20200051
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 12, 2020
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' 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph

Other Authorities

[¶1] **ISSUES ON APPEAL**

[¶2] A. Did the trial court err in failing to honor the statutory presumption against adverse possession set forth in N.D.C.C. § 28-01-07?

[¶3] B. Did the trial court err in failing to award damages, including attorney fees, to Defendant-Appellant Debra Perhus for frivolous or untrue pleadings violating standards set in N.D.C.C. § 28-26-01 or N.D.C.C. § 28-26-31?

[¶4] C. Did the trial court err in failing to require "clear and convincing evidence" as required by Moody v. Sundley, 2015 ND 204, ¶ 11, 868 N.W.2d 491?

[¶5] D. Did the trial court err in failing to require a claim of title based upon a written instrument and passage of twenty (20) years under N.D.C.C. § 28-01-08 [see also, N.D.C.C. § 28-01-09 identifying acts constituting adverse possession based upon a written instrument]?

[¶6] E. Did the trial court err in refusing to recognize Defendant-Appellant Kelly Perhus' ownership interest made public upon recordation of written instruments with the Cass County Recorder, to include a Contract for Deed dated September 15, 2015, and a Warranty Deed dated August 3, 2017?

[¶7] F. Did the trial court err in failing to honor N.D.C.C. § 28-01-11 always requiring a substantial enclosure or cultivation when a person claims title not founded upon a written instrument or upon a judgment or decree?

[¶8] G. Did the trial court err in failing to award damages, including attorney fees, to Defendant-Appellant Kelly Perhus for frivolous or untrue pleadings violating standards set in N.D.C.C. § 28-26-01 or N.D.C.C. § 28-26-31 with respect to

claimed ownership of real property, and the filing of lis pendens?

[¶9] H. Did the trial court err in failing to require the statutorily required time of twenty (20) years for adverse possession?

[¶10] I. Did the trial court err by allowing tacking without any evidence of adverse possession by Plaintiffs'-Appellees' predecessors in title, or assignment of such purported claim for adverse possession?

[¶11] J. Did the trial court err by requiring a landowner to repeatedly verbally claim ownership of property to protect against loss of ownership by adverse possession?

[¶12] K. Did the trial court err by not requiring clear and convincing proof establishing all elements for adverse possession and/or the doctrine of acquiescence?

[¶13] **STATEMENT OF THE CASE**

[¶14] This is a quiet title action brought by Plaintiffs Kevin McCarvel and Angela McCarvel [hereinafter "Claimants"] against record title owner Kelly Perhus [hereinafter "LANDOWNER"], and his wife, Debra Perhus. The quiet title action, apparently under authority of N.D.C.C. Chapter 32-17, was initiated by June 18, 2018, service [Doc ID #s 4 & 5] of a Summons dated June 15, 2018 [Appendix, page 7], and an unverified Complaint signed by a lawyer dated June 6, 2018 [App., ps. 8-15]. Inexplicably, Claimants had earlier recorded with the Cass County Recorder on June 11, 2018, a Notice of Lis Pendens dated June 7, 2018, describing two (2) tracts owned by LANDOWNER consisting of (1) a tract described by metes and bounds consisting of 28.6 acres north of Highway 46, and (2) "all that portion of said Southeast Quarter lying South of Highway No. 46 containing 2.5 acres,

more or less." Defendant's Exhibit 106; App., p. 48. No land north of Highway No. 46 was involved in any adverse possession claim by Claimants, but the lis pendens still included that description. Tr., p. 54, ls. 8-24.

[¶15] Claimants plead their ownership of the "McCarvel Property", specifically identified by metes and bound description in the Complaint at ¶5, the entirety of said tract being located in the Southwest Quarter (SW¼) of Section Thirty-three of Normanna Township. App., p. 8. The "McCarvel Property" is a small tract bounded by the Sheyenne River to the west, Highway No. 46 to the north, the section line to the south, and to the east, a 391.4 foot long quarter section line – all situated within the "Southeast Quarter of the Southwest Quarter of Section Thirty-three". (The "McCarvel Property" is a small tract within a larger legally described tract containing forty (40) acres.) No part of the "McCarvel Property" lies within the Southeast Quarter (SE¼) of Section Thirty-three of Normanna Township.

[¶16] Claimants also pled "Kelly Perhus is the title owner of real property located in Cass County, North Dakota, which was "particularly described" to include the 28.6 acres (north of Highway No. 46) and "(a)lso all that portion of said Southeast Quarter lying South of Highway No. 46 containing 2.5 acres, more or less" which was specifically identified by Claimants as "Perhus Property". App., p. 9.

[¶17] LANDOWNER and Debra Perhus timely responded by Answer dated July 5, 2018 [App., p. 16] admitting the "McCarvel Property" ownerships alleged by Claimants, and specifically noted that "no portion of said description includes real property located in the SE¼ of Section 33-137-50, Cass County, North Dakota". App., p. 16, ¶3. LANDOWNER and Debra Perhus also admitted the LANDOWNER'S ownership of the "Perhus Property".

App., p. 16, ¶3.

[¶18] Claimants assert the existence of "Disputed Property" in the SE¼ of Section 33 lying south of Highway No. 46 [a 2.5 acre tract which is part of the "Perhus Property"] because East River Road, a public township road "has been located on its current right-of-way at all times from and since April 1, 1996" [App., p. 9, ¶8], and that "an un-surveyed parcel of the Perhus Property consisting of approximately .42 acres, more or less, is physically separated from the remainder of the Perhus Property .." App., ps. 9-10, ¶9.

[¶19] This quiet title action relates to "Perhus Property", always located in the SE¼ of Section 33-137-50, Cass County, North Dakota [in Normanna Township], consisting of approximately .42 acres west of the existing township road – which is not "physically separated". Claimants never presented any document evidencing their ownership of land in the Southeast Quarter of Section 33, nor did they ever 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" *(nor was any assignment, transfer, or conveyance of such verbal or written claim by any of the Claimants McCarvels' predecessors in title ever alluded to, claimed to exist, or offered into evidence).*

[¶20] A bench trial was held on September 9, 2019, before the Honorable John C. Irby. Transcript of Court Trial for September 9, 2019 (hereafter, Tr., p. __, l. __).

[¶21] On November 14, 2019, the District Judge issued an Order for Adverse Possession, and requested submissions from both parties as to "costs under N.D.C.C. § 28-26 (sic)". App., p. 85, specifically, p. 92. On January 20, 2020, the District Judge issued an Order Approving Plaintiff's Proposed Statement of Costs and Disbursements [App., p. 98], with

a Judgment entered on January 23, 2020. App., p. 99.

[¶22] Feeling aggrieved, LANDOWNER and Debra Perhus timely filed a Notice of Appeal on February 24, 2020, with the Clerk of the North Dakota Supreme Court. App., p. 102.

