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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Michael Sorenson,)
)
Plaintiff/Appellant,) Supreme Court No. 20100256
)
vs.)
)
Barbara J. Felton,)
)
Defendant/Appellee.)
)

Appeal from the Judgment entered on July 28, 2010
Civ. No. 31-08-C-00105
County of Mountrail, Northwest Judicial District
Honorable William W. McLees, Presiding

REPLY BRIEF OF APPELLANT

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INTRODUCTION

[¶ 1] Despite more than 20 years and at least two chances to preserve her mineral interest, Barbara Felton failed to do so. In her responsive Brief, Felton argues that her lack of vigilance is irrelevant. Rather, she argues the surface owner needs to protect her from her own lack of diligence by going beyond the record title in an attempt to confirm her address of record. As explained below, this construct does not square with the plain language of the abandoned mineral statute, and it would require the Court to ignore the plain meaning of the word "or."

LAW AND ARGUMENT

I. The word "or" indicates an alternative between different things or actions.

[¶ 2] In construing the abandoned mineral statute, this Court is required to give effect to the plain language of the statute. N.D.C.C. § 1-02-02. This well-established principle has been explained by this Court as follows:

> The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature. This intention, however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority.

Madden v. Dunbar, 201 N.W. 988, 990 (N.D. 1924). This Court, in explaining the plain language of the word "or" has stated: "The word "or" is disjunctive in nature and ordinarily indicates **an alternative between different things or actions.** Terms or phrases separated by "or" have separate and independent significance." State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, ¶ 14, 712 N.W.2d 828, 834 (internal citations omitted) (emphasis added).

II. The abandoned mineral statute's use of the word "or" indicates that a surface owner may give notice to the owner's address of record.

[¶ 3] Section 38-18.1-06(2) of the North Dakota Century Code provides in pertinent part as follows:

> **[I[f 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.

(emphasis added). In order to give significance to the word "or," and to prevent the phrase "if the address of the mineral interest owner is shown of record" from being superfluous, then the surface owner must be able to send the notice to the owner's address of record. Felton does not seem to dispute this point. Rather, she would like this Court to read the word "current" into the statute, as in "if the **current** address of the mineral interest is shown of record . . . ." There are several problems with this argument.

[¶ 4] First, under the rules of statutory construction, courts are not at liberty to add words to a statute that were not placed there by the Legislature. Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993) ("Generally, the law is what the Legislature says, not what is unsaid."). In addition, while the Legislature has recently expanded the definition of "reasonable inquiry" under the abandoned mineral statute, it did not alter the remainder of N.D.C.C. § 38-18.1-06.

[¶ 5] Second, this Court has rejected a similar argument and held that where notice was required to be made upon a record title owner, notice was sufficiently sent to the owner's record address, even though such address was not current. In Cota v. McDermott, 16 N.W.2d 54, 55 (N.D. 1944), the statute required notice of the expiration

of a period of redemption to be sent via mail to the record owner, in addition to the notice by publication. In Cota, the notice was sent to the record owner at "her record post office address." Id. at 58. Like Felton here, the non-vigilant defendant in Cota argued that the auditor sending the notice was required to find her and then send notice to her current address (an address not appearing of record):

> Defendant insists that she was entitled to actual notice; that it was the auditor's duty when it appeared that the envelope containing the notice was not received because the defendant no longer got her mail at the post office to which it was sent, to make inquiry as to her whereabouts and, having ascertained the same to send the notice to such later address as he might have obtained or to make other service.

Id. The Court rejected this argument. The Court stated:

> It was because of her [the defendant's] neglect in failing to leave a forwarding address that the notice was not delivered to her. The requirements of the statute were sufficiently complied with.

Id.

[¶ 6] It should be noted that the Court in Cota determined that the requirements of the statute providing notice must be "strictly complied with." Id. at 58. Thus, even under a strict construction of the statute, Felton's argument fails. Nonetheless, a response will be provided to Felton's argument that the trial court properly and strictly construed the abandoned mineral statute against Sorenson. Felton cites a number of cases indicating that a statute providing for the forfeiture of property must be strictly construed. Notably, none of these cases directly address this common law principle as it relates to N.D.C.C. § 1-02-01, which specifically provides otherwise: "The code establishes the law of the state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be construed liberally[.]" Moreover,

"[i]n this state there is no common law in any case in which the law is declared by the code." N.D.C.C. § 1-01-06.

