

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

Plaintiffs/Appellants,

vs.

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; and all other persons
known and unknown having or claiming any
right, title, estate of 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 of any cloud
upon Plaintiffs' title thereto,

Defendants/Appellees.

Supreme Court Civil No.: 20160279

District Court Civil No.: 53-2014-CV-00973

APPELLANTS' APPEAL BRIEF

APPEAL FROM THE JUDGMENT ENTERED ON JUNE 21, 2016

NORTHWEST JUDICIAL DISTRICT
HONORABLE DAVID W. NELSON, PRESIDING

BRIEF OF APPELLANTS
JENNIFER OGREN, LISA MARIE OGREN CASTLE AND ERIC MARCUS OGREN

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STATEMENT OF THE ISSUES

1. Did the District Court error in granting summary judgment in favor of Defendants and denying summary judgment to Plaintiffs and holding that the Assignment of Royalty in question conveyed a fraction of royalty as opposed to a fractional royalty?

STATEMENT OF THE CASE

[¶ 1] The relevant portions of the procedural history of the district level case dealing with the issues on appeal are as follows:

[¶ 2] Appellants Jennifer Ogren, Lisa Marie Ogren Castle, and Eric Marcus Ogren (hereinafter “Plaintiffs” or “Appellants”) filed a Summons and Complaint, on July 30, 2014, against 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. (Appellants’ Appendix 6).

[¶ 3] Appellees Marleen Sandaker, Karen Walden, Marly Rulon (hereinafter “Defendants” or “Appellees”) filed their Answer to Complaint and Counterclaim on December 22, 2015. (Appellants’ App. 14). Thereafter, Randy Barkie, Andrew Barkie and Paulette Barkie filed their Answer to the Complaint on December 31, 2015. (Appellants’ App. 12).

[¶ 4] Thereafter, Appellees moved for summary judgment on April 12, 2016 (Appellants’ App. 20) followed by Appellants filing their Motion for Summary Judgment (Appellants’ App. 71) on June 13, 2016.

[¶ 5] After reviewing the respective motions seeking summary judgment, the district court denied Appellants’ Motion for Summary Judgment on June 13, 2016 and ruled in favor of Appellees’ Motion for Summary Judgment on June 21, 2016. (Appellants’ App. 93).

STATEMENT OF THE FACTS

¶ 6] Because both parties moved for summary judgment as a matter of law, the material facts of this case are undisputed. This entire case revolves around the interpretation of an Assignment of Royalty that was executed in 1958. Originally, Mike Albert and Lorene Albert, husband and wife, obtained mineral interests in the following real property in Williams County, North Dakota as joint tenants (hereinafter “the Property”):

Township 156 North, Range 103 West
Section 4: S1/2NW1/4
Section 5: Lots 3, 4
Section 9: SW1/4

¶ 7] On September 24, 1958, Mike Albert and Lorene Albert conveyed a 7/8th royalty interest in the Property by way of an Assignment of Royalty (hereinafter “Assignment”) to Mike Albert’s seven siblings (1/8th each), and Mike Albert and Lorene Albert retained a 1/8th royalty for themselves. The conveyance language in the Assignment is as follows:

That Mike and Lorene Albert, husband and wife . . . 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, located in the County of Williams, State of North Dakota, to-wit:

(Appellants’ App. 30).

¶ 8] On August 5, 2004, Lorene Albert, as survivor and successor to the Estate of Mike Albert, conveyed equally to their four daughters their remaining 1/8th royalty interest in the Property. Three of their daughters included Marlene Sandaker, Marlys Albert (Rulon), and Karen Walden, who are Defendants in this matter.

[¶ 9] The other daughter was Kathryn Ogren. Through a series of Assignments and Corrective Assignments of Oil and Gas Royalty, Kathryn Ogren obtained 5/8ths of the original royalty interest conveyed by Mike Albert and Lorene Albert from her relatives Kathryn Isaacson, Martha M. Bush, Eli Albert, Elizabeth Harlan, and John Albert. Kathryn Ogren then conveyed her portion of the 1/8th royalty she received from her parents, Mike Albert and Lorene Albert, along with the 5/8th royalty she received from her relatives, all to her children, which include Eric Marcus Ogren and Lisa Marie Ogren Castle, the Plaintiffs in this matter. (Appellants' App. 32-44). Jennifer Ogren is the wife of Eric Marcus Ogren.

[¶ 10] In 2009, Defendants Marlene Sandaker, Marlys Albert (Rulon), and Karen Walden leased the Property for a 3/16th royalty interest. (Appellants' App. 45). Then in 2011, an attorney working for Oasis Petroleum North American LLC (hereinafter "Oasis") conducted a title opinion and concluded that Mike Albert and Lorene Albert originally conveyed a fractional royalty to Mike's seven siblings, which meant the seven siblings each received 1/8th of all of the production from the Property free of cost. (Appellants' App. 51). Royalty payments were made based on this opinion for the first year of production.

