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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Leslie Gimbel,	)	
	)	**Supreme Ct. No. 20190412**
Plaintiff/Appellee,	)	
	)	**District Ct. No. 15-2018-CV-00044**
vs.	)	
	)	
Jeff Magrum and Donna Magrum,	)	
	)	
Defendants/Appellants.	)	
	)	

BRIEF OF APPELLEE

APPEAL FROM THE ORDER DATED OCTOBER 30, 2019 BY THE HONORABLE DOUGLAS A. BAHR, DISTRICT COURT JUDGE, AND JUDGMENT DATED NOVEMBER 13, 2019, IN EMMONS COUNTY DISTRICT COURT, SOUTH CENTRAL JUDICIAL DISTRICT

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II. Whether it was clearly erroneous for the trial court to find that the Magrums did not establish, by clear and convincing evidence, that they acquired ownership of the land in dispute pursuant to the doctrine of acquiescence.

STATEMENT OF FACTS

[¶1] Leslie "Dude" Gimbel ("Gimbel") is the record title and fee simple title owner of a parcel of real estate located in Emmons County, North Dakota, which is legally described as follows:

> "THE EAST HALF OF THE NORTHEAST QUARTER OF THE SOUTHEAST QUARTER (E1/2NE1/4SE1/4), SECTION THIRTY (30), TOWNSHIP ONE HUNDRED THIRTY-SIX (136) NORTH, RANGE SEVENTY-EIGHT (78) WEST OF THE 5TH PRINCIPAL MERIDIAN IN EMMONS COUNTY, NORTH DAKOTA, EXCEPTING THEREFROM APPROXIMATELY 1.25 ACRES TAKEN FOR HIGHWAY AND/OR OTHER GOVERNMENT PURPOSES. THE PARCEL TRANSFERRED CONSISTS OF 18.75 ACRES MORE OR LESS.
>
> (Hereinafter referred to as either the "Gimbel Parcel"). (App. pp. 46-48).

[¶2] Jeff and Donna Magrum (the "Magrums") own the parcel immediately to the south of the Gimbel Parcel which is legally described as follows:

> THE SOUTHEAST QUARTER OF THE SOUTHEAST QUARTER (SE1/4SE1/4) OF SECTION THIRTY (30), TOWNSHIP ONE HUNDRED THIRTY-SIX (136) NORTH, RANGE SEVENTY-EIGHT (78) WEST OF THE 5TH PRINCIPAL MERIDIAN IN EMMONS COUNTY, NORTH DAKOTA.
>
> (Hereinafter referred to as the "Magrum Parcel"). (App. pp. 85-89).

[¶3] Based on the legal descriptions of the parcels referenced above, a 1/16th section line serves as the boundary between the Gimbel Parcel and the Magrum Parcel. (Tr. 73-74).

[¶4] There is a trail on the southern portion of the Gimbel Parcel which runs east to west and lies between 40 and 60 feet north of the southerly boundary line of the Gimbel Parcel (hereinafter referred to generally as the "trail"). The trail is a two wheel trail which is overgrown with grass. (Tr. 38-39, 55). The trail does not run in a straight east to west line in the same manner as 1/16th section lines. (Tr. 72-74, 81). The land lying south of the trail within the Gimbel Parcel is the property in dispute in this matter. The disputed

property has been raw pasture and consists of approximately two (2) acres, more or less. (Tr. 27, 71, 120, 142).

[¶5] In 2015, the Magrums built a barbed wire fence across the Gimbel Parcel. The fence was placed approximately five (5) feet south of the trail on the Gimbel Parcel, running east to west across the entire Gimbel Parcel. Gimbel contends that the fence is encroaching upon his parcel. The Magrums do not dispute that Gimbel is the record title owner of the Gimbel Parcel, rather, the Magrums contend that they acquired all the land south of the trail within the Gimbel Parcel under theories of adverse possession or acquiescence.

[¶6] Gimbel, and his then wife, Roberta Gimbel (now Roberta Golden), originally acquired equitable title to the Gimbel Parcel upon entering into a contract for deed in 1981 with Marshall and Helen Dralle. Gimbel satisfied the terms of the contract for deed and a Warranty Deed was issued on October 31, 1988. Gimbel and Roberta Golden were subsequently divorced. Gimbel was awarded the Gimbel Parcel in the divorce and in March of 2007, Golden conveyed her interest in the parcel to Gimbel. Gimbel (individually or jointly with Roberta Golden) has been the owner of the Gimbel Parcel for the entire 20-year period, and beyond, which is relevant to Magrum's adverse possession and acquiescence claims. (App. pp. 46-48; Tr. 112-115). Gimbel also paid all real estate taxes on the Gimbel Parcel during the 20-year period, and beyond, relevant hereto. (App. pp. 54-84; Tr. 132-133).

[¶7] At the time Gimbel entered into the contract for deed with the Dralles in 1981, there was an upright fence in disrepair that ran east to west and which lied, by Gimbel's estimation at the time, approximately 40 to 50 feet south of the trail on the Gimbel Parcel (hereafter the "1981 Fence"). The 1981 Fence was located in the same, or at least a similar location, as the southerly property line of the Gimbel Parcel as shown on the

survey of record in this matter. (App. pp. 31-33; Tr. 116, 119). Marshall Dralle specifically told Gimbel when he purchased the parcel that the southerly property line went up to the 1981 Fence which Gimbel recalled as being approximately 40 to 50 feet south of the trail. (Tr. 116-117).

