Heine v. Heine

2006 | Cited 0 times | Nebraska Court of Appeals | September 26, 2006

Not Designated for Permanent Publication

Sievers, Moore, and Cassel, Judges.

INTRODUCTION

Allen J. Heine (Appellant) appeals the judgment of the district court for Cedar County which awarded damages and other relief arising from his breaches of trust as trustee for the Justin Heine Trust, the Paula Heine Fejfar Trust, and the Rebecca Heine Trust. On our de novo review of the damage claims, we modify the judgment to adjust the amount awarded for unpaid rents, to eliminate the award of prejudgment interest, to substitute equitable relief requiring removal of an improperly granted easement for the award of monetary damages, and to vacate the award of attorney fees. We affirm as modified.

BACKGROUND

This case arises out of the trusts created by Alphonse and Clara M. Heine for their grandchildren. Alphonse and Clara appointed their sons--Appellant and his brother, Leon "Butch" Heine--as trustees of the trusts. Appellant was trustee of the trusts created for Leon's children--Paula Heine Fejfar, Rebecca Heine, and Justin Heine--and Leon was trustee for the trusts created for Appellant's children. Paula and Rebecca, whose trust periods have terminated, are appellees in this matter, along with Leon's former wife, Arlene Heine (collectively Appellees). Arlene became successor trustee of Justin's trust upon Appellant's resignation on May 3, 1996.

Alphonse and Clara funded the trusts by deeding real estate to Leon and Appellant. The real estate included the "Gust" and "Wubben" properties, which are located in Cedar County, Nebraska, and the "Larson" property, which is in Yankton County, South Dakota. The Gust and Larson properties are row crop farmland, and the Wubben property is pastureland.

The trusts for Paula, Rebecca, and Justin were created at different times, and Alphonse and Clara deeded land to Appellant as trustee at various times during the 1970's and 1980's. Because the deeds did not designate specific trust beneficiaries, in 1994, the Gust, Larson, and Wubben properties were distributed between the three trusts. The Gust property was divided between Paula's and Rebecca's trusts, the Larson property was divided between all three trusts, and the Wubben property was deeded to Justin's trust.

From the inception of the trusts until 1995, the trust property was farmed by Heine Feedlot Co., a family partnership. Initially, the partnership consisted of Alphonse, Clara, Leon, and Appellant. When Alphonse died in 1984, Clara retained a small interest, but the partnership was primarily owned by Leon and Appellant. Leon and Appellant each worked for the partnership according to his expertise. Appellant managed the crops and bookkeeping, and Leon managed the buying and selling of livestock. Appellant's responsibilities included deciding the amount of rent to pay the trusts for the Gust, Larson, and Wubben properties, and he was the primary negotiator of farm leases for the trust properties.

In 1986, Heine Feedlot Co., Alphonse's estate, Clara, Leon, Arlene, Appellant, and Appellant's wife filed for chapter 11 bankruptcy in South Dakota. The bankruptcies were jointly administered, and the bankruptcy court confirmed a combined bankruptcy plan on January 27, 1988. One debt to the trusts was disclosed: a debt of approximately $24,000 that arose when the partnership borrowed from the trusts. The bankruptcy plan required the debtors to pay a dividend of 20 percent over 10 years to unsecured claimants, which included the trusts. This formula would have resulted in approximately $4,800 in dividends to the trusts, which, as of the time of trial, had not been paid by the various debtors.

After Alphonse's death, the relationship between Leon and Appellant deteriorated. In 1989, Leon initiated arrangements to withdraw from the partnership. At that time, inquiries were made into the financial status of the trusts. Leon resigned as trustee for the trusts of Appellant's children in 1990. In 1992, Leon withdrew from the partnership, and since that time, Appellant has managed the partnership. The partnership has not farmed the trust property since 1995.

Arlene testified that in 1993, she retained an attorney to seek an accounting from Appellant regarding her and Leon's children's trusts, but that at some time afterward, that attorney died. In 1994, Arlene retained another attorney, Bill Klimisch, who repeatedly requested from Appellant an accounting of the trusts. Arlene did not receive an accounting, but did obtain two copies of land deeds to Rebecca and Paula, a bank statement from Justin's account, and two farm lease settlement sheets from two nonconsecutive years. Arlene testified that the information was not helpful. Through Klimisch, Arlene repeatedly requested further documentation, but Appellant did not provide any such documentation. In 1996, Arlene received income tax records, followed by additional information in 1997 and 1998, received after the instant litigation was initiated. Appellant testified that Arlene did not request an accounting "until we got involved with . . . Klimisch."

On July 19, 1996, Appellees filed their operative petition seeking an accounting, damages for breaches of trust, and declaratory relief for an easement on trust property. They alleged that Appellant had violated his duties as a trustee by failing to file timely tax returns, failing to account for rent, extending loans to the partnership, failing to provide an accounting, granting an easement on trust property, and converting a radio tower owned by the trusts. Appellees requested damages for the alleged breaches of trust and asserted that an accounting was necessary to calculate amounts due

to Appellees. Appellees further stated that the easement that Appellant had granted in violation of his duties as trustee should be declared "void and unenforceable as between the parties," and Appellees specifically prayed that the easement be declared "void."

The matter came to trial on April 22 and 23, 1999. The parties presented evidence pertaining to the easement, taxes, and rent payments for the Gust, Larson, and Wubben properties for 1984 to 1995.

On August 26, 1999, the district court filed a journal entry ordering Appellant to prepare a full accounting of all trust activity which was subject to the lawsuit and which occurred during the period he served as trustee. At a hearing on November 8, Appellant offered a three-volume accounting, which was received without objection. The three volumes were not labeled as exhibits, or assigned exhibit numbers, but were included in the bill of exceptions. The index to the bill of exceptions refers to the volumes as "Accounting by Bernie Auten," but that individual was not involved in the accounting.

