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NOVEMBER 22, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT STATE OF NORTH DAKOTA

Black Stone Minerals Company, L.P., and the Hamill Foundation, Plaintiffs, and Missouri River Royalty Corporation and Bauer Family LLP, Plaintiffs and Appellants, v. Kate Sarah Brokaw, Gordon Brokaw as Personal Representative of the Estate of Evelyn Brokaw, Gordon Brokaw as Trustee of the Testamentary Trust U/W of Evelyn G. Brokaw FBO Jacob Gordon Brokaw, Gordon Brokaw as Trustee of the Testamentary Trust U/W of Evelyn G. Brokaw FBO Emily Sue Brokaw, Kristen Jones, Steven Irgens, James Scott Brokaw, Ryan Kyle Brokaw, Brett Christopher Brokaw, Gordon D. Brokaw, Linda B. Irgens, Martha Brokaw, Lyman G. Brokaw, and all other person unknown claiming any estate of interest in or lien or encumbrance upon, the real estate described in the complaint, Defendants and Appellees.	Supreme Court No. 20160286 Williams County No. 53-2015-CV-1217

Appeal from Judgment Dated June 16, 2016, of the Williams County District Court

The Honorable Judge Joshua B. Rustad, Presiding

BRIEF OF DEFENDANTS/APPELLEES

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STATEMENT OF ISSUES

[1] The sole issue for this Court to resolve on appeal is whether the district court erred by quieting title of one-half of the minerals under the Subject Property to the defendants.

STATEMENT OF CASE

[2] In 1945, the district court of Williams County entered a Judgment (hereinafter the "1945 Judgment"), which allocated ownership of lands in Williams County (hereinafter the "Subject Property") to Lyman Brokaw and Martha Brokaw. (Johnson Aff., Ex. 2 [A. 21-22].) In 1958, Lyman Brokaw deeded his interest in the minerals under the Subject Property to North American Royalties Inc., the plaintiffs' predecessor in interest. (Johnson Aff., Ex. 3 [A. 23].)

[3] The legal effect of the 1945 Judgment and the 1958 Mineral Deed from Lyman Brokaw form the fundamental basis of the dispute. (Amended Complaint, ¶¶ 6-9 [A. 8]; Answer and Counterclaim, ¶¶ 28 and 33 [A. 14-15]; Answer to Counterclaim, ¶ 8 [Def. A. 2].) The plaintiffs have asserted that the 1945 Judgment vested title in the Subject Property in Lyman Brokaw only, not Martha Brokaw, despite the unambiguous language of the 1945 Judgment. (Amended Complaint, ¶¶ 6-9 [A. 8].) The unambiguous language of the 1945 Judgment states "Lyman G. Brokaw . . . and Martha Brokaw, his wife, are the owners in fee simple absolute of certain real property situated in Williams County", which is the Subject Property. (Johnson Aff., Ex. 2

[A. 21].) Under the plaintiffs' interpretation of the 1945 Judgment, the 1958 Mineral Deed effectively conveyed all of the minerals under the Subject Property to the plaintiffs' predecessor in interest. (Amended Complaint, ¶ 6 [A. 8].) The defendants (hereinafter the "Brokaws") asserted that the unambiguous language of the 1945 Judgment vested one-half of the minerals under the Subject Property in Martha Brokaw. (Answer and Counterclaim, ¶ 44 [A. 18].) And, since Martha Brokaw did not join in the 1958 Mineral Deed, that deed only conveyed Lyman Brokaw's individual interest in the minerals under the Subject Property. (Answer and Counterclaim, ¶¶ 29-33 [A. 14-15].) As a result, Martha Brokaw's share of the minerals under the Subject Property passed to her successors in interest, the Brokaws. (Answer and Counterclaim, ¶¶ 34-39 [A. 15-16].)

[4] The plaintiffs also claimed that they were entitled to possession of the minerals under the Subject Property because they adversely possessed the minerals, were Bona Fide purchasers for value, filed an Affidavit of Marketable Title, and that the Brokaws were barred from asserting any claim due to laches. (Pl. Br., ¶ 16, 28.)

[5] A summary judgment hearing was held on May 17, 2016. The parties agreed that there were no genuine disputes of material fact and the action was ripe for summary judgment.

> **Mr. Weber:** As I think our brief states, no one takes issues to any of the recorded documents or the documents that are put forth so far. The only issue would be the legal interpretation.
>
> **The Court:** Very well. Attorney combs, your comments.
>
> **Ms. Combs:** I would agree as well to that conclusion.

(Tr. p. 10.)

[6] The district court found in favor of the Brokaws and awarded one-half of the minerals under the Subject Property to the plaintiffs and the other half to the Brokaws. (Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Cross-Motion for Summary Judgment [A. 70-74] [hereinafter "Summary Judgment Order"]; Judgment [A. 75-76].)

