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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Twin City Technical LLC, Three Horns Energy, LLC, Prairie of the South LLC, and Irish Oil & Gas Inc., Plaintiffs-Appellees, v. Williams County and Williams County Commission, Defendants-Appellants.	Supreme Court No. 20180264

Appeal from Order Granting Plaintiffs' Motion for Summary Judgment,
Dated April 27, 2018,
Case No. 53-2015-CV-01394
County of Williams, Northwest Judicial District
The Honorable Benjamen J. Johnson, District Judge, Presiding

BRIEF OF APPELLEES

FREDRIKSON & BYRON, P.A.

Lawrence Bender, ND Bar #03908
Spencer D. Ptacek, ND Bar #08295
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
lbender@fredlaw.com
sptacek@fredlaw.com
Telephone: 701.221.8700
Facsimile: 701.221.8750

Attorneys for Appellees Twin City Technical LLC, Three Horns Energy, LLC, Prairie of the South LLC, and Irish Oil & Gas Inc.

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STATEMENT OF ISSUES

[¶ 1] Plaintiffs-Appellees Twin City Technical LLC ("Twin City"), Three Horns Energy, LLC, Prairie of the South LLC, and Irish Oil & Gas Inc. ("Irish") (collectively, "Lessees") agree with Statement of Issues presented by Defendants-Appellants Williams County and Williams County Commission (collectively, the "County").

STATEMENT OF THE CASE

[¶ 2] The present action was initiated by Lessees on November 16, 2015, against the County. On July 20, 2016, Lessees moved for summary judgment. The district court denied Lessees' motion for summary judgment on August 31, 2016, concluding that there appeared to be genuine issues of material fact and that the motion rested on claims not plead in the Complaint. On November 8, 2016, Lessees were given leave by the district court to file an Amended Complaint. The Amended Complaint asserted claims for rescission, based on mistake, fraud, and/or failure of consideration, for declaratory relief, seeking a determination of the validity of the four oil and gas leases that are the subject of this action (the "County Leases") and/or a determination that the County Leases contain an implied covenant of quiet possession, for restitution, based on a theory of unjust enrichment, and for breach of the covenant of quiet possession implied in the County Leases. By these various claims Lessees sought to recover $1,314,516.80 in bonus payments made by Lessees to the County.

[¶ 3] Lessees again filed a motion for summary judgment on January 11, 2017, based on the claims for unjust enrichment and for declaratory relief as to the covenant of quiet enjoyment implied in the County Leases. The district court denied this motion for

summary judgment on March 31, 2017, concluding that the County had not yet had adequate time to complete discovery.

[¶ 4] Lessees filed a third motion for summary judgment on January 19, 2018, based on all of the claims asserted in Lessees' Amended Complaint. The County also filed a motion for summary judgment on January 19, 2018, seeking dismissal of all the claims asserted in the Amended Complaint. A hearing on both motions for summary judgment was held on March 26, 2018. Thereafter, on April 27, 2018, the district court issued an order granting Lessees' motion for summary judgment, denying the County's motion for summary judgment, and directing entry of judgment in the amount of $1,314,516.80 against the County and in favor of Lessees. The district court concluded that judgment in favor of Lessees is proper because the County Leases are void as a matter of law due to the County's failure to comply with N.D.C.C. ch. 38-09. Because the County Leases are void, the district court reasoned, Lessees were entitled to equitable relief, under the theory of unjust enrichment, and were specifically entitled to restitution of the $1,314,516.80 in bonus payments paid by Lessees to the County. The district court also concluded that Lessees had standing to seek a declaration that the County Leases were void pursuant to N.D.C.C. ch. 38-09 and that the County's affirmative defense of laches failed as a matter of law.

[¶ 5] The County now appeals the district court's decision, claiming that the district court erred in granting Lessees' motion for summary judgment and in denying the County's motion for summary judgment.

STATEMENT OF FACTS

[¶ 6] In January of 2012, Williams County Auditor Beth M. Innis ("Innis") discussed leasing certain minerals claimed to be owned by the County with Grant Archer ("Archer"), an independent land agent. Appendix of Appellees ("Appellees App."), pp. 2–5. Innis and Archer apparently discussed the leasing after LoneTree Energy and Associates, LLC ("LoneTree"), a leasing agent for Hess Corporation, expressed interest in leasing the property. *Id.* The minerals at issue were believed to be located in Williams County, North Dakota, in and under the following described lands:

Township 153 North, Range 98 West:
Section 22: Lots 4 and 5, SE/4SE/4
Section 23: SW/4SW/4
Section 27: Lot 1
Section 31: Lots 2, 3, and 5, SW/4NE/4

(the "Subject Lands"). *See* Appendix of Appellants ("Appellants App."), p. 10. Following his discussions with Innis, Archer approached the Lessees with the opportunity to offer the County a lease or leases for the minerals in and under the Subject Lands. Appellees App., pp. 2–3. After a series of communications between Archer, Innis, and the Lessees by telephone, post, and email, an agreement to lease the minerals was reached. *See id.* at 2–5, 9–10. On February 3, 2012, Innis notified Brent Schellin of LoneTree that LoneTree was not the successful bidder. On the same date, she notified Grant Archer that the Lessees were the successful bidders to lease the oil and gas in and under the Subject Lands from Williams County. *See id.* at 2, 9–10.

