20180069
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 24, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

George Seccombe; Barbara Treska; Erik Naesset; Helge Naesset; Astri Holst; Irene Markle; and Alice Nasset Plaintiffs and Appellants, Slawson Exploration Company, Inc.; and Alameda Energy, Inc. Plaintiffs-Intervenors and Appellants, vs. Bradley C. Rohde and Karen D. Rohde, Trustees of the Bradley C. Rohde Trust dated June 22, 2010; Anita Rohde, Trustee of the Anita Rohde Living Trust UDT October 8, 2009; Dennis Rohde, Trustee of the Dennis Rohde Living Trust UDT October 8, 2009; Gary Rohde; Bradley Rohde; Dennis Rohde; Northern Oil and Gas, Inc.; Ryan Family Mineral Partnership; S. Reger Family Mineral Partnership; Kootenai Resources Corporation; Summerfield C. Baldridge; Montana Oil Properties, Inc.; S. Reger Family, Inc.; Beartooth Ridge Resources, Inc.; Lakeside State Bank; and all persons unknown claiming any estate or interest in, or lien or encumbrance upon the property described in the complaint, Defendants and Appellees.	Supreme Court Case No.: 20180069 Mountrail County Civil Case No.: 2012-CV-00104

REPLY BRIEF OF APPELLANTS GEORGE SECCOMBE, BARBARA TRESKA, ERIK NAESSET, HELGE NAESSET, ASTRI HOLST, IRENE MARKLE AND ALICE NASSET

Appeal from Orders on Motions for Summary Judgment, entered March 26, 2013, and December 11, 2017, and Judgment, entered January 17, 2018, by the District Court for the North Central Judicial District, County of Mountrail, the Hon. Judge Gary H. Lee presiding

PEARCE DURICK PLLC

PATRICK W. DURICK, ND Bar #03141
RACHEL A. BRUNER, ND Bar #06418
BENJAMIN W. KEUP, ND Bar #07013
314 E. Thayer Avenue
P.O. Box 400
Bismarck, North Dakota 58502
701-223-2890
Efile: #pwdefile@pearce-durick.com
#rbkefile@pearce-durick.com
#bwkefile@pearce-durick.com

Attorneys for Plaintiffs George Seccombe; Barbara Treska; Erik Naesset; Helge Naesset; Astri Holst; Irene Markle; and Alice Nasset

TABLE OF CONTENTS

Paragraph #

TABLE OF CONTENTS………………………………………………………..page i

TABLE OF AUTHORITIES……………………………………………………………ii

REPLY……………………………………………………………………………….1

I. The district court erred in granting Lakeside's motion for summary judgment..2

a. The Nasset Heirs' claim against Lakeside was not barred by N.D.C.C. § 30-24-13 (1959) or § 30.1-21-05 (1973) 3

b. Lakeside should be held liable to the Nasset Heirs for its Misrepresentations or inadequate disclosures and Attorney Quentin Schulte is not a necessary or indispensable party 8

CONCLUSION..13

TABLE OF AUTHORITIES

Cases

Paragraph #

Christie v. Dold
524 N.W.2d 866 (S.D. 1994) 9

Holverson v. Lundberg
2016 ND 103, 879 N.W.2d 718 7

Larson v. Norkot Mfg., Inc.
2002 ND 175, 627 N.W.2d 386 9

Matter of Estate of Thomas
532 N.W.2d 676 (N.D. 1995) 9

Statoil Oil & Gas Ltf. P'ship v. Abaco Energy, LLC
2017 ND 148, N.W.2D 1 9

Statutes

N.D.C.C. § 30-24-13 (1959) 3

N.D.C.C. § 30.1-21-05 (1973) 3

N.D.R.App.P. 28(g) 3

REPLY

[1] The original heirs and Nasset Heirs relied on Lakeside's misrepresentations or inadequate disclosures, and believed they owned a one-half interest in the Subject Minerals. *Id*. Upon learning of the problems associated with their interest in the Subject Minerals, the Nasset Heirs timely brought this action against Lakeside. *Id*. Lakeside missed its opportunity to make a cross-claim against its attorney or, in the alternative, object to his stipulated dismissal.