In a stipulation and order entered on September 20, 2000, the district court requested assistance in the computation of damages. The parties jointly nominated Bernard W. Auten as a court-appointed expert who would compute the damages to be assessed against Appellant. The district court scheduled a pretrial conference, and on December 6, 2001, Appellees filed a response stating that the only remaining issue was the propriety of attorney fees for Appellant's counsel for the accounting. Appellees further stated that the matter "has already been otherwise fully tried to the Court, and all parties are awaiting the determination of all accounting and liability issues," and Appellees prayed for a judgment on all issues except for those remaining open. At a hearing on September 9, 2002, the district court allowed Appellant to submit into evidence the affidavit of his former attorney. On September 11, Appellant filed a motion requesting findings of fact and conclusions of law, pursuant to Neb. Rev. Stat. § 25-1127 (Reissue 1995).

On January 24, 2003, the district court entered a purported judgment, "based upon the trial of this matter on 22nd through 23rd of April, 1999, the subsequent report of . . . Auten submitted to this court, and the post-trial briefs." The district court determined that Appellees were entitled to (1) damages for the granting of an easement, over which the district court "does not have jurisdiction," by Appellant as trustee of the trusts, without consideration; (2) damages for "debt related to the Chapter 12 [sic] proceeding"; (3) attorney fees incurred in Appellees' efforts to obtain an accounting from Appellant; and (4) damages for inadequate rent payments paid by the partnership between 1984 and 1995 while Appellant was trustee. At a hearing on May 5, 2003, the district court announced that Appellant's motion requesting findings of fact and conclusions of law was overruled because it was not timely.

The parties filed motions for new trial, and on July 28, 2003, the district court overruled the motions. Appellant appealed the July 28 order to this court. On October 7, we filed an order to show cause why the case should not be dismissed pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2001) for lack of

jurisdiction, in that the January 24 order was not a final and appealable order because it did not address all of Appellees' claims. On October 9, upon Appellant's motion, the district court filed a purported order nunc pro tunc stating that its order rendered on January 24 was intended to be a final order and to resolve all issues raised by the parties, and the court purported to amend the order to state that any request for relief by any party not specifically granted was denied. On November 5, Appellant submitted his response to our order to show cause, which response consisted of his motion for the order nunc pro tunc and the order nunc pro tunc. On March 17, 2004, we dismissed the appeal, pursuant to rule 7A(2), and vacated the district court's purported nunc pro tunc order. See Heine v. Heine, 12 Neb. App. liv (No. A-03-985, Mar. 17, 2004).

On June 7, 2004, Appellant filed with the district court another motion for findings of fact and conclusions of law, pursuant to § 25-1127, and a motion to schedule a pretrial conference. Appellant requested findings and conclusions on the following issues: (1) the time period relevant to the determination of farm rent; (2) the amount of rent paid by the tenant in each of those relevant years and the difference, if any, between that amount and the amount that should have been paid; (3) whether Appellees were entitled to damages for the easement; (4) whether the statute of limitations barred any claim by Paula; (5) whether attorney fees were permitted in the action; and (6) whether Auten's report was part of the findings of fact in the action. On September 13, Appellees filed a motion for final judgment and order disposing of the case "and/or" setting the matter for trial.

The district court heard both parties' motions on July 12, 2004. The district court seemed to state that it would schedule a pretrial hearing. However, on December 1, the district court entered a judgment overruling Appellant's motions. The district court sustained the portion of Appellees' motion requesting a final judgment based on the evidence already submitted. The court reiterated its previous award of damages and awarded interest on the damage award from January 24, 2003, but did not refer to the Auten report. In restating the award for the value of the easement, the district court noted that it did not have in rem jurisdiction over the real property upon which the easement was located. Additionally, the district court dismissed Appellees' claims concerning (1) Appellant's failure to timely file tax returns, (2) damages arising out of loans to the partnership by Appellant on behalf of the trusts, (3) conversion of a radio tower by Appellant, (4) a "'wrongfully recorded mortgage,'" (5) declaratory judgment for the easement over which the district court concluded it had "no physical jurisdiction," and (6) Appellant's wrongful charging of miscellaneous items to the trust. Appellant now appeals the December 1, 2004, order, and Appellees cross-appeal.

ASSIGNMENTS OF ERROR

Appellant alleges, rephrased and consolidated, that the court erred in (1) awarding damages that were barred by judicial admissions, collateral estoppel, statutes of limitations, and lack of sufficient evidence; (2) awarding damages for Appellant's failure to collect amounts payable to the trusts which were not yet due and which were not barred by the statute of limitations from collection by the successors in interest of the trusts; (3) granting relief not requested in Appellees' amended petition;

(4) admitting evidence of attorney fees and awarding attorney fees; (5) relying on information which was not received as evidence at trial; (6) overruling Appellant's motion for findings of fact and conclusions of law; and (7) awarding Appellees prejudgment interest.

On cross-appeal, Appellees allege, renumbered, that the court erred in (1) failing to order Appellant to dissolve the easement on trust property and (2) failing to award Appellees an appropriate amount of damages and attorney fees by erring in (a) its findings concerning the proper amount of rental payments that should have been made to the trusts, (b) its findings as to the proper amount of expenses to be charged to the trusts, (c) its findings as to the actual amounts Appellant paid to the trusts, (d) failing to award Appellees the full amount of their attorney fees, (e) not allowing prejudgment interest on all the damages awarded, (f) failing to award damages regarding funds borrowed or misdirected by Appellant, which were never repaid, and (g) failing to award damages, other than damages related to the chapter 11 proceeding, for the first 10 years of the trusts.

STANDARD OF REVIEW

Damage Claims

The parties dispute the appropriate standard of review for Appellees' damage claims arising out of Appellant's alleged breaches of trust. Appellant argues that the claim for damages constitutes an action at law, in which the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. See Anderson Excavating v. SID No. 177, 265 Neb. 61, 654 N.W.2d 376 (2002). Appellees assert that their claims, including a request for damages, sound in equity. In an appeal of an equity action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. Strunk v. Chromy-Strunk, 270 Neb. 917, 708 N.W.2d 821 (2006). Where credible evidence is in conflict on a material issue of fact, the appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. Id.

