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STATE OF NORTH DAKOTA

Supreme Court No. 20190035
District Court No. 31-2017-CV-00088

STATE OF NORTH DAKOTA

In the Supreme Court

Curtis R. Trulson and Lesley D. Trulson,

Plaintiff/Appellant,

vs.

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

Defendants/Appellees.

On appeal from Judgment entered December 5, 2018
in the District Court of
Mountrail County in the North Central Judicial District
The Honorable Todd L. Cresap

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

[¶ 1] On April 13, 2017, the summons and complaint were signed by counsel for the plaintiff. (Docs. ID ## 1,4). Attached to the summons and complaint were two exhibits, one purporting to transfer the minerals owned by John and Jean Meiers to their children, Lauren Meiers and Even Meiers. (Doc. ID # 3); the other was an unrecorded, unnotarized royalty deed from John and Jean Meiers and Curt and Lesley Trulson (hereinafter collectively "Trulsons"). (Doc. ID #2).

[¶ 2] Personal service was commenced on three (3) of the four (4) defendants, including Lauren Meiers, John Meiers, and Jean Meiers (hereinafter collectively "Meiers") by either sheriff's service or personal delivery by a process server on various dates. (Docs. ID ## 5, 6, 7). The fourth (4) defendant, Evan Meiers, does not appear to have ever had service documents filed or served; however, the Meiers do not dispute he is a party to the case. The case was filed in district court on May 8, 2017. (Doc. # 8).

[¶ 3] On May 22, 2019, the Meiers answered the summons and complaint by way of a motion to dismiss based on failure to state a claim and the expiration of the statute of limitations. N.D.R.Civ.P. 12; (Docs. ID ##11 - 15). No amended complaint was filed. Trulsons filed and served a response on May 31, 2017. (Docs. ID ##19 - 20). The district court issued an order denying the motion to dismiss on July 26, 2017. (Doc. ID #22).

[¶ 4] Thereafter, the parties exchanged discovery and depositions were taken of Jean Meiers and John Meiers. On March 14, 2018, the Trulsons filed a motion for summary judgment. (Docs. ID ## 35 – 43). On March 16, 2018, the Meiers filed a cross-motion for summary judgment. (Docs. ID ## 44-64). Both parties filed timely responses to

the motions for summary judgment upon which a hearing was held in Minot, North Dakota at the Ward County District Courthouse on May 8, 2018. (Docs. ID # 69, 71).

[¶ 5] On May 23, 2018, the district court issued a denial on both parties' motions for summary judgment. (Doc. ID # 81).

[¶ 6] On August 21, 2018, a bench trial was held before the Honorable Todd Cresap. The parties filed post-trial briefs per the request of the district court. (Docs. ID # 94, 96). On December 4, 2018, the district court entered its memorandum opinion and order for judgment in favor of the Meiers. (Doc. ID # 98). Notice of Entry of Judgment was served and filed on January 24, 2019. (Doc. ID # 102). Notice of filing the notice of appeal and notice of appeal were filed and served on February 7, 2019.

STATEMENT OF THE FACTS

[¶ 7] On August 21, 2018, the Honorable Todd Cresap held an evidentiary hearing in the above-captioned matter at the Mountrail County Courthouse, North Central Judicial District. Plaintiff Curtis R. Trulson (hereinafter "Trulson") appeared and was represented by Erich M. Grant of McGee, Hankla & Backes, P.C., Minot, North Dakota. Defendants appeared and were represented by Erin M. Conroy, Conroy Legal Services, PLLC, Bottineau, North Dakota. The Court heard testimony from Plaintiff, Curtis Trulson (hereinafter "Trulson"), Defendant Jean R. Meiers (hereinafter individually as "Jean"), John Anthony "Tony" Meiers (hereinafter individually as "John A. or Tony"), and Evan J. Meiers (hereinafter individually as "Evan"). The Court also received into evidence various exhibits from the parties, including the royalty deed at issue in the case, along with other deeds in the chain of title.

[¶ 8] The disputed mineral interest involves a transaction between the parties in January 1982. In January 1982, John A. Meiers and Jean Meiers conveyed approximately 160 surface acres in Mountrail County to the Trulsons via Warranty Deed. (App. at 137-138). The conveyance of the surface interest is not disputed. The legal description of the property is as follows:

> **Township 156 North, Range 92 West of the 5th P.M.**
> **Section 30: NE1/4**

(App. at 137-138).

