IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20140110

Patricia R. Capps, f/k/a Patricia Anderson, Terrel A. Anderson, a/k/a Terral Anderson,

Plaintiffs, Appellants and Cross-Appellees,

and

The Estate of Ruth A. Nelson, Deceased,

Plaintiff and Appellee,

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, a married woman dealing in her sole and separate property, Catherine Harris, f/k/a Cathy Gunderson, a single woman, Norris Weflen, a/k/a Norris L. Weflen, a single man, Windsor Bakken, LLC, a Delaware Limited Liability Company,

Defendants, Appellees and Cross-Appellants,

and

John H. Holt Oil Properties, Inc., Atomic Oil & Gas, a Colorado Limited Liability Company,

Defendants and Appellees,

and

Gulfport Energy Corporation, EOG Resources, Inc., Whiting Oil and Gas Corporation,

Defendants, Appellees and Cross-Appellants,

and

Cade Oil and Gas, LLC, Gerald C. Wools, Penny Brinks, Michael Lee, Gwen Hassan, and Melissa Kellor,

Defendants and Appellees.

REPLY BRIEF OF APPELLANTS AND CROSS-APPELLEES PATRICIA R. CAPPS AND TERREL A. ANDERSON

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LAW AND ARGUMENT

Three issues exist: 1) whether Weflens failed to strictly comply with the requirements of N.D.C.C. § 38-18.1-06 (2005); 2) whether N.D.C.C. § 38-18.1-06 (2005) is unconstitutional as applied; and 3) whether Nelson conveyed all of her interest to the Capps or only half of her interest. Issue three was previously addressed. Arguments on issues two and three were previously made by Capps in the 2012 appeal, which are incorporated here by reference. *See* Brief of Appellees Patricia R. Capps and Terrell A. Anderson, *Capps v. Weflen*, 2013 ND 16, 826 N.W.2d 605 (No. 20120184).

I. Weflens Failed to Strictly Comply With N.D.C.C. § 38-18.1-06(2).

A. Statutes Enacted in Derogation of Common Law are Strictly Construed.

The subject statute states in relevant part:

> 1. Any person intending to succeed to the ownership of a mineral interest upon its lapse shall give notice of the lapse of the mineral interest by publication.
>
> 2. The publication provided for 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 (2005) (emphasis added). The requirements of N.D.C.C. ch. 38-18.1 must be strictly construed. *Spring Creek Ranch, LLC v. Svenberg*, 1999 ND 113, ¶ 10, 595 N.W.2d 323. "[F]orfeitures are not favored. . . ." *Goodman Inv., Inc. v. Swanston Equip. Co.*, 299 N.W.2d 786, 788 (N.D. 1980).

"[I]f the address of the mineral interest owner is shown of record. . ." then the surface owner need only mail notice to the mineral interest owner. *Id.* If the mineral interest owner's address is not shown of record, then a reasonable inquiry must occur. *Id.* Here, while the address shown of record was at one time Nelson's, she was not the mineral interest owner because she was dead.

There is no provision in this statute for a "record owner." This term has no support in statute and has come into existence only through specific circumstances stated in *Estate of Christeson v. Gilstad*, 2013 ND 50, 829 N.W.2d 453. The context in *Gilstad* is distinguishable. *Gilstad* analyzed N.D.C.C. § 38-18.1-03 as to whether a "use" of the minerals occurred when an owner of minerals, who was not of record, leased them. The use of the terms "record owner" and "legal owner" was in the context of the relevant circumstances in *Gilstad* and have no place here. "Record owner" is not used nor defined by statute—it is a term invented to deflect the unambiguous meaning of "owner" contained in N.D.C.C. § 38-18.1-06(2). If the legislature wanted to include "record owner" in the statute then it could have. An owner is an owner. And a deceased person, who while living may have owned, cannot own upon death as a matter of law. Such a person is neither an owner nor a "record owner." Afterall, "this Court must presume the legislature meant what it said and said all it intended to say." *Gilstad*, 2013 ND 50 at ¶14.

Windsor cites the 2009 version of N.D.C.C. § 38-18.1-05(2) at paragraph 37 of its brief, which was also cited in *Gilstad* at paragraph 14. But there was no mention of "record owner" in this statute until it was amended in 2009. Prior versions had no mention of "legal owner" vs. "record owner" or any intimation of a distinction. The legislature did *not* recognize a difference between a "record owner" and a "legal owner" when it enacted the

statute in 1983. That *Gilstad* found that the "legislature recognized the difference between a record owner and a legal owner and knew how to limit the statute's application if it wished to do so" is true only *after* the 2009 amendment. *Id.* The Court should strictly construe the meaning of owner in the plain sense of the word.

