

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

Supreme Court No. 20150170

Douglas J. Meyer, Pamela C. Handley, Stephen T. Meyer, Andrea K. Meyer, Emil J. Meyer, Jr.,

Plaintiffs and Appellants,

v.

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 Ghames, 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 and Appellees.

**BRIEF OF APPELLEE HESS CORPORATION
IN RESPONSE TO “APPELLEE” BRIEF OF
WHITING OIL AND GAS CORPORATION**

Appeal from Summary Judgment
Order for Judgment dated April 28, 2015 and Judgment entered April 29, 2015
in the District Court of Williams County, North Dakota, Northwest Judicial District
The Honorable David Nelson, Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY	¶1
A. The granting clause in the Executrix Deed controls because the terms of any prior contract merged with the terms of the Executrix Deed	¶3
B. Both the Executrix Deed and the administrator's deed in <i>Waldock</i> referred to an order by the county court directing a conveyance	¶6
CONCLUSION	¶9

TABLE OF AUTHORITIES

Cases

<i>Gawryluk v. Poynter</i> , 2002 ND 205, 654 N.W.2d 400	¶2
<i>Lee v. Frank</i> , 313 N.W.2d 733 (N.D. 1981)	¶5
<i>Sittner v. Mistelski</i> , 140 N.W.2d 360, 369 (N.D. 1966)	¶6
<i>Waldock v. Amber Harvest Corp.</i> , 2012 ND 180, 820 N.W.2d 755	¶1, 5, 6, 7
<i>Zimmer v. Bellon</i> , 153 N.W.2d 757 (N.D. 1967)	¶3

Other Authorities

34 C.J.S. Executors and Administrators § 810	¶7
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REPLY

[¶1] As in *Waldock v. Amber Harvest Corp.*, 2012 ND 180, 820 N.W.2d 755, the Executrix Deed, the only deed at issue in this case, is unambiguously a quitclaim deed that only purported to include Carl Meyer's ("Carl's") interest at the time of his death. There is no dispute that Carl owned 50% of the minerals. There is no dispute that the Executrix Deed purported to reserve 50% of the minerals. As a result, there was no overconveyance. The Executrix Deed conveyed the entire surface of the tract in dispute (the "Tract") to Emil Meyer ("Emil"), but no mineral interest in the Tract.

[¶2] The *Duhig* framework, including this Court's analysis of that framework in *Waldock*, is meant to "provide certain and definite guidelines in the interpretation of property conveyances and in title examinations." See *Gawryluk v. Poynter*, 2002 ND 205 ¶ 13, 654 N.W.2d 400. In its brief, Whiting Oil and Gas Corporation ("Whiting") claims a departure from the certainty of *Waldock* is justified for two reasons: (1) there was a preceding contract for deed, and the Executrix Deed deals with sections of land other than the Tract; and (2) the Executrix Deed refers to an order by the county court directing the conveyance. Neither of these reasons justify a departure from this Court's analysis in *Waldock*.

A. The granting clause in the Executrix Deed controls because the terms of any prior contract merged with the terms of the Executrix Deed.

[¶3] Whiting claims that a prior contract for deed distinguishes this case from *Waldock*. (See Whiting's Br. at ¶ 10-11, 13). But, as in *Waldock*, the only controlling instrument is the deed. Under North Dakota law, the terms of a contract for deed merge with the terms of a deed executed in fulfillment of the contract. *Zimmer v. Bellon*, 153 N.W.2d 757, 761 (N.D. 1967) ("[A] deed made in full execution of a contract of sale of

land merges the provisions of the contract therein, and . . . although the terms of preliminary agreements may vary from those contained in the deed, *the deed alone must be looked to for determination of the rights of the parties[.]*” (emphasis original) (quoting 26 C.J.S. Deeds § 91c, page 842)). Thus, any contract for deed merged with the Executrix Deed after the Executrix Deed was fully executed. *See id.* In other words, any prior contract for deed had no legal effect following the execution of the Executrix Deed.

[¶4] The plain language of the Executrix Deed transferred what Carl owned at the time of his death in the lands mentioned, less 50% of the minerals. (See Doc ID #125, Ex. A-4, Executrix Deed) (granting “all the right, title, interest, estate, of the said Carl J. Meyer, decedent, at the time of his death . . . [in Sections 21 and 28] . . . [e]xcepting and reserving . . . 50% of all oil, gas and other minerals in and under and that may be produced from said lands.”). Despite this plain limitation on the grant to what Carl owned “at the time of his death,” Whiting claims that “[t]his result does not make sense when Carl owned 100% of the minerals in some of the land and 50% in other land.” (Whiting’s Br. at ¶ 13).

