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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. Nancy I. Mathews and Paul Mathews, Defendants and Appellants, and Phyllis Delahoyde, Defendant and Appellee.	)	Supreme Court No. 20140451 Sargent Co. No. 41-2012-CV-00088

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 PLAINTIFF AND APPELLEE

Dated: June 1, 2015.

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TABLE OF CONTENTS

Paragraph

STATEMENT OF THE ISSUES

I. Whether the District Court erred when it determined the 1917 Deed and the 1918 Deed are ambiguous.

II. Whether the District Court's findings of fact were clearly erroneous where it found parol evidence shows the intent of the 1917 Deed and the 1918 Deed was to convey a fee simple interest.

STATEMENT OF THE CASE. 1

STATEMENT OF FACTS. 7

ARGUMENT. 13

I. Standard of review. 13

II. Whether the District Court erred when it determined the 1917 Deed and the 1918 Deed are ambiguous. 16

(A) The 1917 Deed and the 1918 Deed both conveyed a fee interest. 16

(B) If the 1917 Deed and 1918 Deed do not unambiguously convey a fee interest ot the SCWRD's predecessor, then an ambiguity exists within the Deeds. 25

III. Whether the District Court's findings of fact were clearly erroneous where it found parol evidence shows the intent of the 1917 Deed and the 1918 Deed was to convey a fee simple interest. 35

(A) It was proper for the District Court to determine the price per acre paid for the Deeds was equivalent to a fee simple purchase. 37

(B) The District Court properly concluded the Property being removed from the tax rolls demonstrated an intent by the parties to convey the Property in fee simple. 41

CONCLUSION. 46

TABLE OF AUTHORITIES

Paragraph

Statutes:

N.D.C.C. § 9-07-02 16
N.D.C.C. § 9-07-04, ... 16
N.D.C.C. § 24-01-01.1(38) 29, 31
N.D.C.C. § 24-01-18 . . . . . 20, 31
N.D.C.C. § 47-09-16 18
N.D.C.C. § 47-10-13 18
N.D.C.C. § 47-10-15 . . . . . 26, 27

Rules:

N.D.R.Civ.P. 52(a).. 13
N.D.R.Civ.P. Rule 52(a)(6). 15

Cases:

Bernards v. Link, 248 P.2d 341 (Or. 1952). 19
Carkuff v. Balmer, 2011 ND 60, ¶ 8, 795 N.W.2d 303. . . . . 16, 19, 26, 27
Cavendish Farms, Inc. v. Mathiason Farms, Inc., 2010 ND 236, ¶ 17, 792 N.W.2d 500 15
Dun v. Dietrich, 53 N.W. 81 (N.D. 1892) 17, 22
El Dorado & Wesson Ry. Co. v. Smith, 344 S.W.2d 343, 344 (Ark. 1961). 19, 40
Hoverson v. Hoverson, 2015 ND 38, ¶ 6, 859 N.W. 2d 390 15
In re Johnson, 2013 ND 146, ¶ 10, 835 N.W.2d 806.. 39
Johnson Cnty. v. Weber, 70 N.W.2d 440, 445 (Neb. 1955). 19
Midland Val. R. Co. v. Arrow Indus. Mfg. Co., 297 P.2d 410, 411 (Okl. 1956). 23
Midland Valley R. Co. v. Jarvis, 29 F.2d 539, 541 (8th Cir. 1928).. 23
N. Sterling Irr. Dist. v. Knifton, 320 P.2d 968 (Co. 1958). 19
Niles v. Eldridge, 2013 ND 52, ¶ 6, 828 N.W.2d 521 13
North Shore, Inc. v. Wakefield, 530 N.W.2d 297, 300 (N.D.1995). 16
Northstar Founders, LLC v. Hayden Capital USA, LLC, 2014 ND 200, ¶ 47, 855 N.W.2d 614. 25
Oliver-Mercer Electric Coop, Inc. v. Fisher, 146 N.W.2d 346 (N.D.1966). 16
Royse v. Easter Seal Soc. for Crippled Children & Adults, Inc. of N. Dakota, 256 N.W.2d 542, 544 (N.D. 1977). 16
Schmidkunz v. Schmidkunz, 529 N.W.2d 857, 860 (N.D. 1995). 15
Texas Co. v. O'Meara, 36 N.E.2d 256 (Ill.1941). 19

