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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20170148
Civil No. 31-2014-CV-00064

Sundance Oil & Gas, LLC,	Plaintiff and Appellee
v.	
Hess Corporation,	Defendant and Appellant
and	
Barbara B. Corwin and Patricia B. Goldberg,	Defendants

BRIEF OF HESS CORPORATION, APPELLANT

Appeal from Judgment Dated February 28, 2017, Order for Partial Summary Judgment Dated May 11, 2016, and Order for Entry of Judgment Dated February 28, 2017
District Court, North Central Judicial District, Mountrail County, North Dakota
The Honorable Judge Stacy J. Louser

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STATEMENT OF THE ISSUES

[¶1] Hess leased minerals from two mineral owners, recorded the leases, and began drilling. Over two years after Hess leased the minerals, Sundance filed an unlocatable mineral owner action, without notice to Hess, claiming the mineral owners' father could not be found. Sundance then obtained a competing lease from a court-appointed trustee. To obtain a superior lease, does the petitioner in an unlocatable owner action have to notify other lessees of the same minerals?

[¶2] The Hess leases were recorded in the tract index, and Sundance claimed it reviewed the title documents. Hess drilled three wells, and Sundance claimed it was also actively engaged in exploration and development of the same lands. The only evidence that Sundance paid value for its lease is a conclusory affidavit that an entity paid the lease bonus "on behalf of Sundance." Did the court err in concluding that Sundance—as a matter of law—was a good faith purchaser for value without notice of competing interests?

STATEMENT OF THE CASE

[¶3] This is an oil and gas lease dispute. It is a dispute between a lessee who took its lease from the actual mineral owners and a lessee who took its lease from a trustee appointed in an unlocatable mineral owner action.

[¶4] Over two years after Hess took its leases from the mineral owners, Sundance filed a lawsuit to create a trust for an unlocatable mineral owner. Although Hess's leases were recorded in the tract index, Sundance did not serve Hess with notice of its lawsuit, it persuaded the court to create the trust, and it took a lease from the trustee to minerals covered by Hess's leases.

[¶5] Then, Sundance sued Hess and the actual mineral owners (Barbara B. Corwin and Patricia B. Goldberg) seeking to quiet title to leasehold mineral interests. (App. 7.) Hess answered and counterclaimed, seeking a declaratory judgment and to quiet title to its own leasehold interests. (*See* App. 39.) Sundance took no action to prosecute its lawsuit from the time suit was filed on May 30, 2014 until twenty months later. But, then, immediately before the deadline for filing summary judgment motions, Sundance filed a motion for summary judgment. (*See* App. 63.) Hess then filed a cross-motion for summary judgment. (*See* App. 129.) Hess also responded to Sundance's motion, arguing that fact issues nevertheless precluded summary judgment in Sundance's favor. (App. 209.)

[¶6] On May 11, 2016, the district court issued an Order for Partial Summary Judgment, granting Sundance's motion for partial summary judgment and denying Hess's motion. (App. 265.) After the partial summary judgment, two issues remained to be resolved before final judgment could be entered: (1) the amount Sundance owed Hess for expenses, assuming the Sundance lease took priority and (2) the amount Hess owed Sundance for revenues, assuming the Sundance lease took priority. (*See* App. 278.) Hess and Sundance reached an agreement to resolve these remaining issues, while reserving Hess's right to challenge the trial court's determination on lease priority. (App. 278.) Because of the stipulation, there were no issues left to be decided by the district court, and the district court entered final judgment on February 28, 2017. (App. 284.) This appeal followed. (App. 286.)

STATEMENT OF THE FACTS

[¶7] The key facts:

Date	Event
March 1952	Edward Brown acquires mineral interests in Mountrail County. (App. 148.)
July 1977	Edward Brown dies intestate in Florida. (App. 169.)
January 2000	Janet Brown, Edward Brown's wife, dies intestate in New York. (App. 171.)
March 2011	Hess leases mineral interests from the mineral owners, Edward Brown's two living heirs (Corwin and Goldberg). (App. 149.)
May 2011	Hess files memoranda of the Hess Leases with the Mountrail County Recorder. (App. 149.) The Mountrail County Recorder properly indexes the Hess Leases in the tract index for the Tract. (App. 228, 233.)
April 2013	Hess acquires permits and begins drilling three wells on the Tract. (App. 227–32.)
May 2013	Without notice to Hess, Sundance initiates an action to establish a trust for Edward Brown's mineral interests (now owned by Edward Brown's living heirs). (App. 153.)
July 2013	Sundance acquires from the trustee a lease to mineral interests once owned by Edward Brown. The Sundance Lease conflicts, in part, with the Hess Leases. (App. 12.)
May 2014	Hess first learns that Sundance was claiming an interest in its leasehold minerals when Sundance sues Hess, Corwin, and Goldberg. (App. 7.)

