MINNESOTA STATE LAW LIBRARY

NO. A08-303

State of Minnesota
In Court of Appeals

Eric J. Slindee and Jerilyn A. Slindee,

Appellants,

v.

Fritch Investments, LLC, a Minnesota limited liability company; and also all unknown persons claiming any right, title, estate, interest, or lien in the real estate described in the complaint herein,

Respondent,

v.

Landecker & Associates, Inc., a Minnesota corporation,

Respondent.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The "disputed area" at issue is part of the Slindees' deeded property. After using the disputed area since they first purchased their property five years earlier, the Slindees were approached and advised by Fritch Investments, LLC ("Fritch") that Fritch owned the disputed area. When the Slindees declined to sign a requested deed to convey the disputed area to Fritch, Fritch trespassed on the disputed area and cut trees and brush. (1/11/07 Trial Tr. pp. 125, 129, 192; Compl.). Consequently, the Slindees were forced to bring this action to quiet title.

Fritch characterizes this action as a "greedy attempt at a land grab by Eric Slindee." (Resp't Br. at 9.) This is an interesting portrayal given that the disputed area was deeded by de Neui and Hicok, the then record owners, to the Slindees for valuable consideration. (A-3, ¶¶ 3, 4; A-31.) How one makes a greedy land grab for property they already own is unknown. If anything, this case involves a land grab by Fritch.

Even if Fritch's initial motives were based on what proved to be an erroneous survey, the fact that Fritch continued to press its claims after learning that its survey was in error, can only lead to the conclusion that it is Fritch, not Slindee, who is engaging in a land grab. The trial court itself acknowledges that under the judgment Fritch received more land in terms of acreage than it believed it was purchasing. (A-20.)

After trial, the lower court awarded the disputed area to Fritch on the theory of boundary line by practical location through an express agreement between de Neui, Hicok, and the Zimmermans. However, the testimony of de Neui, Hicok, and the Zimmermans negates any finding of an express agreement as these parties testified that

they never had any discussions or conversations regarding the location of the disputed boundary line. As Fritch cannot point to any clear, convincing, and unequivocal evidence showing any express agreement, the trial court's judgment that a boundary by practical location was established must be reversed.

ARGUMENT

I. FRITCH FAILS TO PRESENT ANY CLEAR, POSITIVE, AND UNEQUIVOCAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT A BOUNDARY LINE BY PRACTICAL LOCATION WAS FORMED BY EXPRESS AGREEMENT.

In its brief, Fritch has failed to point out any clear, positive, and unequivocal evidence in support of the trial court's finding and conclusion that a boundary line by practical location through express agreement was established. Because the effect of a practical location is to divest one party of property that is clearly and concededly his by deed, the evidence establishing the practical location must be clear, positive, and unequivocal. *Wojahn v. Johnson,* 297 N.W.2d 298, 306 (Minn. 1980); *Theros v. Phillips,* 256 N.W.2d 852, 859 (Minn. 1977)(*citing Beardsley v. Crane*, 52 Minn. 537, 54 N.W. 740 (1893)). In the instant case, the trial court found that, "De Neui and Hicok expressly agreed with Zimmermans that the boundary line was 200 feet east of the fence, i.e. the west boundary of the disputed property." (A-16, ¶12.) It is upon this finding that the trial court based its conclusion that, "Fritch is entitled to judgment fixing the boundary line by practical location at the western edge of the disputed property." (A-22, ¶ 4.) However, the record is devoid of any evidence that de Neui, Hicok, and the Zimmermans came to an express agreement that the boundary line between their parcels

was a line 200 feet east of the fence, let alone any evidence that is clear, positive, and unequivocal to this effect.

Fritch fails to present any testimony of de Neui, Hickok, or the Zimmermans, establishing an express agreement between them of a boundary line location, despite Fritch's claim that the testimony was "unequivocal" of an agreement and that the "testimony could not be clearer." (Resp't Br. 9-11.) Even the cherry picked testimony presented by Fritch in its brief fails to establish that an express agreement was made.

