20180285
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 27, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO. 20180285

Great Plains Royalty Corporation, a North Dakota Corporation, Plaintiff and Appellant

vs.

Earl Schwartz Company, a North Dakota Partnership, Basin Minerals, LLC, a North Dakota Limited Liability Company, Sunbehm Gas, Inc., a North Dakota Corporation, and Kay Schwartz York, Kathy Schwartz Mau, and Kara Schwartz Johnson as the Co-Personal Representative of the Estate of Earl N. Schwartz, Defendants and Appellees

---

APPEAL FROM THE ORDER DENYING THE PLAINTIFF'S/APPELLANT'S MOTION TO AMEND REPLY TO COUNTERCLAIM ENTERED ON APRIL 18, 2018
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT ENTERED ON MAY 17, 2018
JUDGMENT ENTERED ON MAY 30, 2018
AND NOTICE OF ENTRY OF JUDGMENT ENTERED ON MAY 31, 2018
DISTRICT COURT OF MCKENZIE COUNTY
CIVIL NO. 27-2016-CV-00530
THE HONORABLE DANIEL S. EL-DWEEK, PRESIDING

KELLINGTON AND OSTER, P.C.
BY: Daniel H. Oster
Attorney for Plaintiff/Appellant
619 Riverwood Drive, Suite 202
Bismarck, ND 58504
(701) 258-1074
ID #04899
dan@kopcemail.com

COLES LAW FIRM, P.C.
BY: James C. Coles
Co-Counsel for the Plaintiff/Appellant
400 E. Broadway Avenue #301
P.O. Box 2162
Bismarck, ND 58502-2162
(701) 222-8131
ID # 03381
coleslaw@birch.net

TABLE OF CONTENTS

Page No.

Table of Contents i

Table of Authorities iii

I. STATEMENT OF ISSUES FOR REVIEW . . . . [1]

II. STATEMENT OF THE CASE . . . . [3]

A. Course of the Proceedings . . . . [4]

B. Statement of Facts . . . . [19]

III. LAW AND ARGUMENTS . . . . [34]

A. That the trial court erred by concluding the Defendants/Appellees claims were not barred by the doctrines of estoppel and res judicata arising out of prior proceedings in the U.S. Federal Bankruptcy Court cases and the North Dakota District Court case.. . . . . [37]

B. That the trial court erred in concluding that the U.S. Federal Bankruptcy Court proceedings intended to sell all of the Plaintiff's/Appellant's assets to the purchasers therein, despite the orders of the U.S. Federal Bankruptcy Court and unambiguous testimony to the contrary. . . . . [46]

C. That the trial court erred in determining that Burleigh County District Court, Case No. 08-2011-CV-1921, did not grant reinstatement to Plaintiff/Appellant.. . . . . [48]

D. That the trial court erred in granting judgment for the disposition of the Plaintiff's/Appellant's real property where a bankruptcy trustee has not transferred an interest in the real property as required by law.. [50]

E. That the trial court erred in granting the Defendants/Appellees the relief of reformation.. . . . . [52]

F. That the trial court erred in granting the Defendants/Appellees the relief of quiet title despite the failure of the Defendants/Appellees to prove the strength and superior nature of their title claimed according to law.. . . . . [57]

G. That the trial court erred in determining that a reasonable and prudent trustee would not sell less than the entire interest owned by the Plaintiff/Appellant in the Bankruptcy Court proceedings.. . . . . [61]

H. That the trial court erred in determining that the Defendants/Appellees owned all of the assets of the Plaintiff/Appellant, despite the Defendants'/Appellees' acknowledgment that they did not own nor claim all of the assets owned by the Plaintiff/Appellant.. . . . . [65]

I. That the trial court erred in determining that the Plaintiff/Appellant was not entitled to royalties, both past and present, paid to the Defendants/Appellees or entitled to damages for slander of title.. . . . [67]

J. That the trial court erred by signing Findings of Fact, Conclusions of Law and Order for Judgment which contained facts and conclusions of law that were beyond the scope of the trial court's two page letter.. . . . . [71]

IV. Conclusion . . . . [74]

Certificate of compliance 29

Affidavit of Mailing 30

TABLE OF AUTHORITIES

CASES: Page No.

Bertsch v. Bertsch, 2006 ND 31, 710 N.W. 2d 113 (N.D. 2006). . . . . [27][28]

Biteler's Tower Serv., Inc. v. Guderian, 466 N.W.2d 141 (N.D.1991) . . . . [54]

Briggs v. Coykendall, 57 N.D. 785, 224 N.W. 202 (N.D. 1929) . . . . [69]

Ell v Ell, 295 N.W.2d 143 (N.D. 1980) . . . . [55]

Green v. Gustafson, 482 N.W.2d 842 (N.D. 1992) . . . . [58]

Heart River Partners v. Goetzfried, 2005 ND 149,703 N.W.2d 330 (N.D. 2005) . [54][55]

In re Dunning Bros. Co., 410 B.R. 877 (Bkrtcy.E.D.Cal. 2009) . . . . [59]

Maragos v. Union Oil Co. of California, 1998 ND 180, 584 N.W.2d 850 (N.D. 1998(.[69]

Pierce Tp. of Barnes County v. Ernie, 74 N.D. 16, 19 N.W.2d 755 (N.D. 1945) . . . . [58]

Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc., 2007 ND 36,
729 N.W.2d 101 (ND 2007) . . . . [59]

Rohrich v. Rohrich, 434 N.W. 2d 343 (N.D. 1989). . . . . [58]

Sailer v. Mercer Cty., 77 N.D. 698, 45 N.W. 2d 206, (N.D. 1950) . . . . [58]

Serhienko v. Kiker, 392 N.W.2d 808 (N.D.1986) . . . . [65]

Siana Oil & Gas Co., LLC v. Dublin Co. et. al, 2018 ND 164, 915 N.W. 2d
134 (N.D. 2018) . . . . [72]

Woodland v. Woodland, 147 N.W.2d 590 (N.D. 1966). . . . . [58]

RULES:

11 U.S.C. §726(5) and (6) . . . . [27]

N.D.C.C. §10-19.1-148(4) and (5) . . . . [49]

N.D.C.C. §47-16-39.1. . . . . [70]

N.D.C.C. §47-19-46 .... [60]

N.D.C.C. § 47-19.1-09 .... [49]

OTHER SOURCES

North Dakota Title Standard 16-12. .... [51][60]

[1] STATEMENT OF ISSUES FOR REVIEW

[2] A. That the trial court erred by concluding the Defendants/Appellees claims were not barred by the doctrines of estoppel and res judicata arising out of prior proceedings in the U.S. Federal Bankruptcy Court cases and the North Dakota District Court case.

