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SUPREME COURT

OF THE

FEB - 7 2014

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

No. 20130373

Wendell Lund

PLAINTIFF – APPELLANT,

vs.

Orville Lund and Betty Lund

DEFENDANTS – APPELLEES.

APPELLANT'S BRIEF

Appeal from the October 30, 2013 Memorandum Opinion and Order

District Court

Bottineau

Northeast District

Honorable John C. McClintock, Jr.

Case No. 05-2011-CV-118

Theresa L. Kellington
Kellington & Oster, P.C.
619 Riverwood Drive, Suite 202
Bismarck, ND 58504
(701) 258-1074
Fax: (701) 530-1943
ND State Bar #05385
Attorney for Plaintiff - Appellant

Michael S. McIntee
Attorney at Law
116 West Fifth Street
Bottineau, ND 58318
(701) 228-3624
Fax: (701) 228-3625
ND State Bar #03326
Attorney for Defendant - Appellee,
Betty Lund

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I. JURISDICTION STATEMENT

1. The District Court has jurisdiction pursuant to N.D. Const. Article VI, paragraph 8 and N.D.C.C. Section 27-05-06. This Court has jurisdiction under N.D. Const. Art. VI, Paragraphs 2 and 6 and N.D.C.C. Section 29-28-06.

II. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

2. The District Court Erred in Ruling that No Implied Contract existed Between the Parties.

III. STATEMENT OF THE CASE

3. Plaintiff/Appellant, Wendell Lund is appealing the decision of the District Court which dismissed Plaintiff's claims in all regards and held that no implied contract existed between the parties.

IV. PROCEDURAL HISTORY

4. Wendell initiated a lawsuit against his parents, Betty and Orville Lund asserting, generally, that the parties entered into an contract where Wendell would provide certain labor and supplies, pay ½ of the real estate taxes, maintain the mowers and equipment used in cleaning and clearing of the land and property and any other items necessary for the general maintenance of the residences, grounds and farmland and in exchange Wendell would be compensated. App. 10.

V. STATEMENT OF THE FACTS

5. In the year 1985 (T. At p.9:22-24), the parties entered into an express contract

wherein Wendell would provide certain labor and supplies, pay one half (½) of the real estate taxes since 1985 (T. At p. 21:13-19; T. At. p. 31:2-6), insurance (T. At p. 31:15-19), maintain the mowers and equipment used in cleaning and clearing of the land and property and any other items necessary for the general maintenance of the residences, grounds and farmland. In exchange for providing said items, Betty and Orville agreed to compensate Wendell by either conveying to him any and all interest they have in the real property to Wendell upon their deaths, during their lifetimes or with money. (T. At p. 10:8-15; T. At p. 19:8-14) Said real property is described as SE 1/4SW1/4, Section 22, Township 163 North, Range 75 West in Bottineau County, North Dakota.

6. Wendell assisted his parents year round with their property. Betty and Orville left the State of North Dakota for approximately eight (8) months each year. Seven (7) of these months were during the winter and one (1) month during the summer. During these eight (8) months, Wendell was solely responsible for maintaining all of Betty and Orville' property including without limitation their house, exterior and interior, bill paying, mail, etc. (T. at p. 55:5-23; T. At p. 56:1-17). During the remaining four (4) months when Betty and Orville were physically on the property, It was the mutual intention of the all parties to this action that Wendell would receive compensation for his efforts and expenditures including without limitation receiving the subject real property and financial reimbursement in exchange for the extensive

expenditures, financial and physical, made by him towards and on the subject real property.

