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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

JOAN MARIE HALLIN AND JOHN P. HALLIN;
AND SUSAN KAY BRADFORD,
PLAINTIFFS/APPELLANTS,

V.

INLAND OIL & GAS CORPORATION,
DEFENDANT/APPELLEE

SUPREME COURT CASE NO. 20170145

APPEAL FROM THE JUDGMENT OF THE MOUNTRAIL COUNTY DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT,
THE HONORABLE JUDGE RICHARD L. HAGAR, PRESIDING

BRIEF OF PLAINTIFFS/APPELLANTS

Respectfully submitted by:

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STATEMENT OF THE ISSUES

I. The District Court erred in denying Summary Judgment to Appellants, and in granting Summary Judgment to Appellees by misapplying the precedent of *Nichols v. Goughnour*, 2012 ND 178, 820 N.W.2d 740, by not considering, or even addressing, the payment drafts as instruments that have been executed at the same time, by the same parties, in the course of the same transaction, and concerning the same subject matter, which may be read and construed together with the oil and gas leases.

STATEMENT OF THE CASE

¶1 This Appeal arises out of a quiet title action for mineral leasehold interest in Mountrail County, North Dakota. The District Court, the Honorable Judge of the District Court Richard L. Hagar presiding, ordering summary judgment in favor of Defendant/Appellee, ("Inland"), denying judgment in favor of Plaintiffs/Appellants, (Collectively referred to as "Appellants" and/or "Hallins and Bradford"), and quieting title of the disputed mineral leasehold interest in Inland. (App. at 33; RA at #50). Appellants moved for summary judgment and an order quieting title to the disputed mineral leasehold interest in them on November 1, 2016 (RA at #23). Inland responded to the summary judgment motion (RA at #31) and made a cross-motion for summary judgment, supported by a brief (RA at #30 and #31). Appellants opposed Inland's cross-motion for summary judgment (RA at #34) and Inland replied to Appellants' response brief (RA at #44).

¶2 Oral argument was waived by both parties and the District Court entered an Order Granting Summary Judgment to Defendant, Order for Judgment, and Judgment (hereafter referred to as "Order Granting Summary Judgment"), on February 17, 2017. (App. at 33; RA at #50). The Court ordered summary judgment in favor of Inland, which quieted title to the leasehold interest in the disputed mineral interests in Inland, and denied Appellants' motion for summary judgment. Judgment was entered on the same date by the Clerk of Court (App. at 39; RA at #51). Notice of Entry of Judgment was filed and served on February 21, 2017 (RA at #53). Appellants filed a notice of appeal dated April 12, 2017 (App. at 46; RA at #55). There was no hearing before the District Court; therefore, no transcript of hearing was filed with the Supreme Court.

STATEMENT OF FACTS

¶3 Appellants own undivided mineral interests as follows: Joan Marie Hallin and John P. Hallin, as joint tenants, own an undivided 1/4th (25% or 40 net mineral acres); and Susan Kay Bradford, owns an undivided 1/4th (25% or 40 net mineral acres) of all (100% or 160 net mineral acres) of the oil, gas and other minerals in, under, and that may be produced from (the "minerals") the following described land (the "subject property"):

> Mountrail County, North Dakota
> Township 153 North, Range 92 West of the 5th P.M.
> Section 14: S1/2SW1/4
> Section 23: N1/2NW1/4

This action was commenced to quiet title to a portion of the mineral interests owned by Appellants in and under the subject property.

¶4 Ownership, as described above, was quieted in Appellants, Hallins and Bradford, by Judgment of the Northwest Judicial District Court of Mountrail County, dated July 16, 2012, in Civil No. 31-2011-CV-191. The District Court's Judgment was affirmed by the North Dakota Supreme Court in Supreme Court Case No. 20120354, decided on September 25, 2013, which decision became final on October 23, 2013. *See Hallin v. Lyngstad, 2013 ND 168, ¶20, (ND 2013).*

¶5 By Oil and Gas Leases, payment drafts, and accompanying transmittal letters setting forth the offers bargained for and to be accepted by signing and returning said leases, Appellants each accepted offers from, and each leased 30 net mineral acres owned by them in the subject property (for a total of 60 net mineral acres) to Inland. The leasing transactions are set forth in more detail hereafter.

