

NO. A06-2107

State of Minnesota
In Court of Appeals

In the Matter of the Petition of:

Michael C. Rollins

for the Establishment of a Cartway

**BRIEF AND APPENDIX OF
APPELLANT MICHAEL C. ROLLINS**

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STATEMENT OF LEGAL ISSUES

I.

DID THE TRIAL COURT ERR IN HOLDING THAT APPELLANT HAS ACCESS TO HIS PROPERTY ON THE WEST SIDE OF BEAR ISLAND OVER THE NAVIGABLE WATERS OF LEECH LAKE?

Despite the clear language of Minn. Stat. §164.08 subd.2 that access over navigable water was not to be considered in determining whether or not to grant a cartway; the trial court held that access to the Appellant's property, on the west side of Bear Island, which is provided over navigable waters (i.e. Leech Lake), from the mainland, can be limited in inclement weather.

II.

DID THE TRIAL COURT ERR IN HOLDING THAT APPELLANT SEEKS TO GAIN ALTERNATIVE ACCESS TO HIS PROPERTY FROM THE EAST SIDE OF BEAR ISLAND?

Despite the uncontroverted evidence, that Appellant's only means of motorized access to his property is the route proposed in his cartway petition. The trial court held that Appellant seeks to gain alternative access to his property from the east side of the Island. In the plat of Bear Island Woods, an alternative access was provided to the east side of the island over a steep bluff. However, the cost of constructing access at this point would be approximately \$110,000.

III.

DID THE TRIAL COURT ERR IN AFFIRMING THE COUNTY BOARDS' DECISION TO DENY APPELLANT'S CARTWAY PETITION WHERE APPELLANT MET THE REQUIREMENTS OF MINN. STAT. §164.08 SUBD.2?

Despite the uncontroverted evidence that appellant met statutory conditions which imposed a mandatory duty on the county board to grant petitioner's cartway, the district court affirmed the board's decision.

IV.

DID THE TRIAL COURT ERR IN AFFIRMING THE COUNTY BOARD'S DECISION WHERE THE BOARD'S DECISION IS CONTRARY TO THE UNCONTROVERTED EVIDENCE, MOREOVER, THE BOARD APPLIED AN ERRONEOUS THEORY OF LAW, AND ACTED ARBITRARILY AND CAPRICIOUSLY CONTRARY TO THE PUBLIC'S BEST INTEREST?

Despite the uncontroverted evidence that the county board's decision in denying appellant's cartway petition was contrary to the evidence was (1) contrary to the evidence, (2) that the board applied an erroneous theory of law, and (3) acted arbitrarily and capriciously, denying the petition the district court affirmed the board's decision.

V.

DID THE TRIAL COURT ERR IN AWARDING ATTORNEY'S FEES AND COSTS TO RESPONDANT KRUEGERS?

Despite the fact that Appellant's assertions were objectively well founded, and that Respondent Kruegers' attorney was inaccurate in stating that he had not made a filing with the court to which Rule 11 sanctions could apply, the court awarded attorney's fees and costs to Respondent Kruegers.

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STATEMENT OF THE CASE

This is an appeal from a judgment entered pursuant to an order of the District Court, the Honorable John P. Smith, Cass County District Court, affirming on appeal the decision of the County Board (acting as the town board for an unincorporated township) denying Appellant's petition for a cartway.

Appellant, who clearly meets the requirements of the cartway statute, Minn. Stat. § 164.08 subd.2, filed his petition seeking access over an existing trail through Respondent Krueger's property, the only means of providing motorized vehicle access to Appellant's property (App. 1-5). Since the material facts in this proceedings were undisputed, Appellant filed a motion for summary judgment (App. 6-9).

Following the hearing on Appellant's motion for summary judgment, the court affirmed the county board's decision, holding that Appellant had access to his property located on the west side of Bear Island by navigable waters (i.e. Leech Lake) and that Appellant was seeking an alternate route to his property from the east side of the island. Appellant moved for sanctions against Respondent Kruegers, which were denied. This appeal is brought from the court's judgment affirming the county board decision, and from the court's award of attorney's fees (App. 10-15).

STATEMENT OF THE FACTS

Appellant Michael C. Rollins owns four lots on Bear Island, comprising 3.31 acres, which he acquired by conveyance on November 1, 1997, and which were recorded on December 2, 1997, document number 398426 (App. 16). Appellant has no motorized access to his land except via a trail through property owned by Ivan and Lois Krueger that was constructed by the original owner of the property to provide access to purchasers of the lots he platted and sold.

