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R AND B FARMS, INC., A NEBRASKA CORPORATION, APPELLEE, V. CEDAR VALLEY ACRES, INC., A NEBRASKA CORPORATION, APPELLANT.

798 N.W.2d 121

Filed June 10, 2011. No. S-10-568.

1. **Contracts: Reformation: Equity.** An action to reform a contract sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
4. **Rules of the Supreme Court: Pleadings.** The key inquiry of Neb. Ct. R. Pldg. § 6-1115(b) for "express or implied consent" is whether the parties recognized that an issue not presented by the pleadings entered the case at trial.
5. **Reformation: Presumptions: Intent: Evidence.** To overcome the presumption that an agreement correctly expresses the parties' intent and therefore should be reformed, the party seeking reformation must offer clear, convincing, and satisfactory evidence.
6. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
7. **Reformation: Intent.** A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.
8. **Contracts: Reformation.** The fact that one of the parties to a contract denies that a mistake was made does not prevent a finding of mutual mistake or prevent reformation.
9. **Reformation: Intent.** If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties.
10. **Parol Evidence: Contracts.** The parol evidence rule states that if negotiations between the parties result in an integrated agreement which is reduced to writing, then, in the absence of fraud, mistake, or ambiguity, the written agreement is the only competent evidence of the contract between them.

Appeal from the District Court for Boone County: MICHAEL J. OWENS, Judge. Reversed and remanded with directions.

John B. McDermott, of Shamberg, Wolf, McDermott & Depue, for appellant.

John C. Hahn and Brent C. Stephenson, of Jeffrey, Hahn, Hemmerling & Zimmerman, P.C., L.L.O., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

This case arose from a boundary dispute between R and B Farms, Inc. (R and B), and Cedar Valley Acres, Inc. (Cedar Valley). R and B sought reformation of the contract which conveyed the land and an order quieting title in it as owner of the property. The district court determined that mutual mistake had occurred which necessitated reformation of the written agreement. Cedar Valley appeals. The issues on appeal are whether the theory of mutual mistake was properly before the district court, whether parol evidence was properly admitted, and whether R and B's recovery is precluded under the doctrine of conscious ignorance. Although the issue of mutual mistake was properly before the district court, the record does not support a finding of mutual mistake in the instant case. Accordingly, we reverse, and remand with directions.

BACKGROUND

Reginald Dobson, Sr. (Reginald Sr.), and his sons, Reginald Dobson, Jr. (Reginald Jr.); Daniel Dobson; and David Dobson, farmed together operating under a corporation known as Reginald Dobson & Sons, Inc. (Dobson & Sons). In 1993, the farming operations were divided among Reginald Jr., Daniel, and David. Reginald Jr. formed R and B, and Daniel formed Cedar Valley. David formed a third corporation not at issue in this appeal. Reginald Jr. and Daniel act as president for their respective corporations.

In 1993, the three newly formed corporations executed a written "Agreement and Plan of Reorganization" (written agreement) with Reginald Sr. on behalf of Dobson & Sons. The written agreement provided for the division of Dobson & Sons' property among the corporations. The cropland was valued at $1,100 per acre, and the pastureland was valued at $300 per acre. R and B was to receive 348 acres of cropland, and Cedar

Valley was to receive 119 acres of cropland and 240 acres of pastureland. Respectively, R and B paid $382,800, and Cedar Valley paid $202,900 in consideration for the land.

The disputed property in this matter consists of a parcel of cropland located north of a fence on property previously belonging to Dobson & Sons (hereinafter referred to as "the cropland"). The cropland was encompassed by the legal description deeded to Cedar Valley under the written agreement, but R and B claims that all parties decided that a fence line would serve as the boundary for the property. The fence line does not conform to the legal description of the land contained in the written agreement. The parties never conducted a survey on the land described in the written agreement. Reginald Jr. stated that everyone "[f]igured the fenceline was close enough" and that "[e]verybody [gave] their word [the] fenceline would be the boundary."

The written agreement contained the following provisions:

> Entire Agreement. This Agreement and the schedules delivered herewith and the other agreements specifically provided for herein represent the entire agreement of the parties and no provision or document of any kind shall be included in or form a part of this Agreement unless in writing and delivered to the other parties by the party to be charged.
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> . . . Prior Negotiations. All prior negotiations and discussions by and among the parties hereto which are not reflected or set forth in this Agreement or the schedules delivered herewith are merged into this Agreement and said schedules have no force or effect.

