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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20100314

Helen Johnson, Craig A. Johnson and Julia M. Johnson,

Plaintiffs and Appellees

v.

Scott L. Taliaferro, and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint,

Defendant and Appellant

Defendants

APPEAL FROM MEMORANDUM OPINION AND ORDER FOR JUDGMENT ON AUGUST 4, 2010,
IN THE DISTRICT COURT, NORTHEAST JUDICIAL DISTRICT,
BOTTINEAU COUNTY, NORTH DAKOTA
THE HON. MICHAEL G. STURDEVANT, PRESIDING

BRIEF OF APPELLANT SCOTT L. TALIAFERRO

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I. Did the District Court err in ruling that a reasonable inquiry for the address of the mineral interest owner is not required under N.D.C.C. § 38-18.1-06 for the sending of the notice of lapse of mineral interests?

II. Did the District Court err in ruling that proof of a reasonable inquiry for the address of the mineral interest owner for the mailing of the notice of lapse is not required under N.D.C.C. § 38-18.1-06.1 for a quiet title action?

STATEMENT OF THE CASE

Plaintiffs, Helen Johnson, Craig A. Johnson and Julia M. Johnson (the Johnsons), brought this quiet title action asserting ownership of the mineral interests of Defendant Scott L. Taliaferro (Taliaferro) under the Termination of Mineral Interest Act, N.D.C.C. § 38-18.1. Taliaferro answered and counter-claimed seeking quiet title of the mineral interest in his name. The parties filed cross-motions for summary judgment. The District Court granted the Johnsons' Motion for Summary Judgment, quieting title in the Johnsons as to all mineral interests of Scott L. Taliaferro for the real property in dispute. Taliaferro now appeals the decision of the District Court.

STATEMENT OF FACTS

Taliaferro is the record title owner of mineral interests in the real property located in Bottineau County, North Dakota, described as:

Township 159 North Range 81 West
Section 13: S½
Section 24: N½

(App.-Page 014). Taliaferro's mineral interest was recorded in 1950 in Book 30 Page 86 for Bottineau County. Id.

According to the Complaint, Craig A. Johnson and Julia M. Johnson are the surface owners of real property located in Bottineau County, North Dakota, described as:

Township 159 North Range 81 West
Section 13: SW¼
Section 24: N½

(App.-Page 003). According to the Complaint, Helen Johnson is the surface owner of real property located in Bottineau County, North Dakota, described as:

Township 159 North Range 81 West
Section 13: SE¼

Id.

The Johnsons claim that the mineral interests of Taliaferro have lapsed in their favor as surface owners. According to the Complaint, the Johnsons published notice of lapse of minerals in *The Bottineau Courant*, on July 7, 14 and 21, 2009. (App.-Pages 004, 010, 017) On July 30, 2009, the Johnsons mailed the notice of lapse of mineral interests to Taliaferro at an address of 510 Petroleum Building, 451 Pine Street, Abilene, TX 79601-5150. (App.-Pages 009, 017). The Johnsons apparently obtained this address from a search by a third party of the Bottineau Country Recorder's records. (App.-Page

043). This address appeared in the records of the county recorder for the mineral lease recorded in 1960. (App.-Pages 044-51)

In sending the notice of lapse to this outdated address, the Johnsons were fully aware that they were relying on an address that was nearly 50 years old. This address was last used by Taliaferro over 25 years ago and is not a current address. (App.-Page 0525). Taliaferro did not receive the notice of lapse of mineral interest. Id.

The Johnsons made no inquiry to confirm that this was a current address for Taliaferro. (App.-Page 042-3). At most, the Johnsons performed an internet search for Taliaferro's street address listed on the 1960 mineral lease. (App.-Pages 055). The Johnsons also appear to have searched the U.S. Postal Service's website to find the zip code for an address that appeared on a 1960 Oil and Gas Lease. (App.-Page 054). In a Request for Production, Taliaferro requested all documents resulting from the efforts undertaken by the Johnsons to find the address for Taliaferro for mailing the notice of lapse. The only document produced was a printout from the United States Postal Service's website for a search of "Find a Zip+4" Code by Address." (App.-Pages 054).

The Johnsons did not conduct an internet search for a current address for Taliaferro or make any effort to verify that Taliaferro still used the Petroleum Building address.

