20210042
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 3, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Galvanizers, Inc., a North Dakota corporation;
K and K Construction and Repair, Inc., a
North Dakota corporation ,

Plaintiff-Appellants,

vs.

Paul Kautzman,

Defendant-Appellee,

and

The United States of America by and through
the Department of Treasury and its Internal
Revenue Service,

Defendant.

Supreme Court No. 20210042

District Court No. 09-2019-CV-04344

BRIEF OF APPELLEE KAUTZMAN
"ORAL ARGUMENT REQUESTED"

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT DATED FEBRUARY 8, 2021, AND JUDGMENT ENTERED ON FEBRUARY 10, 2021

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE STEVEN L. MARQUART

GARAAS LAW FIRM
Jonathan T. Garaas
Attorneys for Appellee Kautzman
Office and Post Office Address
DeMores Office Park

1314 23rd Street South
Fargo, ND 58103
E-mail address: garaaslawfirm@ideaone.net
North Dakota ID # 03080
Telephone: 701-293-7211

TABLE OF CONTENTS

Paragraph

TABLE OF AUTHORITIES. . . . . page 4

ISSUES ON APPEAL. 1

STATEMENT OF THE CASE. 5

STATEMENT OF FACTS. 7

LAW AND ARGUMENT. 31

Standard of Review-Oral Argument Requested.. 32

POINT 1. The Corporate appellants failed to honor their statutory duties when attempting to quiet title to disputed lands... 38

A. Paul Kautzman's individual ownership interest is protected by law – constructive notice always exists.. 45

B. Paul Kautzman's individual ownership interest since 1974 was not affected by the Minnesota judgment, or proceedings.. . . 48

Point 2. The parol evidence rule precludes any alteration of contractual documents.. 50

Point 3. A final contract – a "Mutual Release of All Claims" – further precludes this action.. 53

Point 4. The appeal is frivolous – Paul Kautzman is entitled to attorney fees, costs and disbursements.. 56

CONCLUSION. 59

TABLE OF AUTHORITIES

Paragraph

North Dakota Cases

Dixon v. Dixon, 2017 ND 174, 868 N.W.2d 546. 43

Ell v. Ell, 295 N.W.2d 143 (N.D. 1980). 34

Gajewski v. Bratcher, 221 N.W.2d 614 (N.D. 1974).. 51

Hildenbrand v. Capital RV Ctr., Inc., 2011 ND 37, 794 N.W.2d 733.. 44

Holverson v. Lundberg, 2016 ND 103, 879 N.W.2d 718. 46

In re Guardianship/Conservatorship of Van Sickle,
2005 ND 69, 694 N.W.2d 212.. 35

North Dakota Statutes

N.D.C.C. Chapter 32-04. 42

N.D.C.C. Chapter 32-17. . . . . 39, 41

N.D.C.C. Chapter 40-50.1. 40

N.D.C.C. § 32-04-01. 42

N.D.C.C. § 32-04-17. . . . . 3, 42, 57, 58

N.D.C.C. § 32-17-01. 39

N.D.C.C. § 45-14-04. 47

N.D.C.C. § 9-01-02. 44

N.D.C.C. § 9-03-01. 44

N.D.C.C. § 9-03-16. 44

N.D.C.C. § 9-08-08. 55

Paragraph

N.D.C.C. § 9-08-09. 55

N.D.C.C. § 9-13-02. 29

Other Authorities

N.D.R.App.P. 28(b)(5).. 6

N.D.R.App.P. 28(b)(6).. 28

N.D.R.App.P. 28(f). 6

N.D.R.App.P. 38. 57

N.D.R.Civ.P. 52(a).. . . . . 2, 33, 35

N.D.R.Civ.P. 81.. 41

N.D.R.Civ.P. 9(b). 43

N.D.R.Ev. 301 47

N.D.R.Ev. 602. 25

[¶1] **ISSUES ON APPEAL**

[¶2] 1. Did the district judge comply with N.D.R.Civ.P. 52(a)?

[¶3] 2. Did the district judge honor N.D.C.C. § 32-04-17 which always requires an aggrieved party to prove "fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, (so that) a written contract does not truly express the intention of the parties"?

[¶4] 3. Is this appeal frivolous?

[¶5] **STATEMENT OF THE CASE**

[¶6] Under the guise of complying with N.D.R.App.P. 28(b)(5), Galvanizers, Inc. and K and K Construction and Repair, Inc. ("Appellant corporations") insert disputed, misleading, or inaccurate facts in ¶2 of the Brief of Appellants, some also without attribution to the record as required by N.D.R.App.P. 28(f), to include:

A. "At all times prior to and following the platting of the Property, the land was considered Partnership property";

B. "Despite having been compensated for his ownership interest in the Property pursuant to the individual redemption agreements, Paul Kautzman never executed a deed to convey his interest."

[¶7] **STATEMENT OF FACTS**

[¶8] Appellant corporations paint with too broad of a brush covering the specifics of reality – sometimes affecting identities, sometimes property. No partnership is a party to this action.

[¶9] Appellant corporations also fail to understand their own differentiations – at ¶2 of Appellant's Brief, the Appellant corporations define "Lot 1 in Block 1 of Kautzman's First

Addition to the City of West Fargo ('the Property'). Index #96.", but also utilize this self-selected descriptive phrase ("the Property") when referring to only a portion of the platted property. When using "apples", one should not throw in a "pear", or a "fig".

