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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Dorothy J. Pierce Family Mineral Trust, Plaintiff, Appellant vs. Richard D. Jorgenson and Brenda R. Jorgenson, Defendants, Appellees.	Supreme Court No.20110355 Mountrail County District Court No. 31-10-C-00094

Appeal from Judgment
Dated November 9, 2011 in Mountrail County District Court
Northwest Judicial District, State of North Dakota,
The Honorable Gary H. Lee Presiding

APPELLEES' BRIEF

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[¶3] STATEMENT OF THE ISSUES

[¶4] I. The district court did not err when ruling in favor of Defendants and against Plaintiff, pursuant to N.D.C.C. § 32-04-17, by finding that Plaintiff failed to present clear and convincing evidence of a mutual mistake.

[¶5] II. The correct interpretation of the mineral reservation in the two warranty deeds renders Defendants the sole record mineral owners.

[¶6] III. The Defendants did not incur any costs for publication in the case at bar.

[¶7] STATEMENT OF THE CASE

[¶8] Plaintiffs are appealing the Mountrail County District Court's finding and ruling which declared Plaintiff failed to establish, by clear, satisfactory, specific, and convincing evidence, the presence of mutual mistake when LaRoy and Eilieen Wright and Dorothy Pierce executed warranty deeds in 1988. Appellant's App. at 32-33. Further, Plaintiffs are appealing the district court's interpretation of the mineral reservation in the warranty deed, as well as, whether publication costs were incurred by Defendants. Appellant's Brief p. 1.

[¶9] On March 25, 2010, Plaintiff commenced an action seeking to quiet title against Defendants in and under Township 158 North, Range 93 West, Section 18: NE ¼ SW ¼ ; Lots 3 and 4; and Township 158 North, Range 93 West, Section 19: Lot 1. Appellant's App. at 3-5. Further, the action sought reformation of two Warranty Deeds from Dorothy J. Pierce and LaRoy L. Wright which conveyed their interest to Defendants. Appellant's App. at 3-5. Plaintiff's Summons and Complaint was filed in the Mountrail County District Court on May

19, 2010. Defendants answered Plaintiff's complaint on April 27, 2010, which was subsequently filed with the Mountrail County District Court on May 20, 2010. Appellant's App. at 1.

[¶10] On January 14, 2011, Defendants moved for Summary Judgment, which was filed with the court on January 17, 2011. On March 16, 2011, the Mountrail County District Court denied Defendants' Motion for Summary Judgment.

[¶11] On August 30, 2011, the case was tried before the Mountrail County District Court in Stanley, North Dakota. Plaintiff was represented by Attorney Michael Maus of Dickinson, North Dakota; and Defendants were represented by Attorney Peter H. Furuseth of Williston, North Dakota. The Honorable District Court Judge Gary H. Lee presided over the proceeding. Appellant's App. at p. 2.

[¶12] On October 19, 2011, the Mountrail County District Court entered the Court's Findings of Fact, Conclusions of Law, and Order for Judgment in favor of Defendants. Appellant's App. at 2, 25-31. The Court's Judgment was filed on November 10, 2011. Plaintiff filed a Notice of Appeal on December 9, 2011.

[¶13] STATEMENT OF FACTS

[¶14] In 1984, Ethewin Wright, a single woman, owned the surface and mineral estates located in Township 158 North, Range 93 West, Section 18: NE¼ SW¼ ; Lots 3 and 4; and Township 158 North, Range 93 West, Section 19: Lot 1. Ethewin Wright is now deceased. Appellant's App. at 25.

[¶15] On March 21, 1984, Ethewin Wright entered into a contract for deed with Richard and Brenda Jorgenson (Richard and Brenda). Appellant's App. at 26. The contract for deed provided that upon full payment Ethewin Wright would convey the surface to Richard and Brenda. Appellant's App. at 26. The contract for deed provided that Ethewin Wright reserved to herself "all remaining oil, gas, coal . . . and all other minerals." Appellant's App. at 12, 26.