STATEMENT OF FACTS

[7] At one time, Lyman Brokaw owned a fee simple absolute interest in the surface and minerals of the Subject Property, by virtue of a County Deed from Williams County. (Johnson Aff., Ex. 1 [A. 20].). Shortly after the tax deed was recorded, the 1945 Judgment was entered by the Williams County District Court. The 1945 Judgment decreed Lyman Brokaw and his wife, Martha Brokaw were the owners in fee simple absolute of the Subject Property. (Johnson Aff., Ex. 1 [A. 21-22].)

[8] In 1958, Lyman Brokaw executed the 1958 Mineral Deed, which conveyed his interest in the minerals under the Subject Property to North American Royalties Inc., the plaintiffs' predecessor in interest. (Johnson Aff., Ex. 3 [A. 23].) Martha Brokaw was not a party to, nor a signatory on, the 1958 Mineral Deed. Id.

[9] Neither the plaintiffs nor the Brokaws dispute their respective chains of title after the 1958 Mineral Deed. (Amended Complaint, ¶¶ 6-9 [A. 8]; Answer and Counterclaim, ¶¶ 28 and 33 [A. 14-15]; Answer to Counterclaim, ¶ 8 [Def. A. 2].). The interpretations of the 1945 Judgment and the 1958 Mineral Deed and the ramifications

thereof form the basis for the legal issues in the instant case. (Amended Complaint, ¶¶ 6-9 [A. 8]; Answer and Counterclaim, ¶¶ 28 and 33 [A. 14-15]; Answer to Counterclaim, ¶ 8 [Def. A. 2].) Put simply, the plaintiffs trace their title to North American Royalties Inc. and Brokaws trace their title to Martha Brokaw.

[10] The plaintiffs also submitted various leases, deeds, and other documents to support their alternative claims of ownership. [A. 35-69.] The existence and authenticity of those documents are not in dispute by the Brokaws. (Tr. p. 10.) It is the legal effect of these documents that is in dispute. Ibid.

[11] As a background for this Court, there has never been an oil and gas well with its surface location upon the Subject Property. (Johnson Aff., ¶¶ 4-5, Ex. 10 [Def. A. 6].) The first oil and gas well ever drilled that included the Subject Property in its producing unit was the BEAR CAT 33-28 1H well, which was spudded on February 19, 2013. (Johnson Aff., ¶¶ 7-9, Ex. 11 [Def. A. 7].) This action was started on October 7, 2015 by the plaintiffs. (Docket Sheet [A. 3].) However, the Brokaws had been working on this issue prior to the start of this action. (Tr. p. 6.)

[12] It was a matter of timing that made the Brokaws parties defendant, instead of being parties plaintiff as they had intended. The start of this action finally brought the ownership issue to a head.

LEGAL ARGUMENT

A. Standard of Review

[13] The district court's decision was made on the parties' competing motions for summary judgment under N.D.R.Civ.P. 56.

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Fleck v. Missouri River Royalty Corp., 2015 ND 287, ¶ 6, 872 N.W.2d 329 (quoting Johnson v. Shield, 2015 ND 200, ¶ 6, 868 N.W.2d 368).

[14] The parties agreed on the record below that there is no genuine dispute of material fact in this case. (Tr. p. 10.) The question is

simply whether the district court correctly applied the law to the undisputed facts.

B. The district court properly awarded one-half of the minerals under the Subject Property to the Brokaws.

[15] In initiating this case in the district court, the plaintiffs originally claimed that the 1958 Mineral Deed conveyed a fee simple absolute 100% interest in the minerals lying under the Subject Land from Lyman Brokaw to North American Royalties Inc. (Amended Complaint, ¶ 6 [A. 8].) However, that allegation ignored the 1945 Judgment entered by the Williams County Court thirteen years before the 1958 Mineral Deed. (Johnson Aff., Ex. 2 [A. 21-22].) In the 1945 Judgment, the court decreed that both Lyman Brokaw and Martha Brokaw "are the owners in fee simple absolute" of the Subject Land, including the mineral interest. Ibid. Therefore, the 1945 Judgment vested title in the surface and minerals of the Subject Property to Lyman Brokaw and his wife, Martha Brokaw. As there was no designation as to how Lyman Brokaw and Martha Brokaw received their interest, it is presumed they received the Subject Property as tenants in common. N.D.C.C. § 47-02-08. Because of the 1945 Judgment,

Lyman Brokaw did not own a 100% interest in the minerals at the time he made the 1958 Mineral Deed.

