STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2222

Renee C. Stevenson,
Appellant,

vs.

Scott W. Brodt, et al.,
Respondents,

Countrywide Bank, FSB,
Respondent.

Filed October 19, 2010
Affirmed and remanded
Minge, Judge

Dakota County District Court
File No. 19HA-CV-08-1203

George L. May, May & O'Brien, LLP, Hastings, Minnesota (for appellant)

Scott W. Brodt, Rosemount, Minnesota (pro se respondent)

Dana M. Brodt, Rosemount, Minnesota (pro se respondent)

Kalli Lynn Ostlie, Bradley N. Beisel, Beisel & Dunlevy, P.A., Minneapolis, Minnesota (for respondent Countrywide Bank, FSB)

Considered and decided by Minge, Presiding Judge; Ross, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

MINGE , Judge

In this boundary dispute, appellant challenges the district court's rejection, after trial, of part of her adverse-possession claims and of her request for injunctive relief and damages. Appellant argues that (a) the record shows that she satisfied each element of adverse possession; (b) the district court failed to adequately address the doctrine of boundary by practical location and the record shows that appellant satisfied the requirements of that doctrine; and (c) the district court should have (i) enjoined respondents from keeping a newly-constructed garage in its current location or otherwise using their land in a way that causes water to flow into appellant's garage and (ii) awarded appellant damages. We affirm and remand with instructions.

FACTS

This is a boundary dispute between appellant Renee Stevenson and her neighbors to the north, respondents Scott and Dana Brodt, and their mortgage lender, respondent Countrywide Bank, FSB. Their homes are located in a long-settled section of the city of Rosemount and are on platted lots facing Cameo Avenue on their west (front) side. Stevenson acquired her property in April 1992. The Brodts acquired their property in August 2007, more than 15 years later. Both parties had professional surveys performed. The survey results basically agreed on the location of the platted lot line between the parcels, the location of improvements, and the location of the area claimed by Stevenson. Neither party disputes the accuracy of the surveys.

Stevenson claims two basic areas of what was originally part of the parcel owned by the Brodts and their predecessor:

- Commencing from the more northerly of the two northeast back corners of Stevenson's garage, then westerly along the exterior of the north wall of the garage to the northwest corner (front corner) of the garage, then due north at a ninety (90) degree angle a distance of four (4) feet, then due west at a ninety (90) degree angle along a straight line to a point on the west property line of the Brodt parcel that is six (6) feet north of the northwest corner marker of the Stevenson lot, then south along Brodt's lot line to said corner marker, then due east on a straight line to the point of beginning and there terminating. This land is referred to as "Driveway/Garage."

- A five-foot wide strip of land just north of the Stevenson garage and lot line and east of the Stevenson driveway, extending to the parties' east (rear) lot line. This strip is referred to as "Corridor."

Stevenson sought a judicial determination that she had acquired title to both the Corridor and the Driveway/Garage through adverse possession and boundary by practical location. Stevenson also sought a permanent injunction against the Brodts to halt construction on the Brodts' new garage, which Stevenson alleged was causing water damage to her garage and was in violation of the Rosemount zoning set-back requirement. After a bench trial, the district court found that Stevenson and her predecessors in title had constructed the driveway and garage and used and maintained the driveway and awarded Stevenson title to the Driveway/Garage by adverse possession. But the district court denied Stevenson's claims to title of the Corridor. The district court also denied Stevenson's request for a permanent injunction and money damages. This appeal follows.

Stevenson challenges the denial of her claims to the Corridor and the denial of the permanent injunction and damages. Neither party challenges the award of title to appellant for the Driveway/Garage.[1]

D E C I S I O N

I.

The first issue is whether the district court clearly erred in concluding that Stevenson had not established the elements of adverse possession for the Corridor. Whether the elements of adverse possession have been established is a fact question. *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. App. 2003). We do not disturb a district court's factual findings unless they are clearly erroneous. Minn. R. Civ. P. 52.01. Those findings are not clearly erroneous if there is reasonable evidence supporting them. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). When reviewing factual findings, we view the record in the light most favorable to the district court's judgment. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). Whether those findings support the district court's legal conclusions is a question of law subject to de novo review. *Ganje*, 659 N.W.2d at 266.

