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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Matter of the Estate of Hazel Poston Herschbach, Deceased; Heidy Herschbach, As Personal Representative for the Estate,	)	Supreme Court No. 20100172 Burleigh County Civil No.09-P-0094
In the Matter of the Estate of E. Fred Herschbach, Deceased; Heidy Herschbach, as Personal Representative for the Estate,	)	Supreme Court No. 20100173 Burleigh County Civil No. 09-P-0095
Appellee,	)	
v.	)	
Frederick J. Herschbach,	)	
Interested Party and Appellant.	)	

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STATE OF NORTH DAKOTA

APPELLEE BRIEF OF HEIDY HERSCHBACH

APPEAL FROM THE DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE GAIL H. HAGERTY

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STATEMENT OF THE ISSUES

Whether the district court's decision to disregard the affidavit of Frederick J. Herschbach ("Frederick") as an attempt to create sham factual issues was correct? Whether the district court properly granted summary judgment in favor of Heidy Herschbach ("Heidy")?

STATEMENT OF THE CASE

Appellee accepts Appellant's summation contained in his Statement of the Case with the following qualifications. The characterization of the affidavit filed by Frederick in response to summary judgment as "supplemental" in nature is rejected—the affidavit is contradictory to his prior deposition testimony. Also, statements regarding the district court's review and analysis of statutory and case law on the issue of delivery of the subject deeds deserves qualification. While the district court did not cite any statutory or case law in its April 13, 2010, Order on this issue, it cannot be said that the district court did not analyze the law involving delivery (as well as acceptance) of the subject deeds.

STATEMENT OF THE FACTS

Heidy filed an Inventory and a Petition For an Order Approving of Proposed Distribution of Assets of Estate of E. Frederick Herschbach with the district court. In response, Frederick filed an Objection to Inventory and Proposed Distribution. The disputed mineral deeds ("subject deeds") are listed in the inventory and are the subject of this appeal. (Appendix ("App.") 18-54). Heidy argued, and the district court agreed, that attempted conveyances of the subject mineral deeds before the death of Frederick's father, E. Frederick Herschbach ("E. Fred), were invalid because they were not delivered

to, or accepted by, Frederick prior to his father's death.[1] In addition to the proposed distribution and inventory of E. Fred's estate, Heidy has also filed an Inventory and Petition for an Order Approving of Proposed Distribution of Assets of Estate of Hazel Poston Herschbach ("Hazel"), E. Fred's wife.

The parties agree that if the subject deeds are determined to be part of E. Fred's estate and/or Hazel's estate, Heidy is entitled to one-half of the interests. The dispute is whether the subject deeds were delivered to, and accepted by, Frederick prior to his father's death.

The deposition of Frederick was taken in Tyler, Texas on December 3, 2009, in an ancillary case venued in the United States District Court for the Eastern District of Texas, Tyler Division. This deposition became a focal point in this matter when Frederick filed an affidavit attempting to create issues of fact in response to Heidy's motion for summary judgment. Before the affidavit that Frederick included in his appendix in this matter existed, Frederick executed a near identical affidavit that was filed in the Texas matter in response to summary judgment. (Appellee Appendix ("Appellee App.") 1-7).

A. General Background

E. Fred was an independent oil & gas landman from Tyler, Texas. He had an office in Tyler with a bookkeeper, Nell Wood, and a secretary, Annette Milstead, from which he conducted his business of buying and selling oil & gas interests. The office maintained files for each of the interests owned by E. Fred. (App. 81, 91, 103, 111, 146).

[1] Indeed, after the district court agreed with Heidy, so too did a Texas federal jury. The record reflects the ancillary Texas case. And it is undisputed that on April 21, 2010, a jury determined that E. Fred did not intend to transfer the subject mineral deeds to Frederick.

E. Fred was married to Hazel. Hazel was not involved in the business of E. Fred. E. Fred and Hazel had two children, Frederick, and Robert, who is now deceased. (App. 80, 106). Robert was married to Heidy at the time of his death.

E. Fred developed colon cancer and in June of 1969 he was operated on. (App. 81). At the time of the cancer, Robert was involved in a difficult divorce from his wife, Turid. In the divorce proceeding Turid threatened to involve Robert's inheritance from E. Fred. According to a letter written by Robert, he and E. Fred discussed this matter and determined that Robert should be written out of E. Fred's will with the understanding that after Robert resolved his divorce he would be restored to his position as an equal with Frederick in E. Fred's estate. (App. 88-90).

