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JUNE 2, 2017
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, Defendants and Appellants and 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, Robert L. Hannah, Estate of Robert L. Hannah, Alan Hannah, Estate of Alan Hannah, 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 and ~~Appellees~~	**SUPREME COURT NO. 20160449** Civil No. 31-2013-CV-00151

ON APPEAL FROM ORDER ON REMAND AND ORDER FOR JUDGMENT DATED NOVEMBER 17, 2016 AND THE JUDGMENT DATED NOVEMBER 21, 2016

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

APPELLANTS' REPLY BRIEF

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I. Section 47-09-12 deems that record title is in Arnold Hannah's successors-in-interest Welker & Ostrem, and Markgraf & Shanahan must overcome the presumption of good title in Welker & Ostrem by clear and convincing evidence.

[¶1] Markgraf & Shanahan argue N.D.C.C. Section 47-09-12 (which dictates Arnold Hannah is deemed to be acting individually in the 196 Grant Deed) is inapplicable and does not bar their implied trust claims. (See Appellees' Brief at ¶¶ 35-39). Welker & Ostrem do not contend N.D.C.C. Section 47-09-12 bars Markgraf & Shanahan's implied trust claim. Rather, N.D.C.C. Section 47-09-12 is relevant to the posture of Markgraf & Shanahan's implied trust claim to the Mineral Rights and the burden of proof they must meet in pursuing such a claim against Welker & Ostrem.

[¶2] Markgraf & Shanahan do not enter this lawsuit on equal footing with Welker & Ostrem. Whereas Welker & Ostrem hold record title to the Mineral Rights and are presumed to have good title, Markgraf & Shanahan are strangers to title attacking an unambiguous deed with parole evidence in an attempt to overcome the presumption of title in Welker & Ostrem.

II. The fact Arnold shared proceeds from the Mineral Rights with certain family up until December 30, 1989 does not prove that his sole retention of the Mineral Rights after 1989 was wrongful.

[¶3] Markgraf & Shanahan contend that the fact Arnold distributed proceeds from the Mineral Rights to certain family members pre-1990 and kept statements showing divisions of proceeds between family members proves an implied trust should be imposed. (See, e.g., Appellee's Brief at ¶ 49). Markgraf & Shanahan argue Arnold would not have distributed proceeds, kept statements, and signed documents using the designation "Arnold Hannah, Trustee" if he owned the Mineral Rights exclusively. (See id.). However, the fact that there may have been some agreement between the family for

Arnold to divide up and distribute the parents' assets pre-1990 does not establish that Arnold's retention of the Mineral Rights after 1990 was wrongful or in violation of some agreement so as to support Markgraf & Shanahan's implied trust theory.

[¶4] Arnold's conduct is consistent with what he wrote in his December 30, 1989 letter, which says that Arnold had fulfilled the requirements of any understanding with respect to his management and distribution of his parents' assets by that time. (A. at 276) (emphasis added) ("They had deeded everything to me, know that I would d[i]vide the net balance equally, **which I have done**…"). His December 30, 1989 letter makes clear that he was retaining the Mineral Rights from that point forward, in a manner consistent with an understanding reached between himself, Kathryn, and Robert, who had died in 1985. (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 [Robert] & Kathryn, that I should have what remained of the mineral rights on the land…"). Markgraf & Shanahan have not and cannot prove by clear and convincing evidence that Arnold violated any agreement or understanding which may have existed concerning the Mineral Rights by keeping what remained of them after December 30, 1989. Accordingly, their implied trust claim fails.

III. Arnold's December 30, 1989 letter is not vague, is consistent with the majority of the evidence in the record, and does not contradict Welker & Ostrem's position.

[¶5] Markgraf & Shanahan contend Arnold's statement in his December 30, 1989 letter that he was keeping what remained of the Mineral Rights pursuant to an understanding between him, Kathryn, and Robert is ambiguous and is inconsistent with all of the other evidence in the record. (Appellee's Brief at ¶¶ 59-69). This contention falls flat because Arnold's letter is crystal clear, is consistent with all of the pre-1990

evidence in the record, and is consistent with the fact Arnold made no further distributions to any of the family members after December 30, 1989.

