ORIGINAL

20130003

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

Earl R. Van Sickle and Harold R. Van Sickle, Plaintiffs, Appellants, and Cross-Appellees vs. Hallmark & Associates, Inc., Frank Celeste, William R. Austin, Phoenix Energy, Bobby Lankford and Earskine Williams, collectively known as "Interest Holders" NEWO, and their successors in interest, Missouri Breaks, LLC, Defendants, Appellee, and Cross-Appellants)	Supreme Court Case No. 20130003 District Court Civil No. 06-C-00120

APPEAL AND CROSS-APPEAL FROM THE ORDERS OF APRIL 1, 2011, FEBRUARY 13, 2012, NOVEMBER 5, 2012, AND AMENDED JUDGMENTS OF NOVEMBER 21, 2012 AND DECEMBER 10, 2012 OF THE DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT, MCKENZIE COUNTY, NORTH DAKOTA

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

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[¶1] **I. ARGUMENT**

[¶2] *1. Appealable Issues.*

[¶3] The Van Sickles argue Defendants waived the right to appeal numerous issues because Missouri Breaks filed a "Motion for a New Trial or Amendment of Findings and Judgment" which limits Defendants' to the issue of the interest that was awarded. (VS App. 167-168) The motion filed by Missouri Breaks was in response to an erroneous interest calculation by the District Court. (VS App. 153) The District Court recognized its interest calculation was in error and actually ***granted*** Missouri Breaks' "Motion for Amendment of Findings and Judgment." (VS App. 198-204) The District Court clearly considered Defendants' Motion a request to amend findings under Rule 52 and/or and amend the judgment under Rule 59(j) of the North Dakota Rules of Civil Procedure and did not consider it a request for a new trial.

[¶4] This is consistent with the Federal Rules of Civil Procedure which presumes that any motion that draws into question the correctness of a judgment is functionally a motion to alter or amend judgment, "whatever its label." *Norman v. Arkansas Dept. of Educ.*, 79 F.3d 748, 750 (8th Cir. 1996); *see also Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 288 (5th Cir. 1989) (Motion for new trial had to be construed as motion to alter or amend order and concomitant judgment; motion apparently questioned substantive correctness of judgment and was filed within ten-day limit prescribed by rule governing motion to alter or amend judgment.)

[¶5] The Van Sickles assert the Interest Holders cannot cross-appeal the issue of successor liability because the Defendants did not identify in their cross-appeal they were appealing from the Order on Damages dated April 13, 2012. In their Notice of Cross-Appeal, the Defendants indicated they were appealing from the "Order on Damages of date February 13, 2012." (VS App. 210) Defendants accidentally indicated February 13th rather than the correct April 13th date, but clearly indicated the "Order on Damages" was included within the scope of the cross-appeal. The Van Sickles also assert the District Court's ruling on successor liability was not properly identified in the cross-appeal. This is incorrect in that Defendants could not have appealed from the Order on Successor Liability dated February 6, 2012 (VS App. 73-82) in that it was an interlocutory order and thus not appealable until the Order for Damages and the Judgment were entered. The Defendants did not waive or otherwise limit the reviewable issues on appeal.

[¶6] ***2. Successor in Interest Liability of the Interest Holders.***

[¶7] The Van Sickles claim the District Court's ruling on Missouri Breaks as successor in interest to Athens/Alpha (VS App. 73-82) somehow made *all* of the Defendants *(i.e.*, Missouri Breaks and the Interest Holders) responsible for paying damages to the Van Sickles, rather than just Missouri Breaks as the responsible successor to Athens/Alpha. This is patently incorrect. The District Court's Order on Damages dated April 13, 2012 specifically ordered only Missouri Breaks to pay damages to the Van Sickles. (VS App. 154) The Order for Amended Judgment dated November 5, 2012 again ordered only Missouri Breaks to pay

damages. (VS App. 204) Notwithstanding the fact that the District Court clearly ordered only Missouri Breaks to pay damages to the Van Sickles, the Interest Holders could not be ordered to pay damages or attorney's fees because the District Court specifically ruled the Interest Holders were not operators of the Well under N. D. Cent. Code § 47-16-39.1. (MB App. 48, 55)

[¶8] ***3. Successor Liability Under Downtowner.***

[¶9] Defendants have cross-appealed the District Court's finding that Missouri Breaks is the successor in interest to Athens/Alpha under the judicially created doctrine of successor liability as set forth in *Downtowner, Inc. v. Acrometal Products*, 347 N.W.2d 118 (N.D. 1984). The District Court had ruled the de facto merger and mere continuation common law exceptions to the doctrine of successor liability as set forth in *Downtowner* were not available to the Van Sickles based on the revisions enacted to N.D. Cent. Code § 10-19.1-104(4) in 2007. (VS App. 75-80) The Van Sickles claim the District Court erred in disregarding the de facto merger and mere continuation exceptions because the 2007 revisions to N.D. Cent. Code § 10-19.1-104(4) were in applicable to the instant case which was governed by the 2005 version of N.D. Cent. Code § 10-19.1-104(4). The District Court properly determined the 2007 revision was a *clarification* of existing law and the de facto merger and mere continuation exceptions were not available to the Van Sickles.