[¶ 7] In addition to the problems stated above for reading in a requirement that notice under the abandoned mineral statute must be sent to the "current" address of record, another problem is that doing so would lead to an absurd and illogical result. State v. Brossart, 1997 ND 119, 565 N.W.2d 752, 757 (N.D. 1997) (holding statute would not be read to render a provision a nullity, which would lead to an absurd result). Basically, in order to ensure that the record address is "current," the surface owner would be required to not only: (1) conduct an inquiry, but he would also be required to (2) actually find the mineral owner. If the Legislature intended for the surface owner to conduct an exhaustive and successful inquiry in every instance, it would have omitted the portions of the statute relating to finding "an address of record," as well as the "reasonable inquiry" provision, to-wit:

> [I[f 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.

N.D.C.C. § 38-18.1-06. It is significant that the Legislature did not do so, neither when this statute was originally enacted nor when it was amended in 2009.

[¶ 8] Moreover, to effectively require actually finding the mineral owner would be tantamount to providing "actual notice." Even when the rigors of the Due Process Clause are at play (which they are not according to Texaco, Inc. v. Short, 454 U.S. 516, 540 (1982)), "actual notice" is not required. Bickel v. Jackson, 530 N.W.2d 318, 321

(N.D. 1995) (stating that "actual notice" does not have to be accomplished in order to satisfy the Due Process Clause).

[¶ 9] Even though the Due Process Clause is not at play, Felton seems to contend she is required to some sort of statutory protection for her failure to avail herself of the protections offered under the abandoned mineral statute and her failure to provide a "current address." In that regard, she argues that mineral owners who do not provide any address of record have "greater protection" (and by implication, a greater chance at receiving notice of lapse) than those who provide an address of record. This is simply incorrect. From the mineral owner's perspective, the "greatest protection" occurs when the mineral owner is diligent and ensures that a current address is of record or, at the very least, has mail forwarded from the address of record to the current address. Thus, because Felton was initially not diligent in preserving her mineral interest by filing a claim within a 20-year period, she had a "second chance" to preserve her mineral interest if she had diligently kept an updated address of record or had her mail forwarded to her current address.

[¶ 10] Moreover, Felton's argument presupposes that a "reasonable inquiry" is more reasonably calculated to lead to notice than notice sent to an address of record that a mineral owner failed to update. Again, the Due Process Clause is not at play, so this argument has no bearing here. But, even if it did, notice sent to a non-current address can lead to actual notice when a "reasonable inquiry" might not. See Bickel v. Jackson, 530 N.W.2d 318, 321 (N.D. 1995).

[¶ 11] Felton further argues this Court should ignore the plain meaning of the word "or" to determine that a reasonable inquiry is required in *every* case because, otherwise, a surface owner could reclaim mineral interests where he has actual knowledge of the non-diligent mineral owner's whereabouts. That is not the case here. Moreover, even if it was the case, 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).

[¶ 12] Sorenson did as the law directed by giving notice to Felton at her address of record. To require otherwise, would require this Court to ignore the plain meaning of the word "or," as demonstrated by this Court's previous rulings and the rules of statutory construction. Moreover, in addition to the district court's ruling previously provided to the Court in the Addendum, the Court should be aware other district courts have also construed "or" in the manner urged by Sorenson. See, e.g., Memorandum Opinion and Order for Judgment, Johnson v. Taliaferro et al, Civ. No. 10C5 (Bottineau County) (currently on appeal in Supreme Court No. 2010-0314).

CONCLUSION

[¶ 13] Michael Sorenson provided Felton with the notice required under the abandoned mineral statute. Felton's failure to provide an updated address of record does not give her the right to any additional notice. Accordingly, Sorenson respectfully requests that the Judgment of the trial court be reversed and title to the abandoned mineral interest quieted in his name.

Dated: November 24, 2010.

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	)	**CERTIFICATE OF SERVICE**
Barbara J. Felton,	)	
	)	
Defendant/Appellee.	)	
	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

I hereby certify that on November 24, 2010, I electronically filed the foregoing with the Clerk of the North Dakota Supreme Court and served the same electronically as follows:

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Dated: November 24, 2010.

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