

IN THE SUPREME COURT
 STATE OF NORTH DAKOTA

Douglas J. Meyer, Pamela C. Handley, Stephen)	
T. Meyer, Andrea K. Meyer, and Emil J. Meyer,)	
Jr,)	
)	
Plaintiffs/Appellants,)	
)	Supreme Court No.
vs.)	20150170
)	
Noman E. Engebretson, Sonja M. Eckert, Karen)	
A. Bailey, Robert C. Engebretson, Stephanie C.)	
McCall and Robert E. McCall Trustees of the)	
Stephanie C. McCall Living Trust dated)	
December 21, 2010, Karen E. Smith Personal)	
Representative of the Estate of Caryl E. Smith,)	
Henry M. Hanson, Dean C. Hanson, Angela Scott)	
DeGrado, Myrna Elletson, Deanna Faye Asmus,)	
Nancy Carlson, Debra Neff, Kristen Giuseffi,)	
Dennis Meyer, Christie Meyer, North Dakota)	
Minerals LLC, Wilma Wiengart, Daniel Meyer,)	
Sandra Spehar, Kay Malloy, Bruce R. Davis,)	
Claude Dean Davis, Kelly Marie Fox, Michelle)	
Annette Jefferson, James Ghrames, John M.)	
Pearsall, Jeanine Sanders, David O. Pearsall The)	
Estate of Oliver O. Pearsall, c/o John M. Pearsall,)	
Gary P. Hytrek, Pamela C. Hytrek, Cheryl D.)	
Hytrek, Barbara June Nisley, Fred Louis)	
Orchard, Eric J. (and Regina) Kaupanger, Elena)	
M. Brady Trustee of the Mark A. Kaupanger)	
2008 Irrevocable Special Needs Trust, Heir of)	
Arthur M. Kaupanger, Sonja M. Nelson,)	
Kristiane Kaupanger f/k/a Chris Ellis, Karen L.)	
Kaupanger, Karlene R. Dahlmeier, Cynthia K.)	
Kaupanger, Kurt Kaupanger, American Oil and)	
Gas Inc., Evertson Energy Partners Royalty LLC,)	
Gary C. Stewart, Ann Marie Urban, LPI)	
Holdings LLC, Eagle Pass Properties LLC, S&E)	
Royalty LLC, Rose Exploration Inc., William R.)	
LaCrosse and Tammy LaCrosse, Sundance)	
Energy Inc., XTO Energy Inc., Whiting Oil and)	
Gas Corporation, Northern Oil and Gas Inc.,)	
Morganthaler Oil and Gas Properties LLC,)	
Charles J. Heringer III Trustee, Triangle USA)	

Petroleum Corporation, Horizon Royalties LLC,)
OGR Bakken Resources LLC, Hess Corporation,)
WM ND Energy Resources II LLC, and any)
individual or entity known and or unknown who)
may have or claim interest in mineral ownership)
in and to all oil gas and other minerals in the)
subject lands,)
)
Defendants/Appellees.)

Appeal from Order for Judgment and Final Judgment Dated April 29, 2015
Case No. 53-2013-CV-01313
County of Williams, Northwest Judicial District
The Honorable David W. Nelson, Presiding

**BRIEF OF DEFENDANTS/APPELLEES EAGLE PASS PROPERTIES
LLC, WILLIAM R. LACROSSE AND TAMMY LACROSSE, LPI
HOLDINGS LLC, NORTHERN OIL AND GAS INC., DAVID O.
PEARSALL, JOHN M. PEARSALL, STEVE PEARSALL, ROSE
EXPLORATION INC., JEANINE SANDERS, TRIANGLE USA
PETROLEUM CORPORATION, AND ANN MARIE URBAN**

FREDRIKSON & BYRON, P.A.

