



[FindLaw](#) | [For Legal Professionals](#) | [For Corporate Counsel](#) | [For Law Students](#)

Welcome MJ Duchene! / [Edit Your Profile](#) | [Log Out](#)

My current location: [city](#) | [Change Location](#)

		Cases & Codes				
Federal Law	State Law	Case Summaries Search	U.S. Code	Newsletters		

[FindLaw](#) > [State Resources](#) > [Minnesota](#) > [Primary Materials](#) > **Minnesota Court Opinions**

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (1998).

**STATE OF MINNESOTA
IN COURT OF APPEALS
C1-99-1378**

In the Matter of:
Brad M. Hanson, et al.,
Respondents,

vs.

Dennis Thom, et al.,
Appellants,

Spring Lake Township, et al.,
Defendants.

**Filed May 30, 2000
Affirmed in part and reversed in part
Halbrooks, Judge**

Scott County District Court
FileNo.C-96-11721

Michelle L. Heimkes, Dennis Patrick Moriarty, 206 Scott Street, Shakopee, MN 55379 (for respondents)

Mark A. Olson, 2605 East Cliff Road, Burnsville, MN 55337 (for appellants)

Considered and decided by Halbrooks, Presiding Judge, Harten, Judge, and Willis, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Respondents Brad Hanson and Keith Unger brought an action for nuisance and attorney fees against appellants Dennis and Jane Thom. The trial court found in favor of respondents and the Thoms appealed. They allege the fee award is not justified under Minn. Stat. §§ 549.21 (1996) or 549.211 (Supp. 1997). They also contend: (a) the district court should not have considered the nuisance claim; (b) the district court's findings do not support a nuisance determination; (c) their conduct did not constitute a nuisance; and (d) even if their conduct did constitute a nuisance, the damages were excessive. The Thoms also request this court to modify the permanent injunction that clarified the terms of the consent decree. We affirm the trial court's finding of nuisance and its award of damages to Hanson and Unger, but we reverse the trial court's award of attorney fees because it was based on the Thoms' continued interference with the easement, rather than bad faith with respect to the litigation itself.

FACTS

Appellants Dennis and Jane Thom own 42 acres of land in the Fish Lake area. Their land has 500 feet of lakeshore on Fish Lake. The Thoms live on the property and derive income from its use for company picnics. Respondents Keith Unger and Brad Hanson own a cabin on a 100-foot by 60-foot lot adjacent to the Thoms' property. This property is approximately 200 feet from the shore of Fish Lake.

Unger purchased the property in 1992 from the previous owners, Herbert and Helen McDonald. The property was subject to an appurtenant easement over the Thoms' property originally granted by the Thoms to the McDonalds and their heirs and assigns. The easement is a 30 feet wide strip of land running east to west from the back of the Unger property to the shoreline of Fish Lake. The easement's terms and conditions are as follows:

Said easement shall include the right to use Fish Lake for boating and fishing and to fish from the shores of Fish Lake. Said easement shall be private (not public). The grantees of said easement, their heirs and assigns, shall not injure any crops, fences or existing trees which grantors, their heirs or assigns, shall keep or maintain on the easement property. In the event said grantors, their heirs or assigns, keep or maintain a fence between the property this easement is appurtenant to, and said Fish Lake, grantees agree to have and keep a gate in

said fence for the use of said grantees, their heirs or assigns. "Grantors," as used herein, shall mean Dennis A. Thom and Jane E. Thom, their heirs and assigns. And "grantees" as used herein, shall mean Herbert J. McDonald and Helen C. McDonald, their heirs and assigns.

After Unger purchased the property from the McDonalds, he was informed by both Jane Thom and Dennis Thom that the lake easement was not valid. The Thoms also stared at Unger when he walked down to the lake shore and told him to get off their property. They installed a barbed-wire fence across the easement with a gate that was difficult to use; planted vegetation within the easement; placed a buoy in the off-shore area of the easement, making it difficult to land a boat; and demanded that Unger seek their permission before using the easement. In response, Unger brought an action to quiet title, and on July 15, 1993, the district court issued a temporary injunction against the Thoms.

