20210050
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 18, 2021
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA
Supreme Court Case No. 20210050
McKenzie County Case No. 13-2019-CV-00012

Vic Christensen Mineral Trust,

Plaintiff

v.

Enerplus Resources Corporation,

Defendant, Cross-Claim Defendant, and Appellant,

and Meyer Family Mineral Trust, Joann Deryce Struthers Trust, and Steven J. Reed Living Trust,

Defendants, Cross-Claim Plaintiffs, and Appellees

APPELLEES MEYER FAMILY MINERAL TRUST'S, JOANN DERYCE STRUTHERS TRUST'S, AND STEVEN J. REED LIVING TRUST'S BRIEF

APPEAL FROM ORDERS OF THE DISTRICT COURT, DATED JULY 27, 2020 AND AUGUST 10, 2020, NOVEMBER 23, 2020, AND MARCH 17, 2021, GRANTING SUMMARY JUDGMENT AGAINST APPELLANT

APPEAL FROM SOUTHWEST JUDICIAL DISTRICT, DUNN COUNTY, NORTH DAKOTA
THE HONORABLE WILLIAM HERAUF

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STATEMENT OF THE FACTS

[1] In 1952, Victor J. Christensen (the then owner of 100% of the surface and minerals) deeded a 5/128 royalty interest in T148N-R95W, Section 1: W½ ("W½") to Henry L. Roquette.

[2] On March 29, 1957, Mildred L. Christensen (successor to Victor J. Christensen) deeded the W½ and other tracts of land to Joe S. Reed and Deryce M. Reed, reserving 4/5 mineral interest, and thereby conveying 1/5 mineral interest to Reeds.

[3] In 1968, Henry L. Roquette deeded all interest in the W½ to Mildred L. Christensen. This interest included the 5/128 royalty interest.

[4] Meyer Family Mineral Trust owns 1/2 of the 1/5 conveyed mineral interest received from the Mildred L. Christensen and Joann Deryce Struthers Trust and Steven J. Reed Living Trust each own 1/4 of the 1/5 mineral interest received from the Mildred L. Christensen conveyance. Collectively, these 3 Trusts are referred to herein as "Trust Defendants". The Vic Christensen Mineral Trust ("VMCT") owns the other 4/5 mineral interest in the W½.

[5] Appellant, Enerplus Resources (USA) Corporation ("Enerplus") drilled a well within the W½.

[6] Enerplus' title examiner did a title opinion on the W½ and required a stipulation to be executed between VCMT and Trust Defendants, in reference to the ownership of the 5/128 royalty interest.

[7] In October, 2017, Enerplus notified VCMT and Trust Defendants of the Requirement and suspended the entire mineral interests of VCMT and Trust Defendants in the W½, and did so until those parties executed a Stipulation of Interest in April, 2019.

[8] After VCMT and Trust Defendants received the Enerplus' notice of suspension, they bickered amongst themselves for over a year in reference to the ownership of the 5/128 royalty interest with VCMT claiming that the 5/128 royalty was owned by it and that it fully burdened Trust Defendants' 1/5 mineral interest. VCMT's claim followed the opinion of Enerplus' title attorney set out in the Requirement that was sent to the parties. Trust Defendants claimed that their 1/5th mineral interest was not burdened by any royalty interest.

[9] Case No. 13-2019-CV-00012 was commenced by VCMT filing a Complaint in January, 2019, against Enerplus and Trust Defendants. The Complaint alleged that VCMT owned the 5/128 royalty interest and that it burdened Trust Defendants' 1/5 mineral interest.

[10] Trust Defendants answered the Complaint and claimed that *Acoma Oil Corp. v Wilson*, 471 N.W.2d 476 (ND 1991) applied to the matter.

[11] VCMT agreed with the assertion that *Acoma* applied and in April, 2019, VCMT and Trust Defendants executed a Stipulation of Interest setting out that Trust Defendants' 1/5 mineral interest was conveyed to them without any royalty burdens being associated therewith.

[12] Enerplus paid VCMT and Trust Defendants their suspended funds.

[13] VCMT moved for summary judgment arguing that the royalties in reference to tis 4/5 mineral interest were wrongly suspended.

[14] The trial court granted summary judgment to VCMT awarding it interest on the suspended funds and its attorneys fees.

[15] Trust Defendants also moved for summary judgment arguing that the royalties in reference to their 1/5 mineral interest were wrongly suspended.

[16] After awarding Enerplus additional months for discovery and holding two (2) hearings on the matter, the trial court granted summary judgment to Trust Defendants awarding

them interest on the suspended funds and their attorneys fees, according to N.D.C.C. §47-16-39.1.

