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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sagebrush Resources, LLC, Plaintiff/Appellant, vs. Daryl Peterson, Larry Peterson, and Galen Peterson, Defendants/Appellees.	)	Supreme Court No. 20130080

Appeal from Judgment Entered on December 26, 2012
Case No. 05-2011-cv-00064
County of Bottineau, Northeast Judicial District
The Honorable Michael Sturdevant, Presiding

BRIEF OF DEFENDANTS/APPELLEES DARYL PETERSON, LARRY PETERSON, AND GALEN PETERSON

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STATEMENT OF THE CASE

[¶1] Sagebrush served its Complaint on Defendants/Appellees Daryl Peterson, Larry Peterson, and Galen Peterson ("Petersons") on March 31, 2011 asserting two counts: Count I (Common Law Trespass) and Count II (Injunctive Relief), and requesting relief in the form of permanent injunctive relief, damages in excess of $50,000, attorneys' fees and costs, and such further relief as was just and equitable. (Sagebrush Appendix ["App."] 5-13). The complaint contained allegations that Petersons unlawfully entered on well sites operated by Sagebrush and climbed onto equipment for the purpose of taking photographs. *Id.*

[¶2] With respect to the basis for its claims against Petersons for damages in excess of $50,000, Sagebrush asserted:

> "as a result of the Defendants' actions, the Defendants filed a series of complaints against Sagebrush with the North Dakota Industrial Commission alleging that Sagebrush had violated or was violating North Dakota statutes and regulations that govern the extraction of minerals from below the surface of the land. Such complaints directly impacted Sagebrush's operations because some or all of said complaints resulted in investigations by the North Dakota Industrial Commission. Sagebrush's participation in said investigations led to direct expenditures by Sagebrush. The investigation also caused the North Dakota Industrial Commission to withhold its approval of a planned sale of Sagebrush's interest in the affected units, thereby delaying said sale."

(Sagebrush App. 38).

[¶3] Petersons made a timely Answer and Demand for Jury Trial, in which they denied any wrongdoing, asserted that Sagebrush's claims and requests for relief were frivolous and brought in bad faith for purposes of intimidation and harassment, and requested recovery of their attorneys' fees and costs pursuant to N.D.C.C. § 28-26-01 and

N.D.C.C. § 28-26-31. (Sagebrush App. 14-20). Petersons also served on Sagebrush a Demand to File the Summons and Complaint. (Docket No. 7).

[¶4] The parties proceeded to put in place a scheduling plan and to conduct written discovery. After completion of written discovery and the deadline for discovery, on July 20, 2012, Petersons filed a Motion for Summary Judgment with supporting memorandum and exhibits asserting that Sagebrush did not have sufficient rights to maintain a trespass claim against the Petersons, could not provide evidence to support its conclusory allegations of trespass and thus could not establish the essential elements of a trespass claim, was unable to show that any alleged damages were compensable or were proximately caused by the Petersons, and did not have standing to request injunctive relief. (Docket Nos. 10-22).

[¶5] On August 23, 2012, Sagebrush filed its Response to the Motion in which it conceded that it could not establish the essential elements of a trespass claim, but asserted that it had provided proper notice of pleading for a claim of interference with rights under an implied easement of the surface estate as discussed in *Hunt Oil C. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D. 1979). (Docket No. 35, Brief of Appellant Sagebrush, ¶ 6). Sagebrush also conceded that its claim for injunctive relief no longer had merit, and deemed it appropriate to dismiss the claim. (Docket No. 35, p. 2, fn. 1). With respect to Petersons' assertion that Sagebrush could not demonstrate damages, despite its earlier concession that no "technical trespass" occurred, Sagebrush argued that it was not required to show actual damages in an action for trespass. *Id.* at p. 13.

[¶6] A hearing on Petersons' Motion for Summary Judgment was conducted on September 7, 2012. After arguments of counsel, the court verbally issued its decision

granting summary judgment in favor of Petersons and awarding them reasonable attorneys' fees and costs. (Sagebrush App. 169-181). Judge Sturdevant explained that he was issuing his decision from the bench because the anticipated trial date was less than four weeks away, and it did not seem appropriate to take the time to issue a written opinion while counsel continued trial preparation for a trial that would not occur. (Sagebrush App. 170-171). Judge Sturdevant issued a lengthy verbal explanation of his decision, ultimately granting summary judgment and awarding Petersons their reasonable attorneys' fees and costs. (Sagebrush App. 169-181). He requested submission of an affidavit itemizing Petersons' costs and attorneys' fees, and provided Sagebrush with fifteen days from submission of the affidavit to respond. *Id.* at 180.

[¶7] Judge Sturdevant also issued a brief written order granting summary judgment on September 7, 2012. (Docket No. 40).

[¶8] Counsel for Petersons submitted an affidavit and itemization of costs and attorneys' fees on October 5, 2012. (Docket Nos. 41-43).

[¶9] Sagebrush submitted a response to the affidavit and itemization opposing the award of attorneys' fees and costs on October 22, 2012, asserting that its claims were not frivolous, and arguing that the attorneys' fees requested were not reasonable. (Doc. No. 44)

[¶10] On November 2, 2012, Petersons' submitted their reply supporting the award and the reasonableness of the fees requested. (Docket No. 48).

[¶11] The Court issued an order on November 15, 2012, in which it again found that Sagebrush's claims were frivolous, and awarded Petersons' reasonable attorneys' fees and costs in the amount of $23,914.96. (Docket No. 50).

