20140089

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The City of Harwood, a political subdivision of the State of North Dakota, and Lake Shure Estates, Inc., a North Dakota nonprofit corporation,
Plaintiffs-Appellees,

vs.

The City of Reile's Acres, a political subdivision of the State of North Dakota, Dr. Ron Knutson, and all other persons unknown claiming any interest or estate in, or lien or encumbrance upon, the property described in the Complaint,
Defendants,

The City of Reile's Acres, a political subdivision of the State of North Dakota,
Appellant.

Supreme Court No. 20140089

District Court No. 09-2011-CV-02313

REPLY BRIEF OF DEFENDANT-APPELLANT, THE CITY OF REILE'S ACRES

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT ENTERED ON JULY 26, 2013; THE JUDGMENT OF SAID DISTRICT COURT ENTERED ON AUGUST 13, 2013; AND THE ORDER CONFIRMING SALE DATED JANUARY 23, 2014

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE STEVEN L. MARQUART

GARAAS LAW FIRM
Jonathan T. Garaas
Attorneys for Defendant-Appellant, The City of Reile's Acres
Office and Post Office Address
DeMores Office Park
1314 - 23rd Street South
Fargo, ND 58103
E-mail address: garaaslawfirm@ideaone.net
North Dakota ID # 03080
Telephone: 701-293-7211

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

North Dakota Cases

Cases of Other Jurisdictions

Statutes

State Regulations

ISSUES ON APPEAL

The City of Harwood ["HARWOOD"] and Lake Shure Estates, Inc. ["LAKE SHURE"] identify two (2) issues on appeal, but fail to understand both issues are irrelevant if the trial court lacks subject matter and/or personal jurisdiction.

STATEMENT OF THE CASE

HARWOOD and LAKE SHURE inaccurately claim "(t)his action was commenced on July 26, 2011, by (HARWOOD and LAKE SHURE), against the City of Reile's Acres ("Reile's Acres"), Dr. Ron Knutson, and all other persons unknown claiming any interest or estate in, or lien or encumbrance upon, the property described in the Complaint." Appellees' Brief, ¶ 3. N.D.C.C. § 28-01-38 dictates that an "action is commenced as to each defendant when the summons is served on that defendant .." No attempt was made to serve all of the defendants, known or unknown, pursuant to N.D.R.Civ.P. 4. Nor did HARWOOD or LAKE SHURE perform an initial mandated step for a partition action – record a lis pendens. N.D.C.C. § 32-16-04. Required acquisition of personal jurisdiction necessary for a trial court to entertain a partition action has not yet been commenced, and the actions of the trial court are void. Alliance Pipeline L.P. v. Smith, 2013 ND 117, ¶ 18, 833 N.W.2d 464.

Without evidence in the record, HARWOOD and LAKE SHURE falsely claim that "Lake Shure and Dr. Ron Knutson purchased the right to use a certain capacity of the Harwood Lagoons." Appellees' Brief, ¶ 4. No such evidence was submitted. Lake Shure Properties – a different legal entity – entered into an agreement whereby it purchased "from Reile's Acres the right to use fifty percent (50%) of the treatment facility volume allocated to Reile's Acres under said agreement (i.e. sixteen percent [16%] of the capacity of the

treatment facility)." App., ps. 9-10; Exhibit 7, ¶ 2; App., ps. 61-62. REILE'S ACRES makes clear the actual legal relationships, including the missing party. Appellant's Brief, pages 8-11. As to the Harwood Lagoon, two (2) owners exist: (1) HARWOOD [undivided 68%]; and (2) REILE'S ACRES [undivided 32%]. As to "treatment capacity" – four (4) entities have access: (1) HARWOOD [68%]; (2) REILE'S ACRES [16%]; (3) LAKE SHURE [9.04%]; and (4) Lake Shure Properties, a North Dakota general partnership [6.96%]. Appellant's Brief, pages 5-12. Only REILE'S ACRES had an ownership interest in its sewer lines [an ownership interest never in controversy, nor the subject of the pleadings, by service of process or consent]. See, Appellant's Brief, page 11.

STATEMENT OF FACTS

HARWOOD and LAKE SHURE erroneously cite the trial judge's "Conclusions of Law" as fact. Appellees' Brief, ¶ 8. REILE'S ACRES did not consider the Harwood Lagoons as having outlived their usefulness to the parties, and REILE'S ACRES was prepared to accept the role of survivor entity in accordance with the contracts so as to maintain the Harwood Lagoon as a back-up system for sewage treatment. Tr., ps. 113-114; Appellant's Brief, pages 12-13.

The Harwood Lagoon was still fully functional, had no noted defects at the time of its last inspection, had operated successfully throughout most of its history, was fully permitted, and was capable of being maintained by REILE'S ACRES. Appellant's Brief, pages 12-13; Exhibit #25, App., ps. 97, 115, Tr., p.40, 46-53, 61-63, 86.

