

THE SUPREME COURT
STATE OF NORTH DAKOTA

Owego Township,)	
)	
Plaintiff and Appellee,)	
)	Supreme Court File No.:
vs.)	2017-01-90
)	
Leon Pfingsten,)	Ransom County District Court No.:
)	37-2015-CV-00042
Defendant and Appellant.)	

BRIEF OF APPELLANT

Appeal from the District Court's
Order Granting Motion to Dismiss Appeal
entered on April 6, 2017
Ransom County District Court
Southeast Judicial District
Honorable Jay Anthony Schmitz

Scott Patrick Brand
N.D. Bar I.D.: 07287
BRUDVIK LAW OFFICE, P.C.
730 13th Ave. E.
West Fargo, North Dakota 58078
Phone: (701) 532 – 1008
Facsimile: (701) 788 – 4243
E-Service: scott@brudviklaw.com

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
	<u>Paragraph</u>
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	5
LAW AND ARGUMENT	13
CONCLUSION	24

TABLE OF AUTHORITIES

<u>CONSTITUTIONS</u>	<u>Paragraph</u>
N.D. Const. art. I, § 16	¶ 15
 <u>CASES</u>	
<u>NORTH DAKOTA CASES</u>	
<u>Becker County Sand & Gravel Co. v. Wosick</u> , 245 N.W. 454 (N.D. 1932)	¶ 16
<u>Gerhardt v. Fleck</u> , 251 N.W.2d 764 (N.D. 1977)	¶ 17
<u>Haman v. McHenry County</u> , 72 N.W.2d 630 (N.D. 1955)	¶ 14
<u>Kessler v. Thompson</u> , 75 N.W.2d 172 (N.D. 1956)	¶ 14,16,17 18,19
<u>Meyer v. National Fire Ins. Co.</u> , 269 N.W. 845 (N.D. 1936)	¶ 17
 <u>OUT-OF-STATE CASES</u>	
<u>People v. Bank of San Luis Obispo</u> , 92 P. 481 (Cal. 1907)	¶ 14
 <u>STATUTES</u>	
N.D. CENT. CODE § 24-07-01	¶ 5
N.D. CENT. CODE § 24-07-22	¶ 4,12,13

STATEMENT OF THE ISSUES

¶ 1 Whether the Appellant’s Notice of Appeal was timely and whether the District Court erred when determining that the Appellant had waived his rights to appeal Owego Township’s taking of his privately-owned land.

STATEMENT OF THE CASE

¶ 2 On April 3, 2015, Owego Township (hereinafter “the Township”) filed a Complaint in the Ransom County District Court requesting the following relief: (1) an area of land known locally as “Bagoon Road” to be considered a road by prescription, (2) the Appellant, Leon Pfungsten (hereinafter “Mr. Pfungsten”), be enjoined from asserting any interest adverse to the public’s use of Bagoon Road, (3) that the Township be awarded damages for injury to Bagoon Road, and (4) that the Township be awarded costs for bringing the action along with any other relief that may be available. (Doc. ID# 1). An Amended Complaint was filed on April 21, 2015, seeking injunctive relief. (Doc. ID# 3). That same day, the Township also filed a Motion for Temporary Restraining Order attempting to enjoin Mr. Pfungsten from “damaging or otherwise interfering” with Bagoon Road. (Doc. ID# 4).

¶ 3 The Ransom County District Court denied the Township’s Motion for Temporary Restraining Order on April 27, 2015. (Doc. ID# 10). The Township filed a Motion to Reconsider on May 1, 2015. (Doc. ID# 12). Mr. Pfungsten hired Don Eppler (hereinafter “Mr. Eppler”) as his attorney and a Return to Motion was filed on May 4, 2015. (Doc. ID# 16). The Court again denied the Township’s Motion, with prejudice, on May 8, 2015, stating the Township “has not met its burden of making a clear showing that it is entitled to a temporary restraining order” because the Township “has not shown

a substantial probability of success on the merits, or that an irreparable injury to anyone will result if a preliminary injunction is not granted.” (Appendix (“Appx.”) 5). The Court made an additional finding that “the affidavits filed in support of [the Township’s] original motion and motion to reconsider appear to contain false or misleading statements about the existence of the prescriptive easement” and other matters. (Appx. 5). Mr. Pfingsten filed an Answer and Counterclaim on May 11, 2015. (Doc. ID# 25). The Township Replied to the Counterclaim on May 28, 2015. (Doc. ID# 27). The matter was scheduled for a trial but the parties signed a Stipulation in December of 2015. (Appx. 6-11). An Order was subsequently issued by the Court. (Doc. ID# 44).