The cropland has been irrigated by three center pivots prior to execution of the written agreement. R and B purchased these pivots from Reginald Sr. pursuant to the written agreement. After the written agreement was executed, from 1993 through 2008, R and B farmed the cropland. During this time, Cedar Valley used pastureland owned by R and B and located south of the fence line for grazing cattle. There was no exchange of rent requested or paid for either parties' use of the respective parcels. Both parties paid taxes on their

respective property as specified under the legal description in the written agreement.

Cedar Valley claimed that R and B was allowed to farm the cropland north of the fence in exchange for Cedar Valley's use of the pastureland south of the fence. From 1993 through 2008, R and B filed paperwork with the U.S. Department of Agriculture which certified that R and B had a rental agreement with Cedar Valley. The rent certification statement was signed by Reginald Jr. and certifies Cedar Valley's status as the owner of the cropland and R and B's status as tenant. To receive government payments for the land, the local Farm Service Agency required both Cedar Valley and R and B to sign documentation to allow R and B to receive such payments, which payments R and B retained. Reginald Jr. disputed that any agreement was in place regarding the exchanged use of land and claimed that the representations made to the Farm Service Agency and the U.S. Department of Agriculture were necessary because "[t]hey had it all tangled up at the courthouse" and "[t]hat's what they had to go by."

In 2008, Cedar Valley provided notice of its intent to terminate what it considered to be the rental agreement with R and B. Thereafter, R and B initiated this suit. In R and B's amended complaint, it alleged three specific causes of action: (1) declaratory judgment, (2) quiet title on the theory of adverse possession, and (3) mutual recognition and acquiescence. The operative complaint did not explicitly plead mutual mistake as a theory of recovery. But R and B listed "Facts Common to All Causes of Action" in the complaint, which included that "the fence was the intended division of the two tracts of land at the time of the sale" and that "the Subject Property was incorrectly, contrary to the intent of the parties, deeded to [Cedar Valley] by its legal description, as opposed to a legal description based on the correct metes and bounds description of the Fence."

Prior to trial, Cedar Valley filed a motion for summary judgment. In R and B's brief in opposition to the motion, it addressed the issue of mutual mistake. Hearing on the motion was held, and R and B argued it was entitled to recovery

under, among other things, the theory of mutual mistake. Cedar Valley addressed R and B's first cause of action as one of mistake. It stated, "The first cause of action is somehow there was a mistake. Well, there was no mistake." Cedar Valley argued there was no mutual mistake as a matter of law, but it did not object to the court's consideration of the issue, argue that it was surprised by the theory, or request a continuance. The court overruled Cedar Valley's motion for summary judgment. Cedar Valley subsequently filed a motion in limine seeking to prevent R and B from presenting any evidence regarding discussions between the parties prior to entering into the written agreement. The court overruled Cedar Valley's motion in limine.

The district court ultimately found in favor of R and B on the theory of mutual mistake. The order stated that the theory was adequately raised by the pleadings and that the evidence adduced established that a mutual mistake had occurred which necessitated reformation of the written agreement previously entered into by the parties. The court determined that it was the parties' mutual intention that R and B receive the cropland north of the fence. R and B was determined to be the owner of the disputed property. Cedar Valley appeals.

ASSIGNMENTS OF ERROR

Cedar Valley assigns, restated and renumbered, that the district court erred in (1) finding that the theory of mutual mistake was properly pled; (2) admitting extrinsic evidence of negotiations and agreements made prior to the execution of the written agreement, in violation of the parol evidence rule; (3) finding that the evidence was sufficient to establish mutual mistake; and (4) reforming the written agreement on the basis of mutual mistake.

STANDARD OF REVIEW

[1,2] An action to reform a contract sounds in equity.[1] In an appeal of an equitable action, an appellate court tries factual

[1] See *J. J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988).

questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[2]

[3] When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[3]

ANALYSIS

Adequacy of Pleadings

On appeal, Cedar Valley argues that the district court erred in admitting evidence relating to an alleged mutual mistake because R and B failed to properly plead this theory. Cedar Valley asserts that it was prejudiced when the district court allowed R and B to proceed on the theory of mutual mistake and that the court did not allow it adequate time to prepare a proper defense.

[4] Neb. Ct. R. Pldg. § 6-1115(b) states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the

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[2] *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007).

[3] *Erickson v. U-Haul Internat.*, 278 Neb. 18, 767 N.W.2d 765 (2009).

