20090124

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
OF THE
STATE OF NORTH DAKOTA

No. 20090124

HAROLD SPITZER,

Plaintiff and
Appellant

vs.

NEIL R. BARTELSON AND
DELILA BARTELSON,

Defendants and
Appellees

BRIEF OF DEFENDANTS/APPELLEES NEIL R. BARTELSON AND DELILA BARTELSON

Appeal from District Court
Mountrail County District Court
Northwest Judicial District
The Honorable William W. McLees
Civil Case No. 31-07-C-00085

Supreme Court No.: 20090124

Bruce A. Selinger, Attorney I.D. # 04368
KUBIK, BOGNER, RIDL & SELINGER, P.L.L.P.
Attorneys for Defendants and Appellees
Office and Post Office Address:
26 East Third Street, P. O. Box 1173
Dickinson, ND 58601-1173
Telephone No. (701) 225-9155

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I. STATEMENT OF THE ISSUES

[¶ 1] Did the Trial Court err in when it determined that the Quit Claim Deed which George Spitzer delivered to Neil and Delila Bartelson in satisfaction of the antecedent Contract for Deed expressed the true intentions of the parties as to the minerals?

II. STATEMENT OF THE CASE

[¶ 2] This is a Quit Claim Deed reformation action involving a 50% mineral interest under a 160 acre quarter of land. Neil and Delila Bartelson entered into a Contract For Deed with Neil's grandmother, Hattie Spitzer and her husband George Spitzer. The Contract for Deed contained a 50% mineral reservation. Hattie died and her interest passed to her husband George Spitzer (1/2), and her sons Ralph Bartelson (1/8th), John Bartelson (1/8th), George Bartelson (1/8th) and Harold Spitzer (1/8th). *See Appendix pg. 20 Decree Establishing Heirship.* Ralph Bartelson, George Bartelson, John Bartelson and Harold Spitzer all signed a deed to George Spitzer containing no mineral reservation. *See Deed, Appendix pg. 22.* George later signed a Quit Claim Deed which did not contain a mineral reservation. George passed away and his and Hattie's son, Appellant, Harold Spitzer (Harold), brought this action seeking reformation of the deed. Harold contends the Quit Claim Deed mistakenly did not contain the reservation. *See Complaint Appendix pg. 5.* The Defendants, husband and wife, Neil and Delila Bartelson, (Bartelsons) contend that the Quit Claim Deed not containing the reservation expresses the true intent of the parties. *See Answer, Appendix pg. 12.* The matter was tried to the

Court on December 8, 2008. *See Amended Judgment, Appendix pg 60.* The Court issued an Amended Opinion of the Court dated March 5, 2009. *See Amended Opinion, Appendix pg. 42.* The Court entered its Amended Findings of Fact, Conclusions of Law and Order for Judgment After Trial by the Court on March 12, 2009. *See Amended Findings of Fact, Conclusions of Law and Order for Judgment After Trial by the Court, Appendix pg. 51.* An Amended Judgment was entered on March 16, 2009. *See Amended Judgment, Appendix pg. 60.* Appellant filed a Notice of Appeal on April 7, 2009. *See Notice of Appeal, Appendix pg. 61.*

III. STATEMENT OF FACTS

[¶ 3] The Appellees will not repeat the facts taken verbatim from the Trial Court's Amended Findings of Fact, Conclusions of Law, and Order for Judgment outlined in Appellant's Brief, Appendix pg. 51. The following additional facts and relevant citations to the record are set out below.

[¶ 4] George Spitzer spent more th an five years in a nursing home prior to his death and never disclosed to the State of North Dakota, who paid for his care, that he claimed any minerals. *See Direct Examination Transcript, pgs. 17 L.5-7. Pg. 36 L2-11.*

[¶ 5] Harold Spitzer was not present or aware that the land was sold to Bartelsons and never claimed any minerals nor saw the Contract for Deed or Quit Claim Deed before beginning the litigation. *See Cross Examination Transcript, pg. 31, L.71-25, pg. 32, L1-5, pg. 39, L1-25.* Also as is outlined hereinabove Harold Spitzer deeded the interest he received from Hattie Spitzer's estate to George Spitzer and did not reserve any minerals. *See Deed Appendix Page 22.*

[¶ 6] Harold Spitzer didn't know if there should or shouldn't have been a mineral reservation in the Quit Claim Deed. *See. Cross Examination Transcript, Pg. 34, L.2-4.*