B. That the trial court erred in concluding that the U.S. Federal Bankruptcy Court proceedings intended to sell all of the Plaintiff's/Appellant's assets to the purchasers therein, despite the orders of the U.S. Federal Bankruptcy Court and unambiguous testimony to the contrary.

C. That the trial court erred in determining that Burleigh County District Court, Case No. 08-2011-CV-1921, did not grant reinstatement to Plaintiff/Appellant.

D. That the trial court erred in granting judgment for the disposition of the Plaintiff's/Appellant's real property where a bankruptcy trustee has not transferred an interest in the real property as required by law.

E. That the trial court erred in granting the Defendants/Appellees the relief of reformation.

F. That the trial court erred in granting the Defendants/Appellees the relief of quiet title despite the failure of the Defendants/Appellees to prove the strength and superior nature of their title claimed according to law.

G. That the trial court erred in determining that a reasonable and prudent trustee would not sell less than the entire interest owned by the Plaintiff/Appellant in the Bankruptcy Court proceedings.

H. That the trial court erred in determining that the Defendants/Appellees owned all of the assets of the Plaintiff/Appellant, despite the Defendants'/Appellees' acknowledgment that they did not own nor claim all of the assets owned by the Plaintiff/Appellant.

I. That the trial court erred in determining that the Plaintiff/Appellant was not entitled to royalties, both past and present, paid to the Defendants/Appellees or entitled to damages for slander of title.

J. That the trial court erred by signing Findings of Fact, Conclusions of Law and Order for Judgment which contained facts and conclusions of law that were beyond the scope of the trial court's two page letter.

[3] II. STATEMENT OF THE CASE

[4] A. Course of Proceedings

[5] That the Plaintiff/Appellant, Great Plains Royalty Corporation, (hereinafter Great Plains) initiated these proceedings on November 20, 2016. (Case Summary, Index nos. 1-2 hereinafter Index nos. 1-2; Plaintiff's/Appellant's appendix 18-27, hereinafter A: 18-27). The summons and complaint were served upon the Defendants/Appellees, Earl Schwartz Company, Basin Minerals, LLC, and Sunbehm Gas, Inc., by admission of service prior to December 22, 2016. (Index nos. 3-5, Appellant's A: 28-30).

[6] Prior to January 21, 2017, ESCO and Sunbehm served Great Plains with an answer and counterclaim. (Index no. 11, 12 A: 31-56). Great Plains served ESCO and Sunbehm with an answer to counterclaim on January 31, 2017. (Index Nos. 14-15, A: 47-56).

[7] Great Plains, ESCO and Sunbehm stipulated to a scheduling order which was signed by the trial court on May 1, 2017. (Index no. 21, A: 57-59). Great Plains then filed a motion to add party defendants and amend complaint to include Kay Schwartz York, Kathy Schwartz Mau and Kara Schwartz Johnson as the co-personal representatives of the estate of Earl Schwartz. (Hereinafter ESCO and Sunbehm), which was granted by the trial court. (Index nos. 22-31, A: 60-83). An amended complaint and summons was served on August 23, 2017. (Index nos. 30-32, A: 84-95).

[8] Great Plains notified ESCO and Sunbehm of Great Plains' designation of an expert witness on September 5, 2017. (Index Nos. 33-34, A: 96-98). On September 9, 2017, Great Plains, ESCO and Sunbehm agreed to modify the scheduling order (Index

no. 36) and an order modifying scheduling order was signed by the trial court on September 15, 2017. (Index no. 39, A: 99-100).

[9] Sunbehm filed an amended answer and counterclaim to Great Plains' amended complaint on September 20, 2018. (Index no. 40, A: 101-105). ESCO, Basin, and Schwartz filed an amended answer to Great Plains' amended complaint on September 22, 2018. (Index no. 42, A: 106-111).

[10] On October 23, 2018, Great Plains filed a motion, notice of motion, affidavit, brief, and exhibit for partial summary judgment. (Index nos. 44-48, Appellant's A: 112-174). On October 26, 2018, Great Plains filed an amended answer to Sunbehm's amended answer and counterclaim. (Index no. 50, A: 175-177). ESCO did not file an amended counterclaim.

[11] ESCO and Sunbehm filed an answer brief in response to Great Plains' partial motion for summary judgment. (Index no. 52, 54, A: 178-195). Great Plains filed reply briefs and exhibit A in response to ESCO and Sunbehm's answer briefs to Great Plains' motion for partial summary judgment. (Index nos. 65-66, 69-70, A: 195-235).

[12] On December 21, 2017, Great Plains filed a motion in limine to exclude ESCO and Sunbehm's expert for failure to designate said expert. (Index nos. 72-74, A: 236-249). On December 22, 2017 Great Plains filed an exhibit list and trial witness list. (Index nos. 77-78, A: 250-256). On December 27, 2017, Great Plains filed a pre-trial memorandum and amended exhibit list. (Index nos. 80-81, A: 257-275). On December 29, 2017, Sunbehm filed a trial witness list and exhibit list. (Index nos. 83-84, A: 276-280).

[13] On January 5, 2018, Sunbehm filed a motion in limine to exclude certain past title opinions. (Index nos. 87-88, A: 281-288). Sunbehm also filed a response to Great Plains' motion in limine with attached exhibits. (Index nos. 90-93, A: 289-306). Great Plains filed a reply brief and exhibit A in opposition to Sunbehm's motion in limine. (Index nos. 95-96, A: 307-321).

[14] On January 8, 2018, Sunbehm filed a pretrial memorandum. (Index no. 101, A: 322-331). On the same day, ESCO, Basin and Schwartz filed a witness list and exhibit list. (Index nos. 103-104, A: 332-336).

[15] Trial on this matter was held on January 9-10, 2018. (Index no. 76). Numerous exhibits were entered by Great Plains, ESCO and Sunbehm. (See Index nos. 108-206, A: 341-685). Great Plains included, as a part of its appendix, the following documents: Great Plains' exhibits (Index nos. 108-109, 117-125, 127-131, 133-135, 137-139, 144-146, 148, 150-156, 158, and 160-163); Sunbehm's exhibit (Index no. 209); ESCO, Basin, and Schwartz's exhibits (Index Nos. 179, 181). On January 16, 2018, Great Plains filed a brief in support of motion to amend prayer for relief. (Index no. 106, A: 337). ESCO, Basin and Schwartz filed a response in opposition to motion to amend, along with an affidavit. (Index nos. 184-185, A: 685-691).