E. Fred's last will and testament is dated September 18, 1969. Robert is not a beneficiary of that document. (App. 88-90). E. Fred left his estate in trust for his wife and son, Frederick, with Hazel to get the income for life and the remainder to Frederick. E. Fred died on December 26, 1969.

B. Subject Deeds

Unbeknownst to Frederick, in the summer of 1969, E. Fred began the process of deeding and assigning mineral interests that he owned to Frederick (App. 104-05). Hazel joined in these conveyances. E. Fred would prepare a deed, and in some instances, send the deed to the appropriate county recorder's office for filing with the originals of the recorded deed returned to his office and placed back in the file for that specific mineral interest. (App. 109-10, 146-47). E. Fred did not advise Frederick of this process and Frederick was unaware of E. Fred's actions until after E. Fred's death. E. Fred was

circumspect in his business affairs, and Frederick was unaware of the extent of E. Fred's mineral holdings (App. 111-115, 118, 126-127; 200-18).

Frederick did not get involved in or assume any responsibilities for the operation of E. Fred's office and business operations until after E. Fred's death. (App. 91-93 102-03, 105-07). E. Fred was alert and continued to be in charge and run his business right up until his death. (App. 92-93).

Frederick was appointed independent executor of the Estate of E. Fred. (App. 82-83). After his appointment, he took over responsibility for the operation of E. Fred's business operations. (App. 91). He did not file an inventory of E. Fred's estate, but apparently E. Fred's estate tax return did contain an attachment of an inventory of E. Fred's holdings. (App. 82-83, 95-96). A copy of the return is not available, but what appears to be a copy of the attachment has been found. The attachment containing the inventory was prepared by Nell Wood from records in E. Fred's office. (App. 97-98, 100-101). A portion of the inventory from the estate tax return and a thorough search of county recorders' offices in North Dakota forms the basis for the Inventory filed in this probate proceeding in North Dakota.

As stated above, Frederick was not involved in his father's business until after E. Fred's death. (App. 92). He was unaware of the fact that his father had deeded him mineral interests in North Dakota during July, August and September of 1969. In some instances those deeds were recorded in September, October and November of 1969 by E. Fred, or E. Fred and Hazel as the grantors. (App. 111-115). After those deeds were recorded they were returned by the county recorder to E. Fred at his office in Tyler. (App. 18-54, 118). Frederick admitted in his deposition that he did not know of the

existence of any of those deeds until after his father's death and did not know of most of the deeds until 2007-2008, 39 years later. (App. 112, 114, 118, 128, 130-131, 134, 135, 137-139, 141). In the meantime, from 1969 until 2007 or 2008 the deeds lay undiscovered in E. Fred's old file folders in his old file cabinets in Tyler, Texas, when they were discovered by Frederick. Frederick was even unaware of the fact that E. Fred had interests in North Dakota. (App. 102, 105). As evidence of his ignorance of the deeds from his father and mother to him, he signed the estate tax return for his father's estate which listed the interests deeded to him as assets of his father's estate. (App. 99, 100).

Frederick testified at his deposition that he did not become aware of the fact that such interests were deeded to him until two or three years ago when he was approached in either his individual capacity or in his capacity as independent executor of his father's estate to lease specific mineral interests. (App. 84, 148-49). At such times he went to the files in his father's office containing the evidence of the interest sought to be leased and found the recorded deed to himself. In several such cases, he then recorded the deed. (App. 132-133). Some of the 1969 deeds were recorded as late as 2008. (App. 114, 128, 130, 135-137, 138, 140).

Although Frederick never filed evidence in North Dakota of his appointment in Texas as Independent Executor of the Estate of E. Fred in North Dakota, in 2008 and 2009 he signed and recorded assignments of mineral interests to Herschbach Petroleum Company, a company he controlled, as Independent Executor in Texas of the Estate of E. Fred in Dunn County, Kidder County, McHenry County, McLean County, Morton County, Pierce County, Rolette County, Sheridan County, Stark County, Wells County

and Williams County. (Appellee App. 8-18). He acknowledged that E. Fred's estate owned the interests involved by signing as Independent Executor of E. Fred's estate and recording these assignments, even though the mineral interests involved in most cases had been deeded to him by E. Fred and Hazel in 1969. The 1969 deeds had been recorded in some instances, but none of the deeds had been delivered to or accepted by Frederick prior to E. Fred's death.

