20120064

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

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

APPEAL FROM THE JUDGMENT ENTERED NOVEMBER 10, 2011,
PURSUANT TO THE ORDER FOR SUMMARY JUDGMENT
DATED OCTOBER 17, 2011
IN THE MOUNTRAIL COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

THE HONORABLE GARY H. LEE, PRESIDING

BRIEF OF APPELLANT
and Addendum

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ATTORNEYS FOR APPELLANT
JOE WALDOCK

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

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

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JOE WALDOCK

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

¶5 **II. STATEMENT OF THE CASE**

¶6 Joe Waldock brought this action to quiet title against numerous Defendants in minerals located in and under real property located in Mountrail County. App. pp. 14-54. The Defendants responded with various Answers, Amended Answers, and Counterclaims. *See* Appendix. Both Mr. Waldock and several of the Defendants filed Motions for Summary Judgment; hearing on the Motions was held on October 4, 2011, before Judge Gary H. Lee. The trial court issued its Order for Summary Judgment on October 17, 2011, finding that (a) an Administrator's Deed is the equivalent of a quitclaim deed, therefore (b) the Duhig rule is inapplicable to the transfer in this case. Because it found that Duhig did not apply, the trial court found that the deed effectively reserved a 25% interest in minerals in the Estate and granted a 25% interest to Mr. Waldock's successor in interest. App. p. 268. The consequence of this is that Mr. Waldock is not entitled to any portion of the contested 25% interest of the minerals under the subject real estate. Judgment was entered on November 10, 2011 (App. p. 278), granting Defendants' Motions for Summary Judgment and denying Plaintiff's Motion for Summary Judgment. The Judgment decreed that the legal effect of the

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[1] For the purpose of arguments made in this brief, the term "administrator's deed" also includes "personal representative's deed" and "executor's deed."

Administrator's Deed recorded in 1954 was that the grantor reserved a 25% interest in all minerals and that grantee Clark Van Horn, predecessor in interest of Mr. Waldock, received a 25% interest in all minerals. The parties agree that the deed is unambiguous.

¶7 **III. STATEMENT OF THE FACTS**

¶8 Joe Waldock filed suit to quiet title to certain minerals in and under the property located in Mountrail County, North Dakota and 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 18-90-151 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.

¶9 On November 5, 1949, the premises was 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. 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. 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 ($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 _____ and State of North Dakota and particularly described as follows,

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"

The Deed attempted to reserve unto the estate an undivided 25% interest in and to all the oil, gas and other minerals upon or in said land, but *failed* to account for the prior reservation of the United States. The effect of this granting language, under the rule set out in Duhig v. Peavey-Moore Lumber Co., 144 S.W.2d 878 (Tex. 1940) and adopted by this Court was to grant 75% of the minerals to Clark Van Horn. In applying the Duhig rule to this overconveyance, the mineral interests that the Grantor formerly held prior to the conveyance are now vested in Mr. Waldock as successor in interest to Clark Van Horn. The Defendants, who have taken their interests from the Estate of W.C. Edwardson argue that the Duhig rule

is inapplicable in this case and that Clark Van Horn received only a 25% interest in the minerals under the subject property, and that 25% was properly reserved to the Estate. There have been several conveyances of the interests of Defendants but those transfers are not pertinent to the resolution of this action.

¶10 **IV. LAW AND ARGUMENT**

¶11 **A. STANDARD OF REVIEW.**

Appeal from the granting of a motion for summary judgment is a question of law that this Court reviews *de novo* on the record. Ernst v. Acuity, 2005 ND 179, ¶ 7, 704 N.W.2d 869; Schmidt v. Gateway Cmty. Fellowship, 2010 ND 69, ¶ 7, 781 N.W.2d 200.

¶12 **B. THE TRIAL COURT ERRED IN FINDING THAT AN ADMINISTRATOR'S DEED IS THE EQUIVALENT OF A QUITCLAIM DEED.**

¶13 The parties agree that the deed is unambiguous. When the language of a deed is plain and unambiguous and the parties' intentions can be ascertained from the writing alone, extrinsic evidence is inadmissible to alter, vary, explain, or change the deed. Minex Resources, Inc. v. Morland, 467 N.W.2d 691, 696 (N.D. 1991).

