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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Twin City Technical LLC, Three Horns Energy, LLC, Prairie of the South LLC, and Irish Oil & Gas Inc.,	)	
Plaintiffs-Appellees,	)	Supreme Court No. 20180264
	)	Williams Co. No. 53-2015-CV-01394
vs.	)	
Williams County and Williams County Commission;	)	
Defendants-Appellants.	)	

APPEAL FROM ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, DATED APRIL 27, 2018.

THE DISTRICT COURT OF WILLIAMS COUNTY, NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE BENJAMEN J. JOHNSON, PRESIDING

BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES

1. Whether the District Court erred in granting Plaintiffs' Motion for Summary Judgment.

2. Whether the District Court erred in denying Defendants' Motion for Summary Judgment.

I. STATEMENT OF THE CASE

[¶1] Williams County and the Williams County Commission ("the County") appeal the District Court's granting Twin City Technical LLC ("Twin City"), Three Horns Energy, LLC ("Three Horns"), Prairie of the South LLC ("Prairie"), and Irish Oil & Gas Inc. ("Irish Oil"), (collectively, "the Lessees") motion for summary judgment, and denying the County's motion for summary judgment. *Appendix of Appellants* ("App.") at 443-61. The District Court's decision ignores issues of material fact and relies on erroneous interpretations of applicable law.

[¶2] Lessees entered into four separate oil and gas leases ("the Leases") with the County in early 2012, for land believed to be located in Williams County. App. at 119-21, 199-207. The Lessees paid the County $1,314,506.80 in bonus payments for the Leases. App. at 208-14, 220-49. Lessees were informed by Hess Corporation in 2013 that the Lease lands may not actually be owned by the County. In 2015, after Lessees were unable to sell the Leases to any third-party investor, Lessees demanded the County return the bonus payments arguing that the County did not own all of the subject minerals and should not have stricken the warranty clause. The County refused to return the bonus payments because the Leases did not contain a warranty clause.

[¶3] The Lessees initiated suit on September 8, 2015. Doc. ID# 2. After denying Lessees' motion for summary judgment in 2016, the District Court granted Lessees' request to amend its complaint, which was filed on November 8, 2016. App. at 8-20; Doc. ID# 10-53. Lessees alleged it was entitled to return of the bonus payments based on numerous causes of action, namely: rescission for mistake, fraud, and failure of consideration, declaratory judgment for failure to comply with competitive bidding statutes

and presence of covenant of quiet possession in Leases, unjust enrichment, and breach of covenant of quiet possession. App. at 8-20. The County denied Lessees are entitled to return of the bonus payments. App. at 21-28.

[¶4] The County moved for summary judgment on January 19, 2018, asserting Lessees cannot prevail on any of their seven claims. Doc. ID# 88-135. The Lessees also moved for summary judgment on January 19, 2018, asserting no valid leases were formed between the parties under North Dakota competitive bidding statutes and lack of consideration, requiring the bonus payments to be returned under an unjust enrichment theory. Doc. ID# 82-87. In the alternative, the Lessees asserted they were entitled to rescission of the Leases due to mutual mistake, fraud, and failure of consideration and that the County was required to secure to the Lessees quiet possession due to the covenant implied in the Leases. Id.

[¶5] On April 27, 2018, the District Court granted summary judgment for the Lessees, reasoning they had standing to contest the competitive bidding process because they were parties to the Leases, that the County failed to comply with the competitive bidding process under N.D.C.C. ch. 38-09, and as a result, the Leases are void as a matter of law, entitling Lessees to return of the bonus payments. App. at 443-56 (Doc. 177). The District Court also found that the County's defense of laches failed. Id. Judgment was entered on May 8, 2018, and the County timely appealed on June 28, 2018. App. at 457-61.

II. STATEMENT OF THE FACTS

[¶6] Prior to the current dispute, the County Auditor, Beth Innis, entered into numerous oil and gas leases on behalf of the County with various companies. App. at 34-

35 ¶ 12, 36. Innis was authorized by the County Commissioners to sign these leases. App. at 45-46 (23:6-24:8), 34 ¶ 11. At that time, Innis was entering into these leases on an informal basis as the requests from companies were received and approved by the County Commissioners, because the County was unaware of statutory requirements for bidding oil and gas leases. Id. at 26:16-19; App. at 34-35 ¶ 12.

[¶7] Using this process, the County entered into two oil and gas leases with Irish Oil unrelated to this case; one in 2010 and another in 2012. App. at 36, 87 (30:6-31:11). The County struck the warranty clauses from these leases. App. at 107-113. Irish Oil has not sought to invalidate these leases nor requested return of the bonuses due to an alleged failure to follow competitive bidding statutes.

[¶8] At the height of the oil boom in western North Dakota, oil and gas companies frequently had landmen go to the courthouse looking for unleased minerals, so it was common for landowners to be approached by representatives of oil and gas companies. On January 10, 2012, Brent Schellin, agent for LoneTree Energy & Associates, LLC, sent an unsolicited letter to Innis expressing interest in minerals owned by the County. App. at 114, 32 ¶ 2. After Schellin contacted Innis about the minerals, Grant Archer, on behalf of Irish Oil, also approached Innis to discuss an offer to lease. App. at 48 (33:5-15), 32-33 ¶ 3. At some point before Innis was approached about the leases, Tim Furlong, owner of Irish Oil, was contacted by Archer and Martin Thompson, both of whom Furlong had worked with before in acquiring oil and gas leases, and informed Furlong that the County owned minerals they may be able to lease. App. at 83 (14:11-25; 15:13-22). Furlong also along with Terry Harris, owner of Twin City, decided to obtain the lease together. Id. at 17:3-7.

