20110191

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

Richard A. Arndt, Karen K. Arndt, TTT Minerals, LLC, Douglas Kinnoin, James S. Enge, Gerald D. Neset, Gary Craft, Marshall Craft, Jane Craft, Brian E. Olson, Peggy Olson, George L. Baranek, Katherine A. Baranek, and William (W.R.) Everett,	**Mountrail Co. No. 09-C-00032**
Plaintiffs – Appellees, ~~and~~ cross-Appellants v.	
Angeline Maki, Marily Bryant, Lillian (Gunderson) Jastrzebski, Caroline Sadle, Esther Maki, Doris Walter, Gloria Worley, Laura Erber, Lloyd Arndt, Jason Arndt,	**Supreme Court No. 20110191**
Defendants – Appellants. ~~and~~ cross - Appellees	

APPEAL FROM SUMMARY JUDGMENT,
MOUNTAIL COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
HONORABLE WILLIAM W. MCLEES, PRESIDING

BRIEF FOR APPELLANTS

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SUPREME COURT

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I.

Was the Defendants Maki intestate inheritance of surface and minerals subjected to fraud and/or mistake by the Personal Representative obtaining Waivers of Inheritance of their mineral acres when only their surface acres were to have been waived.

II

Whether the Defendants Maki are entitled to reformation of the May 1973 Waivers of Inheritance for fraud and/or mistake.

III

Whether the Defendants Maki are entitled to reformation of the 1984 Personal Representative's Deed for fraud and/or mistake.

STATEMENT OF THE CASE

[1] This is a quiet title action by which plaintiffs seek to remove a cloud on title created by a second, corrected Personal Representative's Deed and Statements of Mineral Claim recorded in 2007 which preserved to the Defendants Maki the mineral acres which the original ten Arndt children inherited by intestate succession from their father Carl Arndt, which plaintiffs' failure to conduct a title examination before purchase would have disclosed.

[2] Due to fraud and/or mistake one of the ten children, Richard Arndt, acquired nominal title to all the surface and minerals, when he paid for only the surface acres of the family farm. He then sold mineral acres to the plaintiff third parties named in this suit.

[3] Plaintiffs Richard and the third party buyers then brought two Motions for Summary Judgment in order to access suspended royalties which the trial court denied in favor of the Defendants Maki.

[4] The plaintiffs then split forces and retained separate counsel and brought a third motion for Summary Judgment with a second affidavit of Richard Arndt tailored to meet the trial court's first two denials and quieted title that no reformation based on fraud or mistake in the documents leading up to the October 1973 Contract for Deed or the first October 1984 Personal Representative's Deed could be granted because neither contained a mineral reservation in favor of Defendants Maki and ruled that the mineral title vested in Richard in October 1984 because no one except Richard was alive and present at the negotiation of the 1973 Contract for Deed.

[5] The trial court overlooked the fact that the Defendants Maki and the Plaintiff Richard are alive and were present at the negotiation and signing of the Waivers of Inheritance which were an absolute prerequisite for mother Marie Arndt to obtain the Defendants Maki share of the minerals to convey to Richard by the Contract for Deed.

[6] Defendants Maki appealed and plaintiffs have cross-appealed.

STATEMENT OF THE FACTS

[7] Richard received a letter from his parents, Carl and Marie Arndt, asking him if he would leave the Navy and come home and take over the family farm. He came home on leave May 20 to June 11, 1967 and they discussed it. Richard agreed to come home and farm the Arndt Family Farm with the condition that he be allowed to buy the Arndt Family Farm. Richard Arndt's enlistment was up on January 10, 1968. He was honorably discharged from the Navy and came home to farm the family farm. The Arndt Family Farm included both surface and minerals. The subject matter of this litigation is the Arndt Family Farm minerals only. (Richard Arndt Affidavit, App.199, Dock. 54, Exh. 1)

[8] Richard Arndt, along with his father, Carl Arndt, farmed the family farm from 1968 to 1973. (*id.*)

