

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Dudley J. Stuber, Trustee of the)	
D.J. Stuber Land and Royalty Trust)	
and Rocky R. Svihl as Trustee of the)	Supreme Court Case No. 20160391
RGKH Mineral & Royalty Trust)	
Dated 11-1-95,)	Williams County Case No. 53-08-C-765
)	
Plaintiffs and Appellants,)	
)	
vs.)	
)	
Douglas F. Engel, Nikki Engel,)	
Robert Candee, Coleen Rae Baxter,)	
Dirk Ronald Baxter, Frank A.)	
Steinbeck, Patricia E. Steinbeck,)	
John F. Steinbeck, Margaret)	
Steinbeck, Lillian Dasinger as)	
Trustee of the Lillian Dasinger)	
Family Trust, Tracy Dawn Rude,)	
and Jason Scott Hukill,)	
)	
Defendants and Appellees.)	
)	
vs.)	
)	
EOG Resources, Inc.,)	
)	
Intervenor and Appellee)	
)	

Appeal from FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT
dated July 26, 2016, and JUDGMENT entered October 3, 2016

Williams County, North Dakota
Northwest Central Judicial District
Honorable Joshua B. Rustad

REPLY BRIEF OF APPELLANTS

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Cases:

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2014 Mont. 295, 339 P.2d 599 [¶ 3]

Brigham Oil v. Lario Oil
2011 ND 154, ¶16, 801 N.W.2d 677 [¶ 4]

Gerhardt Const. Co. v. Wachter Real Estate Trust
306 N.W.2d 223, 226 [¶ 9]

Friedt v. Moseanko
484 N.W.2d 861, 863 [¶ 12]

Statutes:

N.D.C.C. § 30.1-18-14 [¶ 1, 2, 3, 6, 7, 8]

N.D.C.C. § 30.1-15-08..... [¶ 4]

MCA § 72-3-618..... [¶ 3, 5, 8]

MCA § 72-3-1012 [¶ 8]

N.D.C.C. § 01-01-25..... [¶ 9]

Other Authorities:

UPC § 3-714 [¶ 5, 8]

ARGUMENT

[¶ 1] Resolution of this case turns primarily on the application of N.D.C.C. § 30.1-18-14, which provides protection to purchasers who deal in good faith with a personal representative. The District Court held Plaintiffs and their predecessors, Northland Royalty Corp. (“Northland”) were not protected by the statute because they were not “good faith purchasers.” The District Court’s holding contradicts the express language of the statute and must be reversed.

I. Plaintiffs And Northland Are Protected By N.D.C.C. § 30.1-18-14.

[¶ 2] Much of the briefs of Defendants and EOG are spent arguing the District Court properly held N.D.C.C. § 30.1-18-14 does not apply because Jay was not appointed personal representative of the estates of Victoria Davis or Helen Jaumotte (“Helen”) in North Dakota. This interpretation, and the District Court’s ruling in its *Findings of Fact, Conclusions of Law and Order* (“the Order”), is incorrect and must be reversed.

[¶ 3] These issues were directly addressed in Northland Royalty Corp v. Engel, 2014 Mont. 295, 339 P.2d 599. Northland arises out of the same set of facts and series of transactions as does the case at bar. In Northland, the Montana Supreme Court applied the Montana version of N.D.C.C. § 30.1-18-14 to Jay’s sale of minerals to Northland in Montana, stating:

There is no dispute that, at the time that the transaction occurred, Helen’s estate was open, there were no restrictions placed in Jay’s letters of appointment, and Keller had no actual knowledge of any restrictions on Jay’s authority. We thus hold that § 72-3-618, MCA, protects Northland’s purchase.

2014 Mont. at ¶13. The Court relied on Jay's appointment as Helen's personal representative in Arizona to uphold the transfer of the Montana minerals to Northland.