¶6 By Oil and Gas Lease, dated March 12, 2007, and recorded April 9, 2007, as Document No. 327542 in the records of Mountrail County, Hallins, as Lessor, leased an

undivided 30 net mineral acres in the subject property to Inland (App. at 8; RA at #4). As consideration for this lease, Inland paid Joan Marie Hallin and John P. Hallin (hereafter "Hallins") $2,250.00, or $75.00 per net mineral acre, for "30 mineral acres", said consideration being specifically identified as being for payment for 30 net mineral acres in a letter, with copy of the first page of the oil and gas lease, and copy of "Customer's Draft" for $2,250.00, from Inland to Hallins, all dated March 12, 2007 (App. at 10; RA at #5).

¶7 By Oil and Gas Lease, dated March 14, 2007, and recorded April 24, 2007, as Document No. 328019 in the records of Mountrail County, Bradford, as Lessor, leased an undivided 30 net mineral acres in the subject property to Inland (App. at 13; RA at #6). As consideration for this lease, Inland paid Susan K. Bradford (hereafter "Bradford") $2,250.00, or $75.00 per net mineral acre, for "30 mineral acres", said consideration being specifically identified as being payment for 30 net mineral acres in a letter, with copy of the oil and gas lease, from Inland to Bradford, all dated March 14, 2007 (App. at 15; RA at #7).

¶8 Appellants, Hallins and Bradford, each own an undivided 10 net mineral acres (totaling an undivided 20 net mineral acres) in the subject property which were not leased to, or paid for, by Inland. *See Hallin v. Lyngstad, 2013 ND 168 (ND 2013)*.

¶9 Several oil and gas wells were subsequently drilled by Fidelity Exploration & Production Company (hereafter "Fidelity"), as operator, within drilling spacing units containing all or part of subject property. (Inland claims that it is a participant in said oil and gas wells to the extent, more or less, of its ownership of leasehold under the above-described oil and gas leases from Hallins (App. at 8) and Bradford (App. at 13).

¶10 Oil and gas royalty payments for production from the said undivided, unleased 20 net mineral acres are being held in suspense (withheld) due to assertions made by Inland that the said oil and gas leases give Inland a claim to the production from the said unleased 20 net mineral acres, in addition to the production Inland already receives from the leased acres (60 net mineral acres) for which it paid consideration and received leases.

¶11 Inland's assertion of a claim against Appellants' unleased 20 net mineral acres constitutes a cloud on Appellants' title to the said acres which is damaging Appellants by preventing them from collecting lease bonus payments, as well as payment for past, present, and future production of oil and gas products attributable to Appellants' unleased, undivided 20 net mineral acres. Appellants submit that they are entitled to have their record title cleared of this cloud.

I. The District Court erred in denying Summary Judgment to Appellants, and in granting Summary Judgment to Appellees by misapplying the precedent of *Nichols v. Goughnour*, 2012 ND 178, 820 N.W.2d 740, by not considering, or even addressing, the payment drafts as instruments that have been executed at the same time, by the same parties, in the course of the same transaction, and concerning the same subject matter, which may be read and construed together with the oil and gas leases.

STANDARD OF REVIEW

¶12 Under N.D.R.Civ.P. 56(c), "[s]ummary judgment is a procedural device for the prompt resolution of 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. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether

summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record." *THR Minerals, LLC, v. Robinson*, 2017 ND 78, ¶6; citing *Markgraf v. Welker*, 2015 ND 303, ¶10, 873 N.W.2d 26 (quoting *Hamilton v. Woll*, 2012 ND 238, ¶9, 823 N.W.2d 754.

LAW AND ARGUMENT

¶13 The District Court found no genuine issues of material fact, but erred in determining, as a matter of law, that the leases were unambiguous as to the number of acres intended to be leased by application of rules for construction of deeds, rather than rules for construction of contracts. "The primary purpose in construing a deed is to ascertain and effectuate the grantor's intent." *Nichols v. Goughnour*, 2012 ND 178, ¶12, 820 N.W.2d 740, quoting *Mueller v. Stangeland*, 340 N.W.2d 450, 452 (N.D. 1983). However, "[t]he general rules governing interpretation of contractual agreements apply to the interpretation of oil and gas leases . . . [and] . . . [t]he construction of a written contract to determine its legal effect is a question of law for the court to decide." *Tank v. Citation Oil & Gas Corp.*, 2014 ND 123, ¶9, 848 N.W.2d 691 (citations omitted). "Contracts, including oil and gas leases, are interpreted to give effect to the parties' mutual intent at the time of contracting. *Tank.*, at ¶9. "A contract is ambiguous when rational arguments can be made for different interpretations." *Nichols v. Goughnour*,