Both legal and equitable principles may be enforced in the same action according to the facts. Nebraska Engineering Co. v. Gerstner, 212 Neb. 440, 323 N.W.2d 84 (1982). The essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the complaint, determine whether a particular action is one at law or in equity, unaffected by the conclusions of the pleader or what the pleader calls it, or the prayer for relief. Id.

In Buell, Winter, Mousel & Assoc. v. Olmsted & Perry, 227 Neb. 770, 420 N.W.2d 280 (1988), the appellants' former employer brought suit against the appellants and their corporation for enticing some of the employer's clients into becoming clients of the appellants' corporation. The district court determined that the appellants had breached their duty of loyalty to the employer and sustained the employer's motion for summary judgment on that issue. The district court tried the issue of damages and entered a damage award in favor of the employer. The appellants then appealed the

district court's findings that they had breached their fiduciary duties and that the employer had proved damages. The Nebraska Supreme Court reviewed the action, including factual issues pertaining to damages, as one in equity. The Supreme Court observed that the petition sought an injunction as well as damages. The Supreme Court concluded that the fact that a summary judgment was granted on the issue of whether the appellants had breached their fiduciary duties, leaving the issue of damages to be litigated separately, did not change the essential character of the action.

In the instant case, Appellees' claims for damages arise out of Appellant's alleged breaches of trust, that is, acts and omissions committed in administering the trust. Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record. In re R.B. Plummer Memorial Loan Fund Trust, 266 Neb. 1, 661 N.W.2d 307 (2003). The essential character of Appellees' action, notwithstanding their request for damages, is equitable. As such, we shall treat Appellees' claim for damages as one in equity and review the matter de novo on the record and come to an independent conclusion without reference to the findings of the district court. See Strunk v. Chromy-Strunk, supra.

Other Claims

The determination of which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. Carruth v. State, 271 Neb. 433, 712 N.W.2d 575 (2006).

An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. Smith v. City of Papillion, 270 Neb. 607, 705 N.W.2d 584 (2005). In reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. Gast v. Peters, 267 Neb. 18, 671 N.W.2d 758 (2003); Lake Arrowhead, Inc. v. Jolliffe, 263 Neb. 354, 639 N.W.2d 905 (2002).

On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. Trieweiler v. Sears, 268 Neb. 952, 689 N.W.2d 807 (2004). When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. Eicher v. Mid America Fin. Invest. Corp., 270 Neb. 370, 702 N.W.2d 792 (2005).

Whether prejudgment interest should be awarded is reviewed de novo on appeal. Gerhold Concrete Co. v. St. Paul Fire & Marine Ins., 269 Neb. 692, 695 N.W.2d 665 (2005).

ANALYSIS

Damage Award for Unpaid Rents

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The district court awarded damages for underpaid rent for the period from 1984 to 1995. Appellant contends that Appellees should not recover damages accruing before January 27, 1988. According to Appellant, Appellees made "judicial admissions" that they were not seeking damages for the time period preceding the confirmation of the bankruptcy plan. Brief for appellant at 16. He argues that this position is reinforced by proceedings in the bankruptcy court and further contends that the bankruptcy court's findings bar reconsideration of periods prior to January 27, 1988, under the doctrine of collateral estoppel.

On May 11, 1998, at a hearing before the district court on Appellant's pretrial "motion to dismiss," Appellees' counsel stated:

As to the bankruptcy, Judge, we are not seeking to undo anything in the bankruptcy. What happened in that bankruptcy is that there was an order entered when the plan of these various entities was confirmed that said Heine Feedlot was supposed to pay my clients, the trusts, approximately 20 some thousand dollars. And what we are seeking is information and declaration of the rights of the parties as to why that partnership, which is now controlled by [Appellant], who was also a trustee of the trust, why those funds haven't been paid. We're not seeking anything before the bankruptcy order. We're seeking only enforcement of the bankruptcy order as applies to our clients.

Later in the hearing, Appellees' counsel denied the assertion by Appellant's counsel that Appellees were attempting to "have the state court determine what bankruptcy court should have done." Appellees' counsel stated:

Judge, there was a confirmed plan. That plan is a contractual document that says Heine Feedlot is supposed to pay my clients $20,000. I'm not suing Heine Feedlot here. I'm not suing [Appellant] in his individual capacity. I'm suing him as trustee to have this court determine if he is liable for the fact that that obligation has not been paid. I'm not seeking to vary anything in the bankruptcy court. I'm not seeking to have anything additional asked. I'm simply asking this court to determine whether he's breached his fiduciary duty by failing to provide that his company pay my clients for the bankruptcy, for the -- for the contractual obligation that that plan confirmation provided for. . . . He is the managing director, the managing partner of Heine Feedlot, he is also a trustee and has fiduciary duty to the trust that I represent. And, Judge, all I'm asking is for this court to determine if he breached his fiduciary duties and, if so, what is the extent of his liability. And that's what I'm seeking in that regard.

The district court received in evidence documents filed in the bankruptcy court. In the bankruptcy court, Appellees filed a pleading in response to Appellant's motion for stay of state court proceedings. Appellees' pleading, filed on March 30, 1999, stated:

Even if the automatic stay were in effect, it would not apply to the Nebraska litigation, as that litigation is not aimed at any pre-petition indebtedness of [Appellant], but rather, as has been

demonstrated in the pleadings and submissions of the parties in that litigation, it involves only post-confirmation indebtedness of [Appellant] to [Appellees].

Appellees submitted a brief to the bankruptcy court in support of their pleading, which stated:

As is demonstrated by even a cursory review of the briefs of [Appellees filed in district court], they are not seeking to recover any pre-confirmation debt; rather, they are seeking recovery for acts that took place subsequent to the confirmation of the Chapter 11 plan of the jointly administered Debtors, and for the activities of [Appellant] which took place after that time.

. . . [T]he state court litigation is aimed at determining [Appellant's] liability for breach of his duties as trustee of the trust. . . . [Appellees] seek recovery for the post-confirmation activities of [Appellant], including his failure to ensure that Heine Feedlot repaid its loans to the trust, consistent with the confirmed Chapter 11 plan. In other words, liability is sought for post-confirmation activity, and not with respect to any pre-petition or pre-bankruptcy claim.

