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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA 09-682

GEORGIA N. MASON, as Personal Representative of the Estate of Ferrel O. Mason, Deceased, and MARY BOSTAIN, son and daughter of Fred O. Mason and Mary Isabelle Mason, husband and wife APPELLANTS V. ALICE BUCKMAN, JOYCE C. MINCHEW, ANN CONNER ROCHE, BEVERLY ANN LACHMANN, LUTZ LACHMANN, SEECO, INC., and CAFFEY GROUP, LLC, et al. APPELLEES	**Opinion Delivered** MARCH 17, 2010 APPEAL FROM THE VAN BUREN COUNTY CIRCUIT COURT [NO. CV-2008-49] HONORABLE MICHAEL A. MAGGIO, JUDGE AFFIRMED

JOHN B. ROBBINS, Judge

Appellants, the children of Fred and Belle Mason (collectively "Masons"), appeal the denial and dismissal of their petition to quiet title to one-half of the mineral rights in a 124-acre tract of land situated in Van Buren County, which they believed they inherited from their parents. The resisting parties were the most recent grantees in the chain of title to these lands and SEECO, Inc., which held an oil and gas lease. On a motion for summary judgment, the judge held that the Masons had no interest in any mineral rights concerning this acreage and dismissed the complaint to quiet title. This decision was based upon application of the

Duhig rule of objective construction to the relevant warranty deed. The Masons appeal, and we affirm the trial court's decision.

The important facts are not in dispute. This case concerns the construction of one deed, the "Mason-Thompson deed." The land at issue was purchased in 1938 by Fred Mason from Elmer and Mamie Merryman. In the deed from the Merrymans to Fred, the sellers reserved one-half of the mineral rights. There is no dispute regarding that conveyance. In 1944, Fred and his wife Belle conveyed what they owned to Lizzie Thompson (Belle's sister and Fred's sister-in-law), by warranty deed (the "Mason-Thompson deed"). This deed described the lands being conveyed and ended the description with these words: "½ of mineral rights with power to mine reserved."

After a series of conveyances following the Mason-Thompson deed, appellees Lutz and Beverly Ann Lachmann became successors in interest to a portion of that same land. The Lachmanns entered into an oil and gas lease with SEECO, Inc., in 2005. In 2008, the Masons filed suit to quiet title in themselves to one-half of the mineral rights in the entire 124 acres conveyed by the Mason-Thompson deed. All persons or entities who might claim an interest in this action were joined.

Ultimately, SEECO filed a motion for summary judgment, citing to certain objective rules of construction applicable to deeds. SEECO claimed that Fred conveyed his one-half interest to his grantee in the Mason-Thompson deed, which passed down the chain of title to include the Lachmanns. The Lachmanns joined the motion for summary judgment.

In resistance, the Masons argued that the words "½ of mineral rights with power to mine reserved," contained in the Mason-Thompson warranty deed manifested Fred's intent to retain *his* one-half interest. The Masons asserted to the trial judge that the *Duhig* rule relied upon by SEECO, adopted as the law in Arkansas in *Peterson v. Simpson*, 286 Ark. 177, 690 S.W.2d 720 (1985), did not apply to the facts of this case, but if it did, it should not be applied retroactively to the Mason-Thompson deed.

As relevant to this case, appellees asserted that (1) there were no material questions of fact because extrinsic evidence of the grantor's (Fred's) intent was not proper, and (2) the relevant rules of construction in Arkansas mandated that the court look only to the four corners of the deed to determine what was conveyed. The Masons disagreed, stating that Fred's intent to keep his one-half mineral interest was made clear by the unambiguous terms of the deed and also by the chain of title that followed.

After the hearing, the trial judge found that summary judgment was proper because the *Duhig* principle, as adopted by the Arkansas Supreme Court in *Peterson v. Simpson*, 286 Ark. 177, 690 S.W.2d 720 (1985), applied and precluded the Masons from obtaining their requested relief; dismissed their complaint; and quieted title in appellees. This appeal resulted.

In reviewing summary judgment cases, this court need only decide if the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Parker v. Perry*, 355 Ark. 97, 131 S.W.3d 338 (2003). The moving party always bears the burden of sustaining a motion for

summary judgment. *Id.* All proof must be viewed in the light most favorable to the resisting party, and any doubts must be resolved against the moving party. *Id.* The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Id.* On appeal, the Masons assert that the trial court erred as a matter of law in applying the *Duhig* rule to the Mason-Thompson deed. We disagree that the trial court erred.

In *Peterson v. Simpson*, 286 Ark. 177, 690 S.W.2d 720 (1985), our supreme court adopted the *Duhig* rule. The *Duhig* rule provides that when an owner of a fractional mineral interest executes a warranty deed without limiting the interest in the minerals granted, and the grant and reservation of mineral rights in the warranty deed cannot both be given effect, the reservation fails, and the risk of loss is on the grantor. *See Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (Tex. 1940). This rule is not applicable to quit-claim deeds. *Hill v. Gilliam*, 284 Ark. 383, 682 S.W.2d 737 (1985).

