20100043

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Mary K. Johnson, Robert G. Liebl, Gregory D. Liebl and DeAnn R. Liebl, Plaintiffs/Appellants, vs. Bertha Hovland, Lambert Hovland, and all other persons unknown claiming any estate or interest in or lien or encumbrance upon the property described in the Complaint, Defendants/Appellees, vs. EOG Resources, Inc., Intervenor Defendant.	)	Supreme Court No. 20100043 Mountrail County Civil No. 31-08-C-98-1

APPELLANTS' REPLY BRIEF

APPEAL FROM THE DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
MOUNTRAIL COUNTY, NORTH DAKOTA
THE HONORABLE RICHARD L. HAGAR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

LAW AND ARGUMENT

¶1 The Johnson Parties request the following relief from the Court. Summary judgment in favor of Hovland/Ritter should be reversed because Mineral Deed #2 was a valid correction deed and, alternatively, reformation of Mineral Deed #1 is appropriate. Summary judgment in favor of the Johnson Parties should be granted because the correction deed was binding on Hovland/Ritter. Finally, denial of Johnson Parties' motion to amend to assert a reformation of Mineral Deed #1 should be reversed.

¶2 Contrary to Hovland/Ritter's assertions, Johnson Parties are not attempting to take the Subject Property from Hovland/Ritter. Rather, Johnson Parties are exercising and defending their full one-half ownership interest in the mineral rights that they have maintained since the death of Bertha Hovland.

I. Valid Correction Deed

¶3 Despite assertions otherwise, Johnson Parties' have maintained their quiet title claim throughout. The attempt to amend their complaint to assert a reformation claim was naturally an alternative argument. The validity of Mineral Deed # 2 as a correction deed was previously addressed in Section II of Appellants' Brief. While Mineral Deed #1 was a valid deed, Mineral Deed #2 corrects it.

¶4 To the extent this assertion is rejected, the Johnson Parties assert reformation of Mineral Deed #1 should be permitted. The determinative question on appeal then becomes whether the district court properly concluded that the limitations period had run on Johnson Parties' reformation claim making the motion to amend futile.

II. Sufficient Factual Evidence Submitted on Motion to Amend Complaint.

A. Standard

¶5 Johnson Parties acknowledge the standard for reviewing a motion to amend that is brought after a summary judgment motion has been served is a summary judgment standard. The Court adopted this standard in *Darby v. Swenson Inc.*, 2009 ND 103, 767 N.W.2d 147. The standard to be applied is summed up as follows:

> If, however, leave to amend is not sought until after discovery has closed and a summary judgment motion has been docketed, the proposed amendment must be not only theoretically viable but also solidly grounded in the record. In that type of situation, an amendment is properly classified as futile unless the allegations of the proposed amended complaint are supported by substantial evidence.

Darby, 2009 ND 103 at ¶ 12 (quoting *Hatch v. Dep't for Children, Youth and Their Families*, 274 F.3d 12, 19 (1st Cir. 2001)). The question on appeal is whether the district court properly applied the summary judgment standard in analyzing the motion to amend. Sufficient competent and admissible evidence has been submitted to survive this standard.

B. Facts

¶6 Hovland/Ritter claim Johnson Parties did not put forth any competent and admissible evidence in support of their motion to amend to assert a reformation action. Affidavits are not the only type of competent and admissible evidence that parties can submit to the district court. And Johnson Parties did not need a legal expert to assert their claims. Afterall, lawyers and judges already are experts in the law. There is no need to hire a second lawyer to inform the first lawyer and the court what the law is. The most important thing for the district court's analysis was to focus on the factual evidence that was presented, determine whether the evidence presented created a

material factual issue, and determine whether summary judgment on the reformation issue was appropriate in denying the motion to amend. In this process, the district court was presented with one very important piece of factual evidence that inherently created a material factual question on the ultimate question of when the limitation period accrued.

¶7 The district court's failure to include the May 2007 Oil and Gas lease entered into by Johnson Parties and Contex Energy in its list of "significant dates" necessitates reversal of the district court's denial of the motion to amend. While it is true that Johnson Parties did not submit any affidavits as to when they learned a reformation action may be necessary, factual evidence was submitted showing they were unaware of the need to seek reformation until after the 2007 lease.

