deed called for lot 9, but the

[district] court found that each of the grantors delivered to his grantee possession of the disputed strip.” *Id.* Plaintiff maintained the lawn and garden in the disputed area just as each of his predecessors had. *Id.* On these facts, “privity was established between the successive occupants” by virtue of their voluntary transfers of lot 9 and their actual possession of the disputed land. *Id.* at 85, 170 N.W. at 923. And adverse possession was established by the successive holders’ acts of occupying and maintaining the strip of land for the statutory period. *Id.*

Here, the contract for deed between Melanson and respondent describing the gas-station property is a voluntary transfer of possession of the gas-station property, and the record establishes that respondent actually possessed the disputed parcels just as Melanson had before the transfer. The district court’s finding that this possession was uninterrupted by intervening possessors is supported by the evidence. Therefore, respondent’s possession is continuous with and connected to Melanson’s. Moreover, Mark LeBlanc and Wade LeBlanc testified they were aware that Melanson had openly and continuously used portions of the disputed areas for years and that they believed the disputed areas to be part of the parcel they were purchasing. Therefore, the sale from Melanson to respondent satisfies *Vandall’s* standard of a “conveyance or understanding which has for its object a transfer of the rights of the possessor, *or of his possession, and is accompanied by a transfer of his possession in fact.*” 42 Minn. at 166-67, 44 N.W. at 526 (emphasis added).

We reject appellants’ assertion that a 1998 survey respondent commissioned in connection with its purchase of the gas-station property, showing no encroachments onto

the Halvorson property, defeats this privity by demonstrating that respondent knew Melanson could not transfer title to the disputed areas. The survey does not purport to fix the location of the encroaching improvements, it merely provides a legal description and drawing of the gas-station property's boundaries. Therefore, the survey would not have alerted respondent to the fact that the improvements and occupied areas encroach onto the Halvorson property.

Appellants also argue that Melanson's several attempts to purchase the Halvorson property from Virginia Halvorson interrupts his continuity of possession. An offer by an individual in possession of disputed property to the owner of record to purchase disputed property may defeat an adverse possession claim, because an acknowledgement of the property's true ownership interrupts the holder's continuous, hostile possession. *Olson v. Burk*, 94 Minn. 456, 458, 103 N.W. 335, 336 (1905) ("An acknowledgment by the adverse claimant of the owner's title before the statute has run in his favor breaks the continuity of his adverse possession, and it cannot be tacked to any subsequent adverse possession."). But the evidence shows that Melanson offered to purchase the *entire* Halvorson property, not the disputed parcels specifically. Therefore, his offers were not an acknowledgement that Virginia owned the disputed parcels.

Because Melanson and respondent are in privity, we conclude that the district court properly tacked respondent's possession together with Melanson's.

## II.

Appellants also argue that the evidence does not support the district court's findings that respondent established title to the disputed parcels by adverse possession.

Whether the elements of adverse possession are satisfied is a question of fact. *Wortman v. Siedow*, 173 Minn. 145, 148, 216 N.W. 782, 783 (1927). “Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses.” Minn. R. Civ. P. 52.01. In boundary disputes, the findings of the district court will not be disturbed unless “the evidence taken as a whole furnishes no substantial support for them or where it is manifestly or palpably contrary to the findings.” *Engquist v. Wirtjes*, 243 Minn. 502, 506, 68 N.W.2d 412, 416 (1955) (quotation omitted). Whether the findings of fact support a district court’s conclusions of law and judgment is a question of law, which we review de novo. *Donovan v. Dixon*, 261 Minn. 455, 460, 113 N.W.2d 432, 435 (1962) (noting that “it is for this court to determine whether the findings support the conclusions of law and the judgment”).

To establish a claim of adverse possession, the claimant must show that the possession was actual, open, hostile, continuous, and exclusive for at least 15 years. *Roemer v. Eversman*, 304 N.W.2d 653, 653 (Minn. 1981); *see also* Minn. Stat. § 541.02 (establishing statute of limitations).