[¶ 7] As a result of the bidding, the County executed a total of four oil and gas leases. Twin City and the County executed an oil and gas lease believed to cover 139.53 acres in Section 31 of the Subject Lands on February 3, 2012, which was recorded with the Williams County Recorder on February 7, 2012, as Document No. 727308. *See*

Appellants App., pp. 119–21, 126. This lease was subsequently amended and believed to cover 162.78 acres in Section 31 of the Subject Lands by an Amendment of Lease dated February 15, 2012, which was recorded with the Williams County Recorder on March 5, 2012, as Document No. 729196. *See id.* at 196–98. Irish and the County executed an oil and gas lease believed to cover 40.00 acres in Section 23 of the Subject Lands on February 28, 2012, which was recorded with the Williams County Recorder on February 29, 2012, as Document No. 728950. *See id.* at 202–04. Irish and the County executed an oil and gas lease believed to cover 21.20 acres in Section 27 of the Subject Lands on February 28, 2012, which was recorded with the Williams County Recorder on February 29, 2012, as Document No. 728951. *See id.* at 205–07. Irish and the County executed an oil and gas lease believed to cover 96.05 acres in Section 22 of the Subject Lands on February 28, 2012, which was recorded with the Williams County Recorder on February 29, 2012, as Document No. 728952. *See id.* at 199–201. As noted above, the leases will be referred to collectively as the "County Leases." Lessees paid the County bonuses totaling $1,314,506.80 for the right to lease the minerals in and under the Subject Lands. *See id.* at 208–14, 220–49. As a result of a series of assignments, the County Leases are now owned by the Lessees.

[¶ 8] The parties' purpose in executing the County Leases was to grant Twin City and Irish, and their assignees, the right to explore for and produce the oil and gas underlying the Subject Lands in exchange for payment of bonuses and production royalties to the County. *See* Appellees App., p. 13. To that end, the County Leases state that the County "has granted, demised, leased and let, and by these presents does grant, demise, lease and let exclusively unto the said Lessee, the land hereinafter

described . . . ." *See, e.g.*, Appellants App., p. 199. Each of the County Leases then goes on to describe a particular tract of land, thought to be located in Williams County, and note the amount of acreage the parties thought that tract contained. *See, e.g.*, *id.* Each of the County Leases is for a term of three years, and as long thereafter as oil or gas is produced from the Subject Lands. *See, e.g.*, *id.* The warranty clause, which provides "[Lessor hereby] warrants and agrees to defend the title to the lands herein described," was stricken from each of the County Leases.[1] *See, e.g.*, *id.* at 200.

[¶ 9] It is undisputed that the County did not advertise or otherwise publish notice of its leasing of the Subject Lands, that it did not hold a public auction for the leasing of the Subject Lands, and that it did not lease the Subject Lands for the requisite five-year term. *See* Brief of Appellants, ¶ 23.

[¶ 10] The County's statement of facts makes a number of assertions that are irrelevant to the basis of the district court's decision. The County attempts to characterize the situation giving rise to this case as one in which Lessees were or should have been aware of numerous "issues" with the County's title to the Subject Lands and had numerous opportunities to identify and fully investigate these issues before leasing and/or before notifying the County of its own lack of title. At the same time the County attempts to suggest that it was innocent of any knowledge about its (lack of) ownership of the

[1] In its brief, the County asserts that "Lessees conceded that the stricken warrant clause prevents recovery of the bonus payments, asserting only that the County removed the warranty clause without the Lessees' consent." Brief of Appellants, ¶ 17. This is a misrepresentation of Lessees' statements. The letter cited to contains no concession by Lessees that they were prevented from recovering bonus payments. *See* Appellants App., pp. 306–07. To the contrary, the letter specifically concludes by stating, "If . . . the County has no basis for claiming ownership in the oil and gas in and under the Subject Lands, please return the $1,314,516.80 in bonus payments that were made to Williams County at your earliest convenience." *Id.* at 307.

minerals it was soliciting bids on and purporting to lease. Contrary to the County's suggestions, however, and as acknowledged in the County's brief, Lessees did in fact conduct due diligence prior to leasing. *See, e.g.*, Brief of Appellants, ¶¶ 11, 18; *see also* Appellants App., pp. 96–97 (64:12–68:5). The County merely takes issue with the quantum of information reviewed in the course of that due diligence and what that information should have disclosed to Lessees or their agents. Furthermore, being aware of an "issue" with leasehold title is much different than confirming that a lease conveys no valid title; in this case, Lessees were not able to do the latter until well after learning of issues with the County's title. *See* Appellants App., p. 92 (50:6–51:21), (49:24–50:23), 335 (102:6–103:21). Accordingly, because this aspect of the case was not a basis for the district court's decision to grant summary judgment in favor of Lessees, it should be disregarded by the Court.