Other Authorities:

Black's Law Dictionary (10th ed. 2014).. 29
Hearing on S.B. 2168 Before the Senate Judiciary Comm., 63rd N.D. Legis. Sess. (January 23, 2013) (testimony of Grant Shaft, Representative of Real Property Section - State Bar Association).. 26
United States Department of Labor, Bureau of Labor Statistics, frequently asked questions http://www.bls.gov/dolfaq/bls_ques3.htm (Last visited on June 1, 2015). 39

STATEMENT OF THE ISSUES

I. **Whether the District Court erred when it determined the 1917 Deed and the 1918 Deed are ambiguous.**

II. **Whether the District Court's findings of fact were clearly erroneous where it found parol evidence shows the intent of the 1917 Deed and the 1918 Deed was to convey a fee simple interest.**

STATEMENT OF THE CASE

[¶1.] Plaintiff/appellee Sargent County Water Resource District ("SCWRD") issued its Complaint against defendant Phyllis Delahoyde and defendants/appellants Paul Mathews and Nancy I. Mathews asserting one claim for declaratory judgment (App. 3-8). The Complaint sought declaratory relief regarding ownership and control of certain property in the Southwest Quarter (SW¼) of Section 23, Township 130 North, Range 57 West, Sargent County, North Dakota, including all property located south of the north boundary of Drain 11 (hereinafter identified as the "Property"). (App. 7). Defendant Delahoyde and Defendant Nancy Mathews own the remainder of the Southwest Quarter (SW¼) of Section 23, Township 130 North, Range 57 West, Sargent County, North Dakota (hereinafter the "SW¼ of Sec. 23"). (App. 3).

[¶2.] As the basis for its claim, SCWRD identified its claim of ownership and control of the Property as a result of its status as the successor in interest to Sargent County who obtained the Property by way of a Right of Way Deed signed in 1917 and recorded in the office of the Sargent County Register of Deeds (hereinafter the "1917 Deed") and by way of a Right of Way Deed signed in 1918 and recorded in the office of the Sargent County Register of Deeds (hereinafter the "1918 Deed") (collectively the "Deeds"). (App. 3-8). Declaratory relief was sought because Paul Mathews

sought to exert control over the Property, claiming a property interest through his rental agreement with Phyllis Delahoyde and Nancy Mathews. Id.

[¶3.] Phyllis Delahoyde submitted an Answer to the Complaint stating "[she] has not made any claims of ownership to property referenced to in paragraphs 5, 6, and 7 [of the Complaint]." Doc. ID. No. 7, p. 1. Ms. Delahoyde appeared at trial in this matter. As the District Court found, "Phyllis Delahoyde is not claiming an interest in the disputed property. Her only purpose in appearing is to avoid being taxed with any costs." (Memorandum Opinion ¶ 6, App. 21). Phyllis Delahoyde has not joined her co-defendants in this appeal.

[¶4.] Nancy Mathews and Paul Mathews (collectively "Mathews") ultimately filed an Amended Answer & Counterclaim. (App. 11). In the Amended Answer and Counterclaim, Mathews raised a variety of defenses and counterclaims. Following trial, the District Court determined "[A]ll of the counterclaims appear to have been abandoned except that regarding right of way versus fee/quiet title as no evidence was submitted regarding the other issues." Id ¶ 3. Mathews have not challenged this statement in their appeal.

[¶5.] A bench trial was held on January 8, 2014. All parties appeared at the trial, represented by counsel. Following the trial, the District Court issued its Memorandum Opinion on February 2, 2014. (App. 020-031). In its Memorandum Opinion, the District Court found the 1917 Deed and the 1918 Deed to be ambiguous. (Memorandum Opinion, ¶ 28, App. 026). The District Court's Memorandum Opinion then went on to analyze extrinsic evidence to determine the intent of the parties to the 1917 Deed and the 1918 Deed. Based on its findings of fact, the Court ordered entry of judgment, declaring the Property was granted to the SCWRD's predecessor in fee. (Memorandum Opinion ¶¶ 47 & 48, App. 31). The District Court went further to require the

SCWRD to provide a legal description of the Property, capable of being recorded, to be included in the Order for Judgment and Judgment being prepared by the SCWRD. Id.