[¶ 4] On September 26, 2016, the Township determined that it needed to take Mr. Pfingsten’s land for Bagoon Road and that \$9,000 was adequate compensation for the taking of his land. (Doc. ID# 53-54). The Township met again on December 3, 2016, and confirmed the Order to Alter Highway and Statement of Damages. (Doc. ID# 56). An appeal of that determination was filed on January 19, 2017. (Doc. ID# 47). The Notice of Appeal states Mr. Eppler received the determination of the Township on December 22, 2016. (Doc. ID# 47). The Township moved to dismiss the appeal on January 26, 2017. (Doc. ID # 50). Each side filed arguments with the Court and a hearing was held on March 30, 2017. (Appx. 3). On April 7, the Court granted the Motion to Dismiss, citing N.D. CENT. CODE § 24-07-22 as the basis for the dismissal. (Doc. ID# 69). Mr. Pfingsten respectfully appeals that Order.

STATEMENT OF THE FACTS

[¶ 5] A road, known locally in Ransom County as Bagoon Road, runs adjacent to Mr. Pfingsten’s land, which is legally described as the Southwest Quarter of Section 9,

Township 135, Range 53. (Appx. 6). Bagoon Road is not located on a section line, and the parties agree that the majority of Bagoon Road is a road by prescription pursuant to N.D. CENT. CODE § 24-07-01. (Appx. 6).

[¶ 6] Bagoon Road is also adjacent to the Sheyenne River. (Appx. 6). An oxbow has eroded away Bagoon Road on multiple occasions. (Appx. 6). Historically, each time that portion of Bagoon Road erodes into the Sheyenne River, traffic is forced to drive further north onto Mr. Pfungsten's land with his reluctant permission. (Appx. 6, Doc. ID# 18). In 2013 and 2014, that portion of Bagoon Road washed out again. (Doc. ID# 18). During these two incidents, the Township, without Mr. Pfungsten's permission, drove onto his land, laid gravel, used dirt from his land, and dug a ditch on his land. (Doc. ID# 18).

[¶ 7] On April 21, 2015, the Township sued Mr. Pfungsten and requested the Southeast Judicial District Court to enter a judgment stating the entirety of Bagoon Road be deemed a road by prescription. (Doc. ID# 1). The request was supplemented by an Affidavit from a Township Board member claiming to have knowledge about Bagoon Road and Mr. Pfungsten. (Doc. ID# 5). That request was eventually denied by the District Court on May 11, 2015, in part, because "the affidavits filed in support of [the Township's] original motion and motion to reconsider appear to contain false or misleading statements about the existence of the prescriptive easement" and other matters. (Appx. 5).

[¶ 8] On October 22, 2015, the Ransom County State's Attorney filed criminal charges against Mr. Pfungsten for Injury to a Highway, Obstructing Highways, and Failure to Erect Warning Signs in case 37-2015-CR-00156. (Appx. 9). That matter would not conclude until 2017 but remained open and active throughout the issues relevant to the case at bar.

[¶ 9] On December 10, 2015, Mr. Pfingsten and the Township signed a Stipulation regarding Bagoon Road. (Appx. 6-11). The Stipulation expressly excluded the washed-out portion of Bagoon Road from being a road by prescription. (Appx. 6). The Stipulation also allowed the Township to commence a takings action after the completion of a survey. (Appx. 8). It also stated that Mr. Pfingsten was to allow public travel over the contested area of Bagoon Road. (Appx. 8). The agreement also required the Owego Township Supervisors to draft a letter requesting two of the three criminal charges brought against Mr. Pfingsten be dropped. (Appx. 9). Lastly, the parties explicitly agreed that they would take no action in furtherance of their position until a resolution has been reached or until December 31, 2016. (Appx. 9).

