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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Matter of the Estate of Lowell H. Vaage, deceased

Correne Vaage, as Special Personal Representative of the Estate of Lowell H. Vaage, Plaintiff, -vs- The State of North Dakota; the Estate of Kenneth Vaage; and his surviving widow, Verna L. Vaage; and their children: James Vaage; Gregory Vaage; Burce Vaage; and Kathleen M. Hettenbough; the Estate of Donald Vaage, and his surviving widow, Mae L. Vaage, and their child, Gary Vaage – if living, and all other persons interested in their estates, if deceased; and all other persons unknown claiming any estate or interest in or lien or encumbrance on the property described in the Complaint, Defendants.	**Supreme Court No. 20150121** Appeal From Judgement of the District Court of Burke County District Court Case No. 07-04-P-3

BRIEF OF THE APPELLANT

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Asked If a Personal Representative of a Contract Seller's Estate may Retain for the Benefit of Estate Heirs an Interest in Property the Deceased Seller had Contracted to Sell during his lifetime – the District Court said *No*. But When Asked to Declare the Offending Deed Be Reformed or Declared Void, the District Court Again said *No* – Holding the Exclusive Remedy to be a Time Barred Action Against the Estate.

Asked On Appeal – May a Personal Representative Obtain Title to Property Not Owned by the Decedent at the Time of His Death and Transfer Such Title to the Heirs of the Estate?

JURISDICTIONAL STATEMENT

¶ 1 This is a quiet title action filed by the Estate of a 1973 Contract Buyer ("Contract Buyer" and "Contract Seller") to quiet adverse mineral estate claims asserted by Heirs of the Contract Seller. Jurisdiction lies with the District Court to determine ownership of property alleged to be property of a decedent. § 30.1-12-05, N.D.C.C. Judgment entered on March 5, 2015 (App. 200); Notice of Appeal was filed on April 24, 2015 (App. 203); and Rule 54(b) Certification was granted by the District Court on remand on July 7, 2015 (App. 205). Appeal is made from each of two separate denials of Motions for Summary Judgment and the Judgment as entered.

ISSUES PRESENTED FOR REVIEW

¶ 2 As a matter of law, the mineral estate at issue never became property of the Contract Seller's Estate. Any purported transfer for the benefit of said estate or its heirs is void. As a matter of law, title to the contested mineral estate vested in the Contract Buyer regardless of wrongful conduct by Contract Seller's Personal Representative. Questions of law are reviewed de novo. Issues presented:

1. Upon death of a Contract Seller, only bare legal title is acquired by the Contract Seller's Estate, with equitable title remaining vested in the Contract Buyer. The Personal Representative of a Contract Seller's Estate may not transfer or reserve property not owned by the decedent at the time of his death. Any Estate Deed attempting to transfer an interest in real property not owned by the decedent at the time of his death is void. Provisions within an Estate Deed issued in satisfaction of a fully performed executory contract of the decedent which are not in conformity with the express terms of the executory contract are void. In re Ryan's Estate, 102 N.W.2d 9, 13 (N.D., 1960); Green v. Gustafson, 482 N.W.2d 842 (N.D., 1992); Johnson v. Finkle, 2013 ND 149, 837 N.W.2d 132.

2. The alleged mineral estate reservation clause within the 1984 Estate Deed is ambiguous. Examination of the four corners of the 1973 Contract and the 1984 Estate Deed under applicable rules of ambiguous contract interpretation directs no mineral estate reservation was intended. EOG Resources, Inc. v. Soo Line Railroad Co., 2015 ND 187, __ NW2d__; § 9-07-07, N.D.C.C. Whether a deed is ambiguous is a question of law, which is fully reviewed on appeal. Wagner v. Crossland Constr. Co., Inc., 2013 ND 219, ¶ 8, 840 N.W.2d 81.

3. The statute of limitations applicable to an action to declare a deed provision void or to reform a deed not reflecting the intent of the parties does not commence until discovery of a discrepancy between what the parties intended and what the recorded deed expressed. Johnson v. Holland, 2011 ND 64, 795 N.W.2d 294, 299-300.

4. Costs and reasonable attorney fees are to be awarded Plaintiff Estate. §§ 47-19.1-09, and 47-10-18, N.D.C.C.

STATEMENT OF THE CASE

¶ 3 The Contract Seller died before final payment was due on the Contract ("1973 Contract" App. 5). The Personal Representative of the Contract Seller's Estate issued a non-conforming deed in satisfaction of the Contract upon receipt of final payment. ("1984 Estate Deed" App. 8) At issue is the discrepancy between verbiage of the "1973 Contract" and the verbiage of the "1984 Estate Deed" concerning the transfer and/or reservation of a 91.6666 acre mineral estate. Relevant verbiage of the "1973 Contract" states:

> "**excepting and reserving , an undivided one-half interest in and to all the oil, gas . . .**"

Relevant verbiage of the "1984 Estate Deed" states:

> "**excepting and reserving , an undivided one-half interest in and to the remaining oil, gas . . .**"

The words "all the" used in the 1973 Contract were replaced with the words "the remaining" in the 1984 Estate Deed. Neither the 1973 Contract nor the 1984 Estate Deed contain language stating either clause is intended to create a reservation of a mineral estate for the benefit of the seller/grantor. An intended beneficiary of the clause is not named in either instrument. Unknown is whether the clause now found in the 1984 Estate Deed is intended to speak to the previously reserved mineral estates now owned by third parties (*See*, Abstract of Title Entry No. 41 (App. 168); and Abstract of Title Entry No. 56 (App. 91)). Nor does the 1984 Estate Deed disclose a point in time to which the

newly introduced qualifier "remaining" is to be applied – is it applied at the time of contract satisfaction or some other point in time?