Lawrence Bender, ND Bar #03908
Michael D. Schoepf, ND Bar #07076
1133 College Drive, Suite 1000
Bismarck, ND 58501
Phone: (701) 221-8700
lbender@fredlaw.com
mschoepf@fredlaw.com

**Attorneys for Defendants/Appellees
Eagle Pass Properties LLC, William R.
Lacrosse and Tammy Lacrosse, LPI
Holdings LLC, Northern Oil and Gas
Inc., David O. Pearsall, John M.
Pearsall, Steve Pearsall, Rose
Exploration Inc., Jeanine Sanders,
Triangle USA Petroleum Corporation,
and Ann Marie Urban**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

	<u>Paragraph</u>
STATEMENT OF THE ISSUE PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS.....	5
ARGUMENT	6
I. Standard of Review.....	7
II. This Court’s Decision in <i>Waldock</i> Controls the Outcome of this Case	8
II. The Pre- <i>Waldock</i> Decisions Relied on by Emil’s Heirs Are Inapposite to this Case	13
CONCLUSION.....	16
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Paragraph

CASES

<i>Carkuff v. Balmer</i> , 2011 ND 60, 795 N.W.2d 303.....	8
<i>Duhig v. Peavy-Moore Lumber Co.</i> , 144 S.W.2d 878 (Tex. 1940)	6
<i>EOG Res., Inc. v. Soo Line R.R. Co.</i> , 2015 ND 187	7
<i>Hamilton v. Woll</i> , 2012 ND 238, 823 N.W.2d 754	7
<i>Kadrmaz v. Sauvageau</i> , 188 N.W.2d 753 (N.D. 1971).....	14, 15
<i>Mau v. Schwan</i> , 460 N.W.2d 131, (N.D. 1990)	12
<i>Melchior v. Lystad</i> , 2010 ND 140, 786 N.W.2d 8.....	12
<i>Miller v. Kloeckner</i> , 1999 ND 190, 600 N.W.2d 881	11, 14
<i>State Bank & Trust of Kenmare v. Brekke</i> , 1999 ND 212, 602 N.W.2d 681	8
<i>North Shore, Inc. v. Wakefield</i> , 530 N.W.2d 297 (N.D. 1995).....	8
<i>Sibert v. Kubas</i> , 357 N.W.2d 495 (N.D. 1984)	14, 15
<i>Waldock v. Amber Harvest Corp.</i> , 2012 ND 180, 820 N.W.2d 755.....	6, 8–11

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

[¶1] Whether the district court erred by granting the Defendants' motions for summary judgment and holding that the Executrix Deed at issue unambiguously conveyed only the property interest owned by Carl J. Meyer at the time of his death and therefore the reservation in the Deed effectively reserved a fifty percent mineral interest to his Estate.

STATEMENT OF THE CASE

[¶2] This case requires the Court to determine whether a deed executed by the executrix of Carl J. Meyer's Estate contained an overconveyance of minerals such that its purported reservation of the fifty percent mineral interest he owned at the time of his death was ineffective. In cross-motions for summary judgment filed in district court, the parties agreed that the Executrix Deed was unambiguous but disagreed about whether it contained an overconveyance and whether the reservation was effective.

[¶3] Plaintiffs Douglas J. Meyer, Pamela C. Handley, Stephen T. Meyer, Andrea K. Meyer, and Emil J. Meyer, Jr ("Emil's Heirs"), and one of the mineral lessees, Whiting Oil and Gas Corporation ("Whiting"), asserted that the deed contained an overconveyance of the Estate's minerals and therefore the reservation was ineffective under the *Duhig* rule. Emil's Heirs and Whiting claimed that because the reservation was ineffective, all of the fifty percent mineral interest owned by Carl J. Meyer at the time of his death passed to their predecessor in interest, Emil Meyer. Defendants Eagle Pass

Properties LLC, William R. Lacrosse and Tammy Lacrosse, LPI Holdings LLC, Northern Oil and Gas Inc., David O. Pearsall, John M. Pearsall, Steve Pearsall, Rose Exploration Inc., Jeanine Sanders, Triangle USA Petroleum Corporation, and Ann Marie Urban (collectively “Northern Defendants”) disagreed. Similar to a quit claim deed, the Executrix Deed only conveyed the interest in the property owned by Carl J. Meyer at the time of his death. Because Carl J. Meyer only owned fifty percent of the minerals at the time of his death, the deed only purported to convey fifty percent of the minerals and the corresponding reservation was effective.