[¶6] At the end of the day, after prior correspondence between the siblings about how the Mineral Rights should be divided, Arnold unequivocally told his sibling Kathryn and nieces and nephews he was keeping the Mineral Rights moving forward. (A. at 276). The fact that Arnold distributed proceeds along with the letter is not inconsistent with his other statements in the letter. He explains that though he is not required to share the Mineral Rights proceeds because he, Robert, and Kathryn agreed he could keep them, he would nevertheless share a last payment with them. (A. at 276).

IV. Arnold writing that Kathryn had to pay income tax on the land sale and lease money she received is not probative of whether Arnold's sole retention of the Mineral Rights was wrongful or in violation of some family understanding to the contrary so as to support an implied trust.

[¶7] Markgraf & Shanahan argue that Arnold's two statements to Kathryn telling her she would have to pay income tax on land sale and lease money he sent to her pre-1990 "resolves any lingering doubt that could possibly exist as to their shared interest in the Property" because only a person that owns property must pay income tax on the proceeds. (See Appellees' Brief at ¶¶ 47-48). There is no evidence that Kathryn actually paid income tax on the land sale and lease money she received. Markgraf & Shanahan's argument that Arnold's statements to Kathryn regarding income tax is dispositive of the contested ownership of the Mineral Rights is ridiculous. Arnold's letters about the tax treatment of proceeds paid by him to Kathryn from land sales and leases is not dispositive, nor even probative, or the question of whether an implied trust should be imposed.

[¶8] Markgraf & Shanahan rely on an October 30, 1981 letter in which Arnold writes: "the way our C.P.A. explains it, the lease money and farm rent is taxable as regular income."(A. at 267). Markgraf & Shanahan also rely on Arnold's January 17, 1990 letter, in which he responds to Kathryn's apparent question about whether the money sent along with his December 30, 1989 letter is taxable, writing: "Glad to get your letter the other day, and sorry but you will have to pay income tax on it." (A. at 277).

[¶9] All Arnold's tax-related statements tend to prove is that Arnold shared proceeds from the Mineral Rights with Kathryn up until December 30, 1989. Welker & Ostrem do not deny it appears Arnold distributed proceeds from the Mineral Rights to Kathryn and other relatives up until December 30, 1989. Arnold's statement in 1990 is not evidence Kathryn "owned" the Mineral Rights at anytime, much less after 1989.

V. Markgraf & Shanahan have the burden to prove by clear and convincing evidence that Arnold's retention of the Mineral Rights was wrongful. Welker & Ostrem have no burden of proof.

[¶10] Markgraf & Shanahan incorrectly argue that Welker & Ostrem have a burden of proof to prove up the agreement between Kathryn, Robert, and Arnold that Arnold should keep what remained of the Mineral Rights. (See Appellees' Brief at ¶¶ 52-53). Welker & Ostrem have no burden to prove up the agreement evidenced by Arnold's December 30, 1989 letter. Only Markgraf & Shanahan have a burden of proof to prove their entitlement to have an implied trust imposed.

[¶11] Markgraf & Shanahan misleadingly rely on a quotation out of context from McCarney v. Knudsen in their attempt to improperly shift the burden of proof to Welker & Ostrem. (See Appellees' Brief at ¶¶ 52 ("He becomes an implied trustee of the thing gained for the benefit of the person who would otherwise have had it, *unless he can prove he has some other or better right thereto*." (emphasis added by Appellees) (quoting

McCarney v. Knudsen, 342 N.W.2d 380, 385 (N.D. 1983)). The italicized portion of the quotation relied on by Markgraf & Shanahan refers only to a circumstance where a claimant ***has already established*** that an implied trust should be imposed by clear and convincing evidence. That is not the case here.

[¶12] The burden of proof shifts to the defendant only if the plaintiff first proves the defendant holds the property due to fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act. Id. Here, it appears from Arnold's December 30, 1989 letter that Kathryn, Robert, and Arnold agreed Arnold should keep the Mineral Rights. (A. at 276). The fact Kathryn and Robert appear to have agreed Arnold should keep the Mineral Rights defeats Markgraf & Shanahan's implied trust claim because they therefore cannot prove by clear and convincing evidence that Arnold's successors-in-interest Welker & Ostrem, "hold[] the property due to fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act." McCarney, 342 N.W.2d at 385.

VI. The mineral leases executed by other family members on one out of four parcels do not demonstrate they were "seized and possessed" of that portion of the Mineral Rights.