[¶ 4] Plaintiffs attempt to distinguish Northland on the facts. Similarly, EOG's version of the facts make it appear an ancillary probate for Helen's estate was established in Montana. EOG Br. at ¶ 50. That is simply incorrect. No probate was established for Helen's estate in Montana. Victoria Davis's estate was probated in Montana, where she resided at the time of her death. Jay was personal representative of the Davis estate in Montana. Jay was not appointed personal representative in North Dakota. That is the only differentiating fact between the cases. However, the Court did not rely on Jay's appointment in Montana as the basis for its opinion. The Court relied exclusively on Jay's appointment as Helen's personal representative. Defendants cite Brigham Oil v. Lario Oil, for the proposition Jaumotte is not a "personal representative" unless appointed in an ancillary probate here. 2011 ND 154, ¶16, 801 N.W.2d 677. The ultimate issue in Brigham Oil was whether the order of another state's court construing a will must be accepted in North Dakota. Id. See, also, N.D.C.C. § 30.1-15-08. Brigham Oil supports Plaintiffs claim. The subject minerals were still in Davis's estate in Montana. Montana fully probated the estate and determined Northland was entitled to the Montana minerals.

[¶ 5] Defendants petitioned for rehearing of the Northland decision. [App. at 132 – 134]. They made precisely the same argument put forth in this case, i.e. recognizing Jay's sale of the minerals would allow a foreign personal

representative to sell property in Montana without establishing an ancillary probate. [App. at 133]. In denying the petition, the Court held:

The issue before the Court was whether Devisees could get their estate property back from Northland when § 72-3-618(1), MCA, protects a purchaser of estate property “as if the personal representative properly exercise the personal representative’s power” if the purchaser acts “in good faith and without notice.” Even if we assume the impropriety of the personal representatives’ actions, the Court’s decision remains the same because the key questions under § 72-3-618(1), MCA, is whether Northland acted “in good faith and without notice” and not whether the personal representative acted lawfully. If Devisees have a claim for failure to comply with the UPC by their personal representative, it is against their personal representative and not Northland.

[App. at 133]. Accordingly, the relevant inquiry under UPC § 3-714 is not whether Jay followed the terms of Helen’s will. He did not. Jay was clearly hiding the contents of Helen’s will from Northland. The only relevant inquiry is whether Northland and Plaintiffs had actual knowledge of the devise to Defendants.

II. N.D.C.C. § 30.1-18-14 Is Subject To An Actual Notice Standard.

[¶ 6] In holding N.D.C.C. § 30.1-18-14 did not govern, the District Court applied a constructive notice standard. Defendants and EOG maintain Northland, and therefore, Plaintiffs were put on constructive notice of something preventing the statute from applying to them. However, the District Court’s interpretation does not withstand review of the express terms of the statute, which provides, in part:

A person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire in the existence of a power or the propriety of its exercise. Except for the restrictions on powers of

supervised personal representatives ..., no provision in any will or order of court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof.

N.D.C.C. § 30.1-18-14. On its face, the statute presumes the personal representative acted without authority because of a limitation in a will. It protects a purchaser from the personal representative's conduct unless the purchaser had actual knowledge of the limitation. Further, it absolves the purchaser from inquiring into the extent of the personal representative's power. A will's prohibition is not relevant to the purchaser's rights without actual knowledge of its terms. While there is a definition of good faith in North Dakota, applying a constructive notice standard to N.D.C.C. § 30.1-18-14 directly contradicts the statute's terms.

[¶ 7] The District Court imputed Northland and Plaintiffs with constructive notice of the terms of Helen's will. In its brief, EOG outlines its position as to why Northland had constructive notice of Defendants' claims. EOG couches it as notice of a "potential problem with the Subject Minerals." EOG Br. at. ¶44 - ¶45. However, the only "potential problem" with the subject minerals resulted from the devise in Helen's will. Ultimately, EOG argues Plaintiffs were on constructive notice of the terms of Helen's will. This interpretation directly contradicts that portion of N.D.C.C. § 30.1-18-14 providing "no provision of a will ... is effective except as to persons with actual knowledge thereof." Similarly, Plaintiffs and EOG find fault with Northland's efforts to locate Helen's will. N.D.C.C. § 30.1-18-14 specifically relieves Northland and Plaintiffs of any duty to inquire into the contents of Helen's will.

[¶ 8] In Northland, the Montana Supreme Court rejected application of a constructive notice standard for good faith to Montana’s version of UPC 3-714.

It held:

We decline to define “good faith and without notice” as used in § 72-3-618 MCA, to require a purchaser’s “honest belief...without [actual or constructive] notice” regarding another parties’ interest in the property. *Foster*, 39 Mont. at 316, 102 P. at 579. Such a rule does not fit in the context of dealings with a personal representative. Estate devisees take property “subject to” the estate’s administration, § 72-3-1012. MCA, . . . By the plain language of these statutes, a personal representative has the power to sell property within the estate, even if that property is specifically devised in the will.

