

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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Appeal No. 31019

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F & K ASSAM FAMILY, LLC,

Appellant–Defendant,

v.

CHRIS RALLIS & MARK WEBER,

Appellees–Plaintiffs,

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Appeal from the Circuit Court  
Second Judicial Circuit  
Minnehaha County, South Dakota

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THE HONORABLE Douglas E. Hoffman  
Circuit Court Judge

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**APPELLANT’S BRIEF**

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Notice of Appeal Filed on March 7, 2025

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## **JURISDICTIONAL STATEMENT**

This is an appeal of a judgment filed on February 10, 2025, notice of entry of which was served on February 12, 2025. CR 539. On March 7, 2025, Defendant/Appellant F & K Assam Family, LLC (“F & K”) filed a Notice of Appeal. CR 550. Plaintiffs/Appellees Chris Rallis and Mark Weber (“Rallis & Weber”) filed a Notice of Review on March 24, 2025. F & K filed and served an Order for Transcript on March 13, 2025, which was endorsed by the court reporter on March 13, 2025. The transcript of the court trial was filed on July 1, 2025. This Court has jurisdiction pursuant to SDCL § 15-26A-3(1) (appeal from final judgment as a matter of right) and SDCL § 23A-32-9.<sup>1</sup>

## **STATEMENT OF THE LEGAL ISSUE**

- I. The trial court erred in concluding as a matter of law that title to the Disputed Area did not vest in F & K despite submission of clear and convincing evidence of adverse possession for a period in excess of 20 years which was not rebutted by any evidence from Rallis & Weber.

The trial court concluded that F & K’s assertion that it openly and notoriously occupied the Disputed Area for the statutory period was not supported by clear and convincing evidence. CR 514, Conclusion of Law No.7.

SDCL 15-3-12

SDCL 15-3-13

*Underhill v. Mattson*, 2016 S.D. 69, 886 N.W.2d 348

*City of Deadwood v. Summit, Inc.*, 2000 S.D. 29, 607 N.W.2d 22

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

*Jutting v. Hendrix*, 2000 S.D. 25, 606 N.W.2d 140

## **STATEMENT OF THE CASE**

On September 8, 2020, Rallis & Weber served a summons and complaint on F & K. CR 3, 4, and 8. Rallis & Weber asked the Court to determine adverse claims to the

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<sup>1</sup> For purposes of this brief, references are as follows: (1) “TT” designates the transcript of the court trial; (2) “TE” designates a trial exhibit; (3) “App” designates Appellant’s Appendix; and (4) “CR” designates the certified record.



subject property and quiet title in their favor. F & K filed an amended answer and counterclaims dated November 16, 2020. CR 23. In its counterclaims, F & K asserted title by adverse possession and acquiescence to boundary line to a strip of land located on the eastern boundary of the subject property. CR 23. F & K brought a motion for summary judgment (CR 40) which was denied. CR 187. A one day court trial was held on December 4, 2024. TT 1. Sam Assam testified on behalf of F & K on usage of the area in dispute from 1980 to date. Rallis & Weber provided no testimony or other evidence on use prior to 2003. The parties filed post-trial proposed Findings of Fact and Conclusions of Law and rebuttals. The trial court held in favor of Rallis & Weber on their claim to quiet title, and against F & K on its counterclaims for title to the Disputed Area by adverse possession or agreement.

The Judgment was filed on February 10, 2025. CR 537. Notice of entry was served on February 12, 2025. CR 539. On March 7, 2025, F & K timely filed a Notice of Appeal. CR 550. Rallis & Weber filed a Notice of Review on March 24, 2025. F & K filed and properly served an Order for Transcript on March 13, 2025, which was endorsed by the court reporter on March 13, 2025. The transcript of the court trial was filed on July 1, 2025.

### **STATEMENT OF FACTS**

F & K is the owner of a parcel of real property located in Minnehaha County, South Dakota, as described below (the “Assam Property”), *to wit*:

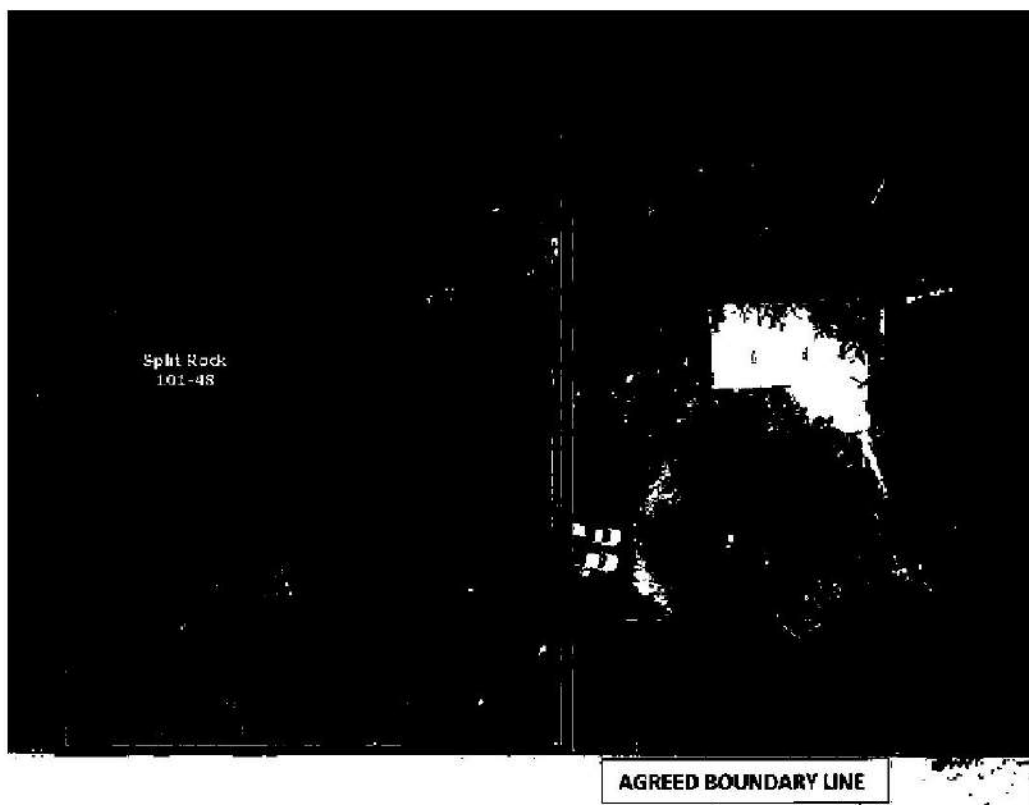
The Southeast Quarter of the Southeast Quarter (SE1/4 SE1/4) of Section 17, Township 101 North, Range 48 West of the 5th P.M., Minnehaha County, South Dakota, except the West 208.71 Feet of the East 928.71 Feet of the South 241.71 Feet thereof and except the West 168.01 Feet of the East 336.02 Feet of the South 259.29 Feet thereof, and except Professor’s 2nd Addition contained therein

Common Address: 9100 E. 10<sup>th</sup> Street, Split Rock Township, South Dakota, No. 01-23-17-400-003-000, all within Minnehaha County, State of South Dakota.

TE 100. Rallis & Weber are the owners of a parcel of real property located in Minnehaha County, South Dakota, as described below (the "Plaintiffs' Property"), *to wit*:

W 168.01' E 336.02' S 259.29' of the Southeast Quarter of the Southeast Quarter (SE1/4 SE1/4) of Section 17, Township 101 North, Range 48 West of the 5th P.M., Minnehaha County, South Dakota

TE 28. The land at dispute between the parties (the "Disputed Area") is an area between the eastern property line of Plaintiffs' Property as shown on surveys (TE 3 and 4) and a line running north south beginning one foot to the east of a well house as shown on TE 101 (TT 9-10, lines 8-25, 1; TT 12-13, lines 9-25, 1-7):



John Scollon was a former owner of both Plaintiffs' Property and the Assam Property. On March 31, 1980, John Scollon and other heirs of B.F. Scollon conveyed the Assam Parcel to Fred and Kay Assam. TE 100 at DEF 00005. Since 1980, the Assam

Property has been owned and used by Fred and Kay Assam, their children, or family trusts and entities. F & K is the current owner. TE 100, DEF 00026-40.

A house was located on the Assam Property at the time it was conveyed to Fred and Kay Assam in 1980. TT 139-140, lines 18-24, 1-3. The garage building was moved to the Assam Property in the 1980s by Fred Assam. TT 47, lines 4-20. The garage is located entirely on the Assam Property. There is a driveway which connects the garage and house on the Assam Property to the public highway. TT 145, lines 11-20, 146, lines 3-10.

Around the time of conveyance of the Assam Property, Scollon and Fred Assam agreed that the boundary line between their parcels was a straight line located one foot to the east of the existing wellhouse (the “Agreed Boundary Line”). TT, 10-11, lines 21-25, 1-5. The Agreed Boundary Line is shown on Trial Exhibit 101. TT 136-137, lines 22-25, 1-13. They, and the subsequent owners of the parcels, acted consistently with this agreement and understanding since 1980. The owners treated the Agreed Boundary Line as the line between the Assam Property and Plaintiffs’ Property. TE 33, ¶ 10. F & K and its predecessors in title possessed and used the Disputed Area as their own. *Id.* The use by F & K and its predecessors in title of the land up to and including the Agreed Boundary Line has been actual, open, visible, notorious, continuous, and hostile since 1980. Rallis & Weber did not present any evidence that contradicted Mr. Assam’s testimony about the agreement reached about the location of the boundary line between the parcels.

Sam Assam has been familiar with the Assam Property since it was purchased by his parents in 1980. TE 33, ¶ 6. He visited it regularly over the years. *Id.* Mr. Assam has managed the Assam Property since 1995. *Id.*; TT 141-2, lines 23-25, 1-9. His father Fred

Assam passed away in November, 1996. TT 141, lines 21-22. Mr. Assam testified that the owners of the Assam Property acted consistently with their understanding of the location of the Agreed Boundary Line and possessed and used the Disputed Area since the purchase of the Assam Property in 1980. TT 141, lines 1-20. These include various improvements, use, and maintenance. F & K and its predecessors in title did the following work since 1980 on the Assam Property, and on the Disputed Area up to the Agreed Boundary Line:

- A. Mowed regularly
- B. Weed control
- C. Snow plowing
- D. Storing of landscaping materials
- E. Stored vehicles, trailers, and equipment

TE 33, ¶ 13; TT 13, lines 8-24. Mr. Assam testified about maintenance, weed control, mowing, and storage of equipment since 1980 on the strip of grass to the west of the driveway, in the Disputed Area. TT 17, lines 1-17. The driveway was not a public road and has been used since 1980 exclusively to access the garage and house on the Assam Property. TE 33, ¶ 15.

The grass and other vegetation on the disputed area was cut and otherwise controlled and managed consistently with the location of the Agreed Boundary Line. TT 34-35, lines 25, 1-7. Mr. Assam and various tenants and hired men mowed the grass in the Disputed Area. TT 35, lines 8-24; TT 18, lines 8-18.

The driveway was maintained and improved exclusively by F & K and its predecessors in title since 1980. It was graded and gravel laid down as needed by F & K

and its predecessors in title. TT 42-43, lines 25, 1- 5; TE 33, ¶ 21. During the winter, since 1980, F & K and its predecessors in title and agents regularly and routinely plowed the driveway clear of snow to allow access to the garage and house, as well as stored items. When Mr. Assam was told by Rallis or Weber to remove trailers or other equipment parked in the Disputed Area, he would not remove them. TT 45, lines 10-23. Dave Arneson, a tenant of F & K, testified that he periodically put down gravel and plowed snow on the driveway since becoming a tenant around 2009. TT 122-123, lines 17-25, 1-25.

In sharp contrast, Rallis & Weber provided no evidence that they or the Scollons performed any maintenance or improvements to the Disputed Area. Rallis & Weber did not provide any testimony about use of the Disputed Area during the relevant time period (1980-2000). This is not surprising, since neither Rallis nor Weber had any personal knowledge of the subject properties prior to 2003, well after title to the Disputed Area had vested in F & K. TT 98, lines 3-17 (Rallis, knowledge since 2003); TT 128, lines 14-16, page 134, lines 2-4 (Weber, knowledge since 2007).

John Scollon and his wife Donna Scollon lived across the road and close to the subject properties, and would have regularly driven past the two properties. TT 15-16, lines 19-25, 1-15; TE 33, ¶ 23. The usage and maintenance of the properties consistent with the Agreed Boundary Line was clearly visible from the road, and visible to the owners of Plaintiffs' Property. *Id.* The use by F & K and its predecessor in title has been open since 1980. It was not concealed. F & K's possession and use was readily visible from the adjacent public highway. *Id.*

The prior owners of Plaintiffs' Property did not object to the location of the

Agreed Boundary Line or the use by the owners of the Assam Property of the Disputed Area. F & K did not bring an action to quiet title because it was unaware that there was a dispute over ownership of the Disputed Area. TT 28, 29, lines 13-17, 11-17. F & K and the prior owners of the Assam Property treated the land up to the Agreed Boundary Line as their own. TT 30, lines 5-10. They did not allow the general public to use the driveway or the land up to the Agreed Boundary Line. The prior owners of Plaintiffs' Property did not claim title or ownership of the land up the Agreed Boundary Line. TE 33, ¶ 26. They did not attempt to use the Disputed Area. *Id.*

Donna Scollon, the widow of John Scollon, sold the Plaintiffs' Property to Rallis & Weber on April 6, 2007. TE 28. Rallis and Weber did not claim title to the Disputed Area, maintain it, disagree with the location of the Agreed Boundary Line, or challenge in any way the use by F & K of the Disputed Area from the date they came into title in 2007 until several years after they purchased Plaintiffs' Property. TE 33, ¶ 28.

### STANDARD OF REVIEW

The legal conclusion of whether facts are sufficient to constitute adverse possession is an issue of law for this Court to review de novo. This Court has held that:

‘Proof of the individual elements of adverse possession present questions of fact for the [circuit] 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 S.D. 29, ¶ 9, 607 N.W.2d 22, 25 (quoting *Lewis v. Moorhead*, 522 N.W.2d 1, 3 (S.D.1994)). Therefore, the circuit court's factual findings are reviewed for clear error, and its legal conclusions are reviewed de novo.

*Underhill v. Mattson*, 2016 S.D. 69, ¶ 8, 886 N.W.2d 348, 352. “Conclusions of law are reviewed under a de novo standard, giving no deference to the circuit court's conclusions of law.” *City of Deadwood*, 2000 S.D. 29, ¶ 9. As stated in *Jutting v. Hendrix*, 2000 S.D. 25, ¶ 10, 606 N.W.2d 140, 142 (2000):

“[W]hether the facts ... are sufficient to constitute adverse possession is a question of law for the court to determine.” *Schultz v. Dew*, 1997 SD 72, ¶ 11, 564 N.W.2d 320, 322. This Court reviews questions of law under a de novo standard. *Paint Brush Corp. v. Neu*, 1999 SD 120, ¶ 15, 599 N.W.2d 384, 389.

