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IN THE OFFICE OF THE
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MARCH 9, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Keith Kvande, Plaintiff/Appellee, v. Dennis Thorson, Defendant/Appellant.	**SUPREME COURT NO. 20190356** Civil No. 53-2017-CV-01341

BRIEF OF APPELLANT DENNIS THORSON

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT DATED SEPTEMBER 9, 2019 FROM THE JUDGMENT ENTERED ON SEPTEMBER 16, 2019

THE HONORABLE BENJAMEN J. JOHNSON, DISTRICT COURT
STATE OF NORTH DAKOTA, WILLIAMS COUNTY
NORTHWEST JUDICIAL DISTRICT

ORAL ARGUMENT REQUESTED

Respectfully submitted,

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STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN DETERMINING THAT THERE WAS NO PREJUDICE SUFFERED BY THE DEFENDANT AS A RESULT OF THE PLAINTIFF'S FAILURE TO FILE THIS LAWSUIT FOR FOUR YEARS.

II. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT THE AFFIRMATIVE DEFENSE OF LACHES DOES NOT APPLY.

III. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT THE DOCTRINE OF EQUITABLE ESTOPPEL DOES NOT APPLY.

STATEMENT OF THE CASE

[¶1] This is an action concerning the occupation of certain real estate in Wheelock, North Dakota, and involves a dispute as to whether the Plaintiff and the Defendant had an agreement which would allow the Defendant to occupy the land. Trial was held on June 6, 2019, before the Honorable Benjamen Johnson in the District Court of Williams County, North Dakota. The Court rendered Findings of Fact, Conclusions of Law and an Order for Judgment on September 9, 2019, and Judgment was entered on September 16, 2019. The Court determined that the Plaintiff and Defendant did not have a contract for the occupation of the land, and that the affirmative defenses of laches and estoppel did not apply. This appeal followed.

STATEMENT OF THE FACTS

[¶2] This case involves two men from Williams County North Dakota. The Defendant, Dennis Thorson, has known the Plaintiff, Keith Kvande for more than forty years. [TR 10:2-4] Prior to the events at issue in this matter, the two men had numerous business dealings. [TR 73:11-25]. At trial, both Dennis Thorson and Keith Kvande provided conflicting testimony about their arrangement for the use of Kvande's property.

[¶3] In the late summer or fall of 2012, Dennis Thorson purchased a church building in Epping, North Dakota (hereinafter called "the church") from a man named John Sheldon, with the intention of using it as a residence. [TR 12:10-14]. Thorson explained that prior to him purchasing the church, he had a conversation with Kvande wherein Kvande told Thorson that Thorson should move out to Kvande's property in Wheelock, and that the two of them would retire together on Kvande's property in Wheelock. [TR 18: 19-19:4]. Thorson testified that Kvande even offered to immediately go down to the courthouse and deed over a portion of the property, which Thorson resisted because of the men's friendship. [TR 20:18-21:1]. At the time Thorson purchased the church, his son-in-law had offered Thorson a different location wherein he could have placed the church. [TR 14:14-18].

[¶4] Thorson testified that the Plaintiff, Keith Kvande originally pointed the church building out to him. [TR 13:25]. Kvande even helped negotiate the purchase price of the building. [TR 68:2-20]. Thorson testified that, at the time he purchased the church building, the agreement between the two men was that Dennis could move the church building onto the property owned by Kvande, live there permanently, and pay Kvande whatever amount of money Dennis felt was appropriate, whenever Dennis wanted to do

so. [TR 73:7-10]. Over the course of their 40 year relationship, Kvande and Thorson had multiple business dealings that were not written down. [TR 73:11-25]. It is undisputed that there is no written contract between the parties.

[¶5] Kvande testified at trial that he had never agreed to allow Thorson to place the building onto a foundation, and that Thorson only had permission to store the building on Kvande's property temporarily. [TR 99:15-19]. Thorson denies that this ever occurred, and that the understanding between the two men was that Thorson was going to live on the property. [TR 27:19-23].

[¶6] After Thorson purchased the church, in the fall of 2012, he had a foundation dug and poured, and then moved the church building onto the property. [TR 29:2-5, TR 42:11-17].

[¶7] Kvande testified that he observed the foundation being dug for the church, and at that time he did not tell Thorson that he had no permission to place the church there, instead Kvande told Thorson he could not do so without a permit. [TR:971-7] He further testified that a couple of weeks later, he drove back out to the property and observed the foundation being poured. [TR: 98:23]. Kvande admits that after taking a picture of the foundation, he did not tell Thorson not to place the church on the foundation. [TR 127: 4-6]. Kvande further admits that he was present on the day the church was being placed onto the foundation, and that he did not raise any objection to this act. [TR 102: 16-19, TR 123: 20-24].

