Court of Appeals of Minnesota.
Kennard ANDERSON, et al., Respondents,
v.
STATE of Minnesota and its Department of Natural Resources, Appellant.

No. A06-1673.

Not Reported in N.W.2d, 2007 WL 2472359

Sept. 4, 2007.

Kittson County District Court, File No. C8-05-129.

Douglas P. Anderson, Rosenmeier, Anderson & Vogel, Little Falls, MN, for respondents.
Lori Swanson, Attorney General, Thomas K. Overton, Assistant Attorney General, St. Paul, MN, for appellant.

Considered and decided by HUDSON, Presiding Judge; LANSING, Judge; and HALBROOKS, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge.

***1** Appellant State of Minnesota and its Department of Natural Resources (DNR) challenge the district court's order granting a prescriptive easement in gross on state land to respondents Kennard Anderson, Evans Anderson, James Anderson, Wayne Anderson, Douglas Anderson, David Anderson, Richard Anderson, and Michael Anderson. We affirm.

FACTS

Since the 1930s, respondents' family has owned a parcel of land that is adjacent to land now owned by appellant State of Minnesota. The state purchased its parcel from Lenadrich, Ltd., a Missouri company, on September 29, 1989, and subsequently created the Halma Swamp Wildlife Management Area (WMA). The WMA is managed by the DNR. The DNR erected signs that advise that use of motorized vehicles on the property is prohibited. In addition, the DNR erected a fence across trail segment # 1 where it enters the WMA. Because respondents have used trails on the state land for more than 60 years, frequently operating cars, pick-up trucks, and all-terrain

vehicles (ATVs) on them, respondents sued the state, claiming a prescriptive easement to use motor vehicles on the state's trails.

The matter was tried to the district court. Based on a stipulation submitted by the parties, testimony, affidavits, and exhibits, the district court made 30 factual findings and concluded that respondents have a right to a prescriptive easement by motor vehicle over trail segments 1 through 5 in section 25. The district court further determined that the right is not assignable and will terminate with the lives of the named respondents. The state did not bring any posttrial motions. This appeal follows.

DECISION

The state raises three issues on appeal: (1) whether the district court erred by granting respondents a prescriptive easement to recreate on another's land when state laws encourage landowners to permit public recreation on their land; (2) whether the district court erred by concluding that respondents established the prescriptive elements of hostility and visibility by clear and convincing evidence; and (3) whether the scope of the prescriptive easement granted by the district court is excessive, given the extent of respondents' use.

Because there was no motion for a new trial, our scope of review includes substantive legal issues properly raised at trial, whether the evidence sustains the findings of fact, and whether such findings sustain the conclusions of law and judgment. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 310 (Minn.2003) (substantive legal issues properly raised at trial); *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976) (whether the evidence supports the findings and the findings support the conclusions of law and judgment).

This court will not set aside the district court's findings of fact "unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn.1999) (quoting Minn. R. Civ. P. 52.01). "In applying this rule, we view the record in the light most favorable to the judgment of the district court." *Id.* Findings may be reversed only if "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole" or "the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id.* (quotations omitted). "But 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." *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 108 (Minn.App.2002). Furthermore, application of a statute to the undisputed facts of a case involves a question of law, and the district court's decision is not binding on this court. *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn.1996).

***2** An easement is "an interest in land in the possession of another which entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists." *Minneapolis*

Athletic Club v. Cohler, 287 Minn. 254, 258, 177 N.W.2d 786, 789 (1970) (citing Restatement (First) of Property § 450 (1944)). Easements may be appurtenant or in gross. *Lidgerding v. Zignego*, 77 Minn. 421, 424-25, 80 N.W. 360, 361 (1899). An appurtenant easement is one granted for no other use than the benefit of the grantee's land. *Id.* In contrast, an easement in gross is personal to its owner and does not serve a specific dominant parcel. *Id.* at 425, 80 N.W. at 361.

Whether a prescriptive easement exists is determined in a manner similar to title by adverse possession. *Romans v. Nadler*, 217 Minn. 174, 177, 14 N.W.2d 482, 484-85 (1944). Thus, a prescriptive easement may be found if the person claiming the easement has acted in a manner "hostile and under a claim of right, actual, open, continuous, and exclusive." *Id.* at 177, 14 N.W. 2d at 485. The proponent of the adverse-possession claim must prove these elements by clear and convincing evidence.[FN1] Rogers, 603 N.W.2d at 657. Adverse possession may be maintained by tacking when the current adverse possessor obtained the property through transfer or descent from a prior adverse possessor. *Fredericksen v. Henke*, 167 Minn. 356, 360, 209 N.W. 257, 259 (1926).

