20120184
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
August 31, 2012
STATE OF NORTH DAKOTA

**IN THE SUPREME COURT**
**STATE OF NORTH DAKOTA**

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|---|---|
| Patricia R. Capps, f/k/a Patricia Anderson, Terrel A. Anderson, a/k/a Terral Anderson, Gerald C. Wools, Penny Brinks, Michael Lee, Gwen Hassan, Melissa Kellor, and the Estate of Ruth A. Nelson, Deceased.,<br><br>Plaintiffs and Appellees,<br><br>vs.<br><br>Colleen L. Weflen, et al.,<br><br>Defendants. | **SUPREME COURT NO. 20120184**<br>District Court No. 31-10-C-00009 |
| Colleen L. Weflen, a/k/a Colleen Weflen, a single woman, Marleen Weflen, f/k/a Marleen W. Tiedt, Sharon Kruse, a/k/a Sharon O. Kruse f/k/a Sharon Weflen, a married woman dealing in her sole and separate property, Catherine Harris f/k/a Catherine Gunderson, a single woman, Norris Weflen, a/k/a Norris L. Weflen, a single man, Windsor Bakken, LLC, a Delaware Limited Liability Company, Gulfport Energy Corporation, EOG Resources, Inc.,<br><br>Defendants and Appellants. | |

ON APPEAL FROM SUMMARY JUDGMENT ENTERED ON
FEBRUARY 8, 2012
STATE OF NORTH DAKOTA
MOUNTRAIL COUNTY DISTRICT COURT
HONORABLE DAVID W. NELSON

# BRIEF OF DEFENDANTS/APPELLANTS

# WINDSOR BAKKEN, LLC

# AND GULFPORT ENERGY CORPORATION

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] A. Did the District Court properly certify this matter for appeal under Rule 54(b)?

[¶2] B. Did the District Court err when it concluded the Weflens failed to properly mail notice under the Termination of Mineral Interest Act because they mailed notice to the last addresses of record for Ruth Nelson rather than make inquiry as to Nelson's heirs and their addresses?

[¶3] C. Did the District Court err when it concluded the Termination of Mineral Interest Act required the Weflens to mail notice via regular mail rather than restrictive delivery so that persons other than the named addressee could receive the mailing?

[¶4] D. Did the District Court err when it denied the Weflens' motion for summary judgment?

## STATEMENT OF THE CASE[1]

[¶5] The Termination of Mineral Interest Act ("Act") provides a mechanism so abandoned minerals can be returned to productive use. The 2006 version of the Act, which is the applicable version for this case, requires a surface owner seeking to reclaim abandoned minerals to publish notice of termination in the official county newspaper and, if the address of the mineral interest owner is shown of record or can be determined upon reasonable inquiry, mail a copy of the notice to the owner of the minerals. N.D.C.C. § 38-18.1-06(2)(2005).

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[1] Windsor adopts the Statement of Case contained in the Brief of Defendant/Appellant EOG Resources, Inc. and incorporates it herein by reference.

[¶6] The Weflens are the owners of the surface above the minerals that are at issue in this case. The Weflens properly published notice under the Act and properly mailed notice to the addresses of record for the owner of the abandoned minerals, Ruth Nelson (Weflens' Appendix ("A") at 310-319.) At the time the notice was mailed, Nelson was dead, a fact the Weflens suspected to be true but that they did not know to be true. (EOG's Supplemental Appendix ("SA") at 37-38; 42.)

[¶7] The Capps Appellees and the Hassan Appellees claim to be Nelson's heirs and that the notice provided by the Weflens was legally deficient because they claim the Weflens mailed notice to Nelson's addresses of record at a time that the Weflens suspected Nelson was dead. They claim the Weflens were under a duty to make a reasonable inquiry as to Nelson's heirs and their addresses.