For twenty-seven years the current and previous plat lot owners have traveled over that portion of that trail, which corresponds with the cartway proposed in the petition of Appellant (App. 17).

At the time Appellant purchased the property, the so-called "disputed access" was in common use by occupants of the island, but subsequently the Kruegers, over whose land the disputed access crossed, cut off all access to that portion of the trail. Appellant is no longer able to bring a vehicle or building materials onto the island and transport them over the trail to complete improvements to his cabin. Kruegers commenced a civil action against Appellant for trespass for driving his truck and bobcat through the trail. He is also unable to use a boat for access to the west side of the island whenever there are strong winds from the west (App. 23-27, 30, 48-51, 56, 57).

The uncontroverted facts presented to the County Board established that the route proposed by Appellant for the location of the cartway is the only means by which motorized access to Appellant's property is possible. Appellant's land is inaccessible over the bluff on the west side of the island (App. 28, 29, 31, 54, 55), and is also inaccessible by the dedicated trail in the plat, since he could reach that trail from the lake only by constructing a road up the steep bluff covered with trees and brush at a prohibitive cost (App. 65-68, 69-72, 73).

The trial court disregarded the facts, which established as a matter of law that Appellant satisfied the cartway statute's requirements and that pursuant to the statute's mandatory language he was entitled to the cartway. (App. 27, 28, 83-86).

ARGUMENT

I. STANDARD OF APPELLATE REVIEW

The establishment of a cartway constitutes quasi-legislative action. See Lieser v. Town of St. Martin, 255 Minn. 153, 158, 96 N.W. 2d 1, 5 (1959), and Rask v. Town Board of Hendrum, 173 Minn. 572, 574, 218 N.W. 115, 116 (1928).

A town board that grants or refuses a cartway petition acts in a legislative capacity and will be reversed on appeal only when 1) the evidence is clearly against the decision, 2) an erroneous theory of the law was applied, or 3) the town board acted arbitrarily and capriciously, contrary to the public's best interest. Lieser, supra, at

159, 96 N.W.2d at 5-6; Rask, supra, 173 Minn. at 574, 218 N.W. at 116. See also Sun Oil Company v. Village of New Hope, 300 Minn. 326-333, 220 N.W. 2d 256, 261 (Minn. 1974).

Questions of statutory construction are subject to de novo review by the appellate courts. American Family Ins. Group v. Schroedel 616 N.W.2d 273, 277 (Minn. 2000). “When the language of a statute is plain and unambiguous, that plain language must be followed.” See Vlahos v. R&I Constr. of Bloomington, Inc., 676 N.W.2d 672, 679 (Minn. 2004).

An award of attorney’s fees may be overturned upon a showing that the trial court abused its discretion. See Blattner v. Forester, 322 N.W. 2d 319. (Minn.1982), See also Mary Ann Uselman et al. v Jerry L. Uselman et al., 464 N.W 2d 130, 140 (Minn.1990), Glarner v. Time Insurance Co., 465 N.W. 2d 591 (Minn.Ct.App. 1991) and Bergman v. Lee Data Corp. 467 N.W. 2d 636, 641 (Minn. App. 1991), review denied, (Minn. May 23, 1991).

II. THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT HAS ACCESS TO HIS PROPERTY FROM THE WEST SIDE OF THE ISLAND AND THEREFORE IS NOT ENTITLED TO A CARTWAY.

The trial court held that Appellant is not entitled to the establishment of a cartway because he has some access to his property from the west shore of the island. Even though, as the trial court incorrectly concluded, Appellant Rollins

may be deemed to have “access” to the island itself over navigable water, he is still entitled to a cartway across the island to afford him reasonable access to his property. The west-side access that the trial court seemed to consider adequate is, in fact, anything but; the west-side access is on a steep bluff, and it is not possible to construct a road up that bluff in order to transport building materials via motorized vehicles (App. 54, 55). Similarly, the platted path on the east side is unusable because it traverses a bluff. This is the precise reason why the so-called “disputed access” that constitutes the requested cartway was used by the Bear Island property owners for the last twenty-seven years (App. 24). It is only coincidental that the public road or highway to which his proposed cartway connects is the navigable water of Leech Lake.

