

Appellate Court Case No. A08-303

STATE OF MINNESOTA  
IN COURT OF APPEALS

Eric J. Slindee and Jerilyn A. Slindee,

Appellants,

vs.

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,

vs.

Landecker & Associates, Inc.,  
a Minnesota corporation,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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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).

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## ADDITIONAL LEGAL ISSUES

- II. **The trial court has clearly determined that Eric Slindee did not present any credible evidence at trial and the findings properly reflect that determination.**

Trial Court Held: The findings of the trial court clearly show that the testimony presented by Eric Slindee was without credibility and granted it no weight.

Apposite cases:

*General v. General*, 409 N.W.2d 511 (Minn. App. 1987).

*In re Welfare of L.A.F.*, 554 N.W.2d 393 (Minn. App. 1996).

- VI. **Because the trial court correctly found for Fritch on other grounds, the trial court did not need to address the issue of reformation. However, if the issue of reformation were to be addressed, the de Neui/Slindee deed should be reformed to correct the mistake in legal description.**

Trial Court Held: The trial court did not address this issue in its findings and conclusions.

Apposite cases:

*Fritz v. Fritz*, 102 N.W. 705 (Minn. 1905)

*Manderfield v. Krovitz*, 539 N.W.2d 802, 805 (Minn. App. 1995)

*Theros v. Phillips*, 256 N.W.2d 852, 857 (Minn. 1977)

- VII. **Where no clear and convincing evidence was presented regarding the continuous use of a path across the disputed area, and no clear and convincing evidence was presented regarding the location of the path, the trial court erred in awarding Slindee an easement for use of the path in law or equity.**

Trial Court held: The trial court granted Slindee an easement for a path across the disputed area.

Apposite cases:

*Bergh and Mission Farms, Inc. v. Great Lakes Transmission Co.*,  
565 N.W.2d 23 (Minn. 1997)

*Block v. Sexton*, 577 N.W.2d 521 (Minn. App. 1998)

*Doering v. Doering*, 629 N.W.2d 124 (Minn. App. 2001)

*Kleis v. Johnson*, 354 N.W.2d 609 (Minn. App. 1998)

*Kornberg v. Kornberg*, 542 N.W.2d 379, 387 (Minn. 1996)

*Jacobsen v. \$55,900 in U.S. Currency*, 728 N.W.2d 510 (Minn. 2007)

## STATEMENT OF THE CASE

The major issue on appeal is the trial court's award of a parcel of land known as the "disputed area" to Fritch Investments, LLC (hereinafter "Fritch") based on a finding of a boundary line by practical location. At trial, Eric and Jerilyn Slindee (hereinafter "Slindee") and Fritch presented very different versions of the facts surrounding this boundary line. The trial court's findings largely side with Fritch's recitation of the facts, and therefore the trial court apparently awarded Slindee's testimony little weight.

In 2002, Fritch purchased a parcel of property on Mule Lake in Cass County, Minnesota. Fritch intended to develop the property, and in the process of planning the development, had a survey done in 2002 by Landecker & Associates (hereinafter "Landecker"). The survey showed some irregularity between the lot lines of Fritch's parcel and Fritch's neighbor to the west, Slindee. The survey did not affect in any way the land that Slindee had thought he purchased and thought he owned for over two years. In order to correct this irregularity, Fritch attempted to have Slindee sign a corrective deed to resolve the error. However, Slindee used the survey on an opportunity for a potential windfall. Slindee started this action to involve the judicial system in his land grab, and Fritch has been forced time and again to defend himself and attempt to hold onto the land that he purchased.

This matter was tried on January 11 and January 12, 2007 in Cass County, Minnesota, before Judge John P. Smith. The trial court issued an order finding a

boundary line by practical location, awarding Fritch the disputed area and denying Slindee any damages for trespass to trees. The court also granted concessions to Slindee that severely impaired the usability of the disputed area for Fritch, granting a “buffer zone” on the disputed area and granting Slindee an easement for a trail across the disputed area. Based on the court’s decision, Fritch rightfully wound up as the owner of the disputed area but the court chose to subject it to such encumbrances that its use and value were completely diminished.

The order was challenged by both parties, 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, the trial court set forth the legal description of Slindee’s path easement and reduced the “buffer zone” to thirty feet in width.

Fritch then brought another motion for amended findings, conclusions and order or for new trial, challenging the location of the path easement that Slindee provided. On December 21, 2007, the trial court denied Fritch’s motion for amended findings.

The Slindees have now brought this appeal.

#### **STATEMENT OF ADDITIONAL FACTS**

Fritch concurs with the facts as presented in Appellant Slindee’s brief, and offers these additional facts:

**A. The properties at issue.**

Fritch offers no additional facts under this section.

**B. The parties.**

Eric Slindee holds a bachelor's degree in management from Augsburg College. (1/11/07 Trial Tr. p. 27, ll 10-14). Eric Slindee holds a master of business administration degree from the University of Minnesota. (1/11/07 Trial Tr. P. 27, ll 15-17). Eric Slindee worked as an industrial engineer and production engineer for Ford Motor Company. (1/11/07 Trial Tr. p. 27, ll 19-24).

Chris Fritch is not an experienced residential developer, and this was his first development project. (1/11/07 Trial Tr. p. 244, ll 16-22).

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

Fritch offers no additional facts under this section.

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

There remains a question over who owns the western boundary agreement area. It is undisputed that Walter Bryant and Gilbert Norman agreed to shift the boundary line between their two properties as referenced in their boundary line agreement. (Trial Ex. 81, A-35). Walter Bryant sold his property to his son, Ted Bryant who sold it to Robert Orth in 1980. Robert Orth then sold the parcel to Dean de Neui in 1993. (1/11/07 Trial Ex. 105, A-41). Dean de Neui sold the parcel to Slindee in 2000. (1/11/07 Trial Ex. 5, A-34). Each of these deeds and transfers failed to include the property covered by the boundary line agreement. As such, Gilbert Norman or his descendants would still be the record owner of the

parcel of land covered by the boundary line agreement. (1/11/07 Trial Tr., p 257, ll 11-20). Paul and Patricia Norman, Gilbert's descendants, deeded that parcel of land to Fritch. (1/11/07 Trial Tr., p. 255, ll 22-25; 1/11/07 Trial Ex. 102, A-38).

**E. Conveyances of the Slindee Parcel.**

Fritch offers no additional facts under this section.

**F. Conveyances of the Fritch Parcel.**

Fritch offers no additional facts under this section.

**G. The disputed area.**

Fritch offers no additional facts under this section.

