

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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,)

Appellees,)

v.)

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,)
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.)

Appellants,)

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.,)

Appellants.)

SUPREME COURT NO. 20120184

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

NOV 30 2012

STATE OF NORTH DAKOTA

Appeal from Summary Judgment
Entered on February 8, 2012
Mountrail County No. 31-10-C-00009
Northwest Judicial District
Honorable David W. Nelson, Presiding

**REPLY BRIEF OF APPELLEES
PATRICIA R. CAPPS AND
TERREL A. ANDERSON TO
STATE OF NORTH DAKOTA
AMICUS BRIEF**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES..... 1

ARGUMENT..... 1

CONCLUSION..... 3

TABLE OF AUTHORITIES

RULES

N.D.R.Civ.P. Rule 24(c)(2)1
N.D.R.App.P. Rule 441

NORTH DAKOTA CENTURY CODE

N.D.C.C. § 38-18.11, 2
N.D.C.C. § 38-18.1-06 (2004) 1, 3

STATEMENT OF THE ISSUE

Whether Appellees Patricia Capps and Terrel Anderson's (together "Capps") alternative argument that N.D.C.C. § 38-18.1-06 (2004) as applied is unconstitutional.

ARGUMENT

First, and to be clear, Capps maintains that the alternative constitutional argument is appropriately before the Court. It is undisputed that the State did not receive notice pursuant to N.D.R.Civ.P. Rule 24(c)(2), the district court nonetheless addressed the constitutional question and determined the statute was not unconstitutional. None of the parties raised the failure to provide notice pursuant to N.D.R.Civ.P. Rule 24(c)(2) (or N.D.R.App.P. Rule 44) until the appellants reply phase in this appeal. For the reasons outlined in Capps supplementary brief on file with the Court, the issue is properly before the Court and any deficiency in providing notice to the State of a constitutional challenge, if one existed, has been cured by virtue of the fact the State has submitted its position on this alternative constitutional argument.

Capps constitutional argument is made in the alternative only. Of course the Appellants present arguments to overturn the district court's decision, in the same way Appellees have presented arguments to preserve the district court's decision. It is agreed that Capps' alternative argument need not be addressed if the Court affirms the district court's decision. But if the Court rejects the district court's decision, and Capps' primary statutory arguments, the Court should address Capps' alternative constitutional argument.

The State cites several recent decisions where this Court did not address the constitutionality of N.D.C.C. ch. 38-18.1. The reason for this is the Court was not asked

to address the constitutionality of N.D.C.C. ch. 38-18.1. Here, the Court is being asked to address, in the alternative only, the constitutionality of the notice components of N.D.C.C. ch. 38-18.1 as applied to Capps.

An alternative argument is one that is addressed only if a primary argument fails. An alternative argument is premised on a hypothetical—in the event a court rejects a primary argument then the hypothetical alternative argument is transformed into an argument and is addressed. In the event the Court rejects Capps’ primary arguments and the district court’s rationale, Capps constitutional argument transforms from hypothetical to reality. If the Court determines that Weflens’ notice of lapse mailed certified, restricted delivery, to a person believed to be deceased conforms to the statute, Capps argues such application to Capps is unconstitutional as violative of due process. Capps’ alternative argument is fully set forth in the Appellee Brief.

The State’s footnote at page three of its brief misses the focus of this quiet title action. The question is not whether the Capps should have updated the record or used the minerals. The question is whether the Weflens complied with the termination of mineral interest statutes. If the Court determines the Weflens complied with the statute, then Capps alternative argument must be analyzed. The analysis of the constitutionality of the notice aspect of the statute, as applied to Capps, has nothing to do with whether Capps used the property or filed a statement of claim. It is not Capps’ burden to prove compliance with the Termination of Mineral Interest Act.

It is true that we will never know what a “reasonable inquiry” would have resulted in because it is admitted none was attempted. In the event the Court holds the notice of lapse mailed to Ruth Nelson was sufficient to satisfy the statutory requirement to mail

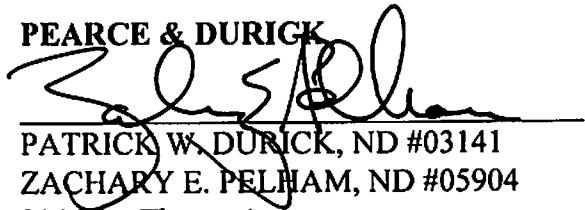
notice to the address of the mineral interest *owner*, then Capps' alternatively argues the statute as applied is unconstitutional because it violates Capps' due process rights by allowing valid notice on a dead person. The Weflens were required to make a "reasonable inquiry" and they admit this was not done. The question of whether compliance with other aspects of the statute, filing a statement of claim or using the minerals, are irrelevant to an analysis of considering whether Weflens complied with the statute.

CONCLUSION

If the Court addresses the alternative constitutional argument presented by Capps, it should hold the notice component of N.D.C.C. § 38-18.1-06 (2004) unconstitutional as applied to Capps for the reasons outlined in the Appellee Brief.

Dated this 30th day of November, 2012.

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AFFIDAVIT OF SERVICE

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

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 30th day of November, 2012, she mailed a copy of *Reply Brief of Appellees Patricia R. Capps and Terrel A. Anderson to State of North Dakota Amicus Brief* by placing a true and correct copy thereof in an envelope and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota, to the following:

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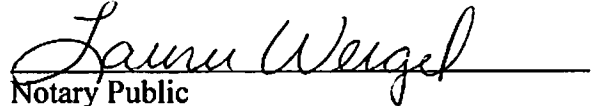
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The foregoing was subscribed and sworn to before me this 30th day of November, 2012,
by Annette Kirschenheiter.

WITNESS my hand and official seal.


Notary Public

