20110037

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

McKenzie County, a North Dakota Municipality, Plaintiff and Appellee, vs. Deborah Reichman, a/k/a Deborah Stonecipher, Defendant and Appellant.	**SUPREME COURT NO. 20110037** McKenzie County No. 06-C-65

ON APPEAL FROM THE JUDGMENT OF DISMISSAL OF
DEFENDANT'S COUNTERCLAIMS
IN DISCTRICT COURT
STATE OF NORTH DAKOTA
NORTHWEST JURISDICTION

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE FACTS

[¶3] The County, by failing to challenge Reichman's statement of the facts, concedes the following facts:

[¶4] The central physical component of the Ranch is a series of corrals centrally located around the Ranch headquarters. (Exhibit L; Appendix ("A") at 136; Exhibits HHH; A at 141-143.)

[¶5] Every owner/user of the Ranch has utilized the Road as part of livestock production – to move livestock; and utilized gates, panels, and wires across the Road as needed to fully utilize the corrals. (T at Goldsberry: 127, 137; Yockim: T at 78, 98; Barbour: T at 173-174, 184; Priddy: T at 26, 45; and Reichman: T at 620-621.) The corrals cannot be used without blocking the Road. (T at 137.)

[¶6] All have blocked the public's use of the Road as the owner/user deemed necessary, in his or her sole discretion. All used the Road to move livestock and for open grazing. Every owner/user modified the Road as needed for ranching operations, including digging up the Road; installing private electric and water lines and culverts; placing permanent fence posts on it; and incorporating it into the corral system. No owner/user asked the County for permission and the County never asserted any right to prevent these activities. (T at 133, 140, and 236.)

[¶7] Although the County claims the owners/users of the Ranch did not block the public's use of the Road, this claim is specious. All blocked the Road and public traffic. They made public traffic defer to the needs of moving, working, and housing livestock in the corrals. (T at 620-621.) All believed they had the right to use the Road.

[¶8] The County also misstates the record as to how long and how often the prior owners/users blocked the Road with gates and panels as necessary to move, work and

house livestock. Wallace Hall testified that in the 1950s there were permanent gates and wires across the Road all along its path including on the Ranch. (T at 590.) Robert Olson testified after the County completed some work on the Road in the 1960s permanent gates continued across the Road in several locations, including on the Ranch and that these gates were in place in 1970 when he left the area. (T at 235, 236, 253.) Fern Goldsberry testified when she purchased the Ranch there were two permanent wire gates across the Road (T at 141.) After the corral system was completed and the permanent wire gates were removed, the Goldsberrys blocked the Road whenever they moved and housed livestock in the centrally located facilities. (T at 137.) Dennis Yockim blocked the Road at least a couple times a year as needed to bring cattle into the yard and use the facilities to house livestock. (T at 78.) Joe Barbour also blocked the Road as needed, especially at branding time, when it was necessary to block the Road for up to five hours at a time. (T at 184.) Ed Priddy blocked the Road when necessary to bring livestock into the corrals. (T at 26.) This occurred at least two or three times per year. (T at 28.) Reichman also blocked the Road as necessary for her ranching operation. (T at 620-621.)

[¶9] Over Reichman's continuing objection that it was inadmissible opinion testimony concerning a legal conclusion, the County asked witnesses whether they considered the Road to be public. (See T at 24.) The Court indicated it agreed with Reichman's objection, but allowed the testimony anyway. (T at 25.) Reichman's evidentiary objection should have been sustained. Amos v. Bateman, 314 S.E.2d 129, 133 (N.C.App. 1984)(Trial court erred in allowing witness in a prescriptive easement

case to testify as to the ultimate question of whether use of a road was a matter of right or not.); Federal Land Bank v. Bergquist, 425 N.W.2d 360, 363 (N.D. 1988).

LAW AND ARGUMENT

I. THE COURT ERRED WHEN IT FAILED TO USE THE TWENTY-YEAR PERIOD FROM THE TIME THE ACTION WAS FILED BACKWARD TO DETERMINE WHETHER THE COUNTY OBTAINED AN EASEMENT BY PRESCRIPTION.

A. REICHMAN RAISED THIS ISSUE BELOW.

[¶10] The County asserts Reichman's argument on how to calculate the twenty-year period was not raised prior to the Court's June 8, 2010 Order, and urges the Court ignore that she did raise this issue in her Motion to Amend Partial Judgment of July 27, 2010. The June 8, 2010 Order was not a final judgment. The final judgment was not entered until December 21, 2010. The fact Reichman raised this issue before a final judgment allows it to be raised on appeal. Weigel v. Weigel, 2000 ND 16, ¶ 16, 604 N.W.2d 462 ("An amended interim order is not a final judgment and, therefore, is subject to revision at any time before entry of final judgment."). See also Citizens State Bank-Midwest v. Symington, 2010 ND 56, ¶8, 780 N.W.2d 676.

