"ESTABLISHING OWNERSHIP BY POSSESSION"[1]
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I. INTRODUCTION

The two theories of adverse possession and boundary by practical location are similar in that possession leads to ownership. Still, they are distinct, not interchangeable. More than one decision indicates that lawyers had better plead and present proof under both legal doctrines if they wish to maintain both theories.

Some cases will better fit adverse possession; and though they're similar, other cases will better meet the practical location rules. ("Although the doctrine of practical location, at least in effect, is similar to acquiring title by adverse possession, the two theories are distinct and require proof of different elements"). *Denman v. Gans*, 607 N.W.2d 788, 796 (Minn. Ct. App. 2000); *see also Engquist v. Wirtjes*, 68 N.W.2d 412, 417 (Minn. 1955) (stating practical location is "independent of adverse possession").

Boundaries established by adverse possession or by practical location of boundary will supersede the outcome of an indisputably correct survey. *Wojahn v. Johnson*, 297 N.W.2d 298, 304 (Minn. 1980).

II. ADVERSE POSSESSION.

A. Generally.

Adverse possession is a "common law" action; no statute created the doctrine. However, a statute of limitation, Minn. Stat. § 541.02, terminates one's right to defend such claims after 15 years.

> "No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff, the plaintiff's ancestor, predecessor, or grantor, was seized or possessed of the premises in question within 15 years before the beginning of the action.
>
> Such limitations shall not be a bar to an action for the recovery of real estate assessed as tracts or parcels separate from other real estate, unless it appears that the party claiming title by adverse possession or the party's ancestor, predecessor, or grantor, or all of them together, shall have paid taxes on the real estate in question at least five consecutive years of the time during which the party claims these lands to have been occupied adversely.
>
> The provisions of paragraph two shall not apply to actions relating to the boundary line of lands, which boundary lines are established by adverse possession, or to actions

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[2] These materials are intended for an overview, with some citations to recent decisions which have developed the law in this area. For additional materials, visit www.olson-law.com.

> concerning lands included between the government or platted line and the line established by such adverse possession, or to lands not assessed for taxation."

Another statute, Minn. Stat. § 559.23, anticipates courts establishing legal boundaries:

> "An action may be brought by any person owning land or any interest therein against the owner, or persons interested in adjoining land, to have the boundary lines established; and when the boundary lines of two or more tracts depend upon any common point, line, or landmark, an action may be brought by the owner or any person interested in any of such tracts, against the owners or persons interested in the other tracts, to have all the boundary lines established. The court shall determine any adverse claims in respect to any portion of the land involved . . ."

Minn. Stat. § 559.23

B. <u>Basic Elements of Adverse Possession.</u>

There are five basic elements of possession which a claimant must establish in order to obtain legal confirmation of ownership of land. The claimant must show he had actual, exclusive, open, continuous and hostile possession of the real property in question for a period greater than 15 years. If he has, he has become the owner of the property involved and the court confirms that ownership. *Ehle v. Prosser*, 197 N.W.2d 458, 462 (Minn. 1972); *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. Ct. App. 2003).

C. <u>Element: Actual Possession.</u>

The claimant must have been in possession of the property for the statutory period. The claimant must have some domination and control over the property. The degree of possession will vary based on the type of property. If its crop land and the claimant tills it for 15 years, and lets it lie fallow during the winter months, this may be sufficient possession even though the claimant is not on the property for months at a time. *See e.g., Voegele v. Mahoney*, 54 N.W.2d 15, 18 (Minn. 1952).

In one case, "substantive and frequent" agricultural and homestead-related uses of the land, including mowing the lawn, was sufficient. *Schauer v. Zellman*, 2001 WL 1530630, *3 (Minn. Ct. App. 2001).

This use must give notice to the owner of the adverse claim:

> "The requirement of actual possession is based on the actions an actual owner would take under the circumstances. *See Skala v. Lindbeck*, 171 Minn. 410, 413, 214 N.W. 271, 272 (Minn.1927) ('The law prescribes no particular manner in which possession shall be maintained or made manifest.'). The only requirement is that the possession give 'unequivocal notice to the true owner that someone is in possession in hostility to his title.' ". . . The evidence shows that the western disputed area was used in a way that is consistent with the normal usage of lakeshore property in the area. The Andersons kept a row of trees along the border to act as a privacy and noise barrier. They installed a dock in the western disputed area. They cleared some trees and planted new ones in the area and mowed along the property line. The district court's findings were based on substantial record evidence and support the determination that the Andersons adversely possessed the western disputed area." .*Juntti v. Bedore*, 2010 WL 3306932, 5 (Minn. Ct. App. 2010)

D. <u>Note: Sporadic Use is Not Enough.</u>

The sporadic use of property is insufficient to establish adverse possession. Such use does not put the owner of the property on notice of a claim. Sporadic use creates problems with other elements of adverse possession, as well.

> "Occasional and sporadic trespasses for temporary purposes, because they do not indicate permanent occupation and appropriation of land, do not satisfy the requirements of hostility and continuity, and do not constitute adverse possession, even where they continue throughout the statutory period. . . This is especially true where, as here, *there is nothing about each separate trespass to indicate that it is anything but a trespass*, much less an assertion of adverse right likely to be persisted in. . . " *Stanard v. Urban*, 453 N.W.2d 733, 735 (Minn. Ct. App. 1990).

