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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Robert M. Hall, Plaintiff and Appellant, vs. John F. Hall, Deborah E. Hall, Leslie Hall, a/k/a Leslie Hall Butzer, and all unknown heirs, devisees, successors, and creditors of Myles Franklin Hall, Myles F. Hall, a/k/a Myles Hall, deceased, and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint, Defendants and Appellees.	Supreme Court No. 20190169 Williams Co. Civil No. 53-2018-CV-00744

APPELLANT'S REPLY BRIEF

Appeal from the Judgment on January 16, 2019 and the Order on January 31, 2019
Case No. 53-2018-CV-00744
County of Williams, Northwest Judicial District
The Honorable Benjamen J. Johnson

PEARCE DURICK PLLC
Zachary E. Pelham, ND #05904
Benjamin W. Keup, ND #07013
314 East Thayer Avenue
P.O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890
#zepefile@pearce-durick.com
#bwkefile@pearce-durick.com
Attorneys for Robert M. Hall

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LAW AND ARGUMENT

[¶1] Robert M. Hall ("Hall") disagrees with Appellees' interpretations of the law and the substantive issues that were previously litigated in Case No. 53-11-C-00120. The district court improperly applied the doctrine of res judicata and its decision should be reversed.

[¶2] Hall has maintained throughout that the issue being litigated is separate and distinct from the issues in Case No. 53-11-00120 ("prior case"). The current issue that Hall has attempted to litigate is the interpretation of the handwritten note of sale subscribed by his father, Myles Hall ("Myles"), and verification of such by the use of an expert's report. App. at 8. The prior case, on the other hand, never considered, or even had the opportunity to consider, the current issue because all that was ever determined was whether or not the Dormant Mineral Act ("DMA"), N.D.C.C. § 38-18.1, applied to non-participating royalty interests ("NPRI"), and whether or not the NPRI at issue was "used" as defined under the DMA. App. 101-159. The district court in the prior case only determined that the DMA was inapplicable to the NPRI and that it had been used within 20 years of the underlying Notice of Lapse of Mineral Interest. *Id*. It concluded that the surface owners in the prior case could not hold title to the NPRI by using the DMA as a mechanism to re-unite NPRIs with the surface. *Id*. In fact, the court in the prior case specifically stated that the surface owners "cannot quiet title . . . to the royalty interest . . . ." App. 159 at ¶ 4.

I. A decision on the merits of Hall's claim has not been made.

[¶3] Appellees continue to maintain that the decision in the prior case was final and on the merits. Appellee Br. at ¶¶ 20, 23-25. Hall disputes this. As mentioned above

and Hall's initial brief, the merits in this case are related to the handwritten note of sale from Myles to Hall, which was never even mentioned in the first case. App. at 101-159.

[¶4] Appellees argue that when a judgment is reached on the substance of a claim, that judgment has been made on the merits. Appellee Br. at ¶ 23. It follows, according to Appellees, that the substantive issues in the prior case determined the outcome that precludes the instant litigation. *Id*. Again, however, Appellees are missing the mark on what the substantive issues are. The prior case's decision was based on an interpretation of the DMA while the substantive issue here is whether or not the NPRI was effectively purchased and conveyed by the note of sale made by Myles in 1988. App. at 101-159. Hall is not inventing new theories in an attempt to relitigate previously disputed issues; rather, he is seeking a determination that says he is entitled to ownership of the NPRI because it was bought and paid for from his father in 1988. Appellee Br. at ¶¶ 23-25.

II. Appellees were not in privity.

[¶5] Appellees cite to several cases for the notion that, as heirs or devisees, they were in privity with the Estate of Myles Hall ("Estate"). *Id*. at ¶ 26. However, because Myles divested himself of the NPRI in 1988, the Estate did not own any North Dakota property, which is precisely why Hall instituted this action: to obtain a ruling on the handwritten note of sale made by his father when the NPRI was purchased in 1988. App. at 22.

[¶6] Appellees further push the district court's ruling that Hall would have been joined in the prior case as an unknown person having title or interest that does not appear of record. Appellee Br. at ¶ 28. Even if true, it does not defeat the point that has been made continuously in this case: only the questions related to the DMA were decided in the

prior action and title to the NPRI was not decided as between the parties here. App. at 101-159. Could or should have Hall claimed his ownership in the prior case? No, "could" or "should" do not mean "shall."

[¶7] Appellees argue *Kulczyk v. Tioga Ready Mix Co.*, 2017 ND 218, 902 N.W.2d 485, does not apply here. Appellee Br. at ¶¶ 29-34. However, Appellees' acknowledgement that there were issues "separate and distinct from the issues that were litigated by the parties to the prior litigation" in *Kulczyk* makes Hall's argument. *Id*. at ¶ 34. The issues in the prior case were solely related to the DMA and the issue brought forth at the inception of this litigation centers on the validity of the handwritten note of sale by Myles in 1988. App. 101-159, 8-12. They are clearly distinguishable issues.

[¶8] Appellees also argue *Ungar v. North Dakota State University*, 2006 ND 185, ¶ 12, 721 N.W.2d 16, does not apply here. Appellees place special emphasis on *Ungar* because they seem to interpret it to say that the expansion of privity is a firm rule. Appellee Br. at ¶ 35-36. However, Appellees fail to recognize that the quoted and bolded language they rely on simply states that the strict rule on privity "is *sometimes* expanded to include . . . a person who is not technically a party to a judgment." *Id*. at ¶ 35 (emphasis added). This clearly does not mean that the parties to this action *must* be bound by the prior judgment when none were named parties. In fact, Hall contends that the Appellees were not in privity at all since Myles sold the NPRI to Hall over forty years ago. App. at 22.

