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' BRIEF

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

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STATEMENT OF THE ISSUES

1. Whether the district court erred in denying Appellants' motion to amend their complaint to assert a claim for reformation.
2. Whether the district court erred in granting Appellees' motion for summary judgment and denying Appellants' motion for summary judgment.

STATEMENT OF THE CASE

¶1 Mary K. Johnson, Robert G. Liebl, Gregory D. Liebl, and DeAnn R. Liebl ("Johnson Parties") commenced this action on April 28, 2008, against Bertha Hovland, Lambert Hovland, and all other persons unknown claiming any estate in or lien or encumbrance upon the property described in the Complaint. (Appendix ("App.") 6-9). On June 25, 2008, Ritter, Laber & Associates, Inc. ("Ritter") served an Answer to the Complaint. (App. 10-12). EOG Resources, Inc. ("EOG"), served its motion to intervene on January 19, 2009. (App. 4). The district court granted EOG's motion to intervene on March 16, 2009. (App. 4). EOG served its Answer on April 1, 2009. (App. 13-15). On August 28, 2009, Ruthvin Hovland ("Hovland") served a "Notice of Appearance." (App. 16-17). No Answer was filed by Hovland.

¶2 Hovland/Ritter moved for summary judgment on August 28, 2009. (App. 4). The Johnson Parties moved for summary judgment, and served their response to Hovland/Ritter's summary judgment motion on September 28, 2009. (App. 4). EOG served a brief in support of the Johnson Parties' motion for summary judgment and a response in opposition to Hovland/Ritter's motion for summary judgment on October 7, 2009. (App. 3). Hovland/Ritter filed a reply brief in support of their motion for summary judgment on October 30, 2009. (App. 3).

¶3 The Johnson Parties moved to amend their complaint on September 28, 2009. (App. 4). EOG served a response in support of Johnson Parties' motion to amend on

October 12, 2009. *Id.* Hovland/Ritter served a response in opposition to Johnson Parties' motion to amend on October 12, 2009. *Id.*

¶4 The district court held oral argument on the competing motions for summary judgment and the Johnson Parties' motion to amend on November 4, 2009. The district court's Order denying the Johnson Parties' summary judgment motion, granting summary judgment in favor of Hovland/Ritter, and denying the Johnson Parties' motion to amend was issued on November 18, 2009. (App. 18-26). Judgment was entered on November 30, 2009. (App. 26). Notice of entry of judgment was served by Hovland/Ritter on December 2, 2009. (App. 27-28). Notice of appeal was served by the Johnson Parties on January 28, 2010. (App. 29).

STATEMENT OF THE FACTS

A. Subject Mineral Deeds

¶5 This action was commenced by the Johnson Parties to secure title over certain mineral rights they have held a continuous and combined fifty percent interest in since 1976. (App. 6-9). The property is described as follows:

> Mountrail County, North Dakota
> Township 155 North – Range 90 West
> Section 34: N1/2

("Subject Property"). The conveyance that is the crux of this matter occurred when Mathilda Olson granted to her daughter, Bertha Hovland, her fifty percent mineral rights in the Subject Property on March 22, 1976, by deed; the deed was recorded on March 23, 1976 ("Mineral Deed #1"). (App. 6-9, 30-31, 18). On March 25, 1976, with the following additional language added, the deed was re-recorded ("Mineral Deed #2"):

> The intendment is to grant a life estate unto Bertha Hovland with the remainder to the following persons with the following interests:
>
> 1/3 Int. to Robert G. Liebl
> 1/3 Int. to Mary K. Johnson

1/6 Int. to Gregory D. Liebl
1/6 Int. to DeAnn Renae Liebl

(App. 32-33).

¶6 Robert G. Liebl and Mary K. Johnson are the children of Bertha Hovland; Gregory D. Liebl and DeAnn Renae Liebl are children of Bertha Hovland's son who predeceased her. (App. 19). Bertha was married to Lambert Hovland at the time of the conveyance. *Id.* The Johnson Parties are not the children of Lambert. *Id.* Both Mineral Deeds were returned to Lambert after being recorded. (App. 31, 33).