STANDARD OF REVIEW

[¶ 11] This Court's standard of review for a district court's grant of summary judgment is well-established:

> [Summary 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.

Maragos v. Newfield Prod. Co., 2017 ND 191, ¶ 7, 900 N.W.2d 44 (quoting *Krenz v. XTO Energy, Inc.*, 2017 ND 19, ¶ 17, 890 N.W.2d 222). "Summary judgment is appropriate against a party who fails to establish the existence of a genuine issue of material fact on an essential element of a claim on which she will bear the burden of proof at trial." *Heng v. Rotech Med. Corp.*, 2004 ND 204, ¶ 10, 688 N.W.2d 389.

[¶ 12] Whether a district court has properly applied state case law is a question of law. *O'Hara v. Schneider*, 2017 ND 53, ¶ 13, 890 N.W.2d 831. Whether a district court has properly applied state statutory law is a question of law. *Id.* ¶ 20. A district court's conclusions of law are fully reviewable on appeal. *See, e.g.*, *Larson v. Midland Hosp. Supply, Inc.*, 2016 ND 214, ¶ 9, 891 N.W.2d 364.

LAW AND ARGUMENT

I. Introduction.

[¶ 13] The Court should affirm the district court's decision to grant Lessees' motion for summary judgment and deny the County's motion for summary judgment. As explained in greater detail below, the district court correctly concluded the County Leases are invalid as a matter of law due to the County's failure to follow the leasing requirements set forth in N.D.C.C. ch. 38-09, and that as a result Lessees are entitled to restitution of the $1,314,516.80 paid to the County as bonus payments. The district court also correctly concluded that summary judgment on Lessees' claims for rescission and for breach of the covenant of quiet enjoyment in favor of the County was not appropriate due to the existence of genuine issues of material fact. Therefore, Lessees respectfully request that the Court affirm the district court's Order Granting Plaintiffs' Motion for Summary Judgment and direct entry of judgment accordingly.

II. The District Court Did Not Err in Granting Lessees' Motion for Summary Judgment.

[¶ 14] The primary basis for the district court's decision to grant Lessees' motion for summary judgment was its conclusion that the County Leases were invalid as a matter of law under N.D.C.C. § 38-09-19 and that Lessees were therefore entitled to restitution of the bonus payments made pursuant to the County Leases. The County does not appear to dispute that it failed to comply with N.D.C.C. §§ 38-09-14 through 38-09-18. *See* Brief of Appellants, ¶ 23. Instead, the County's arguments on appeal are (1) that Lessees cannot "contest the competitive bidding process" utilized by the County and thus the County Leases cannot be declared invalid based on the County's failure to comply with N.D.C.C. ch. 38-09, or, (2) in the alternative, the County Leases are valid under N.D.C.C. § 38-09-19 because they fall within the exception allowing for private negotiation outlined therein. As explained below, the County's arguments on both of these points are unavailing. Accordingly, the Court should affirm the district court's decision to grant Lessees' motion for summary judgment.

A. The District Court Was Not Precluded from Considering the County's Failure to Comply with N.D.C.C. ch. 38-09 in Determining the County Leases Were Invalid.

[¶ 15] The County essentially makes two arguments as to why the district court should not have considered the County's failure to comply with N.D.C.C. ch. 38-09 in declaring the County Leases invalid: (1) that Lessees voluntarily participated in the County's bidding process and thus lack standing or waived their right to argue that the bidding process did not comply with N.D.C.C. ch. 38-09, and (2) that Lessees delayed in arguing that the County's bidding process did not comply with N.D.C.C. ch. 38-09 in a manner that prejudiced the County. The County's specific arguments are addressed in

three subparts, below, but there is a fundamental flaw in the County's reasoning that must first be addressed. The most important point for the Court to understand when considering the standing, waiver, and laches issues raised by the County is that the County is not contesting Lessees' ability to bring a *claim* under N.D.C.C. ch. 32-23 for a declaratory judgment determining the parties' rights under the County Leases and under N.D.C.C. § 38-09-19. Rather, the County is contesting Lessees' ability to raise a particular *argument* or *legal theory* in support of that claim. *See, e.g.*, Brief of Appellants, ¶ 33 ("The County's laches defense only asserts that Lessees are barred from contesting the bidding process, not that they are barred from a contractual challenge to the [County] Leases themselves.").