*Id.* F & K provided sufficient un rebutted clear and convincing evidence to meet its burden to prove title to the Disputed Area by adverse possession.

## ARGUMENT

**I. The trial court erred as a matter of law in concluding that F & K failed to establish title to the Disputed Area through adverse possession despite F & K providing uncontested clear and convincing evidence of open, notorious, and hostile possession and use for the twenty year statutory period.**

It is proper for this Court to reverse the erroneous conclusion of law that F & K failed to present sufficient evidence to establish title to the Disputed Area by adverse possession. The trial court held that F & K failed to show through clear and convincing evidence that it openly and notoriously occupied the disputed land for the required time period. CR 514, Conclusion of Law No. 7. Under de novo review, the trial evidence shows that F & K met its burden to prove title to the Disputed Area through clear and convincing evidence. Importantly, Rallis and Weber submitted no evidence of use during the twenty year period 1980-2000. They did not submit any evidence to rebut the testimony of Mr. Assam regarding possession and use during the statutory period. Neither Rallis nor Weber had any personal knowledge of the subject properties prior to 2003, several years after title to the Disputed Area had vested in F & K. TT, page 98, lines 3-17 (Rallis, 2003); TT, page 128, lines 14-16, page 134, lines 2-4 (Weber, 2007). Mr. Weber confirmed that he had never been out to or observed the property prior to 2007. TT 128, lines 14-16. Mr. Rallis never spoke to Ms. Scollon prior to 2003, and never spoke with Fred or Kay Assam. TT 98-99, lines 18-25, 1.

The elements for adverse possession are defined in SDCL 15-3-12 and by this



Court as follows:

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; *Titus v. Chapman*, 2004 S.D. 106, ¶ 27, 687 N.W.2d 918, 925. As the parties asserting adverse possession, Defendants have the burden of establishing these elements by clear and convincing evidence. *Summit*, 2000 S.D. 29, ¶ 15, 607 N.W.2d at 26.

*Underhill v. Mattison*, 2016 S.D. 69, ¶ 11, 886 N.W.2d 348, 352; *see also City of Deadwood v. Summit, Inc.*, 2000 S.D. 29, ¶ 16, 607 N.W.2d 22, 26 (noting “[t]he traditional elements of adverse possession require the ‘actual, open, visible, notorious, continuous and hostile’ occupation of the property for the statutory period.”).<sup>2</sup> A claimant must establish that its occupation of a parcel is open and notorious. “The purpose of this element is to give the record owner notice of the occupation. ‘[T]he adverse use must be made in such a way that a reasonably diligent owner would learn of its existence, nature, and extent.’ Notably, this standard is an objective one.” *Underhill*, ¶ 15 (citations omitted). *Lewis v. Moorhead*, 522 N.W.2d 1 (S.D. 1994) noted:

We have 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.

*Id.* at 5 (citations omitted). A claimant can “tack” its claim of adverse possession to similar claims of prior owners. *Underhill*, ¶ 16. The claimant must show either substantial enclosure or cultivation or improvement of the subject land, as noted in *Cuka v. Jamesville Hutterian Mut. Soc.*, 294 N.W.2d 419 (S.D. 1980):

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<sup>2</sup> The trial court included factual findings related to the area of the Plaintiffs’ Property. Findings, ¶¶ 10, 12. The reduction in the size of Plaintiffs’ Property which would result if title to the Disputed Area was confirmed in F & K is irrelevant under adverse possession law. The potential effect on the respondent owner is not a factor under either SDCL 15-3-12 or case law.



Under SDCL 15-3-13 a person may claim title to property which he has adversely held, even though he does not have claim to said title upon a written instrument. 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. SDCL 15-3-10. 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. SDCL 15-3-12.

*Id.* at 422. As these are stated in the disjunctive in the statute, “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. Mowing, landscaping, or addition of gravel to a driveway is an improvement under SDCL 15-3-13 (2):

We have explicitly held that “regular mowing of the property constitutes cultivation under SDCL 15-3-13 (2).” *Lewis v. Aslesen*, 2001 S.D. 131, ¶ 8, 635 N.W.2d 744, 747. We have also explicitly held that “landscaping is an improvement to land under SDCL 15-3-13(2).” *Id.*; see also *Schultz v. Dew*, 1997 S.D. 72, ¶ 15, 564 N.W.2d 320, 324 (recognizing the addition of gravel to a driveway as an improvement).

*Underhill*, 2016 S.D. 69 at ¶ 13, 353. Clearing of debris and regular mowing qualify as improvements to the land under the statute. *Jutting*, 2000 S.D. 25, ¶ 11, 606 N.W.2d at 142. F & K provided uncontested evidence of mowing, weed control, addition of gravel to the driveway and other visible improvements to the Disputed Area.

South Dakota recognizes the doctrine of acquiescence to enforce an agreed-upon boundary line. As held in *City of Deadwood*, 2000 S.D. 29, 607 N.W.2d 22:

In South Dakota, if the landowner can show both adjoining property owners mistakenly believed in the location of a boundary line, the element of hostility will be satisfied for purposes of a claim of adverse possession.

*Id.* at ¶ 23. The 20 year possessory requirement must still be established. *Id.* Rallis and Weber provided no evidence to contradict Mr. Assam’s testimony about the agreement reached between Mr. Scollon and Fred Assam confirming their understanding of the

location of the boundary line between their parcels, or about the decades of possession, use, and maintenance of the Disputed Area consistent with their agreement.

F & K presented evidence at trial that proved (1) an occupation of the Disputed Area that was (2) open and notorious, (3) continuous for well over the twenty year statutory period, and (4) under a claim of title exclusive of any other right. It is proper for this Court to reverse the legal conclusion of the trial court.<sup>3</sup>

**a. The uncontested evidence confirms that F & K possessed, occupied, and used the Disputed Area from 1980 to date.**

The evidence established that F & K and its predecessors in title used, improved, maintained, and occupied the Disputed Area up to the Agreed Boundary Line since 1980. Testimony by Mr. Assam showed that the owners of the Assam Property acted consistently with their understanding of the location of the agreed boundary line from 1980 onwards. These include various improvements and maintenance as detailed above. The evidence shows that F & K and its predecessors in title did the following since 1980 on the Disputed Area up to the Agreed Boundary Line:

- A. Mowed regularly
- B. Weed control
- C. Snow plowing
- D. Storing of landscaping materials

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<sup>3</sup> Any argument by Rallis & Weber that they somehow regained title to the Disputed Area from F & K through payment of taxes under SDCL 15-3-15 does not apply here. SDCL 15-3-15 requires both possession of the property at issue and payment of real property taxes. Rallis & Weber have not had possession of the Disputed Area for a period of ten years or for any time. As noted, Rallis & Weber did not present any evidence that they mowed, snow plowed, performed any maintenance, storage, or any evidence to show that they occupied or possessed the Disputed Area. Further, Rallis & Weber did not plead in their Complaint that title to the Disputed Area somehow vested in them under SDCL 15-3-15

E. Stored vehicles, trailers, and equipment

F. Maintained the driveway through grading and application of gravel

The driveway, house, and various other improvements have been part of and utilized by F & K and its predecessors in title for well over 20 years. The grass and other vegetation on the Disputed Area was cut and otherwise controlled and managed consistent with the location of the Agreed Boundary Line. Further, the driveway was maintained and improved exclusively by F & K and its predecessors in title and their tenants since 1980. It was graded and gravel laid down as needed by F & K and its predecessors in title.

TE ¶ 21. During the winter, since 1980, F & K and its predecessors in title and agents regularly and routinely plowed the driveway clear of snow to allow access to the garage and house, as well as stored items. TE ¶ 22. Mr. Assam testified that farm equipment was stored on the Disputed Area by F & K and its predecessors in title, including a cultivator, tractors, and trailers. TT 145, lines 6-10. Mr. Rallis agreed that F & K's tenants plowed the driveway. TT 105, lines 14-18. Mr. Assam provided clear and convincing testimony regarding the regular mowing and other maintenance and improvements performed during the statutory 20 year period and beyond, at trial and in his Affidavit which was submitted by Rallis & Weber as a trial exhibit. TE 33.

In contrast, Rallis & Weber did not provide any testimony that they performed any maintenance, snow plowing, mowing, adding gravel, or performed any work on the driveway. They did not provide any evidence to contradict F & K's evidence of use from 1980. There is no evidence that the Scollons performed any maintenance, snow plowing, adding gravel or other work on the driveway, mowing, storage of items, or any other work or otherwise occupied the Disputed Area. Mr. Weber testified that he never mowed,

snow plowed, or stored anything in the Disputed Area, and never maintained or repaired the driveway. TT 134, lines 8-25. Mr. Rallis testified that he never put down any gravel or snowplowed the driveway and did not do any weed control. TT 103-104, lines 25, 1-10. Mr. Rallis has never mowed the Disputed Area. TT 105, lines 1-13.

Rallis & Weber provided no evidence to contradict the clear evidence of mowing, plowing, and other use and improvements by F & K and its predecessors in title during the time frame 1980 to 2000, the relevant time frame for vesting title by adverse possession. In fact, Rallis & Weber have no knowledge of either property prior to 2003, years after title to the Disputed Area had vested in F & K. Mr. Rallis was not aware of any agreements between John Scollon and Fred Assam. TT 106, lines 21-23. Rallis & Weber failed to present any evidence to contradict the testimony of Mr. Assam regarding the location of the Agreed Boundary Line. As testified by Mr. Arneson, Mr. Rallis thought that the boundary line was actually at an angle across Plaintiffs' Property, as shown on Exhibit 15 to Mr. Arneson's deposition. TE 36, pages 17, lines 11-25; 34-36, lines 22-25, 1-25, 1-25. The boundary line described by Mr. Rallis to Mr. Arneson is drawn on Exhibit 15 to his deposition. *Id.*

Rallis & Weber relied on various aerial photographs of the properties at trial. *See* Exhibits 5-9. None of these aerial photographs were taken in the time frame 1980-2000. Title to the Disputed Area vested in F & K and its predecessors in title in 2000, twenty years after its purchase of the Assam Property and commencement of the adverse possession of the Disputed Area. Thus, the photographs are not relevant. In addition, the photos show only a single time point during a year, and are generally unclear. They were insufficient to rebut the testimony of Mr. Assam regarding use of the Disputed Area.

The trial court noted that photographs suggested that the driveway was enlarged to encroach on Plaintiffs' property sometime after 2008. Findings, ¶ 22. While F & K does not agree that this Finding is supported by the photographs, this is not relevant. All of the photographs submitted as trial exhibits by Rallis & Weber were taken after 2002, which is subsequent to title vesting in F & K in 2000. TE 5-9.<sup>4</sup> Further, F & K's claim to title by adverse possession is not based on the location of the driveway. The Disputed Area is bounded on one side by a north to south line one foot to the east of the well house to the eastern boundary line located by Rallis & Weber's surveyor. F & K has not asserted that the driveway was located on or created a boundary line. There has always been a grass strip between the driveway and the Agreed Boundary Line. Any variations in the width of the driveway over time did not alter the dimensions of the Disputed Area. F & K provided clear and convincing evidence that F & K and its predecessors in title used, improved, maintained, and occupied the Disputed Area since 1980.

**b. F & K's possession and use of the Disputed Area was open and notorious from 1980 to date.**

F & K's use was visible to the Scollons, Rallis & Weber, and the public. TT 146, lines 15-19. This was not contested at trial. The use was never concealed. TT 146, lines 20-22. Mr. Rallis testified that the Disputed Area is visible from the road. TT 109, lines 5-16. Rallis & Weber did not contest, and did not present any evidence to contradict, that the possession and use of the Disputed Area by F & K and its predecessors in title was open and notorious. As with other elements, Rallis & Weber did not present any evidence of use from 1980 to 2003, as they had no personal knowledge of the properties.

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<sup>4</sup> The trial court erroneously references an Exhibit 103 which was not offered or admitted at trial. Findings, ¶ 22, TT 148-9, lines 25, 1-5.

**c. F & K established that adverse possession and use was continuous for well over the twenty year statutory period.**

As set forth above, Mr. Assam provided detailed testimony at trial and in his affidavit about use of the Disputed Area by F & K and its predecessors in title for well over twenty years. Rallis & Weber provided no evidence to contradict Mr. Assam's testimony of uninterrupted use from 1980 until 2000, the statutory period (and beyond). Mr. Assam's testimony about possession and use for the twenty year period was uncontested.

**d. F & K presented uncontested evidence that its possession and use was exclusive of any other right claimed by others.**

As noted above, F & K presented detailed evidence of its possession and use of the Disputed Area, and that Rallis and Weber and their predecessors in title did not possess or use the Disputed Area. The uncontested evidence shows that F & K and its predecessors in title used the Disputed Area as if they owned the property and that they reasonably believed that they owned the Disputed Area, consistent with the location of the Agreed Boundary Line. The driveway is not a public road. TT 146, lines 3-7.

The fact that the various deeds related to the Assam Property did not include title to the Disputed Area is a red herring. F & K asserts title to the Disputed Area under SDCL 15-3-12 through adverse possession for the required time period. It does not claim ownership of the Disputed Area under color of title pursuant to SDCL 15-3-11. As noted in *Lewis v. Moorhead*, 522 N.W.2d 1 (S.D. 1994):

These sections do not require any written instrument or "color of title" in order to claim adverse possession. All that is required is that the portion of the land which is claimed has been actually and continuously occupied by the adverse party.

*Id.* at 4 (referencing SDCL 15-3-12 and 13) (citations omitted). The evidence submitted by F & K met its burden to show actual and continuous use of the Disputed Area.

## CONCLUSION

Based on the foregoing, the erroneous conclusion of law of the trial court is properly reversed, and judgment entered in favor of F & K holding that it is the owner of all right, title, and interest in the Disputed Area, to the exclusion of any rights claimed by Rallis & Weber.

Dated: August 27, 2025.

Respectfully submitted,

/s/Patrick C. Summers

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## CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), the undersigned certifies that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 365, features Times New Roman (12 point) font, and contains a total of 5,041 words, excluding the table of contents, table of authorities, and certificates of counsel. The undersigned has relied on the word and character count of the word-processing program to prepare this certificate.

Dated: August 27, 2025.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 27th day of August 2025, a true and correct copy of the foregoing Appellant's Brief was electronically filed and served via Odyssey File and Serve upon the following, with an original mailed to the clerk of the Supreme Court at 500 East Capitol Avenue, Pierre, South Dakota 57501.

