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STATE OF NORTH DAKOTA

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

George Seccombe, Barbara Treska, Erik Naesset Helge Naesset, Astri Hoist, Helge Naesset, Astri Hoist, Irene Markle, and Alice Naesset,

Appellants,

Slawson Exploration Company, Inc., and Alameda Energy, Inc.,

Appellants,

vs.

Bradley C. Rohde and Karen D. Rohde, Trustees of the Bradley C. Rohde Living Trust dated June 22, 2010, Anita Rohde, Trustee of the Anita Rohde Living Trust UDT October 8, 2009, Dennis Rohde, Trustee of the Dennis Rohde Living Trust UDT October 8, 2009, Gary Rohde, Bradley Rohde, Dennis Rohde, Northern Oil and Gas, Inc., Ryan Family Mineral Partnership, S. Reger Family Mineral Partnership, Kootenia Resources Corporation, Summerfield C. Baldridge, Montana Oil Properties, Inc., Lakeside State Bank, Quentin R. Shulte, and all persons unknown claiming any estate or interest in, or lien or encumbrance upon the property described in the complaint,

Appellees.

Supreme Court No. 20180069

Mountrail County
Civil No.: 31-2012-CV-00104

# BRIEF OF APPELLEES BRADLEY C. ROHDE AND KAREN D. ROHDE, TRUSTEES OF THE BRADLEY C. ROHDE LIVING TRUST DATED JUNE 22, 2010, ANITA ROHDE, TRUSTEE OF THE ANITA ROHDE LIVING TRUST UDT OCTOBER 8, 2009, DENNIS ROHDE, TRUSTEE OF THE DENNIS ROHDE LIVING TRUST UDT OCTOBER 8, 2009, GARY ROHDE, BRADLEY ROHDE, AND DENNIS ROHDE

Appeal from Orders on Motions for Summary Judgment Entered March 26, 2013 and December 11, 2017,
and Judgment Entered January 17, 2018
North Central Judicial District, Honorable Gary H. Lee Presiding

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[¶1] **I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

[¶2] 1. The April 16, 1962 Executor's Deed conveyed a 50% mineral interest to Gilbert Rohde.

[¶3] 2. Plaintiffs' claims are barred by the statute of limitations contained in N.D.C.C. § 30-24-13 (1960).

[¶4] **II. STATEMENT OF THE CASE**

[¶5] This case arose from competing ownership claims to a one-half interest in minerals (herein "50% mineral interest") located in Mountrail, North Dakota. On December 11, 2017, the district court issued its Order on Motions for Summary Judgment in Rohde Defendants' favor. (Slawson's App'x C-22). On January 17, 2018, a Judgment conforming to the district court's Order was entered. (Slawson's App'x D-58). The Naesset heirs, Slawson Exploration Company, Inc., and Alameda Energy, Inc., (herein collectively referred to as "Plaintiffs") appeal from said Order and Judgment.

[¶6] **III. STATEMENT OF THE FACTS**

[¶7] The real estate that is the subject of this appeal is located in Mountrail County, North Dakota, to-wit:

> **Township 151 North, Range 92 West**
> **Section 5: SE1/4**
> **Section 8: NE1/4**

(herein "the property"). Plaintiffs George Seccombe, Barbara Treska, Eric Naesset, Helge Naesset, Astri Holst, Irene Markel, and Alice Naesset (collectively referred to herein as "Naesset heirs") initiated this action against Defendants Bradley C. Rohde and Karen D. Rohde, Trustees of the Bradley C. Rohde Living Trust dated June 22, 2009, Anita Rohde, Trustee of the Anita Rohde Living Trust UDT October 8, 2009, Dennis Rohde, Trustee of

the Dennis Rohde Living Trust UDT October 8, 2009, and Gary Rohde (collectively referred to herein as "Rohde Defendants"), as well as other Defendants. Slawson Exploration Company, Inc., and Alameda Energy, Inc., (collectively referred to herein as "Slawson") intervened in the action.

[¶8] Plaintiffs' claims are rooted in conveyances, transactions, and conduct that took place in 1962. Dkt. #134 and #283. No party to this appeal has first-hand knowledge of what happened in 1962, so the parties, the district court, and this Court are left with a record that includes only documents.

[¶9] On January 4, 1952, the State of North Dakota conveyed the property to Olaf Naesset; the deed provided that the conveyance was "subject to the oil, gas and mineral reservation as provided by Chapter 165, 1941 Session Laws." (Slawson App'x C-27). In this deed, the State of North Dakota reserved 50% of all oil, gas, or minerals. Id. Therefore, Olaf Naesset received the surface of the property and 50% of the oil, gas, and other minerals, which he owned until his death. Id.

[¶10] At some point prior to 1962, Olaf Naesset died and Lakeside State Bank (herein "Lakeside") was appointed as the executor of his estate. Id. The Naesset heirs are Olaf Naesset's successors-in-interest. (Slawson App'x C-25).

[¶11] Lakeside petitioned the county court to sell the property, which the county court granted; the Petition, Order Authorizing Sale, and Publication of Private Sale stated that the estate reserved or reserves "1/2 of the mineral interests." (Slawson App'x F-76, I-85, and K-90). The Report of Sale and Order Confirming Sale, both filed with the county court on April 9, 1962, were silent as to minerals being reserved. (Slawson App'x M-98 & N-101). The Order Confirming Sale was recorded in the Mountrail County Register of Deeds

on April 10, 1962. (Slawson App'x N-101).

[¶12] On April 16, 1962, Lakeside, via an Executor's Deed, conveyed the property owned by the estate, both the surface and a 50% mineral interest to Gilbert Rohde, since the April 16, 1962 Executor's Deed (herein "Original Executor's Deed") contained no mineral reservation thereby divesting the estate of any interest. (Slawson App'x O-103). The Original Executor's Deed was recorded in the Mountrail County Register of Deeds that same day. Id. The Rohde Defendants are the heirs and successors-in-interest to Gilbert Rohde.