Northland, 377 Mont. at ¶13. The Court’s interpretation upholds the spirit and letter of N.D.C.C. § 30.1-18-14, is persuasive authority dealing with the facts of this case, and should be followed.

III. Plaintiffs Did Not Have Constructive Notice Of Defendants’ Adverse Claim To The Subject Minerals.

[¶ 9] Constructive notice is “actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact and [a person] who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself. N.D.C.C. § 01-01-25. While a “superficial inquiry” is not adequate, a person needs to act with only “reasonable diligence.” Gerhardt Const. Co. v. Wachter Real Estate Trust, 306 N.W.2d 223, 226 (N.D.1981). Even if this standard applies, Plaintiffs are only imputed with knowledge of those facts they would have discovered with reasonable diligence. The District Court found Northland and Plaintiffs were on constructive notice that Helen’s will contained a devise of the subject minerals to Defendants. Its finding is clearly erroneous.

[¶ 10] In order to determine what facts can be imputed to Northland, it must be determined what facts Dick Keller (“Keller”) knew at the time of his acquisition of the subject minerals. He knew Helen had been devised the subject minerals by Victoria Davis. Jay resided in Maricopa County, Arizona, at the time Northland contacted him. Jay was the personal representative of Davis’s estate in Montana. The subject minerals were never transferred out of that estate. Helen passed leaving a will appointing Jay her personal representative. Helen and Jay had no children. [App. at 72]. Through a Proof of Death and Heirship sent to Jay, Keller requested information on the existence of Helen’s will, whether it had been probated and, if so, where. [App. 72]. Jay did not provide Keller the information. Keller searched records in Maricopa County, finding nothing. He searched counties in Montana and North Dakota for the information. In addition, Keller gave Jay ample opportunity to provide him the information. Keller did not know where or if Helen’s will was probated. He did not think it relevant because the minerals were still in Davis’s estate and Jay was the personal representative of that estate. These facts do not give rise to the inference that additional inquiry by Keller to Jay would have resulted in Jay revealing where Helen’s will was probated or providing a copy of the will. It is clear Jay had no intention of providing the will. Keller would have had to search the probate records of every county in Arizona to find the will. Such a search is a far more intensive inquiry than what would be required even under a reasonable diligence standard.

[¶ 11] Northland could not acquire constructive knowledge based on Defendants’ own claims because they did not assert them. Frank Steinbeck

(“Steinbeck”) testified at trial on behalf of Defendants. Steinbeck knew of the contents of Helen’s will by 1997. [Tr. 258, line 11]. However, he was unable to contact Jay about the will. [Tr. 257 – 260]. Defendants did not file a petition to start ancillary proceedings in North Dakota. Defendants did nothing until 2006, when they filed an Affidavit of Heirship [Tr. At 256]. Defendants knew Northland was interested in the subject minerals. Had Defendants acted timely, Northland and Plaintiffs would have actual notice of their interest and the transaction would not have taken place.

IV. It Appears Conceded The District Court Erred In Awarding Defendants Past Royalty Payments Or Monies.

[¶ 12] In the Order, the District Court enjoined Plaintiffs from asserting any interest in and to forfeit all royalty payments or monies received from the subject minerals. [APP 121-126]. On appeal, Plaintiffs argued the District Court erred in granting this relief on a number of bases. Neither Defendants nor EOG have responded to Plaintiffs arguments concerning the District Court’s award of past royalties. Generally, if a party does not draw this Court’s attention to relevant authority or supportive reasoning, an argument is assumed to be without merit. Friedt v. Moseanko, 484 N.W.2d 861, 863 (N.D. 1992). The failure of Defendants and EOG to respond to the issue should be deemed an admission Plaintiffs’ argument is meritorious.

CONCLUSION

[¶ 13] For all the foregoing reasons, the JUDGEMENT of the District Court must be REVERSED and remanded for entry of judgment quieting title in the subject minerals to Plaintiffs.

Respectfully submitted this 10th day of May, 2017.

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CERTIFICATE OF SERVICE

[¶ 14] The undersigned certifies that the foregoing **REPLY BRIEF OF APPELLANTS** was served on the following at their last known electronic mail addresses, on the 10th day of May, 2017:

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