IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No.: 20090289
Bottineau County District Court No.: 08-C-00017

Michael Swanson, James Swanson, Robert Swanson, and Candyce Johnson,	Plaintiffs and Appellees.
v.	
Glenn K. Swanson, aka G.K. Swanson,	Defendant and Appellant,

****

Maggie McMillan, John F. Renick, Martha E. Renick, Riley Garrison, Peter Ellingson, aka Pete Ellingson, George Perrin, Arles O. Smith, Liberta Smith, Herman Soenke, Etta Soenke, David Keller, Cynthia Keller, Anna Garrison, aka Anna Swanson, Asmundur Swanson, William S. Swanson, the unknown heirs, devisees, legatees and successors in interest of William S. Swanson, deceased; Arlo C. Swanson, E. Lorraine Swanson, as Trustee of the E. Lorraine Swanson Revocable Trust, any unknown heirs, devisees and legatees or successors in interest of any of the named Defendants, be they deceased; all persons unknown claiming any interest in the property described in the complaint,	Defendants
AND	
Glenn K. Swanson,	Third-Party Plaintiff and Appellant
v.	
E. Lorraine Swanson,	Third-Party Defendant and Appellee.

APPELLANT'S REPLY BRIEF

APPEAL FROM THE JULY 31, 2009 MEMORANDUM OPINION AND ORDER FOR JUDGMENT ISSUED BY JUDGE MICHAEL G. STURDEVANT BOTTINEAU COUNTY DISTRICT COURT

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North Dakota State and Federal cases

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STANDARD OF REVIEW

1. The standard of review is set forth by this Court:

> [W]hether a subsequent purchaser acted in good faith without constructive notice of a prior interest is a mixed question of fact and law, and is fully reviewable. [citations deleted]. A court's ultimate determination that a party is not a good faith purchaser for value is a conclusion of law,

Erway v. Deck, 588 N.W.2d 862, 864, 1999 ND 7, ¶ 11.

SYNOPSIS OF FACTS

2. Glenn Swanson ("Glenn") is an admitted procrastinator. He has neglected to record documents even when recording was to his benefit. Glenn was a co-grantee of a joint tenancy deed delivered to him on June 10, 1963 for 160 acres ("Premises"). App 28-30, 45-46. Glenn became sole owner of the Premises when William Swanson ("William") the other joint tenant, died in 1999.

3. Although William farmed nearby, he never farmed the Premises. T 189. Glenn handled all the affairs of the Premises, located tenants, and Glenn and William shared equally proceeds from the Premises. T 165-167, 222-224, 238-239, 243-245. After William died, Glenn told Lorraine Swanson's ("Lorraine") son, that due to the June 10, 1963 joint tenancy deed and William's death, the Premises belonged to Glenn. T 291-293, App 56. The Court found: "At the 2001 inurnment ceremony, in an act of tactless timing Glenn advised William and Lorraine's son Robert that he (Glenn) owned the Property." App 29.

4. Even though she had signed the 1963 deed to Glenn, Lorraine, as Personal Representative ("PR") of William's Estate, signed a deed purporting to transfer the Premises to Lorraine's Trust on April 3, 2000, for no payment. App 29, 61.

On June 18, 2003, Lorraine, as Trustee of her own Trust, signed a deed conveying to her children the Premises, plus 720 acres that Lorraine had obtained from her family. App 59-60. When asked what her children paid her Trust for 880 acres of land, Lorraine testified "Ten dollar bill." App 61. When asked "What consideration, if anything did you and/or your siblings provide to your mother in exchange for receiving ownership of these properties [the 880 acres]" James Swanson replied: "Well, it was Ten Dollars ... and then she wanted the land to stay in the family ... and then we were going to provide for her just different needs that she should require." T 109. Lorraine was asked:

> Q: "...[A]s a result of you giving your children this particular quarter of land [SW ¼ of 33]... do you think because of that your children are legally obligated to take good care of you?
>
> A: "No, I think they love me and we – I love them and they'd take care of me regardless." App 62.

5. James was asked that had the 160 acre Premises been excluded from the rest of the land that Lorraine's children received from Lorraine's trust, "would you have still had the same obligation – moral and legal obligation to take care of her financial means(sic)? " His answer was "Yeah, I believe so." T 121.

GLENN COULD NOT BE DIVESTED OF HIS OWNERSHIP OF THE PREMISES BY WILLIAM OR HIS HEIRS.

