20170260
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 3, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20170260

Julie Anne Sauter, as Trustee of the Julie Anne Sauter Living Trust Dated February 12, 2014,

Appellee,

vs.

James Miller and Carol Miller,

Appellants.

APPELLEE'S BRIEF

Appeal from Judgment dated March 22, 2017 and entered March 23, 2017
District Court of Bowman County
Southwest Judicial District
The Honorable Dann Greenwood
Civil Case No. 06-2015-CV-00034

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STATEMENT OF THE ISSUES

[1] Defendants James and Carol Miller (the "Millers") identify the following issues of law:

a. Whether the District Court misapplied N.D.C.C. § 28-01-04 in determining Plaintiff, the Julie Ann Sauter Living Trust dated February 12, 2014 ("Ms. Sauter"), gained title to certain real property through adverse possession.

b. Whether the District Court misapplied N.D.C.C. § 28-01-04 in determining Ms. Sauter gained title to certain real property through acquiescence.

c. Whether the District Court erred when it held the Millers liable for trespass and breach of lease after determining that such damages were available from the time title first matured, rather than from the time judgment passes title.

[2] The Millers identify the following issues of fact:

a. Whether clear and convincing evidence exists to support the finding that the Original Fence was a substantial enclosure.

b. Whether clear and convincing evidence exists to support the finding that the Original Fence was intended to serve as a boundary between property owned by Ms. Sauter and property owned by the Millers.

c. Whether clear and convincing evidence exists to support the finding that the Millers had notice of Ms. Sauter's claim of ownership.

d. Whether clear and convincing evidence exists to support the finding that Ms. Sauter's claim to the Disputed Property was hostile.

e. Whether clear and convincing evidence exists to support the finding that Ms. Sauter intended to own the Disputed acres.

f. Whether clear and convincing evidence exists to support the finding that Ms. Sauter's claim was open and notorious.

g. Whether clear and convincing evidence exists to support the finding that the Millers and previous owners of the Miller Property acquiesced.

[3] Whether the District Court abused its discretion in awarding attorneys' fees against the Millers.

JURISDICTIONAL STATEMENT

[4] The Millers have lost the right to appeal the present money judgment, which implicates the Millers' identified issues relating to the claim for breach of lease, trespass, and attorneys' fees. A party loses the right to appeal a judgment when that judgment has been voluntarily satisfied. *Viscito v. Christianson*, 2015 ND 97, ¶ 16, 862 N.W.2d 777. "A civil action in a district court is deemed to be pending from the time of its commencement until its final determination upon appeal or until the time for appeal has passed, unless the judgment is sooner satisfied." N.D.C.C. § 28-05-10 (emphasis added). A judgment may not preclude an appeal in the event that the satisfaction of judgment was involuntary—under coercion or duress. *Twogood v. Wentz*, 2001 ND 167, ¶ 5, 634 N.W.2d 514. "The question of whether a judgment has been voluntarily paid and satisfied 'depends on the facts and circumstances of the particular case[.]" *Id.* The party arguing that the appeal must be dismissed bears the burden of showing that the satisfaction of the judgment was voluntary. *Id.*

[5] A judgment debtor has the duty to protect itself from the collection efforts of the judgment creditor if the debtor would like to preserve its right to appeal. *See Lyon v. Ford Motor Co.*, 2000 ND 12, ¶12, 604 N.W.2d 453. In North Dakota, there are multiple ways

to secure such protection, including a supersedeas bond or a deposit with the district court. *Id.* The *Lyon* court stated:

> Although neither avenue is a jurisdictional prerequisite to an appeal, we see no utility in judicially authorizing yet another avenue for protection from judgment collection efforts during the pendency of an appeal, which would result in little more than a rash of restitution suits for recovery of voluntary payments on later-reversed judgments.

Id.

[6] The *Lyon* court determined that a payment was voluntary where judgment debtor had not even attempted to pursue securing a supersedeas bond or court deposit. 2001 ND 12, ¶ 15; 604 N.W.2d 453. In contrast, this Court exercised its jurisdiction over an appeal where the appellant pursued the existing avenues to protect himself from judgment collection, but was unable to ultimately utilize either method: "We conclude the facts and circumstances do not establish Viscito voluntarily satisfied the judgment because he pursued existing avenues to protect himself from judgment collection efforts after the judgment creditor levied on the membership interests." *Viscito*, 2015 ND 97, ¶ 17, 862 N.W.2d 777 (emphasis added).