STATEMENT OF FACTS

[¶12] In its Brief of Plaintiff/Appellant Sagebrush Resources, LLC, Sagebrush sets forth several allegations which it claims to be undisputed. Petersons do not agree with all of the statements set forth as undisputed and submit that Sagebrush has been artful in omitting relevant facts where they are damaging to Sagebrush's claims.

[¶13] Specifically, Petersons do not agree that Sagebrush was the operator of the wells at issue when it initiated its case against Petersons; Sagebrush concedes, at least in part, that it was not the operator of wells at issue in the case at the time it brought suit against Petersons, and conceded during the briefing on the Motion for Summary Judgment that its request for injunctive relief was meritless because it no longer owned an interest in the wells at issue. (Brief of Appellant Sagebrush, p. 18, Docket No. 35, p. 2, fn. 1). Petersons also disagree with the numerous conclusory assumptions. For example, Sagebrush refers to "photographs of the Rice Well site *that could only have been taken while on the Rice Well site.*" This inference by Sagebrush is unreasonable, and unsupported by the record.

[¶14] However, the resolution of any dispute over the facts cited by Sagebrush was not necessary to determine Petersons' motion for summary judgment and is not necessary to determine whether the district court properly found its claims to be frivolous. Even if those disputed facts are taken to be true, Sagebrush is unable to demonstrate any basis in law or fact for its claims or requests for relief, and no reasonable person could have expected the court to render judgment in Sagebrush's favor.

LAW AND ARGUMENT

I. Standard of Review.

[¶15] A district court's discretion under N.D.C.C. § 28–26–01 and N.D.C.C. § 28–26–31 "lies in determining whether a particular claim is frivolous." *Strand v. Cass County,* 2008 ND 149, ¶ 13, 753 N.W.2d 872. A court also retains discretion under the statute to decide the amount and reasonableness of an attorney's fee award. N.D.C.C. § 28–26–01(2); *Strand,* at ¶ 13. "Frivolous claims are those which have such a complete absence of actual facts or law that a reasonable person could not have expected that a court would render judgment in [that person's] favor." *Deacon's Development, LLP, v. Lamb,* 2006 ND 172, ¶ 12, 719 N.W.2d 379 (quotation omitted). An award under N.D.C.C. § 28–26–01 will only be disturbed on appeal if the district court abuses its discretion. *Deacon's Development,* at ¶ 12. A court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned decision, or if it misinterprets or misapplies the law. *Strand,* at ¶ 18; *Wolt v. Wolt,* 2011 ND 170, 803 N.W.2d 534, 541-42.

II. The District Court Did Not Abuse its Discretion when it Properly Concluded that Sagebrush's Asserted Claims were Frivolous, Not Made in Good Faith, and Untrue.

[¶16] In its Statement of the Case, Plaintiff/Appellant Sagebrush Resources, LLC ("Sagebrush") states that this appeal "requires the Court to decide whether an oil and gas company's assertions in a complaint that (1) it has a legal right to prohibit unauthorized persons from entering onto its well sites and climbing on its equipment and (2) it is entitled to damages for harm caused by past illegal entries were backed by such a complete absence of actual facts or law that no reasonable person would have thought a court would render judgment in the company's favor." (Brief of Appellant Sagebrush, ¶

1). This is not, however, an accurate statement of the issues before this Court or the claims that were asserted against the Petersons in the Complaint. As Sagebrush articulates in its Statement of the Issues Presented for Review, the issues are:

> I. Whether the district court abused its discretion when it concluded that the Complaint was frivolous and not made in good faith, and entered judgment in favor of Defendants for their costs and attorneys' fees?
>
> II. Whether the district court abused its discretion when it concluded that attorneys' fees in the amount of $23,729.00 were reasonable?

[¶17] Sagebrush's Complaint contained four vague allegations against Petersons, purportedly actionable under two counts: Count I (Common Law Trespass) and Count II (Injunctive Relief).

[¶18] First, Sagebrush alleged:

> "on or about January 28, 2011, Defendant Galen Peterson was seen in, around and on the well site of the Rice Well, as well as certain equipment, dikes, berms, tanks and other facilities owned and used by Sagebrush in connection with its operation of the Rice Well." (Sagebrush App. 6).

[¶19] Second, Sagebrush alleged:

> "on or about September 28, 2010, March 8, 2011 and on certain other occasions, Defendants Daryl Peterson and/or Larry Peterson entered into and upon the Cramer Central Tank Battery and climbed onto and upon several of the tanks and other facilities therein for the purpose of taking pictures." (Sagebrush App. 8).

[¶20] Third, Sagebrush alleged:

> "[u]pon information and belief, on certain occasions in the past year, Defendant Daryl Peterson was in, around and on the well sites for the Bronderslev Wells and the Peterson Wells, as well as on the equipment, dikes, berms, tanks and other facilities owned and used by Sagebrush in connection with its operations of said wells." (Sagebrush App. 9).

[¶21] Fourth, Sagebrush alleged:

> "[u]pon information and belief, on certain occasions over the past year, Defendant Daryl Peterson was seen on the well sites for certain of the Kuroki Wells." (Sagebrush App. 11).

[¶22] For its causes of action, in Count I Sagebrush alleged that Petersons "wrongfully entered onto the Subject Property without permission from Sagebrush," that "the unlawful entering of and onto the Subject Property without permission constituted a trespass," and "[a]s a result of the Defendants' trespass, Sagebrush has been damaged in excess of $50,000." (Sagebrush App. 11). In Count II, Sagebrush alleged that it was entitled to injunctive relief because "Sagebrush was the owner of or has the right to possess and control the Subject Property for the purpose of conducting oil and gas exploration and production activities. Defendants have interfered with that right by, among other things, entering upon the Subject Property without the permission of or authorization from Sagebrush." (Sagebrush App. 12).