B. Attempted Notice Sent to a Deceased Person is Invalid.

While the statute does not state that notice must be made on a living person, "[t]he law neither does nor requires idle acts." N.D.C.C. § 31-11-05(23). The burden is on the Weflens to prove strict compliance. The Weflens believed Nelson was deceased; they told their attorney. Norris Weflen testified:

> **Q:** Now, at the time that this lawsuit was filed, do you have any idea whether Herman or Ruth [Nelson] were alive?
>
> **A:** No. 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 –
>
> **Q:** This is in 2005.
>
> **A:** Right.
>
> **Q:** November of 2005.
>
> **A:** Exactly. So they would have had to have been extremely old to still be alive at that time.
>
> **Q:** So you assumed they were dead.
>
> **A:** Yeah.
>
> **Q:** Okay. Did you convey that information to Mr. Eiken?
>
> **A:** Well, yeah.

Capps App. 143-45; EOG App. 304. These admissions are downplayed by cross-appellants, who claim the Weflens had no "actual knowledge" of Nelson's death. But this ignores the undisputed testimony of their state of mind. If a person believes something to

be true, but ignores it, are they not subject to consequence? If the Court answers no, then Capps alternatively submits that knowledge is irrelevant because Nelson was dead when notice was attempted.

The legislature did not enact N.D.C.C. § 38-18.1-06(2) to require service on the "mineral interest owner" who "is shown of record" if the person is deceased. The legislature crafted the statute to allow surface owners the ability to claim abandoned minerals by making a reasonable inquiry if the former owner was deceased and the current (and inherently living) mineral interest owner's address was not of record.

The district court correctly held that regardless of knowledge or belief, Nelson was deceased when the notice was mailed. The district court acknowledged the current case law on interpreting the subject version of N.D.C.C. § 38-18.1-06: "a surface owner is required to conduct a reasonable inquiry only if the mineral owner's address is *not* shown of record." Capps App. 112 (emphasis original). It cannot be disputed that Nelson was not the mineral interest owner when notice was sent certified, restricted delivery, mail. This is true regardless of belief or knowledge. Because Nelson was not the mineral interest owner, a reasonable inquiry was required.

C. The Act Does Not Contain a "Futility Standard."

The Weflens concede no reasonable inquiry was attempted. Capps attempted to seek information on what inquiry was made by the Weflens' attorney but an objection was made and the district court deemed Capps' attempt to depose the attorney moot. Capps App. 144-45; 148-49. The Weflens argue that even if a reasonable inquiry had been performed that it would have been futile. The problem with this argument is twofold: 1)

there is no "futility standard" in the statute and 2) because no reasonable inquiry was performed, the result is unknown.

"Reasonable inquiry" is typically a question of fact. Yet when a reasonable person can make but one conclusion from the evidence, "reasonable inquiry" can be determined as a matter of law. *Spring Creek*, 1999 ND 113 at ¶¶ 19-20.

The Weflens attempted to show the district court it would have been very difficult to find Nelson and performed the following search:

> On November 11, 2010, counsel for the Weflens put Ruth Nelson's name in the [Social Security Death Index] using all the information available to the Weflens in 2006. That information was her name, and other possible keywords such as 'Herman," "North Dakota," "Mountrail County," "Idewild, Tacoma, Washington," and "Lyons, Oregon." That search pulled up 160,134 results for Ruth A. Nelson – the proverbial needle in a haystack.

Capps App. 71. On the very first page of this search Ruth Nelson was noted deceased in Linn County, Oregon in 1979 (12th one down). *Id.* at 92. This highlights an inquiry would not have been futile. And if the Weflens had simply mailed the notice to Nelson's former residences, which were occupied by Capps' first cousin and former husband, it is more than plausible that they would have contacted Capps. *Id.* at 47.

The statute requires a search for an owner's address if it is not of record. The focus of the statute is what must be analyzed and the statute requires what it requires: mailing notice to the *owner* if the address is of record or a reasonable inquiry. The suggestion that heirs must be identified is misleading because the statute requires identification of owners. Here, the mineral owner was dead and no inquiry was made as to the owner's address.