[¶10] Since December 13, 1974, by Warranty Deed recorded by the Cass County Recorder in Book 390 of Deeds at page 287 on December 19, 1974 [Appendix, page 47; Plaintiff's Exhibit 1; Document ID #90], Paul Kautzman has been the owner of an undivided one-half interest in the following tract of land [hereinafter "Paul Kautzman's Real Property"]:

> A tract of land lying in the Southeast Quarter (SE¼) of the Northwest Quarter (NW¼) of Section Four (4), Township One Hundred Thirty-nine (139) North, Range Forty-nine (49) West, Cass County, North Dakota, described as follows:
>
> > Commencing at the Southeast corner of said Northwest Quarter (NW¼); thence North along the East line of said Northwest Quarter for a distance of 824.00 feet; thence West parallel to the South line of said Northwest Quarter a distance of 315.00 feet; thence South parallel to the East line of said Northwest Quarter (NW¼) a distance of 824.00 feet to the South line of said Northwest Quarter (NW¼); thence East along the South line of said Northwest Quarter 315.00 feet to the point of beginning less the South 50.00 feet thereof, deed for highway purposes, and subject, however, to easements and rights-of-way of record,
>
> LESS TWO (2) TRACTS OF LAND REFERENCED IN THE FOLLOWING DESCRIBED DEEDS:
>
> > 1. Warranty Deed dated November 30, 1989, between John Kautzman and Paul Kautzman, as grantors, and Southeast Cass Water Resource District, as grantee, recorded on December 1, 1989, at 11:46 a.m. as Document No. 711673 (Exhibit D-2 attached to Amended Answer of Paul Kautzman) [Defendant's Exhibit D-101; Doc ID #79; Plaintiffs Exhibit 4; Doc ID #93; App., p. 46]; and
> >
> > 2. Warranty Deed dated January 20, 1981, between John Kautzman and Gladys L. Kautzman, and Paul Kautzman, as grantors,

and Galvanizers, Inc., as grantee, recorded on January 22, 1981, at 10:55 a.m. as Document No. 574534 (Exhibit D-3 attached to Amended Answer of Paul Kautzman) [Defendant's Exhibit D-102; Doc ID #80; Plaintiffs Exhibit 2; Doc ID #91; App., p. 49].

[¶11] Paul Kautzman's ownership interest in Paul Kautzman's Real Property [an undivided one-half (1/2) interest is a rectangular tract of land with original dimensions of 824' x 315'] has been recognized to exist multiple times in recorded documents – even Galvanizer, Inc.'s President recognized his brother Paul Kautzman's individual ownership of Paul Kautzman's Real Property, in writing, as part of a recorded Plat[1] – to include the following:

[¶12] A. Warranty Deed dated December 13, 1974, duly recorded with the Cass County Recorder as Document #485796 [Book 390 of Deeds at page 287] wherein John Kautzman and Paul Kautzman were grantees of specifically described real property. Defendant's Exhibit D-100; Doc ID #878; Plaintiffs' Exhibit 1; Doc ID #90. Paul Kautzman's testimony, at Tr., p. 193: "And when you and John Kautzman acquired the property from the Aggie family back in 1974, you got it as individuals, did you not? (Answer) Right."

[¶13] B. Warranty Deed dated November 30, 1989, duly recorded with the Cass

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[1] K & K Construction and Repair, Inc.'s Corporate Controller, Teri Fleming, testified that the 1997 Plat recognized Paul Kautzman was the owner of some of the property within Lot 1 of Block 1 of Kautzman's Addition. Transcript of January 4, 2021, pages 15 and 43; 44 "Paul Kautzman has ownership." Hereinafter. "Tr., p. __". Controller Fleming also testified that the corporation's lawyer had done a title opinion, and that Paul Kautzman was on the title [Tr., ps. 20-22], and also, the 2019 Title Opinion reconfirms what was known about the title to the property in 1997 [Tr., p. 44], without any subsequent conveyances by Paul Kautzman. Tr., p. 45. When questioned, Controller Fleming answered "Yes" to the question posed by attorney Garaas: "So it appears that the public record would indicate that Paul Kautzman has been the owner of that property since 1974. He mortgaged it in 1980's. He platted it in 1997, and there has never been a conveyance out. And so that the record title ownership says he is one of the owners in 2019; correct?"

County Recorder as Document #711673 wherein Paul Kautzman (and John Kautzman) were grantors of specifically described real property. Defendant's Exhibit D-101; Doc ID #79; Plaintiffs' Exhibit 4; Doc ID #93.

[¶14] C. Warranty Deed dated January 20, 1981, duly recorded with the Cass County Recorder as Document #574534 [Book 451 of Deeds at page 451] wherein Paul Kautzman (and John Kautzman) were grantors of specifically described real property. Defendant's Exhibit D-102;DocID #80; Plaintiffs' Exhibit 2; Doc ID #91.

[¶15] D. Plat of Kautzman's First Addition duly recorded with the Cass County Recorder on April 9, 1997, as Document #872823 [Book Q of Plats at page 2] wherein Paul Kautzman (and John Kautzman) was recognized as "OWNERS: PART OF LOT 1, BLOCK 1". Defendant's Exhibit D-103; Doc ID #81; Plaintiffs' Exhibit 7; Doc ID #96; App., p. 53; **the Plat recognizing Paul Kautzman's ownership of Paul Kautzman's Real Property was signed by President John Kautzman of Galvanizers, Inc. (and also, separately signed by John Kautzman as an individual, and again as a partner)**.

[¶16] E. Mortgage * Short-Term Mortgage Redemption dated May 8, 1979, duly recorded with the Cass County Recorder as Document #553274 [Book 621 of Mortgages at page 471] wherein Paul Kautzman (and John Kautzman) were mortgagors of specifically described real property. Defendant's Exhibit D-105; Doc ID #83.

[¶17] F. Assignment of Rents dated May 8, 1979, duly recorded with the Cass County Recorder as Document #553275 [Book E-8 of Miscellaneous at page 568] wherein Paul Kautzman (and John Kautzman) were mortgagors of specifically described real property. Defendant's Exhibit D-106; Doc ID #84.