[¶13] Thereafter, on May 8, 1962, an Amended Order Confirming Sale was executed and said order stated that the "estate reserves a ½ mineral interest." (Slawson App'x P-106). An Amended Executor's Deed was executed on May 8, 1962 wherein Lakeside purports to convey the surface to Gilbert Rohde and attempts to reserve to the estate a one-half mineral interest. (Slawson App'x Q-108 & 109). The Amended Executor's Deed, like the Amended Order, states that a ½ mineral interest is reserved. Id. The deed states:

> This deed is given to correct that certain Executor's Deed dated April 16, 1962, and filed for record April 16, 1962, in Book 350 at page 139.

Id.

[¶14] The Plaintiffs did not present any evidence to the district court that a hearing was held in the Olaf Naesset estate proceedings to determine whether the Amended Executor's Deed should be approved, nor was evidence presented that Gilbert Rohde received notice or an opportunity to be heard on the Amended Executor's Deed. (Slawson App'x C-28 & 36). Plaintiffs did not argue to the district court that the Amended Executor's Deed was delivered to Gilbert Rohde, nor was evidence proffered that Gilbert Rohde accepted the

Amended Executor's Deed. Id.

[¶15] Further, on July 13, 1962, a final Decree of Distribution was issued by the county court, which made no mention of the minerals. (Slawson App'x C-28). On August 6, 1962, the county court issued a final discharge in the probate proceeding. Id. Then, on August 6, 1962, Lakeside filed a petition to reopen the estate for the sole purposes of modifying the final decree to include a one-half mineral interest. Id. The county court then issued an Amended Final Decree of Distribution which included language that provided for a one-half mineral interest in the property. (Slawson App'x C-29).

[¶16] In this instant action, the district court found that the record was devoid of any evidence to suggest that Gilbert Rohde was included in any of these county court estate proceedings, that he was given any notice of the same, or that he was given an opportunity to be heard. (Slawson App'x C-29). At oral argument on the motions for summary judgment, Slawson admitted that no evidence exists that notice was given to Gilbert Rohde. Dkt. #420, Pg. 4.

[¶17] Due to the arguments made on appeal, the dialogue between Defendants' and Plaintiffs' counsel and the district court at the summary judgment hearing are of particular importance.

> MR. OLSCHLAGER [(Slawson's attorney)]: From these facts, we know under [Gruebele v. Gruebele, 338 N.W.2d 805 (N.D. 1983)], that the Court had the authority to correct it's record to reflect that the minerals were actually reserved to the Estate of Olaf Naesset. We also know that neither Gilbert Rohde nor his successors assailed the Court's exercise of its authority in the probate proceeding, which renders this actions an impermissible collateral attack on the Probate Court's exercise of that authority.
>
> THE COURT: Did anybody - - so there was the notice of sale and all that stuff with the reservation. The sale and the deeds and all that without the reservation. Then the Court's action to correct the record?

MR. OLSCHLAGER: Yes, Your Honor.

THE COURT: When the Court acted to correct it's record, was notice of that sent out to all these other parties?

MR. OLSCHLAGER: There is no evidence of notice. Gruebele stands for the proposition that notice was not required, and the version of Rule 60a of the Rules of Civil Procedure in effect that the time of these occurrences differ from that of today and that expressly did not require notice.

….

MR. COOK: The Gruebele case, just briefly, because that was supplemental authority that was filed with the Court well after the briefing and so we haven't got a chance to respond to that. Basically they are using it for the proposition that it proved a Rule 60a to change clerical errors in deeds. A couple key takeaways from that case. First of all, it's a divorce case between a husband and wife. And so, essentially, the Court goes through and says the intent of the order was to divide the parties property equally because it's a divorce. And the husband then turned around and bid on the property. He was the bidder and he ended up getting – he bid on the surface, but he got the minerals too, basically. So the Court is saying that's not fair to the wife because the whole point here was to divide the property equally.

In that case, Justice VandeWalle has a concurrence where he points out the husband testified in that case he knew he wasn't supposed to get the minerals. And there's a footnote in the majorities opinion that says he testified that when he was bidding in response to the ad in the newspaper, he was only bidding on the surface, not the minerals.

Obviously we'd be in a different position here if that was the case. If we had evidence from Gilbert Rohde saying he knew he wasn't supposed to get the minerals, that may show evidence of his intent. But we don't have that.
…

MR. OLSCHLAGER: But, we don't know. And that's true of all these court proceedings. But regardless as to whether or not there was notice to Mr. Rohde, I do still believe that Gruebele is controlling of the issue. Mr. Cook did recite the facts of Gruebele accurately. It was a situation where there was a court ordered sale of property, the minerals weren't supposed to go, but they did. The Court, through ex parte order, directed that half of the minerals go back to the wife. The Court had jurisdiction of the parties, the same thing is true of the 1962 court. Mr. Rohde submitted his bid in response to the published notice of the sale, which is synonymous to the publication of a summons in any civil action. The Court had jurisdiction over the parties and - -

> THE COURT: Did the fact that he purchased the property make him a party?
>
> MR. OLSCHLAGER: I would suggest yes. By voluntarily appearing - -
>
> THE COURT: How did he voluntarily appear? All he did was buy some property.
>
> MR. OLSCHLAGER: He submitted a bid into the Court, and he paid the funds into the Court.
>
> THE COURT: And that makes him a party?
>
> MR. OLSCHLAGER: That is our position, Your Honor.
>
> THE COURT: So if he was a party, shouldn't he have then gotten notice of everything that was going on?
>
> MR. OLSCHLAGER: Gruebele stands for the proposition that that is not necessary after an appearance…

Dkt. #420, Pgs. 4, 28, & 40.