The bankruptcy court denied Appellant's motion for stay, and in a letter to counsel presenting its findings of fact, the bankruptcy court noted that Appellees "were only seeking enforcement of debts created by the confirmed plan or those that arose post-petition" and that the Appellees "acknowledge that they cannot enforce pre-petition debts but may only collect the debt created by the confirmed plan and those debts that arose post-petition." In the order confirming the bankruptcy plan and discharging the debtor, the bankruptcy court discharged the debtors in the jointly administered filings from "all dischargeable debts."

At trial in district court on this matter, Appellant's counsel elicited the following testimony from Arlene on cross-examination:

Q: . . . Your position is this lawsuit only involves indebtedness arising after [Appellant's bankruptcy] plan was confirmed; correct?

A: As pertaining strictly to the $24,000 loan [discharged by the bankruptcy].

Q: All right.

A: Not pertaining to leases, rent, et cetera.

Appellant contends that statements by Appellees' counsel at the May 11, 1998, hearing constitute a judicial admission that Appellees were not seeking recovery for the period before the 1988 bankruptcy order. A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.

Reicheneker v. Reicheneker, 264 Neb. 682, 651 N.W.2d 224 (2002). Statements made by a party or his attorney during the course of a trial may be judicial admissions. Schroeder v. Barnes, 5 Neb. App. 811, 565 N.W.2d 749 (1997), citing 32 C.J.S. Evidence §§ 364 and 397 (1996). Judicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence. U S West Communications v. Taborski, 253 Neb. 770, 572 N.W.2d 81 (1998).

Appellant also argues that admissions made by Appellees during the bankruptcy proceedings support his interpretation of the statements made at trial by Appellees' counsel. Matters contained in pleadings in other cases are simple admissions. Nichols Media Consultants v. Ken Morehead Inv. Co., 1 Neb. App. 220, 491 N.W.2d 368 (1992). An extra-judicial or simple admission is simply an item of evidence in the mass of evidence adduced during a trial, admissible in contradiction and impeachment of the present claim and other evidence of the party making the admission. See Schneider v. Chavez-Munoz, 9 Neb. App. 579, 616 N.W.2d 46 (2000), citing Kipf v. Bitner, 150 Neb. 155, 33 N.W.2d 518 (1948). Such an admission is not ordinarily final and conclusive upon the party by whom it was made, in the absence of controlling elements of estoppel. Id.

At the May 11, 1998, hearing, Appellees' counsel stated, "We're not seeking anything before the bankruptcy order." Reading this statement in context, we conclude that Appellees' counsel made an unequivocal, deliberate, and clear statement--that is, a judicial admission--that forestalls claims for damages predating the bankruptcy. Our conclusion is supported by Appellees' simple admissions in their bankruptcy pleadings. Therefore, we need not address Appellant's argument that Appellees are collaterally estopped from pursuing claims arising before confirmation of the bankruptcy plan, nor need we address Appellant's alternative argument concerning the calculation of certain rents in 1984 and 1985. See Kelly v. Kelly, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

Having determined that Appellees' judicial admissions preclude them from prevailing on claims for damages predating the confirmation of the bankruptcy plan, we conclude that the district court erred in awarding damages for any period before January 27, 1988. Our de novo standard of review requires us to calculate the damages owing to Appellees for the appropriate period. Because the district court awarded one sum for rents accruing from 1984 to 1995 and did not specify how much Appellant owed for each year, we must review the record, calculate anew the damages for unpaid rents, and modify the award accordingly.

The district court awarded Appellees $85,370.65, representing the fair rental value of the trust property from 1984 to 1995 ($179,196), less the credit for the amounts paid to the trust by Appellant ($93,825.35). Although we cannot discern how the district court arrived at these figures, we consider that the district court apparently placed significant reliance on the calculations of Dale Stoltenberg, Appellees' expert, which are closer to the district court's judgment than those of Appellant's experts, Timothy Kuchta and Richard Payne. See Strunk v. Chromy-Strunk, 270 Neb. 917, 708 N.W.2d 821 (2006) (where credible evidence is in conflict on material issue of fact, appellate court will consider

and may give weight to fact that trial judge heard and observed witnesses and accepted one version of facts rather than another). Therefore, we determine that the fair rental value of the trust real property from 1988 to 1995 was $139,601.

Appellees point out that when they filed bankruptcy pleadings, there had not yet been an accounting by Appellant to reveal his liability for years before 1988. By this argument, Appellees attempt to avoid being held to their plain representations at the May 11, 1998, hearing and in the bankruptcy proceedings. However, to avoid the detrimental effect of the judicial admissions, Appellees should have qualified their admissions by stating that an accounting had not yet occurred.

Appellees assert that only those debts scheduled in the bankruptcy plan were discharged. As set forth in 11 U.S.C. § 523(a)(3) (2000), "[a] discharge under . . . this title does not discharge an individual debtor from any debt . . . neither listed nor scheduled under section 521(1) of this title . . . ." Even though Appellees are correct in stating that unscheduled debts were not discharged by the bankruptcy proceedings, such is not the issue before this court, but, rather, whether Appellees made binding judicial admissions in the state court proceedings, and we have resolved that question in the affirmative.

Our conclusion on our de novo review disposes of Appellees' argument on cross-appeal concerning the evidence supporting the award for unpaid rent. See Kelly v. Kelly, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

The district court found that Appellant had paid $93,825.35 to the trusts for rent. It subtracted this amount from $179,196, the fair rental value of the trust property from 1984 to 1995, to calculate the amount it awarded to Appellees for unpaid rents. On cross-appeal, Appellees claim that the district court did not show how it arrived at the figure of $93,825.35 and that Appellant actually paid only $39,874 for rent. We have concluded that 1988 to 1995 are the relevant years for determining the fair rental value of the trust property and have recalculated that figure on our de novo review. Just as we are unable to discern the district court's exact calculation of fair rental value, we cannot determine how the district court calculated gross rents paid by Appellant, but we note that the district court apparently deemed Appellant's testimony on the matter to be credible. On our de novo review, we calculate that figure as well and conclude that Appellant paid $60,800.33 to the trusts for rent from 1988 to 1995.