[¶8] After the church was placed onto the foundation, Thorson connected the church to a pre-existing septic system. [TR 48:24-49:3]. Thorson also installed a cistern for water use. [TR 51:2-12]. He then contacted MDU and had electrical service installed to the

property. [TR 51:13-20]. Thorson began living in the structure in the winter of 2012. [TR 54:15-16].

[¶9] Four years after the church was placed on the foundation, in May of 2016, Kvande and his fiancé, Roberta Ogden, visited the property and confronted Thorson. Kvande testified to telling Thorson he had six months to remove the church from the property. [TR 115:17-23]. Thorson testified that Kvande did ask him to leave the property, and that he needed to move the church off the property. [TR 59:18-60:8] In response to the demand that he remove the church from the property, Thorson told Kvande, "Keith, how am I going to do that? All my money, it's wrapped up in this thing." [TR 60:2]. Thorson testified that approximately 18 months prior to this incident, Kvande had previously told Thorson that Kvande could no longer sell Thorson the property, but that Thorson could live there as long as Thorson wanted. [TR 57:19-25].

[¶10] If Kvande had told Thorson prior to Thorson moving the church onto the property that there was no agreement, Thorson states that he would not have moved the church onto the property. [TR 76:6-9]. Thorson also testified that he had moved five buildings in his life, and that the most expensive part is "the work that goes to picking them up and setting them down. You don't just pick them up, move them someplace in the opposite direction, and then set them down and work on them and then pick them up again because it's double the money." [TR 15:20]. Kvande testified at multiple points that Thorson did not have the money to purchase any land, [TR 99:10-11, TR 101:20-24] and that Thorson did not have employment [TR 102:3-5]. Kvande also testified that he was aware of the cost of moving a building, that it was pretty expensive to move a building, and that doing so in this case cost ten thousand dollars. [TR 131:16-23].

[¶11] Kvande claims that the reason it took so long to bring the action against Thorson was that Kvande didn't know what to do, and that he was concerned about Thorson's personality. [TR 118:10-14]. However, After Thorson placed the church on the property, Kvande attempted to hire Thorson to pick up a backhoe that Kvande had purchased. [TR 108: 20-109:3, TR 134:13-18]. Further, Kvande admits that he was comfortable entering into another business agreement with Thorson even after that church was placed on the foundation. [TR 135: 6-8].

[¶12] At the trial, the Court also heard testimony from William Senff, and his son, William Senff Jr. two men who own property in Wheelock. Senff Sr. testified that he had spoken to both Thorson and Kvande numerous times about their arrangement. [TR 141:3-5]. Senff Sr. testified that Kvande told Senff that his friend Thorson would be moving a church onto Kvande's property, and that a portion of the property would be sold to Thorson and that he was going to fix it up and live there. [TR 141:7-12]. Senff Sr. testified that Kvande never indicated to Senff that the church would only be stored on the property. [TR 141: 1-10]. Senff Sr. also testified that Kvande later started saying the opposite, that Thorson was no longer allowed to live there. [TR 141: 11-14]. This was because Kvande decided the property was worth too much money to allow Thorson to live there. [TR 141:15-25].

[¶13] William Senff Jr. testified to a similar understanding of the deal between Kvande and Thorson, also gained from conversations with Kvande. [TR 151:18-25].

[¶14] The District Court entered its Findings of Fact, Conclusions of Law and Order for Judgment on September 9, 2019. In this ruling, the District Court determine that the parties had no enforceable contract, and that the affirmative defenses of estoppel and

laches did not apply. [App. 14-15]. With regard to estoppel, the District Court wrote that since there was no agreement as to a purchase price for the property, the agreement could not be enforced by promissory estoppel. With regard to equitable estoppel, the District Court held that it did not apply as it could not be used to create an enforceable agreement. [Id.] The District Court also wrote that laches did not apply because, "Thorson has not proven a prejudice due to Kvande's delay in bringing suit. Thorson's circumstances have remained unchanged since the date the Building was moved on the concrete foundation. Thorson suffered no prejudice from Kvande bringing this action in 2017 instead of 2013." [Id. at 15].

STANDARD OF REVIEW

[¶15] This is an appeal from the Court's findings of fact. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, we are left with a definite and firm conviction the district court made a mistake. Knudson v. Kyllo, 2012 ND 155, ¶ 9, 819 N.W.2d 511.