2012 ND 178, ¶12, 820 N.W.2d 740, quoting *Gawryluk v. Poynter*, 2002 ND 205, ¶9, 654 N.W.2d 400. "If a contract is ambiguous, extrinsic evidence may be considered to clarify the parties' intentions." *Id.* "Instruments which have been executed at the same time, by the same parties, in the course of the same transaction, and concerning the same subject matter, are to be read and construed together." *Trengen v. Mongeon*, 206 N.W.2d 284, 286 (N.D. 1973). The District Court erred by interpreting the leases as deeds to ascertain and effectuate what it determined to have been the grantor's intent, rather than as contracts to give effect to the parties' mutual intent at the time of contracting. See, *Nichols*, at ¶12.

¶14 Appellants refer to "payment drafts", herein, even though only Hallins saved a copy of their payment draft which is included in the record (App. at 12; RA at #5). Bradford did not retain a copy of her payment draft, but did provide an Affidavit that she received it and placed it with US Bank for collection. See, *Affidavit of Proof, Susan Kay Bradford* (App. at 20; RA at #9). That Hallins and Bradford received the same payment drafts from Inland has not been disputed. Hallins and Bradford both provided copies of the transmittal letters that contained instructions for execution of both the leases and the payment drafts confirming this. (App. at 10 and 15).

¶15 The District Court, by failing to consider, or even mention, the payment drafts which accompanied the leases and which were signed by the parties as part of the transaction, reached a conclusion that the leases contained "no ambiguity". *Order Granting Summary Judgment*, at ¶12 (App. at 33). Appellants submit that this finding of "no ambiguity" was reached and supported by applying rules appropriate to construing deeds, rather than by applying rules for interpretation of contracts, which is appropriate

for oil and gas leases. "The primary purpose in construing a deed is to ascertain and effectuate the grantor's intent." *Nichols v. Goughnour*, 2012 ND 178, ¶12, 820 N.W.2d 740 (emphasis added), quoting *Mueller v. Stangeland*, 340 N.W.2d 450, 452 (N.D. 1983). "However, deeds [and oil and gas leases] that convey mineral interests are subject to general rules governing contract interpretation, and we construe contracts to give effect to the parties' mutual intentions." *Nichols*, at ¶12 (emphasis added), quoting *Gawryluk v. Poynter*, 2002 ND 205, ¶8, 654 N.W.2d 400. "The same general rules that govern interpretation of contractual agreements apply to oil and gas leases". *Irish Oil & Gas, Inc. v. Riemer*, 2011 ND 22, ¶15, 794 N.W.2d 715.

¶16 Proof that the District Court applied rules for interpreting deeds, rather than rules for interpreting contracts, begins with its citing and quoting N.D.C.C. §47-10-13 in determining that Hallins and Bradford must have intended to lease "all" of their interest in the subject property. N.D.C.C. §47-10-13 is a statute that applies to conveyances (deeds) of fee simple title, stating that "[a] fee simple title is presumed to be intended to pass by a grant of real property unless it appear from the grant that a lesser estate was intended", N.D.C.C. §47-10-13. The District Court used this statute to support Inland's assertion that ". . . there is no limitation to the quantum of minerals being leased on the face of either lease and that the leases clearly cover all of plaintiffs' interest in the subject property." *Order Granting Summary Judgment*, at ¶10 (App. at 33). This is erroneous because, by the very nature of an oil and gas lease, it is a "leasehold" being granted, not "fee simple title". A leasehold is a "lesser estate" than "fee simple title". "Leasing is a contract by which one gives to another the temporary possession and use of real property for reward and the latter agrees to return such possession to the former at a future time."

N.D.C.C. 47-16-01. The District Court used a statute that is applicable to a conveyance of "fee simple title", not to "leasing". The District Court interpreted N.D.C.C. §47-10-13 as if it applies to leases, rather than to deeds. To apply to leases, N.D.C.C. §47-10-13 would need to read that "[a lesser estate (a leasehold) in all of a lessor's mineral acres] is presumed to be intended to pass by a [lease] of real property unless it appear[s] from the [lease] that [a lesser estate (a leasehold) in less than all of the lessor's mineral acres] was intended". Nowhere in their four corners do either of the leases mention an intent to lease all of the lessor's mineral acres. That Hallins and Bradford leased ALL of their mineral acres is an unsupported conclusion reached by applying rules that do not apply to oil and gas lease contracts.

