

NO. A08-303

State of Minnesota  
 In Court of Appeals

Eric J. Slindee and Jerilyn A. Slindee,

*Appellants,*

v.

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

*Respondent,*

v.

Landecker &amp; Associates, Inc., a Minnesota corporation,

*Respondent.*


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**APPELLANTS' BRIEF AND APPENDIX**

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Mark E. Greene (#37461)  
 Sarah L. Krans (#0338989)  
 BERNICK, LIFSON, GREENSTEIN,  
 GREENE & LISZT, P.A.  
 5500 Wayzata Boulevard, Suite 1200  
 Minneapolis, MN 55416  
 (763) 546-1200

*Attorneys for Appellants*

Thomas Gedde (#0033923)  
 28459 Balmoral Drive  
 Battle Lake, MN 56515-9690  
 (218) 864-5552

*Attorney for Respondent  
 Fritch Investments, LLC*

Eric R. Heiberg (#268203)  
 John A. Markert (#0308511)  
 COLEMAN HULL & VAN VLIET  
 8500 Normandale Lake Boulevard  
 Suite 2110  
 Minneapolis, MN 55437  
 (952) 841-0001

*Attorneys for Respondent  
 Landecker & Associates, Inc.*

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).

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## LEGAL ISSUES

### **I. Did the trial court err in concluding that a boundary line by practical location was established?**

The trial court concluded that a boundary line by practical location was established by express agreement and that Respondent Fritch is entitled to judgment fixing the boundary line by practical location at the western edge of the disputed area.

Apposite cases:

*Beardsley v. Crane*, 52 Minn. 537, 54 N.W. 740 (Minn. 1893)

*Nadeau v. Johnson*, 125 Minn. 365, 147 N.W. 241 (1914)

*Phillips v. Blowers*, 281 Minn. 267, 161 N.W.2d 524 (Minn. 1968)

*Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844 (Minn. Ct. App. 2001)

### **II. Did the trial court err in granting judgment in favor of the respondent on the basis of equity?**

Under the circumstances of this case, the trial court entered what it believed to be an equitable order.

Apposite cases:

*Benson v. Saffert-Gugusberg Cement Constr. Co.*, 159 Minn. 54, 198 N.W. 297 (1924)

*Claflin v. Commercial State Bank of Two Harbors*, 487 N.W.2d 242 (Minn. Ct. App. 1992)

*Lindell v. Lindell*, 150 Minn. 295, 185 N.W. 929 (1921)

### **III. Did the trial court err in failing to dismiss respondent's claim for reformation?**

The trial court chose not to address the issue because de Neui (a party to the deed) was not a party to the action.

Apposite cases:

*Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730 (Minn. 1980)

*Manderfeld v. Krovitz*, 539 N.W.2d 802 (Minn. Ct. App. 1995)

*Theros v. Phillips*, 256 N.W.2d 852 (Minn. 1977)

*Watson v. Chicago, M. & St. P. Ry. Co.*, 46 Minn. 321, 48 N.W. 1129 (Minn. 1891)

**IV. Did the trial court err in failing to grant appellants damages for trespass where respondent removed trees on appellants' deeded property?**

The trial court did not specifically discuss appellants' trespass claims as it awarded respondent title to the disputed area.

Apposite cases:

*Rector, Wardens and Vestry of St. Christopher's Episcopal Church v.*

*C. S. McCrossan, Inc.* 306 Minn. 143, 235 N.W.2d 609 (1975)

*Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 792-93

(Minn. Ct. App.1998)

**STATEMENT OF THE CASE**

The trial court describes this matter as a "knotty case" and states that the "situation is tangled and complex." Although the Slindees do not contend that this is a particularly simple, straightforward matter, it is not as complex as the trial court has made it. The seminal issue in this appeal is: where there is no clear and convincing evidence that (1) property owners expressly agreed on a boundary line, and (2) the property owners thereafter acquiesced to the specific boundary line, and (3) where the alleged boundary line itself is ambiguous, can a boundary line by practical location be established?

This matter involves a dispute over the location of a boundary between two adjacent lakeshore properties located on Mule Lake in Cass County, Minnesota. The first property was purchased by Appellants Eric and Jerilyn Slindee from Dean A. de Neui and Donna K. Hicok in 2000. In 2002, Respondent Fritch Investments, LLC, a real estate development company, purchased the property to the east of the Slindee parcel.

Fritch intended to plat its parcel into a planned unit development (“PUD”) and then switched its plans to a five-lot plat. Its plan, however, was rejected by the county surveyor because the proposed plat included property owned by the Slindees under their deed. Fritch then approached the Slindees and requested that they convey the disputed area included on the proposed Fritch plat. The Slindees refused to deed part of their parcel to Fritch and, instead, commenced the current legal action requesting that the court determine and declare that Fritch has no estate or interest in the Slindee parcel and to award damages for trespass. Fritch counterclaimed alleging that it is the owner of the easterly part of the Slindee parcel by adverse possession or under the doctrine of practical location. In the alternative, Fritch sought that the deed from de Neui and Hicok to the Slindees be reformed to exclude that part of the Slindee parcel included in the proposed Fritch plat.

Trial was held before the Honorable John P. Smith in Cass County. In a judgment entered on May 1, 2007, the trial court concluded that Fritch is entitled to judgment fixing the boundary line by practical location at the western edge of the disputed area, but that there was no adverse possession of the disputed area by Fritch. The trial court then ordered that (1) the Slindees were awarded a three-foot easement over the disputed area for the purpose of access to the lake, and (2) that the disputed area be subject to a buffer zone easement restricting Fritch from constructing any structures in the disputed area or removing any trees or vegetation, without the written consent of the Slindees or their successors. With respect to the access easement, the

trial court allowed the Slindees 120 days to provide a surveyed description of the lake access easement.

Both parties then challenged the May 1, 2007 judgment, bringing motions for amended findings, conclusions of law and judgment. On September 17, 2007, the trial court issued amended findings of fact, conclusions of law and an order for an amended judgment. In the amended judgment, entered that same day, the trial court set forth the legal description for the Slindee's lake access easement over the disputed area and reduced the buffer zone easement to 30 feet in width.

Fritch then brought a second motion for amended findings of fact, conclusions of law, and order or for a new trial, challenging the location of the Slindee lake access easement. On December 21, 2007, the trial court denied Fritch's motion for amended findings and determined that the Slindees' lake access easement, as surveyed and described in the September 17, 2007 amended judgment, was accurate.

The Slindees then brought this appeal, seeking a reversal of the trial court's amended judgment and request that this Court, instead, require the title to the disputed area be quieted in the Slindees' name and award the Slindees damages caused by Fritch's trespass.

## **STATEMENT OF FACTS**

### **A. The properties at issue.**

This dispute in this case involves two adjacent lakeshore properties on Mule Lake in Cass County with long metes and bounds descriptions. The first is described in Finding No. 1 of the Amended Judgment and will hereafter be referred to as the "**Fritch parcel**".

The second is described in Finding No. 4 of the Amended Judgment and will hereafter be referred to as the “**Slindee parcel**”.

**B. The parties.**

This dispute is between Fritch Investments, LLC, (“**Fritch**”) which purchased the Fritch parcel and Eric and Jerilyn Slindee (“**Slindees**”) who own the Slindee parcel. Chris Fritch (“**C. Fritch**”), the manager and president of Fritch, (1/11/07 Trial Tr. p. 259, ll. 108), has been in the real estate business since 1987; has taken advanced real estate courses; has given real estate seminars; is a graduate of the Real Estate Institute and holds a Certified Residential Real Estate Certificate (1/11/07 Trial Tr. pp. 261-63). Eric Slindee is retired, having worked at Ford Motor Company. (1/11/07 Trial Tr. p. 27.)

**C. The lay of the land.**

Attached and incorporated at the end of the Amended Judgment is a drawing marked Exhibit “A”, detailing various aspects of the Slindee parcel including the “boundary agreement area” and the “disputed area” later discussed in this brief. (A-26.) That drawing has been reproduced for convenience on the following page as *Fig. 1*.