¶ 4 Within two separate rulings on Motions for Summary Judgment and within the District Court's Memorandum Opinion issued after trial, the District Court consistently held the 1984 Estate Deed verbiage "dishonored" the intention of the Contract Seller as expressed in the 1973 Contract, and further held the Personal Representative of the Contract Seller's estate had no legal authority to alter the performance terms of the decedent's executory contracts. (The relevant language is quoted in ¶5, below) These holdings are correct statements of the law and have not been cross-appealed. But even after having made these correct rulings of law, the District Court denied Plaintiff Estate the prayed for remedies to declare the non-conforming deed void and reform its language to conform to the 1973 Contract. Three times the District Court held the 1984 Estate Deed unlawfully failed to conform to the 1973 Contract, but each time denied Plaintiff Estate any relief. Instead, the District Court held it lacked subject matter jurisdiction over the controversy, and even if it possessed subject matter jurisdiction, it held the applicable Statute of Limitations had run. Due to its erroneous beliefs concerning jurisdiction and limitations of action, the District Court never ruled upon what it labeled a "plethora" (App. 64) of additional issues raised in the pleadings, motions and briefs concerning post-death executory contract performance; contract reformation, and contract ambiguity rules of interpretation – finding all such issues to be superceded by the Court's lack of jurisdiction and the running of the statute of limitations.

¶ 5 The District Court's first Order denying Plaintiff Estate's Motion for Summary Judgment held:

> "Indeed, what the Court has found, as a matter of law, is that the personal representative lacked authority to deliver a deed which was contrary to the contract for deed. In that regard, there is a clear statutory remedy available to any aggrieved party. Section 30.1-18-12, NDCC, provides that if the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from that breach of duty. Whether that possible remedy remains viable after all these years remains to be seen." *Order Denying First Motion for Summary Judgment*, 09-20-13 Order, ¶29.

Plaintiff Estate was never able to sway the District Court away from its erroneous belief that the sole remedy available lay in a time barred action against the wrongful conduct of the Contract Seller's Personal Representative. Again, when denying Plaintiff Estate's Second Motions for Summary Judgment, the District Court continued to erroneously insist the only remedy available lay in an action against the Personal Representative of the Contract Seller's Estate, the District Court stated:

> "What the Court does believe to be true, however, is that an attack on the acts of the personal representative of the Estate of John Vaage [Contract Seller] cannot be made collaterally in this action." *Order Denying Second Motion for Summary Judgment*, 02-10-14 Order, ¶18

The District Court held this point of view even though it continued to hold the actions of the Seller's Estate Personal Representative to have been unlawful:

> "The defendants ask this Court to reconsider its earlier ruling that, as a matter of law, the personal representative had no authority or power to change the conditions of the fully performed contract for deed. The Court has reviewed its earlier decision and believes it is correct." *Order Denying Second Motion for Summary Judgment*, 02-10-14 Order, ¶20

After trial, the District Court in its Memorandum Opinion, again repeated its erroneous belief the only remedy to cure such wrongful conduct lay exclusively in an action against the Contract Seller's Estate Personal Representative, stating:

> "The Estate further notes this Court's earlier ruling that the personal representative of the Estate of John Vaage had no authority to alter the terms of the contract for deed, **and that the actual deed must conform to the contract for deed**. Assuming this Court was correct in that ruling, the Court notes that the remedy available to one harmed by a personal representative exceeding his authority is against the personal representative pursuant to Section 30.1-18-12, NDCC." 02-18-15 *Memorandum Opinion* ¶49 (Emphasis added)

The District Court would not abandon its belief the exclusive remedy lay against the Contract Seller's Personal Representative. The District Court then held it lacked subject matter jurisdiction to hear such an action, and even if it did, the applicable statute of limitations had run. The District Court refused to declare the non-conforming deed void or to reform the deed to conform to the 1973 Contract as prayed in the Complaint. The District Court never addressed any of the deed ambiguity issues.

FACTS

¶ 6 There are no contested facts relevant to the issues on appeal. The words of the 1973 Contract and the 1984 Estate Deed speak for themselves. Both are to be interpreted as a matter of law. Defendants have not cross appealed the District Court rulings relating to either contract.

LEGAL ARGUMENT

I. The 1984 Estate Deed Reserves No Mineral Estate For the Benefit of the Deceased Contract Seller's Estate Heirs.

¶ 7 The District Court correctly understood the legal basis for Plaintiff Estate's challenges to the non-conforming 1984 Estate Deed, but erroneously refused to recognize any remedy other than time barred suit against the Contract Seller's Estate and its Personal Representative. In the District Court's first Order denying Plaintiff Estate's First Motion for Summary Judgment, the District Court held:

> "The plaintiff argues that the personal representative is bound by the terms of the contract for deed. As succinctly stated by the plaintiff at page 10 of her brief, "The death of John Vaage did not diminish such obligation." The plaintiff further asserts, although somewhat obliquely, that the personal representative of John Vaage's estate was required to follow the mandates of Section 30.1-18-15(3)(a), NDCC, and deliver a deed in satisfaction of any fully performed land contracts outstanding at the time of John Vaage's death." " *Order Denying First Motion for Summary Judgment*, 09-20-13 Order, ¶20. (App. 59)

The District Court correctly understood the law:

> "The personal representative is bound to honor the contract for deed. He does so only as a representative of the decedent. It is the duty of the personal representative to honor the intent of the decedent, and not to supplant his own intent for that of the decedent. In completing the conveyance required by the fully satisfied contract for deed, the personal representative was bound to honor the intent of the decedent as expressed in the contract for deed. As a representative only of the decedent, the personal representative had no power or authority to change that intent. The language of the final deed must mirror the language of the underlying contract for deed if the decedent's intentions are to be honored. To allow otherwise would disregard the decedent's intentions, and would give the personal representative the power to re-write the decent's contracts, replacing the decedent's wishes with those of the personal representative." " *Order Denying First Motion for Summary Judgment*, 09-20-13 Order, ¶24. (App. 61)

