

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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THOMAS LUZIER and MARSHA LUZIER,  Plaintiffs/Appellant,  vs.  ANDREW HEMMAH and JENNIFER HEMMAH,  Defendants/Appellees.	Case No. 31234
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APPEAL FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT  
DAY COUNTY, SOUTH DAKOTA

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THE HONORABLE RICHARD A. SOMMERS  
Circuit Court Judge

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**APPELLANT THOMAS LUZIER'S BRIEF**

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**APPELLANT THOMAS LUZIER’S BRIEF**

PRELIMINARY STATEMENT

Plaintiff Marsha Luzier died during the course of these proceedings. This Brief will refer to Appellant Dr. Thomas Luzier as Plaintiff or Dr. Luzier. Appellees Andrew and Jennifer Hemmah will be referred to as Defendants or by their names. References to the Clerk’s Index will be referred to as CI followed by the page number. References to the Appendix attached to Plaintiff’s Brief will be referred to as App followed by the page number. References to the trial transcript will be referred to as TR followed by the page number. References to the transcript of the Preliminary Injunction hearing will be referred to as PIH followed by the Clerk’s Index page and line numbers. References to the deposition testimony of Teri Johnson (EX 66 (CI 319-81)), Chris Johnson (EX 65 (CI 289-318)), Charles Wesley Dickhut (EX 67 (CI 382-421)), Robert Webb (EX 95 (CI 460-520)), and Vince Webb (EX 96 (CI 521-58)), will be referred to respectively as T. Johnson, C.

Johnson, Dickhut, R. Webb, and V. Webb followed by the Clerk's Index page and line numbers. Page 20 of the Appendix contains a table that cross references deposition and trial exhibit numbers. Trial exhibits will be referred to as EX followed by the Clerk's Index page number.

### JURISDICTIONAL STATEMENT

Plaintiff seeks review of the Judgment and Order of the court filed September 16, 2025. (App 1-3). Notice of Appeal was filed September 29, 2025. (CI 707). The Judgment and Order is appealable pursuant to SDCL 15-26A-3(1).

### STATEMENT OF LEGAL ISSUES

I. DID THE TRIAL COURT ERR IN FAILING TO QUIET TITLE TO THE SUBJECT PROPERTY IN FAVOR OF PLAINTIFFS BASED ON ADVERSE POSSESSION?

The trial court ruled that Plaintiffs failed to establish adverse possession by clear and convincing evidence.

- *Underhill v. Mattson*, 2016 SD 69, 886 N.W.2d 348;
- *Lewis v. Aslesen*, 2001 SD 131, 635 N.W.2d 744;
- *Jutting v. Hendrix*, 2000 SD 25, 606 N.W.2d 140;
- *Lewis v. Moorhead*, 522 N.W.2d 1 (S.D. 1994).

II. DID THE TRIAL COURT ERR IN ACCEPTING DEPOSITION TESTIMONY WITHOUT QUESTIONING ITS CREDIBILITY MERELY BECAUSE THE COURT DID NOT HAVE AN OPPORTUNITY TO OBSERVE THE WITNESSES TESTIFY IN PERSON?

Despite substantial credibility issues, the trial court accepted the testimony of witnesses who appeared by deposition because the court did not have an opportunity to observe them.

- *Caldwell v. John Morrell & Company*, 489 N.W.2d 353 (S.D. 1992);

- *Herren v. Gantvoort*, 454 N.W.2d 539 (S.D. 1990);
- *Gross v. Gross*, 355 N.W.2d 4 (S.D. 1984).

III. DID THE TRIAL COURT ERR IN REFUSING TO EXPAND THE PRESCRIPTIVE EASEMENTS IT GRANTED TO PLAINTIFFS?

The trial court refused to expand the prescriptive easements resulting in danger to the structural integrity of Plaintiffs' large garage and restricting Plaintiffs' access to their front yard and the lake.

- *Thompson v. E.I.G. Palace Mall*, 2003 SD 12, 657 N.W.2d 300.

STATEMENT OF THE CASE

This case involves an appeal from a Memorandum Decision (App 4-16)<sup>1</sup> and the subsequent Judgment and Order of the Court (App 1-3) signed by the Honorable Richard A. Sommers, in Day County, Fifth Judicial Circuit.

In this case, Plaintiffs pursued a claim of adverse possession of property located near cabins owned by Plaintiffs and Defendants at Pickerel Lake in Day County. The trial court denied Plaintiffs' adverse possession claim but granted prescriptive easements to Plaintiff concerning two garages located on Plaintiff's property that extend over the surveyed property line. Plaintiff appeals from the decision denying his adverse possession claim and alternatively, appeals from the court's denial of a request to expand the prescriptive easements.

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<sup>1</sup> The court declared the Memorandum Decision to be its Findings of Fact and Conclusions of Law pursuant to SDCL 25-6-52(a). (App 5).

## STATEMENT OF THE FACTS

The Ramona Beach Subdivision was developed in 1925. (App 6). The 1925 plat showed fourteen lots. (*Id.*; EX 18 (CI 237)). The Defendants currently own Lot 8 of the subdivision. Plaintiff owns Lot 9.

There were no pins or other survey markers placed when Ramona Beach was originally developed. (App 6). At one point, the original owners attempted to set property lines by making use of a tape measure. (*Id.*). In 1981, an additional plat was prepared which added outlots. (EX 19 (CI 239)). Outlot 5A was attached to Lot 8 and Outlot 6A to Lot 9. In conjunction with the preparation of the second plat, iron pipes were placed at the western and eastern borders of the outlots but there continued to be no survey marker on the lakeside border of Lots 8 and 9. (App 6-7). No marker of any type was placed on the lakeside border between Lots 8 and 9 until 2002 when Robert Webb hired Clark Engineering to survey Lots 7 and 8. (EX 21 (CI 241-44)). This came about in an attempt to turn Lot 7 and a portion of Lot 4A and Lots 8 and 5A into Lots 1 and 2 of Webb's Addition to Ramona Beach Subdivision. (EX 21, p. 2 (CI 242)). This plan was apparently abandoned in that the plat that was developed was never filed nor recorded anywhere. (EX 21, p. 1 (CI 241)). There is no indication the pin was ever registered.<sup>2</sup>

A survey was prepared by Helms Engineering in 2014. (EX 1 (CI 46)). In preparing the 2014 survey, Helms relied on the unrecorded pin placed in 2002. Defendants obtained the 2014 survey when they purchased their cabin in 2015. (TR 167:21—168:4). They never showed the survey to the Luziers or the Fortners.

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<sup>2</sup> SDCL 43-20-3 requires a surveyor to file a written record of a corner establishment with the register of deeds within ninety days. That was not done. The plat failed to comply with SDCL 11-3-4 and 11-3-6.

(TR 168:5-9, TR 200:7-19).<sup>3</sup> Both Mr. Fortner and Dr. Luzier testified they never saw the 2014 survey until around the time this lawsuit was commenced in June 2024. (PIH 84:25—85:23; TR 100:5-12).

A number of people owned the cabin on Lot 9 over the years. (TR 118:19-120:3). Lot 8 was purchased by Harold and Bernice Webb in the early 1940s. (App 7). The Webb family owned Lots 6 through 8. (V. Webb 529:8-22). Eventually, Maurice Webb became the owner of Lot 8.<sup>4</sup> Defendants purchased their cabin from Maurice Webb's testamentary trust. (EX 74 (CI 435-36)).

In 1947 or 1948, a driveway was constructed on Lot 8. The northern boundary of that driveway consisted of a large rock wall. (R. Webb 495:2-11).<sup>5</sup> Maurice assisted in the construction of the rock wall. (*Id.* 495:5-8).

In 1948, Ben Siebrecht, one of the predecessor owners of Lot 9, tore down the cabin that was on Lot 9 and replaced it with a garage.<sup>6</sup> (PIH 89:6-19; R. Webb 467:12-16; EX 2 (CI 47)). The present cabin owned by Dr. Luzier was built at its present location in 1950. (PIH 89:20-21).

Robert and Teri Johnson purchased Lot 9 in 1979. (App 7). Harold and Bernice Webb owned Lot 8 at that time. (T. Johnson 327:24—328:5). Maurice Webb transferred Lot 6A to the Johnsons in 1981 (TR 15:4-11; EX 20 (CI 240)). The Johnsons owned

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<sup>3</sup> Jonathan Fortner is the son of Marsha Luzier and the stepson of Dr. Luzier. He and his wife Stephanie have been familiar with the Pickerel Lake cabin since the Luziers purchased it in 2005. (PIH (CI 84:1-24)). Fortner provided substantial testimony at both the preliminary injunction hearing and at trial.

<sup>4</sup> At points in the transcript, there is a reference to Morris Webb. Maurice and Morris are the same person.

<sup>5</sup> The north side of Defendants' driveway will be referred to in this Brief as the rock wall.

<sup>6</sup> This garage will be referred to herein as the small garage.

Lots 6A and 9 until they sold them to the Luziers on June 1, 2005. (EX 22 (CI 245)).

The Johnsons built a garage on Lot 6A in 1997.<sup>7</sup> (T. Johnson 342:11-14; PIH 90:6-14; EX 3 (CI 48)).

Marsha Luzier took the lead in making the arrangements for the purchase of Lot 9 and its cabin. (TR 120:11-13). Ms. Luzier met with Robert Johnson who showed her the property line between Lots 8 and 9 (TR 120:14-19), which is the dotted line labeled as “Use of land line” on Exhibit 23 (CI 247). (TR 120:20—121:18). Ms. Luzier also discussed the property line with Maurice Webb, who owned Lot 8 when the Luziers bought Lot 9. (TR 124:3-11). Mr. Webb showed Ms. Luzier the same property line as did Mr. Johnson. (TR 125:6-10).

The Hemmahs eventually became good friends with the Fortners. (TR 128:14-20). In May 2024, Plaintiffs received a letter from Day County informing them of a variance request that had been filed by Defendants. (PIH 85:12-23). Upon receipt of the variance request, Jonathan Fortner contacted Day County Planning and Zoning and obtained copies of the 2014 survey, along with various other documents. (PIH 86:15—87:15). The 2014 survey revealed that portions of both the large and small garages were over the surveyed property line. (PIH 87:16—88:3).

One of the documents Mr. Fortner obtained from the county was an estimate which indicated Defendants intended to demolish the retaining wall which runs off the southwest corner of the large garage. (PIH 98:8-13; EXs 5, 6, 8 (CI 51, 52, 54)). The discovery of this document caused great concern for Plaintiffs. (PIH 98:21—100:1). Another document received from the county indicated that Defendants intended to construct a garage within a few feet of Plaintiffs’ large garage. (EX 28 (CI 252)). The

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<sup>7</sup> This garage will be referred to herein as the large garage.

concern caused by the receipt of these documents resulted in this lawsuit being commenced on June 6, 2024. (PIH 100:14—101:12).

Following the commencement of the lawsuit, Mr. Hemmah put up a string fence which purported to represent the surveyed property line. (PIH 103:13-16; EXs 9-12 (CI 55-58)). The accuracy of the string fence is questionable. Mr. Hemmah admitted that he has never seen the actual pin which is located at the southeast corner of Lot 9. (TR 204:11-18; 213:7-14). He used a flowering bush and a daylily bush to determine the location of the fence, although neither of those items are shown on the 2014 survey. (TR 212:13—213:17).

The placement of the string fence resulted in Plaintiffs filing a Motion for a Preliminary Injunction seeking removal of the fence. (CI 18). A hearing on that motion was held on August 22, 2024. Following the hearing, an Order Regarding Preliminary Injunction was entered, requiring Defendants to remove the temporary fence but allowing them to keep the stakes in place. That order also allowed Plaintiffs to make use of and mow an area the width of a push mower south of the property line established by the 2014 Helms survey. (CI 64). This matter went to trial on May 13 and 14, 2025.

#### STANDARD OF REVIEW

This case involves adverse possession. “Proof of the individual elements of adverse possession present questions of fact for the trial court, while the ultimate conclusion of whether they are sufficient to constitute adverse possession is a question of law.” *Lewis v. Moorhead*, 522 N.W.2d 1, 3 (S.D. 1994). The standard of review on factual issues is clearly erroneous and generally, deference is afforded to the trial court regarding factual testimony. Such deference is not afforded to factual findings based on

deposition testimony. This Court reviews “findings based on deposition testimony and documentary evidence under a de novo standard of review.” *Bender v. Dakota Resorts Management Group, Inc.*, 2005 SD 81, ¶ 5, 700 N.W.2d 739 (quoting *Grauel v. South Dakota School of Mines and Technology*, 2000 SD 145, ¶ 7, 619 N.W.2d 260).

Questions of law are also reviewed de novo. *Mudlin v. Hills Materials Company*, 2005 SD 64, ¶ 5, 698 N.W.2d 67.

### ARGUMENT

#### I. THE TRIAL COURT ERRED IN FAILING TO QUIET TITLE TO THE SUBJECT PROPERTY IN FAVOR OF PLAINTIFFS BASED ON ADVERSE POSSESSION

In order to prevail on an adverse possession claim, a proponent has to establish four elements by clear and convincing evidence. Those are “(1) an occupation that is (2) open and notorious, (3) continuous for the statutory period, and (4) under a claim of title exclusive of any other right.” *Underhill v. Mattson*, 2016 SD 69, ¶ 11, 886 N.W.2d 348.

#### **OCCUPATION**

In determining whether there has been an occupation, courts look to SDCL Chapter 15-3. In this case, since Plaintiffs are not claiming adverse possession on a claim of title under a written instrument, the applicable statutes are SDCL 15-3-12 and 15-3-13. Under SDCL 15-3-13, Plaintiffs have to establish one of three things—a substantial enclosure, cultivation of the property, or improvement of the property. *Jutting v. Hendrix*, 2000 SD 25, ¶ 11, 606 N.W.2d 140. Plaintiffs established all three elements.

- *The evidence established that Plaintiff's predecessors constructed numerous improvements in the disputed area*

The trial court's Memorandum Decision contained a section referencing cultivation and improvements. (App 9-11). The Memorandum Decision did not, however, address or discuss the substantial evidence that was produced concerning improvements to the disputed area. A number of those improvements were described and located on Exhibit 23. (CI 247). A discussion of the improvements addressed in Exhibit 23 follows.

- *Large garage*

Reference points 1 and 2 on Exhibit 23 are located at the west end of the property. Exhibit 1 shows that the large garage encroaches approximately 3.41 feet over the surveyed property line. (CI 46). The large garage retaining wall extends approximately fifteen feet from the southeast corner of the garage. (EX 53 (CI 277)).<sup>8</sup> That wall was constructed at the same time as the garage in 1997. (T. Johnson 363:21-25). A fifteen foot area south of the large garage contains 21 earth anchors. The large garage retaining wall and the anchors serve to keep the garage from falling down. (Dickhut 393:23—397:6; EX 25 (CI 249)). The fifteen foot area south of the large garage was cleared of large trees, presumably when the garage was constructed. (Dickhut 390:20—392:18, 393:7-22; EXs 29-31, 69, 70, 72 (CI 253-55, 425-30, 431, 433)). The large garage and its retaining wall and earth anchors had been in place in the disputed area for 27 years when the litigation was commenced.

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<sup>8</sup> Exhibits 23 and 53 are both surveys performed by Helms Engineering for purposes of the litigation. Exhibit 23 highlights the improvements to the disputed area by Plaintiff's predecessors. Exhibit 53 is focused on measurements.

- *Area west of the small garage*

Reference points 3-6 on Exhibit 23 refer to an area to the west of the small garage. There was substantial evidence presented at trial concerning use of the property west of the small garage on Lots 8 and 5A between the surveyed property line and the rock wall. The Johnsons constructed three retaining walls in this area which extended from Lots 6A and 9 to the south, passing over the surveyed property line. (EXs 32-35, 37 (CI 256-59, 261)). The retaining wall holding up the road (reference point 3) extended all the way from the Luzier driveway to the Hemmah rock wall. (TR 30:6-16). These retaining walls were constructed by the Johnsons in the early 1980s. (T. Johnson 333:24—334:13, 334:21-23, 356:7-15). Robert Webb confirmed that the Johnsons had put in the small garage retaining walls and added that they also created a place to park a car. (R. Webb 507:2-19; EX 36 (CI 260)).

In addition to installing the retaining walls and creating the parking area in the disputed property, the Johnsons also improved the area by putting down plastic and landscape rock in the early 1980s. (T. Johnson 333:24—334:7, 334:12-17, 334:24—335:1; EXs 39-41 (CI 263-65)). The landscape rock ran all the way to the rock wall. (*Id.* 334:18-23). This Court has held on several occasions that landscaping constitutes an improvement under SDCL 15-3-13(2). *Underhill*, 2016 SD 69 at ¶ 13; *Lewis v. Aslesen*, 2001 SD 131, ¶ 8, 635 N.W.2d 744; *Jutting*, 2000 SD 25 at ¶ 11; *Schultz v. Dew*, 1997 SD 72, ¶ 12, 564 N.W.2d 320.

Bob and Chris Johnson placed a red gas tank in the disputed area. (C. Johnson 297:9-11;<sup>9</sup> T. Johnson 331:21—332:7; EX 42 (CI 266)). In 2006, Jonathan Fortner placed a boat on the west side of the small garage in the disputed area. (EXs 42, 43 (CI

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<sup>9</sup> Chris Johnson is the son of Robert and Teri Johnson.

266, 267)). Both of these items remained in place until 2024, when Mr. Hemmah moved them north of the surveyed property line. (TR 37:14—39:1, 210:6-14; EXs 44, 45 (CI 268, 269)).

One other piece of evidence that establishes the Luzier predecessors' use of the disputed area west of the small garage involves some stone steps that were constructed as part of a WPA project before the Johnsons owned the property. (T. Johnson 330:24—331:16; EX 55 (CI 279)). The top of these steps extended over the surveyed property line as shown by Mr. Hemmah's string fence. (EX 44 (CI 268)). The steps led to the former location of the predecessors' outhouse, which was in the disputed area. (T. Johnson 330:24—331:20). Robert Webb testified that the outhouse was put up by the Hoffmans, the original owners of the Luzier property. (R. Webb 501:9-18).

Chris Johnson testified he took care of the disputed area west of the small garage for several years. (C. Johnson 295:23—296:14). The Webbs never made any claim to ownership of the property west or south of the small garage and did not take care of either of those areas. (*Id.* 299:19-25). Despite this extensive evidence regarding the Johnsons' care for and improvements made to the area west of the small garage, the court's Memorandum Decision made no mention of this undisputed testimony. With regard to that area, Plaintiffs clearly established improvements to the area which were put in place by Plaintiff's predecessors more than twenty years before the commencement of litigation.

- *Small garage*

As noted previously, the small garage was constructed in 1948. It is reference point 7 on Exhibit 23. According to Exhibit 1, the small garage extends over the

surveyed property line approximately five to seven feet. It had been in its same location for 76 years when the lawsuit was commenced. The construction and maintenance of a garage was considered to be an improvement in *Underhill*, 2016 SD 69 at ¶ 13. It is still another example of an improvement put in place by one of the Plaintiff's predecessors.

- *Flower bed*

Point 8 on Exhibit 23 is a daylily bed located on the east side of the small garage, which extends over the surveyed property line. Teri Johnson testified she and her husband planted these along the entire east side of the small garage during the first five or six years the Johnsons owned the cabin. (T. Johnson 329:10—330:6; EX 2 (CI 47)). During the entire time they lived there, they maintained the property on the east side of the garage, as well as the property between the south side of the garage and the rock wall. (T. Johnson 330:18-23). Robert Webb acknowledged Teri Johnson planted the daylilies. (R. Webb 502:3-7). Ms. Johnson also testified that the Johnsons planted a hedge between the two cabins, which ran parallel to the screened patio on Lot 8. (T. Johnson 339:24—341:13; EXs 9, 23 (CI 55, 247)). Marsha Luzier testified that the hedge could be seen in the distance on Exhibit 51 (CI 275). Ms. Johnson stated that Maurice Webb, using a rope and a string, confirmed the hedge, which was in the disputed area, was on the Johnson property. (*Id.* 340:14-25). Marsha Luzier testified Maurice Webb asked her on occasion if he had permission to go through the hedge onto the Luziers' property. (TR 125:11-17).

The flower bed and the hedge provide still further evidence of the improvements the Johnsons made in the disputed area during their ownership of Lot 9.

- *Sidewalk*

The sidewalk along the south side of Plaintiff's cabin is reference point 9 on Exhibit 23. (EXs 11-13 (CI 57-59)). The sidewalk across which the string fence cuts was constructed at the same time as the cabin in 1950. (PIH 106:6-9). This is still another example of improvements made by Plaintiff's predecessors in the disputed area, which had been in place for 74 years when this lawsuit was commenced.

- *Oak Tree*

The next reference point on Exhibit 23 is an oak tree, which is designated as point 10. It is located between the two cabins south of the surveyed property line. There is a light fixture in the tree. (EXs 49, 50 (CI 273-74)). It is undisputed that the light fixture was at one time wired to the Luzier cabin and was controlled from that cabin. (T. Johnson 336:21—337:17; R. Webb 500:2-8). Chris Johnson testified the light was in the tree when his parents purchased the cabin in 1979. (C. Johnson 298:7—299:6). Whenever it was installed, the light in the tree has obviously been there for considerably more than twenty years, and is still another example of an improvement made by Plaintiff's predecessors.

- *Sea Wall*

Reference point 11 on Exhibit 23 is described as the shoreline erosion retaining wall. This was commonly referred to in the trial as the sea wall. Photographs show a clear delineation between where the gray sea wall on Lot 9 ends and meets up with the stone and cement wall on Lot 8. (EXs 17, 51 (CI 63, 275)). The sea wall was constructed in 1950. (R. Webb 497:1-12).

To establish occupation under SDCL 15-3-13, a plaintiff need only establish one of the three items listed. As demonstrated by the foregoing, Plaintiff clearly established multiple improvements in the disputed area which were all in existence for more than twenty years when the lawsuit was commenced. The trial court erred in failing to consider these improvements and in failing to find that Plaintiffs had established the occupation element of their adverse possession claim.

- ***The evidence established the existence of a substantial enclosure***

In addition to establishing numerous improvements, Plaintiffs also complied with the substantial enclosure requirement of SDCL 15-3-13. In addressing this requirement, Plaintiffs presented evidence regarding the historical use of the disputed area and the understanding of the owners of Lots 8 and 9 as to where the boundary was between their two properties.

Robert Webb, who was once a part owner of Lot 8, provided historical testimony concerning the Ramona Beach Subdivision. (R. Webb 484:5-24). It was Mr. Webb who testified concerning the use of a tape measure to determine lot lines. (R. Webb 469:12-16). Webb testified no one knew where the property line was until he had the survey done in 2002. (*Id.* 469:4-18). This is evidenced by the fact there are numerous encroachments on Lots 6 through 9 of the Ramona Beach Subdivision. (TR 201:19—202:21; EX 1 (CI 46)).

Teri and Chris Johnson provided testimony concerning the historical understanding as to the location of the property line. During her deposition, Teri was shown a photograph of the string fence put up by Mr. Hemmah. She testified no one ever considered the property line to correspond to that fence. (T. Johnson 369:22—370:10,

371:5-10; EX 49 (CI 273)). She stated everyone knew where the lot lines were. (*Id.* 358:2-6). On the west end of the property, in Lot 6A, the property line started at the end of the large garage retaining wall (*Id.* 365:21-23), then extended eastward along the rock wall (*Id.* 328:8—329:9; EX 15 (CI 61)), and then to the south end of the sea wall. (*Id.* 338:14—339:4, 371:5-10; EX 17 (CI 63)). Ms. Johnson further testified there were different retaining walls as one walked along the beach. It was the general consensus that property lines were located where the retaining walls changed. (*Id.* 346:7-19). According to Ms. Johnson, everyone always considered the end of the retaining wall on Lot 9 to be the property line. (*Id.* 362:16-23; EX 17 (CI 63)).

Chris Johnson's testimony echoed his mother's. From 1979 until at least somewhere around 1986, Chris spent the summers at the cabin on Pickerel Lake with his mother and siblings. (C. Johnson 294:5-22). He agreed everyone always knew where the property line was. (C. Johnson 302:19-23). He was adamant that the rock wall was part of the property line.

A The rock -- the rock wall was the property -- I mean, the rock wall is the prop- -- I shouldn't even say "was." That's the property line.

