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STATE OF NORTH DAKOTA

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 Annabel 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 Lynn Guthrie, William Arlo Guthrie, Roy Goldenberg, 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 Williams County District Court No. 53-2013-CV-00081

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

BRIEF OF BERGMAN APPELLEES

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[¶2] **STATEMENT OF THE ISSUES**

[¶3] Whether the District Court correctly ruled that the warranty deed reserved 50% of the minerals to the Grantors.

[¶4] **STATEMENT OF THE FACTS**

[¶5] Eugenie Goldenberg and Roy J. Goldenberg executed a warranty deed in 1942 in favor of Appellants' predecessors in interest. At the time they executed the deed, it is undisputed that the Goldenbergs owned 100% of the surface and minerals in the property. This pre-printed warranty deed contained the following typed-in clause within the habendum/warranty clause of the deed:

> "but reserving, however, to the grantor fifty per cent (50%) of all of the oil, gas, hydro-carbons and minerals in or with respect to the said real property."

A short time later, Eugenie Goldenberg and Roy J. Goldenberg executed two royalty assignments to the predecessor in interest of Appellees F. Peter Bergman, Pamela Jane Crawford, John W. Bergman, Bradley C. Bergman, William Eric Bergman.

[¶6] Appellants contend that because the 50% reservation of minerals to the grantors was placed in the habendum/warranty clause of the warranty deed, it failed to reserve any minerals to the grantors Eugenie and Roy J. Goldenberg. Appellees argued in the lower court that the reservation was clear and unambiguous, and the District Court agreed, finding that the intent of the grantors to reserve to themselves 50% of the mineral interest was clear an unambiguous. *App.*, page 47(¶2).

[¶7] **ARGUMENT**

[¶8] The deed unambiguously reserves to grantors 50% of the mineral interests.

[¶9] Deeds are to be construed to attempt to give effect to every clause, sentence and provision. *Rolla v. Tank*, 2013 ND 175, ¶7, 837 N.W.2d 907, 910. In *Waldock v. Amber Harvest Corp., 2012 ND 180, ¶ 6, 820 N.W.2d 755, 758* (quoting *Carkuff v. Balmer, 2011 ND 60, ¶ 8, 795 N.W.2d 303*), this court set forth the rules for construing deeds:

> 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, the 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. Whether or not a contract is ambiguous is a question of law. (Citations omitted).

[¶10] The Appellants rely on the case of *Mueller v. Stangeland*, 340 NW2d 450 (ND 1983) as support for their argument. The relevant language of the particular deed construed in that case stated as follows: "The Vendor excepts from this Contract all minerals . . . . not now owned by the Vendor . . . ." This court found that this language did not effectively except or reserve any minerals because the language used was not clear and explicit. *Id.*, at 453. The court noted that in *Royse v. Easter Seal Society for Crippled Children and Adults, Inc.*, 256 NW2d 542 (ND 1977), it had stated that the language will govern the interpretation of a deed if clear and explicit and that the intentions of the parties are to be ascertained from the writing alone if possible. *Id.* Particularly important is that this court recognized that its *Royse* decision did not require a reservation to be placed in any particular part of a deed, as long as the reservation is explicit and leaves no room for doubt. *Id.* The reservation language used by the Goldenbergs in the deed at issue in this case is clear and explicit – they owned all the minerals at the time of the grant and reserved one-half for themselves.

[¶11] Appellants cite a number of cases in their brief which hold that exceptions in habendum or warranty clauses do not effectively reserve minerals to the grantors. However, the word "excepting" or "except" was the operative word used in the deeds, and there was nothing in the language used that expressed the clear intent to reserve a mineral interest. For example, in the case of *Williams v. McCann*, 385 P2d 788 (OK 1963), cited by Appellants, the court found that there was "nothing in the words 'Except the Minerals or Oil Rights in said lands' that showed that the [grantors] intended to retain the minerals . . . ." *Williams*, at 790. The *Williams* court stated that there were "no apt words of reservation." *Id.* Similarly, the language used in other cases cited by Appellants likewise did not clearly and explicitly show an intent to reserve an interest. *Eg.*, *Bascom v. Maxey*, 157 P.2d 158, 159 (OK 1945) ("except that the same is subject to an oil and gas mining lease"); *Bd. Of Cnty Com'rs of Chosctaw Cnty v. Weaver*, 426 P2d 696, 699 (OK 1967) ("except all outstanding interest in the oil, gas and other minerals in the above described land which might have been reserved or conveyed by prior grantors"); *Brungardt v. Smith*, 290 P.2d 1039, 1042 (KS 1956) ("excepting seven hundred fifty (750) acres of royalty commonly known as 15/16ths royalty or mineral interest"). All of these cases do not clearly reserve any interest to the grantors.