INTRODUCTION

[17] In spite of the issues which have been raised by Enerplus in this matter, the only issue herein is whether Enerplus rightfully suspended royalty payments that were due to the Trust Defendants, or in other words, did a title dispute exist, or did Enerplus simply wrongly identify that a title dispute existed. It is the Trust Defendants position that the title dispute was mistakenly and wrongly manufactured by Enerplus, and that no suspension of royalties should have ever occurred. In other words, Enerplus is not entitled to any protection under N.D.C.C. §47-16-39.1

LAW AND ARGUMENT

[18] There are three (3) documents of record that Enerplus interpreted wrongly. They are as follows:

(a) Royalty Deed from Victor J. Christensen (the owner of 100% of the surface and minerals in the W½ and predecessor in interest to Mildred L. Christensen and VCMT) which conveyed 5/128 royalty interest to Henry Roquette. Appellees' App. 3.

(b) Warranty Deed from Mildred L. Christensen (successor to V.J. Christensen and predecessor in interest to VCMT) to Reeds (predecessor in interest to Trust Defendants) conveying the W½, reserving 4/5 interest in the oil, gas, and minerals, and thereby conveying 1/5 mineral interest. Appellees' App. 4-5.

(c) Quit Claim Deed from Henry L. Roquette to Mildred L. Christensen conveying all of his interest in the property, which was the royalty he received under (a) above. Appellees' App 6-7.

[19] Examining Documents (a) and (b) without (c) above, subsequent documents of record, and well established North Dakota law which is set out in *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476 (ND 1991) and *Wenco v. EOG Resources, Inc.*, 822 N.W.2d 701 (ND 2012), results in the following mineral ownership:

> Vic Christensen Mineral Trust
> 80% of the minerals subject to its royalty conveyance in (a)
>
> Meyer Family Mineral Trust
> 10% of the minerals with no outstanding royalty burden
>
> Joann Deryce Struthers Trust
> 5% of the minerals with no outstanding royalty burden
>
> Steven J. Reed Living Trust
> 5% of the minerals with no outstanding royalty burden

[20] Enerplus' title Requirement (Appellees' App. 8-9) did not take into account the *Duhig* Rule which is set out in *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (Tex. 1940) and followed in North Dakota. Based on the *Duhig* Rule, when a grantor such as Mildred L. Christensen reserves 4/5 mineral interest, she is also conveying a 1/5 mineral interest. The *Acoma* and *Wenco* cases extended the *Duhig* Rule to outstanding royalty burdens and found that such royalty burdens are born by the retained mineral interests.

[21] The *Dubig* rule is set out in *Acoma* as follows:

> *Duhig* resolves a conflict between grant and reservation clauses under principles of estoppel by warranty, a subset of estoppel by deed, which precludes a warrantor of title from disputing the title warranted. *Mau, supra.* The effect of *Duhig* is that 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 grand and the reservation, the grant must be satisfied first because the obligation incurred by the grant is superior to the reservation. *Mau v. Schwan, supra: Sibert v. Kubas, supra; Kadrmas v. Sauvageau,* 188 N.W.2d 753 (N.D. 1971); *see* 1 Williams & Meyers, *supra* at § 311; Willis, 28 Rocky Mt. Min. Law

> Institute, 947 (1983).
>
> We follow the *Duhig* rationale in *Kadrmas, supra.* Although we then limited our application of *Duhig* in *Gilbertson v. Charlson,* 301 N.W.2d 144 (N.D. 1981), our decision in *Sibert, supra,* 357 N.W.2d at 497, indicates that *Gilbertson* was limited to "the peculiar facts of that case wherein the grantee, prior to the disputed conveyance, owned an outstanding mineral interest in the property conveyed." We held that "[a]bsent a *Gilbertson* fact situation, a grantee's notice, actual or constructive, of a third party's outstanding mineral interest does not jeopardize his rights against a grantor who has made a conveyance to him by warranty deed." *Id.* at 498. *See also Mau, supra.*
>
> As we explained in *Sibert, supra,* 357 N.W.2d at 497:
>
> " 'If the grantor has warranted title to land he purports to convey, and if the breach of warranty can be remedied by taking the land from the grantor and giving it to the grantee, then there is no reason for refusing to do so in a title action, whether or not styled as one for breach of warranty. They key question is, not what the grantor purported to retain for himself, but what he purported to give to the grantee. If he undertook to convey half the minerals and had the power to do so, he should be held to his undertaking. The risk of title loss is on the grantor in a warranty deed;...' " *Acoma v. Wilson,* 471 N.W. 2d 476 (ND 1991).

