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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

REPLY BRIEF OF APPELLANT

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LAW AND ARGUMENT

I. Introduction

[¶ 1] Neither the Alinders nor their successors recorded anything in Mountrail County in over 50 years to preserve their single mineral interest, despite lots of time and a very simple statutory mechanism to preserve their interest of record. The Alinder children seek to escape their lack of diligence by arguing that North Dakota's abandoned mineral statute excuses it. The Alinder children's arguments, however, are based on an erroneous construction of this statute.

II. The Alinders' mineral interest was extinguished on January 17, 2007, and they owned no mineral interest in the County on that date.

[¶ 2] The Alinders had no other mineral interest in Mountrail County (aside from the interest that was abandoned), and they owned **no** mineral interest on January 17, 2007, the date of the first publication of the lapse of their mineral interest. For their first argument, the Alinders argue they owned a mineral interest on January 17, 2007–they argue they "owned" the "abandoned" mineral interest. This argument, however, ignores principles of statutory construction, and it also ignores the meaning of the word "abandoned." If a person abandons property, it means such person no longer has ownership of the abandoned property. *See Barnes v. Hulet*, 159 N.W. 25, 29 (N.D. 1916); BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "abandoned property").

[¶ 3] The Alinders' single mineral interest was abandoned and extinguished on the date of the first publication, January 17, 2007. The text of section 38-18.1-02 of the North Dakota Century Code will be repeated to emphasize that point:

> Any mineral interest is, if unused for a period of twenty years immediately preceding the first publication of the notice required by section 38-18.1-06, **deemed to be abandoned, unless a statement of claim is recorded in accordance with section 38-18.1-04.** Title to the abandoned mineral interest vests in the owner or owners of the surface estate in the land in or under which the mineral interest is located **on the date of abandonment**.

N.D.C.C. § 38-18.1-02 (2005) (emphasis added). Accordingly, Michael Sorenson owned the mineral interests on January 17, 2007; the Alinders did not own **any** interest because the interest they previously owned was deemed abandoned on January 17, 2007.

[¶ 4] If, however, the Alinders owned **any other** interest on January 17, 2007, they would have had the ability to file a statement of claim within 60 days after January 17, 2007:

> 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 <u>at the time of the expiration</u> 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.

N.D.C.C. § 38-18.1-05 (emphasis added and double emphasis added). As explained above, the Alinders owned **no** mineral interest at "the time of the expiration of the time period provided in section 38-18.1-04," which time is the date of the first publication of the notice of lapse, January 17, 2007. *See* N.D.C.C. § 38-18.1-04.

[¶ 5] Not only does the Alinders' reading of the abandoned mineral statute ignore the meaning of the word "abandoned," it also ignores statutory construction principles. This Court presumes that every word and phrase in a statute is pregnant with

meaning. *Estate of Elken*, 2007 ND 107, ¶ 7, 735 N.W.2d 842 ("We construe statutes to give effect to all of their provisions, so that no part of the statute is rendered inoperative or superfluous."). The Alinders' argument seeks to render N.D.C.C. § 38-18.1-05(1) meaningless and superfluous. Under the Alinders' argument, there is no purpose or meaning to this subsection and it could be completely written out of the statute to achieve the same effect sought by the Alinders. The rules of statutory construction and the plain meaning of the word "abandoned" do not allow this result. The district court's decision should be reversed because the Alinders owned no other mineral interest on January 17, 2007, and the interest vested in Sorenson on that date.

III. The Alinder children were not entitled to notice under N.D.C.C. § 38-18.1-06.

[¶ 6] The Alinder children first argue, although they never took the simple step of updating the records in Mountrail County to provide notice of their asserted interest, that they were nevertheless entitled to notice their parents' mineral interest had lapsed. In doing so, they claim they were "owners" entitled to notice. They also contend that although Russell and Edna Alinders' address appeared of record, Sorenson should have made a "reasonable inquiry" to find the Alinder children, even though their interest never appeared of record. The Alinder children misconstrue the meaning of the word "owner," and they also misconstrue the abandoned mineral statute.

