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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Robert M. Hall, Plaintiff and Appellant v. John F. Hall, Deborah E. Hall, Leslie Hall, a/k/a Leslie Hall Butzer, and all unknown heirs, devisees, successors, and creditors of Myles Franklin Hall, Myles F. Hall, a/k/a Myles Hall, deceased, and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint, Defendants and Appellees.	Williams County Civil No.: 53-2018-CV-00744 **Supreme Court No. 20190169**

BRIEF OF APPELLEES DEBORAH E. HALL AND LESLIE HALL, A/K/A LESLIE HALL BUTZER

APPEAL FROM JUDGMENT OF JANUARY 16, 2019 AND ORDER OF JANUARY 31, 2019 FOR CASE NO. 53-2018-CV-00744
COUNTY OF WILLIAMS, NORTHWEST JUDICIAL DISTRICT
THE HONORABLE BENJAMEN J. JOHNSON

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STATEMENT OF THE CASE

[1] On appeal, Plaintiff/Appellant Robert M. Hall (hereinafter "Robert") contends that the district court erred in granting Defendants/Appellees Deborah E. Hall (hereinafter "Deborah") and Leslie Hall a/k/a Leslie Hall Butzer's (hereinafter "Leslie") Motion for Summary Judgment on the basis of res judicata.

[2] However, Robert's Appellant Brief misinterprets and misrepresents North Dakota precedent and its applicability to the case at bar. The district court correctly found that the issue in the instant case, the ownership of a 1.04% non-participating royalty interest (hereinafter "NPRI"), was previously litigated in a prior action (Williams Co. Civil No. 53-11-C-00120, hereinafter the "prior action"), and that Robert was not allowed to re-litigate that matter in the instant case.

[3] The prior action reached a final decision on the merits. All of the parties to the instant case were in privity with the Estate of Myles Hall, a defendant in the prior action. The instant case raises an issue that was actually litigated, or should have been litigated, in the prior case. Finally, there is an identity of actions between the prior action and the instant case. Res judicata applies, and the district court's Judgment of January 16, 2019, and its Order of January 31, 2019, should be AFFIRMED.

STATEMENT OF THE FACTS

[4] This dispute arises out of the ownership of a 1.04% non-participating royalty interest (hereinafter, the "NPRI") owned by the Estate of Myles Hall (hereinafter the "Estate"). Title to the NPRI was quieted in favor of the Estate in Williams County District Court, Case No. 53-11-C-00120. *See* App. 11. The NPRI encumbers the following described lands in Williams County, State of North Dakota.

Township 153 North, Range 98 West, 5th P.M.
Section 3: Lot 3
Section 10: NE1/4NE1/4

[5] Myles Hall (hereinafter "Myles") acquired the NPRI by way of an Assignment of Oil and Gas Royalty, dated December 26, 1953 (hereinafter the "1953 Assignment"). App. 9. Robert allegedly purchased the NPRI from Myles on or about January 4, 1988. *Id.* Robert alleges that he paid Myles the sum of one hundred dollars ($100.00) *Id.* No receipt has been produced to verify Robert's claim. Robert admits that there was no instrument conveying the NPRI from Myles to Robert. *Id.* Instead, Robert alleges that Myles "instead made a notation at the bottom of the [1953 Assignment]…." *Id.*

[6] Myles died on February 5, 1992, in Duluth, Minnesota. *Id.* Myles last will and testament was submitted to probate in St. Louis County, Minnesota on February 19, 1992. *Id.* Robert admits that he was appointed as a co-executor of the Estate on March 24, 1992. *Id.* Ancillary probate proceedings have never been opened in North Dakota.

[7] On February 9, 2011, Case No. 53-11-C-00120 was initiated in the District Court for Williams County, North Dakota (hereinafter the "prior action"). The plaintiff in the prior action sought to claim ownership of the NPRI via North Dakota's Dormant Mineral Act (N.D.C.C. § 38-18.1; hereinafter "DMA"). [App. 40.] In that action Robert discovered that the surface owner of the land overlying the NPRI had "gone through the process of reclaiming mineral and royalty interests that the surface owner had deemed to be unused by statute." Furthermore, "[a] judgment quieting title in the surface owner had been entered…." App. 10. "The Estate appeared … on April 23, 2013, and moved to have the judgment quieting title in the surface owner vacated so it could answer and defend the surface owner's claims." *Id.* Robert was represented by the same law firm and attorney in the prior action.

