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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Eric Arthur Johnson, a/k/a Eric A. Johnson Eric A. Johnson as Trustee of the Jerol Johnson Trust created under the Betty J. Johnson Revocable Living Trust Agreement dated June 21, 2010, Jerol Johnson, and the Art Johnson and Anabel Johnson Family, LLP, a limited liability partnership organized under the laws of the State of North Dakota,

Plaintiffs and Appellants,

vs.

Suzanne M. Shield, Sandra Guthrie King, Lynda Guthrie, William Arlo Guthrie, Roy Goldberg, F. Peter Bergman, Pamela Jane Crawford, John W. Bergman, Bradley C. Bergman, William Eric Bergman, and Williams County, a municipal corporation organized under the laws of the State of North Dakota, and all other persons unknown claiming any estate or interest in or lien or encumbrance upon the real property described in the Complaint, whether as heirs, legatees, devisees, personal representatives, creditors or otherwise,

Defendants and Appellees,

Supreme Court No. 20150053

District Court No. 53-2013-CV-00081

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MAY 01 2015

STATE OF NORTH DAKOTA

Appeal from the Findings of Undisputed Fact, Conclusions of Law and Order for Summary Judgment and Judgment entered on January 22, 2015, County of Williams, Northwest Judicial District, Honorable Robin A. Schmidt, Presiding

APPELLE'S BRIEF

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STATEMENT OF THE ISSUE

[¶ 1.] The sole issue before the Court is whether the District Court properly interpreted a Warranty Deed as reserving fifty percent (50%) of the mineral estate to the Grantors.

STATEMENT OF THE CASE

[¶ 2.] This is an appeal from a Judgment quieting title to minerals located in Williams County, North Dakota.

[¶ 3.] The action was commenced by the successors in interest to Warranty Deed grantees Arthur and Julian Johnson (which successors shall hereinafter collectively be referred to as "Johnson") against the successors in interest to Warranty Deed grantors Eugenie and Roy Goldenberg (which successors shall hereinafter collectively be referred to as "Guthrie"). By this action, Johnson sought judgment determining that Johnson was the owner of 100% of the minerals located in a tract of land located in Williams County, North Dakota. Guthrie answered denying the claims of Johnson and asserted a claim to 50% of the mineral estate. Johnson and Guthrie filed competing motions for summary judgement, with both agreeing that there were no genuine issues of material fact and both arguing an entitlement to a summary judgment in their respective favor.

[¶ 4.] The lower Court, after having reviewed the documents, affidavits and other evidence provided by the parties, ruled, as a matter of law, that, at the time of the conveyance, Eugenie and Roy Goldenberg were the owners of all of the oil, gas, hydrocarbons and minerals (minerals) found with the property and that, by the language of the Warranty Deed, Eugenie and Roy Goldenberg effectively reserved fifty percent (50%) of all such minerals from their conveyance to Arthur and Julian Johnson.

[¶ 5.] This present appeal was filed by Johnson challenging the summary judgement issued by the lower Court.

STATEMENT OF FACTS

[¶ 6.] By Warranty Deed dated December 8, 1942 (hereinafter "Warranty Deed"), Eugenie Bean Goldenberg (Eugenie) and Roy J. Goldenberg (Roy), as Grantors, conveyed portions of Section 22, Township 157 North, Range 97 West, Williams County, North Dakota (the "property") to Julian Johnson (Julian) and Arthur Johnson (Arthur). *See*, App. 22.

[¶ 7.] Although the grant clause of the Warranty Deed does not discuss or address minerals, the warranty clause of the Warranty Deed provided as follows:

> "...but **reserving**, however, **to the Grantor** fifty percent (50%) of all the oil, gas, hydro-carbons, and minerals in or with respect to said real property[.]" [emphasis added].

[¶ 8.] It is uncontested that, at the time of the conveyance, the Eugenie and Roy were the owners of all of the minerals associated with the property. There has been no allegation, assertion or suggestion by any party that, at the time of the 1942 conveyance, Eugenie and Roy owned less than all of the mineral estate within the property.

