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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

No. 20110191

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,

Plaintiffs and 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,

Defendants and Appellants
and Cross-Appellees

APPEAL FROM SUMMARY JUDGMENT, THE DISTRICT COURT,
NORTHWEST JUDICIAL DISTRICT, MOUNTRAIL COUNTY,
STATE OF NORTH DAKOTA

THE HONORABLE WILLIAM W. McLEES, PRESIDING

BRIEF OF PLAINTIFFS/APPELLEES AND CROSS-APPELLANTS

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STATEMENT OF THE CASE

(1) Appellants, Angeline Maki, Marily Bryant, Lillian (Gunderson) Jastrzebski, Caroline Sadle, Esther Maki, Doris Walter, Gloria Worley, Laura Erber, Lloyd Arndt, and Jason Arndt (hereinafter "Maki Defendants"), have appealed a judgment entered against them by Richard Arndt, Karen Arndt, Gary Craft, Marshall Craft and Jane Craft, and William (W.R.) Everett (hereinafter "Arndt Plaintiffs"). The District Court, Northwest Judicial District, The Honorable William W. McLees presiding, entered Judgment on a Motion for Summary Judgment by the Arndt Plaintiffs quieting title in the Arndt Plaintiffs for mineral interests in Mountrail County and specifically that all interests claimed by the Maki Defendants to the real property, which is the subject of this litigation, were adjudged null and void and that the Maki Defendants have no claim, estate or interest in the subject property and that all persons or entities which purport to claim an interest in the subject property by and through any of the Maki Defendants are likewise adjudged null and void. Judgment was recorded April 20, 2011. Notice of Entry of Judgment and Taxation of Costs was entered April 27, 2011. The Maki Defendants filed their Notice of Appeal June 24, 2011. The Arndt Plaintiffs filed the Notice of Cross Appeal on July 8, 2011 as to that portion of the Judgment wherein the District Court denied, without receipt of evidence or a hearing, the Arndt Plaintiffs' request for attorneys' fees under N.D.C.C. 47-19.1-09.

STATEMENT OF FACTS

(2) The Arndt Plaintiffs are the owners of mineral interests in Mountrail County, North Dakota. The mineral interests are described in the Complaint (App. pp 12-19) and

the Judgment (App. pp 333-5)and will be herein referred to as “subject minerals” or “Arndt Family Farm minerals”.

(3) Carl and Marie Arndt were the parents of Richard A. Arndt, Angeline Maki, Marily Bryant, Lillian (Gunderson) Jastrzebski, Caroline Sadle, Esther Maki, Doris Walter, Gloria Worley, Laura Erber and Charles Arndt. Charles Arndt passed away and his heirs are his sons, Lloyd Arndt, and Jason Arndt. (App. p 199)

(4) Richard Arndt was in the United States Navy in 1967. He received a letter from his parents asking him if he would leave the Navy, come home and take over the family farm. He came home in May and June of 1967. Carl, Marie and Richard discussed Richard coming home to farm. He agreed on the condition that he would allowed to buy the entire Arndt Family Farm. Richard was honorably discharged from the Navy in 1968 and came home and thereafter farmed with his father, Carl, until 1973 when Carl Arndt died. (App. pp 199-200)

(5) Carl Arndt died on May 1, 1973 without a will. The entire Arndt Family Farm was titled in Carl Arndt’s name only. In May 1973 the entire Arndt family, including Marie and all ten children, met with attorney Ralph Bekken in his office regarding the affairs of Carl Arndt. It was explained to the family that under the laws of intestate succession, Marie Arndt was entitled to one-half of Carl Arndt’s estate and the remainder would be divided among the children. Marie Arndt was appointed Personal Representative of the Estate of Carl Arndt. All of the Arndt children consented and renounced their interest in the Arndt Family Farm. Thereafter, the Arndt children understood that Marie Arndt was the sole owner of the Arndt Family Farm including surface, minerals, equipment, stored grain, etc. They all understood that Marie Arndt was free to dispose of the Arndt Family

Farm as she wished. Marie Arndt made known her intention at that time to sell the farm to Richard as had been agreed by Carl and Marie prior to Carl Arndt's death. (App. pp 199-204)

(6) Marie and Richard entered into a handwritten agreement dated May 23, 1973, written by Marie, wherein the terms for the purchase of the Arndt Family Farm by Richard were set forth. (App. pp 205-06) Included in the May 23, 1973 handwritten agreement is the statement "The mineral rights that are on the place go with the place". (*Id.*) The only persons present when the handwritten agreement was discussed, prepared and signed were Marie Arndt and Richard Arndt. Marie did not discuss the terms or conditions of the May 23, 1973 handwritten agreement with her children (the Maki Defendants), other than Richard. (App. p 200)

(7) Richard understood, and has stated under oath, that the intention and agreement of he and his mother at the time the handwritten agreement dated May 23, 1973 was prepared and signed, was that he was buying the entire Arndt Family Farm including all of the minerals. (*Id.*)

(8) Some time prior to October 24, 1973 Marie Arndt contacted attorney Ralph Bekken, her attorney, and had him prepare a typed contract for deed for the sale of the Arndt Family Farm to Richard. Marie Arndt and Richard Arndt signed the Contract for Deed on October 24, 1973 before attorney Ralph Bekken who notarized their signatures. The October 24, 1973 Contract for Deed was recorded at the Office of Register of Deeds, Mountrail County, North Dakota. (App. pp 98-99, 200-01)

(9) None of the remaining Arndt children (Maki Defendants) were present when the October 24, 1973 Contract for Deed was discussed, prepared or signed. Only Marie

Arndt and attorney Ralph Bekken were present when she discussed the preparation of the October 24, 1973 Contract for Deed and only she, Richard Arndt and attorney Ralph Bekken were present when it was signed. Thereafter Richard made all of the payments due under the Contract for Deed to Marie Arndt while she was alive. (App. p 201)

