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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Joe Waldock, Plaintiff / Appellant, v. Amber Harvest Corp., *et al.*, Defendants / Appellees.	Supreme Court No. 20120064 Mountrail County Civil No. 31-09-C-201

Appeal from Judgment Entered November 10, 2011,
Pursuant to the Order for Summary Judgment
Dated October 27, 2010

District Court, Northwest Judicial District

Mountrail County, North Dakota

The Honorable Judge Gary H. Lee, Presiding

BRIEF OF APPELLEE AMBER HARVEST CORPORATION

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STATEMENT OF CASE

[1] This is a quiet title action in which the plaintiff, Joe Waldock, claims ownership of certain mineral rights in North Dakota. The dispute before the Court has its origin in the effect of an Administrator's Deed dated October 6, 1954, and recorded on October 18, 1954 at page 148 of Book 307 of Deeds in the Mountrail County Recorder's Office [hereinafter the "Van Horn Deed"]. (App. at 288-289.)

[2] The Van Horn Deed contains a granting clause by which the Estate of W.C. Edwardson would

> grant, bargain, sell and convey, unto [Clark Van Horn] and his heirs and assigns forever, all the right, title, estate and interest, of the said above named decedent [Edwardson], 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.

It also contains a reservation clause

> 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.

Ibid.

[3] At the time of his death, W.C. Edwardson was the owner of an undivided one-half (50%) interest in the oil, gas, and other minerals

[hereinafter collectively referred to as "minerals"] in the subject land. The dispute between the parties is whether the Van Horn Deed conveyed all of Edwardson's one-half interest or reserved one-quarter of the total interest in the minerals to the estate.

[4] The plaintiff's entire case is predicated on the application of the Duhig rule to the Van Horn Deed. (Brief of Appellant, ¶35.) If the Duhig rule does not apply, then the plaintiff loses. Amber Harvest Corporation [hereinafter "Amber Harvest"] submits by this brief and its arguments before the Court that the mineral reservation in the Van Horn Deed effectively reserved a one-quarter undivided interest in the minerals to the Estate of W.C. Edwardson, that the Duhig rule does not apply, and that the district court's judgment accordingly should be affirmed.

LEGAL ARGUMENT

A. Introduction

[5] The plaintiff presents two separate arguments that the Duhig rule applies to the Van Horn Deed. He separately argues that all administrator's deeds, including the Van Horn Deed, contain warranties of title (Brief of Appellant, ¶¶ 14-22) and that the Duhig rule applies to the deed absent a warranty (Brief of Appellant, ¶¶ 23-31). Neither conclusion is supported by the law.

B. The Duhig rule

[6] The plaintiff's entire case is predicated on the application of the Duhig rule to the Van Horn Deed. (Brief of Appellant, ¶35.) If the Duhig rule does not apply to the deed, the judgment below must be affirmed.

[7] The Duhig rule, as adopted by this Court, holds that a grantor cannot "convey and warrant, and reserve and retain, the same thing at the same time, but the warranty obligation is superior to the [grantor's] reservation rights." Kadrmas v. Sauvageau, 188 N.W.2d 753, 756 (N.D. 1971) (citing, inter alia, Duhig v. Peavy-Moore Lumber Co., 135 Tex. 513, 144 S.W.2d 878 (1940)). Discussing the rule in more depth in a later case, this Court pointed out that "a grantor who, by warranty deed, purports to convey a fractional mineral interest is estopped from asserting title to a reserved fractional mineral interest in contradiction to the interest purportedly

conveyed." Mau v. Schwan, 460 N.W.2d 131, 134 (N.D. 1990) (emphasis supplied; internal quotations omitted). Duhig is effectively a simple application of the principles of estoppel. See Acoma Oil Corp. v. Wilson, 471 N.W.2d 476, 479-480 (N.D. 1991); Gawryluk v. Poynter, 2002 ND 205, ¶ 14, 654 N.W.2d 400.

