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STATE OF NORTH DAKOTA

Case No. 20100064
District Court No. 13-09-C-11
IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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Irish Oil and Gas, Inc.
Plaintiff and Appellant

v.

Gerald C. Riemer, Doris E., Riemer, Lillie J. Riemer, and Joanne Johnson
Defendants and Appellees

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APPEAL FROM THE DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
DUNN COUNTY
THE HONORABLE ZANE ANDERSON

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# BRIEF OF APPELLEE, JOANNE JOHNSON

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## STATEMENT OF THE ISSUES

**I. The District Court did not err in Granting the Motion for Summary Judgment of Defendant, Joanne Johnson and Denying Appellant, Irish Oil and Gas, Inc.'s Motion for Summary Judgment**.

**II. The District Court did not err in denying Appellant, Irish Oil and Gas, Inc.'s Motion to Amend its Complaint.**

## STATEMENT OF THE CASE

### I. Nature of the Case

1. This is an action by Appellant to recover damages based upon the Appellee's alleged breach of an oil and gas lease and associated agreement for payment of a lease bonus. Appellee alleged that the Appellant breached the associated agreement for payment of the lease bonus by failing to timely pay such lease bonus and that such breach entitles her to rescission and/or cancellation of the oil and gas lease.

2. Appellant asserts that Gerald Riemer agreed to extend the time for payment of the lease bonus and that, because he allegedly was her agent, Joanne Johnson also agree to such extension. Joanne Johnson disputed that claim and asserted the defense that neither a modification of the agreement for payment of a lease bonus nor any grant of disputed authority to grant such were in writing as required by statute and/or case law.

### II. Course of Proceedings and Disposition Below

3. This Appellee does not dispute the accuracy of Appellant's Statement of the Case as set forth in paragraphs 1 through 4 of its Brief.

### III. Statement of Facts

4. **Preface.** Notwithstanding that there is a lengthy recitation of facts herein below, from the point of view of this Appellee, there are really only a few facts pertinent to the issues presented. They are:

1. The "contract" between Irish Oil and Joanne Johnson consists of two (2) related written documents, signed simultaneously, i.e., the Oil and

Gas Lease (Lease) and the "Letter Agreement In Lieu of Draft for Oil and Gas Lease Bonus Consideration" (Letter Agreement);

2. The bonus payment of $10, 640 provided for in the Letter Agreement was not paid at the time prescribed in the Letter Agreement;

3. There was no written agreement modifying the Letter Agreement;

4. There was no written agreement authorizing Gerald C. Riemer to act on behalf of Joanne Johnson.

5. On January 25, 2008, Joanne Johnson, simultaneously executed two (2) documents between the same contracting parties (herself and Irish Oil), for the same purpose, and in the course of the same transaction; and, therefore, those documents constitute one contract from Joanne Johnson's perspective. One document was entitled "Oil and Gas Lease" (Lease) and dealt with Joanne Johnson's interest in minerals in Dunn County, North Dakota, known and more particularly described as:

Township 144 North, Range 92 West of the 5th P.M:
Section 5: S½N½, Lots 1(39.01), 2(39.14), 3(39.27), 4(39.41), SE¼

; and one document was entitled "Letter Agreement In Lieu of Draft for Oil and Gas Lease Bonus Consideration" (Letter Agreement) and also dealt with Joanne Johnson's interest in minerals in Dunn County, North Dakota, known and more particularly described as:

Township 144 North, Range 92 West of the 5th P.M:
Section 5: S½N½, Lots 1, 2, 3, 4, SE¼

The Letter Agreement provided that "Within 60 days upon receipt of the signed lease, and subject to approval of title, with right of payment extension of 30 additional days, in the event of title curative issues, from expiration of original 60

days, you will receive a check in the amount of $10,640.00."

6. Irish Oil did not deliver a check in the amount of $10,640.00 to Joanne Johnson within 60 days after receipt of the signed lease from Joanne Johnson or within 30 additional days from expiration of original 60 days; and Irish has admitted such. After the expiration of such time period, Joanne Johnson executed a lease of such minerals to another entity.

7. Following is Joanne Johnson's Request for Admission #6 on that subject and Irish Oil's response:

> "6. Plaintiff, Irish Oil and Gas, Inc. did not deliver a check in the amount of $10,640.00 to Joanne Johnson within 60 days after receipt of the signed lease from Joanne Johnson or within 30 additional days from expiration of original 60 days.
>
> RESPONSE: The Plaintiff **admits** Request No. 6."

8. Irish Oil also admits that Joanne Johnson did not sign any written agreement, or enter into any oral agreement on her own behalf, modifying the terms of the Letter Agreement.

9. Following is Joanne Johnson's Request for Admissions #7 and # 8 on that subject and Irish Oil's response:

> "7. Joanne Johnson did not sign any written agreement modifying the terms of the Letter Agreement In Lieu of Draft for Oil and Gas Lease Bonus Consideration wherein Joanne Johnson was designated as Lessor of the real property which is the subject matter of this action.
>
> RESPONSE: The Plaintiff **admits** Request No. 7.
>
> 8. Joanne Johnson did not, on her own behalf, enter into any oral agreement modifying the terms of the Letter Agreement In Lieu of

Draft for Oil and Gas Lease Bonus Consideration wherein Joanne Johnson was designated as Lessor of the real property which is the subject matter of this action.