(10) Marie Arndt died intestate on November 12, 1975. Angeline Maki and Marily Bryant were appointed Co-Personal Representatives of Marie Arndt's Estate and were also substituted as Co-Personal Representatives of the Carl Arndt Estate. (App. pp 201-03)

(11) After Marie Arndt died Richard Arndt made all of the payments due under the Contract for Deed to the Marie Arndt Estate. Those payments were accepted and the proceeds disbursed to the heirs of Marie Arndt. (*Id.*)

(12) In the summer of 1984 Richard Arndt determined that he would pay off the remainder due on the Contract for Deed. He arranged for a loan at Scandia Bank in Stanley, North Dakota. The balance due under the Contract for Deed was deposited in the Marie Arndt Estate account. That payment was accepted and the proceeds disbursed to the heirs of Marie Arndt. On October 3, 1984 the Final Decree of Distribution in the Estate of Carl Arndt was entered by the Court wherein the entire Arndt Family Farm (without reservation) was distributed to the Estate of Marie Arndt. That Decree was recorded in the Mountrail County Register of Deeds Office on October 4, 1984 at 11:15 a.m. On October 4, 1984 a Personal Representatives' Deed (without reservation) from the Marie Arndt Estate (dated January 13, 1984) was recorded at the Mountrail County Register of Deeds on October 4, 1984 at 3:30 p.m. transferring the entire Arndt Family Farm (without reservation) to Richard Arndt. The January 13, 1984 Personal

Representatives' Deed was signed by Angeline Maki and Marily Bryant in their capacity as Co-PR's of the Marie Arndt Estate. (App pp. 199-215)

(13) On June 28, 1985 Ralph Bekken died. (App. p 216)

(14) A search for records and files of attorney Ralph Bekken has disclosed that all of his records and files have been lost or destroyed. There are no files of attorney Ralph Bekken pertaining to Carl Arndt or his Estate, Marie Arndt or her Estate, the October 24, 1973 Contract for Deed, or the October 4, 1984 PR's Deed nor any documents relating to the Arndt Family Farm except for those documents referenced above and recorded in the office of the Register of Deeds. (App. p 211)

(15) On March 29, 2007 Angeline Maki and Marily Bryant, in their capacity as Co-Personal Representatives of the Estates of Carl Arndt and Marie Arndt, prepared and recorded a second Personal Representatives Deed purportedly conveying the minerals under the Arndt Family Farm to all of the heirs of Carl and Marie Arndt then living. (App. p 211)

(16) In September of 2007 all of the Maki Defendants recorded separate Statements of Claim in which they claim an interest in the Arndt Family Farm minerals. (App. p 171)

(17) Richard Arndt and the mineral owners he had conveyed an interest to commenced a quiet title action against the Maki Defendants by Complaint dated November 4, 2008. (App. pp 12-29)

(18) All the Plaintiffs (including the Arndt Plaintiffs) moved for summary judgment by motion dated February 9, 2009. (App. pp 33-44) This motion was denied. (App. pp 66-85) However, the District Court in its ruling held:

In reviewing the Contract for Deed (10-24-73) and the Deed

> of Personal Representative (01-13-84) given in fulfillment of the contract, the same appear to be wholly *unambiguous* and *consistent*, in the sense that: (a) the parties are clearly identified; (b) the description of the property being conveyed is clearly set forth; (c) the terms of both documents are readily understandable; (d) both documents appear to have been executed with the requisite formalities; and, (e) there is *no mineral reservation* in either of these documents. (Emphasis by the District Court) (App. pp 75-76)

(19) The District Court also stated the Maki Defendants were "facing an uphill battle in their attempt to persuade the finder of fact, by *clear and convincing evidence*, that these documents should be reformed so as to include a mineral reservation. …" (Emphasis by the District Court)(App. pp 76-77)

(20) The Arndt Plaintiffs again moved for summary judgment by motion dated September 10, 2010. (App. pp 164-238). The District Court granted this motion issuing its Memorandum Opinion dated February 25, 2011. (App. pp 299-325)

(21) This appeal followed.

JURISDICTION

(22) The District Court had jurisdiction under North Dakota Constitution Article VI Section 8 and N.D.C.C. § 27-05-06.

(23) The Maki Defendants' Notice of Appeal was filed on June 24, 2011 and the Arndt Plaintiffs' Cross-Appeal was filed July 8, 2011 and the appeal and cross appeal are timely under N.D.R.App.P. 4(a).

(24) The North Dakota Supreme Court has jurisdiction under N.D. Constitution Article VI, Sections 2 and 6 and N.D.C.C. § 28-27-01.

LAW AND ARGUMENT

(25) The Arndt Plaintiffs moved for summary judgment seeking to quiet title in the Arndt Family Farm minerals. The District Court granted summary judgment in favor of the Arndt Plaintiffs which can be fairly summarized in the District Court's Opinion, page 25, App. p 323 as follows:

> When all is said and done, the Court finds, as a matter of law, that the proof offered by the Maki Defendants in support of their reformation claim falls far short of the **clear, satisfactory, specific and convincing evidence** they need in order to show that the parties (i.e., **both** parties) to the documents in question (i.e., the October 24, 1973, Contract for Deed and the January 13, 1984, Deed of Personal Representative) intended …on the separate occasions those documents were executed …to say something different from what is actually said in those documents. (Emphasis by the District Court)

(26) The Maki Defendants, primarily focusing on alleged statements made by their now deceased mother, in the office of the now deceased Ralph Bekken, following the death of their father, Carl Arndt, sought reformation, apparently claiming fraud, mistake, or a combination of fraud and mistake. The Maki Defendants' claims are solely based upon self serving affidavits. These same arguments are advanced in this appeal.

