20190202

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 5, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Cheryl Reese,

Plaintiff and Appellant,

v.

Tia Reese-Young,

Defendant and Appellee.

Supreme Court No. 20190202
Mountrail County
Case No. 31-2017-CV-00105

APPELLANT'S REPLY BRIEF

APPEAL OF AMENDED JUDGMENT DATED MAY 31, 2019 AND THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED FEBRUARY 27, 2019

NORTH CENTRAL JUDICIAL DISTRICT
HONORABLE DOUGLAS MATTSON PRESIDING

PRINGLE & HERIGSTAD, P.C.
Scott M. Knudsvig (#05823)
Matthew H. Olson (#06182)
PO Box 1000, 2525 Elk Drive
Minot, ND 58702-1000
(701) 852-0381
sknudsvig@pringlend.com
molson@pringlend.com
Attorneys for Appellant Cheryl Reese

[i.] **TABLE OF CONTENTS**

Paragraph No.

[¶1] **TABLE OF AUTHORITIES**

Cases **Paragraph No.**

North Dakota Statutes

Secondary Sources

[¶2] **I. INTRODUCTION**

[¶3] Appellant Cheryl Reese (herein "Cheryl") respectfully submits her reply brief and herein incorporates all facts, law, and argument contained in her Brief of Appellant.

[¶4] **II. LAW AND ARGUMENT**

[¶5] **A. The open mines doctrine is the default rule when the instrument creating the life tenancy fails to specify who is to receive the proceeds of the minerals, including the royalties, when the mine was open at the time the life tenancy was created.**

[¶6] The basis of the open mines doctrine is that a life tenant, who is given the beneficial enjoyment of land, is entitled to enjoy the land in the same manner as it was enjoyed before the creation of the life estate. Patrick H. Martin and Bruce M. Kramer, Williams & Meyers, *Oil and Gas Law*, § 513, 649 (LexisNexis Matthew Bender 2017) (Dist. Ct. Dkt. #49). Appellee Tia Young-Reese (herein "Tia") has spent much time arguing that it would be *waste* for Cheryl to continue to receive the royalties from the land in which she owns a life estate in the mineral interests. To support Tia's proposition, Tia attempts to analogize the case at bar to *Ruggles v. Sabe,* 2003 ND 159, ¶ 6, 670 N.W.2d 356. Appellee's Br. at ¶ 13, 14, & 18. *Ruggles* is so factually different that it offers no help in determining who is entitled to royalties in the instant action. Tia's attempted analogy between *Ruggles* and the present facts is unpersuasive for two reasons.

[¶7] First, Sabe did not use the property in the same manner as the Grantor had previously used the property. *Ruggles,* 2003 ND 159 at ¶ 6. Removing the airplane hangar was obviously not a part of the original use of the land and thus it only took the Court seven short paragraphs to reach a holding in *Ruggles*. *Id.* at ¶ 6 & 7. By contrast, Cheryl and Dennis used the land in exactly the same manner as they previously had before the life tenancy was created – receiving royalties from wells on the property.

[¶8] Second, there is no exception to the doctrine of waste that was applicable for the facts present before the North Dakota Supreme Court in *Ruggles*, which involved the removal of an airplane hangar from the property in question. However, there is a well-established and universally accepted exception for open mines. *See e.g.*, Restatement (First) of Property § 138 (1936). The Restatement of Property § 138 states, in total:

> **Subject to** exceptions stated in §§ 141 (language of creating instrument), 142 (police power regulations), 143 (estovers), **144 (open mines** or customary cutting of timber) and 145 (exhaustion of part for preservation of balance), **the owner of an estate for life in possession or in reversion has a duty not to act upon the land in which his estate for life exists so that his conduct causes the market value of the interests limited after his estate for life to be diminished.**

(**Emphasis added**). The comment to § 138 states that the life estate owner has a duty to not commit waste unless the conduct is "privileged pursuant to one or more of the rules stated in the five Sections noted as exceptions to the rule stated in this Section." *Id.* This section, relied on by the Court in *Ruggles*, 2003 ND 159 at ¶ 5, specifically identifies that the doctrine of waste is "subject to" the open mines doctrine, which provides:

> When, prior to the creation of an estate for life, the land in which such estate is created has been used by extracting and selling coal, oil, iron, sand, clay or other like deposits found therein, or by cutting and selling timber located thereon, then the owner of such estate for life is privileged to continue the use so begun, although such continuance causes the market value of the interest limited after the estate for life to be diminished.