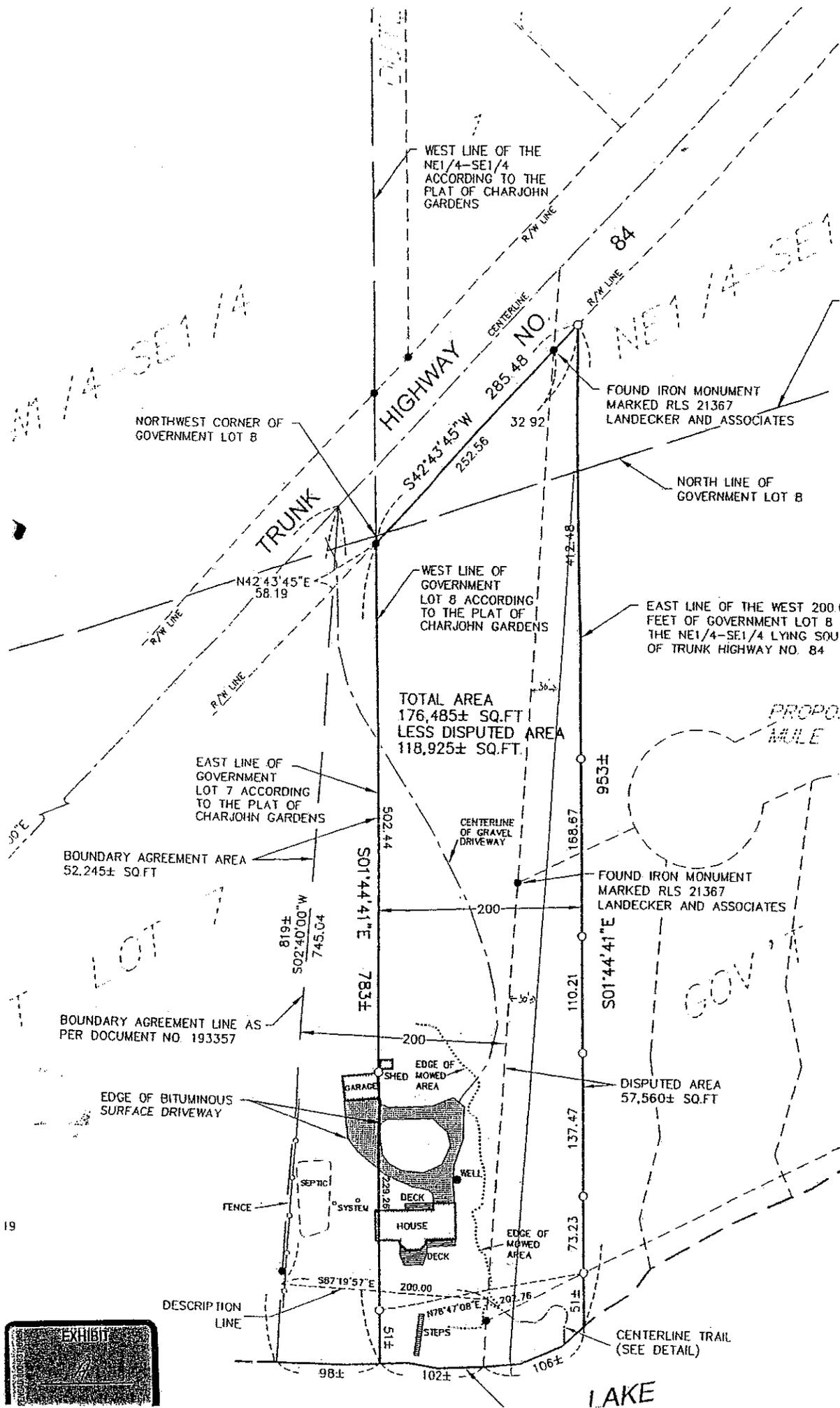


Fig. 1



Mule Lake forms the southern boundary of the Slindee parcel. (*Fig. 1*; A-26.) There is a hill in the southerly portion of the parcel leading down to the lake. This hill is a very steep forming a bluff on the southwestern side of the Slindee parcel with less of a slope down towards southeastern side of the parcel (Trial Ex. A, ((Welch Tr.)) p. 26.) The Slindee house sits above the bluff, some 20 to 30 feet above the lakeshore. (Trial Ex. A, ((Welch Tr.)) p. 29.)

The Slindees' house, circular driveway, and other improvements are located on the southern quadrant of the Slindee parcel nearest the lake. (Trial Ex. A, ((Welch Tr.)) pp. 8-9.) The Slindees and their predecessors mow an area around these improvements, including grass in the middle of the circular driveway, a lawn in the front yard on the west side of the house, the south side of the house, and the east side of the house. (Trial Ex. A, ((Welch Tr.)) p. 26; A-26; *Fig. 1*.) The mow line is irregular running from the house, south to the hill that goes down to the lake, and north of the house to the shed or outer garage. (Trial Ex. A, ((Welch Tr.)) p. 26; A-26; *Fig. 1*.) There is a fence near the western boundary in the southern quadrant. (A-26; *Fig. 1*.) The most northerly quadrant of the Slindee parcel is wetlands. (Trial Ex. A, ((Welch Tr.)) p. 11-12; 1/11/07 Trial Tr. pp. 135, ll. 19-23.) The area north of the shed and south of the wetlands is wooded, wild, and left in its natural state. (A-17-18, ¶ 21; Trial Ex. A, ((Welch Tr.)) 14-16; 1/11/07 Trial Tr. p. 108, ll. 3-8)

**D. The western boundary line agreement.**

Initially, Walter Bryant owned both the Fritch parcel and the Slindee parcel. (A-52.) In 1969 Walter Bryant entered into a boundary line agreement with his neighbor, Gilbert

Norman, who owned Government Lot 7 situated immediately to the west of the Slindee parcel. That agreement is memorialized in a boundary line agreement dated June 10, 1969, and filed in the office of the Cass County Recorder on June 19, 1969, as document #193359. (A-16; A-48.) That western boundary line agreement adjusted the western boundary between the Bryant and Norman properties, moving it 98 feet west (at the lakeshore) of the actual west line of Government Lot 8 and creating the “**western boundary agreement area**”. (See *Fig. 1*; A-26; A-48.) While the boundary line agreement was recorded at the county, no further documents or deeds were ever exchanged or recorded.

There is no dispute that the Slindees own the western boundary agreement area. The Slindees’ garage, septic mound, driveway and a small part of the Slindees’ house are situated on the boundary agreement area. (*Fig. 1*; A-26.) Dan Muscari, Slindees’ neighbor to the west, does not dispute that the western boundary agreement area belongs to the Slindees. (1/11/07 Trial Tr. p. 125).

**E. Conveyances of the Slindee parcel.**

In 1971, Walter Bryant sold off the Slindee parcel to his son, Ted Bryant, who then sold it to Robert Orth in 1980, who then sold it to Dean A. de Neui (“**de Neui**”) and Donna K. Hicok, now Donna de Neui (“**Hicok**”) in 1993. (A-16, ¶ 9; A-52.) In November of 2000, the Slindees purchased the Slindee parcel from de Neui and Hicok. (A-15, ¶ 3; A-52.) At closing, de Neui and Hicok deeded the Slindee parcel to the Slindees. (A-31.) The recorded conveyances of the Slindee parcel include the “disputed area”.

**F. Conveyances of Fritch parcel**

Fritch purchased the Fritch parcel in 2002, from Ronald W. Zimmerman and Ingrid (Terry) T. Zimmerman (“**Zimmermans**”). (A-14-15, ¶1.) The Zimmermans owned the Fritch parcel and operated a resort on it, since they first purchased it in 1978. (A-15, ¶ 2; Trial Ex. A, ((Welch Tr.)) p. 22.) In the purchase agreement between Fritch and the Zimmermans, Fritch included a contingency enabling Fritch the opportunity to obtain a satisfactory consultation with a surveyor as a condition of purchase. (1/12/07 Trial Tr. pp. 10-12; A-42.) This contingency was satisfied and removed by Fritch on June 1, 2002 after Fritch met with Terry Freeman, (“**Freeman**”) a registered land surveyor, from Landecker & Associates, Inc., (“**Landecker**”) to discuss development possibilities for the parcel. (1/11/07 Trial Tr. p. 100, ll. 1-16, pp. 147-150; A-42-45.) Fritch closed on the purchase and received a warranty deed for the Fritch parcel on September 19, 2002. (A-13-14, ¶1, A-40-41.) The warranty deed to Fritch does not include the “disputed area”.

**G. The disputed area.**

In late June of 2002, after removing the survey contingency from the Fritch purchase agreement, Fritch retained Landecker to survey the Fritch parcel. (1/11/07 Trial Tr. p. 150, ll. 15-25, p. 151; A-46.) Landecker, however, did not begin performing any fieldwork in connection with the survey until September 24, 2002, after Fritch closed on the Fritch parcel. (1/11/07 Trial Tr. p. 152, ll. 9-22.) Through the surveying process, Landecker became aware of the western boundary line agreement. (1/11/07 Trial Tr. p. 105.) When the survey was performed, instead of keying the survey off the true west line

of Government Lot 8, Freeman mistakenly keyed it off the western boundary line agreement, as if the west line of Government Lot 8 had been relocated by the western boundary line agreement. (1/11/07 Trial Tr. pp. 112, p. 121, ll. 1-4, p. 153, ll. 20-25, p. 154, l.1.)<sup>1</sup> The result of Landecker's error was to seemingly enlarged the Fritch parcel westerly by including the easterly part of the deed Slindee parcel. (*Fig. 1, A-26.*) This expanded area measures 106 feet at the lakeshore and has become known as the "disputed area" in this lawsuit. (*Id.*) The legal description of the disputed area is as follows:

That part of Government Lot 8, and the Northeast Quarter of the Southeast Quarter, Section 19, Township 140 North, Range 28 West, Cass County, Minnesota, lying South of State Highway 84 and lying easterly of a line drawn 200.00 feet easterly of the following described line: Commencing at the South Quarter corner of Section 19, Township 140 North, Range 28 West; thence South 73 degrees 16 minutes West 517.26 feet along the South line of said Section 19 to the intersection of said South line with a southwesterly extension of the centerline of State Highway 84; thence North 42 degrees 44 minutes East 2542.02 feet along said extension and along the centerline of said Highway 84 to the point of beginning of the line to be described; thence South 2 degrees 40 minutes West 819 feet, more or less, to the shore of Mule Lake and there ending. Said line drawn 200.00 feet easterly of said described line shall be prolonged or shortened to terminate on the centerline of said State Highway 84 and the shoreline of Mule Lake.

(A-17, ¶17.)

The disputed area is located east of the Slindee mow line. (*Fig. 1; A-26.*) The east line of the disputed area measures over 950 feet, north to south. (*Fig. 1; A-26.*) Except for a trail between the parcels that is no longer in use and an historical trail used by the

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<sup>1</sup> Fritch made a third party claim against Landecker & Associates that was settled before trial. The settlement agreement was made confidential by trial court and is part of the trial court record as Trial Exhibit "C". (1/11/07 Trial Tr. 156-59.)

