20110355

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Dorothy J. Pierce Family Mineral Trust, Plaintiff and Appellant, vs. Richard D. Jorgenson and Brenda R. Jorgenson, Defendants and Appellees.	)	**SUPREME COURT NO. 20110355** Mountrail County No. 31-10-C-00094

APPEAL FROM JUDGMENT
DATED NOVEMBER 9, 2011

MOUNTRAIL COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE GARY H. LEE, PRESIDING

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

I. Whether clear and convincing evidence was presented that a mutual mistake was made in the mineral reservation in the deeds to the Jorgensons.

II. What is the correct interpretation of the mineral reservation in the deeds to the Jorgensons.

III. Whether the Defendants incurred any costs for publication.

STATEMENT OF THE CASE

This case was tried to the court. After the trial, the court ruled that there was insufficient evidence of mutual mistake. The court made no ruling on the interpretation of the reservation that is in the existing deeds. Defendants were awarded publication costs and Judgment was entered for the Defendants dismissing Plaintiff's Complaint and quieting title to the disputed minerals in Defendants' names.

STATEMENT OF THE FACTS

Ethewin Wright entered into a Contract for Deed with Richard Jorgenson and Brenda Jorgenson for the sale and purchase of the property involved in this dispute. That Contract for Deed reserved all of the oil, gas, coal and other minerals. The Contract for Deed is dated March 21, 1984, and is Plaintiff's Exhibit 1 (App. 12-13).

By Personal Representative's Deed dated August 13, 1987, all of the interest of Ethewin M. Wright in the land and minerals was conveyed to Dorothy J. Pierce and LaRoy L. Wright. Plaintiff's Exhibit 2 (App. 14-15).

On October 31, 1988, LaRoy L. Wright and his wife, Eileen D. Wright, and Dorothy J. Pierce executed separate deeds to Richard Jorgenson and Brenda Jorgenson conveying the land involved in this dispute and "reserving and retaining unto the Grantors, 1/2 of all remaining oil, gas, coal, gravel, uranium, clay, potash, silver, gold and all other minerals, together with the compounds and by-products of each of them, with the right of ingress and egress and for the purpose of exploring, developing and operating for said minerals." Plaintiff's Exhibits 3 and 4 (App. 16-18).

The mineral reservation in Exhibits 3 and 4 does not conform to the mineral reservation in the Contract for Deed. The purpose of these deeds was to fulfill the Contract for Deed. Jorgensons did not become aware of the difference between the Contract for Deed and the deeds until 2007 when a landman approached them about leasing the minerals. Jorgensons had no discussions with LaRoy Wright, Eileen Wright or Dorothy J. Pierce regarding the minerals. Tr. at 31. Jorgensons apparently learned from a landman that they might be able to claim an interest in the minerals. Tr. at 29.

The Jorgensons knew that Ethewin Wright intended to reserve all of the minerals when the land was sold and that they were not acquiring any mineral rights. Tr. at 25. Ethewin Wright declined to sell the land to a relative because he wanted part of the minerals as part of the sale. Tr. at 12.

On September 8, 2005, Dorothy Pierce leased her interest in the minerals to Petro-Hunt, LLC. Plaintiff's Exhibit 6 (App. 21-22).

On July 8, 2008, Eileen Wright, as successor to LaRoy Wright, conveyed all of their interest in the minerals to Dorothy J. Pierce. Plaintiff's Exhibit 5 (App. 19-20).

In September of 2008, Dorothy Pierce transferred all of her interest in all of the minerals underlying this land to the Dorothy J. Pierce Family Mineral Trust. Plaintiff's Exhibit 7 (App. 23-24).

ARGUMENT

I. THE COURT ERRED IN CONCLUDING THAT THERE WAS INSUFFICIENT EVIDENCE OF MUTUAL MISTAKE.

A decision regarding mutual mistake is a question of fact which will not be overturned unless clearly erroneous. *Heart River Partners v. Goetzfried*, 2005 ND 149, ¶ 15, 703 N.W.2d 330. Furthermore, a contract can only be reformed for mutual mistake if, by clear and convincing evidence, that at the time of execution, both parties intended something different than the document stated. *Id.* That is the case here.