[¶ 9] The warranty deed memorializing the surface conveyance specifically excluded the mineral rights, noting they had been excepted and reserved by prior grantors. (App. at 137-138). The reservation language in the surface deed between the Meiers as grantors and the Trulsons as grantees stated as follows: "No minerals are transferred by this

conveyance, since all minerals have been expected and/or reserved by the previous owners." (App. at 137-138). The warranty deed was a formal warranty deed typical of the time before the common use of computers and printers in law office. The deed was a pre-printed, legal size form, labeled as a "WARRANTY DEED – joint tenancy – Individual." Like similar deeds of its time, the deed was legal sized and had blank lines wherein the form would be populated by a manual or electric typewriter, or by handwritten legal descriptions, names, or other pertinent data. The exception language added to the deed appeared to be inserted by typewriter.

[¶ 10] The surface deed appeared to be signed by John A. Meiers and Jean R. Meiers on January 28, 1982 and was notarized by Robert W. Holte. (App. at 137-138). At the time of the transaction, Robert W. Holte was an attorney in the Williston area and then later, a district court judge. (App. at 137-138). At the time, Attorney Holte was also the employer of Jean Meier, who was an office assistant in his office. (Tr. at 73, lines 1-13). The notarized surface deed was recorded at the Mountrail County Recorder's Office as Document No. 246755 on March 12, 1982. (App. at 137-138).

[¶ 11] The parties do not dispute the Trulsons had expressed potential interest in purchasing a royalty interest in the minerals underlying the surface parcel that John A. Meiers and Jean Meiers had conveyed to the Trulsons. (Tr. at 73, lines 17-19). At that time, John and Jean Meiers testified they believed that John A. Meiers' parents, John F. and Stella Meiers, may have controlled the mineral rights in the subject acreage and the younger Meiers simply did not own the subsurface rights in order sell them to the

Trulsons.[1] (Tr. at 61, lines 6-9; Tr. at 88, lines 13-24). The younger Meiers, John A. and Jean, considered the possibility that the elder Meiers, John F. and Stella, might be interested in conveying these mineral rights to John A. and Jean. (Tr. at 88, lines 13-24).

[¶ 12] Although the events in question occurred over thirty-five (35) years prior, because Jean Meiers worked at a law office at the time, she recalled Robert Holte or one of the other attorneys in the office may have prepared more than one deed, depending on the ultimate status of the subsurface rights: one prepared to convey a royalty interest and one to convey the surface, excepting and reserving all mineral interests to the Sellers. (Tr. at 65, lines 10-25). The deed purporting to convey the subsurface rights appeared to be drafted more than six (6) months after the initial surface-only transaction. (Tr. at 65, lines 14-25). Although an employee of the drafting attorney, Jean had never been on a farm prior to her marriage and was unfamiliar with legal descriptions or other pertinent knowledge required to draft the documents herself. (Tr. at 73, lines 3-19). Jean was unable to recall if she assisted or in any way participated in the drafting of the relevant deeds. (Tr. 73, lines 3-19).

[¶ 13] Based on the knowledge of John A. and Jean Meiers, at the time of the contemplated transaction, the reason they did not convey the subsurface rights or

[1] In this case, the distinction between John A. Meiers and John F. Meiers is relevant due to the familial practice of naming the eldest son, "John." In this brief, references to "John A." are to the relevant defendant, John A. Meiers; who is also at times referred to as "Tony" in the record and transcript. References to "John F." or "John Francis" are to the father of John A. Meiers who is also a prior owner in the chain of title. Repeated use of the middle name or middle initial is used for purposes of clarity.

royalties to the Trulsons is because John A. and Jean Meiers did not believe they owned any subsurface rights. (Tr. at 67, lines 8-22).

[¶ 14] The chain of title on the subject property's surface and subsurface interests in the Northeast quarter of Section 30, Township 156 in Mountrail County, as it relates to the Defendants was outlined in prior pleadings. For the sake of brevity, it was as follows:

A. Executed on December 30th, 1971, recorded as document number 213157 on February 11, 1972 is a Mineral Deed between J.A. and Lillian Meiers to various grantees, including John F. Meiers. The deed purports to convey a one-half (1/2) interest in the minerals of the subject property to nine (9) siblings, divided equally. This deed gives the nine siblings each a 1/18th interest in the mineral rights. (Doc. ID # 50).

B. Executed on February 17, 1981, recorded as document number 242507 on March 18, 1981 is a Mineral Deed between John. F. and Stella Meiers to the eight siblings of John F. Meiers for a 1/18th interest in the subject mineral rights. (Doc. ID # 92). This document re-conveys the mineral interest granted to John F. Meiers from John F.'s parents, specifically providing that grantees will enjoy an undivided interest in any rents, bonuses, and royalties from any leases.

