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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20150170

Douglas J. Meyer, Pamela C. Handley, Stephen T. Meyer, Andrea K. Meyer, Emil J. Meyer, Jr.,

Plaintiffs and Appellants

v.

Norman E. Engebretson, Sonja M. Eckert, Karen A. Bailey, Robert C. Engebretson, Stephanie C. McCall and Robert E. McCall Trustees of the Stephanie C. McCall Living Trust dated December 21, 2010, Karen E. Smith Personal Representative of the Estate of Caryl E. Smith, Henry M. Hanson, Dean C. Hanson, Angela Scott DeGrado, Myrna Elletson, Deanna Faye Asmus, Nancy Carlson, Debra Neff, Kristen Giuseffi, Dennis Meyer, Christie Meyer, North Dakota Minerals, LLC, Wilma Wiengart, Daniel Meyer, Sandra Spehar, Kay Malloy, Bruce R. Davis, Claude Dean Davis, Kelly Marie Fox Sikes, Michelle Annette Jefferson Oneil, James Ghrames, John M. Pearsall, Jeanine Sanders Pearsall, David O. Pearsall, The Estate of Oliver O. Pearsall, c/o John M. Pearsall, Gary P. Hytrek, Pamela C. Hytrek, Cheryl D. Hytrek, Barbara June Nisley, Fred Louise Orchard, Eric J. (and Regina) Kaupanger, Elena M. Brady Trustee of the Mark A. Kaupanger 2008 Irrevocable Special Needs Trust Heir of Arthur M. Kaupanger, Sonja M. Nelson, Kristine Kaupanger f/k/a Chris Ellis, Karen L. Kaupanger, Karlene R. Dahlmeier, Cynthia K. Kaupanger, Kurt Kaupanger, American Oil and Gas, Inc., Evertson Energy Partners Royalty, LLC, Gary C. Stewart, Ann Marie Urban, LPI Holdings, LLC, Eagle Pass Properties, LLC, S&E Royalty, LLC, Rose Exploration, Inc., William R. LaCrosse and Tammy LaCrosse, Sundance Energy, Inc., XTO Energy, Inc., Whiting Oil and Gas Corporation, Northern Oil and Gas, Inc., Morganthaler Oil and Gas Properties, LLC, Charles J. Heringer III Trustee, Triangle USA Petroleum Corporation, Horizon Royalties, LLC, OGR Bakken Resources, LLC, Hess Corporation, WM ND Energy Resources II, LLC, and any individual or entity known and or unknown who may have or claim interest in mineral ownership in and to all oil gas and other minerals in the subject lands.

Defendants and Appellees

REPLY BRIEF OF APPELLANTS

DOUGLAS J. MEYER, PAMELA C. HANDLEY,
STEPHEN T. MEYER, ANDREA K. MEYER, EMIL J. MEYER, JR.,

Appeal from Summary Judgment
Order for Judgment dated April 28, 2015 and Judgment entered April 29, 2015
in the District Court of Williams County, North Dakota, Northwest Judicial District
The Honorable David Nelson, Judge

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Cases

[¶1] Appellants Douglas Meyer, Pamela Handley, Stephen Meyer, Andrea Meyer and Emil J. Meyer, Jr. ("Emil's Heirs") submit this brief in reply to the Brief of Appellee Hess Corporation ("Hess Brief/Br.") and the Brief of Defendants/Appellees Eagle Pass Properties LLC, William R. and Tammy LaCrosse, LPI Holdings LLC, Northern Oil & Gas Inc., David O. Pearsall, John M. Pearsall, Steve Pearsall, Rose Exploration Inc., Jeanine Sanders, Triangle USA Petroleum Corporation, and Ann Marie Urban ("Northern Brief/Br."). The District Court clearly erred in granting summary judgment in favor of Hess and the Northern Defendants[1] (collectively, the "Challengers") and against Emil's Heirs.

