

STATE OF MINNESOTA
IN COURT OF APPEAL

Dean Oliver and Delores Oliver,

Appellants,

v.

Appellate Case No. A08-0646

State of Minnesota, by its Commissioner
of Transportation,

Respondent.

APPELLANTS' 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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ISSUES

- I. Does a property owner who in 1954 bargained with the State DOT for access to T.H.10 over a gravel “haul road”, which served as the exclusive access to market aggregate products for a period of 50 years, have a right to a trial on factual issues including damages (cost to cure) when the State takes the access in condemnation?**

Result Below: The District Court ruled initially that disputed issues of material fact existed and denied summary . Upon renewal of the Summary the District Court embarked on fact finding and weighing of evidence and granted Summary .

Most Applicable Cases:

Rathbun v. W.T. Grant Co., 219 N.W.2d 651 (Minn. 1974)

Merrick v. Sluter, 228 N.W. 755 (Minn. 1930)

Heuer v. County of Aitken, 645 N.W.2d 753 (Minn. App. 2003)

- II. Where real property is historically served by two accesses to public roads, one for residential use, the second exclusively for commercial trucks hauling aggregate, which accesses are separated by wetlands making it extremely costly to construct interior access roads to the gravel pit, and the State closes the access to the gravel pit, is a landowner entitled to a trial on the issue of “reasonably convenient access” for condemnation damages?**

Result Below: After first denying the State’s Motion for Summary Judgment, the District Court reversed itself on the issue of “reasonably convenient access” even though the “cost to cure” to build a road to access the gravel deposits would be \$150,000. To \$250,000.

Most Applicable Cases:

Johnson v. City of Plymouth, 263 N.W.2d 603 (Minn. 1978)

State v. Gannons, Inc., 275 Minn. 14, 145 N.W.2d 321 (1966)

Bulletin Pub. Corp. v. City of Cottage Grove 379 N.W.2d 685 (Minn. App. 1986)

STATEMENT OF THE CASE

Dean Oliver and Delores Oliver (hereinafter "Oliver") purchased real property located in Clay County, Minnesota, with a street address of 532 250th Street North, in 1951. In 1954, Oliver negotiated a contract with the State of Minnesota for sale of gravel for the expansion of State Trunk Highway 10 (T.H.10), which included the construction of an access road. In exchange for a reduced royalty (per unit rate for gravel) the State agreed to construct a "haul road" for Oliver's perpetual use. Instead of building the gravel "haul road" on the Oliver property, the State constructed the road over an easement negotiated with intervening property owners. The easements were acquired by the State in 1955 (after the agreement had been struck with Oliver) and terminated by their express terms on January 1, 1980.

The access road began at the southeast corner of the Oliver property and continued in a southerly direction along the quarter line to its intersection with T.H.10. The gravel haul road remained the sole outlet for gravel sold from the Oliver pit from 1955 to the time it was closed in 2005. An adjacent gravel pit to the east of the Oliver pit used the same gravel haul road as the exclusive outlet for the commercial sale of gravel. Upon closure of the gravel "haul road" the adjacent pit owner was compensated for the loss of access.

The interior road on the Oliver property is inadequate and in too close proximity to the residence of Oliver to accommodate commercial vehicles. The use of the existing interior road would render the Oliver home uninhabitable.

Between 1955 and 2005, Oliver used the gravel “haul road” as the exclusive means to commercially market aggregate products from their pit.

As a direct consequence of the closure of the gravel haul road to T.H 10, Oliver will need to construct, at great expense, an interior roadway to market his aggregate. The estimated “cost to cure” for the loss of access to Oliver will be \$150,000.00 to \$250,000.00.

The State of Minnesota began condemnation proceedings to close the “haul road” access and failed to include Oliver. Oliver petitioned the District Court for a Writ of Mandamus requesting an Order mandating the State to commence condemnation proceedings against Oliver and alternatively seeking damages for the closure of the access road.

The State sought summary judgment which was initially denied by the District Court finding disputed material factual issues existed with regard to Oliver’s claim that his property abutted T.H.10 by virtue of a prescriptive easement on the gravel “haul road”, and found material factual issues as to whether or not Oliver had a reasonably convenient access over another public roadway.

After completing additional discovery, the State once again sought summary judgment. The District Court changed its mind and dismissed the claim, even though it found a number of factual issues in dispute.

This appeal seeks reversal of the grant of summary judgment and requests a jury trial on the factual disputes.

STANDARD OF REVIEW—*DE NOVO*

As a general matter, the Appellate Courts review questions of law *de novo*. *Frost-Benko Electric Assn. v. Minnesota Public Utilities Commissioner*, 358 N.W.2d 639, 642 (Minn. 1984). On appeal from a summary judgment, the Court's role is to determine whether there are any issues of material fact or whether the District Court erred in its application of the law. *Offerdahl v. University of Minnesota Hospitals and Clinic*, 426 N.W.2d 425, 427 (Minn. 1988). Summary judgment is a question of law and the Courts exercise *de novo* review. *Dairyland Insurance Company v. Starkey*, 535 N.W.2d 363, 364 (Minn. 1995).

Rule 56.02 of the Minnesota Rules of Civil Procedure provides that “[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party’s favor as to all or any part thereof.” Rule 56.03 provides, in pertinent part: “Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.”

