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NO. A05-~~2265~~

**STATE OF MINNESOTA**  
**IN COURT OF APPEALS**

**Terrance R. Magnuson, Margaret E. Magnuson and  
Kevin Magnuson, d/b/a Warroad Marina,  
Respondents,**

**vs.**

**John J. Cossette, d/b/a Spearfish Aviation, Inc.,  
Appellant.**

**APPELLANTS' BRIEF AND APPENDIX**

**STEVEN A. NELSON (#78220)**  
210 Fourth Ave.  
International Falls, MN 56649  
(218) 283-8402

Attorney for Appellant  
John J. Cossette, et al

**MICHAEL L. JORGENSON**  
119 West Second Street  
P.O. Box 506  
Thief River Falls, MN 56701  
(218)681-4002

Attorney for Respondents  
Terrance R. Magnuson, et al

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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A05-0377**

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Terrance R. Magnuson,  
Margaret E. Magnuson, and  
Kevin Magnuson, d/b/a  
Warroad Marina,

Respondent,

vs

**APPELLANT'S BRIEF**

John J. Cossette, d/b/a  
Spearfish Aviations, Inc.,

Appellant.

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**INTRODUCTION**

The parties both own real estate north of Warroad, Minnesota on the South shore of Lake of the Woods. The Respondents own property known as the Warroad Estates Marina and the Appellant owns property known as the Warroad Estates RV Park. The boundary between these two parcels is identified by a metes-and-bounds description. A survey of this description places the boundary between the properties into the navigable waters of the Warroad Estates Marina which would give the Appellant riparian rights to Lake of the Woods. The Respondents contend that the metes and bounds description places the boundary

line landward of the shoreline, which would separate the Appellant from Lake of the Woods.

The Respondents further contends that they are entitled to an undefined easement across and through the Warroad Estates RV Park owned by the Appellant in order to haul dredged spoils from the channel connecting the Marina to Lake of the Woods. The Appellant contends that such an easement was never disclosed when he purchased the property, and furthermore there was no activity prior to his purchase that would have given him reason to know an easement was claimed by the Respondents. The Respondents admit that they do not have any written documents giving them a right to such an easement. Respondents commenced this action on March 12, 2003 alleging trespass and seeking an injunction to prevent the Appellant from parking his boat along his property line, which extended into the navigable waters of Lake of the Woods and into the Marina owned by the Respondents. Appellant answered alleging he had riparian rights and counter claimed seeking to enjoin the Respondents from driving trucks through his RV Park without the benefit of an easement.

### **ISSUES**

- 1. Is Respondent entitled to an easement by prescription when there is insufficient evidence to prove use was hostile, actual, open, continuous and exclusive for 15 years?**

*The Trial Court held in the affirmative.*

- 2. Can Respondent obtain an Easement by implication without showing:**
- a) The easement is necessary to the beneficial enjoyment of the dominant land;**
  - b) The easement had been openly continuously used;**
  - c) It was openly apparent that it was intended by the parties to be permanent; and**
  - d) The easement was created contemporaneously with separation of title.**

*The Trial Court held in the affirmative.*

- 3. Can the Respondent receive a nonspecific and undefined easement by prescription that substantially devalues the Appellant's property without showing common usage or need?**

*The Trial Court held in the affirmative and did not define or identify the metes and bounds of the easement granted to the Respondent.*

- 4. Is the Appellant entitled to riparian rights when a metes and bounds description, measured and identified from stable monuments set by a surveyor, defines his property to extend into navigable waters of Lake of the Woods?**

*The Trial Court held in the negative. The finder of fact disregarded the dimensions of the metes and bounds description to move the property line approximately 1½ feet upland, thereby, defeating Appellant's riparian rights.*

### **SCOPE OF REVIEW**

Trial of this action was presented to the Court, without benefit of jury. The Appellant moved for a new Trial or in the alternative, amended Findings of Fact. The District Court denied Appellant's Motion for a New Trial. The Scope of Review from an Order denying a new Trial is very broad. The Appellate Courts may reverse, affirm or modify the judgment or Order appealed from or take any other action as the interest of justice may require. *Rule 103.04, Minnesota Rules of Civil Appellate Procedure.* This Rule has been changed to make it clear that the Scope of Review can and often does depend upon the scope of the Trial proceedings.