Slindees that leads from the southeast corner of the Slindee lawn to the lake, the disputed area is wooded and natural. (A-16-18, ¶¶ 11, 14, 16, 21.)

Fritch initially intended to plat the Fritch parcel into a PUD and sell off the lots. (1/11/07 Trial Tr. pp. 113-14.) The PUD plat first proposed by Fritch, however, was met with resistance from neighbors and the platting authorities. (1/11/07 Trial Tr. pp. 113-14; Trial Exs. 54, 55.) Looking for acceptable alternatives, Fritch submitted a revised five-lot plat with four single-family lots on the lake, and one back lot off the lake (“**five-lot plat**”). (1/11/07 Trial Tr. p. 117; Trial Ex. 29.) When the five-lot plat reached the desk of Bob Kovenan, the County Surveyor, he rejected it. (1/11/07 Trial Tr. p. 119.) The reason for the rejection was that the five-lot plat used the western boundary line agreement as the western line of the plat, rather than the true government lot line. (1/11/07 Trial Tr. pp. 118-21.) Doing so erroneously resulted in including the disputed area as part of the plat. (Trial Tr. p. 121, ll. 1-4.) The problem, as Mr. Kovenan recognized, was that Fritch did not have record title to the disputed area. (1/11/07 Trial Tr. pp. 120-21, 170.) Instead, record title to the disputed area was in the Slindees’ name, having been conveyed by de Neui and Hicok to the Slindees, when the Slindees purchased the Slindee parcel, just as it had been conveyed by Orth to de Neui, when de Neui purchased the property. (A-31; A-50.)

When Fritch learned it lacked record title to the disputed area, its attorneys and Landecker, approached the Slindees and requested a deed from them to convey the disputed area to Fritch. (1/11/07 Trial Tr. pp. 125, 129, 192). The Slindees refused and instead eventually commenced this action to determine the boundary line. (1/11/07 Trial

Tr. p. 129; Compl.) Fritch answered the Slindees' complaint claiming ownership of the disputed area based on theories of adverse possession and practical location of a boundary line. (Answer and Countercl.) Alternatively, Fritch sought to have the deed between de Neui and Hicok and the Slindees reformed to exclude the disputed area. (*Id.*)

### STANDARD OF REVIEW

In this matter, this Court must review the trial court's findings for clear error in light of Fritch's burden to produce clear and convincing evidence establishing a boundary-line by practical location. The district court's determination of a disputed boundary is a factual determination, which is accorded the same deference on appeal as any other factual determination. *Allred v. Reed*, 362 N.W.2d 374, 376 (Minn. Ct. App. 1985). But, because the effect of a practical location is to divest one party of property that is clearly and concededly his by deed, the evidence establishing the practical location must be clear, positive, and unequivocal. *Wojahn v. Johnson*, 297 N.W.2d 298, 306 (Minn. 1980); *Theros v. Phillips*, 256 N.W.2d 852, 859 (Minn. 1977) (*citing Beardsley v. Crane*, 52 Minn. 537, 54 N.W. 740 (1893)). Clear and convincing evidence may be defined as meaning that a party's evidence should be "unequivocal and uncontradicted, and intrinsically probable and credible." *Deli v. University of Minnesota*, 511 N.W.2d 46, 52 (Minn. Ct. App. 1994). As such, this Court must look to the evidence as a whole to determine whether the findings were reasonably supported by evidence that is clear and convincing. *See Hentges v. Schuttler*, 247 Minn. 380, 383, 77 N.W.2d 743, 746 (1956).

The district court's determination of a boundary, including whether a landowner acquiesced in a boundary by practical location, ordinarily is a question of fact, which the appellate court reviews for clear error. *Wojahn*, 297 N.W.2d at 303; *Theros*, 256 N.W.2d at 857. In boundary-line cases, the findings of the district court will not be disturbed unless "the evidence taken as a whole furnishes no substantial support for them or where it is manifestly or palpably contrary to the findings." *Ebenhoh v. Hodgman*, 642 N.W. 2d 104, 108 (Minn. Ct. App. 2002) (citing *Engquist v. Wirtjes*, 243 Minn. 502, 506, 68 N.W.2d 412, 416 (1955) (quotation omitted)). Findings are clearly erroneous if they are manifestly contrary to the weight of the evidence or are not reasonably supported by the evidence as a whole, or were induced by an erroneous view of the law. See *Ortendahl v. Bergmann*, 343 N.W.2d 309, 311 (Minn. Ct. App. 1984); *Olson v. Blue Cross & Blue Shield*, 269 N.W.2d 697, 700 (Minn. 1978). The lower court's findings will be reversed if, upon review of the entire evidence, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Novack v. Northwest Airlines, Inc.*, 525 N.W.2d 592, 597 (Minn. Ct. App. 1995).

Although a trial court's findings are reviewed for clear error, whether the findings of fact support a district court's conclusions of law and judgment is a question of law subject to de novo review. *Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844, 848 (Minn. Ct. App. 2001); *Donovan v. Dixon*, 261 Minn. 455, 460, 113 N.W.2d 432, 435 (1962).

Here, the trial court erred as its findings were not reasonably supported by evidence that is clear and convincing and the findings are intrinsically contrary to each other. In addition, the trial court's findings fail to support its conclusions of law.

## ARGUMENT

### I. THE TRIAL COURT ERRONEOUSLY CONCLUDED THAT A BOUNDARY LINE BY PRACTICAL LOCATION WAS FORMED BY EXPRESS AGREEMENT.

In Minnesota, there are only three ways in which the practical location of a boundary may be established:

- (1) **Acquiescence:** The location relied upon must have been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations - the statute of limitations requires the boundary to be acquiesced in for 15 years;
- (2) **Express Agreement:** the line must have been expressly agreed upon between the parties claiming the land on both sides thereof and afterward acquiesced in; or
- (3) **Estoppel:** the parties whose rights are to be barred must have silently looked on, with knowledge of the true line, while the other party encroached upon it or subjected himself to expense in regard to the land which he would not have had the line been in dispute.

*Theros v. Phillips*, 256 N.W.2d at 858; *Phillips v. Blowers*, 281 Minn. 267, 269, 161 N.W.2d 524, 526 (Minn. 1968); *Moore v. Henricksen*, 282 Minn. 509, 516, 165 N.W.2d 209, 215 (1968) (citing *Gifford v. Vore*, 245 Minn. 432, 436, 72 N.W.2d 625, 628 (1955)); Minn. Stat. § 541.02.

In the instant case, the trial court reaches conclusions of law that the boundary line between the Slindee and Fritch parcels was determined by practical location based upon an express agreement. Specifically, the court wrote in its conclusions of law:

#### A. Boundary by Practical Location

1. Slindees' predecessor in interest [de Neui] agreed to place the boundary line between the Fritch and Slindee properties on the western edge of the disputed area.

2. Fritch and its predecessor in interest [Zimmermans] and Slindees' predecessor in interest [de Neui] agreed that the boundary line between the Fritch and Slindee parcels was to be located on the western edge of the disputed area.

\* \* \*

4. Fritch is entitled to judgment fixing the boundary line by practical location at the western edge of the disputed property. Fritch is awarded title to the disputed area subject to the pathway easement and the buffer zone easement.

(A-22, ¶¶ 1, 2, 4.)

The trial court makes no conclusions or findings that a boundary line was formed by acquiescence or by estoppel, and in fact, makes findings that preclude any conclusions to either effect. Specifically, the trial court found that the disputed area between the two properties has virtually no use by either party (A-17-18, ¶ 21) and that the owners of the two parcels and their predecessors did not use or develop the disputed property except for the use of a trail that went from the Slindee parcel to the lake and a second trail that went from the Slindee parcel to the Fritch parcel (A-16-17, ¶¶ 11, 14, 16). The trial court also found that the Orths, who owned the Slindee parcel from 1980 until 1993 used the two trails on the disputed area and that from 2000 on, the Slindees used the trail to the lake located on the disputed area. (A-16-17, ¶14.) The trial court also concluded that Fritch and its successors did not actually and openly possess the disputed area for a period exceeding fifteen years. (A-22, ¶ 6.) These findings are inconsistent with the requirements necessary to establish practical location by acquiescence or estoppel.

Since de Neui and Hicok only owned the Slindee parcel from 1993 until 2000 (A-16-17, ¶¶ 9, 13), there could not have been acquiescence for the requisite period of fifteen

years necessary to establish a boundary line by acquiescence. Also, because Fritch and its predecessors did not use or develop the disputed area (A-17, ¶ 16) while the Slindees or their predecessors silently looked on, a boundary line cannot be established under any estoppel theory. The only theory relied upon by the trial court for its finding of a boundary line by practical location is the theory of express agreement, as specifically stated in conclusion number 2 of the amended judgment. (A-22, ¶ 2.)