¶7 Both deeds were prepared by attorney Q.R. Schulte. (App. 30-35). Schulte's affidavit sets forth the following factual evidence surrounding the deeds:

> That [the Mineral Deed] was prepared by me in my capacity of the attorney for Mathilda Olson, and that the Mineral Deed was prepared, changed, and re-recorded to reflect the original intentions of both Mathilda Olson and Bertha Hovland, which was to give Bertha Hovland a life estate interest, with the remainder interest to be divided as follows: 1/3rd to Mary K. Johnson, 1/3rd to Robert G. Liebl, 1/6th to Gregory D. Liebl, and 1/6th to DeAnn Renae Liebl.

(App. 34).

B. Death of Grantee, Bertha Hovland

¶8 When Bertha Hovland died intestate on February 15, 1978, her fifty percent interest in the mineral rights on the Subject Property passed to the Johnson Parties pursuant to her wishes contained in Mineral Deed #2. (App. 19, 30-35). This is not only evidenced by the conduct and actions of the Johnson Parties through the years, but also by the action of Bertha and her husband Lambert, as well as the undisputed testimony of Q.R. Schulte. (App. 30-75). Bertha Hovland did not dispute Mineral Deed #2 during her lifetime. Neither did she dispute the Johnson Parties ratification of the 1976 Oil and Gas lease—signed during her lifetime. Lambert Hovland died testate on August 27, 1983. (App. 19). Lambert's personal representative filed the estate's Inventory and Appraisement. (App. 68-75). But the detailed Inventory of other real

property and mineral interests owned by Lambert did not include the Subject Property. (App. 69). Neither did Lambert during his lifetime dispute that the Johnson Parties held a fifty percent ownership of the mineral rights.

¶9 The factual circumstances of this case support the inference that Bertha Hovland was aware of the re-recorded deed and accepted it as a "corrective deed" for her benefit. (App. 30-75). Recording is presumed to effect delivery, but here there is evidence of delivery. The recorder's office indicated that both deeds were returned to Lambert Hovland. (App. 31, 33). While Bertha did not have a will, she was under the belief at the time of her death that her children and grandchildren would inherit her mineral interests.

C. The Johnson Parties Fifty Percent Ownership of the Mineral Rights

¶10 The Johnson Parties have since 1976 acted in a manner consistent as owners of fifty percent of the Subject Property's mineral rights. (App. 36-67). Naturally, the Johnson Parties' actions testify as to their unfaltering belief and knowledge that they alone are the fifty percent owners of the mineral rights on the Subject Property. Their actions and conduct since 1976 underscore their lack of knowledge of any need to take action to preserve their rights in the Subject Property that they have maintained since 1976. Such conduct and actions are competent and admissible factual evidence the Johnson Parties had no knowledge of issues involving the validity of the deeds.

¶11 The Johnson Parties executed a ratification of an oil and gas lease that Bertha Hovland entered into in 1976 as persons having "some right, title or interest in or to the property covered" by the lease—the Subject Property. (App. 36-43). The Johnson Parties executed a Stipulation of Interest in 1990 re-affirming that they owned a fifty percent interest in the mineral rights on the Subject Property. (App. 44-51). The Johnson Parties executed an Oil and Gas Lease in 1992 that is consistent with their fifty percent mineral interest ownership of the Subject Property. (App. 52-59). In May

2007, the Johnson Parties executed a Paid-Up Oil and Gas Lease with EOG's predecessor Contex Energy Company; they did so with full confidence that they owned fifty percent of the mineral rights in the Subject Property. (App. 60-67).

STANDARD OF REVIEW

Summary Judgment Standard

¶12 This Court has outlined the standard for review of summary judgment:

> Summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if either party is entitled to judgment as a matter of law, and if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving disputed facts would not alter the result.

Grinnell Mut. Reinsurance Co. v. Thies, 2008 ND 164, ¶ 5, 755 N.W.2d 852 (internal citations omitted). "Whether a trial court properly granted summary judgment is a question of law subject to de novo review." *Anderson v. Selby*, 2005 ND 126, ¶ 7, 700 N.W.2d 696 (citation omitted). It is the moving party that has the burden to demonstrate a lack of genuine issues of material fact. *Id.* Courts examine "the pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn therefrom" to decide the appropriateness of summary judgment. *Id.* In its review, the district court "must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the evidence." *Id.* "This Court has repeatedly held that summary judgment is inappropriate if the court must draw inferences and make findings on disputed facts to support the judgment." *Farmers Union Oil Co. of Garrison v. Smetana*, 2009 ND 74, ¶ 10, 764 N.W.2d 665.