I. The district court erred in granting Lakeside's motion for summary judgment.

[2] The district court prematurely granted Lakeside's motion for summary judgment prior to any discovery being conducted and prior to a scheduling order. Additionally, the Nasset Heirs timely brought their action after discovering misrepresentations and inadequate disclosures on the part of Lakeside.

a. The Nasset Heirs' claim against Lakeside was not barred by N.D.C.C. § 30-24-13 (1959) or § 30.1-21-05 (1973).

[3] The Nasset Heirs' claims against Lakeside were timely brought and Lakeside's motion for summary judgment should not have been granted. As discussed in the Nasset Heirs' initial brief, the rights of successors and of creditors against a personal representative for breach of fiduciary duty are barred unless commenced six months after the closing statement. N.D.C.C. § 30.1-21-05. However, the statute provides for an exception for a successor or creditor to make claims against a personal representative for "fraud, misrepresentation, or inadequate disclosure related to the settlement of the estate" and no limitation is placed on such claims. *Id*. Under the 1959 version of the statute, actions for the recovery of property sold by an executor have a limitations period of three years or "within three years from the discovery of the fraud *or other ground upon which*

the action is based." N.D.C.C. § 30-24-13 (1959) (emphasis added); *see also* Slawson's N.D.R.App.P. 28(g) Addendum. The limitations period did not start to run until just prior to the commencement of this action.

[4] Under either statute discussed above, Lakeside failed to adequately disclose information relating to retention of the one-half interest in the Subject Minerals that was discovered just prior to the commencement of the action by the Nasset Heirs. Nasset's App'x D—F. As executor, Lakeside went through the legal requirements to proceed with the sale to Gilbert Rohde. Slawson's App'x F—O. Lakeside was aware, or should have been aware, of the intentions of the original heirs to the Estate of Olaf Nasset to retain a one-half interest in the Subject Minerals. Slawson's App'x F—L.

[5] Lakeside signed documentation, including the Executor's Deed, which failed to mention the minerals. Slawson's App'x O. Lakeside then attempted to correct its error by obtaining an Amended Confirmation Order and unilaterally signing an Amended Executor's Deed. Slawson's App'x P, Q. The heirs of Olaf Nasset's estate were led to believe that Lakeside correctly retained a one-half interest in the Subject Minerals for the Estate of Olaf Nasset and relied on this information. Nasset's App'x D—F. As a result of Lakeside's inadequate disclosures, the original heirs of Olaf Nasset's estate were unaware there may be an issue with their ownership of the mineral interest until just prior to bringing this action, thereby making it timely. *Id.*

[6] In its Appellee Brief, Lakeside states that the Nasset Heirs cannot show that a problem should have been known to have been created by Lakeside's unilateral signing of the Amended Executor's Deed. App. Br. of Lakeside State Bank at ¶ 49. Because "this was unknowable and unforeseeable," Lakeside contends that it could not have conceivably

made any misrepresentations or inadequate disclosures regarding the missing mineral reservation. *Id*. This begs the question: If the attorney representing the executor and the executor itself, both who are well-versed in the law and probate administration, could not have known or foreseen a problem with the faulty deed, how would common lay-people who emigrated from a foreign country – and some who still lived in a foreign country – recognize such a problem and realize that action needed to be taken within the 1959 code's limitations period? Slawson's App'x R. This is yet another showing that the original Nasset heirs were unaware of any problems that the current Nasset Heirs only became aware of it immediately prior to timely filing their action. As Lakeside concedes, the only real dispute here is "[w]hen did the cause of action relating to the 1962 probate of the Olaf Nasset Estate accrue?" App. Br. of Lakeside State Bank at ¶ 32. The Nasset Heirs strongly contend that it was not until just prior to commencing this action.