Rule 56 “is designed to implement the stated purpose of the rules—securing a just, speedy, and inexpensive determination of an action—by allowing a court to dispose of an action on the merits if there is no genuine dispute regarding the material facts, and a party is entitled to judgment under the law applicable to such facts.” *DLH, Inc. v. Russ*, 566

N.W.2d 60, 69 (Minn. 1997). The function of the District Court on a motion for summary judgment is “not to decide issues of fact, but solely to determine whether genuine factual issues exist.” *Id.* at 70. In doing so, the Court must not weigh the evidence. *Id.* If there is any doubt as to the existence of a genuine issue of material fact, “the doubt must be resolved in favor of finding that the fact issue exists. *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 651, 646 (Minn. 1974). Fact issues are “facts, inferences, or conclusions that may be drawn by a jury.” *Id.*

Once a motion for summary judgment has been presented and supported, the nonmoving party “may not rest upon the mere averments or denials of the adverse party’s pleading but must present specific facts showing that there is a genuine issue for trial.” Minn.R.Civ.P. 56.05. If the nonmoving party fails to respond in this manner, summary judgment will be granted in favor of the moving party. *Id.* The nonmoving party has the burden of coming forward with sufficiently probative evidence establishing genuine issues of material fact which cause the need for a trial. *DLH*, 566 N.W.2d at 73.

Summary judgment has been described as a “blunt instrument” and courts are cautioned that it “should not be employed to determine issues which suggest that questions be answered before the rights of the parties can be fairly passed upon.” *Donnay v. Boulware*, 144 N.W.2d 711, 716 (Minn. 1966). Therefore, summary judgment should be granted “only where it is perfectly clear that no issue of fact is involved, and that it is not desirable nor necessary to inquire into facts which might clarify the application of law. *Id.*

Rule 52.01 of the Minnesota Rules of Civil Procedure provides that “[f]indings of fact and conclusions of law are unnecessary on decisions on motions pursuant to Rules 12 or 56 or any other motion except as provided in Rule 23.08(c) and 41.02.” With respect to a summary judgment motion, it is inappropriate for the Court to make findings that require it to weigh the evidence in a case. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

STATEMENT OF FACTS

In 1951, Oliver purchased a parcel of real property located in Clay County, Minnesota, with a street address of 532 250th Street North. (Dean Oliver Depo. p. 9, A-19) At the time, the Oliver parcel had an access point on the southwest side of the property to State Trunk Highway 10 (T.H.10) via 250th Street North. (A-1) The Oliver parcel is ½ mile North of T.H.10. (A-1, 2,—Line “A” is the south line of the Oliver Property)

In 1954, Oliver negotiated a contract with the State of Minnesota for the extraction of aggregate for the expansion of T.H.10 from two lanes to four lanes. (A-76) During initial discussions the State agreed to pay Oliver ten cents per yard, but a final price of eight cents per yard was agreed upon because the State agreed to construct a “haul road” which Oliver could permanently use to access T.H.10. (Dean Oliver Depo. p. 11, A-19) An agreement was reached between the State and Oliver for the construction of the “haul road” as part of the original bargain.

The agreement was in the form of an Indenture dated December 2, 1954, and provided for the conveyance by Oliver to the State of “all sand, gravel, clay and other materials suitable for use in the construction, improvement, repair or maintenance of public highways . . .” upon certain specifically described property. (A-76) In addition to a conveyance of the interest in sand, gravel and clay, Oliver granted an easement for a “haul road” to access the gravel pits. The indenture states the “right of ingress to and egress from said described premises shall be upon and along such course or route

described above”. (A-76)

Instead of constructing the “haul road” on the Oliver property, after the deal with Oliver was signed, the State obtained written easements over several parcels of land that separated the Oliver parcel from T.H.10. The easements were dated March 1955. (A-82-84) The resulting private “haul road” to access T.H.10 abuts the southeast boundary of the Oliver parcel. (A-1, A-80) The “haul road” easements obtained by the State in 1955, continued for a period through January 1, 1980. (A-82-84) It is the closure of the “haul road” that caused Oliver to seek compensation.

In 1978, Laurence Aakre purchased a parcel of land that was previously owned by Conrad Swenson, upon which the east one-half of the “haul road” was constructed. (A-32, 81) At that time, the parcel was still subject to the written easement in favor of the State. In 1981, Aakre received confirmation from the State that it would not seek to renew its written easement. (A-35)

In November 1993, Aakre sold a portion of his property in the Northeast Quarter of Section Five, Township 139 North, Range Forty-four West in Clay County, to Jose Santoyo and Ernie and Doris Larson. (A-36) This property also had a gravel pit that used the same “haul road” as Oliver to access T.H.10. (A-86) Aakre conveyed to Santoyo an easement across the “haul road” one-half of which was on others property. (A-36)

The Santoyo parcel was included in the condemnation proceedings, initially limited to the closure of access but subsequently amended to include the entire tract. The

condemnation included the fee interest and right of access “over the existing access road along the west line of said Northeast Quarter of the Southeast Quarter of Section 5.” (A-41) It is the same access “haul road” which Oliver used to market his gravel products.

