IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Dale Exploration, LLC, Bakken HBT, II LP, Dale Exploration, LP, and Dale Lease Acquisitions, LP,

Plaintiffs-Appellees

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; and the Hefner Company, Inc.,

Defendants-Appellees

and

Bill L. Seerup and Hurley Oil Properties, Inc.,

Defendants-Appellants

Supreme Court No. 20180065
District Court No. 53-2014-CV-01174
(Williams County District Court)

BRIEF OF 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-APPELLEES

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT ENTERED DECEMBER 18, 2017, AND JUDGMENT ENTERED DECEMBER 19, 2017

WILLIAMS COUNTY DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT
HONORABLE JOSHUA RUSTAD

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[¶1] Defendants and Appellants Bill L. Seerup [hereinafter "SEERUP"] and Hurley Oil Properties, Inc. [hereinafter "HURLEY OIL"], appeal because neither understands the difference between "executed contracts" and "executory contracts". "An 'executory contract' has been defined as '[a] contract the obligation (performance) of which relates to the future.' Black's Law Dictionary 512 (5th ed. 1979). However, a 'contract is not executory merely because it has not been fully performed by payment, if all the acts necessary to give rise to the obligation to pay have been performed.' *Wagstaff v. Peters*, 203 Kan. 108, 453 P.2d 120, 124 (1969)." North Dakota Public Service Com'm v. Valley Farmers Bean Ass'n, 365 N.W.2d 528, 543 (N.D. 1985). Succinctly stated, "A contract is *executory* when neither party has fully performed its contractual obligations and is *executed* when one party has fully performed its contractual obligations." Nassra v. Nassra, 183 A.3d 1198, 1209 (Conn. App. Ct. 2018). The status of the contract as either executory, or executed, dictates available remedies.

[¶2] **ISSUES ON APPEAL**

[¶3] Appellees Orville G. Hiepler and Florence L. Hiepler, individually [hereinafter "ORVILLE" or "FLORENCE"] and also as co-trustees of the Orville G. Hiepler and Florence L. Hiepler Family Trust dated January 9, 1997 [hereinafter "HIEPLER FAMILY TRUST"], recognize Appellants are obligated to identify "a statement of the issues presented for review", and appellees need not include such statement "unless the appellee is dissatisfied with the appellant's statement." N.D.R.App.P. 28(b) & (c).

[¶4] Never has HURLEY OIL entered into any contract with ORVILLE, FLORENCE, or HIEPLER FAMILY TRUST; never would it have *standing* to litigate the issues or appeal.

Schmidt v. City of Minot, 2016 ND 175, ¶13, 883 N.W.2d 909; Finstad v. Gord, 2014 ND 72, ¶23, 844 N.W.2d 913.

[¶5] SEERUP'S issues are erroneously predicated upon the existence of an *executory* contract, but a legal remedy with a specified formula for damages is mandated when there exists a breach of the covenant of seisen [sometimes, seisen] with respect to an *executed* contract. N.D.C.C. § 32-03-11(1) ["The detriment caused by the breach of a covenant of seizin .. in a grant of an estate in real property, is deemed to be: 1. The price paid to the grantor, or if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property."].

[¶6] **STATEMENT OF THE CASE**

[¶7] SEERUP and HURLEY OIL confuse fact(s), argument(s), and procedure(s), by injecting their flawed argument [Appellants' Brief, "Nature of the Case", ¶s 2-5, inclusive] into that portion of the brief oriented toward recital of the underlying proceedings. N.D.R.App.P. 28(b)(5).

[¶8] SEERUP and HURLEY OIL accurately identify the initial Plaintiff as being Dale Exploration, LLC, and also, a later substitution to add Bakken HBT, II LP, Dale Exploration LP, and Dale Lease Acquisitions, LP, as additional plaintiffs. Appellants' Brief, ¶6. What is unsaid in their Statement of the Case is the un-controverted judicial determination that none of the Plaintiffs ever presented any competent evidence showing that they ever had an ownership interest in the subject property, or that they had any right to bring a quiet title action. App., ps. 15; 79 (see specifically, ¶13 of Judge's Order Granting Summary

Judgment).

[¶9] Appellants persistently fail to differentiate between the parties. For instance, SEERUP and HURLEY OIL have identified the term, "Hieplers" to refer only to Orville Hiepler and Florence Hiepler [Appellants' Brief, ¶ 1(1); and not the "Trust" referenced at ¶3], but chose to ignore the existence of the lengthy, and separate "Answer of the CO-TRUSTEES" claiming fee simple mineral interest ownership under several deeds of record all duly recorded in 1998 at the Williams County Recorder's office, with each deed being specifically identified. App., ps. 156-163, inclusive. ORVILLE and FLORENCE, as individuals, also answered and cross claimed indicating ORVILLE'S individual ownership of about 7.6 mineral acres [3.8333 + 3.8030 = 7.6363], and suggesting existence of legal grounds for rescission, while simultaneously offering to restore SEERUP to everything of value [App., ps. 163-166] evidenced by a May 28, 2013, letter seeking relief under N.D.C.C. Chap. 9-09 for a mutual mistake. App., ps. 168-172.