¶13 The district court did not view the evidence presented by the Johnson Parties in the light most favorable to them. The district court did not give Johnson Parties the benefit of all favorable inferences reasonably drawn from the evidence. The district

court ignored the factual evidence against application of the limitations period and made inferential factual conclusions adverse to the party entitled to have its evidence viewed in the most favorable light. This was not the proper standard applied and was error.

Motion to Amend Standard

¶14 This Court has held that a district court's decision on a motion to amend will not be reversed unless the district court has abused its discretion. *Leet v. City of Minot*, 2006 ND 191, ¶ 7, 721 N.W.2d 398. "A district court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, when its decision is not the product of a rational mental process leading to a reasoned determination, or when it misinterprets or misapplies the law." *Id.* Here the district court held the Johnson Parties' motion would be futile because the limitations period barred a reformation claim. (App. 25). But this factual determination was made prior to even allowing the Johnson Parties to assert reformation. In addition to misapplying the law and failing to consider the factual evidence presented by the Johnson Parties, the district court put the cart before the horse in denying the motion to amend.

¶15 The Johnson Parties' motion to amend was not to be analyzed under the standard for summary judgment. The Johnson Parties did not have the obligation to present their case in chief in seeking to amend their complaint. The unnatural requirement the district court imposed on the Johnson Parties was that they were required to prove elements of their reformation action prior to being able to amend their complaint. Certainly the standard for a successful motion to amend is not for the movant to have to prove the case in chief. And, in any event, the Appellants presented sufficient factual evidence on the limitations issue and the district court misapplied the law. The district court applied too strict of a standard as to the Johnson Parties' motion

and abused its discretion in denying the motion to amend. Justice requires such a claim for reformation be determined on the merits.

LAW AND ARGUMENT

I. AMENDMENT OF THE JOHNSON'S COMPLAINT WAS NOT A FUTILE ACT.

¶16 The district court in denying Johnson's motion to amend their complaint to assert a reformation claim held "that reformation of the Mineral Deed-Version 1 is barred by the statute of limitations render[ing] amendment of the Complaint to add a claim for reformation a futile act." (App. 25). The district court determined any reformation action would be "futile" because it determined that N.D.C.C. §§ 28-01-15 or 28-01-16 time barred such a claim. (App. 23-24). Yet in making this decision, the district court denied the Johnson Parties the right to develop their reformation theory. The focus in this section is on when the limitations period began to accrue for a reformation action. The Johnson Parties put forth sufficient factual evidence that such accrual would not have began until after May 2007, at the earliest. Therefore, the Johnson Parties' reformation action would not be time barred and the district court erred in denying their motion to amend.

A. Reformation is appropriate

¶17 Johnson's reformation action, based on factual evidence, is appropriate. "Reformation is an '[e]quitable remedy used to reframe written contracts to reflect accurately real agreement between contracting parties . . . .'" *Biteler's Tower Serv., Inc. v. Guderian*, 466 N.W.2d 141, 143 (N.D. 1991) (quoting BLACK'S LAW DICTIONARY 1152 (5th ed. 1979)). North Dakota statutory law governs reformation of a contract for mutual mistake:

> 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.

N.D.C.C. § 32-04-17 (emphasis added). Clear and convincing evidence must be proved by the party seeking reformation. *Dahl v. Messmer*, 2006 ND 166, ¶ 9, 719 N.W.2d 341 (citation omitted). Of course, this is the standard at trial, not on summary judgment or on a motion to amend a complaint. "Each case involving a claim for reformation must be determined on its own face and circumstances, and the court may properly look at the surrounding circumstances and take into consideration all the facts that disclose the parties' intentions." *Anderson*, 2005 ND 126 at ¶ 9 (citing *Ell v. Ell*, 295 N.W.2d 143, 150 (N.D. 1980)). And whether a mutual mistake occurred is a question of fact. *Heart River Partners v. Goetzfried*, 2005 ND 149, ¶ 15, 703 N.W.2d 330 (citations omitted).

¶18 The Court has instructed what the basis for a successful reformation of a written contract premised on mutual mistake includes:

> We have recognized that equity will grant remedial relief in the nature of reformation of a written instrument, resulting from a mutual mistake, when justice and conscience so dictate. However, in actions for reformation, a presumption arises from the terms of the instrument that it correctly expresses the true agreement and intention of the parties.
>
> * * *
>
> Each case involving the reformation of a contract on grounds of fraud or mutual mistake must be determined upon its own particular facts and circumstances. In considering whether or not a mutual mistake exists, the court can properly look into the surrounding circumstances and take into consideration *all* facts which disclose the intention of the parties.