¶14 1. An Administrator's Deed Contains a Warranty.

¶15 Generally, "a quitclaim deed conveys only the grantor's interest or title, if any, in property, rather than the property itself." Carkuff v. Balmer, 2011 ND 60, ¶ 10, 795 N.W.2d 303 (*citations omitted*). A true quitclaim deed contains no covenants or warranties of title. *See, e.g.,* Bilby v. Wire, 77 N.W.2d 882, 888 (N.D. 1956). Nevertheless, despite similarities between an administrator's deed and quitclaim deed, when an administrator or personal representative executes a deed, he *is* making a warranty that he has the proper authority to

pass title held by the estate to the grantor:

> One who assumes to act as an agent thereby warrants to all who deal with that person in that capacity that the person has the authority which the person assumes.

N.D.C.C. § 3-04-01. North Dakota's law on real property transfers limits the word "grant" in the context of an estate as follows:

> From the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for the grantor and the grantor's heirs to the grantee and the grantee's heirs and assigns, are implied unless restrained by express terms contained in such conveyance:
>
> 1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, nor any right, title, or interest therein, to any person other than the grantee; and
>
> 2. That such estate, at the time of the execution of such conveyance, is free from encumbrances done, made, or suffered by the grantor, or any person claiming under the grantor. Such covenants may be sued upon in the same manner as if they had been inserted expressly in the conveyance.

N.D.C.C. § 47-10-19. In other words, the administrator's deed warrants that *he*, *the administrator*, did not encumber or muddle up the title, but perhaps the decedent did. Mr. Waldock admits that while the "none other" language of this statute precludes automatically implying a covenant of title in administrator's deed, the statute is clear that by operation of the law there exists an implied grantor's *warranty* in the subject Administrator's Deed. Edward Edwardson *warranted* that what he was transferring wasn't encumbered by Edward Edwardson. "A deed in which covenants are limited to defects which arise by, through, or under the actions of the *grantor* is known as a special warranty deed. Under this limited form of warranty, recovery is available only if the defect arises because of the acts of the *grantor*.

State Bank & Trust v. Brekke, 1999 ND 212, ¶ 11, 602 N.W.2d 681 (*emphasis added*). Under the definition of State Bank & Trust v. Brekke, deeds of the sort that include administrator's deeds and personal representative's deeds *must* be special warranty deeds. The Administrator's Deed contained an implied warranty of authority *and* a special warranty that the administrator did not encumber the transfer; therefore, this administrator's deed is more like a special warranty deed than a quitclaim deed. Finding that the nature of a fiduciary [2] deed is more of a special warranty deed rather than a quitclaim deed does not open the representative up to any liability beyond what he currently bears in his representative status. Accordingly, this Court should not be adverse to finding that an administrator's deed or a personal representative's deed is more in the nature of a special warranty deed because doing so does not heighten the potential liability to the fiduciary nor does it do mischief to our probate law.

¶16 2. An Administrator's Deed Is More than a Quitclaim Deed.

¶17 When the subject property was transferred in 1954, an administrator was required to use an administrator's deed. However, since 1975 and the adoption of the Uniform Probate Code, the law does not require transfer estate property by an "administrator's deed" or an "executor's deed." Though no longer required, the function of the fiduciary deeds themselves have not changed and a personal representative's deed remains the preferred and usual method used to transfer the decedent's real property itself. There is no statutory

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[2] A "fiduciary" includes a personal representative, guardian, conservator, and trustee. N.D.C.C. §30.1-01-06(17). Therefore, real estate transfers by fiduciaries may be referred to as "fiduciary" deeds.