Fritch relies on the testimony of de Neui stating that he observed the mowing line as the east boundary of his property, quoting the following testimony:

> Q. And during the entire time that you occupied that property, did you observe the mowing line as the east boundary of your property?
>
> A. Yes.

(1/12/07 Trial Tr. p. 132, ll. 3-6.)

> Q. Did you observe and respect that east boundary line as your property line during your occupation of the premises as your homestead?
>
> A. Yes.

(1/12/07 Trial Tr. p. 135, ll. 9-12).

Fritch conveniently omits de Neui's testimony given in between the quoted statements, where de Neui unequivocally testified that he never had any discussions with the Zimmermans about his east boundary line:

> Q. Now prior to your sale and during your occupancy of the property for those seven years, did you ever have any discussions with your neighbors to the east, the Zimmermans?
>
> A. Yes.

Q. Did you ever have any discussions with them regarding the location of your east boundary line.

A. Not really, no.

(1/12/07 Trial Tr. p. 133, ll. 11-18.)

Likewise, Fritch presents Ronald Zimmerman's testimony out of context, omitting the first few lines where Mr. Zimmerman testifies he never had any conversations with the neighbors about the boundary line:

Q. Without telling me what they were, did you have some conversations with neighbors over the years about where that west boundary line was located?

A. I don't recall any conversations, just mutual agreements.

(1/12/07 Trial Tr. p. 113, l. 25; p. 114, 1-5.)

Fritch then, without any legal support, asserts that a boundary line by practical location through express agreement can be clearly, positively, and unequivocally established where the parties' alleged to have made the express agreement have never had any discussions or conversations with each other regarding the boundary line. (Resp't Br. at 11.) It is absurd and contrary to reason and case law to assert that merely observing or accepting an area as a property boundary, without ever having any conversations with the neighboring landowner as to the boundary line, can constitute an express agreement as to a "certain, visible, and well-known" boundary line. *See Beardsley v. Crane,* 52 Minn. 537, 546, 54 N.W. 740, 742 (1893).

A. There cannot be a practical boundary line by express agreement where the parties never discussed the location of the boundary and never took steps to demarcate it.

Neither this Court nor the Minnesota Supreme Court has ever held that a boundary line by practical location through express agreement was formed where the parties' merely claimed to have observed or accepted a line as a boundary. In what appears to be the only published Minnesota case where a boundary line by express agreement was found, the parties specifically discussed the location of a boundary line and then, together, took steps to demarcate that boundary. In that case, *Nadeau v. Johnson,* the parties expressly agreed on the dividing line between the lots, participated in the measurements taken for locating the line, and staked the entire line. *Nadeau v. Johnson,* 125 Minn. 365, 366-67, 147 N.W. 241, 241-42 (1914). Thereafter, the defendant landowner constructed his buildings with reference to the agreed upon line and plaintiff adopted the line as a basis for the measurement of the tract in conveying it to a third person. *Id.* In the instant case, any clear, positive, and unequivocal evidence of this sort is completely lacking.

In addition to *Nadeau,* there appears to be only one unpublished Minnesota case where the court affirmed that a boundary line by practical location through express agreement was reached. In that case, *Ampe v. Lutgen*, like in *Nadeau*, the parties agreed to a boundary line, jointly staked and improved the lot in accordance with their agreement, and acquiesced to that agreed location of the boundary line for 14 years. *Ampe v. Lutgen,* 2007 WL 2034381 (Minn. Ct. App. 2007).