[9] On May 1, 1973 Carl Arndt died. He left no will. All of the Arndt Family Farm was titled in Carl Arndt's name only. (*id.*)

[10] In early May 1973, days after Carl Arndt's death, the entire Arndt family, including Marie Arndt, the widow and children Richard Arndt, Angeline (Arndt) Maki, Marily (Arndt) Bryant, Lillian (Arndt) Jastrzebski, Caroline (Arndt) Sadle, Esther (Arndt) Maki, Doris (Arndt) Walter, Gloria (Arndt) Worley, Laura (Arndt) Erbert and Charles

Arndt (father of Plaintiffs Lloyd Arndt and Jason Arndt), met with Attorney Ralph Bekken in his office regarding the affairs of Carl Arndt. Attorney Ralph Bekken represented all the parties administratrix and the heirs despite an inherent conflict of interest. He explained the effect of Carl Arndt owning the Arndt Family Farm in his name alone and the applicable laws of intestate succession. Each of the ten children were entitled to 1/10 of 1/2 of all surface and minerals at the start of the meeting. All of the Arndt children consented to waive their interest in the surface after Marie said she would split all her and Carl's minerals in equal 1/10 shares to the children if they would waive their surface rights to Marie. (Angeline Affidavit, App. 268, Dock. 69; Doris Affidavit, App. 272, Dock. 69; Caroline Affidavit, App. 112, Dock. 35) Thereafter all Defendants Maki understood that Marie Arndt was the sole owner of the Arndt Family Farm, including the surface, equipment, stored grain, etc, excepting the minerals. They all understood that Marie Arndt was free to sell the Arndt Family Farm surface and machinery to Richard so he and Marie could make a living. Marie Arndt made known her intention at the meeting to sell the farm surface acres to Richard Arndt as had been agreed by Carl Arndt and Marie Arndt prior to Carl Arndt's death. (Angeline Affidavit, App. 268, Dock. 69; Doris Affidavit, App. 272, Dock. 69; Caroline Affidavit, App. 112, Dock. 35) All ten children were present when they agreed to waive the surface acres for a full 1/10 of all the mineral acres and then signed Waivers. The Waivers of Inheritance are in Mountrail Probate No. 3139, Carl's Estate.

[11] Some weeks later, May 23, 1973, Marie Arndt and Richard Arndt entered into a handwritten agreement (App. 205, Dock. 54, Exh. 2), written by Marie Arndt, wherein terms for the purchase of the Arndt Family Farm by Richard were set forth,

including "The mineral rights that are on the place go with the place". The only persons present when the handwritten Agreement (App. 205, Dock. 54, Exh. 2) was discussed and prepared were Marie Arndt and Richard Arndt.

[12] Prior to October 24, 1973, Marie Arndt contacted her attorney, Ralph Bekken, and had him prepare a Contract for Deed (App. 207, Dock. 54, Exh. 3) for the sale of the Arndt Family Farm to Richard Arndt. Marie Arndt and Richard Arndt signed the Contract for Deed on October 24, 1973 before attorney Ralph Bekken who in turn notarized their signatures. (*Id.*) The Contract for Deed was recorded at the Register of Deeds Office, Mountrail County, North Dakota. (*Id.*)

[13] Marie Arndt and attorney Ralph Bekken were the only persons present when the October 24, 1973 Contract for Deed was discussed and prepared. Richard Arndt had no input into its preparation. Richard Arndt made all of the payments due under the Contract for Deed to Marie Arndt while she was alive.

