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OCTOBER 2, 2012
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

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

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

REPLY BRIEF OF APPELLANT RONALD ROWLAND

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[¶ 1] I. SUMMARY JUDGMENT WAS NOT APPROPRIATE

[¶ 2] For the reasons set forth below, summary judgment was not appropriate.

[¶ 3] A. The appropriate standard of review for grants of summary judgment is de novo review.

[¶ 4] Plaintiffs assert that the appropriate standard of review for grants of summary judgment is the clear error standard. As support for this assertion, Plaintiffs cite Van Berkom v. Condonnier, 2001 ND 239, ¶ 14, 807 N.W.2d 802. However, summary judgment was not at issue in Van Berkom, and there the North Dakota Supreme Court was reviewing the finding of facts made at a bench trial. See id. at ¶ 4. "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." Farmers Union Oil Co. of Garrison v. Smetana, 2009 ND 74, ¶ 10, 764 N.W.2d 665. The appropriate standard of review is not clear error, as Plaintiffs suggest. "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.

[¶ 5] B. There were factual issues in dispute.

[¶ 6] Both the Plaintiffs and the Gleason Defendants repeatedly argue that there were no disputed issues of fact at the time of summary judgment. As support, the opposing parties cite the district court's Memorandum Opinion stating, "All parties have agreed there are no factual disputes." (App. 143). However, when a district court makes findings of fact, yet expressly states that there are no genuine issues of material fact, as is the case here, 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. There were issues of material fact, as evidenced by Rowland's Brief in Resistance to Motion for Summary Judgment, and this Court should examine the record before the district court to review whether summary judgment was appropriate.

[¶ 7] C. Extrinsic evidence to resolve the ambiguity required findings of fact, which were inappropriate on summary judgment.

[¶ 8] In their Brief, Plaintiffs state: "Rowland did not present any extrinsic evidence to the court in response to the Motion for Summary Judgment." This is absolutely false. In his Brief in Resistance to Motion for Summary Judgment, Rowland stated that, "if a written contract is ambiguous, extrinsic evidence may be considered to show the parties' intent." (App. 111). Rowland then offered extrinsic evidence to assist the court in resolving the ambiguity. (App. 112). Specifically, Rowland argued that the subsequent conveyances executed by Finlay's original grantees, conveying full mineral interests, suggests that the grantees believed that Finlay conveyed a full mineral interest to them in the deeds that are now in question. (App. 112). Furthermore, Rowland attached copies of those subsequent deeds as exhibits to his Brief in Resistance to Motion for Summary Judgment. (App. 119–24). Therefore, Plaintiffs' assertion that Rowland did not present any extrinsic evidence in response to Plaintiffs' Motion for Summary Judgment is flatly wrong.

[¶ 9] Both sides submitted extrinsic evidence to the district court, as the district court recognized in its Memorandum Opinion when it stated, "in this case the only extrinsic evidence is Finlay's experience (and the fact that Finlay's grantees in subsequent deeds transferred mineral acres.)" (App. 149). In granting summary judgment to Plaintiffs, the

district court clearly weighed and examined the extrinsic evidence to resolve the ambiguity in the deeds in question. North Dakota law is clear that "the 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 v. Meidinger, 547 N.W.2d 544, 547 (N.D. 1996). "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." Smetana, 2009 ND 74, ¶ 10, 764 N.W.2d 665. By weighing and examining the extrinsic evidence to resolve the ambiguity, the district court took on the role of "finder of fact," which is unquestionably improper on a motion for summary judgment.

[¶ 10] The Gleason Defendants' arguments are also not rooted in the facts or the law. The Gleason Defendants claim "[a]n ambiguity in the deeds did not create a material issue of fact." North Dakota case law does not support this claim. This litigation is centered on the meaning of certain deeds, which all parties agree are ambiguous. "A court's primary goal in interpreting a contract is to ascertain the mutual intentions of the contracting parties." Moen, 547 N.W.2d at 546. The Plaintiffs and Rowland have both offered extrinsic evidence to assist in understanding the ambiguously expressed intentions of the parties. The ambiguously expressed intentions of the parties to a contract "are questions of fact to be determined with the aid of extrinsic evidence." Bohn v. Johnson, 371 N.W.2d 781, 788 (N.D. 1985). This litigation turns on the factual determination as to the effect of the extrinsic evidence offered in this case. Therefore, the Gleason Defendants' claim that the ambiguity in the deeds did not create a material issue of fact has no merit.