6. The June 10, 1963 deed from William and Lorraine to William and Glenn as joint tenants was valid, regardless of the amount of consideration. N.D.C.C. § 47-09-

03. Young v. Smith, 191 N.W.2d 516 (N.D. 1971). After William signed and delivered the June 10, 1963 deed to William and Glenn as joint tenants, the transfer of ownership to Glenn was complete. N.D.C.C. § 47-09-06. William, or his heirs could never thereafter divest Glenn of his ownership interest, even if the deed into Glenn were destroyed, or never recorded. N.D.C.C. § 47-09-10. Silbernagel v. Silbernagel, 55 N.W.2d 713, 79 N.D. 275 (1952). "The holder of such an instrument [unrecorded deed], however, has definitely succeeded to all the rights of the record owner in the property". Collins v. Federal Land Bank of St. Paul, 119 F.2d 228, 230 (8th Cir, D.C.N.D. 1941). When William died, Glenn, as one of two joint tenants, became 100% owner of the Premises. Jangula v. Jangula, 2005 N.D. 203 ¶ 16, 706 N.W.2d 85.

7. The June 18, 2003, deed from Lorraine's Trust to her children contains two components, each with different legal ramifications. The 720 acres from Lorraine's family was not subject to prior unrecorded deeds. Therefore Lorraine had the right to gift the 720 acres to her children, or sell it for any price. A promise by the children to care for their mother in the future would have been sufficient consideration for a deed to the 720 acres.

8. The second component of the June 18, 2003, deed, the 160 acre Premises, was not owned by Lorraine's Trust; it was owned 100% by Glenn. Having no ownership in the Premises, the Trust had no ownership rights it could transfer and the Trust had no legal justification to receive any payment if it did purport to transfer the Premises. Due to Glenn's prior deed to the Premises, a gift of the Premises from Lorraine's trust could not confer good title to her children. Unless the children

paid "valuable consideration," put at risk a substantial investment, they could not obtain title to the Premises, regardless of how much Lorraine wanted her children to have the land.

9. The transfer from Lorraine's Trust of the 720 acres from Lorraine's family and the 160 acre Premises was via one deed. Initially, the entire 880 acres was a gift, with the deed citing consideration of $1, and the parties testifying the children paid $10. App 59-62. After this litigation began, Lorraine and her children characterized the entire 880 acres as a sale, the" consideration" being the promise to care for Lorraine. However, James testified that had the Premises been excluded from the June 18, 2003 deed of 880 acres, the children would still have had the same obligation to care for their mother. T 121. The obligation, if any, to care for their mother came from transfer of the 720 acres, and the purported conveyance of the Premises did not create any additional obligation.

10. In her video deposition, [Pages 52 – 55, Supplemental Appendix] Lorraine did not make any distinction between the Premises and the other land her Trust conveyed to her children. Lorraine testified that her children care for her because they love her, and that their care would not be less if a portion of the 880 acres had not been conveyed. Even if an obligation to care for Lorraine was consideration for the 720 acres, it was not consideration for the Premises.

11. The Brief of the Appellee is rife with negative aspersions against Glenn, but these are all irrelevant to this action. There were no claims that William and Lorraine lacked mental capacity to sign the June 10, 1963 deed which they voluntarily executed and delivered to Glenn. Therefore Glenn acquired title as a joint tenant

of the Premises on June 10, 1963, and William, or his Estate or heirs, could never divest Glenn of his ownership rights, as "[e]very grant of an estate in real property is conclusive against the grantor and every one subsequently claiming under the grantor ... ." N.D.C.C. § 47-10-08.

12. To encourage prompt recording of deeds, and to protect good faith buyers from grantors who sells the same property twice, N.D.C.C. § 47-19-41 statutorily removes title from the first grantee, who did not record, and bestows it on the second grantee the instant the second grantee records, provided the second grantee acts in good faith and pays valuable consideration. The second grantee does not receive title from the grantor, regardless of what consideration the grantor receives. Rather the second grantee receives good title from the first grantee, based on the sums the second grantee has invested.

LORRAINE'S CHILDREN DID NOT PAY HER TRUST VALUABLE CONSIDERATION FOR THE PREMISES

13. Upon William's death, Glenn owned 100% of the Premises, even though his deed was unrecorded. Only if Lorraine's children had risked or invested a substantial sum in reliance on their belief that Lorraine's Trust owned the Premises would title transfer to them upon their recording.

> The purpose of requiring valuable consideration is to ensure that unrecorded deeds and mortgages are only invalidated if equity compels that result-that is, if another party has acted in detrimental reliance on the failure to record. Anderson v. Anderson, 435 N.W.2d 687, 689 (N.D.1989),... the purpose of recording laws "is to protect those who honestly believe they are acquiring a good title, and *who invest some substantial sum in reliance* on that belief" (emphasis added) ... [A]party can only be a bona fide purchaser for valuable consideration if such

> consideration is actually paid before the purchaser learns of the prior unrecorded interest ... . The reason for this established rule is that the purchaser can stop the transaction without detriment if it becomes aware of the defect in title prior to making payment.

In re Technical Land, Inc., 172 B.R. 429, 435, Bkrtcy.D.Dist.Col., 1994.

