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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

The Estate of Leroy E. Seidel, Plaintiff and Appellee, v. James A. Seidel, Gravel Supply LLC And Troy Seidel, Defendants and Appellants,	**SUPREME COURT NO. 20200148** District Court No. 53-2016-CV-01304

On Appeal from the Findings of Fact, Conclusions of Law, and Order for Judgment dated November 22, 2019 and the Final Judgment dated May 13, 2020, in District Court Case Number 53-2016-CV-01304

County of Williams, Northwest Judicial District
Honorable Josh B. Rustad, Presiding

ORAL ARGUMENT REQUESTED

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES

[¶1] Whether the 2007 Settlement Agreement reached in Civil Case No. 53-2016-CV-01304 was ambiguous (as to conveyance of surface mineral interests (gravel)) as a matter of law?

[¶2] Whether the trial court abused its discretion on evidentiary findings that 2007 settlement and 2008 warranty deed did not intend to convey any surface minerals (gravel) to Defendant/Appellant James Seidel?

[¶3] Whether the mineral estate included surface minerals (gravel) was previously severed by prior deeds and was not conveyed by 2008 Warranty Deed as a matter of law.

[¶4] Whether doctrine of *Res Judicata* or collateral estoppel apply to facts of this case as regards to issue of ownership right to the surface minerals (gravel)?

[¶5] Whether trial court abused its discretion in finding cause to pierce the company veil and hold Defendants personally liable for the damages determined owed by Defendants/Appellants James Seidel and Troy Seidel?

STATEMENT OF THE CASE

[¶6] This case has its roots in the settlement documents (deed) given in a prior Contract for Deed case litigated between Leroy E. Seidel and his brother James A. Seidel concerning the Seidel family farmland involving a Contract for Deed James A. Seidel entered into with his widow mother for the surface farm acres located North West of Williston in Williams County. That case was Civil No. 06-C-0248, District Court, Williams County, North Dakota. That action was resolved by a 2007 Stipulated Settlement (Doc. No. 7 and 73) and a Judgment for dismissal with prejudice was entered in the Contract for Deed action.

[¶7] Pursuant to the terms of the settlement agreement in the Contract for Deed action, the subject February 14, 2008 Warranty Deed from Leroy Seidel to James Seidel was signed and recorded (Doc. No. 41) which deed did not reserve any minerals.

[¶8] The present action for an accounting, damages and declaratory relief as to the interests passed under the subject February 14, 2008 Warranty Deed was commenced in October 2016.

[¶9] Defendant/Appellant James Seidel, in this action, moved for partial summary judgment filed December 21, 2018 (Doc. No. 32) on the basis the subject February 14, 2008 Warranty Deed itself was, unambiguous and clear on its face, that as no surface minerals were reserved (gravel) in such deed, by law § 47-10-25 N.D.C.C. the surface minerals (gravel were now owned by James Seidel as a matter of law.

[¶10] The trial court, by Order entered March 5, 2019 (Doc. No. 70), found that the 2007 settlement agreement (by which the 2008 Warranty Deed was given) was ambiguous and denied Defendant James Seidel's motion for Partial Summary Judgment

and the action moved forward to an evidentiary trial on the issue of the intent of the parties regarding the subject February 14, 2008 Warranty Deed.

[¶11] An evidentiary hearing was held over two days beginning March 21, 2019 and after post trial briefs and after proposed findings were considered by the trial court, the trial court issued its Findings of Fact, Conclusions of Law and Order for Judgment on November 22, 2019 holding the February 14, 2008 Warranty Deed did not convey any gravel rights to James Seidel.

[¶12] A motion for attorney's fees was made by Plaintiff Leroy Seidel December 13, 2019 and was opposed by Defendants/Appellants James Seidel and Troy Seidel and an Order denying attorney's fees was entered by the Court February 11, 2020 (Doc. No. 190).

[¶13] Judgment in this action was entered May 11, 2020 (Doc. No. 193) and Notice of Appeal of the Judgment was filed June 3, 2020 (Doc. No. 196).

STATEMENT OF THE FACTS

[¶14] This action concerns a claim by Leroy Seidel (now Estate of Leroy Seidel) to a one-half (½) undivided interest in and to the surface minerals (primarily gravel) and accounting for the mining and sale of such gravel interests from Seidel land located in Williams County, North Dakota. (hereinafter "Seidel land" or "farmland")

[¶15] The chain of record title regarding the surface minerals (to include gravel) established by the exhibits received at trial for the Seidel land, shows that beginning by Mineral Deed dated January 17, 1978, recorded as document no. 386274, (received as Exhibit 3 Doc. No. 129) the record title holding parents to Leroy and James, conveyed an

undivided one-half (½) interest to the mineral estate described equally to Leroy Seidel and James Seidel, which Mineral Deed, specifically named the surface minerals of coal, clay, scoria and **gravel** as part of the severed mineral estate, concerning the following land described as:

Township 156 North, Range 101 West
Section 20: SE¼NE¼, NE¼SE¼
Section 21: SW¼, SW¼SE¼
Section 28: N½NW¼, NW¼NE¼, S½NE¼
Section 29: E½SE¼

[¶16] The February 17, 1978 mineral deed was followed by a mineral deed dated September 28, 1999 (Exhibit 3 Doc. ID No. 129) by the surviving widow mother Hilda Seidel, recorded as document no. 587811 (also received as Exhibit 3, Doc. No. 129), which mineral deed conveyed an undivided one-half (½) interest to the mineral estate described to Leroy and James, one-half (½) of the mineral estate described to James, which mineral deed also specifically named the surface minerals of coal, clay, scoria and **gravel** as part of the severed mineral estate, concerning the following land described as:

Township 156 North, Range 101 West of the 5th P.M.
Section 33: N½NW¼, SE¼NW¼, NE¼SW¼
Section 28: S½

Containing 320 acres, more or less,

Township 156 North, Range 101 West
Section 20: SE¼NE¼, NE¼SE¼
Section 21: SW¼, SW¼SE¼
Section 28: N½NW¼, NW¼NE¼, S½NE¼
Section 29: E½SE¼

[¶17] The above descried mineral deeds were of record on or about March 17, 2003 when Hilda Seidel, then a widow, entered into a Contract for Deed (Exhibit 4 Doc.

ID No. 130), with son James, for the surface only of the Seidel land ("The contract"). The Contract for Deed specifically states it concerns the surface only and was subject to all prior reservations of record (which reservations included the surface minerals and specifically included coal, clay, scoria and gravel by name) as referenced in the mineral deeds set forth above.

[¶18] At trial, James testified to admit, that the Contract for Deed did not cover any minerals, including specifically, the surface minerals of coal, clay, scoria and gravel. (Transcript of trial pp 35-37). Because the Contract for Deed did not conform to the terms of the Last Will and Testament (with Codicil) of Hilda Seidel, which Last Will and Testament gave James the right to buy the surface Seidel farmland subject to the severed mineral estate, for an appraised price, with the sale proceeds half to be shared with Leroy; a lawsuit was commenced by Leroy in the District Court, Williams County, as Court Case No. 06-C-0248 over the Contract for Deed ("contract litigation").

[¶19] After several years of litigation a settlement (Exhibit 9 Doc. ID No. 136) was reached between Leroy and James of the claims made in the contract litigation Civil Case No. 06-C-0248; which settlement terms were for each party to obtain an appraisal of the surface only (no minerals were appraised including no surface minerals) and James would pay to Leroy one-half (½) of the average of the two appraisals; and Leroy in exchange, would execute a deed to James for Leroy's interest in the property purchased by James under the Contract for Deed.

[¶20] The two appraisals commissioned to settle the contract litigation were received as Exhibits 5 and 6 (Doc. ID Nos. 131 and 132) at the trial, clearly valued only the surface of the Seidel land and did not value any minerals including surface minerals such as coal, clay, scoria and gravel. No claim was made in the contract litigation

involving the mineral estate, surface minerals and particularly gravel under the Contract for Deed land.

