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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Patricia R. Capps, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Supreme Court No. 20140110
	)	Mountrail County Case No. 31-10-C-00009
Colleen L. Weflen, et al.,	)	
	)	
Defendants.	)	

APPEAL FROM THE MOUNTRAIL COUNTY DISTRICT COURT JUDGMENT
DATED MARCH 21, 2014

NORTH CENTRAL JUDICIAL DISTRICT

BRIEF OF APPELLEE AND CROSS-APPELLANT

WHITING OIL AND GAS CORPORATION

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STATEMENT OF THE ISSUES

I. Does a surface owner satisfy the requirements for a notice of lapse of mineral interest under N.D.C.C. § 38-18.1-06 (2005) when the Notice of Lapse of Mineral Interest is mailed to the address of the mineral interest owner shown of record and the record does not reflect that the record owner has died?

STATEMENT OF THE CASE

[¶1] Under Rule 28(j) of the North Dakota Rules of Appellate Procedure Whiting Oil and Gas Corporation, Appellee and Cross-Appellant Whiting Oil and Gas Corporation ("Whiting"), adopts the Statement of the Case set forth in the Brief of Appellees and Cross-Appellants Weflen.

STATEMENT OF THE FACTS

[¶2] Ruth A. Nelson owned the Subject Property in fee until March 24, 1975, when she conveyed the Subject Property to Olav and Rose Weflen via a warranty deed, reserving unto Nelson "one-half of all minerals" in the property. *See* App. 123-24. This warranty deed (the "1975 Warranty Deed") was recorded with the Mountrail County Recorder as Document No. 219971 on April 16, 1975. *Id.* The mineral interest at dispute in this case is the one-half mineral interest reserved by Ruth A. Nelson.

[¶3] The Weflen Defendants are the successors in interest to Olav and Rose Weflen, and they sought to succeed to the disputed mineral interest after it lapsed due to nonuse. They published a Notice of Lapse of Mineral Interest, dated November 29, 2005, listing Ruth A. Nelson as the owner of record of the lapsed interest, in the Mountrail County Promoter on December 28, 2005; January 4, 2006; and January 11, 2006. App. 125-28.

On January 13, 2006 the Weflen Defendants mailed copies of the Notice of Lapse to Ruth A. Nelson's most recent addresses of record: a Washington state address listed on the 1975 Warranty Deed, and an Oregon address taken from a 1973 oil and gas lease signed by Nelson. App. 129-31, 123-24, 137-38. Finally, on March 6, 2006, the Weflens recorded a Notice of Termination of Mineral Interest, the Notice of Lapse of Mineral Interest, an Affidavit of Publication, and an Affidavit of Mailing, as Document No. 320668 with the Mountrail County Recorder. App. 125-36. Although it appears that Ruth A. Nelson was deceased at the time the Notice of Lapse was published and mailed, the record on appeal contains no evidence that her death was of record in Mountrail County or that the Weflen Defendants had actual notice of her death.

[¶4] Nor did the property records contain any indication that Nelson had transferred her interest to Appellants and Cross-Appellees Patricia R. Capps and Terrel A. Anderson (collectively the "Capps Plaintiffs"). Before her death, Nelson conveyed either all or half of her remaining interest in the disputed minerals to the Capps Plaintiffs, via a mineral deed dated June 6, 1979 (the interpretation of this deed is also being appealed). App. 157-58. The Capps Plaintiffs failed to record their mineral deed for nearly thirty years. They finally filed the instrument with the Mountrail County Recorder on March 31, 2009, as Document No. 353538. *Id*. The recording of this deed occurred more than three years after the Notice of Lapse was published and mailed. The Capps Plaintiffs also filed two Statements of Claim of Mineral Interest with the Mountrail County Recorder on October 30 and 31, 2008, approximately two years and eleven months after the first publication of the Notice of Lapse. App. 139-40.

[¶5] Whiting claims its interest in the disputed minerals through an oil and gas lease entered into by Defendant Colleen L. Weflen, a/k/a Colleen Folven, individually and as heir of Rose Weflen a/k/a Rose Weflin, deceased. ROA 235, Exhibit A. Through a series of assignments, Whiting claims a 25% interest in this lease, and Appellee and Cross-Appellant EOG Resources, Inc. ("EOG") a 75% interest in the lease. ROA Nos. 71, 235.