**A. The trial court erred in finding a boundary line by practical location because there is no clear and convincing evidence demonstrating an express agreement, acquiescence to the alleged line, or even a clear boundary line.**

In the present case, the court concluded that a boundary line of practical location was established by an express agreement. (A-22, ¶¶ 1, 2, 4.) Under the theory of boundary line by express agreement, a proponent must show two things: (1) evidence that a neighboring landowner expressly agreed on the location of a boundary line, and (2) that thereafter, the neighbors acquiesced in that agreed line. *Nadeau v. Johnson*, 125 Minn. 365, 366, 147 N.W. 241, 241 (1914). The trial court erred in the present case by concluding that a boundary line of practical location was established by express agreement. This conclusion is in error because:

(1) the record in this matter contains no evidence, let alone clear and convincing evidence, that an express agreement was ever made by any owners of the Fritch and Slindee parcels regarding a boundary line between their properties;

(2) the record in this matter contains no evidence that the parties then acquiesced to that specific line allegedly agreed upon;

- (3) the testimony is ambiguous as to the location of the line itself; and
- (4) the court's order establishing the boundary line is inconsistent with the

testimony and its own findings.

1. The evidence does not support the trial court's finding that an express agreement about the boundary line was made.

In the present case, the only finding of fact that discusses any express agreement regarding the boundary line is Finding No. 12, which states in relevant part:

De Neui and Hicok expressly agreed with Zimmermans that the boundary line was 200 feet east of the fence, i.e. the west boundary of the disputed property.

(A-16, ¶ 12). There are no other findings or discussion indicating how the trial court came to this conclusion. The trial court merely states that, "It was belief of Zimmermans and de Neui that the east boundary of the disputed property was the property line." (A-16, ¶ 9.) An erroneous belief regarding the location of a boundary line cannot constitute an express agreement for the purposes of establishing a boundary line by practical location. *Beardsley*, 52 Minn. at 546, 54 N.W. at 742. The trial court goes on to state, "These neighbors expressly agreed this was the boundary prior to Slindees' purchase of the property." (A-21.) The evidence, however, does not support the trial court's finding of an express agreement.

- a. There is no evidence that de Neui, Hicok, and the Zimmermans ever specifically discussed the boundary line.

The evidence simply does not support the trial court's finding of an express agreement establishing a boundary line. The record is devoid of any testimony that de Neui or Hicok reached any express agreement with their neighbors, the Zimmermans, to

satisfy the requirements necessary to establish a boundary line by practical location. As stated in *Beardsley*, to establish a boundary line by practical location property owners must expressly and deliberately reach an agreement, setting an exact, precise line as the boundary, and thereafter, the parties must acquiesce in that line. If there is an express agreement recognizing an erroneous boundary line, the party making the claim must rest upon practical boundary location by estoppel, not express agreement:

[T]o establish a practical location which is to divest one of a clear and conceded title by deed, the extent of which is free from ambiguity or doubt, the evidence establishing such location should be clear, positive, and unequivocal. There should be an express agreement made between the owners of the lands, deliberately settling the exact, precise line between them, and acquiescence for a considerable time, or, in the absence of proof of such agreement, it should be as clearly and distinctly shown that the party claiming has had possession of the premises claimed up to a certain, visible, and well-known line, with the knowledge of the owner of the adjoining land, and his acquiescence, continued for a considerable period of time. What this period is, has not been limited or defined, is quite vague and uncertain, and must necessarily depend upon the particular circumstances of each case. It has often been said that this acquiescence must have continued for a period of time scarcely less than that prescribed by the statute of limitations; and in some cases it has been held that the doctrine that an express agreement, recognizing an erroneous boundary line, will conclude a party, must rest, if tenable at all, upon the principle of estoppel. (citations omitted).

*Beardsley*, 52 Minn. at 546, 54 N.W. at 742.

While the trial court found an express agreement between de Neui, Hicok and the Zimmermans (A-16, ¶12), the testimony of de Neui, Hicok and the Zimmermans actually abrogates any claim of an agreement between them, let alone an express agreement as to an exact, precise boundary line. In fact, de Neui specifically testifies that he never had any discussions with the Zimmermans regarding the location of the Slindees' east property line:

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

A. Yes.

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

A. Not really, no.

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

Ronald Zimmerman's testimony was no more availing. He testified, confusingly, that he had reached mutual agreements with the neighbors about where the boundary line was located, but that he could not recall any discussions with any neighbors. At best, his testimony was perfunctory and conclusory:

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

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

Q. Did you have some mutual agreements or conversations with Mr. Dean Deneui at times about the location of the boundary line?

A. We both were in agreement that the line was the mow line.

Q. And what do you base that statement on?

A. I don't know how you mean that. How do I base that?

Q. Well, what leads you to that conclusion that you were in agreement as to that boundary line with Mr. Deneui?

A. The fact there was a mowing line and the line was just an accepted piece of line that identified our property versus his.

(1/12/07 Trial Tr. p. 113, l. 25; p. 114, ll. 1-19.)

Thus, Mr. Zimmerman's only basis for believing there was an agreement was that there was a mowing line, not that any express agreement had been reached with the neighbors. His testimony lacks any details about who the alleged agreements were reached with, when they were reached, the circumstances that led up to the agreements, any details about the alleged agreements, and significantly, an explanation of how such an agreement could have been reached without discussions with the neighbors. Neither Mr. Zimmerman's testimony nor Mr. de Neui's testimony, therefore, can create any basis in law for a finding that an express agreement was reached with de Neui and Hicok that the boundary line was 200 feet east of the fence. (A-16, ¶ 12.)

Terry Zimmerman's testimony is no more instructive on this issue. Like her husband's testimony, she only testified that she understood her property went up to the mowing line. (1/12/07 Trial Tr. p. 68.) When asked about having had any discussion with de Neui about where the boundary line was located, she testified only about joking with de Neui about a spilled woodpile. (1/12/07 Trial Tr. pp. 74-77.) There is nothing in her testimony that could lead the lower court to conclude that any express agreement had been reached sufficient to support a claim of practical location.

Similarly, Donna Hicok (de Neui) testified only that she "understood" that the mow line was the boundary between the parcels; she does not testify about any specific agreement or circumstances that led her to that understanding. (1/12/07 Trial Tr. pp. 167-69.) She does not testify about any agreement with the Zimmermans, or even that she spoke to the Zimmermans about the eastern boundary line of the Slindee parcel.

The court stated that:

It was the belief of the Zimmermans and de Neui that the east boundary line of the disputed property was the property line. These neighbors expressly agreed this was the boundary prior to Slindees' purchase of the property.

(A-21.)

There is simply no clear and convincing evidence in the record that substantiates that any express agreement was reached about the location of the boundary line so as to support Finding No. 12. If you put all of the testimony of the supposed parties to the agreement together, the most that can be said is that they all independently, erroneously, assumed their boundary line was the mow line. While these neighbors testified that they observed or recognized the Slindee's mowing line as the boundary, the mere belief that a mowing line is a line of occupation does not rise to the level of any express agreement.

Since the effect of a practical location is to divest one party of property that is clearly and concededly his by deed, the evidence establishing the practical location must be clear, positive, and unequivocal. *Theros*, 256 N.W.2d at 859. Here, where the parties to the alleged boundary line agreement testified that they did not speak with each other regarding a specific boundary line or any boundary line agreement, there is no clear, positive, and unequivocal evidence that a boundary line by practical location was formed by express agreement. There must be more to create a boundary line by practical location than a mistaken belief as to where a property line lies: otherwise, every such mistaken belief would result in a claim of boundary line by practical location. Only where it is very clear that there has been an agreement and the required acquiescence, do the courts

uphold a finding of boundary line by practical location under the theory of express agreement.

In *Nadeau*, for instance, neighboring landowners jointly measured and located a boundary line, drove stakes into the ground, and expressly agreed that the line was the division between their lots. *Nadeau*, 125 Minn. at 366-67, 147 N.W. at 241-42. They staked the entire line, and thereafter treated the line as the true boundary line for purposes of constructing their buildings. The *Nadeau* court determined that the parties, by their acts and conduct, over ten years, established a boundary by practical location through express agreement. *Id.* There is nothing even remotely similar that occurred in the instant case.

In *Phillips*, the neighboring landowners expressly agreed to a definite point of the northeast corner dividing their lots, but did not agree on an entire boundary line. *Phillips*, 281 Minn. at 270-71, 161 N.W.2d at 527-28. The landowners planted trees four feet to the north and south of the proposed line. The *Phillips* Court found that the line itself, falling within an 8-foot space between two incomplete rows of trees and not otherwise clearly expressed by any positive act of possession, was rather ambiguous, and that the acquiescence was likewise ambiguous. *Id.* As such, the *Phillips* Court held that the ambiguous evidence of an agreement and acquiescence was insufficient to establish practical location of a boundary as a matter of law. *Id.* at 271, 161 N.W.2d at 528.

The evidence presented in this instant matter, is even less persuasive than in *Phillips*. Here, contrary to the trial court's finding of an express agreement between de Neui, Hicok, and the Zimmermans, there is no evidence that they spoke to each other

regarding the boundary line between them, or that they even marked a boundary line. The best that can be garnered from the evidence is that they mistakenly believed the Slindees' mowing line to be the boundary line. Recognition of an erroneous boundary line does not establish a practical location boundary by express agreement. *Beardsley*, 52 Minn. at 546, 54 N.W. at 742.

The trial court's conclusions of law that (1) Slindees' predecessor in interest agreed to place the boundary line between the Fritch and Slindee parcel on the western edge of the disputed area; (2) Fritch and its predecessor in interest and Slindees' predecessor in interest agreed that the boundary line between the Fritch and Slindee parcels was to be located on the western edge of the disputed area; and (4) Fritch is entitled to judgment fixing the boundary line by practical location at the western edge of the disputed area are all based upon the Finding No. 12 – that de Neui and Hicok expressly agreed with Zimmermans that the boundary line was 200 feet east of the fence. If this Court concludes that the evidence does not support the trial court's finding that de Neui, Hicok, and the Zimmermans entered into an express agreement about the boundary line, the trial court's conclusions of law that a boundary line was established by practical location must fail.