[16] This Court has considered the question of "whether title to real property may be transferred by operation of a judgment under North Dakota law." McKenzie County v. Hodel, 467 N.W.2d 701, 704 (N.D. 1991). This Court concluded that "a North Dakota state court judgment can have a direct in rem effect upon title to real property." Ibid. Further, "North Dakota law does not impede the transfer of title to real property by operation of a judgment." Ibid. The plaintiffs argue that the court in 1945 concluded Martha Brokaw may have had a homestead interest or some type of other interest and that is why her name is included in the 1945 Judgment (Pl. Br., ¶ 29.) No admissible evidence was provided to support that contention, nor does any language in the 1945 Judgment limit its effect to homestead rights. The plaintiffs' argument is raw speculation without any foundation to be found in the evidence or in the law. It is also nonsensical: while a spouse's signature as grantor is commonly used to ensure that such inchoate homestead rights are not held back in a conveyance, and perhaps the same reasoning could justify including a spouse as a party

in a quiet title action, this reasoning does not apply to the court's wording of the 1945 Judgment, which vests title to the land jointly in Lyman Brokaw and Martha Brokaw. By operation of the 1945 Judgment, Lyman Brokaw and Martha Brokaw owned the Subject Land as tenants in common from 1945 onward. Hodel, 467 N.W.2d at 704; N.D.C.C. § 47-02-08.

[17] In an attempt to distinguish this case from Hodel, the plaintiffs claim that "[t]he facts in this case resemble more of the [City of] Fargo v. D.T.L. [Properties, Inc.] case." (Pl. Br., ¶ 25.) In D.T.L. Properties, this Court was tasked with resolving a lawsuit between the actual parties to a deed when one party mistakenly conveyed its parking lot to the other in addition to the property that the parties had intended to convey. 1997 ND 109, ¶ 7, 564 N.W.2d 274. This Court affirmed the district court judgment, reforming the deed in light of the City of Fargo's mistaken inclusion of the parking lot in the legal description. Id. at ¶ 25. There is precisely zero similarity between this action and D.T.L. Properties. This is not an action to reform a deed, this action is not between parties in any kind of privity, and the parties

in this action do not allege that there was a mistake in a deed between them.

[18] The plaintiffs also cite to Malloy v. Boettcher, 334 N.W.2d 8 (N.D. 1983) as support for their argument that the 1958 Mineral Deed was effective to convey the entire mineral interest under the Subject Property to the plaintiffs' predecessor in interest. (Pl. Br., ¶ 26.) In Malloy, this Court analyzed the question of whether a reservation could be effective to reserve an interest in property to a stranger to title. Id. The plaintiffs' citation contains an excerpt that is taken out of context to reach a different conclusion than the one this Court reached. (Pl. Br., ¶ 26.) A more complete version of that same quote is, "a reservation or exception can be effective to convey a property interest to a third party who is a stranger to the deed or title of the property where that is determined to have been the grantor's intent." Malloy, 334 N.W.2d at 9. The plaintiffs are either mistakenly or purposefully misquoting a case for a position it does not support. Either way, the matter in the case at bar has nothing to do with a reservation or an exception to a third party.

[19] The 1958 Mineral Deed, from which plaintiffs claimed their interest, was executed by Lyman Brokaw alone and was not joined by Martha Brokaw. (Johnson Aff., Ex. 3 [A. 23].) As a result, the 1958 Mineral Deed could only convey Lyman Brokaw's one-half (1/2) share of the minerals in the Subject Land. Wachter Dev. L.L.C. v. Gomke, 544 N.W.2d 127, 130 (N.D. 1996) (citing Robar v. Ellingson, 301 N.W.2d 653, 662 (N.D. 1981)) ("The signature of the deed by some, but not all, of the grantors is considered to be a conveyance of the interest owned by the signing parties, *but it is ineffective as to the nonsigning parties*.") (emphasis supplied). Afterward, Martha Brokaw retained her one-half (1/2) interest in the Subject Property. Simply put, the plaintiffs have no chain of title to the interest that Martha Brokaw owned.

[20] The plaintiffs and Brokaws claimed title through a common source, Lyman Brokaw. Brokaws obtained their title through Martha Brokaw, who obtained her title from Lyman Brokaw in the 1945 Judgment. The plaintiffs obtained their interest from North American Royalties Inc., which obtained its title from Lyman Brokaw in the 1958 Mineral Deed, subsequent to the 1945 Judgment. "Where the parties trace their title to a common source, the [Defendants] need not show a

title good as against the whole world, but only as against the [Plaintiffs], and, the one who has the superior title or equity must prevail." Shuck v. Shuck, 44 N.W.2d 767, 771 (1950) (internal quotations omitted and party nomenclature reversed for clarity). As matter of record title, the Brokaws own the one-half interest the Martha Brokaw owned after the 1945 Judgment was entered.

