

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

In the Matter of the Estate of Lowell H. Vaage, deceased

Burke County Probate No. 07-04-P-3

Correne Vaage, as Special Personal)
Representative of the Estate of)
Lowell H. Vaage,)
)
Plaintiff,)

-vs-)

The State of North Dakota; the Estate of)
Kenneth Vaage; and his surviving widow,)
Verna L. Vaage; and their children:)
James Vaage; Gregory Vaage;)
Burce Vaage; and Kathleen M. Hettenbough;))
the Estate of Donald Vaage, and his)
surviving widow, Mae L. Vaage, and their)
child, Gary Vaage – if living, and all other)
persons interested in their estates,)
if deceased; and all other persons)
unknown claiming any estate or interest)
in or lien or encumbrance on the property)
described in the Complaint,)
)
Defendants.)

Supreme Court No. 20150121

BRIEF IN SUPPORT OF PETITION FOR REHEARING AND ADDENDUM

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¶1 On appeal, Defendants did not argue the doctrine of equitable conversion had not been presented to the District Court. Nor did Defendants argue the rules of law made by the District Court by Orders dated September 20, 2013, and February 10, 2014, did not “involve the merits and affect the judgment appearing upon the record.” Rule 35 NDRAppP This Court reached both issues without affording the Estate notice and opportunity to present argument. By Rule trial court legal briefs may not be part of an Appendix. Rule 30(a)(2) NDRAppP Absent briefing, this Court drew two fundamentally flawed conclusions:

- (1) the doctrine of Equitable Conversion was not briefed to the District Court; and
- (2) the interim Orders did not “involve the merits and affect the judgment.”

Most significantly, this Court allowed stand, a deed, held as a matter of law to breach obligations of contract, under an erroneous application of the law of remedies.

I. Equitable Conversion.

¶2 ¶30 of this Court’s Opinion states:

“The Estate did not raise this argument in the district court and has raised it for the first time on appeal.”

Not true. Equitable conversion was advanced by pleadings and legal argument to the District Court and adopted as the law of the case. Only the appropriate remedy was denied under an erroneous application of the law of remedies. The Estate briefed both meaning and effect of the Doctrine of Equitable Conversion to the District Court, stating:

“First, in the instant case, transfer of the decedent’s “right, title and interest” in the premises was pursuant to the contractual obligations contained in the 1973 Contract for Deed, not by a judicially sanctioned sale by the Personal Representative. **At the time of John Vaage’s death, John Vaage possessed only bare legal title. Beneficial title was held by Lowell H. Vaage, subject to due performance of the 1973 Contract For Deed.** The John Vaage Estate was bound by contract to deliver, by warranty deed, title to the premises as described in the 1973 Contract For Deed. The Personal Representative’s Deed was not issued in a vacuum. The Estate was contractually bound to fulfill the contractual obligations of the 1973 Contract For Deed with mirror image language.” Estate’s Brief, 02-11-2013, Appendix II, pp. 230-1.

The District Court is told title has been bifurcated between a “beneficial title” and “bare legal title.” The Court is further told, at death, the Contract Seller’s Estate possesses “only bare legal title” while the Contract Buyer owns “beneficial title.” And the Court is finally instructed the Contract Seller’s Estate is bound to mirror image performance. This is a black letter law statement of the doctrine of equitable conversion.¹ Thereupon, the District Court held:

“The Court therefore finds, **as a matter of law**, that the personal representative had no authority or power to change the conditions of the fully performed contract for deed.” ¶28; and

“Indeed, what the Court has found, as a matter of law, is that the personal representative lacked authority to deliver a deed which was contrary to the contract for deed.” ¶30, Order 10-20-13

¹The addendum quotes applicable Civil Rules abolishing old forms of action in favor of “short and plain statements of the claim showing that the pleader is entitled to relief.” No magic words are required to place a short and plain statement of a legal doctrine at issue.

The doctrine of equitable conversion as argued, mandated these rulings. With only bare legal title, a personal representative may not alter terms of performance. The holding is repeated in Memorandum Opinion ¶49. Only erroneous application of the law of remedies denied reformation.

