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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

Jennifer Ogren; Lisa Marie Ogren Castle; Eric Marcus Ogren,

Plaintiffs and Appellants,

v.

Marlene Sandaker; Karen Walden; Marlys Rulon; Jennie Rae Davis; Joel D. Wagner, as Personal Representative of the estate of Marilyn C. Wagner; Randy Barkie; Andrew Barkie; Kurt B. Barkie; Patrick Flanigan; Cristina Flanigan; Alfred Barkie; Paulette Barkie; Mary Cook Marathon Oil Company; Oasis Petroleum North America LLC; and all other persons known and unknown having or claiming any right, title, estate or interest in or lien or encumbrance upon the real property described in the complaint, whether as heirs, devisees, legatees or Personal Representatives of the aforementioned parties or as holding any claim adverse to Plaintiffs' ownership or any cloud upon Plaintiffs' title thereto,,

Defendants and Appellees.

Supreme Court No. 20160279

Appeal From the Judgement Entered On June 21, 2016

Williams County District Court
Northwest Judicial District
The Honorable David W. Nelson
Case No. 53-2014-CV-00973

BRIEF OF APPELLEES MARLENE SANDAKER, KAREN WALDEN AND MARYLS RULON

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INTRODUCTION

[¶1] The Appellees' do not disagree with the Statement of the Issues, Statement of the Facts, Statement of the Case and Standard of Review put forth by the Appellants. However, the Appellants are wrong to assert that the District Court committed any errors in this case. The District Court correctly determined that the royalty conveyed by the document at the center of this case was a fraction of royalty. The language of this document is clear and easy to understand, and the Supreme Court should follow the ruling of the District Court.

ARGUMENT

[¶2] A moving party is entitled to Summary Judgment when the party shows there are "no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law." Wenco v. EOG Resources, Inc. 2012 ND 219, ¶8, 822 N.W.2d 701 (quoting Arndt v. Maki, 2012 ND 55, ¶ 10, 813 N.W.2d 564, quoting Saltsman v. Sharp, 2011 ND 172, ¶ 4, 803 N.W.2d 553). However, issues of fact become issues of law if reasonable persons could reach only one conclusion from the facts. Saltsman, at ¶ 5; Hamilton v. Woll, 823 N.W.2d 754, 758 (N.D. 2012).

[¶3] "The assignment of royalty under consideration is clearly a grant." Corbett v. LaBere, 68 N.W.2d 211, 215 (1955). Grants shall be interpreted in like manner with contracts in general ... If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction, and if several parts of a grant are absolutely irreconcilable, the former part shall prevail. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct. Id.

[¶4] The interpretation of a written contract is a question of law, if the parties' intent can be determined from the language of the writing alone. VND, LLC v. Leevers Foods, Inc., 2003 ND

198, ¶ 34, 672 N.W.2d 445. If a written contract is ambiguous, extrinsic evidence may be considered to determine the parties' intent, and the terms of the contract and the parties' intent are questions of fact. Id. If a written contract is unambiguous, however, extrinsic evidence is not admissible to contradict the written language. Id.

[¶5] The North Dakota Supreme Court has never defined " fraction of royalty" and a "fractional royalty." However, the Texas Supreme Court recently defined these terms case in Hysaw v. Dawkins, 59 Tex. Sup. Ct. J. 327 (2016). The Texas Supreme Court stated:

> [¶6] Royalty interests may be conveyed or reserved "as a fixed fraction of total production" (fractional royalty interest) or "as a fraction of the total royalty interest" (fraction of royalty interest). Luckel v. White, 819 S.W.2d 459, 464 (1991). A fractional royalty interest conveys a fixed share of production and "remains constant regardless of the amount of royalty contained in a subsequently negotiated oil and gas lease." Coghill v. Griffith, 358 S.W.3d 834, 838 (Tex.App.–Tyler 2012, pet. denied). In comparison, a fraction of royalty interest (as a percentage of production) varies in accordance with the size of the landowner's royalty in a mineral lease and "is calculated by multiplying the fraction in the royalty reservation by the royalty provided in the lease." Id.; see Luckel, 819 S.W.2d at 464.Id., p. 6.

[¶7] As noted in the Appellant's Brief, "This entire case revolves around the interpretation of an Assignment of Royalty that was executed in 1958." Appellants' Brief at ¶6. Despite the truth of this statement, the Appellants get distracted by other documents. At the beginning of their argument, they write, "This Court should hold that the Assignment conveyed a fractional royalty to the grantees that was determined in the 2011 title opinion, and not a fraction of royalty that was later determined in the 2012 title opinion." *Id.* at ¶14. These two title opinions are irrelevant, as the opinions of the drafting attorneys in each opinion are not binding on this, or any other Court. Instead, the only important issue before this Court is the meaning of the 1958 conveyance, as set forth in its plain language.

1. **The 1958 Conveyance creates a Fraction of Royalty by Its Plain Language**

[¶8] The 1958 Assignment of Royalty granting clause plainly states that the Grantors conveyed:

"... all of their right, title and interest in and to the Seven-eighths (7/8 SHARE) royalty, of all of the oil and of all the gas produced and saved from the hereinafter described lands, ..." Appellant's Appendix at 30.

