

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' BRIEF

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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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2. the unsuccessful litigants did not plead a counter-claim for the money damages awarded to them,	
3. the money damages are based solely on evidence solicited by the District Court after the close of trial, and	
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LEGAL ISSUES

As a matter of law, does the District Court possess the inherent power to award money damages to unsuccessful litigants in an equitable action in which:

- 1. the only relief pled was by the successful litigants who sought judicial recognition of a boundary by practical location or, if not found entitled to that remedy, a prescriptive easement,**
- 2. the unsuccessful litigants did not plead a counter claim for the money damages awarded to them,**
- 3. the money damages are based solely on evidence solicited by the District Court after the close of trial, and**
- 4. the money damages are based solely on evidence not subject to rebuttal or cross examination by the opposing party?**

The District Court awarded damages of \$8,400 to respondent for the land being burdened by the prescriptive easement granted appellant.

MOST APPOSITE CASES AND STATUTES:

- *Fenix v. Contos*, 126 Vt. 477, 236 A.2d 668 (Vt.Sup.Ct. 1967)
- *Shumate v. Robinson*, 52 Or.App. 199, 627 P.2d 1295 (Or.App. 1981)
- *Leach v. Leach*, 209 N.W.636 (Minn. 1926)
- Minn.R.Civ.P. 13

As a matter of law, is it reversible error for the District Court to find that the plaintiffs have proven their claim to a boundary by practical location to the disputed area (up to 13.7 feet wide), but then fail to award them that boundary by practical location, and ultimately only award them a lesser interest in real estate to a lesser area: a prescriptive easement to a 12 foot strip?

The District Court found that “Plaintiffs have established a boundary by practical location through acquiescence. Plaintiffs are entitled to the disputed area under this theory.” “Plaintiffs have proved through clear and convincing evidence that they are entitled to either a prescriptive easement for use of the driveway or a boundary by practical location.” The District Court awarded appellants a non-exclusive 12 foot wide easement for roadway purposes.

MOST APPOSITE CASES AND STATUTES:

- *Matthews v. Matthews*, 292 Ala.1, 288 So.2d 110 (Ala.Sup.Ct. 1973)
- *Kieffer v. Van Leeuwen*, 355 Mich. 430, 94 N.W.2d 793 (Mich.Sup.Ct. 1959)
- *Brown v. Evarts*, 128 Vt. 1, 258 A.2d 471 (Vt.Sup.Ct. 1969)

As a matter of law, is it speculative and clearly reversible error for the District Court to base its award of damages for a prescriptive easement solely on evidence of negotiated fee simple title conveyances, rather than the current value of comparable prescriptive easements?

The District Court awarded respondents damages totaling \$8,400 based on an appraisal submitted by respondents to the District Court after the close of the trial.

MOST APPOSITE CASES AND STATUTES:

- *Corpus Juris Secundum*, updated April 2008, Eminent Domain, § 150
- *Moore v. United States*, 61 Fed.Cl. 73,74 (2004)

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STATEMENT OF THE CASE

Appellants sought a judgment establishing a boundary by practical location or, if not found entitled to that remedy, an exclusive prescriptive easement.

Respondents denied the complaint and asked that appellants' complaint be dismissed in its entirety and that judgment be entered in favor of respondents, including costs and attorney's fees as allowed by law, and such other relief as the court deems just and equitable under the circumstances. Respondents made no other claim for money damages.

The District Court found the appellants had proven both their case for a boundary by practical location to the disputed area and their case for a prescriptive easement. The District Court granted judgment in favor of appellants for a prescriptive easement only. The District Court granted judgment in favor of respondents for damages in the amount of \$8,400.

FACTS

Appellants commenced this action pursuant to Minnesota Statute §559.23. Appendix page A-78. Appellants sought to establish a boundary by practical location or, in the alternative, an exclusive easement by prescription. A-3-5.

The district court granted the appellants a prescriptive easement and granted respondents a judgment against appellants for damages in the amount of \$8,400.00. A-76.

The real estate owned by respondents borders the real estate owned by appellants. A-3 and 6. Appellants' interest in the real estate began when their predecessor in title, Lester Mattson, purchased real estate from Mary Mauriala who is also the source of

respondents' title to their real estate. A-79-80. Respondent Elizabeth Fedoruk moved onto respondents' real estate when her mother, Mary Mauriala, purchased it in 1973. A-81.

Lester Mattson purchased his real estate from Mary Mauriala in 1973. A-80. Shortly after purchasing it, he cleared a driveway from Pioneer Lake Road into his property by removing trees and underbrush. A-80. Mattson cleared the area for the driveway with no objection from Mary Mauriala or respondents. A-81. Mattson graveled and graded the driveway with no objection from Mary Mauriala or respondents. A-81. Mattson testified he believed the driveway was on his real estate although he was never entirely certain of the exact boundary line. A-80.