Mark D. O'Leary  
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Sioux Falls, SD 57105-6864  
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*Attorneys for the Appellees Chris Rallis & Mark Weber*

Dated: August 27, 2025.

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## APPENDIX

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SDLRC - Codified Law 15-3-13 - Acts constituting adverse possession under claim other than written instrument or judgment .....	App 012
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STATE OF SOUTH DAKOTA  
COUNTY OF MINNEHAHA

IN CIRCUIT COURT  
SECOND JUDICIAL DISTRICT

Chris Rallis & Mark Weber,

49CIV20-002603

Plaintiffs,

v.

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

F & K Assam Family, LLC,

Defendant.

The above-entitled matter came on for a court trial before the undersigned Honorable Douglas E. Hoffman, Judge of the Circuit Court, on December 4, 2024. Plaintiffs Chris Rallis & Mark Weber were represented by Mark O'Leary and Katie E. O'Leary of O'Leary Law Office. Defendant F & K Assam Family, LLC was represented by Patrick C. Summers of DeWitt LLP.<sup>1</sup> Based on the pleadings on file, testimony, exhibits, stipulations, and evidence introduced at trial, and following proposals and objections being submitted by both Plaintiffs and Defendant, the Court now makes and enters the following Findings of Fact and Conclusions of Law.

**Findings of Fact**

1. Defendant F & K Assam Family, LLC ("Assam") is the owner of a parcel of real property located in Minnehaha County, South Dakota, as described below (the "Assam

<sup>1</sup> Attorney Clint Sargent of the Meierhenry Sargent LLC firm was present at the start of trial as local counsel for Plaintiff, as attorney Summers appeared pro hac vice. The Court released attorney Sargent from attendance, without objection.

Property"). The common address is 9100 E. 10<sup>th</sup> Street, Split Rock Township, Sioux Falls, Minnehaha County, South Dakota. (Ex.<sup>2</sup> 100, at DEF 00005).

2. The legal description of the Assam property is: Southeast Quarter of the Southeast Quarter (SE1/4 SE1/4) of Section 17, Township 101 North, Range 48 West of the 5<sup>th</sup> P.M., Minnehaha County, South Dakota, except the West 208.71 Feet of the East 928.71 Feet of the South 241.71 Feet thereof and except the West 168.01 Feet of the East 336.02 Feet of the South 259.29 Feet thereof, and except Professor's 2nd Addition contained therein. (Ex. 100, at DEF 00005, emphasis added).
3. On March 31, 1980 John Scollon and other heirs of B.F. Scollon conveyed the above-described Property to Fred and Kay Assam. (Ex. 100, at DEF 00005).
4. Since 1980, the Assam Property has been owned and used by Fred and Kay Assam, their children, or family trusts and entities. Defendant F & K Assam Family, LLC is the current owner of the Assam property. (Ex. 100, at DEF 26 thru 33).
5. Despite repeated conveyances of the Assam Property from 1980 up to 2001 when F & K Assam Family, LLC came into ownership, the property's legal description has never included any portion of the "disputed area." (Ex. 27 & 29).
6. In 2003, Plaintiff Chris Rallis and his wife Susan Rallis were granted a First Option to purchase an approximate one-acre lot on the north side of 10<sup>th</sup> Street owned at that time by Donna Scollon, widow of John Scollon. (Ex. 1 & 2).
7. The legal description of Plaintiff's lot reads: "W 168.01' E 336.02' S 259.29' of the Southeast Quarter of the Southeast Quarter (SE1/4 SE1/4) of Section 17, Township 101 North, Range 48 West of the 5<sup>th</sup> P.M., Minnehaha County, South Dakota." Plaintiff's

---

<sup>2</sup> Reference is to trial exhibits.

property is the except property in the Assam property legal description set out in Finding of Fact No. 2 above.

8. The parties stipulated that the area of land in dispute (“**disputed land**”) is the area between the eastern property line appearing on the land surveys (Ex. 3 & 4) and the Assam claim of the eastern boundary line being agreed to as a line running north-south beginning one foot east of the wellhouse, as shown on Trial Exhibit 101. No evidence was offered to define the “disputed land” by survey or other specifications.
9. Plaintiffs Rallis and Weber purchased the above-described approximately one-acre lot from Ms. Scollon in April 2007. (Ex. 28 & 30).
10. Plaintiffs’ parcel, including the disputed land which is the subject of this action, is slightly greater (26 sq ft) than one acre.
11. The Assam property borders Plaintiff’s property on the west, north, and east sides.
12. Rallis’ uncontroverted testimony was that Minnehaha County mandates a minimum of one acre to construct a residence in this rural area.
13. Samuel Assam testified he was told by his father, Fred Assam, that John Scollon had expressed the desire to retain ownership of the lot on the north side of 10<sup>th</sup> street (the lot which is the subject of this action) in case his son wanted to build a house on the lot, and this was the reason why that one-acre parcel was excepted from the 1980 land sale between Scollon’s and Assam’s.
14. Plaintiff’s property was improved with construction of a wellhouse prior to Plaintiff’s purchase. The property is otherwise a vacant lot that would not have required snow removal or mowing.
15. Samuel Assam testified at trial that he has been familiar with the Assam Property

since it was purchased by his parents in 1980. Assam has managed the Assam Property since 1995. His father Fred Assam passed away in November 1996.

16. Defendant's claim to the disputed land is predicated upon Sam Assam's testimony that his Father Fred Assam told Sam Assam long ago that Fred Assam and John Scollon had agreed at the time of the sale of the Assam Property in 1980 that the boundary line between the Assam Property and the acre lot retained by Mr. Scollon was one foot east of the wellhouse, and that, based upon that understanding and agreement, for more than twenty years thereafter, the Defendant and its predecessors exercised open and notorious dominion and control over the disputed land, and thus established adverse possession of it.
17. Defendant claims that the disputed land was open and notoriously possessed by it and its predecessors since 1980 by mowing the grass and weeds on it, parking vehicles on it, allowing a gravel driveway to accrete onto it through regular vehicle travel, and maintaining the ever-encroaching driveway by periodically grooming it with gravel supplementation and snow removal. No evidence was provided to the Court to substantiate the extent, frequency or cost of said mowing, grooming or parking of vehicles.
18. Plaintiffs have paid the taxes on the Plaintiffs' parcel, including the disputed land, from 2007 to the present, as set forth in the Minnehaha County Payment History for Plaintiff's parcel. This evidence is consistent with the testimony of Chris Rallis that he and Mark Weber have paid the taxes on their property since their purchase of the lot in 2007. (Ex. 26).
19. Samuel Assam admitted in response to Request for Admission No. 3 (Ex. 32) that Defendant has never paid real estate taxes on Plaintiff's parcel, and there was no evidence offered at

trial that any of the Assam owners paid real estate taxes on Plaintiff's property.

20. Samuel Assam testified that since the purchase of the Assam Property in 1980, the owners of the Assam Property, or their tenants, have mowed the disputed area, regularly controlled weeds, plowed snow off the driveway, and stored equipment. However, beyond Mr. Assam's general testimony, the Defendant offered little corroborating evidence as to the nature or extent of the same.
21. David Arneson testified that he had periodically put down gravel and plowed snow on the driveway since becoming a tenant on the Assam property in 2009.
22. Samuel Assam testified that the driveway from East 10<sup>th</sup> Street has been located at its current location since before 1980, but photographic images of the location of the driveway suggest only that the driveway was enlarged to encroach on the Plaintiff's property sometime after 2008. (Ex. 5 thru 10, 102, 103). There was no corroborating evidence that the driveway was enlarged onto Plaintiff's land during the period 1980 to 2000.
23. Arneson testified that when he moved onto the property he was not told where the boundary line was located. (Dep. P. 12, Line 1).
24. Samuel Assam testified that the four-car garage building was moved to the Assam Property in the 1980s by Fred Assam. The western wall of the garage is located east of the disputed land, entirely on the Assam property. (Ex. 6, 7, 8).
25. Chris Rallis testified that since he and Mr. Weber purchased the property in 2007, Plaintiffs regularly demanded that Defendant and its renters remove trespassing vehicles and other materials from the Plaintiffs' property.
26. David Arneson testified any mowing he undertook on the Plaintiffs' land to the west of the wellhouse was gratuitous because he wanted to minimize the presence of "critters."

27. Rallis testified that the present approach and driveway encroaches on Plaintiff's land by approximately 18 feet. (Ex. 10 thru 14).
28. Any Finding of Fact more properly designated as a Conclusion of Law shall be considered as such.

### Conclusions of Law

1. F & K have the burden of proving adverse possession by clear and convincing evidence.  
*Mohnen v. Estate of Mohnen*, 2024 S.D. 35, ¶ 19, 9 N.W. 3d 481, 486.
2. Evidence is *clear and convincing* if it is "so clear, direct, weighty, and convincing as to enable a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in enable either a judge issue." *Irvine v. City of Sioux Falls*, 2006 S.D. 20, ¶ 9, 711 N.W. 2d 607, 610.
3. 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; Titus v. Chapman*, 2004 S.D. 106, ¶ 27, 687 N.W.2d 918, 925. These elements may be demonstrated in cases involving substantial enclosure, cultivation or improvement of the subject land for a period of at least 20 years, as noted in *Cuka v. Jamesville Hutterian Mut. Soc.*, 294 N.W.2d 419 (S.D. 1980).
4. Under SDCL 15-3-13 a person may claim title to property which he has adversely held, even though he does not have claim to said title upon a written instrument. 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. SDCL 15-3-12.



5. Regular mowing can be considered as cultivation, and significant landscaping can constitute substantial improvement of property, depending upon the facts and circumstances that are proven by clear and convincing evidence in a particular case:

We have explicitly held that “regular mowing of the property constitutes cultivation under SDCL 15–3–13(2).” *Lewis v. Aslesen*, 2001 S.D. 131, ¶ 8, 635 N.W.2d 744, 747. We have also explicitly held that “landscaping is an improvement to land under SDCL 15–3–13(2).” *Id.*; see also *Schultz v. Dew*, 1997 S.D. 72, ¶ 15, 564 N.W.2d 320, 324 (recognizing the addition of gravel to a driveway as an improvement).

*Underhill*, 2016 S.D. 69 at ¶ 13, 353. Clearing of debris and regular mowing qualify as improvements to the land under the statute. *Jutting*, 2000 S.D. 25, ¶ 11, 606 N.W.2d at 142.

6. Occupation by agreement is not *adverse* because it is not *hostile*. However, South Dakota recognizes the doctrine of acquiescence to enforce an agreed-upon boundary line. As held in *City of Deadwood v. Summit*, 2000 S.D. 29, 607 N.W.2d 22:

In South Dakota, if the landowner can show both adjoining property owners mistakenly believed in the location of a boundary line, the element of hostility will be satisfied for purposes of a claim of adverse possession.

*Id.* at ¶ 23.

7. All potential avenues or elements of proof for an adverse possession claim are conditioned upon the burden of clear and convincing evidence. Defendant’s assertion that it has openly and notoriously occupied the disputed land for the proscribed period under *SDCL 15-3-12* is not supported by clear and convincing evidence. While there is some evidence of acquiescence, cultivation, and improvement, the nature and extent of the same is too vague. The hearsay withing hearsay statements regarding the allegedly agreed boundary line conversation of 1980, if it ever happened at all, may have been relating to a permissive use rather than a misunderstanding as to the precise location of the actual surveyed boundary. The photographic evidence doesn’t prove accretion of the driveway into the disputed land until sometime between 2007 and 2015. Testimony of the owner’s

son or a tenant occasionally mowing of the grassy area of the disputed land for pest control or using it for occasional overflow parking of farm vehicles is vague and unquantified. In total, Defendant's evidence lacks the clarity, weight and overall probative force necessary to meet the high burden required to establish title through adverse possession. The evidence herein is insufficient to constitute *clear and convincing* evidence of open, hostile and notorious adverse possession.

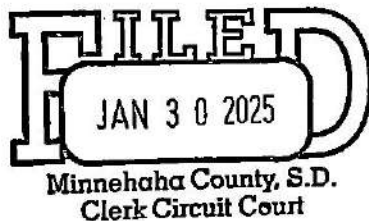
8. Plaintiffs are and remain the owner of the land according to the legal description in their deed.
9. Judgment shall be entered accordingly.

Dated: January 30, 2025.

  
DOUGLAS E. HOFFMAN  
CIRCUIT COURT JUDGE

ATTEST: Karla Kalb, Clerk

By  Deputy



STATE OF SOUTH DAKOTA  
COUNTY OF MINNEHAHA

IN CIRCUIT COURT  
SECOND JUDICIAL CIRCUIT

Chris Rallis & Mark Weber,

Plaintiffs,

v.

F & K Assam Family, LLC,

Defendant.

49CIV20-002603

***Judgment***

This action came on for trial to the Court on December 4, 2024. Mark D. O’Leary and Katie E. O’Leary appeared on behalf of the Plaintiffs. Patrick C. Summers (*Pro Hac Vice*) and Clint Sargent appeared for the Defendant. The trial to the court was held on December 4, 2024, with each party presenting testimony and exhibits. Based on the pleadings on file, testimony, exhibits, stipulations, evidence introduced at trial, and the parties proposals and objections, this Court entered its Findings of Fact and Conclusions of Law which are incorporated herein by this reference. In accordance with such Findings and Conclusions it is hereby

ORDERED, that the Plaintiffs are and remain the owner of the land made the subject of this action according to the legal description in their deed; and it is further,

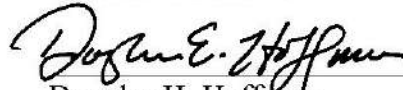
ORDERED, that the Defendant shall remove all of the driveway gravel, landscaping materials, debris, or other material or objects that encroach upon the land of the Plaintiffs not later than April 30, 2025.

ORDERED that immediately *upon entry* of this judgment Defendant shall ensure that their tenants or others acting on Defendants behalf are informed of the precise location of the eastern property line between the land of these parties and that any trespass or encroachments shall not be allowed by order of this court; and it is further,

ORDERED that upon timely application the Plaintiff's shall have and recover from the Plaintiffs a judgment for costs and disbursements pursuant to SDCL 15-6-54(d) and SDCL 15-17-37 in an amount to be docketed by the court.

**2/10/2025 9:47:27 AM**

BY THE COURT:



Douglas H. Hoffman  
Circuit Court Judge

Attest:  
Patzner, Sarah  
Clerk/Deputy



**15-3-12. Actual occupation required for adverse possession under claim other than written instrument or judgment.**

Where it shall appear that there has been an actual continued occupation of premises under a claim of title exclusive of any other right, but not founded upon a written instrument, or a judgment, or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely.