[¶ 7] Harold Spitzer thought his dad gave the minerals away or was talked out of the minerals now owned by Neil Bartelson. *See Cross Examination Transcript, pg. 34 L.10-25.*

[¶ 8] George Spitzer never leased any minerals. *See Cross Examination Transcript, pg. 35 L.21-23.*

[¶ 9] Neil Bartelson stated that he was to receive all minerals after the death of his grandmother, Hattie Spitzer. *See Direct Examination Transcript, pg. 41 L.22-25, pg. 42 L.1-2, pg. 43 L.17-25.*

[¶ 10] John Bartelson was aware of the sale, and knew that the minerals were to end up with Neil Bartelson. *Direct Examination Transcript, pg. 50 L.3-19, pg. 51 L.16-21, pg. 52 L.1-13, pg. 54 L.17-20.*

[¶ 11] Neil Bartelson was the only party to lease 100% of the minerals prior to this litigation. *See Appendix Exhibit 11, pg. 26, Exhibit 14, pg. 33, Exhibit 15, pg. 35 and Exhibit 16, pg. 37.*

SUMMARY OF ARGUMENT

[¶ 12] This case involves the issue as to whether the Quit Claim Deed without a mineral reservation expresses the true intent of the parties or if the prior Contract for Deed with a mineral reservation expresses the true intent of the parties. Harold had the burden of proof by the standard of "clear and convincing evidence" to prove that George

Spitzer never intended to pass the minerals in the Quit Claim Deed. As ruled by the Court, Harold failed to meet this burden. *See Amended Opinion of the Court. See Appendix, pg. 48.*

[¶ 13] This appeal centers around an argument by Harold that Bartelsons need to reform the Contract for Deed. It has always been Bartelsons' position that the Quit Claim Deed expresses the true intent of the parties and that the Contract For Deed does not need to be reformed. Parol evidence is admissible to prove or disprove a reformation claim in a Complaint.

[¶ 14] Harold failed to offer any evidence in support of his position at the trial and his only, unsupported argument was "the Quit Claim Deed must be a mistake". Harold is attempting to switch the burden of proof to the Bartelsons, arguing that they need to reform the Contract For Deed rather than Harold needing to reform the Quit Claim Deed.

[¶ 15] Harold attempts to rely on non-party hearsay in support of his claim, but attempts to twist the facts and testimony, and restrict the testimony of the same non-party who is verifying the intent of the Quit Claim Deed.

[¶ 16] The only reference to a mistake in the Quit Claim Deed is made by the Plaintiff's counsel. His own witnesses never mentioned the word "mistake" in their testimony nor did they offer any testimony or evidence in support of their complaint.

LAW AND ARGUMENT

I. STANDARD OF REVIEW.

[¶ 17] This case involves the Appellant's attempt to reform a Quit Claim Deed not Appellees' needing to reform a Contract for Deed.

[¶ 18] North Dakota law provides for reformation in Section 32-04-17 N.D.C.C. which states as follows:

> 32-04-17. **Revision of contract for fraud or mistake.** When, through fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that intention so far as it can be

[¶ 19] The burden of proof is borne by the party asserting that reformation should occur.

> The party seeking reformation has the burden of proving that the written instrument does not accurately state what the parties intended with evidence that is clear, satisfactory, specific, and convincing that there was a mutual mistake of fact. Zabolotny v. Fedorenko, 315 N.W.2d 668 (N.D. 1982); Ives v. Hanson, 66 N.W.2d 802, 806 (N.D. 1954). Each case must be determined on its own particular facts and circumstances and the court can take into consideration all facts which disclose the intention of the parties. Ell v. Ell, 295 N.W.2d 143, 150 (N.D. 1980).

Wehner v. Schroeder, 354 N.W.2d 678 (N.D. 1984).