[¶18] The district court rejected Plaintiffs' arguments that Gruebele was controlling and granted summary judgment in the Rohde Defendants' favor. The district court's decision was based on numerous rationales. First, the district court determined that an action or petition and notice was required to divest Gilbert Rohde of the 50% mineral interest that he received in the Original Executor's Deed; the district court reasoned:

> The Court take[s] judicial notice of the probate file in the Estate of Olaf Naesset, 31 1961 PR 2245. The estate file contains no action commenced by any heir or executor to correct, or vacate the original April 16, 1962 [Executor's Deed]. Nor has any party pointed to any other civil file in Mountrail County initiated to correct the April 16, 1962, Executor's Deed…
>
> Under the law, as it existed in 1962, the original Executor's deed, approved by the Court, was final. The only way to undo that finality was by a proper legal action. None appears to have been commenced. The subsequent amended deeds and orders are therefore a nullity and of no effect.
>
> That an action was required is further borne out by the case of Canthro v. McArthur, 30 ND 337, 152 N.W. 686 (1915)…
> Sections 7955, and 7956, Revised Code, 1905, were precursors to the 1962 version of Section 30-02-26, NDCC, and Section 30-02-27, NDCC. In 1962, those sections

> provided the Court with the authority to amend process upon motion or petition. The Court could amend the process provided it did not prejudice or injure any party.
>
> Statute and case law as it existed in 1962 required an action, a petition, or some other form of motion, and an opportunity to be heard by all interested persons before any change or amendment to the approved April 16, 1962 Executor's Deed could be made. This is especially so in this case where the amendment sought to dispossess Gilbert Rohde of the minerals.
>
> No evidence of any action, petition, or other motion exists in the record. There is nothing to suggest that Gilbert Rohde was ever given notice of the proposed amendments, or an opportunity to be heard on the proposed amendments. His interest in the minerals therefore cannot be taken away from him, or his heirs, 45 years later.

(Slawson App'x C-34 through 37).

[¶19] Second, the district court found that the Original Executor's Deed controlled, because there was no evidence that the Amended Executor's Deed was both delivered to and accepted by Gilbert Rohde, both of which are required. The district court opined:

> The interest transferred by a grantee by a deed does not vest until there is delivery of the deed by the grantor, Section 47-09-06, NDCC, and acceptance by the grantee. CUNA Mortgage v. Aafedt, 459 N.W.2d 801 (ND 1990)….
>
> Conversely, there is nothing in the record to show that Gilbert Rohde was even aware of the existence of the later amendments to the Executor's Deed, that the later amended deed was delivered to him, or that he accepted delivery of the amended deed. Nor may any acceptance by presumed. While the recording of a deed may create a rebuttable presumption of acceptance, that presumption only arises when the deed is beneficial to the grantee. The presumption does not arise when the deed is a burden to the grantee. Gawryluk v. Poynter, 2002 ND 205, 654 N.W.2d 400.
>
> The burden to Gilbert Rohde by the later amendment of the Executor's Deed is severe and obvious. The amended Deed divests him of his ownership of the minerals.
>
> Under the facts in this case, the Court must accept the original April 16, 1962 Executor's Deed as the controlling deed, and reject the later amendment.

(Slawson App'x C-37 through 38).

[¶20] Third, the district court determined the Naesset heirs' reformation claim lacked the requisite evidence to survive summary judgment. The district court reasoned:

> In order for there to be a mistake sufficient to justify a reformation, however, the mistake must have been mutual. Melchoir v. Lystad, 2010 ND 140, 786 N.W.2d 8. While there may be sufficient evidence to find that the executor and the estate attorney dropped the ball when it came time to drafting the April 16, 1962 Executor's Deed, there is nothing to suggest that Gilbert Rohde was laboring under any mistake.
>
> As noted above, in 1962, an order for sale of real estate in a probate proceeding was an order for the sale of all interest owned by the decedent at the time of his death. There is nothing in any of the documents leading up to the sale which would lead anyone to believe that the estate did not, in fact, own 100% of the minerals, or even some lesser percentage between 50% and 100%, for example 66 2/3%, or 75%. All that the preliminary documents and notices reflect is that the estate was reserving one half of the minerals. It is equally possible to conclude that Gilbert Rohde believed that he was purchasing the entire surface and any remaining minerals, and that the estate was reserving only one half of the minerals, as it is to believe that he knew he was purchasing the surface only.
>
> It is also possible to assume under the facts of this case that Gilbert Rohde may indeed have known of the amendments to the April 16, 1962, deed, but because he believed he had purchased the surface and 100% of the minerals, he allowed the estate to amend the Executor's Deed to effectuate the advertised reservation. In which event, the estate would reserve one half of the minerals, and Gilbert Rohde would acquire the other one half.
>
> No one has provided any discovery or other documentation to help illuminate Gilbert Rohde's thoughts in April, 1962, or later.
>
> Death has sealed the lips of all involved. While it is possible to envision the executor and the estate attorney scrambling after the fact to correct their mistake, there is no evidence to show that Gilbert Rohde was mistaken. The required certainty of error is not present. The Court cannot leap to a factual finding that Gilbert Rohde was mistaken. The reformation must be denied.

(Slawson App'x C-40 through 41).