¶3 Amended Complaint paragraphs 36, 47 and 50 are only true with application of the doctrine of equitable conversion. Estate legal brief of 02-09-13 defines and applies the doctrine. District Court Order dated 09-20-13 enforces the doctrine, holding contract performance must be mirror image. Memorandum Opinion ¶49 affirms the holding. The doctrine was argued long before appeal. Without trial court briefs, how would this Court have known? Dozens of pertinent references can be found in the Briefs now part of Appendix II.

II. Appeal of Interim Orders.

¶4 An Interim Order which “involves the merits and affects the judgment appearing upon the record” may be reviewed on appeal. Rule 35(a)(2) NDRAppP. Appellate review of interim orders are not automatically denied. Its not jurisdictional. If an appeal of an interim order is not challenged by an Appellee, the appealed order should be presumed within the Rule’s exception. If the Supreme Court, of its own motion, questions this exercise of discretionary authority, due process directs an order for supplemental briefing of applicable law and facts. At the very least, the Court’s opinion should express a factual and legal basis for believing the order fails to “involve the merits and affect the judgment” as in Berg v. Dakota Boys Ranch, 629 N.W.2d 563, 2001 ND 122 ¶8-11 (N.D., 2001).

¶5 Those rulings within the interim Orders appealed, address questions of contract interpretation, reviewed de novo. None are affected by testimony at trial. Each are affirmed at Memorandum Opinion ¶49 and affect the judgment. Black and white, the Orders and Memorandum Opinion denied the appropriate remedy of reformation. It was Bad Law. The District Court shaped and premised its final judgment, refusing to correct unlawful PR performance, under an erroneous interpretation of the law of remedies.

¶6 These questions of law require no testimony at trial. The words of the contract and deed speak for themselves. For questions of law, there is no “merger” with questions of fact addressed at trial.

¶7 In a case the District Court cited in its 09-20-13 Interim Order, this Court held:

The construction of a written contract to determine its legal effect is a question of law for the court to decide. [] The determination of whether or not a contract is ambiguous is also a question of law for the court to decide. [] Pursuant to Section 9-07-04, NDCC, the intention of the parties under a written contract is to be ascertained from the writing alone if possible. If the parties' intentions can be ascertained from the writing alone, without reference to extrinsic evidence, then the interpretation of the contract is entirely a question of law, and **this court will independently examine and construe the contract to determine whether or not the district court erred in its interpretation of it.** [] Sorlie v. Ness, 323 NW2d 841, 844 (ND 1982)

The law has not changed. Oil v. Riemer, 794 N.W.2d 715, 2011 ND 22, ¶11 (N.D., 2011)

“Whether a contract is ambiguous is a question of law, which we review independently.”

Funke v. Aggregate Constr., 2015 ND 123, ¶25 (N.D., 2015) The Orders and Memorandum Opinion address these very questions of law. All erroneously apply the law of remedies to a performance held unlawful. None have been “reviewed independently” by this Court.

Rulings on contract interpretation and enforcement raised by the pleadings and briefed inherently “involve the merits and affect the judgment.” Review on Appeal is of Right.

¶8 Although testimony at trial concerned questions of fact surrounding allegations of fraud and mistake, these were not the only theories of recovery advanced by Pleadings, Legal Argument, and supported by the evidence at trial. Nor were these the only issues addressed by the Memorandum Opinion. The alternate theories of recovery required no testimony – contract and deed language speak for themselves. All are questions of law, resolved through interpretation of the instruments. No trial testimony is required to place issues of contract interpretation and enforcement at issue.

¶9 What questions of law were placed at issue by the pleading? Equitable conversion and reformation at paragraphs 36, 47, 50, and 51. Deed ambiguity at paragraphs 13, 19, and 54. Relief prayed for included reformation at paragraph (d); declaration non-conforming language be null and void at paragraph (b); and quieting title to Plaintiffs at paragraph (c).

¶10 The Estate’s Trial Brief stated:

“The Court is asked to treat as its beginning point those findings of fact and conclusions of law made in the Court’s Order dated September 20, 2013.” Estate’s Trial Brief, ¶3, Appendix II, pp. 385.

