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August 20, 2012
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Lawrence A. Hamilton, Philip B. Hamilton and Judy H. Kasper,

Plaintiffs/Appellees,

vs.

Larry G. Woll, Cynthia J. Woll, Tracy J. Holiday, Robert V. Holiday, Philip Knolyn Gatcg II, Jacki DeMay, R. Craig Woll, Dorothy Jean Griswold, Russell Rapp, Jeffery R. Carius, Michael Carius, Mark S. Rapp, Tandals Farm Inc., James H. Bragg, Julie K. McKinley, J. Michael Gleason DBA Gleason Land Co., Strata Minerals, Inc., Frances A. Hannifin, Alan R. Hannifin, Desert Partners II L.P., Value Petroleum Inc., J. Kyle Jones, Margaret J. Hannifin, Fall River Resources, Chatfield Company, Walter E. Opper, Emma Smart, John M. Schattyn, Lloyd S. Schattyn, Noel L. Schattyn Soren, Avalon North LLC, Dakota West Energy LLC, Ronald Rowland, Lee LaBarre, Terry Aronson, Burlington Resources Oil & Gas Company LP; Peyton Woll, Jr., Trust dated June 8, 1993, Peyton H. Woll, Trustee, Dana G. Woll, Successor Trustee; John H. Woll and Dorothea Woll Trust Agreement dated 1-31-90; Helen F. Rapp, Trustee of the Helen F. Rapp Declaration of Trust dated 8-17-2004; Alvin C. Schopp, Trustee; and all other persons unknown claiming any estate or interest in or lien or encumbrance upon the property described in the Complaint,

Defendant/Appellant.

Supreme Court No. 20120269
Bowman County Civ. No. 06-10-C-00043

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APPEAL FROM THE ORDER FOR SUMMARY JUDGMENT ENTERED JANUARY 17, 2012, AMENDED JUDGMENT ENTERED APRIL 16, 2012, AND ORDER DENYING MOTION TO VACATE ENTERED APRIL 30, 2012 IN BOWMAN COUNTY DISTRICT COURT SOUTHWEST JUDICIAL DISTRICT

THE HON. H. PATRICK WEIR, PRESIDING

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# BRIEF OF APPELLANT RONALD ROWLAND

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**[¶1]** **TABLE OF AUTHORITIES**

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**[¶ 2]** **STATEMENT OF THE ISSUES**

I. Whether the district court erred by granting Plaintiffs/Appellees' (Plaintiffs) Motion for Summary Judgment after the court weighed extrinsic evidence and made findings of fact in Plaintiffs/Appellees' favor.

II. Whether the district court erred in finding as a matter of law that the deeds in question conveyed a royalty interest and did not convey a mineral interest, based solely on the factual finding that Finlay was an experienced oil and gas broker.

III. Whether the district court erred in denying Defendant/Appellant Ronald Rowland's ("Rowland") Motion to Vacate Judgment by not giving due consideration to the facts and law offered in support of Rowland's motion.

**[¶ 3]** **STATEMENT OF THE CASE**

**[¶ 4]** Rowland requests this Court to reverse the district court's grant of summary judgment and conclusion that the mineral deeds in question conveyed only a royalty interest and not a mineral interest. Rowland further requests that this Court reverse the district court's decision denying his Motion to Vacate Judgment.

**[¶ 5]** Plaintiffs Lawrence A. Hamilton, et al., initiated this action seeking a declaratory judgment against Defendants on July 7, 2010. (App. 8–11). On September 1, 2010, Rowland filed his Answer asserting numerous defenses, including the defense of laches, along with his Counterclaim and Crossclaim to quiet title. (App. 37–43).

**[¶ 6]** On August 2, 2011, Plaintiffs filed their Motion for Summary Judgment and supporting brief. (App. 71–102). On August 31, 2011, Rowland filed his Reply and Opposition to Motion for Summary Judgment. (App. 103–38). On September 15, 2011, Plaintiffs filed their Response to Rowland's Reply. On October 27, 2011, at the request

of the district court, Rowland filed a Supplemental Brief. On November 1, 2011, Plaintiffs filed a Response to the Supplemental Brief.

