

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

GEM Razorback, LLC,  Plaintiff/Appellant,  vs.  Zenergy, Inc.,  Defendant/Appellee.	SUPREME COURT NO. 2016170  Civil No. 27-2015-cv-00129
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ON APPEAL FROM JUDGMENT GRANTING  
DEFENDANT'S MOTION TO DISMISS  
MAY 4, 2016  
STATE OF NORTH DAKOTA  
COUNTY OF MCKENZIE

REPLY BRIEF OF PLAINTIFF/APPELLANT

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## LAW AND ARGUMENT

### **I. Zenergy mischaracterizes the facts and relief GEM Razorback seeks as GEM Razorback did not request the district court determine whether the costs in the Berquist and Ceynar wells were actual and reasonable**

[¶ 1] Zenergy mischaracterizes the facts and GEM Razorback's request for relief. GEM Razorback did not ask the district court to determine whether the costs for drilling the Berquist and Ceynar wells were actual and reasonable. In its request for declaratory relief, GEM Razorback asked the district court to determine its rights under statute, specifically:

Pursuant to Chapter 32-23, N.D.C.C., including N.D.C.C. §§ 32-23-01 and 32-23-02, Plaintiff requests a declaration by the Court that, as a nonparticipating owner in the Berquist and Ceynar wells, they have a statutory right under Chapter 38-08, N.D.C.C., to the information for the Berquist and Ceynar wells that they have requested from the Defendant, and that the Defendant is required to provide this information to the Plaintiff.

See Complaint at ¶ 20 (ROA #2). Nowhere in the Complaint, or anywhere else in the pleadings, did GEM Razorback ask the district court to determine the actual reasonable costs of the wells. Zenergy further mischaracterizes the record when contending GEM Razorback requested "thirty-nine different items." As noted by the district court, GEM Razorback pared down its request to "six or seven" sets of documents, which Zenergy initially agreed to provide. See Transcript of September 11, 2015 hearing at 2 – 4.<sup>1</sup>

[¶ 2] It was not possible for GEM Razorback to ask the district court to determine if Zenergy was assessing unreasonable costs and risk penalties because Zenergy refused to account for what it assessed GEM Razorback for its share of costs and risk penalties in the wells. Zenergy admits when it operated the wells, GEM Razorback was "assessed

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<sup>1</sup> GEM Razorback's Appendix consists of 38 pages. These pages are included in GEM Razorback's Supplemental Appendix, labeled App. 39 – 41.

costs and risk penalty amounts in proportion to its nonconsenting ownership interest in the wells.” Zenergy Response Brief at ¶ 10. In the very next paragraph, Zenergy sums up GEM Razorback’s point, stating, “the associated risk penalty imposed” is unclear from the record. Id. at ¶ 11. The costs and risk penalties Zenergy assessed are unclear because Zenergy will not account to GEM Razorback, and provide the supporting information, showing what GEM Razorback was assessed for its interests in the wells.

[¶ 3] GEM Razorback asked the district court to declare that, under Chpt. 38-08, N.D.C.C., it was entitled to the information for the wells so it could decide whether to petition the Industrial Commission alleging Zenergy charged unreasonable costs in the wells. The distinction between requesting an accounting from Zenergy so GEM Razorback could complete its audit, versus petitioning the Industrial Commission to determine the reasonable actual costs, was recognized by the Industrial Commission in its Orders in Case Nos. 22615 and 22616. See Supp. App. 23 – 26.

[¶ 4] In the cases before the Industrial Commission, GEM Razorback “[f]iled an application for a Commission order to determine the reasonable actual costs for the drilling and completion of the” Berquist and Ceynar wells. See Supp. App. 23 at ¶ 2 and Supp. App. 25 at ¶ 2. GEM Razorback’s petition to the Industrial Commission is at Supp. App. 5 – 14 (Case No. 22615) and Supp. App. 15 – 24 (Case No. 22616). The Industrial Commission found, in relevant part, that:

GEM intends to perform an audit of costs associated with the drilling and completion of the Berquist #33-28H well and requests that this case be dismissed without prejudice. In the event of any dispute as to such costs, GEM intends to file an application for the Commission to determine the proper costs.