HARWOOD and LAKE SHURE also attempt to mislead by suggesting "Harwood and Reile's Acres no longer use the Harwood Lagoons". Appellees' Brief, ¶ 21. REILE'S

ACRES desired to maintain the use of the Harwood Lagoons for back-up, and HARWOOD was still using it for deposit of effluent by commercial entities. Tr., ps. 33; 82-83; "independent haulers" at 97.

The trial court conceded the "sale of each of the three cells individually" was factually and legally possible. Appellant's Brief, page 13; App., p. 138.

LAW AND ARGUMENT

POINT 1. The District Court did not acquire jurisdiction over the parties, nor subject matter.

Neither HARWOOD, nor LAKE SHURE attempt to identify any additional steps taken to establish jurisdiction over all of the parties, or the subject matter.

In the absence of comment/response, the deficiencies noted by REILE'S ACRES should be deemed conceded for these appellate proceedings. *See* United Coop. v. Frontier FS Coop., 738 N.W.2d 578, 588 (Wis. 2007); Minerals Development & Supply Co., Inc. v. Superior Silica Sands, LLC, 841 N.W.2d 580 (Wis. 2013); and also, Schullo v. Delaval, Inc., 816 N.W.2d 352 (Wis. 2012) and Charolais Breeding Ranches, Ltd. V. FPC Sec. Corp., 279 N.W.2d 493 (Ct.App. 1979).

Appellees also misread State v. J.P. Lamb Land Co., 359 N.W.2d 368 (N.D. 1984) when cited at Appellees' Brief, ¶ 48. J.P. Lamb, at page 69, actually recognizes that the trial court must first have jurisdiction before it can ever entertain a declaratory action. To pursue their action(s), Appellees must first establish both subject matter and personal jurisdiction – which was not done.

POINT 2. Neither HARWOOD, nor LAKE SHURE has the right to initiate this

declaratory action.

The failure by HARWOOD and LAKE SHURE to identify the steps necessarily taken to establish the right to initiate a declaratory action should mean any deficiencies noted by REILE'S ACRES are deemed conceded. *Id.*

Neither Appellee directly addressed REILE'S ACRES' argument that the "District Court was without jurisdiction to 'alter', 'reform', or 'modify' th(e) contract (between HARWOOD and REILE'S ACRES)." Appellant's Brief, page 16, citing Biteler's Tower Service, Inc. v. Guderian, 466 N.W.2d 141, 143-144 (N.D. 1991), E.E.E., Inc. v. Hanson, 318 N.W.2d 101, 104-105 (N.D. 1982). REILE'S ACRES' position should be deemed conceded. *Id.*

"Frustration of purpose" cannot result from a party's own act – if HARWOOD chooses to do some act making an existing contract less desirable or advantageous, there is no "frustration of purpose". HARWOOD and LAKE SHURE inaccurately quote Red River Wings, Inc. v. Hoot, Inc., 2008 ND 117, ¶ 56, 751 N.W.2d 206 [¶ 40 of the Appellees' Brief] when they fail to italicize the words "*without his fault*" – words of emphasis in the original opinion, but now omitted so as to gloss over an essential element of the legal doctrine. This violation should not be tolerated – the emphasized words preclude HARWOOD from asserting the doctrine as a "shield" or "sword".

HARWOOD'S singular choice to discontinue such treatment will always be its act or fault so the doctrine was not available; the 1985 contract always contemplated such event was possible, with the other municipality entitled to assume the administrative role if required. REILE'S ACRES is willing to perform the contractual role as originally

contemplated, and agreed. There is no frustration of purpose, only a desire to get out of a contract by their own fault/decision. The doctrine does not apply to acts voluntarily done.

LAKE SHURE is not a party to the 1985 Agreement, and has no right to seek a declaratory judgment with respect to its terms. N.D.C.C. Chap. 32-23. Nor was it a party to the original agreement involving REILE'S ACRES and Lake Shure Properties. It cannot invoke these laws; it was specious for a non-party to a contract to try [there has not been a full assignment of Lake Shure Properties' contractual right to some treatment capacity, and never an ownership interest].

POINT 3. If subject matter jurisdiction exists, the District Court cannot nullify contracts.

HARWOOD claims it "has the right to seek declaratory relief 'to settle uncertainties about rights, status, and other legal relations,' and the declaratory judgment chapter 'is to be construed and administered liberally.' (citation omitted)" Appellees' Brief, ¶ 47. HARWOOD fails to identify what "uncertainty" exists needing judicial action. The District Court should not have accepted HARWOOD'S invited ruse or subterfuge to alter, reform, or modify, all acts forbidden by law – and never addressed by HARWOOD or LAKE SHURE. Appellant's Brief, page 19, citing Biteler's Tower Service, Inc. v. Guderian, 466 N.W.2d 141, 143 (N.D. 1991), N.D.C.C. § 9-09-06, and E.E.E., Inc. v. Hanson, 318 N.W.2d 101, 104 (N.D. 1982). Nor do HARWOOD and LAKE SHURE dispute the doctrine is not supposed to be a "sword", only a "shield". Appellees' Brief, ¶ 46.

POINT 4. LAKE SHURE does not have the right to initiate an action for partition of real property -- it does not own any land.