(27) The District Court found the documents of sale, specifically, the typed Contract for Deed dated October 24, 1973, and the Personal Representatives' Deed dated January 13, 1984 (recorded October 4, 1984) were:

> …wholly *unambiguous* and *consistent* in the sense that: (a) the parties are clearly identified; (b) the description of the property being conveyed is clearly set forth; (c) the terms of both documents are readily understandable; (d) both documents appear to have been executed with the requisite formalities; and, (e) there is *no mineral reservation* in either of these documents. (Emphasis by the Court) (App. p 320)

(28) The District Court further held the Maki Defendants' burden of proof was to "persuade the finder of fact, by *clear and convincing evidence*, that these documents should be reformed so as to include a mineral reservation, …" (Emphasis by the District Court) (App. p 321)

(29) The District Court, after a thorough review of the case, offered a comprehensive analysis of the law. There is a dearth of evidence by the Maki Defendants to support their claims for reformation. The District Court rightfully focused on the time that the May 23, 1973, handwritten Contract for Deed and the October 24, 1973, typed Contract for Deed were prepared and signed. The Maki Defendants acknowledged that they were not present nor did they have any input into the preparation of the May 23, 1973, handwritten Agreement nor the October 24, 1973 typed Contract for Deed. The District Court stated as follows:

> While all of these deposed siblings of Richard testified as to what Marie supposedly told them were her intentions with respect to ownership of the minerals underlying the Arndt Family Farm, Richard has pointed out to the Court that (a) his siblings have very candidly acknowledged that none of them were present (or privy to what was said) during the discussions leading up to the execution of the May 23, 1973, handwritten agreement between Marie and Richard; (b) his siblings have very candidly acknowledged that none of them were present (or privy to what was said) at the time of the execution of this handwritten agreement; (c) his siblings have very candidly acknowledged that none of them were present (or privy to what was said) at the time of the execution of the October 24, 1973, Contract for Deed between Marie and Richard; (d) the only person still living, with personal knowledge of what transpired during the negotiations leading up to the execution of the May 23, 1973, handwritten agreement between Marie and Richard, is Richard; (e) the only person still living, with personal knowledge of what transpired at the time of the execution of this handwritten agreement, is Richard; (f) the only person still living, with personal knowledge of what transpired at the time of the execution of the October 24, 1973, Contract for Deed between Marie and Richard, is Richard; and, (g) his siblings have been unable to produce

> any written documentation in support of their contention that the minerals underlying the Arndt Family Farm are rightfully owned by the ten Arndt children in equal shares. (App. p 315)

(30) The District Court noted the absence of evidence for the Maki Defendants:

> The Maki Defendants, on the other hand, have offered no evidence that, on the separate occasions the May 24, 1973, handwritten agreement and the October 24, 1973, Contract for Deed were executed, the parties to those two instruments (i.e., Marie and Richard) **intended to say something different from what was actually said in those instruments.** For purposes of this reformation action, the focus has to be on the *dates these instruments were executed*, and not on what Marie may have said (about ownership of the minerals) previously or subsequently thereto. (Emphasis by the District Court) (App. pp 321-22)

(31) The District Court went on to conclude, as a matter of law, that the October 24, 1973 Contract for Deed and January 13, 1984, Deed of Personal Representative recorded October 4, 1984, were wholly *unambiguous and consistent*. (App. p 320)

The District Court concluded:

> When all is said and done, the Court finds, as a matter of law, that the proof offered by the Maki Defendants in support of their reformation claim falls far short of the **clear, satisfactory, specific and convincing evidence** they need in order to show that the parties (i.e., **both** parties) to the documents in question (i.e., the October 24, 1973, Contract for Deed and the January 13, 1984, Deed of Personal Representative) intended ----on the separate occasions those documents were executed----to say something different from what was actually said in those documents.
>
> As the Arndt Plaintiffs have pointed out in their Brief in Support of Motion for Summary Judgment, "The Defendants have no such evidence because no one is alive, save Richard Arndt, who was present when those documents were discussed, prepared and signed. Death has sealed the lips of Marie Arndt and her attorney, Ralph Bekken. Richard Arndt states, under oath, that he intended to buy the entire Arndt Family Farm including the minerals and

> that is what his mother (i.e., Marie) intended to sell him." (Emphasis by the Court) (App. p 323)

I. SUMMARY JUDGMENT

(32) N.D.R.Civ.P. 56(c) provides in pertinent part: "Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

(33) The District Court, quoting this Court from Barbie v Minko Construction, Inc., 2009 ND 99, ¶ 5, 766 N.W.2d 458, 460 stated:

> "Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can be reasonably drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we 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 be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record." (App. p 316)

(34) "A party seeking reformation (of a contract) has the burden to prove by clear and convincing evidence that a written agreement does not fully or truly state the agreement the parties intended to make." Ritter Laber and Associates, Inc. v Koch Oil, Inc., 2007 ND 163, ¶ 14, 740 N.W.2d 67, 72 citing Dahl v Messmer, 2006 ND 166, ¶ 9, 719

N.W.2d 341, 344. The burden rests on the Maki Defendants to present evidence to support reformation and they have wholly failed to do so.

(35) It is incumbent upon the trial court to also consider, in a motion for summary judgment, the standard of proof. This Court stated in Heart River Partners v Goetzfried, 2005 ND 149, ¶ 9, 703 N.W.2d 330, 336: "The Court must consider whether the trier of fact 'could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not.'"

(36) The District Court found, and citing, Ritter, *Id.* at ¶ 14, that the quantum of proof required of the Maki Defendants is *clear and convincing* not merely a preponderance. (Emphasis by the District Court) (App. p 321) *See also*, Dahl v Messmer, 206 ND 166, ¶ 9, 719 N.W.2d 341, 344 and Spitzer v Bartelson, 2009 ND 179, 773 N.W.2d 798.