requirement for any particular deed form for the personal representative's deed; in order to convey property of the deceased, the personal representative must only sign a deed in his official capacity as Personal Representative. *See also* Vasicheck v. Thorsen, 271 N.W.2d 555, 559 (N.D. 1978) (Noting that, as a matter of law, an administrator possesses the power to convey real property in that capacity.) North Dakota's Uniform Probate Code, provides for the powers of the personal representative as follows:

> Until termination of the personal representative's appointment, a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

N.D.C.C. § 30.1-18-11. In that the personal representative has the "same power over title to the property," the type of deed used is one of choice or preference. In turn, except as restricted by will or court order, a personal representative may properly "[a]cquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset." N.D.C.C. § 30.1-18-15(6). There is no specification as to how this is done; in short, there is no *requirement* in the law that the transfer of real estate by a personal representative must be by an personal representative's deed. Nevertheless, it is the universal practice in North Dakota to transfer estate property by a personal representative's deed rather than a simple quitclaim deed from the personal representative. North Dakota's Title Standards Practice Guide, in addressing pre-Uniform Probate Code conveyances like the Edwardson estate, provides the following guidelines:

¶18 c. Executor's Deed Where the Will Contains No Power of Sale or Pursuant to Court Order.

Require:

i. Certified copy of order confirming sale (See NDCC 30-19-18); and

ii. Executor's deed (See NDCC 30-19-20).

App. pp. 290-291. Today, under the Uniform Probate Code, the recommended method of passing title to a purchaser from an estate continues to be by personal representative's deed:

b. Deed to Purchaser from an Estate.

Require:

i. Copy of the letters issued to personal representative certified on or after the date of conveyance (See NDTS 12-01);

ii. Personal representative's deed to purchaser; and

iii. An estate tax clearance, if required.

App. p. 292. Indeed, all of the guidelines for conveyances from an estate provide for an executor's or personal representative's deed; use of a quitclaim deed to convey estate property is never considered. All of this is tacit acknowledgment that a personal representative's deed is "better" than and is *not* the "equivalent" of a quitclaim deed and the use of one indicates an intent to transfer the land itself. Though there is no specific case that Mr. Waldock can point to that holds that an administrator's deed is in the nature of "quitclaim PLUS," administrator's deeds are something "more." That enhanced "something" can only mean that an administrator's deed is more in the nature of a special warranty deed rather than a quitclaim deed and contains an implied warranty of title whether it uses the word "grant" or not. Mr. Waldock submits that all estate practitioners recognize that a

personal representative's deed or an administrator's deed does convey the land itself, and urges this Court to recognize that fact also.

¶19 3. The Nature of an Administrator's Deed is that of a Special Warranty Deed.

¶20 The nature of an administrator's deed is that of a special warranty deed; in fact, under the definition set out in State Bank & Trust v. Brekke, it can be nothing else. In that case, this Court described and defined a special warranty deed as follows:

> A deed in which covenants are limited to defects which arise by, through, or under the actions of the grantor is known as a special warranty deed. Under this limited form of warranty, recovery is available only if the defect arises because of the acts of the grantor.
>
> Our court recognized this language of a special warranty deed in Stracka v. Peterson, 377 N.W.2d 580, 583 n. 6 (N.D.1985):
>
> *A special warranty deed warrants title only against claims held by, through, or under the grantor, or against encumbrances made or suffered by her, and it cannot be held to warrant title generally against all persons.* Therefore, under a special warranty deed a grantor is liable if the grantee's ownership is disturbed by some claim arising through an act of the grantor.

State Bank & Trust v. Brekke, 1999 ND 212, ¶ 11, 602 N.W.2d 681 (*emphasis added*). As noted above, by the use of the word "grant" in the Administrator's Deed, under N.D.C.C. § 47-10-19 Edward Edwardson was warranting title against claims arising under *his* acts - the very definition of a special warranty deed.