[¶ 9.] On January 13, 1943, or one month following the Goldenberg-Johnson conveyance, Eugenie and Roy assigned a 1¼ royalty interest in the minerals to Frederick P. Bergman. *See*, Guthrie Appx. at page 5. On April 15, 1943, or six months following the Goldenberg-Johnson conveyance, Eugenie and Roy assigned a 1 ¼ royalty interest in the minerals to F.P. Bergman. *See*, Guthrie Appx. at page 6. Both Assignments contained warranties of title. As of 1943, Roy and Eugenie Goldenberg believed they had retained an interest in the minerals.

[¶ 10.] Thereafter, through a series of subsequent conveyances, the mineral ownership of Eugenie and Roy was passed to their heirs; namely Suzanne M. Shield, Sandra Guthrie King, Lynda Lynn Guthrie, and William Arlo Guthrie. (hereinafter collectively referred to as "Guthrie"). As noted above, the interests of Guthrie are subject to a 2.5% royalty assignment held by F. Peter Bergman, Pamela Jane Crawford, John W. Bergman, Bradley C. Bergman, and William Eric Bergman (hereinafter the "Bergman family"). There is no dispute between the Guthrie and Bergman families regarding their respective interests in the minerals.

[¶ 11.] By way of a series of subsequent conveyances, the mineral interests of Julian and Arthur were conveyed to the Appellants (hereinafter collectively referred to as "Johnson").

[¶ 12.] The record in this is devoid of evidence concerning the identity of the drafter of the 1942 Warranty Deed. There is no evidence which suggests Eugenie or Roy drafted the Warranty Deed.

[¶ 13.] The record is devoid of any evidence or documentation suggesting that the property was ever lost or taken by Williams County as result of a tax foreclosure proceeding or that the property was lost to or taken by the Federal Land Bank as a result of a mortgage foreclosure proceeding.

[¶ 14.] The sole issue in this case is whether or not the language contained in the December 8, 1942 Warranty Deed reflects an intention by Roy and Eugenie to reserve one-half (1/2) of the mineral estate.

LAW AND ARGUMENT

I. STANDARD OF REVIEW.

[¶ 15.] This is an appeal from a Summary Judgment issued by the District Court. Whether the lower Court properly granted a Summary Judgment is a question of law which the Supreme Court reviews de novo on the entire record. *Capps v. Weflen,* 214 ND 201, ¶7, 855 N.W. 2d 637.

II. THE LOWER COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF GUTHRIE.

[¶ 16.] Rule 56(C) of the North Dakota Rules of Civil Procedure provides that summary judgment "... shall be rendered if the pleadings, discovery and the disclosure materials on file, and any affidavit shows that there is no genuine issue as to any material fact and that the moving parties entitled to judgment as a matter of law." *Beckler v. Bismarck Public School Dist.*, 2006 ND 58, ¶7, 711 N.W.2d 172. As previously noted, there are no genuine issues of material fact. What remains is a legal determination of the intent to the Grantors on the 1942 warranty deed.

[¶ 17.] In this case, although the granting provision of the December 8, 1942 Warranty Deed does not contain a provision addressing the reservation of minerals, the warranty section of the deed provides as follows ... "but **reserving** however, **to the grantor**, fifty percent (50%) of all oil, gas, hydro-carbons and minerals in or with respect to said real property". [emphasis added]. The sole issue in this case is whether the reservation clause contained in the warranty section of the 1942 Warranty Deed effectively reserved minerals to grantors Eugenie and Roy.

[¶ 18.] This Court, in the case entitled *Mueller v. Strangland*, 340 N.W.2d 451(N.D. 1983), addressed and provided guidance in determining whether the insertion of a reservation clause in the warranty section of a deed constitutes a valid and effective reservation. In *Mueller*, the grantors inserted the following language into a blank section of the warranty provision of the warranty deed: "The vendor **excepts** from this contract all minerals, including oil and gas, and all mineral rights **<u>not</u> now owned by the vendor** as described by the records in the office of the Register of Deeds of said county". [emphasis added]. *Id.* at 452. The grantor's heirs in *Mueller* argued that the deed language "excepted or reserved unto [the grantor] all of the minerals...".