(37) The District Court stated:

> Alerus Fin., N.A. v. Western State Bank, 2008 ND 104, ¶ 17, 750 N.W.2d 412 (quoting Riemers v Grand Forks Herald, 2004 ND 192, ¶ 4, 688 N.W.2d 167); *See*, N.D.R.Civ.P. 56(e). "Rule 56 requires the entry of summary judgment against a party who fails to establish the existence of a material factual dispute as to an essential element of the claim and on which the party will bear the burden of proof at trial." *E.g.* Halvorson v Sentry Ins. 2008 ND 205, ¶ 5, 757 N.W.2d 398. "This Court has repeatedly cautioned that 'mere speculation is not enough to defeat a motion for summary judgment, and a scintilla of evidence is not sufficient to support a claim.'" Heart River Partners v Goetzfried, 2005 ND 149, ¶ 8, 703 N.W.2d 330 (quoting State v North Dakota State Univ., 2005 ND 75, ¶ 8, 694 N.W.2d 225); In Re Estate of Richmond, 2005 ND 145, ¶ 12, 701 N.W.2d 897; Investors Real Estate Trust Props, Inc. v Terra Pac. Midwest, Inc., 2004 ND 167, ¶ 5, 686 N.W.2d 140; Zuger v State, 2004 ND 16, ¶ 8, 673 N.W.2d 615; Iglehart v Iglehart, 2003 ND 154, ¶ 10, 670 N.W.2d 343. "In order to meet the burden of establishing a genuine issue of material fact on an essential element of a claim, a party opposing a motion for summary judgment must present 'enough evidence for a

> reasonable jury to find for the plaintiff.'" Riemers, at ¶ 7 (quoting Iglehart, at ¶ 10).
>
> Also, even if factual disputes exist, summary judgment is proper if the law is such that the resolution of those factual issues will not change the result. Diocese of Bismarck Trust v Ramada, 553 N.W.2d 760 (N.D. 1996). Further, disputes of fact can become questions of law if reasonable persons can draw only one conclusion from the evidence. Hougum v Valley Memorial Homes, 1998 ND 24, 574 N.W.2d 812; Kuntz v Mueller, 1999 ND 215, 603 N.W.2d 43. (App. pp 316-17)

(38) As applied to the case at bar, the Maki Defendants who bear the burden of proof are required to prove their case by clear and convincing evidence. A preponderance will not suffice.

(39) A motion for summary judgment is not a substitute for a trial, but, for purposes of determining the granting or denial of a motion for summary judgment, the District Court is certainly not obligated to blindly accept unsubstantiated claims. Similarly, the District Court is not required, nor should it, apply irrelevant or unrelated factual representations to the issues presented. For example, statements or representations by Marie Arndt at times other than when the transactions took place cannot be said to rise to the quantum of proof of clear and convincing when, if they occurred, they occurred at times other when the transaction was discussed and entered into. The District Court stated:

> The Maki Defendants, on the other hand, have offered no evidence, that, on the separate occasion the May 24, 1973, handwritten agreement and the October 24, 1973, Contract for Deed were executed, the parties to those two instruments (i.e., Marie and Richard) **intended to say something different from what was actually said in those instruments**. (Emphasis by District Court) (App. p 321)

(40) In the case at bar, as the District Court pointed out, the Maki Defendants' claims are unsupported as they "very candidly" admit that they were not present and have no documentary evidence to support their claims which would represent what Marie and Richard intended at the time Contract(s) for Deed were negotiated, prepared and signed. (App. p 315)

(41) In addition, disputes of fact can become questions of law if reasonable persons can draw only one conclusion from the evidence. Shipper Construction Inc. v American Crystal Sugar Company, 2008 ND 226, ¶ 12, 758 N.W.2d 744, 748; Hougum v Valley Memorial Homes, 1998 ND 24, 574 N.W.2d 812; and Kuntz v Mueller, 1999 ND 215, 603 N.W.2d 43. This has particular application to the case at bar because no other conclusion can be drawn other than the handwritten Contract for Deed dated May 23, 1973, the typed Contract for Deed dated October 24, 1973 and the PR's Deed dated January 13, 1984 given in fulfillment of the Contract, are wholly *unambiguous and consistent*. Furthermore, the only person alive who was present when the Contract for Deed was discussed, prepared and signed is Richard Arndt and he has provided, by affidavit under oath, an unequivocal representation that the intention of the parties to that agreement was that he was buying the entire Arndt Family Farm, including the minerals.

(42) The District Court, in granting the summary judgment, concluded that while affording the Maki Defendants all benefits and presumptions:

> … the proof offered by the Maki Defendants in support of their reformation claim falls far short of the **clear, satisfactory, specific and convincing evidence** they need in order to show that the parties (i.e., **both** parties) to the documents in question (i.e., the October 24, 1973, Contract for Deed and the January 13, 1984 Deed of Personal Representative) intended----on the separate occasions those documents were

> executed----to say something different from what was actually said in those documents." (Emphasis by the District Court) (App. p 323)

(43) The District Court, in a ruling on a prior motion for summary judgment (App. pp 66-77) engaged in analysis of the documents of conveyance in this particular case (i.e., the May 23, 1973 handwritten Agreement, October 24, 1973 typed Contract for Deed, and the January 13, 1984 PR's Deed (recorded October 4, 1984)) and concluded that they were *unambiguous and consistent*. (Emphasis by the District Court) (App. p 75) This Court, in reviewing the documents at issue, and considering the analysis of the District Court, should likewise conclude that these documents are unambiguous and consistent. Therefore, parol evidence, even though of such poor quality as is presented by the Maki Defendants in this case, need not and should not be considered.

(44) The Parol Evidence Rule is a North Dakota statute on the construction of contracts found at N.D.C.C. § 9-07-04 which states:

> **Intention ascertained from writing alone if possible.** When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible, subject, however to the other provisions of this chapter.

(45) As applied to the case at bar, if the District Court, or this Court for that matter, were to conclude that there were an ambiguity or inconsistency among or between the documents of conveyance at the case at bar, then, but only then, would it be appropriate for the District Court or this Court to consider parol evidence. *See*, Stracka v Peterson, 377 N.W.2d 580 (N.D. 1985) and Des Lacs Valley Land Corp. v Herzig, 2001 ND 17 ¶ 9, 621 N.W.2d 860. Stated otherwise, unless there is ambiguity or inconsistency, parol evidence should not be considered. Since there is neither in the documents before this

Court, the statements of Marie's intention or promise (if made) cannot serve as a basis for a material factual dispute such that summary judgment could be denied.