**Source:** SDC 1939 & Supp 1960, § 33.0223.

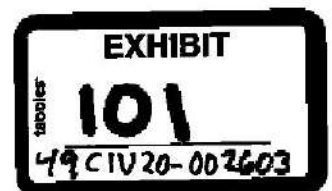
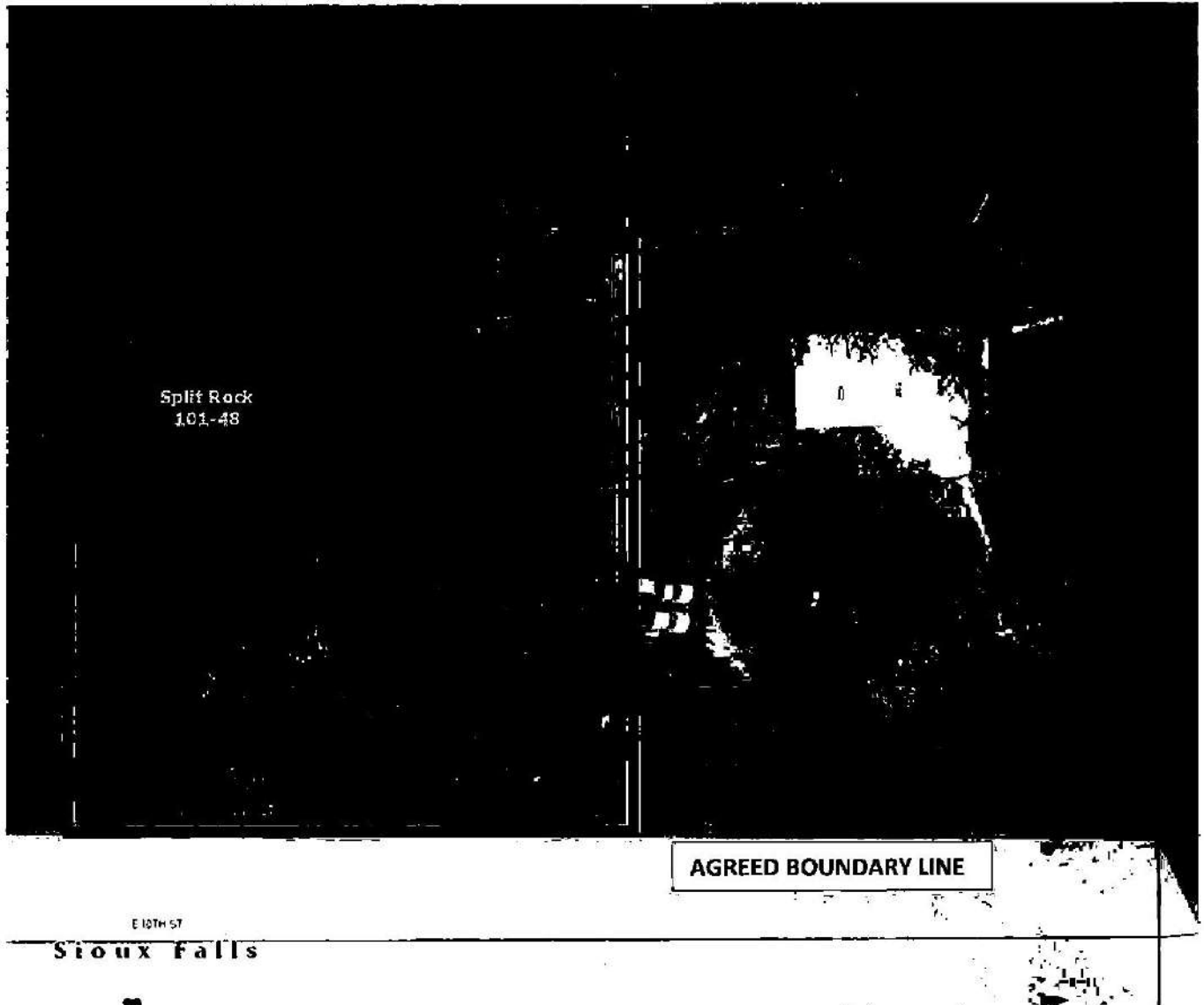
**15-3-13. Acts constituting adverse possession under claim other than written instrument or judgment.**

For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, or judgment, or decree, land 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.

**Source:** SDC 1939 & Supp 1960, § 33.0224.

EXHIBIT B



STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF MINNEHAHA

SECOND JUDICIAL DISTRICT

Chris Rallis & Mark Weber,

Court File No. 49CIV20-002603

Plaintiffs,

v.

**AFFIDAVIT OF SAMUEL R. ASSAM IN  
SUPPORT OF MOTION FOR SUMMARY  
JUDGMENT**

F & K Assam Family, LLC,

Defendant.

STATE OF SOUTH DAKOTA     )  
  ) ss.  
COUNTY OF MINNEHAHA     )

Samuel R. Assam, being first duly sworn on oath, deposes and states as follows:

1. I am the Chief Manager for Defendant F & K Assam Family, LLC ("F & K"). I have firsthand or personal knowledge of the facts stated herein, except only for those stated on information and belief, all of which I believe to be true.

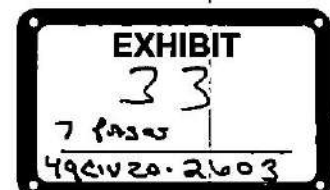
2. F & K is the owner of a parcel of real property located in Minnehaha County, South Dakota, as described below (the "Assam Property"), Record ID 10404:

**Legal Description of Assam Property**

Common Address: 9100 E. 10<sup>th</sup> Street, Split Rock Township, South Dakota  
No. 01-23-17-400-003-000

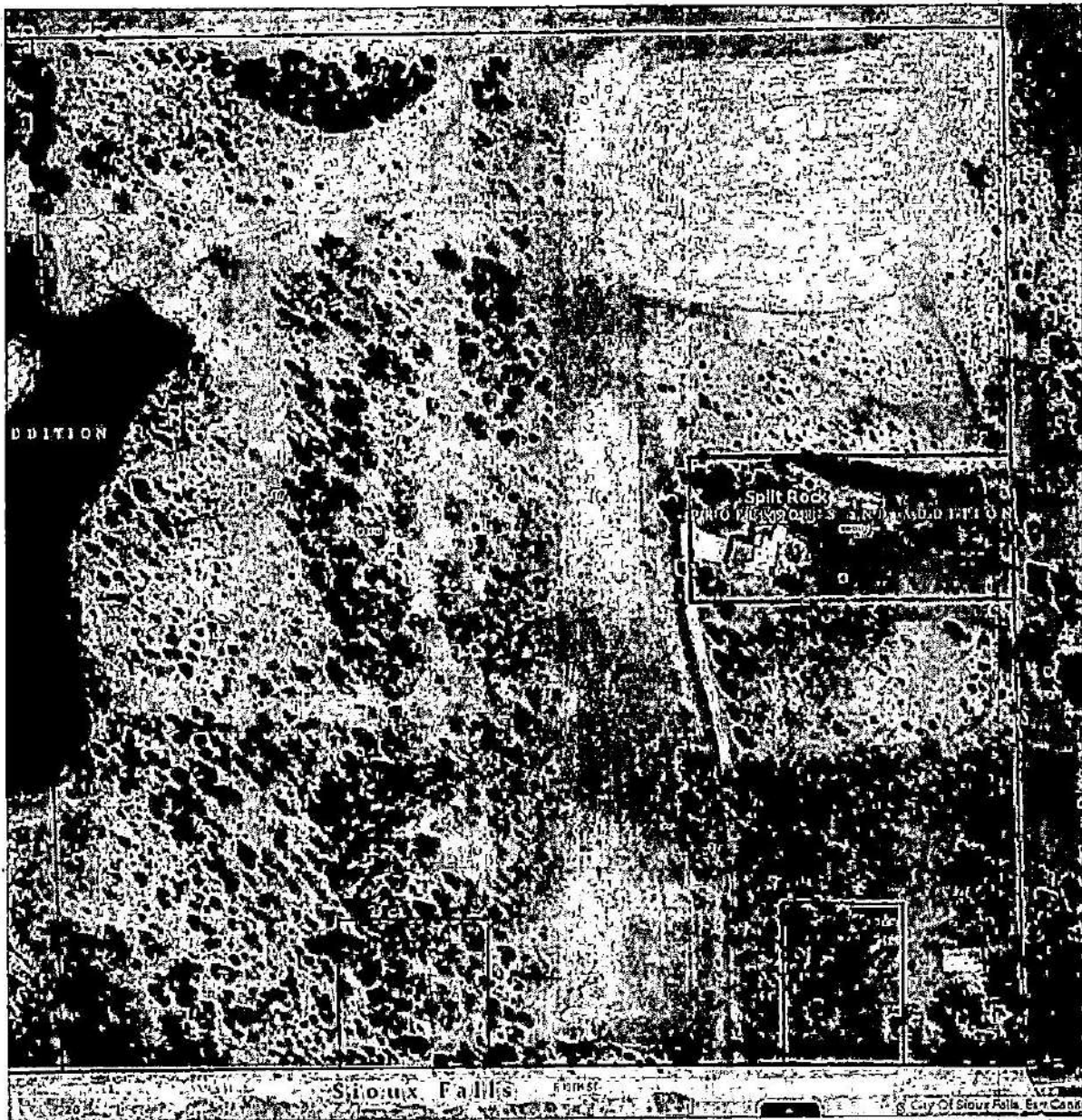
The Southeast Quarter of the Southeast Quarter (SE1/4 SE1/4) of Section 17, Township 101 North, Range 48 West of the 5th P.M., Minnehaha County, South Dakota, except the West 208.71 Feet of the East 928.71 Feet of the South 241.71 Feet thereof and except the West 168.01 Feet of the East 336.02 Feet of the South 259.29 Feet thereof, and except Professor's 2nd Addition contained therein

All within Minnehaha County, State of South Dakota





3.. The property now owned by Plaintiffs which is subject to this suit is believed to be less than one acre in size and is surrounded on three sides by the Assam Property, with the remaining boundary of Plaintiffs' Property being East 10<sup>th</sup> Street. Below are two aerial photographs of the properties, taken from the Minnehaha County GIS database:





The first photograph shows the entire Assam Property, with Plaintiffs' Property located near the southeast corner of the Assam Property. The second photograph is a close up of Plaintiffs' Property and the relevant portion of the Assam Property.

4. The Assam Property has been owned, used, and controlled by Fred and Kay Assam, or their children or family trusts and entities since 1980.

5. F & K is the current owner of the Assam Property. Attached as Exhibit A to my Affidavit are true and correct copies of deeds which establish the chain of title from Fred and Kay Assam through and to F & K.

6. I have been closely familiar with the Assam Property since it was purchased by my parents in 1980. I have visited it regularly over the years. I have managed the Assam Property since 1995. My father Fred Assam passed away in November, 1996.

7. The adjacent Plaintiffs' Property is and has been at all relevant times vacant and unimproved.

8. I understand that John Scollon was a former owner of both Plaintiffs' Property and the Assam Property.

9. John Scollon and other heirs of B.F. Scollon conveyed the Assam Property to Fred and Kay Assam in 1980. *See* Exhibit A, pages DEF 00001-00009. Fred and Kay Assam are my late parents.

10. At the time of conveyance of the Assam Property, Scollon and Fred Assam agreed that the boundary line between their parcels was a straight line located a foot to the east of the existing wellhouse (the "Agreed Boundary Line"). I was personally aware of this agreement and understanding. The Agreed Boundary Line is marked on Exhibit B to my Affidavit. They, and the subsequent owners of the 2 parcels, acted consistently with this agreement and understanding since 1980. The owners have treated the Agreed Boundary Line as the line between the Assam Property and Plaintiffs' Property.

11. F & K and its predecessors in title have paid real estate taxes on the Assam Property from 1980 to date. The GIS system utilized by the County shows tax parcel boundary lines consistent with the Agreed Boundary Line.

12. The use by F & K and its predecessors in title of the land up to and including the Agreed Boundary Line has been actual, open, visible, notorious, continuous, and hostile since 1980.

13. Since the purchase of the Assam Property in 1980, the owners of the Assam Property have acted consistently with their understanding of the location of the Agreed Boundary Line.

These include various improvements and maintenance. F & K and its predecessors in title did the following, since 1980, on the Assam Property, as well as the Disputed Area up to the Agreed Boundary Line:

- A. Mowed regularly
- B. Weed control
- C. Snow plowing
- D. Storing of landscaping materials
- E. Stored vehicles, trailers, and equipment

14. The portion of the Assam Property adjacent to the Plaintiffs' Property contains a house and a four stall garage with a driveway connecting to East 10<sup>th</sup> Street, among other improvements.

15. The driveway from East 10<sup>th</sup> Street has been located at its current location since before 1980. The driveway is not a public road. It is and has been used for many years exclusively for access to the house and garage on the Assam Property.

16. The driveway, house, and various other improvements have been part of and utilized by the owners of the Assam Property and disputed area for well over 20 years.

17. The house was on the Assam Property at the time it was conveyed to Fred and Kay Assam in 1980. It is believed that John Scollon's father lived in the house, which was constructed many years ago.

18. The four car garage building was moved to the Assam Property in the 1980s by Fred Assam, and placed on a new foundation, where it remains to this day.

19. Since purchase in 1980, the owners of the Assam Property regularly mowed the grass, stored trailers, vehicles, various pieces of equipment and other items, and otherwise used the

property openly from 1980 to date up and consistent with the location of the Agreed Boundary Line.

20. The grass and other vegetation on the disputed area was cut and otherwise controlled and managed consistent with the location of the Agreed Boundary Line.

21. The driveway was maintained and improved exclusively by F & K and its predecessors in title since 1980. It was graded and gravel laid down as needed by F & K and its predecessors in title.

22. During the winter, since 1980, F & K and its predecessors in title and agents regularly and routinely plowed the driveway clear of snow to allow access to the garage and house, as well as stored items.

23. John Scollon and his wife Donna Scollon lived across the road and close to the subject properties, and would have regularly driven past the two properties. The usage and maintenance of the properties consistent with the Agreed Boundary Line was clearly visible from the road, and clearly visible to the owners of Plaintiffs' Property.

24. The prior owners of Plaintiffs' Property did not object to the location of the Agreed Boundary Line or the use by the owners of the Assam Property of land up to the location of the Agreed Boundary Line.

25. F & K and the prior owners of the Assam Property treated the land up to the Agreed Boundary Line as their own. They did not allow the general public to use the driveway or the land up to the Agreed Boundary Line.