¶17 Hallins and Bradford do not dispute that they each leased all of their interest in 30 net mineral acres to Inland. These are "leases" that are being interpreted, not "deeds". The District Court went on to find that ". . . [t]here is no limiting language; therefore, the Court finds that, as a matter of law, the Hallins and Bradford leased to Inland whatever interest they had in the subject property at the time the leases were executed". *Order Granting Summary Judgment*, at ¶12 (App. at 33). This analysis uses rules that apply to interpretation of deeds to impose an intention upon the lessors (Hallins and Bradford) without attempting to determine whether it was actually the mutual intent of the parties at the time of contracting. Appellants submit that application of the rules for interpretation of contracts would have led to a different result through an appropriate analysis of this case under the rules set forth in *Nichols*. The District Court erred in applying the wrong rules of interpretation to answer the question of what was intended by the grantor of a deed, rather than by the parties to a contract. Appellants submit, further, that the District

Court's attributing the wrong facts to the *Nichols* case supports an argument that the *Nichols* case was neither understood or properly applied by the District Court. See, *Order Granting Summary Judgment*, at ¶7 (App. at 33).

¶18 This case concerns "contracts", not "deeds", and the "contracts" in this case are the oil and gas leases. "A contract is ambiguous when rational arguments can be made for different interpretations." *Nichols*, at ¶12. "Whether a contract is ambiguous is a question of law for the court to decide." *Id*. "If a contract is ambiguous, extrinsic evidence may be considered to clarify the parties' intentions." *Id*. There are several rational arguments that lead to finding that these leases are ambiguous on the question of how many acres were intended to be leased by the parties at the time of contracting. "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." *Irish Oil & Gas, Inc. v. Riemer*, 2011 ND 22, 794 N.W.2d 715, at ¶15. There is no definition within the leases placing technical or special meaning on the term "160.00 acres, more or less", so these words must be "construed in their ordinary and popular sense". *Id*. The District Court quoted language from the leases stating in part ". . . lease, and let exclusively unto the said Lessee, the land hereinafter described . . . all that certain tract of land situated in Mountrail County, State of North Dakota, described as follows, to wit: . . . [Property Description] . . . and containing 160[.00] acres, more or less." *Order Granting Summary Judgment*, at ¶4 (App. at 33). Appellants submit that, as placed and used in the leases, the phrase "160.00 acres, more or less" refers directly to the surface acreage of the entire tract of land described in the lease, indicating that the entire described tract of land contains "160.00 acres, more or less". Using the ordinary and popular sense of the

words, nothing in the entire paragraph, or even the entire lease, makes reference to how much of the entire tract this lessor either owns or intends to lease.

¶19 As a second example of a rational argument for a different interpretation, the leases from Hallins and Bradford each purport to lease "160.00 acres, more or less" (See leases, App. at 8 and 13). If the phrase "160.00 acres, more or less" is intended to designate the number of mineral acres the lessor intends to lease, one may argue that the lease given to Hallins for execution, and the lease given to Bradford for execution, each indicated that Inland was leasing "160.00 acres" from Hallins, and also "160.00 acres" from Bradford, when the entire tract containing the subject minerals only contained 160.00 acres. Use of the ordinary and popular sense of these words, leads to a reasonable question of ambiguity giving sufficient reason to look elsewhere when one is trying to determine what number of acres was mutually intended to be leased by the parties at the time of contracting. Naturally, Hallins and Bradford could not EACH own "160.00 acres" as it would result in the absurdity of finding that Inland had intended to lease 320.00 acres in a 160.00 acre tract of land; yet, that is one interpretation using the simplest reading of the four corners of the leases, so using this ordinary and popular sense of the words is no help to us in determining the number of acres mutually intended to be leased by the parties at the time of contracting.