On April 1, 1971, following E. Fred's death in December of 1969, Hazel, Frederick and Robert entered into an agreement (the "1971 Agreement") that provided that Robert was to receive from Frederick one half of the assets Frederick received from the estate of E. Fred. (App. 148). Further, in a codicil to her last will and testament, Hazel provided that if the 1971 Agreement was not effective, she thereby left all of her assets to Robert or his heirs and devisees, it being her specific intent that Robert or his heirs and devisees get one half of the joint property of E. Fred and Hazel. (App. 86-87, 142-43, 148-49). Both the 1971 Agreement and Hazel's codicil demonstrate the intent to return to Robert a one-half share of E. Fred's and Hazel's estates, following the conclusion of Robert's divorce from Turid.

Hazel died on September 27, 1985. Her estate tax form 706 listed forty-one non-producing mineral assets in North Dakota. Forty of those forty-one mineral assets were among the mineral assets deeded, but not delivered, by E. Fred and Hazel to Frederick in 1969. In this proceeding Frederick claims all such mineral assets as his sole property, notwithstanding his signature on her form 706, which listed such mineral assets as her property. Frederick was the Independent Executor in Texas of the Estate of Hazel Poston

Herschbach. (App. 84-85). Clearly, his signature on Hazel's form 706 is inconsistent with his current claim.

Robert died on July 12, 1985, leaving his wife Heidy as his sole devisee. (App. 93-94). Frederick now claims that interests deeded to him, and in some cases recorded by E. Fred and Hazel prior to E. Fred's death in 1969, are to be excluded from the 1971 Agreement as well as the codicil to Hazel's last will and testament. (App. 148-49). That claim is made despite the fact that in many instances he assigned those mineral interests to Herschbach Petroleum Company in 2008 and 2009 as Independent Executor in Texas of the Estate of E. Fred.

C. Direct Conflict

In conjunction with, and in response to, a motion for partial summary judgment in the ancillary action in Texas, Frederick signed an eight page affidavit dated January 11, 2010, in which he attempts to recant the critical admissions he made in his December 3, 2009, deposition concerning the lack of delivery by E. Fred and the lack of acceptance by Frederick of the subject mineral deeds. (Appellee App. 1-7). A nearly identical affidavit was created on February 16, 2010, and filed in response to Heidy's de facto summary judgment motion. (App. 156-61). The relevant content of the Frederick's post-deposition affidavit is diametrically opposed to his deposition testimony. Frederick offers no explanation for the direct contradictions. The only explanations offered come from Frederick's attorneys.

What follows are the relevant statements contained in Frederick's affidavit filed in this matter that are directly contradicted by his prior deposition testimony. The prior deposition testimony of Frederick follows the affidavit statements.

> (12) In or about the latter part of October 1969 and early November 1969, my father's health began to decline such that he could no longer consistently go to work. By November 1969, E. Fred Herschbach was bedridden. At that time, my father, E. Fred Herschbach, requested that I take over the business located at 800 Fair Foundation Building, Tyler, Texas and take possession of all the business files and records, including approximately 600-800 mineral deeds and other records pertaining to those mineral interests, deeds and royalty payments. At that time, he relinquished all control over his business records, including all the mineral deeds in his files, to me.

(App. 158).[2]

> "My father gave me a key to the office and requested that I carry on with the business from that point forward on a full time basis."

(App. 158 at ¶ 13).

> (14) Upon my father's request, I began going to the office located at 800 Fair Foundation Building, Tyler, Texas during the latter part of October 1969 and early part of November 1969 on a daily basis. In addition to dealing with my father's declining health, I began managing his business, and I had possession, custody and control of all business records of the business, including, but not limited to, the various mineral deeds located in the filing cabinets at 800 Fair Foundation Building, Tyler, Texas. Due to my father's declining health, from early November until his death, he was unable to go to the office.

(App. 158-159).