**ARGUMENT**

**I. Standard of Review**

Findings of fact of a district court are not to be set aside unless clearly erroneous. Theros v. Phillips, 256 N.W.2d 852 (Minn. 1977). "Findings of fact ... shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. The district court's determination of a boundary line is a factually determination, which is accorded the same deference on appeal as any other factual determination. Allred v. Reed, 362, N.W.2d 374, 376 (Minn. App. 1985).

In this case, the district court had the best opportunity to judge the credibility of the witnesses. The findings in favor of Fritch were all supported by

evidence that was clear and convincing. As such the conclusions of law drawn from those findings were not erroneous. In such a case, the district court's findings should not be disturbed on appeal.

However, as discussed in Section VII, infra, the award of an easement for a path to Slindee is not supported by clear and convincing evidence. In such a case, clear error has occurred, and the findings of the district court should be reversed.

**II. The trial court has clearly determined that Eric Slindee did not present any credible evidence at trial and the findings properly reflect that determination.**

A district court is in a superior position to assess the credibility of witnesses. In re Welfare of L.A.F., 554 N.W.2d 393, 396 (Minn. App. 1996). On review, the court of appeals must defer to the trial court's assessment of witnesses and the weight given to their testimony. General v. General, 409 N.W.2d 511, 513 (Minn. App. 1987).

In the present case, it is important to understand that the court's findings reflect the complete lack of credibility given to Eric Slindee's testimony. The simple fact is that Eric Slindee knew he bought 200 feet of property, thought he owned 200 feet of property and maintained 200 feet of property for four years, never making any claim for anything else, until he stumbled across the windfall created by the Landecker & Associates survey in 2002. This greedy attempt to grab land and the complete lack of credibility on the part of Slindee is best reflected in his own testimony:

Q: But you thought it would be two hundred feet, more or less?  
A: Yeah.  
...  
Q: And a legal description to the property you thought you were purchasing appeared on that title opinion; is that correct?  
A: It had the legal description on there, yes.  
Q: And it started out by reciting that you were getting the westerly two hundred feet of a parcel that then has a lengthy metes and bounds description?  
A: Yes.  
...  
Q: And take a look at Exhibit 2. Does that appear to be your title insurance policy?  
A: It looks like it is.  
Q: And several pages into the title policy is a legal description that's called Schedule C. It's about four pages in.  
A: Yes.  
Q: And it starts out the westerly two hundred feet of the following described premises.  
A: Yes.  
...  
Q: Because you thought you were getting two hundred feet, correct?  
A: That's what it said on my deed.  
...  
Q: And if you look at Exhibit 3, that's the cover page of the abstract to title to your property?  
A: Yes.  
Q: That also refers to two hundred feet of property, does it not?  
A: Yes.  
...  
Q: And you are making a claim today to this Court that you own more than two hundred feet?  
A: Yes.

(1/11/07 Trial Tr. p. 44, ll 24-25; p. 45, ll 10-16; p. 50, ll 11-16, ll 24-25; p. 51, ll 3-7; p. 52, ll 22-24).

That testimony by Eric Slindee on the morning of the first day of trial set the tone for the rest of the trial. The court apparently did not take anything said or done by Eric Slindee after that point to be credible. The court was clearly able to

see this matter for what it was: a greedy attempt at a land grab by Eric Slindee. As the court clearly found Slindee's case to be without credibility, the findings by the trial court in favor of Fritch are clearly appropriate. The findings in favor of Fritch should be affirmed.

**III. The trial court correctly concluded that a boundary line by practical location was formed by express agreement.**

- a. When clear and convincing evidence is presented that adjoining landowners have made an agreement with regards to a boundary line, the trial court was correct in awarding judgment in favor of Fritch for a boundary line by practical location.**

The determination of a boundary is a question of fact, and must be afforded the same deference as any other factual determination. Wojahn v. Johnson, 297 N.W.2d 298, 303 (Minn. 1980); Allred v. Reed, 362 N.W.2d 374, 376 (Minn. App. 1985). Again, findings of fact of a district court are not to be set aside unless clearly erroneous. Theros v. Phillips, 256 N.W.2d 852 (Minn. 1977). A boundary by practical location can be established by an express agreement of the parties claiming the land on both sides of the line. Id. at 857. The agreement must be proven by clear and convincing evidence. Theros, Id. at 857. Clear and convincing evidence is unequivocal, uncontradicted and intrinsically provable and clear. Deli v. University of Minnesota, 511 N.W.2d 46 (Minn. App. 1994).

The findings of the trial court clearly show that the trial court found sufficient facts to award a boundary by practical location. Specifically, the court stated in its factual findings:

2. [the Fritch] parcel was owned by Ronald W. Zimmerman and Ingrid T. Zimmerman from 1978 until 2002, a period of 24 years.
9. The Slindee property was sold by Walter Bryant to Robert Orth in 1980, to Dean de Neui in 1993 and to Slindees in 2000...
12. ... de Neui and Hickok expressly agreed with Zimmermans that the boundary line was 200 feet east of the fence, i.e. the west boundary of the disputed property.
15. ... the practical boundary between the Slindee property and the Fritch property...was the mow line which was consistent with the 200 foot wide lot as measured from the west fence line of the Slindee property...

(9/17/07 Amended Findings, pp. 3-5, RA-17, 18, 19).

The testimony presented at trial is clearly sufficient to support the factual findings of the trial court. Dean de Neui testified that the mowing line was observed as the eastern boundary of his property, now the Slindee property:

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

A: Yes.

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

A: Yes.

(1/12/07 Trial Tr. p. 132, ll 3-6; p. 135, ll 9-12.)

Ronald Zimmerman also testified that there was a mutual agreement between Dean de Neui and Ronald Zimmerman:

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

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

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

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. 114, ll 6–10, ll 14-19.)

In this case, both de Neui and Zimmerman unequivocally testified that they had agreed that the boundary line was the mow line. This evidence is incapable of contradiction by Slindee. The plainly-stated testimony could not be clearer. Slindee struggles at length in his brief to concoct reasons why this evidence is not unequivocal and uncontradicted. Slindee admits the parties “observed” or “recognized” this line as the boundary, but then tries to claim that “observed” or “recognized” is distinguishable from “agreeing”, which they are not. When parties have observed or recognized a boundary line, they have agreed to it.

The two adjoining landowners plainly state that the 200 foot line, as physically marked by the mowing line, was their agreed-upon boundary line. The district court has also agreed that this was their agreed-upon boundary line. Nothing can be more clear and convincing than that. The finding in favor of Fritch on boundary line by practical location should be affirmed.