Unlike in *Nadeau* and *Ampe,* de Neui, Hickok, and the Zimmermans never discussed the location of the boundary line, never measured a boundary line, and never staked or otherwise demarcated any alleged boundary line. (1/12/07 Trial Tr. p. 133, ll. 11-18; 1/12/07 Trial Tr. p. 113, l.25; p. 114, ll. 1-19.) The Zimmermans, de Neui, and Hicok never entered any express agreement as to a boundary line. At best, they merely accepted the mowing line as a "*piece of line* that identified our property versus his." (*See* 1/12/07 Trial Tr. p. 114, ll. 14-19 (emphasis added).) Neither party used the alleged boundary line as a basis for constructing any buildings, fences, or any other improvements. Indeed, de Neui and Hicok deeded the Slindee parcel to the Slindees without ever adopting the alleged agreed upon boundary line as a basis for measuring the tract. (A-31.) *Compare Nadeau,* 125 Minn. at 366-67, 147 N.W. at 241-42 (finding express agreement where boundary line was used as basis for measuring tract in conveying it to a third party.) The facts in this case are a far cry from the facts in *Nadeau* and *Ampe* and cannot constitute clear, positive, and unequivocal evidence of a boundary line by practical location through express agreement. *See Phillips v. Blowers,* 281 Minn. 267, 269, 161 N.W.2d 524, 527 (1968).

Fritch claims that *Nadeau,* is distinguishable and cannot be used to show what is required to constitute a boundary line by practical location because "in *Nadeau,* the dispute was between the two landowners who supposedly created the boundary by practical location." (Resp't Br. at 15.) It is not clear how Fritch's distinction is in any way relevant.

Fritch further claims that, "Because of [de Neui and Zimmermans'] clear testimony on their agreement, there was no need to go into further detail on the activities behind the creation of the line." However, the clear testimony of de Neui and Mr. Zimmerman is that they never had any conversations or discussions with each other regarding the location of the boundary line. (1/12/07 Trial Tr. p. 113, l. 25; p. 114, 1-5; 1/12/07 Trial Tr. p. 133, ll. 11-18.) Fritch has the burden of proving a boundary line by practical location through clear, positive, and unequivocal evidence and has failed to do so.

Fritch bases its entire argument of an express agreement and acquiescence on the fact that the Zimmermans and de Neui mistakenly observed the mow line as the property line. (Resp't Br. at 9-11, 13-15.) Just what they did in observance of that mow line is not expressed. To the east of the mow line, i.e. grass line, it is undisputed that the property was wooded and left in its natural state. (A-17, ¶ 16, 21.) To establish a boundary line by express agreement it must be shown that the purported line was intended to mark the boundary line. *See Weis v. Kozak,* 410 N.W.2d 903, 907 (Minn. Ct. App. 1987)(affirming there was no boundary line by practical location where fence was built to restrain cattle rather than mark boundary line); *Quast v. Brose,* 2001 WL 1035039 (Minn. Ct. App. 2001)(affirming that there was no boundary line by practical location where alleged boundary fence was located in a wooded area between two fields and had apparently been erected to keep cattle from straying across the property line.) There is no evidence that the mow line, which was established long before de Neui owned the Slindee parcel (1/12/07 Trial Tr. p. 67, ll. 6-13) was ever intended to mark

any boundary line. It was merely where the owner of the Slindee parcel stopped mowing the grass and left the remainder of the lot wooded and in a natural state.

Fritch presents no testimony that the mow line was formed with the intent of creating the boundary. The mow line only extends for a short length of the alleged boundary line where grass was planted around the home on the Slindee parcel. The mow line stops at the circular part of the driveway and no mowing is done north of the line because the land turned into woods and brush. In some places the mow line extends 15 feet into the disputed area, and in other places it is up to 40 feet west or of or shy of reaching the disputed area. (1/11/07 Trial Tr. pp. 108-09, 135-36; 1/12/07 Trial Tr. pp. 215-219; A-26 (survey of property and mow line); A-32 (mowing line drawn by Terry Freeman from memory, without having done a survey.))

According to Mrs. Zimmerman, the mowing line had been there since 1978. (1/12/07 Trial Tr. p. 67, ll. 6-13.) There was no evidence presented that Slindees' predecessors planted the grass with the intent to create a boundary or with the intent that it was the actual boundary line. Since the Zimmermans stopped mowing east of their actual western property line at their most westerly cabin, (1/11/07 Trial Tr. pp. 136-37), it makes no more sense to conclude that the Slindee mow line marks the Slindees' eastern property line than it does to conclude that the Fritch mow line marks Fritch's western property line.