[14] Marie Arndt died intestate on November 12, 1975 without completing the promised distribution of 1/10 of all minerals by which she obtained the waivers of the surface to sell to Richard. (Angeline Affidavit, App. 268, Dock. 69; Doris Affidavit, App. 272, Dock. 69; Caroline Affidavit, App. 112, Dock. 35)

[15] Angeline Maki and Marily Bryant were appointed Co-Personal Representatives of Marie Arndt's estate. (Angeline Maki Deposition (AM Depo) page (p). 135 line (l.) 7 to p. 136 l. 15 and Marily Bryant Deposition (MB Depo) p. 36, l. 23 to p. 37 l. 12)

[16] Thereafter Richard Arndt slowly made most of the payments due under the Contract for Deed to the Marie Arndt Estate. Those payments for surface and

machinery were accepted and the proceeds disbursed to the heirs of Marie Arndt. (Angeline Affidavit, App. 268, Dock. 69)

[17] Richard then on July 6, 1984 told the sibling defendants and attorney Bekken that he would distribute the minerals equally as Marie intended after he paid off the Contract for Deed because he needed them as collateral for his purchase loan, see Affidavit of Angeline Maki dated March 16, 2009 (Angeline Affidavit, App. 268, Dock. 69; Doris Affidavit, App. 272, Dock. 69; Caroline Affidavit, App. 112, Dock. 35).

[18] When Richard paid off the Contract for Deed in 1984 without honoring his promise to distribute the minerals equally, attorney Bekken then according to the defendants' understanding used the estate tax payment and inventory to transfer the minerals into Carl's estate so when the Personal Representative's Deed from Marie's estate conveyed to Richard there were no minerals in that estate to be conveyed and Richard received only surface acres.

[19] In the summer of 1984 Richard Arndt determined that he would pay off the remainder of the Contract for Deed because the Personal Representatives were upset with his last two years of no pay-slow pay behavior. He arranged for a loan at the Scandia American Bank in Stanley, North Dakota and the balance due under the Contract for Deed was deposited in the Marie Arndt Estate Account. (Angeline Affidavit, App. 268, Dock. 69; Doris Affidavit, App. 272, Dock. 69; Caroline Affidavit, App. 112, Dock. 35)

[20] On October 3, 1984 the Final Decree of Distribution in the Estate of Carl Arndt, Deceased, was entered by the then Judge Bekken wherein all of the Arndt Family Farm (without mineral reservation) is distributed to the Estate of Marie Arndt, Deceased,

and the Decree was recorded at the Mountrail County Register of Deeds, October 4, 1984 at 11:15 A.M. (App. 214, Dock.54, Exh. 6)

[21] On October 4, 1984, a Personal Representative's Deed was recorded from the Marie Arndt Estate to Richard Arndt. (App. 209, Dock. 54, Exh. 4) This Deed was prepared by Scandia American Bank of Stanley at the request of Richard Arndt as Ralph Bekken was then a sitting judge. (Angeline Affidavit, App. 268, Dock. 69) This Deed was recorded at the Mountrail County Register of Deeds October 4, 1984 at 3:30 P.M. (App. 209, Dock. 54, Exh. 4)

[22] On June 28, 1985 Ralph Bekken died. (App. 216, Dock. 54, Exh. 7)

[23] On March 29, 2007, Angeline Maki and Marily Bryant in their capacity as Personal Representatives of the still open probate prepared and recorded a second Personal Representative's Deed (App. 211, Dock. 54, Exh. 5) purportedly conveying minerals under the Arndt Family Farm to all of the heirs of Carl and Marie Arndt then living. (Charles Arndt has passed away and his heirs are his sons, Lloyd Arndt and Jason Arndt)

[24] Later in 2007 all the Defendants Maki record "Statements of Claim" Ch. 38-18.1- NDCC in which they claim an interest in the Arndt Family Farm minerals.

[25] A search for any records or files of attorney Ralph Bekken has disclosed that all of his records and files have been lost or destroyed. (App. 216, Dock. 54, Exh. 7) There are no files of attorney Ralph Bekken pertaining to Carl Arndt, Marie Arndt, the October 24, 1973 Contract for Deed or the October 4, 1984 PR's Deed or any documents relating to the Arndt Family Farm (*Id.*), excepting the Waivers of Inheritance and probate

court files of Carl and Marie, and the recorded Contract for Deed he drafted and the 1984 Personal Representative's Deed which Bekken notarized.