In its Order and Memorandum granting summary judgment, the District Court found both undisputed and disputed material facts concerning the subsequent use of the “haul road” but remarkably granted summary judgment. The District Court’s findings are restated to illustrate how the court converted the summary judgment motion to a proceeding in the nature of a court trial where the court weighed conflicting testimony and rendered a decision. The District Court characterized the use of the roadway between 1980 and 2000, as follows:

“UNDISPUTED FACTS

A number of individuals who owned land abutting the gravel haul road in issue, from the period of 1980 to 2000, were deposed regarding their use of the road. The Olivers’ (sic) testified about the use of the gravel road by their family. They have driven a car or pickup onto the gravel road and have picked up flowers growing along the side of the road. (Delores Oliver Dep. at 5-6). Occasionally, the Olivers would drive from the East end of their property, head South down the gravel road, and then out onto T.H.10. (Delores Oliver Dep. at 7, 42). When they wanted to add gravel to their driveway on the West side of their property, they would drive a gravel truck to T.H.10 and then onto the gravel road . (Delores Oliver Dep. at 13-14). After putting some gravel in the truck, they would drive back down the gravel road, out onto T.H.10, and then return to their property. (Delores Dep. at 14). Dean Oliver drove gravel trucks on the road from 1980 to

1989. (Dean Oliver Dep. at 4, Delores Oliver Dep. at 41). He also used the gravel road from 1980 to 1997 for hunting purposes. (Dean Oliver Dep. at 5; Delores Oliver Dep. at 8-9, 42-43).

The Olivers also testified about how others used the gravel road. Dean Oliver testified that his contractors also used the gravel road, which Delores identified as Markowitz, Asplin, PCA and Frank Sharon. (Dean Oliver Dep. at 12-13, Delores Oliver Depo. at 18-21, 23). Dean never told the contractors to use the road, but the contractors assumed they should use it because everybody did. (Dean Oliver Dep. at 13). Although he did not ask the contractors to add gravel to the road, he claims their contractors added gravel to the road. (Dean Oliver Dep. at 24-25, Delores Oliver Dep. at 43). They also observed Jose Santoyo using the gravel road north of the Olivers (sic) parcel and then south along the road to T.H.10. (Delores Oliver Dep. at 22-23). Delores testified that Santoyo would do maintenance work on the gravel road; he would use the edge of his loader to wedge the drive so excess water could run off of it. (Delores Oliver Dep. at 44). The Olivers did not maintain the gravel road. (Delores Oliver Dep. at 44).

Larry Babolian would drive a two-ton truck from T.H.10 onto the gravel road to the east side of the Oliver's (sic) property to tend to bee hives the Olivers allowed him to maintain. (Delores Oliver Dep. at 14-17). He would make this trip approximately three times a week from the months of April to October. (Delores Oliver Dep. at 16).

The Olivers had also seen the road used by "lots of" hunters. (Dean Oliver Dep. at 17; Delores Oliver Dep. at 35-36). Delores Oliver claimed that Shane Sorenson, Grandbois (Laurence Aakre's son-in-law) and Steve Aakre (Laurence Aakre's son) would use the gravel road to gain access to

land to hunt deer. (Delores Oliver Dep. at 10-11, 33-34, 38-39).

The Olivers also observed neighboring farmers using the gravel road. Eugene Jetvig, or one of his hired hands, would drive down the gravel road to T.H.10. (Delores Oliver Dep. at 32-34, 36). The Olivers also observed grain trucks, combines, and other farm machinery use the gravel road from Aakre's land. (Dean Oliver Dep. at 21, Delores Oliver Dep. at 40).

The Olivers testified as to signs at the intersection of T.H.10 and the gravel road. Sometime in the 1990's until the T.H.10 project closed the access point to the gravel road, a street sign stood at the access point.

(Delores Oliver Dep. at 28-29). There was never a sign stating that the road was a "private drive". (Delores Oliver Dep. at 28). Dean remembered the street sign and thought "it was 250 and a half street or something like that". (Dean Oliver Dep. at 13, 32)

Dean Oliver claimed that all people used the gravel drive in the same way:

"It was just a public road that everybody used. Travelers would drive down there and sleep, you know, get away from the traffic.

Anybody and everybody, there was no restrictions on it up until they took the approach out."

(Dean Oliver Dep. at 23). He agreed that he was part of the public and that he "used it the same way everybody else did." (Dean Oliver Dep. at 23).

Tim Fox owned land abutting both T.H.10 and the gravel road. (Fox Dep. at 8). Fox claims that the road was not just for gravel haulers, because the farmers use it too. (Fox Dep. at 7). Fox drove machinery onto the gravel haul road, including a combine, tractor, baler, farm trucks, and a swather. (Fox Dep. at 9). Fox believed that Santoyo would grade the road once in a while and would place gravel in the bigger holes, but could not

definitely state that Santoyo was the one actually grading the road. (Fox Dep. at 10). He recalled seeing hunters and kids using the gravel drive once in a while. (Fox Dep. at 13-14). Fox also observed gravel trucks driving back and forth on the gravel road, from either the Olivers' property or Santoyo's property. (Fox Dep. at 13-14). He thought it was a township road for the public to use. (Fox Dep. at 12, 16).

Eugene Jetvig also owned property abutting T.H.10 and the gravel road. (Jetvig Dep. at 6-7). Jetvig claims he used the gravel road to access his property, before it was closed, to check on his crops with a tractor, pickup or grain truck. (Jetvig Dep. at 8-11). Jetvig claimed that Santoyo would use a grader on the road to keep it level, but could not definitely identify the person he saw grading the road as Santoyo. (Jetvig Dep. at 17). He also saw gravel trucks on the road, coming from either the Olivers' property or Santoyo's property. (Jetvig Dep. at 13-14). Jetvig said that no one has told him that he could or could not use the road, except when the State decided to shut it down. (Jetvig Dep. at 19-20).