[¶8] The District Court found, as a matter of law, that the Weflens' suspicions that Ruth Nelson may be dead are the same as the Weflens knowing Nelson was in fact dead. (A at 282-293.) Based on this erroneous factual finding, the District Court concluded the Act placed additional inquiry and notice duties on the Weflens. The District Court concluded a surface owner cannot rely on the address of record contained in title documents recorded with the county recorder when the surface owner suspects the mineral owner may be deceased. (A at 287-288.) The District Court concluded the Act requires the surface owner to make reasonable inquiry of the identities and addresses of the deceased mineral owners' heirs. As part of creating this new burdensome requirement under the Act, the District Court concluded that when the mineral owner of record is deceased, the mineral "owner" entitled to notice under the Act is not the owner listed in the county recorder's title records, but rather, the "owners" are the decedent's

heirs and/or devisees. (A at 288-289.)

[¶9] In the alternative, the District Court concluded the notice mailed by the Weflens was deficient because it was sent via certified mail, restrictive delivery. (A at 287-288.) The Court concluded that when a surface owner suspects the mineral owner of record may be deceased the notice must not be sent restrictive delivery. The Court concluded the notice must be sent via regular mail so that it is possible for a person other than the named addressee to intercept the mailing.

[¶10] Windsor Bakken, LLC and Gulfport Energy Corporation ("Windsor") have leasehold interests in the minerals at issue based on the Weflens' termination of Ruth Nelson's interests. (A at 45-72; 189-191.) Because the District Court's interpretation of the Act is erroneous, Windsor appealed. Windsor requests this Court reverse the District Court and enter summary judgment in favor of the Weflen Appellants. See Windsor's Notice of Appeal (SA at 29.)

## STATEMENT OF THE FACTS

[¶11] Windsor adopts the Statement of Facts contained in the Brief of Defendant/Appellant EOG Resources, Inc. and incorporates it herein by reference.

## LAW AND ARGUMENT

### A. THE DISTRICT COURT PROPERLY CERTIFIED THIS MATTER FOR APPEAL UNDER RULE 54(b).

[¶12] This Court reviews a District Court's Rule 54(b) certification under the abuse-of-discretion standard. Brummund v. Brummund, 2008 ND 224, ¶ 5, 758 N.W.2d 735. A District Court abuses its discretion if it acts in an unreasonable, arbitrary, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned decision, or if it misinterprets or misapplies the law. Brummund, at

¶ 5. Id. This Court has explained that Court's discretion must be measured against the interest of sound judicial administration. See Union State Bank v. Woell, 357 N.W.2d 234, 237 (N.D. 1984) n.4 (stating " 'infrequent harsh case' accurately reflects the stated intent of Rule 54(b) to carry out the policy against piecemeal appeals while affording litigants a remedy in the exceptional case where immediate appellate review would be in the 'interest of sound judicial administration'").

[¶13] A Rule 54(b) certification should not be routinely granted and is reserved for cases involving unusual circumstances where failure to allow an immediate appeal would create a demonstrated prejudice or hardship. Brummund, 2008 ND 224, ¶ 6, 758 N.W.2d 737. This Court has described a non-inclusive list of factors for a District Court to consider in assessing a request for Rule 54(b) certification:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Woell, 357 N.W.2d at 238 (quoting Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 364 (3rd Cir.1975)).

[¶14] All of the factors for Rule 54(b) certification are present in this case. The parties agree and the record reflects that the ownership of the disputed minerals must be resolved before the remaining ancillary issues can be resolved. Given the number of parties, such a result promotes efficiency for the Court and parties. Accordingly, the Court did not abuse its discretion and this Court should decide the appeal.

## B. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THE WEFLENS FAILED TO PROPERLY MAIL NOTICE UNDER THE TERMINATION OF MINERAL INTEREST ACT BECAUSE THEY MAILED NOTICE TO THE LAST ADDRESS OF RECORD FOR RUTH NELSON RATHER THAN MAKE INQUIRY AS TO NELSON'S HEIRS AND THEIR ADDRESSES.