26. The prior owners of Plaintiffs' Property did not claim title or ownership of the land up the Agreed Boundary Line. They did not attempt to use the Disputed Area. The prior owners




did not mow the lawn, snow plow the driveway, maintain the area, store vehicles or equipment in the Disputed Area or otherwise take action to assert any rights in the subject property.

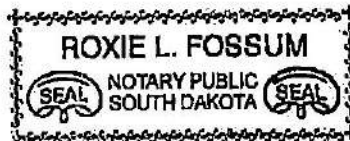
27. Donna Scollon, the widow of John Scollon, sold the Plaintiffs' Property to the Plaintiffs on or about April, 2007.

28. Plaintiffs did not claim title to the disputed areas, use the Disputed Area, maintain it, disagree with the location of the Agreed Boundary Line, or challenge in any way the use by F & K of the Assam Property of the land up to the Agreed Boundary Line from the date they came into title in 2007 until several years after they purchased Plaintiffs' Property. Plaintiffs purchased the property years after F & K and its predecessors in title obtained title by adverse possession of the contested area up to the Agreed Boundary Line.

  
Samuel R. Assam

Subscribed and sworn to before me  
this 13<sup>th</sup> day of September, 2021.

  
Notary Public



My Commission Expires 11-10-2021

**IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA**

**APPEAL NO. 31019**

---

**Chris Rallis and Mark Weber  
Plaintiffs and Appellees,**

**vs.**

**F & K Assam Family, LLC  
Defendant and Appellant**

---

**APPEAL FROM THE SECOND JUDICIAL CIRCUIT  
MINNEHAHA COUNTY, SOUTH DAKOTA**

**TRIAL COURT, THE HONORABLE DOUGLAS E. HOFFMAN**

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**BRIEF OF APPELLEES RALLIS & WEBER**

---

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**NOTICE OF APPEAL FILED: MARCH 7, 2025  
NOTICE OF REVIEW FILED: MARCH 24, 2025**

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### **PRELIMINARY STATEMENT**

References to the settled record as reflected by the Clerk's Index are designated as "R." References to the Appendix to this brief are designated as "App." F & K ordered two transcripts. References to the transcript of the summary judgment hearing held on October 12, 2021 are designated as "SJ." References to the transcript of the December 4, 2024 court trial are designated as "T." References to the trial exhibits are designated as "Ex." The deposition testimony of David Arneson that was read into evidence during trial was admitted into evidence at trial as Exhibit 36(a). Exhibit 36 was admitted and is the complete deposition transcript of David Arneson. Samuel Assam is the Managing Member of F & K Assam Family, LLC. He is referred to as "Assam." The Appellant-Defendant F & K Assam Family, LLC is referred to as "F & K." The Plaintiffs and Appellees are Chris Rallis and Mark Weber. They are referred to as "Rallis and Weber," or "Rallis-Weber." David Arneson is the tenant residing on F & K's property. He is referred to as "tenant" or "Arneson."

### **STATEMENT OF JURISDICTION**

Rallis and Weber respectfully Notice Review from the Judgment dated February 10, 2025, and the Conclusions of Law dated February 10, 2025, in which the court omitted the conclusion of law that Rallis and Weber established possession of the real property by operation of *SDCL 15-3-15*. Rallis and Weber

served and filed their Notice of Review on March 24, 2025. This Court has appellate jurisdiction pursuant to *SDCL 15-26A-3 (1)*.

### **REQUEST FOR ORAL ARGUMENT**

Rallis and Weber respectfully request the privilege of appearing before this Court for oral argument.

### **STATEMENT OF THE APPELLEE'S ISSUES**

1. F & K failed to prove adverse possession by clear and convincing evidence and the trial court's judgment should be affirmed.
2. Even if F & K have proven title by adverse possession as of 2000 as they claim, their title was forfeited by not perfecting title by recording. Under *SDCL 15-3-15* title vested in Rallis and Weber by (1) claim and color of title made in good faith, (2) ten successive years in possession, and (3) payment of all taxes legally assessed.

### **STATEMENT OF THE APPELLEE'S ISSUE FOR REVIEW**

Rallis and Weber have shown by clear and convincing evidence vesting of their title in the disputed area by (1) claim and color of title shown by their recorded deed to the disputed property; (2) More than ten successive years in actual possession of the disputed property as evidenced by their repeated complaints to F & K and their tenant to remove intrusive property; and, (3) payment of all taxes legally assessed.

Rallis and Weber respectfully request that this Court declare that proving of vested title under *SDCL 15-3-15* operates as a complete bar to any *preceding*

claim(s) of adverse possession under *SDCL 15-3-12* that had not ripened to recorded title. Rallis and Weber have incurred tens of thousands of dollars in attorney fees and litigation expenses in defending against F & K's allegations of adverse possession under *15-3-12* when the undisputed evidence conclusively showed that Rallis and Weber had vested title under *SDCL 15-3-15* in 2018, years before F & K first asserted adverse possession in their counterclaim to Rallis and Weber's action. The interests of justice and judicial efficiency will benefit the citizens and courts of South Dakota by recognition that *15-3-15* bars a claim of adverse possession so long as a person can show to judicial satisfaction that they are in actual possession under claim and color of title for ten years and have paid all legally assessed taxes. See generally:

- *SDCL 15-3-15*
- *Healy Ranch Partnership v. Mines*, 2022 S.D. 44, 978 N.W. 2d 768.
- *Mohnen v. Estate of Mohnen*, 2024 S.D. 35, 9 N.W. 3d 481.
- *Hoffman v. Hollow Horn*, 2024 S.D. 59, 12 N. W. 3d 322.

### **STATEMENT OF THE CASE**

This lawsuit began with Rallis and Weber suing to quiet title to a one + acre of land on the east side of Sioux Falls, near the Big Sioux River. Rallis and Weber believed they had no choice but to file suit given that F & K and its tenant David Arneson repeatedly trespassed on to Rallis and Weber's property notwithstanding demands that F & K and Arneson remove vehicles off the property and stop using the Rallis and Weber vacant lot as a dumping ground.

A one-day court trial was held before the Honorable Douglas Hoffman in Sioux Falls on December 4, 2024. Both Parties submitted proposed findings of fact and conclusions of law (R. 449, 514), as well as corresponding objections (R. 459, 482).

On January 30, 2025, the trial court entered its “Findings of Fact and Conclusions of Law.” (R. 514). On February 10, 2025, the trial court entered its judgment holding that F & K had failed to prove adverse possession. F & K’s appeal for reversal, and Appellee’s Notice of Review on the applicability of *SDCL 15-3-15* timely followed.

### **STATEMENT OF THE FACTS**

Rallis and Weber respectfully aver that the following facts set out in the record of this cause support the trial court’s judgment.

1. Defendant F & K Assam Family, LLC is the owner of a parcel of real property located in Minnehaha County, South Dakota, as described below (the "Assam Property"). The common address is 9100 E. 10<sup>th</sup> Street, Split Rock Township, Sioux Falls, Minnehaha County, South Dakota. (Ct Findings of Fact ¶ 1; R 393; Ex.<sup>1</sup> 100, at DEF 00005).
2. The legal description of the F & K property is: Southeast Quarter of the Southeast Quarter (SE1/4 SE1/4) of Section 17, Township 101 North, Range 48 West of the 5th P.M., Minnehaha County, South Dakota, except the West 208.71 Feet of the East 928.71 Feet of the South 241.71 Feet thereof and except the West 168.01 Feet of the East 336.02 Feet of the

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<sup>1</sup> Reference is to trial exhibits. Plaintiff’s exhibits began with 01. Defendant’s exhibits began with 100.

South 259.29 Feet thereof, and except Professor's 2nd Addition contained therein. (Ct Findings of Fact ¶ 2; R. 393; Ex. 100, at DEF 00005).

3. On March 31, 1980 John Scollon and other heirs of B.F. Scollon conveyed the Property to Fred and Kay Assam. (Ct. Findings of Fact ¶ 3; R. 393; Ex. 100, at DEF 00005). The Deed *excepted* that portion of the property which was ultimately purchased by Rallis and Weber.
4. Since 1980, the property has been owned and used by Fred and Kay Assam, or their children, or family trusts and entities. Appellant F & K is the current owner of the property. (Tr P. 10, L. 2-14, Ct Findings of Fact ¶ 4; R. 393; Ex. 100, at DEF 26 thru 33).
5. Samuel Assam ("Assam") is the Managing ["Chief"] Manager of F & K Assam Family, LLC. Tr. P. 10, L 6).
6. Assam testified that he had been told by his father, Fred Assam ("Fred"), that Fred and John Scollon agreed the boundary line would be one foot east of the wellhouse, running north and south to the boundaries. (Tr. P. 10, L. 16 through P. 11, L. 13; T 138, L 22 thru 139, L 3; Ex 101 "[I] was always of the understanding what the boundary line was, which is approximately one foot off the, to the east of the wellhouse running straight north.")).
7. Assam testified by Affidavit (Ex 33, ¶ 10, in support of F & K's motion for summary judgment that the agreement between his father and John Scollon was entered into "at the time of conveyance." T., 150, L 25, through 151, L 16; Ex 33, ¶ 10).
8. Assam testified it was not a permissive use agreement based upon "maintenance and usage of it over 40 some years." (T. P. 11, L. 14 through P. 11, L. 21).
9. Assam testified F & K was defining the "Disputed Area" as beginning one foot east of the wellhouse, and then extends to the east to the survey line. (T. P. 12, L.24 through P. 13, L. 3).
10. Assam testified that adverse occupation within the disputed area included



mowing and maintenance, weed control, parking equipment, plowing, placing gravel, and maintaining the driveway. (T. P. 13, L 8 through P. 14, L.17).

11. Assam testified that F & K and its predecessors never paid taxes on the disputed area. (T. P. 14, L. 18 through P. 15, L. 11).
12. Despite repeated conveyances of the Assam Property from 1980 up to 2001 when F & K Assam Family, LLC came into ownership, the property's legal description has never included any portion of the "disputed area." (Tr. Ct Findings of Fact ¶ 5; R. 311 and 287; Ex. 27 & 29).
13. In 2003, Plaintiff Chris Rallis and his wife Susan Rallis were granted a First Option to purchase an approximate one-acre lot on the north side of 10<sup>th</sup> Street owned at that time by Donna Scollon, widow of John Scollon. (T. P. 52, L. 1 through P. 53 L. 8; Tr. Ct Findings of Fact ¶ 6; R. 251, 253; Ex. 1 & 2).
14. The legal description of Plaintiff's lot reads: "W 168.01' E 336.02' S 259.29' of the Southeast Quarter of the Southeast Quarter (SE1/4 SE1/4) of Section 17, Township 101 North, Range 48 West of the 5<sup>th</sup> P.M., Minnehaha County, South Dakota ." (Ex. 29).
15. Plaintiff's property is the except property in the Assam property legal description set out in Material Fact No. 2 above. (Tr. Ct. Findings of Fact ¶ 7; R. 514, ¶ 5; T 88, L-12; Ex 28).
16. Mark Weber ("Weber") testified that Exhibits 8, 9, and 11 were accurate depictions of the land when he and Rallis purchased the land in 2007. T128, L17 thru T129, L 22).
17. The parties stipulate that the area of land in dispute ("the disputed land") is the area between the eastern property line appearing on the land surveys (R. 254, 255; Ex. 3 & 4) and the Assam claim of the eastern boundary line being agreed to as a line running north-south beginning one foot east of the wellhouse. (T. P. 138, L. 4-8; T P. 138 L. 25 through T. P. 139 L. 43; R. 433; Ex. 101).

18. Plaintiffs Rallis and Weber purchased the approximately one-acre lot in April, 2007. (Tr. Ct. Finding of Fact ¶ 9; R. 310, 346; Ex. 28 & 30).
19. Rallis and Weber's parcel is slightly (26 sq ft) greater than one acre. (T. P. 95, L. 16-18; Tr. Ct. Findings of Fact ¶ 10).
20. F & K's property borders Plaintiff's property on the west, north, and east sides. (Tr. Ct Findings of Fact ¶ 11).
21. Rallis' uncontroverted testimony was that Minnehaha County mandates a minimum of one acre to construct a residence. (T. P. 58, L. 8-15; Tr. Ct Findings of Fact ¶ 12).
22. Assam testified he was told by his father Fred that John Scollon wanted to retain ownership of the lot (the *excepted* property) in case his son wanted to build a house on the lot. (T. P. 11, L. 2-4; T. P. 140, L. 4-11; Tr. Ct. Findings of Fact ¶ 13).
23. The Rallis-Weber lot had been improved with construction of a well house to shelter a well prior to Rallis and Weber's purchase. The property is otherwise a vacant lot. (Tr. Ct Findings of Fact ¶ 14).
24. Assam testified at trial that he has been familiar with the Assam Property since it was purchased by his parents in 1980. (T. P. 137, L. 18-20). Assam has managed the property since 1995. (T. P. 141, L. 23- T P 142, L. 1-9). His father Fred passed away in November, 1996. (T. P. 141, L. 21-22; Tr. Ct Findings of Fact ¶ 15).
25. Rallis testified he and Weber have paid the taxes on their land from 2007 to the present as set forth in the Minnehaha County Payment History for the lot. (Ex. 26). (Tr. Ct Findings of Fact ¶ 18; R. 286; T. 86, L 15 thru 87, L 17' Ex. 26).
26. Assam admitted in response to Request for Admission No. 3 (Ex. 32) that F & K nor its predecessors in interest have never paid real estate taxes on the Rallis-Weber lot. (Tr. Ct Findings of Fact ¶ 19; R. 356; T. 29, L 19, 41, L 12 ).

