

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.)	

APPELLANT'S REPLY BRIEF

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

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ARGUMENT

[¶ 1] Mr. Pfingsten submits this Reply Brief and also relies on his original Appellant Brief. Mr. Pfingsten requests this Court to reverse the Order Granting Motion to Dismiss Appeal and allow Mr. Pfingsten his opportunity to be heard in Court.

I. The Relevance of the Court Proceedings

[¶ 2] The Township claims the lower court proceedings are not relevant. This is an incredible argument considering one of the claims for relief in the Township's Complaint in 37-2015-CV-00048 requests the Township to acquire Mr. Pfingsten's land "through eminent domain proceedings" and the Township asked for Mr. Pfingsten's land to be considered a road by prescription. (Appellee Appendix ("Appellee Appx.") 10, 6). Both actions deal with the exact same area of land and are contemporaneous with the actions taken by the Township outside of the courtroom. Further, the Stipulation in 37-2015-CV-00042 acknowledges that "Pfingsten has contested the taking action." (Appendix ("Appx") 7). The Township knew Mr. Pfingsten did not approve of its taking his land.

[¶ 3] The Township wants this Court to view this case in a vacuum without considering valid proceedings that dealt with this specific piece of land and the Township's attempts to take it from him. The issues in these cases are not irrelevant; they show a pattern of the Township trying to take Mr. Pfingsten's land, at times through deception. (Appx. 5). The District Court's denial of the Township's request for a temporary restraining order did not contain an implication that the Township had misled the Court regarding this portion of

Bagoon Road/Mr. Pfingsten's land, it was an outright finding. (Appx. 5). The deceptive nature as to how the Township has gone about its business in this matter should be taken into consideration with its most recent actions as well.

II. Case Law Favors the Right to Appeal

[¶ 4] It is important to remember the Township has a heavy burden for the dismissal to be upheld. “The right of appeal is remedial and favored in the law.” Haman v. McHenry County, 72 N.W.2d 630, 634 (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. (citing People of San Luis Obispo, 92 P. 481, 482).

[¶ 5] The Township argues the 1955 decision in Haman stands for the principle that the appeal period starts with the filing of the statement of damages. But Haman never used the filing date as the starting point because “the record is silent as to the time of filing.” Id. Instead, the Court used the date of a receipt from the County Treasurer acknowledging he had received the funds to buy the land. Id.

[¶ 6] The Court reasoned, “[i] we assume that the award was filed by the auditor **on the date that he paid the amount awarded** and the receipt was issued. Id. (emphasis added). The Court in Haman assumed the landowner was paid on the same day as the filing of the award. The filing and actual payment are coupled in this analysis. That is not the scenario in the case at bar. The Township did not provide Mr. Pfingsten with the actual award of damages until December 22, 2016. (Doc. ID# 47). Based on the analysis in Haman, until the coupling of the filing and payment occur, the clock for the appeal cannot begin. “Private property shall

not be taken or damaged for public use **without just compensation having been first made** to, or paid into the court for the owner. . . .” N.D. Const. art. I, § 16 (emphasis added).

[¶ 7] The idea that the taking of land cannot occur until compensation having first been made is reflective not just in the constitution, it is also reflected in the North Dakota Century Code. If a county proceeds with an eminent domain proceeding, North Dakota law states that the county must deposit monies with the clerk of court prior to the taking and then the landowner has thirty days from receiving a notice of the funds have been deposited to appeal. N.D. CENT. CODE § 11-10-26. There is no good reason for the Township to be held to a lesser standard than the counties in North Dakota.

[¶ 8] The case at bar is easily distinguishable from a case relied on by the Township, Garaas v. Cass County Joint Water Resource Dist., 2016 ND 148, 883 N.W.2d 436. First, Garaas deals with the establishment of an assessment district, not the taking of privately-owned land for a public use. Garaas at ¶ 2. In an eminent domain action that went to the United States Supreme Court, Justice Scalia noted the taking of private land for government use requires a more cautioned review. Nollan v. California Coastal Comm’n, 483 U.S. 825, 841 (1987) (“We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.”). Second, Garaas uses a more general statute, N.D. CENT. CODE § 28-34-01 (appeals from local governing bodies), than the case at bar, which has been analyzed under N.D. CENT. CODE § 24-07-22 (appeals from

an award of damages from alteration of a highway/cartway). North Dakota law demands the specific provisions regarding eminent domain and the award of damages in this case prevail over the general provision of administrative decisions. N.D. CENT. CODE § 1-02-07.

[¶ 9] The Township's attempts to distinguish this case from Kessler v. Thompson, 75 N.W.2d 172 (1956) are unpersuasive. First, unlike Kessler, Mr. Pfingsten took considerably more action than just a one-time special appearance. It is undisputed he made numerous appearances at local meetings and the Township was aware of his contesting of it taking his land. If making one special appearance is enough to show good faith, making a multitude of appearances certainly proves good faith.

[¶ 10] The argument that somehow Mr. Pfingsten did not commence a separate legal action is misleading. The Township knew Mr. Pfingsten had challenged the Township in three different actions: the two civil actions and the one criminal action. These actions were all contemporaneous to the Township's actions. The Stipulation envisioned a survey to be conducted prior to any takings action. The survey provided to the Court is dated January 16, 2017. (Doc. ID#53). This is 3 days prior to Mr. Pfingsten's appeal and 112 days after the Township declared Mr. Pfingsten's land as its own without first compensating him. (Doc ID#s 47, 53-54).

[¶ 11] It bears repeating that all the actions taken by Mr. Pfingsten make clear he did not waive his right to appeal. His actions were in good faith. His appeal was timely from the award of damages. Even if the Court finds Mr. Pfingsten was

mistaken about exactly what process he should have followed, that does not constitute a waiver of his right to appeal. Kessler 75 N.D. 2d at 186.

CONCLUSION

[¶ 12] For these reasons and for the reasons stated in the Appellate Brief, Mr. Pffingsten respectfully requests the North Dakota Supreme Court to reverse the Order Granting Motion to Dismiss Appeal and allow Mr. Pffingsten his opportunity to be heard in open court.

Dated this 16th day of October, 2017.

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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
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Scott Patrick Brand, attorney for the Defendant and Appellant, Leon Pfingsten, hereby certifies that he did, on October 16, 2017, serve the following:

1. Reply Brief of Appellant
2. Certificate of Service

Emailed to:

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Dated this 16th day of October, 2017.


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