[¶9] Innis was unsure of how either party was informed of the potential for leasing the Subject Lands, and was actually prepared to accept the bid from LoneTree until Archer contacted her. App. at 48 (34:1-35:8), 55 (62:12-17). In his letter, Schellin sought a lease on land believed to be owned by Williams County. App. at 114. The lease would cover 139.53 acres, with $2,500 bonus per acre and 20% royalty with a three-year lease term. Id. On February 2, 2012, Terry Harris sent a letter to Innis with a bid for the same land, offering to pay $5,560 bonus per acre and a 20% royalty for a lease term of three years. App. at 115, 33-34 ¶ 8. Subsequently, Schellin increased his original offer to $5100 bonus per acre. App. at 116, 33 ¶ 5. That same day, Innis notified Twin City it was the successful bidder, and Innis executed the first oil and gas lease at issue in this case ("Section 31 Lease"). App. at 117-21, 33-34 ¶¶ 6, 8, 9. Notably, in the lease provided to Innis, the warranty clause was already stricken when Irish Oil's landman brought the lease to Innis to sign. App. at 122-27, 34 ¶ 9.

[¶10] Lessees received notice on February 3, 2012, there may be title issues with the Subject Lands. Irish Oil sent an email to the other Lessees, stating it had received a list from Archer showing four different properties owned by the County. App. at 186-87. Irish Oil acknowledged this list included land that did not appear to be owned by the County, as it was south of the Missouri River in McKenzie County. Id. Irish Oil's research demonstrated the County owned the other three properties. Id.; App. at 140 (40:1-41:16). Despite the potential issues presented by the proximity to the Missouri River, Irish Oil prepared three sight drafts. App. at 188-92.

[¶11] The first Lease was recorded on February 7, 2012. App. at 119-21, 193. For this Lease, Irish Oil requested Don Sass, an independent landman, conduct a title review.

App. at 139 (39:2-8), 83 (13:8-10). Sass emailed the title report to Irish Oil on February 9, 2012, finding the County did not own part of Section 31. App. at 194-95. As a result, Irish Oil prepared the Amendment of Lease. App. at 196-97. The amendment was filed on March 5, 2012. Id. A new sight draft was issued to adjust for the acreage change. App. at 198.

[¶12] On February 29, 2012, the County and Irish Oil entered into three oil and gas leases for various lots in Williams County. App. at 199-207. These leases also had the warranty clause stricken. Id. § 14. The leases were recorded the same day. Id. The Leases at issue in this action cover the following locations:

> Township 153 North, Range 98 West:
> Section 22: Lots 4, 5, SE4SE4; 96.05 acres
> Section 23: SW4SW4; 40.00 acres
> Section 27: Lot 1; 21.20 acres
> Section 31: Lots 1, 2, 3, 5; 139.53 acres
>
> (collectively, "Subject Lands")

App. at 119-21, 199-207.

[¶13] Irish Oil sent a check for the first bonus payment on March 15, 2012, totaling $905,056.80. App. at 208-14. On March 18, 2012, Irish Oil requested Sass conduct a title review for the other three leases. App. at 215. Sass returned the title reports on March 20, 2012, finding the only title issues were related to an invalid deed and subsequent leases. App. at 216-19. Subsequently, Irish Oil sent checks to the County for the bonus payments, totaling $249,730.00, $104,600.00, and $55,120.00, respectively. App. at 220-49.

[¶14] On March 22, 2012, assignments for the overriding royalty interests ("ORR") in the Leases were made to Grant and Marilyn Archer, and Sandy River Resources, LLC, a company owned by Martin Thompson. App. at 250-85. In exchange for his assistance in acquiring the leases, Archer and his wife received the ORR and a

commission. App. at 144 (57:22-58:18). Thompson also received an ORR assignment for his work with Archer in facilitating the bidding and leases. App. at 250-85, 144 (58:19-59:25). Importantly, these assignments to Archer and Thompson also explicitly disclaim any warranty to title. See App. at 119-21, 199-207 § 14, 250-85. Archer is currently suffering from advanced stages of Alzheimer's, and was unable to participate in any discovery in this case. App. at 43 (15:5-23).

[¶15] Throughout 2012, Twin City sent letters to Hess Corporation ("Hess") and Brigham Oil & Gas, LP, requesting to participate in the wells drilled to develop parts of the Subject Lands. App. at 286-89. On October 4, 2012, Twin City and Irish Oil assigned their respective interests in the Leases to all Lessees in this action in the following manner:

Irish Oil & Gas, Inc.	39.00%
Twin City Technical, LLC	39.00%
Prairie of the South, LLC	20.00%
Three Horns Energy, LLC	2.00%

App. at 250-85. As a result, all four Leases were owned by all four Lessees in the above proportions.

[¶16] Subsequently, on May 15, 2013, Hess sent a letter to Lessees offering to buy all of their interests in the Leases. App. at 290-304. However, during Hess' due diligence period, Hess discovered title defects regarding the Leases due to high and low water mark issues in litigation at the time, and notified Lessees of the issues by letter on June 6, 2013. App. at 305. For these reasons, Hess rescinded the sale of the Leases. Id.

