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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20190035
Mountrail County District Court No. 31-2017-CV-00088

Curtis R. Trulson and Lesley D. Trulson,

Plaintiffs and Appellants,

v.

John Anthony Meiers, Jean R. Meiers, Evan J. Meiers and Lauren B. Meiers,

Defendants and Appellees.

APPEAL OF JUDGMENT DATED DECEMBER 5, 2018, AND FROM ALL ADVERSE ORDERS AND RULINGS MADE THEREIN BY THE DISTRICT COURT, NORTH CENTRAL JUDICIAL DISTRICT, MOUNTRAIL COUNTY, STATE OF NORTH DAKOTA

THE HONORABLE TODD L. CRESAP, DISTRICT JUDGE

BRIEF OF THE PLAINTIFFS/APPELLANTS, CURTIS R. TRULSON AND LESLEY D. TRULSON

ORAL ARGUMENT REQUESTED

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[¶1.] **STATEMENT OF ISSUES**

I. The District Court erred in determining that the royalty deed dated June 28, 1982 was not a valid conveyance of a royalty interest in minerals in and under the subject property, and in quieting title in those mineral interests in the Defendants.

STATEMENT OF THE CASE

[¶2.] This is a quiet title action commenced by the Plaintiffs, Curtis R. Trulson and Lesley D. Trulson on April 19, 2017, against the Defendants John Anthony ("Tony") Meiers, Jean R. Meiers, Evan J. Meiers, and Lauren Meiers seeking determination of ownership of a 1/12 fractional royalty interest in minerals in the following described real property located in Mountrail County, North Dakota:

> Township 156 North, Range 92 West
> Section 30: NE 1/4

[¶3.] It is undisputed that the Meiers prepared and signed a royalty deed, unambiguous on its face, that served to convey the subject royalty interest to the Trulsons, and that the Trulsons received and retained the signed original royalty deed.

[¶4.] In lieu of an Answer to the Complaint, the Defendants filed a motion to dismiss. App. 17. The district court denied the motion, finding that the quiet title action fell within the statute of limitation set by N.D.C.C. § 28-01-04 and that a missing notary acknowledgment on the deed did not preclude the action. App. 28. The Defendants did not file any Answer or other responsive pleading after their motion to dismiss was denied.

[¶5.] The Trulsons and the Meiers each moved for summary judgment prior to trial. App. 35; 93. The Trulsons presented evidence that they had reached an agreement with Tony and Jean Meiers in late 1981 to purchase the entire surface estate of the real property described in the subject royalty deed, plus one-half of the one-third of a one-half mineral

royalty interest owned at that time by the Meiers. A purchase price of $29,000 was agreed upon and paid by the Trulsons. The surface interest was conveyed by a warranty deed dated January 28, 1982. The surface warranty deed included a reservation of mineral interests. The Trulsons presented evidence that on or about June 28, 1982, Tony Meiers delivered a royalty deed purporting to convey the 1/12 royalty interest the parties had agreed to include in the purchase. Along with supporting affidavits, the Trulsons presented the original, signed, June 28, 1982 royalty deed. App. 44. The Meiers admitted that their true signatures were affixed to the royalty deed. App. 49. The royalty deed was not notarized.

[¶6.] The Meiers argued that summary judgment in their favor was appropriate because the quiet title action was precluded by the statute of limitations set forth in N.D.C.C. § 28-01-04. They also argued that because the deed was not notarized, it could not be considered a valid conveyance. Additionally, they argued that evidence of delivery of the royalty deed by the Meiers to the Trulsons was lacking.

[¶7.] In a ruling dated May 23, 2018, the District Court denied both parties' motions for summary judgment. App. 122. The Court made findings that the June 28, 1982 royalty deed purported to convey one-half of the Meiers' royalty interest to the Trulsons, that the royalty deed was signed by Tony and Jean Meiers, and that the deed was unnotarized. The Meiers' defenses based on statute of limitation and invalidity due to lack of notary were both denied as a matter of law. As to the Trulsons' argument that the conveyance of royalty interest was proven and undisputed, the Court found genuine questions of material fact on the essential element of delivery of the deed, which precluded summary judgment.