Therefore, on our de novo review, we modify the award of damages for rent payments to $78,800.67, representing $139,601, the fair rental value of the trust property from 1988 to 1995, less $60,800.33, the gross rents paid by Appellant during that period.

Findings of Fact and Conclusions of Law

Appellant argues that the district court failed to follow the mandate of § 25-1127 and prejudiced Appellant by failing to make "critical findings on the issue of damages." Brief for appellant at 32. His argument on this matter appears to refer to his second motion for findings of fact and conclusions of law. A request for special findings of fact and separate conclusions of law, in a trial of a cause to the court without a jury, must be made before the final submission of the case to render compliance therewith compulsory. See, State, ex rel. Sorensen, v. Mitchell Irrigation District, 129 Neb. 586, 262 N.W. 543 (1935).

Trial concluded on April 23, 1999, with the court asking the parties to submit briefs. Appellant filed his initial motion for findings of fact and conclusions of law on September 11, 2002. The district court entered its purported final judgment on January 24, 2003. On March 17, 2004, we dismissed Appellant's appeal from the district court's order overruling his motion for new trial. See Heine v. Heine, 12 Neb. App. liv (No. A-03-985, Mar. 17, 2004). Appellant filed his second motion for findings of fact and conclusions of law on June 7. At the July 12 hearing on the motion, Appellant's counsel stated:

I believe we reached the point where the Court had entered judgment based upon the record at the time of trial in 1999 because the parties agreed there was no further evidence to support for the record. However, as the Court knows, I am appealing this -- the Court's ruling. I do not want to be in a position where I stipulate away my appeal by moving forward.

So I need the Court, if that's the Court's position, to rule, as far as [Appellant] is concerned, that there is no further opportunity for evidence to be submitted because the parties have already agreed -- agreed to that.

Finally, if the Court does believe that further evidence is going to be considered on any of the issues, I filed my motion for conclusions of law and findings of fact because the Court previously ruled that I didn't file it timely and so the court was not going to sustain it. So at this point, if we're reopening the record, I wanted to have it in place.

Appellees' counsel responded, "I agree we did rest, we did submit our evidence, and, unless the Court believes otherwise, I don't think the Court needs to open the evidentiary record."

The district court's January 24, 2003, order was interlocutory. See Elliot v. First Security Bank, 249 Neb. 597, 544 N.W.2d 823 (1996) (to be final, order must dispose of whole merits of case and must leave nothing for further consideration, and when no further action of court is required to dispose of pending cause, order is final; however, if cause is retained for further action, order is interlocutory). Appellant filed his June 7, 2004, motion after the district court had received all of the evidence it would consider in its December 1 order, but before the parties agreed that the district court need not open the evidentiary record to resolve the case. Therefore, we conclude that Appellant filed his motion before final submission of the case and that compliance therewith may have been compulsory.

The purpose of § 25-1127 is to enable parties to question the rulings of the trial court upon legal questions involved. See Fee v. Fee, 223 Neb. 128, 388 N.W.2d 122 (1986). Such conclusions of fact and law are mandatory when requested in a law action, but are merely helpful in equity actions, since the appellate court reviews the record de novo and reaches conclusions independent of the trial court. See id. Under this section, the court is not obligated to answer specific interrogatories propounded to it by a litigant. Id.

Appellant points out that the district court did not indicate the years when rent shortages occurred or the amount of the shortages for those years, apparently referring to his June 7, 2004, motion, which requested, inter alia, findings and conclusions as to the time period relevant to the determination of farm rent and as to the amount of rent paid by the tenant in each of those relevant years and the difference, if any, between that amount and the amount that should have been paid. We have already concluded that Appellees' claim for rents is one in equity. Therefore, the findings and conclusions Appellant requested were not mandatory. While such findings and conclusions would have been helpful to this court in our de novo review of evidence pertaining to damages, the record was sufficient for us to calculate damages. We cannot say that Appellant was prejudiced by the district court's refusal to state findings of fact or conclusions of law, and we find no reversible error. See D & R Realty v. Bender, 230 Neb. 301, 431 N.W.2d 920 (1988).

Award for Bankruptcy Debt

The district court ordered Appellant to pay Appellees $4,861, representing the chapter 11 dividend which the partnership was to pay in 10 yearly payments commencing 30 days after the January 27, 1988, confirmation of the debtors' plan and continuing every year on the same date. Appellant argues that the district court erred in ordering him to pay the entire dividend. He contends that the judgment should be reduced by the amount of 6 years' rent due from the partnership from 1988 to 1997 that was collectible by his successors in interest but was not collected. He claims that because, under the applicable statute of limitations, the payments were due and payable over 10 years and because there was a window for Paula, Rebecca, and Arlene, as successor trustee, to bring a cause of action for payments accruing for the 5 years before his 1996 resignation, he should not be liable for those amounts. Appellant further alleges that he should not be liable for the payment which accrued in 1997, after he resigned as trustee.

At trial, Arlene admitted that she was the trustee when payments became due in 1996 and 1997, but the parties stipulated that Appellant resigned as trustee on May 3, 1996. Therefore, only the 1997 payment would have been due while Arlene was trustee. Arlene also testified that she did not have records showing how many, if any, payments had been made to the trusts. Based on our de novo review of the evidence, we conclude that Appellant's argument lacks merit. Although the last payment came due after Appellant had resigned as trustee, he had not disclosed to his successor whether he had made all or any of the dividend payments to the trust and had failed to provide trust records to his successor.

Additional Damage Claims

The district court found Appellees did not prove that damages arose from any failure by Appellant to file timely tax returns or that Appellant wrongfully charged approximately $20,000 of miscellaneous items to the trusts, and the court dismissed Appellees' claims for damages relating to those allegations. On cross-appeal, Appellees argue that the district court should have awarded them damages and prejudgment interest for expenses Appellant charged to the trusts for preparation of deeds, tax return preparation, and the placement of a sign on trust property. Appellees do not cite to the record to support these claims, and upon our de novo review, we conclude that the record offers no such support.

