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STATE OF NORTH DAKOTA

In the Supreme Court

State of North Dakota

Paul J. Fredericks, Plaintiff and Appellee, vs. Lyndon B. Fredericks, Defendant-Appellant and Cross-Appellee Bole Resources, LLC, Kodiak Oil & Gas, Inc., Randy Folk, CNR Investments, LLC, Brooks Energy Inc., Waitman Group LLC, Relyk, LLC, and Dale Eubank, Defendants, --- Exok, Inc., Appellee, and Bole Resources, LLC, Randy Folk, CNR Investments, LLC, Brooks Energy, Inc., Waitman Group, LLC, Relyk, LLC, and Dale Eubank, Appellees and Cross-Appellants.	Supreme Court No. 20150359

Appeal from the District Court Judgment
Issued November 9, 2015
The Honorable Dann E. Greenwood

Brief of Appellant Lyndon B. Fredericks

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3. Is "good faith purchaser" status established and deed reformation precluded when purchasers rely on a deed issued by a court-appointed personal representative and a landman's title examination?

4. Does a grantor who relies on attorney advice and statements by a landman and others in the oil and gas industry that he owns minerals, have "good faith" status under the laches doctrine?

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6. Is a grantor who defends title obligated to pay litigation costs incurred by his grantee who chooses also to defend title?

7. Is a grantor who must refund the purchase price, obligated to pay interest on that amount when his grantee has used the property conveyed?

Statement of the Case

¶1 This case is about state court jurisdiction over a dispute involving a tribal member and title to minerals located within the Ft. Berthold Indian Reservation. If state courts have jurisdiction, the substantive issues concern deed reformation, the defenses of laches and good faith purchaser for value, and the scope of damages awarded a grantee who does not receive good title.

¶2 In 1985, Plaintiff Paul Fredericks issued a deed conveying minerals to Kenneth Fredericks. While the deed referred to "joint tenants" taking title, only one person, Kenneth Fredericks, was named as grantee. He died in 1988.

¶3 In 2001, the Personal Representative of Kenneth's estate issued a deed conveying the minerals to Lyndon Fredericks. In 2012, Bole Resources LLC, after having a landman research and confirm Lyndon's title, purchased the minerals from Lyndon. Bole then immediately conveyed most of its interest to others.

¶4 Later in 2012, Paul Fredericks filed a deed reformation and quiet title suit against Lyndon and Bole. Paul claimed the 1985 deed he issued to Kenneth contained an error. He claimed he and the other parties to the deed forgot to include his name as a joint tenant along with Kenneth's.

¶5 The Court found an ambiguity in the 1985 deed and allowed the case to go to trial, and ultimately concluded the parties to the deed intended

to include Paul as a grantee along with Kenneth. Dkt. Nos. 55 (Mem. Dec.), 218 (Mem. Opin.). The deed was reformed and title quieted in Paul. Dkt. No. 218 (Mem Opin.). The Court also held:

1. The 10-year statute of limitations does not apply because Paul did not know about Lyndon's claim until 2007.

2. Because the 1985 deed was recorded, Bole and Bole's grantees had notice of it, and this knowledge, although constructive, deprived them of good faith purchaser status because it should have alerted them to a title problem.

3. Lyndon knew about Paul's claim when he sold the minerals to Bole, and so he did not act in good faith, precluding his laches defense.

4. Although Lyndon honored the "warrant and defend" clause in his deed to Bole, he must nonetheless pay Bole's litigation costs—about $57,000—because N.D.C.C. § 32-03-11(3) so requires.

5. Lyndon must reimburse Bole that portion of its purchase price tied to the disputed minerals, $120,000 plus interest, but Lyndon is not required to reimburse Bole the $10,000 Bole paid for title work prior to its purchase from Lyndon.

See *id.*

¶6 After trial, Lyndon filed a motion to vacate the judgment and dismiss the suit, asserting his status as a tribal member and resident of the reservation deprived the Court of jurisdiction because the underlying dispute involves title to on-reservation minerals. Dkt. No. 220. The motion was denied. Dkt. No. 245. Lyndon appealed and then Bole Resources and its grantees appealed.

Statement of the Facts

¶7 Kenneth Fredericks Sr. was an enrolled member of the Three Affiliated Tribes. Dkt. No. 173 at p. 8 (Last Will). Three Affiliated is the governing tribe of the Ft. Berthold Indian Reservation. Dkt. No. 228 at ¶ 4 (L. Fredericks Affidavit). Kenneth grew up on a reservation ranch near Elbowoods. Trial Tr. at 128 (Lyndon Test.). After graduating from Elbowoods High School he joined the U.S. military, where he graduated first in his class at a jet propulsion school and then served as flight engineer on aircraft participating in the Berlin Air Lift. Id. at 128-29. After several years of service and attaining the rank of Staff Sergeant, he returned to the Ft. Berthold Reservation, where he was a BIA roads supervisor until 1970. Id. at 129-31.

¶8 During this period, Kenneth served on the Halliday School Board and a number of ag-related boards, such as the Indian Cattlemen's Association. Id. at 130. He was a founder of UND's "Indians into Medicine" program and on its Board of Directors. Id. at 130-31.