[¶6.] 2014 was a wet year, which prevented the SCWRD from surveying the boundaries of the Property until the fall. Once a legal description was obtained by survey, the SCWRD prepared Findings of Fact, and Order for Judgment in accordance with the Memorandum Opinion. None of the defendants objected to the Findings of Fact and Order for Judgment prepared by the SCWRD in accordance with the Memorandum Opinion. The Court adopted the Findings of Fact and Order for Judgment on October 20, 2014, and Judgment was entered the same day. Doc. ID. Nos. 48 & 49.

STATEMENT OF FACTS

[¶7.] The Sargent County Board of Drain Commissioners constructed a legal drain that is now identified as Drain 11. Sargent County, and the Sargent County Board of Drain Commissioners are the predecessors in interest to the SCWRD, who is now tasked with the duty to construct and maintain legal drains in an area of Sargent County that includes the SW¼ Sec. 23. Drain 11 was constructed by the Sargent County Board of Drain Commissioners in the SW¼ Sec. 23 nearly 100 years ago, and Drain 11 is currently located in approximately the same spot. Drain 11 does not run parallel to the section line. Doc. ID No. 37. A small parcel of land exists between the drain and the section line immediately to the west of where the drain intersects the south section line. Id. There is also a slightly larger parcel of property between the drain and the south section line in the far southwestern corner of the SW¼ Sec. 23. Id.

[¶8.] Before constructing Drain 11, Sargent County acquired land from the then owners of the SW¼ Sec. 23. (App. 16-18). The acquisition of the Property was memorialized by the 1917

Deed and the 1918 Deed. Both Deeds were on the same form. Both the 1917 Deed and the 1918 Deed contain the following conveyance language, "do hereby grant, sell, and convey..." Id.

[¶9.] The 1917 deed conveyed 3.73 acres to Sargent County. Id. The compensation recited in the deed was $186.50, which equates to $50 per acre. Id. The 1917 Deed referenced plats and blueprints as the boundaries of the property being conveyed. Id. The plats and blueprints referenced have not been located.

[¶10.] The 1918 Deed conveyed 5.1 acres to Sargent County. Id. The compensation recited in the deed was $331.50, which equates to $65 per acre. Id. The 1917 Deed referenced a plat and blueprints as the boundaries of the property being conveyed. Id. The plats and blueprints referenced have not been located.

[¶11.] Currently, the defendants are paying real estate taxes on 151.17 acres for the SW¼ Sec. 23. Doc. ID No. 36. As far back as Sargent County has records on site, the owners of the SW¼ Sec. 23 have only paid taxes on 151.17 acres. T.R. p. 56 ll.18-22. The amount of acres the defendants are paying taxes on equals 160 acres – the presumed starting point for a quarter of land – less the number of acres conveyed by the 1917 Deed and the 1918 Deed. Id. p. 57 ll.4-7. Sargent County only reduces the number of acres an owner is paying property taxes on when those acres are conveyed to another owner. T.R. p. 55 ll. 1-6.

[¶12.] In the years leading up to the conveyance to Sargent County, the entire SW¼ Sec. 23 was involved in a transaction where an undivided 1/4 fee title interest was transferred. T.R. P. 61 ll 9-22. The consideration for the transfer of the 1/4 interest was $65 per acre. Id.

ARGUMENT

I. Standard of review.

[¶13.] The trial court granted declaratory relief after a bench trial. "In an appeal from a bench trial, the trial court's findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a) and its conclusions of law are fully reviewable." Niles v. Eldridge, 2013 ND 52, ¶ 6, 828 N.W.2d 521 (internal quotation marks and citation omitted).

[¶14.] The appellants' statement of the standard of review is correct. The District Court's determination the Deeds in question are ambiguous is fully reviewable on appeal. The District Court's findings regarding the intent of the parties to the Deeds will be reviewed on appeal to determine if the finding is clearly erroneous.