[¶21] Lastly, the district court found that Plaintiffs' claims were barred by the statue of limitations contained in N.D.C.C. § 30-24-13 (repealed in 1973), which was in effect in 1962; the district court wrote:

> Section 30-24-13, NDCC, provided that no action for the recovery of any estate sold by an executor under the provisions of Chapter 30-19, NDCC could be maintained by any heir, or other person claiming under the decedent, unless it was commenced within three years next after the sale. This action was commenced in 2012, approximately 47 years after the sale.
>
> The statue further extends the statute of limitations deadlines to three years from the discovery of any fraud or other ground upon which the action was based. There can be little argument that the alleged error or mistake which brings this case before the Court was discovered almost immediately, in 1962. The executor and the state attorney discovered the omission of the mineral reservation almost immediately and attempted to correct the error before the end of the month of April, 1962. The plain language of then Section 30-24-13, NDCC, would bar this action by May, 1965.

(Slawson App'x C-41 through 42). A Judgment was entered on January 17, 2018. (Slawson App'x D-58).

[¶22] The Naesset heirs and Slawson appeal from the March 26, 2013 and December 11, 2017 Orders on Motions for Summary Judgment and the January 17, 2018 Judgment. (Slawson App'x B-19).

[¶23] **IV. LAW AND ARGUMENT**

[¶24] **A. The North Dakota Supreme Court reviews the district court's grant of summary judgment de novo.**

[¶25] Summary judgment is appropriate "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.D.R.Civ.P. 56(c). Whether summary judgment was properly granted is "a question of law which [the North Dakota Supreme Court] review[s] de novo on the entire record." Wahl v. Country Mut. Ins. Co., 2002 ND 42, ¶ 6, 640 N.W.2d 689.

[¶26] **B. The district court properly determined that the Plaintiffs' claims were barred by the statute of limitation contained in N.D.C.C. § 30-24-13.**

[¶27] "The purpose of a statute of limitation is to prevent plaintiffs from sleeping on their legal rights to the detriment of defendants." Hoffner v. Johnson, 2003 ND 79, ¶ 9, 660 N.W.2d 909 (quotations and citations omitted). "Thus, statutes of limitation are designed to prevent the plaintiff's enforcement of stale claims when, through the lapse of time, evidence regarding the claim has become difficult to procure or even lost entirely." Langowski v. Altendorf, 2012 ND 34, ¶ 8, 812 N.W.2d 427 (quotations and citations omitted).

[¶28] N.D.C.C. § 30-24-13 (repealed in 1973), which was in effect in 1962 when the Original Executor's Deed was executed, sets forth the applicable statute of limitation:

> 30-24-13. Action to recover estate or set aside decree – When begun – Limitation three years – Exception Minors. – **No action for the recovery of any estate sold by an executor or administrator or otherwise disposed of under the provisions of chapter 30-19 can be maintained by any heir or other person claiming under the decedent unless it is commenced within three years next after the sale. An action to set aside a decree directing or confirming a sale or otherwise disposing of such property may be instituted and maintained at any time within three years from the discovery of the fraud or other ground upon which the action is based.** This provision shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues, but all such persons may commence an action at any time within three years after the removal of the disability.

(**Emphasis added**).

[¶29] The district court correctly found that plain language of N.D.C.C. § 30-24-13 barred Plaintiffs' claims, for no action to recover the estate sold by the executor or to set aside the order confirming sale was brought until 2012, approximately 50 years after the sale and 47 years after the statute of limitations had run. (Slawson App'x C-42). The district court

determined that the "alleged error or mistake which brings this case before the Court was discovered" by the end of April 1962 and, therefore, N.D.C.C. § 30-24-13 "would bar this action by May, 1965." Id.; see generally Kranz v. Tavis, 192 N.W. 176 (N.D. 1923) (this section does not create a new remedy nor confer a new right of action, but merely recognizes the existing rule that a judgment may be vacated by an equitable action upon certain grounds, and limits the time within which such action may be brought.)

[¶30] The time to bring an action has long since passed. Nearly immediately after the Original Executor's Deed was executed, Lakeside made attempts to correct what it perceived as an error by asking the Court for an Amended Order and issuing an Amended Executor's Deed. (Slawson App'x C-42). However, no action was brought against Gilbert Rohde and now, over 50 years later, it is too late.

[¶31] This case is the perfect example of why statutes of limitations exist. Here, Lakeside failed to bring a timely action "for the recovery of any estate sold by an executor or administrator or otherwise disposed of under the provisions of chapter 30-19" or to "set aside a decree directing or confirming a sale or otherwise disposing of such property." N.D.C.C. § 30-24-13. If Lakeside would have properly commenced an action to set aside the Original Executor's Deed or the April 9, 1962 Order Confirming Sale, Gilbert Rohde would have been a party to the action allowing the county court to make a determination in the 1960's based on a full slate of facts. The matter is now stale and we are left to guess as to what transpired between the parties and what Gilbert Rohde's knowledge or intent may or may not have been.

[¶32] Therefore, the district court did not err, for it properly determined that N.D.C.C. § 30-24-13 barred Plaintiffs' claims.

[¶33] **C. The Original Executor's Deed conveyed the 50% mineral interest to Gilbert Rohde.**

[¶34] "It is a well-established 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 753, 755 (N.D. 1971). The Original Executor's Deed did not contain a mineral reservation, so the minerals owned by the estate, which was a 50% mineral interest, passed to the grantee, Gilbert Rohde. N.D.C.C. § 47-10-08 reinforces this result; it states: "Every grant of an estate in real property is conclusive against the grantor and every one subsequently claiming under him."

[¶35] Therefore, the 50% mineral interest in the property was conveyed to Gilbert Rohde per the Original Executor's Deed. If this was, in fact, a mistake, Lakeside was required to commence an action against Gilbert Rohde or, at the very least, file a petition with the county court in the probate action and provide notice to Gilbert Rohde so that he would have had an opportunity to be heard. The district court found no evidence that an action was commenced or that Gilbert Rohde was given notice or an opportunity to be heard in regards to the Amended Order Confirming Sale or Amended Executor's Deed. (Slawson App'x C-37). Slawson has admitted that there is no evidence that notice was given. Dkt. #420, Pg. 4.