¶9 Kenneth and his first wife, Gisela, raised seven children. Trial Tr. 42 (Paul Test.), 125 (Lyndon Test). Their children included Paul and Lyndon, who are also enrolled members of Three Affiliated. Dkt. No. 228 at ¶¶ 2-3 (L. Fredericks Affidavit). Along with raising his family and his BIA job, Kenneth operated a ranch on the 1,100 acres he owned and the 5,000 acres he rented. Id. at 125, 140-41.

¶10 In 1965, Kenneth acquired title to the property involved in this suit, the NE¼ and N½SE¼ of Section 35-147-91. Dkt. Nos. 167, 168 (Deeds). When he acquired these 240 acres he also acquired an additional 120 acres in the E½SE¼ and SW¼SE¼ of Section 26-147-91. Id. A map depicting the location of the tracts acquired is in the Appendix at page 64.

¶11 These 360 acres are "fee" or "deeded" land—not Indian trust land—and they are located within the Ft. Berthold Indian Reservation. Dkt. No. 228 at ¶¶5-6 (L. Fredericks Affidavit). Kenneth's acquisition of the land included twenty-five percent of the minerals, that is, a 90-acre undivided mineral interest in the 360 acres. Appx. at 68 (Title Memo).

¶12 In 1970, Kenneth moved to Washington, D.C., where he was soon appointed Chief of the BIA's Division of Trust Services and became responsible for managing Indian trust land throughout the nation, about 52,000,000 acres. Trial Tr. at 131-32 (Lyndon Test.). Kenneth held this position for eight years, retiring in 1984. Id. at 132-34. His retirement was short. The BIA asked him to take over as superintendent of the troubled Pine Ridge Reservation, which he did for a year and then moved to Colorado where he was as a consultant to a law firm. Id. at 135-36.

¶13 While living in D.C., Kenneth still operated his Ft. Berthold ranch, though his sons did the day-to-day work. Id. at 44 (Paul Test.), 139-40 (Lyndon Test.). During this time he also helped his sons Paul Fredericks and Kenneth Fredericks Jr. start their ranches. Id. at 141. In a deed dated July

20, 1979, he and his second wife, Linda, deeded the 240 acres in Section 35 to "Paul J. Fredericks and Deborah E. Fredericks, husband and wife." Appx. at 47 (Deed). Around this time he deeded to Kenneth Jr. the 120 acres in Section 26. Trial Tr. at 49-50 (Paul Test.). Neither deed reserved Kenneth Sr.'s title to the minerals, but in 1985 both sons re-conveyed the minerals to him, with the deed issued by Paul and Deborah being the source of this litigation.

¶14 The deed was signed by Paul and Deborah on January 18, 1985, and it re-conveyed to Kenneth Sr. the Section 35 minerals. Appx. at 48 (Deed). At this same time, he also recovered title to the Section 26 minerals in a deed from Kenneth Jr. Appx. at 50 (Deed). The two deeds are substantively the same. In each, Kenneth Sr. is named as the only grantee, and each states Kenneth Sr. takes title "as joint tenants."

¶15 Paul testified that Kenneth Sr. wanted to recover title to the minerals so that he could lease them to obtain funds needed to buy a house in Virginia. Trial Tr. at 81-82 (Paul Test.). Kenneth, however, was not living in the D.C. area at that time, but had moved to Pine Ridge. Id. at 82; see also (Appx. at 49) (Deed) (listing Kenneth Sr.'s address as PO Box 384 in Pine Ridge). Although Paul states Kenneth needed the minerals as a funding source, at this time Kenneth was earning a "pretty lucrative" salary as Superintendent at Pine Ridge and had just retired from a well-paying

government job. Trial Tr. at 135 (Lyndon Test.). After re-acquiring title to the minerals, Kenneth leased them for $360. Dkt. No. 172 (Lease).

¶16 Lyndon believes his father re-acquired the minerals to keep them in the family in the event of land foreclosures. In the early 1980s some reservation producers were in financial difficulty, and Kenneth Sr. thought that if the Section 26 and 35 minerals were in his name they would be protected if Paul or Kenneth Jr. lost their land due to unpaid debts. Id. at 142-43 (Lyndon Test.). Paul owed FHA $95,000 on one loan and more than $100,000 on another loan. Id. 17, 24, 83-84 (Deborah and Paul Test.). Paul's interest on the loans was nine percent. Id. at 24, 84. (Deborah and Paul Test.).

¶17 Although the January 1985 deeds issued to their father by Paul and Kenneth Jr. each contain the same "joint tenants" language, only Paul asserts these words created an ambiguity requiring reformation. Kenneth Jr. does not make that claim, or any claim to the Section 26 minerals. He has never challenged Lyndon's title. Id. at 143-44 (Lyndon Test.).

¶18 Paul has used the surface of the Section 35 tracts as part of his ranching operation. See id. at 42, 45 (Paul Test.). For a number of years he was also facilities manager at the Twin Buttes elementary school. Id. at 73. While employed there during the early 2000s he committed illegal acts and was indicted. Id. at 74, 263-64. He pled guilty to Count Two of the indictment,

"Embezzlement and theft from an Indian Tribal Organization." Dkt. No. 180. Other counts in the indictment were dismissed. Id.

¶19 In 1988, Kenneth Sr. became ill with leukemia and died December 31, 1988. Trial Tr. at 56 (Paul Test.). Shortly before his death and while in the hospital he had his Last Will prepared, which he signed December 20th. Id. at 175 (Lyndon Test.); Dkt. No. 173 (Last Will). None of the descriptions of the property he bequeathed in his will include the Section 25 and 36 minerals. The will, however, contains a residuary clause, with Lyndon named as its beneficiary. Dkt. No. 173 at Art. 8 (Last Will).

