20120354
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
November 26, 2012
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,	**Supreme Court Case No. 20120354**
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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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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TABLE OF CONTENTS

Paragraph No.

TABLE OF AUTHORITIES

CASES **Paragraph No.**

STATUTES AND RULES **Paragraph No.**

SECONDARY SOURCES **Paragraph No.**

STATEMENT OF THE ISSUES

[1] 1. The District Court erred by creating the issue of, and relying upon, the lack of evidence on a contract or agreement between the Grantors to a Warranty Deed, which contract or agreement would have been separate from the Warranty Deed containing a reservation of mineral interests to the Grantors in the Warranty Deed. The dispute in this case arose from a reservation of mineral interests to the Grantors in a Warranty Deed.

[2] 2. The District Court erred by ordering summary judgment in favor of Plaintiffs/Appellees and quieting title in them.

[3] 3. The District Court erred by denying summary judgment for the Defendants/Appellants.

STATEMENT OF THE CASE

[4] 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, ordered summary judgment in favor of Plaintiffs/Appellees ("Hallins"), denied summary judgment in favor of Defendants/Appellants ("Lyngstads"), and quieted title of the disputed mineral interests in the Hallins. (App. 5-13.)

[5] Hallins served a Summons and Complaint upon Lyngstads on November 21, 2011, claiming they are the rightful owners of certain mineral interests located in Mountrail County. (R. at Doc. ID # 1, 2.) Hallins alleged that they were the rightful owners of 2/3 of 3/4 of the mineral interests that were the subject of the action, as they are successors-in-interest to Grantors of a 1960 Warranty Deed ("1960 Deed"), Walter and Esther Brandt. (R. at Doc. ID # 2, Compl. at ¶ V.) The 1960 Deed is the subject of the dispute between the parties. (Id.) Hallins alleged that the Lyngstads were the owners

of 1/3 of the same 3/4 of the mineral interests, as they were successors-in-interest to Grantors Emma and John Lyngstad in the 1960 Deed. (Id.)

[6] By an Answer dated December 20, 2011, Lyngstads disputed Hallins' interpretation of the reservation language in the 1960 Deed. (R. at Doc. ID # 4.) It was not disputed that Hallins and Lyngstads all had interests in the mineral interests that were the subject of the quiet title action, but the proportion of ownership was in dispute. (R. at Doc. ID # 4, Answer ¶ 3, 7.) Lyngstads alleged that the Grantors named in the 1960 Deed, Emma and John Lyngstad and Walter and Esther Brandt ("Grantors") reserved the mineral interests in equal proportion, according to the language of the 1960 Deed. (Id.) The Lyngstads alleged they were the owners of 1/2 of the 3/4 of the mineral interests in dispute, and the Hallins were the owners of the other 1/2 of the 3/4 of the mineral interests. (Id.)

[7] Lyngstads moved for summary judgment and an order quieting title of the disputed mineral interests in them on February 7, 2012. (R at Doc. ID # 5.) Lyngstads argued there were no material issues of fact to resolve, and the only issues to be resolved were the interpretation and effect of the reservation language in the 1960 Deed. (R. at Doc. ID # 6, Br. in Supp. of Defs.' Mot. for Summ. J. 3.) Lyngstads argued the Grantors' intent in making the 1960 Deed was supreme. (Id. at 4-5.) Lyngstads argued the language in the 1960 Deed was unambiguous and showed the Grantors' intent was to reserve an "undivided" 3/4 interest as equal tenants in common in the mineral interests represented in the 1960 Deed. (Id. at 5-6.) To the extent one of the Grantors, Walter Brandt, had owned a larger share of disputed mineral interests prior to the 1960 Deed and two of the Grantors were spouses of title owners, Lyngstads argued any reservation to a stranger to

the title or spouse to a title owner is a conveyance under North Dakota law. (Id. at 7-8.) Lyngstads also argued that, if the Court were to decide the language of the 1960 Deed was ambiguous, then the only other evidence on the Grantors' intent also supported Lyngstads' interpretation of the 1960 Deed. (Id. at 6-7.) Subsequent conveyances by one of the Grantors, Esther Brandt, showed that the Brandts (predecessors-in-interest to Hallins) collectively reserved 1/2 of 3/4 of the subject minerals, in accordance with their intent as Grantors. (Id.) Further, the relief Hallins requested would request reformation of the 1960 Deed, which was not warranted or allowed in this case. (Id. at 8-9.)