Approximately one year later, the district court issued a permanent injunction with regard to the lake easement. In substantial part, the order and injunction enjoined the Thoms from "constructing any further obstacles or planting any further vegetation within the easement" and "interfering with, blocking or in any way circumventing plaintiff's use of the easement." It also required the Thoms to remove any buoys off-shore from the easement, remove the existing barbed-wire fence across the easement, and to erect only "aesthetically pleasing" fences with a gate "adequate to allow [Unger] egress and ingress over and across the subject easement."

Due to the ambiguities in the easement, the district court also made the following clarifications:

[Unger] is specifically permitted by terms of the easement to have access to Fish Lake for boating and fishing from the shore of the easement. [Unger] is also permitted to walk freely on and over the easement, to swim from the shore of the easement, to have personal guests on the easement, to land a boat upon the shore of the easement and to picnic upon the easement. [Unger] is not permitted to use motorized vehicles of any sort upon the easement.

Additionally, the district court stated that the terms, conditions, and clarifications of the easement set out in the order were to run with the land and inure to the benefit of Unger and his heirs and assigns. These terms and conditions were also to be memorialized on the certificate of title.

Despite receiving a permanent injunction, Unger continued to have difficulties with the Thoms, and he eventually listed the property for sale. Hanson purchased the property

from Unger on a contract for deed in 1996. Prior to purchasing the property, Hanson viewed the property with his father and his realtor. At the viewing, Hanson, his father, and the realtor were walking on the easement in the direction of the lake when Dennis Thom drove across the lawn in his vehicle and stopped in front of them. Thom told the three of them to get off his land. Thom also indicated that the lake easement had been "taken away." Despite this encounter, Hanson purchased the lake lot and cabin from Unger on the condition that the lake easement was still in existence.

Hanson then began making improvements to the cabin. He installed a new roof, new siding, and new windows. He also painted and carpeted the interior of the cabin. He laid new sod and removed overgrown branches from the west border of the property.

Hanson continued to have problems with the Thoms, and both parties sought and received mutual restraining orders on June 25, 1996. On July 17, 1996, Unger and Hanson commenced an action against the Thoms and Spring Lake Township, seeking to quiet title to a 9-foot by 100-foot strip of land between their property line and the traveled portion of the township roadway. They also brought an action for contempt based on the Thoms' alleged violation of the permanent injunction relating to the lake-access easement. In conjunction with the contempt action, Unger and Hanson sought attorney fees and costs. The Thoms filed an answer and counterclaim denying Unger and Hanson's claims, denying the existence of a lake easement, and counterclaiming for trespass with respect to the 9-foot by 100-foot strip of land separating Hanson's land from the road.

On August 7, 1997, Unger and Hanson brought a motion to amend their complaint to include claims of nuisance against the Thoms, contempt against Dennis Thom for violating the mutual harassment restraining order, and punitive damages. The issues regarding the 9-foot by 100-foot strip of land were settled and the nuisance and contempt actions proceeded to trial on March 23, 1999.

Hanson testified at trial about numerous incidents that occurred after he purchased the property from Unger. These incidents included: (1) the Thoms shining their car lights into Hanson's house for a period of 5-10 minutes; (2) the Thoms erecting a wire fence across the easement with an inoperable gate; (3) the Thoms erecting numerous snow fences across the easement; (4) the Thoms erecting numerous "no trespassing" signs around the outside of the easement; (5) the Thoms calling the sheriff numerous times complaining of actions performed by Hanson which were within his rights; (6) Dennis Thom telling Unger that the grass in the easement was a crop; (7) the Thoms allowing the

grass in the easement to grow to almost three feet high and not permitting Hanson to cut the grass; (8) the Thoms placing a dilapidated bright-blue fish house ten feet from the easement line, obstructing Hanson's view of the lake; (9) the Thoms' insistence that a 9-foot strip of land between the road and Hanson's property was owned by the Thoms and that use of this property would constitute trespass; (10) Dennis Thom honking his car horn at 1:30 a.m. and yelling that Hanson's car was on his property; and (11) the Thoms dumping snow on Hanson's driveway. Unger also testified to several instances of the Thoms' interference with his use of the easement.