In the same Brief, the meaning and effect of the contract and its due performance is placed at issue:

“By reason of the express language of the 1973 Contract For Deed and the contract’s due performance, Lowell Vaage acquired the entirety of the 275 acre mineral estate owned by his father, John Vaage.” Estate’s Trial Brief, ¶7 Appendix II, p. 393

The doctrine of equitable conversion mandates a deed to the contrary be null and void. The District Court had ruled, as a matter of law, mirror image performance required, and nonconforming performance unlawful – reformation should have been granted on this ruling alone. The Estate’s Post-Trial Brief references the multiple theories of recovery yet before the Court:

“Other theories to quiet title set forth in the Amended Complaint include application of basic rules of deed interpretation, previously extensively briefed to the Court.”
Estate’s Post-Trial Brief ¶2. Appendix II, p. 409

The trial court summarily ruled on these alternate theories at ¶49 of the Memorandum Opinion, affirming unlawfulness of PR conduct, but erroneously denying reformation.

¶11 At conclusion of trial, interpretation and enforcement of the contract and deed remained before the District Court, and now before this Court, de novo. Issues raised by pleadings, legal arguments, and addressed at Memorandum Opinion ¶49. The erroneous holdings materially involve the “merits and affect the judgment appearing upon the record.”

III. REVERSAL OF ERRONEOUS HOLDING OF LAW OF REMEDIES.

¶12 The District Court properly ruled the Contract Seller’s performance unlawful, but erroneously denied the remedy of reformation:

“Indeed, what the Court has found, as a matter of law, is that the personal representative lacked authority to deliver a deed which was contrary to the contract for deed. In that regard, there is a clear statutory remedy available to any aggrieved party. Section 30.1-18-12, NDCC, provides that if the exercise of power concerning the estate is improper, the personal representative is liable to the interested persons for damages or loss resulting from that breach of duty.” Order, 10-20-13 ¶30

In error, the District Court limited remedies to personal action against the PR. This error “involves the merits and affects the judgment.” If corrected, the judgment is reversed. The District Court held, as a matter of law, the PR delivered a deed “contrary to the contract for deed” when the law required “mirror image” performance:

“The language of the final deed must mirror the language of the underlying contract for deed if the decedent’s intentions are to be honored.” ¶30;

“The personal representative’s deed does not mirror the language of the contract for deed. To give effect to the words of the personal representative’s deed would dishonor the intentions of John Vaage.” ¶28, Order, 10-20-13

This Court’s present Opinion “dishonors the intentions of John Vaage.”

¶13 When asked by Vaage Defendants to reverse these rulings, it refused:

“The defendants ask this Court to reconsider its earlier ruling that, **as a matter of law, the personal representative had no authority or power to change the conditions of the fully performed contract for deed.** The court has reviewed its earlier decision and believes it is correct.” Order, 02-10-2014 ¶20

The District Court continued to deny the remedy of reformation under continuing erroneous belief only suit against the Contract Seller’s PR was allowed:

“What the Court does believe to be true, however, is that an attack on the acts of the personal representative of the Estate of John Vaage cannot be made collaterally in this action.” Order, 02-10-2014 ¶18

This error “involves the merits and affects the judgment.”

¶14 Post-trial, the Court affirmed the holdings:

“¶49 The Estate further notes this Court’s earlier ruling that the personal representative of the Estate of John Vaage had no authority to alter the terms of the contract for deed, and that the actual deed must conform to the contract for deed.

Assuming this Court was correct in that ruling, **the Court notes that the remedy available to one harmed by a personal representative exceeding his authority is against the personal representative pursuant to Section 30.1-18-12, NDCC.**”

Memorandum Opinion, 02-18-15, ¶49.

The error must be reversed. Reversal reverses the judgment. The District Court ruled as a matter of law the PR’s performance unlawful, but denied reformation. **The entirety of ¶49 has nothing to do with legal theories of fraud or mistake**, the only theories reviewed in this Court’s Opinion. Half the case remains unreviewed. This Court erroneously assumed fraud and mistake were the only legal issues before the District Court. ¶49 rules on questions of contract interpretation and enforcement. It incorporates the arguments briefed and ruled upon in 2013, 2014, and 2015. The same issues are addressed in pre-trial, trial and post-trial briefs filed by the Estate. ¶49 addresses contract interpretation, enforcement, and remedies. ¶49 documents the District Court’s affirmation and incorporation of its prior Orders as a material part of the judgment. It has nothing to do with fraud or mistake. Questions of law concerning contract interpretation and enforcement remained before the District Court. No trial testimony is required to allow judicial examination of the four corners of the instruments. The pleadings, briefs and document language in evidence raise the issues. The issues at trial included much more than fraud and mistake.