[21] The plaintiffs assert that laches should have barred the Brokaws' claims. (Pl. Br., ¶ 28.) To establish laches, the party asserting laches must establish a delay or lapse of time and the "party against whom laches is sought to be invoked must be actually or presumptively aware of his rights and fail to assert them against a party who has in good faith permitted his position to become so changed that he cannot be restored to his former state." Simons v. Tancre, 321 N.W.2d 495, 500 (N.D. 1982) (quoting Sabot v. Fox, 272 N.W.2d 280, 283 (N.D.1978)).

[22] The title issues presented in the case at bar have not been addressed until this time because oil and gas exploration of the Subject Property did not begin until February 19, 2013. (Johnson Aff., ¶¶ 4-9 and Exs. 10-11 [Def. A. 6-7].) Prior to 2013, there was no particular

reason for the plaintiffs or the Brokaws to bring the action to the district court.

[23] Additionally, the plaintiffs and their predecessors in interest were on record notice that Martha Brokaw owned half of the Subject Property via the 1945 Judgment. "Laches is based principally upon the inequity of permitting a claim to be enforced due to change of conditions of the parties because of such delay." Sabot v. Fox, 272 N.W.2d 280, 283 (quoting Adams v. Little Missouri Minerals Association, 143 N.W.2d 659, 667 (N.D.1966)). The Brokaws should not be barred from asserting a counterclaim because of the plaintiffs and their predecessors' failure to consider and understand the 1945 Judgment's effect on the title to the Subject Property.

[24] Moreover, the Brokaws diligently prosecuted their rights since oil and gas exploration began on the Subject Property. As is the case with many mineral ownership interests in western North Dakota, some clouds on title had rolled in over the years and the Brokaws worked to clear them. Even before oil and gas exploration began in Section 28, the Estate of Evelyn Brokaw was opened on November 24, 2010. (Application for Informal Probate, In the Matter of Evelyn

Brokaw, deceased, Williams County Case No. 53-10-P-368, Docket #2.) The personal representative received the court's authority to make decisions regarding litigation on behalf of the estate on May 26, 2015. (Order Approving the Authority of the PR to Make Decisions on Behalf of Estate in Litigation Without Further Court Intervention or Approval, In the Matter of Evelyn Brokaw, deceased, Williams County Case No. 53-10-P-368, Docket #83.) The litigation contemplated was precisely the lawsuit brought before the district court, "in regard to mineral interests believed to be owned by the Estate in Township 155 North, Range 100 West, Section 28: S1/2NE1/4, N1/2SE1/4." Ibid.

[25] With authority to litigate on behalf of the estate, the personal representative of the Estate of Evelyn Brokaw began preparations to bring a lawsuit similar in form to the instant one, albeit with the names on either side of the "v." reversed. (Tr. p. 6.) It was only due to the plaintiffs commencing this action first that the Defendants did not do so. Id. The plaintiffs also did not explain why they waited until 70 years after the 1945 Judgment was entered or nearly 25 years after the Supreme Court decided Hodel to do anything to clear up the

clouds that the 1945 Judgment, particularly in light of the Hodel decision, cast across their theory of title.

[26] This is far from the model of laches, an equitable doctrine by which parties who unreasonably sit on their rights may be barred from asserting them when the principles of equity make it unfair to do so. The plaintiffs sat on their rights, if any, for 70 years. The Brokaws have done all they can to clear up issues with their title as successors-in-interest to Martha Brokaw ever since oil and gas development began in Section 28 and they became aware of potential clouds on their title. It was perfectly fair for the district court to reach the merits of the parties' claims.

[27] In summary, the plaintiffs' predecessor in title, North American Royalties Inc., obtained its title from Lyman Brokaw thirteen years after Martha Brokaw obtained her interest and Martha Brokaw never conveyed any of her title to North American Royalties Inc. Therefore, as a matter of law, North American Royalties Inc. received only Lyman Brokaw's share of the mineral interest, which was an undivided one-half (1/2) of 160 acres, or 80 undivided net mineral acres. The plaintiffs claimed an interest through North American Royalties

Inc. and their chain of title is not in dispute. Consequently, the plaintiffs own 80 net undivided mineral acres that North American Royalties Inc. received in the 1958 Mineral Deed. The district court properly interpreted the effect of the documents in the chain of title and quieted title to one-half of the minerals under the Subject Property to the Brokaws.

C. This Court does not have standing to decide arguments related to the plaintiffs' internal disputes regarding ownership.

[28] After the district court entered its Judgment, the plaintiffs submitted a motion to correct judgment. (Motion to Correct Judgment [A. 77-78].) This Court remanded the motion to the district court for 30 days. (Clerk's Order of Remand dated August 17, 2016.) The motion was eventually denied. (Order Denying Plaintiffs' Motion to Correct Judgment [Def. A. 10].) However, the district court did not rule on the motion within the thirty days of this Court's remand. Id. Since a decision on that motion was not rendered until after the thirty-day deadline, this Court should not consider the motion because the district court did not rule on it when it had jurisdiction to do so.

