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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20180112

Desert Partners IV, L.P., and Family Tree Corporation, Inc.

Plaintiffs/ Appellees
vs.

Thomas H. Benson et al; Defendants; John Benson, an individual,

Defendant/Appellant

REPLY BRIEF AND EXHIBITS OF DEFENDANT/APPELLANT JOHN BENSON

Appeal from Order entered on October 13, 2017
Judgment entered on January 17, 2018
And Post Trial Order for Costs January 10, 2018
Court File No. 27-2013-CV-00030

County of McKenzie, Northwest Judicial District
The honorable Robin A. Schmidt, Presiding

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STATEMENT OF FACTS AND CASE HISTORY

1. Appellant hereby incorporates the statement of facts and case history from Benson's Appellate brief by reference and hereby makes them a part hereof.

ARGUMENT

I. Benson's request for a continuance.

2. Appellees, Desert Partners and Family Tree's argument presents a scenario that Benson avoided going to trial for reasons other than being in the Hospital. This is a pernicious misstatement of the facts and is offensive to simple common decency. In fact, John Benson was eager to go to trial as he only needed to ask one question of Keith Foster to prevail, i.e., When Thomas Benson rejected your offer on behalf of all the grandchildren why didn't you inquire further?

3. Family Tree also argues that Benson should have made a motion as required by N.D.R.Ct. 6.1. is absurd. On 8/10/2016 Family Tree by Mr. Grant's made a request via email to Judge Schmidt for the first continuance which was granted by the Court and rescheduled with no motion under N.D.R.Ct. 6.1 *(Doc #81)* A second continuance was granted requested by Benson with no 6.1 motion. The scheduling Order *(Doc #120)* was done with no input from Benson, and Judge Schmidt violated the same Order for Family Tree to file motions past the deadline, *(Doc #143,144,145,146,148,149)* then allowed Grant to argue them at pretrial.

4. Benson's physician stated it would be a danger to Benson's health to appear in North Dakota for trial. *(see attached letters filed with the District Court as confidential as Exhibit A and B C & Respectively).* Furthermore, Benson had no choice as his POA/Medical Proxy and the Emergency Room physician prohibited Mr. Benson from going to trial. Benson legally had to comply and stay in Minnesota.

5. Family Tree argues that *Carroll v. Carroll,* 2017 ND 73, ¶ 11, 892 N.W.2d 173. applies, however this case and all cases presume that the party requesting the continuance is medically able to make a motion.

II. Whether Family Tree presented facts for good faith purchaser finding.

6. Family Tree did not present any facts at trial that they conducted any further inquiry. To the contrary, they called three witnesses Keith Foster, Maggie Atkinson, and Craig Emmanuel all whom testified that the Statement of claim meant nothing to them regarding title to property and there was no need to inquire from the five owners claiming a 100% interest in the property. All three witnesses testified that they did **not do any inquiry regarding the notice of claim.**

7. During oral argument in ***Desert Partners IV, L.P. v. Benson***, 2016 ND 37, 875 N.W.2d 510 **Justice Carol Ronning Kapsner,** made this clear (at minute 26:18) ***"If you are trying to acquire mineral interests, and there may be other owners of those mineral interests, why are you not***

concerned about finding out the status of the other potential owner's claims on the mineral interests you are trying to acquire." I'm talking about for purposes of establishing that you are a good faith purchaser, did you not have at the time you were trying to acquire them some obligation to go out and find out what the status of her ownership was by virtue of this document* (Statement of claim) *being filed under the Swanson Case."

8. **Justice Daniel J. Crothers (at minute *29:69) "that's my question, isn't the notice of claim of record that puts you client, at least doesn't it raise a factual issue whether you client was a good faith purchaser in light of that notice of claim."***

9. Family Tree's entire case at trial was an argument that the Statement of Claim inquiry was not in their business practice, a matter of concern. (see paragraph 36 brief) In discussing the Statement of Claim, Mr. Emmanuel testified that it identified Ann Kemske as an owner of mineral interests in the Subject Property, and that "it just indicates that somebody is providing notice that they may own some interest." This is a fatal flaw in their case. Business practices must follow the law, rather than the law conforming to business practices.