Laurence Aakre owns property that abuts both T.H.10 and the gravel road. (Aakre Dep. at 7-8). Aakre used the road to access his fields during seeding time and harvest. (Aakre Dep. at 8). He would also drive his pickup on the road to go hunting. (Aakre Dep. at 9). Aakre never had a conversation with anyone else about obtaining permission or the right to use the gravel road. (Aakre Dep. at 11, 14). However, he occasionally saw gravel trucks driving from Olivers' gravel pit. (Aakre Dep. at 11). He also knew that Santoyo used the gravel road to haul gravel like the Olivers. (Aakre Dep. at 16).

In 2005, the Minnesota Department of Transportation (MNDOT) closed the access point from the gravel road to T.H.10, which is located

about a half mile south of the southeast boundary of the Oliver parcel. As a result, Santoyo's parcel no longer had any access to T.H.10, and the parcel was rendered landlocked. Santoyo received compensation for the closure in a condemnation action brought against the State.

In January of 2006, the Olivers brought the present mandamus action against the State, arguing that the closing of the access point from the private gravel haul road to T.H.10 was a taking of a property right for which they are entitled to compensation. The State again moves for summary judgment.

DISPUTED FACTS

Dean Oliver claims that, in 1954, the State asked him whether he would be willing to take eight cents per yard if the State would build a public haul road heading south from the Oliver pit across a neighbor's property to T.H.10. He claims he accepted the proposal, although the agreement was never put into writing. The State denies any claim that established a perpetual easement or public haul road at any time material to the pending claim.

Although the parties appear to agree that the Olivers used the gravel haul road on a continuous basis throughout the term of the written easement (1955-1980), they disagree as to whether Oliver had permission from anyone to use the gravel road after the State's easements expired in 1980. Dean Oliver stated in his deposition that he used the gravel road in question from 1980 until 2005 without permission from any of the other property owners. (Dean Oliver Dep. at 18, 22-23, 31). By contrast, the State argues that although the easement had expired by 1980, the original use was permissive.

Aakre claims that after he sold the Santoyo parcel, Dean Oliver said that he was going to charge Aakre for every load of gravel Santoyo took out on the haul road. (Aakre Dep. at 12). Aakre then responded to Oliver, “[w]ait a minute, whose road is this?” (Aakre Dep. at 12). When asked if he had ever had a conversation with Aakre that “in any way related to or involved the gravel drive”, Dean Oliver testified, “[n]ot with Laurence, no.” (Dean Oliver Dep. at 18).

The parties disagree on whether Oliver has reasonably convenient and suitable alternate access to T.H.10. In their response to the previous summary judgment motion, the Olivers’ (sic) submitted deposition testimony regarding the potential impact of diverting the gravel truck traffic across the road in front of their home. In his deposition, Dean Oliver explained that the use of this road would require gravel trucks to drive right past his house, and “with a trailer load of gravel going by my house would be about three trips and my basement would be busted.” (Dean Oliver Dep. dated Sept. 20, 2006, at 23-24). Delores Oliver stated in her deposition that their private road runs right by the front of her house, right up to the edge of the garage. (Delores Oliver Dep. dated Sept. 20, 2006, at 6). Delores Oliver further stated that use of this road would require trucks to enter a narrow driveway, which is meant for only one car. (Delores Oliver Dep. dated Sept. 20, 2006, at 6). Dean Oliver indicated that if a new haul road were constructed over his parcel to connect his gravel pits and 250th Street North, it would have to be built over slough land, and it would be “big investment.” (Dean Oliver Dep. dated Sept. 20, 2006, at 25-26). Oliver estimated that it would cost \$150,000.00 to \$250,000.00 to build a new haul road. (Dean Oliver Dep. dated Sept. 20, 2006, at 31). In this affidavit used in the previous summary judgment motion, Dean Oliver stated:

[T]he only other route out of my gravel pit to Highway 10 would be to take a service road from the pit, where I would then have to remove a gate in order for trucks to be able to navigate through the yard. The trucks would pass less than ten (10) feet of my home. Such proximity of large trucks would destroy my enjoyment of my backyard. I would worry for the safety of me, my wife and grandchildren. The large 18-wheel trucks would kick up copious amounts of dust, discharge diesel fumes thus rendering my home uninhabitable. That would certainly be more than a simple inconvenience.

(Dean Oliver Affd. dated February 13, 2007, ¶ 5).

The State argues that the Olivers still have reasonably convenient and suitable alternate access to their property via the currently-existing roadway which passes near the Olivers' house (250th Street North). The State claims that Minnesota law does not consider the inconvenience or expense occasioned by a landowner to alter their property, thereby insure reasonably suitable and convenient access to a new or existing road, but rather it asks "whether the property still has reasonably suitable and convenient access," rather "it asks only whether there is reasonably convenient and suitable access *to the property itself.*" (State's Mem. in Supp. of its Mot. for Summ. J. at 15). The Olivers claim that improvements to their property to make the gravel pits accessible by another road would cost approximately \$150,000.00 to \$250,000.00.

(A-95-102)

Remarkably, the District Court observed **disputed** material issues of fact and yet granted summary . The District Court found disputed issues of material fact on the 1954

promise of the State to construct a haul road (\$.08 per yard on condition the State construct the “haul road”); on the continuity of use of the “haul road” from 1955-2005 by Oliver; on the notice given by the owner of the servient estate (Aakre) to the owner of the easement (Oliver); on the issue of “reasonably convenient access” to the gravel deposits; on the cost to cure the lack of access to T.H.10.