Although Appellees request specific amounts of damages for Appellant's alleged breaches of trust, due to Appellees' failure to cite to the voluminous record, we had difficulty in locating charges to support their allegations concerning the preparation of deeds and tax return preparation. Neb. Ct. R. of Prac. 9D(1)(g) (rev. 2006) requires parties to annotate to the record each and every recitation of fact, whether in the statement of the facts or elsewhere in the brief. This court's de novo review of the issue does not alleviate appellate counsel's obligation to fulfill the court rules. See Stephens v. Pillen, 12 Neb. App. 600, 681 N.W.2d 59 (2004). We caution counsel to take greater care to comply with the court rules. The failure to comply with rule 9D may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist. See First Westside Bank v. For-Med, Inc., 247 Neb. 641, 529 N.W.2d 66 (1995).

Regarding the charges for the sign, the preparation of deeds, and the tax return preparation, Appellant testified that in each instance, the expenses benefited the trusts. On our de novo review of the evidence, we conclude that the district court did not err in finding that Appellees had failed to prove that damages were incurred as a result of the charges.

On cross-appeal, Appellees also assign that the district court erred in failing to award damages, other than damages related to the chapter 11 proceeding, for the first 10 years of the trusts. We have already concluded that Appellees' judicial admissions forestall recovery of damages incurred before the bankruptcy confirmation plan in 1988. Moreover, although Appellees restate this contention in their brief on cross-appeal, they do not specify the amount or source of such damages. As such, we regard this as a failure to argue an assigned error and will not consider it further. See In re Petition of SID No. 1, 270 Neb. 856, 708 N.W.2d 809 (2006) (in absence of plain error, appellate court considers only claimed errors which are both assigned and discussed).

Statute of Limitations

Appellant alleges that the district court failed to recognize that some of Paula's claims were barred by the statute of limitations pursuant to Neb. Rev. Stat. § 30-2818 (Reissue 1995), which was repealed by 2003 Neb. Laws, L.B. 130, operative January 1, 2005; Appellant alleges that the award of damages

should be altered accordingly. The district court received affidavit evidence at a separate trial on February 22, 1999, on the issue of Appellant's statute of limitations defense. The record does not contain any express ruling by the district court on the statute of limitations issue.

Section 30-2818(1), which was in effect at all times relevant to this case, provides:

Unless previously barred by adjudication, consent, or limitation, or unless otherwise provided by the instrument creating the trust, any claim against a trustee by a beneficiary for breach of trust or breach of any fiduciary duty arising out of the trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter subject to the claim and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within six months after receipt of the final account or statement. In any event, and notwithstanding lack of full disclosure, any claim against a trustee shall be barred as to any beneficiary who has received a final account or statement and who was informed of the location and availability of records for his or her examination unless a proceeding to assert the claim is commenced within four years after receiving the final account or statement and being so informed.

We conclude that the statute of limitations in § 30-2818(1) does not apply to the instant case, because as of the time Appellees filed their cause of action, Appellant had not provided an accounting.

Relying on the introductory phrase "[u]nless previously barred by . . . limitation," Appellant interprets § 30-2818 to mean that "the six-month limitation period from receipt of final accounting by the trustee is not controlling where the action is already barred by another statute of limitation[s]." Brief for appellant at 22. We agree that the introductory phrase does not extend any previous bar of any cause of action, but, rather, provides that any cause of action that was previously barred would remain barred. However, we disagree with Appellant's contention that another statute had already operated to bar any of Appellees' claims.

Our rejection of Appellant's argument is consistent with the general rule that the statute of limitations is tolled while the trust continues, which also disposes of Appellant's contentions that Paula's claims are barred by other statutes of limitations. See In re Estate of Statz, 144 Neb. 154, 12 N.W.2d 829 (1944) (trust of executor or administrator is continuing trust, and he cannot set up statute of limitations as against rights of next of kin or persons entitled to distribution of assets of estate unless they repudiate trust or set up claims in their own rights, or until trust is terminated). See, also, 54 C.J.S. Limitations of Actions §§ 21 and 184 (1987) (as general rule, statute of limitations is tolled while trust exists).

Auten Report

Appellant alleges that the district court relied on "inadmissible evidence," because the district court's January 24, 2003, order recited that it was based in part on Auten's report. Brief for appellant

at 31. Appellant points out that Auten's report was not received in evidence and that the only record of the report on appeal is the attachment to Appellant's motion for new trial.

First, we note that the January 24, 2003, order was interlocutory because it did not dispose of all of the issues, see Mumin v. Dees, 266 Neb. 201, 663 N.W.2d 125 (2003), and that the December 1, 2004, final judgment does not mention Auten's report. Second, Appellant broached the topic of Auten's report with the district court, which resulted in the following colloquy at the hearing on Appellant's motion for new trial on May 5, 2003:

[Appellant's counsel:] The judgment of this court indicates that the decision of this court was based on the evidence and on the report of . . . Auten, the accountant that was employed by the Court to --

THE COURT: Not really.

[Appellant's counsel]: Okay. Just -- just so the record is clear, Your Honor, the -- the judgment says, this matter came on for hearing before the Court on the 20th day of December, 2002, based upon the trial of this matter on the 22nd through 23rd of April, 1999, the subsequent report of . . . Auten submitted to this court, and then the post-trial briefs. And one of the questions -- or one of the issues I had was the . . . Auten report, which the -- the Court had as part of the material that was submitted to the Court. I don't know that that report was ever received in evidence and that concerned me and that was part of my --

THE COURT: It was submitted to the Court.

[Appellant's counsel]: Yes.

THE COURT: And it was never offered into evidence, it was never received into evidence.

[Appellant's counsel]: So it was not utilized by the Court.

THE COURT: Okay.

[Appellant's counsel]: And, of course, the Court is not responsible to me as far as my questions, but it just -- the judgment says upon that and that concerned me.

THE COURT: Well, the -- that's because it was actually -- was actually received by the Court.