Ell, 295 N.W.2d at 150 (emphasis added) (internal citations and citations omitted). It is the intent of the parties that is to be the focus in a reformation action; the party seeking reformation must show that when the contract was executed, the parties mutually intended something different from what was in the contract. *Heart River Partners*, 2005 ND 149 at ¶ 15 (citations omitted).

¶19 Extrinsic evidence is admissible to prove mutual mistake. "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*, 2005 ND 149 at ¶ 14. "A witness in a position to know may testify concerning the intention of the parties to an agreement, to the same effect as to any other fact." *Spitzer v. Bartleson*, 2009 ND 179, ¶ 15, 773 N.W.2d 798 (quoting 66 AM. JUR. 2D *Reformation of Instruments* § 114 (2001)). "Parol evidence is admissible not only to establish the alleged fraud or mistake, but also to correct the instrument to conform to the agreement or intention of the parties." *Anderson*, 2005 ND 126 at ¶ 9. "If courts refused to admit parol evidence in reformation cases, the rule would become 'an instrument of the very fraud or mistake it was designed to prevent.'" *Spitzer*, 2009 ND 179 at ¶14 (quoting *Ell*, 295 N.W.2d at 150).

¶20 *Wehner v. Schroeder*, 335 N.W.2d 563 (N.D. 1983), addressed a statute of limitations issue applied to a reformation claim. The dispute in *Wehner* involved ownership over a fifty percent interest in mineral rights. *Id.* at 564. In 1950, Wehner executed a warranty deed to Schroeder for 160 acres of land in Stark County; no mineral reservation was included in the warranty deed. *Id.* A contract for deed did contain a reservation of mineral rights provision—though it was allegedly erroneous as well. *Id.* Wehner alleged that a mutual mistake occurred when executing the warranty deed because both parties intended that the deed would reserve fifty percent of the mineral rights for Wehner. *Id.*

¶21 While the problem of the mineral rights ownership existed in 1950, Wehner discovered the mistake in 1978, and an action was instituted in 1981. *Id.* at 564-65. In 1951, Schroeder executed a mineral deed conveying an undivided one-half mineral interest to R.V. Hodge. *Id.* at 564. Also in 1951, Schroeder and Wehner executed mineral leases on the subject land. *Id.* In 1963, Schroeder sold the 160 acres to

Tormaschy; no reservation of mineral rights was contained in the deed. *Id.* Wehner sought to reform the 1950 deed and to quiet title. *Id.* at 565. Tormaschy counterclaimed seeking to quiet title in his name. *Id.*

¶22 The trial court, after a trial on the dispute, held that Wehner's reformation action was time barred by N.D.C.C. § 28-01-04. The trial court also considered the following statutes of limitations: N.D.C.C. §§ 28-01-05, 28-01-15, 28-01-16, and 47-19.1-01. *Id.* at 566. As for application of N.D.C.C. § 28-01-04, the *Wehner* Court, stated the issue as follows: "whether or not the Wehners and the Tormaschys may maintain actions to quiet title to the mineral interest under § 28-01-04, N.D.C.C., possession is the crucial factor." *Id.* at 566. The Court determined that neither Wehner nor Tormaschy "had actual or constructive possession of the fifty percent mineral interest." *Id.* Neither party engaged "in subsurface activity to acquire actual possession of the severed minerals." *Id.* Neither had "constructive possession because they had constructive notice of the problems in the recorded documents involving the mineral interest and, therefore, did not have the authority to exercise dominion over the mineral interest." *Id.* The Court concluded that the reformation claim was not barred by N.D.C.C. §§ 28-01-04, 28-01-05, or 47-19.1-01 because these statutes had "no effect upon this action as they . . . require possession of the real property by the claimant, and neither party to this action possessed the interest at issue for the requisite time." Id. at 566-67. The district court in the present case determined that Hovland/Ritter had abandoned their initial reliance on N.D.C.C. § 28-01-04. In the event Hovland/Ritter would attempt to apply N.D.C.C. § 28-01-04, it would be unsuccessful for the same reasons elicited by the *Wehner* Court. (App. 23).

¶23 The *Wehner* Court also concluded that N.D.C.C. §§ 28-01-15(2) and 28-01-16(1) did not apply to bar the reformation claim. *Id.* at 567. These limitations periods

begin to accrue not at possession, rather when the cause of action accrued. *Id.* The Court considered these statutes in *Ell*:

> [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.*

Ell, 295 N.W.2d at 151 (emphasis added). Tormaschy argued that Wehner had the opportunity to, and should have, discovered the mistake when the warranty deed was executed in 1950. *Wehner*, 335 N.W.2d at 567. Wehner claimed to have no reason to review the title after the sale to Schroeder. *Id.* The trial judge determined these statutes of limitations did not apply to the reformation action. *Id.* The Court determined that this decision was not clearly erroneous and that the action accrued in 1978. The same rationale applies here. The Johnson parties had no reason to question the 1976 transfer until May 2007, at the very earliest.

B. Accrual of Limitations Here

¶24 The district court specifically determined it did not need to address the factual question as to when the limitations period began to run. (App. 24). Though the district court held that N.D.C.C. §§ 28-01-15 and 28-10-16 applied to bar any reformation claim. (App. 23-24). The district court concluded it was "unnecessary to determine which date triggered the running of the statute of limitations or which of the two statute of limitations applie[d]. Whatever the triggering date (1976, 1978, 1990, 1992, or 1998), both limitation periods (a 6-year and a 10-year) have expired, and reformation of Mineral Deed-Version 1 is barred." (App. 24). But this conclusion ignores the factual evidence presented that the district court had an obligation to consider. It is clear from the factual documents involving the Subject Property since 1976 that the Johnson Parties had no reason to review the title and no reason to believe there was an issue

until after the EOG title opinion related to the May 2007 oil and gas lease was issued. (App. 36-67).

¶25 The undeniable fact that exists here is that the Johnson Parties were unaware of the need to even seek reformation of the deed until just before this suit was filed. The very reason for filing this suit was brought about because of a title opinion performed by EOG that called into question the extent of mineral rights the Johnson Parties had in the Subject Property. Indeed, in May 2007, the Johnson Parties executed Oil and Gas leases with the firm belief they owned fifty percent of the mineral rights in the Subject Property. (App. 60-67).

¶26 In considering "several significant dates" in its analysis of when a claim for reformation accrued in its mind, the district court offered the following list:

- 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 the district court left off the most significant date in its list, May 2007—when the Johnson Parties entered into an oil and gas lease with Contex Oil for the mineral rights on the Subject Property. The Johnson Parties signed this lease as they had signed every other lease, ratification, or stipulation related to the mineral rights on the Subject Property—as fifty percent owners in the mineral rights. Factual evidence was presented and argued to the district court that the Johnson Parties, even in

May 2007, had no idea that the original conveyance to them in 1976 was subject to dispute and possibly in need of reformation. Yet this crucial piece of evidence was ignored.

¶27 Actions speak louder than words. Factual evidence was presented that Bertha Hovland received Mineral Deed #2 in the same fashion as she received Mineral Deed #1. (App. 31, 33). Bertha did not seek to renounce Mineral Deed #2. Lambert Hovland and Bertha Hovland entered into an oil and gas lease in 1976 involving the Subject Property. In 1976 the Johnson Parties joined in by ratifying the oil and gas lease as remaindermen. (App. 36-43). In 1983, Lambert died testate. His brother and personal representative, Ruthvin Hovland, did not include the subject property in the inventory for the probate. (App. 68-75). A written explanation as to why the Subject Property was not included is unnecessary in light of this factual evidence. It is no more needed than written explanation as to why after more than 30 years of treating the Subject Property as the property of the Johnson Parties that it is only now that Hovland/Ritter swoop in to make their land-grabbing claims.

¶28 Delving deeper into the history of the Johnson Parties' firm conviction that they own fifty percent of the mineral rights, they executed a Stipulation of Interest in 1990 re-affirming their fifty percent ownership in the mineral rights. (App. 44-51). The Johnson Parties executed an Oil and Gas Lease in 1992 that is consistent with their fifty percent ownership of the Subject Property. (App. 52-59). In May 2007, the Johnson Parties executed a Paid-Up Oil and Gas Lease with EOG's predecessor, Contex; they did so with full confidence that they owned fifty percent of the mineral rights in the Subject Property. The fifty percent mineral rights in the Subject Property have been treated as the sole property of the Johnson Parties since the death of Bertha Hovland. And it is this clear actionable history that the district court ignored—or worse, took an unfavorable view of the evidence the Johnson Parties presented. The Johnson Parties

are extremely anxious to testify at trial as to their consistent ownership of the disputed mineral rights. They should not be denied this right.