[¶23] Thus, the issue for this Court is *not* whether an oil and gas company is entitled to assert amorphous, unidentified claims of trespass or interference against individuals who it believes unlawfully entered onto its wellsites. Rather, the issue before this Court is whether Judge Sturdevant abused his discretion in determining that there was a complete absence of actual facts or law supporting *Sagebrush's allegations against Petersons* of trespass, "unlawful entry," or "interference with Sagebrush's right to conduct oil and gas exploration and production activities," such that a reasonable person could not have expected that a court would render judgment in Sagebrush's favor.

[¶24] On this issue, the trial court properly ruled that "[t]here are three legs to the lawsuit: we have evidence and facts we have the legal basis, legal theory and we have the damages. And I don't see the existence of any of those in this case." and "[T]his case which, once again, is without any legal or factual basis in my opinion was brought solely to vex, annoy, harass, and intimidate the defendants here. It was not made in good faith.

We have allegations that not only don't have any support but are just plain, flat out false." (Sagebrush App. at 169-181).

A. Sagebrush's Claims Against Petersons Lacked Any Factual Support.

[¶25] Sagebrush failed to present to the district court competent, admissible evidence supporting its claims against Petersons, and relied only on its conclusory claims in the pleadings and unreasonable, tenuous assumptions.

[¶26] It is apparent from Sagebrush's responses to Defendants' Interrogatories and Requests for Production that Sagebrush did not have evidence to support its conclusory allegations of trespass or interference at the time the claims were made. (Sagebrush App. 27-44). As demonstrated in an analysis of Sagebrush's claims, Sagebrush was unable to offer evidence to satisfy the basic elements of trespass or interference; namely, who allegedly entered onto the property without authorization, where the alleged entry occurred, when the alleged entry occurred, whether such alleged entry was unauthorized. Sagebrush is also apparently unable to identify the individuals who can provide these necessary facts. *Tibert v. Slominski*, 2005 ND 34, ¶ 15, 692 N.W.2d 133; *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d131 (N.D. 1979).

[¶27] As noted *supra* (¶14-15), Sagebrush asserted four vague allegations of trespass against Petersons. For each of the four allegations, Petersons requested in written discovery specific facts, documents, and identification of witnesses supporting Sagebrush's conclusory allegations. For example, with respect to allegation number two in which Sagebrush alleged that Daryl Peterson **and/or** Larry Peterson entered onto a tank battery, Petersons posed a direct interrogatory inquiring whether the allegation was being made against Daryl Peterson, Larry Peterson, or both. (Sagebrush App. 34) Sagebrush responded that "it is asserting that Daryl Peterson, Larry Peterson, or both

Daryl and Larry Peterson entered…the tank battery." *Id.* This response indicates that Sagebrush could not at that time or at the time it made its allegations identify who it was alleging a trespass claim against. Clearly, knowledge of the identity of an alleged trespasser is an essential prerequisite to asserting a trespass claim.

[¶28] Similarly, Sagebrush's evasive and incomprehensible answers to other discovery requests also demonstrate that it could not provide any facts to support its claims:

> **INTERROGATORY NO. 14:** List and describe all information and evidence supporting the allegation that on or about September 28, 2011, Defendants Daryl Peterson and/or Galen Peterson entered into and upon the Cramer Central Tank Battery and climbed onto and upon several of the tanks and other facilities therein.
>
> **ANSWER: Sagebrush objects to Interrogatory No. 14 as overbroad and unduly burdensome to the extent it requests "all information and evidence" supporting the referenced allegation. Subject to and without waiving any of the foregoing objections, Sagebrush responds that attached to a complaint submitted by Daryl Peterson to Lynn D. Helms, Director of the North Dakota Department of Mineral Resources, was a picture of said Cramer Central Tank Battery, purportedly taken by Daryl Peterson on September 28, 2010. Sagebrush further responds that witnesses observed Larry Peterson leaving the Cramer Central Tank Battery in a vehicle, and that Larry Peterson explained to said witnesses that he entered the Cramer Central Tank Battery for the purpose of taking pictures. Daryl Peterson stated to said witnesses that he was accompanied by Daryl Peterson and another man who were following him in a separate vehicle. Discovery and investigation are ongoing.**
>
> **INTERROGATORY NO. 15:** Identify all witnesses who claim to have seen Daryl Peterson or Larry Peterson enter into and upon the Cramer Central Tank Battery and climb onto and upon several of the tanks and other facilities therein for the purpose of taking pictures.

> **ANSWER: Sagebrush objects to Interrogatory No. 15 on the grounds that it is overbroad and unduly burdensome. Subject to and without waiving any of the foregoing objections, Sagebrush responds that employees and representatives of Sagebrush saw Larry Peterson as he was leaving the Cramer Central Tank Battery in a vehicle. Larry Peterson explained to the above-named witnesses that he entered the Cramer Central Tank Battery for the purpose of taking pictures, and that he was accompanied by Daryl Peterson and another man who were following him in a separate vehicle. Discovery and investigation are ongoing.**

(Sagebrush App. 33-34).

The definitions for the discovery requests set out the meaning of the term "identify" as it is used in the aforementioned Interrogatories:

> 1. "Identify" or "identity" means:
> (a) When used in reference to a natural person, to state:
> (1) that person's full name and present or last known address; and
> (2) that person's present or last known position, title and employer or business affiliation.