[¶36] The district court correctly determined that the Original Executor's Deed controls and that an action, notice, and an opportunity for Gilbert Rohde to be heard was required to divest Gilbert Rohde of the 50% mineral interest that he obtained per the Original Executor's Deed. Slawson argues on appeal that the district court ignored Gruebele v. Gruebele, 338 N.W.2d 805 (N.D. 1983). It may be true that the district court's Order did not speak of Gruebele by name, but it is clear that the district court rejected that Gruebele

was controlling. At oral arguments held on the motions for summary judgment, Gruebele was center stage; Plaintiffs argued that it was directly on point, while Defendants argued that Gruebele was sufficiently different to provide no guidance. Dkt. #420, Pgs. 4, 28, and 40. The district court questioned Gruebele's application because the court found it troubling to divest Gilbert Rohde of the 50% mineral interest with no evidence that he had notice and an opportunity to be heard, so the district court found Gruebele unpersuasive.

[¶37] Gruebele was a divorce proceeding wherein a receiver was appointed to sell certain real estate of Jacob and Erna Gruebele, with proceeds to be split equally. Id. at 808. The receiver advertised that all the mineral rights were to be retained by the present owners. Id. At the sale, Jacob, one of the two parties in the divorce action, was the high bidder. Id. The receiver's deed failed to include a mineral reservation. An ex parte order was issued conveying Erna a one-half interest in the minerals. Id. Jacob knew that he was purchasing only the surface when he bid and he testified that he knew that the minerals were not included; therefore, the Court cautiously approved the ex parte order pursuant under Rule 60(a). Id. at 812 and Gruebele v. Gruebele, 338 N.W.2d 805, 813 (N.D. 1983) (Vande Walle, J. concurring). Here, unlike Jacob in Gruebele, Gilbert Rohde was not a party to the action. Here, unlike Gruebele, Lakeside's advertisement did not state that "all" minerals were being reserved; rather, the Petition, Order Authorizing Sale, and Publication of Private Sale would have given Gilbert Rohde the impression that Lakeside had the authority to convey a 50% mineral interest. (Slawson App'x F-76, I-85, & K-90). Lastly, Gruebele's rationale has been called into question. Disciplinary Action Against Wilson, 461 N.W.2d 105 (N.D. 1990).

[¶38] Here, Plaintiffs have tried to use the Amended Order of Sale and Amended Executor's Deed to divest a non-party, Gilbert Rohde, of the 50% mineral interest he received under the Original Executor's Deed. (Slawson App'x C-35 through 37). The district court correctly opined that the Original Executor's Deed controlled and that Gilbert Rohde, a non-party to the Estate of Olaf Naesset, could not be divested of the interest he received in said deed absent an action, petition, notice and an opportunity to be heard. See generally Canthro v. McArthur, 152 N.W. 686 (N.D. 1915) (describing that an application was made, notice was given, and a hearing was held to correct legal descriptions in an estate sale).

[¶39] **D. The district court properly rejected the Amended Executor's Deed because there was no evidence that it was both delivered to and accepted by Gilbert Rohde.**

[¶40] Plaintiffs have no evidence that the Amended Executor Deed, which contained the 50% mineral reservation, was both delivered to and accepted by Gilbert Rohde, which are required to burden Gilbert Rohde and his successors with the mineral reservation contained in the Amended Executor Deed. (Slawson App'x C-37 through 38).[1]

[¶41] Under North Dakota law, a conveyance takes effect upon (1) delivery of the deed and (2) acceptance of the deed by the grantee. CUNA Mortgage v. Aafedt, 459 N.W.2d 801, 803-04 (N.D. 1990). "The recording of the deed may create a rebuttable presumption of its delivery to, and its acceptance by, the grantee." Id. at 804. "However, presumptions

[1] At the district court, Slawson offered no proof of delivery and, only on appeal, has Slawson now argued that the Amended Executor's Deed may have been delivered. (Slawson's Appellant Brief, ¶ 60). Slawson's proof is that the Amended Executor Deed, which was signed by only Lakeside, states that it was "executed and delivered." Q-109. The problem is that the deed goes on to state that the document was "Signed and Delivered in Presence of --" Q-109. The place that was supposed to include a witness's name is left blank. This is not proof of delivery. Additionally, because this "proof" of delivery was not argued to the district court, this Court should ignore this argument, for arguments not made to the district court cannot be considered on appeal. See generally Pettinger v. Carrol, 2018 ND 140, ¶ 10, -- N.W.2d --; Ruud v. Frandson, 2005 ND 174, ¶ 10, 704 N.W.2d 852. In any event, Plaintiffs have no evidence of acceptance.

of acceptance arise only when the deed is beneficial to the grantee, not when the deed places a burden on the grantee." Id.

[¶42] Here, the district court correctly determined that the presumptions of delivery and acceptance were not triggered because the mineral reservation contained in the Amended Executor Deed burdened the grantee, Gilbert Rohde, since it would divest him of the mineral interest previously conveyed to him under the Original Executor's Deed. Plaintiffs needed to offer proof of both (1) delivery and (2) acceptance of the deed by Gilbert Rohde, which Plaintiffs were unable to do. Therefore, the district court correctly determined that the Original Executor's Deed is the controlling deed and not the Amended Executor's Deed. See generally 26 C.J.S. Deeds § 43 (2001) (stating "[w]here the grantor has divested himself or herself of title, although by mistake he or she has not conveyed the title in the way in which he or she intended, he or she may not by a subsequent conveyance correct the mistake, there being no title remaining to convey"); Turner v. Wisconsin Dep't of Revenue, 679 N.W.2d 880, 883 (Wis.Ct.App. 2004) (holding that correction deed naming husband and wife as grantees rather than limited liability partnership held invalid because transfer to property was complete once conveyed to the partnership).

