THE ARKANSAS COURT OF APPEALS HOLDS THAT THE LANGUAGE "SUBJECT TO" IN A WARRANTY DEED CAN INDICATE A RESERVATION IF IT IS THE GRANTOR'S INTENT

The Arkansas Court of Appeals, in *Barger v. Ferrucci*,[1] held that the language "subject to 'reservation of *all* oil, gas and other minerals'" in a warranty deed can indicate a valid reservation if it is the grantor's intention.[2] Ultimately, the court concluded that there are no precise words that must be used in order to create a reservation, but rather, it is the intention of the parties that controls.[3]

This case involved a "dispute over mineral interests between the appellants Billy W. Barger, Patricia Barger, Robert E. Jones, Jr., and Dana Barger and appellee Lena Ferrucci."[4] Appellee and her former husband conveyed property to appellants' predecessor in interest, Burkhead Dairy, Inc.[5] The warranty deed from this conveyance was standard with the exception of language immediately following the legal description: "[s]ubject to reservation of all oil, gas and other minerals."[6] Due to prior mineral reservations in earlier deeds, appellee did not own all of the minerals.[7] Based on this fact, appellants argued that the disputed language was merely an exception to the warranties in the deed and not a valid mineral reservation in the grantor, the appellee.[8] The appellee argued that the warranty deed conveyed to Burkhead Dairy, Inc., did not include any mineral rights and "that none of the successors in title after her received any oil, gas, or mineral rights in the property."[9] Each party sought to quiet title to the mineral rights in the conveyed property.[10]

The White County Circuit Court "entered an order in favor of appellee, finding that the deed did not convey any mineral rights to Burkhead Dairy, Inc." and that the "subject to" clause was a valid reservation of mineral interests.[11] The court concluded that it was the intention of the parties that the

1. 2011 Ark. App. 105, 2011 WL 514662.
2. *Barger*, 2011 Ark. App. 105 at 6, 2011 WL 514662 at *3.
3. *Id*., 2011 WL 514662, at *3.
4. *Id*. at 1, 2011 WL 514662, at *1.
5. *Id*., 2011 WL 514662, at *1.
6. *Id*. at 2, 2011 WL 514662, at *1.
7. *Id*., 2011 WL 514662, at *1.
8. *Barger*, 2011 Ark. App. at 2, 2011 WL 514662, at *1.
9. *Id*. at 2, 2011 WL 514662, at *1.
10. *Id*., 2011 WL 514662, at *1.
11. *Id*. at 3, 2011 WL 514662, at *1.

appellee would retain mineral rights.[12] On appeal, the appellants argued that the language clearly did not reserve any mineral interests in the appellee.[13]

The Arkansas Court of Appeals disagreed.[14] First, the court applied several rules for interpreting the construction of a deed.[15] The court gave primary consideration to the intent of the grantor and this intent was gathered from examining the four corners of the deed.[16] In addition, this intent is gathered from the whole context of the agreement, not one particular clause.[17] The court will not apply rules of construction if the deed is clear and unambiguous.[18]

The appellants first argued that the deed should be construed against appellee as grantor, but the court rejected this argument because it determined that the deed was clear and unambiguous.[19] The appellants then argued that the phrase "subject to" was a term of limitation and only protected the grantor against a claim for breach of warranty and did not create any affirmative rights.[20] In support of this contention, the appellants cited case law from Texas and Mississippi which the court did not find persuasive.[21] The court distinguished these cases from the case at hand because the cited case law dealt with "subject to" language that referred to a separate document specifically mentioned in the deeds in question.[22] Fundamentally, however, none of the cited case law explicitly stood for the proposition that the words "subject to" can never create a reservation in favor of a grantor.[23] Thus, after examining the four corners of the deed, the court determined that the deed and its "subject to" language could create an affirmative right.[24]

The importance of this case is that it stands for the proposition that a reservation of mineral interests can be maintained without precise words.[25] The "subject to" language did not refer to a prior limitation or any other specific document, exception, or reservation.[26] The court determined that the

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12. *Id*., 2011 WL 514662, at *1.
13. *Id*., 2011 WL 514662, at *1.
14. *Barger*, 2011 Ark. App. at 2, 2011 WL 514662, at *1.
15. *Id*. at 4, 2011 WL 514662, at *2.
16. *Id*., 2011 WL 514662, at *2 (citing Harrison v. Loyd, 87 Ark. App. 356, 365, 192 S.W.3d 257, 263 (2004)).
17. *Id*., 2011 WL 514662, at *2 (citing Gibson v. Pickett, 256 Ark. 1035, 1040, 512 S.W.2d 532, 535-36 (1974)).
18. *Id*., 2011 WL 514662, at *2 (citing *Harrison*, 87 Ark. App. at 365, 192 S.W.3d at 263).
19. *Id*., 2011 WL 514662, at *2.
20. *Barger*, 2011 Ark. App. at 5, 2011 WL 514662, at *2.
21. *Id*., 2011 WL 514662, at *2.
22. *Id*., 2011 WL 514662, at *2.
23. *Id*., 2011 WL 514662, at *2.
24. *Id*. at 6, 2011 WL 514662, at *3.
25. *Id*., 2011 WL 514662, at *3.
26. *Barger*, 2011 Ark. App. at 6, 2011 WL 514662, at *3.

"subject to" language was intended to reserve all of the mineral rights in the grantor, the appellee.[27] The court reaffirmed the notion that the intent of the parties controls any interpretation of a warranty deed and held that the "subject to" language can constitute a valid reservation.[28] If a deed in question refers to any outside document, however, the "subject to" language might not be sufficient to illustrate a valid reservation. Therefore, the writer of the deed should make certain that the grantor's intention is clearly shown.[29]

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27. *Id*., 2011 WL 514662, at *3.
28. *Id*. at 7, 2011 WL 514662, at *3.
29. *See Id*. at 5-6, 2011 WL 514662, at *3.