[¶23] **STATEMENT OF FACTS**

[¶24] Claimants have owned the "McCarvel Property" only since February 24, 2003, as evidenced by a Warranty Deed identifying them as joint tenant grantees. Defendant's Exhibit 107; App., p. 50. Twenty (20) years will not expire until at least February 23, 2023, and any possible claim of adverse possession is premature. Claimants admitted the time period from 2003 to June 6, 2018 [the date of the Complaint] is approximately fifteen (15) years, but denied "such time period is 'considerably less than twenty (20) years'" in their Answer to Request for Admission #9. Defendant's Exhibit 108; App., p. 56. Twenty (20) years from after October 7, 2015, when Claimant Kevin McCarvel approached LANDOWNER about the sale of LANDOWNER'S 2.5 acre triangular tract of land south of Highway No. 46 in the Southeast Quarter (SE¼) of Section 33 of Normanna Township [hereafter "2.5 acre triangular tract"], would be in the year 2035.

[¶25] The record is void of any prior verbal or written claim of adverse possession made by any prior owner of the McCarvel Property. Claimants made no effort to prove the existence of a prior adverse possession claim by any of Claimants McCarvels' predecessors in title, nor did they seek to prove any assignment, transfer, or conveyance of such a verbal or written claim to any subsequent owner of the McCarvel Property so as to establish "privity of possession". 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. Moreover, none of the prior conveyances by any of the prior owners of the McCarvel Property, *including the very last conveyance in 2003 to Claimants McCarvel*, made reference to, or assignment of, any claim of ownership based on adverse possession (or any other legal principle) as to any portion of LANDOWNER'S 2.5 acre triangular tract. See specifically, the January 3, 1992, Warranty Deed (LaPash to Cossette; Defendant's Exhibit 104 -App., p. 43); November 30, 2000, Warranty Deed (Cossette to Hennen; Defendant's Exhibit 105 - App., p. 46); and the February 24, 2003, Warranty Deed (Hennen to McCarvel; Defendant's Exhibit 107 - App., p. 50). Tr., p. 42, l. 18 to p. 43, l. 20. Answer to Request for Admissions #s 10, 11, and 20; Defendant's Exhibit 108 - App., ps. 56-57, 59-60.

[¶26] As to the 2.5 acre triangular tract (and other lands) [Exhibit 111 -App., p. 74; closer view at Exhibit 110 - App., p. 73], LANDOWNER is the record title owner by Warranty Deed dated August 3, 2017 [Defendant's Exhibit 103; App., p. 41], duly recorded with the Cass County Recorder on August 7, 2017. LANDOWNER had purchased the 2.5 acre triangular tract (and other lands) from his relative, Leon S. Perhus, by Contract for Deed dated September 15, 2015, duly recorded with the Cass County Recorder on October 7, 2015. Defendant's Exhibit 112; App., p. 75; Tr., ps. 12-13, p. 100, ls. 1-20. Claimants admitted LANDOWNER'S sole record title owner status as to the 2.5 acre triangular tract in their Answer to Request for Admission #1. Defendant's Exhibit 108; App., p. 53.

[¶27] Before LANDOWNER purchased the 2.5 acre triangular tract, LANDOWNER had contract-farmed his relative's lands since the mid-1980's. Tr., p. 101, ls. 11-21. LANDOWNER had been a former Normanna Township Supervisor from approximately

1995 through 2010. Tr., p. 101, ls. 5-10.

[¶28] LANDOWNER contract-farmed the 2.5 acre triangular tract of land south of Highway No. 46 because the field had that shape on the quarter line (the township road "followed that quarter line, which would be the west border of this triangle" and also. the location of the township road) until the road was realigned. Defendant's Exhibit 110; App., p. 73; Tr., p. 102, l. 1 to p. 104, l. 2. After the township road was shifted to allow safe access to Highway No. 46, LANDOWNER'S relative did not cultivate his land to the west because it was too small due to bigger equipment. Tr., p. 104, ls. 16-24; Plaintiff's Exhibit 2 - App., p. 29 (Interrogatory Answer #17).

[¶29] LANDOWNER, and his predecessors in title, have paid all real estate taxes associated with the 2.5 acre triangular tract in Normanna Township. Tr., p. 107, ls. 13-21; Defendant's Exhibits 114 &115, App., ps. 79-84. Claimants paid no real estate taxes on any portion of said 2.5 acre triangular tract. Tr., p. 49, l. 24 to p. 50, l. 8; p. 113, ls. 1-4.

[¶30] When asked, "Is there any document that gives rise to a written claim for ownership of any property in the Southeast Quarter of Section 33?", Claimant Kevin McCarvel testified "Nothing in writing." Tr., p. 50, ls. 15-18. When similarly asked, "Ms. McCarvel, during the course of the proceedings, Mr. McCarvel indicated there is not written any documents relating to the disputed property in favor of you. Is that correct?", Claimant Angela McCarvel responded, "Correct." Tr., p. 63, l. 25 to p. 64, l. 4. Claimant Angela McCarvel also conceded Claimants were not offering any abstract of title or any document evidencing ownership interest in the Southeast Quarter (SE¼) of Section 33 of Normanna Township. Tr., p. 65, l. 25 to p. 66, l. 3. The abstract showing LANDOWNER'S sole ownership interest

was received as Defendant's Exhibit 113. Docket Entry #43.

[¶31] The record is void of any testimony, document, or even evidence of the existence of a claim for adverse possession (against Leon Perhus or LANDOWNER, as the record title owners of the 2.5 acre triangular tract of land south of Highway No. 46 in the Southeast Quarter (SE¼) of Section 33 of Normanna Township) previously made by any of the past record title owners of the McCarvel Property, nor was there any testimony, document, or even evidence indicating such an adverse possession claim was conveyed, assigned, transferred, or alluded to by any of the Claimant McCarvel's predecessor(s) in title when the 2003 conveyance favoring Claimants McCarvel took place with respect to their tract of land in a contiguous quarter section to the west.

[¶32] Claimants made no attempt to testify that their immediate predecessor in title, or any earlier owner, claimed adverse possession of any of the land now solely owned by LANDOWNER, or that such adverse possession claim was conveyed, assigned, transferred, or alluded to by any of the Claimant McCarvel's predecessor(s) in title when conveying their property.

[¶33] The record is void of any verbal or documentary evidence showing "privity of possession" between the successive grantor/grantees with respect to any claim for adverse possession, real or imagined, by any of them with respect to LANDOWNER'S lands (nor were there any such claims made evident against Leon Perhus, his predecessor in title).

[¶34] As to the "Disputed Property" [part of the 2.5 acre triangular tract], Claimant Kevin McCarvel admitted in questioning by his own legal counsel, "Well, we don't own this, of course." Tr., p. 16, l. 23-25. When allowed to elaborate over objection by LANDOWNER'S

counsel, Claimant Kevin McCarvel further testified when he purchased the McCarvel Property in 2003, that "(W)e did not own it" – referring to lack of ownership of the "Disputed Property". Tr., p. 21, ls. 8-15.[1]

[¶35] LANDOWNER testified that no documents are known to exist executed by him, or Leon Perhus, the predecessor in title to the 2.5 acre triangular tract, that concedes ownership to others. Tr., p. 107, l. 22 to p. 108, l. 5.