But note the recent, although unpublished, Court of Appeals case of *Holz-Kinney v. Thaler*, discussing *Stannard*, and distinguishing it:

> "Appellant argues, citing *Stanard v. Urban,* 453 N.W.2d 733 (Minn.App.1990), *review denied* (Minn. June 15, 1990), that respondent's only act of possession after 1977 was his mowing of the grass in the disputed area and that this does not satisfy the hostility requirement. In *Stanard,* this court concluded that a seasonal property owner's acts of mowing grass across the property line, storing a dock on his neighbor's property during the winter, and allowing children to play there were insufficient to support a finding of adverse possession. 453 N.W.2d at 735-36. We reasoned, on those facts, that the disseizor's incursions onto the neighboring property were "best classified as occasional and sporadic" and that it was not until the disseizor built an encroaching storage shed that the statutory period of possession commenced. *Id; see also Romans,* 217 Minn. at 178, 14 N.W.2d at 485 (noting the distinction between occasional trespass and intent to claim a property through adverse possession). Here, the evidence shows more than sporadic or unintended use of the disputed property. Respondent did more than inadvertently cut grass on the disputed property; between 1977 and 2000, *respondent maintained the property in all respects and both he and appellant's predecessors-in-interest treated the tree line as the boundary between their properties*. In 2000, respondent told appellant and her husband that respondent owned the property up to the tree line. Moreover, respondent told appellant's husband that there would be no problem as long as appellant stayed on the east side of the tree line. The record amply supports the district court's finding that respondent's use of the disputed property was both hostile and exclusive." *Holz-Kinney v. Thaler,* 2009 WL 4040789, 3 (Minn.App. 2009) (italics added).

The use required is the normal use for the area. Consistent with that, the use required to be shown in a rural area is less: In a 2009 unpublished Court of Appeals opinion the Court found adverse possession where the witnesses testified to use such as "[using] the property south of the fence line for pasturing cattle; for duck hunting and deer hunting; [playing] back there all the time [as] a child; maintain[ing] the fence and spray[ing] the area for weeds; pick[ing] plums from plum trees . . . [and] hunt[ing] deer" were sufficient. The Court held that the "use of the property by respondents' predecessors-in-interest was appropriate given the property's rural character and, therefore, sufficient to establish continuity. . . [T]he rule of thumb used is that the [adverse possessor] must be using the property as his or her own, i.e., regularly and matched to the land's intended use'" *Schwarz v. Finseth*, 2009 WL 4910552, 1- 4 (Minn. Ct. App. 2009), quoting *Application of Ganje v. Application of Schuler,* 659 N.W.2d 261, 268 (Minn. Ct. App. 2003).

In a case Tom Olson tried which was affirmed by the Court of Appeals, his client claimed ownership by way of adverse possession up to a fence line. *Ronning vs. Nikolai*, 2001 WL 799681 (Minn. Ct. App. 2001). The appellant argued that the claimed area was wild, not maintained, and therefore not possessed. Tom argued successfully that the claimant's possession was appropriate to the area. Owners had gone for walks in the wooded area, children had ridden BMX bikes, and horses had been ridden in this area. The property was bounded by a fence. The District Court and Court of Appeals held the possession was sufficient and appropriate to the area. The presence of the fence undoubtedly helped immeasurably in winning this lawsuit.

A similar case is *Blanchard v. Rasmussen:*

> "The district court's findings in the present case demonstrate that respondents' activities on the disputed property went well beyond the occasional trespasses on a neighbor's land in cutting grass, trimming hedges, and the like that the supreme court referred to in *Romans*. The district court's findings indicate that respondents took open, undeveloped land and turned it into a yard around their cabin, and a portion of the yard that they created and used is on land that appellant owned. The respondents' activities were not the sporadic, occasional activities that this court relied upon in *Stanard . . .*" *Blanchard v. Rasmussen*, 2005 WL 2495991, 8 (Minn. Ct. App. 2005).

E. <u>Element: Open Possession.</u>

Where a statute of limitations is operating to bar his rights, the record "legal" owner must be given notice through the claimant's open possession that his property is being seized.

It doesn't matter whether the owner actually sees it or not, just that the possession is visible.

> "The Hickersons argue that the improvements were not 'open, notorious, and hostile' because the improvements may not have been visible to their predecessors in title from adjoining Green Gables Road. We construe 'open,' however, to mean visible from the surroundings, or visible to one seeking to exercise his rights." *Hickerson v. Bender*, 500 N.W.2d 169, 171 (Minn. Ct. App. 1993).

Same effect, *Holiday House II, LLC v. State*, 2009 WL 1587090, 1 (Minn. Ct. App. 2009).

F. <u>Element: Exclusive Possession.</u>

"The exclusivity requirement of adverse possession is satisfied if the disseizor possesses "the land as if it were his own with the intention of using it to the exclusion of others." *Ebenhoh*, 642 N.W.2d at 108 (quotation omitted); *Ganje v. Schuler*, 659 N.W.2d 261, 267 (Minn. Ct. App. 2003).

"The possession was exclusive; no one except Morris used or cared for the Morris driveway and the rest of the land on the south side of the historic fence." *Morris vs. Smith*, 2002 WL 31654983 (Minn. Ct. App. 2002).

Brief entries into the claimed land by the true owner were insufficient to defeat the plaintiff's claim of exclusive possession. *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 109 (Minn. Ct. App. 2002).

You could imagine one of a group of hunters claiming that he had acquired land by adverse possession (setting aside for a moment whether that use is sufficiently continuous); but if he used the land as one of a group of ten hunters, his use is probably not sufficiently exclusive to maintain a claim.

G. Element: Hostile Possession.

Hostile possession simply refers to an intention to claim the property; a use that goes on without permission by the true owner.

> "...the requirement of 'hostile' possession does not refer to personal animosity or physical overt acts against the record owner of the property but to the intention of the disseizor to claim exclusive ownership as against the world and to treat the property in dispute in a manner generally associated with the ownership of similar type property in the particular area involved." *Norgong v. Whitehead*, 225 Minn. 379, 31 N.W.2d 267 (1948); *Thomas v. Mrkonich*, 78 N.W.2d 386 (Minn. 1956); *Ehle v. Prosser*, 197 N.W.2d 458, 462 (Minn. 1972).