¶20 Lyndon lives on the Ft. Berthold Reservation and manages the tribe's water treatment plant in Twin Buttes. Trial Tr. at 121, 138 (Lyndon. Test.); Dkt. No. 228 at ¶¶5-13 (L. Fredericks Affidavit). He was unaware of Kenneth Sr.'s Section 25 and 36 minerals until the early 1990s when he was approached by Kyle Lovgren, a representative of New London Oil. Trial Tr. at 146 (Lyndon Test.). Mr. Lovgren had been researching title at the Dunn County Recorder's Office and told Lyndon the residuary clause in Kenneth Sr.'s will gave Lyndon title to the Section 25 and 36 minerals. Id. at 146-47, 165-66, 172.

¶21 New London Oil, believing Lyndon owned the minerals, took an oil and gas lease from him. Id. at 135-36 (Lyndon Test.). Mr. Lovgren also told Lyndon that a probate was needed to confirm his title, id. at 150, which required the involvement of Kenneth Jr. because he was designated in

Kenneth Sr.'s Last Will to serve as the estate's Personal Representative. Dkt. No. 173, at Art 9.

¶22 Bismarck attorney Austin Engel—now deceased—was retained to handle the probate. Trial Tr. at 150-51 (Lyndon Test.). He asked Lyndon to provide him with a list of Kenneth Sr.'s heirs, even though Mr. Engel didn't "think we will have to give notice to all the heirs." Appx. at 52 (Letter). Although Paul did not receive notice of the probate, Trial Tr. at 59 (Paul Test.), Lyndon supplied the list of heirs to Mr. Engel as requested, didn't try to hide the probate from anyone, and relied on Mr. Engel to handle the probate as the law required. Id. at 151, 53-54 (Lyndon Test.).

¶23 As documented in a letter to Lyndon from Mr. Engel, Lyndon told the lawyer that even though Paul conveyed the Section 35 minerals back to Kenneth Sr., Paul was claiming title. Appx. at 52. In response, Mr. Engel wrote Lyndon stating he had "checked the records at the Dunn County Register of Deeds Office" and concluded that Paul—as well as Kenneth Jr.—had indeed conveyed "the minerals back to Kenneth Sr." Id. Lyndon has relied on Mr. Engel's opinion that Paul did indeed convey the minerals to their father. Trial Tr. at 152 (Lyndon Test.).

¶24 Mr. Engel filed the probate Application with the Dunn County District Court. Dkt. No. 175. The court approved it, Dkt. No. 176, and issued Letters Testamentary to Kenneth Jr., Appx. at 56, who then issued to Lyndon

a "Personal Representative's Deed of Distribution (Minerals)" for the Section 26 and 35 minerals. Appx. at 54. The deed was recorded August 6, 2001. Id.

¶25 Over the following years, Paul would sometimes tell Lyndon he owned the Section 36 minerals. He didn't explain the basis for his claim and Lyndon didn't learn the basis until this lawsuit. Trial Tr. at 151, 169 (Lyndon Test.). Lyndon assumed Paul was claiming title because he owned the surface and thought this entitled him to the minerals. Id. at 169. Things came to head in 2008 when Paul had a deed drafted by which Lyndon would convey the minerals to one of Paul's sons, but Lyndon refused to sign it. Id. at 68 (Paul Test.). After 2008, Paul had no further direct contact with Lyndon about the minerals. Id. at 69.

¶26 Although Paul claims title to the Section 35 minerals, he didn't take formal action to enforce his claim until this suit. Nor did he record anything asserting his claim. Id. at 99. Paul did not record Kenneth Sr.'s death certificate or an affidavit noting Kenneth's death, as is sometimes done by a surviving joint tenant to give public notice that the joint tenancy has terminated and the property now has a sole owner. See N.D. Title Stds. 4-05 ("Establishing Death of Joint Owner or Life Tenant") (citing N.D.C.C. § 47-19-06). Had Paul recorded something, anyone examining title, such as Kodiak Oil & Gas in 2008 when it took an oil and gas lease from Lyndon, Dkt. No. 191, would have been on notice of Paul's claim. And as Bole Resources would have been on notice in 2012 when it acquired from Lyndon the Section 35

minerals. Appx. at 60 (Deed). By 2012, Lyndon had not heard anything for a couple of years from Paul about his claim to the minerals. Trial Tr. at 161 (Lyndon. Test.).

¶27 Before Bole Resources committed itself to the purchase, Mathew Ekblad, its President, wanted assurance Lyndon owned the minerals and hired Matt Leer, an independent landman he had worked with in the past and that he trusted, to examine the title. Trial Tr. at 212, 221 (Ekblad Test.). Bole paid Mr. Leer $10,000 for his work. Id. at 220-21.