RESPONSE: The Defendant **admits** Request No. 8."

10. See also Joanne Johnson's Demand for Production of Documents # 3 and Irish Oil's response, which is as follows:

"3. Any written agreement executed by Joanne Johnson modifying the terms of the Letter Agreement In Lieu of Draft for Oil and Gas Lease Bonus Consideration wherein Joanne Johnson was designated as Lessor of the real property which is the subject matter of this action.

RESPONSE: The Plaintiff is **unaware of any such document**."

11. Irish Oil further admitted that it had no communication with Joanne Johnson with regard to modification of the terms of the agreement so as to extend the time for payment. Following is Joanne Johnson's Request for Admission #3 on that subject and Irish Oil's response:

"3. Did any representative of Plaintiff, Irish Oil & Gas, Inc. have any communications directly with Joanne Johnson on the subject of modification of the terms of the Letter Agreement In Lieu of Draft for Oil and Gas Lease Bonus Consideration wherein Joanne Johnson was designated as Lessor of the real property which is the subject matter of this action?

If so, state:
...

RESPONSE: No."

12. However, Irish Oil's Reply to Joanne Johnson's Counterclaim alleges that Joanne Johnson authorized her brother, Gerald Riemer, to act as her agent in that regard; and that he agreed to extend the time for payment. Joanne Johnson denies

such at paragraph X of her Answer.

13. The basis for Irish Oil's contention that Gerald Riemer had authority to negotiate a modification of the terms of the Letter Agreement appears to be the allegations set forth in Irish Oil's response to Joanne Johnson's Interrogatory # 4 and #5.

14. Following is Joanne Johnson's Interrogatory #4 on that subject and Irish Oil's response:

> "4. Identify any and all facts of which Plaintiff, Irish Oil & Gas, Inc. is aware which show or imply that Gerald Riemer had any authority to act upon behalf of Joanne Johnson for the purpose of entering into any agreement modifying the terms of the Letter Agreement In Lieu of Draft for Oil and Gas Lease Bonus Consideration wherein Joanne Johnson was designated as Lessor of the real property which is the subject matter of this action.
>
> RESPONSE:
>
> 1. All of the negotiations regarding the lease of oil and gas rights by Irish Oil & Gas, Inc., for mineral rights owned by Gerald and Doris Riemer, Lillie Riemer, and Joanne Johnson for Township 144 North, Range 92 West of the 5th P.M. Section 05: S1/2N1/2, Lots 1, 2, 3, 4, SE1/4, Dunn County, ND were done exclusively through Gerald C. Riemer with Clarence Herz.
>
> 2. In a note dated June 3, 2008, in an envelope addressed from Joanne Johnson to Irish Oil & Gas, Inc., Joanne Johnson states, "Sorry, We never heard from you since Jan. 25-2008 so we accepted another oil & gas lease. I am returning your check. Sincerely, Joanne Johnson."
>
> 3. Gerald C. Riemer made it apparent to Clarence Herz that he was the agent of all the other mineral interest holders on this property when he agreed to allow an extension of time for the receipt of a bonus payment due to a title curative issue as contemplated in the lease agreement.

15. Following is Joanne Johnson's Interrogatory #5 on that subject and Irish Oil's response:

> 5. Identify any and all documents or tangible things of which Plaintiff, Irish Oil & Gas, Inc. is aware which show or imply that Gerald Riemer had any authority to act upon behalf of Joanne Johnson for the purpose of entering into any agreement modifying the terms of the Letter Agreement In Lieu of Draft for Oil and Gas Lease Bonus Consideration wherein Joanne Johnson was designated as Lessor of the real property which is the subject matter of this action.
>
> RESPONSE: The note dated June 3, 2008, bearing Joanne Johnson's signature that infers she was acting in concert with others, as referenced in the response to Interrogatory 4."

16. Irish Oil has not ever identified any other basis for its assertion that Joanne Johnson authorized Gerald Riemer to act as her agent for any purposes relative to the subject of the agreements between the parties or modification thereof.

17. Irish Oil moved the District Court for permission to amend its Complaint. It proposed Amended Complaint (Appx. P. 72) set forth the new allegation at XIII. that:

> "Defendants Joanne Johnson and Lillie J. Riemer represented to an agent of Irish that Gerald Riemer was their agent for purposes of negotiating oil and gas leases and that they would do whatever Gerald Riemer would do."

18. Notwithstanding that proposed amended allegation, Irish Oil has never withdrawn, corrected, nor supplemented any of the aforementioned discovery responses.

## STANDARD OF REVIEW

### Summary Judgment

19. This Court's standard of review on summary judgment is well-established:

> Under N.D.R.Civ.P. 56, summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. The party moving for summary judgment must show there are no genuine issues of material fact and the case is appropriate for judgment as a matter of law. A district court's decision on a motion for summary judgment is a question of law that we review de novo on the record. In determining whether summary judgment was appropriately granted, we view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences which can reasonably be drawn from the record. Grinnell Mutual Ins. Co. v. Thompson, 2010 ND 22, ¶8, 778 N.W.2d 526

#### Question of law - contract

20. The interpretation of a written contract to determine its legal effect is a question of law. Fargo Foods, Inc. v. Bernabucci, 1999 ND 120, ¶ 13, 596 N.W.2d 38.