- b. To the extent an agreement could be found regarding the boundary line, it was abandoned.

Here, no facts are offered, and the court makes no findings, about when the alleged boundary agreement between de Neui and Zimmermans was reached. At most, if the alleged agreement was made when de Neui and Hicok first acquired the Slindee

parcel, the claimed agreement would have lasted only seven years (*See* Finding 9.) and then was abandoned.

The court in *Phillips v. Blowers*, determined that no practical location was established when, after eight years, the boundary line agreement was found to have been abandoned by the conduct of the parties, so that the agreement no longer existed. *Phillips*, 281 Minn. at 271-72, 161 N.W.2d at 527-28. In *Phillips*, eight years after the neighboring landowners agreed to a boundary line location, a resurvey was done by the county surveyor indicating the line was actually on one of the property owner's lot. The court found that it was apparent the agreement was abandoned after the resurvey as the defendant offered to buy the disputed piece of land, which was inconsistent with a continued agreement and acquiescence that the common boundary was along the line originally agreed to by the neighbors. *Id.*

Similar to *Phillips*, in the instant case, the conduct of the parties and their predecessors reflects abandonment of any agreement de Neui and the Zimmermans could have had. First, the inclusion of the disputed area in the conveyance of the Slindee parcel from de Neui to the Slindees, reflects that de Neui was abandoning any agreement to the property line different from the property he deeded. (A15-16, ¶ 4.) Second, the Slindees used a path from their property to the lake that ran through the disputed parcel from 2000 on, without any objections by the Zimmermans or Fritch. (A-17, ¶ 14.) Third, Fritch and the Zimmermans did not use or develop the disputed area. (A-17-18, ¶ 21.) Fourth, Fritch, through its agents, approached the Slindees and requested a deed from them to convey the disputed area to Fritch. (1/11/07 Trial Tr. pp. 125, 129, 192).

The conduct of the parties here is inconsistent with any continued agreement of an alleged boundary line and acquiescence thereafter to that line. Therefore, even if this Court upholds the finding that an initial agreement was made between de Neui and the Zimmermans regarding the boundary line, that agreement was abandoned in 2000.

2. There is insufficient use and no possession by Fritch or its predecessors to demonstrate the required acquiescence necessary to establish a boundary line by practical location after an agreement has been reached.

In the present case, the record is lacking any evidence to substantiate the required acquiescence necessary to establish a practical location boundary line by agreement. To prevail under the theory of practical location of a boundary line by agreement, the proponent must not only show that there was an express agreement locating the boundary line, but that, thereafter, the parties acquiesced to the boundary line created. *Nadeau*, 125 Minn. at 366, 147 N.W. at 241. Evidence of acquiescence must be “clear, positive, and unequivocal”. *Engquist v. Wirtjes*, 243 Minn. 502, 507-508, 68 N.W.2d 412, 417 (Minn. 1955).

Acquiescence is not merely passive consent to a boundary, but rather conduct or lack thereof from which assent may be reasonably inferred. *Engquist*, 243 Minn. at 507-08, 68 N.W.2d at 417. Acquiescence entails affirmative or tacit consent to an action by the alleged disseizor, such as construction of a physical boundary or other use \* \* \*.” *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. Ct. App. 1987). Some action, such as erecting a barrier or making use of the land is required, or there can be no acquiescence:

Although possession of the land is not a prerequisite to establishing acquiescence in a boundary, the disseizor must take some action to demarcate an actual boundary by erecting a barrier or making some use of

the land; otherwise there is no identifiable boundary in which the disseized can acquiesce. *Pratt Investment Co. v. Kennedy*, 636 N.W.2d 844, 849-50 (Minn. 2001); *see also Gifford*, 245 Minn. at 434-36, 72 N.W.2d at 627-28 (holding that when disseizor claimed that she labeled boundary with rocks, flowers, and iron monuments but disseized did not recognize these objects as asserting a boundary line, no boundary line was acquiesced in).

*Blanchard v. Rasmussen*, 2005 WL 2495991, 3 (Minn. Ct. App. 2005)(attached).

In this case, no evidence was introduced about any intentional physical demarcation of a boundary line, or of conduct or lack of conduct on anyone's part, which could be regarded as acquiescing to the boundary line found by the court. Any claim of possession demonstrating acquiescence is undermined by the fact that the disputed area is heavily wooded and has been left in its wild and natural state. The trial court found:

The disputed area between the two properties had virtually no use by either party. It served as a buffer area between the two parties with heavy tree and brush vegetation. The disputed area had been intended by Walter Bryant, the original owner, (Exhibit 8) to remain a wooded area for deer to feed. He desired it to be left in its wild and natural state.

(A-17-18, ¶ 21).

This Finding No. 21 is similar to the facts in *Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844, 849 (Minn. Ct. App. 2001), where the court upheld the referee's reasoning and conclusions that because the disputed land was vacant and heavily wooded, there was no possession on the part of either party to establish the boundary by practical location.

As the *Pratt* court opined:

Here, the referee concluded: The sheep rearing by John Mitchell, a predecessor in [appellant's] title, was not of a sufficient character or duration to be the clear and convincing evidence of occupation as required for adverse possession or practical location \* \* \*.

The referee further held that, because the disputed land was vacant and

heavily wooded, “there is no possession on the part of either party to constitute grounds for adverse possession or to establish the boundary by practical location.”

The referee correctly reasoned that appellant's nonuse of the disputed land was relevant to establishing a practical location by acquiescence claim. While the findings seemingly apply more toward appellant's adverse possession theory, they also refute appellant's practical location claim. For example, if appellant has not used or possessed the disputed land, respondent cannot have acquiesced to any supposed boundary...In addition, if appellant or his predecessor never substantially used or possessed the disputed territory, appellant can hardly claim that he has “relied” upon any supposed boundary for purposes of the practical location doctrine...

*Pratt Inv. Co.*, 636 N.W.2d at 849 (internal citations omitted).<sup>2</sup>

While the Zimmermans maintain they made sporadic use of the disputed area, (1/12/07 Trial Tr. at 77-83, 86-91, 98-104, 117-119), as the court determined, any claim of possession by Fritch or its predecessors “was not clearly visible from the surroundings” and was not exclusive. (A-21.) Additionally, there is no evidence that Fritch or its predecessors ever physically marked the alleged boundary line for the purpose of establishing the property line. Fritch or its predecessors never built a fence on the alleged boundary line, placed no trespassing signs on the disputed area, or took any other action to keep people off the disputed area. (1/12/07 Trial Tr. p. 102, ll. 3-12.) Like *Pratt*, the trial court here found that the disputed area was heavily wooded and unused by either party. (A-17-18, ¶ 21.) However, unlike *Pratt*, the trial court found that a boundary line by practical location had been established. The trial court's finding that the disputed

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<sup>2</sup> *Pratt Inv. Co. v. Kennedy* actually dealt with practical location by acquiescence but is instructive here on what is required for acquiescence to occur.

area was in a wild state and unused is inconsistent as a matter of law, with its legal conclusions that a boundary line by practical location was established.

If a party or his predecessor never substantially used or possessed a disputed area, they can hardly claim that there was reliance upon any supposed boundary for purposes of the practical location doctrine. *Pratt*, 636 N.W.2d at 849. While de Neui, Hickok and the Zimmermans may have all believed that the mow line was the boundary between them, the record is deficient in establishing any action, use, or reliance so as to prove clear, positive and unequivocal acquiescence in that line.

3. The “mow line” used by the trial court is insufficient, too irregular and imprecise to serve as a practical boundary line.

The trial court found that the “practical boundary between the Slindee property and the Fritch property, as it is now known, was the mow line...” (A-17, ¶ 15.) The evidence presented in this matter failed to clearly establish an exact, precise, legally sufficient boundary line existed. The “mow line”, referenced by the trial court and the witnesses, only extends along a short distance of the boundary line of practical location found by the court. More significantly, contrary to the court’s finding, the mow line is not coextensive with any line 200 feet from the Slindee’s west fence line.

To establish a boundary line by practical location through express agreement, the agreement must deliberately settle “the exact, precise line.” *Beardsley*, 52 Minn. at 546, 54 N.W. at 742. When a boundary line is unclear, ambiguous, or contradictory, acquiescence in a particular boundary has not been demonstrated. *Theros*, 256 N.W.2d at 858-59; *See also Phillips*, 281 Minn. at 271, 161 N.W.2d at 528. Where evidence

demonstrating an agreement, acquiescence, and even the “line itself” is ambiguous, the evidence is insufficient as a matter of law to establish a boundary by practical location. *Phillips*, 281 Minn. at 271, 161 N.W.2d at 528.

In Finding No. 15, the trial court determined that the Slindee mowing line on the east was coextensive with a north/south boundary line, which runs over 950 feet, located 200 feet east of the fence on the west side of the Slindee parcel:

Except for the path to the lake, the practical boundary between the Slindee property and the Fritch property, as it is now known, was the mow line which was consistent with the 200 foot wide lot as measured from the west fence line of the Slindee property as memorialized in the boundary line agreement of June 10, 1969. This boundary line is shown by dotted line in Exhibit 21.

(A-17, ¶ 15; A-32.) The evidence supporting this finding is unclear, contradictory, and not in any way convincing.

- a. The Slindee mow line only extends for a portion of the 950+ foot boundary line determined by the trial court.

