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OCTOBER 17, 2011
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

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,	)	
Plaintiffs, Appellees and Cross-Appellants	)	Supreme Court No.20110191
vs.	)	District Court No. 09-C-00032
Angeline Maki, Marily Bryant, Lillian (Gunderson) Jastrzebski, Caroline Sadle, Esther Maki, Doris Walter, Gloria Worley, Laura Erber, Lloyd Arndt, and Jason Arndt	)	
Defendants, Appellants And Cross-Appellees	)	

Appeal from Summary Judgment
Entered February 25, 2011 in Mountrail County District Court
Northwest Judicial District, State of North Dakota,
The Honorable William W. McLees Presiding

APPELLEE'S BRIEF

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[¶2] TABLE OF AUTHORITIES

North Dakota Statutes

[¶3] STATEMENT OF THE ISSUES

[¶4] The district court did not err in entering Summary Judgment in favor of Plaintiffs and against Defendants, pursuant to N.D.R.Civ.P. 56 and N.D.C.C. §§ 32-04-17 & 09-06-07, by declaring that the Defendants have no right, title, or interest in the minerals underlying the Arndt Family Farm.

[¶5] STATEMENT OF THE CASE

[¶6] Defendants are appealing the Mountrail County District Court's order granting Summary Judgment in favor of Plaintiffs and against Defendants which declared Defendants have no right, title, or interest in the minerals underlying the Arndt Family Farm. Appellant's App. at 299-325. On November 4th, 2008, Plaintiffs commenced a quiet title action against Defendants by Summons and Complaint. Plaintiffs commencement of the quiet title action came after Defendants claimed an interest in the Arndt Family Farm by virtue of recording a Personal Representative's Deed of Distribution at the Mountrail County Recorder's office on March 29, 2007. Appellant's App. at 012-13. Defendants claimed ownership to the Arndt Family Farm, which is real property in Mountrail County, North Dakota, described as:

Township 154 North, Range 91 West
Section 2: SW¼
Section 19: Lot 4
Section 30: Lot 1

Township 154 North, Range 92 West

Section 23: E½NE¼, NE¼SE¼, SE¼SE¼, NE¼SW¼, SE¼SW¼, SW¼SW¼
Section 24: NW¼SW¼, W½NW¼
Section 25: E½NE¼, S½NW¼, NW¼NW¼
Section 26: W½SW¼, SE¼SW¼, NE¼SW¼, NW¼, SE¼, S½NE¼, N½ NE¼ (All)
Section 35: NE¼NW¼

Appellant's App. at 012. Plaintiffs' Summons and Complaint was filed with Mountrail County District Court on February 11, 2009. Appellant's App. at 002. Defendants served an Answer and Counterclaim on Plaintiffs on January 12, 2009, and filed these pleadings on December 10, 2009. Appellant's App. at 004.

[¶7] On February 11, 2009, Plaintiffs filed with the Mountrail County District Court Plaintiffs Answer to Defendants' Counter-Claim as well as a Motion for Summary Judgment, Brief in Support of Plaintiffs' Motion for Summary Judgment, and several exhibits. Appellant's App. at 003. On March 16, 2009, Defendants filed a Brief Opposing Summary Judgment, accompanied by an Affidavit from Angeline Maki and several attachments. Id. On March 24, 2009, Plaintiffs filed a Brief in Response to Defendants' Brief Opposing Summary Judgment. Id.

[¶8] On August 20, 2009, the Mountrail County District Court denied Plaintiffs' Motion for Summary Judgment. Appellant's App. at 66. On February 10, 2010, Plaintiffs filed a Supplemental Motion for Summary Judgment, which the Mountrail County District Court denied on March 18, 2010. Appellee's App. at 004.

[¶9] On September 29, 2010, Richard A. Arndt, Karen K. Arndt, Douglas Kinnoin, James S. Enge, Gerald D. Neset, Gary Craft, Marshall Craft, and Jane Craft changed counsel from Peter H. Furuseth to Collin P. Dobrovolny, and filed a Motion for Summary Judgment, supporting Brief, and several exhibits. Appellant's App. at 6-7. The remaining Plaintiffs, TTT Minerals, LLC, Brian E. Olson, Peggy Olson, George L. Baranek, and Katherine A. Baranek continued to be represented by Peter H. Furuseth. On October 15, 2010, these remaining Plaintiffs filed a Brief in Support of the Summary Judgment Motion filed by Plaintiffs Richard A. Arndt, Karen K. Arndt, Douglas Kinnoin, James S. Enge, Gerald D. Neset, Gary Craft, Marshall Craft, and Jane Craft. Appellant's App. at 007.

[¶10] The Mountrail County District Court granted Plaintiffs Motion for Summary Judgment on February 25, 2011. Appellant's App. at 299-329. Defendants filed Notice of Appeal on June 24, 2011.