Appellants contend that we must apply the strict level of review to adverse possession cases consistent with the standard articulated in *Village of Newport v. Taylor*, 225 Minn. 299, 303, 30 N.W.2d 588, 591 (1948). In *Taylor*, the supreme court stated that evidence tending to establish adverse possession must be strictly construed, “without resort to any inference or presumption in favor of the disseizor, but with the indulgence of every presumption against him.” *Id.* But the holding of *Taylor* has since been limited

by the supreme court. *See Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999) (citing *Alstad v. Boyer*, 228 Minn. 307, 311, 37 N.W.2d 372, 375 (1949) (“The rule of the Newport case is limited by its facts, and that is true of the rule as applied in certain prior decisions.”)). Therefore, we apply the standard articulated in *Rogers* that the claimant must prove the elements of adverse possession by clear and convincing evidence. 603 N.W.2d at 657.

We address appellants’ sufficiency-of-the-evidence argument with respect to each parcel in turn.

### **The rainbow parcel**

The district court found that Melanson and respondent had actually, openly, hostilely, and continuously possessed the rainbow parcel for the statutory period based on the following facts:

- a. Continuous plowing from and depositing of snow on the disputed area (dat[ing] back to at least 1972);
- b. Continuous use of the disputed area by semi-tractor/trailers fueling at the station’s diesel pumps (dat[ing] back to at least 1972);
- c. Improvement and maintenance of the driving surface of the disputed area (dat[ing] back at least to 1972 [including respondent’s] paving of a portion of the area in 2000 . . .); and
- d. Continuous use of the disputed area for the placement of a light fixture illuminating the north side of [respondent’s] property (dat[ing] back at least to 1972).

Appellants contend that the evidence of plowing and mowing is too “vague” and “sporadic” to support a finding that Melanson and respondent continuously possessed the grassy area of the rainbow parcel. For support, they cite *Romans*, in which a property

owner's entry onto an adjoining property once every six months to change his window screens and storm windows and once every six or seven years to paint his house was held not to support a claim for adverse possession. 217 Minn. at 176-79, 14 N.W.2d at 484-85. The supreme court stated that such "[o]ccasional and sporadic trespasses" are insufficient "because they do not indicate permanent occupation and appropriation of land, [and] do not satisfy the requirements of hostility and continuity." *Id.* at 178, 14 N.W.2d at 485.

The facts here are distinguishable and support the district court's finding. Unlike the sporadic, occasional, and disconnected incursions described in *Romans*, the evidence shows that since 1972, Melanson and respondent regularly mowed the grassy area in the summer and plowed snow several feet into the grassy area in the winter. As a result of the snow plowing, snow banks were deposited several feet into the grassy area surrounding the rainbow road. This level of activity is continuous and hostile, indicating "an assertion of adverse right likely to be persisted in" rather than mere "separate trespass[es]." *Id.*

Appellants also cite *Stanard v. Urban*, 453 N.W.2d 733 (Minn. App. 1990), *review denied* (Minn. June 15, 1990). There, the district court granted possessors title to a disputed strip of land by adverse possession because the possessors regularly mowed the strip during the summer, stored a dock there during the winter, and allowed their children to play there. *Id.* at 735. This court reversed, explaining, "If [cutting grass, trimming hedges, and the like] should be held to constitute a basis for prescriptive rights, every adjoining landowner would acquire an easement in his neighbors' lands to the

extent of such trespasses. The trespasser should be required to show by some additional acts that the entry is hostile and under claim of right.” *Id.* at 736 (quoting *Romans*, 217 Minn. at 180-81, 14 N.W.2d at 486). This court further concluded that the “additional acts” of winter dock storage and children playing were “not sufficient to establish title by adverse possession.” *Id.*