[29] Further, the district court did not have jurisdiction to grant the motion to correct judgment and this Court does not have jurisdiction to hear those arguments. Zimney v. N. Dakota Crime Victims Reparations Bd., 252 N.W.2d 8, 11 (N.D. 1977). ("It is basic that before any jurisdiction may be exercised by the court appropriate pleading must be filed giving rise to the court's jurisdiction."). The amended complaint filed by the plaintiffs in this matter requested the district court to grant judgment determining the Brokaws' claims to the Subject Property be adjudged as null and void, and that the plaintiffs owned all of the Subject Property. (Amended Complaint [A. 7-10].) During the course of this action, no claim was made in the pleadings and no argument was made at the summary judgment hearing addressing what would happen to the plaintiffs' interests if the Brokaws succeeded on their claims. No evidence was presented regarding how the plaintiffs' interests would be apportioned if the Brokaws' counterclaim or motion for summary judgment was granted. "Issues must be presented to the district court so the district court can develop the issues and a record for this Court to review on appeal." Gustafson v. Estate of Poitra, 2011 ND 150, ¶ 7, 800 N.W.2d 842.

Because the district court was never asked in a pleading to decide and never fully briefed on the issue of plaintiffs' proportional ownership in the event the Brokaws succeeded, the district court was correct in awarding a one-half interest in the minerals under the Subject Property to "North American Royalties and their successors in interest," which are the plaintiffs. (Judgment, ¶ 3 [A. 76].) The record simply does not reflect how The Hamill Foundation's ownership is superior to that of the other plaintiffs. And because the plaintiffs did not present the issue properly before the district court, this Court cannot hear those claims. Heng v. Rotech Med. Corp., 2006 ND 176, ¶ 9, 720 N.W.2d 54 ("We do not address issues raised for the first time on appeal.").

D. The district court properly denied the plaintiffs' motion to correct judgment.

[30] Alternatively, if this Court does entertain arguments regarding the district court's ownership determination on the Judgment, the district court properly denied the motion.

[31] To start, there may have been other interested parties, including the lessees of the plaintiffs, whose rights may be affected if the district court had granted the motion. "No grantee can be bound by

any judgment in an action commenced against his grantor subsequent to the grant; otherwise a man having no interest in property could defeat the estate of the true owner." Dull v. Blackman, 169 U.S. 243, 248 (1898). The plaintiffs offered numerous leases as support for their motion for summary judgment. As such, all of the lessees are interested parties, especially those who leased with plaintiffs other than The Hamill Foundation.

[32] Another area of concern is the status of the plaintiffs' legal representation. Even though the Motion to Correct the Judgment alleged that all of the plaintiffs agreed as to The Hamill Foundation's ownership, the Notice of Appeal listed two plaintiffs, Black Stone Minerals, L.P., and The Hamill Foundation, as appellees. (Notice of Appeal [A. 79].) Therefore, their independent counsel should have been involved in advising them how to resolve a dispute of title between themselves and The Hamill Foundation.

[33] Ultimately, there were too many issues present for the district court to correct the judgment, even if those issues were raised in the pleadings, which they were not. If the plaintiffs do agree as to their ownership, they can sign a stipulation allocating the remaining

minerals under the Subject Property. Alternatively, a separate action can be brought to determine their individual interest.

E. The Marketable Record Title Act did not divest the Brokaws of their interest in the Subject Property.

[34] The plaintiffs claim that the Marketable Record Title Affidavit (hereinafter "Affidavit") filed by Black Stone Minerals Company, L.P., was effective to vest title in the minerals under the Subject Property to the plaintiffs. (Pl. Br. ¶¶ 17-18.)

[35] The Marketable Record Title Act (hereinafter the "Act") did not vest title in the plaintiffs. As provided by N.D.C.C. § 47-19.1-02,

> "A person is deemed to have the unbroken chain of title to an interest in real estate when the records of the county recorder disclose a conveyance or other title transaction of record twenty years or more which purports to create the interest in that person or that person's immediate or remote grantors, with nothing appearing of record purporting to divest that purported interest."

(emphasis supplied). By operation of the 1945 Judgment, one-half (1/2) of Lyman Brokaw's interest in the Subject Property was divested to Martha Brokaw. The Act does not apply because Lyman Brokaw's interest was divested with one-half (1/2) of the full interest being vested in Martha Brokaw's name by the 1945 quiet title Judgment prior to the

1958 Mineral Deed from Lyman Brokaw to North American Royalties, Inc.

[36] Further, the purpose of the Act is to simplify and facilitate real estate title transactions by allowing persons to deal with the record title owner. N.D.C.C. § 47-19.1-10. The plaintiffs and their predecessors in interest were not the record title owner for the entire mineral estate under the Subject Property. Martha Brokaw was the record owner of the other one-half (1/2) interest.

