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JANUARY 10, 2013
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

JOAN MARIE HALLIN AND JOHN P. HALLIN;
AND SUSAN KAY BRADFORD,
PLAINTIFFS/APPELLEES,

V.

JACK LYNGSTAD, A/K/A JOHN LYNGSTAD;
LORRAINE F. LYNGSTAD, ROBERT G. LYNGSTAD, JR.,
AND JOHN O. LYNGSTAD III, AS CO-TRUSTEES OF THE
ROBERT G. LYNGSTAD QTIP TRUST; EDNA MOSES;
JAMES J. MOSES, JR., A/K/A JAMES MOSES, A/K/A JAY
MOSES, AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF EDNA J. MOSES, A/K/A EDNA MOSES,
DECEASED; STEVE TILLOTSON; CAROL TILLOTSON; AND
ELLEN TILLOTSON, A/K/A REVEREND ELLEN TILLOTSON,
DEFENDANTS/APPELLANTS

SUPREME COURT CASE NO. 20120354

APPEAL FROM THE JUDGMENT OF THE MOUNTRAIL COUNTY DISTRICT
COURT, NORTHWEST JUDICIAL DISTRICT,
THE HONORABLE JUDGE GARY H. LEE, PRESIDING

BRIEF OF PLAINTIFFS/APPELLEES

Respectfully submitted by:

Kerry J. Carpenter, Attorney at Law (ND #03739)
Carpenter Law Offices, Attorneys for Appellees
2039 North Kavaney Drive
Bismarck, ND 58501-1642
(701) 223-3080

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II. The District Court did not err by ordering summary judgment in favor of Hallins/Appellees and quieting title in them.

STATEMENT OF THE CASE

[1] This Appeal arises out of a quiet title action for mineral interests in Mountrail County. The District Court, the Honorable Judge of the District Court Gary Lee presiding, ordering summary judgment in favor of Plaintiffs/Appellees, ("Hallins"), denying judgment in favor of Defendants/Appellants, ("Lyngstads"), and quieted title of the disputed mineral interests in the Hallins. (App. at 11-19). Lyngstads moved for summary judgment and an order quieting title to the disputed mineral interests in them on February 7, 2012 (RA at #5). Hallins responded to the summary judgment motion (RA at #10 and #11) and cross-moved for summary judgment, supported by a brief (RA at #18 and #19).

[2] Following oral argument on both motions for summary judgment on May 2, 2012, the District Court entered a memorandum order on July 16, 2012. (RA at #25). The Court ordered summary judgment in favor of Hallins, which quieted title to the disputed mineral interests in Hallins, and denied Lyngstad's motion for summary judgment. Judgment was entered on the same date by the Clerk of Court (RA at #26). Notice of Entry of Judgment was filed and served on July 26, 2012 (RA at #27). Lyngstads filed a notice of appeal on September 14, 2012 (RA at #29). A subsequent Judgment which replaced the words "LET JUDGMENT QUIETING TITLE BE ENTERED ACCORDINGLY" with "JUDGMENT QUIETING TITLE IS HEREBY ENTERED ACCORDINGLY" was entered on October 3, 2012 (App. 11-19, RA at #35). Notice of Entry of Judgment was filed and served on October 8, 2012. (RA at #37). The transcript of the hearing before the District Court was filed with the Supreme Court on October 16, 2012.

STATEMENT OF FACTS

[3] This action was commenced to quiet title to minerals located in Mountrail County, in land described as:

> Township 153 North, Range 92 West of the 5th P.M.
> Section 14: S1/2SW1/4
> Section 23: N1/2NW1/4

(RA at #2, Compl. ¶1). The parties agree that together they all own 3/4 of all of the minerals ("subject minerals") in, under and that may be produced from the above-described property. However, the parties dispute the proportion of ownership of the subject minerals. Hallins claim they collectively own 2/3 of the subject minerals, with the Lyngstads owning 1/3 of the subject minerals. (RA at #2, Compl. ¶V). Lyngstads claim they collectively own 1/2 of the subject minerals, with Hallins collectively owning the other 1/2 of the subject minerals. (RA at #4, Answer ¶3).

[4] The District Court recited the undisputed facts, as agreed by the parties, as follows:

> "4. At some time prior to April, 1949, Frank Brandt owned one hundred percent of the minerals and one hundred percent of the surface to the above described real estate. Frank Brandt died.
> 5. On April 12, 1949, Albert Brandt, as executor of the Frank Brandt estate, conveyed 2/3 of the surface and minerals to Albert Brandt, and 1/3 of the surface and minerals in the property to Walter Brandt.
> 6. Albert Brandt died. On July 1, 1959, Emma Lyngstad, as administrator of Albert Brandt's estate conveyed 1/2 of Albert Brandt's 2/3 interest in the surface and minerals to herself, and 1/2 of the 2/3 of the minerals and surface to Walter Brandt. At this point, Emma Lyngstad owned 1/3 of the surface and minerals, and Walter Brandt owned 2/3 of the surface and minerals.
> 7. On June 27, 1960, Emma Lyngstad and John Lyngstad, as husband and wife, and Walter Brandt and Esther Brandt, as husband and wife, conveyed one hundred percent of the surface to R.I. Hukkanen. The warranty deed conveying the real estate also contained the following: "Excepting from the premises herein conveyed and expressly reserving unto the grantors herein an undivided 3/4 interest in and to all of the oil, gas, and other minerals..."