**[¶ 7]** On December 8, 2011, the district court issued its Memorandum Opinion concluding that the deeds in question conveyed a royalty interest and did not convey a mineral interest. (App. 139–52). On January 17, 2012, the district court issued its Order for Summary Judgment. (App. 153–58). Judgment was entered in Plaintiffs' favor on March 1, 2012. (App. 159–64). On April 1, 2012, Rowland filed a Motion to Vacate Judgment. (App. 210–48). On April 16, 2012, the district court entered an Amended Judgment to provide clarification about the ownership interests of several parties. (App. 251–56). On April 30, 2012, Rowland's Motion to Vacate was denied. (App. 257–58). The Notice of Appeal was filed on June 11, 2012. (App. 259–60).

**[¶ 8]** **STATEMENT OF THE FACTS**

**[¶ 9]** During the 1950s, Finlay F. Hamilton ("Finlay") bought and sold minerals throughout western North Dakota. (App. 82). During this time, Finlay acquired a one-fourth undivided mineral interest by a mineral deed recorded on January 13, 1953 to the following lands:

> Township 130 North, Range 105 West, Bowman County, ND
> Section 21: SW1/4 SE1/4
>
> Township 131 North, Range 105 West, Bowman County, ND
> Section 29: NW1/4

(App. 83–84). Between March 1953 and February 1956, Finlay conveyed portions of his mineral interest by executing and delivering fifteen mineral deeds. (App. 14, 85–99). All fifteen deeds were titled "Mineral Deed" and were granted using a mineral deed form. Id. Each deed contained all the language that normally indicates the conveyance of

mineral rights, including the right of ingress and egress, the right to all bonuses, rentals, and royalties, and complete operating rights. Each deed also identified the interest being conveyed in the form of a fraction, with the denominator of the fraction representing the total number of acres in the tract or tracts of land from which the conveyed portion was taken (for example "---2/320ths." from several tracts containing 320 acres and "---1/160th." from a tract containing 160 acres). (App. 92, 98). In each of the fifteen deeds, the fraction indicating the interest being granted was typed into a blank on the mineral deed form. (App. 85–99). Immediately following the typed fraction on the fifteen deeds in question, the word "Royalty" is typed in the blank. Id.

**[¶ 10]** Each deed also contained portions that were struck out by typing X's over the existing text or lining through the existing text on the deed form. Id. In each of the fifteen deeds in question, the warranty clause is struck out with X's or otherwise crossed out. Id. Moreover, on fourteen of the fifteen deeds, a brief provision stating "(Give exact postoffice address)" is struck out near the blanks where the parties' names and addresses are to be typed in. (App. 86–99).

**[¶ 11]** Rowland is both a mineral owner and a working interest owner of the land in question. Rowland received his mineral interests from the following grantees of Finlay: Myrle A. Ekin, Gladys Ekin, Robert L. Glidden, and Arthur C. Baue. (App. 88, 98, 99). Rowland received his working interest by taking oil and gas leases from the following grantees of Finlay: Russell G. Trummel and/or Grace I. Trummel, Samuel W. Rapp, Jr., Myrle A. Ekin, Gladys B. Ekin, and William E. Opper. (App. 86–88, 93, 96, 125–36).

**[¶ 12]** Plaintiffs/Appellees are heirs of Finlay, and they are attempting to take ownership of mineral interests that Finlay conveyed away over 50 years ago. Their action for

declaratory judgment comes fifteen years after oil production first began on the land in question, and after Rowland expended approximately $100,000.00 as his share of operating expenses. (App. 212–14). Plaintiffs, as holders of interests in the same lands as Rowland, had knowledge of Rowland's claimed interest in the land more than a decade ago through division orders for the various wells and production units on the land in question. Id. However, Plaintiffs failed to dispute the nature of Rowland's interest until this action was commenced in June, 2010. (App. 8–11). Rowland now appeals to reclaim the mineral and working interests that he paid for and that are properly his.