7. Wendell's expenditures include without limitation re-building the home that was substantially totaled in a fire, building a new home for his parents (T. At p. 26:12-20), maintaining both homes, maintaining all grounds (T. At p. 48:14-22), cleaning and clearing hay meadow to allow said property to be farmed, payment of one-half ($\frac{1}{2}$) of the real estate taxes, purchasing supplies and fuel for upkeep of equipment (T. At p. 27:12-15; T. At p. 68:4-11), payment of insurance, cleaning of roads, cleaning of house roofs, cleaning of equipment, cleaning and clearing roadways, clearing and cleaning bush, trees (T. At p. 49:1-25) and rocks (T. At p. 47:9-11), cleaning snow and maintenance of the roads, cleaning and repair of the equipment (T. At p. 30:5-18), cleaning slews, building the house in which he resides (T. At p. 26:8-20; T. At p. 27:7-11), purchasing of tools (T. At p. 30:19-25), rental of equipment (T. At p. 44:2-9), hauling and cutting trees (T. At p. 46:11-25), purchase of trees and planting (T. At p. 50:3-17), removal and burial of rocks (T. At p. 47:21-25). Wendell's Exhibit No. 1, a banker's box, filled with receipts regarding all the above from 1982 on (T. At p. 22 to T. At p. 23:1-24), supported Wendell's position he expended extraordinary services for the benefit of the Defendants. Said Exhibit also reflected the fact that Wendell cashed out certificates of deposit to help pay said expenses (T. At p. 29:1-24). Wendell received nominal profits as a result of cleaning and clearing the hay

meadows. Wendell's Exhibit Number 3 was a summary of the profits that Wendell Lund received as a result of his organic farming operation. In the beginning, this property contained 40 acres of grass land. After years of aggressive cleaning, etc. by Wendell Lund, there is now 22 acres of farmable land, as a result of Wendell's relentless efforts, labor and expenditures. There was originally 7 acres that was actually field (T. At p. 41:24-25). Wendell's Exhibit No. 4 summarized on the increased tillability of land (T. At p. 45:3-25). As Exhibit 3 set forth, the largest income received by Wendell from his organic farming operation was in 2008 when he earned \$9,958.25 in profits from flax, rye and wheat. (T. At p. 70:4-25; T. At p. 71:1-25). The next highest year was in 2003 in which he earned \$6,244.28. As reflected in Wendell's Exhibit Number 4, Wendell turned 40 acres of grass field into 22 acres of tillable acres.

8. Mr. Lund presented extensive documentation at time of trial supporting the expenditures made and labor expended for the benefit of the Betty and Orville. Just in documented receipts alone, Mr. Lund was able to substantiate the amount of \$233,126.58 in expenditures. Said amount is as more fully set forth in Wendell's Exhibit Number 5 as well as the voluminous amount of actual receipts, etc. contained in Wendell's Exhibit Number 1, the banker's box filled with receipts and other supporting documentation. Said receipts date all the way back to 1982.
9. Wendell dealt primarily in cash in the beginning of the contractual

arrangements. (T. At p. 12:10-21). He estimated a very conservative figure of \$40,000 for cash expenditures made prior to 2011. (T. At p. 37:2-18). Wendell's Exhibit Number 5 also set forth with substantial detail other expenditures such as repairs to the tractor Mr. Lund used in maintaining, improving and repairing property belonging to Betty and Orville. (T. At p. 38:7-19). Said exhibit included itemizations for labor provided for the farm, equipment repair, bull dozing, hauling/cutting trees, dealing with rocks, burning, mowing grass, tree maintenance (T. At p. 41:8-13) , expenses and labor associated with the Quonset (T. At p. 51:3-22 and T. At p. 52:8-19), road maintenance and snow removal, installation of drain, farm equipment maintenance, hiring carpenter Duane Allard with supporting documentation (T. At p. 39:12-23) which totaled \$579,661.94. Summary of expenses that had supporting documentation totaled \$233,126.58. (T. At p. 36:5-21).

