Judgment rendered August 14, 2013.

No. 48,021-CA

ON REHEARING

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

CLAUDIA SIMONE FRANKLIN — Plaintiff-Appellant

Versus

CAMTERRA RESOURCES PARTNERS, INC., RODNEY ARBUCKLE, and PETROHAWK PROPERTIES, L.P. — Defendants-Appellees

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Originally appealed from the
Forty-Second Judicial District Court for the
Parish of DeSoto, Louisiana
Trial Court No. 69,972

Honorable Robert Edward Burgess, Judge

* * * * *

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* * * * *

Before BROWN, C.J., STEWART, LOLLEY, MOORE & PITMAN, JJ.

BROWN, C.J., dissents with written reasons.

LOLLEY, J., dissents for the reasons assigned by C.J. Brown.

PITMAN, J.

In the original opinion, this Court affirmed the trial court's judgment granting motions for summary judgment in favor of Defendants, Rodney Arbuckle and Carol Arbuckle (land purchasers), Camterra Resources Partners, Inc., and Petrohawk Properties, L.P., and against Plaintiff, Claudia Franklin, and Intervener, George Franklin. This Court originally found that a deed of the surface rights signed by Plaintiff in Intervention, George Franklin as Trustee of the Franklin Educational Trust, coupled with a quitclaim deed signed by Franklin in his individual capacity, conveyed to the Arbuckles mineral interests he had previously reserved. The Franklins applied for rehearing, which was granted. Upon further consideration, we reverse and remand.

On appeal, summary judgments are reviewed *de novo*; thus, appellate courts ask the same questions the trial court does in determining whether summary judgment is appropriate, i.e. whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. Summary judgment is seldom appropriate for determinations based on subjective facts of motive, intent, good faith, knowledge or malice. *Jones v. Estate of Santiago*, 03-1424 (La. 4/14/04), 870 So. 2d 1002; *Hooker v. Wal-Mart Stores, Inc.*, 38,350 (La. App. 2d Cir. 4/07/04), 870 So. 2d 1131, *writ denied*, 04-1420 (La. 9/24/04), 882 So. 2d 1142. One reason is that these subjective facts call for credibility evaluations and the weighing of testimony. *Hooker, supra*; *Oaks v. Dupuy*, 32,070 (La. App. 2d Cir. 8/18/99), 740 So. 2d 263. Furthermore, the circumstantial evidence usually necessary for proof of motive or intent requires the trier of fact to choose

from competing inferences, a task not appropriate for a summary judgment ruling. *Hooker, supra*.

Courts are bound to give legal effect to all written contracts according to the true intent of the parties, and this intent is to be determined by the words of the contract when these are clear, explicit and lead to no absurd consequences. La. C.C. art. 2046. Although a contract is worded in general terms, it must be interpreted to cover only those things it appears the parties intended to include. La. C.C. art. 2051. A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract and of other contracts of a like nature between the same parties. La. C.C. art. 2053.

Parol or extrinsic evidence is generally inadmissible to vary the terms of a written contract unless the written expression of the common intention of the parties is ambiguous. A contract is considered ambiguous on the issue of intent, and parol evidence is admissible, when either it lacks a provision on that issue, the terms of the written contract are susceptible to more than one interpretation, there is uncertainty or ambiguity as to its provisions or the intent of the parties cannot be ascertained from the language employed. Whether a contract is ambiguous, for purposes of determining whether parol evidence is admissible, is a question of law. *Hendrick v. Patterson*, 47,668 (La. App. 2d Cir. 1/16/13), 109 So. 3d 475, *writ denied*, 13-0670 (La. 4/26/13), 112 So. 3d 849.

The Arbuckle Deed is ambiguous. Uncertainty or ambiguity results from the first page "subject to" language and the second page "quitclaim"

language of the deed. The former purports to be subject to the prior recorded mineral reservation, while the latter does not mention minerals or mineral reservations. As such, the clauses are mutually inconsistent, or, at the least, confusing.

According to the evidence present in the record, there was no discussion in negotiations between the parties about the conveyance of mineral rights, nor was any explanation given as to why Mr. Franklin was asked to execute the Arbuckle Deed in his individual capacity. However, the lack of negotiations about the mineral rights does not imply that they were to be conveyed. No one raised any question about Franklin's mineral ownership. In fact, the initial concern dealt only with whether the trust conveyance complied with Louisiana formality requirements after the Arbuckles' attorney reviewed only the first page of the deed.