14. In the matter at bar, none of the In re Technical Land, Inc. criteria were met. Lorraine's children took no risks to obtain the Premises. Their $10 for title to 880 acres was not a substantial investment. Their only expense after receiving title was giving their mother several rides. At most they have promised to provide future care for their mother, but that care has not yet been expended, and there was no testimony as to how much that future care (that is not covered by social security, medicare, private health insurance, or Lorraine's own assets) would cost, compared to the value of the land received. Furthermore, both the mother and children testified the children would provide that care anyway, even if the Premises had not been conveyed to the children.

15. After they discovered that Glenn recorded his earlier deed, the children had expended only $10 for their deed and could have avoided any obligation of future care by quit claiming the Premises back to their mother. Granted, they would have lost a windfall (receipt of 160 acres for $10), but they had no legal right to that windfall. When a subsequent buyer claims payment of valuable consideration for a deed dated later but recorded earlier than a prior document, the burden is on the subsequent grantee to prove valuable consideration, and lacking proof, the court will deny the later claim. Dolphin v. Marocik, 222 A.D.2d 549, 635 N.Y.S.2d 84 (N.Y.A.D. 2 Dept., 1995).

LORRAINE'S CHILDREN WERE NOT GOOD FAITH PURCHASERS

16. Appellees admit in Paragraph 38 of their Brief that the "trial court determined that the children were given notice of Glenn's claim in the summer of 2001, ..." There was no testimony at trial as to what investigation, if any, the children made after Glenn told them that he owned the property. The burden was on the children to make the investigation and present evidence of same at trial. Erway v. Deck, 588 N.W.2d 862, 864, 1999 N.D. 7 ¶ 10. They presented no evidence of investigation.

17. A recent New York case discusses both valuable consideration and good faith:

> Where a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that [which] he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a bona fide purchaser." [citations deleted]

HSBC Mortg. Services, Inc. v. Alphonso Slip Copy, 16 Misc.3d 1131(A), 2007 WL 2429711.

18. In HSBC the subsequent buyer paid $20,000, and at least alleged that it paid full value. Nonetheless, the Court found valuable consideration was not paid. In the case at bar, the value of the full 880 acres conveyed to Lorraine's children was testified as being between $440,000 and $880,000, but the only evidence of consideration was $10, plus several rides to medical appointments, which were not quantified.

19. The Court in HSBC ruled that when any indication was received by the second buyer that there are potential title problems, the burden was on the second buyer

to conduct a due diligence examination, and offer evidence to the court as to extent of the examination. In the present action, the children knew their father farmed the other family land, but not the Premises. At trial extensive testimony and documentation was submitted that Glenn handled all the affairs of the Premises since the 1950s when Anna owned it. T 165-167, 186-189, 222-224, Paragraph 18 of the Appellee's Brief admits that Glenn managed the Premises. The children knew that ownership of the Premises originated from Anna, stepmother to William and Glenn, and not from Lorraine's family, the source of the other 720 acres transferred. When one of the children were told by Glenn that Glenn owned the Premises that Glenn had been managing for many years, they were obligated to investigate Glenn's claims. They should have sought full details from Glenn and from tenants who had farmed the Premises over the years. They should have inquired from Arlo, to whom Glenn gave a mortgage on the Premises, recorded on the land records on November 24, 1969. App 53-55. The children conducted no investigation, or if they did, they did not submit any evidence of investigation at the trial.

CONCLUSION

20. Neither the character of Glenn nor of Lorraine is at issue in this matter. The sole issue before the Court is whether Lorraine's children were both good faith purchasers and paid valuable consideration for the Premises when they received a deed from Lorraine' Trust to the Premises and 720 other acres on June 18, 2003. The focus of this appeal is solely on the knowledge, investigations and payments made by the children when they received their deed.

21. The Trial Count found that the children knew that Glenn claimed ownership of the Premises in 2001. The children presented no evidence at trial that they conducted any investigation of Glenn's ownership claims before accepting a deed to the Premises. Therefore they were not good faith buyers.

22. The Trial Court found that the only consideration for the deed of 880 acres from Lorraine's Trust to her children in June 2003 was an oral promise by the children to take care of their mother. Both the mother and the witness child testified that the children would care for their mother from love and a sense of filial obligation regardless of the oral promise. Aside from testimony that $10 was paid, no evidence was offered at trial as to what the children have paid or may be obligated to provide for the mother in the future. Therefore valuable consideration was not paid by the children. North Dakota law requires title to vest in Glenn Swanson.

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Dated this 3rd day of March, 2010.

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The **Appellant's Reply Brief and Appendix to Appellant's Reply Brief** was served by depositing a true and correct copy of the same in the United States Mail at Bismarck, North Dakota with postage prepaid on March 3, 2010, to the following;

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