[¶ 19.] The *Mueller* Court began its analysis by stating that "[t]he primary purpose in construing a deed is to ascertain the intent of the grantor. *Id.* at 452; *citing*, Malloy v. Boettcher, 334 N.W.2d 8 (N.D. 1983). The Court thereafter stated that "... grants of real property 'shall be interpreted in a like manner with contracts in general except so far as otherwise provided' in that Chapter". *Id.* The Court then looked to North Dakota Century Code Chapter 9-07 as an aid in construing the deed. The Court summarized Chapter 9-07 of the North Dakota Century Code as follows:

> "...Chapter 9-07, N.D.C.C., provides, among other things, that: (1) the language of a contract governs if it is clear and explicit and does not involve an absurdity (§9-07-02); (2) a contract must be interpreted to give intent to the mutual intention of the parties (§9-07-03), (3) the intention of a written contract is to be ascertained from the writing alone if possible (§9-07-04); a contract is to be interpreted to give effect to every part (§9-07-06); (5) a contract may be explained by reference to the circumstances Under which it was made (§9-07-12); and (6) in cases of uncertainty not otherwise removed, the language is to be interpreted most strongly against the party who caused the uncertainty to exist (§9-07-19).

Id. The Court stated that "[w]hile it is often difficult to distinguish between exceptions and reservations, ... the technical meaning will give way to the obvious intent, even though the

technical term to the contrary was used". *Id.* Therefore, the primary consideration is the intent of the parties with the intent to be derived from the four corners of the document, unless an ambiguity exists.

[¶ 20.] The *Mueller* Court, focusing on the vendor's use of the word "exception" ruled as follows:

> "... we believe that placement of the exception within the warranty clause **and** the use of the words **"excepts"** all minerals ... and all mineral rights now owned by the vendor"... is indicative of an intent to **except** from the warranty all minerals and mineral rights now owned, rather than an intention to except minerals owned from the grant and minerals not owned from the warranty". [emphasis added].

Id. at 453. The Court concluded that "[w]e do not believe that the language used is 'clear and explicit' or a **reservation** 'clearly expressed', or 'so explicit so as to leave no room for doubt'. Nor is it clear that the exception is an exception to the grant and not to the warranty". *Id* at 453.

[¶ 21.] In the present case, the applicable language in the 1942 Warranty Deed contains the word "reserving" and provides that the minerals were reserved to the Grantor. The language of the contract is clear is unambiguous. When coupled with the fact that Eugenie and Roy assigned royalty interests in those same reserved minerals to Frederick Bergman within a month of the Goldenberg-Johnson Warranty Deed, it is certain that Eugenie and Roy thought that they had reserved minerals and intended to reserve minerals. The intent of the grantor is clear and unambiguous. There is no room for a contrary interpretation and no room for doubt.

[¶ 22.] It is noted that Johnson, without any factual basis, stated that Eugenie and Roy drafted the warranty deed and therefore, any ambiguity must be resolved against Goldenberg as the document drafter. N.D. Cent. C. §9-07-03. Unfortunately, Johnson has

provided no evidence establishing the identity of the drafter of the document. The record is devoid of any such evidence.

[¶ 23.] Johnson also argues that because the property had a "history" which includes a default on a mortgage and late tax payments, the Goldenbergs, as grantors, in fact intended to "exclude" minerals from the conveyance to Johnson. Johnson, without any factual or legal support, argues that because Farm Credit Services retained 50% of minerals when foreclosing farm mortgages, Goldenberg must have intended to "exclude" minerals from the conveyance. The record is devoid of any evidence that Farm Credit Services ever foreclosed a mortgage on the premises or that any prior foreclosing party reserved any interest in the mineral estate. In fact, the record, with certainty, establishes that Roy and Eugenie owned all of the mineral estate at the time of the conveyance to Johnson.