> 8. Walter Brandt died. His estate proceeded through probate. Esther Brandt, as executor, filed a final accounting with the Court showing that Walter Brandt owned 1/2 of the minerals at issue. These minerals were distributed to Esther Brandt. Esther Brandt later conveyed 1/2 of the 3/4 interest to herself and her two children.
> 9. The grantors in the 1960 deed, Emma Lyngstad and John Lyngstad, and Walter Brandt and Esther Brandt, are all deceased. **There are no known contemporaneous documents from 1960 which would shed light on the intentions of the parties. None of the Hallins or Lyngstads has any personal knowledge which would help shed any light on what the grantors intended in 1960**." (App. 12-13 – emphasis added)

[5] The Hallins submit that the parties are heirs and successors-in-interest to the Grantors named in the 1960 Deed which contained a reservation of the subject minerals. (App. 7). The parties do not dispute that, prior to execution of the 1960 Deed, Walter Brandt owned 2/3 of all of the minerals in the above-described land, and Emma Lyngstad owned 1/3 of all of the minerals in said land. (RA at #4, Answer at ¶2). Nor do the parties dispute that on June 27, 1960, through the 1960 Deed, Emma Lyngstad and John Lyngstad, wife and husband, and Walter Brandt and Esther Brandt, husband and wife, together conveyed 100 percent of the surface and 1/4 (25 percent) of all of the minerals in said land to R.I. Hukkanen. (Id. at ¶2-¶3). Hukkanen's interests are not at issue.

[6] The parties stipulated to the District Court that there was no evidence, and no witnesses with personal knowledge, which could guide the Court in determining the Grantors' intent at the time they executed the 1960 Deed (App. 12-13 at ¶9, cited and bolded above).

[7] Hallins' position is that this reservation operates to reserve the 3/4 mineral interest to the record title owners in same proportion as their record title ownership, i.e., 1/3 of 3/4 to Lyngstads and 2/3 of 3/4 to Hallins according to the acknowledged and undisputed ownership proportions of their predecessors in title at the time of the 1960 Deed.

LAW AND ARGUMENT

[8] Under N.D.R.Civ.P. 56(c), summary judgment is appropriate "if either litigant is entitled to judgment as a matter of law and if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving factual disputes will not alter the result . . . [citations omitted] . . . whether a district court properly granted summary judgment 'is a question of law that we review de novo on the record'" Nichols v. Goughnor, 2012 ND 178 ¶9, 820 N.W.2d 740 (citing Melchior v. Lystad, 2010 ND 140, ¶7, 786 N.W.2d 8). The parties both agreed in their motions that summary judgment was proper. Further, the parties stipulated on the record in the May 2, 2012, hearing that there were no fact questions at issue and that the only question, that of how to interpret the 1960 Deed, was a question of law (Tr. at 3: 17 through 4: 6).

I. The District Court appropriately applied North Dakota laws on interpretation of a mineral deed which are based in both case law and statute.

[9] The issue in this case is whether the District Court followed the applicable rules of interpretation of the 1960 Deed. "The primary purpose in construing a deed is to ascertain and effectuate the grantor's intent." Nichols v. Goughnor, 2012 ND 178 ¶9, 820 N.W.2d 740 (citing Mueller v. Stangeland, 340 N.W.2d 450, 452 (N.D. 1983). "However, deeds that convey mineral interests are subject to the general rules governing contract interpretation, and we construe contracts to give effect to the parties' mutual intentions." Nichols, at ¶9 (citing Gawryluk v. Poynter, 2002 ND 205, ¶8, 654 N.W.2d 400. "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." Id. at ¶9. "If a contract is ambiguous, extrinsic

evidence may be considered to clarify the parties' intentions." Id. "Whether a contract is ambiguous is a question of law for the court to decide." Id. "On appeal, we independently review a contract to determine if it is ambiguous." Id.

[10] Hallins submit that the only relevant factor was the intent of the parties at the time they executed the 1960 Deed. In other words, at that time, did all Grantors in the 1960 Deed intend to effect a division of the reserved minerals through a conveyance from Walter Brandt of a portion of his previously-owned minerals to Emma and John Lyngstad? The District Court determined that they did not. "A court must interpret a contract to give effect to the mutual intention of the parties as it existed at the time of contracting." N.D.C.C. §9-07-03; Kaler v. Kraemer, 1999 ND 237, ¶13, 603 N.W.2d 698; Pamida, Inc. v. Meide, 526 N.W.2d 487, 490 (N.D. 1995); Hsu v. Marian Manor Apartments, 2007 ND 205, ¶9, 743 N.W.2d 672. "The construction of a written contract to determine its legal effect is generally a question of law." Kaler, at ¶13 (citing Pamida, at 490). "In interpreting a written contract, a court should ascertain the intention of the parties from the writing alone if possible." N.D.C.C. §9-07-04; Kaler, at §13 (citing Pamida, at 490); Hsu, at ¶9.

[11] Lyngstads assert that this case should be reversed based on their argument that the District Court did not apply the rules set forth in Gawryluk v. Poynter, 2002 ND 205, 654 N.W.2d 400, to the plain language of the 1960 Deed. This assertion is without basis. The District Court correctly recognized that this case involves a dispute between two sets of Grantors, rather than between a Grantor and a Grantee, saying . . . "[t]he problem with relying upon . . . [the general rule set forth in the Gawryluk decision] . . . is that it is generally employed to resolve a dispute arising between the grantor and the grantee."

(App. at 14, ¶2) The District Court went on to note that the 1960 Deed ". . . is a deed between two sets of grantors, as one party to the contract, and the grantee, Hukkanen, as a party to the contract . . . [and that] . . . [t]his dispute, however, is between the two groups of grantors, Emma Lyngstad and John Lyngstad as husband and wife, and Walter Brandt and Esther Brandt as husband and wife." (App. at 15, ¶2). However, even though it distinguished the instant case factually from the host of cases which have applied the Gawryluk rules of interpretation to mineral deeds, stating that "[t]he general rules for resolving disputes between two opposite parties to a contract are therefore of little or no value" (App. at 15, ¶2), the District Court went on to properly apply the rules of law found in Gawryluk, Id.