Issues raised on this Appeal were presented to the Trial Court in Appellant's Motion for a New Trial. Errors properly assigned below are reviewable. *Lang v Nelson-Ryan Flight Service, Inc., 263 Minn. 152, 116 N.W.2d 266 (1962)* The Appellant is not bound by issues raised in the Statement of Case if the Trial Court proceedings warrant review. *Lily v City of Mpls., 527 N.W.2d 107 (Minn. App. 1995)* See *Wessin v Archives Corp., 581 N.W.2d 380 (Minn. App. 1998)* A Trial Court's Findings of Fact may be held to be clearly erroneous by the Court of

Appeals notwithstanding some evidence to support such findings. The reviewing Court must be left with a definite firm conviction that a mistake has been made. *In Re: Trust known as Great Northern Iron Ore Properties*, 308 Minn. 221, 243 N.W.2d 302 (1976)(cert. Denied 97 S.Ct. 530, 429 U.S. 1001) Burden of proof lies with the Appellant *In Re: Conservatorship of Smith*, 655 N.W.2c 814 (Minn. App. 2003)

### **STATEMENT OF FACTS**

Robert Anderson, a Real Estate Developer for more than forty years, developed an area generally known as Warroad Estates (see Trial Exhibit 8, an aerial photograph for general reference). This area was developed by Mr. Anderson individually and through related companies and investment groups known as Warroad Estates Investments, a Limited Partnership; AMG, Inc., General Partner and AMG, Inc. (all of which are hereinafter referred to as "Anderson"). Development of this area, and specifically the Warroad Estates Marina, required permits and authorization from the Minnesota Department of Natural Resources (DNR) and the Corp of Engineers. (See Trial Exhibits 9, DNR Permit (a/k/a Trial Exhibit 30) and Trial Exhibit 10, Army Corp of Engineer's Permit)

**The Respondents, Magnuson, purchased the Warroad Estates Marina from Anderson.**

On June 25, 1991 the Respondents purchased the Warroad Estates Marina from Anderson. The transaction included three separate conveyances;

Trial Exhibit 5 – A Warranty Deed conveying the Marina

Trial Exhibit 6 – A Warranty Deed conveying a 20 foot easement allowing Magnuson access to the north bank and to maintain the seawall along the East, South and West boundaries of the RV Park.

Trial Exhibit 7 – A Warranty Deed conveying the North bank of the channel connecting the Marina to Lake of the Woods.

The legal descriptions for the above conveyances were obtained from Gary Thompson, Registered Land Surveyor with Widseth, Smith & Nolting, Crookston, Minnesota. The legal description generated for the Warroad Estates Marina (Exhibit 5) is as follows:

Lots one (1) and Two (2), Block Four (4), Warroad Estates Subdivision, Unit Two, according to the plat thereof on file and of record in the office of the County Recorder of Roseau County, Minnesota and part of the West Half (W ½) of Section Seventeen (17), Township One Sixty-three (163) North, Range Thirty-six (36) West of the Fifth Principal Meridian described as follows:

Beginning at the Northwest Corner of said Lot One (1); thence North 32 degrees, 10 minutes, 17 seconds West, assumed bearing along the Easterly line of Elm Drive 129.46 feet; thence North 01 degrees, 23 minutes, 09 seconds East 459.21 feet to an iron pipe monument; thence South 88 degrees, 36 minutes, 51 seconds East 55.67 feet to an iron pipe monument on the Westerly line of an existing steel wall; thence North 01 degrees, 23 minutes, 42 seconds East along said Westerly line 113.09