[¶ 16] The significance of the foregoing point is that while doctrines such as standing, waiver, or laches may be applied to bar a party from asserting a particular claim, they do not apply to bar a party from making a particular argument, or identifying a particular legal theory, in support of an otherwise valid claim. *See N. Dakota Legislative Assembly v. Burgum*, 2018 ND 189, ¶ 6, 916 N.W.2d 83 ("A claim may be non-justiciable if a party lacks standing. . . ."); *Wenco v. EOG Res., Inc.*, 2012 ND 219, ¶ 19, 822 N.W.2d 701 ("For a waiver to be effective, it must be a voluntary and intentional relinquishment of a known existing advantage, right, privilege, claim, or benefit."); *Williams Cty. Soc. Servs. Bd. v. Falcon*, 367 N.W.2d 170, 174 (N.D. 1985) ("Whether or not laches bars a claim must be determined by examining the underlying facts and circumstances of each particular case."). In fact, the district court's decision and its obligation to apply North Dakota law are not necessarily determined by the particular arguments the parties may raise. *See Sweeney v. Sweeney*, 2005 ND 47, ¶ 15, 693

N.W.2d 29 ("It is the duty of the court to follow the law as it is written in all cases under all circumstances, without fear and without regard to public clamor or personal consequences."); *see also Minex Res., Inc. v. Morland*, 467 N.W.2d 691, 696 (N.D. 1991) (noting that in a case involving the interpretation of a contract, the parties' failure to assert ambiguity of the contract does not preclude the court from determining that the contract is ambiguous and considering extrinsic evidence of the parties' intentions). Furthermore, N.D.C.C. § 38-09-19's declaration that leases of public land are invalid if not advertised and let in accordance with N.D.C.C. ch. 38-09 contains no exception for a lessee's voluntary participation in a non-compliant bidding process or for delay in seeking a determination of lease validity. Thus there would have been no basis for the district court to conclude, as the County proposes, that the County Leases were somehow valid under N.D.C.C. § 38-09-19 for either of these reasons. Accordingly, because the County's arguments regarding standing, waiver, and laches do not preclude Lessees from asserting, and the district court from deciding, a claim for declaratory judgment determining the rights of the parties under the County Leases and N.D.C.C. § 38-09-19, the district court's decision should be affirmed.

1. Standing

[¶ 17] The County argues that Lessees lack standing to "assert a violation of the bidding process" for several reasons, none of which are availing. First, the County argues that Lessees have not suffered an injury as a result of the County's failure to comply with N.D.C.C. ch. 38-09. The County simply ignores the fact that, under N.D.C.C. § 38-09-19, the County's failure to comply with relevant leasing provisions renders the County Leases invalid, and as a result Lessees paid the County more than $1.3 million for nothing. Lessees' failure to receive the rights they paid for is a direct result of the

County's failure to follow the proper procedures for leasing its minerals. Accordingly, the County's argument on this point fails.

[¶ 18] Second, the County argues, under *Baukol Builders, Inc. v. County of Grand Forsk*, 2008 ND 116, ¶ 11, 751 N.W.2d 191, and *Frieh v. City of Edgeley*, 317 N.W.2d 818 (N.D. 1982), that Lessees' voluntary participation in the County's bidding process precludes them from asserting that the County failed to follow proper procedure. The district court previously rejected this argument, concluding that this case is distinguishable from *Baukol* and *Frieh* because Lessees are requesting declaratory judgment as to the validity of the County Leases and those two cases did not require adjudication of the parties rights under a contract. Put another way, the plaintiffs in *Baukol* and *Frieh* were requesting that the bidding process each engaged in be judicially reversed or vacated such that a new bidding process would have to occur, but Lessees in this case are not seeking reversal or vacation of the County's bidding process for the County Leases or requesting a new bidding process for the County Leases take place. Rather, Lessees accept the outcome of the bidding process (i.e., the County's awarding of the County Leases to Lessees), but now that Lessees are parties to the County Leases they wish to have the separate issue of the County Leases' validity determined. Accordingly, the district court's reasoning for distinguishing *Baukol* and *Frieh* from the present case is sound, and its decision should thus be affirmed.

2. Waiver

[¶ 19] The County argues that Lessees waived their right to contest the County's bidding process because they voluntarily participated in it.[2] The County's argument fails for several reasons. First, this argument fails for the reason already discussed, namely that Lessees aren't actually contesting the County's bidding process but are instead seeking a determination of the County Leases entered into after the completion of said bidding process. Second, this argument fails because waiver requires "a voluntary and intentional relinquishment of a known existing advantage, right, privilege, claim, or benefit." *Wenco*, 2012 ND 219, ¶ 19, 822 N.W.2d 701. Lessees are not seeking to assert some "advantage, right, privilege, claim, or benefit" by having the County Leases declared invalid under N.D.C.C. § 38-09-19; instead, they are merely seeking to return the parties to status quo. Lessees are giving up their rights under the County Leases in exchange for a return of the payments made under the County Leases. Furthermore, there is no evidence in the record as to when Lessees knew that the County Leases may be invalid under N.D.C.C. § 38-09-19, prior to raising this issue in the Amended Complaint. The County asserts, "It is undisputed that Lessees had just as much opportunity, if not more, due to their experience, to be aware of the requirements of a public auction for political subdivisions leasing oil and gas rights." Such an assertion is speculative and conclusory, not to mention absurd on its face to the extent it suggests that Lessees should know more about