#### Question of law - statute

21. Interpretation of a statute is a question of law fully reviewable on appeal. Morton County Social Service Bd. v. Cramer, 2010 ND 58, ¶14

### Motion to Amend Complaint

22. A district court's decision on a motion to amend a pleading will not be overruled on appeal unless the court has abused its 637 discretion. *Id.* at ¶ 7. A district court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, when its decision is not the product of a rational mental process leading to a reasoned determination, or when it misinterprets or misapplies the law. *Id.* Kambeitz v. Acuity Ins. Co., 2009 ND 166, ¶11, 772 N.W.2d 632

## ARGUMENT

23. **Preface.** Irish Oil began the argument in its brief by addressing the subject of whether it was error for the District Court to have denied its Motion to Amend its Complaint. Because much of the law relative to Joanne Johnson's argument on that subject would be repetitious of the law relative to her argument on the issue of whether the District Court erred in its rulings on the parties' respective motions for summary judgment, Joanne Johnson will address the subject of whether it was error for the District Court to have denied its Motion to Amend its Complaint issue last.

### I. The District Court did not err in Granting the Motions for Summary Judgment of Defendants, Gerald C. Riemer and Doris Riemer, husband and wife, Joanne Johnson and Lillie J. Riemer and Denying Appellant, Irish Oil and Gas, Inc.'s Motion for Summary Judgment.

#### A. Implied versus express terms.

24. In Irish Oil's argument on this subject, it essentially places "all of its eggs in one basket", i.e. its assertion that paragraph 16 of the Lease required that Appellees seek a judicial determination of default before it can be "terminated." It argues that the District Court erred in its determination that paragraph 16 of the Lease was inapplicable to the current circumstances.

25. The North Dakota Supreme Court has oft held that the interpretation of a written contract to determine its legal effect is a question of law. See, for instance, City of Bismarck v. Mariner Const., Inc., 2006 ND 108, ¶11, 714 N.W.2d 484; and Fargo Foods, Inc. v. Bernabucci, 1999 ND 120, ¶13, 596 N.W.2d 38. Thus, a

discussion of whether there is a fact issue with regard thereto is not appropriate. Rather, the North Dakota Supreme Court's de novo review is limited to determining whether the District Court was correct.

26. It is clear that, after consideration of "... who drafted it, the language used, the placement and context of the paragraph"(Appx. p.83), the District Court determined that paragraph 16 deals with implied covenants. Having reached that conclusion of law, and having noted that "... when one is dealing with implied responsibilities", the District Court went on to conclude that "[i]f an explicitly expressed duty is breached, it would appear to the Court that it would be unreasonable and it would waste judicial and other resources to require the non-breaching party to obtain a Court order." (Appx. p.84).

27. The entirety of the District Court's reasoning for rejecting Irish Oil's argument concerning the aforementioned paragraph is set forth at pages 6 and 7 of its Memorandum Opinion. (Appx. pp 83-4). Joanne Johnson both concurs with the District Court's reasoning, and submits that it is correct.

28. Irish Oil argues that the word "implied" in the phrase "[t]his lease shall not be terminated...for failure ... to perform ... its **implied covenants, conditions, or stipulations**" applies only to "covenants" and not to "conditions, or limitations."

29. Conversely, Joanne Johnson asserts that it is clear, from the entirely of the language used, that the paragraph is addressing implied obligations generally. For instance, the use of the closing statement in paragraph 16 that "Lessee shall not be

liable in damages for breach of **any implied covenants or obligation**" certainly suggests that the term "implied"applies to both covenants and obligations.

30. Although not entirely dispositive, it is interesting to note that several other Courts which have addressed the language at issue, i.e. "[t]his lease shall not be terminated, forfeited, or canceled for failure by Lessee to perform in whole or in part any of its implied covenants, conditions, or stipulations..." almost universally seem to treat it as a "given" that such language is addressing implied obligations. See, for instance, Gillette v. Pepper Tank Co., 694 P.2d 369, 371 (Colo.App.,1984); Kuehne v. Samedan Oil Corp., 626 P.2d 1035, 1037 (Wyo., 1981) **reversed on other grounds**; Waddle v. Lucky Strike Oil Co., Inc.,551 S.W.2d 323, 327 (Tenn. 1977); and Steffes v. Allen 295 Mich., 510, 513-514, 295 N.W. 245, 246 (Mich.1940). In none of those cases is there a suggestion that the word "implied" applies only to "covenants" and not to "conditions, or limitations."

31. In the context of the District Court's statement that "...it would appear to the Court that ... it would waste judicial ...resources to require the non-breaching party to obtain a Court order" (Appx. p.84), Joanne Johnson would note that the United States Supreme Court has held that a ruling based upon a determination that to do otherwise would not be a wise use of judicial resources may be warranted. Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 340, 100 S.Ct. 1166, 1175 (U.S.Miss.,1980).

