

Appellate Court File No. A05-377

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.

* * * * *

RESPONDENT'S BRIEF

* * * * *

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STATEMENT OF ISSUES

- I. ARE THE TRIAL COURT'S FINDINGS AND CONCLUSIONS, WHICH DENY APPELLANT RIPARIAN RIGHTS, SUPPORTED BY THE RECORD AND THE LAW?

The Trial Court held: in the affirmative.

- II. ARE THE TRIAL COURT'S FINDINGS AND CONCLUSIONS, ENJOINING APPELLANT FROM HIS CONTINUAL TRESPASS ON RESPONDENTS' PROPERTY, SUPPORTED BY THE RECORD AND THE LAW?

The Trial Court held: in the affirmative.

- III. ARE THE TRIAL COURT'S FINDINGS AND CONCLUSIONS, WHICH AWARDED RESPONDENTS AN EASEMENT BY IMPLICATION OF NECESSITY, SUPPORTED BY THE RECORD AND THE LAW?

The Trial Court held: in the affirmative.

- IV. ARE THE TRIAL COURT'S FINDINGS AND CONCLUSIONS, WHICH AWARDED RESPONDENTS AN EASEMENT BY PRESCRIPTION, SUPPORTED BY THE RECORD AND THE LAW?

The Trial Court held: in the affirmative.

STATEMENT OF THE CASE

This case originated in the District Court of the Ninth Judicial District, County of Roseau, State of Minnesota. The Honorable Donna K. Dixon presided. This action was initiated by Respondents seeking an injunction against Appellant to prevent his continual trespass of parking his boat in Respondents' marina without compensating Respondents. Respondents also sought a monetary judgement representing unpaid slip fees for the time period Appellant had parked his boat in the marina. In retaliation, Appellant blocked Respondents' use of a road on Appellant's property. Therefore, Respondents amended their complaint to allege Easement by Implication of Necessity and Easement by Prescription across the road.

Appellant's Answer and Counterclaim alleged Appellant's property included riparian rights, and therefore gave him the right to leave his boat in the Respondents' marina. Appellant also sought to block Respondents' use of the road. Appellant also pleaded additional counts of Interference with Scenic Easement, Damage to Property, and Conversion, none of which were pursued by Appellant at trial.

A court trial occurred on the 25th and 26th days of August, 2004. Judgment was entered on November 15, 2004, declaring that Appellant had no riparian rights, that Appellant had been trespassing on Respondents' property and enjoined Appellant from trespassing anymore, awarded Respondents judgment for unpaid slip fees, and awarded Respondents an easement across the road by

Implication of Necessity and Prescription. Appellant brought a motion for a new trial or amended Findings, heard by the trial court on December 7, 2004. The trial court issued an order denying Appellant's Motion, dated December 22, 2004. Appellant appealed the trial court's decision on February 17, 2005.

STATEMENT OF FACTS

Robert Anderson, who lives in Warroad, Minnesota, has been in the real estate building and land development business for over 45 years. (T.22) At one time, he built and owned the Warroad Marina and the Warroad Estates RV Park. (T.23) In the mid to late 1970's, he built the Warroad Marina on the shores of Lake of the Woods, near Warroad, Minnesota. (T.23, 35) Mr. Anderson obtained all the requisite permits and licenses from the Corps of Engineers, the Department of National Resources ("DNR") and various other governmental agencies to construct said marina. (T.23; Exhibit No.9) Approximately 3-4 years later, he constructed the RV Park immediately adjacent to and north of the marina. (T.23; Exhibits 3 & 25) Anderson owned and operated both properties through his limited partnership called Warroad Estates Investments, for 12-13 years. (T.34, 24)

The marina, and the channel extending east from the marina to Lake of the Looks (See photo Exhibit No. 8) required periodic maintenance, including dredging the channel to remove silt and bog material that clog the channel. (T.127) When Anderson owned the marina, he would dredge the channel sporadically, sometimes not for three years and then at some times two years in a row.

