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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sargent County Water Resource District	)	
	)	
Plaintiff and Appellee,	)	
	)	
vs.	)	Sargent Co. No. 41-2012-CV-00088
	)	Supreme Court No. 20140451
Nancy I. Mathews, Phyllis Delahoyde, and Paul Mathews,	)	
	)	
	)	
Defendants and Appellants.	)	

Appeal from Judgment Entered on October 20, 2014
Case No. 41-2012-CV-00088
County of Sargent, Southeast Judicial District
The Honorable Bradley A. Cruff, Presiding

BRIEF OF DEFENDANTS/APPELLANTS NANCY I. MATHEWS AND PAUL MATHEWS

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[¶ 1] Whether a deed from 1917 to "grant…right of way for the laying out, construction, and maintenance of a public drain" conveyed an easement for right of way or fee simple title to the land.

[¶ 2] Whether a deed from 1918 to "grant…right of way for the laying out, construction, and maintenance of a public drain" conveyed an easement for right of way or fee simple title to the land.

II. STATEMENT OF THE CASE

[¶ 3] Plaintiff/appellee Sargent County Water Resource District ("SCWD") served the underlying Complaint in this action on defendants/appellants Paul Mathews and Nancy I. Mathews on October 23, 2012 asserting one claim for declaratory judgment (App. 003-008). The Complaint sought as relief a declaratory judgment regarding ownership and control of approximately 8.83 acres of property encompassed within two right of way deeds from the years 1917 and 1918 (App. 007). The Complaint also sought costs and disbursements as allowed by law and such other relief as was just and equitable. Id.

[¶ 4] SCWD simply asserted as the basis for its claim that it operates a drain on the property at issue, that "Paul Mathews has farmed the property immediately south of [this drain] ... despite instructions from Sargent County Water Resource District to not farm that property," and that "Plaintiff and Defendants cannot each exercise control over the same property" (App. 006, ¶ 18). Implicit in Plaintiff's assertion of control over the property at issue is that SCWD claims ownership of the underlying property based upon the 1917 and 1918 deeds.

[¶ 5] Paul and Nancy Mathews ("the Mathews") timely served their amended Answer and Counterclaim on November 20, 2012 (App. 011-013). In their Answer, the Mathews preserved the defenses of res judicata, estoppel, laches, lack of consideration, statute of limitations, and waiver (App. 011-012, ¶¶ 5, 8). The Mathews also affirmatively alleged adverse possession and, in the alternative, alleged that the right of way deeds referred to in the Plaintiff's Complaint conveyed easements and did not convey fee simple title (App. 011-012, ¶¶ 6, 7). At trial and in related pre-trial and post-trial briefs, the Mathews focused on the argument that the two "right of way deeds" conveyed right of way easements and did not convey fee simple title (App. 021, ¶ 3).

[¶ 6] SCWD timely served its reply on December 3, 2012, asserting the defenses of failure to state a claim and the equitable defenses of estoppel, laches, and waiver (App. 014-015).

[¶ 7] The trial court issued its memorandum of opinion on February 2, 2014 (App. 020-031). In its opinion, the trial court found the two deeds to be ambiguous due to "conflicting language regarding right of way versus fee and also because they are inherently incomplete without [their] referenced surveys, blueprints, plats, or profiles" (App. 028, ¶ 45). The court then relied upon the following parol evidence to support its holding that the deeds conveyed fee simple title to SCWD's predecessor in interest:

(1) "The deeded acres were substantially more than was necessary to construct and maintain the actual drain" (App. 030, ¶ 45);

(2) "The deeded acres were removed from the tax rolls consistent with Sargent County's policy of removing only acres deeded in fee from the tax rolls" (App. 030, ¶ 45);

(3) "Sherry Hotsford, the Sargent County Auditor, testified that a 1910 deed [for nearby property] indicated that the land sold in fee for $65/acre. The same for [other nearby property] in 1914. The 1917

> deed to the Water District computes to $50/acre and the 1918 deed for $65/acre. The consideration for the two deeds is comparable to a sale for title in fee and not a lesser interest for right of way purposes only." (App. 024-025, ¶ 26)

[¶ 8] The trial court adopted SCWD's proposed findings of fact, conclusions of law, and order, which were based upon the February 3rd memorandum opinion, on October 20, 2014 (App. 032-039). The court's final order ruled that the deeds at issue conveyed fee simple title to SCWD (App. 040, ¶ 2). The court's order also clarified the legal boundaries of the property in question since no surveys, blueprints, plats, or profiles existed to delineate the precise legal boundaries of the deeded property (App. 040-041, ¶ 3).