[12] The District Court's conclusion that there are "two sets of grantors" is sound and supported in case law. Support for this is found in the Duhig rule. Duhig v. Peavey-Moore Lumber Co., 144 S.W.2d 878 (Tex. 1940). In Duhig, ". . . a third party owned an outstanding one-half mineral interest in certain land, and the grantor owned the surface and the remaining one-half mineral interest. The grantor conveyed the surface to the grantee by warranty deed but reserved one-half of all the minerals under the land . . . [t]he Texas Supreme Court concluded the grantee owned the surface and a one-half mineral interest, the third party owned the outstanding one-half mineral interest, and the grantor owned nothing." Nichols V. Goughnor, 2012 ND 178, ¶15, 820 N.W.2d 740; Gawryluk v. Poynter, 2002 ND 205, ¶12, 654 N.W.2d 400; both citing Duhig v. Peavey-Moore Lumber Co., 144 S.W.2d 878, 879-880 (Tex. 1940). The Court in Nichols explained the meaning of the Duhig rule, saying that "[t]he effect of Duhig is that a grantor cannot grant and reserve the same mineral interest, and if a grantor does not own a large enough

mineral interest to satisfy both the grant and the reservation, the grant must be satisfied first because the obligation incurred by the grant is superior to the reservation." Nichols at ¶15. "Because the grantor purported to retain a one-half mineral interest and the other one-half mineral interest was owned by a third party, the grantor breached the clause warranting title to a one-half mineral interest." Nichols at ¶15.

[13] Extension of the Duhig rule to Lyngstads' argument opposing the District Court's determination that there were "two sets of grantors" could lead to an untenable result in all cases where grantors to deeds are tenants in common owning differing fractional interests. It is undisputed that the 1960 Deed is a "Warranty Deed" wherein the Grantors agree to "warrant and defend" the title they convey to the Grantee. (App. at 7). In the instant case, under Lyngstads' argument, if the title in a grantor who owns a larger share of the minerals or surface (Walter Brandt) fails for any reason, the owner of the lesser share (Emma Lyngstad) could be argued to have warranted title to, in the instant case, for example, 100% of the surface interest. Further extension of that reasoning to the instant case could lead to the result that an action for breach of warranty for failure of Walter Brandt's title could then have been maintained against Emma Lyngstad because she warranted title to 100% of the surface, but only owned marketable title to a 1/3 interest in her own name. Currently, under the Duhig rule, the owner of the lesser interest would only have to "satisfy the grant" up to the interest that they do own. If this Court were to accept Lyngstads' argument that two owners of unequal percentages constitute one grantor when they join in the same deed, it would have to carry through with enforcement of "grant" and "warranty" clauses in the nature of the Duhig rationale. This would result in countless actions for damages for breach of warranty as described above. "The

interpretation of deeds within the framework of the Duhig rationale provides certain and definite guidelines in the interpretation of property conveyances and in title examinations." Nichols, supra, at ¶15. Hallins submit that this Court's use of the phrases "interpretation of deeds" and "interpretation of property conveyances" means that the Duhig rationale also applies to surface interests, and is not intended to apply only to mineral interests. For this reason, the District Court's recognition that Walter and Esther Brandt, as owners of a 2/3 interest, are one "set of Grantors" in the 1960 Deed, and Emma and John Lyngstad, as owners of a 1/3 interest, are the other "set of Grantors", is sound and rationally based in case law.

[14] Lyngstads argue that the intent of all of the Grantors' who executed the 1960 Deed to equalize among them the ownership of all of the reserved minerals is contained within the plain language of the mineral reservation in the 1960 Deed. (Brief of Defendants/Appellants at ¶23, and ¶25). However, the actual mineral reservation states in pertinent part: "Excepting from the premises herein conveyed and expressly reserving unto the grantors herein an undivided 3/4 interest in and to all of the oil, gas and other minerals…". (App. at 7, and App. at 13, ¶7). Neither the District Court nor the parties cited case law directly on point for resolving a dispute between two sets of Grantors over the division of ownership of minerals reserved in a deed. Hallins argued that a mineral owner can only reserve from the interest that they owned when they convey property. Sharing of one owner's real property interest (minerals) with another person requires evidence of intent to convey from the owner to the other person. The District Court agreed.

[15] Guidance for application of the general rules of contract to ascertain mutual intention of parties to a contract (a mineral deed) under the Gawryluk decision is found in statutory authority. "A court must interpret a contract to give effect to the mutual intention of the parties as it existed at the time of contracting." N.D.C.C. §9-07-03; Kaler v. Kraemer, 1999 ND 237, ¶13, 603 N.W.2d 698; Pamida, Inc. v. Meide, 526 N.W.2d 487, 490 (N.D. 1995); Hsu v. Marian Manor Apartments, 2007 ND 205, ¶9, 743 N.W.2d 672. "In interpreting a written contract, a court should ascertain the intention of the parties from the writing alone if possible." N.D.C.C. §9-07-04; Kaler, at §13 (citing Pamida, at 490); Hsu, at ¶9. The District Court properly applied these rules in its analysis when it focused on the plain language of the 1960 Deed and found no interpretation or evidence showing intent of the parties at that time to convey any portion Walter Brandt's minerals to Emma and John Lyngstad.

[16] Walter Brandt owned the larger share of the minerals than Emma Lyngstad at the time of execution of the 1960 Deed (App. at 12, ¶6). The District Court determined that the only way to find that a portion of Walter Brandts' minerals could have become the property of Emma and John Lyngstad was by a written conveyance from him to them. (App. at 16, ¶5). The District Court properly recognized that Lyngstads were effectively asking it to find, interpret and give effect to some claimed agreement or contract of mineral conveyance between the two sets of Grantors contained within the plain language of the 1960 Deed (App. at 15, ¶3), so it first looked for a written expression of such agreement in the Deed. (App. at 14, ¶1). "[A]n estate in real property can be transferred only by . . . an instrument in writing, subscribed by the party disposing of the same." (App. at 16, ¶5) (citing R.C. 1943, Section 47-1001 (now §47-10-01, N.D.C.C.)). The

District Court found that the plain language of the 1960 Deed, which contained the mineral reservation in question, and which was stipulated by the parties and acknowledged by the District Court to be the only evidence before it, contained no expressed agreement/contract of conveyance, ruling that "[t]here is no evidence of any written agreement subscribed to by Walter Brandt and Esther Brandt to convey any mineral interest to Emma Lyngstad and John Lyngstad so as to equalize everyone's percentage of ownership." (App. at 16, ¶5). In light of this, Hallins assert that there is no merit to Lyngstads' argument that "[i]t appears the district court did not consider the reservation of the subject minerals as a transaction or a conveyance." (See Brief of Defendants/Appellants at ¶32). Since the District Court found no evidence of an expressed agreement/contract of conveyance found in the plain language of the 1960 Deed, it moved on to analysis of the general rules of contracts relating to implied contracts under §47-10-01, N.D.C.C., in an effort to determine if the Lyngstads' claim had merit.