[¶10] *Without legal authority for such a pleading*, Appellants did bring a "COUNTERCLAIM - BREACH OF CONTRACT" against ORVILLE and FLORENCE requesting in the alternative, specific performance or money damages in an amount to be proven at trial. App., ps. 181-184. The legal and factual deficiencies of their purported "Counterclaim" [an unauthorized pleading - N.D.R.Civ.P. 7(a)], to include Appellants' willing participation in the sham quiet title proceedings initiated by Plaintiffs, were plead with specificity by ORVILLE, FLORENCE, and HIEPLER FAMILY TRUST. App., ps. 186-198.

[¶11] The lower court outlined multiple reasons for precluding summary judgment. App.,

p. 79. Appellants' representation as to the reasons are vague, but Appellants have not appealed from that September 19, 2017, decision. App., ps. 80; 10 (Notice of Appeal).

[¶12] At time of trial, ORVILLE recognized legal and evidentiary reality – there was no possibility that SEERUP would acknowledge "a mutual mistake that would allow rescission", and "if there is a clear and unambiguous document, the law is going to dictate what the result will be and we (ORVILLE and FLORENCE) would not be going forward with the attempt to rescind on this document. .. So it becomes a parol evidence rule and we will be taking that position throughout." App., ps. 202; 219.

[¶13] Appellants' paraphrase of the stipulation with respect to the April 7, 2007, Mineral Deed [Appellants' Brief, ¶ 10] is not accurate. The actual stipulation ["STIPULATION"] is set forth at Appendix, page 220 [see also, App., ps. 218-219 for the lead-in discussion resulting in the STIPULATION proposed by Appellants' legal counsel]:

> MR. OLSCHLAGER: If Mr. Hiepler, in his individual capacity and as co-trustee of the Trust, is willing to stipulate that the April 7th, 2007 mineral deed is clear and unambiguous, binding upon the parties, and not subject to reformation or rescission, I don't have a need for any further testimony today.
>
> MR. GARAAS: So stipulated, Your Honor.
>
> THE COURT: Very well. Based on that stipulation – he has – there is a stipulation that it is a clear and unambiguous document, specifically referring to the deed, and that the grounds for rescission and/or reformation do not exist in this matter. And based on that, I guess I'll move forward.

[¶14] While only two (2) witnesses testified, by other stipulation, multiple documents were introduced into the evidentiary record. Without objection, twenty (20) exhibits initially offered by ORVILLE, FLORENCE, and HIEPLER FAMILY TRUST were admitted into

evidence, along with five documents submitted by SEERUP and HURLEY OIL. Transcript of 9/25/2017, pages 14-15. Other documents were admitted into evidence, with only one objected to by SEERUP and HURLEY OIL, and no appeal was taken from the letter [Plaintiff's Exhibit #26; Docket Entry #201] indicating legal representation of SEERUP by Plaintiff's counsel, Peter H. Furuseth of Furuseth, Kalil, Olson & Evert, P.C. Tr. of 9/25/2017, ps. 24, 38, & 51-53. Without challenge by SEERUP and HURLEY OIL, every document establishes/evidences the facts later determined by the District Court, to include multiple 1997 Grant Deeds, properly recorded in 1998 with the Williams County Recorder, favoring HIEPLER FAMILY TRUST [Docket Entries #176-181; 183], a surface ownership Quit Claim Deed favoring HIEPLER FAMILY TRUST [Docket Entry #182]; oil and gas leases/assignments [Docket Entries #184-189]; ORVILLE and FLORENCE'S May 28, 2013, letter of rescission/offer to return [Docket Entry #190; App., ps. 168-172]; Requests for Admission deemed admitted against each Plaintiff [Docket Entries #191-194]; Affidavit of Bill L. Seerup [Docket Entry #198]; Oil and Gas Leases of 2009 and 2010 [Docket Entry #199]; a June 21, 2007, Mineral Deed from SEERUP to Family Tree Corporation [Docket Entry #200]; and a June 25, 2013, letter from Peter H. Furuseth of Furuseth, Kalil, Olson & Evert, P.C. [Plaintiff's counsel], claiming to have "been retained by Mr. Bill Seerup in regards to the dispute regarding the purchase of mineral acres from the Hiepler family for the Hiepler trust" [Docket Entry #201].

[¶15] At the onset of the trial, District Judge Rustad posed the question, "Are the parties asking to do post-trial briefing and proposed findings?", to which attorney Olschlager immediately responded, "Yes, Your Honor." Attorney Garaas then commented, "I believe

that's appropriate, Your Honor", and the Court so allowed. Tr. of 9/25/2017, ps. 12-13. SEERUP and HURLEY OIL now impliedly criticize the District Judge's action – action taken at their request – stating, "the district court did not make a single independent finding and simply adopted the proposed findings and conclusions of Mr. Hiepler verbatim." Appellants' Brief, ¶10. In truth, by numbered paragraphs, the District Judge made twenty-two (22) independent Findings of Fact, and nineteen (19) independent Conclusions of Law, with most having multiple components establishing other facts/law. App., ps. 14-53. Never once within Appellant's Brief does either SEERUP or HURLEY OIL challenge a single evidentiary fact so determined by Judge Rustad [not even a typographical error between findings and some documentary evidence has been identified]; instead, SEERUP and HURLEY OIL concede HIEPLER FAMILY TRUST'S mineral interest ownership since 1998, but dispute the only legal remedy available after examination of the facts and law consistent with the STIPULATION first suggested by attorney Olschlager acting on behalf of SEERUP and HURLEY OIL – legal damages fixed by N.D.C.C. § 32-03-11(1). Specific performance, an equitable remedy, is not available when a legal remedy exists, and neither SEERUP or HURLEY OIL fulfilled legal requirements allowing for deviance from such elementary legal principle: "A fundamental principle of equity is that a party is not entitled to equitable relief if there is a remedy provided by law which is equally adjusted to rendering complete justice." Matter of Estate of Hill, 492 N.W.2d 288, 295 (N.D. 1992).