32. In any event, it is the position of Joanne Johnson, and the basis for her defense,

that Irish Oil breached an express provision of the contract between the parties. Neither Joanne Johnson nor any other Appellee has asserted that Irish Oil breached an implied covenant in the contract.

**B. Lack of written agreement modifying written contract.**

33. In this case there is no dispute but that the agreement of the parties as executed required that Irish Oil pay Joanne Johnson the lease bonus payment of $10,640.00 within not more than ninety (90) days of January 25, 2008 and that Irish Oil did not do so.

34. Therefore, Irish Oil's argument turns on the issue of whether or not Joanne Johnson agreed to a modification of the contracts so as to extend the time for payment.

35. It is Joanne Johnson's contention that reasonable persons could come to but one conclusion on that subject; and that is that Joanne Johnson made no agreement, particularly no written agreement, to modify the time for payment and that no one else was authorized to agree to such on her behalf, whether in writing or otherwise.

36. As the North Dakota Supreme Court held in the recent case of Alerus Financial, N.A. v. Western State Bank, 2008 ND 104, ¶17, 750 N.W.2d 412, 419,

> [¶ 17] "The party moving for summary judgment must show ... no genuine issues of material fact [exist] and the case is appropriate for judgment as a matter of law." *Id.* "In determining whether summary judgment was appropriately granted, we ... view the evidence in the light most favorable to the party opposing the motion," giving that party "the benefit of all favorable inferences which can reasonably be drawn from the record." *Hasper v. Center Mut. Ins. Co.*, 2006 ND 220, ¶ 5, 723 N.W.2d 409. However, "[u]nder N.D.R.Civ.P. 56, if the movant meets its initial burden of showing the absence of a genuine issue of material fact, the party opposing the motion may not rest

> on mere allegations or denials in the pleadings, but must present competent admissible evidence by affidavit or other comparable means to show the existence of a genuine issue of material fact." *Riemers v. Grand Forks Herald,* 2004 ND 192, ¶ 4, 688 N.W.2d 167.

37. See also, the very recent case of State ex rel. North Dakota Dept. of Labor v. Matrix Properties Corp., 2009 ND 137, ¶5, 770 N.W.2d 290, wherein the North Dakota Supreme Court, in discussing the standard of review in summary judgment situations, held as follows:

> [¶ 5] In *Grinnell Mut. Reinsurance Co. v. Thies,* 2008 ND 164, ¶ 5, 755 N.W.2d 852 (citations omitted), we outlined our standard for review of summary judgments:
>
> Summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if either party is entitled to judgment as a matter of law, and if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving disputed facts would not alter the result. A party moving for summary judgment has the burden of proving there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. In considering a motion for summary judgment, a court must view the evidence in the light most favorable to the party opposing the motion and must give that party the benefit of all favorable inferences that reasonably can be drawn from the evidence. Whether a district court properly granted summary judgment is a question of law that we review de novo on the record.
>
> The determination of when a cause of action accrues is generally a question of fact, but if there is no dispute about the relevant facts, the determination is a question of law for the court. *See Tarnavsky v. McKenzie County Grazing Ass'n,* 2003 ND 117, ¶ 9, 665 N.W.2d 18.

38. Joanne Johnson submits that Irish Oil presented nothing other than unsupported, conclusory allegations to support its contention that Gerald Riemer was authorized to act on Joanne Johnson's behalf and that, assuming **arguendo** that he was so authorized, that he agreed on her behalf that the terms of her contract with

Irish Oil could be modified so as to extend the time for payment of the initial $10,640.00. See, for instance, the case of Abdullah v. State, 2009 ND 148, ¶9, 771 N.W.2d 246, wherein it is held that:

> A party resisting a motion for summary judgment cannot merely rely on the pleadings or other unsupported conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact. *Beckler v. Bismarck Pub. Sch. Dist.*, 2006 ND 58, ¶ 7, 711 N.W.2d 172.

39. As further stated in the recent case of Buchholz v. Barnes County Water Bd., 2008 ND 158, ¶12-13, 755 N.W.2d 472, it is not sufficient to rely on conclusory allegations. The Buchholz case holds that:

> The party opposing the motion, however, may not simply rely upon the pleadings or upon unsupported, conclusory allegations. *Riemers,* at ¶ 7; *Johnson,* at ¶ 9. Rather, the party resisting the motion must set forth specific facts by presenting competent, admissible evidence, whether by affidavit or by directing the court to relevant evidence in the record, demonstrating a genuine issue of material fact. *Riemers,* at ¶ 7; *Johnson,* at ¶ 9; *Koapke,* at ¶ 11. As expressed in N.D.R.Civ.P. 56(e):
>
> If a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, must be entered against the adverse party.
>
> Summary judgment is appropriate against a party who fails to establish the existence of a genuine factual dispute on an essential element of his claim and on which he will bear the burden of proof at trial. *Riemers,* at ¶ 7.(emphasis
>
> added)

40. In addition to the fact that Irish Oil failed to demonstrate that there are any genuine issues of fact, the facts of record, as applied to the relevant law, demonstrate

not only that Irish Oil is not entitled to judgment but that Joanne Johnson is.

