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STATE OF NORTH DAKOTA

NORTH DAKOTA SUPREME COURT

Harry W. Chornuk and

Linda D. Chornuk,

Plaintiffs and Appellees,

v.

Craig Nelson and

Julie Nelson,

Defendants and Appellants.

Supreme Court File No. 20140124

Appeal Following Bench Trial Before the Honorable Josh B. Rustad, Judge of the McKenzie County Court, Northwest Judicial District, Civil No. 27-10-C-00123

APPELLEES' BRIEF

ANTHONY OSTLAND BAER & LOUWAGIE P.A.
Aaron R. Hartman (MN Bar No. 320195)
Admitted Pro Hac Vice
90 South 7th Street
Suite 3600
Minneapolis, MN 55402
Telephone: 612-349-6969
Fax: 612-349-6996
Email: ahartman@aoblaw.com

And

Jordon J. Evert (ND Bar No. 06969)
Furuseth, Kalil, Olson & Evert, P.C.
P.O. Box 417
108 Main Street
Williston, ND 58802-0417
Telephone: 701-774-0005
Fax: 701-572-1505
Email: jordon@furusethlaw.com

ATTORNEYS FOR APPELLANTS

MACKOFF KELLOGG LAW FIRM
Mark C. Sherer (ND Bar No. 06749)
Michael J. Maus (ND Bar No. 03499)
38 Second Avenue East
Dickinson, ND 58601
Telephone: 701-227-1841
Email: msherer@mackoff.com
ATTORNEYS FOR APPELLEES

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STATEMENT OF THE ISSUES

In addition to the issue raised by the Appellants, Craig Nelson and Julie Nelson, the Appellees, Harry W. Chornuk and Linda D. Chornuk pose the following additional issue for determination: Did the Nelsons waive their right to appeal the judgment by voluntarily satisfying the judgment entered by the District Court?

STATEMENT OF FACTS

[1] On September 3, 2010, the Plaintiffs, Harry W. Chornuk and Linda D. Chornuk (hereinafter the "Chornuks"), filed their Complaint against the Defendants, Craig Nelson and Julie Nelson (hereinafter the "Nelsons"), alleging trespass to land, conversion and seeking to quiet title to certain real property, described as follows in the Complaint:

Township 150 North, Range 90 West
Section 17: 1.667 acre tract in NW 1/4 SW 1/4

[Index No. 1[1]; App. 8-11]

[2] A trial was held before the District Court of McKenzie County, North Dakota on September 28, 2011, following which the Court took the matter under advisement. [Index No. 50; Tr. Tran. 61:11-13]

[3] At issue in the case was the ownership of certain real property located in McKenzie County, North Dakota, which Norman and Mildred Dahl conveyed to the Chornuks by a Warranty Deed, dated January 17, 1986 (hereinafter, the "1986 Deed"). [App.32-33; Tr. Tran. 7:8-25 (A.59)] The Chornuks paid consideration for the property. [App. 32-33]

[11] Citations to the "Index" are taken from the McKenzie County Case Summery which is part of the Record and which has also been submitted with the Appellant's Appendix, ppg. A.1-A.7]

[4] The Chornuks recorded their deed on June 24, 2010. [App.33; Tr. Tran. 8:5-9] The Chornuks did not record their deed until roughly 20 years later because they were not aware that the 1986 Deed had not been recorded. [Tr. Tran. 9:21]

[5] At the time the Chornuk's purchased the property at issue, the seller, Norman Dahl, assured them that he would take care of recording the deed, just as he had done with two prior transactions in which the Chornuks had purchased property from Mr. and Mrs. Dahl. [Tr. Tran. 8:18-23; 12:4-25; 13:1; 25: 20-24; 34:7-8; 36:17-19]

[6] The Chornuk's believed that they had been paying taxes on the property during the duration of their ownership, and no evidence was submitted by the Nelson's to the contrary. [Tr. Tran. 28:9-11;30:14-15]

[7] On June 17, 2005, Mildred Dahl conveyed the same Property by Warranty Deed to the Defendants, Craig and Julie Nelson (hereinafter, the "2005 Deed"). [Index No. 30, App. 34-37]. They recorded the 2005 Deed with the McKenzie County Recorder on July 5, 2005. (App. 34).