[¶11] STATEMENT OF FACTS

[¶12] Carl and Marie Arndt, husband and wife, 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 (Arndt children). Appellant's App. at 199. Charles Arndt passed away and his heirs are his sons, Lloyd Arndt and Jason Arndt. Id. Between 1967 and 1968 Carl Arndt (Carl) and Marie Arndt (Marie), agreed with Richard Arndt

(Richard) that he would take over the Arndt Family Farm conditioned upon Carl and Marie permitting Richard to purchase the entire farm. Id.

[¶13] Richard and Carl farmed together from early 1968 until May 1, 1973, the date in which Carl died intestate. Appellant's App. at 200. Upon Carl's death, all of the Arndt children agreed to disclaim their rights to the Arndt Family Farm to their mother, Marie. Appellant's App. at 200. At the time the children agreed to relinquish their rights to Marie, Marie informed the entire family of her intent to sell the Arndt Family Farm to Richard. Appellant's App. at 200.

[¶14] Marie and Richard discussed the terms of the sale, which included surface and mineral interests, and a written agreement was reached between them on May 23, 1973. Appellant's App. at 200, 205-06. Richard's siblings were not present when Marie and Richard entered into the agreement on May 23, 1973. Appellant's App. at 200. Nor were Richard's siblings present when Marie and Richard discussed the sale of the Arndt Family Farm to Richard. Appellant's App. at 200.

[¶15] A Contract for Deed was prepared by attorney Ralph Bekken and was entered into between Marie and Richard on October 24, 1973. Appellant's App. at 207. The Contract for Deed was recorded in Mountrail County on October 30, 1973. Appellant's App. at 201, 207-08. Marie died on November 12, 1975. Appellant's App. at 201. Richard made the final payment on the Contract for Deed to the Estate of Marie Arndt sometime in July or August of 1984. Appellant's App. at 201. The proceeds of the land sale were then distributed to

the heirs of Marie Arndt. Appellant's App. at 211. Since Marie was deceased, upon Richard's final payment on the Contract for Deed Angeline Maki and Marily Bryant, Co-Personal Representatives of the Estate of Marie Arndt and sisters to Richard, executed a Personal Representative Deed on January 13, 1984, granting the Arndt Family Farm to Richard. Appellant's App. at 209. The Personal Representative Deed was filed on Mountrail County on October 4, 1984, and included both the surface and mineral interests in the Arndt Family Farm. Appellant's App. at 200.

[¶16] On March 29, 2007, Angeline Maki and Marily Bryant then executed a Personal Representative's Deed of Distribution, which was recorded in Mountrail County. Appellant's App. at 211. The 2007 Personal Representative's Deed of Distribution distributed the Arndt Family Farm mineral interests, which were already deeded to Richard Arndt via the Personal Representative Deed on October 4, 1984. Appellant's App. at 200.

[¶17]LAW AND ARGUMENT

[¶18] The district court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 27-05-06(1). This Court has jurisdiction under N.D. Const. art. VI, §§ 2 & 6, and N.D.C.C. § 28-27-01.

[¶19] "Summary judgment is a procedural device for promptly disposing of a lawsuit without a trial if there are no genuine issues of material fact or inferences which can be reasonably drawn from undisputed facts, or if the only issues to be resolved are questions of law." Heart River Partners v. Goetzfried, 2005 ND 149,

¶ 8, 703 N.W.2d 330, (citing State v. North Dakota State University, 2005 ND 75, ¶ 8, 694 N.W.2d 225). A motion for summary judgment can be made by either party – "the plaintiff at any time after the answer has been served and the defendant at any time after claim has been asserted against him." Hurd v. Sheffield Steel Corp., 181 F.2d 269, 271 (8th Cir. 1950). The party that is seeking summary judgment has the burden to clearly demonstrate that that there is no genuine issue of material fact. North Dakota State University, 2005 ND at ¶ 9.

[¶20] A court must, however, consider the substantive evidentiary standard of proof when ruling on a motion for summary judgment, which requires that court to 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.'" Id., (quoting Estate of Stanton, 472 N.W.2d 741, 743 (N.D. 1991)). In reformation claims, a party who seeks reformation has the burden to prove by clear and convincing evidence that a written agreement does not state the agreement the parties intended. Heart River Partners, 2005 ND 149 at ¶ 14.

[¶21] A court, when determining whether or not it is appropriate to grant summary judgment, may examine the pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn from that evidence. Swenson, v. Raumin, 1998 ND 150, ¶ 9, 583 N.W.2d 102. A party that is resisting a motion for summary judgment must present competent admissible evidence by

affidavit or other means that raises an issue of material fact, or draws the court's attention to relevant evidence in the record that raises an issue of material fact. Id.