[¶16] SEERUP and HURLEY OIL misrepresent the District Court's Finding of Fact #20 [App., p. 34] when they erroneously claim "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." Appellant's Brief, ¶ 11; 24 (similar comment). In truth, Finding of Fact #20 makes no finding as to "enforceability" or the rest being "held in Trust", and reads as follows fully consistent with the STIPULATION first suggested by SEERUP and HURLEY OIL:

> 20. That Orville G. Hiepler and Florence L. Hiepler, acting as individuals, breached their contract dated April 7, 2007, evidenced by the clear and unambiguous Mineral Deed [Defendant's Exhibit A] that is not capable of being rescinded or reformed. The breach of contract by Orville G. Hiepler relates to the extent of his ownership of mineral interests which was then limited to only 7.6363 net mineral acres then individually owned by Orville G. Hiepler. At the time of the execution of the Mineral Deed on April 7, 2007, the public records of Williams County, North Dakota, proved all the rest of the mineral interests set forth in Finding of Fact 2(a)-(h), inclusive, were owned by another legal entity – Orville G. Hiepler and Florence L. Hiepler as co-trustees of the Orville G. Hiepler and Florence L. Hiepler Family Trust dated January 9, 1997, created under the laws of California, but also recognized to exist under the laws of North Dakota. Defendant's Exhibit E; N.D.C.C. § 59-12-03.

[¶17] SEERUP and HURLEY OIL continue their confusion as to "parties, "facts" and "law" in their Appellants' Brief, at ¶ 11. Appellants accurately identify the lower court's Conclusion of Law #9 [App., p. 43-44] that ORVILLE had breached "the covenant of seisen giving rise to statutory damages fixed by N.D.C.C. § 32-03-11", **but only with respect to Bill L. Seerup** – never was there a breach involving HURLEY OIL, or any other individual or entity because (a) there had never been any privity (of contract) between ORVILLE and HURLEY OIL [or any other entity resulting from SEERUP'S activities], and (b) there never had been any assignment of his action by SEERUP to HURLEY OIL [or any other entity]. Conclusion of Law #9 through 15, inclusive; App., ps. 43-50. However, in the same

paragraph, SEERUP and HURLEY OIL misrepresent the lower court's findings with respect to both the covenant of seisen and the covenant of further assurances found at Conclusion(s) of Law #18 & #19 [App., ps. 51-53]. As to the 7.6333 mineral acres conveyed by ORVILLE to SEERUP, no breach of either covenant [seisen or further assurances] had occurred; and *both covenants only exist with respect to that interest in the land actually owned by ORVILLE* [Conclusion of Law #18 citing Bull v. Beiseker, 16 N.D. 290, 113 N.W. 870 (N.D. 1907), and Gale v. Shillock, 30 N.W. 138 (Mem)(Dak. Terr. 1886); App., ps. 51-52]– hence, if no land ownership (or mineral interest ownership) exists, no covenants will exist to run with non-existent land(s). Moreover, SEERUP had made no assignment of any action, real or imagined, against ORVILLE [without title or possession, the covenant of seisen does not run with the land, nor is it transferred by later conveyance] so that "Defendants Hurley Oil Properties, Inc., Family Tree Corporation, the Hefner Company, Inc., do not have any action" against ORVILLE, FLORENCE, or HIEPLER FAMILY TRUST. App., ps. 51-53. Simply put, as to the covenant of further assurances, even if such covenant originally existed as to the 7.6333 mineral acres, no such assurances exist with respect to any non-existent mineral interest(s), nor was there ever any privity between ORVILLE and SEERUP'S successors. Incredibly ignored by both SEERUP and HURLEY OIL, even if the covenant of further assurance existed, are the actual words of the statute if ORVILLE was ever compelled to act with respect to the 7.6333 mineral acres (or any mineral acres) – by statute, **all of the expense** *[certainly including the purchase price from HIEPLER FAMILY TRUST at the time of acquisition]* **must first be paid by the party requiring the "further assurance".** N.D.C.C. § 47-10-04. SEERUP and HURLEY OIL should note the lower court's attempt

to segregate the parties according to their actual interest in the real property in the quiet title action – guilt by association is to be condemned, but the lower court also recognized that HURLEY OIL had no claim against anyone except possibly SEERUP, which cause of action was never brought, and statutes of limitation should preclude any success if initiated by any of them. Conclusions of Law #17; App., p. 51.

[¶18] **STATEMENT OF FACTS**

[¶19] At ¶s13-17 of the Appellants' Brief, SEERUP and HURLEY OIL perpetuate their legal and factual error, failing to understand the effect of ORVILLE and FLORENCE'S April 7, 2007, mineral deed, duly accepted and subsequently recorded by SEERUP. App., ps. 82-83. The parol evidence rule dictates factual findings and legal conclusions, and the parties' STIPULATION dictates the legal remedy (if not otherwise dictated by the statute).

