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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, Plaintiffs – Appellees, Cross-Appellant v. Angeline Maki, Marily Bryant, Lillian (Gunderson) Jastrzebski, Caroline Sadle, Esther Maki, Doris Walter, Gloria Worley, Laura Erber, Lloyd Arndt, Jason Arndt, Defendants – Appellants. Cross-Appellee	**Mountrail Co. No. 09-C-00032** **Supreme Court No. 20110191**

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

REPLY BRIEF FOR APPELLANTS

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Whether the trial court erred as a matter of law that the defendants Maki are strangers to title, contrary to NDT Std. 2-01.

ARGUMENT

I.

Whether the Waivers of Inheritance filed in Mountrail Co. Probate No. 3139, Carl Arndt, are entitled to Judicial Notice.

All the plaintiffs Arndt and their respective counsel have contended that the trial court did not err in giving no judicial notice, and therefore no weight or materiality, to the Waivers of Inheritance because they were not formally admitted into evidence. No rational mind can ignore the conclusion that the recorded Contract for Deed and the first recorded Personal Representative Deed conveyances of title cannot exist as they do without the absolute prerequisite of the complete Waivers of Inheritance of minerals by

the defendants Maki which all parties plaintiffs and defendants admit are in Probate No. 3139, Estate of Carl Arndt, deceased.

The plaintiffs admit throughout their briefs that Marie only had ½ the surface and minerals at the family meeting with Marie's attorney Bekken (App. 299, Trial Ct. Op. p.13, § 7 NB: § 8 which Richard changes from "sell the farm" at § 7 to "sell the entire farm") Cf. also § 17 in which the trial court incorrectly concludes that Richard and his mother always "understood and agreed" that the "entire" farm was to be sold with all the minerals, when at § 7 Richard is only stating "the farm" originally was to be sold in discussions with defendants Maki in Bekken's office; Furuseth Brief ¶ 12, 13 Richard's affidavit as cited says "the farm", but their brief later morphs and cites "entire farm"; Dobrovolny Brief ¶ 4, Cf. Richard's Affidavit at App. 199 says "farm", the brief misstates facts not originally in the first cited evidence as "entire farm". Query: did Richard really leave the service in the Vietnam War so he could farm the family minerals?

Dobrovolny Brief ¶ 5: the defendants Maki and Richard were advised they owned ½ of all the surface and minerals by attorney Bekken, then they "renounced their interest in "the farm"; "[t]hereafter the Arndt children understood Marie was sole owner of the. . . minerals" (emphasis added), and finally Marie declared her intent to sell " the farm" to Richard.

The trial court's omission of the genuine issues of material fact arising from the inducement and taking of the Waivers without consideration from the defendants Maki is error as a matter of law.

The annotation to NDR Ev. 201 makes it quite clear that plaintiffs Arndt argument is mistaken. Professor Weinstein states:

> "Rule 201 is the only rule dealing with the subject of judicial notice and, by the terms of subdivision (a) is limited in application to the judicial notice of adjudicative facts, i.e., the facts of the particular case before the courts, facts that are normally the subject of proof by formal introduction of evidence. ... If the function of judicial notice is to remove from the stricture of formal proof facts that are clearly beyond dispute, then either basis for the exercise of judicial notice is valid.
>
> ...It should be noted that although the taking of judicial notice, under subdivision (c), is discretionary if not requested by a party, the scope of appellate review of a trial court's decision is not limited to determining whether the trial court's decision was "clearly erroneous," the usual standard applied in reviewing discretionary decisions. As stated in 1 Weinstein's Evidence ¶ 201(04) at 201-33-34:
>
> > "The grant of discretionary authority does not mean, as it does in other situations, that the trial judge's determination is virtually insulated from appellate review. An appellate court is in as good a position as the trial court to ascertain the degree of probability of a judicially noticeable fact. There is no need for the appellate court to defer to the trial judge's feel for the case. Accordingly, subdivision (b) must be read in conjunction with subdivision (f) authorizing judicial notice 'at any stage of the proceedings.' If the trial judge failed to notice a fact which the appellate court feels was a proper subject for judicial notice, the appellate court may notice the fact despite the grant of discretionary authority. This does not mean, however, that 'judicial notice***should be used as a device to correct on appeal an almost complete failure to present adequate evidence to the trial court.'"

The Waivers never had to be produced or admitted because they were and are "capable of accurate verification" under R.Ev. 201.