Mattson also testified that Mary Mauriala never complained or otherwise protested the location of the road. A-80. Respondent Elizabeth Fedoruk is the daughter of Mary Mauriala. A-80. Respondent Elizabeth Fedoruk testified that Lester Mattson told her mother that he would be using the driveway and parking on the west. A-80. Mary Mauriala did not object to this arrangement. A-80.

Mattson testified that he and his guests were the only persons who used the driveway the entire time he owned the lot. A-80. Mattson maintained the driveway and the area around it, but not beyond the eastern edge of the driveway. A-80-81. This driveway was Lester Mattson's sole means of accessing his property from Pioneer Lake Road. A-81.

In addition, Lester Mattson built and maintained a boat ramp in the disputed area of real estate on the shoreline, all with no objection from Mary Mauriala or the respondents. A-81. The boat ramp was on the real estate as early as 1973 and respondents did not

object. A-83.

The only fence on the property was on the west side of the property. A-81.

In 1982, Lester Mattson sold his real estate to appellant Jack Gabler. A-81.

Respondent Gabler continued to use and maintain the driveway without objection from Mary Mauriala or respondents. A-81. In 1982 when appellant Gabler bought the property, he began mowing and maintaining the grass to the east and south of the driveway up to the tree line. A-81-82. Respondents and Mary Mauriala never objected. A-82.

Mary Mauriala died in 1986. A-81. Respondents inherited their real estate from Mary Mauriala. A-82.

By 1988, the driveway had been in place for 15 years. A-82. In 1988, neither party was aware of the true boundary line but both appellant Gabler and his predecessor in title, Lester Mattson, continued to believe that the boundary line was east of the driveway. A-82.

Lester Mattson brought a trailer to his real estate, which he used as a cabin. A-82. Respondent Elizabeth Fedoruk was upset when trees were cut down when the trailer was brought in, but never voiced a single complaint about the driveway that had been already cut through the trees. A-82. They never once protested the gravel driveway that had been carved through the woods. A-82.

In 1991, appellant Gabler learned the driveway was truly not on his property. A-82. He hired a lawyer who wrote a letter to respondents informing them of the encroachment and offering to resolve the situation. A-82. Respondents again failed to act. A-82.

Respondents did not ask Gabler to move the driveway. A-82. Respondents did not even know how much the driveway encroached beyond the true boundary line, nor did they bother to investigate it themselves. A-82. Respondent Elizabeth Fedoruk testified that the letter wasn't clear so she simply assumed the encroachment was minor. A-82.

From the photos received into evidence, the area up to the tree line to the east of the driveway has been maintained for a period of years. A-83. Respondents never mowed or otherwise maintained this area. A-83. Appellants' predecessor in title, Lester Mattson, mowed, fertilized, or otherwise maintained the grass to the eastern edge of the driveway and to the lakeshore for nine years from 1973 to 1982. A-83. Appellant Gabler mowed, fertilized and maintained the grass to the tree line and the shoreline for 24 years, from 1982 to 2006. A-83. In 2006, appellant Gabler sold the real estate to appellants Fredricks. A-83.

Respondents sat by while appellants cleared trees and underbrush and installed a gravel driveway. A-84. Respondents continued to sit by while appellants regularly used the driveway. A-84. Even in 1991, when told at least some of the driveway was on their land, respondents chose to sit by and do nothing further. A-84.

The driveway was constructed in 1973 and remains in place today. A-84.

Appellants have shown that they use the driveway to the exclusion of the community at large. A-84. The driveway was not a public road open to use by the public at large. A-84. It was a private driveway leading to a private home and appellants privately maintained it. A-84. Respondents' use of the driveway was limited to walking or contractors parking alongside the driveway. A-84-85.

Respondents initially submitted a claim for attorney's fees but prior to trial conceded they were not recoverable. A-85.

Respondents claim the loss of the disputed real estate will lead to their inability to subdivide their two adjoining lots in the future. A-85. The district court found that even if the real estate has been taken, there is still plenty to subdivide. A-86. A survey placed in record by respondents locates the respondents' home squarely in the middle of the two lots. A-86.

Respondents obtained an appraisal of their alleged damages well after trial. A-86. The appraiser was not disclosed prior to or during trial. A-86. The district court found that based on the appraisal report, the value of the property burdened by the prescriptive easement is \$8,400.00. A-86-87 and 94.

The disputed real estate is outlined in a survey. A-31 and 65-66. The width of the disputed real estate ranges from three feet at the shoreline of Pioneer Lake to a maximum width of 13.7 feet. A-66 and 27. Appellants' complaint summarized the prescriptive easement width as 14 feet. A-4. Respondents appraiser based his appraisal on the assumption the prescriptive easement would be 14 feet wide. A-28 and 33. Respondents' proposed order to the district court identifies a 12-foot wide easement but legally describes it as the westerly 14 feet. A-72-74. The district court awarded appellants a nonexclusive easement 12 feet wide. A-94.