[¶21] A standard form of Release of Claims (Exhibit 14 Doc. ID NO. 141) was signed by Leroy and James December 18, 2007. James paid Leroy the settlement price and Leroy signed a Warranty Deed dated February 14, 2008 recorded as document no. 652695 by Leroy as Grantor to James as Grantee (Exhibit D-6 Doc. ID No. 152) which deed was prepared by James' attorney in the contract litigation and contains no mention or reservation of any mineral estate or gravel in the subject deed.

[¶22] The deposition transcript of James Seidel, taken in the contract litigation Civil Case No. 06-C-0248 contains the sworn testimony of James admitting that the Contract for Deed between Hilda Seidel and himself did not involve the sale or purchase of any minerals. (Exhibit 8 Doc. ID No. 135 lines 21-25). See also Transcript in this case pp. 35-37.)

[¶23] Several months before the commencement of the contract litigation, James, in his fiduciary capacity as Personal Representative for the estate of Hila Seidel, deceased, did sign and deliver a Personal Representative's Mineral Deed of Distribution, dated May 3, 2006 and recorded as document no. 635275 (Exhibit 7 Doc. ID No. 133) conveying an undivided one-half (½) mineral interest to Leroy and an undivided one-half (½) mineral interest to James. The mineral interest described in this May 3, 2006 Mineral Deed follows the previous description by Hilda Seidel to include surface minerals, and gravel in particular, by name and covers the following described Seidel land located in Williams County, described as:

> An undivided one-fourth (¼) interest in
> Township 155 North, Range 102 West

Section 5: S½NE¼, Lots 1 and 2
Section 6: SE¼NW¼, Lots 3, 4 and 5

An undivided one-eighth (1/8) interest in
Township 155 North, Range 102 West
Section 6: E½SW¼, Lots 6 and 7
Section 7: E½NW¼, Lots 1 and 2

An undivided one-fourth (¼) interest in
Township 156 North, Range 102 West
Section 19: NE½

This Mineral Deed of Distribution comes subsequent to the March 17, 2003 Contract for Deed and before the February 14, 2008 Warranty Deed signed in settlement of the contract litigation.

[¶24] Subsequent to the settlement of the contract litigation additional minerals were found as part of Hilda Seidel's estate and after obtaining, Letters for Subsequent Administration, James as Personal Representative for the Estate of Hilda Seidel, did execute a Personal Representative's Mineral Deed of Distribution dated April 13, 2010 and recorded as document no. 686438 (Exhibit 7A Doc. ID No. 134) covering the following Seidel land located in Williams County, described as:

Township 155 North, Range 103 West
Section 1: Lot 1, Lot 2, S½NE¼

which again conveyed the minerals described equally ½ to Leroy and ½ to James; **however, this particular April 13, 2013 mineral deed was changed from all prior mineral deeds and left out "gravel" from the list of named surface minerals** as was previously specifically described in all previous mineral deeds.

[¶25] Leroy then commenced a Quiet Title Action on or about January 8, 2014, in the District Court, Williams County ("Quiet Title Action") seeking to clarify and quiet

title to the oil and gas mineral estate after Bakken oil wells had been drilled on Seidel land and division order title opinions had been prepared by the oil company flagging the February 14, 2008 deed as to the intent of the parties.

[¶26] To clear up title to the oil and gas interests, a settlement was reached December 4, 2014, in the Quiet Title action between Leroy and James, in the form of a settlement agreement, and a Stipulation of Interests, as to the oil and gas; however, such settlement and Stipulation of Interest (dated November 20, 2014 and recorded as document no. 797849) contained specific wording such document did not cover clay, scoria or gravel, nor was to contrive or interpret the rights or obligations of the settlement reached in the contract litigation, where the Stipulation of Interest states of record title:

> WHEREAS, the parties desire to settle the quantity of ownership in the oil, gas, casinghead gas, casinghead gasoline, and fissionable materials, in, under and that may be produced from the above described real property, and said parties desire to stipulate their interest in said property,. The parties specifically agree that clay, scoria, and gravel are not included in this stipulation and cross-conveyance. Further, the parties specifically agree this stipulation and cross-conveyance in no way construes or interprets the Parties' rights, obligations or intentions in that certain Settlement Agreement entered into by and between the parties in Civil No. 06-C-0248 in District Court, Williams County, North Dakota.

(See Exhibit 10 Doc. ID NO. 137)

[¶27] In 2012, James formed a limited liability company called North America Earth Products, L.L.C., a North Dakota Limited Liability Company ("Earth Products"), with James as owner and managing member, and James did then lease the surface minerals, including gravel to the company Earth Products.

[¶28] In 2012 Defendant Troy Seidel ("Troy"), son of James, formed a North Dakota Limited Liability Company called Gravel Supply, L.L.C. ("Gravel Supply"), with

Troy Seidel, as managing member, which included the other children of James; namely Chad Seidel and Nicole (Seidel) Harts as members.

[¶29] By contract captioned "Agreement to Sell and Purchase Sand and Gravel" dated May 1, 2012 (Exhibit D-12) Earth Products entered into a contract with Gravel Supply for the mining and sale of sand and gravel by Gravel Supply for the rate of 50¢ per yard of gravel mined to be paid by Gravel Supply to Earth Products. Leroy Seidel was not part of this contract or any contract to mine and sell his interest in surface minerals and gravel in particular from Seidel land.

[¶30] The evidence at trial, through copies of cancelled checks and bank records, documented, gravel sales by Gravel Supply to end consumers totaling the sum of $137,917.90. (Exhibit 12 Doc ID. No. 139 and Exhibit D-15 Doc. ID. No. 161)

[¶31] The gravel was mined by Troy Seidel with assistance by James on site occurring on Seidel land using equipment provided by James for the effort. Gravel Supply was involuntarily dissolved by the North Dakota Secretary of State. James testified that neither he personally, nor the company Earth Products, has received any payment for the gravel mined and sold by Troy or Gravel Supply and that the claimed expenses and cost of mining operations owed to James for use of his farm equipment and gravel supply farm conveyor equipment for use of this equipment has been, "on the books", but never paid by Troy or Gravel Supply to James or Earth Products. James testified no bills for such expenses or demands for payment of royalty for gravel sold has been sent by him or Earth Products to Troy or Gravel Supply. (*See* transcript pp. 107-113, p. 147, 151-153.)

[¶32] Troy Seidel testified that he has paid himself "expenses" as a salesman for the gravel sales but has not paid James or Earth Products. Troy confirmed the company Gravel Supply, L.L.C. has been involuntarily dissolved and James has formed a new family company partnership "Tango Sierra Properties, L.L.L.P." with his children. ("Tango Sierra") and that by Quit Claim Deed dated December 26, 2014 James and Judy Seidel did deed all of the Seidel land without reservation to Tango Sierra (Exhibit D-9 Doc. ID No. 155), however, Tango Sierra has not mined or sold any gravel. All sales subject to this action were made by Troy Seidel d.b.a Gravel Supply. (*See* transcript p. 147, pp. 165-167, 183-184, 186-188).

[¶33] The testimony at trial, by both James and Troy, was, that no amounts have been invoiced or paid for the mining royalty owed, and no payment has ever been paid to James or Earth Products for use of the mining equipment. James testified that no bills, invoices or collection has been initiated by James to collect upon these costs of mining. Troy testified that he has paid himself "reasonable expenses" for the job as a salesman for the gravel. No arm's length documentation of expenses, ledgers, payments of accounts payable to James or Earth Products, or evidence of independent operations of Gravel Supply, was provided to the Court at the trial.

STANDARDS OF REVIEW ON APPEAL

[¶34] This appeal involves appellate "*de novo*" review of issues of law, and "abuse of discretion" review of issues of fact as determined by the trial court.