C. After execution of this deed, John F. and Stella Meiers have only a one-half subsurface interest they received in combination with the surface transaction on March 1, 1963. (Doc. ID # 49). If John F. and Stella retained their interests identical to the siblings, it would have comprised a 12.5% share of a one-half interest.

D. Executed on March 31, 1981, recorded as document number 242730 on April 8, 1981 is Deed of Royalty between John F. and Stella Meiers to John A. Meiers and Sharon Gravos, as Tenants in Common. The deed purported to convey "an undivided 2/3 of Grantor's remaining interest in 12.5% royalty of all the oil and gas produced and saved from" the subject property. However, John F. had already conveyed a portion of his mineral interests to his siblings. (Doc. ID # 52).

E. Executed on July 23, 1980, recorded as document number 242815 on April 14, 1981 is a Contract for Deed on the surface between John F. and Stella Meiers to John A. Meiers. John F. and Stella Meiers purported to reserve "all remaining minerals, including oil, gas, and coal but not limited thereto, with right of ingress and egress of purpose of mining, drilling and exploring for same." (Doc. ID #87).

F. Executed on January 28, 1982, recorded as document number 246222 on January 28, 1982 is a Warranty Deed between John F. and Stella Meiers to John A. and Jean R. Meiers, the subject property purporting to make the following reservation on the deed: "reserving and retaining unto the Grantor, all remaining oil, gas, coal, gravel, uranium, clay, potash, silver, gold, and all other minerals…" (Doc. ID #88).

G. Executed on January 28, 1982, recorded as document number 246755 on March 12, 1982 is a Warranty Deed between John A. Meiers and Jean Meiers to Curtis R. Trulson and Lesley D. Trulson. John A. Meiers and Jean R. Meiers reserved the mineral rights by writing, "No minerals are transferred by this conveyance, since all minerals have been excepted and/or reserved by previous owners." (Doc. ID # 86).

H. Recorded on October 13, 1984, recorded as document number 252186 is a Mortgage taken out by Curtis R. Trulson and Lesley D. Trulson on the subject property. The mortgagee is USDA and the United States. (Doc. ID # 58).

I. Executed on November 13, 2008, recorded as document number 348617 on November 13, 2008 is a Quit Claim deed conveying the mineral interests on the property between John A. and Jean Meiers to the children of John A. and Jean Meiers, Evan J. Meiers and Lauren B. Meiers. (Doc. ID # 61).

[¶ 15] The foregoing is, admittedly, an intricate knot of property transactions that may appear opaque without adequate context. Although not offered as part of the substantive record, the following narrative may render the chain of title more decipherable. J.A. and Lillian Meiers, homesteaders and farmers of Mountrail County, had nine children, of whom John F. Meiers was the eldest son. (Doc. ID # 46). In keeping with the farming traditions of the last century, John F., as eldest son, stood to inherit the farm. (Tr. at 69, lines 9-16). Perhaps in part as a reaction to this perceived favoritism, John F.'s siblings balked when John F. was given an equal share in the mineral estate along with his other siblings. Not wanting to alienate his family, John F., an amiable and giving man, opted to redistribute his share in the minerals to his siblings via the mineral deed recorded on February 17, 1981. (Doc. ID # 92).

[¶ 16] In the intervening period, the elders Meiers, John F. and Stella, had duly executed wills and various conveyances settling their property on their children. In a standard contract for deed to John A. in 1980 and subsequent warranty deed of 1982 involving the subject parcel, the mineral rights were excepted and reserved in boilerplate language. (Doc. ID # 87),

[¶ 17] As was and is the ordinary practice, subsequent deeds were prepared duly disposing of the minerals that had been "reserved" and conveying them separately to John A. and Sharon, the couple's only children and heirs. On November 19, 1990, following the death of John F., his estate purported to convey via Personal Representative's Deed various mineral rights to John A. and Sharon, reserving a life estate to Stella. (Doc. ID #57). In May 2008, Stella Meiers passed away therefore vesting ostensible title in the mineral rights in John A. and Sharon by operation of the life estate deed. In 2008, following Stella's death, John A. and Jean conveyed their share of the mineral interests to their children, Evan and Lauren Meiers. (Doc. ID # 61).

