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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA10-797

BILLY W. BARGER, PATRICIA BARGER, ROBERT E. JONES, JR., and DANA BARGER APPELLANTS V. LENA FERRUCCI APPELLEE	**Opinion Delivered** FEBRUARY 9, 2011 APPEAL FROM THE WHITE COUNTY CIRCUIT COURT [NO. CV-09-815-1] HONORABLE THOMAS MORGAN HUGHES, III, JUDGE AFFIRMED

RITA W. GRUBER, Judge

This case involves a dispute over mineral interests between appellants Billy W. Barger, Patricia Barger, Robert E. Jones, Jr., and Dana Barger and appellee Lena Ferrucci. The confusion arises from language in a warranty deed, pursuant to which appellee and her former husband[1] conveyed certain property to appellants' predecessor in interest, Burkhead Dairy, Inc. The White County Circuit Court determined that no mineral rights passed from the Friedrichs to Burkhead Dairy under the deed and that the Friedrichs retained all of the oil, gas, and other minerals. Appellants brought this appeal, contending that the court erred in finding that the language in the deed effectuated a valid reservation. We affirm the circuit court's order.

[1]At the time of this conveyance, appellee was married to George M. Friedrich. Mr. Friedrich died on August 27, 1990, and appellee later married Ray Ferrucci, who is not a party to this lawsuit.

Appellants began this case by filing a petition to quiet title against appellee, alleging that appellants, as the successors in interest to Burkhead Dairy, were the legal owners of all mineral interests not already reserved before appellee and Mr. Friedrich ("the Friedrichs") conveyed the property to Burkhead Dairy. The land conveyed to Burkhead Dairy was comprised of four separate tracts, and due to mineral reservations in earlier deeds, the Friedrichs did not own all of the minerals. The disputed deed contained the traditional language found in a warranty deed—that is, the grantors granted, bargained, sold, and conveyed property, which was described therein, to Burkhead Dairy. Immediately following the legal description, the deed contained the following language: "Subject to reservation of all oil, gas and other minerals."

Appellants contended in their petition that this language was merely an exception to the warranties in the deed, due to the prior reservations, and not a valid mineral reservation in the grantors. Appellee answered and filed a counterclaim, contending that she and Mr. Friedrich did not convey any of the mineral rights to Burkhead Dairy and that none of the successors in title after her received any oil, gas, or mineral rights in the property. She requested that title to the mineral rights, less those reserved by her predecessors in title, be quieted in her.

At a hearing on the matter, the parties abandoned their petitions for quiet title and agreed that the court's decision regarding the mineral interests in dispute would bind only the parties before the court. The facts were not disputed, and both parties considered the

language in the deed unambiguous. Indeed, the parties agreed to stipulated facts regarding the mineral rights severed from the property before the Friedrichs acquired it. They agreed that of the four tracts making up the property, one-half of the mineral rights in Tract 1, one-half of the mineral rights in Tract 2, all of the mineral rights in Tract 3, and none of the mineral rights in Tract 4 had been severed from the property before the Friedrichs acquired it. They also stipulated that Burkhead Dairy, via the trustee in a Chapter 7 bankruptcy case, conveyed the property to Randy and Elizabeth Gilliam; that the Gilliams then conveyed the property to Billy and Patricia Barger; and that the Bargers later conveyed a portion of the property to Robert and Dana Barger Jones. Like the deed in question in this case, all of these warranty deeds contained a description of the property followed by the language, "Subject to reservation of all oil, gas and other minerals."

After hearing arguments from the parties, the circuit court entered an order in favor of appellee, finding that the deed did not convey any mineral rights to Burkhead Dairy and finding that the granting clause in the deed provided that the real property was being conveyed subject to reservation of all oil, gas, and other minerals. The court stated that it was applying the basic rules of construction of deeds in Arkansas by ascertaining and giving effect to the intention of the parties, which must be gathered from the four corners of the instrument. The court noted that the intention was not to be gathered from some particular clause but from the whole context of the agreement. On appeal, appellants argue that the language in the deed clearly failed to reserve any mineral interests in the Friedrichs.

The construction of a deed is a matter of law, which we review de novo. *Maxey v. Kossover*, 2009 Ark. App. 611, at 1. When interpreting a deed, we give primary consideration to the intent of the grantor. *Harrison v. Loyd*, 87 Ark. App. 356, 365, 192 S.W.3d 257, 263 (2004). We examine the deed from its four corners for the purpose of ascertaining that intent from the language employed. *Id*. Further, we gather the intention of the parties, not from some particular clause, but from the whole context of the agreement. *Gibson v. Pickett*, 256 Ark. 1035, 1040, 512 S.W.2d 532, 535–36 (1974). We will not resort to rules of construction when a deed is clear and contains no ambiguities, as here, but only when the language of the deed is ambiguous, uncertain, or doubtful. *Harrison*, 87 Ark. App. at 365, 192 S.W.3d at 263.