[16] On January 26, 2018, Great Plains filed a post trial brief. (Index no. 187, A: 692-727). ESCO and Sunbehm did the same, (Index no. 189, 196, A: 728-750). On February 7, 2018, ESCO, Basin, and Schwartz filed or attempted to file updated discovery answers. (Index no. 202, A: 751-758).

[17] On February 23, 2018, the trial court sent an email to the attorneys for Great

Plains, ESCO and Sunbehm. In that email, the trial court denied Great Plains' motion to amend the amended complaint and answer to ESCO and Sunbehm's counterclaims. (Index no. 207, A: 759-760). On April 18, 2018, the trial court signed an order, prepared by ESCO and Sunbehm's attorneys, denying Great Plains' motion to amend the amended complaint. (Index no. 213, A: 763-766). On April 19, 2018, the trial court sent another email to the attorneys for Great Plains, ESCO and Sunbehm. In a two page letter, the trial court denied Great Plains' amended complaint and quieted title in ESCO and Sunbehm. (Index no. 212, A: 761-762). On April 2, 2018, ESCO, Basin, and Schwartz filed proposed findings of fact, conclusions of law, and order for judgment. (Index no. 214, A: 767-781). On May 17, 2018, Great Plains objected to those proposed findings of fact, conclusions of law, and order for judgment. (Index no. 217, A: 791-792). On May 17, 2018, the trial court signed the findings of fact, conclusions of law, and order for judgment. (Index no. 219, A: 793-805). On May 30, 2018, the judgment was signed by the Clerk of Court (Index no. 222, A: 806-810), and notice of entry of judgment was filed on May 31, 2018. (Index no. 224, A: 811).

[18] On July 25, 2018, Great Plains filed a notice of appeal with statement of preliminary issues (Index no. 227, A: 812-815), and order for transcript (Index no. 228, A: 818-819). The clerk of court filed a certificate on appeal on August 15, 2018. (Index no. 231, A: 822).

[19] B. Statement of Facts

[20] Great Plains incorporated on 6, 1958. (Index no. 48, A: 132). After its formation, Great Plains acquired various mineral, and oil and gas interests in the State of North

Dakota and other states, including interests in McKenzie County. (Index no. 48, A: 133-140). In the amended complaint (Index no. 30, A: 84-93), Great Plains describes its McKenzie County minerals as Properties Nos. 2 and 3 (Index no. 30, 44, A: 86-91, 133-140).

[21] On April 12, 1968, Great Plains was subjected to an involuntary bankruptcy petition, that being Bankruptcy No. 68-00039 (hereinafter bankruptcy case). (Index no. 48, A: 141-151).

[22] The bankruptcy case was later changed to a voluntary liquidation on October 11, 1969. The bankruptcy estate was administered by its trustee, Myron Atkinson, who is now deceased. (Index no. 126). Prior to his death, Trustee Atkinson testified at a deposition and at a bankruptcy adversary proceeding involving Great Plains, ESCO and Basin. (Index no. 127-129, A: 384-479). As stated by Trustee Atkinson: he, and estate legal counsel Frank Jestrab, of Williston, identified the assets of the debtor, i.e. Great Plains to the extent possible. The assets so identified were offered for sale and sold. Trustee Atkinson also stated that he suspected that not all of Great Plains' assets had been identified during his term as trustee. (Index no. 127, A: 393-394, 400, 404). A partial listing of Great Plains' identified assets as known to the Trustee were included in a bankruptcy inventory (Index no. 117, A:344-347), report of appraiser (Index no. 118-119, A: 348-359), and order confirming sale of assets (Nunc Pro Tunc) filed on June 19, 1969 (Index no. 121, A: 371-373) and partial amended order confirming sale of assets (Nunc Pro Tunc) dated February 9, 1970, from the bankruptcy court confirming the sale of Great Plains' identified assets. (Index no. 123, A: 377-378). The partial amended

order confirming sale of assets (Nunc Pro Tunc) amended the order confirming sale of assets (Nunc Pro Tunc) provided in part, as follows: "...Upon petition of Myron Atkinson, Trustee of the Estate of Great Plains Royalty Corporation...That section 5 of the Order of June 19, 1969, is hereby amended to read that the Referee confirms the sale of all of the assets of the bankrupt corporation **included in the Notice of Sale** to Earl Schwartz of Kenmare, North Dakota, for the sum of $225,000.00..." (Emphasis added), (Index no. 123, A:377).

[23] The bankruptcy case was first closed on or about July 25, 1974, with the approval of Trustee Atkinson's Account, and an order for his discharge. (Index no. 48, A: 143). Since then, there have been other proceedings in the bankruptcy case. (Index no. 48, A: 144-151).

[24] In April and May of 1982, after the bankruptcy case had been closed, two mineral deeds for property owned by Great Plains were recorded in Burke County. (Index nos. 161-162, A: 666-667). The deeds were alleged to contain the signature of the bankruptcy Trustee Atkinson. However, Trustee Atkinson, testified that "he had concerns about the signatures on the deeds, had no recollection of the two deeds, that in 1982 after he had been discharged as trustee, he had no authority as trustee for Great Plains, that the deeds were not drafted in a form he would have used, and that had he been presented those deeds, he would have sought advice from legal counsel as to whether or not he had the authority to sign those deeds." (Index no. 127, A: 407-410).

[25] Great Plains was involuntarily dissolved for failing to file its annual reports with the North Dakota Secretary of State on November 22, 1983. The corporation was

reinstated as allowed by law on September 14, 2011. (Index nos. 108-109, A: 341-343). Both before and after reinstatement, persons affiliated with Great Plains discovered that not all of the assets of Great Plains had been identified during the administration of the bankruptcy case by Trustee Atkinson. (Index no. 46, A: 118). Because there remained unpaid general creditor claims, some of the missed and unsold assets Trustee Atkinson were identified to the new trustee, Gene Doeling, and a price was negotiated. (Index no. 48, A:148).

[26] Great Plains initiated adversary proceedings against ESCO and Basin. (Index nos. 128-129, A: 421-479). As a result of Adversary number 13-07018, the Honorable Shon Hastings issued several memorandum orders. (Index nos. 128-129, A: 421-479). One order determined a motion for summary judgment. (Index no. 128, A: 433). Thereafter, a trial was held in bankruptcy court addressing the remaining issues regarding the dispute of Great Plains' assets and the status of Great Plains being recognized as a corporation in good standing. The bankruptcy court first determined that Great Plains was reinstated as a corporation in North Dakota. (Index no. 129, A: 437). The bankruptcy court also quieted title to Great Plains in a number of assets that ESCO and Basin were claiming. (Index no. 129, A: 434-479).

[27] Thereafter, the funds paid to Trustee Doeling resulted in full payment of all claims and statutory interest. The surplus remaining after such payments were made were distributed to Great Plains as the debtor. See 11 U.S.C. §726(5) and (6).