B. N.D.C.C. § 28-01-04 APPLIES TO THIS CASE

[¶11] The County claims N.D.C.C. §28-01-04 does not apply to prescriptive easement cases. As part of its argument, the County cites Nagel v. Emmons County, 474 N.W.2d 46 (N.D. 1991), but fails to inform the Court that as part of the Nagel case, the Court clearly indicated that N.D.C.C. § 28-01-04 does in fact apply to prescriptive easement cases. Id. at 49.

[¶12] The County claims Section 47-05-12, N.D.C.C., should be applicable to this matter, noting a servitude "acquired by enjoyment" may be extinguished "by disuse

thereof by the owner of the servitude for the period prescribed for acquiring title by prescription." The County argues Section 47-05-12 should be harmonized to give meaning to the "related provision" found in N.D.C.C. § 24-07-01.

[¶13] The statutes cited by the County do not specify how the twenty-year period is to be calculated. Whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, if possible, the two must be construed so that effect may be given to both provisions; if the conflict between the two provisions is irreconcilable, the special provision must prevail and must be construed as an exception to the general provision. N.D.C.C. § 1-02-07; see also Johnson v. Nodak Mut. Ins. Co., 2005 ND 112, ¶ 12, 699 N.W.2d 45 ("[A] specific statute controls a general statute."). N.D.C.C. § 28-01-04 specifically provides no action for the recovery of real property may be maintained unless the plaintiff was seized or possessed of the premises within "twenty years before the commencement of such action." The James Court commented on the specificity of the statute, noting, "[u]nder the plain terms of the statute, the twenty year period put forth in Section 28-01-04 is 'measured back from the commencement of the action.'" James v. Griffin, 2001 ND 90, ¶ 12, 626 N.W.2d 704. The related – and more specific – statute expressly notes the twenty-year period is to be measured from the commencement of the action, and the more general language of Section 47-05-12 must bend to the specificity the Legislature and this Court determined applies to a plaintiff attempting to assert a prescriptive easement.

C. THE COUNTY HAS FAILED TO IDENTIFY ANY 20 YEAR PERIOD TO SUPPORT ITS BURDEN OF PROOF.

[¶14] Even if the County may rely on any twenty-year period to support its claim, the District Court still erred because no twenty-year period has ever been identified when

the County has shown it met all of the elements of its claim. The County, in effect, has created a moving target – a 60 year period of time in which it can cherry-pick the best facts in support of each of the elements of its claim, without proving that all of the elements were in place at the same time. For instance, the County relies on the fact that it was involved in constructing the Road in the 1960s. The undisputed facts establish, however, that throughout this time period, up until sometime in the 1970's, owners of the Ranch maintained permanent gates and wires across the Road. When analyzing whether landowners blocked the Road, however, the County ignores this evidence and relies on evidence later in time. Similarly, the County relies on the fact that for some periods of time it performed maintenance on the Road. It ignores, however, the periods when it did not do maintenance and landowners and oil companies performed maintenance on the Road.

II. THE COURT ERRED WHEN IT CONCLUDED THE ACTIONS OF ALL PREVIOUS OWNERS OF THE RANCH EXERCISING DOMAIN AND CONTROL OVER THE ROAD DID NOT DEFEAT THE COUNTY'S ABILITY TO OBTAIN AN EASEMENT BY PRESCRIPTION.

[¶15] The County relies on three facts to establish its claim: 1) the County, along with oil companies, and landowners, improved the Road; the Road appears on maps; and that prior owners allowed the public to travel the Road, subject to their use.

[¶16] As to the effect of public travel, the County and the District Court impermissibly shifted the burden of proof from the County to Reichman. The Court concluded if the owners of the Ranch allowed the public to use the Road, subject to their use as part of operating the Ranch, the burden would shift to Reichman to demonstrate the "landowners reserved the right to restrict public use." (A at 164.) Similarly the County argues: "Reichman was unable to muster any additional evidence indicating the

public's use was 'permissive' instead of adverse under claim of right." (Brief of Appellee at 26.)