In January, 2010, the Johnsons, within six months of mailing the notice of lapse, commenced this quiet title action by mailing the Summons, Complaint and Notice of Filing to Taliaferro at his current address at 1414 Tanglewood Road, Abilene, TX 79605-4709. (App.-Pages 020). The Johnsons' counsel located Taliaferro's current address through a search of the social security death index, internet white pages and the internet

database Zabasearch. (App.-Pages 055). This is the current address of Taliaferro and he received the Summon and Complaint. (App.-Pages 053).

Taliaferro moved for summary judgment on the grounds that the Johnsons cannot obtain a judgment of quiet title in their favor because they cannot offer any evidence that they conducted a reasonable inquiry as defined by N.D.C.C. § 38-18.1-06(6) and as required under N.D.C.C. § 38-18.1-06.1 for a quiet title action under that chapter. Further, they did not, as matter of law, conduct a reasonable inquiry for the address of Taliaferro and, therefore, did not give proper notice of lapse of mineral interest under N.D.C.C. § 38-18.1-06. In response, the Johnsons moved for Summary Judgment asserting that they had complied with the provisions of N.D.C.C. § 38-18.1 and that any amendments to N.D.C.C. § 38-18.1 effective after the mailing of the notice of lapse in July of 2009 are inapplicable. Taliaferro responded to the Johnsons' Motion for Summary Judgment, to which the Johnson submitted a further response.

The trial court granted the Johnsons' Motion for Summary Judgment and issued its Memorandum Opinion and Order for Judgment setting forth the trial court's reasoning for its decision. (App.-Pages 025). In its reasoning, the trial court concluded that a reasonable inquiry was not required under N.D.C.C. § 38-18.1-06 and that the statute was satisfied by sending the notice of lapse to an address that appeared in a recorded mineral lease nearly 50 years ago. The trial court further reasoned that the recently enacted N.D.C.C. § 38-18.1-06.1 only required proof of reasonable inquiry for purposes of service of process for a quiet title action, as a modification of the requirements for service by publication under N.D.R.Civ.P. 4(b)(2)(A) and did not affect the mailing of the notice of lapse.

STANDARD OF REVIEW

As this Court has established, summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no disputed genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. Ernst v. Acuity, 2005 ND 179, ¶ 7, 704 N.W.2d 869. Whether the trial court properly granted summary judgment is a question of law that this Court reviews *de novo* on the entire record. Id. This Court's review on appeal is to determine whether the information available to the trial court precluded the existence of the genuine issue of material fact and entitled the moving party to summary judgment as a matter of law. Riemers v. Anderson, 2004 ND 109, ¶ 10, 680 N.W.2d 280, 285, quoting Zuger v. State, 2004 ND 16, ¶¶ 7, 8, 673 N.W.2d 615 (citations omitted). Further, summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of a claim on which they will bear the burden of proof at trial. Id.

The party resisting the motion must demonstrate a genuine issue of material facts by setting forth specific facts, by presenting competent, admissible evidence and may not simply rely upon the pleadings or upon unsupported conclusory allegations. Tarnavsky v. Rankin, 2009 ND 149, ¶ 8, 771 N.W.2d 578, 582. Such competent, admissible evidence includes affidavits or other comparable means which raise an issue of material fact. Beckler v. Bismarck Pub. Sch. Dist., 2006 ND 58, ¶ 7, 711 N.W. 2d 172, 175. This burden is not satisfied by reasserting the allegations in the pleadings or by mere factual assertions in a brief. Riemers, *supra*. If a non-moving party fails to produce any

evidence on an element of a claim, it is assumed that no evidence exists to support the element. Beckler, *supra*.

Finally, statutory interpretation is a question of law, which is fully reviewable on appeal. Nelson v. Johnson, 2010 ND 23, ¶ 12, 778 N.W.2d 773, 776-777.

LAW AND ARGUMENT

I. THE DISTRICT COURT ERRED BY FINDING THAT A REASONABLE INQUIRY FOR THE ADDRESS OF THE MINERAL INTEREST OWNER WAS NOT REQUIRED UNDER N.D.C.C. § 38-18.1-06 AND THAT THE JOHNSONS COMPLIED WITH THE STATUTE BY MAILING THE NOTICE OF LAPSE TO A NEARLY 50 YEAR OLD ADDRESS OF RECORD.

Under N.D.C.C. § 38-18.1, any mineral interest not used within the twenty years preceding the requisite notice of lapse is deemed abandoned and vests in the owner of the surface estate unless the mineral interest owner timely files a statement of claim in the recorder's office.

