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SEPTEMBER 9, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Kathleen Markgraf and Marilyn Shanahan, Plaintiffs and Appellees v. Connie Welker, Vicki Ostrem, Margaret Rehmer, Robert Leroy Hannah, Jr., Robert Hannah, Cheryl Hannah, Donna Shilliam, William J. Hannah, Estate of William J. Hannah, Mary Hannah, Estate of Mary Hannah, Wilbert Hannah, Estate of Wilbert Hannah, Robert L. Hannah, Estate of Robert L. Hannah, Alan Hannah, Estate of Alan Hannah, Kathryn Hannah Nelson, Estate of Kathryn Hannah Nelson, Barbara Eggert, Estate of Barbara Eggert, Arnold Hannah, Estate of Arnold Hannah, Donald Hannah, Estate of Donald Hannah, Larry Erickson, Estate of Larry Erickson, and all other persons unknown claiming any estate interest in or lien or encumbrance upon, the real property described in the Complaint, whether as heirs, legatees, personal representatives, devisees, creditors, or otherwise, Defendants --- Connie Welker and Vicki Ostrem, Appellants	**SUPREME COURT NO. 20150116** Civil No. 31-2013-CV-00151

ON APPEAL FROM ORDER DATED FEBRUARY 17, 2015, GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; ORDER FOR JUDGMENT; AND JUDGMENT

MOUNTRAIL DISTRICT COURT
NORTH CENTRAL JUDICIAL DISTRICT
HONORABLE RICHARD L. HAGAR

APPELLANTS' REPLY BRIEF

TABLE OF CONTENTS

Paragraph

TABLE OF CASES

TABLE OF AUTHORITIES

ARGUMENTS IN REPLY

I. MARKGRAF & SHANAHAN'S CLAIMS ARE BARRED BY THE TWENTY-YEAR STATUTE OF LIMITATIONS FOR QUIET TITLE CLAIMS.

[¶1] The District Court erred in refusing to grant Welker & Ostrem summary judgment because the statute of limitations expired on Markgraf & Shanahan's claims on or around December 30, 2009 at the latest – twenty years after Arnold Hannah expressly informed Kathryn Nelson and his other relatives he was retaining the Mineral Rights himself in a December 30, 1989 letter. N.D.C.C. Section 28-01-04 bars any quiet title action brought by anyone who has not been "seized or possessed" of the property in question for twenty years. A person is not "seized or possessed" of mineral rights under N.D.C.C. Section 28-01-04 once she has notice she does not have authority to exercise dominion over them. Wehner v. Schroeder, 335 N.W.2d 563, 566 (N.D. 1983).

[¶2] Neither Markgraf & Shanahan nor their mother Kathryn has been "seized or possessed" of the Mineral Rights since on or around December 30, 1989 because they have had notice of Arnold's assertion of full ownership of Mineral Rights since that date, when Arnold sent Kathryn a letter which stated he was keeping what remained of them. (A. at 122). The statute of limitations on any action by Kathryn or her successors-in-interest seeking ownership of Arnold's asserted interest in the Mineral Rights therefore began running on or around December 30, 1989, and expired on or around December 30, 2009. There is no evidence in the record that Arnold made any distributions of proceeds from the Mineral Rights to Kathryn or any other relative after he wrote his December 30, 1989 letter so as to toll the running of limitations.

[¶3] Markgraf & Shanahan argue, and the District Court held, that their claims to the Mineral Rights are not barred because N.D.C.C. Section 28-01-04 applies to quiet title

actions *based on adverse possession or acquiescence only*. See Appellees' Brief, ¶30; A. at 158, ¶18. There is absolutely no support for this position under North Dakota law. By its plain language, N.D.C.C. Section 28-01-04 applies to *all* quiet title actions, not just quiet title actions based on adverse possession or acquiescence. See N.D.C.C. Section 28-01-04 (which applies to any "action for the recovery of real property or for the possession thereof"). In Wehner v. Schroeder, which was not an adverse possession nor acquiescence case, but an action to quiet title to mineral rights, this Court analyzed whether the parties were "seized or possessed" of the mineral rights within twenty years under N.D.C.C. § 28-01-04. Wehner, 335 N.W.2d 563, 566 (N.D. 1983).

[¶4] Markgraf & Shanahan also seem to assert there is no statute of limitations for quiet title claims in North Dakota because there is no limitation language within the quiet title statute itself. See Appellees' Brief, ¶ 31. However, statutes of limitation and repose are frequently contained in separate statutory provisions from the causes of action to which they apply, as is the case here. See Chapter 28-01, N.D.C.C.

[¶5] Markgraf & Shanahan also argue that the statute of limitations was tolled in 2012 when Kathryn filed her Statement of Claim, and alternatively argue the statute of limitations did not begin running until 2012. (See Appellees' Brief, ¶¶ 33-34). These arguments completely ignore Arnold's December 30, 1989 letter, in which he clearly states to Kathryn and the other family members that he is keeping what remained of the Mineral Rights for himself, to the exclusion of all other family members.