¶28 Mr. Leer researched title at the Dunn County Recorder's Office and issued a title report stating Lyndon owned twenty-five percent of the minerals. Id. at 187-88 (Leer Test.); Appx at 68 (Title Memo). This kind of title report is commonly prepared and relied upon in the industry. Trial Tr. at 213-14, 221-22 (Ekblad Test.); 232, 245 (Bratlien Test.). Based on it, and on the fact Kodiak Oil & Gas had leased from Lyndon, and on the fact a Personal Representative deed had been issued to Lyndon, Mr. Ekblab was confident about Lyndon's title, completed the deal, and paid Lyndon $180,000. Trial Tr. at 215, 217, 221-22. (Ekblad Test.). (Because Paul's claim is confined to the Section 35 minerals and Kenneth Jr. doesn't make any claim to the Section 26 minerals, $60,000 of the $180,000 is not at issue.)

¶29 Within a week after Bole Resources acquired the minerals, it sold all but four of the ninety acres it had acquired from Lyndon. Its purchasers were:

Randy Folk (two acres for $6,150)
CNR Investments (one acre) (amount paid not in the record)
Brooks Energy (one acre for $2,350)
Waitman Group (R. Waitman) (five acres for $11,750)
Relyk LLC (Z. Waitman) (five acres for $11,750)
Valentina Exploration (seventy-two acres for $169,200)

Dkt. Nos. 183-87 (deeds); Dkt. Nos. 195-99 (checks and wire transfers); Appx. at 74-75, 95-97 (Title Memo). (Valentina Exploration conveyed its interest to Dale Eubanks. Trial Tr. at 218-19 (Ekblad Test.)). These buyers relied on Mr. Leer's title report. E.g., Trial Tr. at 215 (Ekblad Test.), 240 (Schatz Test.), 252-53 (Waitman Test.), 261 (stipulation). Some of them knew Mr. Leer and considered him reliable and thorough. Id. at 229 (Bratlien Test.), 253 (Waitman Test.)

Disputed Facts

¶30 The primary disputed fact is whether the 1985 deed contains a mutual mistake and, if so, how it is to be corrected. Also in dispute is whether Bole Resources and its grantees purchased in good faith, but this determination is a mixed question of fact and law. E.g. Diocese of Bismarck Trust v. Ramada, Inc., 553 N.W.2d 760, 768 (N.D. 1996). Whether Lyndon acted in good faith in conveying to Bole, necessary for laches, is also disputed and is also a mixed question of fact and law, for although laches stands or falls on the facts, whether in light of those facts "it would be unjust . . . to enforce the claim is a question of law." Williams Cnty. Soc. Servs. Bd. v. Falcon, 367 N.W. 170, 174 (N.D. 1985).

¶31 There is a factual dispute over the reason Kenneth Sr. sought to re-acquire title to the minerals. Other disputed facts involve conversations between Paul and Lyndon about title, that is, the content of those conversations and whether some even occurred.

Argument

I. Subject Matter Jurisdiction

(Standard of Review: De Novo - Question of Law)

¶32 **In general.** Subject matter jurisdiction is "the court's power to hear and determine the general subject involved in the action . . . ." Alliance Pipeline L.P. v. Smith, 2013 ND 117, ¶ 18, 833 N.W.2d 464. "[S]tate courts have no jurisdiction over civil causes of action involving Indians, arising within the exterior boundaries of an Indian Reservation . . . ." Airvator, Inc. v. Turtle Mountain Mfg. Co., 329 N.W.2d 596, 600 (N.D. 1983). Lyndon Fredericks is an enrolled member of the Three Affiliated Tribes, a resident of the Ft. Berthold Indian Reservation, and the dispute concerns title to minerals on the reservation. The on-reservation status of the dispute is as important as Lyndon's Indian status, for where property title is involved, its location may "be a dispositive factor" for jurisdiction. Nevada v. Hicks, 533 U.S. 353, 360 (2001). As the Supreme Court "has affirmed and reaffirmed," tribal sovereignty in large part turns on geography. Brendale v. Confed. Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 457 (1989) (Blackmun, J., concurring in part and dissenting in part).

¶33 The District Court never had subject matter jurisdiction. Well-founded motions asserting lack of subject matter jurisdiction "must be granted." Roe v. Doe, 2002 ND 136, 659 N.W.2d 566; see also, e.g., First Nat'l Bank of Crosby v. Bjorgen, 389 N.W.2d 789, 793 (N.D. 1986) (because a judgment entered without jurisdiction is void, a court cannot exercise discretion to uphold it). Where a court lacks subject matter jurisdiction, "all proceedings" conducted by it "are void." In re Estate of Big Spring, 2011 MT 109, ¶ 60, 255 P.3d 131.

¶34 **Federal Pre-emption and Tribal Sovereignty**. Tribal sovereignty and federal interests promoting Indian self-government limit state court jurisdiction. E.g., Gustafson v. Estate of Poitra, 2011 ND 150, ¶ 10, 800 N.W.2d 842. A state court should not exercise jurisdiction if doing so undermines tribal authority or infringes on the right of Indians to govern themselves, id., which occurs if a state court adjudicates title to on-reservation property where Indians have an interest in the dispute. Exercising jurisdiction over disputes arising on a reservation would "subject . . . reservation Indians to a forum other than the one they have established for themselves," Fisher v. Dist. Court, 424 U.S. 382, 387–88 (1976), and the Ft. Berthold Reservation dose have a tribal court system. Dkt. Nos. 228 at ¶ 16 (L. Fredericks Affidavit), 229 at ¶ 3 (Carvell Affidavit). Hence, "state court . . . jurisdiction in cases against Indian defendants arising in Indian country is impermissible." Winer v. Penny Enterprises, Inc., 2004 ND 21, ¶ 11, 674

N.W.2d 9 (emphasis added). In Gustafson, the Court ruled state courts lack jurisdiction over a dispute involving Indian interests in land located on the Turtle Mountain Reservation. 2011 ND 150, at ¶¶ 8, 15.