Despite this definition, Sagebrush simply asserts that "employees and representatives of Sagebrush" witnessed Larry Peterson leaving. Again, either Sagebrush cannot identify the witnesses because no such witnesses exist, or it engaged in sanctionable conduct by inexcusably withholding relevant, material discovery responses.

[¶29] These responses are representative of Sagebrush's other responses to Petersons' requests for specific facts, documents, and identification of witnesses supporting Sagebrush's conclusory allegations. (Sagebrush App. 27-44). In its responses to discovery and in its briefing to the district court, Sagebrush failed to produce *any* witnesses, affidavits, or demonstrative evidence in support of its factual allegations. When a nonmoving party on summary judgment does not bring forward any evidence on

an element of the claim, it is assumed no evidence exists to support the element. *Perez v. Nichols*, 2006 ND 20, 708 N.W.2d 884, *see also Good Bird v. Twin Buttes Sch. Dist.*, 2007 ND 103, 733 N.W.2d 601, 605.

[¶30] Instead, Sagebrush relied solely on unreasonable inferences and assumptions as a factual basis for initiating its claims against Petersons. For each of the four allegations, Sagebrush relied exclusively on the unreasonable assumption that because Plaintiffs submitted to the NDIC photographs which it believed could only have been taken from the wellsite or from a position on top of well equipment, Plaintiffs must have trespassed to obtain the photographs. (Brief of Appellant Sagebrush, ¶¶ 17-19). As Petersons argued extensively in their Memorandum in Support of Summary Judgment, the inferences relied on by Sagebrush were not only erroneous, but also unreasonable because they assume a multitude of facts that Sagebrush did not establish *or even allege*. (Docket No. 11). Sagebrush's justification for its fourth claim, alleging that "on certain occasions over the past year, Defendant Daryl Peterson was seen on the well sites for certain of the Kuroki Wells," demonstrates the unreasonableness of its assumptions. (Sagebrush App. 11).

[¶31] In response to a request for all information or evidence supporting this fourth claim, Sagebrush responded "that at a landowners association meeting attended by Brad Gilbertson, Daryl Peterson stated that he had traveled to the Kuroki Field to inspect the Kuroki Wells operated by Sagebrush." (Sagebrush App. 36). Daryl Peterson has never been to any of the Kuroki Wells. (Sagebrush App. 47). However, the statement that "he had traveled to the Kuroki Field to inspect the Kuroki Wells operated by Sagebrush," even if assumed to be true, does not lead to a reasonable inference that Daryl

Peterson trespassed. *Id*. In order to reach that inference, the factfinder must assume that Daryl Peterson entered onto any or all of twelve different unidentified well site(s) on unidentified date(s), that the inspection of the site(s) required him to enter onto property from which Sagebrush had a right to exclude, and that such entry was unauthorized.

[¶32] As the district court properly concluded, "We can talk about inferences but it just isn't there. There isn't the proof. I can't possibly see a jury, sitting in our little courtroom here, coming to the conclusion that because those photographs existed that any of the Petersons were actually physically on the well sites. So I don't see a factual basis for it." (Sagebrush App. 173).

[¶33] Even if these tenuous inferences are accepted, Sagebrush was *still* unable to demonstrate that Petersons trespassed or interfered with Sagebrush's operations by entering the property for the purpose of taking pictures. Sagebrush makes much of the fact that Petersons admitted they entered onto certain wellsites formerly owned by Sagebrush or took photographs of wellsites. (Brief of Appellant Sagebrush ¶¶ 20-24, 30). Yet Sagebrush persists in ignoring the remaining elements necessary under a trespass claim: 1) that there was an actual entry, and 2) that the entry was unauthorized; or the remaining element of interference: 1) that Petersons actions in taking pictures somehow hindered or affected Sagebrush's rights or ability to develop and produce the oil and gas. *Tibert v. Slominski*, 2005 ND 34, ¶ 15, 692 N.W.2d 133; *Hunt Oil Co. v. Kerbaugh*, 283

N.W.2d131 (N.D. 1979)[1]. For each "admission" that Petersons purportedly made, they were either on land adjacent to the wellsite, authorized by the landowner to be present on the property, accompanying a state or county official with authority to enter the site, the photographs were taken from a position off of the wellsite, or the photographs were not taken by them. (Docket No. 11; Sagebrush App. 45-55; 75; 77-79; 80; 85-87). These "admissions" do not support a claim for trespass or interference.

[¶34] To the extent that Sagebrush claimed that Petersons interfered with its "incidental right of entering, occupying, and making such use of the surface lands as is reasonably necessary in exploring, mining, removing, and marketing the minerals" by taking pictures of its operations, such claim is beyond credibility. *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d131, 135 (N.D. 1979). Sagebrush states that "[i]n Sagebrush's view, the act of entering the well sites at all constitutes interference with its right to use the surface of the property for a well site," but offers no legal authority or basis for this conclusion. (Brief of Appellant Sagebrush, ¶ 32). Furthermore, Sagebrush offered no evidence to the district court which supports the assertion that the purported picture-taking did or could interfere with its ability to develop the minerals in any way. Sagebrush did not have any evidence, factual or inferential, to support its conclusory allegations of trespass or interference against the Petersons and the district court was justified in finding that its claims were frivolous.

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[1] Petersons do not concede that *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d131 (N.D. 1979) provides Sagebrush with a cause of action against them, but apply the principle of the case for purposes of argument here.

