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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Joan Marie Hallin and John P. Hallin; and Susan Kay Bradford,	)	
	)	**Supreme Court Case No. 20120354**
Plaintiffs/Appellees,	)	
vs.	)	
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,	)	**CIVIL NO. 31-2011-CV-00191**
Defendants/Appellants.	)	

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REPLY BRIEF OF DEFENDANTS/APPELLANTS

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APPEAL FROM THE JUDGMENT ENTERED ON THE 4th DAY OF OCTOBER, 2012, IN DISTRICT COURT, COUNTY OF MOUNTRAIL, STATE OF NORTH DAKOTA, THE HONORABLE GARY H. LEE PRESIDING

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LAW AND ARGUMENT

[1] This Brief will use the designations from its initial Appellants' Brief: the Appellants shall be referred to as "Lyngstads," the Appellees as "Hallins," and the deed at issue as the "1960 Deed."

1. Contrary to Hallins' Arguments, the District Court Did Not Interpret the 1960 Deed and Relied on the Lack of a Separate, Written Agreement.

[2] The district court clearly stated in its Order that, "The Court is not interpreting the Deed." (Order 7, Docket ID # 25.) Despite the parties' repeated contentions that there was no surrounding evidence separate and apart from the language in the 1960 Deed to show the Grantors' intent, the district court did not interpret the language in the 1960 Deed.

[3] The parties both recognized that the legal effect of the language and its value in showing the Grantors' intent was controlling. The court's decision was based on an issue that the parties did not raise or brief. It cannot be denied that the district court looked for a separate agreement between the grantors "before they signed the Deed." (Order 7, Docket ID # 25.) Contrary to the statements in Hallins' Brief, at no point in time did Lyngstads ask the court to look for a separate agreement. (See Appellees' Br. ¶ 16.) Lyngstads and Hallins both asked the court to make a decision on the legal effect of the deed language and what it showed of the Grantors' intent. Lyngstads never briefed, nor argued the issue of, an "implied contract of conveyance." (Order 5, Docket ID # 25.) Lyngstads continue to argue that an agreement between the parties is necessarily included in the language of the 1960 Deed alone.

[4] Lyngstads have raised these issues for a very important reason: after researching the issues raised by the district court, Lyngstads have been unable to find any support for

analyzing implied, unwritten contracts in interpreting a deed where the parties both acknowledged no other agreement existed. While separate agreements might be relevant where they are known to exist and the parties' use separate agreements to prove intent, such was not the case here. Lyngstads have been unable to find any case where the parties acknowledge there is no other agreement, implied or otherwise that shows the Grantors' intent, yet the court still looks outside the deed language to rely on the lack of an agreement, just because the issue is between two grantors rather than a grantor and grantee.

[5] As an example, in Malloy v. Boettcher, an owner made a reservation and included his wife in the reservation. 334 N.W.2d 8, 8 (N.D. 1983). That conveyance involved a grantor and a person named in the grantor portion. Id. The courts did not look to see what other agreements may have existed to explain the transaction, and the parties did not introduce any extrinsic evidence. Id. The courts looked to the language of the deed at issue. Id. The same applies here. Two grantors and two others named in the grantor portion made a reservation, and the deed language is the transaction and the only evidence of what transpired. The Lyngstads have found no case that says even where the language of the deed is the only evidence, the court should still look elsewhere simply because the issue is between two grantors.

[6] Likewise, Lyngstads have been unable to find case law in jurisdictions following the same rules for reservations as North Dakota that require a separate written agreement to convey property. The statute of frauds was satisfied by the 1960 Deed itself. Again, the Court was looking for external evidence where it was admitted over and over again that none existed. The point on the parol or extrinsic evidence arguments made by Lyngstads,

is that the court was looking for extrinsic evidence. When the court relied on the fact there was no extrinsic evidence, it ruled in favor of Hallins. Hallins argue this is appropriate because there is no evidence on equalization of ownership interests, but it must be noted there is no evidence on proportion of ownership interests in the 1960 Deed either.

2. Contrary to Hallins' Arguments, the Opinion of the Malloy Court Declined to Follow the Majority Rule on Reservation of Interests, and the Spouse/Stranger-to-Title Distinction is of No Consequence.

[7] The Supreme Court's decision in Malloy v. Boettcher may appear complicated. Lyngstads submit that the opinion of the Court, written by then-Chief Judge Erickstad, abrogated the common law rule that a reservation could not be a conveyance to a third party, as the language is in the opinion of the Court. 334 N.W.2d at 9. The issue is really as simple as that. Whether or a not a spouse is a stranger to title or a third party is not a determinative consideration, because with the abrogation of the common law rule, the spouse/non-spouse distinction really does not matter. For the sake of brevity, Lyngstads will not repeat their analysis on Malloy's application to this case, as an analysis is contained in Lyngstads' initial Appellants' Brief.

[8] To the extent the North Dakota Mineral Title Standards are "uncertain" on whether Malloy or Stetson v. Nelson, 118 N.W.2d 685 (N.D. 1962) should apply where the third party is a spouse, the North Dakota Title Standards cited by Lyngstads in their Appellants' Brief (¶ 50) might conflict. Regardless of the possible conflict between the North Dakota Mineral Title Standards and the North Dakota Title Standards, the Court said the common law rule that a reservation could not be a conveyance to a third party was abrogated in Malloy, which was decided in 1983.

3. **The Duhig Rule Does Not Apply in this Case.**

[9] The Duhig rule does not apply in this case, because the issue is not whether the Grantors tried to convey more than they owned while making a reservation. See Melchior v. Lystad, 2010 ND 140, ¶ 8, 786 N.W.2d 8. That analysis does not apply.

[10] In their arguments related to the Duhig rule, Hallins argue there are two sets of Grantors in this case, and that Lyngstads have erroneously argued each of the Grantors is a separate party. On the contrary, Lyngstads have argued that whether there were four separate Grantors or two sets of Grantors does not really matter, because the outcome is the same. (Defs.' Br. in Reply to Pls.' Resp. to Mot. for Summ. J. pp. 5-6, Docket ID # 17.) Lyngstads have not opposed any determination that there were two sets of grantors in this case. (See Appellees' Br. ¶ 13.) Likewise, Lyngstads did not argue that the named Grantors became one grantor as Appellees assert in their Brief. (See id.)

[11] Hallins also raise issues of breach of warranty and marketable title under its Duhig analysis, which has no place in this case. The parties have not briefed the issue in the district court or the Supreme Court until the Appellees' Brief, and Lyngstads argue that these issues do not apply in the present case. Breach of warranty and marketable title issues have not been issues. Hallins' slippery slope argument is also misplaced.

4. **The Issue of the Subsequent Deeds was Provided for an Alternative, in Case a Court Determined the Deed was Ambiguous.**

[12] Hallins have argued that Lyngstads cannot bring in extrinsic evidence on the Grantors' intent. While Lyngstads agree the language of the Deed controls, Lyngstads also recognize that the Deed could still be declared ambiguous. Lyngstads' alternative argument regarding Esther Brandt's subsequent conduct is just that –alternative proof for the Court in case the 1960 Deed is deemed ambiguous at some point.

CONCLUSION

[13] For the foregoing reasons, Defendants/Appellants Lyngstads respectfully request the Court to reverse the District Court's Order and Judgment and direct summary judgment in favor of Lyngstads.

DATED this 24th day of January, 2013.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Defendants/Appellants hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains **1,340** words from the portion of the brief entitled "Law and Argument" through the signature block. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

Dated this 24th day of January, 2013.

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STATE OF NORTH DAKOTA
COUNTY OF CASS

Judy Fennell, being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Fargo, North Dakota, not a party to nor interested in the action, that she served the attached document(s):

REPLY BRIEF OF DEFENDANTS/APPELLANTS (Microsoft Word)

on the following person:

Kerry J. Carpenter Kerry@bis.midco.net

by electronic mail on January 24, 2013; that to the best of Affiant's knowledge, the electronic mail address is that of the party intended to be so served. The above documents are mailed by e-mail and in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Judy Fennell

SUBSCRIBED AND SWORN to before me on January 24, 2013.

Notary Public

SARAH D. KLAVA
Notary Public
State of North Dakota
My Commission Expires July 13, 2016