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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)

PETITION FOR REHEARING

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

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[¶1] **PETITION FOR REHEARING**

[¶2] Appellants/Petitioners Kelly Perhus and Debra Perhus petition this Court for a rehearing of the decision of McCarvel v. Perhus, 2020 ND 314, ___ N.W.2d ____, on diverse grounds. Appellant/Petitioner Kelly Perhus seeks rehearing for reasons set forth in Point One and Point Two. Appellant/Petitioner Debra Perhus seeks rehearing because she never should have been made a party – a factual and legal determination confirmed by the opinion, which remains unremedied. See Point Three.

[¶3] **Point One: The Supreme Court confuses "adverse possession" and the "doctrine of acquiescence".**

[¶4] The opinion of the Supreme Court gives lip service to the decision of the District Court stating, "(t)he court ultimately held the McCarvels met their claim for adverse possession by clear and convincing evidence. It also found the McCarvels met all the elements for boundary by acquiescence." *Id.*, ¶7.

[¶5] In truth, the Supreme Court opinion makes no effort to support the District Court's decision with respect to adverse possession concepts because of evidentiary and legal infirmities, and the District Court actually said (*emphasis* added), "(a)lthough, the Court finds that the Plaintiffs have met their burden by clear and convincing evidence to meet their claim of adverse possession, they have also met all of their requirements for *boundary by acquiesce*" – a legal concept heretofore never known to exist in North Dakota, nor have its elements been legally defined. For the newly crafted elements of "boundary by acquiese", the District Court solely relied upon Kelly Perhus having never "communicated" permission, and that it would be inequitable to allow improvements knowing Perhus would "someday

eject them from the property." Order For Adverse Possession; App., p. 91 at ¶ 13.

[¶6] **Point Two: The elements of "doctrine of acquiescence" and/or "boundary by acquiescence" do not exist.**

[¶7] Unfortunately, those two (2) simple elements do not meet the legal standard required for "boundary by acquiescence" as set forth in Manz v. Bohara, 367 N.W.2d 743, 745–46 (N.D. 1985) or Production Credit Ass'n of Mandan v. Terra Vallee, Inc., 303 N.W.2d 79, 84-85 (N.D. 1981) ["Thus, from these cases, we conclude that to establish a new boundary line, it must be acquiesced in by the parties as the boundary between their lands for at least 20 years."]. Made part of a greater discussion concerning the now-accepted "doctrine of acquiescence", the North Dakota Supreme Court used the phrase "boundary by acquiescence" to always require "mutual recognition" of the boundary – something not present because Kelly Perhus never recognized either road or dike as a boundary, and Perhus' land on the other side of the road was incapable of being economically farmed (the road became a barrier, not boundary), but he still kept on paying the taxes, rejected McCarvels' offer of purchase[1], and asserted ownership in writing prior to any litigation (and within twenty (20) years of McCarvels' acquiring the adjacent property) (**emphasis** added):

> We discussed the doctrine of acquiescence at length in *Production Credit Association of Mandan v. Terra Vallee, Inc.,* 303 N.W.2d 79 (N.D.1981), and concluded from a review of our prior decisions [see *Trautman v. Ahlert,* 147 N.W.2d 407 (N.D.1966); *Bernier v. Preckel,* 60 N.D. 549, 236 N.W. 243 (1931)], that **"to establish a new boundary line, it must be acquiesced in by the parties as the boundary between their lands for at least 20 years."** 303 N.W.2d at 85. **Both parties must have knowledge of the existence of**

[1] Each letter written by Perhus' counsel stands as an assertion of Perhus' land ownership, knowledge of his boundaries, and actual evidence – which should be *conclusive evidence*. Benson v. Feland Brothers Properties, 2018 ND 29, ¶ 10, 906 N.W.2d 98.

a line as a boundary line, but knowledge of the true boundary line is not required when establishing a boundary line by acquiescence. *Id.* at 84.

> " 'In order to establish a boundary by acquiescence, it is not necessary that the acquiescence should be manifested by a conventional agreement, but **mutual recognition is necessary**. Aside from this what constitutes an acquiescence or recognition of a boundary line depends on the words or declarations of the parties interested, on their silence, or, as is more frequently the case, on inference or presumptions from their conduct.' " *Bernier v. Preckel,* 236 N.W. at 247, quoting 9 C.J. page 246, § 198. *See Ward v. Shipp,* 340 N.W.2d 14, 16 (N.D.1983); *Production Credit Association of Mandan v. Terra Vallee, Inc.,* 303 N.W.2d at 84.