[¶ 24.] Johnson further argues that a theoretical property tax foreclosure proceeding during the early 1900's is evidence of the Goldenbergs' intent to "exclude" minerals from the conveyance. Initially, there is no evidence that the property was ever "lost" to Williams County or the State for non-payment of taxes. Nor is there any evidence that Williams County or the State ever acquired any such mineral interests. Finally, there is no evidence that Roy and Eugenie were aware of any such hypothetical claim by Williams County or the State to the mineral estate.

[¶ 25.] Finally, in support of their position and claim, Johnson cites three Oklahoma cases and one Kansas case; namely *Williams v. McCann*, 385 P.2d 788, 790 (OK 1963) [wherein the operative language in the deed was "Except the Minerals or Oil Rights in said lands..."]; *Bascom v. Maxey*, 157 P.2d 158, 159 (OK 1945) [wherein the operative language was "...except the same is subject to an oil and gas mining lease..."];

Board of County Com'rs of Choctaw County. v. *Weaver,* 426 P.2d 696, 699 (OK 1967) [wherein the operative language was "...except all outstanding interest in the oil, gas and other minerals in the above described land which might have been reserved by prior grantors,..."]; *Brungardt v. Smith*, 290 P.2d 1039, 1042 (Kan. 1956) [wherein the operative language was "..except an oil & gas lease...", and "...excepting seven hundred fifty (750) acres of royalty commonly known as 15/16ths royalty or mineral interest,.."]. In all of Johnson's cited cases, the operative word in the conveying documents was "except" or "excepting". None of the documents addressed in any of the cases cited by Johnson used the word "reserve" or "reserving" when discussing the mineral estate.

CONCLUSION

[¶ 26.] In conclusion, it is submitted that the 1942 Warranty Deed is clear and unambiguous and that, pursuant to language of the deed, Eugenie and Roy reserved one half of the oil, gas, hydrocarbons and other minerals in or with respect to the property. It is therefore requested that this Court in all ways affirm the summary judgment issued by the lower Court.

Dated this 30th day of April, 2015.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney for the Appellees in the above-entitled matter hereby certifies, in compliance with Rule 32(a)(8)(A), N.D.R.App.P., that the above brief contains 2,629 words (excluding words contained in (1) the table of contents, (2) the table of authorities, and (3) this certificate, which is within the limit of 8,000 words.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

<table>
<tr><td>Eric Arthur Johnson, a/k/a Eric A. Johnson
Eric A. Johnson as Trustee of the Jerol Johnson Trust created under the Betty J. Johnson Revocable Living Trust Agreement dated June 21, 2010, Jerol Johnson, and the Art Johnson and Anabel Johnson Family, LLP, a limited liability partnership organized under the laws of the State of North Dakota,

Plaintiffs and Appellants,

vs.

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20150053

District Court No.
53-2013-CV-00081</td></tr>
</table>

CERTIFICATE OF SERVICE

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

I hereby certify that on May 1, 2015, I caused to be electronically filed the Appellee's Brief and Appellee's Appendix with the Clerk of the North Dakota Supreme Court (as supclerkofcourt@ndcourts.gov) and served the same electronically as follows:

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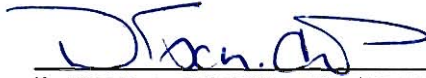

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IN THE SUPREME COURT
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Eric Arthur Johnson, a/k/a Eric A. Johnson Eric A. Johnson as Trustee of the Jerol Johnson Trust created under the Betty J. Johnson Revocable Living Trust Agreement dated June 21, 2010, Jerol Johnson, and the Art Johnson and Anabel Johnson Family, LLP, a limited liability partnership organized under the laws of the State of North Dakota,	)	Supreme Court No. 20150053
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Defendants and Appellees,	)	

CERTIFICATE OF SERVICE

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

I hereby certify that on May 14, 2015, I caused to be electronically filed the Amended Appellee's Brief with the Clerk of the North Dakota Supreme Court (as supclerkofcourt@ndcourts.gov) and served the same electronically as follows:

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