[¶18] G. Satisfaction of Mortgage dated October 30, 1987, duly recorded with the Cass County Recorder as Document #678198 on November 6, 1987, wherein a mortgage given by Paul Kautzman (and John Kautzman) for $135,000.00 [Book 665 of Mortgages at page 203] for specifically described real property was paid. The Satisfaction of Mortgage also released the "leasehold interest held by the lessee under that certain lease dated October 10, 1980, from John Kautzman and Paul Kautzman to K & K Construction and Repair, Inc., covering the tract of land described above, and all extensions and renewals of said lease and all subsequent leases between the parties covering said tract." Defendant's Exhibit D-107; Doc ID #85; Defendant's Exhibit D-109; Doc ID #87.

[¶19] H. Satisfaction of Mortgage and Assignment of Rents dated April 13, 1989, duly recorded with the Cass County Recorder as Document #701420 on April 18, 1989, wherein a mortgage given by Paul Kautzman (and John Kautzman) recorded on May 15, 1979 [Book 621 of Mortgages at page 471; Assignment of Rents recorded at E-8 of Miscellaneous on page 568] for specifically described real property was paid. Defendant's Exhibit D-108; Doc ID #86.

[¶20] I. Satisfaction of Mortgage dated April 26, 1989, duly recorded with the Cass

> County Recorder as Document #702152 on May 4, 1989, wherein a mortgage given by Paul Kautzman (and John Kautzman) recorded on August 2, 1984 [Book 738 of Mortgages at page 265] for specifically described real property was paid. Defendant's Exhibit D-110; Doc ID #88. The Satisfaction of Mortgage also released the "leasehold interest held by the lessee under that certain lease dated October 10, 1980, from John Kautzman and Paul Kautzman to K & K Construction and Repair, Inc., covering the tract of land described above, and all extensions and renewals of said lease and all subsequent leases between the parties covering said tract." Defendant's Exhibit D-110; Doc ID #88.

[¶21] As part of their factual presentation, Corporate appellants failed to identify the specifics of the "mutual mistake" suffered by all parties, except to suggest that "(t)he value of the Property was included in the final valuations that were submitted to the (divorce) court." Brief of Appellants, ¶7. Even if said exception/suggestion is true, on December 31, 2013, three (3) separate and individual transactions occurred with substantially different consideration(s) identified in writing, namely: (1) Partnership Redemption Agreement involving Kautzman Brothers Partnership [Plaintiffs' Exhibit 19; Doc ID #108]; (2) Stock Redemption Agreement involving K and K Construction and Repair, Inc. [Plaintiffs' Exhibit 20; Doc ID #109; App., p. 34]; and (3) Stock Redemption Agreement involving Galvanizers, Inc. [Plaintiffs' Exhibit 21; Doc ID #110; App., p. 27]. None of the three (3) contractual documents reference, or even allude to, any obligation of Paul Kautzman to convey any real property whatsoever, nor is there anything in the record to suggest Paul Kautzman's Real

Property was ever the subject of any preliminary negotiation(s), or even post-contractual negotiation when later executing the Mutual Release of All Claims on *November 30, 2018*. App., p. 40. There is no evidence of any deeds of conveyance having been presented to Paul Kautzman on December 31, 2013, for execution by him, and no deed of conveyance was contemplated to be required by any of the three (3) separate agreements. Finding of Fact ¶11; App., p. 57.

[¶22] The district court was also aware the appraisals were fatally flawed in suggesting, "According to legal documents, Galvanizers, Inc. owns all 14 acres of land at the West Fargo site. .. Kautzman's corporate attorney will work on the legal documents to rectify the situation. For purposes of this appraisal, half of the West Fargo land is allocated to Galvanizers, Inc. and half is allocated to Kautzman Brothers Partnership." Such statement cannot be true because Kautzman Brothers Partnership would have a minimum value of $1,125,000 (representing 1/2 of $2,250,000.00 - Plaintiffs' Exhibit 12, page 5; Doc ID#101), instead of the significantly lesser value of $99,724 actually utilized by the parties to value the partnership, resulting in payment to Paul Kautzman of only $49,862.00 for his entire 50% partnership ownership interest. Plaintiffs' Exhibit 19; Doc ID #108. In addition, the partnership had to have even a greater value than $2,250,000.00 because the appraisers even disregarded partnership ownership of equipment - "We did not attempt to allocate values of the equipment to Kautzman Brothers. Rather, all equipment owned by Kautzman Brothers is included on the K&K Construction list." Plaintiffs' Exhibit 12, page 3; Doc ID #101.

[¶23] The Appellant corporations cannot rely upon the appraisals due to the realities of time – there can be no mutual mistake of ownership by Galvanizers, Inc., for Paul Kautzman

always knew he was an individual owner (since 1974), as well as Paul Kautzman also owning an interest in a partnership which subsequently owned a separate tract within Kautzman's First Addition. The parol evidence rule should have always precluded consideration of the appraisals. See Point 2. The Title Opinion submitted by Plaintiffs [Plaintiffs' Exhibit 24; Doc ID #113] also recognizes four (4) owners, including Paul Kautzman as being one (1) of the named owners of a part of Lot 1 in Block 1 of Kautzman's First Addition - Appellant corporations' proof in the form of a title opinion [Plaintiff Exhibit 24; Doc ID # 113] actually proves, or concedes, Paul Kautzman to be an owner of land within Lot 1 of Block 1 of Kautzman's First Addition. Title should have been quieted in Paul Kautzman, and others.

[¶24] As an aside – Appellant corporations never explain, nor did they present any evidence, on how an earlier recorded 1997 Plat can be reformed as the result of a "mutual mistake" only possibly arising out of 2013 divorce court valuations – sixteen (16) years too late?

[¶25] Plaintiffs presented no party, nor other witness testifying to the contrary.[2]

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[2] The current President of both Plaintiff corporations, Cody Shomen, testified for the Corporate appellants. Tr., ps. 64-78. At time of trial, he had served in that capacity for only the last eighteen (18) months, and could not testify as to any possible prior 2013 mutual mistake based upon his personal knowledge [John Kautzman was President in 2013, and Cody Shomen becomes interested only after a 2014 succession agreement occurs with Cody and Kyle Shomen buying only *shares of stock* in Plaintiff corporations (not any partnership interest is involved)]. Cody Shomen was without any personal knowledge of the 2013 transactions. Tr., ps. 66-67; 72 (the court indicated he was "disqualified" from testifying about 2013 transactions); 73-74. N.D.R.Ev. 602 provides "(a) witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

Similarly, Comptroller Teri Fremling cannot testify as to any purported 2013 mistake relating to the three (3) documents, supposedly only discovered in 2019 when a title opinion was secured recognizing Paul Kautzman's ownership interest in a portion of Lot 1 in Block 1 of Kautzman's First Addition. Plaintiff's Exhibit 24; Doc ID #113. Comptroller

[¶26] The three (3) separate contracts clearly identify the consideration flowing to each party under each separate and individual contract as set forth in the following tables, *without any reference to land value* – thereby repudiating Appellant corporations' unsupported contention(s) that sale was based upon appraisals showing land and equipment value totaling $3,455,000.00 in 2012 [Plaintiffs' Exhibit 12; Doc ID #101]:

Description	Paul Kautzman's "Stock" or "Partnership Interest" Amount	Paul Kautzman's "Other Consideration" Amount
Partnership Redemption Agreement Stock Redemption Agreement [Plaintiffs' Exhibit 19; Doc ID #108]		
Purchase price of "fifty percent (50%) interest in KAUTZMAN BROTHERS PARTNERSHIP" - ***no reference to any land exists***; purchase price was equal to one-half (1/2) of a partnership bank account.	$ 49,862.00	
K and K Construction Stock Redemption Agreement [Plaintiffs' Exhibit 20; Doc ID #109]		
Purchase price of "individual shares of stock" - ***no reference to any land exists***	$ 48,150.00	
Non-Competition Agreement		$ 100,000.00
Additional Compensation		$ 431,994.00
Guarantor Fees		$ 150,000.00

Fremling's testimony, and witness Mark Larson's testimony is incapable of being used to alter or reform any documents under the limitations of N.D.R.Ev. 602, and also, due to the parol evidence rule. See Point 2.

Accountant Mark Larson testified that he did not know anything about the title of the property. Tr., ps. 79, 158.

Description	Paul Kautzman's "Stock" or "Partnership Interest" Amount	Paul Kautzman's "Other Consideration" Amount
Galvanizers, Inc. Stock Redemption Agreement [Plaintiffs' Exhibit 21; Doc ID #110]		
Purchase price of "individual shares of stock" - ***no reference to any land exists***	$ 575,576.00	
Non-Competition Agreement		$ 250,000.00
Guarantor Fees		$ 185,000.00
Total Purchase Price Paid To Be Paid To Paul Kautzman for shares of stock or partnership interest ***without reference to any land to be conveyed***	$ 673,588.00	
Total "Other Consideration" To Be Paid to Paul Kautzman ***without reference to any land to be conveyed***		$ 1,116,994.00

[¶27] 9. Corporate appellants' attempt to rely upon appraisals provided by (a) Sliwoski and Stumphf and/or Crown Appraisals [Brief of Appellants, ¶s 6-7; Plaintiffs' Exhibit 12, Plaintiff Exhibit 13, Plaintiffs' Exhibit 14, Plaintiffs' Exhibit 15 - Doc ID #s 101-105], or (b) documents provided by Mark Larson [Plaintiffs' Exhibit 18 - Doc ID #107] to modify, amend, or alter the three (3) individual transactions that occurred on December 31, 2013, were properly disregarded. Contrary to Corporate appellants' assertions, the three (3) agreements did not adopt the valuations suggested by the referenced appraisals. Approximately 62% of Paul Kautzman's consideration [$673,588.00 + $1,116,994.00 = $1,790,582.00 - $1,116.994.00 ÷ $1,790,582.00 = 62.38%] *relates to matters not even addressed within the appraisals*, to include (a) non-competition payments, (b) guarantor

payments, and (c) additional compensation. The Mutual Release of All Claims dated November 30, 2018, does not except (or exclude) land disputes, quiet title actions, or contract reformation actions – **the result is for events/transactions prior to November 30, 2018, involving the parties, no actions are possible**. The parol evidence rule precludes any consideration of the appraisals, among other exhibits similarly prohibited. See Point 2.

[¶28] Appellant corporations accurately state, at ¶9 of their Brief, intending to recite "facts relevant to the issues submitted for review" pursuant to N.D.R.App.P. 28(b)(6), "Paul (Kautzman) did not execute a deed conveying any interest he may have had in the Property as part of the redemption agreements." Interestingly, Appellant corporations do not identify such facts as being in dispute, another requirement of the cited appellate rule, if applicable.

[¶29] A "Mutual Release of All Claims" dated November 30, 2018 [Defendants Exhibit 104; Doc ID #82; App., p. 40], was signed by Paul Kautzman and also John Kautzman as President of Galvanizers, Inc., John Kautzman as President of K & K Construction and Repair, Inc., and John Kautzman as a general partner of Kautzman Brothers Partnership. Tr., p. 74. The mutual release should have precluded this litigation, as its breadth was to include even unknown claims by specific reference to N.D.C.C. § 9-13-02. See Point 3.

[¶30] Appellant corporations' last factual claim, "The result is that Galvanizers now holds equitable title to the Property", is without attribution to anything in the record, and Appellant Galvanizers, Inc., has thrown Appellant K and K Construction and Repair, Inc., under the bus.

[¶31] **LAW AND ARGUMENT**

[¶32] **Standard of Review-Oral Argument Requested**

[¶33] Appellant corporations' failure to recognize their underlying burden of proof ["clear and convincing evidence"] taints their description as to the proper standard of appellate review. Their failure to introduce "clear and convincing evidence" helps explain District Judge Steven L. Marquart's determination, fully complying with N.D.R.Civ.P. 52(a), that "Plaintiff (corporations) have not proved that theory (of mutual mistake)." See Point 1.

