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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

Dale Exploration, LLC, Bakken HBT, II LP, Dale Exploration, LP, and Dale Lease Acquisitions, LP, Plaintiffs, vs. Orville G. Hiepler and Florence L. Hiepler, individually and also as co-trustees of the Orville G. Hiepler and Florence L. Hiepler Family Trust dated January 9, 1997, Defendants and Appellees, Bill L. Seerup and Hurley Oil Properties, Inc., Defendants and Appellants, Hefner Company, Inc., Defendant.	)	Supreme Court Case No. 20180065 William County Civil No.: 53-2014-CV-01174

BRIEF OF APPELLANTS BILL L. SEERUP AND HURLEY OIL PROPERTIES, INC.

Appeal from Findings of Fact, Conclusions of Law and Order for Judgment entered December 18, 2017, and Judgment entered December 19, 2017, by the District Court for the Northwest Judicial District, County of Williams, The Honorable Joshua Rustad, Presiding

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STATEMENT OF THE ISSUES

[1] Hurley Oil Properties, Inc. ("HOP") and Bill L. Seerup ("Seerup" or "Mr. Seerup") present two issues for the Court's review:

1. Whether the district court erred in failing to award specific performance as the appropriate remedy for Orville ("Mr. Hiepler") and Florence Hiepler's (collectively, the "Hieplers") breach of their express agreement to convey 150 net mineral acres to Mr. Seerup. This issue encompasses the following questions of law:
    a. Did the district court err in failing to apply the statutory presumption (N.D.C.C. § 32-04-09) that specific performance is the proper remedy for the breach of an agreement to convey real property?
    b. Did the district court err by finding the Hieplers only breached the covenant of seisen, and thus by failing to find and consider the breach of the covenant of further assurances in determining whether to award specific performance?
2. Whether a seller who purports to sell mineral interests as an individual, but owns those interests in trust, can be compelled to reach into the trust and effectuate the agreed upon transaction when the seller is the settlor, beneficiary and trustee of a revocable trust and has complete control over the trust property.

STATEMENT OF THE CASE

A. Nature of the Case

[2] In 2007, an agreement was reached between Orville G. Hiepler, Florence L. Hiepler and Mr. Seerup, whereby Mr. Seerup would pay the Hieplers $15,609.00 in exchange for 150 net mineral acres in Williams County, North Dakota. This agreement was reduced to

writing as evidenced by that certain Mineral Deed dated April 7, 2007, recorded in Williams County on April 16, 2007 as Document No. 644554 (herein referred to as the "Mineral Deed"), wherein the Hieplers promised to convey the 150 net mineral acres, warranted title to the 150 net mineral acres and also promised "to execute such further assurances as may be requisite for the full and complete enjoyment of the rights herein granted". App. F at 82-83; App. C at 24.[1]

[3] However, the Hieplers, in their individual capacities, did not own sufficient minerals to effectuate the grant. Instead, the Hieplers owned nearly all of the mineral interests to be conveyed as trustees of Orville G. Hiepler and Florence L. Hiepler Family Trust dated January 9, 1997 (the "Trust"). Now, despite being paid in full, and despite the unquestioned ability to reach into the Trust to fulfill his promise to "execute such further assurances," Mr. Hiepler refuses to fulfill his promise to convey the full 150 net minerals acres to Mr. Seerup.[2] Instead, after deciding he would rather keep the minerals, Mr. Hiepler seeks to back out of his agreement arguing that he is only obligated to pay damages (fixed as of 2007) based upon the proportion of the purchase price attributed to the mineral interests held in trust and thus not conveyed via the Mineral Deed.

[4] The Hieplers breached an agreement that, by Mr. Hiepler's own admission, is clear and unambiguous, not subject to recision or reformation and fully binding between the parties. App. O at 218-220. In North Dakota and in jurisdictions across this country, the presumed remedy for a breach of an agreement to sell real property is specific performance.

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[1] The Appendices to this brief will be referenced in in the form "App. [Appendix Letter] at [Appendix Page(s)]."

[2] Florence Hiepler died on August 21, 2015. As set forth herein, Mr. Hiepler is presently a trustee of the Trust and has absolute control over Trust property.

Not only that, the Hieplers expressly promised to take the steps necessary to effectuate the agreement in the event of a failure to fully transfer title. While they may not have owned the minerals necessary to complete the transaction, individually, the Hieplers did and Mr. Hiepler still does own the minerals and has the unquestioned ability to reach into the Trust to fulfill his agreement.

[5] The district court failed to correctly apply the law regarding specific performance leading it to the erroneous conclusion that Mr. Seerup is only entitled to damages. It is for this reason that HOP and Mr. Seerup now ask this Court to reverse the district court and hold that: (1) HOP and Mr. Seerup are entitled to specific performance, and (2) Mr. Hiepler is required to reach into the Trust and convey the mineral interests necessary to complete the transaction.

B. Course of Proceedings and Disposition at the District Court

[6] Plaintiff, Dale Exploration, LLC, initiated this action in the Fall of 2014 seeking to quiet title to the 150 net mineral acres purported to be conveyed by the Mineral Deed. App. L at 173-176. Dale Exploration, LLC named Orville and Florence Hiepler, individually, and as co-trustees of the Trust, as well as HOP, Mr. Seerup and Hefner Company, Inc. as defendants and parties claiming an interest in at least a portion of the net mineral acres at issue.[3]

[7] The Hieplers answered and filed a cross-claim arguing that the Mineral Deed should either be rescinded or reformed so as to only convey the amount of mineral acres they owned in their individual capacities and seeking an order quieting title to the

[3] By Order dated July 20, 2016, the district court granted plaintiff's motion to substitute and add Bakken HBT, II LP, Dale Exploration LP and Dale Lease Acquisitions, LP as additional plaintiffs along with Dale Exploration, LLC. Record at Docket Number ("Dkt.") 87.

remaining mineral acres in the Hieplers as trustees of the Trust. App. K, N at 155-172, 185-198.

[8] HOP and Mr. Seerup answered plaintiff's Complaint as well as the Hieplers' Cross Claim, and asserted their own claim of breach of contract against the Hieplers seeking specific performance of the conveyance of minerals as promised and agreed to in the Mineral Deed. App. M at 177-184.

[9] In May of 2017, HOP and Mr. Seerup moved for summary judgment as to their breach of contract claim, requesting specific performance via an order compelling Mr. Hiepler to reach into the Trust to fulfill his agreement. Dkt. 100-102, 125. In June of 2017, Mr. Hiepler also moved for summary judgment against all Plaintiffs asserting that Plaintiffs had no cause of action due to a lack of interest in the property at issue, and responded to HOP and Mr. Seerup's motion by continuing to assert that the Mineral Deed should be reformed or rescinded upon the grounds of mistake. Dkt. 112-123. Plaintiffs failed to answer the Mr. Hiepler's motion and the district court granted the motion dismissing Plaintiffs' claims. The district court then denied HOP and Mr. Seerup's motion citing numerous issues of disputed fact regarding mistake, rescission, reformation, the remedy of specific performance and Mr. Hiepler's authority to reach into the Trust. App. E at 75-80.

[10] The case was then tried to the district court on September 25, 2017. At trial, Mr. Hiepler abandoned his claims that the Mineral Deed should be rescinded or reformed and the parties stipulated to the fact that the Mineral Deed constitutes a valid, enforceable, and unambiguous contract that is fully binding between the parties. App. O at 202, 218-220. Only two witnesses were presented: (1) HOP and Mr. Seerup's expert witness, Mr. Charles "Bucky" Heringer who testified as to the valuation of the minerals at the time of the

transaction, and (2) Mr. Seerup, called by Mr. Hiepler. Upon the conclusion of trial, the parties were asked to submit post-trial briefing and proposed findings of fact, conclusions of law and judgment, and the matter was taken under advisement. On December 18, 2017 the district court issued its *Findings of Fact, Conclusions of Law and Order for Judgment*. App. C at 13-53. In doing so, the district court did not make a single independent finding and simply adopted the proposed findings and conclusions of Mr. Hiepler verbatim. See id.; see also Dkt. 163. *Judgment,* similarly drafted by counsel for Mr. Hiepler, was entered on December 19, 2017. See App. D at 54-74; Dkt. 159.

[11] In its *Findings of Fact, Conclusions of Law and Order for Judgment*, the district court correctly found the Mineral Deed to be an enforceable and unambiguous contract by which the Hieplers agreed to convey 150 net mineral acres to Mr. Seerup, and that this contract was breached by virtue of the Hieplers only conveying 7.6363 net mineral acres, as the rest was held in Trust. App. C at 34. The district court also held, however, that the Hieplers only breach was of the covenant of seisen, specifically finding no breach of the covenant of further assurances. Id. at p. 43, 52. As to remedy, the district court relied on N.D.C.C.§ 32-03-11 to hold that the presumed and ordinary remedy for a breach of the covenant of seisen was for damages, and that HOP and Mr. Seerup failed to meet their burden to show that the remedy of damages is inadequate. Id. at p. 43-44. The district court thus denied the remedy of specific performance and awarded Mr. Seerup damages in the amount of $20,147.96 based upon the proportion of the purchase price attributed to the 142.3637 mineral acres not conveyed, as well as statutory interest. Id.

[12] Notice of Entry of Judgment was served on December 20, 2017 and HOP and Mr. Seerup timely filed their Notice of Appeal on February 14, 2018. App. B at 10-12.

STATEMENT OF THE FACTS

[13] The property subject to this dispute is 150 net mineral acres in and under the following lands located in Williams County, North Dakota:

> Township 156 North, Range 99 West
> Section 7: Lot 3, NE/4SW/4
> Section 8: S/2NW/4, N/2SW/4
> Section 17: NW/4
> Section 18: Lot 4, SE/4SW/4
> Section 31: NE/4, E/2NW/4, N/2SE/4
>
> Township 156 North, Range 100 West
> Section 1: Lots 1 and 2, S/2NE/4

(the "Subject Lands"). In April of 2007, the Hieplers entered into a contract with Mr. Seerup to convey the 150 net mineral acres in exchange for $15,609.00, an amount paid in full to the Hieplers. App. C at 34-35. This agreement was reduced to writing as evidenced by the Mineral Deed. According to the unrefuted and unrebutted expert testimony of Bucky Heringer, the contract price of $15,609.00 was just and reasonable for the 150 net mineral acres and constituted a fair market price in 2007. See App. O at 203-208.

[14] In addition to the Hieplers agreeing to grant, bargain, sell, convey, transfer and assign the 150 net minerals acres to Mr. Seerup, the Mineral Deed included a warranty and further assurances clause stating:

> GRANTOR agrees to execute such further assurances as may be requisite for the full and complete enjoyment of the rights herein granted and . . . GRANTOR does hereby warrant said title to GRANTEE, its heirs, successors . . . and assigns forever[.]

App. F at 82-83.

[15] At the time of its execution, the Hieplers, in their individual capacities, lacked a sufficient mineral interest in the Subject Lands to fulfill the grant contained in the Mineral Deed. This is the result of a series of deeds whereby the Hieplers conveyed to themselves,

as co-trustees of the Trust, almost all of their mineral interests in the Subject Lands, including more than a sufficient quantity of minerals to fulfill the grant to Mr. Seerup. App. C at 33-34.

[16] Following the delivery of the Mineral Deed, Mr. Seerup executed conveyances of 135 and 7.5 net mineral acres in and under the Subject Lands in favor of HOP and Family Tree Corporation, respectively. App. C at 25; App. G and H at 84-90.

[17] Orville and Florence Hiepler were the initial settlors and trustees of the Trust. See App. J at 99. Florence Hiepler died on August 21, 2015, leaving Orville as the sole settlor and trustee. Id. On July 4, 2016, Mr. Hiepler exercised his right to amend and restate the Trust. Id. Under the terms of the restatement, the Trust is fully revocable and Mr. Hiepler retains unfettered control over the Trust property. His powers include the authority to: (1) act for and conduct business on behalf of the Trust without the consent of any other trustee, (2) amend, restate or revoke the Trust, in whole or in part, for any purpose, (3) remove any property from the Trust at any time, and (4) control the income and principle distributions from the Trust and to direct distribution of as much of the Trust property for his own unrestricted use and benefit, "even to the exhaustion of all trust property". Id. at 101, § 1.04(a)-(d). The Trust is expressly created under California law and, for tax purposes, Mr. Hiepler is treated as owning all Trust property as if he held it in his individual capacity. Id. at 99, 101.

STANDARD OF REVIEW

[18] When reviewing a district court's decision following a bench trial, this Court's standard of review is well established:

> the trial court's findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a) and its conclusions of law are fully

> reviewable. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, we are left with a definite and firm conviction a mistake has been made. In a bench trial, the trial court is the determiner of credibility issues and we do not second-guess the trial court on its credibility determinations.

Service Oil, Inc. v. Gjestvang, 2015 ND 77, ¶ 12, 861 N.W.2d 490 (internal citations and quotations omitted).

[19] Rule 52 requires the district court to make findings of fact and conclusions of law sufficient "to enable an appellate court to understand the factual findings and the basis for its conclusions of law and decision." In re Guardianship of R.G., 2016 ND 96, ¶ 18, 879 N.W.2d 416. "Conclusory, general findings do not comply with N.D.R.Civ.P. 52(a)." Id. A reviewing court must know the basis of the lower court's decision to intelligently rule on the issues, and if a district court "does not provide an adequate explanation of the evidentiary and legal basis for its decision [the appellate court] [is] left to merely speculate whether the court properly applied the law." In re Guardianship of V.A.M., 2015 ND 247, ¶ 22, 870 N.W.2d 201.

[20] For issues involving questions of law, such as the interpretation or application of law or statute, the standard of review is *de novo*. Hoff v. Krebs, 2009 ND 48, ¶ 9, 763 N.W.2d 520 ("This Court reviews conclusions of law under the de novo standard"); Johnson v. Taliaferro, 2011 ND 34, ¶ 9, 793 N.W.2d 804. When reviewing mixed questions of law and fact, this Court "review[s] the questions of law subject to the de novo standard of review and the findings of fact subject to the clearly erroneous standard of review." In re P.L.-P, 2014 ND 28, ¶ 43, 842 N.W.2d 889. And when simply applying the law to undisputed facts or facts taken as true, the result is a conclusion of law reviewed *de novo*. In re Pederson Trust, 2008 ND 210, ¶ 17, 757 N.W.2d 740.

ARGUMENT

[21] Specific performance is governed by N.D.C.C. Ch. 32-04. Under N.D.C.C. § 32-04-09, "[i]t is to be presumed that the breach of an agreement to transfer real property cannot be relieved adequately by pecuniary compensation and that the breach of an agreement to transfer personal property can be thus relieved." In its blanket adoption of Mr. Hiepler's proposed findings and conclusions, the district court misapplied this legal presumption, neglected to find and consider the full extent of the Hieplers' breach, and as a result, abused its discretion in failing to find specific performance as the appropriate remedy. No evidence or discussion was presented or cited to refute this statutory presumption, and therefore, specific performance must be awarded, if possible. That remedy is in fact possible here and can be compelled by the Court. Mr. Hiepler, as trustee, grantor, and beneficial interest holder of the Trust, has complete control over sufficient minerals to complete the transaction. See N.D.C.C. § 32-04-04 (stating that a person entitled to real property may recover the property through a judgment requiring the other party to perfect and deliver possession of the property).

I. Review of the District Court's Decision Must Begin with its Dubious Wholesale Adoption of the Hieplers Proposed Findings and Conclusions.

[22] Critical to analyzing this appeal is the fact that the district court failed to make any independent findings of fact or its own conclusions of law, but rather adopted Mr. Hiepler's proposed findings and conclusions verbatim. See App. C-D at 13-73; Dkt. 159, 163. Although adopting findings of fact and conclusions of law as drafted by counsel is not, by itself, reason to reverse the district court's decision, it is a practice explicitly disfavored by this Court. Smith Enterprises, Inc. v. In-Touch Phone Cards, Inc., 2004 ND 741, ¶ 11, 685 N.W.2d 741; Schmidkunz v. Schmidkunz, 529 N.W.2d 857, 859 (N.D. 1995) (stating that

"such an approach may fail to foster the appearance of fairness and impartiality in our courts, and may thereby reduce confidence in our judicial system") .

[23] Regardless, by adopting Mr. Hiepler's proposed findings and conclusions, those findings and conclusions became those of the district court, and must be reviewed as such. Smith Enterprises, Inc., at ¶ 11. Still, as one might expect, the district court's decision to merely rubber stamp Mr. Hiepler's submissions sets the tone for a decision filled with legal errors, and which requires reversal.

II. The Hieplers Breached their Contract with Mr. Seerup.

[24] It is undisputed that the Hieplers entered into a contract with Mr. Seerup to convey 150 net mineral acres in and under the Subject Lands in exchange for $15,609.00. App. C at 24-25. At trial, the parties stipulated that the contract is not subject to reformation or recision, is unambiguous and fully enforceable. App. O at 218-220. Therefore, and as the district court correctly found, the Hieplers breached this agreement as to 142.3637 mineral acres due to the fact that at the time of the Mineral Deed's execution and delivery, the Hieplers, as individuals, only owned (and thus only conveyed) 7.6363 net mineral acres in and under the Subject Lands. App. C at 34-35. By merely adopting the proposed findings and conclusions submitted by the Hieplers, however, the court incorrectly limited that breach to the covenant of seisen. See App. C at 43. Failing to own, and thus failing to convey, the mineral interests promised in the Mineral Deed, indeed constitutes a breach the covenant of seisen. See 21 C.J.S. Covenants § 16 (June 2018 Update) (stating that the covenant of seisen is the grantor's promise that he owns the property interest purported to be conveyed). But such a substantial failure to own and failure to convey breaches far more than a single covenant of title, and the district court erred as a matter of law in

determining that the Hieplers breach was so limited.

[25] By express and unambiguous language, the Mineral Deed purported to convey 150 net mineral acres to Mr. Seerup, and included the following warranty and further assurances clauses:

> GRANTOR agrees to execute such further assurances as may be requisite for the full and complete enjoyment of the rights herein granted and . . . GRANTOR does hereby warrant said title to GRANTEE, its heirs, successors . . . and assigns forever[.]

App. F at 82-83. As a result—by failing to convey the estate promised and agreed to, by now asserting the Trust's title as superior to HOP and Mr. Seerup's, and by refusing to execute the necessary documents to convey the promised interests from the Trust—Mr. Hiepler has also breached the Mineral Deed's express covenants of warranty and further assurances.

[26] The covenant of warranty is an assurance that the grantor will protect the grantee against the consequences of a failure or defect in grantor's title. See 20 Am. Jur. 2d Covenants, Etc. § 58 (May 2018 Update); 21 C.J.S. Covenants § 21 (June 2018 Update). This covenant is breached upon an "eviction" from the lands purportedly granted, meaning the grantee's loss of rights or property based upon another's assertion of paramount title. 20 Am. Jur. 2d Covenants, Etc. § 63 (May 2018 Update). The Hieplers unquestionably breached this covenant by failing to convey the title warranted, and later, by Mr. Hiepler's own assertion that the Trust has paramount title to the mineral interest purportedly conveyed in the Mineral Deed.

[27] The covenant of further assurances is a covenant of title that requires the grantor to "perform all acts necessary to provide further assurances of title" and "execute any additional documents that might be needed in the future to perfect the title which the

original deed reported to convey." 21 C.J.S. Covenants § 20 (June 2018 Update). The foundational principle of this covenant is that it mandates performance of the underlying promise to convey title to the interest purported to be granted. 4 Tiffany Real Prop. § 1015 (3d ed.). The terms of the Mineral Deed are clear. The Hieplers promised and agreed to execute any such further assurances to ensure the agreement is fulfilled, including the duty to now execute any conveyance necessary to effectuate the conveyance of the full 150 net mineral acres. By refusing to reach into the Trust to do so, Mr. Hiepler has breached this obligation as a matter of law.

III. The Appropriate Remedy for the Hieplers' Breach is Specific Performance.

[28] The very purpose of specific performance is to compel parties to perform as they have agreed to do so. Larson v. Larson, 129 N.W.2d 566, 567 (N.D. 1964). This is the presumptive and ordinary remedy in cases involving conveyances of real property, where courts frequently award the remedy of specific performance because monetary damages cannot replace the unique nature of specific real property. See Jonmil, Inc. v. McMerty, 265 N.W.2d 257, 259 (N.D. 1978); see also Restatement (First) of Contracts § 360 (1932); Restatement (Second) of Contracts § 360 (1981) cmt. e ("Contracts for the sale of land have traditionally been accorded a special place in the law of specific performance. A specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money.").

[29] Specific performance is an equitable remedy and this Court's review of a district court's decision not to grant specific performance is well established. See Landers v. Biwer, 2006 ND 109, ¶¶ 7-9, 714 N.W.2d 476.

> Specific performance rests in the sound discretion of the district court, and this Court will not reverse a lower court's decision unless it has abused its

> discretion. **A court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, or if it misinterprets or misapplies the law**.

Id. at ¶ 7 (internal citations and quotations omitted) (emphasis added). Although subject to a deferential standard, the district court's decision not to grant specific performance constitutes an abuse of discretion due to several instances of misapplication and misinterpretation of the law, as well as an unreasonable and arbitrary application of equitable principles, and therefore must be reversed.

A. The District Court Misapplied and Misconstrued the Law in Arriving at its Conclusion that Damages are the Appropriate Remedy.

[30] The application of statute and determinations as to whether the district court misapplied or misinterpreted the law are questions of law, reviewed *de novo*. In this case, the district court erred by: (1) failing to apply the statutory presumption of specific performance for breaches of contracts to sell real property; and (2) failing to find, and thus, consider the effect of Mr. Hiepler's breach of the express promise to execute all necessary further assurances. Each of these errors led the district court's mistaken conclusion that specific performance is not the appropriate remedy, and thus to its reversible error.

1. The District Court Failed to Apply N.D.C.C. § 32-04-09.

[31] The district court failed to apply, consider or even reference the statutory mandate establishing specific performance as the presumptive remedy when there is a breach of an agreement to transfer real property. Under both this Court's precedent and legislative mandate, "[s]pecific performance is presumed to be the proper remedy when there is a breach of an agreement to transfer real property." See Landers, ¶ 8 (citing N.D.C.C. § 32-04-09). Section 32-04-09 very clearly states:

> It is to be presumed that the breach of an agreement to transfer real property cannot be relieved adequately by pecuniary compensation and that the breach of an agreement to transfer personal property can be thus relieved.

[32] The district court correctly pointed out that, as an equitable remedy, specific performance typically requires the party requesting such relief to show that the legal remedy of damages are inadequate. See App. C at 44 (citing Wolf v. Anderson, 334 N.W.2d 212, 215 (N.D. 1983)). However, pursuant to the clear language of N.D.C.C. § 32-04-09 and applicable precedent, a party presumptively meets that burden simply by virtue of seeking specific performance upon a breach of a contract to convey real property. See Jonmil, Inc. v. McMerty, 265 N.W.2d 257, 259 (N.D. 1978) (citing the provision as recognizing a "buyers right to specific performance on the ground that monetary damages are presumed to be inadequate").

[33] Thus, at trial, it was Mr. Hiepler who had the burden to refute the presumption of specific performance as the proper remedy, rather than HOP and Mr. Seerup's burden to further support it. See Sunderland v. North Dakota Workman's Compensation Bureau, 370 N.W.2d 549, 552 (N.D. 1985) (holding that statutory presumptions in North Dakota "operate to shift both the burden of going forward with evidence and the burden of persuasion"). Section 34-04-13 sets forth the specific instances in which this presumption can be rebutted. However, as evidenced by the transcript, Mr. Hiepler failed to assert or present any evidence to establish any of those grounds, nor any other grounds sufficient to rebut the presumption of specific performance. As such, the district court abused its discretion by clearly misapplying the law and coming to an unsupportable decision to deny specific performance.

2. The District Court Failed to Consider the Express Covenant of Further Assurances and Mr. Hiepler's Breach Thereof.

[34] As a second instance of misapplying the law, the district court not only erred by failing to find a breach of the covenant of further assurances, it further committed legal error by failing to consider such breach in refusing to grant specific performance. According to the district court, "[HOP and Mr. Seerup] have no claim for the breach of the 'covenant of further assurances[.]'" App. C at 52. As established above, this conclusion is erroneous as a matter of law.

[35] In failing to recognize this breach, the district court also failed to provide any analysis as to how the breach affects its decision to grant specific performance. Therefore, there are no factual findings or exercise of discretion in this regard, and the implications of this breach as to the appropriate remedy are a matter of first impression for this Court.

[36] The covenant of further assurances is a well-established covenant of title and its basis and function is well described in Werner v. Wheeler, 142 A.D. 358, 368 (N.Y. App. 1st 1911):

> "[The Covenant of further assurances] is in the nature of **an agreement to convey in the future** and it obligates the covenantor and his heirs and grantees **to make any further conveyance necessary to vest in the covenantee the title intended to be conveyed**, and it relates to an interest which could have been but was not conveyed by the deed containing the covenant . . . [It] must be construed as meaning that the grantor and his heirs, or successors, and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title or interest of, in, or to the premises conveyed by, from, under, **or in trust for him or them**, **shall and will** . . . **make, do, and execute, or cause to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises thereby granted or so intended** . . . It may be that under this covenant **the covenantor and his heirs and grantees might be compelled by an action for specific performance** to surrender or file title papers in his or their possession essential to the covenantee's title.

Id. (internal quotations and citations omitted) (emphasis added).

[37] From this, as well as from countless other sources, it is evident that this covenant imposes the obligation upon the grantor to take all additional, necessary steps to fulfill the conveyance. See id.; 21 C.J.S. Covenants § 20 (June 2017 Update); 4 Tiffany Real Prop. § 1015 (3d ed.). It is a covenant that, by its very nature, contemplates and requires the remedy of specific performance.

[38] By expressly promising "to execute such further assurances as may be requisite for the full and complete enjoyment of the rights herein granted" the Mineral Deed itself plainly requires the remedy of specific performance. The district court, however, failed to recognize and failed to consider this covenant in arriving at its remedy, and thus committed reversible error by misapplying the law and abusing its discretion.

B. Notwithstanding the Legal Requirements, Equitable Considerations also Support the Appropriateness of Specific Performance as the Proper Remedy.

[39] The legislature has provided for certain exceptions to the statutory presumption that specific performance is the default remedy for a breach of contract to convey real property, including that specific performance cannot be enforced against a party if "it is not as to that party just and reasonable." N.D.C.C. § 32-04-13(2).

[40] At the outset, it should be noted that the district court based its denial of specific performance on its misapplication of law imposing the burden on HOP and Mr. Seerup to establish their right to specific performance. Further, Mr. Hiepler did not allege and the district court did not find that the award of specific performance would be unjust or inequitable, and for that reason this Court should not entertain such an argument on appeal. Nevertheless, applying equitable principles results in the conclusion that specific performance is the proper remedy.

[41] In applying equitable considerations to determine whether specific performance is "just and reasonable" under N.D.C.C. § 32-04-13(2), this Court in Landers has stated:

> Specific performance is an equitable remedy and equitable principles must be followed in its use. A litigant seeking the remedy of specific performance is held to a higher standard than one merely seeking money damages, and to receive equity he must "do equity" and must not come into court with "unclean hands." A purchaser seeking specific performance of a contract for the sale of real property must make a showing of utmost good faith by him in executing the contract.

Landers, ¶ 9 (citing Boe v. Rose, 1998 ND 29, 574 N.W.2d 834) (internal citations omitted). The Court went on to hold that, applying these principles consists of considering "the circumstances surrounding the transaction[.]"[4] Id. at ¶ 10.

[42] As to the facts relevant to the transaction, all parties have stipulated and agreed, and the district court properly found the following:

- By Mineral Deed dated April 7, 2007, the Hieplers entered into a clear and unambiguous contract to convey 150 net mineral acres in the Subject Lands to Mr. Seerup. App. C at 24-25.
- The Hieplers indeed intended to transfer and convey the 150 net mineral acres to Mr. Seerup for the price of $15,609.00, which the Hieplers received. Id. at 24-25, 35.
- The Mineral Deed included the Hieplers' express promise to "execute such further assurances as may be requisite for the full and complete enjoyment of the rights herein granted[.]" App. F at 82-83.

It was also conclusively established at trial, by unchallenged and uncontradicted expert testimony, that at the time of the transaction, the contract price of $15,609.00 was an appropriate and fair market price for 150 net mineral acres in Williams County, North

[4] To the extent that Mr. Hiepler would raise Mr. Seerup's testimony as bearing on the equities of specific performance, any confusion stemming from Mr. Seerup's testimony at trial regarding the timing of events leading up to the execution of the Mineral Deed or the nature and extent of Mr. Seerup's title research has no relation to the fairness of the transaction itself. App. O at 209-213, 215-217.

Dakota. See App. O at 203-208.

[43] Despite presumptively meeting the prerequisites for specific performance via the subject matter of the contract, each and every one of these facts supports the conclusion that equitable principles favor the statutory remedy of specific performance. Mr. Seerup demonstrated his good faith and willingness by performing his obligations under the contract. It is Mr. Hiepler who now, despite having reaped the full benefit of the deal, refuses to hold up his end of the bargain and take the steps necessary to fully effectuate the promised conveyance. HOP and Mr. Seerup merely seek the very remedy that Mr. Hiepler expressly agreed to when he executed the Mineral Deed.

IV. Mr. Hiepler can be Compelled to Reach into the Trust to Fulfill the Promise he made to Mr. Seerup.

[44] Given that the award of specific performance is the appropriate remedy and that the mineral interests necessary to effectuate this conveyance are owned by Orville Hiepler in trust, the only remaining issue is whether Mr. Hiepler can be compelled to reach into the Trust to effectuate his promised conveyance. Mr. Hiepler retains all beneficial interest and unfettered control over Trust property, with the unquestioned power to convey it. Under these facts, Mr. Hiepler cannot hide behind the Trust which he fully controls, and this Court may compel Mr. Hiepler to reach into the Trust to effectuate the conveyance.

[45] In its *Findings of Fact, Conclusions of Law and Order for Judgment*, the district court appears to be confused and under the impression that HOP and Mr. Seerup seek to reform the Mineral Deed to include the Hieplers, in their capacity as trustees, as additional grantors. This is not the case. As clearly outlined in the briefing associated with HOP and Mr. Seerup's Motion for Summary Judgment, as well as their pre- and post-trial briefing, the requested relief is not to reform the Mineral Deed, but for an order from the Court under

N.D.C.C. § 32-04-04 requiring Orville Hiepler, as the surviving settlor and as a trustee of the Trust, to fulfill his agreement and execute a conveyance as trustee conveying the remaining 142.3637 net mineral acres to Mr. Seerup. Dkt. 100-102, 125, 151, 155-156.

A. Mr. Hiepler Retains Full Control Over the Disposition of Trust Property, Even to the Extent of Revoking the Trust Entirely.

[46] Aside from the trust document, no evidence or testimony was presented regarding the Trust, and thus this Court has only the trust document to refer to in examining the nature and scope of the Trust. In interpreting a trust instrument, the Court's primary objective is to ascertain the settlor's intent. Langer v. Pender, 2009 ND 51, ¶ 13, 764 N.W.2d 159. General rules of contract interpretation apply to the construction and interpretation of trust instruments. "When a trust instrument is unambiguous, the settlor's intent is ascertained from the language of the trust document itself." Hecker v. Stark County Soc. Serv. Bd., 527 N.W.2d 226, 230 (N.D. 1994). "Whether or not a trust is ambiguous is a question of law, fully reviewable on appeal." Id.

[47] In this case, the trust instrument is unambiguous and the powers, roles and authorities granted by Orville Hiepler to himself as settlor, beneficiary and as a trustee are clear and effectively limitless. The Trust is fully revocable. App. J at 98-153. Mr. Hiepler is the sole surviving settlor, a trustee of the Trust, and retains the powers to (1) act for and conduct business on behalf of the Trust without the consent of any other trustee; (2) amend, restate or revoke the Trust, in whole or in part, for any purpose; (3) remove any property from the Trust at any time; and (4) control the income and principle distributions from the Trust and to direct distribution of as much of the Trust property for his own unrestricted use and benefit, "even to the exhaustion of all trust property". Id. at 101, § 1.04(a)-(d). Moreover, the trust instrument expressly indicates that for tax purposes, Mr. Hiepler is

treated as owning all Trust property as if he owned it in his individual capacity. Id. In essence, there is no meaningful difference between property owned by Mr. Hiepler in his individual capacity and that which is held in Trust. Mr. Hiepler retains full beneficial use of the Trust property and has absolute control over the same, without any limitation.

B. Orville Hiepler has the Unquestioned Authority to Reach into the Trust to Fulfill the Grant and this Court should require the same.

[48] The question of whether a purchaser can compel specific performance from a grantor who purports to transfer property in his individual capacity, but instead holds legal title to the property in trust is one of one of first impression in North Dakota. However, other jurisdictions have addressed the issue and found that specific performance is available under these circumstances. See Walgren v. Dolan, 226 Cal.App.3d 572 (Cal. App. 1990); 81A C.J.S. Specific Performance § 57, n. 5 (March 2017 Update).

[49] The case of Walgren v. Dolan involved a strikingly similar factual pattern and concluded with the court holding that a contract to sell property could be specifically enforced when the seller of the property did not own the property individually, as stated in the contract, but rather owned it in trust. In Walgren, the plaintiff entered into a contract to purchase property from Dolan, Sr. ("Dolan"). Id. at 574. Although the agreement was with Dolan, individually, legal and record title to the property was held in Dolan's trust. Id. Dolan, however, was both the settlor and beneficiary of the trust, and retained complete control over the disposition of the trust property. Id. at 574-575. The court held that specific performance was available to the plaintiff because, although Dolan did not own the property individually, he owned both equitable title and had the power to call for the delivery of legal title. Id. at 576 (stating that where "a party holds the equitable title to realty and has the power to 'call for' legal title, it is established that specific performance

is available").

[50] In this case, Mr. Hiepler is the surviving settlor and a trustee of the Trust with the absolute control over and power to dispose of Trust property. As such, the same result is mandated and specific performance can be compelled. In fact, the circumstances surrounding the Trust at issue in this case are even more favorable toward the conclusion of compelling specific performance from the Trust. Unlike Dolan, who was the settlor and beneficiary of the trust with the power and control over Trust property, Mr. Hiepler is also the trustee of the Trust and can himself effectuate any conveyance from the Trust.

[51] In sum, both at the time of the execution of the Mineral Deed and now, the Hieplers (and now only Mr. Hiepler) held equitable title to the mineral interests promised to be conveyed and had/have the power to call for legal title and effectuate the conveyance. Under these circumstances, specific performance is available, and Mr. Hiepler can be compelled to reach into the Trust to fulfill his promise. See Id. at 576-77.

[52] Such a holding is also in accordance with trust law generally, which does not permit an owner of property to place property in trust, retain beneficial use of the property and nevertheless move the property out of the reach of his creditors. See Restatement (Second) of Trusts § 156 (1959); Nelson v. California Trust Co., 202 P.2d 1021, 1021-22 (Cal. 1949); In re Mogridge's Estate, 20 A.2d 307, 309 (Pa. 1941) ("it is against public policy for one so to limit his property in trust that he retains to himself the beneficial incidents of ownership therein and yet places it beyond the reach of those to whom he is or may become indebted"); Glass v. Carpenter, 330 S.W.2d 530, 534 (Tex.Civ.App.-San Antonio 1959). In these situations, and except as provided by statute, it is held that creditors must have equal rights as to the debtor as to the debtors property. Although the current situation does

not pertain to a debtor/creditor relationship per se, these provisions provide guidance as to the appropriate lens with which to adjudicate this issue. In essence, Mr. Hiepler attempts to use his Trust, over which he retains absolute control and beneficial use of the property contained therein, as a method to preclude and prevent the enforcement of the agreement he agreed to with Mr. Seerup. As with a debtor trying to utilize a trust to shield assets, yet maintain full use and enjoyment of them, Mr. Hiepler's efforts are contrary to public policy and cannot be condoned.

CONCLUSION

[53] For the foregoing reasons, the district court incorrectly denied HOP and Mr. Seerup specific performance as the proper remedy for the Hieplers' breach of contract. HOP and Mr. Seerup respectfully ask this Court to reverse the district court and to order Mr. Hiepler, individually, and in his capacity as a trustee of the Trust, to execute and deliver a deed to Mr. Seerup conveying all such interests in the Subject Lands as necessary to effectuate a full conveyance of 150 net mineral acres as promised by Mineral Deed.

Dated this 13th day of June, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This Brief contains 6,964 words, excluding the parts of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify that this Brief complies with the typeface requirements of N.D.R.App.P. 32 and the type style requirements of that rule, because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Times New Roman, 12 point font.

By: /s/ Adam Olschlager
Adam Olschlager (#06428)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLANTS BILL L. SEERUP AND HURLEY OIL PROPERTIES, INC.,** and a true and correct copy of the **APPENDIX TO BRIEF OF APPELLANTS BILL L. SEERUP AND HURLEY OIL PROPERTIES, INC.,** were on the 13th day of June, 2018, served electronically on the following:

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