> FN1. This standard supersedes a stricter standard that is now limited to the facts of the specific case. Rogers, 603 N.W.2d at 657. The former standard was described in *Village of Newport v. Taylor*, 225 Minn. 299, 303, 30 N.W.2d 588, 591 (1948), when the supreme court indicated that
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> adverse possession may be established only by clear and positive proof based on a strict construction of the evidence, without resort to any inference or presumption in favor of the disseizor, but with the indulgence of every presumption against him. The burden of proving the essential facts which create title by adverse possession rests upon the disseizor. The evidentiary way of the disseizor is hard.

I.

The state argues that the district court erred by granting an easement to respondents when Minnesota law encourages landowners to permit public recreation on their land and purports to protect landowners from claims arising from such recreational use. In support of its contention, the state cites Minn.Stat. § § 604A.20, .21, .27 (2006) and Minn.Stat. § § 87.01, .02, .03 (1971). The district court found that the Minnesota recreational-use statute was not adopted until 1994, and therefore it applies only to causes of action arising on or after 1994.

Since 1961, Minnesota law has encouraged public use of lands and waters for beneficial recreational purposes. *Compare* Minn.Stat. § 604A.20 (2006) ("It is the policy of this state, in furtherance of the public health and welfare, to encourage and promote the use of ... privately owned lands ... by the public for beneficial recreational purposes ...."), *with* 1961 Minn. Laws ch. 638, § 1, at 1192 (establishing the language that forms the basis of current law).

The legislature first effected this public policy through establishing "free recreational areas," which were private property open to recreation for which the owner did not receive compensation for those who entered. 1961 Minn. Laws ch. 638, § 2, at 1193. In such areas, the landowner's personal liability and liability against dedication were limited. *Id.* at § § 3-4, at 1193. Landowners could make their land a "free recreational area" by the owner's written declaration filed in the county recorder's office, 1961 Minn. Laws ch. 638, § 2, at 1193, or by the owner posting the land indicating it was a free recreation area. 1963 Minn. Laws ch. 207, § 1, at 303.

***3** But in 1971, the legislature abolished "free recreational areas" and extended state policy and liability protections to all privately owned land. 1971 Minn. Laws ch. 946, § 8, at 1977-79. The act was effective June 8, 1971. *Id.* at 1979; *see* Minn.Stat. § 645.02 (1969) ("Each act ... enacted finally at any session of the legislature takes effect at the beginning of the day next following its final enactment, unless a different date is specified in the act."). The 1971 act provided the following protection against dedication for recreational uses: "No dedication of any land in connection with any use by any person for a recreational purpose shall take effect in consequence of the exercise of such use for any length of time hereafter except as expressly permitted or provided by the owner...." 1971 Minn. Laws ch. 946, § 8, at 1979 (codified at Minn.Stat. § 87.03 (1971)).

The 1994 legislature enacted a new version of the law as a part of statutory recodification. 1994 Minn. Laws ch. 634, art. 4, § § 1-8, 11, at 1497-99, 1501. This enactment strengthened the protection against dedications by explicitly protecting against prescriptive easements.
No dedication of any land in connection with any use by any person for a recreational purpose takes effect in consequence of the exercise of that use for any length of time except as expressly permitted or provided in writing by the owner, *nor shall the grant of permission for the use by the owner grant to any person an easement or other property right in the land except as expressly provided in writing by the owner.*

Id. at § 8, at 1499 (emphasis added) (codified at Minn.Stat. § 604A.27 (2006)). The amendment was "effective August 1, 1994 and appl[ies] to causes of action arising on or after that date." *Id* . at § 11, at 1501. Thus, although the 1971 act protected landowners against dedication resulting from recreational uses permitted in the statute, only in 1994 was protection against prescriptive easements added to statutory language.

While the district court's finding regarding the inapplicability of the recreational-use statute has a basis in the language of the 1994 amendment, we do not have to reach it because the state's argument ignores respondents' use of the property that long preceded the state's acquisition of the land in 1989. Respondents testified extensively regarding their use of the property and trails beginning in the 1930s. Use continued uninterrupted until 2002, when the DNR installed signs, and 2003, when the DNR erected a fence across a trail. The evidence in this record supports the district court's finding that respondents' adverse use of the trails in section 25 extended for 15 or

more years before the state's ownership of the land.

II.

In a related argument, the state contends that the district court erred by concluding that respondents have established a prescriptive easement because, since recreational use is encouraged by Minnesota law, the element of hostility cannot be established. Further, the state argues that the district court erred by determining that respondents' adverse use of the WMA was visible.

***4** We note at the outset that, before trial, the parties agreed to certain terms in a stipulation that was submitted to the court. The parties stipulated to the following, which the district court explicitly adopted in its factual findings:

2. Kennard Anderson, Evans Anderson, James Anderson, Wayne Anderson, Douglas Anderson, David Anderson, Richard Anderson, and Michael Anderson ("[respondents]") are the owners in equal shares of the Northwest Quarter (NW1/4) of Section 25, Township 160, Range 47 ("Anderson Land").