[¶43] **E. The Original Executor's Deed is not void, nor did it unambiguously reserve the 50% mineral interest to Olaf Naesset's estate.**

[¶44] Slawson argues, based on archaic caselaw, that the Original Executor's Deed is void. Alternatively, Slawson argues that the deed unambiguously reserved the 50% mineral interest to Olaf Naesset's estate. The district court correctly found these inconsistent arguments unpersuasive.

[¶45] **1. <u>The caselaw offered by Plaintiffs does not support the propositions they assert.</u>**

[¶46] In support of Slawson's argument that the Original Executor's Deed is void, Slawson gives this Court numerous cases, none of which are applicable to the instant case. First, Slawson relies on 100-year-old cases from West Virginia, Missouri, and Delaware. Second, Slawson, based on these cases, offers a hypothesized, bright-line rule that, "[t]o the extent the court purported to authorize or confirm the sale of any greater estate in the land, the sale was void." (Slawson's Appellant Brief, ¶ 36).

[¶47] Slawson cites <u>Chapman v. Branch</u>, 72 W.Va. 54, 78 S.E. 235 (1913) for the proposition that the sale was void. Slawson ignores the complexity of <u>Chapman</u> and the rationale for that Court's decision. In <u>Chapman</u>, one of the many issues the West Virginia Court was deciding was whether the Lincoln County Court had "jurisdiction by decree of confirmation to invest in the purchaser title to property not sold, or offered for sale, or authorized to be sold, except on condition that that offered for sale and reported as sold by the commissioner would not sell for sufficient to pay decedent's debts…" <u>Id.</u> at 239. In <u>Chapman</u>, there was a specific West Virginia statute that addressed whether the court had jurisdiction. <u>Id.</u> at 239. The Chapman Court described the statute as follows:

> But in this State by statute a suit whether by administrator or creditor to sell a decedent's lands to pay his debts is in personam as well as in rem. Section 7, chapter 86, Code 1906, requires that the widow, heirs, and devisees, if any, and all known creditors of decedent shall be made defendants, and the rights of all parties, infants and adults, must be protected by proper process and decree. Jurisdiction of the person as well as of the property must be acquired, to sell and to give good title to purchasers.

<u>Id.</u>

[¶48] The Chapman Court stated that the Court "was without jurisdiction to confer title to the additional property and property rights on the purchaser." Id. In its explanation of its holding, the Court stated:

> Upon the principles of these authorities, we hold, that the decree of confirmation in this case in so far as it undertook to confirm to the purchaser property and property rights other than what were sold and reported by the commissioner is absolutely void, and that the purchaser by the decree of confirmation took no title thereto as against the infant defendants, plaintiffs in this suit. Those rights which we think should be eliminated from the decree of confirmation and the deed of the commissioner, consist in the right confirmed to erect coke ovens and manufacture coke; the right to erect and maintain buildings on said land, other than those necessary to conveniently remove the coal and the other minerals sold and conveyed; the right to take any of the timber therefrom, for any purpose; rights of way over and upon said land, for general railroad purposes; the right to erect and maintain store houses or other improvements thereon, not necessary for the convenient mining and removal of coal and other mineral substances fairly included within the mineral rights sold and purchased by the purchaser. In so far as such property and property rights and interests were by the said decree of confirmation confirmed to the purchaser, we hold it to be void and that it should be set aside, reversed and annulled, and that defendants should be required to account to plaintiffs therefor, and for the use and occupation of said lands, not legally authorized, and for the property and property rights taken which were not sold and purchased under the decree of sale.

Id. A reading of this explanation by the Chapman Court reveals that Slawson has taken great liberty with its holding on jurisdiction and void deeds.

[¶49] Additionally, the North Dakota Supreme Court has specifically found that an improper execution sale by a sheriff of foreclosed property does not render the sale void nor does it divest the court of jurisdiction. Baird v. Sax Auto Co., 291 N.W. 696 (N.D. 1940); see generally Northwestern Nat'l Life Ins. Co v. Delzer, 425 N.W.2d 365 (N.D. 1988) (foreclosure judgment was not void for failure to comply with the notice before foreclosure requirements); First Nat'l Bank of Crosby v. Bjorgen, 389 N.W.2d 789 (N.D 1986) (creditor's failure to comply with anti-deficiency judgment laws did not render

judgment or sale void); Rott v. Connecticut General Life Ins. Co., 478 N.W.2d 570 (N.D. 1991) (sale was not void by fact that sheriff sold property located outside sheriff's county); Winslow v. Klundt, 201 N.W. 169 (N.D. 1924) (irregularity in publishing notice of sale did not render sale void). The facts in Chapman and the law in West Virginia over 100 years ago are simply too different to provide this Court any guidance. This Court should not rely upon nor create precedent based upon a West Virginia statute in effect in 1913.

[¶50] Slawson, in stating that the Original Executor Deed was void, relies on Melton v. Fitch, 28 S.W. 612 (Mo. 1894). The Melton Court was operating under Missouri statutes in effect in the 1890's. Id. at 612-13. In Melton, the administrator of the estate clearly made multiple errors in the handling of the sale of a decedent's estate; more specifically, the order authorizing the sale and the notice described the wrong property. Id. at 612-13. This 1894 Missouri case, which interpreted Missouri law, should not be relied upon.

[¶51] Scarlett v. Cleaver, 145 A. 121, 122 (Del. 1926) has nothing to do with an estate sale, yet Slawson relies on this Delaware case to establish that the Original Executor's Deed was void because the county court exceeded its authority. Rather, Scarlett was a quiet title action based upon conduct of a trustee in a partition action. Scarlett offers no guidance to the instant matter.