The District Court misread the 1954 Indenture finding that the agreement to construct a “haul road” was “was never put into writing”. (A-100) This is at variance with the specific terms of the agreement reached between the State and Oliver to construct a “haul road” on Oliver’s property for the transportation of materials from the gravel pit. (A-76)

Given the history of negotiations between Oliver and the State, where a “haul road” to T.H.10 was negotiated and part of the bargain between Oliver and the State, the State cannot be heard to deny Oliver’s right to compensation for the closure of his access to T.H.10. Otherwise the State first has Oliver pay for the road by negotiating a reduced royalty for the gravel removed, then upon closing of the road requires Oliver to pay once again to construct another “haul road”. Such action of the State must be subject to a trial and a weighing of all the evidence before a decision can be made on the merits.

On review of a motion granting Summary Judgment the District Court’s recitation of disputed material issues of fact should be sufficient to reverse this dismissal.

LEGAL ANALYSIS

A. CONSTITUTIONAL GUARANTEE OF COMPENSATION

Article 1, section 13 of the Minnesota Constitution provides that “[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.” Inverse condemnation is “a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.” *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 111 n.1 (Minn. 2003) (citations omitted). A taking can arise out of any state interference with the ownership, possession, enjoyment or value of private property. *Grossman Inv. v. State by Humphrey*, 571 N.W.2d 47, 50 (Minn. App. 1997).

Property owners who believe their property has been taken may petition the Court for a writ of mandamus to compel the State to initiate condemnation proceedings under chapter 117 of the Minnesota Statutes. *Id.* In this type of action, “the trial court must decide, as a threshold matter, whether a taking of property has occurred in the constitutional sense.” *Id.* Although the parties may request a jury trial on factual issues, “the court ultimately decides whether the facts as determined constitute a taking.” *Id.*

Access to a public highway from abutting property is treated as a property right which may not be denied without just compensation. *State v. Gannons, Inc.*, 275 Minn. 14, 24, 145 N.W.2d 321, 329 (1966). Minnesota appellate courts have recognized that

“[p]roperty owners have a right of ‘reasonably convenient and suitable access’ to a public street or highway that abuts their property.” *Grossman*, 571 N.W.2d at 50 (citing *Hendrickson v. State*, 127 N.W.2d 165, 173 (Minn. 1964)). However, owners of non-abutting property “have no right to damages merely because access to a conveniently located highway may be denied, causing them to use a more circuitous route.” *Hendrickson*, 127 N.W.2d at 170-71.

Further, “not every denial of immediate or convenient access will support a claim for damages.” *Grossman*, 571 N.W.2d at 50. An abutting property owner has a claim for compensable damage due to loss of access “only when the owner is left without ‘reasonably convenient’ and suitable access to the main thoroughfare in at least one direction.” *Id.* (citations omitted). In determining whether reasonably convenient and suitable access exists, it is proper for the trier of fact to consider the effects the restriction of an access point had on a business, and whether the restriction resulted in a disruption of business. *County of Anoka v. Esmailzadeh*, 498 N.W.2d 58, 62 (Minn. App. 1993). Whether a claimant has “reasonable access” to a main thoroughfare depends on the unique circumstances of each case. *Grossman*, 571 N.W.2d at 50; see *Bulletin Pub. Corp. v. City of Cottage Grove*, 379 N.W.2d 685, 687 (Minn. App. 1986) (stating that reasonable access is a question of fact). However, the trial court must ultimately determine whether, as a matter of law, the change in access constitutes a compensable taking. *Id.*

B. MATERIAL FACTUAL DISPUTES EXIST AS TO THE OLIVERS' CLAIM THAT THEIR PROPERTY PHYSICALLY ABUTS T.H.10 THROUGH A PRESCRIPTIVE EASEMENT OVER THE GRAVEL "HAUL ROAD"

1. Oliver Acquired a Prescriptive Easement on the "Haul Road".

To establish a prescriptive easement over private land, a party must prove use of the roadway for the prescriptive period of 15 years and that the use was hostile, actual, open, continuous, and exclusive. *McCuen v. McCarvel*, 263 N.W.2d 64, 65 (Minn. 1978). The elements necessary to prove a prescriptive easement must be established by clear and convincing evidence. *Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999). Once a party claiming a "prescriptive easement has established actual, open, continuous and exclusive use for the required length of time, the burden shifts to the owner of the servient estate to prove permission." *Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000).

The claimant prevails unless the defendant successfully rebuts the presumption of adversity. *Hartman v. Blandings, Inc.*, 288 Minn. 415, 419, 181 N.W.2d 466, 468 (1970). Where the presumption of adverseness is unavailable, adverseness is a question of fact with the burden on the party claiming the easement to prove the allegation by a preponderance of the evidence. *Heuer v. County of Aiken*, 645 N.W.2d 753 (Minn. App. 2002) citing *Rice v. Miller*, 306 Minn. 523, 525, 238 N.W.2d 609, 611 (1976). Questions of fact if in dispute cannot be resolved on summary judgment. The District Court analyzed only two elements, i.e. exclusivity and hostility. The elements of actual, open and continuous must be presumed to be found in favor of Oliver. The District Court

improperly weighed the evidence, engaged in fact finding and judged the credibility of witness testimony in reaching its conclusion.

(a) Oliver Had Exclusive Use of the Easement Which Use Was Not Dependent on the Rights of Others.