[8] At the time of the sale, the Nelsons knew that Mildred Dahl was not using the property, and admit that they have seen the Chornuks watering the trees and mowing the grass on the Property. [Tr. Tran. 41:7-15 (App. 72)] Despite this knowledge, the Nelsons failed to ask Mildred Dahl about the Chornuk's right to use the Property or to make any similar inquiries. [Tr. Tran. 41:16-23 (App.72)]

[9] After the Nelsons purchased the Property from Mildred Dahl it went unused by them between 2005-2010 [Tr. Tran. 51:8-10 (A.81)] During this time, Craig Nelson admitted to seeing the Chornuks watering the trees and mowing the grass, yet did not

inquire as to why the Chornuks were caring for the property. [Tr. Tran. 51:11-13; 17-19 (App. 81)].

[10] Following the trial, the Court issued its Order on November 3, 2011, in which it ruled for the Chornuks, quieting title to the said real property in their favor and awarding damages of $2,830.00. [Index. No. 25]

[11] In the November 3, 2011 Order, the Court made the following Findings:

> The Court finds that the act of mowing the subject property three or four times a year, planting trees on the property and installing a drip line for those trees, installing a flower box on the property, and other general maintenance are sufficient facts that would put a prudent person on notice and require Defendants to conduct further inquiry, particularly where the Defendants went past the subject property on a near-daily basis. As such, the Defendants are not protected as good faith purchasers. [Index No. 25, Pg. 4]

[12] The Court's Order also stated: "The Court further finds that the circumstances presented indicated open and notorious possession and occupancy of the subject property." [Index. No. 25, Pg. 4]

[13] Thereafter, Judgment was entered following the Court's Order of November 3, 2011, wherein title to the following described real property was quieted as to the Chornuks:

> A tract of land located in the NW 1/4SW1/4 of Section 17, Township 150 North, Range 98 West of the Fifth Principal Meridian. Beginning at a point 1368.0 feet due North of the section line, and 33.0 feet, South 89°41" East of the Southwest corner of Section 17, Township 150 North, Range 98 West to the true point of beginning and described as follows: Thence south 89°41" East, a distance of 333.0 feet; thence North 0°05" East, a distance of 218.0 feet; thence North 89°41" West, a distance of 333.0 feet; thence South 0°05' East, a distance of 218.0 feet to the point of beginning. Tract contains 1.667 acres, more or less. [Index No. 26]

[14] On November 23, 2011, the Nelsons filed their Motion for Reconsideration, and Brief in Support, challenging the amount of the damage award entered in favor of the Chornuks by the Court. [Index. No's 44 and 45]

[15] A hearing on the Motion to Reconsider was held on January 22, 2013. [Index. No. 70, ¶3] Following the hearing, the Court issued an Order, dated February 11, 2014, amending its prior Order and Judgment, which awarded damages to the Chornuks for the conversion of trees by the Nelsons. That Judgment amount was reduced to $360.00. [Index. No. 70, ¶8]

[16] Thereafter, an Order for Amendment to Judgment and an Amended Judgment, reflecting the decision outlined in the Order of February 11, 2014, were entered. [Index No's. 73 and 74]

[17] The Nelsons paid the Amended Judgment entered against them and in favor of the Chornuks, as noted in the Satisfaction of Judgment filed on March 11, 2014. [Index No. 76]

LAW AND ARGUMENT

I. THE NELSONS CANNOT BE GOOD FAITH PURCHASERS BECAUSE THEY HAD CONSTRUCTIVE NOTICE

[18] Following the trial in this matter, the District Court entered a finding that the Nelsons had been put on notice of the Chornuk's interest in the subject property prior to completing the purchase of the property from Mrs. Dahl. Specifically, the Court found that the Nelsons were not "good faith purchasers" [App. 25] due to the fact that Chornuk's maintenance activities were enough to "put a prudent person on notice and require Defendants to conduct further inquiry" at the time of the 2005 transaction. [App. 25] The evidence entered at trial was undisputed that the Chornuks, both before and after the

Nelson's purchased the property, had regularly mowed the grass on the property three to four times per year, and that they had planted and maintained trees, flower boxes and a drip line on the property. [App. 25] Those facts formed the basis for the Court's finding in favor of the Chornuks. The Court's Judgment should be upheld.