B. Sagebrush's Claims Against Petersons and Claims for Damages Lacked Any Legal Support.

[¶35] As Petersons argued extensively to the district court, because of the nature of mineral interests, and the rights concurrent therewith, as an oil and gas developer Sagebrush had specific and *limited* rights to the surface estate of the properties on which it alleges the Petersons trespassed. (Docket Nos. 10, 38). Sagebrush's interests as a former owner of the leasehold interest and former operator of the well do not allow Sagebrush to bring an action against the Petersons for trespass.

[¶36] Petersons agree that Sagebrush's former rights to the properties upon which it alleges the Petersons trespassed are set forth in *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131 (N.D. 1979). In that case, the Supreme Court of North Dakota commented:

> This court in Christman v. Emineth, 212 N.W.2d 543, 550, 70 A.L.R.3d 366 (N.D.1973), adopted the general rule set forth in 58 C.J.S. Mines and Minerals s 159b as to the implied rights of the mineral estate owner: unless the language of the conveyance repels such a construction, as a general rule a grant of mines or minerals gives to the owner of the minerals the incidental right of entering, occupying, and making such use of the surface lands as is reasonably necessary in exploring, mining, removing, and marketing the minerals.

Id. at 134-35 (internal quotations omitted). "[T]he access and use of the surface estate by the mineral owner is limited to what is reasonably necessary for the development of the mineral estate." *Id.*; *see also, Union Producing Co. v. Pittman*, 245 Miss. 427, 433, 146 So. 2d 553, 555 (1962) ("[A] grant or reservation of mines or minerals gives to the mineral owner the incidental right of entering, occupying, and making such use of the surface lands as is reasonably necessary in exploring, mining, removing, and marketing the minerals.").

> The North Dakota Century Code defines a "dominant tenement" as "land to which an easement is attached," N.D.Cent. Code § 47–05–03 (1978), and a "servient tenement" as "land upon which a burden or servitude has

> been placed," N.D.Cent. Code § 47–05–04 (1978). "An easement is a charge or burden upon one estate, the servient, for the benefit of another, the dominant." *Johnson v. Armour & Co.,* 69 N.D. 769, 291 N.W. 113, 116 (1940). By classifying the mineral estate as dominant over the servient surface estate, it appears that North Dakota has adopted the position, which is in accord with the general rule in the oil and gas industry, that a mineral lessee acquires an easement in the surface estate for the purpose of developing its mineral interest. *See, e.g.,* 1 H. Williams & C. Meyers, Oil and Gas Law § 218 (1959) ("surface easements are implied as will permit the lessee or mineral owner to enjoy the interest conveyed"); 4 W. Summers, The Law of Oil and Gas, § 652 (1962) ("an oil and gas lessee has merely an easement and not a lease of the surface * * * ").

Slaaten v. Cliff's Drilling Co., 748 F.2d 1275, 1278 (8th Cir. 1984).

[¶37] In order to maintain a claim for trespass, the party asserting the claim must have a possessory interest in the real property upon which the alleged trespass occurred. "[The North Dakota Supreme Court] has defined trespass as an intentional harm, where a person intentionally and without a consensual or other privilege . . . enters land in possession of another or any part thereof or causes a thing or third person so to do." *Tibert v. Slominski*, 2005 ND 34, ¶ 15, 692 N.W.2d 133. "A trespass occurs when there is an actionable interference with possession of land." 75 Am. Jur. 2d Trespass § 18. "The essence of a trespass to real property is the injury to the right of possession." *Id*. Sagebrush's right as a former mineral leasehold owner and former operator to enter, occupy, and make such use of the surface estate as is reasonably necessary to explore, mine, remove, and market the minerals is a limited non-exclusive easement that burdens the surface estate; it is not a right to the possession of the surface estate.

[¶38] "An easement is a nonpossessory interest in land belonging to another which entitles the owner of the interest to a limited use or enjoyment of the land in which the interest exists." *Schatz v. Schatz*, 419 N.W.2d 903, 907 (N.D. 1988).

> An easement is an interest in land in the possession of another. It is not, itself, a possessory interest. The owner of it, therefore, is not entitled to the

> protection which is given to those having possessory interests. The fact that the owner of an easement is not deemed to have a possessory interest in the land with respect to which it exists indicates a lesser degree of control of the land than is normally had by persons who do have possessory interests. Thus, a person who has a way over land has only such control of the land as is necessary to enable him to use his way and has no such control as to enable him to exclude others from making any use of the land which does not interfere with his.

5 Restatement (First) of Property § 450 (1944) (Comment b).

[¶39] Because Sagebrush does not hold a possessory interest in the surface estate, it cannot claim that the Petersons injured its right to possession and therefore cannot maintain a claim for trespass. "An easement owner is debarred from actions traditionally established for the protection of a possession, such as trespass, writ of entry and ejectment, because the easement owner does not have the prerequisite possession. Instead, liability for interference with an easement lies in a nuisance action. Thus, unless the [Petersons] … interfered with the right of [Sagebrush] to use the easement property, [Sagebrush] cannot justify its exclusion of the [Petersons]. [Sagebrush] does not allege, nor does the record support, such interference in this case." *O'Neil's Markets v. United Food & Commercial Workers' Union, Meatcutters Local 88, AFL-CIO, CLC*, 95 F.3d 733, 739 (8th Cir. 1996) (internal citations omitted).