[¶36] Claimant Kevin McCarvel even acknowledged speaking with LANDOWNER about Claimants' purchase of the 2.5 acre triangular tract. Tr., ps. 28-29; 39 "We never discussed a price. He never got back to me. He just said that he was willing to do it, but never did get back to me."; ps. 41-42 (when referencing LANDOWNER'S sale price on November 24, 2017; Exhibit 102 -App., p. 39).

[¶37] Despite Claimant Kevin McCarvel's initial ***erroneous*** testimony that his "entire property" is located in the Southeast Quarter (SE¼) of Section 33 predicated upon a misunderstanding of the meaning of a legal description initially describing a gross forty (40) acre tract: "Tract of land Southeast Quarter, Southwest Quarter of section –" [Tr., p. 33, ls. 4-17], Claimant Kevin McCarvel ultimately conceded his property is located in the Southwest Quarter (SW¼) of Section 33 of Normanna Township [Tr., p. 33, ls. 18-24], and the Court made clear the McCarvel's "deeded property does not contain a description of any property in the southeast quarter." Tr., p. 34, ls. 11-14. Claimant McCarvels' written chain of title does not establish "privity of possession" as to any disputed property, and there is no

---

[1] Adverse possession under color of title is impossible. N.D.C.C. § 47-06-03. See also, N.D.C.C. § 28-01-08 always requiring a "written instrument" of "conveyance of the premises in question" with a "claim for twenty years". See, Point Two.

evidence of any verbal conveyance either.

[¶38] Claimant Angela McCarvel conceded that LANDOWNER owns the land underneath the township road. Tr., p. 67, ls. 2-15. When questioned by her own counsel, Claimant Angela McCarvel *falsely* testified that LANDOWNER had never told her it was his property that she was working on. Tr., p. 70, ls. 2-4. The falsity of Claimant's testimony was made evident when she later acknowledged receipt of three (3) letters written on behalf of LANDOWNER as the owner: (A) a November 24, 2017, letter for "Kelly Perhus, the owner of a triangular tract of land located immediately to the east of (Claimants') property at 5407 River Road East" which included a printed map [Defendant's Exhibit 102; App. p. 39]; (B) a subsequent December 8, 2017, letter containing identical language identifying the owner, and reference to the earlier correspondence [Plaintiffs' Exhibit 3; App., p. 31], and (C) a third letter dated May 9, 2018, containing identical language identifying the owner, and reference to the earlier correspondence. Defendant's Exhibit 101; App., p. 38. Tr., p. 70, l. 11 to p. 72, l. 1.

[¶39] LANDOWNER also testified that Claimant Kevin McCarvel had expressed interest in purchasing the 2.5 acre triangular tract of land south of Highway No. 46, and indicated that if "(he) were to sell it, that (he would) give him first opportunity to buy it." Tr., p. 108, ls. 6-19. Before any written correspondence on behalf of LANDOWNER claiming ownership [letters dated November 24, 2017; December 8, 2017; and May 9, 2018], Claimant McCarvel had approached LANDOWNER about purchasing the 2.5 acre triangular tract of land from LANDOWNER – Claimants McCarvel knew who owned the land.

[¶40] LANDOWNER testified that no there are no fences or other enclosures along the west

line of the 2.5 acre triangular tract of land south of Highway No. 46 shown on Defendant's Exhibit 110. App., p. 73; Tr., p. 108, l. 21 to p. 109, l. 19. None of the pictures show fences or other enclosures within any portion of the 2.5 acre triangular tract – nothing within said 2.5 acre triangular tract of land is substantially enclosed.

[¶41] LANDOWNER testified that Debra Perhus has no interest in the 2.5 acre triangular tract, and, as a matter of public record, only he is the owner of the property. Tr., p. 111, ls. 8-20. No evidence, nor testimony was presented to the contrary.

[¶42] Claimants' testimony was not the only evidence of the frivolity of the quiet title action/lis pendens, but also made evident when they admitted not having done any research of the public record to learn LANDOWNER had purchased the property from a relative until after starting the action ["Since this trial has happened, yes, that's – ". Tr., p. 28, ls. 5-7], Such concessions means they brought a frivolous action against Debra Perhus, at a minimum. Claimant Kevin McCarvel did not even know what a lis pendens was [Tr., p. 43, l. 21 to p. 44, l. 11], but included legal descriptions for lands north of Highway No. 46, and also, made claim against Debra Perhus for no known reason, after admitting that he had never investigated the Cass County Recorder's office to see if Debra Perhus had any interest in the 2.5 acre triangular tract. Tr., p. 45. Claimants ultimately admitted "Debra Perhus had no title ownership in the property described" in their Answer to Request for Admission #2. Defendant's Exhibit 108; App., ps. 53-54. Further, Claimants responded in Interrogatory/Request No. 19, that "(Claimants) do not know what interest Debra Perhus may claim to have to the Disputed Property." Defendant's Exhibit 109; App., ps. 66-67. They did nothing to remove her from the litigation.

[¶43] A neighbor called by Claimants testified to the obvious – that recording a deed shows ownership of property to the public, and that matters of public record in the county recorder's office could ascertain ownership of property. Tr., p. 80, l. 14 to p. 81, l. 20; p. 83, ls. 11-16.

[¶44] Conceding benefits to landowners, Claimant Kevin McCarvel understands that farmers might like someone taking care the farmer's weeds [Tr., p. 54, ls. 1-6], an understanding equally shared by Claimant Angela McCarvel. Tr., p. 68, ls. 22-24.

[¶45] Neither Leon Perhus, nor LANDOWNER took offense to Claimants weeding their property, but ownership of the property never changed, to include ownership of the land under the township road. Tr., p. 105, ls. 7-21. LANDOWNER does not consider weeding an area owned by him to be hostile to LANDOWNER'S ownership. Tr., p. 107, ls. 7-13. Nor did LANDOWNER regard mowing or planting a gifted tree objectionable. Tr., p. 114, ls. 12-17.

[¶46] The public record reflects only LANDOWNER'S ownership of the 2.5 acre triangular tract - until this Judgment undermining North Dakota property law.

[¶47] **LAW AND ARGUMENT**

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

[¶49] The Supreme Court "fully review(s) conclusions of law and mixed questions of law and fact under the *de novo* standard." Burlington Northern R. Co. v. Fail, 2008 ND 114, ¶5, 751 N.W.2d 188. Oral argument would be helpful in discussing the ramifications of both law and fact.