III. Title to the NPRI was not litigated in the prior case.

[¶9] Although the prior case was brought as a quiet title action based on an underlying Notice of Lapse of Mineral Interest and on N.D.C.C. § 38-18.1-06.1's option to perfect title in a surface owner, title was never quieted on the merits. *See generally* Case

No. 53-11-C-00120. Rather, the prior case turned on the interpretation of the DMA itself – whether royalty interests were subject to the DMA and whether the particular NPRIs involved were "used" as defined therein.

[¶10] Appellees attempt to convince this Court that because the prior case and this case are both quiet title actions, they are necessarily involving the same issues. Appellee Br. at ¶¶ 39-43. This could not be further from the truth. This case is one of interpretation of a handwritten note of sale while the prior case was one of interpretation of a statute.

IV. The identities of the actions are distinguishable.

[¶11] Appellees argue that the same evidence supports both actions and, therefore, should operate as a bar to this action. *Id*. at ¶ 44 (citing *Meagher v. Quale*, 77 N.W.2d 878, 880 (N.D. 1956)). However, Appellees fail to acknowledge that the prior action used none of the evidence that has been presented in this case that proves Hall purchased the NPRI from Myles. App. at 8-37; *see generally* Case No. 53-11-C-00120. Rather, the prior case did not use any evidence other than conveying documents and a few affidavits; no expert reports were used and no testimony was offered. *See generally* Case No. 53-11-C-00120. Here, numerous affidavits and an expert report have already been offered, but Appellees' motion for summary judgment prevented all such supporting and incontrovertible evidence from even being considered by the district court. App. at 8-37, 243-290.

[¶12] Appellees attempt to distinguish *Sundance Oil and Gas, LLC v. Hess Corporation*, 2017 ND 269, 903 N.W.2d 712, with this case. They point out the obvious, yet meaningless, distinction that the prior case did not seek to create a trust as was done in *Sundance*. Appellee Br. at ¶ 49. Appellees follow that up, however, with an inaccurate statement that the prior case "sought to determine whether the Estate was entitled to

ownership of the NPRI." *Id*. Initially that may have been the surface owners' goal in the prior case, but it is clear this did not happen when a large number of NPRI owners had default judgments against them vacated and then successfully argued that the DMA did not apply to their NPRIs at all. *See, e.g.*, App. at 150-159. So, all NPRI owners were back to the status quo. *Id*. Now Hall seeks to get a determination on the ownership of the NPRI that he purchased from his father over forty years ago. App. at 70. These are not the same issues. Take, for instance, what would have happened had the prior case been appealed: the surface owners would not have been appealing the question of ownership, they would have been appealing the question of whether NPRIs are subject to the DMA and whether the NPRIs had been "used" under the statute.

[¶13] Finally, Appellees contend that "[t]he application of the DMA is a legal argument to determine ownership" and that "[t]he alleged sale of the NPRI is another legal argument to determine ownership." Appellee Br. at ¶ 51. Appellees' argument is flawed because the prior case did not determine ownership as to the present parties and, more importantly, only determined that the DMA could not be used to re-unite non-participating royalty interests with the surface. App. 150-159. Therefore, the DMA was precluded by the district court from being used to determine ownership. *Id*. The district court's decision should be reversed and Hall should be given the opportunity to present his evidence of purchase and sole ownership of the NPRI.

CONCLUSION

[¶14] For all the reasons set forth above, as well as in Appellant's initial brief, this Court should reverse the district court's decision that res judicata bars the current action.

Each and every element of res judicata must be satisfied and Appellees have failed to meet this standard.

Dated this 20th day of September, 2019.

PEARCE DURICK PLLC

/ s / Benjamin W. Keup
ZACHARY E. PELHAM, ND#05904
zep@pearce-durick.com
Efile: #zepefile@pearce-durick.com
BENJAMIN W. KEUP, ND#07013
bwk@pearce-durick.com
Efile: #bwkefile@pearce-durick.com
314 East Thayer Avenue
P. O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890

Attorneys for Appellant Robert M. Hall

CERTIFICATE OF COMPLIANCE

[¶ 15] The undersigned, attorney for the Plaintiff/Appellant in the above matter, hereby certifies, in compliance with N.D.R.App.P. 32, that the above brief was prepared with proportionally spaced, 12-point font typeface, and the total number of pages of the brief totals 10 pages, inclusive.

Dated September 25, 2019.

PEARCE DURICK PLLC

/ s / Benjamin W. Keup
ZACHARY E. PELHAM, ND#05904
zep@pearce-durick.com
Efile: #zepefile@pearce-durick.com
BENJAMIN W. KEUP, ND#07013
bwk@pearce-durick.com
Efile: #bwkefile@pearce-durick.com
314 East Thayer Avenue
P. O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890

Attorneys for Appellant Robert M. Hall

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

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 20th day of September, 2019, she electronically filed with the Supreme Court through the Supreme Court's E-Filing Portal *Appellant's Reply Brief* and that said documents were served through the Supreme Court's E-Filing Portal to the following:

Attorney for Leslie Butzer and Deborah E. Hall
William C. Black
Larson Latham Huettl
wblack@bismarcklaw.com

I further certify that a copy of the foregoing documents will be mailed first class mail, postage paid, to the following non-E-filing party:

John F. Hall
10748 E. Efaw Ln.
Lake Negagmon, WI 54849

and that the address of such party served is the last reasonable ascertainable post office address of such party.

Annette Kirschenheiter

Subscribed and sworn to before me this 20th day of September, 2019.

CARI TIMMONS
Notary Public
State of North Dakota
My Commission Expires August 27, 2020

Notary Public