Respondents' appraiser values the easement by prescription at \$8,400.00. A-17 and 20. The appraisal report was intended to be used as a basis for negotiations. A-27. Respondents' appraiser based his valuation of the prescriptive easement on sales of land.

A-34. The appraisal does not make a distinction between the values of voluntary sales of fee title to real estate and prescriptive easements over real estate. The appraiser's first three comparables include complete recent acquisitions of buildable-size lots ranging from 1.7 acres to 4.25 acres. A-34. Their square foot values are \$.77, \$.89, and \$1.45. A-34. The appraiser concluded that the value of the real estate was \$1.30 per square foot.

A-35.

The appraiser's last comparable, No. 4, is slightly dated, situated some distance from the subject property and was a 25-foot wide strip of land. A-34. The 25-foot wide strip of land purchased was valued at \$1.12 a square foot. A-34. Estimating the land's value at \$1.30 per square foot, the appraiser states that the disputed area had a market value of \$5,800.00. A-35.

The appraiser concluded that because the disputed area has been cleared and a gravel/stone road built, this will benefit appellants. A-35. The appraiser valued the road over the disputed area at \$2,600.00. A-35-36. The total of the estimated land value (\$5,800.00) and the value of the roadway totals \$8,400.00. A-38. Appellants cleared the land and built that road. A-80, 81, 83. Respondents did not mow or maintain the area. A-83.

ARGUMENT

1. Standard of Review : De Novo

The court of appeals is not bound by and need not give deference to a district court's decision on purely legal issues. Modrow v. JP Foodservice, Inc., 656 N.W.2d 389, 393 (Minn. 2003) (citing Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984)).

“This court reviews purely legal issues, such as case law relied upon by the district court, de novo.” Haefele v. Haefele, 621 N.W.2d 758, 761 (Minn. App. 2001).

“Interpretation of procedural rules presents questions of law, which we review de novo. Rubey v. Vannett, 714 N.W.2d 417, 421 (Minn. 2006) “Interpretation and application of procedural rules are legal issues that are reviewed de novo.” Clark v. Clark, 642 N.W.2d 459, 464 (Minn. App. 2002). “In construing procedural rules, we first look to the plain language of the rule and its purpose.” Rubey v. Vannett, 714 N.W.2d 417, 421 (Minn. 2006).

Whether a statute has been properly construed is a question of law subject to de novo review. State v. Murphy, 545 N.W.2d 909, 914 (Minn. 1996), Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 346 (Minn. 2003) (citing St. Otto's Home v. Minn. Dept. of Human Servs., 437 N.W.2d 35, 39 (Minn. 1989)), Houston v. Int'l Data Transfer Corp., 645 N.W.2d 144, 149 (Minn. 2002), Burkstrand v. Burkstrand, 632 N.W.2d 206, 209 (Minn. 2001), Ramirez v. Ramirez, 630 N.W.2d 463, 465 (Minn. App. 2001), and Brookfield Trade Center, Inc. v. County of Ramsey, 584 N.W.2d 390, 393 (Minn. 1998).

- 2. As a matter of law, the District Court does not possess the inherent power to award money damages to unsuccessful litigants in an equitable action in which:**
- 1. the only relief pled was by the successful litigants who sought judicial recognition of a boundary by practical location or, if not found entitled to that remedy, a prescriptive easement,**
 - 2. the unsuccessful litigants did not plead a counter claim for the money damages awarded to them,**
 - 3. the money damages are based solely on evidence solicited by the District Court after the close of trial, and**
 - 4. the money damages are based solely on evidence not subject to rebuttal or cross examination by the opposing party.**

The District Court awarded damages of \$8,400 to respondents for the land being burdened by the prescriptive easement granted appellants even though respondents had not pled a counter-claim for damages and damages were not litigated during the trial.

The day after testimony was closed, the District Court wrote a letter to the parties' attorneys requesting evidence on damages. In its letter, the District Court requested evidence on the value of the contested property because almost nothing was said during testimony about valuation. A-8. More fully the District Court wrote in its letter sent after the close of trial:

“...Second, I need more information on the value of the contested property. I need both facts and argument to determine both the amount and method of valuation—for example, is the Court to simply apply a fair-market-value approach to the square footage in controversy, or try to determine the value of a temporary or permanent easement, or is it the value lost by the Fedoruks if they are unable to subdivide their property? Under any of these methods, what do each of you argue the proper value or range or values is? **Because almost nothing was said during the testimony about valuation,** I want to make clear that I am allowing each of you to submit additional factual material (a specific dollar value) on which the Court could base its decision. If I receive no additional factual information, I will assume that both sides have conceded that issue, rendering it moot.” Emphasis added. A-8.