[¶34] While repeatedly noting the action brought was a "quiet title action" [Tr., ps. 2, 9, 11, 143; and falsely claiming in their Brief, at ¶ 16: "Galvanizers and K and K were not seeking to reform or revise a contract."], both Corporate appellants assert the right to first reform four (4) different contracts [two (2) of which contracts involve a non-party partnership], and one (1) recorded Plat, without ever recognizing the enormous burden of proof noted in Ell v. Ell, 295 N.W.2d 143, 150 (N.D. 1980):

> The burden of proof rests on the party who seeks reformation to prove that the written instrument does not fully or truly state the agreement that the parties intended to make. *Oliver-Mercer Electric Cooperative, Inc. v. Fisher*, 146 N.W.2d at 356; *Ives v. Hanson*, 66 N.W.2d at 805-06. Further, we said in *Oliver-Mercer Electric Cooperative, Inc. v. Fisher*, 146 N.W.2d at 355-56:
>
> > "(P)arol evidence of an alleged mutual mistake as a basis for the modification of a written instrument must be clear, satisfactory, specific and convincing, and a court of equity will not grant the high remedy of reformation even upon a mere preponderance of the evidence, but only upon the certainty of error. *Ives v. Hanson*, N.D., 66 N.W.2d 802; *Wilson v. Polsfut*, 78 N.D. 204, 49 N.W.2d 102; *Metzler v. Bolen*, D.C., 137 F.Supp. 457; *Wheeler v. Boyer Fire Apparatus Co.*, 63 N.D. 403, 248 N.W. 521."

[¶35] This is a heightened evidentiary standard at the trial court level for any claimed "mutual mistake", and, when dealing with individual liberties, such as the protection of private property, In re Guardianship/Conservatorship of Van Sickle, 2005 ND 69, ¶ 24, 694

N.W.2d 212, contemplates "appellate review under N.D.R.Civ.P. 52(a) us(ing) a *more probing* 'clearly erroneous' standard". *Emphasis* added.

[¶36] Appellee Kautzman would assert the appellate standard of review should be affirmation of the trial court unless there is "certainty of error" after a more probing inquiry.

[¶37] Appellant corporations cannot reasonably assert an "inference" [Brief of Appellants, ¶11] will ever substitute for "clear and convincing evidence" – there first must be evidence. The District Court recognized Corporate appellants bit off more than they could chew – the theory of mutual mistake was not proved. Oral argument is requested to address legal and factual issues that may arise in understanding the nature or course of the proceedings.

[¶38] **POINT 1. The Corporate appellants failed to honor their statutory duties when attempting to quiet title to disputed lands.**

[¶39] Quiet title actions, authorized by N.D.C.C. Chapter 32-17, always require the existence of an "adverse estate, interest, lien, or encumbrance." N.D.C.C. § 32-17-01. Under the guise of a quiet title action – when neither Corporate appellant had presented any document of conveyance in their favor with respect to Paul Kautzman's land individually owned, neither Corporate appellant should be allowed to proceed with the action (see Point 3), or seek to amend the Plat wherein "Paul Kautzman" is recognized as one (1) of four (4) identified "Owners: Part of Lot 1, Block 1" without clear and convincing evidence, and not mere surmise, prayer, or hope.

[¶40] The Plat of Kautzman First Addition cannot be reformed as requested in the Complaint [App., p. 9] without an action served on all persons having an interest – which should include landowner Southeast Cass Water Resources District, and even the political

subdivision(s) having statutory rights with respect to platting/subdivisions. N.D.C.C. Chapter 40-50.1. This was supposed to be a quiet title action, not an action seeking reformation of documents/plat under some unplead concepts, or action not brought. Appellee Paul Kautzman was entitled to judgment quieting his title, as well as costs and disbursements.

[¶41] When acting under special statutory procedures such as "Actions to Quiet Title and Determine Claims to Real Estate" under authority of N.D.C.C. Chapter 32-17 [see, N.D.R.Civ.P. 81], the lower court is without jurisdiction to reform contracts, nor would reformation be permissible as a matter of law. Corporate appellants chose the wrong body of law to start an action – if an action is even possible.

[¶42] Chapter 32-04 of the North Dakota Century Code, entitled "Specific Relief", includes N.D.C.C. § 32-04-01 providing, "(s)pecific relief may be given in the cases specified in this chapter and in no other cases." Within the chapter, N.D.C.C. § 32-04-17 specifies when a contract may be revised for fraud or mistake. There must exist either "fraud", "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" to allow any revision.

[¶43] No allegation of fraud, mutual mistake, or even unilateral mistake known or suspected by the other party was alleged, nor proved in this quiet title action [N.D.R.Civ.P. 9(b) requires "a party must state with particularity the circumstances constituting fraud or mistake"]; although the catch-phrase "mutual mistake" was invoked, such was never plead with particularity as required by law. App., p. 7. "A party seeking reformation has the

burden to prove by clear and convincing evidence that a written agreement does not fully or truly state the agreement the parties intended to make." Dixon v. Dixon, 2017 ND 174, ¶10, 868 N.W.2d 546. Conveyance of his individually-owned land was not contemplated by land owner Paul Kautzman when the three (3) December 31, 2013, agreements were executed, nor does it appear that any deeds of conveyance by Paul Kautzman were prepared for the closing, nor were such deeds of conveyance in existence at time of closing, nor was such conveyance required by any of the three (3) agreements fully executed on December 31, 2013.