ARGUMENT

[¶2] The undisputed facts in this case compel application of the rule of *Duhig v. Peavy-Moore Lumber Company*, 135 Tex. 503, 144 S.W.2d 878 (1940) (the "*Duhig* Rule"). The Challengers' reliance on *Waldock v. Amber Harvest Corp.*, 2012 ND 180, 820 N.W.2d 755, is misplaced. *Waldock* honored *Duhig* and the North Dakota cases that follow it. The Challengers' attempt to distinguish these cases fails. The result in this case is governed by the overriding principle that, where there is a conflict between a grant and reservation of mineral rights, the grant is honored.

1. The Executrix Deed Granted Mineral Rights to Emil.

[¶3] Hess argues that "the Executrix Deed did not purport to convey any mineral interest to Emil" because "[t]he language of the granting clause in the Executrix Deed is nearly identical to the granting clause" in *Waldock*. Hess Br. ¶¶19, 28. At the same time,

[1]Terms not defined in this brief have the meanings assigned in Appellants' Opening Brief.

Hess acknowledges that the deed in *Waldock* "conveyed what the grantor owned at the time of his death, which was undisputedly 50% of the minerals," and that "Carl [J. Meyer] owned 50% of the minerals [under the Subject Lands] at the time of his death." Hess Br. ¶¶19, 24.

[¶4] Hess cannot have it both ways. If the deed in *Waldock* granted the 50% interest that the decedent owned—as this Court found it did—then so did the Executrix Deed.

[¶5] Even if, as Hess argues, the Executrix Deed is deemed a quitclaim deed, nothing in *Waldock* supports Hess's assertion that "the *Duhig* rule does not apply to quitclaim deeds as a matter of law." Hess Br. ¶17. The passage that Hess cites in support of this argument, Hess Br. ¶24, found that the *Duhig* Rule did not apply because there was no *overconveyance*. *Waldock*, ¶13. This Court performed a *Duhig* analysis in *Waldock* to reach this conclusion.

[¶6] Moreover, the Executrix Deed is not a quitclaim deed simply because it shares language with the deed in *Waldock*. *See Hall v. Malloy*, 2015 ND 94, ¶24, 862 N.W.2d 514 (conveying instrument must be construed as a whole to determine the intention of the parties). There is no indication in *Waldock* that the deed was given to satisfy the decedent's obligations under a contract for deed. In this case, Carl J. Meyer had agreed to convey the Subject Lands to Emil through a "deed for said land containing covenants warranting said title against all conveyances, liens and encumbrances." The Order Directing Conveyance in Fulfillment of Contract Made Prior to Death ordered the Executrix "specifically to perform said agreement" by conveying the Subject Lands to Emil "according to the terms of said agreement." The Order Confirming Conveyance of Real Estate Sold Under Contract "confirmed, approved, and declared valid" the

conveyance to Emil, further reciting that it "shall pass the title to the estate contracted for as fully as if the contracting party himself still were living and had executed the conveyance." Appellants' Br. ¶¶5-7. Thus, if it mattered, the Executrix Deed should be deemed a warranty deed. *Cf. Christensen v. Larson*, 77 N.W.2d 441 (N.D. 1956) (affirming judgment requiring administratrix to execute warranty deed to complete transfer under contract for deed).

[¶7] The nature of the deed is not the focus of inquiry, however. In response to Waldock's argument that "the administrator's deed contains a warranty and is more than a quitclaim deed," this Court found that "the label of the deed is not controlling. Rather, the specific language of the granting clause of the deed controls the interests the grantor purported to give the grantee." *Waldock*, ¶10. Thus, "a '*Duhig* result may be reached with a limited warranty *or with no warranty*.'" *Waldock*, ¶9, *quoting Miller v. Kloeckner*, 1999 ND 190, ¶16, 600 N.W.2d 881 (emphasis added). Exceptions to the grant "'are not intended as a limitation on the nature of the interest conveyed by the granting clause.'" *Miller*, ¶15 (citation omitted).

