

IN THE SUPREME COURT OF NORTH DAKOTA

George Seccombe; Barbara Treska; Erik Naeset; Helge Naeset; Astri Holst; Irene Markle; and Alice Nasset,

Plaintiffs,

Slawson Exploration Company, Inc.; and Alameda Energy, Inc.

Plaintiffs-Intervenors and Appellants,

vs.

Bradley C. Rohde and Karen D. Rohde, Trustees of the Bradley C. Rohde Living Trust dated June 22, 2010; Anita Rohde, Trustee of the Anita Rohde Living Trust UDT October 8, 2009; Dennis Rohde, Trustee of the Dennis Rohde Living Trust UDT October 8, 2009; Gary Rohde; Bradley Rohde; Dennis Rohde; Northern Oil and Gas, Inc.; Ryan Family Mineral Partnership; S. Reger Family Mineral Partnership; Kootenai Resources Corporation; Summerfield C. Baldrige; Montana Oil Properties, Inc.; S. Reger Family Inc., Beartooth Ridge Resources, Inc.; and all persons unknown claiming any estate or interest in, or lien or encumbrance upon the property described in the complaint,

Defendants and Appellees.

Supreme Court Case No:
20180069

Mountrail County Civil
Cause No:
2012-CV-00104

**REPLY BRIEF OF APPELLANTS SLAWSON EXPLORATION COMPANY,
INC. AND ALAMEDA ENERGY, INC.**

Appeal from Order on Motions for Summary Judgment, entered December 11, 2017, and Judgment, entered January 17, 2018, by the District Court for the North Central Judicial District, County of Mountrail, the Hon. Judge Gary H. Lee presiding

Attorneys for Plaintiffs-Intervenors, Slawson Exploration Company, Inc. & Alameda Energy, Inc.:

Adam Olschlager (#06428)
P.O. Box 2529
Billings, MT 59103-2529
(406) 252-3441

Uriah J. Price (#07173)
Griffin B. Stevens (#08383)
P.O. Box 10969
Bozeman, MT 59718
(406) 556-1430

TABLE OF CONTENTS

TABLE OF CONTENTS..... p. i

TABLE OF AUTHORITIES p. ii

INTRODUCTIONp. 1, ¶ 1

ARGUMENTp. 1, ¶ 3

 1. The Executor’s Deed reserved the Subject Minerals to the Estate by operation of its plain language and N.D.C.C. §30-19-20.p. 1, ¶ 3

 2. Appellees ask the Court to read all meaning out of the 1962 probate code’s restrictions and procedures.p. 3, ¶ 9

 3. The Amended Confirmation Order confirmed the Estate’s reservation of the Subject Minerals and obviated the need for Nasset’s heirs to clarify the effect of the Executor’s Deed in a separate suit.p. 4, ¶ 12

 4. Appellees mischaracterize the relevant statutes and case law.....p. 6, ¶ 16

 a. *Cathro* confirms that the Executor’s Deed and Confirmation Order were void to the extent they could be read to convey the Subject Minerals.p. 6, ¶ 17

 b. Appellees mischaracterize the terms of N.D.C.C. §30-19-05.....p. 6, ¶ 18

 c. *Gruebele* controls the present case.p. 7, ¶ 20

CONCLUSION.....p. 7, ¶ 22

CERTIFICATE OF COMPLIANCE WITH RULE 32(a).....p. 9

CERTIFICATE OF SERVICEp. 10

TABLE OF AUTHORITIES

Cases

<i>Cathro v. McArthur</i> , 152 N.W. 686 (1915)	¶ 17
<i>Duhig v. Peavy-Moore Co.</i> , 144 S.W.2d 878 (Tex. 1940)	¶ 7
<i>Gruebele v. Gruebele</i> , 338 N.W.2d 805 (N.D. 1983).....	¶¶ 20-21
<i>In re Foster's Estate</i> , 89 N.W.2d 112 (N.D. 1958)	¶ 11
<i>Sittner v. Mistelski</i> , 140 N.W.2d 360 (N.D. 1966).....	¶ 7
<i>Vanderhoof v. Gravel Prod., Inc.</i> , 404 N.W.2d 485 (N.D. 1987).....	¶ 7
<i>Waldock v. Amber Harvest Corp.</i> , 2012 ND 180, 820 N.W.2d 755.....	¶ 7