[2] The County asserts it is "undisputed that Lessees approached the County for an informal bidding process." Brief of Appellants, ¶ 30. This is incorrect. In deposition testimony Tim Furlong, of Irish Oil, stated that he was contacted by Grant Archer and/or Martin Thompson and that they informed him that Williams County would be offering up minerals for lease. Appellants Appendix, p. 83 (14:9–15:22). Martin Thompson likewise testified that he heard about the minerals when "Grant [Archer] just called me and said Beth [Innis] has these leases," and Thompson denied procuring leases on behalf of Irish. *Id.* at 420–21 (23:23–24:13).

the County's own leasing requirements than the County itself "due to their experience." *See* Brief of Appellants, ¶ 6 ("Prior to the current dispute, the County Auditor, Beth Innis, entered into numerous oil and gas leases on behalf of the County with various companies."). The County cannot rely on such speculation to create a genuine issue of material fact. *See Gillespie v. Nat'l Farmers Union Prop. & Cas. Co.*, 2016 ND 193, ¶ 6, 885 N.W.2d 771 (stating that a party resisting a motion for summary judgment "cannot rely on speculation and must present enough evidence for a reasonable trier of fact to find for that party"). Accordingly, the Court should conclude that summary judgment on this issue in favor of Lessees was proper, and the district court's decision should be affirmed.

3. Laches

[¶ 20] The County argues that Lessees are precluded from contesting the County's bidding process as a result of laches. The County's argument fails for several reasons. First, as noted in the preceding subpart, there is no evidence in the record as to when Lessees became aware of the invalidity of the County Leases, and thus no evidence to show when the purported delay underlying the County's laches claim began. *See, e.g.*, *Nave-McCord Mercantile Co. v. Ranney*, 29 F.2d 383, 391 (8th Cir. 1928) ("Laches cannot exist as to a party, unless he has legal knowledge of the facts affecting his rights."). Second, as noted in the district court's opinion, the County has failed to show that it has been prejudiced by Lessee's alleged delay in questioning the County Leases. *See, e.g.*, *Stenehjem ex rel. State v. Nat'l Audubon Soc'y, Inc.*, 2014 ND 71, ¶ 12, 844 N.W.2d 892 ("The party invoking laches has the burden of proving he was prejudiced because his position has become so changed during the delay that he cannot be restored to the status quo."). The County's defense is essentially that it should not be required to return the Lessees' money because the County has already spent it, or that it has already

made plans to spend it. The County asserts that it would be "a hardship for the County to repay the bonuses," yet this is far from an assertion that the County could not be returned to its status quo. *See* Brief of Appellants, ¶ 33. The County actually states that "[i]n order to make the repayment, the County would have to cancel projects that have already [been] funded in order to reallocate funds to repay the bonuses," which suggests that the County presently *does* have the money to repay the Lessees. *Id.* The County's cancellation of "funds for projects or budgets" would not prevent the County from being returned to its status quo, as the County presumably did not have such projects or budgets in place prior to its receipt of the $1.3 million in bonus payments from the Lessees. Accordingly, for the foregoing reasons, the County's defense of laches fails and the district court's decision should thus be affirmed.

B. The District Court Correctly Concluded that the County Leases Do Not Fall within the Exception to N.D.C.C. § 38-09-19 Allowing for Private Negotiation of Leases.

[¶ 21] The County asserts that it was not required to adhere to the statutory bidding process because the County Leases fell within N.D.C.C. § 38-09-19's private negotiation exception for nonoperative oil and gas leases that are less than the minimum drilling unit. As recognized by the district court, however, the County's argument fails on both counts. First, the County misinterprets the phrase "minimum drilling unit under well spacing regulations," as used in N.D.C.C. § 38-09-19(1). The minimum (i.e., smallest) drilling unit under N.D.A.C. art. 43-02-03 is one governmental quarter-quarter section, or forty acres. *See* N.D.A.C. § 43-02-03-18(1)(a). Three of the four County leases meet or exceed forty acres. The County's reliance on larger unit sizes for horizontal wells, or on unit sizes set by orders of the North Dakota Industrial Commission, is not supported by

the plain language of N.D.C.C. § 38-09-19(1), which merely refers to "the minimum drilling unit under well spacing regulations," and makes no mention of vertical vs. horizontal wells or orders of the Industrial Commission. *See, e.g.*, N.D. Op. Atty. Gen. 53-96, *available at* https://www.ag.nd.gov/Opinions/1953/53-96.pdf (noting that the minimum drilling unit is forty acres). Likewise, nothing in the County Leases themselves restricts operations on the Subject Lands to development by horizontal wells, thus there is no reason to assume that a forty-acre spacing unit would never be established over the Subject Lands. *See, e.g.*, Appellants App., pp. 199–201. And finally, as noted by the district court, the County's interpretation would lead to outcomes that are "arbitrary and unduly complicated," such as allowing a political subdivision to privately negotiate a 640-acre lease in a 1280-acre spacing unit while an 80-acre lease in an area not subject to a spacing order would require a public auction. Accordingly, all but one of the County Leases fails to fall within the first prong of N.D.C.C. § 38-09-19's private negotiation exception.