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

[¶51] North Dakota law clearly provides for a statutory presumption against adverse

possession of real estate – the title to the statute, N.D.C.C. § 28-01-07, so states (*emphasis* added):

> **N.D.C.C. § 28-01-07. Presumption against adverse possession of real estate**
>
> In every action for the recovery of real property or for the possession thereof, *the person establishing a legal title to the premises must be presumed to have been possessed thereof within the time required by law, and the occupation of such premises by any other person must be deemed to have been under and in subordination to the legal title*, unless it appears that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of such action.

[¶52] LANDOWNER'S status as the sole record title owner, and sole taxpayer, for the 2.5 acre triangular tract is not contested, and he always enjoys a statutory presumption against adverse possession of his real estate by third parties.

[¶53] **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".**

[¶54] Early on, and no later than December 8, 2017 [Plaintiff's Exhibit 3; App., p. 31], Claimants and their counsel were advised that the claim of "adverse possession" cannot be sustained [whether based on "written instrument", or not], and also, Claimants were advised of their burden of proof ("clear and convincing evidence") and the mandatory elements of adverse possession, as identified in Moody v. Sundley, 2015 ND 204, ¶ 11, 868 N.W.2d 491:

> I am enclosing a photocopy of the referenced Warranty Deed (Defendants' Exhibit 107; App., p. 50) for your review. Under these circumstances there can be no claim for adverse possession predicated upon N.D.C.C. § 28-01-08 which requires both "a claim of title .. upon a written instrument" and passage of twenty (20) years, among other things. Neither statutory requirement can be met, and it is to be remembered that your clients

have never paid any taxes as to the 2.5 acre triangular tract.

Absence of Adverse Possession

As to the claim of "adverse possession", the McCarvels will be unable to meet the legal and factual requirements as recently set forth in Moody v. Sundley, 2015 ND 204, ¶ 11, 868 N.W.2d 491:

> ¶ 11] Whether there has been an adverse possession is a question of fact, which will not be reversed on appeal unless it is clearly erroneous. *Gruebele v. Geringer,* 2002 ND 38, ¶ 6, 640 N.W.2d 454. "To satisfy the elements for adverse possession, the acts on which the claimant relies must be actual, visible, continuous, notorious, distinct, and hostile, and of such character to unmistakably indicate an assertion of claim of exclusive ownership by the occupant." *Id.* at ¶ 7. All of the elements must be satisfied, and if any elements are not satisfied the possession will not confer title. *Id.* "The burden is on the person claiming property by adverse possession to prove the claim by clear and convincing evidence, and every reasonable intendment will be made in favor of the true owner." *Id.* at ¶ 8.

It is not my intention to establish all of the legal reasons why your clients cannot deprive my client of his real property by a claim of adverse possession. My client, and his predecessor in title, knew where the property line was actually located, and there are executed and recorded documents establishing actual transfer of the ownership of the 2.5 acre triangular tract by way of an initial Contract for Deed dated September 15, 2015 [Document #1460060 (Defendant's Exhibit 112; App., p. 75)] and the Warranty Deed dated August 3, 2017 [Document #1517376 (Defendant's Exhibit 103; App., p. 41)]. There has never been any mistake on our part as to the location of the boundary line, among other deficiencies, so not even the doctrine of acquiescence, also discussed in Moody, would apply.

My client (and his predecessor in title) have not opted to cultivate the sliver of land to the west of the township road because of its size, but no transfer of ownership can arise out of your clients opting to periodically cut the grass adjacent to the township road. N.D.C.C. § 28-01-11 identifies the two (2) types of cases "constituting an adverse possession by a person claiming title not founded upon a written instrument nor upon a judgment or decree" where land shall be deemed to have been possessed and occupied for twenty (20) years or longer, neither circumstance existing:

1. When it (the land) has been protected by a substantial enclosure; or
2. When it (the land) has been usually cultivated or improved.

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

[¶56] The District Court errs as a matter of law when no evidence – which is substantially less than "clear and convincing evidence" – is presented that the land has been possessed and occupied by Claimants McCarvel for twenty (20) years or longer. The District Court errs as a matter of law when there is not twenty (20) years of adverse possession by Claimants, whether triggered by a February 24, 2003, event [the date McCarvels acquire the "McCarvel Property"; App., p. 50] or a later September 15, 2015, event [LANDOWNER'S new status as contract for deed vendee; App., p. 75].

[¶57] The District Court Judge determined that "(t)he (McCarvels) have an unbroken chain of title to their property of more than 20 years. In addition, the McCarvels and their predecessors have adversely possessed the approximate .410 of an acre, the disputed property, for a period of time exceeding 20 years." App., p. 87, ¶8. Only the first sentence is supported by clear and convincing evidence; the second sentence is unsupported by any evidence.

[¶58] Interestingly, shortly after LANDOWNER'S informative letter of December 8, 2017, the North Dakota Supreme Court decided Benson v. Feland Brothers Properties, 2018 ND 29, ¶ 15, 906 N.W.2d 98, affirming Moodie's legal principles, but implicated here because of the lower court's mistaken belief that (a) landowners cannot rely on deeds, but rather, landowners have to forever announce the boundaries of their property [see, Point 2(B)], and (b) that legal descriptions are irrelevant when adverse possession is asserted. The Benson

case, at ¶10, confirmed that boundary lines and descriptions referenced in deeds, if not ambiguous, are what is intended to be conveyed – *conclusively* (**emphasis** added):

> [¶ 10] "As a general rule, the boundary line between adjacent properties is determined by referring to the deeds and the intention of the parties as reflected by the description in the deeds, and when there is no ambiguity in the **descriptions they are to be taken as the conclusive evidence of the intention of the parties**." *Hansford v. Silver Lake Heights, LLC*, 294 Kan. 707, 280 P.3d 756, 760 (2012). ..

[¶59] Claimants McCarvel presented no evidence that their immediate predecessor in title [Hennen; Defendant's Trial Exhibit 107; App., p. 50] intended to convey any property in the Southeast Quarter (SE¼) of Section Thirty-three of Normanna Township (or that grantor Hennen was the recipient of any earlier grant). If that recorded deed's description is "conclusive evidence", the lower court always errs when it seeks to expand the quantity of land conveyed by Hennen to include LANDOWNER'S property, which was also subject to an equally "conclusive evidence" presumption in 2015 and 2017, the dates of the Contract for Deed and subsequent Warranty Deed. App., ps. 75; 41. The ownership of the land under any township road is never involved, and Claimant Angela McCarvel conceded LANDOWNER'S ownership of land under the township road. See ¶38. Similarly, the evidence is conclusive that Leon Perhus intended to convey all of the 2.5 acre triangular tract located in the Southeast Quarter (SE¼) of Section Thirty-three of Normanna Township – free of any claim by McCarvels.

[¶60] In the context of this case, the lower court errs, as a matter of law, when allowing tacking – without any evidence whatsoever that a claim of adverse possession was "also conveyed" by grantor Hennen. The burden of proof on Claimants McCarvel is "clear and

convincing evidence" of an adverse possession claim by each predecessor in title for over twenty (20) years. They presented no evidence from any prior owner – and no one testified, and no evidence exists in this record, that any prior owner intended to also convey a claim for adverse possession (there are no ambiguities in the legal descriptions; no adverse possession claim was conveyed, nor intended to be conveyed).