A. The plain meaning of the word "owner" means the owner of record.

[¶ 7] The Alinder children argue they are "owners" because of the concept that "title" to real property devolves upon death. The Alinder children concede by their argument they were not the mineral owners of record; prior to the notice of lapse, Russell Alinder and Edna Alinder were the owners of record. The Alinder children's argument that "non-record title" equates to "owner" does not square with the plain meaning of the

word "owner." Moreover, the Alinder children have cited no case equating a person holding "non-record title" as the "owner." Indeed, the very purpose of the statute is to solve the problem of persons that have not kept their record title current.

[¶ 8] The rules of statutory construction have been explained by this Court as follows:

> In interpreting a statute, we first look to the language of the statute. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless specifically defined in the code. Statutes are construed as a whole and are harmonized to give meaning to related provisions.

Ward v. Bullis, 2008 ND 80, ¶ 18, 748 N.W.2d 397 (internal citations omitted). The term "owner" is not specifically defined in the abandoned mineral statute. However, in analyzing a condemnation statute requiring notice to "owners," this Court assumed the term to be property owners "**of record**." *See Cass County Joint Water Resource Dist. v. 1.43 Acres of Land in Highland Tp.*, 2002 ND 83, ¶ 11, 643 N.W.2d 685 ("Thus, to comport with due process, **property owners of record** must be given notice and an opportunity to be heard in the condemnation action." (*citing* N.D.C.C. § 32-15-18(2) (condemnation complaint must include "[t]he names of all **owners** and claimants of the property, if known, ... who must be styled defendants") (emphasis added).

[¶ 9] Under the plain meaning of the word "owner," the Alinder children, who both had abandoned their mineral interests and who were not mineral owners of record, were not "owners." They were, therefore, not entitled to notice under N.D.C.C. § 38-18.1-06.

B. A "reasonable inquiry" is not required if an owner's address is shown of record.

[¶ 10] The Alinder children argue that a "reasonable inquiry" is needed in every case to find the person or persons who might have "title" to the lapsed mineral interest, even if the public records already disclose the record owner's address. In other words, the Alinder children would like the statute to read that notice should be sent to the "last reasonably ascertainable address" of the person who actually has "title," and, therefore, "[i]f 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." (Appellees' Brief at ¶ 12.)

[¶ 11] There are at least two problems with this argument. First, the statute does not provide that the notice should be sent to the "last reasonably ascertainable address." As was explained in Appellant's Brief, and was not addressed in the Alinder children's Brief, if the Legislature had meant that a "reasonable" inquiry was required in every instance of providing notice, it certainly knew how to say as much. *See, e.g.,* N.D.C.C. § 26.1-01-04 ("The commissioner immediately shall forward one copy by registered mail to the person against whom the process, notice, order or demand is directed at that person's last **reasonably ascertainable address**[.]"). The fact that the Legislature knew how to impose a reasonable inquiry into every notice provision, but did not do so here, only reinforces the conclusion that Sorenson was not required to **also** conduct a reasonable inquiry. *Hennum v. City of Medina*, 402 N.W.2d 327, 332 (N.D. 1987) (determining that when the Legislature knows how to achieve a particular result as evidenced by its language in legislation in other areas, but does not use such language in

the contested provision, enforces a conclusion that the legislature did not mean to achieve the result in the contested provision).

[¶ 12] The second problem with the argument of the Alinder children is that the statute does not require a surface owner to look for persons who hold non-record "title" to the mineral interest. Rather, it calls for notice to the "owner." As explained above, the Alinder children are not "owners" under the plain meaning of that term.

[¶ 13] Moreover, *Jensen v. Schwartz,* 90 N.W.2d 716, 720 (N.D. 1958), supports the conclusion that even if a reasonable inquiry was required, in the context of quiet title actions, this Court rejected the idea that it would be "reasonable" to search for heirs of the record title holder when the interests of such persons were not shown of record in the county:

> The main contention of appellant is that the affidavit for publication is insufficient; **that 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**. 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**.

