

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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

Plaintiffs/Appellants, )

vs. )

Supreme Court No.  
20150170

Noman 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, Michelle )  
Annette Jefferson, James Ghrames, John M. )  
Pearsall, Jeanine Sanders, 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 Louis )  
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, )  
Kristiane 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/Appellees. )

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Appeal from Order for Judgment and Final Judgment Dated April 29, 2015  
Case No. 53-2013-CV-01313  
County of Williams, Northwest Judicial District  
The Honorable David W. Nelson, Presiding

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**DEFENDANTS/APPELLEES' RESPONSE TO BRIEF OF  
WHITING OIL AND GAS CORPORATION**

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## **STATEMENT OF ADDITIONAL ISSUE PRESENTED FOR REVIEW**

[¶1] Whether the Contract for Deed, executed by Carl J. Meyer and Christina Meyer in favor of Emil J. Meyer and Helen Meyer (“Contract for Deed”), Bender Aff. Ex. B (Doc ID# 105), or the Order Directing Conveyance For Fulfillment of Contract For Deed Made Prior To Death (“Order Directing Conveyance”), Bender Aff. Ex. C (Doc ID# 106), render the ruling in *Waldock v. Amber Harvest Corp.* inapplicable to the present case.

## **ARGUMENT**

[¶2] Whiting Oil and Gas Corporation (“Whiting”) contends that the existence of the Contract for Deed and the Order Directing Conveyance distinguish this case from *Waldock v. Amber Harvest Corp.*, 2012 ND 180, 820 N.W.2d 755. Whiting argues that the *Duhig* rule applies to the Contract for Deed and, therefore, to the Executrix’s Deed (“Executrix Deed”), Bender Aff. Ex. D (Doc ID# 107), executed in fulfillment of the Contract for Deed. As this Court explained in *Waldock*, if the deed is not ambiguous, the determination of whether it contains an overconveyance of mineral rights should focus on the granting clause alone to determine what the grantor purported to convey to the grantee. 2012 ND 180 ¶ 9, 820 N.W.2d at 759. [¶3]

[¶3] Because the Executrix Deed is unambiguous as a matter of law, the Court should limit its inquiry to the four corners of the Deed and hold that it did not convey to Emil Meyer any mineral interest in the Subject

Lands for the reasons Stated in Defendants'/Appellees' Opening Brief. *See* Brief of Defs./Appellees ¶¶ 6-15.

**I. The Application *Vel Non* of *Duhig* to the Contract for Deed Is Not Relevant to the Outcome of This Case.**

[¶4] Whiting is correct in contending that *Waldock* did not involve a contract for deed, but this fact is irrelevant to the application of *Waldock* to the present case. “The language of [a] deed, if clear and explicit, governs its interpretation; the parties’ mutual intentions must be ascertained from the four corners of the deed, if possible.” *North Shore, Inc. v. Wakefield*, 530 N.W.2d 297, 300 (N.D. 1995). “[T]he law is too well settled to require the citation of numerous authorities that, when a deed of conveyance is finally executed and delivered, all previous conversations or executory agreements are merged in the deed, unless the evidence justifies a reformation of it for a mutual mistake.” *McGinley v. Martin*, 275 F. 267, 269 (8th Cir. 1921) (citing numerous authorities). The North Dakota Supreme Court continues to recognize that “a deed made in full execution of a contract of sale of land merges the provisions of the contract therein, including all prior negotiations and agreements leading up to the execution of the deed.” 26A C.J.S. Deeds § 221 (2015); *see also Four Seasons Healthcare Center, Inc. v. Linderkamp*, 2013 ND 159 ¶ 12, 837 N.W.2d 147, 152 (quoting *Zimmer v. Bellon*, 153 N.W.2d 757, 761 (N.D. 1967), which is itself quoting an earlier edition of the C.J.S.). As courts have concluded in interpreting North Dakota’s statutory parol evidence rule, “unless fraud, accident, or mistake be averred, the

writing constitutes the agreement between the parties[.]” *Golden Eye Resources, LLC v. Ganske*, 2014 ND 179 ¶ 17, 853 N.W.2d 544, 551. Thus, “the specific language of the granting clause of the deed controls the interests the grantor purported to give the grantee.” *Waldock v. Amber Harvest Corp.*, 2012 ND 180 ¶ 10, 820 N.W.2d 755, 759.