In applying the doctrine of acquiescence, courts have generally held that the line acquiesced in must be definite, certain and not speculative, and open to observation. 2 H. Tiffany, *The Law of Real Property* § 654 (3rd Ed.). *See, e.g., Drake v. Claar,* 339 N.W.2d 844, 847 (Iowa App.1983) ["Adjoining landowners may establish a boundary line by mutually acquiescing in a dividing line definitely marked by a fence or some other manner...."]; *Glover v. Graham,* 459 A.2d 1080, 1084 n. 8 (Me.1983) [Obtaining title to property by the doctrine of acquiescence requires, in part, "possession up to a visible line marked clearly by monuments, fences or the like."]; *Fuoco v. Williams,* 18 Utah 2d 282, 421 P.2d 944 (1966) [A ditch, constantly subject to shifting or obliteration by erosion, weeds or cleaning and which was originally established by plowing two furrows down an open field for purposes of irrigation held not to constitute a boundary by acquiescence.] **The claimed line must also have been recognized as a boundary, and not as a mere barrier.** *Terra Vallee,* 303 N.W.2d at 85.

[¶8] The evidentiary failure to have "mutual recognition" by both McCarvels and Kelly Perhus of the same boundary line (not a barrier, but rather recognized "boundary") always precludes any possibility of "boundary of acquiescence" concept being applied, just as the opinion overlooks the reason why the greater doctrine of acquiescence can never be applied – the greater legal concept always required the existence of a "mutual mistake" as to the location of the property line boundary – both parties must make the same mistake. Moody

v. Sundley, 2015 ND 204, ¶ 23, 868 N.W.2d 491, and specifically quoting Brown v. Brodell, 2008 ND 183, ¶ 9, 756 N.W.2d 779 (**emphasis** added):

> The doctrine of acquiescence is separate from adverse possession and may apply when all of the elements of adverse possession cannot be met. *See James v. Griffin,* 2001 ND 90, ¶ 10, 626 N.W.2d 704. "The doctrine of acquiescence allows a person to acquire property when occupying part of a neighbor's land **due to an honest mistake about the location of the true boundary**, because the adverse intent requirement of the related doctrine of adverse possession could not be met." *Fischer v. Berger,* 2006 ND 48, ¶ 12, 710 N.W.2d 886. **"To establish a new boundary line by the doctrine of acquiescence, it must be shown by clear and convincing evidence that both parties recognized the line as a boundary, and not a mere barrier, for at least 20 years prior to the litigation."** *Brown v. Brodell,* 2008 ND 183, ¶ 9, 756 N.W.2d 779.

A "mutual acquiescence" could not, and did not exist – Kelly Perhus never recognized the road or dike as a boundary, and his land on the other side of the road was incapable of being economically farmed, but he still paid the taxes – the road is a mere barrier to his farming operations, and was never recognized to be a boundary.

[¶9] Kelly Perhus was not the only person recognizing the disputed area was his land – Kevin McCarvel actually testified that he knew he did not own it, and that his predecessors in title, if they had not purchased, were merely borrowing it [Transcript, page 21, lines 8-15 (**emphasis** added)]:

> "A. So when we did purchase it, we were told that somebody at some point purchased some more property. I did notice that little area, but, yeah. I mean, looking back, yeah, we now know that, no, **we did not own it. But I thought that we might have because they said that they borrow or bought some more land.** Now whether that has ever been bought, I don't know or have never seen anything to say such."

"Borrowing land" by any predecessor in title is equivalent to a license. A license creates a privilege personal to the licensee, which cannot be ordinarily transferred by him to another.

Riverwood Commercial Park, LLC v. Standard Oil Co., Inc., 2011 ND 95, ¶ 10, 797 N.W.2d 770. Borrowed land is not assignable – never an easement, nor adverse ownership, nor even boundary by acquiescence can arise out of a prior license. Nor can it result in a "tacking" – never plead, nor proved. Not a single witness testified to any claim by any of McCarvels' predecessor in title to the Perhus property. No tacking and/or privity of property was plead, nor proved.[2] The Supreme Court's opinion at ¶ 12 infers tacking is appropriate "(w)here successive adverse occupants hold in privity with each other under the same claim of title .." Unfortunately, no evidence was presented giving rise to such legal position – *no pleading or evidence exists that any predecessor in title made claim to ownership of the disputed property*. Even Kevin McCarvel acknowledged no title exists by purchase, but rather they had merely "borrowed" it – equivalent to a license.