It is undisputed that the mow line on the eastern side of the Slindee parcel does not extend the entire length of the Slindee parcel. During his testimony, Terry Freeman, a land surveyor hired by Fritch, drew a dotted line on Exhibit 21A<sup>3</sup>, which he considered to demark the Slindee mow line and the line of occupation. (1/11/07 Trial Tr. pp. 108-09; A-32.) The line he drew, however, was drawn by his recollection and admittedly, without ever having surveyed the mow line. (1/11/07 Trial Tr. p. 108, ll. 23-24, p. 143, ll. 13-21.) The mow line, as drawn by Freeman, did not run along the entire 950 +/- foot north-south

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<sup>3</sup> Trial Exhibit 21 was remarked as Trial Exhibit 21A after Terry Freeman made his notations and markings on it. (See Trial Tr. p. 134, ll. 7-13.)

axis of the Slindee parcel but ends approximately 200 feet north of the lake shore. (1/11/07 Trial Tr. pp. 108-09, p. 134, ll. 9-10; A-32.) Freeman testified that the mow line went up alongside the Slindee house and driveway, and then “kind of quit” and that the Slindees “didn’t mow all the way up this line” because it “turned into woods and brush”. (1/11/07 Trial Tr. pp. 108, ll. 3-8).

Freeman further testified that that the mow line that he drew stopped at the circular part of the driveway (1/11/07 Trial Tr. pp. 135, ll. 15-18) and no mowing was done north of the line he drew as the mowing line. (1/11/07 Trial Tr. pp. 108, ll. 3-8; 141, ll. 6-8.) He also testified that beyond the point where the Slindee’s stopped mowing, there was no visible line of occupation. (1/11/07 Trial Tr. p. 136, ll. 1-4.) Instead, there the land “turned into woods and brush”, (1/11/07 Trial Tr. p. 108, ll. 3-8), and near the north end of the property, into wetlands (1/11/07 Trial Tr. pp. 135, ll. 19-23).

The trial court found that de Neui and Hicok expressly agreed with Zimmermans that the boundary line was 200 feet east of the fence (finding 12), however, as discussed above, there is no testimony regarding any express agreement. The Zimmermans, de Neui, and Hicok simply refer to the mow line as the line they believed to be the boundary; they do not discuss any boundary line running 200 feet from the fence on the western side of the Slindee parcel.

Terry Zimmerman did not testify about any express agreement with de Neui or Hicok regarding a boundary, but only testified that it was her understanding that their property went up to the Slindee mowing line. (1/12/07 Trial Tr. p. 68, ll. 14-21, pp. 74-77.) At no point in her testimony does Mrs. Zimmerman ever mention any type of 200

foot measurement from the Slindee's fence on the west side of the Slindee parcel. In fact, Mrs. Zimmerman testifies that she does not even know how wide the disputed area is down at the lake or at the highway. (1/12/07 Trial Tr. p. 86, ll. 21-25, p. 87, l. 1.) Likewise, Mr. Zimmerman testified that he believes the Slindee mow line was the western line of their property, but never mentions anything regarding a line 200 feet from the Slindee's western fence line. (1/12/07 Trial Tr. pp. 110-22.) Similarly, Donna Hicok (de Neui) testified only that she "understood" that the mow line was the boundary between the parcels; she does not testify about any specific agreement or circumstances that led her to that understanding, nor does she mention a 200-foot measurement. (1/12/07 Trial Tr. pp. 167-74).

Of the four people that the trial court found to have made an express agreement, Mr. de Neui is the only person to mention a 200-foot measurement and he states only that he believed his property (the Slindee parcel) was 200 feet wide. (1/12/07 Trial Tr. p. 128, ll. 5-13, p. 129, ll. 12-19.) However, de Neui specifically testified that he did not have any discussions with the Zimmermans regarding the location of his east boundary line. (1/12/07 Trial Tr. p. 133, ll. 11-18.)

To establish a boundary line by practical location through express agreement, the agreement must deliberately settle "the exact, precise line." *Beardsley*, 52 Minn. at 546, 54 N.W. at 742. The entire boundary line must be agreed upon, not simply a corner or portion of the line. *See Phillips*, 281 Minn. at 270-71, 161 N.W.2d at 527-28 (finding there was no boundary by practical location through agreement when neighboring

landowners, although they expressly agreed on the corner dividing their lots, never agreed on an entire boundary line).

In this case, the evidence, at most, reflects that de Neui, Hicok, and the Zimmermans believed that the Slindee's mowing line was the boundary between the properties. However, the mowing line only extends for a fraction of the distance of the boundary line determined by the court. Even if the parties had expressly agreed that the mowing line divided their lots, as a matter of law it could not create a boundary line by practical location because an entire, precise, boundary line was never agreed to or established.

- b. The Slindee mow line is irregular and is not consistent with the boundary line determined by the court.

The testimony offered at trial demonstrates that the mow line was not coextensive with the boundary line determined by the court. Eric Slindee testified that the mow line is irregular. In some places the mow line actually extends 15 feet into the disputed area, and in other places it is up to 40 feet west of or shy of reaching the disputed area. (1/12/07 Trial Tr. pp. 215-219, 222-24).

This testimony is consistent with surveys of the Slindee parcel. In its original judgment, the trial court ordered the Slindees to survey the trail that leads from the Slindee's mow line over the disputed area to the lake. (A-11, ¶ 2.) The resulting survey supports Slindee's testimony regarding the mow line and clearly reflects that the mow line is irregular and does not run with the boundary line determined by the trial court. (A-53.) Exhibit A to the trial court's amended judgment also reflects that the mow line is

not coextensive with the boundary line. (A-26; *Fig. 1.*) Any agreement using the mow line as a boundary is, therefore, too vague and inexact to support any claim of boundary line by practical location.

The testimony of Ron Zimmerman regarding the location of a woodpile demonstrates how imprecise it is to base the practical boundary location off of the mow line that does not extend beyond the driveway:

Q. And who did that wood pile belong to?

A. It belonged to Mr. Deneui.

Q. Was that on his side of the mowing line or your side or how was that?

A. Well, you know, that was very difficult to decide because the mowing line was very [in]definite<sup>4</sup>. By the house there's grass; and if you make an extension of that line, presumably it could be on either or on both.

Where a line is not positively and precisely located, a court must refrain from finding a boundary line by practical location. *See Beardsley*, 52 Minn. at 546, 54 N.W. at 742; *Phillips*, 281 Minn. at 270-71, 161 N.W.2d at 527-28. Here the trial court found that the practical boundary between the Slindee parcel and the Fritch parcel was the mow line that the court believed was consistent with a 200-foot wide lot as measured from the west fence line of the Slindee parcel. (A-17, ¶ 15.) However, the evidence presented shows that the mow line is irregular, imprecise, and is not consistent with the boundary line determined by the trial court.

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<sup>4</sup> The trial transcript actually says: the "line was very 'definite' ", however, this was incorrectly transcribed and the transcript should say "indefinite" as is evident from the context and remainder of the quoted testimony.

4. The trial court's own findings are inconsistent with any line of practical location.

The trial court made a number of findings recognizing that the Slindees and their predecessors in title used a path located on disputed area to get to and from the lake. It is contradictory to conclude that a boundary line was expressly agreed to and acquiesced in, when the parties disputing the alleged line, as well as their predecessors, made use of the disputed area beyond that line. Yet, that is precisely what the trial court did here. Specifically, the trial court found that:

10. As a result of the boundary line agreement, the Bryants and their successors in interest continued to use the fence line as the westerly boundary and to maintain a tract extending 200 feet easterly of the boundary line agreement.

11. The only exception to this was that the Orths, owners of the Slindee property from 1980 to 1993, used a trail that went to the lake (Exhibit 6) and a second trail (Exhibits 7 and 9) that went to the property that was then owned by Ronald W. Zimmerman and Ingrid T. Zimmerman and now owned by Fritch.

\* \* \*

13. After Slindees purchased the property in 2000, they used the path from their property to the lake but did not use any other trail across the disputed property.

\* \* \*

15. Except for the path to the lake, the practical boundary between the Slindee property and the Fritch property, as it is now known, was the mow line which was consistent with the 200 foot wide lot as measured from the west fence line of the Slindee property as memorialized in the boundary line agreement of June 10, 1969. This boundary line is shown by dotted line in Exhibit 21.

(A-16-17, ¶¶ 10, 11, 13, 15.) In its discussion, the trial court again recognized that “the pathway to the lake had been used by the Orths as well as the Slindees...” (A-21.)

The trial court also found that Fritch and its predecessors did not use the disputed area. Again, these findings are inconsistent with a conclusion that a clear boundary line was established and that thereafter there was acquiescence to that boundary line.

Specifically the trial court found that:

16. The owners of the two parcels and their predecessors in interest did not use or develop the disputed property except as detailed in paragraph 11, and the disputed area served as a buffer area between the two parcels.

\* \* \*

21. The disputed area between the two properties had virtually no use by either party. It served as a buffer area between the two parties with heavy tree and brush vegetation. The disputed area had been intended by Walter Bryant, the original owner, (Exhibit 8) to remain a wooded area for deer to feed. He desired it to be left in its wild and natural state.

(A-17-18, ¶¶ 16, 21.)

It is inherently contradictory to find a line of practical location, then make an exception to that line based on the use of paths located over that line, (A-16-17, ¶¶ 11, 13, 15) and then find that the disputed area was virtually not used (Findings 16 and 21). These contradictions are further evidence that a mistake has been made by the lower court in concluding that a boundary line by practical location was established. Whether the findings of fact support a particular legal conclusion is a question of law subject to de novo review. *Pratt Inv. Co.*, 636 N.W.2d at 848.