[¶10] ***4. Attorney's Fees.***

[¶11] The Interest Holders have cross-appealed the District Court's failure to award attorney's fees pursuant to N. D. Cent. Code § 47-16-39.1 as prevailing parties. The Van Sickles assert the Interest Holders reliance on prior North Dakota Supreme Court cases discussing standards for determining the "prevailing party" for purposes of assessing taxable costs under N. D. Cent. Code § 28-26-01 are inapplicable to the determination of the prevailing party under Section 47-16-39.1. This argument is not persuasive. The North Dakota Supreme Court follows the rule of construction that "words used in a statute should be construed according to the sense in which they have been previously used in like statutes." *Gimble v. Montana-Dakota Utilities Co.*, 77 ND 581, 44 N.W.2d 198, 202 (1950) *citing Great Northern Railway Co. v. Ward County*, 54 ND 75, 208 N.W. 768, 769 (1926). It must be presumed that in enacting N. D. Cent. Code § 47-16-39.1, the North Dakota Legislature was aware of the case law that has developed with respect to the issue of "prevailing parties" and specifically used that term for a reason.

[¶12] All of the claims against the Interest Holders were dismissed by the District Court. Furthermore, the District Court specifically held "the individual Interest Holders are not operators of the Well under N.D. Cent. Code § 47-16-39.1 and, therefore, are not liable for the payment of royalties." (MB App. 55) Accordingly, there can be no dispute that the Interest Holders were prevailing parties and entitled to attorney's fees under Section 47-16-39.1. Furthermore, the

Van Sickles' assertion the Interest Holders should somehow be required to pay attorney's fees to the Van Sickles based on the District Court's determination that *Missouri Breaks* is liable to the Van Sickles is completely unfounded.

[¶13] ***5. Simple vs. Compound Interest.***

[¶14] Finally, the Van Sickles repeat their argument that the District Court should have awarded compound interest rather than simple interest. They claim the interest awarded pursuant to N. D. Cent. Code § 47-16-39.1 was intended to be compounded, notwithstanding that Section 47-16-39.1 provides for "interest calculated at the rate of eighteen percent per annum" and does not explicitly authorize compound interest as required under common law. *See* 44 Am.Jur.2d *Interest and Usury* § 54 ("The common law has long favored simple interest and disfavored compound interest, and the generally recognized rule is that interest should not bear interest.") The Van Sickles urge the Supreme Court to find the common law presumption that interest is simple in kind was displaced by N.D. Cent. Code § 47-16-39.1. "Ordinarily, statutes are presumed not to alter or modify the common law unless they expressly so provide." *Agassiz & Odessa Mut. Fire Ins. Co. v. Magnusson*, 136 N.W.2d 861, 868 (Minn. 1965). There is no basis for allowing the compounding of interest in this case.

[¶15] **II. CONCLUSION**

[¶16] Defendants respectfully request the North Dakota Supreme Court reverse the ruling of the District Court finding Missouri Breaks was the successor in

interest to Athens/Alpha and remand for a determination as to attorney's fees due and owing to Defendants.

[¶17] Alternatively, if the Supreme Court affirms the District Court's ruling as to Missouri Breaks' liability, then Defendants request the Court affirm the ruling of the District Court as to the damages for unpaid royalties in the sum of $3,698.56 plus interest in the sum of $6,388.02 for a total award of $10,086.67 due to each Plaintiff. Defendants also request the Supreme Court affirm the award of $3,000 in attorney's fees to the Plaintiffs, but reverse as to the District Court's refusal to award attorney's fees to the Interest Holders.

Dated this 8th day of April, 2013.

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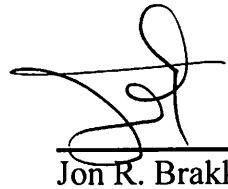
CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellees/Cross-Appellants in the above-entitled matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents and table of authorities totals 1,507.

Dated this 8th day of April 2013.



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Supreme Court No. 20070154
McKenzie County Civil No. 06-C-120

STATE OF NORTH DAKOTA)
) ss
COUNTY OF CASS)

AFFIDAVIT OF SERVICE BY MAIL

Jordan C. Morin, being first duly sworn on oath, does depose and say: She is of legal age and not a party to or interested in the above entitled matter.

On the 8th day of April, 2013, affiant served one bound copy of the following document:

Reply Brief of Appellees/Cross-Appellants

on the involved counsel by placing the same in envelopes addressed as follows:

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and causing them to be placed in the mail at Fargo, North Dakota with first-class postage prepaid.

Jordan C. Morin

Subscribed and sworn to before me this 8th day of April, 2013.

SONIE J. THOMPSON
Notary Public
State of North Dakota
My Commission Expires Aug. 13, 2016

Notary Public, Cass County, North Dakota

(SEAL)