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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

BRIEF OF APPELLANT

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

ORAL ARGUMENT REQUESTED

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[¶1] **TABLE OF AUTHORITIES**

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[¶2] **I. STATEMENT OF THE ISSUES**

[¶3] The district court erred when it failed to apply the open mines exception to the doctrine of waste to the July 22, 2008 Quit Claim Deed wherein Dennis L. Reese and Plaintiff/Appellant Cheryl D. Reese reserved a life estate. Oral argument is requested and would be helpful to the Court as the issue of whether the open mines exception to the doctrine of waste should be applied is a case of first impression before the North Dakota Supreme Court.

[¶4] **II. STATEMENT OF THE CASE**

[¶5] Plaintiff/Appellant Cheryl D. Reese (herein "Cheryl") requests that this Court reverse the judgment of the district court in favor of Defendant/Appellee Tia D. Reese-Young (herein "Tia"). Cheryl further requests that this Court remand to the district court to enter judgment in Cheryl's favor.

[¶6] Cheryl initiated this quiet title action against Tia on June 2, 2017. Appendix Page 5-9 (herein "App."). Cheryl brought two claims in her complaint: quiet title and declaratory judgment. On June 26, 2017, Tia answered and counterclaimed for quiet title and declaratory judgment. App. 12-16. On July 10, 2017, Cheryl answered the counterclaim. App. 17-19.

[¶7] On September 19, 2018, Tia moved for summary judgment. Dist. Ct. Dkt. #18, 19 & 22. On October 16, 2018, Cheryl filed a cross motion for summary judgment. Dist. Ct. Dkt. # 25, 26, & 27. Both Cheryl and Tia filed response briefs. Dist. Ct. Dkt. #58 & 67. Oral argument was held on January 11, 2019.

[¶8] On February 27, 2019, the district court issued its Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion for Summary Judgment which granted Tia's motion and denied Cheryl's motion. App. 20-29. A Judgment was filed March 8, 2019. App. 30-31. The Notice of Entry of Judgment was entered on March 8, 2019. Dist. Ct. Doc. #80. On March 20, 2019, Cheryl filed a Motion to Amend Judgment. Dist. Ct. Dkt. #83. A hearing regarding this matter was held on April 18, 2019. The district court granted Cheryl's motion on May 22, 2019 and the Amended Judgment was entered on May 31, 2019. App. 32-36. The Notice of Entry of Amended Judgment was entered on June 6, 2019 followed by Cheryl's Notice of Appeal that was filed on June 27, 2019. Dist. Ct. Dkt. #94 & App. 37-39.

[¶9] **III. STATEMENT OF THE FACTS**

[¶10] Tia is the daughter of the late Dennis Reese ("Dennis") and Patricia Reese. Dist. Ct. Dkt. # 28, page 7, lines 1-2 (herein deposition page and line numbers are referred to as "7:1-2"). In approximately 1977, Dennis and Patricia were divorced. Dist. Ct. Dkt. #28, 7:9-16. Dennis and Cheryl were married in 1982. Dist. Ct. Dkt. #29, 9:13-15. Cheryl is Tia's stepmother.

[¶11] On March 1, 2001, Dennis, as Grantor, conveyed to his daughter, Tia, and himself, as joint tenants, "an undivided 50% interest in and to an undivided ½ interest – mineral interest only" to the following lands located in the County of Mountrail, State of North Dakota:

<u>Township 153 North, Range 89 West</u>
Section 20: S½N½; SE¼
Section 29: E½NE¼; S½; SW¼NW¼
Section 30: SE¼; E½SW¼; Lot 4
Section 31: Lots 1, 2, 3 and E½NW¼; NE¼

(herein "the Property"). Dist. Ct. Dkt. #30. This 2001 deed was filed of record in the office of the Mountrail County Recorder on March 30, 2001 as Document No. 305265. *Id.* After this conveyance, Dennis and Tia, as joint tenants, each owned an undivided one-half interest in a 25% interest in the minerals of the Property. [1]

[¶12] Thereafter, on January 26, 2005, both Dennis and Tia, as lessors, executed an oil and gas lease in favor of Double Deuce Land & Minerals, Inc., as lessee (the "Lease"). Dist. Ct. Dkt. #31. This lease was filed of record in the office of the Mountrail County Recorder on April 29, 2005 as Document No. 316042. *Id.* A Correction of Description in Oil and Gas Lease was executed by both Tia and Dennis in September and October of 2006, which corrected a typographical error in the original lease. These corrections were recorded as Document No. 325118 and Document No. 328119. Dist. Ct. Dkt. #32 & 33. EOG Resources, Inc. is Double Deuce's successor in interest. *Id.*

[¶13] The Lease had a five-year primary term, but the mineral interests leased are currently under production and, to this day, the Lease has been extended and continues to be held by production per the terms of the Lease. Dist. Ct. Dkt. #34-37. Production of oil and gas in paying quantities under Section 31 of the Property began on May 15, 2007, when the C&B 1-31H Well was completed. Dist. Ct. Dkt. #34 & 52. Production of oil and gas in paying quantities under Section 30 of the Property began when the Wenco 1-30H well was completed on September 24, 2007. Dist. Ct. Dkt. #35 & 52. Production of oil and gas in paying quantities under Section 20 of the Property began when the John 1-20H well was completed on April 13, 2008. Dist. Ct. Dkt. #36 & 52. Production of oil

[1] Dennis L. Reese also had an interest in the surface and additional mineral interests (collectively referred to as "additional interests") in the Property at this time, but his additional interests were sold via a Contract for Deed, Amended Contract for Deed, and ultimately a Deed of Personal Representative. These additional interests are not the subject matter of this present litigation.

and gas in paying quantities under Section 29 of the Property began when the Wentz 1-29H well was completed on May 30, 2008. Dist. Ct. Dkt. #37 & 52.

[¶14] Dennis was diagnosed with lymphoma cancer in approximately 2006. Dist. Ct. Dkt. # 29, 12:19-25 & 13:1. Dennis and Cheryl discovered that Dennis had underlying pancreatic cancer in the spring of 2008. Dist. Ct. Dkt. #29, 14:1-4. It was at this time that Dennis and Cheryl took steps to make sure his affairs were in order. Dist. Ct. Dkt. #29, 24:10-14 & # 38. Dennis wanted to take steps to make sure that both his daughter, Tia, and his wife, Cheryl, would receive royalty income after his death. Dist. Ct. Dkt. #29, 15:4-21; 46:22-25; & 47:1-2 & #38.

[¶15] On July 22, 2008, by way of a quit claim deed, Dennis and Tia, as Grantors, conveyed a 12.5% interest in the minerals to Dennis and Cheryl, as joint tenants, and a 12.5% interest in the minerals to Tia. Dist. Ct. Dkt. #39. The Deed was filed of record in the office of the Mountrail County Recorder on August 18, 2008 as Document No. 345091. Dist. Ct. Dkt. #39. After this conveyance, Dennis and Cheryl, as joint tenants, owned a 12.5% interest in the minerals of the Property while the remaining 12.5% was owned by Tia.

[¶16] Thereafter, on the same day, on July 22, 2008, Dennis and Cheryl, as Grantors, conveyed via a "QUIT CLAIM DEED - MINERALS" (herein "the Subject Deed") to Tia their 12.5% mineral interest to the Property. App. 10-11. The Subject Deed reserved a life estate in the Grantors but was silent as how the income from oil and gas production, namely, the royalties, were to be shared between Dennis and Cheryl, as life tenants, and Tia, the remainderman. More specifically, the Subject Deed states, "Grantor[s] desire[] to transfer said minerals to the Grantee, Tia D. Reese-Young, while reserving a life estate

interest to said minerals to the grantors for the term of their lives, then upon the death of both grantors to Tia D. Reese-Young." *Id.* The deed then, a second time, repeats the "reservation in grantors of a life estate interest for the term of their lives." *Id.* The Subject Deed was filed of record in the office of the Mountrail County Recorder on August 18, 2008 as Document No. 345092. After this conveyance, Tia owned in fee a 12.5% interest in the minerals while Dennis and Cheryl had a life interest for the duration of their joint lives in the other 12.5% mineral interest with Tia having the remainder interest in this second 12.5% interest.

[¶17] After the Subject Deed was executed and recorded, Dennis and Cheryl continued to receive royalty payments under the Lease until his death on September 20, 2008. Dist. Ct. Dkt. #29, 20:23-21:19 & #38. After Dennis' death, Cheryl received the royalty payments. *Id.*

[¶18] In February 2009, both Tia and Cheryl executed EOG Resources Division Orders dated February 3, 2009, wherein they both agreed that Tia would be paid a royalty interest of .01069263 and Cheryl, would be paid the same percentages as Tia - .01069263. Dist. Ct. Dkt. #41 & 42. The division orders specifically identify that Cheryl is to be paid the same interest as Tia because of Cheryl's "life estate" interest. *Id.* The division orders state that the "division order shall become valid and binding on each of the parties hereto…." *Id.* Cheryl also signed additional division orders for the Property. Dist. Ct. Dkt. #38, 43, 44, & 45.

[¶19] Both Cheryl and Tia made motions for summary judgment arguing that, as a matter of law, each was entitled to judgment quieting title in their respective favor. Cheryl urged the district court to apply the exception to the doctrine of waste known as

the open mines doctrine. Tia requested that the doctrine of waste apply because the open mines exception was not the law in North Dakota.

[¶20] On February 27, 2019, the district court issued its "Findings of Fact, Conclusions of Law, and Order Granting [Tia's] Motion for Summary Judgment." App. 20-29. The district court found that that, upon Dennis Reese's death, "Cheryl is the life tenant while Tia is the remainderman under the Subject Deed." App. 22-23, ¶ 11. The district court correctly pointed out that "[t]he Subject Deed does not specify how the income from oil and gas production, namely, the royalties and bonuses, was to be shared between Cheryl and Tia." *Id.* The district court opined that there "is nothing in the Subject Deed that explicitly creates a reservation of the bonus, royalty, and other income derived from the production of oil and gas to Cheryl for her life." *Id.*

[¶21] Ultimately, the district court decided not to apply the open mines exception to the doctrine of waste because the "open mines doctrine is not the law in North Dakota" since N.D.C.C. § 47-02-33 does not provide for any exceptions to the doctrine of waste and Cheryl was unable to point to a case by the North Dakota Supreme Court wherein the Court recognized and applied the open mines exception to the doctrine of waste. *Id.* at ¶ 16. The district court cited *Ruggles v. Sabe,* 2003 ND 159, 670 N.W.2d 356 wherein the North Dakota Supreme Court relied on the Restatement (First) of Real Property. *Id.* at ¶ 25. The district court reasoned, "In *Ruggles,* the Supreme Court held the life tenant committed waste when he removed an asset from the property, an airplane hanger, which decreased the property's value". *Id.* The district court further cited to *Ruggles*:

> The issue of whether a life tenant may remove structures in such a way as to diminish the value of the property is addressed in the Restatement, which provides:

> Subject to exceptions ... 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.
>
> Restatement (First) of Real Property § 138 (1936). In the comments, the Restatement further explains, subject to certain exceptions, "the owner of an estate for life has a duty not to destroy or to remove structures which are located upon, and which add to the value of the land in which the estate for life exists." Restatement (First) of Real Property § 138 cmt. c (1936).

Id. Ultimately, the district court granted Tia's motion for summary judgment by applying the doctrine of waste, stating, "Like *Ruggles*, Cheryl would be decreasing the Subject Property's value, to Tia's detriment, by profiting from its most valuable assets, the oil and gas royalties, in the absence of clear and explicit language in the Subject Deed reserving that interest to her." *Id.* The district court found that "Cheryl is required to hold the corpus, including the proceeds from the oil and gas royalties, in trust for Tia's benefit with Cheryl entitled only to the income generated from the corpus during her life." *Id.* at ¶26. An Amended Judgment, consistent with the district court's decision, was entered on May 31, 2019. App. 35-36.

[¶22] **IV. LAW AND ARGUMENT**

[¶23] **A. The North Dakota Supreme Court reviews the district court's grant of summary judgment de novo.**

[¶24] Summary judgment is appropriate "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.D.R.Civ.P. 56(c). Whether summary judgment was properly granted is "a question of law which [the North Dakota Supreme Court] review[s] de novo

on the entire record." *Wahl v. Country Mut. Ins. Co*., 2002 ND 42, ¶ 6, 640 N.W.2d 689. After finding that the district court erred as a matter of law, this Court can reverse and remand directing the district court to enter judgment in favor of other party. *Airport Inn Enterprises, Inc. v. Ramage*, 2004 ND 92, ¶ 16, 679 N.W.2d 269, 273.

[¶25] **B. The district court erred when it did not apply the open mines exception to the doctrine of waste to the July 22, 2008 Quit Claim Deed wherein Dennis L. Reese and Cheryl D. Reese reserved a life estate.**

[¶26] According to the open mines doctrine, which is an exception to the doctrine of waste, Cheryl, the life tenant, is entitled to receive the proceeds from the mineral interest and has no duty to retain the proceeds as corpus for Tia, the owner of the remainder interest. The North Dakota Supreme Court has not yet recognized the common law open mines exception to the doctrine of waste, for no fact pattern has been before the Court warranting its application. However, the overwhelming authority in other states, echoed by secondary sources, stands for the proposition that the open mines doctrine applies when a lease exists prior to the creation of the life estate.

[¶27] The general rule – the doctrine of waste – is that when a life tenant and remainderman together grant an oil and gas lease without agreeing to the division of proceeds, courts have generally allocated funds between the life tenant and the remainderman on the basis of classification of the funds as income or corpus. John S. Lowe, *Oil and Gas Law in a Nutshell*, 5th Edition, 108-09 (West 2009) (Dist. Ct. Dkt. #48). "Funds classified as income are paid to the life tenant*." Id.* "If classified as corpus, a return of the 'body' of the trust, the funds are invested to yield income (which is paid to the life tenant) and held as principal to be turned over to the remainderman when the life tenant dies." *Id.* The application of this general rule "rarely satisfies either the life tenant

or the remainderman." *Id.*

[¶28] "The open mines doctrine, borrowed from the law of hard minerals, changes the general rules for division of oil and gas lease proceeds." *Id.* "The most important exception to the general rules limiting the power of a life tenant to sever and remove minerals without the concurrence of the owner of the future interest in the land arises from the operation of the 'open mines' doctrine." Patrick H. Martin and Bruce M. Kramer, Williams & Meyers, *Oil and Gas Law*, § 513, 648, 649 (LexisNexis Matthew Bender 2017) (Dist. Ct. Dkt. #49).[2]

[¶29] "Where there is an 'open mine' on the property when the life tenancy is created, the life tenant is entitled to all lease payments, including any bonus and royalties (as well as the right to work the mine in absence of a lease)." Lowe at 109; *see* Williams & Meyer at 649. (stating the owner of the future interest – the remainderman – is not entitled to have such proceeds impounded or to receive an apportioned share thereof"); 31 C.J.S. Estates § 49 (2018) (describing that a life tenant is entitled to all proceeds, including oil and gas royalties, when the mine was open at the time the life estate was created); William D. Warren, *Policy Limitations on Oil and Gas Leasing*, 3 UCLA L. Rev. 474, 489 (1956) (Dist. Ct. Dkt. #50) (stating that this principle has been accepted in petroleum law and that it clearly applies to give the life tenant full royalties in the case of a lease being in place when a life estate is created or when production is in place at the time the life tenancy is created); Ernest R. Fleck, *Selected Leasing Problems – Protection Leases, Life Estate and Remainder Interest, Interest in a Particular Stratum*, 15 Rocky Mnt. Min. Law Inst. 217, 231-32 (1969) (Dist. Ct. Dkt. #51) (stating that the life tenant is entitled to the all royalties during his lifetime to the exclusion of the remainderman if the

[2] The doctrine is also known as the "open well" doctrine. 31 C.J.S. Estates § 49.

life tenancy was created after a lease was in place). The rationale is that the "life tenant should have the use of the property as it was when the life tenancy was created." Lowe at 109.

[¶30] The "life tenant is also entitled to the proceeds from additional wells drilled." *Id.*; *see* 31 C.J.S. Estates § 49 (2018) (stating that "[w]here an oil or gas lease has been executed prior to the inception of the life estate, but actual drilling operations do not commence until after the inception of the left estate, the open mines doctrine applies, and the life tenant is entitled to all accruing royalties"); *Cherokee Const. Co. v. Harris*, 122 S.W. 485, 487 (Ark. 1909) (stating that it is uniformly held that "[life tenants] may work old mines already opened when they obtained the estate" and that the mine can be worked "even to exhaustion" so long as the mine was open at the vesting of the life estate); *Hook v. Garfield Coal Co.,* 83 N.W. 963, 966 (Iowa 1900) (stating that mines open when the life tenancy is created can be worked "even to the point of exhaustion"); *Koen v. Bartlett*, 23 S.E. 664, 666 (W. Vir. App. 1895) (stating that a tenant for life may work open mines "to exhaustion").

[¶31] "Generally, a mine is held to be 'open' when an oil and gas lease exists when the life tenancy is created; the grant of a lease 'opens' the mine." Lowe at 109. "By the weight of the authority, the mere execution of a lease, without any drilling operations on the land, will be sufficient to constitute the opening of mines." Williams & Meyers at 651; *see Cronan v. Castle Gas Co., Inc.*, 512 A.2d 1, 2-3 (Pa. Super. 1986) (stating that and oil and gas lease opens the mines under the "open mines" doctrine and that actual drilling operations is not necessary); 31 C.J.S § 49 (2018) (stating where "an oil or gas lease has been executed prior to the inception of the life estate, but actual drilling

operations do not commence until after the inception of the left estate, the open mines doctrine applies").

[¶32] The open mines exception to the doctrine of waste existed long before the United States was born:

> In a nisi prius opinion which was affirmed on appeal in Dashwood v. Magniac (Eng) [1891] 3 Ch 306—CA, Chitty, J., said: "It was established as long ago as the year 1344, and was settled law in Lord Coke's time, that it was not waste for the tenant for life to work an open mine:…. Where the mine has been opened by the settlor, the tenant for life is entitled to treat the minerals gotten by himself from the mine as part of the ordinary profits of the estate.

V. Woerner, *Rights of Tenant for Life or for Years and Remaindermen Inter Se in Royalties or Rents Under Oil, Gas, Coal, or Other Mineral Lease*, 18 A.L.R.2d 98, 119 (1951). On appeal, Bowen, Ld. J., stated:

> The open mine is an instance, beginning in the Roman, but familiar already to the English law as far back as the reign of Edward III. It is important, however, to observe that the open mine does not constitute an arbitrary exception to real property law. It is merely an instance of the application of a well-known principle of construction in virtue of which grants of mineral land are given such force and effect as is reasonably necessary to carry out the obvious intentions of the grantor. The grantor was absolute master of his property, and could carve the lands which were the subject of his grant into such estates and interests as he pleased. It is therefore from his presumed will and intention that the result in the case of the open mine follows.

Id. at 119 citing *Dashwood v. Magniac* (Eng) [1891] 3 Ch 306—CA.

[¶33] The open mines exception to the doctrine of waste was common law in England at the time of origin of the United States and thus became common law in the United States.

> The customary method of developing, working, and obtaining profits from mineral lands, at the time of the adoption of our Constitution, was by means of mineral leases similar to those in question. The removal of ore from the demised land was not deemed waste, but a legal and reasonable way of securing the profits of the land. The lessee for life or years of land was, by the common law, authorized to operate and take the profits of

> open mines, …

Minnesota Loan & Trust Co. v. Douglas, 161 N.W. 158, 161 (Minn. 1917). Furthermore, the Minnesota Supreme Court stated:

> A consideration of the cases in this country leads to a like conclusion. The propriety of a lease for the purpose of developing and working mines is recognized by all of the cases, and the rule established by the great weight of authority that such leases do not constitute a sale of any part of the land, and, further, that iron or other materials derived from the usual operation of open mines or quarries constitute the rents and profits of the land, and belong to the tenant for life or years…

Id. at 420-21.

[¶34] 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 at 649 (Dist. Ct. Dkt. #49); *see Williamson v. Jones*, 27 S.E. 411, 413 (W. Va. 1897) (stating that one of the justifications for the open mines exception is "[t]he offense of waste consists in the first penetration and opening of the soil, and it is not waste to dig in mines or pits already open, which have become part of the annual profit of the land").

[¶35] In *Kimbark Exploration Co. v. Von Lintel*, 391 P.2d 55, 57 (Kan. 1964), in 1957, Clementina Von Lintel obtained a life estate in property pursuant to her husband's last will and testament, while her husband's children received a remainder interest.[3] An oil and gas lease was entered in 1955, before the life tenancy was created, and production began in June 1960, after the life tenancy was created. *Id.* The remainderman argued that the royalty should be deemed principal while the life tenant argued that she should be paid the royalty that had accrued or may accrue during her lifetime. *Id.* The Kansas

[3] In determining whether the "open mines' doctrine applies, "no distinction is made between a life tenant who holds a conventional life estate and one who holds a legal life estate." *Youngman v. Shular*, 288 S.W.2d 495, 496 (Tex. 1956).

Supreme Court applied the common law open mines doctrine and held that the royalty belonged to the life tenant. *Id.* at 60.

[¶36] Here, like in *Kimbark*, Cheryl and Dennis' life estate was created in July 2008, after the lease opened the mine, which was executed in January 2005. Dist. Ct. Dkt. # 31, 32, 33 & 40. Further, unlike in *Kimbark*, production began in 2007 and was already occurring on the Property before the life estate was created, which makes the application of the open mines exception to the doctrine of waste even more warranted in this instant matter, since caselaw only requires a lease, not production, to open the mine. Here, there was both a lease that opened the mine and actual production. Dist. Ct. Dkt. #31, 34-37, & 52. Therefore, the mine had been opened before Dennis L. Reese and Cheryl reserved the life estate and both Dennis L. Reese and Cheryl, as life tenants, were and continue to be (as to Cheryl) entitled to all proceeds of the open mine, including all royalties, while living. The application of this doctrine also echoes Dennis and Cheryl's intentions, for, after Dennis found out he had pancreatic cancer, he took steps to make sure his affairs were in order, which included making sure that Cheryl and Tia would both receive royalties. Dist. Ct. Dkt. #29, 15:4-21; 46:22-25; & 47:1-2 & #38.

[¶37] The Virginia Supreme Court, in 1938, stated the open mines exception to the doctrine of waste is "so well established as to scarcely need citation of authority…" *Graham v. Smith*, 196 SE 600, 602 (Va. 1938). The open mine exception to the doctrine of waste has been explicitly recognized by many jurisdictions in the United States and the support for its application is extensive. *See Cronan*, 512 A.2d at 2-3 (stating that a life tenant who reserved the life estate in a deed is entitled to all proceeds from oil and gas wells if they were opened by the grant of a lease before the creation of the life estate);

Youngman v. Shular, 288 S.W.2d 495, 496-96 (Tex. 1956) (holding that life tenant was entitled to royalties from oil and gas lease when lease was in place when life tenancy was created); *Nutter v. Stockton*, 626 P.2d 861, 862 (Okla. 1981) citing *Lawley v. Richardson*, 223 P. 156, 159 (Okla. 1924) (stating "a life tenant takes the land in the condition in which it was when the estate vested in him, and that he is entitled to all of the rents and profits which may accrue from the lands by reason of minerals which may be produced from mines or wells existing at the time of the death of the testator, or which may be produced from mines or wells opened under authority of conveyances executed prior to the vesting of the life estate"); *Koen*, 23 S.E. at 666 (stating "The [open mines] rule is well settled that a tenant for life, when not precluded by restraining words, may not only work open mines, but may work them to exhaustion; and it is settled law that rents of an open mine are income and go to the tenant for life"); *Haskell v. Wood*, 256 Cal.App.2d 799, 805-07 (Cal. Ct. App. 1967) (holding that where a life interest in certain land was conveyed after the grant of an oil and gas lease, even if the grant of the life tenancy did not contain any provision for the distribution of royalties, the open mines rule still applies and the life tenant is entitled to the income derived from the oil and gas lease throughout the remainder of their interest in the property); *May v. Chinn*, 193 S.W.2d 149, 150 (Ky. Ct. App. 1946) (holding that a life tenant, unless precluded by wording of instruments creating the life estate, may work mines that were opened by the owner of fee prior to commencement of life estate); *Temple v. Carter*, 165 S.E.2d 541, 544 (N.C. Ct. App. 1969) (holding that that the continuation by the life tenant for a commercial use of timber is consistent with the open mine/timber exception to the doctrine of waste); *Minnesota Loan and Trust Co.*, 161 N.W. at 161 (stating "The lessee for life or years of land was, by

the common law, authorized to operate and take the profits of open mines, although the lease was silent as to mines, but he could not open new mines even when the land was let with the mines…"); *Cherokee Const. Co.*, 122 S.W. at 487 (stating "If there are mines already opened on the land when the tenant takes the estate, it is not waste to continue to work them, and so it has been held that a mine which was opened at the vesting of the life estate or estate for years may be worked by the tenant even to exhaustion"); *Traer v. Fowler*, 144 F. 810, 817 (8th Cir. 1906) (the Eighth Circuit Court of Appeals when interpreting Illinois law stating, applies the open mines doctrine".); *Brooks v. Hanna*, 10 Ohio C.D. 480, 489 (Ohio Cir. 1899) (stating that "…those cases follow the law as laid down by all the authorities, that where mines are opened at the time that the will takes effect, the life-tenant gets a right to work the mines during the time of her life-estate".); *Clift v. Clift*, 9 S.W. 198, 201 (Tenn. 1888) (stating "We hold, therefore, that dower is assignable to widow in mines, quarries, and the like, and she may enjoy the same either by an allotment by metes and bounds or by a share of the rents and royalties, where the mines or quarries were opened and operated in the life of the husband"); *Coates v. Cheever*, 1 Cow. 460, 478 (N.Y. 1823) (holding owner of a life estate can work an open mine for her benefit); *Fawn Lake Ranch Co. v. Cumbow*, 167 N.W. 75, 77 (Neb. 1918) (holding life tenant has the right to work open mines); *Mayer v. Lane*, 262 P. 178, 180 (N.M. 1927) ("The 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."); *Hill v Ground*, 89 S.W. 343, 344 (Mo. App. 1905) (stating "If the owner of the fee has opened mineral veins and extracted ore therefrom for commercial purposes,

the life tenant must be held authorized to continue such operations, even to the extent or exhausting the deposits so opened."); *Owings v. Emery*, 6 Gill 260, 266-67 (Md. Ct. Spec. App. 1847) (stating "If a man hath land in part of which there is a coal mine open, and he leases the land to one for life, or for years, the lessee may dig for it; forasmuch as the mine is open at the time, and he leases all the land, it shall be intended that his interest is as general as his lease is; that is, that he shall take the profit of the land, and by consequence, of the mine in it."); *In re Estate of Womack*, 372 P.3d 690, 694 (Utah Ct. App. 2016) (reversed on other grounds) (stating "If at the time of the life-estate bequest there exists a mineral extraction operation paying royalties to the testator, the life-estate holder will also be entitled to enjoy those royalties"); *Poole v. Union Trust Co.*, 157 NW 430, 432-33 (Mich. 1916) ("It has, however, long been the law that where mines were opened or the leases executed before the life estate commenced, the owner of the life estate might, in the absence of restraining words, work the mines, even to the point of exhaustion, and take the profits."); *Billings v. Taylor*, 10 Pick. 460, 470-71 (Mass. 1830) (stating that it was well settled law that the open mines exception applies to the doctrine of waste); *State v. Snyder*, 212 P. 758, 763 (Wyo. 1923) (finding that "[w]here a life estate, with remainder over, has come into existence, and the life tenant finds open mines upon the land, he may continue to use the mine, and such use is considered as ordinary"); *Lyman v. Arnold*, 15 F.Cas. 1143, 1146 (C.C.D.R.I. 1828) (stating "[t]he lease conveyed the same land with all the profits and it was held no waste to work the open mine; and the reason was, that, being an open mine, the intention of the parties must be presumed to be to grant all those things, which might be used in the then state as profits of the land"); *Bailey v. Bond*, 77 F. 406, 409 (9th Cir. 1896) (interpreting Washington state property

law) (stating: "Thus, a tenant, whether for life, years, or a single year, may work an open mine on the premises, or a quarry, and the products of the mine are a part of the profits of the estate to which he is entitled"); *Moore v. Rollins*, 45 Me. 493, 494 (Me. 1858) (stating that "[a] widow is dowable of a lime quarry which was owned by her husband, and had been opened and wrought during her coverture"); *Waldorf v. E. & W. R. Co*., 41 N. E. 396 (Ind. Ct. App. 1895) (opining that "[i]t is settled law that tenants for life or years are entitled to work mines, quarries, clay pits, or gravel beds which had been opened and used before the time of the commencement of the particular estate"); and *Reed's Ex'rs v. Reed*, 16 N. J. Eq. 248, 249-50 (N.J.Ch. 1863) (stating that "[t]he tenant for life is entitled to work a mine, quarry, clay-pit, or sand-pit, which has been opened and used by the former owner").

[¶38] Here, Tia, the Appellee, failed to direct the district 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. Rather, Tia relied solely on the argument that if North Dakota wanted the open mines exception to apply, then the legislature would have provided for such via statute. The district court was satisfied with this argument and cited Article 552 of the Louisiana Civil Code, [*see*, now, La. C.C. Art. 561 and La. R.S. 31:190] which sets forth the open mines doctrine, in support of its decision to refuse to apply the open mines doctrine in North Dakota. While Tia relied heavily on the fact that the North Dakota Legislature has not yet recognized the common law open mines exception, she only identified one jurisdiction in which a state legislature has explicitly included the exception in statute. The district court's reliance on Louisiana law is overwhelmingly unpersuasive because Louisiana is the only jurisdiction in the United States that uses a

civil law system, compared to the common law system that the other forty-nine states use. In common law states, numerous laws exist that are not codified, but rather have become law based on judicial precedent. *See e.g.*, *In re Estate of Conley*, 2008 ND 148, 753 N.W.2d 384, ¶ 25 (citing N.D.C.C. § 1-01-03(7)) (explaining that North Dakota incorporates the common law as part of the law in North Dakota and thus the decisions from the tribunals enforcing those rules, which, though not enacted, form what is known as customary or common law). Referencing N.D.C.C. § 1-01-05, the Court further explained that it is not limited in relying upon the decisions of North Dakota tribunals:

> In determining the common law of this state we are not restricted to the law as it has evolved over the centuries in England. The common law, which is based on reason and public policy, can best be determined by studying the decisions of our federal and state courts and the writings of past and present students of our country's law over all the years of American judicial history. This is not to say that help in determining the common law may not be found by studying the ancient law of England, but we are in no wise limited to such a study for a determination of the common law of North Dakota.

In re Estate of Conley, 753 N.W.2d 384 at ¶ 26 (quoting *Lembke v. Unke*, 171 N.W.2d 837, 842 (N.D. 1969)). On the other hand, in a jurisdiction that uses a civil law system, courts rely less on court precedent and more on codes and a court or judge's resolution in a specific matter is not binding in subsequent determinations. *See First Health Settlement Class. v. Chartis Specialty Ins. Co.*, 111 A.3d 993, 1000 (Del. 2015) (citations omitted) (stating that "[u]nder civil law, priority is given to statutes and codes over common law jurisprudence" and "[c]ivil law codes provide the core of the law-general principles [, which] are systematically and exhaustively exposed in codes[,] and particular statutes complete them"). In 2005, the Louisiana Supreme Court stated:

> First, civilian methodology and the civil code instruct that the sources of law are legislation and custom, and that legislation is the superior source

> of law. LSA–C.C. arts. 1, 3. Legislation, which is defined as the solemn expression of legislative will, LSA–C.C. art. 2, is to be interpreted according to the rules set forth in the Civil Code…

Willis-Knighton Med. Ctr. v. Caddo Shreveport Sales & Use Tax Comm'n, 903 So.2d 1071, 1085 (La. 2005). In *Holman v. State*, this Court cited 2 H. Williams & C. Meyers, *Oil and Gas Law* § 414 at 338, which stated, "[a]lthough special reasons arising from the civil law basis of its jurisprudence may exist in Louisiana for the continued employment of the distinction between an assignment and sublease, we see no valid reason for other jurisdictions to follow the Louisiana example." *Holman v. State*, 438 N.W.2d 534, 539 (N.D. 1989). The Court then pronounced, "Accordingly, we believe it is improper to rely upon Louisiana decisions to decide the effect, if any, that a reservation of an overriding royalty has on a transfer of a lease because oil and gas leases in Louisiana have a unique status." *Holman*, 438 N.W.2d at 539. The states have long recognized that differences exist between the civil law system used by Louisiana and the common law system used by the rest of the states. The mere fact that the Louisiana Legislature has regurgitated the common law open mines exception into a statute of their own has absolutely no bearing whatsoever on whether the open mines doctrine should be applied in North Dakota. Cheryl has identified numerous states which have explicitly recognized the common law open mines exception through case precedent. More specifically, Cheryl has identified 30 states which have recognized the common law open mines exception through caselaw.

[¶39] Rather than comparing North Dakota to Louisiana, a much stronger analogy consists of comparing the laws of North Dakota to those of Minnesota. North Dakota law states, "The owner of a life estate may use the land in the same manner as the owner of a fee simple, except that the owner of a life estate must do no act to the injury of the

inheritance." N.D.C.C. § 47-02-33. Minnesota law provides, "If a guardian, tenant for life or years, joint tenant, or tenant in common, of real property, commits waste thereon, any person injured by the waste may bring an action against the waster…". MN ST § 561.17. Like North Dakota, Minnesota statutes do not provide for an exception to the doctrine of waste. Rather, through caselaw, Minnesota has further defined the application of the law regarding waste the and recognized the open mines exception to the doctrine of waste. *See e.g., Beliveau v. Beliveau*, 14 N.W.2d 360, 364 (Minn. 1944) (stating that a life tenant "cannot injure or dispose of it to the injury of the remaindermen, even though power of disposition and encroachment are annexed to the life estate"); *Minnesota Loan & Trust Co.*, 161 N.W. at 161 (recognizing the open mines exception to the doctrine of waste: "… iron or other materials derived from the usual operation of open mines or quarries constitute the rents and profits of the land, and belong to the tenant for life or years…"). Neither North Dakota nor Minnesota have statutory language providing for the open mines exception to the doctrine of waste. Rather, through caselaw, Minnesota expressly recognized the open mines doctrine when the issue came before the court.

[¶40] Additionally, the passage of time does not tip the scale in favor of not applying or adopting the open mines doctrine, since this issue has not previously been before the Court. It is not uncommon for legal theories to be adopted in North Dakota many years after legal theories have been pronounced in other states. For example, in *Duhig v. Peavy-Moore Lumber Co.,* 144 S.W.2d 878 (Tex. 1940), the Texas Supreme Court, in 1940, pronounced the doctrine known as the "Duhig rule" which has gained universal acceptance in oil and gas producing jurisdictions. The North Dakota Supreme Court did not have a fact pattern present itself warranting the Duhig rule's adoption and application

until the Court did in *Kadrmas. v. Savageau*, 188 N.W.2d 753 (N.D. 1971), some thirty-one years after *Duhig* was decided.

[¶41] Not only have most states chosen to explicitly recognize the common law open mines exception to the doctrine of waste through caselaw, secondary sources also call for the application of the open mines doctrine. In these secondary sources, the open mines doctrine and its application go unquestioned because of its universal acceptance. The Mineral Title Standards Committee, in the North Dakota Mineral Title Standards, acknowledges that the North Dakota Supreme Court has not yet had reason to opine on the matter but the Comment to NDMTS § 7-03.1 (2017) states that "[j]urisdictions which have adjudicated the issue have uniformly [applied the open mine doctrine and] held that a life tenant is entitled to the benefit of an open mine without liability or accountability to the remainderman in fee simple."

[¶42] In 2003, this Court relied on the Restatement (First) of Property in deciding *Ruggles v. Sabe*, 2003 ND 159, ¶5, 670 N.W.2d 356. Specifically, the Court stated, "**Subject to exceptions ...** 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". *Id.* quoting Restatement (First) of Real Property § 138 (1936) (**emphasis added**). The Court, based on the fact pattern in *Ruggles*, had no reason to review or apply any of the exceptions, which is why the Court omitted the specific exceptions by using the ellipsis symbol. The Restatement (First) 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.**

Restatement (First) of Property § 138 (**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.* citing Restatement (First) of Real Property § 138 cmt. c (1936). This section, relied on by the Court in *Ruggles*, specifically identifies that the doctrine of waste is "subject to" the open mines doctrine, which provides for the following:

> 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.

[¶43] The district court erred by not applying the open mines exception to the doctrine of waste. Cheryl respectfully requests that this Court adopt the open mines doctrine, reverse the judgment of the district court and remand to enter judgment in Cheryl's favor stating that Cheryl is entitled to all proceeds from the minerals, including all oil and gas royalties, during the duration of her life, with **no duty** to hold the proceeds as corpus, in trust, for Tia's benefit.

[¶44] **V. CONCLUSION**

[¶45] 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.

[¶46] Dated this 24th of July, 2019.

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[¶47] **CERTIFICATE OF COMPLIANCE ON PAGE COUNT**

[¶48] I hereby certify that this brief complies with NDAPP 32(a)(8); the page count is 30.

Dated this 24th day of July, 2019.

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[¶49] **CERTIFICATE OF WORD PROCESSING PROGRAM**

[¶50] The word-processing program is Microsoft Office Word 2016.

Dated this 24th day of July, 2019.

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IN THE SUPREME COURT
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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 24th day of July, 2019, the following documents:

1. Brief of Appellant
2. Appendix of Appellant

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:

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CERTIFICATE OF ELECTRONIC SERVICE

[¶1] I certify that on the 29th day of July, 2019, the following documents:

1. Brief of Appellant
2. Appendix of Appellant

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:

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