Q No ifs, ands, or buts --

A No.

Q -- about that.

A Nobody -- it was always well understood.

(C. Johnson CI 296:16-22). It was also always Plaintiffs' understanding that the property boundary ran in accordance with the dotted line on Exhibit 23 as testified to by Teri and Chris Johnson. (TR 46:25—47:11, 100:13—101:1).

In order to establish an enclosure, it is not necessary that a fence or a wall run the entire length of the property being claimed. *Schultz*, 1997 SD 72 at ¶ 12. In *Moorhead*, a partial fence was used to define a property line.

Even though the white fence did not run the entire distance between the lots, it did provide a physical and visual basis for determining the property line. See *Klinefelter v. Dutch*, 161 Wis.2d 28, 467 N.W.2d 192, 194-95 (Wis. App. 1991). (“An inclosure having no purpose of physical exclusion of outside interferences—a mere furrow turned with a plow around the land, or a line marked by cutting away the bush, or a fence opened so as to admit outside disturbers may be sufficient under the circumstances to indicate, as a matter of fact, the boundaries of an adverse claim . . .” (citations omitted)); *Cuka*, 294 N.W.2d at 422<sup>10</sup> (a natural barrier, such as a river, can fulfill the substantial enclosure element of the statute).

522 N.W.2d at 3, n.4. As in *Moorhead*, the Hemmah property is divided from the Luzier property by the rock wall, which is a substantial enclosure. That line continues by the oak tree down to the south end of the sea wall. Although there is no physical border between the end of the rock wall and the sea wall, there is “a physical and visual basis for determining the property line,” created by the rock wall, the oak tree, and the sea wall. The straight line of trees to the south of the large garage also creates a substantial enclosure. A tree line was found to be a substantial enclosure in *Schultz*, 1997 SD 72 at ¶ 12.

The evidence established that the predecessors to both Plaintiff and Defendants recognized the rock wall as a substantial enclosure with a line running from that wall to the south end of the sea wall on Lot 9. It is particularly noteworthy that Robert Johnson and Maurice Webb both showed Marsha Luzier that the property line was as demonstrated by the dotted line on Exhibit 23. This is further evidenced by the fact that Maurice Webb asked Marsha Luzier’s permission to go through the hedge which ran

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<sup>10</sup> *Cuka v. Jamesville Hutterian Mutual Society*, 294 N.W.2d 419 (S.D. 1980).

along that same line. All of this evidence was sufficient to establish the existence of a substantial enclosure and the trial court erred in determining otherwise.

- ***The evidence established that Plaintiffs and their predecessors cultivated the disputed area for many years***

A substantial portion of Defendants' presentation at trial involved photographs showing Defendants making use of the disputed area and purportedly attempting to show how the grass was cut differently along the surveyed property line. All that testimony is essentially irrelevant in that the evidence established adverse possession of the disputed area was obtained prior to Defendants purchasing Lot 8 in 2015.

A party obtaining possession of property may already be owners by adverse possession even before their occupancy begins. *Underhill*, 2016 SD 69 at ¶ 16.

"[A]dverse possession occurs by operation of law and does not require an action to commence it, nor to continue it." *Rotenberger v. Burghduff*, 2007 SD 19, ¶ 16, 729 N.W.2d 175 (quoting *Johnson v. Biegelmeier*, 409 N.W.2d 379, 382 (S.D. 1987)). The Johnsons owned the property from 1979 to 2005, a period of twenty-six years.

Furthermore, there is evidence of Plaintiff's predecessors making use of some of the disputed property going all the way back to at least 1948—approximately 67 years before Defendants purchased Lot 8. Therefore, whatever the Hemmahs did beginning in 2015 is of no significance.

As far as cultivation is concerned, several cases have held that mowing an area constitutes cultivation. *See Underhill*, 2016 SD 69 at ¶ 13; *Aslesen*, 2001 SD 131 at ¶ 8; *Jutting* 2000 SD 25 at ¶ 13; *Schultz* 1997 SD 72 at ¶ 13. Not only did the Johnsons cultivate the disputed property by mowing, they also planted flowers, a hedge, and

bushes. Planting a garden is also considered cultivation. *See Taylor v. Tripp*, 330 N.W.2d 542, 544 (S.D. 1983).

Teri Johnson and her children spent the entire summer at their cabin when they owned it. Her husband would come up on weekends and during his vacations. (T. Johnson 326:4-9). Both Teri and Chris testified the Johnsons maintained the disputed area by mowing and raking. (T. Johnson 341:16—342:10, 566:10-20); C. Johnson 299:7-13). Chris testified that he, along with Vince Webb and Maurice Webb’s son, frequently mowed all of the property around the cabins owned by the Webbs and the Johnsons. (C. Johnson 309:21—310:9)). The fact the Johnsons allowed others to mow their grass at times does not defeat Plaintiff’s adverse possession claim. *Jutting*, 2000 SD 25 at ¶¶ 15-16. Plaintiffs claimed to have mowed the disputed area prior to 2024. (PIH 106:17-22, 108:20—109:3; TR 48:21—49:9; EX 14 (CI 60)). Defendants claimed otherwise. They assert they maintained the disputed area since obtaining their cabin in 2015. Defendants admitted, however, they had no knowledge as to who cared for the area from 2005 to 2015. (TR 199:6-9).

The evidence at trial demonstrated that the Johnsons and the Luziers maintained the disputed area from at least 1979 through 2015. Therefore, Plaintiffs established the cultivation element of SDCL 15-3-13.

#### **OPEN AND NOTORIOUS**

The second thing Plaintiff must prove is that his occupation has been open and notorious. “The traditional elements of adverse possession require the ‘actual, open, visible, notorious, continuous and hostile’ occupation of the property for the statutory period.” *City of Deadwood v. Summit, Inc.*, 2000 SD 29, ¶ 16, 607 N.W.2d 22 (quoting

*Moorhead*, 522 N.W.2d at 3). The purpose of the open and notorious element is to give the record owner notice. *Underhill*, 2016 SD 69 at ¶ 15. In *Underhill*, a garage was located on the land the defendants claimed to have adversely possessed. The Court held the presence of the garage made possession open and notorious. *Id.* In *Aslesen*, the Court noted that mowing, planting, and spraying of weeds were all evidence of open, visible, notorious, continuous, and hostile possession. 2001 SD 131, at ¶ 9. The doctrine of acquiescence “gives an evidentiary presumption as to the element of hostility. It applies even though the occupancy occurred due to ignorance, inadvertence, or mistake, and without an intention to claim the lands of another.” *City of Deadwood*, 2000 SD 29 at ¶ 22 (citing *Lien v. Beard*, 478 N.W.2d 578 (S.D. 1991)). *See also Moorhead*, 522 N.W.2d at 5. The doctrine “presumes hostility in situations where both parties acquiesced to a boundary line for the statutory period required for adverse possession.” *Fuoss v. Dahlke Family LP*, 2023 SD 3, ¶ 14, 984 N.W.2d 693. Therefore, the fact Maurice Webb may have mistakenly assumed the rock wall had been placed on the property line, does not defeat Plaintiffs’ adverse possession claim. *City of Deadwood*, 2000 SD 29 at ¶ 24; *Lewis v. Moorhead*, 522 N.W.2d at 6.

As applied to this case, the presence of the garages has been actual, open, visible, notorious, continuous, and hostile. The same is true for the care of the disputed property by the Johnsons. There has also been acquiescence. Although Robert Webb claims he was aware the large garage was being constructed over the property line, he did nothing to try to stop the construction. (R. Webb 490:8—492:1). The Johnsons never heard any complaints about the location of either garage. (T. Johnson 328:14-21, 342:15-18, 344:1-3; C. Johnson 296:23—297:6, 299:15-18). The Webbs never asserted any ownership to

the area west of the small garage. (T. Johnson 336:9-20). The Hemmahs became aware of the 2014 survey when they acquired their property in 2015 and learned the two garages were over the surveyed property line. (TR 200:7-14). They did nothing about the location of the garages. Until 2024, there was acquiescence by the Hemmahs and their predecessors.

Plaintiffs had no knowledge regarding the pin placement in 2002 until after the litigation commenced. (TR 17:8-12, 100:5-12, 125:18-25).<sup>11</sup> The Johnsons were never aware of the property line established by the 2014 survey. The Luziers and Fortners did not become aware of it until shortly before this litigation began. That inadvertence has no impact on the validity of Plaintiffs' adverse possession claim. This is highlighted by the above quote from the *City of Deadwood* case about occupancy due to "ignorance, inadvertence, or mistake."

In discussing the open and notorious requirement, the trial court's Memorandum Decision mentions exclusivity. (App 11). Exclusivity has to do with the fourth element of the adverse possession test and will be addressed later.

The court concluded that Plaintiffs' "occupation of the land was not open and notorious as to put the Hemmah's on notice of the adverse use." (App 12). That conclusion misses the point. As noted previously, the disputed area was adversely possessed by Plaintiff and their predecessors long before the Hemmahs purchased Lot 8 in 2015. The fact the Hemmahs claim to have received no notice of Plaintiff's claim to the disputed area prior to the institution of this lawsuit is insignificant.

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<sup>11</sup> Teri and Chris Johnson were not specifically questioned about the 2002 survey because they were deposed on November 26, 2024, and existence of the survey was not revealed until shortly before Robert Webb was deposed on April 4, 2025. *See* discussion re: Appeal Issue II.

## STATUTORY PERIOD

The third element is occupation for the statutory period. The applicable period in this case is twenty years as set forth in SDCL 15-3-1. A proponent of adverse possession does not need to prove that they alone have occupied the property for twenty years. Tacking allows the proponent to add their claim to the occupation of their predecessors. *Underhill*, 2016 SD 69 at ¶ 16. *See also Moorhead*, 522 N.W.2d at 6.

In this case, proof has been presented concerning the use and occupation of the disputed area going all the way back to at least 1948 when the small garage was built. The rock wall was constructed in 1947 or 1948. The sidewalk and sea wall were constructed in 1950. There is evidence the light was put in the oak tree prior to 1979. There is substantial testimony of the Johnsons' use and maintenance of the disputed area in the 1980s. They constructed the large garage in 1997. The twenty year timeframe set forth in SDCL 15-3-1 has clearly been satisfied.

Determining Plaintiffs had failed to establish continuous occupation for the statutory period, the trial court relied on the testimony of Robert Webb and Vince Webb. (App 13). The court's acceptance of the testimony of Robert and Vince Webb is dealt with in a separate section of this Brief. The court also relied on testimony from Teri Johnson "that Bernice Webb gardened in the disputed area on the right hand side of the retaining wall." (*Id.*). That statement mischaracterizes Ms. Johnson's testimony. She stated that Bernice Webb gave her some plants, but it was Johnson who dug the holes and did the actual planting. (T. Johnson 329:10-21, 372:9-21). The Court also referenced the testimony of the Hemmahs concerning their use of the property since 2015. *Id.* As has

been noted previously, Plaintiffs and their predecessors had already obtained adverse possession of the property by the time the Hemmahs became owners of Lot 8.

#### EXCLUSIVITY

The last element of the test is exclusivity. Exclusivity can be shown by the party using and treating the disputed property as their own. *Underhill*, 2016 SD 69 at ¶ 17. Exclusivity does not require wrongful intent on the part of the adverse possessor. *Id.* In *Schultz*, the court rejected the defendant's assertion that "the exclusive test of adverse possession is the physical exclusion of others under a claim of right." 1997 SD 72, ¶ 11, n.8. Exclusivity does not require the placement of armed guards on the property line.

In *Aslesen*, this Court was faced with a factual scenario which has some similarities to the case at issue:

Although they were neighbors on friendly terms for over a quarter century, the Lewises and the Aslesens came to dispute the ownership of a 16-foot-wide strip of land running between their residential lots in Canton, South Dakota. According to the recorded deeds, the disputed property belonged to the Aslesens. They paid all the property tax on it. Both families used this strip for nonessential purposes since they purchased their adjoining lots in the same year, 1972. The uses differed, however. Where the Aslesens used the strip for sports, get-togethers, parking, and occasional access to their property, the Lewises planted three trees roughly along a line in the middle of it and a flower garden on a portion of it. Both families mowed it at various times between 1972 and 1999, the year this action was filed, and both shoveled snow from the sidewalk running across it.

2001 SD 131 at ¶ 2. This Court affirmed the trial court's decision that the Lewises had established their claim of adverse possession even though the two parties had made use of the subject property.

The portion of the court's Memorandum Decision dealing with exclusivity does not really focus on that subject. (App 13-15). The applicable section of the court's Memorandum Decision is entitled Claim of Title. The court's focus is on the Plaintiff's

alleged failure to put Defendants on notice. The concluding paragraph of the exclusivity portion of the Memorandum Decision comes back to referencing “actual, open, visible, notorious, continuous, and hostile occupation” as opposed to exclusivity. (App 15). The Memorandum Decision does not really contain any findings of fact or conclusions of law concerning the subject of exclusivity.

The Memorandum Decision states Dr. Luzier informed the Hemmahs that he possessed easements for the two garages. (App 14). A review of Dr. Luzier’s actual testimony does not support that statement. He stated he was aware of the existence of some easements but, when he discussed this with Mr. Hemmah, he was referencing easements on the north and west sides of the property. (TR 101:15—102:10).

As referenced previously, a substantial portion of Defendants’ presentation at trial had to do with the fact they supposedly mowed the disputed area and frequently made use of the area for recreational and other activities. Exclusivity does not mean that the party seeking adverse possession cannot let others make use of the property. In *Taylor*, the plaintiff sought to quiet title to a portion of property she had used for years. The fact the plaintiff allowed neighbors to use the space in question to garden at times did not defeat the plaintiff’s adverse possession claim. 330 N.W.2d at 543.

Based on the foregoing, Plaintiffs established, by clear and convincing evidence, that they met the requirements for adverse possession of the disputed area. The trial court erred in concluding otherwise.

II. THE TRIAL COURT ERRED IN ACCEPTING DEPOSITION TESTIMONY WITHOUT QUESTIONING ITS CREDIBILITY MERELY BECAUSE THE COURT DID NOT HAVE AN OPPORTUNITY TO OBSERVE THE WITNESSES TESTIFY IN PERSON

- *The trial court placed significant emphasis upon the testimony of Robert and Vince Webb*

Both parties presented deposition testimony of several witnesses. Robert Webb was subpoenaed to testify at trial, but Defendants presented his deposition instead. (CI 195). The parties stipulated to the use of the depositions.

The trial court placed significant weight upon the testimony of Robert and Vince Webb. In determining that the rock wall did not constitute the property boundary, the court cited testimony from the Webbs. (App 9). The trial court cited no other evidence regarding the substantial enclosure element and ignored considerable evidence that contradicted the Webbs. The court also relied on the testimony of the Webbs to support the determination that Plaintiffs failed to establish cultivation, continuous use of the property for the statutory period, and exclusivity. (App 10, 13, 14).

- *The trial court failed to assess the credibility of the Webbs' testimony*

The trial court acknowledged that Plaintiffs raised questions about the credibility of Robert Webb's testimony but concluded: "Since this Court did not have the opportunity to observe Mr. Webb or the Johnson's [sic] testify, the Court accepts their testimony." (App 10). During the trial, the court also expressed an inability to judge credibility where the court did not have an opportunity to observe the witnesses. (TR 73:5—74:2).

The court's comments regarding judging credibility of a witness who testifies by depositions are concerning on a couple of levels. First, the court could not accept both

the testimony of the Webbs and the Johnsons. Certain portions of the testimony of both Robert and Vince Webb were clearly disputed by the testimony of Teri and Chris Johnson. Secondly, facial expressions or tone of voice are not the only way to assess the credibility of a witness. The trier of fact can also examine the testimony and see if it is reasonable or internally consistent. South Dakota juries are routinely instructed that deposition testimony should be considered “just as if the witness was in court.” SDPJ (Civil) 1-30-40. In discussing the consideration of deposition testimony in a work comp case, this Court stated that where testimony is submitted by deposition, “we will decide for ourselves the credibility of the deponents and the weight and value to be attached to their testimony.” *Caldwell v. John Morrell & Company*, 489 N.W.2d 353, 357 (S.D. 1992). The trial court should have assessed the credibility of the witnesses who testified by deposition based on what these witnesses said.

There is much more to determining credibility than just personally observing the witness. Certainly, that is important but, as demonstrated by South Dakota Civil Pattern Jury Instruction 1-30-10, there are a number of other factors that can be used to decide whether a witness’ testimony is believable. As pertinent to this case, those things include:

- the witnesses’ ability and opportunity to observe;
- their memories;
- whether they said or did something different at an earlier time;
- any apparent interest, bias, or prejudice they may have; and
- the reasonableness of their testimony in light of all the evidence in the case.

A court has the obligation to determine credibility of witnesses. *Gross v. Gross*, 355 N.W.2d 4, 11 (S.D. 1984). Where a witness' testimony is "replete with inconsistencies" a factfinder may properly disregard the testimony. *Herren v. Gantvoort*, 454 N.W.2d 539, 541 (S.D. 1990). There are multiple reasons the testimony of Robert and Vince Webb should be disregarded or questioned.

- ***Robert Webb was not a disinterested witness***

The court's Memorandum Decision described Robert Webb as "a disinterested witness." (App 10). A close review of his testimony reveals that not to be the case. In acknowledging that the Luziers may have historically mowed up to the oak tree, Mr. Webb made the unsolicited comment, "that still doesn't prove a property line." (R. Webb 479:11-16). He also made a comment clearly directed to the Luziers about "stealing" property. (*Id.* 485:8-13). He acknowledged speaking to the Hemmahs about the dispute, sending them a copy of the 2014 survey, and suggesting they put a fence up, which Andrew Hemmah did. (*Id.* 504:15-24). Although Andrew Hemmah denied that Mr. Webb told him to put up a string fence, he acknowledged that Webb was "happy" about it. (TR 212:4-9). Why would a disinterested witness make the comments referenced above and be happy about Mr. Hemmah's construction of the string fence? Jennifer Hemmah also testified about discussing this matter with Robert Webb. (TR 171:4-15). Yet Webb never spoke to the Luziers or the Fortners about the dispute. (R. Webb 505:1-3). By his actions, Robert Webb demonstrated he was not a disinterested or unbiased witness.

- *Robert Webb's testimony was replete with inconsistencies and errors*

Robert Webb's testimony was also inconsistent and, in several instances, clearly wrong. His deposition was taken on April 4, 2025, just a little over a month before the trial began. On March 24, 2025, Defendants filed a Pretrial Brief. (CI 167). That Brief made reference to Defendants' predecessor having hired a surveyor to determine the boundary line in 2002. (CI 170). This was the first time Plaintiffs heard anything about a 2002 survey. (CI 185, ¶ 9). Plaintiffs did not learn any details regarding the 2002 survey until Robert Webb was deposed on April 4, 2025. (TR 228:1-3). None of the parties saw the 2002 plat until it was provided to Defendants' counsel on April 14, 2025. (EX 21, p. 1 (CI 241)).

Defendants' Pretrial Brief was submitted prior to Mr. Webb's deposition. Robert Webb had to have been the source of the information contained in the Pretrial Brief. This is still further evidence of Mr. Webb's bias in favor of Defendants. The testimony concerning the survey also was significant regarding Mr. Webb's lack of candor or, at least, his faulty memory.

During his deposition, Webb testified on three separate occasions that he had either presented or shown a copy of the 2002 survey to Bob and/or Teri Johnson. (R. Webb 470:2-4, 481:18-21, 500:21-22).<sup>12</sup> He told Jennifer Hemmah the same thing. (TR 171:4-17). Webb testified he brought a copy of the 2002 survey with him to the deposition but, when asked to produce it, he presented a copy of the 2014 survey prepared by Helms Engineering, rather than the 2002 plat prepared by Clark Engineering. (R. Webb 483:2-14, 486:15-19; EXs 1, 21 (CI 46, 242)). He then gave incredible

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<sup>12</sup> As discussed earlier, an actual survey report was not prepared in 2002. The only thing that resulted from the 2002 survey was a plat and pin, which were never recorded. (EX 21 (CI 241-44)).

testimony that the survey was not completed until 2014 because Clark Engineering was “floored with paperwork.” (*Id.* 486:20—487:6)). This obviously made no sense in that the 2002 work was performed by Clark Engineering while the 2014 survey was prepared by Helms Engineering.

After realizing he could not have shown the 2014 survey to Bob Johnson because the Johnsons were gone by 2014, Webb changed his testimony to say that he had shown Mr. Johnson where the pin was placed. (*Id.* 500:21—501:5). This testimony included the statement that “they could see the pin down in front.” Both Jonathan Fortner and Andrew Hemmah testified that the pin is buried and is not visible. (TR 17:21-22, 204:11-18). One would also expect the Johnsons would not have installed the retaining walls west of the small garage over the surveyed property line or planted flowers over the line if they knew where that line was.

Furthermore, Teri Johnson disputed Mr. Webb’s testimony. She stated the Johnsons knew nothing about a pin located near the beach daylily bush. (T. Johnson 346:23-25). She further stated the Johnsons knew nothing about the property line shown on Exhibit 1. (*Id.* 347:1-5). Ms. Johnson also testified her husband was a stickler about things such as property lines. (T. Johnson 343:6-11, 361:9-13). Robert Johnson obtained an easement to extend the west end of the large garage across a property line. (EX 4 (CI 49)). Johnson also obtained easements regarding encroachments on the north side of Lot 9. (TR 20:18—21:12). If he truly knew his garages were over the property line, one would expect he would have taken steps to address it. There are, however, no easements for the garages to the south. (PIH 91:21-25; TR 21:17-20).

Robert Webb testified he told Mr. Johnson the large garage was over the property line, not only after the 2002 survey, but also while it was being built. (R. Webb 489:22—490:20). This testimony was rebutted by Chris Johnson who stated he was around when the large garage was built and no one claimed it was over the line. (C. Johnson 300:1-8). The only concern about the large garage was that it not interfere with Bernice Webb's garden, which was located 30 to 40 feet south of the garage. (*Id.* 302:5-16).

Other than Robert Webb's highly questionable testimony about having shown Bob Johnson where the pin was located, there is absolutely no evidence that anyone knew of the existence of the pin until the 2014 survey was prepared. As noted in the Statement of the Facts, Defendants received the survey in 2015. They did not share it with the Luziers or the Fortners, who never saw it until Jonathan Fortner obtained a copy of it from Day County Planning and Zoning in May 2024.

The foregoing all raises significant questions about Robert Webb's credibility but there is more. Other examples of inconsistent or incorrect testimony provided by Robert Webb include the following:

- Webb testified the 2002 survey was recorded. (R. Webb 469:20-21). It was not. (EX 21 (CI 241)).
- He claimed Helms Engineering performed the 2002 survey. (*Id.* 483:19-25). Again, page 2 of Exhibit 21 (CI 242) shows he was clearly wrong in that it was prepared by Clark Engineering.
- He testified some rocks on the beach had been in the position as shown in Exhibit 17 (CI 63) for twenty-five years. (*Id.* 508:6-13). This testimony was in error as evidenced by several photographs showing the rocks in different

positions over the years. (EXs 56, 57, 75, 77 (CI 280, 281, 438, 440)). Vince Webb did not recall the rocks being in the position shown on Exhibit 17. (V. Webb 532:24—533:4).

- *The trial court incorrectly relied on the testimony of the Webbs in finding that Plaintiffs failed to establish the elements of adverse possession*

As previously noted, the trial court relied heavily on the testimony of Robert and Vince Webb in determining Plaintiffs had failed to establish several elements of their adverse possession claim. In discussing the substantial enclosure issue, the court cited Robert Webb's testimony that the rock wall was not the property boundary because his family planted flowers north of the wall. (App 9). In relying on this testimony, the trial court seemingly ignored all the evidence that contradicted Mr. Webb's statement about the rock wall. According to Chris Johnson, everyone considered that wall to be the property line when the Johnsons owned their cabin. (C. Johnson 296:16-22).

Furthermore, Maurice Webb assisted in the construction of the rock wall and showed Marsha Luzier in 2005 that it was the property line. (R. Webb 495:2-8; TR 124:7-10). Robert Webb admitted Maurice was familiar with the property lines in the area. (R. Webb 492:17-19). There could not be a much sturdier or permanent structure. That being the case, why would Maurice Webb allow the wall to be built several feet south of the property line? Maurice Webb knew, just as the Johnsons did, that the location chosen for the rock wall corresponded to what had historically been considered the property line between Lots 8 and 9.