**[¶ 13] LAW AND ARGUMENT**

**[¶ 14] I. The district court improperly considered extrinsic evidence and resolved questions of material fact when it considered Plaintiff's Motion for Summary Judgment, therefore summary judgment was not appropriate.**

**[¶ 15]** Summary judgment is appropriate "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.D.R.Civ.P. 56(c).

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Lynch v. New Pub. Sch. Dist. No. 8, 2012 ND 88, ¶ 7, 816 N.W.2d 53. The North Dakota Supreme Court "has repeatedly held that summary judgment is inappropriate if the court must draw inferences and make findings on disputed facts to support the judgment." Farmers Union Oil Co. of Garrison v. Smetana, 2009 ND 74, ¶ 10, 764 N.W.2d 665. "The district court may not weigh the evidence, determine credibility, or attempt to discern the truth of the matter when ruling on a motion for summary judgment." Id. When the trial court deems it necessary to make inferences from surrounding circumstances, resolve ambiguities in a written contract, and to make findings of fact, the entry of a summary judgment is generally inappropriate. Brown v. N. Dakota State Univ., 372 N.W.2d 879, 883 (N.D. 1985). When a district court makes findings of fact, yet expressly states that there are no genuine issues of material fact, the North Dakota Supreme Court "will proceed to review whether summary judgment was warranted based upon the record before the district court." Smetana, 2009 ND 74, ¶ 12, 764 N.W.2d 665. Because findings of fact are inappropriate on a motion for summary judgment, the clearly erroneous standard set out in N.D.R.Civ.P. 52(a), which governs our review of a district court's findings of fact in a bench trial, is inapplicable to our review of the court's resolution of a motion for summary judgment." Id. at ¶ 10. "A motion for summary judgment is not an opportunity to conduct a mini-trial. If there are disputed issues of material fact that require resolution by findings of fact, the party opposing summary judgment is entitled to present its evidence to a finder of fact in a full trial." Id. at ¶ 11. "If the moving party meets its initial burden of showing the absence of a genuine issue of material fact, the party opposing the motion may not rest on mere

allegations or denials . . . but must present competent admissible evidence to show the existence of a genuine issue of material fact." Lynch, 2012 ND 88, ¶ 7, 816 N.W.2d 53.

**[¶ 16]** Despite the clear standard prohibiting the district court from engaging in factual determinations when considering a motion for summary judgment, the district court weighed extrinsic evidence to resolve an ambiguity within the deeds in question and used that finding of material fact as support for granting Plaintiff's Motion for Summary Judgment. The district court's exercise in making a finding of fact was inappropriate in deciding a motion for summary judgment, therefore, the district court's grant of summary judgment should be reversed and the case remanded.

**[¶ 17] A. The deeds in question are ambiguous and therefore create a question of fact to be determined by the trier of fact.**

**[¶ 18]** "In construing a deed, the primary purpose is to ascertain and effectuate the grantor's intent, and deeds are construed in the same manner as contracts." Carkuff v. Balmer, 2011 ND 60, ¶ 8, 795 N.W.2d 303 (citing Williams Co. v. Hamilton, 427 N.W.2d 822, 823 (N.D. 1988) (internal quotations omitted)). "The construction of a written contract to determine its legal effect is a question of law for the court to decide and, on appeal, we independently examine and construe the contract to determine if the trial court erred in its contract interpretation." Moen v. Meidinger, 547 N.W.2d 544, 546 (N.D. 1996). "A court's primary goal in interpreting a contract is to ascertain the mutual intentions of the contracting parties." Id. If the language of the contract is clear and unambiguous, and the intent is apparent from its face, there is no room for further interpretation." Id. at 547. However, if reasonable arguments can be made for different positions as to the contract's meaning, then the contract is ambiguous. Id.

**[¶ 19]** In Williams Co. v. Hamilton, 427 N.W.2d 822, 824 (N.D. 1988), the North Dakota Supreme Court held that deeds identical to those at issue in this case and executed by the same grantor are ambiguous as a matter of law. The Court held that the insertion of the word "Royalty" into a mineral deed form created an ambiguity because rational contrary arguments could be made as to the meaning of the language contained in the deeds. Id. The Court also held that "**Finlay's 'ambiguously expressed intentions, . . . are questions of fact to be determined with the aid of extrinsic evidence.**" Id. (quoting Bohn, 371 N.W.2d 781, 788 (N.D. 1985)) (emphasis added).

