ORIGINAL

20080129

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

James H. Bragg and J. Michael Gleason,	)	Supreme Court No. 20080129
	)	Bowman County No. 05C-73
Appellees,	)	
Vs.	)	
Burlington Resources Oil and Gas Company LP,	)	
Appellant.	)	

PETITION FOR REHEARING

Appeal from April 10, 2008 Judgment
The Honorable Zane Anderson
Bowman County District Court
Southwest Judicial District

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Burlington Resources Oil and Gas Company LP ("Burlington"), appellant in this appeal, respectfully petitions the Court for rehearing pursuant to Rule 40 of the North Dakota Rules of Appellate Procedure. Specifically, Burlington submits that the opinion of the Court[1] overlooks or misapprehends the substance and nature of the settlement between James Bragg ("Bragg"), J. Michael Gleason ("Gleason") and Continental Resources, Inc. ("Continental") in the litigation between those parties. Additionally, Burlington submits that if the Court determines that a factual issue exists regarding the intended effect of that settlement, Continental is a necessary and indispensable party to this action.[2]

1. Majority Opinion.

The opinion of the Court determines that (1) at the time Continental reconveyed its interest in the "White Lease" to Burlington in January 2001, Continental had filed a notice of lis pendens, so Burlington took an interest in the "White Lease" subject to the outcome of the lawsuit, including settlement; (2) Continental, Bragg, and Gleason settled the lawsuit, and Burlington is bound by the terms of the settlement: and (3) per the settlement, Continental conveyed its interest in the "White Lease" to Bragg, so Burlington received nothing.

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[1] The decision in this matter is unusual in that the opinion of the court is only joined by two justices, with a third justice specially concurring and two justices dissenting.

[2] Burlington acknowledges that the concurring opinion does not constitute the opinion of the Court. Given that the concurring opinion was necessary to arrive at a majority opinion, however, it is appropriate to address the issues raised in the concurring opinion.

Burlington disagrees that the lis pendens statute requires that Burlington be bound by the terms of a settlement not incorporated into the record of the prior action. However, even assuming, *arguendo*, that the settlement is binding on Burlington, such a conclusion does not mean that Burlington is subject to something other than what the parties to the settlement intended. In this instance, the undisputed facts do not support the conclusion that the settlement resulted in Burlington being divested of its interests. The effect of the settlement between Bragg, Gleason, and Continental – like any other agreement – is determined by the intent of the parties. The Court has overlooked or misapprehended two key and related facts in this case, which, in turn, has resulted in the Court misconstruing the intent of Bragg, Gleason, and Continental regarding their settlement.

First, contrary to the Court's statement in paragraphs 2 and 18 of its opinion, the prior action between Bragg, Gleason, and Continental was not to determine the validity of competing interests in "the White Lease," but to determine which lease covering the Whites' mineral interests was superior: the lease between Diamond Resources and the Whites, which was conveyed to Continental ("White/Diamond Lease"); or the two leases between Bragg and the Whites, a portion of which had been conveyed to Gleason ("White/Bragg Leases"). App. 4-5, 16-17, 110-121. Thus, the superiority of competing leases, as opposed to competing claims to a single lease, was at issue in the prior action between Bragg/Gleason and Continental.

Second, contrary to the Court's statement in paragraph 2 of its opinion, the settlement did not result in Continental conveying a single "White Lease" to Bragg via

quit claim deed. In reality, Continental quit claimed "all right, title, and interest, if any, that Continental may now own in and to the following described oil and gas *leases*," and the leases referenced in the quit claim deed were the White/Diamond Lease and the two White/Bragg Leases. App. 134 (emphasis added). Although Continental never claimed an interest in the White/Bragg Leases, nor did Bragg and Gleason allege at any point in the prior action that Continental had made such a claim, the quit claim deed conveyed Continental's "interest" in those two leases to Bragg. App. 4-18, 110-121, 134.

To understand the importance of these two facts in determining the intended effect of the settlement, they must be viewed in light of the record of the prior proceeding: Continental had already assigned its interests in the White/Diamond Lease to Burlington in 2001; a partial summary judgment, holding that the White/Diamond Lease was valid and superior to the White/Bragg Leases, and quieting title to the leasehold in Continental, had been issued in 2003; the partial summary judgment, adverse to Bragg and Gleason, confirmed Continental's right to convey its interests in the White/Diamond Lease to Burlington; Bragg/Gleason and Continental negotiated a settlement after the issuance of the partial summary judgment, which included, among other things, the exchange of cash and a quit claim deed to Bragg from Continental; Bragg understood that Continental had transferred its interests in the White/Diamond Lease to Burlington at the time of settlement; and Bragg understood the effect of a quit claim deed, i.e., that it only conveyed the interests held by Continental at the time the quit claim deed was executed, which was none. App. 075-076, 110-121, 133-134, 151-156.

