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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Michael Sorenson, Plaintiff/Appellant, vs. Ken Alinder; Ken Alinder, Personal Representative of the Estate of Russell Alinder; Ken Alinder, Personal Representative of the Estate of Edna Alinder; Sharon Dragland; and Robert Alinder, Defendants/Appellees.	)	Supreme Court No. 20100254

APPEAL FROM JUDGMENT DATED JULY 28, 2010, IN THE DISTRICT COURT OF MOUNTRAIL COUNTY, STATE OF NORTH DAKOTA, THE HONORABLE WILLIAM W. McLEES, PRESIDING

BRIEF OF APPELLEES

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I. MICHAEL SORENSON'S "AUTOMATIC EXTINGUISHMENT" ARGUMENT SHOULD BE IGNORED BECAUSE IT IS BASED ON INDIANA LAW WHICH IS DIRECTLY CONTRARY TO NORTH DAKOTA LAW

[¶1] Michael Sorenson ("Sorenson") spends much time arguing that the Alinders' mineral interest was automatically and irreversibly extinguished when Sorenson published his notice of lapse on January 17, 2007. *Brief of Appellant*, ¶¶ 23-34. The sole basis for this argument is Sorenson's contention that he was not required to comply with the full notice requirements of N.D.C.C. § 38-18.1-06 (2001) because the Alinders' did not own more than one mineral interest in Mountrail County. Sorenson supports this contention with references to *Indiana* law and a United States Supreme Court decision interpreting *Indiana* law. Id. However, *North Dakota* law is clear that in the absence of strict compliance with all of the notice requirements of N.D.C.C. § 38-18.1, a claim to unused minerals does not effectuate a forfeiture in favor of the surface owner, regardless of how many mineral interests the owner may own. Spring Creek Ranch, LLC v. Svenberg, 1999 ND 113, ¶¶ 10-11, 595 N.W.2d 323.

[¶2] In urging the Court to depart from established law, Sorenson relies heavily upon the United States Supreme Court's decision in Texaco, Inc. v. Short, 454 U.S. 516 (1982) which upheld the validity of an Indiana abandoned minerals statute. Sorenson's brief contains numerous snippets taken from Texaco, Inc. which, in a vacuum, would support his position. *Brief of Appellant,* ¶¶ 28-34. However, Sorenson fails to grasp the differences between the statute at issue in Texaco, Inc. and the provisions of N.D.C.C. § 38-18.1 that were in effect at the time of his claim.

[¶3] The pertinent provisions from the Indiana statute can be summarized as follows:

(1) Unused minerals automatically vest in the surface owner upon the expiration of a 20 year period of nonuse. The triggering event is the passage of time and no action is required of the surface owner. Ind. Code § 32-5-11-1 (1976).

(2) After the passage of a 20 year period of nonuse, a mineral interest may only be preserved if the owner files a statement of claim within 60 days of the publication of notice (*see* subpart 3 below) or within 60 days of receiving actual notice of the expiration of the 20 year period. Furthermore, the statement of claim is only effective if the owner owns ten or more mineral interests in the pertinent county, had made diligent efforts to preserve all of his or her mineral interests by filing a statement of claim within ten years of the lapse and failed to preserve the interest in question through inadvertence (i.e. an omitted legal description in a prior statement of claim). Ind. Code § 32-5-11-5(1976).

(3) No notice is required to be given to the mineral interest owner. However, the surface owner may elect to publish notice which triggers the running of the 60 day period described in subpart 2 above. Ind. Code § 32-5-11-6 (1976).

[¶4] While the Indiana statute may have served as a basis for the North Dakota statute, it is important to note that the North Dakota legislature revised the statute in two ways which offer dramatically more protection to the mineral owner. First, the legislature required notice to be given in *every* case. N.D.C.C. § 38-18.1-02 (1989). Second, the legislature did away with the Indiana statute's strict limitations on a mineral interest owner's ability to preserve his or her interest after the lapse. N.D.C.C. § 38-18.1-05 (1989). Instead of allowing the mineral owner to file a statement of claim only where he or she owns 10 or more mineral interests and had inadvertently omitted the interest in question from a prior statement of claim, the North Dakota legislature allowed any mineral owner to preserve his or her interest by filing a statement of claim within 60 days of the required publication. Id.

[¶5] Sorenson's assertion that North Dakota law draws a distinction between an owner of one mineral interest and an owner of multiple mineral interests is incredible and ignores the plain language of the statute. N.D.C.C. § 38-18.1-05 (1989) provides that:

> Failure to record the statement of claim within the time period provided in Section 38-18.1-04 will not cause a mineral interest to be extinguished if the owner of the mineral interest meets all of the following requirements:
>
> 1. Owns one or more mineral interests in the county in which the mineral interest in question is located at the time of the expiration of the time period provided in Section 38-18.1-04.
> 2. Has failed to preserve the mineral interest in question.
> 3. Within sixty days after first publication of the notice provided for in section 38-18.1-06, recorded a statement of claim.