[¶40] The district court properly ruled that Sagebrush did not have sufficient rights to maintain a trespass claim. Judge Sturdevant explained, "Well I first have to decide is the plaintiff in a position to assert a claim for relief based on trespass. And the answer is no." (Sagebrush App. at 174). Despite its concession to the trial court that Sagebrush's claims did not "fit the technical definition of trespass" and its admitted failure to make any argument to the trial court that its limited rights included a possessory interest in the well site, Sagebrush attempts to argue anew on appeal that it does, in fact,

have a possessory interest in the surface estate. (Docket No. 35, p. 9; Brief of Appellant Sagebrush, ¶¶ 33, 34). This new legal position is irrelevant because Sagebrush failed to make the arguments to the district court. "If a party fails to properly raise an issue or argument before the district court, the party is precluded from raising that issue or argument on appeal." *Rutherford v. BNSF Ry. Co.*, 2009 ND 88, 765 N.W.2d 705, 715. "It is well established that arguments not raised before the district court cannot be raised for the first time on appeal." *Morris v. Moller*, 2012 ND 74, 815 N.W.2d 266, 269. Even if the argument could be properly considered by this Court, it is of no consequence because Sagebrush did not own the wells at issue and did not have any factual support for its trespass claims. Sagebrush's failure to argue this point to the district court also belies any argument that its claims against Petersons were based on a "good-faith argument for an extension, modification, or reversal of the existing law" excepting them from application of N.D.C.C. § 28-26-01.

[¶41] Sagebrush also argues that although it could not assert a "technical trespass," it properly pled a claim against Petersons for interference with its right to use the surface of the property for oil and gas development, pursuant to *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d131, 135 (N.D. 1979). (Docket No. 30). *Kerbaugh* stands for the proposition that the surface estate is servient to the mineral estate and the surface owner may not interfere with the mineral owner's inherent, limited right to develop the minerals underlying the surface estate by prohibiting access to the land. *Kerbaugh* does not address an operator's right to maintain a trespass claim against a third party and provides no legal support for Sagebrush's claims against Petersons, however those claims are

characterized. *Id*. In addition to the lack of legal support for Sagebrush's claims, Sagebrush also lacked any basis in fact or law for its claims for damages.

C. Any Damages Experienced by Sagebrush Were Not Compensable and Were Not Caused by Petersons.

[¶42] Finally, Sagebrush was also unable to show that any alleged damages were compensable or were proximately caused by the Petersons. Sagebrush's claim for damages in excess of $50,000 essentially states that because the Petersons made complaints regarding Sagebrush's violations of North Dakota laws and regulations to the North Dakota Industrial Commission, which attached the photographs that they purportedly took, Petersons should have to pay Sagebrush for the cost of defending itself and the penalties imposed for the violations. (Sagebrush App. 38-39). Sagebrush's claims for damages failed for several reasons.

[¶43] First, Sagebrush argues that it was not obligated to prove actual damages because it asserted trespass claims. It has conceded, however, that its claims were not a "technical trespass," therefore it was obligated to prove that it had experienced actual damages under any other theory of recovery which may have applied. (Brief of Appellant Sagebrush, ¶ 35).

[¶44] Second, its damage claims do not arise from the alleged trespasses, but rather from the Petersons' actions in reporting Sagebrush's spills. Sagebrush did not establish that its purported damages were proximately caused by any alleged trespass by the Petersons. Even if Sagebrush was able to support its trespass claims against the Petersons, no reasonable and fair-minded person could draw the conclusion that Petersons' alleged trespass caused Sagebrush to violate the law, caused the NDIC's decision to postpone the sale of Sagebrush's interests, or caused the NDIC to investigate and penalize Sagebrush for its violations. *Jones*

v. Ahlberg, 489 N.W.2d 576, 581 (N.D. 1992) ("Proximate cause is that cause which, as a natural and continuous sequence, unbroken by any controlling intervening cause, produces the injury, and without which it would not have occurred."); *Schmitt v. N. Imp. Co.*, 115 N.W.2d 713, 718 (N.D. 1962). A reasonable person would not see this to be a "natural and continuous sequence." The district court properly found: "The fact that Sagebrush had to pay some money is a result of their own conduct. It's not a result of the conduct of the Petersons." (Sagebrush App. 177). The only action by Petersons that could be identified as an impetus to the NDIC investigations (and subsequent penalties against Sagebrush) is their complaints to the NDIC of Sagebrush's spills and violations of North Dakota law and regulations.

[¶45] Third, Petersons' acts in reporting Sagebrush's spills and violations are not unlawful acts and cannot be relied on as a basis to support Sagebrush's alleged damages. As authorized and anticipated by statute, the Petersons reported violations of law and regulations to the North Dakota agency charged with regulating the oil and gas industry in North Dakota. N.D.A.C. § 43-02-03-54, N.D.C.C. § 38-08-17. This is a communication protected by both an absolute and a qualified privilege. *See* N.D.C.C. §§ 14-02-05(2-3); *Soentgen v. Quain & Ramstad Clinic, P.C.*, 467 N.W.2d 73, 78 (N.D. 1991); (Docket No. 11).

[¶46] Finally, any detriment suffered by Sagebrush for its noncompliance and the costs associated with its noncompliance are a direct result of its own actions and cannot be attributed to the Petersons. The NDIC brought an administrative action against Sagebrush, and Sagebrush admitted that spills in question had happened. (Sagebrush App. 58-70). Sagebrush admitted to violations complained of by the Petersons, entered into a consent agreement with the NDIC, and paid a penalty to the NDIC as a result of the violations. *Id.*

Sagebrush is responsible for and was held accountable for its violations of the law. The cause of these "damages" was not the Petersons' alleged trespasses or reports of legal violations; the cause was *Sagebrush breaking the law and getting caught*.

