

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

JACK H. GABLER AND RICHARD A. FREDRICKS
AND PATRICIA A. FREDRICKS

Appellants,

vs.

ELIZABETH FEDORUK AND
STANLEY FEDORUK, HER HUSBAND,

Respondents.

RESPONDENTS' 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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LEGAL ISSUES

1. Did the District Court grant the appropriate judgment as mandated by Minn. R. Civ. P. 52.01 when it awarded Appellants an Easement by Prescription and damages to the Respondents, where the District Court found that Appellants had satisfied the elements for both Easement by Prescription and Boundary by Practical Location?

The District Court awarded the Appellants an Easement by Prescription with damages to Respondents. The District Court also found that the Appellants had satisfied the requisite elements for Boundary by Practical Location.

2. Did the District Court sitting in equity abuse its discretion by ordering Appellants to pay damages to Respondent in the amount of \$8,400.00 where the District Court first raised the issue of damages after the conclusion of testimony, and the issue was not explicit in the parties' pleadings?

The District Court awarded damages in the amount of \$8,400.00 to Respondents, after it had awarded equitable relief to Appellants. The District Court held that it had the discretion to award damages sitting as a court of equity.

STATEMENT OF THE CASE

Appellants initiated this cause of action against Respondents, alleging that they were entitled to a portion of Respondents property by virtue of either a Boundary by Practical Location or, in the alternative, an Easement by Prescription. Appellants requested judgment granting them one of their two equitable remedies, and an award of reasonable attorneys' fees.

Respondents interposed an answer denying Appellants' claims.

The District Court, sitting in equity, awarded judgment to Appellants for an Easement by Prescription and damages to Respondents for the burden on their land. The District Court also found that Appellants had established a Boundary by Practical Location. Appellants' filed a post-trial motion for clarification, requesting a legal description for the easement ordered by the Court and an amendment to the order disallowing damages for the Respondents. The District Court, adopting Respondents' suggested language for the easement, provided a description. The Court, however, upheld its damage award. Appellants' did not raise the issue of whether the Boundary by Practical Location should have been awarded rather than the Easement in its post-trial motion.

STATEMENT OF FACTS

The parties come before the Court with a dispute over the impact of an access road on the parties' respective property rights. The parties own bordering parcels of real property. Appellants, Plaintiffs at District Court, initiated this action requesting an award by the Court of either a Boundary by Practical Location, or in the alternative, an Easement by Prescription.

Appellants' predecessor in interest – one Lester Mattson – purchased the property in 1973, and constructed the access road in dispute. A-79 - A-80. At that time, Mr. Mattson believed that the access lied on his property, although he testified that he was never certain as to the location of the boundary. Id. at A-80. He also testified that he only maintained the property to the eastern edge of the driveway access. Id. The District Court found at trial that the true boundary had never been established, and that there had been no prior agreement as to the true boundary or whether the access road made the demarcation. A-80.

It is in 1991 that the parties realized that the access road encroached upon Respondents' property. A-82. Appellants, realizing the encroachment, approached Respondents about resolving the issue at that time. No resolution was reached at that time. Id. The driveway access was Mattson's and Appellants' means of accessing the property. A-84.

However, Respondents made use of the driveway beyond Appellants accessing their property between 1991 and 2005. There was evidence presented that Respondents made use of the access road, taking walks on the road multiple times on a weekly basis, as well as having their contractors' vehicles parked there during a period of construction. A-17.

There was also testimony that in 2005, undisputed by Appellants at trial, that in 2005 that the parties agreed to Appellants' continued permissive use of the driveway access, until sale to a third party. A-16.

The District Court found that the driveway access was a private drive leading to a private home. A-84. There was evidence presented that Appellants' made efforts to maintain the area around the driveway (See A-83), but there was also evidence presented that this maintenance was a relatively recent development. A-16.

STANDARDS OF REVIEW

Interpretation of the Minnesota Rules of Civil Procedure is subject to a de novo review. See Rubey v. Vannett, 714 N.W.2d 417, 421 (Minn. 2006). The District Court's legal conclusions are also subject to de novo review. See Lindquist v. Weber, 404 N.W.2d 884, 886 (Minn. Ct. App. 1987). Review of whether the District Court properly exercised its authority as a court sitting in equity is subject to an abuse of discretion review. Commercial Assocs., Inc. v. Work Connection, Inc., 712 N.W.2d 772, 778 (Minn. Ct. App. 2006).