[17] The District Court analyzed Lyngstads' claim under general rules of contracts by questioning whether there was any reasonable interpretation ". . . that the execution of the 1960 deed created an implied contract of conveyance by Walter Brandt and Esther Brandt of a portion of their mineral interests to Emma Lyngstad and John Lyngstad so as to equalize their ownership interest, 1/2 of 75% to each husband and wife set." (App. at 16, ¶5). The District Court cited §9-06-01, N.D.C.C., as the rule that "[a] contract . . . may be implied, that is, one in which the existence and terms of the contract are manifested by conduct" (App. at 15, ¶4); B.J. Kadrmas, Inc. v. Oxbow Energy, 2007 ND 12, ¶11, 727 N.W.2d 270. "A contract implied in law is a fiction of law adopted to achieve justice

where no true contract exists." Estate of Zent, 459 N.W.2d 795 (ND 1990). The District Court ruled that, although it ". . . may, in this case, find that there was an implied agreement between the two groups of grantors, that is, the Lyngstads and the Brandts, to convey a property interest to Hukkanen . . . [because] . . . [b]y their conduct they did so . . . [it could not] . . . create an additional implied contractual term where there is no conduct by the parties which would be evidence of their intention." (App. at 15-16, ¶4). In other words, an implied contract of conveyance can be found in every deed between a Grantor and a Grantee by virtue of their conduct in executing, delivering, and accepting the deed. The District Court properly recognized that the virtually automatic conclusion of the existence of an implied contract to convey that is present in everyday conveyances between "grantors and grantees" to a deed cannot be assumed to exist between "grantors and grantors". The District Court clearly applied the rules relating to implied contracts to the 1960 Deed in finding no merit in Lyngstads' claim that it operated to convey a portion of Walter Brandt's mineral interest to Emma and John Lyngstad.

[18] The District Court further analyzed the evidence (the 1960 Deed) under North Dakota's statute of frauds, §9-06-04, N.D.C.C.. "[A]ll agreements for the sale of real property, or any interest therein, must be in writing." (App. at 16, ¶6, citing §9-06-04, N.D.C.C.). Under this section, all agreements or contracts for the sale of real property or any interest therein, including mineral interests, must be in writing. Lohse v. Atlantic Richfield, 389 N.W.2d 352, 354 (ND 1986). Again, after reading the plain language of the 1960 Deed, the District Court ruled that "[t]here is no writing which conveys any mineral interest from Walter Brandt and Esther Brandt to Emma Lyngstad and John Lyngstad . . . [and] . . . [t]he Court cannot imply the existence of that agreement." (App.

at 16, ¶6). This is a proper application of the general rules of contract by the District Court in analyzing and interpreting the plain language of the 1960 Deed.

[19] Lyngstads suggest that the District Court's analysis of expressed and implied contracts, §9-06-01, N.D.C.C., and the statute of frauds, §9-06-04, N.D.C.C., as applied to the 1960 Deed constitutes reversible error when they suggest that the District Court essentially "created" an agreement and then based its decision to rule against Lyngstads on the fact that such agreement did not exist. Lyngstads argue that " . . . the parties never raised . . . [the issue of the existence of an undisclosed and undetermined agreement, i.e., an expressed or implied contract] . . . because there was no evidence any such agreement ever existed . . . [and therefore] . . . [t]he court's analysis is erroneous and not supported by the law." (Brief of Defendants/Appellants at ¶21 and 22). Further, Lyngstads would have this Court believe that the District Court's application of general rules of contract relating to implied contracts took it "outside the 1960 Deed to consider parol evidence or to deem the lack of a separate agreement outside of the 1960 Deed controlling". (Brief of Defendants/Appellants at ¶28). This assertion is misguided and does not accurately characterize the analysis of the District Court in any reasonable way. Hallins agree that no evidence or argument was ever presented that the 1960 Deed was incomplete or inconclusive, and further agreed that there was no need for the District Court to look further than the 1960 Deed. (See Brief of Defendants/Appellants at ¶23). In fact, every aspect of the analysis by the District Court refers to its interpretation of the 1960 Deed and its inability to find in it any type of agreement, expressed or implied, by Walter Brandt to convey a portion of his minerals to Emma and John Lyngstad. All the District Court did that Lyngstads claim was error was to analyze the conduct of the parties in

conjunction with the plain language of the 1960 Deed, ascertaining and pointing out that that no implied contract or agreement of conveyance, which could have supported the Lyngstads' claim, could be found in the plain language of the 1960 Deed, or in the conduct of the Grantors at the time of execution thereof. The District Court properly applied the general rules of contract relating to implied contracts as one element of its analysis and never once said that an implied contract existed, as is argued by Lyngstads (See Brief of Defendants/Appellants at ¶29). Nor did the District Court create any such agreement, and then rely on its nonexistence, as is argued by Lyngstads. In fact, the District Court only pointed out that one did not exist, and that it therefore ". . . cannot imply the existence of that agreement". (App. at 16, ¶5 and ¶6). Lyngstads' argument that the District Court decided this case upon an existing implied contract or agreement mischaracterizes the District Court's decision. (See Brief of Defendants/Appellants at ¶30).

[20] Lyngstads make a number of contradictory arguments that Hallins will attempt to address one at a time. Lyngstads again argue that "[a] separate agreement or contract, analyzed by the district court, would have been parol evidence." (Brief of Defendants/Appellants at ¶25). Hallins see no merit in this argument since the District Court actually said that such "a separate agreement or contract" did not exist when it said that ". . . [t]he Court cannot imply the existence of that agreement." (App. at 16, ¶6).