[¶5] But the Executrix Deed did not warrant or make any explicit conveyance of minerals to Emil. It merely included in the grant what Carl owned at the time of his death, and a reservation is precisely the method to exclude such mineral rights from the grant. *See Waldock*, 2012 ND 180 ¶ 12, 820 N.W.2d 755 (grant included 50% of the minerals, reservation excluded 25% of the minerals from grant, and deed conveyed 25% of the minerals); *cf. Lee v. Frank*, 313 N.W.2d 733 (N.D. 1981) (discussing a deed whereby the grantor effectively reserved 100% of the minerals from a fee simple grant by “excepting and reserving . . . all ores and minerals”). As to the Tract, this straightforward

conveyance therefore: (1) started with what Carl owned at the time of his death (the surface and 50% of the Tract's minerals), (2) reserved 50% of the Tract's minerals, and (3) conveyed the surface of the Tract.

B. Both the Executrix Deed and the administrator's deed in *Waldock* referred to an order by the county court directing a conveyance.

[¶6] As in *Waldock*, the Executrix Deed “complied with the contemporaneous statutory provision for an estate’s conveyance of real property by private sale.” *Waldock* 2012 ND 180 ¶ 10, 820 N.W.2d 755 (citing 1943 N.D.C.C. § 30-19-20 and *Sittner v. Mistelski*, 140 N.W.2d 360, 369 (N.D. 1966)). That provision under the prior probate code required an executor’s or administrator’s deed to refer to the “orders of the county court authorizing and confirming the sale of the property of the estate and directing conveyance thereof to be executed.” *Sittner*, 140 N.W.2d at 369 (quoting 1943 N.D.C.C. § 30-19-20). Therefore, the Executrix Deed’s reference to the county court’s order does not distinguish it from *Waldock*. (See Whiting’s Br. at ¶ 12). A similar reference existed in the deed in *Waldock*, and such reference was required by law.

[¶7] Further, this Court has already examined the effect of deeds issued under former § 30-19-20, and Whiting offers no other explanation why nearly identical deeds in compliance with § 30-19-20 should be treated differently. Indeed, “N.D.C.C. § 30-19-20 clearly indicates [a] conveyance of [a] decedent’s real property by [a] decedent’s estate conveys only the right, title, and interest of the decedent in the premises.” *Waldock*, 2012 ND 180 at ¶ 10, 820 N.W.2d 755; cf. 34 C.J.S. Executors and Administrators § 810 (“On a sale of a decedent’s property under court order, there is no implied warranty, either of title or quality The doctrine of caveat emptor applies.”).

[¶8] Applying *Duhig* after probate administration to deeds that only purport to include the decedent's estate in their grant would create the chaos that this Court was concerned about at oral argument in *Waldock*—namely, that administrators and executors could expose themselves to liability by warranting title outside the bounds of the estate. This result was not justified in *Waldock*, where the appellant argued that the deed purported to transfer 75% of the minerals when the estate only owned 50% of the minerals. (Appellant's Br. at ¶ 35, *Waldock v. Amber Harvest*, No. 20120064 (arguing that "Clark Van Horn received a 75% interest in and to all the minerals, though the United States was owner of 50% of the interest")). Nor is it here, where the Executrix Deed only purports to deal with property of Carl's estate and makes no mention of any property outside of Carl's estate—such as the other 50% mineral interest not owned by Carl and not mentioned in the Executrix Deed. As a result, both the Executrix Deed and the administrator's deed in *Waldock* are the equivalent of a quitclaim deed, as both only purported to deal with the property of the estate.

CONCLUSION

[¶9] *Waldock* is directly on point. The Emil Heirs own no mineral interests in the Tract because the *Duhig* rule does not apply to the conveyance from Carl's estate to Emil. For the reasons stated above and in the Brief of Appellee Hess Corporation, Hess requests that this Court affirm the District Court's judgment, and that Hess be granted all other relief to which it has shown itself to be entitled.

Dated this 11th day of September, 2015.

Respectfully submitted,

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Douglas J. Meyer, et al. v. Norman E. Engebretson, et al.
Supreme Court No. 20150170
Williams Co. Court No. 2013-CV-01313

AFFIDAVIT OF SERVICE

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COUNTY OF HARRIS)

[1] LuAnn Burgess, being duly sworn on oath, deposes and states that she is of legal age and that on September 11, 2015, she served the Brief of Appellee Hess Corporation in Response to "Appellee" Brief of Whiting Oil and Gas Corporation in the above matter electronically as follows:

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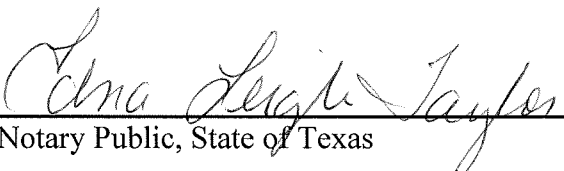
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LuAnn Burgess

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Notary Public, State of Texas