In its Order and Judgment, the court addressed the legislative change to the cartway statute, which provides: “Effective July 1, 2004, Minn. Stat. § 164.08 provides for the establishment of a cartway upon a petition of an owner of a tract of land . . . [who] has no access thereto except over a navigable waterway or over the lands of others” (emphasis added.) In other words, the statute now mandates that a cartway be granted if the landowner’s only other access to his land is by a navigable waterway or over someone else’s land. This is exactly Appellant’s situation.

The trial court, however, commented: “[S]ince the statutory changes were enacted, no published case law has arisen with regard to Minn. Stat. § 164.08,” and erroneously concluded from this that the term “navigable waterway,” as it relates to Minn. Stat. § 164.08, is not defined by statute, legislative history, or case law. Since, in the court’s view, the term “navigable waterway” was not defined, the court concluded that cartway statute did not apply, and the west-side lake landing was sufficient “access” to preclude Appellant from establishing a cartway across the disputed access to the east shore.

The trial court’s conclusion was incorrect in several respects. First, the law has, in fact, defined Leech Lake as a navigable waterway. The question of whether a particular body of water is a navigable waterway is normally determined by federal, not state law. State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1957); cert. denied, 79 S.Ct. 45, 358 U.S. 826 (1958). In fact, navigable waters have been defined in detail under federal law; and Leech Lake has been specifically listed as a navigable waterway in accordance with federal law (App. 99); see <http://www.mvp.usace.army.mil/regulatory/default.asp?pageid'978>.

Furthermore, Minnesota courts have repeatedly held that navigable waters within the state are public waters, and are therefore public highways. See Bybee v. City of Minneapolis, 292 N.W. 617 (1940) (judicial notice that the Mississippi

River is a navigable stream, and “as such it is an actual or potential artery for river traffic in this sense, it is a public highway”); Page v. Mille Lacs Lumber Co., 53 Minn. 492, 55 N.W. 608, 609 (1893) (“The right to use watercourses as highways, and the right to use highways on land, are said to be analogous, and to depend on the same general principles”); 78 Am. Jur. 2d, Waters § 88 (1975).

The Court’s conclusion is also at odds with the unambiguous language of the legislative change to the cartway statute. Questions of statutory construction are subject to de novo review by the appellate courts. See Vlahos v. R&I Constr. Of Bloomington, Inc., 676 N.W.2d 672, 679 (Minn. 2004); American Family Ins. Group v. Schroedel, 616 N.W.2d 273, 277 (Minn. 2000) (“When the language of a statute is plain and unambiguous, that plain language must be followed.” Under Minnesota law it is clear that the navigable water of Leech Lake is a public highway, and the trial court erred in interpreting the cartway statute as revised.

II. APPELLANT IS ENTITLED TO A CARTWAY BASED ON THE UNDISPUTED EVIDENCE.

The settled construction of Minn. Stat. § 164.08, subd.2 is that it is the mandatory duty of the County, acting as a Town Board, to establish a cartway where the statutory conditions exist and the route named is a proper one. State ex rel. Rose v. Town of Greenwood, 220 Minn. 508, 514, 20 N.W. 2d 345, 348, (1945). According to the rules of statutory construction found in Minn. Stat. §

645.44, Subd.16, the word “shall” is deemed mandatory. Appellant’s evidence presented at the hearing shows that his petition meets all the requirements of Minn. Stat. § 164.08, subd.2, which triggers the mandatory establishment of a cartway.

First, Appellant owns the four lots acquired by conveyance on November 1, and recorded on 1997, December 2, 1997, as document number 398426, (App. 16).

Second, Appellant owns 3.31 acres of land (App. 101). Thus, as of January 1, 1998, Mr. Rollins was the owner of a parcel of land that contained more than two but less than five acres, as required by Minn. Stat. § 164.08, subd.2.

Third, Appellant has no access to his land except over a navigable waterway, or over the lands of Kruegers, through which he petitioned for the cartway. As described above, pursuant to the 2004 amendment to the cartway statute, the Town Board shall establish a cartway for an “owner of a tract of land that . . . has no access thereto except over a navigable waterway or over the lands of others” (emphasis added). The change in the statute plainly establishes the Legislature’s intent that property owners have a right to access over land and not just over navigable waters. Accordingly, the fact that Appellant has access to the island over a navigable waterway is irrelevant to the application of the cartway statute.