[¶15.] After analyzing extrinsic evidence, the District Court found it was the intent of the Deeds to convey the property described in the Deeds in fee simple. "A finding of fact is clearly erroneous only if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after review of the entire record, we are left with a definite and firm conviction a mistake has been made." Cavendish Farms, Inc. v. Mathiason Farms, Inc., 2010 ND 236, ¶ 17, 792 N.W.2d 500 (internal quotation marks and citation omitted). Under the clearly erroneous standard of review, the District Court's findings are accorded deference. N.D.R.Civ.P. Rule 52(a)(6). The North Dakota Supreme Court has described the deference as follows, "Under the clearly erroneous standard of review, we do not reassess the witnesses' credibility or reweigh conflicting evidence." Hoverson v. Hoverson, 2015 ND 38, ¶ 6, 859 N.W. 2d 390 (internal quotation marks and citation omitted). The Court goes on to explain the reason the District Court's findings deserve deference is because "the district court has the advantage of judging the credibility of witnesses by hearing and observing them

and of weighing the evidence as it is introduced, rather than from a cold record." Id. When findings of fact are challenged on appeal, "the party challenging a finding of fact on appeal bears the burden of demonstrating it is clearly erroneous." Schmidkunz v. Schmidkunz, 529 N.W.2d 857, 860 (N.D. 1995).

II. Whether the District Court erred when it determined the 1917 Deed and the 1918 Deed are ambiguous.

(A) The 1917 Deed and the 1918 Deed both conveyed a fee interest.

[¶16.] When reviewing the effect of a Deed, the Supreme Court has determined "[T]he language, if clear and explicit, will govern the interpretation of the deeds and that the parties' intentions are to be ascertained from the writing alone, if possible." Royse v. Easter Seal Soc. for Crippled Children & Adults, Inc. of N. Dakota, 256 N.W.2d 542, 544 (N.D. 1977), *citing* N.D.C.C. §§ 9-07-02, 9-07-04, and Oliver-Mercer Electric Coop, Inc. v. Fisher, 146 N.W.2d 346 (N.D.1966). "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, *citing* North Shore, Inc. v. Wakefield, 530 N.W.2d 297, 300 (N.D.1995).

[¶17.] Both Deeds at issue here were on the same form. Both the 1917 Deed and the 1918 Deed contain the following conveyance language, "do hereby grant, sell, and convey..." (App. 16-18). The controlling word in this conveyance language is the word "grant," which results in a conveyance of a fee simple interest to the grantee. Dun v. Dietrich, 53 N.W. 81 (N.D. 1892) ("in this jurisdiction, the use of the word 'grant' is universal in conveyances of fee simple estates...").

[¶18.] The transfer of fee simple title when using the word "grant" in a conveyance is so important to the transfer of real property in North Dakota, that a presumption such conveyance

results in the transfer of fee simple has been codified in the North Dakota Century Code. N.D.C.C. § 47-10-13. The North Dakota Century Code goes further to disfavor the transfer of less than all rights the grantor holds in the property being transferred. N.D.C.C. § 47-09-16. Use of the grant sell and convey language unambiguously conveyed a fee simple interest to SCWRD's predecessor.

[¶19.] The Mathews have argued both Deeds conveyed a "right of way" to the SCWRD's predecessor. In making this argument, the Mathews have cited to cases from outside of North Dakota and extended the holding of Carkuff beyond its determination of whether or not a quitclaim deed conveyed after-acquired property. The cases cited from other jurisdictions involve mineral interests (*see* N. Sterling Irr. Dist. v. Knifton, 320 P.2d 968 (Co. 1958); and Texas Co. v. O'Meara, 36 N.E.2d 256 (Ill.1941)), property acquired by way of a right of way deed that is no longer being used for the purpose it was acquired for (*See* Bernards v. Link, 248 P.2d 341 (Or. 1952);and El Dorado & Wesson Ry. Co. v. Smith, 344 S.W.2d 343, 344 (Ark. 1961)) and a conveyance of an interest to an irrigation district that reserved unto the grantor the right to use the property conveyed in any manner that did not interfere with the construction of the levee (*See* Johnson Cnty. v. Weber, 70 N.W.2d 440, 445 (Neb. 1955)).

[¶20.] SCWRD does not assert any control over the oil, gas, or fluid minerals underlying the Property. As is recognized in N.D.C.C. § 24-01-18, political subdivisions may acquire a fee interest in lands within the state of North Dakota without acquiring the underlying oil and gas rights. N.D.C.C. § 24-01-18. It is common in North Dakota for the surface ownership to be severed from the underlying minerals. Even after the minerals are severed, an owner still holds a fee interest in the surface. Therefore, the cases from other jurisdictions that indicate right of way acquired for a

drainage ditch or irrigation canal does not include the conveyance of minerals is not applicable to this discussion.

