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FILED
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OCTOBER 7, 2015
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; Bruce 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

REPLY BRIEF OF THE APPELLANT

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VOID DEED

¶ 1 "A void deed is no deed." "A void deed is void ab initio." Both are legal maxims commonly used to describe the legal effect of a deed purporting to grant something not owned by the grantor. Such deeds are not voidable, but void:

> "The statutory term "void" is distinguishable from "voidable" as any contract deemed void fails as an illegal contract, while a voidable contract may fail only after the election of one of the parties.[]." Broten v. Broten, 2015 ND 127 ¶ 19 (N.D., 2015) (citations omitted)

The general rule of law is: "A void deed passes no title, and cannot be made the foundation of a good title even under the equitable doctrine of bona fide purchase." 26 Corpus Juris Secundum, pp. 307 and 308. A Texas Court reasoned:

> "The question of whether the trustee's deed is void or voidable depends on its effect upon the title at the time it was executed and delivered. If it was a mere nullity, passing no title and conferring no rights whatsoever, it was absolutely void, but if it passed title to Mrs. Slaughter, the purchaser, subject only to the right of Qualls to have it set aside upon proof that the sale was improperly made, then it was merely voidable." Garcia v. Garza, 311 S.W.3d 28 (Tex. App., 2010)

In the instant case, no title passed, no rights conferred.

¶ 2 Here, the Contract Seller died **before** final payment was due on the Contract for Deed and the Personal Representative of the Seller's Estate issued an ambiguous, non-conforming deed in satisfaction of the Contract.

¶ 3 Three times the District Court held the 1984 Estate Deed verbiage "dishonored" the intention of the Contract Seller. The Court held the Personal Representative had no legal authority to alter performance terms of the decedent's executory contracts, stating:

> "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." *Order Denying First Motion for Summary Judgment*, 09-20-13 Order, ¶29.

When denying Plaintiff Estate's Second Motions for Summary Judgment, the District Court stated:

> "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 stated:

> "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

The District Court denied relief, finding the exclusive remedy lay against the Contract Seller's Personal Representative.

¶ 4 Vaage Defendants would have this Court believe the Estate's legal arguments are "**novel**." (Def. Br. ¶41) Defendant's Brief devotes only four short paragraphs in refutation. One of those paragraphs attacks the holding of Green v. Gustafson, 482 NW2d 842 (ND 1992), asserting: "This is not and has never been the law in North Dakota." (Def. Br. ¶44) It is the law. In Green, the Court stated:

> "The Uniform Probate Code provisions that authorize the personal representative to sell property **extend only to property included in the estate**. It is axiomatic that the personal representative is not thereby empowered to exercise dominion over property which was never owned by either the decedent or the estate." Ib. 846.

The Court rejected enforcement of a deed of distribution seeking to distribute property free and clear of a contract for deed:

> "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. 848-9 (citations omitted)

The Court in Green held an Estate Deed of Distribution attempting to pass title free and clear of the obligations owed under a contract are 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)

Here the Seller's Estate owned bare legal title. As a matter of law, the 1984 Estate Deed purports to convey to the Estate's Heirs a greater interest in the property than was owned by the grantor Estate. The Contract Seller's Estate owned no mineral estate. A Deed from the Seller's Estate attempting to transfer or reserve an interest in the mineral estate to the heirs of the Seller's Estate grants nothing.

¶ 5 Past holdings involving deeds purporting to transfer estate property later found not to be property of the estate reach a similar result. A case in which title to land owned by a surviving spouse (under an unrecorded Deed executed in 1934) but administered and

distributed as a part of her husband's estate in 1941, was held not to be affected by the Estate's deed of distribution:

> "Having reached the determination that there was a delivery of the warranty deed from Katharina Koch to Andrew Koch at or shortly after the time of its execution, which transferred title to him, the next question is whether that title is affected by the decree of summary distribution entered in the County Court of Stark County in September 1941. We have concluded that his title was not affected thereby." Stark County v. Koch, 107 N.W.2d 701 (N.D., 1961)

A deed purporting to transfer an interest in real property not owned by the grantor is of no legal affect and "title will not be affected thereby." A like result was reached in Parceluk v. Knudtson, 139 N.W.2d 864 (N.D., 1966), wherein the Court held:

> "A valid delivery of a deed from husband to wife some years prior to his death passes title to the wife, and such title **will not be affected** by a subsequent decree of distribution where such property was wrongfully included in the husband's estate." Ib. 866.

