2015 IL App (3d) 140259-U

Order filed April 9, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

TRADEMARK DESIGNS, INC.,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Plaintiff-Appellee,	)	Rock Island County, Illinois,
	)	
v.	)	Appeal No. 3-14-0259
	)	Circuit No. 12-L-32
MATTHEW J. STERN,	)	
	)	The Honorable
Defendant-Appellant.	)	James G. Conway, Jr.
	)	Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice Carter specially concurred.

ORDER

¶ 1 *Held*: The trial court did not err in finding (1) there was a mutual mistake in the number of acres in the subject parcel and (2) the parties intended the sale to be "per acre." The requisite reformation of the contract is not precluded by the doctrine of merger. Defendant's attorney was properly barred from testifying because the necessity of this testimony was not a surprise to either party. The remedy is affirmed as deficit recoupment under the contract and is not unjust enrichment.

¶ 2 FACTS

¶ 3 The plaintiff, Trademark Designs, Inc. (Trademark), purchased real estate from the defendant, Matthew J. Stern. By reason of this transaction, Trademark, filed a two-count verified complaint against Stern, alleging (1) breach of contract or (2) requesting contract reformation due to a mutual mistake of fact. The plaintiff sought monetary damages in the amount of $90,315 and other relief.

¶ 4 On the standard Residential Real Estate form the parties used for the real estate transaction, a total purchase price of $643,500 with $3,500 earnest money was specified. On the same form, the address of the property/legal description referenced an attached legal description. The legal description included the language "containing One Hundred Forty-three (143) acres more or less***"

¶ 5 Although Trademark's deed for the property is dated July 6, 2010, in the summer of 2011, its president, Kai Driessens, hired Michael Crapnell, a registered professional surveyor, to perform a survey of the real estate. Crapnell's result and opinion was that the property consisted of 122.93 acres. Stern disputed the accuracy of Crapnell's report. Trademark thereafter sued to recover damages for the alleged deficiency.

¶ 6 The complaint indicated that Driessens contacted Stern regarding the sale of the property and was told that it would sell for $5,500 per acre. The complaint further alleged that: Stern told Driessens to meet with his attorney, Frank Coyle to complete negotiations; Driessens met with Coyle "for the purpose of negotiating and signing an agreement for the sale of real estate;" and "plaintiff and defendant agreed on a purchase price of $4,500 per acre, based upon 143 acres or $643,500."

¶ 7 Stern's answer denied the initial contact with Driessens. He admitted having Driessens speak with Coyle for the aforementioned purpose, but denied that the purchase price was agreed upon as described.

¶ 8 At trial, Steve Rusk, the parties' mutual friend, testified to being an intermediary during the initiation of the property sale, going back and forth between the parties on at least three occasions. On a hunting excursion, the defendant told Rusk he was selling the real estate. Knowing Driessens had always had an interest in the property, Rusk stated he told Driessens of the pending sale and Driessens asked him to ascertain the asking price. Rusk testified that Stern said he was asking a large amount, which Rusk recalled was $700,000 to $750,000. Rusk admitted his recollection of the exact amount and the specifics of the transaction were vague. However, he stated he relayed the large amount to Driessens. After Rusk informed Stern of Driessens' interest in the property, Stern initially refused to sell, but later acquiesced.

¶ 9 Both Rusk and Stern testified that they never discussed a per acre sale of the property. Stern conveyed his final offer of $650,000 for the property to Driessens through Rusk. Thereafter, Stern and Driessens spoke directly. Stern stated that he also never discussed a per acre sale with Driessens. He testified he accepted Driessens counter-offer of $643,500 as the final price of the real estate. Then, due to pending travels, he contacted Coyle and gave him authority, via a power of attorney, to execute a purchase agreement for the sale of the property on his behalf. Stern stated that he informed Coyle of the final agreed purchase price and that Coyle had no authority to deviate from that price.

¶ 10 Driessens testified that he spoke directly with Stern over the telephone about the sale of the property and Stern stated an initial asking price of $5,500 per acre. Driessens further testified that he countered with $3,500 per acre. Later in a second phone conversation, Driessens stated

he offered $4,500 per acre. Stern then told him to meet with his attorney to write up the contract. Driessens testified that he and Coyle used a calculator to establish the final purchase price by multiplying 143 acres by $4,500 per acre.

¶ 11 During Driessens' testimony, Coyle addressed the court, stating he might potentially be a witness. The court continued the trial to allow Stern to secure new counsel to proceed with day two of trial. However, Trademark filed a motion to bar Coyle as a witness. The court granted the motion because it found no surprise warranting Coyle's testimony existed.