Restatement (First) of Property § 144 (1936). In *Ruggles*, the Court acknowledged that exceptions to the doctrine of waste do, in fact, exist and have application if the facts warrant that one or more of the exceptions apply. 2003 ND at 159 at ¶ 5.

[¶9] Furthermore, Cheryl did not commit waste because the lease had opened the mine before the life tenancy was created. The basis of the open mines doctrine is that a life tenant, who is given the beneficial enjoyment of land, is entitled to enjoy the land in the

same manner as it was enjoyed before the creation of the life estate. Williams & Meyers § 513 at 649 (Dist. Ct. Dkt. #49).

[¶10] "It is undisputed that the Deed does not specify how the oil and gas royalties from the property would be split between Cheryl and Tia." Appellee's Br. at ¶7. As a result, the open mines exception to the doctrine of waste clearly governs in this situation and Cheryl is entitled to the benefits from the mineral interest for the remainder of her life. Upon the application of the open mines doctrine, Cheryl will be paid royalties on a 12.5% interest in the minerals while living and Tia will be paid royalties on a 12.5% interest in the minerals and, upon Chery's death, Tia then will own in fee and be paid royalties on the entire 25% interest in the minerals in and under the Property.

[¶11] **B. The open mines exception to the doctrine of waste is part of the common law and is therefore the law in North Dakota.**

[¶12] In her initial brief, Cheryl identified thirty states where the open mines exception to the doctrine of waste is the law. At the time of formation of the United States, the open mines exception to the doctrine of waste was the common law in England. *Minnesota Loan & Trust Co. v. Douglas*, 161 N.W. 158, 161 (Minn. 1917); *see* N.D.C.C. §§ 1-01-03 (stating that North Dakota incorporates the common law as part of the law in North Dakota and that common law is found in the decisions of tribunals). On the other hand, Tia has only identified one state that has **allegedly** rejected the common law open mine exception to the doctrine of waste. Appellee's Br. at ¶12, 14, & 15 (**emphasis added**). In support of this assertion, Tia references two Montana cases in her brief.

[¶13] First, Tia states:

> In *State ex rel. v. Dickgraber v. Sheridan*, using the same rationale as *Ruggles,* the Court relied on the bedrock law controlling the life tenant and remainderman relationship. "A tenant for life ... cannot do anything which

> has the effect of permanently diminishing the value of the future estate. Cases on this point are too numerous to cite." *Dickgraber*, 254 P.2d 390, 402 (Mont. 1953) (citations omitted). Cf. N.D.C.C. § 47-02-33.

Appellee's Br. at ¶14. Cheryl notes that Tia does not give any of the facts of *Dickgraber*. *Dickgraber* deals with the State of Montana, via Montana statutes, leasing state school land and the statutory minimum of rentals. There is no application of this case to the present situation. Tia does not even cite to the opinion of *Dickgraber* but instead quotes the dissent wherein the dissenting jurist, Anderson, J., in passing, describes the general rule regarding waste. *State ex rel. Dickgraber v. Sheridan*, 254 P.2d 390, 402 (Mont. 1953) (Anderson, J., dissenting). Cheryl has no issue with the doctrine of waste, but the doctrine of waste is not applicable to the facts in the instant matter.

[¶14] Second, Tia states:

> In *McLaren Gold Mines Co.,* the Court concluded that royalty payments must be treated as principal owed to the remainderman, not the life tenant. "Such rents or royalties are principal, and not income, and must be so treated in the ascertainment of the respective interests of life tenants and remaindermen." *McLaren* at 981.

Appellee's Br. at ¶15. However, this was not the conclusion by the court in *McLaren*. Rather, in its opinion, the court simply quoted four paragraphs from a secondary source: 3 Lindley on Mines (3d Ed.), § 861, which contained such language. *McLaren Gold Mines Co. v. Morton*, 224 P.2d 975, 980-981 (Mont. 1950). Furthermore, the blurb extracted by the Appellee from this secondary source was not relevant to the holding of *McLaren*, which dealt solely with principal and agency law. *Id.* at 982. No facts were before the court in *McLaren* which called for the application of the open mine exception to the doctrine of waste. *Id.* Additionally, 3 Lindley on Mines (3rd Ed.), § 789a, p. 1939, unequivocally follows the open mines doctrine, stating: "[T]he tenant for life or for years

had the right to work an open mine and the recognized reason why such an act was not deemed waste was, that it constituted the normal use of the property in the character which it possessed at the time of the accrual of the tenancy."