### 1. Standard of Review.

[¶15] Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can be reasonably drawn from the undisputed facts, or if the only issue to be resolve is a question of law. First Intern. Bank & Trust v. Peterson, 2011 ND 87, ¶ 7, 797 N.W.2d 316 (quoting Lucas v. Riverside Park Condo. Unit Owners Ass'n, 2009 ND 217, ¶ 16, 776 N.W.2d 801). Whether the District Court properly granted summary judgment is a question of law which this Court reviews *de novo* on the entire record. Saltsman v. Sharp, 2011 ND 172, ¶ 4, 803 N.W.2d 553. Summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of their claim and on which they will bear the burden of proof at trial. Black v. Abex Corp., 1999 ND 236, ¶¶ 23, 603 N.W.2d 182. Even if a factual dispute exists, summary judgment is appropriate if resolution of the factual dispute will not change the result under the law. Swenson v. Raumin, 1998 ND 150, ¶ 8, 583 N.W.2d 102. Further, factual disputes may become questions of law appropriate for summary judgment if reasonable persons can draw only one conclusion from the evidence. Hougum v. Valley Mem'l Homes, 1998 ND 24, ¶ 8, 574 N.W.2d 812.

### 2. The Weflens' Suspicions Ruth Nelson May Be Dead Are Not the Same as Knowledge That She Was in Fact Dead.

[¶16] In granting summary judgment in favor of the Capps and Hassan Appellees, the District Court made erroneous findings of fact and mistaken conclusions of law. The

District Court found, as a matter of law, the Weflens had knowledge Ruth Nelson was dead at the time they provided notice under the Act. The record does not support this finding. The Weflens suspected Ruth Nelson was dead, based on an assumption of what her age was when she lived in the area and based on the passing of time since that time. They did not, however, have actual knowledge that she was in fact dead. (SA at 37-38; 42.)

[¶17] Based on this erroneous factual finding, the District Court concluded the Weflens failed to provide proper notice to terminate the mineral interests owned of record by Ruth Nelson. Since, however, the Weflens did not have knowledge Ruth Nelson was in fact dead, under the District Court's own reasoning, all they were required to do, in addition to publishing the notice, is mail notice to the last addresses of record for Nelson, which they did do.

**3. The Weflens Satisfied All of the Act's Notice Requirements.**

[¶18] Even if this Court concludes the Weflens' suspicions concerning Nelson's mortality should be treated as knowledge she was no longer living, that conclusion does not change what was required of the Weflens under the Act. The 2006 version of the Act provided:

> [¶19] The publication provided 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.*

N.D.C.C. § 38-18.1-06(2)(2005) (emphasis added).

[¶20] A plain reading of the Act results in two requirements concerning notice. The first requirement is publication of the notice for three weeks in the official county

newspaper. There is no dispute that this was properly completed.

[¶21] The second notice requirement concerning mailing is a contingent requirement, stated in the alternative. The surface owner is required to determine whether the address of the mineral owner is shown of record or not. If the address is shown of record the surface owner is required to mail the notice to the address of record. If the address of the mineral owner is not shown of record, then the surface owner is required to make reasonable inquiry to try to determine the owner's address and then mail notice based on that inquiry. If an address cannot be determined after reasonable inquiry, then the minerals can be reclaimed based solely on publication notice. If inquiry is required, the Act only requires inquiry as to the owner's address – not inquiry as to the owner's heirs.

[¶22] It is undisputed in this case that at the time of notice the county recorder's title records disclosed only one owner of record of the minerals, Ruth Nelson. At the time of notice, Ruth Nelson no longer owned the minerals because she transferred all of them to Terrel Anderson and Patricia Anderson (the Capps) via a mineral deed executed on June 6, 1979. (A at 321.) That deed, however, was not recorded until after the minerals were reclaimed by the Weflens. (A at 322.) From June 6, 1979 until the Capps interest was terminated by the Weflens, the minerals were owned by the Capps, but Ruth Nelson remained the owner of record for purposes of the Act.

[¶23] The Capps concede that Nelson transferred to them her entire interest to the minerals (A at 27, 262, 265-266.) Because Ruth Nelson transferred her interest in the minerals prior to her death, all of the District Court's analysis concerning notice to heirs is erroneous. The Capps were only entitled to receive notice in their capacity as the

actual owners of the minerals. They did not receive notice, however, because they choose to not record their deed. Any property owner who fails to record proof of his ownership of real property assumes the risks associated with that decision, including the risk that he may lose his interest, without notice. The Weflens properly concluded Nelson was the owner of the minerals for purposes of providing notice under the Act.

[¶24] It is undisputed that two possible addresses were listed in the recorder's title records for Ruth Nelson and that the Weflens properly mailed notice to each address. (A at 308, 314, 317.)