The District Court then correctly held:

> "John Vaage's intent regarding the minerals can be determined by reading the contract for deed. The personal representative's deed does not mirror the language of the contract for deed. **To give effect to the words of the personal representative's deed would dishonor the intentions of John Vaage**. The Court therefore finds, as a matter of law, that the personal representative had no authority or power to change the conditions of the fully performed contract for deed. The personal representative was bound to honor the intent of John Vaage as stated in the contract for deed, including his intentions with regard to any mineral reservation. The language of the March 5, 1984 Deed of Personal Representative, with regard to any mineral reservation, did not mirror the language of the September 26, 1973 Contract for Deed." *Order Denying First Motion for Summary Judgment*, 09-20-13 Order, ¶28. (App. 62-3)

One would assume as a matter of law the case was over: the law requires the 1984 Estate Deed to conform to the 1973 Contract; the law requires the Personal Representative to honor the decedent's intentions; the 1984 Estate Deed "dishonors the intentions of John Vaage" and his Personal Representative had no legal authority to do so. But the District Court went on to erroneously limit the available remedy to an action against the Contract Seller's Estate Personal Representative:

> "Indeed, what the Court has found, as a matter of law, is that the personal representative lacked authority to deliver a deed which was contrary to the contract for deed. In that regard, there is a clear statutory remedy available to any aggrieved party. Section 30.1-18-12, NDCC, provides that if the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from that breach of duty. Whether that possible remedy remains viable after all these years remains to be seen." *Order Denying First Motion for Summary Judgment*, 09-20-13 Order, ¶30. (App. 63)

At conclusion of trial, the District Court repeated its erroneous statement of law;

> "The Estate further notes this Court's earlier ruling that the personal representative of the Estate of John Vaage had no authority to alter the terms of the contract for deed, and that the actual deed must conform to the contract for deed. Assuming this Court was correct in that ruling, the Court notes that the remedy available to one harmed by a personal representative exceeding his authority is against the personal representative pursuant to Section 30.1-18-12, NDCC." 02-18-15 *Memorandum Opinion* ¶49 (App. 195)

The District Court refused to declare the nonconforming "excepting and reserving" language null and void or reform the same. The District Court erroneously believed the sole remedy lay against the Contract Seller's Personal Representative. This is not the law. **As a matter of law, the District Court's Orders Dated September 20, 2013, February 10, 2014, and repeated again within its Memorandum Opinion of February 18, 2015 are in error in their statement of the law as it relates to the remedies applicable and should be reversed**. No Personal Representative possesses the legal ability to transfer an interest in property not owned by the decedent at the time of death. As a matter of law, such a deed, or any provision within a deed attempting to do so, is void.

A. Contract Seller's Estate Acquires No Title to Assets Not Owned by the Contract Seller at time of Contract Seller's Death.

¶ 8 The questions of who, why and when the language now found in the non-conforming 1984 Estate Deed were inserted are red herrings. The answers to these questions of fact as adduced at trial have no relevance to the legal effect of the use of non-conforming language in the 1984 Estate Deed. After the Contract Seller entered the 1973 Contract with the Contract Buyer, the only interest the Contract Seller retained was a bare legal title. The equitable title immediately vested in the Contract Buyer. This division of ownership is a product of the "equitable conversion" of title. The interest of the Contract Seller thereafter becomes personalty, and remains so even after the death of the Contract Seller:

> "A contract for the sale of real estate, which is valid and enforceable in equity, operates as a conversion. The vendor's interest thereafter in equity is in the unpaid

purchase price, and is treated as personalty; the vendee's interest is in the land, and is realty. **Upon the death of the vendor his interest passes to his executors as personalty, and continues as such for the purposes of administration** . . ." In re Ryan's Estate, 102 N.W.2d 9, 13 (N.D., 1960) (Emphasis added)

In Green v. Gustafson, 482 N.W.2d 842 (N.D., 1992), an estate heir acquired title under an estate deed of distribution purporting to transfer title from the estate, free and clear of the interests of a contract buyer. The heir attempted to deny the contract buyer's rights under his executory contract by asserting the deed of distribution barred any action in specific performance. The Court rejected the argument:

> "Jack's argument, however, ignores the effect of the doctrine of equitable conversion, which provides that once parties have entered into a valid, enforceable contract for the sale of land, equitable title vests in the purchaser and the seller holds bare legal title as security for payment of the balance of the purchase price. Equity regards the realty as "converted" into personalty." Ib. at 848.

The Estate Deed of Distribution purporting to pass title free of the obligations owed to the contract buyer was of no legal effect:

> "It is axiomatic that a deed cannot convey a greater interest or estate in the property than the grantor has. [ ]. **A deed which purports to convey a greater interest than that held by the grantor conveys only the lesser interest actually held by the grantor**. [ ]." Ib. at 849. (Emphasis added)

In the instant case, as a matter of law, **the 1984 Estate Deed conveys "no greater interest or estate in the property than the grantor has."** The Contract Seller's Estate owned no mineral estate. A Deed from the Seller's Estate attempting to reserve an interest in a mineral estate not owned reserves nothing. As a matter of law, the attempted reservation of the contested 91.6666 acre mineral estate is void and of no legal effect. "Only the interest actually held by the grantor" may be conveyed. As held more recently:

> "The subsequent conveyance under the warranty deed after the terms of the contract for deed have been met does not create a new right, but rather perfects the right existing under the contract and gives effect **to the parties' intent** by perfecting title relating back to the date of the contract." Johnson v. Finkle, 2013 ND 149, ¶17, 837 N.W.2d 132. (Emphasis added)

No new rights are created. The deed issued in satisfaction "gives effect to the parties' intent." The Contract Seller's Estate possessed a bare legal title for purposes of enforcing the vendor's rights under the contract as security for payment of the unpaid purchase price. Semmler v. Beulah Coal Mining Co., 48 N.D. 1011, 188 N.W. 310 (N.D., 1922). Death of the Contract Seller does not change the status of title or the obligations of an executory contract.