N.D.C.C. § 38-18.1-06(2) requires that the surface owner provide notice to the mineral interest owner. To satisfy the terms of that provision, a surface owner claiming lapsed minerals must conduct a reasonable inquiry to determine the address of the mineral interest owner. In addition to notice by publication, the statute requires that:

> [H]owever, if the address of the mineral interest owners 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.

When interpreting a statute, the language of the statute is given its plain, ordinary and commonly understood meaning unless defined by statute or contrary to the plain intention. N.D.C.C. §1-02-02; Great Western Bank v. Willmar Poultry Co., 2010 ND 50, ¶ 7, 780 N.W.2d 437, 440. Statutes, however, are construed in a practical manner with

consideration to the content of the statute and its purpose, particularly if strict adherence to the letter of the statute would lead to an absurd or ludicrous result. Morton County Social Service Bd. v. Cramer, 2010 ND 58, ¶ 16, 780 N.W.2d 688, 692.

Importantly, the law abhors forfeiture. Ridl v. EP Operating Ltd. P'ship, 553 N.W. 2d 784, 788 (N.D. 1996). The extinguishment of mineral interest is in derogation of the common law and any such statute which creates a forfeiture must be strictly construed. Spring Creek Ranch, LLC v. Svenberg, 1999 ND 113, ¶ 10, 595 N.W. 2d 323, 326. "Forfeiting statutes should be strictly construed in favor of a person whose property is sought to be forfeited." Ridl, *supra*; *see, also,* Cowl v. Wentz, 107 N.W. 2d 697, 700 (N.D. 1961). Where the purpose of the statute is to provide notice to an owner at risk of losing property, the mode of giving notice must be strictly complied with, especially as to every requisite of the statute having the semblance of benefit to the property owner. Id. Accordingly, N.D.C.C. § 38-18.1-06 must be interpreted in favor of the mineral interest owner including requiring a reasonable inquiry for the address of the mineral interest owner.

The key term in N.D.C.C. § 38-18.1-06(2) is the word "or." While the word 'or' is disjunctive in nature and ordinarily indicates an alternative between different things or actions, any statutory construction must assure that the terms and phrases separated by 'or' have separate and independent significance. Industrial Contractors, Inc. v. Workforce Safety & Ins., 2009 ND 157, ¶ 12, 772 N.W.2d 582, 588 -589. The term "or" should be given is literal meaning, unless it renders the statute inoperable or the meaning becomes questionable. Christl v. Swanson, 2000 ND 74, ¶ 12, 609 N.W.2d 70, 72 -73.

This Court has recognized that the disjunctive 'or' functions to require multiple obligations under a statute, instead of operating to allow a choice between the separate phrases. Industrial Contractors, *supra*. In Industrial Contractors, this Court interpreted that language of N.D.C.C. §65-05-28.2(5), which provides that "[f]ailure to give written notice *or* to properly post notice as required under this subsection invalidates the selection, allowing the employee to make the initial selection of a medical provider." (Emphasis added.) This Court held that both written notice and posted notice were required. In other words, the "or" operated to require two separate and distinct acts instead of offering the employer an opportunity to choose the least burdensome of the two.

Likewise, N.D.C.C. § 38-18.1-06(2) creates separate and distinct requirements for the mailing of the notice of lapse. The surface owner has a duty to mail the notice if an address of the mineral owners appears in the record, but also, has a separate and independent duty to mail the notice of lapse if an address can be determined from a reasonable inquiry. The surface owner is not allowed to choose between the requirements but must comply with both. Only if neither arises, can the surface owner rely on solely the publication of the notice.

In addition, this Court's analysis of N.D.C.C. § 38-18.1-06 is consistent with requiring that the surface owner conduct a reasonable inquiry into the address of the mineral interest owner. As the Court noted in Spring Creek, *supra,* the service of notice of lapse requirements under N.D.C.C. § 38-18.1-06(2) is similar to the requirements for service of process under N.D.R.Civ.P. 4(e)(2)(A), which allows service by publication. The later allows service of summons by publication only after the plaintiff has shown by

affidavit '[t]hat after diligent inquiry personal service of summons cannot be made upon defendant in this state to the best knowledge, information and belief" of the affiant. This Court equated the two provisions as both requiring that a person using publication must conduct an inquiry that is reasonable or diligent under the circumstances. *See, also*, Halvorson v. Starr, 2010 ND 133,¶ 8, 785 N.W.2d 248, 251. Thus, the Court's analysis supports interpreting the statute as requiring a reasonable inquiry, as is consistent with its purpose to provide notice to interested persons.

