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

PETITION FOR REHEARING

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
Telephone: (701) 293-7211
North Dakota ID 03080

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[¶1] **PETITION FOR REHEARING**

[¶2] Petitioner, The City of Reile's Acres ["REILE'S ACRES"] hereby petitions for a rehearing in order to review this Supreme Court's rejection of REILE'S ACRES' positions. City of Harwood v. The City of Reiles Acres, 2015 ND 33, __ N.W.2d __.

[¶3] REILE'S ACRES' Petition for Rehearing is predicated upon a belief that the Supreme Court has failed to honor North Dakota's constitutional and statutory scheme and/or consistent judicial principles earlier enunciated.

[¶4] Contrary to insinuation, REILE'S ACRES has never argued that district courts do not have jurisdiction to hear and determine all civil actions and proceedings, to include the right to construe and determine property rights under contracts. REILE'S ACRES even endorses many of the Court's legal observations set forth in ¶s 10, 11, 12, 13, and 14 of the opinion, but there exists buried legal gems that were recited, but ignored by the Court in its opinion which actually, if honored, preclude the decision.

[¶5] This Petition for Rehearing relates to two (2) basic concepts:

[¶6] **Point 1. "Frustration of purpose" is not a legal concept that can be invoked by the City of Harwood ["HARWOOD"], nor Lake Shure Estates, Inc. ['LAKE SHURE"].**

[¶7] At ¶ 18 of the opinion, the Supreme Court fails to accurate quote Silbernagel v. Silbernagel, 2011 ND 140, ¶ 13, 800 N.W.2d 320, when describing the legal doctrine called "frustration of purpose" – it glaringly omits the first sentence of ¶ 13 [the missing words are emphasized in **bold**] which recognizes that the concept only acts as a shield, and never a sword:

> [¶ 13] **Frustration of purpose is a defense to a breach of contract claim**

> **and constitutes an avoidance of all or part of a plaintiff's contract claim.** *WFND, LLC v. Fargo Marc, LLC*, 2007 ND 67, ¶ 18, 730 N.W.2d 841. "[F]rustration of purpose 'occurs when "after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made."'" [WFND,] at ¶ 18 (quoting Tallackson Potato Co., Inc. V. MTK Potato Co., 278 N.W.2d 417, 424 n.6 (N.D. 1979)).

[¶8] The missing sentence describes the equitable concept; the quoted language merely identifies the timing. Never before has the Supreme Court used the equitable doctrine as a sword, unilaterally hefted by a contracting party, to eliminate written contractual obligations – *with good cause*. If the frustration of purpose doctrine can be unilaterally invoked by either contracting party, not one North Dakota contract is worth its weight in salt/dirt/detritus.

[¶9] Jonathan T. Garaas recently bought a 2014 Ford Explorer for transportation purposes under a contract that provides for an approximate $510 monthly payment, and I am confident that US Bank, N.A., wants to receive the monthly payment with some regularity. Under the new, and expanded legal doctrine of "frustration of purpose" in North Dakota, Jonathan T. Garaas need only go into any Chevrolet car dealership, and buy a new 2015 Chevrolet [for cash or credit; not relevant to US Bank, N.A.], and then give notice to US Bank, N.A., that the contract involving the 2014 Ford Explorer is over – the $510 monthly payment will not be again paid; Garaas' need for transportation using a 2014 Ford Explorer is no more.

[¶10] *Au contraire*, says the Supreme Court, the "frustration of purpose" has two (2) other qualifications [first in *italics* and the second **bolded**] that assures US Bank, N.A., of payment – "a party's principal purpose is substantially frustrated *without his fault* by the **occurrence of an event the non-occurrence of which was a basic assumption** on which the contract was made."