[¶8] Gimbel testified that when he purchased the parcel in 1981, there were no monuments or structures sitting next to the trail, nor was there grazing cattle or crops planted next to the trail on the south side. (Tr. 119).

[¶9] The 1981 Fence was taken down a short while after Gimbel entered into the contract for deed. (Tr. 118). Thereafter, no fence was built within 60 feet south of the road between the Gimbel Parcel and the Magrum Parcel until the Magrums built their fence in 2015. (Tr. 118). From 1981, and even prior, until the time the Magrums built their fence, there was never a fence standing upright in the same or a similar location as Magrum's 2015 fence. (Tr. 25-26, 101, 119, 160).

[¶10] Joseph Kalberer ("Kalberer"), 56 years old, has lived in the Hazelton area his entire life. Kalberer is friends with both parties and is very familiar with their parcels and the trail that runs east to west across the Gimbel Parcel. At trial, Kalberer's testimony was consistent with Gimbel's in that during Kalber's lifetime, the only upright fence between the Gimbel Parcel and the Magrum Parcel, which pre-dated Magrum's 2015 fence, was the 1981 fence which lied approximately 40 to 50 feet south of the trail. Kalberer had not observed the 1981 fence for decades, but he did observe the corner posts from the 1981 Fence within the last 10 years. He testified that the fence posts were, by his estimation, 40 or more feet south of the trail. Until Magrum erected his fence, Kalberer had never observed a fence in the same or a similar location as Magrum's fence. (Tr. 99-103, 106).

[¶11] Gimbel testified that he never recognized the trail as his southerly property line. Prior to having a survey completed in 2018, Gimbel was always under the impression that

his property line was around 40 to 50 feet south of the trail. (Tr. 116-117; 154-155). In fact, shortly after Gimbel acquired the Gimbel Parcel, he inquired from the County if he could fence off the trail. (Tr. 117).

[¶12] Between the years of 1981 to 2013, except for periods not lasting more than a few months, Gimbel did not reside on the Gimbel Parcel. Gimbel was traveling around the country working as a union sheet metal worker and would return to his property a few times per year. During this period of time, Gimbel permitted various individuals to hay his entire parcel as he was not using, or residing on, the land. When Gimbel would visit his parcel, there was never any visible indicator that another person was claiming, or attempting to claim, ownership to any portion of the Gimbel Parcel. In 2013, Gimbel retired and took up residence on his parcel. (Tr. 120-123, 141). Gimbel never himself cut hay on his parcel during the entire time that he has owned it. He has always allowed others to cut his hay for free. (Tr. 142).

[¶13] The Magrum Parcel was purchased by brothers Kenneth Schiermeister and Lonnie Schiermeister (referred to collectively as the "Schiermeisters") on November 12, 1992. (App. p. 104). The Schiermeisters testified that they had believed that the trail was the northerly property line when they owned the parcel. As far as the reason for their belief, Kenneth stated that: "It's just the way I understood it. I mean nobody ever said any different, and it was never surveyed when we bought it or sold it." (Tr. 169). Lonnie stated that he believed the trail to be the line because: "That's the way we bought it. That's the way its always been." (Tr. 184). The trail was not referenced as being a boundary line in the Warranty Deed in which the parcel was conveyed to the Schiermeisters. (App. p. 104).

[¶14] The Schiermeisters never built a fence on the Gimbel Parcel, nor was there ever an upright standing fence south of the trail on the Gimbel Parcel, during the time that the

Schiermeisters owned the Magrum Parcel. (Tr. 119, 178). The Schiermeisters never ran cattle or planted crops on the land lying south of the trail on Gimbel Parcel. (Tr. 26, 172). No monuments or structures were placed on the land lying south of the trail on the Gimbel Parcel by the Schiermeisters. (Tr. 121-122). The Schiermeisters did not store equipment on the Gimbel Parcel. Likewise, the Schiermeisters never made any improvements upon the portion of the Gimbel Parcel in dispute. (Tr. 27-28, 120). There was however testimony indicating that the Schiermeisters would, on occasion, hay some, but not all, of the land lying south of the trail on the Gimbel Parcel.

[¶15] Kenneth testified that he and his brother would not hay the land all the way up to the trail, rather, they would only hay up to 20-25 feet south of the trail, which is about 10 or 15 feet south of where the Magrums built their fence. (Tr. 171). [1] The Schiermeisters would hay one (1) time per year most, but not all, years that they owned the Magrum Parcel. (Tr. 189-190).

[¶16] On April 27, 2011, the Schiermeisters entered into a handwritten purchase agreement with Jeff Magrum for the purchase of the Magrum Parcel. The purchase agreement, and the legal description contained therein, was prepared by Lonnie Schiermeister. No reference was made in the purchase agreement about the trail being the northerly boundary line of the parcel. (App. p. 85; Tr. 215).

[¶17] On June 20, 2011, the Schiermeisters conveyed the Magrum Parcel by Warranty Deed to the Magrums. The Warranty Deed, and the legal description contained therein, was prepared by Donna Magrum. (App. pp. 86-87; Tr. 216). Again, there was no mention in the Warranty Deed about the trail being a boundary line.

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[1] Lonnie's testimony was slightly different from Kenneth's in that he said they would hay approximately 5 to 10 feet south of where Magrum erected his fence. (Tr. 185-186).

[¶18] A Corrected Warranty Deed was issued on or about September 17, 2012 to clarify and correct errors and issues in the June 20, 2011 Warranty Deed. The Corrected Warranty Deed was prepared by an attorney. (App. pp. 88-89; Tr. 216). There was no reference made in the Corrected Warranty Deed about the trail being the northerly boundary line of the Magrum Parcel. (App. pp. 88-89).