[¶8] This Court found that "the language [in the estate's deed] conveyed Edwardson's interest in the property at the time of his death, which undisputedly included 50 percent of the mineral interests." *Waldock*, ¶12. The same is true in this case.

2. The Executrix Deed Attempted an Overconveyance.

[¶9] Both Challengers erroneously assert that the Executrix Deed did not result in an overconveyance because the estate did not purport to grant Emil a *greater* interest than it owned. Hess Br. ¶18; Northern Br. ¶¶11-12. *Waldock* proves otherwise.

[¶10] "In cases involving an overconveyance of mineral interests in deeds, this Court has applied the rule of construction from *Duhig*." *Waldock*, ¶7. In support of this statement, this Court cited some cases in which the grantor attempted to reserve more mineral interests than he owned. *Gawryluk v. Poynter*, 2002 ND 205, ¶11, 654 N.W.2d 400 (deed "conveyed more mineral interests to Crafton than Poynter actually owned"); *Mau v. Schwan*, 460 N.W.2d 131, 134 (N.D. 1990) (grantor conveyed one-half and reserved one-half of the minerals "when he then owned less than one-half"). The Court also cited cases in which the grantors owned 50% of the mineral interests and attempted to reserve the same percentage. *Miller*, ¶ 18; *Sibert v. Kubas*, 357 N.W.2d 495, 497 (N.D. 1984); *Kadrmas v. Sauvageau*, 188 N.W.2d 753, 756 (N.D. 1971).

[¶11] The Northern Defendants admit that the Executrix Deed conveyed "fifty percent of the minerals in and under the" Subject Lands and "expressly reserved … that same fifty percent." Northern Br. ¶10. "The effect of *Duhig* is that a grantor cannot grant and reserve the same mineral interest." *Waldock*, ¶8; *see also Sibert*, 357 N.W.2d at 497 (where grantor "owned only one-half of the minerals … it was impossible for her to both convey and reserve one-half of the minerals"); *Kadrmas*, 188 N.W.2d 756 (grantors "could not convey and warrant, and reserve and retain, the same thing at the same timer [sic]"). The attempted reservation is invalid under *Duhig*.

3. Duhig, Miller, Sibert and Kadrmas Govern the Result in this Case.

[¶12] Nothing in *Waldock* supports the Challengers' attempt to distinguish the Executrix Deed from the deeds in *Miller*, *Sibert* and *Kadrmas*. They assert that the deeds in these cases purported to convey 100% of the minerals underlying the land. Hess Br.

¶37; Northern Br. ¶14. Their attempts to attribute legal significance to this ostensible distinction fall short.

[¶13] The Northern Defendants assert that the Executrix Deed "never purports to grant the entire surface and mineral estate," and conclude that "[i]t purports to grant Emil Meyer nothing and reserve the entire fifty percent to Carl J. Meyer." Northern Br. ¶15. This assertion directly contradicts their earlier statements that the Executrix Deed "purported to convey fifty percent of the minerals" and "granted to Emil Meyer … all of the surface and fifty percent of the minerals." Northern Br. ¶¶6, 10. It also fails to address this Court's finding in *Waldock* that language the Northern Brief describes as "substantively identical" to the Executrix Deed transferred the 50% interest owned by Edwardson. *Waldock*, ¶12; Northern Br. ¶10.

[¶14] Hess incorrectly states that *Miller*, *Sibert* and *Kadrmas* "examined deeds where 100% of the minerals were specified by the granting clause." Hess Br. ¶37. None of the deeds specified *any* percentage of minerals, or even mentioned minerals, prior to the clause in which the invalid reservation of minerals was attempted. *See Miller*, ¶2 (land was granted; mineral rights were reserved); *Sibert*, 357 N.W.2d at 496 (property was conveyed; minerals were reserved); *Kadrmas*, 188 N.W.2d at 754 (reservation appeared "immediately following the description of the land"). There is no support for Hess's conclusion that this case warrants a different result because "[t]here is no explicit conveyance of any mineral interest" in the Executrix Deed. Application of the *Duhig* Rule does not depend on an "explicit conveyance."