III. STATEMENT OF THE FACTS

[¶ 9] The facts in this case are undisputed. This case presents a pure question of law as to whether the 1917 and 1918 right of way deeds conveyed fee title or instead conveyed an easement for right of way to SCWD.

[¶ 10] Defendant/appellant Nancy I. Mathews owns a one-half interest in certain real property located within Sargent County, North Dakota (App. 011, ¶ 3). This property is more fully described as the Southwest Quarter (SW1/4) of Section Twenty-three (23), Township One Hundred Thirty North (130N), Range Fifty-seven West (57W) of the Fifth Principal Meridian, located in Sargent County, North Dakota (hereafter the "subject property"). Id.

[¶ 11] A Right of Way Deed in favor of Sargent County was executed on December 11, 1917 and recorded on March 12, 1918 (hereafter "1917 deed"). This 1917 deed conveyed to Sargent County a right of way over and across approximately 3.73 acres of the subject property (App. 016-017).

[¶ 12] A Right of Way Deed in favor of Sargent County was executed on February 1, 1918 and was recorded on March 12, 1918 (hereafter "1918 deed"). This 1918 deed conveyed to Sargent County right of way over and across approximately 5.10 acres of the subject property (App. 018).

[¶ 13] Both the 1917 and 1918 deeds contain the following language: "The owners of the following described lands … do hereby grant, sell, and convey, and forever release to the People of the County of Sargent in the State of North Dakota, right of way for the laying out, construction and maintenance of a public drain, as the same may be located by the Board of Drain Commissioners, through said above described lands…" (App. 016; App. 018; App. 021-022, ¶¶ 8, 10).

[¶ 14] The Sargent County Water Resource District is the successor in interest to Sargent County with respect to laying out, constructing, and maintaining legal drains within the boundaries of Sargent County (App. 004, ¶ 8).

[¶ 15] A legal drain, identified as Drain No. 11, was constructed through the subject property in accordance with the 1917 and 1918 deeds. Drain No. 11 is located in the southern portion of the subject property (App. 005 ¶ 10; App. 019).

[¶ 16] Defendant/appellant Paul Mathews farms a portion of the area conveyed by the two right of way deeds. Mr. Mathews has farmed this area at all times material to the underlying Complaint (App. 011, ¶ 4).

[¶ 17] On or about December, 2000, SCWD began depositing spoil on portions of the area outside of the immediate drain but included within the area described by the two right of way deeds (App. 024, ¶¶ 21-22). Some of this land had previously been farmed by defendant/appellant Paul Mathews. Mr. Mathews objected to this activity at

that time on the basis that SCWD did not have permission to deposit these spoils on the subject property. Id. The spoil still exists on the property today. Approximately twelve years after initially depositing this spoil, and almost a hundred years after the original grantors conveyed the underlying Right of Way Deeds, SWCD now, for the first time, alleges fee ownership of the disputed property.

IV. STANDARD OF REVIEW

[¶ 18] "Deeds are construed in the same manner as contracts." Carkuff v. Balmer, 2011 ND 60, ¶ 8, 795 N.W.2d 303, 306. "Interpretation of a contract is a question of law, and on appeal this Court independently examines and construes the contract to determine if the district court erred in its interpretation … A contract must be read and considered in its entirety so that all of its provision[s] are taken into consideration to determine the true intent of the parties." Lario Oil & Gas Co. v. EOG Res., Inc., 2013 ND 98, ¶ 5, 832 N.W.2d 49, 52.

[¶ 19] "Whether a contract is ambiguous is a question of law" reviewed *de novo* by this Court. State Bank & Trust of Kenmare v. Brekke, 1999 ND 212, ¶ 12, 602 N.W.2d 681, 685 (internal citations omitted).

[¶ 20] "Resolution of an ambiguity in a contract by extrinsic evidence is a finding of fact subject to review under the clearly erroneous standard of N.D.R.Civ.P. 52(a). A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, on the entire evidence, we are left with a definite and firm conviction a mistake has been made." Rolla v. Tank, 2013 ND 175, ¶ 5, 837 N.W.2d 907, 909 (internal citations omitted).