[¶ 10] While the terms of the Stipulation were in place, the Township entered an Order to Alter Highway on September 26, 2016. (Doc. ID# 53). A Statement of Damages was filed the same day, determining Mr. Pfingsten would be paid \$9,000 for the taking of his land. (Doc. ID#54). The Township met again on December 3, 2016, and confirmed the Order to Alter Highway and Statement of Damages. (Doc. ID# 56). Mr. Eppler admits to receiving service of the award of damages on December 22, 2016. (Doc. ID# 47). Mr. Eppler filed a notice of appeal on behalf of Mr. Pfingsten on January 19, 2017. (Doc. ID# 47).

[¶ 11] The criminal matter briefly discussed above went to trial and was eventually dismissed by the District Court on March 21, 2017. The State's Attorney pressed all three charges against Mr. Pfingsten. To date, the Undersigned (who was counsel for Mr. Pfingsten in the criminal trial) has never seen a letter from the Township Board of

Supervisors asking the State’s Attorney to dismiss any of the charges against Mr. Pfungsten.

[¶ 12] On March 30, 2017, the District Court held a Motion Hearing for the civil case. Calling the situation a “case of ambush,” Mr. Eppler argued at the hearing that he believed neither he nor Mr. Pfungsten needed to take any action because the Stipulation expressly said the Township cannot commence a takings action unless a survey was conducted and that the survey was not dated until January of 2017. (Motion Hearing Transcript (“Mr. Hr. Tr.”) 4: 15-16). The survey used by the Township at the hearing was dated January 16, 2017. (Doc. ID# 53). Mr. Eppler also argued that Mr. Pfungsten’s actions in the civil cases clearly show he provided notice to the Township that he contested its taking of his land. (Mt. Hr. Tr. passim). The Court orally granted the Motion to Dismiss at the end of the hearing, citing N.D. CENT. CODE § 24-07-22. (Mt. Hr. Tr. 21: 9-15). The Court signed an Order Granting Motion to Dismiss Appeal on April 7, 2017. (Appx. 12-14). Mr. Pfungsten appeals from that Order.

LAW AND ARGUMENT

I. Mr. Pfungsten’s Notice of Appeal was Timely

[¶ 13] “Any person who feels aggrieved by any determination **or** award of damages made by the board having jurisdiction, either in laying out, altering, or discontinuing . . . any highway or cartway, within thirty days after the filing of such determination or award of damages, as provided in this chapter, may appeal therefrom to the district court.” N.D. CENT. CODE § 24-07-22 (emphasis added). The only evidence in the record regarding the receipt of the award of damages is the Notice of Appeal, which dates service on December 22, 2016. (Doc. ID# 47). The Notice of Appeal was filed on January 19,

2017. (Doc. ID# 47). The calculation between these two dates is twenty-nine (29) days. Therefore, pursuant to N.D. CENT. CODE § 24-07-22, Mr. Pfingsten's appeal is timely.

[¶ 14] The burden of proof is on the “movant for the dismissal of the appeal, to show that the period within which an appeal might be taken began to run more than thirty days prior to the service of the notice of appeal and undertaking.” Haman v. McHenry County, 72 N.W.2d 630, 633 (N.D. 1955). “The right of appeal is remedial, and in doubtful cases the doubt should be resolved in favor of the right whenever the substantial interests of a party are affected by a judgment.” Id. at 634 (quoting People v. Bank of San Luis Obispo, 92 P. 481, 482 (Cal. 1907)). “The owner must have the right to resort to the courts in case he desires before his property is taken or damaged, to determine whether his property is necessary for a public use and to ascertain the compensation to which he is entitled.” Kessler v. Thompson, 75 N.W.2d 172, 181 (N.D. 1956).

[¶ 15] In the case at bar, the District Court essentially ordered Mr. Pfingsten's land taken 30 days after the September 26 documents were served on Mr. Pfingsten. This runs contrary to the North Dakota State Constitution and North Dakota law. “Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner. . . .” N.D. Const. art. I, § 16. The timetable for when Mr. Eppler should have appealed started the date he received the award of damages, which was December 22, 2016, because that is the first date when the Township could have legally taken Mr. Pfingsten's land.