[19] In their brief, the Nelson's correctly note that the District Court decision should be reviewed under a "clearly erroneous" standard. "Findings of fact, including findings in juvenile matters, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." N.D.R.Civ.P. 52(a)(6). At the trial in this matter, testimony was elicited from all of the parties. The District Court had the opportunity to observe the testimony of all of the witnesses, including Mr. Nelson. He admitted that he had seen the Chornuks caring for the trees and mowing the grass on the subject property. He also admitted that at the time that he and his wife purchased the property from Mrs. Dahl, he "knew that she was not using the property." [Tr. Trans. 41:7-15] In light of such evidence, the District Court's findings that the Nelsons were put on notice to make further inquiry

[20] In North Dakota, unrecorded deeds are not declared void where it can be shown that a subsequent purchaser did not acquire the land in good faith. North Dakota's recording statute reads as follows:

> Every conveyance of real estate not recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any part of or portion thereof, whose conveyance, whether in the form of a warranty deed, or deed of bargain and sale, or deed of quitclaim and release of the form in common use or otherwise, first is deposited with the proper officer for record and subsequently recorded, whether entitled to record or not, or as against an attachment

> levied thereon or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance.

N.D.C.C. § 47-19-41.

[21] The key phrase in that statute which applies to the instant case is "subsequent purchaser in good faith". Id. It is undisputed that the Nelsons were subsequent purchasers, and that the Deed they received from Mrs. Dahl was recorded before the 1986 Deed wherein Mr. and Mrs. Dahl conveyed title to the property to the Chornuks. However, "[o]ne is not a purchaser in good faith, so as to be protected against an outstanding contract, who has constructive notice of such contract; and this because the law itself imputes, in the case of constructive notice, knowledge to him." Hunter v. McDevitt, 12 N.D. 505, 513-514, 97 N.W. 869, 872 (N.D. 1903). The District Court properly found that the Nelsons were not purchasers in good faith, because the actions of the Chornuks, by openly and notoriously maintaining and using the property, constituted constructive notice of their interest. "But one may honestly believe that he has good title when in fact he has not, and, while this belief will not avail him as against an outstanding contract or title of which he has constructive notice, he will nevertheless be entitled to be protected in his permanent improvements, for the test of good faith as to them is his honest belief that he has good title." Id.

[22] The decision of the North Dakota Supreme Court in Farmers Union Oil Co. vs. Smetana is instructive in this case. It reads in pertinent part as follows: "Under N.D.C.C. §1-01-25, a person who has actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact and who omits to make an inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself." Farmers

Union Oil Co. v. Smetana, 2009 ND 74, P16, 764 N.W.2d 665, 671 (N.D. 2009). Here, as the Nelsons acknowledged in their testimony at trial, the Chornuks openly used and maintained the subject property both before and after the 2005 Deed was issued. The Chornuk's activities on the property constituted sufficient notice to put the Nelsons, as prudent persons, on notice to make further inquiry into whether the Chornuk's had a interest in the property prior to completing the subsequent transaction with Mrs. Dahl. They failed to do so.