There is simply no clear, positive, and unequivocal evidence in the record to support the trial court's finding that de Neui, Hicok and the Zimmermans expressly agreed to a practical boundary line or to support the trial court's conclusion that Fritch is

entitled to the disputed area by practical location. Therefore, the trial court's judgment must be reversed.

B. Fritch fails to present any clear, positive, and unequivocal evidence that de Neui, the Zimmermans and their successors acquiesced to the alleged agreed upon boundary line.

To establish a boundary line by practical location through express agreement, the line must have been expressly agreed upon by the interested parties and afterwards acquiesced in. *LeeJoice v. Harris,* 404 N.W.2d 4, 7 (Minn. Ct. App. 1987). Here, Fritch has failed to point out any evidence of acquiescence. Like evidence of an express agreement, evidence of acquiescence must be "clear positive and unequivocal." *Enquist v. Wirtjes,* 243 Minn. 502, 507-08, 68 N.W.2d 412, 417 (Minn. 1955). Acquiescence is not merely passive consent to a boundary, but rather conduct or lack thereof from which assent may be reasonably inferred. *Engquist*, 243 Minn. at 507-08, 68 N.W.2d at 417. "Acquiescence entails affirmative or tacit consent to an action by the alleged disseizor, such as construction of a physical boundary or other use * * *." *LeeJoice*, 404 N.W.2d at 7. Some action, such as erecting a barrier or making use of the land is required for there to be acquiescence to boundary line. *See Blanchard v. Rasmussen,* 2005 WL 2495991, 3 (Minn. Ct. App. 2005); *Pratt Inv. Co. v. Kennedy,* 636 N.W.2d 844, 849 (Minn. Ct. App. 2001); *Phillips v. Blowers*, 281 Minn. 267, 271, 161 N.W.2d 524, 528 (1968).

Fritch, as the party alleging boundary line by practical location, has the burden of proving acquiescence to the alleged boundary. Ironically, Fritch attempts to switch the burden to the Slindees to prove there was no acquiescence. (Resp't Br. at 15 "Furthermore, Slindee has not provided one piece of evidence or testimony to show that

de Neui, Zimmerman or their predecessors **did not** acquiesce in this line as their boundaries.") Although not required, the Slindees did provide evidence that acquiescence was lacking. (Appellants' Br. at 25-28.) The trial court even made findings inconsistent with acquiescence. First, the trial court found that the Slindees' predecessors, the Orths, used two trails from the Slindee parcel through the disputed area from 1980 to 1993. (A-16, ¶¶ 10, 11.) Second, the trial court found that the Slindees continued to use one of these trails from their property through the disputed area to the lake from the time they first purchased the Slindee parcel in 2000. (A-17, ¶ 14.) Third, the trial court found that the owners of the two parcels and their predecessors in interest did not use or develop the disputed property except as detailed [above] and the disputed area served as a buffer area between the two parcels. (A-17, ¶ 16, ¶ 21.) Use of a trail over the disputed area by the Slindees and Orths, fee owners of the property, and a complete lack of use of the disputed area by the disseisors, is contrary to the proposition that there was any acquiescence to an alleged boundary line.

Fritch fails to set forth any facts in its brief evidencing acquiescence to an alleged boundary line. (Resp't Br. 11-16.) Fritch contends that, "the trial court has concluded there was acquiescence in that boundary line for at least seven years." (Resp't Br. at 13.) However, Fritch cannot cite to any part of the trial court's amended judgment for this proposition. The trial court failed to make any specific findings as to acquiescence or otherwise discuss what facts constituted acquiescence and in fact, made several findings contrary to a finding of acquiescence as stated above. Fritch does not, and

cannot, point to any facts legally sufficient to constitute acquiescence. Therefore, the trial court's judgment as to boundary line by practical location must be reversed.

C. To the extent an agreement could be found regarding the boundary line, the Slindees presented evidence that it was subsequently abandoned.