[26] On February 9, 2009, Plaintiffs moved for summary judgment alleging that Marie Arndt owned the minerals under the Arndt Family Farm and that because there is no reservation of minerals in the Contract for Deed (App. 207, Dock. 54, Exh. 3) nor the 1984 Personal Representative's Deed (App. 209, Dock. 54, Exh. 4), the entirety of the Arndt Family Farm, including the minerals, have been conveyed to Richard Arndt. (Court Opinion, App. 299, Dock. 72)

[27] The Defendants responded to the Motion for Summary Judgment on March 16, 2009 and claimed, based on recollections of alleged statements by Marie Arndt of her intentions. These statements were made at the time to obtain the Waivers of Inheritance in Bekken's office that they are each entitled to a 1/10 of all interest in the Arndt Family Farm minerals and seek as a remedy reformation to reflect the interest. (*id.*)

[28] The trial court denied the Motion for Summary Judgment on August 20, 2009 (8/20/09 Opinion, *id.*), however, in its denial the Court points out that there was no affidavit from Richard Arndt representing his testimony as to events surrounding the conveyance of the Arndt Family Farm. (8/20/09 Opinion, *id.*, p. 11) Richard Arndt's testimony by affidavit (App. 199, Dock. 54, Exh. 1) is then supplied to the Court. The Court also concluded that "The contract for Deed (10-24-73) (App, 207, Dock. 54, Exh. 3) and the Deed of Personal Representative (01-13-84) (App. 209, Dock. 54, Exh. 4) given in fulfillment of the contract, the same appear to be wholly "*unambiguous and consistent*" (Emphasis by the Court) (8/20/09 Opinion, App. 299, Dock. 72, p. 10). The

Court further held, in its analysis of the allegations by the Defendants, that their contention that the 1984 Personal Representative's Deed be subject to reformation on the basis of fraud, mistake, or a combination of the two, requires "*clear and convincing evidence*", for the deed to be reformed. (Emphasis by the Court) (8/20/09 Opinion, App. 299, Dock. 72, pp. 11 and 12), NDCC §32-04-17.

[29] On May 26, 2010 the Arndt Plaintiffs move to amend the pleadings to assert statute of limitations, latches and bona fide purchaser for value without notice defenses to Defendants' claims.

[30] On June 14, 2010 the Defendants object to the Motion to Amend.

[31] On August 4, 2010 the Court rules granting leave to amend the Pleadings by the Plaintiffs.

[32] On August 24 and 25, 2010 depositions of Angeline Maki, Marily Bryant, Esther Maki, Doris Walter, Gloria Worley, Laura Erbert and Lillian Jastrzebski are taken. Copies are filed with the Court.

[33] The trial court grants summary judgment for plaintiffs on the sole basis that there is no ev*id*ence the Contract for Deed and Personal Representative's Deed don't say what the parties' intended and ignoring the Defendants Maki evidence that fraudulent and/or mistaken Waivers of Inheritance are the prerequisite, inherent documents that don't say what the parties Marie and Defendants Maki intended making the seemingly correct later documents as mistaken products of the original mistaken and/or fraudulent Waivers and defendants appeal, and plaintiffs cross-appeal.

LAW AND ARGUMENT

STANDARD OF REVIEW

[34] The issues of this case are questions of law entitled to review de novo by the appellate court with no deference to the district court, Slope Cty., Etc. v. Consolidation Coal Co. 277 NW2d 124 127 (ND 1979) and Northern States Power Co. v. Hagen 314 NW2d 278 (ND 1982).

I

Was the Defendants Maki intestate inheritance of surface and minerals subjected to fraud and/or mistake by the Personal Representative obtaining Waivers of Inheritance of their mineral acres when only their surface acres were to have been waived.

[35] The task of the supreme court on appeal from summary judgment is to determine: Did the information available to the trial court, when viewed in a light most favorable to the opposing party, preclude the existence of a genuine issue as to any material fact and entitle the moving party to summary judgment as a matter of law? Binstock v. Tschider, 374 N.W. 2d 81 (N.D. 1985).

[36] Even though facts may not be in dispute, summary judgment is inappropriate if inferences reasonably deducible from the facts are conflicting. Latendresse v. Latendresse, 294 N.W. 2d 742 (N.D. 1980).

[37] In resolving a motion for summary judgment, the evidence must be viewed in the light most favorable to the party against whom summary judgment is sought, and summary judgment is not appropriate if reasonable differences of opinion

exist as to the inferences to be drawn from undisputed facts. Canterra Petro., Inc. v. Western Drilling & Mining Supply, 418 N.W. 2d 267 (N.D. 1987).

[38] In an action based on contract, where there were material issues of fact as to whether there was an agreement between the parties and whether compensation was to be paid, summary judgment was improper. Volk v. Auto-Dine Corp., 177 N.W. 2d 525 (N.D. 1970).

[39] The trial court has failed to give the Defendants Maki the benefit of the inference of the material fact that Marie could not have conveyed the children's respective 1/10 of 1/2 of all the minerals to Richard, but for inducing Waivers of Inheritance from the Defendants Maki of their 1/2 of all the minerals in Carl's probate file. The inducement was actually represented as obtaining Defendants Maki 9/10 of 1/2 of all the surface acres to be able to sell the entire farm surface to Richard so he could make a living. (Angeline Affidavit, App. 268, Dock. 69; Doris Affidavit, App. 272, Dock. 69; Caroline Affidavit, App. 112, Dock. 35)

[40] There is logically more than one inference that can be drawn from the Waivers of Inheritance that are on the public record in Carl's Probate No. 3139, but no one can deny that without the Waivers, the Contract for Deed and the Personal Representative's Deed do not convey title to the 9/10 of 1/2 of all minerals which Defendants Maki owned at the start of the Bekken office meeting.

[41] The affidavits of Angeline, Caroline and Doris who were all present at the time of the Waivers execution state that they were each to receive 1/10 of Marie's 1/2 of all minerals in exchange for their 1/10 of 1/2 of all their surface acres. (Angeline

Affidavit, App. 268, Dock. 69; Doris Affidavit, App. 272, Dock. 69; Caroline Affidavit, App. 112, Dock. 35)

[42] The trial court failed to recognize the plain facts that the Defendants Maki are alive and available to testify that what the Waivers of Inheritance they were induced to sign say is different from what was represented to them by Marie and/or Bekken. This is a genuine issue of material fact for trial. (Court Opinion, 2/25/2011, App. 303, Dock. 71, p. 5), Ritter, Laber & Assoc., Inc. v. Koch Oil, Inc. 2007 ND 163, ¶163; 740 NW2d 67.

[43] Richard's last affidavit simply puts forward a half-truth by stating that the other nine simply "renounced" all their minerals to him for no apparent reason and for no consideration.

[44] The recorded Contract for Deed contains no stated consideration for minerals despite listing a specific value for the surface and the machinery items on p. 2 (App. 208, Dock. 54).

[45] Any way you slice it, a reasoning mind viewing the evidence in the light most favorable to the Defendants Maki reaches the conclusion that there was no logical basis for the Waiver of the Defendants Maki 9/10 of 1/2 of all their mineral acres for Richard to be able to buy the farm surface and make a living.

[46] The further conclusion from that inference is that both the recorded 1973 Contract for Deed and the 1984 Personal Representative's Deed operate as the Defendants Maki understood, to convey surface only, but for the mistaken or fraudulently obtained Waivers of the 9/10 of 1/2 of all the minerals which did not say what Marie represented to the Defendants Maki to get their signatures.

