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**Fred M. Soucie, plaintiff and counterdefendant, Respondent, vs. DuWayne E. Hess,
defendant and counterclaimant, Appellant.**

A04-1881

COURT OF APPEALS OF MINNESOTA

2005 Minn. App.

June 21, 2005, Filed

NOTICE: [*1] THIS OPINION WILL BE UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINNESOTA STATUTES.

PRIOR HISTORY: Hubbard County District Court File No. C0-02-100. Hon. Jay D. Mondry.

DISPOSITION: Affirmed in part, reversed in part, and remanded.

COUNSEL: Larry A. Kimball, Kimball Law Office, Walker, MN, (for respondent).

Steven R. Peloquin, Peloquin & Minge, P.A., New York Mills, MN, (for appellant).

JUDGES: Considered and decided by Toussaint, Chief Judge; Schumacher, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI § 10.

OPINION BY: TOUSSAINT

OPINION

UNPUBLISHED OPINION

TOUSSAINT, Chief Judge

Appellant, a landowner, challenges the district court's finding that appellant did not present evidence to support his claims that he acquired some of respondent's land by adverse possession or practical location of boundaries. He also argues that the district court abused its discretion by awarding respondent one-half of the cost of the survey taken of the parties' property and clearly

erred in awarding respondent punitive damages. Because the record supports the finding that appellant had not acquired any of [*2] respondent's land by adverse possession or practical location of boundaries, we affirm in part. But because we see an abuse of discretion in the award of the cost of one-half of the survey, we reverse that award, and because we see clear error in a portion of the punitive damages award, we reverse and remand that award.

FACTS

Appellant Duwayne Hess and respondent Fred Soucie own adjoining parcels of rural property.¹ Hess acquired his land from his father, who had owned it since the 1950s; Soucie purchased his in 1998.

1 Part of their border is a former railroad easement now designated by the Department of Natural Resources (DNR) as part of the Paul Bunyan Trail on which the DNR filed a quiet title action opposed by Hess and some other landowners. The railroad easement belongs to the state. *State v. Hess*, 684 N.W.2d 414 (Minn. 2004).

In 1999, Soucie noticed that Hess had erected a fence on Soucie's land. The parties were unsuccessful in their attempts to resolve their dispute, and, [*3] in 2000, Hess erected another fence affecting Soucie's property. Soucie objected. In 2001, Soucie brought this action to establish the boundary and to obtain damages for trespass from Hess. Hess counterclaimed for damages for trespass on his property. In connection with the action, the parties agreed to split the cost of a survey. The survey revealed that the fence erected by Hess was in fact not on the boundary line but on Soucie's land.

A bench trial was held on the issue of trespass. Adverse possession was first mentioned during trial in connection with an objection to appellant's testimony; the

doctrine of boundary by practical location was not mentioned at all during trial.² The district court found that the correct boundaries of the parties' properties were set forth in the certificate of survey, that Hess did not present clear and convincing evidence to support his claims for adverse possession and boundary by practical location, and that Hess was liable to Soucie for \$ 1,155 in compensatory damages and \$ 8,331.22 in litigation expenses. The district court also granted Soucie's motion to amend to include a claim for punitive damages. After the hearing on that motion, the [*4] district court ordered Hess to pay Soucie \$ 6,000 in punitive damages.

2 In his brief, Hess claims that his answer and counterclaim "alleged that he had acquired ownership of the property over which [respondent] claimed he had trespassed by either adverse possessor the doctrine of boundary by practical location." In fact, the answer and counterclaim did not mention either of these allegations.

Hess moved for amended findings or a new trial. The district court amended its order to set litigation expenses at \$ 5,450.07 and punitive damages at \$ 5,000. Hess challenges the findings that he had not offered evidence to support his adverse possession and punitive damages claims, the litigation costs award, and the punitive-damages award.

DECISION

I.

*Adverse Possession and Boundary by Practical Location*³

3 As a threshold matter, this issue is not properly before us because Hess conceded it at the hearing on punitive damages, when he testified that he would have to move his fences to conform to the boundary lines and thus admitted that he had not acquired the land he had fenced by adverse possession or practical location of a boundary. Hess may not change his position on appeal. See *Farmers State Bank of Delavan v. Easton Farmers Elevator*, 457 N.W.2d 763, 765 (Minn. App. 1990), review denied (Minn. Sept. 20, 1990) (party that took one position in seeking summary judgment could not change position on appeal). However, we address the issue in the interest of completeness. See Minn. R. Civ. App. P. 103.04 (permitting review "as the interest of justice may require").

[*5] To show adverse possession, a disseizor must show, by clear and convincing evidence, actual, open, hostile, continuous, and exclusive possession for 15

years. *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. App. 2003). Whether the elements of adverse possession have been established is a question of fact. *Id.* Evidence presented in support of adverse possession must be strictly construed without any inference or presumption in favor of a disseizor and with every presumption against a disseizor. *Id.*

Practical location of a boundary may be determined by acquiescence, if the parties acquiesced for 15 years; or by agreement, if they expressly agreed to a boundary and afterwards acquiesced in it; or by estoppel, if the party whose rights are to be barred knew the true boundary line but looked on silently while the other party encroached on his property. *Allred v. Reed*, 362 N.W.2d 374, 376 (Minn. App. 1985), review denied (Minn. Apr. 18, 1985). The evidence of practical location of a boundary must be clear, positive, and unequivocal. *Id.* The district court's determination of a boundary is a fact issue and is accorded the same deference as [*6] any other factual determination. *Id.*

The district court concluded that:

[Hess] did not establish by clear and convincing evidence the kind of open, notorious and adverse use required for adverse possession, and also did not present any evidence of a common point or landmark that would allow the Court to set boundary lines for the property in dispute any different than as they are indicated on the certificate of survey as stipulated to by the parties.