The Waivers are necessarily, inherently and expressly part of the evidence of this case, but which the trial court has ignored to focus only on the recorded Contract for Deed and the first recorded Personal Representative's Deed as internally and mutually consistent, to the mistaken exclusion of how they were arrived at: through the surviving

witnesses of the defendants Maki who were present at the negotiation of the terms of the Waivers of Inheritance and the Contract for Deed to be recorded.

But for the mistaken and/or fraudulent Waivers taking the ½ of all Carl's minerals from the defendants Maki, there could be no conveyance of them to Richard. Those minerals were not necessary to sell the farmland to Richard according and the defendants Maki who were present at the time of the Waivers.

Therefore, the trial court erred in concluding that there is no evidence of defendants Maki names being in the chain of title. A competent and diligent title examination would have to necessarily consider the Waivers naming each defendant Maki: The defendants Maki are not strangers to title as concluded by the trial court.

II.

Whether there are living witnesses to the negotiations of the sale terms from Marie Arndt to Richard Arndt.

All the plaintiffs Arndt argue that there are no living witnesses to the negotiations and formation of the Contract for Deed between mother Marie Arndt and son Richard.

The plaintiffs admit throughout their briefs that Marie only had ½ the surface and minerals at the family meeting with Marie's attorney Bekken (App. 299, Trial Ct. Op. p.13, § 7 NB: § 8 which Richard changes from "sell the farm" at § 7 to "sell the entire farm") Cf. also § 17 in which the trial court incorrectly concludes that Richard and his mother always "understood and agreed" that the "entire" farm was to be sold with all the minerals, when at § 7 Richard is only stating "the farm" originally was to be sold in discussions with defendants Maki in Bekken's office; Furuseth Brief ¶ 12, 13 Richard's affidavit as cited says "the farm", but their brief later morphs and cites "entire farm";

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Dobrovolny Brief ¶ 5 the defendants Maki and Richard were advised they owned ½ of all the surface and minerals by attorney Bekken, then they "renounced their interest in "the farm"; "[t]hereafter the Arndt children understood Marie was sole owner of the. . . minerals" (emphasis added), and finally Marie declared her intent to sell " the farm" to Richard. No mention is made of Angeline and Doris' Affidavits listing Marie's promise inducing the Waivers.

But for the Waiver of Inheritance obtained from the defendants Maki upon father Carl's death, there could not be any purchase of the "entire" farm. "Farm" in its ordinary meaning does not include minerals or royalties, but only products of animals or crops, Black's Law Dictionary, 7th ed. The defendants Maki had title to 9/10 of all the surface and minerals, and believed they left with 9/10 of all the minerals.

The plaintiff's evidence is that the defendants Maki simply "agreed" without request or inducement and gifted all their surface and minerals to Marie so she could sell it immediately for a profit to Richard. If Marie or the defendants Maki or Richard thought she had to take the defendants Maki ½ of the minerals, so that she could deed her ½ of the minerals, then they were obviously mistaken at the time of the Waivers. Angeline Aff., App. 113, 268-270, Doris Aff., App. 272-273.

The defendants Maki evidence is that Marie told them all that if they would sign Waivers of Inheritance of their surface interests, then she would deed them each 1/10 of all the minerals. Otherwise, she wouldn't be able to sell the "entire" surface to Richard to farm. Again, that is either a mistake of law or fraud in the inducement.

Marie's attorney Bekken while adverse to the defendants Maki, but not disclosing that fact, then proceeded to take all of the defendants Makis' surface and minerals from them and convey them to Marie.

Any way you slice it, there is either no reason to have taken the defendants Maki ½ mineral interest in order to get their surface interest away from them. Marie's inducement to convey them her ½ of all minerals does not require them to first convey their ½ of all minerals to her, as a matter of law. The only logical conclusion on this point is that Marie and the defendants Maki were either both mistaken as to how to effectuate their intent, that one party was mistaken and the other party knew it (the latter most certainly Marie due to her attorney's superior knowledge and adverse position to the defendants Maki and/or Richard), or that the defendants Maki were subjected to outright fraud. All of which scenarios qualify for reformation of the appropriate combination of the Waivers, the recorded Contract for Deed, and the first recorded Personal Representative's Deed.

III.

Why the defendants Maki signed the Personal Representative if it had no mineral reservation (the trial court's query)?