¶35 **State Disclaimer of Jurisdiction.** Gustafson was based not only on federal preemption, but also because North Dakota "'has disclaimed jurisdiction over Indian reservation lands.'" Id. at ¶ 13 (quoting Winer, 2004 ND 21, at ¶ 21). Century Code Chapter 27-19 sets up a method by which state jurisdiction can be extended to civil claims arising on a reservation. N.D.C.C. § 27-19-01. It requires acceptance by an "affirmative vote of the majority of the enrolled residents . . . ." N.D.C.C. § 27-19-02; see also Winer, 2004 ND 21, at ¶ 10; Airvator, 329 N.W.2d at 600. The Three Affiliated Tribes has not accepted state jurisdiction. Dkt. No. 228 at ¶ 15 (L. Fredericks Affidavit).

¶36 Until a reservation's members do consent, state courts have no jurisdiction over "any cause of action arising within the boundaries of the Indian reservation involving Indians." Gourneau v. Smith, 207 N.W.2d 256, 259 (N.D. 1973). Without the vote, Chapter 27-19 operates "as a complete disclaimer of State jurisdiction over civil causes arising on an Indian reservation . . . ." Gourneau, 207 N.W.2d at 258 (citing In re Whiteshield, 124 N.W.2d 694 (N.D. 1963)).

II. Good Faith Purchasers

(Standard of Review: De Novo/Clearly Erroneous)

¶37 While written agreements can be reformed, this relief is allowed only if "it can be done without prejudice to rights acquired by third persons in good faith and for value." N.D.C.C. ¶ 32-04-17.[1] Because Bole Resources and its grantees did purchase the minerals and did pay for their purchases, supra at ¶ 29, the question is whether they did so in good faith, the essence of which is not taking unfair or unconscientious advantage of another. N.D.C.C. §1-01-21.

¶38 Before Bole Resources purchased Lyndon's minerals it did due diligence in assuring itself Lyndon owned the minerals. Supra at ¶¶ 27-28. It did what is customary in the oil and gas business, it hired a landman to examine title, id.; one of a landman's primary functions. The landman was Matt Leer, who Bole had worked with in the past and trusted. Id. Mr. Leer did the title work at the Dunn County Register of Deeds Office, submitted his report to Bole, and Bole relied on it. Supra at ¶ 28. Some of Bole's grantees

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[1] N.D.C.C. ¶ 32-04-17:

> 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.

also knew Mr. Leer and had confidence in his title work, and all of them relied on it. Id. at ¶ 29.

¶39 In addition to Mr. Leer's work, Bole Resources relied on the 2008 lease Kodiak Oil & Gas acquired from Lyndon because Kodiak does not acquire and pay for leases without first examining title. Trial Tr. at 208 (Leer Test.). The fact Kodiak had leased the minerals gave Bole confidence about Lyndon's title. Supra at ¶28.

¶40 Bole also relied on the 2001 Personal Representative deed issued to Lyndon. Id. Filed with the deed are the Letters Testamentary issued by the Court authorizing Kenneth Jr. to act as P.R. Appx. at 56. (Deed and Letters).

¶41 Any constructive notice of the disputed 1985 deed was addressed and resolved with the later P.R. deed. Whatever issue lingered over the 1985 deed was resolved through the probate in which the court issued Letters Testamentary to Kenneth Jr., the person Kenneth Sr. designated to serve as his P.R. Supra at ¶ 21. Personal Representatives are "officer[s] of the court," e.g., 31 Am. Jur. 2d Executors & Administrators § 343 (Nov. 2014), bound by fiduciary duties. E.g., Estate of Rohrich v. Noziska, 496 N.W.2d 566, 571 (N.D. 1993). Their actions command some respect. Indeed, a purchaser who acquires property from a person who received the property under a "deed of distribution from the personal representative . . . takes title free of any right of an interested person in the estate . . . whether or not the distribution was

proper . . . ." N.D.C.C. § 30.1-20-10. In sum, a handful of factors establish that Bole's purchase and the purchases by other defendants were in good faith.

¶42 While the District Court held that Bole and its purchasers had constructive notice of the joint tenancy language in the 1985 deed, they had actual knowledge of the 2001 P.R. deed issued to Lyndon and the 2008 lease Kodiak Oil took from Lyndon—both of which were noted in Matt Leer's title report. Appx. at 66. "Constructive notice is never considered to be superior to actual notice in legal effect." Lawyers Title Co. v. Bradbury, 179 Cal. Rptr. 363, 365 (Ct. App. 1981).

III. Laches

(Standard of Review: De Novo/Clearly Erroneous)

¶43 Laches is a delay in suing that results in disadvantage to another. E.g., Simons v. Tancre, 321 N.W.2d 495, 500 (N.D. 1982) (citation omitted). The doctrine recognizes the inequity of enforcing a claim when circumstances change during the delay. Id.

¶44 Paul claims he learned about Lyndon's assertion of title in 2007, but he didn't sue until mid-2012. Dkt. No. 1 (Complaint). If Paul had sued earlier, or taken the easy step of filing something of record asserting his claim, Lyndon would not be in a situation where he had sold the minerals and became obligated to either pay Bole's costs to defend title or defend title himself. Bole filed a crossclaim against Lyndon seeking an order requiring him to "indemnify and defend" Bole and to pay Bole unspecified damages.

Dkt. No. 6 (Answer & Cross Claim). Getting sued is a laches-triggering "disadvantage."

¶45 For the doctrine to apply, Lyndon's sale to Bole must have been in good faith. See Simons v. Tancre, 321 N.W.2d at 500. A string of circumstances led up to Lyndon's decision to sell to Bole. In the early 1990s, Lyndon was told by a New London Oil representative, who was probably a landman, that he, Lyndon, owned the minerals under the residuary clause of his father's will. Supra at ¶ 20. New London was confident enough about Lyndon's title to take a lease from him. Supra at ¶ 21. Lyndon next heard about his title from attorney Austin Engel, who told Lyndon he had researched title at the Register of Deeds Office and concluded Paul did not own the minerals, but had conveyed them to Kenneth Sr. Supra at ¶ 23.

¶46 Lyndon received a P.R. deed from Kenneth Jr., the person who was not only appointed by Kenneth Sr.'s as P.R., but who was involved in the earlier transactions with Kenneth Sr. regarding minerals. Supra at ¶13-14, 17. The deed Lyndon received included not only the Section 35 minerals, claimed by Paul, but also minerals under Kenneth Jr.'s Section 26. Appx. at 54. Kenneth Jr. would not have issued the deed, an act adverse to his own interest, if he doubted the minerals were part of Kenneth Sr.'s estate. Lyndon could trust Kenneth Jr. to know what he was doing. He could trust Mr. Engel to research title and handle the probate properly.

¶47 In 2008, Lyndon leased the minerals to Kodiak Oil & Gas, supra at ¶ 28, giving him further confidence about his ownership. And before Lyndon sold to Bole, he was told by Bole's Mr. Ekblad that the deal would not be finalized until after a title review was complete and title was in order. Appx. at 99.

¶48 By the time Lyndon completed the transaction with Bole, he had been told he owned the minerals by New London Oil's Kyle Lovgren, who had researched title; by an attorney who had conducted a title search; by a court-appointed P.R.; by Kodiak Oil & Gas; and by Bole Resources after it had also researched title. Although Paul had made claims, he never explained to Lyndon the basis for them. Supra at ¶ 17.

¶49 Good faith is not "taking unconscientious advantage of another." NDCC § 1-01-21. Lyndon relied on people he was justified in relying on and dealt with Bole only after Paul had gone silent for a couple of years and seemed to abandon his claim.

IV. Deed Reformation
(Standard of Review: Clearly Erroneous)

¶50 Deed reformation "is governed by N.D.C.C. § 32-04-17."Vaage v. State of North Dakota, 2016 ND 32, ¶ 23, 875 N.W.2d 527. The statute states that a written contract may be revised when it "does not truly express" the parties' intent due to "fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected." Paul claims the

1985 deed contains a mutual mistake; it is his burden to prove this by "clear and convincing evidence." Vaage, 2016 ND at ¶ 23 (citation omitted).

¶51 In reforming written agreements, courts "'exercise great caution and require a high degree of proof.'" Id. (quoting Arndt v. Maki, 2012 ND 55, ¶ 12, 813 N.W.2d 798. This is "'especially [so] when death has sealed the lips" of one of the parties to the agreement. Vaage, 2016 ND at ¶ 23 (quoting Arndt, 2012 55, at ¶ 12). Such rules exist, in part, because of "'the doubtful veracity and the uncertain memory of interested witnesses.'" Des Lacs Valley Land Corp. v. Herzig, 2001 ND 17, ¶ 8, 621 N.W.2d 860 (quoting Gajewski v. Bratcher, 221 N.W.2d 614, 626 (N.D.1974)).

¶52 Thus, "evidence justifying reformation 'must be clear, satisfactory, specific, and convincing.'" Vaage, 2016 ND at ¶ 23 (quoting Freidig v. Weed, 2015 ND 215, ¶ 12, 868 N.W.2d 546). "'[C]ertainty of error'" must be proven. Vaage, 2016 ND at ¶ 23 (quoting Freidig, 2015 ND 215, at ¶ 12). This burden extends to showing not only that the written agreement has an error, but to proving that the error should be revised as proposed by the person seeking reformation.

¶53 Because these are questions of fact, deference is given the District Court, but it can be overturned if found clearly erroneous. Vaage, 2016 ND at ¶¶ 24, 28. A finding of fact is clearly erroneous if induced by an erroneous view of the law, if no evidence supports it, or if this Court is "left

with a definite and firm conviction a mistake has been made." Id. (citing Bredeson v. Mackey, 2014 ND 25, ¶ 5, 842 N.W.2d 860).

¶54 The disputed 1985 deed states that Paul and Deborah are the "Transferor" and Kenneth Sr. is the "Transferee." Appx. at 48. If indeed there was to have been more than one transferee, the failure to include that second person's name should have been readily apparent to the parties, and corrected. It is more likely, however, that the mutual mistake is the deed's inclusion of references to joint tenants. It is more likely that the parties overlooked and misunderstood the consequences of legalese in the deed like "joint tenants" and "as joint tenants and not as tenants in common," than to believe they forgot to include Paul's name as a transferee. Had Paul or Deborah been at all diligence, they would have, if their recollection of events is accurate, spotted the error and corrected the deed.

