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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Lincoln Land Development, LLP,	)	
	)	Supreme Court
Appellee,	)	Case No: 20180117
	)	
vs.	)	
	)	
City of Lincoln,	)	
	)	
Appellant.	)	

*** *** ***

APPEAL FROM FINAL ORDERS, JUDGMENT, AND AMENDED JUDGMENT IN
THE DISTRICT COURT, SOUTH CENTRAL JUDICIAL DISTRICT,
BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE JAMES HILL
CIVIL NO. 08-2015-CV-00348

REPLY BRIEF OF APPELLANT CITY OF LINCOLN

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I. ARGUMENT

A.

1. The Court's plain errors and abuses of discretion are apparent from the record.

[¶1] Under the clear and convincing evidence standard, the court correctly concluded City established a prescriptive easement in Lagoon Road ("the road") prior to the 2011 improvement project. (app.66,73-75). In fact, the court concluded based on the same heightened legal standard that the prescriptive easement had been established during the ownership of LLD's predecessor in interest:

> The [evidence] clearly and convincingly show[s] the Subject Property has been used as an access road by the City [] through the lawful succession of ownership dating back to 1984, when CIP was the owner, through the [] eventual[] purchase by [LLD] in 2005 [] More than 20 years have elapsed.

(app.63). None of the court's factual findings or conclusion City had a prescriptive easement are being appealed.

[¶2] However, contradicting the prescriptive easement conclusion and contradicting *Reichman*[1], the court also concluded the prescriptive easement was considered a "lawful taking" without just compensation and thus supported inverse condemnation. (app.75). The court ruled, "[t]he proof of [the prescriptive easement] defense negates [the inverse condemnation claim], which relies on a theory of an 'unlawful' governmental taking. However the issue of just compensation remains."

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[1] *McKenzie Cty. v. Reichman*, 2012 ND 20, ¶38, 812 N.W.2d 332, 345 ("Reichman is not entitled to damages for inverse condemnation because the road became a public road before she obtained her interest in the land in 2000. [] Reichman therefore acquired her land with the burden of the prescriptive road upon her land, and the district court did not err in dismissing her claim for inverse condemnation." (citations omitted)).

(app.75) (emphasis in original). The court erroneously conflates the concepts of prescriptive easement and taking:

> [T]he Court must determine whether there existed an easement by prescriptive use. **If so, the issue of extent and value of "taking" is relevant for determination by a jury.**
>
> (. . . .)
>
> At the same time the Court finds that not only is the prescriptive easement in existence but the general scope of the easement is discernable from the undisputed records. (Exhibit P-1). **Its value is for a jury to decide**.

(app.59,66-67) (emphasis added). And it never explains why compensation is required where a prescriptive easement is validly established. N.D.C.C. § 24-07-01 clearly does not require payment. *Reichman*, 2012 ND 20 at ¶11 ("A party claiming a road by prescription under [Section] 24–07–01, must establish [] the general, continuous, uninterrupted and adverse use of the road by the public under a claim of right for 20 years.").

[¶3] While LLD argues City has waived its appeal because it did not file the trial transcripts, *see* Appellee Brief at ¶7, the plain errors and abuses of discretion are readily grasped without reference to trial transcripts.[2] The examples from the post-bench trial order are just a few samples of those clearly discernible errors and misapplication of law.

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[2] Filing of trial transcripts on appeal is not a strict requirement where conclusions, jury instructions, and verdict forms are plainly erroneous, affect substantial rights, and/or constitute an abuse of discretion. *See Bakke v. D & A Landscaping Co., LLC*, 2012 ND 170, ¶ 15, 820 N.W.2d 357 ("[]Rule 51 has long been read to allow appellate review of plain jury instruction errors even absent timely objection[]."); *Rittenour v. Gibson*, 2003 ND 14, 656 N.W.2d 691 (held: failure to instruct jury on duty to warn erroneous and affected substantial rights); *Hildenbrand v. Capital RV Ctr., Inc.*, 2011 ND 37, ¶ 16, 794 N.W.2d 733, 738 (reviewing special verdict under abuse-of-discretion, which includes "misinterpret[ing] or misapply[ying] the law." (citations omitted)).

[¶4] The same plain errors of law in the order are found but even more dramatically in the Charge to the Jury (app.107) and the Curative Instruction (app.133), where the jury was twice instructed a prescriptive easement is a taking requiring just compensation:

> At the same time the Court has also determined legally that [City] had, by the year 2011, acquired a right of access, known as a prescriptive easement, on a portion of the property belonging to [LLD] upon which Lagoon Road was built/improved, which, as noted, the Court has concluded **constitutes a "taking for public use" by the City of Lincoln**.

