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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20220091

District Court Case No. 13-2020-CV-00079

Scott Kubik,

Appellant/Plaintiff,

v.

Dominic Hauck,

Appellee/Defendant

APPELLEE'S BRIEF

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT ENTERED BY THE SOUTHWEST JUDICIAL DISTRICT, COUNTY OF DUNN, STATE OF NORTH DAKOTA, THE HONORABLE RHONDA R. EHLIS, ON FEBRUARY 17, 2022.

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page,¶

Cases

Statutes

Rules

Treatises

Constitutional Provisions

JURISDICTIONAL STATEMENT

1. The district court had jurisdiction under N.D. Const. Art. VI, § 8, and N.D.C.C. § 27-05-06. The appeal was timely under N.D.R.App.P. 4(a). This Court has jurisdiction under N.D. Const. Art. VI, §§ 2 and 6, and N.D.C.C. § 28-27-01.

STATEMENT OF THE ISSUES

2. Whether the District Court properly found that Kubik failed to meet his burden to prove adverse possession.

3. Whether the District Court correctly found that Kubik failed to meet his burden to prove that he is entitled to title by acquiescence.

4. Whether the District Court appropriately found Kubik's action for trespass failed, and no evidence of damages was proven by Kubik.

ORAL ARGUMENT REQUESTED

5. Appellee Dominic Hauck requests oral argument. Oral argument would assist the Court in addressing the District Court's proper findings on the elements of mutual recognition within the 20-year period before Kubik's litigation. Oral argument would further clarify the lack of evidence to meet Kubik's burden to prove his claims for quiet title, trespass, and damages.

STATEMENT OF THE CASE

6. This case comes to the North Dakota Supreme Court on appeal from the Dunn County District Court following a trial held on September 24, 2021, at the Stark County Courthouse, Dickinson, North Dakota. The Plaintiff/Appellant, Scott Kubik (hereinafter "Kubik"), appeared personally and through his attorney, Jordan Selinger. The

Defendant/Appellee, Dominic Hauck (hereinafter "Hauck"), appeared personally and through his attorney, Sandra K. Kuntz.

7. Kubik is the owner of the SW1/4 of Section 2, Township 141 North, Range 95 West. Hauck is the owner of the NW1/4 of Section 2, Township 141 North, Range 95 West. The issue before the District Court is where the boundary lies between these two quarters of land, and thus, who owns a contested strip of land that both parties assert they own.

8. Kubik brought the District Court action to quiet title in his favor with service on Hauck via certified mailing July 9, 2020. He alleges that he is the owner of the disputed property through either the doctrine of adverse possession or the doctrine of acquiescence. Kubik also alleges that Hauck trespassed upon his property when Hauck cut the hay on the disputed property, thus resulting in damages owing to Kubik for the conversion of his property. Finally, Kubik is requesting attorney's fees for having to bring this action.

9. Hauck counterclaimed to quiet title in his favor, as again, he alleges that he is the owner of the disputed property. Hauck also requests attorney's fees for having to bring his counterclaim.

10. The District Court heard testimony and received evidence. Both Parties submitted written closing arguments to the Court. After review of the testimony given at trial, the evidence received and consideration of the arguments of counsel, the Court issued its Memorandum Opinion. (R129). On February 18, 2022, the District Court issued is Findings of Fact, Conclusions of Law, & Order for Judgment (R134) and Judgment (R135).

11. Kubik filed his Notice of Appeal March 22, 2022. (R136).

12. Kubik challenges on appeal that the District Court erred in finding that the original fence had not been the established boundary line for 20 years; that the District Court erred

in concluding that Kubik was not entitled to quieted title in the disputed property under the doctrine of acquiescence; and the District Court erred in finding that Kubik failed to prove Hauck's trespass or damages.

13. The District Court properly found that Kubik failed to meet his burden to prove by clear and convincing evidence the elements of adverse possession.

14. The District Court correctly found that Kubik failed to meet his burden to prove by clear and convincing evidence the elements of acquiescence as he failed to meet the 20 year period prior to the litigation, and failed to prove mutual recognition.

15. Kubik's claims were further barred by laches which the District Court did not address based on the Court's decision that Kubik had not met his burden of proof to quiet title in his name. (R129:¶26).

16. The District Court appropriately found that because Kubik's action to quiet title failed, and that Hauck is the rightful owner of the disputed land, Kubik's action for trespass fails. Because Kubik failed to offer any evidence that he incurred any damages for the foot-wide strip of grass mowed while Hauck was installing his new fence, the Court denied Kubik's request for damages.

17. The Supreme Court should summarily affirm the District Court in all respects. In the event the Supreme Court determines an error by the District Court, Kubik's claims remain barred by the doctrine of laches and Hauck's status as a good faith purchaser without notice of Kubik's claims. Said defenses by Hauck remain unaddressed by the District Court.

STATEMENT OF THE FACTS

18. Hauck owns in fee simple and possesses that certain real property consisting of 160.08 acres situated in Dunn County, North Dakota, and described as follows:

> The NW¼ of Section 2, Township 141 North, Range 95 West of the 5th Principal Meridian, Dunn County, North Dakota. (R91).

19. Hauck purchased the above parcel at an auction in November 2018, at which Hauck paid in full for 160.08 acres, with an accompanying purchase agreement verifying that acreage down to the decimal, and received title via a Trustee's Deed recorded as Document #3087531, recorded January 24, 2019, at 2:31 PM, in the Dunn County Recorder's office. (R90, 91, 92; R142:181:1-15). Hauck paid a total of $240,120.00 for the land at a rate of $1500/acre which verifies the total acreage purchased to be 160.08 acres, consistent with the public tax rolls. Id. Hauck testified that he has paid taxes on 160.08 acres since his purchase. Id.; (R142:183:4-24).

20. Hauck is a purchaser who in good faith and for valuable consideration acquired title that first is duly recorded without notice of Kubik's asserted claims. (R91; R8:¶13). No representations were made in the sale brochures or at the public auction that the fence line was a property line after which the land belonged to Scott Kubik. (R142:185:9-15.) Hauck inspected all the fences before his purchase (R142:185:16-25, 186:1-10). Hauck researched satellite photos of the quarter (R102). Hauck paid for a survey on the property which recorded December 12, 2018. (R94-101; R142:189:7-18).