[8] In response to the summary judgment motion, Hallins agreed that summary judgment was appropriate because interpretation and effect of the plain language of an unambiguous deed was the only issue to be decided. (R. at. Doc. ID # 10, Pls.' Resp. to Defs.' Mot. for Summ. J. and Cross-Mot. for Summ. J. 5.) Hallins argued Lyngstads' interpretation of the reservation of mineral interests in the 1960 Deed was not rational, and it did not make sense that Walter Brandt would convey any of his mineral interests to the Lyngstads through the reservation. (Id. at 7-8.) Hallins also disputed Lyngstads' interpretation of an opinion by the North Dakota Supreme Court, Malloy v. Boettcher, 334 N.W.2d 8 (N.D. 1983), which applied to the issue of conveyance to John Lyngstad and Esther Brandt, previously not named as owners on the title. (Id. at 13-15.) Lyngstads filed a Reply Brief on March 12, 2012. (R. at Doc. ID # 17.)

[9] Hallins made a cross-motion for summary judgment on March 28, 2012. (R. at Doc. ID # 18.) Hallins re-argued many of their arguments from their response to the summary judgment motion, and argued that Walter Brandt, one of the Grantors and a record title owner, could not convey any mineral interests to another Grantor, John

Lyngstad as he was a stranger to the interests of Walter Brandt. (Id.) Lyngstads filed a Response to the cross-motion for summary judgment on April 16, 2012. (R. at Doc. ID # 23.)

[10] Oral argument on the motions for summary judgment was heard on May 2, 2012 before the Honorable Judge of the District Court Gary Lee. Attorney Malcolm Pippin of the Nilles Law Firm appeared on behalf of the Lyngstads, and Attorney Kerry Carpenter appeared on behalf of the Hallins.

[11] The district court entered a memorandum order on July 16, 2012. (R. at Doc. ID # 25.) The court decided there was no evidence of a separate contract or agreement between the Grantors, which separate agreement the court said was necessary for any interests to be conveyed among the parties. The court ordered summary judgment in favor of Hallins. A "Judgment" was entered on the same date. (R. at Doc. ID # 26.) Notice of Entry of Judgment was made on July 26, 2012. (R. at Doc. ID # 27.) Lyngstads filed a notice of appeal on September 14, 2012. (R. at Doc. ID # 29.) A judgment quieting title in favor of Hallins was entered on October 3, 2012. (App. 5-13, R. at Doc. ID # 35.) Notice of Entry of Judgment was made against on October 8, 2012. (R. at Doc. ID # 37.) The transcript of the hearing before the district court was filed with the Supreme Court on October 16, 2012.

STATEMENT OF FACTS

[12] This lawsuit concerns mineral interests located in Mountrail County, in land described as:

> Township 153 North, Range 92 West
> Section 14: S1/2SW1/4
> Section 23: N1/2NW1/4

(R. at Doc. ID # 2, Compl. ¶ 1.) The parties agree that together they all own 3/4 of the total mineral interests ("subject minerals") in the just-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. (R. at Doc. ID # 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. (R. at Doc. ID # 4, Answer ¶ 3.)

[13] The parties are heirs and successors-in-interest to Grantors named on the 1960 Deed, which contained a reservation of the subject minerals to the Grantors. (App. 1.) The Grantors are Emma and John Lyngstad, as predecessors-in-interest to Lyngstads, and Walter Brandt and Esther Brandt, as predecessors-in-interest to Hallins. (Id.) The parties did not dispute that prior to execution of the 1960 Deed, Walter Brandt owned 2/3 of the subject minerals, and Emma Lyngstad owned 1/3 of the subject minerals. (R. at Doc. ID # 4, Answer at ¶ 2). The parties did not 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 of the property described at the beginning of this Section, and 1/4 of the mineral interests in that property, to R.I. Hukkanen. (Id. at ¶¶ 2-3.)

[14] Emma and John Lyngstad and Walter and Esther Brandt were collectively identified as the Grantors, and as the Grantors, reserved an "undivided" 3/4 of the mineral interests in the Property to themselves through the plain language of the 1960 Deed. (App. 1.) The Grantors simply reserved "unto the Grantors herein" an "undivided" 3/4 of the mineral interests. (App. 1.)