¶ 9 In Clapp v. Tower, 11 N.D. 556, 93 N.W. 862 (1903), the Court held the making of a contract amounted to an equitable conversion of the property by the vendor; that such a contract conveyed the entire equitable title to the vendee; that the vendor retained only bare legal title as security and upon vendor's death his interest in the contract passes to his executor as personalty. An Estate takes title subject to the decedent's executory contract rights. A seller's estate possesses only a security interest in the due performance of the contract. No amount of "misconduct" or "fraud" or "mistake" on the part of a Personal Representative can diminish the obligations of the contract or enlarge the ownership interests of the Estate Heirs.

¶ 10 In the context of an executory contract owned by a decedent at the time of death, a Contract Seller's Estate cannot deed a greater estate than owned by the Contract Seller at death:

> "The result is that the vendor's estate and his personal representative has no greater rights than had the vendor in his lifetime, and as a consequence, if the contract does not mature and/or is not paid during the probate of the estate, the county court cannot decree to the heirs, legatees, or devisees any greater interest than that possessed by the estate, which is the naked legal title subject to the terms and conditions of the contract." In re Ryan's Estate, 102 N.W.2d 9, 13 (N.D., 1960)

A Personal Representative "**cannot** decree to the heirs, legatees, or devisees any greater interest than possessed by the estate, which is the naked legal title subject to the terms and conditions of the contract." Ib. (Emphasis added) Attempts to do so are void.

¶ 11 The bare legal title held by an Estate is only a security interest in the due performance of the contract, and nothing more:

> "Under a contract for deed, the vendor retains the legal title to the property and holds it in trust for the purchaser and as security for the purchaser's compliance with the conditions of the contract." Johnson v. Finkle, 2013 ND 149, ¶ 17, 837 N.W.2d 132.

This is not new law:

> "Upon the making of the contract for the sale of land, where the vendee takes possession, a relation more than personal is created between the parties. A privity of estate arises. In equity, an estate passes to the vendee. In equity, the estate is measurable as a fee subject to the vendor's lien. In equity, there exists an equitable conversion. [ ] In law, the vendor retains the legal estate, but, in reality through the interposition of equity, this legal estate is retained for purposes of enforcing the vendor's rights under the contract and the payment of the unpaid purchase price." Semmler v. Beulah Coal Mining Co., 48 N.D. 1011, 188 N.W. 310 (N.D., 1922)

In the instant case, upon the Contract Seller's death, the Contract Seller's Estate did not acquire title to the subject mineral estate. The Estate acquired only a bare legal title subject to the obligations of the executory contract. The Heirs of the Contract Seller's Estate cannot receive a greater interest than granted to them by the 1973 Contract. **No**

number of mistakes, misconduct or fraud committed by the Personal Representative of the Contract Seller's Estate may act to vest the Contract Seller's Estate or its Heirs with title to mineral interes the decedent did not own at the time of his death.

¶ 12 After finding the 1984 Estate Deed had failed to honor the intentions of the parties, the District Court held any remedy flowing from the "misconduct" of the Contract Seller's Personal Representative time barred by a five year statute of limitations. Such is an erroneous application of the law. As a matter of law, no title or interest in the contested mineral estate passed to the Heirs of the Contract Seller by reason of the execution and recording of the non-conforming 1984 Estate Deed and related Estate Deed of Distribution. (App. 9) The Judgment of the District Court, as a matter of law, should be reversed and title quieted in the name of Plaintiff Estate. As a matter of law, the 1984 Estate Deed reserves no mineral estate. Any provision to the contrary is void. On this rule of law alone, title may be quieted in the name of Plaintiff Estate. The alternative rules of law hereinafter addressed which independently yield the same result should be held moot.

II. Rules of Ambiguous Contract Interpretation Require a Joint Reading of the 1973 Contract and the 1984 Estate Deed to Determine the Mutual Intent of the Parties.

A. "Excepting and Reserving" Clause within 1984 Estate Deed is Ambiguous.

¶ 13 The "Excepting and Reserving" clause within the 1973 Contract states:

> "**excepting and reserving , an undivided one-half interest in and to all the oil, gas . . .**"

The 1973 Contract does not state or imply any mineral estate be "reserved" for the benefit of the Contract Seller, nor does it qualify the application of the clause to the "remaining" mineral estate. To the contrary, the 1973 Contract unambiguously and clearly states the clause applies to "all" of the mineral estate. The word "remaining" is not found anywhere in the 1973 Contract. Nor does the 1973 Contract use any language to direct any mineral estate be held for the benefit of Contract Seller, his heirs or assigns.

¶ 14 Even if one attempts to argue the "excepting and reserving" clause found in the 1973 Contract intended a reservation in favor of the Contract Seller, no mineral estate would be created. As shown by the Abstract of Title in evidence, the Contract Seller then owned less than 50% of the mineral estate and contracted to grant the entirety. (See, Abstract of Title Entry No. 41 (App. 168); and Abstract of Title Entry No. 56 (App. 91) Application of the Duhig Rule precludes reservation.

¶ 15 Under the Duhig Rule, a Seller who owns half or less of the mineral estate must draft a contract carefully to avoid both a conveyance and an attempted reservation of the same asset. To avoid application of the Duhig Rule, two things must be present in the contract:

> "for a reservation to be valid, it must appear from the instrument that: (1) the grantor intended to, and with appropriate words expressly reserved an interest unto himself; and (2) the grantee must receive the amount the grantor is warranting." Timmothy Dowd, Oil and Gas Title Law, N.D. Law Rev., Vol. 90: 289, 307.