Finally, the cartway route for which Appellant petitioned is the only usable and practical over-land access to his property. The County Board made no findings

or decision concerning the proposed cartway route, notwithstanding that Appellant presented evidence at the hearing in the form of a road plan, letter of Robert Wright, Affidavit of Terry L. Freeman, and an estimate of \$110,000 by Schrupp Excavating for construction of a road through the bluff on the so-called dedicated trail.

The evidence also showed that in order to construct such a road over the bluff, Appellant would be required to submit a permit application to Cass County Environmental Services and to obtain a variance; and in order to construct a road within the forty foot right-of-way through the bluff, additional land would have to be acquired from Krueger's property and from the Smith property north of the dedicated trail. It is obvious that such a project is simply not realistic by any definition of the word.

Black's Law Dictionary defines access, as the term is used in real property law, as "the right vested in the owner of land which adjoins a road or other highway to go and return from his own land to the highway without obstruction." Clearly, Appellant does not have access to his property within this meaning of the word. The bluff where the dedicated trail is located is an obstacle that makes the east end of the dedicated trail effectively inaccessible. The west side of the island, as well, is on a bluff, making the transportation of supplies and equipment other

than on foot highly impractical. According to Minnesota Attorney General's Opinion #3776-1 (1938) (App. 102), "Even though a person's land adjoins a public highway we believe that the town board may establish a cartway over another person's land if, because of natural obstacles, said first party does not have "access" to such highway". See State ex rel. Rose v. Town of Greenwood, et al., 220 Minn. 508, 514, 20 N.W. 2d 345, 348, (1945).

IV. THE TRIAL COURT ERRED IN AFFIRMING THE COUNTY BOARD'S DECISION.

A. The County Board Misapplied the Law.

The County Board, in denying the Appellant's cartway petition, misapplied the law. Assistant Cass County Attorney Greg Bloomstrom provided an opinion to the Cass County Commissioners regarding Appellant's petition for a cartway (App. 103-106). This opinion included erroneous answers, for which there was no legal basis.

First, the County Attorney determined that the County, acting as the Township Board for the unorganized Boy Lake Township, is not required to establish a cartway under Minn. Stat. § 164.08, Subd.2 (2004). This position is contrary to Minnesota law because it treats the establishment of a cartway as discretionary instead of mandatory, as the statute requires. The settled construction of the cartway statute is that it is the mandatory duty of the County to establish a

cartway where the statutory conditions exist. See State ex rel. Rose v. Town of Greenwood, 220 Minn. 508, 514, 20 N.W. 2d 345, 348, (1945).

The County Attorney's letter also stated that there are no public roads to connect a cartway to as required by Minn. Stat. § 164.08 (2004). This is also erroneous. As discussed above, Leech Lake, including all associated arms, bays, narrows, and the Leech Lake River, are federally-listed navigable waters. See www.mvp.usace.army.mil/regulatory/default.asp?pageid=978. The Minnesota courts have repeatedly characterized navigable waters as public highways. In one such case, the court referred to a navigable stream as a public highway, and then went on to say that streams used for highway purposes are governed by the same general rules of law as highways upon land. Page v. Mille Lacs Lumber Co., 53 Minn. 492, 55 N.W. 608 (1893); see also Tousley v. Heffelfinger, 182 Minn. 447, 234 N.W. 673 (1931); State v. Korrer, 127 Minn. 60, 148 N.W. 617 (1914). As a navigable water, Leech Lake constitutes a public highway. Thus, the proposed cartway would connect to a public highway, and the County Attorney's advice to the County Board was in error.

By subsequent letter dated October 27, 2005 (App. 107), the County Attorney stated that his legal opinion in the matter had not changed, and that Mr. Rollins was "asking the County to establish a cartway from the lots to a private

trail, which is not dedicated to the use of the property owners and not a public roadway.” This assertion is also incorrect. In Bryant v. Gustafson, 230 Minn. 1, 40 N.W.2d 427 (1950), the court determined that a passageway could be dedicated to the property owners pursuant to Minn. Stat. § 505.01 (1986), which expressly authorizes a dedication to any person or corporation. Minn. Stat. 505.01 (1986) provides:

Plats of land may be made in accordance with the provisions of this chapter, and when so made, and recorded, every donation to the public or any person or corporation noted thereon shall operate to convey the fee of all land so donated, for the uses and purposes named or intended with the same effect, upon the donor and the donor’s heirs, and in favor of the donee, as though such land were conveyed by warranty deed.