Fritch claims that the Slindee's abandonment argument was raised for the first time on appeal. (Resp't Br. at 17.) In fact, abandonment was raised by the Slindees in their Post-Trial Memorandum, page 21. Fritch also claims that there is no evidence in the record to support a finding of abandonment. *Id.* The Slindees fully laid out their abandonment argument and the facts supporting it in their initial brief and do not believe Fritch has set forth any argument to which a reply is necessary. (See Appellants' Br. at 23-25.)

D. Fritch fails to present any evidence from the record to support the trial court's finding that the practical boundary line is a line 200 feet from the west line of the Slindee property.

Again, Fritch wrongfully asserts that the Slindees have not previously raised the issue of the mow line being too irregular and too imprecise to serve as a practical boundary line. (Resp't Br. at 18.) Again, the Slindees set forth this argument in their Post-Trial Memorandum, page 19 and in their Memorandum for Amended Findings, Conclusions and Judgment or For a New Trial, page 9.

Without any citations to the record, Fritch argues that there is evidence to support the trial court's finding that that de Neui, Hicok, and the Zimmermans expressly agreed that the boundary line was 200 feet east of the Slindee's western fence line. (Resp't Br. at

18-20.) Fritch appears to completely ignore the Slindees' arguments on this issue and simply alleges that the trial court's findings are proper because the trial court found so.

The Slindees' argued that the trial court improperly found that de Neui and Hicok expressly agreed with the Zimmermans that the boundary line was 200 feet east of the fence. The Slindees contend that this finding is improper because: (1) in the testimony provided by de Neui, Hicok, and the Zimmermans, they only assert that they observed the "mow line" as the boundary line and none of them mention any agreement that the boundary line ran 200 feet from the Slindees' west fence; (2) the mow line discussed by de Neui, Hicok, and the Zimmermans is not consistent with the 200 foot boundary line established by the trial court, and (2) the mow line discussed by de Neui, Hicok, and the Zimmermans is too irregular and imprecise to constitute a boundary line by practical location as a matter of law. (See Appellants' Br. at 28-33.)

To establish a boundary line by practical location through express agreement, the agreement must deliberately settle "the exact, precise line." *Beardsley,* 52 Minn. 537, 546, 54 N.W. 740, 742 (Minn. 1893). The line must be known, definite, certain and capable of ascertainment. *Fishman v. Nielsen,* 273 Minn. 1, 53 N.W.2d 553, 557 (Minn. 1952). The Slindees presented evidence in the record that the mow line was imprecise, uncertain, and inconsistent with the boundary line as determined by the trial court. (Appellants' Br. at 28-33.) The mow line did not run the length of the boundary line determined by the trial court and, in fact, extends 15 feet into the disputed area at some points and is up to 40 feet shy of reaching the disputed area at other points. (1/11/07 Trial Tr. pp. 108-09, 135-36; 1/12/07 Trial Tr. pp. 215-19, 222-24; A-32; A-26; A-53.)

Additionally, the testimony of de Neui, Hicok, and the Zimmermans cannot sustain a finding that they clearly, positively, and unequivocally entered into an express agreement upon an exact, precise line that that ran 200 feet from the Slindees' western fence line. As previously discussed, there is insufficient evidence as to any express agreement between them as to a boundary line. Second, their testimony only refers to the mow line, which they believed to be the boundary, not a line 200 feet east of the Slindees' fence.

Fritch cannot satisfy its required burden of proof and fails to set forth any clear, positive, and equivocal evidence from the record that could support the trial court's finding that an express agreement was made that the boundary line was 200 feet east of the fence. (Resp't Br. at 18-20.)

II. THE TRIAL COURT ERRED IN GRANTING THE DISPUTED AREA TO FRITCH WHERE FRITCH HAD CONSTRUCTIVE AND IMPLIED NOTICE OF THE TRUE BOUNDARY LINE.