**[¶ 20]** In the present case, the district court agreed with the reasoning of this Court in Williams Co. and held as a matter of law that the deeds in question are ambiguous and that extrinsic evidence is necessary to ascertain the intentions of the parties to the deeds. (App. 144–45). The key fact giving rise to the ambiguity is that the word "Royalty" was inserted into a deed form used to convey mineral interests. Because royalty interests and mineral interests are separate and distinct legal interests, and because rational arguments can be made in support of both potential interpretations, the deeds are ambiguous and the district court's conclusion to that effect is sound.

### [¶ 21] B. The district court erred by resolving a question of material fact in Plaintiff's favor when considering Plaintiff's Motion for Summary Judgment

**[¶ 22]** "Whether or not a contract is ambiguous is a question of law." Id. However, "[a] determination of ambiguity is but the starting point in the search for the parties' ambiguously expressed intentions, which are questions of fact to be determined with the aid of extrinsic evidence." Bohn, 371 N.W.2d at 788. "[T]he resolution of an ambiguity

with extrinsic evidence requires the trier of fact to make a finding of fact." Bendish v. Castillo, 2012 ND 30, ¶16, 812 N.W.2d 398; Moen, 547 N.W.2d at 547.

**[¶ 23]** Because the deeds in question are ambiguous, Rowland offered extrinsic evidence to assist in ascertaining the true intent of the original parties to the deeds. (App. 119–124). In his Brief in Resistance to Motion for Summary Judgment, Rowland provided several deeds, which he received from Finlay's original grantees, conveying full mineral interests. Id. Rowland argued that these subsequent deeds demonstrate the intent of Finlay's original grantees that they received full mineral interests, and not merely royalty interests. (App. 112). This evidence is particularly appropriate considering that, in Williams Co., the North Dakota Supreme Court stated that evidence to resolve the ambiguity could be found through evidence regarding Finlay's grantees. 427 N.W.2d at 824. The weight and effect of this extrinsic evidence should have been left to be decided by the trier of fact at trial; however, the district court took it upon itself to examine the extrinsic evidence and discern the truth of the parties' intent, despite ample case law prohibiting such findings of fact on motions for summary judgment. (App. 148–150); Saltsman v. Sharp, 2011 ND 172, ¶ 18, 803 N.W.2d 553; Smetana, 2009 ND 74, ¶ 10, 764 N.W.2d 665.

**[¶ 24]** The district court errantly claimed that the ambiguously expressed intent of the parties was "for this court to determine, as a factual matter." (App. 148–49); Lynch, 2012 ND 88, ¶ 7, 816 N.W.2d 53 (stating that summary judgment is only appropriate when there are no issues of material fact); Bendish, 2012 ND 30, ¶16, 812 N.W.2d 398 (stating that "the resolution of an ambiguity with extrinsic evidence requires the trier of fact to make a finding of fact."). In furtherance of this incorrect assumption of the role of

fact-finder, the district court spent several pages of its Memorandum Opinion addressing the extrinsic evidence and weighing the merits of that evidence. (App. 145–50). Specifically, the district court identified two pieces of extrinsic evidence: the Affidavit of Lawrence A. Hamilton stating that Finlay bought and sold mineral interests in western North Dakota in the 1950s; and several deeds executed by Finlay's grantees unambiguously conveying full mineral interests to Rowland. (App. 149). Regarding the affidavit evidence that Finlay bought and sold minerals in North Dakota in the 1950s, the district court surmised that Finlay was therefore an "experienced oil broker" and that "[i]ndividuals purchasing and selling interests in this type of property know (or should know) what was being transferred." (App. 149–50). Regarding the evidence of later conveyances by Finlay's grantees transferring full mineral interests, the court found such later conveyances irrelevant because Finlay's grantees "only got royalty interests and could not transfer what they did not receive," wholly ignoring the weight of that evidence tending to show Finlay's grantees believed they were receiving full mineral interests. (App. 149). Based on this conclusory analysis of the extrinsic evidence, the district court decided the factual question of the original parties' intent and granted summary judgment to Plaintiffs based on the court's factual determination.

**[¶ 25]** The competent, admissible evidence of the subsequent deeds executed by Finlay's grantees conveying full mineral interests should have been sufficient to preclude summary judgment, but instead, the court disregarded that evidence and made its own factual findings. Because the district court improperly made a factual determination and based its order granting summary judgment on that factual determination, summary judgment was not appropriate.