On June 7, 1999, the trial court entered an order finding that the Thoms' actions constituted nuisance and awarding Unger and Hanson \$30,000 in damages. It denied Hanson's and Unger's claims for contempt and punitive damages, but awarded them partial attorney fees in the amount of \$10,000. The court also denied the Thoms' counterclaims. This appeal followed.

DECISION

1. Attorney Fees

The Thoms contend that the trial court erred in awarding Hanson and Unger attorney fees pursuant to Minn. Stat. § 549.21 (1996). First, they point out that the statute was repealed in 1997 and replaced by Minn. Stat. § 549.211 (Supp. 1997). Second, they argue that the court failed to identify any actions in the "course of litigation" that supported an award of fees and that the court improperly awarded the fees based on their alleged conduct in the underlying action. Finally, they contend that an award of attorney fees under Minn. Stat. § 549.211 is not appropriate because Hanson and Unger did not file a separate motion for sanctions, as required by the statute. *See* Minn. Stat. § 549.211, subd. 4 (requiring parties to file a separate motion for sanctions).

Effective August 1, 1997, Minn. Stat. § 549.21 (1996) was repealed and replaced with Minn. Stat. § 549.211 (Supp. 1997). The new statute was enacted on May 22, 1997, took effect on August 1, 1997, and applies to all causes of action arising on or after its effective date. *See* 1997 Minn. Laws ch. 213, art. 1, § 1 (enacting Minn. Stat. § 549.211); *Cole v. Star Tribune*, 581 N.W.2d 364, 370 (Minn. App. 1998) (stating Minn. Stat. § 549.21 (1996) applies to actions that arose before August 1, 1997). Because Hanson and Unger filed their cause of action before August 1, 1997, any award of attorney fees is governed by Minn. Stat. § 549.21, not the subsequent statute.

Minn. Stat. § 549.21, subd. 2, provides in relevant part:

Upon motion of a party, or upon the court's own motion, the court in its discretion may award to that party * * * reasonable attorney fees * * * if the party or attorney against whom * * * reasonable attorney fees * * * are charged acted in bad faith; asserted a claim or defense that is frivolous and that is costly to the other party; asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass * * * .

The statute is intended to sanction "individuals who abuse the legal process to harass opponents or delay resolution of a dispute." *Anderson v. Medtronic, Inc.*, 382 N.W.2d 512, 515 (Minn. 1986). This statute is only applicable to situations where a party acts in bad faith with respect to the litigation itself, as opposed to bad faith with respect to the underlying cause of action. *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n*, 294 N.W.2d 297, 311 (Minn. 1980); *Bank of Elbow Lake v. First State Bank*, 439 N.W.2d 53, 56 (Minn. App. 1989), *review denied* (Minn. July 12, 1989). Reviewing courts apply an abuse-of-discretion standard to a district court's decision to assess attorney fees. *State Bank of Young America v. Fabel*, 530 N.W.2d 858, 863 (Minn. App. 1995), *review denied* (Minn. June 29, 1995).

Here, the trial court awarded attorney fees because the Thoms' actions "following the issuance of [the district court's] Order resulted in unnecessarily protracted and extended litigation in violation of the intention and purpose of Minn. Stat. § 549.21." The actions referred to by the trial court were the Thoms' continuing interference with Hanson's and Unger's use of the easement. The trial court did not find that the Thoms' actions with respect to the litigation itself were made in bad faith or designed to extend the litigation. We conclude, therefore, that the award of fees under Minn. Stat. § 549.21 was an abuse of the trial court's discretion because the actions referred to by the court were not actions related to the litigation itself. *See Bergman v. Lee Data Corp.*, 467 N.W.2d 636, 640 (Minn. App. 1991) (holding damages under § 549.21 are available "only where the bad faith occurs with respect to the litigation itself, not with respect to the underlying cause of action"), *review denied* (Minn. May 23, 1991).

