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CLERK OF SUPREME COURT
SEPTEMBER 19, 2012
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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| Lawrence A. Hamilton, Philip B. Hamilton and Judy H. Casper,<br><br>Plaintiffs/Appellees,<br><br>v.<br><br>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 E. Woll, Trustees of the John & 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,<br><br>Defendants/Appellants. | Supreme Court No. 20120269<br><br>Bowman County No. 06-10-C-00043<br><br>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<br><br>THE HON. H. PATRICK WEIR, PRESIDING |

**BRIEF OF APPELLEES**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Paragraph No.**

**Cases**

**Statutes**

**Other Authorities**

## LAW AND ARGUMENT

### I. SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE THERE WERE NO ISSUES OF FACT.

¶1 Rowland's appeal presents multiple issues on which the District Court has ruled on multiple occasions, with those issues largely concerning the intent of the parties when executing the royalty deed.

¶2 N.D.R.Civ.P. 56(c) provides that summary judgment is appropriate if 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. The fact that the trial court characterized undisputed fact as findings of fact does not make summary judgment inappropriate. Plaintiffs were entitled to judgment as a matter of law, and there were no disputed facts before the court when the summary judgment motion was ruled upon.

¶3 The first issue that Rowland addresses is that the District Court made findings of fact and that summary judgment is therefore inappropriate because there were, therefore, material issues of fact. The issue was the characterization of the deeds and any ambiguities they presented. In its original opinion, the District Court noted that **all of the parties agreed that there were no factual issues** and thus the case was appropriate for disposition on a summary judgment motion. Appendix at 143.

¶4 Ambiguity of a contract is a question of law. *State Bank & Trust of Kenmare v. Brekke*, 1999 ND 212, ¶ 12, 602 N.W.2d 681. Using extrinsic evidence to resolve the ambiguity, however, is an issue of fact that makes summary judgment inapplicable. *Bohn*

*v. Johnson*, 371 N.W.2d 781, 788 (N.D. 1985). Rowland's argument is premised on the idea that extrinsic evidence ought to be used to ascertain the intent of the parties in the contract. Rowland did not present any extrinsic evidence to the court in response to the Motion for Summary Judgment.

¶5 Extrinsic evidence is essentially nonexistent. The parties are all dead. Rowland attempted to manufacture extrinsic evidence by introducing subsequent deeds from the original grantees. Finlay Hamilton, the original grantor, is not included in these deeds, and they show nothing of his intent. Trial courts are required to presume that a properly executed instrument conveys the parties' intentions. *Ell v. Ell*, 295 N.W.2d 143, 150 (N.D. 1980).

¶6 Even with an ambiguity, there still has to be sufficient evidence to overcome the presumption and shows that the District Court clearly erred in its ruling. An analogous situation occurred in *Van Berkom v. Cordonnier,* in which this Court ruled that the presumption may only be overturned in the event that there is a definite and firm conviction that a mistake has been made. *Van Berkom v. Cordonnier*, 2011 ND 239, ¶ 14, 807 N.W.2d 802. There is no such evidence in this case.

¶7 Here, there are no other documents which indicate the intent of the parties. As the District Court noted, the ambiguity ends up being irrelevant. Regardless of the ambiguity in the contracts, the end result does not change because there is no extrinsic evidence to indicate that the original deed conveyed anything beyond a royalty interest. The extrinsic evidence which Rowland now seeks to have introduced does not change anything. The requisite standard that there exist a definite and firm conviction that a mistake has been made does not exist. As such, this Court should affirm the District Court ruling.

## II. THE COURT CORRECTLY CONSTRUED THE MINERAL INTEREST CONVEYED BY HAMILTON AS A ROYALTY INTEREST.

¶8 Plaintiffs sought a declaratory judgment construing the deeds to convey a royalty interest only and quieting title to the remaining royalty and mineral acres underlying the subject property. N.D.C.C. § 32-23-02 grants the Court the power to construe deeds and declare the rights, status and legal effect of the deeds given by Finlay L. Hamilton.