The trial court's query is answered by the facts of the record evidence: plaintiffs admit that attorney Bekken represented Marie only at the time of the Waivers taking defendants Maki ½ of the minerals in 1973; without disclosing his conflict Bekken then commenced representing defendants Maki in 1975 as Personal Representative's in Marie's estate without disclosing his prior conflict; and finally Bekken signed and/ or notarized documents in 1984 both as attorney and judge without disclosing his conflicts

as attorney or judge that a mineral reservation was required to retain Marie's promised 1/10 of all mineral interest to each of her children. The "certainty of error" in our case is that the Waivers of Inheritance, the recorded Contact for Deed and the first Personal Representatives Deed were all authorized or endorsed by attorney Bekken who was undisclosedly adverse to the defendants Maki.

From the inception to the conclusion, attorney Bekken misrepresented defendants Maki who relied on him to their detriment.

IV.

Whether the trial court erred as a matter of law that the defendants Maki are strangers to title, contrary to NDT Std. 2-01.

Separate from the argument that Waivers of Inheritance necessarily require a diligent title examiner to recognize the record title ownership of the defendants Maki, T Std 2-01 makes clear that the second recorded Personal Representatives Deed complained of as slander requires a competent title examiner to look back at the Carl and Marie probate files and the Waivers with the former. Strangers to the Title:

> "Notice should be taken of the interest of a person joining with the record owner in a contract, mortgage, lease, plat or easement, other than a spouse joining for possible homestead interest under NDCC 47-18-05. Conveyances by strangers to the chain of title may be disregarded, unless a title examiner has actual notice or knowledge (through sources other than record) of the interest of the grantor, or unless subsequent to such conveyances there is recorded a deed or other conveyance vesting title in such stranger" (citations omitted).
>
> "Caveat: In order to ignore conveyances from a "stranger" the "good faith" test of Recording Act (NDCC 47-19-41) must be met. Any circumstances which should cause further inquiry to be made as to the status of the "stranger" which inquiry would disclose the unrecorded interest of the "stranger", preclude ignoring the "stranger's" conveyance. Possession inconsistent with record title, execution of a mortgage and other information suggesting an interest in a third person not appearing of record have been held

to preclude "good faith" status. Conveyances or other instruments from a "stranger" to chain of title which contain erroneous legal descriptions may be ignored." NDT Std. 2-01.

CONCLUSION

The trial court's to narrow only on the recorded Contract for Deed and the first recorded Personal Representative's Deed as mutually unambiguous and consistent erroneously excludes prerequisite evidence of the mistaken and/or fraudulently induced Waivers of Inheritance, but for which defendants Maki would never have lost title to 9/10 of 1/2 of all the Carl Arndt Minerals.

Without those Waivers from his siblings Richard would never have obtained title the defendants Maki 9/10 of 1/2 mineral interest, or to the defendants Maki 9/10 of 1/2 surface interest. Instead, it evolved to a perverted gift to him because the defendants Maki were unrepresented by competent, independent counsel and relied on the "family lawyer" to represent them.

The defendants Maki being parties aggrieved under § 32-04-17 NDCC, the trial court should be directed to reform the Waivers of Inheritance, the recorded Contract for Deed and the first recorded Personal Representative's Deed to quiet title to 9/10 of 1/2 of all the Carl Arndt minerals in the defendants Maki which they mistakenly and/or fraudulently were induced to convey out by the Waivers.

Respectfully submitted this 31st day of October, 2011.

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CERTIFICATE OF SERVICE

I, Greg W. Hennessy, hereby state that true and correct copies of the APPELLANT'S REPLY BRIEF was served by first class mail with postage prepaid on this 31st day of October, 2011 addressed to the following party(s):

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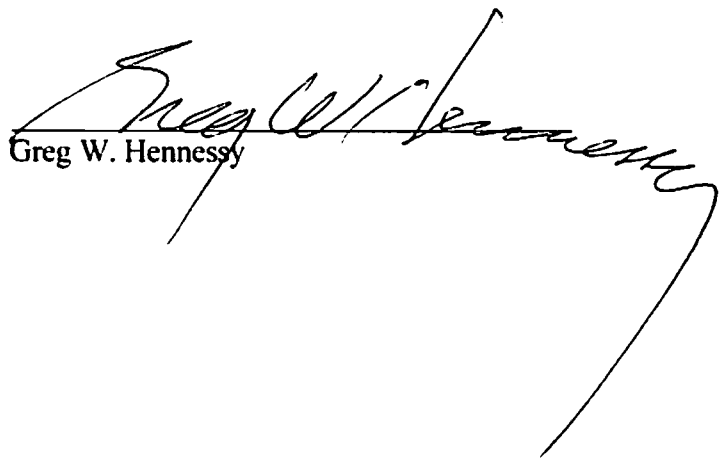

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