[¶9] The document also contains an intent clause, which states:

"IT IS THE INTENT OF THE ASSIGNORS to assign to each of the seven assignees an equal, but undivided, one-seventh division of the seven-eighths share of royalty being assigned herewith so that each assignee receives an undivided one-eighth share of the total royalty, the assignors retaining the remaining undivided one-eighth share." *Id.*

[¶10] Finally, the Grantors also recited that the conveyance was made subject to any existing or future lease on the property, by stating "assignors do hereby assign said royalty under the lease now covering said lands as well as any lease or leases, that may be hereafter made covering said premises." *Id.*

[¶11] As noted in the Appellant's Brief and in this Brief, the Texas Supreme Court, in setting out the differences between fractional and fraction of royalty, has stated that a fraction of royalty varies in accordance with the size of the landowner's royalty in a mineral lease and "is calculated by multiplying the fraction in the royalty reservation by the royalty provided in the lease." Thus, a fraction of royalty is determined by multiplying two numbers. These two numbers are referenced in the 1958 conveyance.

[¶12] First, in the intent clause, the conveyance states that each of the grantees is to receive a one-eighth share of the total royalty. This is the first number, the fraction in the royalty reservation as mentioned above. Next, the conveyance states that it is subject to any existing or future lease on the property. This language sets out the second number; which is whatever royalty is provided for under any existing or future oil and gas lease on the property. Thus, any of the grantees under this conveyance is entitled to receive one-eighth of royalty reserved to the lessor of any oil and gas lease. This number isn't specifically set out in the 1958 conveyance,

because it can't be, as the Grantors couldn't know what future lease royalties would be. However, the formula is there, and is easy to understand. Because the royalty is calculated by multiplying these two numbers, a fraction of royalty exists, and the Supreme Court should rule in favor of the Appellees.

[¶13] It is worth noting that nowhere in their brief do the Appellants' address the language of this conveyance which states that it is subject to any existing or future leases. There is a very simple reason for this, as the only way the Appellants' to prevail in this case is for the Court to ignore this language. After all, under the definitions provided by the Texas Supreme Court, and relied upon by the Appellants, a conveyance which requires the royalty granted to be multiplied by the lease rate from an existing or future lease creates a fraction of royalty, not a fractional royalty as the Appellants argue.

[¶14] As the District Court noted in its ruling in this case, "If there was any question after reading the first part of the deed, those questions are answered in the intent clause at the end. Looking no further than the four corners of the document we know exactly what the Grantors were doing." Appellant's Appendix at 93, ¶4.

2. The Court Does Not Need to Apply Texas Law To Interpret This Conveyance

[¶15] The Appellants and Appellees have both cited to Texas law in this matter, in order to discuss the interpretation of the 1958 conveyance as creating either a fractional royalty or a fraction of royalty. However, the North Dakota Supreme Court has not determined the definitions of these terms, or dealt with any previous cases regarding their applicability to North Dakota law. Such a determination is not required in this case, as the plain language of the document supplies all the information the Court needs to interpret it.

[¶16] The 1958 conveyance, in its granting clause, states that the Grantors "do hereby sell,

assign, transfer, convey and set over unto the said assignees, all of their right, title and interest in and to the seven-eighths (7/8 SHARE) royalty, of all of the oil and of all the gas produced and saved from the hereinafter described lands…" Appellants Appendix at 30. It is the position of the Appellants that this conveyance grants each of the seven assignees 1/8th of the total royalty produced from the lands in question, without any regard as to whether those lands are leased or not. This is a fractional royalty interest, as defined by the Texas Supreme Court.

[¶17] It is the position of the Appellees' that the royalty conveyed by the 1958 conveyance is subject to any leases on the property. This means that if the property was leased with a 3/16ths royalty rate, each original assignees' 1/8th royalty would be deducted from the 3/16ths figure. This would be a fraction of royalty interest, as defined by the Texas Supreme Court. More important than this, however, is that fact that this interpretation is the one specifically set out in the document itself. As is noted above, the conveyance states that, "assignors do hereby assign said royalty under the lease now covering said lands as well as any lease or leases, that may be hereafter made covering said premises." Appellants Appendix at 30. If the royalty is assigned under any lease under the lands, then it must be taken from the owner's royalty, not the from the total royalty, otherwise the royalty conveyed would interfere with the lessee's royalty granted under any lease.

[¶18] If the royalty from this conveyance was not taken from the owner's royalty, then the mathematics of the result would be completely absurd. If 7/8ths of the total value of the oil from the property were conveyed by this assignment, as the Appellants' contend, then there would only be 1/8th left to be split between the owner of the minerals leased, and the oil company seeking to develop those minerals. As is mentioned in the Appellant's Brief, these minerals are leased at a 3/16 royalty rate. See Appellant's Brief at ¶11. Therefore, under the Appellants' view,

the owners of the minerals (Defendants Marlene Sandaker, Marlys Rulon, and Karen Walden) in this case must provide 7/8ths of the total production to the assignees under the original conveyance, and then must further provide 13/16ths to the lessee under the lease currently under the property. Thus, for every barrel of oil extracted from the property, the owners would be required to pay 168.75% of that value to the lessee and the assignees under this conveyance. Not only is this interpretation of the conveyance mathematically unconscionable, it is also in direct contradiction to the plane language of the conveyance itself.

[¶19] The Court need not apply Texas law in this case in order to interpret the 1958 conveyance, as the plain language of the conveyance requires the royalty to be taken from the lease royalty, not the total royalty.

CONCLUSION

[¶20] Whether the Court choses to apply Texas law or not in this case, the ultimate result must be that the 1958 conveyance is interpreted in favor of the Appellees, and the District Court's ruling must be upheld.

DATED this 14th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that the Brief of Appellees Marlene Sandaker, Karen Walden and Maryls Rulon was served via email and U.S. Mail upon the following on this 14th day of October, 2016:

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Dated this 14th day of October, 2016.

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