A. Corwin and Goldberg own the minerals.

[¶8] Edward J. Brown ("Brown") once owned minerals in Mountrail County, North Dakota. (the "Mineral Owners' Interest"). (App. 148.)[1] In 1977, he died intestate in Florida. (App. 169.) In 2000, his wife died intestate in New York. (App. 171.) Brown's living heirs were his daughters, Corwin and Goldberg (the "Mineral Owners"). (App. 171.)

B. Hess leased minerals from the Mineral Owners, properly recorded the leases, and began drilling.

[¶9] In March 2011, the Mineral Owners leased to Hess (the "Hess Leases"). (App. 149.) Hess leased a portion of the Mineral Owner's Interest (the "Tract"), not their entire interest.[2]

[¶10] In May 2011, memoranda of the Hess Leases were filed with the Mountrail County Recorder. (App. 149.) The memoranda were properly indexed in the Mountrail County Recorder's tract index. (App. 228, 233.)

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[1] Specifically, he owned a 50/2000ths interest in:

Township 153 North, Range 94 West
Section 1: NW1/4, N1/2SW1/4, SW1/4SW1/4
Section 2: E1/2SE1/4, SW1/4SE1/4, SE1/4NE1/4, Lots 1 and 2

Township 154 North, Range 94 West
Section 23: E1/2NW1/4, SW1/4NW1/4, W1/2NE1/4, N1/2SW1/4, SE1/4SW1/4, W1/2SE1/4, SE1/4SE1/4
Section 25: E1/2NW1/4, E1/2SW1/4, SW1/4NW1/4, SW1/4SW1/4, SW1/4SE1/4, and part of the SW1/4 of the SE1/4, 20 acres
Section 26: NE1/4, E1/2NW1/4, N1/2SW1/4
Section 35: SE1/4, S1/2NE1/4, SE1/4NW1/4, NE1/4SW1/4, W1/2NW1/4, SE1/4SW1/4, SW1/4SW1/4, 20 acres

(App. 148.)

[2] Hess leased minerals from the Heir's Interest in Township 154 North, but not any of their minerals in Township 153 North. (App. 149.)

[¶11] By April 2013, Hess had acquired permits and had begun drilling three wells on the Tract. (App. 227–32.) The permits, production, and spacing data were publicly available on the North Dakota Industrial Commission's website. (*See* App. 227–32.)

C. Over two years after Hess leased the Tract, Sundance acquired a conflicting lease.

[¶12] About a month after Hess began drilling—and over two years after Hess leased the Tract—Sundance petitioned a probate court, seeking the establishment of a trust for Brown's mineral interests, which were then owned by the Mineral Owners (the "Trust Action"). (App. 153.) Sundance claimed Brown was an unlocatable mineral owner. (App. 153.) It had searched for Brown and suspected that he was deceased. (*See* App. 71.) Nevertheless, Sundance then attempted service on Brown by certified mail and publication. (App. 156.)

[¶13] In the Trust Action, Sundance did not serve Hess, nor did it attempt to do so. But, as part of its Trust case, Sundance stated that it was "actively engaged in the exploration and development" of the Tract and that it had "investigat[ed] and review[ed] . . . [the] title documents recorded in Mountrail County, North Dakota." (*See* App. 121, 153.) Sundance moved forward with the Trust Action without notice to Hess, despite Hess's active oil and gas operations on the Tract and the properly indexed memoranda of the Hess Leases. (*See* App. 227–32.)

[¶14] Obviously, Brown did not answer or appear in the Trust Action. (App. 166.) By default judgment, the probate court established a trust (the "Trust") for Brown's mineral interests, naming the Mountrail County Treasurer as trustee (the "Trustee"). (App. 166.) The Trustee then executed an oil and gas lease dated July 17, 2013 in favor of Sundance which conflicts, in part, with the previously executed Hess Leases (the "Sundance

Lease"). (App. 12.) The Sundance Lease covers the Tract, plus additional acreage not leased by Hess.[3]

[¶15] In May 2014, Sundance sued Hess in this case. (App. 7.) This lawsuit was the first notice that Hess ever received that Sundance sought to claim an interest in Hess's mineral interests.

ARGUMENT

[¶16] The district court concluded that "[t]he issues involved this action . . . seemed to amount to a chicken or the egg question." (App. 276.) The district court erred in two ways.

[¶17] First, the district court held incorrectly that Sundance could obtain from a trustee a superior competing lease to the same acreage as Hess without providing Hess with actual notice of the trust proceedings. Because the district court's notice conclusion was incorrect, the Court should reverse and render judgment for Hess.