[¶11] **A. "[A] party's principal purpose is substantially frustrated *without his fault*.."**

[¶12] The North Dakota Supreme Court describes the purpose of HARWOOD, now blest at ¶ 26 of the opinion, when it is writes the "district court did not err in interpreting the principal purpose and basic assumption of the 1985 agreement and in finding that purpose was frustrated by the municipalities' growth and contracts with Fargo for waste water treatment services. The court also found the parties were not at fault for contracting with Fargo for waste water treatment services and no longer using the Harwood Lagoon for municipal waste water treatment services, because the contracts were prompted by the municipalities' population growth and the design capacity of the Harwood Lagoon. On this record, the district court did not err in finding the municipalities were not at fault for outgrowing the design capacity for the Harwood Lagoon and separately contracting with Fargo for their waste water treatment services."

[¶13] Simply put, if "the Harwood Lagoon was designed and constructed in 1985 to provide waste water treatment services for about 500 people" [*Id.*, ¶ 26], that did not change, nor did the use of the Harwood Lagoon change. Not one person testified that the primary purpose of the Harwood Lagoon was to treat ALL sewage from these communities – the purpose of treating the sewage from at least 500 people always remains constant – the contract even provides for the continued maintenance so as to assure such capacity, and also contemplates future administration by REILE'S ACRES should HARWOOD desire to opt out of administrative obligations. At all relevant times, for over a decade, REILE'S ACRES was using, and continued to want to use the Harwood Lagoon as its back-up system [and also, to

honor its contractual obligation to provide sewage lagoon capacity to its contracting party - which had no ownership interest in the Harwood Lagoon, nor any ownership interest in REILE'S ACRES' pipes anywhere on the face of the earth AND outside of the real property identified in the partition action].

[¶14] Moreover, the act of "contracting" with Fargo by HARWOOD [or even earlier, by REILE'S ACRES] will always be regarded as a voluntary act on the part of each party to the contract. N.D.C.C. § 9-01-02. A contract voluntarily entered into by HARWOOD for Fargo treatment of sewage will always be an act that precludes use of the defense of frustration of purpose – HARWOOD can do no act to voluntarily end its contractual obligation with REILE'S ACRES, nor could REILE'S ACRES do such an act. Frankly, if a judge on my own matter, until this opinion becomes final, I would have ruled against Plaintiff Jonathan T. Garaas had he brought a declaratory action against US Bank, N.A., concerning the 2014 Ford Explorer. If the opinion stands, there will be no end to litigation so Jonathan T. Garaas, and every other lawyer that reads the decision, will take delight in anticipated new revenues from both sides of possible contracting parties – (a) drafting contracts that preclude implementation of the equitable doctrine thereby restoring certainty of contracts, (b) drafting contingency agreements based on a percentage of monies not necessarily paid to creditors by debtors wanting to avoid contractual terms, or (c) representing either party feeling offended by the judicially sanctioned results when purposes of contracts are unilaterally declared frustrated by any debtor.

[¶15] B. "[T]he **occurrence of an event the non-occurrence of which was a basic assumption** on which the contract was made."

[¶16] Not one person testified, nor does admitted evidence disclose, a belief or assumption that either community would not grow beyond 500 people providing sewage for treatment at the Harwood Lagoon – such a concept/event cannot be an "occurrence" triggering the equitable doctrine.

[¶17] Not one person testified, nor does admitted evidence disclose, a belief or assumption that either community would not voluntarily contract with the City of Fargo, City of West Fargo, or the even the City of Moorhead [among many other possible political subdivisions] for treatment of sewage developed within the many square mile otherwise described as the geographical area of HARWOOD, REILE'S ACRES, and/or non-annexed LAKE SHURE – such a concept/event cannot be an "occurrence" triggering the equitable doctrine.

[¶18] The purposes of the Harwood Lagoon are not thwarted by either population growth or other voluntary sewage treatment contracts – both concepts/events were well within the contemplation by any city official in the 1980's of modest intelligence and normal experience when the contracts were entered into. If foreseeable, the doctrine of frustration of purpose should not be available as a shield to excuse the performance – and never as a sword hefted to destroy a clear and unambiguous contract with judicial sanctification.