The intent of the parties at the time of conveyance was for Wright to reserve all of the minerals. At trial, Richard Jorgenson testified that it was understood that was the intent. Tr. at 25. Later in his testimony, Jorgenson stated that he knew at the time the contract was signed that the minerals were to be reserved. Tr. at 26. It was admitted that both sides assumed and intended for all of the minerals to be reserved. The absence of a proper mineral reservation in the deeds is, therefore, a mutual mistake. Defendants did not even attempt to contest this at trial. As such, there is clear and convincing evidence that the deeds should be reformed.

The trial court ignored the overwhelming evidence of this mutual mistake presented at trial, including the following testimony of Richard D. Jorgenson:

Tr. Page 25, Lines 13 to 22:

13	Q	I'm going to ask you to look at what is marked as Exhibit No. 1. First of all, is that a contract for deed where you're one of the parties?
16	A	Yes.

17 Q Do you recall entering into the contract with Ethewin Wright?

19 A Yes.

20 Q Do you recall at that time that it was her intention to reserve the minerals?

22 A Yes.

Tr. Page 26, Lines 17 to 25:

17 Q And you talked about the terms of the contract for deed?

19 A Yes.

20 Q And you also talked about the fact that she was going to reserve the oil, gas and minerals?

22 A Yes. And I also said some of the minerals should go with the land.

24 Q But at the time on the contract for deed you recognized you were not getting any of the minerals?

Tr. Page 27, Lines 1 to 4:

1 A Yes

2 Q I mean, you knew that at the time in 1984, correct?

4 A Yes

Tr. Page 28, Line 25 - Tr. Page 29, Lines 1 to 19:

25 Q When did you become aware that there was a (continued on Line 1, P. 29) difference in the mineral reservation between the deeds and the contract for deed?

3 A. I don't recall, until just recently when this court case came up.

5 Q Well, you leased the minerals out at once. Did you not?

7 A Yeah, in 2007

8	Q	Is that when you first became aware that the contract for deed and the deeds were different?
10	A	I don't recall
11	Q	Okay. Well, you knew at that time that you signed the contract for deed that Ethewin reserved all of the minerals?
14	A	Yes.
15	Q	And you found out in 2007 that you had some minerals to lease, correct?
17	A	Yes.
18	Q	Did you know that before 2007?
19	A	No.

Tr. Page 31, Lines 22 to 25:

22	Q	And you didn't have any discussions with either LaRoy Wright or Dorothy Pierce about the minerals. Would that also be correct?
25	A	Yes

They assert a claim to one-half of the minerals based upon the 1988 deeds. Jorgensons did not negotiate a purchase of the minerals from Wright or Pierce. No additional consideration was paid. The 1988 deeds were simply in fulfillment of the 1984 Contract for Deed.

The case presently before the Court is analogous, in many respects, to the case of *Wehner v. Schroeder*, 354 N.W.2d 674 (ND 1984). In that case, Wehners brought an action to reform a Warranty Deed that did not contain a mineral reservation. The Contract for Deed, however, stated that the Wehners reserved 50% of the oil, gas and other minerals.

The Court held that the plaintiffs were not estopped from asserting title to the mineral interest because defendants had means of acquiring state of the title from the public record, that the trial court's finding of mutual mistake with regard to the reservation of mineral interest was not clearly erroneous, that plaintiffs' failure to read the documents before signing them did not bar them from reformation, and that the doctrine of merger did not bar reformation.

In the case presently before the Court, the Defendants had the same access to the state of title from the public record. The accumulated evidence, by a clear and convincing standard, shows the mutual mistake of the parties that sellers intended to reserve all of the minerals. Jorgensons do not deny that a mistake was made and that the intent was that they would not receive any minerals. They produced no evidence that Ethewin Wright changed her mind and decided to convey the minerals to them and no evidence that they were supposed to receive some of the minerals. Such argument would have no merit because the deeds actually came from LaRoy Wright and Dorothy J. Pierce and they never spoke to Wright and Pierce.