¶9 The issue in this case centered on the construction of the Hamilton deeds. Plaintiffs contended that the deeds conveyed a royalty interest only and not mineral acres. The trial court agreed with this.

¶10 This is the second time Finlay Hamilton's mineral deeds conveying a royalty interest has been litigated in North Dakota. In *Williams Company v. Hamilton*, 427 N.W.2d 822 (N.D.1988), the Williams Company sued Hamiltons seeking to recover lease bonus payments. In that case, like the one before this Court, Finlay Hamilton used mineral deeds to convey to various parties royalty interests. The language and deeds used by Hamilton in those deeds is identical to the deeds before this Court with the exception of the grantees and the legal description. The trial court granted summary judgment in favor of the Hamiltons, construing the deeds to convey a royalty interest only and directed the Williams Company to account for the production from the property. Williams Company appealed, which appeal was dismissed, the Court holding Williams Company "has appealed from a judgment that only partially disposes of an action in which 'more than one claim for relief is presented.' Rule 54(b), N.D.R.Civ.P." *Anderson v. State*, 344 N.W.2d 489 (N.D.1984). Because Rule 54(b), N.D.R.Civ.P., has not been complied with, "[t]he partial disposition embodied in the

judgment appealed from therefore is not ripe for review (*Id.*, at 490), and we dismiss the appeal.

¶11 The Court also noted that the Williams Company failed to join indispensable parties, the grantees of the deeds, suggesting they may have extrinsic evidence which will aid in explaining the "ambiguous intent" of the deeds. Williams Company did not further pursue recovery of the lease bonus and no further proceedings were had to construe or interpret the deeds. The Supreme Court found the deeds to be ambiguous and suggested that extrinsic evidence may help in construing the deeds. The deeds being ambiguous, applicable rules of construction must be resorted to determine Finlay Hamilton conveyed away. In this case, however, no such evidence exists.

¶12 North Dakota, like all other jurisdictions, recognizes that a "royalty" interest is separate and distinct from a full mineral interest. The Court in *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476 (N.D. 1991), discussed the difference between a royalty interest and a full mineral interest or mineral acre and held:

> A mineral acre is the full mineral interest in one acre of land. 8 Williams & Meyers, Manual of Terms, p. 561 (1987). A mineral interest is a property interest created after an oil and gas severance from the surface and 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. 1 Williams & Meyers, supra, at Sec. 301; 8 Williams & Meyers, supra, at p. 562. Mineral rights generally include those same basic interests. 8 Williams & Meyers, supra, at p. 563. A royalty interest is a smaller interest in a mineral estate which is a share of the product or proceeds reserved to the owner for permitting another to develop or use the property. 1 Williams & Meyers, supra, at Sec. 301; 8 Williams & Meyers, supra, at p. 564. Mineral and royalty interests are separate property interests with different characteristics. *Texaro Oil Co. v. Mosser*, 299 N.W.2d 191 (N.D.1980). Although royalty interests are part of the full spectrum of a mineral estate, the interest in minerals in place and the interest in royalty

based on the production of those minerals are separate and distinct estates. *Selman v. Bristow*, 402 S.W.2d 520 (Tex.Civ.App.1966).

¶13 It is undisputed that Finlay acquired 80 mineral acres under the subject lands. It is further undisputed that he conveyed away 10 mineral acres by mineral deeds. It is the remaining deeds using the fractional interest of a royalty interest that were deemed to be ambiguous, requiring construction.

¶14 The deeds requiring construction and interpretation are all preprinted forms entitled "Mineral Deed." In each of the deeds Finlay conveyed a fractional "royalty" interest in the oil and gas and other minerals. The fractional interest conveyed varied from deed to deed, some conveying 1/320ths royalty and others a 5/320, a 2/320ths or 10/320ths fractional royalty. The fractional interest and the term "royalty" were added to the preprinted form deed by typing in the granting clause the fractional interest of royalty to be conveyed . It is this language that conveyed a royalty interest and not mineral acres.