21. Bob Procive (hereinafter "Procive") was certified as an expert witness land surveyor. (R142:133:5-7). He testified to the history of Section 2 and multiple well-documented corner monument records that appear of public record, as well are well sites and other surveys completed by competitors that corroborated the coordinates utilized by Procive. (R142:117-

137; R:94-101). Procive described the four corners of Section 2 as a whole were well documented as depicted in the Section Breakdown (R98) and the recorded monument records (R99) and the Well Location Plat (R100). From there, the middle of the section was determined by intersecting lines to become the southeast corner of the NW¼ surveyed south boundary. Procive explained his opinion that the fence could not be the proper boundary as it was not old enough to override the original monuments of record that had been found, recorded, and verified by other additional surveys. Procive attested to the processes and considerations required in determining boundaries and his compliance with those professional standards in setting the corner pins for the southwest corner and completing the south boundary of the NW¼ of Section 2. Id. Procive recorded the corner monument for the southwest corner of the NW¼ of Section 2 in the office of the Dunn County Recorder as Document Number C5014 on December 12, 2018, consistent with N.D.C.C. Chapter 47-20.1 Survey and Corner Recordation Act. (R99). N.D.C.C. §47-20.1-07 provides, "When such a corner described herein has been established and filed, that corner record shall be the official record…." Id.

22. Hauck asserts that the "fence" at issue belongs to him and sits on the land Hauck purchased as verified by the survey and surveyor's testimony. Id.; (R142:117-137). When Hauck measured the surveyed boundary, the old, dilapidated fence he removed was 11 feet away from the surveyed corner on the southwest and 7 feet away from the surveyed corner on the southeast. (R142:198:16-22; R113; R142:196:21-25; R109)

23. Alfred Sickler testified that he is one of 12 siblings and one of the sons of Tony Sickler who previously acquired the subject property in 1935 and owned in fee simple and

possessed that certain real property situated in Dunn County, North Dakota, and described as follows:

> The NW¼ of Section 2, Township 141 North, Range 95 West of the 5th Principal Meridian, Dunn County, North Dakota. (R142:146-149)

24. Alfred Sickler is 82 years of age and grew up working the land in question with his brothers and father until 1956 when Alfred enlisted and was deployed in the Navy. (R142:146:20-25, 147:1-18).

25. Alfred testified as well as reaffirmed and clarified the testimony contained in his affidavit to the Court. (R89). Alfred wasn't certain but believes the fence at issue was originally built by his father on the Sickler/Hauck land on the south side of the NW¼. Id. Alfred was unwavering that the fence was exclusively used as a barrier for containing cattle but was not and has never been acknowledged as a boundary between the Sickler and Kubik lands. Id.¶10; (R142:156:3-5) Alfred testified that through 1956, his family routinely maintained the fence for purposes of running their cattle. (R142:147:19-25). Upon his return from the service in 1960, Alfred did not return to the family farm to live, but frequently assisted his brother Dale approximately three times per week with fixing the 'subject fence,' working cattle, and assisting the operation on the homestead and other land parcels with their father, Tony Sickler. Id. Alfred testified that Dale ran cattle from 1976 through 1996 on the NW¼. In 1994, the NW¼ was transferred to the Sickler family trust, titled in the name of David A. Sickler, Adzie Barstow, and Dale Sickler as Co-Trustees of the Tony Sickler Trust Dated March 19, 1994 (hereinafter "Trust"). (R142:152:4-12). In 1996, the cattle were liquidated to avoid foreclosure and the land rented out. (R89:¶7).

26. Both Alfred Sickler and Dominic Hauck testified that the wires were on the north side of the posts consistent with the way fences have historically been built and signified

who owned the fence as the wires are designed to keep animals inside the wire with the posts serving as the brace against which the animals would push when grazing the fence lines. ((R89:¶6; R142:150:1-5;189:1-4; 235:2-9). Kubik's renter, Barry Steffan, who has been a rancher all his life, also testified that when building a fence, the wire is put on the side that the cattle will be in to allow them to push the wire into the post and not away from the post. (R142:87:15-24).

27. Alfred testified that the land is sandy in that area and thus the fence has been rebuilt, shuffled north and south numerous times in Alfred Sickler's lifetime, as the fence fell in disrepair when not utilized for cattle. Alfred confirms they moved the fence line all within their property of the NW¼ to have fresh ground to reposition posts and otherwise preserve some land for wildlife habitat. (R89:¶8; R142:153:21-25; 155:1-19).

28. Alfred testified that his father, and subsequently the Tony Sickler Trust, have consistently paid taxes on the full 160.08 acres of the NW¼ of Section 2, Township 141N, Range 95W, Dunn County. Id.

29. The Kubik land has been uncultivated grassland under the Conservation Reserve Program (CRP) for the last 15-20 years. (R142:52:1-20; 54:17-23). Sickler denies Kubik has ownership over the grass which Sicklers allow to have grown on, around, and along their fence. Sicklers and Hauck have always been good stewards of the land and wildlife in the area. (R89:¶11).

30. Alfred testified that the Trust rental contracts always contained provisions requiring the renters to maintain the fences. (R89:¶7; R142:167:14-16; 168:16-24). Bobby Kubas, one of Sicklers' renters, testified that he did a major rebuild of the fence in 2014 and was required to maintain it during the four leases he operated under with Dale Sickler. (R103;

R142:171:16-25; 173:12-17; 174:6-25) From 1996 until 2016, Dale Sickler primarily managed the contracts for the Trust. Dale died in 2016, at which time Alfred became a Successor Trustee and took over management of the Trust lands including the NW¼ and its rental. (R89:¶7; R142:153:15-16; 156:6-23).

31. Alfred testified that Scott Kubik has never spoken with him about the fence or land piece at issue. (R142:165:2-7; 168:13-15). Bobby Kubas, the renter verified that Kubik never approached or talked to him from 2014 through the 4 years he operated in Sickler's quarter and rebuilt and maintained the fence. (R142: 172:24-25; 173:1-7).

32. Scott Kubik testified that he has never spoken with Alfred Sickler, Adzie Barstow, or David A. Sickler, whom were the three Co-Trustees of the Trust from 2016 to present. (R142:50:21-24; 76:12-18; 228:19-24).

33. Kubik's land, located in the SW¼, has been and continues to be in the Conservation Reserve Program since 1998 and pasture on the east end. (R123; R142:54:17-22; 55:2-6) There has been no activity other than to exist as growing grassland. Id. At best Kubik offers testimony that there has been partial haying near the disputed area every three years. (R142:57:13-19).

STANDARD OF REVIEW

34. This Court set forth in Larson v. Tonneson, 2019 ND 230, ¶ 10, 933 N.W.2d 84, that the following standard is applied when reviewing an appeal from a bench trial:

> "In an appeal from a bench trial, the district court's findings of fact are reviewed under the clearly erroneous standard of review, and its conclusions of law are fully reviewable. Sauter v. Miller, 2018 ND 57, ¶ 8, 907 N.W.2d 370; Moody v. Sundley, 2015 ND 204, ¶ 9, 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 of the evidence, this Court is convinced a mistake has been made. Sauter, at ¶ 8; Moody, at ¶ 9. '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, at ¶ 8. 'Findings of the trial court are presumptively correct.' W. Energy Corp. v. Stauffer, 2019 ND 26, ¶ 5, 921 N.W.2d 431 (citing Brash v. Gulleson, 2013 ND 156, ¶ 10, 835 N.W.2d 798)." Larson v. Tonneson, 2019 ND 230, ¶ 10, 933 N.W.2d 84.