[22] Enerplus' Requirement did not even mention the *Duhig* or *Acoma* cases and the possibilities or their application to the situation. Enerplus' further misinterpreted Document (c) above as merging the conveyed royalty into the VCMT's 4/5 mineral interest and then crediting the VCMT with a 5/128 royalty interest burdening the Trust Defendants' 1/5 mineral interest. If Enerplus and its title attorney had never heard of the *Duhig, Acoma* and *Wenco* cases, they surely could still have applied after acquired title principles to Documents (b) and (c), thereby not burdening the Trust Defendants' 1/5 mineral interest that was conveyed to them in Document (b). Document (b) was a Warranty Deed containing the word grant, and the after acquired royalty

conveyed to Mildred L. Christensen, the grantor in Document (b), should have been passed along to make the Trust Defendants' 1/5 mineral interest an unburdened interest.

[23] Instead of applying *Duhig, Acoma, Wenco* or the after acquired title doctrine, Enerplus' attorney in the Requirement states that when the royalty was reconveyed to VCMT, it merged into the 4/5 mineral interest of VCMT only and that the 1/5 mineral interest owned by Trust Defendants is burdened by the 5/128 royalty interest. This makes absolutely no sense.

[24] Enerplus' attorney also described in his Requirement another outstanding royalty interest that was conveyed out by V.J. Christensen in 1952 (just as the Roquette royalty was) to Theodore Kellogg. This royalty was reconveyed to Mildred L. Christensen by a Quit Claim Deed dated December 17, 1957 and recorded March 6, 1958. Enerplus' attorney merged this royalty interest with all of the mineral interests and made no requirement in reference to this interest. This interest was of record when the Warranty Deed to Reeds was executed and was not reconveyed until after the execution of the Warranty Deed, so why did Enerplus' attorney treat the Kellogg royalty interest differently? This is just another example of the misinterpretations being made by Enerplus and their attorney. The Roquette 5/128 royalty interest should have merged with all of the mineral interests and not just the 4/5 VCMT mineral interest, just as the Kellogg royalty interest was treated.

[25] When Enerplus notified the mineral owners that they were requiring a Stipulation to be signed VCMT was under the impression that they had a royalty interest under the Trust Defendants' minerals. They were under that impression because of the misinterpretation contained in the title opinion. This thinking caused the long delay in getting the Stipulation signed and caused this lawsuit. The VCMT chose not to weigh in Trust Defendants' and Enerplus' summary judgment motions but in fact they did weight in when they signed the Stipulation that was recorded. As soon as the attorneys for VCMT were made aware of the *Acoma* case in Trust

Defendants' Answer to Plaintiffs' Complaint, they agreed to the following language in the Stipulation that was executed and recorded:

> It is the intent of the undersigned that the 1/5 Mineral Interest oil, gas and mineral interest conveyed in Book 58, Page 419, and which is now owned collectively by the Meyer Family Mineral Trust, the Joann Deryce Struthers Trust Dated July 9, 2009 and the Steven J. Reed Trust U/D/T 8/10/07 was conveyed without any royalty burdens being associated therewith and that said I /5 oil, gas and mineral interest includes all royalty associated therewith.

[26] Enerplus' title attorney executed an after the fact Affidavit stating that he considered *Acoma* and chose not to apply it due to certain excepting language contained in the Warranty Deed. However, the language cited does not preclude *Duhig, Acoma* and *Wenco* from being applied herein.

[27] In fact, the Warranty Deed in this matter is a classic *Duhig* rule deed, and *Acoma* followed *Duhig* extending its rule to outstanding royalty interests being born by Grantors. The deed herein is a "Warranty Deed" which conveyed property reserving 4/5 mineral interest. Applying *Duhig* and *Acoma* results in Trust Defendants owning a 1/5 mineral interest unburdened by any outstandingroyalty.

[28] The fact that the deed states "the above grant and conveyance, however being subject to all mineral reservations and conveyances" does not make the *Duhig* and *Acoma* rules inapplicable. The Warranty Deed reserves 4/5 of the minerals which results in a conveyance of 1/5 of the minerals. The "subject to" language did not reserve the outstanding royalty interest to the Grantor. Rather, this wording was only "intended to protect the grantor on the warranty and are not intended as a limitation on the nature of the interest conveyed by the granting clause." *Miller v. Kloeckner,*1999 ND 190, No. 990128.

