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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

Ernest Maki, Judith Abrahamson, Ronald Maki, Kevin Maki, Cheryl Larson and Linda Richter, Plaintiffs and Appellees, vs. Roger Maki, Rodney Maki, Bonnie Billadeau, Mark Maki, Carla Folven, Lori Zimmiond, Kristen Srey, Raymond Maki, Defendants and Appellants, and Verlene Mahlum, Whiting Oil & Gas, the assigns or successors in interest of any Defendants, and all other persons unknown claiming any or interest in, or lien or encumbrance upon, the property described in the complaint, Defendants.	Supreme Court No. 20100120 Mountrail County Civil No. 31-08-C-00233

APPEAL FROM THE JUDGMENT ENTERED FEBRUARY 9, 2010,
AND DENIAL OF MOTION FOR RULE 60(b) RELIEF DATED APRIL 19, 2010,
MOUNTRAIL COUNTY DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT

THE HONORABLE WILLIAM W. McLEES, PRESIDING

BRIEF OF APPELLANTS

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¶2 **STATEMENT OF ISSUES FOR REVIEW**

¶3 (1) Whether the District Court erred in granting summary judgment in favor of grantees quieting title in them to mineral interests conveyed by warranty deed which failed to include a mineral reservation set forth in a prior contract for deed.

¶4 (2) Whether the District Court abused its discretion in denying Rule 60 relief to grantors' descendants.

¶5 **STATEMENT OF THE CASE**

¶6 **A. Introductory Statement:**

This case involves a family mineral dispute between Ernest Maki, Judith Abrahamson, Ronald Maki, Kevin Maki, Cheryl Larson and Linda Richter (the Maki Plaintiffs) and Roger Maki, Rodney Maki, Bonnie Billadeau, Mark Maki, Carla Folven, Lori Zimmiond, Kristen Srey, and Raymond Maki (the Maki Defendants). The Maki Plaintiffs filed suit to quiet title to a mineral interest in property deeded to Ernest and Adeline Maki by William and Mary Maki, which deed did not contain the mineral reservation in the contract for deed they previously executed. (App. pg. 4.) The Maki Defendants answered and counterclaimed for reformation of the deed to include the mineral reservation set forth in the contract for deed. (App. pg. 7.) This appeal is from both the District Court Judgment granting summary judgment in favor of the Maki Plaintiffs and the District Court's denial of the Maki Defendants' Motion for Relief from Judgment.

¶7 **B. Procedural History:**

The Maki Plaintiffs filed suit by Complaint dated December 10, 2008, seeking to

quiet title to minerals underlying property conveyed by William and Mary Maki to Ernest and Adeline Maki by warranty deed. (App. pg. 4.) The Maki Defendants filed an Answer and Counterclaim for reformation of the warranty deed to include the mineral reservation set forth in a previously-executed contract for deed. (App. pg. 7.)

¶8 Both the Maki Plaintiffs and Maki Defendants filed motions for summary judgment. The District Court, on October 30, 2009, issued an opinion granting the Maki Plaintiffs' Motion for Summary Judgment. (App. pg. 21.) The Maki Defendants moved for reconsideration. (App. pg. 38.) The Court denied the motion. (App. pg. 42.) On February 9, 2010, the Court entered judgment granting the Maki Plaintiffs Motion for Summary Judgment. (App. pg. 44.) The Maki Defendants served and filed a Rule 60(b) Motion for Relief from Judgment, (App. pg. 49), which the District Court denied on April 9, 2010. (App. pg. 64.)

¶9 **C. <u>Factual Background</u>:**

William Maki and Mary Maki, husband and wife, owned real property in Mountrail County. (App. pg. 5.) They entered into a contract for deed on February 11, 1964, to sell the property to their son, Ernest Maki, and his wife Adeline Maki. (App. pg. 5.) The contract for deed, which was recorded with the Mountrail County Recorder, contained a reservation of minerals as follows: "The Sellers shall expressly retain an undivided one-half of all the oil, gas and other minerals remaining of record, as of the date of this instrument, in and under the described premises." (App. pg. 5.)

¶10 Two years later, by warranty deed dated February 8, 1966, William Maki and Mary Maki conveyed the premises to Ernest and Adeline Maki as joint tenants. (App. pg. 5.) The

deed did not include any mineral reservation. (App. pg. 5.) Adeline Maki died on May 29, 2004. (App. pg. 5.) Ernest Maki subsequently conveyed the property to the other plaintiffs in this case, reserving a life estate unto himself. (App. pg. 4.) The Maki Defendants are descendants of William Maki and Mary Maki.