In discussing the substantial enclosure issue, the trial court also relied on Vince Webb's testimony that he believed the sidewalk and the flowering bush were the property

line and that he would mow up to those items. (App 9).<sup>13</sup> Although this testimony seemingly has more to do with cultivation, it was cited by the court to rebut Plaintiffs' position that the historical property line ran by the oak tree with the light in it. *Id.* The flowering bush was planted by Teri Johnson. (T. Johnson 339:19-24, 361:3-8). Johnson denied that the flowering bush had anything to do with designating the property line. (T. Johnson 361:14-20). It makes no sense that Ms. Johnson would have planted the flowering bush to designate the line because the Johnsons were not aware of the 2014 surveyed property line during the time they owned Lot 9. It also makes no sense for Vince Webb to have relied on the flowering bush as establishing the property line since he testified he was involved in mowing the property only up until about 1988. (V. Webb 549:20-25). That was even before his father had the 2002 survey done.

The trial court also relied on the testimony of the Webbs in addressing the issue of cultivation. The court cited Vince Webb's testimony that he recalls the Hemmahs maintaining the disputed area. (App 10). Whether the Hemmahs maintained the area is not significant in that adverse possession was established prior to 2015. Vince Webb's testimony was also cited for the proposition that he did not recall the Johnsons mowing the disputed area. He claimed Chris Johnson told him the flowering bush planted by his mother was on the property line. (V. Webb 530:17—531:4, 532:4-9). He testified he understood the property line to be in accordance with the surveyed property line on Exhibit 1. He said he knew where the property line was in the 1980s when he was doing the mowing from what he was told by Chris Johnson. (*Id.* 552:9—553:3)). The problem with his testimony is that it is totally inconsistent with the testimony of his father. Robert

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<sup>13</sup> Exhibit 17 (CI 63) shows the location of the flowering bush. It is the bush with the white flowers in the center of the photograph.

Webb testified that no one knew where the property line was until he had his survey performed in 2002. (R. Webb 469:4-18). That being the case, how could Chris Johnson have known where the property line was when Vince Webb was supposedly mowing the disputed area in the 1980s?

Additional questions are raised concerning Vince's credibility based on his testimony that he had heard stories about both garages being on his grandfather's property. (V. Webb 530:5-9). Since the property lines were not established until 2002, how could he have heard stories about the two garages being over the line on his grandfather's property? His grandfather certainly could not have told him because he died in 1987 or 1988. (R. Webb 489:5-6).

Like his father, Vince's testimony evidenced a bias in favor of Defendants. When asked by defense counsel, he testified he never personally observed the Fortners or Luziers tending to the disputed property. (V. Webb 545:19-21). Yet, on cross examination, he backtracked and admitted that they may have mowed at least part of the disputed area and acknowledged he did not stand around and watch them mow. (*Id.* 546:1-14).

The testimony regarding cultivation is an example of the trial court not following through on the statement in the Memorandum Decision that he was accepting all of the deposition testimony as true. There are clear disagreements between the testimony of the Webbs and the Johnsons with regard to cultivation. Nonetheless, without examining the inconsistencies in the depositions of the Webbs, the court accepted their version of the events over the testimony of Teri and Chris Johnson.

The court again cited Robert and Vince Webb's testimony in the section of the Memorandum Decision entitled "Continuous." (App 12-13). The court stated: "Robert Webb and Vincent Webb testified that they used the daylily and flowering bush as a reference to the property line." (App 13). Once again, it is important to look at the actual testimony presented by the Webbs. Questions have already been raised about Vince Webb's reference to the flowering bush when he was doing his mowing in the 1980s since his father testified no one knew where the property line was until 2002. Furthermore, Vince himself agreed he could not have used the daylily as a reference point since it was not there when he was doing his mowing in the 1980s. (V. Webb 532:4-12).

As far as Robert is concerned, he testified he helped maintain and mow Lot 8. (R. Webb 471:17-20). When asked to describe what he used to determine the boundary line, he inexplicably responded, "Kind of the lake." (*Id.* 471:21-25). When testifying about the sale of his one-third interest in Lot 8 in 2002 or 2003, he stated he did so because he "didn't want the maintenance." (*Id.* 484:20-24). How can this statement be reconciled with his testimony he started mowing the property after 2002?

Robert contradicted the Johnsons' testimony by stating that they used the daylily and the flowering bush as the property line when mowing. (R. Webb 472:20—473:3). He later admitted, however, that the Johnsons might have mowed and maintained the disputed property. (R. Webb 475:7-14). He also acknowledged that the property usually got mowed during the week when he was not there. (*Id.* 473:5-7).

What all the foregoing demonstrates is that there were multiple questions raised concerning the credibility of the testimony presented by Robert and Vince Webb. The

trial court apparently did not, however, attempt to weigh the credibility of the witnesses who testified by deposition. This was error. Instead, the court simply said it accepted all such testimony. This Court does not give any deference to a trial court's review of deposition testimony. Consequently, this Court should review the testimony of those witnesses who were presented by way of deposition and reach its own conclusions as to their credibility.

### III. THE TRIAL COURT ERRED IN REFUSING TO EXPAND THE PRESCRIPTIVE EASEMENTS IT GRANTED TO PLAINTIFFS

Finding that the Plaintiffs' use of the two garages was sufficiently open and notorious, the trial court determined Plaintiffs were entitled to prescriptive easements for those garages. (App 15-16). The elements for a prescriptive easement are similar to those for adverse possession. The difference between the two is that the party obtains title under a successful adverse possession claim but only an easement under a prescriptive easement claim. *Thompson v. E.I.G. Palace Mall*, 2003 SD 12, ¶ 7, 657 N.W.2d 300. As its name implies, adverse possession involves possession of property. A prescriptive easement deals with use of property. *Thompson* 2003 SD 12 at ¶ 7. The court did not explain how it determined how the use of the garages by Plaintiffs and their predecessors was open and notorious but the possession of the garages was not. This is not a situation where Plaintiffs were making use of something owned by another party.

Plaintiffs did not ask for prescriptive easements and continue to maintain that they are entitled to prevail on their claim of adverse possession. Nevertheless, if this Court disagrees and finds that Plaintiffs are only entitled to prescriptive easements, those easements need to be expanded to protect the integrity of the large garage and to allow Plaintiff to access the lake and his front yard which borders the lake.

Following receipt of the court's Memorandum Decision, Defendants submitted a proposed Judgment and Order to the court which, in paragraph 4, addressed the prescriptive easements. (App 17-19). Plaintiff filed an objection to the proposed Judgment and Order. (CI 677-79). Plaintiff requested that a portion of the Judgment and Order be modified so as to protect the retaining wall and earth anchors attached to the large garage, to allow Plaintiff to repair and maintain the garages, and to allow Plaintiff to have a right to access the Defendants' property to perform such tasks. (CI 677-78).

Concerning the large garage, Plaintiffs requested that the prescriptive easement extend to the fifteen foot area running from the south end of the garage, which contains the retaining wall and the earth anchors. This was to protect the integrity of that garage based upon the testimony of Mr. Dickhut that the earth anchors and the retaining wall provide stability for the south wall of the garage. It does not make much sense to have a prescriptive easement that does not protect the structural integrity of the large garage.

Plaintiff also sought an additional prescriptive easement which would allow him to access his front yard and the lake. It was requested that easement extend five feet to the south of the edge of the sidewalk abutting the south side of Plaintiff's cabin. This request was based on testimony provided by Mr. Fortner regarding Plaintiffs' need to use the area between the two cabins to access the front yard and the lake. Although the accuracy of it has not been determined, the string fence constructed by Mr. Hemmah, cut across a portion of the Luzier sidewalk. Mr. Fortner testified the string fence interfered with Plaintiffs' ability to access the front yard and lake. (PIH 106:6—107:1, 107:16-20). Plaintiffs are unable to readily access their property from the north side of the cabin due to the presence of a culvert. (PIH 107:2-15). Vince Webb provided support to Mr.

Fortner's testimony by agreeing that it would be difficult to access the front yard and the lake from the north side of Plaintiffs' cabin. There was also testimony that the Luziers and the Johnsons had always made use of the yard between the two cabins to get to the front yard and the lake. (R. Webb 497:17-21; V. Webb 550:1-6).

In response to Plaintiff's objection to the proposed order, Defendants presented a revised Judgment and Order, which was accepted by the court. (App 1-3). This Order addressed the ability to support and maintain the garages. It did not, however, address the fifteen foot area to the south of the large garage or Plaintiff's ability to access his front yard and the lake. The trial court erred in failing to address these two issues and, should this Court determine that Plaintiff is only entitled to prescriptive easements, Plaintiff requests the modification of the court's Order concerning the easements.

#### CONCLUSION

In denying Plaintiffs' adverse possession claim, the trial court relied, in large part, upon the deposition testimony of Robert and Vince Webb. Although stating the court accepted all of the deposition testimony because of an inability to observe the witnesses, the court, in large part, rejected the testimony of Teri and Chris Johnson. This Court should independently assess the credibility of the witnesses who testified by deposition. Doing so should lead to the conclusion that Plaintiff and his predecessors adversely possessed the disputed area prior to Defendants purchasing Lot 8 in 2015. Consequently, the trial court should be reversed and title quieted in favor of Plaintiff to the disputed area. Alternatively, this Court should expand the prescriptive easements granted by the trial court so as to protect the integrity of the large garage and to provide Plaintiff with access to the lake and his front yard.

Dated this 8th day of December 2025.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

*/s/ Reed Rasmussen*

---

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this Brief complies with the type volume limitation of SDCL 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this Brief, the body of the Brief contains 9,990 words and 49,775 characters (not including spaces).

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Reed Rasmussen

---

CERTIFICATE OF SERVICE

The undersigned, attorneys for Appellant, hereby certifies that on the 8th day of December 2025, a true and correct copy of the foregoing APPELLANT THOMAS LUZIER'S BRIEF was served via Odyssey File and Serve on the following:

Gordon P. Nielsen  
Delaney, Nielsen & Sannes, P.C.  
PO Box 9  
Sisseton, SD 57262  
[gordon@delaneylawfirm.com](mailto:gordon@delaneylawfirm.com)

Dated this 8th day of December 2025.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Reed Rasmussen

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STATE OF SOUTH DAKOTA

COUNTY OF DAY

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

THOMAS LUZIER and MARSHA  
LUZIER,

18CIV24-000026

Plaintiffs

JUDGMENT AND ORDER  
OF THE COURT

vs.

ANDREW HEMMAH and JENNIFER  
HEMMAH

Defendants.

The above-entitled matter was brought on for trial before the Court on May 13-14, 2025. At that time, the Plaintiffs appeared personally, and with counsel, Reed A. Rasmussen of the Siegel, Barnett & Schutz, LLP, law firm of Aberdeen, South Dakota and the Defendants appeared personally, and with counsel, Gordon P. Nielsen of the Delaney, Nielsen & Sannes, P.C. law firm of Sisseton, South Dakota.

The Court has now had an opportunity to carefully consider the testimony of the witnesses, the exhibits received, the arguments of counsel, the post-hearing briefing, and pleadings therein, and the Court having issued its Memorandum Decision dated August 14, 2025 which Memorandum Decision constitutes the Court's findings of fact and conclusion of law pursuant to SDCL 15-6-52(a), the Court now enters the following Judgment and Order of the Court.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. That this Court has jurisdiction over the subject matter and the parties to this action.
2. That subject only to the easement set forth in paragraph 4 below, the Defendants are hereby declared to be the owners, in fee simple, of the real property involved in this action, situated in Day County, South Dakota, and described as follows:

**Lot 5A of First Addition to Ramona Beach Subdivision in the Southeast Quarter (SE1/4) of Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

**Lot 8 of Ramona Beach being a part of Lot 4 in Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

and are likewise entitled to the immediate possession thereof, and title thereto is hereby forever quieted in the Defendants, against the Plaintiffs named herein.

3. That subject only to the easement set forth in paragraph 4 below, that the Plaintiffs named in this action, and all persons claiming by, under or through them, are hereby perpetually enjoined and restrained from asserting any right or title to, interest or estate in, or lien or encumbrance upon the real property described in paragraph 2 above adverse to the rights of the Defendants, and the Court hereby adjudges that all of the rights of said Plaintiffs in this action, and each and every one of the said Plaintiffs, in and to said real property described in paragraph 2 above, if any there be, are in all respects, junior, inferior and subordinate to the rights of the Defendants in and to said real property.
4. That the Plaintiffs are entitled to a prescriptive easement allowing the Plaintiffs to continue to use the existing small and large garages that currently encroach onto the Defendants' real property described in paragraph 2 above in the manner in which said existing garages have historically been used. Said prescriptive easement for the use of the small garage and the large garage shall include only that portion of the Defendants' real property upon which said garage structures now actually occupy, and no other. Said prescriptive easement shall include the limited right to the use of the easement area and the immediate adjacent area which is necessary to support the maintenance and operation of Plaintiffs' existing garages in the manner in which said existing garages have historically been used. Plaintiffs, as the easement holders, do not have the right to expand the use of the easement beyond that which is necessary to support the maintenance and operation of their existing garages in the manner in which said existing garages have historically been used.
5. That the Plaintiffs are the owners of the real property involved in this action, situated in Day County, South Dakota, and described as follows:

**Lot 6A of First Addition to Ramona Beach Subdivision in the Southeast Quarter (SE1/4) of Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

**Lot 9 of Ramona Beach being a part of Lot 4 in Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

6. That the Defendants are the owners of the real property involved in this action, situated in Day County, South Dakota, and described as follows:

**Lot 5A of First Addition to Ramona Beach Subdivision in the Southeast Quarter (SE1/4) of Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

**Lot 8 of Ramona Beach being a part of Lot 4 in Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

7. The property lines between the parties respective properties are to remain consistent with the legal descriptions contained within the parties' recorded deeds and the recorded plats associated with said properties.
8. The Defendants shall have the immediate possession of the real property as described in paragraph 2 above, free of any claim of the Plaintiffs other than as is specifically set forth in paragraph 4 above.

9/16/2025 8:45:32 AM

Attest:  
Holler, Robin  
Clerk/Deputy



BY THE COURT:

A handwritten signature in cursive script, appearing to read "Richard A. Sommers".

Honorable Richard A. Sommers  
Circuit Court Judge

**FILED**

AUG 14 2025

IN CIRCUIT COURT

STATE OF SOUTH DAKOTA

CLAUDETTE OPITZ  
DAY CO. CLERK OF COURTS

FIFTH JUDICIAL CIRCUIT

COUNTY OF DAY

THOMAS LUZIER and MARSHA  
LUZIER,

**18CIV24-26**

Plaintiffs,

v.

**MEMORANDUM  
DECISION**

ANDREW HEMMAH and JENNIFER  
HEMMAH,

Defendants.

Plaintiff instituted this lawsuit on June 5, 2024, requesting this Court to quiet title the contested property, grant a judgment declaring Plaintiffs have acquired ownership of the contested property, and for the Court to issue a judicial plat and order survey markers be placed in conformity with the judicial plat.<sup>1</sup> On June 18, 2024, Defendants filed an Answer and Counterclaim denying Plaintiff's allegations and asserting their own claims of quiet title and trespass. On June 24, 2024, Plaintiff filed a Reply to the Counterclaim denying the allegations in the Counterclaim.

On September 3, 2024, the parties stipulated to Plaintiff filing an Amended Complaint, which Plaintiff filed September 4, 2024, alleging adverse possession and doctrine of acquiescence. Defendants filed their Amended

<sup>1</sup> References to Plaintiffs Post-Trial Brief and Final Argument will be cited as ("PPTB") followed by a page number; References to Defendants Closing Argument Brief will be cited as ("DCB") followed by a page number; References to an exhibit will be cited as ("Exhibit") followed by the number designated at trial.

Answer and Counterclaim September 5, 2024. On September 5, 2024, Plaintiffs filed their Reply to Amended Counterclaim.

This matter came on for a trial on May 13-14, 2025. Following the presentation of evidence, the Court instructed the parties to brief their closing arguments and took the matter under advisement. Having considered the testimony of the witnesses, the exhibits received, the arguments of counsel, the post-hearing briefing, and pleadings therein, the Court now issues this Memorandum Decision.<sup>2</sup>

#### STATEMENT OF FACTS

This case involves a property line dispute between two adjacent parcels of real property on the west shoreline of Pickerei Lake in Day County, South Dakota. Specifically, the primary question is the proper location of the north-south property line between Plaintiffs' and Defendants' respective properties.

Plaintiffs, Dr. Thomas Luzier and the late Marsha Luzier, husband and wife<sup>3</sup>, are the record title holders of Lot 6A and Lot 9, which has the legal description of:

LOT 6A, FIRST ADDITION TO RAMONA BEACH SUBDIVISION IN THE  
SE ¼ OF SECTION 27, TOWNSHIP 124 N., RANGE 53 WEST, DAY  
COUNTY, SOUTH DAKOTA,

AND

---

<sup>2</sup> This Memorandum Decision constitutes the Courts findings of fact and conclusions of law. See SDCL 25-6-52(a).

<sup>3</sup> After trial, but before this Memorandum Decision was issued, Marsha Luzier passed away. Dr. Thomas Luzier is currently the sole owner of Lot 9 and 6A. See *Suggestion of Death* (filed by Plaintiff on July 23, 2025).

LOT 9 OF RAMONA BEACH BEING A PART OF LOT 4 IN SECTION 27 IN TOWNSHIP 124 NORTH OF RANGE 53 WEST OF THE 5<sup>TH</sup> P.M., DAY COUNTY, SOUTH DAKOTA.

("Luzier Property"). Defendants, Andrew Hemmah and Jennifer Hemmah, husband and wife, are the owners of the adjacent real property to the south of the Luzier Property referred to as Lot 8, which has a legal description of:

LOT 8 OF RAMONA BEACH BEING A PART OF LOT 4 IN SECTION 27, TOWNSHIP 124 NORTH, RANGE 53 WEST OF THE 5<sup>TH</sup> P.M., DAY COUNTY SOUTH DAKOTA, ACCORDING TO THE RECORDED PLAT THEREOF,

AND

LOT 5A OF FIRST ADDITION TO RAMONA BEACH SUBDIVISION IN THE SOUTHEAST QUARTER (SE1/4) OF SECTION 27, TOWNSHIP 124 NORTH, RANGE 53 WEST OF THE 5<sup>TH</sup> P.M., DAY COUNTY, SOUTH DAKOTA, ACCORDING TO THE RECORDED PLAT THEREOF.

("Hemmah Property"). The Luzier's received their Trustee's Deed from Robert D. Johnson and Teri L. Johnson. The Hemmah's received their Trustee's Warranty Deed from Johnathan D. Webb and Lura A. Usselman, Trustees of the Trust Created Under Article V of the Last Will and Testament of Maurice E. Webb, Deceased.

The Ramona Beach subdivision was developed in 1925. The 1925 plat showed 14 lots. *Exhibit 18*. When the lots were originally developed, no pins or survey markers were placed to establish lot lines. At one point, the original owners tried marking fifty-foot lines themselves with a tape measure. The lines ended up being about twenty feet off. The lot lines on this plat were straight.

In 1981 a second plat map was prepared. *Exhibit 19*. Lots 8 and 9 were joined with Lots 5A and 6A. This plat map showed iron pipes placed at the

western and eastern borders but did not indicate pins on the lakeside borders of the Ramona Beach Subdivision except Lots 1 and 14.

Teri and Robert Johnson purchased Lot 9 in 1979. Harold and Bernice Webb were owners of Lot 8, which they had purchased in the 1940's. After Harold's death, the land was divided amongst his three children. One of the children, Maurice, bought out his two siblings and was the sole owner of Lot 8.

At trial, both parties testified that their relationship as neighbors initially was amicable. However, issues began to arise between the parties when Plaintiffs were notified of a variance request that Defendants submitted to Day County involving construction of a garage on Defendants' property.

#### ADVERSE POSSESSION

"Adverse possession occurs when there is (1) an occupation that is (2) open and notorious, (3) continuous for the statutory period, and (4) under a claim of title exclusive of any other right. SDCL § 15-3-12; As the parties asserting adverse possession, [Plaintiffs] have the burden of establishing these elements by clear and convincing evidence. *Underhill v. Mattson*, 2016 S.D. 69, ¶ 12, 886 N.W.2d 348, 352. Moreover, "adverse possession occurs by operation of law and does not require an action to commence it, nor to continue it." *Id.* at ¶ 16 (internal citations omitted). "To establish title by adverse possession, the claimant must be in actual, open, visible, notorious, continuous and hostile occupation for the statutory period." *Gangle v. Spiry*, 2018 S.D. ¶ 12, 916

N.W.2d 119, 123 (citing *Titus v. Chapman*, 2004 S.D. 106, ¶ 27, 687 N.W.2d 918, 925); *See also* SDCL § 15-3-1. Each element is addressed in turn.

1. OCCUPATION

To prevail on their adverse possession claim, Plaintiffs must show that the property in question, in this case the corner of the rock wall, to the oak tree, down to the south end of the sea wall has been (1) protected by a substantial [enclosure] or (2) usually cultivated or improved. SDCL § 15-3-13. SDCL § 15-3-13 “provides a prerequisite to a justiciable adverse possession claim. Failure to show either a substantial enclosure or usual cultivation or improvement preempts the claim.” *Lewis v. Aslesen*, 2001 S.D. 131, ¶ 7, 635 N.W.2d 744, 746. “Since these provisions are stated in the disjunctive, a claim of adverse possession may succeed if the claimant establishes either a substantial enclosure or cultivation or improvement.” *Jutting v. Hendrix*, 2000 S.D. 25, ¶ 11, 606 N.W.2d 140, 142 (internal citations and quotations omitted).

**A. Was the disputed area protected by a substantial enclosure?**

“An enclosure need not be absolutely secure to satisfy the ‘substantial enclosure’ statutory requirement.” *Titus v. Chapman*, 2004 S.D. 106, ¶ 32, 687 N.W.2d 918, 926. Plaintiffs argue that the “Hemmah property is divided from the Luzier property to the south of the small garage by the rock wall, which is a substantial enclosure.” PPTB 13. Further, that the straight line of trees south of the large garage creates a substantial enclosure. *Id.* Plaintiffs must prove that for twenty years, which required the previous owners to have also used

these markers as a substantial enclosure to establish adverse possession. At trial, this Court was presented with conflicting testimony. Prior to the Luzier's owning their lot, Robert Webb testified that the rock wall was not the property boundary because his family planted flowers north of the wall.

In Vincent Webb's deposition testimony, he stated when his family owned the Hemmah property, he believed the sidewalk and flowering bush were the property line that he would mow up to those items. He also stated that his recollection did not support the Luzier's contention that their property extended to the oak tree. Both parties occupied the land and freely used it throughout the years. No substantial enclosure existed to show either party that it was intended to be connected to Lot 9.

All of the above testimony creates doubt that the land was surrounded by a substantial enclosure. This Court does not find that the area of land Plaintiffs claim to have adversely possessed was substantially enclosed. Plaintiffs were unable to provide this Court with uncontradicted testimony or evidence that the property boundary is substantially enclosed.

**B. Was the disputed area cultivated or improved by Plaintiffs?**

The South Dakota Supreme Court has held that "regular mowing of the property constitutes cultivation under SDCL 15-3-13(2)." *Underhill v. Mattson*, 2016 S.D. 69, ¶ 13, 886 N.W.2d 348. "[L]andscaping is an improvement to land under SDCL 15-3-13(2)." *Id.*

Plaintiffs argue that any testimony by Defendants about their use of the disputed area is irrelevant because adverse possession was already established

prior to 2015 when Lot 8 was purchased. There is no dispute that the Luzier's mowed the disputed area or that the Lot 9's prior owners, the Johnson's planted flowers and bushes. Vincent Webb testified that he recalls the Hemmah's maintained that area. Pg 16 Line 9. When Vincent Webb was at the property, he does not recall the Johnson's (past owners before the Luzier's) ever mowing the disputed area. He specifically recalls being told "it's your problem."

The Hemmah's produced several exhibits at trial to show they have cultivated and improved the disputed land since 2015 when they purchased Lot 8. Photographs depict clear mow lines where the Hemmah's believe the property boundary to be. *Exhibit 62*. The Hemmah's further cultivated the disputed area by laying down mulch. As discussed above in regard to which lot owner maintained the disputed area, there is conflicting testimony about who cultivated and maintained the disputed area in past years. Robert and Vincent Webb testified that neither the Luzier's or the Johnson's cultivated or exercised control over the disputed property. The Johnson's testified that they cultivated and improved the disputed area.