- b. When clear and convincing evidence is shown that the landowners on either side of a boundary have acquiesced in that line for a period of not less than seven years, the trial court correctly found a boundary had been established by practical location.**

A boundary line can be established by practical location through express agreement. Theros v. Phillips, 256 N.W.2d 852, 858 (Minn. 1977). If the agreed line is based on an error between the parties, an additional requirement of acquiescence is possibly added to the express agreement. Beardsley v. Crane, 54 N.W. 740, 742 (Minn. 1893).

Slindee's brief incorrectly states "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." and cites Beardsley, supra, for this proposition. In fact, Beardsley holds exactly the opposite, that an erroneous belief **can** be the basis for establishing a boundary:

"Evidence of what is called a 'practical location' of the boundaries of real property is often competent in cases of controversy respecting division lines...the erroneous line must have been agreed upon between the parties claiming the land, on both sides thereof, and afterwards acquiesced in..."

Beardsley, 54 N.W. at 742.

The line de Neui, Zimmerman and their predecessors agreed upon as the boundary was based on a long series of errors in recorded instruments. Despite the claims of Slindee's brief, Beardsley does **not** limit a boundary involving an erroneous line to practical boundary by estoppel. Id. Beardsley merely adds an additional element of acquiescence, but admits that the time period for acquiescence must be determined on a case-by-case basis. Id.

As stated above, all the elements for formation by express agreement were found by the trial court and are supported by the plain testimony. The only issue

remaining was whether there was acquiescence in this line for a sufficient amount of time, and that amount of time is to be decided on a case by case basis.

When neighboring landowners agree on a boundary, there is no fifteen year requirement. Nadeau v. Johnson, 147 N.W. 241, 242 (Minn. 1914); Ampe v. Lutgen, 2007 WL 2034381 (Minn. App.); Blanchard v. Rasmussen, 2005 WL 2495991 (Minn. App.) The courts have not been clear on what the time requirement for acquiescence is, but consistently agree that it is less than fifteen years. Nadeau, 147 N.W. at 242.

The court clearly found that there was acquiescence for a sufficient amount of time. In the trial court's conclusions, it states:

2. Fritch and its predecessor in interest and Slindee's 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.

(9/17/07 Amended Findings, p. 10, RA-24)

Fritch and its predecessor in interest (Zimmermans) have owned the parcel since 1978. Slindee's predecessor in interest (de Neui) owned the Slindee parcel for seven years. Therefore, the trial court has concluded there was acquiescence in that boundary line for at least seven years.

In addition to the previously outlined testimony of de Neui and Zimmerman, the testimony of Terre Zimmerman at trial clearly supports the court's conclusions

- Q: Prior to the time you moved to Florida, what was your residence and your occupation?
- A: We owned [the Fritch parcel] for 24 years and we worked the resort.

- ...
- Q: And have your various neighbors to the west, now the Slindee property, mowed a lawn from time to time over the years, have they kept a mowed lawn?
- A: Yes.
- Q: And has that been consistent from 1978 until 2002?
- A: Yes.
- Q: Mowed to essentially the same dimensions or the same boundary?
- A: The same line, yes.
- ...
- Q: Was there such a thing as the mowing line where the various owners of that home had mowed up to that line since 1978?
- A: That's always been the mowing line, yes.
- Q: And over the time you owned the property, did you have an understanding as to where the west boundary line of your resort property was located?
- A: Yes.
- Q: And what was your understanding of where the west boundary line of where your resort property was located?
- A: We went right up to that mowing line.
- ...
- Q: Without telling me what they were, do you know whether you had any specific discussions or not with Mr. Robert Orth as to where that boundary line was located?
- ...
- A: Okay. Yes.
- ...
- Q: And did you have some discussions with Mr. Dean de Neui as to where that boundary line was located?
- A: Yes.
- Q: And did you continue to believe that that west - - that that mowing line was your west boundary line during the years that Mr. Orth and then Mr. de Neui owned the property?
- A: We always believed that, yes.

(1/11/07 Trial Tr. p 65, ll 14-16; p 67, ll 6-16; p 68, ll 10-21; p 73, ll 19-22; p 74, ll 1-10)

In the present case, there is ample evidence to substantiate the required acquiescence necessary to establish a practical location boundary line by agreement. Terre Zimmerman testified that from 1978 through 2002, the owners

of the Slindee parcel to the west of the disputed area have always mowed their lawn just up to a point on the western edge of the disputed area. The line was agreed upon as long as Terre Zimmerman owned the land, at least twenty-four years.

Furthermore, Slindee has not provided one piece of evidence or testimony to show that de Neui, Zimmerman or their predecessors **did not** acquiesce in this line as their boundaries. Until the survey done in 2002, there was not one single doubt that the mow line was the boundary line.

In addition, as set out above, de Neui and Zimmerman have testified that they have always observed the mowing line as their boundary line. de Neui and Zimmerman were neighbors for seven years. In this case, based on the testimony of the parties, the trial court found that the length of time that de Neuis, Zimmerman, and their predecessors acquiesced in the boundary line was sufficient to conclusively establish the line.

Slindee attempts to use Nadeau, 147 N.W at 241, to show that de Neui and Zimmerman did not have the requisite activities to establish their boundary line by practical location. However, Nadeau is easily distinguishable. In Nadeau, the dispute was between the two landowners who supposedly created the boundary by practical location. Id. The plaintiff in Nadeau claimed that no such boundary existed, the defendant claimed otherwise. Id. The court was then forced to analyze their actions in detail to determine whether a line existed. Id.

In this case, the two landowners who created the boundary both agreed, and continue to agree, that the west boundary of the disputed area was their property line. Because of their clear testimony on their agreement, there was no need to go into further detail on the activities behind the creation of the line. The only way Nadeau would be applicable to this case is if the dispute in this case was between Dean de Neui and the Zimmermans.

Slindee also attempts to use Phillips v. Blowers, 161 N.W.2d 524 (Minn. 1968), to show that the agreement between de Neui and Zimmerman was not specific enough to establish a boundary. Again, Phillips is easily distinguishable. In Phillips, the key piece of evidence that the court looks at is that the landowners who supposedly created the boundary had a survey done and thereafter abandoned the agreed upon boundary line. Id. The court determined that the other evidence presented did not outweigh the abandonment and therefore made the agreement vague. Id.

In this case, the two landowners who created the boundary both agreed, and continue to agree, that the west boundary of the disputed area was their property line. There is not any shred of evidence that either landowner abandoned this property line at any time. The only way Phillips would be applicable to this case is if de Neui and Zimmerman had abandoned their agreement at some time prior to selling to Slindee and Fritch.