[Appellant's counsel]: All right. First, Your Honor --

THE COURT: But I -- the judgment was prepared from -- by --

[Appellant's counsel]: Counsel.

THE COURT: -- counsel, yes

Based on the record, we conclude that the district court's ruling was not based on the Auten report and, consequently, that no prejudice resulted from any improper receipt of the document.

Easement

Both parties dispute the district court's judgment concerning the easement Appellant granted on the trust property in South Dakota. Appellees' operative petition stated that the easement should be declared "void and unenforceable as between the parties" and specifically prayed that the easement be declared "void." The district court found that it did not have "physical jurisdiction" over the easement, but awarded Appellees $2,500 for the value of the easement, plus interest. Appellant alleges that the district court erred in awarding Appellees damages relating to the easement, because Appellees made a judicial admission when, at the close of Appellees' evidence and in response to a motion to dismiss by Appellant, Appellees' counsel stated, "[W]e are seeking declaratory judgment, not monetary damages, with regard to the easement." Appellant also claims that there was no evidence regarding the value of the easement. On cross-appeal, Appellees allege that the district court erred in awarding damages, rather than dissolving the easement.

We note that Appellees' prayer that the easement be declared "void and unenforceable" differs from their brief's allegation that they had requested an order dissolving the easement. At trial, Appellant testified that the easement benefited his children and Leon's children, and Appellant admitted that his children's trust land would be landlocked without the easement. Thus, a declaration that the easement was void would have affected third parties not joined in the action and would have involved an interest in real estate in another sovereign state.

The district court lacked in rem jurisdiction to order the South Dakota easement declared void, as requested in the operative petition. See Weesner v. Weesner, 168 Neb. 346, 95 N.W.2d 682 (1959) (court of one state cannot directly affect or determine title to real property located in another state). The district court acknowledged its lack of in rem jurisdiction in the December 1, 2004, judgment.

Although the district court lacked in rem jurisdiction over the easement, it had personal jurisdiction over Appellant such that it could enter a personal order requiring Appellant to remove the easement. See Abbott v. Wagner, 108 Neb. 359, 188 N.W. 113 (1922) (court of equity, in holding trustee liable for breach of trust, proceeds in personam). See also, Neb. Rev. Stat. § 30-2804 (Reissue 1995), repealed by 2003 Neb. Laws, L.B. 130. Such an order would not have involved the jurisdictional problems inherent in Appellees' request that the easement be declared void, nor would an order awarding damages. However, damages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove the plaintiff's alleged

damages. J.D. Warehouse v. Lutz & Co., 263 Neb. 189, 639 N.W.2d 88 (2002). Although Appellees' operative petition requested unspecified damages "due to improper impression of an easement" on trust property, we find no evidence of the amount of damages incurred by Appellees as a result of the easement. Therefore, we need not address whether damages are an appropriate alternative form of equitable relief, and we modify the award, striking the damage award of $2,500 and substituting an order directing Appellant to remove the easement. Upon remand, supplemental proceedings may be required if it is subsequently determined that such relief is impossible to accomplish.

Attorney Fees

The district court ordered Appellant to pay $5,000, plus interest, for attorney fees incurred by Appellees in an attempt to obtain an accounting from Appellant. On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. Trieweiler v. Sears, 268 Neb. 952, 689 N.W.2d 807 (2004). In the context of trust administration cases, as a general rule, attorney fees and expenses may be recovered in a civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. See In re Estate of Linch, 139 Neb. 761, 298 N.W. 697 (1941). Appellant contends that no statute or uniform course of procedure authorizes recovery of attorney fees in an accounting action or breach of trust case.

We observe that Neb. Rev. Stat. § 30-3893 (Cum. Supp. 2004) now provides a statutory basis for the award of attorney fees in a proceeding involving the administration of a trust, but in the instant case, that section does not apply, because it became operative on January 1, 2005, after the district court entered its final order and award of attorney fees.

At the time of the district court's final judgment, the only statute which could have supported an award of attorney fees in the instant case is Neb. Rev. Stat. § 25-824(4) (Reissue 1995), which provides in part:

The court shall assess attorney's fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment.

Appellant claims that his statute of limitations defense was not frivolous and therefore not a basis for the award of fees, and Appellees take the opposite position. As used in § 25-824, the term "frivolous" means an improper motive or legal position so wholly without merit as to be ridiculous. See Harrington v. Farmers Union Co-Op. Ins. Co., 13 Neb. App. 484, 696 N.W.2d 485 (2005). Any doubt whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question. Id. Although Appellant was not successful in his statute of limitations defense, it was not so wholly without merit as to be ridiculous and was not frivolous. We conclude that attorney fees would not be justified under § 25-824(4).

Having found no statute which would provide for attorney fees in the instant case, we consider whether Nebraska law contains a uniform course of procedure which would support such an award. As we noted above, In re Estate of Linch, supra, sets forth the general rule concerning attorney fees in the context of trust administration. Therefore, we reject Appellees' attempt to articulate a uniform course of procedure by relying on cases from other jurisdictions and general authority.

In In re Estate of Linch, the Nebraska Supreme Court implemented the common fund doctrine. In that case, a law firm was awarded attorney fees for its services in preserving the assets of a trust estate via an action against the successor trustee, to be deducted from the amount owed to the trust by the trustee. On appeal, the Supreme Court affirmed the award of fees. The Supreme Court recognized the above-stated general rule, but also noted:

"Where many persons have a common interest in a trust fund or property, and one of them, for the benefit of all, at his own cost and expense, takes legal action for its preservation or administration, the court of equity in which the suit was brought may order the successful litigant to be reimbursed his costs and expenses, including counsel fees, from the property of the trust or order those benefited to contribute proportionately toward that expense."

In re Estate of Linch, 139 Neb. 761, 764, 298 N.W. 697, 699 (1941), quoting Blacker v. Kitchen Bros. Hotel Co., 133 Neb. 66, 273 N.W. 836 (1937) (applying common fund doctrine but allowing attorney fees only out of trust fund rather than enlarging trust fund). See, also, Misle v. Misle, 247 Neb. 592, 529 N.W.2d 54 (1995) (in action by cotrustee against two other co-trustees for final trust distribution to beneficiary, cotrustee, who did not have common interest in trust with any other persons, did not satisfy requirements of In re Estate of Linch for attorney fees, whereas if beneficiary had brought action as he was entitled to do, he may have been entitled to attorney fees provided he had initiated action at his own cost and expense).