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[3] The Sundance Lease covers:

> Township 153 North, Range 94 West
> Section 1: Lots 3 (40.10), 4 (40.14), S1/2NW1/4, SW1/4SW1/4, N1/2SW1/4
> Section 2: Lots 1 (40.19), 2 (40.25), SE1/4NE1/4, E1/2SE1/4, SW1/4SE1/4
>
> Township 154 North, Range 94 West
> Section 23: S1/2NE1/4, W1/2E1/2, N1/2SW1/4, SE1/4SE1/4, SE1/4SW1/4, NW1/4NW1/4
> Section 25: E1/2W1/2, SW1/4NW1/4, SW1/4SW1/4, West 20 acres of the SW1/4SE1/4
> Section 26: NE1/4, E1/2NW1/4, N1/2SW1/4
> Section 35: Lot 1 (39.10), NW1/4NW1/4, SE1/4NW1/4, S1/2NE1/4, NE1/4SW1/4, SE1/4, 20 acres located in the SW1/4SW1/4, SE1/4SW1/4

(App. 12.)

[¶18] Second, the district court erred in holding that Sundance was, as a matter of law, a good faith purchaser for value. Because Sundance's good faith status was a disputed fact issue, the case should be remanded if the Court does not reverse and render.

I. Sundance could not obtain from the Trust a superior competing lease without actual notice to Hess.

[¶19] "This Court reviews a district court's interpretation of a statute de novo." *See, e.g.*, *Grinnell Mut. Reinsurance Co. v. Thompson*, 2010 ND 22, ¶ 9, 778 N.W.2d 526, 530. To establish a trust to lease minerals from a person whose whereabouts "are unknown and cannot be reasonably ascertained," a petitioner must show at least two things: (1) that "a diligent but unsuccessful effort to locate the absent owner or claimant has been made," and (2) "that appointment of a trustee will be in the best interest of *all* owners of an interest in the mineral, leasehold, or royalty interest." N.D.C.C. § 38-13.1-01 (emphasis added).

[¶20] This Court should conclude (1) that the trust statute requires notice to the unlocatable owner; (2) that the trust statute also requires notice to those "owners of an interest in the mineral, leasehold, or royalty interest"; and (3) that the trust statute requires actual notice to other owners whose whereabouts are reasonably ascertainable.

A. It is undisputed that the trust statute required notice to the unlocatable owner.

[¶21] Notice to the unlocatable owner is not key to this case, but it provides useful background for the parties' arguments and the district court's holding regarding notice to other interested parties such as Hess.

[¶22] Sundance initiated the Trust Action under N.D.C.C. § 38-13.1 (the "trust statute"). Section 38-13.1-01 allows owners of an interest in minerals to seek the

establishment of a trust in favor of another, unlocatable owner in the same minerals. N.D.C.C. § 38-13.1-01. A petitioner must first show that "a diligent but unsuccessful effort to locate the absent owner has been made." *Id.*

[¶23] Although § 38-13.1-01 does not explicitly use the word "notice," notice to the unlocatable owner is required, as Sundance has admitted. (App. 195–96 (stating that "Sundance compl[ied] with the . . . requirements for completing service by publication.")) Whether a statute uses the word "notice" or not, a party cannot simply set up a statutory trust in someone's name and lease their minerals without attempting to notify them. And, were there any doubt, general North Dakota law provides for such notice. For example, this Court stated in *Nelson v. Ecklund*, 68 N.D. 724, 283 N.W. 273 (1938) that:

> Because a statute makes no provision for notice does not say that notice is not required. If a statutory form of notice be prescribed, ordinarily it would be sufficient. *If the statute be silent as to form, it becomes the duty of the court to devise some adequate form before a person may be divested of rights.*

68 N.D. 724, 283 N.W. 273, 276 (emphasis added).

[¶24] As a result, a petitioner under § 38-13.1-01 cannot simply make "a diligent but unsuccessful effort to locate the absent owner"—the petitioner must also properly attempt to *notify* the unlocatable owner. *See* N.D.C.C. § 38-13.1-01.[4]

[4] Hess takes no position in this appeal as to the adequacy of the notice by publication to Edward J. Brown, the "unlocatable" owner. However, to the extent that Sundance claims that Hess was notified by the same publication, that notice was improper for the reasons stated below.

B. The trust statute also requires notice to other parties interested in the same minerals, including lessees.

[¶25] Section 38-13.1-01 also requires that "the petitioner must show . . . that appointment of a trustee will be in the best interest of *all* owners of an interest in the mineral, leasehold, or royalty interest." *Id.* (emphasis added). Again, this section does not explicitly use the word "notice."