[¶17] Lessees did not contact the County regarding these issues until **almost two years later**, on April 14, 2015, when they sent a letter to the County stating it may not own the Subject Lands. App. at 306-07. Lessees conceded that the stricken warranty clause prevents recovery of the bonus payments, asserting only that the County removed the

warranty clause without the Lessees' consent. Id. However, Lessees' characterization that they were unaware of the stricken warranty clause is contradicted by Sara Caya, Irish Oil's employee and owner of Three Horns, who actually struck the warranty clause for the County prior to execution of the leases. App. at 122-27, 136 (26:3-5) Caya, as a landman, testified as to the purpose of striking the warranty clause, stating "a mineral owner will choose to strike the warranty to sort of protect themselves in case something were to come up that they are saying that they might not know for sure what they own." App. at 137 (30:25-31:11) (emphasis added). Terry Harris also routinely strikes the warranty clause in his own leases because he is not a landman. App. at 323 (41:21-23) Furlong testified that he routinely strikes the warranty clause when his family enters into leases because "it leaves you open to be sued if you're warranting your minerals." App. at 93 (52:11-53:13)

[¶18] In fact, even though Caya was aware of the unique title issues presented by land located adjacent to a river, she relied only on the Precis title book from the mid-1980s, BLM maps from the Industrial Commission website, and Don Sass's title results from the courthouse, instead of personally researching whether the Missouri River movement may have affected title to the Subject Lands. App. at 142-44 (51:12-56:2). Lessees admit they were responsible for conducting due diligence on the Leases, as the land people in the transaction. App. at 173 (36:12-37:9). Although Caya admits she should have paid extra attention in the title search due to their proximity to the river, she did not recall discussing this issue with Don Sass, the person who conducted the title search. App. at 145-46 (62:21-65:9). Caya specifically testified how necessary it is to review maps in addition to traditional title work when conducting a title search for property located along a river. Id. at 65:15-67:1. Caya admitted that even though oil companies knew about the potential title

issues with leasing land near the river, companies were willing to make the gamble. Id. at 69:9-21. Furlong admitted he was aware of the uncertainties that arise with leasing minerals adjacent to the river. App. at 88 (35:15-24). Most importantly, at no point did any of the Lessees, either prior to or during the due diligence period or afterwards, conduct a physical inspection of the Subject Lands to determine whether there may be title issues. App. at 177 (55:7-9). Lessees attempted to sell the Leases to Hess because "if they would buy it, then we would know that the leases were good." App. at 332 (88:8-10).

[¶19] After Lessees notified the County of its assumed deficiencies in title to the Subject Lands, they requested return of the bonus payments. The County refused to return the bonus payments due to the lack of a warranty clause in the Leases. Lessees filed suit, seeking to invalidate the Leases and a refund of the bonus payments. Lessees are not entitled to repayment, as the undisputed material facts demonstrate as a matter of law that the Leases are not invalid.

III. ARGUMENT

A. STANDARD OF REVIEW

[¶20] The standard of review for a district court's grant of summary judgment is well established. Maragos v. Newfield Prod. Co., 2017 ND 191, ¶ 7, 900 N.W.2d 44 (quoting Krenz v. XTO Energy, Inc., 2017 ND 19, ¶ 17, 890 N.W.2d 222). "Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record." Id.

[¶21] The District Court improperly granted summary judgment for the Lessees because the Lessees were not entitled to judgment as a matter of law. The District Court also improperly weighed the evidence and made findings on disputed facts in granting

summary judgment. Further, based on the undisputed facts, the County was entitled to summary judgment as a matter of law.

B. THE LESSEES WERE NOT ENTITLED TO SUMMARY JUDGMENT, AND SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED IN FAVOR OF THE COUNTY

[¶22] In its Order, the District Court granted summary judgment to the Lessees, focusing on the standing and statutory bidding process arguments. App. at 443-56. First, the District Court found the Lessees had standing to contest the competitive bidding process used by the County in bidding the Leases because the Lessees were parties to the Leases. App. at 445-46. Second, the District Court found that the County failed to comply with the statutory bidding requirements of N.D.C.C. ch. 38-09, because the exception to these requirements did not apply to the leases. App. at 446-51. Specifically, the District Court found the minimum drilling unit for the exception to apply is forty acres and that a lease must include a non-drilling or non-development clause for it to be nonoperative under the exception. Id. Based on the acreage and language of the Leases, the District Court found the exception in N.D.C.C. § 38-09-19 did not apply, and the County should have bid the Leases at a public auction, and without the auction, the Leases were void as a matter of law. App. at 446-52. Finally, the Court found the Lessees were entitled to equitable return of the bonus payments and the County's defense of laches failed, despite the County's evidence demonstrating prejudice for the delay in filing suit. App. at 452-56.

1. The Lessees are Barred from Contesting the Competitive Bidding Process Utilized by the County in Bidding the Leases based on Standing, Waiver, and Laches.

[¶23] Lessees assert that the Leases are invalid because the County did not follow the statutory bidding process for oil and gas lands provided in N.D.C.C. ch. 38-09. See

N.D.C.C. §§ 38-09-14 to 38-09-20. This claim, an apparent afterthought to Lessees, was added to the Amended Complaint in November 2016, approximately a year after filing suit. App. at 8-20; Doc. ID# 2. This bidding process requires a political subdivision to give notice according to N.D.C.C. § 38-09-15, which requires notice be made through the county newspaper and the Bismarck Tribune under the Board of University and School Lands rules. N.D.C.C. § 38-09-16. The County does not dispute that it did not advertise notice of the bidding through the newspapers. However, Lessees cannot legally challenge the failure to follow the bidding process because they do not have standing, they waived their right to question the validity of the bidding process, and are barred by laches in challenging the process.

a. The Lessees do not have Standing to Contest the Competitive Bidding Process.