A person claiming a prescriptive easement does not need to exclude use by the owner of the land or the public. *Wheeler v. Newman*, 394 N.W.2d 620, 623 (Minn. App. 1986). The exclusivity requirement for a prescriptive easement is not as strictly defined as that of adverse possession. *Nordin v. Kuno*, 287 N.W.2d 923, 926 (Minn. 1980). The exclusivity element of a prescriptive easement requires a showing that the claimant's right to use the land does not depend on a similar right in others; it must be exclusive against the community at large. *Wheeler*, 394 N.W.2d at 623.

In *Merrick v. Schleuder*, the Minnesota Supreme Court found a prescriptive easement to an alley, despite the fact that other members of the community also used the land. 228 N.W. 755 (Minn. 1930). To establish an easement by prescription, and to meet the exclusive requirement, all that is required is "that the right shall not depend for its enjoyment upon a similar right in others". *Merrick* at 756.

The use by Oliver was based on a promise by the State to provide a "haul road" for gravel extraction. Oliver used the "haul road" continuously and in an unmolested manner from 1955 to 2005. (Dean Oliver Depo. p. 11, A-19, A-76)

Additional authority for the Olivers' claim of exclusivity is provided in *Wheeler v. Newman*, 394 N.W.2d 620 (Minn. App. 1986). *Wheeler* was decided after a trial on the

merits in District Court, not on summary judgment. The Court of Appeals found a prescriptive easement to a private driveway, despite the fact that other members of the community also used the property. *Id.* at 622. A party seeking to obtain a prescriptive easement must show that his use of the land was under claim of right and adverse to the owner's interest. Claim of right is presumed where the claimant of an easement by prescription has shown open, visible, continuous and unmolested use for the statutory period inconsistent with the rights of the owner of the servient estate and under circumstances from which his knowledge and acquiescence may be inferred. *Wheeler* at 623, citing *Hildebrandt v. Hagen*, 228 Minn. 353, 357, 38 N.W.2d 815, 818 (1949).

The District Court erred to find on summary judgment that the claim of Oliver did not meet the "exclusive" requirement. At minimum, the District Court had to weigh conflicting evidence on this issue, which is prohibited in a summary judgment context.

(b) Material Issues of Fact Exist as to the Olivers' Claim they Showed "Hostile" Possession of the Easement for the Required 15 Year Time Period.

Use of an easement is presumed to be hostile when the claimant shows "open, visible, continuous and unmolested use for the statutory period that is inconsistent with the owner's rights, under circumstances from which the owner's acquiescence may be inferred." *Heuer v. County of Aitkin*, 645 N.W.2d 753, 759 (Minn. Ct. App. 2002).

When the presumption is not available, "adverseness [or hostility] becomes a question of fact with the burden on the party claiming the easement to prove the allegation by a preponderance of the evidence." *Id.* (citing *Rice v. Miller*, 238 N.W.2d 609, 611 (Minn.

1976)).

Heuer makes it clear that the issue of hostility is a question of fact, with the burden on the party claiming the easement to prove the allegation by a preponderance of the evidence. Having observed the “hostility” element being a question of fact, the District court, nevertheless, weighed the evidence, weighed the testimony, and formed conclusions from the testimony on summary judgment.

The record reveals disputed issues of material fact as to the hostility of use. Oliver claims that he made a bargain with the State to accept a lower royalty for the gravel deposits (eight cents instead of ten cents) on the condition the State construct a “haul road”. The District Court noted that the “State denies any claim that established a perpetual easement or public haul road at any time material to the pending claim.” (A-100) Applying the facts of this case to the element of hostility, the usage from its inception was hostile. The easements negotiated by the State with neighboring landowners were for the benefit of the State not Oliver. Oliver’s use was hostile to the servient owners. The issue of continuous use is in dispute. The continual use of the haul road by Oliver and his contractors from 1955 until the road was closed in 2005, triggered the time period for computation of the fifteen years. *Boldt v. Roth*, 618 N.W.2d 393 (Minn. 2000). Arguably the 15 year time period ended in 1970.

(c) The Historical Development of the “Haul Road” Reveals Disputed Issues of Material Fact.

The historical development of the gravel haul road can not be overlooked. The

District Court found material factual disputes as to the agreement between Oliver and the State of Minnesota, when the initial negotiations took place in 1954. In the “disputed facts” section of the summary judgment Order, the District Court indicated:

“Dean Oliver claims that, in 1954, the State asked him whether he would be willing to take \$0.08 per yard if the State would build a public haul road heading south from the Oliver pit across the neighbors property to T.H.10. He claims he accepted the proposal although the agreement was never put into writing. The State denies any claim that established a perpetual easement or public haul road at any time material to the pending claim.” (A-100)

Dean Oliver characterized the agreement in his deposition: (Dean Oliver Depo. p. 11, A-19)

“well, the purpose of this agreement was that I had the gravel that they needed when they made number 10 into a four lane highway. And they agreed—they wanted to pay me ten cents a yard, and I talked with this Mr. Sandman, his name was, that represented the State, and we finally agreed upon eight cents a yard and the State build the haul road in. And there was no time limit. It was to be the outlet for my gravel pit. They also had the option to go down my south line, and they chose to go straight south to number 10. And by taking eight cents a yard, I more or less gave up two to four cents per yard to pay for that road.”