[¶20] ORVILLE, FLORENCE, and HIEPLER FAMILY TRUST each reiterate – never once within Appellant's Brief does either SEERUP or HURLEY OIL challenge a single evidentiary fact determined by Judge Rustad in Finding of Fact #1 through #22, inclusive. App., ps. 15-36. The District Court was aware the case arose out of a sham quiet title action brought by Plaintiffs having no estate or interest in the land; the Court properly determined the Plaintiffs had no right to bring a quiet title action. App., ps. 15-16; Finding #1; Finding #18, App., p. 33.

[¶21] On January 9, 1997, ORVILLE and FLORENCE created the HIEPLER FAMILY TRUST, for the benefit of many individuals and charitable entities (App., ps. 17-18; Finding #6; and not just ORVILLE or FLORENCE was a designated beneficiary), and subsequently the two (2) individuals conveyed substantial mineral interests to the HIEPLER FAMILY

TRUST by multiple deeds duly recorded with the Williams County Recorder on March 11, 1998. App., ps. 18-22; Finding #7 [some surface ownership also at #7(g) recorded on September 5, 2005]. After the 1998 recorded deeds, ORVILLE only owned 7.6363 net mineral acres within the referenced lands of the April 7, 2007, mineral deed. App., p. 82, 23-24; Finding #9 & #10.

[¶22] In late 2006, or early 2007, ORVILLE was contacted by James P. Desjarlais who was only interested in acquiring whatever interest "Orville G. Hiepler and Florence L. Hiepler Husband and Wife" owned as of "March 16, 2007" in return for $15,609" as set forth in a proposed agreement. ORVILLE and FLORENCE did not know how many net mineral acres that they individually owned, if any, and were appreciative of being advised that they did own minerals individually. App., ps. 169, 24 (Findings #11-12). *There is no evidence of any proposed written document involving sale of minerals ever being executed by anyone, including SEERUP - no executory contract existed.* From date of recording in 1998, the public records of the Williams County Recorder reflect the mineral ownership interests of the HIEPLER FAMILY TRUST, and all persons are charged with knowledge of such notice(s). N.D.C.C. § 47-19-19; Brigham Oil & Gas, L.P. v. Lario Oil and Gas Co., 2011 ND 154, ¶ 19, 801 N.W.2d 677. The two (2) Co-Trustees (ORVILLE and Mark O. Hiepler, successor Trustee) are "compelled to 'hold, administer, and dispose of all accepted trust property for (ORVILLE and FLORENCE'S) benefit and for the benefit of (their) beneficiaries,[1] in accordance with the terms of this trust.' Article One, Section 1.03(b)."

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[1] At least sixteen (16) named beneficiaries of the HIEPLER FAMILY TRUST, and also, the descendants of certain of them. App., ps. 17-18.

Additionally, each named beneficiary, including ORVILLE, was subject to a spendthrift provision prohibiting assignment, anticipation, encumbering, alienation, or other voluntary transfer of either income or principal. App., p. 18; Finding #6.

[¶23] SEERUP and HURLEY OIL both (a) fail to identify other relevant facts, and/or (b) fail to take issue with the District Judge's findings of fact, to include the following:

[¶24] A. Finding of Fact #13 (App., ps. 24-25)[**emphasis** in original]: "On April 7, 2007, Orville G. Hiepler and Florence L. Hiepler, acting only individually, *and not in any representative capacity on behalf of the Hiepler Family Trust*, executed a "Mineral Deed" typed by Defendant Bill L. Seerup [Defendant's Exhibit A], **which is clear and unambiguous, and not capable of being rescinded or reformed by stipulation of all parties**, in return for $15,609. Plaintiff's Exhibit #15. The Mineral Deed [recorded on April 16, 2007, as Document #644554 with the Williams County Recorder] indicated that it was the intent of the grantors to convey 150.00 net mineral acres, but at the time, Orville G. Hiepler and Florence L. Hiepler – the grantors – did not own 150 net mineral acres; only 7.6363 net mineral acres were then individually owned by Orville G. Hiepler. See Finding of Facts #8-10, above. Nowhere within the confines of the Mineral Deed dated April 7, 2007 [Defendant's Exhibit A], is there any reference to the Hiepler Family Trust, nor is there any reference to either Orville G. Hiepler or Florence L. Hiepler acting in any representative capacity, or in a fiduciary capacity, for the Hiepler Family Trust."

[¶25] B. Finding of Fact #15 (App., p. 26): Lack of privity between ORVILLE and HURLEY OIL (and Family Tree Corporation or Hefner Company, Inc.).

[¶26] C. Finding of Fact # 16 (App., ps. 26-27): Lack of litigation against SEERUP with respect to non-conveyance of contracted mineral interests for more than ten (10) years, and the unavailability of successful litigation without collusion or wilful waiver of available legal defenses.

[¶27] D. Finding of Fact #17(A & B & C)(App., ps. 27-32): **SEERUP'S false testimony** with respect to (1) sequence and timing of contacts with ORVILLE (*with SEERUP repeatedly testifying that he only dealt with ORVILLE as an individual, and that no mention of the HIEPLER FAMILY TRUST had ever occurred*), (2) the date of discovery of the HIEPLER FAMILY TRUST'S ownership of mineral interests, and (3) researching the title, the timing of his investigation, and the identity of the title investigator.

[¶28] E. Finding of Fact #17(D)(App., ps. 32-33): SEERUP'S silence despite "constructive notice" and "actual notice" of HIEPLER FAMILY TRUST'S mineral interest ownership when ORVILLE and FLORENCE sought rescission arising out of lack of consent/mutual mistake by letter dated May 28, 2013. App., ps. 168-172.