Although In re Estate of Linch supplies the general rule for awarding attorney fees in the context of trust administration, neither In re Estate of Linch nor Blacker supports an award of attorney fees in the instant case. Whereas in each of those cases, one beneficiary bore the expense of litigation that benefited all of the beneficiaries, in the case at bar, all of the trust beneficiaries have retained the same counsel and no one beneficiary has borne more than his or her fair share of the cost of litigation.

The uniform course of procedure recognized in In re Estate of Linch does not provide authorization for an award of fees against the trustee. Rather, it operates only to prevent one beneficiary from bearing more than his or her fair share of the cost of recovery or another beneficiary from receiving a windfall by avoiding his or her fair share of the expense. That situation does not apply in the case before us.

Because we find no statute and no uniform course of procedure providing for the award of attorney

fees against Appellant in this case, we conclude that the district court abused its discretion in awarding attorney fees and we modify the judgment to vacate the district court's award of attorney fees.

On cross-appeal, Appellees request attorney fees incurred after trial due to Appellant's delay in providing documents for the accounting, but the record contains no evidence of the charges for services rendered after trial.

Insofar as Appellees request attorney fees incurred on appeal, Neb. Ct. R. of Prac. 9F (rev. 2006) requires that any person who claims the right to an attorney fee in a civil case appealed to the Nebraska Supreme Court must file a motion for the allowance of such a fee supported by an affidavit which justifies the amount of the fee sought. Willers v. Willers, 255 Neb. 769, 587 N.W.2d 390 (1998). Rule 9F also applies to this court pursuant to Neb. Ct. R. of Prac. 2A (rev. 2006). See Salkin v. Jacobsen, 263 Neb. 521, 641 N.W.2d 356 (2002). The record before us contains no such motion.

Moreover, even assuming without deciding that § 30-3893 would apply to this appeal so as to authorize an award of attorney fees on appeal, justice and equity would not permit such an award because, in light of our reduction of the district court's judgment, Appellees are not the prevailing parties on appeal. See Brodersen v. Traders Ins. Co., 246 Neb. 688, 523 N.W.2d 24 (1994) (attorney fees are costs awarded to prevailing parties).

Prejudgment Interest

In the judgment entered on December 1, 2004, the district court awarded Appellees interest on the awards for the easement, the bankruptcy debt, attorney fees, and rent and assigned January 24, 2003, the date of the entry of its interlocutory order, as the date from which such interest would begin. In opposing the award of interest, Appellant characterizes the interest as prejudgment interest. We agree.

Whether the interest award in this case constitutes prejudgment interest depends on whether the January 24, 2003, order was a judgment. A judgment is the final determination of the rights of the parties in an action. Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2004). We dismissed Appellant's initial appeal after Appellant responded to our order to show cause why the case should not be dismissed pursuant to rule 7A(2) for lack of jurisdiction, in that the January 24 order was not a final and appealable order because it did not address all of Appellees' claims. Additionally, we vacated the district court's purported nunc pro tunc order, which stated that the January 24 order was intended to be a final order and to resolve all issues raised by the parties and that any request for relief by any party not specifically granted was denied. Finally, this is not a case where the district court expressly directed the entry of a final judgment as to one or more but fewer than all of the claims or parties, as provided in Neb. Rev. Stat. § 25-1315 (Cum. Supp. 2004), and the January 24 order did not purport to utilize the authority of § 25-1315 to provide for an immediate appeal. As such, we conclude that the

interest awarded for the period prior to December 1, 2004, constituted prejudgment interest.

Appellant contends that in awarding prejudgment interest, the district court failed to comply with Neb. Rev. Stat. § 45-103.02 (Reissue 2004) and arbitrarily chose a date on which prejudgment interest would commence, even though "the alleged debt created by the various portions of the amended petition would have occurred at different times." Brief for appellant at 32.

Section 45-103.02 prescribes the conditions for allowance of prejudgment interest on all causes of action accruing on or after January 1, 1987. Folgers Architects v. Kerns, 262 Neb. 530, 633 N.W.2d 114 (2001). Prejudgment interest may be awarded only as provided in § 45-103.02. IBP, inc. v. Sands, 252 Neb. 573, 563 N.W.2d 353 (1997). Under § 45-103.02(1), interest accrues on the unpaid balance of unliquidated claims "from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the entry of judgment" if specific conditions concerning the settlement offer are met. Under § 45-103.02(2), interest on the unpaid balance of liquidated claims accrues "from the date the cause of action arose until the entry of judgment." A claim is liquidated when there is no reasonable controversy either as to the plaintiff's right to recover or as to the amount of such recovery. See Davis v. Davis, 265 Neb. 790, 660 N.W.2d 162 (2003). There must be no dispute either as to the amount or as to the plaintiff's right to recover. Id.

Because there was no settlement offer in this case and § 45-103.02(1) cannot apply, we consider whether the district court awarded prejudgment interest as provided in § 45-103.02(2). Appellees brought causes of action for an accounting, damages for breaches of trust, and declaratory judgment for the easement. In its January 24, 2003, interlocutory order, the district court awarded damages relating to each cause of action and reiterated those awards in the December 1, 2004, final order. However, we find no Nebraska case law stating that an interlocutory order can be the basis of liquidating a claim. Therefore, we modify the judgment to eliminate any prejudgment interest and to award only postjudgment interest commencing on December 1, 2004, the date of the final judgment.

CONCLUSION

For the foregoing reasons, we affirm the district court's judgment, but modify the judgment to adjust the award for unpaid rents to $78,800.67, to eliminate the award of prejudgment interest and provide only for postjudgment interest, to substitute equitable relief requiring removal of the improperly granted easement for the award of monetary damages, and to vacate the award of attorney fees.

Affirmed as modified.