[¶16] Ethewin Wright died and on August 13, 1987, Dorothy Pierce, Personal Representative of Ethewin Wright's estate, conveyed to herself and LaRoy Wright, all of the estate's interests in the property, subject to the contract for deed. Appellant's App. at 14, 26. Dorothy Pierce and LaRoy Wright were Ethewin Wright's children. Appellant's App. at 26.

[¶17] Richard and Brenda continued to make payments under the terms of the contract for deed after Ethewin Wright's death. Appellant's App. at 26. These payments were made to Dorothy Pierce and LaRoy Wright. Appellant's App. at 26. Upon making the final installment payment, Dorothy Pierce and LaRoy and Eileen Wright executed two warranty deeds on October 31, 1988. Appellant's App. at 26. One warranty deed was between LaRoy Wright and Richard and Brenda, while the other warranty deed was between Dorothy Pierce and Richard and Brenda. Appellant's App. at 27. The language of both deeds provided: "Reserving and retaining onto the Grantors, ½ of all oil, gas, coal, gravel, uranium, clay, potash, silver, gold, and all other minerals, together with the compounds and

by-products of each of them, with the right of ingress and egress for the purpose of exploring, developing and operating for said minerals." Appellant's App. at 27.

[¶18] The two warranty deeds were delivered to Richard and Brenda on January 23, 1989. Appellant's App. at 27. There was no testimony as to why the deeds differed from the contract for deed. Appellant's App. at 27. Neither Dorothy Pierce nor LaRoy Wright were available to testify as to why there was a difference between the contract for deed and warranty deeds. Appellant's App. at 27. Further, from the testimony garnered at trial, there is no indication as to who prepared the two warranty deeds. See Trial Transcript.

[¶19] In 2007 Richard and Brenda were approached to lease the mineral interest under the disputed properties. Appellant's App. at 27. In 2008 the Dorothy J. Pierce Family Mineral Trust was created.

[¶20]**LAW AND ARGUMENT**

[¶21] 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.

[¶22] Plaintiff argues the Mountrail County District Court erred in concluding there was insufficient evidence of mutual mistake. Appellant's Brief at 5. Further, Plaintiff alleges the Trust is entitled to reformation of the two warranty deeds, which were executed by Dorothy Pierce and LaRoy Wright, granting the property to Richard and Brenda. Appellant's Brief p. 5.

[¶23] [This Court] reviews a trial court's challenged "findings of fact under the clearly erroneous standard set forth in N.D.R.Civ.P. 52(a)." Van Berkom v. Cordonnier, et al., 2011 ND 239, ¶ 9 (decision filed December 13, 2011) (quoting Piatz v. Austin Mut. Ins. Co., 2002 ND 115, ¶ 24, 646 N.W.2d 681)). Further, a trial court's findings of fact "must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." N.D.R.Civ.P. 52(a). "A trial court's findings of fact on appeal are presumed to be correct, and the complaining party bears the burden of demonstrating a finding is clearly erroneous." Piatz, 2002 ND 115, ¶ 24, 646 N.W.2d 681. This Court has stated "'[a] finding of fact is clearly erroneous when there is no evidence to support it, or when, although there is some evidence to support it, the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made." Am. Bank Ctr. V. Wiest, 2010 ND 251, ¶ 13, 793 N.W.2d 172 (quoting Sargent Cnty. Bank v. Wentworth, 500 N.W.2d 862, 874 (N.D. 1993)). A finding of fact is not clearly erroneous merely because this Court might have reached a different result. Agnes M. Gassmann Revocable Living Trust, 2011 ND 169, ¶ 9, 802 N.W.2d 889.

[¶24] **I. The district court did not err when finding Plaintiff failed to present clear and convincing evidence of a mutual mistake.**

[¶25] Section 32-04-17 of the North Dakota Century Code 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.

(2011).

[¶26] "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). This 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, 763 N.W.2d 294 (quoting Ell v. Ell, 295 N.W.2d 143, 150 (N.D. 1980)).