ARGUMENT AND AUTHORITY

I. LACHES SHOULD OPERATE TO KEEP THE DEFENDANT FROM BEING REMOVED FROM THE PROPERTY.

[¶16] Thorson has raised laches as an affirmative defense in this action, the District Court erred by ruling that Thorson was not prejudiced by Kvande's delay in bringing suit, and that laches does not apply.

[¶17] Laches and estoppel are both affirmative defenses, and thus must be affirmatively pled by the defendant. N.D.R.Civ.P. 8(c)(1). Similarly, laches and estoppel are both equitable defenses. Although estoppel and laches each arise out of equity, they are distinguishable. "The emphasis in laches is on delay; the emphasis on estoppel is on

misleading." Leisure Hills of Grand Rapids, Inc. v. Minnesota Dep't of Human Servs., 480 N.W.2d 149, 151 (Minn.Ct.App.1992). The Federal Circuit Court of Appeals has also differentiated laches from estoppel, in the context of patent infringement:

> laches focuses on the reasonableness of the plaintiff's delay in suit.... equitable estoppel focuses on what the defendant has been led to reasonably believe from the plaintiff's conduct. Thus, for laches, the length of delay, the seriousness of prejudice, the reasonableness of excuses, and the defendant's conduct or culpability must be weighed to determine whether the patentee dealt unfairly with the alleged infringer by not promptly bringing suit.

A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1034 (Fed.Cir.1992).

[¶18] Whereas laches is based on the unreasonable passage of time or delay in pursuing a claim, equitable estoppel is founded on principles of fraud. Stenehjem ex rel. State v. Nat'l Audubon Soc'y, Inc., 2014 ND 71, ¶ 15, 844 N.W.2d 892, 899–900:

> Laches does not arise from a delay or lapse of time alone, but is a delay in enforcing one's rights which works a disadvantage to another…The party against whom laches is sought to be invoked must be actually or presumptively aware of his rights and must fail to assert them against a party who in good faith permitted his position to become so changed that he could not be restored to his former state. The party invoking laches has the burden of proving he was prejudiced because his position has become so changed during the delay that he cannot be restored to the status quo. Cases involving laches must stand or fall on their own facts and circumstances. Laches is generally a question of fact.. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, we are left with a definite and firm conviction the district court made a mistake.

Bakken v. Duchscher, 2013 ND 33, ¶¶ 19-20, 827 N.W.2d 17, 22 (internal citations omitted).

[¶19] The record also clearly indicates a four year delay from Thorson's digging the foundation for the building until Kvande ultimately demanded that Thorson leave the property. The District Court's findings on laches indicate that there was no prejudice

because Thorson's circumstances are unchanged from the date the church was placed on the foundation. However, the District Court has missed the point here.

[¶20] First, Kvande admitted that he never actually told Thorson not to place the building on the foundation, only that he couldn't engage in the activities he did without a permit. This statement doesn't indicate that the parties did not have a deal, or that Thorson's understanding of the deal was wrong. Thoreson testified that all of his money was wrapped up in the house, and the record is clear that he made improvements to it. Further, Kvande testified at several points to Thorson not having employment and not having a lot of money. Finally, Kvande testified that he knew Thorson spent $10,000 to move the building, and Thorson testified to other improvements made to the church. All of this combines to create a scenario wherein Thorson had been disadvantaged by Kvande's failure to enforce his rights, and which establish the affirmative defense of laches.

[¶21] Kvande knew that he did not want Thorson living on the property when the hole for the foundation was dug, and before the concrete foundation was installed and the church moved from Epping and placed on the foundation. Kvande could have stopped the process, but did not do so. Kvande claims he had concerns about Thorson's reaction, but while Thorson was living in the house, Kvande felt safe enough to visit him on several occasions and even hire him to pick up a backhoe.

[¶22] Kvande's failure to assert his rights caused Thorson considerable expense, and Thorson then lived in the church building without any sort of demand that he leave until May of 2016. Thorson made a home for himself based on his understanding of the verbal agreement of the parties. It's worth noting that Kvande, at least according to Thorson,

told Thorson at some point eighteen months prior to May of 2016 that Thorson could not buy the land, but could continue to live there as long as he wanted. Thorson has clearly been prejudiced by Kvande's failure to act, and it is not possible to return him to the status quo in this matter, as this would leave Thorson bereft of all of the work he put into the building, and the substantial sums of money he spent. For these reasons, it is clear that the District Court has made a mistake, and the Supreme Court should reverse the District Court's ruling.