(T.37, 38) Anderson would have first dredged the channel in 1982 or 1983. (T.40) Anderson was required to obtain, and did obtain, permits from the Corps of Engineers and DNR to perform the dredging maintenance work. (T.42, 43; Exhibit No.10) When the spoil was removed from the channel, it was placed north and south of the channel, as indicated on the permits. (T.38, 43; Exhibit No.10)

To gain access to the area north of the channel for purposes of dredging and removing spoil, Anderson used a "haul road", which extended from the area north of the channel west through his RV park. (T.38; Exhibit No.8) The haul road is, in fact, referred to on the Corp of Engineers permits for dredging and placement of spoil. (Exhibit No.10) The haul road is a private road. (T.39) Anderson testified that there is no other way to gain access to that area north of the channel other than across the haul road. (T.39)

On the north edge of the marina, south of the RV Park, was a sea wall constructed out of corrugated aluminum, placed by driving 13' sheets of aluminum 6' into the bottom of the marina's clay bed. (T.62, 62, 122, 123) It is 6" wide, with a cap on top of the sea wall. (T.61)

Respondents Terry Magnuson and Margaret Magnuson, husband and wife, maintain a residence in Florida, as well as Grand Forks, North Dakota. (T.116, 117) Terry Magnuson is retired but had previously owned several businesses, including Westgate Marine in Grand Forks. (T.117) The Respondents became aware of

the marina in 1985, and rented a slip from Mr. Anderson for their boat. (T.118) Mr. Anderson then approached the Respondents, offering to sell the marina to them, suggesting that it would be a compliment to their Marine business. (T.118, 119) Respondents were hesitant, because they had never operated a marina before. (T.119) So the Respondents proposed to lease the marina from Mr. Anderson, with an option to purchase. (T.119)

Mr. Anderson, and one of Respondents' companies, Westgate Motors, Inc., entered into a three year lease for the marina in October of 1988. (Exhibit No.1; T.119, 120) The parties then entered into an Option to Purchase the marina in November of 1990 for \$225,000. (Exhibit No.2; Transcripts 25-27, 120-121) The Respondents exercised that option shortly after that. (T.121, 29) The Respondents purchased the property in three pieces. First, pursuant to a Warranty Deed dated December 14, 1990, the Respondents acquired a triangular piece west of the marina, legally described as:

That part of the Southeast Quarter of the Northwest Quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$) of Section Seventeen (17), in Township One Hundred Sixty-three (163) North, Range Thirty-six (36) West of the Fifth Principal Meridian, according to the plat thereof on file and of record in the office of the County Recorder of Roseau County, Minnesota, described as follows, to-wit:

Commencing at the Southwest Corner of Lot Sixteen (16), in Block Five (5) of the plat of Warroad Estates Subdivision, Unit 2; thence East on and along the South line of said Lot Sixteen (16) a distance of 60 feet; thence at a right angle South to the Northeast line of Elm Drive, as shown on said

plat; thence Northwesterly, on and along the Northeast line of said Elm Drive to its intersection with the East line of Lakeview Drive; thence Northeasterly, on and along said East line of Lakeview Drive to the point of beginning, (Excepting Therefrom the Northerly 300 feet thereof.

(Exhibit No. 4; T.122)

Second, they acquired the marina itself, pursuant to a Warranty Deed dated June 25, 1991, described as follows:

Lots One (1) and Two (1), 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 (W½) 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 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 (W½) 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 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. (Emphasis Added)

(Exhibit No.5; T.30, 122)

As part of the purchase of the marina, the Respondents acquired a 20' easement on the southern side and eastern side of the RV park for the purposes of maintaining the sea wall.

(Exhibit No.6; T.124, 125, 31, 32) Finally, the Respondents acquired a 2.95 acre piece of property north of the marina's channel, for a location to place spoil dredged from the channel, legally described as:

That part of the Northwest Quarter (NW¼) of Section Seventeen (17), Township One Sixty-three (163) North, Range Thirty-six (36) West of the Fifth Principal Meridian, Roseau County, Minnesota, described as follows:

Beginning at the Northeast Corner of the said Northwest Quarter (NW¼); thence South 00 degrees, 53 minutes, 37 seconds East, assumed bearing, along the East line of the said Northwest Quarter a distance of 1,247.14 feet to the point of beginning of the tract to be described; thence continuing South 00 degrees, 53 minutes, 37 seconds East, along the said East line 127.86 feet; thence South

76 degrees, 58 minutes, 24 seconds West
1,037.74 feet; thence North 88 degrees, 36
minutes, 51 seconds West 22.50 feet; thence
North 00 degrees, 20 minutes, 19 seconds West
6.95 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, 09 seconds East 107.73 feet; thence
North 76 degrees, 58 minutes, 24 seconds
East, 1,024.24 feet to the point of
beginning, containing 2.95 acres, more or
less.