[¶ 20] Harold is attempting to reform the Quit Claim Deed given by his father to Bartelsons which does not contain a mineral reservation. *See Quit Claim Deed, Appendix, pg. 17.* Bartelsons are not trying to reform the Contract for Deed previously entered into with a reservation. *See Contract for Deed, Appendix, pg. 15-16.*

[¶ 21] A more recent pronouncement on the burden of proof in reformation actions came out of the North Dakota Supreme Court's decision in Ritter, Laber & Assoc. v. Koch Oil, Inc., 2007 N.D. 163, ¶14, 740 N.W.2d 67:

> "A party seeking reformation has the burden to prove by clear and convincing evidence that a written agreement does not fully or truly state the agreement the parties intended to make. Dahl v. Messmer, 2006 ND 166, ¶ 9, 719 N.W.2d 341. For a mutual mistake to justify reformation of an agreement, the party seeking reformation must show that, when the agreement was executed, both parties intended to say something different

> from what was said in the document. Heart River Partners v. Goetzfried, 2005 ND 149, ¶ 15, 703 N.W.2d 330. Whether there has been a mutual mistake sufficient to support a reformation claim is a question of fact. Id. A district court's findings of fact will not be reversed on appeal unless they are clearly erroneous. N.D.R.Civ.P. 52(a)."

[¶ 22] Thus, whether or not there was a mutual mistake made in not including a mineral reservation in the Quit Claim Deed becomes a question of fact. Harold had to show that the Quit Claim Deed not containing the mineral reservation did not express the true intent of the parties. The standard of review is based upon the clearly erroneous standards. In this case Harold presented no evidence in support of his claim for reformation. In fact, the evidence Harold presented supports the Quit Claim Deed. This evidence includes:

[¶ 23] George Spitzer spent more than five years in a nursing home prior to his death and never disclosed to the State of North Dakota, who paid for his care, that he claimed any minerals. *See Direct Examination Transcript, pgs. 17 L.5-7. Pg. 36 L2-11.*

[¶24] Harold Spitzer was not present, or aware that the land was sold to Bartelsons and never claimed any minerals nor saw the Contract for Deed or Quit Claim Deed before beginning the litigation. *See Cross Examination Transcript, pg. 31, L.71-25, pg. 32, L1-5, pg. 39, L1-25.*

[¶ 25] Harold Spitzer didn't know if there should or shouldn't have been a mineral reservation in the Quit Claim Deed. *See. Cross Examination Transcript, Pg. 34, L.2-4.*

[¶ 26] Harold Spitzer thought his dad gave the minerals away or was talked out of the minerals now owned by Neil Bartelson. *See Cross Examination Transcript, pg. 34 L.10-25.*

[¶ 27] George Spitzer never leased any minerals. *See Cross Examination Transcript, pg. 35 L.21-23.*

[¶ 28] Bartelsons on the other hand offered the following evidence in support of the Quit Claim Deed:

[¶ 29] Neil Bartelson stated that he was to receive all minerals after the death of his grandmother. *Direct Examination Transcript, pg. 41 L.22-25, pg. 42 L.1-2, pg. 43 L.17-25.*

[¶ 30] John Bartelson was aware of the sale, and knew that the minerals were to end up with Neil Bartelson. *Direct Examination Transcript, pg. 50 L.3-19, pg. 51 L.16-21, pg. 52 L.1-13, pg. 54 L.17-20.*

[¶ 31] Neil Bartelson was the only party to lease 100% of the minerals prior to this litigation. *See Appendix Exhibit 11, pg. 26, Exhibit 14, pg. 33, Exhibit 15, pg. 35 and Exhibit 16, pg. 37.*

[¶ 32] The testimony offered by Bartelsons regarding the intent of the parties was to prove that the Quit Claim Deed was not in error, not to reform the Contract for Deed as alleged by Spitzer. All parties knew that the minerals were to end up with the Bartelsons once Hattie Spitzer died. That's why George Spitzer never included a mineral reservation in the Quit Claim Deed. The fact that Bartelsons leased 100% of the minerals after Hattie Spitzer died and before George Spitzer signed the Quit Claim Deed supports this intent. George Spitzer never leased these minerals because he knew they were to end up with Bartelsons.

II. THE COURT DID NOT ERR BY ADMITTING PAROL EVIDENCE TO RESOLVE THE ISSUE OF INTENT REGARDING THE QUIT CLAIM DEED.

[¶ 33] The issue before the Trial Court was Harold's attempt to reform the Quit Claim Deed, not Bartelsons' attempt to reform the Contract for Deed.

[¶ 34] In this case the Bartelsons offered all of their testimony in support of the Quit Claim Deed. The Quit Claim Deed was a written, clear and unambiguous document. Section 9-06-07 N.D.C.C. provides as follows:

> **9-06-07. Written contract supersedes oral negotiations.** The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

§ 9-06-07 N.D.C.C.