- c. **When no evidence has been presented to show that the actions of landowners on either side have intended to abandon a boundary line by agreement, the trial court's finding of a boundary by practical location must be upheld.**

The Court must not consider issues raised for the first time on appeal. See Steenberg Constr. v. Rohr, 207 N.W.2d 722, 723 (Minn. 1973). Slindee has not raised the issue that the boundary line was abandoned in any of his pleadings. In fact, Slindee did not argue or address the issue of abandonment in any way prior to the appeal. This issue has been raised for the first time on appeal. Therefore, this issue is not properly before this Court.

However, **even** if this issue were to be considered, there is no evidence in the record to support a finding of abandonment. No case law cited by Slindee provides the standard for determining when a boundary line is abandoned. Slindee cites Phillips, 161 N.W.2d at 527-28, for the proposition that between the landowners who agreed upon the line, a survey was done showing the proper boundary line, and thereafter an offer to buy the disputed area was made. This conduct was inconsistent with the landowners' original agreement, and the court found the line to be abandoned.

In this case, there is **nothing** in the record to suggest that the landowners who agreed upon the line, de Neui and Zimmerman, ever had such a survey done, ever had such an offer to purchase, or ever contemplated that the line was abandoned. In fact, as shown in their testimony above, quite the opposite is true. To this day, de Neui and Zimmerman still agree that the western edge of the

disputed area is the boundary between the two properties. There are no facts to support a finding of abandonment.

- d. The trial court correctly found that the boundary had been established at a point 200 feet from the west line of the Slindee property, physically marked by the mow line, buildings and the fence on the west side of the property.**

The Court must not consider issues raised for the first time on appeal. See Steenberg Constr. v. Rohr, 207 N.W.2d 722, 723. (Minn. 1973). Slindee has not previously raised the issue of the “mow line” being too irregular and too imprecise to serve as a practical boundary line. This issue has been raised for the first time on appeal. Therefore, this issue is not properly before this Court.

However, were the Court to consider this issue, the evidence and legal precedent is sufficient to establish the mowing line as a boundary by practical location. A mowing line can be sufficient to establish a boundary by practical location on a portion of property. Ampe, 2007 WL 2034381 (Minn. App.). The purpose of the requirement for demarcating the boundary or erecting the barrier is so that there is an identifiable boundary in which the two parties can acquiesce. Pratt Inv. Co. v. Kennedy, 636 N.W.2d 844, 849-50 (Minn. App. 2001). The basic requirement is that the line be known, definite, certain and capable of ascertainment. Fishman v. Nielsen, 53 N.W.2d 553, 557 (Minn. 1952).

Slindee’s discussion on this point misses the mark. The trial court did not find that the mow line was the boundary. Instead, the trial court found that the

boundary was a line 200 feet from the west line of the Slindee property. In its findings, the trial court specifically states:

15. ... 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...

(9/17/07 Amended Findings, p. 5, RA-19)

The trial goes on to elaborate on that point in its discussion, stating “Up to [the time of the survey] the practical location was established by the mow line, the building locations and the fence line on the west boundary of the Slindee property. The boundary location was “clear, positive and unequivocal.” (9/17/07 Amended Findings, p. 9, RA-23).

The trial court clearly found that the mow line, the building locations and the reference point of the western fence were sufficient to mark the agreed upon boundary line. The mow line runs on or near the 200-foot line for a large portion of the useable area of the Slindee property, with the remainder being dense wooded land. The fence on the western side serves as the reference point for the remainder of the 200-foot boundary line. As was testified by Terre Zimmerman, Dean de Neui and Ron Zimmerman, supra, adjoining landowners on both sides for at least twenty-four years knew that the mow line and the building locations were the physical manifestations of the 200-foot line.

The important fact here is not that there was a mowing line that did not run the entire length of the boundary line. It is just necessary that the line be known,

definite, certain and capable of ascertainment. The parties had a line on the ground that marked their understanding of the boundary line. The court clearly agreed with them, finding a known, definite, and certain line 200 feet from the western fence of the Slindee property.

- e. **By making findings that Fritch was the rightful owner and that Slindee had trespassed on that parcel by way of a path to the lake, the trial court's findings are entirely consistent.**

As stated previously, the trial court made a determination supported by the facts and the law that a boundary line had been formed by practical location at the western edge of the disputed area. Furthermore, the trial court awarded Slindee an easement for a path located over the disputed area. The validity of the findings regarding the path are further explored in section VII of this brief, infra.

The findings regarding Fritch's ownership of the disputed area and Slindee's use of a path are entirely consistent. Essentially, the court has found that Fritch's testimony was credible and correctly awarded the property is titled in Fritch; however, the trial court also chose to recognize Slindee's trespass on Fritch's property and, in a concession to Slindee, awarded him an easement for a path across Fritch's property. In fact, this is exactly what the trial court states in its order, granting an "easement" to Slindee. (9/17/07 Amended Findings, p. 11, RA-25).

Slindee attempts to argue that the court cannot establish a boundary by practical location and then make a finding that the property was not used or

developed. Slindee does not cite any authority for this point. Just because Slindee decides to make a statement of legal principle does not make it so.

The elements for establishing a boundary by practical location have been set forth above. There is no requirement that land be used and developed in order for a boundary by practical location to be established. The mere facts that the parties had agreed where the boundary lay and then acquiesced in that boundary are sufficient to establish the line, whether or not the property was developed. See, e.g., Theros, 256 N.W.2d at 858; Nadeau, 147 N.W. at 242; Beardsley, 54 N.W. at 742.

- IV. After determining the parties were of equal equities, the trial court properly awarded Fritch the disputed area based on application of the law of boundary by practical location.**
- a. After making findings of an agreed upon boundary line and sufficient time of acquiescence, the trial court's award of the disputed area to Fritch was proper under the law.**

Slindee apparently takes the position that the only reason the district court granted the property to Fritch was "equity". The trial court's "Discussion" states: "In the Court's view, the equities are equal". (9/17/07 Amended Findings, p. 8, RA-22). That sentence is not the basis for the court's findings. After finding equal equities, the trial court goes on to make awards based soundly in the law. The district court's "Conclusions of Law" clearly show a sound basis for awarding Fritch the disputed area based on boundary by practical location, not based on equity. (9/17/07 Amended Findings, p. 10, RA-24).

Slindee quotes this passage from the trial court's "Discussion" to support his claim that Fritch was granted the disputed area on the trial court's opinion of justice:

"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."