[¶8.] A bench trial was held on August 21, 2018. Curtis Trulson, John "Tony" Meiers, Jean Meiers, and Evan Meiers testified. After post-trial briefs were submitted, the Court issued a memorandum opinion and order for judgment dated November 30, 2018, finding "indications that no transfer of minerals was intended" from the Meiers to the Trulsons, and ordering that the disputed mineral royalty interest be quieted in the name of the Meiers. App. 167.

STATEMENT OF THE FACTS

[¶9.] Curtis Trulson and John Anthony ("Tony") Meiers were close with one another growing up, and later farmed near one other in Ross, Mountrail County, North Dakota. App. 179. During the time period from 1980 through 1982, they saw one another frequently. App. 180. At some point in 1981, Mr. Trulson learned that Mr. Meiers was interested in selling a particular quarter section of pasture land that he had been renting to Mr. Trulson. App. 181; 192. Mr. Trulson was interested in purchasing the property and testified that the two men discussed both a purchase price and inclusion of a mineral interest in the purchase. Tr. 182. Mr. Meiers informed Mr. Trulson that he did not own the mineral acres under the parcel, but that he did own a fractional mineral royalty interest. Tr. 182. Mr. Trulson testified that the parties eventually agreed on a $29,000 purchase price in exchange for the full surface estate, along with half of the mineral royalty interest that was then owned by Tony Meiers along with his wife, Jean R. Meiers. Tr. 183.

[¶10.] The Trulsons paid the full $29,000 purchase price to the Meiers and received a warranty deed to the surface estate. App. 182; 134. The surface deed included a reservation of mineral interests. Mr. Trulson recalled that Tony Meiers promised he would deliver a mineral royalty deed at a later date, and that Mr. Trulson trusted his representation.

Tr. 183. Approximately 5-6 months later, Mr. Meiers delivered a mineral royalty deed to Mr. Trulson at his home, which conveyed the 1/12 fractional interest they had agreed upon. Id.; App. 125. The signed original royalty deed was presented to the court by Mr. Trulson at trial, and a photocopy of the signed original was entered into evidence. App. 184.

[¶11.] Mr. Trulson testified that at the time of delivery he did not inspect the notary blank on the back of the deed, and consequently did not notice the lack of notary. App. 186. Mr. Trulson placed the signed original royalty deed into his filing cabinet along with other important papers he kept. App. 186; 189. He explained that he did not try to record the royalty deed immediately, stating: "maybe being a little dumb in your early twenties and early thirties as to what to do with the deed, it got put in a file, and I went about with my business and I just never got it recorded…." App. 189.

[¶12.] Tony Meiers testified at trial, recalling that he offered the quarter section of land for sale to Mr. Trulson, and that a discussion of including a mineral royalty interest in the purchase had taken place. App. 192. He testified that he could not remember what exact terms were eventually agreed upon. Id. However, he testified that his true signature was affixed to the 1982 mineral royalty deed. App. 193. He agreed that the one-third of a one-half royalty interest referenced in the royalty deed was the actual fractional share that he and Jean Meiers owned in 1982, on the effective date of the royalty deed. App. 195. He could not recall, one way or another, whether or not he had delivered the royalty deed to Mr. Trulson. Id.

[¶13.] Jean Meiers testified that she and Tony would have never sold any of their mineral or mineral royalty interests to anyone except their children. App. 196. However, she also testified that the royalty deed to the Trulsons was prepared at her request, by attorneys at

the law firm she worked at, or possibly by herself, and that she and Tony signed the royalty deed after it was prepared. App. 197. She did not know, one way or another, whether her husband had delivered the signed royalty deed to the Trulsons. App. 203. Questioned on this apparent contradiction, Jean Meiers testified:

Q: Okay. And so you testified that you never intended to convey the royalty interest that's described in Exhibit 1. Why did you sign the deed if it was not your intent to convey?