2. Nuisance

The record indicates that the Thoms did not make a motion for a new trial and that this appeal is from the judgment entered pursuant to the trial court's findings and conclusions. When there has been no motion for a new trial, our scope of review is limited

to determining whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and judgment. *Comstock & Davis, Inc. v. G.D.S. & Assocs.*, 481 N.W.2d 82, 84 (Minn. App. 1992).

The Thoms contend that the trial court erred in finding appellants liable on a nuisance theory and awarding damages of \$30,000. They argue that the evidence does not sustain the trial court's findings of fact, the court did not make "valid" findings, and the findings the court made do not support a cause of action for nuisance. They also contend Hanson and Unger's action should have been restricted to the four corners of their complaint and Unger's claims are precluded by res judicata. Finally, they argue the damages were excessive.

A. Findings of Fact

The Thoms contend that the trial court merely recited the parties' claims, rather than making true findings of fact, because it prefaced its findings with the phrase "Hanson testified about." In support of their claim, the Thoms rely on *Dean v. Pelton*, 437 N.W.2d 762 (Minn. App. 1989), a child-support-modification case where this court reversed in part because the trial court prefaced its factual findings with phrases such as "petitioner claims" and "according to petitioner's application." *Id.* at 764.

Dean has no applicability to the instant case. Here, the trial court's order and memorandum leave no question regarding the trial court's factual findings. The trial court clearly expressed its findings of fact regarding the Thoms' conduct and unequivocally stated it found both Hanson's and Unger's trial testimony credible.

B. Inadmissible Evidence

i. Facts outside the complaint

The Thoms next claim that the trial court improperly considered facts beyond those pertaining to the specified instances of nuisance enumerated in Unger and Hanson's amended complaint. They contend that the testimony should have been limited to the failure to maintain trees, the placement of docks, and the placement of the ice house near Unger and Hanson's property.

While the complaint must state facts showing that the plaintiffs are entitled to relief, it does not have to include every fact supporting the plaintiffs' claim. *Pullar v. Independent Sch. Dist.* 701, 582 N.W.2d 273, 276 (Minn. App. 1998). Minnesota is a notice pleading state that does not require absolute specificity in pleading, but does require a sufficient basis of facts to notify the opposing party of the claims raised against it. *See*

Minn. R. Civ. P. 8.01 (requiring pleading to include “short and plain statement of the claim” showing entitlement to relief); *Roberge v. Cambridge Coop. Creamery Co.*, 243 Minn. 230, 232, 67 N.W.2d 400, 402 (1954) (stating pleadings must “be framed so as to give fair notice of the claim asserted and permit the application of the doctrine of res judicata”). Thus, contrary to the Thoms’ assertion, we conclude the trial court did not err in accepting testimony on facts supporting the nuisance claim that were in addition to the examples enumerated in the amended complaint.

ii. Unger’s testimony

The Thoms also assert that the trial court erred in considering Unger’s testimony, because it was essentially the same testimony that he provided at the hearing that resulted in the May 23, 1994 permanent injunction. The Thoms claim Unger’s participation in the previous action for unlawful deprivation of property rights and an injunction operates as res judicata to his participation in the instant nuisance claim.

Res judicata is an affirmative defense and must be timely raised. Minn. R. Civ. P. 8.03. Failure to affirmatively plead the defense in the initial pleadings or in a later amendment of the pleadings is a waiver of the defense. *Beutz v. A.O. Smith Harvestore Prods., Inc.*, 431 N.W.2d 528, 532 n.3 (Minn. 1988). Because the Thoms raise the defense of res judicata for the first time on appeal, we conclude they have waived the claim.