ARGUMENT

I. The District Court's granting of an Easement by Prescription rather than a Boundary by Practical Location was not reversible error because the District Court granted the appropriate judgment as required under the Minnesota Rules of Civil Procedure, where Appellants at most only proved entitlement to a right of access, not title to the disputed portion of property.

Appellants' contention is that the District Court committed reversible error when it found Appellants had satisfied the elements for a finding of both an Easement by Prescription and a Boundary by Practical Location, but in its judgment only awarded the Appellants an Easement by

Prescription. Appellants cite no mandatory/primary authority to support its argument that the court was in error. Rather, it only cites secondary/persuasive authority from Pennsylvania, Alabama, Oregon, Michigan, and Vermont.

The District Court's mandate in this situation is set forth in the Minnesota Rules of Civil Procedure. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law and direct entry of the appropriate judgment. Minn. R. Civ. P. 52.01. The purpose of the rule is to aid the appellate court by affording it a clear understanding of the ground or basis of the trial court's decision. Transit Team, Inc. v. Metro. Council, 679 N.W.2d 390, 398 (Minn. Ct. App. 2004). There is no explicit definition or guidance in Minnesota case law or statute as to what is deemed an "appropriate judgment." In this case, the District Court set forth its findings of fact and conclusions of law in a memorandum attached to its Order. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court or in an accompanying memorandum. Minn. R. Civ. P. 52.01.

Where factual findings are incomplete, the court on appeal may construe the District Court's findings "in light of the entire record, including the evidence, to ascertain the intent of the trial court." Tangen ex rel. Estate of Tangen v. Electro-Plating Eng'g Co., Inc., 2001 WL 910068 at *3 (Minn. Ct. App.). Insofar as the intent of the Court may be an issue, in its Order on Plaintiff's Motion for Clarification, the Court stated that "It was the Court's intention to order a prescriptive easement in Plaintiff's favor in order to allow them driveway access" A-98. The District Court felt that this was "the most equitable outcome." Id.

In the case at bar, it is the practical consequences and effects of ordering either the relief of Boundary by Practical Location, Easement by Prescription, or both, that determines what is the "appropriate" judgment in this case. The effect of a boundary by practical location is to divest the titleholder of property, which necessarily impels that the location must be clear, positive, and unequivocal. Ampe v. Lutgen, 2007 WL 2034381 at *1 (Minn. Ct. App.). See also In re Zahradka, 472 N.W.2d 153, 156 (Minn. Ct. App. 1991); Fishman v. Nielsen, 53 N.W.2d 553, 556 (Minn. 1952); Moore v. Henricksen, 165 N.W.2d 209, 214 (Minn. 1968). The doctrine of practical location is intended to resolve boundary line disputes, *not* to

establish ownership of substantial parcels of land (emphasis in opinion).
Skelton v. Doble, 347 N.W.2d 81, 83 (Minn. Ct. App. 1984).

Appellants did not plead or prove facts to establish ownership of the parcel of land at trial, and cannot attempt to establish such ownership even if the District Court found that Boundary by Practical Location had been established by acquiescence. The legal theories of adverse possession and practical location are not interchangeable. Pratt Inv. Co. v. Kennedy, 636 N.W.2d 844, 849 (Minn. Ct. App. 2001). Although the doctrine of practical location, at least in effect, is similar to acquiring title by adverse possession, they are independent and distinct, and require proof of different elements. See id.

What this dispute essentially boils down to is an access road to Appellants' property that lies on Respondents' property. It should be noted by this court that Appellants' written submission prior to the close of the evidence focused almost entirely on the fact that it was this access road that justified the award of either Boundary by Practical Location or Easement by Prescription. Indeed, Appellants' trial counsel makes numerous references to the access road: "Mary L. Mauriala agreed to the location of the access" A-16. "Mr. Gabler and Mr. Mattson both testified that the length and width of the access is now the same";

“Mr. Mattson and Mr. Gabler have both testified that this access has been used exclusively by the owners of the property”; “The testimony is conclusive that the access is the only way to get to the Fredrick’s property” Id. “There has been no evidence that anyone including the Defendants, Elizabeth Fedoruk and Stanley Fedoruk, have ever attempted to bar access....” A-17. “Mr. Fedoruk testified that in 2005 he told Mr. Gabler that he could use the property but if he ever sold it he would have to construct another access road”; “The Defendants have had knowledge of where the access to the Fredricks property is since 1991”; “Mr. Gabler also testified that he has incurred expense for this access including purchasing gravel, having the access leveled, hauling his own gravel, cutting grass and maintaining the property” Id. There are vague, unspecific references to “the property” in Appellants’ written arguments at trial, but these are in the context of statements regarding the access road. Appellants’ entire argument for relief rests on the access road, and the use of that access road.

