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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 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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

[¶1] This Court established a legal framework to construe language placed in the warranty clause of a deed. Under the framework, the placement of reservation language in a warranty clause demonstrates an intent to except something from the warranty, rather than the granting clause. In order to conclude otherwise, there must be so clear and explicit of an intent manifested in the deed that there is no room left for doubt.

[¶2] The Guthrie Defendants and Bergman Defendants (collectively referred to as the "Defendants") contend the language at issue is so clear and explicit as to leave no room for doubt because it includes the term "reserves" instead of "excepts." This Court has rejected applying such an overly technical distinction to these terms for several decades, and this case should be no different. Under these circumstances, the general rule should control and the placement of the reservation language in the warranty clause should be construed as an exception from the warranty.

ARGUMENT

I. The North Dakota Supreme Court has repeatedly refused to give conclusive effect to the technical meaning of "reservation" and "exception"

[¶3] The Defendants' primary argument centers on the purported distinction between a "reservation" and an "exception." Namely, the Warranty Deed at issue uses the term "reserving" in the warranty clause, whereas the term "excepts" was used in the deed discussed in Mueller v. Stangeland, 340 N.W.2d 450, 451-52 (N.D. 1983).

APP. 21. According to the Defendants, the use of the term "reserving" clearly and explicitly shows the intent of the grantors to reserve 50 percent of the minerals.

[¶4] This Court has rejected the Defendants' argument for over 40 years. In Christman v. Emineth, 212 N.W.2d 543, 552 (N.D. 1973), the Court held the technical difference between a reservation and exception does not control:

> Notwithstanding that a distinction has been recognized between a reservation and an exception, it is often difficult to distinguish between an exception and a reservation in a deed. This is so because, in general, a reservation, like an exception, is something to be deducted from the thing granted, narrowing and limiting what would otherwise pass by the general words of the grant. Courts have therefore held that the terms are often used interchangeably or indiscriminately and are not conclusive as to the nature of the provision, and that the technical meaning will give way to the obvious intent, even though the technical term to the contrary was used.

In virtually every decision since Christman was decided, the Court continues to reject the application of a technical distinction between a "reservation" and an "exception." In the recent decision of Hallin v. Lyngstad, 2013 ND 168, ¶ 15, 837 N.W.2d 888, for instance, the Court once again "acknowledged the difficulty [of distinguishing between an 'exception' and a 'reservation'] because both cause something to be deducted from the thing granted, narrowing and limiting what would otherwise pass by the general words of the grant." (internal quotation marks and citation omitted). Thus, the Court refused to let the technical meaning override the grantor's intent. Id.

[¶5] Mueller itself teaches that the terms "reservation" and "exception" are to be used interchangeably. 340 N.W.2d at 452. The Court in Mueller reaffirmed its

holding in Christman, and again held the grantor's intent controls, "whichever word is used." Id. It makes little sense for the Defendants to attempt to distinguish this case from Mueller based solely on the use of the term "reserves" instead of "excepts," when Mueller itself expressly declared that distinction does not control.

[¶6] The better guide for determining the Goldenbergs' intent is the placement of the disputed language in the warranty clause rather than the granting clause. At the same time this Court has refused to rely on a technical distinction between "reservation" and "exception," it has repeatedly held the warranty clause "does not define the estate conveyed." Miller v. Kloeckner, 1999 ND 190, ¶ 15, 600 N.W.2d 881. When examining whether minerals were conveyed in a deed, the granting clause controls because it "define[s] and designate[s] the estate conveyed." Id. (internal quotation marks and citation omitted). Therefore, "[e]xceptions inserted into a covenant of warranty are intended only to protect the grantor on the warranty and are not intended as a limitation on the nature of the interest conveyed by the granting clause." Id.; see also Royse v. Easter Seal Soc. for Crippled Children & Adults, Inc. of N.D., 256 N.W.2d 542, 545 (N.D. 1977) (concluding words inserted in a warranty clause cannot be held as a reservation of any part of the title conveyed by the granting clause). Other authorities agree with this reasoning as well:

> While there is a well-defined distinction between a "reservation" and an "exception" in a deed, the use, in the instrument of conveyance, of one or the other of those terms is by no means conclusive of the nature of the provision. In fact, it may be said that because these two terms are commonly used interchangeably, little weight is given to the fact

> that the grantor used one or the other . . . *Evidence of intent can be ascertained by determining whether a limitation was placed in the granting clause of a deed or in the warranty clause*.

23 Am.Jur.2d Deeds § 267 (2015) (emphasis added).

[¶7] Applying these well-established principles here, the Goldenbergs use of the word "reserving" only shows an intent to deduct one-half of the minerals from something in the deed. Mueller, 340 N.W.2d at 452. The placement of the language in the warranty clause demonstrates the Goldenbergs' intent to deduct one-half of the minerals from the warranty clause, rather than the granting clause.

[¶8] In order to hold otherwise, and accept the Defendants' arguments, this Court would need to overturn Mueller, Royse, Miller, and a number of other decisions. First, the Court would be required to give conclusive effect to the technical distinction between the terms "reservation" and "exception," which the above decisions refuse to do. Second, the Court would be required to ignore the placement of the language in the warranty clause, and to conclude that language in the warranty clause acts as a reservation of the title conveyed by the granting clause. In short, the Court was right when it decided Mueller, Royse, Miller, and the other decisions, and the Court's reasoning in those decisions is equally valid today. Therefore, the Court should reject the Defendants' implied suggestion to overturn its existing authority, and conclude the language in the Warranty Deed conveyed 100 percent of the minerals to Johnson.