[¶17] The County at all times had the burden of proving by clear and convincing evidence that its use of the Road was general, continuous, uninterrupted, and adverse use by the public under a claim of right. The County cannot point to a single fact that shows the County ever exercised control over the Road in a manner that was adverse or hostile to the rights of the owners/users of the Ranch. Mere use of the land by the public, as a highway, is insufficient, of itself, to establish a public highway by prescription. Berger v. Berger, 88 N.W. 2d 98, 99 (1958). Evidence that the landowner retained control, possession and dominion of his or her land negates a claim of adverse and hostile use by the public as a basis for establishing a prescriptive easement. Id. at 104.

[¶18] The County's analysis is also too narrow in its focus. It only tries to account for the blocking of the Road by owners/users of the Ranch. Owners also used the Road to move and graze livestock; and they freely modified the Road as they believed necessary.

[¶19] Without citing any authority, the County claims blocking the Road as part of ranching operations is not a sign the prior owners/users were exercising control over the Road and that the only factor that matters is blocking the public from traveling across the Road. This Court however, has consistently held exactly the opposite: mere use of a road as a highway is not evidence of adverse use. Berger, 88 N.W.2d at 103.

[¶20] The District Court recognized the owners/users of the Ranch retained their right to use the Road as part of ranching operations. (T at 645-646.) The Court's finding is inconsistent with its award of a prescriptive easement to the County.

[¶21] It is undisputed that the County did not introduce any evidence establishing its use of the Road was hostile to the owners' use of the Road. In an attempt to gloss over this deficiency, the County again narrows the inquiry to a single question – whether the owners' use of gates is indicative of permissive use or whether the use of gates can be harmonized with the County's burden of showing hostile use. The County contends the use of gates can be harmonized with its hostile use because it claims Reichman failed to prove the gates and panels were used to exclude the public, rather than to utilize the land for ranching – the owners' preferred use of the property. This argument, however, ignores clear, consistent case law that holds that merely allowing the public to travel over a road is not evidence of adverse use. Neighborly use is not adverse use. See, e.g., Keebler v. Harding, 247 Mont. 518, 523, 807 P.2d 1354, 1358 (1991) ("evidence of a local custom of neighborly accommodation or courtesy, without more, is sufficient to establish permissive use."); Reed v. Soltys, 106 Mich.App. 341, 347–48, 308 N.W.2d 201, 204 (1981); Burrows v. Dintlemann, 41 Ill.App.3d 83, 85, 353 N.E.2d 708, 710 (1976).

[¶22] The other flaw in the County's argument is that it fails to take into account that the County's use of the Road was never adverse to the owners' use of the Road. Such adverse use is a perquisite to the County obtaining a prescriptive easement. Recently, the West Virginia Supreme Court explained that for the element of "hostile" possession, the "person claiming adverse possession must show that his possession of the property was against the right of the true owner and is inconsistent with the title of the true owner." O'Dell v. Stegall 703 S.E.2d 561, 581 FN14 (W.Va. 2010). See also Insko v. Mosier 234 P.3d 984, 989 (Or.App. 2010); Wiser v. Elliott, 228 Or.App. 489, 503, 209

P.3d 337, 345 (Or.App. 2009); McCumbers v. Puckett, 918 N.E.2d 1046, 1049 (Ohio App. 12 Dist. 2009).

[¶23] Because the owners always used the Road in a manner that dominated public travel, the County cannot cite a 20-year period of adverse or hostile possession.

III. THE COURT ERRED WHEN IT FAILED TO MAKE FINDINGS AS TO THE SCOPE AND NATURE OF THE EASEMENT.

[¶24] Without citing any law, the County claims it was under no duty to prove a precise physical description of the Road it claims it acquired by prescription because there is general, conflicting evidence concerning the location of the Road as it has changed over time.

[¶25] If the County is entitled to a Road, it is only entitled to the Road it adversely possessed, which means the Road that existed for the twenty-year period. Since the County has never identified the twenty-year period, it is impossible to know which version of the Road is the version the County claims it now possesses. Although the County claims the Road has not changed over time, the undisputed evidence establishes the physical nature of the Road has changed over time and has changed since Reichman purchased the Ranch. After the District Court entered its order allowing the County control over the Road as part of this litigation, the County fundamentally changed the size and scope of the road. (T at 637.)

[¶26] Second, without a description, it is impossible going forward to determine where the County's rights begin and where the County's rights end concerning the Road. None of the items relied upon by the County to support the District Court's actions establish a clear means of determining the boundaries of the Road.

Dated this 28th day of September, 2011.

By: /s/ Monte L. Rogneby

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