[¶15] Despite attempts by Tia to show that Montana has rejected the open mine exception to the doctrine of waste, Tia has failed to make such a showing. In fact, Tia has failed to direct the Court's attention to a single jurisdiction in the United States that has refused to apply the open mines exception to the doctrine of waste.

[¶16] Furthermore, Tia makes the sweeping accusation that the open mines exception to the doctrine of waste "runs roughshod" over North Dakota statute and caselaw. Appellee's Br. at ¶ 12. In support of such assertion, Tia stated the following:

> "It is the ultimate rule that the life tenant or the tenant for years is not privileged to take oil and gas, nor has he the power to create such privilege in others by way of lease of the land for oil and gas purposes." *Eide v. Tveter*, 143 F.Supp. 665, 671 (D.N.D. 1956).

Appellee's Br. at ¶ 12.

[¶17] However, *Eide* did not involve the application of the open mines exception to the doctrine of waste. *Id.* *Eide* merely stands for the proposition that a life tenant, without the ratification of his remaindermen, cannot executed a valid oil, gas and mineral lease. This is not being called into question, for it is a general rule that neither a life tenant nor a remainderman can alone execute a valid mineral lease without the joinder of the other. That is not what is in dispute in this instant action. After citing *Eide*, Tia asserts that "[i]f Cheryl, as the life tenant, cannot take the oil and gas from the property under North Dakota law, likewise, she cannot receive the proceeds from someone else removing the oil and gas…" The problem for Tia is that her assertion is not the law, for, in the instant matter, at the creation of the life tenancy, the mine had already been opened by the

execution of an oil and gas lease. North Dakota has not yet had a case present itself warranting the application of the open mines exception to the doctrine of waste until now.

[¶18] C. The open mines exception to the doctrine of waste should be applied retroactively.

[¶19] As a last resort, Tia argues that if the Court adopts the open mines doctrine, it should only apply prospectively, and to deeds executed after the Court's decision. Appellee's Br. at ¶ 20. It should be noted that Tia's argument regarding prospective application was not made to the district court and, therefore, should be disregarded in total. *See Bickler v. Happy House Movers, L.L.P.*, 2018 ND 177, ¶ 11, 915 N.W.2d 690 (stating "[t]his Court does not consider questions that were no presented to the district court and are raised for the first time on appeal").

[¶20] Lastly, the Appellee argues that the open mines doctrine should be applied prospectively because of an analysis of the factors set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). When a court examines the Chevron factors, it must be stressed, against the background presumption that retroactivity is "overwhelmingly the norm." *James B. Dean Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991). "This Court has, albeit infrequently, resorted to pure prospectivity." *Id. at* 536 (citing *Chevron Oil Co.,* 404 U.S. at 107). As such, a litigant seeking prospective-only application must firmly convince a court that each factor favors such a decision. Richard Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 Am. J. Comp. L. Supp. 37, 42 (2014). At the outset, it must be stated that the retroactive application of the open mines exception to the doctrine of waste will have no impact on person not parties to the action, let alone "widespread ramifications" as Tia suggests. Tia's hyperbole regarding such impact should fall on deaf ears.

[¶21] As for *Chevron* factor one, by recognizing the common law open mines exception to the doctrine of waste, the Court would not be overruling clear past precedent which litigants may have relied on because North Dakota acknowledged the exceptions to the doctrine of waste in *Ruggles*, 2003 ND at ¶ 5. Likewise, the resolution was foreshadowed by *Ruggles* when the Court alluded to the exceptions to the doctrine of waste, including the open mines exception, but did not apply any of the exceptions at that time because they were not issues that were presently before the Court. *Id.*

[¶22] As for *Chevron* factor two, the purpose and effect of the doctrine of waste is to prevent the life tenant from improperly diminishing the value of the property. However, the purpose behind the exceptions to the doctrine of waste is to ensure that the life estate owner can utilize the property in the same manner as the grantor had utilized the property. It is considered waste to first open the mine, not continue to work an already opened mine. Williams & Meyers, § 513 at 649 (Dist. Ct. Dkt. #49). When a mine is opened by a grantor prior to the creation of the life estate, technically speaking, the grantor was already "diminishing" the value of the property. If the life tenant works open mines or receives the benefit of such work for mines that were open at the time of the grant of the life estate, the life tenant has acted in accordance with the purpose of using the property in the same manner as the grantor.