II. Maki Defendants' Arguments

(46) The Maki Defendants' claims, which they advance as a basis for reformation, even if true, all fail. There is little, and really no, evidence upon which a finder of fact could reform the handwritten Contract for Deed of May 23, 1973, the typed Contract for Deed of October 24, 1973, and the January 13, 1984 Personal Representatives Deed. There is no evidence the parties to those documents intended, at the time the documents were signed, something other than the "wholly unambiguous and consistent" effect of the documents. Considering the burden of proof required of the Maki Defendants and the paucity of their evidence, their claim for reformation must fail.

(47) The Maki Defendants make a convoluted, confusing and wholly unconvincing argument that an ambiguity exists among the documents of record in this case. However, it was apparent to the District Court and is apparent from reviewing the documents that no such ambiguity or inconsistency is present in the documents.

(48) The Maki Defendants then attempt, through self serving affidavits without so much as a single document to bolster their claim, to avoid the clear, unambiguous language of the documents with naked claims of mistake or fraud. The Maki Defendants' claims should be rejected as completely without support in fact or law.

A. Statements of Marie Arndt (even if made) Do Not Support Reformation

(49) The Maki Defendants argue that some form of agreement or bargain was struck between them and their mother after their father, Carl, died and that upon this reformation is appropriate. This argument must fail for a number of reasons. First, the statements,

self serving as they are, were made at a time other than when the pertinent documents were discussed, prepared and executed. In order to reform the documents on the basis of mistake or fraud the Maki Defendants must present admissible evidence that is clear, satisfactory, specific and convincing to show that the documents did not accurately state what both parties intended **at the time** of the execution of the documents. (Emphasis added) Heart River, *supra* ¶¶ 14 and 16. "It must be shown that *at the time* of the execution of the agreement …" both parties intended to say something different from what was said in the instrument" Melchior v Lystad, 2010 ND 140, ¶ 10, 786 N.W.2d 8, 12 quoting Ell v Ell, 295 N.W.2d 143, 150 (N.D. 1980) (Emphasis added by the Melchior Court) The Maki Defendants admit they were not present and have no knowledge of what was discussed in the context of preparing the documents of conveyance. No one is alive who was present when those events occurred other than Richard Arndt. Richard has stated unequivocally that he was intending to buy, and his mother was intending to sell, the entire Arndt Family Farm including minerals at the time the documents were prepared and signed.

(50) Second, it must be pointed out that the Maki Defendants did not offer the District Court nor this Court any documentary evidence of this supposed arrangement. The Maki Defendants have not provided the District Court, and therefore it is unavailable for this Court, the Waivers of Inheritance, assuming there is such a document, which would establish or at least could possibly establish, whether there was an agreement to exchange renunciation for a future conveyance. The burden rests on the Maki Defendants to offer this evidence and they have not. The District Court was concerned over the absence of

documentary evidence as this Court should be. "The Maki Defendants, on the other hand have offered no evidence …" (Emphasis by the District Court) (App. p 321)

(51) Third, the burden rests on the Maki Defendants to establish by **clear, satisfactory, specific and convincing** evidence the basis for their reformation. The quality of the Maki Defendants proof is so flimsy and specious that the District Court was really left with no choice but to grant summary judgment. This Court has countenanced:

> In reformation claims, courts presume the terms of an instrument accurately express the actual agreement of the parties. Ell v Ell¸295 N.W.2d 143, 150 (N.D. 1980) 'Courts will not make a new contract through reformation of a written instrument in a manner never considered or intended by the parties.' *Id*. When considering whether to reform a written instrument 'courts should exercise great caution and require a high degree of proof, *especially when death has sealed the lips of the original parties or a party.'* Ives v Hanson, 66 N.W.2d 802, 805 (N.D 1954) (emphasis in original)(citation omitted). '[A] party who seeks reformation has the burden to prove by clear and convincing evidence that a written instrument does not state the agreement the parties intended.' Heart River Partners v Goetzfried, 2005 ND 149, ¶ 14, 703 N.W.2d 330, 337 Therefore, courts 'will not grant the high remedy of reformation even upon a mere preponderance of the evidence, but only upon the certainty of error.' Ell at 150 (quoting Oliver v Mercer Elec. Coop., Inc. v Fisher, 146 N.W.2d 346, 355 (N.D. 1966). Spitzer v , 2009 ND 179, ¶ 24, 773 N.W.2d 798, 805

(52) In the case at bar, death has sealed the lips of Marie Arndt as to the events surrounding the preparation and signing of the May 23, 1973, handwritten agreement. Death has sealed Marie Arndt's lips regarding the circumstances surrounding the October 24, 1973 typed Contract for Deed, as well as the attorney who prepared it for her. Therefore, no one is alive to contradict what Richard has presented by sworn affidavit. Richard Arndt states it was the intention of the parties at the time of the sale of the Arndt

Family Farm that he was buying and Marie was selling the entire Arndt Family Farm, including minerals, and the contract documents state exactly that in a "wholly unambiguous and consistent" manner.

(53) Fourth, the conveyance of the Arndt Family Farm by the Maki Defendants, although in their capacity as PRs of the Estates of Carl Arndt and Marie Arndt, establishes a presumption that they knew what was being conveyed and that they intended to convey the entire Arndt Family Farm to Richard. *See*, Federated Surety Company v Midwest Construction Company, 228 NW 432 (N.D. 1929)

(54) The Maki Defendants are unable to overcome the clarity and consistency of the two 1973 Contracts for Deed and the 1984 PR's Deed. As the District Court found, and is obvious from reviewing the documents, all three of these documents had as their object, and ultimately resulted in a conveyance of the entirety of the Arndt Family Farm, including minerals to Richard.