D. Just Mail It.

The Weflens argue the statutory requirement of "mailing" should mean sending notice by certified, restricted delivery, mail. But the law does not provide this. The district

court held: "N.D.C.C. § 38-18.1-06(2) does not require a notice of lapse to be mailed by certified mail, return receipt, restricted delivery." Capps App. 115. Adding this requirement to the law improperly changes and restricts the plain language of the statute.

The legislature is aware that the U.S. Postal Service provides products such as certified mailing and restricted delivery mailing. North Dakota law actually defines "registered mail": "Wherever the term 'registered mail' appears in the laws of the state of North Dakota it means 'registered or certified mail.'" N.D.C.C. § 1-02-36. If the legislature intended something other than simple mailing, it could have required it. Here, the plain meaning of "mailing" is to place a stamped envelope in a mailbox.

Cross-Appellants argue that N.D.R.Civ.P. Rule 4 governs N.D.C.C. § 38-18.1-06(2). But Rule 1 states in part: "These rules govern the procedure in all civil actions and proceedings in district court, except as stated in Rule 81. . . ." N.D.R.Civ.P. Rule 1. The notice requirement in N.D.C.C. § 38-18.1-06(2) is not filed in district court and does not commence a civil action. Our civil procedure rules are inapplicable. The legislature does not enact our civil procedure rules (no more than courts enact legislation). Service and mailing are distinct. Unilateral additions placed on the notice statute by individuals who have everything to gain by the inability to provide notice should not be tolerated.

Notice is meant for the mineral interest owner. Here, the mineral interest owner was not Nelson. Because notice was sent restricted delivery, no living person could have accepted it. By adding restricted delivery mailing, Weflens changed the requirement of the statute and prevented the possibility of notice accomplishing notice on the mineral owner. Here, had notice been mailed, the occupants of the residences continued to have a

connection to Capps and notice could have been accomplished on Capps, the mineral owner.

E. Legislative History Irrelevant.

N.D.C.C. § 38-18.1-06 is not ambiguous and legislative history is irrelevant. *Sorenson v. Felton*, 2011 ND 33, ¶ 16, 793 N.W.2d 799; Capps App. 56. To engage in debate over whether the legislature meant this or that, as to a statute that has already been determined by this Court to be unambiguous, is inappropriate.[1]

G. *Alinder*, *Felton*, and *Taliaferro* Distinguished.

The Court previously addressed N.D.C.C. § 38-18.1-06. *Johnson v. Taliaferro*, 2011 ND 34, 793 N.W.2d 804; *Sorenson v. Felton*, 2011 ND 33, 793 N.W.2d 799; *Sorenson v. Alinder*, 2011 ND 36, 793 N.W.2d 797. Capps' arguments are distinguishable.

Alinder contained facts in which "owners" were deceased; *Felton* and *Taliaferro* considered owners who had moved and not updated their record addresses. *Alinder* did not address the impact death has on a mineral interest owner, leaving the following question to be addressed: can a deceased person be a mineral interest owner? Capps say no, Cross-Appellants yes.

The Court noted "mineral interest owners of record" Russell Alinder and Edna Alinder had died. *Alinder*, 2011 ND 36 at ¶ 2. But the opinion did not address the effect their deaths had on the notice requirement. And the terminology used, "mineral interest owners of record," is not found in statute. The Court stated the "dispositive issue on appeal is whether the district court erred in requiring Sorenson to conduct a 'reasonable inquiry'

[1] Capps rejects arguments presented by Cross-Appellants that legislative history favors their position.

under N.D.C.C. § 38-18.1-06(2004), when the address of the mineral interest owner was shown of record." *Id.* at ¶ 4. While it can be said, perhaps, that the *Alinder* Court impliedly accepted the proposition that a person listed as the owner in the record, while in fact dead, can still be an owner, the decision does not actually address the issue. And, if that is what the *Alinder* Court actually meant, the precedential effect of a determination that dead people can own property is revolutionary. Here, Capps argues that a person believed to be deceased by the Weflens, and who was deceased when notice was attempted, cannot own anything and therefore attempted notice on Nelson caused the Weflens' attempt to comply with N.D.C.C. § 38-18.1-06 to fail.

In *Felton*, an argument was raised by the mineral interest owner that the "result is absurd because a surface owner with knowledge of a mineral owner's correct mailing address could send notice to an incorrect record address." *Id.* at ¶ 14. The Court rejected this: "[the] scenario is not the set of facts before us, and we will not issue an advisory opinion." *Id.* Here, a similar scenario exists. It is absurd for a statute to require notice be sent to a person believed to be, and who was, deceased.