¶55 Courts "will not protect a person who fails to take reasonable steps for his own protection." State Farm, Fire & Casualty Co. v. Home Ins. Co., 276 N.W.2d 349, 351 (Wis. 1979). Where a person has the capacity and opportunity to read a contract and does not do so, he should not "throw upon the courts the burden of protecting him from the consequences of his imprudence." Hanes v. Mitchell, 49 N.W.2d 606, 610 (1951). See also Bangen v. Bartelson, 553 N.W.2d 754, 758 (N.D. 1996) (citation omitted) ("Helen is charged with having read the lease for purposes of a mistake of fact analysis."). Deed reformation is an equitable remedy. Vaage, 2016 ND at ¶

21. Its application should require a modicum of vigilance on the person seeking reformation. Indeed, "'[i]t is the duty of every contracting party to learn and know [the contract's] contents before he signs and delivers it.'" Hanes v. Mitchell, 49 N.W.2d 606, 610 (N.D. 1951) (quoting 12 Am. Jur. Contracts § 137).

¶56 Paul claimed his father wanted the minerals back, intending to use the money received from an oil and gas lease to help him buy a house in Virginia. Supra at ¶ 15. Kenneth Sr., however, wasn't living in Virginia at the time, id., and his asserted need to get from his sons a little extra money—which turned out to be $360 (id.)—to buy a house is inconsistent with the character of an accomplished man. To the extent this testimony about Kenneth Sr.'s intent amounts "to little more than after-the-fact, self-serving testimony as to what [a] party believed the agreement meant," it should get "little weight with respect to the ultimate issue." Sickler v. LoneTree Energy & Associates, LLC, No. 4:12-CV-077, 2014 WL 1334185, at *8 (D.N.D. Apr. 2, 2014). Particularly here, where there is no documentary evidence, or independent third party corroboration, or course of conduct to lend credibility to the testimony.

¶57 Paul's rationale for Kenneth Sr.'s acquisition of the minerals is further comprised by Paul's character: his theft and embezzlement from the reservation school where he worked. Supra at ¶ 18. Deborah Fredericks, who supported Paul at trial, believes that if Paul wins the lawsuit that will

benefit the children she had with Paul. Trial Tr. at 30. And Paul and Deborah's position is inconsistent with the actions of Kenneth Jr., a disinterested third party whose circumstances are similar to Paul's, but who never challenged Lyndon's title. Supra at ¶ 17.

¶58 Paul gave different descriptions to the disputed 1985 deed and its intent. He stated he had "sold" the minerals to his father. Trial Tr. at 51, 92 (Paul Test.). He stated that although he held the minerals in joint tenancy, Kenneth Sr. was to get all the revenues, which he acknowledged is inconsistent with a joint tenancy. Id. at 71-72. He stated that although he was a joint tenant, his father had full authority to lease the minerals because he, Paul, had "transferred them over to my father." Id. at 55. Such testimony does not meet the "'clear, satisfactory, specific, and convincing'" evidence required for deed reformation,Vaage, 2016 ND 32, at ¶ 23 (quoting Freidig, 2015 ND 215, at ¶ 12), which is a "high remedy." George v. Veeder, 2012 ND 186, ¶ 13, 820 N.W.2d 731.

¶59 This Court is skeptical of reformation when the evidence of mistake comes entirely from the party seeking reformation. E.g., Veeder, 2012 ND 186, ¶ 13; Johnson v. Hovland, 2011 ND 64, ¶¶ 20-11, 795 N.W.2d 294. In Veeder, the grantor of a 1970 deed sought to have it reformed to reserve or recover title to scoria. When he filed suit, the deed's two grantees were deceased. 2012 ND 186, at ¶ 2. Although he stated all the parties to the deed agreed it would not convey scoria, and presented circumstances at the

time the deed was issued to support his claim, and stated that the failure to specify scoria as a reserved substance was a drafting error, this evidence—which is similar to Paul's—was insufficient to reform the deed. Id. at ¶¶ 14-15, 18.

V. Damages for Breach of Warranty
(Standard of Review: De Novo – Question of Law)

¶60 **"Properly Incurred" Expenses**. The statute governing damages for breach of warranty states that damages include "[a]ny expense properly incurred by the covenantee in defending the covenantee's possession." N.D.C.C. § 32-03-11(3).[2] Bole incurred about $57,000 in attorney fees to defend title, Appx. at 157 at ¶ 5 (Judgment), but the statute allows recovery of only expenses "properly incurred." Bole's expenses were not "properly incurred" because as soon as the litigation began Lyndon retained

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[2] N.D.C.C. § 32-03-11:

> The detriment caused by the breach of a covenant of seizin, of right to convey, of warranty, or of quiet enjoyment, in a grant of an estate in real property, is deemed to be:
>
> 1. The price paid to the grantor, or if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property.
>
> 2. Interest thereon for the time during which the grantee derived no benefit from the property, not exceeding six years.
>
> 3. Any expense properly incurred by the covenantee in defending the covenantee's possession.

counsel and actively defended title throughout the case. Dkt. Nos. 242 (Sambor Affidavit, 243 (Carvell Affidavit); Appx. 1-9 (Register of Actions). There was no need for Bole to hire counsel to defend title. Bole of course had the right to do so, but that choice does not require Lyndon to pay twice. His duty was to defend title, which he fulfilled.