(Exhibit No.7; T.33, 35, 125, 126)

For the purpose of acquiring a legal description of the marina, etc., Anderson hired the firm of Widseth, Smith, Nolting and Associates to perform a survey. A Certificate of Survey was issued May 6, 1991. (Exhibit No.3; T.27, 28) It was the intention of Mr. Anderson and the Respondents, that the Respondents would be acquiring the sea wall as part of the marina. (T.31, 32, 124) Anderson testified that there would not have been the need to give the 20' easement to maintain the sea wall to the Respondents, if the wall had not been conveyed to them. (T.32)

Gary Thompson is a registered land surveyor working for Widseth, Smith, Nolting and Associates. (T.75) He has 35 years of experience. (T.76) He was the person who prepared the 1991 survey for Mr. Anderson. (T.76) Mr. Thompson testified that he was told by Mr. Anderson to draft a legal description so that the sea wall would go with the marina. (T.77) And he drafted the legal description with that intent. (T.77, 78) He referenced the sea wall in the description for that purpose. (T.77) Further, he

intended for the reference to the sea wall to have priority over the metes and bounds description. (T.78) The following exchange took place at trial:

Q. When in your - - in preparing your legal descriptions you use landmarks such as the steel wall. What sort of priority does that have over metes and bounds descriptions?

A. Well, uh, normally your first priority is natural monuments like rivers or lakes or bolders or something, and then artificial monuments are - - come next or you know, something that's constructed, and then you have distances and then probably bearings or angles.

Q: When you reference the steel wall in your description, did you mean that to have priority over the metes and bounds description?

A: Yes.

(T.77-78)

Thompson testified that the call he used in the legal description referenced the wall, so the distances used in the description could change. (T.89, 90) Further, he testified that when he originally did this survey, the wall was not a straight line, thus another reason for referencing the wall on the legal description. (T.91) Even more, Thompson testified that the original description prepared in 1991, not only referenced the wall, but he made the description to reflect that the east-west call ran along the north side of the wall, thus placing the sea wall inside the marina. (T.91, 97)

After Mr. Anderson conveyed the marina to the Respondents in 1991, Mr. Anderson continued to own and operate the RV park until approximately the year 2000. (T.45) The Respondents had actually

began operating the marina in 1988, when they had entered the lease. (T.120) Respondents took over maintenance of the marina, including dredging the channel. They have dredged the channel every year since they have owned the marina. (T.127) As Anderson had done before them, they placed the spoil from dredging to the north and south side of the channel. (T.127, 152-154) From the area north of the channel they could use drag lines and back hoes out into the lake. Such access was not available south of the channel. (T.128) Again, the spoil was placed in the locations designated by the DNR and the Corp of Engineers. (T.128) The permits to dredge were renewed from year to year. (T.129)

As Anderson had done before, the Respondents gained access to the area north of the channel via the haul road that ran through the RV park. (T.130, 154) The Respondents never asked Anderson for permission to use the haul road, nor did Anderson give Respondents' permission to use the road. (T.39, 40, 131, 155) In fact, it was never discussed. (T.40, 131) Anderson testified that he never thought about it, and took no action to prevent Respondents' use of the road. (T.155) Respondents testified they just used it because that is the way it had been done previously. (T.131) There was no other way to gain access to the area north of the channel. (T.39, 155) Respondents used the road openly. (T.41, 155) That road had been used every year by the Respondents since 1988. (T.131)

In 2000, Mr. Anderson, through Warroad Estate Investments, entered into a Contract For Deed to sell to John J. Cossette

d/b/a Spearfish Aviation Inc., the RV park for \$267,000.

(Exhibit No.11; T.46, 180) Subsequently, in July of 2003, Appellant paid off the Contract For Deed and received a Deed from Mr. Anderson. (Exhibit No.12; T.46, 180) The legal description in both the Contract For Deed and the Warranty Deed are identical, and both reference the sea wall:

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 ($W\frac{1}{2}$), Section Seventeen (17), Township One Hundred Sixty-three (163) North, Range Thirty-six (36) West of the Fifth Principal Meridian, 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 seconds West, assumed to 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)

(Exhibit No.11 and 12; T.181-182, 47)

In 2000, the year the Contract For Deed was entered into, Mr. Anderson asked Gary Thompson of Widseth, Smith, Nolting and Associates to prepare a description for the RV park. (T.78, 79) Mr. Thompson prepared said description, as stated on a report in September of 2000. (T.79; Exhibit No. 25) A new survey, wherein stakes would have been placed, was not prepared. (T.79) Thompson prepared the legal description from information obtained from the earlier survey nine years previous. In drafting the legal description, it was Thompson's intent to exclude the sea wall. (T.79)

In conveying the RV park to Appellant, Mr. Anderson was not intending to convey the sea wall to Appellant. (T.48) He was not

intending to convey any part of the marina to Appellant. (T.49) He was not intending to convey Appellant any property that abutted the water, but only land that ran up to the sea wall. (T.49) Prior to the conveyance, Mr. Anderson and Appellant visited the property, when Mr. Anderson would have generally pointed out the boundaries, that he did not measure anything out. (T.49) Mr. Anderson told Appellant but Respondents owned the marina. (T.49) Appellant admits that as well. (T.143).