[23] "The issues of good faith and constructive notice are similar in that they both require an examination of the information possessed by a person." Id. "The information, however, need not be so detailed as to communicate a complete description of an opposing interest; instead, the information must be sufficient to assert the existence of an interest as a fact, which in turn gives rise to a duty to investigate." Id. It stands to reason that disinterested persons would not regularly for a period of years, mow the grass, plant and maintain trees, and install and maintain flower boxes on property in which they had no interest. Mr. Nelson testified that he drove by the property at issue in this case on a daily basis, and sometimes he would drive by on more than one occasion in a day. [Tr. Trans. 50:3-8] "In making inquiry, a person must exercise reasonable diligence; a superficial inquiry is not enough." Id. Additionally, "notice can be acquired directly or indirectly by any means sufficient to place a reasonable purchaser on alert of a situation out of the ordinary." Farmers Union Oil Co. v. Smetana, 764 N.W.2d at 672, (citing 27 Richard A. Lord, Williston on Contracts § 70:46 (4th ed. 2003)). No evidence was submitted that any inquiry was made.

[24] The North Dakota Supreme Court has held time and time again that "open and notorious possession and occupancy of real property by another than his grantor is sufficient to charge a purchaser of real estate with knowledge of the rights of the occupants thereof." Agricultural Credit Corp. v. State, 74 N.D. 71, 78, 20 N.W.2d 78 (N.D. 1945). The Chornuk's possession of the at issue property was open and notorious as shown by their maintenance and use of it for many years. The Nelsons had the opportunity to, and did, observe that open and notorious use and possession. Yet, they made no inquiry as to who prior to completing the 2005 transaction with Mrs. Dahl. Their failure to make inquiry means that the Nelson's were not protected pursuant to N.D.C.C. §47-19-21.

[25] The Nelsons argue that under N.D.C.C. § 47-19-21, they were protected against the Chornuk's unprotected interest in the Property because they purchased the Property in good faith. Their argument was based on the assertion that because they did not have reason to know that the Chornuks made improvements to the property and maintained the property, they did not have constructive notice. Their position in that regard is contradicted by the evidence entered at trial. The Chornuks activities of maintaining, improving and using the property were known to the Nelsons and provided sufficient reason for them to make further inquiries about why they regularly observed the Chornuks using and maintaining the property. In addition, Mr. Nelson did not have actual knowledge that the property in dispute was part of the larger tract that he purchased. Instead, he only assumed it was. [Tr. Tran. 45: 16-19] It was not until 2010, five years after the Nelson's purchased the property, that they actually took steps to try and ascertain what property they owned by conducting a survey. He was asked:

Q. What was the purpose of the survey?

A. Just to find out what the boundaries were so we could know officially what--we didn't--didn't want to trespass on somebody else's land. [Tr. Trans. 47: 25 and 48:1-3]

[26] At the trial, Craig Nelson testified that he grew up in Watford City and that he lives only one half of a mile north of the Property. [Tr. Tran. 43:11-16, 25; 44-1-3] Both Craig Nelson and Julie Nelson testified that they frequently drive by the Property and have seen the Chornuks display use and control of the property through watering trees, mowing the lawn, and other basic maintenance. [Tr. Tran. 46:18-22; 50:3-9; 51:11-14; 53:3-5; 54:1-3; 54:13-18; 55:24-25; 56:1] Despite seeing the Chornuks use and maintain the Property, the Nelsons failed to inquire as to why the Chornuks were using and maintaining the Property. [Tr. Tran. 56:2-7]

[27] At the trial, Julie Nelson testified that between 2005 and 2010 she and Craig Nelson knew that the Chornuks were mowing the Property. She testified that she and her husband decided to "be neighborly" by letting the Chornuk's care for and retain control of the property, meaning property that the Nelsons claimed to own. [Tr. Tran. 54:13-18] Despite knowing that the Chornuks were openly using the Property, the Nelsons consciously chose not to confront the Chornuks about their presence on the Property. In fact, the Nelson's did not inquire about the ownership of the property until 2010 when they conducted a land survey. [Tr. Tran. 50:22-23]

[28] Basically, the Nelsons frequently drove past the Property, they admitted seeing the Chornuks use and control the land, yet they failed to investigate in any way whether the Chornuk's had or claimed an interest in the property. They even failed ask the Chornuks the basic question of why they were watering the trees and mowing the lawn.