[21] Lyngstads make the alternative argument that, if the Court were to find that the language of the 1960 Deed was ambiguous, extrinsic evidence of the later actions by Esther Brandt, in probating Walter Brandt's estate and then conveying minerals to herself and her children, show ". . . that the Grantors intended to reserve 1/2 of 3/4 of the

minerals to each of the Lyngstads and Brandts as Grantors." (Brief of Defendants/Appellants at ¶26). This position is contrary to case law. In deciding whether eight warranty deeds were to be read and construed together and united as one transaction, and applying the Gawryluk decision to the plain language of the eight warranty deeds, this Court found that ". . . the eight separate warranty deeds are unambiguous and cannot be read together as part of a single contract or one transaction . . . [because] . . . [n]othing on the face of each deed refers to the other deeds or indicates the deeds were dependant on each other or united into one transaction." Nichols v. Goughnor, 2012 ND 178 ¶14, 820 N.W.2d 740. Similarly, in the instant case, the District Court, in applying the Gawryluk decision, reviewed the plain language of the 1960 Deed (App. at 14, ¶1) and made no finding of ambiguity of the 1960 Deed.

[22] At oral argument, Lyngstads argued for the District Court to consider extrinsic evidence in determining the intent of the Grantors to the 1960 Deed. (Tr. 15: 2 through 18: 7). However, "[w]hen 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." Gawryluk, supra, at ¶9. "If a contract is ambiguous, extrinsic evidence may be considered to clarify the parties' intentions." Id. "Whether a contract is ambiguous is a question of law for the court to decide." Id. While the District Court did not specifically use the word "unambiguous", Hallins submit that the District Court's omission of Lyngstads' proffered extrinsic evidence is tantamount to a statement by the Court that it considered the 1960 Deed to be unambiguous. "On appeal, we independently review a contract to determine if it is ambiguous." Id. There is no ambiguity in the plain language of the 1960 Deed such as

would permit the introduction of extrinsic evidence. See Nichols, supra, at ¶14, and Gawryluk, supra, at ¶11 (both rejecting similar claims). Even so, subsequent probate of a deceased mineral owner's estate has been held to be non-persuasive as proof that the said mineral owner knew or accepted the effect later claimed by an opposing party in an earlier deed. Gawryluk, supra, at ¶20. At the time of the 1960 Deed, 1/3 of the minerals were owned by Emma Lyngstad and Walter Brandt was the owner of the other 2/3 of the minerals, not Esther Brandt. (App. at 12, ¶6). Esther's later actions after Walter's death are irrelevant to determine the intent of Walter Brandt at the time he signed the 1960 Deed. Lyngstads' argument at a later point in their brief that ". . . to the extent Hallins' arguments showed any ambiguities in the 1960 Deed, Hallins failed to rebut the Lyngstads' evidence concerning the subsequent conduct of Esther Brandt . . ." (Brief of Defendants/Appellants at ¶36), should be defeated under the same rationale.

[23] Lyngstads again mischaracterize the findings of the District Court by claiming that "[t]hat the district court recognized a separate agreement between the Grantors was an 'undisclosed and undetermined agreement which may, or may not have existed between' the Grantors 'before they signed the 1960 Deed.'" (Brief of Defendants/Appellants at ¶27, emphasis added). This is exactly the opposite of what the District Court "recognized" when it said that it could not find any additional agreement between the Grantors. What the District Court actually ruled was that "[t]he Court cannot, even through the legal fiction of an implied contract, find that the conduct of the parties conveyed any mineral interest between the two sets of grantors . . . [and] . . . [t]he Court cannot imply the existence of that agreement." (App. at 16, ¶5 and ¶6). Yet, Lyngstads persist in arguing that "[i]t was error for the district court to go outside the

1960 Deed to consider parol evidence . . .” (Brief of Defendants/Appellants at ¶28) consisting of that “separate agreement” they claim that the District Court found when it did not. Lyngstads’ support this claim of error by employing a “double negative” type of argument. They argue that the District Court ruled that this “separate agreement” did exist so it could consider the agreement as parol evidence and then find that it did not exist, relying on its nonexistence to rule in favor of Hallins and against Lyngstads. Hallins submit that, if you remove Lyngstads’ “double negative” from this argument, you find that the District Court simply did not find any separate agreement and, therefore, could not have considered it as parol evidence in making its ruling.

[24] Lyngstads imply that “[t]he district court raised the issue of the existence of an implied contract briefly at the hearing on the summary judgment motions.” (Brief of Defendants/Appellants at ¶29, citing “Tr. 20-21”, emphasis added). The reason Lyngstads do not quote the specific statements of the District Court from the transcript to make this point is because they do not exist. What the District Court actually said when addressing Lyngstads attorney, Mr. Pippin, was “I’m thinking, looking at 47-10-01, that says that any interest in real property can only be conveyed by an instrument in writing. How can that percentage, whatever that would happen to be, go from Mr. Carpenter’s clients to your clients without some kind of written conveyance instrument signed by them?” (Tr. 20: 20-25). The next statement cited by Lyngstads and attributed to the District Court as raising “the existence of an implied contract” is the following statement made to Mr. Pippin: “I guess, I’m puzzled here. Are you asking that I -- and do you have any case law that says that I can assume a transfer took place when there’s no document of conveyance?” (Tr. 21: 12-15). This is a misstatement of the record of the May 2,

2012, hearing which is being attributed to the Judge of the District Court. Then, citing B.J. Kadrmas, Inc. v. Oxbow Energy, LLC, 2007 ND 12, ¶7, 727 N.W.2d 270, Lyngstads go on to use this misstatement as support for an argument that a "clearly erroneous standard of review" should be applied to the findings of the District Court in the instant case. Specifically, Lyngstads argue support in B.J. Kadrmas, Inc., at ¶7, for a claim that ". . . any 'findings' the district court made regarding an implied contract . . ." should be reversed for three reasons drawn from the B.J. Kadrmas, Inc. decision. That it was an ". . . erroneous view of the law for the court to decide the issue of an implied contract was necessary . . . [that] . . . there was no evidence to support even the analysis let alone the court's findings on the issue of an implied contract, and a mistake was made by the district court in relying upon the existence or lack of an implied contract." (Brief of Defendants/Appellants at ¶29).