¶21 The trial court cited Idhe v. Kempkes, 422 N.W.2d 788 (Neb. 1988) and Stephan v. Brown, 233 So.2s 140 (Fla. Dist.Ct. App. 1970) in support of its finding that an administrator's deed is the equivalent of a quitclaim deed. These cases do support the trial court's ruling, but Mr. Waldock is unable to locate any other reported Nebraska or Florida cases that have expanded on or explained the interpretation of "administrator's deed =

quitclaim." That said, *this* Court has not addressed the issue before and Mr. Waldock submits that administrator's deeds function more like special warranty deeds and urges this Court to recognize that they *do* convey the land itself.

¶22 There are many cases that, although they are not in any way discussing the nature of a fiduciary deed, have in common the fact that when title was passed by one of these deeds, the fiduciary didn't use a "fiduciary" deed in the first place but simply transferred the land itself with a special warranty deed. This suggests that *functionally* a fiduciary deed is of the same "value" or "effect" as a special warranty deed and transfers the land itself. *See, e.g.* Ingram v. Amrhein, 2011 U.S. Dist. LEXIS 98697 (W.D. Pa. Sept. 1, 2011) (Executors of estate transfer property by special warranty deed); Ingersoll v. Ingersoll (In re Loraine Boley Ingersoll Trust), 950 A.2d 672 (D.C. App. 2008) (Trustee of deceased's estate had been ordered by lower court to transfer title to certain real estate to a beneficiary "in fee simple by trustee's deed or special warranty deed," thereby equating a trustee's deed with a special warranty deed); Vasquez v. Vasquez, 973 S.W.2d 330, 331 (Tex. App. 1998) (*petition for review denied*) (Executor conveyed real property via special warranty deed); Kemp v. Harrison, 431 S.W.2d 900, 905 (Tex. App. 1968) (Method by which title was transferred to purchaser of real property from decedent's estate was by both an administrator's deed and a special warranty deed from the heirs); Hodny v. Hoyt, 243 N.W.2d 350, 358 (N.D. 1976) (Trustees of fraternal organization conveyed real property held in trust by special warranty deed); Anderson v. Riegel, 281 N.W. 915 (Wis. 1938) (Trustees under the will conveyed real estate by special warranty deed); Palliser v. Mills, 171 N.E. 618, 619 (Ill. 1930) (Executor conveyed real property of deceased by special warranty deed); Cochrane v. McCoy, 179

N.W. 210, 211 (S.D. 1920) (Trustee of business syndicate transferred syndicate real estate via special warranty deed); Curtis v. Hawley, 85 Ill. App. 429, 437 (Ill. App. Ct. 1899) (Administrators of the estate of the deceased conveyed the premises by special warranty deed). Clearly, 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.

¶23 **C. THE TRIAL COURT ERRED IN FINDING THAT THE DUHIG RULE IS INAPPLICABLE TO THE TRANSFER VIA AN ADMINISTRATOR'S DEED.**

¶24 1. An Express and Explicit Warranty is not Necessary for *Duhig* to Apply.

¶25 A true quitclaim deed contains no covenants or warranties of title. *See, e.g.,* Bilby v. Wire, 77 N.W.2d 882, 888 (N.D. 1956). As set out above, the Administrator's Deed had characteristics of a quitclaim deed, but is in the nature of, or functions as, a special warranty deed and *is* intended to transfer the land itself. The deed was intended to transfer the land in exchange for a payment of $4,700. As this Court has stated, Duhig applies if there is a special warranty or even if there is *no* warranty:

> A deed with special warranty, indeed, as we have seen, a deed with no warranty at all, as completely estops the grantor from making a claim of title which would diminish the title of his grantee as would a deed with general warranty.
>
> . . . .
>
> In Duhig's case, as here, what is important and controlling is not whether 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 v. Kloeckner, 1999 ND 190, ¶ 17, 600 N.W.2d 881, *quoting* American Republics

Corp. v. Houston Oil Co., 173 F.2d 728, 734 (5th Cir. 1949). Because there is no express warranty in the Administrator's Deed, the "key question is not what the grantor purported to retain for himself, but what the grantor purported to give the grantee." Gawryluk v. Poynter, 2002 ND 205, ¶ 14, 654 N.W.2d 400. "If he undertook to convey half the minerals and had the power to do so, he should be held to his undertaking." Miller v. Kloeckner, 1999 ND 190, ¶ 17, 600 N.W.2d 881, *citing* **Williams & Meyers**, at 580.36. 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, and 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"

Unambiguously, the Deed attempted to reserve unto the estate an undivided 25 % interest in and to all the oil, gas and other minerals, but *failed* to account for the prior reservation belonging to the United States, thereby resulting in an overconveyance to Clark Van Horn.