(9/17/07 Amended Findings, p. 11, RA-25).

However, nothing in that passage says the disputed area was granted to Fritch on the basis of justice. On the contrary, it explicitly says that the land was granted to Fritch on the trial court's finding of a boundary by practical location. Furthermore, the passage explicitly says, "Slindees do not **deserve** the disputed property". (Emphasis added).

Slindee lived on his parcel for two years thinking he owned only a 200-foot lot (1/11/07 Trial Tr. p. 50, ll 11-16, ll 24-25). Slindee mowed that 200-foot lot, occupied that 200 foot lot and never made a claim for anything more. However, once Slindee found out about the 2002 Landecker survey, he realized for the first time that he could try to make a claim for part of Fritch's property, which has now become known as the disputed area. (9/17/07 Amended Findings, #19, RA-19).

Fritch did not buy his land based on shoreline or acreage. He went out and walked the property with the owners and his realtor, saw the parcel, and made an offer (1/11/07 Trial Tr. p. 241, ll 17-25; p. 242, ll 1-12). Fritch bought a visual

parcel, not a specific amount of shoreline. Fritch was visually aware of exactly what he was purchasing, and was not certain on the exact measurements. (1/11/07 Trial Tr. p. 243, ll 15-17). At one point, he was told the parcel had 640 feet of shoreline. (1/11/07 Trial Tr. p. 245, ll 10-14). At one point, he was told the parcel had 487 feet of shoreline. (1/12/07 Trial Tr. p. 13, ll 21-23). At one point he was told the parcel had 402 feet of shoreline. (1/12/07 Trial Tr. p. 22, ll 3-5). It was clear that Fritch was not concerned with the measurements of his property; he knew the parcel he was buying.

The fact that Fritch was visually aware of what he was purchasing is key. In terms of equity, by awarding Fritch the disputed area, Fritch gets **exactly** what he thought he was buying at the time of purchase. Furthermore, by awarding Fritch the disputed area, Slindee still owns **exactly** what he thought he was buying at the time of purchase. The court did not find Slindee's greedy claim that he owned more than he thought he was buying to be credible, and that is why the trial court found in favor of Fritch.

- b. Because overwhelming evidence was presented that Slindee knew he only owned a 200 foot lot, the trial court was correct in finding that Slindee did not deserve the disputed property.**

The trial court again and again referenced the 200 foot lot that transferred from Orth to de Neui to Slindee. In fact, the court mentions the 200 feet **twenty-five** times in its findings (see 9/17/07 Amended Findings, RA-15). It is clear that the trial court found this fact overwhelmingly persuasive. As stated in Section II,

supra, this is the critical fact to the entire dispute. In its findings, the trial court states:

5. At the time of the purchase, Slindees intended and knew they were purchasing a parcel of real estate 200 feet wide measured from the west fence line of the Slindee property.
8. Slindees were given a sketch (Exhibit 18) at closing that showed the 200 feet they were purchasing as being the 200 feet east of the boundary line as established between Gilbert Norman and Walter Bryant dated June 10, 1969, filed June 19, 1969 as document #193357.
9. The Slindee property was sold by Walter Bryant to Robert Orth in 1980, to Dean de Neui in 1993 and to Slindees in 2000 using a metes and bounds description that described a parcel 200 feet in width...
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.
19. Until Landecker & Associates did the surveying [in 2002] on the Fritch property, Slindees did not assert ownership over the disputed area. They believed their 200 feet was as measured from the fence line as described in the boundary line agreement.

(9/17/07 Amended Findings, p. 4, 5, RA-18,19).

The trial court only mentioned Fritch's mistaken belief about the acreage he was purchasing once in its findings. The court was clearly aware that Fritch was purchasing his property based on visual boundaries as opposed to measurements. It is clear the trial court awarded far more weight to Slindee's knowledge that he was purchasing 200 feet in making its findings and conclusions.

**i. Slindee has erroneously interpreted the “good faith purchaser” doctrine and the doctrine has no application to this case.**

Again, the Court must not consider issues raised for the first time on appeal. See Steenberg Constr. v. Rohr, 207 N.W.2d 722, 723. (Minn. 1973). Slindee has not previously raised the issue of Fritch not being a good faith purchaser of the Zimmerman property. In fact, Slindee did not argue or address the issue of good faith purchaser in any way prior to the appeal. This issue has been raised for the first time on appeal. Therefore, this issue is not properly before this Court.

Slindee has taken the issue of whether someone is a good faith purchaser and turned it on its head, backwards and inside out. A “purchaser in good faith” defense would be raised by a buyer to defend against claims that he had acquired title with notice of any other interests in the property. Minn. Stat. § 507.34; Clafin v. Commercial State Bank of Two Harbors, 487 N.W.2d 242 (Minn. App. 1992).

In this case, Slindee could only use a “purchaser in good faith” defense to defend against claims that he had acquired his title with notice of other interests in his property. It is not available for Slindee to impute upon Fritch.

**ii. Fritch’s knowledge of a small, barely-used and overgrown path on the disputed area does not rise to the level of knowledge needed to provide a Fritch with actual notice of another’s interest.**

Again, the Court must not consider issues raised for the first time on appeal. See Steenberg Constr. v. Rohr, 207 N.W.2d 722, 723. (Minn. 1973). Slindee has not previously raised the issue of Fritch not being a good faith purchaser of the Zimmerman property by virtue of actual notice. In fact, Slindee did not argue or address the issue of good faith purchaser in any way prior to the appeal. This issue has been raised for the first time on appeal. Therefore, this issue is not properly before this Court.

However, were this Court to consider this issue, Fritch would still prevail. Chris Fritch has admitted that he saw a path in the disputed area to the lakeshore. Slindee's brief makes large mention of this fact. Slindee then makes the assertion that merely seeing a path in the woods is sufficient to give Fritch actual notice of Slindee's supposed ownership interest in the disputed area. Slindee cites three cases for this proposition. However, a reading of the cases shows them to be clearly distinguishable.

In Henschke v. Christian, 36 N.W.2d 547 (Minn. 1949), the potential buyer testified at trial that he had actual notice before signing a contract for deed. In Clafin v. Commercial State Bank of Two Harbors, 487 N.W.2d 242 (Minn. 1992), the subject property was a two-story home in which a party was actually and openly possessing. In Flowers v. Germann, 1 N.W.2d 424 (Minn. 1941), the object providing actual notice was a "large cement barn".