[15] According to the "Final Decree of Distribution" of Walter Brandt's Estate in July of 1963, Esther Brandt, the surviving spouse and Executor of Walter Estate, filed a final accounting of Walter Brandt's assets indicating Walter owned 1/2 of the subject minerals – 1/2 of a 3/4 interest in the total mineral interests in the property described at the beginning of this section. (App. 2.) It was also undisputed that, in a 1964 Warranty Deed, Esther Brandt conveyed the same 1/2 of the subject minerals to herself and her two children, John Hallin and Susan Carlson, as joint tenants. (App. 3.)

[16] Numerous times throughout the pleadings and arguments, the parties agreed there was no further evidence on the Grantors' intent in executing the 1960 Deed.

LAW AND ARGUMENT

[17] Summary judgment is "a procedural device for the prompt and expeditious disposition of a lawsuit without a trial '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 factors, or if resolving factual disputes will not alter the result.'" Nichols v. Goughnor, 2012 ND 178, ¶ 12, 820 N.W.2d 740. Summary judgment is appropriate if a party is entitled to judgment as a matter of law, and if no dispute on the material facts or inferences to be drawn from undisputed facts exist. Melchior v. Lystad, 2010 ND 140, ¶ 7, 786 N.W.2d 8. Even if factual disputes exist, summary judgment is proper if the law is such that resolution of those factual disputes will not change the result. Diocese of Bismarck Trust v. Ramada, Inc., 553 N.W.2d 760, 764 (N.D. 1996).

[18] The parties agreed in their motion and cross-motion for summary judgment that summary judgment is proper in this case. On appeal, Lyngstads argue that they are entitled to summary judgment in their favor, summary judgment in favor of Hallins was

not proper, and the district court's analysis of the issues was erroneous. Summary judgment is reviewed de novo on the record, and is a question of law.

I. The District Court Erred By Creating the Issue of, and Relying Upon, the Lack of Evidence on a Contract or Agreement Between the Grantors to a Warranty Deed, Which Contract or Agreement Would Have Been Separate from the Warranty Deed Containing a Reservation of Mineral Interests to the Grantors in the Warranty Deed.

A. The laws on interpretation of a deed must apply

[19] The district court ignored the rules of deed interpretation, and instead decided the lack of evidence on a separate and independent agreement between the Grantors in the 1960 Deed was dispositive. (App. 8-10.) The parties introduced no evidence on a separate or independent agreement between the Grantors, because no evidence regarding any possible agreement exists separate from the 1960 Deed. The district court's analysis and dependence on the lack of a separate, written agreement is erroneous.

[20] The district court acknowledged that, "Deeds conveying minerals are subject to the general rules of contract and must be construed to give effect to the mutual intention of the parties." (App. 8 (citing Gawryluk v. Poynter, 2002 ND 205, 654 N.W.2d 400).) The court further acknowledged that a deed must be interpreted first by looking at the plain language, and if the intention of the parties can be ascertained from the plain language of the deed, then the court may not look to extrinsic evidence in order to determine the intention of the parties. (Id.) The court then diverged from decades of North Dakota Supreme Court case law, and stated the dispute in this case was between two groups of grantors, so the court had to "determine the existence and meaning of an undisclosed and undetermined agreement which may, or may not have existed between"

the Grantors "before they signed the 1960 Deed." (Id. at 9.) The court correctly noted there was no evidence that any such agreement existed. (Id.)

[21] The parties had not presented any evidence on an "undisclosed and undetermined agreement," and the parties had never raised such an issue because there was no evidence any such agreement ever existed. As there was no separate writing to evidence the conveyance of property, the court determined there was no conveyance among the grantors. (App. 10.) The court stated that the North Dakota Supreme Court cases recognizing a reservation can be a conveyance did not apply, because those cases involved a dispute between "two opposing sides to the deed" – meaning a dispute between a grantor or grantor's successor, and a grantee or grantee's successor. (Id. at 10-11.) The court concluded it could not "invent a further agreement that the two sets of grantors intended to do anything more, conveying interests among themselves." (Id. at 11-12.)

[22] The court's analysis is erroneous and not supported by law. The dispute in this case arises directly from the reservation of mineral interests in the 1960 Deed, as shown by all the pleadings and arguments in the case. The reservation at issue in this case is not a separate conveyance apart from the transaction in the 1960 Deed. The reservation is a part of the 1960 Deed, and the parties' intent regarding the reservation is evidenced only by the 1960 Deed. The Grantors are all parties to the 1960 Deed and their intent as grantors is supreme under the rules of interpretation of a reservation in a deed. Further, extrinsic evidence of an agreement would have been inappropriate, even if it had existed or been an issue pleaded and argued by the parties. The laws of interpretation of a deed must apply.