See Supp. App. 24 at ¶ 4. The Order for the Ceynar well made the same finding. See Supp. App. 26 at ¶ 4. The Industrial Commission left the “audit of costs associated with

the drilling and completion” of the wells to GEM Razorback. Id. If the Industrial Commission was tasked with auditing the wells, as Zenergy contends, the Industrial Commission would have ordered the operator to produce the information requested by GEM Razorback to the Industrial Commission. The Industrial Commission did not order the operator of the wells, Oasis Petroleum North America, LLC, to produce the information requested by GEM Razorback to the Industrial Commission.

[¶ 5] While the Industrial Commission is empowered to “summon witnesses, to administer oaths, and to require the production of records, books, and documents for examination at any hearing or investigation conducted by it,” see N.D.C.C. § 38-08-12(1), the Industrial Commission does not audit wells for mineral owners. There is nothing in Chapter 38-08, N.D.C.C., delegating the task of auditing wells, or accounting for what an operator assessed an owner for its share of costs and risk penalties, to the Industrial Commission. The Industrial Commission’s role, in the event of a dispute as to costs, is determining the proper costs. See N.D.C.C. § 38-08-08(2) (stating, “In the event of any dispute as to such costs, the commission shall determine the proper costs.”) GEM Razorback cannot dispute the costs and risk penalties assessed by Zenergy for the Berquist and Ceynar were unreasonable wells when it does not know what those costs and risk penalties were because Zenergy refused to provide that information.

[¶ 6] The Industrial Commission left it to GEM Razorback to request the information from the operator in order to account for what was assessed in costs and risk penalties for the wells. Oasis provided the information. See (ROA #27). After Oasis provided the information, GEM Razorback requested Zenergy account for what it assessed in costs

and risk penalties, which would allow GEM Razorback to complete its audit and determine if further proceedings before the Industrial Commission were necessary.

As a result of our [Industrial Commission] hearing, Oasis agreed to allow GEM Razorback to conduct an audit of the Berquist and Ceynar wells. That audit is being conducted by GEM Razorback's petroleum accounting expert, Mr. Bob Malone of Malone Petroleum Consulting in Houston. ... However, to effectively audit these wells, it is critical that GEM Razorback's accounting expert be allowed to review certain documents in Zenergy's possession. ... GEM Razorback has a right to these records as an owner in the Berquist and Ceynar wells. As an owner that has paid their share of costs plus risk penalty per statute, GEM Razorback is entitled to review the documents listed in Schedule "A".

(ROA #3). Had Zenergy accounted for the costs and risk penalties it assessed for the wells, thus allowing GEM Razorback to complete its audit, then, in the event of a dispute as to costs, GEM Razorback could have renewed its application for the Industrial Commission to determine if those costs were proper. See Supp. App. 24 at ¶ 4 and Supp. App. 26 at ¶ 6. GEM Razorback cannot complete its audit because Zenergy refuses to account for what it assessed in costs and risk penalties.

[¶ 7] Zenergy contends that GEM Razorback has no right to know what Zenergy assessed GEM Razorback for its share of costs and risk penalties in the wells. "No such right to production of documents and information as requested by GEM Razorback is provided in Chapter 38-08 against Zenergy as a former well operator. *See generally* N.D.C.C. ch. 38-08." (ROA #14 at ¶ 13). Whether North Dakota law, Chpt. 38-08, N.D.C.C., gives GEM Razorback the right to the information it requested for the wells is a question of law for the Court, not the Industrial Commission, reviewed de novo on appeal. "However, interpretation of a statute is a question of law, and this Court reviews questions of law de novo." Olson v. Job Service North Dakota, 2013 ND 24, ¶ 3, 827 N.W.2d 36. See also Garaas v. Cass County Joint Water Resource Dist., 2016 ND 148,

¶ 7, 2016 WL 4273483. Thus, the interpretation of Chpt. 38-08, N.D.C.C., is a question of law fully reviewable by the Court. “Statutory interpretation is a question of law subject to full review on appeal.” GO Committee ex rel. Hale v. City of Minot, 2005 ND 136, ¶ 9, 701 N.W.2d 865. See also Medcenter One, Inc. v. North Dakota State Bd. Of Pharmacy, 1997 ND 54, ¶ 13, 561 N.W.2d 634 (stating, “The interpretation of a statute is a question of law that is fully reviewable by a court.”)