Plaintiffs want this Court to find Robert Webb's testimony to not be credible. However, the Court was not able to observe the witness in person and only presented with Mr. Webb's deposition testimony. Mr. Webb, like the Johnson's, is a disinterested witness. This Court does not believe Mr. Webb would have any reason to deceive the parties or this Court about his recollection of events. Since this Court did not have the opportunity to observe Mr. Webb or the Johnson's testify, the Court accepts their testimony.

This Court finds that Plaintiffs have not met their burden to establish that for twenty years, the land was cultivated and improved by the owners of Lot 9. Plaintiffs were unable to prove to this Court at trial by clear and convincing evidence at the disputed land was substantially enclosed, cultivated, or improved.

## 2. OPEN AND NOTORIOUS

“The second element of adverse possession that [Plaintiffs] must establish is that their occupation was open and notorious.” *Underhill*, 2016 S.D. 69, ¶ 15, 886 N.W.2d at 354. “The purpose of this element is to give the record owner notice of the occupation.” *Id.* “The adverse use must be made in such a way that a reasonably diligent owner would learn of its existence, nature, and extent.” *Id.* (internal citations and quotations omitted).

At trial, Dr. Luzier testified that the property he claims to adversely possess was not exclusive. Other neighbors would mow the grass and the Hemmah’s used and enjoyed the property since they bought their lot in 2015. Nothing was conveyed to the Hemmah’s by the Luzier’s or by simply looking at the property to put them on notice that a claim for adverse possession would be made. The rock driveway which is at an angle is within Lot 8. Despite testimony that both Lot 8 and Lot 9 owners cared for that area of land, this Court does not find that the Luzier’s have presented enough evidence to prove by clear and convincing evidence that record notice was given to owners of Lot 8 that they would learn of its existence, nature and extent. The Hemmah’s were not aware that the Luzier’s claimed property within the boundaries of Lot 8.

The original 1925 plat map shows the property lines as straight. The Luzier's occupation of the land was not open and notorious as to put the Hemmah's on notice of the adverse use.

In fact, the only reason the Hemmah's had any idea that the Luzier's were taking claim of the disputed area is the filing of this lawsuit. Dr. Luzier testified that nothing about the way the Luzier's used the disputed area would put the Hemmah's on notice that the Luzier's claimed that portion of land. The Hemmah's were not told they could not use that portion of the property or that the Luzier's owned it. The Hemmah's based their knowledge on the 2014 survey which concluded that they were the rightful owners of the disputed area and treated it as such.

Plaintiffs have failed to show that their use of the property was open and notorious so far as their use would give record notice to the actual owners of the occupation.

### 3. CONTINUOUS

"In South Dakota, the statutory period for adverse possession is 20 years." SDCL § 15-3-1; *Estate of Billings v. Deadwood Congregation of Jehovah Witnesses*, 506 N.W.2d 138, 141 (S.D.1993). "[Plaintiffs] must prove their occupation was continuous for the statutory period." *Underhill*, 2016 S.D. 69, ¶ 15, 886 N.W.2d at 354. "Although [Plaintiffs have] not claimed ownership of the Property for such a length of time, 'the principle of 'tacking' allows [them] to add [their] own claim[ ] to that of previous adverse possessors under whom [they] claim a right of possession.'" *Id.* (quoting *Estate of Billings*, 506 N.W.2d at

141). See also *Titus v. Chapman*, 2004 S.D. 106, ¶ 29, 687 N.W.2d at 925-26 (stating “tacking allows a party to add its own claim to that of previous adverse possessors in interest, and under whom the party claims a right of possession.”). Thus, the principle of “tacking” would allow Defendants to use their own claim of years along with any previous owners.

In the present matter, this Court was presented with testimony that the Luzier’s and their predecessors considered the disputed area a part of Lot 9 since 1979. At trial, there was evidence that contradicted this fact. Robert Webb and Vincent Webb testified that they used the daylily and flowering bush as a reference to the property line. Vincent Webb testified that he mowed the disputed area and was told by Chris Johnson “[m]ake sure you get this part done because its your problem.” Teri Johnson testified that Bernice Webb gardened in the disputed area on the right hand side of the retaining wall.

Since 2015 when the Hemmah’s owned Lot 8, they have occupied the disputed area continuously. Several photographs introduced as exhibits showed this Court that they often utilize the disputed area for recreation as well as cultivating and improving the land.

This Court finds that Plaintiffs have not proven by clear and convincing evidence that their occupation of continuous use met the statutory period of twenty years.

#### 4. CLAIM OF TITLE

The final element Plaintiffs must prove is claim of title. This element does not require wrongful intent on the part of the adverse possessor. “Possession of

property is adverse to the true owner ... even though such occupancy ... was due to mistake and without an intention to claim the land of another." Estate of Billings at 141. The South Dakota Supreme Court has "long recognized that a claim for adverse possession does not require a good faith belief or an intention to claim another's land, but can be founded upon ignorance, inadvertence, or mistake as to the actual boundary between two parcels." *Lewis v. Moorhead*, 522 N.W.2d 1, 5 (S.D. 1994) (citing *Lien v. Beard*, 478 N.W.2d 578, 580 (S.D. 1991); *Taylor v. Tripp*, 330 N.W.2d 542, 545 (S.D. 1983); *Labore v. Forbes*, 238 N.W.2d 124, 125-26 (S.D. 1931); *Sullivan v. Groves*, 172 N.W. 926 (S.D. 1919); and *Lehman v. Smith*, 168 N.W. 857 (S.D. 1918)).

Dr. Thomas Luzier informed the Hemmah's that he possessed an easement onto their property for the garages. This establishes that Plaintiffs knew that the garages encroached onto Defendants property and that they were not owners of that land. Dr. Luzier also testified that nothing was ever established or erected to put Defendants on notice of the claimed property line. The Luzier's never informed the Hemmah's they should not use the disputed property or that they should not occupy it.

Plaintiffs contend throughout their post-hearing brief that the Luzier's were allowing Defendants to access the property. However, they pose no explanation for why the Webb's and then the Hemmah's are improving and cultivating the disputed area while using it as their own.

The alleged possession of the property by the Luzier's was never adverse to the Hemmah's. As mentioned above, the Hemmah's believed until this lawsuit

was filed that the disputed area was their property and no one was claiming title to it.

This Court does not find that Plaintiffs have met their burden to provide evidence that establishes adverse possession by clear and convincing evidence. Plaintiffs failed to establish that actual, open, visible, notorious, continuous, and hostile occupation of the subject property for the required statutory period.

#### PRESCRIPTIVE EASEMENT

“To establish a prescriptive easement, [Plaintiffs] must prove by clear and convincing evidence an ‘open, continued, and unmolested use’ of the pathway across the [Defendants’] land for twenty years and that the use was in a manner that was hostile or adverse to [Defendants].” *Hamad Assam Corp. v. Novotny*, 2007 S.D. , ¶ ,737 N.W.2d 922, 924 (quoting *Vivian Scott Trust v. Parker*, 2004 S.D. 687 N.W.2d 731, 733).

“A prescriptive easement is much like a claim of ownership by adverse possession, except that with the former the adverse user acquires only an easement and not title.” *Thompson v. E.I.G. Palace Mall, LLC*, 2003 S.D. ¶ 657 N.W.2d 300, 304 (internal citations omitted). This Court finds, based on the testimony and evidence presented, that Plaintiffs use of the garages was “consistent with the normal use that an owner of the property would make and is sufficiently open and notorious to give notice to the owner of the servient estate and that the user is asserting an easement.” *Hamad Assam Corp.*, at 926 (internal citations and quotations omitted). Defendant claims that the use

was permissive, but it was clear to this Court that despite Plaintiffs allowing the Hemmah's to use the garages, they were aware that the Luzier's owned the small and large garage. Therefore, a prescriptive easement of the large and small garages is proper.

**CONCLUSION**

Plaintiffs claim for adverse possessions fails because this Court cannot find based on the evidence presented that the use of the disputed land was actual, open, visible, notorious, continuous, and hostile for the requisite statutory period of time. Although Plaintiffs claim for adverse possession fails, a prescriptive easement has been established. The prescriptive easement allows Plaintiffs to continue to use the small and large garage that encroach onto Defendants' property. The parties property lines are to remain consistent with the legal descriptions contained within the parties' recorded deeds.

Dated this 14<sup>th</sup> day of August, 2025

BY THE COURT:



RICHARD A. SOMMERS  
Circuit Judge



*Claudette Ortiz*  
Clerk

STATE OF SOUTH DAKOTA

COUNTY OF DAY

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

THOMAS LUZIER and MARSHA  
LUZIER,

18CIV24-000026

Plaintiffs

vs.

JUDGMENT AND ORDER  
OF THE COURT

ANDREW HEMMAH and JENNIFER  
HEMMAH

Defendants.

The above-entitled matter was brought on for trial before the Court on May 13-14, 2025. At that time, the Plaintiffs, appeared personally, and with counsel, Reed A. Rasmussen of the Siegel, Barnett & Schutz, LLP, law firm of Aberdeen, South Dakota and the Defendants appeared personally, and with counsel, Gordon P. Nielsen of the Delaney, Nielsen & Sannes, P.C. law firm of Sisseton, South Dakota.

The Court has now had an opportunity to carefully consider the testimony of the witnesses, the exhibits received, the arguments of counsel, the post-hearing briefing, and pleadings therein, and the Court having issued its Memorandum Decision dated August 14, 2025 which Memorandum Decision constitutes the Courts findings of fact and conclusion of law pursuant to SDCL 15-6-52(a), the Court now enters the following Judgment and Order of the Court.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. That this Court has jurisdiction over the subject matter and the parties to this action.
2. That subject only to the easement set forth in paragraph 4 below, the Defendants are hereby declared to be the owners, in fee simple, of the real property involved in this action, situated in Day County, South Dakota, and described as follows:

**Lot 5A of First Addition to Ramona Beach Subdivision in the Southeast Quarter (SE1/4) of Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

**Lot 8 of Ramona Beach being a part of Lot 4 in Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

and are likewise entitled to the immediate possession thereof, and title thereto is hereby forever quieted in the Defendants, against the Plaintiffs named herein.

3. That subject only to the easement set forth in paragraph 4 below, that the Plaintiffs named in this action, and all persons claiming by, under or through them, are hereby perpetually enjoined and restrained from asserting any right or title to, interest or estate in, or lien or encumbrance upon the real property described in paragraph 2 above adverse to the rights of the Defendants, and the Court hereby adjudges that all of the rights of said Plaintiffs in this action, and each and every one of the said Plaintiffs, in and to said real property described in paragraph 2 above, if any there be, are in all respects, junior, inferior and subordinate to the rights of the Defendants in and to said real property.
4. That the Plaintiffs are entitled to a prescriptive easement allowing the Plaintiffs to continue to use the existing small and large garage that currently encroach onto the Defendants' real property described in paragraph 2 above in the manner in which said garages have historically been used. Said prescriptive easement for the use of the small garage and the large garage shall include only that portion of the Defendants' real property upon which said garage structures now actually occupy, and no other.
5. That the Plaintiffs are the owners of the real property involved in this action, situated in Day County, South Dakota, and described as follows:

**Lot 6A of First Addition to Ramona Beach Subdivision in the Southeast Quarter (SE1/4) of Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

**Lot 9 of Ramona Beach being a part of Lot 4 in Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**
6. That the Defendants are the owners of the real property involved in this action, situated in Day County, South Dakota, and described as follows:

**Lot 5A of First Addition to Ramona Beach Subdivision in the Southeast Quarter (SE1/4) of Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

**Lot 8 of Ramona Beach being a part of Lot 4 in Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**
7. The property lines between the parties respective properties are to remain consistent with the legal descriptions contained within the parties' recorded deeds and the recorded plats associated with said properties.

8. The Defendants shall have the immediate possession of the real property as described in paragraph 2 above free of any claim of the Plaintiffs other than as is specifically set forth in paragraph 4 above.

BY THE COURT:

Denied: 09/16/2025

~~—/s/ Sommers, Richard~~  
Honorable Richard A. Sommers  
Circuit Court Judge

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Teri Johnson	1	15
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	3	45
	4	39
	5	40
	6	41
	7	49
	8	50
	9	17
	11	1
Chris Johnson	10	48
Charles “Wes” Dickhut	1	68
	2	69
	3	70
	4	71
	5	72
	6	73
Robert Webb	1	1
	10	17
	11	60
	2	2
Vince Webb	1	1
	10	17
	17	91

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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Appeal No. 31234

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THOMAS LUZIER and MARSHA LUZIER,  
  
Plaintiffs/Appellants,

v.

ANDREW HEMMAH and JENNIFER HEMMAH,  
  
Defendants/Appellees.

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APPEAL FROM THE CIRCUIT COURT  
FIFTH JUDICIAL CIRCUIT  
DAY COUNTY, SOUTH DAKOTA

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THE HONORABLE RICHARD A. SOMMERS  
Circuit Court Judge

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BRIEF OF THE APPELLEES

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NOTICE OF APPEAL FILED SEPTEMBER 29, 2025

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### **PRELIMINARY STATEMENT**

Citations to the settled record as reflected by the Clerk's Index are designated with "SR" followed by the page number. Citations to the Appellants' Appendix are designated "App." followed by the page number.

References to Plaintiffs/Appellants in this matter may be referred to as "the Luziers" collectively, or "Dr. Luzier" and "Marsha Luzier" individually. The Defendants/Appellees in this matter may be referred to as "the Hemmahs" collectively, or "Andrew Hemmah" and "Jennifer Hemmah" individually.

The Transcript of the Court Trial held on May 13 and 14, 2025 will be referred to as "CT" followed by the page and line number. The deposition testimony of Robert Webb (Exhibit 95, SR 460), Vince Webb (Exhibit 96, SR 521), Teri Johnson (Exhibit 66, SR 319), Chris Johnson (Exhibit 65, SR 289), and Charles Wesley Dickhut (Exhibit 67, SR 382) will be referred respectively as R. Webb, V. Webb, T. Johnson, C. Johnson, and Dickhut followed by the settled record page and line numbers.

### **JURISDICTIONAL STATEMENT**

The date and form of the judgment or order sought to be reviewed by the Luziers is the trial court's Judgment and Order of the Court dated September 16, 2025 and filed with the Clerk of Courts on September 16, 2025. (SR 699, App. 1). Notice of Entry of said Order was dated September 16, 2025, and filed with the Clerk of Courts on September 16, 2025. (SR 702). The Luziers' Notice of Appeal was given on September 29, 2025 and filed with the Clerk of Courts on September 29, 2025. (SR 707). This Court has appellate jurisdiction in this case under SDCL 15-26A-3(1), (2) and (4), as well as SDCL 15-26A-7 and SDCL 15-26A-10. The Hemmah's filed their Notice of Review with

the Clerk of the Supreme Court on October 6, 2025.

### **STATEMENT OF THE ISSUES**

1. WHETHER THE TRIAL COURT CLEARLY ERRED IN DECIDING THE LUZIERS FAILED TO ESTABLISH CLEAR AND CONVINCING EVIDENCE THAT THEY EXCLUSIVELY OCCUPIED THE HEMMAHS' PROPERTY TO A VISIBLE AND ASCERTAINABLE BOUNDARY IN A HOSTILE MANNER FOR THE STATUTORY PERIOD OF 20 YEARS.

The trial court decided that the Luziers did not present sufficient evidence to establish by clear and convincing evidence that they adversely possessed the disputed property in excess of the statutory period.

- Gangle v. Spiry, 2018 S.D. 55, 916 N.W.2d 119
- Cuka v. Jamesville Hutterian Mut. Soc'y, 294 N.W.2d 419 (S.D. 1980)
- Ashby v. Oolman, 2008 S.D. 26, 748 N.W.2d 132
- Rancour v. Golden Reward Mining Co., L.P., 2005 S.D. 28, 694 N.W.2d 51

2. WHETHER THE TRIAL COURT CLEARLY ERRED IN MAKING FINDINGS BASED ON DEPOSITION TESTIMONY.

The trial court determined that Robert Webb and the Johnsons were disinterested witnesses, and that Robert Webb had no reason to deceive the parties or the Court about his recollection of events, so the trial court accepted all deposition testimony introduced at trial.

- Peterson v. Evangelical Lutheran Good Samaritan Soc'y, 2012 S.D. 52, 816 N.W.2d 843
- In re Estate of Gaaskjolen, 2020 S.D. 17, 941 N.W.2d 808
- State v. Nekolite, 2014 S.D. 55, 851 N.W.2d 914

3. WHETHER THE TRIAL COURT ERRED IN GRANTING THE LUZIERS PRESCRIPTIVE EASEMENTS.

The trial court granted a prescriptive easement to the Luziers for the encroachment of their garages onto Lot 8.

- Fuoss v. Dahlke Family Ltd. P'ship, 2023 S.D. 3, 984 N.W.2d 693

4. WHETHER THE SCOPE OF THE PRESCRIPTIVE EASEMENTS GRANTED BY THE TRIAL COURT IS PROPER.

The prescriptive easement granted by the trial court includes the immediate adjacent area which is necessary to support the maintenance and operation of the Plaintiffs' existing garages in the manner in which said existing garages have historically been used.

- Cuka v. Jamesville Hutterian Mut. Soc'y, 294 N.W.2d 419 (S.D. 1980)

## STATEMENT OF THE CASE

On June 5, 2024, the Luziers served a Summons and Complaint on the Hemmahs alleging that the Luziers had acquired ownership of a portion of the Hemmahs' property by adverse possession. (SR 1, 5). On June 18, 2024, the Hemmahs filed their Answer and Counterclaim, alleging trespass and requesting quiet title of the disputed property, and for a permanent injunction forbidding the Luziers from the disputed property. (SR 11).

Upon stipulation of the parties, the Luziers amended their Complaint on September 4, 2024, to include allegations that the Hemmahs and their predecessors in interest had acquiesced to the property boundaries claimed by the Luziers.

Discovery was exchanged between the parties, and several depositions were taken. Both parties submitted pre-trial briefs. (SR 167, 176, 196). The trial was held on May 13 and 14, 2025. Both parties submitted post-trial briefs as their closing arguments. (SR 209, 602, 654). The trial court took the matter under advisement.

After trial but before a decision was issued, Marsha Luzier passed away. (SR 663). The trial court entered its Memorandum Decision on August 14, 2025. (SR 664). The Hemmahs drafted a proposed Judgment and Order, to which the Luziers' objected. (SR 677). The Hemmahs filed a response to the Luziers' objections, and the Luziers' filed a reply. (SR 680, 687). The Luziers filed their own proposed findings of fact and conclusions of law. (SR 690, 693). On September 16, 2025, the trial court denied the original proposed judgment and order (SR 696), and entered its Judgment and Order of the Court, quieting title of the disputed property in the Hemmahs and granting the Luziers a prescriptive easement for their garages located on the Hemmahs' property. (SR 699).

On September 29, 2025, the Luziers filed a Notice of Appeal. (SR 707). On October 6, 2025, the Hemmahs filed a Notice of Review with the Clerk of the Supreme

Court pursuant to SDCL 15-26A-22.

**STATEMENT OF THE FACTS**

In 2005, the Luziers acquired the following real property along Pickerel Lake in Ramona Beach Subdivision:

Lot 6A, First Addition to Ramona Beach Subdivision in the Southeast Quarter of Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota,

and

Lot 9 of Ramona Beach being a part of Lot 4 in Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.

(Hereinafter referred to as "Luzier property" or "Lot 9").

The Luziers' predecessors in interest are Teri and Robert Johnson, who owned Lot 9 from 1979 until 2005, (T. Johnson, 325:19-326:3; SR 245), and Lot 6A from 1981 until 2005. (SR 240).

In 2015, the Hemmahs acquired the neighboring lots described as follows:

Lot 5A of First Addition to Ramona Beach Subdivision in the Southeast Quarter of Section 27 Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota,

and

Lot 8 of Ramona Beach being a part of Lot 4 in Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.

(Hereinafter referred to as "Hemmah property" or "Lot 8").

Prior to the Hemmahs, Lot 8 was owned by Maurice Webb. (SR 435). Prior to Maurice, Maurice and his two siblings each owned a one-third interest in Lot 8, who received the property from their parents, Harold and Bernice Webb. (App. 7). Robert Webb is Maurice's brother. Robert Webb spent significant time during the summer

months from 1942 to 2002 at the cabin on the Hemmah property. (R. Webb, 465:17-23, 468:18-21).

Robert Webb currently owns Lot 7 of Ramona Beach Subdivision and has owned it since 2002. (R. Webb, 468:1-3). He has lived on Lot 7 for the majority of the summer every summer from 2002 until 2023. (R. Webb, 468:10-17).

Ramona Beach Subdivision was originally platted in 1925. (SR 237). It is unclear from this plat whether pins were set in the ground to mark boundary lines, and any assumption that no pins were set at this time is speculation.

In 1981, Maurice Webb caused Outlot A of Ramona Beach Subdivision to be replatted, and he conveyed these lots to owners of the respective front lots. (SR 239, 240). Robert Webb had a plat prepared in 2002 for Lots 7 and 8 of Ramona Beach Subdivision. (SR 242). This plat was never recorded. The 2002 plat indicates that pins were found and/or set on the corners of Lot 8 and Lot 5A, which shows the exact boundary line between the Luzier and Hemmah properties. (SR 242).

The Hemmahs had a survey done of Lots 6, 7, and 8 in 2014 by Helms & Associates prior to purchasing their property. (SR 46). This survey shows the same location of the pipes in the 1981 plat and pins shown in the 2002 unrecorded plat.

The Luzier's small garage<sup>1</sup> was built in 1948 by one of their predecessors. (PIH 89:6-18; R. Webb 467:12-16; SR 47). The south end of the small garage encroaches on the Hemmahs' property. (SR 46).

The Luziers' large garage<sup>2</sup> was built in 1997 while owned by Robert and Teri

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<sup>1</sup>Also referred to as "old garage". See Exhibit 23 (SR 247), reference point 7.

<sup>2</sup>Also referred to as "new garage". See Exhibit 23 (SR 247), reference point 1.

Johnson. (T. Johnson, 342:11-14; PIH 90:6-14; SR 48). The south end of the large garage also encroaches on the Hemmahs' property, and it has earth anchors underground for stabilization that encroach on the Hemmahs' property. (SR 46, 247; CT 941:2-12).

When the large garage was being built, Robert Webb knew that the large garage encroached onto Lot 8 and informed Robert Johnson of it. (R. Webb 481:12-17). Because construction was already under way, Robert Webb permissively allowed the large garage to remain where it is. (R. Webb 481:18-482:18). Likewise, when Robert Webb learned the small garage also encroached onto Lot 8, he permissively allowed the small garage to remain where it is. (Id.; R. Webb, 492:2-13).

The Fortners, who are the Luziers' children and grandchildren, frequently visit the Luziers' lake house. The Fortners and the Hemmahs became friends, and their children played together. The Hemmahs and the Luziers were friendly neighbors until 2024. (CT 879:16-21).

In 2024, the Hemmahs applied for a variance to allow them to construct a garage near the Luziers' large garage. (CT 953:19-954:1). In response, the Luziers commenced this action to halt the Hemmahs' construction plans. (CT 857:14-858:7).

Following the commencement of this lawsuit, Andrew Hemmah put up a temporary string fence along the surveyed property line. He used measurements from the 2014 survey to place certain stakes in the ground, and he pulled the string straight which was in line with the flowering bush. (CT 936:10-937:7; 957:13-958:17). Also, there is a visible pipe which marks the northeast corner of outlot 5A and the northwest corner of Lot 8. (SR 247, CT 948:22-949:8).

There is a flowering bush and a daylily bush that were planted along the property

line. Robert Webb testified that he told his niece to plant the daylily bush near a pin that marked the boundary line. (R. Webb 471:10-16). Robert Webb testified that the flowering bush was planted by Teri Johnson to indicate the property line. (R. Webb 500:13-16). At trial, Jonathan Fortner testified that he learned from the 2024 survey that the daylily bush and the flowering bush, as well as the rocks on the beach, line up with the actual property line, yet he concludes that it is coincidence. (CT 803:15-23; SR 247).