10. The total of \$579,661.94 did not include the purchase, moving and/or placement of the three bins that are currently on the property. As testified by Mr. Lund, this totaled an additional \$2,235.00. (T. At p. 58:6-19; T. At p. 60:2-25; T. At p. 61:1-25; T. At p. 62:1-25 and T. At p. 63:1-19). Additionally, Mr. Lund paid for the purchase or and installation of special ordered cupboards which cost approximately \$6,000. (T. At p. 63:20-25; T. At p. 64:1-6; T. At p. 106:15-24). All with supporting documentation.
11. The total of \$579,661.94 also does not include all the cash expenditures and/or payments made by Mr. Lund on behalf of his parents, which Mr. Lund

estimates was approximately \$250,000.00. All of the foregoing totals over \$750,000.00. The Plaintiff is seeking reimbursement of \$750,000 to be allocated equally between Betty and Orville.

12. Wendell sought a court order that Betty and Orville be jointly and severally liable for the amount of \$750,000.00 with Defendant Orville Lund's one-half ($\frac{1}{2}$) share of \$375,000 to be paid by conveyance of the real property to the Wendell and a money judgment for the difference of the value of the property and Orville's share of the liability and Defendant Betty Lund's one-half ($\frac{1}{2}$) share of \$375,000.00 to be paid pursuant to a money judgment. (T. At p. 78:7-9).

VI. LEGAL ARGUMENT

A. Standard of Review

13. Rule 52(a) of the North Dakota Rules of Civil Procedure provides pursuant to subparagraph (6) that findings of fact, including findings in juvenile matters, whether based on oral or other evidence, must not be set aside unless clearly erroneous and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility. The Court in Hartleib v. Simes, 2009 ND 205, 776 N.W.2d 217, describes the abuse of discretion standard of review by stating that "a district court abuses its discretion if it acts in an arbitrary, unconscionable or unreasonable manner, if its decision is not the product of a rational mental process by which the facts of record and law relied upon are stated and considered together for the purpose of

reaching a reasonable determination, or if it misinterprets or misapplies the law.” The Court in Berger v. Myhre, 2010 ND 28, 778 N.W.2d 579, describes the clearly erroneous standard of review by stating that “a finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court is left with a definite and firm conviction a mistake has been made.”

B. The District Court Erred in Finding that there was No Implied Contract Between the Parties.

14. Wendell Lund firmly believes that the District Court made a mistake and that the Supreme Court, being the review court, should be left with a definite and firm conviction that a mistake was made. North Dakota Century Code Section 9-01 et seq. addresses Contracts and Obligations. Section 9-01-01 defines a contract as “an agreement to do or not to do a certain thing.” Section 9-01-02 sets forth the requirements of a contract as 1) parties capable of contracting; 2) consent of the parties; 3) lawful object; and 4) sufficient cause or consideration. Section 9-03-01 provides that the consent of the parties to a contract must be 1) free; 2) mutual; and 3) communicated by each to the other.
15. Mr. Lund testified that a contract existed between he and the Defendants. Betty Lund claimed there was no such agreement but rather the Wendell did what he did for she and Orville Lund only because of the parent-child relationship. Wendell disagrees. In 1991, Betty Lund transferred her interest

to said real property to Wendell via Warranty Deed dated December 2, 1991. (T. At p. 13:21-25 and T. At p. 14:9-15). Had there been no agreement, why would Betty Lund have transferred her interest accordingly? From 1991 to approximately late 2009 early 2010, at no time did Betty Lund ever complain or assert that she signed said Warranty Deed in 1991 under coercion, force or otherwise. (T. At p. 16:24-25). She said nothing to her children, her friends, the police, social services, etc. (T. At p. 17:7-14). The first indication of complaint by Betty Lund was during the divorce action and only then. (T. At p. 72:9-25). She argued that said Warranty Deed was signed under duress only in an attempt to gain a financial advantage in the divorce action between she and Orville Lund. For approximately 18-19 years, Betty Lund said absolutely nothing to anyone claiming that the Warranty Deed should be set aside or that she was forced to sign the Warranty Deed. Nothing was said or done by Betty Lund for 18-19 years.