Appellant claims that prior to purchasing the RV park, he had Murray Surveying from Bemidji, Minnesota show him where the stakes were from the 1991 survey performed by Gary Thompson. (T. 185, 186) He then measured from one stake northward, and determined that the boundary between the marina and the RV park fell south of the sea wall about 1', in the water of the marina. (T.186), 191) Appellant claims to have made his measurements known to Anderson before the Contract For Deed was signed. (T.224) But Appellant admits that Anderson never agreed that the boundary line was in the water. (T.246) Appellant admits that he never discussed riparian rights with Anderson. (T.246) Further, Appellant admits that he never discussed ownership of the wall with Mr. Anderson. (T.193) Appellant acknowledges that he was aware that the legal description referenced the sea wall as a land mark when he bought the RV park. (T.181, 240) In reply to Appellants measurements, Anderson simply referred to the legal description that contained the sea wall as a reference point. (T.242) Anderson made no attempt to change the legal description.

(T.225)

More importantly, Appellant admits that he never discussed his measurements with the Respondents in 2000 when he bought the RV park. (T.194) In fact, he did not approach the Respondents at all in 2000 because he did not know them. (T.243)

Curiously, despite Appellants demand for riparian rights and his supposed measurements, Appellant stated at trial that he makes no claim to the sea wall. (T.195, 242) Further, he makes no claim to any part of the marina. (T.182)

Appellant also claims that at the time he purchased the RV park, he was unaware of the previous use of the haul road down the middle of the RV park to remove spoil from the area north of the channel. (T.234-235) Mr. Anderson never mentioned it to him. (T.59, 187) However, at the time Appellant bought the RV park, the haul road clearly extended all the way through the RV park up to that area north of the channel. (T.71) There was no other visible access to that area. (T.71) In fact, Appellant admitted that when he bought the RV park "It was obvious to me that there was no access to that area." (T.245)

As Mr. Anderson had done previously, the Respondents continued to use the haul road after Appellant bought the RV park. (T.183) They never asked Appellant permission to use the haul road, nor was it ever given. (T.145, 155) Respondents never tried to hide their use of the road and have used it openly. (T.184, 155, 131) Appellant admits that he can not dispute the fact that Respondents' use, coupled with Mr. Anderson's use of

that road, exceeds 15 years. (T.183)

In the year of 2002 and 2004, Appellant parked his boat in the marina, next to the sea wall. (T.133, 134, 164, 165) Appellant did not have Respondents' permission to park his boat in the marina, nor did he pay the requisite slip fee. (T.135, 165) When Respondents asked Appellant to move his boat, Appellant would not comply. (T.134, 165) Further, Appellant testified that he intended to continue parking his boat in the marina unless told not to by the court, claiming he has riparian rights. (T.182) Respondents normally charge annual slip fees for \$400-\$500 to park a boat in the marina. (T.135, 165)

In 2003, Appellant attempted to block Respondents' use of the haul road. (T.135) Respondents were able to get a temporary injunction enjoining Appellant from interfering with Respondents' use of the haul road while this matter was pending.

Respondents brought the present action to enjoin Appellant's continued trespass into the marina, and to seek an easement across the haul road. Appellant answered and counterclaimed, alleging he has riparian rights to the marina, and also seeking to stop Respondents' use of the haul road. Appellant brought various other claims against the Respondents, which were not pursued at trial.

ARGUMENT

STANDARD OF REVIEW

The purpose of appellate review is to determine whether the

trial court has made an error and not to try the case de novo. Turner v. Alpha Phi Sorority House, 276 N.W.2d 63, 68, (Minn. 1979). In other words, the function of the reviewing court is not to weigh the evidence as if trying the case, but rather to determine if the evidence as a whole sustains the trial court's findings. Twin City Hide v. Transamerica Insurance Company, 358 N.W.2d 90, 92, (Minn. App. 1984).

The scope of review in cases tried by the court without a jury is limited to determining whether the trial court's findings are clearly erroneous and whether it erred in its conclusions of law. Schweich v. Ziegler, Inc., 463 N.W.2d 722, 729, (Minn. 1990); Reserve Mining Co. v. State, 310 N.W.2d 487, 490, (Minn. 1981). Clearly erroneous means "not reasonably supported by evidence in the record considered as a whole." Hubbard v. United Press International, Inc., 330 N.W.2d 428, 441, (Minn. 1983). When determining whether the findings are clearly erroneous, the appellate court must view the record in the light most favorable to the trial court's findings. Vangness v. Vangness, 607 N.W.2d 468, 472, (Minn. App. 2000); and Snesrud v. Instant Web, Inc., 484 N.W.2d 423, 428, (Minn. App. 1992). It is presumed that the findings of the trial court are correct and that the trial court considered all relevant facts in making them. Naftlin v. John Wood, Inc., 116 N.W.2d 91, 100, (Minn. 1962).