[¶26] The trust statute, however, explicitly names lessees—owners of a leasehold interest—as interested parties. *See* N.D.C.C. § 38-13.1-01. And oil and gas lessees have a property interest in real property leased. *See, e.g., Nantt v. Puckett Energy Co.*, 382 N.W.2d 655, 659 (N.D. 1986) ("Oil and gas leases are interests in real property in North Dakota."). In this case, Sundance admitted that "Hess had an interest in the Trust Action in that the creation of the trust and authorization of the Sundance Lease created a competing claim by a subsequent purchaser." (App. 199.)

[¶27] Notice to these interested parties is required, separate from the notice to the unlocatable owner. This is because "wherever possible statutes must be interpreted . . . so as to give to all interested parties reasonable notice and a fair hearing upon the merits." *See, e.g., First Am. Bank & Trust Co. v. Ellwein*, 198 N.W.2d 84, 95 (N.D. 1972); *see also Nelson*, 68 N.D. 724, 283 N.W. at 276 ("If the statute be silent as to form, it becomes the duty of the court to devise some adequate form before a person may be divested of rights.").

[¶28] Notice to other owners avoids at the outset problems (such as the ones in this case) by avoiding "circuity of actions" or the "[a]djudication of a case in the absence of persons who have a strong interest in the dispute [that] may lead to a duplication of effort

for all concerned." *Williams Co. v. Hamilton*, 427 N.W.2d 822, 824 (N.D. 1988) (internal quotations and citation omitted). Because one of the presumable goals of the trust statute is to find the "unlocatable" owner, notice to other owners who may have already located this "unlocatable" owner helps achieve this goal. *See* N.D.C.C. § 38-13.1-01; *see Williams Co.*, 427 N.W.2d at 824 (where no notice or joinder to grantees of mineral deeds in dispute, "grantees should have been made parties" because "[t]hose grantees may have evidence of and insight . . . not presented or possessed by the parties to this action.").[5]

[¶29] Analogous trust statutes of other states further support interpreting North Dakota's statute to require providing notice to all owners, not just the unlocatable owner. For example:

- West Virginia requires "a certified copy of any competing lease or easement of record, that is to say, a lease or easement from landowners who are not defendants, embracing all or part of the tract of land which is the subject of the petition . . . ." W. Va. Code Ann. § 55-12A-5.

- Arkansas requires that there are no operations "under existing valid mining and operating leases," Ark. Code Ann. § 15-56-301, and to ensure that competing leases are not created, the petitioner must "make as parties defendant owners of the various interests or their lessee, if any, in the mineral lands or mineral rights in, on, and under the lands." Ark. Code Ann. § 15-56-304.

- Maryland requires that the "petition . . . shall name as defendants . . . [a]ny other person with a legal interest in the severed mineral interest, including any unknown or missing owners." Md. Code Ann., Envir. § 15-1206.

[¶30] Because North Dakota's trust statute is silent on notice, this Court should recognize an adequate form of notice—by interpreting the trust statute to require notice to interested parties. *See Nelson v. Ecklund*, 68 N.D. 724, 283 N.W. 273, 276 (1938) (where

[5] Hess evidently had evidence and insight not presented to the Trust Action court because Hess had located and leased from the Mineral Owners some two years before the Trust Action. (App. 149.)

no statutory notice is provided, "it becomes the duty of the court to devise some adequate form before a person may be divested of rights.").

C. The trust statue requires actual notice to reasonably ascertainable interested parties; otherwise, the trust statute is unconstitutional.

[¶31] The district court conflated the notice issue, summarily dismissing Hess's notice argument by concluding that through notice by publication to *Edward J. Brown or his successors in interest*, "Hess and the world had notice of the trust action." (App. 274.) This holding erroneously sidestepped Hess's arguments. Hess did not dispute the adequacy of the notice by publication to the *unlocatable owner*—the first kind of notice discussed above. Rather, because Hess is *an interested party*, it was entitled to its own, actual notice of the Trust Action—the second kind of notice addressed above. Because the district court conflated notice to the unlocatable owner and notice to Hess, it erred.

[¶32] The district court's holding also waded into unconstitutional waters. The constitutional problem is that the district court assumed that notice by publication to an unlocatable owner (whose whereabouts are not reasonably ascertainable) is sufficient notice to other interested parties (even if their whereabouts are reasonably ascertainable). Interpreting the trust statute in this manner makes it unconstitutional.

1. Interpreting the trust statute to allow notice to other interested parties—by publication only, even if their names and addresses are reasonably ascertainable—makes the trust statute unconstitutional.