[¶ 11] The Gleason Defendants also claim in their Brief that "the facts presented through extrinsic evidence were not in dispute." This assertion cannot possibly be made in good faith. The district court identified two pieces of extrinsic evidence: Finlay's experience as a buyer and seller of oil and gas properties, and the subsequent deeds of Finlay's grantees. (App. 149). In their respective briefs on the issue of summary judgment, Plaintiffs and Rowland argued at length about the proper interpretation of the extrinsic evidence. (App. 76–79, 112, 115). In its Memorandum Opinion, the district court even noted the various arguments each side made regarding the extrinsic evidence. (App. 146–47). The effect of the extrinsic evidence was clearly in dispute. "[T]he resolution of an ambiguity with extrinsic evidence requires the trier of fact to make a finding of fact." Bendish, 2012 ND 30, ¶16, 812 N.W.2d 398; Moen, 547 N.W.2d at 547. "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." Smetana, 2009 ND 74, ¶ 11, 764 N.W.2d 665. Because the parties sought to resolve the ambiguity with extrinsic evidence, it was necessary to allow the trier of fact to determine the effect of that extrinsic evidence. Rowland was never afforded that opportunity, due to the district court's improper grant of summary judgment. The district court's order granting summary judgment to Plaintiffs should therefore be reversed, and the case remanded so these factual issues can be determined at trial.

[¶ 12] II. THE DISTRICT COURT ERRED IN FINDING AS A MATTER OF LAW THAT THE DEEDS CONVEYED A ROYALTY INTEREST.

[¶ 13] The parties in this case are in agreement that the insertion of the word "Royalty" in the blank on the mineral deed form is the sole cause of ambiguity in the deeds in

question. Other than the insertion of the word "Royalty" in that blank on those deed forms, **every other clause in the deeds denotes a conveyance of minerals**. The deeds contain all of the classic characteristics of a mineral conveyance, such as "in and under" language, the right to drill, explore, and develop, the right to ingress and egress, and the right to lease. See Acoma Oil Corp. v. Wilson, 471 N.W.2d 476, 481 (N.D. 1995); 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)). Moreover, none of these clauses indicating a conveyance of minerals were struck out, which would be expected if the deed form was being altered to convey only a royalty interest. This is especially true considering that other portions were struck out, such as the warranty clause, and a clause requiring the exact post office address. It is also especially true considering that Finlay was a "professional investor in oil and gas properties," as Plaintiffs purport, and that he certainly would have understood the difference between a mineral and a royalty interest. The Plaintiffs' position is that every other word or clause in the entire deed indicating a conveyance of minerals should be ignored due to the insertion of the word "Royalty" in the deed form. Such an interpretation would wholly ignore North Dakota case law defining the nature of a mineral interest.

[¶ 14] Plaintiffs have argued repeatedly that the insertion of the word "Royalty" in the deed forms must mean that Finlay intended to convey a royalty interest. However, this argument is conclusory. There are other explanations for including the word "Royalty" in these deeds. For example, "Royalty" may have been inserted to indicate that the grantee of the mineral interest was also entitled to any further royalty payments owed to

the mineral owner from any production from those minerals. Also, as argued in the Brief of Appellant Ronald Rowland, the word "royalty" was commonly used to convey full mineral interests in other mid-continent oil producing states—including Oklahoma, where Finlay lived—during the exact time that these deeds were executed. See, e.g., Melton v. Sneed, 109 P.2d 509, 513 (Okla. 1940) ("That the word [royalty] is frequently used in this State to denote an interest in the mineral rights is a matter of common knowledge."); 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); Corlett v. Cox, 333 P.2d 619, 622 (Colo. 1958) (adopting the same reasoning as the Oklahoma courts). Rowland does not argue that these cases are controlling in North Dakota, or that the policy espoused in these cases should be adopted in North Dakota. However, these cases do provide a perfectly rational and sensible reason why Finlay, a supposed oil and gas broker from Oklahoma, may have included the word "Royalty" in these deeds. Therefore, Plaintiffs' assertion that Finlay only would have included the word "Royalty" in these deeds if he intended to convey a royalty interest is not supported by the facts in this case.