[¶21.] The cases cited by Mathews for the proposition the Deeds conveyed only a right of way are not applicable to this situation. Some of the cases include conveyance language that is very different from the grant, sell and convey language used in the Deeds, and still other cases did not identify the conveyance language at all. Furthermore, there is no argument that SCWRD has, in any way, abandoned its interest in the Property. Drain 11 was constructed on the Property, and is currently being maintained on the Property

[¶22.] It is important to note the cases cited by Mathews do not include a discussion about the meaning of the word "grant" in the right of way deeds. In North Dakota, the term "grant" has special meaning. The term "grant" has been synonymous with a conveyance of fee simple since 1892, which was the era when the Deeds were executed. Dun v. Dietrich, 53 N.W. 81 (N.D. 1892). The use of the term "grant" raises a presumption the interest conveyed was a fee interest. The cases cited by Mathews do not address this presumption.

[¶23.] It is also interesting to note that of the seven cases cited by Mathews in their brief to this Court arguing it is universal that right of way deeds convey an easement, two of those cases held the right of way deeds in the respective cases conveyed a fee interest to the grantee. Midland Val. R. Co. v. Arrow Indus. Mfg. Co., 297 P.2d 410, 411 (Okl. 1956); and Midland Valley R. Co. v. Jarvis, 29 F.2d 539, 541 (8th Cir. 1928).

[¶24.] The Deeds contain conveyance language that has been recognized as conveying a fee interest. Based upon the jurisprudence existing at the time the Deeds were signed, the use of the word "grant" in the conveyance document, and the payment of a substantial sum for the Property

being acquired, indicates the intent of the parties was for the 1917 Deed and the 1918 Deed to convey a fee simple interest. Now, nearly 100 year later, there is a statutory presumption the interest conveyed is a fee interest, and the arguments of the Mathews have not overcome that presumption. Therefore, the 1917 Deed and the 1918 Deed unambiguously conveyed a fee simple interest in the Property to the SCWRD's predecessor in interest.

(B) If the 1917 Deed and 1918 Deed do not unambiguously convey a fee interest to the SCWRD's predecessor, then an ambiguity exists within the Deeds.

[¶25.] The cases cited by Mathews show a case by case review is required to determine the property interest conveyed by each right of way deed. In this case, SCWRD has made an argument the Deeds unambiguously conveyed a fee interest to the SCWRD's predecessor in interest. The Mathews have alleged the Deeds conveyed "right of way" to the SCWRD's predecessor in interest. Although Mathews does not define what the "right of way" is, they do contend it is less than a fee interest. The District Court reviewed the Deeds in their entirety and was left with the impression the Deeds as a whole are ambiguous. If rational arguments can be made for multiple interpretations of the terms of a deed, the deed itself is ambiguous. Northstar Founders, LLC v. Hayden Capital USA, LLC, 2014 ND 200, ¶ 47, 855 N.W.2d 614. The District Court determined as a matter of law that the language of the Deeds could convey either a fee simple interest or a right of way. (Memorandum Opinion paragraph 28, App. 25).

[¶26.] Mathews has used Carkuff v. Balmer in response to SCWRD's argument the use of the work "grant" controls this matter. In Carkuff, the conveyance language was as follows, "grant, bargain, sell, remise, release, and quit-claim." Carkuff, 2011 ND 60, ¶ 8. Carkuff held the focus of the conveyance language should be on what interest is being conveyed by the words of conveyance,

not on whether the word "grant' was used in the conveyance. Id. at ¶ 8. Using that focus, the Court in Carkuff determined a quit claim deed did not convey after-acquired property. The North Dakota legislature, with the guidance of the Real Property Section of the State Bar Association of North Dakota, responded to the Carkuff decision by modifying N.D.C.C. § 47-10-15 to include the following provision, "A quitclaim deed that includes the word 'grant' in the words of conveyance, regardless of the words used to describe the interest in the real property being conveyed by the grantor, passes after-acquired title." N.D.C.C. § 47-10-15. The minutes of the Senate Judiciary Committee Hearing for S.B. 2168 to modify N.D.C.C. § 47-10-15 include the following testimony from Grant Shaft as a representative of the Real Property Section of the State Bar Association:

> He explains the reason for this bill is that the Supreme Court has addressed a case recently that dealt with a quit claim deed, if the deed utilizes the language grant after acquired title will always pass. If it does not have the grant language in it it will not pass after acquired title....
>
> He says it was decided to go with what the practice has always been and that is the use of the word grant whatever the document is would pass after-acquired title.