In reviewing a decision of the trial court, the burden is on the Appellant to show that there is no substantial evidence reasonably tending to sustain the trial court's findings.

Lieberman Music Company v. Hagen, 404 N.W.2d 290, 292, (Minn. App. 1987); and Minnesota Valley Country Club, Inc. v. Gill, 356 N.W.2d 356, 360, (Minn. App. 1984). A trial court's findings of fact will be set aside only if the reviewing court is left with a definite and firm conviction that a mistake has been made. Snesrud, 484 N.W.2d at 428; Gjovik v. Strobe, 401 N.W.2d 664, 667, (Minn. 1987); In Re Welfare of LCC, 393 N.W.2d 186, 188, (Minn. App. 1986).

I.

THE TRIAL COURT'S FINDINGS AND CONCLUSIONS, WHICH DENY APPELLANT RIPARIAN RIGHTS, ARE SUPPORTED BY THE RECORD AND THE LAW.

"Riparian rights" are rights incident to an estate in land which adjoins a body of water such as a lake, including the right of access to the water. Farnes v. Lane, 161 N.W.2d 297, 299, (Minn. 1968). The land must touch upon the water in order to have riparian rights. Land that does not touch upon the water ceases to be riparian. Id.

Appellant argues that when he was deeded the RV park by Mr. Anderson, he was granted property extending approximately 1' south of the sea wall into the marina. Appellant therefore argues that his property touches upon the water and he has riparian rights. From that, Appellant claims he has a right to access the water, and park his boat in the marina.

In Appellants argument, he concentrates only upon the metes and bounds (courses and distances) part of the legal description

of his deed from Mr. Anderson. Appellant ignores that part of the legal description which references the sea wall. The description places the sea wall as part of the marina, in both Appellant's deed from Mr. Anderson, and in Respondent's deed from Mr. Anderson. The reference to the sea wall takes precedence over the courses and distances part of the legal description.

It has been a long settled rule of construction of legal descriptions in Minnesota that courses and distances are given the least priority in determining boundaries. It is a general rule, when identifying boundary lines, that fixed and known monuments or objects, called for in a description found in a deed of conveyance, must prevail over given courses and distances, the order of application being - first, to natural objects; second, to artificial marks; and third, to courses and distances. Yanish v. Tarbox, 51 N.W. 1051, 1052, (Minn. 1892). Few legal propositions are so universally accepted as the familiar one that in determining boundaries natural and permanent objects control courses and distances. Kleven v. Gunderson, 104 N.W. 4, 7, (Minn. 1905). It is thoroughly settled that in locating lines and boundaries according to prior surveys, courses and distances must yield to monuments, fixed points, and the boundaries of adjoining lands established before the survey in question as shown on the plat or record thereof. Hunt v. Keye, 184 N.W. 840, 842, (Minn. 1921).

In the present case, the legal descriptions in both Mr. Anderson's deed to Appellant for the RV park, and Mr. Anderson's

deed to Respondents for the marina, reference the sea wall as the monuments dividing Appellant's property from Respondents' property. Although the metes and bounds (courses and distances) part of the legal description might put the dividing line in the water, that part of the description is superceded by the reference to the sea wall. Moreover, Gary Thompson, the surveyor who drafted the legal descriptions and the only expert to testify, gave unrebutted testimony that in reviewing legal descriptions, monuments have priority over metes and bounds descriptions. (T.78) He further testified that it was his intent in drafting the legal descriptions to place the sea wall in the property being conveyed to Respondents. (T. 72, 78)

Appellant has argued that a survey stake can constitute a permanent monument, citing the case of City of North Mankato v. Carlstrom, 2 N.W.2d 130, (Minn. 1942). Appellant argues that if you start at a survey stake, identified as a point 1 at trial, and then use the metes and bounds description from there, that he owns property 1' into the marina. But again, such an interpretation ignores the other permanent monument referenced in the deed, namely the sea wall. Said metes and bounds description would, by law, be extended to reach the sea wall.

Moreover, Appellant's argument ignores the intent of Mr. Anderson, in first conveying the marina to Respondents, and then the RV park to Appellant. In the last analysis, the call adopted as the superior and controlling one in legal descriptions should be that which is most consistent with the apparent intent of the

grantor. Dittrich v. Ubl, 13 N.W.2d 384, 390, (Minn. 1944). The cardinal rule is to ascertain and give effect to the intentions of the parties. Id at 390; Sandretto v. Wahlsten, 144 N.W. 1089, 1090, (Minn. 1914).