Almost nothing was said during testimony about valuation because it was not an issue. The respondents did not plead damages in a counter-claim. No known law in Minnesota makes damages an issue in this type of equity litigation. On its own, the District Court created this issue after the close of trial. A-8.

Most likely, damages were not pled or offered into evidence by respondents because trial counsel recognized that Minnesota law does not permit damages to the unsuccessful litigant in a boundary by practical location or prescriptive easement case.

There is no known law that permits, or compels, a court of equity to go beyond the known equitable remedies and create another after the close of trial.

This would be an interesting question to ask respondents' counsel at oral argument: why were no damages alleged in a counter-claim? Probably, damages were not claimed because it is common knowledge that the losing party in an equitable action, such as this, is not compensated monetarily. Respondents' counsel could not have anticipated an unknown remedy yet to be created by the District Court after trial.

Appellants' counsel did not anticipate a new issue or remedy would be created after trial, which is why their case was based on the pleadings. This is how trials are tried and how trial attorneys prepare for trial. The trial issues are framed by the pleadings and respondents pled no damages. Damages weren't litigated.

Like appellants' trial counsel, my research has also failed to find any other Minnesota case in which the unsuccessful litigant, in either a boundary by practical location or prescriptive easement case, received money compensation. Likewise, I did not find any case from any other jurisdiction in this country in which the unsuccessful litigant was awarded damages for a claim not alleged in a counter-claim and created by the trial court after the end of trial.

In one old Minnesota case, the Supreme Court sets out a general principle regarding damages in an equity action. Damages are generally available to the prevailing party, not the losing party or a third party, when they are in addition to or incident to an equitable remedy. *Leach v. Leach*, 209 N.W.636 (Minn. 1926). The

Supreme Court wrote at 209 N.W.638:

“A court of equity, as a rule, declines the jurisdiction to grant mere compensatory damages when they are not given in addition to, or as an incident of, some other special equitable relief. If such power exists, and perhaps it may, it should not be exercised, unless it be necessary to promote the ends of justice.”

Haugland v. Canton, 84 N.W.2d 274 (Minn. 1957) is consistent with the Leach v. Leach premise that damages may be available as an alternative remedy to one seeking equitable relief. Plaintiff first sought specific performance and only requested damages in the alternative, if his claim for specific performance was denied.

Haugland v. Canton, 84 N.W.2d 274, 274 (Minn. 1957). In Haugland plaintiff was denied specific performance, but was awarded damages for the value of seed he provided to be planted on the land. The case does not stand for the principle that damages may be awarded to a losing party, only that they may be awarded in lieu of equity, to do equity.

The District Court is not permitted under any authority, including its inherent authority, to create remedies. The District Court is bound to comply with and to enforce the rules of court. This includes Minn.R.Civ.P. 13, which requires defendants to state their claims in a counter-claim.

The District Court ignored Minn.R.Civ.P. 13 when it created the issue of damages, where none existed, and did so after the close of trial. This interpretation of a procedural rule has no basis in law, and is patently wrong and inequitable.

Procedural rules are interpreted de novo. *Madson v. Minn. Mining and Mfg. Co.*, 612 N.W.2d 168, 170 (Minn. 2000). When construing rules, the Court of Appeals looks to the plain language of rules and their purpose. *Madson v. Minn. Mining and Mfg. Co.*, 612 N.W.2d 168, 171 (Minn. 2000). The Court of Appeals should examine de novo the District Court's novel revision of Minn.R.Civ.P. 13 to permit new issues to be added after trial, without a counter-claim. The District Court does not have the power to do that.

Minn.R.Civ.P. 13 accomplishes several broad well recognized objectives:

- Fair notice to the adverse party of the claims being litigated.
- Opportunity for complete discovery.
- Options to dismiss claims that are not recognized in law or equity (as the one here created by the District Court after trial.)
- Full opportunity to cross-examine adverse witnesses and rebut their testimony and evidence during trial.
- Complete understanding of the potential losses so attorneys can effectively and knowledgeably counsel clients on the risks of trial and the advantages of settlement discussions.

“When established and reasonable procedures have failed, an inferior court may assert its inherent judicial power by an independent judicial proceeding brought by the judges of such court or other parties aggrieved.” *In the matter of the Clerk of Court's Compensation for Lyon County v. Lyon County Commissioners*, 241 N.W.2d 781, 786 (Minn. 1976). However, before it may resort to its inherent powers for the

purpose of nullifying a well established and reasonable rule of procedure the District Court must demonstrate that established procedures have failed. *Ibid.* But, Rule 13 had not failed.