Instead, the Nelsons testified that were being neighborly by letting the Chornuks care for real property that the Nelsons now claim they thought belonged to Mrs. Dahl, and then them. In fact, the only testimony elicited at trial regarding a dialogue between the Chornuks and the Nelsons in regard to the Property arose in 2010 after the Nelson's decided they wanted to use the Property and conduced a survey to confirm whether or not the Property was included in the 2005 Deed. The Nelsons' would have us believe that it was perfectly natural for people who had no interest in real estate to regularly maintain and improve that property over a period of years. Why would people who had no interest in a real property regularly and continuously improve and maintain that property? They would not do so. The fact that the Chornuks regularly maintained the property, together with the Nelson's knowledge of those activities, forms the basis of the findings entered by the District Court in this matter.

[29] Pursuant to the holding in Agricultural Credit Corp. v. State, the open and notorious possession and occupancy of the Property by the Chornuks, as acknowledged by the Nelsons, was enough to give the Nelsons constructive notice of the Chornuks' interest in the Property. Additionally, the fact that the Nelsons frequently drove past the property and frequently saw the Chornuks caring for the property, yet failed to exercise any, much less reasonable, diligence by making an inquiry as to whether or not the Chornuks had an interest in the property constitutes constructive notice under N.D.C.C. § 1-01-25.

[30] At the very least, following the holding in Farmers Union Oil Co. v. Smetana, which stated that "notice can be acquired directly or indirectly by any means sufficient to place a reasonable purchaser on alert of a situation out of the ordinary," the act of

habitually watering trees, mowing the lawn, and frequently using property that one does not own is a situation out of the ordinary, and the Nelsons' knowledge of the Chornuks' actions should have alerted them to further inquire as to the ownership of the Property. Farmers Union Oil Co. v. Smetana,764 N.W.2d at 672, (citing 27 Richard A. Lord, Williston on Contracts § 70:46 (4th ed. 2003)). These acts constitute, at minimum, indirect notice, if not actual direct notice of the Chornuk's interest in the property.

II. THE NELSONS WAIVED THEIR RIGHT TO APPEAL FROM THE JUDGMENT

[31] In their Appellants' Brief, the Nelsons ask this Court to reverse the trial court's decision which quieted title in the Chornuks' favor and required the Nelsons to pay damages, first in the amount of $2,830.00, then, after the judgment was amended, for $360.00. However, under North Dakota law these requests are invalid.

[32] This Court follows the rule that "a party who voluntarily pays a judgment against him waives the right to appeal from the judgment." State ex rel. Storbakken v. Scott's Electric, Inc.,2014 ND 97, ¶ 6 (citing Ramsey Fin. Corp. v. Haugland, 2006 ND 167, ¶ 9, 719 N.W.2d 346. Additionally, this Court has held that an attempted appeal from a judgment that has been properly satisfied of record fails for lack of jurisdiction. Mr. G's Turtle Mt. Lodge, Inc. v. Roland Twp., 2002 ND 140, ¶ 9, 651 N.W.2d 625; see also Lyon v. Ford Motor Co., 2000 ND 12, P10, 604 N.W.2d 453. ("A judgment that has been paid and satisfied of record ceases to have any existence."); DeCoteau v. Nodak Mut. Ins. Co., 2001 ND 182, P10, 636 N.W.2d 432 ("A satisfaction of judgment on the record extinguishes the claim, and the controversy is deemed ended, leaving an appellate court with nothing to review."); Gregory v. North Dakota Workers Comp. Bureau, 1998 ND

94, P22, 578 N.W.2d 101 ("An appellate court is without jurisdiction if there is no actual and justiciable controversy.").

[33] On November 3, 2011, the trial court filed its Order, which quieted title of the Property in favor of the Chornuks and awarded a monetary judgment in favor of the Chornuks for conversion of the Property. (App. 22). The March 7, 2014 Order for Amendment to Judgment reduced the amount awarded for conversion from $2,830 to $360.00. (App. 93). On March 10, 2014, the Satisfaction of Amendment to Judgment was filed by the Chornuks' attorney indicating that the $360.00 judgment in favor of the Chornuks has been fully satisfied by the Nelsons. (App. 97).