[¶24] Lessees do not have standing to assert a violation of the statutory bidding process. The process for demonstrating standing is well-established. See Nodak Mut. Ins. Co. v. Ward Cnty. Farm Bureau, 2004 ND 60, ¶ 11, 676 N.W.2d 752. "A party is entitled to have a court decide the merits of a dispute only after demonstrating the party has standing to litigate the issues placed before the court." Id. (quoting Rebel v. Nodak. Mut. Ins. Co., 1998 ND 194, ¶ 8, 585 N.W.2d 811).

> Standing analysis requires a two-fold inquiry: (1) **plaintiffs must suffer some threatened or actual injury resulting from the putatively illegal action**, and (2) the asserted harm must not be a generalized grievance shared by all or a large class of citizens, i.e., plaintiffs generally must assert their own legal rights and interests and cannot rest their claim for relief on the legal rights and interests of third parties.

Id. (citing Kjolsrud v. MKB Mgmt. Corp., 2003 ND 144, ¶ 14, 669 N.W.2d 82; State v. Carpenter, 301 N.W.2d 106, 107 (N.D. 1980)) (emphasis added). "The standing

requirement applies to declaratory judgment actions." Id. ¶ 12 (citing Rebel, ¶ 13; Richland Cnty. Water Res. Bd. v. Pribbernow, 442 N.W.2d 916, 918 (N.D. 1989)). The existence of standing is a question of law. Id. (citations omitted).

[¶25] Here, Lessees do not have standing because they cannot demonstrate any threatened or actual injury resulting from the County's failure to publicly advertise for bids on the leases. In fact, Lessees actually benefited from the bidding process, as the lack of other bidders created less competition, presumably allowing them to pay less for the Leases than they would have had the Leases been publicly bid. The only injury Lessees can assert is related to the title issues, not any alleged failure to comply with competitive bidding statutes. In its Order, the District Court conflated standing to contest the competitive bidding process with standing to contest the validity of Leases as a contractual document, and completely ignored that there is no evidence in the record to support that the Lessees suffered any injury from the bidding process alone. See App. at 445-46. The relevant inquiry is whether Lessees suffered "some threatened or actual **injury resulting from the putatively illegal action**," i.e., the improper bidding process, not whether the Leases were profitable or devoid of title issues. As the record stands, there is no evidence that Lessees suffered from the lack of a public auction of the Leases. In fact, Lessees actually benefitted from the private auction, as they received the Leases for a price lower than what the Leases likely would have sold for at a public auction.

[¶26] Indeed, Lessees are not even included in the category of individuals competitive bidding statutes are intended to protect.

> Statutory competitive bidding requirements are enacted for the **benefit of the public and taxpayers** to invite competition; to prevent favoritism, fraud, corruption, improvidence, extravagance, and collusion; and to secure the best work or supplies at the lowest price practicable. Competitive

> bidding requirements promote honesty, economy, and aboveboard dealing in the letting of public contracts.

Baukol Builders, Inc. v. Cnty. of Grand Forks, 2008 ND 116, ¶ 17, 751 N.W.2d 191 (citations omitted) (emphasis added). "A party cannot seek to enjoy the benefits of a transaction under the law and thereafter challenge the validity of the transaction." Baukol Builders, Inc. v. County of Grand Forks, 2008 ND 116, ¶ 11, 751 N.W.2d 191 (quoting Quist v. Best W. Int'l, Inc., 354 N.W.2d 656, 664-65; Frieh v. City of Edgeley, 317 N.W.2d 818, 819-20 (N.D. 1982)). In Frieh, "the City of Edgeley advertised for bids for the collection of garbage." Id. (citing Frieh, at 819). "The plaintiffs submitted bids for the contract, but another bidder was awarded the contract." Id. "The plaintiffs then challenged the city's decision, asserting it was improper for the city to engage in a bidding process for obtaining garbage services in the absence of a city ordinance or a resolution authorizing the process." Id. In holding the plaintiffs were precluded from challenging the city's contracting process, this Court reasoned:

> Our Court has repeatedly held that **a party seeking to enjoy the benefits under a law cannot thereafter, in the same proceedings, question the constitutionality of the act.** We are not aware of any valid reason why the same rationale and concept should not apply to an action challenging the validity of the city's action as distinguished from an action challenging the legality of the law under which the city acted.
>
> **Frieh's voluntary participation in the city's bidding process, not only once but twice, without raising any objection as to the city's authority or proper procedure** amounts to consent and he cannot now be heard to complain or object because he did not receive the bid and contract.

Id. (quoting Frieh, at 819-20) (emphasis added).

[¶27] Here, Lessees participated in and sought to enjoy the benefits of the County's bidding process for the Leases. The District Court attempted to distinguish the facts of this case from Baukol and Frieh because the plaintiffs in those cases did not win

the bids and Lessees did. App. at 446. However, the District Court's reasoning is flawed, because this Court's precedent on the issue is clear: voluntary participation in a flawed process without any objection amounts to consent to the process and precludes standing to contest that very process. This Court makes no distinction between a party that actually wins the bid and a party that loses the bid, and there is no legal or logical support for such a position. This Court has stated that the bidding process is to protect the public and the taxpayers, not the individuals that willingly participate in a flawed process. Irish Oil even participated this same process in two leases prior to the Leases at issue here and has not sought to challenge the validity of those leases, a fact which the District Court also ignored. App. at 36. It is clear Lessees are only protesting the bidding process now because of the alleged title issues regarding the Subject Lands and do not want to have to quiet title to the Leases due to the legal implications surrounding the Missouri River, water movement, accretion, and falling oil prices. Regardless of the reason for the challenge, the law on this issue is well-established; Lessees cannot avail themselves of the benefits of the process by entering into a risky investment without doing proper due diligence, and then attempt to recover their gambling losses by asserting the process was invalid. Summary judgment should have been granted to the County on this issue, not the Lessees.

b. The Lessees Waived Their Right to Contest the Competitive Bidding Process.

