20120064

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

Joe Waldock,	)	
	)	Supreme Court No: 20120064
Appellant,	)	District Court No: 31-09-C-201
	)	
-vs-	)	FILED
	)	IN THE OFFICE OF THE
	)	CLERK OF SUPREME COURT
Amber Harvest Corp., *et al.*,	)	
	)	MAY 11 2012
	)	
Appellees.	)	STATE OF NORTH DAKOTA

BRIEF OF APPELLEE

Appeal from Order dated October 17, 2011 and Judgment entered November 10, 2011, the District Court of Mountrail County, Northwest Judicial District, the Honorable Gary H. Lee, Judge

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¶ 2 **ISSUES**

¶ 3 I. Whether the trial court erred in finding that an Administrator's Deed is the equivalent of a quitclaim deed.

¶ 4 II. Whether the trial court erred in finding that the Duhig rule is inapplicable to transfer via an Administrator's Deed.

¶ 5 **STATEMENT OF THE FACTS**

¶ 6 Joe Waldock filed suit to quiet title to certain minerals in and under the property located in Mountrail County, North Dakota described as:

> Township 151 North, Range 90 West
> Section 18: E½SW¼, Lots 3 and 4

(hereinafter the "subject property"). Review of the title documents show that on July 8, 1919, Julia Marks received from the United States a patent for the property which was recorded on January 18, 1922, in Book 155 of Deeds page 532. In the patent, the United States reserved all coal in the lands so granted subject to the limitations of the Act of August 3, 1914; 38 Stat 681. On October 2, 1943, the premises was conveyed to Herman M. Kruse in a Quit Claim Deed from the Federal Farm Mortgage Corporation, reserving 50% of all right and title to any and all oil, gas and other minerals in or under said premises. This Deed was recorded in Book 270 page 193. The Federal Farm Mortgage Corporation conveyed all right, title and interest it owned in or under E½SW¼, Lots 3 and 4, Section 18, Township 151 North, Range 90 West of the 5th P.M. to United States of America by a Mineral Quit Claim Deed dated September 6, 1957, and recorded December 18, 1957, in Book 326, page 525.

¶ 7 On November 5, 1949, the property was then conveyed with no mineral reservation to W. C. Edwardson, by Herman M. Kruse and Lila Kruse, in a Warranty Deed that was recorded on December 1, 1949, in Book 287 page 497. Lastly, on October 6, 1954, the premises was conveyed to Clark Van Horn by an Administrator's Deed of the Estate of W.C. Edwardson, deceased (hereinafter "Edwardson"). App. p. 288-289. The Deed was recorded on October 18, 1954 in Book 307 page 148, and contained the following granting language:

> NOW THEREFORE, the said party of the first part as Administrator aforesaid to the order last aforesaid, and for and in consideration of the said sum of Four Thousand Seven Hundred ($4,700.00) 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 _____ and State of North Dakota and particularly described as follows,

Id. The deed also contained the following reservation:

> 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

Id.

¶ 8 As illustrated by the language of the Deed, an undivided 25% interest in and to all the oil, gas and other minerals upon or in said land was reserved by the Edwardson Estate. There have been several conveyances of the interests of Appellees since the

administrator's deed; however, these transfers are not pertinent to the determination of this action.

¶ 9 **LAW AND ARGUMENT**

¶ 10 **I. The Order for Summary Judgment should be affirmed as an Administrator's Deed is the equivalent of a quitclaim deed.**

¶ 11 1. An Administrator's deed does not carry a warranty of title; thus is akin to a quit claim deed.

¶ 12 Under North Dakota Law, a quitclaim deed is distinguishable from a grant of property. Carkuff v. Balmer, 2011 ND 60, ¶ 10, 795 N.W.2d 303. "[A]" quitclaim deed conveys only the grantor's interest or title, if any, in property, rather than the property itself." Id. (internal citations omitted). "If a deed purports and is intended to convey only the right, title, and interest in the land, as distinguished from the land itself, it is a quitclaim deed; if it was the intention to convey the land itself, then it is not a quitclaim deed, although it may possess characteristics peculiar to such deeds." Id. (internal citations omitted).

¶ 13 Although North Dakota has yet to make an exact determination whether an administrator's deed contains a grant with a warranty, it has considered a very analogous case to the one before the Court now. More particularly, the case of Carkuff, 2011 ND 60, ¶ 10, 795 N.W.2d 303 was recently decided by the North Dakota Supreme Court.