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[1] In Stevenson's brief, she argues that the Driveway/Garage should be expanded to 6.5 feet at the western property edge (Cameo Street) and 5 feet on its eastern end to conform to the record. But at oral argument, Stevenson indicated that she was not challenging the dimensions of the driveway that the district court awarded her. To the extent that she argued this issue in her brief, we note that the record does not support her argument. Stevenson herself testified that she measured the claimed driveway at the western edge of the property and it was only 5.5 feet. Since the district court awarded Stevenson six feet at this point, it gave her more land than she testified she was entitled to. The greatest width shown on the surveys for the Driveway/Garage is six feet. We conclude that the record reasonably supports the district court's description of the Driveway/Garage.

To establish title by adverse possession, a claimant must show by clear and convincing evidence an actual, open, hostile, continuous, and exclusive possession of land for 15 years. *Ehle v. Prosser*, 293 Minn. 183, 189, 197 N.W.2d 458, 462 (1972). Failure to establish any one of these elements is fatal to the adverse-possession claim. *Johnson v. Raddohl*, 226 Minn. 343, 345, 32 N.W.2d 860, 861 (1948).

Stevenson argues that she is entitled to the Corridor. Stevenson notes that her and her son's testimony about her use of the Corridor before the Brodts' purchase is undisputed. She argues that the district court clearly erred by failing to find that this undisputed testimony was sufficient to establish the elements of adverse possession. Just because testimony is undisputed, however, does not mean that it must be accepted by the district court. *See Varner v. Varner*, 400 N.W.2d 117, 121 (Minn. App. 1987) (stating that a fact finder "is not required to accept even uncontradicted testimony if the surrounding facts and circumstances afford reasonable grounds for doubting its credibility."). Nor does the fact that the testimony is undisputed mean that it proves—by clear and convincing evidence—the essential elements of adverse possession. We analyze the record and the essential elements in turn.[2] While there are ongoing

[2] Stevenson owned her property for over 15 years before the Brodts acquired the adjacent property. Fifteen years is the time period required to obtain title through adverse possession. Minn. Stat. § 541.02 (2008); *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 109 (Minn. App. 2002). Except as noted in the subsequent discussion, Stevenson does not claim that the prior owners of her property established title to the Corridor by adverse possession or that her claim of adverse possession to the Corridor relates back to the conduct of the former owners. Accordingly, with limited exceptions, the actions and beliefs of the former owners are not addressed. Resolution of the adverse possession issue largely turns on the evidence of Stevenson's actions.

references to the garage's roof overhang, the overhang is addressed at the end of this section of our opinion.

Actual and Open Possession

To establish actual and open possession, the claimant must possess the land in such a way as to provide the owner with "unequivocal notice" of the possession. *Skala v. Lindbeck*, 171 Minn. 410, 413, 214 N.W. 271, 272 (1927). Exactly what form that possession takes is not prescribed; rather, it depends on how an owner would treat property of that type in that particular area. *Ehle*, 293 Minn. at 190, 197 N.W.2d at 462. "The requirement of actual and visible occupation is more imperative in an old and populous country than in a new country in which the land is only partially improved." *Skala*, 171 Minn. at 413, 214 N.W. at 272. The claimant's possession must be sufficient to make it known that (a) the claimant possesses the owner's property adversely and (b) the claimant "keep[s] his flag flying." *Romans v. Nadler*, 217 Minn. 174, 178, 14 N.W.2d 482, 485 (1944). Open possession is a related concept. It refers to possession that is "visible from the surroundings, or visible to one seeking to exercise his rights." *Hickerson v. Bender*, 500 N.W.2d 169, 171 (Minn. App. 1993). Taken together, actual and open possession means that the claimant must openly possess the property through visible and notorious acts of ownership over the land. *Ganje*, 659 N.W.2d at 266-67.

The Corridor is largely an area that is overgrown with brush and small trees. Stevenson's use of this area from 1992 to 2007 consisted of the following:

- She dug a trench alongside the north side of her garage and installed 10 feet of drain tubing in 1992. Then, she graded the land around the tubing.