[¶12] A case more directly on point, not cited by Appellants, is *Westcott v. Bozarth*, 211 P2d 258 (OK 1949). In *Westcott*, the owners of the fee simple title conveyed the land by warranty deed which contained the following language at the end of the warranty clause: "except 15/16 of all mineral rights reserved on [the property]." Id, at 258. The court held that the language was sufficient to reserve 15/16 of the minerals in the grantors:

> In the present case there are apt words contained in the exception which properly reserve or carve out of the conveyance 15/16ths of all the minerals. The language used in the exception is "except 15/16 of all mineral rights reserved," and we think clearly expresses the intent of the grantors to reserve from the conveyance such interest. Plaintiff's contention that the exception should be construed as merely excepting 15/16ths of the mineral rights from the covenant of warranty cannot be sustained.

Id., at 259. The *Westcott* court noted that the modern rule followed by the majority of courts is that the whole deed and every part of it is to be taken into consideration in determining the intent of the grantor, and that clauses in deeds subsequent to the granting clause are given effect so as to curtail, limit or qualify the estate conveyed in the granting clause. *Id.*, at 259. The court found that it was clear from the language that a reservation of minerals was intended and that neither the grantee nor subsequent transferees could have been misled or deceived by the language used. *Id.*, at 260.

[¶13] The language used in the warranty deed executed by the Goldenbergs is even more clear and explicit than the language used in the *Westcott* case discussed above. The *Mueller* reservation, i.e., "The Vendor excepts from this Contract all minerals . . . . not now owned by the Vendor," does not clearly reserve any minerals. By contrast, the reservation language in this matter, i.e., **"but reserving, however, to the grantor** fifty per cent (50%) of all of the oil, gas, hydro-carbons and minerals in or with respect to the said real property," is clear and explicit. (Emphasis added). These are apt words of reservation, which clearly and explicitly show the intent of the grantors to reserve half of their minerals.

[¶14] Appellants theorize that a foreclosure of a mortgage and unpaid taxes could be a reason why the Goldenbergs would reserve 50% of the minerals from the warranty only. They point out that the Federal Land Bank had a history of reserving half the minerals and that counties had a practice of reserving half of the minerals in County deeds. Appellants'

argument is meritless, as they point to no tax forfeiture proceedings and no Federal Land Bank foreclosure or deed. Moreover, they ignore their own complaint which alleges and acknowledges that the Goldenbergs owned all of the minerals.

[¶15] Appellants also argue that the District Court's analysis is lacking in its initial Order denying their motion for summary judgment. However, the judgment entered in this case clearly establishes the basis for the court's ruling, i.e., the intent of the Goldenbergs to reserve 50% of the minerals is clear and unambiguous. *App.*, page 47(¶2).

[¶16] **CONCLUSION**

[¶17] From the four corners of the warranty deed, the unambiguous language "but reserving, however, to the grantor fifty per cent (50%) of all of the oil, gas, hydro-carbons and minerals in or with respect to the said real property" are apt words of reservation that clearly expresses the intention of the Goldenbergs to keep fifty percent of the minerals. The reservation is explicit and leaves no room for doubt, and the Judgment of the District Court should be affirmed.

Dated this 4th day of May, 2015.

OLSON & BURNS P.C.

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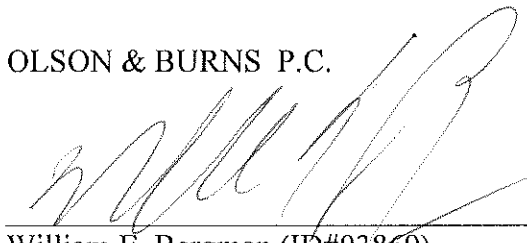
[¶18] **CERTIFICATE OF COMPLIANCE**

I, William E. Bergman, Attorney for the Bergman Appellees, do hereby certify that the above brief complies with all type-volume limitations as set forth in the North Dakota Rules of Appellate Procedure.

I further certify that the attached Appellees' Brief contains fewer than 8,000 words, and was prepared using WordPerfect 10.0, Times New Roman font, size 12.

Dated this 4th day of May, 2015.

OLSON & BURNS P.C.



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[¶19] **CERTIFICATE OF SERVICE**

I, William E. Bergman, Attorney for the Bergman Appellees, do hereby certify that on the 4th day of May, 2015, a copy of the BRIEF OF BERGMAN APPELLEES was served on the following by electronic mail transmission, per N.D. Sup.Ct. Admin. Order 14(D):

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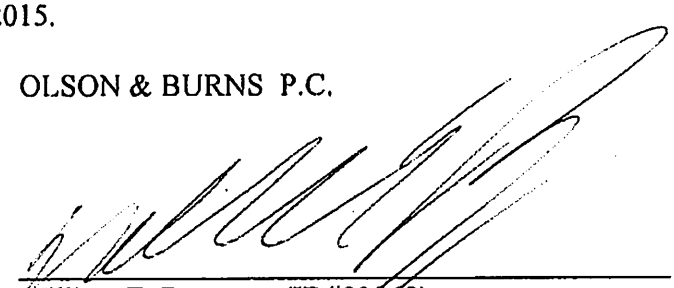

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[¶19] **CERTIFICATE OF SERVICE**

I, William E. Bergman, Attorney for the Bergman Appellees, do hereby certify that on the 5th day of May, 2015, a copy of the BRIEF OF BERGMAN APPELLEES was served on the following by electronic mail transmission, per N.D. Sup.Ct. Admin. Order 14(D):

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