¶ 14 In Carkuff, the issue presented to the Court was whether the word "grant" carried with it a "warranty of title" sufficient to pass after acquired title. In coming to a holding on this issue, the Court stated:

> The October 20, 1953, deed is plainly labeled a quitclaim deed and is on a printed form. The form states, in relevant part, that Alice Carkuff "does by these presents GRANT, BARGAIN, SELL, REMISE,

RELEASE and QUIT-CLIAM unto [James Carkuff], and to his heirs and assigns, all *the right title and interest in and to* the" subject property. (Emphasis added.) Although the deed uses the term "grant," it does so in reference to Alice Carkuff's "right, title and interest" in the property, rather than specifically "grant[ing]" the entire fee, i.e. the property itself, to James Carkuff. The parties here do not assert that the deed is ambiguous. Therefore, proper consideration of the deed looks to the entire document, rather than focusing on the single word "grant." *See* 23 Am Jur.2d *Deeds* § 225, *supra.* For example, in *Kemmerer*, 84 N.W. at 772 (emphasis added), the South Dakota Supreme Court, construing statutes similar to ours, stated:

> It is true that the word "grant" is used in the conveyance, but it is qualified by the terms "remise, release, and quitclaim," as well as by the words "right, title, estate, interest, property, and equity in and to the following real property." It will be noticed that by section 3249 it is provided that, from the "use of the word 'grant' in any conveyance by which an estate of inheritance or fee simple is to be passed," certain covenants are implied, and that by subdivision 4 of section 3254 is provided that where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title thereto, the same passes by operation of law to the grantee. It is not sufficient, therefore, that the instrument contain the word "grant," but it must purport to convey the property itself in fee simple. This, the deed in controversy in this case does not purport to do. Upon its face it only purports to quitclaim to the state the right, title, and interest that the defendant had in the property, and contains no covenant of warranty.

Here, considering the deed on its face as a whole to determine the parties' intent, and subordinating operative words of grant or release to words defining or restricting the interest granted, we construe the deed as a quitclaim deed. We reject the Carkuffs' assertion that use of the work "grant" transforms the entire deed so as to also pass after-acquired title. We therefore affirm the district court's decision regarding the effect of the October 20, 1953, deed, concluding the quitclaim deed did not pass after acquired title.

Id. at ¶ 13-14.

¶15 Interpreting the language of the Court above, the reasoning illustrates the analysis is concerned with what is being conveyed, the land or the interest owned by the grantor. In the case at hand, the administrator's deed states:

> .... 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 thee deceased, **at the time of his death,** in and to all that certain lot, piece or parcel of land....

App. p. 288-289 (emphasis added).

¶16 What Edwardsons' estate transferred was the interest it owned. The conveyance did not pertain to the land itself, but the interest it owned in the land at the time of Edwardsons' death. Further, Edwardson's estate sold the interest it owned to Clark Van Horn retaining part of what it owned through a reservation, which stated:

> excepting and reserving unto said estate, its successors and assigns, forever, an undivided Twenty-five (25%) per cent 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;...

Id. The estate purported to give Van Horn what it owned less 25% of the minerals which it would keep for itself.

¶17 There was no warranty of title in the administrator's deed from the estate to Van Horn. The granting language of the administrator's deed was limited to "all the right, title, estate and interest of the said above named decedent, at the time of his death". By the language in the administrator's deed, Van Horn was aware that he was not going to get more than the estate owned. Further, Van Horn was also aware of what the estate was keeping for itself. Therefore, in the case at hand, as in Carkuff, the conveying deed clearly indicated that the interest conveyed was limited to that owned by the estate.

¶ 18 Although North Dakota has yet to make a determination whether an administrator's deed constitutes a grant of property, other persuasive jurisdictions have

considered this issue. The Nebraska Supreme Court in Idhe v. Kempkes, 422 N.W.2d 788, 789-790 (Neb. 1988), found "the deed of the executor or administrator is the equivalent of a quitclaim deed." It reasoned: "there is no implied warranty of title or of the soundness of an article of personality sold by an executor or administrator acting in his representative capacity. So too, in sales of land by an executor or administrator, the purchaser in the absence of a covenant in the deed, takes title without any warranty." Likewise, in Stephan v. Brown, 233 So.2d 140, 141-142 (Fla. Dist. Ct. App. 1970), the Court held "the rule is well settled that, in the transfer of realty belonging to a decedent's estate an executor or personal representative has no power in his representative capacity to give a warranty or covenant of title, including a covenant against encumbrances, but has authority to convey only the interest that the decedent had in the realty in question." Id.