> (17) Before my father's death, I knew, and he informed me, that he and my mother, where applicable, had transferred a number of mineral interests to me that were kept in the files in his office that I assumed possession, custody and control over in October 1969. At no point did I ever disclaim, reject or not accept any conveyance of any mineral interest to me by my father or mother, including the mineral interests that I knew were conveyed to me prior to my father's death. I accepted the mineral interests from my father, E. Fred Herschbach and, where applicable, my mother, Hazel Herschbach.

(App. 159).

[2] It is to be noted that in spite of the fact that Frederick states that E. Fred was bedridden by November of 1969, on November 19-21, 1969 mineral deeds were filed by E. Fred in Dunn, Emmons, Grant and McHenry Counties in North Dakota. App. 32-35, 38-39.

The following are portions of Frederick's prior deposition testimony that are directly contradicted by his affidavit statements:

Q. Okay. Talking about those files, when your father bought minerals and that sort of thing, would he set up a file on the new acquisition of that particular property?

A. That's apparently what he did.

Q. You weren't familiar with any of that before he died, were you?

A. No. I was in Kansas until shortly before he died.

Q. Yes.

A. Six months or so before he died.

Q. And so you didn't really get involved in the day-to-day activities of his office until after he passed away and you started assuming the obligation of an independent executor as well as trying to run the business, so to speak?

A. Yes.

Q. Would that be a correct summarization?

A. Correct.

(App. 91-92) (emphasis added).

Q. You just sort of moved in and assumed his position as far as the hands-on operations, right?

A. Yes.

Q. And prior to his death, you really didn't do that, did you?

A. No.

Q. In fact, he pretty well took charge of things right up till the end of his death, didn't he?

A. Yes.

Q. End of his life?"

A. (Witness nods head affirmatively.)

Q. He was fairly active and agile and even cognizant right up to the very end?

A. He was.

(App. 92-93) (emphasis added).

Q. But you didn't even know he owned property in North Dakota until after he died and you came to the office and started digging through the files and trying to run the business, did you?

A. I didn't know all the places he owned property, no. That was --

Q. And you didn't know to the extent he owned property in the state of Texas, did you?

A. No. Nor would my brother have known that.

Q. No. And none of -- and probably your mother didn't even know a lot of the properties?

A. She had no idea of any of it.

Q. Because as we were talking about while ago, those old time landmen and lease brokers played it real close to the vest, didn't they?

A. I think he did.

Q. It was very, very secretive, because competition was very keen, wasn't it? Most times. The competition, I mean if someone knew that you were out there or your dad was out there, a representative of your dad was trying to buy a mineral interest from a landowner out in the Piney Woods, there's a good chance that somebody else would show up and try to get a little piece of it; isn't that right? Isn't that the way the business worked?

MR. ZIPS: Objection, form.

A. I think that's probably true, but I was not in the middle of that kind of --

Q. (By Mr. Campbell) I know. But you knew -- you know enough about it, having dealt with it over the years after your father died, to this day they still play it real close, don't they?

A. Yes. Certain things are held real close to the vest.

(App. 105-107) (emphasis added).

Q. You're aware that when your dad died, that he owned a considerable amount of property, mineral interests in North Dakota, correct?

MR. ZIPS: Objection, form.

Q. (By Mr. Campbell) Or you found out about it shortly after he died?

A. Yes.

Q. You didn't know <u>anything</u> about it when he died, did you?

A. No, I was not aware of what he was doing and where he was doing it. For the most part, that was his business.

Q. And he pretty much kept his business to himself?

A. Yes.

Q. Which was old time lease buyers and royalty buyers, the expression goes, played it real close to the vest, right?

A. He was an independent petroleum landman. He worked for himself and for other companies.

Q. And nobody except who he was representing or working for knew what he was doing and why he was doing it?

A. Yes. Yes. He didn't –

Q. Isn't that sort of the model that those old boys followed?

A. Yes. This was not conversation around the table.

Q. Not even around your own dinner table?

A. No.

(App. 102-03) (emphasis added).

Q. Your position is you never – your testimony is you never did know **anything** about these deeds until sometime after they were recorded and put in the file, after December the –

A. That's correct.

Q. –22nd of '08

(App. 115) (emphasis added).