[¶44] Further, the Corporate appellants fail to understand that if the lower court were to determine that the three (3) executed 2013 agreement(s) were not completely accurate as to the consideration, then no valid contract existed, and reformation of the "1997 plat" as sought by the Complaint [App., ps. 7; 9] would be legally impossible. It is essential to the existence of a contract that there be mutual consent of the parties. N.D.C.C. § 9-01-02; N.D.C.C. § 9-03-16 ("Consent is not mutual unless the parties all agree upon the same thing in the same sense.") See also, N.D.C.C. § 9-03-01 which requires the consent of the parties to a contract must be free, mutual, and communicated to each other. If the parties did not have mutual consent ("meeting of the minds"[3]), no valid contract exists with respect to any

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[3] See Hildenbrand v. Capital RV Ctr., Inc., 2011 ND 37, ¶ 21, 794 N.W.2d 733: Here, the district court's jury instructions included seven instructions defining contract principles, including one entitled "CONTRACTS–MUTUAL CONSENT," stating in part: "One of the essential elements of a contract is the consent of the parties.... Consent is not mutual unless all the parties agree on the same thing in the same sense." *See* N.D.C.C. § 9–03–16. This instruction conveys a concept similar to a "meeting of the minds." Moreover, this Court has warned:

> "The invocation of the shorthand expression 'meeting of the minds' is more misleading than helpful in deciding contract issues. Mutual assent to a

of the three (3) claimed contracts of sale relating only to sale of either shares of stock or a partnership interest – each expressing specific considerations (*never referencing land or land values*), and never including Paul Kautzman's individually-owned land.

[¶45] **A. Paul Kautzman's individual ownership interest is protected by law – constructive notice always exists.**

[¶46] Holverson v. Lundberg, 2016 ND 103, ¶ 20, 879 N.W.2d 718, makes clear Corporate appellants have always had constructive notice of Paul Kautzman's ownership interest, and the recorded plat of Kautzman's First Addition [Plaintiffs' Exhibit 7; Defendant's Exhibit D-103; App., p. 51] shows actual notice of Paul Kautzman's ownership interest exists as of 1997 (ever since a recorded 1974 deed):

> Under N.D.C.C. § 47–19–19, however, the "record of any instrument shall be notice of the contents of the instrument, as it appears of record, as to all persons." Consistent with that statutory provision, we have said a person dealing with real property is charged with constructive notice of properly

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> contract is indeed required, but that assent must be evidenced in some way, and if the evidence is clear enough, the contract will be binding, regardless of mental reservations or misunderstandings of one or both parties, in the absence of fraud or other recognized ground for setting aside the contract. It is the words of the contract and the manifestations of assent which govern, not the secret intentions of the parties....
> ....
> " 'Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words.'
> ....
> "Professor Williston sums it all up by saying that the term 'meeting of the minds' is a 'familiar cliche, still reechoing in judicial dicta,' and that is a nineteenth-century expression which seems to be contrary to the rule 'long ago settled that secret intent was immaterial, only overt acts being considered in the determination of such mutual assent' as the law requires."

Delzer v. United Bank, 527 N.W.2d 650, 655 n. 3 (N.D.1995) (quoting *Amann v. Frederick,* 257 N.W.2d 436, 439 (N.D.1977)).

> recorded instruments affecting title to the property. *Vanderhoof v. Gravel Products, Inc.,* 404 N.W.2d 485, 488–91 (N.D.1987); *Burlington N., Inc. v. Hall,* 322 N.W.2d 233, 238 (N.D.1982); *Schulz v. Hauck,* 312 N.W.2d 360, 361 (N.D.1981); *Northwestern Mut. Sav. & Loan Ass'n v. Hanson,* 72 N.D. 629, 635, 10 N.W.2d 599, 602 (1943). Under those authorities and N.D.C.C. § 47–19–19, when a person engages in transactions involving real property, the person is charged with constructive notice of properly recorded instruments affecting title to the real property.

[¶47] Moreover, Paul Kautzman's individually-owned land is presumptively not partnership property. In 1995, before the 1997 platting of Kautzman's First Addition specifically recognizing Paul Kautzman as an individual owner, and also Kautzman Brothers Partnership as another/different owner, North Dakota enacted N.D.C.C. § 45-14-04, which provides, in pertinent part, as follows:

> 4. Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property, even if used for partnership purposes.

Rule 301 of the North Dakota Rules of Evidence establish the effect of this presumption – "In a civil case, unless a statute or these rules provide otherwise, if facts giving rise to a presumption are established by credible evidence, the presumption substitutes for evidence of the existence of the fact presumed." The 1974 Warranty Deed [Plaintiff Exhibit 1; Defendant's Exhibit D-100; App., p. 45] establishes both John Kautzman and Paul Kautzman are entitled to a statutory presumption of ownership as individuals – it was not partnership property, as a matter of law. In 1997, upon platting the real property, the individual ownership interest of Paul Kautzman (and John Kautzman) was re-confirmed, and even Galvanizers, Inc., signed the same document recognizing Paul Kautzman's individual

ownership status, as did John Kautzman while acting on behalf of Kautzman Brothers Partnership. Defendant's Exhibit D-103; Plaintiffs' Exhibit 7; App., p. 51. Indeed, the recent Quit Claim Deed dated November 13, 2019 [Plaintiffs' Exhibit 9; Doc ID #98] wherein John Kautzman, as an individual, quit claims Lot 1 in Block 1 of Kautzman's First Addition to K and K Construction and Repair, Inc., recognizes the existence of his individual ownership of its described land prior to its 2019 delivery.