H. Note: Acknowledgement of Title Defeats Hostile Element.

Sometimes it is what you say. A claimant defeats his own claim where he admits the ownership of his neighbor. 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. *Olson v. Burk*, 103 N.W. 335 (Minn. 1905).

In another decision, the claimant defending against an ejectment action admitted he had contracted with the legal owner to purchase the property. This acknowledgment of ownership defeated his claim. A 2008 decision involved an offer to purchase which was a factor defeating a claim of adverse possession. *Siegel v. Nagel*, 2008 WL 668131, 2 -3 (Minn. Ct. App. 2008). A lease defeated a claim in *Sage v. Rudnick*, 69 N.W. 1096 (Minn. 1897); *but see Winfield v. Kasel*, 2009 WL 174211 (Minn. Ct. App. 2009) (an adverse claimant first executed a lease for the disputed land, then prosecuted this suit successfully claiming he owned up to a fence by virtue of adverse possession. The Court relied on the fact the statute of limitations had already expired).

PRACTICE TIP: Carefully denominate any offer of settlement to purchase, take an easement, etc. as protected under Rule 408, Minnesota Rules of Evidence pertaining to offers of compromise.

But in one old case, the Court also recognized that a tenant's possession may actually become adverse to his landlord where he attorns to and pays rent to another. *Hanson v. Sommers*, 117 N.W. 842, 843 (Minn. 1908).

I. Note: Consent.

In order for possession to be adverse, it cannot be commenced or continued with the consent of the legal owner. His consent makes the possession non-hostile.

> …where an occupant's original possession of land was permissive the statute of limitations did not commence to run against the owner until the occupant had subsequently declared or otherwise manifested an adverse holding and notice thereof had

been brought to the attention of the owner. *Norgong v. Whitehead*, 31 N.W.2d 267 (Minn. 1948).

J. Note: Inferred Consent.

The courts have inferred consent where there was a close family relationship between original owners and the ownership was then separated:

> …existence of a close family relationship between the claimant of land and the record owner, such as existed in the instant case, created the inference, if not the presumption, that the original possession by the claimant of the other's land was permissive and not adverse … and that when such original use was thus permissive it would be presumed to continue as permissive, rather than hostile, until the contrary was affirmatively shown. *Norgong v. Whitehead*, supra;

See also *Boldt v. Roth*, 618 N.W.2d 393, 397 (Minn. 2000).

K. Element: Continuous Possession.

That possession must be continuous seems fairly obvious but there are a couple nuances. It must be uninterrupted in any way. *Application of Stein*, 99 N.W.2d 204 (Minn. 1959). An interruption of possession is fatal to the adverse possessor's claim. *Simms v. William Simms Hardware*, 216 Minn. 283, 12 N.W.2d 783 (Minn. 1943). Further, though the possession is subsequently interrupted, if it had continued for 15 years before the period of interruption, title has ripened and should be established.

To maintain a title acquired by adverse possession, it is not necessary to continue the adverse possession beyond the time when title is acquired. The title once acquired is a new title; a legal title though not a record title is not lost by a cessation of possession, and continued possession is not necessary to maintain it. *Fredericksen v. Henke*, 209 N.W.257 (Minn. 1926). However, a four month absence from the state was not a substantial interruption in the continuity of possession. *Nygren v. Patrin*, 179 N.W.2d 76 (Minn. 1970) (where the use is appropriate to the claimed land (e.g., gardening), an absence during winter months is not a bar.)

L. Tacking of Ownerships

The claimant of adverse possession does not need to show that she or he held possession of the property for 15 years if their predecessors in title can be shown to have possessed the property. *Burns v. Plachecki*, 223 N.W.2d 133, 136, 301 Minn. 445 (Minn. 1974).

> "There must be privity between successive owners to allow tacking. Privity is essential. Possession lost by abandonment or lost by disseisin, and possession taken when a prior occupant abandons or is disseised, cannot be tacked. Possession through descent or by transfer of title or possession is in privity." *Fredericksen v. Henke*, 209 N.W. 257, 259 (Minn. 1926).

Tacking was confirmed in 2005 case and somewhat limited in a 2009 case:

> "The possession of successive occupants, if there is privity between them, may be [combined] to make adverse possession for the requisite period." *Fredericksen v. Henke*,

167 Minn. 356, 360, 209 N.W. 257, 259 (1926)." *Houdek v. Guyse*, 2005 WL 406217, 2 (Minn. Ct. App. 2005).

The Joe Mauer case—not *that* Joe Mauer—narrowly applied tacking, requiring a showing that each former owner was in privity AND maintained hostile possession. *Mauer v. Otter Tail Power Company*, 2009 WL 2225820 (Minn. Ct. App. 2009):

> Landowner could not establish adverse possession by tacking previous owners' adverse use because landowner did not present any evidence that predecessors in title used the land without permission…

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. *Olson v. Burk*, 94 Minn. 456, 103 N.W. 335 (Minn. 1905).

Also see *Forbes v. Kociscak*, 2002 WL 264576 (Minn. Ct. App. 2002), where the Court said there was no showing a corporate predecessor's officers had "possessed" the disputed land:

As these materials were being readied, we were looking for any case which discusses presence or absence of privity following foreclosure, in adverse possession context, or otherwise. There is one old case which sheds some light, i.e., *Hanson v. Sommers*, 117 N.W. 842, 843 (Minn. 1908). In this case, following foreclosures on both sides of a tangled chain of title, Hanson remained in possession, followed by his tenant for the statutory period. The Supreme Court there said: "No doubt can arise that there was here a privity of estate between the successive wrongful holders requisite to enable allowance of the privilege of tacking."

Another decision may imply that when a Mortgagee becomes owner and does not take physical possession, that the actual and continuous possession might be interrupted. The case actually turns on the decision that an earlier quiet title action went uncontested by the defaulting fee owners, whose rights along with that of the lender who was not even named in the action, were forfeited. *Ford Consumer Finance Co., Inc. v. Carlson and Breese, Inc*., 611 N.W.2d 75, 78 (Minn. Ct. App. 2000).