C. Finding of Nuisance

The Thoms’ primary arguments appear to be that the trial court’s findings of fact regarding the Thoms’ actions are not supported by the record and do not support a finding of nuisance as a matter of law.

In Minnesota, the nuisance cause of action is codified at Minn. Stat. § 561.01 (1998).

This statute defines nuisance as

[a]nything which is * * * indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.

“The statute codifies an equitable cause of action which implicitly recognizes a need to balance the utility of appellants’ actions against the harm to respondents.” *Matter v. Nelson*, 478 N.W.2d 211, 214 (Minn. App. 1991). “To maintain a nuisance action, a plaintiff must show that the defendant intentionally interfered with the use and enjoyment of the plaintiff’s land.” *Fagerlie v. City of Willmar*, 435 N.W.2d 641, 643 (Minn. App. 1989) (citation omitted).

i. Factual findings supported by record

Unger testified at trial that Dennis Thom told him there was no easement. The Thoms planted bushes and a willow tree in the easement. The Thoms erected a wire fence with a gate that would not open. The Thoms placed buoys in the lake preventing Unger from full use of the easement. The Thoms stared at and harassed Unger and his wife when they were using the easement. The Thoms told the Ungers that they could only walk “there and back” over the easement without stopping or picnicking and that the grass on the easement was a “crop” that could be damaged in violation of the easement.

Hanson testified to similar instances of interference with his use of the easement. He stated that when he was viewing the property with his realtor, Dennis Thom drove his car into the easement and said, “[G]et off my land. The easement has been taken away.” Two days later, Dennis Thom used his car to block Hanson’s car for about 15 minutes. As previously indicated, Hanson also testified to multiple incidents that occurred after he purchased the property by which the Thoms interfered with his use of the property.

In its findings of fact, the trial court recited Unger’s and Hanson’s testimony regarding the Thoms’ actions and found Unger’s testimony “credible and convincing.” The court also found Unger and Hanson’s combined testimony “convincing and credible.” Moreover, the court indicated it did not find the Thoms’ contrary testimony credible.

This court gives due regard to the trial court’s ability to judge the credibility of the witnesses and will not set aside its findings of fact unless they are clearly erroneous. Minn. R.Civ. P. 52.01. The instant case turns on witness credibility, and the Thoms have cited nothing in the record supporting their argument that respondents’ testimony was not credible. We, therefore, conclude the evidence sustains the trial court’s factual findings.

ii. Facts support finding of nuisance

In order for interference with enjoyment of life or property to constitute nuisance, the interference must be material and substantial. *Fish v. Hanna Coal & Ore Corp.*, 164 F. Supp. 870, 872 (D. Minn. 1958); *Jedneak v. Minneapolis Gen. Elec. Co.*, 212 Minn. 226, 229, 4 N.W.2d 326, 328 (1942). The degree of discomfort is measured by the standards of ordinary people with regard to the area where they reside. *Id.*

The facts testified to by Hanson and Unger and accepted by the trial court clearly fall within the statutory definition of nuisance. They are “an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.” Minn. Stat. § 561.01; *see, e.g., Holmberg v. Bergin*, 285 Minn. 250, 257, 172 N.W.2d 739, 744 (1969)

(holding that planting tree near boundary line of neighbor's property so that it grew across line onto plaintiffs' adjoining property, pushing plaintiffs' fence out of line and raising ground level from base of tree to plaintiffs' sidewalk, obstructed free use and enjoyment of plaintiffs' property constituted a nuisance).

D. Excessive Damages

The Thoms argue that the damages awarded by the trial court are excessive, and they ask this court to adopt a rule that monetary damages may not be awarded in nuisance claims where there is no evidence of physical damage to the property or physical injury to the person.

The remedies provided in the nuisance statute are injunction, abatement, and damages. Minn. Stat. §561.01. “[A] plaintiff may be entitled to recover damages for property damage and physical suffering, discomfort, and inconvenience resulting from the nuisance.” *Holmberg*, 285 Minn. at 259, 172 N.W.2d at 745 (citation omitted). The choice or combination of remedies and the extent of relief to be granted lie largely within the discretion of the trial court. *Matter*, 478 N.W.2d at 215. On appeal, our function is to determine whether the trial court has abused its discretion. *Holmberg*, 285 Minn. at 258, 172 N.W.2d at 744.