**[¶ 26] II. The district court erred in finding as a matter of law that the deeds in question conveyed a royalty interest and not a mineral interest.**

**[¶ 27]** "In construing a deed, the primary purpose is to ascertain and effectuate the grantor's intent, and deeds are construed in the same manner as contracts." Carkuff, 2011 ND 60, ¶ 8, 795 N.W.2d 303. "The construction of a written contract to determine its legal effect is a question of law for the court to decide and, on appeal, we independently examine and construe the contract to determine if the trial court erred in its contract interpretation." Moen, 547 N.W.2d at 546.

**[¶ 28] A. The district court's ruling that the deeds conveyed a royalty interest and not a mineral interest is inconsistent with North Dakota law.**

**[¶ 29]** In Acoma Oil Corp. v. Wilson, 471 N.W.2d 476, 481 (N.D. 1995), the North Dakota Supreme Court discussed in detail the nature of a mineral interest. "A mineral interest . . . generally includes the right to sell all or part of the estate, the right to explore and develop the estate, the right to execute oil and gas leases, and the right to create fractional shares of the mineral estate." Id. The deeds in this case convey fractional shares of the mineral estate and expressly identify the right to explore and develop the land, and therefore the conveyed interest perfectly reflects the key characteristics of a mineral interest under North Dakota law.

**[¶ 30]** Furthermore, the North Dakota Supreme Court has recognized that grants of oil and gas "in and under" the land are generally construed to convey a mineral interest. Id. The deeds in this case all use the classic "in and under" mineral language that is almost universally held to convey mineral interests and not royalty interests.

**[¶ 31]** Further still, in discussing the difference between mineral and royalty interests, the North Dakota Supreme Court has said, "The prime characteristic of a mineral interest

is the right to enter the land to explore, drill, produce and otherwise carry on mining activities. . . . It is this attribute of operating rights that distinguishes a mineral interest from a royalty interest." Texaro Oil Co. v. Mosser, 299 N.W.2d 191, 194 (N.D. 1980) (overruled on unrelated grounds by GeoStar Corp. v. Parkway Petroleum, Inc., 495 N.W.2d 61, 67 (N.D. 1993)). The deeds in this case clearly grant "the right of ingress and egress at all times for the purpose of mining, drilling, exploring, operating and developing said lands for oil, gas, and other minerals . . ." Therefore, the deeds in question contain the prime characteristic of a mineral interest according to the North Dakota Supreme Court.

**[¶ 32]** It is also important to note that no effort was made by the drafter of the deeds to strike out or modify the key operative terms in the deeds that denote a mineral interest, despite the fact that other portions of the deeds were struck out or modified. (App. 95–99). The deeds are titled "MINERAL DEED." (App. 14, 85–99). Finlay did not strike out or correct the title of the instrument to indicate that a royalty interest was being conveyed, despite the fact that other portions of the instrument were struck out, presumably because those portions were not in conformity with Finlay's intent for the deeds. (App. 95–99). The provisions in the deed that were struck out include the warranty clause as well as a portion of fine print requesting that the parties "Give exact post office address" in the granting clause. Id. In other words, Finlay was so cautious and attentive in the drafting of the deeds that he made sure to strike out a short provision requiring the parties' exact post office addresses, yet he left intact and undisturbed all of the language in the deeds that indicates the conveyance of a mineral interest, despite his

purported experience as an oilman as attested to in the Affidavit of Lawrence A. Hamilton.

**[¶ 33]** By ruling that these deeds conveyed only a royalty interest, the district court entirely ignored case law explaining the mineral-royalty distinction and produced a result that is inconsistent with North Dakota law.

### [¶ 34] B. The use of the word "royalty" was frequently used to transfer full mineral interests in mineral conveyances during the 1950s.