It is not clear how the modern Court might treat some foreclosing lender's succeeding lien holder's subsequent purchaser, but this is some indication that a foreclosure in the chain does not wipe out every vestige of rights.

M. Appropriate Use.

Where use is occasional, the claimant argues his use was typical or appropriate to the property. The Court of Appeal addressed this issue again in 2009 holding that planting gardens, obviously a seasonal use, along with a large boulder and a canoe was enough possession in this instance. *Gelao v. Coss*, 2009 WL 2745833, 6 (Minn. Ct. App. 2009).

N. Public Property May Not Be Adversely Possessed, But…

A private citizen may not adversely possess adjoining public lands even though he would otherwise meet all the tests. Minn. Stat. 541.01. The statute prohibits establishment of a prescriptive easement over public property as well. *Heuer v. County of Aitkin*, 645 N.W.2d 753, 757-58 (Minn. Ct. App. 2002); *Claussen vs. City of Lauderdale*, 681 N.W. 2d 722 (Minn. Ct. App. 2004).

Rupley v. Fraser, 156 N.W. 350 (Minn. 1916) allows one to gain title to an entire tract which includes public streets; just not the streets themselves. One may not acquire a state swamp, *Scofield v. Schaeffer*, 116 N.W. 210 (Minn. 1908), or a public school grounds, *Junes v. Junes*, 196 N.W. 806 (1924).

O. <u>Exceptions to the No Adverse Possession of Public Land Rule.</u>

A municipality can compromise a disputed boundary location and later be forced to honor it. *Magnuson v. City of White Bear Lake*, 203 N.W.2d 848, 851 (Minn. 1973).

For abandonment of public property to be shown, there must be some affirmative or unequivocal acts of the municipality representing intent to abandon. *Rein v. Town of Spring Lake*, 145 N.W.2d 537, 540 (Minn. 1966).

See also *Denman vs. Gans*, 607 N.W.2d 788 (Minn. Ct. App. 2000). where the Court held that waterfront property which was dedicated to the use of a small, defined group of property owners was not properly dedicated to a public use, and therefore not insulated against a claim of adverse possession by another.

Note that a boundary may be determined against a public entity via practical location due to an estoppel; see section pertaining to practical location of boundaries.

P. <u>Payment of Real Estate Taxes Not Prerequisite (usually).</u>

Payment of the real estate taxes on the land is not required in instances where the claim simply involves settlement of the location of a boundary; nor is it required in claims which don't involve an entire separate tax parcel, Minn. Stat. 541.02:

> "..Such limitations shall not be a bar to an action for the recovery of real estate assessed as tracts or parcels separate from other real estate, unless it appears that the party claiming title by adverse possession or the party's ancestor, predecessor, or grantor, or all of them together, shall have paid taxes on the real estate in question at least five consecutive years of the time during which the party claims these lands to have been occupied adversely..."

See *Wagner v. McPhaill*, 2008 WL 4909420 (Minn. Ct. App. 2008) (failure to pay real estate taxes didn't bar adverse possession); *Mellenthin v. Brantman*, 1 N.W.2d 141, 144 (Minn. 1941) (tax payment was not required). If the adverse possessor has paid taxes on the disputed property <u>as physically occupied</u>, even if the property's legal description on the assessment roll is inconsistent with the physical occupation, the requirement of M.S.A. 541.02 is satisfied. *LeGro v. Saterdalen*, 607 N.W.2d 173, 175-76 (Minn. 2000).

Claims relating to boundary lines of lands and claims to lands not assessed for taxation as separate tracts -- both of which are presented in this case--are clearly exempt from the statutory provisions requiring the payment of taxes. *Ehle v. Prosser*, 197 N.W.2d 458, 462 (Minn. 1972).

One cannot acquire an entire parcel of land not having paid the real estate taxes on that parcel—but what is the entire parcel?

"In *Skelton*, this court ruled that when a landowner made a legally ineffective sale to neighbors of a 3.47-acre parcel of property encompassing a pond and certain land surrounding it, the doctrine of boundary by practical location was inapplicable because that "doctrine is intended to resolve boundary line disputes, *not* to establish ownership of substantial parcels of land. Expanding the doctrine as [one parcel claimant] urge[s] would undermine the statute of frauds and the recording act. *Id.* at 83 (emphasis in original)." *Ampe v. Lutgen*, 2007 WL 2034381, 2 (Minn. Ct. App. 2007).

Q. <u>Adverse Possession of Torrens Property Prohibited.</u>

Adverse possession is unavailable against registered Torrens property. See Minn. Stat. 508.02, specifically prohibiting adverse possession, and Minn. Stat. 508.25 specifying a certificate holder's rights against unregistered interests (i.e., interests not shown on the certificate of title).

One Minnesota Supreme Court decision states: "By affording a method of acquiring a decree of registration and a certificate of title free from all adverse claims and encumbrances not noted on the certificate, the Torrens law confers a conclusive title on the holder of a certificate. *Moore v. Henriksen*, 165 N.W.2d 209, 217 (Minn. 1968); *see also In re Petition of Alchemedes/Brookwood, Ltd. Partnership*, 546 N.W.2d 41, 42 (Minn.App.1996) (concluding persons dealing with registered property need look no further than certificate of title for any transactions that might affect land), review denied (Minn. June 7, 1996), and *Petition of Geis*, 576 N.W.2d 747, 749 (Minn. Ct. App. 1998).

R. <u>How to Terminate an Adverse Possession Before it Ripens Into Title.</u>

It is necessary to act; it is normally not necessary to trash someone's shed which is over the line. However, after fair warning is given stating the claim must be resolved or action will taken, and if use continues, you have to act (and/or sue). You cannot stand by while another's possession ripens into title. Suit tolls running of the statute,

"…if the June 1991-May 1993 suit was an action to quiet title and recover the disputed land, the suit tolled appellants' period of adverse possession." *Osgood v. Stanton*, 2009 WL 1586943, 5 (Minn. Ct. App. 2009).

