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COURT OF APPEALS CASE A08-517
STATE OF MINNESOTA
IN COURT OF APPEALS

Jack H. Gabler,
Richard A. Fredricks, and
Patricia A. Fredricks,
Appellants,

vs.

Elizabeth Fedoruk and Stanley Fedoruk,
Respondents.

APPELLANTS' REPLY BRIEF

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REPLY ARGUMENT

Factual findings by district court have not been appealed

Neither appellants nor respondents have appealed the findings of fact made by the district court. Neither party ordered a transcript of the trial because the district court's findings are not contested.

Respondents did not file a Notice of Review as required by Civ.App.P. Rule 106 to raise new issues.

Respondents filed a Statement of the Case in which they do not dispute any of the district court's findings. Respondents' Statement of the Case essentially mirrors the appellants' Statement of the Case, except that it replaces "as a matter of law" with "abuse its discretion." Respondents' restatement of the issues goes only to the standard of review, nothing more. It does make the district court's findings of fact an issue.

Accordingly, respondents' brief is irrelevant to the extent it argues the evidence that led to the uncontested findings of fact.

Standard of Review

The standard of review is de novo because there are only legal issues on appeal. Appellants' Brief, 13. The application of law to stipulated facts is a question of law, which this court reviews de novo. *Morton Bldgs., Inc. v. Comm'r of Revenue*, 488 N.W.2d 254, 257 (Minn. 1992).

Respondents argue that all equitable cases must be reviewed by an abuse of discretion standard. Respondents' Brief, 9. Respondents cite one case to support this position: *Commercial Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772 (Minn. App. 2006).

Abuse of discretion is the standard of review only if the district court's equity findings of fact are disputed. The factual findings, of course, are not the issue in this appeal. Rather, the only issues are whether the district court made errors of law. Errors of law are reviewed de novo when the facts are not in dispute. *Morton Bldgs., Inc. v. Comm'r of Revenue*, 488 N.W.2d 254, 257 (Minn. 1992). This should be the rule whether the case is at law or in equity.

Commercial Assocs., Inc. v. Work Connection, Inc., 712 N.W.2d 772 (Minn. App. 2006) does not hold that all equity cases are always subject to an abuse of discretion review. Rather, in Commercial Assocs the Minnesota Court of Appeals used an abuse of discretion standard because the district court's choice of equitable remedies turned on whether the findings of fact supported the district court's conclusions. Abuse of discretion would be an appropriate review standard, whether in law or in equity, when the appellate court is reviewing whether the District Court's conclusions are supported by the factual findings.

That is not the case in this appeal. Instead, the district court found that appellants were entitled to a remedy, boundary by practical location, but then failed to award that remedy. A boundary by practical location is the only recognized remedy that follows a finding that a party is entitled to a boundary by practical location. Creating a new remedy is an error of law subject to *de novo* review.

That Commercial Assocs turns on the relationship between the findings of fact and conclusions of law is pivotal, and therefore mentioned often in the opinion. The district court is the trier of fact in determining the amount of fee forfeiture for breach of a fiduciary duty. Commercial Assocs at 778. The district court in Commercial Assocs. was permitted by previous settled law to select a remedy on a sliding scale. The determinative factor was the degree of misconduct, a factual finding. "The thrust of *Perl III* is that the trier of fact has discretion to consider the degree of misconduct in determining the amount of the fee forfeiture." Commercial Assocs at 780. "Under *Perl III,* the district court must initially determine whether the total or scaled-fee-forfeiture

rule applies by considering whether there was actual fraud or bad faith, and actual harm. Commercial Assocs at 780.

The district court was called on in Commercial Assocs to make a factual finding it did not make and then to elect a remedy from a sliding scale. "Without the requisite findings, we have no basis on which to review the district court's decision for an abuse of discretion." Commercial Assocs at 780.

Commercial Assocs is distinguishable from the present appeal. In the present appeal the district court found the appellants proved their case for a boundary by practical location. That is the finding of fact. The district court erred as a matter of law in not providing the one and only recognized remedy for a boundary by practical location: a boundary by practical location. Minnesota law does not establish a sliding scale of remedies, as was the case in Commercial Assocs which did not deal with a boundary by practical location.

This is not a case of whether the conclusion is supported by the findings of fact. This is a case in which the law, as it exists today in Minnesota, permits only one conclusion. Failure to reach that single conclusion is an error of law.