[¶ 22] As for the second prong, the County Leases are not "nonoperative leases" insofar as they do not contain "a non-drilling or non-development clause." *See id.*[3] To the contrary, the County Leases appear to specifically contemplate drilling activities on the land covered thereby. *See, e.g.*, Appellants App., pp. 199. The County's contention that the County Leases are nonoperative because they are underwater is irrelevant; just

[3] Williams & Meyers Manual of Oil and Gas Terms defines a "non-development lease" as "[a] lease that prohibits the use of the surface for drilling and other drilling-related activities including access." Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Manual of Oil and Gas Terms*, 676 (16th ed. 2015). A "nondrilling lease" is defined as "[a] lease which grants the lessee the usual rights relative to oil or gas under described premises but which provides that a well shall not be surfaced on the premises." *Id.*

because development hasn't occurred yet, and the likelihood that it will occur is unknown, does not prohibit anyone from actually attempting to conduct development operations thereon. Accordingly, because three of the four leases exceed the minimum drilling unit under well-spacing regulations and because the County Leases are not "nonoperative," the County Leases do not fall within the private negotiation exception of N.D.C.C. § 38-09-19, and the County Leases are thus invalid as a matter of law.

C. The District Court Correctly Concluded that Lessees Are Entitled to Restitution under a Theory of Unjust Enrichment.

[¶ 23] The County argues that it was inappropriate for the district court to rule in favor of Lessees on their unjust enrichment claim because the County Leases constitute an express contract between the parties. For all of the reasons set forth in this Part II, this argument is unavailing.

III. The District Court Did Not Err in Denying the County's Motion for Summary Judgment.

A. The County Was Not Entitled to Summary Judgment as to Lessees' Rescission Claims.

[¶ 24] The County asserts that all of the Lessees' claims for rescission fail as a matter of law because the Lessees failed to exercise their right to rescind with reasonable promptness upon discovery of the facts necessary to justify rescission. Contrary to the County's assertions, however, there is at least an issue of fact as to the Lessees' actions upon discovery of the title issues affecting the County Leases. The County's statement of facts fails to acknowledge testimony presented to the district court that, upon learning the County may not own an interest in the Subject Lands, the Lessees conducted exhaustive investigation and research to determine whether there was any way to get operators in the area to recognize the minerals purportedly covered by the County Leases. *See* Appellants

App., p. 92 (50:6–51:21), (49:24–50:23), 335 (102:6–103:21). There remains an issue of fact as to when the Lessees conclusively determined that the County Leases conveyed no title to oil and gas interests, and without such information summary judgment on the Lessees' claims for rescission would have been improper.

1. Mistake

[¶ 25] The County also argues that the Lessees' claim for rescission based on mistake fails as a matter of law because the Lessees' mistake as to the County's ownership of the minerals covered by the County Leases was caused by the Lessees' neglect of their legal duty to conduct due diligence. Despite the County's assertions, there remain issues of fact as to this claim for rescission based on mistake. First, the County's argument ignores the fact that the Lessees did conduct due diligence prior to entering into the County Leases. *See, e.g.*, Appellants App., pp. 96–97 (64:12–68:5). The County and the Lessees simply disagree over the quantum of due diligence that would have been appropriate under the circumstances; thus whether the Lessees "neglected" their "duty" to conduct due diligence remains a questions of fact. Second, the County should not be permitted to complain about the Lessees' diligence when the County admits it did no due diligence whatsoever. The County purported to "grant" the Lessees an interest in the lands even though it had no idea whether it actually owned an interest and made no attempt to find out. *See id.* at 85 (22:4–15), 114, 336 (106:3–13). The question of whether the County's own conduct during negotiation contributed to the Lessees' mistake as to title to the minerals is likewise an issue of material fact. Accordingly, because genuine issues of material fact exist as to the Lessees' claim for rescission based on mistake, summary judgment as to this claim would be improper.

2. Fraud

[¶ 26] The County also argues that the Lessees' claim for rescission based on fraud fails as a matter of law because the Lessees cannot show that the County was aware of any potential title issues prior to bidding the leases. A person commits actual fraud when that person, with intent to induce another party to enter a contract, makes a positive assertion, in a manner not warranted by the information of the person making it, of that which is not true though that person believes it to be true. N.D.C.C. § 9-03-08; *see also Bourgois v. Montana-Dakota Utilities Co.*, 466 N.W.2d 813, 818 (N.D. 1991) (discussing negligent misrepresentation as a subset of actual fraud claims). In this case it is undisputed that the County actively solicited bids from both representatives of the Lessees and representatives of third parties in connection with the County Leases. Appellants App., p. 114 (noting that Innis "called" Archer on February 1, 2012, regarding an offer received from Brent Schellin, that Innis "called" Brent Schellin on February 1, 2012, regarding an offer received from Archer); *see also id.* at 48 (34:19–36:6) (discussing the "back and forth" between Archer, Innis, and Brent Schellin). Implicit in this solicitation is that the County is offering its minerals for lease. When Innis made these solicitations, her belief that the County owned the mineral underlying the Subject Lands was based entirely on representations from the bidders themselves; she made no effort to determine the extent, if any, of the County's ownership or to seek the advice of a disinterested third-party in determining the extent of the County's ownership. *See id.* at 52 (49:3–50:1). Whether or not the information available to Innis during the negotiation of the County Leases warranted her assertions and actions in doing so presents an issue of material fact, and summary judgment on the Lessees' claim for rescission based on fraud is improper.