Statutes

N.D.C.C. § 30-19-05 (1959)	¶ 18
N.D.C.C. § 30-19-20 (1959)	¶¶ 3-6
N.D.C.C. § 30-24-01 (1959)	¶ 14

Treatises

34 C.J.S. Executors and Administrators § 793	¶ 11
--	------

INTRODUCTION

[1] In 1962, the Executor received the County Court’s permission to sell the Surface while retaining a 1/2 mineral interest. The State of North Dakota owned the other 1/2 mineral interest of record; therefore, all potential buyers were on legal notice that the sale was limited to the Surface. The Executor published notices of sale of the Surface, received bids, and accepted Rohde’s as the highest. The court confirmed the sale and the Executor issued a deed incorporating the court’s orders and the Estate’s reservation of the Subject Minerals. A few weeks later, the court issued an amended order confirming that only the Surface was sold. Nasset’s heirs relied on the court’s amended order and the corresponding Amended Executor’s Deed for the next 50 years.

[2] Appellees¹ now claim the heirs’ reliance was misplaced. Citing modern conveyancing principles and ignoring the context of the subject transaction—a probate proceeding—Appellees argue that the Executor’s Deed is the only operative document; that the heirs should have instituted a separate action to confirm reservation of the Subject Minerals; and that because the heirs failed to pursue such a redundant action, Rohde should be deemed to have received something he never paid for and Nasset’s heirs never agreed to sell—the Subject Minerals.

ARGUMENT

1. The Executor’s Deed reserved the Subject Minerals to the Estate by operation of its plain language and N.D.C.C. §30-19-20.

[3] Incredibly, Appellees claim “[i]t is undisputed the Executor’s Deed did not contain any mineral reservation.” (Montana Defendants ¶26; Rohde Defendants ¶¶64-65). As

¹ “Appellees” means each of the Rohde Defendants, Northern Oil, and the Montana Defendants. While Appellees submitted multiple answer briefs, their arguments are similar. For brevity’s sake, Slawson will not differentiate among them.

Slawson and Alameda (collectively “Slawson”) explained in their appeal brief, the Executor’s Deed reserved the Subject Minerals to the Estate by virtue of its terms and operation of N.D.C.C. §30-19-20.²

[4] N.D.C.C. §30-19-20 unequivocally commands that a probate conveyance “must refer to . . . orders of the county court authorizing and confirming the sale.” The Executor’s Deed complied with this directive by stating that the sale was made “[u]nder and by virtue of said order of sale” “authorizing and licensing [the Executor] to sell . . . certain real estate.” (O-103).

[5] Per N.D.C.C. §30-19-20, this reference to the order authorizing sale must be given “the same effect as if the orders were inserted in the conveyance.” Because the order authorizing sale expressly “reserve[d] a 1/2 mineral interest,” the Executor’s Deed must be given the “same effect” as if it expressly stated the same reservation. (I-85).

[6] Appellees nonetheless argue that the Executor Deed’s reference to the order authorizing sale did not operate as a reservation. Appellees rely on this Court’s general statement that “reservations must be clearly expressed” and a Texas federal court’s conclusion that a deed cannot incorporate a reservation by reference. (Montana Defendants ¶¶31-32). However, neither the Court’s statement nor the Texas court’s holding were made in the probate context or involved a statute like N.D.C.C. §30-19-20, which unequivocally provides that reference to the court’s order must be given the same effect as if the order authorizing sale and its reservation of “a 1/2 mineral interest” were inserted in the Executor’s Deed.

² Statutory citations herein are to the 1959 versions applicable at the time of the Estate’s probate sale.

[7] Appellees' argument that Rohde must have thought he was receiving the other 1/2 mineral interest is unsupported by any evidence and ignores over 50 years of precedent. Rohde was charged with constructive notice of the true state of the Estate's title—that is, with notice that the Estate owned only a 1/2 mineral interest and “reserved” that interest. *E.g.*, *Waldock v. Amber Harvest Corp.*, 2012 ND 180, ¶ 10, 820 N.W.2d 755; *Vanderhoof v. Gravel Prod., Inc.*, 404 N.W.2d 485, 490 (N.D. 1987); *Sittner v. Mistelski*, 140 N.W.2d 360, 368 (N.D. 1966). Under North Dakota law, Appellees' speculation about Rohde's actual knowledge is irrelevant and their reliance on *Duhig v. Peavy-Moore Co.*, 144 S.W.2d 878 (Tex. 1940) is contrary to this Court's holding in *Waldock*, ¶¶5-13.

[8] Moreover, Appellees' argument that Rohde only had notice and knowledge of the Executor's Deed is misleading considering that the Executor's Deed referenced and incorporated the earlier order authorizing sale, which was of record, and considering that Rohde made his bid according to the instructions in the public notice. Each document contained an express reservation of the Subject Minerals. (I-85; J-87; K-90; O-103).