[29] *Miller v. Kloeckner* 1999 ND 190, No. 990128 considered similar excepting language situations in warranty deeds and upheld the *Duhig* rule therein, which rule was followed in *Acoma* and *Wenco*. The Court stated therein:

> "A warranty deed which describes the land conveyed, and excepts and reserves one-half of the minerals to the grantors, conveys the surface and one-half of the minerals."
> [¶11] In *Gilbertson v. Charlson,* 301 N.W.2d 144 (N.D. 1981), this court declined to apply the *Duhig* rule when the grantee had actual notice of an outstanding mineral interest, because she owned that interest, and had at lease constructive notice of another outstanding mineral interest that was of record.
> [¶l2] In *Sibert v. Kubas,* 357 N.W.2d 495,497 (N.D. 1984), this court again applied *Duhig* in accordance with *Kadrrnas*:
>
> > It is undisputed that at the time of the conveyance Mary owned only one-half of the minerals. Consequently, it was impossible for her to both convey and reserve one-half of the minerals. The result, explained by the *Duhig* doctrine which this Court adopted in *Kadrrnas v. Sauvageau,* 188 N.W.2d 753 (N.D. 1971), is that Patricia and David, as grantees, received Mary's one-half mineral interest, and Mary is estopped from asserting title to that interest under the reservation clause because "the warranty obligation is superior to the . . . [grantor's] reservation rights." *Kadrmas, supra,* 188 N.W.2d at 756.
>
> The court limited *Gilbertson* to its specific facts, wherein the grantee owned an outstanding mineral interest before the disputed conveyance, and said: "Absent a *Gilbertson* fact situation, a grantee's notice, actual or constructive, of a third party's outstanding mineral interest should not jeopardize his rights against a grantor who has made a conveyance to him by warranty deed." *Sibert,* 357 N.W.2d at 498. We have more recently applied the *Duhig* rule in *Acoma Oil Corp. v. Wilson,* 471 N.W.2d 476 (N.D. 1991), and *Mau v. Schwan,* 460 N.W.2d 131 (N.D. 1990).
> [¶13] This 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." *Mau v. Schwan,* 460 N.W.2d 131, 134 (N.D. 1990).
> [¶l4] Hron contends the trial court erred in failing to determine they own one-half the minerals because W.V. Hron used a special warranty deed, rather than a general warranty deed, to convey the land to Huether. "A special warranty deed warrants

> title only against claims held by, through, or under the grantor, or against encumbrances made or suffered by her, and it cannot be held to warrant title generally against all persons." *Stracka v. Peterson,* 377 N.W.2d 580,583 n. 6 (N.D. 1985).
>
> [¶15] A warranty does not define the estate conveyed:
>
> > The purpose of a granting clause is "to define and designate the estate conveyed." *Kynerd v. Hulen,* 5 F.2d 160, 161 (5th Cir.), *cert. denied,* 269 U.S. 560, 46 S.Ct. 20, 70 L.Ed.
> >
> > 411 (1925). . . Exceptions inserted into a covenant of warranty are intended only to protect the grantor on the warranty and are not intended as a limitation on the nature of the interest conveyed by the granting clause.
>
> *O'Brien v. Village Land Co.,* 794 P.2d 246,251 (Colo. 1990). In *Mueller v. Stangeland,* 340 N.W.2d 450 (N.D. 1983), the granting clause of a deed conveyed without reserving or excepting any minerals. The warranty clause provided: *"The Vendor excepts from this Contract all minerals. including oil and gas. and all mineral rights not now owned by the Vendor." Id* at 452. This court held that provision "is indicative of an intention to except from the warranty all minerals and mineral rights not owned, ratherthan an intention to except minerals owned from the grant and mineral rights not owned from the warranty." *Id.* at 453.

[30] The deeds in the *Wenco* case contained similar language and the *Acoma* rule was applied therein. In *Wenco,* Dockters owned a 100% mineral interest and executed a royalty deed to a party conveying 64/160 of all royalty. Then Dockters conveyed a 1/2 mineral interest to Wm. F. Grinnan by a warranty mineral deed stating the conveyance was "made subject to any rights nowexisting to any lessee or assigns under any valid and subsisting oil and gas lease of record heretofore executed." Dockters then conveyed their remaining interest in the property to *Wenco* by warranty deed made subject "to prior mineral reservations now of record." The Court in *Wenco* applied the rule set out in *Acoma* and found that *Wenco's* mineral interest bore the entire royalty burden.