C. Interpretation of deeds

[8] The Van Horn Deed is an administrator's deed, conveying from an estate to a person. The plaintiff writes a great volume of words arguing that it is in the form of a special warranty deed while other appellees and the district court hold that it is the equivalent of a quitclaim deed. While, for the purposes before the Court, finding that the deed is the equivalent of a quitclaim deed is the correct outcome, Amber Harvest respectfully submits that these arguments are orthogonal to the issue this Court must decide. The actual issue is simply what the parties intended to convey by the Van Horn Deed. As another appellee in this matter has aptly stated: "Like any other deed, it is not the title of the instrument but the express language from the deed itself which controls how it is to be interpreted." (Brief of Appellees John H. Holt Oil Properties, Inc. and Cade Oil & Gas LLC, ¶ 63.)

[9] Regardless of what label we give to the Van Horn Deed, the question on appeal is whether the parties to the deed intended to convey all of the Edwardson mineral interest to Van Horn or to reserve some to the

Estate of W.C. Edwardson. This Court interprets deeds "to ascertain and effectuate the grantor's intent." Carkuff v. Balmer, 2011 ND 60, ¶ 8, 796 N.W.2d 303 (quoting State Bank & Trust of Kenmare v. Brekke, 1999 ND 212, ¶ 12, 602 N.W.2d 681). See also Stracka v. Peterson, 377 N.W.2d 580, 582 (N.D. 1985). "In construing [a reservation clause] we must strive to give effect to the mutual intention of the parties as it existed at the time, so far as the intent is ascertainable and lawful." Perschke v. Burlington Northern, Inc., 311 N.W.2d 564, 567 (N.D. 1981). When a dispute arises as to the interpretation of a reservation in a grant, it is construed in favor of the grantor. N.D.C.C. § 47-09-13. Cf. Mueller v. Stangeland, 340 N.W.2d 450, 452 (N.D. 1983) ("[A]n obvious intent to deduct something from the thing granted will be given effect.")

D. The Van Horn Deed contains no warranty of title

[10] The plaintiff's argument for finding a warranty in the Van Horn Deed can be summarized as follows: The Van Horn Deed is an administrator's deed and an administrator's deed contains a warranty of the administrator's authority to act, therefore the Van Horn Deed is a special warranty deed, therefore it contains a warranty of title, and therefore the Duhig rule applies. (Brief of Appellant, ¶ 15.) The fallacy here is that the plaintiff admits that the Van Horn Deed contains no express warranty of title, ibid., but nevertheless conflates the implied warranty of authority to act

with a warranty of title and proceeds with his attempt to pull up hard enough on his bootstraps to lift the Van Horn Deed to the reach of the Duhig rule.

[11] The plaintiff presents a litany of cases from other states in which fiduciaries utilized special warranty deeds in his attempt to show that "the intent and function of a fiduciary deed is to transfer the property itself; sometimes fiduciaries recognize that fact and simply transfer the land via a special warranty deed." (Brief of Appellant, ¶ 22.) This argument begs the question. The plaintiff invents the term "fiduciary deed," id. at ¶ 15, n. 2,[1] states that fiduciaries commonly use special warranty deeds to convey property, and from this concludes that all fiduciary deeds are special warranty deeds. The argument lacks reference to the law governing interpretation of deeds, under which this Court gives credence to the language used in a deed, not to whether others similarly situated have commonly used a particular form of deed.[2]

[12] To the extent that it matters in determining this appeal, the Van Horn Deed's granting clause is in the form of a quitclaim. Cf. Carkuff, 2011 ND 60, ¶¶ 13-14. As the parties have argued to this Court and below, other jurisdictions having had occasion to address the issue have held that this is

[1] No reported decision of this Court has ever used the term "fiduciary deed."
[2] The plaintiff's argument would also support the conclusions that all conveyances by individuals are warranty deeds because individuals commonly give warranty deeds and that all conveyances from a government are land patents because governments commonly give land patents.

the case. The plaintiff's conclusion that, because it is an administrator's deed, the Van Horn Deed is—or should be treated like—a special warranty deed is simply incorrect.