The District Court’s opinion is also similarly replete with references to the “driveway.” See, e.g., A-80 (“Ms. Mauriala never complained or protested the location of his driveway”, “[H]e would be using the driveway”; “Ms. Mauriala . . . was told by Mr. Mattson that he would

be using the driveway”; Mr. Mattson . . . cleared a driveway”; “He believed the driveway was on his own property”; “He also maintained the driveway and the area around it, but not beyond the eastern edge of the driveway”)

Also, the District Court’s actions in the case at bar finding that Appellants’ may be entitled to a Boundary by Practical Location and Easement by Prescription, but only awarding the Easement by Prescription is not as unprecedented in Minnesota as Appellants indicate. See Moore v. Henricksen, 165 N.W.2d 209 (Minn. 1968). Like this case, Moore involved a dispute over a driveway used for access. Id. at 213.

Property was owned by one Kent Henricksen that bordered property owned by Plaintiff Moore. Moore’s father, his predecessor in interest, conveyed property to Henricksen’s predecessor in interest, Joseph Cotton. Id. at 212. When Cotton began to construct a house, he discovered that he had no room for a driveway. Id. Cotton successfully petitioned the Duluth Common Council to vacate the public alley, and in turn created an easement for a private alley. Id. The alley was located on the southerly 20 feet of the parcel owned by Moore’s predecessor. Id.

Cotton eventually constructed a concrete driveway which was slightly north of the alley, and was less than 10 feet from the south edge of

Moore's property. Id. at 213. The Cotton driveway was used by Plaintiff and his predecessor to access to their garage. Like this case, there was evidence presented that Plaintiffs helped maintain the driveway access and cut grass between the north edge of the driveway and the south edge of Moore's property. Id.

After disputes as to the condition of the driveway arose subsequent to Henricksen's acquisition, Henricksen eventually barricaded the disputed driveway. Plaintiff brought an action first to enjoin Defendant Henricksen from barricading her property, citing an easement created by Henricksen's predecessor in title, Joseph Cotton. Id. at 213.

The District Court found that the practical location of the boundary burdened Defendant's (Henricksen's) property with an easement, and the court subsequently awarded the Plaintiffs the easement. The District Court explained that while the practical location of the boundary would logically give plaintiff title by adverse possession . . . he was limiting his decree to provide for right of access across the strip. Id. at 214.

It should be noted that in the Moore case, the District Court's easement was granted by virtue of the boundary by practical location. Id. at 213-214. It is also very important to note that in that case, the Minnesota Supreme Court reversed the finding of a boundary by practical

location. Id. at 215. The finding of a boundary by practical location was reversed as not satisfying any of the tests under Minnesota law, and that the Easement by Prescription was upheld. Id. at 215-16. The District Court's determination was not reversed due to its limiting of its decree to a right of access. The District Court's reasoning in Moore is at least instructive as to the fashioning of an appropriate order under Minn. R. Civ. P. 52.01.

The elements of proof necessary to establish an Easement by Prescription are analogous to those elements required to establish adverse possession and requiring a showing that the property was used in an actual, open, continuous, exclusive, and hostile manner for the requisite statutory period of time. Rogers v. Moore, 603 N.W.2d 650 (Minn. 1999). An easement is an interest in land in the possession of another that entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists. 17 DUNNELL MINN. DIGEST *Easements* §1.00 (5th ed. 2005), citing Braaten v. Jarvi, 347 N.W.2d 279 (Minn. Ct. App. 1984).

The issue before the Court is whether the Easement was the "appropriate" judgment. An Easement by Prescription, rather than a Boundary by Practical Location, is the appropriate remedy in this case,

even if the court made findings that the elements for Boundary by Practical Location had been satisfied. Where factual findings are incomplete, the appellate court may construe those findings “in the light of the entire record, including the evidence, to ascertain the intent of the trial court.”