[¶23] As for *Chevron* factor three, no substantial inequitable results would occur by recognizing the open mines doctrine and applying it retroactively. The Court has recognized doctrines that were not previously recognized in North Dakota and applied such doctrines retroactively. *See e.g.*, *Kadrmas v. Sauvageau*, 188 N.W.2d 753 (N.D. 1971) (applying *Duhig* rule retroactively to 1962 mineral conveyance). Furthermore,

when other states recognized the open mines exception, they have applied it to the case at bar, not prospectively. *See e.g.*, *Minnesota Loan & Trust Co.*, 161 N.W. 158.

[¶24] Lastly, while Tia argues that Cheryl is asking the Court to "perform a legislative function" since the common law rule has not yet been recognized in North Dakota, Tia then asks the Court to perform a legislative function by applying the common law open mines doctrine prospectively. Appellee's Br. at ¶ 9 & 20. On one hand, Tia is asking the court not to function like a legislature while on the other hand asking the Court to only pronounce what the law will be in the future. "[T]his equitable method [prospectively of judgments] has its own drawback: it tends to relax the force of precedent and thereby allows the courts to act with a freedom comparable to that of legislatures." *James B. Beam Distilling Co.*, 501 U.S. at 536. In applying a new rule prospectively, courts are "free to act, in effect, like a legislature…" *Mackey v. United States*, 401 U.S. 668, 688 (1971) (Harlan, J., concurring and dissenting). "Prospective decisionmaking is the handmaid of judicial activism and, and the born enemy of stare decisis." *Harper v. Virginia Dep't of Taxation,* 509 U.S. 86, 105 (1993) (Scalia, J., concurring). Based on the forgoing reasons, Tia's argument that the common law open mines exception to the doctrine of waste be applied prospectively is wholly unpersuasive.

[¶25] **III. CONCLUSION**

[¶26] For the above stated reasons, Cheryl requests that the judgment of the district court be reversed and remanded to enter judgment in favor of Cheryl.

[¶27] Dated this 5th of September, 2019.

Pringle & Herigstad P.C.

/s/ Matthew H. Olson
Scott M. Knudsvig (#05823)
Matthew H. Olson (#06182)
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
(701) 852-0381
sknudsvig@pringlend.com
molson@pringlend.com
Attorneys for Appellant Cheryl Reese

[¶28] **CERTIFICATE OF COMPLIANCE ON PAGE COUNT AND WORD PROCESSING PROGRAM**

[¶29] I certify that this brief complies with NDAPP 32(a)(8) - the page count is 12; the word processing program is Microsoft Office Word 2016.

Dated this 5th day of September, 2019.

Pringle & Herigstad P.C.

/s/ Matthew H. Olson
Scott M. Knudsvig (#05823)
Matthew H. Olson (#06182)
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
(701) 852-0381
sknudsvig@pringlend.com
molson@pringlend.com
Attorneys for Appellant Cheryl Reese

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Cheryl D. Reese,

Plaintiff,

v.

Tia D. Reese-Young,

Defendant.

Supreme Court No. 20190202
Mountrail County
Case No. 31-2017-CV-00105

CERTIFICATE OF ELECTRONIC SERVICE

[¶1] I certify that on the 5th day of September, 2019, the following documents:

1. Appellant's Reply Brief

were electronically filed with the North Dakota Supreme Court through the North Dakota Supreme Court E-filing Portal in Docket No. 20190202, and an E-mail Service Notification will be sent to the following:

Joshua Swanson - jswanson@vogellaw.com
Counsel for Defendant

By: */s/ Scott M. Knudsvig*
Scott M. Knudsvig (ID# 05823)
Matthew H. Olson (ID# 06182)
Attorneys for Plaintiff
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
(701) 852-0381
sknudsvig@pringlend.com
molson@pringlend.com