¶26 The trial court found that because the Administrator's Deed is the equivalent to a quitclaim deed conveying only the grantor's interest or title in the property rather than the property itself, it did not contain an implied warranty of title. Mr. Waldock submits that the Administrator's Deed, as a special warranty deed transferring the property itself, did contain an implied covenant of title to the property which brought it into the ambit of the Duhig rule. A covenant of warranty of title to real estate runs with the land. Aure v. Mackoff, 93 N.W.2d 807, 811 (N.D. 1958). The parties intended that the deed was to convey the land itself so the covenant of warranty of title was present.

¶27 2. The Administrator's Deed is Akin to a Special Warranty Deed and Transferred an Interest in the Land Itself.

¶28 "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 appears that the intention was to convey the land itself, then it is not a quitclaim deed, although it may possess characteristics peculiar to such deeds." Carkuff v. Balmer, 2011 ND 60, ¶ 10, *citing* 23 Am. Jur. 2d Deeds § 223 (2002). Though the trial court found that an administrator's deed is the equivalent to a quitclaim deed, this is not reflected in the practice of law or the title standards.

¶29 This Court has acknowledged that the quitclaim deed is the lowest and least desirable form of deed. "The use of a quitclaim deed can be regarded as notice to the purchaser that there may be outstanding equities against the grantor's title." North Dakota Workers Compensation Bureau v. General Inv. Corp., 2000 ND 196, ¶ 12, 619 N.W.2d 863, *quoting* 14 Powell on Real Property § 81A.03[1][c] (2000). The Defendants have argued that the deed only intended to convey "a right, title, and interest, and that is all." Transcript, p. 16, lines 12-13. That cannot be what was intended in this case because Clark Van Horn did not pay $4,700 to the administrator of the estate for the mere execution of a quitclaim deed that may convey nothing; rather, he paid $4,700 for the land *itself.* In addition, though the trial court found the granting language to be similar to that of the quitclaim deed in Carkuff, the granting language is not similar.

¶30 In Carkuff, Alice Carkuff only conveyed her "right, title and interest (if any) therein" in the property - period. *See* Carkuff, ¶ 5. The Carkuff deed is different from the Edwardson

deed because the Edwardson deed did not simply convey only all the "right, title and interest" as did the Carkuff deed. The Edwardson deed conveyed much more – the granting clause conveyed:

> 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 . . . .

(*Emphasis added*) (See Deed, App. p.288.) This granting clause not only conveyed what the decedent had, but also what the estate had "by operation of law or otherwise may have acquired other than or in addition to." What the estate had acquired "by operation of law or otherwise" was the real property itself. In addition, N.D.C.C. § 47-10-13, which was in effect when the Administrator's Deed was executed provides that:

> A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended.

Clearly, the expansive granting language of the Administrator's Deed does not express that a "grant of a lesser estate was intended"; instead, the effect of the broad granting language was a grant of a conveyance of property in fee simple. *See also* Bilby v. Wire, 77 N.W.2d 882, 888 (N.D. 1956) (differentiating between a conveyance of real property and a conveyance of a person's mere right, title, and interest).

¶31 Thus, because it appears that fee simple title was being passed, the doctrine of after-acquired title gives Mr. Waldock a claim of ownership of the minerals under the subject property. N.D.C.C. 47-10-15 provides for the doctrine of after-acquired title as follows:

> When a person purports by proper instrument to grant real property in fee simple and subsequently acquired any title or claim of title thereto, the same passes by operation of law to the grantee or the grantee's successors.