Tangen, 2001 WL 910068 at *3.

It is illustrative that Appellants did not put forth Adverse Possession as one of their theories of relief, which unlike Boundary by Practical Location, can establish ownership and title to property. See, e.g., Konantz v. Stein, 167 N.W.2d 1, 4 (Minn. 1969)(“In Minnesota, adverse possession of land for the period of time prescribed by the statute of limitations . . . practically extinguishes the right of the party having the true paper title and vests a perfect title in the adverse holder.”) Unlike the issue of damages in this equitable proceeding, which the District Court specifically (and within its discretion) raised as an issue and for which it left the record open for evidence, adverse possession was neither plead, raised, argued, or even suggested (except in Defendants’ written arguments on Easement by Prescription) by either party as a theory for relief.

An element of Adverse Possession is the element of Hostility. Hostility is related to the disseizor’s entry on the land, possession of the land as if it were his or her own, and the exclusion of others from the land.

See, e.g., Smith v. Higgins, 2006 WL 2053400 at *4. See also Ebenhoh v. Hodgman, 642 N.W.2d 104, 110 (Minn. Ct. App. 2002). Hostility contemplates the disseizor entering and taking possession of the land as if it were the disseizor's and owning it with the intention of excluding others. Ganje v. Schuler, 659 N.W.2d 261, 268 (Minn. Ct. App. 2003).

In this case, there was no evidence taken that there was ever an intention on the part of Appellants to exclude Defendants from the property (let alone others), or a showing that there was intent to claim exclusive ownership. While there is no requirement of subjective intent to take property adversely, hostility sufficient to confer title via adverse possession requires the intention of the disseizor to claim exclusive ownership as against the world and to treat the property in dispute in a manner generally associated with the ownership of similar type property. See Ehle v. Prosser, 197 N.W.2d 458, 462 (Minn. 1972). In the context of the case at bar, as pertains to the element of hostility, Appellants did not plead or show that they had claimed exclusive ownership as "against the world," or that they possessed the requisite exclusionary intent.

There was testimonial evidence presented that Respondents walked the disputed property "several times each week" without objection from Appellants. See, e.g., A-17. Appellants' brief discloses that Respondents

made use of the property, again without objection, including “walking or contractors parking along the driveway.” Appellants’ Br. 10. Indeed, there is little evidence, if any, in Appellants’ record to show that Appellants intended to exclude Respondents, or that Respondents were in fact excluded at all from the disputed portion of the land between the two properties, or that Appellants established hostility or exclusivity for the statutory period, to justify an award of title rather than merely a right of access.

The District Court in the case at bar also addressed exclusivity in the context of awarding an Easement by Prescription. Exclusivity as to the community at large means that Appellants’ rights to the disputed access do not depend for its enjoyment on a similar right in others. See, e.g., Merrick v. Schleuder, 228 N.W. 755 (Minn. 1930). The exclusivity requirement for Easements by Prescription is not as strictly defined as that of adverse possession. Wheeler v. Newman, 394 N.W. 2d 620, 623 (Minn. Ct. App. 1986). The clear implication from case law is that the exclusivity requirement for adverse possession is strictly defined, or at least more strictly defined than exclusivity required for Easement by Prescription.

Respondents presented evidence that if the boundary by practical location were awarded, the resultant divestiture of title of the disputed

portion would have a significantly higher financial impact on the Respondents than the award of an easement. The appraisal estimated that the impact of the proposed boundary by practical location was \$37,000, as opposed to \$8,400.00 for an Easement by Prescription.

The court was also presented evidence of Appellants' unclean hands. See A-19-A-20. Evidence was presented that Appellants may have violated a local zoning ordinance, and that there may have been misrepresentations on an application for a variance. Id.