In the instant case, neither are present. The contract contains no words to "**expressly reserve**" an interest in the Contract Seller, nor does the Contract Seller own a large enough percentage of the mineral estate to satisfy both the grant and the reservation.

¶ 16 The 1973 Contract unambiguously states an exception to warranty of title and nothing more is expressed or implied. There is no hint of an alternate meaning. No ambiguity exists. Ambiguity did not exist until created in the 1984 Estate Deed issued by the Contract Seller's Estate. The 1984 Estate Deed altered the above quoted "excepting and reserving" clause to read as follows:

> "excepting and reserving , an undivided one-half interest in and to ***the remaining*** oil, gas . . ."

Even with this changed verbiage, the first prong necessary for the successful creation of a reservation of a mineral estate remains unmet. The 1984 Estate Deed, like the 1973 Contract before it, contains no words to "expressly reserve" any interest in the name of the Contract Seller, his heirs or assigns. Without this express statement, the Estate Deed fails to express a clear intent to create a reservation. On its face, the deed is ambiguous, capable of more than one interpretation.

¶ 17 The 1984 Estate Deed also introduces doubt concerning the second prongs of the test. The 1973 Contract referenced "all the" mineral estate, and the 1984 Estate Deed introduces a qualifier replacing this words with the word "remaining." There is no

statement withing the clause expressing it is intended for the benefit the Grantor, nor is the time frame for application of the qualifier "remaining" defined. "Remaining" when?

¶ 18 Use of the word "remaining" in the 1984 Estate Deed introduces ambiguity where none had existed. Does the clause merely state an exception as before, or does it now intend to express a clear and unambiguous intent to create a severed mineral estate in one-half of the grantor's "remaining" mineral estate? Does the Estate Deed grant all, and then attempt to reserve "half of the remaining" mineral estate? If so, to whose benefit? At what point in time is the determination of what yet "remains" applied? – 1984 or 1973? The 1984 Estate Deed is ambiguous, capable of multiple interpretations.

¶ 19 As the District Court correctly held in the Order dated September 20, 2013, at ¶¶ 20, 23, & 24 (App. 59-61), this was not a sale of an estate asset by a Personal Representative in the due course of the administration of an estate as in Waldock v. Amber Harvest Corp., 2012 ND 180, 820 N.W.2d 755. Waldock style estate sale transactions have authority granted under Section 30.1-18-15(6), N.D.C.C. Instead, the 1984 Estate Deed issued was in satisfaction of an executory contract created by the decedent during his lifetime. The Personal Representative's authority to satisfy an executory contract is granted by Section 30.1-18-15(3)(a), N.D.C.C. The 1973 Contract required a "deed of warranty" conforming to the Contract be issued upon performance of the Buyer's covenants.

¶ 20 Introduction of the word "remaining" creates ambiguity, capable of more than one meaning. The ambiguity is exacerbated by the absence of language evidencing a clear and

concise intent the clause intends the Contract Seller be its beneficiary. EOG Resources, Inc. v. Soo Line Railroad Co., 2015 ND 187, ¶15, __ NW2d__

B. Use of words "excepting and reserving" do not remove ambiguity.

¶ 21 The words "excepting and reserving" identify the clause, but contribute little to interpretation. These words historically had two separate meanings:

> "The parties' competing interpretations of the 1960 deed highlight the difficulty in distinguishing between an "exception" and a "reservation" in a deed. See Christman v. Emineth, 212 N.W.2d 543, 552 (N.D.1973). As explained in Christman, although these words are "confused" or used "interchangeably," courts have said "while a reservation is, in effect, a regrant of the thing reserved, an exception operates to take something out of the thing granted which would otherwise pass." Id. This Court acknowledged the difficulty 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." Id. Thus, the terms "are not conclusive as to the nature of the provision, and ... the technical meaning will give way to the obvious intent, even though the technical term to the contrary was used." [Citations omitted]" Hallin v. Lyngstad, 2013 ND 168, ¶ 15, 837 N.W.2d 888, 892-3.

Today, the words "excepting and reserving" give a reader no clue of the meaning of the contract clause to follow. Without additional express words indicating an intent the identified mineral estate is to be held for the benefit of the grantor, or, in the alternative, merely state an exception to the grant, ambiguity is introduced. An intended beneficiary is not named. If a reservation, for whom? A stranger to title? A spouse? Or is an exception to the grant intended? One is forced to engage in speculation absent a clear and concise expression of intent within the four corners of the deed. To avoid ambiguity, the clause should state it is a reservation "to the Grantor, his heirs and assigns."

¶ 22 Also unclear is the time at which one determines what mineral estate "remains." If 1984 is intended, no mineral estate then remained in the Contract Seller's Estate. Equitable title had already passed to the Contract Buyer in 1973. Johnson v. Finkle, 2013 ND 149, ¶17, 837 N.W.2d 132; In re Ryan's Estate, 102 N.W.2d 9, 13 (N.D., 1960). The District Court erred in failing to find the 1984 Estate Deed ambiguous.

C. Reservation of a Mineral Estate Must Be By Clear and Explicit Language.

¶ 23 This Court requires reservation language be clear and explicit:

> "Although a court may look to the circumstances under which a deed was made to explain ambiguous language [ ] we have said that exceptions or reservations of property in a deed should be set forth with the same prominence as the property granted **and should be so explicit as to leave no room for doubt**. [ ]. In order to promote certainty from the four corners of a deed and from the record title, **our rules for construing deeds thus express a preference for clear and explicit reservations or exceptions in a deed**. [ ]. North Shore, Inc. v. Wakefield, 530 N.W.2d 297, 301 (N.D., 1995) (emphasis added)

Reservation language must not be deceptive:

> " We believe exceptions or exclusions of property should be set forth in the granting clause with the same prominence as the property granted, or, if placed elsewhere, **should be so explicit as to leave no room for doubt**. Were we to endorse anything short of this we would be encouraging practices which would **lend themselves readily to fraud and deception**. This we propose not to do." Royse v. Easter Seal Society for Children, 256 N.W.2d 542, 545 (N.D. 1977)

There is no "clear and explicit" reservation made in the instant case. As a matter of law, the purported reservation is ambiguous.