¶ 12 On day two of the trial, Stern called Mary Wellman, an office manager for a title company, to dispute Crapnell's survey. Wellman was not a licensed surveyor or attorney and had never actually been to the property. She reviewed the legal description of the subject parcel and reported that "[she] cannot verify the number of acres contained within the boundaries of the legal description."

¶ 13 The trial court found Driessens' testimony credible, found Crapnell's survey of the property to be accurate, and held that Wellman's report buttressed the court's ultimate finding that a mutual mistake of fact existed in the transaction that required reformation to avoid unjust enrichment. The merger doctrine was foreclosed. It awarded Trademark its damages and did not reach the second issue of breach of contract. Stern's motion to reconsider was denied with the court holding that it did not err in its application of the law and that its decision was "an equitable remedy of restitution to prevent unjust enrichment to the seller***."

¶ 14 The defendant timely appealed.

¶ 15 ANALYSIS

¶ 16 The standard of review in a contract reformation case is whether the trial court's decision is contrary to the manifest weight of the evidence. *Novak v. Smith*, 197 Ill. app. 3d 390, 398

(1990). "A finding is against the manifest weight of the evidence when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Vancura v. Katris*, 238 Ill. 2d 352, 374 (2010). Deference is afforded the findings of the trial court where credibility determinations are involved unless they, too, are against the manifest weight of the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002).

¶ 17 Stern argues that the trial court's ruling is against the manifest weight of the evidence because (1) the sale of the real estate was a sale in gross, rather than a sale per acre, and (2) the merger doctrine precludes Trademark's equitable relief of contract reformation. Trademark counters it demonstrated, by clear and convincing evidence, that the sales agreement for the real estate contained a mutual mistake of its actual acreage amount and that the sales price was determined with a per acre calculation. Thus, they are not precluded relief by the merger doctrine.

¶ 18 A written instrument will not be reformed on the ground of mistake, unless the evidence shows unquestionably and without any reasonable doubt that it does not express the intention of the parties. *Christ v. Rake*, 287 Ill. 619, 622 (1919). Although contested by the defendant, the trial court's finding of a mutual mistake that the property consisted of 143 acres is not against the manifest weight of the evidence. It actually supports the finding of a mutual mistake that the property consisted of 143 acres.

¶ 19 From the commencement of negotiations between the parties, 143 acres has been an identifier of the property. Stern's yard sign only stated "FOR SALE; 143 ACRES." The warranty deed dated June 18, 2001, conveying the land to Stern warranted the land consisted of 143 acres. Neither party had the property surveyed prior to its sale. Driessens waited four months after the purchase and conveyance of the deed before he had it surveyed. Stern even

strongly disputed Crapnell's survey result of the property consisting of only 122.93 acres, which the trial court found credible. Stern called Wellman as a witness to contest the result. However, the trial court said her testimony only buttressed its finding of a mutual mistake. Both parties intended the sale and purchase of 143 acres of land. The great disparity between the claimed and actual number of acres conveyed, which was discovered after the sale, constituted a mutual mistake of fact.

¶ 20 This significant discrepancy, however, is rendered immaterial if we are to accept Stern's argument that the property was sold "in gross" and not calculated "by the acre" for the total sales price as the trial court found. Stern relies upon *Beal v. Schewe*, 291 Ill. App. 3d 204 (1997), in support of his contention.

¶ 21 The court in *Beal* finds a rebuttable presumption that "[w]here a real estate contract does not expressly provide that the sale is 'by the acre' or 'per acre,' it should be viewed as a sale 'in gross.' " *Id*. at 211. It also opined that it is well settled that where a tract of land is conveyed using its proper governmental description, the boundaries included in that description control the acreage quantity. *Id.* at 209. The purchaser and seller are without remedy for any excess or deficiency in the quantity and the mention of acres has no legal effect. *Id.* In this case, the parties used the proper legal description of the property in the sales agreement and made no reference to its sale being "by the acre" or "per acre." Thus, under *Beal*, the acreage amount – 143 acres, more or less – contained in the legal description of the sales agreement for the property would have no legal effect.

¶ 22 *Beal* is, however, distinguishable from our present case on the issue of whether the sale was in gross or by the acre. The court in *Beal* noted not only was there "no allegation of [a] mutual mistake in the plaintiff's pleading" but also "the evidence was not sufficiently clear and

convincing to prove a mutual mistake." *Beal*, 291 Ill. App. 3d at 211. The plaintiff did not show that there was a mutual mistake in the number of acres sold. *Id*. The contract did not indicate a price per acre and no acreage amount was included in the property's legal description. *Id*. The discrepancy itself was considered insignificant. *Id*. at 209.