The Court should affirm the district court's decision to treat Frederick's affidavit as a "sham affidavit" and disregard the conflicting testimony contained in the affidavit. *See Popoalii v. Correctional Med. Servs.*, 512 F.3d 488, 498-99 (8th Cir. 2008) (concluding the district court did not abuse its discretion in striking an affidavit that as

"actually inconsistent" with the affiant's prior deposition testimony); *Schiernbeck v. Davis*, 143 F.3d 434, 438 (8th Cir. 1998) (citing prior 8th Circuit case law has held "parties to a motion for summary judgment cannot create sham issues of fact in an effort to defeat summary judgment"); 3 Litigating Tort Cases § 31:11 (explaining "the sham affidavit doctrine refers to the practice of striking or disregarding an affidavit that is submitted in opposition to a motion for summary judgment, in cases where the affidavit contradicts the affiant's prior sworn deposition testimony").

LAW AND ARGUMENT

Heidy addresses two issues on appeal. First, she argues the district court properly disregarded Frederick's affidavit as to statements that directly contradicted his prior deposition testimony. The prior deposition testimony was clear, he was not confused (nor has he claimed to have been confused), and he had the benefit of counsel. His counsel could have questioned him further, but chose not to. Most importantly, Frederick failed to explain in his affidavit the reason(s) for these blatant contradictions.

The second issue is intertwined with the first. Because Frederick admitted at his deposition that he had no knowledge of the subject deeds until after his father's death, did not accept the mineral deeds until after his father's death, did not receive the subject deeds until after his father's death, and did not take possession of his father's business or office until after the death of his father, the deeds were not validly conveyed to Frederick and remained a part of the estate of E. Fred. The district court properly interpreted *basic* North Dakota law on acceptance and delivery of deeds: non-delivery of a deed prior to the death of the grantor invalidates the attempted transfer to the grantee.

The district court's decision should be affirmed. The subject deeds remained a part of E. Fred's estate. The district court distribution order correctly and properly distributed a one-half interest in the subject deeds to Heidy and a one-half interest in the subject deeds to Frederick.

A. The District Court Properly Disregarded Frederick's Affidavit

Frederick claims his affidavit dated February 16, 2010, is accurate and "supplements" his deposition testimony. The argument, however, is unsupportable. Clear and specific questions relevant to the issue of delivery and acceptance were asked of Frederick at his deposition. The affidavit filed by Frederick should be considered a "sham affidavit."

This Court has recognized an affidavit can be stricken under appropriate circumstances. *Delzer v. United Bank of Bismarck*, 484 N.W.2d 502, 507-08 (N.D. 1992). The Court was presented with an argument that an affidavit filed by the plaintiff should be disregarded because it was contrary to the plaintiff's prior deposition testimony. *Id.* It was determined that the affidavit of the plaintiff did not "seriously contradict" prior deposition testimony. *Id.* at 508. But *Delzer* noted that "[t]here are no doubt cases where contradictions in a party's discovery testimony will result in summary judgment because they are so extreme or farfetched as to be unbelievable." *Id.* The present case must be what *Delzer* was referring to.

Delzer cited several cases in which courts granted summary judgment because an affidavit contradicted prior testimony. *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361 (8th Cir. 1983); *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572 (2d. Cir. 1969); *Guardian State Bank v. Humpherys*, 762 P.2d 1084 (Utah 1988). *Perma*

Research minted the term "sham affidavit": "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out *sham* issues of fact." *Id.* at 578 (emphasis added). The determination that an affidavit is a sham is not a credibility finding: "We do not read this conclusion as a credibility determination but rather as a recognition of a sham issue similar to those that the *Perma Research* and *Radobenko* courts held should not require trial." *Camfield Tires*, 719 F.2d. at 1365.

Other factors for disregarding a sham affidavit have been generally accepted. The Tenth Circuit adopted the rationale of *Camfield Tires* and *Perma Research* in the following analysis:

> Factors relevant to the existence of a sham fact issue include whether the affiant was cross-examined during his earlier testimony, whether the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence, and whether the earlier testimony reflects confusion which the affidavit attempts to explain. These factors convince us that Dr. Franks' affidavit should be disregarded in considering the propriety of summary judgment. *He was carefully cross-examined when he gave his earlier testimony, and as a participant in the alleged conversations he clearly had access to the relevant evidence at that time. Moreover, his affidavit makes no reference to his earlier contrary statements, and his earlier testimony is unequivocal. We also note that the affidavit was offered only after summary judgment had been granted against him on that issue.* Under these circumstances, we must conclude that this is one of those unusual cases in which the conflict between the testimony and the affidavit raises only a sham issue.

Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986) (internal citations omitted) (emphasis added).

The same analysis used in the above-cited decisions applies here. Frederick was carefully cross-examined by opposing counsel in a case involving the same issue of whether the subject deeds had been delivered and accepted prior to the death of E. Fred. Frederick's affidavit makes no reference to his prior unequivocal testimony—there is no attempt to explain the contradictions. And his affidavit was offered only in the face of summary judgment.

i. No Explanation (But for a Lawyer's Musings)

Explaining prior deposition testimony that is contradicted by a subsequent affidavit must be done by the affiant. In *Guardian State Bank*, the court cited the following rationale: "But when a party takes a clear position in a deposition, that is not modified on a cross-examination, he may not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, *unless he can provide an explanation of the discrepancy*." *Guardian State Bank*, 762 P.2d at 1087 (citation omitted) (emphasis added). *Camfield Tires* explained the plaintiff's "affidavit *does not explain aspects of his deposition testimony*, nor does the deposition reflect any confusion on Camfield's part that might require explanation." *Camfield Tires*, 719 F.2d. at 1365 (emphasis added). If an explanation comes after a summary judgment motion is filed, it is naturally entitled to less credibility. *See Machin v. Leo Burnett, Inc.*, 376 F.Supp.2d 188, 200 (D. P.R. 2005) (citing *Torres v. E.I. Dupont De Nemours & Co.*, 219 F.3d 13, 20-21 (1st Cir. 2000); *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 5 (1st Cir. 1994)). The Seventh Circuit cut to the chase:

> Affidavits, though signed under oath by the affiant, are typically and here written by the affiant's lawyer, and when offered to contradict the affiant's deposition are so lacking in credibility as to be entitled to zero weight in summary judgment proceedings unless the affiant gives a plausible

> explanation for the discrepancy. The explanation, moreover, must come in the affidavit itself, *not in a lawyer's musings*, which are not evidence.

Beckel v. Wal-Mart Assocs., Inc., 301 F.3d 621, 623 (7th Cir. 2002) (internal citations omitted) (emphasis added).

The following circumstances and rationale found in *Beckel* are strikingly similar to this case.

> The plaintiff's affidavit, filed a suspiciously long seven months after the deposition, offers no reason for the discrepancy. *Her lawyer argues that "the reason it [the threat to terminate her] was not mentioned in her deposition was because it was never addressed by Wal-Mart's counsel during the deposition" The argument is entitled to no weight because it is just a lawyer's unsworn argument*, not the affiant's testimony (or testimonial equivalent) under oath. It is also a very poor argument, since he was present at his client's deposition and could have asked her about the threat; and if it was apparent that she was having memory problems, he could even have asked her leading questions about it. He adds that the threat "was also not mentioned by Beckel's own attorney [i.e., himself, during her deposition] for tactical reasons at that time." That is another bad as well as weightless reason, which at oral argument he abandoned, arguing instead that he had slipped up at the deposition and should have tried to jog his client's memory. Too late; the mistake of a deponent's lawyer is no ground for allowing his client to contradict her deposition by a subsequent affidavit.

Beckel, 301 F.3d at 623-24 (internal citations omitted) (emphasis added). Indeed, Frederick is attempting to use the same rationale Beckel's attorney attempted. The Court should reject this strategy. If Frederick truly was confused or misunderstood questions at his deposition, then he must explain this in his affidavit. Because Frederick chose to rely on his attorney's musings, rather than proffer an explanation of the discrepancies between his prior testimony and his affidavit, the decision of the district court should be affirmed.

ii. Confusion (But Only if Explained)

Confusion at a deposition is a possible factor in explaining subsequent contradictory statements, but it must be alleged and explained in an affidavit. *Taylor v.*

St. Louis County Bd. Of Election Comm'rs, 2009 WL 1176298, at *4, (E.D. Mo. 2009) (citing *Herring v. Canada Life Assurance Co.*, 207 F.3d 1026, 1030-31 (8th Cir 2000)). The Eighth Circuit held in *Popoalii* that an expert's affidavit was "actually inconsistent" with his prior deposition testimony. *Popoalii*, 512 F.3d at 498-99. The deposition was not alleged to be confusing, nor was any explanation given of what was allegedly confusing. *Id.*