- She entered the Corridor one or two times a year to trim the overgrowth.[3]
- She maintained the roof overhang of her garage, about 9/10 foot over the lot line.

The Corridor lies within a long-established residential neighborhood in Rosemount. Excepting the area below the roof overhang of the garage, it is hard to conclude that such sporadic and limited use would constitute visible and notorious acts of ownership over the Corridor. Despite trimming the overgrowth one or two times a year, Stevenson testified that the Corridor was always covered in brush and that it was impossible to see from the front of the property to the back by looking through the Corridor because it was so overgrown. This buttresses the inference that Stevenson's trimming was not sufficient to notify the owners because it was not having a noticeable effect on the Corridor. It was overgrown before—and after—Stevenson's infrequent trimming. Moreover, the record suggests that even when Stevenson trimmed, her activity in the Corridor was limited. Stevenson testified that when she erected a fence behind (east of) her garage, she did not put the fence farther north and into the Corridor in part because then she would have been trimming trees that the prior owners of the Brodt property could have claimed. This allows the inference that Stevenson was not trimming the entire Corridor so much as trimming the growth that was coming through and over the fence and interfering with her enjoyment of her yard to the south.

[3] A prior owner of Stevenson's land built a fence east of the garage that was near or in the Corridor. Stevenson's replacement of this fence with a newer fence does not constitute use of the Corridor. There was evidence that the new fence was south of the Corridor. Stevenson mowed, gardened, and made continuous use of this property south of the new fence.

The case Stevenson cites as supporting her position, *Costello v. Edson*, 44 Minn. 135, 46 N.W. 299 (1890), is not helpful. The conduct the supreme court held sufficient for adverse possession in *Costello* went well beyond the limited trimming conducted by Stevenson. *See id*. at 137-38, 46 N.W. at 300-01. In *Costello*, the claimant cleared the lot by cutting *all* of the small brush off the lot and all the trees except for one, and by burning the debris. *Id*. That conduct resulted in a visible and dramatic change and was of an entirely different character from Stevenson's trimming. Viewing the facts in the light most favorable to the verdict, the district court did not clearly err in concluding that Stevenson's use of the Corridor was not sufficient to establish open and actual possession. We address the portion of the Corridor subject to the roof overhang separately below.

Exclusive Possession

Exclusive possession means that the claimant "takes possession of the land as if it were his own with the intention of using it to the exclusion of others." *Ebenhoh*, 642 N.W.2d at 108 (quotation omitted). Intent to seize the land is not a requirement, but the claimant must intend to exclude all others. *Ehle*, 293 Minn. at 189, 197 N.W.2d at 462.

The record indicates that the Corridor was rarely used by anyone but Stevenson and her son. But the fact that the prior owners of the Brodts' home only rarely ventured into the Corridor does not establish Stevenson's exclusive possession. Stevenson must show she intended to exclude all others, and Stevenson offered no testimony that she took action to prevent her northerly neighbors from walking into the Corridor or that she intended that they stay out of that area. Neither the garage roof overhang nor the buried

drainage pipe constitutes exclusive use. That Stevenson did not object or comment when the Brodts hired contractors and cleared vegetation in the Corridor allows the inference that she did not treat that portion of the Corridor as her own with the intention to exclude others. Absent some evidence showing an intent to exclude others, Stevenson cannot satisfy this element and the district court did not clearly err by finding she had not done so.

Continuous Possession

Continuous possession requires that the claimant so use the property as to meet all the other elements of adverse possession for a period of 15 years. *Ganje*, 659 N.W.2d at 268. There is no bright-line test for how much use is required to be continuous use. *Id.* "Instead, the [general] rule . . . is that the [claimant] must be using the property as his or her own, i.e., regularly and matched to the land's intended use." *Id.*

Stevenson's reliance on *Costello* to show that her sporadic use of the Corridor was continuous is misplaced. In *Costello*, the supreme court noted that constant occupancy of the property by a claimant is not required when "all the conditions show a continuance of [the claimant's] established dominion." 44 Minn. at 137, 46 N.W. at 300. In that case, the claimant completely cleared the wooded land with the exception of one tree, planted fruit bushes and apple trees, built a barn, and built a house. *Id.* at 137, 46 N.W. at 300. All of these actions by the claimant showed continuous dominion even when he was not there. *Id.* at 137-139, 46 N.W. at 301. In contrast, the only action Stevenson took that had a somewhat lasting effect was the maintenance of her existing, minimally encroaching garage-roof overhang and burying drain tubing to the north of her garage.