27. Assam testified that since the purchase of the Assam Property in 1980, the owners of the Assam Property, or their tenants, have mowed the disputed area, regularly controlled weeds, plowed snow off the driveway, and stored equipment. Beyond Assam's testimony, F & K offered little corroborating evidence as to the nature or extent of the same. (Tr. Ct. Findings of Fact ¶ 20).
28. David Arneson testified that he had periodically put down gravel and plowed snow on the driveway since becoming a tenant on the Assam property in 2009. (Tr. Ct Findings of Fact ¶ 21).
29. Rallis and Weber each testified that photographic images of the location of the driveway suggest that the driveway began to be enlarged to a point where it encroached on their property sometime after 2008, most probably beginning in 2014 (Tr. Ct. Findings of Fact ¶ 22; R. 256 – 261; Ex. 5 thru 10; R.434; Ex. 101).
30. Assam could not testify to the origin of Ex. 101, nor who drew the lines on the Exhibit. (T 148, L 21 thru 150, L 5).
31. Assam testified that the four-car garage building was moved to the Assam Property in the 1980s by Fred Assam.
32. The evidence supports the conclusion that the western wall of the garage is located east of the eastern boundary of the Rallis-Weber lot. (Tr. Ct. Findings of Fact, ¶24, R.257-259, Ex. 6, 7, 8).
33. Rallis testified that since he and Weber purchased the property in 2007, they regularly demanded that F & K and its tenant, Arneson, remove trespassing vehicles and other materials from their property. (Tr. Ct. Findings of Fact, ¶ 25). Weber also complained to Assam. (T 131, L 24 to 132, L 7; T, 132, Line 4 – L 19).
34. Assam admitted that Rallis and Weber complained about encroachments and intrusions on their property. (T. 44, L 2-14; Ex. 15-18)

35. David Arneson testified any mowing he undertook on the Plaintiff's land to the west of the wellhouse was gratuitous because he wanted to minimize the presence of "critters." (T. P. 120, L 23 thru P. 121, L 7; 125, L. 2-126-L 1.), Tr. Ct Findings of Fact, ¶ 26).
36. Rallis testified there was no reason for Plaintiff's lot to be mowed, or that they plow the approach, because the property is vacant with the exception of the presence of the well house. (T. P. 134, L. 8-15).
37. Rallis testified that the approach and driveway now encroaches on their land by approximately 18 feet as evidenced by observations and the survey they commissioned. (Tr. Ct. Findings of Fact, ¶ 27, R. 261-265, Ex. 10 -14; T. P. 60, L 7 thru 62, L. 3; T 69, L 1 thru 72, L 1).
38. Weber testified it would not be necessary to cut across the Rallis-Weber land to drive up the driveway to the structures on F & K's property. (T 135, L 12).
39. Arneson testified he has added a dump truck of gravel on the driveway each year that he has rented the Assam property. (T. P. 123, Line 18- P. 124, L 2).
40. Rallis testified there were repeated interactions with Arneson demanding that he keep his vehicles and equipment off of the Rallis-Weber land. (T. 83, L 20 thru P. 86, L 6 ; Ex. 18).

### **STANDARD OF REVIEW**

In this appeal this Court reviews the trial court's findings of fact under the clearly erroneous standard and its conclusions of law under the de novo standard. *Hoffman v. Hollow Horn*, 2024 S.D. 59, ¶ 16 12 N.W. 3d 322, 328. " 'A finding is "clearly erroneous" when after reviewing all of the evidence, we are left with a definite and firm conviction that a mistake was made.' " *Id.* Under the de novo standard no deference is given to the decision of the trial court. *Id.*

## **ARGUMENT**

### **Preliminary Observations of Plaintiff's Arguments**

1. F & K repeatedly assert an oral agreement was entered into between Fred Assam and John Scollon to relocate the eastern boundary of the lot being sold to Fred Assam in 1980 by relocating the eastern boundary shown on the land survey west to a north-south line one foot east of the eastern wall of the well house. That alleged relocation creates the “Disputed Area” between F & K and Rallis-Weber. However, Rallis-Weber argue that if agreement actually existed, and was enforceable, then a claim of adverse possession would be nonsensical given that the disputed area would be deemed sold to Assam at the time of the conveyance. This appears to have been Judge Damgaard’s focus at the hearing on Defendant’s Motion for Summary Judgment.
2. On the other hand, if F & K had sufficient clear and convincing evidence to prove adverse possession of the disputed area between 1980 and 2000, then the existence of an oral agreement relocating the eastern boundary would also be nonsensical given that ownership would be established by adverse possession, not by agreement.
3. F & K argue they have established by clear and convincing evidence that the following activity on the disputed area proves adverse possession:
  - A. Mowed regularly
  - B. Weed control
  - C. Snow plowing
  - D. Storing of landscaping materials

- E. Stored vehicles, trailers, and equipment
- F. Maintained the driveway through grading and application of gravel  
(F & K Br. p. 11-12.)

These assertions of fact were brought to the trial court solely on the testimony of Mr. Samuel Assam. F & K did not produce a single witness that occupied the F & K land between 1980 and 2000 to corroborate Mr. Assam's testimony. No other Member of F & K Assam Family, LLC was called to testify to corroborate Mr. Assam's testimony. Not a single document or photograph originating between 1980 and 2000 were offered by F & K to corroborate the testimony asserting hostile occupation of the Disputed Area.

**A.**

**THE TRIAL COURT'S JUDGEMENT THAT F & K FAILED TO PROVE ADVERSE POSSESSION BY CLEAR AND CONVINCING EVIDENCE SHOULD BE AFFIRMED.**

F & K is asserting they and their predecessors in interest have adversely possessed by open, visible, notorious, hostile, and continuous occupation the strip of land for the statutory period of 20 years between 1980 and 2000. The trial court found the evidence lacking. *Titus v. Chapman*, 2004 S.D. 106, ¶ 27, 687 N.W.2d 918, 925. ("To establish title by adverse possession, the claimant must be in actual, open, visible, notorious, continuous and hostile occupation for the statutory period.") The evidence was insufficient to enable the trial court "to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue" *Irvine v. City of Sioux Falls*, 2006 S.D. 20, ¶ 9, 711 N.W. 2d 607, 610. F & K cannot escape their reliance on insufficient evidence as follows:

**1. There is not clear and convincing evidence that F & K routinely or continuously mowed in the disputed area between 1980 and 2000.**

Assam testified he graduated from law school in 1987 (T. 37, L21-25) and that he himself had not mowed his Father's land since the summers between law school. (T. 35, L.15). Assam admitted he had no evidence to corroborate who mowed, or how often mowing occurred during the period 1980 through 2000. (T. 36, L 1-8).

Rallis testified that the Rallis-Weber property is a vacant, rural lot for which no mowing was necessary. (T. 104, L 17- 105-13). Rallis also testified he did not recall ever seeing noxious weeds on the Rallis-Weber lot that would have required weed control. (T. 104, L 8-10).

Arneson testified that he never talked with "Sam" [Assam] about the need to mow. He just did it. (T. 127, L 2-6). That testimony is barely relevant given that F & K is relying solely on the alleged mowing of the Disputed Area between 1980 and 2000. Arneson did not come to the land as a tenant until 2007 or perhaps 2008.

The record evidence supporting hostile occupation by cultivation is limited to Assam's uncorroborated testimony that regular mowing occurred. (F & K Brief, p. 5, A). That the "grass and other vegetation on the disputed area was cut and otherwise controlled and managed." (Br. 5). A review of Assam's testimony on the topic evidences only conclusory statements. "So, your claim is that you mowed the grass to the east of the well house, and that in your, if I understand



your testimony, that is clear and convincing evidence of hostile occupancy? A. Yes.” (T. p. 34, L25-p.35, L 4). Assam was asked if he had any evidence of "who mowed the grass, how often they mowed, and how much they were paid to mow. “Is there any of the evidence available for this court? A. Those records are ancient. Q. So the answer is no. A. That’s correct.” (T. p. 35, L 13 – p. 36, L 8). On direct, Assam was asked “Q. ... what did you observe in terms of work being done and, and usage of that disputed area by your parents in the 1980’s and 1990’s? in the 1980’s and 1990’s. A. Just the mowing, snow removal, obviously, gravel had to be periodically. Ah, weed control. That’s about it.” (T. p. 141, L 1-9.) The testimony was so vague and lacking specificity that the court found it did not rise to the level of clear and convincing evidence.

With this evidence it has not been shown that F & K, with open and notorious occupation, was mowing as an element of hostile occupation. As the trial court expressly wrote: “While there is some evidence of acquiescence, cultivation, and improvement, the nature and extent of the same is too vague... [T]estimony of the owner’s son or a tenant occasionally mowing of the grassy area of the disputed land for pest control or using it for occasional overflow parking of farm vehicles is vague and unquantified. In total the Defendant’s evidence lacks the clarity, weight and overall probative force necessary to meet the high burden required to establish title through adverse possession” (R 504, Conclusion of Law No. 7).



**2. The evidence of the storing of landscaping materials, vehicles, trailers, and equipment was equally vague and lacking the specificity of clear and convincing evidence.**

On direct examination Assam testified that in addition to the mowing and weed control there “were also storage and some landscaping materials (T. p. 145, l 1-5. And that “back when they used cultivator, we had a cultivator up there. We would have had tractors up there from time to time, and trailers.” (T. p. 145, L 6-10). Assam did not, nor was he asked to define what he meant by “up there.” Neither was there any specificity as to storage of landscaping materials. While photographs admitted into evidence depict recent parking of vehicles in the disputed area by the tenant, and photos depict what might be described as “landscaping materials” next to the west wall of the garage (Ex. 17), Assam provided no testimony as to the relationship of these materials to the 1980-2000 time period. In fact, given that Arneson testified he is in the property maintenance business it is not clear from Assam’s testimony if the landscaping materials being referenced related to 1980-2000, or the years of Arneson’s tenancy. (Ex. 36(a), P. 7, L 21).

The aerial photographs (Ex. 5, 8) exhibit the F & K land in relationship to the driveway, the well house, the garage, and the house where Fred and Kay resided, and that Arneson rented during the period from 2007 to the date of trial. Given the vagueness of Assam’s testimony the parking of a cultivator or trailers, could have occurred in any number of areas surrounding Fred’s garage and house,

including in front of the garage, or either northeast of the house, or southeast of the house. We just don't know from Assam's testimony.

Rallis testified Exhibit 10 evidences the location of one of the survey pins marking the eastern boundary of the Rallis-Weber lot. Exhibit 11 evidences the man in the red shirt locating another survey pin. Exhibit 13 evidences the man in the red shirt marking 12 feet west of the surveyor's location stake (Ex. 12). Exhibit 13 and 14 depict materials that are immediately adjacent to the F & K garage, and east of the lot line. Exhibit 18 evidences two vehicles and a trailer that belonged to Arneson and were the subject of a Rallis-Weber complaint. Exhibits 5 suggests it was taken closest in time to the year 2000. The remaining photos are suggestive of being taken post 2000, mostly in the 2014 to 2022 timeframe. Point being, Assam's testimony is so vague with respect to mowing or other alleged occupation of the disputed area between 1980 and 2000 that the trial court correctly found the evidence was insufficient.

**3. There is not clear and convincing evidence that predecessors in interest to F & K plowing of snow, placing gravel, or other maintenance of the driveway for over 20 years was adverse to Scollon.**

While F & K appear to have abandoned reliance on the width of the driveway, or its maintenance, to prove adverse possession of the disputed area (Br. p. 14<sup>2</sup>) Assam testified he established those factual assertions from his

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<sup>2</sup> "Further, F & K's claim to title by adverse possession is not based on the location of the driveway."

personal observations, and some photographic evidence (T. P. 13, L 25 – P. 14, L 17). The trial court's Findings indicate otherwise. The court's determination was that the photographic images of the location of the driveway actually showed that the driveway on F & K's property did not begin to enlarge to the point of encroachment on the Rallis-Weber land until sometime after 2008. (R. 514, P. 5, ¶ 22). That Finding was also consistent with the testimony of David Arneson that he had annually put down gravel since becoming a tenant on the Assam property in 2008 (or 2009). (R. 514, P. 5, ¶ 21; T. P. 122, L 18 to P. 124, L 2).

And, while it was uncontested that F & K, its predecessors, or its current and past tenants plowed the driveway, Rallis testified that Rallis-Weber had no use for a driveway given that their lot was vacant. More importantly, since F & K failed to establish the driveway encroached on the Rallis-Weber lot for 20 years or more, the evidence of plowing snow and placing gravel on the driveway was irrelevant, or at least merely consistent with any landowner maintaining a driveway extending from the public highway to structures on their property as depicted in the photos. The photographic evidence of the location and width of the driveway was far more persuasive than Assam's otherwise uncorroborated testimony seeking to show that plowing and maintenance of the driveway for the 1980 through 2000 period was somehow adverse and hostile to Scollon. (Ex. 5-8, 10-14; R 514, ¶ 22, Conclusion ¶ 7.)

Indeed, the trial court findings confirms that was not proven to the satisfaction of the trial court..

- 4. No clear and convincing evidence was admitted that the driveway was intentionally widened in 1980 for the purpose of encroachment on the Rallis-Weber Lot. Otherwise stated, the driveway provides no evidence of adverse possession.**

Unless the driveway was caused to occupy some of the disputed land for the 20 years between 1980 and 2000 the use and maintenance of the driveway has no probative value.

Rallis testified that when the lot was purchased the driveway extended from the county road straight north entirely on F & K's property to the yard and buildings. F & K's Proposed Findings at Paragraph 13 confirmed Rallis' testimony. It reads: "The portion of the Assam Property *adjacent to* the Plaintiff's Property contains a house and four stall garage with a driveway connecting to East 10<sup>th</sup> Street, among other improvements." (R. 514, ¶ 13 at P. 3). When F & K plowed the driveway, they pushed the snow on to the Rallis-Weber lot. Because the Rallis-Weber lot was vacant they had no need for a driveway. (T. P. 105, L 14-24). F & K's proposed Finding of Fact at ¶ 21 confirms the driveway was plowed to "allow access to the garage and house, as well as stored items."

Rallis testified that it was in 2014 or 2015 that the F & K driveway began to be expanded in width to the west, on to the Rallis-Weber lot, as can be seen in Exhibits 5, 6, 7, 9 (T. 92, L 23 – 94, L 19 & Ex. 102 (T. 96, L 10 – 20). Mark

Weber testified the approach and driveway had gotten wider since he and Rallis purchased the land in 2007. (T. 130, L 3 – 22, Ex 8, 9, 11, ). Weber also testified it is not necessary to cut across the Rallis-Weber land to turn on or off the driveway to the F & K property rented. (T. 135, L 12-19).

Ameson testified (by deposition, Ex. 36, 36a) he maintained the driveway by adding gravel and plowing snow since he began renting from F & K (in 2007). (T. 122, L17 – 124, L 2).

In summary, F & K failed to admit evidence that maintenance or use of the driveway between 1980 and 2000 was clear and convincing proof of adverse possession. Direct evidence with respect to the driveway being maintained adversely to the Scollon ownership of the lot was never offered. Assam's testimony alone was insufficient. Especially the case when F & K argues in their brief that the location of the driveway was not being used by them to establish adverse possession.

**5. The Doctrine of Acquiescence as a presumption of hostility in the occupation of property does not apply.**

In *City of Deadwood v. Summit, Inc.*, 2000 S.D. 29, ¶ 21, 607 N.W. 2nd 22, 27, this Court explained that “the doctrine of acquiescence in boundaries is merely a potential component of adverse possession—not an independent legal doctrine.” This Court wrote: “[T]his doctrine provides an evidentiary presumption of hostility to the occupation of property to a ‘visible and ascertainable boundary’ *for the statutory period*.” (emphasis added in the opinion). *City of Deadwood* makes clear

that while acquiescence may be a component of adverse possession, a person claiming title by adverse possession must still show by clear and convincing evidence proving “actual, open, visible, notorious, continuous and hostile occupation for the statutory period.” *Id* at ¶ 16.