¶11 The Maki Plaintiffs commenced suit to quiet title to the mineral interests under the premises conveyed in the warranty deed. (App. pg. 4.) The Maki Defendants served and filed their Answer and Counterclaim, alleging that the mineral reservation was mistakenly omitted from the Warranty Deed and that the deed should be reformed to include the mineral reservation which had been set forth in the contract for deed. (App. pg. 7.)

¶12 The Maki Plaintiffs filed a Motion for Summary Judgment, contending that Maki Defendants did not have clear and convincing evidence to establish a basis for reformation. Specifically, the Maki Plaintiffs contended that the Maki Defendants had no evidence to show that at the time of the execution of the warranty deed, the grantors William and Mary Maki and the grantees Ernest and Adeline Maki intended to say something different that what was included in the deed.

¶13 In response, the Maki Defendants filed a Return to Motion for Summary Judgment and Motion for Summary Judgment. (App. pg. 11.) In its brief, the Maki Defendants pointed out that Ernest and Adeline Maki decided to obtain third-party financing to pay off the contract for deed early, and that Ernest Maki acknowledged that the deed was not prepared by the same attorney who prepared the contract for deed. *Id.* The Maki Defendants also pointed out to the Court the inconsistent testimony of Ernest Maki in his discovery response, wherein he stated that he does not remember the details of the preparation of the

warranty deed. *Id.*

¶14 In reply, the Maki Plaintiffs submitted the Affidavit of Ernest Maki, wherein he stated that a mistake in the warranty deed was not made and that it was his understanding that he was receiving the minerals when the deed was executed. (App. pg. 19.)

¶15 The District Court issued an Opinion on October 30, 2009, granting the Maki Plaintiffs' Motion for Summary Judgment. (App. pg. 21.) In response, the Maki Defendants filed a Motion for Reconsideration. (App. pg. 37.) As a supplement to the Motion for Reconsideration, the Maki Defendants submitted a letter to the Court on December 18, 2009 (App. pg. 41), bringing to the attention of the Court the inconsistency between the Interrogatory Answer of Ernest Maki that he did not recall the details regarding the preparation of the warranty deed (App. pg. 10) and his affidavit in which he stated it was his understanding that he was receiving the minerals when the warranty deed was executed. (App. pg. 19.) The District Court denied the motion. (App. pg. 42.) The Court stated that it considered the Maki Defendants supplemental letter. The District Court entered judgment granting the Plaintiffs' Motion for Summary Judgment. (App. pg. 44.)

¶16 The Maki Defendants filed a Motion for Relief from Judgment under N.D.R.Civ.P. 60(b) based on newly discovered evidence and excusable neglect. (App. pg. 49.) The Maki Defendants presented affidavits from Angeline Maki (the spouse of Richard Maki, son of William Maki) and from Raymond Maki (son of William Maki) that William and Mary Maki spoke Finnish at home and understood little English. (App. pg. 52.) Raymond Maki's affidavit also set forth that his parents, William and Mary Maki, never told him that they intended on transferring all of the minerals to his brother Ernest Maki. (App. pg. 57)

Angeline Maki's affidavit also recalled a conversation at about the time the contract for deed was executed in which her husband, Richard Maki, told his father never to sell his mineral interests and offered to obtain a loan to keep him from selling his mineral interests. (App. pg. 52.) The District Court denied the Motion for Relief. (App. pg. 64.) This Appeal followed. (App. pg. 66.)

¶17 **ARGUMENT AND ANALYSIS**

¶18 I. District Court erred in granting summary judgment in favor of Maki Plaintiffs.

¶19 **A. Standard of Review:**

The Supreme Court reviews a District Court's decision to grant summary judgment de novo on the entire record. *Fetch v. Quam,* 2001 ND 48, ¶ 8, 623 NW2d 357.

¶20 **B. Issues of material fact entitle Maki Defendants to right to trial.**

In *Witzke v. City of Bismarck,* 2006 ND 160, ¶ 7, 718 N.W.2d 586, this court noted that "[S]ummary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that reasonably can be drawn from the undisputed facts, or if the only issues to be resolved are questions of law." [citation omitted]. The party moving for summary judgment must show there are no genuine issues of material fact and the case is appropriate for judgment as a matter of law. *Id,* [citation omitted]. The evidence must be viewed in the light most favorable to the opposing party, who is entitled to the benefit of all favorable inferences. *Id.* [citation omitted].