Here, the trial court ordered “abatement and enjoinder” of the Thoms’ actions and monetary damages of \$30,000. In support of its order, the court stated that “because the Permanent Injunction currently in place constitutes an adequate remedy already against future harm, monetary damages are appropriate here.” Further, it reasoned the award was justified because of

the amount of time involved, the continued actions for the Defendants in spite of extended legal action already resulting in both temporary and permanent injunctions against them, and the overall lack of respect for the property rights of Mr. Unger and Mr. Hanson.

Given the trial court’s broad discretion in assessing damages for personal discomfort and annoyance and the Thoms’ continuing interference with the easement, we conclude the trial court’s award of damages is not an abuse of its discretion.

3. Modification of May 23, 1994 Injunction

Finally, the Thoms argue that this court should modify the May 23, 1994 permanent injunction to delete any express terms that were added to the consent decree that established the original easement. They admit that they did not raise this issue before the trial court, but contend this court should exercise its “inherent equitable powers” and

address the issue.

We decline the Thoms' invitation to exercise our equitable powers and conclude that the issue is not properly before this court. *See Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 687 (Minn. 1997) (holding as general rule, this court will not consider issues that were not presented to or decided by the district court unless the issue is plainly decisive of the entire controversy and the lack of a district court ruling causes no possible advantage or disadvantage to either party).

Affirmed in part and reversed in part.

Sponsored Links

AppealFinance®: is a non-recourse investment in a money judgment on appeal. Unlike a loan, it doesn't have to be repaid if the case is ultimately lost.

U.S. Legal Forms, Inc.: **Over 36,000 Legal Forms** Stop Reinventing the Wheel each time you draft a legal document. Save Time and Money! Visit USlegalforms.com Today!

Online Legal Document Services: Bill More, Work Less. Let LegalZoom take care of your document preparation. Incorporations, LLCs, Trademark Searches, and more.

Amicus Attorney & Amicus Accounting: Easy-to-use and intuitive practice management software and time, billing & legal accounting for the law office. FREE TRIAL.

AbacusLaw: Complete law office software for time, billing, accounting, calendars, clients and cases. Quick to learn, easy to use. Free demo!

PCLaw & PCLawPro: ONE integrated system to manage your whole office. Provides time billing, accounting and practice management. Download a FREE demo.

Tabs3 and PracticeMaster: Reliable billing and practice management software for solo to mid-sized firms. Support satisfaction is over 95%

LexisNexis Time Matters 8.0: Use Time Matters 8.0 and exceed client expectations with a complete view of your practice.

Find a Lawyer: Our free service locates Bankruptcy, Criminal, DUI, Family, Immigration, Personal Injury, Real Estate, or Trademark lawyers in your area who can help you with your legal issues.

Lawyer Marketing: web sites, attorney written custom content, visibility on FindLaw.com, search engine optimization.

FindLaw Market Center: - Free directory of expert witnesses, legal technology products, process servers, legal investigators, mediators, couriers, paralegals, and court reporters.

Ads by Google

Speed Up Slow XP

Free Download - XP Optimization Software. 100% Guaranteed.

[PC-Optimize.com](http://www.PC-Optimize.com)

Free Windows XP® w/ SP2

Get your free copy of Windows XP w/ SP2 by Microsoft®. Ends today!

www.GetSoftwareFree.com

[Xp Home Sp2](#)

Shop and save on Computer Software Compare products, prices & stores.

www.Shopping.com



[Help](#) | [Site Map](#) | [Contact Us](#) | [Media Kit](#) | [About Us](#) | [FindLaw Local](#) | [Disclaimer](#) | [Privacy Policy](#)
Copyright © 1994-2007 FindLaw, a Thomson business