*Stanard*, too, is distinguishable. In addition to frequently mowing, plowing, and depositing snow, Melanson and respondent occupied the rainbow parcel with permanent improvements that indicate hostile entry under claim of right. These improvements include (1) a gravel or paved road behind the gas station that has been used regularly by gas-station customers to access the diesel-fuel pumps since before Melanson purchased the property, and (2) two utility poles with security lights on the parcel have illuminated the gas-station property, one since at least 1972 and one since 1974. Moreover, adverse possession findings have been upheld on the basis of regular lawn maintenance even without such extensive, permanent intrusions. *See Kelley*, 142 Minn. at 84-85, 170 N.W. at 923 (holding area where garden and lawn were maintained was adversely possessed); *Nash v. Mahan*, 377 N.W.2d 56, 57-58 (Minn. App. 1985) (holding that area regularly mowed was adversely possessed, but those mowed “a few times a year” were not).

Appellants also argue that the district court’s findings are clearly erroneous because the rainbow driveway has not encroached for the statutory period and cannot support the adverse possession finding. For this assertion, they rely on Melanson’s testimony that Halvorson, Sr. erected a livestock fence, which has since deteriorated and been removed, along what Melanson believed to be the true northern boundary line of the

gas-station property. Melanson testified that the driveway remained south of the fence line while the fence was still standing, so appellants surmise that the driveway expanded north of the boundary line sometime after the fence collapsed. And appellants contend that this expansion likely occurred when respondent paved the driveway in 2000, because the 1998 boundary survey did not show the driveway encroaching into the rainbow parcel.

The evidence does not support this contention. Melanson merely testified that it was his *belief* that the fence was built along the actual property line. He was not certain where the actual property line was because he had never been given a copy of a boundary survey. And respondent points to evidence in the record from which the district court could have surmised either that Halvorson, Sr. erected the fence north of the actual property line or that the driveway expanded over the property line shortly after the fence was removed. In either case, the encroachment has existed continuously for the statutory period.

Additionally, there is evidence that the driveway has not expanded significantly since Melanson purchased the gas-station property in 1972. Melanson testified that the rainbow-shaped driveway was created by truck drivers approaching the diesel fuel pumps located to the west of the gas-station building. He explained that drivers are forced to make a wide turn around the back of the gas station as they approach or leave the pumps to avoid hitting a well head located behind the gas-station building. Because neither the well head nor the diesel pumps ever changed locations, Melanson testified that truck drivers are “using the same tracks” now as in 1972. In addition, Mark LeBlanc testified

that when respondent paved the rainbow road after the 1998 purchase of the gas station, the edge of the then-existing gravel road was maintained as a shoulder to the paved road, so the paving could not have expanded the road as appellants claim. And finally, aerial photographs from 1972, 1981, and 1991 show a rounded gravel driveway behind the gas station roughly consistent with the paved driveway present today.

We conclude that the evidence supports the district court's findings, and the court's findings establish that respondent gained title to the rainbow parcel by adverse possession.

### **The swale parcel**

The district court found that Melanson and respondent actually, openly, hostilely, and continuously possessed the swale parcel for the statutory period based on the following facts:

- a. Continuous plowing from and depositing of snow on the disputed area (dat[ing] back to at least 1972);
- b. Continuous use of the disputed area as part of [respondent's] underground tank system . . . dat[ing] back at least to 1972 . . . ;
- c. Continuous use of the disputed area for the base and product sign for the service station (dat[ing] back at least to 1972); and
- d. Continuous use, improvement, and maintenance of the disputed area as a ditch and swale system to drain the concrete cap (dat[ing] back at least to 1972).

Appellants argue that reversal is warranted as to the swale parcel because the district court erroneously found that the swale and concrete cap were in place in 1972. Respondent agrees that the date cited by the district court is inaccurate, but argues that

the errors are harmless because, using the correct date of 1989, the statutory period was satisfied by 2004. We agree.