When placed in context, the fact that there were competing leases at issue, and that Continental conveyed its "interest" in the White/Diamond Lease and the White/Bragg Leases, lead to three key conclusions regarding the intended effect of the settlement. First, since Continental never claimed an interest in the White/Bragg Leases, Continental's quit claim of its "interest" in the White/Bragg Leases to Bragg conveyed nothing to Bragg. Furthermore, not only did Bragg receive nothing, he knew he was receiving nothing.

Second, the fact that Bragg willingly accepted a quit claim deed for the White/Bragg Leases – when he knew he was not getting anything from Continental because Continental had no interest in those leases – is directly contrary to the trial court's conclusion that the only reasonable interpretation of the settlement was that the quit claim from Continental conveyed the "White Lease" [actually, the White/Diamond Lease] to Bragg because "[i]t defies logic and seems inconceivable that Bragg and Gleason would accept a quit claim deed from Continental as part of a settlement and know they were receiving nothing." App. 237. While this Court's opinion does not expressly address this determination, its conclusion that something in the stipulated judgment of dismissal or the quit claim of any interest Continental had in the "White Lease" at the time of making the quit claim assignment gives Bragg and Gleason a superior claim to the interest constitutes an implicit or tacit approval of the determination.

Third, the fact that the record shows Bragg accepted a quit claim deed covering leases not at issue in the lawsuit (i.e., the White/Bragg Leases) demonstrates that it is not beyond reason to conclude that the quit claim of the White/Diamond Lease as part of the

settlement was likewise not intended to convey anything. Bragg knew that Continental had conveyed its interest in the White/Diamond Lease to Burlington, prior to the issuance of the partial summary judgment. App. 075-076. The trial court's order for partial summary judgment, which held that the White/Diamond Lease was superior to the White/Bragg Leases, confirmed Continental's right to convey the White/Diamond Lease to Burlington. App. 110-121. Thus, when Bragg and Gleason entered into settlement negotiations with Continental, Bragg knew not only that Continental did not have an interest in the White/Bragg Leases, but that Continental no longer had an interest in the White/Diamond Lease. App. 075-076. Moreover, while Bragg did not receive anything from the quit claim deed other than assurances that Continental did not have any interest in any of the White leases, Bragg testified that he did receive a portion of the $325,000 paid by Continental to Gleason. App. 076.

When the missing facts are included in the analysis, the undisputed facts lead to the conclusion that parties did not intend for the quit claim deed to divest Burlington of its interests in the White/Diamond Lease. "Courts agree that a quitclaim deed, unless a contrary intent appears, passes all the right, title and interest which the grantor has at the time of making the deed, which is capable of being transferred by deed, and nothing more." 23 Am. Jur. 2d Deeds §276. Thus, not only does the recipient of a quit claim deed receive only the interest held by the grantor at the time the quit claim deed is executed, but the intent of the grantor when executing a quit claim deed must be taken into consideration when determining what interests were conveyed. Here, the fact that Continental quit claimed interests in the White/Bragg Leases, which it did not own or

claim to own, coupled with the status lawsuit at the time the quit claim deed was executed and the other terms of the settlement agreement, demonstrate that the quit claim deed was not intended to convey the White/Diamond Lease to Bragg, nor was it intended to recognize the White/Bragg Leases as somehow superior to the White/Diamond Lease.

This conclusion is not contrary to the underlying legal basis for the Court's conclusions in paragraph 20 of its opinion:

> We conclude Burlington is bound by the settlement in the prior action, which is referenced in the stipulation for dismissal of that action, and Burlington took its interest in the White Lease subject to the outcome of that litigation, including the settlement. We therefore conclude the district court did not err in deciding Burlington's interest in the White Lease was subject to the lis pendens.

Accepting all of these statements as true, however, still leaves one key question before the Court: what was the intended effect of the settlement entered into by Bragg, Gleason, and Continental? Given the undisputed facts, it is this question that the trial court failed to answer correctly. Burlington, as a lis pendens purchaser, is subject to the final determination of the litigation between Bragg, Gleason, and Continental and, thus, the Court has concluded that Burlington is subject to the terms of the settlement. As the undisputed facts demonstrate, Bragg, Gleason, and Continental did not intend for the quit claim deed to convey any interest in the White/Diamond Lease to Bragg. As such, the settlement did not divest Burlington of its interests in the White/Diamond Lease, and this case should be reversed and remanded to the trial court with instructions to enter summary judgment in favor of Burlington.

