

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

Plaintiffs

vs

Supreme Court No. 20190338
District Court No. 53-2014-CV-01174
(Williams County District Court)

Orville G. Hiepler; Florence L. Hiepler;
Mark Hiepler as successor trustee of the
Orville G. Hiepler and Florence L. Hiepler
Family Trust dated January 9, 1997; the Hefner
Company, Inc.; Bill L. Seerup; and Hurley
Oil Properties, Inc.

Defendants-Appellant or Appellees

PETITION FOR REHEARING
“ORAL ARGUMENT REQUESTED”

APPEAL FROM ORDER AFTER APPEAL DATED OCTOBER 22, 2019, THE
RESULTING JUDGMENT AFTER APPEAL DATED OCTOBER 22, 2019, AND THE
ORDER DENYING MOTION TO DISMISS DATED NOVEMBER 5, 2019

WILLIAMS COUNTY DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT
HONORABLE JOSHUA B. RUSTAD, DISTRICT JUDGE

GARAAS LAW FIRM

Jonathan T. Garaas
Attorneys for Successor Trustee Mark Hiepler
Office and Post Office Address
DeMores Office Park
1314 23rd Street South
Fargo, North Dakota 58103
E-mail address: garaaslawfirm@ideaone.net
North Dakota Bar ID#03080
Telephone: 701-293-7211

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[¶1]

PETITION FOR REHEARING

[¶2] Mark Hiepler as successor trustee of the Orville G. Hiepler and Florence L. Hiepler Family Trust dated January 9, 1997 [hereinafter “Hiepler Family Trust”], hereby petitions for rehearing pursuant to N.D.R.App.P. 40 predicated upon the North Dakota Supreme Court’s unprecedented opinion/decision which is based upon factual and legal falsehoods, and even beyond the jurisdiction of the North Dakota Supreme Court – it has no authority to alter a final judgment involving the Hiepler Family Trust, and as to any substitution for Orville L. Hiepler, the substituted party has to act within the legal constraints of the Uniform Probate Code.

[¶3]

The Judgment as to the Hiepler Family Trust was final

[¶4] Predicated upon an appeal by Appellant-Defendants Bill L. Seerup and Hurley Oil Properties, Inc., *only briefing and deciding issues pertaining to Orville L. Hiepler, an individual*, the North Dakota Supreme Court issued its opinion reported as Dale Exploration, LLC v. Hiepler, 2018 ND 271, 920 N.W.2d 750 [App., p. 126; specifically p. 137], which “reverse(d) the damages judgment and remand(ed) for further proceedings consistent with this opinion”, and also, issued its Judgment which provided “the judgment of the district court was REVERSED and REMANDED for further proceedings consistent with the opinion.” App., p. 138.

[¶5]

The District Court’s underlying Judgment with respect to the Hiepler Family Trust [App., ps. 100-120] was not altered, modified, or changed by the Dale Exploration decision – the right, title and interest of the “Hiepler Family Trust” was “quieted” and “the adverse claims of the Defendants Bill L. Seerup, Hurley Oil Properties, Inc., the Hefner Company, Inc., and/or Family Tree Corporation, and each of them (were) determined to be non-existent,

invalid, inferior and junior to the right, title and interest of (the Hiepler Family Trust) ..” and said referenced Defendants were “forever barred and enjoined from further asserting the same.” Judgment, ¶4; App., ps. 107-108; see also, ¶18; App., p. 118. Moreover, the Hiepler Family Trust was determined by the District Court to have never contracted with Defendants Bill L. Seerup, Hurley Oil Properties, Inc., Family Tree Corporation, nor the Hefner Company, Inc., so no privity of contract, estate, or property ever existed. Judgment, ¶s 10, 12, & 14; App., ps. 112-113.

[¶6] Put in other words – the decision as to the Hiepler Family Trust was final, it had survived an appeal which only focused upon *the actions of Orville G. Hiepler as an individual* – never his actions as Trustee.