Mr. Anderson testified that it was his intent to convey the marina, up to and including the sea wall, to the Respondents. (T.31, 32) It was the Respondents' intent to acquire the entire marina, up to and including the sea wall. (T.134) As Mr. Anderson testified, there would not have been a need to give Respondent a 20' easement in the RV park to maintain the sea wall, if that property up through the sea wall had not been conveyed to Respondents. (T.32). Further, Mr. Anderson testified that, in the conveyance of the RV park to Appellant, it was not his intent to convey any property that abutted water, but only land that ran up to the sea wall. (T.49) Obviously, from Respondents' perspective, they purchased the marina so they could charge people to park their boats in the marina, and not to be subjected to the riparian rights of neighboring land owners.

Appellant's reference to the case of Holmgren v. Bondhus, 247 N.W.2d 608, (Minn. 1976) in support of his case is erroneous. In fact, the Holmgren case would support Respondents' case. In Holmgren, there was a boundary line dispute between neighboring land owners. The properties were conveyed originally by a common grantor. The first litigant to receive their property received it by a metes and bounds description, and the second litigant received their property by reference to a plat. There was an

overlap of approximately 4 ½'. The court in Holmgren decided in favor of the first to receive their property from the common grantor, holding that description was sufficient to give subsequent grantees notice of the exact boundaries. Id. at 612.

In the present case, Respondents received their property first from the common grantor, Mr. Anderson. The description of Respondents' property, referencing the sea wall as the boundary, was sufficient to give the subsequent grantee, Appellant, notice of the exact boundary. Appellant, who acquired an interest in the RV park approximately 9 years after Respondent acquired the marina, should not be allowed to step in and take property away from Respondent based upon his measurements. If Appellant truly feels he did not get the benefit of the bargain from Mr. Anderson he intended, then perhaps he has a claim against Mr. Anderson. His remedy is not to take property away from Respondents.

Appellants attempt to characterize Respondents' claim to property up through the sea wall as a Boundary by Practical Location argument, is erroneous. Respondents' pleadings do not allege such a claim, nor did Respondents ever argue Boundary by Practical Location below. Rather, Respondents' claim the marina property up through the sea wall based upon the descriptions in the deeds themselves, and the intent of the parties.

II.

**THE TRIAL COURT'S FINDINGS AND CONCLUSIONS, ENJOINING
APPELLANT FROM HIS CONTINUAL TRESPASS ON RESPONDENTS' PROPERTY,**

ARE SUPPORTED BY THE RECORD AND THE LAW.

Respondents alleged a continual trespass by Appellant parking his boat in the marina and requested an injunction to prevent said repeated trespass. "Trespass" encompasses any unlawful interference with one's person, property or rights, and requires only two elements: a rightful possession in the plaintiff and an unlawful entry upon such possession by the defendant. Widminger v. Forst Farms, Inc. 662 N.W.2d 546, 550, (Minn. App. 2003); Special Force Ministries v. WCCO Television, 584 N.W.2d 789, 792-793, (Minn. App. 1998); Citizens for a Safe Grant v. Lone Oak Sportsman's Club, Inc., 624 N.W.2d 796, (Minn. App. 2001). A permanent injunction is a proper remedy to restrain continuous and repeatedly threatened trespass. Theros v. Phillips, 256 N.W.2d 852, 859, (Minn. 1977); Sullivan v. Eginton, 406, N.W.2d 599, 602, (Minn. App. 1987). Citizens for a Safe Grant v. Lone Oak Sportsman's Club, Inc. 624 N.W.2d 796, (Minn. App. 2001).

In the present case, there was no dispute that Respondents owned the marina. Appellant admitted that he had no ownership rights to the marina. (T.182) As such, Respondents were in rightful possession of the marina. Further, there was no dispute that Appellant parked his boat in the marina for two years, without Respondents' consent and without compensating Respondents. (T.133-135; 164-165). When Respondents asked Appellant to remove his boat, he refused. (T.134, 165) Further, Appellant testified that it was his intent to continue parking

his boat in the marina. (T.182)

The only excuse, or claim of right made by Appellant for his continued trespass, was his claim of riparian rights. That claim was previously dealt with in this brief, and Appellant has no valid claim to riparian rights. As such, there can be no dispute that Appellant was trespassing. Respondents were entitled to the permanent injunction.

III.