(app.107,136) (emphasis added). The jury was further twice instructed it would decide the scope of City's prescriptive easement and value of property taken: "There remains a factual dispute as to the precise legal description and scope of the prescriptive easement and the value of the property taken, if any, in the construction/improvement of Lagoon Road in 2011." (app.107,133).

[¶5] Despite paying "lip service" to the prescriptive easement and declaring it to be a jury issue, the special verdict form (app.135) dealt the "fatal blow" to City's entirely valid prescriptive easement established prior to LLD taking title to the property. The verdict form did not include a single question that would have allowed the jury to determine the scope of City's prescriptive easement, but rather only asked whether the "**taking for public use**" was the proximate cause of damages, and if so, how much. (app.135-136) (emphasis added).

[¶6] Based on plainly erroneous instructions and verdict form, the jury could have only believed City's prescriptive easement was just another form of "taking for public use" demanding just compensation, contrary to ND law. This is not the law in ND. *Reichman*, 2012 ND 20 at ¶38. The court was operating under a plainly erroneous

understanding of ND law and it misapplied that faulty reasoning at both trials. Given plain error and abuses of discretion, this Court need not consider arguments misstating the court's findings and ignoring other findings not being appealed. The Court also need not consider attempts to distinguish away controlling case law demonstrating categorically that City's prescriptive easement could not at the same time be a "taking" of the same property.

[¶7] LLD raises two arguments[3] geared to resuscitate the court's plain errors: (1) the road was significantly changed and increased in size in 2011 from what was present prior thereto, and thus the apparent conflation of prescriptive easement and taking was not error; and (2) controlling law provides any physical increase to an easement must be undertaken by eminent domain or by procuring an additional easement, and because City did not proceed in either manner prior to the 2011 project, the increased road is a taking. Both of LLD's arguments fall flat when the actual findings are considered and controlling case law is reviewed.

2. <u>The court's findings confirm the road and City's use of the road never exceeded its prescriptive easement.</u>

[¶8] LLD argues this Court must accept the court's factual findings as true. *See* Appellee Brief at ¶7. However, while arguing on the one hand the Court must accept those findings, LLD misstates the findings and ignores other findings undercutting its false themes that (1) Lagoon Road never existed prior to 2011 except as a dirt trail, and

[3] LLD does not attempt to explain the propriety of the court's implicit overruling of N.D.C.C. § 24-07-01, in its determination the prescript easement established during prior ownership is considered a lawful "taking for public use" requiring just compensation to the current landowner. Nor has LLD attempted to present argument it is the successor in interest to the prior landowner.

(2) the road's footprint was substantially increased in 2011. *See e.g.*, Appellee Brief at ¶¶14-15. LLD's rendition of the findings – which is not an issue any party is appealing – is geared to suggest as fact that the physical size of the road increased beyond City's prescriptive easement. This is demonstrably false.

[¶9] The court's findings show the road was constructed in 1984 and City used it in the same fashion up to present:

> [] The manner of use before and after 2011 was and is the same. And the Court finds that it is in agreement [] that the footprint of Lagoon Road remained visibly unchanged through the years. The Court concludes that the City [] has proven the roadway has remained unchanged and is consistent with the nature of enjoyment of the road established through prescriptive use for more than 20 years.

(app.74-75). LLD leaves these facts out of its briefing. The court relied on clear and convincing evidence including satellite imagery from the NRCS (doc.513) confirming the roadbed and the road surface were unchanged from 1988 to present. (app.61). Findings also include maintenance by the City during that entire timeframe (app.62-63,65), that NDDOH inspected the road "clearly on an ongoing basis over the years[,]" (app.65-66), and as part of a 1995 inspection determined the road was inadequate, and a year later after the City improved the road, determined the road was again "adequate". (app.66).

[¶10] In relation to an alleged increase of the size of the road beyond what was there previously, the court never made a specific finding as to the width in feet. The court found by clear and convincing evidence the location and footprint of the road – which includes its width – never changed. (app.74-75). This alone shows the court did not make a finding as to the width. While it is true the court discusses the evidence from certain witnesses who testified about the width (e.g. a neighbor testified to a ten

foot road [app.49-50], Hagen testified the project "widened the width of the road" [app.69]), the court did not adopt that testimony as its finding. The findings also reference the 2011 project plans and stripping limits, and calculations about the length of the road (app.68,69) but the court states all of this is evidence to be considered by the jury: "Whether this resulted in damage [] is a question for the jury." (app.70).

[¶11] The court did not make a determination about the precise width of the road because it was determined to be an issue for the jury: "The trial involved a great deal of testimony regarding what was actually 'taken' assuming that a 'taking' occurred. That becomes acutely relevant if the extent and value of the 'taking' reaches a fact-finder" and "Based upon the more persuasive evidence the Court concludes material fact issues remain for a jury to determine the extent and scope of the prescriptive easement and the value of the governmental taking." (app.52,76). To suggest as LLD does, that the width of the road (for example 8 feet) was a fact determined by the court, is simply false. Even in the court's discussion about the "two wheel track dirt road", it was careful to specify the footprint was unchanged: "**However, it followed the exact same pattern over and on the Subject Property**. []" (app.41) (emphasis added).