Jensen v. Schwartz, 90 N.W.2d 716, 720 (N.D. 1958) (emphasis added). The Alinder children attempt to distinguish this case by arguing it only requires no "reasonable inquiry" for heirs has to be shown **in the affidavit**; the affidavit only requires diligence be shown in the search for the defendants, the record title owners. (Appellants' Brief ¶ 11.) The implication by the Alinder children is that a "reasonable inquiry" for the heirs of the record title owner must still be performed, even if the sheriff does not have to, as a matter of form, indicate in the affidavit that a reasonable inquiry was performed for the

heirs. This strained reading is simply not supported by the language of Jensen, which bears repeating:

> The main contention of appellant is that the affidavit for publication is insufficient; that 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. 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**.

Jensen, 90 N.W.2d at 720 (emphasis added). The Alinders' attempt to distinguish *Jensen*, which requires the Court to ignore the last sentence of this passage from *Jensen*, should be rejected.

[¶ 14] The Alinders also argue:

> 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.

(Appellant's Brief ¶ 14.) Of course, there was absolutely **no** evidence, or even an implication, that Sorenson had actual knowledge of the present identity and whereabouts of the Alinder children who never appeared of record and never made any effort to preserve their mineral interests. Certainly, when there is such evidence, this Court can address how such claim should be addressed in that particular case. Moreover, even if there was such evidence, courts have rejected this type of argument because, otherwise, "there will be no end of litigation," as demonstrated by the passage from the following case:

> Appellees urge as fraud many incidents which appear from the record in Cause No. 16915. It is claimed the publishing of the notice in the Minden News, the action being brought in Council Bluffs, and the defendants, or at least a part of them, living in Omaha, shows a desire upon the part of Annie E. McNay, plaintiff in said case, to prevent the defendants from obtaining actual notice of the suit. Conceding this to be true, yet in the absence of a duty, secret intent is not fraud. It is admitted by all parties that the plaintiff, therein, complied with all the statutory requirements necessary to obtain jurisdiction. If the secret intent of each plaintiff in an action is subject to review as a fraud, then there will be no end of litigation. **There being no legal duty on the plaintiff to do other than the law directs, there can be no fraud for not so doing.**

Reimers v. McElree, 28 N.W.2d 569, 572 (Iowa 1947) (emphasis added). The bottom line, however, is that the alleged "harm," meant to provide justification for requiring and litigating a "reasonable inquiry" in every case is simply not present in this case, nor has it been demonstrated as an issue that will likely arise.

[¶ 15] A far greater and demonstrated harm will occur if the Court requires litigation of a "reasonable inquiry" in every case, even where the address is shown of record. As demonstrated by this case and the case set forth in the Appellant's Addendum, non-diligent heirs are attempting to reclaim long-neglected mineral interests well after the notice of lapse has been filed. It certainly was not the intent and purpose of the legislature to burden the courts with litigation over such an issue, which could be alleged in every case in which abandoned mineral interests are reclaimed. Rather, as set forth in the Appellant's Brief, the abandoned mineral statute was meant to provide an easy mechanism for surface owners to reclaim abandoned mineral interests, without the benefit of a lawyer. Not only does the Alinder children's argument circumvent this purpose, it is also not supported by the plain language of the abandoned mineral statute.

IV. Conclusion

[¶ 16] The district court's judgment, quieting title in the Alinder children, should be reversed.

Dated: November 5, 2010.

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I hereby certify that on November 5, 2010, I caused the **Reply Brief of Appellant** to be filed electronically with the Clerk of the Supreme Court by e-mailing a true and correct copy to **supclerkofcourt@ndcourts.com** and to be served upon the attorneys for defendants, Kent Reierson and Adam Olschlager, by e-mailing true and correct copies to **kreierson@crowleyfleck.com** and **aolschlager@crowleyfleck.com**, respectively.

The originals of the foregoing are being held in my office.

Dated: November 5, 2010.

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I hereby certify that on November 8, 2010, I caused the ***revised*** **Reply Brief of Appellant** to be filed electronically with the Clerk of the Supreme Court by e-mailing a true and correct copy to **supclerkofcourt@ndcourts.com** and to be served upon the attorneys for defendants, Kent Reierson and Adam Olschlager, by e-mailing true and correct copies to **kreierson@crowleyfleck.com** and **aolschlager@crowleyfleck.com**, respectively.

The originals of the foregoing are being held in my office.

Dated: November 8, 2010.

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