[¶ 18] Twenty-six (26) years after purchasing the surface rights to the subject parcel, and 24 years after obtaining a USDA mortgage on the surface parcel, which mortgage would have necessarily involved the issuance of a title opinion on the property, Plaintiff Curtis Trulson recorded an Affidavit with the Mountrail County Recorder's Office claiming that John A. and Jean Meiers had conveyed a royalty interest to him in the minerals in 1982. (Doc. ID # 2). Trulson testified the entire purchase was financed. (Tr. at 17, lines 4-12). Trulson further testified that in order to procure financing, a preliminary and final title opinion were obtained. (Tr. at 17, lines 13-24). He further admitted to re-financing the property at a later date, again having the opportunity to

review the preliminary and final title opinions, which would have noted the complete reservation of all the minerals by the Trulsons. (Tr. at 24, lines 5-8).

[¶ 19] Trulson testified the transaction was closed at Robert Holte's office. (Tr. at 18, lines 13-14). Trulson also testified the parties had executed a purchase agreement to memorialize the transaction but Trulson could not produce it for trial. (Tr. at 18, lines 15-20). Trulson could also not produce any settlement documents or title opinion documents.

[¶ 20] As an exhibit to his complaint initiating this case, Plaintiff Curtis Trulson attached an unacknowledged typewritten form for a royalty deed, bearing a legal description for the subject parcel and reflecting what appears to be signatures of the names John A. Meiers and Jean Meiers at the bottom of the form. (Doc. ID # 2). The exhibit to the complaint was incomplete. It did not contain the full affidavit as recorded and appeared to be a fully executed, notarized royalty deed. One can only surmise the omission of the first page of the affidavit was intentional on the part of Trulson to bolster his claim of an executed, delivered deed. (Doc. ID # 2). Other than the quit claim conveying the subsurface rights from John A. and Jean Meiers to Evan Meiers and Lauren Meiers, no other exhibits were attached or included with the complaint.

[¶ 21] John A. and Jean never finalized this draft document in the presence of a notary, as they had done in the presence of Robert Holte, Stanley attorney and Jean's employer at the time, in the case of the surface parcel. (Tr. at 22, lines 1-3). John A. and Jean have no knowledge as to how Plaintiffs came into possession of this unacknowledged draft document and deny either of them ever delivered the deed to Trulson. (Tr. at 68, lines 11-14; Tr. at 76, lines 20-25; Tr. at 77, lines 1-9.) John A. and Jean testified

unequivocally neither of them intended to delivery of the royalty deed to Trulsons. (Tr. at 68, lines 11-14; Tr. at 76, lines 20-25; Tr. at 77, lines 1-9).

[¶ 22] Plaintiffs brought this action in April 2017, nearly thirty-five (35) years following the alleged transaction for the royalty interest in question.

LAW AND ARGUMENT

[¶ 23] Appellant's brief correctly identifies the standard of review in this case as clear err. Under N.D.R.Civ.P. 52, on review from a bench trial this Court will not set aside a district court's findings of fact unless they are clearly erroneous, and due regard is given of the district court's opportunity to judge and assess the credibility of the witnesses. Freidig v. Weed, 2015 ND 215, ¶ 13, 868 N.W.2d 546. "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 an appellate court is left with a definite and firm conviction a mistake has been made." Spitzer v. Bartelson, 2009 ND 179, ¶ 23, 773 N.W.2d 798 (quoting City of Fargo v. D.T.L. Properties, Inc., 1997 ND 109, ¶ 16, 564 N.W.2d 274.)

[¶ 24] The district court determines credibility of the witnesses. The Supreme Court has repeatedly explained it will not second-guess the district court's credibility determinations. Northstar founders, LLC v. Hayden Capital USA, LLC, 2014 ND 200, ¶19, 855 N.W.2d 614. "A district court's choice between two permissible views of the weight of the evidence is not clearly erroneous, and simply because we may have viewed the evidence differently does not entitle us to reverse the district court." Id.

[¶ 25] The question of whether delivery of a deed occurred is a question of fact reviewed under the clearly erroneous standard. In the context of delivery of a deed, intent to deliver title can be inferred from words, acts, or other objective facts. Jorgensen v. Crow, 466 N.W.2d 120 (N.D. 1991), and intent therefore is a question of fact. In re Estate of Dittus, 497 N.W.2d 415 (N.D. 1993).

[¶ 26] In this case, the failure of the delivery of the deed was the basis of the district court's decision. The failure of the delivery was rooted in the Trulston's failure to establish sufficient evidence meeting its burden and Trulson's credibility issues at trial.

A. The District Court did not Consider Parole Evidence and Properly Concluded the Subject Royalty Deed was not Delivered.