[¶48] **B. Paul Kautzman's individual ownership interest since 1974 was not affected by the Minnesota judgment, or proceedings.**

[¶49] The Minnesota divorce court documents, including deposition testimony – an action not involving Corporate appellants, or either of them – cannot act to reform any of the existing agreements (or Plat), none of which signed agreements purport to divest Paul Kautzman of his individually-owned land. Corporate appellants illogically argue that Paul Kautzman's individually-owned real property involved in this action is not mentioned in specific divorce documents, so it must be owned by them. Nowhere within the Stipulated Supplemental Findings of Fact Conclusions of Law, Order for Judgment, and Judgment and Decree arising out of Minnesota proceedings [Plaintiffs' Exhibit 16; Doc ID #105] does it say that all real and personal property owned by the parties anywhere on the planet Earth is set forth, or even referenced in said document. In Section 4 [Plaintiffs' Exhibit 16, page 14; Doc ID #105], it is specifically recognized that "each party shall be awarded ownership and possession of his or her separate property, whether now owned or hereafter acquired, to the exclusion of the interest of the other party, subsequent to the date of separation." In reading the document, Respondent Susan Kautzman was only interested in making sure her marital

lien of $525,000 as set forth in Section 9 (page 26), was secured with *Minnesota property* – "Said settlement agreement shall be secured with a lien against all of Petitioner's personally owned real property described in Section 5 with the exception of the real property located in the State of North Dakota." Plaintiffs' Exhibit 16, pages 26-27; Doc ID #105. Under the Minnesota order, Respondent Susan Kay Kautzman was not entitled to utilize Paul Kautzman's individually-owned North Dakota land as security for the marital lien; Paul Kautzman, as record title owner of the undivided one-half (1/2) interest in his North Dakota land had no need for court proceedings to protect title to North Dakota land already owned (even if forgotten). Respondent Susan Kautzman had sufficient security in Minnesota, and was aware that Paul Kautzman owned the West Fargo property because he earlier testified in conformity with the 1974 deed wherein John Kautzman and Paul Kautzman, as individuals, were undivided one-half owners [Plaintiffs' Exhibit 1; Defendant's Exhibit D-100; Doc ID #78] at page 12 of the deposition (Plaintiffs' Exhibit 10; Doc ID #99):

> A. Okay. The bank wanted the property (in West Fargo). They came, offered us a real good deal and a low loan to go where we're at now out on 7th Avenue, so we (John Kautzman and Paul Kautzman) bought seven acres out there, and they gave us (John Kautzman and Paul Kautzman) a loan to put the building up and everything, and we moved out there, then it become K & K. Kautzman Brothers was always there, but then it become K & K Construction and Repair. ...

See also, the recorded documents referenced at ¶s 12-20.

[¶50] **Point 2. The parol evidence rule precludes any alteration of contractual documents.**

[¶51] The "parol evidence rule" precludes Corporate appellants any relief other than judicial recognition of their ownership interests within Lot 1 of Block 1 of Kautzman's First Addition

subject to Paul Kautzman's undivided one-half (1/2) interest in specifically lands described by metes and bounds within said Lot 1 of Block 1 of Kautzman's First Addition. Gajewski v. Bratcher, 221 N.W.2d 614, 625–26 (N.D. 1974), states:

> First, our statute provides, 'The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.' Section 9—06—07, N.D.C.C.
>
> Construing this statute, we held: 'This is a legislative enactment, in part, of the parol evidence rule. * * * This is not an evidentiary or interpretive rule, but rather one of substantive law.' *Hanes v. Mitchell*, 78 N.D. 341, 49 N.W.2d 606, 608 (1951).
>
> We have held further, in effect, that the parol evidence rule applies where, as here (1) the parties have adopted a writing as a definite expression of their agreement; (2) that deeds are subject to the parol evidence rule; and (3) that fraud, mistake or accident, or any other matter constituting an avoidance or affirmative defense, must be specifically pleaded to make proof thereof admissible. Rules 8(c) and 9(b), North Dakota Rules of Civil Procedure; *Sobolik v. Vavrowsky*, 146 N.W.2d 761 (N.D.1966); *City of Granville v. Kovash, Incorporated*, 118 N.W.2d 354 (N.D.1962).
>
> The parol evidence rule has been variously defined and has been best stated as follows:
>
> > ""Where parties, Without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement:' * * * 'all preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract * * * and 'unless fraud, accident, or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence. ""' *Associated Hardware Supply Co. v. Big Wheel Distributing Company*, 355 F.2d 114, 119 (3d Cir. 1966), 17 A.L.R.3d 998.
>
> See also, 32A C.J.S. Evidence s 851; 30 Am.Jur.2d Evidence s 1017.

> The parol evidence rule is founded on experience and public policy and created by necessity, and it is designed to give certainty to a transaction which has been reduced to writing by protecting the parties against the doubtful veracity and the uncertain memory of interested witnesses. *Hanes v. Mitchell, Supra*; 32A C.J.S. Evidence s 851.
>
> We have approved and applied this rule in the interpretation of § 9—06—07, N.D.C.C., and have held:
>
> 'Where a written contract is complete in itself, is clear and unambiguous in its language and contains mutual contractual covenants agreed upon, such parts cannot be changed by parol testimony, nor new terms added thereto, in the absence of a clear showing of fraud, mistake or accident.' *Larson v. Wood*, 75 N.D. 9, 25 N.W.2d 100 (1946).
>
> See also*, Bolyea v. First Presbyterian Church of Wilton, N.D.*, 196 N.W.2d 149 (N.D.1972); *Zimmer v. Bellon*, 153 N.W.2d 757 (N.D.1967); *Ives v. Hanson*, 66 N.W.2d 802 (N.D.1954); *Hanes v. Mitchell, Supra*.

[¶52] Corporate appellants did not prove their theory, nor could they – they presented no party having knowledge, nor legally admissible evidence that would allow an action to even proceed (nor is there a meritorious appeal).