41. The primary points of Joanne Johnson's position, discussed in the same order below, can be summarized as follows:

1. The two (2) documents which were executed by her on January 25, 2008, together constitute "the" contract between herself and Irish Oil;

2. The contract between Joanne Johnson and Irish Oil is one to which the statute of frauds, as set forth in N.D.C.C. §9-06-04(3) applies;

3. Any modification of a written contract, and/or any modification of a contract to which the statute of frauds applies, must be in writing and the alleged modification of the contract herein so as to extend the time for payment was not in writing;

4. Joanne Johnson did not agree to a modification of the contract so as to extend the time for payment and she did not authorize Gerald Riemer or any other person to do so on her behalf; and

5. Authorization for any agent to enter into any contract to which the statute of frauds must be in writing signed by the party to be charged, i.e. Joanne Johnson in this case.

**1. The two (2) documents which were executed by Joanne Johnso on January 25, 2008, together constitute "the" contract between herself and Irish Oil**

42. At paragraph VIII of her Answer, Joanne Johnson alleged that the agreement between herself and Irish Oil was comprised of both the "Oil and Gas Lease" and the "Letter Agreement", each being conditioned and/or dependent upon the other.

43. It is a matter of general law, and both the statutory and case law of this State, that instruments executed at the same time, by the same contracting parties, for the same purpose, and in the course of the same transaction will be considered and construed together since they are, in the eyes of the law, one contract or instrument.

44. In terms of general law, see 17A Am Jur 2d, (2nd Edition 1991) Contracts §388, p. 413, citing Restatement, Contracts 2d §202(2), wherein it is provided that:

> "The general rule is that in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same contracting parties, for the same purpose, and in the course of the same transaction will be considered and construed together, since they are, in the eyes of the law, one contract or instrument."

45. That is consistent with North Dakota statutory law. See N.D.C.C. §9-07-07 which provides that:

> Several contracts relating to the same matters between the same parties and made as parts of substantially one transaction are to be taken together.

Likewise, the North Dakota Supreme Court, in the case of Grynberg v. Dome Petroleum Corp., 1999 ND 167, ¶10, 599 N.W.2d 261, 264, held that:

> [¶ 10] The construction of a written contract to determine its legal effect is a question of law. *265 *Lire, Inc. v. Bob's Pizza Inn Restaurants, Inc.*, 541 N.W.2d 432, 433 (N.D.1995). Contracts are construed to give effect to the mutual intention of the parties at the time of contracting. N.D.C.C. § 9-07-03; *Lire,* at 433-34. The parties' intention must be ascertained from the writing alone, if possible. N.D.C.C. § 9-07-04; *Lire,* at 434. A contract must be construed as a whole to give effect to each provision if reasonably practicable. N.D.C.C. § 9-07-06; *Lire,* at 434. **Under N.D.C.C. § 9-07-07, several contracts relating to the same matter between the same parties and made as part of substantially one transaction must be construed together.** Words in a contract are construed in their ordinary and popular sense, unless used by the parties in a technical sense or given a special meaning by the parties. N.D.C.C. § 9-07-09. If the parties' intention in a written contract can be ascertained from the writing alone, the interpretation of the contract is a question of law for the court to decide. *Ohio Farmers Ins. Co. v. Dakota Agency, Inc.*, 551 N.W.2d 564, 565 (N.D.1996). (emphasis added)

46. The "Letter Agreement" herein provided that "[w]ithin 60 days upon receipt of the signed lease, and subject to approval of title, with right of payment extension

of 30 additional days, in the event of title curative issues, from expiration of original 60 days, you will receive a check in the amount of $10,640.00." Based upon the foregoing, it is clear that the requirement for payment of $10,640.00 was a term of "the" contract between the parties. In view of the fact that Irish Oil has admitted in response to Joanne Johnson's Request for Admission #6 that Irish Oil and Gas, Inc. did not deliver a check in the amount of $10,640.00 to Joanne Johnson within 60 days after receipt of the signed lease from Joanne Johnson or within 30 additional days from expiration of original 60 days, it is indisputable that Irish Oil failed to comply with a material provision of the contract. Absent a waiver thereof, or a valid modification thereof, Irish Oil is in breach of the contract and not entitled to the relief requested.

**2. The contract between Joanne Johnson and Irish Oil is one to which the statute of frauds, as set forth in N.D.C.C. §9-06-04(3) applies**

47. Although it hardly needs be said because it deals with an interest in real property, and also because it involves a lease in excess of one year, the contract which is the subject of this action is one to which the statute of frauds applies. As the Court is aware, N.D.C.C. §9-06-04 provides, in relevant part, as follows:

> The following contracts are invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by the party's agent:
> ...
> 3. An agreement for the leasing for a longer period than one year, or for the sale, of real property, or of an interest therein. Such agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing subscribed by the party sought to be charged.
> ...

48. Lest there be any doubt but that mineral leases involve interests in "real property" subject to N.D.C.C. §9-06-04, the Court's attention is directed to the case of Petroleum Exchange v. Poynter, 64 N.W.2d 718, 722 (N.D.1954) which holds that:

> "We conclude therefore that oil, gas and mineral leases are conveyances of interests in real property under the provisions of Section 9-0604."