[¶19] After the Magrums purchased their Parcel, they hayed annually a portion of the Gimbel Parcel lying south of the both the trail and the location of the Magrums' current fence. (Tr. 192, 212). Gimbel testified that the entire time the portion of his parcel lying south of the trail was being hayed, he was still under the belief that he was the owner of said portion. (Tr. 154-155).

[¶20] At some point in 2015, Jeff Magrum approached Gimbel and asked if he wanted to share the cost of a survey because the Magrums wanted to build a fence between the parcels. (Tr. 124, 202). Gimbel testified that he informed Jeff Magrum that he was not interested in paying for half of the survey because the fence was not a benefit to him. Gimbel further testified that he told Jeff Magrum that if he put the fence in the wrong place, Jeff Magrum would have to move it. After this encounter between Gimbel and Jeff Magrum, Gimbel was left with the impression that the Magrums were going to hire a professional to determine the property lines before laying their fence. (Tr. 124). Jeff Magrum testified that during the aforementioned encounter, Gimbel said, when asked to share the cost of a survey: "Why would we do that? Everyone knows the center of the road is the property line. That would be a waste of money?" (Tr. 202). Jeff Magrum said his son Erin Magrum was present during this conversation. (Tr. 204). Erin Magrum testified that he did not witness any agreements made about the property line between Jeff Magrum and Gimbel, but could only say that he did not recall any disputes. (Tr. 226-227). Donna Magrum did not testify at trial and there were no text messages, emails or

recordings which corroborated Jeff Magrum's recollection of statements made during casual conversations had with Gimbel.

[¶21] When Jeff Magrum was asked at trial why, if he believed the property line was the center of the road, he asked Gimbel to share the cost of a survey, his response was that he was just trying to be neighborly. (Tr. 202-203, 210-211).

[¶22] The Magrums did not obtain a survey to determine the boundary line between the parcels prior to erecting the fence. They did not use GPS, GIS or other technology. (Tr. 217). After discussing the survey with Gimbel, the Magrums then took significant efforts, by using existing government surveyor markers, in an attempt to locate the actual property line between the parcels. (Tr. 200-201).

[¶23] Jeff Magrum testified that Gimbel would visit with him often while he and his son Erin Magrum were working on the fence. (Tr. 203). Erin Magrum estimated that Gimbel visited with them between 5 and 10 times. (Tr. 228). Gimbel did not recall having any conversations with the Magrums except for the initial discussion about going in on a survey together and a conversation had later after Gimbel's survey confirmed that the Magrums were encroaching on his property. (Tr. 152).

[¶24] Once construction of the Magrums' fence was completed, Gimbel was surprised by how close the fence was to the trail. He questioned whether the fence was on his property but did not take immediate action because he did not have enough money, at that time, to pay for a survey. (Tr. 125, 144). All witnesses at trial in this matter agreed that there had never been a fence in the last 20 years, and beyond, that had been located in the same location as the Magrums' fence; this was a new fence line established for the first time in 2015 by the Magrums. Likewise, all witnesses with knowledge of the haying done on the south side of the trail agreed that, over the past 20 years, nobody had hayed up to the Magrums' new fence line. (Tr. 171, 173-174, 178, 189, 212).

[¶25] In approximately May of 2016, Gimbel went to see Nathen Leier ("Leier"), the Emmons County Geographic Information Systems (GIS) Coordinator, for information on the location of his southerly boundary line. Leier provided Gimbel with a GIS aerial map showing the boundaries the County had on record for Gimbel's taxable parcel as legally described in Gimbel's deed of record. The GIS image indicated that the southern property line of the Gimbel Parcel is south of both the trail and the Magrums' fence. The boundaries shown on the GIS image prompted Gimbel to hire a surveyor to locate the true boundary lines of the Gimbel Parcel. (App. p. 17; Tr. 10-12, 126). [2]

[¶26] In April or May of 2018, Gimbel hired Gregory L. Johnson ("Johnson"), a licensed land surveyor to complete a survey of the Gimbel Parcel. Based on Johnson's education, training, substantial professional experience and his associations and affiliations, the trial court determined Johnson to be a qualified expert in the field professional land surveying. (App. p. 18; Tr. 45). Johnson's survey of the Gimbel Parcel was performed and completed in accordance with all accepted practices and methods in the State of North Dakota. (App. pp. 110-111).

[¶27] During the survey process, Johnson first researched Emmons County real estate records recorded in the office of the Emmons County Recorder. No prior surveys of the Gimbel Parcel had been completed and recorded with the County. Additionally, Johnson determined that there was no dedication, easement or other reference of the trail in any records contained in the office of the Emmons County Recorder. The trail had not been documented as a legal or established road or trail of any kind. (Tr. 46-50).

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[2] The Appellant has identified page 17 of the Appendix as "Arial Photo." The document in Page 17 is actually a copy of the GIS Aerial Map which Leier provided to Gimbel in 2016.

[¶28] Johnson obtained from the Emmons County Recorder's Office the North Dakota Department of Transportation's ("NDDOT") Right of Way Plat for the stretch of the original Highway 1804 which lies east of the Gimbel and Magrum Parcels. The Right of Way Plat shows that the 1/16th line in Section 30, that runs east to west, which is the boundary between the Gimbel Parcel and the Magrum Parcel. Johnson explained that 1/16th lines run in a straight line, east to west, and do not veer in the manner that the trail does. (Tr. 74). On the Right of Way Plat, the NDDOT did not recognize the trail as an established road, barrier, or line of division. (App. p. 20; Tr.47-50).