[47] Marie Arndt exhibited a mistaken understanding when she had written "the minerals that are on the place stay on the place" in May 23, 1973 in the first unrecorded contract for deed three weeks after the Bekken meeting. No such language was required as a matter of law, but Marie apparently thought that an affirmative statement of conveyance was needed to transfer the 1/10 minerals of all minerals to Richard, to keep her promise to all the children some three weeks earlier. (App. 206, Dock. 54, Exh. 2, unrecorded Contract for Deed)

[48] If Richard knew and intended to receive 10/10 of the minerals on May 23, 1973, then he withheld disclosure of Marie's mistake in having to write the mineral language, which she then wrote and signed with Richard. Alternatively, if Richard thought affirmative language was necessary, then he too was mistaken.

[49] Richard's self-serving affidavit fails to explain why if he knew the law, he did not then correct Marie's mistake or if he was also mistaken, why his now stated intention to buy "all the minerals" is not the language, but only "the minerals that are on the place." (App. 206, Dock. 54, Exh. 2)

[50] Carl's Probate Court file No. 3139 shows evidence that attorney Bekken held all the minerals in the estate and later paid taxes on the minerals more than ten years from date of death and separately in order that the minerals were not titled in Marie's estate at the time in October 1984 that Marie's co-personal representatives deeded the surface to Richard (Order of County Court Determining Estate Tax dated May 14, 1985, App. 61, Dock. 18 and Amended Estate Tax Return Transmittal dated June 3, 1985, App. 58, Dock. 18). If the co-representatives had been independently counseled they should never have delivered that deed without a proper mineral reservation, but they were under

the mistaken belief that the minerals were titled in Carl's Estate and that an affirmative conveyance of the minerals was needed to transfer them to Richard and another affirmative conveyance to transfer them out of Richard.

[51] Richard and Craft et al. have entirely overlooked the fact that the recorded contract for deed plainly states that Richard will receive a deed "accompanied by an abstract evidencing good title." (App. 207, Dock. 54, Exh. 3.) There is no evidence that Richard, Craft/Enge or any of the plaintiffs examined the Recorder Office or Clerk of Court office to determine the true state of the mineral title or ever received a title opinion showing good and marketable mineral title, despite being on notice of all those public title records showing the title discrepancy regarding Bekken's recorded actions. (Order of County Court Determining Estate Tax dated May 14, 1985, App. 58, Dock. 18 and Amended Estate Tax Return Transmittal dated June 3, 1985, App. 61, Dock. 18)

[52] Richard's brief fails to disclose that in March 2007 when the co-personal representatives distributed the 1/10 of all Carl's minerals in accordance with their mother's promise, Carl's Estate was still open, some thirty-four years from his death. It did not have to be re-opened because Bekken had intentionally left it open to accomplish Marie's express promise to convey 1/10 of all to each child. (App. 211, Dock. 54, Exh. 4, March 2007 PRD.)

[53] The trial court erred in concluding as a matter of law that the recorded Contract for Deed and the 1984 Personal Representative's Deed are controlling, when they cannot exist without the mistaken and/or fraudulently obtained Waivers of Inheritance that are in the public record in Carl Arndt's Estate, Mountrail Co. Probate No. 3139.

[54] The Defendants Maki have made a showing of affidavit evidence to the trial court which should have resulted in the inference of mistake and/or fraud leading to a conclusion that the Defendants Maki are entitled to at least 9/10 of 1/2 of all minerals, and, upon a trial with the parties who were present at the creation and execution of the Waivers of Inheritance all 100% of the minerals in equal 1/10 shares.

[55] The trial court's mistaken reliance on Richard's after-the-fact tailoring of an affidavit to meet the court's earlier rulings on the Contract for Deed, misled it from the inference that but for the Waiver there is no Contract for Deed conveyance of his siblings' minerals.

[56] The trail court itself posed as a "Query" (App. 322, Dock. 71, p. 24) a genuine issue of material fact as to why the Defendants Maki executed a Personal Representative's Deed to Richard without a mineral reservation? The obvious answer is they didn't know what they were doing and made a mistake. At trial the Defendants Maki will testify that they didn't know what a mineral reservation was and that neither Judge Bekken or Richard told them that this was the perfect opportunity to correct the mineral title problems that existed between them.

