STATE OF MICHIGAN

COURT OF APPEALS

E.V. ZIOBRON, W.T. ZIOBRON, and E.G. ZIOBRON,

Plaintiffs-Appellants,

v

MARVIN L. WILKIE and MARJORIE E. WILKIE,

Defendants-Appellees,

and

RICHARD H. FRUEHAUF, JR. and H.R.F. ANTRIM LTD PARTNERSHIP,

Defendants.

UNPUBLISHED
June 19, 1998

No. 195090
Otsego Circuit Court
LC No. 93-005750 CK

Before: O'Connell, P.J., and White and Bandstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court's judgment quieting title to oil, gas and mineral rights in favor of defendants Marvin and Marjorie Wilkie.[1] We reverse and remand for further proceedings.

On December 16, 1974, plaintiffs entered into a land contract with defendants pursuant to which defendants agreed to sell eighty acres of unimproved real estate to plaintiffs. In conjunction with that agreement, defendant furnished to plaintiffs a commitment for title insurance. After plaintiffs fulfilled their obligations under the land contract, a warranty deed was issued on May 19, 1988. At the time the parties entered into their land contract, the title policy listed reservations and exceptions regarding certain oil, gas and minerals in and under the subject real estate. However, neither the land contract nor the warranty deed contained any language reserving or excepting oil, gas and mineral rights.

The reservations and exceptions listed in the title insurance policy stem from a deed from Baywood Associates, Inc. (Baywood), which on October 16, 1972 conveyed the subject real estate by warranty deed to defendant Marvin Wilkie's corporation, Land O'Pines Development Corporation (Land O'Pines). This deed inadvertently reserved the oil, gas and minerals in and under the property, although the 1968 land contract between Baywood and Land O'Pines contained no such reservation. According to the record, Wilkie and Baywood both intended that the conveyance include the oil, gas and mineral rights. In September, 1974, Land O'Pines conveyed the property to Wilkie, but retained certain oil, gas and mineral rights. Land O'Pines also conveyed certain oil, gas and mineral rights to Pineland Gas and Oil, an assumed name used by Wilkie and Foeller, a business associate. Two months later, in December 1974, Wilkie entered into the land contract with plaintiffs. Thereafter, on January 31, 1985, Baywood conveyed to Land O'Pines by a correcting deed the oil, gas and minerals in and under the subject real estate. Land O'Pines was later dissolved, and one-half of the mineral rights were transferred to Wilkie. Defendants entered into various leases with respect to their reputed interest in the oil, gas and minerals.

Plaintiffs filed a complaint on August 20, 1993, for breach of contract and damages and to quiet title to the oil, gas and mineral rights at issue. Plaintiffs claimed that after the 1985 transfer, the oil, gas and mineral rights vested in plaintiffs under the doctrine of after-acquired title. Plaintiffs also argued that by entering into leases after 1985, defendants misrepresented their interest in the oil, gas and minerals and converted money due to plaintiffs. On September 27, 1993, defendants filed a counter-complaint to quiet title. Defendants argued that the failure to include an explicit reservation of oil, gas and mineral rights in the land contract and warranty deed was due to mutual mistake or unilateral mistake accompanied by fraud.

A one-day bench trial was held on August 24, 1995. At trial, the court admitted and considered parol evidence regarding whether the parties intended the sale of the land to include oil, gas and mineral rights. On October 19, 1995, the trial court issued its opinion and judgment. The court determined that there was no meeting of the minds regarding whether oil, gas and mineral rights were included in the sale, and that Wilkie did not intend to sell such rights. The court therefore entered judgment quieting title to the oil, gas and mineral rights in defendants' favor. The court was not persuaded that there was a mutual mistake and therefore declined to exercise the remedy of reformation. On appeal, plaintiffs argue that the court should have entered judgment in their favor because, *inter alia*, the unambiguous language in the land contract and warranty deed conveying the real estate contained no reservations for the oil, gas and mineral rights.

Plaintiffs' first argument on appeal is that the trial court erred by admitting and considering parol evidence regarding whether the parties intended oil, gas and mineral rights to be included in the sale because the contractual language was unambiguous. We disagree. We review this issue de novo, *SSC Assoc Ltd Partnership v Gen'l Retirement System of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995), and conclude that the trial court properly entertained testimony regarding the parties' discussions, understandings and intent in determining whether reformation of the parties' contract should take place.

If a contract is clear and unambiguous, parol evidence of prior or contemporaneous negotiations may not be admitted for the purpose of varying the terms of the contract. *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 544; 362 NW2d 823 (1984). In the present case, we agree with plaintiffs that, by the plain language of the agreements, the land contract and warranty deed are unambiguous. However, because reformation of the contract was an issue before the trial court, parol evidence was admissible not to vary the terms of the contract but to show an alleged mutual mistake and the true intention of the parties. See *Scott v Grow*, 301 Mich 226, 239; 3 NW2d 254 (1942). As our Supreme Court stated in *Clark v Johnson*, 214 Mich 577, 581-582; 183 NW 41 (1921):

> It is elementary that when, because of a mistake in fact, an instrument does not express the agreed intention of the parties, equity will correct such mistake unless the rights of third parties intervene. As applied to the allegations in plaintiffs' bill of complaint, the rule is thus stated in 34 Cyc. p. 910:
>
> "Wherever an instrument is drawn with the intention of carrying into execution an agreement previously made, but which by mistake of the draftsman or scrivener, either as to law or fact, does not fulfil the intention, but violates it, there is ground to correct the mistake by reforming the instrument."
>
> Whether or not such a mistake was made is a subject of inquiry open to parol testimony. [*Id.* (citation omitted).]

See also *Scott*, *supra* at 239; Corbin on Contracts, § 540, p 89 (1960 ed.).[2] In the present case, defendants claimed that the failure to include an explicit reservation of oil, gas and mineral rights in the land contract and warranty deed resulted from mutual or unilateral mistake. As such, the trial court properly admitted parol evidence to determine whether such a mistake was made.

We conclude, however, that the trial court erred in concluding that there was no meeting of the minds regarding whether the oil, gas and mineral rights were included in the sale, and because there was no meeting of the minds, the rights were not part of the sale. We can find no authority to support this proposition. If there was no "meeting of the minds," it does not follow that judgment should be entered in favor of defendants where the contract and deed contain no reservation. Although the court stated that it would deny reformation, the court nevertheless effectively reformed the contract and deed by concluding that the documents reserved rights that were not reserved by their terms.

The court acknowledged that Wilkie and Ziobron gave differing accounts of the conversations surrounding the sale. Wilkie testified that the mineral rights were discussed and that Ziobron was informed that the rights were not being sold. Ziobron testified that the rights were discussed and Wilkie agreed to sell them and to correct the problems with the deeds. The court stated:

> The unequivocal contradictory testimony between [the parties] is at the core of this dispute. Both witnesses were persuasive to the point that this court declines to choose between their testimony. Rather, the Court finds that while the parties may think otherwise, there was in fact no meeting of the minds as to whether oil, gas and mineral

> rights were to be included in the sale. Certainly the Court finds Marvin L. Wilkie had no intent to sell Plaintiffs the oil, gas and mineral rights.

The trial court found support for its conclusion in Wilkie's testimony that he did not intend to sell the rights, and in the circumstances that the land contract and deed do not mention the rights and Wilkie did not own the rights at the time he sold the property to plaintiffs. While these circumstances lend support for Wilkie's version of the events, and together with other evidence in the case could have supported a conclusion that neither party believed that the oil, gas and mineral rights were intended to be included in the sale, and that therefore the deed should be reformed, the circumstances relied on cannot justify reforming the unambiguous contract and deed without the crucial finding regarding Ziobron's understanding and intent.

Reformation is appropriate if a mutual mistake has been made by the parties, and if "the evidence of the mistake and mutuality thereof" is "so clear as to establish the fact beyond cavil." *Lyons v Chafey,* 219 Mich 493; 189 NW 86 (1922). In the present case, defendants claimed that the land contract should be reformed because of the alleged mutual mistake of omitting the appropriate reservation provisions from the contract, or the mistake of defendants in this regard, and the fraud of plaintiffs in connection therewith. The trial court, however, did not find that mutual mistake had taken place. Absent such a finding, reformation would not be appropriate.