[¶ 16] “The Constitution guarantees to the owner something more than a right to recover judgment for the damages caused by the taking of his property or a recovery of the property itself after it has been taken; it guarantees that his property shall not be taken or

damaged even for a necessary public use without just compensation (in money) having been first made to, or paid into court for the owner.” Kessler, 75 N.W.2d at 181 (N.D. 1956) (quoting Becker County Sand & Gravel Co. v. Wosick, 245 N.W. 454, 456 (N.D. 1932) (internal quotations omitted). Because the Township did not supply the award of damages until December 22, 2017, Mr. Pfingsten’s appeal was timely and therefore the District Court’s Order Granting Motion to Dismiss Appeal should be reversed.

II. The District Court erred when determining Mr. Pfingsten waived his rights to appeal the Township’s taking of his privately-owned land

[¶ 17] The North Dakota Supreme Court has unambiguously stated that “[w]e prefer to decide cases on the merits” when contemplating motions to dismiss. Gerhardt v. Fleck, 251 N.W.2d 764, 767 (N.D. 1977). The District Court had previously ruled that the Township “has not shown a substantial probability of success on the merits” in this case. (Appx. 5). Case law in North Dakota states the Township must show Mr. Pfingsten intentionally abandoned his right to appeal. “Waiver is the intentional relinquishment of a known right. The term connotes a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed.” Kessler, 75 N.W.2d at 186 (citing Meyer v. National Fire Ins. Co., 269 N.W. 845 (N.D. 1936)). In the case at bar there has been no voluntary or intentional relinquishment of Mr. Pfingsten’s right to appeal. On the contrary, Mr. Pfingsten has been actively asserting his legal rights and challenging the Township’s actions on his privately-owned land for years and has done so through multiple forums.

[¶ 18] In Kessler, a meeting was held by the county commissioners regarding the taking of a road. Id. at 176. Kessler’s attorneys made a special appearance at the meeting and objected to “the jurisdiction of the board of county commissioners over the subject matter and the person of the plaintiff, and challenged their right to ascertain and determine the damages and make the award to the plaintiff.” Id. at 176-77. The commissioners argued that the failure to request a judicial determination over the takings action constituted a waiver. Id. at 185.

[¶ 19] The North Dakota Supreme Court rejected this argument and found that “the special appearance reveals clearly that there was no voluntary and intentional relinquishment or abandonment of any known existing legal right, advantage, benefit, claim or privilege by the plaintiff.” Id. at 185. Although Kessler and his attorneys did not use the technically proper procedure to contest the taking, the North Dakota Supreme Court stated the action of Kessler “in challenging the constitutionality of the procedure in this action demonstrates his good faith. That he was mistaken in the type of procedure he should pursue does not constitute a waiver of his right to appeal.” Id. at 186.

[¶ 20] Mr. Pfingsten also had a good faith reason to believe the issues regarding Bagoon Road were still unresolved. The civil action had an active Stipulation that was enforceable through December 31, 2016. (Appx. 10). The Township admits that Mr. Pfingsten showed up at the hearings to discuss and/or contest actions taken by the Township regarding the eroded portion of Bagoon Road (Doc. ID# 36). The Stipulation expressly states the Township needs to conduct a survey prior to commencing a takings action. (Appx. 8). The survey is dated for January of 2017. (Doc. ID# 53) Without a

survey being conducted, Mr. Pfingsten had a good faith reason to believe a formal appeal was not needed in September because the Stipulation was still in effect.

[¶ 21] The Stipulation’s language about there being an open issue regarding whether Bagoon Road was a road by prescription or being located Mr. Pfingsten’s private land cannot be more clear in this case. When describing Bagoon Road being a road by prescription, the Stipulation says, “with the exception of the washed out area.” (Appx. 6). It further states “[t]he parties dispute whether the area cut by Pfingsten is part of the public road by prescription or is Pfingsten’s private property.” (Appx. 7). It also unequivocally declares that “Pfingsten has contested the taking action.” (Appx. 7). The Stipulation has Mr. Pfingsten granting the Township “and the public the temporary right to travel over and across the portion of the Bagoon roadway that is located on Pfingsten’s private property.” (Appx. 8). Lastly, the Stipulation states that “[t]he parties agree to take no action in furtherance of their position” until a resolution is found or until December 31, 2016. (Appx. 10). There are at least five moments in that one document indicating that Mr. Pfingsten intentions to challenge the Township on its taking of his land. The Township drafted the Stipulation and signed it with full knowledge of its contents. (Appx. 10).