[57] The trial court then mistakenly concluded that the Defendants Maki were represented by attorney Ralph Bekken and that they knew the rule in Kadrmas v. Savageau, 188 N.W. 2d 753 (ND 1971) that a mineral reservation was required to reserve the minerals to them.

[58] The record is plain to see that Bekken was not an attorney at that time in 1984, he was the sitting county judge, and he did not draft the Personal Representative's Deed or advise them on it at that time, but merely notarized the document. If they had

been advised properly in 1984 by Bekken, regardless of his official capacity, to simply go see a real estate lawyer the Personal Representative's Deed without a mineral reservation would never have been delivered to Richard's bank for recording, as a matter of plain logic. The only inference that can be drawn from the particular act of delivery is that the Co-Personal Representatives did not know the consequences of what they were doing.

[59] Richard suggests, if not admits, that Judge Bekken may not have advised the Personal Representatives properly as an explanation for the Defendants Maki incomprehensible act of delivery of the Personal Representative's Deed, (Richard's Brief App. 187, Dock. 54, p. 22). Richard's acceptance of the incorrect Personal Representative's Deed without mineral reservation evidences a mix of fraud and/or mistake on his part. It evidences plain mistake on the Defendants Maki part. Either way, it warrants reformation of the Waivers of Inheritance, the recorded Contract for Deed May 1973, and the 1984 Personal Representative's Deed.

[60] The trial court erred by not reaching the inference that the recorded Contract for Deed could not have sold all the minerals to Richard, if the Defendants Maki had not been fraudulently or mistakenly induced to sign blanket Waivers of Inheritance by then attorney Bekken.

[61] This miscarriage of justice is exactly why the remedy of reformation exists.

II

Whether the Defendants Maki are entitled to reformation of the May 1973 Waivers of Inheritance for fraud and/or mistake.

[62] The present case is almost identical to the two cases of Wehner v.

Schroeder 335 NW2d 563 (ND 1983) and Wehner v. Schroeder 354 NW2d 674 (ND 1984).

[63] In Wehner I, the Wehners sold to Schroeder in 1950 intending to reserve 50% of the minerals. The Contract for Deed however stated "that second parties (Schroeders) retain 50% of all oil, gas and minerals on said land". Later that year Wehners delivered a warranty deed to Schroeder containing no mineral reservation whatsoever. Schroeders later deeded to John Tormaschy et ux. without a mineral reservation. John Tormaschy et ux. later deeded to son Albert Tormaschy et ux.

[64] The Wehners discovered the mistake in 1978 and sued for reformation and to quiet title in 1981.

[65] "The deed at issue...can be reformed only if the rights of third persons, acquired in good faith and for value, are not prejudiced", Wehner I at 565.

[66] Here, Richard Arndt was firstly, aware of the mutual mistake because he promised Marie and Angeline he was going to cure the mistake and secondly, after Marie's death misrepresented to his siblings that he would equally distribute the minerals as Marie intended, (Angeline Affidavit, App. 268, Dock. 69; Doris Affidavit, App. 272, Dock. 69; Caroline Affidavit, App. 112, Dock. 35).

[67] Separately, Richard's grantees as the plaintiffs have constructive notice, just as in Wehner I at 565, by way of the probate files of Carl (Mountrail Probate No. 3139) and Marie (Mountrail Probate No. 3369) in favor of Angeline on or about March 15, 1985 that she re-opened the Estate of Carl to equally distribute the minerals and that the estate was still open at the time of the alleged slander of title. There is no sworn

statement to close the estate in the file, as a proper title examination would have disclosed.

[68] The defendants are entitled to reformation, Wehner I at 566, that third party purchasers had constructive notice of the filed public documents.

