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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kevin McCarvel and Angela McCarvel,

Plaintiffs-Appellees

vs.

Kelly Perhus and Debra Perhus,

Defendants-Appellants.

Supreme Court No. 20200051

Civil No. 09-2018-CV-01917
(Cass County District Court)

APPELLENTS' REPLY BRIEF
(ORAL ARGUMENT REQUESTED)

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT
ENTERED ON JANUARY 23, 2020, AND FROM UNDERLYING ORDERS

CASS COUNTY DISTRICT COURT, SOUTHEAST JUDICIAL DISTRICT
HONORABLE JOHN C. IRBY

GARAAS LAW FIRM

Jonathan T. Garaas
Attorneys for Defendants-Appellants Perhus
Office and Post Office Address
DeMores Office Park
1314 23rd Street South
Fargo, North Dakota 58103
E-mail address: garaaslawfirm@ideaone.net
North Dakota Bar ID#03080
Telephone: 701-293-7211

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[¶1] **ISSUES ON APPEAL**

[¶2] Without expressing dissatisfaction with Appellants Kelly Perhus' [hereinafter "LANDOWNER"], and his wife's, Debra Perhus, identified issues [N.D.R.App.P. 28(c)], Appellees Kevin McCarvel and Angela McCarvel [hereinafter "Claimants"] over-simplify the issues arising out of the action, procedures, facts, and erroneous judicial result.

[¶3] **STATEMENT OF THE CASE**

[¶4] Claimants honor N.D.R.App.P. 28(c)(3) by omission – Claimants do not dispute any representation set forth in ¶s 13-22 entitled "Statement of the Case" of Appellant's Brief.

[¶5] Claimants do not dispute: (a) irregularities created by them arising out of the timing and extent of property affected by the Notice of Lis Pendens and the later unverified complaint [Appellants' Brief, ¶ 14]; (b) that "(n)o part of the "McCarvel Property" lies within the Southeast Quarter (SE¼) of Section Thirty-three (33) of Normanna Township" [Appellants' Brief, ¶ 15] where "Kelly Perhus is the title owner of .. all that portion of said Southeast Quarter lying South of Highway No. 46 containing 2.5 acres, more or less", and which was specifically identified by Claimants as being "Perhus Property" [App., p. 9; Appellants' Brief, ¶ 16]; (c) their failure to present any document evidencing their ownership of land in the Southeast Quarter of Section 33, and also, their failure to present any evidence of any verbal or written claim to said Southeast Quarter of Section 33 in Normanna Township made by any prior owner of the "McCarvel Property" [Appellants' Brief, ¶ 19][1]; and (d) their failure to present any "*assignment, transfer, or conveyance of such verbal or*

[1] Claimants never address this factual failure of proof of "verbal or written claim" by Claimants' predecessors in title.

written claim by any of the Claimants McCarvels' predecessors in title ever alluded to, claimed to exist, or offered into evidence" [Appellants' Brief, ¶ 19][2].

[¶6] **STATEMENT OF FACTS**

[¶7] Claimants assert LANDOWNER'S and Debra Perhus' statement of facts "overly complicates what is essentially a very simple and straightforward matter", but never challenge any factual assertion. Claimants' Brief, ¶ 4. Instead, Claimants assert facts that do not exist, apparently hoping to alter the legal elements for adverse possession and/or doctrine of acquiescence. Claimants confuse "barriers" and "boundaries". Claimants' are legally and factually wrong when they assert (a) the "McCarvel Property is largely cut off from neighboring properties by physical barriers" [Claimants' Brief, ¶ 7]; (b) "(t)he only property which physically abuts the McCarvel Property is a small triangular portion of land consisting of approximately .41 acres" [Claimants' Brief, ¶ 7]; (c) "(t)he Disputed Parcel is surrounded and cut off from other parcels" [Claimants' Brief, ¶ 10]; (d) "(t)he only property that abuts the Disputed Parcel is the McCarvel Property, which makes up its west boundary" [Claimants' Brief, ¶ 11]; prior to 1992, "East River Road provided a clear and visible boundary between the McCarvel Property and the Perhus Property [Claimants' Brief, ¶ 11]; "(t)he McCarvel Property was completely cut off from adjoining properties .." [Claimants' Brief, ¶ 11]; "East River Road was relocated and angled such that it is now intersected the Perhus Property and severed the Disputed Parcel from the remainder of the property" [Claimants' Brief, ¶ 12]. The legal boundaries set by legal description never changed, and

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[2] Claimants never address this factual failure of proof of any "*assignment, transfer, or conveyance of such verbal or written claim*" by Claimants' predecessors in title.

a road is not necessarily a barrier, nor boundary. Claimants attempt to confuse legal elements of adverse possession never using terms like "cut off", "surrounded and cut off", "clear and visible boundary" when referencing a road, and "severed". However descriptive, there still exist legal boundaries set by deed(s) – proclaimed to the world by public document.