II. The other evidence in the record demonstrates the grantor intended to convey all of the minerals to Johnson

[¶9] The Defendants misconstrue the effect of the other evidence in the record, including the concerns in the title history and the assignment of royalty interests. Each of these issues will be discussed in turn.

A. The title history explains the limitation on the warranty

[¶10] First, the Defendants argue the title history shows no evidence of foreclosure proceedings, nor does it show Williams County or the State acquired any minerals in the property. Thus, the Defendants contend there is no evidence the Goldenbergs owned less than 100 percent of the minerals at the time of conveyance.

[¶11] The Defendants misunderstand the title history evidence. Johnson agrees the Goldenbergs owned the entire mineral estate at the time of the conveyance, which aligns with Johnson's claim to full ownership of the minerals. However, the mortgage default and late tax payments raised potential concerns regarding the title to those minerals. Faced with these concerns, it is entirely plausible the Goldenbergs did not want to execute a warranty to 100 percent of the minerals.

[¶12] It bears repeating that the effect of inserting an exception or reservation in a covenant of warranty is "to protect the grantor on the warranty," because the grantor could be liable to the grantee based upon defects in the chain of title. Miller, 1999 ND 190, ¶ 15 (internal quotation marks and citation omitted). Given the questions in the title history, the Goldenbergs likely wanted to protect themselves by

limiting the covenant of warranty to only 50 percent of the minerals. The title history thus fully supports Johnson's claim to the minerals, and it explains the limitation contained in the warranty clause.

B. The circumstances under which the Warranty Deed was executed supports an interpretation of a 100 percent conveyance

[¶13] The Defendants next contend there is no evidence showing the Warranty Deed was drafted by the Goldenbergs and/or their attorney. This argument belies the fact the deed was executed by the Goldenbergs and notarized on the same day in the State of California, where they resided, as contrasted with Johnsons' residence in North Dakota. APP. 21; see also Stracka v. Peterson, 377 N.W.2d 580, 583 (N.D. 1985) (holding a deed should be interpreted against a grantor when the language could plausibly be construed as an exclusion to the grantor's warranty).

[¶14] The execution and notarization are part of the circumstances under which the Warranty Deed was executed. See Mueller, 340 N.W.2d at 452 ("[A] contract may be explained by reference to the circumstances under which it was made"). Moreover, these circumstances justify construing the language most strongly against the Goldenbergs. See id. ("[T]he language is to be interpreted most strongly against the party who caused the uncertainty to exist").

C. The assignments of royalty interests occurred after the execution of the Warranty Deed

[¶15] The Defendants also claim certain assignments of royalty interests made by the Goldenbergs after the execution of the Warranty Deed show the Goldenbergs

thought they had reserved minerals in the Warranty Deed. This argument is incompatible with the construction urged by the Defendants, because the only way in which the assignments could be considered is if the Warranty Deed were held to be ambiguous. See Nichols v. Goughnour, 2012 ND 178, ¶ 14, 820 N.W.2d 740 ("We conclude each deed is clear and unambiguous, and extrinsic evidence therefore was not admissible to alter, vary, explain, or change the deed."). As discussed above, the Defendants' construction of the Warranty Deed rests solely on the purported distinction between the terms "reservation" and "exception," which does not render the Warranty Deed ambiguous.

[¶16] At most, the assignments could only come into play after a remand to the district court, if this Court were to conclude the district court erred as a matter of law in holding the Warranty Deed to be unambiguous. See Gawryluk v. Poynter, 2002 ND 205, ¶ 9, 654 N.W.2d 400 ("Whether a contract is ambiguous is a question of law for the court to decide."). In that event, however, the other evidence would also need to be considered, including the evidence discussed in the Appellant's Brief. This other evidence would support Johnson's claim to the minerals.

CONCLUSION

[¶17] The Defendants' argument asks this Court to overturn decades of well-established authority. The Court need not grant this request, because Mueller and Royse dictate the result in this case and remain good law. Under these decisions, the placement of purported reservation language in a warranty clause only serves as a

limitation on the warranty. In order to conclude otherwise, there must be so clear and explicit of an intent as to leave no room for doubt that the grantor intended otherwise. Given the language of the Warranty Deed, it cannot be said that there is no room for doubt in this case.

[¶18] The Defendants' only challenge to the construction advanced by Johnson is to rely on a technical distinction between the terms "reservation" and "exception." This Court has declined to give conclusive effect to such a technical distinction for over 40 years, and it should not start doing so for purposes of this case. Accordingly, the Court should reaffirm its precedent in Mueller, Royse, and other decisions by reversing the district court and concluding the Goldenbergs conveyed 100 percent of the minerals to Johnson's predecessor in interest.

Dated: May 15, 2015.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney for the Appellants 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 1,980 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 2,000 words.

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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 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 District Court No. 53-2013-CV-00081

CERTIFICATE OF SERVICE

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

I hereby certify that on May 15, 2015, I caused to be electronically filed the **Appellant's Reply Brief** with the Clerk of the North Dakota Supreme Court (at **supclerkofcourt@ndcourts.gov**) and served the same electronically as follows:

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