[8] The court vacated the default judgment and the Estate answered the original complaint of the surface owner and made a counterclaim. App. 10. On October 9, 2014, the Court quieted title to the NPRI in the Estate. App. 11. Robert admits in his Complaint that he was completely aware of these proceedings and that he participated in the same. *Id.* Judgment in favor of the Estate of Myles F. Hall was entered on July 17, 2015. *Id.* An amended judgment was entered on November 16, 2017, and a notice of entry of judgment was entered on November 17, 2017. *Id.* No parties appealed the court's final order in the prior action. *Id.*

[9] Despite Robert's current allegation of ownership of the NPRI, he asserted no claim to the NPRI in Case No. 53-11-C-00120. Robert's contention that he was the rightful owner of the NPRI is not mentioned in any of the pleadings, filings, or exhibits in this prior action.

[10] Plaintiff Robert M. Hall and Defendants John F. Hall, Deborah E. Hall, and Leslie Hall, a/k/a Leslie Hall Butzer, are the children of Myles F. Hall and are the heirs and devisees of his Estate. No probate has been opened in the State of North Dakota, but Myles F. Hall's Last Will and Testament has been probated in the State of Minnesota. Despite direct knowledge of his own claim and of the prior action, Robert failed to quiet title to the NPRI in his name or to adjudicate his claims against the Defendants.

[11] On November 15, 2018, Leslie and Deborah moved for summary judgment on the basis that Robert's claims were barred by collateral estoppel and/or res judicata. App. 243. On December 28, 2018, Robert filed his response opposing Leslie and Deborah's Motion for Summary Judgment. App. 256. On January 7, 2019, the district court entered its Order Granting Motion for Summary Judgment (hereinafter the "Order"), finding that Robert's claims were barred by res judicata. App. 266.

[12] In its Order, the district court stated that: (1) there was a final decision on the merits in Case No. 53-2011-C-00120 relating to Myles' ownership of the NPRI; (2) Robert, Leslie and Deborah all had privity with the Estate of Myles Hall (a defendant in the prior action); (3) that Robert's

ownership claim predated, and could have been litigated during, the prior action; and (4) that there was an identity of the causes of action. App. 268, 269.

[13] In finding that privity existed between Robert, Leslie and Deborah, the district judge noted that "[i]n this case, Robert and [Leslie and Deborah] are the heirs (successors in interest) of the Estate of Myles Hall. The Estate of Myles Hall was a Defendant in [the prior action]. Robert, John F. Hall, Deborah E. Hall, and Leslie Hall Butzer all have privity with the Estate of Myles Hall." *Id.*

[14] In finding that the instant case raised an issue that was actually litigated, or which should have been litigated in the prior action, the district court stated:

> "Was the issue of Robert's ownership of the NPRI, due to his purchase of the NPRI in 1988, addressed directly in the first action? No, but Robert's ownership claim through the 1988 purchase could have and should have been address [sic] in the first action. Robert was aware of and involved in the first matter. As personal representative of the Estate of Myles Hall, Robert would have had the right and responsibility to defend the Estate, which Robert successfully did. Robert allegedly purchased the NPRI in 1988. Robert's alleged ownership would have predated the first action. If Robert did in fact purchase the BPRI in 1988, the first action under the dormant mineral act would have been a claim against Robert's ownership interest in the NPRI, not the State's, as Roberts's [sic] alleged purchase of the NPRI from Myles Hall would have ultimately divested Myles Hall and his esate of any ownership of the NPRI. Under N.D.C.C. 32-17-06, Robert would have been joined as a Defendant in the first action as an unknown person having title or interest which does not appear of record, as Robert never filed anything with the Recorder's Office indicating he had succeeded to an ownership interst in the NPRI. As the alleged owner of the NPRI at the time of the first action, Robert, in accordance with N.D.C.C. 32-17-08, could have denied that the plaintiff had an estate or interest as

> alleged in the complaint; Robert could have set forth fully and particularly the origin, nature, and extent of his own claim to the property; or Robert may have set forth his rights in the property as a counterclaimant and demanded affirmative relief against the plaintiff and any co-defendant. In other words, Robert could have litigated his ownership of the NPRI in the first action against co-defendants (which would have included the Estate of Myles Hall) as well as the plaintiffs. Robert could and should have litigated the matter in the first action, but did not." *Id.*

[15] The district judge also noted that "[i]f Robert had chosen to litigate his ownership in the NPRI in the first matter, a final judgment would have barred in the second action. It also appears that the same evidence would be used in both the first and second actions." *Id.*

[16] The district court directed Leslie and Deborah's counsel to prepare a proposed judgment in accordance with the order. *Id.* The proposed judgment was submitted. *Index* # 95.