Stevenson testified that she had no idea if the drain tubing was even still there. As described above, her trimming was scarcely—if at all—noticeable. Viewing the record in the light most favorable to the district court's findings, we conclude that the district court did not clearly err in determining that Stevenson did not establish continuous possession within the meaning of adverse possession.

Hostile Possession

Hostile possession means possession "with an intention to claim the property adverse to the true owner." *Ganje*, 659 N.W.2d at 268. Hostility in this context does not mean personal animosity or physical violence. *Ehle*, 293 Minn. at 190, 197 N.W.2d at 462. It refers "to the intention of the [claimant] 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 in the particular area involved." *Id*. In essence, it is a sum of the other requirements: actual, open, continuous, and exclusive possession creates a presumption that this requirement is met. *See Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000) (discussing prescriptive easements, but concluding such easements involve the same elements of proof as adverse possession); *Ehle*, 293 Minn. at 190, 197 N.W.2d at 462. Thus, except for the roof overhang of the garage, Stevenson's "possession" of the Corridor does not satisfy the hostile element for the same reasons it does not satisfy the other elements.

Encroachment of Stevenson's Garage

Stevenson's survey shows that the edge of the roof eave on the north wall of her garage encroaches on the Brodt property by 9/10 foot. The district court awarded

Stevenson only the portion of the land on which the garage wall encroaches: between 3/10 foot on its east end and 4/10 on its west end. The issue we face is whether the district court erred in failing to grant special recognition to the garage-roof overhang in assessing Stevenson's interest in the Corridor. The Minnesota Supreme Court has granted a prescriptive easement for the drip line of the roof over a neighbor's land. *Romans*, 217 Minn. at 183, 14 N.W.2d at 487.

Here, no party disputes the accuracy of the survey's location of the garage. Although Stevenson does not urge that the roofline presents a unique and sufficient basis for a special adverse possession claim, we recognize that this overhang is a part of Stevenson's garage structure, that the area of the overhang is within the Corridor which Stevenson is claiming, and that the overhang dimension is clear in the record. As previously stated, the record shows that Stevenson's garage existed for over 15 years before the Brodts' acquired their property. The district court found that the encroachment by the garage wall satisfies the elements of adverse possession. We conclude that there is undisputed evidence that pursuant to *Romans v. Nadler*, Stevenson is entitled to a non-exclusive prescriptive easement for the garage-roof overhang and drip line above the Corridor.

We note that the order that Stevenson has appealed directs her to obtain a final survey and provide the same to the respondents and to the district court. Thus, a remand of this case is necessary. As a part of this remand, we instruct the district court to consider whether the roofline matter should be addressed in this proceeding or some other manner and, if it is to be recognized in this proceeding, how the roofline matter

should be recognized. On remand, the district court shall have discretion to open the record to enable it to adequately address this matter.

In sum, with respect to the Corridor issue, we affirm and remand with instructions to address the roof overhang and to complete the survey/legal description matter.

II.

The next issue is whether the district court erred in determining that Stevenson had not established by practical location a boundary encompassing the Corridor.[4] Minn. Stat. § 559.23 (2008) authorizes a district court to determine boundary lines. The following methods for establishing a boundary line by practical location are relevant to this appeal:

> (1) Acquiescence: The location relied upon must have been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations.
>
> . . . .
>
> (3) Estoppel: The party whose rights are to be barred must have silently looked on with knowledge of the true line while the other party encroached thereon or subjected himself to expense which he would not have incurred had the line been in dispute.

Theros v. Phillips, 256 N.W.2d 852, 858 (Minn. 1977). Because the effect of this doctrine is to divest parties of property they own by deed, the evidence establishing a boundary line by practical location "must be clear, positive, and unequivocal." *Id*. The district court's determination of a boundary is a fact question that we review under the

[4] Because we have already addressed the roof overhang, we do not consider it in considering this issue.

same deferential standard described above for questions of fact under adverse possession. *Wojahn v. Johnson*, 297 N.W.2d 298, 303 (Minn. 1980).