One can sue to eject the other from the property, put up no trespassing signs, or otherwise interrupt the possession. Another approach is to announce your consent to the claimant's permissive use. The problem here is that he may fire back that it's his property to use as he sees fit, or worse he can just ignore you, leaving the consent in limbo.

Short of property owners getting into violent confrontations guaranteed to make settlement an impossibility, a timely lawsuit for ejectment before the running of the statute of limitations is an effective way to toll (stop the running of) the 15 year statute.

S. <u>Actions for Damage; Nuisance; Punitive Damages.</u>

One possible counter to a claim of adverse possession or practical location is a threat of an action for damages: compensatory, or in rare cases, punitive. You may bring an action for damages for trespass if you can show you have genuinely been hurt, or lost something. Often, there may be little proof of actual damages. The fact that another has occupied property along a 10 foot wide strip for five years may entitle the claimant to some nominal damages. Here is what the Supreme Court has said about damages for trespass:

> "The general rule is that damages in an action for trespass upon real property may be such as are appropriate to the tenure by which the plaintiff holds. Possession alone will entitle him to recover damages for any injury solely affecting it. If he seeks to recover for the future, he must show that his title gives him an interest in the damages claimed, and he can recover none except such as affect his own right, unless he holds in such relation to other parties interested that his recovery will bar their claim."
>
> *Williams v. Lynd Tp.*, 312 N.W.2d 110, 113 (Minn. 1981)

Although the Court commented above regarding future trespass damages, usually the remedy would be the removal of the trespass rather than the award of future damages. Damages may not be based on speculation or guess.

Here, the district court first instructed the jury right out of the Jury Instruction Guides: "a party asking for damages must prove the nature, extent, duration, and consequences of his or her injury…The jury "…must not decide damages based on speculation or guess" See 4A Minnesota District Judges Association, Minnesota Practice, Jury Instruction Guides--Civil, JIG 90.15 (4th ed.1999). *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002); *Peters v. Independent School Dist. No. 657, Morristown*, 477 N.W.2d 757, 760 (Minn. Ct. App. 1991); *Gelao v. Coss*, 2009 WL 2745833 (Minn. Ct. App. 2009) (Neighbor was found to have created a private nuisance by erecting large steel poles at disputed boundary line which destroyed some of landowner's landscaping. Neighbor was also found liable for damages to a retaining wall.).

1. Nominal Damages

   Without actual provable damages, a claimant may be limited to nominal damages. *Lake Mille Lacs Inv., Inc. v. Payne*, 401 N.W.2d 387, 391 (Minn. Ct. App. 1987). One who commits a trespass must pay at least nominal damages even though no actual damages are shown. *Id.* However, no punitive damages can be awarded for a trespass if there were no actual damages. *Meixner v. Buecksler*, 13 N.W.2d 754, 757 (Minn. 1944).

2. Punitive Damages.

   Rare cases have permitted punitive damages.

   Minnesota law provides that punitive damages are allowed in civil actions upon clear and convincing evidence that the defendant's acts show deliberate disregard for the rights or safety of others. Minn. Stat. § 549.20, subd. 1(a) (2000). A defendant acts with deliberate disregard for the rights or safety of others if the defendant acts intentionally in disregard of facts that create a high probability of injury to the rights or safety of others. *Id.* at subd. 1(b)(1), (2) (2000).

   Brantner Farms, Inc. v. Garner, 2002 WL 1163559, 2 (Minn. Ct. App. 2002): This case involved a large punitive damages award ($50,000) despite the fact the Jury gave only nominal damages ($800). It seems reasonable to suggest that a good faith claim to adverse possession should bar consideration of punitive damages; or claimants may be unfairly prohibited from bringing such claims for fear of disproportionate punishment.

One Supreme Court decision allows double dipping when a trespass includes damage to trees. The Court there said the claimant could recover both treble damages (under the tree statute) and punitive damages:

> "Appellants argue that treble damages for the destruction of trees, shrubs or bushes are punitive in nature. Therefore, appellants claim permitting both treble damages and punitive damages effectively permits an unfair double recovery for the same injury." *Johnson v. Jensen*, 433 N.W.2d 472, 476 (Minn. Ct. App. 1988).

T. Enforcement of Rights.

Technically, when 15 years have elapsed with the claimant having maintained actual, open, continuous, hostile, exclusive possession of a property, it is the claimant's property. His/her rights are established. A court is merely confirming those rights acquired by way of adverse possession.

In an unusual case, after losing an adverse possession case but ignoring the outcome and refusing to remove improvements, this party almost re-acquired the property by attempting to remain on the property for a new 15 year period. *Osgood v. Stanton*, 2009 WL 1586943 (Minn. Ct. App. 2009): the time during which action is pending might be included in the period of adverse possession. The only time not counted is that time during which a party is prevented by "paramount authority" from seeking recovery of disputed land. However, *Osgood* was ultimately decided on other grounds.

Osgood also makes it clear that commencing an action tolls running of the statute: "…*Holmgren* states the general rule that, in the adverse-possession context, 'the commencement of an action [to quiet title and recover property] interrupts the running of the statute of limitations during its pendency, provided the action is prosecuted to final judgment. 116 N.W. at 206'."

U. Limitation on Equity.

Though equity is said to be flexible, it has its limits as can be seen below. A trial court in fashioning a remedy may not ignore the facts proving a boundary has been established and give the possessor a more limited remedy, or compensate the "disseized" party for his loss.