[28] On July 20, 2015, and February 4, 2016, Great Plains commenced two additional adversary actions in the bankruptcy case to address issue of title to additional

properties in which Great Plains held title. (Index no. 48, A: 150-151). In each case, ESCO and Basin argued that the United States Bankruptcy Court no longer had jurisdiction over Great Plains' assets because all creditors had been paid in full and the title issues were no longer related to any bankruptcy questions. The Honorable Shon Hastings agreed and dismissed the proceedings. (Index no. 48, A: 161-162). On May 24, 2016, the Great Plains' bankruptcy case was re-closed. (Index no. 48, A: 151).

[29] That as a result, in order to clear title to un-administrated assets, Great Plains had to proceed forward in North Dakota state court. (Index nos. 1-2, 11, 12, 14-15, Appellant's A: 18-27, 31-56).

[30] Trial on this matter was held on January 9 and 10, 2018. On April 19, 2018, the trial court sent an email to the attorneys for Great Plains and Sunbehm. In a two page letter, the trial court denied Great Plains' amended complaint and quieted title in ESCO and Sunbehm. (Index no. 212, A: 761-762). Not only did the trial court quiet title in the properties that were in dispute before the trial court, the trial court stated: "... The court is left with two outcomes: 1) that Great Plains managed to somehow retain interests in property over 40 years after it was liquidated in bankruptcy, or 2) that the bankruptcy trustee sold the entire estate to ESCO. The only conclusion that makes sense is that **EVERYTHING** owned by Great Plains Royalty was sold in 1969 by the bankruptcy trustee to ESCO." (Emphasis added). (Index no. 212, A: 761-762).

[31] From the trial court's two page email, on April 2, 2018, ESCO, Basin, and Schwartz filed thirteen pages of proposed findings of fact, conclusions of law, and order for judgment. (Index no. 214, A: 767-781). On May 17, 2018, Great Plains objected to

those proposed findings of fact, conclusions of law, and order for judgment. (Index no. 217, A: 791-792). On May 17, 2018, the trial court signed the findings of fact, conclusions of law, and order for judgment. (Index no. 219, A: 793-805). On May 30, 2018, a five page judgment was signed by the Clerk of Court (Index no. 222, Appellant's A:806-810).

[32] The findings of fact, conclusions of law and order for judgment contained numerous statement that were not addressed in the trial court's two page email. The findings of fact also went into detail as to why ESCO and Basin were entitled to those two properties. (Index no. 219, Appellant's A: 797-800). The conclusions of law cited portions of the trial court's two page email, but added the following language to the paragraph stating that: "Great Plains managed to somehow retain interests in property over 40 years after it was liquidated in bankruptcy, but adding: "and nearly thirty years after it was involuntarily dissolved by the North Dakota Secretary of State." (Index No. 219, Appellant's A: 800) The conclusions of law also went beyond the trial court's two page email by stating: "that the bankruptcy trustee sold the entire estate to ESCO," but adding: "Accordingly, as explained below, the court concludes it was the intent of the parties to the bankruptcy proceeding and sale to sell all of GPRC's assets to Earl Schwartz at the June 5, 1969 sale. Moreover, even if this was not the case, GPRC subsequently lost its ability to claim title to property no. 2 and property no. 3 by virtue of its involuntary dissolution by the North Dakota Secretary of State." (Index no. 219, A: 761-762). The conclusions of law also added entire provisions that were not addressed by the trial court in its two page email. In particular, the conclusions of law state: "...In

the present case, as noted above, the report of sale and petition for order confirming sale, filed one day after the actual sale of GPRC's property, as well as the order confirming sale of assets (Nunc Pro Tunc), filed within a month of the sale of GPRC's property, both indicate that Earl Schwartz purchased "all of the assets" of GPRC, and that Atkinson was merely selling the interest of GPRC "as is." In addressing the status of Great Plains as a corporation, the conclusions of law go on to state: "This fails to acknowledge that as of August 1, 1983, at the latest, GPRC ceased to exist as a corporation, and thus ceased being a "person" capable of owning or possessing any property... Upon reinstatement, Great Plains Royalty Corporation shall have all of the rights and privileges it would have possessed as a North Dakota corporation had it properly and timely submitted all annual reports and fees to the North Dakota Secretary of State. But this decision by the district court for Burleigh County is not binding on Defendants in the present action, because none of Defendants were parties to the Burleigh County case and because issues of ownership pertaining to property no. 2 and property no. 3 were not raised in that case." (Index no. 219, A; 803).

[33] The judgment also contains numerous provisions that were not included within the trial court's two page email. Two of those provisions were: "That on June 5, 1969, as part of its involuntary bankruptcy proceeding, GPRC's assets were liquidated and sold by the bankruptcy trustee in an auction sale. It was the intent of the parties to the bankruptcy proceeding and sale to sell all of GPRC's assets to the purchaser therein, Earl Schwartz."

[34] III. Law and Arguments

[35] This appeal involves questions of law, an abuse of discretion and questions of fact. For questions of law, a de novo standard is applied, a clearly erroneous standard for questions of fact, and an abuse discretion for discretionary matters.

[36] Bertsch v. Bertsch, 2006 ND 31, 710 NW2d 113 (N.D. 2006).

[37] A. That the trial court erred by concluding the Defendants/Appellees claims were not barred by the doctrines of estoppel and res judicata arising out of prior proceedings in the U.S. Federal Bankruptcy Court cases and the North Dakota District Court case.

[38] An order confirming sale of assets (Nunc Pro Tunc) was the initial court approval of the auction sale as of June 17, 1969. Nunc Pro Tunc designates the court's exercise of its inherent power to enter an order that is construed as effective as of an earlier date. (Index no. 121, A: 371-373). Thereafter, a partial amended order confirming sale of assets (Nunc Pro Tunc) was issued and established the intent of the trustee in regards to the auction sale. It was also entered Nunc Pro Tunc" as of June 17, 1969. In other words, there is no gap between the hearing for confirmation of sale, the first order of confirmation, or this amended order. All are effective as of one date. Next, the partial amended order clearly states the reason for the amendment; that being the earlier order was broader than contemplated by the parties at said public auction. Notably, the reference isn't just to the contemplation of the trustee, but to all parties at the sale. The partial amended order clearly limits the confirmation to the assets included in the Notice of Sale. The order goes on to recite a sale to Earl Schwartz for the sum of $225,000.00. (Index No. 123, A: 377).

[39] In its answer to the counterclaim of the ESCO and Sunbehm, Great Plains pled the affirmative defenses of estoppel and res judicata. (Index no. 14-15, A: 47-56). This Court has described this defense as follows:

> [40] The doctrines of res judicata and collateral estoppel bar courts from relitigating claims and issues in order to promote the finality of judgments, which increases certainty, avoids multiple litigation, wasteful delay and expense, and ultimately conserves judicial resources. The applicability of res judicata or collateral estoppel is a question of law, fully reviewable on appeal. Although collateral estoppel is a branch of the broader law of res judicata, the doctrines are not the same. Res judicata, or claim preclusion, prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies. Thus, res judicata means a valid, existing final judgment from a court of competent jurisdiction is conclusive with regard to claims raised, or those that could have been raised and determined, as to [the] parties and their privies in all other actions. Res judicata applies even if subsequent claims are based upon a different legal theory. Collateral estoppel, or issue preclusion, forecloses relitigation of issues of either fact or law in a second action based on a different claim, which were necessarily litigated, or by logical and necessary implication must have been litigated, and decided in the prior action. *(Citation omitted)*.... The basic difference between claim preclusion and issue preclusion is simply put: claim preclusion applies to whole claims, whether litigated or not, whereas issue preclusion applies to particular issues that have been contested and resolved. Claim preclusion is broader in scope than issue preclusion as to the claims that come within its purview, but narrower in scope as to the parties to whom the doctrine can be applied. While claim preclusion and issue preclusion advance the same basic principle—the need for finality in judicial proceedings—they do so in substantially different ways. Claim preclusion prevents parties and those in privity with them from raising legal theories, claims for relief, or defenses which could have been raised in the prior litigation, even though such claims were never actually litigated in the prior case. Issue preclusion, on the other hand, precludes litigation of issues actually litigated and necessary to the outcome of the prior case, even if such issues are subsequently presented as part of a different "claim." (Emphasis added).
>
> Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc., 2007 ND 36, ¶¶ 13-14, 729 N.W.2d 101 (ND 2007).

[41] In Adversary No. 13-07018 the plaintiff was Great Plains and the defendants were ESCO and Basin. (Index no. 129, Appellant's A: 434-479). Therefore, there is complete

identity of the parties in that case and in this case as to the counterclaim of ESCO and Basin. The bankruptcy estate was in privy with these defendants. In Adversary No. 13-07018 Great Plains commenced the proceedings, but ESCO and Basin then filed a counterclaim. The central issue in that case, as in this case, is what did Earl Schwartz purchase from the bankruptcy estate at the auction in 1969?

[42] The decision of Bankruptcy Judge Shon Hastings in Adversary No. 13-07018 precludes further litigation as to the properties described in the complaint as the "Disputed Assets", under the doctrine of claim preclusion as described above. The doctrine of issue preclusion also bars ESCO and Sunbehm from re-litigating the issue of the intent of Trustee Atkinson in regards to the properties sold at the auction. ESCO and Sunbehm requested the bankruptcy court to somehow construe the Notice of Sale and related orders of confirmation as a contract, and reform the contract by removing all qualifying and limiting language contained in the Notice of Sale and award title to ESCO and Sunbehm in and to all underlying minerals.

[43] In Adversary No. 13-07018, ESCO and Basin requested and received leave of the court amend their counterclaim to add a claim for reformation. Judge Hastings Memorandum and Order makes it clear that this issue was litigated and her decision on the issue was necessary to the outcome. In pertinent part, Judge Hastings states: "As a result, the parties dispute whether the Trustee intended to transfer the actual mineral acres, a royalty interest, or something else." (Index no. 129, Appellant's A: 445). "ESCO and Basin argue that the Trustee conveyed 124 net mineral acres to them." (Index no. 129, A: 447). "ESCO and Basin assert that the Trustee intended to transfer net

mineral acres, as opposed to merely a royalty interest in the oil and gas produced from a specific well. They request the Court to declare they own the mineral acres." (Index no. 129, A: 447). "The evidence received at trial also shows that to transfer seven net mineral acres the Trustee would have had to issue a mineral deed. ESCO and Basin offered no evidence of such a deed…". (Index no. 129, A: 467). "More importantly, there is no evidence that the transfer of a fractional royalty interest was an error or that the Trustee actually intended to transfer seven net mineral acres but mistakenly used the wrong words. ESCO and Basin's request that the Court declare they are entitled to the seven mineral acres and the reform the conveyance accordingly is denied." (Index no. 129, A; 467). An examination of Judge Hastings' findings and conclusions as to the "7/160 Interest" make it clear that she has already decided the same critical issue that ESCO and Sunbehm requested the district court to revisit in this case. (Index no. 129, A: 467-469). At trial, ESCO and Sunbehm asserted that Trustee Atkinson had intended to convey to Earl Schwartz (or ESCO) the actual seven net mineral acres owned by Great Plains at the time of its bankruptcy. Great Plains presented evidence that the trustee had only intended to convey a fractional interest in the named well, i.e. a "well bore" or "drilling unit" interest. ESCO and Sunbehm's expert testified that it was possible to sell only an interest in a "well bore". (Transcript page 2-184, lines 4-13, hereinafter Transcript p. 2-184, L:4-13). Judge Hastings arrived at the same conclusion and stated: "The Court concludes that the Assignment should have conveyed to ESCO a .005469 royalty interest in the Melvin E. Peterson 1 Well in the North Tioga Field Madison Unit….." (Index no. 129, A: 478).

[44] In order for Judge Hastings to come to the conclusion in her opinion, she considered the intent of Trustee Atkinson and made a determination of such intent which is now conclusive as to ESCO and Sunbehm. Sunbehm is bound because it claims its title, if any, through the auction sale to Earl Schwartz. (Index no. 121, Appellant's A: 373).

[45] ESCO and Sunbehm requested the trial court to find that the fractional royalty interests offered in the Notice of Sale actually equate to mineral interests. In making this request they are asking for a second bite of the apple apparently dissatisfied with the decision of Judge Hastings on the issue. However, that does not change the fact that her ruling on this issue, as among these parties, is conclusive and ESCO and Sunbehm are barred from re-litigating the same issue in this matter.

[46] B. That the trial court erred in concluding that the U.S. Federal Bankruptcy Court proceedings intended to sell all of the Plaintiff's/Appellant's assets to the purchasers therein, despite the orders of the U.S. Federal Bankruptcy Court and unambiguous testimony to the contrary.

[47] The trial court determined it was the trustee's intent to sell all of Great Plains' assets. (Index no. 212, A: 761-762). In doing so, the trial court ignored the partial amended order confirming sale of assets (Nunc Pro Tunc), (Index no. 123, A: 377-378) and Earl Schwartz's recording of the document. (Index no. 123, 125, A: 379-383). There is also a subsequent appraisal and sale of additional property to Sunbehm. (Index no. 119, A: 360-364). In addition, Attorney Jestrab filed a Petition seeking a corrective conveyance to correct decimals and clarify trustee intent as to a number of properties. As

stated in the Petition, the properties were sold to include only the "drilling units" and by inference not the entire leasehold previously held. (Index no. 120, A: 365-370). There is also an April 28, 1971, Amerada letter informing Earl Schwartz of title deficiencies. (Index no. 151, A: 627). There were Trustee conveyance instruments and corrective instruments and the fact that in 2002 ESCO manager, Robert Mau, personally examined the bankruptcy case records searching for court asset approval orders. (Index no. 156, Appellant's A; 661-663). Finally, ESCO and Basin sought trustee intent clarification in their bankruptcy counterclaim.

[48] C. That the trial court erred in determining that Burleigh County District Court, Case No. 08-2011-CV-1921, did not grant reinstatement to Plaintiff/Appellant.

[49] N.D.C.C. §10-19.1-148(4) and (5) allows a corporation, under statutory authority, to be re-instated so long as the provisions of law are followed, such as filing past annual reports, pay fees for the reports, and pay for reinstatement. (Index nos. 108-109, Appellant's A; 341-343). Great Plains was re-instated and entitled to all rights and privileges. The trial court did not address this issue in the two page email and decision. However, it was included in the findings of fact, conclusions of law, and order for judgment and judgment, wherein it stated that Great Plains was no longer a corporation. By doing so, the trial court ignored a previous district court's order and Honorable Shon Hastings findings that Great Plains was a duly recognized corporation.

[50] D. That the trial court erred in granting judgment for the disposition of the Plaintiff's/Appellant's real property where a bankruptcy trustee

has not transferred an interest in the real property as required by law.

[51] While investigating the record title for Great Plains assets, Gary Preszler found, among other things, two deeds. (Index nos. 161-162, A: 666-667). The deeds were alleged to contain the signature of the bankruptcy trustee, Myron Atkinson. However, Trustee Atkinson, testified that he did not sign those deeds. (Index no. 127, A: 407-410). It is beyond dispute but that the deeds are forgeries and were improperly recorded against Great Plains' minerals. Therefore, the orders confirming the sale do not apply because the orders only confirm sale of the assets on the notice of sale. Without such order of confirmation, no marketable title is conveyed as provided by North Dakota Title Standard 16-12. As such the deeds are void or voidable. However, the trial court refused to do so.

[52] E. That the trial court erred in granting the Defendants/Appellees the relief of reformation.

[53] As noted above, ESCO and Basin moved to add a request for reformation in Adversary No. 13-07018. In this case, ESCO and Sunbehm requested the same relief without pleading the same. The trial court did not specifically address this issue, but it must be assumed that it was a basis for its decision.

[54] The requirements for proving a claim for reformation are difficult to satisfy. The North Dakota Supreme Court has considered the doctrine and stated:

> Reformation is an "[e]quitable remedy used to reframe written contracts to reflect accurately [the] real agreement between contracting parties." Biteler's Tower Serv., Inc. v. Guderian, 466 N.W.2d 141, 143 (N.D.1991). When, through fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that intention so far as it can be done without prejudice to rights acquired

by third persons in good faith and for value.

Heart River Partners v. Goetzfried, 2005 ND 149, ¶¶ 12-13, 703 N.W.2d 330

[55] The quantum of proof required of the party requesting reformation is also discussed: "A party who seeks reformation has the burden to prove by clear and convincing evidence that (emphasis added) a written agreement does not fully or truly state the agreement the parties intended to make. Ell, 295 N.W.2d at 150." Heart River Partners, supra, at ¶ 14.

[56] The only evidence offered by ESCO and Sunbehm was their experts' wholly unsupported testimony that Trustee Atkinson, must have intended to sell all of Great Plains' assets, despite the testimony of Trustee Atkinson to the contrary. Robert Mau returned to a prior, but now discredited, theory that ESCO and Sunbehm purchased all assets. However, that is not true because ESCO and Basin admitted the same and Judge Hastings has conclusively ruled on that issue. (Index 129, Appellant's A: 440, Transcript p. 2-41, L:14-25). Therefore, to the extent this was a basis for the trial court to determine that Great Plains sold all of its property, ESCO and Sunbehm did not carry their burden of proof and the notice of sale is the final word on what was sold by Trustee Atkinson to Earl Schwartz at the bankruptcy auction sale.

[57] F. That the trial court erred in granting the Defendants/Appellees the relief of quiet title despite the failure of the Defendants/Appellees to prove the strength and superior nature of their title claimed according to law.

(58) "A quiet-title action is an equity proceeding." Green v. Gustafson, 482 N.W.2d 842, 849 (N.D.1992) (citing Rohrich v. Rohrich, 434 N.W.2d 343, 346 (N.D.1989).

The case law is also clear that each party requesting relief in the form of quiet title must bring forward evidence of their superior title. "The law is firmly established in this state that one seeking to determine adverse claims and quiet title pursuant to the provisions of the statute, Chapter 32–17, RC 1943, supra, must recover, if at all, upon the strength of his own title and not upon the weakness of his adversary's title." Sailer v. Mercer Cty., 77 N.D. 698, 706, 45 N.W. 2d 206, 210 (1950). Pierce Tp. of Barnes County v. Ernie, 74 N.D. 16, 19 N.W.2d 755; Woodland v. Woodland (N.D.), 147 N.W.2d 590.

[59] Great Plains proved through the testimony of Gary Preszler and by land records that they had good title. Whereas, ESCO and Sunbehm's expert addressed the issue of title for all the properties. He seemed to acknowledge the fact that Great Plains' possessed record title, but went on to discuss a claim of equitable title on the part of ESCO and Sunbehm. (Transcript p 2-159-160, L:24-4). ESCO and Sunbehm did not offer any instruments of conveyance apparently relying on the argument as to equitable title. The trial court determined that Great Plains could no longer have title to the assets forty years after in exited bankruptcy. However, from the moment that Great Plains' bankruptcy was filed until all of the claims against it were paid in 2015, all of its assets were vested in the trustee. In a similar case a Bankruptcy Court stated:

> ... unscheduled property remains " property of the estate" after a bankruptcy case is closed-even seven decades later. That was settled law when this case commenced under the Bankruptcy Act of 1898 and remains the law today...The occasion for reopening after 73 years is the need to clear the cloud on title lingering over a fee interest in real estate that the debtor did not schedule.