¶20 As another example, in a further effort to look within the four corners of the leases, we find that each lease also contained the phrase "more or less" in conjunction with the "160.00 acres"; however, this also provides no help because applying the ordinary and popular sense of the word "more" would again mean that the tract containing 160.00 acres could somehow contain 320.00 acres. This wouldn't make sense

regardless of whether it was referring to surface acres or mineral acres. Further, assuming for the sake of argument that this is a reference to "mineral acres", rather than "surface acres", applying the ordinary and popular sense of the word "less" leaves us where we began, with no means of accurately determining how much "less" than 160.00 acres was mutually intended to be leased by the parties at the time of contracting. How then, when the reasonable question of what number of mineral acres was mutually intended by the parties to be leased, could that number of mineral acres ever be determined without application of the rules set forth in *Nichols*?

¶21 When, at the end of examination and analysis of the leases, one is left still wondering about the answer to this reasonable question, it is fair to consider that this is a situation where "rational arguments can be made for different interpretations" and the leases are ambiguous as to the number of acres the parties mutually intended to lease at the time they executed the leases. Inland would like to have "160.00 acres, more or less" interpreted to mean "all of Hallins' and Bradford's mineral acres within the 160.00 acre tract", but if that was really Inland's intent at the time of contracting, the leases that Inland drafted could have said "all of our interest within this tract of land, containing 160.00 acres, more or less", but they do not. The District Court erroneously refers to fee simple estates versus leasehold estates in order to find rules justifying its ruling that Hallins and Bradford intended to lease a larger number of mineral acres to Inland, regardless of whether Inland negotiated and paid for those acres, or not.

¶22 While it is easy to assume from looking at a preprinted lease form that the parties "mutually intended" to lease the entire number of mineral acres owned by each Hallins and Bradford, this is an assumption that requires one to guess. This is unfair to parties

who thought they were doing something else, and who accepted payment for what they thought they were doing. This is especially unfair when clear evidence of what they really intended is in front of District Court that is treating them as if they are in the oil business, just like Inland; and by treating them as grantors of a deed, instead of as parties to a contract that was drafted by Inland. Hallins and Bradford are not in the oil business and did not draft their leases. "In cases of uncertainty . . . the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." N.D.C.C. 9-07-19; *Mueller v. Stangeland*, 340 N.W.2d 450, 452 (N.D. 1983). The District Court, by holding Hallins and Bradford responsible for what was in a lease contract that was drafted and presented by Inland, rather than seeking to determine their actual intent, has taken from them the opportunity to prove what was clearly intended in these lease contracts as shown in the other contemporaneous writings that accompanied those written leases. There is not even a single written document in the record from the time of contracting that ever mentions any number of acres other than 30. The facts in this case justify a look elsewhere, including at the payment drafts, to answer the question of how many mineral acres the parties mutually intended to lease.

¶23 What actually is unambiguous in this leasing situation is that ALL of the writings, other than the leases, show clearly that the parties mutually intended to lease 30 net mineral acres at the time of contracting. The only "ambiguous" documents are the leases which say nothing about what actual number of mineral acres Hallins and Bradford are each leasing, other than an ambiguous reference to "160.00 acres, more or less". The payment drafts, letters, and all of the written communications from Inland, right up until the time Hallins and Bradford successfully quieted title to the additional 20 net mineral

acres in late 2013 (See, *Hallin v. Lyngstad*, supra), clearly show that the parties all mutually intended for these leasing transactions to be for 30 net mineral acres each from Hallins and Bradford. Only after Hallins and Bradford succeeded in quieting title to the additional mineral acres, did Inland change its position and begin to argue that it "always" intended to lease 40, not 30, net mineral acres each from Hallins and Bradford. The District Court erroneously applied rules appropriate for interpretation of deeds in order to dismiss all of the unambiguous documentation that was before it.

¶24 Appellants are on record with rational arguments that they (Hallins and Bradford) were each paid for 30 net mineral acres and that this is what they intended to lease to Inland. In contrast, Inland is on record arguing for both 30 net mineral acres each, and 40 net mineral acres each, for Hallins and Bradford; however, Inland's argument that they leased 40 net mineral acres from each did not arise until 2013, when Hallins and Bradford successfully quieted title to an additional 10 mineral acres each in *Hallin v. Lyngstad*, 2013 ND 168, ¶20, (ND 2013). Proof of this change in position lies in written communications produced and filed in answer to Interrogatories and Requests for Production of Documents from Inland wherein Inland argued that Hallins and Bradford each owned and leased 30 net mineral acres, rather than 40, and that this was Inland's intent at the time of leasing. Among other communications in the same vein, in 2010, Inland made many attempts to get Hallins and Bradford to stipulate and cross-convey with the heirs of Emma Lyngstad (referred to by Inland as "the Moses heirs") in order to make the title conform to 30 net mineral acres each ". . . <u>as we leased them</u> and as we interpreted the intent of the title . . .". <u>See</u> email message from Lynn Moser to Cody Strothman, dated June 3, 2010 (App. at 32; RA at #28, page 51) (emphasis added). See,

also, Proposed Stipulations contained in Exhibit 1 for Answers to Interrogatories, RA at #28).