....

10. Ferdie Anderson and [respondents] have used the State Lands for more than 60 years. Over the years, trails on the State Lands have been established and used by the [respondents] for vehicle and foot travel. The [respondents] have accessed the State Lands by car and pickup. Prior to DNR ownership of the State Lands, the [respondents] maintained the trails by removing deadfalls, removing rocks, and brushing out trails.

....

12. The [respondents] have used the State Lands for many years for picking berries in June, hunting partridge in September, hunting deer, snowmobiling, and nature viewing. More recently, the [respondents] rode four-wheelers in the State Lands.

In addition, the district court found:

20. Various aerial photographs, maps, and records confirm the existence of the trails for many years prior to the time that the State obtained title to the property in 1989. The [state] had actual notice of the existence of the trails when it bought the land in the S1/2 of Section 25. It had visual evidence of the trails as well as the County Board resolution which specified that existing trails must be left open.

....

26. [Respondents] testified to the following regarding the State Lands:

a. The [respondents] use of the trails was open for more than 15 years prior to September 29, 1989 when the [state] acquired its interest in the property.

b. The [respondents] use of the trails was notorious for more than 15 years prior to September 29, 1989.

c. [Respondents] use of the trails was hostile for more than 15 years prior to September 29, 1989.

d. The previous owners of the S1/2 of Section 25 had not consented to the use of the trails by [respondents].
e. The [respondents] have exercised dominion and control over the trails providing fill, clearing and brushing, removing rocks and deadfalls, and maintaining the trails in adequate width so that motor vehicles could pass along the Segments.
27. [Respondents] testified that they have used motor vehicles on the trails for ingress and egress to accomplish the following purposes: wood harvesting, deer hunting, moose hunting, berry picking (chokecherry and cranberry), rabbit hunting, partridge (grouse) hunting, trail maintenance and clearing, 3-wheeling, 4-wheeling, snowmobiling, and nature viewing. When Ferdie Anderson first purchased the property in the 1930s, it was not only used for hunting but also to harvest wood since that was the primary source of heat for the farm in the winter. Wood was harvested on [respondents'] land as well as on the land now owned by [the state]. [Respondents] testified that Evans Anderson began using the trails by motor vehicle in approximately 1941 and has used them to the current time. Douglas Anderson began using the trails in 1961 and has used them to the present time by motor vehicle.

***5** The evidence in this matter sustains the district court's findings of fact. In addition to the parties' stipulation, four members of respondents' family testified at trial. Evans Anderson, age 77, testified that his father, Ferdie Anderson, purchased land in section 25 in the early 1930s. At that time, the family cut trees in the section to burn in the wood stove. Evans Anderson began accessing trails in the section in approximately 1941. He also stated that his brother, Kennard Anderson, age 84, accessed the property by foot or, later, by ATV roughly three times per week over the length of his life.

On cross-examination, Evans Anderson was asked:
Q. You indicated earlier that you used the property consistently. Can you describe what you mean by consistently?
A. Well we used it-we used it for deer hunting. That was at the end of the summer or fall, and then the early spring, I mean not early spring but in-in the summer then there was berry picking. In the winter we-we used these trails for going in there to hunt rabbits, especially the snowshoe rabbit.

The state's argument that respondents' use of the land was not visible is brief and conclusory. It consists of one paragraph in its brief that states, in part: “For example, signs of motorized trail use for hunting or observing nature would not be distinguishable by the owner from trail use for berry picking. Thus, any hostile activities should not be considered to meet the visibility requirement.”

The supreme court has stated:
It is axiomatic that where a burden has been imposed upon land sold, assuming the marks of the burden are known to the purchaser or are open and visible and apparent on ordinary inspection of

the premises, the purchaser takes the title with the servitude upon it. It has long been recognized in Minnesota that a person who purchases land with knowledge or with actual, constructive, or implied notice that it is burdened with an easement in favor of other property ordinarily takes the estate subject to the easement.

Levine v. Twin City Red Barn No. 2, Inc., 296 Minn. 260, 264, 207 N.W.2d 739, 742 (1973) (citations omitted).

Here, there is no dispute that there were existing trails on section 25 when the state purchased the land in 1989. Donovan Pietruszewski, Area Wildlife Supervisor for the DNR and the state's only witness at trial, agreed that, based on his review of earlier aerial photographs, trails were in existence in 1989.[FN2] In addition, the August 15, 1989 Kittson County Board of Commissioners' approval of the state's proposed acquisition specifically states that "all existing trails or roads currently existing ... shall remain open to the public unless other provisions are approved by the County Board." While this evidence alone does not address the visibility of respondents' use of the trails, we conclude that, in combination with the unrefuted testimony of respondents' use at trial, it is sufficient to sustain the district court's findings of fact, which sustain its conclusion that respondents established a prescriptive easement.