[¶61] 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. The underlying statute [N.D.C.C. § 28-01-04; formerly Revised Code of 1877, § 5188] may have changed slightly in form, but not in substance – McCarvels' claim must fall because they failed to plead and prove any "privity of possession", or the assignment of the adverse possession from each prior owner to the next subsequent owner covering the requisite time; Claimants do not have twenty (20) years of their own ownership. 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 (*em**pha**sis* added):

> Under the statute just quoted, and all similar statutes, the decisive question in determining whether the bar is complete as against a claimant out of possession is whether he, his ancestor, predecessor, or grantor, has been in possession within 20 years prior to commencing his action. In determining this question courts are frequently met with the fact that a number of persons have been in adverse possession successively. *It is clear that, to make the bar of statute complete as against a claimant out of possession, there must have been a continuous adverse possession for the full statutory period. When no privity exists between the several adverse occupants,* ***the continuity***

> ***of possession is broken at each new entry, for the reason that the law presumes that the true owner is in possession***. When, however, there is *privity of possession* between the occupants, the courts have uniformly held that the one holding adversely may tack the possession of his predecessor to his own, and thus a continuous adverse possession is made out against the claimant out of possession. The entire scope of this so-called "doctrine of tacking" is, however, as will be seen, not to determine whether the occupant has been in possession for any fixed period of time, but is to determine whether the claimant out of possession has in fact or in law been in possession within the statutory period, so as to entitle him to maintain his action. In other words, it is merely a uniform rule adopted by the courts for determining whether a claimant out of possession when his action is commenced has been in possession at any time within the 20-year period. ***If no privity is found to exist between the successive disseisors, and the last occupant has not held adversely for the full statutory period, the bar is not complete, as the law presumes that the possession of the land returns to the true owner at each change of possession, when there is no privity between the several occupants.*** When, however, there is *privity of possession*, and it has continued for the statutory period, the bar is complete, for the very plain reason that the claimant out of possession has not, in that event, been in possession within the statutory period.

[¶62] The burden always on Claimants McCarvel, was first to prove twenty (20) years of continuous adverse possession [always requiring "privity of possession", by assignment from the prior owner(s) as to the adversely possessed land since Claimant McCarvels' ownership was less than twenty (20) years]. No evidence exists of any adverse possession claim made by Douglas L. Hennen, Claimant McCarvel's grantor [App., p. 50], nor does there exist any evidence of a claim of adverse possession made by any prior owner of the McCarvel Property. Claimants McCarvel had a duty to plead and prove, by clear and convincing evidence, the "privity of possession" as to the adversely possessed property that would possibly allow tacking; they cannot assume anything, nor can the judge – there exists a contrary statutory presumption only favoring LANDOWNER. Morgan v. Jenson, 181 N.W. 89, 90-91 (N.D. 1921) makes clear there must be evidence [possibly even parol agreement]

of a conveyance of the adverse possessory right from past owners to satisfy the continuous twenty (20) years requirement, otherwise there is no privity of estate [no "privity of possession" evidenced by agreement] allowing tacking. LANDOWNER, clearly announcing the boundaries of his land when recording the Contract for Deed [September 15, 2015], and later Warranty Deed [August 3, 2017], is entitled to the statutory presumption [Point 1], and also, North Dakota case law presumption that "the possession of the land returns to the true owner at each change of possession, when there is no privity between the several occupants." *Id.* The "privity of possession" did not exist, nor was it plead and proved; the presumption of ownership by Kelly Perhus stands intact.

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

[¶64] North Dakota law is quite clear that adverse possession will fall into one (1) of two (2) types, and the law is different as to each type. LANDOWNER submits that adverse possession is either (1) *based upon a written instrument* (N.D.C.C. § 28-01-08; with acts constituting adverse possession based upon a written instrument found at N.D.C.C. § 28-01-09) or (2) *based on **no** written instrument* (N.D.C.C. § 28-01-10, with acts constituting adverse possession not based upon a written instrument found a N.D.C.C. § 28-01-11).

[¶65] The district court properly determined "(t)he McCarvel claim is not by written instrument", but errs when he seemingly analyzes their claim only "under N.D.C.C. § 28-01-10." App., p. 87; ¶9 of Order for Adverse Possession. N.D.C.C. § 28-01-10 does identify the extent of real estate affected by adverse possession not based on any written instrument, as its title suggests, but it does not set forth the whole evidentiary standard for such adverse possession claims. The referenced statute requires twenty (20) years of "actual continued

occupation of premises under a claim of title exclusive of any other right" [which does not exist; see Point Two], but N.D.C.C. § 28-01-11 identifies the only two (2) types of physical facts that will qualify for land "to have been possessed and occupied" for the requisite time period:

> "1. When (the land) has been protected by a substantial enclosure; or
> 2. When it has been usually cultivated or improved."

[¶66] Claimants McCarvel were advised of such statutory requirement as early as December 8, 2017 [Plaintiff's Exhibit 3; App., p. 31], but they presented no evidence meeting either requirement, and the District Court Judge seemingly ignored the statutory evidentiary requirement(s), and mandatory time period based upon Claimants McCarvel having maintained a dike, planted trees, mowed the grass, and maintained their driveway, and also, Claimant McCarvels "believed that the land belonged to the McCarvels". The District Court errs when it asserts that a landowner has a duty to tell others where the boundary line is located, or to affirmatively "communicate() his 'permission'", or risk of loss of ownership. App., ps. 88; 90; Order for Adverse Possession, ¶s 10; 12.

[¶67] As set forth in correspondence dated December 7, 2017 [Plaintiff's Exhibit 3; App., p. 31], LANDOWNER was well aware of the definition of "adverse possession" set forth in Moody v. Sundley, 2015 ND 204, ¶ 11, 868 N.W.2d 491 (**emphasis** added), and wanted Plaintiffs (and their counsel) to be equally knowledgeable or informed by quoting the text of the case at ¶11. See ¶ 54 above for quoted text.

[¶68] There is no known statute, nor North Dakota case law that requires landowners to notify others of the boundaries of their property. The *world*, including Claimants McCarvel,

have "actual notice" of any landowner's property rights upon recordation of the underlying deed of conveyance (or other instrument). N.D.C.C. § 1-01-23; N.D.C.C. § 47-19-19 ("The record of any instrument shall be notice of the contents of the instrument, as it appears of record, as to all persons."). For those who ignore public record, they have "constructive notice" of such property right(s). N.D.C.C. § 1-01-24. Indeed, Claimant Kevin McCarvel had to know of LANDOWNER'S ownership status, and made certain when he tried to buy LANDOWNER'S 2.5 acre triangular tract – an act which evidences actual knowledge of Kelly Perhus' ownership existing sometime after September 15, 2015 [Defendant's Exhibit 112; App., p. 75]. From that date of contact, twenty (20) years must again run before adverse possession can be legally asserted.