The issue on appeal is whether the language "[s]ubject to reservation of all oil, gas and other minerals" contained in the granting clause of the disputed deed effectively reserved a valid mineral interest in the Friedrichs. Citing Arkansas case law as authority, appellants first argue that the deed should be construed against appellee, as the grantor. The cited authority has no application in this case. It is only when the deed is ambiguous that we construe it most strongly against the grantor. *Harrison*, 87 Ark. App. at 365, 192 S.W.3d at 263. Even then, the rule is one of last resort to be applied only when all other rules for construing an ambiguous deed fail to lead to a satisfactory clarification of the instrument and is particularly subservient to the paramount rule that the intention of the parties must be given effect, insofar as it may be ascertained, and to the rule that every part of a deed should be harmonized and reconciled so that all may stand together and none be rejected. *Id*. Here, the

deed is not ambiguous.

Appellants also contend that "subject to" is a term of qualification or limitation that merely protects the grantor against a claim for breach of warranty and does not create any affirmative rights. In support of this argument, appellants cite case-law authority from Texas and Mississippi. We do not find those cases persuasive. In those cases, unlike in this case, the "subject to" language references another document specifically mentioned in the deed. For example, *Kokernot v. Caldwell*, 231 S.W.2d 528 (Tex. Civ. App. 1950), concerned an ambiguous deed that contained irreconcilable conflicts, and the deed indicated that it was "subject to" the terms of a particular lease; the court found that the "subject to" language was merely limiting. In *Walker v. Foss*, 930 S.W.2d 701 (Tex. App. 1996), the language "subject to" specifically mentioned a prior reservation. Finally, in *Richardson v. Moore*, 22 So. 2d 494 (Miss. 1945), a deed conveyed title in fee simple and then stated that the conveyance was "subject to mineral and oil rights, if any, now of record and not owned by the grantors herein." At that time, the mineral rights had never been severed or reserved by anyone. A subsequent deed by the grantees conveyed the property and reserved mineral rights "in accordance with" the earlier deed. The court held that there was no reservation of mineral rights in either of these deeds. We do not find the Mississippi court's analysis of the "subject to" language relevant in this case. Indeed, none of these cases are authority for the proposition that the words "subject to" can never create a reservation in favor of a grantor.

Our job is to examine the deed from its four corners for the purpose of ascertaining

the intent from the language employed. *Harrison*, 87 Ark. App. at 365, 192 S.W.3d at 263. We do not attach unwarranted importance to one word in the deed; rather, we look at all of the words and clauses in the context of the entire deed. The deed in this case did not mention the reservation of minerals by the Friedrichs' predecessors in title. It merely conveyed the property and then, in the granting clause, stated immediately following the legal description "[s]ubject to reservation of all oil, gas and other minerals." "A reservation is a clause in a deed whereby the grantor reserves some new thing to himself, issuing out of the thing granted which was not *in esse* before." *Deltic Timber Corp. v. Newland*, 2010 Ark. App. 276, at 5, 374 S.W.3d 261, 265. Despite appellants' argument that "subject to" may not create an affirmative right, our examination of this deed from its four corners convinces us otherwise.

There are no precise words that must be used to create a reservation; the question is what the parties intended. *Gibson*, 256 Ark. 1035, 512 S.W.2d 532. The "subject to" language in this deed does not refer to a prior limitation or any other specific document, exception, or reservation. It states that the grant is subject to "reservation of *all* oil, gas and other minerals." (Emphasis added.) It is apparent to us that this language was intended to reserve all of the mineral rights in the grantor and that the deed conveys no mineral rights to the grantee. *See, e.g.*, *Bulger v. McCourt*, 138 N.W.2d 18 (Neb. 1965) (holding "subject to ONE-HALF OF ALL OIL AND MINERAL RIGHTS" contained at the end of the granting clause in a deed was not merely a limitation but constituted a reservation of one-half

of the mineral rights in the grantor); *Kelley v. Haas*, 262 S.W.2d 687 (Ky. Ct. App. 1953) (holding that "subject to . . . all mineral rights" constituted a valid reservation). Accordingly, we affirm the circuit court's order finding that the disputed deed conveyed no mineral rights to the grantees and that appellee and her former husband retained all oil, gas, and minerals.

Affirmed.

VAUGHT, C.J., and ABRAMSON, J., agree.