¶29 Again, actions speak louder than words. When the original deed was recorded on March 23, 1976, it was corrected and re-recorded within two days. This proximity in time cannot be ignored. Both deeds were returned to Lambert Hovland. Yet during Bertha's life, she took no action to dispute the corrected deed. And why would she? She wanted to provide for her children and grandchildren by having such property transferred after her death without the need for a will. And neither did Lambert during his lifetime take any action to attempt to dispute the corrected deed. The survivors of Lambert Hovland have already admitted, through the actions of their predecessors, that the corrected deed included the true intent of Bertha Hovland.

¶30 The factual evidence presented to the district court was sufficient to survive summary judgment and for the Johnson parties' motion to amend to be granted. The factual inferences created by the evidence presented by the Johnson Parties was sufficient to show they had no idea of any potential problem with their ownership over the disputed mineral rights until, at the earliest, May 2007 when a lease with Contex was executed. The analysis used by the district court on a motion to amend was as stringent as the analysis used for a summary judgment motion—this was error. The district court did not even acknowledge the May 2007 oil and gas lease in its list of "significant dates." This Court should reverse the district court's decision to deny the Johnson Parties' motion to amend and direct the district court to permit their reformation claim to proceed.

II. MINERAL DEED #2 WAS A VALID CORRECTION DEED.

¶31 Johnson concedes that Mineral Deed #1 is clear and unambiguous on its face. But Mineral Deed #2 is also clear and unambiguous on its face. Both deeds were recorded. In the same way that it is presumed Mineral Deed #1 was delivered and

accepted by Bertha Hovland, so too must it be presumed that Mineral Deed # 2 was delivered and accepted by her. And evidence exists from the recording that both deeds were actually returned by the recorder's office to Lambert Hovland. The following section explains why the district court should have granted the Johnson Parties' summary judgment motion because the recording of Mineral Deed #2 created a rebuttable presumption that it was delivered and accepted by Bertha Hovland. This section also explains why the Johnson Parties' summary judgment should be granted because the failure to renounce Mineral Deed #2 equitably estopped Hovland/Ritter from denying its validity.

A. Recording Mineral Deed #2 Created a Rebuttable Presumption of its Validity

¶32 North Dakota law clearly holds that delivery of a deed by a grantor to a grantee is required for a valid transfer. "A grant takes effect so as to vest the interest intended to be transferred only upon its delivery by the grantor and is presumed to have been delivered at its date." N.D.C.C. § 47-09-06. This Court has held: "Under North Dakota law, conveyance by deed takes effect upon delivery of the deed by the grantor." *CUNA Mortgage v. Aafedt*, 459 N.W.2d 801, 803-04 (N.D. 1990) (citations omitted). "Absent a delivery of the deed, the deed is of no effect." *Id.* at 804 (citations omitted). "Acceptance by the grantee is an essential part of a delivery." *Id.* (citations omitted). "The recording of a deed may create a rebuttable presumption of its delivery to, and its acceptance by, the grantee." *Id.* (citations omitted).

¶33 This Court instructed that "the primary purpose in construing a deed is to ascertain and effectuate the grantor's intent." *Gawryluk v. A.M. Poynter*, 2002 ND 205, ¶ 8, 654 N.W.2d 400 (citations omitted). General rules governing contract interpretation govern mineral deeds. *Id.* "Mutual intentions" of parties are given effect when construing contracts. *Id.* (citation omitted).