[7] Further supporting the Nasset Heirs' position that the original heirs were not privy to the error and its ramifications is another admission made by Lakeside. In its Appellee Brief, Lakeside admits that the documents in probate proceedings are the only evidence in this case. *Id*. at ¶ 33. Noticeably absent from the record and from all those filings is any sort of notice of the petition to re-open the estate for the sole purpose of correcting. *See* Dkt. ID #16. Without notice, Lakeside is thereby charging the initial heirs of the estate to uncover a mistake that was made and that, as executor, it was unilaterally attempting to cure its own blunder. This is counterintuitive to the *Holverson v. Lundberg*, 2016 ND 103, ¶ 19, 879 N.W.2d 718, 724, case and language quoted therefrom by Lakeside. That language states that a party has a responsibility to find out what its rights are resulting from an acquisition of facts sufficient to put a reasonable person of ordinary intelligence on

inquiry. *Id.* It further states that a party need not know the extent of an injury, but only that there was an injury. *Id.* Again, without notice of the petition to re-open the estate, the original Nasset heirs had no reason to believe that there were any problems with the probate or deed and, therefore, could not have been on notice of any such injury. This certainly reveals inadequate disclosures by Lakeside. Lakeside's inadequate disclosures prevented the original heirs of Olaf Nasset from bringing a claim against Lakeside and claims to correct its mistakes years ago when the they were still alive. Nasset's App'x D—F. Despite Lakeside's statement that

> [t]he evidence is indisputable that the first-generation Nasset heirs had notice of the contents of the instruments in 1962, that they were aware that mistakes had been made, that they were aware of the error on the Executor's Deed, and that they were aware that Quentin Schulte reopened the probate case to correct the error

is simply unfounded and Lakeside cites to nothing in the record supporting its claims. App. Brief of Lakeside State Bank at ¶ 34. No notice of the petition to re-open the probate was provided.

b. Lakeside should be held liable to the Nasset Heirs for its misrepresentations or inadequate disclosures and Attorney Quentin Schulte is not a necessary or indispensable party.

[8] Lakeside contends that the attorney who represented it as the executor of the estate, Quentin Schulte ("Schulte"), is a necessary or indispensable party to this appeal. *Id.* at ¶¶ 60-64. The Nasset Heirs disagree. On March 26, 2013, the District Court issued an Order Granting Summary Judgment for Lakeside. Nasset's App'x C. Schulte was an original party to the action. *See* Dkt. ID #1. After the District Court's March 26, 2013, Order, Schulte was dismissed by stipulation. *See* Dkt. ID #57. It was at this point that Lakeside had an opportunity to object to such dismissal and it was during the pleadings stage of the

case that Lakeside had an opportunity to cross-claim. Lakeside did neither. *See generally*, Nasset App'x A.

[9] Lakeside now attempts to protect itself from any liability by putting the blame on a decedent who it failed to hold accountable when it had the opportunities to do so. If Lakeside wanted to hold its attorney responsible, it should have raised malpractice claims when they were available rather than now passing the buck to a now-deceased former party to the action. App. Brief of Lakeside at ¶¶ 60-62. As the personal representative, it is Lakeside that was represented by the attorney and not the estate. *See Christie v. Dold*, 524 N.W.2d 866, 870-71 (S.D. 1994). And, it follows that the Nasset Heirs would not have standing to bring a claim against Schulte since it was Lakeside that he represented. This Court has said that "[a] personal representative may not avoid liability for breach of his fiduciary duty to the heirs of the estate by asserting a blanket defense of reliance upon counsel. A personal representative may reasonably rely upon *legal* advice from counsel." *Matter of Estate of Thomas*, 532 N.W.2d 676, 686 (N.D. 1995) (citations omitted). Therefore, Lakeside cannot shift the blame to an absent Schulte or his estate within this action any longer; its claims should have been brought against Schulte in the early stages of this action. Liability lies with Lakeside and if it desires to have Schulte's estate share in that liability, it is now up to Lakeside to decide whether it wants to do so in a separate action. *Larson v. Norkot Mfg., Inc.*, 2002 ND 175, ¶ 10, 627 N.W.2d 386 ("A cause of action for legal malpractice does not accure, and the statute of limitations does not commence to run, until the client [here, Lakeside] has incurred some damage.")