feet; thence South 88 degrees, 42 minutes, 45 seconds East along said wall 314.56 feet; thence North 00 degrees, 20 minutes, 19 seconds West 193.41 feet; thence North 54 degrees, 44 minutes, 39 seconds East 23.48 feet; thence North 79 degrees, 49 minutes, 04 seconds East 12.11 feet; thence North 01 degrees, 23 minutes nine seconds East 107.73 feet; thence North 76 degrees, 58 minutes, 24 seconds East 1,024.24 feet to the East line of the West Half (W ½) of said Section Seventeen (17); thence South 00 degrees, 53 minutes, 37 seconds East along said East line 250.60 feet; thence South 76 degrees, 58 minutes, 24 seconds West 612.13 feet; thence South 08 degrees, 50 minutes, 47 seconds West 867.73 feet; thence South 06 degrees, 59 minutes, 23 seconds East, 171.89 feet; thence North 90 degrees, 00 minutes, 00 seconds West 353.34 feet to the Southeasterly corner of said Lot Two (2); thence South 78 degrees, 02 minutes, 34 seconds West along the Southerly line of said Lot Two (2) a distance of 200.00 feet to the Southwesterly Corner of said Lot Two (2); thence Northwesterly along the Westerly line of said Lots One (1) and Two (2) along a non-tangential curve concave to the Southwest having a radius of 693.33 feet and a central angle of 20 degrees, 18 minutes, 51 seconds, a distance of 245.82 feet to the point of beginning, containing 21.06 acres more or less.

The 20 foot easement (Trial Exhibit 6) commences at a *pipe monument* “on the Westerly line of an existing steel wall, being the point of beginning of the line so described” and continues northerly to the southwest corner of the north bank of the channel. (See Trial Exhibit 6)

The third conveyance to Magnuson was a 2.95 acre strip approximately 200 feet wide and 1000 feet long stretching along the North bank of the channel that connects the Warroad Estates Marina with Lake of the Woods. (See Trial Exhibit 7)

The channel connecting the Marina and Lake of the Woods requires to be dredged. Anderson testified that the channel connecting the Marina to Lake of the

Woods had to be dredged occasionally. He testified "It might go for a couple three years and (you'll) not have to do it, and then (you) might have to do it two years in a row...it varied." (Tr. P.38, L.1-4) Spoils would be dredged from the channel and placed on the north bank. After they had drained, they would be hauled away. When hauling the spoils, the Respondents would simply drive through the Appellant's RV Park.

**The easement claimed by Respondents through the RV Park is not necessary.** The Respondents have three alternative ways to remove spoils from the north bank of the channel; they can dredge from the ice, haul around the north side of the RV Park over land still owned by Anderson, or haul over the 20 foot easement along the south side of the RV park.

It is possible to dredge the channel without hauling spoils through the RV Park. Anderson admitted it was possible to go on the ice to dig out the spoils and haul them away from there. (Tr. P.38, L.8-11; Tr. P.146, L.1-4) Anderson further testified "If it's done at the right time of the year where the ice conditions are just right you can get a big backhoe or drag line in there, cut the ice out. You can load trucks and haul it off; yes, we did it that way." (Tr. P.72, L.1-9)

The Respondents have the possibility of hauling spoils from the North bank over property still owned by their grantor, Anderson. At the time of sale to

Magnusons, Anderson owned property north of the RV Park and West of the North bank of the channel. He continues to own property north of the RV Park at the time of trial. (Tr. P.57, L.1-2; P.183, L.3-6)

The Respondents acknowledge they have a 20 foot easement along the south side of the RV Park, but claim they would not be able to run heavily loaded trucks in that area without damaging their sea wall. The easement is for "maintenance" purposes and all parties assumed this was limited to maintenance of the sea wall.

The Respondents further acknowledge that they have never had an easement to haul through Mr. Cossette's property. (Tr. P.145, L.8-15) The Magnusons leased the Marina from Anderson in 1989, and they worked together to dredge the channel. At that time, and in subsequent years, Magnusons and Anderson simply hauled through the RV Park because it was most convenient.

After purchasing the Marina, the Magnusons simply continued to use the roads through the RV Park to haul spoils. They did not ever ask permission; it was never discussed. (Tr. P.39, L.24; P.40, L.5) Anderson acquiesced to their use of it. He testified "I never thought much about it I just kinda you know, allowed them to do it." (Tr. P.55, L.11-12) He did not ever take any action to prevent them from hauling over his property, did not ever tell them not to do it, did not discourage them from doing it. (Tr. P.56-57)

**Appellant, Cossette, had no knowledge of a claimed easement across his property at the time he purchased it from Anderson.** Cossette testified (Tr. P.187, L.17-25) that at the time he signed the Contract for Deed to purchase the Warroad Estates RV Park, there was no indication Respondents claimed an easement that ran right down through the middle of the park. Furthermore, he testified that Mr. Anderson did not ever mention that there was an easement through the Park. The first time it came to Appellant's attention that the Magnusons, or contractors under their direction, were running down through the middle of the RV Park with hundreds of truckloads of "spoils" was the following <sup>2001</sup> spring (200~~1~~) after ice-out.