[¶28] Furthermore, Lessees waived their right to contest the bidding process by participating in it. "Under North Dakota law, waiver is 'the voluntary and intentional relinquishment and abandonment of a known existing right, advantage, benefit, claim, or privilege which, except for the waiver, the party would have enjoyed.'" Ctr. for Special Needs Trust Admin., Inc. v. Olson, 676 F.3d 688, 698 (8th Cir. 2012) (quoting Runck v.

Kutmus, 997 F.2d 399, 400 (8th Cir. 1993)); Holverson v. Lundberg, 2016 ND 103, ¶ 23, 879 N.W.2d 718. "A party who makes an unexplained delay in enforcing his contractual rights or who accepts performance in a manner different from that required by the contract has been held to have acquiesced to the nonconforming performance made by the other party." Dangerfield v. Markel, 252 N.W.2d 184, 191 (N.D. 1977). "Once the right is waived, the right or privilege is 'gone forever and cannot be recalled.'" Tormaschy v. Tormaschy, 1997 ND 2, ¶ 19, 559 N.W.2d 813 (quoting Meyer v. Nat'l Fire Ins. Co. of Hartford Conn., 269 N.W. 845, 852 (1936)). "A waiver cannot be extracted, recalled or expunged." Id. (citing Steckler v. Steckler, 492 N.W.2d 76, 79 (N.D. 1992)).

[¶29] Waiver can be demonstrated either "by an express agreement or by inference from acts or conduct." Wenco v. EOG Resources, Inc., 2012 ND 219, ¶ 19, 822 N.W.2d 701; Pfeifle v. Tanabe, 620 N.W.2d 167, 172 (N.D. 2000); Tormaschy, 1997 ND 2, ¶ 19, 559 N.W.2d 813. "Furthermore, when parties engage in an activity which clearly constitutes a waiver, they cannot later claim they did not know their actions amounted to a voluntary and intentional waiver of their rights, because, 'he who consents to an act is not wronged by it.'" Tormaschy, ¶ 19 (quoting Beck v. Lind, 235 N.W.2d 239, 251-52 (N.D. 1975); N.D.C.C. § 31-11-05(6)). The existence of waiver usually constitutes a question of fact, but it will be considered a "question of fact, the issue becomes a question of law if reasonable persons could draw only one conclusion from the circumstances." Wenco, ¶ 19.

[¶30] Here, the undisputed evidence demonstrates Lessees waived their right to contest the validity of the bidding process as a matter of law. It is undisputed that Lessees approached the County for an informal bidding process, and subsequently entered into the Leases in early 2012 without an auction. It is undisputed that Lessees had just as much

opportunity, if not more, due to their experience, to be aware of the requirements of a public auction for political subdivisions leasing oil and gas rights. It is also undisputed that Lessees did not question this process until October 2016; over four years after the Leases were executed. In fact, Lessees only questioned the bidding process after their investment became less valuable. Lessees willingly participated in the process and knowingly waived their right to contest the bidding process. In its Order, the District Court failed to address this issue, as even if the undisputed facts did not render it an issue of law, it created a genuine issue of fact, precluding summary judgment.

c. The Lessees are Barred by Laches from Contesting the Competitive Bidding Process.

[¶31] If Lessees did have standing to contest the bidding process and they did not waive their right to contest it, Lessees' claim is still barred by laches. "A 'stale claim' may be barred by the equitable defense of laches." Stenehjem ex rel. State v. Nat'l Audubon Soc'y, Inc., 2014 ND 71, ¶ 12, 844 N.W.2d 892 (quoting Sall v. Sall, 2011 ND 202, ¶ 14, 804 N.W.2d 378). "Laches is a delay or lapse of time in commencing an action that works a disadvantage or prejudice to the adverse party because of a change in conditions during the delay." Peltier v. State, 2015 ND 35, ¶ 27, 859 N.W.2d 381. "Laches does not arise from a delay or lapse of time alone, but is a delay in enforcing one's rights which works a disadvantage to another." Stenehjem, at ¶ 12 (quoting Sall, at ¶ 14).

[¶32] Here, Lessees were aware of potential title issues by at least June 6, 2013, yet did not notify the County until April 14, 2015. They did not bring suit until September 31, 2015, over three years after the leases were executed. The County has been substantially prejudiced by Lessees' delay in pursuing their claim questioning the validity of the bidding process. Once the County received the bonus payments from Lessees, the money was

placed into the County's General Fund and distributed as projects were approved for payment, rather than being ear-marked for any one specific purpose. App. at 35 ¶ 14.