35. The burden of proving acquiescence lies with the party claiming property to the exclusion of the true owner. Manz v. Bohara, 367 N.W.2d 743, 748 (N.D. 1985). Whether there has been mutual recognition of a boundary is a question of fact and will be reviewed on appeal under a clearly erroneous standard. Knutson v. Jensen, 440 N.W.2d 260, 262 (N.D. 1989).

LAW AND ARGUMENT

36. Kubik asks the court to accept his statements as an interested party to be the uncontradicted facts of the case. The facts are contradicted as well as the inferences to be drawn therefrom as was established by the testimony, exhibits, and related evidence presented at trial. Kubik fails to meet his burden to bring forward clear and convincing evidence to substantiate his claimed ownership of the disputed property by adverse possession or acquiescence.

I. The District Court Properly Found That Kubik Failed To Meet His Burden To Prove Adverse Possession.

37. As the Court has explained in Gimbel v. Magrum, 2020 ND 181, [¶7], the requirements for adverse possession not founded upon a written instrument are explained in Tonneson, 2019 ND 230, ¶¶12-14, 933 N.W.2d 84:

> Generally, **N.D.C.C. § 28-01-07 provides a presumption against the adverse possession of real property** 'unless it appears that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of such action' (Emphasis added.) …N.D.C.C. § 28-01-10, states: 'When there has been an actual continued occupation of premises under a claim of title exclusive of any other right, but not founded

> upon a written instrument or upon a judgment or decree, **the premises actually occupied and no other must be deemed to have been held adversely.**' (Emphasis added.) . . . N.D.C.C. § 28-01-11 provides: 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.** (Emphasis added.) Id.

38. Neither of these elements were proven by clear and convincing evidence by Kubik. While Kubik alleged adverse possession in his Complaint, he did not argue this theory in his closing arguments. Uncertain of whether Kubik abandoned his claim under adverse possession, the District Court made the following findings:

> 11. Despite Kubik's assertions that he maintained his fence, the Court finds the testimony of Hauck to be more credible as to the state of the fence running between the NW¼ and SW¼. Hauck testified that the fence was in a state of disrepair and would not have held the cattle he intended to graze on his new property. Therefore, the Court finds that the fence was not a substantial enclosure for the purposes of proving adverse possession.
> 12. No testimony was provided that improvements or cultivation was made to the land. It is CRP land and pasture land. The CRP was hayed every third year, and despite what appears to be the state of the fence, animals, at times over the years, were pastured on the land. No improvements were made to the land. Therefore, Kubik has not proven that he obtained adverse possession of the land due to cultivations or improvement. (R134:¶¶11-12)

39. The court's findings are supported by the evidence. Kubik does not establish the fence and land at issue was "protected by a substantial enclosure" under the first prong of the adverse possession elements. Here the testimony of Dominic Hauck, Alfred Sickler, and Bobby Kubas was uncontroverted that the 'fence' was severely dilapidated. (R142:185:16-25; 171:16-25; 173:12-17; 174:6-25)). Hauck testified that the "fence" at the time of purchase was merely an intermittent line of old posts, either broken, laid over or otherwise in disrepair with random one or two strands of rusted and broken barbed wire, the majority of which was on the ground, buried by sand, grass and debris. Id. Hauck took

photos of Kubik's other fence lines to depict the nature of what Kubik otherwise told the Court were fences 'enclosing' his entire quarter. (R122). Hauck described the 'fence' he took down was in much worse condition and would never hold livestock. Id. Kubik offered negligible contradictory evidence other than his self-serving testimony, and the Court found "the testimony of Hauck to be more credible as to the state of the fence running between the NW¼ and SW¼ ." (R134:¶¶11-12).

40. While Kubik claims the court's decision is clearly erroneous because it ignored testimony favorable to his case, this Court has held, "[i]n 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.

41. The law is well established that, "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." Gruebele v. Geringer, 2002 ND 38, ¶7, 640 N.W.2d 454; see also Benson v. Feland Bros. Props., 2018 ND 29, ¶15, 906 N.W.2d 98; Benson v. Taralseth, 382 N.W.2d 649, 653 (N.D. 1986); Torgerson v. Rose, 339 N.W.2d 79, 84 (N.D. 1983); Woodland v. Woodland, 147 N.W.2d 590, 597 (N.D. 1966). "Actual knowledge of the adverse possession is not necessary if there is a course of conduct directly hostile and these acts of hostility are 'unmistakably clear." Benson, 382 N.W.2d at 653.

42. The person 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, at ¶8. "All of the elements must be satisfied, and if any elements are not satisfied the possession will not confer title." Moody [v. Sundley],

2015 ND 204, ¶11, 868 N.W.2d 491. Whether an adverse possession has occurred presents a question of fact, which will not be reversed on appeal unless clearly erroneous. Moody, at ¶11; Gruebele, at ¶6.

43. In Gruebele, the owners of Tract 1 built a garage that encroached on Tract 2 and evidence showed that all predecessors shared the garage use. When Geringer later bought Tract 1 and tried to assert a claim of adverse possession against Tract 2 owner Gruebele, the Court denied the claim holding there was no evidence in the record to indicate an act by Tract 1 predecessor to establish hostile and exclusive possession of the garage. To be effective as a means of acquiring title, an adverse claimant's exclusive possession must be such as to operate as an ouster of disseisin of the owner of legal title, and the owner must be wholly excluded from possession by the claimant. 2 C.J.S. Adverse Possession §5.5, at 728 (1972). In proving all the elements of adverse possession, the claimant must prove actual possession of the property. See Grandin v. Gardiner, 63 N.W.2d 128, 133 (N.D. 1954).

44. Here, there is no evidence of Kubik's actual or exclusive possession of the fence and disputed land area. At best, the record contains testimony from Alfred Sickler, Scott Kubik, Bobby Kubas, Barry Steffan, and Richard Schmidt that each claimed to have built, repaired, rebuilt and maintained the fence and used the surrounding land for cattle, wildlife, or other agricultural or conservation purposes. (R89:¶8,11; R142:147:19-25; 171:16-25; 173:12-17; 174:6-25). Bobby Kubas testified to a significant rebuild of the fence in 2014. R142:171:9-17). Kubik testified that the last time his family ran cattle on the quarter was November 1997. (R142:16:9-14). Kubik's land, located in the SW¼, has been and continues to be in the Conservation Reserve Program since 1998 and pasture on the east

end. (R123; R142:54:17-22; 55:2-6) There has been no activity other than to exist as growing grassland. Id.