THE TRIAL COURT'S FINDINGS AND CONCLUSIONS, WHICH AWARDED RESPONDENTS AN EASEMENT BY IMPLICATION OF NECESSITY, ARE SUPPORTED BY THE RECORD AND THE LAW.

The doctrine of implied grant of easement is based upon the principal 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 includes by implication the right to continue such use. That right is an easement of appurtenant to the estate granted to use the serviant estate retained by the owner. Under the rule that a grant is to be construed most strongly against the grantor, all privileges and appurtenances that are obviously incident and necessary to the fair enjoyment of the property granted substantially in the condition in which it is enjoyed by the grantor are included in the grant. Romanchuk v. Plotkin, 9 N.W.2d 421, 424, (Minn. 1943).

The courts have narrowed the claim to an Easement by Implication of Necessity to three essential elements:

- a. Separation of title;
- b. The use which gives rise to the easement shall have been so long continued and apparent as to show that it was intended to be permanent; and
- c. That the easement is necessary to the beneficial enjoyment of the land.

Romanchuk, 9 N.W.2d at 424; Lake George Park v. IBM Mid-America, 576 N.W.2d 463, 465, (Minn. App. 1998); Kleis v. Johnson, 354, N.W.2d 609, 611, (Minn. App. 1984).

The existence of an implied easement is determined at the time of severance. Lake Geroge, 576 N.W2d at 465; Clark v. Galaxy Apartments, 427 N.W2d 723, 726, (Minn. App. 1988). A person who purchased land with actual knowledge or with constructive or implied knowledge that it is burdened with an easement in favor of other property ordinarily takes the land subject to the easement. Kleis, 354 N.W2d at 611.

The word "necessary" in connection with an Easement by Implication of Necessity, does not mean indispensable, but rather reasonably necessary or convenient to the beneficial use of the property. Romanchuck, 9 N.W.2d at 426; Clark, 427 N.W.2d at 726.

In the present case, there was, at one time, unity of title in Mr. Anderson of the RV park, the marina and the surrounding land, including those acres north of the channel. In 1991, there was a separation of title, wherein Mr. Anderson conveyed to

Respondents the marina and those acres north of the channel, with Mr. Anderson retaining the RV park. (Exhibit No. 6 & T.31-33, 35, 124-126)

At the time of the separation of title, there existed a "haul road" through the RV park, to gain access to those acres north of the channel. (T.38) Anderson had used that haul road to gain access to the area north of the channel to remove dredged material from the channel, since the property was constructed. The use had continued for so long and was so apparent, that Respondents continued to use that road to gain access after they bought those acres, without even thinking about asking permission. (T.55, 131)

As Mr. Anderson testified, there was no other way to gain access to that area north of the channel. (T.39, 71) Anderson's property further north of those acres conveyed to Respondent, is swamp land. (T.178) At certain times of the year, the channel can be dredged by accessing it over the ice, but at four times the cost. (T.146, 71-72) Those acres north of the channel were sold to the Respondents for the specific purpose of allowing Respondents a place to put spoil dredged from the channel. (T.35) Use of the haul road by Respondents was reasonably necessary and convenient in order for them to have beneficial use of those acres north of the channel.

Appellants argument rebutting Respondents' Easement by Implication of Necessity, is flawed. Appellant seems to argue that because the easement was not apparent to him when he bought

the RV park from Mr. Anderson, it does not exist. However, as stated above, the existence of an implied easement is determined at the time of severance. The severance occurred in 1991, when Respondents bought their property, not in 2000 when Appellant bought his property. By all accounts, the easement was quite apparent in 1991. But further, the evidence established that the easement should have also been apparent to Appellant when he bought the RV park in 2000. Mr. Anderson testified that when Appellant bought the RV park, the road still extended across the RV park into Respondents' acres north of the channel. (T.71) Appellant should have had constructive or implied knowledge of that easement, because it was the only access to those acres.

Appellant's argument that there is no "reciprocal benefits" to him is both illogical and irrelevant. The elements of Easement by Implication of Necessity do not include a reciprocal benefit to the serviant land owner. Appellant purchased a serviant tenement, and he should have been aware of the dominant estates use of that road. It is not necessary that Appellant be provided some benefit.

Further, Appellant's argument concerning reformation of a deed, to allege the easement, is also not applicable. Respondents' pleadings do not include a reformation of deed cause of action, nor was evidence presented at trial below for such a cause of action.

Also, Appellant's "good faith purchaser" argument has no validity. Appellant suggests that Respondents' failure to record

their easement somehow relieves his property from the burden of the easement. But the undersigned is unaware of any law that would require one to record an Easement by Implication of Necessity. In fact, it is contradictory to suggest an implied easement needs to be recorded. If an easement is in written form to be recorded, it is no longer an "implied" easement. Moreover, Appellant should have been aware of the easement, because of the obvious nature of the road extending into those acres north of the channel.