[¶13] Pursuant to N.D.C.C. § 28–01–04, Markgraf & Shanahan are barred from bringing this action, unless they or their mother Kathryn were "seized or possessed" of the Mineral Rights within twenty years before bringing the action. See Markgraf v. Welker, 2015 ND 303 ¶ 32, 873 N.W.2d 26. Markgraf & Shanahan incorrectly contend "evidence of possession" of the Mineral Rights is all that is required under N.D.C.C. § 28–01–04. That is false and finds no support in the language of that statute. Under N.D.C.C. § 28–01–04, Markgraf & Shanahan must actually have been "seized or possessed" of the Mineral Rights within 20 years of filing this action.

[¶14] Markgraf & Shanahan and the other Hannah relatives have not been "seized or possessed" of the Mineral Rights since December 30, 1989. Markgraf & Shanahan argue the mineral leases executed by the Hannah relatives prove they were "seized or possessed" of the Mineral Rights. (See Appellees' Brief at ¶ 80). This is incorrect. The fact that a person executes an oil and gas lease concerning a parcel does not constitute actual possession of it. Sickler v. Pope, 326 N.W.2d 86, 93 (N.D. 1982). Additionally, in the mineral rights context, a person is not "seized or possessed" of mineral rights 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). Markgraf & Shanahan's predecessor-in-interest Kathryn Nelson had notice of Arnold's assertion of sole ownership when she received Arnold's December 30, 1989, more than twenty years prior to this action, and had notice of record title to the Mineral Rights, which was in Arnold individually.

[¶15] Further, the mineral leases relied on by Markgraf & Shanahan only concern the one out of the four parcels of the Mineral Rights, the Southwest Quarter of Section 25. (A. at 278-87; 289-301). The Mineral Rights consist of the mineral interests under four parcels of Mountrail County, North Dakota land described as:

Parcel 1:	Township 156 North, Range 92 West Section 19: E1/2NW1/4, Lots 1 & 2
Parcel 2:	Township 154 North, Range 93 West Section 17: N1/2NW1/4, SW1/4NW1/4, NW1/4SW1/4
Parcel 3:	Township 156 North, Range 93 West Section 25: SW1/4
Parcel 4:	Lots 1, 2, 3 and 4, of Block Eight (8), Original Townsite of Ross.

(A. at 232). None of Arnold's relatives executed leases concerning the three parcels of the Mineral Rights under Section 19 (Parcel 1), Section 17 (Parcel 2), or Lots 1, 2, 3, and

4 of Block Eight in Ross (Parcel 4). Accordingly, any effect of the Hannah relatives' execution of mineral leases is limited to the Mineral Rights under Section 25 (Parcel 3).

Respectfully submitted June 2, 2017.

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Kathleen Markgraf and Marilyn Shanahan, Plaintiffs and Appellees v. Connie Welker, Vicki Ostrem, Defendants and Appellants and 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, Robert L. Hannah, Estate of Robert L. Hannah, Alan Hannah, Estate of Alan Hannah, 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 and Appellees	**SUPREME COURT NO. 20160449** Civil No. 31-2013-CV-00151

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NORTH CENTRAL JUDICIAL DISTRICT
HONORABLE RICHARD L. HAGAR

AFFIDAVIT OF ELECTRONIC SERVICE

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

Alicia Rash, 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 June 2, 2017, **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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Alicia Rash

Subscribed and sworn to before me this 2 day of June, 2017.

Notary Public

(SEAL)

JULIE KINNISCHTZKE
Notary Public
State of North Dakota
My Commission Expires Nov 23, 2022

IN THE SUPREME COURT
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Kathleen Markgraf and Marilyn Shanahan, Plaintiffs and Appellees v. Connie Welker, Vicki Ostrem, Defendants and Appellants and 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, Robert L. Hannah, Estate of Robert L. Hannah, Alan Hannah, Estate of Alan Hannah, 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 and Appellees	**SUPREME COURT NO. 20160449** Civil No. 31-2013-CV-00151

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Alicia Rash

Subscribed and sworn to before me this 5 day of June, 2017.

JULIE KINNISCHTZKE
Notary Public
State of North Dakota
My Commission Expires Nov 23, 2022
(SEAL)

Notary Public