[¶52] Slawson proffers two North Dakota cases in maintaining that the sale, and ultimately, the Original Executor Deed were void. Both cases are not analogous to the present situation.

[¶53] Plaintiffs rely on In re Foster's Estate, 89 N.W.2d 112 (N.D. 1958) for its assertion that the Original Executor's Deed was void. In Foster's, the North Dakota Supreme Court was called upon to interpret the meaning of Section 30-1914 NDRC 1943 and the interplay

between this statute and its subsequent amendment. Section 30-1914 states that the notice must state the day on or after which the sale will be made and the "sale must be made within six months thereafter." Id. at 114. The six-month timeframe expired on November 20, 1952. Id.

[¶54] Four years later, the Bolinske's submitted a written bid and thereafter wished to rescind the bid because they wanted to submit a new bid based on the subsequent re-publication for bids (the administratix had published a new notice based on the new version of the statute). Id. at 114-15. The administratix did not allow the Bolinskes to rescind their original bid. The Bolinskes petitioned the court to vacate the sale challenging the validity of the sale based on the six-month period prescribed in Section 30-1914 was applicable even though the statute had subsequently been amended. Id. Ultimately, the North Dakota Supreme Court affirmed the district court's determination that the administratix's authority to sell according to the first notice had lapsed under the original statute and therefore vacated the sale with the Bolinskes. Id. at 116. Foster's deals with a specific set of facts with a required timeframe contained in a specific statute – the administratix failed to sell within the 6-month window and therefore the sale was vacated. The application of this holding offers no guidance in this instant matter.

[¶55] Likewise, Palmer v. Donavan, 175 N.W. 866 (N.D. 1919) offers no assistance to the matter at hand. In Palmer, the defendant was a constable of Ransom County who had levied upon, and sold, personal property of plaintiff pursuant to a chattel mortgage and judgment rendered by the justice of the peace. Id. The plaintiff argued that, under section 112 of the Constitution, the justice of the peace lacked jurisdiction. Id. The defendant cited "section 9006, subd. 3, C. L. 1913" and specific laws of the "territory of Dakota" to

establish that the justice of the peace did have jurisdiction. Id. The court, in dicta, discusses judgments, but the court ultimately reversed because "the answer of the defendant states full and complete defense to plaintiff's cause of action." Id. As such, Palmer is of no help and should be ignored.

[¶56] Slawson takes great liberties in citing to these cases while making the claim that Original Executor Deed was void. None of these cases are instructive to the facts at hand; therefore, this Court, just like the district court did, should disregard such arguments.

[¶57] **2. The executor, Lakeside State Bank, did not exceed its authority.**

[¶58] Plaintiffs argued ad nauseam to the district court that Lakeside and the county court exceeded its authority in the Original Executor's Deed and Order Confirming Sale which, to Slawson, causes the deed to be rendered void. The district court found this argument lacking. Slawson, on appeal, has revisited this same argument.

[¶59] Slawson has argued that the Petition, Order Authorizing Sale, and Publication of Private Sale "unequivocally stated that the Estate reserved the Subject Minerals" and that they were "concerned only with the sale of the Surface…" (Slawson's Appellant Brief, ¶ 37). In this same vein of reasoning, they contend that Gilbert Rohde had "actual knowledge that the Subject Minerals were reserved from the sale" and that "[i]t is beyond a reasonable dispute that Rohde had actual knowledge of the notices and the Estate's reservation of the Subject Minerals." (Slawson's Appellant Brief, ¶¶ 38 & 39).[2] Based on these premises, Plaintiffs argue that the Original Executor's Deed is void because the county court or Lakeside exceeded their authority.

[2] It should be noted that Plaintiffs, at the district court level, contended that Gilbert Rohde "most likely had … knowledge … that the Court had not authorized the sale of the minerals." Doc. ID# 341 at ¶¶43 & 44. Now, on appeal, they argue that he had "actual notice" and that it is "beyond a reasonable dispute." Nothing in the record establishes this fact beyond Plaintiffs' assumptions that Gilbert Rohde must have known this.

[¶60] The Court must look carefully at Plaintiffs' claims to see if they have merit. Plaintiffs' claims are that Lakeside had ***ONLY*** the power to convey the surface and that Lakeside ***WAS NOT AUTHORIZED*** to sell or convey any of minerals. The Naesset heirs and Slawson have chosen their words very carefully as to not draw attention to the flaw in their argument. The Petition, the Order Authorizing Sale, and Publication specifically set forth that Lakeside was selling specific real estate and reserving "a ½ mineral interest in and to" the real estate. (Slawson App'x F-76, I-85, & K-90). The Petition, Order Authorizing Sale, and Publication do not state that the Executor is reserving ALL the minerals or that NO minerals were being included as Plaintiffs repeatedly suggest. Id.

[¶61] ***It must be asked: What did Lakeside have the power to convey?*** Answer: Lakeside had the power to sell and convey the surface AND the other half of the minerals. Gilbert Rohde, another bidder, or any other person reading the Petition, the Order Authorizing Sale, and Publication, if, in fact, read by anyone, would have believed that he was bidding on the surface and the other half of the minerals. (Slawson App'x F-76, I-85, & K-90). The Petition, Order Authorizing Sale, and Publication do not inform the reader that the Estate is reserving ALL the minerals or that the Estate only has a ½ interest and therefore was not conveying any minerals at all. Id. To argue that a bidder was informed that no minerals were included in the sale is an absurdity in light of the actual language contained in the Petition, Order Authorizing Sale, and Publication. Id.