The only reported judicial decision interpreting N.D.C.C. § 38-18.1-06 on this issue required a reasonable inquiry. Applying North Dakota law, the federal court denied the mineral interest owners' motion for summary judgment because a reasonable inquiry was a question of fact. Nichols v. Satkin Corp., 2010 WL 2560417 (D. N.D. June 18, 2010). In that case, the surface owners sent the notice of lapse to the address of the mineral interest owners discovered by a third party from a search of the county recorder's office and reported in a resulting ownership report. The mineral interest owner moved for summary judgment arguing that a reasonable inquiry was required and as a matter of law the surface owner made no reasonable inquiry. The surface owners contended that they were allowed to rely on a literal approach to the statute and they had to either use the address shown of record or determine the address upon a reasonable inquiry. The court, however, implicitly rejected the surface owners' reasoning and necessarily implied that the surface owners were required to conduct a reasonable inquiry by denying the mineral interest owner's motion for summary judgment based on a question of fact on whether there was a reasonable inquiry. The court, however, did not deny the motion on the basis that no reasonable inquiry was required although that issue was before it.

Further, in the only other decision on this issue, a Kansas court agreed that identical language in the Kansas statute required a reasonable inquiry for the mailing of notice. Scully v. Overall, 840 P. 2d 1211, 1214 (Kan. Ct. App. 1992); see Kan. Stat. Ann. 55-1605 (2010). Specifically, the court adopted the analysis of Professor David Pierce that:

> The Kansas Mineral Lapse Act equitably balances the interests of the surface owner and mineral owner. The Kansas Act requires the surface owner to make reasonable efforts to identify and contact the owners of the lapsed interest.

Id. at 587, *quoting* Pierce, *July 1 is Deadline for Filing Claims to Preserve "Unused Mineral Interests,"* 25 Circuit Rider 6 (Summer 1986). The other statutes with identical language have not been subject to judicial interpretation. *See* S.D. Codified Laws §43-30A-6 (2010), Ind. Code § 32-23-10-6 (2010); *see, also,* Or. Rev. Stat. §517.180 (2010) ("If the address of the mineral interest holder is known or can be determined by due diligence…").

The trial court's ruling that N.D.C.C. § 38-18.1-06(2) does not require a reasonable inquiry disregards multiple principles of statutory construction. The trial court based its ruling solely on the disjunctive nature of the term 'or' and fails to give any consideration to any other tenet of statutory construction. Particularly, the trial court fails to consider that any statute that operates a forfeiture must be strictly construed *in favor of* the forfeiting party. Ridl, *supra*. Such a favorable construction would include requiring a reasonable inquiry.

The trial court further reasoned that the legislature by implication affirmed that a reasonable inquiry is not required because it failed to amend the language of N.D.C.C. § 38-18.1-06(2). This reasoning ignores, however, the fact that all cases discussing the

sending of notice of lapse are consistent with requiring a reasonable inquiry under the current language. *See, e.g.*, Spring Creek, *supra*; Scully, *supra*.

To interpret N.D.C.C. § 38-18.1-06(2) to allow notice to be sent to an outdated address without any reasonable inquiry is contrary to the clear intent of the provisions in the statute. Statutes that terminate unused mineral interest with the surface estate fall into two general categories. John S. Lowe, Owen L. Anderson, Ernest E. Smith, & David E. Pierce, Cases and Material on Oil and Gas Law, 545-53 (4th ed. 2002). The first are statutes with the primary purpose of reuniting terminated mineral interest with the surface estate. The Indiana Dormant Mineral Interests Act is this type of statute. Id., *see*, Ind. Code § 32-23-10-1, et. al. Under that act, the termination of mineral interest was automatic and self executing, and no notice was required to be given to the mineral owner prior to the termination of the mineral interest. Lowe, et. al., *supra* at 546.