Gabler v. Fedoruk, 756 N.W.2d 725 (Minn. Ct. App. 2008): Claimant proved a boundary was established by practical location but the trial court only granted a prescriptive easement and gave damages to the losing landowner. The Court of Appeals said a Court's equity powers are not so elastic; that if one is entitled to it, he deserves confirmation of his title, and there is no basis for damages. The decision drew a dissenting opinion.

V. Necessity of Pleading Both Theories.

In one decision, the Court of Appeals inferred that it might bar a party from establishing practical location of a boundary if the party had proceeded solely on an adverse possession theory through the trial without ever mentioning the practical location theory. Though similar, the two theories are not identical and may require different proof. The Court goes on to state: Generally, "relief cannot be based on issues that are neither pleaded nor voluntarily litigated." *Roberge v. Cambridge Co-op. Creamery Co.*, 67 N.W.2d 400, 403 (Minn. 1954).

In *Quast v. Brose*, 2001 WL 1035039, *2 (Minn. Ct. App. 2001), the Court did allow practical location to be raised for the first time in post trial memoranda. In a recent decision, the importance of thorough pleading is evident. The claimant pleaded only practical location by agreement. He did not plead other theories. He was not allowed to argue acquiescence on appeal. *Kaukola v. Menelli*, 2009 WL 1374172, 2 (Minn. Ct. App. 2009).

Remember that though you may not adversely possess public land, practical location of the boundary may work an estoppel against a public entity defendant; reason alone to plead it.

W. Burden of Proof: Clear & Convincing Evidence.

The burden of proof on a claimant is by clear and convincing evidence. *Stanard v. Urban*, 453 N.W.2d 733, 735 (Minn. Ct. App. 1990). This burden is considerable because "every presumption [is] against [the disseisor]." *Vill. of Newport v. Taylor*, 30 N.W.2d 588, 591 (Minn. 1948); *Houdek v. Guyse*, 2005 WL 406217, 1 (Minn. Ct. App. 2005).

1. Strict construction of evidence

   But the courts are not done making it hard for the claimant. The evidence they offer is also "strictly construed", i.e., looked at more closely than ordinary evidence. *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 108 (Minn. Ct. App. 2002).

2. Conflicting surveys: question of fact

   The trial judge's decision as to the correctness of two surveyors whose opinions are in conflict is a question of fact. *Ganje v. Schuler*, 659 N.W.2d 261,266 (Minn. Ct. App. 2003).

III. BOUNDARY BY PRACTICAL LOCATION.

A. Generally.

Another means of establishment of a boundary is "practical location". It is often founded on the location of a fence, not infrequently a fence that has been in place long enough to have wire grown into trees near it. The two distinct theories may be confused because they are used somewhat interchangeably both by litigants and by the courts in boundary line cases. This theory looks to the neighbors' actions and understanding respecting a boundary which may be inferred often through circumstantial evidence.

B. Three Ways to Establish a Boundary by Practical Location.

"Ordinarily, in order to establish a practical location of a boundary line it must appear (1) the location relied on was acquiesced in for the full period of the statute of limitations; or (2) the line was expressly agreed upon by the parties and afterwards acquiesced in; or (3) the party barred acquiesced in the encroachment by the other, who subjected himself to expense which he would not have done if there had been a dispute as to the line." *Romanchuk v. Plotkin*, 9 N.W.2d 421, 427 (Minn. 1943); see also *Fishman v. Nielsen*, 53 N.W.2d 553, 556 (Minn. 1952).

C. <u>Practical Location by Agreement.</u>

This can occur where "the line was expressly agreed upon by the parties and afterwards acquiesced in." *Romanchuk v. Plotkin*, 9 N.W.2d 421, 427 (Minn. 1943).

While the statute of limitations literally applies to boundaries established via acquiescence, boundaries which can be established either through an express agreement do not absolutely require passage of the 15 year period: If neighboring landowners expressly agree on a boundary, they do not need to demonstrate acquiescence for the full 15 years to establish a claim. *See Nadeau v. Johnson*, 147 N.W. 241, 242 (Minn. 1914) (finding existence of boundary line by practical location based on express agreement, when landowners measured, located, and staked boundary line, expressly agreed on dividing line between lots, and treated line as boundary for 10 years). *Ampe v. Lutgen*, 2007 WL 2034381, 2 (Minn. Ct. App. 2007); *see also Amato v. Haraden*, 159 N.W.2d 907, 910 (Minn. 1968).

Case law requires that the new boundary have been acquiesced to for a considerable time, terminology which is not quantified. So, how long is long enough? The Minnesota Court of Appeals recently held, in an unpublished decision, that nine years is long enough.

> "With respect to the second element, that the boundary must have been acquiesced to "for a considerable time," the district court found that Bedore and the Junttis respected the eastern border of the Junttis' property for a period of nine years, from the sale of the property in 1994 to the time the informal survey was conducted in 2003. The district court cited to *Nadeau v. Johnson*, 125 Minn. 365, 367, 147 N.W.2d 241, 242 (1914), a case involving ten years of acquiescence to a boundary, in concluding that nine years is a "considerable time." Bedore argues that *Nadeau* is distinguishable because the objecting property owner had himself used the line as a reference when conveying some of his property. *Nadeau*, 125 Minn. at 367, 147 N.W. at 242. But the Junttis placed a dock in the eastern disputed area, built a swimming beach there, and made other improvements to the property (including placing an outhouse close to the eastern border) in reliance on Bedore's representation about the location of the eastern property line. It was not until the informal survey that Bedore challenged the location of the Junttis' eastern boundary. We conclude that this nine-year period of acquiescence was sufficiently long to establish a boundary by practical location." *Juntti v. Bedore* 2010 WL 3306932, 4 (Minn. Ct. App. 2010).

A recent Court of Appeals case made it clear that the express agreement theory requires clear proof of an agreement: "We hold that an 'express agreement' requires more than unilaterally assumed, unspoken and unwritten 'mutual agreements' corroborated by neither word nor act." *Slindee v. Fritch Investments, LLC*, 760 N.W.2d 903, 909 (Minn. Ct. App. 2009).