**[¶ 35]** At the time the deeds in question were executed, the law in Oklahoma, the state in which Finlay Hamilton resided, recognized that the word "royalty" often carries a broader meaning that actually conveys a full mineral interest. (App. 14, 85–99); see, e.g., Melton v. Sneed, 109 P.2d 509, 512–13 (Okla. 1940); see also Meyers v. Cent. Nat. Bank of Okmulgee, 80 P.2d 584, 586 (Okla. 1937) (holding that a conveyance of "an undivided one half interest in and to the oil and gas royalty rights" conveyed a one-half interest in the oil and gas mineral rights); Burns v. Bastien, 50 P.2d 377, 382 (Okla. 1935) (holding that the reservation of an undivided interest "in and to all the royalties of oil and gas under and pertaining to said premises" reserved ownership of the minerals). In Melton, the Supreme Court of Oklahoma stated, "That the word [royalty] is frequently used in this State to denote an interest in the mineral rights is a matter of common knowledge." 109 P.2d at 513. The use of the word "royalty" to convey a mineral interest is particularly likely in cases in which the deed does not reference any lease covering the land or the royalty reserved by any such lease. Id. This concept was not unique to Oklahoma, but was derived from the principle explained in the early West Virginia case of Toothman v. Courtney, 58 S.E. 915, 918(W. Va 1907) that "a reservation of all possible benefit of the oil is tantamount to a reservation of the corpus thereof." Based on

that reasoning, a grant of royalty was tantamount to a grant of the mineral estate itself. See id. This principle was also adopted by the state of Colorado in Corlett v. Cox, 333 P.2d 619, 622 (Colo. 1958). Simply stated, the word "royalty" was used in a number of oil producing jurisdictions to convey mineral interests at the time Finlay executed the deeds.

**[¶ 36]** Despite the wealth of mid-continent oil and gas case law demonstrating that the word "royalty" was routinely used to convey full mineral interests during the 1950s, the Plaintiff's claimed in their Brief in Support of Summary Judgment that "the deeds in question must be construed to convey royalty only. To find otherwise requires that the typed word 'royalty' be totally ignored which cannot be done." (App. 79). The district court was persuaded by the Plaintiffs' claim and held that "[i]t is inexplicable why Finlay would have typed in 'royalty' in the granting clause of the disputed deeds if he did not intend to grant only a royalty interest." (App. 149). Far from being "inexplicable," the use of the word "royalty" to convey mineral interests was a common practice in Oklahoma and other states at the time Finlay executed the deeds. When interpreting the deeds in this context, the deeds' seeming contradiction can be reasonably resolved and made coherent. Therefore the district court erred in determining as a matter of law that the deeds in question conveyed only a royalty interest and not a mineral interest.

### [¶ 37] C. The district court failed to apply statutory rule of construction instructing courts to interpret ambiguous deeds against the drafting party.

**[¶ 38]** "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." N.D.C.C. § 47-09-13. "However, interpretation of

ambiguities in a grantee's favor is a last resort rule of construction, applied when all other means of ascertaining the parties' intent have failed." Webster v. Regan, 2000 ND 89, ¶ 11, 609 N.W.2d 733. Because deeds are to be construed in the same manner as contracts, N.D.C.C. § 9-07-19 also applies, which states, "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." As stated in Part I of this brief, the weight and merit of extrinsic evidence is not for the district court to decide on summary judgment, but is a question of fact to be determined by the trier of fact. However, on appeal, this Court may "look to the circumstances under which [the contract] was made to explain the provision." Mueller v. Stangeland, 340 N.W.2d 450, 454 (N.D. 1983).

**[¶ 39]** In this case, the district court acknowledged that "there is some merit in the argument that contractual ambiguities should be construed against the originator of the ambiguity," but the court opted not to apply that rule because of the presence of extrinsic evidence. (App. 149). The extrinsic evidence cited by the court was Finlay's experience as a buyer and seller of oil and gas properties and the subsequent deeds of Finlay's grantees conveying full mineral interests. Id. However, the extrinsic evidence cited by the court does not provide any reason to deviate from the statutory rule, which was designed to protect non-drafting parties from being injured by the mistakes of the drafting party. As noted above, Finlay's purported experience as a buyer and seller of oil properties does not provide any insight into his actual intent in the deeds in this case. Moreover, the grantees' subsequent deeds weigh heavily in favor of finding the deeds to convey mineral interests. Therefore the extrinsic evidence cited by the court does not provide any just reason to not apply N.D.C.C. § 9-07-19.