[¶33] Statutes must be interpreted, wherever possible, to be constitutional. *See In re Estate of Elken*, 2007 ND 107, ¶ 10, 735 N.W.2d 842, 845 ("[T]he court's interpretation is contrary to the due process requirements of *Pope*."); *see also First Am. Bank & Trust*

Co. v. Ellwein, 198 N.W.2d 84, 95–96 (N.D. 1972) ("Where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional, and by the other of which it would be valid, the Court will adopt a construction which will sustain its validity.").

[¶34] To pass constitutional muster, the trust statute must require actual notice to mineral lessees, such as Hess, whose names and addresses are reasonably ascertainable. Notice by publication only is not enough, because while "[p]ublication may theoretically be available for all the world to see, [] it is too much . . . to suppose" that every individual whose interests are at stake "does or could examine all that is published to see if something may be tucked away in it that affects his property interests." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 320 (1950). As such, due process requires that:

> Notice by mail or other means as certain to ensure actual notice is a *minimum constitutional precondition* to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well-versed in commercial practice, if its name and address are reasonably ascertainable.

Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) (emphasis added).

[¶35] *Mennonite* rings true in this case. Mineral leases like Hess's leases are "legally protected property interests within the meaning of the fourteenth amendment." *See, e.g.*, *Davis Oil Co. v. Mills*, 873 F.2d 774, 787 (5th Cir. 1989). The Trust Action adversely affected Hess's property interests. Sundance admitted that "Hess had an interest in the Trust Action in that the creation of the trust and authorization of the Sundance Lease created a competing claim by a subsequent purchaser." (App. 199.) Further, Hess's name and address were reasonably ascertainable because Hess's Leases were indexed in

the tract index system for each portion of the Tract and readily identifiable by a simple search of the proper township, section, and range. (App. 228, 233.) And, contrary to the district court's holding, it is too much to suppose that Hess could examine every newspaper in North Dakota "to see if something is tucked away in it." *See Mullane*, 339 U.S. at 320.

[¶36] As a result, due process required actual notice to Hess. *See Mennonite*, 462 U.S. at 800. This is true regardless of the district court's conclusion that Hess could have "protect[ed] its interests in the leases . . . by doing any number of things" (App. 276), because "a party's ability to take steps to safeguard its interests" does not relieve a "constitutional obligation" even with respect to parties "well-versed in commercial practice." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983).

[¶37] The United States Supreme Court and this Court have addressed two exceptions where actual notice is not required—but neither applies here. First, actual notice is not required if the statutory scheme is "self-executing"—meaning that the statute does "not require any judicial action." *See Capps v. Weflen*, 2014 ND 201, ¶¶ 21–22, 855 N.W.2d 637, 647 (citing *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988)). But unlike the self-executing statute in *Capps* that was similar to a statute of limitations, the trust statue *does* require "significant state action [because] [t]he probate court is intimately involved throughout, and without that involvement" the statutory trust is never created. *See id.* (quoting *Pope*, 485 U.S. at 486–87); N.D.C.C. § 38-13.1-01 ("After determining that these conditions have been met, the court shall appoint the county treasurer as trustee . . . ."); *see also In re Estate of Elken*, 2007 ND 107, 735 N.W.2d 842 ("[A] probate provision for notification of a claim period solely by publication failed to

satisfy due process, which requires actual notice to known or reasonably ascertainable creditors."). Further, a lease like Sundance's cannot be created without the probate court's approval. N.D.C.C. § 38-13.1-01. Therefore, there was significant state action, the trust statute was not self-executing, and actual notice was required.

[¶38] Second, actual notice is not required if the process requires "impracticable and extended searches . . . in the name of due process." *Pope*, 485 U.S. at 490 (internal quotation and citation omitted). But, as this Court has noted several times, searching a tract index system by a simple search of the proper township, section, and range is not an impracticable and extended search. *Swanson v. Swanson*, 2011 ND 74, ¶ 15, 796 N.W.2d 614 ("[The] tract index system for recording real estate transactions . . . makes all instruments *easily accessible* by focusing on the tract of land in question, rather than on the grantor or grantee of the land." (emphasis added)); *Hanson v. Zoller*, 187 N.W.2d 47, 56 (N.D. 1971) ("In our state, today, the tract index is the only practical index through which instruments on record can be located. *It would be a prohibitive burden to locate instruments on record without a tract index.*" (emphasis added)).[6] As a result, actual notice was required.