¶21 The Maki Defendants, as the parties who seek reformation of the warranty deed, have the burden to prove by clear and convincing evidence that the warranty deed does not state

the agreement that the grantors and grantees of the deed intended to make. *Spitzer v. Bartelson*, 2009 ND 179, ¶24, 773 NW2d 798. Each case for reformation must be decided on its own facts and circumstances, and the court may look at the surrounding circumstances and all facts that disclose the parties intentions. *Anderson v. Selby*, 2005 ND 126, ¶9, 700 NW2d 696, *citing Ell v. Ell*, 295 NW2d 143, 150 (ND 1980). NDCC § 32-04-17 is the statutory basis for reformation in North Dakota. It provides as follows:

¶22 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 done without prejudice to rights acquired by third persons in good faith and for value.

¶23 In *Heart River Partners v. Goetzfried*, 2005 ND 149, ¶16, 703 NW2d 330, this court quoted *Lemoge Elec. v. County of San Mateo*, 297 P2d 638, 640-641 (CA 1956), as follows:

> Reformation may be had for a mutual mistake or for the mistake of one party which the other knew or suspected, but in either situation the purpose of the remedy is to make the written contract truly express the intention of the parties. Where the failure of the written contract to express the intention of the parties is due to the inadvertence of both of them, the mistake is mutual and the contract may be revised on the application of the party aggrieved. When only one party to the contract is mistaken as to its provisions and his mistake is known or suspected by the other, the contract may be reformed to express a single intention entertained by both parties. Although a court of equity may revise a written instrument to make it conform to the real agreement, it has no power to make a new contract for the parties, whether the mistake be mutual or unilateral.

¶24 Because Ernest Maki (one of the Maki Plaintiffs) is the only surviving party to the contract for deed and the subsequent warranty deed, the Maki Defendants' proof must necessarily be made without the benefit of testimony from the grantors, William and Mary Maki. That proof also would include the testimony of Ernest Maki, which places his

credibility in issue. Summary judgment is improper when the moving party's credibility is placed in issue by inconsistencies among affidavits and answers to interrogatories, because the nonmoving party is entitled to the benefit of all favorable inferences which might be reasonably drawn from the evidence. *Smith v. Idaho State University Federal Credit Union*, 646 P2d 1016 (ID Ct. App, 1982). The question of the intent of the parties to the warranty deed is a question of fact inappropriate for summary judgment. *First National Bank and Trust Company of Williston v. Scherr*, 456 NW2d 531, 534 (ND, 1990).

¶25 "When the facts may not be in dispute but the inferences reasonably deducible therefrom may be conflicting, summary judgment is inappropriate." *Farmer's Elevator Co. v. David*, 234 NW2d 26 (ND 1975). Summary judgment is, therefore, inappropriate when there are conflicting inferences from the facts. *Albers v. Nodak Racing Club, Inc.* 256 NW2d 355, 358 (ND 1977), *citing Wilson v. Great Northern Railway Co.*, 157 NW2d 19 (SD 1968). Summary Judgment was never intended to be used as a substitute for a court trial. *Id.* Moreover, surmising that a party will not prevail at trial is not a sufficient basis to grant a motion for summary judgment on issues that are not shown to be sham, frivolous or so unsubstantial that it would be futile to try them. Id., at 358-359 [citation omitted].

¶26 In this case, the Maki Plaintiffs submitted the affidavit of Ernest Maki, the only surviving party to the contract for deed and the warranty deed. In his affidavit, Ernest Maki states that it was his understanding that he was receiving the minerals when the warranty deed was executed. (App. pg. 19.) In their responsive brief to the Motion for Summary Judgment, the Maki Defendants pointed out to the Court that Ernest Maki stated in Answers to Interrogatories that he does not remember the details of the warranty deed preparation.

(App. pg. 16.) Ernest Maki's Affidavit stated it was his understanding he was receiving the minerals and that a mistake was not made. (App. pg. 19.) The Maki Defendants pointed out these inconsistent statements to the Court. (App. pg. 41.) These inconsistent statements, when viewed in a light most favorable to the Maki Defendants, make summary judgment inappropriate.

¶27 The District Court stated the following in its October 30, 2009 Opinion:

> [T[he fact remains that [Ernest Maki] is the only person who can come before the Court and say, "this is what happened in relation to this land transaction." There is no evidence before the Court to contradict the plain language of the Warranty Deed, and no evidence to contradict Ernest Maki's stated understanding that he "was receiving the minerals when the February 8, 1966, Warranty Deed was executed."