[25] Hallins have shown that the District Court was applying "general rules of contract" under the Gawryluk decision, supra at ¶8, when it found that no implied contract existed. Lyngstads' reliance on B.J. Kadrmas, Inc., supra, is misplaced because the issue they are referring to regarded the existence of a contract implied in fact. "Under contracts implied in fact, the court merely attempts to determine from the surrounding circumstances what the parties actually intended." B.J. Kadrmas, Inc., supra at ¶11, citing Bismarck Hospital Ass'n v. Burleigh County, 146 N.W.2d 887, 893 (N.D. 1966). B.J. Kadrmas, Inc. involved enforcement of an alleged oral contract and did not involve interpretation of a deed or other written instrument. There was no similarity in evidence presented because that case involved a bench trial with witnesses and testimony upon which the District Court decided issues of fact. This case was stipulated to have no

evidence other than the 1960 Deed and no testimony to consider. The authority cited by Lyngstads has no application here when the District Court analyzed the general rules of contract pertaining to a contract implied in law (a question of law) and decided that it had no evidence upon which to make a finding that such an agreement existed. Here, the District Court made no "findings" regarding any implied in fact contracts at all. The closest "finding" by the District Court in the instant case was that, as a question of law, no finding of implied contract could be supported by either the plain language of the 1960 Deed or the conduct of the Grantors. Lyngstads' reliance on an "implied in fact" contract argument is legally and factually misplaced.

[26] In another argument, Lyngstads state that "[i]t appears the District Court did not consider the reservation of the subject minerals as a transaction or a conveyance." (Brief of Defendants/Appellants at ¶32). The District Court held that it ". . . must interpret a deed by first looking at the plain language." (App. at 14, ¶1). Clearly, the District Court reviewed all of the plain language of the 1960 Deed, including the "reservation of the subject minerals" and determined that "[t]here is no writing which conveys any mineral interest from Walter Brandt and Esther Brandt to Emma Lyngstad and John Lyngstad." (App. at 16, ¶6). There is no support for the argument that the District Court's review of the plain language did not include a review of the mineral reservation.

[27] Lyngstads next argue that the District Court erred in ordering summary judgment in favor of Hallins ". . . because there was a lack of a separate, written agreement transferring any interests among the Grantors to the 1960 Deed." (Brief of Defendants/Appellants at ¶33). The District Court recognized that minerals, as an interest in real property, are subject to North Dakota's statute of frauds which requires

that all agreements for conveyance thereof must be in writing. (App. at 16, ¶6). The District Court reviewed the plain language of the 1960 Deed and determined that "[t]here is no writing which conveys any mineral interest from Walter Brandt and Esther Brandt to Emma Lyngstad and John Lyngstad." (App. at 16, ¶6). There is no support for any argument that the District Court somehow required a "separate, written agreement" to effect a transfer of minerals. The District Court only required a showing of some written agreement to support a claimed transfer of an interest in real property (minerals) from Walter Brandt to Emma and John Lyngstad pursuant to its analysis under North Dakota's statute of frauds and it looked to the plain language of the 1960 Deed in its attempt to find an agreement.

[28] In support of their claim that the mineral reservation operated to equalize ownership of the subject minerals among the Grantors, Lyngstads argue that N.D.C.C. §47-02-08 creates a presumption that ". . . a property interest created in favor of several persons is presumed to create an interest in common, which each tenant in common is equally entitled to the use, benefit, and possession of the common property." (Brief of Defendants/Appellants at ¶35); §47-02-08, N.D.C.C. This argument is misplaced in that it presumes a conveyance of minerals from Walter Brandt to Emma and John Lyngstad. The District Court found that there was no such conveyance. (App. at 16, ¶5 and ¶6).

[29] Lyngstads represent that ". . . Hallins failed to explain the Grantors' use of the phrase 'undivided 3/4 interest' when the Grantors reserved the subject minerals to themselves, which Lyngstads had argued showed the Grantors' intent." (Brief of Defendants/Appellants at ¶35). In the May 2, 2012, oral argument, the following appears in the transcript: "MR. CARPENTER: . . . Attorney Pippin's discussion of the word

'undivided' in the mineral reservation, I would submit is misplaced. Because what they're talking about in that case is not an undivided split of the minerals; it's an undivided interest in the minerals, which is common in mineral conveyances and reservations. It's always an undivided 50 percent or an undivided 10 mineral acres. It's undivided as to the whole of the property, not the parties." (Tr. 26: 12-18, emphasis added). Lyngstads argue that "[t]he 1960 Deed reserved an undivided 3/4 interest, not a 3/4 interest with 1/3 to be reserved to Emma Lyngstad and 2/3 to be reserved to Walter Brandt." (Brief of Defendants/Appellants at ¶37). Lyngstads' misunderstand the use of this common terminology in mineral reservations and conveyances. This Court held that "[a] mineral acre represents the full mineral interest on one acre, as an undivided interest in a larger described tract of land. . . . Consequently, in a tract containing 160 acres, an 80 acre mineral interest would be the same as an undivided 1/2 mineral interest." Hild v. Johnson, 2006 ND 217, ¶9, 723 N.W.2d 389, emphasis added. As Hallins explained at oral argument, the term "undivided" as used in the mineral reservation contained in the 1960 Deed refers to an undivided 3/4 of the entire 160 acres contained in the subject property or an undivided 120 net mineral acres out of 160 gross acres. It has nothing to do with how the reserved minerals are to be divided among the Grantors of the 1960 Deed. Lyngstads' argument is without merit.

[30] Lyngstads next argue that "[r]eformation here is inappropriate, because Hallins did not make the necessary pleadings to seek reformation, and any suit for reformation is barred by the statute of limitations." (Brief of Defendants/Appellants at ¶37). Hallins did not plead to seek reformation because they were not seeking reformation. Reformation is an inappropriate remedy when, as Hallins submit, the plain language of the 1960 Deed is

unambiguous. The District Court acknowledged that Hallins' request was only to interpret the plain, unambiguous language of the 1960 Deed (Tr. 3: 17-25 through 4: 1-6), and neither party was seeking reformation.

II. The District Court did not err by ordering summary judgment in favor of Plaintiffs/Appellees and quieting title in them.