V. ARGUMENT

[¶ 21] The Mathews set forth two principal arguments for this Court's consideration. First, the 1917 and 1918 right of way deeds clearly and unambiguously show the intent of the original grantors to merely convey right of way easements to SCWD. Moreover, use of the word "grant" in the deeds and missing surveys or plats do not render this plain language ambiguous. Second, and in the alternative, if this Court finds that these deeds are ambiguous, the trial court's interpretation of parol evidence is clearly erroneous because (1) the record contains no support for the trial court's characterization of Sargent County's policy for removing deeded property from its tax rolls, and (2) the trial court did not account for extraordinarily high inflation that occurred during World War I when it compared the price paid for the 1917 and 1918 conveyances to fee title sales from 1910 and 1914.

A. Courts nationwide have found no difficulty determining that right of way deeds similar to those at issue here conveyed easements.

[¶ 22] The overwhelming weight of authority from across the country indicates that right of way deeds similar to those at issue here convey easements for right of way and not fee simple. Although these cases are far too numerous to include every decision here, a selection of cases includes the following: N. Sterling Irr. Dist. v. Knifton, 320 P.2d 968, 970-72 (Co. 1958) (in case disputing whether "right of way deed" for a drainage ditch to water district conveyed an easement or fee, court noted that "numerous cases in this and other jurisdictions sustain[]" the conclusion that the deed merely conveyed an easement given plain language of deed, water district's lack of need for anything more than an easement, and water district's inability to obtain more than an easement through eminent domain); Bernards v. Link, 248 P.2d 341, 343-44 (Or. 1952)

(document entitled "right of way deed" conveyed easement, not fee, in accord with prior Oregon case in which court came to same conclusion with "no difficulty"); Texas Co. v. O'Meara, 36 N.E.2d 256, 259 (Ill. 1941) (in construing "right of way deed" conveying strip of land for ditch to water district, court concluded that words "right-of-way meant exactly what they said and nothing more" and held that the deed conveyed an easement); Midland Valley R. Co. v. Jarvis, 29 F.2d 539, 539-40 (8th Cir. 1928) (right of way deed underlying railroad dispute described as "easement"); Midland Val. R. Co. v. Arrow Indus. Mfg. Co., 297 P.2d 410, 411 (Ok. 1956) (where "right of way deed" conveys "right of way over a strip of land," conveyance is construed as easement); Johnson Cnty. v. Weber, 70 N.W.2d 440, 445 (Neb. 1955) ("right of way deed" described as a "grant and conveyance" of right of way construed as easement appurtenant to the land); El Dorado & Wesson Ry. Co. v. Smith, 344 S.W.2d 343, 344-45 (Ark. 1961) ("right of way deed" that contained the language "hereby grant, bargain, sell, and convey…forever, a strip of land…over and upon the following described land…" conveyed an easement, not fee).

B. The plain language of the "right of way deeds" unambiguously shows intent to convey easements for right of way and not fee simple.

[¶ 23] "In construing a deed, the primary purpose is to ascertain and effectuate the grantor's intent, and deeds are construed in the same manner as contracts. If a deed is unambiguous, this Court determines the parties' intent from the instrument itself. In other words, [t]he language of the deed, if clear and explicit, governs its interpretation; the parties' mutual intentions must be ascertained from the four corners of the deed, if possible." Carkuff v. Balmer, 2011 ND 60, ¶ 8, 795 N.W.2d 303, 306 (internal citations and quotations omitted).

[¶ 24] Here, the language of both deeds shows a clear and unambiguous intent of the original parties to convey easements for right of way. The title of both deeds contains the words "right of way," and both deeds further state that the purpose of the conveyances was to give SCWD "right of way for laying out, construction and maintenance of a public drain… **through** said above described lands." (emphasis added). The word "through" is particularly important as it indicates the parties' intent to convey only right of way upon the surface of the property. Numerous cases from other jurisdictions have held that where a deed uses such language, it is unquestionably an easement. See, e.g., Texas Co. v. O'Meara, 36 N.E.2d 256, 259 (Ill. 1941) (in construing "right of way deed" conveying "right of way…through…the land" for ditch to water district, court concluded that words "right-of-way meant exactly what they said and nothing more" and held that the deed conveyed an easement); N. Sterling Irr. Dist. v. Knifton, 320 P.2d 968, 970-72 (Co. 1958) (in construing "right of way deed" conveying "strip of ground…over, across, and upon [described property]" for purpose of drainage ditch, court held that deed conveyed an easement). Moreover, the word "fee" does not appear anywhere in the 1917 or 1918 deed.