In contrast, the second category of statutes has the primary purpose to identify and locate mineral interest owners. Id. The Kansas Mineral Lapse Act is this type of statute. Id. Like the Kansas act, the North Dakota statute requires notice be given to the mineral interest owner and provides for the mineral interest owner the opportunity to save their mineral interest by filing a timely statement of claim after the notice of lapse. *Compare* N.D.C.C. § 38-18.1-05 & -06 *with* Kan. Stat. Ann. 55-1604 & -1605; Lowe, *et. al*., *supra* at 551. Further, North Dakota's statute, as does Kansas, lacks the 'self executing' feature of the Indiana act. *Compare* N.D.C.C. § 38-18.1 *with* Ind. Code § 32-23-10-1, *et. al*. (2010); Lowe, *et. al*., *supra* at 551. Thus, like the Kansas Act, the primary purpose of N.D.C.C. § 38-18.1 is to locate the mineral interest owner, give them notice and afford them the opportunity to protect their property. To interpret the statute to do nothing more

than mail the notice of lapse to an old and outdated address and nothing more is contrary to this recognized purpose. The statute must be construed to require a reasonable inquiry in furtherance of the purpose of the statute to identify and notify the mineral interest owner and to allow him to file a timely claim after the notice to protect his mineral interests.

The question is then whether the Johnsons conducted a reasonable inquiry as required. As noted above, this Court held that the proper analysis under N.D.C.C. § 38-18.1-06(2) is whether the inquiry was reasonable under the circumstances. Spring Creek, *supra*. While the reasonableness of the inquiry is usually a question of fact, such an issue of fact may become issues of law for the court, if reasonable persons could reach only one conclusion from the facts. Id. From the record, there is no question of fact since the Johnsons did not perform any reasonable inquiry and the trial court erred in denying Taliaferro's Motion for Summary Judgment.

A reasonable inquiry requires more that just a record search in the County Recorder's office. In Spring Creek, *supra*, this Court addressed what constituted a reasonable inquiry to satisfy N.D.C.C. § 38-18.1-06(2). There, the surface owner conducted a search of the records of the county recorder's office where the disputed property was located, along with the records of the sheriff's office, the county auditor, and the county treasurer. The search of these records produced no street addresses for the mineral interest owners and the only information resulting from the search was the county and state for the mineral interest owners as appeared on the original deeds from nearly fifty years prior. This Court reversed the summary judgment in favor of the plaintiffs holding that whether an inquiry is reasonable under the circumstances is

generally a question of fact and merely searching the records of the county register is not sufficient for summary judgment.

Importantly, however, this court considered the reasonableness of the inquiry under the circumstances of the case. Under such analysis, the inquiry of Plaintiffs in the instant case is so lacking that no reasonable person could consider it reasonable and no question of fact on the issue remains. The circumstances that must be considered, in contrast to the facts of Spring Creek, are the passage of time and with it, the prevalence of the Internet. Since 1989, when the surface owner published the notice of lapse in Spring Creek, the Internet has dramatically risen in accessibility, use and prevalence. Such a circumstance must be considered in determining whether the Johnsons conducted a reasonable inquiry into the address of Taliaferro. A basic internet search of the address of a person is a common and easy task to perform. Yet the Johnsons failed to complete even the most cursory Internet search for a current address for Taliaferro.

The Johnsons apparently have access to the Internet and use it with basic familiarity as evidenced by their Google search for the address of the Petroleum Building and their use of the U.S. Postal Service website. By sending the notice of lapse to a nearly 50 year old address without conducting any searches for the address of the record title owner, the Johnsons did not conduct a reasonable inquiry as a matter of law and did not comply with the provisions of N.D.C.C. § 38-18.1-06.

The unreasonableness of the Johnsons' "efforts" to locate Taliaferro is further demonstrated by uncontroverted fact that the Johnsons were able to locate the current address of Taliaferro for the quiet title action. The ability of the Johnsons to locate Taliaferro six months after the Notice of Lapse was mailed demonstrates that with any

limited effort, the Johnsons should have been equally able to determine the current address of Taliaferro to mail the notice of lapse and allow him time, as provided in the statute, to protect his claim to the mineral interests.

Further, the North Dakota Legislature amended N.D.C.C. § 38-18.1-06 to add a definition of reasonable inquiry and added N.D.C.C § 38-18.1-06.1 in 2009 Session Law Ch. 317. Both changes were effective August 1, 2009, after the date that the Johnsons sent the notice of lapse. The statutes, however, confirm that a reasonable inquiry is required to complete the process to claim lapsed minerals and to further clarify the requirements for a reasonable inquiry. *See, e.g.*, Fandrich v. Wells County Bd. of County Com'rs, 2000 ND 181, ¶22, 618 N.W.2d 166, 173 ("Subsequent amendments to statutes may be used in ascertaining the legislative intent of earlier versions of the statutes.") Under the persuasive guidance of the 2009 amendments, the Johnsons were required to make a reasonable inquiry and that inquiry required more than a search of the county recorder's office. The Johnsons failed to conduct a reasonable inquiry as a matter of law. The trial court, therefore, erred in denying Taliaferro's Motion for Summary Judgment and in granting Johnsons' Motion for Summary Judgment.