While the trial court bases its judgment upon boundary line by practical location, it appears that the impetus for the trial court's decision is based upon its notion of equity, rather than law. The trial court apparently believes that because the Slindees thought they were purchasing 200 feet of property, that is all they are entitled to, despite what property the deed grants them and despite Slindees' testimony that they were told that the disputed area was part of their property before purchasing it. (A-31; 1/12/07 Trial Tr. 179-82, 190.) Ironically, Fritch believed that it was purchasing 11.8 acres with 460+/- feet of lakeshore (1/12/07 Trial Tr. 266, 274; A-17, ¶ 20, A-39A, A-42) and as a result of the trial court's judgment received a total of 533 feet of lakeshore and more acreage than it believed it was purchasing.

A district court's decision to grant equitable relief is not unlimited and must be supported by the facts and law. *Lindell v. Lindell,* 150 Minn. 295, 299, 185 N.W. 929, 930 (1921). Where the parties are equally at fault, the doctrine of in pari delicto bars recovery of one party in favor of another and the court will leave the parties as they were. *State by Head v. AAMCO Automatic Transmissions, Inc.,* 293 Minn. 342, 347, 199 N.W.2d 444, 448 (1972). In the instant case, the trial court essentially found that neither party is deserving of equitable relief and that the equities are equal. (A-20.) Yet, the trial court awarded Fritch the Slindees' property.

Fritch is not a good faith purchaser because he had implied and constructive notice of the Slindees' ownership of the disputed parcel. Fritch improperly and disingenuously claims that Slindees' argument that Fritch was not a good faith purchaser is a new issue raised for the first time on appeal. (A-25.) Again, this argument was raised by Slindees in their Memorandum for Amended Findings, Conclusions, and Judgment or For a New Trial, page 22.

It is true that Slindees' good faith purchaser argument is not asserted in the traditional sense as Fritch's deed never included the disputed area, which was properly included as part of the Slindees' deeded parcel. The fact that Fritch was not a good faith purchaser of the disputed area, however, is relevant to a weighing of the equities and Fritch's claim of a boundary line by practical location, as he who comes into equity must come with clean hands. *Hruska v. Chandler Assocs., Inc.,* 372 N.W.2d 709, 715 (Minn. 1985).

Fritch is not entitled to any equitable relief because Fritch does not come into this action with clean hands. Under the Minnesota Recording Act, a purchaser in "good faith," is one who gives consideration without actual, implied or constructive notice of inconsistent outstanding rights of others. *Claflin v. Commercial State Bank of Two Harbors,* 487 N.W.2d 242, 247-48 (Minn. Ct. App. 1992).

"Implied notice has been found where one has actual knowledge of facts which would put one on further inquiry." *Clafli,* 487 N.W.2d at 248. In the instant case, the Slindees had been using the trail from their lawn through the disputed area to the lake for two years before Fritch purchased the Fritch parcel. (A-17, ¶ 14.) Chris Fritch admits seeing this trail before purchasing the Fritch parcel. (12/19/07 Trial Tr. pp. 71, 76-77.) As such, Fritch had implied notice that the disputed area belonged to the Slindees and should not be permitted to claim an interest in the disputed area.

Fritch argues that viewing the trail is not sufficient enough to put it on notice that the disputed area was not part of the Fritch parcel. (Resp't Br. at 26-27.) Viewing a footpath, however, has been held to constitute implied notice. *See Mehrkens v. Ryan,* 2003 WL 21694568, 3 (Minn. Ct. App. 2003). In the instant case, the only place the Slindee trail leads is from the Slindees' yard to the disputed lakeshore. (1/19/07 Trial Tr. p. 6, ll. 15-20.) Seeing a trail that only leads from the neighbors' yard would give any reasonable person, and particularly an experienced real estate agent like Chris Fritch, knowledge of facts that would put them on further inquiry.