[¶29] F. Finding of Fact #14(App., ps. 25-26): SEERUP'S conveyance by Mineral Deeds of April 10, 2007, and June 21, 2007, to HURLEY OIL and Family Tree Corporation, at prices consistent with legal damages fixed by North Dakota's statutory law, when SEERUP knew, by constructive notice or with

actual knowledge, that neither ORVILLE or FLORENCE owned sufficient net mineral acres to satisfy their Mineral Deed dated April 7, 2007. By any account, SEERUP had "unclean hands" and had to have defrauded HURLEY OIL, and the others that follow.

[¶30] G. Finding of Fact #19(App., p. 34): HIEPLER FAMILY TRUST'S leasing activities, ultimately all of which were incompatible with ORVILLE owning any mineral interests.

[¶31] H. Finding of Fact #20-22(App., ps. 34-36): ORVILLE and FLORENCE, acting only as individuals, having "breached their contract dated April 7, 2007, evidenced by the clear and unambiguous Mineral Deed [Defendant's Exhibit A] that is not capable of being rescinded or reformed [among other things, not capable of being reformed as to identify of the parties, nor quantity of the minerals]", nor can it be "reformed to include another party such as the entity owning the bulk of the mineral interests known as Orville G. Hiepler and Florence L. Hiepler as co-trustees of the Orville G. Hiepler and Florence L. Hiepler Family Trust dated January 9, 1997, nor can the Mineral Deed be reformed to reduce the quantity to 7.6363 net mineral acres – the quantity then individually owned by Orville G. Hiepler", and that N.D.C.C. § 32-03-11 has a formula for statutorily fixed damages calculated to be $20,147.96, with no further accruing interest. Further, no evidence of an assignment of SEERUP'S action for the breach of the covenant of seisen exists.

[¶32] The facts were set forth in the documentary evidence, and even the expert called by

SEERUP and HURLEY OIL confirmed the legitimacy of the statutory formula in the event of a breach of the covenant of seisen – thereby disproving any need for an alternate remedy from statutory damages (had such theory/evidence been advanced by Appellants, but it was not). The only other sworn testimony provided to the District Judge was SEERUP'S testimony, which, in a limited time, incredibly seemingly changed from question to question, and was even in conflict with his own prior sworn affidavit. App., ps. 27-32.

[¶33] **LAW AND ARGUMENT**

[¶34] **Standard of Review**

[¶35] Service Oil, Inc. v. Gjestvang, 2015 ND 77, ¶12, 861 N.W.2d 490, the decision cited by SEERUP and HURLEY OIL at ¶ 18 of their Appellants' Brief, appears to be the standard of review. Neither Appellant has questioned any of the twenty-two (22) factual findings as being "clearly erroneous", nor does either Appellant attempt to rehabilitate witness SEERUP, who "choose to testify falsely in several respects". Finding #17; App., ps. 27-33.

[¶36] **POINT 1. HURLEY OIL has no standing to appeal.**

[¶37] As earlier noted, HURLEY OIL never entered into any contract with ORVILLE, FLORENCE, or HIEPLER FAMILY TRUST; never would it have *standing* to litigate the issues or appeal. Schmidt v. City of Minot, 2016 ND 175, ¶13, 883 N.W.2d 909; Finstad v. Gord, 2014 ND 72, ¶23, 844 N.W.2d 913. HURLEY OIL'S appeal should be summarily rejected for lack of standing.

[¶38] **POINT 2. Equitable relief is not possible, an adequate legal remedy exists.**

[¶39] **A. There exists only one (1) contract – never involving the HIEPLER FAMILY TRUST, nor does the contract provide for future conveyances.**

[¶40] The Appellants legal argument begins with a massive legal and factual error – there is no "agreement to transfer real property". Appellants' Brief, ¶21. SEERUP and HURLEY OIL fail to understand the Mineral Deed is "the fully executed contract", and, upon delivery, the Mineral Deed operated to immediately convey whatever mineral interest was then owned by ORVILLE or FLORENCE, up to the amount specified in the instrument. Rice v. Neether, 2016 ND 247, ¶11, 888 N.W.2d 749. There is no contract providing for some future conveyance by either ORVILLE or FLORENCE – the sole contract was fully complete by delivery, acceptance, and recordation; no further conveyances were contemplated or provided for in the Mineral Deed; HIEPLER FAMILY TRUST was not involved whatsoever.

[¶41] Moreover, the "execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." N.D.C.C. § 9-06-07. If there is a valid contract, the parol evidence rule precludes either party from asserting the existence of other terms, such as asserting the right to future conveyances, or required conveyances by others as now asserted by SEERUP and HURLEY OIL at Appellants' Brief, ¶ 25: "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."[2] Please note only "Mr. Hiepler" failed; neither FLORENCE, nor HIEPLER FAMILY TRUST so failed. Equally important, a breach of the covenant of

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[2] Appellants' Brief, ¶ 27: "duty (of the Hieplers) to now execute any conveyance necessary to effectuate the conveyance of the full 150 net mineral acres." See also, ¶45: "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."

warranty, if it occurs, has the same legal remedy as a breach of the covenant of seisen – N.D.C.C. § 32-03-11. No matter which covenant is breached, the damages would result in the same statutory calculation(s), whether a "whole" or "partial" breach under our legal remedy fixed by the North Dakota Legislative Assembly.