Stevenson asserts there are four district court errors. First, Stevenson argues that the district court clearly erred by not specifically considering that a boundary by practical location may be established through estoppel. The district court concluded that "[p]laintiff has failed to prove . . . boundary by practical location of the [Corridor] area." The district court's general rejection of boundary-by-practical-location arguments implies rejection of Stevenson's specific arguments of estoppel and acquiescence. We address the detrimental-reliance element of estoppel in discussing the second claimed error. Otherwise, we conclude that the absence of a specific discussion of estoppel is not reversible error.

Second, Stevenson argues that even though a prior owner of the Brodts' property told the prior owner of Stevenson's property that the old fence east (in back) of the garage was on the property line, actually this old fence stood within the Corridor. Stevenson asserts that the Brodts' predecessor in title had acquiesced in the fence encroachment on the Corridor and the Brodts are now estopped from asserting that Stevenson does not possess the Corridor through practical location. But the record does not clearly establish that the old fence was in the Corridor. After being shown the surveys, the prior owner of Stevenson's home testified that the old fence was on the lot line. Stevenson herself could not specify how much further north the old fence was from the new fence she installed.

Moreover, to establish estoppel, Stevenson would have to show that she suffered an unknowing detrimental reliance. *Theros*, 256 N.W.2d at 859. Stevenson asserts no unknowing detriment. The actions Stevenson took were to tear down the old fence and build a new fence perhaps a little further south. But Stevenson testified that her new fence was not a boundary fence. Rather, she testified that she located the new fence further away from the overgrown Corridor so she could more easily trim growth coming through it and because it would keep her dog in her yard. This indicates that Stevenson's decision about the location of the new fence was not based on the property line. As a result, any knowing silence by the former neighbors as to the location of the property line had nothing to do with any detriment she incurred. Because a premise of Stevenson's second argument is faulty and because the detriment element of estoppel is not satisfied, we conclude that the district court did not err in rejecting Stevenson's second argument regarding boundary by practical location.

Stevenson's third argument regarding boundary by practical location is that because the district court found that Stevenson established ownership of the Driveway/Garage through adverse possession, the north boundary line must be extended all the way to the east, which would give Stevenson ownership of the Corridor. But just because Stevenson established entitlement to the Driveway/Garage does not mean that the north line should be extended easterly to encompass the Corridor. That result would only follow if there was no material difference between Stevenson's actions in the Corridor and the Driveway/Garage. But there are material differences. In the Corridor, Stevenson installed 10 feet of drain tubing, and twice a year trimmed the overgrowth. In

the Driveway/Garage, she actively occupied the entire area; she regularly parked her car there, held garage sales on the asphalt, maintained the driveway by sealing cracks and hiring contractors to seal cracks, shoveled snow from the driveway during the winter, and maintained her garage. These differences justified the district court's disparate treatment of the different areas by awarding her title to the Driveway/Garage but not the Corridor.

Stevenson's final argument is that the district court improperly relied on the testimony of prior residents about their ownership history and conduct to deny her boundary-by-practical-location argument. Although the district court made findings of fact regarding this historical evidence, the district court's order does not indicate that it denied Stevenson's practical-location claims because of this evidence. On the contrary, with the exception of the garage-roof overhang, the limited nature of Stevenson's use of the Corridor defeats her claims.

The district court did not clearly err in rejecting Stevenson's claims that she was entitled to a boundary by practical location encompassing the Corridor.

III.