[¶22] Disputes of fact can become questions of law if reasonable persons can draw only one conclusion from the evidence. Schipper Const., Inc. v. American Crystal Sugar Co., 2008 ND 226, ¶ 12, 758 N.W.2d 744, 748. It is appropriate to grant summary judgment against those parties who fail to establish the existence of a factual dispute on an essential element of a claim on which they bear the burden of proof at trial. Zuger v. State, 2004 ND 16 ¶ 7, 673 N.W.2d 615.

[¶23] Whether summary judgment was properly granted is "a question of law which we [the Court] review de novo on the entire record." Johnson v. Hovland, 2011 ND 64, ¶ 7, 795 N.W.2d 294.

[¶24] **The district court did not err in granting Summary Judgment in favor of Plaintiffs and against Defendants.**

[¶25] Defendants allege they are entitled to reformation of the May 1973 Waivers of Inheritance and of the 1984 Personal Representative's Deed due to fraud and/or mutual mistake. Appellant's Brief p. 16, 19.

[¶26] Section 32-04-17, N.D.C.C., provides the statutory basis for reformation:

> When, through fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that

> intention so far as it can be done without prejudice to rights acquired by third persons in good faith and for value.

(2009).

[¶27] "Reformation is an equitable remedy used to rewrite a contract to accurately reflect the parties' intended agreement." Johnson v. Hovland, 2011 ND 64, ¶ 11, 795 N.W.2d 294 (quoting Spitzer v. Bartelson, 2009 ND 179, ¶ 22, 773 N.W.2d 798).

[¶28] The type of evidence admissible in deciding whether reformation is appropriate is as follows:

> [I]t is well-established that parol evidence is admissible in a suit to reform a written instrument on the grounds of fraud or mutual mistake of the parties. The nature of [a reformation] action is such that it is outside the field of operation of the parol evidence rule, since the court does not receive parol testimony to vary the contract of the parties but to show what their contract really was. If courts refuse to admit parol evidence in reformation cases, the rule would become an instrument of the very fraud and mistake it was designed to prevent.

Johnson, 2011 ND 64 at ¶ 12 (citations omitted).

[¶29] **a. Fraud.**

[¶30] Defendants allege they are entitled to reformation of the May 1973 Waivers of Inheritance and of the 1984 Personal Representative's Deed due to fraud. Appellant's Brief p. 16, 19. A party alleging fraud has the burden of proving each element by clear and convincing evidence. Heart River Partners, 2005 ND 149 at ¶ 19. Fraud is ordinarily treated as a question of fact. Id. Although fraud may be a ground for reformation of a written instrument, fraud perpetrated to induce a party to enter into the agreement is a ground for rescission,

but is not a ground for reformation. Id. at ¶ 21. Fraud may be a ground for reformation of a written contract when a party is misled or deceived into signing a written contract that differs from the parties' prior oral agreement. Id. at ¶ 24.

[¶31] Defendants first argue that they were induced into signing Waivers of Inheritance. Appellant's Brief p. 10. Defendants allege they consented to executing the Waivers of Inheritance because Marie stated she would convey all of her and Carl's minerals in equal shares to the Arndt children if the waivers were executed. Appellant's Brief p. 4. Defendants, however, are requesting this Court to reform a document, the Waivers of Inheritance, which has not even been produced by Defendants as of today.

[¶32] More so, Defendants have failed to produce any documentary evidence of the alleged agreement showing that when the Arndt children disclaimed their interest in Carl's estate, the Arndt children would receive a future conveyance of the minerals by Marie. Thus, consistent with the District Court order granting Summary Judgment, there is no merit to reform the Waivers of Inheritance based on fraud.

[¶33] Defendants also argue they are entitled to reformation of the 1984 Personal Representative's Deed due to fraud. Appellant's Brief p. 19. This argument is also meritless. All other documentary evidence, such as the written contract between Richard and Marie dated May 24, 1973, the Contract for Deed executed between Richard and Marie on October 24, 1973, and Personal Representative's Deed executed on January 13, 1984, by Marily Bryant and

Angeline Maki, refutes Defendants' reformation claim based on fraud. The written agreement between Richard and Marie indicates Marie's intent to sell all surface and mineral interests to Richard. The Contract for Deed, which was executed after the handwritten agreement, did not have a mineral reservation and is consistent with the written contract. Finally, the Personal Representative Deed, which conveys the surface and minerals of the Arndt Family Farm to Richard, does not include a mineral reservation clause. These documents unambiguously show Marie's intent to transfer all of the Arndt family minerals to Richard. Thus the Personal Representative Deed is not subject to reformation based on fraud.

[¶34] Also, none of the Defendants were present during the negotiations or the execution of the written agreement Marie and Richard entered into on May 24, 1973. Nor were the Defendants present at the time the Contract for Deed was executed between Richard and Marie on October 24, 1973. Thus, Defendants claim that the Personal Representative's Deed executed on January 13, 1984, by Marily Bryant and Angeline Maki is fraudulent warrants no merit.