III. The District Court's Finding of Frivolity Was Carefully Considered, Reasoned, and Was Firmly Based Upon the Record.

[¶47] Sagebrush asserts that Judge Sturdevant's determination that its claims were frivolous was based on "passing requests made in the introduction and conclusion of the Petersons' memorandum in support of their motion for summary judgment." (Brief of Appellant Sagebrush, ¶ 26). To the contrary, Petersons have maintained throughout the litigation that Sagebrush's claims are frivolous and have no basis in fact or law. (Sagebrush App. 17, 18; Docket No. 11 pp. 1, 2 ["Plaintiff's trespass claims against the Petersons are not supported by law or fact,"], pp. 6, 7, 8, 9, 11, 12, 14, 15, 17, 19, 23, 24; Docket No. 30, p. 2; Docket No. 38, pp. 4, 5, 6, 7).

[¶48] Sagebrush attempts to proffer belated, altruistic justifications for its actions claiming that the "thrust of the lawsuit was Sagebrush's request for equitable relief," "because Sagebrush was concerned that the Petersons would injure themselves or damage its equipment in the process." (Brief of Appellant Sagebrush, ¶¶ 35, 2). These justifications are not supported by any evidence in the record, and did not surface until Sagebrush's objection to Judge Sturdevant's award of attorney's fees. (Sagebrush App. 200) ("The newfound argument that it was necessary to sue the Defendants to avoid potential liability for personal injuries, etc. is without merit."). Instead, it seems more plausible that Sagebrush's action in commencing the lawsuit was in retaliation for Petersons' lawful reporting of Sagebrush's environmental violations and an attempt to intimidate and harass Petersons into submission. *See* Docket No. 30, p. 1 ("Sagebrush

initiated this trespass action in March 2011, alleging that Defendants entered onto certain well sites owned and operated by Sagebrush without authorization for the purpose of taking photographs and inspecting the sites. Defendants used the information they obtained to conduct a campaign against Sagebrush by repeatedly lodging complaints against Sagebrush with the North Dakota Industrial Commission and other officials, thereby causing harm to Sagebrush.")

[¶49] It is abundantly clear from the judge's frank discussion in the verbal order granting summary judgment, and the subsequent order regarding attorney's fees and costs that Judge Sturdevant carefully reviewed and considered all of the materials submitted by the parties, was intimately aware of the relevant facts of the case, and was thoughtful in his ultimate decision. Judge Sturdevant's decision to award Petersons' attorneys' fees was logical, reasonable, fair, and was the product of a rational mental process leading to a reasoned decision and there was no abuse of discretion.

IV. The District Court Did Not Abuse Its Discretion in Finding the Attorney's Fees Claimed by the Petersons to be Reasonable.

[¶50] Sagebrush asserts that Judge Sturdevant also abused his discretion in determining the reasonableness of the fees incurred by Petersons. The following guidelines have been established for the district court to follow when awarding attorney fees:

> (1) the time and labor required on legal work as distinguished from clerical and investigation; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent ...; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of professional relationship with the client; and (12) awards in similar cases.

Lynch v. Sweeney, 2007 ND 81, 732 N.W.2d 377, 380.

[¶51] As Petersons argued to the district court, the application of these factors to this case support the award of attorney fees to Petersons. (Docket No. 48). For example, "the skill requisite to perform the legal services properly" in this case is important because despite the frivolity of Sagebrush's claims, the nature of the property rights concomitant with oil and gas rights requires an attorney with specialized knowledge of mineral rights and oil and gas law. Further, Sagebrush made a claim against the Petersons for over $50,000.00. Regardless of whether the claims were frivolous, this is a significant claim for damages that must be defended against vigorously. Another factor includes the experience, reputation, and ability of the attorneys. Baumstark Braaten Law Partners ("Baumstark Braaten") is a well-known firm with a history of fighting for North Dakota's farmers and ranchers, beginning with its founders, Beth Baumstark and Sarah Vogel. (Sagebrush App. 193-195). In light of the specialized knowledge required for the case, the proven ability and expertise of the attorneys involved, and the quality of work provided to the clients, the attorneys' fees requested and the current billing rates of the attorneys are reasonable.

[¶52] At the time Petersons' Motion for Summary Judgment was granted, the lawsuit was in its final stage and the only significant proceeding remaining was a trial. The complaint and answer had been filed, discovery was completed, and the Petersons had filed a Motion for Summary Judgment with numerous exhibits, a Reply to Plaintiff's Response in Opposition, as well as a Memorandum in Opposition to Plaintiff's Request for Additional Time in the interim. Regardless of the merits of the allegations involved

in the lawsuit, Petersons' counsel were required to respond to the allegations and expend time and labor in rigorously defending against the claims.

[¶53] Sagebrush asserted specifically that the time Plaintiffs' counsel spent on research, drafting memos, and drafting their summary judgment motion was excessive. It should be noted that Sagebrush's calculations are misleading; a close inspection of the line items which Sagebrush takes issue with demonstrates that in the majority of instances Petersons' counsel were also performing other tasks necessary to the representation, such as communicating with clients and witnesses, reviewing discovery, and reviewing the file, that was included in the time calculation along with drafting and research. (Sagebrush App. 186-192).

[¶54] Although Sagebrush's claims for relief had no basis in law or fact, it was nonetheless time-consuming to address and specifically refute with competent, admissible evidence each of Sagebrush's vague claims against three different defendants alleging trespass on thirty-eight different wellsites over the span of a year's time. Indeed, the vagueness of Sagebrush's claims makes it more difficult to respond. Petersons submitted a Motion for Summary Judgment that was thoroughly researched, supported by relevant and applicable authority, and successfully demonstrated that Sagebrush did not have adequate factual or legal grounds to support its allegations or claims of damages. This was not without time and effort by Petersons' counsel, and such time was not unreasonable.