3. Failure of Consideration

[¶ 27] Finally, the County argues that the Lessees' claim for rescission based on failure of consideration fails as a matter of law because the warranty clause was removed from the County Leases thereby "extinguishing any guaranteed right to any oil and gas interests." Defendants fail to understand the distinction between *removing* a warranty clause from a lease and *expressly disclaiming the warranty* in a lease. *See Marcia R. Sickler Mineral Tr. v. LoneTree Energy & Assocs., LLC*, No. 4:12-CV-077, 2013 WL 4508429, at *7 n.2 (D.N.D. Aug. 23, 2013). In other words, removing the phrase "lessor hereby warrants and agrees to defend title to the lands herein described" from a lease is not equivalent to expressly stating in such lease "lessor does not warrant or agree to defend title to the lands herein described." Thus the omission of a warranty clause does not somehow bring into existence consideration for the County Leases that would not have existed had a warranty clause been included.

[¶ 28] Defendants also assert that "[j]ust as a lack of any actual oil and gas interests in the Subject Lands would not constitute failure of consideration, neither does a possible lack of good title." Brief of Appellants, ¶ 49. To the contrary, absence of oil or gas would not constitute a failure of consideration because the County Leases do not actually convey oil or gas, but lack of the right to explore and produce oil and gas from the Subject Lands would constitute a failure of consideration because this is exactly what the County Leases purport to convey. *See, e.g.*, Appellants App., p. 199. The County's striking of the warranty clauses in the County Leases does not alter the fact that each lease purports to convey a certain quantum of rights to and interests in land. Thus even in the absence of a warranty clause, the County Leases purport to convey to the Lessees a certain interest in the Subject Lands in exchange for bonus and royalty payments, but

absent title to the Subject Lands the County Leases entirely fail to convey any of this promised consideration. At minimum, the County *acknowledges* that a genuine issue of material fact exists as to ownership of the Subject Lands so as to preclude summary judgment. *See* Brief of Appellants, ¶ 49 ("[T]he extent of ownership over the Subject Lands by the County is still unknown, as no title opinion has been produced, so any finding on this issue would be premature."). Accordingly, summary judgment in favor of the County on Lessees rescission claim for failure of consideration would be inappropriate at this time.

B. The County Was Not Entitled to Summary Judgment as to Lessees' Covenant of Quiet Possession Claims.

[¶ 29] The County argues that there is no implied covenant of quiet possession in the County Leases, thus precluding a claim for breach of such covenant, because N.D.C.C. § 47-16-08 does not apply to oil and gas leases and because the County struck the warranty clause from the County Leases. The County's argument fails on both counts. First, the Lessees recognize that oil and gas leases generally "are not and should not be governed by the law or policy applicable to ordinary landlord and tenant leases." *Holman v. North Dakota*, 438 N.W.2d 534, 539 (N.D. 1989). However, N.D.C.C. ch. 47-16, and N.D.C.C. § 47-16-08 in particular, are not merely "ordinary landlord and tenant" provisions. Chapter 47-16 contains provisions specific to landlord/tenant law, *see, e.g.*, N.D.C.C. §§ 47-16-13.1–13.2, provisions specific to agricultural leases, *see, e.g.*, N.D.C.C. § 47-16-03, provisions specific to mineral leases, *see, e.g.*, N.D.C.C. §§ 47-16-36–41, and generally applicable provisions like Section 47-16-08. The legislature made clear when it intended to limit the reach of a statute to particular lessor/lessee relationships by using specific terms like "farm lease," "landlord," "tenant," and "oil, gas,

or mineral lease." Section 47-16-08 simply refers to "lessors" and "lessees," and it should therefore be applied to all "agreement[s] to lease real property." N.D.C.C. § 47-16-08.