The next issue is whether the district court abused its discretion in denying Stevenson's request for a permanent injunction. We will not reverse a district court's denial of a permanent injunction absent an abuse of discretion. *Unique Sys. Dev., Inc. v. Star Agency*, 500 N.W.2d 144, 146 (Minn. App. 1993), *review denied* (Minn. July 15, 1993). "Injunctive relief should be awarded only in clear cases reasonably free from doubt and when necessary to prevent great and irreparable harm." *Bush Terrace Homeowners Ass'n, Inc. v. Ridgeway*, 437 N.W.2d 765, 768-69 (Minn. App. 1989)

(quotation omitted), *review denied* (Minn. June 9, 1989). We will not disturb a district court's factual findings unless they are clearly erroneous. *Fletcher*, 589 N.W.2d at 101. Factual findings are not clearly erroneous if there is reasonable evidence supporting them. *Id*. A judge's credibility determinations in a bench trial are given the same weight as those of a jury and are entitled to deference. *State v. Fisler*, 374 N.W.2d 566, 569 (Minn. App. 1985), *review denied* (Minn. Nov. 18, 1985).

Stevenson argues that she is entitled to an injunction prohibiting the Brodts from allowing conditions on their land that allegedly result in water damage to her garage. She argues she is entitled to the injunction for three reasons.

First, she argues that the Brodts' new garage and their alteration of the area between the two garages results in water leaking into and damaging her garage. But the district court found that the water damage in her garage was not from these sources. Rather, the district court credited the expert testimony of Lowell Russell, the contractor who built the Brodts' new driveway. Russell testified that that Stevenson's water damage was caused by her driveway being higher than the floor of her garage so that water would flow from the middle of her driveway back into her garage.

Moreover, Russell's testimony is logical. He testified that Stevenson's driveway was composed of three layers: an original concrete layer and two asphalt layers that were successively added on. Each layer raised the height of the driveway and made it higher than the floor of Stevenson's garage. When told about Stevenson's testimony that she did not have water in her garage before the Brodts moved next door except for in 1992, this did not change Lowell's opinion. He discussed the silt material he saw at the foot of

her garage door as evidence that water had been running back from the driveway, forming ponds, and depositing the silt it carried when it evaporated. He also testified that the water damage he saw in her garage would take years to develop, so the water problem had been happening for a long time. Finally, he testified that there would not have been any runoff from the Brodts' completed driveway onto Stevenson's driveway because the Brodts' driveway was lower than hers.

Stevenson's arguments against Russell's testimony are not persuasive. Stevenson notes that Lowell never saw water flow from her driveway into her garage. But this does not undercut his opinion that water would flow in this manner based on the construction of her driveway. One does not need to see water flow to know that it flows downhill. Although Stevenson testified that the water in her garage was due to the Brodts' construction, the district court's decision to credit Lowell's testimony instead of her's is not clearly erroneous. The district court did not clearly err in concluding that the water in Stevenson's garage was not from the Brodts' construction.

Second, Stevenson argues that she is entitled to an injunction because the Brodts' garage is not set back from her garage by at least five feet, as required by Rosemount ordinances. The case cited by Stevenson, *McCavic v. Deluca*, does stand for the proposition that a landowner may obtain an injunction to prevent an adjacent landowner from violating a setback provision in a city ordinance. 233 Minn. 372, 379, 382, 46 N.W.2d 873, 877-78 (1951). The Rosemount city code does require a single-story garage to have at least a five-foot side-yard setback. Rosemount City Code § 11-4-6(F)(5)(a). But the record is mixed on whether the Brodts' garage is actually closer than five feet to

the lot line. The Brodts' survey shows that their new garage is between four and five feet from the lot line. Thus, it is unclear from the Brodts' survey how much—if any—of the new garage is less than five feet from Stevenson's property. Stevenson testified that the new garage is less than five feet from her property. But on cross-examination, she admitted that the City of Rosemount staff member who responded to her complaint disagreed with her measurement and that the city took no action against the Brodts. Although the district court made no factual finding specifically on this argument, it impliedly rejected it by denying Stevenson's request for an injunction. Because of this mixed record, because of the failure of Stevenson, or her predecessor in title, to comply with the garage setback for her own garage, and because of her own encroachments on the Brodts' lot, we affirm the district court's implied rejection of this argument.

Third, Stevenson argues that the Brodts' garage constitutes a continuing trespass. Stevenson did not present this continuing-trespass argument to the district court, and we do not consider it on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that appellate courts will generally not consider matters not argued to and considered by the district court).

In sum, the district court did not abuse its discretion in denying Stevenson's request for a permanent injunction and not awarding her damages.

Affirmed and remanded.

Dated: