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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

McKenzie County,	)	**Supreme Court Case No. 20110037**
	)	
Plaintiff/Appellee	)	
	)	
vs.	)	
	)	
Deborah Reichman a/k/a Deborah Stonecipher,	)	
	)	
Defendant/Appellant	)	
	)	
______________________________	)	

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BRIEF OF APPELLEE MCKENZIE COUNTY

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APPEAL FROM DISTRICT COURT FINDGINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT DATED JUNE 8, 2010, DISTRICT COURT ORDER FOR JUDGMENT OF DISMISSAL DATED DECEMBER 21, 2010, MCKENZIE COUNTY DISTRICT COURT NORTHWEST JUDICIAL DISTRICT THE HONORABLE GERALD RUSTAD

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STATEMENT OF THE ISSUES

[1] Was the District Court's decision to apply the twenty-year period from the beginning of the adverse use clearly erroneous?

[2] Was the District Court's decision that temporary gates and corral panels did not preclude the County's ability to obtain an easement by prescription clearly erroneous?

[3] Was the District Court's decision with respect to the location of the easement clearly erroneous?

[4] Was the District Court's dismissal of Reichman's claim for inverse condemnation in error?

[5] Was the District Court's dismissal of Reichman's claim for damages on the County's alleged illegal act of obtaining an ex parte restraining order erroneous?

STATEMENT OF THE CASE

[6] The County initiated an action for prescriptive easement by Summons and Verified Complaint on May 2, 2006. (Appendix at 10 ("Appendix" hereafter cited to as "A.")). At issue was whether the public had acquired an easement by prescription on a road referred to as Flat Top Rock Road or Flat Top Road (the "Road"). (A. at 161). The County alleged the current owner of Flat Top Ranch (the "Ranch"), Deborah Reichman ("Reichman"), was blocking public travel on the Road, so it sought and obtained an ex parte restraining order from the District Court to prevent Reichman from restricting the public's access to the Road. (A. at 19).

[7] Reichman answered the County's Amended Complaint and made several counterclaims. (A. at 106). Among the counterclaims was a claim for inverse condemnation and a claim for the County's alleged wrongful act in obtaining the ex parte order. (A. at 109).

[8] The case was tried before the District Court, beginning on September 29, 2008. (Transcript. at 1 ("Transcript" hereafter cited to a "T.")). On June 8, 2010, the District Court entered an Order granting the County an easement by prescription. (A. at 173). The County made a Motion for Summary Judgment to dismiss Reichman's remaining claims for inverse condemnation and the County's alleged wrongful acts in obtaining the ex parte order. (A. at 178). On December 21, 2010, the County's Motion for Summary Judgment was granted, and Reichman's remaining claims were dismissed. (A. at 181).

[9] The County served Notice of Entry of Judgment on December 30, 2010. (A. at 184). Reichman filed her Notice of Appeal on January 26, 2011. (A. at 186).

STATEMENT OF FACTS

[10] Evidence admitted at trial focused on several areas: (1) who or what entity constructed the Road; (2) who or what entity maintained the Road since it was constructed; (3) how the Road was used by each owner of the Ranch and the public at large; (4) whether each Ranch owner and the public at large believed the Road to be public or private; (5) whether the Ranch owners took action to show ownership of the Road; (6) whether fences, gates, or corral panels were used, whether they actually blocked public traffic when used, how often and how long they were used, and for what purposes they were used; and (7) whether the Road was placed on public maps. The District Court heard testimony from nearly all past owners of the Ranch, people with personal knowledge of the Ranch and the surrounding area, County maintenance workers who maintained the Road, and County officials who had access to County records concerning the Road.

[11] Robert Olson ("Olson") lived just south of the Ranch from 1920, when he was born, until 1952, when he moved just north of the Ranch. (T. at 200; 202). Olson lived a mile north of the Ranch until 1970. (T. at 203). There was an unimproved trail through the Ranch prior to the Road being built. (T. at 201). Olson and the other residents in the area had requested a road from the County so they could travel in and out without going through all the little trails. (T. at 237). In the early to mid 1950s, Olson, his parents, a county commissioner, and a few other members of the public who lived in the area took an airplane over the Ranch and the surrounding area, and the county commissioner agreed to try and get a location in that area. (T. at 225; 233). Two months later, the County built the Road through the Ranch, although it was not located in the exact location as the old trail because the County chose a better path. (T. at 201; 205; 207; 228). Olson traveled the Road several times a week and always considered it a public road. (T. at 210; 214). After the Road was constructed and improved, the County continued to maintain it. (T. at 208). The County performed snow removal, graded the Road, put scoria on it, and took care of drainage issues by installing culverts and bridges. (T. at 208-209).

[12] Fern and Vernon Goldsberry ("Fern" and "Vernon," respectively) purchased the Ranch in 1967 and moved there in 1968. (T. at 114). Vernon redesigned the Ranch into its current setup in 1974. (T. at 138; 143). Fern and Vernon lived at the Ranch until 1981, when Vernon passed away and Fern sold the Ranch to Dennis Yockim. (T. at 114). From 1981 to 1993, Fern visited the Ranch a couple times a month. (T. at 117). She lived there for a period in 1993 and 1994 on a temporary basis, too. (T. at 115). During the entire time, even after the Ranch improvements were made, no one attempted to block

public traffic. (T. at 119; 130). Neighbors, hunters, oilfield people, county officials, and the general public would use the road on a daily basis. (T. at 120; 122-23; 129). Fern never considered the Road to be private. (T. at 123).

[13] The County continued to maintain the Road during Vernon and Fern's tenure on the Ranch, and they never attempted to block it. (T. at 120). The County maintained the road by grading it, plowing snow, and laying scoria. (T. at 121; 152-53; 157). The County also installed car passes and cattle guards while they lived on the Ranch. (T. at 121; 152).

[14] Fern and Vernon put up gates across the road when they were bringing in livestock once a year for fifteen or twenty minutes. (T. at 119). They put them up so the horses would not run up the Road. (T. at 120). It was never their intent to block traffic, and the gates were never locked. (T. at 120; 123). Olson assisted Vernon and Fern Goldsberry in their horse operations, too. (T. at 222). According to Olson, the panels were never locked and were up for a half hour to an hour two or three times a year. (T. at 222).

[15] Dennis Yockim ("Yockim") was on the Ranch from the fall of 1981 until the mid-1990s. (T. at 75). He bought it from Fern in 1981 and re-conveyed it to her in 1984, but stayed on the Ranch under a management contract with Fern until she sold it to Ed Priddy in May of 1995. (T. at 75-76). Yockim always considered the Road a public access road, because the public used it all the time to get from the main blacktop highway to the south. (T. at 79). Yockim never took any steps to block the road to prevent traffic or to stop anybody from using the road. (T. at 78-79). Oil traffic, neighbors, sightseers, hunters, and the general public used the Road on a daily basis. (T. at 79; 82). At no point did

Yockim believe the Road was something other than a public road, and nothing led him to believe it was private. (T. at 80; 110). Yockim freely used the Road to access areas south of the Ranch prior to owning the Ranch. (T. at 83; 84). He never witnessed anybody blocking or impeding the use of the Road. (T. at 85). Yockim assumed it was a public road because he saw people using the road all the time without asking permission. (T. at 104).

[16] The County continued to maintain the Road after it was conveyed to Yockim (and re-conveyed to Fern). (T. at 80). Yockim did not perform maintenance on the Road. (T. at 80). The County brought maintainers there to grade the road, do scoria work, and plow snow. (T. at 811 101). Whenever it was time to reset or maintain the cattle guards, the County came out and did it. (T. at 98). The County also put in speed limit signs within the Ranch. (T. at 85).

[17] Yockim only used the "temporary gates" (as he called it) for the purpose of moving cattle from one lot to another. (T. at 78). The "temporary gates" were basically corral panels Yockim threw across the road; there was no gate. (T. at 78). Once cattle operations were finished, the "temporary gates" were taken down so they would not impede traffic. (T. at 83). Yockim would not lock the gates. (T. at 83).

[18] Joe Barbour ("Barbour") worked on the Ranch from 1981 to 1991. (T. at 169). In the beginning, he and his family were hired to work there; then in 1985 he leased the Ranch from Fern and Yockim under a livestock share agreement. (T. at 170). During this time, the public was free to come and go using the Road. (T. at 172). He never tried to stop the public from using the road or attempted to block or stop traffic by any mechanism. (T. at 173). When he arrived in 1981, the oil boom was going strong, so

traffic was thick. (T. at 177). Barbour did not see or observe anything that led him to believe the Road was anything but public. (T. at 178).

[19] The County also maintained the Road during Barbour's time on the Ranch. (T. at 174). Barbour observed the County blading the Road, plowing snow, and putting scoria on the Road. (T. at 174-75; 186). He asked the County to put up speed limit signs to control dust on the Road and for safety issues. (T. at 175-76). Barbour asked the sheriff if he could put up speed bumps or do something about the speed of vehicles through the Ranch. (T. at 189). Barbour was told by the sheriff he could not do anything about the it because it was a public road. (T. at 189).

[20] Barbour used the corral panels once or twice a year for an hour or two at a time, at the most. (T. at 174). The panels would be removed so the Road would not be blocked. (T. at 174). When the corral panels were up and somebody needed to get through, Barbour would open it up for them. (T. at 177).

[21] Ed Priddy ("Priddy") purchased the Ranch from Fern Goldsberry in May 1995 and resided there until he conveyed it to Reichman in December of 1999. (T. at 20). While Priddy owned the Ranch, he considered it to be a public road at all times. (T. at 24, 31). He never thought of it as private. (T. at 26). His neighbors, ranchers, the general public, and county officials traveled on the Road. (T. at 30, 51). Pickups traveled on the Road to check on oil wells, and, every once in awhile, a tanker went through hauling oil. (T. at 33).

[22] Priddy did not provide maintenance on the Road during his tenure on the Ranch. (T. at 29). The County did; it scraped snow in the winter and put scoria on the Road in

the summer. (T. at 29). Priddy never attempted to stop maintenance activities from being performed on the Road. (T. at 34).

[23] Priddy closed the gates on the road two to three times a year for twenty minutes at a time to move livestock. (T. at 26). He reopened the gates right away when he was finished so traffic could go through. (T. at 26, 33). Priddy never attempted to impede traffic on the Road or stop vehicles and never locked the gates. (T. at 27; 31; 33).

[24] Even Reichman admits the only reason for closing the corral panels was because of cattle operations. (T. at 416-417). She observed the County put scoria down, grade, spray weeds, and clear snow from the Road until she later stopped them. (T. at 418).

[25] Several of the County's employees testified as to the extent of the maintenance the County performed for the Road. The County bladed the Road, placed scoria on the Road, plowed snow, graded it (built it up, cleaned ditches, raised the road in spots), fixed drainage issues (including placing culverts, repairing washouts, and removing bridge), changed narrow car passes to wider car passes, cleaned car passes, sprayed cattle guards, and mowed roads. (See T. at 340, 342-45, 350, 360, 365, 378, 385-86, 388, and 389).

[26] The employees always considered the Road to be a public road. (T. at 353, 391). A foreman believed it to be a public road because traffic was going through there and the County had to provide a detour when employees were doing roadwork. (T. at 366-67). The Road was always open to maintenance crews. (T. at 356).

[27] The trail first showed up in County records on the original survey map, dated 1901. (T. at 330). The trail also showed up on a 1942 soil survey map, a 1966 Midland Atlas Map, and a bridge inventory map the State publishes of all bridges that are considered for state inspection. (T. at 331). The Road was shown as a general highway

on a map of McKenzie County, dated 1936 and revised in 1942. (T. at 334). Roger Chinn has been a County commissioner for about 21½ years. (T. at 448). Based upon his knowledge, the Road has continued to be located on subsequent atlases and maps since 1942. (T. at 451).

LAW AND ARGUMENT

I. STANDARD OF REVIEW.

[28] The parties agree the standard of review is clearly erroneous. Riechman, however, provides an incomplete description of the standard of review. A district court's findings of fact will not be reversed on appeal unless they are clearly erroneous under N.D.R.Civ.P 52(a). Smestad v. Harris, 2011 ND 91, ¶ 6, 796 N.W.2d 662. 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 the entirety of the evidence, the Supreme Court is left with a definite and firm conviction a mistake has been made. Id. A district court's findings of fact are presumed correct, and the Supreme Court views the evidence in the light most favorable to its findings. Eberle v. Eberle, 2010 ND 107, ¶ 16, 783 N.W.2d 254.

[29] Under the clearly erroneous standard of review, the Supreme Court must not reweigh the evidence or reassess the credibility of the witnesses when there is evidence to support a district court's findings, and it may not reverse a district court's decision merely because it might have reached a different result. Id. In a bench trial, the trial court is the determiner of credibility issues, and the Supreme Court will not second-guess the trial court on its credibility determinations. Akerlind v. Buck, 2003 ND 169, ¶ 7, 671 N.W.2d 256. The Supreme Court may not reweigh evidence or reassess credibility, nor

does it reexamine findings of fact made upon conflicting testimony. Id. The Supreme Court is to give due regard to the trial court's opportunity to assess the credibility of the witnesses, and the court's choice between two permissible view of the evidence is not clearly erroneous. Id.

II. BACKGROUND LAW.

[30] Some background law is necessary to allow the Court to place the arguments in the appropriate legal context. "Under North Dakota law, a user of land creates an easement by prescription if the use is adverse, continuous and uninterrupted, and for the 20 year period of prescription." Fischer v. Berger, 710 N.W.2d 886, 888 (N.D. 2006). "Except for the requirement of public use for establishing a road by prescription, that approach is consistent with the requirements for establishing a road by prescription under N.D.C.C. § 24-07-01, which requires the general, continuous, uninterrupted and adverse use of a road by the public under a claim of right for 20 years." Id. North Dakota Century Code section 24-07-01 provides:

> All public roads and highways within this state which have been or which shall be open and in use as such, during twenty successive years, hereby are declared to be public roads or highways and confirmed and established as such whether the same have been laid out, established, and opened lawfully or not.

N.D.C.C. § 24-07-01. "[A] proceeding under N.D.C.C. § 24-07-01 is an action that recognizes and authorizes the enforcement of a prescriptive easement for a public road whether the same has been laid out, established and opened lawfully or not." Home of Economy v. Burlington Northern Santa Fe Railroad, 736 N.W.2d 780, 785 (2007).

III. ARGUMENTS:

[31] The District Court made no reversible error in this matter. Its application of the twenty-year rule was not clearly erroneous. It did not err in concluding the previous owners' use of the gates and/or corral panels did not defeat the County's ability to obtain an easement by prescription. It made no error regarding the location of the prescriptive easement. It did not err when it dismissed Reichman's inverse condemnation claim, and it did not err when it dismissed Reichman's claim for damages for the County's alleged illegal acts in obtaining an ex parte restraining order. The County will provide the Court an explanation for each in turn.

A. The District Court's application of the twenty-year rule was not clearly erroneous.

[32] Riechman claims the District Court's findings were clearly erroneous because it failed to use the twenty-year period from the time the action was filed looking backward. This Court must reject Reichman's argument for several reasons. First, she failed to raise the issue at trial. Second, the North Dakota Century Code and Supreme Court caselaw require application of the twenty-year period at the beginning of the adverse use.

1. Reichman failed to raise the issue at trial.

[33] Issues or contentions not raised in the district court cannot be raised for the first time on appeal:

> The purpose of an appeal is to review the actions of the trial court, not to grant an appellant an opportunity to develop and expound upon new strategies or theories. The requirement that a party first present an issue to the trial court, as a precondition to raising it on appeal, gives that court a meaningful opportunity to make a correct decision, contributes valuable input to the process, and develops the record for effective review of the decision. It is fundamentally unfair to the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Accordingly, issues or contentions not raised in the district court cannot be raised for the first time on appeal.

Spratt v. MDU Resources Group, Inc. 2011 ND 94, ¶ 14, 797 N.W.2d 328.

[34] Reichman cannot show she raised the issue of how to calculate the twenty-year period at any point in pretrial, at any point during trial, or even during her post-trial briefing. Reichman did not raise this issue at any point before the June 8, 2010, Order, when the relevant factual and legal issues were determined. After the completion of the County's case-in-chief, Reichman made a motion for judgment as a matter of law. (T. at 470-71). During the motion hearing, she did not make any argument concerning proper application of the twenty-year period. (T. at 470-71). In fact, she specifically asked the District Court to look twenty years back from the time she acquired the Ranch in 1999. (T. at 473). Reichman cannot show she brought it up in her Post Trial Brief (in fact, if she references this Brief, the Court should note she discussed the character of the use in the 1950s, 60s, and 70s). The time periods discussed by Reichman would be immaterial to her defense if the District Court was required to apply the twenty-year period immediately preceding commencement of the suit.

[35] Reichman may point out she raised the issue in her Motion to Amend Partial Judgment, dated July 27, 2010. The Court must disregard this argument. Although there was a full round of briefing regarding the motion, the Supreme Court denied Reichman's motion to remand to the District Court for consideration of her Motion to Amend Partial Judgment. (A. at 177). The District Court's Dec. 21, 2010, Order only considers the County's Motion for Summary Judgment regarding the remaining claims not addressed by the June 8, 2010, Order. (See A. at 181). Reichman's Motion to Amend Partial Judgment was never properly before the District Court for its consideration.

[36] Even if it were properly before the District Court, it was a transparent attempt to preserve the issue for appeal without actually having the District Court give meaningful thought to the issue. By this method, any party could raise new issues via a Rule 59(j) Motion to Amend Judgment in order to preserve an issue for appeal. N.D.R.Civ.P. 59(j). This cannot be what the Court intended by the principle discussed in Spratt, 2011 ND 94 at ¶ 14.

2. The twenty-year period in N.D.C.C. § 24-07-01 begins to run at the beginning of the adverse use.

[37] Even if Reichman had properly raised the issue, the Court must reject her contention for several reasons. First, the Griffin case Reichman replies upon is distinguishable from the case at hand. Second, Reichman's contention is contrary to North Dakota's rules of statutory construction.

a. Griffin is distinguishable.

[38] The linchpin of Reichman's argument is James v. Griffin, 2001 ND 90, 626 N.W.2d 70. Reichman argues the Griffin opinion requires courts to look at the twenty years immediately preceding commencement of the action to determine whether the public has acquired an easement by prescription. In Griffin, this Court held the twenty-year period for establishing a claim for acquiescence is measured back from the commencement of the action. 2001 ND 90 at ¶ 12. This conclusion was based on the Court's interpretation of the twenty-year period contained in N.D.C.C. § 28-01-04. Id.

[39] In this matter, the twenty-year period is supplied by a completely different statute: N.D.C.C. § 24-07-01. This Court has applied N.D.C.C. § 24-07-01 in several cases, and in each case, the twenty-year period has been held to start at the beginning of the use, without regard to the commencement of the action.

[40] This Court has already determined the twenty-year period for prescription is applied when the adverse use begins. "The period of prescription does not begin when the owner becomes offended by the burden placed on his land but rather, when the burden is placed on his land." Nagel v. Emmons County North Dakota Water Resource Dist., 474 N.W.2d 46, 50 (N.D. 1991). "Title by prescription relates back to the inception of the use." Conlin v. Metzger, 44 N.W.2d 617, 625 (N.D. 1950). The Court's express interpretation of the twenty-year period in N.D.C.C. § 24-07-01 controls, here.

[41] This Court has a long history of applying the 20-year stated in N.D.C.C. § 24-07-01 at the beginning of the use instead of looking back from commencement of the suit. In Kritzberger v. Traill County, the Court was faced with two claims for prescription brought in early 1930s. 242 N.W. 913, 915 (N.D. 1932). For the first parcel, the Court held that a road traveled by the public continuously from 1871 until January 1, 1896, without interruption by the owner of the land over which the road runs, became a legal public highway after the expiration of the twenty years from the time the use began. Id. For the second parcel, the Supreme Court held a road traveled by the public continuously from March 1897 uninterrupted for more than twenty years became a legal public highway after the expiration of twenty years from the time the use began. Id. In Berger v. Berger, the action was brought in the late 1950s, yet the Supreme Court analyzed the public's use of the road from the early 1900s. 88 N.W.2d 98, 100 (N.D. 1958). In Fears v. Y.J. Land Corporation, this Court reviewed the character of the public's use from 1918 to when the action was brought in the 1990s. 539 N.W.2d 306, 307-08 (N.D. 1995). In Fears, the Supreme Court decided an undisputed factual circumstance -- execution and delivery of a tax deed -- in 1980 did not extinguish the public's claim and unadjudicated

easement. Id. Instead, the Supreme Court remanded to see if the public had satisfied the twenty-year requirement before 1980. Id. In Mohr v. Tescher, the Supreme Court reviewed the character of use from the 1920s for a case commenced in 1980. 313 N.W.2d 737, 740 (N.D. 1981). In Backhaus v. Renschler, the Supreme Court reviewed the character of use from the 1920s for a case seemingly commenced in the late 1970s or early 1980. 304 N.W.2d 87.

[42] The Court should also note that in none of the aforementioned cases – Kritzenberger, Berger, Fears, Mohr, and Backhaus – did any issue arise with respect to N.D.C.C. § 28-01-04. There was one relevant twenty-year time period: the one stated in N.D.C.C. § 24-07-01, and that time period began to run at the beginning of the use.

[43] The Supreme Court in Casey v. Corwin reviewed whether the claimant had obtained an easement by satisfying the twenty-year requirement without considering when the action was commenced. 71 N.W.2d 533 (N.D. 1955). The Court in Casey analyzed whether the easement was "extinguished" by nonuse under N.D.C.C. §§ 24-07-31 and 47-05-12. Id. The Court held, "[s]ince the nonuse in this case only continued for about four years prior to the commencement of this action we are satisfied that the easement of the public for a highway over these lots has not been extinguished." Casey, at 533. If the twenty year period was to be applied from commencement looking backward, there would be no reason for this Court to examine whether or not it had subsequently been extinguished.

b. North Dakota rules of statutory construction require the twenty-year period in N.D.C.C. § 24-07-01 to begin running at the beginning of the adverse use.

[44] Even if Griffin is not distinguishable, North Dakota rules of statutory interpretation require courts to apply the N.D.C.C. § 24-07-01 twenty-year statutory period at the beginning of the use, not looking backward from commencement of the action.

[45] North Dakota's rules of statutory interpretation are well-established:

> The primary objective in interpreting a statute is to determine the intent of the legislature by first looking at the language of the statute. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined in the code or unless the drafters clearly intended otherwise. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-09.1. If the language of a statue is clear and unambiguous, "the letter of the statute cannot be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05. A statute is ambiguous if it is susceptible to different, rational meanings. If the language is ambiguous or doubtful in meaning, the court may consider extrinsic aids, such as legislative history, to determine legislative intent. N.D.C.C. § 1-02-39.

Arnegard v. Cayko, 2010 ND 83, ¶ 10, 782 N.W.2d 54. When the Court construes a statute, it must presume that the Legislature intended all that it said, and that it said all that it intended to say. Johnson v. North Dakota Workers' Compensation Bureau, 539 N.W.2d 295, 298 (N.D. 1995). In construing statutes and rules, the law is what is said, not what is unsaid, and the mention of one thing implies exclusion of the other. Sanderson v. Walsh County, 2006 ND 83, ¶ 16, 712 N.W.2d 842.

[46] When two statutes relating to the same subject matter appear to be in conflict, they should whenever possible be construed to give effect to both, if such can be done without doing violence to either. City of Bismarck v. Fettig, 1999 ND 193, ¶ 14, 601 N.W.2d 247. When there is a conflict between statutes, the Court must construe specific statutes to control general statutes. Id. at ¶ 15. If an irreconcilable conflict exists, the

latest enactment will control or will be regarded as an exception to, or as a qualification of, the prior statute. Id. at ¶ 17

[47] The rules of statutory construction require the District Court to apply the twenty-year period at the beginning of the adverse use, not looking backward from the commencement of the action. First and foremost, the interpretation offered in Griffin does not apply here because it is based wholly upon a different statute. Here, public prescription is based upon N.D.C.C. § 24-07-01, not N.D.C.C. § 28-01-04. The two separate statutes are entitled to two separate interpretations, and they require two fundamentally different interpretations. The majority in Griffin reviewed N.D.C.C. § 28-01-04, which provides:

> No action for the recovery of real property or for the possession thereof may be maintained, unless the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within twenty years before commencement of the action.

[48] The words "twenty years before commencement of the action" are what guided this Court to its decision. Griffin, at ¶¶ 12 and 15. The majority even emphasized the specific phrase:

> We are guided by our statutes and caselaw on acquiescence. Section 28-01-04, N.D.C.C., requires a person seeking title by acquiescence to have been "possessed of the premises in question *within 20 years before the commencement of such action.*"

Griffin, at ¶ 15 (emphasis original). Contrast this with N.D.C.C. § 24-07-01, which contains no similar language:

> All public roads and highways within this state which have been or which shall be open and in use as such, during twenty successive years, hereby are declared to be public roads or highways and confirmed and established as such whether the same have been laid out, established, and opened lawfully or not.

N.D.C.C. § 24-07-01.

[49] Reichman is asking the Court to read "within 20 years before the commencement of such action" into N.D.C.C. § 24-07-01, which is not permitted under the rules of statutory construction. Johnson, 539 N.W.2d at 298 ("When the Court construes a statute, it must presume that the Legislature intended all that it said, and that it said all that it intended to say."). Reichman is also asking the Court to equate "recovery" and "possession," terms of ownership reserved for N.D.C.C. § 28-01-04, with "use," a term reserved to characterizing servitudes and easements relevant to N.D.C.C. § 24-07-01. See N.D.C.C. § 47-01-01 ("The ownership of a thing shall mean the right of one or more persons to possess and use it to the exclusion of the others."). The County did not bring action against Reichman to recover or exclusively possess (i.e., own) the property; it brought action to use the property for a public way. There is no conflict between N.D.C.C. § 24-07-01 and § 28-01-04, as they apply to completely independent types of actions.

[50] Even if there was a conflict, the twenty-year period beginning at the commencement of the action in N.D.C.C. § 24-07-01 controls. Applying the twenty-year period to the beginning of the use gives effect to related provisions, whereas Reichman's construction of looking back from commencement of the action does not. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. 1-02-07. Section 47-05-12 of the North Dakota Century Code is a related provision that provides: "A servitude is extinguished . . . [w]hen the servitude was acquired by enjoyment, disuse thereof by the owner of the servitude for the period prescribed for acquiring title by prescription." There is no use or need for Section 47-05-

12 if the twenty-year period must be applied back from commencement of the action, because no easement could be ever extinguished. There would be no time period to review after establishment of a prescriptive easement. If there is any disuse before commencement of the action, the public would not be entitled to a prescriptive easement, anyway.

[51] The Court should also consider the practical implications regarding Reichman's arguments. According to her, a road could be undisputedly used by the public as a public road continuously for 100 plus years. If there was no declaration and it was not previously adjudicated as a public road, the private landowner upon which the road is situated could interrupt the use. Reichman would have the Court ignore the first 80 years of undisputed prescriptive use by the public, and focus on the one event interrupting use at the very tail end. Under Reichman's construction, no public road would exist. It would also mean that any public entity holding unadjudicated legal title by prescription would need to immediately file suit without negotiation to foreclose this possibility. The County submits this is not what the Legislature intended by N.D.C.C. § 24-07-01. The District Court did not err in its application of the twenty-year period.

B. The District Court did not err in concluding the previous owners' use of gates and/or corral panels did not defeat the County's ability to obtain an easement by prescription.

[52] Reichman argues the Court erred when it concluded the previous owners' use of the gates and corral panels did not defeat the County's ability to obtain an easement by prescription. Reichman does not appear to take issue with the factual record upon which the District Court made its findings of fact. Rather, it appears Reichman takes issue with the corresponding conclusion the Court reached. According to Reichman, *any*

prescriptive easement suit should be precluded by the presence of gates or fences. This Court must reject this assertion for several reasons.

1. The mere presence of fences, gates, or corral panels do not preclude a finding of adverse use.

[53] This Court has confronted prescriptive easement cases involving fences or gates. See generally Fischer, 2006 ND 48, 710 N.W.2d 886; Mohr, 313 N.W.2d 737; Backhaus, 304 N.W.2d at 87; Berger, 88 N.W.2d 98. The Supreme Court has never taken the position that the mere presence of gates demands a finding of permissive use. See generally ids. Contrary to Reichman's argument, gates are only indicative of permissive use. See Mohr, 313 N.W.2d at 739 ("We have consistently held that the existence of a gate across a road is *indicative* of permissive use." (emphasis added)). In fact, this Court views gates or other obstructions as evidence of an intention on the part of the owner to assume and assert ownership and possession of the land over which the road runs. Id. The existence of gates is way to ascertain the landowner's intent; it does not supersede the landowner's intent. As such, evidence of gates does not invariably preclude a public easement by prescription.

2. This Court's previous cases involving fences and gates are factually distinguishable from this case.

[54] Moreover, Fischer, Mohr, Backhaus, and Renschler are factually distinguishable and do not control here. In this case, the District Court found:

> The adjacent owners periodically utilized temporary fencing to assist in their ranching operations subsequent to construction of the roadway. These fencing operations did not restrict the free flow of public traffic other than a few times per year, and then for limited times. There was no evidence [the County] ever objected to those uses by the adjacent landowners. The testimony of all users and former owners of the land adjacent to the roadway (with the current exception of the Defendant) was that they all felt that the road was a public road.

(June 8, 2010, Order, p. 2-3). The District Court went on to say:

> From 1968 to 2000 all who have owned or occupied the premises which are currently occupied by the Defendant, including Fern Goldsberry, Dennis Yockim, Joe Barbour, and Ed Priddy, testified that:
> . . .
> c. That the only time travel on the road was in any way impeded was when corral panels were used across the road a couple times a year for short periods of time, and then only for purposes of briefly containing livestock when moving cattle or horses;

(June 8, 2010, Order, p. 3). The District Court further found:

> Defendant primarily relies on the fact that the adjacent landowners have been allowed, since about the time the road was constructed in the 1950's, to periodically use fences and cattle panels along the road for their cattle operations while not interfering with the use of the roadway. Landowner intent is relevant as to whether the use is permissible or adverse as it relates to the elements of prescriptive use. The Court finds no indication that at the time of construction of the roadway and thereafter that the landowners reserved the right to restrict public use.

(June 8, 2010 Order, p. 3-4). Reichman was unable to muster any additional evidence indicating the public's use was "permissive" instead of adverse under claim of right.

[55] Unlike the matter here, in Fischer, Mohr, Backhaus, and Berger, the Supreme Court confronted additional evidence of the owner's intent to assume ownership and possession of the property has accompanied the fences and gates. See Fischer, 2006 ND 48 at ¶ 9 (stating the gate was accompanied by evidence showing the landowners refused to sign an easement and the landowner's threat to withdraw permission to use the trail if the person failed to close the gate); Mohr, 313 N.W.2d at 739-40 (stating the gates were accompanied by the placement of other obstructions and barriers; no trespassing signs; cattle allowed to graze on a fenced-off portion of the yard, including road; usage of the roadway as a driveway, as landowner would park cars on road; the unilateral relocation of the road; and maintenance by the landowners with little public assistance); Backhaus,

304 N.W.2d at 89-90 (stating the gates were accompanied by explicit permission given by the landowner to the county blade operator to travel the road; the landowner's explicit prohibition communicated to the county blade operator of any maintenance; locked gates; and wired up gates); Berger, 88 N.W.2d at 102 (stating the gates were accompanied with the landowner's statement to remember to keep the gates closed; the traveler's agreement to keep the gates closed; and that no other person was claiming the public right to travel the road).

[56] Also unlike the matter here, each of the four cases did not confront a factual scenario involving gates which were only "temporary." See generally Fischer, 2006 ND 48; Mohr, 313 N.W.2d 737; Backhaus, 304 N.W.2d 87; Berger, 88 N.W.2d 98. Rather, in each instance, the fences and gates were permanent and used continuously. See Fischer, at ¶¶ 2-4 (showing the fences and gates were used for over forty years); Mohr, at 740 (stating the "road has been continuously obstructed by gates for over fifty years"); Backhaus, at 89 (reviewing the fencing of the land, stating it was fenced at all times pertinent to the inquiry, i.e., twenty years); Berger, at 102 (showing the evidence reflected gates were used continuously for over fifty years).

[57] Those four cases also did not involve gates which were intended to and actually used to conduct cattle operations instead of gates which were intended to and actually used to restrict public travel. See generally Fischer, 2006 ND 48; Mohr, 313 N.W.2d 737; Backhaus, 304 N.W.2d 87; Berger, 88 N.W.2d 98. Rather, those cases involved gates and fences the factfinders found demonstrated a restriction to the public's free passage. See generally ids. No such finding was made in this matter. Each of the four

cases involves meaningful factual differences and is distinguishable. The conclusions reached in those cases do not require this Court to reach the same conclusion in this case.

3. Factually and legally analogous cases from other jurisdictions allow the factfinder to inquire as to the actual use and intent for the fences or gates.

[58] The Court would be better served by following the direction of cases which espouse the same legal principles employed in prior Supreme Court cases, but have more similar factual records and have inquired into intent. By every meaningful metric, these cases support the District Court's decision.

[59] Section 24-07-01, N.D.C.C., has not changed in substance since it was cited as Section 37 of chapter 29 of the Political Code of 1877 of Dakota Territory. See Walcott Tp. of Richland County v. Skauge, 6 N.D. 382, 71 N.W. 544 (1897). Montana, North Dakota, South Dakota, and Wyoming formerly comprised Dakota Territory, and all shared the same law at one point. The County submits that these sister jurisdictions in this case should be given particular deference as a result. These sister jurisdictions confronted with an analogous factual situation consider length of use, actual use, and actual purpose as important variables in determining whether a gate should be considered evidence of permissive use.

[60] The Montana Supreme Court, like the North Dakota Supreme Court, has held gates can be evidence of permissive use. See e.g. Kostbade v. Metier, 432 P.2d 382, 386 (Mont. 1967). Montana courts do not end the inquiry simply by determining whether a gate is present; rather, such assessment is only the beginning of the analysis:

> A close examination of the facts of this particular case, however, reveals that this gate was not constructed or maintained in such a way as would show permissive use of the road. The gate is part of a drift fence constructed in 1938 to control cattle. It was never locked, and was only

> closed during the summer. Its purpose was not to control traffic on the road and it appears that it did not in fact hinder public use of the road. The county did not stop its maintenance work at the gate but continued on through it to the old Taylor homestead. The road was in use by the public for 25 or more years before the construction of the gate and this use continued virtually unchanged for 26 years after it was built.

Kostbade, 432 P.2d at 386.

[61] Proving this holding was not an aberration, the Supreme Court of Montana used the same analysis with a similar factual scenario:

> Testimony by current and past landowners using the road documented public use of the road going back over 50 years. During that period, various gates were installed along the road for the purpose of keeping cattle from roaming, not to deny access. Until Fowler locked his gate, no evidence of restricting public use was shown, save one. In that instance, Rasmussen's predecessor, Lawrence McFadgeon instituted a civil suit in 1949 to enjoin one George Schwab from closing off the road. The record discloses that the suit was dismissed and Schwab thereafter made it known the road was not to be closed.
>
> . . .
>
> Most of those testifying stated they used the road, without seeking permission, to gain access to their lands. Others testified that the county claimed the road for a period, and provided a grader to be used in its maintenance. This is on all fours with McClurg v. Flathead County Commissioners (1980), 188 Mont. 20, 610 P.2d 1153, wherein the landowner attempted to close a road used by the public for over 33 years in a continuous, uninterrupted and adverse manner. This Court held that the public's continued adverse use, and the grading and maintaining of the road without the landowner's permission were sufficient to show adverse control.

Rasmussen v. Fowler, 800 P.2d 1053, 1055–1056 (Mont. 1990).

South Dakota Courts also look past the mere existence of gates to determine if an easement by prescription is warranted. The court held, "[t]he trial court did not err in finding that the use of the road was commensurate with the needs of the public during all times in question and that the existence of gates and fences along the road was not inconsistent with the existence of a public right-of-way in view of the general custom and

usage of the locality." Taylor v. Pennington County, 204 N.W.2d 395, 401–402 (S.D. 1973) (internal citation omitted).

[62] The jurisdictions from which this Court adopted the principle with respect to fences have recognized certain other factors trump mere presence. The Supreme Court of North Dakota imported the principle of gates as evidence of permissiveness from the Alabama Supreme Court and the Arkansas Supreme Court. See Berger, 88 N.W.2d at 102–03 (citing Williams v. Prather, 196 So. 118 (Ala. 1940); Pierce v. Jones, 179 S.W.2d 545 (Ark. 1944)). The Alabama Supreme Court examined the purpose and use of the gates:

> There were some witnesses who undertook to show that the road was a private road and the respondent strongly relies on the installation of gates and stock gaps when he purchased a part of the land in 1928. Pictures are before us which show these installations. They are located at the points where the road enters and leaves the land of the respondent. The gates do not extend across the roadway and do not appear to have been locked. It is evident that by placing the stock gaps beside the gates, there was no interruption of the use by foot or automotive vehicles. The gates can be opened to permit of horse drawn traffic. In fact the stock gaps and gates indicate an intent not to interfere with public travel but only to restrict the movement of livestock.

Huggins v. Turner, 60 So. 2d 909, 910–11 (Ala. 1952). The Arkansas Supreme Court similarly examined the purpose and use of a gate as follows:

> The placing of a temporary device across a roadway for the purpose of restraining livestock, but not for the purpose of obstructing an adjoining owner or the public in the use of the road, is not sufficient to interfere with the reasonable enjoyment of a right to use it. On the other hand, it is well settled that erection and maintenance of a gate or a wire gap across a road, by an owner, when his purpose is not merely to restrain livestock, constitutes notice to the public that, thereafter, any travel upon the road is by permission of the owner and not as a matter of right to the public or to any individual traveling the road, even though the gate or gap may be left open during certain seasons.

Hoover v. Smith, 451 S.W.2d 877, 879 (Ark. 1970) (internal citations omitted).

[63] Here, like in Kostbade, Rasmussen, Huggins, and Hoover, the factfinder determined the fences and later the corral panels were: (1) used to control livestock only and were not used to control foot or vehicle traffic; (2) were never locked; and (3) were used only during cattle operations. (A. at 162-63). Like in Kostbade, Rasmussen, Huggins, and Hoover, the District Court also concluded that the presence of fences and corral panels did not necessarily preclude a finding of adverse use. The District Court's findings and conclusions were not clearly erroneous because it looked to the landowners intent and purpose behind the corral panels.

4. Construction, maintenance, and appearance on maps is acceptable evidence of adverse use under claim of right.

[64] In passing, it appears Reichman takes issue with the District Court using evidence of construction, maintenance, public travel, subjective characterizations, and appearance on maps as proof of the public's adverse use under claim of right. Reichman argues none of this Court's prescriptive easement cases support the District Court's conclusion that maintenance is evidence of adverse use.

[65] This is a relevancy issue, first and foremost. The district court has broad discretion in deciding whether a witness's testimony will assist the trier of fact, and the Supreme Court should be reluctant to interfere with the District Court's decision. Westby v. Schmidt, 2010 ND 44, ¶ 11, 779 N.W.2d 681. Moreover, no appeal was taken regarding relevancy, and no objection was made as to relevancy. Precedent need not be established for every type of evidence in order to assist the trier of fact to make a decision.

[66] Even though this is a relevancy issue, the District Court provided a comprehensive background of decisions using evidence of construction, maintenance,

subjective characterizations, and maps as proof of adverse use. (A. at 164-72). Furthermore, as the Statement of Facts in this matter demonstrates, the District Court was presented with and accepted substantial evidence showing construction, maintenance, subjective characterizations, and maps. All such evidence was undisputed. Even if it were disputed, this Court is not permitted to reweigh the evidence, reassess credibility, or reexamine findings of facts made upon conflicting testimony. Akerlind, 2003 ND 169 at ¶ 7. The District Court's findings and conclusions were not erroneous.

D. The District Court made no error regarding the location of the prescriptive easement.

[67] Reichman argues the District Court erred by failing to make findings as to the scope and the nature of the easement. The Court must reject this argument because explicit findings are not required, and, even if they were, a factual record was developed that allowed the District Court to make sufficient findings as to its location.

[68] The District Court need not make explicit findings with respect to the metes and bounds of the Road because North Dakota law does not require such a finding. In Keidel v. Rask, 304 N.W.2d 402, 409 (N.D. 1981), the Court stated that prescriptive easements "include 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." By finding a prescriptive easement exists, the District Court necessarily found the prescriptive easement is located on the portion of the road actually traveled as well as the shoulders and ditches needed and have actually been used to support and maintain the traveled portion.

[69] Even if a finding regarding specific location were required, the District Court's findings enable the Court to understand its decision regarding the road's location. This Court has said, with respect to findings of fact and conclusions of law, as follows:

> **[70]** The district court is required to make such findings of fact and conclusions of law that are sufficient to enable the appellate court to understand the factual determinations made by the district court and the basis for its conclusions of law. To this end, the district court's findings of fact . . . should be stated with sufficient specificity to assist the appellate court's review and to afford a clear understanding of the district court's decision.

Haugrose v. Anderson, 2009 ND 81, ¶ 7, 765 N.W.2d 677.

[71] The District Court found the Road first appeared on road maps of McKenzie County as far back as 1909. (A. at 162). The District Court further explained:

> That the Plaintiff is hereby declared to be the holder of a prescriptive easement with respect to the Flat Rock Road, sometimes referred to as the Flat Top Rock Road, located in McKenzie County, North Dakota, *as it presently exists*, including ditches and back slopes (together with any rights-of-way as set forth under North Dakota law), which is hereby declared, under North Dakota law, to be a public road for travel by the public.

(A. at 173 (emphasis added)).

[72] The District Court's findings and conclusions were based upon evidence admitted into the record. Maps and aerial photos were admitted into evidence. (See Plaintiff's Ex. No. 62; Defendant's Ex. K, HHH(4), HHH(10), HHH(11), HHH(12)). A photograph showing the current location of the Road was admitted into evidence. (See Defendant's Ex. L). Priddy recognized the location of the Road as being the same from recent aerial photographs. (T. at 39). From the exhibits, Priddy said it was a true and correct depiction of the Ranch when he lived there. (T. at 255; HHH(10), (11), and (12)). Yockim said so, too. (T. at 89-90). Yockim said the Road looked the same in 1981. (T.

at 91). Barbour testified HHH(11) was a correct depiction of the Road when he lived at the Ranch from 1981 to 1991. (T. at 180).

[73] The maps entered into evidence show the Road has not moved. The trail first showed up in County records on the original survey map, dated 1901. (T. at 330). The trail also showed up on a 1942 soil survey map, a 1966 Midland Atlas Map, and a bridge inventory map the State publishes of all bridges that are considered for state inspection. (T. at 331). The Road was shown as a general highway map of McKenzie County, dated 1936 and revised in 1942. (T. at 334). Roger Chinn has been a County commissioner for about 21½ years. (T. at 448). Based upon Chinn's knowledge, the Road has continued to be located on subsequent atlases and maps after 1942. (T. at 451).

[74] All of the witnesses testified it was the same road. There was no evidence the gates moved, which means the entryways for the road have not moved. There was no evidence that the Road deviated since it was first improved by the County. The District Court's finding with respect to the Road's current location was not clearly erroneous.

E. The District Court did not err when it dismissed Reichman's inverse condemnation claim.

[75] Reichman argues the District Court erred when it dismissed Reichman's inverse condemnation claim in its December 21, 2010, Order. This Court should reject this assertion for two reasons: (1) Reichman's argument with respect to reversing Hager v. Devils Lake, 2009 ND 180, 773 N.W.2d 420, providing for the applicable statute of limitations, was not raised until this appeal; (2) the District Court's June 8, 2010, Order precluded any action for inverse condemnation; and (3) Hager should not be overruled.

1. Reichman failed to raise the issue at trial.

[76] As stated more completely above, issues or contentions not raised in the district court cannot be raised for the first time on appeal. Spratt, 2011 ND 94 at ¶ 14. Reichman made several arguments regarding inverse condemnation in her Brief in Opposition to Plaintiff's Second Motion for Summary Judgment. She brought up arguments regarding the law of the case doctrine, attempted to re-litigate the findings made in the District Court's June 8, 2010, Order, and argued issues of fact remain. Now, apparently recognizing none have merit, she has raised none of them on appeal. In fact, she admits no issue of fact remains for any inverse condemnation claim under current law: "[a]pplication of that rule [stated in Hager] to this case would result in the accrual of the cause of action for damages on May 1, 1986, and its extinction on May 2, 1992." (Appellant's Brief at 32). It is fundamentally unfair to blame the District Court for failing to rule correctly on an issue it was not given the opportunity to consider. Id.

[77] Reichman cannot show she raised any argument regarding statute of limitations or Hager in her Brief. She cannot show she raised it at any other time, either. The District Court recognized its findings and conclusions on June 8, 2010, may render any claims for inverse condemnation moot. (See A. at 124 ("if the Defendant's inverse condemnation claims are not rendered moot by this Court's decision on the issues to be tried commencing on September 29, 2008, then the inverse condemnation claim shall be scheduled for subsequent trial at a scheduling conference to be convened by the Court.")). That is exactly what has happened here.

2. The District Court's June 8, 2010, Order precludes any claim for inverse condemnation.

[78] Even if she had raised this argument before appeal, the District Court's December 21, 2010, and June 8, 2010, Orders preclude any claim for inverse condemnation. This

Court has held "[t]itle by prescription relates back to the inception of use." Conlin v. Metzger, 44 N.W.2d 617, 620 (N.D. 1956. The District Court held:

> It is undisputed that the Plaintiff constructed the road. The road went from a trail to a constructed scoria road in the early 1950s. Robert Olson testified that the road was constructed at the request of the public, at the expense and labor [of] the Plaintiff, and thereafter was maintained by the Plaintiff.
> . . .
> Plaintiff has proven, by clear and convincing evidence, that a prescriptive easement exists and that the Plaintiff's use is adverse to the claim of right of the Defendant. If not before, the 20-year time period commenced at the time of construction by the Plaintiff.

(A. at 162, 172). Under these findings and conclusions, as applied to North Dakota law, the latest the County acquired title was in the 1950s. Reichman cannot use an inverse condemnation action to dispute findings already made by the District Court in the same matter. The finding was made and is binding on her other claims until an appellate court overturns it. She has not claimed the finding of fact to be clearly erroneous.

[79] To the extent Reichman argues no basis was given for dismissal, she and this Court need only look to the District Court's June 8, 2010, which provides the full basis for the subsequent dismissal. (A. at 161). The District Court found the 20-year time period commenced at the time of construction by the County in the 1950s, if not before. (A. at 162, 172).

3. This Court should not overrule Hager.

[80] The legal principles explained in Hager are rooted deep in our State's Constitution, Century Code, and interpretive caselaw:

> Our prior cases have expressly concluded that under N.D. Const. art. I, § 16, the obligation of the state to pay just compensation to the owner for the taking of or for damages to his property is, in effect, a contract to compensate for damages. [Our] cases make it clear that we look to the legal theory undergirding the cause of action to determine which statute of

> limitations applies. For either a taking case or a nontaking case, an inverse condemnation action under N.D. Const. art. I, § 16, is premised upon the governmental entity's implied promise to compensate the owner of property taken or damaged for public use. Therefore, the action is one upon contract, obligation, or liability, express or implied, and the six-year statute of limitations under N.D.C.C. § 28-01-16(1) governs.

Hager, 2009 ND 180 at ¶ 34. Not only is Reichman asking this Court to overturn Hager, she is asking it to overturn decades of jurisprudence concerning statutes of limitations and inverse condemnation. As Hager makes clear, courts are to look at the legal theory undergirding the cause of action to determine which statute of limitations applies. Id. The legal theory for inverse condemnation is an implied promise to compensate. Id. If this indeed is fundamentally unfair, as Reichman argues, it is up to the legislature to change N.D.C.C. § 28-01-16(1).

F. The District Court did not err when it dismissed Reichman's claim for the County's alleged illegal acts in obtaining an ex parte restraining order.

[81] Reichman argues the District Court erred when it dismissed her claim for damages for the County's alleged illegal acts in obtaining an ex parte restraining order. Riechman cannot provide any legal authority which would allow her to recover for this alleged cause of action.

[82] Reichman cannot show the County owed her any legal duty or the County's alleged conduct was in any way actionable. This is not an action in contract; it is not an action in tort; and it is not a negligence action because no duty was owed. Reichman failed to present to the District Court any legal theory which would allow redress through damages.

[83] Even if there was some duty and breach of duty, Reichman cannot show legal causation for the damages. The District Court has discretion to make determinations on

whether to allow oral testimony on an ex parte motion, and whether the defendant should be heard before granting an injunction. N.D.C.C. §§ 32-06-06 and 11. More importantly, it is the District Court that must decide if there exists such an exigency or occasion requiring the immediate issuance of an order so that the rights of the parties may be preserved." N.D.C.C. § 32-06-07. After the application was made, neither party had any right to present oral testimony, and Reichman had no right to be heard before the injunction. N.D.C.C. §§ 32-06-06 and 11. Reichman cannot show any legal causation between the County's alleged action and her damages. Even if the allegations are true, she has not and cannot show the result would have changed in any way. The Supreme Court should affirm the District Court's dismissal of this cause of action.

CONCLUSION

[84] For the foregoing reasons, McKenzie County respectfully requests the Court affirm the District Court's Order dated June 8, 2010, and Order dated December 21, 2010.

DATED this 26th day of August, 2011.

/s/ H. Malcolm Pippin
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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellee McKenzie County hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains **10,184** words from the portion of the brief entitled “Statement of the Issue” through the signature block. This word count was done with the assistance of the undersigned’s computer system, which also counts abbreviations as words.

Dated this 26th day of August, 2011.

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