49. Irish Oil alleged at paragraph V of its Reply to Joanne Johnson's Counterclaim that the statute of frauds doesn't apply to the "Letter Agreement". Joanne Johnson asserts that Irish Oil is simply wrong. The law set forth above clearly demonstrates that the "Oil and Gas Lease" and the "Letter Agreement" constitute one contract; and clearly the "Oil and Gas Lease" portion of that contract is "[a]n agreement for the leasing for a longer period than one year, or for the sale, of real property, or of an interest therein" as provided in N.D.C.C. §9-06-04(3).

**3. Any modification of a written contract, and/or any modification of a contract to which the statute of frauds applies, must be in writing and the alleged modification of the contract herein so as to extend the time for payment was not in writing**

50. At paragraph XII of her Answer, Joanne Johnson alleged that any agreement between herself and Irish Oil was of the type which the Statute of Frauds requires to be in writing; and, that any modification thereof must also be in writing. Irish Oil, on the other hand, alleges at paragraph V of its Reply to Joanne Johnson's Counterclaim that the statute of frauds doesn't apply thereto because, as mentioned above, it is Irish Oil's position that the "Letter Agreement" does not fall within the statute of frauds. Again, and for additional reasons, Joanne Johnson asserts that Irish Oil is simply

wrong.

51. Joanne Johnson asserts that it is a matter of general law, and both the statutory and case law of this State, that modification of a contract which is within the statute of frauds must be in writing and signed by the party to be charged in order to be enforceable.

52. It is, in fact, Hornbook law. See, for instance, §96 "Oral Modifications under the Statute of Frauds", p. 192. Handbook of the Law of Contracts by Laurence P. Simpson, Second Edition, Hornbook Series, West Publishing Co. 1965, wherein it is provided that:

> "*Oral Modifications*
>
> Any agreement, in modification or substitution for an earlier contract, which by its terms is within any section of the statute of frauds, must be in writing and signed by the party to be charged in order to be enforceable."

53. In addition, it is consistent with the law of this State. N.D.C.C. §9-09-06 provides that:

> **A contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise**. An oral agreement is executed within the meaning of this section whenever the party performing has incurred a detriment which that party was not obligated by the original contract to incur. (emphasis added)

54. While that statute is "consistent" with the general law to the effect that modification of a contract within any section of the statute of frauds must be in writing (See National Bank of Harvey v. Pauly, 280 N.W.2d 85, 89 (N.D., 1979), footnote 2), it is important to note that N.D.C.C. §9-09-06 is not limited to modification of a contracts within any section of the statute of frauds. N.D.C.C. §9-

09-06 very simply requires that any contract which is in writing can only be modified by written contract. Therefore, whether the "Letter Agreement" is subject to the statute of frauds is irrelevant to the issue of whether any modification of it must be in writing. It must be. As a result, Irish Oil's position is simply wrong.

**4. Joanne Johnson did not agree to a modification of the contract so as to extend the time for payment and she did not authorize Gerald Riemer or any other person to do so on her behalf**

55. There is no evidence that Joanne Johnson agreed to modify the contract so as to extend the time for payment of the initial payment or that she authorized Gerald Riemer or any other person to do so on her behalf. As outlined in the Facts portion of this brief, Irish Oil admits that Joanne Johnson did not sign any written agreement, or enter into any oral agreement modifying the terms of the Letter Agreement.

56. The only "supposed" evidence of such authority identified by Irish Oil is outlined in its responses to Joanne Johnson's interrogatories #4 and #5, which are set forth in the Facts portion of this Brief. That "supposed" evidence can be summarized as follows:

1. All of Irish Oil's negotiations for the contracts was with Gerald Riemers;

2. Joanne Johnson used the term "we" in her note that "Sorry, We never heard from you since Jan. 25-2008 so we accepted another oil & gas lease. I am returning your check. Sincerely, Joanne Johnson" in returning the untimely payment check; and

3. Gerald Riemers supposedly "made it apparent" that he was acting on Joanne Johnson's behalf.

57. Item 2 is nothing more than a self serving assumption with no basis in fact

whatsoever; and a gigantic stretch at that. To suggest such is evidence is frivolous. Items 1 and 3 are not evidence. At best, they are conclusory allegations. As stated above by reference to the Abdullah v. State and the Buchholz v. Barnes County Water Bd., cases, **supra.**, the party opposing the motion may not simply rely upon the pleadings or upon unsupported, conclusory allegations.

58. Items 1 and 3 would seem to invoke the theory of ostensible agency. Joanne Johnson would assert that ostensible agency depends on the conduct of the principle, not the purported agent. See N.D.C.C. §3-01-03, which provides that:

> An agency is either actual or ostensible. It is actual when the agent really is employed by the principal. It is ostensible **when the principal intentionally or by want of ordinary care causes a third person to believe another to be the principal's agent**, who really is not employed by the principal. (emphasis added)

See the recent case of Lagerquist v. Stergo, 2008 ND138, ¶10, 752 N.W.2d 168 wherein the North Dakota Supreme Court held that:

> "An apparent or ostensible agency must rest upon **conduct or communications of the principal** which, reasonably interpreted, causes a third person to believe that the agent has authority to act for and on behalf of the principal." (emphasis added)

59. Irish Oil has not identified any conduct on the part of Joanne Johnson which would cause a reasonable person to conclude that Gerald Riemer was authorized to act for her.