[¶35] On the issue whether the 2007 Settlement Agreement was ambiguous and required an evidentiary hearing, this issue involves both an initial *de novo* review on the issue of ambiguity and a follow up abuse of discretion reviewed on the factual issue to

resolve such ambiguity as was discussed by this Court in *Thomas C. Roel Associates, Inc. v Henrikson,* 295 N.W.2d 136, 137 (ND 1980):

> Here, Roel contends that the terms of the agreement are ambiguous. Whether or not ambiguity exists is a question of law for the courts. *Kruger v. Soreide,* 246 N.W.2d 764 (N.D. 1976); *Grove v. Charbonneau Buick-Pontiac, Inc.,* 240 N.W.2d 853 (N.D. 1976). But once it is determined that an agreement is ambiguous and that the parties' intent cannot be ascertained from the writing alone, reference must then be made to extrinsic evidence, and those questions in regard to which extrinsic evidence is adduced are questions of fact to be determined by the trier of fact. *Metcalf v. Security Intern. Ins. Co.,* 261 N.W.2d 795 (N.D. 1978); *Farmers Elevator Company v. David,* 234 N.W.2d 26 (N.D. 1975). If the agreement in this instance is ambiguous, then, as with any ambiguous contract, a hearing should be held so that evidence of the parties' intent at the time the agreement was entered into may be presented to aid the court in interpreting the agreement. Sec. 9-07-12, N.D.C.C.

[¶36] On the issue of application of *Res Judicata* or collateral estoppel to the facts of this case, these are issues of law under a "*de novo*" standard of review.

[¶37] The standard of review for review of the trial court's findings supporting the piercing of the corporate veil is a heavily fact specific determination, and accordingly, is subject to review whether the trial court abused its discretion, when making such a determination. *Watts v. Magic 2%2A 52 Mgmt., Inc.,* 2012 ND 99 ¶ 13, 816 N.W.2d 770.

[¶38] On the issue of damages raised by the Defendants/Appellants such findings by the trial court are fact dependent and are subject to our abuse of discretion review by the Court.

LAW AND ARGUMENT

I Summary of Argument

[¶39] As will be documented below, the parents to sons Leroy Seidel and James Seidel, by mineral deeds executed years before the Contract for Deed did sever the mineral estate from the surface farmland. These mineral deeds filed as exhibits with the

trial court specifically name and include gravel and other surface minerals as part of the severed mineral estate.

[¶40] The Contract for Deed litigation initiated in 2006 only involved the surface farm acreage where the severed mineral estate (to include gravel) was never part of the litigation or settlement contract reached in 2007 to resolve the contract for deed action.

[¶41] The subject February 14, 2008 Warranty Deed given by Leroy Seidel to James Seidel, as part of the settlement agreement in the contract for deed action, does not have any mineral reservation. However, the trial court held the settlement agreement to be ambiguous as to the issue of gravel, denied partial summary judgment based on the sole reliance of the 2008 Warranty Deed, held the deed to be part of a series of transactions involved in the settlement, and held an evidentiary hearing as to the intent of the parties regarding the settlement (of which the 2008 Warranty Deed was made a part) to make findings, it was not the intent of the parties, to transfer any mineral estate (gravel rights) in the settlement of the contract for deed litigation.

[¶42] The 2008 Warranty Deed also caused record title problems with Bakken Oil Wells drilled subsequent to the 2008 Warranty Deed which were resolved in the settlement of the Quiet Title action brought by Leroy Seidel in 2014 which was resolved by a Stipulation of Interest and dismissal of the Quiet Title Action. That stipulation of interest specifically stated no resolution of the gravel rights was made by the parties, reserving the right to determine the issue of surface mineral (gravel) rights.

[¶43] As the gravel was mined and sold by James Seidel and Troy Seidel years after the contract for deed action, which has led to the present action for declaratory relief

as to the gravel interests passed by the 2008 Warranty Deed and damages for Leroy Seidel's half interest in the gravel sold from Seidel land.

[¶44] As the issue of the mineral estate was never involved in the contract for deed action and was specifically and intentionally omitted and reserved by the parties in the settlement of the Quiet Title Action involving the oil and gas interests, the doctrine of *res judicata* and collateral estoppel do not apply as a matter of law.

[¶45] That leaves the issue of whether the trial court abused its discretion involving the intent of the parties of the terms in the Contract for Deed settlement of which the February 14, 2008 Warranty Deed was made a part of the Settlement.

[¶46] Here, there is more than ample, proper and documented evidence in the record, supporting the trial court's findings that the gravel rights were never involved in the settlement and were not intended to be transferred form Leroy Seidel to James Seidel under the subject February 14, 2008 Warranty Deed.

[¶47] There is further compelling factual evidence in the record, relied upon by the trial court, to support the trial court piercing the company veil to hold James Seidel and Troy Seidel jointly and severally liable to pay the damages for the half interest in the gravel proceeds belonging to Leroy Seidel.

[¶48] Finally, as the issue of gravel rights was not part of the 2006 Contract for Deed litigation and settlement of same, and was specifically omitted by the settlement of oil and gas rights in the 2014 Quiet Title action, the gravel issue was not litigated on the merits in either prior action, the doctrines of *res judicata* and collateral estoppel do not apply as a matter of law.

II Mineral Estate was Severed and Not a Part of 2006 Contract for Deed Litigation

[¶49] The above Statement of Facts documents the exhibits and testimony received in this action showing that the parents of sons Leroy Seidel and James Seidel executed several mineral deeds which severed the mineral estate from their surface farmland. All of these mineral deeds were signed and recorded years before the Contract for Deed for the surface of the family farmland was entered into between the widow mother Seidel and James Seidel, before commencement of the 2006 civil action concerning the Contract for Deed, before the 2007 Settlement contract, and before the February 14, 2008 Warranty Deed. Critical to this appeal, each prior mineral deed specifically names and includes the surface minerals, including specifically naming gravel, as part of the severed mineral estate.

[¶50] The claims and subject matter of the Contract for Deed action in civil case no. 53-2006-CV-0248 solely concerned the surface farmland and such legal action had absolutely nothing to do with the mineral estate (which included gravel).

[¶51] The settlement contract (Doc. No. 63) had several parts, one of which, involved a deed to be executed by Leroy Seidel to James Seidel covering the lands covered by the Contract for Deed. It is the February 14, 2008 Warranty Deed (Doc. No. 152), executed as part of the Settlement contract, which is at the center of this appeal, which deed did not reserve any minerals, and is claimed by James Seidel to have conveyed title to all surface minerals and gravel rights to James Seidel. As the stipulation for settlement, with its terms, was not set forth in any Judgment where the only judgment entered in action 53-2006-CV-0248 was a judgment for Dismissal with Prejudice; no doctrine of merger has occurred and we look to the settlement stipulation for the intent of

the parties. *Ridley v. Metropolitan Federal Bank FSB,* 544 N.W.2d 867, 868 (N.D. 1996).

[¶52] A settlement agreement is a contract, and is subject to all rules of consideration, ambiguity and issues of intent under the law. *Hastings Pork v Johannson,* 335 N.W.2d 802, 805 (N.D. 1983) *citing, Sorlie v. Ness,* 323 N.W.2d 841 (N.D. 1982).

[¶53] The settlement contract, and its parts, to resolve the Contract for Deed action, relied upon the average of two appraisals of only the surface farmland which appraisals did not involve or value the severed mineral estate or any surface minerals (gravel) located on the Seidel farmland. (See stipulated settlement Doc. No. 63). As part of the settlement contract, Leroy Seidel was also to give a Warranty Deed to James Seidel to clear title to the land covered by the Contract for Deed. There is nothing in the settlement contract mentioning or including any mineral interest, surface mineral interest or gravel deposits in, under or that which could be produced from the subject Seidel farmland.

[¶54] The February 14, 2008 Warranty Deed (Doc. No. 152) was signed by Leroy Seidel, as was agreed in the settlement agreement, contains no mineral reservation of any kind. (See February 14, 2008 Warranty Deed at Doc. No. 152).