Had Frederick simply attempted to explain in his affidavit that he had a memory problem, was fatigued, or was confused at his deposition, this could have possibly been a sufficient explanation for his contradictory testimony. *See Hernandez-Loring v. Universidate Metropolitana*, 233 F.3d 49, 54 (1st Cir. 2000). ("[L]apse of memory, new sources of information or other events can often explain a revision of testimony"); *Lamarche v. Metro. Life Ins. Co.*, 236 F.Supp.2d 34, 41 (D.Me. 2002) (stating affiant explained in his deposition errata sheet that he was fatigued and confused at his deposition). But Frederick cannot escape the fact that the questions asked at his deposition were clear cut. He was not confused—nor does he even allege to have been confused. So what if leading questions were asked? Frederick was represented by counsel at his deposition. Frederick is a very educated individual—having all but defended his dissertation in German language and literature at the University of Kansas. (App. 80). Video deposition testimony was played to the district court and it was very clear that Frederick understood what was being asked at his deposition.

iii. Deposition vs. Affidavit (Fresh vs. Canned)

Most would not dispute that fresh vegetables are preferred over canned vegetables. And most would not dispute that live recorded testimony with the

opportunity of cross-examination and direct-examination is preferred to affidavits. Most, because Frederick believes his contrived affidavit is superior to his live and fluid deposition testimony.

Such logic is not just shared by litigation attorneys, but also by courts. "The main practical reason supporting the sham affidavit doctrine is that *prior depositions are more reliable than affidavits*." *Perma Research*, 410 F.2d at 578 (emphasis added). "The deposition of a witness will usually be more reliable than his affidavit, since the deponent was either cross-examined by opposing counsel, or at least available to opposing counsel for cross-examination." *Id.*; *see also Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 253-54 (3rd Cir. 2007); *Darnell v. Target Stores*, 16 F.3d 174, 176 (7th Cir. 1994) ("Inherently depositions carry an increased level of reliability. Depositions are adversarial in nature and provide the opportunity for direct and cross-examination.").

Courts have recognized something everyone already knows—affidavits are rarely drafted by affiants. "Affidavits, on the other hand, are usually drafted by counsel, whose familiarity with summary judgment procedure may render an affidavit less credible." *Jiminez*, 503 F.3d at 253; *see Russell v. Acme-Evans Co.*, 51 F.3d 64, 67-68 (7th Cir.1995) ("We have been highly critical of efforts to patch up a party's deposition with his own subsequent affidavit. Almost all affidavits submitted in litigation are drafted by the lawyers rather than by the affiants and a comparison of the diction of Russell's deposition with that of the affidavit makes clear that his affidavit is no exception." (internal citations omitted))." The point is that the deposition testimony of Frederick was fresh, his affidavit was canned.

In summation of this section, the district court's decision to disregard the relevant portions of Frederick's affidavit directly in contradiction to prior deposition testimony was appropriate. Frederick chose to remain silent as to these contradictions—instead relying on the musings of his attorneys. It is undisputed that Frederick understood all of the questions at his deposition and was not confused. Frederick was represented by counsel at his deposition. He had ample opportunity to attempt to explain direct contradictions between his deposition testimony and affidavit. The district court properly disregarded the relevant portions of Frederick's "sham affidavit."

B. Heidy Is Entitled to Distribution of the Subject Property

Frederick affirmatively admitted at his deposition that he did not take delivery, constructively or actually, of the subject mineral deeds, and did not even know of the existence of the subject mineral deeds until after the death of his father. Indeed, many of the subject deeds were not even known to Frederick until well into 2007. Many were not discovered by Frederick until late 2008, 39 to 40 years after they were signed and in some cases recorded by E. Fred. The mineral deeds were part of E. Fred's estate at his death.

Basic North Dakota law holds that delivery of a deed by a grantor to a grantee is required for the grant to be effectual. "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 (emphasis added). This Court 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 (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). Here, none of the subject mineral deeds were ever delivered, constructively or otherwise, to Frederick before his father's death; neither were they accepted prior to E. Fred's death.