[¶12] Although the findings give the appearance of being mutually contradictory at times, they are actually in agreement the footprint and location of the road never changed. What City concedes did change on this record is that the roadbed was raised having the effect of forming or increasing ditches, and culverts were installed. (app.67-68,72). Concerning ditches, in addition to the court's findings the 2011 project included cutting new ditches, additional findings were made on clear and convincing evidence that City maintained the road at all times prior to 2011, including by "mowing ditches along Lagoon Road". (app.63). When viewing all of the findings in relation to

ditches it is apparent the pre-2011 road had ditches, but that the 2011 project cut some new ditches when the roadbed was raised. City's actions in improving the road in 2011, including keeping the footprint and path of the road identical, raising the road bed, forming new ditches, and installing culverts, falls within the scope of its prescriptive easement. LLD's citation to the factual findings leaving out or misstating these points should not be given any consideration.

3. <u>LLD's attempts to distinguish away controlling ND case law is unavailing.</u>

[¶13] The controlling cases[4] establish City's 2011 project, including maintaining an identical path and footprint, raising the roadbed resulting in ditches, and installation of culverts, were well within the scope of its prescriptive easement under Section 24-07-01. LLD relies heavily on *Keidel v. Rask*, 304 N.W.2d 402 (N.D. 1981) ("*Keidel*") to argue otherwise, and points out general rules from that case that are applicable: "Public use cannot be said to apply to lands not actually used," as "a property owner receives no notice as to a public claim on any property in excess of that which has been actually used." *Id.* at 409. These propositions do not apply here because the court never found City's use extended onto lands not previously used. On the contrary, the court found by clear and convincing evidence – not being appealed – that the use and footprint were functionally identical prior to and after 2011. Therefore, the following holding from *Keidel* should be applied: "[T]he width of the prescriptive easement, i. e.,

[4] LLD's attempt to distinguish *Reichman* and other ND cases relied on by City is unavailing for the reasons stated in City's Appellant brief. Likewise, *Casey v. Corwin*, 71 N.W.2d 553 (N.D. 1955), does not support LLD's position as no one argues City acquired a fee in the road. The issue is City's right to use land per its prescriptive easement. Only in the event it is determined a taking occurred would the fee to the land become an issue. *See* N.D.C.C. 32-15-27.

that it includes the portion of the road actually traveled as well as the shoulders and ditches that are needed and have actually been used to support and maintain the traveled portion. []" *Id.* at 409. This is not a case involving use of the road on portions of LLD's property not previously used.

B.

[¶14] Concerning the court's unwillingness to consider evidence having independent legal significance that directly supports City's implied easement and easement by estoppel defenses, due to word limitations City continues to rely on its arguments and citation to legal authority cited in Appellant's Brief.

C.

[¶15] Concerning the court's faulty prevailing party conclusion, LLD uses "circular" logic: because the court determined LLD was the prevailing party and because the judgment reflects it was the prevailing party, the court could not be in error. LLD does not cite the court's post-bench trial conclusions in its order stating very clearly LLD failed in certain of its claims (meaning City prevailed in its defenses), resulting in the dismissal of LLD's surface water claims (increased drainage, wetlands, and storm water detention pond claims):

> The Court finds that Lincoln Land Development failed to meet its burden of proving its surface water surface claims and therefore no "taking" occurred in that regard. . .

(app.46,72-73). The City also prevailed on its prescriptive easement defense under clear and convincing evidence, but the court refused to concede the City prevailed in that regard either. Simply because the court refused to acknowledge the legal significance of the dismissal of most of LLD's claims prior to (trespass and nuisance –

doc.24) or at trial does not change the fact they were in reality dismissed. The court's determination LLD was the sole prevailing party entitled to costs and attorneys' fees was error. Due to word limitations, City continues to rely on its arguments and citation to legal authority cited in Appellant's Brief.

II. CONCLUSION

[¶16] City requests the challenged orders and judgments, including the *Findings, Conclusions and Order for Judgment* (app.36) and the *Amended Judgment On Jury Verdict* (app.177), be reversed as requested herein, and judgment entered in City's favor.

[¶17] Dated this 29th day of August, 2018.

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CERTIFICATE OF COMPLIANCE

[¶18] The undersigned, as attorneys for the Appellant in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the ND Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 2,569 words.

Dated this 29th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT CITY OF LINCOLN** was on the 29th day of August, 2018, emailed to the following:

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