In re Dunning Bros. Co., 410 B.R. 877 (Bkrtcy.E.D.Cal. 2009). This case makes it clear that the mere passage of time does not remove property from the trustee's authority.

[60] ESCO and Sunbehm's expert attempt to characterize or interpret the intent of Trustee Atkinson is wholly without probative value. He also failed to produce any learned treatises, statutes, cases, or rules that bear directly on the issues. He also professed no knowledge of North Dakota Title Standards as they relate to real property transfers by a bankruptcy trustee. See NDTS 16-12. However, he still maintained that ESCO and Sunbehm acquired equitable title to properties beyond those listed in the Notice to Sale because of the circumstances of the bankruptcy sale and the later confirmation of sale. The trial court essentially agreed with him. However, his analysis required two leaps of legal logic to arrive at that conclusion. The first leap was be to find the acquisition of title under the rules of equity. He stated that an unrecorded instrument can bind the parties to the instrument. His statement does find support in North Dakota law. NDCC §47-19-46 provides in pertinent part: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." The question, posited above, is where are those unrecorded instruments? The answer is they do not exist. The first leap of legal reasoning also required the trial court to deem the Notice of Sale and the subsequent orders confirming the sale as an unrecorded instrument. However, that is not the case. The second leap of legal logic is of a much greater magnitude and it is not supported by any evidence or law. ESCO and Sunbehm's expert testified that not only are ESCO and Sunbehm entitled to title under the bankruptcy proceedings, but that the extent of title is without limit. This required the trial court to take the Notice of Sale, then strip away every limiting or qualifying term, and then find title in ESCO and Sunbehm to all right, title, and interest of Great Plains in the underlying ground. When it was suggested that

such a conclusion would provide a windfall, ESCO and Sunbehm argued that it would simply give Earl Schwartz the benefit of his bargain. That conclusion is incorrect. The value for the mineral properties was determined to be $206,278.37. The purchase price was $225,000.00. That certainly was not a premium price for assets over and above those actually noticed for sale.

[61] G. That the trial court erred in determining that a reasonable and prudent trustee would not sell less than the entire interest owned by the Plaintiff/Appellant in the Bankruptcy Court proceedings.

[62] The testimony of Trustee Atkinson was significant in regards to this issue and what was intended to be sold by Trustee Atkinson in regards to Great Plains' bankruptcy and sale of assets. His knowledge of these events was personal and direct. Whereas, ESCO and Sunbehm's expert who sought to interpret or characterize the intent of Trustee Atkinson or the actual bankruptcy court records in the administration of the bankruptcy was of little or no probative value.

[63] Trustee Atkinson was trained and licensed as an attorney in the State of North Dakota. (Index no. 127, A: 388). He was a part of the North Dakota Guarantee and Title Company. (Index no. 127, A:389). The records for Great Plains that were found were stored at the office of Attorney Frank Jestrab. Atkinson described the available records by stating "it's a mess" and there was no cooperation from the then principals of Great Plains. (Index no. 127, A:392). Trustee Atkinson and Attorney Jestrab concluded that they would work from the records they had because additional title work or title searches would not be economically feasible. (Index no. 127, A:393). The sale of Great Plains'

assets by auction was arranged by Attorney Jestrab, but Trustee Atkinson personally handled the auction and acted as auctioneer. (Index no. 127, A:396). Trustee Atkinson makes clear that no warranties were given including any warranty as to the property descriptions. (Index no. 127, A:398-399). Also he did not recall any questions as to the nature of the interest being offered and he assumed bidders understood the descriptions and determined their bidding on that. He was quite clear that there were no representations of anything other than the described properties on the advertised notice. (Index no. 127, A:400). Trustee Atkinson recalled no discussions at the sale as to whether the properties actually to be sold varied from the sale notice. (Index no. 127, A: 401). Also, he had no recollection of any complaints from Earl Schwartz as to what he had purchased at the sale. (Index no. 127, A:403). Trustee Atkinson was asked directly if he had represented to Earl Schwartz that the bidding was for all of the assets of Great Plains and he replied "No, absolutely not". (Index no. 127, A:404). When asked if there may be other assets that were not be offered for sale, he stated "I had concerns all along, and Frank Jestreab did also, that there would be properties we had not identified". (Index no. 127, A:404). Trustee Atkinson was asked about the general results of his administration of the Great Plains' bankruptcy. He felt good about the fact that all secured creditors had been paid and general creditors had been paid excess of 95% of their claims. (Index no. 127, A:405). Trustee Atkinson was shown the 1982 deeds (Index nos. 161-162, A: 666-667). He had no recollection of the deeds. (Index no. 127, A:407-408). Finally, Trustee Atkinson stated that it was his intention to sell the assets listed for sale. (Index no. 127, A:413).

[64] The bankruptcy court inventory and appraiser's report also support what was intended for the sale at Great Plains' auction. In addition, Trustee Atkinson's intent as to what was to be sold can be found in the Trustees' Petition, (Index no. 120, A: 365-370) which was presented to the bankruptcy court and approved corrective conveyances for a number of the properties included in the list of counterclaim properties. As noted in the descriptions of the petition, it was the intent to only sell the drilling units of the leases.

[65] H. That the trial court erred in determining that the Defendants/Appellees owned all of the assets of the Plaintiff/Appellant, despite the Defendants'/Appellees' acknowledgment that they did not own nor claim all of the assets owned by the Plaintiff/Appellant.

[66] The trial court awarded ESCO and Sunbehm all of Great Plains' property. However, ESCO and Sunbehm acknowledged that they did not own all of Great Plains' property. (Transcript p 2-241, 242, l 22-3). As they acknowledged in open court that they did not own all of Great Plains' property, the trial court erred when it issued its two page decision.

[67] I. That the trial court erred in determining that the Plaintiff/Appellant was not entitled to royalties, both past and present, paid to the Defendants/Appellees or entitled to damages for slander of title.

[68] Great Plains' amended complaint states a claim against ESCO and Sunbehm for slander of title. By statute, slander of title is defined by N.D.C.C. § 47-19.1-09.

[69] The North Dakota Supreme Court has described the elements of slander of title and the resulting damages.

> This Court has defined slander of title as "a false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, and causing him special damage." Briggs v. Coykendall, 57 N.D. 785, 788, 224 N.W. 202, 204 (1929). The plaintiff must demonstrate the defendant acted with malice, intending to injure, vex, or annoy the plaintiff. Serhienko v. Kiker, 392 N.W.2d 808, 815 (N.D.1986); Briggs, 57 N.D. at 789-90, 224 N.W. at 204-05.
>
> Maragos v. Union Oil Co. of California, 1998 ND 180, ¶¶ 4-5, 584 N.W.2d 850.