Hearing on S.B. 2168 Before the Senate Judiciary Comm., 63rd N.D. Legis. Sess. (January 23, 2013) (testimony of Grant Shaft, Representative of Real Property Section - State Bar Association).

[¶27.] The modification of N.D.C.C. § 47-10-15 in response to Carkuff shows the longstanding intention of real estate transactions in North Dakota is to rely upon the term "grant" in the conveyance document to describe the interests being conveyed, instead of relying upon the description of what is being conveyed to determine the nature of the interest conveyed.

[¶28.] If the focus is shifted from the "grant" language of the conveyance to focus on what is being conveyed, the property right acquired through the Deeds must be viewed as ambiguous. Both Deeds indicate Sargent County was granted a "right of way." The Deeds go on to describe the

expected improvement to be constructed using the "right of way" as a public drain. Drain 11 was constructed on the Property, and remains in place today.

[¶29.] Although the term "right of way" is not defined with respect to legal drains, it is defined as it applies to the state highway system. N.D.C.C. § 24-01-01.1(38) defines "right of way" as follows, "'Right of way' means **a general term denoting land, property, or interest therein**, acquired for or devoted to highway purposes and shall include, but not be limited to publicly owned and controlled rest and recreation areas, sanitary facilities reasonably necessary to accommodate the traveling public, and tracts of land necessary for the restoration, preservation, and enhancement of scenic beauty adjacent to the state highway system." N.D.C.C. § 24-01-01.1(38) (emphasis added). This also corresponds with the Black's Law dictionary definition of right of way, which is:

> 1. The right to pass through property owned by another. • A right-of-way may be established by contract, by longstanding usage, or by public authority (as with a highway). Cf. easement. 2. The right to build and operate a railway line or a highway on land belonging to another, or the land so used. 3. The right to take precedence in traffic. 4. The strip of land subject to a nonowner's right to pass through.

Black's Law Dictionary (10th ed. 2014), right-of-way.

[¶30.] The use contemplated within the four corners of the Deeds does not include a road or a railroad. There is also no expectation Sargent County would simply pass through the Property to construct a drain elsewhere. As was expressed in the Deeds themselves, the expectation was for Sargent County to acquire the Property to construct a drain.

[¶31.] Under the title "Right of way and materials may be acquired by purchase or eminent domain" the North Dakota Legislature has provided the department of transportation authority to acquire an easement over lands, or a **fee simple interest** in lands currently necessary, or necessary in the future for the construction of a road. N.D.C.C. § 24-01-18. It is unclear if the discussion of

right of way found in the Highways Bridges and Ferries Title of the North Dakota Century Code applies to water projects because no highway is involved in constructing and laying out a drain. If the definition of right of way found in N.D.C.C. § 24-01-01.1(38) is applicable to these Deeds, right of way and fee simple are not mutually exclusive. It may have been the intent of the Grantor to convey a fee simple interest to Sargent County that is identified by the general term, right of way. If the definition of right of way found in N.D.C.C. § 24-01-01.1(38) is not applicable to the Deeds, that casts even more ambiguity on the Deeds because there is no other definition of "right of way" commonly used in North Dakota law.

[¶32.] The Mathews made arguments in their brief about whether the uncertainty of the legal descriptions of the Deeds rendered the entire document ambiguous. This argument is misplaced because the District Court determined the Deeds were ambiguous because of the rational argument regarding what interest was conveyed. This ambiguity was in addition to the ambiguity caused by the legal descriptions referencing documents that have since been lost. Mathews concedes it is impossible to determine the extent of the Property conveyed because the legal descriptions reference documents that have since been lost. The District Court recognized this problem as well, and required SCWRD to properly survey Drain 11. It was appropriate for the District Court to order a survey of the Drain to define the legal description of the Property because the control of the Property is in controversy. Furthermore, even if the Deeds only conveyed a "right of way," SCWRD would still enjoy a property right in all property described in the Deeds.