**II. THE TRIAL COURT ERRED IN GRANTING FRITCH A PORTION OF THE SLINDEE PARCEL ON THE BASIS OF EQUITY WHERE THE DECISION WAS CONTRARY TO LAW AND THE COURT FOUND THE EQUITIES EQUAL**

Based on its view that the equities between the parties were equal (A-20-21), the lower court dissiezed the Slindees of record title to the disputed area and awarded it to Fritch (A-23, ¶ 1). The court erred in awarding the disputed area to Fritch on an equitable basis where the decision was not supported by the facts or law, and where the equities actually favor the Slindees.

The Slindees acknowledge the court's inherent authority to utilize equitable powers in appropriate circumstances. *Swogger v. Taylor*, 243 Minn. 458, 462, 68 N.W.2d 376, 381 (Minn. 1955). But "one may not seek a remedy in equity when there is an adequate remedy at law." *Southtown Plumbing, Inc. v. Har-Ned Lumber Co.*, 493 N.W.2d 137, 140 (Minn. Ct. App. 1992). Also, district court's decision to grant equitable relief is not unlimited and must be supported by the facts and law. *Claussen v. City of Lauderdale*, 681 N.W.2d 722, 726 (Minn. Ct. App. 2004)(citing *Lindell v. Lindell*, 150 Minn. 295, 299, 185 N.W. 929, 930 (1921)). A common maxim is he who seeks equity must do equity. *Lindell*, 150 Minn. at 299, 185 N.W. at 930. "In applying the maxim a court is invested with no arbitrary discretion; that is, a judge may not impose conditions which in his individual opinion would work substantial justice between the parties. Plaintiff may only be required to do that which fixed legal principles make it his duty to do." *Id.* Where there is equal equity the law must prevail. *Benson v. Saffert-Gugusberg Cement Constr. Co.*, 159 Minn. 54, 59, 198 N.W. 297, 299 (1924). Whether a party has

an adequate remedy at law is a legal question that this court reviews de novo. *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 305 (Minn. 1996).

Despite the court here believing the equities between the parties were equal, it wrongfully granted Fritch a portion of the Slindee parcel on the basis of equity. (A-20-21.) The equities between Fritch and Slindee are not equal, however, and the case should have been decided as a matter of law in favor of the Slindees.

**A. The trial court's equitable decision to grant Fritch a portion of the Slindee parcel was not based upon the facts or the law.**

The trial court granted Fritch a portion of Slindees' deeded property on the basis of having found a boundary line by practical location through express agreement. (Conclusions 1-4).

A reading of the court's Principals of Law and Discussion, however, evidences that its award to Fritch was based on the trial court's opinion of justice, rather than law.

The trial court states:

Slindees do not deserve the disputed property because they have received exactly what they bargained for when they purchased their property, i.e. a parcel 200 feet in width. Fritch believed it was purchasing the property up to the practical location, which has been set out in the findings the Court has made. However, Fritch still received more land in terms of acreage than it believed it was purchasing.

(A-20.)

A district court's decision to grant equitable relief is not unlimited and must be supported by the facts and law. *Claussen*, 681 N.W.2d at 726. The trial court's opinion that the Slindees are undeserving of the property deeded to them is not relevant to the legal principals regarding a finding of boundary line by practical location. Because the

trial court's award of the disputed area was based upon its opinion of justice rather than the facts and the law, its decision to grant Fritch the disputed area must be reversed.

**B. The trial court erred in granting Fritch's claims on the basis of equity where the equities are in favor of Slindees.**

The trial court erred in granting Fritch the disputed area because Fritch was not a good faith purchaser and the equities favor the Slindees. The trial court gave Fritch more land in terms of acreage than Fritch believed it was purchasing (A-20), only because Fritch's predecessor believed the property line extended to the area of practical location (A-17, ¶ 20). The trial court ignored that Fritch and its predecessors had both constructive and implied notice of the true property line between the properties.

1. Fritch was not a good faith purchaser as it had constructive notice of the true property line between the Fritch and Slindee properties.

The Minnesota Recording Act is contained in Minn. Stat. §507.34; and provides in relevant part:

Every conveyance of real estate shall be recorded in the office of the county recorder of the county where such real estate is situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any part thereof, whose conveyance is first duly recorded..."

Under the Minnesota Recording Act, a purchaser in "good faith," is one who gives consideration without actual, implied or constructive notice of inconsistent outstanding rights of others. *Clafin v. Commercial State Bank of Two Harbors*, 487 N.W.2d 242, 247-48 (Minn. Ct. App. 1992). "Constructive notice is a creature of statute and, as a matter of law, imputes notice to all purchasers of any properly recorded instrument even

though the purchaser has no actual notice of the record.” *Anderson v. Graham Investment Co.*, 263 N.W.2d 382, 384 (Minn. 1978).

The Slindee deed was recorded in the Office of the Cass County Recorded on November 3, 2000, as document #430232. (A-15-16, ¶ 4.) The deed reflects the eastern boundary of the Slindee parcel as being 200 feet east of the western line of government lot 8. (*Id.*) Fritch did not purchase the Fritch parcel until two years after the Slindee deed was recorded. (A-14-15, ¶ 1, A-40-41.) Fritch not only had notice of the true property line by the Slindee deed but also by its own deed, which reflects that the western boundary ends 200 feet short of the western boundary line of government lot 8. (*Id.*)

Fritch, by the recorded Slindee deed and by its own deed, had constructive notice of the property line between the Fritch and Slindee properties. The court erred in allowing Fritch to claim title to the disputed area when record title to the disputed area was in the name of the Slindees, regardless of what Fritch claimed the Zimmerman’s informed C. Fritch about the boundary line. It is inequitable to grant Fritch land that it had notice belonged to another when it purchased its parcel.

2. Fritch had implied notice of Slindees’ ownership of the disputed area before Fritch purchased the Fritch parcel as the Slindee path was clearly visible.

Even absent the notice provided by the Slindees’ recorded deed, Fritch had notice of Slindee’s use of the disputed area, preventing it from being a good faith purchaser. One is not a “bona fide purchaser”, if one has knowledge of facts which ought to have put one on inquiry that would have led to knowledge of an unrecorded conveyance. *Clafin*, 487 N.W.2d at 248. One is not a “bona fide purchaser” entitled to protection of recording

act, though it paid a valuable consideration and did not have actual notice of a prior unrecorded conveyance from the same grantor, if it had knowledge of facts that ought to have put it on an inquiry that would have led to knowledge of such earlier conveyance. *Henschke v. Christian*, 228 Minn. 142, 146-47, 36 N.W.2d 547, 550 (Minn. 1949).

In the instant case, the court found that the Orths, successors to the Bryants, used two trails that extended from the Slindee lawn east onto the disputed area of their property (A-16, ¶ 11) and that Slindees used one of those trails (A-17, ¶ 14). Use of the trail by the Orths was not inconsequential. The Orth family placed a dock at the end of the trail that led to the lake. There they kept a variety of boats and fish, swam and engaged in other water activities. (See Trial Ex. 10). While de Neui denies using this trail during the time that he and Hicok owned the Slindee parcel, he admits that it was visible during the time he owned the Slindee parcel. (1/12/07 Trial Tr. p. 135, ll. 13-25, p. 136, ll. 1-5, p. 159, ll. 8-19.) The Slindees used this trail when they purchased their property. (A-17, ¶ 14.) The distance from the southeast corner of the Slindee lawn where the path begins to its point of terminus is 87 feet long. (1/12/07 Trial Tr. p. 192.) The only place the trail leads is to and from the Slindee's yard and the disputed lakeshore. (1/19/07 Trial Tr. p. 6, ll. 15-20.) Its only purpose is to enable passage from the Slindees yard to the disputed lakeshore. Chris Fritch admits seeing this trail the first time he inspected the Fritch parcel before purchasing it. (12/19/07 Trial Tr. pp. 71, 77.) Yet Fritch never asked about the trail, or who used it or under what right. He who comes into equity must come with clean hands. *Hruska v. Chandler Assocs., Inc.*, 372 N.W.2d 709, 715 (Minn. 1985).

Under the law, Fritch is charged with the obligation to have made reasonable inquiry about the trail. "Implied notice has been found where one has actual knowledge of facts which would put one on further inquiry." *Clafin*, 487 N.W.2d at 248 (internal citations omitted). "A party dealing with real estate of which another is in the actual possession, is bound to make inquiries of the occupants, and to ascertain the nature and extent of their interests. The legal presumption is that he will make these inquiries, and he is estopped to deny that he made them." *Flowers v. Germann*, 211 Minn. 412, 417-418, 1 N.W.2d 424, 428 (Minn. 1941)(internal citations omitted).

Given the existence of the lakeshore trail over the disputed area, Fritch, cannot be regarded as a good faith purchaser of the Zimmerman property. Regardless of what C. Fritch was told or was not told by Terre Zimmerman about where the boundaries were, he was under a duty to ascertain the Slindees' use and possession of the property. Had he done so, as the law presumes he must, he would have discovered the Slindees' claim of title.

Being charged with the obligation to have discovered the Slindee's ownership of the disputed area, both by their record title and the historic use of the lake path located there, it is inequitable to have stripped the Slindees of their record ownership of the disputed area.