The evidence shows that there was confusion with the quitclaim language regarding the effect of the Arbuckle Deed, which continued to exist as late as 2006, coincidentally, when there was an increased interest in minerals per the development of the Haynesville Shale. In 2006, the Arbuckles' attorney contacted Mr. Franklin to express Mr. Arbuckle's worries about the possible disruption of use of the surface property if Mr. Franklin leased the mineral rights. The implication of this communication was that, even at that time, the Arbuckles believed Mr. Franklin owned the mineral rights to the property.

Clearly, genuine issues of material fact remain regarding proof of motive or intent in the contract, which requires the trier of fact to choose

from competing inferences, and the genuine issues of material fact make this case inappropriate for summary judgment.

CONCLUSION

For the foregoing reasons, rehearing is granted in favor of Plaintiff, Claudia Simone Franklin, and Intervener, George S. Franklin, Jr., and against Defendants, Rodney and Carol Arbuckle, Camterra Resources Partners, Inc. and Petrohawk Properties, L.P. The judgment of the trial court is hereby reversed, and this matter is remanded to the trial court for further proceedings consistent with this opinion. Costs are assessed against Defendants, Rodney and Carol Arbuckle, Camterra Resources Partners, Inc. and Petrohawk Properties, L.P.

REVERSED AND REMANDED.

BROWN, CHIEF JUDGE, dissents on rehearing

On rehearing, the majority has with sleight of hand changed the dispositive analysis of this case from one of "cause or a vice of consent" to "ambiguity." They have also ignored the recent unanimous Louisiana Supreme Court's decision of *Peironnet v. Matador Resources Co.*, 12-2292 (La. 06/28/13), ___ So. 3d ___, 2013 WL 3752474.

The majority now states that "[t]he Arbuckle Deed is ambiguous" in that the two "clauses are mutually inconsistent, or, at least, confusing." In fact, the two clauses transferring property are clearly consistent and definitive. The Trust transferred what it owned to the Arbuckles. All the parties and their attorneys knew that Franklin had previously transferred the property to the Trust with a mineral reservation. The Trust did not own the minerals. Franklin as one of the two trustees signed the deed with the "subject to" language. Thereafter, the holder of the mineral reservation, Franklin, signed a second time in his personal capacity specifically transferring his mineral interest. There is nothing inconsistent or unclear about this.

The Arbuckle Deed was drafted to transfer ownership, including the minerals, to the Arbuckles for the purpose of building a home. The parties and their attorneys stated that they read the contents of the writing to which they all affixed their signatures. Neither Franklin nor his attorney questioned, sought any clarification or discussed the clear language that transferred his mineral rights. The Arbuckles built their home on the land and now, some seven years later with the discovery of the Haynesville

Shale, Franklin claims that he did not intend to transfer his mineral rights. The majority writes that Franklin's alleged intent to keep the minerals makes the deed ambiguous and confusing. This is fallacious reasoning. While Franklin's motive or cause may be questionable, the clarity of the deed is not.

I further note that before this action was lodged, the property was leased from the Arbuckles, and a producing well was drilled in the unit. Agents for Camterra and Petrohawk found the deed to be clear as to the ownership of the land and minerals. La. C.C. art. 3342 provides that "[A] party to a recorded instrument may not contradict the terms of the instrument or statements of fact it contains to the prejudice of a third person who after its recordation acquires an interest in or over the immovable to which the instrument relates." By finding the deed to be ambiguous, the majority has now prejudiced these oil and gas companies.

A transfer of immovable property must be made by authentic act or by act under private signature. La. C.C. art. 1839. A mineral right is an incorporeal immovable. La. R.S.31:18. When the law requires a contract to be in written form, the contract may not be proved by testimony or by presumption, unless the written instrument has been destroyed, lost, or stolen. La. C.C. art. 1832. Generally, parol (testimonial) evidence is not admissible to contradict, vary or modify a written instrument. Notwithstanding, while "[t]estimonial or other evidence may not be admitted to negate or vary the contents of [a writing], … in the interest of justice, that evidence may be admitted to prove such circumstances as a vice

of consent…." La. C.C. art. 1848; *Harnischfeger Sale Corp. v. Sternberg Co.*, 179 La. 317, 327, 154 So. 10, 13 (1934).