To the extent that the trail as constructed by the original developer and used by the property owners of the platted lots until it was blocked off in 1998 is located outside the dedicated trail, Appellant Rollins does not have access. Since Appellant does not now have an easement over the 200-foot section of the existing trail that constitutes the disputed access, he is entitled to a cartway over this tract of land to the public waters of Leech Lake, which constitute a public highway.

The County Attorney’s opinion also stated that the government is not in the business of establishing private roads for private individuals. With respect to a cartway, this statement is also erroneous. A cartway is not a private road, nor is

Appellant requesting a private road. Instead, Appellant is asking for a cartway that benefits him and the public, including the other residents of the island. It is the right to use, and not the extent of use, that controls; In Re Rask v. Town Board of Hendrum, 173 Minn. 572, 218 N.W. 115 (1928) (although petitioner would be the person primarily benefited, “the public without a doubt has interest in having access. . . A determination of whether a cartway be public or private does not depend upon the number of people who use it, but upon the fact that everyone desiring to do so, may lawfully use it”). Accordingly, although Appellant is the sole petitioner for the cartway, the proposed cartway would clearly benefit other property owners in the plat of Bear Island Woods, as well as the public visiting the island.

Furthermore, the County Attorney told the Commissioners that if they approved the cartway, the County would be creating a public road, and would therefore be responsible for road maintenance, including the need for winter access to the land. This too is an erroneous statement of the law. Pursuant to Minn. Stat. § 164.08(2)(d)(2004), “town road and bridge funds shall not be expended on the cartway unless the town board or the county board acting as the town board in the case of a cartway established in an unorganized territory, by resolution determines that an expenditure is in the public interest. If no resolution is adopted to that

effect, the grading or other construction work and the maintenance of the cartway is the responsibility of the petitioner, subject to the provisions of section 164.10.”

Finally, the County Attorney mistakenly claimed that the reason cartways have to be established is because people have children that need to go to school. There is no provision whatsoever in Minn. Stat. § 164.08 (2004) or in court decisions interpreting it stating or even suggesting that the purpose of establishing a cartway is only to provide access for school children. To the contrary, according to Attorney General Opinion, 377 B-1, March 3, 1950 (App. 108), the town board “was not compelled to establish and construct and maintain a cartway on basis that party served had children of school age who had to attend school.”

The County Attorney offered the similarly mistaken opinion that if Appellant’s requested cartway is granted, then, because the cartway is on an island, a causeway or bridge from the mainland would need to be constructed to provide services to the property owners of Bear Island. Absolutely no support or authority was offered for this opinion; there is no statutory or other requirement that the County construct a means to provide services from the mainland to the property owners of Bear Island.

B. The Trial Court Erred in Declining to Hold that the County Board’s Refusal to Grant the Cartway was Arbitrary and Capricious.

As explained above, Appellant meets all of the requirements of Minn. Stat. § 164.08 subd.2, triggering the mandatory establishment of a cartway. The route proposed by the Appellant is the only practical and feasible route for the location of the cartway; the current and former property owners of the Bear Island lots had used the trail for twenty-seven years. The Appellant's land is inaccessible over the bluff since he could gain access from the lake only by constructing a road up the steep bluff at a prohibitive cost. There is no disagreement about the topography of the bluff area, or the cost of construction. See Schacht v. Town of Hyde Park, C9-97-1754, unpublished, 1998 W.L. 202655 (Minn. Ct. App. 1998), (district court's decision granting cartway affirmed; board's decision in denying the cartway held arbitrary and capricious) (unpublished opinion attached hereto as App. 109-111 pursuant to Minn. Stat. § 480.A.08)

V. THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES AND COSTS TO RESPONDENTS KRUEGERS.

The trial court abused its discretion when it awarded attorney's fees and costs in the amount \$4,732.00 to Respondents. The court found that, "based on the court's reading of the law that the motion for sanctions is made in bad faith and warrants sanctions." (App. 14). However, the court was also required under Minn. Stat. § 549.211 subd.5(c) to "describe the conduct determined to constitute a violation of the section and explain the basis for the sanction imposed." The trial

court failed to comply with this mandatory requirement of the statute. Furthermore, and even more importantly, there is absolutely no support in the record for any such findings. The burden of proof is on the party requesting fees to show that an award is warranted. See Libera v. Burlington R.R., 394 N.W. 2d 827 (Minn. Ct. App. 1986), and this burden was not met. The Respondent Kruegers failed to provide any evidence that Appellant acted in bad faith in any way with respect to the litigation as required in Mary Ann Uselman et al. v Jerry L. Uselman et al., 464 N.W 2d 130, 140 (Minn.1990). The trial court abused it's discretion in awarding fees to Respondent Kruegers. See Glerner v. Time Insurance Co., 465 N.W. 2d 591, 598 (Minn.Ct. App. 1991).