[¶69] **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.**

[¶70] The decision in Gruebele v. Geringer, 2002 ND 38, ¶ 10, 640 N.W.2d 454, mandates the Claimants McCarvel to plead and prove their, or their predecessor(s)' "hostile possession for the statutorily required" twenty (20) years, and that LANDOWNER be "wholly excluded". See also, Ellison v. Strandback, 62 N.W.2d 95, 100 (N.D.1953).

[¶71] Never has any owner – neither Leon Perhus or Kelly Perhus – ever been "wholly excluded from possession by the claimant(s)", hostile or not. Indeed, LANDOWNER'S hired hand drove on LANDOWNER'S land, as was his right. The District Court errs when it attaches any importance to Claimants' "complaint to law enforcement" "(w)hen Kelly Perhus' employee damaged the property by driving a farm implement over it .." App., p. 90; Order for Adverse Possession, ¶12. Claimants McCarvel actually are presenting evidence

that the LANDOWNER **was not** "wholly excluded from possession by the claimant", as required by Gruebele. As noted in Moody v. Sundley, at ¶ 19 (**emphasis** added):

> The evidence did not establish Sundley's predecessors-in-interest exclusively possessed the property or that their possession was hostile. "To be effective as a means of acquiring title, an adverse claimant's exclusive possession must be such as to operate as an ouster or disseisin of the owner of legal title, and the owner must be wholly excluded from possession by the claimant." *Gruebele,* 2002 ND 38, ¶ 10, 640 N.W.2d 454. **"Exclusive possession, for purposes of establishing title through adverse possession, requires the exclusion of the record owner and third parties as well."** *Id.* at ¶ 11.

McCarvel's own evidence precludes any claim of their ownership by adverse possession to any of LANDOWNER'S land(s) should the hired hand be a third party, not the LANDOWNER.

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

[¶73] The descriptions devised by the District Judge at ¶s 3 & 4 [Order for Adverse Possession; App., p. 86] – due to a judicially recognized absence of evidence submitted by Claimants McCarvel – possibly interfere with a prescriptive easement favoring the township. The North Dakota Supreme Court ruled in Larson v. Tonneson, 2019 ND 230, ¶16, 933 N.W.2d 84, (citing Smith v. Anderson, 144 N.W.2d 530 (N.D. 1966), and City of Jamestown v. Miemietz, 95 N.W.2d 897 (N.D. 1959) that "adverse possession cannot be obtained against a public entity under North Dakota law." Claimant McCarvels did not show any portion of the township road (to include the mailbox) was exclusively possessed – never can any portion of the township road, or its adjacent ditches/drainage system be the subject of an adverse possession claim – as a matter of law. The District Court errs to the extent it

includes any portion of the township road easement area, presumptively designed to be 66' wide.

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

[¶75] Similarly, the grassy area to the west of the existing township road up to the quarter section line was never exclusively possessed by Claimants McCarvel, nor was the use hostile to LANDOWNER. Under North Dakota law, if there exists a claim of adverse possession "not founded upon a written instrument or upon a judgment or decree", our Legislative Assembly has identified the only two (2) types of specified acts that will suffice to prove adverse possession – to constitute adverse possession within those "acts" allowed to prove adverse possession under N.D.C.C. § 28-01-11, the "acts" are limited to:

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

[¶77] A review of Plaintiff's Exhibit 4, 5, and 6 [App., ps. 33, 35, & 37], along with examination of Defendant's Exhibits 102, 110, and 111 [App., ps. 39, 73, & 74] will not disclose the existence of "any enclosure", so obviously there is not any evidence of a "substantial enclosure" under subsection 1. The Merriam Webster Dictionary, New Edition 1994, defines enclose as "to surround with a fence". No fence is shown in the pictures, and no one testified to the existence of a fence, or any other form of enclosure (such as a building?). No statutory "act" exists under subsection 1 of N.D.C.C. § 28-01-11; no adverse possession can be claimed – as a matter of law. The lower court cannot change the statutory language "substantial enclosure" to "obvious line of demarcation of the disputed property" [App., p. 89, Order for Adverse Possession, ¶ 12]. The lower court's "lines of demarcation"

are without legal foundation, and contrary to statutory verbiage.

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

[¶79] There was no evidence of cultivation whatsoever, nor was there any evidence that any portion of LANDOWNER'S real property was used for pasturage of animals. See, Martin v. Rippel, 152 N.W.2d 332, 338 (N.D. 1967)[also pertinent to issue of fencing]. Claimants McCarvel never made any claim that mowing grass/weed control/planting a tree acts as either "cultivation"[2] or "improvement". Instead Claimants McCarvel argued in Plaintiffs' Post Trial Brief, ¶9; see also, ¶20 [Docket Entry #46] other words, or acts, that do not appear anywhere within N.D.C.C. 28-01-11(2) ["used and maintained the Disputed Property", and that the "use and maintenance includes mowing the Disputed Property, weed and pest management, planting trees, and calling law enforcement when an employee of Kelly Perhus drove a tractor onto the Disputed Property and caused damage."], which the lower court turned into a finding, *not based on statutory language*, of "regular use of the disputed property". App., p. 89; Order for Adverse Possession, ¶ 12. Neither "use", nor "maintenance", nor "regular use" is synonymous with "cultivation" or "improvement" – as a matter of law. None of such activities meet the law's requirements – "continuous, notorious, distinct, and hostile, and of such character to unmistakably indicate an assertion of claim of exclusive ownership by the occupant". When not all required legal elements for adverse possession exist, Claimant McCarvels' claim of adverse possession should have failed. See, Moody v. Sundley, ¶ 11; statutes of adverse possession are "strictly construed" -

[2] The Merriam Webster Dictionary, New Edition 1994, defines cultivate as "to prepare for the raising of crops" or as to vegetables, "to foster the growth of by tilling or by labor and care".

Morgan, page 90. LANDOWNER benefits by someone else taking care of his weeds, and he has no obligation to remind Claimants McCarvel of his ownership interest(s) – upon recordation, his Contract for Deed and Warranty Deed announced his ownership to the world in 2015 and 2017. It should also be remembered that no witness has testified concerning any understandings concerning the earlier mowing of Leon Perhus' grass by anyone's predecessor(s) in title – without "clear and convincing evidence" that the mowing of Leon Perhus' grass by prior owners LaPash [Defendants Exhibit 104; App., p. 43], prior owners Cossette [Defendants Exhibit 105; App., p. 46], or prior owner Hennen [Defendants Exhibit 107; App., p. 50] was a "*notorious*" and "*hostile*" act, it proves nothing with respect to a claim of adverse possession except that Leon Perhus was also saved time and expense by good neighbors – helping your neighbors[3] does not give rise to ownership of land.