Acquiescence is defined as “the acceptance of something without protest, a passive acceptance or submission.”<sup>3</sup> “To accept passively.” Black’s Law Dictionary 25 (8<sup>th</sup> ed 2005). Some evidence of acquiescence does not relieve F & K from their burden of proving the acts, conduct, or nature of the *something* they allege Scollon was *accepting without protest*. As stated in the trial court’s Conclusion of Law No. 7:

“While there is some evidence of acquiescence, cultivation, and improvement, the nature and the extent of the same is too vague... [T]he photographic evidence doesn’t prove accretion of the driveway into the disputed area until sometime in 2007 and 2015. Testimony of the owner’s son or a tenant occasionally moving of the grassy area of the disputed land for pest control or using it for occasional overflow parking of farm vehicles is vague and unquantified. In total, Defendant’s evidence lacks the clarity, weight and overall probative force necessary to meet the high burden required to establish title through adverse possession. (R. 514, P. 7-8, ¶ 7).

Assam’s testimony that Scollon could see the grass strip from the road and did not object to [some unidentified] intrusion or adverse use alleged to have been occurring has no evidentiary value. It is mere speculation, especially given that F & K have not presented evidence of actual occupation that would satisfy the clear

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<sup>3</sup> (<https://www.merriamwebster.com/dictionary/acquiescence>).

and convincing burden, nor have they presented direct or circumstantial evidence of Scollon's acquiescence beyond the notion that because they drove by they must have seen [something] and didn't complain. Rallis and Weber urge that because F & K's evidence is so lacking with respect to what hostile occupancy may have been occurring between 1980 to 2000, it is impossible for the trial to conclude there was acquiescence by Scollon sufficient to satisfy a presumption of hostility.

The trial court's conclusion that F & K's evidence was not sufficient to prove hostile occupation by acquiescence should be affirmed.

**6. The trial court's legal conclusion that f & k failed to prove an enforceable oral agreement for the conveyance of real property should be affirmed.**

*SDCL 53-8-2(3)* governs the conveyance of the real property from John Scollon and Jeanette Olson to Fred and Kay Assam on March 31, 1980. That contract is evidenced by the Warranty Deed delivered to Fred Assam. (Ex 100, Def 05).

To support their claim of adverse possession of the "disputed area" (T. P. 12, L 24 – P. 13, L. 3), F & K relies on the testimony of Assam that he was told by his father, Fred, that at the time of conveyance<sup>4</sup> Fred and John Scollon orally agreed the east boundary line between the piece conveyed to Fred, and Scollon's remaining land to the east, would be one foot east of the wellhouse. (T. P. 10, L.

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<sup>4</sup> When answering Request for Admission Number 10 F & K stated that the oral agreement was entered at "the time of conveyance." At trial, Mr. Assam sought to back away from that statement, testifying "it was about [or around] the time of conveyance." (T. P. 150, L 25 to P. 151, L. 16; Ex. 33, P. 10.

16 – P. 11, L. 13; T. 138, L. 22 thru P 139, L 3). Rallis and Weber view this as oral conveyance of real property. If F & K were conveyed ownership then a claim of adverse possession is moot.

An additional inconsistency was raised by the Rallis testimony that if the alleged oral agreement was made it would have resulted in the loss of approximately 18 feet of land along the eastern border of the Rallis-Weber lot. Rallis reasoned that if Scollon had made that agreement, his intent to except the one + acre [should one of his children want to build on it] would have, instead, caused the property to be less than one acre in size barring construction of a single family residence. (T P. 58, L 8-15 – P. 59, L 3). In support of this conclusion, Rallis testified that the surveys of his and Weber's lot evidence the lot is 43,586 square feet. (Ex 3-4, T P. 57, L 22 – P. 58, L 22.) Later in his testimony, Rallis testified, without objection, that he calculated the square footage of an acre of land to be 43,560 square feet (T P.95, L2 – 19). Therefore, the inconsistency is that the loss of 26 square feet would cause the Rallis-Weber lot to be too small for construction of a private residence. The reasonable inference from this evidence is the absurdity of F & K's assertion that Scollon would have agreed to a revised eastern boundary that would have destroyed his intent when excepting the one + acre.

An additional fatal flaw in F & K's assertion is that an oral agreement at the time of conveyance should have been merged into the specifications of the Deed. “[T]he general rule is that a deed executed in pursuance of a contract for the



conveyances of real property supersedes and merges all prior negotiations or contracts relating to it. The exceptions to this rule are the existence of fraud or mistake or collateral contractual provisions or agreements which are not intended to be merged in the deed.” *Vander Heide V. Boke Ranch, Inc.*, 2007 S.D. 69, ¶ 25, 736 N.W. 2d 824, 833. If the oral agreement was made at the time of conveyance the Deed should have revised the legal description to move the eastern boundary west in accord with Assam’s version of the agreement.

Another flaw in F & K’s assertion of an oral agreement granting ownership to the disputed area was, in part, the subject of Judge Damgaard’s inquiries during the Motin hearing. How is it that an oral agreement to relocate a boundary line can be seen as an open, visible, notorious, hostile, and continuous occupation for the statutory period of 20 years. “Possession which is not hostile cannot be adverse.” *Gangle v. Spiry*, 2018 S.D. 55, ¶ 14, 916 N.W.2d 119, 123. (Internal citations omitted). “...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.” *Id at* ¶ 15, 916 N.W.2d 119, 123–24. Quoting the Supreme Court of Rhode Island this Court wrote “[a] permissive use may become hostile only when the permission has been withdrawn or when events have occurred indicating that the original permission no longer obtained.” *Id. at* ¶ 17, 124.

During the Summary Judgment hearing, the circuit court was expressing concern whether this is a case of *adverse possession*, *agreement*, or *permissive*

use? Mr. Summers stated “there isn’t a separate claim for an agreed boundary line. What that [the alleged agreed-to boundary line] shows is useful in the context of adverse possession is simply pointing out where the adverse possession stops....”(SJ P. 6, L 23 – P. 7. L 7). The logic fails.

If F & K is asserting that the oral agreement conveyed the disputed area to Fred Assam, then there is no hostile occupation. If the agreement was for permissive use, F & K provided no evidence of the permission being withdrawn, which would then have started the adverse possession clock.

The law is very rigid with respect to the fact that a use permissive in the beginning can be changed into one which is hostile and adverse only by the most unequivocal conduct on the part of the user. The rule is that the evidence of adverse possession must be positive, must be strictly construed against the person claiming a prescriptive right, and that every reasonable intendment should be made in favor of the true owner. *Gangle v. Spiry*, 2018 S.D. 55, ¶ 18, 916 N.W.2d 119, 125 (Quoting the Supreme Court of Wisconsin in *Lindokken v. Paulson*, 272 N.W. 453 (Wis. 1937).

All one seems to be left with is that F & K must abandon the claim of an oral agreement in order to assert adverse possession. They have not done so. Rallis and Weber find it worthy of note that beginning with F & K’s Proposed Finding Number 26 (R. 514, 522, P. 3) there are no less than twenty references to the existence of an “Agreed Boundary Line.” In summary, F & K’s reliance on an alleged oral agreement to establish ownership is unsuccessful for multiple reasons, including the (1) Statute of Frauds; (2) the complete lack of corroborating evidence; and, (3) the legal dichotomy in asserting ownership by adverse possession over property when concurrently asserting mutual agreement.

### NOTICE OF REVIEW

While the trial court found clear and convincing evidence that Rallis and Weber paid taxes from 2007 to the date of trial on their property (Findings of Fact ¶ 18 & 19) the court omitted a Conclusion of Law that Rallis and Weber remain the owners of the land in accord with *SDCL 15-3-15* and did not enter judgment on those grounds as requested in Plaintiff's Proposed Findings of Fact and Conclusions of Law (R. 449, ¶ 10, 19).

The statute reads:

Every person in the actual possession of lands or tenements under claim and color of title made in good faith, and who shall have continued for ten successive years in such possession, and shall also during said time have paid all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his paper title. All persons holding under such possession by purchase, devise, or descent before said ten years shall have expired, and who shall have continued such possession and payment of taxes as aforesaid so as to complete said term of ten years of such possession and payment of taxes, shall be entitled to the benefit of this section. S.D. Codified Laws § 15-3-15.

Rallis and Weber have proven (1) actual possession since 2007 (R. 514, Findings of Fact ¶ 9); (2) under claim and color of title made in good faith (R. 514, Findings of Fact ¶ 7, 18); ; (3) who shall have continued for ten successive years in such possession, (2007 to the Present); and, (4) during said time paid all taxes legally assessed on such lands (R. 514, Findings of Fact ¶ 18, Ex 26).

Having proven each element under *15-3-15*, Rallis and Weber have shown the legal basis for judgment that Rallis and Weber “shall be held and adjudged to be

the legal owner of said lands or tenements to the extent and according to the purport of his paper title.”

Rallis and Weber respectfully request that this Court hold that proving of vested title under *SDCL 15-3-15* operates as a complete bar to any *preceding* claim(s) of adverse possession that had not been reduced to recorded title. Rallis and Weber have been caused to defend against F & K’s allegations of adverse possession under *15-3-12* when the evidence conclusively showed at the time of commencement of the quiet title action that Rallis and Weber had vested title under *SDCL 15-3-15* in 2018, ten years after their purchase in 2007, and two years before F & K asserted adverse possession in their November 13, 2020, Counterclaim. It would seem the interests of justice and judicial efficiency will benefit the citizens and courts of South Dakota by this Court’s declaration that *SDCL 15-3-15* bars a claim of title by adverse possession predicated on alleged prior hostile occupation that has not been perfected by recorded deed.

### **CONCLUSION**

WHEREFORE, Appellee Rallis and Weber respectfully requests that this Court *affirm* the judgment. In the alternative, this Court remand this case for entry of judgment in favor of Plaintiffs under *SDCL 15-3-15*.

Dated this the 28th day of August, 2025

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**CERTIFICATE OF SERVICE**

I, Mark D. O'Leary, certify that on this the 28<sup>th</sup> day of August, 2025, in Appeal No. 31019, 49CIV20-002603, *Rallis & Weber v. F & K Assam Family, LLC*, Second Judicial Circuit, Minnehaha County, South Dakota,

I served the following document(s):

1. Plaintiffs-Appellee's Brief; and,
2. Certificate of Service,

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**CERTIFICATE OF COMPLIANCE**

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 7224 words from the

Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

*Mark D. O'Leary*  
\_\_\_\_\_  
Mark D. O'Leary

IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA

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Appeal No. 31019

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F & K ASSAM FAMILY, LLC,

Appellant–Defendant,

v.

CHRIS RALLIS & MARK WEBER,

Appellees–Plaintiffs,

---

Appeal from the Circuit Court  
Second Judicial Circuit  
Minnehaha County, South Dakota

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THE HONORABLE Douglas E. Hoffman  
Circuit Court Judge

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**APPELLANT’S REPLY BRIEF**

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Notice of Appeal Filed on March 7, 2025

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## STANDARD OF REVIEW

Chris Wallis and Mark Weber (“Rallis & Weber”) do not dispute the applicable standard of review in this appeal. The circuit court’s legal conclusions of whether the facts were sufficient to constitute adverse possession is an issue of law for this Court to review de novo. *City of Deadwood v. Summit, Inc.*, 2000 S.D. 29, ¶ 9.

## ARGUMENT

### **Preliminary Observations of Responses to Appellees’ Arguments**

1. Rallis & Weber provided no evidence or testimony regarding possession and use of the subject Disputed Area during the relevant twenty-year time period of 1980-2000. In contrast, Mr. Assam provided uncontested testimony about the possession and use of the Disputed Area from 1980 to 2000 by F & K Assam Family LLC (“F & K”) and its predecessors in title. He testified about the actions of F & K and its predecessors in title in relation to the Disputed Area up to the Agreed Boundary Line, including:

- A. Mowed regularly
- B. Weed control
- C. Snow plowing
- D. Stored landscaping materials
- E. Stored vehicles, trailers, and equipment
- F. Maintained the driveway through grading and application of gravel

There is no requirement under South Dakota law that requires documentary or photographic evidence be submitted by the party asserting a claim for adverse possession under SDCL 15-3-12.

2. Rallis & Weber assert that F & K claims there was an oral agreement between Fred Assam and John Scollon to relocate the boundary between their parcels. This is an incorrect characterization of F & K's position. The agreement reached between John Scollon and Fred Assam in 1980 was that the boundary line between their adjacent parcels was a straight line located one foot to the east of the existing wellhouse. F & K has not and did not assert that this agreement was meant to convey any land or change the legal descriptions in applicable deeds. This was merely a practical agreement reached between two owners who lacked a survey or a clear understanding of the actual on the ground location of the boundary line. They agreed to the location of the boundary line and then proceeded to occupy and use their respective properties consistent with this understanding.
  3. The trial court properly did not find that SDCL 15-3-15 applied. This adverse possession statute requires possession of the property at issue. Rallis & Weber did not have actual possession of the Disputed Area. Further, Rallis & Weber never plead a claim under SDCL 15-3-15.
- I. Contrary to Rallis & Weber's arguments, the trial court erred as a matter of law in concluding that F & K failed to establish title to the Disputed Area through adverse possession even though F & K submitted uncontested clear and convincing evidence of open, notorious, and hostile possession and use for the twenty-year statutory period.**

Rallis & Weber argues that F & K failed to present sufficient clear and convincing evidence that title to the Disputed Area vested in F & K in 2000. This is contrary to the record. Rallis & Weber do not acknowledge that the testimony of Mr. Assam regarding the extensive use and possession of the Disputed Area by F & K and its predecessors in title was un rebutted. Mr. Assam confirmed that Exhibit 101 accurately depicts the

location of the agreed boundary line. TT 138-139, lines 22-25, 1-12. Rallis & Weber did not submit any evidence about F & K's use and possession during the relevant time frame. They did not call any witnesses with knowledge of use from 1980-2003. Neither Rallis nor Weber had any personal knowledge of the subject properties prior to 2003, several years after title to the Disputed Area had vested in F & K. TT, page 98, lines 3-17 (Rallis, 2003); TT, page 128, lines 14-16, page 134, lines 2-4 (Weber, 2007). Mr. Weber confirmed that he had never been out to or observed the property prior to 2007. TT page 128, lines 14-16. Mr. Rallis never spoke to Ms. Scollon prior to 2003 and never talked with Fred or Kay Assam. TT page 98-99, lines 18-25, 1.