[¶33.] The District Court determined there are rational arguments for the proposition the Deeds convey a fee simple interest, and for the proposition the Deeds convey a right of way. The

existence of multiple rational arguments about the meaning of the Deeds renders the Deeds ambiguous.

[¶34.] If it is not determined that the Deeds unambiguously conveyed a fee simple interest to Sargent County, the Deeds should be found ambiguous, and subject to the application of parol evidence to determine intent.

III. Whether the District Court's findings of fact were clearly erroneous where it found parol evidence shows the intent of the 1917 Deed and the 1918 Deed was to convey a fee simple interest.

[¶35.] The District Court relied upon parol evidence when determining what interest the grantors of the Deeds intended to convey. In doing so, the District Court identified the following factors that indicated a conveyance of a fee simple interest:

- The land south of Drain 11 may not have been easily accessible from the north, east, or west when the Deeds were executed, thereby making it undesirable for the owners of the remainder of the SW¼ of Section 23 to retain ownership of the land south of the drain;
- The number of acres acquired by way of the Deeds exceeds the number of acres necessary for the construction of the Drain;
- The consideration paid was consistent with the sale of a fee interest; and
- The acres conveyed by the Deeds were removed from the tax rolls, consistent with Sargent County's policy to remove only acres deeded in fee from the tax rolls.

Memorandum Opinion p. 11, App. 30.

[¶36.] The District Court found only one factor inconsistent with a grant of a fee interest. That factor was the use of the Property located south of the drain by the owners of the remainder of the SW¼ Sec. 23 until the year 2000. Based upon the parol evidence identified above, the District Court found the Deeds conveyed a fee simple interest.

(A) It was proper for the District Court to determine the price per acre paid for the Deeds was equivalent to a fee simple purchase.

[¶37.] The 1917 Deed conveyed 3.73 acres to Sargent County. App. 16. The compensation recited in the 1917 Deed was $186.50, which equates to $50 per acre. Id. The 1918 Deed conveyed 5.1 acres to Sargent County. App. 18. The compensation recited in the 1918 Deed was $331.50, which equates to $65 per acre. Mathews argued the consideration recited in the Deeds was not actually paid. The District Court specifically ruled the consideration was paid, and Mathews has not challenged that factual finding on appeal.

[¶38.] The District Court compared the price per acre paid to acquire the Property described in the Deeds to the price per acre paid for the purchase of a fee simple interest in land near the Property, sold at approximately the same time as the Property was acquired. Memorandum Opinion pp. 5 & 11. App. 24 & 30. Mathews has raised for the first time on appeal that it was improper to rely upon the previous sales because the consumer price index showed inflation during the time between the last sale and the 1917 Deed.

[¶39.] Mathews' argument regarding inflation is improper for two reasons. First, this argument was not raised at the District Court. Mathews is seeking to introduce additional evidence by way of judicial notice at the Supreme Court. There is no support for the Supreme Court to take judicial notice of facts to be relied upon after the District Court has already ruled. Issues not raised with the District Court may not be raised on appeal. In re Johnson, 2013 ND 146, ¶ 10, 835 N.W.2d 806. "The purpose of an appeal is to review the actions of the trial court, not to grant the appellant an opportunity to develop and expound upon new strategies or theories." Id. Second, the consumer price index does not include real estate or investment property as a component of inflation. United

States Department of Labor, Bureau of Labor Statistics, frequently asked questions; What Goods and Services Does the Consumer Price Index cover? http://www.bls.gov/dolfaq/bls_ques3.htm (Last visited on June 1, 2015). Therefore, even if it was proper to raise the additional evidence at this late stage, the evidence Mathews is now seeking to introduce is not relevant to the price comparison between sales of real property close in time to the Deeds and the consideration paid for the Deeds themselves.