[7] The judgment in this matter has been satisfied. (Doc. ID #260). The Millers did not take any action to protect themselves from judgment collection—they did not secure a supersedeas bond and did not move to have judgment stayed pending appeal by making a deposit with the District Court. (*See* Appellants' App. 2-9). Instead, the Millers chose to pay the judgment amount with a cashier's check after Ms. Sauter sent a Garnishee Summons to Dakota Western Bank. The garnishment process was never completed, Ms. Sauter never ordered a writ of execution from the District Court, and she did not take any other action towards collecting the judgment amount. (*See* Appellants' App. 2-9). The

Millers had a cashier's check delivered to Ms. Sauter to satisfy the judgment. The Millers had every opportunity to pursue protection from Ms. Sauter's collection efforts; however, they did not. Under these circumstances, the Millers' payment of the judgment was voluntary, and thus, the Millers have lost the right to pursue an appeal as to the money judgment.

[8] Therefore, Ms. Sauter respectfully requests that this Court deny the Millers' appeal of the money judgment awarded by the District Court on the grounds that the Millers have already waived their right to appeal.

STATEMENT OF THE CASE

[9] Ms. Sauter and the Millers own property which borders each other in Bowman County, North Dakota. A dispute arose when the Millers had the property surveyed and the Millers' surveyor determined that the fence which stood in place between their properties for more than 50 years (the "Original Fence") was not on the actual boundary line of the legal description for the properties. The Millers determined that they owned the property on the other side of the Original Fence up to the survey line (the "Disputed Property"). The Millers, without consulting Ms. Sauter, removed the Original Fence, constructed a new fence on the survey line, and constructed a water well on the Disputed Property.

[10] Ms. Sauter brought action against the Millers in response to their actions on June 26, 2015 (Appellants' App. 10-16). The claims included adverse possession, acquiescence, trespass, willful damage to property (conversion), and breach of contract. *Id.* On July 27, 2015, the Millers filed their Answer and Counterclaim (Appellants' App. 17-20) denying all of Ms. Sauter's claims and asserting their own claim for breach of contract by Ms. Sauter. During the pendency of the lawsuit, Ms. Sauter brought motions requesting the

award of attorneys' fees for violation of a Temporary Injunction and other discovery abuses committed by the Millers (Doc. ID #38, #91). The District Court took those requests under advisement, and deferred the award of attorneys' fees for trial (Appellee's App. 1-2).

[11] After trial, the District Court ruled in favor of Ms. Sauter, quieting title to the Disputed Property in the Trust under the doctrines of adverse possession and acquiescence. (Appellants' App. 43-44). Further, the District Court determined that the Trust was entitled to damages for breach of contract and trespass, and attorneys' fees. *Id.* The Millers paid these amounts and satisfied the Judgment. (Doc. ID #260).

STATEMENT OF FACTS

[12] Ms. Sauter is the owner of property located in Bowman County, North Dakota, which is more particularly described as follows:

> Township 129 North, Range 103 West of the 5th P.M.
> Section 13: SE¼SW¼; W½SW¼

(the "Sauter Property"). (Appellants' App. 54-55). The Sauter Property has been owned by Julie Sauter's family since it was purchased by her father, Oscar Greni, in 1942. (Appellee's App. 12). On May 22, 1990, the Sauter Property was transferred to Ms. Sauter personally. (Appellants' App. 52). The Sauter Property was last transferred from Ms. Sauter to the Trust on May 30, 2014. (Appellants' App. 54-55).

[13] The Millers are the owners of property in Bowman County, North Dakota, which includes the following parcel directly to the North of the Sauter Property:

> Township 129 North, Range 103 West of the 5th P.M.
> Section 13: NE¼SW¼

(the "Miller Property"). (Appellants' App. 45-46). The Millers acquired the Miller Property in 2012 from Kurt Heinrich and Katina Heinrich (the "Heinrichs"). *Id.*

[14] The Sauter Property and the Miller Property had been separated by the Original Fence since the 1960's, or at least fifty years. (Trial Tr. 22). The Original Fence served as a boundary line between the two parcels. (Trial Tr. 22-23, 45, 80).

[15] Carol Miller herself testified that in 1974 she witnessed a conversation between Thelma Greni, Ms. Sauter's mother, and Ray Germann, the previous owner of the Miller Property, where the parties discussed the property boundary. (Trial Tr. 118-21). The Original Fence existed at the time of this discussion, and it was not moved as a result of this discussion.

[16] In 2012, the Heinrichs and Ms. Sauter were parties to a Grazing Lease which permitted the Heinrichs to graze a number of Ms. Sauter's pastures, including the Sauter Property. (Appellants' App. 49). Once the Millers acquired the Miller Property, they subleased the Grazing Lease from the Heinrichs. (Trial Tr. 93-94). On February 5, 2014, Ms. Sauter and the Millers entered into a new Grazing Lease for pastures which included the Sauter Property. (Appellants' App. 50). The Grazing Lease required that the Millers keep the fences in as good condition and repair as they were then or may be at any time during the term of the lease and to not remove or allow any other person to remove any of the fences from the premises. *Id.*

[17] In 2012, when the Millers acquired the Miller Property, the Original Fence was in place. (Trial Tr. 137).