ARGUMENT

[¶6] Whiting appeals the District Court's ruling that the Weflen Defendants failed to satisfy the requirements of the Termination of Mineral Interest Act. Because Whiting's interest is substantially similar to that of EOG for purposes of this appeal, Whiting adopts any arguments that EOG shall raise on the appeal, as permitted under Rule 28(j) of the North Dakota Rules of Appellate Procedure. Below is a summary of the primary reasons this Court should reverse the District Court and hold that the Weflen Defendants succeeded to the mineral interest at issue in this case.

I. Standard of Review

[¶7] A District Court's order granting summary judgment is "reviewed anew on the entire record." *Halvorson v. Sentry Ins*., 2008 ND 205 ¶ 5, 757 N.W.2d 164, 171. Interpretation of the Termination of Mineral Interest statute is a question of law reviewed de novo. "The question of how to interpret and apply chapter 38-18., N.D.C.C. . . . is a question of law; therefore the standard of review is de novo." *Johnson v. Taliaferro*, 2001 ND 34 ¶ 9, 793 N.W.2d 804, 806.

II. The Weflen Defendants complied with the requirements of N.D.C.C. § 38-18.1-06 (2005), and therefore succeeded to an interest in the disputed minerals.

[¶8] The District Court, in its *Order Denying Weflens' Motion for Summary Judgment, Granting Capps' Motion for Reconsideration and Rule 54(b) Certification*, provided three reasons for holding that the Weflen Defendants failed to succeed to the minerals at issue. App. 114-20. All three reasons are in error; each is addressed in turn below.

A. The Weflen Defendants complied with the statute by mailing the Notice of Lapse to the address of the mineral interest owner "shown of record."

[¶9] At the time relevant here, the statutory provision at issue stated:

> [I]f 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 (2005).

[¶10] The District Court reasoned that "mailing service to a dead person would be absurd," and that the Weflens should have conducted a reasonable inquiry for addresses of current mineral owners. App. 115. *Sorenson v. Felton* and *Sorenson v. Alinder* are the controlling authority on this issue. 2011 ND 33, 793 N.W.2d 799; 2011 ND 36, 793 N.W.2d 797. In *Felton*, this Court held that a reasonable inquiry to determine the address of the mineral owner is only required when the mineral owner's address does not appear of record. 2011 ND 33 ¶¶ 13-14, 793 N.W. 2d at 802-03. The rule of *Felton*, according to this Court, "is not an absurd result because Felton would have received notice if she had kept her address of record current." *Id.* ¶ 14, 793 N.W.2d at 803. In *Alinder*, this Court held that *Felton* was applicable in a case where the owners of record had died. 2011 ND 36 ¶¶ 3, 6, 793 N.W.2d at 799 (noting that 50 years had passed since the

minerals were used and that both mineral owners of record had died before the notice of lapse was mailed to their address of record).

[¶11] The District Court attempts to distinguish these cases by stating that the Weflen Defendants had "knowledge" of Ruth A. Nelson's death. App. 115. However, the factual record of this case does not support that conclusion. Plaintiffs have relied on a short passage from the deposition of Norris Weflen: "I knew they were passed away at that time, yeah, when this was -- this was in, you know – **I don't know. This was many years later. They would have had to have been extremely old** at that time, so --" App. 143 (emphasis added). He agreed with the examining attorney that he simply "assumed they were dead." App. 144. Weflen exhibited uncertainty as to whether Ruth A. Nelson was actually dead in 2005, while admitting that – given her age – it was probable that she was deceased. Such a state of mind falls far short of the standard for "knowledge" or actual notice of an event. *See* N.D.C.C. § 01-01-23 (defining actual notice as the "express information of a fact").