[¶29] As part of the survey process, Johnson, in accordance with the North Dakota Standard Practices Manual, researched relevant records, which are available to the public, at the office of the North Dakota Corp of Engineers. In so doing, Johnson was able to locate a take line plat from a survey conducted by the US Army Corps of Engineers in the 1950s. Said plat shows that pins were placed by the Corps of Engineers along Gimbel's property lines, including the southerly property line in dispute in this action. (App. p. 21; Tr. 51-55)

[¶30] Johnson also obtained various records, again in accordance with the North Dakota Standard Practices Manual, from the State Water Commission including historical aerial photos of the parcel, 1866 original field notes and plats of the area. (App. pp. 35-45; Tr. 57-62).

[¶31] Johnson was as able to locate T-Irons and other monuments placed by the Corps of Engineers when the take line survey was completed. Visible markers were located along the southerly line of the Gimbel Parcel. From the research and onsite findings, Johnson was able to properly and accurately complete a survey of the Gimbel Parcel. (App. p. 23-30; Tr. 64-69). The official survey, as well as the survey laid upon an aerial

photo of the Gimbel Parcel, were admitted into evidence, and considered by the trial court. (App. pp. 31-33).

[¶32] The Magrums did not present any evidence from a surveyor, or other expert witness, which contradicted the validity or accuracy of Johnson's survey. The trial court held that the survey by Johnson accurately depicts the boundaries of the Gimbel Parcel as legally described in Gimbel's deed(s) and further that Gimbel is the legal owner of the property in dispute in this action. The trial court further concluded that the Magrums did construct a fence on the Gimbel Parcel. (App. p. 112).

[¶33] Once Johnson had confirmed that the Magrums' fence was encroaching on the Gimbel Parcel, Gimbel, on Memorial Day in 2018, notified the Magrums of the survey and informed them that they would have to move their fence. (Tr. 126-127, 205-206). [3]

[¶34] The official survey drawing was completed on May 30, 2018. (App. p. 32-33). In June of 2018 Plaintiff brought the survey to the Emmons County Recorder for recording. The survey was presented to the Emmons County Commission for approval at the June 2018 meeting and, at the request of Jeff Magrum, the item was tabled until the next meeting. (Tr. 127-129, 207-208). After the June meeting, but before the July meeting, Jeff Magrum called Gimbel and left the following message:

> "Hey Dude, it's Jeff Magrum here. Just checking to see if you got some paperwork for me from that surveyor... I'd like to see something on that. I was at the County Commission meeting when you they brought that plat that you submitted and I asked if they would hold off on that because I can't see how that surveyor is right buy maybe he is but you know we've had 2 surveys done before on different properties and the surveyors many times have been different so anyway I would never bet that this guy's right, I would bet he's wrong because where he's putting that stake that don't even make any sense because the other guys would have had to allow somebody to fence up past that property line years ago and that's highly unlikely. But you can call me again and we'll talk about it bye."

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[3] Gimbel also had an attorney send the Magrums a letter demanding that the fence be relocated. (Tr. 207).

(Tr. 127-129, Docket No. 85).

[¶35] Jeff Magrum made no statement in his message indicating that Gimbel had previously agreed to the location of Magrum's fence or that Gimbel had previously agreed or acquiesced that the trail was the properly line between the parcels.

[¶36] Gimbel's survey was accepted by the Emmons County Commission at the July 18, 2018 meeting and was thereafter recorded with the County as the official survey of the Gimbel Parcel. (Tr. 129). Erin Magrum testified that Gimbel stated at the meeting that "we had a gentlemen's agreement and I changed my mind." Nothing further was presented by the Magrums to elaborate upon what was meant by the alleged statement. (Tr. 235-236).

[¶37] Once the survey was completed, and prior to this action being commenced, Gimbel visibly marked the southern boundary of his parcel with stakes wrapped in caution tape. After these markers were placed, the Magrums stopped haying past the surveyed boundary line. (App. p. 50; Tr. 130-131).

[¶38] James McLeish ("McLeisch") owns a small parcel immediately to the west of the Gimbel Parcel which is also immediately north of the Magrum Parcel. He acquired the McLeish Parcel in 1996 or 1997. The same 1/16th section line runs east to west across both the southerly property lines of the McLeish Parcel and the Gimbel Parcel. (Tr. 23-24). McLeish testified that the Magrums' fence is also encroaching upon his parcel and that prior to the Magrum Fence, he had never observed a fence in the same or a similar location. Prior to the Magrum Fence, the land south of the trail on his parcel and the Gimbel Parcel was not being grazed, cultivated or improved upon. (Tr. 26-27).

[¶39] Justin Vinje ("Vinje") grew up on a parcel neighboring the Gimbel and Magrum Parcels. Vinje utilized the trail by vehicle and by foot. Vinje testified that there had not previously been a fence or other monuments in the same location as the Magrums' fence.

Vinje further testified that he never recognized the trail as a property line of any sort. (Tr. 158-162),

[¶40] At all times relevant to this action, neither Gimbel, the Magrums, nor their predecessors maintained, paved or otherwise kept up the trail. (App. 37-42; Tr. 58-60). Expert Surveyor Gregory L. Johnson described the trail as a two-wheel road that does not establish a property line. (Tr. 55).

LAW AND ARGUMENT

I. Whether it was clearly erroneous for the trial court to find that the Magrums did not establish, by clear and convincing evidence, that they acquired ownership of the land in dispute by adverse possession.