[¶25] Based on these undisputed facts and this Court's holdings in Sorenson v. Felton, 2011 ND 33, ¶¶ 13-14, 793 N.W.2d 799, 802-803, and Sorenson v. Alinder, 2011 ND 36, ¶ 6, 793 N.W.2d 797, 799, nothing further was required of the Weflens to reclaim the abandoned minerals.

[¶26] Based on the undisputed facts and this Courts prior holdings, the District Court should have granted the Weflens' motion for summary judgment. It did not. Instead, the District Court ignored this Court's prior decisions and improperly created additional duties under the Act in situations where the mineral owner is suspected to be dead.

**4. The Act Does Not Require A Surface Owner to Determine the Identity of a Deceased Mineral Owner's Heirs.**

[¶27] In Felton, this Court refused to give an advisory opinion concerning whether mailing the notice to the mineral owner at the last address of record would be sufficient if the surface owner had actual knowledge that the address was invalid. Felton, 2011 ND 33, ¶ 14, 493 N.W.2d at 803. Citing this reference, the District Court concluded it would be absurd to mail notice to a deceased mineral owner and that such an act would be akin

to mailing notice to an address known to be invalid. (A at 287.) The Court, evidently, concluded both circumstances would require additional reasonable inquiry by the surface owner and would negate reliance on the address of record.

[¶28] The District Court's legal conclusion that the surface owner is required to do more than what the Act requires concerning a known-to-be invalid address is wrong because such a requirement destroys the very purpose of the Act, which is to easily and efficiently place abandoned minerals back into production. The North Dakota Legislative Assembly could have required notice be sent to the last address of record; and that the surface owner conduct a reasonable inquiry and mail notices to all additionally discovered addresses. The Legislative Assembly did not so require and this Court should not impose additional requirements beyond the clear statutory requirements. The Act sufficiently protects the Constitutionally protected property rights of mineral owners by using a twenty-year period of inactivity and by requiring notice by publication.

[¶29] Even if, however, this Court were to conclude mailing to a known-to-be-invalid address of record is not sufficient, it is inappropriate to use that conclusion as a springboard for requiring a surface owner to determine a deceased mineral owner's heirs and then make inquiry as to their addresses.

[¶30] No such investigative requirement exists in the Act. Certainly, the Legislative Assembly contemplated that many abandoned minerals may be held of record by deceased individuals and despite knowing this fact it did not require inquiry into possible heirs. The exact opposite is true, the Act contemplates situations where no address of record is available or discoverable after reasonable inquiry, and, even without mailed notice of any kind, the abandoned minerals may still be reclaimed based solely on

publication of the notice.

[¶31] Such a research requirement would present a near impossible hurdle for most surface owners. How will a surface owner go about determining a dead mineral owner's heirs when, like here, the decedent's name is common, there is no record of death or of any probate? Should notice go to heirs at law? What about devisees under a will? A bright-line rule which allows reliance on the address of record is consistent with due process and with the purpose of the Act. The Act does not require an investigation of a dead mineral owner's heirs and this Court should not impose that requirement.

**5. The "owner" of the Minerals Under the Act Is the Owner of Record Based On Recorded Title Documents**.

[¶32] As part of its expansion of the Act's investigation requirements, the District Court concluded Ruth Nelson was not the owner of the minerals because upon death, the minerals devolved to her heirs by operation of law. (A at 288-292.) This conclusion is based on an erroneous factual finding. As noted above, Ruth Nelson transferred all of her interest in the minerals to the Capps prior to her death. She did not own these minerals at the time of her death. The minerals did not devolve to her heirs.

[¶33] This conclusion is also based on a misunderstanding of the Probate Code. N.D.C.C. § 30.1-12-01 provides that "ownership" of property devolves upon death to the decedent's devisees and heirs. For purposes of having legal standing as the record owner of the property, however, North Dakota law places a burden on the person who claims to be an heir to establish their legal right to the property. A person entitled to property by intestacy is required to establish his right to the property by proof of the decedent's ownership, the decedent's death, and the person's relationship to the decedent. N.D.C.C. § 30.1-20-01. Furthermore, devolution is not the same as ownership for purposes of legal

control of the property. In Feickert v. Frounfelter, 468 N.W.2d 131, 132 (N.D.1991), this Court recognized that although property devolves upon death, that devolution is subject to administration, and the personal representative has "power over the title" during the administration of the estate, including the power to sell the property. Feickert, at 132. The ownership of real property may accrue to an heir upon death, but for purposes of the Act the heir is not the "owner" until such time as the heir has established his interest in the property. The District Court erred when it concluded the Weflens could not rely on the ownership records which establish that Ruth Nelson was the owner of the minerals.