FN2. Pietruszewski had no personal knowledge of any events prior to 2001.

III.

***6** Finally, the state claims that the district court erred in the scope of the prescriptive easement it granted because there was no evidence of respondents' use of trail segment # 5 or respondents' use of the section during the early spring of the year. We disagree. Our review of the record confirms that the evidence sustains the district court's findings. Respondent Michael Anderson testified, in response to a question about the family's use of ATVs on cross-examination, "[W]e'd go out in the spring right after the snow, and it was kind of a continuous thing through deer season." Respondent Douglas Anderson testified, "We are able to take a motor vehicle in there, mostly truck, a pickup as I say, pretty much year round." And respondent Evans Anderson referred to trail # 5 when he spoke of the "nice big trail" that provides hunting access from the east.

"Minnesota courts have long recognized that the extent of an easement depends upon the character and purpose of the use." *Block v. Sexton*, 577 N.W.2d 521, 526 (Minn.App.1998). Again, the unrefuted evidence in this record well supports the district court's findings, which sustain the legal conclusions as to the scope of the prescriptive easement.

Affirmed.

LANSING, Judge (dissenting).
To establish a prescriptive easement, the claimant must prove use of the property that is actual, open, continuous, exclusive, and hostile for the prescriptive period of fifteen years. *Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn.1999). A use is hostile if it is not permissive and is inconsistent with the rights of the owner. *Burns v. Plachecki*, 301 Minn. 445, 448, 223 N.W.2d 133, 136 (1974).

The Andersons testified that they have used the property at issue for recreational and motorized hunting activities for years. The county board's resolution approving the DNR's purchase of the property provided "that all existing trails or roads currently existing on [the] lands shall remain open to the public unless other provisions are approved by the [c]ounty [b]oard." Thus the Andersons, as members of the public, have full use of the existing trails or roads consistent with the policies of the wildlife management area. *See* Minn.Stat. § 86A.05, subd. 8 (2006) (discussing administration of wildlife management areas). The Andersons, however, seek to establish a prescriptive easement that permits them to use all-terrain and motor vehicles for hunting throughout the property. This use, which the Andersons maintain is permitted by a prescriptive easement, is inconsistent with the regulations of the wildlife management area. Because the evidence-as a matter of law-fails to satisfy the requirement of hostility, I disagree with the majority's conclusion that this use is permitted by a prescriptive easement.

Since 1971, Minnesota has, by statute, barred prescriptive easements based on recreational use. No "dedication" of land can be obtained through recreational use. Minn.Stat. § 604A.27 (2006); Minn.Stat. § 87.03 (1971). Land is "dedicated" if it is "made available by easement, license, permit, or other authorization." Minn.Stat. § 604A.21, subd. 2a (2006). Recreational use includes hunting, pleasure driving, and snowmobiling. *Id.*, subd. 5; Minn.Stat. § 87.021, subd. 4 (1971). The majority concludes that because the Anderson's recreational use of the property predated 1971, it may be considered hostile for purposes of establishing a prescriptive easement. I agree that the enactment of the statute creates an explicit prohibition. But I believe the statute codified rather than modified the existing common law.

***7** The 1971 statute is consistent with Minnesota's longstanding policy "to encourage and promote the use of privately owned lands and waters by the public for beneficial recreational purposes." Minn.Stat. § 87.01 (1971). Since long before 1971, our state has permitted hunters to hunt on nonagricultural land unless the hunters were explicitly told to leave or "no-trespassing" signs were posted. *See* Minn.Stat. § 100.29, subd. 3 (1945) (forbidding hunting on posted land or after notice); 1919 Minn. Laws ch. 400, § 7, at 428. (forbidding hunting on posted land or after notice); *see also* Minn.Stat. § 97B.001, subds. 3, 4 (2006) (forbidding entry for recreational purposes on posted land or after notice).

Minnesota's policy of permitting recreational and hunting use has encouraged the efficient use of natural resources. This policy was even more compelling in the early 20th century, when natural resources were more widely available. Consistent with this policy, landowners were not forced to build fences or post "no-trespassing" signs in order to protect against the creation of an adverse

interest by repeated recreational use of their property. Because the structure of Minnesota laws and our public policy has not permitted recreational easements to arise, landowners are not put in a position in which they would affirmatively have to confront hunters in order to preserve their property rights from the establishment of an adverse interest.

In this case, the Andersons' use of the land was permitted by statute and state policy. The Andersons' use was not inconsistent with the rights of the property owners and was not hostile. *Burns*, 301 Minn. at 448, 223 N.W.2d at 136. Because the Andersons' use was not hostile, they have not obtained a prescriptive easement. Therefore, I respectfully dissent.