[¶7] **The Supreme Court is without jurisdiction to alter a final judgment, nor does it have jurisdiction to determine facts**

[¶8] The role of the District Court was succinctly stated in State, ex rel. Harris v. Lee, 2010 ND 88, ¶ 13, 782 N.W.2d 626:

Under N.D. Const. art. VI, § 8, the district court has “original jurisdiction of all causes, except as otherwise provided by law.” Section 27–05–06(1), N.D.C.C., clarifies that district courts have “[c]ommon-law jurisdiction and authority within their respective judicial districts for the redress of all wrongs committed against the laws of this state affecting persons or property.”

[¶9] While the Supreme Court is the highest court of the state, it only has “appellate jurisdiction” [with some limited original jurisdiction] under Article 6, § 2, of the North Dakota Constitution. See also, N.D.C.C. § 27-02-04 wherein it is expressly stated “(t)he supreme court may exercise appellate jurisdiction only, except when otherwise specially provided by law or by the constitution.” When the District Court decision with respect to the Hiepler Family Trust was not challenged on appeal, it is a “final judgment” – never again subject to later appeal. Time limits set forth in N.D.R.App.R. 4 also preclude appellate

action. The Supreme Court does not have either the “original jurisdiction” reserved to district courts, nor the “[c]ommon-law jurisdiction and authority .. for the redress of all wrongs committed against the laws of this state affecting persons or property”. See, N.D.C.C. § 27–05–06(1).

[¶10] The jurisdictional limitations set by constitution and statutes is important; the earlier decision of Dale Exploration, LLC v. Hiepler did nothing to alter the judicially determined (at the district court) ownership of the mineral interests of the Hiepler Family Trust, and the North Dakota Supreme Court did not change the underlying judgment. As to only Orville G. Hiepler, an individual (then being also a Trustee), the Supreme Court sent it back for subsequent action by the district court judge to consider/address the statutory presumption – but, if facts warranted utilization of the statutory presumption, the lower court could only require the “individual” action of Orville L. Hiepler, as Settlor, to withdraw sufficient mineral acres from the separate legal entity [Hiepler Family Trust] to satisfy any court-ordered specific performance.

[¶11] This Court’s current statement [“We reversed the judgment and remanded for the court to order specific performance”, citing *Dale Expl.*, 2018 ND 271, ¶ 22, 920 N.W.2d 750] is false. No order for specific performance was issued, nor is it jurisdictionally possible – at best, the lower court’s legal errors were identified, to be remedied “in further proceedings consistent with this opinion.” *Id.*, ¶ 23. The district court could do anything consistent with the evidence and law, to include entry of an order indicating specific performance was inappropriate because Bill L. Seerup (and/or Hurley Oil) never met the “burden of proving or establishing the right and need for such relief”, “proof .. of good faith”, “legal remedy of damages is inadequate”, and/or “an award of damages will fail to put the

injured party in as good a position as if the other party had fully performed”. Jonmil, Inc. v. McMerty, 265 N.W.2d 257 (ND. 1978) notes specific performance must be based upon the “sound discretion of the court”, and the burden of proof and pleading imposed upon anyone requesting deviation from the legal remedy, as quoted above from page 259.

[¶12] The pleadings, now deemed adequate to argue for specific performance, do not excuse Bill L. Seerup’s (or Hurley Oil’s) failure to 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. Indeed, their own expert established the legal damages would be appropriate – and Orville G. Hiepler had a right to rely upon such evidence even if offered by Bill L. Seerup who falsely testified, and showed only “bad faith”.

[¶13] N.D.C.C. § 32-04-13 forbids enforcement by specific performance against parties to the contract if facts supporting any of the four subsections exist; most certainly there can be no specific performance ordered against a “replacement party” (a) never allowed due process of law, and (b) never a party to any contract. By stipulation, the Mineral Deed cannot be reformed to include the Hiepler Family Trust, and no burden can be placed upon a non-party to an executed contract.

[¶14] Aside from the fact that Hiepler Family Trust was not involved in the original “counterclaim”, due process of law would still require that it be afforded the opportunity to answer pleadings when properly served, along with discovery, notice, hearing, opportunity to call witnesses, and ultimately a trial – not even the Supreme Court has authority to ignore constitutional and statutory predicates mandating due process of law. North Dakota

Constitution, Article 1, § 12. “Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.” The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan v. Louisiana*, 391 U.S. 145, 147–149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

[¶15]

Prayer for Rehearing

[¶16] The subsequent death of Orville G. Hiepler should have stopped all proceedings – the action abates. Seerup and Hurley Oil would still have their rights to pursue their claims, but North Dakota law dictates that such be done under the procedures set forth in the Uniform Probate Code. N.D.C.C. Title 30.1, see specifically, N.D.C.C. Chapter 30.1-19 establishing procedures for creditors’ claims.