¶61 Interpreting a similar statute, the Oklahoma Supreme Court held that when the warrantor employs able counsel to defend his warranty, "he is relieved from paying the counsel fees contracted for by the warrantee, and it is only where the warrantor fails to defend that he may be charged with the reasonable attorney's fees paid by his warrantee." Eysenbach v. Naharkey, 236 P. 619, 625 (Okla. 1924) (modified on other grounds 246 P. 603 (Okla 1926)); see also Sartin v. Hughen, 7 P.2d 151, 153 (Okla. 1932) (the rule expressed in Eysenbach "is a correct one").

¶62 **Interest.** The damages statute also allows interest on the purchase price, but only for the time period in which the "grantee derived no benefit from the property." N.D.C.C. § 32-03-11(2) (emphasis added). When Bole Resources was contemplating buying Lyndon's minerals, it was also looking to immediately re-sell them. Trial Tr. at 215-16 (Ekblad Test.). And it found buyers. Bole's deeds to its five purchasers are dated February 27, 2012, one week after Lyndon's deed to Bole. Supra at ¶ 29. Dkt. Nos. 83-87 (deeds). Bole conveyed eighty-six of ninety acres it acquired from Lyndon. Supra ¶ 29. And it received payment for what it conveyed. Id; see also Dkt. Nos. 120 at ¶5

(Folk Affidavit); 121 at ¶5 (Schatz Affidavit); 122 at ¶5 (Bratlien Affidavit); 123 at ¶5 (R. Waitman Affidavit); 124 at ¶5 (Z. Waitman Affidavit); and 125 at ¶6 (Eubank Affidavit) (stating they purchased interests from Bole at "considerable cost").

¶63 The Oklahoma statute has been interpreted as imposing on a grantee seeking interest the burden to prove he derived no benefit from the property prior to being dispossessed. Rubey v. Irick, 163 P. 514, 515 (Okla. 1917). Bole didn't present such evidence. The evidence we have shows Bole received a benefit from the minerals.

Conclusion

¶64 This Court should hold the District Court lacked jurisdiction and declare its decisions void.

¶65 If the District Court had jurisdiction, this Court should hold the suit barred by laches, or hold that Bole Resources and other defendants were good faith purchasers for value precluding reformation, or rule that Paul's claim fails for inadequate proof of what the parties to the 1985 deed intended.

¶66 If the District Court's decision to reform the deed is upheld, this Court should rule that Lyndon is not required to pay Bole's litigation costs, nor any interest on the $120,000 purchase price.

Dated April 25, 2016.

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Attorney For Lyndon B. Fredericks

In the Supreme Court

State of North Dakota

Paul J. Fredericks, Plaintiff and Appellee, vs. Lyndon B. Fredericks, Defendant-Appellant and Cross-Appellee Bole Resources, LLC, Kodiak Oil & Gas, Inc., Randy Folk, CNR Investments, LLC, Brooks Energy Inc., Waitman Group LLC, Relyk, LLC, and Dale Eubank, Defendants, --- Exok, Inc., Appellee, and Bole Resources, LLC, Randy Folk, CNR Investments, LLC, Brooks Energy, Inc., Waitman Group, LLC, Relyk, LLC, and Dale Eubank, Appellees and Cross-Appellants.	)	Supreme Court No. 20150359

Appeal from the District Court Judgment
Issued November 9, 2015
The Honorable Dann E. Greenwood

Affidavit of Service

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Linda Reis, being first duly sworn on oath, states that on the 25th day of April, 2016, I electronically filed, via email, with the Clerk of the North Dakota Supreme Court, the following documents:

1. Brief of Appellant Lyndon B. Fredericks
2. Appendix

by sending the above documents to the Clerk at supclerkofcourt@ndcourts.gov, and that on April 25, 2016, copies of the documents were simultaneously electronically served, via email, on opposing counsel, Monte Rogneby mrogneby@vogellaw.com and Malcolm Pippin malcolm@pippinlawfirm.com. Further, due to errors contained in the formatting of the Brief and Appendix, the same were re-served on opposing counsel on April 28, 2016.

I further swear that copies of the documents were mailed, via United States Mail, both on April 25, 2016, and April 28, 2016, to:

Exok, Inc.
c/o James W. Wallis
Registered Agent
6410 B North Santa Fe
Oklahoma City, OK 73116

Linda Reis

Subscribed and sworn to before me this 28th day of April, 2016.

DAYNA BARONE
Notary Public
State of North Dakota
My Commission Expires October 10, 2018

Notary Public

In the Supreme Court

State of North Dakota

Paul J. Fredericks, Plaintiff-Appellee, vs. Lyndon B. Fredericks, Defendant-Appellant and Bole Resources, LLC, Kodiak Oil & Gas (USA), Inc., Exok, Inc., Randy Folk, CNR Investments, LLC, Brooks Energy, Inc., Waitman Group LLC, Relyk LLC, and Dale Eubank, Defendant-Appellees	)	Supreme Court No. 20150359

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Exok, Inc.
c/o James W. Wallis
Registered Agent
6410 B North Santa Fe
Oklahoma City, OK 73116

Linda Reis

Subscribed and sworn to before me this 25th day of April, 2016.

DAYNA BARONE
Notary Public
State of North Dakota
My Commission Expires October 10, 2018

Notary Public