[¶6] Finally, Markgraf & Shanahan assert Kathryn's execution of mineral leases in 2001 and 2007, drafting of a letter to the Mountrail County Recorder in 2002, and filing of a Statement of Claim in 2012 are examples of her possession of the Mineral Rights

within twenty years of 2013. (See Appellees' Brief, ¶ 35). However, the fact that a person executes a mineral lease concerning a parcel does not constitute possession of it. Sickler v. Pope, 326 N.W.2d 86, 93 (N.D. 1982). Further, once Kathryn had notice of Arnold's assertion of sole ownership of the Mineral Rights in 1989, she did not have the authority to exercise dominion over the Mineral Rights and was not in possession of them. See Wehner, 335 N.W.2d at 566. Therefore, none of her conduct is evidence she was in possession of the Mineral Rights.

II. MARKGRAF & SHANAHAN CANNOT PROVE ARNOLD HANNAH VIOLATED ANY AGREEMENT, UNDERSTANDING, OR CONFIDENTIAL RELATIONSHIP CONCERNING THE MINERAL RIGHTS.

[¶7] Markgraf & Shanahan's implied trust claims fail because legal title to the Mineral Rights is held by Arnold Hannah individually pursuant to N.D.C.C. Section 47-09-12 and Markgraf & Shanahan cannot prove such a result is inconsistent with or in violation of any discernible understanding to the contrary. An implied trust, whether resulting or constructive, is a remedial device to be imposed to correct a wrongful taking or holding of property. Holbach v. Holbach, 2010 ND 116, ¶ 30, 784 N.W.2d 472 (Sandstrom, J., dissenting) (citing 76 Am.Jur.2d *Trusts* § 132 (2005)). To establish they are entitled to have the Court impose an implied trust, Markgraf & Shanahan must prove by clear and convincing evidence that what did occur with respect to Arnold Hannah's handling of the Mineral Rights ***was in violation of*** a particular understanding concerning their ownership. Markgraf & Shanahan have not, and cannot based on the evidence in the record, prove that Arnold's retention of the Mineral Rights is ***in violation of*** some particular agreement, understanding, or confidential relationship. Accordingly, there was no wrongful taking or unlawful holding of property, and there is no wrongdoing or injustice to be remedied by

imposition of an implied trust. See id. at ¶ 31 ("I would not reverse on the basis of the implied trust argument either. Here, there was no wrongful taking or unlawful holding of property…the terms of the agreement to agree are not reasonably certain and definite such that they can now be enforced.").

[¶8] The evidence on which Markgraf & Shanahan rely in support of their claims points to no violation of any understanding, but instead tends only to show Arnold paid out proceeds from the Mineral Rights until 1989 ***in accordance with*** some understanding concerning the Mineral Rights and then kept the Mineral Rights himself after 1989 ***in accordance with*** some understanding concerning the Mineral Rights. While there generally may have been some understanding Arnold would manage all the assets of W.J. Hannah and distribute them amongst the family in some fashion, which is not clear from the record, the particular terms of such an understanding are unclear, and there is no evidence Arnold's retention of the Mineral Rights after December 30, 1989 was in violation of any particular understanding which may have existed. In a March 24, 1967 letter from Arnold to Donald Hannah, Arnold makes clears that his parents' assets included "accounts receivable, the bulk plant, the land, etc." and that before W.J.'s death "we had most of the transfers made direct from him…to me, Arnold Hannah, Trustee…" (A. at 110-111).

[¶9] From 1965 until December 30, 1989, Arnold apparently managed all of the assets of his parents' estates and distributed proceeds therefrom, including from the Mineral Rights, between himself and his relatives. This is consistent with what Arnold wrote in his December 30, 1989 letter, which suggests that Arnold had fulfilled the requirements of any understanding with respect to his management and distribution of the assets by

that time. (A. at 122) (emphasis added) ("They had deeded everything to me, know that I would d[i]vide the net balance equally, ***which I have done***..."). His 1989 letter makes clear that he was retaining the Mineral Rights from that point forward, in a manner consistent with any original understanding, as well as with a more recent understanding reached between himself, Kathryn, and Robert. (Id.) ("As you may know, after all the North Dakota land was sold, the bills paid, etc., and proceeds d[i]vided among all concerned it was decided by your father & Kathryn, that I should have what remained of the mineral rights on the land...").

[¶10] In the event the Court should decide to impose an implied trust, Welker & Ostrem have not waived their challenge to the particular percentage distribution of the Mineral Rights imposed by the District Court. (See Appellees' Brief, ¶¶ 58-59). Welker & Ostrem maintained in their summary judgment briefing and argument to the District Court that Markgraf & Shanahan carry the burden to prove the terms of any trust it seeks to have imposed. Because Markgraf & Shanahan presented no competent evidence as to any particular distribution of the Mineral Rights, Welker & Ostrem were not required to produce evidence of a different distribution.