[70] The trial court should have conclude that ESCO and Sunbehm did not prove title to mineral interests in excess of the interests as described in the Notice of Sale (i.e. equitable title) and ESCO and Sunbehm slandered the title of Great Plains properties. Great Plains proved its record title through testimony and certified real estate records. Whereas, ESCO and Sunbehm presented no instruments of conveyance divesting Great Plains of its assets. As a result of these slanderous filings, ESCO and Sunbehm induced Petro-Hunt, LLC and Hess Corporation to pay to them royalties which were the rightful property of Great Plains. The slanderous nature of the filings is proven by the fact that as the instruments were recorded, Petro-Hunt, LLC would respond thereto by changing the named payee of the royalties. If slander of title is found, Great Plains is entitled to an award of all of it damages proven at trial, its costs, and reasonable attorney's fees. In such case, Great Plains would be entitled to the statutory rate of interest of 18% in order for it to be made whole. See N.D.C.C. § 47-16-39.1. Even if slander of title is not found, Great Plains has presented sufficient evidence of the fact that the defendants have wrongfully converted or misappropriated Great Plains' mineral royalties and the court should have awarded damages of six percent.

[71] J. That the trial court erred by signing Findings of Fact, Conclusions of Law

and Order for Judgment which contained facts and conclusions of law that were beyond the scope of the trial court's two page letter.

[72] That in Siana Oil & Gas Co., LLC v. Dublin Co. et. al, 2018 ND 164, 915 N.W. 2d 134 (ND 2018) this Court stated:

> The district court granted summary judgment quieting title in favor of the defendants. The order documenting the district court's determination was prepared by counsel for the defendants and summarily concluded that 'all of the defenses [asserted by the defendants] are well-founded and apply.' No further analysis of the defenses is provided in the order. The order stated, without analysis, that the defendants had proven the 'origins' of their chain of title and Tank had failed to establish that the defendants' title was invalid.

[73] In the case now before this Court, the district court issued a two page email outlining his decision. No other analysis was provided other than that email. From that decision, and as stated previously, ESCO's legal counsel prepared thirteen pages of finding of facts, conclusions of law, and order for judgment and a five page judgment. Those documents contained numerous provisions that were not addressed by the trial court and therefore are in error.

[74] CONCLUSION

[75] WHEREFORE, Great Plains respectfully request that this Court recognize and uphold the federal bankruptcy case, Adversary No. 13-07018, and reverse the trial court in this matter wherein it granted title of all of Great Plains' assets to ESCO and Sunbehm, grant Great Plains the relief requested in its amended complaint and in its answers to ESCO and Sunbehm's counterclaims, determine that ESCO and Sunbehm have no right, title, or interest, in properties not listed for sale by the Trustee, dismiss ESCO and Sunbehm's counterclaim and amended counterclaim, determine that ESCO and Sunbehm

slandered the title to Great Plains properties, award damages, costs, and attorney fees according to statute or adjudge that ESCO and Sunbehm are liable for damages for royalties misappropriated by them along with interest, grant costs and disbursements, reasonable attorney's fees, and such other relief as the court deems fair and equitable.

[76] Dated this 26th day of November, 2018.

/s/ Daniel H. Oster
KELLINGTON AND OSTER, P.C.
BY: Daniel H. Oster
Attorney for Plaintiff/Appellant
619 Riverwood Drive, Suite 202
Bismarck, ND 58504
(701) 258-1074
ID #04899
dan@kopcemail.com

CERTIFICATE OF COMPLIANCE

[1] The undersigned, as attorney for Great Plains Royalty Corporation, a North Dakota Corporation, Plaintiff and Appellant, in the above matter, and as the author of the Plaintiff's and Appellant's brief, hereby certifies, in compliance with Rule 28 of the North Dakota Rules of Appellate Procedure, and the Plaintiff and Appellant's brief, excluding words in the table of contents, table of authorities, addendum and certificate of compliance totals 7,986.

[2] Dated this 27th day of November, 2018.

/s/ Daniel H. Oster
KELLINGTON AND OSTER, P.C.
BY: Daniel H. Oster
Attorney for Plaintiff/Appellant
619 Riverwood Drive, Suite 202
Bismarck, ND 58504
(701) 258-1074
ID #04899
dan@kopcemail.com

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO. 20180285

Great Plains Royalty Corporation, a North Dakota Corporation, Plaintiff and Appellant

vs.

Earl Schwartz Company, a North Dakota Partnership, Basin Minerals, LLC, a North Dakota Limited Liability Company, Sunbehm Gas, Inc., a North Dakota Corporation, and Kay Schwartz York, Kathy Schwartz Mau, and Kara Schwartz Johnson as the Co-Personal Representative of the Estate of Earl N. Schwartz, Defendants and Appellees

---

APPEAL FROM THE ORDER DENYING THE PLAINTIFF'S/APPELLANT'S MOTION TO AMEND REPLY TO COUNTERCLAIM ENTERED ON APRIL 18, 2018
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT ENTERED ON MAY 17, 2018
JUDGMENT ENTERED ON MAY 30, 2018
AND NOTICE OF ENTRY OF JUDGMENT ENTERED ON MAY 31, 2018
DISTRICT COURT OF MCKENZIE COUNTY
CIVIL NO. 27-2016-CV-00530
THE HONORABLE DANIEL S. EL-DWEEK, PRESIDING

AFFIDAVIT OF ELECTRONIC SERVICE

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

[1] Brenda Lewis, being first duly sworn, on oath, does depose and say: That this affiant is of legal age and not a party to this action.

[2] That on the 27th day of November, 2018, affiant electronically served a true and

correct copy of the following documents(s): **PLAINTIFF'S AND APPELLANT'S BRIEF AND PLAINTIFF'S AND APPELLANT'S APPENDIX** as follows:

[3] Penny Miller, Clerk
North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

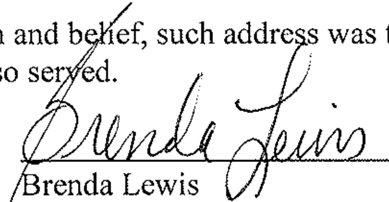
[4] and were emailed upon the following:

[5]

Lawrence Bender	Jon Bogner
lbender@fredlaw.com	jonbogner@ndsupernet.com
Attorney for Appellees	Attorney for Appellees

James J. Coles
Co-Counsel for Plaintiff/Appellant
coleslaw@birch.net

[6] To affiant's knowledge, information and belief, such address was the last known email address of the parties intended to be so served.



Brenda Lewis

[7] Subscribed and sworn to before me this 27th day of November, 2018 at Burleigh County, North Dakota.

Notary Public
State of North Dakota

(SEAL)