[¶10] At ¶ 14 of the McCarvel opinion, weight is attached to Kelly Perhus' silence so as to "infer mutual recognition of a boundary line". Equally true, Kelly Perhus never felt offended by anything McCarvels did to his land; it was actually advantageous for McCarvels to eliminate weeds, and prevent flooding of his tillable acres. Even the attempt to purchase the property by the McCarvels confirms the doctrine of acquiescence (and adverse possession) can never exist – their claim never existed for the requisite twenty (20) years.

[¶11] This Supreme Court should never alter vested property rights so that, without color

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[2] Tacking is not presumed – the right to tack must be established by clear and convincing evidence, and both the lower court and the Supreme 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 – *every new owner starts fresh*, if any claim for adverse possession exists at all.

of title in any written or recorded document, title can be transferred to contiguous landowners that erroneously claim it as their own – their chain of title does not include any prior claim to Perhus land, nor was there any evidence (ZERO, NADA, NONE) that any of McCarvels' predecessor(s) in title ever claimed ownership of the disputed land, or ever did anything to the Perhus land without permission or other authority.

[¶12] **Point Three. Frivolous lawsuit, and untrue allegations warrant awards.**

[¶13] Debra Perhus was subjected to litigation without cause or investigation. Untrue statements were alleged by McCarvels, and never did they present any evidence justifying either the action or their allegations, but their transgressions were excused because the trial court did not make a "finding of frivolity", nor did the court "find the pleadings were untrue and made without reasonable cause and not in good faith". McCarvel, ¶ 22. Appellant/Petitioners appealed because those legal findings should have been made, and it is the height of folly for the Supreme Court to issue its decision based on a non-existent foundation of magic words – the absence of the magic words (which should have been written because McCarvels' words and action were untrue and/or frivolous) forms the basis for the appellate issue. Nor should the Supreme Court ever infer that North Dakota statutes will only be enforced according to the discretion of the district judge. McCarvel, ¶s 21-23. Appellants/Petitioners identified with specificity why the lower court should have awarded costs and attorney's fees under N.D.C.C. § 28-26-01 and/or N.D.C.C. § 28-26-31 – the lower court did not find there were any "actual facts or law" that supported McCarvels' allegations/action against Debra Perhus, nor did it find any "reasonable cause" or "good faith" reason for the litigation. Debra Perhus was wronged, there is supposed to be a remedy

– Debra Perhus is entitled to the remedy imposed by statute.

[¶14] **CONCLUSION**

[¶15] Kelly Perhus and Debra Perhus request rehearing so that this Court may re-establish the rule of law with respect to land ownership, and proper exercise of jurisdiction by district court judges. Land cannot be taken away by coveting neighbors, nor can it be lost for failure to object to advantageous use. If this opinion stands as the law of North Dakota, the undersigned will be the owner of at least the south eleven (11") inches of my contiguous neighbor's backyard due to my exclusive use of the area south of a fence due to continuous use (to include my planted flowers/vines and placement of a tool storage facility) since about 1984 or 1985. Real property rights should not be so cavalierly disregarded as now allowed by this opinion.

Dated this 31st day of December, 2020.

GARAAS LAW FIRM

/s/ Jonathan T. Garaas

_____

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The above-signed attorney certifies, pursuant to N.D.R.App.P. 32(e), that the Appellant's Petition for Rehearing consisting of ten (10) pages complies with the ten (10) page limitation imposed by N.D.R.App.P. 40(b) for such petitions.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kevin McCarvel and Angela McCarvel,

Plaintiffs-Appellees

vs.

Kelly Perhus and Debra Perhus,

Defendants-Appellants.

Affidavit Of Service By Electronic Means
Supreme Court No. _____

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

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 31st day of December, 2020, Affiant electronically served a true and correct copy of the following document(s) in the above entitled action: **Petition for Rehearing.**

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

[¶4] Asa Keith 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 31st day of December, 2020.

/s/ David Garaas & SEAL
_____
Notary Public