¶ 23 By contrast, in this case, Trademark pled the existence of a mutual mistake and the trial court found there to have been such a mistake. We have already determined that the trial court's finding of a mutual mistake in the number of acres sold was not against the manifest weight of the evidence. Though the sales agreement did not indicate a price per acre, its attached legal description did include an acreage amount and a 14% acreage difference is significant. In addition, the actual price was $643,500, which is the same as 143 acres at $4500 per acre.

¶ 24 Even if we were to find that the trial court's finding of a sale by the acre is against the manifest of the evidence, the supreme court's statement in *Wadhams v. Swan*, 109 Ill. 46, 56-57 (1884), of our courts' general rule concerning the "presumption of fraud" or "the essence of the contract" would, in some circumstances, weigh against the defendant. A presumption of an "in gross" purchase is defeated if the "excess or deficiency is so great as to raise a presumption of fraud" or " where such statement is expressly, or by necessary implication, made the essence of the contract." *Wadhams*, 109 Ill. at 56-57.

¶ 25 The acreage difference of 20.11 acres according to Crapnell's survey (a 14% deficiency) is great and could raise a presumption of fraud. However, we agree with the trial court that a review of the record would show an absence of fraudulent misrepresentations or intent to defraud. The only "hint" of fraud in this transaction is the difference in the legal description of the property contained in the sales agreement compared to subsequent documents used in the transaction. Yet, the record shows that the legal description of the property in the sales

agreement is identical to the legal description of the property in the warranty deed that had been issued to Sterns by his seller in 2001.

¶ 26 We do agree, however, with the trial court that the total number of acres sold was an essential and material term of the contract. One hundred forty-three acres had been an identifier of the property from the start of negotiations for the sale, including its use as the sole description on Stern's yard sign. In affirming the trial court's finding of a mutual mistake, we note that both parties intended the purchase/sale of an entire subject track of 143 acres. Delivery of the 143 acres was required for specific performance of the contract. See *Dillenberger v. Ziebold*, 70 Ill. App. 3d 585, 588-89 (1979).

¶ 27 Nonetheless, based on our standard of review, we hold that the trial court's finding that the transaction was a sale "by the acre" according to *Hagenbuch v. Chapin*, 149 Ill. App. 3d 572 (1986), is not against the manifest weight of the evidence. In *Hagenbuch*, the sale was determined to be "by the acre" because the plaintiff's purchase of the property involved an auction with bidding invited and cast on a per-acre basis. *Id*. at 575. The total purchase price was then calculated by multiplying the final bid amount by the total acreage sold. *Id*.

¶ 28 Here, the trial court found credible Trademark's evidence supporting its claim that the agreed upon total purchase price resulted from multiplying 143 acres times a per acre price of $4,500. Sufficient contrary evidence to refute this contention does not exist in the record. The trial court assigned no credibility to Stern's testimony of the sale being "in gross" and the sales agreement, which listed only the total purchase price and not a per acre price delineation, is not enough. The trial court actually construed the use of the terms – 143 acres, more or less – in the sales agreement's legal description of the property against Stern, as drafter. It found that the parties intended a per acre sale of the 143 acres.

¶ 29 The testimony of Coyle, which is assumed to have contradicted Driessens' assertions of calculating the final sales price at their meeting, was properly barred. Although parol evidence is admissible in cases alleging mutual mistake to show the parties' true intent (*Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 869 (2008)), the trial court has discretion to admit evidence that will not be disturbed on appeal unless there is a showing of abuse (*Bauer v. Memorial Hospital*, 377 Ill. App. 3d 895, 912 (2007)). "An abuse of discretion may be found where no reasonable person would take the view adopted by the court." *Bauer*, 377 Ill. App 3d at 912.

