20140451
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 18, 2015
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

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

Baumstark Braaten Law Partners

JJ England, ND Bar #08135
Derrick Braaten, ND Bar #06394
109 North 4th Street, Suite 100
Bismarck, ND 58501
Phone: (701) 221-2911
Attorneys for Defendants/Appellants Nancy I. Mathews and Paul Mathews

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ARGUMENT

[¶ 1] Sargent County Water Resource District's ("SCWD") primary argument is that use of the word "grant" in a conveyance is a magic word that "results in a conveyance of a fee simple," regardless of other language in a deed. (Appellee Brief at ¶¶ 17, 22). The Mathews, in their opening brief to this Court, argued that the deed must be read in its entirety. The 1917 and 1918 deeds say "grant…right of way for the laying out, construction, and maintenance of a public drain…through said above described lands, being a strip of land...." (App. 016-018). Not once does SCWD quote this full language in their brief, and not once does SCWD actually address Appellants' plain meaning argument that the words "right of way" gives meaning to the word "grant." Moreover, the case that SCWD relies upon, Dun v. Dietrich, 53 N.W. 81 (N.D. 1892), simply notes that use of the word "grant" implied certain covenants under the 1913 Compiled Laws. SCWD has quoted this case wholly out of context.

[¶ 2] SCWD's interpretation, if adopted by this Court, would have disturbing practical effects. No doubt, countless thousands of North Dakota easements use the word "grant" (with additional language limiting the extent of the grant) in reliance on the Century Code's statement, unchanged since 1913, that "[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);[1] Comp.L. 1913, § 5527. Likewise, this Court stated in Lalim v. Williams Cnty., 105 N.W.2d 339, 344-45 (N.D. 1960) that use of the word "grant" in a conveyance does not raise a "conclusive

[1] This Court has attributed a similar meaning to N.D.C.C. § 47-09-16, which SCWD also cites. Acoma Oil Corp. v. Wilson, 471 N.W.2d 476, 483 (N.D. 1991) (interpreting N.D.C.C. § 47-09-16 to mean that "a deed passes whatever interest the grantor has in the land unless words are used to show an intent to convey a smaller estate") (emphasis added).

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." SCWD's interpretation of the law would render the phrase "unless it appears from the grant that a lesser estate was intended" in N.D.C.C. § 47-10-13 (2015) and Comp.L. 1913, § 5527 meaningless surplusage. SCWD's interpretation cannot be correct. "One of the most elementary rules of statutory construction is that a statute should be so construed, where possible, as to give effect to every word." Rosoff v. Haussamen, 228 N.W. 830, 837 (1930).

[¶ 3] SCWD also attempts to refute the Mathews' argument that the overwhelming weight of authority from across the country shows that right of way deeds are typically construed to convey easements and nothing more. (Appellee Brief at ¶¶ 21-23). However, SCWD does not cite a single case to support its position. The two cases that SCWD picks out of Appellants' Brief as in fact conveying fee simple both support the Mathews' position. Midland Val. R. Co. v. Arrow Indus. Mfg. Co., 297 P.2d 410, 411 (Okl. 1956) stands for the proposition that "where the instrument purports to convey a described strip of land rather than a right of way over a strip of land the conveyance is considered a fee estate instead of an easement." (Emphasis added). Here, both the 1917 and 1918 deeds conveyed easements "through said described lands," App. 016-018 (emphasis added), with "through" serving the same purpose as "over" in Arrow Indus. Mfg. Co. As for Midland Valley R. Co. v. Jarvis, 29 F.2d 539, 540 (8th Cir. 1928), this case stands for the proposition that for the special situation of railroads, railroad rights of way have the "attributes of the fee." This wording necessarily means that such rights of way are *not* in fact true fees, but rather are easements that allow for undisturbed use.

[¶ 4] SCWD asserts that the Mathews have not defined the phrase "right of way" (Appellee Brief at ¶ 25), and the Mathews take this opportunity to define this phrase now. N.D.C.C. § 47-05-01 defines "[t]he right of way" as one of sixteen enumerated types of "easements" attached to other lands. SCWD also quotes Blacks Law Dictionary's definition of "right-of-way" as "[t]he right to pass through property owned by another … Cf. easement." (Appellee Brief at ¶ 29). This definition supports the Mathews' position. The 1917 and 1918 Deeds both "grant…right of way…through said above described lands," which is the same language used by Blacks Law Dictionary. (App. 016-018) (emphasis added). To the extent that SCWD attempts to attribute the definition of "right of way" from the state's highway code to public drains, this is irrelevant. (Appellee Brief at ¶ 29). Drains are not highways, and N.D.C.C. § 24-01-01.1 expressly limits its definition of "right of way" to "this title," i.e. the highway code in Title 24. The definition of "right of way" in the highway code carries no weight in light of the specific definition of "right of way" as a form of "easement" in the property code.