[¶8] Claimants' failure to present evidence of a verbal or written claim by their predecessor(s) in title, and the subsequent assignment, transfer, or conveyance of any such verbal or written claim by each, limits the Claimants' action to events since February 24, 2003 – the date of their Warranty Deed identifying them as joint tenant grantees. Defendant's Exhibit 107; App., p. 50. Tacking was not pled, nor proved. No "privity of possession" relating to the adjacent 2.5 acre triangular tract was alluded to, nor claimed to exist, and Claimants McCarvel introduced no evidence from any prior owner of the McCarvel Property suggesting such prior owner made any claim for adverse possession [nor gave subsequent assignment] against Leon Perhus or LANDOWNER.

[¶9] There exists no evidence that any prior owner planted trees or grass, and there exists no evidence that the extended driveway is not within the right-of-way of the township road – which prior prescriptive easement for public road will not be lost to the State, or any of its political subdivisions, until at least 2032 (if the road was shifted in 1992; 40 year process). N.D.C.C. § 28-01-01; Nagel v. Emmons County North Dakota Water Resource District, 474 N.W.2d 46, 49 (N.D. 1991). Without written document, not even LANDOWNER will get full control of his land until after the forty (40) year wait.

[¶10] **LAW AND ARGUMENT**

[¶11] **Standard of Review - Oral Argument**

[¶12] The entire case is mixed questions of law and fact – Claimants McCarvel assert (a) non-existent facts/evidence when tacking was never pled, nor proved, and (b) non-existent elements for their legal theories. *De novo* review is appropriate.

[¶13] **Point One. Statutory presumption against adverse possession.**

[¶14] The burden of proof always rested upon Claimants McCarvel to prove the "premises have been held and possessed adversely to (LANDOWNERS') legal title for twenty years before the commencement of such action." N.D.C.C. § 28-01-07. When Claimants McCarvel did not own land until February 24, 2003 – it is impossible for Claimants to overcome the statutory presumption; the action was commenced too soon (by years).

[¶15] **Point Two. Adverse possession must endure for over twenty (20) years – the burden of proof to overcome the statutory presumption against adverse possession is "clear and convincing evidence".**

[¶16] **A. No evidence establishes adverse possession for over twenty (20) years.**

[¶17] While Claimants readily adopt the lower court's attempt to tack using the predecessors-in-interest, none of the recorded deeds include any evidence of a verbal or written adverse possession claim by their predecessor(s) in title, and the subsequent assignment, transfer, or conveyance of any such verbal or written claim to the subsequent grantee. Nor did other evidence exist of such claims/assignments. Tacking was <u>not supported by any evidence</u>, which means "clear and convincing evidence" is impossible.

[¶18] Each letter written by LANDOWNER'S counsel stands as an assertion of LANDOWNER'S land ownership, knowledge of his boundaries, and actual evidence – which should be *conclusive*. <u>Benson v. Feland Brothers Properties</u>, 2018 ND 29, ¶ 10, 906

N.W.2d 98.

[¶19] Claimants also fail to address their evidentiary void – as noted earlier, there exists **no evidence** that any of their predecessor(s) in title (a) ever asserted an adverse possession claim (or the alternate claim of mistaken boundary under the doctrine of acquiescence), or (b) ever assigned such a claim to their grantee (no evidence of any verbal or written assignment exists). Without privity of possession there can be no tacking, and it is not presumed - the statute presumes to the contrary. N.D.C.C. § 28-01-07.