“The test to be applied in these cases is whether the relief requested by the court or aggrieved party is necessary to the performance of the judicial function as contemplated in our state constitution. **The test is not relative needs or judicial wants, but practical necessity in performing the judicial function.**” Emphasis added. *Id.* But, it was not necessary for the District Court to disregard Minn.R.Civ.P. 13. The District Court probably thought it was being fair, but disregarding Minn.R.Civ.P. 13 was neither fair nor correct nor in compliance with Lyon County Commissioners. It is an error of law that should be reversed.

Also, “Such a proceeding must include a full hearing on the merits in an adversary context before an impartial and disinterested district court.” In the matter of the Clerk of Court’s Compensation for Lyon County v. Lyon County Commissioners, 241 N.W.2d 781, 786 (Minn. 1976). Abrogating the rules of procedure and creating a new cause of action for damages after the close of trial, as the District Court did in this case, is not a full hearing on the merits in an adversarial context. At most, it is an afterthought.

There appears to be no Minnesota cases directly addressing a money award of damages to an unsuccessful litigant for a claim not alleged, but created by the court after trial. However, somewhat similar issues have been litigated in other states. Those states give guidance.

The Vermont Supreme Court considered related issues in an equity action regarding encroachment on a right-of-way. The trial court in *Fenix v. Contos*, 126 Vt. 477, 236 A.2d 668 (Vt.Sup.Ct. 1967) granted plaintiff greater equitable relief than requested in her complaint. The sole issue on appeal was whether the trial court could grant greater equitable relief than requested when the trial “record does not indicate the issue was enlarged by the conduct of the parties during trial.” Id. 236 A.2d 670. The Vermont Supreme Court wrote at 236 A.2d 670:

“The plaintiff is confined to the relief sought by her bill, and neither the answer, prayer for relief nor the proofs can aid her to recover upon a case not made by the bill. [Citations omitted] It is a familiar rule of equity pleading that one who invokes the aid of that court must set forth all the essential facts with certainty. This requirement is for two reasons. First, that the defendant may be appraised of the nature of the claim made against him; and, second that the court may know what decree to render, if the proof sustains the allegations. Reasonable and convenient certainty is all that is required.”

The Oregon Appeals Court considered a case almost identical to the present appeal. The plaintiff brought an equity action to quiet title to real estate in *Shumate v. Robinson*, 52 Or.App. 199, 627 P.2d 1295 (Or.App. 1981). As in the present appeal, defendant entered a general denial but, unlike the respondents’ answer in this appeal, also raised several defenses. The trial court rejected all defendant’s claims and found

that plaintiff owned the real estate. Then, as in the present appeal, the trial court, *sua sponte*, entered a decree awarding defendant a nonexclusive prescriptive easement that had not been claimed in the pleadings. *Ibid.* 627 P.2d 1295. As in the present case, “Plaintiff claims she was ‘shocked and surprised’ when the trial court, on its own motion and without prior notice to the parties, awarded defendants an easement...” *Id.* 627 P.2d 1296. The Oregon Appellate Court discussed the very clear law that a court of equity is not free to fashion any decree it feels appropriate, but must comply with the rules. This is summarized at 627 P.2d 1298:

“This court recently held that the policy behind the well established rule that a party must recover, if at all, on the party’s pleadings is to prevent unfair surprise. [Citation omitted]”...

“We find that the relief granted defendants here was outside the scope of the pleadings.”

“The broad power of a court of equity should not be invoked to shape a decree which was not reasonably contemplated by the parties and which, as here, represents a substantial departure from the pleadings and the legal theories relied upon by the parties.”

The Court of Appeals in Virginia has also reviewed a trial court’s election to fashion its own remedy, contrary to the restrictions of law and precedent. In *Boyd v. Boyd*, 2 Va.App.16, 340 S.E.2d 578 (Va.App. 1986) the court faced the sole question of whether it could award spousal support when it was not requested in the pleading. Family court is a court of equity. The Virginia appellate court reversed the trial

court's award of spousal maintenance because it was not pled. It was an error of law.

The appellate court wrote at 340 S.E.2d 580:

“Fundamental rules of pleading provide that no court can base its judgment or decree upon a right which has not been pleaded and claimed. [Citation omitted] The office of pleadings is to give notice to the opposing party of the nature and character of the claim, without which the most rudimentary due process safeguards would be denied. [Citation omitted] The rule is clearly stated in Potts: ‘The basis of every right of recovery under our system of jurisprudence is a pleading setting forth facts warranting the granting of the relief sought. It is the *sine quo non* of every judgment or decree. No court can base its decree upon facts not alleged, nor render its judgment upon a right, however meritorious, which has not been pleaded and claimed. [Citation omitted]. Pleadings are as essential as proof, the one being unavailing without the other. **A decree can not be entered in the absence of pleadings upon which to found the same, and if so entered it is void....The general prayer in appellee’s cross-bill for ‘further relief,’ in the absence of a pleading or motion requesting such relief, did not justify an award by the chancellor of spousal support.**” Emphasis added.