[18] Ms. Sauter, along with her husband, Jay Ralph A. Sauter ("Mr. Sauter"), visited the Millers at their ranch in August 2013. (Trial Tr. 94). It was at this time that the Millers allegedly made Ms. Sauter aware of their plans to drill a new water well, and indicated to her where that well would be placed by indicating it on a plat map. (Trial Tr. 98-100). However, the survey the Millers commissioned on their property was not completed until October of that same year. (Trial Tr. 125-26; Appellants' App. 57).

[19] On or about October 13, 2013, the Millers retained someone to determine the location of where to place a water well. (Trial Tr. 125-26). It was determined that the best place to put the water well would be on the Sauter Property side of the Original Fence. On or about October 15, 2013, the Millers retained a surveyor for the purpose of attempting to locate the boundary line between the Sauter Property and the Miller Property according to the properties' legal descriptions. On or about October 22, 2013, the surveyor located what he determined to be the south line of the Miller Property. *Id.* Thereafter, the Millers caused the commencement of drilling of a water well on the Disputed Property.

[20] Ms. Sauter only became aware that the water well had been placed on the Disputed Property on June 20, 2014. (Trial Tr. 131). Ms. Sauter then documented the state of the Disputed Property, including the location of the Original Fence, by taking photographs of the area. (Trial Tr. 25-31; Appellee's App. 7-11).

[21] Sometime thereafter, the Millers caused the Original Fence to be removed. It is unclear as to exactly when the Original Fence was removed. (Trial Tr. 22, 37, 41, 78).

[22] In May of 2015, the Millers constructed a new fence along the survey line identified by their surveyor. (Trial Tr. 136).

[23] Ms. Sauter initiated the present action on June 26, 2015, in order to prevent the Millers from further encroaching on her property.

ARGUMENT

I. THE DISTRICT COURT DID NOT MISAPPLY THE LAW.

[24] A district court's conclusions of law are fully reviewable, de novo, upon appeal. *Ruud v. Frandson*, 2005 ND 174, ¶ 6, 704 N.W.2d 852; *Moody v. Sundley*, 2015 ND 204, ¶ 9. 868 N.W.2d 491, 495.

A. The District Court correctly calculated the 20-year possession period.

[25] The Millers argue that Sauter could not have acquired the Disputed Property via adverse possession or acquiescence because the Original Fence was removed shortly prior to the commencement of the present action. Appellants' Br. ¶¶ 37, 65. Thus, that the Millers' actions in removing the fence negated the Trusts' possession of the Disputed Property relating back until the 1960's. *Id.* The Millers' position is illogical, and not supported by the law.

[26] The Millers first provide a citation to N.D.C.C. 28-01-04, which reads as follows: "No action for the recovery of real property or for the possession thereof may be maintained, unless the plaintiff, or the plaintiff's ancestor, predecessor, or grantor, was seized or possessed of the premises in question within twenty years before the commencement of such action." Second, the Millers point to *James v. Griffin*, 2001 ND 90, 626 N.W.2d 704, in which the court analyzed the previous statute. Appellants' Br. ¶ 64.

[27] In *James*, plaintiffs claimed they had adversely possessed a strip of their neighbor's land where the plaintiffs' gravel driveway, garage foundation, and brick fireplace were placed on the neighbor's land. 2001 ND 90, ¶ 4, 626 N.W.2d 704. Plaintiffs first acquired title to their property in 1945. *Id.* at ¶ 2. It remained in their possession until September 1979 when it was briefly transferred to the City of Wahpeton. *Id.* ¶ 3. The City then transferred it back to plaintiffs two months later. *Id.* The neighbor discovered plaintiffs' encroachment on its neighbor property in June 1998, and built a fence on the real property line. *Id.* at ¶ 4. In April 1999, plaintiffs brought a lawsuit against the neighbor. *Id.* at ¶ 5. The plaintiffs did not dispute on appeal that the City of Wahpeton did not hold the property

adversely for the two months it was the title holder. Plaintiffs recognized that the statutory 20-year period had not passed since they re-acquired possession from the City of Wahpeton. *Id.* at ¶ 9. Instead they argued that they adversely possessed the property prior to its transfer to the City of Wahpeton—in the period from 1945 to 1979, which occurred roughly nineteen years prior to the plaintiffs bringing the action. *Id.* at ¶ 13.