Nonetheless, while the trial court appears to have refused reformation, we agree with plaintiffs that the end result, i.e. the court's determination that the "sale of oil, gas and mineral rights was not part of this sale," did effectively reform the land contract and warranty deed. In order to give effect to the lower court's determination, it is necessary to amend the warranty deed to include a reservation of the oil, gas and mineral rights.

Furthermore, we agree with plaintiffs that the court erred in failing to hold that title to the oil, gas and mineral rights vested in plaintiffs under the doctrines of estoppel by deed and after-acquired title. Because the unambiguous land contract and warranty deed convey defendants' interest in the oil, gas and mineral rights, defendants are estopped from claiming ownership of such rights. The doctrine of estoppel by deed generally precludes a grantor of real property from asserting, as against the grantee, any right or title in derogation of the deed. See 6A Powell, The Law of Real Property (1982) ¶ 927, pp 84-112. As the Texas Supreme Court noted in *Duhig v Peavy-Moore Lumber Co,* 144 SW2d 878, 880; 135 Tex 503 (1940):

> It is a general rule, supported by many authorities, that a deed purporting to convey a fee simple or a lesser definite estate in land and containing covenants of general warranty of title or of ownership will operate to estop the grantor from asserting an after-acquired title or interest in the land, or the estate which the deed purports to convey, as against the grantee and those claiming under him. [*Id.* (quoting Am Jur, Vol 19, § 16, p 614).]

Consequently, when a grantor conveys, by warranty deed, a fee simple interest in the subject property without excepting oil, gas and mineral rights, he thereby warrants title to and conveys the oil, gas and mineral rights to the grantee. *Sibert v Kubas,* 357 NW2d 495, 496 (ND 1984).

The rationale for this result is explained in 1 H. Williams and C. Meyers, Oil and Gas Law, § 311, p 580.10 (1983) (quoted in *Sibert, supra* 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. The 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 . . . ."

In the present case, the land contract and warranty deed purport to convey the oil, gas and mineral rights associated with the subject property.[3] Therefore, under the doctrine of estoppel by deed, plaintiffs are entitled to all of defendants' interest in the oil, gas and mineral rights.[4]

Our conclusion is not altered by the fact that defendants did not own the oil, gas and mineral rights at the time they entered into the land contract with plaintiffs. Where a grantor purports to convey property by warranty deed, "the doctrine of estoppel permits the grantee to have the benefit of such titles as the grantor may subsequently acquire." *Klever v Klever,* 333 Mich 179, 192; 52 NW2d 653 (1952). See also *Campbell v Butler,* 770 P2d 7, 11 (Okla 1989). The vesting of title in the grantee passes by operation of law without court intervention. See *Wood v Sympson,* 833 P2d 1239, 1943 (Okla 1992); *Schwenn, supra* at 952. In any case, even though defendants did not own the oil, gas and mineral rights at the time the land contract was entered into, defendants did own an undivided one-half interest in the rights at the time the warranty deed was issued. This interest passed with title to the surface property upon issuance of the deed.

We are also guided by the analysis of the Colorado Supreme Court in *O'Brien v Village Land Co,* 794 P2d 246 (Colo 1990). In *O'Brien,* the court considered an "unambiguous deed which conveyed a fee simple interest in a sixty-acre parcel of land and reserved an undivided one-half interest in oil, gas, and other minerals . . ." *Id.* at 246-247. Although an additional fractional mineral interest was reserved by the grantor's predecessor in title, the court held that "where . . . a deed is unambiguous on its face, the nature and extent of the interests conveyed by the deed must be determined from the contents of the deed itself without regard to extrinsic evidence." *Id.* at 247. See also *Schwenn v Kaye,* 155 Cal App 3d 949, 953; 202 Cal Rptr 374 (1984).