As this Court has stated, "The doctrine of after-acquired title is one under which title to land acquired by a grantor who previously attempted to convey title to the same land which he did not then own inures automatically to the benefit of his prior grantee." Torgerson v. Rose, 339 N.W.2d 79, 82 (N.D. 1983), *citing* Kirby v. Holland, 316 N.W.2d 746, 750 (Neb. 1982). The Administrator's Deed had, under law, certain implied covenants annexed to it. It was a grant in every sense, and after-acquired title passed by operation of law to Clark Van Horn or his successors in interest.

¶32 3. The Reservation to the Estate Was Not Operative Under *Duhig*.

¶33 Not only did the granting language convey the property in fee simple, this Court should conclude that the language used did not effectively except or reserve any minerals unto the Estate of W.C. Edwardson. The granting language of the Administrator's Deed did not contain any exceptions to the grant. In Royse v. Easter Seal Society for Crippled Children and Adults, Inc., 256 N.W.2d 542 (N.D. 1977) this Court said that generally, "reservations must be clearly expressed in the deed." *Id.* at 545. This Court also opined that:

> "In addition to the certainty requirement, an exception, although it may appear in any part of the deed, *must* be an exception to the grant, not to some other provision in the deed. Thus, words inserted in a covenant against encumbrances for the purpose of modifying the grantor's liability thereon will not constitute an exception. . . .
>
> "We believe exceptions or exclusions of property should be set forth in the granting clause with the same prominence as the property granted, or, if placed elsewhere, should be so explicit as to leave no room for doubt. . . ." [*Citations omitted.*]

Royse v. Easter Seal Society for Crippled Children and Adults, Inc., 256 N.W.2d 542, 545 (N.D. 1977). In this case, the granting language of the Administrator's Deed did not reference the interest of the United States; without excepting that interest, the logical consequence is that the Estate is transferring the entire fee simple, including 100% of minerals. *See also* Lutz v. Krauter, 553 N.W.2d 749, 754 (N.D. 1996) (noting that exceptions or exclusions of property should be prominently set forth in the granting clause of a deed and that anything short of this encourages practices which lend themselves readily to fraud and deception).

¶34 Thus, when the Administrator's Deed reserved unto W.C. Edwardson's estate a 25% interest "in *all* of the oil, gas, and other minerals upon, or in said [subject property]" the reservation was ineffective. The "all" referred to the entire 100% of the minerals rather than the 50% of the minerals actually owned by W.C. Edwardson.

¶35 In correctly applying the Duhig rule to this case, the grantee receives that fractional interest not reserved to grantor. Clark Van Horn received a 75% interest in and to all the minerals, though the United States was owner of 50% of the interest. Therefore, W.C. Edwardson's estate only owned a 50% interest and Clark Van Horn received only the 50% owned by the estate. The intent was to transfer the land itself, and the grantor purported to give 50% of the minerals to the grantee. As there was an insufficient percentage of minerals to fulfill the granting clause, the entire fractional interest of the minerals owned by the grantor passed to Clark Van Horn and subsequently Mr. Waldock as his successor in interest.

¶36

V. CONCLUSION

For all of the reasons set out above, Joe Waldock respectfully requests that this Court reverse the trial court, granting him summary judgment quieting title in him in and to 50% of the minerals in and under the subject property as a matter of law.

Dated this 12th day of April, 2012.

OLSON & BURNS, P.C.

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¶37 **CERTIFICATE OF SERVICE**

I Richard P. Olson, attorney for Appellant Joe Waldock, do hereby certify that on the 12th day of April, 2012, copies of the BRIEF OF APPELLANT, and APPELLANT'S APPENDIX were deposited into the United States mails, postage prepaid, at Minot, North Dakota, and addressed to the following counsel for Appellees:

Mr. Dennis E. Johnson Johnson Law Office P. O. Box 1260 Watford City, ND 58854	Attorney for Amber Harvest Corporation
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Mr. John H. MacMaster Attorney at Law P. O. Box 547 Williston, ND 58802-0547	Attorney for: Gertrude Erickson heirs, Larry Gensch, Gerald Gensch, Robin Armstrong, Donna McCutcheon, Barbara Green, Sandra Lee McKee, Diane Cooper, Mary Lou Lindbloom, Leona Williams, Nancy Martin, Lori Peters, Lisa Meier, Jason Robbins, Jeremie Robbins, Nancy Martin as Trustee of Larry Erickson Mineral Trust
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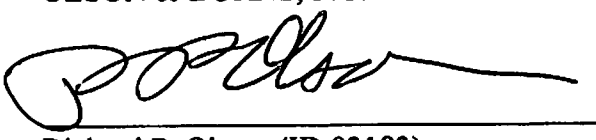
Mr. Dwight C. Eiken Neff Eiken & Neff, P.C. 111 East Broadway P.O. Box 1526 Williston, ND 58802-1526	Attorney for: Cade Oil & Gas LLC, and John H. Holt Oil Properties, Inc.
Mr. Lawrence Bender Fredrikson & Byron, P.A. P.O. Box 1855 Bismarck, ND 58502-1855	Attorney for: EOG Resources, Inc., and Slawson Exploration Company, Inc.
Mr. Michael J. Maus Hardy, Maus & Nordsven, P.C. P.O. Box 570 Dickinson, ND 58602-0570	Attorney for Slawson Exploration Company, Inc.
Mr. Loren J. O'Toole II Attorney at Law P.O. Box 529 Plentywood, MT 59254	Attorney for: Montana Oil Properties Inc., Northern Oil & Gas Inc., S. Reger Family Mineral Partnership dated 6/9/06, Fyan Family Mineral Partnership dated 6/27/03, Summerfield C. Baldridge, Kootenai Resource Corp.

Dated this 12th day of April, 2012.

OLSON & BURNS, P.C.



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¶38 **CERTIFICATE OF SERVICE**

I Richard P. Olson, do hereby certify that on the 12th day of April, 2012, copies of the BRIEF OF APPELLANT, were deposited into the United States mails, postage prepaid, at Minot, North Dakota, and addressed to the following Appellees:

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Dated this 12th day of April, 2012.

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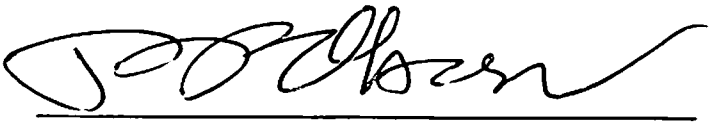
¶39 **CERTIFICATE OF COMPLIANCE**

I, Richard P. Olson, attorney for the Appellant Joe Waldock, do hereby certify that the above brief complies with all type-volume limitations as set forth in the North Dakota Rules of Appellate Procedure.

I further certify that the attached Brief of Appellant contains the following number of words: 6,963, and was prepared using WordPerfect 10.0, Times New Roman font, size 12.

Dated this 12th day of April, 2012.

OLSON & BURNS, P.C.



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NORTH DAKOTA CENTURY CODE

3-04-01. Agent warrants authority.

One who assumes to act as an agent thereby warrants to all who deal with that person in that capacity that the person has the authority which the person assumes.

30.1-18-11. (3-711) Powers of personal representatives - In general.

Until termination of the personal representative's appointment, a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

30.1-18-15. (3-715) Transactions authorized for personal representatives - Exceptions.

Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 30.1-20-02, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

6. Acquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset.

47-10-13. Grant presumes fee simple title.

A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended.

47-10-15. After-acquired title.

When a person purports by proper instrument to grant real property in fee simple and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or the grantee's successors.

47-10-19. Covenants implied from use of word grant.

From the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for the grantor and the grantor's heirs to the grantee and the grantee's heirs and assigns, are implied unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, nor any right, title, or interest therein, to any person other than the grantee; and

2. That such estate, at the time of the execution of such conveyance, is free from encumbrances done, made, or suffered by the grantor, or any person claiming under the grantor. Such covenants may be sued upon in the same manner as if they had been inserted expressly in the conveyance.