[¶ 8] GEM Razorback was not required to exhaust its administrative remedies because the construction of a statute is a question of law, which does not require the Industrial Commission’s expertise or any agency fact finding. Cf. Hansen v. Hunt Oil Company, 2014 WL 11531330, \*6 (D.N.D. May 14, 2014) (holding the Industrial Commission was required to exercise its expertise and engage in complex fact finding to resolve the plaintiffs’ claims they were entitled to royalties corresponding to the value of gas flared by Hunt Oil Company). Such facts, like those in Hansen v. Hunt Oil Co., are not present here. There is no requirement for exhaustion of administrative remedies where the construction of a statute is involved because that question presents a “[p]ure legal question customarily decided by courts.” Medcenter One at ¶ 12.

[¶ 9] A request for declaratory relief made under Chpt. 32-23, N.D.C.C., is remedial in nature and must be liberally construed. “The declaratory judgment act, NDCC Ch. 32-23, is remedial and is to be liberally construed to settle uncertainty concerning rights, statuses, and other legal relations. NDCC 32-23-12; *In Interest of McMullen*, 470 N.W.2d 196 (N.D. 1991).” Medcenter One at ¶ 9. GEM Razorback requested declaratory relief asking the court to determine whether North Dakota law gives it a right to, and required Zenergy to account for, the information requested for the wells. See Complaint (ROA #2



at ¶¶ 15 – 16, 17 – 20). The district court had jurisdiction over GEM Razorback’s request for declaratory relief, which involved a question of statutory interpretation under N.D.C.C. § 32-23-02. The Industrial Commission cannot decide whether Chpt. 38-08, N.D.C.C., gives GEM Razorback the right to the accounting and well information requested from Zenergy.

[¶ 10] The cases cited by Zenergy for the proposition that declaratory relief is inappropriate, including Brown v. State Bd. Of Higher Educ., 2006 ND 60, 711 N.W.2d 194 (involving a grievance between a student and university where the student’s doctoral degree was revoked); Richland Cnty. Water Res. Bd. v. Pribbernow, 442 N.W.2d 916 (N.D. 1989) (holding the district court’s opinion was an advisory opinion), and Tracy v. Cent. Cass. Pub. Sch. Dist., 1998 ND 12, 575 N.W.2d 781 (holding teacher failed to first bring his claim involving the termination of his teaching certificate to the Education Standards and Practices Board), are distinguishable. None of the cases Zenergy cites address the interpretation of a statute and whether a party is entitled to certain information, as a matter of law, as GEM Razorback claims.

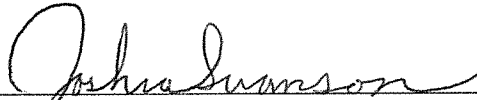
[¶ 11] Zenergy contends there is no specific reference to GEM Razorback’s right to an accounting and for information in Chpt. 38-08, N.D.C.C. In addition to those provisions in Chpt. 38-08, N.D.C.C., cited by GEM Razorback in its brief to the Court, see GEM Razorback Brief at ¶¶ 30 – 40, the Court has held that rights and duties between parties can be found in a statute even if not specifically delineated. For example, in Kortum v. Johnson, 2008 ND 154, 755 N.W.2d 432, the Court held that while there was “[n]ot a particular statutory section delineating the fiduciary duties closely held corporation shareholders owe one another,” the shareholders still owed one another “[a] duty to ‘act

in an honest, fair, and reasonable manner in the operation of the corporation.”” Kortum at ¶ 26. Like Kortum, while there may not be a statutory section delineating the specific information Zenergy is required to provide an owner like GEM Razorback, the statutory purpose and language throughout Chpt. 38-08, N.D.C.C. provides that Zenergy must account for the costs and risk penalty assessed to GEM Razorback so that GEM Razorback can protect its interests. See GEM Razorback Brief at ¶¶ 39 – 40.

Submitted this 25<sup>th</sup> day of August, 2016.

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## **CERTIFICATE OF COMPLIANCE**

The undersigned, as attorneys for the Plaintiff/Appellant in the above matter, and as the author of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 1,999.

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**CERTIFICATE OF SERVICE VIA EMAIL**

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I hereby certify that on August 25, 2016, the following documents:

**REPLY BRIEF OF PLAINTIFF/APPELLANT AND  
SUPPLEMENTAL APPENDIX OF PLAINTIFF/APPELLANT**

were filed electronically with the Supreme Court Clerk and served via e-mail to the following:

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