> party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

The key inquiry of this rule for "express or implied consent" is whether the parties recognized that an issue not presented by the pleadings entered the case at trial.[4] Implied consent may arise in two situations. First, the claim may be introduced outside of the complaint—in another pleading or document—and then treated by the opposing party as if pleaded. Second, consent may be implied if during the trial the party acquiesces or fails to object to the introduction of evidence that relates only to that issue.[5]

R and B did not expressly use the phrase "mutual mistake" to describe a cause of action in its complaint. But in both its complaint and amended complaint, R and B pled that "the fence was the intended division of the two tracts of land at the time of the sale" and that "the Subject Property was incorrectly, contrary to the intent of the parties, deeded to [Cedar Valley] by its legal description, as opposed to a legal description based on the correct metes and bounds description of the Fence."

At the hearing on its motion in limine, Cedar Valley did object to evidence presented on the issue of mutual mistake on the basis of the parol evidence rule. It also argued that mutual mistake was not properly pled. But previously, at the hearing on the motion for summary judgment, Cedar Valley conceded that R and B had raised the issue of mistake and proceeded to address the theory of mutual mistake on the merits. In general, a finding of implied consent depends on whether the parties recognized that an issue not presented by the pleadings entered the case at trial.[6] During pretrial hearings, both parties argued on the issue of mutual mistake. Cedar Valley specifically argued in response to R and B's theory of mistake and stated that "it doesn't make any sense whatsoever to take [R and B's]

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[4] See *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006).

[5] *Id.*

[6] See *id.*

position that, well, it was a mutual mistake. No, it wasn't a mutual mistake."

The facts pled by R and B were sufficient to place the theory of mutual mistake at issue. R and B did not use the words "mutual mistake," but this failure did not affect the substantial rights of Cedar Valley. Cedar Valley was aware from the complaint and the amended complaint that R and B sought reformation on the basis that the written agreement did not reflect the intentions of the parties—a theory of mutual mistake. And Cedar Valley was put on notice that it would have to defend against that theory based on the issues addressed at the hearing on its motion for summary judgment. Cedar Valley addressed this issue on the merits; the record thus indicates that the issue of mutual mistake was tried by the implied consent of the parties. We therefore determine that the claim of mutual mistake was properly before the district court.

In its brief, Cedar Valley states that the court "opted to proceed—over arduous objection from Cedar Valley . . . without adequate pleadings on file and without allowing Cedar Valley . . . time to respond thereto."[7] But nothing in the record indicates either that Cedar Valley requested a reformation of the pleadings to reflect the theory of mutual mistake or that it requested a continuance. The pretrial conference makes clear that it had notice of R and B's intent to proceed on this theory. Had Cedar Valley requested the pleadings be amended and it be granted a continuance to prepare, this remedy would clearly be allowed under § 6-1115(b). Cedar Valley's failure to request a continuance indicates that it was not prejudiced when the court allowed R and B to proceed on the theory of mutual mistake.

Because mutual mistake was properly before the court, we also determine that parol evidence was properly admitted to enable the trier of fact to ascertain the parties' actual intent at the time of entering into the contract.[8] The district court

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[7] Brief for appellant at 19.

[8] See *Johnson v. Stover*, 218 Neb. 250, 354 N.W.2d 142 (1984). Cf. *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007) (extrinsic evidence properly admitted to resolve ambiguity or mistake under Uniform Trust Code for reformation in conformity with settlor's intent).

therefore did not err when it determined that parol evidence was admissible to show that because of mutual mistake, the written agreement did not reflect the intention of the parties.[9] The district court did not abuse its discretion in admitting extrinsic evidence relevant to the theory of mutual mistake, and Cedar Valley's arguments to the contrary are without merit.

Mutual Mistake

An action to reform a contract sounds in equity.[10] Reformation may be granted to correct an erroneous instrument to express the true intent of the parties to the instrument.[11] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[12]

[5,6] The right to reformation depends on whether the instrument to be reformed reflects the intent of the parties. Where it appears that a mistake has been made, a court will order the cancellation or the reformation of a deed.[13] To overcome the presumption that the agreement correctly expresses the parties' intent and therefore should be reformed, the party seeking reformation must offer clear, convincing, and satisfactory evidence.[14] Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.[15]

[7,8] Cedar Valley argues that the district court erred in finding sufficient evidence to prove that a mutual mistake occurred

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[9] See, *Thirty and 141, L.P. v. Lowe's Home Centers, Inc.*, 565 F.3d 443 (8th Cir. 2009); *Johnson v. Stover, supra* note 8.

[10] *J. J. Schaefer Livestock Hauling v. Gretna St. Bank, supra* note 1.