B. The language of the 1960 Deed is sufficient to show intent

[23] In North Dakota, the primary purpose in construing contracts is to give effect to the parties' mutual intentions, and the primary purpose in construing a deed is to ascertain and effectuate the grantor's intent. Gawryluk, 2002 ND 205, ¶ 8, 654 N.W.2d 400. "The intent of the parties is the intent expressed in the deed, and which existed at the time the deed was executed." Mitchell v. Nicholson, 3 N.W.2d 83, 85 (N.D. 1942). "Ordinarily, to determine the intent of the parties, a court looks only to the deed and no further. See N.D.C.C. § 9-07-04." Gilbertson v. Gilbertson, 452 N.W.2d 79, 81 (N.D. 1990). The intent of the Grantors, grantors and parties to the 1960 Deed, was expressed in the 1960 Deed. The Grantors did not cease being parties to the Deed because the reservation language was at issue, and no evidence or argument was ever presented that the 1960 Deed was incomplete or inconclusive. There was no need for the district court to look further than the 1960 Deed.

[24] Contracts and deeds are generally interpreted according to the same statutes and common law rules.

> Except as otherwise provided in N.D.C.C. ch. 47-09, grants are interpreted in the same manner as contract. N.D.C.C. § 47-09-11. Contracts are construed to give effect to the parties' mutual intent at the time of contracting. N.D.C.C. § 9-07-03; Haag v. Noetzelman, 1999 ND 157, ¶ 6, 598 N.W.2d 121. The parties' intent must be ascertained from the writing alone if possible. N.D.C.C. § 9-07-04; Haag, at ¶ 6. The parties' intent must be ascertained from the entire instrument, and every clause, sentence, and provision should be given effect consistent with the main purpose of the contract. Haag, at ¶ 6. . . . If the parties' intent can be ascertained from the writing alone, the interpretation of the contract is entirely a question of law, and we independently examine and construe the contract to determine if the trial court erred in its interpretation of the contract. Haag, at ¶ 6.

Valley Honey Co., LLC v. Graves, 2003 ND 125, ¶ 12, 666 N.W.2d 453 (quoting U.S. Bank v. Koenig, 2002 ND 137, ¶ 8, 650 N.W.2d 820.) "Under N.D.C.C. § 47-09-13, a

grant in a contract is interpreted in favor of the grantee, except if there is a reservation in a grant, it must be interpreted in favor of the grantor." Id. at ¶ 14.

[25] As with contracts, there are situations where it is necessary to look beyond the language in a deed. "[P]arol evidence is admissible where through fraud, mistake or accident, the document fails to express the real intention of the parties." Gilbertson, 452 N.W.2d at 81. However, evidence of oral negotiations and agreements which preceded a written contract or deed may not be offered to vary terms expressed in the written contract or deed, nor may any such agreements be separately enforced. Radspinner v. Charlesworth, 369 N.W.2d 109, 112 (N.D. 1985). "The general rule is that because a grantor is presumed to have made all the reservations or exceptions he intended to make the reservations must be clearly expressed in the deed." Id. at ¶ 13. In this case, the parties did not allege or argue, nor was there any evidence of, any fraud, mistake, or accident on the part of the grantors of the 1960 Deed. The parties argued the Grantors' intent could be ascertained from the language of the 1960 Deed alone. No other evidence or parol evidence was necessary, or would have been admissible, to explain or alter the intention of the parties in making the reservation in the 1960 Deed. A separate agreement or contract, analyzed by the district court, would have been parol evidence.

[26] If a contract or deed is ambiguous, extrinsic evidence may be considered to clarify the parties' intentions. Gawryluk, 2002 ND 205, ¶ 9, 654 N.W.2d 400. The parties in this case agreed the 1960 Deed was unambiguous. Further, the only extrinsic evidence on the parties' intention that was available supported the Lyngstads' interpretation of the reservation in the 1960 Deed. In case the court found the language of the 1960 Deed was ambiguous, which that Court or even the Supreme Court may so find, the Lyngstads'

evidence of subsequent conduct by one of the Grantors to the 1960 Deed, Esther Brandt, showed that the Grantors intended to reserve 1/2 of 3/4 of the minerals to each of the Lyngstads and Brandts as Grantors. (App. 2, 3.) The parties agreed no other extrinsic evidence was available for the district court to interpret the 1960 Deed.