[37] Assuming, *arguendo,* that the Act did apply, the Affidavit offered by the plaintiffs is only in the name of Black Stone Minerals Company, L.P. (Exhibit AC – Aff. of Marketable Title, [A. 69].) None of the other plaintiffs were privy to the Affidavit. Id. As a result, any effect would only be attributable to Black Stone Minerals Company, L.P.'s potential interest. Further, the Affidavit only references a one-quarter (1/4) mineral interest under the Subject Property. Id. Therefore, it is not effective against the entirety of the Subject Property or against the other one-half interest that Martha Brokaw owned. The Affidavit actually omits Martha Brokaw's interest on its face and does not even claim ownership of it.

[38] The plaintiffs assert that, "oil production is not required for possession minerals [sic]" under the Act. (Pl. Br., ¶ 15.). The Brokaws concede that the Act was amended in order to define possession in relation to the Act. However, the legislative changes do not excuse the defects in the Affidavit and cause it to vest title in the plaintiffs. As explained above, there are numerous issues with the Affidavit that render it ineffective to vest title in the plaintiffs.

F. The plaintiffs did not adversely possess the mineral under the Subject Property.

[39] If the plaintiffs are somehow asserting that the amendments concerning possession under the Act somehow alter the requirements for adverse possession, the plaintiffs cite no case law or other support for that theory. Adverse possession requires proof of specific elements, as listed in N.D.C.C. § 28-01-07 and more thoroughly explained by this Court through case law. As the district court found, the plaintiffs failed to provide sufficient evidence to establish any genuine issue of material fact in regard to their claim for adverse possession. (Summary Judgment Order, ¶ 8 [A. 73].) N.D.C.C. § 28-01-07 establishes a presumption against adverse possession of real estate and the plaintiffs failed to overcome that presumption.

[40] "To satisfy the elements for adverse possession, the acts on which the claimant relies must be actual, visible, continuous, notorious, distinct, and hostile, and of such character to unmistakably indicate an assertion of claim of exclusive ownership by the occupant." Gruebele v. Geringer, 2002 ND 38, ¶ 7, 640 N.W.2d 454. N.D.C.C. § 28-01-07 establishes that a person claiming adverse possession must have held and possessed the property for twenty years.

[41] The plaintiffs supported their claim of adverse possession through deeds and leases to the property, some of which were recorded, some of which were not. [A. 35-69.] However, as the district court found, the plaintiffs failed to establish how their contentions came together to meet the elements of adverse possession. (Summary Judgment Order, ¶ 8 [A. 73].)

[42] In supporting the claim of adverse possession, the plaintiffs relied on the deeds executed by their predecessors in interest to support their claim of actual, open, and hostile use of the minerals. (Pl. Br., ¶¶ 19-21.) While deeding the property may be considered, on some level, a use of the property, no contention is made that such a use is hostile, open, or continuous. The Brokaws cannot find a case that holds it is a

hostile, open, or continuous use merely to deed property. If it were, a stranger to title could convey property he did not own to another, record the instrument, sit on it for twenty years, and then claim adverse possession. They would be able to prove adverse possession without once entering upon the land, where such entry that dispossessed the record owner is the real key to adverse possession. Such a result is absurd.

[43] The plaintiffs also contend the leases of from the individual plaintiffs and their predecessors in interest show actual and hostile possession of the Subject Property. The plaintiffs and their predecessors in interest owned some of the mineral estate under the Subject Property via the deed from Lyman Brokaw to North American Royalties, Inc. and had the right to lease anything they owned. The plaintiffs' contention that such a use is hostile does not address the fact of dual ownership as a co-tenant of an undivided interest. Oil and gas leases commonly describe a larger interest than what the mineral owner actually owns.

[44] For example, North American Royalties, Inc., conveyed one-half of its interest in the Subject Property to Claud D. Hamill in July,

1958 (Combs Aff., Ex. K [A. 39]), then it conveyed one-fourth (1/4) of its interest to Louis W. Hill, Jr. in August, 1959 (Combs Aff., Ex. L [A. 40]), then it conveyed all of its remaining interest to the Wiser Oil Company in May, 1977 (Combs Aff., Ex. M [A. 41-43]). All of the leases proffered by the plaintiffs after those conveyances describe the Subject Property in full as 160 acres, even though North American Royalties, Inc., had executed multiple conveyances to separate parties, which created smaller interests in numerous parties. None of the leases contain a description of how many net mineral acres the lessor owns. The plaintiffs' argument on this point is self-defeating. This Court has long held that "the execution of oil and gas leases does not evidence possession of minerals for purposes of adverse possession." Nelson v. Christianson, 343 N.W.2d 375, 379 (N.D. 1984) (citing Bilby v. Wire, 77 N.W.2d 882 (N.D. 1956) and Sickler v. Pope, 326 N.W.2d 86 (N.D. 1982)). No statute or statutory amendment has been passed and there has been no decision by this Court that has altered or overruled the holding in Nelson.