The district court in this appeal fashioned its own remedy, not authorized by Minnesota law, to achieve its own brand of equity. Whether the district courts in Minnesota have the inherent right to ignore the only recognized remedy in a boundary by practical location case, and then create its own novel remedy that also rewards the unsuccessful litigant, appears to be a case of first impression.

Minnesota should follow the other states cited in appellants' brief that hold trial

courts do not have the authority to create remedies, but must award the remedy earned by the district court's own findings of fact. Not only is this the better rule, but respondent cites no case from any other jurisdiction with a different rule. It is the only rule, and it was not applied by the district court.

District court may not choose a lesser remedy than its findings require

Respondents cite *Moore v. Henricksen*, 165 N.W.2d 209 (Minn. 1968) for the proposition that there is a precedent for awarding a prescriptive easement when a boundary by practical location has been proved. *Moore* involved registered property and turns on notice given at the time of the initial registration. It is impossible to acquire adverse title or a prescriptive easement against property that has been registered. *Moore*, 165 N.W.2d 520.

Contrary to respondents' claim, *Moore* does not stand for the inherent authority of a district court to award a prescriptive easement when it finds a case has been proven for a boundary by practical location. In *Moore*, plaintiff failed to prove a boundary by practical location, so the case is distinguishable. The Minnesota Supreme Court wrote at 165 N.W.2d 517:

> "In short, the evidence does not sustain the trial court's finding of a practical location of a boundary."

In the present appeal, the evidence supporting the district court's uncontested findings has not been appealed. If the evidence had been at issue, one of the parties would have ordered a transcript so the evidence could be argued. None was ordered. The factual findings are not at issue. *Moore v. Henricksen* does not hold that district

courts have the inherent power in Minnesota to fail to order the one and only remedy supported by its findings. Moore v. Henricksen does not give the district courts the inherent power to award damages to the unsuccessful litigant who did not claim damages.

Damages were not litigated by consent

The issue of damages was not litigated during the trial. The district court in its letter to counsel acknowledges that damages were not discussed as an issue "at the close of trial." Appellants' Brief Appendix, p. A-8. The district court's letter is dated the day after the close of trial. The issue of damages to compensate the unsuccessful litigant was not alleged nor litigated by consent. Litigation was complete.

Rather, the issue was first raised, not by respondents but by the district court, when it was time to write closing arguments. The judge created the new issue after trial "Because almost nothing was said during the testimony about valuation,..." *Ibid.* The judge wanted the issue addressed in "closing briefs." *Ibid.* Closing arguments do not create issues by consensual litigation. They are arguments.

Respondents cite MT Properties, Inc. v. CMC Real Estate Corp., 481N.W.2d 383 (Minn. Ct. App. 1992) for authority that the district court can add an issue after the close of trial. The case does not say that. It discusses evidence tried in the normal way, during the course of litigation. Indeed, the Court of Appeals found that the issue had not been litigated by consent. MT Properties., 481N.W.2d 388-389.

Respondents cite dictum in R.E.R. v. J.G., 552 N.W.2d 27 (Minn. Ct. App. 1996) for the proposition that the district court has inherent power to award damages in an equitable action. However, the dictum in R.E.R. more fully says that a court of equity

can award damages as an "incident to an equitable action" only if they "supplement the granting of equitable relief." R.E.R., 552 N.W.2d 30. Money damages are a second remedy in addition to the equitable relief awarded the successful litigant. The court awarded money damages to the plaintiff, in addition to equitable relief. R.E.R. does not award money damages to the unsuccessful litigant, which is what the district court did in the present appeal.

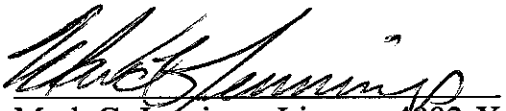
Conclusion

The district court's factual findings have not been contested on appeal by either party. Without equivocation, the district court found that appellants proved their case to a boundary by practical location. Parsing through the evidence that led to those findings is irrelevant to this appeal.

Facts are not at issue. Only issues of law are before the Court of Appeals. Respondent has not cited any Minnesota authority that controls the legal issues raised in the appeal. The legal issues are new to Minnesota. The Court of Appeals should adopt the clear law of the several jurisdictions cited in appellants' brief.

Dated: May 27, 2008

Respectfully submitted,



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