[¶35] Additionally, in Defendants fraud argument, Defendants allege Richard's last affidavit states "the other nine children of Carl and Marie 'renounced' all their minerals to him [Richard] for no apparent reason and for no consideration." Appellant's Brief p. 12, ¶ 43. This allegation misstates Richard's affidavit and the facts. The other nine children never "renounced" their minerals to Richard. All of the Arndt children, including Richard, relinquished their interests in the Arndt Family Farm to Marie, not Richard. Then Marie and

Richard entered into the sale agreement of the Arndt Family Farm on May 23, 1973, sometime after the date in which Carl died.

[¶36] When considering whether to reform an 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." Spitzer, 2009 ND 179 at ¶ 24. Here, death has sealed the lips of Marie Arndt. Therefore, because there is no documentary evidence of any agreement indicating the Arndt children disclaimed their interest in Carl's estate in exchange for a future conveyance from Marie, Defendants' argument that the Waivers of Inheritance and the 1984 Personal Representative Deed must be reformed based on fraud cannot stand and is meritless.

[¶37] **b. Mutual Mistake.**

[¶38] Defendants further allege they are entitled to reformation of the May 1973 Waivers of Inheritance and the 1984 Personal Representative's Deed due to mistake. Appellant's Brief p. 16, 19. It is a well settled rule that a general conveyance of land, without any exception or reservation of the minerals therein, carries with it the minerals as well as the surface." Kadrmas v. Sauvageau, 188 N.W.2d 573, 755 (N.D. 1971); See also, McLaughlin v. Lambourn, 359 N.W.2d 370, 374 (N.D. 1985) and Spitzer, 2009 ND 179 at ¶ 26.

[¶39] The North Dakota Supreme Court has recognized that "equity will grant remedial relief in the nature of reformation of a written instrument, resulting from a mutual mistake when justice and conscience so dictate." Johnson, 2011

ND at ¶ 11 (quoting Ell v. Ell, 295 N.W.2d 143, 150 (N.D. 1980)). The party seeking reformation of a written instrument must establish by clear and convincing evidence that the document does not state the **parties' intended agreement**. Johnson, 2011 ND at ¶ 12 (emphasis added). Courts grant the "high remedy of reformation" only upon the "certainty of error." Id. (quoting Ell, 295 N.W.2d at 150.

[¶40] Generally, for a mutual mistake to justify reformation of a contract, "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 08 (quoting Mau v. Schwan, 460 N.W.2d 131, 135 (1990)) (emphasis added). Whether there has been a mutual mistake sufficient to support a reformation claim is a question of fact. Heart River Partners 2005 ND 149 at ¶ 15. A district court's findings of fact will not be reversed on appeal unless they are clearly erroneous. Id.; N.D.R.Civ.P. 52(a).

[¶41] Again, at this point Defendants have failed to produce the Waivers of Inheritance or any documentary evidence which would show a mutual mistake of the Waivers of Inheritance. Thus, Defendants have not met their burden of establishing a certainty of error in the Waivers of Inheritance and reformation of the waivers based upon mutual mistake is inappropriate.

[¶42] Further, in the present case, the District Court stated:

> [T]he proof offered by the Maki Defendants in support of their reformation claim falls far short of the clear, satisfactory, specific and convincing evidence standard 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.

[¶43] Defendants' argument that the 1984 Personal Representative Deed should be reformed based upon mistake is inappropraite. First, Defendants were never a party to the written contract between Marie and Richard or the Contract for Deed between Marie and Richard. Both agreements were between Marie and Richard. Upon Marie's death, her estate was then obligated to perform the contractual obligations of the Contract for Deed. The obligations were performed by the Co-Personal Representatives of the Estate of Marie Arndt when the 1984 Personal Representative Deed was executed and filed with the Mountrail County Recorder. Thus, the initial contract between Marie and Richard, the Contract for Deed, and the Personal Representative Deed are consistent and unambiguous, which is exact conclusion the District Court came to. Appellant's App. p. 322.

[¶44] Therefore, there is no evidence of mistake in the Waivers of Inheritance or the 1984 Personal Representative Deed.

[¶45] **CONCLUSION**

[¶46] In conclusion, the District Court did not err when it granted Plaintiffs' Summary Judgment motion by declaring Defendants had no right, title, or interest in the minerals underlying the Arndt Family Farm. Thus, Plaintiffs ask this Court to affirm the District Court's order granting Summary Judgment.

[¶47] Respectfully submitted this 17th day of October, 2011.

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[¶48] **CERTIFICATE OF SERVICE**

[¶49] A true and correct copy of the foregoing document was sent via email on the 17th day of October, 2011 to:

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