### C. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THE ACT REQUIRED THE WEFLENS TO MAIL NOTICE VIA REGULAR MAIL RATHER THAN CERTIFIED MAIL WITH RESTRICTIVE DELIVERY SO THAT PERSONS OTHER THAN THE NAMED ADDRESSEE COULD RECEIVE THE MAILING.

[¶34] As noted above, the District Court concluded the Weflens were required to make reasonable inquiry as to Ruth Nelson's heirs and their addresses. The Court found this failure precluded reclamation of the minerals. In the alternative, the Court concluded the Weflens' use of certified mail with restrictive delivery, in and of itself, violated the Act. (A at 287-288.) The Court concluded using restrictive delivery to send a notice to Ruth Nelson was improper because Ruth Nelson was dead and no other person would have been able to intercept the mailing and receive the notice. This alternative rational for the District Court's decision is contrary to law.

[¶35] The Act does not require a specific form of mailing and therefore no particular form is required to be used. If the Legislative Assembly intended to require a specific method of mailing it would have done so, as it has done in many other statutes. See, e.g. N.D.C.C. § 4-12.2-21 (notice of abandoned apiary and abandoned equipment); N.D.C.C. § 13-04.1-08 (notice of revocation of money broker's license); N.D.C.C. § 43-

10-26 (notice of disposition of stored cremated remains); N.D.C.C. § 39-01-16 (notice of intent to suspend motor vehicle dealer's license).

[¶36] Although the Act does not require a particular manner of mailing, it is appropriate for a notice of lapse to be mailed by certified mail, return receipt, restricted delivery to create a proper record of not only the mailing of the notice but also a record of if it was received and by whom.

[¶37] Furthermore, certified mail, restrictive delivery satisfies the requirement in Rule 4(m) of the North Dakota Rules of Civil Procedure which provides that "[i]f a statute requires service and does not specify a method of service, service must be made under this rule." The Weflens complied with these procedural rules.

[¶38] In addition to being mistaken as to the legal requirements under the Act and Rules, the District Court's conclusion is based on a faulty premise. The Court concluded restricted delivery prevents a third-party from intercepting the notice whereas general delivery would allow a third-party to intercept the mail and learn of its contents. This premise is contrary to what is required under the Act. No other person was entitled to notice under the Act. This premise is also contrary to federal law which precludes any unauthorized person from intercepting the mail of another. 18 U.S.C. § 1702. Here, because Ruth Nelson's estate was not probated, no person was authorized to intercept the mail addressed to her.

[¶39] The Weflens use of restrictive delivery did not violate the Act.

### D. THE DISTRICT COURT ERRED WHEN IT DENIED THE WEFLENS' MOTION FOR SUMMARY JUDGMENT DECLARING THAT THEY PROPERLY TERMINATED RUTH NELSON'S INTEREST IN THE MINERALS.

[¶40] The Weflens complied with all of the notice requirements of the Act. The

District Court erred when it denied the Weflens' motion for summary judgment. This Court should order summary judgment in the Weflens' favor.

## CONCLUSION

[¶41] Because the decision of the District Court relies on erroneous findings and conclusions of law, this Court should reverse the District Court. Because there are no issues of material fact concerning the Weflens' compliance with the notice requirements of the Act, this Court should order summary judgment in favor of the Weflens.

Respectfully submitted this 4th day of September, 2012.

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CERTIFICATE OF SERVICE

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

I hereby certify that on September 4, 2012, I electronically filed with the Clerk of the North Dakota Supreme Court the following:

**CORRECTED BRIEF OF DEFENDANTS/APPELLANTS WINDSOR BAKKEN, LLC AND GULFPORT ENERGY CORPORATION**

and served the same electronically as follows:

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