[¶ 35] The North Dakota Supreme Court has confirmed this standard: "Where a written contract is complete in itself, is clear and unambiguous in its language and contains mutual contractual covenants agreed upon, such parts cannot be changed by parol testimony, nor new terms added thereto, in the absence of a clear showing of fraud, mistake or accident. Larson v. Wood, 75 N.D. 9, 25 N.W.2d 100, 101." Mevorah v. Goodman, 79 N.D. 443, 57 N.W.2d 600 (N.D. 1953).

[¶ 36] The Trial Court recognized that a contract suspends all prior or contemporaneous oral agreements concerning the subject matter of the contract. Ell v. Ell, 295 N.W.2d 143, 149 (N.D. 1980). However "[e]vidence extrinsic to the documents is relevant to a claim for reformation based on fraud or mistake." Mau v. Schwan, 460 N.W.2d 131, 134 (N.D. 1990) (citing Ell, 295 N.W.2d at 149). "In considering whether or not a mutual mistake exists, the Court can properly look into the surrounding circumstances and take into consideration all facts which disclose the intention of the

parties." Id. (Emphasis supplied). "Generally, for a mutual mistake to justify reformation of an agreement, it must be shown that at the time of the execution of the agreement . . . both parties intended to say something different from what was said in the instrument." Id. At 135. Citing Meyer v. McCormick, Inc., 445 N.W.2d 21, 24 (N.D. 1989). See also: City of Fargo v. DTC Properties, Inc., 1997 ND 109, ¶ 12-13, 564 N.W.2d 274 (Holding that in a reformation action any information showing the parties' true intent is admissible and not barred by parol evidence). *See Appendix Findings of Fact, pg. 57.*

[¶ 37] Since the Trial Court in this case was being asked to determine whether a mutual mistake justifies reformation of what appears (on its face) to be an unambiguous Quit Claim Deed given in satisfaction of an antecedent Contract for Deed, evidence which has any tendency to disclose the true intentions of the parties to this transaction (i.e., the Hattie/George S. – Neil/Delila sale) is needed, and was properly taken into account by the Court. *See Appendix Findings of Fact, pg. 37-58.*

[¶ 38] If you consider the argument of Harold based upon his narrow reading of § 9-06-07 N.D.C.C. you would not be allowed any parol evidence leading up to the execution of the written Quit Claim Deed. Once again, the parol evidence allowed was in support of the Quit Claim Deed, not to reform the Contract for Deed. The following seems to be the general rule regarding how to interpret parol evidence:

> "The application of the parol evidence rule will be impacted by the precise issue the court is considering. For example, the parol evidence rule will be at its zenith when a party seeks to determine title to an interest, but will have little impact when the party seeks to set aside or reform a particular instrument. If the suit is to determine title, any attack upon an instrument in the chain of title is merely collateral to the purpose of the litigation. Parol evidence is normally excluded when offered to mount a collateral

> attack upon an unambiguous instrument. Where the purpose of the litigation is a direct attack to set aside, modify or reform the writing, parol evidence is freely admitted. In such a direct attack the issue is whether the instrument, as prepared, actually reflects the true intention of the parties. Therefore, the intention of the parties, as revealed by parol evidence, must be compared with the writing to determine whether it should be set aside or reformed." Edwards v. Carter Oil Co., 288 S.W.2d 954 (Ark.1956) (mutual mistake); Smalley v. Rogers, 100 So.2d 118 (Miss.1958) (reformation due to mutual mistake); Wiseman v. Priboth, 310 S.W.2d 600 (Tex.Civ.App.1958) (reformation due to mutual mistake).

III. THE TRIAL COURT DID NOT ERR IN ADMITTING THE NON-PARTY TESTIMONY AND DID NOT BASE IT'S DECISION SOLELY ON SUCH TESTIMONY.

[¶ 39] Neil Bartelson's uncle, John Bartelson testified about his understanding of who was supposed to end up with the minerals. He testified that he was initially involved in the sale discussion to Neil. *Transcript, pg. 49 L.2-125, pg. 54 L.17-20.* It was clear from these discussions that the minerals were to end up with the surface. See *Transcript, pg. 50 L.3-19.* John Bartelson personally owned minerals in these lands. He himself gave up his share of the minerals because he knew that the deal was that the minerals were to end up with the land. *See Transcript, pg. 51 L.16-21, pg.52 L.1-13.* Even Harold himself testified that he knew the minerals were to be the Bartelsons' as early as the nineteen eighties and did nothing about it back then. *See Transcript Cross Examination, pg. 34 L.10-25.* The Court, as the fact finder can decide what testimony of a witness it will rely upon. The Court carefully considered what evidence to allow as parol evidence when it stated:

> "While Harold is critical of the Court's receipt (and potential consideration) of what he labels as "self-serving hearsay" testimony from Neil and John concerning the intentions of the parties to this transaction (i.e., the Hattie/George S. – Neil/Delila sale), it is clear to the Court that it may properly take into account all facts which may shed light on the intentions of the parties when determining whether reformation is an

appropriate remedy in a particular case." Wehner v. Schroeder, 354 N.W.2d 678 (N.D. 1984).