[¶17] The only evidence of damages that exists suggests legal damages were fully adequate, and the presumption for specific performance under N.D.C.C. § 32-04-09 would never arise, but if such is possible, the successor of Orville G. Hiepler would always be entitled to a process conforming to due process of law established by the Uniform Probate Code. Orville G. Hiepler’s death caused all action based on contracts to abate as a matter of law. N.D.C.C. § 28-01-26.1. Only a Personal Representative can be substituted for a decedent. See, N.D.C.C. Chapters 30.1-17 and/or Chapter 30.1-18. Why are the beneficiaries and/or heirs of Orville G. Hiepler not entitled to equal protection of the law? Constitution of North Dakota, Article 1, § 21; Fourteenth Amendment to the United States Constitution.

[¶18] Without doubt, under N.D.C.C. § 30.1-18-01, “(t)he duties and powers of a personal representative commence upon appointment. ..”. When the creditors’ claims are legally processed under the now-applicable Uniform Probate Code, the Personal Representative may

be compelled to withdraw mineral interests – but the constitutionally recognized requirement for due process involves different proceedings than these abated – as a matter of law that cannot be ignored by this North Dakota Supreme Court.

[¶19] The Supreme Court of North Dakota confuses “substitution” with “replacement” – while the law allows for the *substitution* of a Personal Representative, due process of law will never allow for the *replacement* of a party post-trial.

[¶20] The Supreme Court further errs by not addressing the obvious – not even courts can go back in time to make the specific performance effective April 7, 2007, by way of either deed or judicial order. Furthermore, even if it could, such does not take into account the 7.6363 mineral acres known to have been previously deeded which is now ignored. The “stipulation” – the law of the case – precludes retroactive reformation of the deed. The action against Orville G. Hiepler abated upon his death, and the mislabeled cross claim – only lodged against him and his deceased wife – should have been dismissed.

Respectfully submitted this 8th day of July, 2020.

Garaas Law Firm

/s/ Jonathan T. Garaas

Jonathan T. Garaas
Attorneys for Successor Trustee Mark Hiepler
Office and Post Office Address:
DeMores Office Park
1314 23rd Street South
Fargo, North Dakota 58103
E-mail address: garaaslawfirm@ideaone.net
Telephone: (701) 293-7211
North Dakota Bar ID #03080

The above-signed attorney certifies, pursuant to N.D.R.App.P. 32(e), that the Appellant’s Petition for Rehearing consisting of ten (10) pages complies with the ten (10) page limitation imposed by N.D.R.App.P. 40(b) for petitions for rehearing.

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

Plaintiffs-Appellees vs

Orville G. Hiepler; Florence L. Hiepler; Mark
Hiepler as successor trustee of the Orville G.
Hiepler and Florence L. Hiepler Family Trust
dated January 9, 1997; the Hefner Company,
Inc.; Bill L. Seerup; and Hurley Oil Properties,
Inc.

Defendants-Appellant or Appellees

State of North Dakota
County of Cass

Affidavit Of Service By Electronic Means
Supreme Court No. 20190338

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

[¶1] Jonathan T. Garaas, being first duly sworn on oath, deposes and says that 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 8th day of July, 2020, Affiant electronically served a true and correct copy of the following document(s) in the above entitled action: **Petition for Rehearing**

[¶3] The electronically attached documents were served upon the identified lawyer as follows:

[¶4] Adam Michael Olschlager at aolschlager@crowleyfleck.com

[¶5] Jordon Evert at jordon@furusethlaw.com

[¶6] To the best of Affiant's knowledge, the electronic address above given was the actual electronic mailing address of the party intended to be so served. The above documents were duly e-mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure, as revised by other rules.

/s/ Jonathan T. Garaas

Jonathan T. Garaas

Subscribed and sworn to before me this the 8th day of July, 2020.

/s/ David Garaas with seal

Notary Public