[¶ 30] Second, the County's striking of the warranty clause from the County Leases does not constitute an express disclaimer of the covenant of quiet possession for several reasons. First, North Dakota law recognizes the covenant of warranty and the covenant of quiet possession are two distinct covenants that may be included in an instrument granting an estate in real property. *See, e.g.*, N.D.C.C. §§ 32-03-11, 47-04-26. Thus removing the former will not preclude implication of the latter. More importantly, however, the County Leases contain no *express* disclaimer of warranty that would prevent inclusion of the implied covenant of quiet possession. *See Marcia R. Sickler Mineral Trust*, No. 4:12-CV-077, 2013 WL 4508429, at *7 & n.2 (noting that striking an express warranty of title does not necessarily turn an oil and gas lease into a conveyance akin to a "quitclaim" deed, and explaining that N.D.C.C § 47-16-08 and other statutes may provide additional protections); *see also Pine Petroleum, Inc. v. Ekern*, No. 4:12-CV-079, 2014 WL 345289, at *7 n.3 (D.N.D. Jan. 30, 2014); *Tank v. Burlington Res. Oil & Gas, Co., LP*, No. 4:10-CV-088, 2011 WL 2600458, at *8-10 (D.N.D. June 28, 2011). The effect of striking the warranty of title in the County Leases was to omit the covenant of warranty, rather than to disclaim the covenant of quiet possession. Therefore the parties omission of the warranty of title from the County Leases does not prevent the inclusion of the covenant of quiet possession by operation of law under N.D.C.C. § 47-16-08.

[¶ 31] Third, the County asserts that "even if the Leases contained a covenant of quiet possession, Lessees claim should have been dismissed as a matter of law" because

there is no evidence of a competing claim of ownership of the Subject Lands. Brief of Appellants, ¶ 51. This is incorrect for several reasons. First, even if there weren't evidence in the record as to Lessees' claim for breach of the covenant of quiet possession, Lessees' claim for a declaration that the covenant of quiet possession is implied in the County Leases is a separate and distinct claim that would be ripe for decision on its own. Second, the County's argument ignores documents submitted to the district court showing that oil and gas is being produced from the Subject Lands under leases other than the County Leases. *See* Appellees App., pp. 17–45; *see also* N.D.C.C. § 47-19-19 ("The record of any instrument shall be notice of the contents of the instrument, as it appears of record, as to all persons."). The actions of the lessors, lessees, and oil and gas well operator identified in these documents in connection with the Subject Lands are disturbing and/or preventing the Lessees from obtaining quiet possession of the oil and gas in and under the Subject Lands, which the County purportedly leased to the Lessees by virtue of the County Leases. Accordingly, because third parties have asserted claims to the oil and gas in and under the Subject Lands in a manner that has deprived the Lessees their quiet possession thereof, the Lessees are entitled to summary judgment on their claim that the County Leases contain a covenant of quiet possession and that such covenant has been breached by the County.

CONCLUSION

[¶ 32] For the reasons stated above, Lessees respectfully request that the Court affirm the decision of the district court and direct that judgment be entered accordingly.

Dated this 25th day of October, 2018.

FREDRIKSON & BYRON, P.A.

By: /s/ Lawrence Bender

Lawrence Bender, ND Bar #03908
Spencer D. Ptacek, ND Bar #08295
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
lbender@fredlaw.com
sptacek@fredlaw.com
Telephone: 701.221.8700
Facsimile: 701.221.8750

Attorneys for Appellees Twin City Technical LLC, Three Horns Energy, LLC, Prairie of the South LLC, and Irish Oil & Gas Inc.

CERTIFICATE OF COMPLIANCE

[¶ 33] The undersigned certifies the above brief is in compliance with N.D.R.App.P. 32(a)(7)(A) and the total number of words in the brief, excluding words in the table of contents, table of authorities, signature lock, certificate of service and this compliance totals 7,037 words.

Dated this 25th day of October, 2018.

FREDRIKSON & BYRON, P.A.

By: /s/ Lawrence Bender

Lawrence Bender, ND Bar #03908
Spencer D. Ptacek, ND Bar #08295
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
lbender@fredlaw.com
sptacek@fredlaw.com
Telephone: 701.221.8700
Facsimile: 701.221.8750

Attorneys for Appellees Twin City Technical LLC, Three Horns Energy, LLC, Prairie of the South LLC, and Irish Oil & Gas Inc.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Twin City Technical LLC, Three Horns Energy, LLC, Prairie of the South LLC, and Irish Oil & Gas Inc., Plaintiffs-Appellees, v. Williams County and Williams County Commission, Defendants-Appellants.	Supreme Court No. 20180264

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

CERTIFICATE OF SERVICE

I hereby certify that on October 25th, 2018, I electronically filed the following documents:

Brief of Appellees; and

Appendix of Appellees.

with the Clerk of the North Dakota Supreme Court and served by E-mail on the following:

Scott K. Porsborg
sporsborg@smithporsborg.com

Sarah E. Wall
swall@smithporsborg.com

FREDRIKSON & BYRON, P.A.

By: /s/ Lawrence Bender

Lawrence Bender, ND Bar #03908
Spencer D. Ptacek, ND Bar #08295
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
lbender@fredlaw.com
sptacek@fredlaw.com
Telephone: 701.221.8700
Facsimile: 701.221.8750

Attorneys for Appellees Twin City Technical LLC, Three Horns Energy, LLC, Prairie of the South LLC, and Irish Oil & Gas Inc.

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