II. Alternatively, the 2005 Version of N.D.C.C. § 38-18.1-06 Violates Due Process and is Unconstitutional as Applied.

Capps argued in the alternative that if the district court did not grant summary judgment in favor of Capps, then the district court should hold the statute, as applied, unconstitutional as violative of Capps' substantive and procedural due process rights. Capps asks that N.D.C.C. § 38-18.1-06 (2005) be found unconstitutional as applied because it deprives property without due process of law. The district court rejected this argument in its first amended order but did not address the argument in the second order. Capps App. 105-07.

N.D.C.C. § 38-18.1-06 should be deemed unconstitutional if the Court determines a deceased person can be subjected to notice. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1. The Supreme Court has held:

> An elementary and fundamental requirement of due process in any proceeding which is to be recorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); *see also Kornblum v. St. Louis County, Mo.*, 72 F.3d 661, 663 (8th Cir. 1995). The notice in *Mullane* was deficient "not because in fact it failed to reach everyone, but because under the circumstances it [was] not reasonably calculated to reach those who could easily be informed by other means at hand." *Mullane*, 339 U.S. at 319. Here, notice was not reasonably calculated to reach anyone because Nelson was deceased and those mailing the notice believed she was deceased.

The *Mullane* due process standard did not apply to the Indiana Mineral Lapse Act. *Texaco, Inc. v. Short*, 454 U.S. 516, 534-36 (1982). A severed mineral interest in Indiana that is not used for a period of twenty years automatically lapses and reverts to the current surface owner unless the mineral owner files a statement of claim prior to the end of the twenty year period. *Id.* at 541. *Short* rejected constitutional arguments by the mineral owners based on taking, equal protection and due process. *Id.* at 530-40. North Dakota's statute is materially different from Indiana's statute making *Short* distinguishable.

A. North Dakota Act Compared to the Indiana Act.

The North Dakota Act differs from Indiana's Act in three ways. First, notice to a mineral owner was not mandatory in Indiana. The Indiana statute did not require any notice to a mineral owner prior to a statutory lapse. A surface owner who succeeded to the ownership of a mineral estate pursuant to the statute "may" give notice that the mineral interest has lapsed. *Short*, 454 U.S. at 520, n.9. The North Dakota statute, however, requires "notice must also be made by mailing a copy of the notice to the owner of the mineral interest." N.D.C.C. § 38-18.1-06(2). Once notice is required, it must be reasonably calculated to actually apprise interested parties of the controversy.

Second, under the Indiana statute, the severed mineral interest is terminated upon expiration of the twenty year period. In North Dakota, the severed mineral interest never lapses without publication and notice to the surface owner and filing with the County Recorder. The North Dakota statute, unlike the Indiana statute, is not equivalent to a statute of limitations.

Third, under North Dakota's statutory scheme, a mineral owner's interest is not extinguished if the owner files a statement of claim within sixty days of publication of the notice. Under the Indiana statute, a mineral owner has no right to notice prior to extinguishment of the interest. *Short*, 454 U.S. at 533.

B. Applying *Short* and *Mullane*.

In discussing the due process claim, *Short* explained that it was essential to differentiate between a self-executing statute or whether subsequent judicial determination is required to determine whether a lapse actually occurred. *Id.* at 533-34. In the case of a self-executing statute, specific notice of a lapse need not be given. *Id.* If the statute is not

self-executing, however, the *Mullane* due process standard requires notice reasonably calculated to reach all interested parties and a prior opportunity to be heard must be provided before judgment can be entered in a quiet title action. *Short*, at 534.

The Supreme Court expounded upon its discussion of self-executing statutes and due process requirements in *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988). *Pope* involved a challenge to Oklahoma's non-claim statute, which required the executor of an estate to give notice to creditors by publication only and required creditors to present their claims to the probate court within two months of publication. *Id.* at 479-81. Creditors challenged the statute on due process grounds, arguing they were entitled to actual notice. The Supreme Court agreed, holding due process required actual notice to reasonably ascertainable creditors of an estate that the period described in the non-claim statute had begun to run. *Id.* at 490-91. In doing so, the Court distinguished *Short* on the basis that Indiana's mineral lapse act was self-executing, whereas the Oklahoma non-claim statute required involvement of the probate court. *Id.* at 486-87.