A: Because at the time I believe that it was something that was talked about but that we didn't do it. And I can't remember any more than what I've already given you about that.

App. 199.

[¶14.] Mr. Trulson testified that he retrieved the signed original royalty deed from his filing cabinet in approximately 2007 and realized at that time that it was unnotarized. App. 190-191. He brought the unnotarized deed to Tony Meiers in the fall of 2007 and requested he provide a notarized deed. App. 190. A notarized royalty deed was never provided by the Meiers. Id. On November 13, 2008, Tony and Jean Meiers conveyed the mineral interests of the subject property to their children, Evan and Lauren Meiers. App. 11. Evan Meiers, one of the Meiers children who received the royalty interest, testified that he may have paid one dollar in exchange for the royalty interest from his parents. App. 204.

LAW AND ARGUMENT

[¶15.] In an appeal from a bench trial, the trial court's findings are reviewed under the clearly erroneous standard of review and its conclusions of law are fully reviewable. Savre v. Santoyo, 2015 ND 170, ¶8, 865 N.W.2d 419. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after

reviewing all of the evidence, the appellate court is convinced a mistake has been made. Id.

[¶16.] Deeds are construed in the same manner as contracts. Williams Co. v. Hamilton, 427 N.W.2d 822, 823 (N.D. 1998). The grantor's intent is ascertained from the deed alone unless it is ambiguous. See N.D.C.C. 9-07-04. If clear and explicit, the language of the deed governs its interpretation. North Shore, Inc. v. Wakefield, 530 N.W.2d 297, 300 (N.D. 1995). Whether or not a deed is ambiguous is a question of law. State Bank & Trust of Kenmare v. Brekke, 1999 ND 121, ¶12, 602 N.W.2d 681.

[¶17.] A lack of notary or acknowledgment is immaterial when considering the validity of the transaction between the parties themselves. Amann v. Frederick, 257 N.W.2d 436, 440 (N.D. 1977) ("As between the parties, it is immaterial that an instrument in writing subscribed by the parties and affecting real estate is not acknowledged."); Desert Partners IV, L.P. v. Benson, 2016 ND 37, ¶ 12 ("[a]n unrecorded instrument is valid between the parties to the instrument." (citing N.D.C.C. § 47-19-46)).

[¶18.] Under North Dakota law, conveyance by deed takes effect upon delivery of the deed by the grantor. N.D.C.C. § 47-09-06. Absent a delivery of the deed, the deed is of no effect. Id. "A deed produced at the trial and offered in evidence by the grantee is presumed to have been delivered to such grantee on the day of its date, and its date is presumed to be the true date." Leonard v. Fleming, 13 N.D. 629, 633 (1905). Clear and convincing evidence must be produced to rebut the presumption of the delivery of a deed to or ownership of an instrument by a grantee in whose possession the deed is retained. Cox v. McLean, 268 N.W. 686, 688 (N.D. 1936).

I. The District Court erred in determining that the royalty deed dated June 28, 1982 was not a valid conveyance of a royalty interest in minerals in and under the subject property.

A. The District Court erred in considering parole evidence when the royalty deed at issue is unambiguous on its face.

[¶19.] The language of the royalty deed is unambiguous, and the Meiers raised no ambiguity defense in their pleadings. The district court did not find the June 28, 1982 royalty deed to be ambiguous, at either the summary judgment stage, or after trial. Therefore, the language of the signed deed should have governed its interpretation. See North Shore, Inc. v. Wakefield, 530 N.W.2d 297, 300 (N.D. 1995). The district court erred by disregarding the explicit language of the deed and relying instead on contradictory parole evidence.

[¶20.] The undisputed evidence of the case is that the Trulsons paid a monetary consideration to the Meiers, the Meiers prepared and signed the royalty deed, and the Trulsons received and retained the signed original. The deed unambiguously serves to convey a 1/12 fractional mineral royalty from the Meiers to the Trulsons. After consideration of competing summary judgment evidence, the Court found a dispute of material fact on the element of delivery and determined that a trial was necessary to resolve that disputed fact question.

[¶21.] At trial, the only direct evidence presented on the delivery question was testimony by Mr. Trulson that Tony Meiers had delivered the signed royalty deed to him around June of 1982. He recalled that Mr. Meiers had delivered the deed to Mr. Trulson's home. App. 184. His testimony was corroborated by his possession of the signed original deed, which was presented to the Court. App. 185. His testimony was further corroborated by testimony from Tony and Jean Meiers that their true signatures were affixed to the deed.

Tony and Jean Meiers both testified that they could not recall delivering the deed, but neither directly disputed its delivery.

[¶22.] As a matter of law, the presumption of delivery to Mr. Trulson was established by his testimony, his presentation of the signed original deed to the Court, and acknowledgment by Tony and Jean Meiers that their signatures were affixed to the deed. At that point, the burden should have shifted to the Meiers to rebut the presumption of delivery by clear and convincing evidence. Cox v. McLean, 268 N.W. 686, 688 (N.D. 1936). The District Court made no findings that the Meiers had done so. The royalty deed itself is unambiguous and serves to convey a 1/12 fractional royalty share to the Trulsons.

[¶23.] All of the essential elements of a conveyance of a mineral royalty interest through the June 28, 1982 royalty deed were met. There was no basis to consider extrinsic evidence outside the four corners of the executed royalty deed. The Court erred in not finding that the royalty deed constituted a valid conveyance of the interest described therein to the Trulsons.

B. Alternatively, even if the District Court properly considered parole evidence, including the reservation of minerals contained in the January 28, 1982 warranty deed, the District Court misapplied the law by finding that the reservation controlled over the subsequent grant.

[¶24.] The District Court ultimately looked outside the four corners of the royalty deed in its analysis, making findings that "no transfer of minerals was intended." App. 104. This analysis is rooted in the presumption that the mineral reservation contained in the January 28, 1982 surface deed governed the entire transaction between the Trulsons and the Meiers, and rendered ineffective the subsequent June 28, 1982 royalty deed.

[¶25.] As a practical matter, the two conveyances are not in conflict. Mineral royalty interests were *not* conveyed directly through the January 28, 1982 warranty deed. They *were* conveyed through the June 28, 1982 royalty deed, which was prepared and signed by the Meiers. This is consistent with the representation made by Tony Meiers to Mr. Trulson at closing that he would deliver the royalty deed at a later date. The initial reservation did not prevent the later conveyance, nor did it create an ambiguity requiring analysis of extrinsic parole evidence. Both deeds at issue are unambiguous standing alone.

[¶26.] The Court suggests that the Trulsons should have sought reformation of the January 28, 1982 surface deed to effect the royalty conveyance. However, there was no reason for the Trulsons to seek reformation when they received the royalty deed a short time after the surface deed, and the royalty deed was unambiguous and conveyed all they had bargained for. It should also be noted that Meiers did not present a deed reformation defense in their pleadings, nor did either party argue it at any stage of the proceedings.

[¶27.] Even if the surface warranty deed and the subsurface royalty deed are considered in conjunction with one another, the Duhig rule provides that the grant by the Meiers supersedes the reservation. The Duhig rule applies when a grantor both grants and reserves the same minerals. In those cases, the "grantor loses because the risk of title loss is on him," and priority is given to the granted interest. Gawryluk v. Poynter, 2002 ND 205, ¶ 13, 654 N.W.2d 400 (quoting 1 Williams & Meyers Oil and Gas Law, § 311, p. 580.39 (2001). The reservation in an earlier deed does not serve to extinguish a subsequent grant. See Miller v. Kloeckner, 1999 ND 190, ¶16, 600 N.W.2d 881 ("[T]he Duhig rule will be applied whether or not the deed contains a general warranty if it purports to convey the described interest. Having asserted ownership, the grantor is estopped to deny it.") The

effect of the Duhig rule to this case, if both deeds are analyzed together, is that the conveyance by the Meiers supersedes the reservation.