[¶33] The bonus payments from Lessees have long since been allocated and spent. Id. As the County no longer has the funds to return to Lessees, it would be a hardship for the County to repay the bonuses, as currently all of the money in the General Fund has been assigned to a budget or project. Id. In order to make the repayment, the County would have to cancel projects that have already funded in order to reallocate funds to repay the bonuses. Id. The District Court improperly weighed facts when it determined that the affidavit submitted by Innis was insufficient to demonstrate when the bonus payments were spent. App. at 455. The District Court also conflated notice as to the potential title issues of the Leases with the date the bidding process occurred in its Order. Id. The District Court confusingly found the County should have presented evidence of whether the bonus payments were spent between June 3, 2013, and September 30, 2015, the time between when Lessees were on notice of potential title issues and when they brought suit. Id. The County is unsure how the District Court came to this conclusion, as the 2013 date is completely irrelevant to the bidding process. The County's laches defense only asserts that Lessees are barred from contesting the bidding process, not that they are not barred from a contractual challenge to the Leases themselves. Doc. ID# 90. The only contractual claims brought by Lessees are regarding rescission and the covenant of quiet possession, which again, have no bearing on whether Lessees are barred by laches from contesting the competitive bidding process. The District Court also found "that the Defendants suffered prejudice" in its laches analysis. App. at 455. However, the District Court then went on to hold that "the Defendants failed to produce evidence of prejudice due to the delay." App.

at 456. Regardless, summary judgment should have been granted to the County, as there were no genuine issues of material facts regarding laches.

2. The County did not Violate the Statutory Competitive Bidding Process under N.D.C.C. ch. 38-09.

[¶34] Regardless of whether Lessees can contest the bidding process, the County was not required to publicly bid the Leases under N.D.C.C. ch. 38-09 because each Lease was for less than the minimum drilling unit and the Leases were nonoperative based on the land they covered. An exception to public bidding process is provided in N.D.C.C. § 38-09-19, and states that this public bidding process is not required "[w]here the acreage or mineral rights owned by the state or its departments and agencies or political subdivisions is **less than the minimum drilling unit** under well spacing regulations, **nonoperative oil and gas leases** may be executed through private negotiation." N.D.C.C. 38-09-19(1) (emphasis added). Put simply, a political subdivision is not required to publicly advertise public lands for lease if the acreage is less than the minimum spacing unit and the leases are nonoperative.

[¶35] For the first prong, N.D. Admin. Code section 43-02-03-18 provides that drilling units are set by the orders of the Industrial Commission. N.D. Admin. Code § 43-02-03-18. In the absence of an order of the Industrial Commission, this regulation provides drilling unit requirements for both vertical and horizontal wells. N.D. Admin. Code § 43-02-03-18(1)-(2). The Leases in this case were for oil and gas interests from horizontal wells. App. at 97 (70:22-71:1), 336 (104:22-105:13). For horizontal wells, the minimum drilling unit is one governmental section or two adjacent governmental quarter sections within the same section, depending on the depth of the well. N.D. Admin. Code § 43-02-03-18(2)(a). A governmental section is 640 acres, and a quarter section is 160 acres, so the

minimum drilling unit for a horizontal well is 640 acres, or 320 acres if it is on two adjacent quarter sections within the same section. See 73B C.J.S. Public Lands § 48.

[¶36] The Industrial Commission issued orders on the Subject Lands shortly before Lessees and the County entered into the Leases, setting the spacing units to 1280 or 1600 acres, depending on the Section. App. at 361-63, 366, 373, 376. The Subject Lands for each Lease are less than 140 acres, which are well below both the minimum spacing unit set under either spacing unit regulations or the Industrial Commission orders. As a result, this portion of the exception to the advertising requirement of the bidding process is met.

[¶37] For the second prong, the Leases also qualify as nonoperative. Lessees allege that the submersion of the Subject Lands has led to title issues. Lessees admit in their Amended Complaint that the Subject Lands are underwater, and that in order to develop the land, they would need to operate wells off-site. Supreme Court Docket #7 at 10; App. at 11-12 ¶¶ 16-21. Lessees have never provided any evidentiary support that it was their intention to develop the Subject Lands on-site. At the very least, there is an issue of fact as to whether the Leases were nonoperative. Thus, the District Court erred in granting summary judgment for the Lessees on this issue.

3. Unjust Enrichment is Unavailable Where Parties have an Express Agreement.

[¶38] The doctrine of unjust enrichment "does not apply when there is an express agreement between the parties since, . . . the doctrine is premised upon the absence of an express contract." Bakken Residential, LLC v. Cahoon Enterprises, LLC, 154 F.Supp.3d 812, ¶ 42 (D.N.D. 2015). "The North Dakota Supreme Court more fully explained this point, stating '[w]hen an impoverishment results from a valid contractual arrangement

made by a party, the result is not contrary to equity and there has been no unjust enrichment.'" Id. (quoting Lochthowe v. C.F. Peterson Estate, 2005 ND 40, ¶ 10, 692 N.W.2d 120).

[¶39] Here, it is undisputed the parties entered into an express agreement – the Leases. For their unjust enrichment claim, Lessees rely on their claims of rescission and statutory bidding process to invalidate the contract that was formed between the parties. However, as demonstrated herein, there are no grounds to invalidate the Leases, precluding Lessees' claim for unjust enrichment, and entitling the County to summary judgment on this claim.

4. Lessees are not Entitled to Rescission of the Leases due to Mistake, Fraud, or Failure of Consideration

[¶40] Lessees have asserted three causes of action for rescission: mistake, actual or constructive fraud, and failure of consideration. However, all three claims fail as a matter of law, and should have been dismissed on summary judgment.

[¶41] "A party will be granted rescission only if the party acts with reasonable diligence to rescind promptly and restore to the other party the value which was received under the contract." Check Control, Inc. v. Shepherd, 462 N.W.2d 644, 648 (N.D. 1990) (citing Holcomb v. Zinke, 365 N.W.2d 507, 510 (N.D. 1985)); N.D.C.C. § 9-09-04. "A party waives the right of rescission if the party fails to promptly exercise that right upon discovering the facts necessary for rescission." Id.