[¶ 5] The Mathews also note that SCWD has not rebutted, and therefore appears to agree, that their predecessor only had the ability to obtain an easement in the property at issue in this case through eminent domain. SCWD also does not dispute that this fact sheds light on the original intent of the parties.

[¶ 6] For the first time, SCWD now argues that it "does not assert any control over the oil, gas or fluid minerals underlying the Property" at issue. (Appellee Brief at ¶ 20). In other words, SCWD argues that it does not in fact seek a fee simple absolute, and then cites to North Dakota's highway laws in Title 24 of the Century Code in an attempt to change its intent post-hoc for the first time before this Court. *Id.* Again, the highway

laws have no bearing on this case, and although SCWD asserts that N.D.C.C. § 24-01-18 extends to "political subdivisions," this is simply not the case. By its plain language, N.D.C.C. § 24-01-18 only extends to the highway department and no other entities. Moreover, SCWD's argument is perplexing since SCWD *did* seek a declaratory judgment from the trial court that the Water District owns the subject property outright. (App. 007, ¶ 1). Indeed, this is precisely the relief the trial court granted when it ruled in its final judgment that "the 1917 and 1918 Deeds granted fee simple title to the Sargent County Board of Drain Commissioners" (i.e., SCWD's predecessor). (App. 40, ¶ 2). With no evidence in the record of any severed mineral interests, fee ownership necessarily includes mineral rights. N.D.C.C. § 47-01-12 (scope of ownership for land held in fee).

[¶ 7] As to the factual issues raised by the Mathews, SCWD seems to argue that because changes in real property prices are not used to calculate inflation, that inflation should not be considered by this Court. (Appellee Brief at ¶ 39). But it is common, judicially noticeable knowledge that inflation simply measures the buying power of a sum of money and that this buying power changes over time. This fact does not change regardless of how inflation is calculated. While a dollar may significantly change in value over the course of several years, just as it did from 1913-1918, the *thing* purchased—be it a jar of jam or an easement—does not change the value of that dollar.

[¶ 8] As for the statements of Ms. Hosford, the Sargent County Auditor, she stated that "if there would be any type of a right-of-way deed or that conveys ownership [sic], we would have to remove that acreage from that person's parcel" from the County's tax rolls. (App. 046, Lines 7-10). The important point is that Ms. Hosford noted that Sargent County removes right-of-way deeds from the tax rolls *in addition to* grants

conveying full ownership. The Mathews therefore maintain that the trial court's following findings of fact have no support in the record:

> "It is the policy of Sargent County not to remove property used for right of way from the tax rolls…unless the property has been purchased in fee by the county." (App. 024, ¶ 25); (App. 035, ¶ 24) (emphasis added).

> "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).

[¶ 9] Finally, the Mathews argued in their opening brief that the trial court's findings of fact are internally inconsistent. Although Appellee has not pressed any argument to the contrary, on further review, the Mathews believe that this argument was in error. The Mathews respectfully withdraw this argument.

II. CONCLUSION

[¶ 10] This case stands for the common sense proposition that a "right of way deed" that expressly grants "right of way…through said described property" conveys an easement for right of way and nothing more. The Appellants' position is further supported by overwhelming authority from other jurisdictions. No amount of argument nearly a century later by SCWD should change the clear intent of the original parties. Although the plain language of the 1917 and 1918 deeds clearly indicates the intent of the original parties to convey an easement, SCWD's arguments also do not overcome the problematic factual findings of the trial court. Therefore, the decision of the trial court should be reversed.

DATED this 18th day of June, 2015.

BAUMSTARK BRAATEN LAW PARTNERS

/s/ *JJ England*

By: JJ England, ND Bar #08135
Derrick Braaten, ND Bar # 06394
Attorneys for Defendants/Appellees
109 North 4th Street, Suite 100
Bismarck, ND 58501
Phone: 701-221-2911
Fax: 701-221-5842
jj@baumstarkbraaten.com
derrick@baumstarkbraaten.com

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 June 18th, 2015, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

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

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