**[¶ 40]** In sum, Finlay's insertion of "Royalty" into the mineral deed form caused the ambiguity to exist, and no other evidence before the court provided any logically grounded insight into Finlay's intent in these deeds. At the same time, the subsequent deeds from Finlay's grantees **did** provide evidence of the grantees' intent to receive a full mineral interest. Of all the extrinsic evidence offered to the district court, there was no evidence that would shed any light on Finlay's intent. Therefore, the presence of extrinsic evidence does not provide a valid reason for the court to not apply N.D.C.C. § 9-07-19, and the court should have interpreted the deed most strongly against the party responsible for creating the ambiguity – Finlay. The district court failed to apply this statutory rule of construction, relying instead on an illogical application of the extrinsic evidence before the court at that time. For that reason, this Court should reverse the district court's judgment finding that the deeds in question conveyed only a royalty interest and not a mineral interest.

**[¶ 41] III. The district court abused its discretion by denying Rowland's Motion to Vacate Judgment without stating or rationally considering the facts and law to achieve a reasonable determination, and therefore the district court's Order Denying Motion to Vacate should be reversed.**

**[¶ 42]** N.D.R.Civ.P. 60(b)(6) allows the court to relieve a party from final judgment, upon motion and just terms, "for any other reason that justifies relief." "A movant for relief under Rule 60(b) has a burden of establishing sufficient grounds for disturbing the finality of the judgment." First Nat. Bank of Crosby v. Bjorgen, 389 N.W.2d 789, 794 (N.D. 1986). "This rule provides the ultimate safety valve to avoid enforcement by vacating a judgment to accomplish justice." Peterson v. Peterson, 555 N.W.2d 359, 362 (N.D. 1996) (internal quotations omitted). To vacate a judgment under Rule 60(b)(6), there must be some extraordinary circumstances present that justify relief. Small v.

Burleigh County, 239 N.W.2d 823, 828 (N.D. 1976). North Dakota law "permits a party moving to vacate judgment to raise a meritorious defense under Rule 60(b)." State v. $33,000.00 U.S. Currency, 2008 ND 96, ¶ 17, 748 N.W.2d 420.

**[¶ 43]** The North Dakota Supreme Court will "review a district court's denial of a motion to vacate or to reconsider a judgment under the abuse-of-discretion standard." Estate of Loomer, 2010 ND 93, ¶20, 782 N.W.2d 648. A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination. Id. This court does "not determine whether the court was substantively correct in entering the judgment from which relief is sought, but determine[s] only whether the court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not established." Knutson v. Knutson, 2002 ND 29 ¶7, 639 N.W.2d 495. In deciding that an order denying a motion to vacate under Rule 60(b) was in error, this Court held that ". . . [w]here a trial court's application of this standard is guided by a misinterpretation and misapplication of our law, rather than a rigorous analysis of the facts, reversal of the trial court is the proper remedy." Beaudoin v. South Texas Blood & Tissue Center, 2005 ND 120, ¶40 699 N.W.2d 421.

**[¶ 44]** In this case, relief from the judgment was justified due to the court's lack of consideration of Rowland's laches defense. Laches is a delay or lapse of time in commencing an action that works a disadvantage or prejudice to the adverse party because of a change in conditions during the delay. Williams County Soc. Services Bd. v. Falcon, 367 N.W.2d 170, 174 (N.D. 1985). "Prejudice is an essential element of a claim of laches." Schmidt v. Schmidt, 540 N.W.2d 605, 608 (N.D. 1995). "In addition

to the time element, the party invoking laches must have in good faith permitted its position to become so changed during the delay that it could not be restored to the status quo." Id. "[T]he party invoking laches . . . [has] the burden of proving prejudice from changed conditions occurring during the delay." Id.

**[¶ 45]** Rowland's laches defense was properly pled in his answer (App. 39–40), but as a result of the summary judgment ordered by the district court and the subsequent denial of his Motion to Vacate, this defense was never considered by the court. Because Rowland had a meritorious defense, he moved the district court to vacate the judgment so that his laches defense might be considered, as is allowed by North Dakota law. (App. 239); $33,000.00 U.S. Currency, 2008 ND 96, ¶ 17, 748 N.W.2d 420 (permitting a party to move to vacate a judgment to raise a meritorious defense). In his Brief in Support of Motion to Vacate Judgment, Rowland provided the district court, through affidavit testimony and exhibits, evidence showing that Rowland had participated in the Woll 14-21H well in 1996 and later the Eagon Well in 1997. (App. 212–20, 248). Rowland subsequently participated in the Cedar Hills South Unit in 2001. (App. 212–20, 248). Rowland's capacity to participate in these wells and unit was derived solely from his ownership of mineral rights in the land in question, and he would not have had the ability to participate in production operations if the deeds in this case conveyed only a royalty interest. Plaintiffs/Appellees at no time until initiating this lawsuit disputed the nature of Rowland's interest, despite their knowledge of Rowland's claimed interest from division orders which Plaintiffs/Appellees would have received as co-owners of rights in the same producing lands. (App. 212–20, 248).