[¶4] On April 29, 2015, the district court issued an Order for Judgment and Judgment, concluding that the Executrix Deed only purported to convey fifty percent of the minerals in and under the property and therefore the reservation of a fifty percent interest in the estate was effective. The Plaintiffs now appeal from that Judgment. The only issue before the Court is whether, as a matter of law, the district court correctly interpreted the unambiguous Executrix Deed.

STATEMENT OF FACTS

[¶5] The Northern Defendants do not dispute the Statement of Facts set forth in the Appellant’s Brief. However, many of the assertions in Emil’s Heirs’ Statement of Facts are irrelevant to this appeal. The parties agree that the Executrix Deed is unambiguous. As a result, the Court’s

interpretation of the Deed must turn on the language of the Deed alone. Any reference to extraneous evidence should be ignored.

ARGUMENT

[¶6] This case concerns different parties and different lands, but is otherwise indistinguishable from *Waldock v. Amber Harvest Corp.*, 2012 ND 180, 820 N.W.2d 755. As this Court explained in *Waldock*, to determine whether a deed contains an overconveyance of minerals the inquiry should focus on the granting clause to determine what the grantor purported to convey to the grantee. *Id.* at ¶ 9. In this case, as in *Waldock*, the grantor purported to convey only “the right, title, interest and estate, of said Carl J. Meyer, decedent, at the time of his death” Executrix Deed, Ex. C to the Affidavit of Lawrence Bender (Doc. ID# 107). Because Carl J. Meyer owned only fifty percent of the minerals in and under the property at the time of his death, the granting clause of the Executrix Deed only purported to convey fifty percent of the minerals. Likewise, because the Deed only purported to convey fifty percent of the minerals, there is no conflict between the granting clause and the reservation of the same percentage. Simply put, there was no overconveyance and the *Duhig* rule is inapplicable. *See generally Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878, 880 (Tex. 1940) (explaining the rationale for the rule and supplying its name). Accordingly, the district court’s Judgment must be affirmed.

I. The Standard of Review.

[¶7] This Court recently explained the well-established standard for reviewing orders granting motions for summary judgment as follows:

Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

EOG Res., Inc. v. Soo Line R.R. Co., 2015 ND 187, ¶ 13 (quoting *Hamilton v. Woll*, 2012 ND 238, ¶ 9, 823 N.W.2d 754) (additional citation omitted).

II. This Court's Decision in *Waldock* Controls the Outcome of this Case.

[¶8] Deeds are construed “to ascertain and effectuate the grantor’s intent” *State Bank & Trust of Kenmare v. Brekke*, 1999 ND 212, ¶ 12, 602 N.W.2d 681. “The language of the deed, if clear and explicit, governs its interpretation; the parties’ mutual intentions must be ascertained from the four corners of the deed, if possible.” *North Shore, Inc. v. Wakefield*, 530 N.W.2d 297, 300 (N.D. 1995). Whether a deed is ambiguous is a question of law. *See Brekke*, 1999 ND 2012, ¶ 12; 602 N.W.2d 681 *see also Carkuff v.*

Balmer, 2011 ND 60, ¶ 8, 795 N.W.2d 303; *Waldock*, 2012 ND 180, ¶ 6, 820 N.W.2d 755. Thus, “the specific language of the granting clause of the deed controls the interests the grantor purported to give the grantee.” *Waldock*, 2012 ND 180, ¶ 10, 820 N.W.2d at 759.