¶ 30 The advocate-witness rule precludes an attorney from acting as an advocate and a witness in the same case unless, at the trial court's discretion, the testimony is deemed necessary. *Id*. at 912-13. We find that although Coyle's testimony may have been necessary to rebut Driessens' assertions during trial, Coyle knew or should have anticipated that he had relevant and significant information and his testimony would have been needed. He was Stern's attorney, he conferred with Driessens at Stern's direction in Stern's absence, and he, thereafter, drafted the purchase agreement. Also, the complaint put him and Stern on notice that Trademark was alleging Driessens met with Coyle "for the purpose of negotiating and signing the agreement." Stern admitted this in his answer without the clarification he attempts to make in his brief that Coyle was not authorized to change the final price or set and compute the purchase price. Moreover, to allow Coyle to testify as a witness in a trial in which he had participated as an advocate, unfairly prejudices Trademark with respect to witness exclusion. See generally *People v. Dixon,* 23 Ill.2d 136 (1961) (discussing the purpose of witness exclusion). Thus, the trial court did not err in barring Coyle's testimony and in finding that the property was sold by the acre.

¶ 31 We pause to consider the trial court's "[a]cademic comment" noted in the transcript from the hearing on Stern's motion to reconsider which opines that *Beal* and *Hagenbuch* are "on a

direct collision course." The impending conflict alluded to by the court is discerning which initial presumption and threshold for rebuttal a court looks to when confronted with the issue of whether the sale was "in gross" or "by the acre." *Hagenbuch* stands for the proposition that: "Where a farm is sold and described as containing any certain number of acres, a presumption arises that the sale is by the acre*** This presumption is not lightly overcome and may be rebutted only by clear and convincing proof that the parties intended it to be a sale 'in gross.'" *Hagenbuch*, 149 Ill. App. 3d at 575. *Beal* states as previously quoted, however, "[w]here a real estate contract does not expressly provide that the sale is 'by the acre' or 'per acre' it should be viewed as a sale 'in gross'" and, that "[e]vidence supporting a per-acre sale should be strong." *Beal*, 291 Ill. App. 3d at 211.

¶ 32 Illinois case law has long held that "a sale of a farm or tract by name or general description is a sale in gross and acreage is not the basis of the contract, even though it is mentioned by description." *Beal*, 291 Ill. App. 3d at 209 (citing *Dillenberger*, 70 Ill. App. 3d at 588 (1979; *May v. Nyman*, 3 Ill. App. 3d 580, 584 (1972)); see also *Wadhams*, 109 Ill. at 57. This standard prevails unless "the seller warrants the tract, either expressly or by necessary implication, to contain a certain number of acres, or, which amounts to the same thing, where the sale is by the acre." *Wadhams*, 109 Ill. at 57. The abovementioned proposition in *Hagenbuch* does not comport with Illinois case law and is not followed in that respect. Nevertheless, we affirm the trial court's finding of a sale "by the acre."

¶ 33 Additionally, because we affirm the trial court's finding that there was a mutual mistake of fact and that this was a "by the acre" sale, Trademark is not precluded from contract reformation and recovery by operation of the doctrine of merger. See *Fitton v. Barrington Realty*

Co., 273 Ill. App. 3d 1017, 1022 (1995) (noting an exception to the merger doctrine for "by the acre" real estate sales where a mutual mistake is found).

¶ 34 However, the trial court's grant of equitable relief based on unjust enrichment is in error. "Unjust enrichment may only form the basis of recovery in the absence of an agreement between the parties; whereas, reformation may only be awarded in order to conform a writing to an actual agreement between the parties" *Wheeler-Dealer, Ltd.*, 379 Ill. App. 3d at 872. See also *People ex rel Hartigan v. E. & E. Hauling, Inc.*, 153 Ill. 2d 473, 497 (1992).

¶ 35 The Illinois Supreme Court has not adopted the Restatement of Restitution § 21, which provides:

> "A person who has paid money to another for land, chattels or services, in accordance with a contract or offer which provides for a price per unit, is entitled to restitution of an overpayment caused by a mistake as to the amount or number of things transferred or the amount of services rendered, unless one of the parties is entitled to rescind the entire transaction and so elects."
>
> Restatement (First) of Restitution § 21 (1937).

¶ 36 Conversely, "Illinois law, in a suit by the seller for the purchase price, will permit a set-off, or recoupment, of a deficit at the contract price." *Hagenbuch v. Chapin*, 149 Ill. App. 3d at 577 (citing *Wadhams*, 109 Ill. at 61). The amount calculated by the trial court is the amount to be recouped by the plaintiff for his acreage overpayment due to the mutual mistake that required the contract reformation. The trial court's monetary remedy is so affirmed on that basis. See *Janda v. United States Cellular Corp.*, 2011 IL App (1st) 103552, ¶ 84 (We are afforded great latitude to affirm the trial court on any basis in the record.)