D. <u>Practical Location by Acquiescence:</u>

Under the acquiescence theory, the full statute of limitations period must run. *Romanchuk v. Plotkin*, 9 N.W.2d 421, 427 (Minn. 1943). Again, that period is 15 years. Minn. Stat. § 541.02.

That is simple. What actually constitutes acquiescence is more complicated. Acquiescence by definition is inaction: Webster's defines acquiesce as to "grow quiet, to consent without protest".

One of the more concrete, easy to understand examples is found in *Fishman v. Nielsen*, 53 N.W.2d 553, 555-556 (Minn. 1952): "Acquiescence exists when adjoining landowners, for example, mutually construct a fence with the intention that the fence represents an adequate reflection of the property line." The court found practical location by acquiescence when parties and their predecessors in title built dividing fence as close as possible to actual boundary and remained satisfied with fence's location for the statutory period.

A great quote on this topic comes from *Enquist v. Wirtjes*, 68 N.W.2d 412, 417 (Minn. 1955): "It must be kept in mind that the acquiescence required is not merely passive consent to the existence of a fence or sod strip, but rather is conduct or lack thereof from which assent to the fence or sod strip as a boundary line may be reasonably inferred." The holding in *Engquist* was reaffirmed in *Pratt Investment Co. v. Kennedy*, 636 N.W.2d 844, 849 (Minn. Ct. App. 2001).

E. <u>The Boundary Line Can be Marked Many Different Ways.</u>

As the Court of Appeals has noted in an unpublished decision,

> "Practical location by acquiescence can be established where the disseizor unilaterally marks a boundary line and the adjoining property owner treats that line as the actual boundary. *Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844, 851 (Minn.App.2001); *Allred v. Reed*, 362 N.W.2d 374, 376 (Minn.App.1985), *review denied* (Minn. Apr. 18, 1985). *Markers, fences, and other physical barriers may establish a practical location so long as they are intended to identify boundaries*. *See Neill v. Hake*, 254 Minn. 110, 120, 93 N.W.2d 821, 828-29 (1958) (affirming that a boundary had been located by acquiescence when conveyances confirmed that an alley had served as a boundary for platted land for more than 30 years); *Fishman v. Nielson*, 237 Minn. 1, 9, 53 N.W.2d 553, 557 (1952) (holding that the parties had acquiesced to a fence line that they had recognized as their common boundary for almost 20 years); *see also Sage v. Morosick*, 69 Minn. 167, 168-69, 71 N.W. 930, 931 (1897) (observing that it is not necessary to construct a fence to establish a boundary). Here, the district court found that appellant's predecessors-in-interest acquiesced to the tree line as a boundary for the required 15 years. Minn.Stat. § 541.02 (2008) (establishing 15-year statute of limitations). Appellant argues that the tree line is too wide and imprecise to serve as a boundary by practical location. Respondent contends that the tree line was the equivalent of a fence line and that it clearly marked the border between his property and that of his neighbor to the east. We agree. The 2006 survey, photographs, and testimony demonstrate that the tree line was clearly identifiable. *Respondent planted trees along the east and north edges of his property with the intent of marking his property lines*. Even after 1977, when respondent deeded land to appellant's predecessor-in-interest, respondent, the owner of the neighboring property to the east, and the easement holders treated the tree line as the eastern border of respondent's property. It was not until appellant purchased the neighboring land, well after the statutory period had expired, that anyone asserted that the tree line marked anything other than the eastern boundary of respondent's land.

Holz-Kinney v. Thaler, 2009 WL 4040789, 4 (Minn. Ct. App. 2009) (emphasis added).

F. <u>The Line Established Must Be Definite, and Complete.</u>

The Court of Appeals has held boundary by practical location cannot be established where the claim was based on an incomplete line.

> In *Phillips*, a dispute developed between two landowners when one built a fence ostensibly on the shared boundary. 281 Minn. 267, 270, 161 N.W.2d 524, 527 (1968). These landowners' respective predecessors in interest had reached an express agreement regarding a mutual corner and they had marked it with an iron pipe. *Id. But the successors reached only a general agreement regarding the boundary extending from the marker*. *Id.* at 271, 161 N.W.2d at 527. The supreme court noted that the boundary as previously agreed to was unclear and rested within an eight-foot area between two incomplete tree lines. *Id.*, 161 N.W.2d at 528. It also observed that the parties had no other positive act of possession until the fence construction. *Id. The court held that the evidence was too ambiguous on both the agreement and acquiescence to establish a boundary by practical location through express agreement*. *Id.*
>
> * * *
>
> Even if there had been some basis to treat the mow line as a marker evidencing an attempted boundary agreement, a title-transferring boundary agreement must also establish an "exact, precise line." *Beardsley*, 52 Minn. at 546, 54 N.W. at 742; *see also The American Heritage Dictionary* 636, 974 (3d ed.1992) (defining "exact" as "not approximate" and "strictly and completely in accord with fact" and defining "precise" as "clearly expressed or delineated; definite"). The evidence does not support the district court's determination that the mow line's existence helped to establish the eastern boundary *because the mow line is irregular, imprecise, and inconsistent*. *Without an exact, precise line, Fritch cannot prove express agreement or acquiescence in that line. Theros*, 256 N.W.2d at 858-59.
>
> We add that separate practical problems also prevent reliance on the mow line to establish the boundary in this case. *The mow line extends for less than one half the length of the parcel's eastern boundary*. The surveyor noted that the mow line "kind of quit" because the area to the north "turned into woods and brush" and wetlands. An Orth family member noted that the parcel's southern boundary ended in a bluff and the parcel's eastern boundary became wooded near the path. *An incomplete boundary line is too ambiguous to rely on to prove an expressly agreed boundary. See Phillips*, 281 Minn. at 271, 161 N.W.2d at 528 (refusing to apply boundary by practical location through express agreement when the boundary line was within an eight-foot area of "two incomplete rows of trees" and appeared ambiguous in agreement and possession). The mow line here is similarly too ambiguous to establish the boundary even if the parties had agreed generally to rely on it."