II. EQUITABLE ESTOPPEL SHOULD APPLY TO PREVENT THE PLAINTIFF FROM DENYING THE EXISTENCE OF THE AGREEMENT WITH THORSON.

[¶23] The doctrine of equitable estoppel is codified at NDCC § 31–11–06:

> "When a party, by his own declaration, act, or omission, intentionally and deliberately has led another to believe a particular thing true and to act upon such belief, he shall not be permitted to falsify it in any litigation arising out of such declaration, act, or omission."

Matter of Helling, 510 N.W.2d 595, 597 (N.D. 1994)

[¶24] To establish equitable estoppel, a plaintiff must show, on the part of the defendant:

> "(1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than those which the [defendant] subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or will influence, the [plaintiff]; and (3) knowledge, actual or constructive, of the real facts."

[¶25] The plaintiff also must show, on her own part:

> "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the [defendant]; and (3) action or inaction based thereon, of such a character as to change the position or status of the [plaintiff], to his injury, detriment, or prejudice." The plaintiff's reliance on the defendant's conduct must be reasonable. Matter of Helling, 510 N.W.2d 595, 597 (N.D. 1994) (internal citations omitted).

[¶26] In this case, the Court determined that equitable estoppel did not apply, on the basis that equitable estoppel can not be used to create an enforceable contract where one does not already exist. However, on the basis of the record of this case, Defendant Thorson believes that an enforceable agreement, sufficient to give rise to equitable estoppel, exists. In this case, Thorson, and both Senffs, testified that there was an agreement whereby Thorson would be allowed to live on the property This idea is tied into Thorson's argument for laches, above, and as noted in the citations in that argument, the focus of equitable estoppel is on misleading.

[¶27] As noted above, Kvande testified that he did not tell Thorson that Thorson had no right to dig the foundation on the property, or that he could not permanently place the church on the property, on the multiple occasions while Kvande noted the progress of the installation of the church. Kvande knew Thorson intended to live on the property permanently, and yet he did nothing to stop Thorson from doing so until four years had gone by. Thorson, on the other hand, acted on the agreement of the parties, relied upon Kvande's initial representation and his subsequent silence, to his injury, detriment, and prejudice. This reliance was also reasonable, Kvande told the neighbors, the William Senffs, that Thorson could, and would, be living on the property, and Kvande, despite many opportunities to stop the installation of the church, only ever communicated that permits were needed, not that the conduct was not allowed by Kvande. Accordingly, equitable estoppel should apply here, and should stop Kvande from asserting that there was no agreement for Thoreson to live on the property permanently.

III. IF THE COURT AFFIRMS THE DECISION, THE COURT SHOULD RESET THE DISTRICT COURT'S 120 DAY ORDER.

[¶28] In the event that the Supreme Court decides to affirm the District Court in this matter, the Defendant requests that the Court consider the 120 day deadline set forth in the District Court's Order. This deadline is presently stayed by a subsequent order of the Court, but that order indicates that deadline is merely stayed until the Supreme Court rules on this matter. If the Court affirms the District Court, this 120 day deadline, which allows Thorson to remove the church building and his personal property, will have already passed. Accordingly, the Defendant requests that, should the Supreme Court affirm the District Court, that the Supreme Court reset the 120 day deadline, to allow him to remove his property, including the church.

CONCLUSION

[¶29] Defendant Thorson respectfully requests that the Supreme Court reverse the District Court in this matter, as the affirmative defenses of laches and equitable estoppel should prevent Thorson from being removed from the property.

Respectfully submitted this 9th day of March, 2020.

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CERTIFICATE OF COMPLIANCE

[¶30] The undersigned, as attorney for Appellees in the above matter, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional spaced, 12 point font typeface, and the total number of pages of the above Brief totals 16 pages, inclusive.

Dated this 9th day of March, 2020.

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CERTIFICATE OF SERVICE

[¶31] I hereby certify that on March 9, 2020, I filed and served the foregoing document on the following by electronic mail transmission, pursuant to Rules 25 and 31 of the N.D.R.App.P.:

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Dated this 9th day of March, 2020.

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ORAL ARGUMENT STATEMENT

[¶32] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, the Defendant requests oral argument on this matter. Oral argument is appropriate in order to allow the Court to ask questions of the parties. The facts of this matter, particularly with regard to the many falsehoods perpetrated by the Plaintiff, are quite convoluted, and so the ability of the Court to ask, and the ability of the parties to answer, questions is important. Accordingly, the Defendant respectfully requests that the Court schedule oral argument.

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CERTIFICATE OF SERVICE

[¶31] I hereby certify that on March 23, 2020, I filed and served the foregoing document on the following by electronic mail transmission, pursuant to Rules 25 and 31 of the N.D.R.App.P.:

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Dated this 23rd day of March, 2020.

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