20130003

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
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CLERK OF SUPREME COURT

MAR 22 2013

STATE OF NORTH DAKOTA

Earl R. Van Sickle
and Harold R Van Sickle

Plaintiff,
Appellant,
Cross-Appellees

v.

Hallmark & Associates, Inc. Frank Celeste, William R. Austin, Phoenix Energy, Bobby Lankford and Earskine Williams, collectively known as "Interest Holders" NEWCO, and their successors in interest, Missouri Breaks LLC

Defendant,
Appellee,
Cross-Appellant

Supreme Court No. 20130003
Dist. Ct. Civil No. 2006-C-120

APPEAL FROM THE DISTRICT COURT, NORTHEAST
JUDICIAL DISTRICT, MCKENZIE COUNTY, NORTH DAKOTA

REPLY BRIEF OF APPELLANT- PLAINTIFF
EARL R. Van Sickle and Harold R Van Sickle

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Introduction

Van Sickle's have submitted their Appellate Brief. It has been responded to by Hallmark et al. The following is the Reply Brief of the Van Sickles.

ANALYSIS

1) Appealable Issues. Defendants urge that they filed a Motion for New Trial etc. In fact the only defendant to request relief was *Missouri Breaks LLC* (MB). (VS App pg 167). None of the other Interest Holders (I.H) joined in on that application. That request addressed interest on unpaid royalties and nothing more. (VS app pg 167-168).

The Court's Order on Reconsideration etc (VS App pg 198 et seq) noted MB was sole defendant, to seek relief on the Motion for New trial. Further, that Order addressed the matters of interest, fees and the entities that were responsible for the same. This recognizes that the ruling on Successor in Interest (VS app pg 73, et seq,81) relates that *all* defendants were liable for various damages. That ruling was changed in part for unknown reasons and not otherwise explained by the Order on Reconsideration (VS App 198 et seq)

The Cross Appeal of Defendants (VS app 210) relates nothing about the Order on Damages of 13th of April 2012 (VS App 149-155) As such, there is no appeal of the Order

on Damages. Note also I.H right to appeal the Court's ruling on Successor liability etc is doubtful on account of their privity relationship with M.B - considering I.H. failure to join in on the Motion for New Trial or amendments. (compare VS app 210, with 167) As MB failed to challenge the ruling on Successor in Interest by not adequately identifying the same in their cross appeal, and/or failing to seek relief from the same at the time of the Motion for New Trial- their request for relief on that matter (successor liability) has been waived. (Riverwood Commerical Park v Standard Oil 2007 ND 36 Par 13 729 NW2d 101- privity relationship can bar by res judicata 3rd parties claims. Ungar v North Dakota State Univ 2006 ND 185,Par 11721 NW2d 16,20. Enger v Neff 43 NW2d 644 (ND 1950) Cartier v Northwestern 2010 ND 14, Par 9 777 NW2d 866- when a motion for new trial is made the party making the motion is limited on appeal to the matters presented to the trial court) on that application.

Defendants infer (Appellee brief pg 11) that Van Sickle did not raise any issue with regard to attorney fees on their cross motion. They fail to acknowledge that Van Sickle raised the issued on their Motion for Reconsideration and by reference otherwise. (VS app pg 156 et seq, 173) Note VS motion for reconsideration of

damages and cross motion does not limit which of the defendants would be liable. As was noted above the lower Court's ruling on successor in interest placed full liability for various damages on all of the defendants. The Order on Remand only struck liability based upon piercing of the veil theories. (MB app 48) As such Van Sickles are entitled to claim on this appeal that all defendants are liable for damages.

2) Successor liability;

Defendants continue to urge that they are not liable. I.H. as working interest owners have a duty under the leases to develop produce and pay. These claims were advanced by pleading (VS app 21-22)and on plaintiff's application in 2011 for partial summary judgment. (R.O.A 144) There at page 7 of the Van Sickle's brief- they showed an alternate basis for recovery from the interest holders that had nothing to do with piercing of the veil. This recognizes that nothing in the submissions of Van Sickle on damages limited their request to only Missouri Breaks. Van Sickle's submission was consistent with the lower courts ruling- that Plaintiffs Motion for Partial Summary Judgment designating Defendants as Successor in Interest is granted. (VS app pg 81- 82) Again nothing in the Order limits which defendant is

liable for fees (VS app 81,201 et seq) Only that there is no piercing of the veil. Further it stated that the *defendants* were liable for damages. (id) While the Court changed words in its final ruling,- it is clear that there was no limitation on which defendants would be responsible for various damages. (VS app pg 200, 204)