In addition to implied notice, Fritch had constructive notice that the Slindees owned the disputed area. "Constructive notice is a creature of statute and, as a matter of law, imputes notice to all purchasers of any properly recorded instrument even though the purchaser has no actual notice of the record." *Anderson v. Graham Investment Co.,* 263 N.W.2d 382, 384 (Minn. 1978). It cannot be disputed that the Slindee deed was recorded two years before Fritch purchased the Fritch parcel. That deed reflected that the Slindees owned the 200 feet east of the western line of government lot 8, which includes the disputed area. (A-15-16, ¶ 4, A-31.) The description in Fritch's own warranty deed does not include the disputed area. (A-40-41.) To overcome this, Fritch claims he bought a visual parcel and, therefore, what was on the deeds is not relevant. (A-22-23.) Under the law, however, Fritch cannot claim to have purchased the disputed area in good faith where Fritch had constructive notice that the Slindees owned the disputed area.

III. IF THIS COURT DETERMINES THE DISPUTED AREA IS OWNED BY THE SLINDEES, THEY ARE ENTITLED TO TRESPASS DAMAGES AGAINST FRITCH.

The Slindees presented expert testimony by Roger Rutt that the Slindees were damaged in the amount of $11,430.00 as a result of Fritch's trespass and wrongful removal of trees. (1/11/07 Trial Tr. at 87.) Fritch did not present any expert testimony to refute the damages amount. The trial court found there was no trespass, as it determined the disputed area belonged to Fritch. (A-18, ¶ 22.) If the trial court's award of the disputed area is reversed, the matter must be remanded for the trial court to award trespass damages against Fritch.

IV. THE TRIAL COURT ERRED IN NOT CONCLUDING THAT FRITCH'S CLAIMS FOR REFORMATION MUST FAIL AS A MATTER OF LAW.

Fritch states that the trial court does not make one mention of reformation, except to state it had not addressed the issue. (Resp't Br. at 33.) In fact, the trial court specifically discusses reformation in the amended judgment, stating, "Although the Court could have decided this issue, it has chosen not to because de Neui is not a party to this action." (A-25; RA-27.)

Reformation is only allowed against the original parties to an instrument and those in privity with the original parties. *Manderfeld v. Krovitz,* 539 N.W.2d 802, 805 (Minn. Ct. App. 1985). Fritch has no standing to seek reformation of the deed from de Neui to the Slindees as Fritch is not a party to the deed. (A-31.) Fritch disingenuously claims it is in privity with de Neui due to quit claim deeds given it by Paul and Patricia Norman and Donna Hicok and Dean de Neui. (Resp't Br. 34-35.) There is nothing in the record to indicate that Paul and Patricia Norman ever owned the disputed area. Furthermore, Fritch never gave any consideration for any of these deeds, which were obtained several years after de Neui and Hicok already conveyed the disputed area to the Slindees by warranty deed. (A-31; RA-38-40.) Because Fritch is not a party to the de Neui/Slindee deed, the court erred in failing to dismiss its reformation claim with prejudice as a matter of law.

V. IF THIS COURT AFFIRMS THE TRIAL COURT'S AWARD OF THE DISPUTED AREA TO FRITCH, THE SLINDEES ARE ENTITLED TO THE EASEMENTS AWARDED BY THE TRIAL COURT.

Fritch claims that the Slindees were required to establish a prescriptive easement by clear and convincing evidence to sustain the trial court's award of the easements to the Slindees. (Resp't Br. at 36-40.) Fritch has provided no support for this proposition.

The trial court has awarded the easements to the Slindees as an exercise of its equitable powers specific to the unique facts of this case. *See Beliveau v. Beliveau*, 217 Minn. 235, 245, 14 N.W.2d 360, 366 (1944). The trial court found that, "after Slindees purchased the property in 2000, they used the path from their property to the lake..." (A-17, ¶ 14.) The trial court later states that:

> ...Given that the disputed property had been used as a buffer area for many years, and that the pathway to the lake had been used by the Orths as well as the Slindees, the Court finds it equitable that these uses continue despite the location of the practical boundary.
>
> By allowing the pathway easement to the lake over the property awarded to Fritch, the Court preserves the status quo of the pathway.

(A-21.)

Given the trial court's findings, its award of the easement to the Slindees is not an abuse of discretion of its equitable powers. *See Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979)(stating equitable relief will not be reversed absent an abuse of discretion).