[¶ 25] If this language is insufficient to evince the original intent of the parties to convey an easement, it is difficult to discern what language *would* be sufficient. Nonetheless, the trial court found "the deeds to be ambiguous on their face due to conflicting language regarding right of way versus fee and also because they are inherently incomplete without the referenced surveys, blueprints, plats, or profiles" (App. 028, ¶ 38). The Mathews address each of these alleged ambiguities in turn.

1. The deeds do not contain conflicting language regarding easement versus fee.

[¶ 26] The trial court did not indicate what language it found to be "conflicting" in regards to "right of way versus fee" in the underlying deeds. However, the most likely source of the trial court's finding of ambiguity is SWCD's argument below that use of the word "grant… in a conveyance results in the transfer of fee simple." Doc. ID 26 ¶ 13, 14. This is an incorrect statement of law. "A fee simple title is presumed to be intended to pass by a grant of real property **unless** it appears from the grant that a lesser estate was intended." N.D.C.C. § 47-10-13 (2015); Comp.L. 1913, § 5527; see also Lalim v. Williams Cnty., 105 N.W.2d 339, 344-45 (N.D. 1960) (use of word "grant" in conveyance does not raise conclusive presumption of fee ownership, rather, the Court will "examine the deed to determine whether or not the parties intended that the deed should pass a fee simple title or a lesser estate"). Here, the 1917 and 1918 deeds contain clear and unambiguous language limiting the extent of the grant. They state the grantor "hereby grant[s]…right of way" (App. 016, 018).

[¶ 27] Carkuff v. Balmer is directly on point and, apart from the difference in interest conveyed, is almost perfectly analogous to this case. 2011 ND 60, ¶ 8, 795 N.W.2d 303, 306. Carkuff involved an underlying quiet title action in which one of the parties argued that use of the word "'grant' transformed … [a] quitclaim deed … into fee simple title … so as also to pass after-acquired property rights and mineral interests." Id. at ¶ 12. The deed at issue was "plainly labeled a quitclaim deed" and contained the language "grant, bargain, sell, remise, release, and quit-claim…all the right, title and interest in and to the subject property." Id. at ¶ 13.

[¶ 28] This Court in Carkuff stated that based upon this language in the deed, the deed at issue was unambiguously a quit-claim deed, nothing more. Id. at ¶ 14. The Court further favorably cited American Jurisprudence Second, stating that "the intention of the parties so controls that the use of the term "grant" does not necessarily designate the character of a deed, but whether an instrument is a quitclaim deed or a deed of grant, bargain, and sale that purports to convey the property itself is to be determined from the whole of the granting clause contained in the deed." Id. at ¶ 14 (quoting 23 Am.Jur.2d Deeds § 225 (2002)) (emphasis added). This Court then favorably cited the South Dakota Supreme Court to conclude that the "remise, release, and quitclaim" language contained in the deed in that case *qualified* the word "grant," and that "[i]t is not sufficient…that the instrument contain the word "grant," but it must purport to convey the property itself in fee simple." Carkuff at ¶ 13 (quoting State v. Kemmerer, 84 N.W. 771, 772 (S.Dak.1900)).

[¶ 29] Like Carkuff, the 1917 and 1918 deeds at issue here contain clear and unambiguous words limiting the type of grant to a right of way easement. This is clearly indicated by use of the phrase "right of way" in both the title of these documents and as limiting language in the granting clause of the deed ("hereby grant…right of way"). Also like the deed in Carkuff, the 1917 and 1918 deeds lack the words "fee" or "fee simple."

2. The two right of way deeds are integrated documents—missing plats do not inject ambiguity into the type of interest conveyed by the underlying deeds.

[¶ 30] The trial court also found that the right of way deeds are ambiguous because "they are inherently incomplete without the referenced surveys, blueprints, plats or profiles" (App. 028, ¶ 38). In other words, the trial court was of the opinion that the deeds are not integrated documents. The trial court's opinion, however, failed to

recognize that the 1917 and 1918 deeds *are* integrated with respect to the *type* of interest conveyed.[1]

[¶ 31] "An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement." Restatement (Second) of Contracts § 209 (1981) (emphasis added). As shown in this passage of the Restatement Second, a document can be integrated with respect to certain terms but not others. The 1917 and 1918 deeds contained the material terms indicating the *type* of property conveyed within the four corners of the document itself. It is very difficult to conceive that "surveys, blueprints, plats or profiles" referenced in the 1917 and 1918 deeds would contain any additional contract terms as to the type of interest conveyed. Rather, those type of documents would have bearing merely on the location of the conveyed property. Therefore, there is little question that the underlying 1917 and 1918 deeds are fully integrated documents with respect to the type of interest transferred in spite of any missing surveys, blueprints, plats or profiles. Because these documents are fully integrated, the trial court erred in determining that the deeds were ambiguous on their face in part due to these missing documents.