¶15 The actual legal rationale supporting District Court Rulings at ¶¶24, 28 & 30, of the 10-20-13 Order and affirmed at Memorandum Opinion ¶49 are not relevant if the holdings are correct – they are. As a matter of law, the PR had no legal authority to alter the terms of contract performance. The District Court’s ruled correctly regardless of legal theory employed. The rulings are supported by the facts and law. Under the rulings, the Estate is

entitled to the remedy of reformation. Reformation was erroneously denied. **If corrected, the deed is reformed and judgment reversed.** How can this Court allow a deed held not in compliance with the obligations of contract to stand unreformed when the trial court correctly held:

“Indeed, what the Court has found, as a matter of law, is that the personal representative lacked authority to deliver a deed which was contrary to the contract for deed.” Order 10-20-13 ¶30; and affirmed at Memorandum Opinion ¶49.

This court must correct the remedy and “reform to conform” the language of the deed.

¶16 The District Court erroneously believed the sole remedy for wrongful contract performance lay in proceedings against the PR. Although this Court reversed the substance of the holding (Opinion ¶¶15,16,17), the adverse use of the bad rule of law found in Memorandum Opinion ¶49 has not been addressed. A deed held unlawful by the trial court remains unreformed solely due to error.

CONCLUSION

¶17 This Court is asked to grant Rehearing, or in the alternative, to Order reformed the language of the PR Deed to conform to the contract; or to remand the case for proceedings consistent with the Opinion of the Court. Oral argument is requested.

Submitted this ___ day of March, 2016.

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ADDENDUM

Rules of Civil Procedure Referenced at Footnote 1:

RULE 1. SCOPE OF RULES

These rules govern the procedure in all civil actions and proceedings in district court, except as stated in Rule 81. They should be construed and administered to secure the **just**, speedy, and inexpensive determination of every action and proceeding.

RULE 2. ONE FORM OF ACTION

There is one form of action—the civil action.

Official Note: This rule is identical to Fed.R.Civ.P. 2 and provides for one form of action to be known as a "civil action." **The old forms of action have been abolished, as has the distinction between "law" and "equity" cases.**

RULE 8. GENERAL RULES OF PLEADING

- (a) Claims for Relief. A pleading that states a claim for relief—whether an original claim, a counterclaim, a crossclaim, or a third-party claim—must contain:
 - (1) **a short and plain statement of the claim showing that the pleader is entitled to relief; and**
 - (2) **a demand for the relief sought, which may include relief in the alternative or different types of relief.**
- (d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.
 - (1) In General. Each allegation must be simple, concise, and direct. **No technical form is required.**
- (e) Construing Pleadings. **Pleadings must be construed so as to do justice.**

Applicable Rules of Appellate Procedure:

RULE 35. SCOPE OF REVIEW

- (a) Civil Appeals.
- (2) Intermediate Orders. Upon an appeal from a judgment, the court **may** review any intermediate order or ruling which involves the merits and affects the judgment appearing upon the record.

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Correne Vaage, as Special Personal)
Representative of the Estate of)
Lowell H. Vaage,)
Plaintiff/Appellant,)

-vs-

Supreme Court No. 20150121

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described in the Complaint,)
Defendants/Appellees.)

CERTIFICATE OF SERVICE

Appeal From Judgement of the

District Court of Burke County

District Court Case No. 07-04-P-3

¶ 1 A true and correct copy of the Brief and Appendix II filed in support of Petition for Rehearing on behalf of the Appellant/Plaintiff were sent by U.S. Mail with adequate postage attached on March 11, 2016, to be delivered to:

Mr. Scott M. Knudsvig
P.O. Box 1000
Minot, North Dakota 58702-1000
With a PDF copy served by email to: sknudsvig@pringlend.com

and seven bound copies of the Brief and Appendix II to the Brief, also filed on behalf of the Appellant/Plaintiff were sent by U.S. Mail with adequate postage attached on March 11, 2016, to be delivered to:

Ms. Penny Miller, Clerk of the Supreme Court
600 East Boulevard Avenue
Bismarck, North Dakota 58505-0530
With Word Perfect and PDF copies of the brief electronically served to:
SupClerkofCourt@NDCourts.Gov

¶ 2 Dated this 11th day of March, 2016.

/s/ Larry M. Baer

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