[¶55] Instruments executed by the same parties in the course of the same transaction and concerning the same subject matter may be read and construed together. *Nichols v. Goughnour,* 2012 ND 178 ¶ 13, 820 N.W.2d 740, *citing Trengen v. Mongeon,* 206 N.W.2d 284, 286 (N.D. 1973). *See also* N.D.C.C. 9-07-07 "[s]everal contracts relating to the same matters between the same parties and made as parts of substantially one transaction are to be taken together." *See also, Knox v. Krueger,* 145 N.W.2d 904,

907 (ND 1966). This point was discussed by this Court in *Nichols, supra* ¶ 13, where this Court stated:

Instruments that have been executed at the same time, by the same parties, in the course of the same transaction, and concerning the same subject matter, may be read and construed together. *Trengen v. Mongeon,* 206 N.W.2d 284, 286 (N.D. 1973). In *Trengen,* at 286, this Court said a warranty deed conveying 960 acres of land and a separate payment agreement reciting consideration for the 960 acres between the same parties must be construed together to ascertain the parties' intentions. Under N.D.C.C. § 9-07-07, "[s]everal contracts relating to the same matters between the same parties and made as parts of substantially on transaction are to be taken together." In *First Nat'l Bank v. Flath,* 10 N.D. 281, 287, 86 N.W. 867, 870 (1901) this Court interpreted that language and stated the requirement that several contracts are to be "taken together" does not mean they are to be joined into a single contract. This Court said that language means the contracts "are to be taken together" for the purpose of interpreting either the transaction to which they relate, or the several contracts themselves. *Id.* This Court explained the statute does not purport to destroy the separate identity of the several contracts and does not unite two or more contracts relating to a transaction into a single contract. *Id.*

[¶56] A contract is ambiguous when rational arguments can be made for different interpretation. *Gawryluk v. Poynter,* 2002 ND 205 ¶ 654 N.W.2d 400, *citing Minex Resources Inc. v. Morland,* 467 N.W.2d 691, 696 (ND 1991), *Miller v. Schwartz,* 354 N.W.2d 685, 688 (N.D. 1984).

[¶57] Here, the Contract for Deed litigation had absolutely no mention of any mineral interests, particularly, no mention or involvement of any surface minerals or gravel rights. The stipulated settlement (Doc. No. 63) provides for a release of claims to be signed; a deed for Leroy to sign his interest on the land canceled by the Contract for Deed to brother James Seidel; two appraisals of the surface land to get averaged to establish the buyout, and for James to buy out Leroy's interest in the Contract for Deed. No mention of conveyance of any oil or gas rights or surface minerals (gravel) is stated in the Settlement. The release of claims only covers the claims concerning the Contract for Deed and the issue of gravel ownerships ripens many years into the future. Hence a

rational argument that no surface minerals were included in the settlement of the Contract for Deed litigation can be made regarding the settlement.

[¶58] Here, the February 14, 2008 Warranty Deed has no mention or reservation of any minerals in the deed. Consequently, James Seidel has advanced the legal argument the previously severed mineral estate was conveyed to him under the February 14, 2008 Warranty Deed, including surface minerals by operation of 47-10-24 N.D.C.C.. Here, a rational argument can be made the settlement did convey the surface minerals to James Seidel.

[¶59] This is a definite and obvious case of an ambiguous settlement contract issue where reasonable arguments, can be and have been made, on whether the February 14, 2008 Warranty Deed, passed any mineral title and particularly surface minerals (gravel) from Leroy Seidel to James Seidel.

[¶60] Defendants James Seidel and Troy Seidel made a motion for Partial Summary Judgment based on the February 14, 2008 Warranty Deed and the Release of Claim contract, the trial Court correctly identified the ambiguity, denied summary judgment and set this action for an evidentiary hearing. (See Order denying motion for Partial Summary Judgment Document No. 70 at ¶¶ 8 and 13).

[¶61] The trial court did then properly follow the judicial protocol for scheduling an evidentiary hearing to determine the intent of the parties and what real property interests were intended to be conveyed under the February 14, 2008 Warranty Deed, as such procedure has been set forth by this Court in *Thomas C. Roel Associates, Inc. v. Henrikson,* 295 N.W.2d 136,137 (N.D. 1980), as follows:

> Here, Roel contends that the terms of the agreement are ambiguous. Whether or not an ambiguity exists is a question of law for the courts. *Krieger v.*

Soreide, 246 N.W.2d 764 (N.D.1976); Here, Roel contends that the terms of the agreement are ambiguous. Whether or not ambiguity exists is a question of law for the courts. *Kruger v. Soreide,* 246 N.W.2d 764 (N.D. 1976); *Grove v. Charbonneau Buick-Pontiac, Inc.,* 240 N.W.2d 853 (N.D. 1976). But once it is determined that an agreement is ambiguous and that the parties' intent cannot be ascertained from the writing alone, reference must then be made to extrinsic evidence, and those questions in regard to which extrinsic evidence is adduced are questions of fact to be determined by the trier of fact. *Metcalf v. Security Intern. Ins. Co.,* 261 N.W.2d 795 (N.D. 1978); *Farmers Elevator Company v. David,* 234 N.W.2d 26 (N.D.1975). If the agreement in this instance is ambiguous, then, as with any ambiguous contract, a hearing should be held so that evidence of the parties' intent at the time the agreement was entered into may be presented to aid the court in interpreting the agreement. Sec. 9-07-12, N.D.C.C.

III Trial Court's Findings of Fact on Intent of Parties and Interest Conveyed Under February 14, 2008 Warranty Deed Have Good Support in the Record and Were Not an Abuse of Discretion by the Trial Court

[¶62] The standards for appellate review of a Finding of Fact by a trial court in a bench trial are long established by this Court applying as abuse of discretion standard of review:

In an appeal from a bench trial, 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. *Fargo Foods, Inc. v. Bernabucci,* 1999 ND 120, ¶ 10, 596 N.W.2d 38. 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 convection a mistake has been made. *Moen v. Thomas,* 2001 ND 95, ¶ 19, 627 n.W.2D 146,. "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.'" *Id.* at ¶ 20. *Brash v. Gulleson,* 2013 ND 156 ¶ 7, 835 N.W.2d 798.

[¶63] Here, the trial Court made the following specific Findings of Fact, on the intent of the parties on what real property interests were to pass under the February 14, 2008 Warranty Deed: (See trial Court's Findings of Fact at Doc. No. 171)

Findings

The chain of record title regarding the surface minerals (to include gravel) established by the exhibits received at trial for the Seidel land, shows that beginning by Mineral Deed dated January 17, 1978, recorded as document no. 386274, (received as

Exhibit 3 Doc. No. 129) the record title holding parents to Leroy and James, conveyed an undivided one-half (½) interest to the mineral estate described equally to Leroy and James, which Mineral Deed, specifically named the surface minerals of coal, clay, scoria and **gravel** as part of the severed mineral estate, concerning the following land described as:

Township 156 North, Range 101 West
Section 20: SE¼NE¼, NE¼SE¼
Section 21: SW¼, SW¼SE¼
Section 28: N½NW¼, NW¼NE¼, S½NE¼
Section 29: E½SE¼

The February 17, 1978 Mineral Deed was followed by a Mineral Deed dated September 28, 1999 (Exhibit 3 Doc. ID No. 129) by the surviving widow mother Hilda Seidel, recorded as document no. 587811 (also received as Exhibit 3), which Mineral Deed conveyed an undivided one-half (½) interest to the mineral estate described to Leroy and James, one-half (½) of the mineral estate described to James, which mineral deed also specifically named the surface minerals of coal, clay, scoria and **gravel** as part of the severed mineral estate, concerning the following land described as:

Township 156 North, Range 101 West of the 5th P.M.
Section 33: N½NW¼, SE¼NW¼, NE¼SW¼
Section 28: S½

Containing 320 acres, more or less,

Township 156 North, Range 101 West
Section 20: SE¼NE¼, NE¼SE¼
Section 21: SW¼, SW¼SE¼
Section 28: N½NW¼, NW¼NE¼, S½NE¼
Section 29: E½SE¼

The above descried Mineral Deeds were of record on or about March 17, 2003 when Hilda Seidel, then a widow, entered into a Contract for Deed (Exhibit 4 Doc. ID No. 130), with son James, for the surface only of the Seidel land ("The contract"). The Contract for Deed specifically states it concerns the surface only and was subject to all prior reservations of record (which reservations included the surface minerals and specifically included coal, clay, scoria and gravel by name) as referenced in the Mineral Deeds set forth above by the Court.