45. In Gimbel v. Magrum, the Magrums claimed they acquired ownership of the disputed property by adverse possession because they and their predecessors hayed the land annually for more than twenty years. The district court found the annual cutting of hay, "which occurred once annually the years it occurred, was not cultivation, continuous, and exclusive of Gimbel's right of title . . . ." The court also found the haying was not adverse to Gimbel. Id. at [¶8]. Gimbel testified he always allowed others to hay the disputed property for free because it was uneconomical to hay and he did not want the hay. In addition, it was undisputed that the property was raw pasture land existing in its natural state. Because the evidence supported the district court's findings concerning a lack of adversity and a lack of cultivation, the court's determination that the Magrums did not establish adverse possession was affirmed. Id. at [¶9].

46. In this case, it is undisputed that the land along the north boundary of Kubik's SW¼ has been utilized as grasslands in the Conservation Reserve Program and pasture since 1998. (R123; R142:54:17-22; 55:2-6). Kubik and his renter Barry Steffan testified that the north boundary is only sporadically hayed every third year through a rotational management of the CRP, which runs half the disputed area from west to east, and the far east half is pasture. (R142:57:13-19).

47. Alfred both testified at trial and affirmed the testimony contained within his affidavit which states, "Haying the disputed property for free has been tolerated because it was uneconomical to hay the strip around the fence and they prefer to leave it for wildlife habitat." (R89:¶11). Like the case in Gimbel v. Magrum, the Sickler/Hauck property and

the Kubik property are raw grass land existing in their natural state, which does not lend to a claim of adverse possession in light of the lack of adversity, lack of cultivation, and lack of actual, distinct, hostile, or exclusive ownership. Id. at [¶9]. See also Moody v Sundley, 2015 ND 204 (holding in the midst of conflicting evidence about the location of playground equipment, Sundley failed to establish his predecessors-in-interest had actual possession of the disputed property, and he therefore failed to establish the boundary of his property by adverse possession or by acquiescence.)

48. Because the evidence supports the district court's findings that the fence was not a substantial enclosure and that there was a lack of cultivation or improvements, the court's determination that Kubik did not establish adverse possession is not clearly erroneous.

49. Kubik's focus on appeal is exclusively on counting and identifying a 20-year window of time, but ignores the above elements required to be proven within either of Kubik's alleged 20-year windows to meet his burden. Kubik also fails to address the significance of the language "for at least 20 years **prior to the litigation**." Hauck's defense of laches defeats Kubik's alleged 20 years from the commencement of his litigation on July 9, 2020. See Defenses of Laches and Good Faith Purchaser Argument within Appellee's Brief, Infra at ¶75.

II. The District Court Properly Found That Kubik Failed To Meet His Burden To Prove That He Is Entitled To Title By Acquiescence.

50. Next Kubik asserts ownership of the property by acquiescence. 'To establish a new boundary line by the doctrine of acquiescence, it must be shown by clear and convincing evidence that both parties recognized the line as a boundary, and not a mere barrier, for at least 20 years prior to the litigation.' Brown v. Brodell, 2008 ND 183, ¶9, 756 N.W.2d 779.

51. Kubik commenced his litigation by service of his Summons and Complaint via an

Affidavit of certified mail dated July 9, 2020. Although Kubik believed the fence to be the boundary, mutual recognition requires that Dominic Hauck, as well as Alfred Sickler, Adzie Barstow, and David A. Sickler as Co-Trustees of the Trust also recognized the fence as the boundary *for 20 years prior to the litigation*. While Kubik gave self-serving testimony of a verbal understanding with Dale Sickler, an original Trustee, claiming ownership belonged to Kubik, it is undisputed that there is no written agreement as the basis for Kubik's claims to satisfy the statute of frauds. Kubik admits he never communicated with Adzie Barstow or David A. Sickler as Co-Trustees with Dale Sickler from 1994 when the Trust was established through Dale Sickler's death in 2016. (R142:50:21-24; 76:12-18; 228:19-24). It is further undisputed that Kubik never communicated with Alfred Sickler, Adzie Barstow, or David A. Sickler, who were the three Successor Co-Trustees of the Trust from 2016 to present. Id.

52. In Gimbel v. Magrum, the Court held:

> [¶11] The doctrine of acquiescence applies when parties mutually mistake a boundary as a property line. Sauter, 2018 ND 57, ¶10, 907 N.W.2d 370. "The doctrine of acquiescence is separate from adverse possession and may apply when all of the elements of adverse possession cannot be met. See James v. Griffin, 2001 ND 90, ¶10, 626 N.W.2d 704. 'The doctrine of acquiescence allows a person to acquire property when occupying part of a neighbor's land due to an honest mistake about the location of the true boundary, because the adverse intent requirement of the related doctrine of adverse possession could not be met.' Fischer v. Berger, 2006 ND 48, ¶12, 5 710 N.W.2d 886.

A. Kubik Fails To Show Mutual Recognition.

53. Because the parties have never met nor communicated for the four years prior to Kubik's lawsuit, he must prove, by clear and convincing evidence, that the parties' mutual recognition of the boundary may be inferred by conduct or silence. Brown, supra at ¶10. The determination whether there has been mutual recognition of a boundary is a question of fact,

which is reviewed under the clearly erroneous standard on appeal. Id.; See also Moody v Sundley, 2015 ND 204, ¶ 23, 868 N.W.2d 491.

54. In Gimbel v Magrum, the Magrums claimed they, their predecessors, and Gimbel all mistook the trail as the property line. Id. at ¶12. They argued the district court erred by finding no mutual mistake concerning the property line because the court improperly imported elements of adverse possession into its acquiescence analysis. Id at ¶13. "Appellate courts review the record and findings as a whole and if the controlling findings are supported by the evidence, they will be upheld on appeal notwithstanding immaterial misstatements in the lower court's decision." Puklich v. Puklich, 2019 ND 154, ¶45, 930 N.W.2d 593. The district court discussed the lack of improvements made to the disputed property and used the terms "hostile" and "notice" while explaining its finding that Gimbel did not acquiesce in the trail as a property line. Although the court used terms and concepts that overlap with adverse possession analysis, its controlling finding—that Gimbel did not recognize the trail as the property line—supports a lack of acquiescence. Id at ¶14.

55. Kubik relies upon Sauter v. Miller, 2018 ND 57. In Sauter, the Millers and Julie Sauter own property with a common border in Bowman County. The parties disputed the ownership of a 55-60 foot strip of land equaling approximately two acres located on the Sauter side of the fence separating the properties. Id. at ¶3.

56. A fence ("Original fence"), running east and west along the Sauter property and the Miller property was constructed sometime before the 1960s and remained in place until it was removed by the Millers in 2014. The Millers did not have the property surveyed prior to the purchase, but subleased the Sauter property in 2013 and directly leased the Sauter property in 2014. In 2013, the Millers wanted to drill a water well on their property which required the

land to be surveyed. The survey revealed the Original fence did not follow the actual boundary line of the two properties. The Millers tore down the Original fence, constructed a new fence on the surveyed boundary line, and drilled a water well on the disputed property. Julie Sauter brought an action against the Millers, and the district court quieted title to the property in favor of Julie Sauter and dismissed the Millers' counterclaims. The district court found Sauter was the legal owner of the disputed property under the theories of adverse possession and acquiescence. The district court also ordered damages for breach of contract, trespass, and attorney's fees in favor of Sauter.