¶25 Again, it was not until after this Court quieted title to the disputed 20 net mineral acres in *Hallin v. Lyngstad* that Inland changed its position and began arguing that Inland "always" intended to lease 40 net mineral acres from each. With Inland arguing for 30 net mineral acres each at the time of contracting, and then arguing for 40 net mineral acres each after the title was quieted, it seems clear that, if the parties had any clear, mutual intention at the time of contracting, it was to lease 30 net mineral acres each from Hallins and Bradford. At the very least, it shows that this is a situation where rational, believable arguments could be (and were) made for different interpretations of the number of acres intended to be covered by the lease contracts, making this a set of facts for which analysis under *Nichols* is appropriate. Inland simply cannot have it both ways. "If a contract is ambiguous, extrinsic evidence may be considered to clarify the parties' intentions." *Nichols*, at ¶12. "A contract is ambiguous when rational arguments can be made for different interpretations." *Id*. "Instruments which have been executed at the same time, by the same parties, in the course of the same transaction, and concerning the same subject matter, are to be read and construed together." *Trengen v. Mongeon*, 206 N.W.2d 284, 286 (N.D. 1973).

¶26 Appellants submit that these lease contracts are ambiguous as to the number of acres mutually intended to be leased, and that the leases cannot possibly be read and interpreted to reach any unambiguous conclusion as to what number of mineral acres the parties mutually intended to lease at the time of contracting without referring to instruments that were executed at the same time, by the same parties, in the course of the

same transaction, and concerning the same subject matter. This is the very definition of ambiguous that was intended to be addressed and resolved through application of the rules for interpretation set forth in *Nichols*.

¶27 Inland's persistence in arguing that it intended at the time of contracting to lease 40 net mineral acres each from Hallins and Bradford, raises a question of whether there even was mutual intent between these parties at that time. It actually opens the question of whether both leases should be voided in their entirety because there was no mutual intent on an essential element of intent to contract at the time of leasing. However, Appellants have never argued that both parties did not mutually intend to lease 30 net mineral acres at the time of contracting. This litigation was made necessary by Inland changing its position when the title was quieted in 2013 to argue that it really intended all along to have leased the additional acres for which it did not pay. Appellants only ever argued that the leases do not apply to the additional acres because Inland did not ask them to lease those acres, Inland did not pay them to lease those acres, and none of the parties, including Inland, intended to lease more than 30 net mineral acres each from Hallins and Bradford when they executed the leases and payment drafts simultaneously. Inland should not be allowed to claim and pay for the lesser acreage and then, later, claim the greater acreage when it finds out that it incorrectly interpreted the title. This would give unjust enrichment to Inland for doing nothing but claiming the greater acreage for the price of the lesser acreage.

¶28 Parties have been found to have mutually intended to lease less than all of the mineral acres they owned, leading this Court to partially invalidate a lease as to acres for which the lessee did not pay. See, *Borth v. Gulf Oil Exploration & Production Co.*, 313

N.W.2d 706 (N.D. 1981). In *Borth*, the issue considered by the court was whether or not the Borths were estopped from asserting the termination of the mineral lease because they accepted payments which were insufficient, *Borth*, at page 710. "The case for application of equitable relief . . . becomes stronger when the failure to make the proper payment is due to the conduct of the lessors." *Id.* The court went on to consider the conduct and knowledge attributable to Gulf Oil and Batts, finding that ". . . the problem developed in this instance because of a failure to fully and accurately check the record title to resolve any inconsistencies, and the failure of the Borths to object to insufficient payment because of their reliance upon Batts.", *Borth*, at page 711. The court found ". . . that each of the parties in the instant action were chargeable to some degree with the failure to properly ascertain the correct number of acres involved in the lease . . . [and concluding] . . . that the doctrines of estoppel, laches, or mutual mistake are not available as equitable considerations to validate the entire 80-acre mineral lease . . . [and] . . . because of the acceptance by the Borths of partial payment of the mineral lease . . . termination of the entire lease is not warranted.", *Borth*, at page 711. "Based on this, we conclude that the district court properly terminated the lease as to 20 acres and also properly validated the lease as to the 60 acres paid for by Gulf Oil.", *Borth*, at page 712. Even viewing the evidence in a light most favorable to Inland, there are no genuine issues of material fact and Appellants are entitled to judgment as a matter of law.