[¶41] There exists a statutory presumption of possession by the record titleholder under N.D.C.C. § 28-01-07, which provides:

> "In every action for the recovery of real property or for the possession thereof, the person establishing a legal title to the premises must be presumed to have been possessed thereof within the time required by law, and the occupation of such premises by any other person must be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of such action."

[¶42] The party claiming property by adverse possession has the burden to prove the claim by clear and convincing evidence, "and every reasonable intendment will be made in favor of the true owner." Gruebele. v. Geringer, 2002 ND 38, ¶ 8, 640 N.W.2d 454.

> "To satisfy the elements for adverse possession, the acts on which the claimant relies must be actual, visible, continuous, notorious, distinct, and hostile, and of such character to unmistakably indicate an assertion of claim of exclusive ownership by the occupant. Torgerson v. Rose, 339 N.W.2d 79, 84 (N.D. 1983). To constitute an effective adverse possession, all the elements must be satisfied, and if a single element is wanting, the possession will not confer title. See 2 C.J.S. *Adverse Possession* § 25, at 678 (1972)."
>
> Gruebele, at ¶ 7.

[¶43] "For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument nor upon a judgment or decree, land shall be

deemed to have been possessed and occupied only in the following cases: (1) When it has been protected by a substantial enclosure; or (2) When it has been usually cultivated or improved." N.D.C.C. § 28-01-10. The Magrums do not argue on appeal that the dilapidated fence lying on the ground, in the grass, south of the trail, constitutes a substantial enclosure that was actual, visible, continuous, notorious, distinct, and hostile. Even if such an argument can be implied from Magrum's Appellant's Brief, a dilapidated fence, such as that described in the record, is an insufficient enclosure for the purposes of establishing adverse possession.

> "An enclosure is not sufficient to establish title by adverse possession where it is only temporary or is not maintained for the period of limitation prescribed by statute. 2 C.J.S. *Adverse Possession* § 26(3), page 541. The appellant, having failed to maintain the fence under which his claim is made, accordingly has not succeeded in proving adverse possession by virtue of protection by a substantial enclosure for a period of at least twenty years."
>
> Martin v. Rippel, 152 N.W.2d 332, 338 (N.D. 1967).

[¶44] The record shows that when Gimbel entered into the contract for deed for his parcel, there existed a fence - *i.e.*, the 1981 Fence, that was near the actual southerly property line as legally described in Gimbel's contract for deed, warranty deed and quit claim deed. (App. pp. 46-48). That fence was taken down in the 1980s or 1990s. [4] Thereafter, no fence was erected or maintained on the Gimbel Parcel, south of the trail, until the Magrums erected their fence in 2015. Since the Magrums' fence has not constituted an actual, visible, continuous, notorious, distinct, and hostile taking for the last 20 years, the trial court properly concluded that the Magrums failed to prove, by clear and convincing evidence, adverse possession pursuant to N.D.C.C. § 28-01-10(1).

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[4] Gimbel testified that the fence was taken down sometime after he purchased the parcel, but he could not recall the exact date. The Schiermeisters testified that the fence was not standing when they purchased the parcel in 1992. (Tr. 118, 177-178).

[¶45] The Magrums argue on appeal that, because they and the Schiermeisters occasionally hayed a portion of the Gimbel Parcel lying south of the trail, they acquired ownership to ***all*** the land lying south of the trail in the Gimbel Parcel by adverse possession. The trial court found that the occasional haying that occurred did not establish adverse possession by clear and convincing evidence. Rather the trial court found that neither the Schiermeisters nor the Magrums actually adversely possessed the portion of the Gimbel Parcel in dispute until the Magrums built their fence in 2015. There was sufficient evidence presented at trial to support this finding given that, prior to 2015, neither the Schiermeisters nor the Magrumsmade improvements to the land, erected buildings or structures, stored equipment on the land, cultivated or grazed the land, or enclosed the land. (App. pp. 113-114).

> "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 of the evidence, this Court is convinced a mistake has been made. In a bench trial, the district court is the determiner of credibility issues and we will not second-guess the district court on its credibility determinations."
>
> Sauter v. Miller, 2018 ND 57, ¶ 8, 907 N.W.2d 370 (citing Moody v. Sundley, 2015 ND 204, ¶ 9, 868 N.W.2d 491).

[¶46] Findings of fact are not clearly erroneous merely because the appellate court may have viewed the facts differently had the appellate court been the original trier of fact. Giese v. Morton County, 464 N.W.2d 202, 203 (N.D. 1990). A choice between two permissible views of the evidence is not clearly erroneous. Gilmore v. Morelli, 472 N.W.2d 738, 740 (N.D. 1991). While the Magrums may disagree with the trial court's findings of fact, there is substantial evidence in the record which supports said findings. Therefore, for the reasons stated herein, the Magrums have not provided this Court with a sufficient basis to reverse the trial court's Order and Judgment. (App. pp. 107-126).