[13] The plaintiff also tries to find a warranty of title in the word "grant" in the administrator's deed, which he argues carries with it a covenant that the grantor has not already conveyed the property and has not encumbered the property. (Brief of Appellant, ¶ 15; citing N.D.C.C. § 47-10-19). This Court has held explicitly that the word "grant" does not transform the entire deed to more than the meaning to be found on the face of the deed, when read in its entirety. Carkuff, 2011 ND 60, ¶ 14. The plaintiff presents no justification for carving out an exception to the rule of Carkuff in this case. Even with an exception, though, the covenant that the grantor has not already conveyed or encumbered the property falls far short of a covenant that he owns and is conveying an unencumbered interest in the property or other basis for estoppel. There is nothing about the Van Horn Deed that triggers application of the Duhig rule.

E. The Van Horn Deed conveyed only the grantor's interest and effectively reserved a twenty-five percent undivided mineral interest

[14] Even if the Court does treat the Van Horn Deed as a special warranty deed that warrants title to the interest it conveys, the conclusion does not change. "A warranty does not define the estate conveyed." Miller v.

Kloeckner, 1999 ND 190, ¶ 15, 600 N.W.2d 881. The language of the Van Horn Deed says that it intends to "grant, bargain, sell and convey … all the right, title, estate and interest, of the said above named decedent, at the time of his death." (Van Horn Deed [App. at 288].) The intention of the parties to the deed was clearly to transfer only the interest that W.C. Edwardson owned at the time of his death, not the entire fee simple absolute interest in the subject property. Even if the word "grant" here creates the warranty the plaintiff claims (Brief of Appellant, ¶ 15), it does not actually warrant the title that he needs for this Court to reverse the judgment below. The implied warranty does not apply to acts of prior grantors, including the prior grantor who severed one-half of the minerals from the surface. (Amended Complaint at 2-3 [Appellant App. at 36-37]; Brief of Appellant, ¶ 8.)

[15] The plaintiff also argues that the Duhig rule applies to the Van Horn Deed absent a warranty of title. (Brief of Appellant, ¶¶ 24-25.) "[T]he Duhig rule will be applied whether or not the deed contains a general warranty if it purports to convey the described interest." Miller, 1999 ND 190, ¶ 16 (quoting 1 Eugene Kuntz, Oil and Gas § 14.5 (1999 Supp. at 106)) (emphasis supplied). The Van Horn Deed did not purport to convey anything beyond the interest of W.C. Edwardson at the time of his death. The Duhig rule is inapplicable to the granting clause in the Van Horn Deed whether it contains no warranty, a special warranty, or a general warranty of title.

[16] The plaintiff's contention that the Van Horn Deed contains an overconveyance of minerals (Brief of Appellant, ¶ 25) is without merit. The deed does not purport to convey more than the grantor owned. The plaintiff's assertion that "[t]he parties intended that the deed was to convey the land itself," id. at ¶ 26, finds no basis in the language of the deed. Indeed, the plaintiff does not quote the granting clause of the Van Horn Deed in presenting this argument. The granting clause answers the question of what the grantor purported to convey and disposes of the plaintiff's case in one fell swoop.

[17] The Van Horn Deed clearly states that it reserves twenty-five percent of the entire mineral interest to the grantor, the Estate of W.C. Edwardson. The intent of the grantor was undeniably to reserve that portion of the overall mineral interest in the subject lands, even before applying the rule that reservations are construed in favor of the grantor. N.D.C.C. § 47-09-13. Mueller, 340 N.W.2d 450, 452. The Van Horn Deed is unambiguous on its face and the Court need look no further than the language of the deed to ascertain the parties' intent.