The disputed boundary line alleged by the Luziers is not visible or ascertainable on the property. It is only evidenced by the dotted line on Exhibit 23. (SR 247). Dr. Luzier testified that there is no line, fence, hedge, or anything that would put the Hemmahs on notice as to what is the claimed property line. (CT 851:18-852:10).

#### **STANDARD OF REVIEW**

"Proof of the individual elements of adverse possession present questions of fact for the trial court, while the ultimate conclusion of whether they are sufficient to constitute adverse possession is a question of law." City of Deadwood v. Summit, Inc., 2000 SD 29, P9, 607 N.W.2d 22, 25 (citing Lewis v. Moorhead, 522 N.W.2d 1, 3 (S.D. 1994)). To establish a claim of right by adverse possession, the proof must be by clear and convincing evidence. Taylor v. Tripp, 330 N.W.2d 542, 544 (S.D. 1983).

The Supreme Court "review[s] the circuit court's findings of fact under the clearly erroneous standard." City of Deadwood, 2000 S.D. 29, ¶ 9, 607 N.W.2d at 25 (citing New Era Mining Co. v. Dakota Placers, Inc., 1999 SD 153, P7, 603 N.W.2d 202, 204) (citations omitted). "Clear error is shown only when, after a review of all the evidence, 'we are left with a definite and firm conviction that a mistake has been made.'" Id. (citations omitted). "The trial court's findings of fact are presumed correct and we defer to

those findings unless the evidence clearly preponderates against them." Id. (citing Lewis, 522 N.W.2d at 3). "Conclusions of law are reviewed under a de novo standard, giving no deference to the circuit court's conclusions of law." Id. (citing Sherburn v. Patterson Farms, Inc., 1999 SD 47, P4, 593 N.W.2d 414, 416).

## ARGUMENT

### **I. THE TRIAL COURT DID NOT CLEARLY ERR IN DETERMINING THE LUZIERS FAILED TO ESTABLISH CLEAR AND CONVINCING EVIDENCE THAT THEY EXCLUSIVELY OCCUPIED THE HEMMAHS' PROPERTY TO A VISIBLE AND ASCERTAINABLE BOUNDARY IN A HOSTILE MANNER FOR 20 YEARS.**

#### *a. Law on adverse possession.*

"The record owner of disputed property is presumed to have been possessed of the property within the time presumed by law unless adverse possession is proven." Titus v. Chapman, 2004 S.D. 106, ¶ 27, 687 N.W.2d 918, 925 (citation omitted). In obtaining property by adverse possession through a claim of title not founded on a written instrument, there must be an actual and continued occupation of the premises for at least twenty years. SDCL 15-3-1; 15-3-12. "[L]and shall be deemed to have been possessed and occupied in the following cases only: (1) Where it has been protected by a substantial inclosure; or (2) Where it has been usually cultivated or improved." SDCL 15-3-13.

"[O]ccupancy *to a visible and ascertainable boundary* for the statutory period is the controlling feature in determining hostility in mistaken boundary-line cases." Taylor, 330 N.W.2d at 544 (citing Labore v. Forbes, 59 S.D. 12, 238 N.W. 124 (1931)) (emphasis added). "It is obvious that the only sensible, safe and really equitable rule is to make the physical characteristics of possession, *excluding all other persons*, the sole test of adverse possession[.]" Id. (citing Labore, 59 S.D. at 16, 238 N.W. at 126) (emphasis

added). "Under South Dakota statutes, the sole test for adverse possession has been said to be 'physical exclusion of all others under a claim of right.'" Thompson v. E.I.G. Palace Mall, 2003 S.D. 12, ¶ 7, 657 N.W.2d 300, 304 (citation omitted). "Realizing these principles, we conclude that if the occupancy of land beyond the true boundary line was actual, open, visible, notorious, continuous, *and hostile* in other respects, it is adverse even though such occupancy took place due to mistake and without the intention to claim the lands of another." Id. (citing Annot., 80 A.L.R.2d 1171 (1961)) (emphasis added).

"The claimant's occupation must be of such a nature as '*to give the true owner notice of actual possession and to put him on inquiry as to the invasion of his rights.*'" Gangle v. Spiry, 2018 S.D. 55, ¶ 13, 916 N.W.2d 119, 123 (citing Hamad Assam Corp. v. Novotny, 2007 S.D. 84, ¶ 7, 737 N.W.2d 922, 924) (emphasis added). "[P]ossession which is *not hostile cannot be adverse.*" Id. ¶ 14 (citing Broadhurst v. Am. Colloid Co., 85 S.D. 65, 75, 177 N.W.2d 261, 266 (1970)) (emphasis added). "Also, we have stated that '[c]ontinued use which is *permissive* is insufficient to fulfill the requirement of . . . hostile use.'" Id. (citing Travis v. Madden, 493 N.W.2d 717, 720 (S.D. 1992)) (emphasis added).

Furthermore, in South Dakota and many other jurisdictions, "it is well established that permissive use cannot ripen into adverse possession until a *positive assertion of a right hostile to the record holder is made known to him.*" Gangle, 2018 S.D. 55, ¶ 15 (emphasis added). See also Id. ¶ 15, n. 4.

- b. *The Luziers have failed to establish by clear and convincing evidence the improvements that encroach onto the Hemmah property establish adverse possession.*

The large garage was built in 1997. When it was being built, Robert Webb knew

that it partially encroached on Lot 8, and he told Robert Johnson to move it north, which he did, but not far enough. (R. Webb, 481:12-17; 482:15-17; 491:15-20). Then in 2002, after the Clark Engineering plat, Robert Webb testified that he showed Robert Johnson a copy of said plat and had a conversation about the location of the large garage and the old garage. (R. Webb, 481:18-482:18; 492:2-13; SR 242). Robert Webb allowed the garages to stay where they were. Id. Permissive use is not hostile. Gangle, 2018 S.D. 55, ¶ 14, 916 N.W.2d at 123.

Dr. Luzier knew the garages encroached onto Lot 8, likely since he purchased the property in 2005 because his mortgage paperwork shows the actual boundary line and encroachments. (CT 858:8-859:1; SR 287). Dr. Luzier informed the Hemmahs that he had easements for encroachments. (CT 859:2-20)<sup>3</sup>; specifically, that the garages encroached onto Lot 8, and that the Luziers had an easement for them. (CT 910:24-911:5; 946:5-14). Andrew Hemmah asked to see the easements several times, but they were never produced. (CT 946:11-18). Then, at trial, Dr. Luzier testified that he did not know what the easements were for, and that he was mistaken when he spoke to the Hemmahs, and the easements were for the north and west side of his property, and not for Lot 8. (CT 859:2-20).

Dr. Luzier's testimony at trial is obscure and convoluted. It does not make sense that Dr. Luzier told the Hemmahs he had easements for the garages if he was claiming ownership of the disputed property. Also, neither of the garage encroachments support adverse possession up to the Luziers' claimed boundary line. The trial court did not

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<sup>3</sup> Page 23 of Appellant's Brief misrepresents that Dr. Luzier testified that he informed the Hemmahs that he had easements on the north and west sides of his property.

clearly err in finding that the Luziers knew the garages encroached onto the Hemmahs' property, and that the alleged possession of the property was never adverse to the Hemmahs. (App. 14).

The Johnsons testified that they constructed retaining walls behind the small garage in the early 1980s which extend from Lots 6A and 9 south into Lots 5A and 8, referenced on Exhibit 23 as points three through six. (SR 256-59, 261, SR 247; T. Johnson 333:24-334:13; 334:21-23; 356:7-15). They also did landscaping in this area in the early 1980s. (T. Johnson, 333:24-334:7, 334:12-17, 334:24-335:1; SR 263-65). "In order to establish an adverse possession under this statute, the adverse claimant must either protect the land by a substantial enclosure or usually cultivate or improve the land, *and he must do either act for a continuous period of twenty years.*" Cuka v. Jamesville Hutterian Mut. Soc'y, 294 N.W.2d 419, 422 (S.D. 1980) (citing SDCL 15-3-10) (emphasis added). "The possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period." Id. (citations omitted). "Additionally, the evidence must show that during the statutorily required period the adverse possessor must have 'from time to time continuously subjected some portion of the disputed land to the only use of which it was susceptible.'" Id. (citations omitted).

The installation of said retaining walls and landscaping in the 1980s was not continuous cultivation, improvement, or maintenance for over 20 years; it was a single occurrence in the early 1980s. Marsha Luzier testified that it did not need to be manicured, it needed to be dense, presumably for better erosion control. (CT 866:5-8). Also, the retaining walls protect both properties from erosion. There are retaining walls

up and down Ramona Beach for the same purpose. (CT 855:11-14; 862:3-13). Their construction was not a claim to property.

Rather, the area of land behind the Luziers' small garage has been historically maintained by the Webb family, or it has "gone to nature" and was maintained by no one. (R. Webb, 476:13-478:22; V. Webb, 540:21-541:7; 541:18-25). The Hemmahs cleaned up the area and made a play area for their children. (R. Webb 478:5-11; CT 907:25-908:8). The landscaping and retaining walls in the area behind the old garage does not amount to exclusive hostile use or occupation for a continuous 20 years.

The Luziers argue that they and their predecessors placed their property in the disputed area, including a red gas tank and a boat. However, Dr. Luzier knew the gas tank and boat were on the Hemmah property, and he informed the Hemmahs they could move them whenever they wanted. (CT 931:2-25). The gas tank and the boat were permissively allowed to remain on the Hemmah property beginning in 2015. Permissive use is not hostile. Gangle, 2018 S.D. 55, ¶ 14, 916 N.W.2d at 123. Further, the gas tank and the boat located on the Hemmah property do not support adverse possession up to the Luziers' claimed boundary line.

In their brief, Appellants also argue that stone steps constructed as part of a WPA project extend over the surveyed property line. However, as shown in Exhibit 44, the top of the steps barely crosses the string fence, which depicts the actual boundary line. (SR 268)<sup>4</sup>. The Luziers' predecessors' use of those steps is not hostile possession that would put the Hemmahs' predecessors on notice of a claim of right up to the claimed boundary line.

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<sup>4</sup> The boat in this photograph is located on Lot 9. See CT 783:21-784:11.

The Luziers also argue that Chris Johnson testified he took care of the disputed area west of the small garage for several years. However, Chris does not testify as to what years he allegedly maintained that area. (C. Johnson, 295:23-296:14). Chris really only did lawn work for Lot 9 from 1979 until 1986. (C. Johnson, 294:8-22; 304:15-25). Chris does not know who did the mowing or maintenance behind the small garage after 1986. (C. Johnson, 305:17-23; 307:16-25). The time that Chris allegedly mowed and maintained the disputed property does not amount to 20 years.

The Luziers also argue that the flower bed encroaching onto the Hemmahs' property is evidence of adverse possession. (SR 247, reference point 8). Even though Teri Johnson testified that she and her husband planted that flower bed, they did not exclusively use the disputed property. Robert Webb testified his mother, Bernice, had flowers on the north side of the rock wall and the screen house on Lot 8, which is directly in the disputed area. (R. Webb, 485:23-486:2; 495:20-23). Also, Teri Johnson and Bernice Webb gardened together in the disputed area. (T. Johnson, 354:4-19; 367:2-6; 372:9-373:1).

Further, the Appellants allege that there used to be a hedge in the disputed property planted by the Johnsons. The hedge is no longer there. Teri Johnson planted the hedge, and she testified that it was between the two cabins and ran parallel to the screen patio on Lot 8. The hedge was on the right side of the screen patio or summerhouse and the right side of the tree shown in Exhibit 17 (SR 63). (T. Johnson, 339:24-341:12). Teri testified that Maurice Webb used a rope and string to confirm that the hedge was on the Johnson property. Id. There are no photographs or diagrams showing where the hedge was located. The actual boundary line is on the right side of the tree shown in Exhibit 17,

consistent with Teri's testimony. (SR 63). Maurice Webb re-platted the land in 1981, so he had reason to know where the actual property lines were. It is more reasonable for Maurice to confirm the hedge was on the Johnsons' property because it was actually on the Johnsons' property, Lot 9. The Luziers failed to show clear and convincing evidence the hedge was planted on Lot 8, so the hedge does not support the Luziers' claim of adverse possession. Also, the hedge was not there for more than 20 years, and it does not constitute a substantial enclosure.

The sidewalk along the south side of the Luzier cabin, which is reference point 9 on Exhibit 23 (SR 247), is depicted by Exhibits 11 through 13. (SR 57-59). The string fence shown in the photos barely crosses the edge of the sidewalk. (See also SR 247). Like the stone steps, the Luziers' and their predecessors' use of the sidewalk is not hostile possession that would put the Hemmahs' predecessors on notice of a claim of right up to the claimed boundary line.

Concerning the light fixture in the oak tree within the disputed property (Exhibit 23, reference point 10 (SR 247)), Teri Johnson testified that she is unsure as to who installed the light fixture, and that it may have been Robert Webb that did so. (T. Johnson, 356:18-357:11). Chris Johnson testified that the fixture was there when they moved into the cabin on Lot 9, however, Chris was 11 years old at the time. (C. Johnson, 294:8-13; 298:24-299:6). Teri testified that the light lit up the beach and yard between the cabins, so it benefited both properties. (T. Johnson, 337:24-338:1; 356:23-357:2). The light no longer works. (CT 789:4-5). The record is not clear as to when the fixture was installed, who installed it, or when it quit working. The light is not improvement or use of the disputed property that is exclusive of any other right. It does not put the owners of Lot

8 on notice of a claim of right. This is not clear and convincing evidence of the Luziers' or their predecessors' adverse possession of the disputed property.

The sea wall (Exhibit 23, reference point 11 (SR 247)), also does not constitute cultivation or improvement continuously for 20 years. See Cuka, 294 N.W.2d at 422. The sea wall shown in Exhibit 17 (SR 63) was repaired in 1950 after the existing sea wall had collapsed. (R. Webb 496:13-497:8). The sea wall was repaired where it had collapsed, so it did not represent a property line. There is no testimony that the Luziers or their predecessors maintained or repaired it since then. It was a single occurrence that did not put the Hemmahs' predecessors on notice of a claim of right. The sea wall is connected to the Hemmahs' sea wall, and as a whole it benefits both Lots 8 and 9. (SR 63).

All of the improvements that the Luziers allege within the disputed property do not constitute clear and convincing evidence of usual cultivation or improvement of the entire claimed disputed property for 20 years, even when considered altogether. The disputed property was not used exclusively by the Luziers and their predecessors, and they do not show occupation up to the claimed boundary line. "Only that portion of land which has been actually and continuously occupied may be claimed when there is no written instrument forming the basis of the claim." Cuka, 294 N.W.2d at 422 (citing SDCL 15-3-12). Therefore, the Luziers cannot claim the entire disputed property by adverse possession.

*c. The Luziers have failed to establish by clear and convincing evidence that there exists a substantial enclosure.*

The Luziers cite a lot of testimony about where people considered property lines to be, that everyone supposedly knew where the property line was, and that no one supposedly knew where the property line was. (Appellant's Brief, p. 14-15). This does

not establish a substantial enclosure.

The Luziers' claimed boundary line is represented by the dotted line on Exhibit 23 (SR 247). The Luziers allege that the claimed boundary line goes from the earth anchors south of the large garage<sup>5</sup>, east to the end of the brick retaining wall that comes off of the large garage (reference point 2), southeast toward and along the Hemmah's driveway, and then northeast near the oak tree (reference point 10) and to where the sea wall changes material (reference point 11). (CT 791:25-792:14; 824:12-25; 851:13-17; SR 283, 284). Jonathan Fortner had to tell the surveyor where to draw the claimed boundary line. (CT 823:9-19). These reference points do not constitute a substantial enclosure or even a straight line.

The South Dakota Supreme Court has specifically defined "substantial enclosure" and ruled against an invisible line as an enclosure:

However, a substantial enclosure is more than an invisible line running from a tree stump to a pine tree to a dilapidated, half-hidden fence at the back property line. . . . Substantial is defined as "consisting of or relating to substance . . . , not imaginary or illusory . . . [or] being largely but not wholly that which is specified . . . ." Enclosure is defined as "something that encloses [or] something enclosed." Merriam Webster Online Dictionary, [www.m-w.com](http://www.m-w.com) (last accessed on March 20, 2008). An invisible line from stump to pine tree to a hidden run-down fence is not largely enclosing the property and does not meet the definition of substantial enclosure.

Ashby v. Oolman, 2008 S.D. 26, ¶ 21, 748 N.W.2d 132, 137-38.

Jonathan Fortner testified that there is not a substantial enclosure of the whole disputed property that would put the Hemmahs and their predecessors on notice of a claim of right. (CT 823:3-7). Dr. Luzier testified that there is no line on the property that

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<sup>5</sup> The earth anchors are not visible and do not form any visible line above ground. (CT 941:2-12).

shows the claimed boundary line to put the Hemmahs on notice of a claim of right. (CT 851:18-852:5). The record does not support the Luziers' assertion of an alleged line of trees behind the large garage.

The Luziers' reference points through which they claim the property line runs is not a substantial enclosure because that line is an invisible line. The only portion of the claimed line that may be protected by a substantial enclosure is the Hemmahs' driveway, which is built up by rocks and referred to as the rock wall. (See Exhibit 23, SR 247, SR 61). However, as argued below, this area was not exclusively occupied by the Luziers or their predecessors.

*d. The Luziers failed to establish clear and convincing evidence that the Luziers and their predecessors cultivated the disputed property for at least 20 years.*

The Luziers have failed to establish clear and convincing evidence that they and their predecessors cultivated the disputed property for at least 20 years. "Many years" is not adequate. South Dakota law requires a minimum of 20 years. SDCL 15-3-1.

The Luziers assume their predecessors, the Johnsons, established adverse possession of the disputed area while they owned Lot 9, and they argue that anything the Hemmahs have done on their property since 2015 is of no significance. (Appellant's Brief, p. 17). However, there is not clear and convincing evidence the Johnsons acquired the property by adverse possession, so the Hemmahs' undisputed and diligent maintenance and cultivation of their lawn up to the actual property line since 2015 marks the end date for any potential adverse possession.

The Luziers claim that they and their predecessors mowed up to the claimed property line. However, the Webbs' testimony directly contradicts the Johnsons'

testimony, who testified that the Webbs typically mowed up to the actual property line, using the daylily bush, flowering bush, and sidewalk as a reference. (R. Webb, 472:16-24; 475:2-12) (V. Webb, 530:17-531:7; 532:4-9; 536:9-14; 539:21-540:14; 545:9-23). Robert concedes that the Luziers may have mowed past the actual boundary line into the disputed property, but that was what neighbors did. (R. Webb, 474:5-20). There is also a lot of testimony that neighbors would mow other lawns in an effort to be neighborly or helpful. (V. Webb 543:21-544:9; R. Webb 474:11-475:1; 506:5-17; C. Johnson 309:21-311:9).

The Luziers allege that the Johnsons allowing others to mow their grass at times does not defeat the Luziers' adverse possession claim, citing Jutting v. Hendrix, 2000 SD 25, P15-16. However, the Hemmahs are not claiming that the Luziers disclaimed title to the disputed property. Rather, the Hemmahs assert that the neighborly efforts to help each other mow lawns do not constitute hostile possession or physical exclusion of others. The Luziers have failed to clearly establish adverse possession through exclusive and continuous cultivation for the statutory period.

*e. The Luziers failed to establish by clear and convincing evidence the required elements of adverse possession.*

The Luziers have failed to establish by clear and convincing evidence the required elements of adverse possession, so their claim fails.

*i. Open and notorious.*

First, the Luziers ignore the evidence of permission for the Luziers' garages to remain over the property line. Robert Webb did not acquiesce to the location of the large garage built in 1997. Rather, Robert Webb told Robert Johnson that the garage was way over the property line when it was being built, and the garage was moved but not far

enough. (R. Webb, 470:8-10; 481:12-17). In 2002, when Robert Webb had the property surveyed and platted, he discussed with Robert Johnson that the large garage was over the property line, and they agreed that perhaps Robert Webb could use the garage. (R. Webb, 481:18-482:18). They also discussed that the small garage was over the property line, but Robert Webb decided there was nothing that needed to be done. (R. Webb, 492:2-13). Robert Webb's actions constitute permission.

Further, the Hemmahs testified that when they bought Lot 8, Dr. Luzier told them that he knew the garages were on their property and had easements for them, and he also offered the Hemmahs to use the space. (CT 910:24-911:5; 946:5-14). Dr. Luzier's testimony at trial regarding easements for the garages shows that he knew he did not own the disputed property. (CT 858:8-859:1). Dr. Luzier's belief that he had easements for the garages shows that his occupation was not hostile.

The Luziers' statement that the Johnsons never heard any complaints about the location of the garages is not accurate. Neither Teri nor Chris Johnson can testify whether Robert Johnson knew that the garages encroached onto Lot 8. Robert Webb testified that he informed Robert Johnson in 2002 that both garages encroached onto Lot 8, and showed him the location of the property lines. (R. Webb, 489:22-490:4; 481:18-21).

The encroachment of the Luziers' garages onto Lot 8 is permissive. Use that is permissive cannot be hostile. Gangle, 2018 S.D. 55, ¶ 14, 916 N.W.2d at 123. Therefore, the location of the garages does not constitute open, notorious, and hostile use.

The Luziers state in their brief that Maurice Webb may have mistakenly assumed the rock wall had been placed on the property line. (Appellants' Brief, p. 19). This is pure speculation. There is nothing in the record that supports this statement. Maurice Webb

did not testify in this matter because he is deceased.

*ii. Statutory period.*

The Luziers also failed to establish adverse possession for the statutory period, which is twenty years. SDCL 15-3-1. Again, "In order to establish an adverse possession under this statute, the adverse claimant must either protect the land by a substantial enclosure or usually cultivate or improve the land, and he must do either act *for a continuous period of twenty years.*" Cuka, 294 N.W.2d at 422 (citing SDCL 15-3-10) (emphasis added). The Luziers' and their predecessors' occupation of the disputed property, if any, was not hostile or adverse for twenty continuous years. There is ample evidence of permissive use and use that was not exclusive, as shown above. Therefore, the Luziers did not establish clear and convincing evidence of adverse possession for the statutory period.

The Luziers assert that the circuit court mischaracterized Teri Johnson's testimony regarding Bernice Webb gardening near the retaining wall. (Appellant's Brief, p. 21). Teri certainly testified, as the circuit court concluded, that Bernice Webb gardened in the disputed area on the right side of the retaining wall, or at least helped Teri garden there. (T. Johnson, 354:4-19; 367:2-6; 372:9-373:1). Robert Webb testified his mother Bernice had flowers in the disputed property. (R. Webb 485:23-486:2; 495:20-21). The circuit court was correct in finding that Bernice Webb also gardened in the disputed area.

*iii. Exclusivity.*

The Luziers have failed to establish exclusivity of the disputed property, so their adverse possession claim must fail. While this Court in Schultz v. Dew, 1997 SD 72, 564 N.W.2d 320 in a footnote rejected the argument that the *exclusive* test of adverse

possession is the physical exclusion of others under a claim of right, "the hostile or adverse requirement under South Dakota law requires that the claimant's use be to the 'physical exclusion of all others under a claim of right.'" Rancour v. Golden Reward Mining Co., L.P., 2005 S.D. 28, ¶ 8, 694 N.W.2d 51, 54. *Accord* Rotenberger v. Burghduff, 2007 S.D. 19, ¶ 8, 729 N.W.2d 175, 178.

The Luziers point out that Lewis v. Aslesen, 2001 SD 131 had a factual scenario where both parties made use of the disputed property. However, their extent and type of use differed, and the Aslesen opinion did not discuss the issue of exclusivity.

In this case, the record establishes that the Luziers and their predecessors did not exclusively use the disputed property because both parties and their predecessors mowed, used, improved, and gardened in the disputed property. Further, it is undisputed that the Hemmahs diligently maintained, cultivated, improved, and used their property up to the actual boundary line. (CT 881:6-882:5; 882:19-884:1; 885:6-24; 887:15-23; 888:12-890:21; 891:2-895:11; 896:7-19; 897:19-898:6; 900:18-902:18; 903:15-25; 905:13-906:15; 901:25-908:16; 909:23-910:13, etc.) Nor did the Luziers and their predecessors physically exclude the Hemmahs or their predecessors from the disputed property under a claim of right. (CT 826:8-827:2; 850:15-851:2).