[¶42] **B. The contract's covenant of seisen was breached by ORVILLE and FLORENCE, and North Dakota law dictates legal detriment based upon the purchase price, whether whole or partial breach.**

[¶43] On May 28, 2013, ORVILLE and FLORENCE originally sought rescission asserting lack of consent by both parties to the same terms under legal principles found in N.D.C.C. Chap. 9-03, primarily based upon mutual mistake. App., p. 168; Answer and Cross Claim; App., ps. 163-166. When it became clear SEERUP would not concede lack of consent due to mutual mistake, ORVILLE [after FLORENCE'S death] abandoned the equitable remedy of rescission. Tr. of 9/25/2017, p. 12. The STIPULATION establishes the Mineral Deed – the only contract that exists – "is clear and unambiguous, binding between the parties, and not subject to reformation or rescission." *Id.*, p. 71. Without controversy, ORVILLE and FLORENCE did not own 150 mineral acres on the date of the April 7, 2007, Mineral Deed, and a breach of the convenant of seisen immediately occurred. Incredibly, both SEERUP and HURLEY OIL concede this point – ORVILLE'S breach of the covenant of seisen – at Appellants' Brief, ¶24:

> Failing to own, and thus failing to convey the mineral interests promised in the Mineral Deed, indeed constitutes a breach (of) 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).

In 1887 when part of Dakota Territory, territorial laws established a legal remedy for such breach, now codified as N.D.C.C. § 32-03-11, which deems the detriment caused by the breach of a covenant of seizen in a grant of an estate in real property to be "(t)he price paid to the grantor, or if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property (and) (i)nterest thereon for the time during which the grantee derived no benefit from the property, not exceeding six years." This statutorily-mandated calculation was honored by the District Judge, to the penny [$20,147.96]. App., ps. 43-45.

[¶44] Since the ordinary remedy for a breach of the covenant of seisen [or seizen] is an action in law for damages under N.D.C.C. § 32-03-11, SEERUP [or possibly HURLEY OIL, had there been an assignment, which there was not] had the burden to establish that the legal remedy is inadequate. See, Wolf v. Anderson, 334 N.W.2d 212 (N.D. 1983); Holzworth v. Roth, 78 SD 287, 101 N.W.2d 393, 395 (1960); and Livingston v. Balsdon, 2006 ND 11, ¶ 6, 709 N.W.2d 723. For SEERUP [or his grantees'] to even seek specific performance, SEERUP'S proof and *his pleadings* are held to a higher standard for SEERUP, and his pleadings, ".. must clearly show the that the legal remedy of damages is inadequate." Wolf v. Anderson, *supra.*, page 215; Livingston v. Balsdon, *supra.*, ¶ *6.* The District Court's Conclusion of Law #9 noted this significant evidentiary and pleading deficiency, stating:

> "Said Defendants [Bill L. Seerup, Hurley Oil Properties, Family Tree Corporation, or the Hefner Company, Inc.] made no attempt to show the inadequacy of damages under the statute, but rather, confirmed the value by introduction of testimony of the expert called by Defendant Bill L. Seerup and Hurley Oil Properties, Inc. Nor did the Defendants comply with pleading requirements for equitable relief – within the pleadings of Defendant Bill L. Seerup and Hurley Oil Properties, Inc., neither attempts to explain how

> damages, measured by N.D.C.C. § 32-03-11, are inadequate. Further, Defendant Bill L. Seerup "elected his remedy" on or before April 7, 2007, when he had to know Orville G. Hiepler did not own many minerals [and certainly not 150 net mineral acres], yet he prepared a Mineral Deed never mentioning any trust whatsoever, and then accepted its delivery after execution by two (2) individuals (and never were the two (2) individuals identified as representatives of the Hiepler Family Trust)."

[¶45] Even in these proceedings, SEERUP and HURLEY OIL fail to address the Legislative Assembly's legal remedy [N.D.C.C. §32-03-11] except to acknowledge the district court's reliance [Appellants' Brief, ¶11], nor do they address the recognized deficiencies of pleading and proof noted above. Even if specific performance is possible under the circumstances set forth in their cited case of Walgren v. Dolan, 226 Cal.App.3rd 572, 276 Cal.Rptr. 554 (1990), neither SEERUP, nor HURLEY OIL made any attempt to plead or prove the inadequacy of the available legal remedy set by the North Dakota Legislative Assembly, and that SEERUP had clean hands.

[¶46] Neither SEERUP, nor HURLEY OIL, ever had a contract with HIEPLER FAMILY TRUST, and the Mineral Deed [App., ps. 82-83] never mentions the HIEPLER FAMILY TRUST, even obliquely. The STIPULATION [the Mineral Deed is "clear and unambiguous, binding upon the parties, and not subject to reformation or rescission"] precludes any attempt to impose future duties upon a non-party [HIEPLER FAMILY TRUST] to the executed contract – it cannot be so reformed by STIPULATION, if not by fact and law.

[¶47] **C. Specific performance could not be considered in the absence of pleadings and proof supplied by SEERUP or HURLEY OIL, or both.**

[¶48] Appellants seek specific performance, citing Larson v. Larson, 129 N.W.2d 566, 567 (N.D. 1964) at ¶28 of their joint brief, stating "(t)he very purpose of specific performance is

to compel parties to perform as they have agreed to do so." HIEPLER FAMILY TRUST was not a party, and SEERUP had constructive notice, or actual notice that HIEPLER FAMILY TRUST was the owner of all but 7.6363 mineral acres (owned by ORVILLE). The Larson decision, at page 568, sets forth an additional requirement for specific performance which makes such equitable relief impossible when SEERUP has knowledge of ORVILLE'S mistake:

> Before an agreement can be specifically enforced to convey real estate, the court will insist on a showing of utmost good faith on the part of the purchaser. *Raasch v. Goulet*, 57 N.D. 674, 223 N.W. 808.