[¶47] This Court, in Moody v. Sundley, 2015 ND 204, ¶ 12, 868 N.W.2d 491, held that the occasional haying and mowing around a school house was not enough to satisfy the actual, visible, continuous, notorious, distinct and hostile elements of adverse possession. Several courts in other jurisdictions have drawn similar conclusions. See Ennis v. Stanley, 78 N.W.2d 114, 117 (Mich. 1956) (holding that the casual hay cutting, amounting to a little more than an annual trespass, is not sufficient to warn the owner of the record title of a claim of adverse possession); Doctor v. Turner, 231 N.W. 115, 119 (Mich. 1930) (held that annual hay cutting was nothing more than an annual trespass and insufficient for adverse possession); Crone v. Nuss, 263 P.3d 809, 816 (Kan. Ct. App. 2011) ("annual or occasional entries on unenclosed land to cut hay [are] not sufficient to warn the legal owner that the person cutting the hay did so under a claim of right or title"); Asher v. Gibson, 248 S.W. 862, 864–65 (Ky. 1923) ("occasional trespassing by cutting timber, or otherwise, is not such a continuous occupancy or assertion of ownership as will eventually ripen a title in the trespasser, since between the trespasses his flag was not flying so as to continuously notify the true owner of the character of entries upon the latter's possessions"); Turnipseed v. Moseley, 27 So. 2d 483, 486–87 (Ala. 1946) ("In lands of the character here involved, occasional acts of entry and cutting of timber therefrom are not sufficient adverse possession to divest a true owner"); Romans v. Nadler, 14 N.W.2d 482, 485 (Minn. 1944) ("Occasional and sporadic trespasses for temporary purposes, because they do not indicate permanent occupation and appropriation of land, do not satisfy the requirements of hostility and continuity, and do not constitute adverse possession, even where they continue throughout the statutory period").

[¶48] In the current case, there were no improvements made upon the Gimbel Parcel by the Magrums or the Schiermeisters prior the installation of a the Magrums' fence in 2015.

Neither the Magrums nor their predecessors have ever stored buildings, equipment or other property upon the Gimbel Parcel. There is no record of the Magrums or their predecessors placing any signage, "no trespassing" signs or otherwise, or other markers or monuments on the property within the last 20 years.

[¶49] The Magrums cite four (4) cases from other jurisdictions which they allege support their position that minimal and occasional haying is sufficient to meet the "usually cultivated or improved" requirement under N.D.C.C. § 28-01-11. In Howard v. Carroll, 526 A.2d 996 (M.D. Ct. Spec. App. 1987), the Maryland Court of Special Appeals, held that altering the contour of the land, or improving the land, to further crop production is included in the term cultivation. No mention was made by the Maryland Court of Special Appeals about minimal haying being included in the definition of "cultivation". Howard v. Carroll, 526 A.2d 996, 1001-02 (M.D. Ct. Spec. App. 1987).

[¶50] In Erskine v. Board of Regents of University of Neb., 104 N.W.2d 285 (Neb. 1960), the Nebraska Supreme Court held that "good state of cultivation", when used in a will, includes seeding of land to brome grass and alfalfa. The Nebraska Supreme Court did not make any ruling indicating that occasional haying constitutes usual cultivation for the purpose of establishing adverse possession. Erskine v. Board of Regents of University of Neb., 104 N.W.2d 285, 290 (Neb. 1960).

[¶51] In Bryce v. State, 39 S.E. 282 (Ga. 1901), the Georgia Supreme Court, when interpreting a statute on trespass of cultivated land, held that "cultivated land" does not mean the land must have crops growing at the time of the trespass. Bryce v. State, 39 S.E. 282, 283 (Ga. 1901). The land in question in Bryce was an uninclosed garden which had been cultivated continuously in the proper seasons for six or seven years. Id. The Georgia Supreme Court made no ruling indicating that occasional haying is the same as usual cultivation when determining whether adverse possession has occurred.

[¶52] In State v. Crook, 44 S.E. 32 (N.C. 1903), a case in which Joshua Cook was criminally charged in 1903 for removing crop, the Supreme Court of North Carolina held that the trial court properly refused a proposed jury instruction that said "hay not being a cultivated crop." The Supreme Court of North Carolina made no determination as to whether occasional haying is sufficient to prove adverse possession by clear and convincing evidence. State v. Crook, 44 S.E. 32, 33 (N.C. 1903).

[¶53] Ballentines Law Dictionary defines the term "cultivate" as follows: "To cultivate means to till, or husband the ground; to forward the product of the earth, by general industry. To prepare land for grazing only is not to 'cultivate' it within the meaning of the homestead law." Ballentine's Law Dictionary (3rd Ed. 1969) citing State v. Allen, 35 NC (13 Ired L) 36, 37 (1851); United States v. Niemeyer, 94 F. 147 (E.D. Ark. 1899). Black's Law Dictionary has defined the term "cultivated" as follows: "A field on which a crop of wheat is growing is a cultivated field, although not a stroke of labor may have been done in it since the seed was put in the ground, and it is a cultivated field after the crop is removed. It is, strictly, a cultivated piece of ground." Black's Law Dictionary (3rd Ed. 1933) [citations omitted].

[¶54] The land in question was never seeded, hoed, planted or otherwise stripped or prepared for the same. The land is merely raw pasture. (Tr. 27, 120, 142). At most, the Magrum's established that, over the past 20 years, the Schiermeisters or the Magrum's hayed some, but not all, of the land lying south of the trail on the Gimbel Parcel once per year most, but not, all years. It was not clearly erroneous for the trial court to find that such minimal haying activity failed to establish that the Magrums and the Schiermeisters usually cultivated or improved the land in dispute for 20 or more consecutive years. N.D.C.C. § 28-01-11.

[¶55] Further supporting the trial court's determination that the occasional haying was not adverse possession is that Gimbel testified he had always permitted his neighbors to hay his land. "Possession, which is permissive in its inception can become adverse only where there is a disclaimer of the true owner's title, or there are acts of such an unequivocal nature on the part of the user, that notice of the hostile character of the possession is brought home to the record owner." Ellison v. Strandback, 62 N.W.2d 95, 100 (N.D. 1953). The Magrums did not present any evidence at trial indicating that the haying of land was adverse at its inception.