[28] A divided *James* court rejected plaintiffs' argument. The court cited three out-of-state cases in support of this holding. In each of these cases, the acquiescence period was destroyed because the record title holder was no longer holding adversely. *Salazar v. Terry*, 911 P.2d 1086, 1089 (Colo. 1996) (finding that the acquiescence period was interrupted because of common ownership of the two properties, and a common owner cannot hold adversely to itself); *Patton v. Smith*, 71 S.W. 187, 190 (Mo. 1902) (same); *Conklin v. Newman*, 115 N.E. 849, 850 (Ill. 1917) (holding that a fence was not appurtenant to certain property where there was previously common ownership of the two parcels). The court adopted the rule that once acquiescence was destroyed in this manner that the "statutory clock for obtaining title by acquiescence beg[an] 'ticking anew.'" *James*, 2001 ND 90, ¶ 14, 626 N.W. 2d 704. "A rule allowing record title of property to be lost by a 20-year period of unadjudicated acquiescence occurring in the distant past does not foster predictability and certainty of rights." *Id.* at ¶ 14 (emphasis added).

[29] The present circumstances are distinguishable from the *James*. The adverse possession/acquiescence period was not interrupted by a period were the land was not held adversely. Ms. Sauter can establish a single, continuous acquiescent possession, relating back until at least the 1960's. (Trial Tr. 45). Further, the period of time claimed by Ms.

Sauter is not in the "distant past", but took place only shortly before the adverse possession action was initiated.

[30] The Millers assert that the partial removal of the Original Fence without notice to Ms. Sauter and in violation of the Grazing Lease was sufficient to interrupt the period of adverse possession and acquiescence. Appellants' Br. ¶¶ 38-39. This is the first time the Appellants have advanced this argument, as it was not briefed before the District Court, and thus, the District Court did not address this matter of law. (Doc. ID #231; Appellants' App. 21-36). Further, this argument exponentially expands the court's holding in *James*. Acceptance of this theory would effectively negate the laws of adverse possession and acquiescence, as a lawsuit would have to be brought before any ownership dispute arises.

[31] The District Court correctly determined that the statutory 20-year period had passed pursuant to N.D.C.C. § 28-01-04, and thus, that Ms. Sauter had satisfied this requirement under the theories of adverse possession and acquiescence.

B. The District Court correctly determined that Ms. Sauter was entitled to damages for breach of lease and trespass.

[32] The Millers argue that the money damages against them are inappropriate because the Court incorrectly determined when title to property acquired by adverse possession passes. Appellants' Br. ¶¶ 67-68. The District Court found that title transfers upon the passage of 20 years during which the elements of adverse possession have been met. (Appellants' App. 28). The Millers argue that title does not pass until adjudication, and thus, that a trespass claim could not have accrued. Appellants' Br. ¶¶ 67-68.

[33] In support of their position, the Millers cite to *James v. Griffin*, which was discussed above. Appellants' Br. ¶ 67. In *James*, the court held that a party claiming adverse possession could not establish the 20-year time period for adverse possession using a period

of time, after which, the land was no longer being held adversely. 2001 ND 90, ¶ 14, 626 N.W.2d 701. The *James* court did not make any decision relating to trespass or breach of contract.

[34] Title by adverse possession relates back to the inception of the adverse use:

> It is a general theory underlying adverse possession that the title, once matured, relates back to the beginning of the adverse holding. Under such theory, it is presumed that the origin of the title was rightful, not wrongful; that the possession of which has matured it was in support, not in derogation, of the rightful title; and that the claimant, who by a possession pursuant to law has matured a title, has been the owner of the title from the beginning.

3 Am. Jur. 2d *Adverse Possession* § 250 (2002). No North Dakota law applicable directly to adverse possession or acquiesence has been found, but the North Dakota Supreme Court has applied this principle to cases addressing prescriptive easements: "Title by prescription relates back to the inception of the use." *Conlin v. Metzger*, 44 N.W.2d 617, 625 (N.D. 1950); *McKenzie Cty. v. Reichman*, 2012 ND 20, ¶ 13, 812 N.W.2d 332. Establishment of a prescriptive easement and adverse possession are similar legal theories—both require establishment of adverse use in order to gain property rights. It logically follows that title by adverse possession would relate back in the same manner as that of title by prescription. Thus, a litigant would be able to recover damages for actions taken prior to an adjudication of adverse possession or acquiescence, as long as those damages were inflicted after the inception of the adverse use. The Millers' acts of trespass and breach of lease were inflicted after Ms. Sauter's adverse use began, and thus, Ms. Sauter must be able to recover damages stemming from those wrongful actions.