See Appendix Findings of Fact, pg. 56.

IV. BECAUSE HAROLD FAILED TO MEET HIS BURDEN CHALLENGING THE QUIT CLAIM DEED THE MINERALS ARE ALL OWNED BY BARTELSONS.

[¶ 40] Harold is under the false presumption that Bartelsons have the burden to reform the Contract for Deed. This is in error as Harold has the burden by clear and convincing evidence to prove that the Quit Claim Deed was a mutual mistake.

[¶ 41] Harold never provided any evidence in support of reformation. He simply relies on the false assumption that since the two documents are different there must be a mistake. He refuses to accept that there was another alternative. The Court correctly set out this alternative when it ruled based on the evidence, that Harold has failed to meet the very exact burden of proof he is charged with in this matter. Specifically, he has failed to prove --- by evidence that is **clear, satisfactory, specific, and convincing** . . . that the Quit Claim Deed which George Spitzer delivered to Neil and Delila did not express the true intentions of the parties to the Quit Claim Deed. *See Appendix Conclusions of Law, pg. 58.*

[¶ 42] "Clear and convincing evidence" is evidence which leads one to a firm belief or conviction that certain allegations are true. This is a higher standard of proof than proof by the greater weight of the evidence. The evidence need not be undisputed to be clear and convincing. See NDJI C-1.41. Burden of Proof – Clear and Convincing Evidence. *See Appendix Conclusions of Law, pg. 55.*

[¶ 43] In the case before the Court, the only individuals who testified before the Court who had first-hand knowledge as to the negotiations/discussions between the parties to the Hattie and George Spitzer to Neil and Delila Bartelson land sale were Neil Bartelson and John Bartelson. While Neil Bartelson obviously has something to gain by being able to persuade the Court to adopt the argument advanced by he and his wife, the Court observed that John Bartelson really does not "have a dog in this fight", as he has never made any claim to the minerals in question. Accordingly, the Court found John Bartelson's testimony to be particularly persuasive in terms of whether a mutual mistake was made when the Quit Claim Deed did not contain the reservation set out in the prior Contract for Deed and, as already indicated, John Bartelson unequivocally told the Court that the minerals were to "go with the land" after Hattie's death. *See Appendix Conclusions of Law, pg. 58.*

[¶ 44] The Court correctly found that the Wehner decision was distinguishable, on its facts, from the present case in the sense that, in Wehner, the District Court was presented with evidence indicating that the parties to the Contract for Deed and subsequent non-conforming Warranty Deed contemplated that the Wehners would in fact retain "50% of all oil gas and mineral" underlying the subject property. Therefore, if the Contract for Deed is not a result of a mistake, the evidence presented in this case shows that the Quit Claim Deed with no mineral reservation followed the true intent of the parties hereto.

VI. CONCLUSION

[¶ 45] The District Court's Judgment should be affirmed and Judgment entered for Bartelsons.

Dated this 9th day of July, 2009.

KUBIK, BOGNER, RIDL & SELINGER, PLLP
Attorneys for Defendants
26 East Third Street
P. O. Box 1173
Dickinson, ND 58602-1173
(701) 225-9155
Telephone No. 701-225-9155
Facsimile No. 701-225-9157

By: Bruce A. Selinger
Bruce A. Selinger, Attorney
(I.D. #04368)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEES was served by e-mail this 9th day of July, 2009, on the following:

Kent Reierson
Crowley Fleck PLLP
Attorneys at Law
111 East Broadway
P. O. Box 1206
Williston, ND 58802-1206
e-mail: kreierson@crowleylaw.com

North Dakota Supreme Court
State Capitol – Judicial Wing 1st Floor
600 E Boulevard Ave., Dept. 180
Bismarck, ND 58505-0530
supclerkofcourt@ndcourts.gov

Bruce A. Selinger
Bruce A. Selinger