[¶12] Moreover, even if this Court accepts the District Court's determination that one or more of the Weflens had "knowledge" of Ruth A. Nelson's death, the District Court's conclusion was still in error. To quote *Felton*, simply allowing the notice of lapse to be mailed to the address of record "is not an absurd result because [the mineral owner] would have received notice if she had kept her address of record current." 2011 ND 33 ¶ 14, 793 N.W.2d at 803. To the extent that the present situation is "absurd," it is entirely a product of the Capps Plaintiffs' failure to record their mineral deed until thirty years after they received their interest, and the remaining Plaintiffs' failure to make any claim

of record to the minerals. Just like Felton, they should have kept their address of record current if they wanted to ensure that they would be mailed any notice of lapse.

B. The Weflen Defendants' certified mailing of the Notice of Lapse complied with the statute.

[¶13] The Weflen Defendants sent notice by certified mail, return receipt, restricted delivery; the District Court found this method of mailing problematic. App. 115-16. But beyond the requirement that notice be "made by mailing," the statute is silent as to how notice should be mailed to the mineral owner of record. N.D.C.C. § 38-18.1-06 (2005). In other words, no particular method of mailing is required. In the end, the Capps Plaintiffs prevented themselves from receiving the Notice of Lapse by failing to record their mineral deed, and Nelson's remaining heirs likewise made no claims of record to the minerals. Sending the Notice of Lapse by certified mail, return receipt, restricted delivery was perfectly proper.

C. The address of the mineral interest owner was shown of record.

[¶14] As a third and final basis for holding that the minerals did not vest in the Weflens, the District Court reasoned that "[t]he Owner's address did not appear of record . . . because property devolves to the deceased's heirs upon death." App. 116. The District Court then embarked on a discussion of probate law and the concept that property passes upon death, subject only to administration. App. 116-19. Whiting does not dispute this concept of probate law. But it does not follow that Ruth Nelson's death prevented the mineral interest owner's address from being "shown of record" for purposes of North Dakota's Termination of Mineral Interest statute.

[¶15] As a preliminary matter, it is undisputed that the Capps Plaintiffs claim their ownership through a 1979 mineral deed executed by Nelson before she died. App. 157.

At least as to them, this was a not a situation in which a mineral interest passed on death, subject to administration.

[¶16] More fundamentally, surface owners are entitled to rely on the county property records, and it is the mineral owner's burden to keep a current address of record. In *Alinder*, the surface owners mailed a notice of lapse in 2007 to the record address of mineral owners who had acquired their interest through a 1953 mineral deed and had not used the minerals for over 50 years. 2011 ND 36 ¶ 2, 793 N.W.2d at 798. The two mineral owners of record had passed away in 1980 and 1999. *Id.* This Court ruled that mailing the notice of lapse to the address shown of record was enough to satisfy the statutory requirements for a notice of lapse of mineral interest:

> [I]t is undisputed Sorenson timely mailed the notice of lapse to Russell and Edna Alinder at their address shown of record in Buffalo, North Dakota, within ten days after the last publication. Based on this record, Sorenson complied with the mailing requirement of N.D.C.C. § 38–18.1–06(2), and the district court erred in requiring Sorenson to also conduct a "reasonable inquiry" to establish compliance with N.D.C.C. § 38–18.1–06.

Id. ¶ 6, 793 N.W.2d at 799. The reasoning in *Alinder* is controlling and dispositive given the facts of this case. It is undisputed that the county property records here listed Ruth A. Nelson as the owner of the disputed mineral interest and supplied her address. The Weflen Defendants were entitled to rely on the address "shown of record" when mailing their Notice of Lapse, and they therefore succeeded to ownership of the lapsed mineral interest at issue.

CONCLUSION

[¶17] For the reasons set out above, Whiting Oil and Gas Corporation respectfully requests that this Court reverse the Judgment dated March 21, 2014 and overturn the determinations made by the District Court in its February 7, 2012, Order Denying

Weflens' Motion for Summary Judgment, Granting Capps' Motion for Reconsideration, and Rule 54(b) Certification.

DATED this 13 day of June, 2014.

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CERTIFICATE OF SERVICE

[¶18] I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE AND CROSS-APPELLANT WHITING OIL AND GAS CORPORATION** was on the 13th day of June, 2014, served electronically to the following:

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