IV.

THE TRIAL COURT'S FINDINGS AND CONCLUSIONS, WHICH AWARDED RESPONDENTS AN EASEMENT BY PRESCRIPTION, ARE SUPPORTED BY THE RECORD AND THE LAW.

A prescriptive easement claimant must prove that the property for which he is requesting the easement was used in an actual, open, continuous, exclusive and hostile manner for 15 years. The claimant has the burden of proof, but if he proves actual, open, continuous and exclusive use, the hostility of the use is presumed, so as to place the owner of the serviant estate with the burden of rebutting the presumption by evidence that the use was permissive. Boldt v. Roth, 618 N.W2d 393, 396, (Minn. 2000). Although the elements for prescriptive easements appear to be the same as those for adverse possession, there are inherent differences. Boldt, 618 N.W.2d at 396. The differences between such claims arise from the differences between possessing the land for adverse possession and using the land for a

prescriptive easement. Id; Rogers v. Moore, 603 N.W.2d 650, 657, (Minn. 1999)

A distinguishing factor between prescriptive easement and adverse possession relates to the exclusivity factor. Adverse possession requires use that is exclusive against all other persons, including the record owner. Ganje v. Schuler, 659 N.W.2d 261, 267, (Minn. App. 2003). Exclusivity for a prescriptive easement means only that the party claiming the use intended the use to exclude the general public and not necessarily the rightful owner. Nordin v. Kuno, 287 N.W.2d 923, 926, (Minn. 1980).

Further, the same continuity of use is not required in cases of prescriptive easements as in those of title by adverse possession. In cases of easements, the requirements of continuity depend upon the nature and character of the right claimed. Hartman v. Blandings, Inc. 181 N.W.2d 466, 469, (Minn. 1970).

Respondents' use, and the predecessors use, of the haul road has been "actual". They have driven up and down that road with vehicles hauling dredging equipment and spoil. (T.38, 130, 154) Their use has been "open" for all to see. They did not attempt to hide their use. (T.41, 155) Respondents' use has been "continuous". Every year, when access to the area north of the channel was needed to dredge the channel and remove spoil, numerous trips by trucks were made across said road. (T.38-39, 55, 127, 130-131, 153-154, 156) Each use reflected the nature and

character of the road. The use has been "exclusive", meaning against the public at large. It was undisputed that this was a private road, not a public road. (T.39, 130, 155, 183) And the use of that road has extended beyond 15 years. Mr. Anderson began using that road as early as 1982, when he began dredging the channel. (T.40-41) Respondents have used that road every year since 1988. (T.131)

Respondents' use of that road has been "hostile". Respondents never received permission to use the road. (T.39, 40, 131, 155) In fact, it was never discussed. (T.40, 131) Respondents simply used the road, as Mr. Anderson had done previously. Mr. Anderson took no action to stop Respondents' use of the road. (T.55) But "acquiescence" is not synonymous with permission. Hartman v. Blandings, Inc. 181 N.W.2d 466, 470, (Minn. 1970) "Acquiescence" means, passive conduct on the part of the owner of the serviant estate consisting of a failure on his part to assert his paramount rights against the invasion thereof by the adverse user. "Permission" means more than acquiescence; it denotes the grant of a permission in fact or a license. Id. Because there as no express permission given in this case, Respondents' use of the road was hostile.

Appellant's entire argument in his Brief, concerning Respondents' claim for a prescriptive easement, is only four sentences long. Appellant claims there has not been the exclusivity of use as required by adverse possession, and that the use has not extended for 15 years. But as indicated above,

the exclusivity required for adverse possession is not required for a prescriptive easement. The use must simply be exclusive as to the public at large. And in this case, every one admits that this is a private road, not a public road. Further, Respondents' use of this road exceeds 15 years, beginning in 1988. Further, Respondent's predecessors use began, at least, in 1982. That road has been in use for more than 15 years.

CONCLUSION

All of the trial court's findings are well supported by the record. All of the trial court's conclusions are supported by the law. Appellant has failed on his burden to show that the trial court's decision was clearly erroneous, or that there was no substantial evidence reasonably tending to sustain the trial court's decision. Appellant is not entitled to riparian rights because his land does not touch upon the water. Respondents are entitled to an injunction, enjoining Appellant's continuing trespass upon Respondents' property. All of the elements by Easement by Implication of Necessity and Easement by Prescription have been proven, and Respondents are entitled to an easement across the haul road. The trial court's decision should be affirmed.

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