[¶39] Because Hess was not provided actual notice of the Trust Action, Sundance could not claim that it properly displaced Hess's leasehold interest by virtue of the Trust Action. In the Trust Action, Sundance could have provided actual notice to Hess or joined Hess as a necessary party under N.D.R.Civ.P. 19. It did neither. Like many other situations where a party proceeds without proper notice to other parties, Sundance's

[6] North Dakota is therefore unlike states like Louisiana which do not use a tract index system, where performing a grantor-grantee search may be an impracticable and extended search. *See Davis Oil Co. v. Mills*, 873 F.2d 774, 789 (5th Cir. 1989) (searching Louisiana's grantor-grantee index unduly burdensome).

choice to proceed in Hess's absence should not prejudice the Hess Leases. *See Van Sickle v. Hallmark & Assocs., Inc.*, 2013 ND 218, ¶ 31, 840 N.W.2d 92, 103 ("We conclude the defendants' arguments are unavailing because the Van Sickles did not receive notice of the bankruptcy proceedings and the confirmation order and reorganization plan are simply not binding on the Van Sickles."); *Wacker Oil v. LoneTree Energy*, 459 N.W.2d 381, 383 (N.D. 1990) ("[T]he absence of Edwin's heirs from the action may serve to jeopardize Wacker's rights in the future, inasmuch as any judgment in this action may not be binding upon them."). Sundance's "recording act" arguments to the contrary should have been rejected. In short, Sundance should not have been allowed to win a race to the courthouse by declaring itself, effectively, the only runner in the race. The Court should reverse the district court's judgment and render judgment in favor of Hess.

II. Sundance was not, as a matter of law, a good faith purchaser for value.

[¶40] On review, the summary evidence must be viewed "in the light most favorable" to Hess, as the non-movant, and Hess must be given "the benefit of all favorable inferences." *See, e.g., Diocese of Bismarck Trust v. Ramada, Inc.*, 553 N.W.2d 760, 764 (N.D. 1996). Sundance argued, and the district court agreed, that it was, as a matter of law, a good faith purchaser for value without notice of a competing interest. But two fact issues precluded summary judgment on this issue. First, there were disputed facts regarding Sundance's duty to inquire into Hess's competing leases. Second, whether Sundance actually paid value was a disputed fact question. As a result, if the Court does not reverse and render, it should remand.

A. There were disputed facts regarding Sundance's duty to inquire into Hess's competing leases.

[¶41] "A party's status as a good faith purchaser without notice of a competing interest is a mixed question of fact and law." *Swanson v. Swanson*, 2011 ND 74, ¶ 9, 796 N.W.2d 614, 617 (quotation and citation omitted). "The factual circumstances necessary to determine whether a party has attained the status of a good-faith purchaser without notice constitute findings of fact." *Id.*

[¶42] The district court erred in applying that standard in two ways. It first erred when it held that "the factual issues underlying the notice determination have already been judicially determined." (App. 275.) As a result, it also erred in holding as a matter of law that Sundance was a good faith purchaser without notice of competing claims. (App. 275–76.)

1. The district court erred in holding that factual issues about notice had already been judicially determined.

[¶43] As the district court recognized, "a determination [of] whether a party is or is not a good-faith purchaser without notice of competing claims" requires a determination of factual issues. (App. 275.) Yet, it held that the necessary findings of fact about notice had already been established based on "Judge Hagar's determination [in the Trust Action] that Sundance had made a diligent, but unsuccessful, effort to locate Edward J. Brown and/or his successor(s) in interest." (App. 275.)

[¶44] Respectfully, that holding missed the mark. The good-faith issue is whether Sundance had notice of *Hess's competing lease*, not whether Sundance had located Brown or his successors in interest. Judge Hagar made no such determination in the

Trust Action—neither Hess's competing lease nor Sundance's efforts to investigate any competing leases were ever mentioned in the Trust Action.

[¶45] Further, adopting Judge Hagar's determination against Hess was an improper application of res judicata. (App. 273–74 ("Sundance [says] that the findings in the Trust Action are res judicata . . . . The Court finds that the issue was decided by Judge Hagar in the Trust Action.")). Res judicata "prohibits the relitigation of claims or issues that were raised or could have been raised in a prior action between the same parties or their privies and which was resolved by final judgment in a court of competent jurisdiction." *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 383 (N.D. 1992).

[¶46] Res judicata does not apply because Hess was neither a party nor a party's privy to the Trust Action. *Hull v. Rolfsrud*, 65 N.W.2d 94 (N.D. 1954) is on point. In *Hull*, the defendant acquired a deed to a tract of land from plaintiffs, the heirs to an estate, before the estate was probated. *Id*. at 97. About three years later, the estate was probated and the court entered a judgment distributing the property in question to the plaintiffs. *Id.* at 97–98. The defendant was neither joined in or notified of the probate proceedings. *Id.* at 98. Plaintiffs then brought a suit to quiet title, claiming that the defendant was barred from challenging the distribution of property under the probate judgment. *Id.* at 97–98.

[¶47] The Court disagreed, noting that:

> "[The defendant was] not made a party to the probate proceedings nor served with any notice of them. Whatever interest he has under the quitclaim deed was obtained by him some three years before the probate proceedings in question were commenced. His rights whatever they are were not in issue in the probate proceedings nor are they derived through any issue decided in said probate proceeding. He had no right of control over those proceedings or right of appeal therefrom."

Id.

[¶48] Hess was not made a party to the Trust Action. (App. 153, 166.) Hess was not served with any notice of the Trust Action. (App. 156.) Further, the Hess Leases were lawfully and validly obtained some two years before the Trust Action was commenced. (App. 149.) Hess's rights were not at issue in the Trust Action nor are they derived through any issue in the Trust Action. (App. 153, 156.) Nor did Hess have any right of control over the Trust Action or the right to appeal from the Trust Action. Therefore, the district court erred holding that the factual issues about notice had already been determined—and in bypassing the significant factual issues regarding Sundance's knowledge of Hess's competing lease. *See Hull*, 65 N.W.2d at 97–98.

2. The district court therefore also erred in holding that Sundance acted in good faith as a matter of law.

[¶49] "Good faith" means "an honest intention to abstain from taking any unconscientious advantage of another even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious." N.D.C.C. § 1-01-21. A party cannot claim protection as a good faith purchaser under the recording act if (1) "the facts or circumstances were sufficient to put a prudent person on inquiry" and (2) the party failed "to conduct such inquiry with reasonable diligence." *Swanson v. Swanson*, 2011 ND 74, ¶ 10, 796 N.W.2d 614.

[¶50] "*[A]ny* circumstances[] which should cause further inquiry into the status of the 'stranger' preclude the prospective purchaser from ignoring the 'stranger's' conveyance." *Swanson*, 2011 ND 74, ¶ 17, 796 N.W.2d at 620 (emphasis added). In other words, the information needed to put a prudent person on inquiry "need not be so full and detailed as

to communicate a complete description of the opposing party['s] interest." *Id.* at ¶ 12 (citations omitted).

[¶51] Because the district court ignored Hess's evidence as barred by res judicata, it erred in holding, as a matter of law, that Sundance acted in good faith. Hess's evidence showed a factual dispute—by the time Sundance had obtained its Lease from the Trust, Hess had already (1) obtained the Hess Leases from the Mineral Owners; (2) recorded the Hess Leases, which were properly indexed; (3) permitted three wells on the Tract; and (4) begun drilling the three wells on the Tract. (App. 227–32.) For its part, Sundance searched only for the record owner and knew or suspected that he was deceased. (*See* App. 71.)

[¶52] Viewing these circumstances in the light most favorable to Hess, there was at least a factual dispute as to whether Sundance had notice of facts which would provoke a prudent person to make further inquiry. *See Diocese of Bismarck Trust v. Ramada, Inc.*, 553 N.W.2d 760, 769 (N.D. 1996) (discussing factual dispute regarding constructive notice and holding factual dispute existed).

[¶53] The threshold for circumstances to set a prospective purchaser on notice is not so high as to negate any duty as a matter of law under these circumstances. *Swanson*, 2011 ND. 74, ¶ 17, 796 N.W.2d at 620 (comment at funeral enough to trigger duty to investigate); *see also Miller v. Hennen*, 438 N.W.2d 366, 370–71 (Minn. 1989) ("[F]ourteen mortgages were on record . . . [and even though] none of these mortgages arose out of a chain of title recorded back to the record fee owner . . . [t]hese mortgages . . . may be considered "actual knowledge of facts which would put one on further inquiry." (cited with approval in *Swanson*, 2011 ND. 74, ¶ 17, 796 N.W.2d at 620)).

[¶54] There was enough evidence to submit questions to the jury regarding what Sundance knew and when it knew it about the competing Hess Leases. The facts regarding whether Sundance was aware of the Hess Leases when Sundance "investigat[ed] and review[ed] . . . [the] title documents recorded in Mountrail County, North Dakota" were in dispute, given that the Hess leases were indexed in the tract index system for each portion of the Tract. (*See* App. 121, 227–32.) The facts regarding the notice provided by Hess's drilling operations on the same lands were also in dispute, given that Sundance was "actively engaged in the exploration and development" of the Tract. (*See* App. 153, 227–30); *see also Chornuk v. Nelson*, 2014 ND 238 ¶ 21, 857 N.W.2d 587 ("The open and notorious possession and occupancy of property by a person other than the grantor is sufficient to charge a purchaser with knowledge of the rights of the occupant.").

[¶55] Moreover, Sundance's good faith argument turned the classic recording act scenario on its head. The classic scenario is: A conveys to B; B does not record; A conveys to C; C records. In this instance, party C "wins." In this case, however, Sundance argued that it is a good faith purchaser in an entirely different factual scenario: actual owners of A's mineral interests convey to B; B records; C, unable to find A, seeks judicial intervention to place A's lands in trust, without looking to see if anyone else had already leased the lands; Trust of A conveys to C; C records. Therefore, Sundance argued, as party "C" it "wins."