¶15 Oil and gas royalty is an interest in real property. *GeoStar Corp. v. Parkway Petroleum, Inc.*, 495 N.W.2d 61, 67 (N.D.1993). Thus, the rules for the construction of such grants are the same ones applicable to the construction of a written contract. *Johnson v. Mineral Estate, Inc.*, 343 N.W.2d 778( N.D. 1984); N.D.C.C. § 47-09-11:

> 47-09-11. Interpretation of grants.
>
> Grants shall be interpreted in like manner with contracts in general except so far as is otherwise provided by this chapter. If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction, and if several parts of a grant are absolutely irreconcilable, the former part shall prevail. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct.

¶16 The Court in *Carkuff v. Balmer*, 2011 ND 60, ¶ 8, 795 N.W.2d 303, stated:

> 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." *State Bank & Trust of Kenmare v. Brekke*, 1999 ND 212, ¶ 12, 602 N.W.2d 681; *see Williams Co. v. Hamilton*, 427 N.W.2d 822, 823 (N.D.1988). If a deed is unambiguous, this Court determines the parties' intent from the instrument itself. *See Brekke*, at ¶ 12; *Stracka v. Peterson*, 377 N.W.2d 580, 582 (N.D.1985). In other words, "[t]he language of the deed, if clear and explicit, governs its interpretation; the parties' mutual intentions must be ascertained from the four corners of the deed, if possible." *North Shore, Inc. v. Wakefield*, 530 N.W.2d 297, 300 (N.D. 1995); *see* N.D.C.C. §§ 9-07-02, 9-07-03, 9-07-04, 47-09-11. Whether or not a contract is ambiguous is a question of law. *Brekke*, at ¶ 12.

¶17 *See also Riverwood Commercial Park, LLC v. Standard Oil Co., Inc.*, 2011 ND 95,¶ 7, 797 N.W.2d 770, where the Court held:

> Grants of interests in real property are "interpreted in like manner with contracts in general . . ." N.D.C.C. § 47-09-11; *Valley Honey Co., LLC v. Graves*, 2003 ND 125, ¶ 12, 666 N.W.2d 453; *Schulz v. Hauck*, 312 N.W.2d 360, 363 (N.D. 1981); *see also Mougey Farms v. Kaspari*, 1998 ND 118, ¶¶ 18-20, 579 N.W.2d 583. In *Kuperus v. Willson*, 2006 ND 12, ¶ 11, 709 N.W.2d 726, we explained:
>
> > Contracts are construed to give effect to the mutual intention of the parties at the time of contracting. The parties' intention must be ascertained from the writing alone if possible. A contract must be construed as a whole to give effect to each provision, if reasonably practicable. We construe contracts to be definite and capable of being carried into effect, unless doing so violates the intention of the parties. Unless used by the parties in a technical sense, words in a contract are construed in their ordinary and popular sense, rather than according to their strict legal meaning.
> >
> > If a written contract is unambiguous, extrinsic evidence is not admissible to contradict the written language. However, if a written contract is ambiguous, extrinsic evidence may be considered to show the parties' intent. Whether or not a contract is ambiguous is a question of law. An ambiguity exists when rational arguments can be made in support of contrary positions as to the meaning of the language in question.

(quoting *Lire, Inc. v. Bob's Pizza Inn Rests., Inc.*, 541 N.W.2d 432, 433-34 (N.D. 1995) (citations omitted)).

¶18 As stated above, the Hamilton deeds have been found to be ambiguous and thus extrinsic evidence may be considered. However, in response to the Motion for Summary Judgment, Rowland did not present any extrinsic evidence, relying instead on his interpretation of the deeds. Due to the passage of time and the impossibility of obtaining testimony from the parties to the deed, extrinsic evidence is minimal. The Court could consider the fact that Finlay Hamilton was a professional investor in oil and gas properties. He bought and sold mineral acres throughout western North Dakota. Affidavit of Larry Hamilton; Appendix at 82 and 102. As such he knew the difference between conveying mineral acres and royalty interests. Hamilton's experience and profession could appropriately be considered by the court in construing the deeds.