[35] The Millers argue that the District Court's ruling "would in effect eliminate title opinions and would no doubt make lenders nervous." Appellants' Br. ¶ 68. The Millers

have neglected to explain this assertion, or support it with any legal citation. It is unclear how this decision will eliminate title opinions, as most title opinions already include exceptions aimed at disclaiming title defects due to adverse possession.

[36] The District Court correctly determined that Ms. Sauter was entitled to damages relating to the Millers' wrongful actions, including trespass and breach of contract.

II. THE DISTRICT COURT'S FINDINGS OF FACT WERE NOT CLEARLY ERRONEOUS.

[37] Adverse possession and acquiescence must be proved by clear and convincing evidence. The determination of adverse possession or acquiescence is a finding of fact, and will not be overturned unless the finding is clearly erroneous. *Benson v. Taralseth*, 382 N.W.2d 649, 653 (N.D. 1986); *Moody v. Sundley*, 2015 ND 204, ¶ 23, 868 N.W.2d 491. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, [the Court is] left with a definite and firm conviction a mistake has been made." *Adams v. Adams*, 2015 ND 112, ¶ 13, 863 N.W.2d 232. The evidence is to be viewed in the light most favorable to the district court's factual findings, and those findings are treated as presumptively correct. *Id.* "A choice between two permissible views of the evidence is not clearly erroneous if the district court's findings are based either on physical or documentary evidence, or inferences from other facts, or on credibility determinations." *Id.*

A. The District Court's finding that the Original Fence was a substantial enclosure is not clearly erroneous.

[38] The Millers argue that the Original Fence was not a substantial enclosure because Ms. Sauter did not present evidence that she maintained the Original Fence. Appellants'

Br. ¶ 43. The Millers indirectly argue that the Original Fence was not a substantial enclosure because it would not hold cattle. Appellants' Br. ¶ 48.

[39] It was undisputed at trial that the Original Fence was in place from at least the 1960s until the Millers removed the Original Fence. It was undisputed at trial that the Original Fence made up part of the continuous fence which enclosed the Sauter Property, including the Disputed Property. At trial, Ms. Sauter and Mr. Sauter testified that the Original Fence was in a good working quality, sufficient for keeping livestock from passing between the Sauter Property and the Miller Property. (Trial Tr. 25, 60-61, 78-79, 81-82). This oral testimony was supported by several photographs which were admitted into evidence. (Appellee's App. 7-11; Trial Tr. 27-31). These photographs confirm the testimony of Ms. Sauter and Mr. Sauter, and show the quality of the Original Fence. The District Court indicated in its Memorandum Opinion that it relied upon this testimony and the photographic evidence when it concluded that the fence was a substantial enclosure. (Appellants' App. 30). In light of the evidence introduced regarding the quality of the fence, it is immaterial that no evidence of the specific actions taken to maintain the fence was introduced at trial.

[40] At trial both Jim Miller and Carol Miller orally testified that the Original Fence was "junk", falling down and unable to keep livestock from crossing through it. (Trial Tr. 104-05, 134). This oral testimony was completely unsupported by any photographic or other visual evidence and should be given little weight. The District Court noted in its Opinion that the Millers' lack of meaningful testimony or evidence to the contrary supported the finding that the Original Fence was a substantial enclosure. (Appellants' App. 30). It was

within the District Court's purview to make this type of credibility determination, and that determination must not be reversed on appeal. *Adams v. Adams*, 2015 ND 112, ¶ 13.

[41] Last, Ms. Sauter provided for the maintenance of the Original Fence by requiring her lessees to provide all required maintenance. The last two leases for the Sauter Property include the following provision: "LESSEE IN CONSIDERATION OF THE LEASING SAID PROPERTY, HEREBY COVENANTS AND AGREES . . . To keep said property, fences and appurtenances in as good condition and repair as the same now are or may be at any time during said term . . ." (Appellants' App. 49-51). As can be seen, Ms. Sauter's lessees, including the Millers, were responsible for the maintenance and repair of the Original Fence. *Id.*

[42] Thus, the District Court's finding that the fence is a substantial enclosure is not clearly erroneous, and the District Court's ruling must be upheld.

B. The finding that the Original Fence was intended to serve as a boundary between the Sauter Property and the Miller Property is not clearly erroneous.

[43] The Millers argue that there was no evidence of their acquiescence, and that prior owners did not acquiesce to Sauter's ownership, specifically Kurt Heinrich. Appellants' Br. ¶ 66. In order to establish acquiescence, the claimant must prove that both parties recognized the line as a boundary. "Mutual recognition of the boundary may be inferred by a party's conduct or silence." *Moody v. Sundley*, 2015 ND 204, ¶ 23, 868 N.W.2d 491.