[27] 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." (App. 9.) It is true that "Instruments that have been executed at the same time, by the same parties, in the course of the same transaction, and concerning the same subject matter, may be read and construed together." Nichols, 2012 ND 178, ¶ 13, 820 N.W.2d 740. In Nichols, the issue was whether several contracts actually related to a single transaction and contract so that they may be read together. In this case, there was no showing or proof that there were contracts that may be read together with the 1960 Deed, because the issue was created by the district court and not alleged or argued by the parties. Therefore, there was no evidence on whether there was an instrument executed at the same time as the 1960 Deed, whether it involved the same parties, whether it was in the course of the same transaction as the 1960 Deed, or whether it concerned all the same subject matter. As repeatedly argued by the parties, the 1960 Deed was the only evidence that existed at the time of the transaction on the parties' intent.

[28] It was an error for the district court to go outside the 1960 Deed to consider parol evidence or to deem the lack of a separate agreement outside of the 1960 Deed controlling. Further, if the deed was ambiguous, the only other evidence offered to show the Grantors' intent was in favor of Lyngstads.

C. Findings on an implied contract were erroneous

[29] The existence of a contract is a question of fact. B.J. Kadrmas, Inc. v. Oxbow Energy, LLC, 2007 ND 12, ¶ 7, 727 N.W.2d 270. The district court raised the issue of the existence of an implied contract briefly at the hearing on the summary judgment motions (Tr. 20-21), and in its memorandum order and Judgment. The district court's findings on a separate contract are subject to the clearly erroneous standard of review, which means a finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, on the entire record, the Court is left with a definite and firm conviction a mistake was made. B.J. Kadrmas, Inc., at ¶ 7. All three bases for reversing any "findings" the district court made regarding an implied contract exist here. It was an erroneous view of the law for the court to decide the issue of an implied contract was necessary, 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.

[30] The district court cited Estate of Zent, 459 N.W.2d 795 (N.D. 1990), and stated "An implied contract is a legal fiction, employed by the Court to create a contract where there is no evidence that a contract in fact existed." (R. at Doc. ID # 35, J. 5.) It appears the Court relied upon a contract implied by law. A contract implied by law is a fiction that is adopted to achieve justice where no true contract exists, and is an equitable remedy. B.J. Kadrmas, Inc., 2007 ND 12, ¶ 11, 727 N.W.2d 270 (citing Estate of Zent, at 798). An implied contract in law cannot exist where there is an express or implied in fact contract between the parties relating to the same subject matter. Lord & Stevens, Inc. v. 3D Printing, Inc., 2008 ND 189, ¶ 14, 756 N.W.2d 789. There is an express contract in

this case containing the terms of any agreement between the parties – the 1960 Deed – and there is no place in this case for an implied contract in law. Therefore, for the district court to decide the case upon an implied contract in law was an error.

[31] It is not clear whether the district court examined the issue of an implied in fact contract. To the extent the court's order and judgment may contain any findings regarding an implied in fact contract, it must be noted that the parol evidence and extrinsic evidence rules stated above should apply and make the actual writing in the 1960 Deed conclusive. Further, the parties did not present any evidence or arguments regarding an implied in fact contract, and findings on an implied in fact contract must be considered clearly erroneous.

[32] The district court decided the usual rules on deed interpretation did not apply because the dispute here did not arise out of the transaction between the Grantors and the grantee, R.I. Hukkanen. It appears the district court did not consider the reservation of the subject minerals as a transaction or a conveyance. Appellants have found no case that stands for the proposition that rules on interpretation of a deed or contract do not apply where interpretation of a reservation to grantors and other parties is the issue. The district court's distinction between cases on deed interpretation and the present case is a distinction without a difference. As alleged and argued by the parties, the terms of the 1960 Deed contain the agreements and transaction between the parties regarding the mineral reservation. The Grantors are parties to the 1960 Deed, and their intent as grantors is supreme in interpreting the reservation.

II. The District Court Summary Judgment and Order Quieting Title in Hallins is Erroneous

[33] The district court erred in ordering summary judgment in favor of Hallins and quieting title of the subject minerals in them. The court quieted title in favor of Hallins because there was a lack of a separate, written agreement transferring any interests among the Grantors to the 1960 Deed. As stated in the previous section, this was erroneous.