Throughout the entire course of these cartway proceedings, Appellant has sought only to assert his legitimate claim to a cartway to which he is entitled, under a properly plead cartway petition with supporting statutes and case law. At no time has Appellant asserted a claim or position that was not based on a good faith interpretation of existing law. In the absence of any showing of bad faith, it was error, and a clear abuse of the trial court's discretion, to order Appellant to pay any amount of attorneys' fees and costs to the Respondent Kruegers.

Following the County Board's denial of the cartway petition, Appellant appealed to the District Court by notice dated January 20, 2006 (App. 112-115).

Appellant also filed his informational Statement (App. 116-119). The Notice of Appeal set out the specific basis for the appeal as follows:

1. The evidence presented by the Appellant, Michael C. Rollins, is clearly against the board's decision;
2. An erroneous theory of law was applied by the board; and
3. The board acted arbitrarily and capriciously, contrary to the public's interest in denying the cartway petition.

Counsel for the Kruegers served and filed an Informational Statement dated March 30, 2006, which included the following description of the case:

Plaintiff seeks establishment of a public road over Ivan and Lois Krueger's property. The undersigned represents Ivan and Lois Krueger. Litigation occurred in the district court on Appellant Rollins' efforts to obtain a statutory dedication, a common law dedication of the trail he now seeks to impose as a road. He also sought in former litigation every form of easement imaginable to obtain rights over the Kruegers property which he now seeks to have declared a road. That litigation has been fully and finally adjudicated and is, in fact, on appeal to the Minnesota Court of Appeals. The district court in that former litigation held that there was no easement by prescription, no easement by necessity, no adverse possession and no other form of easement. In that litigation findings were made that the access was not necessary for Appellant Rollins or any other of the parties properly in the litigation.

There also was [sic] findings in the original district court action that all of the subdivision owners sought in this action to be benefited by a public road, have access, already, on the west side of their property and that no access over Krueger's property was necessary. There are also included findings in the original district court action that access to

the east side was provided already through the Mucaminishing [sic] trail. The current access as indicated on the plat of Bear Island Woods is sufficient for the access intended, and the Court has so held. Further, the Board's decision in denying Appellant Rollins' request for the establishment of a road was, in all respects, properly made and within the authority of the Board.

(App. 120-122).

The allegations in this detailed and highly adversarial Informational Statement served as the foundation for issues outlined by Appellant's counsel in the Notice of Motion for Sanctions, served on June 16, 2006, and subsequently filed with the Court (App. 123-129).

Appellant's Notice of Motion and Motion for Sanctions identified four separate grounds for seeking sanctions. First, Krueger's counsel argued that Appellant had two other points of access over water, which he claimed would preclude the granting of a cartway pursuant to Minn. Stat. § 164.08. However, as Appellant pointed out to counsel, the cartway statute was amended in 2004, and argued in the Motion for Sanctions that this amendment expressly precluded Krueger's argument because a navigable waterway is not considered "access" under the cartway statute as amended. Obviously the change in the law was directly pertinent to the issue pending in the cartway petition (App. 123, 124), and counsel was aware of it.

Second, Krueger's counsel claimed that the prior decision of Judge Harrington denying Appellant an easement or a dedication was applicable to the cartway petition when the applicable law indisputably granted original jurisdiction over the cartway issue to the town board (App. 124-126). Because the issues in the matter before Judge Harrington were entirely different, the cartway claim was not precluded by res judicata or collateral estoppel, and in fact the District Court reached no such conclusion (App. 10-15).

Third, Krueger's counsel claimed that there were no public roads to connect a cartway as required by Minn. Stat. § 164.08. In fact, counsel was notified that Leech Lake, a federally identified navigable water, qualified as a public highway pursuant to numerous decisions by Minnesota courts. Nevertheless, Krueger's counsel continued to assert that the proposed cartway could not be established to any public highway (App. 126, 127).