The evidence shows that Melanson installed underground petroleum tanks with an overlying concrete cap in 1989, and he installed a swale at the same time to drain water from the cap. These improvements constitute actual, open, and hostile possession, and this possession has been continuous since 1989. Because the statutory period was satisfied in 2004, the district court's error as to the date these improvements were built is harmless and does not warrant reversal. Minn. R. Civ. P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

Appellants argue that the evidence shows that the original concrete cap did not encroach onto the Halvorson property, and that only the replacement cap encroached when it was installed in 2007. Accordingly, they contend that the statutory period has not been satisfied. But the district court's finding that the original cap did encroach is supported by the testimony of Mark LeBlanc, Mark Katt, who oversaw the replacement of the concrete cap, and Nathan Blasing, a tank inspector for the Minnesota Pollution Control Agency, establishing that the new cap was laid directly over the old cap's footprint.

Appellants also contend that the district court's finding that Melanson began snow plowing across the swale in 1972 is not supported by evidence establishing, with particularity, a specific date plowing began. Although Melanson never gave a specific date on which he began plowing snow across the property's western border, his testimony

was sufficient to establish that the plowing has been continuous for the requisite statutory period. Melanson testified that he began plowing snow into the swale parcel “with a little bit of experiences” after purchasing the gas station, because he learned that with “the northeast wind there, you made sure that all the snow pretty much went to the south or to the west.” His testimony at one point suggested that this plowing began after the underground tanks and concrete cap were installed in 1989, saying, “We plowed some over after them tanks were put in over there we plowed off the cement there.” But he later clarified that he began pushing the snow off to the west “kind of before that time” after a “policeman told [him he] couldn’t push it across Highway 2 anymore.” Taken as a whole, this testimony demonstrates that Melanson began plowing snow into the swale parcel sometime before 1989. And the evidence shows that respondent’s plowing routine was consistent with Melanson’s. Thus, even if the evidence does not support the district court’s finding that the plowing began in 1972, any error as to the date it began is harmless because the statutory period was satisfied.

We therefore conclude that the evidence supports the district court’s findings that the swale parcel has been actually, openly, and hostilely occupied, and that this occupancy has been continuous since 1989 or before. Accordingly, the district court properly awarded respondent title to the swale parcel by adverse possession.

### **The berm parcel**

The district court found that Melanson and respondent actually, openly, hostilely, and continuously possessed the berm parcel for the statutory period based on the following facts:

- a. Continuous use of the disputed area for the placement of a berm to retain spilled petroleum products . . . (dat[ing] back at least to 1972); and
- b. Continuous use of the disputed area for the placement of a light fixture illuminating the north side of [respondent's] property (dat[ing] back at least to 1972).

Appellants argue that reversal is warranted because the district court erroneously found that the northeastern power pole was erected in 1972, rather than 1974. Because the statutory period is met under either date, this error is harmless. Minn. R. Civ. P. 61.

Appellants also contend that adverse possession has not been established because the above-ground tanks the berm surrounds are not in use, so there is no evidence that Melanson used the berm area or that respondent uses the berm area. But the berm is a tangible structure, and its mere presence constitutes possession of the land with the intent to hold it and exclude others. The same is true of the utility pole, regardless of whether it is respondent or Minnesota Power who has the authority to remove it. Because the pole was installed at Melanson's request, it illuminates the gas-station property, and respondent bears the costs of electricity, it is an entry by respondent onto the berm parcel.

We conclude that the evidence supports the district court's findings with respect to the berm parcel, with the exception of the harmless error regarding one of the dates. Accordingly, the district court properly granted respondent title to the berm parcel by adverse possession.

### **III.**

Finally, at oral argument, appellants argued for the first time that the district court's findings were insufficient to support its legal conclusions because the court failed

to make an explicit finding that respondent's possession of the three parcels was exclusive. But appellants' principal brief framed its adverse possession argument as a challenge to the sufficiency of the evidence, not as a challenge to the sufficiency of the district court's findings to support its conclusion of law that respondent owns the disputed property through adverse possession. Because this argument was not raised in appellants' principal brief, it is waived and we will not consider it. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived).

**Affirmed.**