[¶56] Given the statutory presumption against adverse possession, the Court's duty to make every reasonable intendment in favor of Gimbel, and the substantial evidence in the record which supports the trial court's findings, it was not clearly erroneous for the trial court to find that the Magrums did not adversely possess the portion of the Magrum parcel in dispute for the requisite twenty (20) year period. Gruebele. v. Geringer, 2002 ND 38, ¶ 8, 640 N.W.2d 454.

II. Whether it was clearly erroneous for the trial court to find that the Magrums did not establish, by clear and convincing evidence, that they acquired ownership of the land in dispute pursuant to the doctrine of acquiescence.

[¶57] "Acquiescence is a 'sister doctrine' of adverse possession, and the doctrines are conceptually similar and share some of the same elements." Schindler v. Wageman, 2019 ND 41, ¶ 13, 923 N.W.2d 507 (citing Sauter v. Miller, 2018 ND 57, ¶¶ 11, 16, 907 N.W.2d 370). With most of the elements being identical in claims for adverse possession and acquiescence, Gimbel's arguments above also apply to the Magrums' acquiescence claim.

[¶58] "The doctrine of acquiescence was created to allow a person to acquire property when occupying part of a neighbor's land due to an honest mistake as to the location of the true boundary, because the adverse intent requirement of the related doctrine of

adverse possession could not be met under those circumstances." James v. Griffin, 2001 ND 90, ¶ 10, 626 N.W.2d 704 (citing Production Credit Association v. Terra Vallee, Inc., 303 N.W.2d 79, 83–84 (N.D.1981)). "To establish a new boundary line by acquiescence, it must be shown by clear and convincing evidence that the parties recognized the new boundary line as a boundary, and not a mere barrier, for at least 20 years." James v. Griffin, 2001 ND 90, ¶ 10. "A boundary line acquiesced in must be definite, certain and not speculative, and open to observation. Moreover, acquiescence requires possession up to a visible line marked clearly by monuments, fences, or the like." Sauter v. Miller, 2018 ND 57, ¶ 10, 907 N.W.2d 370 (citing Manz v. Bohara, 367 N.W.2d 743, 746 (N.D. 1985). "Although acquiescence may be found from a party's silence, or inferred from conduct, the burden of proving acquiescence rests with the person claiming property to the exclusion of the true owner." James v. Griffin, at ¶ 10 [internal citations omitted].

[¶59] Gimbel has maintained an interest in his parcel for almost forty (40) years. The Schiermeisters acquired the Magrum Parcel more than a decade after Gimbel. The Magrums acquired their parcel from the Schiermeisters in 2011, therefore, in order for the Magrums' to prevail under the doctrine of acquiescence, any acquiescence must be tacked from prior use.

> "As in adverse possession, the principle of tacking is applicable to claims of acquiescence. Bernier v. Preckel, 60 N.D. 549, 557, 236 N.W. 243, 247 (1931). Thus, acquiescence in a boundary line is binding on the parties thereto and those claiming under them, and where successive adverse occupants hold in privity with each other under the same claim of title, the time limit for maintaining an action may be computed by the last occupants from the date the cause of action accrued against the first adverse user. Trautman v. Ahlert, 147 N.W.2d 407, 412 (N.D. 1966). Our caselaw makes it clear that when tacking is relied upon to meet the 20–year period, it must result in a single continuous acquiescent possession. *See, e.g., Brooks v. Bogart,* 231 N.W.2d 746, 751 (N.D.1975); Ahlert, 147 N.W.2d at 411–12; Severson v. Simon, 110 N.W.2d 289, 292 (N.D.1961); Morgan v. Jenson, 47 N.D. 137, 141–42, 181 N.W. 89, 90–91 (1921). If a possession is not adverse to the true owner, it may not be tacked to satisfy the 20–year period. See McGee v. Stokes' Heirs at Law, 76 N.W.2d 145, 151–52 (N.D.1956)."

James v. Griffin, 2001 ND 90, ¶ 11, 626 N.W.2d 704.

[¶60] "[A]cquiescence requires possession up to a visible line marked clearly by monuments, fences, or the like." Sauter v. Miller, 2018 ND 57, ¶ 10, 907 N.W.2d 370 (citing Manz v. Bohara, 367 N.W.2d 743, 746 (N.D. 1985). As indicated above, the trial court specifically found that neither the Schiermeisters nor the Magrums actually possessed the portion of the Magrum Parcel in dispute until the Magrums built their fence in 2015. Therefore, it was not clearly erroneous for the trial court to conclude that the Magrums' failed to prove, by clear and convincing evidence, that they met the "possession" element of both adverse possession and acquiescence.

[¶61] With the exception of erecting a fence in 2015, it is undisputed that neither the Magrums nor the Schiermeisters protected the land in dispute by a substantial enclosure; nor did they usually cultivate or improve the land. They did not plant crops, store equipment, erect building or structures, create rock lines, put up signs, or lay any other monuments which should have put Gimbel, or any other member of the community, on notice of their alleged mistaken belief regarding the location of their northerly property line. The trial court did not err by failing to infer acquiescence from the conduct of the parties. James v. Griffin, 2001 ND 90, ¶ 10, 626 N.W.2d 704.

[¶62] There were not verbal or written agreements pertaining to the property line, rather the Schiermeisters simply testified they assumed their northerly line was the trail because nobody ever said anything different. (Tr. 169). This belief was not based upon any conversations had with Gimbel who had owned his parcel for more than a decade prior and formed his own beliefs about the property line based upon statements made by Marshall Draalle in 1981. (Tr. 117).