[¶40.] The price paid for the acquisition is relevant to the determination of what property rights were conveyed. In El Dorado & Wesson Ry. Co. v. Smith, the Arkansas Supreme Court analyzed a right of way deed to determine if a fee simple interest was conveyed, or an easement. One of the main areas of focus for the El Dorado & Wesson Ry. Co. v. Smith Court was the consideration paid. As part of that analysis, the Court stated, "The only significant difference between the cases is that here the consideration paid, $55 for a right of way totaling about ten acres, is not as clearly nominal as was the payment in the Daugherty case." El Dorado & Wesson Ry. Co. v. Smith, 344 S.W.2d 343, 345 (Ark. 1961). If there was the possibility the $5.50 per acre paid in 1905 for the right of way deed in El Dorado & Wesson Ry. Co. v. Smith was approaching the level of a fee simple payment, it is reasonable for the District Court in this case to conclude the $50 and $65 per acre paid by Sargent County was intended to be for the acquisition of a fee interest in the property.

(B) The District Court properly concluded the Property being removed from the tax rolls demonstrated an intent by the parties to convey the Property in fee simple.

[¶41.] The defendants only pay real estate taxes on 151.17 acres for the SW¼ Sec. 23. Doc. ID No. 36. The Sargent County Auditor, Sherry Hosford, testified Sargent County's records dating

back to 1949 show the owners of the SW¼ Sec. 23 have only paid taxes on 151.17 acres. T.R. p. 56 ll.18-22. In her roll as auditor, Ms. Hosford does not recall any of the defendants ever seeking to pay real estate taxes on more than 151.17 acres of land in the SW¼ Sec. 23. T.R. p. 58 ll. 1-3. The amount of acres the defendants are paying taxes on is 160 acres – the presumed starting point for a quarter of land – less the number of acres conveyed by the 1917 Deed and the 1918 Deed. Id. p.57 ll.4-7. Sargent County only reduces the number of acres an owner is paying property taxes on when those acres are conveyed to another owner. T.R. p. 55 ll. 1-6.

[¶42.] In their brief, Mathews argued there was no basis in the record to support the District Court's finding of fact concluding "it is the policy of Sargent County not to remove property used for right of way from the tax rolls, regardless of whether the property is used for roads, drains or other public purposes, unless the property has been purchased in fee by the county or some other public entity." Memorandum Opinion p. 5, ¶ 25, App. 24. In making this argument, Mathews pinpoints only three lines from the transcript of Ms. Hosford's testimony to determine the policy of Sargent County with respect to when property is removed from the tax rolls.

[¶43.] Ms. Hosford's testimony stretched for thirty-three pages. Much of that testimony was about the County's policy of what property to remove from the tax rolls. All three of the attorneys asked questions of Ms. Hosford about the County's policy regarding removal from the tax rolls, and Judge Cruff also asked several questions about the removal of land from the tax rolls.

[¶44.] Ms. Hosford testified on cross examination by Mathews' attorney about the County's policy as follows, "it's a practice of our office to do that procedure whenever a right-of-way deed is filed – to remove it from the property and then it belongs to the county or whatever entity is acquiring that right of way." T. R. p. 65 ll. 2-10. She went on to clarify her use of the term "right-

of-way deed" to mean those deeds that transfer a full interest to the grantee. Id at ll. 8-10. On cross examination by Ms. Delahoyde's attorney, Ms. Hosford testified if there is any question about what type of interest is being conveyed by a document, that she would contact the state's attorney for clarification. T.R. p. 81 ll. 5-10.

[¶45.] There is support for the finding of fact regarding the county's policy on removal of land from the tax rolls. The District Court was in a position to analyze the testimony, and make a finding of fact from the testimony. Deference must be given to the District Court's findings because it had the opportunity to make the findings of fact based on testimony, instead of simply on a cold record, and there is a basis in the record for the finding made. The District Court's finding the County only removes property that has been acquired in fee from the tax rolls should not be disturbed on appeal. Ultimately this finding adds to the parol evidence that supports a conclusion the Deeds transferred the land in fee to the predecessor of the SCWRD.

V. CONCLUSION

[¶46.] For the reasons set forth above, the judgment of the District Court should be affirmed.

Dated this 1st day of June, 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 and Paul Mathews, Defendants and Appellants, and Phyllis Delahoyde, Defendant and Appellee.	)	Supreme Court No. 20140451 Sargent Co. No. 41-2012-CV-00088

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

CERTIFICATE OF SERVICE

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

I hereby certify that on June 1, 2015, I electronically filed with the Clerk of the North Dakota Supreme Court the Brief of Plaintiff and Appellee, and served the same electronically as follows:

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