[¶80] By statute, planting trees or grass without any enclosures, such as a fence, is insufficient to establish adverse possession by usually cultivating or improving the property in dispute, nor is it even hostile to the landowner. Simpson v. Kao, 636 N.Y.S.2d 70 (App. Div. 1995), provides:

> The proof that the defendants planted and cultivated a few trees on the plaintiff's property near the boundary line between their property and the plaintiff's property is insufficient to establish adverse possession by usually cultivating or improving the property in dispute *(see,* RPAPL 522 [1]; *Van Valkenburgh v Lutz,* 304 NY 95; *City of Tonawanda v Ellicott Cr. Homeowners Assn.,* 86 AD2d 118).

[¶81] LANDOWNER (even Leon Perhus) chose to accept the benefits of weed control along

---

[3] The undersigned is aware that Fargo requires a fence to be constructed at least one (1) foot in from the property boundary; when the undersigned mows up to the fence (with at least eleven inches of the neighbor's land being mowed), no ownership by adverse possession would ever arise.

the township road, and did not object to the driveway extension, but never considered themselves excluded from possession of the 2.5 acre triangular tract of land. LANDOWNER (even Leon Perhus) gladly accepted the gift of noxious weed control, and even some gravel, as would any right-thinking farmer given the opportunity to save time and expense otherwise required by law. N.D.C.C. Chapter 4.1-47; see specifically, N.D.C.C. § 4.1-47-02 and the possible civil penalty of $80/day [$4,000/annually] under N.D.C.C. § 4.1-47-31, and also, the obligation of landowners or operators of land along township roads to cut weeds and grasses as set forth in N.D.C.C. § 63-05-01. Such acts would not be "notorious" or "hostile", nor "unmistakably indicate an assertion of claim of exclusive ownership by the occupant".

[¶82] As to the dike, Claimants McCarvel never presented any evidence as to who constructed the dike that they now claim protects their property, but they, and the lower court failed to recognize that LANDOWNER (even Leon Perhus) also receive the benefit of that constructed dike located along the Highway No. 46 right-of-way. As constructed, it prevents the Sheyenne River waters from flowing over LANDOWNER'S land and washing out the existing township road – that township road is also the only field access available to the owner of the entire 2.5 acre triangular tract of land south of Highway No. 46. The dike benefits LANDOWNER – its existence is not a hostile act; there was no evidence presented that the dike was constructed or maintained without permission of LANDOWNER (or possibly Leon Perhus). Such acts would not be "notorious" or "hostile", nor "unmistakably indicate an assertion of claim of exclusive ownership by the occupant".

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

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

[¶85] Claimants McCarvel had a fall-back position [Plaintiffs' Post Trial Brief, ¶s 24-25; Docket Entry #46] predicated upon the "doctrine of acquiescence" as mentioned in Moody v. Sundley, and Sauter v. Miller, 2018 ND 57, ¶10, 907 N.W.2d 370, which was accepted by the lower court – "(T)hey have also met all of their requirements for boundary by acquiesce." App., p. 91; Order for Adverse Possession, ¶13. The basis for the lower court's "boundary by acquiesce" (sic) is LANDOWNER'S failure to communicate "permission to the McCarvels and their predecessors to use the property". The lower court, without identified legal basis, asserts "there would be an equitable estoppel preventing Mr. Perhus from asserting this right after he sat on it for over 20 years and allowed improvements to be made with the full knowledge that he would someday eject them from the property." *Id.*

[¶86] LANDOWNER did not sit on anything for over 20 years – his ownership begins in 2015, and Claimants McCarvel, owners only since 2003, do not have twenty (20) years of adverse possession – the doctrine of tacking requires "privity of possession" (not evidenced).

[¶87] Secondly, there is no known "boundary by acquiesce" (sic) set forth in North Dakota statutes, or case law. Thirdly, the lower court alludes to "equitable estoppel", without any understanding of North Dakota's statutes. N.D.C.C. § 31-11-06 is the restatement of the equitable doctrine of estoppel, and "insofar as real estate titles are concerned, the elements of estoppel have been expressed often", and never could such principles be applied to LANDOWNER as made clear in Farmers Co-op Ass'n of Churches Ferry v. Cole, 239 N.W.2d 808, 812 (N.D. 1976)(citing prior authority):

> 'first, that the party making the admission by his declaration or conduct was apprised of the true state of his own title; Second, that he made the admission with the express intention to deceive, or with such careless and culpable

> negligence as to amount to constructive fraud; Third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, Fourth, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved.'

The lower court relies on a legal concept having no application whatsoever: LANDOWNER only spoke the truth, and did no act inconsistent with his ownership interest; there is no evidence of any intent to deceive; Claimant McCarvels had knowledge of the boundaries of their owned lands; and there is no evidence that Claimants McCarvel relied upon anything said or done by LANDOWNER – they even tried to buy his land. The lower court invoked a legal concept that sounds good, but the statutory requirements for equitable estoppel do not exist in this record.

[¶88] Fourth, as of December 8, 2017 [App., p. 32; Plaintiff's Exhibit 3], LANDOWNER tried to legally educate Claimants McCarvel, and their counsel, as to the doctrine of acquiescence, writing that LANDOWNER knew his boundary line so the referenced legal doctrine could never exist:

> "There has never been any mistake on our part as to the location of the boundary line, among other deficiencies, so not even the doctrine of acquiescence, also discussed in Moody, would apply."

Such reference was to the following language found in Moody, at ¶ 23, quoting Brown v. Brodell:

> "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.

[¶89] When LANDOWNER knows the *quarter line* is his western boundary for the 2.5 acre triangular tract, there is no possibility of "both parties recogniz(ing)" any different boundary

line under the doctrine of acquiescence. Neither can there be any "honest mistake about the location of the true boundary" – LANDOWNER knew his boundary established by unambiguous legal description in a deed as being the *quarter line*, and claimed the land as his own; Claimant Kevin McCarvel tried to buy it; and LANDOWNER'S employee later drove off the township road, and unto the grass west of the road, but always driving only upon LANDOWNER'S land. Only after LANDOWNER'S sales price was identified [App., p. 39; Defendant's Exhibit 102; November 24, 2017] did a claim of McCarvel ownership "through deed or adverse possession" arise, and never then was such ownership predicated upon the "doctrine of acquiescence" [Claimants McCarvel then only asserted "(t)his property already belongs to the McCarvels whether acquired through deed or adverse possession."; see, Plaintiff's Exhibit 3; App., p. 31]. There was no "mutual mistake", and never did LANDOWNER regard the township road as a boundary or barrier.

[¶90] While LANDOWNER most certainly **did not** recognize the township road that deviated off of the quarter line as the boundary, neither did Claimants McCarvel when offering to purchase LANDOWNER'S land. Equally certain, Claimants McCarvel did not prove acquiescence by the required "clear and convincing evidence" that the other party "claim(s) property to the exclusion of the true owner." Sauter v. Miller, ¶ 10.