**[¶ 46]** Rowland also expended approximately $100,000.00 during the last fifteen years to participate in the development and production activities on the land. (App. 214, 221–38). The district court's decision in determining the deeds at question were royalty conveyances has made it impossible for Rowland to be restored to the status quo. The time and money spent by Rowland, along with the unjustified delay in challenging Rowland's claimed interest for over a decade, is clearly prejudicial to Rowland, and laches provides a meritorious defense to Plaintiffs/Appellees' action based on the evidence.

**[¶ 47]** Despite the evidence offered by Rowland demonstrating the existence of a meritorious defense, the district court did not review the evidence or give any thoughtful analysis as to its merits. The district court's Order Denying Motion to Vacate Judgment states in its entirety:

> The Defendant has moved to vacate the judgment pursuant to N.D.R.Civ.P. Rule 60(b)(6). All parties agreed there were no factual disputes in this case when the summary judgment was issued. Based on the filings and affidavits provided, the Court made Its decision. The Court is not persuaded that It erred and will not now consider additional extrinsic evidence. The Movant has not raised any issues which would entitle him to the relief sought. The motion is therefor denied.

(App. 257–58). The district court's decision in denying the motion was not reasoned, nor was it the result of a rational mental process. There was no rigorous analysis of the facts, nor was there a fair consideration of the injustice that would occur if Rowland's interest would be extinguished without the court's consideration of his laches defense. Instead, the district court summarily denied the motion without even a modicum of thoughtful analysis or due consideration that might lead to a reasoned determination. It was clearly arbitrary. Rowland should be given the opportunity to argue this defense in the trial court

for a determination on the merits. Therefore, Rowland requests that this Court reverse the Order Denying Motion to Vacate Judgment.

**[¶ 48] CONCLUSION**

**[¶ 49]** In sum, the district court's grant of summary judgment was erroneous due to the presence of questions of material fact stemming from extrinsic evidence. The district court improperly weighed and applied that extrinsic evidence and made a factual determination that should have been left for the trier of fact. The district court's grant of summary judgment should therefore be reversed.

**[¶ 50]** The district court erred in finding the deeds in question to convey a royalty interest only and not a mineral interest. North Dakota law clearly identifies the key characteristics of mineral conveyances, and all of those characteristics, without exception, are present in the deeds. Moreover, the insertion of the typed word "Royalty" can be easily harmonized to the rest of the deed's language by looking at the historical context of mineral transactions in the 1950s, during which time the word "Royalty" was commonly used to convey full mineral interests. In addition to neglecting these legal principles, the court also failed to apply the statutory rule of construction instructing courts to interpret ambiguous deeds against the party responsible for creating the ambiguity. For these reasons, the district court erred and the judgment should be reversed and judgment entered for Rowland.

**[¶ 51]** The district court erred in denying Rowland's Motion to Vacate Judgment by failing to give fair consideration to Rowland's meritorious laches defense. The court did not provide a rigorous analysis of the facts or the law, but rather summarily denied Rowland's motion without regard for the injustice Rowland had experienced by not being

allowed to present his valid defense. For this reason, the district court's Order Denying Motion to Vacate should be reversed.

Dated this 20th day of August, 2012.

**Pringle & Herigstad P.C.**

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**[¶ 52]** **CERTIFICATE OF COMPLIANCE ON WORD COUNT**

**[¶ 53]** I hereby certify that this brief complies with NDAPP 32(a)(7)(A); the word count is 7,058.

Dated this 20th day of August, 2012.

**Pringle & Herigstad P.C.**

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**[¶ 54]** **CERTIFICATE OF WORD PROCESSING PROGRAM**

**[¶ 55]** The word-processing program is Microsoft Office Word 2003.

Dated this 20th day of August, 2012.

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