10. The trial court was confused as per (transcript page 82 starting at line 9) THE COURT: "*And they sent it back to me indicating that a duty of further inquiry was imposed by that statement of claim. Which I understand. And I understand your testimony regarding what you all*

did after you saw that statement of claim of mineral interest. What I'm wondering is a hypothetical that we don't have here. But if there was a statement of claim that had somebody's name what was not in title anywhere, would you do anything with that? Would you make any further inquiry of that? THE WITNESS: *No.* **THE COURT**: ***Then I don't understand what further inquiry is required.***

11. Family Tree's attorney **Mr. Grant interrupted to testify**: by MR. GRANT: *"Well, Your Honor, I mean there's no secret that our position is that the further inquiry that's required is to run title from patent to present. And the statement of claim doesn't convey title."*

12. In Judge Schmidt's Memorandum and opinion she states in paragraph (5) that *"this court is unaware of any further steps Plaintiff's could have reasonably completed to research the disputed mineral interests"* Obviously this is an admission by Judge Schmidt that she not only was confused as she stated during the trial, Clearly Judge Schmidt did not understand what further inquiry the Supreme Court ruled must be done to establish a factual finding the inquiry Family Tree conducted was sufficient, which makes it impossible for her to rule as a matter of law Family Tree were good faith purchasers.

13. Family Tree argues that subsequent to the execution of their deed, they conducted a title search of the 1,720 acres contained in the deed. The problem is that is had to be **done before the conveyance was made .**

14. In ***Chornuk v. Nelson***, 2014 ND 238, 857 N.W.2d 587 [¶19] The district court did not make any specific findings about when the Chornuks' activities on the property occurred. However, **"the court is required to consider the information the purchaser possessed when the property was conveyed."**

15. **NDCC 47-19-42.** Conveyance defined. The term "conveyance" as used in section **47-19-41** shall include every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered…

16. The only testimony presented at the trial was that **after the deed was executed,** they checked title. They relied upon a "leasing activity" report for determining ownership. N.D. Bar Association Title Standards were not followed. They didn't even check the tract index on NDRIN! Craig Emmanuel at trial (transcript, page 80 lines 7-9) *"Well, because we don't want to spend any – you know, go out and have excess costs on running title prior to actually having a signed deed."*

17. In ***Gannaway v. Torres,*** 2017 ND 287, 904 N.W.2d 317, [¶11] The district court concluded the Gannaways were entitled to quiet title. The district court also determined the Schneiders had constructive notice of the fraud **by failing to inquire about the ownership of the property or exercising reasonable diligence before executing the mortgage.** They had **a duty to inquire** [¶22] We conclude the district court

properly quieted title in the Gannaways and determined **they own the property free and clear of the Schneiders' mortgage.**

18. Judge Schmidt was confused at trial and said so more than once! (first on page 82, and transcript page 86) THE COURT: ***"Yeah. I guess I'm confused by the Supreme Court's direction."***

III. Denial of Benson's motions

19. Benson made nine motions to The District Court, (Doc. ID #127) and the Court was in err in denying Benson's Summary Judgment Motions. After discovery was completed it became clear that Family Tree had no evidence to offer at trial, making this case appropriate for summary judgment when Benson filed While Rule 35(a), N.D.R.App.P. authorizes the review of non-appealable orders upon an appeal from a judgment, *"the supreme court may review any intermediate order or determination of the court which involves the merits and necessarily affects the judgment"* ***Herzog,*** 399 N.W.2d at 293. Benson's motions were summarily denied without any reasoning. (Doc.#219).

20. In paragraphs (45-51) Family Tree argues that Court to find that the property owned as an 100% undivided interest could be granted/sold by Kemske to Family Tree.