16. Immediately prior to initiating the divorce action against Orville Lund, Betty Lund told Wendell that he would still be getting the 36 acres and the home in which he was residing. (T. At p. 72:19-25). Betty admitted this during her testimony. (T. At p. 195:6-20). It was only then that Wendell knew that Betty Lund would not be honoring the terms of the express contract between them. Wendell immediately sought advise to protect his interest in the real property and the expenditures/labor, etc. he had expended on the property from 1985 to 2009. Wendell sought legal advise from a local attorney (T. At

p. 74:5-11; T. At p. 76:2-6; T. At p. 111:14-25); he sought advise from the County Recorder's office who unfortunately gave him erroneous information; he filed a Miscellaneous Statutory Lien on April 19, 2010. (T. At p. 74:2-3). He did so without legal advise. (T. At p. 75:13-19). Unfortunately, the attorney for whose assistance Wendell was seeking was untimely in representing Wendell. Wendell, having absolutely no previous legal experience (T. At p. 73:17-25). , did the only thing he felt he could - and that was filing the Lien. Said Lien was set aside by the divorce Judge (T. At p. 76:7-11). At the trial for the divorce action, Betty Lund, for the very first time, argued that she felt forced into signing the Warranty Deed. Yet, she testified on August 30, 2013 at this trial that she never sought assistance from her children, the police, abuse center, attorney, etc. even though she felt threatened by Orville to sign the Warranty Deed. Betty Lund's behavior in doing nothing about the Warranty Deed for such an extended period of time only confirms that she believed there was an agreement with Wendell.

17. According to N.D.C.C. section 9-03-25, "a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known or ought to be known to the person accepting." Betty Lund lived on the property with Wendell. She saw on a daily basis all the work, improvements, expenditures, labor, etc. being expended by the Wendell. (T. At p. 114:18-20). She never objected to any of it yet she benefitted from his efforts and expenditures. As a direct result

of Wendell's expenditures, services, the value of the real estate increased. T. At p. 108:6-10. Had he known that Betty had no intention of following through with the agreement, Wendell would not have done what he did. (T. At p. 114:1-13). Betty admitted that the value of the property was increased because of Wendell. (T. At p. 189:1-16).

18. Wendell believes that District Court erred in not finding an implied contract. N.D.C.C. Section 9-06-01 defines express and implied contracts as "a contract is either express or implied. An express contract is one the terms of which are stated in words. An implied contract is one the existence and terms of which are manifested by conduct."
19. According to the Court in Matter of Estate of Zent, 459 N.W.2d 795 (N.D. 1990) to be compensable in quantum meruit, services rendered must be of such a nature that, under the circumstances of a particular case, fairness and justice compel conclusion that they ought to be compensated on implied in law contractual theory because recipient ought to have been forewarned that such services do not come cost-free. No reasonable mind could with good faith hold that even in light of the significant amount of labor, work, expenditures, etc. made by Wendell over twenty (20) plus years were given gratuitously. No reasonable person would expend such efforts if compensation was not expected.
20. In the Case of In the Matter of the Estate of Emanuel Lutz, Lutz vs. Schneider, 2000 ND 226, 620 N.W.2d 589 involved a wife seeking

reimbursement for services she provided to her husband, who ultimately died. The Lutz case is a probate action. The Court held that “although a person who performs substantial services for another without an express agreement for compensation ordinarily is entitled to the reasonable value of the services, a presumption arises that services were gratuitous and that compensation was not intended when those services are performed by a family member in the same household. The presumption may be overcome with evidence that the services rendered are exceptional and extraordinary nature. Mutuality of the benefits is also a factor to consider.” In determining whether the services were exceptional and extraordinary, the Court indicated that “much of the care referred to would not fall into the extraordinary category and would have been the typical household responsibilities, including meal preparation and cleaning.” The Court further ruled that the complainant derived “significant benefits from the marriage, including ongoing companionship, opportunities for travel and engagement in activities, including card playing and dancing, which the couple enjoyed.”