B. The Maki Defendants Claim of Mistake Cannot Support Reformation

(55) The Maki Defendants also present to this Court (as they did the District Court) a claim that they were mistaken and/or did not understand that a deed without reservation conveys the entirety of the grantor's interest, including minerals. The Maki Defendants don't apparently dispute the effect of a deed without reservation, nor do they have a basis for doing so. "It is a well established rule that a general conveyance of land, without any exception of minerals conveys not only the surface but also the minerals." Kadrmas v Sauvageau, 188 N.W.2d 753, 755 (N.D. 1971), *See also*, Miller v Kloeckner, 1999 ND 190, ¶ 10, 600 N.W.2d 881, 884 and Spitzer v Bartelson, 2009 ND 179, ¶ 26, 773 N.W.2d 798.

(56) The Maki Defendants don't dispute the law, only claim they didn't know or understand it. The Maki Defendants' unilateral lack of understanding of the law is not a basis to reform this deed.

(57) This argument for reformation fails for a number of reasons. First, the Maki Defendants have not offered, and cannot offer, any evidence upon which it could be concluded that Marie Arndt was mistaken as to the law or the effect of the language of the Contract for Deed at the time she entered these agreements. She is deceased. The evidence, self serving as it is, is for times other than when the agreements were discussed and entered.

(58) Second, while Marie was alive and the Contract for Deed was prepared she had the assistance of counsel, attorney Ralph Bekken. Logic would conclude that attorney Ralph Bekken knew the law and that the October 24, 1973 Contract for Deed says what it means. Certainly there is no evidence to conclude otherwise.

(59) Third, the Maki Defendants have no evidence that Richard misunderstood the law, nor do they have any evidence that Richard knew of any misunderstanding (if there ever was one) by Marie, or for that matter, the Maki Defendants.

(60) Fourth, the Maki Defendants, and in particular, Angeline Maki, argues that she was mistaken or did not understand the effect of this well known rule of law when she, along with her sister, Marily Bryant, as co-personal representatives of the estates of Marie and Carl Arndt, executed a deed resulting in the conveyance of the entire Arndt Family Farm (including minerals) to Richard. However, it is presumed that a party, in this case, Angeline Maki and Marily Bryant as co-personal representatives of the estates acted voluntarily and with knowledge as to what they had signed (i.e., the 1984 PR's

Deed), what it contained, and what their signatures bound them to. *See*, Federal Surety Company v. Midwest Construction Company, 228 N.W. 432, 434 (N.D. 1929) in which this Court upheld an instruction to the jury of: "A person in signing any bond or contract is presumed to act voluntarily, with knowledge as I (the trial court instructed) said before of what he has signed, and what it contains, and what his signature binds him to."

(61) The Maki Defendants' claims of mistake as a basis for reformation must be rejected.

C. Attorney Ralph Bekken's Statements or Representations (If Made) Cannot Support Reformation

(62) The Maki Defendants raise the specter that attorney Ralph Bekken somehow played a role in them not getting the minerals under the Arndt Family Farm. The Maki Defendants claim that it was represented to them, by attorney Ralph Bekken, that the minerals under the Arndt Family Farm were somehow put back in Carl Arndt's Estate. The "put back" was supposedly accomplished without Richard's knowledge or agreement. That didn't and couldn't happen.

(63) The Maki Defendants also argue that Carl Arndt's Estate was still open and somehow, for as yet unexplained reasons, that is a basis for reformation. This is simply not the law. Whether Carl Arndt's Estate was open or not has no bearing on the transaction between Richard Arndt and Marie Arndt. Once the minerals were transferred to Marie Arndt's Estate, and her Estate transferred them to Richard the transaction was complete.

(64) This argument is fatally flawed. If attorney Ralph Bekken did or failed to do what should or should not have been done, the issue is between the Maki Defendants and

attorney Ralph Bekken. While it is known that attorney Ralph Bekken is long since dead and his files have been lost or destroyed and there is certainly the issue of the statute of limitations, those matters are not a basis for the District Court, or for this Court, to reform a transaction between Marie Arndt and her Estate and Richard Arndt.

(65) There was no evidence presented to the District Court and none to this Court that Richard played any role whatsoever in what attorney Ralph Bekken said to Marie or the Maki Defendants. There is likewise no evidence that Richard even had any knowledge of what attorney Ralph Bekken may have said to Marie or the Maki Defendants. Therefore, this cannot support reformation.

D. The Maki Defendants Claim for Reformation, Based on Bare Assertions of Fraud and/or Mistake by Richard Must Fail

(66) The Maki Defendants claim Richard engaged in some form of fraud as a basis for reformation and/or that there was a mistake by them that was known to Richard. There are, as with all of the Maki Defendants' arguments, obvious and fatal flaws with their argument. First, and probably most significant, they have no evidence to support their claims. Richard, by Affidavit and as the only living party in the transaction with his mother, Marie, has stated unequivocally the agreement was Marie was selling and he was buying the entire farm, including minerals.

(67) Second, Richard's stated intention is wholly consistent with the documents executed between he and Marie, and Marie's Estate.

(68) Third, the Maki Defendants have acknowledged that they were not present when the terms of the sale to Richard were discussed between he and Marie and therefore they

are not in a position to challenge what the parties' intentions were at the time the agreement was signed.

(69) Fourth, the Maki Defendants (Angeline and Marily) presumably with knowledge of its contents and effect, signed the 1984 PR's Deed, which like the previous documents is wholly consistent and unambiguous.

E. Wehner I and II Are Distinguishable and Do Not Support Reformation

(70) The Maki Defendants contend that the case at bar is "almost identical" to the cases of Wehner v Schroeder, 335 N.W.2d 563 (ND 1983)(Wehner I) and Wehner v Schroeder, 354 N.W.2d 674 (ND 1984) (Wehner II). This is simply not correct. Wehner I and Wehner II are clearly distinguishable from the case at bar. In Wehner I and II there was an obvious inconsistency on the face of the documents. The Contract for Deed in Wehner I and II contained a specific 50% reservation of minerals. The fulfilling deed had no reservation. In the case at bar, there is no inconsistency between the Contract(s) and the fulfilling Deed. Wehner I and Wehner II are not "almost identical" to the case at bar. In point of fact, they are significantly different.