¶19 In the case of *Arkansas Val. Royalty Co. v. Arkansas-Oklahoma Gas Co.*, 222 Ark. 213, 258 S.W.2d 51 (Ark. 1953), the court construed a deed deemed to be ambiguous as it was unclear if a royalty interest or mineral acres were being conveyed. The court relied in part in construing the deed on the drafter's years of experience in the oil business and held:

> And a practical oil man of many years experience in the oil business, serving as president of a royalty company, is presumed to know and fully understand the difference between these separate estates.

¶20 Because of the similarity of facts of the Arkansas case involving the use of a mineral deed to convey royalty, the Arkansas case is especially relevant to the case before this Court. Despite the fact that the deed conveyed what appeared to be full mineral interests and granted easements for exploration and development in one part and also referred to the grant

of royalty in another part of the deed, the Arkansas court nevertheless found a conveyance of royalty. *Arkansas Valley Royalty Co., supra.*

¶21 Another case finding a royalty conveyance despite opposite-tending mineral terminology is *Atlantic Refining Co. v. Beach*, 78 N.M. 634, 637; 436 P.2d 107 (N.M. 1968). This case required construction of a conveyance by a document denominated "Mineral Deed" as to whether it conveyed a 1/16 of the minerals in place, or 1/2 of the usual 1/8 royalty. The New Mexico court reviewed in detail the relevance of the title of the deed, and the deed's mineral terminology. The court determined that because it was the intent to convey royalty, the deed must be construed to convey royalty only:

> Canons and rules of construction are but aids in determining the intention of the instrument and all rules of construction must yield to the expressed intention of the parties. *Davis v. Hardman*, 148 W.Va. 82, 133 S.E.2d 77. In this case, the parties offered no testimony in support of any claimed construction of the language of the instrument. We must, accordingly, interpret the intention from the language of the instrument itself. Under such circumstances, we are committed to the rule that the intention of the parties 'as gathered from the four corners of the deed is the polestar of construction and that all parts of the deed must be examined together for the purpose of ascertaining the intention.' *Sharpe v. Smith*, 68 N.M. 253, 360 P.2d 917; *Price v. Johnson, supra.* Applying these rules, we agree with the appellees that the deed granted a royalty interest.

¶22 At page 638 the court went on to state:

> The weight of the decided cases construe instruments describing the intention to grant or reserve a royalty interest, to convey or reserve that interest only despite the presence of 'opposite tending mineral terminology.' 1 Williams & Meyers, Oil & Gas Law, § 304.8 and § 304.10. *See also Arkansas Valley Royalty Co. v. Arkansas-Oklahoma Gas Co., supra*; *Watkins v. Slaughter*, 144 Tex. 179, 189 S.W.2d 699; *Armstrong v. Bell*, 199 Miss. 29, 24 So.2d 10.

¶23 The fact that Finlay inserted in the deeds the word "royalty" compelled a finding that the deeds conveyed royalty only. The typed in word "royalty" cannot be ignored and supersedes the preprinted language. Each word or provision in a contract must be given effect if reasonably possible. *Lire, Inc. v. Bob's Pizza Inn Rests., Inc.*, 541 N.W.2d 432, 433-34 (N.D.1995). Under N.D.C.C. § 9-07-16, when a contract is partly written and partly preprinted, the written parts control the preprinted parts. *See Thiel Indus., Inc. v. Western Fire Ins. Co.*, 289 N.W.2d 786, 788 (N.D.1980); *Olson v. Peterson*, 288 N.W.2d 294, 298 (N.D.1980). The handwritten insertions in an agreement control and must be construed to have meaning. *Estate of Dionne*, 2009 ND 172, 772 N.W.2d 891, 896.

¶24 There simply is no way to construe the word "royalty" to convey a mineral acre.

¶25 Rowland also argues that the language stating the interest conveyed as a royalty actually means that a mineral interest was conveyed. This is premised upon cases from Oklahoma, West Virginia, and Colorado dating from the middle of the 20th Century or earlier. These decisions have no basis in North Dakota law. Nothing in this State has ever indicated that a mineral interest and a royalty interest should be conflated. Rowland is attempting to make up a new explanation for the language of conveyance which does not exist in North Dakota without any supporting information beyond stating that it is conceivable. Such an interpretation exists entirely in conjecture and does not further any conviction that the District Court made a mistake in its judgment.