¶8 The district court did analyze "significant dates" that were explicitly factual in nature in the context of when the limitations period began to accrue:

> There are several significant dates in this action:
>
> - Mineral Deed-Version 1 was executed on March 22, 1976, and recorded on March 23, 1976;
> - Altered Mineral Deed-Version 2 was recorded on March 25, 1976;
> - "Ratifications of Oil and Gas Leases" were recorded by the four Plaintiffs in 1978;
> - "Stipulations of Interest" were executed by the four Plaintiffs in 1990;
> - "Oil and Gas Leases" were executed by the four Plaintiffs in 1992;
> - Releases of the oil and gas leases were filed on March 27, 1998;
> - The instant action was commenced in April, 2008.

(App. 23-24). But despite the 2007 lease having been presented to the district court in the same manner as all of the documents listed by the district court. the district court did not include the 2007 lease in its list. Neither did the district court hold the 2007 lease in a light most favorable to the Johnson Parties and give them all favorable inferences reasonably drawn from the 2007 lease. The reasonable inferences being that Johnson Parties continued to assert full ownership over one-half of the subject property when the 2007 lease was executed. On this basis alone, reversal of the district court's denial of the motion to amend is necessary.

¶9 The district court concluded "it unnecessary to determine which date triggered the running of the statute of limitation or which of the two statute of limitations applie[d]." (App. 23-24). Because the district court did not include the 2007 lease in its list, its ultimate conclusion that "[w]hatever the triggering date (1976, 1978, 1990, 1992, or 1998), both limitations periods (a 6-year and the 10-year) have expired, and reformation of Mineral Deed-Version 1 is barred" is error. *Id.* For it was on May 9, 2007, that the Johnson Parties *again* re-affirmed their full one-half ownership of the subject property's mineral rights. The Johnson Parties are entitled to such a favorable inference. Especially when the district court gave such deference to the list of significant dates, while inexplicably leaving the 2007 lease off.

¶10 Here, the district court was presented with factual evidence that, from 1976 to the present, Johnson Parties have acted in a manner consistent with a full one-half ownership rights over the Subject Property. Not only was this factual assertion inherently and inferentially included in the motion to amend. it was presented to the district court at oral argument by EOG's counsel and included in EOG's Brief in

Support of Plaintiffs' Cross Motion for Summary Judgment at pages 10-11. Of course this is argument, but it is argument backed by factual evidence. The district court improperly applied the summary judgment standard on the motion to amend because substantial factual evidence existed showing the accrual period did not begin until after May 2007.

¶11 Conduct is quintessential factual evidence. "Any evidence that tends to show the true intention of the parties, whether it be evidence of conduct or declarations of the parties extrinsic to the contract or documentary evidence, is admissible." *Heart River Partners v. Goetzfried*, 2005 ND 149, ¶ 14, 703 N.W.2d 330. Hovland/Ritter ask the Court to ignore the actions of Johnson Parties and Hovlands. According to Hovland/Ritter the actions over thirty years of the Johnson Parties and Hovland are not factual evidence. According to Hovland/Ritter the fact that Ruthvin Hovland did not include the Subject Property in the inventory of Lambert Hovland's probate is not factual evidence. According to Hovland/Ritter the fact that the Johnson Parties have executed numerous documents from 1976 to 2007 holding themselves out as one-half owners of the Subject Property is not factual evidence. According to Hovland/Ritter the fact that Lambert Hovland, and his heirs, did nothing to assert their alleged rights in the subject property from 1976 to 2008 is not factual evidence. According to Hovland/Ritter the fact that Bertha Hovland accepted Mineral Deed #2 is not factual evidence. According to Hovland/Ritter the affidavit of EOG's Division Land Advisor, Kenneth T. Stillman, who sets forth Johnson Parties leased their interests in the Subject Property to Contex. is not factual evidence. While words may ring, actions speak louder.