[¶91] Claimants McCarvel falsely claimed that LANDOWNER offered only his testimony "to support his claim that there was no mutual misunderstanding (as to the boundary line)", and that he remained silent. Plaintiffs' Post Trial Brief, ¶ 27; Docket Entry #46. The lower court apparently bought the falsehood asserting a landowner has to announce permission/boundaries, or suffers loss of property. In truth, LANDOWNER testified as to

Claimant McCarvels' prior offer of purchase, and his uncontroverted testimony negates the validity of any attempt by Claimant McCarvels (or the lower court) to utilize the doctrine of acquiescence always requiring an "honest mistake" by "both parties" as to the boundary line. Aside from the December 3, 2017, letter asserting LANDOWNER'S sole ownership [App., p. 31], LANDOWNER'S evidence of sole ownership, both testimony and documentary, is uncontroverted. See Statement of Facts.

[¶92] LANDOWNER suggests that evidence supporting the doctrine of acquiescence is antagonistic, perhaps fatal, to any claim of ownership based upon adverse possession. See, Production Credit Association of Mandan v. Terra Vallee, Inc., 303 N.W.2d 79, 84 (N.D. 1981). Adverse possession requires "notorious", "distinct", and "hostile" acts – none of which can be done by "honest mistake". Brown v. Brodell, ¶9; Sauter v. Miller, ¶10. Nor are there the required "monuments, fences, or the like." Manz v. Bohara, 367 N.W.2d 743, 746 (N.D. 1985) as cited in Sauter v. Miller, ¶10. Moreover, the doctrine of acquiescence always requires "mutual recognition" of the same mistaken boundary. Brown v. Brodell, ¶13 (and payment of taxes is proof of non-mutual recognition; *id.*, ¶14 – LANDOWNER (or Leon Perhus) paid all taxes. LANDOWNER should not have to breach the peace to protect his property, nor did he (upon advise of counsel).

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

[¶94] The North Dakota Supreme Court has determined, in Fischer v. Berger, 2006 ND 48,

¶ 13, 710 N.W.2d 886 [4] (**emphasis** added):

> [¶ 13] The American Law Institute recognizes that acquiescence does not apply to servitudes created by prescription, because modern prescriptive doctrine is based on theories of acquisitive prescription and the running of the statute of limitations, and because acquiescence of the owner cannot be distinguished from permission of the owner, which is fatal to a claim for prescriptive use. *Restatement (Third) of Prop.: Servitudes* § 2.17 cmt. g (2000) (citing *Restatement (Third) of Prop.: Servitudes* § 2.16(1) (2000)). **We agree with the rationale that for purposes of acquisitive prescription, acquiescence of an owner cannot be distinguished from permission of an owner. Because permission of an owner is fatal to a claim of prescriptive use, we conclude the doctrine of acquiescence is not applicable to a claim for an easement by prescription for a trail across another's property. We therefore reject Fischer's claim that they were entitled to an easement by prescription under the doctrine of acquiescence.**

[¶95] Claimants McCarvel have presented no evidence whatsoever establishing the current placement of the dike was done without the permission of Leon Perhus, or any other record title owner.

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

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

[¶98] As to Debra Perhus, dismissal should have been summarily granted because not one shred of evidence was submitted establishing anything other than her marital status as wife to LANDOWNER. "Debra Perhus is not a record titleholder of the property. There was no evidence that she claimed any homestead right in the disputed property or any property which made up the entire parcel owned by Kelly Perhus." App., p. 87; Order for Adverse Possession, ¶7. Debra Perhus should have been awarded reasonable actual and statutory

---

[4] LANDOWNER did not seek to alter the status of the township road in any way; it undoubtedly had been used for more than twenty (20) years when located on the quarter line, and its deviation for purposes of connecting with Highway No. 46 east of the guard rails has not been challenged.

costs, including reasonable attorney's fees pursuant to N.D.C.C. § 28-26-01(2), and/or payment of all expenses, including a reasonable attorney's fee, to be summarily taxed by the court pursuant to N.D.C.C. § 28-26-31 for allegations in pleadings, made without reasonable cause and not in good faith, and found to be untrue. N.D.R.Civ.P. 11(b) includes an attorney's representation to the court that his pleadings, or other paper, are certified to the "best of (the attorney's) knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: .. (3) the factual contentions have evidentiary support or will likely have evidentiary support after a reasonable opportunity for further investigation or discovery .." There are also similar Rule 11(b)(2) implications. Without evidence, without investigation of the public record, and without reasonable excuse, Debra Perhus was subjected to litigation and expense, and she is entitled to judicial relief. Any claim for relief against Debra Perhus was, and is both frivolous and untrue. Debra Perhus is entitled to an award of reasonable actual and statutory costs, including reasonable attorney's fees pursuant to N.D.C.C. § 28-26-01(2), and/or payment of all expenses, including a reasonable attorney's fee, to be summarily taxed by the court pursuant to N.D.C.C. § 28-26-31 for allegations in pleadings, made without reasonable cause and not in good faith, and found to be untrue. Claimants McCarvel were under a duty to dismiss their claim against Debra Perhus when they finally conceded they had no case, and their decision to still proceed against Debra Perhus should not be condoned, nor should the Court's denial of undisputed costs of $35.00 (before attorney fees that should be ordered paid). App., p. 94.

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

[¶100] Unfortunate for LANDOWNER, Claimants McCarvel also filed a lis pendens

covering land north of Highway No. 46, which even the district court found "never explained". App., p. 87; Order for Adverse Possession, ¶6. The rationale for an award of reasonable actual and statutory costs, including reasonable attorney's fees pursuant to N.D.C.C. § 28-26-01(2), and/or payment of all expenses, including a reasonable attorney's fee, to be summarily taxed by the court pursuant to N.D.C.C. § 28-26-31 for allegations in pleadings, made without reasonable cause and not in good faith, and found to be untrue apply also as to LANDOWNER.

[¶101] **CONCLUSION**

[¶102] 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. Debra Perhus should be made whole by proper award for being subject to a frivolous action predicated upon falsehoods. LANDOWNER'S property should be restored, and he too should be made whole by proper award for being subject to a frivolous action.

Dated this 12th day of May, 2020.

GARAAS LAW FIRM

/s/ Jonathan T. Garaas

_____

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

CERTIFICATE OF COMPLIANCE

The above-signed attorney certifies, pursuant to N.D.R.App.P. 32(e), that the Appellant's Brief consisting of thirty-eight (38) pages complies with the thirty-eight (38) page limitation imposed by N.D.R.App.P. 32(a)(8) for principal briefs.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kevin McCarvel and Angela McCarvel,

Plaintiffs-Appellees

Supreme Court No. 20200051

vs.

Civil No. 09-2018-CV-01917

Kelly Perhus and Debra Perhus,

(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 12th day of May, 2020, Affiant electronically served a true and correct copy of the following document(s) in the above entitled action: Appellants' Brief; Appendix.

[¶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 12th day of May, 2020.

/s/ David Garaas with seal

_____

Notary Public