**5. Authorization for any agent to enter into any contract to which the statute of frauds must be in writing signed by the party to be charged, i.e. Joanne Johnson in this case.**

60. Joanne Johnson would argue that even if, **arguendo**, it were true that Gerald

Riemer was authorized to enter into any such agreement on her behalf (a matter which she denies) the supposed modification of the "Letter Agreement" by him on her behalf would be invalid because his authority to act on her behave was not in writing.

61. As indicated above, N.D.C.C. §9-06-04(3) provides that:

> 3. An agreement for the leasing for a longer period than one year, or for the sale, of real property, or of an interest therein. **Such agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing subscribed by the party sought to be charged**. (emphasis added)

62. From Joanne Johnson's reading of the case of Petroleum Exchange v. Poynter, 64 N.W.2d 718, 726 (N.D.1954) cited above, this precise issue was addressed therein. The specific issue therein was the applicability of the statute of frauds to an oil and gas lease, in general, and the authority of an agent, in particular. It appears that the Court indicated that any agency for dealings with regard to oil and gas leases must be in writing. In holding that the plaintiff in that case failed to establish a cause of action with regard to an assignment of an oil and gas lease allegedly entered into by an agent on behalf of the Defendant, the Court held that:

> In the instant case there is no evidence in the record that W. M. Berger as agent of the defendant was authorized in writing to accept the leases and assignments under consideration...

63. Irish Oil has acknowledged in its response to Joanne Johnson's Interrogatory No. 5 that the only document indicating authority is the **"after the fact**" note wherein she references the term "we". That indicates there was no writing creating that alleged agency relationship. Therefore, Irish Oil's argument that Gerald Riemer, acted as an agent for Joanne Johnson in modifying the "Letter Agreement" fails as a

matter of law.

## II. The District Court did not err in denying Appellant, Irish Oil and Gas, Inc.'s Motion to Amend its Complaint.

64. Following the service and filing of Joanne Johnson's Motion for Summary Judgment, Irish Oil made its Motion to Amend Complaint.

65. On the subject of the standard of review with regard to the District Court's ruling on a Motion to Amend Complaint, the North Dakota Supreme Court held, in the case of Kambeitz v. Acuity Ins. Co., 2009 ND 166, ¶11, 772 N.W.2d 632, that:

> A district court's decision on a motion to amend a pleading will not be overruled on appeal unless the court has abused its 637 discretion. *Id.* at ¶ 7. A district court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, when its decision is not the product of a rational mental process leading to a reasoned determination, or when it misinterprets or misapplies the law. *Id.*

66. Irish Oil's proposed Amended Complaint (Appx. P. 72) set forth the new allegation at XIII. that:

> "Defendants Joanne Johnson and Lillie J. Riemer represented to an agent of Irish that Gerald Riemer was their agent for purposes of negotiating oil and gas leases and that they would do whatever Gerald Riemer would do."

67. The District Court denied the motion, stating that:

> "... the Court does not find that justice requires that justice requires that leave to amend the complaint be given. ..."

68. However, it is very important to note that Irish Oil has never withdrawn, corrected, nor supplemented any of the foregoing discovery responses. Those responses demonstrate that Joanne Johnson never personally agreed, in writing or otherwise, to modify the Lease or Letter Agreement so as to extend the time for

payment of the lease bonus payment. Neither did Irish Oil ever offer any evidence that Joanne Johnson authorized Gerald Riemer, in writing, to act on her behalf as concerns the Lease and/or Letter Agreement.

**A. The Motion to Amend would have been "futile" and would not have changed the result.**

69. Even if Irish Oil had been allowed to amend its pleadings to allege the foregoing, and even had it's agent executed an affidavit to assert the facts alleged in the proposed Amended Complaint, those facts would not have demonstrated any genuine issue of material fact or provided a sufficient basis to deny summary judgement, even if assumed to be true.

70. Under the law set forth above, it is clear, as a matter of law, that any modification of the initial written contract between the parties, and any agency with regard to a matter for which the statute of frauds requires a written agreement, must also be in writing. Therefore, it would have been futile, in the context of the motion for summary judgment, for the Court to have granted Irish Oil's motion to amend the complaint. It still would have failed to establish a genuine issue of material fact or otherwise alter the fact that Joanne Johnson is entitled to Judgment as a matter of law.

71. Therefore, the proposed amendment would be "futile."

72. The North Dakota Supreme Court has held in many cases that, under N.D.R.Civ.P. 15(a), while leave to amend the pleadings is to be freely given when justice so requires, leave is not automatically granted. See, for instance, Leet v. City of Minot, 2006 ND 191, ¶7, 721 N.W.2d 398; and Bernabucci v. Huber, 2006 ND 71,

¶ 28, 712 N.W.2d 323.

73. The North Dakota Supreme Court has also held that a trial court does not abuse its discretion by denying a requested amendment that would be futile. See, Darby v. Swenson Inc., 2009 ND 103, ¶12, 767 N.W.2d 147 and First Interstate Bank of Fargo, N.A. v. Rebarchek, 511 N.W.2d 235, 243 (N.D.,1994).