[¶9] In *Waldock*, the North Dakota Supreme Court examined facts that are materially identical to the facts here. There, Edwardson, the original grantor, owned a 50% interest in the minerals in and under certain lands at the time of his death. 2012 ND 180, ¶ 2, 820 N.W.2d at 759. After Edwardson’s death, the administrator of Edwardson’s estate issued an administrator’s deed to Van Horn. *See id.* The administrator’s deed expressly reserved to the Estate of Edwardson twenty-five percent of the minerals at issue. *See id.* The deed at issue in *Waldock* contained the following language:

NOW, THEREFORE, the said *party of the first part as Administrator* aforesaid pursuant to the order last aforesaid, and for and in consideration of the said sum of Four Thousand Seven Hundred (\$4700.00) and no/100 Dollars, to his in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, *has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey, unto the said party of the second part and his heirs and assigns, forever, all the right, title, estate and interest, of the said above named decedent, at the time of his death,* and also all the right, title, and interest that the said estate, by operation of law or otherwise, may have acquired other than or in addition to, that of said deceased, at the time of his death, in and to all that certain lot, piece or parcel of land, situated, lying and being in said County of [Mountrail] and State of North Dakota and particularly described as follows, to-wit:

The East half of the Southwest Quarter (E½SW¼) and Lots Three (3) and Four (4) Section Eighteen (18), Township One Hundred Fifty-one North (151N), Range Ninety West (90W) *excepting and reserving unto said estate, its successors and assigns, forever, an undivided Twenty-five percent (25%) interest in all of the oil, gas, and other minerals upon, or in said land*, together with such rights of ingress and egress as may be necessary for exploring for and mining or otherwise extracting and carrying away the same; and provided further that the purchaser shall settle for summerfallow and other like improvements upon the said land.

Id. (emphasis original). The Court determined the specific language of the deed granted Van Horn only the interest owned by Edwardson at the time of his death—all of the surface and fifty percent of the minerals. *Id.* at ¶¶ 12–13. Accordingly, the North Dakota Supreme Court held that the plain language of the administrator’s deed reserved 25% of the minerals at issue. *Id.*

[¶10] The same result is warranted here. The language of the Executrix Deed is substantively identical to the language of the deed in *Waldock*. Compare *id.* at ¶ 2 with Executrix Deed, Ex. C to the Affidavit of Lawrence Bender (Doc. ID# 107). The Executrix Deed provides:

NOW THEREFORE, The said Agnes O. Pearsall, as Executrix of the Estate of Carl J. Meyer, decedent, as aforesaid, the party of the first part, purusant [sic] to the Order last aforesaid of the said County Court, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey, unto the said party of the second part, his heirs and assigns, forever, all the right, title, interest and estate, of the said Carl J. Meyer, decedent, at the time of his death, and also all the right, title and interest that the said estate, by operation of law or otherwise, may have acquired other than or in addition to, that of the said decedent, at the time of his death, in and to all the

certain real estate situated and being in said County of Williams and State of North Dakota, particularly described as follows, to wit:

Twp. 157 N., Rge. 96 W.

Sec. 21: W1/2SE1/4

Sec. 28 W1/2, SW1/4SE1/4

Excepting and reserving to the Grantor, his heirs and assigns, 50% of all oil, gas and other minerals in and under and that may be produced from said lands, with full right of ingress and egress to search for and to mine and produce the same; containing 440 acres, more or less according to the United States Government survey thereof.

Id. Thus, as in *Waldock*, the Executrix Deed granted to Emil Meyer only what Carl J. Meyer owned at the time of his death—all of the surface and fifty percent of the minerals in and under the described lands. Further, it expressly reserved to Carl J. Meyer’s Estate that same fifty percent interest. There is no conflict between a granting clause that grants fifty percent of the minerals and an express reservation that reserves the same fifty percent.

[¶11] Despite the clear precedent set by this Court in *Waldock*, Emil’s Heirs contend this case is distinguishable because the reservation applies to fifty percent of the mineral estate rather than twenty-five percent. Appellants’ Br. at ¶¶ 14–15. Contrary to their argument, the percentage of minerals reserved does not matter as long as it does not result in an overconveyance. Indeed, as Emil’s Heirs admit, the key inquiry is “‘not what the grantor purported to retain for himself, but what he purported to give to the grantee.’” *Id.* at ¶ 12 (quoting *Miller v. Kloeckner*, 1999 ND 190, ¶ 17, 600 N.W.2d 881) (additional citation omitted). Here, the grantor purported to

convey only half of the minerals underlying the property. Accordingly, reserving that same one-half interest did not result in an overconveyance.