Although the Slindees are not required to prove an easement by prescription over land deeded to them, there is evidence in the record that the path was used for 15 continuous years by the Slindees' predecessors. Ted Bryant acquired the Slindee parcel

in 1971. (A-52.) The property was then sold to Robert Orth in 1980, who owned the property until 1993. (A-16, ¶ 9.) The Zimmerman's purchased the Fritch parcel in 1978 from Walter Bryant. (A-15, ¶ 2; A-52.) Mrs. Zimmerman testified that when they bought the Fritch parcel in 1978, the path was very much like [Exhibit 95] because the Bryant's used it a lot. (1/12/07 Trial Tr. p. 104, ll. 19-25; p. 105, l. 1.) Mrs. Zimmerman also testified that the Bryants had a dock in the disputed area before 1978 and that Ted Bryant used the dock after the Zimmermans bought the Fritch parcel. (1/12/07 Trial Tr. pp. 69-71.) The trial court also found that the Orths used the path to the lake from 1980, when they purchased the Slindee parcel from Ted Bryant, to 1993. (A-16, ¶ 11.) The record, therefore, contains clear and convincing evidence that the path over the disputed area was in use for over 15 continuous years, supporting a prescriptive easement of the path to the owners of the Slindee parcel, had the trial court chose to make such a finding. Additionally, Mr. de Neui - despite his claims that he never used the path during the trial - testified post trial that he used the path "a number of times, two, three." (12/19/07 Trial Tr. p. 39.)

Fritch also argues that Slindee did not establish the location of the path through clear and convincing evidence. (Resp't Br. at 37.) In fact, Slindee provided substantial evidence of the location of the path at the post trial hearing on December 19, 2007, including extensive photos (Exs. 94, 94A, 95, 95A, 113-121) and a certificate of survey, giving a legal description of the trail easement (A-53). Fritch also claims that Slindee moved, improved, widened and lengthened the path and the survey is of the new path. (Resp't Br. at 38.) However, the testimony of Mr. Slindee is that the survey accurately

depicts the trail when he first purchased the property and that he has never changed the configuration of the trail or widened the path. (12/19/07 Trial Tr. pp. 8-9.) Dan Muscari, the neighbor to the west of the Slindee parcel for twenty-one years also testified that he walked the path for the first time in 1986 or 1987 and again in 2007 and that there was no difference in the path and the course of the path had not changed. (12/19/07 Trial Tr. pp. 51-52, 57.) Indeed, the trial court found, "that the pathway as surveyed and described in the Court's order dated September 2007 is accurate and reflects the location of the pathway as it existed at the time Plaintiffs purchased the property on November 1, 2000." (A-28.)

There is ample evidence in the record to support the trial court's judgment granting the easements to the Slindees under its equitable powers. As such, if this Court upholds the trial court's judgment that the disputed area belongs to Fritch, the easements granted to the Slindees should be affirmed.

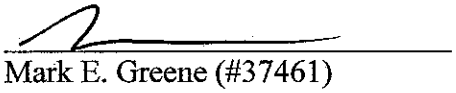
CONCLUSION

Fritch has failed to present any clear, positive, and unequivocal evidence to support the trial court's finding and conclusion that a boundary line by practical location was formed by express agreement. Therefore, the trial court erred in finding a boundary line by practical location. Further, the trial court erred in granting the disputed area to Fritch on an equitable basis where Fritch was not a good faith purchaser, having implied and constructive notice of the true boundary line. The trial court also erred as a matter of law in not dismissing Fritch's reformation claim where Fritch was not a party to the deed seeking to be reformed.

Accordingly, the Slindees respectfully request that this Court reverse and remand this matter to the trial court to quiet title to the disputed area in the Slindees' name, to award the Slindees trespass damages, and to dismiss Fritch's claim for reformation with prejudice.

BERNICK, LIFSON, GREENSTEIN, GREENE, & LISZT, P.A.

Dated: May 23, 2008



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