21. The Supreme Court in ***Desert Partners II***, 2016 ND 37, ¶¶ 15-18, 875 N.W.2d 510, had a different view. In oral argument before the Court *(at*

minute 32:83) Justice Kapsner inquires: *"I have a question back to the statement of claim in your saying that it actually supports your case because it shows she had an interest,* ***but it says she had an undivided 100% interest. How do you buy a portion of an undivided interest?*** *Bourray: Uh I think there were other owners...Kapsner:* ***How can you buy a part of an undivided interest?*** *Bourray: um...Kapsner* ***without, without, contacting the other folks who have an interest in that?*** *Does it mean they own them together when it says they own a 100% undivided interest?*

22. "The rights of a cotenant stem from the one unity common to the three types of concurrent ownership—the unity of possession. This means that each tenant has the right to use the real estate as if he were the sole owner, except that "he has no right to exclude his co-owners, or to appropriate to his sole use any particular portion thereof. The tenants out of possession may at any time assert their right to share in the possession, or they may have the property partitioned by a division, each taking a distinct part according to the extent of his interest." ***Massman v. Duffy,*** 333 Ill.App. 30, 76 N.E.2d 547 (1947) An undivided interest is the interest of a concurrent owner entitling her to a share of the whole property but not to a specific part of it.

23. Family Tree is required to partition the property under Chapter 32-16, N.D.C.C., in a proceeding pursuant to Section 32-16-01, N.D.C.C, however did not.

24. Kemske argues in *(paragraph 26)* that Brandhagen v. Burt, 117 N.W. 2d 696, 700 (ND 1962). This is a case in collateral estoppel and does not stand for the proposition that someone can sell and "undivided interest".

IV. Sanctions.

25. Family Tree argues *(in paragraph 53)* that Benson waived his right to challenge the District Court's imposition of sanctions against him, because lack of a briefing. Benson doesn't need to brief this issue as he had argued that the Judgment in favor of Family Tree should be reversed and thereby the sanctions would not stand.

V. Constitutional Issue

26. There is nothing to brief whether or not the **49-19-41** is in violation of the constitution. Benson argued that he is precluded from demanding specific performance of the deed he received From Thomas H. Benson, because the race statute could take away Thomas H. Benson's property because he failed to file his deed first. The constitution states that no law shall interfere with contractual rights. **49-19-41** violates Article 1, Section 18 of the North Dakota Constitution. **ARTILE I Section 18. No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.** *(para.50, page 18 Benson Brief in support of motions.)(doc ID#129)* also see *Benson's pre- trial transcript: (page 13 line 16) & (page 10 lines 9 & 10.*

CONCLUSION

Wherefore: for reasons stated in all Court documents, Benson respectfully requests that the Court Reverse/Vacate the Judgment/Order and Order for Costs by the District Court, and order a judgment quieting title in Brian and John Benson of the 20% claimed by Family Tree to the subject mineral interests and further that the mineral interests conveyed to the Benson Grandchildren is held as an undivided ownership interest and no interest conveyed outside the family is a legal grant/conveyance, and grant any further relief the Court deems appropriate.

Respectfully Submitted,
September 16, 2018
s/John Benson

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STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

John Benson, a resident of Minnetonka Minnesota, being first duly sworn upon oath deposes and states that in said County and State of Minnesota he served the following parties the **Appellant's Reply Brief Plus Exhibits** By electronic means on September 17, 2018, to Mr. Nicholas Grant, representing the Plaintiff's Desert Partners and Family Tree, Mr. David McLaughlin representing defendants Ann & Jon Kemske Defendants, and Brian Benson and Edward Benson Defendants and Courtney Titus, assistant AG for the State of North Dakota. At the below email addresses:

Furthermore on the same day served via first class U.S. mail in Minnesota in a securely enclosed envelope, with prepaid postage, a paper copy to Leatrice Benson, The Legacy, RM: 114, 622 7th St. Morris, Minnesota 56267.

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Dated: 9/17/2018 ~~consisting~~ of 2 pages

John Benson

Subscribed and sworn to before me this 17th day of September 2018

Notary Public

LOC THANH LUONG
Notary Public
Minnesota
My Commission Expires
Jan 31, 2023