57. In Sauter the Court explained, "The doctrine of acquiescence allows a property owner to acquire neighboring property due to an honest mistake over the location of the boundary line." Brown v. Brodell, 2008 ND 183, ¶9, 756 N.W.2d 779. "To establish a new boundary line by the doctrine of acquiescence, it must be shown by clear and convincing evidence that both parties recognized the line as a boundary, and not a mere barrier, for at least 20 years prior to the litigation." Id. **A boundary line acquiesced in must be definite, certain, and not speculative, and open to observation**. Manz v. Bohara, 367 N.W.2d 743, 746 (N.D. 1985). **Moreover, acquiescence requires possession up to a visible line marked clearly by monuments, fences, or the like. Id. The burden of proving acquiescence lies with the party claiming property to the exclusion of the true owner**. Brodell, 2008 ND 183, ¶10, 756 N.W.2d 779. "Whether there has been mutual recognition of a boundary is a question of fact, and will be reviewed on appeal under a clearly erroneous standard." Id. at ¶10.

58. ***Unlike the facts in Sauter wherein the Millers did not offer any disputing evidence or call any previous owners to testify***, here Dominic Hauck has offered significant disputing evidence having called Alfred Sickler as a prior owner and one of three Co-Trustees, as well

as Bobby Kubas, a Sickler renter, and Bob Procive, the expert land surveyor, to testify and dispute Kubik's claims. Hauck also asserts numerous affirmative defenses including laches and his status as a good faith purchaser for value without notice of Kubik's claim, ***none of which were addressed in <u>Sauter</u>***.

59. Here, the Court found:

> 21. After review of the evidence, the Court finds that Kubik has not met his burden to show that the fence was considered a boundary by both he and the Sicklers, and later Hauck. The Court did not receive any evidence as to whether the co-Trustees believed the fence to be the boundary line. Unfortunately, the parties who could provide this information are deceased. This, however, does not change Kubik's burden to show that the parties mutually recognized the fence as the boundary between the NW¼ and the SW¼.
> 22. Most of the evidence simply shows who the parties believe own the fence. That is not the issue. The question again is whether both parties mutually recognized the fence as the boundary, rather than a barrier.
> 23. From the evidence provided, the Court finds that there was not a mutual recognition that the fence was a boundary. Sicklers moved the fence at times, which supports a finding that the fence was only a barrier, as it was moved. The fence was there to contain livestock, not to act as a boundary.
> 24. Without more definite evidence or testimony that the co- Trustees of the Sickler Trust intended the fence to be a boundary versus a barrier, Kubik fails to meet his burden of proof. (R134:¶¶21-24)

60. Alfred Sickler testified that the fence at issue is not the "original fence", but in fact has been removed, replaced, fixed up and moved multiple times during the statutory period in question, all work completed by Sicklers, their renters, and most recently, Dominic Hauck. At no time amidst any of these prior replacements, has Kubik asserted a claim to the subject property nor contributed to the costs or labor associated with the subject fence. (R89¶8; R142:147:19-25). Other than his self-serving testimony, Kubik does not offer a single receipt of expenditures toward the fence. (R76:8-11). Hauck further denies Kubik's claims to the land, all of which property lies in its natural state as uncultivated pasture and CRP on Kubik's quarter. (R123; R142:54:17-22; 55:2-6).

61. Bobby Kubas testified that he was a renter from 2014 through 2018. He testified that his rental contract in 2014 and 2015 was made through Dale Sickler as Co-Trustee of the Trust and required him to maintain the fence in question. Bobby testified to a major rebuild of the fence in 2014 on the south side of the NW¼ of Section 2 as it was significantly dilapidated with wires broken, buried in the grass or missing, posts rotted and broken, etc. and required him to replace most of the fence including a corner post on the southwest corner to fence in his cattle. (R142:171:16-25; 173:12-17; 174:6-25; R113). Bobby's rental contracts from 2016 through 2018 were made through Alfred Sickler as Successor Co-Trustee of the Trust and contained the same requirement to maintain the fence in question. (R142:171:1-7; R103). Bobby ran approximately 70 pair of cattle on the acreage in 2014-2016. Throughout the four years of renting the NW¼, Scott Kubik never contacted Bobby Kubas about the fence, Bobby's labor and costs of maintenance, or any claim of ownership. (R142:172:24-25; 173:1-7; 176:1-14). Bobby testified that Kubik's quarter consisted of CRP and pasture grass. R142:175:8-11).

62. Alfred Sickler attested to his recollection of the fence's purpose as well as his knowledge of his siblings' treatment of the fence as a mere barrier for livestock throughout his time on the homestead, during his brother Dale's operations on the land, and tenants who ran livestock on the Trust lands. Kubik tries to explain away the years of Sicklers, the Trust, and Sickler tenants fixing the fence by asserting he had a 'verbal understanding' with Dale Sickler that the fence belonged to Kubik but he was permitting its use conditioned upon everyone else fixing it. Kubik's assertion fails under the statute of frauds as no writing exists to prove Kubik's claim, nor does Kubik have any independent evidence to support his self-serving explanation.

63. Moreover, Dale Sickler was only one of three Co-Trustees of the Trust that owned the land. Kubik offered no evidence that the remaining two Co-Trustees recognized or agreed to the fence as a boundary. In fact the record is clear that all three Co-Trustees have consistently acted together to approve telephone easements in 2012 related to the quarter (R93), mineral leases of record, etc. When Dale Sickler died in 2016, the additional two remaining Co-Trustees, Adzie Barstow and David A. Sickler, acted to appoint Alfred Sickler as a Successor Co-Trustee to assume Dale's former position. (R142:153:14-16).

64. Kubik admits that at no time has he taken any action to communicate to either the original Co-Trustees, Adzie Barstow and David A. Sickler, or Alfred Sickler as Successor Co-Trustee concerning his current claims of the fence as a boundary. (R142:50:21-24; 76:12-18; 228:19-24). Even when the property was placed for sale at a public auction held November 2018, Kubik admits knowing of the sale, and attendance at the sale, but never talked to any of three Co-Trustees as owners of the disputed fence and related land. Id.