[31] Lyngstads' argument that summary judgment should have been denied to Hallins and granted to them is based on their allegation that there is no evidence to support any interpretation of the plain language of the 1960 Deed other than that the Grantors intended to divide the reserved minerals into four equal portions. This position entirely ignores established rules for interpretation of third party mineral reservations. Further, Lyngstads' argument is directly contrary to accepted rules for interpreting mineral reservations to third parties who are strangers to the title. Extension of Lyngstads' rationale could make the equally implausible argument that the full 1/4 of the minerals warranted to the grantee in the 1960 Deed should have come from only the Lyngstad 1/3 interest because Emma and John Lyngstad were listed as the first grantor in the granting clause. Such an argument, with no basis found in the plain language of the deed, would clearly be against generally accepted rules of deed interpretation.

[32] In granting 1/4 of the minerals to the grantee in the 1960 Deed (effectively, by granting 100% and reserving 3/4 pursuant to the Duhig rule, supra), and absent plain language in the deed showing another intent, it is unreasonable to argue anything other than that 1/3 of the 1/4 minerals received by Hukkanen would have come from Emma Lyngstad and 2/3 of the 1/4 minerals received by Hukkanen would have come from Walter Brandt. In other words, Emma Lyngstad would have granted 100% of her 1/3

interest in the surface and minerals to Hukkanen, reserving 3/4 of her 1/3 mineral interest to herself; and Walter Brandt would have granted 100% of his 2/3 interest in the surface and minerals to Hukkanen, reserving 3/4 of his 2/3 mineral interest to himself. See, Duhig discussion, supra. This concept is so generally and historically accepted among mineral title examiners that that no one legitimately questions it. However, when it comes to the reservation, Lyngstads feel it is appropriate to apply a different rule of interpretation in order to support their theory of an intent that is not stated anywhere in the plain language of the deed.

[33] Hallins understand that Lyngstads stand to gain a significant interest if they can make a successful argument to extend their version of the rationale found in Malloy v. Boettcher, 334 N.W.2d 8 (N.D. 1983), to the plain language of the 1960 Deed. Lyngstads have put forth such an argument. (Brief of Defendants/Appellants at ¶¶46-50). Hallins dispute this argument and submit the following application of the Malloy rationale to the 1960 Deed. It should be noted that the District Court found the Malloy argument to be ". . . neither controlling nor persuasive in this context." (App. at 18, ¶10).

[34] Summary judgment to Hallins was appropriate because the settled law, as argued to the District Court, favors Hallins. North Dakota Mineral Title Standard 3-06 "Third Party Reservations" highlights an important distinction from Lyngstads' arguments regarding strangers to title, quoted here in its entirety:

> **Standard: An exception or reservation can be effective to convey a property interest to a spouse, who does not own an interest in the land prior to the deed, but joins in the execution of the deed, where it is determined to have been the grantor's intent. The title examiner is justified in determining that a spouse is not a "stranger" to the conveyance and may acquire a property interest through a reservation.**

Comment: In Stetson v. Nelson, 118 N.W.2d 685 (N.D. 1962), the court held that the grantor's attempted reservation to a third party stranger to the instrument was void as to the third party, but did, however, operate to reserve the minerals in the grantor.

In Malloy v. Boettcher, 334 N.W.2d 8 (N.D. 1983), the Supreme Court refused to apply Stetson where the third party is a spouse. In Malloy, the grantor and his wife conveyed an interest to their daughter. The deed "reserved to the parties of the first part a life estate." The grantor's wife did not own an interest prior to the deed. The court found the wife held a life estate interest in all of the lands conveyed.

A majority of the court in Malloy held a wife is not a "stranger," and therefore Stetson does not apply and the wife is allowed to acquire an interest through a third party reservation. Where the reservation is to a "true stranger," it is uncertain as to whether Malloy or Stetson would apply.

In either situation, the title examiner should require all parties to clarify their intent either by a stipulation of interest or quiet title action.

Authority: Malloy v. Boettcher, 334 N.W.2d 8 (N.D. 1983)
Stetson v. Nelson, 118 N.W.2d 685 (N.D. 1962)
1 Kuntz, *The Law of Oil and Gas*, section 14.4
1 Williams and Meyers, *Oil and Gas Law*, section 310.4

North Dakota Mineral Title Standards (NDMTS), Standard 3-06 Third Party Reservations (emphasis added)

[35] NDMTS 3-06 sets forth the standard that is generally accepted and applied by North Dakota mineral title examiners in the interpretation of third party mineral reservations. Application of this Standard, and the case law cited therein, to the plain language of the 1960 Deed leads to a single result that each mineral owner/grantor (2/3 Walter Brandt and 1/3 Emma Lyngstad) reserved minerals they owned in the same proportion in which they originally owned them. The only question under Malloy is whether each of the mineral owners/grantors effectively conveyed a mineral interest in their respective third party spouse by virtue of the mineral reservation in the 1960 Deed.

[36] As noted in NDMTS 3-06, in North Dakota, third party reservations are interpreted under either Malloy v. Boettcher, supra, or Stetson v. Nelson, supra. Both cases apply to third parties who join as grantors in the execution of deeds containing reservations of an interest in the real property being conveyed, but who are not already owners of an interest in the property. There is a significant distinction in that Malloy applies where the third party grantor is a spouse who does not already own an interest of record in their spouse's property; while Stetson applies where the third party grantor is not a spouse and does not already own an interest in the property. The distinction set forth by this Court between spouse and non-spouse third parties as illustrated in these two cases stands as support for Hallins' argument that the 1960 Deed should be interpreted as having only two grantors, the record title mineral owners, each joining with their respective spouses in the execution thereof. This distinction places the facts of the instant case squarely within both Malloy (spouse third party) and Stetson (non-spouse third party). No extrinsic evidence is needed or admissible in the application of these two cases to the plain language of the 1960 Deed. "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 . . .". Gawryluk v. Poynter, 2002 ND 205, ¶9, 654 N.W.2d 400.