At trial, James testified to admit, that the Contract for Deed did not cover any minerals, including specifically, the surface minerals of coal, clay, scoria and gravel. (Transcript of trial pp 10-11). Because the Contract for Deed did not conform to the terms of the Last Will and Testament (with Codicil) of Hilda Seidel, which Last Will and

Testament gave James the right to buy the surface Seidel farmland subject to the severed mineral estate, for an appraised price, with the sale proceeds half to be shared with Leroy; a lawsuit was commenced by Leroy in the District Court, Williams County, as Court Case No. 06-C-0248 over the Contract for Deed ("Contract litigation").

After several years of litigation a settlement (Exhibit 9 Doc. ID No. 136) was reached between Leroy and James of the claims made in the Contract litigation Civil Case No. 06-C-0248, which settlement terms were for each party to obtain an appraisal of the surface only (no minerals were appraised including no surface minerals) and James would pay to Leroy one-half (½) of the average of the two appraisals; and Leroy in exchange, would execute a deed to James for Leroy's interest in the property purchased by James under the Contract for Deed.

The two appraisals commissioned to settle the Contract litigation were received as Exhibits 5 and 6 (Doc. ID Nos. 131 and 132) at the trial, clearly valued only the surface of the Seidel land and did not value any minerals including surface minerals such as coal, clay, scoria and gravel. No claim was made in the Contract litigation involving gravel under the Seidel land or particularly the ownership of the previously severed mineral estate.

A standard form of Release of Claims (Exhibit 14 Doc. ID NO. 141) was signed by Leroy and James December 18, 2007. James paid Leroy the settlement price and Leroy signed a Warranty Deed dated February 14, 2008 recorded as document no. 652695 by Leroy as Grantor to James as Grantee (Exhibit D-6 Doc. ID No. 152) which Deed was prepared by James' attorney in the Contract litigation and contains no mention or reservation of any mineral estate or gravel in the subject Deed.

The Court finds that by a series of mineral deeds prior to the subject 2003 Contract for Deed, the mineral estate, which included the gravel and other surface minerals, was severed from the surface estate.

The deposition transcript of James Seidel, taken in the Contract litigation Civil Case No. 06-C-0248 (Exhibit 8) contains the sworn testimony of James admitting that the Contract for Deed between Hilda Seidel and himself did not involve the sale or purchase of any minerals (Exhibit 8 Doc. ID No. 135 lines 21-25).

The payment by James to Leroy, the signing of the Release of Claims and the signing and delivery of the February 14, 2008 Warranty Deed by Leroy to James, are all of series of actions to execute the terms of the settlement agreement and were performed to fully settle the claims made in the Contract litigation, which litigation did not contain any claim involving gravel or any minerals, located on Seidel land.
(See trial Court's Findings of Fact at Doc. No. 171 ¶¶ 3-11)

The Court finds the 2003 Contract for Deed only concerned the sale of the surface and not any part of the minerals, and specifically, did not include the sale of gravel deposits and other surface minerals to James.

The settlement reached in the Contract litigation involved only the claims made in the Contract action and such claims did not involve, the mineral estate, and specifically, did not involve claims regarding title to the gravel and other surface minerals on the Seidel land.

The February 17, 2008 Warranty Deed (Doc. ID No. 152), given as part of the settlement of claims in the Contract for Deed action, could not convey title to any mineral estate including gravel and surface minerals pursuant to 47-10-25 N.D.C.C., given the prior intent of gravel and surface minerals being specifically named, in the prior mineral deeds for the Seidel land. Further, as the ownership of the mineral estate, gravel and other surface minerals have not been part of any claim made in the Contract for Deed action, no consideration was paid by James to Leroy to buy out any interest in the severed mineral estate to include the gravel deposits and other surface minerals.
(See trial Court's Findings of Fact at Doc. No. 171 ¶¶ 28-30)

Evidence Supported Findings

[¶64] The trial court did not abuse its discretion by making the above findings of fact concerning the intent of the parties when ruling on the issue of gravel and construing the parties intent for the February 14, 2008 Warranty Deed, where the trial court had the following evidence in the record to review and consider:

a. the prior mineral deeds which were executed before the Contract for Deed to James Seidel which included surface mineral and gravel severed from the surface estate. (Doc. Nos. 36, 37, 52, 133, 134)

b. the Contract for Deed itself which only concerned the surface only of the Seidel farmland and did not concern any mention of minerals, surface minerals or gravel. (Doc. No. 62)

c. the settlement agreement for the contract for deed which relied on the average of two land appraisals for the surface only of the subject farmland and no evaluation of any minerals whatsoever. (Doc. Nos. 63, 132)

d. the subsequent 2014 Stipulation of Interest years after the settlement of the contract for deed which stipulated to the oil and gas but specifically reserved any

settlement over the gravel rights currently then mined by James Seidel and Troy Seidel. (Doc. No. 137)

e. the trial testimony of James Seidel which admitted that no minerals or gravel rights were the subject of the Contract for Deed. (Transcript pp. 37).

f. the complete absence of any testimony or document specifically mentioning or showing any intent for the settlement agreement and the February 14, 2008 Warranty Deed given to perform the 2007 Settlement Agreement to intend to include any minerals including gravel in such settlement of the contract for deed litigation.

[¶65] Together, the above factual evidence is more than sufficient to support the Trial Court's Findings of Fact, and accordingly, the findings by the trial were not an abuse of discretion, were not clearly erroneous, were not induced by an erroneous view of the law and there was ample evidence in the record to support the findings of the trial court in this case.

IV Doctrines of *Res Judicata* and Collateral Estoppel Do Not Apply in This Case

[¶66] Appellant James Seidel and Troy Seidel rely heavily in this appeal, that the issue of gravel was included or should have been included in the 2007 settlement and 2008 Warranty Deed, was litigated or could have been litigated, such that the doctrines of *Res Judicata* or collateral estoppel should have been applied by the trial court, as a matter of law, subject to *de novo* review by this Court on appeal.

[¶67] In particular, Appellants James Seidel and Troy Seidel argue the trial court committed reversible error when it failed to apply the collateral estoppel factors set forth in *Fettig v. Estate of Fettig,* 2019 ND 261 ¶ 16 and 21, 934 N.W.2d 547 as follows:

The primary differences between res judicata claim preclusion and collateral estoppel issue preclusion can be summarized as follows:

> The basic difference between claim preclusion and issue preclusion is simply put: claim preclusion applies to whole claims, whether litigated or not, whereas issue preclusion applies to particular issues that have been contested and resolved.

> Claim preclusion is broader in scope than issue preclusion as to the claims that come within its perview, but narrower in scope as to the parties to whom the doctrine can be applied. While claim preclusion and issue preclusion advance the same basic principle – the need for finality in judicial proceedings – they do so in substantially different ways. Claim preclusion prevents parties and those in privity with them from raising legal theories, claims for relief, or defenses which could have been raised in the prior litigation, even though such claims were never actually litigated in the prior case. Issue preclusion, on the other hand, precludes litigation of issues actually litigated and necessary to the outcome of the prior case, even if such issues are subsequently presented as part of a different "claim".

Fettig at ¶ 16.

> Four tests must be met before collateral estoppel will bar relitigation of a fact or issue involved in an earlier lawsuit: (1) Was the issue decided in the prior adjudication identical to the one presented in the action in question?; (2) Was there a final judgment on the merits?; (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?; and (4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Fettig at ¶ 21.

[¶68] Here in this case, the trial court held the Contract for Deed action and its settlement had nothing to do with the mineral estate which included the subject gravel rights. The trial court also found the parties specifically reserved the issue of ownership of the subject gravel rights when entering into a Stipulation of Interest to clean up the oil and gas rights for the oil wells then drilled on Seidel farmland, where the trial Court stated in its findings:

> A standard form of Release of Claims (Exhibit 14 Doc. ID NO. 141) was signed by Leroy and James December 18, 2007. James paid Leroy the settlement price and Leroy signed a Warranty Deed dated February 14, 2008 recorded as document no. 652695 by Leroy as Grantor to James as Grantee (Exhibit D-6 Doc. ID No. 152) which Deed was prepared by James' attorney in the Contract litigation and contains no mention or reservation of any mineral estate or gravel in the subject Deed.
> (*See* ¶19 trial court findings at Doc. No. 171).
>
> To clear up title to the oil and gas interests, a settlement was reached December 4, 2014, between Leroy and James, in the form of a settlement agreement, and the execution of a formal Stipulation of Interests, as to the oil and gas; however, such settlement and Stipulation of Interest (dated November 20, 2014 and recorded as document no. 797849) contained specific wording such document did not cover clay, scoria or gravel, nor was to

contrive or interpret the rights or intentions of the settlement reached in the Contract litigation, where the Stipulation of Interest states of record title:

> *WHEREAS, the parties desire to settle the quantity of ownership in the oil, gas, casinghead gas, casinghead gasoline, and fissionable materials, in, under and that may be produced from the above described real property, and said parties desire to stipulate their interest in said property,. The parties specifically agree that clay, scoria, and gravel are not included in this stipulation and cross-conveyance. Further, the parties specifically agree this stipulation and cross-conveyance in no way construes or interprets the Parties' rights, obligations or intentions in that certain Settlement Agreement entered into by and between the parties in Civil No. 06-C-0248 in District Court, Williams County, North Dakota.* (See Exhibit 10 Doc. ID NO. 137)

(*See* trial Court findings ¶ 16 and 17 Doc. No. 171).

[¶69] From the above, it is clear that (1) the settlement and release in the Contract for Deed litigation could not and did not release any future claims, or adjudicate any claims regarding the severed mineral estate (gravel) and; (2) the issue of gravel rights was reserved by the parties in the settlement and Stipulation of Interest for the oil and gas right reached and recorded in 2014.

[¶70] Here, the doctrine of *Res Judicata* does not apply as the issue of ownership of the gravel rights was not litigated in the 2007 Contract for Deed litigation. The claim for damages for selling Leroy Seidel's ½ interest in the gravel had not yet occurred until over five years in the future.

[¶71] Here, the doctrine of collateral estoppel, relied upon by Appellants James Seidel and Troy Seidel, is factually unsupported and legally inapplicable; as specifically written in the Stipulation of Interest placed of record (to resolve issues raised by the oil companies in their division order title opinions, for the oil and gas rights) the parties took the effort to specifically reserve the issue of gravel ownership and no hearing, pleadings or trial took place concerning gravel rights in 2014.

[¶72] Accordingly, the four point test in *Fettig* fails to apply in this case: (1) as the issues were not identical as was in the Contract for Deed litigation; (2) no final

Judgment (except for a Judgment of Dismissal was entered) adjudicating the gravel issue has ever been entered by the court prior to this action; and (3) under no circumstances, was the issue ever litigated nor for the parties to have opportunity to be heard on the gravel issue was made prior to this lawsuit. This lawsuit now on appeal, was the first time, the parties gathered their evidence, and an evidentiary hearing was held, on the issue of ownership of the gravel. The facts in *Fettig* have not been met in this case for the doctrine of collateral estoppel to apply to this case.

[¶73] Here, the trial court is to interpret deeds in the same manner as contracts, with the primary purpose, to ascertain and effectuate the parties or grantor's intent. *THR Minerals, L.L.C. v Robinson,* 2017 ND 78 ¶ 8, 892 N.W.2d 193; *citing, Sargent Cty. Water Res. Dist. V Mathews,* 2015 ND 277, ¶ 6, 871 N.W.2d 608 (when contract is ambiguous extrinsic evidence may be considered and intent of parties becomes an issue of fact for trial court).

[¶74] Accordingly, it is not true, as claimed by Appellants James Seidel and Troy Seidel, that his is the third or fourth time the issue of gravel ownership has come before a court. The doctrine of *res judicata* and collateral estoppel do not apply in this case, as a matter of law.

[¶75] Such equitable relief, even if applicable, does not flow to James Seidel where the trial court noted James Seidel, when a fiduciary for his mother Hilda Seidel's estate, deliberately, left off gravel from a personal representative mineral deed for Leroy Seidel's half interest to a parcel of Seidel land just after James Seidel obtained his Contract for Deed signed before Hilda's death, where the trial court found:

Subsequent to the settlement of the Contract litigation and subsequent to the February 14, 2008 Warranty Deed Leroy executed to James as part of the settlement in

the Contract litigation; additional minerals were found as part of Hilda Seidel's estate and upon obtaining, Letters for Subsequent Administration, James as Personal Representative for the estate of Hilda Seidel, did execute a Personal Representative's Mineral Deed of Distribution dated April 13, 2010 and recorded as document no. 686438 (Exhibit 7A Doc. ID No. 134) covering the following Seidel land located in Williams County, described as:

Township 155 North, Range 103 West
Section 1: Lot 1, Lot 2, S½NE¼

which again conveyed the minerals described equally ½ to Leroy and ½ to James; **however, this particular April 13, 2013 Mineral Deed has been changed from all prior mineral deeds and leaves out and omits "gravel" from the list of surface minerals as was previously specifically described in all previous mineral deeds** as described above. At the time of the April 13, 2010 Mineral Deed of Distribution, James was Personal Representative for the estate of Hilda Seidel, deceased, and owed Leroy fiduciary duty not take advantage of Leroy to omit gravel which Hilda Seidel has specifically shown was intended to be included in the mineral estate being divided between Leroy and James; as was followed by all previous mineral deeds and estate mineral deeds covering the Seidel land. The Court takes judicial notice that by 2010 Williams County was under economic expansion of County roads and highway requiring large amounts of gravel with the Bakken oil exploration boom in Northwest North Dakota.
(*See* trial Court Findings ¶ 14 at Doc. No. 171)

[¶76] When seeking equitable specific performance or declaratory relief to enforce the alleged gravel rights, Appellant James Seidel, to receive equity, must come to the Court "with clean hands". *Landers v. Biwer,* 2006 ND 109 ¶ 9, 714 N.W.2d 476, *citing Boe v Rose,* 1998 ND 29 ¶ 12, 574 N.W.2d 834. James Seidel does not have "clean hands" in this action.

V Trial Court's Findings on Damages and Piercing Company Veil Not an Abuse of Discretion

Damages

[¶77] The issue of damages and piercing the company veil to establish individual liability, are fact dependent issues, subject to an abuse of discretion standard on appeal. *Hanson v Boeder,* 2007 ND 20 ¶ 7, 727 N.W.2d 280 (district court's

determination of the amount of damages is a finding of fact subject to clearly erroneous standard of review.) Issue of piercing the veil are heavily fact dependent and subject to abuse of discretion standard of review. *Solid Comfort, Inc. v. Hatchett Hospitality, Inc.,* 2013 ND 152 ¶ 17-18 836 N.W.2d 415.

[¶78] Here, once the trial court determined Leroy Seidel owned an undivided one-half interest in the gravel and sales, the Court calculated damages at ½ of the net proceeds of sale.

[¶] The Court finds, that not including any cash sales of converted gravel and surface minerals, the documented amount of sales of gravel and surface minerals from the subject Seidel land is in the sum of $137,917.90; and the value of Leroy E. Seidel's converted mineral interest, in and to the gravel and surface minerals sold and converted by the Defendants acting in concert to deprive Leroy E. Seidel of his property is in the sum of $68,958.75 (Exhibit 12 Doc. ID No. 139 and Exhibit D-15 Doc. ID No. 161).

[¶] The Court finds that James E. Seidel, Troy Seidel, and Gravel Supply jointly and severally, did engage in conduct to intentionally and willfully convert and deprive Leroy E. Seidel of his half interest in the gravel and surface minerals mined and sold off from the subject Seidel land.

(See trial Court's Findings of Fact at Doc. No. 171 ¶¶ 41-42)

[¶79] Where the trial Court had the evidence of the checks and payments received from gravel sales, the trial court had good evidence for the calculation and awarding of damages and such calculations not finding by the trial court was not an abuse of discretion.

Piercing the Veil

[¶80] On the issue of piercing the veil and holding James Seidel and Troy Seidel personally liable, such issue is also heavily fact dependent and subject to an abuse of discretion standard on appeal; this standard of review and the factors to find need to pierce the company veil were set forth by this Court in *Solid Comfort, Inc. v. Hatchett Hospitality, Inc.,* ¶¶ 17-18, 2013 ND 152, 836 N.W.2d 415, as follows:

We have said generally that "a corporation's officers and directors…are not liable for the corporation's ordinary debts." *Watts v. Magic 2 x 52 Mgmt., Inc.,* 2012 ND 99, ¶ 12, 816 N.W.2d 770: see also *Coughlin Constr. Co. v. Nu-Tec Indus., Inc.,* 2008 ND 163, ¶ 19, 755 N.W.2d 867; *Axtmann v. Chillemi,* 2007 ND 179, ¶ 12, 740 N.W.2d 838. But "the corporate veil may be pierced when the legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime." *Coughlin Constr.,* at ¶ 19. We have discussed the following factors for the district court's consideration in deciding whether to pierce the corporate veil:

> Factors considered significant in determining whether or not to disregard the corporate entity include: insufficient capitalization for the purposes of the corporate undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of the debtor corporation at the time of the transaction in question, siphoning of funds by the dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and the existence of the corporation as merely a façade for individual dealings.

Coughlin Constr., at ¶ 20 (quotations and citations omitted). Before a court may properly pierce the corporate veil, "an element of injustice, inequity or fundamental unfairness" must also be present. *Id.* (quoting *Jablonsky v. Klemm,* 377 N.W.2d 560, 564 (N.D.1985)).

Additionally, North Dakota recognizes the "alter ego" approach to piercing the corporate veil. We have said the "to apply the alter ego doctrine, 'there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist,' and 'there must be an inequitable result if the acts in question are treated as those of the corporation alone.' " *Red River Wings, Inc. v. Hoot, Inc.* 2008 ND 117, ¶ 34, 751 N.W.2d 206 (quoting *Sonora Diamond Corp. v. Superior Court,* 83 Cal.App. 4th 523, 99 Cal.Rptr.2d 824, 836 (2000), and citing *Axtmann*, 2007 ND 179 ¶¶ 12-15, 740-75 (N.D.1983)). "The burden of proving the requirements for piercing the corporate veil is on the party asserting the Claim." *Watts*, 2012 ND 99, ¶ 13, 816 N.W.2d 770. In the context of a trial of contested facts, we have explained that "resolving the issue is heavily fact-specific and, therefore, is *within the sound discretion* of the district court." *Id.*

See also**,** *Taszarek v. Lakeview Excavating, Inc.,* 2016 ND 172 ¶¶ 9-13, 883 N.W.2d 880: We have also described an "alter ego" approach to piercing the corporate veil:

> To apply the alter ego doctrine, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist, and there must be an inequitable result if the acts in question are treated as those of the corporation alone.

Red River Wings, Inc. v. Hoot, Inc. 2008 ND 117, ¶ 34, 751 N.W.2d 206 (internal quotation marks omitted) (citing *Axtmann,* 2007 ND 179, ¶¶ 12-15, 740 N.W.2d 838; *Jablonsky,* 377 N.W.2d at 563-67; *Hilzendager,* 335 N.W.2d at 774-75). This approach to veil piercing simply recognizes there may be instances when a corporation is in face a mere instrumentality or later ego of its owner. *Cf. Solid Comfort, Inc. v. Hatchett Hosp., Inc.,* 2013 ND 152, ¶¶ 14-17, 836 N.W.2d 415; *Mahanna v. Westland Oil Co.,* 107 N.W.2d 353, 361-62 (N.D.1960).

In deciding whether an alter ego claim has been established, courts examine various factors "which reveal how the corporation operates and the particular defendant's relationship to that operation." *NetJets Aviation, Inc. v. LHC Commc'ns,* 537 F.3d 168, 176-77 (2d Cir.2008) (applying Delaware law). These factors include those similar to our *Hilzendager-Jablonsky* factors. See, e.g., *NetJets Aviation,* 537 F.3d at 177; *Estate of Raleigh v. Mitchell,* 947 A.2d 464, 470-71 (D.C.2008); *Hoyt Props., Inc. v. Prod. Res. Grp.,* 736 N.W.2d 31, 318019 (Minn.2007); *T & R Trucking, Inc. v. Maynard,* 221 W.VA. 447, 655 S.E.2d 193, 198 (2007); *In re Phillips,* 139 P.3d 639, 644 (Colo.2006); *Hildreth v. Tidewater Equip. Co., Inc.,* 378 MD. 724, 838 A.2d 1204, 1210-11 (2003); *Meridian Minerals Co. V. Nicor Minerals, Inc.,* 228 Mont. 274 742 P.2d 456, 462-63 (1987); *see also* 1 William Meade Fletcher, *Fletcher Cyc. Of the Law of Corp*. §§ 41.10, 41.30 (2015 rev. vol.).

To the extent our case law may be unclear, we require an examination of the *Hilzendager-Jablonsky* factors as part of the analysis for deciding whether to pierce the corporate veil under the alter ego doctrine. In addition to those factors, an overall element of "injustice, inequity, or fundamental unfairness" must also be established before veil piercing is appropriate. *Jablonsky,* 377 N.W.2d at 564. Moreover, "courts generally apply the alter ego rule with great caution and reluctance." 1 *Fletcher Cyc. Corp.* § 41.10, at 188.

"The burden of proving the requirements for piercing the corporate veil is on the party asserting the claim." *Watts,* 2012 ND 99, ¶ 13, 816 N.W.2d 770. We have explained that "resolving the issue is heavily fact-specific and, therefore, is within the sound discretion of the district court." *Id.*

[¶81] Here, in this case, the trial court, after reviewing the exhibits and hearing the trial testimony, found that both James Seidel and Troy Seidel had been operating sham "alter ego" companies to mine and sell the gravel, and did find good factual basis to pierce the veil to determine James Seidel and Troy Seidel were both personally liable for the damages found owed, based on the following:

> The Court finds that the formation of Gravel Supply, L.L.C. and the conduct of its business dealings between Earth Products, James A. Seidel, Gravel Supply and Troy Seidel, were a sham, wherein: no bills or invoices for gravel mined were sent or collected by Earth Products; no royalty from the gravel mined and sold by Gravel Supply were paid out; no costs of mining and use of equipment to mine and sell the subject gravel were ever been paid and no accounting has ever been made to James Seidel, Leroy Seidel or Earth Products by Gravel Supply. The Court finds the company Gravel Supply has operated as the alter ego of Troy Seidel, and Troy Seidel was the recipient of thousands of dollars of alleged sales fees and other distributions which drained Gravel Supply of proceeds from sales which did occur, and the company was ultimately involuntarily dissolved by the North Dakota Secretary of State. Further, the Court finds Earth Products was operated as the alter ego of James A. Seidel and not as any independent company. (*See* trial court findings ¶22 at Doc. No. 171)

> The gravel was mined by Troy Seidel with assistance by James on site occurring on Seidel land using equipment provided by James for the effort. The evidence received at trial was that Gravel Supply was involuntarily dissolved by the North Dakota Secretary of State. James testified that neither he personally, nor the company Earth Products, has received any payment for the gravel mined and sold by Troy or Gravel Supply and that the claimed expenses and cost of mining operations owed to James for use of his farm equipment and gravel supply farm conveyor equipment for use of this equipment has been, "on the books", but never paid by Troy or Gravel Supply to James or Earth Products. James testified no bills for such expenses or demands for payment of royalty for gravel sold has been sent by him or Earth Products to Troy or Gravel Supply.
>
> Troy Seidel testified that he has paid himself "expenses" as a salesman for the gravel sales but has not paid James or Earth Products. Troy confirmed the company Gravel Supply, L.L.C. has been involuntarily dissolved and James has formed a new family company partnership "Tango Sierra Properties, L.L.L.P." with his children. ("Tango Sierra") and that by Quit Claim Deed dated December 26, 2014 James and Judy Seidel did deed all of the Seidel land without reservation to Tango Sierra (Exhibit D-9 Doc. ID No. 155), however, Tango Sierra has not mined or sold any gravel. All sales subject to this action were made by Troy d.b.a Gravel Supply.
>
> The testimony at trial by both James and Troy remains, that no amounts have been invoiced or paid for the mining royalty owed, and no payment has ever been paid to James or Earth Products for use of the mining equipment. Further James testified that no bills, invoices or collection has been initiated by James to collect upon these costs of mining. Troy testified that he has paid himself "reasonable expenses" for the job as a salesman for the gravel and no underlying

accounting and documenting such expenses was provided to the Court, except the amounts estimated by Troy for tax purposes. No arm's length documentation of expenses, ledgers, payments of accounts payable to James or Earth Products, or evidence of independent operations of Gravel Supply, was provided to the Court and the Court finds Gravel Supply and Earth Products were both sham companies, operated as alter egos of James Seidel and Troy Seidel, used to provide income to Troy Seidel and siblings with the collusion of James Seidel's assistance. (*See* trial court's findings ¶¶ 23-25 at Doc. No. 171)

[¶82] The above findings were based on the following evidence received at trial:

a. testimony of James Seidel (*See* Doc. No. 135 deposition transcript of James Seidel) (*See also* transcript pp 28, 35, 36, 37, 42, 43, 55, 61, 67, and 68).

b. testimony of Troy Seidel (*See* transcript pp. 97, 101, 103, 121, 138, 139, 140, and 141.)

c. records from the corporation division of the North Dakota Secretary of State (Exhibit 13 received at trial, Doc. No. 140)

[¶83] Accordingly, the trial court's findings to pierce the veil do have support in the record and were not an abuse of discretion.