[1] Given the inseparable relationship between contract integration and ambiguity, determination of whether a contract is integrated is a question of law subject to the *de novo* standard of review. See, e.g., State Bank & Trust of Kenmare v. Brekke, 1999 ND 212, ¶ 12, 602 N.W.2d 681, 685 ("[w]hether a contract is ambiguous is a question of law") (internal citations omitted); Carolina Metal Products Corp. v. Larson, 389 F.2d 490, 493 (5th Cir. 1968) (whether a contract is integrated is a question of law); Digitech Computer, Inc. v. Trans-Care, Inc., 583 F. Supp. 2d 984, 992 (S.D. Ind. 2008) ("the Seventh Circuit has explained that the initial decision of whether or not the parties intended a complete integration is a question of law for the court." Utica Mut. Ins. Co. v. Vigo Coal Co., Inc., 393 F.3d 707, 714 (7th Cir.2004).

3. Intent of the parties is further informed by the eminent domain statute available to the Water District in 1918, which would have only allowed for an easement.

[¶ 32] This Court, in a similar case involving whether a property transfer for purposes of a public highway was in the form of an easement or fee, explained that eminent domain statutes may have direct bearing on discerning the intent of the parties if the grantee possesses power of eminent domain and the property is acquired for a use allowed by the eminent domain statute. In that instance, the limitations of the estate which the grantee could acquire by eminent domain may be considered in determining the intent of the parties. Lalim v. Williams Cnty., 105 N.W.2d 339, 346 (N.D. 1960).

[¶ 33] Here, SWCD's predecessor in 1917/1918 would only have been able to obtain an easement through eminent domain and could not have obtained fee title for a drain. The law in effect in 1918 specifically stated as follows:

> What estate may be taken. The following is a classification of the estates and rights in lands subject to be taken for public use:
>
> 1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow or a place for the deposit of debris or tailings of a mine.
>
> 2. An easement, when taken for any other use.

Comp.L. 1913, § 8204. The fact that SCWD could only have obtained an easement in 1917/1918 through eminent domain further supports the already plain intent of the original parties to convey an easement. It also comports with common sense. There is no reason that a public drain would require an estate larger than an easement for right of way in order for the drain to properly function.

C. In the alternative, if the deeds are ambiguous, the trial court's interpretation of parol evidence is clearly erroneous.

[¶ 34] The Mathews firmly believe the 1917 and 1918 deeds at issue are unambiguous on their face. Nonetheless, should this Court find that these deeds are ambiguous, the Mathews assert that two of the trial courts' findings of fact relied upon as parol evidence are clearly erroneous. The trial court relied upon the following parol evidence to conclude that the deeds conveyed fee simple title to SCWD:

> (1) "The deeded acres were substantially more than was necessary to construct and maintain the actual drain" (App. 030, ¶ 45; App. 037, ¶ 31);
>
> (2) "The deeded acres were removed from the tax rolls consistent with Sargent County's policy of removing only acres deeded in fee from the tax rolls" (App. 030, ¶ 45; App. 037, ¶ 31);
>
> (3) "Sherry Hotsford, the Sargent County Auditor, testified that a 1910 deed [for nearby property] indicated that the land sold in fee for $65/acre. The same for [other nearby property] in 1914. The 1917 deed to the Water District computes to $50/acre and the 1918 deed for $65/acre. The consideration for the two deeds is comparable to a sale for title in fee and not a lesser interest for right of way purposes only" (App. 035-036, ¶ 25).

The trial court's conclusion is clearly erroneous because its factual findings are not supported by the record.

1. The record does not support the trial court's factual finding that Sargent County only removes acres deeded in <u>fee</u> from the tax rolls.

[¶ 35] The trial court attempted to use Sargent County's property tax treatment of the subject property to indicate the nature of the conveyances at issue. The trial court made the following relevant findings of fact:

> 1. "It is the policy of Sargent County not to remove property used for right of way from the tax rolls." (App. 024, ¶ 25); (App. 035, ¶ 24).