[¶12] Overconveyances generally occur when a grantor who owns less than one-hundred percent of the minerals underlying a tract of land executes a deed that purports to convey one-hundred percent of the minerals and also reserve a percentage for itself. *See, e.g., Melchior v. Lystad*, 2010 ND 140, ¶ 4, 786 N.W.2d 8 (applying the *Duhig* rule where the deed purported to convey one-hundred percent of the minerals and reserve half and the grantors owned less than half); *Mau v. Schwan*, 460 N.W.2d 131, 134 (N.D. 1990) (same). The Executrix Deed did not purport to convey one-hundred percent of the minerals in and under the property. It purported to convey only those minerals owned by Carl J. Meyer at the time of his death—fifty percent. *See* Executrix Deed, Ex. C to the Affidavit of Lawrence Bender (Doc. ID# 107). Thus, there was no overconveyance and *Duhig* does not apply.

III. The Pre-Waldock Decisions Relied on by Emil's Heirs Are Inapposite to this Case.

[¶13] As Emil's Heirs correctly point out, a conveyance of real estate generally includes both the surface and the grantor's interest in the minerals below the surface. Appellants' Br. at ¶ 32. Thus, in the absence of a reservation, the Executrix deed would have conveyed all of the interest owned by Carl J. Meyer at the time of his death in the surface of the described lands and the minerals underneath those lands. However, it does not follow from this general rule, as Emil's Heirs seem to contend, *see id.* at

¶ 33, that a grantor is prohibited from reserving *all* of the grantor's mineral interest in the property. Grantors are free to reserve all or any part of the minerals they own as long as the reservation is explicit and does not result in an overconveyance. None of the cases cited by Emil's Heirs prove otherwise.

[¶14] *Miller*, 1999 ND 190, ¶¶ 2, 18, 600 N.W.2d 881, *Sibert v. Kubas*, 357 N.W.2d 495, 496–97 (N.D. 1984), and *Kadrmass v. Sauvageau*, 188 N.W.2d 753, 754, 756 (N.D. 1971), all involved warranty or special warranty deeds that purported to grant the entire surface and mineral estate, reserving fifty percent of the minerals to the grantees. Thus, the Court construed the deeds to contain a grant of the entire surface of the described property and the remaining fifty percent of the minerals that were not reserved. *See Miller*, 1999 ND 190, ¶ 18, 600 N.W.2d 881; *Sibert*, 357 N.W.2d at 497; *Kadrmass*, 188 N.W.2d at 756. Because the grantors only owned fifty percent of the minerals to begin with, however, they could not both convey a fifty-percent mineral interest and reserve a fifty percent interest in themselves. As a result, the Court gave effect to the grant and the reservations failed. *See Miller*, 1999 ND 190, ¶ 18, 600 N.W.2d 881; *Sibert*, 357 N.W.2d at 497; *Kadrmass*, 188 N.W.2d at 756.

[¶15] The Executrix Deed at issue in this case, in contrast to the warranty and special warranty deeds at issue in *Miller*, *Sibert*, and *Kadrmass*, never purports to grant the entire surface and mineral estate. *See Executrix Deed*, Ex. C to the Affidavit of Lawrence Bender (Doc. ID# 107). It purports

to grant only the interest owned by Carl J. Meyer at the time of his death. As a result, the Deed does not purport to grant fifty percent to the Emil Meyer and reserve fifty percent to Carl J. Meyer's Estate. It purports to grant Emil Meyer nothing and reserve the entire fifty percent to Carl J. Meyer. *See id.* Nothing in this Court's decisions in *Miller*, *Sibert*, and *Kadrmass* prevents property owners from conveying the surface of their property and retaining all of their minerals, which is exactly what Carl J. Meyer's Estate did in this case.

CONCLUSION

[¶16] For the reasons set forth above, the Northern Defendants respectfully request that the Court enter an order affirming the judgment entered by the district court.

DATED this 17th day of August, 2015.

FREDRIKSON & BYRON, P.A.