We also dismiss as irrelevant defendants' assertion that the reservation in the title policy and commitment placed plaintiffs on notice that defendants did not own the oil, gas and mineral rights or that defendants intended to retain ownership of such rights. Once again, we find support for our conclusion in Williams and Meyers, Oil and Gas Law, *supra* at 580.18-580.20:

> Actual and constructive notice do not bar suits for breach of warranty by a grantee nor do they bar the grantee's acquisition of the after-acquired title by estoppel by deed. There is no adequate reason for them to bar enforcement in the grantee's favor of a deed as written. The contest between grantor and grantee should be resolved by the language of the deed between them. Only one meaning can be drawn from the deed standing alone: the grantee is to receive that percentage or fractional interest in the land not reserved to the grantor, since the deed purports to deal with 100% of the minerals. If both grant and reservation cannot be given effect, the reservation must fail. The risk of title loss is on the grantor. [*Id.* (footnotes omitted).]

See also *Scarmardo v Potter*, 613 SW2d 756, 759 (Tex 1981) (noting that the estoppel by deed doctrine "emanates from the scope of the warranty clause and therefore the knowledge of the grantee is immaterial"); *Schwenn, supra* at 953 (finding that the fact that the defendant had constructive notice of a prior transfer "is of no consequence since the doctrine of after-acquired title applies even if the grantee had knowledge of the deficiency"). The warranty deed in the present case clearly and unambiguously purported to transfer to plaintiffs all of defendants' interest in the subject property. As such, defendants are estopped from claiming ownership of the oil, gas or mineral rights.

A title policy simply provides assurance as to the state of the title, and the title company's insurance against loss or damage subject to the exclusions noted. A reference to the title commitment or policy in the land contract or warranty deed does not change the terms of the land contract or warranty deed. The reference means only that the buyer understands and accepts the state of the record title. A buyer is free to accept a land contract promising to convey, or a warranty deed purporting to convey, an interest in land that a title search shows was reserved by the seller's grantor. Such a buyer, who is willing to risk the possibility that the title defect will never be remedied and forego a title insurance company's commitment, relying instead on the seller's representation that the reservation was in error and will be rectified, has nevertheless received a contract promising to convey and a deed purporting to convey the reserved interest. If the interest is later conveyed to the seller, that interest passes to the buyer in accordance with the earlier agreement and conveyance.

Plaintiffs' next argument is that the trial court erred by failing to construe the land contract and warranty deed against defendants because Mr. Wilkie, a licensed real estate broker, drafted the documents. Although an ambiguity in a contract must be construed against its drafter, *Stark v Kent Products, Inc*, 62 Mich App 546, 547-548; 233 NW2d 643 (1975), we have concluded that the contract was not ambiguous and plaintiffs have conceded as much on appeal. Therefore, the contract must be construed according to its plain sense and meaning. *Stark, supra* at 548. Since there are no ambiguities to construe against the drafter, plaintiffs' argument is without merit.

Plaintiffs also argue that defendants are bound by a purported admission of defendants' attorney. Plaintiffs assert that defendants' attorney admitted in correspondence before trial that the oil, gas and mineral rights vested in plaintiffs according to the chain of record title, on its face, and the doctrine of after acquired title.[5] Whether defendants are bound by their attorney's admission is a question of law which is reviewed de novo on appeal. *SSC Assoc Ltd Partnership, supra* at 452.

A statement constitutes a judicial admission only if it is "a statement made by a party or his attorney during the course of trial, and is a distinct, formal, solemn admission which is made for the express purpose of dispensing with formal proof of that particular fact at a trial." *Michigan Health Care, Inc v Flagg Industries, Inc*, 67 Mich App 125, 129; 240 NW2d 295 (1976). Here, plaintiffs have presented no argument indicating that these requirements were met. This issue is therefore waived. *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995).[6] In any event, our review of the record does not suggest that the statement was made for the purpose of dispensing with formal proof of ownership of the oil, gas and mineral rights. Furthermore, the statement may be read as a conclusion of law rather than a statement of fact. An admission by an attorney on a point of law is not binding on a court. *Michigan Health Care, supra* at 130.