2. Appellees ask the Court to read all meaning out of the 1962 probate code's restrictions and procedures.

[9] Ignoring the fact that this case did not involve a typical private transaction and continuing to rely on general laws concerning property transfers, Appellees argue that the Executor's Deed is the sole operative document and that “the pre-conveyance probate events” giving rise to, and incorporated by, the Executor's Deed are of no consequence. (Montana Defendants ¶¶27-32; Rohde Defendants ¶¶58-59).

[10] Rohde's purchase was not a typical, unsupervised transfer in which the buyer's and seller's intent as memorialized in a recorded deed was the sole metric of what was sold. The transfer was made in a “wholly statutory” probate proceeding designed to protect heirs

and estates. (Slawson’s Appeal Brief ¶¶ 26-33). The pre-conveyance petitions, notices, and orders were just as relevant to title as the Executor’s Deed because such procedures were the means by which heirs were given notice of the sale and opportunity to be heard, the court obtained jurisdiction over heirs and estate property, and the Executor acquired authority to transfer estate property. (*Id.*) The pre-conveyance proceedings were not meaningless procedural hurdles. (*Id.*) Without them the sale could not have occurred at all, and they statutorily restricted what the Executor could sell and what the County Court could approve for sale.

[11] Here, the petition and notices to interested persons, and the notice to Rohde of the sale, all unequivocally stated that the Estate reserved the Subject Minerals. (F-76; G-79; H-82; I-85; J-87; K-90; O-103). Similarly, the hearing on the petition was concerned only with the sale of the Surface, and the court’s order authorizing the sale specifically reserved the Subject Minerals to the Estate. (I-85). Thus, even if the Executor’s Deed could be read as lacking a reservation of the Subject Minerals, any conveyance that may have resulted was beyond the bounds established by the pre-conveyance probate proceedings and, therefore, void as exceeding the Court’s jurisdiction and Executor’s authority. *E.g., In re Foster’s Estate*, 89 N.W.2d 112, 116 (N.D. 1958); 34 C.J.S. Executors and Administrators § 793 (“A sale of property not included within the terms of the order will be set aside.”).

3. The Amended Confirmation Order confirmed the Estate’s reservation of the Subject Minerals and obviated the need for Nasset’s heirs to clarify the effect of the Executor’s Deed in a separate suit.

[12] Appellees argue the Amended Confirmation Order exceeded the County Court’s authority and had no effect. Despite the lack of any evidence in support, Appellees also

claim that the Amended Confirmation Order was a perfunctory gesture in which the County Court merely “did what the executor asked.”

[13] In reality, the Amended Confirmation Order was not necessary to reserve the Subject Minerals for the reasons discussed above. The Amended Confirmation Order simply provided further indication of the County Court’s understanding of the probate sale, and ordered the Executor to issue an Amended Executor’s Deed to resolve the very doubt upon which Appellees now predicate their claims. The court confirmed the reservation by exercising its authority to make the Executor’s Deed and Confirmation Order more clearly and explicitly reflect the truth of the transaction.

[14] Appellees nonetheless claim that Nasset’s heirs could not rely on the County Court’s order and should have filed an independent action asking for a redundant confirmation order from the same court. (Montana Defendants ¶¶46-73, 79; Rohde Defendants ¶¶27-31). The court had spoken twice. Asking it to speak a third time would have defied common sense. Appellees’ argument also finds no support in the terms of N.D.C.C. §30-24-01 since there was no need in this case for the heirs to recover anything from Rohde.

[15] Appellees’ request that the Court refrain from deciding the effects of the probate transaction on the Subject Minerals is similarly unsupported. Appellees’ laches and statute of limitations arguments are predicated on Appellees’ claim that the Executor’s Deed passed the Subject Minerals to Rohde, the Amended Executor’s Deed had no effect, and the Court cannot now divest Appellees of title. For the reasons discussed above, Rohde never paid for nor received title to the Subject Minerals, the Amended Executor’s Deed did

not divest Appellees of anything, Slawson does not seek to divest Appellees of anything, and Slawson's quiet title claim is not time-barred.

4. Appellees mischaracterize the relevant statutes and case law.

[16] Slawson cannot address each of Appellees' mischaracterizations of cases and statutes due to the constraints of N.D.R.App 32(a)(8). Appellees' most notable mischaracterizations are highlighted below. Regarding other mischaracterizations, Slawson maintains its descriptions of the relevant law set out in Slawson's initial brief.

a. *Cathro* confirms that the Executor's Deed and Confirmation Order were void to the extent they could be read to convey the Subject Minerals.