The Minnesota Supreme Court agrees that a general prayer for relief cannot be used to create a remedy. *Leach v. Leach*, 209 N.W.636, 638 (Minn. 1926).

The Virginia Supreme Court also considered the inherent authority of courts of equity and reached the same conclusion as the Virginia Court of Appeals discussed above. The Virginia Supreme Court wrote, “A court cannot enter a decree or judgment on a right which has not been pled or claimed. [Citation omitted] Even though the power of the equity court is broad, it cannot extend beyond those rights asserted by the parties.” *Smith v. Sink*, 247 Va. 423, 442 S.E.2d 646, 647 (Va.Sup.Ct. 1994).

The Supreme Court of Alabama agrees with the courts of Virginia, Oregon, and Vermont. *Mid-State Homes, Inc. v. Ledford*, 284 Ala. 613, 227 So.2d 126 (Ala.Sup.Ct. 1969). Quoting from a previous decision of the Alabama Supreme Court, it quotes Justice Storey’s treatise on equity pleadings at 227 So.2d 128:

“ ‘It is a fundamental principle applicable to courts of equity as stated by Mr. Justice Storey in his work on equity pleadings ‘That which is not presented to the court by the pleadings and thus made a part of the record, can not be judiciously decided or determined by the court. Every court must have a record. The pleadings in a case are a part of the mandatory record of the court; and every court is bound by its record.’ *Storey’s Equity Pleadings*, s 10, repeated in *7th Mayfield’s Digest*, p.691.’”

3. As a matter of law, it is reversible error for the District Court to find that the plaintiffs have proven their claim to a boundary by practical location to the disputed area (up to 13.7 feet wide), then fail to award them that boundary by practical location, and instead award them a lesser interest in real estate to a lesser area: a prescriptive easement to just a 12 foot strip.

As with other unprecedented actions by the District Court discussed in this brief, there is no known law in Minnesota directly stating whether or not a trial court is free to refuse to award a remedy required by its own findings of fact. Therefore, it is once again appropriate to look to the appellate courts of other states for guidance.

The Pennsylvania Superior Court held that once a trial court found plaintiff had proven its equitable claim, the trial court was duty bound to give plaintiff its remedy. The Superior Court reversed the trial court's failure to award the remedy that flowed naturally from the factual finding. *Joseph D. Shein, P.C. v. Myers*, 394 Pa.Super. 549, 576 A.2d 985 (Pa.Super.Ct. 1990). In that case, the trial court found plaintiff had proven its case, but did not award damage to compensate plaintiff. The appellate court twice phrased the trial court's duty to provide a remedy, based on its findings of fact, as a "must" duty of the trial court. 576 A.2d 986 and 989.

The Pennsylvania case is comparable to the present appeal. In the present appeal, the District Court found, "Plaintiffs have established a boundary by practical location through acquiescence. Plaintiffs are entitled to the disputed area under this theory." A-83. The District Court's failure to follow this clear concise finding with the remedy of a boundary by practical location is an error of law. The District Court

should be reversed with instructions to enter an order awarding the appellants the remedy the District Court has already found they are entitled to receive.

Once the District Court found appellants were entitled to a boundary by practical location to the disputed area, its award of a lesser interest in title to a smaller area is an unlawful taking of appellants' property without due process and without compensation. Granting fee title to the entire disputed area to respondents deprives appellants of the natural ownership interest that always attends a finding of a boundary by practical location. The District Court denied appellants their property: their fee interest as found by the District Court.

Next, the District Court aggravated the first error by only granting the appellants a nonexclusive easement about two full feet narrower than the area to which they should have been granted fee title. The District Court's twelve feet wide easement is two feet narrower than all proof as to the width of the disputed property. The District Court has now denied appellants the right to use two feet it previously found appellants should actually own.

The District Court further compounded these errors by awarding damages to the respondents, who have now taken appellants' real estate away from them. Respondents were allowed to take damages without even making a counter-claim requesting damages.

The District Court further erred by including in that award of money damages, the value of the improvements made by appellants and their predecessors in title. The appellants or predecessors in title built and maintained the driveway, yet respondents

were awarded \$2,600.00 (A 35-38) to compensate respondents for the value of the road built by appellants at appellants' expense. Appellants and predecessors built and maintained the road; the District Court took their road from them; and then the District Court found appellants had to pay for the road a second time by paying the respondents \$2,600.00. The District Court should be reversed as a matter of law.