¶ 37 CONCLUSION

¶ 38 We affirm the trial court's finding of a mutual mistake in the number of acres sold pursuant to a sale "by the acre." We also find that the trial court did not abuse its discretion in barring the testimony of the defendant's attorney because the attorney acted as an advocate even though the strong likelihood he would be called to testify was evident. Contract reformation is necessary and is not precluded by the doctrine of merger. We also affirm the monetary remedy as a recoupment due to a deficit in the contract and not unjust enrichment.

¶ 39 Affirmed.

¶ 40 JUSTICE CARTER, specially concurring.

¶ 41 I concur with the majority's judgment, but I write separately because I would affirm the trial court's grant of equitable relief of restitution based on unjust enrichment.

¶ 42 The majority opinion rejects the possibility that the trial court could grant an equitable remedy for unjust enrichment when there existed an actual agreement between the parties that required contract reformation. See, *e.g.*, *Wheeler-Dealer*, 379 Ill. App. 3d at 872; *Hartigan*, 153 Ill. 2d at 497. In so doing, the majority elects not to follow the principle stated in the Restatement (First) of Restitution § 21 cmt. a, illus. 1 (1937) providing for restitution of an overpayment caused by a mutual mistake because the Illinois Supreme Court has not specifically adopted that section. I suggest that the statement quoted from the *Wheeler-Dealer* decision that unjust enrichment may only form the basis of recovery in the absence of an agreement is overly broad and misleading in circumstances such as the instant case.

¶ 43 The statement in the majority that unjust enrichment cannot be the basis for recovery is in part based on the general principles set forth in section 107 of the Restatement (First) of Restitution, wherein a party under contract is only allowed to recover pursuant to the contract.

Restatement (First) of Restitution § 107(1) cmt. a (1937). That same principle is now found in section 2(2), Limiting Principles, in the new Restatement. Restatement (Third) of Restitution and Unjust Enrichment § 2(2) cmts. a and c (2011). Section 2 of the Restatement (Third) of Restitution states, in part, a basic limiting axiom that restitution claims are generally subordinate to a valid contract and the terms of the agreement displaced claims of unjust enrichment. However, particular exceptions are noted. For example:

> "*c. Restitution subordinate to contract.* Judicial statements to the effect that 'there can be no unjust enrichment in contract cases' can be misleading if taken casually. Restitution claims of great practical significance arise in a contractual context, but they occur at the margins, when a valuable performance has been rendered under a contract that is invalid, or subject to avoidance, or otherwise ineffective to regulate the parties' obligations. Applied to any such circumstance, the statement that there can be no unjust enrichment in contract cases is plainly erroneous. See §§ 31-36." Restatement (Third) of Restitution and Unjust Enrichment § 2(2) cmt. c (2011).

The incompatibility of a recovery based on contract and unjust enrichment is correct as long as the reference to contract is restricted to valid and enforceable obligations. Restatement (Third) of Restitution and Unjust Enrichment § 2 report's note c (2011); see also *Rutledge v. Housing Authority of City of East St. Louis*, 88 Ill. App. 3d 1064, 1067-71 (1980) (understanding embodied in written proposal and handbook prevented contractors from recovering quasi-contractual relief).

¶ 44 In the cases cited by the majority, the party seeking reformation failed to establish that there was an underlying agreement by mutual mistake or otherwise that was inconsistent with the

instrument sought to be reformed. Thus, that party was not entitled to a claim of unjust enrichment. See, *e.g.*, *Wheeler-Dealer*, 379 Ill. App. 3d at 872 (vendor who conveyed more than he intended failed to prove vendee thought he was purchasing less than he received); *Hartigan*, 153 Ill. 2d at 497 (no claim for unjust enrichment when there was an express contract). Likewise, the cases cited by the above authority also failed in their proofs to show a claim for reformation, all citing section 107 of the Restatement (First) of Restitution. See, *e.g.*, *La Throp v. Bell Federal Savings & Loan Ass'n*, 68 Ill. 2d 375, 391 (1977) (claim for unjust enrichment rejected when specific contract in place); *Brooks v. Valley National Bank*, 548 P.2d 1166, 1171 (1976) (specific contract governed relationship); *Ashton Co. v. State*, 454 P.2d 1004, 1009-10 (1969) (contractor not entitled to reformation).