[34] The Hallins agreed the language of the 1960 Deed was controlling and did not provide any evidence to create an issue of fact in this case. Hallins argued the language of the 1960 Deed was unambiguous and controlling. (R. at Doc. ID # 10, Pls.' Resp. to Defs.' Mot. for Summ. J. and Cross-Mot. for Summ. J. 5.) Hallins went on to provide a different interpretation of the language of the 1960 Deed, including that there remained only two grantors, Emma Lyngstad and Walter Brandt, receiving mineral interests through the reservation. (Id. at 6-7.) Hallins also argued Lyngstads' interpretation of the 1960 Deed was not rational, because there was no reason for Walter Brandt to convey any of his interests to the Lyngstads through the reservation of the subject minerals. (Id. at 7-8.) Hallins also argued that, although a reservation of mineral interests may be effective to convey mineral interests to spouses of a title owner/grantor named in a reservation in a deed, in this case, the Lyngstads' arguments would result in Emma Lyngstad's husband John receiving some of Walter Brandt's previously-owned mineral interests. (Id. at 13-15; R. at Doc. ID # 19, Pls.' Supplemental Br. in Supp. of Pls.' Cross-Mot. for Summ. J.)

[35] Though the Hallins provided other possible interpretations of the language of the 1960 Deed, 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. Hallins failed to explain why no language of proportion was used by Grantors in the 1960 Deed. Lyngstads had argued that the Grantors would have used language of proportion if they intended to reserve the subject minerals in certain proportions other than equal among themselves. At the hearing on the summary judgment motions, Lyngstads argued that any evidence on the proportion of ownership of the mineral interests to the 1960 Deed would be extrinsic evidence, which extrinsic evidence the Hallins had argued was inappropriate and inadmissible in this case. (Tr. 27-29.) Hallins failed to rebut the presumption 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. N.D.C.C. § 47-02-08; Volson v. Volson, 542 N.W.2d 754, 756 (N.D. 1996). Based upon the plain language and legal effect of the language used in the 1960 Deed, summary judgment in favor of Hallins was erroneous as a matter of law, which will be explained further in the following section.

[36] Moreover, 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, a Grantor to the 1960 Deed, wherein she conveyed 1/2 of the subject minerals in subsequent transactions, in accordance with the Lyngstads' claims. Just a few years after the 1960 Deed, Esther Brandt executed documents of conveyance of 1/2 of the subject minerals, not 2/3 of the subject minerals. (App. 2, 3.)

[37] Summary judgment in favor of Hallins would require reformation of the 1960 Deed to include language of proportion in accordance with Emma Lyngstad and Walter

Brandt's prior ownership interests. The 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. Hallins' arguments simply are not supported by the language in the 1960 Deed, or any evidence on subsequent conduct of the Grantors. Reformation 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.

[38] Hallins failed to show they were entitled to summary judgment in their favor, as a matter of law.

III. Lyngstads Were Entitled to Summary Judgment in Their Favor

[39] The district court erred in denying summary judgment in favor of Lyngstads. In North Dakota, the grantors' intent is paramount in construing a deed, and by the plain language of the 1960 Deed, the Grantors clearly intended to reserve an undivided 3/4 share of the mineral interests. The terms of the 1960 Deed, and the legal effect of the language reserving the undivided 3/4 interest, created equal shares as tenants in common of the reserved 3/4 interest between the Grantors. Further, if this Court determined the language of the 1960 Deed was ambiguous, the subsequent conduct of one of the Grantors showed the Grantors intended to reserve the mineral interests in equal shares.

A. Grantors' intent is paramount in construing a deed

[40] "It is well settled that the primary purpose in construing a deed is to ascertain and effectuate the intent of the grantor." Malloy, 334 N.W.2d at 9. A deed must be construed to carry out a grantor's intent if at all possible. Id. There is a presumption that the language in a written instrument correctly expresses the true intentions of the parties. Van Berkom v. Cordonnier, 2011 ND 239, ¶ 11, 807 N.W.2d 802.

[41] The 1960 Deed provided:

> 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 in and under and that may be produced from the lands herein described, . . .

(App. 1.) The named Grantors in the 1960 Deed were Emma and John Lyngstad, and Walter and Esther Brandt. The plain language of the 1960 Deed showed the Grantors' intent was to reserve an undivided 3/4 interest in the subject minerals, without any division or language of proportion. It was undisputed that the Grantors did not state a proportion to be reserved to each of the Grantors.

B. Legal effect of language in 1960 Deed shows equal ownership

[42] The parties agreed the Grantors reserved the subject minerals. A reservation is the creation of a new right issuing out of what was granted, and it creates a new right in the grantor which did not exist as an independent right before the grant. Christman v. Emineth, 212 N.W.2d 543, 552 (N.D. 1973) (citing Elrod v. Heirs, Devisees, etc., 55 N.W.2d 673, 675 (Neb. 1952)); see also Plopys v. Bryson, 69 P.3d 1257 (Ore. App. 2003), providing a reservation should be considered the creation of a new right to the grantor out of the thing granted.

[43] In North Dakota, a property interest created in favor of several persons is presumed to create an interest in common. N.D.C.C. § 47-02-08. A tenancy in common is an undivided common interest in property, which each tenant in common equally entitled to the use, benefit, and possession of the common property. Volson, 542 N.W.2d at 756. The subject minerals, the undivided 3/4 interest reserved by the 1960 Deed, was then owned equally by the Grantors.

C. If 1960 Deed was ambiguous, subsequent conduct of Grantor supports Lyngstads' interpretation

[44] The North Dakota Supreme Court may independently review a contract to determine if it is ambiguous. Nichols, 2012 ND 178, ¶ 12, 820 N.W.2d 740. Even if this Court were to determine the reservation language in the 1960 Deed was somehow unclear or ambiguous, the subsequent conduct of Hallins' predecessors in interest shows the Grantors' intent was to reserve equal shares in the subject minerals to each of the Brandt and Lyngstad sides of the family through the 1960 Deed. (App. 2, 3.) If a deed is ambiguous, the parties' conduct subsequent to the deed's execution may be used to help determine the meaning of ambiguous language. Stracka v. Peterson, 377 N.W.2d 580, 583 (N.D. 1985).

[45] Esther Brandt, a party to the 1960 Deed as a Grantor, and a recipient of the minerals reserved in the 1960 Deed, acknowledged the Brandts reserved 1/2 of 3/4 of the mineral interests in the Property by filing the final account of Walter's Estate in 1963, just three years after the 1960 Deed. One would expect that she would have administered a 2/3 interest if that had been what the Grantors intended in the 1960 Deed. Esther Brandt also had court oversight and the court, in a Final Decree of Distribution of Walter's Estate dated 1963, ordered "An undivided one-half interest of an undivided three-fourths interest in and to all of the oil, gas and other minerals in and under [the property]" to be distributed to Esther Brandt. (App. 2.) The parties do not dispute that Esther Brandt later conveyed 1/2 of the subject minerals through the 1964 Deed, (App. 3), further evidencing the fact the Grantors intended that the Brandts retain 1/2 of the subject minerals. As a party to the 1960 Deed, Esther Brandt would have known the intent of the Grantors' mineral interest reservation, and her actions clearly show she

understood that each of the Lyngstad and the Brandt families intended to reserve 1/2 of the 3/4 of the subject minerals.

D. Any issue regarding a conveyance to non-title owners through the reservation should be resolved according to the Grantors' intent

[46] In the summary judgment pleadings, the parties disputed whether John Lyngstad and Esther Brandt, who had not previously been listed on the title of the Property, could be conveyed any interests through the reservation in the 1960 Deed. Hallins had argued that finding in Lyngstads' favor would require the conveyance of mineral interests to John Lyngstad from Walter Brandt, and John Lyngstad was a stranger to the title of Walter Brandt. Walter Brandt had owned 2/3 interest of the total mineral interests in the subject property prior to the 1960 Deed, and John Lyngstad's wife Emma had owned the remaining 1/3 interest. Though it was undisputed that North Dakota Supreme Court case law allowed that spouses to title owners may be conveyed interests through a reservation even though a stranger to the title, Hallins had argued that summary judgment in favor of Lyngstads would have meant Walter Brandt conveyed some of his interest to both Emma and John Lyngstad. Hallins argued North Dakota Supreme Court case law did not allow the interests of Walter Brandt to be conveyed to a non-spouse stranger to his own title, such as John Lyngstad.

[47] The common law rule that prevails in many states is that a reservation cannot, by ordinary words of reservation, convey interests to a stranger to title. W.W. Allen, Reservation or exception in deed in favor of stranger, 88 A.L.R.2d 1199. Several states have abandoned the common law rule in favor of a rule that focuses on the grantor's intent to convey an interest to a third party through use of a reservation clause. See

Conway v. Miller, 232 P.3d 390 (Mont. 2010); Aszmus v. Nelson, 743 P.2d 377 (Alaska 1987); Simpson v. Kistler Inv. Co., 713 P.2d 751 (Wyo. 1986); Townsend v. Cable, 378 S.W.2d 806 (Ky. 1964). In North Dakota, the Court's opinion in Malloy followed the lead of states such as California, Oregon, Kentucky, and Wyoming in abandoning the common law rule. 334 N.W.2d at 9. The policy reasons for abandoning the common law rule are compelling: the common law rule is based upon archaic concepts, and most modern courts like North Dakota courts focus on the intent of the grantor rather than archaic notions of property transfers. 88 A.L.R.2d 1199.

[48] The North Dakota Supreme Court, in Malloy, "abandon[ed] the common law rule and appl[ied], in its stead, the rule that a reservation or exception can be effective to convey a property interest to a third party who is a stranger to the deed or title of the property where that is determined to have been the grantor's intent." 334 N.W.2d at 9; see also N.D. Title Standard 1-09. The Court's opinion reiterated that the grantor's intent is the supreme consideration, and a grantor may intend to convey mineral interests to a stranger to the title through a reservation. Id. The Court's opinion focused on the intent of the grantor and did not otherwise limit the grantor's ability to convey interests to a stranger to the title through a reservation.

[49] It must be noted that several separate opinions were filed in the Malloy case. Some of the Malloy Court stated N.D.C.C. § 47-09-17 should be construed to permit a person to receive a present interest in property, even if that person was not named through words of conveyance as a party under the grant. 334 N.W.2d at 10. Section 47-09-17 provides: "A present interest and the benefit of a condition or covenant respecting property may be taken by any natural person under a grant although not named a party

thereto." This statute is in accordance with the Court's opinion in Malloy, and has been interpreted as a specific authorization of the creation of an interest in someone other than the grantor and person conveying an interest. See Joyce Palomar, Patton and Palomar on Land Titles § 346 n.14, (3d ed. 2011); see also Owen L. Anderson and Charles T. Edin, The Growing Uncertainty of Real Estate Titles, 65 N.D.L.Rev. 1, 1-15 (1989); James W. Ely, Jr. and Jon W. Bruce, The Law of Easements and Licenses in Land § 3.9 n.13, (2011).

[50] Through N.D.C.C. § 47-09-17 and the Court's opinion in Malloy, it is clear North Dakota law allowed the reserved mineral interests to be conveyed to John Lyngstad and Esther Brandt, even though they were not original owners of the property sold or reserved in the 1960 Deed. Further, Walter Brandt's mineral interests could be conveyed to someone other than himself or his spouse through the reservation. While Hallins tried to make an issue of any possible conveyance from Walter Brandt to John Lyngstad, the North Dakota Supreme Court did not hold that a stranger to title may only receive property interests through a reservation if the conveyee was the spouse of the conveyor. On the contrary, the North Dakota Supreme Court stated they "abandon[ed] the common law rule and apply, in its stead, the rule that a reservation or exception can be effective to convey a property interest to a third party who is a stranger to the deed or title of the property where that is determined to have been the grantor's intent." Malloy, 334 N.W.2d at 9 (emphasis added). The North Dakota Title Standards, in analyzing the Court's case law, also provide, "A reservation or exception can be effective to convey a property interest to a third party who is a stranger to the deed or title of the property where that is determined to have the grantor's intent." NDTS 1-09 (2009).

CONCLUSION

[51] 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 26th day of November, 2012.

/s/ Charlotte J. Skar

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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 **6,747** words from the portion of the brief entitled "Statement of the Issue" 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 26th day of November, 2012.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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, vs. Joan Marie Hallin and John P. Hallin; and Susan Kay Bradford, Plaintiffs/Appellees.	**Supreme Court Case No. 20120354** Civil No. 31-2011-CV-00191 **AFFIDAVIT OF SERVICE VIA E-MAIL**

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):

1. **BRIEF OF DEFENDANTS/APPELLANTS (Microsoft Word);**
2. **APPENDIX OF DEFENDANTS/APPELLANTS (PDF); and**
3. **AFFIDAVIT OF SERVICE (PDF).**

on the following person:

Kerry J. Carpenter Kerry@bis.midco.net

by electronic mail on November 1, 2012; 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 November 26, 2012.

Notary Public

SARAH D. KAVA
Notary Public
State of North Dakota
My Commission Expires July 15, 2016