65. Here, Hauck and Sickler attested to similar facts that support a lack of acquiescence through conduct, or silence. The evidence of conduct of the Sicklers was that they and their renters utilized the fence and corresponding land area whenever and however they chose. Alfred describes how the fence migrated, was used by them and their renters, and was rebuilt over the years due to the soil conditions. Sickler and Hauck identified the wire positioning on the north side of the posts to contain livestock run on the Sickler/Hauck land. Sickler also verifies the undisputed status of the land on and around the fence, as raw grassland existing in its natural state. See Gimbel Supra. Sickler's acts of growing grass next to Kubik's grass (held in CRP), even if Kubik was allowed to hay close to the fence every three years, does not satisfy nor establish mutual recognition by Sickler/Hauck. Gimbel supra at [¶8]. At best, the

evidence shows both parties grew grass side by side, they may have each used and repaired the fence, and otherwise Sicklers and their renters used the land, let it sit idle for wildlife, or randomly every third year permitted Kubik to hay near the fence. None of these acts suffice to meet Kubik's burden to clearly prove mutual recognition of a boundary. Id.

66. Hauck has counterclaimed for title to be quieted as to Kubik's claims consistent with his survey. The Court has previously explained:

> [§27] The purpose of a quiet title judgment is to provide clarity and finality to legal ownership of a disputed parcel of property. See 74 C.J.S. Quieting Title § 1 (2002) (the purpose of a quiet title action is "to clear up all doubts or disputes concerning the land"). In order to create that clarity and finality, the judgment must precisely describe the property in which title is quieted. Thus, N.D.C.C. §32-17-04 requires that, in a quiet title action, the property must be described in the complaint with such certainty as to enable an officer upon execution to identify it." In Ward v Shipp, 340 N.W.2d 14, 17 (N.D.1983), this Court held that, in a quiet title action, evidence describing the property by referencing a fence line was insufficient to adequately describe the property. If the judgment in this case were recorded it provides little or no permanent guidance as to the exact property included within the judgment. A judgment quieting title to land extending 116 feet southward from "the southern edge of the fence on the Smetana property" is only as final as the amount of time it takes to dismantle a fence. It is easy to imagine that in ten, twenty, or theiry years the fence will be gone. At that point, this quiet title judgment would be wholly ineffective. A quiet title judgment should include precise description, rather than merely referencing an impermanent fence. Farmers Union Oil Company v. Smetana, 2009 ND 74.

67. Kubik does not know the distance of the disputed area. He testified that he "stepped off the distance on the southwest corner from the new fence to the green treated post, which he asserts is 15 feet. Kubik admits that he did not take any action to determine the distance on the east end, but rather 'assumes it is a straight line and therefore 15 feet.' Kubik's lack of certainty as to the disputed area coupled with the dilapidated state of the old fence establish additional basis to deny his claims to quiet title by either adverse possession or acquiescence under N.D.C.C. §32-17-04.

68. Alfred Sickler testified that he and his siblings as co-trustees have paid all taxes on the full 160.08 acres, have signed all oil and gas leases governing the full 160.08 acres, and have additionally signed all easements of record concerning the 160.08 acres.

69. Alfred Sickler adamantly denies that the fence was anything more than a barrier utilized to contain livestock on the Sickler/Hauck land.

70. **The law is clear that a property owner does not acquiesce in a fence as a boundary merely because he builds the fence upon his own property and not upon the property line.** Production Credit Ass'n of Mandan v. Terra Vallee, Inc., 303 N.W.2d 79, 85 (N.D. 1981). "The intent must have been to establish the fence as the boundary, not a mere barrier between the properties." Sauter at ¶21.

71. In this case, the fence was nothing more than an unkept barrier that was left in disrepair as testified by Dominic Hauck. Unlike the facts in Sauter, here there is no evidence of intent. Kubik offers **no evidence of mutual recognition by all the Co-Trustees on behalf of the Sickler Trust,** no corresponding lease, deed, nor an uninterested witness, rather just self-serving and unsupported allegations by Kubik alone.

72. The Court should be troubled by the lack of evidence presented by Kubik in this case. The doctrine of acquiescence evolved from the harsher rule of adverse possession, which requires that the property of another be held by open and hostile possession. The burden of proving adverse possession rests with the person alleging it and must be established by clear and convincing evidence. Torgerson v. Rose, 339 N.W.2d 79, 84 (N.D. 1983). This burden equally applies to one claiming property to the exclusion of the true owner through the doctrine of acquiescence. Trautman v. Ahlert, 147 N.W.2d 407, 413. The Supreme Court in Manz v. Bohara, 367 N.W.2d 743, 748 (N.D. 1985), emphasized**, "To conclude otherwise**

would only serve to encourage aggressive, assertive, action across boundary lines, and not good neighborliness. Further, if we did not require this quantum of proof we might flood our courts with boundary disputes to the detriment of other cases needing our attention."

73. The evidence supports the district court's findings that Kubik failed to prove that both parties recognized the line as a boundary, and not a mere barrier, for at least 20 years prior to the litigation. Therefore the court's determination that Kubik is not entitled to title through the doctrine of acquiescence is not clearly erroneous.

74. Based on the District Court's decision that Kubik did not meet his burden of proof to quiet title in his name, the District Court did not address Hauck's defenses of laches or good faith purchaser without notice. (R129:¶26) In the event this Court determines that the District Court erred, both of Hauck's defenses should be addressed on remand.

B. Kubik's Claims Are Barred By Laches And Hauck's Status As A Good Faith Purchaser Without Notice Of Kubik's Claims.

75. Hauck asserts that Kubik's claims are barred by the affirmative defense of laches. (R8:¶4i). The Court has summarized the doctrine of laches in North Dakota: "Laches is a delay or lapse of time in commencing an action that works a disadvantage or prejudice to the adverse party because of a change in conditions during the delay. However, the mere delay or lapse of time in commencing an action does not of itself constitute laches. Whether or not laches bars a claim must be determined by examining the underlying facts and circumstances of each particular case." Williams County Social Services Bd. v. Falcon, 367 N.W.2d 170, 174 (N.D. 1985) (quotation and citations omitted).

76. In Siana Oil & Gas Co.,LLC, vs. Dublin, 2018 ND 164, the Supreme Court stated:

> [¶24] Laches does not arise from a delay or lapse of time alone, but is a delay in enforcing one's rights which works a disadvantage to another. Sall v. Sall, 2011 ND 202, ¶14, 804 N.W.2d 378. The party against whom laches is sought to be invoked must be actually or presumptively aware of his rights and must fail to assert them against a party who in good faith permitted his position to become so changed that he could not be restored to his former state. Loberg v. Alford, 372 N.W.2d 912, 919 (N.D. 1985). The party invoking laches has the burden of proving he was prejudiced because his position has become so changed during the delay that he cannot be restored to the status quo. Sall, at ¶14. Cases involving laches must stand or fall on their own facts and circumstances. Loberg, at 919. Laches is generally a question of fact. Bakken v. Duchscher, 2013 ND 33, ¶20, 827 N.W.2d 17. Whether a party acted in good faith is also a question of fact. See Desert Partners IV, L.P. v. Benson, 2016 ND 37, ¶13, 875 N.W.2d 510.