/s/ Michael D. Schoepf
Lawrence Bender, ND Bar #03908
lbender@fredlaw.com
Michael D. Schoepf, ND Bar #07076
mschoepf@fredlaw.com
1133 College Drive, Suite 1000
Bismarck, ND 58501
Phone: (701) 221-8700

**Attorneys for Defendants/Appellees
Eagle Pass Properties LLC, William R.
Lacrosse and Tammy Lacrosse, LPI
Holdings LLC, Northern Oil and Gas
Inc., David O. Pearsall, John M.
Pearsall, Steve Pearsall, Rose
Exploration Inc., Jeanine Sanders,
Triangle USA Petroleum Corporation,
and Ann Marie Urban**

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2015, I electronically filed with the Clerk of the North Dakota Supreme Court the foregoing Brief by E-mail, and served the Brief by E-mail on the following:

Gary Michael Beaudry
Gmb322@hotmail.com

Jon Bogner
jonbogner@ndsupernet.com

Ross Sundeen
Ross@dakotalawdogs.com

Gene W. Allen
gene@allenpllc.com

In addition, I further certify that the following unrepresented Defendants were served by U.S. Mail:

American Oil & Gas, Inc.
15050 17th St., Ste. 2400
Denver, CO 80265

Claude Dean Davis
250 East Elizabeth Way #1080
Chandler, AZ 85225

Gary P. Hytrek
40684 177th St. East
Lancaster CA 93535

Norman and Shirley Engebretson
1180 Monte Vista Drive
Reno, NV 89511

Horizon Royalties LLC
c/o NCORP Services
919 S.7th St. Ste. #503
Bismarck, ND 58504-5835

Kelly Marie Fox
f/k/a Kelly Marie Sikes
214 Winchester Dr.
Libby, MT 59923

James Ghrames
139 Birch Dr.
Kalispell, MT 59901

Charles J. Heringer III, Trustee
P.O. Box 486
Billings, MT 59103

Evertson Energy Partners Royalty,
LLC
4362 E. Hwy 30
Kimball, NE 69145

Cheryl D. Hytrek
7829 Pomeroy Way
Citrus Heights, CA 95610

Pamela C. Hytrek
250 Elizabeth Way Apt. 2040
Chandler, AZ 85225

Michelle Annette Jefferson
199 Stoner Creek Rd.
Lakeside, MT 59922

Stephanie C. McCall & Robert E.
McCall
1308 South Street
Castle Rock, CO 80104

Daniel Meyer
c/o Linda Meyer
6799 110th Ave NW
Tioga, ND 58852

North Dakota Minerals LLC
1746-FS Victoria Ave.
Ventura, CA 93003

Fred Louis Orchard
c/o Gary Hytrek
40684 177th St. East
Lancaster, CA 93535

Karen E. Smith
c/o Stephanie C. McCall
1308 South Street
Castle Rock, CO 801 04

Gary C. Stewart
2511 Juniper Court
Golden, CO 80401

Wilma Wiengart
41050 Bay Point Rd.
Polson, MT 59860

Morganthaler Oil & Gas Properties
4200 Night Hawk Rd.
Billings, MT 59106

Barbara J. Nisley
c/o Gary Hytrek
40684 177th St. E.
Lancaster, CA 93535

OGR Bakken Resources LLC
c/o Corp. Services Co.
316 N. 5th St.
P.O. Box 1695
Bismarck, ND 58502-1695

S&E Royalty, LLC
8470 W. 4th Ave
Lakewood, CO 80226

Sandra Spehar
317 South Washington St.
Dillon, MT 59725

Sundance Energy Inc.
c/o CT Corporation System
314 E. Thayer Ave.
Bismarck, ND 58501-4018

WM ND Energy Resources II, LLC
c/o CT Corporation System
314 E. Thayer Ave.
Bismarck, ND 58501-4018

/s/ Michael D. Schoepf
MICHAEL D. SCHOEPF
ND Bar #07076
1133 College Drive, Suite 1000
Bismarck, ND 58501
Phone: (701) 221-8700
mschoepf@fredlaw.com