[¶20] Tacking is not presumed – the right to tack must be established by clear and convincing evidence, and the lower court errs as a matter of law because Claimants McCarvel do not have twenty (20) years adverse possession without it. The decision in J.B. Streeter, Jr., Co. v. Fredrickson, 91 N.W. 692 (N.D. 1902), still stands to preclude the current claim – they must plead and prove privity of possession (with assignments). The J.B. Streeter decision makes clear, tacking is not presumed, it must be proved, and furthermore – *every new owner starts fresh*, if any claim for adverse possession exists at all.[3]

[¶21] Claimants assert the tacking argument is being advanced for the first time on appeal. Claimants' Brief, ¶ 33. Actually, LANDOWNER has always asserted – at least three (3) written letters exist in the record [App., ps. 39 {11/24/17}, 31 {12/8/17}, & 24 {5/9/18}] – that Claimants had no right to pursue an adverse possession claim (or the alternate claim under the doctrine of acquiescence) because they lacked twenty (20) years, having acquired

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[3] The underlying statute [N.D.C.C. § 28-01-04; formerly Revised Code of 1895, § 5188 (the earlier brief erred by referencing 1877)] may have changed slightly in form, but not in substance. The "tacking" aspect of the decision was cited; Claimants do not have any right to assert the referenced ten (10) year statute requiring their payment of taxes – which tax payments did not happen. LANDOWNER paid all taxes on the 2.5 acre triangular tract.

their property on February 24, 2003. App., p. 50. The lower court, for the first time, conjured up a result based on tacking – without support in the evidence, and contrary to law.

[¶22] **B. Adverse possession is predicated upon a written instrument, or not.**

[¶23] North Dakota law is quite clear that adverse possession will fall into one (1) of two (2) types [(a) based on written instrument; (b) no written instrument], and the law is different as to each type. The Supreme Court should reject Claimants' attempt to create a third (3rd) type – "(Claimants) believed that they were receiving the Disputed Parcel as well" [Claimants' Brief, ¶ 38] which can be based upon acts, some inconsequential, benefitting LANDOWNER. Claimants cannot change law; nor should the District Judge.

[¶24] No evidence, written or verbal, exists of any predecessor in title (a) making an adverse possession claim, or (b) assigning such adverse possession claim. Claimants' efforts to undermine Morgan v. Jenson, 181 N.W. 89 (N.D. 1921), which allowed verbal assignment ("parol agreement"), should be rejected – Claimants present nothing except their *beliefs* (even their belief that "the McCarvels' predecessors constructed a permanent earthen dike" [Claimant's Brief; ¶ 44] is unsupported in the record. The dike benefits LANDOWNER too; it is not adverse. Claimants' horticultural efforts, such as mowing and planting, help LANDOWNER, and are not adverse to his interests, nor do they evidence sole ownership is claimed by the actor.

[¶25] **C. Never has there been an ouster or disseisin of the owner of legal title; never has the owner been wholly excluded from possession by Claimants McCarvel.**

[¶26] Claimants declaration of "mere use and possession" being sufficient for adverse possession [Claimants' Brief, ¶ 45] flies in the face of their own quoted language from

Moody v. Sundley, 2015 ND 204, ¶ 19, 868 N.W.2d 491, identifying legal standards like "ouster", "disseisen of the owner", "wholly excluded from possession", "exclusive possession", "exclusion of the record owner and third parties as well".

[¶27] **1. The land subjected to the township's easement is not subject to divestiture by claim of adverse possession.**

[¶28] Claimants appear to ignore these legal concepts.

[¶29] **2. The land covered with grass is not subject to divestiture by claim of adverse possession.**

[¶30] Claimants argue their beliefs substitute for statutory prerequisites, always requiring either "substantial enclosure" or "usually cultivated or improved". N.D.C.C. § 28-01-11.

[¶31] **"1. When it has been protected by a substantial enclosure; or"**

[¶32] Claimants make no claim that a fence or other substantial enclosure exists.

[¶33] **"2. When it has been usually cultivated or improved."**

[¶34] Claimants McCarvel never made any claim that mowing grass/weed control/planting a tree acts as either "cultivation" or "improvement", but on appeal, now assert such is an improvement. What they did in 2003, and thereafter, also proves twenty (20) years have not elapsed so they can bring no action for adverse possession, or any alternate concept.