F. Heart River Is Instructive and Supports The District Court's Holding In The Case At Bar

(71) The case of Heart River Partners v. Goetzfried, 2005 ND 149, 703 N.W.2d 330, more closely resembles the case at bar factually and legally. In Heart River this Court affirmed a summary judgment of dismissal in which the plaintiff (Heart River) had sought reformation of a deed. It was contended by Heart River that the warranty deed did not include terms which had been verbally agreed to but were not included in the final deed. The basis for Heart River's contention was a (self serving) affidavit wherein it was

represented to the court that an agreement had been reached as to terms that were not included in the deed and that was the basis for the claim for reformation. The defendants (Goetzfried) and prevailing parties, disputed, once again by affidavit, the purported agreement for the additional terms. The trial court dismissed, on summary judgment motion, the Heart River claim for reformation and this Court upheld that determination. The basis upon which the trial court granted the summary judgment was that the warranty deed was "unambiguous". *Id.* at ¶ 6, p 335 The trial court further found that there was "no evidence of a mutual mistake by the parties, nor were the Goetzfrieds aware the partnership was under a mistaken impression about the assessments" *Id.*. This Court concluded in Heart River:

> More important, however, the conflicting factual versions of the parties' negotiations indicate there may be a dispute about the terms of the parties' oral agreement, but that dispute is not a material fact for purposes of the reformation claim because there was no common intention entertained by both parties. The warranty deed unambiguously stated the property was "free from all encumbrances except installments of special assessments or assessments for special improvements which had not been certified to the county auditor for collection." The written deed conformed to the Goetzfried's version of the facts and does not support a claim that both parties intended to say something different from what was said in the deed. *Id* at ¶ 17, p. 338

(72) As applied to the case at bar, Richard has stated unequivocally that he was buying the entire Arndt Family Farm, including the minerals. That is what the handwritten Agreement dated May 23, 1973 states, that is what the October 24, 1973 typed Contract for Deed in effect was being conveyed and that is what the January 13, 1984 PR's Deed

conveys. The written contracts and deed all conform to Richard's version of the facts, therefore there is no dispute of material fact.

(73) Furthermore, in Heart River, both parties to the contract were present to offer sworn affidavits. In the case at bar, Marie Arndt and her attorney are long since deceased and therefore the Maki Defendants really have no evidence that could be offered as to what was discussed at the time those documents were prepared and signed.

(74) Heart River more closely coincides with the case at bar and supports the District Court's granting of summary judgment and this Court reaching that same conclusion.

CONCLUSION

(75) This Court should affirm the decision of the District Court and uphold the determination entering judgment quieting title in the interests of the Arndt Plaintiffs in the Arndt Family Farm minerals.

ARNDT PLAINTIFFS' CROSS APPEAL

STATEMENT OF THE CASE ON CROSS APPEAL

(76) Did the District Court error in its ruling as follows:

> Further, the Court is *not* persuaded that the Maki Defendants recorded the March 29, 2007 Personal Representative's Deed of Distribution for the purpose of slandering title to the minerals underlying the Arndt Family Farm … and the Plaintiffs' request for an award of attorneys' fees/damages under N.D.C.C. 47-19.1-09 is *denied.* (Emphasis by the District Court) (App. p 324)

LAW AND ARGUMENT

(77) The District Court denied the Arndt Plaintiffs' attorneys' fees without a hearing or receipt of any evidence. The Arndt Plaintiffs seek a remand and direction to the District

Court to conduct proceedings at which the Arndt Plaintiffs can present evidence on the issue of attorney's fees.

(78) The Arndt Plaintiffs were denied the opportunity to present evidence upon which a determination of fact could be made as to whether the Maki Defendants "…filed a claim for the purpose of slandering title to such real estate or to harass the owner of the real estate. …" (N.D.C.C. 47-19.1-09) Upon which the Court "…shall award the plaintiff all the costs of such action, including attorneys' fees to be fixed and allowed to the plaintiff by the court, and all damages that plaintiff may have sustained as a result of such notice of claim having been filed for record or the instrument having been recorded." (*Id.*)

(79) To be clear, the issue is not whether or not the Arndt Plaintiffs are entitled to attorneys' fees, but that the District Court failed to afford the Arndt Plaintiffs an opportunity to present evidence upon which a determination as to whether the Maki Defendants "…filing … (was) …for the purpose of slandering the title to real estate or to harass the owner of the real estate…" (*Id.*)

(80) The Arndt Plaintiffs included within their claim a claim for attorneys' fees and costs pursuant to N.D.C.C. 47-19.1-09. (App. pp 12-29) That statute, in full, is as follows:

> **47-19.1-09. Slanderous notice – Penalty.** No person shall use the privilege of filing notices under chapter or recording any instrument affecting title to real property for the purpose of slandering the title to real estate or to harass the owner of the real estate and in any action brought for the purpose of quieting title to real estate, if the court shall find that any person has filed a claim for the purpose of slandering title to such real estate or to harass the owner of the real estate, the court shall award the plaintiff all the costs of such action, including attorney fees to be fixed and allowed to the plaintiff by the court, and all damages that plaintiff may have sustained as the result of such notice of

> claim having been filed for record or the instrument having been recorded.

(81) Angeline Maki and Marily Bryant in their capacity as personal representatives prepared and recorded on March 29, 2007, a Personal Representative's Deed purporting to convey the minerals under the Arndt family farm to all of the then living heirs of Carl and Marie Arndt thirty-four (34) years after a recorded Contract for Deed was prepared by Marie Arndt's attorney, signed by Marie and Richard, and properly recorded. They filed the second PR's Deed twenty-three (23) years after the fulfilling deed was delivered and recorded, by these same two defendants. (Appendix pp 211-12) Each and every one of the Maki Defendants also recorded Statements of Claim (App. pp 117, 211-13) after this same lengthy delay.