Hess's testimony at the hearing supports this conclusion and defeats his adverse possession claim. He testified that his use of the land was limited to "hiking and looking for wildlife and checking to make sure everybody else is staying off it." The land was unimproved and in a wild state. "One who leaves land in a wild and natural state cannot acquire title by adverse possession." *Nash v. Mahan*, 377 N.W.2d 56, 58 (Minn. App. 1985). The district court did not err in concluding that Hess did not acquire the land by adverse possession.

To support his claim of practical location of a boundary, Hess relies on *Allred*. But *Allred* is distinguishable on two grounds. First, the claimant in that [*7] case built the fence as close as possible to the boundary. 362 N.W.2d at 376. Hess testified that he went onto Soucie's property to build his fence, built the fence on Soucie's property, and left it there even after receiving the survey. Second, the actual landowner in *Allred* acquiesced by treating a fence not located on the boundary as the border of the property. *Id.* Here, Soucie testified that

he repeatedly opposed Hess's purported acquisition of Soucie's land; Soucie also submitted a letter that he wrote to Hess in 2000 objecting to the fences and telling Hess not to trespass. Both parties testified at length as to their disputes over the boundary. The district court did not err in finding that Hess did not present the clear and convincing evidence necessary to support his claims of adverse possession and boundary by practical location.

II.

Costs

Minn. Stat. § 549.04 (2004) provides that a prevailing party in a case before the district court "shall be allowed reasonable disbursements paid or incurred." An award of disbursements is reviewed under an abuse-of-discretion standard. *Minn. Council of Dog Clubs v. City of Minneapolis*, 540 N.W.2d 903, 904 (Minn. App. 1995), [*8] review denied (Minn. Jan. 25, 1996). The district court awarded respondent \$ 5,450.07 in costs, of which \$ 4,000 was for one-half the cost of the survey. It is undisputed that the parties had agreed to split the cost of the survey, which was \$ 8,000. Appellant argues that awarding respondent one-half the cost of the survey was an abuse of discretion. We agree. When parties have agreed, before trial, to split a particular expense, neither party may claim its share of that expense as a cost or disbursement after trial. We reverse the award of one-half the survey expense as a cost.

III.

Punitive Damages

Whether punitive damages are available in an action for intentional damage to property, when the only damage is to property, presents a question of law reviewed de novo. *Jensen v. Walsh*, 623 N.W.2d 247, 249 (Minn. 2001).

Minn. Stat. § 549.20, subd. 1(a) (2004) provides that punitive damages are allowed only if clear and convincing evidence indicates that a defendant's acts showed deliberate disregard for the rights of others. A defendant who intentionally disregards facts that create a high probability of injury to the rights [*9] of others acts with deliberate disregard for those rights. *Id. subd. 1(b)* (2004). The district court found that "[Hess's] course of conduct in asserting his perceived ownership rights was an aggressive and intentional one where he entered onto the land, cut down trees and constructed barricades/fences. [Hess] ignored any objections by [Soucie], contrary evidence or facts that did not fit in with his belief that he was the owner of the property." Punitive damages were available to Soucie.

A punitive-damages award is reviewed on an abuse-of-discretion standard. *Ray v. Miller Meester Adv., Inc.*, 664 N.W.2d 355, 371 (Minn. App. 2003), *aff'd*, 684 N.W.2d 404 (Minn. 2004). *Minn. Stat. § 549.20, subd. 3* (2004), provides that:

any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, [*10] the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Appellate review of a punitive-damages award is also based on these measures. *Id. subd. 5* (2004).

The district court based its punitive-damage award in part on these measures, making findings as to Hess's income and assets and finding that Hess had engaged in self-help remedies, behaved with hostility when confronted, and carried out his misconduct "over a lengthy time period and in a calculating manner." These findings reflect the statutory measures of a punitive-damages award. *See id., subd. 3*.

But the district court also based the punitive-damages award in part on Hess's conduct in "entering into mediation between the parties in bad faith, intentionally undermining the [*11] mediation agreement reached by the parties and requiring further litigation by [Soucie] to resolve the matter." Using Hess's conduct during mediation as a basis for punitive-damages was an abuse of discretion: mediating in bad faith is not among the statutory factors provided to measure punitive-damage awards, nor does it resemble any of those factors. *See id.; see also Minn. Stat. § 595.02, subd. 1(l)* (2004) (providing that a person cannot be examined as to

any communication or document made in course of or because of mediation pursuant to agreement to mediate).

In any event, this court cannot add to a statute what the legislature has either purposely omitted or inadvertently overlooked. *Ullom v. Indep. Sch. Dist. No. 112*, 515 N.W.2d 615, 617 (Minn. App. 1994). We cannot add

bad faith in mediation to the statutory measures of punitive damages. We therefore reverse and remand the award of punitive damages for calculation without reference to Hess's conduct during mediation.

Affirmed in part, reversed in part, and remanded.