The record is void of any evidence establishing any assignment/transfer by Lake Shure Properties to Dr. Ron Knutson.

LAKE SHURE, as an assignee of Lake Shure Properties, did not acquire any interest in real property; the trial court had no right to reform any contract so as to transfer or convey REILE'S ACRES' *sole ownership* of its sewer lines, inside and outside of the tract of land referenced as Harwood Lagoon.

It is incongruous for the trial court to cancel contract(s) due to "frustration of purpose and/or impossibility of performance" while simultaneously expanding LAKE SHURE'S [and/or Knutson's] interest under the same canceled contract to include "an undivided ownership interest in and right to use the 6" force main running to the Harwood Lagoons from near the intersection of 45th Street and 52nd Avenue North" – REILE'S ACRES' sewer line. App., p. 138. Contrary to their assertion [Appellees' Brief, ¶s 52, 54], Appendix pages 61-63 and 65-66 do not establish any ownership interest in anyone other than REILE'S ACRES as to its land, and its sewer lines – only "treatment capacity" was granted Lake Shure Properties, a portion of which was assigned to LAKE SHURE [and the rest retained].

POINT 5. The District Court lacks personal jurisdiction over all of the parties.

HARWOOD and LAKE SHURE impliedly concede all statutory breaches claimed by REILE'S ACRES. Appellees' Brief, ¶s 67-72. Appellees failed to provide proof of service upon the defendants identified in the Summons [App., p. 17] as being "all other persons unknown claiming an interest or estate in, or lien or encumbrance upon, the property described in the Complaint". Nor did they provide proof of service upon "unknown defendants who claim or may claim certain estates or interests in, or liens or encumbrances

upon, the Harwood lagoon by virtue of entering into a contract with defendant Reile's Acres" [Complaint, ¶ 5; App., p. 6], by publication, or otherwise. Schmidt v. Frank, 140 N.W.2d 588 (N.D. 1966), involving a partition action, but not a declaratory action, has no application – there was no assertion that "unknown parties" existed in Schmidt, so publication service requirements were not invoked. The presumptive owner of 6.96% of the sewer lagoon capacity was not made a party, nor served – jurisdiction did not exist.

POINT 6. Should jurisdiction exist, the sale of the real property was inappropriate -- it can be divided between the parties without need for forced sale.

Appellees cannot reasonably rely upon Schmidt v. Wittinger, 2004 ND 189, 687 N.W.2d 479, as authority. At ¶s 5-7 of the opinion it recognized that the "law favors partition in kind, and there is a presumption that partition in kind should be made unless great prejudice is shown. ..'The burden of proving that partition in kind cannot be made without great prejudice is on the party demanding a sale.'" When the trial court ordered sale by separate tracts, the trial court legally determined that partition in kind was possible. Appellees did not timely meet their "burden"; the trial court is not a proper party allowed to develop later evidence for "value of the share" as compared to "value of the whole". Only if the trial court originally determines that the "property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, (may) the court .. order a sale thereof." N.D.C.C. § 32-16-12. Contrary to insinuation [Appellees' Brief, ¶ 63], REILE'S ACRES has never asserted HARWOOD did not have the right to seek partition, only that it [and the trial court] had to do it right. Continuity of the 1985 contract is not dependant upon the percentage, or form of land ownership.

Appellees erroneously assert the non-use of the Harwood Lagoon.

CONCLUSION

REILE'S ACRES pray that the law be followed.

Respectfully submitted this 6th day of June, 2014.

Garaas Law Firm

Jonathan T. Garaas
Attorneys for The City of Reile's Acres
1314 23rd Street South
Fargo, North Dakota 58103
E-mail address: garaaslawfirm@ideaone.net
Telephone: (701) 293-7211
North Dakota Bar ID #03080

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The City of Harwood, a political subdivision of the State of North Dakota, and Lake Shure Estates, Inc., a North Dakota nonprofit corporation,
Plaintiffs-Appellees,

vs.

The City of Reile's Acres, a political subdivision of the State of North Dakota, Dr. Ron Knutson, and all other persons unknown claiming any interest or estate in, or lien or encumbrance upon, the property described in the Complaint,
Defendants,

The City of Reile's Acres, a political subdivision of the State of North Dakota,
Appellant.

Supreme Court No. 20140089

District Court No. 09-2011-CV-02313

AFFIDAVIT OF MAILING

State of North Dakota
County of Cass

Jonathan T. Garaas, being first duly sworn on oath, deposes and says: Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

On the day of 6th day of June, 2014, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: **REPLY BRIEF OF DEFENDANT-APPELLANT, THE CITY OF REILE'S ACRES.**

The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

John T. Shockley
Robert G. Hoy
Ohnstad Twichell, P.C.
P.O. Box 458
West Fargo, ND 58078-0458

Sean O. Smith
Tschider & Smith
418 E. Rosser Ave., Ste 200
Bismarck, ND 58501-4046

To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Jonathan T. Garaas

Subscribed and sworn to before me this 6th day of June, 2014.

Notary Public

DAVID GARAAS
Notary Public
State of North Dakota
My Commission Expires July 2, 2017