The first requirement of N.D.C.C. § 38-18.1-05 (1989) is met by any individual who owns a mineral interest in a given county as such individual necessarily "owns one or more mineral interests" in the county. To reach Sorenson's conclusion, one must add language into the statute which the legislature did not see fit to include and had specifically rejected. Particularly, the statute would have to be modified to read: "[o]wns **more than one** mineral interests in the county in which the mineral interest in question is located at the time of the expiration of the time provided in Section 38-18.1-04". This construction should be rejected as it ignores the plain, ordinary and commonly understood meaning of the language contained within N.D.C.C. § 38-18.1-05 and is contrary to North Dakota law. See Pyratel v. T.E., 2007 ND 166, ¶ 7, 740 N.W.2d 100; N.D.C.C. §§ 1-02-02, 1-02-03.

[¶6] Sorenson's references to Indiana law and a case interpreting Indiana law are not instructive. The Alinders were entitled to the full notice required by N.D.C.C. § 38-18.1-06 (2001).

II. N.D.C.C. 38-18.1-06 (2001) REQUIRED SORENSON TO CONDUCT A REASONABLE INQUIRY INTO THE PRESENT WHEREABOUTS OF THE ALINDERS

[¶7] Despite actually conducting a search for the Alinders (which was determined to be insufficient by the trial court), Sorenson contends that he was not required to do so and that the notice requirements of N.D.C.C. § 38-18.1-06 (2001) are fulfilled simply by mailing notice to the owner of record at the owner's address of record. *Brief of Appellant*, ¶ 35; *App.* 29, ¶ 6, *Stipulated Facts*. This contention is based upon an incorrect reading of N.D.C.C. § 38-18.1-06 (2001) which provides, in pertinent part, as follows:

> 1. Any person intending to succeed to the ownership of a mineral interest upon its lapse shall give notice of the lapse of the mineral interest by publication.
>
> 2. The publication provided for in subsection 1 must be made once each week for three weeks in the official county newspaper of the county in which the mineral interest is located; however, if the address of the mineral interest owner is shown of record or can be determined upon reasonable inquiry, notice must also be made by mailing a copy of the notice to the owner of the mineral interest within ten days after the last publication is made.

A. Sorenson's erroneous construction of the term "owner"

[¶8] Sorenson first errs in construing the term "owner" to mean "owner of record title". This Court's decision in Spring Creek Ranch, LLC 1999 ND 113 at ¶ 10 requires that the term "owner" be strictly construed. Black's Law Dictionary (8th Ed. 2004)

defines strict construction as "an interpretation that considers only the literal words of a writing…" or "a construction that considers words narrowly…". When strictly construed, "owner" means "owner", not "owner of record title".

[¶9] North Dakota law is clear that upon death, an individual's property devolves to his devisees subject only to administration by the personal representative. N.D.C.C. § 30.1-12-01. Title to real property passes immediately upon the testator's death, not upon distribution of the estate. Feickert v. Frounfelter, 468 N.W.2d 131, 132 (N.D. 1991). Russell Alinder died on March 9, 1980. *App.* 30, ¶ 9, *Stipulated Facts*. Russell Alinder's Will left all of his real property to his wife, Edna Alinder. Id. Edna Alinder died on November 28, 1999 and her Will left all of her real property to her three children, the Alinders. Id. at ¶ 10. As such, the Alinders were the owners of the mineral interest at issue at the time of Sorenson's claim and Sorenson was under an affirmative duty to provide them notice with his claim. N.D.C.C. § 30.1-12-01; § 38-18.1-06 (2001).

[¶10] Sorenson's contention that Jensen v. Schwartz, 90 N.W.2d 716 (N.D. 1958) stands for the proposition that he was not required to search for the Alinders, even though they were the owners of the mineral interest in question at the time of his claim, is incorrect. The issue in Jensen v. Schwartz was the sufficiency of service of process in a quiet title action. 90 N.W.2d at 720. In Jensen, the appellant contended that a quiet title judgment entered in 1945 was void for lack of jurisdiction because the pertinent affidavit for publication was insufficient as "no diligence was shown by the affiant in his attempt to find whether Jens J. Jensen was dead, and if so, who his heirs were". Id. In addressing this argument, the Court stated the following and moved on:

> There is a showing of inquiries made. The statute, however, does not require such diligence to be shown in the affidavit. To require diligence in searching 'for persons unknown' and whose interests are unknown would be a useless and unfruitful act and one which the law does not contemplate. Bartell v. Morken, N.D., 65 N.W.2d 270, 276; 46 A.L.R.2d 1364.