The Luziers claim that the Court in Taylor v. Tripp awarded the claimant adverse possession even when she allowed neighbors to use the disputed property to garden. (Appellant's Brief, p. 23). However, upon reading the full opinion, this Court adhered to the exclusivity requirement of adverse possession. Taylor, 330 N.W.2d at 544. The claimant maintained exclusivity when she "pulled out survey stakes prior to the construction of the new fence, told potential buyers she owned the disputed piece of

property and otherwise resisted attempts by the developer to encroach on what appellee believed to be her property." Id. at 543. The claimant's resistance to the developer's encroachment onto the disputed property constitutes exclusion. See also Underhill v. Mattson, 2016 S.D. 69, P17, 886 N.W.2d 348, 354 (claimants physically excluded the owners from a garage under a claim of right).

In this case, the Luziers have failed to clearly establish they or their predecessors physically excluded the Hemmahs or their predecessors from the disputed property. As such, any occupation by the Luziers and their predecessors was not hostile, and none of the owners of Lot 8 could have been put on notice that the owners of Lot 9 claimed ownership of the disputed property.

## **II. THE TRIAL COURT DID NOT CLEARLY ERR IN MAKING FINDINGS BASED ON DEPOSITION TESTIMONY.**

The Luziers take issue with the trial court's acceptance of Robert Webb and Vince Webb's deposition testimony at trial. However, the trial court did not clearly err in its findings based on both oral and documentary evidence.

This Court should not review deposition testimony de novo in this case because there was no administrative decision. See Peterson v. Evangelical Lutheran Good Samaritan Soc'y, 2012 S.D. 52, 816 N.W.2d 843. Rather, SDCL 15-6-52(a) governs, which states, "Findings of fact, *whether based on oral or documentary evidence*, may not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." SDCL 15-6-52(a) (emphasis added). This Court has clarified that SDCL 15-6-52(a) as amended in 2000 requires "clearly erroneous review of a circuit court's trial findings based on documentary evidence, but the Legislature left intact the case law requiring de novo review of

administrative agency findings based on documentary evidence.” Peterson, 2012 S.D. 52, ¶ 18, 816 N.W.2d at 849. *Accord* Stockwell v. Stockwell, 2010 S.D. 79, ¶ 17, 790 N.W.2d 52, 59.

Additionally, “[a]ll conflicts in the evidence must be resolved in favor of the trial court's determinations. The credibility of the witnesses, the weight to be accorded their testimony, and the weight of the evidence must be determined by the circuit court and we give due regard to the circuit court's opportunity to observe the witnesses and the evidence.” In re Estate of Gaaskjolen, 2020 S.D. 17, ¶ 17, 941 N.W.2d 808, 813-14. Also, “[w]here findings of the trial court are based on conflicting testimony . . . we will not disturb them on appeal.” State v. Nekolite, 2014 S.D. 55, ¶ 13, 851 N.W.2d 914, 918 (citing Pellegrin v. Pellegrin, 1998 S.D. 19, ¶ 13, 574 N.W.2d 644, 647). “To do so would usurp the fact-finder's ‘function in resolving conflicts in the evidence, weighing credibility, and sorting out the truth.’” Id. (citing State v. Dowty, 2013 S.D. 72, ¶ 15, 838 N.W.2d 820, 825).

The Luziers did not object to the admission of any of the deposition transcripts as evidence at trial. Clearly, there was contradictory and disputed testimony in this case. Robert Webb's testimony aligns with the actual boundary lines shown in all the surveys and property sketches admitted into evidence in this case. (SR 46, 237, 238, 242, 247, 252, 277, 287). The Luziers assert the trial court failed to assess the credibility of the Webbs' testimony, however, they cite no rule that requires the trial court to assess the credibility of the witnesses in excess than it did in its Memorandum Decision. The trial court accepted all deposition testimony, including the Johnsons' testimony, and performed its function in resolving conflicts in the evidence in making its decision that

the Luziers failed to establish clear and convincing evidence of adverse possession.

The Luziers attempt to show Robert Webb is not credible by pointing out vague and mischaracterized inconsistencies in his testimony, and asserting he was not a disinterested witness. (Appellant's Brief, p. 26-29). The Luziers' only reason to assert Robert Webb was not a disinterested witness is certain comments made about proving the property line and stealing property, and that he only spoke to the Hemmahs about the dispute, and not the Luziers. (Appellant's Brief, p. 26). However, this does not make him an interested witness or noncredible witness. The Luziers fail to assert what Robert Webb would gain or lose based upon the outcome of the case because he had nothing to gain or lose. He was merely a predecessor that had an opinion on the dispute. The Luziers' predecessors likewise had opinions on the dispute. Dr. Luzier admitted that he does not know if the Webbs "have a horse in the race or not". (CT 849:11-25). Lastly, it must be noted the Luziers and Jonathan Fortner talked a great deal with Teri Johnson about the dispute, and even requested pictures from her, and the Luziers rely greatly on Teri's testimony. (T. Johnson 349:4-350:10).

While Robert Webb may have gotten confused during his deposition, his testimony was not "replete with inconsistencies". Regarding the 2002 plat, Robert Webb knew that he had paid for it and gotten pins set in 2002. When it was pointed out to him that the 2014 survey was not the 2002 plat, he was confused and trying to figure out an explanation for it. It was the Luziers' counsel that pressed Robert Webb, asking if he waited until 2014 to get a copy of the 2002 plat, to which Robert Webb answered he "may have". (R. Webb 486:20-487:8). Then later, Robert reiterated that he got the 2002 plat in July of that year, and showed it to Robert Johnson the following weekend. (R.

Webb 489:22-490:4).

Robert Webb's testimony on settled record page 500 is vague as to which survey was being talked about. Robert knew he could not have shown any survey to the Johnsons in 2014 because they were not there. (R. Webb 500:21-501:5). But Robert Webb knew he showed the property line to Robert Johnson. (R. Webb 501:1-2). It is reasonable that in 2002, Robert Webb showed Robert Johnson the location of the pin because it had been newly set, and there was likely disturbed dirt. Also, page 28 of Appellant's Brief states that the Johnsons would not have installed the retaining walls west of the small garage over the surveyed property line or planted flowers if they knew where the line was. However, those retaining walls were installed in 1980, and the flowers were planted five or six years later, (T. Johnson 329:25-330:6), which is years prior to 2002. Further, the retaining walls were built to hold up the road and decrease erosion, and not necessarily with consideration of the property line.

Next, the mere fact that Teri Johnson's testimony disputed Robert Webb's testimony does not prove that Robert Webb is not credible. Teri's lack of knowledge of the pin near the daylily bush does not mean it is not there.<sup>6</sup> It is pure speculation as to why Robert Johnson did not obtain easements for his garages on the south side of Lot 9. However, the evidence shows that since the garages were already built, Robert gave permission for the garages to remain encroaching because it was a neighborly thing to do, making an easement unnecessary. Robert Webb was sound and aware. He correctly answered that John Webb was not the owner of Lot 8, but that he was the trustee of the trust that owned it. (R. Webb, 480:21-24; 502:16-19) (SR 435).

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<sup>6</sup>There is a pin located adjacent to the daylily bush. (CT 803:11-14).

Furthermore, the Luziers and their witnesses had their own inconsistencies in their testimony. At trial, Jonathan Fortner changed his testimony as to the reason that the Luziers initiated the lawsuit. (CT 798:25-799:13). He testified differently as to how many mower widths into the contested property he would mow, ranging from three to eight mower widths. (CT 799:14-800:5). He also changed his testimony as to where the invisible boundary for the contested property was between the small garage and the rock wall. (CT 800:17-801:20). He further changed his testimony as to whether there was a *per se* line for the edge of the claimed disputed property. (CT 807:11-808:22).

When Dr. Luzier was asked why he thought he would need an easement for his garages if he owned the disputed property, Dr. Luzier testified he did not know what easements and encroachments meant legally. (CT 859:2-860:2). A few moments earlier, Dr. Luzier testified that he learned the garages encroached onto the Hemmahs' property when he refinanced his mortgage. (CT 858:8-859:1). At his deposition, he testified that he learned of the encroachments in 2005 when he purchased Lot 9. Id. Exhibit 63 at trial is a mortgage loan sketch of Lot 9 prepared for the Luziers in 2005 by Stellner Engineering Co., signed and sealed by a registered land surveyor, that indicates the property pins for Lot 9 and the garages' encroachment onto Lot 8. (SR 287). Dr. Luziers' change in testimony is not supported by the evidence.

At trial, Marsha Luzier tried to correct and re-explain her answer given at her deposition that she had limited knowledge as far as the maintenance of the property. (CT 871:20-873:3). She also admitted to never seeing a plat map of their property prior to this lawsuit. (CT 874:10-17).

As for Teri Johnson's deposition testimony, she testified that she and her husband

bought the land to the west of them to build their large garage into that property. (T. Johnson 342:21-24; 366:4-7; 370:20-371:4). Robert Johnson was actually granted an easement for that purpose. (SR 49). Teri also testified that she did not recall ever seeing a survey of the property prior to her deposition. (T. Johnson 348:24-349:3). Teri initially testified that she planted the daylily bush, but later admitted she probably planted it, but could not remember. (T. Johnson 367:10-25). Teri also testified that she did not know anything about the earth anchors attached to the large garage, including whether they were even there, yet she then testified, "Honestly, the retaining wall<sup>7</sup> probably went right to the property line, and that's where the anchors went in, as far as I remember." (T. Johnson, 365:1-23). Teri also did not remember that a light installed in a tree was hardwired to their cabin. (T. Johnson 369:2-6).

Lastly, the location of the Luziers' claimed boundary line has changed throughout the course of this proceeding. (See CT 800:14-803:5). The Luziers and Fortners are not even certain what property they are claiming by adverse possession.

The trial court did not clearly err in finding that Robert Webb's family planted flowers north of the rock wall (App. 9) because there was no evidence to contradict it. The Johnsons' testimony only showed that they believed their property line was up to the rock wall. Since the Webb family used the area north of the driveway, the Johnsons cannot clearly and convincingly prove that they occupied that area adversely and exclusively for 20 years. The Luziers improperly speculate in their brief as to why Maurice Webb would construct the driveway south of the property line (Appellant's

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<sup>7</sup> Referring to the retaining wall south of the large garage, reference point 2 on Exhibit 23 (SR 247).

Brief, p. 30) when Robert Webb testified that the contractors likely selected the easiest way to construct it. (R. Webb, 495:5-15).

The Luziers assert that it makes no sense for Teri Johnson to have planted the flowering bush to designate the property line, and for Vince Webb to have used the flowering bush as the property line while mowing. (Appellants' Brief, p. 31). The record only shows that Teri Johnson was not aware the actual boundary line goes right through the flowering bush and the daylily bush; it does not show whether her husband Robert Johnson knew where the actual boundary line was. It does show that Chris Johnson told Vince Webb to mow up to the flowering bush. (V. Webb, 530:19-531:4).

The Luziers refer to the actual boundary line as the "2014 surveyed property line", but it must be noted that the boundary line in the 2014 Helms survey is the same that is represented in every prior survey and plat. (SR 46, 242, 239, 237). Therefore, lot owners of Ramona Beach Subdivision had resources to know where their property lines were before 2002. While Teri Johnson testified that she did not plant the flowering bush to indicate the property line, she knew that Lot 8 and Lot 9 were 50-foot lots. (T. Johnson, 347:19-20; 363:6-10). Robert Webb testified he told his niece to plant the daylily bush on the property line, and the flowering bush is in line with the daylily bush. (R. Webb, 471:10-16). Based on the evidence in the record, it is not unreasonable that the flowering bush and the daylily bush were used to indicate the property line, especially since they are actually on the property line.

The Luziers also depend on Robert Webb's testimony that supposedly no one knew where the property lines were prior to 2002. (Appellants' Brief, p. 31). However, even prior to 2002, lot owners would have their own understanding of where the property

line lies, and lot owners would know where they should mow their lawns. Vince Webb testified as to where he mowed the lawn on Lot 8, and his testimony should not be discounted.

The Luziers assert that property lines were not established until 2002. (Appellant's Brief, p. 32). This statement is simply not correct. The oldest document that shows property lines for Ramona Beach dates back to 1925. (SR 237). The lakeside pins for Lot 8 were not set until 2002. (SR 242). This does not mean that there were no property lines prior to 2002.

Vince Webb's testimony about hearing stories about both garages being on his grandfather's property should not be discounted. It is reasonable that Vince heard about the garages' encroachment when his father, Robert Webb discovered it, and that Vince knew that the encroachment was on Lot 8, which was previously owned by his grandfather. (R. Webb 466:21-467:2). Referring to Lot 8 as his grandfather's property does not discredit his testimony.

The Luziers further try to discredit Vince Webb by pointing out his testimony that he did not use the daylily as a reference point because it was not there when he was mowing Lot 8 in the 1980s. (Appellant's Brief, p. 33). However, Vince never testified that he used the daylily bush to indicate the boundary line while he was mowing. Rather, he testified he used the "bush that Johnsons planted about partway up from the sand up to their house", or the flowering bush, and the sidewalk to indicate the boundary line, clarifying that the daylily bush was not there in the 1980s. (V. Webb, 530:22-25; 532:8-12). As to the daylily bush, he only testified that he knew the daylily bush was moved to indicate the property line. (V. Webb, 531:18-21).

Teri testified that her husband conducted most of the business affairs, and that it is possible that there were discussions her husband had with the Webbs that Teri did not know about. (T. Johnson 350:17-351:13). The Luziers' assumption of Robert Johnson's knowledge is pure speculation.

The Luziers also select certain parts of the Webbs' testimony they believe support their position, then they nitpick the rest of their testimony and allege inconsistencies to support their claim that the Webbs are not credible. Rather, a review of Robert Webb's testimony shows that he is not inconsistent; he was trying to remember events from over 40 years ago; he was sound and aware; and that he knows the location of the actual boundary line between Lot 8 and Lot 9. A review of Vince Webb's testimony shows that he mowed Lot 8 up to the actual boundary line. The Luziers' black and white interpretation of the Webbs' testimony ignores the basic concept that their testimony is accurate within its proper context.

As shown above, several witnesses in this matter have inconsistencies in their testimony, and much of the testimony is conflicting with other witnesses in some way. The trial court pointed this out multiple times in its Memorandum Decision. (See App. 9, 10, 11, 13). The trial court also found that Robert Webb and the Johnsons are disinterested witnesses, and it did not believe that Robert Webb would have any reason to deceive the parties or the Court about his recollection of events. (App. 10). The trial court decided that the Luziers did not present enough evidence to prove by clear and convincing evidence that they adversely possessed the disputed property for 20 years. (App. 11, 13, 15). The trial court properly resolved the conflicts in the evidence and performed its function in weighing evidence and sorting out the truth.

The Luziers do not cite any law that requires the trial court to go through each witnesses' contradictory statements and inconsistent testimony and determine which it believed. They simply disagree with the trial court's decision to accept the Webbs' testimony. The trial court had access to the entirety of the Webbs' and Johnsons' deposition transcripts, and it did specifically consider the credibility of Robert Webb. (App. 10). The trial court did not clearly err in making findings upon consideration of the deposition testimony in this matter. This Court should not disturb the trial court's findings based on conflicting testimony. Nekolite, 2014 S.D. 55, ¶ 13.

### **III. THE TRIAL COURT ERRED IN GRANTING THE LUZIERS PRESCRIPTIVE EASEMENTS.**

“Similar to adverse possession claims, a claimant for a prescriptive easement must show ‘an open, continued, and unmolested use of the land in the possession of another for the statutory period of 20 years.’” Fuoss v. Dahlke Family Ltd. P'ship, 2023 S.D. 3, ¶ 49, 984 N.W.2d 693, 706 (citing Helleberg v. Estes, 2020 SD 27, ¶ 18, 943 N.W.2d 837, 842). “The claimant must also show that ‘the property is being used in a manner that is hostile or adverse to the owner.’” Id. (citing Helleberg, 2020 SD 27, ¶ 18; Rotenberger, 2007 S.D. 19, ¶ 8, 729 N.W.2d at 178). “Like adverse possession, ‘a use that is merely permissive and not adverse to the interests of the property owner will not become a prescriptive easement.’” Id. (citing Thompson, 2003 S.D. 12, ¶ 7, 657 N.W.2d at 304). “In order to rebut any presumption of a hostile use, [the property owner] needed only to present evidence that the access was permissive.” Id. ¶ 55.

Here, the Hemmahs presented evidence that the encroachment of the Luziers' garages onto Lot 8 was permissive. The Webb family permissively allowed the garages to remain. (R. Webb, 482:1-25). Teri Johnson and Chris Johnson never disputed Robert

Webb's testimony about his conversation with Robert Johnson, and they cannot testify as to what Robert Johnson knew. Dr. Luzier also offered to make use of the garages, (CT 855:22-25; 911:6-11; 941:13-15), which the Hemmahs accepted his offer.

The trial court found that Dr. Luzier informed the Hemmahs that he possessed an easement for the garages. (App. 14). This finding is not clearly erroneous based on the testimony at trial. (CT 858:8-859:20; 910:24-911:5; 946:5-14). Dr. Luzier's admission that he was incorrect shows that he believed his easements were for Lot 8.

The trial court then concluded that Plaintiffs knew that the garages encroached onto Defendants' property and that they were not owners of the disputed property. (App. 14). The trial court also found that the alleged possession of the property by the Luziers was never adverse to the Hemmahs. Id.

The Hemmahs have rebutted any presumption that the encroachment of the garages was a hostile use because they have presented sufficient evidence that the use was permissive. Based on the evidence presented at trial, and based on the trial court's own findings, the trial court clearly erred in granting the Luziers a prescriptive easement for the garages. The Hemmahs request this Court reverse the trial court's grant of the prescriptive easements for the garages.

#### **IV. THE SCOPE OF THE PRESCRIPTIVE EASEMENTS GRANTED BY THE TRIAL COURT IS PROPER.**

The Hemmahs maintain that the trial court erred in granting prescriptive easements for the Luziers' two garages encroaching onto Lot 8 as argued above. However, if this Court determines the Luziers are entitled to a prescriptive easement, then the trial court properly expanded the prescriptive easements to allow the Luziers to maintain and operate the garages in the manner they have historically been used.

The trial court's Judgment and Order of the Court states in relevant part,

Said prescriptive easement shall include the limited right to the use of the easement area and the immediate adjacent area which is necessary to support the maintenance and operation of Plaintiffs' existing garages in the manner in which said existing garages have historically been used.

(App. 8, SR 700).

Because the elements of a prescriptive easement are so similar to that of adverse possession, the same rule should apply: "Only that portion of land which has been actually and continuously occupied may be claimed when there is no written instrument forming the basis of the claim." Cuka, 294 N.W.2d at 422.

First, the area immediately adjacent to the garages impliedly includes the earth anchors for the large garage and the retaining wall because they are necessary for maintenance and operation. The Judgment and Order need not be changed to include the Luziers' desired "fifteen foot" verbiage. This relief was not requested at trial. Inserting an arbitrary distance of 15 feet from the garage would be unreasonable here because no one is certain how deep the earth anchors reach into the ground. Mr. Dickhut testified that he estimated the anchors were approximately 10 to 15 feet long, but he cannot be completely sure. (Dickhut, 392:12-20). A 15-foot easement would severely limit the Hemmahs' use of their property.

The Judgment and Order allow the Luziers to use the area immediately adjacent to the large garage to, in other words, maintain the status quo. The flexibility of the easement allows the Luziers to use the exact right area in Lot 8 to maintain their large garage, and it allows the Hemmahs to only be the servient estate up to the area necessary for maintenance and operation of the large garage. See also SDCL 43-13-5 ("The extent of a servitude is determined by ... the nature of the enjoyment by which it was

acquired.”) Therefore, the prescriptive easement granted by the trial court's Judgment and Order should not be expanded to include fifteen feet from the large garage.

Second, the Luziers are not entitled to a prescriptive easement five feet south of the sidewalk abutting the south side of the Luziers' cabin. The Luziers assert they need this easement to allow them to access their front yard and lake. (Appellants' Brief, p. 35). The Complaint and Amended Complaint do not request this relief. (SR 1, 75). Nor was this relief requested at trial. The Luziers can access their front yard and lake from the north side of their cabin. (SR 247). Any potential obstruction on their property can be changed or improved by the Luziers. Also, the sidewalk south of the Luziers' cabin allows them to access their front yard and lake. While the boundary line may cross slightly over the sidewalk, it certainly does not restrict the Luziers' access to their front yard. (SR 57, 58, 273). The Luziers do not need an easement across Lot 8 to access their front yard.

Further and most importantly, the trial court determined that the Luziers failed to present clear and convincing evidence of adverse possession of the disputed property. That being the case, if the Luziers could not establish hostile and adverse use of the disputed property for adverse possession as argued above, they cannot establish hostile and adverse use to establish a prescriptive easement within the disputed property. Therefore, the prescriptive easement granted by the trial court's Judgment and Order should not be expanded to include five feet south of the sidewalk.

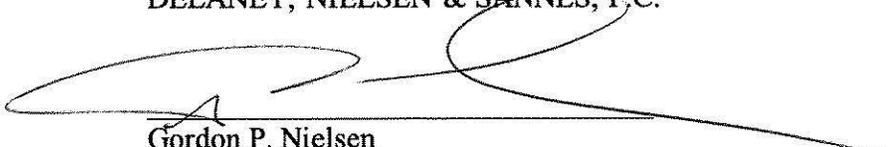
### **CONCLUSION**

The trial court did not clearly err in finding that the Plaintiffs did not produce clear and convincing evidence of adverse possession of the disputed property for more

than 20 years, and this Court should affirm the Hemmahs' ownership of the disputed property. The trial court erred in granting a prescriptive easement for the Luziers' garages that encroach onto Lot 8 because the garages were permissively allowed to remain, and this Court should reverse the prescriptive easement. Should this Court determine the Luziers are entitled to a prescriptive easement, this Court should affirm the trial court's prescriptive easements and deny the Luziers' request to expand the easement.

Dated this 4 day of February 2026.

DELANEY, NIELSEN & SANNES, P.C.

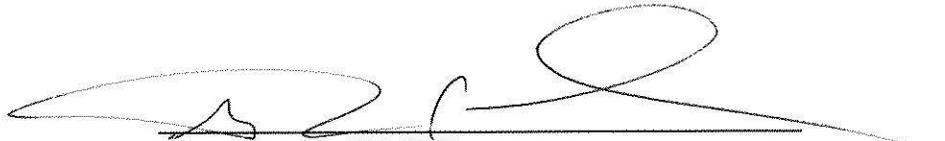


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**CERTIFICATE OF COMPLIANCE**

Gordon P. Nielsen, one of the attorneys for Appellees, hereby certifies that the foregoing brief meets the requirements for proportionately spaced typeface in accordance with SDCL 15-26A-66(b) as follows:

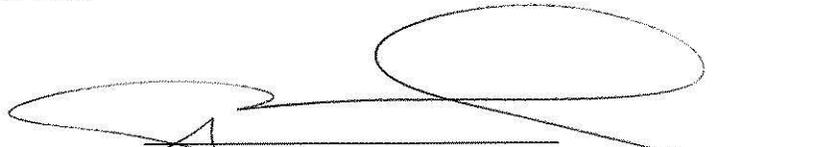
- a. The body of Appellees' brief was typed in Times New Roman 12 point proportionally spaced typeface; and
- b. Appellees' brief contains 9,832 words and 49,313 characters, according to the word and character counting system in Microsoft Word used by the undersigned.

  
GORDON P. NIELSEN

**CERTIFICATE OF SERVICE**

I, Gordon P. Nielsen, the undersigned, hereby certify that on the 4 day of February 2026, a true and correct copy of the foregoing Brief of the Appellee was served via electronic transmission through the Odyssey eFileSD system upon the following:

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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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THOMAS LUZIER and MARSHA LUZIER,  Plaintiffs/Appellant,  vs.  ANDREW HEMMAH and JENNIFER HEMMAH,  Defendants/Appellees.	Case No. 31234
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APPEAL FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT  
DAY COUNTY, SOUTH DAKOTA

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THE HONORABLE RICHARD A. SOMMERS  
Circuit Court Judge

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**APPELLANT THOMAS LUZIER'S REPLY BRIEF**

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## APPELLANT THOMAS LUZIER'S REPLY BRIEF

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### PRELIMINARY STATEMENT

This Brief will reference the record in the same manner as Plaintiff's original Brief with one exception. In the original Brief, Plaintiff referenced the original pages of the trial transcript. In this Brief, references to the trial transcript will be to the page number in the Clerk's Index. References to Defendants' Brief will be designated as DB followed by the page number.