[45] Co-tenants of mineral interests severed from the surface of lands own an undivided mineral interest with each other. The

plaintiffs' contention that, as co-tenants of a severed mineral estate with the Brokaws, they can adversely possess and acquire ownership of the Brokaws' mineral interest simply by entering into oil and gas leases, is directly counter to the law. If that were the case, any co-tenant could claim the ownership of a non-leasing co-tenant's undivided mineral interest merely by giving an oil and gas lease.

[46] Even the owner of the surface cannot acquire ownership of severed minerals by merely leasing the minerals as if he were the owner.

> "A typical statement is that the domain exercised over the minerals must give notice to the owners of the mineral estate that the occupier of the surface is claiming the minerals thereunder. An actual, public, notorious, and uninterrupted working of the minerals for the statutory period is generally required. The mere execution, delivery, or recording of oil and gas leases or mineral deeds will not constitute adverse possession."

Williams & Meyers, Oil and Gas Law, Volume 1, Section 224.4.

[47] As the Oklahoma Supreme Court said in Mohoma Oil Co. v. Ambassador Oil Corp.:

> Plaintiff is not seeking to establish this right in it by ownership of land or by adverse possession of the land of which the minerals are a part, but by reason of adverse possession of the minerals separate and apart from the title to the land itself. In this situation the only way for such a person to acquire a title or interest in minerals by adverse

> possession is to take actual possession of the minerals by opening and operating mines for the statutory period.

474 P.2d 950, 960 (Okla. 1970) (citing Deruy v. Noah, 185 P.2d 189, 191 (Okla. 1947); Douglas v. Mounce, 303 P.2d 430 (Okla. 1956); Hassell v. Texaco, Inc., 372 P.2d 233, 235 (Okla. 1962)).

[48] The Oklahoma Supreme Court later explained the law of adverse possession as it applies specifically to oil and gas, holding

> "that a leasehold interest may not be adversely possessed either (1) by the drilling of and production of oil and gas from a well drilled on a separate tract of land within a drilling and spacing unit created by the Commission, or (2) by the possession of that oil and gas leasehold under a claim of right for the statutory period."

Atlantic Richfield Co. v. Tomlinson, 859 P.2d 1088, 1096 (Okla. 1993). There has never been an oil and gas well with its surface location upon the Subject Property. (Johnson Aff., ¶¶ 4-5, Ex. 10 [Def. A. 6].) The first oil and gas well ever drilled that included the Subject Property in its producing unit was the BEAR CAT 33-28 1H well, which was spudded on February 19, 2013. (Johnson Aff., ¶¶ 7-9, Ex. 11 [Def. A. 7].) This action was started on October 7, 2015. (Docket Sheet [A. 3].) Even if the plaintiffs had laid some groundwork for adverse possession by leasing

more minerals than they owned, they are roughly 18 years short of the statutory period required to succeed in this claim.

[49] Due to the lack of precise descriptions, the Brokaws and their predecessors in interest would have had an arduous task in trying to determine what the plaintiffs and their predecessors in interest were claiming via their leases because no instrument of record would have shown the Brokaws or their predecessors the exact interest claimed by other parties, much less if such a claim was adverse to them. The party asserting adverse possession must "unmistakably indicate an assertion of claim of exclusive ownership by the occupant." Gruebele, 2002 ND 38, ¶ 7. No such unmistakable indication is present in the case at bar. Further, the parties admitted, during the course of the summary judgment hearing, that there were no genuine disputes of material fact existed. (Tr. p. 10.)

[50] Further, the first recorded lease offered by the plaintiffs was recorded on November 24, 1997, as microfilm Document No. 574951 in the offices of the Williams County Recorder. (Combs Aff., Ex. V [A. 61]). The plaintiffs did not provide any evidence that would demonstrate the Brokaws or their predecessors in interest would have notice of any

leases prior to that time. Even if it were accepted that a lease to another constitutes hostile possession, the plaintiffs would not have possessed the Subject Property in an open hostile manner for a period of twenty (20) years, as required by N.D.C.C. § 28-01-07.