Consent may be vitiated by error, fraud, or duress. La. C.C. art. 1948. However, error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party. La. C.C. art. 1949.

A similar case out of this court was *Peironnet v. Matador Resources Co.,* 47,190 (La. App. 2d Cir. 08/01/12), 103 So. 3d 445. This case, written by Judge Stewart, was reversed by an unanimous supreme court. *See Peironnet v. Matador Resources Co.*, 12-2292 (La. 06/28/13), ___ So. 3d ___, 2013 WL 3752474.

Peironnet arose out of a one and one-half year extension of a three-year primary term oil and gas lease covering 1805.34 acres in the southern part of Caddo Parish. Plaintiffs sued the lessee, Matador Resources Company, to rescind or reform the extension agreement making it applicable only to 168.95 nonproducing acres. The supreme court concluded that plaintiffs were precluded by law from advancing their claim of unilateral error given their inexcusable failure to read and question the unambiguous extension agreements and that summary judgment on this issue was appropriate as a matter of law. The court reversed the judgment of the court of appeal, finding:

> In the present case, plaintiffs alleged their agent, Moore, was mistaken on the cause of the agreement—in essence he did not understand the Extension Agreement extended the entirety of the Lease—and the defendants knew or should have known of his misunderstanding. In response, defendants raised the defense of contractual negligence, demonstrating through

affidavits and documentary evidence: (1) the plaintiffs could show no excuse for failing to read and understand the clear terms of the Extension Agreement, which was written "in plain English, without technical language or terms of art," explicitly extending the primary term of the Lease from three to four and one-half years; (2) plaintiffs' agents, particularly Moore and Hand, were self-proclaimed experts in dealing with oil and gas matters, including oil and gas leases; and (3) the original lease between the parties was executed on Regions's own lease form and undisputably extended to all depths during the primary term.

Applying the modern civilian concept of inexcusable error as advanced in our contractual negligence defense to these undisputed facts, we find, as did the District Court, reasonable persons could not disagree the alleged error on the part of the plaintiffs' agents in this case was easily detectable and could have been rectified by a minimal amount of care, *i.e.*, by simply reading the document and/or by requesting simple changes to the written offer before acceptance. *See Scott*, 512 So. 2d at 362-63; *see also Tweedel v. Brasseaux*, 433 So. 2d 133, 137 (La.1983)("The presumption is that parties are aware of the contents of writings to which they have affixed their signatures ... The burden of proof is upon them to establish with reasonable certainty that they have been deceived…. If a party can read, it behooves him to examine an instrument before signing it; and if he cannot read, it behooves him to have the instrument read to him and listen attentatively whilst this is being done."). Moreover, it is undisputable the agents of the complaining party, Regions's petroleum landmen, were both "through education and experience in a position which renders [their] claim of error particularly difficult to rationalize, accept, or condone." *Scott*, 512 So. 2d at 362-63.

. . .

It follows, therefore, the plaintiffs' failure to question the extension, to seek clarification of the acreage covered, or to even discuss the Deep Rights demonstrates an inexcusable lack of "elementary prudence" or simple diligence that now precludes their rescission of the agreement.

In light of these undisputed facts, we find the plaintiffs were precluded by law from advancing a unilateral theory of error due to their own inexcusable error, and defendants were entitled to ***summary judgment as a matter of law.*** (Emphasis added).

Peironnet, No. 2012-C-2377, 2013 WL 3752474, at *18–20 (La. 06/28/13).

This is exactly the factual scenario in the case at hand. The language in the Arbuckle Deed transferred Franklin's mineral interest to the Arbuckles. Franklin had experience and knowledge concerning mineral rights, as he had reserved the minerals on a number of occasions, including when he transferred the property at issue to the Educational Trust. Franklin's attorney, through education and experience, was in a position to understand the effect of the language in the deed. As the supreme court did in *Peironnet, supra*, I find the claim now of error "particularly difficult to rationalize, accept, or condone."