[10] Lakeside argues that the four interests used to determine an indispensable party in *Statoil Oil & Gas Ltf. P'ship v. Abaco Energy, LLC*, 2017 ND 148, ¶ 6, 897 N.W.2d 1, 7,

should result in Schulte being labeled as indispensable. However, two of those four factors could have been avoided had Lakeside made a cross-claim against Schulte early on in this case. That is, Lakeside could have cross-claimed to avoid multiple litigation and in order to avoid sole responsibility for a liability. *Id*. Had Lakeside cross-claimed against Schulte when it had the opportunity to do so, the liability could have been determined within this case and those two parties could have shared in the responsibility for the liability resulting from their unilateral decision to petition to re-open the estate and subsequently execute the Amended Executor's Deed. Now, instead, if Lakeside is found at fault it will only be left with the option of pursuing its own remedies against Schulte's estate in later litigation.

[11] The Nasset Heirs do not care who is charged with the liability for Lakeside and Schulte's errors, or whether that determination is made at trial upon reversal or in a separate action by Lakeside against Schulte's estate. Schulte is not an indispensable party and Lakeside should be held responsible for its actions.

[12] In the alternative to cross-claiming against Schulte, Lakeside could have objected to the stipulated dismissal of Schulte. *See* Dkt. ID #57-64. Counsel for Lakeside was served with each of those docket entries and, despite stating that "Lakeside had no reason to think about the Schulte dismissal," the Nasset Heirs would argue otherwise. *Id*.; *see also* App. Br. of Lakeside State Bank at ¶ 64. In reality, Lakeside had *every* reason to think about his dismissal had it considered the avenues down which this case could potentially go. The consequences of that oversight should not be borne by the Nasset Heirs.

CONCLUSION

[13] The Nasset Heirs respectfully ask this Court to reverse the District Court's December 11, 2017, Order and Judgment entered January 17, 2018, regarding title to the Subject Minerals. The Nasset Heirs also respectfully ask this Court to reverse the District

Court's March 26, 2013, Order and hold that there are questions of fact to be resolved on trial. Lastly, the Nasset Heirs respectfully as this Court to determine that Quentin Schulte is not an indispensable party and that Lakeside is responsible for any fault that may be determined against it.

Dated this 24th day of May, 2018.

PEARCE DURICK PLLC

By: *_/s/ Benjamin W. Keup_*
PATRICK W. DURICK, ND Bar #03141
RACHEL A. BRUNER, ND Bar #06418
BENJAMIN W. KEUP, ND Bar #07013
314 E. Thayer Avenue
P.O. Box 400
Bismarck, North Dakota 58502
701-223-2890
Efile: #pwdefile@pearce-durick.com
#rbkefile@pearce-durick.com
#bwkefile@pearce-durick.com

Attorneys for Plaintiffs George Seccombe; Barbara Treska; Erik Naesset; Helge Naesset; Astri Holst; Irene Markle; and Alice Nasset

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This Brief contains 1,975 words, excluding the parts of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify that this Brief complies with the typeface requirements of N.D.R.App.P. 32 and the type style requirements of that rule because it has been prepared in a proportionally spaced typeface using a Microsoft Word, Times New Roman, 12-point font.