These three cases that Slindee cites are clearly decided on different facts. In this case, Chris Fritch saw a dirt trail running through dense woods. No one

was on the trail at the time, and no one had made claim that they use the trail. This is clearly not the same situation as admitting actual notice, failing to notice open and actual possession of a two-story house or seeing a large concrete barn on the premises. No evidence was presented at trial to suggest that the Fritch's viewing of a small, barely-used and overgrown trail was somehow sufficient to place him on notice of another's interest. The facts in this case simply do not rise to a level sufficient to find that Fritch had actual notice of Slindee's claimed ownership.

- c. Where the potential gain or loss to Fritch in this transaction is irrelevant to the award of the disputed area, and insufficient testimony and evidence was presented on this matter the trial court properly did not consider financial gain or loss in its findings.**

Slindee attempts again to raise the economics of the transactions of the various Fritch parcels. In response to a line of questioning by Mr. Greene, the trial court ruled that economics were not relevant:

(By Mr. Greene)

Q: All right. And you sold Lot 2 for approximately \$235,000, correct?

A: Yeah, right around there, yes, I believe so.

Q: And again, it was a vacant lot?

MR RUFER: I'll object on grounds of relevance. I'm not sure of the economics and what they have to do with this lawsuit.

THE COURT: Sustained.

(1/12/07 Trial Tr. p 22, ll 15--25; p 23, ll 1--6)

Plaintiffs improperly raise the issue of economic gain or loss to the defendant. Despite it having no relevance at trial or on appeal, Slindee attempts to

paint the picture that the court somehow failed to sympathize with Slindee because he may not gain financially from this result. In doing so, Slindee uses an incomplete record to reach the conclusion that Fritch will suffer no financial loss from his development if Fritch is not awarded the land that is rightfully his. Slindee uses limited information from the purchase agreement, a bank estimate and a previous settlement to come up with the conclusion that Fritch will suffer no financial loss. Slindee does not present any information regarding costs of development, including lot preparation, surveying, legal fees, and other related expenses. Fritch did not present any evidence regarding financial gain or loss because it was not relevant to the record. There is no way to infer from the current record whether Fritch would have made or lost money from this development.

Slindee's discussion of economic equity is improper in this memorandum when it was ruled to be without relevance by the trial court. If economic equity becomes an issue the matter would have to be remanded for further testimony before it could be decided.

- V. The trial court correctly found in favor of Fritch on the issue of trespass to trees, as Slindee did not put on sufficient evidence to support a finding of damages.**
- a. **Slindee is not entitled to damages for trespass to trees because he did not provide sufficient evidence to show that he is entitled to replacement cost, nor did he provide any evidence regarding diminution in value.**

The longstanding rule that the proper measure of damages for damage to trees is the difference in land value resulting from the damage to the trees. Ballion

v. Carl Bolander & Sons Co., 235 N.W.2d 613, 614 (Minn. 1975). In very rare circumstances, the measure of damages will be the replacement cost of the damaged trees. Id. To be entitled to replacement cost, it must be established that the damaged trees had some sort of aesthetic or ornamental value. Id. Replacement cost is not proper when the trees are "...for the most part, ill-formed, unattractive and of little intrinsic value..." Id. at 615.

The court, in its findings, specifically states that the trees in the disputed area were without value.

21. The disputed area between the two parties had virtually no use by either party. It served as a buffer area between the two parties with heavy tree and brush vegetation...
22. Slindees suffered no financial loss nor did they lose any trees on the property they owned.

(9/17/07 Amended Findings, p. 5-6, RA-19,20).

Slindee's own expert, Roger Rutt, provided evidence that shows the trees are not ornamental and have not been planted for any specific purpose:

- Q: And the vegetation that was removed here, you didn't find any evidence that anybody had planted any of that vegetation, any of those trees or shrubs, did you?
- A: Not that I could discern. I didn't see any planted trees as far as I know.
- Q: And you didn't see any evergreen trees of any kind that had been cut or removed; is that right?
- A: I could not find any evergreen trees.
- Q: When you work with private parties who are interested in sheltering their view or sheltering the sound as you mentioned, don't they often include some evergreen trees in their plans here in northern Minnesota?
- A: Sometimes, yes.

Q: And that's because when you have deciduous trees such as what was brushed here, you only have a screen, if you have on at all, for the summer months basically; is that right?

A: Maybe, maybe not. There are shelter belts that incorporate deciduous trees and evergreens.

Q: But no evergreens here?

A: as far as I could tell there was no evergreens.

Q: And no shelter belt that anyone had planted or anything like that?

A: I would say no.

Q: When you hear about logging, you hear the term clear cutting. What happened here wasn't what you would call clear cutting was it?

A: No. Clear cutting would be removal of all trees.

Q: And I gather from your report and your photos that all the trees of three inches of diameter and above remained undamaged; is that right?

A: Yes. As far as I could see.

Q: And there are probably dozens if not hundreds of trees on the disputed area, is that correct?

A: Yes.

Q: And these remaining trees would provide shade?

A: Yes.

(1/11/07 Trial Tr. p 91, ll 14-24; p 92, ll 16-25; p 93, ll 1).

Slindee did not present any evidence to show that the scrub trees removed by Fritch had any aesthetic or ornamental value. Therefore, the replacement cost of these trees is clearly not the proper measure of damages.

In addition, no evidence was offered at trial to claim that the tree damage diminished the value of the disputed area in any way. Neither Slindee nor Rutt expressed an opinion on the value of the real estate prior to or after the removal of the scrub brush trees. The opinions Rutt did offer on valuation of the individual trees were completely lacking in accuracy.

Q: In your report you have done the damages calculation that you've told us about. And when you reported fore instance on the black ash

trees, some of those trees that you counted and observed were quarter inch saplings; is that right?

A: Yes.

Q: And some of them were no taller than one foot in height?

A: That's correct.

Q: And when you calculate your dollar replacement cost, you use a blanked figure of sixty dollars per tree for the black as?

A: Yes.

Q: But obviously if you went to a nursery and you wanted to buy a one quarter inch black ash, one foot in height, they wouldn't charge you sixty dollars for that, would they?

...

A: Probably not.

Q: You can order saplings from the Soil and Water Conservation Service where you can buy trees kind of in the sapling stage for eighty-five cents a tree, can't you?

A: You can buy bare root stock, yes.

(1/11/07 Trial Tr. p 93, ll 2-14, 17-21).

Rutt priced all removed trees based on their value as "nursery trees". Rutt made no adjustments for the smaller trees, many of which he acknowledged can be purchased for \$0.85 per tree.