[¶53] **Point 3. A final contract – a "Mutual Release of All Claims" – further precludes this action.**

[¶54] Subsequent to December 31, 2013 (the date of three (3) different contracts), and specifically, on November 30, 2018, all of the parties executed a Mutual Release of All Claims that precludes this quiet title action. App., p. 40. By valid November 30, 2018, contract signed by Paul Kautzman, Galvanizers, Inc., and K and K Construction and Repair, Inc., no claims may be brought, by or against, any of the parties to the contract as to prior matters – this quiet title action violates the mutual release recognized by valid contract dated November 30, 2018. The "Mutual Release of All Claims" executed by Corporate appellants

including the following "Waiver" at ¶3 (App., ps. 41-42):

> 3. Waiver: As further consideration for the payment made herein the parties further agree to waive the provisions of Section 9-13-02 of the North Dakota Century Code, or any similar applicable state or federal provision, which may state that a general release does not extend to claims the creditor does not know or expect to exist in its favor at the time of executing the release, which if known by, must have materially effected the settlement with the debtor. The parties also agree, as further consideration for the payment herein to waive the provisions of Section 9-08-08 and Section 9-08-09 of the North Dakota Century Code or similar or applicable federal or state provisions which relates to any rights to elect to rescind this agreement for whatever reason.

[¶55] Corporate appellants and Paul Kautzman had contractually agreed to a "mutual release of any and all claims whether former, present, or future" (App., p. 40), but further, all parties "waived" the protections of other statute(s)[4] to make their agreement non-rescindable. The quiet title action should not have been brought, and this appeal should not have been initiated by Corporate appellants.

[¶56] **Point 4. The appeal is frivolous – Paul Kautzman is entitled to attorney fees, costs and disbursements.**

[¶57] N.D.R.App.P. 38 provides for the possibility of "just damages and single or double costs, including reasonable attorney's fees" if the court "determines that an appeal is frivolous .." Due to the frivolous nature of Corporate appellant's argument, Paul Kautzman requests such relief. The action was improperly initiated as a quiet title action, predicated only upon assumptions or surmise, unsupported by legally admissible testimony or

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[4] N.D.C.C. § 9-08-08 and N.D.C.C. § 9-08-09 generally relate to personal injuries; however, the Mutual Release of All Claims is worded so that it expresses an intent to eliminate any possibility of rescission by any of the parties – it is supposed to be a perpetual agreement "never ending, never changing".

document, and now justified by a ridiculous and false appellate statement that application of N.D.C.C. § 32-04-17 by the district judge was misdirected: "Galvanizers and K and K were not seeking to reform or revise a contract." Brief of Appellants, ¶ 16.

[¶58] Corporate appellants' current argument proves their action, and complaint was folly. Their complaint was represented to be a roadmap based upon "mutual mistake" that would allow revision of (a) the 1997 Plat [Complaint's ¶ 9; App., p. 7, 9], and (b) the redemption agreements. Complaint's ¶ 17; App., p. 8-9. The district court judge is criticized for telling both corporations their roadmap leads nowhere. Both Corporate appellants now falsely represent they "were not seeking to reform or revise a contract." Without "mutual mistake", no reformation of three (3) different contracts is possible, as a matter of law known to the district court (N.D.C.C. § 32-04-17), but apparently not by either corporation (or their legal counsel). After execution of the "Mutual Release of All Claims", no action, nor meritorious appeal was possible. It is time for Paul Kautzman to be free from corporate lawyers – the corporations should pay for their frivolous appeal when it is based upon an abandoned, but properly applied roadmap.

[¶59] **CONCLUSION**

[¶60] Since 1974, Paul Kautzman has owned land in Cass County, North Dakota, as an individual. There are multiple recorded transactions recognizing his individual ownership (after two (2) separate conveyances of lesser tracts). The record is void of any negotiations, or contracts providing for the transfer or conveyance of his remaining individually owned land (other than a 1980 lease) to any other individual, or entity. Corporate appellants further executed a "Mutual Release of All Claims", forever waiving any right to pursue unknown

claims, or to rescind the agreement – yet they breached their contractual word(s) by bringing an unfounded and unsupported action, and blame the district judge who merely applied the law, and said they did not prove their insufficiently pleaded legal theory. The price of their failure should not be borne by Paul Kautzman.

Respectfully submitted this 3rd day of June , 2021 .

Garaas Law Firm

/s/ Jonathan T. Garaas

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Jonathan T. Garaas
Attorneys for Paul Kautzman
Office and Post Office Address:
DeMores Office Park
1314 23rd Street South
Fargo, North Dakota 58103
E-mail address: garaaslawfirm@ideaone.net
Telephone: (701) 293-7211
North Dakota Bar ID #03080

The above-signed attorney certifies, pursuant to N.D.R.App.P. 32(e), that the Appellant's Brief consisting of twenty-nine (29) pages (counting this page) complies with the thirty-eight (38) page limitation imposed by N.D.R.App.P. 32(a)(8)(A) for principal briefs.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Galvanizers, Inc., a North Dakota corporation; K and K Construction and Repair, Inc., a North Dakota corporation ,

Plaintiff-Appellants,

vs.

Paul Kautzman,

Defendant-Appellee,

and

The United States of America by and through the Department of Treasury and its Internal Revenue Service,

Defendant.

Supreme Court No. 20210042

District Court No. 09-2019-CV-04344

CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

[¶1] Jonathan T. Garaas, a North Dakota licensed attorney representing Paul Kautzman, does hereby certify the following:

[¶2] On the 3rd day of June, 2021, Affiant electronically served a true and correct copy of the following document(s) in the above entitled action: **Brief of Appellee Kautzman**.

[¶3] The electronically attached documents were served upon the identified lawyers as follows:

[¶4] Ann E. Miller at amiller@andersonbottrell.com

[¶5] Leslie J. Aldrich at ljohnson@ljalaw.net

[¶6] To the best of the undersigned lawyer's knowledge, the electronic address above given was the actual electronic mailing address, or post office address of the party intended to be so served. The above documents were duly e-mailed or mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure, as revised by other rules.

GARAAS LAW FIRM

/s/ Jonathan T. Garaas

_____

Jonathan T. Garaas
Attorneys for Paul Kautzman
DeMores Office Park
1314 23rd Street South
Fargo, North Dakota 58103
Telephone: (701) 293-7211
E-mail address: garaaslawfirm@ideaone.net
North Dakota Bar ID #03080