[¶42] Here, the undisputed facts demonstrate Lessees waived their right to rescind the contract and are therefore estopped from seeking rescission. Lessees did not exercise due diligence with regard to title either before or after bidding on the Leases. During the due diligence period, Caya was aware the Subject Lands were along the river

and was also aware of the various issues related to title and river movement. App. at 142-44 (51:12-56:2), 145-46 (62:21-65:9). Caya also admitted the maps were suspicious whether some of the Subject Lands were in Williams or McKenzie County. Id. Caya further admitted there was concern by Lessees about title even before the bonus payments were made. Id. at 38:5-14. Also, Lessees did not act with reasonable diligence to rescind the Leases upon discovery of the title issue. Lessees waited almost two years to inform the County of the title issue, as they were informed by Hess on June 6, 2013, about the possible title defects, and did not contact the County requesting repayment of the bonuses until April 14, 2015. App. at 305-07. Lessees assumed the risk of the Leases without a warranty clause, failed to exercise due diligence, and waited an unreasonable amount of time after discovering potential title defects to notify the County. Lessees waived their right to rescind the Leases and are estopped from asserting rescission.

a. Lessees are not Entitled to Rescission due to Mistake.

[¶43] Even if Lessees were not estopped from asserting rescission, their claims of rescission for mistake, fraud, and failure of consideration still fail. First, rescission for mistake of fact is not proper where a mistake stems from a party's own negligence or carelessness rather than from any misrepresentation or warranty on the part of the other party. Sec. State Bank of Wishek v. State, 181 N.W.2d 225, 232-33 (N.D. 1970).

[¶44] Here, any alleged mistake of fact is the direct result of Lessees' own negligence or carelessness and their failure to conduct due diligence with regard to the title search of the Subject Lands. The County required Lessees to strike the warranty clause from the Leases, which they did. Lessees were on notice that there could be title issues with regard to Subject Lands due to their proximity along the river. The County never

represented to Lessees that it had done a title search. On the contrary, the County specifically requires all of its oil and gas leases to have the warranty clause stricken for this specific purpose, as it does not conduct any research regarding title to its lands. App. at 34 ¶ 10. The County had no reason to doubt title to the lands either, as both LoneTree and Irish Oil approached the County about leasing the Subject Lands. Therefore, Lessees cannot demonstrate a claim for rescission based on mistake of fact, and their claim should have been dismissed as a matter of law.

b. Lessees are not Entitled to Rescission due to Fraud.

[¶45] Lessees also cannot establish a claim of rescission for fraud. "The burden is on the party asserting fraud to establish the elements of fraud." First Union Nat. Bank v. RPB 2, LLC, 2004 ND 29, ¶ 22, 674 N.W.2d 1. "Under [N.D.C.C. § 9-03-08], actual fraud requires either an intent to deceive a party to the contract, or an intent to induce that party to enter into the contract." West v. Carlson, 454 N.W.2d 307, 310 (N.D. 1990). "Fraud cannot exist unless an intent to deceive is present, for it is action of the mind which gives existence to the fraud." Zuraff v. Empire Fire & Marine Ins. Co., 252 N.W.2d 302, 308 (N.D. 1977).

[¶46] "Constructive fraud is generally used to characterize a misrepresentation made without knowing it is false." Clausen v. Nat'l Geographic Soc., 664 F. Supp.2d 1038, 1053 (D.N.D. 2009). "[C]onstructive fraud arises from a breach of a duty which is owed ordinarily because of a fiduciary or confidential relationship between the parties." Id. (quoting Land Office Co. v. Clapp-Thomssen Co., 442 N.W.2d 401, 406 (N.D. 1989)). "A fiduciary or confidential relationship exists in a 'business agency, professional relationship, or family tie impelling or inducing the trusting party to relax the care and vigilance

ordinarily exercised. In a fiduciary relationship, the superior party has a duty to act in the dependent party's best interest.'" Id. (quoting Nesvig v. Nesvig, 2004 ND 37, ¶ 20, 676 N.W.2d 73).

[¶47] Here, there is no evidence the County was aware of any potential title issues prior to bidding the Leases. In addition, it is undisputed there was no fiduciary relationship between the County and Lessees at any time during the transaction. As such, Lessees claim for rescission due to fraud must fail as a matter of law, and should have been dismissed on summary judgment.

c. Lessees are not Entitled to Rescission due to Failure of Consideration.

[¶48] For its last rescission claim, Lessees assert that in exchange for payment of the bonuses and the promise to pay royalties on any oil and gas extracted from the Subject Lands, the County conveyed a leasehold interest in all of its oil and gas interests in the Subject Lands to Lessees. Lessees argue that the lack of any leasehold interest by the County in the Subject Lands constitutes a failure of consideration. "The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." N.D.C.C. § 9-05-11. "Failure of consideration arises when a valid contract has been formed, but the performance bargained for has not been rendered." Check Control, Inc. v. Shepherd, 462 N.W.2d 644, 646 (N.D. 1990).