Terrance Magnuson acknowledged that he did not have an easement to haul on Mr. Cossette's property. (Tr. P.145, L.10) He did not have a written easement and he did not ever ask Mr. Cossette for permission to haul spoils across his property. Terrance Magnuson further acknowledged (Tr. P.147, L.1-5) that he can access the North bank of the channel from the ice at certain times of the year (but it costs about four times as much).

Mr. Anderson acknowledged that he did not ever advise Mr. Cossette that there was an easement through the RV Park to haul spoils from the North bank of the channel. He further acknowledged that Mr. Cossette would not have been able to identify any particular road that would have been in the RV Park that led to the

North Channel because the roads he would have seen were just trailer park roads. (Tr. P.58, L.12-20) Mr. Anderson further acknowledged there wasn't in fact an easement there and there wouldn't have been any indication to Mr. Cossette that there was. He admitted he did not indicate anything to Mr. Cossette that would have alerted him that a *haul road* went through the middle of the property. (Tr. P.59, L.20)

Appellant knew there was a twenty foot (20') easement running along the boundary between his RV Park and the Marina. He also understood that Anderson owned property to the North of the RV Park that abutted the North bank of the channel connecting the Marina to Lake of the Woods. He understood that the channel could be dredged from the ice, and observed that the channel had been dredged from the South bank with spoils piled to the East of the RV Park. He purchased the RV Park without knowledge or reason to know the Respondents claimed an easement through the Park that would be subjected to hundreds of trucks heavily loaded with spoils. The whole Park is built on spoils and the big loaded trucks create deep ruts that require repair. (Tr. P. 188, L.18-20)

**Appellant's property, as described, has Riparian Rights to navigable waters.** In the Fall of 2000, Appellant began to negotiate with Anderson for the purchase of the Warroad Estates RV Park. On December 23, 2000, a Contract for Deed (Trial Exhibit 11) was signed between Anderson and Cossette. Cossette took

possession of the RV Park contemporaneously with signature on the Contract for Deed and, on July 29, 2003 met his obligations pursuant to the terms and conditions of the Contract to receive a Warranty Deed. (Trial Exhibit 12)

Anderson again contacted Gary Thompson, Registered Land Surveyor, to prepare a survey and a legal description for the RV Park. Using the surveys and the legal descriptions from the prior survey dated May 6, 1991, Thompson prepared an updated survey dated September 26, 2000. (Trial Exhibits 3&25) Steel pin monuments set in 1991 were located in 2000 “to find the point of beginning” of the meets and bounds description.

The meets and bounds legal description of the Warroad Estates RV Park is as follows:

Lots One (1) through Sixteen (16), inclusive, Block Five (5); and Lots Thirty-six (36) through Forty-six (46), inclusive, Block Six (6), all being a part of War-Road Estates Subdivision, Unit 2, according to the recorded plat thereof;

AND

Part of the West Half (W ½), Section Seventeen (17), Township One Hundred Sixty-three (163) North, Range Thirty-six (36) West of the Fifth Principal Meridian in Minnesota, according to the United States Government Survey thereof, described as follows:

Commencing at the Northwest Corner of Lot One (1), Block Four (4), War-Road Estates Subdivision, Unit 2, according to the recorded plat thereof; thence North 32 degrees, 10 minutes, 17 second West, assumed bearing, along the Easterly line of Elm Drive 129.46 feet; thence North 01 degrees, 23 minutes, 09 seconds East 469.21 feet **to an iron pipe monument being the point of beginning** of the parcel to be described; thence South 88 degrees, 36 minutes, 51 seconds East 55.67 feet to an iron pipe monument