¶26 The deeds in Finlay's chain of title can also be considered in determine Finlay's intent. In the deed by which he acquired 80 minerals acres in January of 1953 was clearly

a conveyance of mineral acres. In April of 1953 he began his conveyances in which he made specific mention of "royalty", unlike the deed he received from C. F. Clark.

¶27 The last two deeds he gave in 1956 did not mention "royalty", but were conveyances of fractional mineral acres. He obviously knew the difference between royalty and mineral acres. It is apparent he inserted the word "royalty" in his deeds for a purpose and with the intent to convey royalty. His intent was given effect.

¶28 Admittedly, it is unusual to convey royalty in this manner by describing it as a fractional interest. However, a total of the fractional interest conveyed by Finlay is 37/320 in a portion of the land with a conveyance of 1/160ths in the NW1/4 29-131-105. The fraction 37/320 is equal to 0.115625. Leases in the 1950's generally provided for a 1/8th royalty or 0.125 for the mineral owner. Converting the fractional interest to percentage reveals Finlay conveyed a little over 0.1218 royalty in the NW1/4 of 29 and 0.1156 royalty in all of the remaining acreage. This would leave Finlay owning some royalty in the conveyed interest as well as the 70 mineral acres.

¶29 It is also important to keep in mind division orders, utilized by oil companies, in determining the amount of royalty to be paid out of production also use percentage interests and not fractional interests. Had Finlay used a percentage interest in describing the royalty conveyed, his intended conveyance would have been clearer. If the deeds described the interest to be conveyed on a percentage and did not mention royalty, the language would appear somewhat as follows: .00625 interest in the oil gas and other minerals. Mineral acre conveyances almost never use percentage interest. A conversion of the factional interest in

Finlay's deeds to a percentage interest further supports the contention that the interest conveyed is royalty and is consistent with a construction of the deeds to convey royalty only.

## III. THE TRIAL COURT PROPERLY DENIED ROWLAND'S MOTION TO VACATE JUDGMENT.

¶30 Lastly, Rowland argues a defense of laches. Rowland did not raise the laches argument in response to the Motion for Summary Judgment. He relied instead upon his argument as to the meaning of the mineral deed. After the ruling on the Motion for Summary Judgment, he attempted to introduce evidence of laches after the Court had already ruled on this case.

¶31 Laches does not arise from a delay or lapse of time alone, but is such a delay in enforcing one's rights as to create a disadvantage to another. *Simons v. Tancre*, 321 N.W.2d 495, 500 (N.D. 1981). Laches, which is to be considered on an individual basis, only arises when a party is so prejudiced that it is impossible to be placed in the position it was before the action. *Burlington Northern, Inc. v. Hall*, 322 N.W.2d 233, 242 (N.D. 1982). Rowland is not in such a position that he cannot be restored to the position he held prior to this suit's commencement. In his affidavit, Rowland sets forth expenses he has incurred but does not disclose profits he has received.

¶32 Rowland's rights are not being removed, but instead modified to royalty rights. Royalty rights are not insubstantial and result in payment, not unlike the mineral rights. Rowland argues that he has put substantial money into the well and that the judgment eliminates any chances of recouping those payments. Royalty rights still produce money. Rowland is not so prejudiced that he has no chance of being placed in his prior position.

¶33 Rowland's motion was properly denied because it was not presented in a timely fashion (laches).

## CONCLUSION

¶34 Rowland's appeal is not a meritorious one. He argues that the District Court should have considered extrinsic evidence when no evidence exits which would change the outcome of the case, that this Court adopt, without any reason why, one possible interpretation of a contract based on a few cases from other jurisdictions from the middle of the last century, and that he has been unfairly prejudiced by this action. None of these defenses hold true. There is nothing to support his argument that there is a clear conviction that an error has been made. Finlay Hamilton conveyed a royalty interest and Rowland has been loath to accept that. His appeal is without merit and the judgment of the District Court should be affirmed.

Dated this 19th day of September, 2012.

Respectfully submitted,

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