The ultimate issue in this case is not whether Appellants proved a case for adverse possession; it is whether the District Court's remedy in this case was an "appropriate judgment." The key fact is that Appellants' relief is predicated upon an access road, and the use of that access road. The more appropriate judgment in this case, where Appellants' case is predicated on an access road and the use of an access road, is Easement by Prescription. See Wheeler v. Newman, 394 N.W.2d 620, 622-23 (Minn. Ct. App. 1986). ("Through a prescriptive easement, a person gains the right to use land for certain purposes."). To award Appellants' title to the disputed portions of the property would be inappropriate, where they have neither shown through their pleadings nor shown through the evidence presented anything entitling them to ownership and title. Acquiescence as

to the location of a boundary line predicated on the use and location of an access road alone does not satisfy the elements of adverse possession to entitle Appellants to ownership and title of the disputed portion of property, and certainly does not satisfy the requirement that to take title and ownership, that Appellants had the requisite intent to claim exclusive ownership, to the exclusion of Respondents.

Again, while adverse possession was not argued, it is instructive that in 1991 Mr. Gabler approached Respondents about an encroachment. The District Court made note of this occasion in its written opinion. A-82. If Mr. Gabler had intended to claim exclusive ownership as against the world (as is required to show adverse possession), he would never have offered to resolve the situation. Mr. Gabler's offer in 1991 to compromise is inimical to a claim of exclusive ownership, or the intent to exclude others. There was also undisputed testimonial evidence presented that as late as 2005 there were discussions between the parties as to the use of the access. This evidence cuts against a finding of hostility and exclusivity to result in an award of title and ownership to property. Appellants' entire argument at trial and on appeal is that the elements of their case had been established almost entirely in reference to the driveway access. That the

driveway access is the key fact in this case is borne out in the District Court's opinion as well.

The court acted equitably in this situation in deciding an appropriate remedy, and because the Appellants' had not plead the issue, nor presented evidence to show that they are entitled to title and ownership to the disputed portions of the property, they are at most, only entitled to the access that was awarded by the District Court. An easement is the most appropriate remedy and judgment in this case where Appellants' claims are entirely predicated on the access road. The judgment of the trial court should be affirmed, or in the alternative, remanded for findings consistent with a finding that Appellants have not plead or proven facts to warrant an award of title and ownership to the disputed portion of the property.

II. The District Court did not abuse its discretion in ordering damages to the Respondent. The District Court may order damages ancillary to equitable relief, and when the District Court requested evidence and argument from the parties on this issue, Appellants failed to object as outside of the pleadings and instead submitted written arguments on the issue.

The District Court's award of damages to Respondents is predicated on its award of an Easement by Prescription to the Appellants. (It should

be noted that Appellant makes no argument for or against the measure of damages employed by the District Court). Appellants' argument is that Respondents are not entitled to money damages in an equitable proceeding chiefly because the Respondents did not "prevail," and that the issue was not specifically plead or argued during the trial phase.

The trial court has jurisdiction to determine any interests or issues that are fairly covered by the pleadings and the evidence presented.

Clausen v. City of Lauderdale, 681 N.W.2d 722, 726 (Minn. Ct. App. 2004).

A court of equity will not allow the pleadings to prevent it from getting at the heart of the controversy and seeing that a right result is reached.

20 DUNNELL MINN. DIGEST *Equity* §1.04(a) (5th ed. 2006), citing Prince v. Sonnesyn, 25 N.W.2d 468 (Minn. 1946).

District Courts may award equitable relief to a party, even though such relief was not explicit in a prayer for relief. For example, a trial court has jurisdiction to reform deeds in an action to quiet title, even though that relief was not requested in the pleadings. See Clausen, 681 N.W.2d at 726.

The court's exercise of its inherent authority *sua sponte* is limited by the requirement that the court give the parties the opportunity to be heard and present evidence. A district court cannot *sua sponte* exercise its

inherent authority to grant equitable relief in a manner that prejudices the opposing party by failing to give it an opportunity to present evidence to oppose the relief ultimately given. Clausen, 681 N.W.2d at 726. In the case at bar, such an opportunity was given: the court gave both parties notice that it was considering the issue of damages, and that it was keeping the record open for the parties to present evidence and legal arguments on that issue. See A-8, A-99.

Also, the parties impliedly consented to the damage issue. Issues not raised by the pleadings which are tried by express or implied consent are treated in all respects as if they had been raised in the pleadings. Minn. R. Civ. P. 15.02.

Mere reference to an issue by the parties does not constitute the intent to litigate the issue. MT Properties, Inc. v. CMC Real Estate Corp., 481 N.W.2d 383, 389 (Minn. Ct. App. 1992). However, this was not an issue raised by either party-it was raised by the court. Also, this was no "mere reference." This was an explicit directive from the Court requesting evidence and argument on the (to use the District Court's words) "specific issue" of damages.