The Alabama Supreme Court considered an equity case almost identical to the present one now on appeal. *Matthews v. Matthews*, 292 Ala.1, 288 So.2d 110 (Ala.Sup.Ct. 1973). In *Matthews* the plaintiff sought a resulting trust in real property. The defendant, as in the present case on appeal, entered a denial and did not make a counter-claim for money damages. As in the present case, the trial court awarded plaintiff equitable relief, but conditioned it on the payment of money to defendant. That trial court awarded money damages to the unsuccessful litigant "to do equity to them." *Ibid.* 288 So.2d 112. The Alabama Supreme Court reversed the money judgment granted "to do equity" for the defendants because the trial court was limited to the defendants' pleadings, which did not ask for money damages.

In the present appeal, the District Court is prohibited as a matter of law, just as it is the law in Alabama, from setting up its own balancing of equities scheme that conditions an award of equitable relief on payment of money to the unsuccessful litigant. The District Court's award of money damages to respondents is without legal authority. Regardless of the District Court's well-intended balancing exercise, the District Court is not permitted to do it. Rules apply to the District Court. Its inherent power has limits. The District Court's award of money damages should be reversed

as an error of law.

The Oregon Court of Appeals concurs in this approach in Mainland Industries, Inc. v. Timberland Machines and Engineering Corporation, 58 Or.App. 585, 649 P.2d 613 (Or.App. 1982). The Oregon Court of Appeals articulates two basic truths about the present appeal:

- Denial of complete equitable relief as proven by appellants and found by the District Court is a denial of property, both rightly and equitably, belonging to appellants.
- Respondents are unjustly enriched by now getting the fee title to all the real estate the District Court found belonged to the appellants by the practical location of the boundary.

That summary is a fair statement of the analysis and logic of the Oregon Court of Appeals in Mainland Industries, Inc. v. Timberland Machines and Engineering Corporation, 58 Or.App. 585, 649 P.2d 613 (Or.App. 1982). The Oregon Court of Appeals summarized the logic of equity at 649 P.2d 618 and 619:

“An equity court has broad power to fashion an appropriate remedy. However, the court’s discretion is not absolute, and it must be exercised within bounds of sound legal and equitable principles.”

“Equity seeks complete relief. To be completely vindicated, Mainland is entitled to recover profits earned by defendants as a result of their wrongful use of the patent. Mainland would be

deprived of what was justly its, and defendants would be unjustly enriched were they permitted to retain such profits.”

The Michigan Supreme Court agrees that once a litigant is found entitled to an equitable remedy, the trial court is obligated to provide that equitable remedy. The Michigan Supreme Court reviewed, like the present case on appeal, a trial court that failed to provide the remedy proven by the factual findings and, instead, creatively fashioned its own brand of equity balancing.

In *Kieffer v. Van Leeuwen*, 355 Mich. 430, 94 N.W.2d 793 (Mich.Sup.Ct. 1959) plaintiff sought specific performance of an oral contract for real estate. Under Michigan statutory law, equity cases may be decided by a jury. The jury in *Kieffer* found the plaintiff was entitled to specific performance: conveyance of fee title. Rather than enter an order implementing the factual finding of the jury, the judge merely granted the plaintiff a life estate, not the fee interest found by the jury. The Michigan Supreme Court vacated that judgment and remanded to the trial court to enter an order conveying the fee title consistent with the factual finding of the jury.

The Michigan Supreme Court concluded that trial judges do not have the authority to fashion their own creative sense of equity by ordering a conveyance of a lesser title than plaintiff was found to be entitled to receive. It summarized its reasoning this way at 94 N.W.2d 796:

“It seems apparent that the learned chancellor was trying to do equity by reaching what he thought was a fair compromise between the two conflicting claims....However broad, the

chancellor's powers are not without limits in his proper efforts to reach a fair result....In a suit for specific performance, once the chancellor finds that a contract exists and decides to enforce it, he must do so according to the terms thereof....**In situations of this kind, perhaps regrettably, there is no room for compromise, however, 'fair' it may appear. Plaintiff here was entitled to all or nothing, there was no middle ground. We think the undisputed proofs show that she was entitled to all.**" Emphasis added.

In the present case on appeal, appellants were clearly found to be entitled to a boundary by practical location. The District Court tried to create a middle ground, but as the Michigan Supreme Court correctly concludes, there is no middle ground in such cases. The undisputed proof shows appellants are entitled to a boundary by practical location for the entire disputed area.

The Vermont Supreme Court agrees with the Michigan Supreme Court. In Vermont, once the plaintiff in an equity action is found entitled to an equitable remedy, the trial court is duty bound to order that equitable remedy.

In *Brown v. Evarts*, 128 Vt. 1, 258 A.2d 471 (Vt.Sup.Ct. 1969) plaintiff sued for specific performance of an agreement to purchase real property. The Supreme Court found the undisputed evidence established good and sufficient cause for specific performance. *Ibid.* 258 A.2d 475. At that page, the Vermont Supreme Court wrote:

“The facts essential to this relief were neither disputed nor denied and each was made the subject of a valid request to find, which was duly presented to the chancellor....In the presence of valid requests to find, according to uncontradicted evidence, the decree must follow the result demanded by the requested findings.”