The District Court analyzed the original negotiations between the State and the Olivers as follows:

“In the original negotiations with the State, the Olivers wanted a perpetual easement for the gravel haul road so that he would be entitled to use the road for gravel hauling purposes even after the contract with the State ended. However, the Olivers did not insist upon that being included in the Warranty Deed that the State received to remove gravel from his land. Oliver claims that he agreed to sell the gravel at \$0.08 a yard instead of \$0.10 under the assumption that he was going to get the perpetual easement, but none of this was in writing. Therefore, the Olivers have no property right based on the alleged oral understanding that he was to receive a perpetual easement.”

Although the District Court found that the agreement to build a road was not committed to writing, the indenture dated December 2, 1954, belies that fact. The indenture provides an easement for a haul road across the Oliver property in favor of the State of Minnesota. The State of Minnesota promised to Oliver that the “right of ingress to and egress from said described premises shall be upon and along such course or route described above as may be improved, graded and maintained at such times and in such manner as may be reasonably necessary for the transportation of materials from said described premises.” (A-76)

The contract terms viewed in a light most favorable to Oliver provide that Oliver agreed to a reduced per yard price for gravel in exchange for the construction of “haul road” that would perpetually permit Oliver to convey gravel to market. Rather than build

the “haul road” on the Oliver property, the State chose to purchase an easement from several other owners from the southeast corner of the Oliver’s land straight south one-half mile to T.H.10. (A-82-84)

The gravel “haul road” easement between the State of Minnesota and the three affected property owners, Alfred G. Nelson, Arthur G. Carlson and Conrad Swenson, continued until January 1, 1980. The State did not communicate this fact to Oliver.

The road constructed was approximately midpoint on the quarter line. One-half of the roadway would have been on the Conrad Swenson property and one-half on the property previously owned by Alfred Nelson and Arthur Carlson. (The road varied in width from 18 to 20 feet approximately centered on the quarter line.) (Brian Bausman Depo. p. 28, A-75, A-86-87)

There is nothing in the record to suggest that Oliver was granted permission to use the easement negotiated between the State of Minnesota and Conrad Swenson, Arthur Carlson or Alfred Nelson. In fact, the grant of an easement for the “haul road” was to the “State of Minnesota, Department of Highways, its successors and assigns”. There was nothing in the “haul road” easement that would have granted permission to Dean Oliver to use the road to haul gravel on his own. Any use by Dean Oliver was directly adverse to the property owners from the date the road was constructed in 1955. The adverse use time of beginning as to Dean Oliver’s claim would be 1955. The District Court erroneously concluded that the activity of Oliver up to 1980 was permissive use under the State’s easement. (A-112)

C. THE DISTRICT COURT IMPERMISSIBLY WEIGHED EVIDENCE

The District Court weighed the evidence and facts in this case and at times formed false conclusions from the evidence, which it is not permitted to do in the context of a summary judgment motion. As an example the District Court indicates that the “Olivers did not insist upon [a perpetual easement for the haul road] being included in the Warranty Deed that the State received to remove gravel from his land.” (A-111,112) The State did not receive a Warranty Deed but rather an “indenture”. The indenture conveyed to the State all “sand, gravel, clay and other materials” suitable for road construction to the State on certain described property, and conveyed to the State an easement for a haul road over the Oliver property. (A-76) The grant of ingress and egress provided specifically that the ingress and egress “shall be upon and along such course or route described above”. Contrary to the Court’s finding, there is a specific provision in the indenture between Oliver and the State to provide in perpetuity a haul road.

The District Court engaged in impermissible weighing of evidence and making findings of fact. The District Court reviewed the evidence of the Olivers’ usage of the road from 1980 to 2005, and improperly engaged in weighing the evidence as opposed to taking the evidence in a light most favorable to Oliver. The District Court stated

“Dean Oliver stopped personally hauling gravel with his truck in 1989, nine years after the State’s easement ended. After that time, contractors, to whom Oliver sold gravel, used the road up to the time the access was closed. The use was infrequent to the point where neighbors did not know

whether it was Santoyo's trucks or Olivers' contractors using the road for gravel hauling purposes and the Olivers' use was nothing extraordinary or exclusive compared to the other uses by any other individuals."

Clearly, the District Court is engaging in weighing of the evidence by finding that the Olivers' use was "nothing extraordinary or exclusive compared to other uses by any other individuals". (A-113) The District Court continued to make conclusions and weigh the evidence by finding

"the only use the Olivers made of the road was for ingress and egress, like all of the others who used the road. Their intentions were not to acquire a prescriptive easement claim of right against the rights of the underlying owner; rather, it was under the assumption that it was a public road. Clearly, subsequent to 1980 and up to 2005, the Olivers did not show an 'open assertion of hostile title' and there was no 'knowledge brought home to the owner of the land' (Aakre) as required in *O'Boyle*, 69 N.W. at 38." (A-113)

Clearly prohibited by summary judgment standards, the Court weighed the evidence.

This is an issue of fact that cannot be determined on summary judgment.

D. A DETERMINATION OF REASONABLY CONVENIENT ACCESS IS A FACT QUESTION.

The District Court erroneously determined that the Olivers have a reasonably convenient alternate access to their property. If the Olivers have a prescriptive right to access T.H.10 across the gravel "haul road" constructed by an agreement reached in

1954, the Olivers have a right to claim damages irrespective of having an alternate access to T.H.10. If Oliver has a right of access to T.H.10 over the gravel “haul road”, the State of Minnesota condemned his access which provided the sole means of transporting gravel to market.