¶29 "If the moving party 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 to show the existence of a genuine issue of material fact." *Beaudoin v. JB Mineral Services, LLC*,

2011 ND 229, ¶7, 808 N.W.2d 671. Appellants met their initial burden of showing the absence of a genuine issue of material fact by presenting competent, admissible evidence in the form of letters and payment drafts that were executed simultaneously by the parties and which, when read and construed together under *Nichols*, clearly showed the intent of the parties at the time of contracting. If read and construed together, those documents speak for themselves to remove all doubt as to what the parties intended to lease, and pay for, at the time of contracting. This was evidence that properly could have been read and construed together under *Nichols* had the District Court not chosen to dismiss it or, in the case of the payment drafts, ignore its existence. The District Court accepted Inland's presentation of "allegations", "denials", and "speculation" as sufficient to defeat the initial burden that was met by Appellants. The District Court erred in denying summary judgment to Appellants.

¶30 "Mere speculation is not enough to defeat a motion for summary judgment, and when no pertinent evidence on an essential element is presented to the district court in resistance to the motion for summary judgment, it is presumed no such evidence exists." *Beaudoin*, at ¶7. Inland presented no pertinent evidence on this essential element in resistance to Appellants' motion for summary judgment, other than to disagree and urge the District Court to apply rules of construction for deeds in order not to consider the payment drafts. "[W]hen no pertinent evidence on an essential element is presented . . . it is presumed no such evidence exists". *Beaudoin*, at ¶7.

¶31 In its "Discussion", the District Court included in support of its reasoning that "Inland disagrees that the Court should consider the letters and asserts that the leases are unambiguous and the Court should look no further than the four corners of the leases to

determine that the Hallins and Bradford leased to Inland the interest they owned in the subject minerals to Inland [sic]". *Order Granting Summary Judgment*, at ¶8 (App. at 33) (emphasis added). The District Court spent time discussing the definition of the letters that accompanied the leases and payment drafts to determine that the letters were not "instruments" and, therefore, could not be read and construed together with the leases under *Nichols*. See, *Order Granting Summary Judgment*, at ¶9 (App. at 33). However, the District Court failed to apply this same analysis to the payment drafts. Appellants submit that, had the District Court applied to the payment drafts the same analysis it applied to the letters, the result would have been different. Unlike the transmittal letters, the payment drafts are "instruments" that were executed at the same time, by the same parties, in the course of the same transaction, and concerning the same subject matter. As such, *Nichols* would allow the payment drafts to have been read and construed together with the leases to determine the intent of the parties at the time as to the number of net mineral acres being leased.

¶32 Given the District Court determined that Inland met this initial burden, Appellants' presentation of the payment drafts as "instruments" that were executed at the same time, by the same parties, in the course of the same transaction, and concerning the same subject matter, are evidence and must be considered to be more than "mere allegations or denials in the pleadings" to oppose the motion. "If the moving party 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 to show the existence of a genuine issue of material fact." *Beaudoin v. JB Mineral Services, LLC*, 2011 ND 229, ¶7, 808 N.W.2d

671. Likewise, the payment drafts rise far above "mere speculation" for the purpose of opposing the motion for summary judgment. The payment drafts are pertinent evidence presented in opposition to the motion for summary judgment. "Mere speculation is not enough to defeat a motion for summary judgment, and when no pertinent evidence on an essential element is presented to the district court in resistance to the motion for summary judgment, it is presumed no such evidence exists." *Id.*, at ¶7. The District Court did not consider and dismiss the payment drafts, as it did with the letters. Instead, the payment drafts were completely ignored.

¶33 The District Court's application of the rules of construction for deeds, rather than contracts, in order to dismiss the letters and ignore the payment drafts was the only way around application of *Nichols* in order to accomplish two things. First, it allowed denial of summary judgment to Appellants by leaving them without "competent evidence" to meet the initial burden of showing the absence of a genuine issue of material fact; and, second, it took away from Appellants the pertinent evidence that the Appellants had presented on an essential element in opposition to the cross-motion for summary judgment (See, *Beaudoin*, at ¶7), namely that another document identifying the limited number of acres being leased, in fact, had been executed at the same time as the leases, by the same parties, as part of the same transaction.