[¶35] **Point Three. The Doctrine of Acquiescence does not apply.**

[¶36] **A. No "mutual mistake" as to the boundary ever existed.**

[¶37] Claimants appear to argue that the boundary line's location is subject to judicial discretion – the judge has to accept the testimony of the LANDOWNER as being credible. Claimants' Brief, ¶ 60. The boundary line was fixed by legal description based upon

government surveys. LANDOWNER had knowledge; and so declared – in writing, by lawyer letter, and verbally to Claimants McCarvel – it's not for sale. There is no evidence that LANDOWNER did not know where the boundary was; if Claimants were mistaken, their burden is to prove LANDOWNER was too, otherwise the doctrine of acquiescence is missing an element – but the doctrine, as it exists in the common law, does not require landowners to march around the boundaries of the property proclaiming ownership – with or without a loudspeaker. Every recorded deed, or recorded contract for deed publically declares ownership requiring a new twenty (20) year period (unless extended by the doctrine of tacking which requires "privity of possession" - without evidence in this action). Claimants do not address the absence of the concept, "boundary by acquiesce" (sic) set forth in North Dakota statutes, or case law, as determined by the lower court. Claimants fail to address the antagonism between evidence for adverse possession and evidence for the doctrine of acquiescence [LANDOWNER'S Brief, ¶ 92].

[¶38] **B. The Doctrine of Acquiescence does not apply to servitudes created by prescription, and permission is fatal to a claim for prescriptive use.**

[¶39] Claimants fail to address this issue [LANDOWNER'S Brief, ¶s 93-95].

[¶40] **Point Four. Frivolous lawsuit, and untrue allegations warrant awards.**

[¶41] **A. Debra Perhus is entitled to fees, costs, and reasonable attorneys fees.**

[¶42] Claimants fail to address this issue [LANDOWNER'S Brief, ¶s 96-98], except to acknowledge they brought suit "because it was unknown what marital interest, homestead, or otherwise she may have claimed" [Claimants' Brief, ¶ 21] and/or she waived her right to damages. Claimants' Brief, ¶ 67. Debra Perhus did submit her statement of costs [App., p.

94], which would have been larger to include attorney fees and costs had the lower court properly determined the pleadings were frivolous – an issue now on appeal. Debra Perhus should not have to suffer for Claimants' lack of knowledge, or frivolous pleadings done without investigation.

[¶43] **B. Frivolous lawsuit - untrue allegations against Kelly Perhus.**

[¶44] Claimants fail to address this issue [LANDOWNER'S Brief, ¶s 96; 99-100], except to assert some form of waiver. Claimants' Brief, ¶ 67. Only a prevailing defendant is allowed costs, so only Debra Perhus did so. N.D.C.C. § 28-26-09. When the erroneous lower court decision is reversed, LANDOWNER will do so.

[¶45] **CONCLUSION**

[¶46] LANDOWNER and Debra Perhus request this Court re-establish the rule of law with respect to land ownership, and proper exercise of jurisdiction by district court judges.

Dated this 22nd day of June, 2020.

GARAAS LAW FIRM

/s/ Jonathan T. Garaas

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Jonathan T. Garaas
Attorneys for Defendants-Appellants
1314 23rd Street South
Fargo, North Dakota 58103
E-mail address: garaaslawfirm@ideaone.net
Telephone: (701) 293-7211
North Dakota Bar ID # 03080

The above-signed attorney certifies, pursuant to N.D.R.App.P. 32(e), that the Appellant's Brief consisting of twelve (12) pages complies with the twelve (12) page limitation imposed by N.D.R.App.P. 32(a)(8) for reply briefs.

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(Cass County District Court)

Affidavit Of Service By Electronic Means

Defendants-Appellants.

State of North Dakota
County of Cass

[¶1] Jonathan T. Garaas, being first duly sworn on oath, deposes and says that 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.

[¶2] On the 22nd day of June, 2020, Affiant electronically served a true and correct copy of the following document(s) in the above entitled action: Appellants' Reply Brief.

[¶3] The electronically attached documents were served upon the identified lawyer as follows:

[¶4] Asa K. Burck at asa@kaler-doeling.com

[¶5] To the best of Affiant's knowledge, the electronic address above given was the actual electronic mailing address of the party intended to be so served. The above documents were duly e-mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure, as revised by other rules.

/s/ Jonathan T. Garaas

_____

Jonathan T. Garaas

Subscribed and sworn to before me this the 22nd day of June, 2020.

/s/ David Garaas with seal

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Notary Public