Slindee had the burden of proof on his tree damage counterclaim, and introduced no relevant evidence to support his claim. Slindee offered no evidence regarding the ornamental value of the trees; nor did Slindee offer any value of the land before and after the tree removal. Slindee did not meet his burden, and cannot be awarded any damages for trespass to trees. The judgment in favor of Fritch should be affirmed.

- b. Slindee is not entitled to treble damages because he has not shown any compensable damage to trees and Minn. Stat. 561.04 is not applicable to Fritch.**

Minn. Stat. § 561.04 states as follows:

Whoever without lawful authority cuts down...any wood, underwood, tree or timber...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 therefore, 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 his own*, in which case judgment shall be given for only the single damages assessed.

(emphasis added)

As stated above, Slindee did not present sufficient evidence at trial to establish any compensable damages for the trees removed by Fritch. Therefore, application of the statute is moot.

However, even if Slindee had proved damages, the trial court's findings clearly show that Fritch had probable cause to believe that the land on which the tree cutting took place was its own. Therefore, Minn. Stat. 561.04 does not apply to the actions by Fritch, and treble damages are not available.

**VI. As the trial court correctly granted Fritch the disputed area on the basis of boundary line by practical location, the trial court also properly did not decide the issue of reformation. However, if the trial court had decided this issue, the evidence supports a conclusion that the de Neui/Slindee deed should be reformed to correct a mutual mistake.**

The trial court did not need to reach a decision on the issue of reformation because it had already awarded Fritch the disputed area on other grounds. This Court also does not need to decide the matter of reformation at this time because it is clear that the judgment in favor of Fritch should be affirmed. In the event this Court should decide to reverse the district court's finding of a boundary line by practical location, then the issue of reformation would come before this Court.

The facts and testimony in favor of Fritch's claim for reformation are even stronger than for a finding of boundary by practical location. In that chance, the decision of the lower court should be affirmed on the grounds of reformation.

It is obvious that Slindee is trying to preempt this issue from being decided by this Court by stating under the Legal Issues in its brief: "The trial court chose not to address the issue because de Neui (a party to the deed) was not a party to the action". (Slindee Appellate Brief, p. 1). Not so. The lower court does not make one mention of reformation, except for to briefly state that it had not addressed the issue in any way. The district court certainly does not indicate it failed to decide the matter based on the involvement of Dean de Neui.

Based on the facts as presented at trial, the deed must be reformed as a matter of law. In order for reformation to occur, the following must be proven: 1) there was a valid agreement between the parties expressing their real intentions; 2) the written instrument allegedly evidencing the agreement failed to express the real intentions of the parties; and 3) the failure was due to a mutual mistake of the parties. Theros v. Phillips, 256 N.W.2d 852, 857 (Minn. 1977); Fritz v. Fritz, 102 N.W. 705 (Minn. 1905).

The court made the following findings of fact:

3. Eric and Jerilyn Slindee, hereinafter Slindees, purchased a lake home on the north shore of Mule Lake in Cass County on November 1, 2000, from Dean A. de Neui and Donna K. Hicok.
4. The deed was recorded in the Office of the Cass County Recorder on November 3, 2000, as document #430232. The deed provided that they were purchasing 200 feet...

8. Slindees were given a sketch at closing that showed the 200 feet that they were purchasing as being the 200 feet east of the boundary line as established between Gilbert Norman and Walter Bryant dated June 10, 1969, filed June 19, 1969 as document #193357.
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.
19. Until Landecker & Associates did the surveying on the Fritch property, Slindees did not assert ownership over the disputed area. They believed their 200 feet was as measured from the fence line as described in the boundary line agreement.

(9/17/07 Amended Findings, p. 3-5, RA-17, 18, 19).

The trial court's finding #3 and #4 clearly show there was a valid agreement between de Neui and Slindee for the sale of 200 feet of land, running westerly from the east boundary of the disputed area. The trial court's finding #8 clearly shows that the written instrument as described in finding #4 failed to express the true intentions of the parties. The trial court's findings #10 and #19 clearly show that this failure was due to a continuous mutual mistake of fact.

Slindee argues that reformation is not proper because Fritch was not party to the de Neui/Slindee transaction. "Reformation is ... generally allowed only against the original parties to an instrument and those in privity with the original parties". Manderfield v. Krovitz, 539 N.W.2d 802, 805 (Minn. App. 1995).

Due to the mistake in the original de Neui/Slindee deed, Fritch has obtained a deed to a parcel of land that was the intention of Slindee to purchase, but

because of the deed did not purchase, and Fritch now is a party who can properly request reformation of the de Neui/Slindee deed.

Slindee erroneously bases his argument that Defendant does not have standing for reformation on the deed that Fritch obtained from de Neui and Hicok for the disputed parcel. (Trial Ex. 103, RA-40). Slindee yet again completely ignores the deed that Fritch obtained for the parcel of land between the Muscari fence line and the west line of Government Lot 8. (Trial Ex. 102, RA-38). This land was not included in Slindee's deed, and has remained in Bryant's name dating back to the boundary line agreement. Any reformation of the deed has to include this parcel, as awarding this parcel to Slindee will reflect the true intentions of the parties. Fritch now owns an interest in the parcel adjoining the Muscari property, and by such ownership, owns an interest in land affected by the deed to be reformed. Therefore, Fritch clearly has standing to raise the issue of reformation.

The court's findings clearly support a finding of reformation by law. Furthermore, the evidence and testimony presented at trial grants Fritch standing to request reformation of the de Neui/Slindee deed.

**VII. Because Slindee has not presented clear and convincing evidence regarding a easement or the location of the path, the district court erred in awarding Slindee an easement for a path across the disputed area.**

The district court grants Slindee an "easement" for a path across the disputed area in its findings (9/17/07 Amended Findings, p. 11, RA-25). The

district court does not elaborate on its finding of an easement, leaving two options: despite not expressly saying so, the court may have awarded Slindee a prescriptive easement; or the court may have decided to use its equitable powers to grant Slindee the “easement”.

- a. **When no clear and convincing evidence was presented to show that a path had been continuously used for the required period, and no clear and convincing evidence was presented to conclusively establish the location of the path, the trial court erred in awarding an easement for use of a path across the disputed area.**

An easement can be granted expressly. Bergh and Mission Farms, Inc. v. Great Lakes Transmission Co., 565 N.W.2d 23 (Minn. 1997). An easement can be granted through necessity. Kleis v. Johnson, 354 N.W.2d 609 (Minn. App. 1984). An easement can be granted by prescription. Block v. Sexton, 577 N.W.2d 521 (Minn. App. 1998). The record contains no facts to remotely infer that an easement was expressly granted to Slindee. The record contains no facts to remotely infer that the easement awarded to Slindee was a necessity. Even though the trial court did not state it was awarding an easement by prescription, that is the most likely reason for its decision. However, the facts simply do not support such an award.