The closing of the gravel “haul road” access to T.H.10 amounted to a “partial taking” of Olivers’ property rights. Reasonable access to a public roadway is a property right in the nature of an easement for which condemnees are entitled to compensation. *State v. Gannons, Inc.*, 275 Minn. 14, 24, 145 N.W.2d 321, 329 (1966). The taking of the reasonable access to outlet commercial gravel sales entitles Oliver to severance damages. Severance damages are limited to the “cost to cure” under the doctrine of mitigation of damages. *State v. Pahl*, 254 Minn. 349, 357, 95 N.W.2d 85, 91 (1959). The only evidence of the cost to cure for lack of access is the testimony of Dean Oliver that the placement of a suitable road to allow the commercial extraction of aggregate products would be \$150,000.00 to \$250,000.00.

The District Court in the original denial of the Motion for Summary Judgment observed that

“Dean Oliver indicated that if a new haul road were constructed over his parcel to connect his gravel pit and 250th Street North, it would have to be built over slough land, and it would be a ‘big investment’. (Dean Oliver Dep. at 25-26). Oliver estimated that it would cost \$150,000 to \$250,000 to build a new haul road. (Dean Oliver Dep. at 31).

Although the Olivers technically have access to T.H.10 via 250th Street North, the question is whether the small, private road is capable of handling the traffic of heavy gravel trucks. It is unclear whether the existing dirt road which presently connects the Olivers' gravel pits to 250th Street North can withstand the demands of heavy truck traffic. Also, if the private dirt road is incapable of handling the heavy truck traffic, the Olivers may incur significant expenses in building a new private haul road across their property. The potential adverse effect that the truck traffic may have on the Olivers' use and enjoyment of their home, and possible reduction in value to their entire premises, remains an open factual issue. These factual issues must be resolved by the trier of fact in determining whether the Olivers have reasonably convenient and suitable access to T.H.10."

(A-53)

Those same disputed facts exist. The District Court, upon a second review, reversed itself concluding that the Olivers had a "reasonable and convenient access" in spite of the factual issues yet to be determined. (A-114) The District Court cites to *Grossman*, 571 N.W.2d at 50 and *County of Anoka*, 498 N.W.2d at 61-62, to support its legal determination that the Olivers have reasonable and convenient access. Neither case supports such a finding.

The existence of "reasonable access" depends on the unique circumstances of each case. *Johnson v. City of Plymouth*, 263 N.W.2d 603, 607 (Minn. 1978). A party is

entitled to have fact issues tried by a jury. Minn. Stat. §586.12 (1996); *Grossman v. State*, 571 N.W.2d 47 (Minn. App. 1997). In this case, the evidence viewed in the light most favorably to the nonmoving party demonstrates that in order to continue to be able to market gravel, Oliver would need to invest \$150,000.00 to \$250,000.00 in infrastructure alterations to market gravel because the State closed off the access it had promised Oliver in 1954. A determination of a reasonable access is dependent upon facts which must be determined after hearing all the evidence, not on a summary judgment basis.

Grossman supports Oliver's claim that he has a right to a trial on the factual issues. *Grossman* case was submitted to the District Court on stipulated facts where both parties agreed that the material facts were undisputed. Not so in this case. In *Grossman*, the State did not take any land from Grossman for the highway reconstruction. Nothing in *Grossman* would suggest that Grossman was required to expend significant amounts of money to obtain access to a public roadway. Grossman was seeking damages as a consequence of the reconfiguration of the access to his property by customers.

Similarly, *County of Anoka v. Esmailzadeh*, 498 N.W.2d 58 (Minn. App. 1993), can be distinguished on the facts. In *County of Anoka*, the case was appealed to the District Court from a Commissioner's Award where trial was held before the District Court. It is not a summary judgment case. The Court of Appeals reversed the District Court in *County of Anoka*, reminding the District Court that "what constitutes reasonable access must, of course, depend to some extent on the nature of the property under

consideration. The existence of reasonable access is thus a question of fact to be determined in light of the circumstances peculiar to each case.” *County of Anoka* at 61 citing *Johnson v. City of Plymouth*, 263 N.W.2d 603 (Minn. 1978). *County of Anoka* supports Oliver’s claim that he has a right to a trial on the issue of “reasonable access”.

The District Court improperly concluded that the Olivers had reasonable access to T.H.10. This finding weighs by discounting the evidence that suggests use of the existing interior roads on Olivers’ property would destroy his dwelling and the cost of construction of an alternate roadway would be between \$150,000.00 and \$250,000.00. The Court’s determination that “any potential adverse effect that the truck traffic may have on the Olivers’ use and enjoyment of their home, including the inconvenient of its location, and the fact that the Olivers may have to expend money to build a new haul road, does not make it a compensable taking under Minnesota Constitution, Article 1, Section 13” is not sustainable under existing case law. (A-115)

The District Court lost sight of the history of negotiations between the State and Oliver for the construction of the haul road. The facts, viewed in a light most favorable to Oliver, suggest that the State promised to construct a perpetual haul road for Oliver’s usage in exchange for a reduced price for gravel extracted. The unique facts of this case make it a poor candidate for resolution on summary judgment.

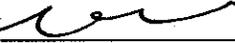
CONCLUSION

Oliver has demonstrated material factual disputes to exist with regard to their prescriptive easement claim to the gravel haul road. A determination of reasonably convenient access is factual in nature and not subject to resolution on a motion for summary judgment. The Court should remand to the District Court for trial.

Dated: June 16, 2008

Respectfully submitted,

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