II. THE DISTRICT COURT ERRED BY REFUSING TO REQUIRE PROOF IN A QUIET TITLE ACTION OF A REASONABLE INQUIRY FOR THE MAILING OF THE NOTICE OF LAPSE UNDER N.D.C.C. § 38-18.1-06.1.

N.D.C.C. § 38-18.1-06.1(2) requires proof of a reasonable inquiry in a quiet title action brought under that section. The trial court believed that this reasonable inquiry applied only to the bringing of the quiet title action. This application is incorrect. Instead, N.D.C.C. § 38-18.1-06.1(2) requires that in a quiet title action, the surface owners must submit proof of a reasonable inquiry for the mailing of the notice of lapse.

In other words, proof of a reasonable inquiry is required under section 6.1 as part of the surface owners' burden on their substantive claim that they complied with the requirements of N.D.C.C. § 38-18.1, not merely a procedural prerequisite affecting only service of process. The Johnsons' failure to submit proof of a reasonable inquiry is fatal to their claim.

As enacted by the Legislature, effective August 1, 2009, N.D.C.C. § 38-18.1-06.1(2) provides:

> In an action brought under this section, the owner or owners of the surface estate *shall* submit evidence to the district court establishing that all procedures required by this chapter were properly completed *and that a reasonable inquiry as defined by subsection 6 of section 38-18.1-06 was conducted.*

Emphasis added. The word 'shall' in a statute is ordinarily mandatory. Ramsey County Farm Bureau v. Ramsey County, 2008 ND 175, ¶ 13, 755 N.W. 2d 920, 924. N.D.C.C. § 38-18.1-06.1 specifically provides that the owners of the surface estate "shall" provide evidence of reasonable inquiry in order to obtain a judgment of quiet title to any lapsed minerals. Such evidence of a reasonable inquiry is, therefore, required and failure to submit such evidence is fatal to the quiet title action.

As part of the 2009 legislation, the Legislature also clarified what is required as a reasonable inquiry. N.D.C.C. § 38-18.1-06 provides:

> To constitute a reasonable inquiry as provided in subsection 2, the owner or owners of the surface estate or the owner's authorized agent must conduct a search of:
>
> a. The county recorder's records for the existence of any uses as defined in section 38-18.1-03 by the owner of the mineral interest;
>
> b. The clerk of court's records for the existence of any judgments, liens, or probate records which identify the owner of the mineral interest;

> c. The social security death index for the last-known residence of the owner of the mineral interest, if deceased; and
>
> d. One or more public internet databases to locate or identify the owner of the mineral interest or any known heirs of the owner. The owner or owners of the surface estate are not required to conduct internet searches on private fee internet databases.

N.D.C.C. § 38-18.1-06(6).

The trial court ruled that under N.D.C.C. § 38-18.1-06.1, "this reasonable inquiry requirement relates to the bringing of the quiet title action not to the preparation of the notice." (App.-Pages 032). The trial court reasoned that "[t]he effect of this reference is to impose a greater burden upon the surface owner when commencing the action to perfect title in mineral interests." Id. The Court particularly noted that the statute would make the surface owner "go the additional mile" in comparison to a diligence inquiry as required under N.D.R.Civ.P. 4. Id.

Construing the language of N.D.C.C. § 38-18.1-06(2) as applying to only the bringing of the quiet title action ignores the language of N.D.C.C § 38-18.1-06(1) which directly addresses commencing such an action. N.D.C.C. § 38-18.1-06(1) provides that, "This action must be brought in the same manner and is subject to the same procedures as an action to quiet title pursuant to chapter 32-17." It would be inconsistent to require a quiet title action for lapsed minerals to be brought "in the *same* manner and subject to the *same* procedure" as any other quiet title action in subsection 1 and then construed subsection 2 to impose a greater burden when commencing such a quiet title action. Apparent conflicting provisions in a statute must be harmonized, if possible. Chamley v. Khokha, 2007 ND 69, ¶ 13, 730 N.W.2d 864, 868. Instead, subsection 2 addresses the substantive burden on the surface owners on the merits of their claim. The requirement

of proof of a reasonable inquiry under subsection 2 refers to proof of a reasonable inquiry in preparation of the notice of lapse. Without such proof, the quiet title action must fail.