Slindee v. Fritch Investments, LLC, 760 N.W.2d 903, 909-910 (Minn. Ct. App. 2009) (emphasis added).

Similarly, the Court of Appeals held recently that it takes more than one point to establish a line like the North Line:

> Because the uncontested trial testimony established that the plow lines have always run directly from the field driveway to the post and from the post to the fence line, we deem the fact that the plow lines might have varied slightly from year to year to be legally inconsequential. . . . *And because each plow line has fixed and ascertainable end points*, it is not necessary for the line always to have been perfectly straight or in precisely the same position at every point in every

> year. *See Nash v. Mahan*, 377 N.W.2d 56, 58 (Minn.App.1985) (stating, in adverse-possession case, that two stakes could establish boundary between properties if adverse possessor actually used and occupied land up to stakes); *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 806 (Iowa 1994) (affirming boundary by practical location between two fields when line was marked by three posts and "crop residue line" that did not run perfectly straight each year); *cf. Slindee*, 760 N.W.2d at 90708 (holding that curving and meandering "mow line" between residential lots that did not appear intended to follow the claimed straight boundary could not establish practical location of straight boundary). It is clear to us from our review of the record that the parties intended to plow along a line between the south edge of the field-driveway and the steel post, reflecting Roehrs's disputed northern boundary, and also along a line between the post and the Rasmussen-Roehrs fence line, reflecting Roehrs's disputed western boundary. *Given the fixed end points of each plow line and the owners' intent to plow along the straight boundary from point to point, the boundary is sufficiently known and capable of ascertainment*.

Roehrs v. Rasmussen, 2010 WL 1850796, 3 (Minn. Ct. App. 2010) (unpublished, courtesy copy attached) (emphasis added).

G. <u>Practical Location of Boundary on Registered Torrens Property.</u>

The Torrens Statute was recently amended to make clear that although one may not adversely possess registered property, a boundary may be established by practical location:

> …No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession, but the common law doctrine of practical location of boundaries applies to registered land whenever registered. Section 508.671 shall apply in a proceedings subsequent to establish a boundary by practical location for registered land. Minn. Stat. § 508.02 (West, 2008).

H. <u>Practical Location Versus Public Body.</u>

In contrast to adverse possession, in the case of practical location it is possible to estop a city, township, etc. from claiming ownership of property, though the standard is high:

> "We recognize that municipal corporations are afforded an added degree of protection as regards their property: The doctrine of estoppel is not applicable to municipal corporations as freely and to the same extent that it is to individuals. When it is applied, the basis of application is usually not because of the nonaction of the officers of the municipality, but because they have taken some affirmative action influencing another, which renders it inequitable for the corporate body to assert a different set of facts." *Halverson v. Village of Deerwood*, 322 N.W.2d 761, 767 (Minn. 1982).

The Court in one recent case discussed a perceived lack of good faith on the part of the claimant as though it was a requisite element. *Pomphrey v. State ex rel. St. Louis County*, 2008 WL 3288623, 2 (Minn. Ct. App. 2008)

I. <u>A Fence Only Gives Rise to a Boundary By Practical Location Claim if it is Intended to Serve as a Boundary.</u>

In an unpublished decision, the Minnesota Court of Appeals held that a fence not intended as a boundary fence would not give rise to a claim of establishing ownership by practical location of boundaries:

> "Stevenson testified that her new fence was not a boundary fence. Rather, she testified that she located the new fence further away from the overgrown Corridor so she could more easily trim growth coming through it and because it would keep her dog in her yard. This indicates that Stevenson's decision about the location of the new fence was not based on the property line. As a result, any knowing silence by the former neighbors as to the location of the property line had nothing to do with any detriment she incurred. Because a premise of Stevenson's second argument is faulty and because the detriment element of estoppel is not satisfied, we conclude that the district court did not err in rejecting Stevenson's second argument regarding boundary by practical location." *Stevenson v. Brodt* , 2010 WL 4068727, 6 (Minn. Ct. App., 2010)

J. <u>Resolution of an Overlap via Practical Location.</u>

Practical location may resolve an overlap problem, including where title is Torrens. The claiming owner had constructed a parking lot which then remained without objection. *See Matter of Zahradka*, 472 N.W.2d 153, 154 (Minn. Ct. App. 1991).

K. <u>Judicial Determination of Torrens Boundaries.</u>

The Torrens Act contemplates judicial determination of boundaries. The statute states in relevant part:

> "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." Minn. Stat. § 508.671.

However, a Court may not rule in such a way as to alter the boundaries set out in a Torrens certificate:

> "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." *Petition of Geis*, 576 N.W.2d 747, 750 (Minn. Ct. App. 1998); *see also Petition of Building D, Inc*., 502 N.W.2d 406 (Minn. Ct. App. 1993).

> "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." *Petition of McGinnis*, 536 N.W.2d 33, 35 (Minn. Ct. App. 1995).

L. <u>Expert Opinion.</u>

A good discussion of competing survey testimony is found in *Wojahn v. Johnson* involving attempts to relocate lost government corner lot markers, and claims of adverse possession and practical location. 297 N.W.2d 298, 303 (Minn. 1980). Sometimes persons other than surveyors may be permitted to testify to expert opinions concerning boundary line issues. An expert is basically anyone who by education, training or experience is qualified to render opinion evidence which may be helpful to the finder of fact. A mine engineer technician was allowed to testify

although not a surveyor because his evidence was helpful to the Court's understanding. *State v. Larson*, 393 N.W.2d 238, 242 (Minn. Ct. App. 1986).