3. The equities between the parties are not equal, but favor the Slindees.

The result of this case does not treat the parties equitably. Fritch will suffer no financial loss from its development if the court leaves the parties with their respective record titles. Fritch purchased the Fritch parcel from the Zimmermans for \$470,000. (A-

42.) Consistent with the purchase agreement and the half-section map, Fritch advised its financing bank that the parcel was 12 acres and contained 487 feet of lakeshore. (A-35.) Fritch estimated to that bank that the undeveloped appraised value would come in at \$635,000. (A-36.) Fritch has already sold two lots that have netted it in excess of its \$470,000 original investment. Additionally, it has recouped a sum in excess of \$80,000 from claims it made against the surveyor, Landecker, (Trial Ex. C) and still has one more lot to sell, which is larger than the two lots already sold.

If the Court's judgment is left to stand, Fritch will have acquired almost 13 acres and 640 feet of shoreline, while the Slindees will have lost record title to the disputed area and their property area will, thereby, be reduced to less than 4.2 acres (due to the angle that the highway runs to the north). The trial court recognized that by its judgment Fritch received more land in acreage than it believed it was purchasing. (A-20.)

If the Court were to leave the parties where they were before this litigation - that is, leave the Slindees with their record title, and leave Fritch with its record title - Fritch will still have gained more than it bargained for. In that case, Fritch will in fact, own title to 533 feet of lakeshore, an increase of over 44 feet more of shoreline than is shown on the half-section map for the Fritch parcel. (A-39A; 1/12/07 Trial Tr. pp. 37-39.) Where the parties are equally at fault, the doctrine of *in pari delicto* bars recovery of one party in favor of another and the court will leave the parties as they were. *State by Head v. AAMCO Automatic Transmissions, Inc.*, 293 Minn. 342, 347, 199 N.W.2d 444, 448 (1972). Here, where the trial court determined that neither party is deserving of complete relief, it erred in failing to leave the parties as they were. (A-21.)

**C. The trial court erred in granting Fritch the disputed parcel where it determined the equities of the parties' were equal.**

Even though, Fritch was not a good faith purchaser of the disputed area, and the equities are in favor of the Slindees, the trial court stated that in its view, the parties' equities' are equal. (A-20.) Despite this, the trial court granted Fritch a portion of the property deeded to Slindees stating that the "Slindees do not deserve the disputed property..." (*Id.*) The court then found that Fritch still received more land in terms of acreage than it believed it was purchasing. (*Id.*)

Where there is equal equity the law must prevail. *Benson*, 159 Minn. 54, 198 N.W. 297. Here, the trial court erred in making an equitable decision to grant Fritch a portion of the Slindee parcel, where it determined that the equities of the parties are equal.

**III. THE TRIAL COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT FRITCH'S CLAIM FOR REFORMATION OF THE DE NEUI/SLINDEE DEED MUST FAIL AS A MATTER OF LAW.**

In its memorandum in the amended judgment, the court contends:

Fritch asks the Court to reform the de Neui/Slindee deed...The Court did not address this issue because the Court felt its decision was dispositive of the issues before it. Although the Court could have decided this issue, it has chosen not to because de Neui is not a party to this action.

(A-25.)

The Slindees respectfully contend that the lower court erred in failing to find and conclude that Fritch's claim for reformation of the de Neui/Slindee deed must fail as a matter of law. A district court may reform a written instrument if the party requesting the reformation proves with "clear and consistent, unequivocal and convincing" evidence the following: (1) there was a valid agreement between the parties expressing their real

intentions; (2) the written instrument failed to express the real intentions of the parties; and (3) this failure was due to a mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party. *Nichols v. Shelard Nat'l Bank*, 294 N.W.2d 730, 734 (Minn. 1980).

The Slindees deny that any mistake has occurred and there is no claim that they engaged in any fraud or inequitable conduct. Fritch has offered no facts substantiating a valid agreement that expressed any intentions contrary to the unambiguous deeds that conveyed the Slindee parcel to the Slindees and the Fritch parcel to Fritch. (A-31, A40-41.) Nor has Fritch demonstrated that there was any written agreement that failed to express those intentions, nor that there was any mutual mistake or unilateral mistake, which the Slindees somehow used to their advantage. The fact is that the Slindee deed includes the disputed area that was shown by de Neui to have been part of the Slindee parcel and the Fritch deed does not.

The proponent of reformation must demonstrate not only that a mistake was made, but must also submit clear proof of the actual agreement between the parties. *Theros*, 256 N.W.2d at 857. Reformation is, therefore, generally allowed only against the original parties to an instrument and those in privity with the original parties. *Manderfeld v. Krovitz*, 539 N.W.2d 802, 805 (Minn. Ct. App. 1995).

Fritch is not a party to the original deed between de Neui and Slindee and de Neui is not a party to this action. While Fritch attempts to insert himself into the chain of title by having obtained a deed to the disputed parcel from de Neui and Hicok (Trial Ex. 103), this deed is dated long after this controversy arose and amounts to nothing more than a

desperate and transparent attempt to skirt the requirement that Fritch be in actual privity. The deed is nothing more than a sham. First, it is a quit claim deed without warranties; second, there was no consideration for the deed; third, the deed conveyed nothing as de Neui and Hicok had already conveyed the property to the Slindees with warranties; and fourth, the sole purpose of the deed was not to actually convey the described property, but rather to make it appear as if Fritch were in privity with Slindee. (1/12/07 Trial Tr. p. 145, ll. 17-25, p. 146, ll. 1-23.) This desperate effort must be rejected as must Fritch's claims. There is simply no support for Fritch's claims to reform a deed to which it was neither a party or in genuine privity. The deed conveying real estate from de Neui to Slindee cannot be reformed in an action to which the sellers are not parties. *Watson v. Chicago, M. & St. P. Ry. Co.*, 46 Minn. 321, 328, 48 N.W. 1129, 1131 (Minn. 1891).

#### **IV. THE SLINDEES ARE ENTITLED TO TRESPASS DAMAGES**

The Slindees contend that the court erred in failing to award them trespass damages. Trespass encompasses any unlawful interference with one's person, property, or rights, and requires only two essential elements: a rightful possession in the plaintiff and unlawful entry upon such possession by the defendant. *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 792-93 (Minn. Ct. App. 1998) (citations omitted).

Trespass to trees is a separate tort than trespass to realty and the statutory penalty for intentional wrongful removal of trees is treble damages. Minn. Stat. § 561.04, in relevant part, provides:

Whoever without lawful authority cuts down or carries off any wood, underwood, tree, or timber, or girdles or otherwise injures any tree, timber, or shrub, on the land of another person ... is liable in a civil action to the owner of such land ... for

treble the amount of damages which may be assessed therefor, unless upon the trial it appears that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's ... in which case judgment shall be given for only the single damages assessed.

Thus, where a landowner's trees were bulldozed and buried without his consent, the landowner was awarded, both treble damages for the trespass to his trees and punitive damages for the trespass to his land. *See Muehlstedt v. City of Lino Lakes*, 473 N.W.2d 892 (Minn. Ct. App. 1991).

In the instant case, Fritch admitted that it authorized the entry onto the Slindees' property to brush out the disputed area. (1/11/07 Trial Tr. p. 71.) This trespass diminished the shade, the aesthetics, the sheltering view, and the seclusion that the Slindees enjoyed before the trespass. (1/11/07 Trial Tr. pp. 73-85.)

Roger Rutt, a consulting forester, testified on behalf of the Slindees that the replacement damages sustained as a result of Fritch's trespass, amounted to in excess of \$11,430. (1/11/07 Trial Tr. p. 87, Trial Ex. 25.) Replacement value is the proper damage valuation as the trees removed by Fritch created a screen to the surrounding property and added aesthetic value to the Slindee parcel. *See Rector, Wardens and Vestry of St. Christopher's Episcopal Church v. C. S. McCrossan, Inc.* 306 Minn. 143, 146, 235 N.W.2d 609, 611 (1975). In *C.S. McCrossan*, the court said that the proper measure of damages for alleged negligence on part of road contractor in suffocating roots of shade trees located on plaintiffs' church property was the replacement cost of trees rather than the value of real estate, notwithstanding inability of plaintiffs to prove that destruction of trees diminished value of property as a whole, where trees not only acted to screen area

from heavy traffic on two sides, but gave area a natural, pleasing, aesthetic, wooded atmosphere. *Id.* at 146, 235 N.W.2d at 611.

At a minimum, the Slindees should receive judgment against Fritch in the amount of the \$11,430 damages established by Rutt. Since Fritch trespassed at a time when it knew that the Slindees were challenging its claims to the disputed area, under Minn. Stat. §561.04, the Slindees are justifiably entitled to an award of treble the amount of damages found by Rutt.

### CONCLUSION

The trial court erred in finding a boundary line by practical location. The record lacks clear and convincing evidence demonstrating that an express agreement about a boundary line was reached, that there was acquiescence to any alleged line, or that there was even a clear boundary line.

The trial court further erred in granting Fritch the disputed parcel on an equitable basis where the decision was contrary to law and the court found the equities equal.

Accordingly, the Slindees respectfully request that this Court reverse and remand this matter to the trial court to quiet title to the disputed parcel in the Slindees' name and to award the Slindees trespass damages. The Slindees are also seeking to have this Court adjudge that Fritch's claim for reformation of the de Neui/Slindee deed fails as a matter of law.

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

Dated: April 9, 2008



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Mark E. Greene (#37461)  
Sarah L. Krans (#0338989)  
The Colonnade, Suite 1200  
5500 Wayzata Boulevard  
Minneapolis, Minnesota 55416  
(763) 546-1200

*Attorneys for Appellants*