Fourth, counsel claimed that the cartway petition was not for a public purpose as required by the cartway statute. This claim was wholly unfounded because if a cartway had been established, it would not have been a private road solely for Appellant's use, and would have benefited other Bear Island property owners and visitors. Counsel had no legal or factual basis for asserting that the requested cartway was not for a public purpose (App. 127, 128).

In the Memorandum in support of his Motion for Summary Judgment, Appellant presented a good-faith argument that Minnesota law supported the establishment of a cartway and that the County Board was in error in denying the petition (App. 83-86).

After Krueger's counsel filed a Responsive Memorandum opposing the Motion for Summary Judgment (App. 130-139), Appellant's counsel served and filed with the Court the Notice of Motion and Motion for Sanctions, Memorandum of Law in Support of Sanctions (App. 140-149), and Affidavit.

The memorandum for sanctions set out the factual support for the requirements of the cartway statute, Minn. Stat. § 164.08, subd.2, as well as a legal analysis in support of a finding that Leech Lake may be considered a public highway for purposes of the cartway statute. The following points, all supported by Minnesota case law, were raised:

- Minnesota courts have held navigable waters to be public highways., Page v. Mille Lacs Lumber Co., 55 N.W. 608, 609 (Minn. 1893).
- Minnesota Courts have held on numerous occasions that navigable waters of the state are public waters and are public highways. Bybee v. City of Minneapolis, 292 N.W. 617 (Minn. 1940) (judicial notice taken that the Mississippi River is a navigable stream and is an actual or potential artery for river traffic, and in this sense is a public highway).
- The issue of whether a lake is navigable is determined by federal law. State v. Adams, 89 N.W.2d 661, 665 (Minn. 1957) (cert. denied. March 14, 1958) 79 S.Ct. 45, 358 U.S. 826.

- Leech Lake, inclusive of all associated arms, bays, narrow, and the Leech Lake River, is a federally listed navigable water of the United States as identified by the U.S. Army Corp of Engineers.
http://www.mvp.usace.army.mil/regulatory/default.asp?_pageid'978.
- Under Minnesota law, Leech Lake, a navigable water, is a public highway. Tousley v. Heffeling, 234 N.W. 673 (Minn. 1931). (holding the term road and highway are synonymous)
- The fact that Appellant Rollins has access to his property over navigable water does not preclude him from meeting the requirements of the cartway statute, Minn. Stat. § 164.08, in light of the amendment to the statute in 2004.
- The proposed cartway would connect to the public road or highway that is the navigable water of Leech Lake.

(App. 141, 142).

The balance of the Memorandum contained the legal arguments in support of the motion for sanctions (App. 143-149). Appellant's counsel confirmed that the appropriate procedure was followed as a threshold requirement for bringing a motion for sanctions, fees and costs. Counsel further contended that the arguments raised by Kruegers in opposition to the cartway petition were not based on a reasonable belief that the law or facts were correct. Further, the issues presented on behalf of Appellant are well-grounded in fact and law, and that Appellant was forced to incur significant expenses in seeking the cartway.

Krueger's counsel submitted a Memorandum of Law in Opposition to the Motion for Sanctions, Fees and Costs dated August 8, 2006 (App. 150-157), which dismissed the arguments made by Attorney Hendricks in support of the Motion for Sanctions, stating that "Rollins simply expresses a disagreement with certain legal positions and arguments proffered by the parties." (App. 150).

He further states that he "did not submit or present anything to any Court for any purpose, but only to the County Board of Commissioners" (App. 151). However, he did in fact, submit a detailed Informational Statement described above, setting out the Krueger's position in a highly adversarial fashion. Therefore, the claim Krueger's counsel made to the Court in the Memorandum in Opposition to the Motion for Sanctions that he did not "submit or present anything to the Court for any purpose" is not correct. More to the point, the Motion for Sanctions and all supporting documents were not filed with the Court until after Krueger's counsel made two separate filings with the Court: the Informational Statement and the Memorandum in Opposition to the Motion for Summary Judgment.

By Order dated September 8, 2006, Judge John Smith awarded Kruegers the requested attorney fees.

Minnesota Statute § 549.211, subd.2 provides, “[b]y presenting to the court, whether by signing, filing, submitting or later advocating, a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person’s knowledge, information, and belief formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Minn. Stat. § 549.211, subd.2 (emphasis added).

Appellant’s memoranda clearly demonstrate the good-faith factual and legal basis upon which Appellant’s counsel relied in moving for sanctions. The legal analysis upon which the motion was based establishes that it was not frivolous in

any respect. The trial court had no justification for concluding that sanctions were warranted under Minn. Stat. § 549.211, subd.2.

The trial court specifically acknowledged that there were no decided cases involving the legislative change in the cartway statute after 2004; therefore there could be no contradictory law. The arguments of Appellant's counsel are completely well-founded, and are warranted by existing law as well as by a good faith argument for the extension, modification or reversal of existing law, or the establishment of new law pursuant to § 549.211 subd.2(2).

There is absolutely no evidence that Appellant's arguments and case law in support of his position is "not an objectively unreasonable one" or not brought in good faith; nor is there any evidence whatsoever that Appellant pursued the cartway petition or moved for sanctions for the purpose of harassing Kruegers or increasing their litigation costs.

Minn. R. Civ. P. 11.02 and Minn. Stat. § 549.211(2) both provide that parties are permitted to submit pleadings that contain good faith arguments for the extension or modification of existing law. Rule 11 should be narrowly construed: "[W]hile some sanctionable conduct might escape discipline, that is preferable to deterring legitimate or arguably legitimate claims." Leonard v. Northwest Airlines, Inc., 605 N.W. 2d 425, 432 (Minn. App. 2000). A district court's imposition of

sanctions will be upheld in the absence of an abuse of discretion, Brown v. State, 617 N.W.2d 421, 427 (Minn. App. 2000), review denied (Minn. Nov. 21, 2000); however, it is an abuse of discretion to impose sanctions against an attorney who, in good faith, brings an arguably legitimate claim. Id. Furthermore, Rule 11 should be construed narrowly to avoid deterring claims that are even arguably legitimate. Id. The district court's award of sanctions must be reversed if the party's assertion is "not an objectively unreasonable one". Bergman v. Lee Data Corp. 467 N.W. 2d 636, 641 (Minn. App. 1991), review denied, (Minn. May 23, 1991).

Appellant has suffered a significant loss in the value and utility of his property, which he purchased in reliance on the continued use of the access that constitutes the proposed cartway in this case. Appellant was entitled to zealous representation within the bounds of the law in an attempt to mitigate that loss. Even if a court is unpersuaded by a party's claim, counsel should never be punished with sanctions for his mere failure to persuade unless there is some objective showing that the claim was offered in bad faith, that it was contrary to existing law or that it was not based on a reasonable argument for a change in the law. Under the circumstances of this case and under applicable law, the trial court's unexplained and unsupported decision that the arguments presented by

Appellant's counsel were in bad faith either in fact or in law is not warranted, and the award of sanctions must be reversed.

CONCLUSION

The trial court, in declining to reverse the arbitrary decision of the County Board, erroneously disregarded the facts and the law supporting Appellant's statutory right to the establishment of a cartway. Appellant has no reasonable access to the only over-land route to his island property. The trial court clearly erred in concluding that the fact that Appellant could reach the island constituted sufficient access. The conclusion was in clear contravention of the recent amendment to the cartway statute, which mandates the grant of a cartway if a property owner does not have access to his property except via a navigable waterway or over the property of another, and refused to acknowledge that under federal law, Leech Lake is a navigable waterway. This was a clear error of law requiring reversal.

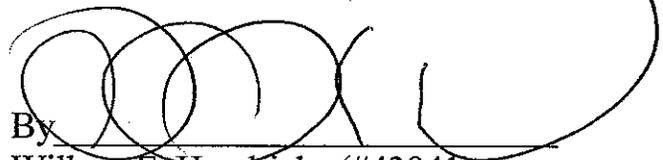
Furthermore, the trial court erred in failing to make findings or explain the basis for imposing sanctions on Appellant's counsel. There is no objective evidence whatsoever that Appellant's claim was brought in bad faith or lacked support under the law. Respondent failed to carry the burden of establishing the

existence of bad faith, and the trial court erred in imposing sanctions without any objective basis for doing so.

For all the reasons set forth above, Appellant respectfully requests this Court to reverse the decision of the District Court.

Dated December 2, 2006

HENDRICKS LAW FIRM

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

By
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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).