¶19 Applying the above cases at hand represents there was no warranty of title in the administrator's deed from the estate to Van Horn. The granting language of the administrator's deed was limited to "all the right, title, estate and interest of the said [Edwardson], at the time of his death"; which does not carry with it a warranty of title. Carkuff, 2011 ND 60, ¶ 10, 795 N.W.2d 303. Therefore, due to only conveying Edwardsons right, title, estate, and interest, the administrator's deed is akin to a quitclaim deed.

¶20 **II. The Order for Summary Judgment should be affirmed as the Duhig Rule does not apply because there was not an over conveyance of minerals.**

¶21 1. There Was Not An Over Conveyance of Minerals

¶ 22 Plaintiff argues that it is entitled to 50% of all the minerals because of application of the "Duhig Rule". North Dakota courts have applied the Duhig rules in cases involving the over conveyance of mineral rights. See Gawryluk v. Poynter, 2002 ND 205, ¶ 11, 654 N.W.2d 400; Miller v. Kloeckner, 1999 ND 190, ¶ 9, 600 N.W.2d 881; Acoma Oil Corp. v. Wilson, 471 N.W.2d 476 (N.D. 1991); Mau v. Schwan, 460 N.W.2d 131 (N.D. 1990); Sibert v. Kubas, 357 N.W. 2d 495 (N.D. 1984); Kardrmas v. Sauvageau, 188 N.W.2d 753 (N.D. 1971). However, the Duhig Rule does not apply to the grant and reservation in this case as there was no over conveyance of minerals.

¶23 The North Dakota Supreme Court has explained the Duhig Rule as follows:

> The Duhig rule says that where a grantor conveys land in such a manner as to include 100% of the minerals, and then reserves to himself 50% of the minerals, the reservation is not operative where the grantor owns only 50% of the minerals. The deed is construed as undertaking the transfer of 50% of the minerals to the grantee. Both this grant and the reservation cannot be given effect, so the grantor loses because of the risk of title loss is on him.

Gawryluk, 2002 ND 205, ¶ 11, 654 N.W.2d 400. "[W]hat is important and controlling is not whether the grantor actually owned the title to the land it conveyed, but whether, in the deed, it asserted that it did, and undertook to convey it." Miller, 1999 ND 190, ¶ 17, 600 N.W.2d 881.

¶24 North Dakota courts have applied the Duhig rule "based on estoppel of warranty, a subset of estoppel by deed, which precludes a warrantor of title from questioning the title warranted." Id. at ¶13. The focus in a case of a deed with no warranty provisions "is not what the grantor purported to retain for himself, but what the grantor purported to give the grantee." Gawryluk, 2002 ND 205, ¶ 14, 654 N.W.2d 400. Thus, when applying

the Duhig Rule to the case at hand it is essential we dissect the grant and reservation language of the administrator's deed.

¶25 North Dakota has clearly identified how grants and reservations are to be interpreted. N.D.C.C. § 47-09-11 states:

> **Interpretation of grants.** Grants shall be interpreted in like manner with contracts in general except so far as is otherwise provided by this chapter. If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction, and if several parts of a grant are absolutely irreconcilable, the former part shall prevail. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct.

Id. Further, N.D.C.C. § 47-09-13 states:

> **Grant shall be interpreted in favor of grantee --Exceptions.** A grant shall be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.

¶ 26 The primary purpose in construing a deed is to ascertain and effectuate the grantor's intent. Mueller v. Stangeland, 340 N.W.2d 450, 452 (N.D. 1983) (citing Malloy v. Boettcher, 334 N.W.2d 8, 9 (N.D. 1983)). However, deeds that convey mineral interests are subject to the general rules governing contract interpretation, Minex Resources, Inc. v. Morland, 467 N.W.2d 691, 696 (N.D. 1991), Miller v. Schwartz, 354 N.W.2d 685, 688 (N.D. 1984), and we construe contracts to give effect to the parties' mutual intentions. Mueller, 340 N.W.2d at 452.