on the **Westerly line** of an existing steel wall; thence North 01 degrees, 23 minutes 42 seconds **East along said Westerly line** 113.09 feet; thence South 88 degrees, 42 minutes, 45 seconds **East along said wall** 314.56 feet; thence North 00 degrees, 20 minutes, 19 seconds West 193.41 feet; thence North 54 degrees, 44 minutes, 39 seconds East 24.48 feet; thence North 79 degrees, 49 minutes, 04 seconds East 12.11 feet; thence North 01 degrees, 23 minutes, 09 seconds East 476.02 feet; thence North 88 degrees, 36 minutes, 51 seconds West 255.93 feet to the Northeast Corner of Lot Twelve (12), Block Five (5), said War-Road Estates Subdivision, Unit 2; thence south 01 degrees, 23 minutes, 09 seconds West, along the East line of said Block Five (5), a distance of 500.00 feet to the Southeast Corner of said Block Five (5); thence North 88 degrees, 36 minutes, 51 seconds West along the South line of said Block Five (5) a distance of 200.00 feet to the Southwest Corner of said Block Five (5); thence South 01 degrees, 23 minutes, 09 seconds West, along the Easterly line of Lakeview Drive, also being an extension of the Westerly line of said Block Five (5), a distance of 238.35 feet; thence Southwesterly along a tangential curve concave to the Northwest having a radius of 207.43 feet and a central angle of 17 degrees, 17 minutes, 20 seconds, a distance of 62.58 feet; thence South 88 degrees, 36 minutes, 51 seconds East 69.37 feet to the point of beginning and there terminating. (emphasis added)

**The Appellant was justified in relying upon an expectation that he would have Riparian rights.** Mr. Cossette read the legal description and measured the meets and bounds to determine the location of the boundary between the Warroad Estates RV Park and the Warroad Estates Marina. Specifically, he located the iron monument set by the surveyor and measured the distance from the monument located on the West edge of the seawall identified in the description. The measurement, 113.09 feet, brought him a little more than one foot short of the East-West portion of the seawall. This placed the boundary of his property into the

navigable waters of Warroad Estates Marina which is connected to Lake of the Woods.

Cossette, in an over-exercise of caution, hired Murray Surveying, of Bemidji, Minnesota, and asked them to verify the pins and the boundary lines prior to consummating his deal with the Andersons. He testified "They showed me at the time that I owned out into the water." (Tr. P.186, L.4-5)

Cossette approached Anderson before closing his agreement to purchase the RV Park to advise him that the property line in the description fell short of the seawall. Anderson did not object to this. Cossette understood that Anderson had made several attempts to get the Magnusons to discuss the discrepancy, but it never happened. (Tr. P.194, L.12-15)

Prior to Trial, in 2004, Appellant contacted Gary Thompson, Widseth, Smith & Nolting, to prepare another survey. Mr. Thompson testified that when they returned in 2004 they were able to find the survey stakes and monuments that had been placed in 1991. They found one stake along the described wall (monument no. 1 on Trial Exhibit 3) (Tr. P.80, L.7-9) and they found another pin a short distance away. Mr. Thompson further testified, on re-direct examination, by Respondent's counsel, that the location of pin number 1 had been verified and that it had not moved according to the dimensions from the other irons that were used. The same, however, cannot be said for the seawall. According to the surveyor, the

pin number 1 had not moved. The measurement from the pin could not change, so the sea wall had to have moved. (Tr. P.92, L.1-10) Notwithstanding the fact the sea wall moved, the description would not have moved because it originated from a pin that was in a confirmed location. The measurement from pin number 1 falls one foot short of the seawall and brings the property line of the Warroad Estates RV Park approximately one foot into the navigable waters of Lake of the Woods. (See Trial Exhibit 34 *photo showing survey stakes lined up approximately one foot out into the water south of the East-West seawall*)

**The Warroad Estates Marina is navigable water.** It was established by stipulation that water drained from the area of the Warroad Airport North Northeasterly through the Warroad Estates, under a bridge into the Warroad Estates Marina and through the Marina out the channel into Lake of the Woods. All of the applications for construction of the Marina and Warroad Estates approved by the Corp. of Engineers and Department of Natural Resources relied on the fact that the waterway was natural and navigable. (Tr. P.251, L.4-13 – *stipulation between counsel with approval of Court*)

### **LAW AND ARGUMENT**

The Respondent claims to be entitled to an easement through Appellant's RV Park under two theories: **First, Respondent claims an easement by prescription.** Facts are insufficient to prove exclusivity of use and requisite time

for adverse possession. An easement by prescription cannot be justified by the facts in this case. Less than 15 years had elapsed between the Respondents' obtaining title and the commencement of the within action. The only difference between an easement by prescription and adverse possession is exclusivity of use.