[31] In *Wenco* the Court in following *Acoma* stated:

> First, we might agree that *Acoma* should be overruled if it were an aberration in the law. It is not. *Acoma* is supported by decisions in two other jurisdictions, and *Wenco* points to no cases from other jurisdictions that have held to the contrary under these circumstances. Second, and foremost, *Acoma* has been the law in North Dakota for more than 20 years and its holding is embodied in the North Dakota Mineral Title Standards. "The rule of stare decisis is grounded upon the theory that when a legal principle is accepted and established rights may accrue under it, security and certainty require that the principle be recognized and followed thereafter." *Dickie v. Farmers Union Oil Co.* 2000 ND 111, 13, 611 N.W.2d 168. That rule is especially applicable here. As evidenced by this case, rights have accrued under *Acoma*, and certainty and security in already existing division orders and title opinions overwhelmingly militate against overruling its holding.
>
> **[**¶17] We conclude the district court correctly ruled *Acoma* controls this case and that *Wenco's* interest bears the entire burden of the Bank's royalty interest.

[32] Mineral Title Standard 7-05.1 states therein about the *Wenco* case:

> Because the mineral deed did not **specifically** reference the prior royalty conveyance, the Court held that the successors to the original mineral owner alone bore the entire burden of the prior royalty conveyance. (Emphasis added.)

The Warranty Deed from Christensen to Reeds did not **specifically** mention the prior royalty conveyance and therefore *Acoma* and *Wenco* apply herein.

[33] The CAUTION portion at the end of 7-05.1 states that stipulations should be required if *Acoma* and *Wenco* are not applicable but those cases are clearly applicable herein. This Caution would apply only in the event that a conveying mineral owner does not retain a large enough mineral interest to satisfy the entire outstanding royalty interest. That is certainly not the case herein and as pointed out above, there is no outstanding royalty at all at this point.

[34] Enerplus spends a lot of its Brief trying to explain why *Hild v. Johnson*, 2006 ND 217, 723 N.W.2d 389 does not apply, however it would apply if determining the 5/128 royalty

was an issue in the present case. It is not an issue because based on *Duhig*, *Acoma* and *Wenco*, VCMT would be bearing the royalty burden if it existed today. It does not exist because Roquette reconveyed the interest to VCMT.

[35] Enerplus also argues that was obvious that a title dispute existed because VCMT sued Trust Defendants and it took a long time for the parties to sign the Stipulation that was required by Enerplus. The facts are VCMT sued Enerplus too and might have never commenced a lawsuit if Enerplus had not wrongly suspended their 4/5 unburdened mineral interest. Also, the Stipulation was a needless requirement. Rather, Enerplus should have applied *Duhig, Acoma, Wenco* or the after acquired title doctrine to the situation.

[36] Enerplus' raising the issue that trial court erred in requiring that only the 5/128 royalty interest should have been suspended is a moot issue in that the trial court actually ruled that Enerplus should not have suspended any interests in the case.

CONCLUSION

[37] The trial court thoroughly considered the law and the arguments in this matter (as can be seen in the hearing transcripts in the matter) and ruled correctly. Enerplus' title Requirement and its suspension of Trust Defendants' royalties were not reasonable under the law and the facts and the trial court's findings should be in all matters affirmed.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, in compliance with N.D.R.App.P. 32(a)(8)(A), that the Appellees Meyer Family Mineral Trust's, Joann Deryce Struthers Trust's, and Steven J. Reed Living Trust's Brief was prepared with Times New Roman proportional typeface, 12 pt. font, and totals 15 pages.

Dated this 17th of June, 2021.

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Defendants, Cross-Claim Plaintiffs, and Appellees

DECLARATION OF SERVICE

STATE OF NORTH DAKOTA)
:ss
COUNTY OF STARK)

Leslie Bernstein declares under penalty of perjury that one the 18th day of June, 2021, she served a true and correct copy of the following:

1. Appellees Meyer Family Mineral Trust's, Joann Deryce Struthers Trust's, and Steven J. Reed Living Trust's Brief
2. Appellees Meyer Family Mineral Trust's, Joann Deryce Struthers Trust's, and Steven J. Reed Living Trust's Appendix

along with this service document, via electronic mail submission through the Supreme Court filing portal to the following:

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DECLARATION OF SERVICE

STATE OF NORTH DAKOTA)
:ss
COUNTY OF STARK)

Leslie Bernstein declares under penalty of perjury that one the 21st day of June, 2021, she served a true and correct copy of the following:

1. Appellees Meyer Family Mineral Trust's, Joann Deryce Struthers Trust's, and Steven J. Reed Living Trust's Brief (with Appendix references renumbered)
2. Appellees Meyer Family Mineral Trust's, Joann Deryce Struthers Trust's, and Steven J. Reed Living Trust's Appendix (with pages renumbered)

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