Consent to litigate an issue not raised in pleadings may be implied where party does not object to evidence relating to issue or puts in his own

evidence relating to issue. See Shandorf v. Shandorf, 401 N.W.2d 439 (Minn. Ct. App. 1987). Where a party does not seasonably object to evidence as outside the scope of the pleadings, the issues raised by that evidence shall be treated as if they had been raised in the pleadings. MT Properties, Inc. v. CMC Real Estate Corp., 481 N.W.2d 383, 389 (Minn. Ct. App. 1992). Appellants made no such objection either in its final written submissions to the District Court, nor did it make any such objection to the issue in its post-trial motions.

Once a court of equity acquires jurisdiction of a cause, it will grant full relief, either legal, equitable, or both. See Peterson v. Johnson Nut Co., 297 N.W. 178 (Minn. 1941). A court, once it assumes equitable jurisdiction, may award ancillary damages incident to the complaint...R.E.R. v. J.G., 552 N.W.2d 27, 31 (Minn. Ct. App. 1996). The court's exercise of its equitable authority is reviewed on an abuse of discretion standard. See Commercial Assocs, Inc. v. Work Connection, Inc., 712 N.W.2d 772, 778 (Minn. Ct. App. 2006).

That the court raised the issue of damages is not disposed of by any absence from the written pleadings. A court may fashion an equitable remedy even though it has not been specifically plead. See, e.g., Neill v. Hake, 93 N.W.2d 821, 828 (in an action to quiet title, the District Court has

jurisdiction to reform deeds without the necessity of an action for reformation, and despite that relief not being requested in the pleadings). The court first identified and raised the issue of damages in this equitable proceeding. The trial court has the authority to raise issues *sua sponte*, even if those issues catch the parties off guard. See Papermaster v. Wolf & Assocs., 2001 WL 1182834 at *2-3 (Minn. Ct. App.) (The trial court has the inherent authority to raise the issue of summary judgment *sua sponte*, without notice to either party, where there was no showing of prejudice to objecting party, and no procedural irregularities). In the case at bar, the parties had agreed that written arguments would be submitted in lieu of oral summations. The District Court requested that the parties present arguments and evidence on the issue of damage for either party in their summations.

Further, when the court raised the issues of damages, Appellants' trial counsel did not object to the admission of evidence on the issue; instead it submitted its own legal arguments that damages could not be awarded. It is important to note that the District Court specifically requested argument as to which of Plaintiffs' theories of relief allowed for damages. See A-8. That the issue was not mentioned in the written pleadings is not dispositive. Litigation by consent is not to be applied

artificially, but rather is to be implied where the novelty of the issues sought to be raised is reasonably apparent and the intent to try these issues is clearly indicated by failure to object or otherwise. Roberge v. Cambridge Coop. Creamery Co., 67 N.W.2d 400, 404 (Minn. 1954). MT Properties, 481 N.W.2d at 389.

Appellants now cite the apparent novelty of a damage award in an equitable proceeding as reason for reversal, when it litigated the issue at the District Court. The trial was not over and the record was not closed when the damages issue was raised. Even though testimony and oral arguments may have been completed, the District Court was explicit that it was keeping the record open for the admission of further factual evidence on the issue of damages. Appellants' trial counsel did not object to the issue of damages; rather, he put his own evidence and legal arguments into the record relating to the issue. Appellants litigated the issue of damages by submitting written arguments on that issue, rather than raising an objection to an issue whose novelty (if it may be considered "novel") was at least "reasonably apparent." By failing to object to the issue as outside of the pleadings at trial and submitting its own legal arguments on the issue, Appellants' counsel effectively consented to trial on the issue of damages pursuant to Minn. R. Civ. P. 15.02.

Even though this was an equitable proceeding, the court was within its discretion to balance the equities and award appropriate relief. Therefore, the District Court should be affirmed.

CONCLUSION

The judgment of the District Court should be affirmed. The District Court entered the appropriate judgment, even where Appellants had satisfied the elements to both its claims for relief, because the facts and the evidence presented do not warrant an award of title, only access. Further, the District Court's award of damages should be affirmed where damages are within the discretion of the court (even in equitable proceedings), and the Appellants impliedly consented to that issue by failing to object.

Respectfully Submitted,

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