D. Rules for the Interpretation of Ambiguity in Deeds Dictate No Reservation Intended.

¶ 24 Rules for the interpretation of ambiguous deeds have oft been succinctly stated by this Court:

> "We interpret deeds in the same manner as we interpret contracts. N.D.C.C. § 47-09-11. The primary purpose in interpreting a deed is to ascertain and effectuate the grantor's intent. [ ]. The intent must be ascertained from the writing alone, if possible. Id. When a deed is unambiguous we determine the parties' intent from the instrument itself. [ ] A deed is ambiguous if rational arguments can be made in support of contrary positions as to the meaning of the term, phrase, or clause in question. [ ] Whether a deed is ambiguous is a question of law, which is fully reviewable on appeal. [ ] EOG Resources, Inc. v. Soo Line Railroad Co., 2015 ND 187, ¶ 15, __ NW2d __.

In the instant case, the sole statement of the deceased Contract Seller's intent is found in his 1973 Contract. Because a mineral estate is at issue, an additional rule of law applies in which the "mutual intentions" of the parties must be given effect:

> "The primary purpose in construing a deed is to ascertain and effectuate the grantor's intent. [ ]. "However, **deeds that convey mineral interests are subject to general rules governing contract interpretation, and we construe contracts to give effect to the parties' mutual intentions**." [ ]. "When the language of a deed is plain and unambiguous and the parties' intentions can be ascertained from the writing alone, extrinsic evidence is inadmissible to alter, vary, explain, or change the deed." [ ]. "If a contract is ambiguous, extrinsic evidence may be considered to clarify the parties' intentions." [ ] "A contract is ambiguous when rational arguments can be made for different interpretations." [ ] "Whether a contract is ambiguous is a question of law for the court to decide." [ ]" Nichols v. Goughnour, 2012 ND 178, ¶ 12, 820 N.W.2d 740.

¶ 25 The clause in question is either an exception to the warranty of title or a reservation of interest to an unspecified party. On appeal, this Court independently reviews a contract to determine if it is ambiguous. Nichols v. Goughnor, 2012 ND 178, ¶

12, 820 N.W.2d 740. If ambiguous, the mutual intentions of the parties must be ascertained:

> "Because we conclude that the language in the reservation in the ALC deeds is ambiguous, we must interpret the language so as to give effect to the mutual intention of the parties as it existed **at the time of contracting** so far as that intention is ascertainable and lawful. [ ] The best evidence of the parties' intention, of course, is the language in the deed itself, and, therefore, the language of the writing alone, if clear and explicit, governs the interpretation of the parties' intent. [ ]. Here, however, the language in the ALC deed was not clear and explicit and we must look elsewhere to ascertain the reasonable intention of the parties. []" Nichols v. Goughnor, 2012 ND 178, ¶ 12, 820 N.W.2d 740. (Emphasis added)

"At the time of contracting" in the instant case refers to the last contract drafted while both parties were alive, the 1973 Contract. Without aid of any extrinsic evidence, the 1973 Contract unambiguously expresses the intent of the parties.

¶ 26 The State Legislature directs specific rules be followed to resolve ambiguity in a written contract. Relevant are §§ 9-07-03; 9-07-05; 9-07-05; 9-07-15; 9-07-17; and 9-07-18, N.D.C.C. (See Addendum for text) Section 9-07-07, N.D.C.C. directs the analysis in the instant case. There exists more than one contract defining the intentions of the parties, but only one of which was executed while both parties yet lived. Both the 1973 Contract and the ambiguous 1984 Estate Deed issued in satisfaction of the 1973 Contract relate to a single transaction between identical parties. The Law mandates the contracts be read together to resolve ambiguity. The 1973 Contract and the Estate Deed constitute "several contracts relating to the same matters between the same parties and made as parts of substantially one transaction" and are to "be taken together." § 9-07-07, N.D.C.C. Taken together, mutual intent of the parties is clear – the clause states an exception to the warranty of title.

¶ 27 The 1973 Contract contained no ambiguity. The "excepting and reserving" clause has no meaning other than to operate as an exception to the warranty of title. The word "remaining" is not used, nor is there any hint of an intent this clause is intended to create a new mineral estate for the benefit of the contract seller. The joint interpretation of the 1973 Contract and the 1984 Estate Deed is also aided by the statutory maximum: "Particular clauses remain subordinate to the general intent of the two contracts read in their entirety." §§ 09-07-07 and 15, N.D.C.C. The later repugnant introduction of the inconsistent word "remaining" must be made subordinate to the general intent and purpose of the two contracts. §§ 09-07-17 and 18, N.D.C.C. Uncertainty is to be interpreted against the party causing it. § 09-07-19, N.D.C.C. In the present case, the Grantor's Estate introduced the uncertainty into the meaning and purpose of the "excepting and reserving" clause. The Statute mandates ambiguity be construed against interests of the Contract Seller's Estate.

¶ 28 A ambiguous deed interpretation case in Idaho held:

> "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." I.C. § 55–604. **A deed reservation "should not be indefinite or uncertain.... [F]ailure of a grantor to clearly express the kind of rights retained on a conveyance may result in the entire fee title passing to the grantee, without reservation**." C.J.S., Deeds, § 357." Ida–Therm, LLC v. Bedrock Geothermal, LLC, 293 P.3d 630 (Idaho, 2012) (Emphasis added)

To remove ambiguity, language expressing a clear intent to reserve something for the benefit of the grantor is required. A reservation must clearly state it is "to the Grantor, heirs and assigns" or language of similar clear meaning and intent. Such language does not exist in the 1984 Estate Deed, nor is such intent expressed in the 1973 Contract.