*Boldt v Roth*, 618 N.W.2d 393, 396 (Minn. 2000)

**Second, the Respondent claims an easement by implication.** The doctrine of implied easements was stated by the Supreme Court in *Romanchuk v Plotkin*, 215 Minn. 156, 160 9 N.W.2d 421, 424 (1943) where it was stated:

**The doctrine of implied grant of easement is based upon the principle that where, during unity of title, the owner imposes an apparently permanent and obvious servitude on one tenement in favor of another which at the time of severance of title is in use and is reasonably necessary for the fair enjoyment of the tenement to which such use is beneficial, then, upon a severance of ownership, a grant of the dominant tenement included by implication the right to continue such use. That right is an easement pertinent to the estate granted to use the servient estate retained by the owner.**

**An easement by implication must rely upon an inference of intention between the parties.** In the present case, Appellant clearly did not intend to allow the Respondent to drive loaded trucks through his RV Park. The Respondent drives more than one hundred heavily loaded dump trucks carrying spoils from the North bank of the channel connecting Warroad Estates Marina with Lake of the Woods through the rather delicate roads in his RV Park. The RV Park itself was constructed largely on filled lands, and the roads through the RV Park are not

designed to withstand use by heavy trucks loaded with water saturated dredgings. Furthermore, there is nothing to support Respondent's claim that an inference could be drawn from the transaction between the Appellant and Anderson, the grantor of the Warroad Estates RV Park. In fact, testimony from Anderson clearly indicates there would be no reason the Appellant would know or would have suspected the Respondent had the intention or the right to use the roads through the RV Park to haul spoils.

In Restatement of Property, section 476, (A) states the rule as follows:

**An easement created by implication arises as an inference of the intention of the parties to a conveyance of land. The inference is drawn from the circumstances under which the conveyance was made rather than from the language of the conveyance. To draw an inference of intention from such circumstances, they must be or must be assumed to be within the knowledge of the parties. The inference drawn represents an attempt to ascribe an intention to the parties who had not thought of had no bothered to put the intention into words. Or perhaps more often, to parties who actually had formed no intention conscious to themselves. In the latter aspect, the implication approaches in fact, if not in theory, crediting the parties with an intention which they did not have, but which they probably would have had had they actually foreseen what they might have foreseen from information available at the time of the conveyance.**

*Olson v Mullin*, 244 Minn. 31, 68 N.W.2d 640, 646 (Minn. 1955) enumerates the factors important in determining the implication of an easement. The following factors are to be considered:

- a. Whether the Claimant is the conveyer or the conveyee;
- b. The terms of the conveyance;

- c. The consideration given;
- d. Whether the claim is made against a simultaneous conveyee;
- e. The extent of necessity of the easement to the claimant;
- f. Whether reciprocal benefits result to the conveyor and the conveyee;
- g. The manner in which the land was used prior to its conveyance;
- h. The extent to which the manner of prior was or might have been known to the parties.

The Respondent claims the easement should be granted because of “necessity”. When considering the eight factors enumerated in Olson, the first four do not apply favorable to the Respondent. The fifth and seventh factor do arguably apply. The only factor available to substantiate the Respondents’ claim is the extent of the necessity of the easement and the manner in which the land was used prior to its conveyance.

**The easement claimed by the Respondent is not necessary.** The facts clearly establish the North bank of the channel can be accessed across land presently owned by Anderson, the original grantor, or by water during the summer and by ice during the winter. In fact, dredging had occurred from the ice on at least two prior occasions. Admittedly, it is more expensive to dredge from the ice than to simply pile the spoils on the North bank and haul them later when convenient, but this benefit must be considered in light of reciprocal benefits which would result to both the conveyor and the conveyee. Obviously, there are no reciprocal benefits to the Appellant. In fact, there is a considerable detriment because the roads through his RV Park are destroyed by the heavy hauling trucks

making 100 or more trips across roads that are not designed for such use. Further, testimony indicated that the Respondent made little or no effort to repair the roads damaged by their trucks.