77. In analyzing application of the rule of laches, our Supreme Court has looked to other jurisdictions for guidance citing:

> In Eggart v. Tennant, 260 Ala. 9, 68 So.2d 714 (1953), the Alabama Supreme Court applied laches to a case in which a deed had apparently been delivered forty years earlier but subsequently lost. The Alabama Supreme Court stated: The rule of laches is well understood. It precludes relief where, as the result of delay, the original transactions have become so obscure by lapse of time or loss of evidence as to render it difficult or hazardous to do justice or danger of doing injustice. **This rule has application where the matter is not pressed until after the death of adverse party or 18 material witness, or loss or destruction of the evidence that could have explained or denied the contentions made by adverse interest**. (Emphasis added) Swanson v. Swanson, et al., 2011 ND 74, ¶47.

78. Here, Kubik fails to take any action to validate his asserted claims of verbal agreements regarding ownership of the fence or his claim of its mutual recognition as a boundary until after the death of Dale Sickler who could have explained or denied the contentions raised by Kubik. In fact, Kubik failed to take any action to put the Co-Trustees or Successor Co-Trustees or Hauck as a good faith purchaser, on notice of his claimed ownership. Dale Sickler died in 2016. (R142:153:14-16). Kubik admits his knowledge and attendance of public auction of the NW¼ of Section 2, in November 2018. (R142:232:2-3). Hauck had the NW¼ surveyed and the Land Surveyor Procive recorded the Corner

Monument Record December 12, 2018 as Document #C5014. (R99). A Trustees Deed recorded ownership to Hauck on January 24, 2019. (R91). Kubik failed to take action to protect his asserted claims until after Hauck, in good faith, purchased and surveyed the land in November 2018, then in August 2019, tore out the dilapidated structure and put up a new fence relying upon professionals and the Co-Trustees/prior owners, as he diligently verified his title, acreage, and boundaries.

79. Kubik by contrast, sat idly by, despite his present assertions that he claimed an interest that could have been clarified by Co-Trustee Dale Sickler **years prior** to Hauck's purchase and investment in his property and improvements, and certainly prior to the costs of this litigation. Kubik took no action to reduce his alleged agreement to writing or declare his claim during the years from 1996-2016 when Dale Sickler operated on the NW¼. Kubik had every opportunity upon Dale Sickler's death in 2016 through the time of the public sale in November 2018, to contact the Co-Trustees and Successor Co-Trustees to secure his claim in writing or seek to quiet title through the Court. Instead Kubik talked to none of the Co-Trustees or Successor Co-Trustee; he didn't talk to the renters of the Sickler property; nor did Kubik reach out to Dominic Hauck upon his purchase at the public sale, which Kubik acknowledges having attended. Kubik's delay in asserting his claim until January 2020, has placed both the Successor Trustees and Hauck in prejudiced positions and unable to be restored to the status quo. Dale Sickler's testimony is lost; the public sale was held; 160.08 acres were sold with funds transferred from Hauck to the Successor Trustees; a survey was purchased; monuments were recorded in the public record; the dilapidated structure was torn down; and a new fence built at the expense, time, and labor of Hauck and his family. Hauck cannot be restored to the status quo that existed prior to 2016 when Kubik claims to have had his 'agreement' with

former Co-Trustee Dale Sickler.

80. Hauck asserts that he is a purchaser who in good faith and for valuable consideration acquired title that first is duly recorded without notice of Kubik's asserted claims. (R8:¶6).

81. Under N.D.C.C. § 32-04-17, a good faith purchaser must acquire rights without actual or constructive notice of another's rights. Wehner v. Schroeder, 335 N.W.2d 563, 565 (N.D. 1983). Actual notice consists of express information of a fact, N.D.C.C. § 1-01-23, while constructive notice is notice imputed by law to a person having no actual notice. N.D.C.C. § 1-01-24.

82. N.D.C.C. § 01-01-21 defines Good Faith as: "Good faith shall consist in an honest intention to abstain from taking any unconscientious advantage of another even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious." Under N.D.C.C. § 1-01-25, a person who has actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact and who omits to make an inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself. The issues of good faith and constructive notice are similar in that they both require an examination of the information possessed by a person. The information, however, need not be so detailed as to communicate a complete description of an opposing interest; instead, the information must be sufficient to assert the existence of an interest as a fact, which in turn gives rise to a duty to investigate. In making inquiry, a person must exercise reasonable diligence; a superficial inquiry is not enough. A person who fails to make the proper inquiry will be charged with constructive notice of all facts that such inquiry would have revealed.

83. Hauck testified that his pre-auction inspection of the property showed the subject

fence to be in significant disrepair, wires broken and buried in the sand and tall grass, posts broken and rotted, and in those places wires remain affixed were on the north side of the posts. (R142:185:16-25). Alfred Sickler testified similarly that he had inspected the fence, described its broken-down state, and verified the wires to be on the north side of the posts consistent with his position that the fence belonged to the Sicklers for its use when cattle were run on the property.

84. Hauck testified that at the public land sale, the auctioneer announced to all buyers that as to all fences, if the wire was on your side of the posts, then the fence was more likely or most likely owned by you. (R142:234:22-25, 235:1-5). Hauck inquired of Alfred Sickler, who has consistently asserted the fence to be owned by Sicklers and utilized as a barrier for running cattle by Sicklers or their renters. After Hauck purchased the property at the public auction November 8, 2018, he then contracted with Bob Procive, a professional land surveyor, to have the south boundary of the NW¼ of Section 2 surveyed and pins set in order to build a new fence on his property that would be utilized to hold his cattle. (R142:189:5-17).

85. Hauck testified that over a four-day period in August 2019, he and his family tore out the wires and debris buried in the tall grass, picked up broken and rotted wooden posts, and pulled other posts of the prior dilapidated structure. (R142:211:16-25; 213:1-12). Then utilizing the pins and lathes of the surveyors, Hauck began building a fence on his side of the boundary marked for the NW¼ of Section 2. (R142:209:18-25; R106-107, and R62). In the midst of building the fence, Scott Kubik drove up to the location where Hauck was building the fence and claimed ownership of the old structure as the boundary between the NW¼ and SW¼. (R142:208-211).

86. Hauck testified that he showed Kubik the surveyed pins and lathes. (R142:210:4-8;

R106). Kubik admits he was shown the pins and lathes.(142:75:18-25) Nonetheless, Kubik then proceeded to file a complaint against Hauck with the Dunn County Sheriff's Office. (R85). Hauck testified and the photos document that the land in dispute was all tall grass at the time he put up the new surveyed fence. (R105-122).

87. The officer testified that he never interviewed Hauck or any other persons, no further investigation was conducted, the report was referred to the Dunn County States Attorney, and no criminal charges were ever brought. (R142:106:20-25, 107:1-11).