While it is abundantly clear that none of the subject mineral deeds were ever delivered to, or accepted by, Frederick, Heidy does not dispute that some, but not all, of those mineral deeds were recorded by E. Fred prior to his death in 1969. And Heidy acknowledges that "[t]he recording of a deed may create a *rebuttable* presumption of its delivery to, and its acceptance by, the grantee." *CUNA Mortgage*, 459 N.W.2d at 804 (citations omitted) (emphasis added). Clear and convincing evidence must be provided to rebut this presumption. *Cox v. McLean*, 268 N.W. 686, 688 (N.D. 1936); *Eide v. Tveter*, 143 F.Supp. 665, 669 (D. N.D. 1956). The admissions against interest by the purported grantee, Frederick, demonstrate by clear and convincing evidence that E. Fred did not deliver, and Frederick did not accept, the subject mineral deeds prior to the death of E. Fred.

Frederick seeks to compare the facts of this case to *Dinius v. Dinius*, 448 N.W.2d 210 (N.D. 1989). But *Dinius* is no more similar to the set of facts here than is *CUNA Mortgage*. Indeed, the law of *Dinius* is the law of *CUNA Mortgage*. And it is the law of North Dakota that applies. The ultimate question for the Court is whether the subject deeds were delivered to, and accepted by, Frederick prior to his father's death. Frederick's admissions contained in his deposition testimony clearly and convincingly show the subject deeds were not delivered or accepted until after his father's death.

In summary, the following is Heidy's position regarding non-delivery and non-acceptance of the subject deeds prior to the death of E. Fred:

1. Frederick admits having no knowledge of the subject deeds prior to the death of his father.

2. Frederick admits not taking control of his father's business and office until after his father's death.

3. North Dakota law requires delivery and acceptance of deeds to effectuate a transfer.

4. To the extent some of the subject deeds were recorded prior to E. Fred's death, the presumption of delivery to Frederick has been rebutted by clear and convincing evidence. Frederick's admissions clearly and convincingly show that he was unaware of **anything** about the subject deeds, and did not take control of his father's business or office, until after his father's death.

5. Because the subject deeds were not validly conveyed to Frederick prior to his father's death, the subject deeds remained a part of his father's estate entitling Heidy Herschbach to one-half of the subject mineral interests.

CONCLUSION

The Court should AFFIRM the district court's decision to approve the distribution of the assets of the Estate of E. Frederick Herschbach, and approve the distribution of the assets of the Estate of Hazel Poston Herschbach, in the manner set forth by Heidy Herschbach.

Dated this 7th day of September, 2010.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In the Matter of the Estate of Hazel Poston Herschbach, Deceased; Heidy Herschbach, As Personal Representative for the Estate,	)	Supreme Court No. 20100172 Burleigh County Civil No.09-P-0094
In the Matter of the Estate of E. Fred Herschbach, Deceased; Heidy Herschbach, as Personal Representative for the Estate,	)	Supreme Court No. 20100173 Burleigh County Civil No. 09-P-0095
Appellee,	)	
v.	)	**AFFIDAVIT OF MAILING**
Frederick J. Herschbach,	)	
Interested Party and Appellant.	)	

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

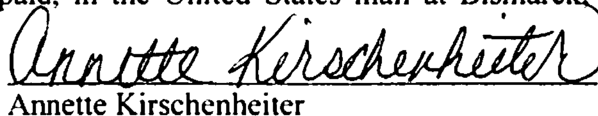
Annette Kirschenheiter, being first duly sworn, deposes and says that on the 7th day of September, 2010, she mailed a copy of the foregoing:

APPELLEE BRIEF OF HEIDY HERSCHBACH and **APPENDIX OF HEIDY HERSCHBACH**

by placing a true and correct copies thereof in an envelope, addressed to the following:

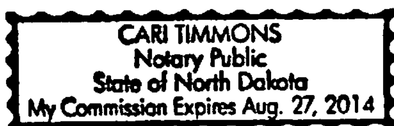
Kristy L. Albrecht
Fredrikson & Byron, P.A.
51B Broadway, Suite 402
Fargo, ND 58102

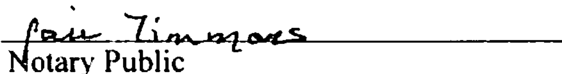
and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.



Annette Kirschenheiter

Subscribed and sworn to before me this 7 day of September, 2010.





Notary Public