¶ 29 A similar result is reported in Texas:

> "[A] warranty deed will pass all of the estate owned by the grantor at the time of the conveyance unless there are reservations or exceptions which reduce the estate conveyed." [ ] Property "excepted" or "reserved" under a deed is "never included in the grant" and is "something to be deducted from the thing granted, narrowing and limiting what would otherwise pass by the general words of the grant." [ ] **Reservations must be made by "clear language," and courts do not favor reservations by implication.** [ ] Graham v. Prochaska, 429 S.W.3d 650, 655 (Tex. App., 2014) (Emphasis added)

In the instant case, a "reservation by implication" is all that exists. The implication is created solely by the introduction of the repugnant qualifier "remaining" into an otherwise unambiguous statement of an exception to warranty. An ambiguity may not be used to create a new contract right.

> "Under Harney, parol evidence may be used to explain a latent ambiguity, **but may not be used to create a new or a different contract**. [ ]" Gawryluk v. Poynter, 2002 N.D. 205, ¶ 12, 654 N.W.2d 400. (Emphasis added)

In the instant case, no reserved mineral estate was created by the 1973 Contract. The intent of the 1973 Contract cannot be subverted through later introduced ambiguity to create the illusion of an alternate intent.

¶ 30 The 1984 Estate Deed is ambiguous. As a matter of law, an examination of the four corners of the Estate Deed and the 1973 Contract, read together for the purpose of removing ambiguity, leads to but one conclusion – no reservation of any mineral estate was intended by the parties to the 1973 Contract. Introduction of ambiguity with non-conforming language may not be used to re-write the 1973 Contract.

III. Statute of Limitations Has Not Expired.

¶ 31 This is a proceeding to determine if the subject mineral estate is property of the Lowell Vaage Estate.

> "The court has exclusive jurisdiction of formal proceedings to determine how decedents' estates subject to the laws of this state are to be administered, expended, and distributed, including actions to determine title to property alleged to belong to the estate." §30.1-12-05, N.D.C.C.

As a matter of law, the mineral estate in question never became a part of the Contract Seller's Estate. Equitable title vested in the Contract Buyer, Lowell Vaage (and now his Estate) upon consummation of the 1973 Contract. In 1984, the Contract Seller's Estate owned but a bare legal title as security for the due performance of the contract, and nothing more. As a matter of law, the District Court's insistence this action is a collateral attack on the Contract Seller's Estate is error.

¶ 32 The Statute of Limitations relied upon by the District Court has no application to property never owned by the Contract Seller's Estate. Because the mineral estate at issue was never an asset of the Contract Seller's Estate, the statute of limitations applicable to the due administration of property owned by that Estate has no application.

¶ 33 Each of multiple alternative legal principals yield the same result. None are time barred by any applicable statute of limitations:

1. The Estate of the Contract Seller may not reserve title to property not owned. Any attempt to do so is void.

2. Interpreted in compliance with statutory rules, the ambiguous 1984 Estate Deed vest title to the contested mineral estate in the Contract Buyer.

3. Non-conforming provisions within the 1984 Estate Deed are void and must be reformed to conform to the mutual intent of the parties expressed in the 1973 Contract.

All three theories were pled, briefed and argued before the District Court. The District Court held the 1984 Estate Deed to be an unlawful instrument, but erroneously held the sole remedy lay in a civil action against the Contract Seller's Estate – claims now time barred.

¶ 35 The applicable statute of limitations for the present claims did not begin to run until the date of discovery, whether it be discovery of the failure of the recorded deed to conform to the mutual intent of the parties, the discovery of ambiguity in the deed, or the discovery of a void deed of record – none were discovered until February, 2011.

> "[A] reformation action accrues, or comes into existence as a legally enforceable right, not at the time the instrument in question is executed, but at the time the facts which constitute the mistake and form the basis for reformation have been, or in the exercise of reasonable diligence should have been discovered by the party applying for relief." [ ] (holding after trial that the record clearly showed parties did not become aware of the absence of a mineral reservation in a 1964 contract for deed or in a 1971 deed until 1978); [ ] (holding action accrued in 1978 where "irregularity" occurred in 1950, but was not discovered until 1978). When a cause of action has accrued for purposes of applying a statute of limitations generally involves a question of fact, and the district court's determination will not be overturned unless clearly erroneous. [ ]. However, when the facts are undisputed, the issue of whether a statute of limitations has run is a question of law for the court. Id." Johnson v. Holland, 2011 ND 64, ¶ 13, 795 N.W.2d 294, 299-300. (Emphasis added)

The first time Heirs of the Contract Seller placed Contract Buyer's Estate on notice of an adverse claim of title to the mineral estate in question within a letter dated February 9, 2011. See *Backes 02-09-11 Letter and Attachments*, (App. 81) No evidence contradicts February of 2011 as the applicable date of discovery. No adverse claims to the contested

mineral estate are documented to have been presented to the Contract Buyer or his Estate prior to February of 2011, less than eighteen months prior to the filing of the present action. The statute of limitations is not a bar to the present action.

IV. Admission of Deposition Testimony and Exhibits.

¶ 36 The District Court erred in failing to formally admit of record the Deposition Transcript of Correne Vaage dated February 10, 2014, as offered at trial. The District Court obviously relied upon the Deposition in drafting its Memorandum Opinion, but failed to address the reserved question of admission. The propriety of the taking of the Deposition is addressed in the Court's Opinion commencing at page 77 of the Appendix. No other issues barring admission are known. This issue has no bearing on the dispositive questions of law.

V. Costs and Attorney Fees.

¶ 37 Section 47-19.1-09, N.D.C.C., mandates " the court **shall** award the plaintiff all the costs of such action, **including attorney fees**" against persons slandering title to real estate. Both the present defense to this action and the leasing and receipt of payment for the contested mineral estate slander title of the Contract Buyer Estate.