[44] At trial, Julie Sauter testified that the Original Fence was meant to serve as a boundary between the Sauter Property and the Miller Property, and that it was meant to keep livestock on the correct sides of the pasture. (Trial Tr. 25). Further, she testified that no person, to her knowledge, ever disputed the fact that the Original Fence was the

boundary of the property prior to the Millers having the land surveyed. (Trial Tr. 45). The Millers' survey and removal of the Original Fence occurred much after the 20-year period for acquiescence had already run. (Trial Tr. 125-26). Mr. Sauter's testimony corroborated that of Ms. Sauter. (Trial Tr. 80). The District Court specifically states that it based its finding of acquiescence on this undisputed testimony. (Appellants' App. 32).

[45] Further, the District Court found that the 1974 Incident supports an inference that previous owners of the Miller Property, through their silence, acquiesced to the Original Fence as a boundary. (Appellants' App. 32).

[46] Thus, the District Court's finding that the Original Fence was intended to serve as the boundary is not clearly erroneous, and the District Court's ruling must be upheld.

C. The finding that the Millers had notice of Ms. Sauter's claim of ownership is not clearly erroneous, and in any regard, is irrelevant.

[47] The Millers argue that the District Court erred in finding that the Millers had notice of Ms. Sauter's claim of ownership. They assert that Ms. Sauter failed to verbally communicate ownership of the Disputed property until "late in the game", and that she failed to maintain the Original Fence. Appellants' Br. ¶¶ 58, 61.

[48] The District Court does not make a finding of fact related to notice, nor is such a finding necessary in these circumstances. (*See* Appellants' App. 21-36). Adverse possession exists when there is possession that is: "actual, visible, continuous, notorious, distinct, and hostile, and of such character as to unmistakably indicate an assertion of claim of exclusive ownership by the occupant." *Gruebele v. Geringer*, 2002 ND 38, ¶7, 640 N.W.2d 454 (*citing Torgerson v. Rose*, 339 N.W.2d 79, 84 (N.D. 1983)). Direct notice or a course of conduct in direct hostility is required in cases where one cotenant asserts adverse possession against another cotenant. *Brooks v. Bogart*, 231 N.W.2d 746, 751 (N.D.

1975). This heightened standard is not applied in cases where the adverse possession is not between cotenants. Ms. Sauter and the Millers were not cotenants, and thus, direct notice was not required.

[49] However, the Millers did have notice that Ms. Sauter intended to own all the property on the Sauter side of the Original Fence. Ms. Sauter and her predecessors in interest had consistently used or leased the Disputed Property for grazing livestock. (Trial Tr. 25, 32). The only individuals allowed on the Disputed Property were Ms. Sauter, her husband, or others leasing the Sauter Property. (Trial Tr. 50-51). Finally, Carol Miller was aware that Thelma Greni had previously defended the placement of the Original Fence as a boundary. (Trial Tr. 118-20).

[50] Thus, the Millers contention regarding notice of Ms. Sauter's claim to the Disputed Property is without merit, and the District Court's ruling must be upheld.

D. The findings that Ms. Sauter's claim to the Disputed Property was hostile, open and notorious, and that Ms. Sauter intended to own the Disputed Property is not clearly erroneous.

[51] The Millers argue that Sauter's claim was not hostile because there was no evidence as to when the Original Fence was built. Further, that the strip of land was not cultivated or improved. Appellants' Br. ¶¶ 53-54.

[52] It was undisputed at trial that Ms. Sauter has owned the Sauter Property for more than 20 years. It was undisputed at trial that the Original Fence was in place from at least the 1960s until the Millers removed the Original Fence. The Original Fence unambiguously marked the edges of what Ms. Sauter asserts is her property. The only individuals to enter upon the Disputed Property during the 20-year adverse possession period were Ms. Sauter or those to whom she gave express authority, including Ms. Sauter's husband, her tenants,

and sub-tenants. (Trial Tr. 22-25, 32, 47). These facts satisfy the elements of adverse possession. The District Court relied upon this evidence when making its findings of fact that Ms. Sauter's possession satisfied these requirements of adverse possession. (Appellants' App. 31).

[53] Further, the District Court relied upon the fact that Carol Miller herself testified to witnessing a conversation between Thelma Greni and a previous owner of the Miller Property, whereby property boundaries and the Original Fence were discussed. (Appellants' App. 31). This conversation shows that Thelma previously defended the placement of the original fence, believed the Original Fence was the boundary line, and defended the placement of that line in clear hostility to any other person's property interest in the Disputed Property. This supports the District Court's finding that Ms. Sauter satisfied the elements of open, notorious, and hostile possession, and shows that Ms. Sauter, through her predecessors in interest, intended to own the Disputed Property.