3) Application of Downtowner: Downtowner Inc v Acrometal Products 347 NW2d 118,121 (ND 1984) is to be applied. Changes based upon Minnesota law are not relevant as the claim of Van Sickle arose prior to 2005. Amendments that occurred (2007) were after the claim arose. This recognizes that generally statutes and changes thereto apply prospectively. White v. Altru Health System, 2008 ND 48, 746 N.W.2d 173. Even assuming that Downtowner type recovery mechanisms are not applicable, the Bankruptcy Code which is part of the confirmed plan imposed obligations on the defendants that were separate and apart from Downtowner. In this regard the plan noted that the oil and gas leases were assumed. The assumption of the leases included the duty of curing all leases assumed by reason of 11 USC 365. This was a separate obligation from what arose under the leases themselves. While Defendants would urge that the leases were transferred free of all claim etc that fails to recognize that the status of good

faith purchaser was resolved by *Van Sickle I* 2008 ND 12,Par 15 et seq 744 NW2d 532,538-539. There this Court held that Van Sickles who were not on notice could directly challenge defendants in this matter notwithstanding a bankruptcy ruling. Defendants may not now challenge that ruling as it is the rule of the case, (Thompson v Schmitz 2011 ND 70 Par 10, 795 NW2d 913,917) when defendants have conceded that they failed to provide Van Sickles with notice of the bankruptcy case.

4) Attorney Fees; While attorney fees under NDCC 47-16-39.1 are within the province of the Court. However the Court must follow what has been prescribed. The act says nothing about offset for non related matters. Nor does the act reference anything about a party having to take the initiative. In this case defendants are not prevailing parties under 47-16-39.1 Nothing in the act considers attorney fees to be the equivalent of taxable costs under NDCC 28-26-01. Reliance upon Stand v Cass County 2008 ND 149, Par 19, 753 NW2d 872, Dowhand v Brockman 2001 ND 70 Par 11, 624 NW2d 690, Lemer v Campbell 1999 ND 223, Par 9, 602 NW2d 686 and similar authorities is misplaced --as those cases relate to costs and not attorney fees. A cost does not include attorney fees when the legislature has directed that fees be recoverable as an additional damage

item. see NDCC 47-16-39.1 NDCC People of Sioux County, Neb. v. National Surety Co., 276 U.S. 238, 48 S.Ct. 239, 72 L.Ed. 547,550 (1928). In Hensley v Eckerhart 461 US 424 , 103 S Ct 1933 76 L.Ed2d 40,50 (US 1983) the Supreme Court has noted that a 'prevailing party' for attorney fees-is one that has succeeded on any significant issue which achieves some of the benefit sought in bringing the suit. The Court must then determine what is reasonable and which considers a methodology similar to that used in North Dakota.

The lower court in the case at bar did not consider these standards, but relied upon issues that were handled before the remand that had nothing to do with the act. Further it didn't make any consideration of the factors that go into an award on fees other than matters having nothing to do with act. This recognizes that various cases have considered who a *prevailing party* is. Van Sickle meets that criteria. Wachovia SBA Lending, Inc. v. Kraft, 165 Wash. 2d 481, 200 P.3d 683 (2009) ("prevailing party" defined as "the party in whose favor final judgment is rendered"). They are entitled to fees and for more than initiating the case. Fees are the obligation of all of the defendants as the lower court has noted.

Defendants seek fees but have failed to make a

competent claim for them. First they have not shown that they prevailed under the act. No damages were set over to them in any regard. They failed to prevail on the issues of import under the act. Unpaid royalties were found to be due and by the defendants. Further they have failed to make any timely fee claim of what is alleged due.

5) Simple vs Compound Interest; Defendants seek to redraft the legislation. The legislature could have said simple interest. It did not. What method of multiplication should be employed needs to be considered by the trial court. While it is urged that MB was not the operator during the times in question it assumed the leases and had the duty to cure past defaults as did the I.H.

Defendants urge that the common law resolves this matter. It does not. It has been noted that there is in this state no common law in any case where the law is declared by the code (NDCC 1-01-06)In this matter nothing in the 47-16-39.1 NDCC permits supplementation of the act with the common law as occurred in Great American Ins v Amer State Bank 385 NW2d 460, (ND 1986). Here the common law has been displaced by the legislature in its attempt to level the playing field and afford remedial help to recover materially delayed royalties. In this case multiplying interest is appropriate. Now is not the time

to deny the citizens of this state with the measure of relief that the legislature wanted them to have.

Conclusion

It is requested that the matter be remanded to the lower court for the award of fees that are reasonable that consider all factors along with multiple interest - from all defendants and such other and further relief as is proper and just.

Dated this 22 day of March 2013

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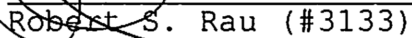
CERTIFICATE OF SERVICE

I , the undersigned , served a copy of **Appellants Reply Brief** on the ____ day of _______________, 2013, upon entities herein, by depositing a copy thereof , postage prepaid, or express service addressed as follows:

Jon R. Brakke
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389

Dated this 22 day of March, 2013.



____
Robert S. Rau (#3133)

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