¶34 The District Court ignored Appellants' "competent admissible evidence" in order to rely on "mere allegations", "denials" and "speculation" by Inland to find that Inland had met its initial burden. The District Court accepted as adequate for Inland to meet its initial burden of showing the absence of a genuine issue of material fact that "Inland disagrees that the Court should consider the letters and asserts that the leases are

unambiguous . . . “. *Order Granting Summary Judgment*, at ¶8 (App. at 33). Inland cannot be allowed to rest on the mere allegations, denials, or speculation in its opposition to Appellants' motion for summary judgment to meet its initial burden of showing the absence of a genuine issue of material fact.

¶35 In order to grant Inland's cross-motion for summary judgment, the District Court erred by reversing the standards applied to summary judgments. The District Court considered Inland, through its use of “allegations”, “denial”, and “speculation”, to have met the initial burden of showing the absence of a genuine issue of material fact by considering only one of the simultaneously executed documents (the leases) and ignoring the payment drafts which were executed at the same time as the leases, by the same parties as part of the same transaction(s). “Inland disagrees that the Court should consider the letters and asserts that the leases are unambiguous . . . “. *Order Granting Summary Judgment*, at ¶8 (App. at 33). Additionally, the act of ignoring the payment drafts allowed the District Court to treat Appellants as not having presented “pertinent evidence” on an essential element in opposition to Inland's cross-motion for summary judgment. Inland was allowed to rest on mere allegations, denials, and speculation in its opposition to Appellants' motion for summary judgment, while competent, admissible evidence presented by Appellants was dismissed or ignored in order to grant Inland's cross-motion for summary judgment. The District Court erred in granting summary judgment to Inland.

¶36 In the event this Court is willing to apply *Nichols* to read and construe the leases together with the payment drafts and accompanying instruction letters, Appellants urge the Court to consider and apply N.D.C.C. §9-07-16 which states that, in pertinent part,

that ". . . the written parts control the printed parts . . .". *Id*. "We must give effect to each provision of a contract if possible, see N.D.C.C. § 9-07-06, and in a conflict between written and printed parts of a contract, the written part controls. See N.D.C.C. §9-07-16. *The Pifer Group, Inc. v. Liebelt*, 2015 ND 150, ¶18, 864 N.W.2d 759. The payment draft contains the provision ". . . covering 30 Acres, m/l, describe as . . .". (App. at 12). The "30" is typed into the blank on this pre-printed form. Further, the transmittal letters both state "Pursuant to our conversation, please find enclosed a . . . Customer's Draft covering your mineral interest in Mountrail County, North Dakota, containing 30 mineral acres." (App. at 12) (emphasis added). "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." N.D.C.C. §9-07-13. At the time of contracting, it is clear that all parties intended that Inland was leasing "30 mineral acres" each from Hallins and Bradford.

CONCLUSION

¶37 For these reasons, based upon the undisputed facts, the pleadings, and North Dakota statutory and case law, Hallins and Bradford respectfully request that this Court reverse the District Court's Order, deny Inland's cross-motion for summary judgment, and grant Appellants' motion for summary judgment, quieting title to the leasehold for the additional 20 net mineral acres in Hallins and Bradford, 10 net mineral acres each.

Respectfully submitted this 22nd day of May, 2017.

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CERTIFICATE OF SERVICE

¶38 I hereby certify that a copy of the foregoing Appellee's Brief was served on Wade C. Mann, Attorney at Law, Crowley Fleck, PLLP, 100 West Broadway Ave., Suite 250, PO Box 2798, Bismarck, ND 58502-2798, via email at wmann@crowleyfleck.com on this 22nd day of May, 2017.

Kerry J. Carpenter______________________________________
Kerry J. Carpenter, Attorney at Law (ND #03739)

CERTIFICATE OF COMPLIANCE

¶39 I hereby certify under Rule 32 N.D.R.App.P. that this Appellants' Brief on Appeal was prepared in Word format, using 12-point Times New Roman proportional font, and contains less than 8,000 words (7,266).

Kerry J. Carpenter______________________________________
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