[¶ 27] The district court's judgment in this case should be affirmed because written instruments, such as deeds, must be delivered to take effect and transfer the property in question. Essential to the valid transfer of real property is the delivery of the written instrument effectuating the conveyance and the facts surrounding the delivery and its intended effect. Absent delivery of the subject written instrument, such as a deed, the transfer does not take effect and the property has not been properly conveyed pursuant to N.D.C.C. § 47-09-06.

[¶ 28] When real property is transferred by an instrument, such as a deed, the interest transferred does not vest until "there has been delivery of the deed." Jorgensen, 466 N.W.2d at 122. Absent delivery of a deed, no interest in real property has been transferred because the deed has no effect. Id.

[¶ 29] As has been clearly established by the pleadings and prior motions and briefs of the parties, a conveyance by deed of an interest in property takes effect upon the delivery of the deed by the grantor. Frederick v. Frederick, 178 N.W.2d 834, 837 (N.D. 1970). The issue of whether delivery occurred "is a question of fact to be found from all the circumstances surrounding the transaction." Rice v. Neether, 2016 ND 247, ¶ 13, 888 N.W.2d 749.

[¶ 30] "An indispensable element to be considered in determining whether a deed has been delivered is the intention of the grantor." Id. at ¶ 14. Trulson, as the party asserting

title, carried and continues to carry the burden of proving delivery occurred by a preponderance of the evidence. Id., ¶ 13.

[¶ 31] Trulson argues the district court inappropriately considered parole evidence in its decision. Trulson argues the deed is not ambiguous on its face; thusly, the district court may not look at any evidence other than the fact that at some point in time Trulson came into possession of the unnotarized deed which constitutes per se delivery. This argument is incongruous with the settled law of deeds and delivery. If taken to its logical conclusion, this interpretation of the law would negate decades, or perhaps even centuries, of settled statutory and case law on the law governing intent and the delivery of deeds.

[¶ 32] In his brief, Trulson argues deeds are interpreted as though they are contracts. (Brief of Appellant, ¶ 16). Trulson further argues if a deed is unambiguous, it must be accepted on its face, as though it were a contract. Trulson then argues the district court improperly consider parole evidence. (Brief of Appellant, ¶ 16). This is an incorrect application of the law and an incorrect reading of the district court's analysis. In Rice v. Neether, 2016 ND 247, 888 N.W.2d 749 this Court outlined the appropriate consideration of facts for a district court to consider in concluding whether a deed was effectively delivered to the ostsentive grantee.

[¶ 33] In this case, the totality of Trulson's testimony on direct examination alleging property delivery of the deed was that at "some time" five (5) or six (6) months following the initial transaction, John A. Meiers brought the unnotarized deed to Trulson. Upon cross-examination, Trulson admitted there were several important elements surrounding the purported delivery of the deed that he could not corroborate,

such as the day the deed was delivered or whether the joint owner on the property, Jean Meiers, intended delivery of the deed. (Tr. at 9, lines 14-16).

[¶ 34] Trulson testified there was an abstract for the property on which he owns the surface and the abstract documented the subsurface history of the property; however, he was unable to produce the abstract to support his claim of ownership. (Tr. at 92, lines 23-25; and Tr. at 93, lines 1-3). Trulson was unable to produce anything outside of the unnotarized and unrecorded deed to support his claim. (Tr. at 92, lines 23-25; and Tr. at 93, lines 1-3).

[¶ 35] Trulson's testimony also must be viewed in light of certain credibility issues that arose at trial. During trial, Trulson first testified to uncovering the deed in 2005 while cleaning out his file cabinet. (Tr. at 12, lines 13-20). Later, Trulson changed his testimony to state that he found the deed in either 2007 or 2008 – at a time more in line for his claim to quiet title within the statute of limitations. (Tr. at 25, lines 5-17). Furthermore, on cross-examination, Trulson refused to answer simple questions and appeared evasive. Trulson was unable to testify to the date or time of the purported delivery. Trulson could testify only that John A. Meiers brought the deed at some point at Trulson's property, but other than the vague testimony of John A. Meiers bringing the deed, Trulson could not support his version of events with details or other written evidence which would corroborate his version of the account.

[¶ 36] By contrast, the Meiers' actions have always reflected their sound belief that they maintained full and complete ownership over the royalties at issue. The Meiers deeded the property to their children in 2008 as a part of a discussion on how the Meiers children might be able to pay their student loans. (Tr. at 95, lines 8-20). Evan testified

that at no time prior to or during the conveyance of the interest did either the elder or the younger Meiers believe they did not own the royalty interest purportedly owned by Trulson. (Tr. at 95, lines 8-20).