2. "The deeded acres were removed from the tax rolls consistent with Sargent County's policy of removing only acres deeded in **fee** from the tax rolls" (App. 030, ¶ 45; App. 037, ¶ 31) (emphasis added).

The second statement adds the very important phrase "deeded in fee." This is not only internally inconsistent with the trial court's earlier finding of fact describing Sargent County's policy of removing "property used for right of way from the tax polls," but it finds no support in the record.

[¶ 36] At trial, the Sargent County Auditor explained that "if there would be any type of a right-of-way deed **or** that conveys ownership [sic], we would remove that acreage from that parcel" in regard to the County's tax rolls (App. 046, Lines 7-10). This statement appears to be the only one in the record directly describing the County's policy, and it clearly shows that the County does not "only" remove "acres deeded in fee" from its tax rolls, but rather that it also removes property conveyed by right of way deed. The trial court directly relied upon this unsupported finding of fact in determining that the 1917 and 1918 deeds conveyed fee simple absolute. Because the trial court's finding of fact that the county's policy was to remove "only acres deeded in fee" finds no support in the County Auditor's statement at trial, this finding has no support in the record and is therefore clearly erroneous.

2. The trial court did not account for extraordinarily high inflation that occurred from 1914 to 1918 when it compared sales of nearby land in fee.

[¶ 37] Additionally, the trial court also accepted and relied upon parol evidence regarding the prices paid for other property sold in fee near the subject property to determine the nature of the 1917 and 1918 conveyances. This evidence was disclosed through testimony for the first time at trial leaving little, if any time, for detailed review of the facts surrounding this testimony. The trial court specifically compared two nearby

sales: a 1910 deed selling property in fee for $65/acre, and a 1914 deed selling property in fee for $65/acre. The trial court found that the property conveyed by the 1917 and 1918 deeds "computes to $50/acre" for the 1917 deed and "$65/acre" for the 1918 deed and that "consideration for the two deeds is comparable to a sale for title in fee." The trial court directly relied on this parol evidence to determine that the conveyances transferred the underlying property in fee simple.

[¶ 38] The trial court's conclusion is clearly erroneous, however, because it failed to account for extraordinarily high inflation that occurred from approximately 1914-1918, i.e., during World War I. The North Dakota Rules of Evidence provide that "The court may take judicial notice at any stage of the proceeding" and that "the court…must take judicial notice if a party requests it and the court is supplied with the necessary information." N.D.R.Ev. 201. N.D.R.Ev. 201 contains the same language as F.R.Ev. 201. The official comment to F.R.Ev. 201 states that "[i]n accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal."

[¶ 39] It is commonly accepted in other jurisdictions that the Consumer Price Index, which is an official statistic of the U.S. Bureau of Labor Statistics used to measure inflation, is an adjudicative fact that can be judicially noticed. See e.g., Arkansas Pub. Serv. Comm'n v. Cont'l Tel. Co., 561 S.W.2d 645, 651 (Ark. 1978) ("The devastating effect of inflation and the increase in interest rates since that time are matters of such common knowledge that any court must take judicial notice of these facts."); Pickett v. Sheridan Health Care Ctr., 664 F.3d 632, 648 (7th Cir. 2011) ("the CPI belongs to the category of public records of which a court may take judicial notice."); Kunz Const. Co.

v. U.S., 16 Cl. Ct. 431, 438 (1989) aff'd, Kunz Const. Co. v. U.S., 899 F.2d 1227 (Fed. Cir. 1990) ("Because of CPI's broad acceptance, a court can take judicial notice of its figures when adjusting EAJA awards for inflation"); State ex rel. Helm v. Kramer, 510 P.2d 1110, 1119 (Wa. 1973) (noting that court "can take judicial notice of the Consumer Price Index of the United States Department of Labor, Bureau of Labor Statistics"); Thomas v. Strauss, 75 N.W.2d 268, 272 (Ia. 1956) ("the trial court also correctly took judicial notice of the depression and the period of inflation that eventually followed"); Kaiser v. Kaiser, 186 N.W.2d 678, 684, FN 4 (Mn. 1971) ("We do not doubt that judicial notice may be taken of both the fact of increase and the extent of increase in the cost of living by resort to consumer price indices published by the United States Bureau of Labor Statistics.")