**Ironically, the Appellant suggested a plan for mutual benefit during his testimony.** The Respondent would benefit to have an easement through Appellant's RV Park to haul spoils from the North bank of the channel, and it would be a reciprocal benefit if Appellant was allowed to enjoy Riparian rights along the South side of his property. The Respondents adamantly refused notwithstanding the fact that the property description indicated such rights did in fact exist.<sup>1</sup>

In *Olson v Mullin*, supra. the Court declined finding an easement by necessity based on options that were available to the claimant which he chose not to take. A showing of necessity, not convenience is required. To establish an implied easement by way of necessity, the Respondent must show more than simply inconvenience resulting from a denial of the easement. One cannot claim an easement by way of necessity or with lands which have another method of access, however inconvenient. *Mackie v U.S.*, 194 Fed. Sup. 306 (Dist. Minn. 1961)

**The Appellant was a good faith purchaser for value.**

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<sup>1</sup> In fact, this entire action was commenced because of the Respondents attempt to obtain an injunction against the Appellant for "trespass" because he had parked his boat along the South boundary of his property

In Nunnelee v Schuna, 431 N.W.2d 144 (Minn. App. 1988) this Court held that property owners were not entitled to an easement by necessity where they failed to join adjacent property owners to establish whether an alternate easement was practical. Apparently, if claimants failed to timely record their interest on the subject property, and a good faith purchaser buys the property without notice of the claimant's interest, the claimant's failure to record their interest is fatal for a claim of an easement by necessity. If the Respondents had relied on their easement by implication to haul spoils through the RV Park, they had ten years to perfect that easement through contacting their grantor, Anderson. Similarly, Anderson could have been joined in this litigation in an action attempting to reform the conveyance between Anderson, the Appellant, and Cossette. Magnusons, however, took no such action. In fact, the testimony at Trial shows they failed to respond to Anderson and Cossette's attempts to resolve this matter prior to commencement of litigation.

Evidence supporting reaffirmation of a written instrument, including a deed, must be consistent, clear, unequivocal and convincing. Kleis v Johnson, 354 N.W.2d 609 611 (Minn. App. 1984) There is no element of mutual mistake or unilateral mistake or fact coupled with fraud in the present transaction. The Respondent's claim for an easement by implication must fail.

**The Appellant is entitled to Riparian Rights.** Riparian land has been defined by Statute to include lands adjacent to public waters, drainage systems, wetlands or locally designated priority waters identified in a comprehensive local water plan. Minn. Stat. 103F.511, subd. 8(A) A landowner has a right to submerged lands lying between an original shoreline and an established dock line. See Minn. Stat. 508.04 (relative to registration of land titles). The Supreme Court has held that abutting land owners may acquire Riparian rights in artificial water course as formed by the diversion of a natural channel. Kray v Muggli, 84 Minn. 90, 96 N.W. 882 (1901) It was established during trial (and stipulated by the parties) that the Warroad Estates Marina is a natural waterway.

The Appellant purchased the Warroad Estates RV Park by Contract for Deed dated December 23, 2000 and Warranty Deed fulfilling the terms of the Contract dated July 29, 2003. The legal description contained on the Contract for Deed (see page 12, Statement of Facts) defines the property purchased by the Appellant from Anderson, grantor, by *metes and bounds*. It has long been the law in the State of Minnesota that when boundaries are to be ascertained by the “calls in the deed” no extrinsic evidence of fact may be resorted to in order to control or vary the description. Beardsley v Crane, 52 Minn. 537, 54 N.W. 740 (1893)

The metes and bounds description in the Deed received by the Appellant clearly describes the property which he purchased. In fact, a surveyor, returning to

the same location years later, was able to stake the exact property described in the legal description.

The dispute arose when it was evident the property described in the Deed extends one foot beyond the shoreline (identified by the seawall) of the Warroad Estates Marina. There was testimony that it was intended by the grantor, Anderson, and the Respondent, Magnuson, at the time Magnuson purchased the Marina in 1991 that the sea wall would constitute the boundary line.<sup>2</sup> However, there is no evidence this was ever the intention of the Appellant and, in fact, the evidence supports a contrary intention. The Appellant had contacted Anderson before closing to advise that his surveyor determined the property line extended beyond the seawall into Warroad Estates Marina. Furthermore, the grantor, Anderson admitted he did not clarify this issue prior to closing, and did not state that his intention was to the contrary.