[¶62] A bidder (such as Gilbert Rohde) would have thought that he was receiving the other one-half mineral interest.[3] A simple and plain reading of the Order Authorizing Sale

[3] Slawson states that Gilbert Rohde knew the minerals were not included, and, in making this claim, states that he referenced the "Surface" of the property in his bid. This is false. The bid does not reference the "Surface." (Slawson App'x L-93). Rather, he submits a bid on the stated legal description and there is nothing to indicate that he knew minerals were being reserved. Id.

and Publication indicates Lakeside had the ability to convey the surface and a 50% mineral interest, for only one-half was being reserved by the Estate.

[¶63] **3. <u>The Original Executor's Deed did not unambiguously reserve the minerals to the Olaf Naesset Estate.</u>**

[¶64] Slawson has crafted an argument based on N.D.C.C. § 30-19-20, which requires a conveyance from an estate to refer to both (1) the order that authorizes the sale and (2) the order that confirms the sale. Slawson's argument is that, because the Order Authorizing Sale is referred to in the conveyance, the Original Executor's Deed is no longer void (as Slawson also argues), but now clearly and unambiguously reserved a 50% mineral interest to the Estate of Olaf Naesset.

[¶65] The problem for Slawson is, that the Order Authorizing Sale and Publication gave bidders the impression that Lakeside was conveying the other half of the minerals to the high bidder. (Slawson App'x F-76, I-85, and K-90). The Original Executor's Deed, the Report of Sale, and the Order Confirming Sale, all describe that Gilbert Rohde purchased the surface and no mineral reservation was included, which resulted in Gilbert Rohde receiving the 50% mineral interest. The Rohde Defendants, as well as all litigants, are now aware that the Estate of Olaf Naesset, at the time of the Original Executor's Deed, only had one-half of the minerals under the property being sold, but this was not described to the bidders in the Order Authorizing Sale or the Publication (although Plaintiffs wish this Court to believe that all bidders involved in the 1962 sale knew that Lakeside was conveying NO minerals at all).

[¶66] Additionally, N.D.C.C. § 30-19-20 required the order confirming sale also be referenced in the executor's deed and, by such reference, that it is inserted in the conveyance. This results in the following: first, the Order Authorizing Sale authorized

Lakeside to sell the surface and a 50% mineral interest, since the Estate was only reserving a one-half interest. (Slawson App'x F-76.) Second, the Report of Sale and the Original Executor's Deed contained no mineral reservation resulting in Gilbert Rohde receiving the 50% mineral interest that the Order of Sale authorized. (Slawson App'x O-103). Third, the Order Confirming Sale (and Report of Sale) was consistent with the Original Executor's Deed, which resulted in Gilbert Rohde receiving the surface and the 50% mineral interest. (Slawson App'x M-98 & N-101). These documents are not inconsistent and the Court should not succumb to Slawson's repeated urgings that all bidders in 1962 must have known that the Estate was only selling the surface when the record is completely devoid of proof of this claim.

[¶67] Therefore, the district court did not err in finding that the Original Executor Deed was controlling, and that the deed passed the 50% mineral interest to Gilbert Rohde.

[¶68] **V. CONCLUSION**

[¶69] For the above-mentioned reasons, the Rohde Defendants respectfully request that the judgment of the district court be affirmed.

Dated this 12th day of June, 2018.

PRINGLE & HERIGSTAD, P.C.

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[¶70] **CERTIFICATE OF COMPLIANCE ON WORD COUNT**

[¶71] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8)(A); the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of word processing program, certificate of service and certificate of compliance on word count does not exceed 8,000.

Dated this 12th day of June, 2018.

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[¶72] **CERTIFICATE OF WORD PROCESSING PROGRAM**

[¶73] The word-processing program is Microsoft Office Word 2016.

Dated this 12th day of June, 2018.

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

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George Seccombe, Barbara Treska, Erik Naesset Helge Naesset, Astri Hoist, Helge Naesset, Astri Hoist, Irene Markle, and Alice Naesset,

Appellants,

Slawson Exploration Company, Inc., and Alameda Energy, Inc.,

Appellants,

vs.

Bradley C. Rohde and Karen D. Rohde, Trustees of the Bradley C. Rohde Living Trust dated June 22, 2010, Anita Rohde, Trustee of the Anita Rohde Living Trust UDT October 8, 2009, Dennis Rohde, Trustee of the Dennis Rohde Living Trust UDT October 8, 2009, Gary Rohde, Bradley Rohde, Dennis Rohde, Northern Oil and Gas, Inc., Ryan Family Mineral Partnership, S. Reger Family Mineral Partnership, Kootenia Resources Corporation, Summerfield C. Baldridge, Montana Oil Properties, Inc., Lakeside State Bank, Quentin R. Shulte, and all persons unknown claiming any estate or interest in, or lien or encumbrance upon the property described in the complaint,

Appellees.

Supreme Court No. 20180069

Mountrail County
Civil No.: 31-2012-CV-00104

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**CERTIFICATE OF SERVICE**

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I hereby certify that on the 12th day of June, 2018, I electronically filed with the Clerk of the North Dakota Supreme Court (supclerkofcourt@ndcourts.gov) the **BRIEF OF APPELLEES BRADLEY C. ROHDE AND KAREN D. ROHDE, TRUSTEES OF THE BRADLEY C. ROHDE LIVING TRUST DATED JUNE 22, 2010, ANITA ROHDE, TRUSTEE OF THE ANITA ROHDE LIVING TRUST UDT OCTOBER 8, 2009, DENNIS ROHDE, TRUSTEE OF THE DENNIS ROHDE LIVING TRUST UDT OCTOBER 8, 2009, GARY ROHDE, BRADLEY ROHDE, AND DENNIS ROHDE** and served the same electronically to the following:

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