SEERUP'S willingness to ignore public documents providing constructive notice, if not actual notice, and his willingness to testify falsely, evidences something considerably less than "utmost good faith on the part of the purchaser" – perhaps "despicable" would be more apt. In addition, Appellants' citation to Jonmil, Inc. v. McMerty, 265 N.W.2d 257 (ND. 1978) is misguided; such decision seemingly re-affirms the "sound discretion of the court", and the burden of proof and pleading imposed upon anyone requesting deviation from the legal remedy, at page 259:

> In *Zimmerman v. Campbell*, 245 N.W.2d 469, 471 (N.D.1976), this court noted that specific performance is neither a matter of grace nor of absolute right but is an equitable remedy, and as such rests in the sound discretion of the court. See also, *Sand v. Red River National Bank & Trust Co.*, 224 N.W.2d 375 (N.D.1974).
>
> Courts generally demand that the party seeking specific performance as a remedy for breach of contract has the burden of proving or establishing the right and need for such relief. *Rohrich v. Kaplan*, 248 N.W.2d 801, 807 (N.D.1977). This proof must include a showing of good faith on the part of the plaintiff (see *Rohrich*, supra) and a showing that the legal remedy of damages is inadequate, or that an award of damages will fail to put the injured party in as good a position as if the other party had fully performed.

Tower City Grain Co. v. Richman, 232 N.W.2d 61 (N.D.1975).

[¶49] Neither SEERUP, nor HURLEY OIL made any attempt to plead, or prove the inadequacy of the legal remedy [a legal remedy undoubtedly first passed in 1877, and maintained thereafter to prevent fraud by purchasers claiming two contemporaneous values – the value fixed by contract, and a much higher value in the marketplace]. N.D.C.C. § 32-03-11 acts to protect sellers against the unscrupulous, just as the fundamental concept of judicial estoppel prevents a party in a judicial proceeding from denying or contradicting sworn statements made therein. Meide v. Stenehjem ex rel. State of N.D., 2002 ND 128, ¶ 15, 649 N.W.2d 532. In the instant case, SEERUP and HURLEY OIL'S own expert established the legal damages would be appropriate. Appellants failed to prove the inadequacy of the legal remedy – they actually provided expert evidence supporting legal and factual positions taken by ORVILLE and FLORENCE.

[¶50] In the Appellants' Brief, at ¶33, SEERUP and HURLEY OIL initially claims ORVILLE has "the burden to refute the presumption of specific performance as the proper remedy", and erroneously cites N.D.C.C. § 34-04-13 as "se(tting) forth the specific instances in which this presumption can be rebutted". That referenced statute was repealed in 1961, and Appellants probably meant to refer to N.D.C.C. § 32-04-13. This latter-referenced statute has no application by its very terms – HIEPLER FAMILY TRUST was not "a party to a contract", a lead-in statutory requirement. By STIPULATION, the Mineral Deed cannot be reformed to include HIEPLER FAMILY TRUST, and no burden can be placed upon a non-party to an executed contract. Moreover, to make HIEPLER FAMILY TRUST responsible, N.D.C.C. § 32-04-17 is implicated. Under this statute, SEERUP and/or

HURLEY OIL have a tremendous burden which cannot be borne by either of them:

> **N.D.C.C. § 32-04-17. Revision of contract for fraud or mistake**
>
> When, through fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that intention so far as it can be done without prejudice to rights acquired by third persons in good faith and for value.

Without doubt, SEERUP had dirty hands and knew of ORVILLE'S mistake, so no "mutual mistake" was possible. By STIPULATION, no reformation or revision to the Mineral Deed was possible, and the District Judge acted in conformity with all available evidence which established the applicability of the long-existing legal remedy – monetary damages for the detriment deemed appropriate by N.D.C.C. § 32-03-11 as a partial breach of the covenant of seisen (or even warranty, if applicable).

[¶51] **D. The covenant of further assurances does not create a legal basis to reform the contract.**

[¶52] As to the covenant of further assurances, SEERUP and HURLEY OIL ignore the law relating to covenants that run with the land set forth by the District Judge, and made unique to the parties by specific identification instead of lumping together as is repeatedly done by SEERUP and HURLEY OIL, at Conclusion of Law #18 & #19 (App., ps. 38-40) [and SEERUP would have no claim with respect to the 7.6363 mineral acres actually conveyed by ORVILLE and FLORENCE]:

> 18. Defendants Hurley Oil Properties, Inc., Family Tree Corporation, the Hefner Company, Inc., do not have any action against Defendants Orville G. Hiepler and Florence L. Hiepler, individually, or as co-trustees of the Orville G. Hiepler and Florence L. Hiepler Family Trust dated