[¶55] It is also worth noting that a large portion of the time that Sagebrush took issue with was research time spent by a summer law clerk that was not familiar with oil and gas law and which was significantly reduced in the bills to the clients. It is not

reasonable to expect that a first year law student will have the experience to efficiently navigate such a specialized area of law, yet it is important to provide an opportunity for students to develop the skills necessary to practice in the future. Sagebrush cannot assert, given the reduced billing rate and discounted time, that this was unreasonable.

[¶56] Sagebrush also took issue with the time spent by Paralegal Fry in reviewing and summarizing depositions from the case of Daryl and Christine Peterson v. Sagebrush Resources, LLC, Bottineau County, Case No. 05-10-c-00100, which involved a dispute over a contract for a salt water disposal well on Petersons' property and environmental contamination from the well.[2] (Docket No. 44). Conversely, Sagebrush also argued that the time spent by Defendants' counsel was excessive because "[n]either party deposed any witnesses, nor were there…[any] particularly burdensome discovery requests." *Id*. at p.6. Not surprisingly, the depositions in the other case contained testimony that was relevant to the parties, to Sagebrush's ownership and interests in the property at issue in this case, and to the allegations against the Petersons in this case. Thus, Petersons' counsel was wise to review that discovery and the deposition transcripts, and was efficient in doing so rather than duplicating that discovery in the present lawsuit. Furthermore, much of the information requested by Sagebrush from the Petersons in the interrogatories and requests for production was previously addressed within or provided to Sagebrush in the Peterson v. Sagebrush suit and counsel was directed by the clients to refer to those responses in reviewing discovery.

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[2] Sagebrush took issue with the time spent by paralegal Nilla Fry in reviewing these depositions, but failed to recognize that Ms. Fry bills at a lower rate than the attorneys working on the case.

[¶57] Although Sagebrush failed to address or analyze the application of these factors in their arguments to the court, and instead simply made conclusory allegations that the attorneys' fees requested by Petersons were excessive, Petersons addressed these factors in depth in their brief in response to Sagebrush's objection to the award of attorney fees. (Docket No. 48, pp. 5-8). In its Order awarding fees, it is apparent that the Court analyzed these factors, "carefully read and reviewed all of the materials received by the parties while reflecting upon the previous filings and the hearing," and specifically responded to the arguments of the parties in making its decision regarding the frivolity of the claims and the reasonableness of the attorney fees requested by Petersons. Notably, the Court reduced the fees for 9.1 hours of time in the amount of $1,137.50, as requested by Sagebrush, which further evidences that the Court's award was carefully considered, reasoned, and supported by an analysis of the relevant factors. (Sagebrush App. 199-200). (Sagebrush App. 199-200). The district court did not act in an "arbitrary, unreasonable, or unconscionable manner," its decision was certainly "the product of a rational mental process leading to a reasoned decision," and it did not "misinterpret[ ] or misappl[y] the law" in awarding Petersons' attorney fees and costs in the amount of $23,914.96. *Strand v. Cass County,* 2008 ND 149, ¶ 18, 753 N.W.2d 872.

V. Appellant's Claims on Appeal are Frivolous.

[¶58] Under N.D.R.App.P. 38, a party who insists on appealing a non-meritorious claim may be assessed attorney's fees, "[i]f the court determines that an appeal is frivolous, or that any party has been dilatory in prosecuting the appeal, it may award just damages and single or double costs, including reasonable attorney's fees." Under this rule, this Court may award reasonable attorney fees if it finds the appeal to be

frivolous. *Torgerson v. Torgerson*, 2003 ND 150, 669 N.W.2d 98, 104 (citing *Rolin Mfg., Inc. v. Mosbrucker,* 1997 ND 139, ¶ 7, 566 N.W.2d 819).

[¶59] An appeal is frivolous if "it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which evidences bad faith." *Lawrence v. Delkamp*, 2003 ND 53, ¶ 14, 658 N.W.2d 758 (citing *Peterson v. Zerr,* 477 N.W.2d 230, 236 (N.D.1991)). The arguments presented on appeal to this Court by Sagebrush are not supported by law, or fact, nor are they good faith arguments to change the law. *Torgerson*, 2003 ND 150 at 104-05.

[¶60] Sagebrush has made no arguments which can offer further support for its decision to assert claims that were unwarranted by fact or law at the time they were made. Even if every benefit of the doubt and inference is resolved in favor of Sagebrush, it was still unable to maintain claims of trespass or interference against the Petersons and thus continues to persist in groundless, meritless, bad faith litigation.

[¶61] For these reasons, Petersons request that this Court award them the reasonable attorney fees incurred in defending against this appeal.

CONCLUSION

[¶62] Based on the foregoing, Defendants/Appellees Daryl Peterson, Larry Peterson, and Galen Peterson respectfully request that this Court affirm the Bottineau County District Court's Order awarding them $23,914.96 in attorneys' fees and costs, and awarding them reasonable attorneys' fees and costs incurred in defending against this appeal pursuant to N.D.R.App.P. 38.

DATED this 17th day of June, 2013.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sagebrush Resources, LLC, Plaintiff/Appellant, vs. Daryl Peterson, Larry Peterson, and Galen Peterson, Defendants/Appellees.	)	Supreme Court No. 20130080

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

I hereby certify that on June 19, 2013, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

1. **BRIEF OF DEFENDANTS/APPELLEES DARYL PETERSON, LARRY PETERSON, AND GALEN PETERSON**

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