[17] In *Cathro v. McArthur*, 152 N.W. 686, 687 (1915), "misdescription" of a property in a probate sale did not invalidate the sale. "The county court obtained jurisdiction upon the filing of a proper petition" and subsequent errors in description of property did not prevent the buyer from taking what was correctly described in the petition and notices. *Id.* This Court held that errors in the description were not jurisdictional because the court was authorized to and did transfer the property described in the petition. *Id.* Here, on the other hand, any purported conveyance of the Subject Minerals was in excess of the Court's jurisdiction and the Executor's authority because conveyance of the Subject Minerals would have been conveyance of more than what was described in the petition. (F-76).

b. Appellees mischaracterize the terms of N.D.C.C. §30-19-05.

[18] Appellees incorrectly claim that N.D.C.C. §30-19-05 prevents inconsistencies in the description of property from invalidating a transfer. (Montana Defendants ¶38). N.D.C.C. §30-19-05 states only that the County Court will not lose jurisdiction due to

“defects” in the petition’s recitation of certain information, other than the description of property to be sold.

[19] Slawson is not suggesting that there was an error in the petition’s description of the property. Instead, the accurate description of property in the petition served to limit the County Court’s jurisdiction, and Executor’s authority, to sell anything more than described.

c. *Gruebele* controls the present case.

[20] Appellees attempt to distinguish *Gruebele v. Gruebele*, 338 N.W.2d 805 (N.D. 1983), by the case’s divorce subject-matter and by characterizing Rohde as a non-party in the probate proceeding. (Montana Defendants ¶¶66-71; Rohde Defendants ¶¶36-37). The point of *Gruebele* is, however, that a court may by ex parte order modify court-supervised sales to “speak the truth” and “reflect what was intended.” *Gruebele*, 338 N.W.2d at 811-12. That *Gruebele* involved a receiver’s sale while this case involved an executor’s, and that the husband in *Gruebele* was a party to the action while Rohde was not, are distinctions without difference.

[21] Although Rohde, like Nasset’s heirs, may not technically have been a party in the strictest sense, Rohde was a knowing participant in the probate action. When the court revised the receiver’s sale by ex parte order in *Gruebele*, the husband received no more notice or opportunity to be heard than Rohde did in this case. *Id.* at 809-12. Nonetheless, the wife, like Nasset’s heirs, was entitled to rely on the court’s ex parte order clarifying the effect of the sale, which was issued to make the “record speak the truth.” *Id.* at 813.

CONCLUSION

[22] Plaintiffs-Intervenors respectfully ask this Court to reverse the District Court and hold that title to the Subject Minerals was reserved to the Estate during the 1962 sale.

Dated this 26th day of June, 2018.

CROWLEY FLECK PLLP

By: /s/ Uriah J. Price _____
Adam Olschlager (#06428)
P.O. Box 2529
Billings, MT 59103-2529
(406) 252-3441
aolschlager@crowleyfleck.com

Uriah J. Price (#07173)
Griffin B. Stevens (#08383)
P.O. Box 10969
Bozeman, MT 59718
uprice@crowleyfleck.com
gstevens@crowleyfleck.com

*Attorneys for Plaintiffs-Intervenors,
Slawson Exploration Company, Inc.
& Alameda Energy, Inc.*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This Brief contains 2,000 words, excluding the parts of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify that this Brief complies with the typeface requirements of N.D.R.App.P. 32 and the type style requirements of that rule, because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Times New Roman, 12 point font.

By: /s/ Uriah J. Price
Uriah J. Price (#07173)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **REPLY BRIEF OF APPELLANTS SLAWSON EXPLORATION COMPANY, INC. AND ALAMEDA ENERGY, INC.** were on the 26th day of June, 2018, served electronically on the following:

Patrick W. Durick
#pwdefile@pearce-durick.com

Rachel A. Bruner-Kaufman
#rabefile@pearce-durick.com

Benjamin W. Keup
#bwkefile@pearce-durick.com

Lawrence Bender
lbender@fredlaw.com

Matthew H. Olson
molson@pringlend.com

Adam D. Cook
acook@ohnstadlaw.com

Scott M. Knudsvig
sknudsvig@pringlend.com

Robert G. Hoy
rhoy@ohnstadlaw.com

Michel W. Stefonowicz
mstefonowicz@ohnstadlaw.com

Loren J. O'Toole II
otoole@otoolelawmt.com

Richard P. Olson
rpolson@minotlaw.com

Wanda L. Fischer
olsonpc@minotlaw.com

By: /s/ Uriah J. Price

Uriah J. Price (#07173)