[37] In Gawryluk v. Poynter, supra, this Court reiterated its holding in Mueller v. Stangeland, 340 N.W.2d 450, 452 (N.D. 1983) (citing Malloy v. Boettcher, supra, at 9) that ". . . [w]e have said the primary purpose in construing a deed is to ascertain and effectuate the grantor's intent . . . However, deeds that convey mineral interests are subject to the general rules governing contract interpretation . . . [citations omitted] . . .

and we construe contracts to give effect to the parties' mutual intentions." Gawryluk at ¶8. ". . . [A] question of fact becomes a question of law only when a reasonable person can draw a single conclusion from the evidence". Hurt v. Freeland, 1999 ND 12, ¶9, 589 N.W.2d 551. The parties stipulated on the record that interpretation of the 1960 Deed was a question of law. (Tr. 3: 17-25 through 4: 1-6).

[38] Under Malloy, supra, spouses are not considered strangers to title and application of Malloy would hold that only the spouses of the mineral title owners who join in execution of the deed are deemed to acquire an interest in the real property (minerals) under a third party reservation if it is determined that the grantor/mineral owner intended that result. Assuming that Walter Brandt intended to give his spouse, Esther Brandt, an interest in his reserved minerals, and that Emma Lyngstad intended to give her spouse, John Lyngstad, an interest in her reserved minerals, the result would be that Walter and Esther Brandt jointly owned Walter's 2/3 of the reserved 3/4 of the minerals and Emma and John Lyngstad jointly owned Emma's 1/3 of the reserved 3/4 of the minerals. This is the first of two theories applying the Malloy rationale that supports Hallins' request to quiet the title.

[39] Under the second theory, Hallins submit that the Malloy Court left open the argument that Stetson v. Nelson, supra, may still apply where the third party is not a spouse. Justice Vandewalle emphasized the narrow extent of the Malloy ruling by stating that ". . . [t]he issue presented to us in the instant case was merely whether or not a wife is a stranger to the title. The parties neither raised nor briefed the larger issue of completely abrogating the holding in Stetson v. Nelson . . .". Malloy, at 11. Further, in his concurring opinion, Justice Pederson considers a wife (spouse) to be a necessary party

in North Dakota to a transaction conveying her husband's (spouse's) real property, stating that ". . . [i]t is a misnomer to label . . . [a wife] . . . a stranger in this case. When a case involving a real stranger comes along, I think this court may very well want to apply Stetson v. Nelson." Id., at 11 (emphasis added).

[40] It is noteworthy that a panel of experienced North Dakota title attorneys working through the Bar Association as the Mineral Title Standards Committee believes that the this Court may very well apply Stetson in situations where the third party reservation involves a stranger to title who is not the spouse of the grantor (See NDMTS 3-06, Comment, supra). Therefore, when Stetson is applied, the result is necessarily consistent with the language of Malloy, citing Stetson, that "a reservation or exception in a deed of conveyance cannot operate as a conveyance to a third party who is a stranger to the title or deed". Malloy, at 8.

[41] Lyngstads' argument that the minerals were divided into four equal portions is inconsistent with both Stetson and Malloy since achieving the desired "equal" distribution requires an interpretation of the plain language of the 1960 Deed holding that John Lyngstad be given a portion of Walter Brandt's minerals. However, applying Malloy and Stetson, John Lyngstad cannot be deemed to have acquired a mineral interest from Walter Brandt, absent a clear statement in the plain language of the 1960 Deed that it was Walter Brandt's intention to do so, because John Lyngstad was not the spouse of Walter Brandt (Malloy) and he was a stranger in title as to Walter Brandt (Stetson). It is simply not possible to "equalize" ownership of the reserved minerals as argued by Lyngstads in any other way than to take minerals from Walter Brandt and effectively give them to John Lyngstad. With this in mind, proper application of the rules of

interpretation set forth in Malloy and Stetson leads to only one reasonable conclusion that, after the 1960 Deed, Walter and Esther Brandt jointly owned Walter's 2/3 of the reserved 3/4 of the minerals and Emma and John Lyngstad jointly owned Emma's 1/3 of the reserved 3/4 of the minerals. This is the second of two theories applying the Malloy rationale that supported Hallins' request to quiet the title.

[42] Application of the generally accepted rules of interpretation from Malloy and Stetson make it clear that there are no genuine issues of material fact or inferences which can be reasonably drawn from the undisputed facts of the instant case. Application to the plain language of the 1960 Deed of the rule for interpreting reservations to spouse third parties as set forth in Malloy, and the rule for interpreting reservations to non-spouse third parties as set forth in Stetson, as a question of law, both lead to the same conclusion that, after the 1960 Deed, Walter and Esther Brandt jointly owned Walter's previously owned 2/3 proportion of the reserved 3/4 of the minerals and Emma and John Lyngstad jointly owned Emma's previously owned 1/3 proportion of the reserved 3/4 of the minerals. After the 1960 Deed, whether Walter Brandt alone owned his 2/3 share, or whether Walter and Esther Brandt owned it jointly would lead to the same result. Either way, Hallins succeeded to the same interest.

CONCLUSION

[43] For these reasons, based upon the undisputed facts, the pleadings, and North Dakota statutory and case law, Hallins respectfully submit that this Court affirm the Summary Judgment in their favor, as granted by the District Court, quieting title in Hallins.

Respectfully submitted this 10th day of January, 2013.

Kerry J. Carpenter
Kerry J. Carpenter, Attorney for Appellee (ND #03739)
2039 North Kavaney Drive
Bismarck, ND 58501-1642

CERTIFICATE OF SERVICE

[44] I hereby certify that a copy of the foregoing Appellee's Brief was served on Charlotte J. Skar, Attorney at Law, Nilles Law Firm, 201 N 5th Street, 1800 Radisson Tower, PO Box 2626, Fargo, ND 58108-2626 by placing a copy of the same in the U.S. mail, properly addressed and with sufficient postage thereon on this 10th day of January, 2013.

Kerry J. Carpenter
Kerry J. Carpenter, Attorney at Law (ND #03739)

CERTIFICATE OF COMPLIANCE

[45] I hereby certify under Rule 32 N.D.R.App.P. that this Appellee's Brief on Appeal was prepared in Word format, using 12-point Times New Roman proportional font, and contains less than 10,500 words (9,548).

Kerry J. Carpenter
Kerry J. Carpenter, Attorney at Law (ND #03739)