[¶ 40] The historical records of the CPI available from the Bureau of Labor Statistics show that an item that cost $65 in 1914 would have cost $83.20 in 1917 due to 28% cumulative inflation (App. 056; App. 059).[2] The same records show that an item that cost $65 in 1914 would have cost $98.15 in 1918 due to 51% cumulative inflation (App. 056; App. 060). Likewise, an item purchased for $55 in 1917, the price paid per acre for the 1917 deed, could have been purchased in 1914 for $42.97 due to inflation (App. 056; App. 061). An item purchased for $65 in 1918, the price paid per acre for the 1918 deed, could have been purchased in 1914 for $43.05 due to inflation (App. 056;

[2] The inflation calculator referenced by the Appendix to this brief is available at http://www.bls.gov/data/inflation_calculator.htm on the Bureau of Labor Statistics official government website. Additionally, inflation can be calculated manually from the CPI information (App. 056) by comparing the change in the CPI between two years. For example, to following formula calculates inflation from 1914 to 1918: (Y2 – Y1) / (Y1) x 100 = inflation, where Y2 is cost as expressed in the CPI in 1918 and Y1 is cost as expressed in the CPI in 1914.

App. 062). Records are not available for 1910 because official records of the CPI begin in the year 1913. The Mathews request under N.D.R.Ev. 201 that this Court take judicial notice of the CPI and inflation comparisons indicated in this paragraph.

[¶ 41] The trial court's finding of fact that "consideration for the two deeds is comparable to a sale for title in fee" is clearly erroneous because the price paid per acre for nearby property purchased in fee in the year 1914 is significantly more than the consideration backing the 1917 and 1918 deeds when inflation in this time period is accounted for. Because the price per acre paid for the property described in the 1917 and 1918 deeds when adjusted for inflation is substantially less than the price per acre paid for nearby property purchased in fee in 1914, this is clear evidence of a conveyance of an easement rather than fee simple.

VI. Conclusion

[¶ 42] Because the trial court incorrectly determined as a matter of law that the 1917 and 1918 deeds are ambiguous and further because the trial's court's judgment is based upon findings of fact that are clearly erroneous, the judgment of the trial court must be reversed.

DATED this 28th day of April, 2015.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sargent County Water Resource District Plaintiff and Appellee, vs. Nancy I. Mathews, Phyllis Delahoyde, and Paul Mathews, Defendants and Appellants.	)	Sargent Co. No. 41-2012-CV-00088 Supreme Court No. 20140451

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

I hereby certify that on April 28th, 2015, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

1. Brief of Defendants/Appellants Nancy I. Mathews and Paul Mathews;

   and,

2. Appendix of Defendants/Appellants Nancy I. Mathews and Paul Mathews,

and served the same electronically as follows:

Christopher M. Mcshane
Attorney For Plaintiff
Sargent County WRD
PO Box 458
West Fargo, ND 58078- 0458
cmcshane@ohnstadlaw.com

/s/ *JJ England*
JJ ENGLAND

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sargent County Water Resource District Plaintiff and Appellee, vs. Nancy I. Mathews, Phyllis Delahoyde, and Paul Mathews, Defendants and Appellants.	)	Sargent Co. No. 41-2012-CV-00088 Supreme Court No. 20140451

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

I hereby certify that on April 28th, 2015, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

1. Brief of Defendants/Appellants Nancy I. Mathews and Paul Mathews;

   and,

2. Appendix of Defendants/Appellants Nancy I. Mathews and Paul Mathews,

and served the same electronically as follows:

Christopher M. Mcshane
Attorney For Plaintiff
Sargent County WRD
PO Box 458
West Fargo, ND 58078- 0458
cmcshane@ohnstadlaw.com

/s/ *JJ England*
JJ ENGLAND

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sargent County Water Resource District	)	
	)	
Plaintiff and Appellee,	)	
	)	
vs.	)	Sargent Co. No. 41-2012-CV-00088
	)	Supreme Court No. 20140451
Nancy I. Mathews, Phyllis Delahoyde, and Paul Mathews,	)	
	)	
	)	
Defendants and Appellants.	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

I hereby certify that on April 28th, 2015, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

1. Brief of Defendants/Appellants Nancy I. Mathews and Paul Mathews;

   and,

2. Appendix of Defendants/Appellants Nancy I. Mathews and Paul Mathews,

and that on April 30th, 2015, I served the same electronically on:

Lyle R. Bopp
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/s/ *JJ England*
JJ ENGLAND