Id. When taken out of context, the above statement could potentially stand for Sorenson's proposition; however, the true meaning of this statement is revealed by a reading of the cited case, Bartell v. Morken, 65 N.W.2d 270 (N.D. 1954).

[¶11] In Bartell, the issue was also the validity of a prior quiet title judgment. 65 N.W.2d at 273. One of the appellant's contentions was that the judgment was void for lack of jurisdiction because the affidavit for publication did not contain a statement of one of the four grounds for service by publication contained within NDRC 1943 § 28-0620. Id. at 275, 276. The Alinders note that one of these grounds was:

> When personal service cannot be made upon such defendant in this state to the best knowledge, information, and belief of the person making the affidavit mentioned in Section 28-0621, and such affidavit is accompanied by the return of the sheriff of the county in which the action is brought stating that after diligent inquiry for the purpose of serving such summons he is unable to make personal service thereof upon such defendant.

NDRC 1943 § 28-0620(4).

In addressing the appellant's argument, the Court held:

> A careful reading of these grounds discloses that none of them apply to unknown persons defendant. Section 32-1707 sets forth the grounds for service by publication on unknown persons defendant. The affidavit in question meets the requirements of this section and as to such persons it is sufficient in form.
>
> We also point out in answer to a further objection by the plaintiff as to the validity of these proceedings that there is no requirement as to unknown parties defendant that the sheriff make a return stating that after diligent inquiry for the purpose of serving the summons he is unable to make personal service upon such defendants. The absurdity of such a return is

> apparent. **To require the sheriff to make a return in a civil action showing that he has made diligent search and inquiry for persons unknown and whose interests are unknown would be a completely idle and unfruitful act and one which the law does not contemplate**.

Bartell, 65 N.W.2d at 276 (emphasis added). Thus, it is clear that Jensen v. Schwartz stands only for the proposition that an affidavit for publication does not require a statement indicating that a diligent inquiry was made into the whereabouts of the unknown defendants. See Bickel v. Jackson, 530 N.W.2d, 318, 320 (N.D. 1995) (recognizing the limited holding of Bartell and rejecting the plaintiff's claim that Bartell allowed one to ignore the diligence required where service is to be made by publication).

B. Sorenson's erroneous construction of the conjunction "or"

[¶12] N.D.C.C. § 38-18.1-06(2) (2001) requires that notice be mailed to the mineral owner "if the address of the mineral interest owner is shown of record or can bedetermined upon reasonable inquiry". Sorenson erroneously construes this statutory language to mean that no reasonable inquiry into the present whereabouts of a mineral owner is required when there is an address of record. *Brief of Appellant*, ¶ 38. Sorenson argues that requiring a reasonable inquiry in every circumstance would render the "if the address of the mineral interest owner is shown of record" language superfluous. Id. This is simply incorrect. When common sense is applied, the meaning of this language is clear and no portions are superfluous. The surface owner has an obligation to conduct a reasonable inquiry into the whereabouts of the mineral owner. N.D.C.C. § 38-18.1-06(2) (2001). If the reasonable inquiry does not turn up the present whereabouts of the mineral owner, the surface owner need only mail the notice to the mineral owner's last address of record. Id.

[¶13] Furthermore, Sorenson's construction of N.D.C.C. § 38-18.1-06(2) (2001) is contrary to fundamental fairness and the approval of his proposed construction would amount to the approval of fraud. Statutes should be construed to avoid unreasonable or absurd consequences. State ex rel. Workforce Safety, and Ins. v. Altru Health Sys., 2007 ND 38, ¶ 15, 729 N.W.2d 113. Likewise, it is presumed that a just and reasonable result is intended by the legislature. N.D.C.C. § 1-02-38(3).

[¶14] When carried to its logical conclusion, Sorenson's construction of N.D.C.C. § 38-18.1-06(2) (2001) would allow a surface owner, with actual knowledge of the present identity and whereabouts of a mineral interest owner, to succeed to that individual's mineral interest simply by publishing notice and mailing the requisite notice to the last address of record, regardless of whether the mineral interest owner currently resides at that address. This construction is clearly unjust and should not be adopted by this Court. Both North Dakota law and common sense dictate that when a surface owner has actual knowledge or can conduct a reasonable inquiry to obtain actual knowledge of the present identity and whereabouts of a mineral interest owner, the surface owner must send notice to the mineral interest owner at his or her actual address, not the last address of record. See Spring Creek Ranch, LLC, 1999 ND 113 at ¶ 18. Sorenson did not avoid the reasonable inquiry component of N.D.C.C. § 38-18.1-06(2) (2001) by causing his agent to mail a copy of the notice of lapse to Russell Alinder and Edna Alinder at their last address of record.