[¶ 22] The criminal action also provided Mr. Pfingsten with a good faith belief that the question regarding his portion of Bagoon Road was still open. The Court’s Order that dismissed the criminal action against was dated March 21, 2017. This dismissal of criminal charges regarding Bagoon Road from the same District Court comes well after the time frame asserted by the Township.

[¶ 23] Mr. Eppler is justified in calling the actions of the Township an “end run.” (Mt. Hr. Tr. 9: 14-16). The Township has tried multiple disingenuous avenues to take Mr. Pfingsten’s land without success. In attempts to fast-track its taking, members of the Township Board have even been found, as a matter of fact, to have made “false or misleading statements” in their Affidavits to take Mr. Pfingsten’s land. (Appx. 5). Township Board Members also promised to draft a letter to the Ransom County State’s Attorney to dismiss criminal charges against him, but no letter was ever produced. (Appx. 4). Mr. Pfingsten has objected to the taking of his land in civil cases, at Township meetings, in a criminal trial that was ultimately dismissed, and in the express language of a signed Stipulation between the Township and Mr. Pfingsten. For the Township to claim that it did not have notice of Mr. Pfingsten’s intent to contest the taking of his land would be completely illogical and in stark contradiction to the facts before it and the Court. Because Mr. Pfingsten made a good faith effort to have his intentions known to the Township, his right to appeal should not be considered waived, and therefore, the District Court’s Order Granting Motion to Dismiss Appeal should be reversed.

CONCLUSION

[¶ 24] The burden is on the Township to show Mr. Pfingsten waived his right to appeal. They are not able to meet that burden because Mr. Pfingsten’s Notice of Appeal was timely. However, even if there is doubt about the timeliness of the Notice of Appeal, case law indicates that the matter should be resolved in favor of allowing the appeal to move forward. The evidence of the civil proceedings, the Stipulation, his appearances at Township meetings, the criminal case, and the filing of the Notice of Appeal all show Mr. Pfingsten’s good faith effort to make his objections known. Mr. Pfingsten has a right for

a hearing to be held on his appeal. For these reasons, Mr. Pfingsten, by and through his undersigned Counsel, respectfully requests the North Dakota Supreme Court to reverse the Order Granting Motion to Dismiss Appeal and allow Mr. Pfingsten his opportunity to be heard in open Court.

Dated this 28th day of August, 2017.

/s/ Scott Patrick Brand
Scott Patrick Brand
N.D. Bar I.D.: 07287
Attorney for Defendant
BRUDVIK LAW OFFICE, P.C.
730 13th Ave. E.
West Fargo, North Dakota 58078
(701) 532 – 1008
scott@brudviklaw.com

NORTH DAKOTA SUPREME COURT

Owego Township,

Plaintiff,

vs.

Leon Pfingsten,

Defendant.

CERTIFICATE OF SERVICE

Supreme Court File No.: 2017-01-90

Ransom Cnty No.: 37-2015-CV-00042

Scott Patrick Brand, attorney for the Defendant and Appellant, Leon Pfingsten, hereby certifies that he did, on August 29, 2017, serve the following:

1. Brief of Appellant
2. Appendix of Appellant

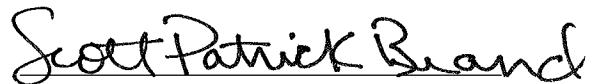
Scott Patrick Brand, attorney for the Defendant and Appellant, Leon Pfingsten, hereby certifies that he did, on August 29, 2017, serve the following:

1. Title Page and Table of Contents for Appendix of Appellant

Emailed to:

Janel B. Fredericksen
Attorney at Law
janelfredericksen@smithstrege.com

Dated this 29th day of August, 2017.



Scott Patrick Brand

N.D. Bar I.D.: 07287

BRUDVIK LAW OFFICE, P.C.

Attorney for the Defendant

730 13th Ave. E.

West Fargo, ND 58078

Phone: (701) 532 – 1008

Email: scott@brudviklaw.com