**A. The Contract for Deed Is Not Relevant Because the Executrix Deed Is Clear and Unambiguous.**

[¶5] The Contract for Deed is not relevant as a matter of law to the interpretation of the Executrix Deed. “If a deed is unambiguous, this Court determines the parties’ intent from the instrument itself.” *Carkuff v. Balmer*, 2011 ND 60, ¶ 8, 795 N.W.2d 303, 306. Whether a deed is ambiguous is a question of law. *See id.*; *see also State Bank & Trust of Kenmare v. Brekke*, 1999 ND 2012, ¶ 12; 602 N.W.2d 681, 685. A court will not seek out ambiguity if none is apparent from the face of the deed. *Johnson v. Shield*, 2015 ND 200, ¶ 12 (*quoting Royse v. Easter Seal Soc. for Crippled Children & Adults, Inc. of N. Dakota*, 256 N.W.2d 542, 545 (N.D. 1977)). “A contract is ambiguous if rational arguments can be made for different interpretations.” *Funke v. Aggregate Const., Inc.*, 2015 ND 123, ¶ 25, 863 N.W.2d 855, 863, *reh’g denied* (July 1, 2015).

[¶6] Neither Whiting nor Appellants have contended that the Executrix Deed is ambiguous. *See, e.g.*, Appellant’s App. APP-15, APP-200; Appellants’ Opening Br. ¶ 3; Pl.’s Br. Supp. Mot. Summ. J. (Doc ID# 121) ¶ 17 (“The facts material to the legal question appear in recorded documents, the



terms of which are not subject to dispute . . . .”). Rather than raising the issue of ambiguity, Whiting, and to some extent Appellants, have instead simply referred to the Contract for Deed as if it were *de facto* part of or binding upon the Executrix Deed. *See, e.g.,* Br. of Appellee, Whiting Oil & Gas Corp. ¶¶ 8-12; Whiting Oil & Gas Corp.’s Reply to Def. Hess Corp.’s Am. & Corrected Resp. (Doc ID# 167) ¶ 2 (“[T]he Order and the Executrix Deed which followed the Contract For Deed refer to fulfilling the Contract and therefore the Contract and its warranty language cannot be dispensed with[.]”); Pl.’s Br. Supp. Mot. Summ. J. (Doc ID# 121) ¶ 11. For this reason, Whiting and Appellants are precluded on appeal from arguing ambiguity as a basis for consideration of the Contract for Deed. *See Heng v. Rotech Med. Corp.*, 2006 ND 176 ¶¶ 9-10, 720 N.W.2d 54, 59-60; *see also Hirschhorn v. Severson*, 319 N.W.2d 475, 479 n. 7 (N.D. 1982) (noting that, even where an issue is raised in a party’s Answer, it cannot be raised on appeal if the trial court did not consider it).

[¶7] But even if the issue of ambiguity had been raised, Appellants’ and Whiting’s arguments would have failed because the *Waldock* court concluded that language materially identical to the language in the Executrix Deed is unambiguous as a matter of law. *See* 2012 ND 180 ¶ 13, 820 N.W.2d at 760 (“We conclude the specific language of the deed granting, bargaining, selling, and conveying ‘all the right, title, estate and interest of [Edwardson], at the time of his death’ is clear and unambiguous . . . .” (alteration in

original)); *see also* Def. Hess Corp.'s Mem. Law Supp. Mot. Summ. J. ¶ 19 (Doc ID# 110), Ex. B (Doc ID# 117). Thus extrinsic evidence, such as the Contract for Deed, is not relevant to determining the interests granted by the Executrix Deed, and Whiting's arguments based on the Contract for Deed are not relevant to the outcome of this case.