[¶ 37] Jean testified unequivocally that the Meiers never intended to convey the royalties to Trulson. Jean and John A. Meiers were married at the time of the purported conveyance. The parties do not dispute Jean would have also needed to intend the delivery of the deed in order for the conveyance to be effective. John A. Meiers also testified if he had intended delivery of the deed to Trulson, he would have discussed the issue with Jean, something to which both John A. Meiers and Jean testified never occurred. (Tr. at 88-89, lines 21-15 and 1).

[¶ 38] The Meiers do not know how Trulson came to be in possession of the unnotarized deed. Jean testified it is possible that the deed was accidentally sent to Trulson through a mailing error by the law office. (Tr. at 63-64, lines 10-25 and 1). Both parties offered testimony that John A. Meirs worked for Trulson for several years. (Tr. at 34, lines 5-19). The testimony reflected John A. Meiers would sometimes work for Trulson at his place, but that John A. Meiers would also work at his home office on matters for Trulson. (Tr. at 34, lines 5-19). John A. and Jean offered testimony the deed may have accidentally been included in paperwork being brought back and forth between the parties. (Tr. at 34, lines 5-19).

[¶ 39] Evan testified that his father's memory of past events has dramatically waned over the last several years. John A. Meiers' memory issues were evident from both the substance and delivery of his testimony; a circumstance from which only the district court could use in its decision. John A.'s memory loss is well-known to Trulson, as

the parties interact with each other on a regular basis. Evan testified that John A.'s memory began declining in the last two (2) years, which is conveniently when Trulson decided to bring the action, even though he testified knowing of the unnotarized deed as far back as 2005. (Tr. at 68, lines 15-24).

[¶ 40] In sum, the evidence presented by the parties amounts to Trulson's claim that "a delivery" occurred "sometime," coupled with Trulson's inability to present any corroboration of this claim, or any evidence of a purchase agreement, a title opinion, abstract, settlement statement, or other documentary evidence to substantiate what he said occurred. On the other hand, the Meiers presented clear evidence that they had no intention of selling the subject royalties and took no steps to deliver such a deed to Trulson, which was corroborated by all of their subsequent actions.

[¶ 41] The evidence led the district court to the inescapable conclusion that if and when the unnotarized deed did come into Trulson's possession, it was not intentional on the part of the Meiers. Rather, delivery was as the result of an accident or otherwise unintentional. In light of the caselaw stating that the intent of the grantor is an indispensable element of delivery, see Rice, 2016 ND 247 at ¶ 14, Trulson has failed to prove delivery by a preponderance of the evidence, and has therefore failed to establish any right to title to the disputed mineral royalties. This issue of whether the district court inappropriately considered parole evidence is simply a misplace application and interpretation of contract law.

[¶ 42] Trulson argues the district court improperly looked at parole evidence to construe the deed and accompanying conveyance. The district court rationale and interpretation comports properly with recent case law from this Court regarding the chain of title

wherein a district court may not property "read in" a latent ambiguity to a deed or conveyance. Goodell v. Monson, 2017 ND 92, ¶ 12, 893 N.W.2d 774.

[¶ 43] The district court weighed the credibility of the parties and looked at the four corners of the conveyancing document and properly quieted title in the Meiers.

B. The District Court Property Applied the Law to Conveyance in Quieting Title of the Subject Property in favor of the Meiers.

[¶ 44] The district court properly concluded the evidence and testimony presented by Trulson on the matter lacked credibility in both form and substance. In his brief, Trulson argues the analysis applied in cases involving an over-conveyance of minerals should apply in this case. Known as the Duhig rule, this concept applies when a grantor has conveyed more than intended to a potential subsurface or mineral owner. Gawryluk v. Poynter, 2002 ND 205, ¶ 11, 654 N.W.2d 400; Miller v. Kloeckner, 1999 ND 190, ¶ 9, 600 N.W.2d 881; Acoma Oil Corp. v. Wilson, 471 N.W.2d 476 (N.D.1991); Mau v. Schwan, 460 N.W.2d 131 (N.D.1990); Sibert v. Kubas, 357 N.W.2d 495 (N.D.1984); Kadrmas v. Sauvageau, 188 N.W.2d 753 (N.D.1971). The Duhig rule arose from a Texas case which has since been applied and analyzed in North Dakota. Duhig v. Peavey–Moore Lumber Co., 144 S.W.2d 878, 878–79 (Tex. 1940);

[¶ 45] Notwithstanding this is a new argument on appeal, the issue of whether the Duhig rule applies in this case is addressed in the below-paragraphs.