¶28 While obviously the Maki Defendants cannot present the testimony of grantors William and Mary Maki, Ernest Maki's inconsistent statements place his credibility in issue, and the finder of fact should have the opportunity to determine that credibility even though his statement is uncontroverted. *Ives. v. Hanson*, 66 NW2d 802 (ND 1954). If the Court is to look at all of the circumstances and all facts that bear on the parties intentions, *Anderson v. Selby, supra*, surely the court as trier of fact must be able to judge the credibility of the one remaining party to the transactions at issue.

¶29 When presented with a motion for summary judgment, the District Court's role is "limited to determining whether the evidence and inferences to be drawn therefrom, when viewed in the light most favorable to the party opposing summary judgment, demonstrate that there are no genuine issues of material fact." *Farmers Union Oil Company of Garrison v. Smetana*, 2009 ND 74, ¶10, 764 NW2d 665, quoting *Heng v. Rotech Medical*

Corporation., 2004 ND 204, ¶34, 688 NW2d 389. "The district court may not weigh the evidence, determine credibility or attempt to discern the truth of the matter when ruling on a motion for summary judgment." *Id.* [citations omitted]. "If there are disputed issues of material fact that require resolution by findings of fact, the party opposing summary judgment is entitled to resent its evidence to a finder of fact in a full trial." *Id.*, at ¶11.

¶30 Here, by submitting the affidavit of Ernest Maki, the Maki Plaintiffs sought to support their Motion for Summary Judgment by the one person with knowledge of facts peculiarly within his grasp. Ernest Maki's affidavit, particularly in light of the inference to be drawn from his conflicting interrogatory answer, does not and should not preclude trial on his knowledge of the circumstances leading up to execution of the warranty deed. In *Weidner v. Engelhart*, 176 NW2d 509 (ND 1970), this Court held that summary judgment was improperly granted where the issue involved pertained to the knowledge peculiarly within the minds and control of the moving party. In *Weidner*, directors of a corporation were sued for securities fraud, and they filed affidavits in support of their motion for summary judgment claiming ignorance of any Securities Act wrongdoing. The Court found that the plaintiffs proof must largely be drawn from the directors themselves, who were hostile to the plaintiffs' claims, and that therefore the plaintiffs would at trial be required to rely principally on cross-examination to establish their claims. *Id.*, at 519. The Court held that the affidavits of the directors should not be accepted as conclusive on the question of knowledge and preclude trial on that issue. *Id.* The Court also stated the following:

> ¶31 We believe that it is possible, on a trial of the action, that evidence may be produced from which the jury may infer knowledge on the part of the directors, or some of them, of the securities violations alleged, and that they,

> or some of them, in some way participated or aided in making some, or all, of the sales.
>
> . . .
>
> Thus, to preclude trial of these issues by the granting of summary judgments of dismissal based on the affidavits of the directors which relate to matters peculiarly within their own knowledge and control, without the benefit of cross-examination and observation of their demeanor as they testify, prevents an evaluation of credibility by the trier of the facts.

Weidner, at 519-520. The *Weidner* Court also noted the decision of *Alvado v. General Motors Corporation*, 229 F.2d 408 (2d Cir., 1956), wherein the Court said that where an affidavit of a party in a summary judgment proceeding relates to facts peculiarly within the knowledge of the affiant, granting of summary judgment on the facts contained in such affidavit is error. *Id*, at 520. The *Weidner* Court noted that the *Alvado* Court said to rule otherwise would deprive affiant's opponent of the opportunity to cross-examine and thus prevent the Trial Court from evaluating the credibility of the witnesses by observing their demeanor. *Id.* "Where a party reasonably expects to rely in large part on cross-examination of an adverse party to establish his claim or defense summary judgment will rarely be appropriate." *Sagmiller v. Carlsen*, 219 NW2d 885, 887 (ND 1974).

¶32 Ernest Maki, the sole surviving party to the contract for deed and warranty deed, has submitted inconsistent interrogatory responses and affidavit as to matters peculiarly within his knowledge. Also, his affidavit and his answers to interrogatories, when taken in a light most favorable to the Maki Defendants, create an issue as to whether a mistake was made in the execution of the warranty deed. The conflicting inferences that may be drawn from Ernest Maki's interrogatory answer and his affidavit create a genuine issue of material fact precluding summary judgment. *See Pierce v. Washington Mutual Bank*, 226 SW3d 711, 717

(TX App., 2007). That this is so is buttressed by the reservation in the contract for deed executed a mere two years earlier. *See Spitzer, supra* (contract for deed relevant along with totality of the evidence).

¶33 II. The District Court Abused Its Discretion in Denying Maki Defendants' Motion for Relief From Judgment.