21. The Lutz case is distinguishable from this case on several grounds. First, the Lutz case is a probate case pertaining to services rendered by a wife to her husband prior to his death. Second, the Lutz requirements of exceptional and extraordinary apply only when there is no agreement. There was such an agreement in this case. The District Court erred in ruling that Wendell Lund’s services, labor, expenditures, did not quantify as “exceptional and

extraordinary.” Betty and Orville would have been forced to hire people to remove the stumps, fill holes, pour cement, etc. Wendell did all of this on his own, his own labor, his own equipment. (T. At p. 100:17-21).

22. Wendell’s Exhibit Number 6 reflects all the payments that Wendell Lund made for real estate taxes for the land owned by the Defendants. Wendell’s Exhibit Number 5 reflects the extensive hours in labor and services that he provided for the benefit of the Betty and Orville. Said Exhibit more specifically reflects the following:

- a. Wendell expended \$233,126.58 for the improvement, maintenance, etc. of defendants’ property. This total is a summary of **actual documented receipts** as is evidenced in the voluminous documents contained within Plaintiff’s Exhibit Number 1.
- b. For farm labor (cleaning, hauling, pulling stumps, loading truck, dirt, gravel, trees, Wendell expended a total of 2,602.24 hours;
- c. For equipment repair, Wendell expended a total of 400 hours;
- d. For bull dozing, Wendell used his tractor for 300 hours and expended labor also for 300 hours;
- e. For hauling and cutting trees, Wendell expended 98.40 hours;
- f. For the handling of rocks, Wendell expended 98.40 hours of labor;
- g. For burning, stacking, brush piles, burying rock piles and working and reworking the land Wendell expended 112 hours of labor;
- h. For mowing, Wendell expended 2,426.32 hours;

- I. For tree maintenance, trimming, hauling, weeding, burning, cutting, filling hoes, clearing brush, tree stumps, watering trees, etc. Wendell expended 3,949.35 hours;
 - j. For the Quonset, Wendell expended 38 hours;
 - k. For road maintenance and snow removal, Wendell used his tractor for 800 hours and expended 800 hours of labor;
 - l. For miscellaneous items, such as servicing Betty and Orville's vehicles, motor home, home, electricity, bill paying, mail, etc. 797 hours;
 - m. For snow removal, Wendell expended 20 hours of labor and 20 hours usage of his tractor;
 - n. For the drain system, Wendell expended 30 hours of his labor and 6 hours of his tractor;
 - o. For farm equipment maintenance, Wendell expended 700 hours of labor.
23. The foregoing is not an exhaustive summary of the labor that Wendell expended for the benefit of Betty and Orville. Just the documented hours of labor totals 12,371.71 hours. This in turn results in approximately 619 hours per year and 52 hours per month. The District Court erred in ruling that said amount of services, labor, etc. is not exceptional nor extraordinary. None of the other siblings expended even a fraction of the time and money that Wendell did for the benefit of the Betty and Orville. The siblings did not

help even close to what Wendell did. (T. At p. 114:14-17. Betty admitted that Wendell did more. (T. At p. 178:10-16). In fact, she admitted that he did substantially more than any sibling. (T. At p. 190:7-8).

24. It is clear that the services, expenditures, etc. made by Wendell for the benefit of Betty and Orville quantify as exceptional and extraordinary, thereby meeting the burden to overcome the presumption that said services/expenditures were gratuitous.