Finally, if the Court does not conclude that the undisputed facts lead to the conclusion that all parties knew and understood that the quit claim deed did not convey any interest in the White/Diamond Lease to Bragg, then, at the very least, a factual issue exists regarding the intended effect of the settlement. One certainly cannot contend, as did the trial court, that "[i]t defies logic and seems inconceivable" that Bragg would have accepted a quit claim deed that did not convey anything when Bragg undisputedly accepted a quit claim of interests in the White/Bragg Leases, which Bragg and Gleason not only knew Continental did not own and did not claim to own, but never alleged otherwise. If a factual issue regarding the intention of the parties to the settlement exists, then the case should be reversed and remanded to the trial court so the parties' intent can be determined.

2. Concurring Opinion.

The concurring opinion concludes that Continental was a party in whose absence complete relief cannot be accorded among those already parties and that the failure to join Continental as a party can reasonably be interpreted as an election to forego the right. While this opinion is not an opinion of the Court, it does form the basis for the concurrence in the majority opinion and is therefore critical to the outcome of the action.

If Continental is, in fact, a party without whom complete relief cannot be granted, the litigants cannot by consent, either passive or express, dispense with adding a necessary party. Rebel v. Nodak Mutual Insurance Co., 585 N.W.2d 811 (N.D. 1998); McIntyre v. State Board of Higher Education, 3 N.W.2d 463 (N.D. 1942). Burlington asserts that the undisputed facts demonstrate that Bragg, Gleason, and Continental did not

intend for the quit claim deed to convey the White/Diamond Lease to Bragg, nor did they agree that the White/Bragg Leases are superior to the White/Diamond Lease. If the Court determines that the intended effect of the settlement between Bragg, Gleason, and Continental is not clear, however, then Continental would, in fact, be an indispensible party under Rule 19. Continental would have an interest in the subject matter of the lawsuit that may be impaired by the outcome of the litigation, i.e., its obligations under the settlement. Rule 19(a)(2)(i). In addition, as the concurring opinion illustrates, Continental would be at substantial risk of inconsistent obligations, i.e., obligations under a settlement agreement that in no way divests Burlington of the White/Diamond Lease, and obligations to Burlington under an indemnity provision based on the determination in this litigation that Bragg, as opposed to Burlington, owns the White/Diamond Lease. Rule 19(a)(2)(ii). For these reasons, if the Court remands based on a determination that a factual issue exists regarding the intent of Bragg, Gleason, and Continental to the settlement in the prior action, Continental should be made a party to this lawsuit.

When placed in the context of the facts set forth above, a decision in this case that Bragg and Gleason are not entitled to any relief fulfills the strong public policy of North Dakota encouraging settlement of disputes and discouraging litigation. The majority opinion does the opposite. It will result in the potential for significant additional litigation between Burlington and Continental on Burlington's indemnification claim, as well as litigation between Continental and Bragg and Gleason on issues relating to the settlement – even though Bragg and Gleason and Continental intended to fully resolve and settle all issues including issues relating to the White minerals.

CONCLUSION

Assuming, *arguendo*, that Burlington is subject to the settlement between Continental, Bragg and Gleason, Burlington is only subject to the settlement entered into by the parties. The Court's opinion continues the trial court's error in assuming, despite the uncontested evidence in the record to the contrary, that Continental agreed to convey, and Bragg and Gleason expected to receive, more than "the right, title and interest, if any, that Continental may now own" in the White/Diamond Lease on July 7, 2004. At the very least, a factual issue exists regarding the intent of the parties regarding the effect of the settlement, and, if that is the case, Continental is an indispensible party to this action.

Burlington respectfully requests that the Court reconsider its action, request such additional briefing or argument as it may deem advisable, and reverse the decision of the trial court.

Respectfully submitted this 16th day of April, 2009.

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By _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was on the 16th day of April, 2009, mailed to the following:

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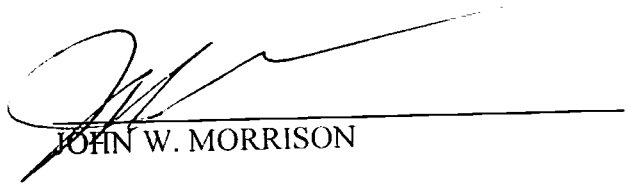

JOHN W. MORRISON