¶ 45 I suggest, contrary to the majority position, that our supreme court's citation to section 107 of the Restatement (First) of Restitution in *La Throp* implicitly incorporated the Restatement's other basic principles, such as § 21.[1] Although restitution is subordinate to contract, it does not displace a claim for unjust enrichment under the circumstances of the instant case. In this case, the land sale was negotiated with a mistaken belief, shared by both parties, that the property consisted of 143 acres, when in fact the acreage was only 122.93 acres. When a sale is by the acre, mistakes in acreage will support a claim in restitution for unjust enrichment when it exceeds *de minimis* amounts:

> "Mistakes about acreage lead to unjust enrichment and a claim in restitution when they result in the conveyance of more or less land than contemplated by the parties' agreement. The degree to which the parties will be held to have contemplated

[1] I would note that section 21 of the Restatement (First) of Restitution was also cited with approval in *Chicago Title &Trust Co. v. Walsh*, 34 Ill. App. 3d 458, 464 (1975).

> a potential variation in quantity (beyond the ordinary margin of 'more or less') depends on the basis on which the sale is negotiated. Where the sale is 'by the acre,' a mistake as to acreage resembles other cases of mistake in performance: to the extent the vendor conveys either more or less land than the quantity by which the price has been fixed, there is unjustified enrichment (on one side or the other) by the benchmark of the parties' agreement. Where by contrast the sale is 'by the tract' or 'in gross,' the parties will be considered to have accepted, within reasonable limits, the risk of quantity variation; so that a mistake about acreage, where the sale is in gross, must be analyzed instead by the standards of mistake in basic assumptions." Restatement (Third) of Restitution and Unjust Enrichment § 34 cmt. f (2011).

¶ 46 In the case of mutual mistake about the identity of a property, restitution is readily available by money abatement based on the deficiencies in the acreage. Thus, I believe that the trial court in this case was correct in awarding an abatement of the purchase price under the principle of unjust enrichment.

¶ 47 The law in Illinois involving equitable relief for reasons of mutual mistake of fact has been well established. *Schmitt v. Heinz*, 5 Ill. 2d 372, 379 (1955); see *Worden v. Williams*, 24 Ill. 67 (1860). Likewise, a person who has paid money to another in accordance with an agreement which provides for a price by the unit is entitled to restitution for an overpayment caused by a mutual mistake of fact on the ground of unjust enrichment.[2] See, *e.g.*, *Stifel, Nicolaus & Co. v. Coloia*, 2 Ill. App. 3d 224, 229-30 (1971) (when overpayment by mistake may be recovered);

[2] It should be noted that the Restatement (Third) of Restitution and Unjust Enrichment § 5 cmt. g (2011) rejects any distinction between mistake of fact and mistake of law in the analysis of whether restitution should be granted or withheld.

Salvati v. Streator Township High School District No. 40, 51 Ill. App. 2d 1, 4-5 (1964) (money paid by mistake of fact can be recovered); *cf. Devine v. Edwards*, 87 Ill. 177 (1877) (mistake allows party to have wrong corrected); see also Restatement (First) of Restitution § 21 cmt. a, illus. 1 and 2 (1937) (deficiency in acreage of land); Restatement (Third) of Restitution and Unjust Enrichment § 34 cmt. f, illus. 31 (2011) (mistake in real property transactions allows restitution with an abatement of the price); *cf.* Restatement (Third) of Restitution and Unjust Enrichment § 6 cmt. a (2011) (payment by mistake); Restatement (Third) of Restitution and Unjust Enrichment § 12 cmt. e (2011) (a claim in restitution is justified where there is a divergence between the terms of the instrument (in this case, the deed's property description indicated when surveyed 122.93 acres) and the terms of the parties' valid agreement (in this case, the sale of 143 acres)); § 12 cmt. a (2011) (the function of § 12 is to include a category of unjust enrichment as a result of invalidating mistake, regardless of whether reformation is the appropriate remedy); Restatement (First) of Restitution § 51 cmt. c (1937) (when grantee receives a smaller interest than to which the parties agreed, the grantee may be entitled to reformation).

¶ 48 In this case, the party seeking reformation established that there was an underlying agreement that was inconsistent with the instrument sought to be reformed. The rectification of this mistaken exchange by adjusting the price paid to prevent unjust enrichment was the proper remedy; thus, the trial court was correct in directing an abatement of the price. This remedy follows one of the basic equitable principles of the law of restitution as stated by Lord Mansfield and as quoted in the Restatement (Third): " '[i]n one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.' " Restatement (Third) of Restitution and Unjust Enrichment § 1,

cmt. b (2011) (quoting Lord Mansfield in *Moses v. MacFerlan*, 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 681 (K.B. 1760)).

¶ 49 For the reasons stated above, I respectfully specially concur with the majority order.