¶34 Hovland/Ritter point to *Gawryluk* for support of its argument that Mineral Deed #2 is invalid. The *Gawryluk* Court addressed a dispute over mineral rights and the propriety of a "correction deed." Poynter, owned fifty percent of the mineral rights of the subject land in Billings County; he conveyed his entire mineral rights interests in August 1951 to Crafton, Gawryluk's predecessor in interest. *Id.* at ¶ 3. More than two years later, in September 1953, Poynter executed and recorded a deed attempting to correct the amount of mineral rights conveyed to Gawryluk in August 1951. *Id.* Poynter executed and recorded a "Correction Mineral Deed" in October 1953 attempting to further correct the original conveyance of mineral rights to Gawryluk in August 1951. *Id.* at ¶4. Nearly fifty years later, the dispute involved whether the attempt by Poynter to correct the amount of mineral rights conveyed was effective. On appeal, after a bench trial, the Court affirmed the trial court's determination that Poynter's attempts to correct the original deed were ineffective and the entire mineral interests of Poynter were conveyed to Gawryluk in August 1951. *Id.* at ¶ 1.

¶35 The *Gawryluk* Court determined that the August 1951 mineral deed was "plain and unambiguous" and that the writing alone was all that was necessary to ascertain the parties' intentions. *Id.* at ¶ 9, 11. Because no ambiguity existed on the face of the document, no extrinsic evidence was permitted to be introduced. *Id.* at ¶ 11.

¶36 But it is upon the following that the Johnson Parties assert that Mineral Deed #2 acted as a valid correction deed upon Mineral Deed #1. *Gawryluk* considered Poynter's argument that the two 1953 correction deeds modified the 1951 deed because the correction deeds were recorded, thus delivery and acceptance were presumed. *Id.* at ¶ 16. Poynter argued that because Gawryluk's predecessor did not renounce the correction deeds, and the estate affirmed the correction deeds during probate, they were accepted as modified. *Id.* Indeed, there is a presumption that the recording of a deed creates a rebuttable presumption of delivery and acceptance by the grantee. *Id.* at ¶ 17

(citing *CUNA Mortgage*, 459 N.W.2d at 804; *Dinius v. Dinius*, 448 N.W.2d 210, 216 (N.D. 1989)). Such a presumption under these circumstances arises only "when the deed is beneficial to the grantee and not when the deed is a burden on the grantee." *Gawryluk*, 2002 ND 205 at ¶ 17. Poynter argued that the correction deeds were not burdensome and expressed the "parties' true intent." *Id.* In rejecting Poynter's arguments, the Court held that the correction deeds were adverse to Gawryluk's predecessor because they reduced the grantee's rights.

¶37 The Court has not addressed the meaning or construction of what would be "beneficial" to a grantee. And it would seem that such a determination of a "benefit" is inherently a factual issue where extrinsic evidence is appropriate. Here, the benefit to Bertha Hovland was clear. As the mother or grandmother to the Johnson Parties, the benefit to Bertha was her property would be conveyed to the Johnson Parties upon her death—no expenses for a will, probate, or separate deed. The fact that she had no children with Lambert, in the very least, supports such a benefit to Bertha. Bertha maintained the benefits of the minerals during her lifetime, executing a lease in 1976. The benefit that existed was the automatic conveyance of her mineral interests to her children/grandchildren.

¶38 The Court should adopt a balancing test as to whether the benefit of an easy and inexpensive transfer to Bertha's issue upon her death contained in Mineral Deed #2 outweighed any detriment. Such a test would be based on factual evidence. It is a factual issue that has not been fully developed and one that has not been addressed by the district court. There is competent and admissible evidence in the form of the affidavit of Q.R. Schulte in the record that Mineral Deed #2 was beneficial to Bertha.

¶39 As a sub-argument, this case is further distinguished from *Gawryluk* because evidence of *actual* delivery of both deeds exists. Factual evidence that the recorder's office delivered both deeds to Lambert Hovland after they were recorded was

presented. While a presumption of delivery exists simply by recording, evidence that the deeds were actually returned to Lambert Hovland is even greater evidence that they were accepted by Bertha and Lambert. The clear implication from this fact is further proof that Bertha and Lambert Hovland accepted the corrective impact of Mineral Deed #2 when it was recorded in 1976.

B. Hovland/Ritter is Equitably Estopped From Denying The Acceptance of Mineral Deed #2

¶40 While this section may be more appropriate under the reformation discussion, the issue was addressed by *Gawryluk*. Poynter argued that because Gawryluk knew of or accepted the correction deeds that he was estopped from denying acceptance. *Gawryluk*, 2002 ND 205 at ¶ 19. Poynter also argued that the subsequent probate of Gawryluk's predecessor in interest, wherein the disputed mineral rights were distributed in the manner called for in the 1953 corrective deeds, estopped Gawryluk from denying acceptance of the correction deeds. *Id.* at ¶¶ 5, 19-20. The *Gawryluk* Court declined to apply equitable estoppel because it determined it was appropriate to a reformation action.