88. Hauck testified that due to the behavior of Kubik, he took measurements of the new surveyed fence and it distances from the holes and/or remnants of the dilapidated fence. (R142:221:7-25; 222:1-14). (R105-119). As verified by the land surveyor, the distance on the southwest corner is shown to be 11 feet from the surveyed corner pin to the green treated corner post placed by Bobby Kubas in 2014. (R142:198:16-25; R101; R113-116). The distance on the southeast corner is shown to be approximately six (6) feet from the pin to a post hole remnant of the prior structure. (R142:199:1-8; R109).

89. Hauck asserts that the difference in the disputed area from 11 feet on the west end to 6 feet on the east end is consistent with Alfred Sickler's testimony that the fence moved over the years as erosion buried the fence and it had to be rebuilt. (R142:199:8--202:18) Bobby Kubas, further testified to a significant rebuild in 2014 and placing of a green treated corner post depicted in Exhibits J9, J10, & J12. (R142:171:16-25; 173:12-17; 174:6-25; R113-116).

90. Each of Hauck's steps from pre-purchase inspection, discussions with the owners/Co-Trustees, review of the public records, verification of the acreage he purchased as consistent with taxes on the property, notice to his neighbors of his intent to run cattle in his quarter, followed by survey of the land, all demonstrate his Good Faith and reasonable diligence prior

to taking action to purchase the property as well as prior to the tear down of the old structures and building of the new fence on the Northwest Quarter. No evidence was presented by Kubik to defeat or dispute Hauck's status as a good faith purchaser without notice of Kubik's claims.

III. The District Court Appropriately Found Kubik's Action For Trespass Failed, And No Evidence Of Damages Was Proven By Kubik.

91. Because Kubik fails to meet his burden to support his claims for adverse possession and acquiescence, his related claims as to trespass and willful damage to property must also fail with Hauck as the rightful owner of the disputed property. Should the Court give merit to Kubik's position, Hauck argues that N.D.C.C. §32-03-09.1 governs damages. Kubik's Complaint seeks 1) Quiet Title; 2) Judgment ordering Hauck to remove the new fence and construct a fence along the old fence line at the sole cost of Hauck; 3) Judgment for damages in an amount to be decided at trial; and 4) Kubik's attorneys fees and costs. (R1:¶1-4).

92. N.D.C.C. §32-03-09.1 provides:

> The measure of damages for injury to property caused by the breach of an obligation not arising from contract, except when otherwise expressly provided by law, is presumed to be the reasonable cost of repairs necessary to restore the property to the condition it was in immediately before the injury was inflicted and the reasonable value of the loss of use pending restoration of the property, unless restoration of the property within a reasonable period of time is impossible or impracticable, in which case the measure of damages is presumed to be the difference between the market value of the property immediately before and immediately after the injury and the reasonable value of the loss of use pending replacement of the property. Restoration of the property shall be deemed impracticable when the reasonable cost of necessary repairs and the reasonable value of the loss of use pending restoration is greater than the amount by which the market value of the property has been diminished because of the injury and the reasonable value of the loss of use pending replacement.

93. In Schulz v Helmers, 2021 ND 158, the Court explained the two measures of damages, stating:

> "We agree that the lesser of the cost to repair or the diminution in value is the proper measure of damages for a breach of a duty to repair in a lease. The rule for damages in construction contract cases is based on avoiding windfalls and economic waste, and the same rationale applies to damages for a breach of the duty to repair related to a lease. The cost to repair generally will be the correct measure, but it is only a place to start in determining the correct amount of damages. **The non-breaching party should not be awarded an amount that will put them in a better position than they would have been in if the breach never occurred**. We conclude either the cost of repair or the diminution of value may be an appropriate measure of damages in this case." Citing Three Aces Props. LLC v. United Rentals (N. Am.), Inc., 2020 ND 258, ¶18.

94. The only evidence Kubik presents in support of his claims for damages is a single estimate from a primarily oil field-based fencing company. (R86). Both Alfred Sickler and Dominic Hauck testified as to the dilapidated state of the old fence. (R142:185:16-25). For Kubik to be awarded the tear-down of the new fence Hauck built, and re-construction of a new fence "on the old fence line," would award Kubik a significant windfall. Dominic testified that the cost of tearing out the old fence was two days labor by him and his family plus constructing the new fence totaled approximately $1900 and 2 additional days labor. (R142:212:22-25, 213:1-23). Hauck acknowledged that he inadvertently mowed about a foot onto Kubik's side of the surveyed boundary when putting up the new fence in an effort to have a clear view of the lathes which marked the boundary. (R142:215:2-3).

95. Kubik offered no evidence as to damages for the foot-wide strip of grass mowed. Kubik presented no evidence to support an award of damages of any nature, including for diminution in value to Kubik for the use of the land area in dispute. The District Court therefore denied Kubik's request for damages for the strip of land that Hauck mowed while putting up his new fence. The District Court explained:

> ¶29 …Kubik has not proven that he incurred any damage from Hauck mowing a small strip of grass, on Kubik's property, while Hauck was installing his new fence. The Court did not hear any testimony that Hauck took this mowed hay

> for his own use or profit. The only testimony the Court heard was that the strip was mowed so that it was easier to build the fence. Kubik is not currently running any livestock in this area, so he did not lose hay for gazing purposes. ¶30 For these reasons, the Court DENIES Kubik's Request for damages for the mowed strip of grassland/CRP. (R134:33-34).

96. Because the evidence supports the district court's findings, the court's determination is not clearly erroneous.

CONCLUSION

97. For the reasons stated herein, the Supreme Court should affirm the District Court's Judgment in all respects.

Respectfully submitted this 30th day of August, 2022.

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CERTIFICATE OF COMPLIANCE

98. The undersigned hereby certifies, in compliance with N.D.R.App.P 32(a)(8)(A), that the Brief of Defendant and Appellee, Dominic Hauck, was prepared with Times New Roman proportional typeface, 12 pt. font, and totals 36 pages.

Dated this 30th day of August, 2022.

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Scott Kubik, Appellant/Plaintiff, v. Dominic Hauck, Appellee/Defendant,	)	**DECLARATION OF SERVICE** **Supreme Court Case No. 20220091** (District Court Case No. 13-2020-CV-00079)

1. I, Sandra K. Kuntz, certify that on August 30, 2022, a true and correct copy of the following document was filed and served through the North Dakota Supreme Court E-Filing Portal:

   a. Appellee's Brief

2. In accordance with the requirements of the North Dakota Rules of Civil Procedure and North Dakota Rules of Appellate Procedure, a copy of the foregoing document was served to the following email addresses:

Jordan L. Selinger jordanselinger@kbrslawfirm.com	Clerk of the Supreme Court supclerkofcourt@ndcourts.gov

3. That to the best of declarant's knowledge, information, and belief, such address as given above was the actual email address of the parties intended to be so served.

4. I certify under penalty of perjury that the foregoing is true and correct.

Dated this 30th day of August, 2022. /s/ Sandra K. Kuntz

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