[54] The Millers argue that Ms. Sauter's claim of ownership was not open, notorious, or visible because Ms. Sauter did not pay the taxes on the Disputed Property. ¶ 56. "The payment of taxes is not essential in acquiring title...under the general statutes governing the matter of 20 years' adverse possession." *Power v. Kitching*, 10 N.D. 254, 260, 86 N.W. 737, 739 (1901). There are two ways to acquire title by adverse possession when adversely possessing real estate for at least 20 years. See N.D.C.C. § 28-01-08; N.D.C.C. § 28-01-10. Alternatively, adverse possession may be obtained in 10 years if:

> "A title to real property, vested in any person who has been or hereafter shall be, either alone or including those under whom that person claims, in the actual open adverse and undisputed possession of the land under such title for a period of ten years and who, either alone or including those under whom that person claims, shall have paid all taxes and assessments legally levied thereon, shall be valid in law."

N.D.C.C. § 47-06-03. Ms. Sauter has not claimed adverse possession pursuant to N.D.C.C. § 47-06-03. Ms. Sauter claims adverse possession not based upon written instrument pursuant to N.D.C.C. § 28-01-10, which requires 20 years of adverse possession. For this reason, evidence regarding the fact that Ms. Sauter did not pay taxes on the disputed property was irrelevant and did not need to be considered by the District Court.

[55] Thus, the District Court's finding that Ms. Sauter's claim to the Disputed Property was hostile, open and notorious, and that Ms. Sauter intended to own the Disputed Property is not clearly erroneous, and the District Court's decision must be upheld.

E. The finding that the Millers and previous owners of the Miller Property acquiesced is not clearly erroneous.

[56] The Millers argue that they did not acquiesce because they surveyed their property and tore down the Original Fence prior to the commencement of the action. Appellants' Br. ¶ 66. Further, that there was no evidence that prior owners acquiesced to Sauter's ownership, specifically Kurt Heinrich. *Id.* Each of these arguments has previously been addressed above. *See* supra ¶¶ 38-41. Thus, for those reasons, the District Court's decision must be upheld.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT AWARDED SAUTER ATTORNEYS' FEES AGAINST THE MILLERS.

[57] "A trial court has considerable discretion in awarding costs and attorney fees, and its decision will not be overturned on appeal absent an abuse of discretion." *Giese v. Giese*, 2002 ND 194, ¶ 11, 653 N.W.2d 663. "A trial court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, when its decision is not the product of a rational mental process leading to a reasoned determination, or when it misapplies or misinterprets the law." *Simpson v. Chicago Pneumatic Tool Co.*, 2003 ND 31, ¶ 10, 657

N.W.2d 261. The Millers do not point to any specific error made by the District Court when it awarded attorneys' fees, just that it was an abuse of discretion. Appellants' Br. ¶ 71.

[58] The Millers' actions showed a conscious disregard for anyone other than themselves during the pendency of the lawsuit. This is evidenced by the Millers' violation of the Temporary Injunction (Appellee's App. 1), forcing Ms. Sauter to file a motion to compel (Doc. ID #91, Appellee's App. 5), forcing Ms. Sauter to respond to the Millers' Motion for Discovery Protective Order on the same questions to which the Motion to Compel was granted (Doc. ID #128), forcing Ms. Sauter to respond to the Millers' Motion to Remove and Maintain Property only to have the Motion withdrawn (Doc. ID #141, #154). This shows a lack of respect for the Court and for Ms. Sauter.

[59] The District Court awarded Ms. Sauter attorneys' fees in its Memorandum Opinion relating to two previously-issued orders: (1) Order Granting in Part and Denying in Part Motion for Contempt Sanctions dated July 12, 2016 (Appellee's App. 1), and (2) Order Granting Motion to Compel dated July 28, 2016 (Appellee's App. 5).

A. The District Court did not abuse its discretion when it awarded Ms. Sauter attorneys' fees relating to the Millers' violation of the preliminary injunction.

[60] The Court may punish disobedience of a preliminary injunction as a contempt. N.D.R.Civ.P. 65(i). The Court may impose a remedial sanction for contempt in the form of a payment of a sum of money sufficient to compensate a party for a loss or injury suffered as a result of the contempt, including an amount to reimburse the party for costs and expenses incurred as a result of the contempt. N.D.C.C. § 27-10-01.4(1)(a).

[61] The District Court entered its Order Granting in Part and Denying in Part Motion for Contempt Sanctions Against Defendants James Miller and Carol Miller (Appellee's App. 1). The District Court, in relevant part, found that the Millers violated the terms of the Temporary Injunction by removing and failing to replace the fence on the east side of the Disputed Property. After trial, the District Court awarded an appropriate amount of attorneys' fees to Ms. Sauter for the Millers' actions.