**B. The Contract for Deed Is Not Relevant Because the Executrix Deed is Not the Product of Fraud, Accident, or Mistake.**

[¶8] Like the issue of ambiguity, it should be noted that at no point in these proceedings have Whiting or Appellants argued that the language of the Executrix Deed is the product of fraud, accident, or mistake, such that the Contract for Deed should be used in interpreting or reforming the former; for this reason alone, this issue should not be considered. *See Heng*, 2006 ND 176 ¶¶ 9-10, 720 N.W.2d at 59-60; *see also Hirschhorn*, 319 N.W.2d at 479 n. 7 (N.D. 1982).

[¶9] But even if Whiting and Appellants had argued at summary judgment for reformation of the Executrix Deed on the basis of fraud or mistake, they would not have succeeded. "The burden of proof rests on the party who seeks reformation to prove that the written instrument does not fully or truly state the agreement that the parties intended to make." *Ell v. Ell*, 295 N.W.2d 143, 150 (N.D. 1980). A party seeking reformation must present evidence that is "clear, satisfactory, specific, and convincing," and shows "certainty of error." *Freidig v. Weed*, 2015 ND 215, ¶ 12. "In

considering whether to grant the high remedy of reformation of a written instrument, courts should exercise great caution and require a high degree of proof, *especially when death has sealed the lips of the original parties or a party.*” *George v. Veeder*, 2012 ND 186, ¶ 13, 820 N.W.2d 731, 735 (citation and internal quotation marks omitted).

[¶10] The only evidence extrinsic to the Executrix Deed that Whiting apparently considers relevant to the conveyance is the Contract for Deed and the corresponding Order Directing Conveyance. Whiting has not offered a single affidavit or any other evidence to support its assertion that the language of the Contract for Deed should be used to reform later Executrix Deed. The Contract for Deed, standing alone, does not come close to meeting the “high degree of proof” required to prove a reformation claim. *Id.* Accordingly, even if Whiting had pleaded such a claim, it would fail as a matter of law.

## **II. The Order Directing Conveyance for Fulfillment of Contract for Deed Made Prior to Death Does Not Affect the Interests Conveyed by the Executrix Deed.**

[¶11] Whiting asserts that the Order Directing Conveyance distinguishes the present case from *Waldock*. Br. of Appellee, Whiting Oil & Gas Corp. ¶¶ 10, 12. But as Appellee Hess Corporation argued in the lower court, not only does this conflict with the plain language of the Executrix Deed, it conflicts with the jurisdiction of the probate court. *See* Def. Hess Corp.’s Am. & Corrected Resp. (Doc ID# 163). As a matter of law, a deed

issued under Section 30-19-20 of the North Dakota Century Code is nothing “more than a quitclaim deed,” *Waldock*, 2012 ND 180 ¶ 10, 820 N.W.2d at 759, because section 30-19-20 “clearly indicates that a conveyance so made conveys only the right, title, interest, and estate of the decedent in the premises.” *Sittner v. Mistelski*, 140 N.W.2d 360, 369 (N.D. 1966). Therefore, by statute, the Executrix Deed could not purport to include in the granting and description clause more than Carl owned, which was undisputedly 50% of the minerals. Whiting’s attempt to extend the Order Directing Conveyance beyond the jurisdiction of the issuing court to modify the terms of the Executrix Deed is therefore misplaced.

### CONCLUSION

[¶12] For the reasons set forth above, and for the reasons set forth in Defendants’/Appellees’ Opening Brief, the Northern Defendants respectfully request that the Court enter an order affirming the judgment entered by the district court.

DATED this 11th day of September, 2015.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 11th, 2015, I electronically filed with the Clerk of the North Dakota Supreme Court the foregoing Brief by E-mail, and served the Brief by E-mail on the following:

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