The metes and bounds description used by the grantor conveying the RV Park to the Appellant was essentially the same metes and bounds description<sup>3</sup> used by the grantor in conveying the Marina to the Respondents. Any description, by metes and bounds, which establishes a boundary between two parcels of land, places the Grantee on notice of the exact boundaries contained in the conveyance.

*Holmgren v Bondhus*, 311 Minn. 157, 247 N.W.2d 608 (Minn. 1976) The law

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<sup>2</sup> No evidence was submitted to indicate whether the landward edge, center or water-way edge would constitute the boundary line.

<sup>3</sup> Point of beginning was a different location within the description.

presumes that the grantor and grantee intended the precise dimensions specified in the Deed. *Id.* @ *N.W.2d* 611 The measurements in the legal description are definite. The Respondent has not raised an argument at Trial that the Warranty Deed between the grantor Anderson and the parties to this action should be reformed to represent the intention of the parties, but rather refused to discuss the issue until commencement of the litigation. There is no evidence that the grantees receiving properties from Anderson were ever in agreement as to where the boundary line was or should be.

The proper point from which to commence a survey is a point that is directly and accurately traceable to a monument landmark. *Erickson v Turnquist*, 247 *Minn.* 529, 77 *N.W.2d* 740 (1956) A stake stuck by a surveyor constitutes a permanent monument. See *City of North Mankato v Carlstrom*, 212 *Minn.* 32 2*N.W.2d* 130 (*Minn.* 1942)

The Respondent argues the sea wall is a practical location for the boundary line. A “practical location” for a boundary sufficient to divest one party of property that is clearly defined by Deed must be clear, positive and unequivocal. *Theros v Phillips*, 256 *N.W.2d* 852 (*Minn.* 1977) The three methods by which practical location of a boundary may be determined are by; acquiescence, agreement and estoppel. *Allred v Reed*, 362 *N.W.2d* 374 (*Minn. App.* 1985) None of these three methods apply to the present case.

A practical location may constitute a boundary line only if the location has been relied upon long enough to meet the Statute of Limitations. If not, the line must have been expressly agreed upon between the parties claiming the land on both sides and afterwards acquiesced to. The parties must have silently looked on with knowledge of the true line while the other party encroached upon his land. *Gifford v Vore*, 245 Minn. 432, 72 N.W.2d 625 (1955) The requisite Statute of Limitations of fifteen years has not expired from the time Respondent purchased the Marina from Anderson and not even from the time when the Respondents signed the original Option to Purchase.

### CONCLUSION

The case before us requires the construction of documents of conveyance from a single grantor, Robert Anderson. First, the easement by prescription claimed by the Respondent is not included in the Deed between the grantor and the Appellant. In order to reach an easement by description, the Trial Court had to modify the legal description in this conveyance and further change the benefit of the value obtained by the Appellant in his negotiated purchase of the RV Park. Conversely, in order to prevent the Appellant from obtaining Riparian rights, the Trial Court had to construe the clear meaning of the legal description against the Appellant and in favor of the Respondent, extending the metes and bounds description distance by a foot and one-half to stretch the property line to the North

side of the seawall separating the RV Park from the Marina. The Trial Court gave the Respondent the benefit of both doubts, and ignored or modified the legal description between Anderson and the Appellant on both occasions.

The legal description between Anderson and the Appellant is clear and unambiguous. It says nothing about an easement, undefined, that meanders through the RV Park using any private road deemed appropriate by the Respondent and, no such easement should be granted. Furthermore, the metes and bounds description clearly identifies the size of the RV Park and the South boundary of the Park extends more than one foot beyond the shoreline established by a seawall into the navigable waters leading to Lake of the Woods. The Appellant should be granted the full benefit of the property, which he purchased, and nothing less. The Judgment of the District Court should be reversed on both accounts and the case remanded for Findings consistent therewith.

Respectfully submitted,

5/24/05



Steven A. Nelson, #78220  
Attorney for Appellant  
210 Fourth Avenue  
International Falls, MN 56649  
218/283-8402

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).