[¶ 46] The Duhig rule applies when a grantor conveys land in such a manner as to include 100% of the minerals, and then reserves to himself 50% of the minerals, the reservation is not operative where the grantor owns only 50% of the minerals. In such a case, all of the mineral ownership would be conveyed to the grantee, because the mistake of percentages lies with the grantor. In such a case, the deed is construed as transferring

all 50% of the minerals to the grantee. "Both this grant and the reservation cannot be given effect, so the grantor loses because the risk of title loss is on him." Miller, at ¶ 9 (quoting Patrick H. Martin & Bruce M. Kramer, WILLIAMS & MEYERS OIL AND GAS LAW § 311, p. 580.39 (1998)).

[¶ 47] Under the Duhig analysis, a grantor cannot grant and reserve the same mineral interest, and if a grantor does not own a large enough mineral interest to satisfy both the grant and the reservation, the grant must be satisfied first because the obligation incurred by the grant is superior to the reservation. Melchior v. Lystad, 2010 ND 140, ¶ 9, 786 N.W.2d 8. The interpretation of deeds within the framework of the Duhig rationale provides certain and definite guidelines in the interpretation of property conveyances and in title examinations. 1 WILLIAMS & MEYERS, at § 313, p. 616–616.1.

[¶ 48] In this case, the Duhig rule does not apply. The warranty deed in conveying the surface rights to Trulson did not convey any of the subsurface rights or royalties, which is a necessary element for the Duhig rule to apply. When applying the Duhig rule, this Court has previously explained, "the key question is not what the grantor purported to retain for himself, but what the grantor purported to give the grantee." See Melchior, at ¶ 8. (citing Gawryluk v. Poynter, 2002 ND 205, ¶¶ 12–14, 654 N.W.2d 400. Since the warranty deed in question for this case purported to transfer no rights or royalties, the Duhig cannot now be retroactively applied to invoke application of a separate deed that was not executed at the same time, under the same circumstances, and in the course of the same transaction.

[¶ 49] Additionally, the Duhig rule does not apply because the second deed purporting to be a conveyance of the royalty interests was not a warranty deed. In prior cases, the

North Dakota Supreme Court's application of Duhig has been based on "estoppel by warranty, a subset of estoppel by deed, which precludes a warrantor of title from questioning the title warranted." Miller v. Kloeckner, 1999 ND 190, ¶ 13, 600 N.W.2d 881 (citing Mau v. Schwan, 460 N.W.2d 131, 134 (N.D.1990)); Acoma Oil Corp. v. Wilson, 471 N.W.2d 476, 479–80 (N.D.1991); Sibert v. Kubas, 357 N.W.2d 495, 497 (N.D.1984).

[¶ 50] In this case, the only warranty deed at issue in this transaction was the initial warranty deed which did only convey the surface and by clear, plain language it transferred nothing else. (App. at 133).

[¶ 51] The Duhig rule, while certainly applicable in cases where over conveyances are an issue, simply has no place in this case for application. The district court properly quieted title in the Meiers based on the failure of Trulson to adequately meet the requirements for application of the rule.

C. The District Court did not Err in Quieting Title to the Subject property in all Defendants based on Plaintiff's Failure to Establish Delivery by a Preponderance of the Evidence.

[¶ 52] The Trulsons argued court erred in sua sponte ordering a de facto reformation defense when such a defense was not raised by the Meiers. As with the two (2) prior arguments, this argument is not interpreted or applied correctly. The district court in this case did not base its decision on the reformation defense or theory; this theory appears to be advanced by Trulson in his appeal brief as a constructive theory. The district court's concluding paragraph firmly establishes Trulson failed to meet his burden establishing delivery of the deed sufficient to constitute a valid conveyance. Other than to reject the

theory of reformation, the district court decision does not order or even mention reformation of any deed. (Doc. ID #98).

[¶ 53] Trulson is correct in his brief when he argues Trulson filed and served a complaint that did not assert a claim for reformation. Trulson is also correct when he argues the Meiers entered their appearance and answer with a motion to dismiss, which acted as a general denial to the complaint. Trulson did not serve or file an amended complaint to answer the motion to dismiss. This is the only one of the three (3) arguments made in Trulson's brief that is not raised for the first time on appeal.

[¶ 54] At the opening of the trial, Trulson argued the Meiers' use of the motion to dismiss as a general answer and denial to the complaint was insufficient. At no time during the course of the litigation did Trulson argue or make a motion for default based on the ostensive failure to file or serve a formal answer, instead the Meiers relied on their general denial and affirmative defenses asserted in the motion to dismiss. In its motion to dismiss, the Meiers asserted and preserved several important affirmative defenses, including statute of limitations, among failure of delivery of the deed and failure of the deed to be appropriately acknowledged. (Doc. ID # 13).