III. THE TRIAL COURT'S REFERENCE TO TOD MALECKAR'S TESTIMONY IN ITS JUNE 25, 2010 OPINION WAS APPROPRIATE

[¶15] Sorenson's last contention is that the trial court erred by applying an "expert standard" in determining whether Sorenson's inquiry into the whereabouts of the Alinders was sufficient to satisfy N.D.C.C. § 38-18.1-06(2) (2001). *Brief of Appellant*, ¶ 45. Simply put, Sorenson has conjured this argument out of thin air. Nowhere in the trial court's June 25, 2010 Opinion of the Court or the resulting Judgment is there any reference to the standard the trial court applied in evaluating Sorenson's actions. *App.* 38-73, *Opinion of the Court*; *App.* 74-75, *Judgment*. Nor is there any reference to the weight given to Mr. Maleckar's testimony. Id.

[¶16] Contrary to Sorenson's contentions, it does not appear that this Court adopted or rejected any particular criteria for evaluating whether a surface owner conducted a reasonable inquiry under N.D.C.C. § 38-18.1-06(2) (2001). Spring Creek Ranch, LLC, 1999 ND 113 at ¶ 13, n.1. Instead, it appears that the Court deferred to rule on the issue at the time. Id. The Court did, however, describe the notice component contained within N.D.C.C. § 38-18.1-06(2) (2001) as follows:

> Service of the notice of lapse under N.D.C.C. § 38-18.1-06(2) is similar to the personal service requirement under N.D.R.Civ.P. 4(e)(2)(A). N.D.C.C. § 38-18.1-06(2) mandates a copy of the notice of lapse must be mailed to the owner of the mineral interest within ten days after the last publication is made if the mineral owner's address is "shown of record or can be determined upon reasonable inquiry." N.D.R.Civ.P. 4(e)(2)(A) states before service of summons by publication is authorized, the plaintiff must file an affidavit in the clerk of court's office stating that "after diligent inquiry personal service of the summons cannot be made upon the defendant in this state to the best knowledge, information, and belief of the affiant." N.D.C.C. § 38-18.1-06(2) and N.D.R.Civ.P. 4(e)(2)(A) require a person using publication to conduct an inquiry that is "reasonable" or "diligent" under the circumstances.

Spring Creek Ranch, LLC, 1999 ND 113 at ¶ 18. Generally, where notice is required to be given, the "means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it". Mullane vs. Central Hanover Bank & Trust Co., et al., 339 U.S. 306, 315 (1950). A mere gesture is insufficient. Id.

[¶17] Mr. Maleckar is a professional landman and makes his living by taking leases from mineral interest owners. *Trial Tr.* 16. Thus, Mr. Maleckar is an individual who is truly desirous of finding absent mineral interest owners. To the extent the trial court relied upon Mr. Maleckar's testimony, it was perfectly appropriate to do so.

IV. CONCLUSION

[¶18] The Alinders acknowledge that mineral development has become extremely important to North Dakota. The Alinders also acknowledge that N.D.C.C. § 38-18.1 was intended, at least in part, to foster mineral development. However, that does not mean that N.D.C.C. § 38-18.1 should be given an unreasonable interpretation. The sponsor of N.D.C.C. § 38-18.1 explained that the "intent with this bill was not to take anything away from anyone". Hearing on H.B. 1084 Before the House Natural Resources Comm., 48th Legis. Sess. (Jan. 21, 1983) (testimony of Rep. Jack Murphy, sponsor of the bill). Rather, the intent of the legislation was to allow a surface owner recovery of minerals only where the "owners cannot be found". H.B. 1344 Before the House Natural Resources Comm., 59th Legis. Sess. (Feb. 3, 2005) (testimony of Rep. Shirley Meyer). Had Sorenson performed a reasonable inquiry, the Alinders would have been found. See *Trial Tr.* 18. Sorenson's arguments as to why he was not required to

give the Alinders the notice that they were due are contrary to the intent of the legislature, common sense and fundamental fairness. Sorenson's argument that the trial court's reliance on Mr. Maleckar's testimony, if any, is misplaced and is also contrary to North Dakota law. The Judgment of the trial court should be affirmed.

DATED this 22nd day of October, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on October 22nd, 2010, I electronically filed the **Brief of Appellees** with the Clerk of the Supreme Court by e-mailing a true and correct copy to supclerkofcourt@ndcourts.com**.** Also on this same date, I served a copy of this document upon the following counsel of record for Plaintiff/Appellant, by the means designated below:

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