III. MARKGRAF & SHANAHAN SUBMITTED NO ADMISSIBLE PROOF EVIDENCING AN IMPLIED TRUST.

[¶11] The District Court's denial of Welker & Ostrem's evidentiary motions, and reliance on the documents subject to those motions, was error because the documents are hearsay and lack foundation and are therefore inadmissible in evidence on summary judgment. Markgraf & Shanahan contend the Affidavits of Markgraf and Robert L. Hannah, Jr., for example, are not hearsay because they are excluded from the definition of hearsay under N.D.R.Ev. 801(d)(2) as statements made by parties. (See Appellees'

Brief, ¶¶ 63-64). However, N.D.R.Ev. 801(d)(2) only excludes out-of-court statements made by an ***opposing*** party from hearsay, and the statements contained in those documents are instead Markgraf and Robert L. Hannah, Jr.'s ***own*** statements.

[¶12] Markgraf & Shanahan also contend such documents are not hearsay under N.D.R.Ev. 804(b)(3), which excepts from the definition of hearsay statements against interest made by declarants who are "unavailable" as witnesses. (See Appellees' Brief, ¶ 65). This argument is misguided because neither Markgraf nor Robert L. Hannah, Jr. is "unavailable" under N.D.R.Ev. 804(a), nor are their statements ***against*** their interest under 804(b)(3), but are instead directly aligned ***with*** their interest in this lawsuit.

[¶13] As to Arnold Hannah's writings attached the Affidavit of Attorney Cook, Arnold Hannah is not a party because he is deceased. While a deceased person's estate can be served and made a party to an action under N.D.R.Civ.P. 4, a deceased person himself cannot be served, and thus cannot be considered a "party".

[¶14] Markgraf & Shanahan's contention that Welker & Ostrem's second evidentiary motion was untimely is similarly without merit because motions to exclude evidence in a bench trial are timely up until the time of and during trial. Shark v. Thompson, 373 N.W.2d 859, 864-65 (N.D. 1985); (See Appellees' Brief, ¶ 65). Markgraf & Shanahan's contention that the documents subject to the second motion are admissible just because they were produced in discovery is also without merit, as relevant documents produced during discovery may not be admissible in evidence.

[¶15] Markgraf & Shanahan's assertion that the challenged documents are not offered to prove the truth of the matter asserted also fails. (See Appellees' Brief, ¶¶ 73-75). None of the challenged documents contain statements "said with respect to the making or terms

of an oral agreement" so as to have independent legal significance. Such statements therefore are not non-hearsay "verbal conduct". See Matter of Estate of Raketti, 340 N.W.2d 894, 900 (N.D. 1983).

CONCLUSION

[¶16] The District Court erred in granting summary judgment for Markgraf & Shanahan because Markgraf & Shanahan's claims are barred the twenty-year statute of limitations for quiet title actions, and because the state of the record is such that Markgraf & Shanahan cannot establish an implied trust, whether resulting or constructive, requiring Arnold Hannah to distribute the Mineral Rights to his relatives by clear and convincing evidence.

Respectfully submitted September 9th, 2015.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Kathleen Markgraf and Marilyn Shanahan, Plaintiffs and Appellees v. Connie Welker, Vicki Ostrem, Margaret Rehmer, Robert Leroy Hannah, Jr., Robert Hannah, Cheryl Hannah, Donna Shilliam, William J. Hannah, Estate of William J. Hannah, Mary Hannah, Estate of Mary Hannah, Wilbert Hannah, Estate of Wilbert Hannah, Robert L. Hannah, Estate of Robert L. Hannah, Alan Hannah, Estate of Alan Hannah, Kathryn Hannah Nelson, Estate of Kathryn Hannah Nelson, Barbara Eggert, Estate of Barbara Eggert, Arnold Hannah, Estate of Arnold Hannah, Donald Hannah, Estate of Donald Hannah, Larry Erickson, Estate of Larry Erickson, and all other persons unknown claiming any estate interest in or lien or encumbrance upon, the real property described in the Complaint, whether as heirs, legatees, personal representatives, devisees, creditors, or otherwise, Defendants --- Connie Welker and Vicki Ostrem, Appellants	**SUPREME COURT NO. 20150116** Civil No. 31-2013-CV-00151

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MOUNTRAIL DISTRICT COURT
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AFFIDAVIT OF ELECTRONIC SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Olivia Emmel, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on September 9, 2015, **Appellants' Reply Brief** was filed electronically with the Clerk of Court of the North Dakota Supreme Court through email, and that the same documents were electronically served through email upon:

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Olivia Emmel

Subscribed and sworn to before me this 9th day of September, 2015.

Notary Public

(SEAL)
ALICIA RASH
Notary Public
State of North Dakota
My Commission Expires Dec. 12, 2017