Further, the federal court in Nichols, *supra*, reasoned that under N.D.C.C. § 38-18.1-06.1(2) a reasonable inquiry is required. In that case, the surface owners sent the notice of lapse to the mineral interest owners of record in February 2006 and filed their complaints for quiet title in May 2009, both before the effective date of N.D.C.C. § 38-18.1-06.1(2). The court still applied N.D.C.C. § 38-18.1-06.1(2) as requiring that the surface owners conduct a reasonable inquiry for purposes of sending the notice of lapse, not merely for the service of process.

The Johnsons must therefore provide evidence of a reasonable inquiry that satisfies the provisions of N.D.C.C. § 38-18.1-06(6). The Johnsons cannot do so. The Johnsons were asked through Interrogatories to describe their efforts to discover Taliaferro's address for the mailing of the notice of lapse. (App.-Pages 042). The Interrogatories specifically asked whether the Johnsons searched the four sources as required by N.D.C.C. § 38-18.1-06(6). In their sworn answer, the Johnsons admit that the only search conducted was that of the Bottineau County Recorder's records and that they did not search the clerk of court's records, the social security death index or any public internet database, as required by the statute. The Johnsons admit they used the internet only to obtain the street address for the building listed on the 1960 oil and gas lease, and for the zip code. They did not make any internet search for a current address of Taliaferro. (App.-Pages 042). Their minimal searches through the internet are insufficient to meet the requirement of N.D.C.C. § 38-18.1-06(6)(d) requiring a search of an internet database.

By their sworn admissions, the Johnsons cannot provide any evidence that they conducted a reasonable inquiry. They did not conduct a search sufficient to meet the requirements of a reasonable inquiry under N.D.C.C. § 38-18.1-06(6). Under N.D.C.C. § 38-18.1-06.1, the Johnsons must provide evidence of the reasonable inquiry in sending the notice of lapse in order for the court to quiet title to the mineral interest in their favor. As it is impossible for them to provide such evidence, their action for quiet title should have been denied as a matter of law and their claims dismissed. Because they cannot establish their claim to the mineral interests, Taliaferro's interests have not lapsed and, therefore, judgment should have been entered in favor of his claims to quiet title as a matter of law.

CONCLUSION

As discussed above, a reasonable inquiry is required under N.D.C.C. § 38-18.1-06(2) and further, under N.D.C.C. § 38-18.1-06.1(2). The Johnsons could not provide any evidence that they conducted a reasonable inquiry as discussed in Spring Creek, *supra*, or as defined under N.D.C.C. § 38-18.1-06(6). As such the trial court erred in granting the Johnsons' Motion for Summary Judgment and denying Taliaferro's Motion for Summary Judgment. Taliaferro requests that this Court reverse the decision of the trial court and render judgment quieting title in Taliaferro.

Dated this ___ day of October, 2010.

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Scott L. Taliaferro
Appellant

v.

Helen Johnson, Craig A. Johnson and Julia M. Johnson
Appellees

**APPEAL FROM MEMORANDUM OPINION AND ORDER FOR JUDGMENT ON AUGUST 4, 2010,
IN THE DISTRICT COURT, NORTHEAST JUDICIAL DISTRICT,
BOTTINEAU COUNTY, NORTH DAKOTA
THE HON. MICHAEL G. STURDEVANT, PRESIDING**

AFFIDAVIT OF SERVICE

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

Noni Geer, being first duly sworn on oath, does depose and say: That she is a citizen of the United States over the age of eighteen years and not a party to the above-entitled matter.

That on the ____ day of October, 2010, this affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, true and correct copies of the following documents in the above-captioned action:

1. Brief of Appellant Scott L. Taliaferro

2. Appendix

That the copies of the above documents were securely enclosed in envelopes with postage duly prepaid, and addressed as follows:

William E. Bergman
Attorney at Law
PO Box 1180
Minot, ND 58702-1180

To the best of your affiant's knowledge, information, and belief, such addresses as given above are the actual post office addresses of the parties intended to be so served.

That the above documents were duly mailed in accordance with the provisions of the Rules of Civil Procedure.

_____
Noni Geer

Subscribed and sworn to before me this ____ day of October, 2010.

_____
Notary Public (SEAL)