¶12 The Johnson Parties are not making new arguments for the first time on appeal. That the district court did not address the factual evidence presented does not translate into an argument being raised for the first time on appeal. The Johnson Parties are merely highlighting the factual evidence that was presented to the district court that was discounted, given unfavorable inferences, or ignored. All of the arguments made by Johnson Parties on appeal are appropriate and have been raised.

C. Attorney Knowledge Not Imputed to 3rd Party Non-Clients

¶13 Hovland/Ritter argue that Johnson Parties must have known about the mistake made by Mathilda Olson's attorney, Q.R. Schulte. This assertion is pure speculation. While knowledge of a mistake can conceivably be imputed from an attorney to a client, none of the Johnson Parties were clients of Q.R. Schulte. Imputation of an attorney's knowledge to a non-client third-party is not appropriate. As stated in *Ell v. Ell*, 295 N.W.2d 143 (N.D. 1980):

> [A] reformation action accrues, or comes into existence as a legally enforceable right, not at the time the instrument in question is executed, but at the time the facts which constitute the mistake and form the basis for reformation have been, or in the exercise of reasonable diligence should have been, discovered *by the party applying for relief.*

(emphasis added). The Johnson Parties are the parties applying for relief. They did not discover the need to seek reformation until, at the earliest, after May 2007. They had no reason to question the conveyance because they had acted in a manner consistent with their one-half ownership over the subject property since the death of Bertha Hovland. And no one, including Hovland/Ritter, questioned their ownership rights until 2008.

D. N.D.C.C. 32-04-17 Inapplicable

¶14 Hovland/Ritter point to *Wehner v. Schroeder*, 335 N.W.2d 563 (N.D. 1983), for support of their assertion that Johnson Parties had knowledge of the discrepancy in mineral deeds for the subject property. (Appellee Brief p. 13) *Wehner* contains two issues, whether the limitations period had run on the reformation claim and whether N.D.C.C. § 32-04-17 barred the reformation claim. Hovland/Ritter point to N.D.C.C. § 32-04-17 for support of their claim of knowledge. This is the first time Hovland/Ritter has raised this assertion. And it is not appropriate to raise an issue for the first time on appeal. Even so, Johnson Parties will explain why this statute is not relevant here.

¶15 In *Wehner*, the party resisting reformation, Tormaschy, was the purchaser of the subject land from Schroeder (who had previously purchased the subject land from Wehner). *Id.* at 564-65. Wehner claimed he reserved a fifty percent interest in the mineral rights, but the original conveyance to Schroeder was alleged to have been done improperly and alleged to be a mutual mistake. It was upon this mistake that Wehner sought reformation of the deed—more than thirty years after it had been executed. Tormaschy claimed to be a bona fide purchaser of the land from Schroeder. Tormaschy claimed N.D.C.C. § 32-04-17 prevented the reformation action. The statute states:

> 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 person in good faith and for value.*

Wehner, 335 N.W.2d at 565 (quoting N.D.C.C. § 32-04-17) (emphasis original). The district court found, after a trial on the matter, Tormaschy was a bona fide purchaser of

the property, dismissing Wehner's reformation claim pursuant to N.D.C.C § 32-04-17. But this Court reversed, holding that Tormaschy had constructive notice of a possible claim through recorded documents and was not a bona fide purchaser. *Id.* at 566. Wehner was not prohibited from pursuing a reformation action based on the bona fide purchaser exception in N.D.C.C. § 32-04-17.

¶16 Here, there is no third-party purchaser, let alone a bona fide one. Nothing in the record indicates anyone has purchased the Subject Property since it was conveyed and Johnson Parties have held themselves out as the one-half owners since the death of Bertha Hovland. Certainly no third-party has come forward asserting they are a bona fide purchaser. Hovland/Ritter's reliance on N.D.C.C. § 32-04-17 is misplaced.

CONCLUSION

¶17 For all the reasons set forth, this Court should reverse the district court's grant of summary judgment in favor of Hovland/Ritter, reverse the district court's denial of Johnson Parties' motion to amend their complaint, and reverse the district court's denial of Johnson Parties' motion for summary judgment.

Dated this 9th day of July, 2010.

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