[¶27] 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, 763 N.W.2d 294 (emphasis added). Courts grant the "high remedy of reformation" only upon the "certainty of error." Id. (quoting Ell, 295 N.W.2d at 150).

[¶28] 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, 773 N.W.2d 798. More so, 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, 773 N.W.2d 798.

[¶29] 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).

[¶30] In this case, Plaintiff asserts that the weight of the evidence does not support the trial court's decision that Plaintiff failed to present enough evidence to satisfy the clear and convincing evidentiary standard required for reformation of contracts due to mutual mistake. Appellant's Brief p. 5.

[¶31] Just as the Mountrail County District Court began its analysis, so too will Defendants. First, the law requires a trial court to presume a properly executed instrument correctly states a party's intention. Ell, 295 N.W.2d at 150. As such, a party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence. See N.D.R.E. 301(a). Thus, it is presumed that Dorothy Pierce and LaRoy and Eileen Wright intended to convey their mineral interests to the Richard and Brenda. See Appellant's App. at 29. To rebut this presumption, Plaintiff offered the contract for deed between Ethewin Wright and Richard and Brenda, as well as the warranty deeds executed by Dorothy Pierce and LaRoy and Eileen Wright.

[¶32] Plaintiff argues the intent of Ethewin Wright was to reserve all mineral interests and Richard's testimony of the understanding Ethewin Wright would retain her mineral interests constitutes clear and convincing evidence of mistake, which warrants reformation of the warranty deeds executed by Dorothy Pierce and LaRoy and Eileen Wright. Plaintiff, however, fails to recognize that no testimony was presented to the trial court regarding Dorothy Pierce's *intent* or LaRoy and Eileen Wright's *intent* to transfer their mineral interests to Richard and Brenda. See Trial Transcript.

[¶33] During the trial, Plaintiff's attorney attempted to elicit testimony from Suzan Shatto on Dorothy Pierce's intent to transfer her mineral interests to Richard and Brenda, but a timely objection was made by Defendants' attorney which was sustained by the Mountrail County District Court Judge. See Trial Transcript pp. 17-21. Therefore, the only evidence the trial court was allowed to rely on in addressing whether a mutual mistake existed was the contract for deed, the two warranty deeds, and Richard Jorgenson's testimony. See Appellant's App. 29. The trial court found this evidence was insufficient to establish a mistake *between the parties* to the warranty deeds, which were Dorothy Pierce, LaRoy and Eileen Wright, and Richard and Brenda.

[¶34] Further, death or incapacitation has sealed the lips of Ethewin Wright, LaRoy Wright, Eileen Wright, and Dorothy Pierce. See Appellant's App. at 30. As such, trial 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.

See Spitzer, 2009 ND 179 at ¶ 24, 773 N.W.2d 798. Thus, it was not clear err for the trial court to find:

> [T]he Court may infer that LaRoy Wright, his wife, and Dorothy Pierce all made a mistake when they signed the two warranty deeds, but the Court's inference should not take the place of actual evidence, especially when the evidentiary burden is that of clear and convincing, and the presumption that a written instrument correctly reflects the true intention of the parties is so strong.

Appellant's App. at 30.

[¶35] Plaintiff failed to meet the clear and convincing evidentiary standard because they failed to provide sufficient evidence and testimony regarding the circumstances surrounding the execution of the two warranty deeds and the intent of LaRoy Wright, Eileen Wright, and Dorothy Pierce when they executed the two warranty deeds. See Van Berkom, 2011 ND 239 at ¶ 13 (the trial court did not clearly err when it found a party failed to overcome the presumption that an instrument correctly stated the party's intention when that party primarily relied on the difference of a mineral reservation between the contract for deed and warranty deed). Therefore, the evidence presented to the trial court was insufficient to establish mistake since it did not show both parties intended the deeds to say something different. See Melchior, 2010 ND 140, ¶ 10, 786 N.W.2d 08 (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).