74. See also the case of Powers v. Martinson, 313 N.W.2d 720 (N.D. 1981), wherein the North Dakota Supreme Court denied a motion to amend where it determined that the amendment would not have corrected a weakness in Irish Oil's case.

**B. It would not have been in the interest of justice to grant the Motion to Amend as concerns Joanne Johnson.**

75. In the "Statement of Facts" portion of this brief, Joanne Johnson sets forth the sworn discovery responses of Irish Oil. From Joanne Johnson's perspective, the allegations of paragraph XIII (Appx. P. 72) set forth allegations which were entirely inconsistent with the sworn discovery responses. Those responses had been made nine (9) months or more before Irish Oil's Motion to Amend Complaint and had not been withdrawn, supplemented or corrected so as to be consistent with the new allegations in the proposed Amended Complaint. Because the aforementioned discovery responses were not withdrawn, supplemented or corrected, Joanne Johnson suggests the inconsistent allegations of the proposed Amended Complaint were effectively "untimely" if not "trumped up" so as to attempt to defeat summary judgment.

76. In the case of Johnson v. State, 2006 ND 122, 714 N.W.2d 832, the North Dakota Supreme Court, in construing 15(a) N.D.R.Civ.P., held that:

> A motion to amend may be denied if the proponent has unnecessarily delayed. Crosby v. Sande, 180 N.W.2d 164, 171 (N.D. 1970). "Although not binding, federal court interpretations of a corresponding federal rule of civil procedure are highly persuasive in construing our rule." Thompson v. Peterson, 546 N.W.2d 856, 860 (N.D. 1996). As the United States Supreme Court noted in Foman v. Davis, undue delay may justify a denial of a motion to amend. 371 U.S. 178, 182 (1962).

See, also, the cases of Grandbois and Grandbois, Inc. v. City of Watford City, 2004 ND 162, 685 N.W.2d 129, First Trust Co. of ND v. Scheels Hardware & Sports Shops, Inc., 429 N.W.2d 5 (N.D. 1988) and Shark v. Thompson, 373 N.W.2d 859 (N.D. 1985), wherein the North Dakota Supreme Court upheld the denial of a motion to amend as untimely.

77. The new allegations set forth in XIII of Irish Oil's proposed Amended Complaint were of the type upon which its entire claim might have turned, but for the statute of frauds and/or N.D.C.C. §9-09-06. Therefore, it couldn't be argued in good faith that failure to include such in the aforementioned response to Joanne Johnson's Interrogatories was simply an oversight or that it was somehow implicit in the remainder of its response. It is clear that the response to Interrogatory No. 4 was already "reaching for straws."

78. It was Joanne Johnson's concern that Irish Oil was essentially fabricating facts with which to oppose Joanne Johnson's Motion for Summary Judgment.

79. At the very least, Irish Oil's failure to include the facts set forth in XIII of the proposed Amended Complaint in its sworn response to Joanne Johnson's

aforementioned Interrogatory No. 4 constituted a "failure to serve answers" with regard to those allegations as that term is used in 37(d) N.D.R.Civ.P.

80. Joanne Johnson did and does assert that such, in turn, warranted the imposition, as a sanction pursuant to 37(d) N.D.R.Civ.P. pursuant to 37(b)(2)(B) N.D.R.Civ.P., of "an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence. In this case, it warranted an Order providing that Irish Oil could not amend its complaint so as to set forth the allegations set forth in the proposed XIII insofar as they concern Joanne Johnson.

81. 37(d) N.D.R.Civ.P. provides, in relevant part, as follows:

> **d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party or an officer, director, superintendent, or managing agent of a party ... fails:
>
> ...
>
> (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories;
> ...
> , the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B) and © of subdivision (b)(2). In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.
>
> The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26©.

82. 37(b)(2)(A-C) N.D.R.Civ.P., to which the foregoing provision refers, provides by extension that, for failure to serve answers, the Court may enter:

> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence**;**
>
> © An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

83. Joanne Johnson submits that the foregoing facts, case law and rules gave the District Court both authority and reason to deny Irish Oil's Motion to Amend, at least as concerns the allegations of XIII of it's proposed Amended Complaint as concerns Joanne Johnson.

84. For the foregoing reasons, the District Court was warranted in determining that justice did not require that it grant Irish Oil's Motion to Amend, at least as concerns the allegations of XIII of the proposed Amended Complaint as concerns Joanne Johnson.

## CONCLUSION

85. For the reasons set forth herein above, the decision of the District Court should be affirmed. Because it is clear that no reversible error of law appears and that the district court did not abuse its discretion, this Court should affirm the decision of the Trial Court, through application of N.D.R.App.P. 35.1 or otherwise.

Dated this 6th day of May, 2010.

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## CERTIFICATE OF COMPLIANCE

86. The undersigned, as attorneys for the Appellee, Joanne Johnson, in the above matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(5) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities and certificate of compliance totals 8060.

Dated this 6th day of May, 2010.

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## CERTIFICATE OF SERVICE

87. I hereby certify that a true and correct copy of the foregoing BRIEF FOR APPELLEE, Joanne Johnson, was on the 6th day of May, 2010, emailed to the following:

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