[¶ 15] Plaintiffs argue that this Court should adopt the reasoning in Arkansas Val. Royalty Co. v. Arkansas-Oklahoma Gas Co., 258 S.W.2d 51, 54 (Ark. 1953). However, in their Brief, Plaintiffs failed to mention that the instrument in Arkansas has the words "full royalty" handwritten five times throughout the text of the instrument. Additionally,

the instrument specifically makes the conveyance subject to the terms of a specific oil and gas lease. The minerals were subject to a lease which provided the mineral owners with a 1/8 royalty. The later conveyance of the royalty specifically referenced the lease and the lease's 1/8 royalty. These significant facts make the instrument in the Arkansas case clearly distinguishable from the Hamilton deeds. In this case, the ambiguous deeds do not reference any existing lease. Moreover, as cited above, Rowland has provided ample case law from other mid-continent oil producing states where the word "royalty" was used to convey mineral interests in circumstances directly mirroring the facts in this case. Plaintiffs opted not to address that case law in their Brief and instead focused on the Arkansas case, which is inapplicable based on the facts.

[¶ 16] Plaintiffs also cite Atlantic Refining Co. v. Beach, 436 P.2d 107 (N.M. 1968) as support for their position. The Atlantic case is equally unhelpful to Plaintiffs. In Atlantic, the instrument in question contained an "intention clause" which clearly communicated that the grantor intended to convey only a royalty interest. No such clause is present in the Hamilton deeds. The Atlantic case is easily distinguishable from the present case, and it should not control the outcome of this case.

[¶ 17] In their Briefs, Plaintiffs and the Gleason Defendants avoid any discussion regarding the application of N.D.C.C. § 47-09-13 or N.D.C.C. § 9-07-19. We reiterate that the extrinsic evidence cited by the district 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. (App. 149). 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. 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.

[¶ 18] III. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO RATIONALLY CONSIDER THE FACTS AND LAW IN DENYING ROWLAND'S MOTION TO VACATE.

[¶ 19] As explained in Rowland's Brief, Rowland moved the district court to vacate its judgment due to his good meritorious defense of laches, and the district denied his motion. 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. Estate of Loomer, 2010 ND 93, ¶20, 782 N.W.2d 648. The district court did not even bother to address the barest of facts surrounding Rowland's motion to vacate, instead disposing of the motion in just 78 words. 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. The district court therefore abused its discretion, and this Court should reverse the Order Denying Motion to Vacate Judgment.

Dated this 2nd day of October, 2012.

Pringle & Herigstad P.C.

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

[¶ 21] I hereby certify that this reply brief complies with NDAPP 32(d); the word count is 2,465.

Dated this 2nd day of October, 2012.

Pringle & Herigstad P.C.

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

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

Dated this 2nd day of October, 2012.

Pringle & Herigstad P.C.

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THE HON. H. PATRICK WEIR, PRESIDING

AFFIDAVIT OF MAILING

STATE OF NORTH DAKOTA)
) **AFFIDAVIT OF MAILING**
COUNTY OF WARD)

Kristi Bailie being first duly sworn, deposes and states:

That she is a citizen of the United States of America, of legal age and is not a party to nor interested in the above entitled action; that on the 2nd day of October, 2012, this Affiant electronically served a true and correct copy of the following documents in this action:

1. ***Reply Brief of Appellant Ronald Rowland; and***
2. ***Affidavit of Mailing.***

That said documents were sent to the following persons at their known e-mail addresses as follows:

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Wade C. Mann
wmann@crowleyfleck.com

Bruce Selinger
bruceselinger@ndsupernet.com

Kristi L. Bailie

Subscribed and sworn to before me this 2nd day of October, 2012.

CHELSYE CHANEY
Notary Public
State of North Dakota
My Commission Expires Aug. 24, 2017

, Notary Public
For the state of North Dakota
My commission expires:

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Wade C. Mann
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The above documents were duly e-mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Kristi L. Bailie

Subscribed and sworn to before me this 3rd day of October, 2012.

CHELSYE CHANEY
Notary Public
State of North Dakota
My Commission Expires Aug. 24, 2017

Notary Public
For the state of North Dakota
My commission expires: