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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

DAVID A. BLASI and PAULA J. BLASI, as TRUSTEES OF THE BLASI LIVING TRUST, On behalf of themselves and a class of similarly situated persons,	)
Appellants,	) Supreme Court No. 20200327-20200331
v. Bruin E&P Partners, LLC, et al., v. Lime Rock Resources Operating Company, Inc., et al., v. Kraken Development III LLC, v. Continental Resources, Inc., v. EOG Resources, Inc.,	)
Appellees.	)

Certified Question of Law Submitted November 30, 2020
Case Nos. 3:20-cv-85; 3:20-cv-91; 3:20-cv-92; 3:20-cv-93; 3:20-cv-94
United States District Court for the District of North Dakota
The Honorable Peter D. Welte, Chief Judge

BRIEF OF *AMICUS CURIAE* FROM WHITE RIVER ROYALTIES, LLC AND SARA CAMMACK IN SUPPORT OF PLAINTIFFS/APPELLANTS' INTERPRETATION OF LEASE LANGUAGE

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AMICUS CURIAE STATEMENT OF IDENTITY AND INTEREST

[¶ 1] White River Royalties, LLC and Sara Cammack ("Royalty Litigants") are the named plaintiffs in the putative class action styled *White River Royalties, LLC, et al. v. Hess Bakken Investments II, LLC*, 1:19-cv-218, United States District Court for the District of North Dakota. Royalty Litigants, as named plaintiffs, are currently prosecuting an oil royalty underpayment class action which involves approximately 25,000 leases which contain the same oil royalty provision that is at issue in the certified question.

STATEMENT OF AUTHORSHIP AND CONTRIBUTIONS

[¶ 2] Counsel for the parties authored no portion of this brief. The parties to this proceeding and their attorneys did not contribute money to fund preparation or submission of this brief.

STATEMENT OF THE CASE

[¶ 3] Appellants David A. Blasi and Paula J. Blasi, as Trustees of the Blasi Living Trust ("Appellants"), filed five separate class action lawsuits against oil producers Bruin E&P Partners, LLC, Lime Rock Resources Operating Company, Inc., Kraken Development III LLC, Continental Resources, Inc., and EOG Resources, Inc. ("the Oil Producers"), in the United States District Court for the District of North Dakota ("District Court").

[¶ 4] Each of the Oil Producers filed a motion to dismiss the Appellants' complaints.

[¶ 5] The Oil Producers' motions to dismiss relied upon an oil industry definition of the word "pipeline" to support their interpretation of the "free of cost, in the pipeline" oil royalty provision at issue. *Blasi, et al. v. Lime Rock Resources Operating Company,*

Inc., et al. 3:20-cv-91 ("*Lime Rock*"), Doc. 18, pp. 6-9, 11-12; *Blasi, et al. v. Kraken Development III LLC* 3:20-cv-92 ("*Kraken*"), Doc. 16, pp. 11-13; *Blasi, et al. v. Continental Resources, Inc.* 3:20-cv-93 ("*Continental*"), Doc. 17, pp. 13, 17; *Blasi, et al. v. EOG Resources, Inc.* 3:20-cv-94 ("*EOG*"), Doc. 16, pp. 7-10. However, none of the Oil and Gas Producers' motions discuss: (1) North Dakota oil and gas customs or practices, or (2) the contracting parties' knowledge of North Dakota customs and practices. *Id.*

[¶ 6] Before ruling on the Oil Producers' motions to dismiss, the District Court certified the following question of law to this Court:

> Whether the instant oil royalty provision is interpreted to mean the royalty is based on the value of the oil "at the well:"
>
> Lessee agrees … "[t]o deliver to the credit of the lessor, free of cost, in the pipeline to which lessee may connect wells on said land, the equal [fractional] part of all oil produced and saved from the leased premises."

(*Lime Rock,* Doc. 27; *Kraken*, Doc. 25; *Continental*, Doc. 25; *EOG*, Doc. 25).

ARGUMENT

I. INTRODUCTION.

[¶ 7] In the District Court, the Oil Producers filed motions to dismiss, arguing that the "free of cost, in the pipeline" oil royalty provision at issue is unambiguous, and requires royalties to be paid based upon the value of the oil "at the well." The Oil Producers relied on a purported definition of the word "pipeline" to support their argument that the "free of cost in the pipeline" royalty provision permits the Oil Producers to pay royalties based upon the value of the oil "at the well." As discussed below, under North Dakota law, a purported definition of a technical word should be considered by a court only if: (1) the court determines that the contractual provision at issue is ambiguous; and (2) there is evidence in the record that the purported definition is so well known in the community of

the original contracting parties that such parties are presumed to have acted with reference to such definition.

[¶ 8] In addition, the Oil and Gas Producers' motions to dismiss have ignored the established law in North Dakota regarding the interpretation of ambiguous royalty provisions in oil and gas leases. As discussed below, this Court has consistently held that construction of an oil and gas lease containing ambiguities is in favor of the lessor and against the lessee, for the reason that the lessee usually provides the lease form or dictates the terms thereof, and if such lessee is desirous of more complete coverage, the lessee has the opportunity to protect itself by the manner in which it draws the lease. *Tank v. Citation Oil & Gas Corp.*, 848 N.W. 2d 691, 700 (N.D. 2014); *West v. Alpar Resources, Inc.*, 298 N.W. 2d 484, 490-91 (N.D. 1980).

II. THE ALLEGED CUSTOMARY MEANING OF "PIPELINE" IN THE OIL AND GAS INDUSTRY IS NOT ADMISSIBLE TO DETERMINE THE MEANING OF THE OIL ROYALTY PROVISION AT ISSUE.

[¶ 9] In their motions to dismiss, the Oil Producers argue that "[i]n the oil and gas industry, the word 'pipeline' has a particular meaning." (*Continental*, Doc. 17, p. 9). Under North Dakota law, however, evidence of industry custom and practice to aid in the interpretation of a written agreement can only be considered if: (1) the agreement is silent or ambiguous regarding a certain point; and (2) the record shows that "each party" to the agreement "knows or has reason to know" of the industry custom and practice at the time the agreement was executed. *Come Big or Stay Home, LLC v. EOG Resources, Inc.*, 816 N.W.2d 80, 85 (N.D. 2012) (quoting *Tong v. Borstad*, 231 N.W.2d 795, 800 (N.D. 1975)); *VND, LLC v. Leevers Foods, Inc.*, 672 N.W.2d 445, 455 (N.D. 2003). "Custom and usage may be given effect as part of a written contract where the agreement is silent or ambiguous

on a point, and where there is a well-established custom concerning a subject so that the parties may be presumed to have acted with reference to the custom." *Id*.

[¶ 10] The Oil Producers do not contend that the oil royalty provision at issue is ambiguous. But even if this Court determines that the oil royalty provision is ambiguous, this Court should not consider a purported custom and practice in the oil industry unless the Oil Producers establish that "each party" to the Lease Agreements at issue "knows or has reason to know" of the alleged industry custom and practice at the time the Lease Agreements at issue were executed. *Come Big or Stay Home*, 816 N.W. 2d at 85. None of the Oil Producers has submitted any evidence that any of the lessors to the Leases knew, or should have known, of the alleged custom and practice upon which the Oil Producers rely. (*See e.g. Continental*, Doc. 17, pp. 13, 17).

[¶ 11] The record on appeal does not contain any evidence of North Dakota oil and gas industry customs or practices, nor does it contain any evidence that any of the original lessors ever knew about any purported industry custom and practice. Unless the evidence in the record shows that there is a well-established custom concerning the subject at issue, a court cannot presume the parties acted with reference thereto. *Ehrman v. Feist*, 568 N.W.2d 747, 753-54 (N.D. 1997) (affirming the disallowance of custom evidence where the record contained no evidence of the purported custom.) The record before the Court does not contain evidence of North Dakota oil and gas industry customs and practices regarding the meaning of the term "pipeline" in the oil royalty provision, nor does the record contain any evidence of the original contracting parties' knowledge of any such custom or practice.

[¶ 12] Other state and federal appellate courts have also recognized that industry customs and practices are not admissible in the interpretation of a lease agreement unless both parties to the lease agreement had knowledge of the alleged industry custom and practice at the time the agreement was executed. *Garman v. Conoco, Inc.*, 886 P.2d 652, 660 (Colo. 1994) (rejecting the gas producer's proposed evidence that "industry practice allows proportionate allocation of post-production costs," and holding that the gas producer "cannot invoke industry custom and practice to limit the rights of royalty and overriding royalty owners unsophisticated in the intricacies of mineral development."); *Piney Woods Country Life School v. Shell Oil Co.*, 726 F.2d 225, 236 (5th Cir. 1984) ("For a practice to be legally relevant custom, both parties to the contract must have actual or presumed knowledge of the practice … Those not engaged in an industry will not be presumed to know that words which have common meanings outside the industry have a different meaning inside it … We will not find 'custom' binding on lessors from a practice within the control and understanding only of the lessees."); *TXO Production Corp. v. Page Farms, Inc.*, 698 S.W.2d 791, 792 (Ark. 1985) (lessors under an oil and gas lease are not bound by alleged industry custom and practice in the absence of proof that the lessors were so familiar with the oil and gas industry that their knowledge and acceptance of the particular usage must be presumed.); *King v. Calvert and Marsh Coal Co.*, 362 So.2d 889, 893 (Ala. 1978) (lessors under a coal mining lease cannot be bound by an alleged custom in the coal trade where there was no showing that the lessors "had knowledge of any such custom.").

III. THE OIL AND GAS INDUSTRY'S PURPORTED UNDERSTANDING OF TECHNICAL TERMS SHOULD BE DISREGARDED.

[¶ 13] The decisions limiting the consideration of custom and practice evidence apply with equal force to the consideration of an alleged industry custom regarding

contractual terms. Generally, contract terms are to be understood in their ordinary sense, "unless used by the parties in a technical sense." N.D.C.C. § 9-07-09. The general rules of contract interpretation also apply to oil and gas leases. *See Swenson v. Mahlum*, 2019 ND 144, ¶ 20, 927 N.W.2d 850 (stating, "The general rules of contract interpretation apply to leases."); and *Dakota Partners, L.L.P. v. Glopak, Inc*. 2001 ND 168, ¶ 19, 634 N.W.2d 520 (stating, "When a contract term is undefined, we usually look to its clear, ordinary meaning."). The plain meaning of a term is essential to a court's interpretation thereof, because courts applying North Dakota law consider how "a person not trained in the law" would understand a technical term. *Hanneman v. Continental Western Ins. Co.*, 575 N.W.2d 445, 451 (N.D. 1998). Accordingly, "words are given the common prevailing meaning as generally understood by people." *Grove v. Charbonneau Buick-Pontiac, Inc.*, 240 N.W.2d 853, 857 (N.D. 1976) (acknowledging that the record before the court did "not disclose that any of the phrases or words used in the offer have a special usage" and no such usage could be implied.).

[¶ 14] In the District Court, the Oil Producers offered the oil and gas industry's technical definitions of the term "pipeline" to support their argument that clearly the parties intended that the royalty owners agreed to share in the post-production costs at issue (SOC, ¶ 5), but those definitions are not generally understood by ordinary people in North Dakota. *Grove*, 240 N.W.2d at 857.

[¶ 15] On numerous occasions, this Court has discussed the meaning of the word "pipeline" outside of the context of interpreting an oil and gas lease. For example, in multiple criminal cases, this Court discussed trespassers and protesters activities at the "Keystone Pipeline" and the "Dakota Access Pipeline." *State v. Bearrunner*, 921 N.W.2d

894, 895 (N.D. 2019); *State v. Foster*, 921 N.W.2d 454, 457 (N.D. 2019); and *State v. Simon*, 916 N.W.2d 626, 628 (N.D. 2018). In a personal injury case, this Court noted the location of a vehicle accident had occurred on a highway after the driver "left a crude oil pipeline station." *Farmers Union Mut. Ins. Co. v. Associate Elec. and Gas Ins. Services Ltd.*, 737 N.W.2d 253, 255 (N.D. 2007). Again, in a tax assessment case, this Court upheld the North Dakota Tax Commissioner's valuation of oil "at pipeline delivery points" which are "downstream from the well." *Koch Oil Co., a div. of Koch Industries, Inc. v. Hanson*, 536 N.W.2d 702, 705-06 (N.D. 1995). Last, when determining whether "field condensate" was equivalent to "oil," this Court observed that a midstream services provider, which collected "field condensate" in its processing system, sold "'field condensate' at a crude oil price and put[] it in a crude oil pipeline." *Western Gas Resources, Inc. v. Heitkamp*, 489 N.W.2d 869, 870-71 (N.D. 1992). Thus, the above-referenced opinions of this Court have generally recognized that the term "pipeline," as generally understood by people, to be a well-known pipeline, far away from the wellhead, and at least at the tailgate of a processing facility.

IV. THE OIL ROYALTY PROVISION, IF AMBIGUOUS, MUST BE CONSTRUED AGAINST THE LESSEE.

[¶ 16] When interpreting an oil and gas lease, this Court has consistently recognized that "the lease must be construed most strongly against" the lessee. *West*, 298 N.W.2d at 490-92; *Tank*, 848 N.W.2d at 700; *see also* N.D.C.C. § 9-07-19 (providing that in cases of uncertainty, "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."). The lessee, as the drafter of the lease, has the opportunity to draft the lease with clear language, and is also well-informed compared to the lessor. *Tank*, 848 N.W.2d at 700 ("An oil and gas lease is often construed

most favorably to the lessor because the lessee usually drafts the lease and has more experience drafting the lease to give himself an advantage."). As such, if this Court determines that the "free of cost" oil royalty provision is ambiguous, it should construe the royalty provision in favor of the lessor. *Nantt v. Puckett Energy Co.*, 382 N.W.2d 655, 658 (N.D. 1986) (*citing West*, 298 N.W.2d at 484).

[¶ 17] In *West*, this Court determined that a gas royalty provision which obligated the lessee to pay royalties on the "proceeds from the sale of gas" was ambiguous. *West*, 298 N.W.2d at 490. Thereafter, this Court noted that it "was within the power of [the lessee's] predecessor in interest, as lessee and drafter of the lease, to expressly provide for a deduction of expenses which it failed to do." *Id.* at 491. Rather than determining which particular expenses incurred by the lessee were allowed under the royalty provision, this Court construed the royalty provision in favor of the lessors, and concluded that the lessors were "entitled to royalty payments based upon a percentage of the total proceeds received by [the lessee] from the sale of the gas without deduction for" any costs incurred. *Id.*

CONCLUSION

[¶ 18] When interpreting the "free of cost" oil royalty provision, this Court cannot consider North Dakota oil and gas industry custom and practice as evidence because there is no such evidence available in the record. Further, this Court cannot consider any industry definitions relating to the "free of cost" oil royalty provision because it is required to apply the meaning of words as generally understood by the people of North Dakota. Last, this Court, if it finds the "free of cost" royalty provision to be ambiguous, is required to construe the language in favor of the lessor and against the lessee.

Dated this 11th day of January, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

[¶ 19] I, Joshua A. Swanson, hereby certify that the foregoing amicus curiae complies with the page limitation in Rules 29 and 32, N.D.R.App.P., as it is a total of 13 pages (from the cover page through the signature line after the Conclusion).

/s/ Joshua A. Swanson
Joshua A. Swanson

CERTIFICATE OF SERVICE

[¶ 20] I, Joshua A. Swanson, hereby certify that on this 11th day of January, 2021, a true and correct copy of Brief of *Amicus Curiae* was served upon the following persons by electronic mail transmission, pursuant to N.D.R.App.P. 25.

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CERTIFICATE OF SERVICE

[¶ 1] I, Joshua A. Swanson, hereby certify that on this 26th day of January, 2021, a true and correct copy of the corrections to the title page of Brief of *Amicus Curiae* from White River Royalties, LLC and Sara Cammack in Support of Plaintiffs/Appellants' Interpretation of Lease Language was served upon the following persons by electronic mail transmission, pursuant to N.D.R.App.P. 25.

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