January 9, 1997, because Defendant Bill L. Seerup cannot transfer his action against Orville G. Hiepler, individually (or even as Co-Trustee) for the breach of the warranty of seisin, by the mere grant or conveyance in another Mineral Deed. This legal concept was stated in the *Syllabus by the Court* in Bull v. Beiseker, 16 N.D. 290, 113 N.W. 870 (N.D. 1907): "Where the covenantor has neither title nor possession, the covenants do not run with the land, so as to transfer the cause of action for the breach thereof to remote grantees by operation of assumed conveyances of the property by the execution and delivery of deeds purporting to convey the same." Even before North Dakota's statehood, it had been judicially determined that a breach of the covenant of seisin does not run with the land. See, Gale v. Shillock, 30 N.W. 138 (Mem) (Dak. Terr. 1886), stating in pertinent part, with *emphasis* added: ...There are several covenants recognized by our Code, and a deed containing any one of them could be properly called a warranty deed. Some of these run with the land, so as to vest in the assigns of the covenantee, and others do no not. The only covenants that run with the land are covenants of warranty for quiet enjoyment, or for further assurance on the part of the grantor. This is the general rule at common-law, and an express provision of our statute. Sections 819-824, inclusive, Civil Code. *The covenants named in our statute, and which do not run with the land, are covenants of seizin*, of right to convey, and covenants against incumbrances. Civil Code, §§ 1951, 1952. *Suppose the covenant in her deed to be of seizin only. That covenant does not run with the land, and is not assignable.* Rawle, Cov. 333, and cases cited;[citations omitted] ...

19. Defendants Bill L. Seerup, Hurley Oil Properties, Inc., Family Tree Corporation, and/or the Hefner Company, Inc., have no claim for the breach of the "covenant of further assurances". There can be no legal damages arising out of any breach of the "covenant of further assurance" because N.D.C.C. § 47-10-04 provides, with ***emphasis*** added:

> **47-10-04. Form of covenants**
>
> The covenants mentioned in section 47-10-03 must be in substance as follows:
>
> The party of the first part covenants with the party of the second part that the former now is seized in fee simple of the property granted, that the latter shall enjoy the same without any lawful disturbance, that the same is free from all encumbrances, that the party of the first part and all persons acquiring any interest in the same through or for the party of the first part on demand will execute and deliver to the party of the second part, ***at the expense of the latter***, any further

> assurance of the same that reasonably may be required, and that the party of the first part will warrant to the party of the second part all the said property against every person lawfully claiming the same.

Under N.D.C.C. § 47-10-04, the "expense" of the further assurance is to be borne by the "latter" grantee [or covenantee (Bill L. Seerup)] – not the covenantor. Never would damages exist against Orville G. Hiepler, an individual.

[¶53] Simply put, only SEERUP is entitled to the benefits arising out of covenants running with the land as to 7.6363 mineral acres; ORVILLE and FLORENCE did not have title to any other mineral acres, and no covenants will run with non-existent title. Moreover, North Dakota law makes SEERUP responsible for whatever expense is involved in securing any necessary "assurance" of the title that was warranted up to 7.6363 acres, if necessary. So no damages are possible.

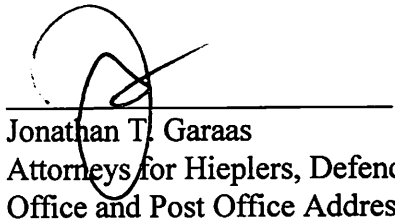
[¶54] **CONCLUSION**

[¶55] SEERUP elected his remedy when he choose to be silent upon delivery of the Mineral Deed, and thereafter, his continued silence when the mistake was made known so as to cause ORVILLE and FLORENCE to seek rescission predicated upon mutual mistake. But it was not a mutual mistake – SEERUP had both constructive knowledge and actual knowledge of ORVILLE'S mistake, and apparently hoped that ORVILLE would die before the end of the litigation. A sham quiet title action resulted in SEERUP'S false testimony properly rejected by the District Judge that applied North Dakota's statutory legal remedy arising out of the breach of any covenant applicable to this real property action. Moreover, SEERUP did not plead, or prove the inadequacies of the statutory detriment fixed by law going back to 1877, undoubtedly established to preclude fraudulent claims of value different than that fixed by

contract. SEERUP, and those that claim through him, should not be allowed to use the courts to perpetrate fraud upon North Dakota landowners by way of sham proceedings, and false testimony.

Respectfully submitted this 13th day of July , 2018.

Garaas Law Firm



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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Dale Exploration, LLC, Bakken HBT, II LP, Dale Exploration, LP, and Dale Lease Acquisitions, LP,

Plaintiffs-Appellees

vs

Supreme Court No. 20180065
District Court No. 53-2014-CV-01174
(Williams County District Court)

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; and the Hefner Company, Inc.,

Defendants-Appellees

and

Bill L. Seerup and Hurley Oil Properties, Inc.,

Defendants-Appellants

AFFIDAVIT OF MAILING

State of North Dakota
County of Cass

[¶1] Pat Doty, being first duly sworn on oath, deposes and says: Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

[¶2] On the 13th day of July, 2018, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: **Brief of 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-Appellees.**

[¶3] The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

Adam Olschlager
Crowley Fleck PLLP
P.O. Box 2529
Billings, MT 59103-2529

Jordon Evert
Furuseth, Olson & Evert, P.C.
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P.O. Box 417
Williston, ND 58802-0417

[¶4] To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Pat Doty

Pat Doty

Subscribed and sworn to before me this 13th day of July, 2018.

Notary Public

JONATHAN T. GARAAS
Notary Public
State of North Dakota
My Commission Expires Dec. 28, 2021