Jorgensons don't even contend that Wright and Pierce intended to convey a portion of the minerals to them. Jorgensons instead seem to rely upon the argument that even though a mistake was made in the deeds, it's too bad and they should therefore own the minerals.

A recent case regarding a similar issue is *Van Berkom v. Cordonnier*, 2011 ND 239. In that case, the Supreme Court affirmed the trial court's ruling that the Cordonniers did not prove the presence of mutual mistake justifying reformation by a clear, satisfactory, specific

and convincing evidence. In that case, Van Berkoms presented testimony demonstrating the intent to transfer the mineral rights along with the surface rights when the payments under the contract for deed were completed. In the present case, the only evidence regarding the intention of the parties is the acknowledgment by Defendants that the sellers intended to reserve the minerals. In the *Van Berkom* case, there was testimony on both sides as to the intent of the parties. That is not true in the present case. The evidence by Cordonnier heirs that this was the usual practice is not the same as the evidence in this case where Richard Jorgenson admits that the sellers intended to reserve the minerals. This case is clearly distinguishable from the *Van Berkom* case.

There is no evidence which rebuts the contention of the Plaintiff in the case that there was a mutual mistake made and that the deeds were in error. The evidence is clear and convincing because it is the only evidence. The deeds should be reformed to conform with the Contract for Deed.

II. THE CORRECT INTERPRETATION OF THE MINERAL RESERVATION IS THAT THE PIERCE TRUST OWNS THE MINERALS.

In their Brief in Support of their Motion for Summary Judgment, the Defendants relied upon *Kadrmas v. Sauvageau*, 188 N.W.2d 753 (ND 1971), and application of the *Duhig* doctrine. Their position before the Court, however, is not consistent with application of the *Duhig* doctrine. If the *Duhig* doctrine were strictly applied to both the Wright deed and the Pierce deed, Jorgensons would own 100% of the minerals. For example, because the deed from Dorothy J. Pierce reserved half the minerals, the Jorgensons would have received the other half of the minerals. The same is true of the Wright deed. Since the Jorgensons

would have received one-half of the minerals from Wright and one-half from Pierce, they would own 100% of the minerals. Not even the Jorgensons take that extreme position.

The most reasonable interpretation of the mineral reservation is that when Dorothy Pierce and the Wrights signed the deeds, that they were each reserving to themselves the one-half of the minerals that they each owned. If Dorothy Pierce reserved one-half of the remaining minerals, she would be reserving all of the minerals that she owned because she owned one-half of the property. The same would be true of Wrights so that even if the deeds are not reformed, the correct interpretation of the mineral reservation is that the minerals were reserved by the sellers. In its decision, the trial court ignored this interpretation.

The above arguments are legal arguments as to why the minerals are currently owned by the Dorothy J. Pierce Family Mineral Trust. Legal arguments aside, it is apparent from reviewing the documents and the testimony at trial that the minerals belong to the Dorothy J. Pierce Family Mineral Trust. Jorgensons did not buy the mineral rights and they did not inherit the mineral rights. Jorgensons are trying, by use of a technical interpretation of the mineral reservations, to gain title to property which does not belong to them and they know does not belong to them.

III. DEFENDANTS ARE NOT ENTITLED TO RECOVER COSTS FOR PUBLICATION.

Finally, the trial court's judgment also included an award of a cost for publication. There is no affidavit of costs supporting this and these costs were not incurred. This award of costs is a mistake and should be overturned.

CONCLUSION

The undisputed evidence before the Court is that the seller intended to reserve the minerals. This is clear and convincing evidence that a mutual mistake was made in the mineral reservation in the deeds in part because it is undisputed. The trial court's decision should be reversed, and ownership of the minerals quieted in the name of the Plaintiff.

Respectfully submitted this 24th day of January, 2012.

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CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the **APPELLANT'S BRIEF and APPENDIX** to be served on the 24th day of January, 2012, by first class mail, with postage duly prepaid, deposited in the U.S. Post Office, Dickinson, North Dakota, properly addressed to the following:

Peter H. Furuseth
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P.O. Box 417
Williston, ND 58802-0417

_____
Michael J. Maus