To be awarded an easement by prescription, a claimant must prove, through clear and convincing evidence, that he used the easement for the prescriptive period of 15 years. Block, 577 N.W.2d at 521. A party that has the burden at the

inception of trial carries that burden throughout the trial. Minn. R. Evid. 301; Jacobson v. \$55,900 in U.S. Currency, 728 N.W.2d 510 (Minn. 2007).

At no place in the record of this case does Eric Slindee establish that the path across the disputed area was used continuously for 15 years. In fact, Dean de Neui plainly testified that he “never” used the path during the time he lived there, from 1993 – 2000 (1/12/07 Trial Tr. p 135, ll 13–23) At best, Slindee has established that something on the disputed area was used for an unknown amount of time prior to de Neui’s occupation and for the four years that Slindee owned the property prior to trial.

Furthermore, Slindee has not established the location of the path through clear and convincing evidence. The trial testimony all generally describes an approximate location of a path. There were no reference lines, physical markers or legal descriptions offered to show the location of the path. To reinforce this point, the path as it exists today is quite different than the path as it existed at the inception of litigation.

During trial, the testimony all referenced a path across the disputed area as it had existed at least since the time the Zimmermans had owned it, a period of twenty-four years.

Terre Zimmerman testified that a path had existed, but had become unrecognizable by the time they sold the property:

Q: Okay. All right. And then there was a path that was visible when you bought your property that was located on the disputed area, correct?

A: Yes.

...

Q: And that path was still visible when you sold your property, wasn't it?

A: It was visible but not –

Q: Thank you.

A: -- to this extent.

Q: Mrs. Zimmerman, when Mr. Greene asked you about whether the picture was accurate at the time of purchase, and you said, "Can I say something else" what did you want to tell us?

A: The picture he showed me, he said was Mr. Slindee's dock and that path. When we bought the resort, yes, that path was very similar to that because the Bryants used it a lot. All right. Then after that, no one really used the path anymore. When we sold the resort, you could always tell there had been a path but it was pretty well overgrown but you could still see there was a path, and that's all I wanted to say.

(1/12/07 Trial Tr. p 87, ll 14–17; p 88, ll 12–16; p 104, ll 19-25; p 105 ll 1-6)

Dean de Neui testified that he had never used the trail:

Q: here's been some testimony during this proceeding about a trail that led down to the lake from the southeast corner, what you understood to be your property?

A: Yeah.

Q: Are you familiar with a trail that goes down?

A: Yes.

Q: Okay, and did you make it a practice to use that trail?

A: Never.

...

Q: And why didn't you use that trail?

A: It was steep and there was poison ivy down there at the time and I knew it wasn't my property.

(1/12/07 Trial Tr. p 135, ll 13–23; p 136, ll 3–5).

Slindee has since moved, improved, widened and lengthened the path, and submitted to the trial court a survey showing the location of this new path.

(12/19/07 Trial Ex. #122, RA-43). Dean de Neui testified that the path now

“looks like a highway” compared to when he lived there. (12/19/07 Hearing Tr. p. 40, ll 4). Rusty Lillyquist testified that the path had been mowed, raked, built up with sand and patio blocks had been put in for steps. (12/19/07 Hearing Tr. p. 62, ll 12-14). Mr. Lillyquist further testified that this trail was not there at the time Fritch bought the property. (12/19/07 Hearing Tr. p. 62, ll 15-17). Despite all of the evidence to the contrary, the court accepted this new survey and granted Slindee an easement for the newly-created path. (9/17/07 Amended Findings, p. 11, RA-25).

Slindee has not provided clear and convincing evidence as to the exact location of the path. Without clear and convincing evidence that the path has been used continuously across the disputed area for 15 years, no prescriptive easement can be granted. Without clear and convincing evidence as to the location of the path, no prescriptive easement can be granted. Without evidence as to any other type of easement, no easement can be granted. The finding of the lower court granting Slindee an easement across the disputed area should be reversed.

- b. **When the court has found that the equities between the parties are equal, the law must prevail, and when Slindee has presented no clear and convincing evidence to support the establishment of an easement, the law does not support a finding of an easement across the disputed area.**

A district court’s decision to grant equitable relief is not unlimited and must be supported by the facts and the law. Claussen v. City of Lauderdale, 681 N.W.2d 722, 726 (Minn. App. 2004). Where there is equal equity the law must

prevail. Benson v. Saffert-Gugusberg Cement Constr. Co., 198 N.W. 297, 299 (Minn. 1924).

As stated above, the Court has found the equities of the parties to be equal: “In the Court’s view, the equities are equal.” In such case, the Court’s decisions must not be based in equity, but the law must prevail. In this case, the district court has granted Slindee an easement for a path either on the basis of a prescriptive easement or on the basis of what the district court felt was an equitable decision. However, as stated in Section VII.a., supra, the law does not support a finding of an easement for the path on the basis of a prescriptive easement. When, as in this case, the equities are equal, the district court’s decision must be based in law. If the law does not support a finding of a prescriptive easement, the court’s equitable powers cannot support such a finding either.

### CONCLUSION

The trial court correctly found the testimony presented by Appellant Slindee to be without little weight or credibility. As a result, the trial court was correct in finding that a boundary line by practical location had been established on the western edge of the disputed area. The trial court was further correct in awarding the disputed area to Respondent Fritch.

The trial court was correct in not reaching the issue of reformation as the issue had already been decided on the grounds of boundary by practical location.

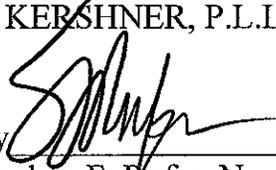
The trial court erred in finding that Slindee was to be awarded an easement for a path across the disputed area when no clear and convincing evidence was

presented to show that the path had existed for the required amount of time, nor was clear and convincing evidence presented regarding the precise location of the path.

Accordingly, Respondent Fritch respectfully requests that this Court affirm the district court's holding that finds a boundary by practical location and awards the disputed area to Fritch. Furthermore, Fritch respectfully requests that, should this Court reverse on grounds of boundary by practical location, that this Court find that the de Neui/Slindee deed be reformed to reflect the true legal description of the Slindee parcel. Finally, Fritch respectfully requests that this court reverse the trial court's holding that Slindee is entitled to an easement for a path across the disputed area.

Respectfully submitted,

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