[¶19] **Point 2. Partition actions are legal actions – not even the courts can excuse non-compliance with the law.**

[¶20] The Supreme Court's decision makes comments about partition actions under N.D.C.C. Chap. 32-16, at ¶ 28 of its opinion, that are undoubtedly true – but again the legal gems are ignored to avoid the mandated result. The partition complaint does not set forth the interests of all persons in the property, whether known or unknown, nor is the summons

directed at, nor was it ever served, on all persons having an interest in the real property. At ¶ 34 of the opinion, the Court is absolutely incorrect when asserting the statutorily mandated, but missing, notice of the pendency of the action can be excused because "(t)his record does not establish that any entity with a conveyance or lien of record in the partitioned property was not made a party to the partition action under N.D.C.C. § 32-16-03." Neither HARWOOD, LAKE SHURE, nor the Supreme Court can account for the ownership of 6.96% of the treatment capacity by Lake Shure Properties, a North Dakota general partnership, and developer of North 81-20 Subdivision and Willow Tree Subdivision [Appellant's Brief, pages 7-12] which interest, upon reflection, clearly constitutes ownership of an easement under N.D.C.C. § 47-05-01(8) ["The right of receiving water from or discharging the same upon land."], or possibly an appurtenance under N.D.C.C. § 47-01-06.

[¶21] Failure to plead and serve *all parties* – Lake Shure Properties – means the court was without jurisdiction to proceed. Point 5 of REILE'S ACRES' Brief.

[¶22] And if ever authorized to judicially act, the statute requires partition in kind before public sale – the Court is statutorily compelled to only order public sale if the property "is so situated that partition cannot be made without great prejudice to the owners" – only then may the court order a sale thereof. N.D.C.C. § 32-16-12. The judge required separate sales for each cell proving a public sale without a partition was legally unnecessary.

[¶23] The Supreme Court's opinion errs when it states, at ¶ 33, "Lake Shure Estates was not granted relief on the partition claim, and we reject Reile's Acres' claims about its involvement in the partition part of this action." In that Lake Shure Estates was not a party to the "1985 agreement between Harwood and Reiles Acres" which was repudiated under

the "frustration of purpose" doctrine used as a sword, only the partition action component remains as a judicial vehicle for granting ownership interests in REILE'S ACRES' separately owned sewage lines [located outside of the Harwood Lagoon] by the District Court. The Supreme Court decision is either (a) wrong, or (b) sanctions the judicial taking of REILE'S ACRES' property [a percentage of sewer lines outside of the Harwood Lagoon previously owned by REILE'S ACRES alone] – property not within the statutorily mandated legal description possibly subject to the partition action, or (c) allows a judicial re-write of the contract between REILE'S ACRES and a non-party [Lake Shure Properties, a North Dakota general partnership] – LAKE SHURE was not a party to that contract, merely an assignee of a non-party. The court was without jurisdiction to "alter", "reform", or "modify" any contract. 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).

[¶24] The matter should be re-heard, or the opinion rewritten to conform to law and fact which would require REILE'S ACRES contract rights and ownership rights be restored.

Respectfully submitted this 25th day of February, 2015.

GARAAS LAW FIRM

Jonathan T. Garaas
Attorneys for 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

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FILED
IN THE OFFICE OF THE
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FEB 25 2015

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Appellant.

Supreme Court No. 20140089

District Court No. 09-2011-CV-02313

AFFIDAVIT OF MAILING

State of North Dakota
County of Cass

Pat Doty, 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 25th day of February, 2015, 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: **PETITION FOR REHEARING.**

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.

Pat Doty

Pat Doty

Subscribed and sworn to before me this 25th day of February, 2015.

JONATHAN T. GARAAS
Notary Public
State of North Dakota
My Commission Expires Dec. 28, 2015

Notary Public