[69] Regarding statutes of limitations that Richard argued, the Wehner I ruling at 566-67 says that no one had possession/seisin of the minerals until they were produced. The minerals at issue have produced only within the last five years according to the recorded Oil and Gas Lease to John Holt. Therefore, the minerals have not been possessed or seised by Richard Arndt or any of his grantees for twenty years or more. The Defendants Maki claims have not lapsed by the statute of limitations.

[70] Ell v. Ell 295 NW2d 143, 151 (ND 1980) stated that "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 the reformation have been, or in the exercise of reasonable diligence should have been, discovered by the party applying for relief."

[71] Here, that date is 2007 when Angeline understood that the minerals were still in Carl's estate to be distributed equally to all the siblings which she then attempted to do by recording the Personal Representative's Deed at issue.

[72] Wehner II, supra addressed the subsequent issues of laches, estoppel, and mutual mistake and resolved them all in favor of Wehner, which in this case applies in favor of the defendants.

[73] "Where the parties entrust to an attorney or scrivener the duty of preparing a deed or other document in accord with their agreement, and he, by his own mistake or

fraud, embodies in it stipulations and conditions other than those agreed upon, the party against whom it is sought to be enforced may have it reformed, although he signed it without reading it.", Wehner II at 679, citing 66 Am. Jur. 2d Reformation of Instruments §§84 and 85, 81 ALR 2d 7, §§12 and 13.

III

Whether the Defendants Maki are entitled to reformation of the 1984 Personal Representative's Deed for fraud and/or mistake.

[74] For all the reasons set forth above and in reliance on Wehner I and II, the Defendants Maki should be granted reformation of the 1984 Personal Representative's Deed.

CONCLUSION

The trial court erred in not reconciling the material fact that the recorded 1974 Contract for Deed and the 1984 Personal Representative's Deed could not have conveyed all the minerals to Richard without fraud and/or mistake in the inducement of the Defendants Maki to sign over their 1/2 of all the minerals by an improper Waiver of Inheritance in the Estate of Carl.

Similarly, the third party buyers/plaintiffs would never have been able to manufacture color of Defendants Maki title in themselves if a proper Waiver of the surface only had been signed. They are using the trial court to create marketable title after the fact, when they were on record notice of the title problems in the Estate of Carl and should have conducted title curative work before purchasing, as a bank would have to do. Their business risk falls to them for purchasing with record notice of the Waiver and tax issues in the Probate File No. 3139 and on actual knowledge that the second

Personal Representative's Deed was being recorded to preserve the Defendants Maki minerals.

Defendants Maki request the Supreme Court to order either reformation of the Waivers of Inheritance to surface only which would cure the latent defects in the Contract Deed and first Personal Representative's Deed or reformation of the Contract for Deed to conform it to the representations of Marie to her ten children in inducing them to sign over their intestate inheritance. Alternatively, to remand to the trial court for trial leading to the above described remedy.

Respectfully submitted this 16th day of September, 2011.

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CERTIFICATE OF SERVICE

I, Greg W. Hennessy, hereby state that true and correct copies of the APPELLANT'S BRIEF and APPENDIX was served by priority mail with postage prepaid on this 16th day of September, 2011 addressed to the following party(s):

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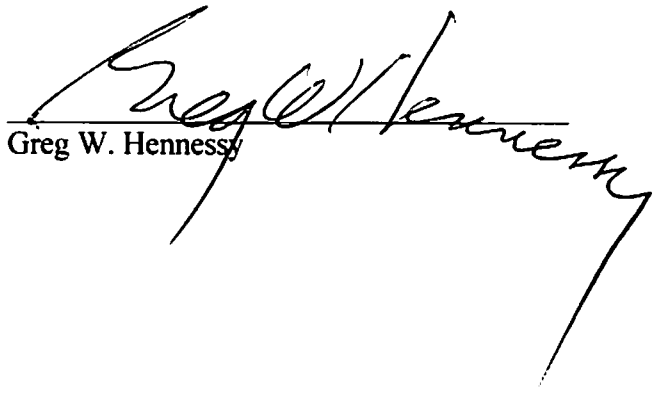

Greg W. Hennessy