[¶ 11] Then a year later in 2012, an attorney on behalf of Oasis changed the opinion and concluded that the 1958 Assignment of Royalty to Mike Albert's siblings conveyed a fraction of a royalty, which meant the seven siblings each received 1/8th of the production subject to the terms of the future lease. (Appellants' App. 87). In this case, the future lease called for a 3/16th royalty interest. By definition of a fraction of a royalty, each sibling would earn 1/8th of the 3/16th royalty interest per the lease. This

new title opinion certainly benefited the lessee, as it would no longer be subject to the additional cost required by the royalty per the 2011 title opinion. The attorney in the 2012 opinion noted that, in his opinion, although the interpretation in 2011 was within the language of the Assignment, the real intent of Mike Albert was to convey a fraction of a royalty instead.

[¶ 12] As a result of the conflicting title opinions, payment was held in suspense and this action was commenced to resolve the correct interpretation of the Assignment.

ARGUMENT

I. STANDARD OF REVIEW

[¶ 13] Whether the district court properly granted summary judgment is a question of law which the North Dakota Supreme Court reviews de novo on the entire record. Poppe v. Stockert, 2015 ND 252, ¶ 4, 870 N.W.2d 187, 190–91, reh'g denied (Dec. 1, 2015). Because this appeal involves whether the district court properly granted summary judgment in favor of the Appellees and denied summary judgment of Appellants, the standard of review for this Court should be de novo, without reference to the district court's decision.

II. THE ASSIGNMENT OF ROYALTY CONVEYED A FRACTIONAL ROYALTY INTEREST TO THE GRANTEEES AS OPPOSED TO A FRACTION OF ROYALTY INTEREST.

[¶ 14] 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.

[¶ 15] Both parties agree that summary judgment is appropriate in this case because there are no genuine issues of material fact. The only issue in dispute is the

interpretation of the Assignment. The Assignment is a grant, similar to a conveying instrument such as a deed, which should be interpreted in the same manner as a contract. N.D.C.C. § 47-09-11. “When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible” N.D.C.C. § 9-07-04. Therefore, if the language of the contract is clear and explicit and does not involve an absurdity, the language governs the interpretation. N.D.C.C. § 9-07-02. In this case, the Assignment is clear and explicit to how it should be interpreted, so the language of the Assignment should govern its interpretation. The Alberts conveyed their royalty interest to Mike Albert’s seven siblings with the following language:

That Mike and Lorene Albert, husband and wife . . . 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, located in the County of Williams, State of North Dakota, to-wit:

(emphasis added). (Appellants’ App. 30). At the time of the Assignment, the Alberts owned 8/8th of the royalty interests. The Alberts retained 1/8th interest and conveyed the other 7/8th interests to Mike’s seven siblings, 1/8th each. The Assignment outlines this intent clearly, that all of the 1/8th interest owners shall share in the proceeds of any oil and gas production from the Property. The Assignment also clearly outlines that the grantees should receive a fractional royalty, and not a fraction of a royalty.

[¶ 16] This Court has not previously determined the definitions of fractional royalty or a fraction of a royalty and therefore North Dakota case law is scarce on the issue. The terms are mentioned in Hamilton v. Woll, 2012 ND 238, ¶11, but there was no analysis and the issue in that case was determining whether a conveyance was a mineral or royalty grant. However, the Texas Supreme Court has defined the two and

can provide guidance to this Court. In Hysaw v. Dawkins, 59 Tex. Sup. Ct. J. 327 (2016), the Texas Supreme Court defined the two:

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.

[¶ 17] The language in the Assignment in this case conveyed a fractional royalty interest. Language that conveys a fractional royalty interest contains phrases such as “a one-fourth royalty in all oil, gas, and other minerals in and under and hereafter produced” or “an undivided one-sixteenth royalty interest of any oil, gas, or minerals that may hereafter be produced.” Williams & Meyers Oil and Gas Law § 327.1. The language in the Assignment mirrors these examples. Once again, the relevant part of the conveyance language in the Assignment reads, “. . . 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’ App. 30).

[¶ 18] In contrast, the language of a fraction of royalty conveyance differs. Examples of a conveyance of a fraction of royalty includes, “an undivided one-half interest in and to all of the royalty” and “one-half of one-eighth of the oil, gas, and other mineral royalty that may be produced.” Williams & Meyers, § 327.1. These examples differ from the Assignment language, and it does not convey an interest in an amount of

gross production. These examples were cited in another Texas case, Moore v. Noble Energy, Inc., 374 S.W.2d 644, 649 (Tex.App.-Amarillo 2012), in which the court concluded that a fractional royalty was reserved.

[¶ 19] Therefore, the granting language in the Assignment is more similar to that of a fractional royalty and should be construed as such, just as it was in the 2011 title opinion and how it was paid out for the first year of production.

CONCLUSION

[¶ 20] This Court should interpret that the 1958 Assignment of Royalty conveyed a fractional royalty to the grantees that was determined in the 2011 title opinion.

[¶ 21] For the foregoing reasons, Plaintiff/Appellant requests that this Court reverse the decision of the district court and grant summary judgment in favor of the Appellants to quiet title to the royalty interests in a manner requested by the Complaint in this matter.

Dated this 15th day of September, 2016.

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AFFIDAVIT OF SERVICE

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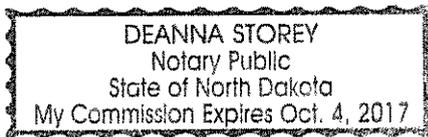
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and depositing the same, with postage prepaid, in the United States Mail at Fargo, North Dakota.



Brenda L. Halbakken, an employee of
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Subscribed and sworn to before me on September 15, 2016.



Notary Public