[11] *Jelsma v. Acceptance Ins. Co.*, 233 Neb. 556, 446 N.W.2d 725 (1989).

[12] *Ottaco Acceptance, Inc. v. Larkin, supra* note 2.

[13] *Id.*

[14] See, *Walker v. Walker Enter.*, 248 Neb. 120, 532 N.W.2d 324 (1995); *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994).

[15] *Nelson v. Nelson*, 267 Neb. 362, 674 N.W.2d 473 (2004).

which necessitated the reformation of the written agreement. A mutual mistake is:

> "'[A] belief shared by the parties, which is not in accord with the facts. . . . A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument. . . . "A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties."'"[16]

The fact that one of the parties to a contract denies that a mistake was made does not prevent a finding of mutual mistake or prevent reformation.[17] However, based upon our de novo review, we find that the record does not support a finding of mutual mistake in the instant case.

[9] A mutual mistake is a belief shared by the parties, which is not in accord with the facts.[18] It is a mistake common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about its instrument.[19] Mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.[20] If incorrect language or wording is inserted by mistake, including a scrivener's mistake, into an instrument intended to reflect the agreement of the parties, such mistake is mutual and contrary to the real intention and agreement of the parties.[21]

[10] The parol evidence rule states that if negotiations between the parties result in an integrated agreement which

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[16] *Records v. Christensen, supra* note 14, 246 Neb. at 916, 524 N.W.2d at 761.

[17] *Olds v. Jamison*, 195 Neb. 388, 238 N.W.2d 459 (1976).

[18] *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986).

[19] *Id.*

[20] *Id.*

[21] *Omaha Door Co. v. Mexican Food Manuf. of Omaha*, 232 Neb. 153, 439 N.W.2d 776 (1989).

is reduced to writing, then, in the absence of fraud, mistake, or ambiguity, the written agreement is the only competent evidence of the contract between them.[22] This rule gives legal effect to the contracting parties' intention to make their writing a complete expression of the agreement that they reached, to the exclusion of all prior or contemporaneous negotiations.[23]

The written agreement executed by the parties contained an "Entire Agreement" provision and a "Prior Negotiations" provision, which specifically provided that all prior negotiations were merged into the written agreement and that the written agreement represented the entire agreement of the parties. R and B does not contend that the legal description contained in the written agreement granted R and B ownership of the cropland. Under the legal description, Cedar Valley is the legal owner of the parcel.

It appears that no witness unequivocally knew what property boundaries the legal description in the written agreement provided. But R and B did not present any testimony or other evidence that the parties mistakenly believed that the legal description in the written agreement separated the parcels at the fence line. In fact, Reginald Jr. testified that though a survey was not conducted, they "[f]igured the fenceline was close enough" and that "[e]verybody [gave] their word [the] fenceline would be the boundary." This fails to demonstrate that the legal description in the written agreement was transcribed or included by mistake or that either party believed that it described the fence line as a boundary.

It is understandable that laypersons could read a legal description of realty and not know whether the property was accurately described. However, R and B did not produce clear and convincing evidence that the parties mistakenly believed the contract to mean one thing when in reality it did not. The record does not indicate that the legal description at issue was inserted by mistake or that the parties intended the legal

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[22] *Podraza v. New Century Physicians of Neb.*, 280 Neb. 678, 789 N.W.2d 260 (2010).

[23] *Id.*

description to reflect the fence line as the property boundary. The record therefore does not support a finding of mutual mistake. In the absence of such mistake, the four corners of the written agreement must control.[24]

A court may reform a written agreement only when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought.[25] Because the record does not support a finding of mutual mistake, we find that the district court erred in reforming the contract.

CONCLUSION

For the foregoing reasons, the district court erred in finding that the evidence established a mutual mistake, because there was not clear and convincing evidence that the parties had a mistaken understanding of the term at issue. As such, reformation on the basis of mutual mistake was also erroneous. Accordingly, we reverse the judgment and remand the cause with directions to the district court to enter judgment consistent with this opinion, reinstating and upholding the January 25, 1993, written agreement with respect to all parties.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

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[24] See *id.*

[25] *In re Estate of Dueck*, 274 Neb. 89, 736 N.W.2d 720 (2007).

STATE OF NEBRASKA, APPELLEE, V.
ELEAZAR OCEGUERA, JR., APPELLANT.
798 N.W.2d 392

Filed June 10, 2011. No. S-10-605.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Constitutional Law: Double Jeopardy: Sentences: Appeal and Error.** The Double Jeopardy Clause of the federal Constitution is not offended if an appellate court remands a cause for resentencing.