¶34 **A. Standard of Review.**

A trial court's decision to deny relief under N.D.R.Civ.P. 60(b) will not be overturned on appeal absent an abuse of discretion. *Manning v. Manning*, 2006 ND 67, ¶15, 711 NW2d 149.

¶35 **B. Case should proceed to trial based on additional evidence.**

A court in a reformation action can look into the surrounding circumstances and take into consideration all facts which disclose the intention of the parties. *Spitzer, supra*, at ¶15. Any evidence tending to show intention is admissible. *Id.* A court may grant reformation of a written instrument to correct a mutual mistake "when justice and conscience so dictate." *Farmers Union Oil Company of Garrison v. Smetana*, 2009 ND 74, ¶14, 764 NW2d 665.

¶36 In this case, the Maki Defendants' Motion for Relief from Judgment established by affidavit that William and Mary Maki, the grantors, spoke Finnish at home and understood little English. (App. pg. 52.) Raymond Maki, one of William Maki's sons, stated by affidavit that his parents never told him that they intended on transferring all of the minerals to his brother Ernest Maki. (App. pg. 57.) The grantors' daughter-in law, Angeline Maki, testified by affidavit about a conversation at about the time the contract for deed was executed in which her husband, Richard Maki, told his father never to sell his mineral

interests.

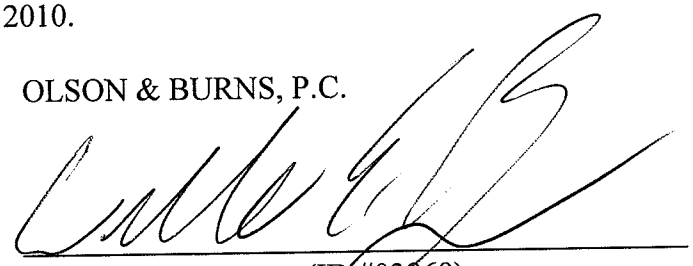
¶37 The additional evidence raises at least an inference that the grantors did not intend to execute a warranty deed that did not comply with the terms of their contract for deed executed two years earlier. By denying the motion for relief, the Court has abused its discretion by failing to look at all of the evidence and circumstances surrounding the execution of the warranty deed, and denying the Maki Defendants their right to trial and the opportunity to cross examine Ernest Maki so that his demeanor and credibility can be measured by the Court.

¶38 **CONCLUSION**

Based on the foregoing, the Maki Defendants respectfully request that this Court reverse the Judgment of the Trial Court and remand the case for trial.

¶39 Dated this 17th day of June, 2010.

OLSON & BURNS, P.C.



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¶40

CERTIFICATE OF SERVICE

I, William E. Bergman, attorney for Appellants do hereby certify that on the 17th day of June, 2010, copies of the **Brief of Appellants** and **Appellants' Appendix**, were served electronically upon the following:

Scott M. Knudsvig, attorney for Appellees Ernest Maki, Judith Abrahamson, Ronald Maki, Kevin Maki, Cheryl Larson and Linda Richter - sknudsvig@srt.com

A true and correct copy of the **Brief of Appellants** and the **Appellants' Appendix** was mailed to Verlene Mahlum on June 17, 2010, at the following address:

Verlene Mahlum
P.O. Box 61
Stanley, ND 58784

William E. Bergman (ID #03869)

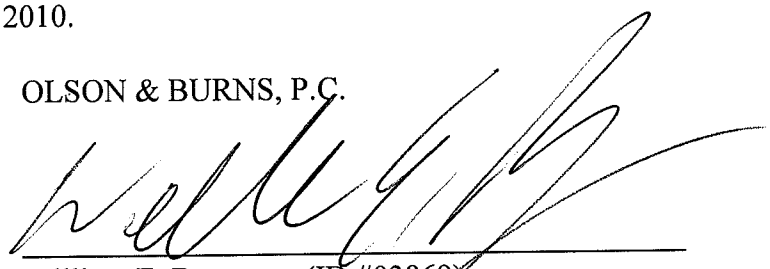
¶41 **CERTIFICATE OF COMPLIANCE**

I, William E. Bergman, attorney for the Appellants in the above matter, and as the author of the above brief, do hereby certify that the above brief complies with all type-volume limitations as set forth in the North Dakota Rules of Appellate Procedure.

I further certify that the attached Brief of Appellant contains the following number of words: 4,281, and was prepared using WordPerfect 10.0, Times New Roman font, size 12.

Dated this 17th day of June, 2010.

OLSON & BURNS, P.C.



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