[¶ 55] Trulsons argue the Meiers were, by operation of law, estopped from asserting <u>any</u> defense at trial because the district court denied the Meiers' motion to dismiss. (Brief of Appellant, ¶ 29). This is not the purpose of an answer or motion to dismiss. North Dakota is a notice pleading jurisdiction. Although not cited in his brief, this harkens back to the rules of procedure governing default judgment. The applicable rule provides, "[i]f a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise appear the court may direct judgment by default." N.D.R.Civ.P. 55 (ellipses omitted). By

its very language, Rule 55 provides default judgment may not be obtained against a party who has appeared.

[¶ 56] In his appeal brief, Trulson essentially asks this court to reverse the district court's decision in essentially a default judgment at the appellate level. This is a well-settled area of law in North Dakota. Just as a plaintiff is entitled to have its claims heard on the merits; thus, pleadings for both parties, including the defendant, are to be construed to do substantial justice. Tibert v. Minto Grain, LLC, 2004 ND 133, 682 N.W.2d 294 (referring to Gowin v. Hazen Memorial Hosp. Ass'n, 311 N.W.2d 554, 556 (N.D.1981); (citing Kaler v. Kraemer, 1998 ND 56, ¶ 7, 574 N.W.2d 588. This Court has consistently held the requirement of substantial justice equally applies to the defendant's drafting of pleadings and responsive documents. Id. at 21.

[¶ 57] A motion to dismiss filed in lieu of an answer acts as a general denial sufficient to put the opposing party on notice. Filler v. Bragg, 1997 ND 24, ¶¶ 12-13, 559 N.W.2d 225; see also Jesse French & Sons Piano Co. v. Getts, 192 N.W. 765, 767 (N.D. 1923)(holding that when a defense arguments are sufficiently ascertainable on filed and served documents, a verified answer is not necessary to determine the case on its merits). Further, in this case, the brief in support of the motion to dismiss sufficiently established all the defenses sufficient to put the Trulsons on notice and ultimately, these were the theories employed by the district court to issue its decision. (Doc. ID # 98).

[¶ 58] Trulsons further attempt to argue the district court's order and memorandum opinion constructively operates to reform the deed to comport with only the surface transaction. (Brief of Appellant, ¶¶29-30). A cursory reading of the district court's memorandum and opinion will quickly apprise the Court this is not the case. The district

court's conclusion was firmly rooted in the originating pleadings, including the original complaint and motion to dismiss. (Docs. ID ##13, 98).

[¶ 59] Trulson's argument appears to request this Court issue a default judgment against the Meiers when no such motion was ever filed or argued in the case. This Court has repeatedly and firmly expressed a strong preference to resolve cases on their merits. Sioux Falls Construction Co. v. Dakota Flooring, 109 N.W.2d 244 (N.D.1961); Azar v. Olson, 61 N.W.2d 188 (N.D.1953).

[¶ 60] In this case, the district properly proceeded to resolve the issue on the merits, which related back to precisely the arguments proffered by the Meiers in their original motion to dismiss. (Doc. ID #13).

CONCLUSION

[¶ 61] The Meiers respectfully request this Court affirm the district court's order in all respects.

Dated this the 12TH day of June 2019.

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CERTIFICATION

[¶ 62] The undersigned, as the attorney representing Appellee, and the author of the Brief of Appellee, hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that the brief was prepared with proportional typeface and that the total number of words does not exceed 8,000 from the portion of the brief entitled "Statement of Issues" through the signature block. The word count was verified with the assistance of the undersigned's word processing software, which also counts abbreviations as words.

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STATE OF NORTH DAKOTA | IN DISTRICT COURT

COUNTY OF MOUNTRAIL | NORTH CENTRAL JUDICIAL DISTRICT

Curtis R. Trulson and Leslie D. Trulson, Plaintiff, vs. John Anthony Meiers, Jean R. Meiers, Evan J. Meiers and Lauren B. Meiers, Defendant.	Civil No. 31-2017-CV-00088 Supreme Court No. 20190035 **CERTIFICATE OF SERVICE**

[¶ 1] I hereby certify that on June 12, 2019, the following documents:

(1) Brief of Defendants/Appellees (Word version);
(2) Brief of Defendants/Appelles (PDF version).

were emailed to the Clerk of the North Dakota Supreme Court at:

supclerkofcourt@ndcourts.gov

and a copy of the same was emailed to

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