¶41 It is the law of North Dakota that the "failure to renounce a deed with knowledge of its existence may be sufficient to show a grantee accepted the deed." *Id.* at ¶ 19 (citing *CUNA Mortgage*, 459 N.W.2d at 804). While the grantee's four-week delay in making formal objection to the quit claim deed in *CUNA Mortgage* was deemed insufficient to raise a factual issue over laches or estoppel, here there is a more than thirty year delay in objecting to Mineral Deed #2. Hovland/Ritter should be estopped from asserting any interest in the disputed mineral rights because they have failed to renounce Mineral Deed #2.

¶42 Evidence exists that Bertha Hovland knew of the existence of Mineral Deed #2. The deeds were returned to Lambert Hovland. Q.R. Schulte's affidavit indicates Bertha was aware of Mineral Deed #2 and specifically intended for it to control. Bertha never

filed a corrective deed or otherwise renounced Mineral Deed #2. And the estate of Lambert Hovland did not claim any interest in the Subject Property when probating his will.

¶43 The district court held that "there was no indication on Mineral Deed-Version 2 that Mathilda, as Grantor, approved of the alteration." (App. 20-21). To the contrary, there was factual evidence presented that such alteration was not only approved, but directed by Mathilda Olson and Bertha Hovland. The affidavit of Q.R. Schulte clearly states that this was the intention of Mathilda. Schulte, as Mathilda's attorney, had a professional and ethical obligation to follow through with his client's wishes. The factual inference is that he was following through with his client's wishes/directives.

¶44 The concern voiced by the district court that such an alteration makes every valid deed vulnerable to alteration by anyone is unfounded. This alteration was done by the grantor, for the benefit of the grantee, and with both the authorization of the grantee and grantor. This concern, while it may be justified in a case with different circumstances, is not applicable here. The district court's decision that "caselaw on 'correction deeds' and 'rebuttable presumptions of deliver and acceptance' is not applicable to the case at bar" is error. (App. 21).

¶45 Further distinguishing this case and *Gawryluk* is the proximity in time that Mineral Deed #2 was delivered to Bertha and Lambert Hovland. This factual piece of evidence was not addressed by the district court. Within two days of recording Mineral Deed #1, Mineral Deed #2 was recorded. The correction deeds in *Gawryluk* were recorded more than two years after the original deed. The close proximity in time, here, lends itself to the factual inference that this transaction would be fresh in the mind of Bertha Hovland. If she disagreed with Mineral Deed #2, it would be more likely two days after the recording of Mineral Deed #1 that she would dispute Mineral Deed #2.

The fact that she did not dispute Mineral Deed #2 is factual evidence that Hovland/Ritter should be estopped from claiming any interest in the Subject Property.

¶46 The deeds were actually delivered and that they were recorded also creates a presumption they were delivered. That nothing was done to dispute Mineral Deed #2 is evidence that Bertha Hovland accepted it. There was a clear benefit to Bertha Hovland in Mineral Deed #2. This alone is evidence that the correction deed was valid and binding. Going further, evidence was presented that Bertha Hovland's failure to renounce Mineral Deed #2, as well as the actions of Lambert Hovland and other presented facts, is further proof of their knowledge and acceptance of Mineral Deed #2. Summary judgment in favor of the Johnson Parties should have been granted because the corrective deed was valid.

CONCLUSION

¶47 For all the reasons set forth above, this Court should reverse the district court's decision to grant Hovland/Ritter's motion for summary judgment, reverse the district court's decision to deny the Johnson Parties' motion to amend their complaint, and reverse the district court's decision to deny the Johnson Parties' motion for summary judgment.

Dated this 26th day of April, 2010.

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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 **AFFIDAVIT OF MAILING**

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

Cari Timmons, being first duly sworn, deposes and says that on the 26th day of April, 2010, she mailed a copy of the foregoing APPELLANTS' APPENDIX and APPELLANTS' BRIEF by placing a true and correct copy thereof in an envelope, addressed to the following:

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and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Cari Timmons

Subscribed and sworn to before me this 26 day of April, 2010.

ANNETTE KIRSCHENHEITER
Notary Public
State of North Dakota
My Commission Expires April 18, 2014

Notary Public