In adopting the *Duhig* rule in *Peterson*, the supreme court set out the reason for rejecting the subjective-intent approach:

> Subsequent purchasers, or grantees, must be able to rely upon this interpretation or else, under these type of circumstances, every title would require a lawsuit in order to be alienable. Rejection of the *Duhig* Rule would mean sacrificing the degree of certainty and guidance that it can provide concerning marketability of mineral interests, and replacing it with an outbreak of lawsuits. This we are not willing to do.

Peterson, 286 Ark. at 181, 690 S.W.2d at 723. The *Peterson* decision discussed application of the *Duhig* rule:

> Therefore, the proper procedure to follow in cases which do not involve the original grantor and his immediate grantee, as here, is to arrive at the meaning of the deed according to rules of objective construction, which we now hold to include application of the *Duhig* rule. Subjective considerations are not appropriate in such cases. Accordingly, with respect to such reservations contained in warranty deeds, a subsequent grantee is to receive that percentage of mineral interest in the land not reserved to the grantor, since the deed purports to deal with 100% of the minerals. If both the grant and reservation cannot thereby be given effect, the reservation must fail and the risk of title loss is on the grantor.

Peterson, 286 Ark. at 181, 690 S.W.2d at 723. The validity of the *Duhig* rule remains, and it was reaffirmed in *Sutton v. Sutton*, 2009 Ark. 109, where the supreme court stated that it applies the rules of objective construction, under the parameters set in *Peterson* and *Duhig*, in warranty-deed transactions involving non-original grantor-grantees.

The *Duhig* rule, as adopted in *Peterson*, *supra*, and reaffirmed in *Sutton*, *supra*, can be summarized to instruct as follows:

> (1) When construing a warranty deed involving mineral interests, as between the grantor's successors in interest and the grantee's successors, the *Duhig* rule would apply to the following set of facts.
> (2) Grantor owns only a fractional part of the mineral interests in the property conveyed.
> (3) Grantor does not specify the quantum of interest in the minerals conveyed.
> (4) Grantor purports to reserve some fractional interest in the mineral rights conveyed.
> (5) As between the grantor and his grantee, the deed will be construed to address 100 percent of the mineral interests and grantee will take such 100 percent, less the fractional interest the deed reserves to grantor. If grantor actually owns less than 100 percent, grantor will be the party to first bear the loss up to the extent of his interest reserved.

There can be no question that this was a warranty-deed transaction now being placed in issue by non-original grantor and grantees. Objective rules apply. On the face of the deed, Fred conveyed the property at issue by warranty deed to his sister-in-law with "½ of mineral rights with power to mine reserved." Nowhere is it clarified that one-half of the mineral interests had been reserved by Fred's grantor. Under those circumstances, Fred bore the risk of loss, to the benefit of his grantee and her successors in interest.

The Masons attempt to distinguish the rule's application based upon where the reservation is located in the deed, i.e., in the grant clause as opposed to after the warranty clause as it appeared in the *Duhig* case. However, we see that as a distinction without a difference. The face of Fred's warranty deed purported to convey all ownership to the property except half of the mineral rights. Inasmuch as half of the mineral rights continued to be owned by Fred's grantor, the remaining half was conveyed to Fred's sister-in-law, intentionally or unintentionally. We observe that our supreme court made no distinction regarding the location of the reservation in adopting the *Duhig* rule.

The Masons suggest that if the *Duhig* rule applies, it should not be applied to a deed executed in the 1940s, long before the rule was adopted. We decline that invitation. In *Peterson*, our supreme court saw fit in 1985 to apply this rule of construction to a deed executed in 1948. *See also Sutton v. Sutton*, *supra*. Arkansas Supreme Court decisions are applied retrospectively. *See Felton v. Rebsamen Medical Center*, 373 Ark. 472, 284 S.W.3d 486

(2008); *Flemens v. Harris*, 323 Ark. 421, 915 S.W.2d 685 (1996); *Baker v. Milam*, 321 Ark. 234, 900 S.W.2d 209 (1995). This is a rule of construction, not a rule of property law.

In addition, the Masons assert that if the *Duhig* rule applies, it should not apply to appellees because they were not bona fide purchasers without notice, and that if the purpose of the rule is not to determine the grantor's intent but rather to protect bona fide purchasers, this purpose is not met on these facts. The Masons assert that there is a deed appearing in one branch of the chain of title, devolving from the grantee in the Mason-Thompson deed, which excepts "all minerals, oil & gas on said land" inasmuch as such interests had been previously sold or reserved in a deed identified by book and page recording (the Mason-Thompson deed). However, application of the *Duhig* rule makes it unnecessary to examine deeds subsequent to the deed under objective construction. *Duhig* and *Peterson* require an examination of the face of the deed in question to determine what portion of mineral interests were conveyed with that particular warranty deed. Whatever was conveyed occurred at that point in time. Searching through subsequent deeds for the purpose of ascertaining the subjective intentions of the parties to the warranty deed would be an exercise in irrelevancy.

Because the trial court did not err in applying the law to these facts, we affirm the entry of summary judgment. If the Masons wish to have *Peterson* and *Sutton* overruled and set Arkansas law on a different course, that relief can only be granted by our supreme court.

Affirmed.

HART and HENRY, JJ., agree.