A 1931 unrecorded Deed and a 1948 Deed of Distribution declared of no legal affect in 1966. No Personal Representative possesses the legal ability to alter title to property not owned by the decedent.

¶ 6 In the instant case, the 1984 Estate Deed may convey "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 is void and reserves nothing. "Only the interest actually held by the grantor" may be conveyed.

> "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.

The deed issued in satisfaction is to give effect to the parties' intent." The Contract Seller's Estate only possesses bare legal title for purposes of enforcing the vendor's rights under the contract as security for payment of the unpaid purchase price. Clapp v. Tower, 11 N.D. 556, 93 N.W. 862 (1903); Semmler v. Beulah Coal Mining Co., 48 N.D. 1011, 188 N.W. 310 (N.D., 1922).

¶ 7 Defense Counsel attacks In re Ryan's Estate, 102 N.W.2d 9, 13 (N.D., 1960), not because it was bad law, but because the underlying statute necessitating the decision has been repealed. With or without a taxation statute, the law of equitable conversion applies. The Ryan Court defined the interest owned by a Contract Seller at death. Repeal of the tax law has nothing to do with the underlying legal analysis:

> "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)

See also, Johnson v. Finkle, 2013 ND 149, ¶ 17, 837 N.W.2d 132; Semmler v. Beulah Coal Mining Co., 48 N.D. 1011, 188 N.W. 310 (N.D., 1922)

AMBIGUITY

¶ 8 Defense Counsel argues the "Excepting and Reserving" Clause within 1984 Estate Deed is not Ambiguous**.** The clause names no beneficiary. It contains no words to "expressly reserve" an interest in the name of the Contract Seller, his heirs or assigns. For whom is the alleged mineral estate reservation intended? On its face, the deed is ambiguous, capable of more than one interpretation. Absent language evidencing a clear

and concise intent, the clause fails as a reservation. EOG Resources, Inc. v. Soo Line Railroad Co., 2015 ND 187, ¶15, 867 NW2d 308. Because this is a mineral interest, "mutual intent" of the parties is controlling. Nichols v. Goughnour, 2012 ND 178, ¶ 12, 820 N.W.2d 740.

COMPROMISE

¶ 9 Vaage Defendants extensively brief the case of Spitzer v. Bartelson, 2009 ND 179. It is not applicable. The non-conforming deed issued in satisfaction of the contract in Spitzer was executed and delivered by the Contract Seller, giving rise to factual and legal principals not applicable here. They next argue the non-conforming deed was the result of compromise or settlement, yet offered not on shred of evidence in support of such theory as advised to do by the District Court. *Order Denying Second Motion for Summary Judgment*, 02-10-14 Order, ¶22. The burden of Proof lies with Vaage Defendants. Hodny v. Hoyt, 243 N.W.2d 350, 361 (N.D., 1976)

¶ 10 The District Court possesses jurisdiction to determine if the subject mineral estate is property of the Lowell Vaage 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. As a matter of law, the District Court's insistence this action is a collateral attack on the Contract Seller's Estate is error.

¶ 11 A statute of limitations does not cure a void deed. (There a tax deed inherently defective of a right to sell) Nind v. Myers, 15 N.D. 400, 109 N.W. 335, 339, 345, 350 (N.D., 1906) Even under reformation to conform a deed to reflect "mutual intent of the parties" the applicable statute of limitations does not run until discovery. Johnson v.

Holland, 2011 ND 64, ¶ 13, 795 N.W.2d 294, 299-300.

CONCLUSION

¶ 12 The mineral estate was never 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 should be quieted in the name of the Lowell Vaage Estate.

Submitted this 7th day of October, 2015.

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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.	)	**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 (revised Table of Contents and Table of Authorities therein. Everything else remains the same.) copy of the corrected Reply Brief of the Appellant/Plaintiff were sent by email delivered to:

Scott M. Knudsvig
PDF copy served by email to: sknudsvig@pringlend.com

and seven copies of the corrected Table of Contents and Table of Authorities 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
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¶ 2 Dated this 12th day of October, 2015.

/s/ Larry M. Baer

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