[34] There is no evidence indicating that the payment of the judgment by the Nelsons was not voluntary. Therefore, because the Nelsons voluntarily fully paid the judgment for conversion, they have waived their right to appeal the trial court's conversion judgment as well as the trial court's quiet title decision. They waive their right to appeal the quiet title decision because the conversion award was predicated on the Chornuks' ownership of the property.

CONCLUSION

[35] The Nelsons have failed to demonstrate, in light of the evidence, that the District Court's findings of fact were clearly erroneous. The Chornuks regularly maintained, and improved, the real property at issue herein. Their activities on the property were open and notorious. Because the Nelsons drove past the property on a daily basis, sometimes multiple times per day, and they admitted seeing the Chornuks activity on the property. Under North Dakota law, the Chornuk's activities on the property, as observed by the Nelsons, was sufficient to give constructive notice to the Nelson's that the Chornuks had

an interest in the property. These facts, when analyzed in conjunction with the Supreme Court's decision in Farmers Union Oil Co. vs. Smetana, are sufficient to impose a duty upon the Nelsons to investigate. Farmers Union at ¶16 The Nelsons made no inquiry. As such, they were not purchasers in good faith who were protected from the claims of the Chornuks.

[36] In addition to the factors discussed above, the Nelsons the District Court's decision should be upheld because the Nelsons voluntarily satisfied the money judgment entered by the Court. As noted in State ex rel. Storbakken vs. Scott's Electric, Inc., "a party who voluntarily pays a judgment against him waives the right to appeal from the judgment." Id. At ¶6 The judgment has been paid, and there is no evidence the payment was involuntary. By virtue of their voluntary payment, the Nelsons waived the right to appeal from that Judgment.

[37] The Appellees, Harry W. Chornuk and Linda Chornuk, for the reasons set forth above, respectfully request that the Supreme Court conclude that the Nelsons failed to demonstrate that the findings of fact and decision of the District Court and the judgment entered thereon, were clearly erroneous. The Chornuks further request that the Supreme Court uphold the District Court's decision to quiet title in the real property at issue in the Chornuks and leave intact the decision, as amended. The District Court correctly concluded that , activities the Nelson's admitted they were aware of, served to put the Nelsons on notice For all the foregoing reasons, the Nelsons respectfully request that this Court uphold the trial court's decision to quiet title in favor of the Chornuks and to award conversion damages in favor of the Chornuks, which has already been paid by the Nelsons.

Dated this 13th day of June, 2014.

MACKOFF KELLOGG LAW FIRM
Attorneys for Harry and Linda Chornuk
Office and Mailing Address:
38 Second Avenue East
Dickinson, North Dakota 58601
Telephone: (701) 4566-3210
Facsimile: (701) 227-4739
msherer@mackoff.com

By: /s/ Mark C. Sherer
Mark C. Sherer, Attorney #06749

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellees, Harry W. Chornuk and Linda Chornuk., and as author of the above Brief, hereby certifies compliance with the North Dakota Rules of Appellate Procedure, including specifically Rule 32, as to proper form of Appellee's Brief. Counsel certifies that consistent with Rule 32(a)(5), the above Brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, certificate of compliance and certificate of service, totals 3,934.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Brief of Appellee's, Harry W. Chornuk and Linda Chornuk,** was, on the 20th day of June, 2014, served by first class United States Mail, postage prepaid, and e-mail, upon the following:

Aaron R. Hartman
Admitted Pro Hac Vice
ANTHONY, OSTLUND, BAER & LOUWAGIE, P.A.
90 South 7th Street, Suite 3600
Minneapolis, MN 55402
ahartman@aoblaw.com

Jordon J. Evert
FURUSETH, KALIL, OLSON & EVERT, P.C.
P.O. Box. 417
Williston, ND 58802-0417
jordon@furusethlaw.com

By: /s/ Mark C. Sherer
Mark C. Sherer, Attorney #06749