CONCLUSION

25. There was an agreement, whether express or implied, between the parties. Wendell Lund relied on said agreement in expended a huge amount of money, labor and services for Betty and Orville which resulted in a much improved piece of property. Had there been no agreement, Wendell would not have rebuilt the burnt structure; he would not have aggressively cleared and cleaned the grass field in order to make it farmable; he would not have stayed on the real property for 95% of his life; he would not have paid the real estate taxes, etc. Betty Lund signed a Warranty Deed in 1991 and said nothing of her complaints for 18-19 years. She did not contact the police. (T. At p. 185:25; T. At p. 186:1-3). She did not consult with an attorney. (T. At p. 186:4-11). Even during the trial in this case, she repeatedly referenced the property as belonging to Wendell. Even opposing counsel referred to the property as Wendell's. (T. at p. 102:15; T. At p. 103:14-21). Wendell's brother also thought the house belonged to Wendell. (T. At p. 134:11-17).

Betty treated and thought the property was Wendell's. (T. At p. 21 to p. 24; T. At p. 173:10-11; T. At p. 180:8-11). The only logical conclusion from the facts of this case as established through the testimony is that there was an agreement, whether express or implied, that Wendell Lund would be compensated for his services and expenditures. He is entitled to compensation in the amount of \$750,000 to be allocated equally between the Betty and Orville.

VII. CONCLUSION

31. Based upon the foregoing, the decision of the District Court should be reversed.

Dated this 5 Day of February, 2014.



Theresa L. Kellington (NDID 05385)

Kellington & Oster, P.C.

619 Riverwood Drive, Suite 202

Bismarck, ND 58504

Telephone: (701) 258-1074

Facsimile: (701) 530-1943

Attorney for Appellant

theresa.kopc@midconetwork.com

20 130373

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PROOF OF SERVICE

Appeal from the October 30, 2013 Memorandum Opinion and Order
District Court
Bottineau
Northeast District
Honorable John C. McClintock, Jr.
Case No. 05-2011-CV-118

The undersigned, being duly sworn, deposes and says that I am a citizen of the United States, over the age of 18 years and not a party to the above entitled matter, that on the 7th day of February, 2014, I served copies of the following:

1. Copy of Appellant's Brief; and
2. Copy of Appendix To Appellant's Brief,

by placing true copies in an envelope addressed to the person named below, at the address stated below which is the last known address of the addressee, and by depositing said envelope in the United States first class mail with postage fully prepaid at Bismarck, North Dakota;

Michael S. McIntee
Attorney at Law
116 West Fifth Street
Bottineau, ND 58318
(701) 228-3624
Fax: (701) 228-3625
ND State Bar #03465
Attorney for Defendant, Betty Lund
Appellee

Supreme Court of North Dakota- hand
delivery.

supclerkofcourt@ndcourts.gov

Dated this 7th day of Febtuary, 2014.

A handwritten signature in cursive script, reading "Theresa L. Kellington". The signature is written in black ink and is positioned above the printed name and contact information.

Theresa L. Kellington
Kellington & Oster, P.C.
619 Riverwood Drive, Ste 202
Bismarck, ND 58504
(701) 258-1074
Facsimile: (701) 530-1943
ND State Bar #05385
Attorney For Apellee
theresa.kopc@midconetwork.com

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Honorable John C. McClintock, Jr.
Case No. 05-2011-CV-118

The undersigned, being duly sworn, deposes and says that I am a citizen of the United States, over the age of 18 years and not a party to the above entitled matter, that on the 11th day of February, 2014, I served copies of the following:

Copy of Appellant's Brief

by placing true copies in an envelope addressed to the person named below, at the address stated below which is the last known address of the addressee, and by depositing said envelope in the United States first class mail with postage fully prepaid at Bismarck, North Dakota;

Orvell Lund
1559 104th St. NE
Bottineau, ND 58318-8112

Supreme Court of North Dakota
supclerkofcourt@ndcourts.gov

Dated this 1st Day of February, 2014.

Theresa L. Kellington

Theresa L. Kellington
Kellington & Oster, P.C.
619 Riverwood Drive, Suite 202
Bismarck, ND 58504
(701) 258-1074
Facsimile: (701) 530-1943
ND State Bar #05385
theresa.kopc@midconetwork.com