(82) Upon learning of the recorded Personal Representative's Deed and Statements of Claim, counsel for the Arndt Plaintiffs sent correspondence to each of the Defendants apprising them that their actions amounted to a slanderous notice against he interests of the Arndt Plaintiffs. (*See*, Court file, deposition exhibit(s) of Maki Defendants) They refused to capitulate.

(83) The Maki Defendants were deposed (all except Caroline Sadle, Lloyd Arndt and Jason Arndt) and each asked and offered the opportunity to surrender their claim and explaining to each of them the potential for an award of attorneys' fees against them. (*See*, Court file, depositions of Maki Defendants) Once again they refused.

(84) The above information is provided to the Court to indicate that there is an evidentiary basis upon which the District Court could make a finding for an award of attorneys' fees and costs.

(85) To reiterate, the Arndt Plaintiffs are not requesting that this Court make a determination as to an award of attorneys' fees. The Arndt Plaintiffs are requesting that this Court remand the issue of attorneys' fees pursuant to N.D.C.C. 47-19.1-09 to the District Court for an evidentiary hearing or otherwise receive evidence upon which the District Court is to determine whether attorneys' fees and costs are appropriate. The Arndt Plaintiffs were deprived of that opportunity by the District Court's ruling.

(86) The North Dakota Supreme Court in Briggs v. Coykendall, 224 N.W. 202 (N.D. 1929) stated:

> Slander of title is a false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, causing him special damage.
> * * *
> Not only must the statements and acts have been false, but they must have been made maliciously, for their can be no slander of title without malice. *Id.* at 204

(87) Falsity and malice are both questions of fact. *See,* Johnson v. Huhner, 33 N.W.2d 268 (N.D. 1948) holding that a determination in malicious prosecution of the existence (or not) of an essential belief on the part of the defendant is a question of fact. *Id.* at 273. Actual malice as a question of fact. *See*, Soentgen v. Quain and Ramstad Clinic, P.C., 467 N.W.2d 73, 79 (N.D. 1991), Prosser & Keeton on Law of Torts at § 115; Restatement (2nd) Torts at § 619 (2): 50 Am.Jur.2d, Liable and Slander at § 288.

(88) Whether a statement is true or false is ultimately a question of fact. Whether the defendants knew their PR's Deed and/or Notice of Claims were false and were filed for

purposes of vexation, annoyance, or harassment to the Arndt Plaintiffs, is likewise a question of fact.

(89) The Arndt Plaintiffs are not asking this Court for a determination that the Maki Defendants acted with malice in filing false claims, but merely asking this Court for the opportunity to present evidence to a finder of fact in support of that contention.

(90) The District Court also failed to offer any rationale or reasoning for its decision which it is required to do.

(91) The North Dakota Supreme Court in Farmland Mutual Insurance Company v. Farmers Elevator Inc., of Grace City, 404 N.W.2d 473 (N.D. 1987) at p. 479 apprised the lower courts:

> The trial court did not give any reason for its action. The trial court's failure to state its rationale in awarding attorneys' fees renders it "impossible for this court on appeal to appropriately review the trial court's determination" (citations omitted) We therefore remand on the issue of attorneys' fees for the trial court "to make a re-determination which is based upon the expressed rationale". *Id., See also,* Arneson v. City of Fargo, 331 N.W.2d 30, 40 and 41 (N.D. 1983); Herzig v. Yuill, 399 N.W.2d 287 (N.D. 1987); and, All Season's Water Users Association, Inc. v. Northern Improvement, 399 N.W.2d 278 (N.D. 1987).

(92) As applied to the case at bar, the District Court must make findings regarding the issue of an award of attorneys' fees. It cannot simply pronounce that it is not persuaded that the defendants recorded the deed for the purpose of slandering the title to the minerals at issue. In particular, the court cannot make such a pronouncement when it has failed to hold any kind of evidentiary hearing or consider any evidence, or give a party even the opportunity to make its case regarding the issue. The District Court must go

further. It must explain the rationale for its decision. In the case at bar the District Court did neither.

(93) In Van Beek v. Umber, 2010 ND 47, 780 N.W.2d 52, the issue on appeal was the award of attorneys' fees to the prevailing party in a quiet title action. The North Dakota Supreme Court acknowledged that the trial court has the discretion to award attorneys' fees under N.D.C.C. 28-26-31 "based on evidence" Van Beek, ¶ 6 and that the trial court must provide findings in support of that determination. *Id.* ¶ 7.

(94) Further, that which may have been done without malice can become malicious when all of the facts are fully presented and an opportunity to withdraw is present and refused. In this case, even if the Defendants did not act maliciously when initially preparing and recording the second PR's Deed, or even the Statements of Claim, but it can and will be argued that certainly malice was present when the Defendants refused to surrender their specious claims when fully apprised of the facts.

CONCLUSION

(95) This Court should remand this matter to the District Court for the sole purpose of considering evidence and making a determination as to the issue of attorneys' fees for the Arndt Plaintiffs pursuant to N.D.C.C. 47-19.1-09 and for the District Court thereafter to provide its rationale for its decision.

Respectfully submitted this 17th day of October, 2011.

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CERTIFICATE OF COMPLIANCE

The undersigned, attorney for the Arndt Plaintiffs (Appellees), certifies, that the foregoing document was prepared with proportional type face and contains 9,743 words, excluding words in the table of contents, table of authorities, signature block, certificate of compliance and certificate of service.

Dated October 17, 2011.

/s/ Collin P. Dobrovolny
Collin P. Dobrovolny (03295)

CERTIFICATE OF SERVICE

STATE OF NORTH DAKOTA)
COUNTY OF WARD)

The undersigned, attorney for the Arndt Plaintiffs in this matter, certifies that on October 17, 2011, a true and correct copy of the foregoing document was served upon the following individuals by electronic mail pursuant to N.D.R.App. 25(c)(1)(D)

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