F & K presented evidence at trial that proved (1) occupation of the Disputed Area that was (2) open and notorious, (3) continuous for well over the twenty-year statutory period, and (4) under a claim of title exclusive of any other right. Under de novo review, the evidence at trial shows that F & K met its burden to prove title by adverse possession to the Disputed Area through clear and convincing evidence. It is proper for this Court to reverse the legal conclusion of the trial court.

**a. F & K provided uncontroverted evidence about regular mowing and other uses of the Disputed Area.**

Testimony at trial confirmed that the grass and other vegetation in the Disputed Area was cut and otherwise controlled and managed consistently with the location of the Agreed Boundary Line. TT, pages 34-35, lines 25, 1-7. The strip of grass to the west of the driveway up to the well house was maintained and mowed, also weed control. TT pages 17, lines 7-10. Mr. Assam and various tenants and hired men mowed the grass in the Disputed Area. TT page 35, lines 8-24; TT page 18, lines 8-18. As a condition of leasing the house, the tenants of F & K and its predecessors in title would maintain and

mow the grass. TT page 18, lines 8-18. The grass was mowed to the east of the wellhouse. TT pages 34-35, lines 25, 1-7. Rallis & Weber did not challenge the mowing of the Disputed Area by F & K. TT page 35, lines 5-7. In their brief, Rallis & Weber state that no mowing or weed was necessary on their lot. Appellees' Brief, page 12. This is irrelevant – this case is about adverse occupancy and use by F & K of the Disputed Area. F & K is not claiming title to the remainder of Rallis & Weber's lot. The grass in the Disputed Area is and has been cleanly mowed, while the Rallis & Weber Property contains tall weeds and grass. TT page 147, lines 3-8. F & K provided sufficient evidence that it maintained and mowed the grass in the Disputed Area from 1980 to date.

In addition, trial testimony confirmed that farm equipment was stored in the Disputed Area, such as a cultivator, tractors, and trailers. TT page 145, lines 6-10.

**b. Mr. Assam provided extensive evidence of F & K and its predecessors' use and maintenance of the driveway which crosses the Disputed Area.**

F & K provided extensive testimony regarding the use and maintenance of the driveway which is partially located within the Disputed Area. Rallis & Weber seek to remove a significant portion of the driveway where it crossed the Disputed Area. The driveway was graded and gravel laid down as needed by F & K and its predecessors in title. TE 33, ¶ 21; TT page 43, lines 1-5; TT page 13, lines 20-24. During the winter since 1980, F & K and its predecessors in title and agents regularly and routinely plowed the driveway clear of snow to allow access to the garage and house, as well as stored items. TE 33, ¶ 22. Hired men of F & K and its predecessors would plow the driveway. TT page 18, lines 19-23. Mr. Rallis agreed that F & K's tenants plowed the driveway. TT page 105, lines 14-18. The driveway has been used since 1980 to access the house on the Assam Property. TT page 146, lines 8-10.

In contrast, Rallis & Weber did not provide any testimony that they performed any maintenance, snow plowing, mowing, adding gravel, or any work on the driveway. They did not provide any evidence to contradict F & K's evidence of use from 1980. There is no evidence that the Scollons performed any maintenance, snow plowing, adding gravel or other work on the driveway, mowing, storage of items, or any other work or otherwise occupied the Disputed Area. Mr. Weber testified that he never mowed, snow plowed, or stored anything in the Disputed Area, and never maintained or repaired the driveway. TT page 134, lines 8-25. Mr. Rallis testified that he never put down any gravel or snowplowed the driveway and did not do any weed control. TT pages 103-104, lines 25, 1-10. Mr. Rallis has never mowed the Disputed Area. TT page 105, lines 1-13.

Rallis & Weber provided no evidence to contradict the clear evidence of mowing, plowing, and other use and improvements by F & K and its predecessors in title during the time frame 1980 to 2000, the relevant time frame for vesting title by adverse possession. In fact, Rallis & Weber have no knowledge of either property prior to 2003, years after title to the Disputed Area had vested in F & K.

Despite Rallis & Weber's attempt to cherry pick certain phrases from F & K's brief and other filings, F & K's maintenance and use of the driveway is relevant to its claim to title of Disputed Area by adverse possession. The driveway does not form the boundary line of the Disputed Area. Rather, it runs across and through the Disputed Area. The Disputed Area is bounded on one side by a north to south line one foot to the east of the well house with the other side being the eastern boundary line located by Rallis & Weber's surveyor. F & K has not asserted that the driveway was located directly along or created a boundary line. There has always been a grass strip between the driveway and the Agreed Boundary

Line. Any variations in the width of the driveway over time did not alter the dimensions of the Disputed Area, as such changes occurred in part within the Disputed Area. F & K provided clear and convincing evidence that F & K and its predecessors in title used, improved, maintained, and occupied the Disputed Area since 1980.

Rallis & Weber rely on various aerial photographs of the properties as supporting their allegations claiming changes to the driveway over time. *See* Trial Exhibits 5-9. However, none of these aerial photographs were taken in the time frame 1980-2000, the relevant time frame. In addition, the photos show only a single time point during a year, and are generally unclear. They do not clearly show any significant alteration in the location of the driveway. The photographs are insufficient to rebut the testimony of Mr. Assam regarding use of the Disputed Area during the relevant time period 1980-2000, or since then.

Rallis & Weber's brief states "Rallis testified that when the lot was purchased the driveway extended from the county road straight north entirely on F & K's property to the yard and buildings." Brief, 17.<sup>1</sup> Unusually, there is no citation to the trial transcript to support this statement. The absence of a citation makes sense, as the trial transcript does not contain any such testimony from Rallis. He never said this. In fact, Rallis's actual trial testimony shows the opposite. In his direct testimony, Rallis was asked when he walked the property in 2007 whether he knew if the driveway was then encroaching on or across the property line. TT page 90, lines 20-22. Rallis responded that he did not. TT page 90, lines 23-25. On cross examination, Rallis confirmed, after being shown his prior deposition testimony, that before he purchased the property in 2007 he observed some of

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<sup>1</sup> In an apparent attempt to give credence to non-existing testimony by Rallis, the brief quotes a portion of a proposed Finding from F & K which also does not state that the driveway was contained entirely on the Assam Property. F & K's position and testimony throughout this case has been that a portion of the driveway runs across the Disputed Area. Further, a proposed Finding hardly qualifies as evidence.

the gravel from the driveway was on his property. TT pages 102-103, lines 3-12, 24, 1-2. F&K's maintenance and use of the driveway as it crosses the Disputed Area is relevant to F & K's adverse title claim.

**c. F & K's possession and use of the Disputed Area was open and notorious from 1980 to date.**

F & K's use was visible to the Scollons, Rallis & Weber, and the public. TT page 146, lines 15-19. This was not contested at trial. Use by F & K and its predecessors in title was never concealed. TT page 146, lines 20-22. Mr. Rallis confirmed that the Disputed Area is visible from the road. TT page 109, lines 5-16. The Scollons acquiesced to the use of the Disputed Area by F & K and its predecessors in title during the statutory period. To borrow Rallis & Weber's use of Black's Law Dictionary, the Scollons accepted such use passively without protest. Rallis & Weber did not contest, and did not present any evidence to contradict, that the possession and use of the Disputed Area by F & K and its predecessors in title was open and notorious. As with other elements for adverse possession, Rallis & Weber did not present any evidence of use from 1980 to 2003, as they had no personal knowledge of the properties.

**II. F & K's claim to the Disputed Area is based on adverse possession and not some sort of oral agreement for conveyance of land.**

Rallis & Weber create a strawman argument that alleges that F & K asserts that Mr. Scollon intended to convey additional land to the Assams in 1980.<sup>2</sup> This is incorrect. F & K does not assert that the Scollons intended to convey fee title to the Disputed Area to the Assams through some sort of oral transfer of land. The reason that the owners of these

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<sup>2</sup> Appellees assert that "Rallis and Weber view this as oral conveyance of real property." Opposition Brief, page 21. How Rallis & Weber choose to view this agreement as to the "on the ground" location of a common boundary line is irrelevant. F & K do not assert that this agreement was an "oral conveyance of real property."



adjacent parcels agreed to the location of the boundary line between their lots was simple. No one knew the precise location of the boundary lines of the lots. There is no evidence that anyone ordered a survey until decades later. The owners simply agreed to the location of the boundary line and proceeded to use their respective properties accordingly. Mr. Scollon and the elder Mr. Assam agreed where they each believed the common boundary line was located.<sup>3</sup> A practical and common solution between two owners of land in the country. Rallis & Weber provided no evidence to contradict the evidence of this agreement about the location of the boundary line. More importantly, evidence was presented to establish subsequent possession and use of the Disputed Area by F & K and its predecessors consistent with this agreement as to the location of the boundary line. There was no “revised” boundary line, simply an agreement as to where it was located. The evidence is undisputed that the owners proceeded to use their land for decades consistent with this understanding. Rallis & Weber did not buy their land until 2007, years after title to the Disputed Area vested in F & K.

South Dakota recognizes the doctrine of acquiescence to enforce an agreed-upon boundary line. As held in *City of Deadwood*, 2000 S.D. 29, 607 N.W.2d 22:

In South Dakota, if the landowner can show both adjoining property owners mistakenly believed in the location of a boundary line, the element of hostility will be satisfied for purposes of a claim of adverse possession.

*Id.* at ¶ 23. The 20-year possessory requirement must still be established. *Id.* Mr. Scollon and Mr. Assam had a mistaken belief as the location of the boundary line between their lots. They and their successors in title then acted consistently with this belief for over 20 years. If the Scollons believed that the boundary line was located elsewhere, they could have easily told the Assams and F & K to cease their adverse possession and use of the

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<sup>3</sup> John Scollon and Fred Assam are both deceased. TT page 19, lines 2-6.

Disputed Area. It is not in dispute that the Disputed Area was visible from the adjacent highway. F & K's use for decades couldn't have been more visible, which is evident in the various aerial photos submitted by Rallis & Weber. The Scollons resided just down that same highway.

Rallis & Weber spend a lot of time in their brief focused on the legal descriptions in the deeds. The fact that the legals in the deeds to the Assam Property do not convey title to the Disputed Area is a red herring. F & K asserts title to the Disputed Area under SDCL 15-3-12 through adverse possession for the required time period. It does not claim ownership of the Disputed Area under color of title pursuant to SDCL 15-3-11. There is no evidence that Mr. Scollon or Mr. Assam realized that the legal descriptions in their deeds did not match their understanding of the location on the ground of the boundary line.

Rallis & Weber argue that a reduction in the size of their parcel may limit their ability to develop the lot. Even if true, this is irrelevant under adverse possession law. The potential effect on a respondent owner is not a factor under either SDCL 15-3-12 or case law.

**III. Rallis & Weber did not regain title to the Disputed Area through operation of SDCL 15-3-15 (which they did not plead) as they presented no evidence that they had actual possession of the Disputed Area for the statutory 10-year period.**

As an initial matter, and dispositive of this argument, Rallis & Weber did not plead in their Complaint that title to the Disputed Area somehow vested in them under SDCL 15-3-15. They cannot now add a new claim. Chapter 15-3 deals with claims of adverse possession. SDCL 15-3-15 is clearly intended to provide an alternate basis to assert title through adverse possession, and not to defeat a claim for adverse possession. There was no claim before the circuit court that title somehow "re-vested" in Rallis &

Weber under SDCL 15-3-15. The trial court properly did not include a conclusion of law regarding SDCL 15-3-15.

Further, SDCL 15-3-15 requires possession of the property at issue. Rallis & Weber did not have the necessary actual possession of the Disputed Area. The statute states:

Every person in the actual possession of lands or tenements under claim and color of title made in good faith, and who shall have continued for ten successive years in such possession, and shall also during said time have paid all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his paper title. All persons holding under such possession by purchase, devise, or descent before said ten years shall have expired, and who shall have continued such possession and payment of taxes as aforesaid so as to complete said term of ten years of such possession and payment of taxes, shall be entitled to the benefit of this section.

SDCL 15-3-15 (emphasis added). Rallis & Weber presented no evidence that they had “actual possession” of the Disputed Area for the required ten-year period, let alone clear and convincing evidence. No evidence that they mowed, snow plowed, performed any maintenance, storage, or any evidence to show that they occupied or possessed the Disputed Area. Rallis & Weber do not cite a single case to support their over-broad interpretation of SDCL 15-3-15. The statute requires that Rallis & Weber had “actual possession” of the Disputed Area for at least ten years. They provided no evidence of any possession, other than that weak argument that because the Disputed Area is in the country, they did not need to take any action to actually possess it.

Rallis & Weber did not establish they had “actual possession” of the Disputed Area for the required ten-year period. In their brief, Rallis & Weber claim they proved actual possession since 2007, citing Paragraph 9 of the Findings. Appellees’ Brief, page 24. However, Finding No. 9 notes that Rallis & Weber purchased their property in 2007,

but says nothing about actual possession of the land. Findings of Fact ¶ 9. Mr. Weber testified that he only spoke to Mr. Assam three or four times over a period of four or five years. TT pages 131-132, lines 24-25, 1-7. Rallis & Weber complained about some trees which were burned in the middle of the Rallis & Weber property. TT page 79, lines 11-20; TE 16. But this was not in the Disputed Area, and thus irrelevant. Mr. Rallis testified that he told tenant Arneson to remove what he saw as encroachments, that Mr. Arneson did so initially, but then stopped as Mr. Assam informed him that it was F & K's land and he could park in the Disputed Area. TT page 86, lines 1-14. Mr. Rallis stated that parking vehicles and trailers and other use by F & K or its tenant in the Dispute Areas was "repeated and continuous" despite his stated complaints. TT page 86, lines 1-6. This is hardly evidence that Rallis & Weber were in "actual possession" of the Disputed Area. SDCL 15-3-15 does not apply in this case.

### CONCLUSION

Based on the foregoing, the erroneous conclusions of law of the trial court are properly reversed, and judgment entered in favor of F & K holding that it is the owner of all right, title, and interest in the Disputed Area, to the exclusion of any rights claimed by Rallis & Weber. Rallis & Weber's Notice of Review is properly denied as SDCL 15-3-15 does not apply.

Dated: September 26, 2025.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), the undersigned certifies that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 365, features Times New Roman (12 point) font, and contains a total of 3,655 words, excluding the table of contents, table of authorities, and certificates of counsel. The undersigned has relied on the word and character count of the word-processing program to prepare this certificate.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of September 2025, a true and correct copy of the foregoing Appellant's Reply Brief was electronically filed and served via Odyssey File and Serve upon the following, with an original mailed to the clerk of the Supreme Court at 500 East Capitol Avenue, Pierre, South Dakota 57501.

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