[¶49] Here, consideration for payment from Lessees was a leasehold interest in all of the County's oil and gas interests in the Subject Lands, not the guaranteed entitlement to usable or fruitful oil and gas interests. The warranty clause in the Leases was stricken, extinguishing any guaranteed right to any oil and gas interests. Thus, the actual consideration for the Leases was the opportunity for Lessees to lease oil and gas interests

in the Subject Lands. Just as a lack of any actual oil and gas interests in the Subject Lands would not constitute failure of consideration, neither does a possible lack of good title. If failure of consideration applies here, the warranty clauses, and striking them, would have no meaning. Furthermore, the extent of ownership over the Subject Lands by the County is still unknown, as no title opinion has been produced, so any finding on this issue would be premature. Therefore, Lessees failure of consideration claim must be dismissed as a matter of law.

5. There is Not an Implied Covenant of Quiet Possession in the Leases, nor did the County Breach Such Covenant.

[¶50] Lessees allege the Leases contain an implied covenant of quiet possession, and the County breached this covenant by not having good title to the Subject Lands. "An agreement to lease real property binds the lessor to secure to the lessee the quiet possession of such property during the term of the lease **against all persons lawfully claiming the same.**" N.D.C.C. § 47-16-08 (emphasis added). Specifically, "[t]he expression, 'lawfully claiming the same' means that the one claiming has a legal right to the use or possession of the property." Smith v. Nortz Lumber Co., 7 N.W.2d 435, 436 (N.D. 1943). Further, a plaintiff attempting to recover under this statute must show "that the defendant, or someone by its connivance put him out of possession." Id. at 437.

[¶51] Here, the record is devoid of any party lawfully claiming right to the use or possession of the Subject Lands. Lessees have not brought a quiet title action to these lands, or even produced a title opinion. Lessees must demonstrate that a party has a competing claim to title, or a party has put Lessees out of possession in order to sustain a breach of covenant of quiet possession claim. Thus, even if the Leases contained a covenant of quiet possession, Lessees claim should have been dismissed as a matter of law.

[¶52] While oil and gas leases are generally construed like other contracts, "oil and gas leases are not and should not be governed by the law or policy applicable to ordinary landlord and tenant leases." Irish Oil and Gas, Inc. v. Riemer, 2011 ND 22, ¶ 15, 794 N.W.2d 715. Here, the Leases are for oil and gas purposes, and are not a standard landlord/tenant lease. There is no North Dakota authority supporting that the implied covenant of quiet possession applies to an oil and gas lease, and as such, Lessees claims should have been dismissed as a matter of law.

[¶53] Even if North Dakota implied a covenant of quiet possession into oil and gas leases, the Leases do not include any such implied covenant. An express provision in an agreement negating any and all warranties will extinguish any covenant of quiet possession. A covenant of quiet enjoyment is implied in a lease "absent some provision in the lease negating such an implied covenant . . . ." 49 Am. Jur. 2d Landlord and Tenant § 478 (Nov. 2017); see Best v. Crown Drug Co., 154 F.2d 736, 737-38 (8th Cir. 1946) (applying Missouri law); Stinson, Lyons, Gerlin & Bustamante, P.A. v. Brickell Bldg. 1 Holding Co., Inc., 923 F.2d 810, 813-14 (11th Cir. 1991) (applying Florida law); Butler v. Bazemore, 303 F.2d 188, 190 (5th Cir. 1962) (applying Louisiana law); Four Bros. Boat Works, Inc. v. Tesoro Petroleum Cos., Inc., 217 S.W.3d 653, 665-66 (Tex. App. 2006) ("It is well-settled that, in the absence of express language to the contrary, there is an implied warranty that the lessee shall have the quiet and peaceful enjoyment of the leased premises.").

[¶54] Here, the parties expressly disclaimed that the County could be held liable for any title disputes by striking the warranty clauses. See App. at 119-21, 199-207 ¶ 14. The striking of this express provision unambiguously demonstrates the intent of the parties

the County would not warrant and defend the title, negating any implied covenant of quiet possession in the Leases. Lessees took the risk of entering into the Leases without the covenants of warranty or quiet possession. "Interpretation of a written contract to determine its legal effect is a question of law, fully reviewable on appeal." Kittleson v. Grynberg Petroleum Co., 2016 ND 44, ¶ 10, 876 N.W.2d 443. "The general rules governing contract interpretation apply to the interpretation of leases." Id. (quoting Sterling Dev. Grp. Three, LLC v. Carlson, 2015 ND 39, ¶ 13, 859 N.W.2d 414). "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible." Id. (quoting N.D.C.C. § 9-07-04). "Words are given their plain, ordinary, and commonly understood meaning, unless a contrary intention plainly appears." Id. (citing N.D.C.C. § 9-07-09).

[¶55] The plain, ordinary, and commonly understood meaning of the parties' agreement in the Leases demonstrates they agreed to disclaim any and all warranties to title, including the covenant of quiet possession. As a result, the undisputed facts establish the Leases do not contain an implied covenant of quiet possession. Therefore, Lessees' claim should have been dismissed as a matter of law on summary judgment.

IV. CONCLUSION

[¶56] For the foregoing reasons, the District Court's order granting Lessees' motion for summary judgment should be reversed and remanded with an instruction to grant the County's motion for summary judgment.

Dated this 25th day of September, 2018.

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CERTIFICATE OF COMPLIANCE

[¶57] The undersigned certifies the above brief is in compliance with N.D.R.App. P. 32(a)(7)(A) and the total number of words in the brief, excluding words in the table of contents, table of authorities, signature block, certificate of service, and this certificate of compliance totals 7915 words.

Dated this 25th day of September, 2018.

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CERTIFICATE OF SERVICE

[¶58] I hereby certify that on the 25th day of September, 2018, a true and correct copy of the foregoing **BRIEF OF APPELLANTS** was served as follows:

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