Plaintiffs' final argument is that the trial court improperly considered parol evidence and made inconsistent findings of fact. Plaintiffs specifically argue that the court made "contradictory rulings that the Defendants did not own and, therefore, could not transfer mineral rights but where the Defendant testified that he intended to reserve mineral rights." As noted above, the trial court's decision to admit parol evidence was proper. This conclusion is not altered by plaintiffs' allegation that the court made inconsistent findings of fact based on the evidence. In any case, since we believe that reversal is in order, we decline to further consider this issue.

In sum, we conclude that the court erred in ruling that because Wilkie did not intend to convey the oil, gas and mineral rights the rights were reserved notwithstanding the unambiguous terms of the land contract and deed. The trial court, in effect, reformed the contract and deed, which was not proper absent a finding of mutual mistake or unilateral mistake accompanied by fraud. Absent reformation, the land contract failed to reserve the oil, gas and mineral rights, and the deed conveyed the rights owned by defendants in 1988 when the deed was executed, and any rights they obtain in the future.

We conclude, however, that the case should be remanded for further fact-finding. The trial judge clearly found that Wilkie did not intend to convey the oil, gas and mineral rights. The court "declin[ed] to choose" between the parties' versions of their discussions leading to the land contract, instead finding that there was no meeting of the minds. It is unclear what the court's ruling on the credibility issue would have been had the court been required to address the issue in order to decide the case;[7] nor is it clear whether the court's final finding stating that it is not persuaded that any mutual mistake occurred is dependent upon the court's earlier analysis finding that there was no meeting of the minds. We therefore remand for further findings and conclusions. If the court concludes that Ziobron understood that the oil, gas and mineral rights were to be reserved and excepted from the sale, the contract and deed should be reformed. If the court does not so find, title to the rights must be quieted in plaintiffs and the issue of damages must be addressed.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Richard A. Bandstra

[1] The Ziobrons' claim was originally initiated against the Wilkies, H.R.F. Antrim Limited Partnership and H. Richard Fruehauf, Jr., but the latter parties were later dismissed by the Ziobrons pursuant to an order of dismissal dated January 3, 1994.

[2] Corbin notes that in some cases, words may have been transcribed incorrectly or omitted altogether. Evidence of such a mistake is relevant to the "reformation" process; in this process, "the 'parol evidence rule' plays no part," and "[t]he parties are permitted to contradict the writing by this kind of relevant testimony." [*Id.*]

[3] Plaintiffs received the warranty deed after title to the oil, gas and mineral rights had vested in defendants. Thus, the doctrine of "after-acquired" title appears to be not as relevant as the more general concept of "equitable estoppel."

[4] Our review of the record indicates, however, that defendants only own an undivided one-half interest in the rights. Therefore, since defendants' interest in insufficient to make plaintiffs whole, plaintiffs may have a cause of action in damages for breach of warranty for an additional undivided one-half of the oil, gas and mineral interest. See *Scarmardo, supra* at 759.

[5] Prior to trial, defendants' attorney sent plaintiffs a letter which stated, "I certainly am aware that the chain of record title, on it's [sic] face, coupled with the doctrine of after-acquired title, would indicate that title to the oil, gas and minerals is vested in the Ziobrons."

[6] Plaintiffs also argue that defendants should be bound by certain admissions made by defendants themselves. Because this issue was not included in the statement of questions presented, appellate review is inappropriate. *Marx v Dep't of Commerce*, 220 Mich App 66, 81; 558 NW2d 460 (1996). Also, plaintiffs have abandoned this issue by failing to cite any authority in support of their position. *Terzano v Wayne County*, 216 Mich App 522, 533; 549 NW2d 606 (1996).

[7] We recognize that at a later point, in denying defendant's motion for costs after trial, the court said, inter alia: "Somebody was wrong or lying at trial and the Court does not know who - - either party could have avoided this lawsuit by including express language regarding oil, gas and mineral rights in the land contract, but they failed to do so." Notwithstanding this statement, we are persuaded that it is appropriate to remand because the statement was made in the context of denying a motion for costs after the court had already expressly declined to decide the credibility issue. If on remand the court is still unable to decide the credibility issue one way or the other, plaintiffs must prevail, since defendant bears the burden of establishing a right to reformation.