[¶15] Hess's insistence that *Duhig* does not apply unless a deed purports to transfer 100% of the mineral interests underlying the land also misconstrues the dispute and

holding in *Waldock.* The grantee's successor in *Waldock* did not argue that "the deed attempted to convey 75% of the minerals to the grantee." Hess. Br. ¶22. He claimed, and sought to quiet title to, the 25% interest reserved. *Waldock*, ¶5. Neither the grantee nor the estate made any claim to the 50% interest held by the United States. *See Waldock*, ¶2.

[¶16] The administrator's deed in *Waldock* did not specifically grant any mineral rights, but this Court found that it "conveyed Edwardson's interest in the property at the time of his death, which undisputedly included 50 percent of the mineral interests." The Court then took note of the reservation and concluded that "the legal effect of [the grant and reservation] conveyed 25 percent of Edwardson's interests in the minerals to Waldock's predecessor in interest and excepted and reserved 25 percent." *Waldock*, ¶¶12, 13. In other words, this Court determined the percentage interest actually conveyed by determining the *net effect* of the transaction.

[¶17] In doing so, this Court employed a *Duhig* analysis. The analysis begins with the premise that a transfer of land carries with it all of the *grantor's* mineral interests. To continue the analysis, a court compares the percentage interest *actually owned* with the percentage interest reserved to determine whether there is an attempted overconveyance. The conclusion of this analysis in *Miller*, for example, was that the grantor "purported to convey a one-half interest in the minerals [*not 100% of the minerals*] and reserve a one-half interest in the minerals when [he] owned only a one-half interest in the minerals." *Miller*, ¶18; *see also Kadrmas*, 188 N.W.2d at 755 (grant of land excepting half of minerals conveyed "aside from the surface … a one-half interest" in the minerals).

[¶18] Given the holding in *Waldock*, Hess must acknowledge—as do the Northern Defendants—that the Executrix Deed transferred the Subject Lands and 50% of the

mineral interests to Emil. The estate attempted to reserve this same 50% interest. "The effect of *Duhig* is that a grantor cannot grant and reserve the same mineral interest, and if a grantor does not own a large enough mineral interest to satisfy both the grant and the reservation, the grant must be satisfied first because the obligation incurred by the grant is superior to the reservation." *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476, 480 (N.D. 1991); *accord Waldock*, ¶8.

[¶19] In *Waldock*, the reservation was consistent with the grant. Edwardson owned a 50% interest, would have been presumed to convey it all, but *effectively* reserved half of it. This Court thus found no overconveyance, and quieted title in the 25% to the estate.

[¶20] In summary, even if the Executrix Deed is deemed a quitclaim deed, as Hess argues, the net effect of the transfer and reservation was to grant to Emil and then attempt to reserve the 50% mineral interest owned by Carl J. Meyer's estate. In honoring the reservation instead of the grant, the District Court erred.

CONCLUSION

[¶21] Application of the *Duhig* Rule requires reversal of the District grant of summary judgment in favor of the Challengers and entry of summary judgment in favor of Emil's Heirs.

Respectfully submitted, this 26 day of August, 2015.

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Defendants and Appellees

CERTIFICATE OF SERVICE

Appeal from Summary Judgment
Order for Judgment dated April 28, 2015 and Judgment entered April 29, 2015
in the District Court of Williams County, North Dakota, Northwest Judicial District
The Honorable David Nelson, Judge

I, the undersigned, hereby certify that on August 28, 2015, the following:

APPELLANTS' REPLY BRIEF

was deposited in the US Mail at Bigfork, Montana, prepaid first class postage, to the following:

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I, the undersigned, hereby certify that on August 28, 2015, the following:

APPELLANTS' REPLY BRIEF

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Dated this 28th day of August, 2015.

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