[¶63] In order to prevail at trial on an acquiescence claim, the Magrums were tasked to establish, by clear and convincing evidence, that both they and Gimbel recognized the

trail as the boundary line between their properties. James v. Griffin, 2001 ND 90, ¶ 11, 626 N.W.2d 704. Gimbel testified that when he purchased the Gimbel Parcel, the southerly property line was disclosed to him by the seller as being forty to fifty feet south of the trail where the1981 Fence then existed. The existence of the 1981 Fence was corroborated by Kalberer and McLeish. Gimbel testified that around the time he purchased the Gimbel Parcel he looked into the possibility of blocking the trail. Gimbel testified that he never recognized the trail as his southerly property line, but believed it to be an established road or trail for public use. All of this evidence in the record supports the conclusion that Gimbel always believed that his property line extended south of the trail. into blocking off the trail. (Tr. 36, 101-103, 116-117; 154-155). Gimbel did not, at any time, personally hay his land, and specifically did not hay the land south of the trail because it was not economical for him to do so. (Tr. 141-142). Further, Gimbel has paid real estate taxes on his entire parcel, including the portion in dispute, from at least 1989 to present. See, Brown v. Brodell, 2008 ND 183, ¶¶ 6, 12, 14, 756 N.W.2d 779, (this Court affirmed the trial court's denial of an acquiescence claim in part because the record title owner had paid real estate taxes for the parcel in dispute). (App. pp. 54-84).

[¶64] The trial court also properly found that there was evidence showing that the Magrums themselves questioned the location of their northerly property line.

> "The Magrums considered having a survey completed prior to erecting the fence. They asked Gimbel if he would pay half of the cost of the survey. The Magrums also expended effort to try to locate their property line by referring to existing boundary markers. The fact they considered a survey and made effort to try to locate the boundary line indicate the Magrums were unsure of the property line."
>
> (App. p. 121).

[¶65] The trial court also found that Gimbel's actions after the Magrums' constructed their fence was evidence that Gimbel did not acquiesce to the trail serving as the property line.

> "Gimbel made it clear that he did not agree that the new fence or trail was the property line when, shortly after the current fence was built, Gimbel told Jeff Magrum that Jeff Magrum has to move the fence because it is on Gimbel's land and then followed up with a letter from his attorney. Those actions unequivocally demonstrate Gimbel did not acquiesce to the trail as the property line between the [Gimbel] and [Magrum] Parcels."
>
> (App. p. 122).

[¶66] The trail in question is a two-track overgrown trail that has not been recognized by any historical record as an official road, easement or right of way. (Tr. 75). The trail is of the kind that the this Court has held to be an insufficient marker of a mistaken boundary line for acquiescence purposes.

> "In our previous decisions where we have upheld claims of title based upon the doctrine of acquiescence, there has existed a boundary line comprised of something more substantial, such as a fence line or a rock line. Terra Vallee, 303 N.W.2d 79; Trautman, 147 N.W.2d 407; Bernier, 60 N.D. 649, 236 N.W. 243. Since the doctrine of acquiescence can deprive the record owner of his or her property, a court should be reluctant to conclude that a trail between three rock piles, one of which rock piles has been removed years ago and which rock piles vary in width with the passage of time and continue to accumulate rocks in normal course of farming, and which trail could move from one location to another within those widths with field usage on either side, has that visibility, certainty, and persistency of placement necessary to constitute a boundary by acquiescence, which we have observed must be definite, certain, and not speculative, and open to observation."
>
> Manz v. Bohara, 367 N.W.2d 743, 748 (N.D. 1985).

[¶67] It is undisputed that the legal description in Gimbel's deed(s) includes the portion of the parcel in dispute. According to the legal description on both parties' deeds, a 1/16th section line serves as the property line between the two parcels. 1/16th lines run in a straight line; while the trail does not. (Tr. 73-74). The occupation of someone else's land is presumed to be under and in subordination to the legal title of record. N.D.C.C. §

28-01-07. Therefore, for the reasons provided herein, it was not clearly erroneous for the trial court to find that the Magrums did not prove, by clear an convincing evidence, that Gimbel acquiesced to the trail as the property line.

CONCLUSION

[¶68] For the foregoing reasons, it is respectfully requested that the trial court's Order and Judgment be affirmed.

Respectfully submitted this *20th* day of May, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Appellee's Brief complies with the page limitations imposed by Rule 32 of the North Dakota Rules of Appellate Procedure in that it does not exceed 38 pages.

/s/ Garrett D. Ludwig
GARRETT D. LUDWIG
State Bar ID No. 06275

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Leslie Gimbel,	)	
	)	**Supreme Ct. No. 20190412**
Plaintiff/Appellee,	)	
	)	**District Ct. No. 15-2018-CV-00044**
vs.	)	
	)	
Jeff Magrum and Donna Magrum,	)	
	)	
Defendants/Appellants.	)	
	)	

CERTIFICATE OF SERVICE

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[1] I hereby certify that on May 20th, 2020, the following documents were electronically filed with the Clerk of the North Dakota Supreme Court, via email, and served upon the person below by email:

Documents Filed and Served:

1. Brief of Appellee (PDF Version and WordPerfect Version);
2. Certificate of Service (this document).

Persons Served:
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STATE OF NORTH DAKOTA

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Documents Filed and Served:

1. Brief of Appellee (PDF Version and WordPerfect Version) - *with corrections*.

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