[18] If the Court chooses to look beyond the language of the deed itself, as the plaintiff invites by referring to deeds other than the one before the Court, it will find the record wholly lacking in evidence that the Estate of W.C. Edwardson had the intent to relinquish all of its mineral rights to Clark

Van Horn. Contemporary documents are replete with confirmation of the intent to reserve to the estate twenty-five percent of the mineral rights in the subject land. The advertisement for the estate's sale of the land put potential buyers on notice that mineral rights would be reserved. (Brief of Defendant Amber Harvest in Opposition to the Motion by Plaintiff for Summary Judgment & In Support of Motion for Summary Judgment by Amber Harvest [hereinafter "Amber Harvest Br."], Ex. B [Amber Harvest App. at 24].) The Order Confirming Sale entered by the probate court prior to the Van Horn Deed's being made reflects the twenty-five percent mineral reservation. (Amber Harvest Br., Ex. C [Amber Harvest App. at 25].) The Final Decree of Distribution reflected distribution of twenty-five percent of the minerals in the subject land to W.C. Edwardson's heirs and devisees. (Amber Harvest Br., Ex. E [Amber Harvest App. at 29].)

[19] Moreover, the Van Horn Deed contains no warranty of title to minerals or any other indication that W.C. Edwardson was conveying a complete, undivided mineral interest. Van Horn was on record notice of Edwardson's actual mineral ownership by way of the chain of title from the July 8, 1919 United States patent for the land up to the November 5, 1949 warranty deed to W.C. Edwardson, including the severance of a one-half undivided mineral interest. N.D.C.C. § 47-19-19 ("The record of any instrument shall be notice of the contents of the instrument, as it appears of

record, to all persons.") The plaintiff admits that, at page 193 of Book 270 of Deeds in the Mountrail County Recorder's Office, there appears the deed by which the minerals were severed. (Amended Complaint at 2-3 [Appellant App. at 36-37]; Brief of Appellant, ¶ 8.) Van Horn was, at the time he took the deed from the Estate of W.C. Edwardson, on notice that the estate owned only a one-half undivided mineral interest. The Van Horn Deed's conveyance explicitly of the interest of the decedent at the time of his death included only what he owned, and Van Horn knew exactly what that was.

[20] The language of the Van Horn Deed is clear as to what the parties to it intended. There is no evidence to dispute their intent. The law is clear as to effectuating that intent. The Van Horn Deed transferred the surface and a twenty-five percent undivided interest in the minerals and reserved a twenty-five percent undivided interest to the Estate of W.C. Edwardson.

CONCLUSION

[21] The Duhig rule applies only when a grantor purports to convey something that he also purports to reserve. In the Van Horn Deed, the Estate of W.C. Edwardson purported to convey only the interest of the grantor at the time of his death. The reservation of a twenty-five percent undivided mineral interest is not in conflict with that conveyance, and the estate did not warrant anything that it purported to reserve. There was neither an overconveyance of minerals nor a warranty of title to more minerals than the deed actually conveyed.

[22] In this case, there are no competing interests for the Court to weigh as it had to in finding that a warranty obligation is superior to a reservation in Kadrmas. There is no purported conveyance by which the Estate of W.C. Edwardson could be estopped from asserting title to the twenty-five percent undivided interest in the minerals that it reserved as in Mau. Neither the Duhig rule nor the rationale upon which it is based apply to the Van Horn Deed.

[23] Because the Van Horn Deed did not contain an overconveyance of minerals and did not warrant title to minerals not owned by the grantor, the Duhig rule does not apply. Giving effect to the mutual intentions of the parties to the deed and construing the reservation in favor of the grantor, the Estate of W.C. Edwardson effectively reserved an undivided twenty-five

percent interest in all of the oil, gas, and other minerals in the subject land. The district court's conclusion was legally correct. The judgment below should be affirmed.

Dated this 21st day of May, 2012.

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