[51] The plaintiffs also contend that the Brokaws cannot show twenty years of ownership, that the Brokaws' ownership is adverse, and the Brokaws have not shown that they "exclusively possessed the property or that their possession was hostile" (Pl. Br., ¶ 21.) The plaintiffs have it backwards. The Brokaws do not need to prove adverse possession. The Brokaws did not make a claim of adverse possession. They did not make such a claim because they are the record owners of the one-half interest that Martha Brokaw owned since no later than 1945 and the plaintiffs are trying to take away that interest in this action. The quote cited by the plaintiffs is applicable to the person claiming adverse possession, not those defending against such a claim. Moody v. Sundley, 2015 ND 204, ¶ 19, 868 N.W.2d 491. The plaintiffs made the claim of adverse possession and it was their burden to prove such a claim. They did not approach their burden, much less meet it as a matter of law.

G. The plaintiffs did not divest the Brokaws of their interest in the Subject Property by being Bona Fide Purchasers for Value.

[52] The plaintiffs also argue that they are bona fide purchasers for value. (Pl. Br., ¶ 22.) The district court correctly concluded that such a claim was without merit. (Summary Judgment Order, ¶ 8 [A. 73].) The plaintiffs and their predecessors in interest are not bona fide purchasers for value. The 1945 Judgment was recorded against the Subject Property prior to North American Royalties, Inc., purchasing minerals from Lyman Brokaw. (Johnson Aff. Ex. 2, 3 [A. 21-23].) North American Royalties, Inc., was on record notice that Martha Brokaw owned a one-half interest in the Subject Property. The title opinion obtained by North American Royalties, Inc., made a legal assumption that turned out to be incorrect. (Goodling Aff. Ex. B. [A. 35-36].) Cp. Hodel, supra. If erroneous legal assumptions stated in a title opinion were enough to divest Martha Brokaw of title simply because someone buying land from Lyman Brokaw relied on them, an incompetent, ignorant, or unscrupulous attorney could render a mistake-riddled title opinion for any piece of real property and the purchaser would automatically become a bona fide purchaser for value. Such a result is

absurd. If a title opinion is incorrect, the claim is for damages against the attorney who rendered an incorrect opinion, not to take away title from the true owners of the property.

[53] Even if the plaintiffs and their predecessors in interest were bona fide purchasers, there is no principle of law that allows them to succeed to Martha Brokaw's title. The plaintiffs are grasping for straws and could not even find a good straw. In Ell v. Ell, one brother sued another to reform a written contract. 295 N.W.2d 143, 144 (N.D. 1980). This Court stated, "[t]he general rule is that reformation will be allowed as against the original parties to the instrument and all those who claim under said parties in privity, with the exception of bona fide purchasers for value and without notice." Id. at 153 (emphasis supplied).[1] The plaintiffs did not demonstrate in the district court, nor have they demonstrated now, that this "general rule" applies in any way to the facts of this case. Moreover, the exception to this general rule applies because the plaintiffs were on record notice since 1945 that Martha Brokaw was the owner of one-half of the mineral interest in the Subject Property. (Johnson Aff., Ex. 2 [A. 21-22].) (Judgment recorded

[1] The quote that the plaintiffs, at ¶ 22 of their brief, attributed to this Court, citing specifically to 295 N.W.2d at 153, is nowhere to be found in the opinion.

in Book 2 of Misc., page 400, on December 29, 1945, at 11:52 a.m.) The 1945 Judgment was very clear that "the plaintiffs, Lyman G. Brokaw, also known as L. G. Brokaw, and Martha Brokaw, his wife, are the owners in fee simple absolute" of the Subject Property. Ibid. (emphasis supplied). The plaintiffs' suggestion that Martha Brokaw's interest was "vague at best" is disingenuous. (Pl. Br., ¶ 22.) By the same logic, all quiet title judgments in favor of more than one party are just as vague, which is disquieting. Further, following that line of reasoning would render any decision in favor of these plaintiffs vague as well, as there are more than one of them. The plaintiffs are not good faith purchasers of Martha Brokaw's one-half interest. In fact, they are not even bad faith purchasers as they never purchased anything from Martha Brokaw.

CONCLUSION

[54] The district court's application of the law to the undisputed material facts was correct. The 1945 Judgment quieted title in one-half of the minerals under the Subject Property to Martha Brokaw. The plaintiffs did not adversely possess or otherwise succeed to Martha

Brokaw's interest. The Brokaws respectfully request this Court to affirm the district court's final judgment.

Respectfully submitted this 22nd day of November, 2016.

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CERTIFICATE OF SERVICE

[55] I hereby certify that, on today's date, I served the foregoing document on the following by electronic mail transmission, pursuant to N.D.R.App.P. 25(c)(4)(B):

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Dated this 22nd day of November, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that, on today's date, I served the foregoing documents on the following by electronic mail transmission, pursuant to N.D. Sup. Ct. Admin. Order 14(D):

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