### HISTORY OF THE PROPERTY

The main thrust of Plaintiff's case is that, for many years, the occupants of the Ramona Beach Subdivision did not rely upon survey pins or markers to determine the property lines between the various lots. They accepted what they believed to be the property lines. The trial court found that there were no pins or markers in place when the Subdivision was developed in 1925 and that the original owners attempted to determine property lines by using a tape measure. (App 6). Defendants dispute this finding stating lot owners in the Subdivision "had resources to know where their property lines were before 2002." (DB 26). In support of this statement, Defendants cite the 2014 survey (EX 1 (CI 46)), the original plats for the subdivision (EXs 18, 19 (CI 237-39)), and the 2002 plat (EX 21, p. 2 (CI 242)). Obviously, the 2002 plat and the 2014 survey do not show what anybody knew prior to 2002. As far as the original plats are concerned, there is nothing on them to indicate the placement of any pins. As Robert Webb testified: "[W]hen I had it surveyed [in 2002] that was the first time that I think people actually knew where the lot line was." (R. Webb

469:8-10).<sup>1</sup> Webb’s recollection in this regard is supported by the fact he was familiar with the property since 1942 but was not aware the small garage on Lot 9, which was constructed in 1948, was over the property line until 2002. (*Id.* 468:5-7, 481:7-11). Still further evidence that property lines eventually surveyed were unknown for many years is provided by the fact there are encroachments “all over the place.” (*Id.* 498:16-21). Lot owners were evidently constructing structures based on their understanding as to where the lot lines were as opposed to lot lines established by later surveys.

Both Teri and Chris Johnson testified they understood the property line to be consistent with the dotted line on Exhibit 53. (CI 277). Marsha Luzier testified both Robert Johnson, the owner of the cabin on Lot 9, and Maurice Webb, the owner of the cabin on Lot 8, showed her the property line when the Luziers purchased their cabin and that it was consistent with the dotted line on Exhibit 53. (TR 865:14—866:18, 869:3-11, 870:6-10).

This case also involves permanent and visible structural encroachments that existed openly and without objection for decades. This includes all of the improvements discussed in Plaintiffs’ initial Brief and in the following sections of this Brief. These were not hidden or temporary uses. They were fixed, substantial improvements known to neighboring owners and never removed or meaningfully challenged during the time required for adverse possession to vest.

## OCCUPATION

### *Improvements*

At trial, Plaintiffs presented substantial evidence concerning improvements put in place by their predecessors. This included the two garages which, by the time this lawsuit

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<sup>1</sup> After Mr. Webb’s father and others attempted to use a tape measure to determine the lot lines, residents of the Subdivision apparently believed they knew where the lines were. Mr. Webb testified that they wound up being twenty feet off. (R. Webb 469:12-16).

was commenced, had been in place for 76 years and 27 years. The retaining walls and landscaping west of the small garage, the flower bed east of the small garage, the light fixture in the tree, the sidewalk to the south of the Luzier cabin, and the sea wall had all been in place for time periods ranging from approximately 39 to 74 years.

Citing *Cuka v. Jamesville Hutterian Mutual Society*, 294 N.W.2d 419, 422 (S.D. 1980), Defendants argue that the area to the west of the small garage was not usually cultivated or improved for a continuous period of twenty years. (DB 9). *Cuka* does not require continuous use of the property for it to be adversely possessed. It is only necessary that it be used from “time to time.” *Id.* at 422.

The purpose of the retaining wall and landscaping was to prevent erosion. (T. Johnson 333:14-20). Teri Johnson testified the Johnsons always maintained the area to the west of the small garage. (*Id.* 336:9-12). Chris Johnson testified he took care of that area “for years.” (C. Johnson 295:23—296:7). Even if no one routinely cared for the area, as testified to by Robert and Vince Webb (DB 10), the fact remains that the retaining walls and landscaping continued to serve the purpose of preventing erosion. Work in this area was done by the Johnsons in the early 1980’s. It was maintained over the years by the Johnsons and Luziers.

Regarding the light fixture in the tree, Defendants cite Teri Johnson’s testimony that she thought Robert Webb might have installed it. (DB 12). That does not make much sense in light of the fact it was wired to the cabin on Lot 9. Ms. Johnson was uncertain about the light and said she would defer to her son, Chris. (T. Johnson 356:21—357:4). Chris Johnson clearly testified that the light had been there when the Johnsons arrived in 1979.

(C. Johnson 298:7—299:6). It was still operable, twenty-six years later, when the Luziers moved in. (TR 868:1-8).

A line of demarcation between the sea wall on the Luzier property and the sea wall on the Hemmah property is readily observable. (EXs 17, 51 (CI 63, 275)). Defendants' Brief states the sea wall was repaired in 1950 when the existing sea wall collapsed. (DB 13). That being the case, it makes no sense that the sea wall on Lot 9 would have been constructed anywhere other than where the owners of the property at that time believed Lot 9 ended and Lot 8 began.

***Substantial enclosure***

Defendants rely on *Ashby v. Oolman*, 2008 SD 26, 748 N.W.2d 132, to argue that Plaintiffs failed to present sufficient evidence of a substantial enclosure. In *Ashby*, the plaintiff argued that a tree stump, a second tree, and remnants of a dilapidated fence constituted a substantial enclosure. *Id.* at ¶ 20. The *Ashby* opinion, at ¶ 20, distinguished that case from *Lewis v. Moorhead*, which involved a partial fence, because the partial fence “did provide a physical and visual basis for determining the property line.” 522 N.W.2d 1, 3, n.4 (S.D. 1994).

Starting from the west end of the subject property, the retaining wall, which extends approximately fifteen feet off the southeast corner of the large garage (EX 53 (CI 277)), along with the line of trees to the south of the garage, creates a readily observable substantial enclosure. Heading eastward, the rock wall clearly creates a substantial enclosure. A line running from the end of the rock wall to the end of the sea wall on Lot 9 creates the type of substantial enclosure that this Court approved in *Moorhead* and *Schultz v. Dew*, 1997 SD

72, ¶ 12, 564 N.W.2d 320. (“Surely, the enclosure need not be absolutely secure to satisfy subsection (1) of the statute.”).

### ***Cultivation***

Defendants’ argument that Plaintiff failed to establish the element of cultivation is based primarily on the work Defendants supposedly did since obtaining possession of the property in 2015 and the questionable testimony of Robert and Vince Webb. What Defendants did since purchasing Lot 8 is irrelevant since adverse possession was established before they came into the picture. In *Rotenberger v. Burghduff*, 2007 SD 19, ¶ 11, 729 N.W.2d 175, this Court noted that the prescriptive easement involved in that case was in place when the plaintiff purchased the land in question. Similarly, Plaintiff’s adverse possession of the disputed property was in place when Defendants purchased their property. As such, any cultivation or other uses of the disputed property by Defendants after 2015 does not change anything.

### **OPEN AND NOTORIOUS**

Defendants claim Plaintiff failed to establish the open and notorious requirement because Robert Webb gave permission for both of the garages to remain in place. (DB 16-17). Defendants rely on *Gangle v. Spiry*, 2018 SD 55, 916 N.W.2d 119. In that case, however, the defendant specifically gave the plaintiff’s father permission to use the land in question. *Id.* at ¶ 4. Similarly, prescriptive easement and adverse possession claims were defeated in *Travis v. Madden*, 493 N.W.2d 717, 720 (S.D. 1992), and *Fuoss v. Dahlke Family LP*, 2023 SD 3, ¶ 31, 984 N.W.2d 693, where there was clear evidence permission had been given. Such a situation does not exist here.

The small garage was built in 1948. Mr. Webb testified he was not aware of it being over the property line until he arranged for a survey to be performed in 2002. (R. Webb 481:7-11). The fact he did not take steps to have the small garage torn down after learning it had been over the property line for 54 years can hardly be considered permission.

Robert Webb claims he informed Robert Johnson that the large garage being constructed in 1997 was over the property line. (R. Webb 470:8-10). He claims Mr. Johnson moved the garage back a little bit but not far enough. (*Id.* 481:12-17). Webb also claims he told Mr. Johnson “he better move it.” (*Id.* 491:19-20). This testimony does not establish the type of specific affirmative permission required under South Dakota law.

The only discussion about permission with Mr. Webb was the following exchange:

Q. Was the garage allowed to remain there with the permission of the Webb family?

MR. RASMUSSEN: Objection. Leading.

Q. You can answer.

A. I guess so.

(*Id.* 482:21-25). That exchange comes nowhere near establishing a specific grant of permission as occurred in *Gangle, Travis, and Fuoss*.

In *Rotenberger v. Burghduff*, Neil Ketchum, the plaintiff’s predecessor, had used a trail running over the defendants’ property for approximately forty years. The plaintiff then used the same trail for seventeen years, until 2001, when the defendant padlocked the trail gate. 2007 SD 19 at ¶ 2. The plaintiff was granted summary judgment on his claim for a prescriptive easement. *Id.* at ¶ 4. On appeal, this Court found that the defendant had failed to put forth any specific facts showing that Ketchum was granted permission to use the trail. *Id.* at ¶ 11. The Court stated:

Burghduff alleges that he “consented to and allowed” Rotenberger to use the trail until 2001, therefore, the “hostile or adverse” elements could not be fulfilled. The circuit court noted he did not show any evidence he granted Rotenberger “permission” to use the trail. Instead, the circuit court noted the doctrine of acquiescence, found in adverse possession law, could be used to demonstrate the adverse or hostile requirement in prescriptive easements. It is undisputed that Burghduff had knowledge of Rotenberger’s use of the trail and did not prevent him from using it. “When such acquiescence continues during the statutory period prescribed as a bar to reentry, title may be acquired through acquiescence alone.”

(Citing *City of Deadwood v. Summit, Inc.*, 2000 SD 29, ¶ 22, 607 N.W.2d 22).

Likewise, Defendants have presented no evidence that Robert Webb or anyone else specifically gave permission for either garage to be built over the property line. Furthermore, by allowing the garages to be built and remain in place, Defendants’ predecessors, acquiesced to their locations. This acquiescence by Defendants’ predecessors, along with the lack of evidence regarding permission, defeats Defendants’ argument concerning the open and notorious element as it relates to the two garages. The same is true with regard to the retaining wall attached to the large garage, the landscaping to the west of the small garage, the flowers to the east of the garage, the light in the oak tree, the sidewalk, and the sea wall. The fifteen foot retaining wall physically attached to the large garage is not a casual encroachment. It is a structural manifestation of ownership, as are all the other improvements.

Defendants also claim that offers by Mr. Johnson and Dr. Luzier to Mr. Webb and the Hemmahs that they can make use of the garages on Lot 9 is evidence of permission. (DB 17). With regard to the offer of Mr. Johnson, Mr. Webb stated, “we were kidding around more than anything else.” (R. Webb 511:3-8). Nonetheless, an offer to let a neighbor make use of a garage, certainly does not amount to the type of specific permission needed to defeat an adverse possession claim.

It should also be noted that the trial court's Memorandum Decision did not even address permission as it relates to the open and notorious element. (App 11-12). The only mention of permission in the trial court's decision relates to the prescriptive easement issue. (App 15-16).

SDCL 15-6-52(a) provides:

Any action or decision of the court in making or modifying findings of fact or conclusions of law shall be deemed excepted to, but the failure of the court to make a finding or conclusion on a material issue is not to be deemed excepted to unless such finding or conclusion has been proposed to or requested from the court.

Defendants failed to propose or request any findings from the court relative to the permission issue as it related to the open and notorious requirement. "A claim or theory not mentioned in the proposed findings of fact and conclusions of law is deemed abandoned." *Stemper v. Stemper*, 415 N.W.2d 159, 160 (S.D. 1987); *see also People in the Interest of D.A.J.*, 2008 SD 92, ¶ 17, 757 N.W.2d 70. This provides still another reason to reject Defendants' arguments concerning permission.

Defendants further claim that statements by Dr. Luzier about easements somehow demonstrated Plaintiffs' occupation was not hostile. (DB 17). This argument is really not explained. In support of their claim Dr. Luzier was aware of the encroachments, Defendants cite Exhibit 63. (CI 287). (DB 8). This is inappropriate in that Exhibit 63 was never received into evidence. (TR 751, 838:11—840:8). Thus, it should not be considered by the Court in connection with this appeal. In any event, whether or not Dr. Luzier was aware of the encroachments prior to 2024, is not determinative as to whether the location of the garages was open, notorious, and hostile.

The purpose of the open and notorious element is to give the record owner notice. *Underhill v. Mattson*, 2016 SD 69, ¶ 15, 886 N.W.2d 348. Defendants' predecessors had

notice and were well aware of use of the disputed property by Plaintiffs and their predecessors before the Hemmahs' purchase of Lot 8.

#### STATUTORY PERIOD

In disputing this element, Defendants make the same argument as addressed earlier concerning the decision in *Cuka*. For the same reasons previously set forth, this argument fails. By the time Defendants purchased Lot 8, the small garage and the retaining walls had been in existence well beyond the twenty year statutory period. By 2017, the large garage had been in existence for twenty years.

#### EXCLUSIVITY

Citing *Rancour v. Golden Reward Mining Co., L.P.*, 2005 SD 28, 694 N.W.2d 51 and *Rotenberger*, Defendants take issue with a statement in Plaintiff's initial Brief taken from *Schultz v. Dew*. In *Schultz*, there was evidence one of the defendants mowed and shoveled snow in the disputed area, along with erecting a snow fence. 1997 SD 72 at ¶ 7. When the plaintiffs sought to sell the disputed property, the defendants asserted ownership, after which the plaintiffs sued for adverse possession. *Id.* at ¶ 8. The defendants argued there was insufficient evidence to establish a substantial enclosure or cultivation. *Id.* at ¶ 9. In ruling in favor of the plaintiffs, this Court stated: "The plain language of this statute and *Cuka* disprove Dews' assertion that 'the exclusive test of adverse possession is the physical exclusion of others under a claim of right.'" *Id.* at ¶ 11, n.8. There is nothing in the *Rancour* or *Rotenberger* cases which question this statement.

It has seemingly continued to be Defendants' position throughout this case that merely allowing a neighbor to come onto your property or occasionally mow it somehow

defeats an adverse possession claim. As demonstrated by the statement in *Schultz*, that simply is not the law.

#### DEPOSITION TESTIMONY

Plaintiff's initial Brief contains an error in the section labeled Standard of Review where it is stated this Court is to review deposition testimony *de novo*. Under SDCL 15-6-52(a), deposition testimony is, like any other testimony, to be assessed under the clearly erroneous standard. That statute goes on to say that, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." This is where there is a problem in this case. As noted in Plaintiff's initial Brief, the trial court made comments both during the trial and in the Memorandum Decision that he was unable to judge the credibility of witnesses who testified by deposition. (TR 818:5—819:2; App 10).

Defendants argue the court did assess credibility but the record does not support that claim.

Defendants contend that Plaintiff's attacks on Robert Webb's credibility are based on "vague and mischaracterized inconsistencies in his testimony." (DB 22). Those inconsistencies were not vague and mischaracterized. This is particularly true with regard to his testimony concerning his interaction with Robert Johnson following the 2002 survey.

Mr. Webb testified as follows:

Q. Did you present a copy of that survey to the Johnsons who were the owner of Lot 9 at that time?

A. Yes.

(R. Webb 470:2-4). "I showed it to Bob and Teri." (*Id.* 470:13).

Q. So did you have a conversation with Bob about the location of the garage in 2002 when you had the property surveyed?

A. Yes. I showed him the -- showed him my copy of it.

(*Id.* 481:18-21).

Q. Do you still have a copy of that 2002 survey?

A. Yes.

Q. Where do you have it? At home?

A. Right here (indicating).

Q. Could I see it?

(*Id.* 483:2-6). Following this questioning, Mr. Webb presented counsel with what he claimed to be the 2002 survey but was actually the 2014 survey. (*Id.* 483:10-13). Upon cross-examination by Plaintiff's counsel, Mr. Webb again stated that he had shown the survey to Mr. Johnson.

Q. You said you showed the survey to Bob Johnson?

A. Yes.

(*Id.* 500:20-22). After making that statement, Mr. Webb suddenly realized it was not possible for him to have shown the survey to Mr. Johnson since the Johnsons were long gone by 2014. (*Id.* 500:23-25). Mr. Webb then changed his testimony to say he showed Mr. Johnson where the pin was. (*Id.* 500:25—501:5).

Defendants' Brief states that, "[i]t is reasonable that in 2002, Robert Webb showed Robert Johnson the location of the pin because it had been newly set, and there was likely disturbed dirt." (DB 23). This is total speculation. The foregoing testimony clearly raises significant questions concerning Mr. Webb's memory and credibility. The trial court clearly erred in failing to assess the credibility of the testimony of both Robert and Vince Webb for all the reasons stated in Plaintiff's initial Brief.

#### PRESCRIPTIVE EASEMENT

Defendants' Notice of Review argues that the trial court erred in granting Plaintiffs a prescriptive easement because permission was given concerning the location of the garages.

(DB 29-30). This is the same argument Defendants made with regard to the open and notorious element of adverse possession. As previously discussed, there is no specific evidence of permission having been given to Plaintiff's predecessors for the construction and location of either garage. Thus, the trial court did not err in rejecting Defendants' arguments concerning permission and in granting prescriptive easements after denying Plaintiff's adverse possession claim. (App 15-16). The court should, however, have granted the additional relief requested by Dr. Luzier.

Regarding the large garage, Defendants acknowledge that the court's Judgment and Order (App 17-19) "impliedly includes the earth anchors for the large garage and the retaining wall because they are necessary for maintenance and operation." (DB 31).

Despite this, Defendants object to the request that the prescriptive easement extend fifteen feet to the south.

Defendants argue that it is uncertain exactly how far the earth anchors extend. There is, however, no dispute that the retaining wall attached to the garage extends fifteen feet. (Exhibit 53 (CI 277)). Therefore, it only makes sense to extend the prescriptive easement for that same distance. Without that extension, the easement is illusory because it fails to protect the structural integrity of the large garage. This whole dispute started when Jonathan Fortner discovered Defendants had a plan to demolish part of the large garage's retaining wall and construct their own garage within a few feet of the south edge of the Luzier garage. (PIH 98:8—101:9). Extending the prescriptive easement for fifteen feet would ensure against anything like that occurring in the future.

In opposing the request that the prescriptive easement be extended to the south of the sidewalk so as to allow Plaintiff to access his front yard and the lake, Defendants argue

access can be obtained from the north side of the cabin. In support of this statement, Defendants cite only Exhibit 23. (CI 247) (DB 32). That exhibit is one of the surveys Plaintiffs presented at trial. It does not prove Plaintiff can access the lake from the north side of his cabin. Defendants cite no testimony or photographs to establish that Plaintiff can access his front yard and the lake by going around the north side. Such a claim is rebutted by the testimony of both Jonathan Fortner and Vince Webb. (PIH 107:2-15; V. Webb 550:1-6). Judge Sommers also recognized Plaintiffs' need to use the disputed area for access in his Order Regarding Preliminary Injunction. (CI 64).

Substantial evidence was presented regarding the historical use of the yard between the two cabins which provides Luziers and their predecessors' access to the front yard and the lake. A prescriptive easement should be granted so as to continue to permit access to those areas.

### CONCLUSION

The evidence at trial established that, for far more than twenty years, the predecessors to both Plaintiffs and Defendants considered the property line to be as set forth on the dotted line contained on Exhibit 53 (CI 277). Plaintiffs presented clear and convincing evidence to support their adverse possession claim. The trial court clearly erred in determining otherwise. This case presents long-standing structural occupation of land beyond the surveyed boundary, not a mere misunderstanding between neighbors. The trial court should be reversed and a judgment for adverse possession entered in favor of Plaintiff. Alternatively, this Court should affirm the trial court's decision granting Plaintiff prescriptive easements and expand those easements as requested by Plaintiff.

Dated this 17th day of February 2026.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

*/s/ Reed Rasmussen*

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this Brief complies with the type volume limitation of SDCL 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this Brief, the body of the Brief contains 3,803 words and 19,177 characters (not including spaces).

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Reed Rasmussen

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CERTIFICATE OF SERVICE

The undersigned, attorneys for Appellant, hereby certifies that on the 17th day of February 2026, a true and correct copy of the foregoing APPELLANT THOMAS LUZIER’S REPLY BRIEF was served via Odyssey File and Serve on the following:

Gordon P. Nielsen  
Delaney, Nielsen & Sannes, P.C.  
PO Box 9  
Sisseton, SD 57262  
[gordon@delaneylawfirm.com](mailto:gordon@delaneylawfirm.com)

Dated this 17th day of February 2026.

SIEGEL, BARNETT & SCHUTZ, L.L.P.

/s/ Reed Rasmussen

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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

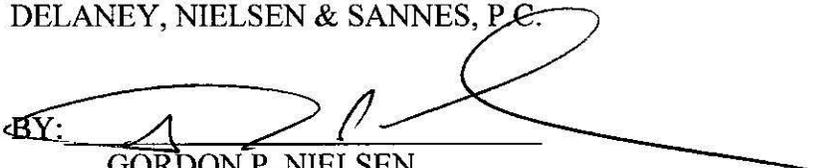
THOMAS LUZIER and MARSHA LUZIER,  Plaintiffs/Appellants,  vs.  ANDREW HEMMAH and JENNIFER HEMMAH,  Defendants/Appellees.	Case No. <u>31234</u>  NOTICE OF REVIEW
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TO: PLAINTIFF THOMAS LUZIER, and his attorney of record Reed Rasmussen.

PLEASE TAKE NOTICE that the Defendants, Andrew Hemmah and Jennifer Hemmah, do hereby file this Notice of Review pursuant to SDCL 15-26-22 to the Supreme Court of South Dakota from the final judgment rendered in this action entered on the 16<sup>th</sup> day of September 2025.

Dated this 6 day of October 2025.

DELANEY, NIELSEN & SANNES, P.C.

BY: 

GORDON P. NIELSEN  
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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

<p>THOMAS LUZIER and MARSHA LUZIER,  Plaintiffs/Appellants,  vs.  ANDREW HEMMAH and JENNIFER HEMMAH,  Defendants/Appellees.</p>	<p>Case No. 31234  APPELLEES' DOCKETING STATEMENT</p>
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SECTION A.

TRIAL COURT

1. The circuit court from which the appeal is taken: 5<sup>th</sup> Judicial Circuit.
2. The county in which the action is venued at the time of appeal: Day County.
3. The name of the trial judge who entered the decision appealed: Honorable Richard A. Sommers.

PARTIES AND ATTORNEYS

4. Identify each party presently of record and the name, address, and phone number of the attorney for each party.

Appellant: Thomas Luzier

Appellant's  
Attorneys: Reed Rasmussen  
Siegel, Barnett & Schutz, L.L.P.  
415 South Main Street, Suite 400, PO Box 490  
Aberdeen, South Dakota 57402-0490  
[rrasmussen@sbslaw.net](mailto:rrasmussen@sbslaw.net)

Appellees': Andrew Hemmah and Jennifer Hemmah

Appellees'

Attorney: Gordon P. Nielsen  
Delaney, Nielsen & Sannes, P.C.  
520 2<sup>nd</sup> Avenue East, P.O. Box 9  
Sisseton, South Dakota 57262  
[gordon@delaneylawfirm.com](mailto:gordon@delaneylawfirm.com)

## SECTION B.

### TIMELINESS OF APPEAL

5. The date the judgment or order appealed from was signed and filed by Trial Court on September 16, 2025.
6. The date Notice of Entry of Judgment or Order as served on each party on September 16, 2025.
7. State whether either of the following motions were made:
8. Motion for Judgment n.o.v. SDCL 15-6-50(b): **No.**
9. Motion for new trial, SDCL 15-6-59: **No.**

### NATURE AND DISPOSITION OF CLAIMS

10. State the nature of each party's separate claims, counterclaims or cross-claims and the trial courts disposition of each claim (e.g., court trial, jury verdict, summary judgment, default judgment, agency decision, affirmed/reversed, etc.)