¶ 38 Defendants' chain of title flows exclusively in their capacity as heirs of Contract Seller John Vaage. Defendants' litigation (both as to the first 91.6666 mineral acres quieted and the acres now in issue) breach Seller's warranty of title. Section 47-10-18, N.D.C.C. None of the Defendants purchased their interests for value given. The present action was made necessary to quiet the adverse claims of the heirs of the contract seller. All costs and reasonable attorney fees should be awarded Plaintiff Estate.

IV. RULE 54(B) CERTIFICATION

¶ 39 This is a quiet title action filed by the Estate of a 1973 Contract Buyer to quiet adverse mineral estate claims asserted by Heirs of the Contract Seller. The District Court has jurisdiction over all property claimed to be owned by the decedent. § 30.1-12-05, N.D.C.C. No Defendant is an heir or has an interest in the Lowell Vaage Estate. No other issues remain to be resolved before the District Court in the administration of that Estate. Certification is appropriate.

CONCLUSION

¶ 40 The mineral estate at issue never became property of the Contract Seller's Estate. Any purported transfer of such mineral estate for the benefit of the Heirs of the Contract Seller's Estate is void. Title to the contested mineral estate vested in the Contract Buyer regardless of wrongful conduct by Contract Seller's Personal Representative. Title should be quieted in the name of the Lowell Vaage Estate.

Submitted this ___ day of July, 2015.

/s/ Larry M. Baer
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ADDENDUM

STATUTES CITED AT ¶ 26:

§ 9-07-03. Contract interpreted to give effect to mutual intention.
A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful. For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter are to be applied

§ 9-07-05. Real intention to govern in cases of fraud, mistake, or accident.
When through fraud, mistake, or accident a written contract fails to express the real intention of the parties, such intention is to be regarded and the erroneous parts of the writing disregarded.

§ 9-07-07. Several contracts part of one transaction interpreted together.
Several contracts relating to the same matters between the same parties and made as parts of substantially one transaction are to be taken together.

§ **9-07-15. Clauses subordinate to general intent.**
Particular clauses of a contract are subordinate to its general intent.

§ **9-07-17. Repugnancies reconciled with intent.**
Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clause subordinate to the general intent and purposes of the whole contract.

§ **9-07-18. Inconsistent words rejected**.
Words in a contract which are inconsistent with its nature or with the main intention of the parties are to be rejected.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

<table>
<tr><td>Correne Vaage, as Special Personal
Representative of the Estate of
Lowell H. Vaage,
Plaintiff/Appellant,

-vs-

The State of North Dakota; the Estate of
Kenneth Vaage; and his surviving widow,
Verna L. Vaage; and their children:
James Vaage; Gregory Vaage;
Burce Vaage; and Kathleen M. Hettenbough;
the Estate of Donald Vaage, and his
surviving widow, Mae L. Vaage, and their
child, Gary Vaage – if living, and all other
persons interested in their estates,
if deceased; and all other persons
unknown claiming any estate or interest
in or lien or encumbrance on the property
described in the Complaint,

Defendants/Appellees.</td><td>)
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Supreme Court No. 20150121

CERTIFICATE OF SERVICE

Appeal From Judgement of the

District Court of Burke County

District Court Case No. 07-04-P-3</td></tr>
</table>

¶ 1 A true and correct copy of the Brief, Addendum to the Brief, and Appendix of the Appellant/Plaintiff was sent by U.S. Mail with adequate postage attached on July 28, 2015, to be delivered to:

Scott M. Knudsvig
P.O. Box 1000
Minot, North Dakota 58702-1000

and seven bound copies and one unbound copy of the Brief and Addendum to the Brief, and eight bound copies of the Appendix filed on behalf of the Appellant/Plaintiff were sent by U.S. Mail with adequate postage attached on July 28, 2015, to be delivered to:

Penny Miller, Clerk of the Supreme Court
600 East Boulevard Avenue
Bismarck, North Dakota 58505-0530

¶ 2 Further, an additional copy of the Brief of the Appellant/Plaintiff was at the same time electronically filed as a Word Perfect Document with the Clerk of the Supreme Court:

Penny Miller, Clerk of the Supreme Court
SupClerkofCourt@ndcourts.gov.

¶ 3 Dated this 28th day of July, 2015.

/s/ Larry M. Baer

____

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/s/ Rauleigh D. Robinson

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AUG 0 3 2015

20150121

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUG 0 3 2015
STATE OF NORTH DAKOTA

Correne Vaage, as Special Personal Representative of the Estate of Lowell H. Vaage,
Plaintiff/Appellant,

-vs-

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Defendants/Appellees.

Supreme Court No. 20150121

CERTIFICATE OF SERVICE

Appeal From Judgement of the

District Court of Burke County

District Court Case No. 07-04-P-3

¶ 1 To correct a photo copy error detected in the first distribution of hard copies of Appellant/Plaintiff's Brief, a true and correct copy of the corrected Brief and Addendum of the Appellant/Plaintiff were sent by U.S. Mail with adequate postage attached on July 31, 2015, to be delivered to:

Scott M. Knudsvig
P.O. Box 1000
Minot, North Dakota 58702-1000
With a PDF copy served by email to: sknudsvig@pringlend.com

and seven bound copies of the corrected Brief and Addendum to the Brief, also filed on behalf of the Appellant/Plaintiff were sent by U.S. Mail with adequate postage attached on July 31, 2015, to be delivered to:

Penny Miller, Clerk of the Supreme Court
600 East Boulevard Avenue
Bismarck, North Dakota 58505-0530

¶ 2 Dated this 31st day of July, 2015.

/s/ Larry M. Baer

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20150121
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JULY 31, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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/s/ Larry M. Baer

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Larry M. Baer (N.D. #03284) Co-Counsel For the Plaintiff
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