By: */s/ Benjamin W. Keup*
Benjamin W. Keup, ND Bar #07013

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

George Seccombe; Barbara Treska; Erik Naesset; Helge Naesset; Astri Holst; Irene Markle; and Alice Nasset Plaintiffs and Appellants, Slawson Exploration Company, Inc.; and Alameda Energy, Inc. Plaintiffs-Intervenors and Appellants, vs. Bradley C. Rohde and Karen D. Rohde, Trustees of the Bradley C. Rohde Trust dated June 22, 2010; Anita Rohde, Trustee of the Anita Rohde Living Trust UDT October 8, 2009; Dennis Rohde, Trustee of the Dennis Rohde Living Trust UDT October 8, 2009; Gary Rohde; Bradley Rohde; Dennis Rohde; Northern Oil and Gas, Inc.; Ryan Family Mineral Partnership; S. Reger Family Mineral Partnership; Kootenai Resources Corporation; Summerfield C. Baldridge; Montana Oil Properties, Inc.; S. Reger Family, Inc.; Beartooth Ridge Resources, Inc.; Lakeside State Bank; and all persons unknown claiming any estate or interest in, or lien or encumbrance upon the property described in the complaint, Defendants and Appellees.	Supreme Court Case No.: 20180069 Mountrail County Civil Case No.: 2012-CV-00104

Appeal from Orders on Motions for Summary Judgment, entered March 26, 2013, and December 11, 2017, and Judgment, entered January17, 2018, by the District Court for the North Central Judicial District, County of Mountrail, the Hon. Judge Gary H. Lee presiding

AFFIDAVIT OF SERVICE

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 24th day of May, 2018, she forwarded a copy of the forgoing:

1. Reply Brief of Appellants George Seccombe, Barbara Treska, Erik Naesset, Helge Naesset, Astri Holst, Irene Markle and Alice Nasset

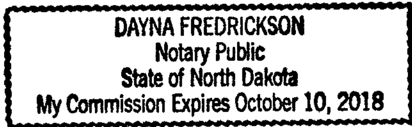
by email to the following:

Attorneys for Plaintiffs-Intervenors-Appellants Slawson Exploration Company, Inc. and Alameda Energy, Inc. Crowley Fleck PLLP Adam Olschlager, ND Bar #06428 aolschlager@crowleyfleck.com Uriah J. Price, ND Bar #07173 uprice@crowleyfleck.com Griffin B. Stevens, ND Bar #08383 gstevens@crowleyfleck.com	***Attorneys for Defendants-Appellees Bradley C. Rohde and Karen D. Rohde, Trustees of the Bradley C. Rohde Trust dated June 22, 2010; Anita Rohde, Trustee of the Anita Rohde Living Trust UDT October 8, 2009; Dennis Rohde, Trustee of the Dennis Rohde Living Trust UDT October 8, 2009; Gary Rohde; Bradley Rohde; Dennis Rohde*** PRINGLE & HERIGSTAD, P.C. Scott Knudsvig, ND Bar #05823 sknudsvig@pringlend.com Matthew H. Olson, ND Bar #06182 molson@pringlend.com
Attorneys for Defendant-Appellant Northern Oil and Gas, Inc. FREDRIKSON & BYRON, P.A. Lawrence Bender, ND Bar #03908 lbender@fredlaw.com Dani Krause, ND Bar #06874 dkrause@fredlaw.com	***Attorneys for Defendant-Appellant Lakeside State Bank*** OLSON & BURNS P.C. Richard P. Olson, ND Bar #03183 rpolson@minotlaw.com Wanda L. Fischer, ND Bar #05128 olsonpc@minotlaw.com
Attorneys for Defendants-Appellants Ryan Family Mineral Partnership, S. Reger Family Inc., S. Reger Family Mineral Partnership, Kootenai Resources Corporation, Summerfield C. Baldridge, Montana Oil Properties, Inc., and Beartooth Ridge Resources, Inc. OHNSTAD TWICHELL, P.C. Michael W. Stefonowicz, ND Bar #02914 mstefonowicz@ohnstadlaw.com Robert G. Hoy, ND Bar #03527 rhoy@ohnstadlaw.com Loren J. O'Toole, ND Bar #P01638 otoole@otoolelawmt.com	

Dated this 24th day of May, 2018.

Annette Kirschenheiter

Subscribed and sworn to before me this 24 day of May, 2018.



Notary Public