B. The District Court did not abuse its discretion in awarding Ms. Sauter attorneys' fees for the Millers' discovery abuse.

[62] If a Motion to Compel is granted the Court must, after giving an opportunity to be heard, require the party whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses in making the motion, including attorney's fees. N.D.R.Civ.P. 37(a)(5)(A). The Court must not order this payment if the movant filed the motion before attempting in good faith to obtain discovery without court action, if the opposing party's nondisclosure, response, or objection was substantially justified, or other circumstances make an award of expenses unjust. *Id.* None of these exceptions apply in this case. Ms. Sauter attempted in good faith to obtain discovery responses from the Millers, but Ms. Sauter's attempts were completely ignored. For this reason, pursuant to N.D.R.Civ.P. 37(a)(5)(A), the District Court awarded Ms. Sauter reasonable expenses in making the motion, including attorney's fees.

IV. THE MILLERS DID NOT PRESENT AN EQUITY ARGUMENT TO THE DISTRICT COURT, AND IT SHOULD NOT BE CONSIDERED ON APPEAL.

[63] The Millers argue that the Disputed Property should be treated as theirs "[j]ust as a matter of fairness". Appellants' Br. ¶ 69. They do not provide any legal support or a theory as to the legal basis of this claim. *Id.* Further, the issue of equity was not included in the

Millers pleadings and was not addressed by the District Court. "Issues not raised in the trial court cannot be raised for the first time on appeal." *Ruud v. Frandson*, 2005 ND 174, ¶ 6, 704 N.W.2d 852. Thus, this issue should not be considered by the Court.

CONCLUSION

[64] For the reasons set forth herein, Ms. Sauter conclusively established she is the owner of the Disputed Property at trial, and the issues of fact and law identified by the Millers are without merit. Further, the Millers committed acts of trespass, conversion, and breach of contract and as a result Ms. Sauter suffered damages. Last, the Millers' wrongful actions during litigation caused Ms. Sauter further damage. The District Court rightfully awarded Ms. Sauter a money judgment in order to compensate for the Millers' wrongful actions. Therefore, Ms. Sauter respectfully asks that the North Dakota Supreme Court affirm the judgment entered by the District Court in this Action on March 23, 2017.

Dated this 3rd day of November, 2017.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20170260

Julie Anne Sauter, as Trustee
Of the Julie Anne Sauter Living
Trust Dated February 12, 2014,

Appellee,

vs.

James Miller and Carol Miller

Appellants.

CERTIFICATE OF FILING AND SERVICE

STATE OF NORTH DAKOTA)
: ss.
COUNTY OF STARK)

Karen Walton, being first duly sworn, deposes and says: That she is a citizen of the United States, of legal age, and not a party to nor interested in the above-entitled matter.

That on the 3rd day of November, 2017, in accordance with the provisions of Appellate Procedure, this affiant e-served upon the persons hereinafter named a true and correct copy of the following documents in said matter:

1. **APPELLEE'S BRIEF**
2. **APPELLEE'S APPENDIX**

by causing the same to be e-served to the following persons and the Court will file the same:

Dennis W. Lindquist
Dwlindquist65@gmail.com

Penny L. Miller
Clerk of Supreme Court
pmiller@ndcourts.gov
supclerkofcourt@ndcourts.gov

EBELTOFT SICKLER

That to the best of affiant's knowledge, information, and belief, such email addresses as given above are the actual email addresses of the parties intended to be e-served.

Dated this 3rd day of November, 2017.

Karen Walton

Karen Walton

Subscribed and sworn to before me this 3rd day of November, 2017.

Peggy L. Schiwal

Peggy L. Schiwal, Notary Public

PEGGY L. SCHIWAL
Notary Public
State of North Dakota
My Commission Expires May 9, 2020

EBELTOFT SICKLER

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1. **DATED SIGNATURE PAGE OF APPELLEE'S BRIEF**

by causing the same to be e-served to the following persons and the Court will file the same:

Dennis W. Lindquist
Dwlindquist65@gmail.com

Penny L. Miller
Clerk of Supreme Court
pmiller@ndcourts.gov
supclerkofcourt@ndcourts.gov

EBELTOFT SICKLER
LAWYERS

That to the best of affiant's knowledge, information, and belief, such email addresses as given above are the actual email addresses of the parties intended to be e-served.

Dated this 3rd day of November, 2017.

Karen Walton

Karen Walton

Subscribed and sworn to before me this 3rd day of November, 2017.

PEGGY L. SCHIWAL
Notary Public
State of North Dakota
My Commission Expires May 9, 2020

Peggy L. Schiwal

Peggy L. Schiwal, Notary Public

EBELTOFT SICKLER LAWYERS