C. North Dakota Act Not Self-Executing.

The clearest demonstration of required state action under our statute is that the North Dakota Supreme Court has already ruled that whether "reasonable inquiry" has been made, and whether mailing is sufficient, are questions of fact. *Spring Creek*, 1999 ND 113 at ¶ 18. Since a question of fact always exists, a judicial determination is always going to be necessary to determine whether proper notice was given. *Id.* Since a judicial determination is required, the statue is not self-executing. *See also* N.D. Mineral Title Standard 13-01 (reaching the same conclusion and requiring a quiet title action). This is the state involvement found in *Pope*, which triggered application of *Mullane*.

If the mineral interests are "unused for a period of twenty years immediately preceding the first publication of the notice required by section 38-18.1-06. . .[,] " and "[t]itle to the abandoned mineral interest vests in the owner or owners of the surface estate in the land in or under which the mineral interest is located on the date of abandonment . . .[,]" then the statute cannot be construed to be self-executing *because* "notice must also be made by mailing a copy of the notice to the owner of the mineral interest . . . ." N.D.C.C. § 38-18.1-02 and -06. If notice "must" be mailed, then the statute cannot be self-executing.

Short likened the Indiana Act to a statute of limitations, in that the right to the mineral interests lapsed by a certain date. Yet North Dakota requires both notice and "state action." The notice must be mailed. The severed mineral interest is not extinguished unless the surface owner publishes and files a "copy of the notice and an affidavit of service of the notice" with the County Recorder. N.D.C.C. § 38-18.1-06(4). Because state action is required, *Mullane* applies.

As applied here, the statute is unconstitutional because it violates Capps' guarantee of due process under the law. There is no question that the attempted notice in this case was not reasonably calculated to reach Nelson. The notice was not reasonably calculated to reach anyone. Capps' due process rights have been violated because notice was not reasonably calculated to reach the owner of the minerals.

Since a determination of whether proper notice and service is required in this case, the Court must look to the *Mullane* due process standard. The Weflens' actions clearly do not meet the *Mullane* standards. Nelson would have been 108 years old at the time of mailing, had she not died 26 years earlier, and the Weflens believed she was deceased. Attempting to send notice to Nelson did not, and could not, have apprised anyone of the

purported lapse and afford them an opportunity to present objections. If the Court finds that a deceased person can be subject to notice if that person was listed in the record as an owner of minerals (even though they are, and believed to be, deceased), such notice is clearly violative of substantive and procedural due process and the statute is unconstitutional as applied.

D. Effect of the 1979 Mineral Deed Ruling.

The district court determined that Nelson only conveyed half of her minerals to Capps in the 1979 Mineral Deed, with the remaining half going to Nelson's heirs upon her death. Capps App. 150-56. Capps argues for reversal of this decision. But, at the same time, Capps cannot ignore the possibility of the Court affirming the district court and offers the following in the alternative only. If the Court affirms, it must review the effect of procedural and substantive due process rights afforded to the heirs of Nelson as to the notice component of N.D.C.C. § 38-18.1-06(2). The heirs became owners of the minerals immediately upon Nelson's death, subject to administration. As argued, Nelson was not an owner—not a "record owner" and not a "legal owner." She was dead. The statutory requirement is that notice is to be mailed to the "mineral interest owner" if their address is of record or, if it is not, then a reasonably inquiry must be done. This was not followed and is evidence of non-compliance with the statute. If the Court rejects this argument and determines the Weflens complied with the statute, then Capps argues the statute is unconstitutional as applied.

CONCLUSION

The Court should affirm the district court's judgment that the Weflens do not have ownership of the subject mineral interests. The Court should reverse the district court's

judgment that the 1979 Mineral Deed conveyed only half of Ruth Nelson's minerals to Capps.

Dated this 3rd day of July, 2014.

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Supreme Court No. 20140110

AFFIDAVIT OF SERVICE BY MAIL

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

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 3rd day of July, 2014, she mailed a copy of *Reply Brief of Appellants and Cross-Appellees Patricia R. Capps and Terrel A. Anderson*, by placing a true and correct copy thereof in an envelope, addressed to the following:

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Annette Kirschenheiter

Annette Kirschenheiter

Subscribed and sworn to before me this 3 day of July, 2014.

Dayna Barone

Notary Public

DAYNA BARONE
Notary Public
State of North Dakota
My Commission Expires October 10, 2018