**Plaintiffs sought to quiet title to property through adverse possession. Defendants counterclaim was to quite title and asserted a claim for trespass. After a Court trial, the Court denied Plaintiffs' adverse possession claim but ruled Plaintiffs were entitled to two prescriptive easements.**

11. Appeals of rights may be taken only from final appealable orders. See SDCL 15-26A-3 and 4.
12. Did the trial court enter a final judgment or order that resolves all of each party's individual claims, counterclaims or cross-claims: **Yes.**

13. If the trial court did not enter a final judgment or order as to each party's individual claims, counterclaims or cross-claims, did the trial court make a determination and direct entry of judgment pursuant to SDCL Sec. 15-6-54(b)?  
**NA**
14. State each issue intended to be presented for review.
- a) **The trial court erred in granting Plaintiff a prescriptive easement.**

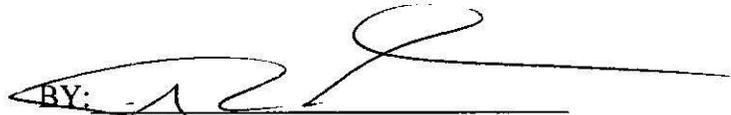
**Attachments:**

Copy of the Memorandum Decision

Judgment and Order of the Court

Dated this 6 day of October 2025.

DELANEY, NIELSEN & SANNES, P.C.

BY: 

GORDON P. NIELSEN  
Attorney for Defendants/Appellees  
520 2<sup>nd</sup> Avenue East  
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**FILED**

**AUG 14 2025**

IN CIRCUIT COURT

STATE OF SOUTH DAKOTA

COUNTY OF DAY

CLAUDETTE OPITZ  
DAY CO. CLERK OF COURTS

FIFTH JUDICIAL CIRCUIT

THOMAS LUZIER and MARSHA  
LUZIER,

Plaintiffs,

v.

ANDREW HEMMAH and JENNIFER  
HEMMAH,

Defendants.

**18CIV24-26**

**MEMORANDUM  
DECISION**

Plaintiff instituted this lawsuit on June 5, 2024, requesting this Court to quiet title the contested property, grant a judgment declaring Plaintiffs have acquired ownership of the contested property, and for the Court to issue a judicial plat and order survey markers be placed in conformity with the judicial plat.<sup>1</sup> On June 18, 2024, Defendants filed an Answer and Counterclaim denying Plaintiff's allegations and asserting their own claims of quiet title and trespass. On June 24, 2024, Plaintiff filed a Reply to the Counterclaim denying the allegations in the Counterclaim.

On September 3, 2024, the parties stipulated to Plaintiff filing an Amended Complaint, which Plaintiff filed September 4, 2024, alleging adverse possession and doctrine of acquiescence. Defendants filed their Amended

<sup>1</sup> References to Plaintiffs Post-Trial Brief and Final Argument will be cited as ("PPTB") followed by a page number; References to Defendants Closing Argument Brief will be cited as ("DCB") followed by a page number; References to an exhibit will be cited as ("Exhibit") followed by the number designated at trial.

Answer and Counterclaim September 5, 2024. On September 5, 2024, Plaintiffs filed their Reply to Amended Counterclaim.

This matter came on for a trial on May 13-14, 2025. Following the presentation of evidence, the Court instructed the parties to brief their closing arguments and took the matter under advisement. Having considered the testimony of the witnesses, the exhibits received, the arguments of counsel, the post-hearing briefing, and pleadings therein, the Court now issues this Memorandum Decision.<sup>2</sup>

### **STATEMENT OF FACTS**

This case involves a property line dispute between two adjacent parcels of real property on the west shoreline of Pickerel Lake in Day County, South Dakota. Specifically, the primary question is the proper location of the north-south property line between Plaintiffs' and Defendants' respective properties.

Plaintiffs, Dr. Thomas Luzier and the late Marsha Luzier, husband and wife<sup>3</sup>, are the record title holders of Lot 6A and Lot 9, which has the legal description of:

**LOT 6A, FIRST ADDITION TO RAMONA BEACH SUBDIVISION IN THE  
SE ¼ OF SECTION 27, TOWNSHIP 124 N., RANGE 53 WEST, DAY  
COUNTY, SOUTH DAKOTA,**

**AND**

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<sup>2</sup> This Memorandum Decision constitutes the Courts findings of fact and conclusions of law. See SDCL 25-6-52(a).

<sup>3</sup> After trial, but before this Memorandum Decision was issued, Marsha Luzier passed away. Dr. Thomas Luzier is currently the sole owner of Lot 9 and 6A. See *Suggestion of Death* (filed by Plaintiff on July 23, 2025).

LOT 9 OF RAMONA BEACH BEING A PART OF LOT 4 IN SECTION 27 IN TOWNSHIP 124 NORTH OF RANGE 53 WEST OF THE 5<sup>TH</sup> P.M., DAY COUNTY, SOUTH DAKOTA.

("Luzier Property"). Defendants, Andrew Hemmah and Jennifer Hemmah, husband and wife, are the owners of the adjacent real property to the south of the Luzier Property referred to as Lot 8, which has a legal description of:

LOT 8 OF RAMONA BEACH BEING A PART OF LOT 4 IN SECTION 27, TOWNSHIP 124 NORTH, RANGE 53 WEST OF THE 5<sup>TH</sup> P.M., DAY COUNTY SOUTH DAKOTA, ACCORDING TO THE RECORDED PLAT THEREOF,

AND

LOT 5A OF FIRST ADDITION TO RAMONA BEACH SUBDIVISION IN THE SOUTHEAST QUARTER (SE1/4) OF SECTION 27, TOWNSHIP 124 NORTH, RANGE 53 WEST OF THE 5<sup>TH</sup> P.M., DAY COUNTY, SOUTH DAKOTA, ACCORDING TO THE RECORDED PLAT THEREOF.

("Hemmah Property"). The Luzier's received their Trustee's Deed from Robert D. Johnson and Teri L. Johnson. The Hemmah's received their Trustee's Warranty Deed from Johnathan D. Webb and Lura A. Usselman, Trustees of the Trust Created Under Article V of the Last Will and Testament of Maurice E. Webb, Deceased.

The Ramona Beach subdivision was developed in 1925. The 1925 plat showed 14 lots. *Exhibit 18*. When the lots were originally developed, no pins or survey markers were placed to establish lot lines. At one point, the original owners tried marking fifty-foot lines themselves with a tape measure. The lines ended up being about twenty feet off. The lot lines on this plat were straight.

In 1981 a second plat map was prepared. *Exhibit 19*. Lots 8 and 9 were joined with Lots 5A and 6A. This plat map showed iron pipes placed at the

western and eastern borders but did not indicate pins on the lakeside borders of the Ramona Beach Subdivision except Lots 1 and 14.

Teri and Robert Johnson purchased Lot 9 in 1979. Harold and Bernice Webb were owners of Lot 8, which they had purchased in the 1940's. After Harold's death, the land was divided amongst his three children. One of the children, Maurice, bought out his two siblings and was the sole owner of Lot 8.

At trial, both parties testified that their relationship as neighbors initially was amicable. However, issues began to arise between the parties when Plaintiffs were notified of a variance request that Defendants submitted to Day County involving construction of a garage on Defendants' property.

#### ADVERSE POSSESSION

"Adverse possession occurs when there is (1) an occupation that is (2) open and notorious, (3) continuous for the statutory period, and (4) under a claim of title exclusive of any other right. SDCL § 15-3-12; As the parties asserting adverse possession, [Plaintiffs] have the burden of establishing these elements by clear and convincing evidence. *Underhill v. Mattson*, 2016 S.D. 69, ¶ 12, 886 N.W.2d 348, 352. Moreover, "adverse possession occurs by operation of law and does not require an action to commence it, nor to continue it." *Id.* at ¶ 16 (internal citations omitted). "To establish title by adverse possession, the claimant must be in actual, open, visible, notorious, continuous and hostile occupation for the statutory period." *Gangle v. Spiry*, 2018 S.D. ¶ 12, 916

N.W.2d 119, 123 (citing *Titus v. Chapman*, 2004 S.D. 106, ¶ 27, 687 N.W.2d 918, 925); *See also* SDCL § 15-3-1. Each element is addressed in turn.

## 1. OCCUPATION

To prevail on their adverse possession claim, Plaintiffs must show that the property in question, in this case the corner of the rock wall, to the oak tree, down to the south end of the sea wall has been (1) protected by a substantial [enclosure] or (2) usually cultivated or improved. SDCL § 15-3-13. SDCL § 15-3-13 “provides a prerequisite to a justiciable adverse possession claim. Failure to show either a substantial enclosure or usual cultivation or improvement preempts the claim.” *Lewis v. Aslesen*, 2001 S.D. 131, ¶ 7, 635 N.W.2d 744, 746. “Since these provisions are stated in the disjunctive, a claim of adverse possession may succeed if the claimant establishes either a substantial enclosure or cultivation or improvement.” *Jutting v. Hendrix*, 2000 S.D. 25, ¶ 11, 606 N.W.2d 140, 142 (internal citations and quotations omitted).

### **A. Was the disputed area protected by a substantial enclosure?**

“An enclosure need not be absolutely secure to satisfy the ‘substantial enclosure’ statutory requirement.” *Titus v. Chapman*, 2004 S.D. 106, ¶ 32, 687 N.W.2d 918, 926. Plaintiffs argue that the “Hemmah property is divided from the Luzier property to the south of the small garage by the rock wall, which is a substantial enclosure.” PPTB 13. Further, that the straight line of trees south of the large garage creates a substantial enclosure. *Id.* Plaintiffs must prove that for twenty years, which required the previous owners to have also used

these markers as a substantial enclosure to establish adverse possession. At trial, this Court was presented with conflicting testimony. Prior to the Luzier's owning their lot, Robert Webb testified that the rock wall was not the property boundary because his family planted flowers north of the wall.

In Vincent Webb's deposition testimony, he stated when his family owned the Hemmah property, he believed the sidewalk and flowering bush were the property line that he would mow up to those items. He also stated that his recollection did not support the Luzier's contention that their property extended to the oak tree. Both parties occupied the land and freely used it throughout the years. No substantial enclosure existed to show either party that it was intended to be connected to Lot 9.

All of the above testimony creates doubt that the land was surrounded by a substantial enclosure. This Court does not find that the area of land Plaintiffs claim to have adversely possessed was substantially enclosed. Plaintiffs were unable to provide this Court with uncontradicted testimony or evidence that the property boundary is substantially enclosed.

**B. Was the disputed area cultivated or improved by Plaintiffs?**

The South Dakota Supreme Court has held that "regular mowing of the property constitutes cultivation under SDCL 15-3-13(2)." *Underhill v. Mattson*, 2016 S.D. 69, ¶ 13, 886 N.W.2d 348. "[L]andscaping is an improvement to land under SDCL 15-3-13(2)." *Id.*

Plaintiffs argue that any testimony by Defendants about their use of the disputed area is irrelevant because adverse possession was already established

prior to 2015 when Lot 8 was purchased. There is no dispute that the Luzier's mowed the disputed area or that the Lot 9's prior owners, the Johnson's planted flowers and bushes. Vincent Webb testified that he recalls the Hemmah's maintained that area. Pg 16 Line 9. When Vincent Webb was at the property, he does not recall the Johnson's (past owners before the Luzier's) ever mowing the disputed area. He specifically recalls being told "it's your problem."

The Hemmah's produced several exhibits at trial to show they have cultivated and improved the disputed land since 2015 when they purchased Lot 8. Photographs depict clear mow lines where the Hemmah's believe the property boundary to be. *Exhibit 62*. The Hemmah's further cultivated the disputed area by laying down mulch. As discussed above in regard to which lot owner maintained the disputed area, there is conflicting testimony about who cultivated and maintained the disputed area in past years. Robert and Vincent Webb testified that neither the Luzier's or the Johnson's cultivated or exercised control over the disputed property. The Johnson's testified that they cultivated and improved the disputed area.

Plaintiffs want this Court to find Robert Webb's testimony to not be credible. However, the Court was not able to observe the witness in person and only presented with Mr. Webb's deposition testimony. Mr. Webb, like the Johnson's, is a disinterested witness. This Court does not believe Mr. Webb would have any reason to deceive the parties or this Court about his recollection of events. Since this Court did not have the opportunity to observe Mr. Webb or the Johnson's testify, the Court accepts their testimony.

This Court finds that Plaintiffs have not met their burden to establish that for twenty years, the land was cultivated and improved by the owners of Lot 9. Plaintiffs were unable to prove to this Court at trial by clear and convincing evidence at the disputed land was substantially enclosed, cultivated, or improved.

## 2. OPEN AND NOTORIOUS

“The second element of adverse possession that [Plaintiffs] must establish is that their occupation was open and notorious.” *Underhill*, 2016 S.D. 69, ¶ 15, 886 N.W.2d at 354. “The purpose of this element is to give the record owner notice of the occupation.” *Id.* “The adverse use must be made in such a way that a reasonably diligent owner would learn of its existence, nature, and extent.” *Id.* (internal citations and quotations omitted).

At trial, Dr. Luzier testified that the property he claims to adversely possess was not exclusive. Other neighbors would mow the grass and the Hemmah’s used and enjoyed the property since they bought their lot in 2015. Nothing was conveyed to the Hemmah’s by the Luzier’s or by simply looking at the property to put them on notice that a claim for adverse possession would be made. The rock driveway which is at an angle is within Lot 8. Despite testimony that both Lot 8 and Lot 9 owners cared for that area of land, this Court does not find that the Luzier’s have presented enough evidence to prove by clear and convincing evidence that record notice was given to owners of Lot 8 that they would learn of its existence, nature and extent. The Hemmah’s were not aware that the Luzier’s claimed property within the boundaries of Lot 8.

The original 1925 plat map shows the property lines as straight. The Luzier's occupation of the land was not open and notorious as to put the Hemmah's on notice of the adverse use.

In fact, the only reason the Hemmah's had any idea that the Luzier's were taking claim of the disputed area is the filing of this lawsuit. Dr. Luzier testified that nothing about the way the Luzier's used the disputed area would put the Hemmah's on notice that the Luzier's claimed that portion of land. The Hemmah's were not told they could not use that portion of the property or that the Luzier's owned it. The Hemmah's based their knowledge on the 2014 survey which concluded that they were the rightful owners of the disputed area and treated it as such.

Plaintiffs have failed to show that their use of the property was open and notorious so far as their use would give record notice to the actual owners of the occupation.

### 3. CONTINUOUS

"In South Dakota, the statutory period for adverse possession is 20 years." SDCL § 15-3-1; *Estate of Billings v. Deadwood Congregation of Jehovah Witnesses*, 506 N.W.2d 138, 141 (S.D.1993). "[Plaintiffs] must prove their occupation was continuous for the statutory period." *Underhill*, 2016 S.D. 69, ¶ 15, 886 N.W.2d at 354. "Although [Plaintiffs have] not claimed ownership of the Property for such a length of time, 'the principle of 'tacking' allows [them] to add [their] own claim[ ] to that of previous adverse possessors under whom [they] claim a right of possession.'" *Id.* (quoting *Estate of Billings*, 506 N.W.2d at

141). *See also Titus v. Chapman*, 2004 S.D. 106, ¶ 29, 687 N.W.2d at 925-26 (stating “tacking allows a party to add its own claim to that of previous adverse possessors in interest, and under whom the party claims a right of possession.”). Thus, the principle of “tacking” would allow Defendants to use their own claim of years along with any previous owners.

In the present matter, this Court was presented with testimony that the Luzier’s and their predecessors considered the disputed area a part of Lot 9 since 1979. At trial, there was evidence that contradicted this fact. Robert Webb and Vincent Webb testified that they used the daylily and flowering bush as a reference to the property line. Vincent Webb testified that he mowed the disputed area and was told by Chris Johnson “[m]ake sure you get this part done because its your problem.” Teri Johnson testified that Bernice Webb gardened in the disputed area on the right hand side of the retaining wall.

Since 2015 when the Hemmah’s owned Lot 8, they have occupied the disputed area continuously. Several photographs introduced as exhibits showed this Court that they often utilize the disputed area for recreation as well as cultivating and improving the land.

This Court finds that Plaintiffs have not proven by clear and convincing evidence that their occupation of continuous use met the statutory period of twenty years.

#### 4. CLAIM OF TITLE

The final element Plaintiffs must prove is claim of title. This element does not require wrongful intent on the part of the adverse possessor. “Possession of

property is adverse to the true owner ... even though such occupancy ... was due to mistake and without an intention to claim the land of another." Estate of Billings at 141. The South Dakota Supreme Court has "long recognized that a claim for adverse possession does not require a good faith belief or an intention to claim another's land, but can be founded upon ignorance, inadvertence, or mistake as to the actual boundary between two parcels." *Lewis v. Moorhead*, 522 N.W.2d 1, 5 (S.D. 1994) (citing *Lien v. Beard*, 478 N.W.2d 578, 580 (S.D. 1991); *Taylor v. Tripp*, 330 N.W.2d 542, 545 (S.D. 1983); *Labore v. Forbes*, 238 N.W.2d 124, 125-26 (S.D. 1931); *Sullivan v. Groves*, 172 N.W. 926 (S.D. 1919); and *Lehman v. Smith*, 168 N.W. 857 (S.D. 1918)).

Dr. Thomas Luzier informed the Hemmah's that he possessed an easement onto their property for the garages. This establishes that Plaintiffs knew that the garages encroached onto Defendants property and that they were not owners of that land. Dr. Luzier also testified that nothing was ever established or erected to put Defendants on notice of the claimed property line. The Luzier's never informed the Hemmah's they should not use the disputed property or that they should not occupy it.

Plaintiffs contend throughout their post-hearing brief that the Luzier's were allowing Defendants to access the property. However, they pose no explanation for why the Webb's and then the Hemmah's are improving and cultivating the disputed area while using it as their own.

The alleged possession of the property by the Luzier's was never adverse to the Hemmah's. As mentioned above, the Hemmah's believed until this lawsuit

was filed that the disputed area was their property and no one was claiming title to it.

This Court does not find that Plaintiffs have met their burden to provide evidence that establishes adverse possession by clear and convincing evidence. Plaintiffs failed to establish that actual, open, visible, notorious, continuous, and hostile occupation of the subject property for the required statutory period.

#### PRESCRIPTIVE EASEMENT

“To establish a prescriptive easement, [Plaintiffs] must prove by clear and convincing evidence an ‘open, continued, and unmolested use’ of the pathway across the [Defendants’] land for twenty years and that the use was in a manner that was hostile or adverse to [Defendants].” *Hamad Assam Corp. v. Novotny*, 2007 S.D. , ¶ ,737 N.W.2d 922, 924 (quoting *Vivian Scott Trust v. Parker*, 2004 S.D. 687 N.W.2d 731, 733).

“A prescriptive easement is much like a claim of ownership by adverse possession, except that with the former the adverse user acquires only an easement and not title.” *Thompson v. E.I.G. Palace Mall, LLC*, 2003 S.D. ¶ 657 N.W.2d 300, 304 (internal citations omitted). This Court finds, based on the testimony and evidence presented, that Plaintiffs use of the garages was “consistent with the normal use that an owner of the property would make and is sufficiently open and notorious to give notice to the owner of the servient estate and that the user is asserting an easement.” *Hamad Assam Corp.*, at 926 (internal citations and quotations omitted). Defendant claims that the use

was permissive, but it was clear to this Court that despite Plaintiffs allowing the Hemmah's to use the garages, they were aware that the Luzier's owned the small and large garage. Therefore, a prescriptive easement of the large and small garages is proper.

### CONCLUSION

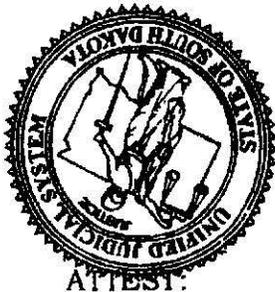
Plaintiffs claim for adverse possessions fails because this Court cannot find based on the evidence presented that the use of the disputed land was actual, open, visible, notorious, continuous, and hostile for the requisite statutory period of time. Although Plaintiffs claim for adverse possession fails, a prescriptive easement has been established. The prescriptive easement allows Plaintiffs to continue to use the small and large garage that encroach onto Defendants' property. The parties property lines are to remain consistent with the legal descriptions contained within the parties' recorded deeds.

Dated this 14<sup>th</sup> day of August, 2025

BY THE COURT:



RICHARD A. SOMMERS  
Circuit Judge



Clerk

STATE OF SOUTH DAKOTA

COUNTY OF DAY

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

THOMAS LUZIER and MARSHA  
LUZIER,

18CIV24-000026

Plaintiffs

JUDGMENT AND ORDER  
OF THE COURT

vs.

ANDREW HEMMAH and JENNIFER  
HEMMAH

Defendants.

The above-entitled matter was brought on for trial before the Court on May 13-14, 2025. At that time, the Plaintiffs appeared personally, and with counsel, Reed A. Rasmussen of the Siegel, Barnett & Schutz, LLP, law firm of Aberdeen, South Dakota and the Defendants appeared personally, and with counsel, Gordon P. Nielsen of the Delaney, Nielsen & Sannes, P.C. law firm of Sisseton, South Dakota.

The Court has now had an opportunity to carefully consider the testimony of the witnesses, the exhibits received, the arguments of counsel, the post-hearing briefing, and pleadings therein, and the Court having issued its Memorandum Decision dated August 14, 2025 which Memorandum Decision constitutes the Court's findings of fact and conclusion of law pursuant to SDCL 15-6-52(a), the Court now enters the following Judgment and Order of the Court.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. That this Court has jurisdiction over the subject matter and the parties to this action.
2. That subject only to the easement set forth in paragraph 4 below, the Defendants are hereby declared to be the owners, in fee simple, of the real property involved in this action, situated in Day County, South Dakota, and described as follows:

**Lot 5A of First Addition to Ramona Beach Subdivision in the Southeast Quarter (SE1/4) of Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

**Lot 8 of Ramona Beach being a part of Lot 4 in Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

and are likewise entitled to the immediate possession thereof, and title thereto is hereby forever quieted in the Defendants, against the Plaintiffs named herein.

3. That subject only to the easement set forth in paragraph 4 below, that the Plaintiffs named in this action, and all persons claiming by, under or through them, are hereby perpetually enjoined and restrained from asserting any right or title to, interest or estate in, or lien or encumbrance upon the real property described in paragraph 2 above adverse to the rights of the Defendants, and the Court hereby adjudges that all of the rights of said Plaintiffs in this action, and each and every one of the said Plaintiffs, in and to said real property described in paragraph 2 above, if any there be, are in all respects, junior, inferior and subordinate to the rights of the Defendants in and to said real property.
4. That the Plaintiffs are entitled to a prescriptive easement allowing the Plaintiffs to continue to use the existing small and large garages that currently encroach onto the Defendants' real property described in paragraph 2 above in the manner in which said existing garages have historically been used. Said prescriptive easement for the use of the small garage and the large garage shall include only that portion of the Defendants' real property upon which said garage structures now actually occupy, and no other. Said prescriptive easement shall include the limited right to the use of the easement area and the immediate adjacent area which is necessary to support the maintenance and operation of Plaintiffs' existing garages in the manner in which said existing garages have historically been used. Plaintiffs, as the easement holders, do not have the right to expand the use of the easement beyond that which is necessary to support the maintenance and operation of their existing garages in the manner in which said existing garages have historically been used.
5. That the Plaintiffs are the owners of the real property involved in this action, situated in Day County, South Dakota, and described as follows:

**Lot 6A of First Addition to Ramona Beach Subdivision in the Southeast Quarter (SE1/4) of Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

**Lot 9 of Ramona Beach being a part of Lot 4 in Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

6. That the Defendants are the owners of the real property involved in this action, situated in Day County, South Dakota, and described as follows:

**Lot 5A of First Addition to Ramona Beach Subdivision in the Southeast Quarter (SE1/4) of Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

**Lot 8 of Ramona Beach being a part of Lot 4 in Section 27, Township 124 North, Range 53 West of the 5<sup>th</sup> P.M., Day County, South Dakota.**

7. The property lines between the parties respective properties are to remain consistent with the legal descriptions contained within the parties' recorded deeds and the recorded plats associated with said properties.
8. The Defendants shall have the immediate possession of the real property as described in paragraph 2 above, free of any claim of the Plaintiffs other than as is specifically set forth in paragraph 4 above.

9/16/2025 8:45:32 AM

Attest:  
Holler, Robin  
Clerk/Deputy



BY THE COURT:

A handwritten signature in black ink, appearing to read "Richard A. Sommers", written over a horizontal line.

Honorable Richard A. Sommers  
Circuit Court Judge