It may be difficult for trial courts to implement equity in Vermont, Michigan, Oregon, and Alabama. But, it is clearly their job to do so. Appellants urge the Minnesota Court of Appeals to adopt the well reasoned law in those states and make it the duty of the Minnesota District Court to implement its equity findings with consistent equity orders.

Because the District Court did not implement its findings with an appropriate order establishing a boundary by practical location as proven and found, the District Court should be reversed as a matter of law with instructions to enter an order implementing its finding of a boundary by practical location to the disputed area.

4. As a matter of law, it is speculative and reversible error for the District Court to base its award of damages for a prescriptive easement solely on evidence of negotiated fee simple title conveyances rather than the current value of comparable prescriptive easements.

The District Court awarded \$8,400 money damages to respondents. A-86-87. The District Court found “that the value of the property burdened by prescriptive easement is \$8400.” A-86-87. That value was based on the appraisal submitted by

respondents. A-86.

The District Court erred as a matter of law by awarding damages for an easement based on the “value of the property” rather than on the value of the burden on the property. The value of the underlying fee title is not used to establish the value of an easement over property. A fee title and an easement are two entirely distinct and independent interests in real estate. Because this is so well understood, I could find no case discussing the District Court’s use of the value of the land burdened rather than the value of the burden placed on the land.

The black letter law on the value of an easement is summarized, with little citation to authority, in *Corpus Juris Secundum*, updated April 2008, Eminent Domain, § 150:

“Ordinarily, where only a right of way or other easement is taken, damages to the owner is measured by the resulting depreciation in value of the land as burdened with the easement.”

“In other words, the measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement. Such ‘before and after’ methodology requires a determination of the fair market value of the entire affected parcel as if the easement did not exist and then another determination in light of the taking.”

“...Absent some extraordinary circumstances, the value of a servitude taken is not the same as the full market value of the land.”

The District Court did the contrary; it valued the servitude as the full market value of the land.

The United States Court of Federal Claims explained the “before and after” valuation of an easement this way at *Moore v. United States*, 61 Fed.Cl. 73,74 (2004)

“Both experts used a ‘before and after’ methodology to determine compensation. This requires ‘a determination of the fair market value of the entire affected parcel as if the easement did not exist and then another determination in light of the taking.’ [citation omitted] The figure resulting from a proper application of a before and after analysis includes the value of the part actually taken, together with any severance damages affecting the value of the remaining parcel.”

The survey relied upon by the District Court did not use a “before and after” analysis. Instead, it is purely a valuation of the underlying fee title, which remains with the respondents and which did not pass to the appellants. The prescriptive easement granted appellants leaves ownership of the underlying fee simple interest with respondents. The value used by the District Court is the value of property that is owned by respondents because the District Court failed to implement its finding that a boundary by practical location had been proven. The District Court has awarded

money damages to compensate respondents for a loss they have not suffered.

Respondents still own fee title to the property.

Because the District Court had already found that the appellants are entitled to a boundary by practical location to the disputed area (A-83), granting the appellants a mere easement amounts to an involuntary taking of appellants' rightful fee title to the property. If damages are to be awarded, they should be awarded to appellants, not respondents. This is especially sensible because their boundary by practical location established their fee title to 14 feet and their new easement is only 12 feet wide.

Under a "before and after" analysis, the value of the property taken from appellants would compare their fee title for 14 feet to a total loss of fee title to all 14 feet plus the permanent loss of the right to use 2 of those 14 feet.

In addition, respondents improved the property by the road they constructed and have not been compensated for it. Instead, the appraiser's analysis has the appellants pay a second time for the road they built. The District Court adopted the appraiser's analysis with its order that appellants pay a second time for the road.

None of this was litigated because the District Court did not make damages an issue until after the close of trial. The District Court measured the part of the value of the prescriptive easement solely on evidence of the value of other fee title conveyances (\$5,800). The District Court did not base its finding of damage on any alleged burden on the fee title retained by the respondents. The District Court did not use a "before and after test." The District Court's damage finding and order includes an amount (\$2,600) previously paid by the appellants to build the road. The award of

damages against appellants is an error of law, several black letter laws. The District Court's award of damages should be reversed as an error of law.

Conclusion: Reverse the District Court

Appellants dispute no factual findings of the District Court. All issues raised in this appeal ask the Court of Appeals to review purely legal issues and questions of law. Review is de novo.

The Court of Appeals is requested to reverse the District Court as a matter of law and order the District Court to:

1. Enter an order that the appellants are granted a boundary by practical location to the disputed area, as the District Court found at Appendix page A-83 appellants are entitled to receive.
2. Enter an order abrogating the damages award to respondents.

Dated: April 17, 2008

Respectfully submitted,


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