¶27 The Edwardson estate purported to convey to Van Horn: "all the right, title, estate and interest of the said above named decedent, **at the time of his death**" but "excepting and reserving unto said estate, its successors and assigns, forever, an undivided Twenty-five (25%) per cent interest in all of the oil, gas, and other minerals upon, or in said land." (App. p. 288-289). The granting language of the administrator's deed clearly states that

the estate never intended to convey a 100% interest of the lands sold to Van Horn. The granting language clearly limited the interest it was conveying to that owned by the estate, which interest was already subject to a 50% reservation of the minerals in favor of FFMC. The intent, as demonstrated in the instrument itself, was that 25% of all of the mineral interest would be retained by the estate.

¶28 Simply stated, Edwardsons' estate did not convey the land to Van Horn in such a manner as to include 100% of the minerals. The estate was by the granting language in the administrator's deed only conveying the interest that Edwardson owned at the time of his death, which was already subject to a 50% mineral reservation. The limited granting language of the administrator's deed made it clear that the estate was only conveying what it owned as of the time of the death of Edwardson, it was not a grant of 100% of the minerals and the Duhig Rule has no application.

¶ 29 Similar to the application of the Duhig Rule, a review North Dakota Mineral Standard 3-07 yields the same outcome. North Dakota Mineral Standard 3-07 states:

> Where full effect cannot be given both to the interest conveyed in the granting clause of a Warranty Deed and to the interest reserved therein because of a previous outstanding interest in a third party, priority will be given to the interest conveyed in the granting clause rather than to the interest reserved until full effect is given to the interest conveyed.

Id. (underline added). This precise language also requires a determination of the extent of the interest "conveyed in the granting clause." As set forth above, the granting language of the administrator's deed clearly limited the interest it was conveying to that owned by the estate, which is specifically limited to 50% of the mineral interest owned by the Edmunson estate on the date of his death. Therefore under North Dakota Mineral

Standard 3-07, the Duhig rule does not have an application in the case at hand because there was not an over conveyance of minerals.

¶30 This is not a situation of an over conveyance of minerals with a corresponding warranty of title or a deed that purports to convey 100% of the lands. As such, the Duhig Rule is not applicable and does not prevent the estate of Edwardson, and its assigns and successors, from receiving the 25% of the minerals retained by the estate. Van Horn received what the estate had, knowing that the intents of both himself and the estate was the estate retaining for itself 25% of the minerals.

¶31 **CONCLUSION**

¶32 Appellees' Larry Gensch, Gerald Gensch, Robin Armstrong, Donna McCutcheon, Barbara Green, Sandra Lee McKee, Diane Cooper, Mary Lou Lindbloom, Leona Williams, Nancy L. Martin, Lori Peters, Lisa Meier, Jason Robbins, Jeremie Robbins, and Nancy Martin, Trustee of the Larry Erickson Mineral Trust submit that the October 17, 201,1 Order and the Judgment entered November 10, 2011, by the Honorable Gary H. Lee, Judge of the District Court of Mountrail County, Northwest Judicial District should be affirmed, because an Administrator's Deed does not carry a with it a warranty of title and there was not an over conveyance of minerals by the Edwardon's Estate making the Duhig Rule inapplicable to the case at hand. Accordingly, the October 17, 2011, Order of the Honorable Gary H. Lee should be affirmed.

Signature Page to Follow

Dated this 11th day of May, 2012.

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¶33 **CERTIFICATE OF SERVICE**

I, Ryan Geltel, attorney for Appellees' Larry Gensch, Gerald Gensch, Robin Armstrong, Donna McCutcheon, Barbara Green, Sandra Lee McKee, Diane Cooper, Mary Lou Lindbloom, Leona Williams, Nancy L. Martin, Lori Peters, Lisa Meier, Jason Robbins, Jeremie Robbins, and Nancy Martin, Trustee of the Larry Erickson Mineral Trust, do hereby certify that on the 11th day of May, 2012, copies of the BRIEF OF APPELLEE were deposited in the United States mails, postage prepaid, at Williston, North Dakota, and addressed to the following counsel for Appellants:

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¶34 **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that the Appellee's Brief is in compliance with Rule 32(5)(A) and 32(7)(A) of the North Dakota Rules of Appellate Procedure.

Ryan Geltel

Ryan Geltel