[¶84] Having pierced the veil the trial court did enter its findings and conclusions of law finding James Seidel and Troy Seidel to have acted in concert to sell and retain proceeds for Leroy Seidel's undivided half interest in the gravel to enter Judgment for the sum of $137,917.90.

The Court finds, that not including any cash sales of converted gravel and surface minerals, the documented amount of sales of gravel and surface minerals from the subject Seidel land is in the sum of $137,917.90; and the value of Leroy E. Seidel's converted mineral interest, in and to the gravel and surface minerals sold and converted by the Defendants acting in concert to deprive Leroy E. Seidel of his property is in the sum of $68,958.75 (Exhibit 12 Doc. ID No. 139 and Exhibit D-15 Doc. ID No. 161).

The Court finds that James E. Seidel, Troy Seidel, and Gravel Supply jointly and severally, did engage in conduct to intentionally and willfully convert and deprive Leroy E. Seidel of his half interest in the gravel and surface minerals mined and sold off from the subject Seidel land.
(*See* trial court's findings ¶¶ 41-42 at Doc. No. 171)

The Court does conclude that the conduct of Troy Seidel in the formation, undercapitalization, operation, and manipulation of the company Gravel Supply, L.L.C. as the alter ego of Troy Seidel before its dissolution, justify the piercing of the company

veil and holding Troy Seidel, personally liable for the conversion and damages owed to Leroy E. Seidel as a matter of law.
(*See* trial court's findings at ¶ 55 Doc. No. 171)

The Court finds James A. Seidel did operate Earth Products as his alter ego such that James A. Seidel is personally liable for the conduct through Earth Products to convert and deprive Leroy E. Seidel of the value of the gravel mined and sold belonging to Leroy E. Seidel.
(*See* trial court's findings ¶14 at Doc. No. 171)

That James A. Seidel, Troy Seidel and Gravel Supply, L.L.C. are all jointly and severally liable for damages found by the Court to be owed Leroy E. Seidel, now estate of Leroy E. Seidel, in the sum of $68,958.75 plus prejudgment interest as the statutory rate of 6.5% from and after August 9, 2013 to date of entry of Judgment in this action.
(*See* trial court's findings ¶ 55 Doc. No. 171).

CONCLUSION

On Issues of Law:

[¶85] The trial court was correct to find the 2007 settlement of the Contract for Deed action ambiguous as to the issue of mineral interests (gravel) being a part of the global settlement and to thereafter hold an evidentiary hearing on the intent of the parties.

[¶86] The trial court was correct to look to all of the parts of the 2007 settlement of the Contract for Deed action, to include the February 14, 2008 Warranty Deed as a contract, to determine the intent of the parties; specifically, whether the subject deed conveyed any mineral title (including gravel) from Leroy Seidel as grantor to James Seidel as grantee.

[¶87] The trial court was correct to rule that Section 47-10-25 N.D.C.C. did not apply to pass any surface minerals (gravel) to James Seidel in the February 14, 2008 Warranty Deed, as the surface minerals (gravel) had been previously specifically named and reserved in the prior mineral deeds severing the mineral estate.

[¶88] The trial court was correct to hold that if the February 14, 2008 Warranty Deed did not transfer any minerals, such minerals, including the surface minerals (gravel) remain severed from the surface and Leroy Seidel owned an undivided ½ interest to such

surface minerals (gravel) which gave Leroy Seidel a ½ interest in the net proceeds from the sale of such gravel.

[¶89] The trial court was correct to hold the doctrine of *Res Judicata* and collateral estoppel, do not apply, where the issue of gravel and the severed mineral estate was not the subject of the 2006 contract for deed action, the claims for conversion of the gravel had not yet occurred, the release of claims then could not then apply to any gravel claims now here involved in this action; the 2014 quiet title action for and gas curative specifically reserved and excluded resolving the legal effect of the February 14, 2008 Warranty Deed, the parties had yet to be heard on the issue of surface minerals and as the action for the gravel sales had not occurred and no prior judgment on the issue of gravel rights had been entered, accordingly *res judicata* and collateral estoppel did not apply to this case.

[¶90] The Defendants James Seidel and Troy Seidel are jointly and severally liable for the damages awarded by the Court for the value of the ½ interest held by Leroy Seidel in such gravel sold.

On Issues of Fact:

[¶91] The trial court's findings of fact in this case, were supported by the evidence and testimony received at trial, were not clearly erroneous, not based on an erroneous view of the law, were there was evidence to support the Court's findings and accordingly, were not an abuse of discretion to find:

[¶92] The intent of the parties in the settlement of the Contract for Deed litigation involved the surface only and nothing to do with any severed minerals including the severed surface minerals (gravel).

[¶93] The intent of the February 14, 2008 warranty deed was to transfer only the surface acreage and was intended to not include or transfer any minerals, including surface minerals (gravel) from Leroy Seidel as grantor to James Seidel as grantee.

[¶94] The Defendants/Appellants James Seidel and Troy Seidel did operate their respective gravel companies, as a sham and as their alter egos, justifying the piercing of the company veil and holding James Seidel and Troy Seidel jointly and severally liable for the damages found and awarded in this action.

[¶95] The damages awarded were based on evidence of checks and receipts showing the proceeds of payment for gravel sales and because James Seidel and Troy Seidel, acted in concert, to deprive Leroy Seidel of the value of his share of the gravel sales, that James Seidel and Troy Seidel be jointly and severally liable for the damages found and awarded in this action.

RELIEF REQUESTED

[¶96] Accordingly, the Judgment (as amended to exclude attorney's fees) should here be AFFIRMED.

ORAL ARGUMENT REQUESTED

[¶97] In light of the significant legal and factual issues, the Court would be aided by oral argument in this matter. The Plaintiff respectfully requests argument be allowed.

Dated: September 11, 2020.

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CERTIFICATE OF COMPLIANCE

[¶98] The undersigned, as attorney for the Appellee in the above matter, hereby certifies in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional spaced, 12 point font typeface, and the total number of pages of the above Brief totals 38 pages, inclusive, which is within the limit of 38 pages.

/s/ Charles L. Neff
Charles L. Neff, ND ID #04023

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

The Estate of Leroy E. Seidel, Plaintiff and Appellee, v. James A. Seidel, Gravel Supply LLC And Troy Seidel, Defendants and Appellants,	**SUPREME COURT NO. 20200148** District Court No. 53-2016-CV-01304

CERTIFICATE OF SERVICE

[¶] Deborah Brown, being first duly sworn, deposes and states that on the 11th day of September, 2020, she served the following documents:

1. Appellee's Brief

with the Clerk of the North Dakota Supreme Court and Served the same electronically as follows:

By Electronic Mail:

Andrew D. Cook …….. acook@ohnstadlaw.com

I declare under penalty of perjury that the foregoing is true and correct. I signed this Affidavit in the County of Williams, State of North Dakota, on this 11th day of September, 2020.

/s/ Deborah Brown
Deborah Brown