[¶28.] Given this controlling substantive law, even if parole evidence in the form of the January 28, 1982 warranty deed is taken into consideration, the proper outcome is to effect the transfer and quiet title to the mineral royalties in favor of the Trulsons. The District Court erred in reaching the opposite conclusion.

C. The court erred in presenting a reformation defense when a cause of action for reformation was not brought by the Plaintiffs, raised as a defense by the Defendants, or tried by consent of the Parties.

[¶29.] The only cause of action brought by the Trulsons, as evidenced by their Complaint, is a cause of action to quiet title to the mineral referenced in the June 28, 1982 royalty deed. App. 5-6. The Meiers responded to the Complaint with a motion to dismiss in lieu of an answer. App. 13. They did not serve an answer after their motion was denied. Rule 12(b) of the North Dakota Rules of Civil Procedure governs presentation of defenses in civil actions, and requires every defense to a claim for relief in any pleading be asserted in an answer. The Defendants effectively waived their defense by not interposing an answer or otherwise providing the Plaintiffs adequate notice of any defenses they intended to assert.

[¶30.] The Defendants' lack of an answer notwithstanding, the District Court *sua sponte* introduced the defense that the mineral reservation in the January 28, 1982 surface warranty deed superseded the conveyance of mineral royalties in June 28, 1982 royalty deed, and that the Plaintiffs had failed to meet the requirements for reformation of the original deed. This defense was not raised by the Defendants in any of their pleadings. It was not raised by either party or considered by the District Court in its summary judgment memorandum, and it was not brought to the parties' attention at any point before or during

trial. Neither party argued reformation during trial. At the conclusion of the Plaintiffs' case, the Defendants moved for a directed verdict on the disputed fact question of delivery of the royalty deed, without any references to reformation. After trial concluded, neither party argued for or against reformation in their post-trial briefing. It cannot be reasonably argued that the issue of reformation was tried by consent of the parties when it was not even referenced by either party.

[¶31.] There is inherent prejudice to the parties when the case is decided based on a legal theory that neither party advocated for, defended against, or otherwise pleaded. Consent of the parties is generally required to try an unpleaded issue. The reasoning behind this requirement is sound, since "if evidence is introduced to support basis issues that have been pleaded, the opposing party may not be conscious of its relevance to the issues not raised by the pleadings unless that fact is specifically brought to his attention." Fleck v. Jacques Seed Co., 445 N.W.2d 649, 652 (N.D. 1989) (quoting 6 Wright & Miller, Federal Practice and Procedure: Civil § 1493, at pp. 446-467 (1971)). This maxim is certainly applicable in this case. Neither party advocated for or against a reformation claim. Consequently, evidence relevant to a reformation was not put forth, nor was its applicability argued by counsel at any stage of the proceeding.

[¶32.] The Court erred by deciding this case based on a legal cause of action that neither party pleaded, raised, or tried by consent. The matter should have been tried on the cause of action put forth by the Plaintiffs.

CONCLUSION

[¶33.] For the reasons stated above, the Appellants, Curtis and Lesley Trulson, respectfully request this Court reverse the District Court's decision and order judgment

entered in their favor, quieting title to the mineral royalty interests conveyed through the June 28, 1982 royalty deed in the name of the Trulsons.

ORAL ARGUMENT REQUESTED

[¶34.] The Appellant's respectfully submit that oral argument would be helpful to the Court for the purpose of recalling the trial proceedings, summarizing witness testimony, and answering questions that may be presented with respect to the chain-of-title of the subject mineral interest or other topics not readily discernible from the lengthy case record.

DATED this 13th day of May, 2019.

MCGEE, HANKLA & BACKES, P.C.

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CERTIFICATE OF SERVICE

[¶35.] I hereby certify that on May 13th, 2019, I served the foregoing (1) Brief of the Plaintiffs/Appellants and (2) Appendix on the following by electronic mail transmission:

Erin M. Conroy
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DATED this 13th day of May, 2019.

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