[¶56] Sundance's attempt to distort the usual recording act protection through a complicated trust process—a "form[] or technicalit[y] of law"—amounted to an "unconscientious advantage" that was not a good faith purchase. *See* N.D.C.C. § 1-01-

21. This Court has noted several times that transactions involving trusts should put a purchaser on notice of the need to inquire. *See Vanderhoof v. Gravel Products, Inc.*, 404 N.W.2d 485, 488–49 (N.D. 1987) ("The fact that the seller was a trustee should also have indicated to the Boeckels the need to inquire about the state of the trustee's title."); *Gerhardt Construction Co. v. Wachter Real Estate Trust*, 306 N.W.2d 223, 226 (N.D. 1981) ("The presence of the word 'Trustee' after [the seller's] signature on the earnest money agreement certainly suggests possibilities a prospective purchaser should investigate.").

[¶57] The same is true here. Sundance should have at inquired into the state of the title by a search of the tract index, which would have revealed the entirety of Hess's interests. *See Swanson v. Swanson*, 2011 ND 74, ¶ 15, 796 N.W.2d 614, 619 (citing 66 Am.Jur.2d *Records and Recording Laws* § 99 (2010) for the proposition that "when a statute requires a tract index be kept, a subsequent purchaser is under a duty to examine that index").

[¶58] As a result, the district court erred in holding that Sundance as a matter of law acted in good faith.

B. There was also a question of fact on whether Sundance paid for its lease.

[¶59] To show that it was a good faith purchaser for value as a matter of law, Sundance was required to show that it paid substantial consideration for its lease. *Anderson v. Anderson*, 435 N.W.2d 687, 689 (N.D. 1989). The only evidence of consideration was a conclusory affidavit attached to Sundance's summary judgment reply brief. (App. 258.)

[¶60] But, "[a]ffidavits in support of summary judgment must be made on personal knowledge and set forth facts that are admissible in evidence." *Rooks v. Robb*, 2015 ND 274, ¶ 8, 871 N.W.2d 468, 471. In *Rooks*, the Court examined an affidavit that alleged that a note was assigned to a trust. *Id.* The affidavit did not "state any facts evidencing the trust manager's personal knowledge of the transfer . . . [and] [a]side from stating the affiant was the vice president and trust manager of the bank that administered the Trust . . . the affidavit [did] not establish the affiant had any involvement with the Trust." *Id.* The Court held the district court erred when it found this conclusory affidavit "established the note was transferred to the Trust." *Id.*; *see also Perius v. Nodak Mut. Ins. Co.*, 2010 ND 80, ¶ 18, 782 N.W.2d 355 ("Affidavits containing conclusory allegations on an essential element of a claim are insufficient to raise a genuine issue of material fact.").

[¶61] Similarly, the affidavit here was conclusory. The affidavit does not state any facts evidencing personal knowledge of payment of consideration for Sundance's Lease. (App. 258.) The affidavit alleges that the affiant is the President of Sundance, but the affidavit states that *O'Brien Resources, LLC*—not Sundance—allegedly paid a lease bonus. (App. 258.) The affidavit also makes the conclusory claim that O'Brien Resources paid the lease bonus "on behalf of Sundance." (App. 258.) There is no allegation that the affiant had any involvement with O'Brien Resources much less that he had personal knowledge of O'Brien Resources' payment of consideration for the Sundance's Lease "on behalf of Sundance." (App. 258.)

[¶62] Because Sundance failed to show as a matter of law that it paid substantial consideration for its lease, this additional fact issue precluded summary judgment.

CONCLUSION

[¶63] The district court erred in allowing Sundance to invalidate Hess's prior recorded lease through the maneuverings of a statutory trust. First, it erred by holding that Sundance could obtain a superior lease from a statutory trust without providing actual notice to Hess. This holding makes the trust statute unconstitutional. Second, the district court erred by holding that Sundance as a matter of law was a good faith purchaser. In doing so, the district court bypassed significant factual issues through an improper application of res judicata. The court also erred by holding that Sundance as a matter of law paid substantial consideration for its lease. For these reasons, Hess respectfully requests that the Court reverse and render judgment in favor of Hess, or, in the alterative, remand.

Dated this 24th day of July, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

[¶64] This brief contains 6,766 words, excluding the parts of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify this brief complies with the typeface requirements of N.D.R.App. 32 and the type style requirements of that rule because it has been prepared in a proportionally-spaced typeface using Microsoft Word, Times New Roman, 12 point font.

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