[¶36] Plaintiff also argues that Richard and Brenda failed to present evidence denying Plaintiff's assertion the intent was for Plaintiff to reserve the minerals. Appellant's Brief p. 8. More so, Plaintiff argues Richard and Brenda's failure to contend "Wright and Pierce intended to convey a portion of the minerals to them," constitutes clear and convincing evidence of mistake. Id. Plaintiff is misplacing which party has the burden of proving mutual mistake. In the present case, Plaintiff bears the burden of establishing mistake by clear and convincing evidence. See Johnson, 2011 ND at ¶ 12, 795 N.W.2d 294 (party seeking reformation of a written instrument must establish by clear and convincing evidence that the document does not state the parties' intended agreement).

[¶37] Finally, Plaintiff failed to present any evidence of Suzan Shatto, or any other individuals, being present during the creation and/or execution of the warranty deeds that conveyed Dorothy Pierce's and LaRoy and Eileen Wright's mineral interests. Nor was there any evidence or testimony concerning the execution of the two warranty deeds. Thus, Plaintiff's claim that warranty deeds were executed by mutual mistake is meritless.

[¶38] **II. The correct interpretation of the mineral reservation of the two warranty deeds is that Richard and Brenda should be the sole record mineral owners.**

[¶39] An issue not considered by trial court cannot be raised for the first time on appeal. See Paulson v. Paulson, 2011 ND 159, ¶9, 801 N.W.2d 746. While this issue was not addressed in the Mountrail County District Court's Findings of Facts, Conclusions of Law, Order for Judgment, and/or Judgment,

Defendants are of the position they are entitled to all of the mineral interests under the property at issue pursuant to the Duhig rule adopted in Kadrmas, 188 N.W.2d at 755-56.

[¶40] In Kadrmas the North Dakota Supreme Court adopted the Duhig rule. This rule is named after a famous Texas case that established the rule that a Grantor could not convey and warrant, and reserve and retain, the same thing at the same time. See Kadrmas 188 NW 2d at 756. In that case, the Sauvageaus conveyed a tract of land to the Kadrmases, reserving unto themselves one-half of the minerals beneath the property. Id. at 754. At the time, however, the Sauvageaus only owned one-half of the minerals. Id. Applying the Duhig rule, the North Dakota Supreme Court found that a Grantor's warranty is superior to its reservation, and the one-half interest passed to the Kadrmases. Id. at 756.

[¶41] Applying the Duhig rule to the present dispute should return the same result. In this instance, both Dorothy Pierce and LaRoy and Eileen Wright conveyed to the Richard and Brenda a one-half interest in the minerals beneath the subject land. See Appellant's App. at 16-18. In each case, both Dorothy Pierce and LaRoy and Eileen Wright only owned one-half of the minerals beneath the subject land. Thus, under Duhig, Richard and Brenda should receive all of the mineral interests owned by each Grantor, and should receive all of the minerals beneath the subject property.

[¶42] **III. The Defendants did not incur any costs for publication in the case at bar.**

[¶43] Defendants did not incur any costs for publication in the case at bar. The publication costs assessed to Plaintiff was made in error.

[¶44] **CONCLUSION**

[¶45] In conclusion, the District Court did not err when it ruled Plaintiff failed to present clear and convincing evidence of a mutual mistake. Thus, Defendants ask this Court to affirm the District Court's ruling Plaintiff did not establish, by clear and convincing evidence, a mutual mistake regarding the warranty deeds.

[¶46] More so, while the issue of interpreting the two warranty deed's mineral reservation does not appear to be addressed by the trial court, Defendants contend the correct interpretation would grant Richard and Brenda with all of the mineral ownership under the disputed property.

[¶47] Finally, Defendants do not dispute the costs assessed to Plaintiff for publication costs was an error.

[¶48] Respectfully submitted this 22nd day of February, 2012.

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[¶49] **CERTIFICATE OF SERVICE**

[¶50] A true and correct copy of the foregoing document was sent via email on the 22nd day of February, 2012 to:

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