[17] On January 14, 2019, Robert filed his Motion for Reconsideration on the Court's Order Granting Summary Judgment. App. 271-289. On January 21, 2019, Leslie and Deborah submitted their Answer Brief in Opposition to Plaintiff's Motion for Reconsideration on Court's Order Granting Motion for Summary Judgment. Index # 107. On January 28, 2019, Robert filed a reply brief. Index # 109. On January 31, 2019, the district court issued its Order Denying Motion for Reconsideration. [App. 290.]

[18] Robert filed his own motion for summary judgment on March 8, 2019, seeking to dispose of Leslie and Deborah's counterclaims. [App. 291.] Leslie and Deborah resisted, but the district court granted Robert's motion on

April 24, 2019 and a notice of entry of judgment was filed on May 10, 2018. [App. 298, 308]. Robert timely filed his notice of appeal. [App. 310, 314, 319.]

STANDARD OF REVIEW

[19] The summary judgment standard of review 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.

Poppe v. Stockert, 2015 ND 252, ¶ 4, 870 N.W.2d 187 (internal citations omitted). Robert does not claim that an issue of material fact exists, only that Leslie and Deborah were not entitled to judgment as a matter of law.

LAW AND ARGUMENT

I. The district court correctly decided that Robert's Claims are barred as res judicata.

[20] There are four elements to apply to determine whether a claim is barred as res judicata: (1) A final decision on the merits by a court of competent jurisdiction; (2) The second action involves the same parties, or their privies, as the first; (3) The second action raises an issue actually litigated or which

should have been litigated in the first action; and (4) an identity of the causes of action. *Missouri Breaks, LLC v. Burns*, 2010 ND 221, ¶ 12, 791 N.W.2d 33.

[21] "Under res judicata principals, it is inappropriate to rehash issues which were tried ***or could have been tried by the court in prior proceedings***." *Laib v. Laib*, 2010 ND 62, ¶ 10, 780 N.W.2d 660. The purpose of res judicata is to "promote finality of judgments, which increases certainty, avoids multiple litigation, wasteful delay and expense, and ultimately conserves judicial resources." *Lucas v. Porter*, 2008 ND 160, ¶ 16, 755 N.W.2d 88.

[22] Robert argues, at multiple places in his brief, that the district court made errors of law for each of the four elements. However, the district court properly found that all four elements were present and was correct in granting Leslie and Deborah's summary judgment motion. As such, the district court's Judgment of January 16, 2019, and its Order of January 31, 2019, should be AFFIRMED.

A. Case. No. 53-11-C-00120 was a final decision on the merits.

[23] A final judgment on the merits is a judgment that reaches the substance of a claim, ending the litigation after the parties' claims are determined on the substantive issues.[1] For res judicata purposes, this means

[1] See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981); Restatement (Second) of Judgments §19 cmt. a (1982). For example, a dismissal for failure to state a claim is considered a final judgment on the merits because the judgment determines that there is no cause of action, and

that the first case in front of the court was decided on the substantive issues of that case. It does not mean that the first action had to decide each and every possible theory of the issue in that case.

[24] In the prior action, the Estate of Myles Hall was a named defendant. Default judgment was entered against Myles, and title to the NPRI was quieted in the plaintiff, but Robert, as Personal Representative of the Estate of Myles Hall, had the default judgment vacated and restored the NPRI to Myles' name, as it had been previously. [App. 99.] Robert accomplished this by arguing that the DMA did not apply to non-participating royalty interests and that, if it did, the NPRI had been "used" as defined by the DMA. [App. 101, 150.] Simply put, Robert argued, and the district court decided, that the Estate of Myles Hall owned the NPRI. That decision was not appealed.

[25] On appeal, Robert contends that res judicata should not apply because he believes that the merits of the first case are not the merits of the second case. Appellant Br. at ¶ 19. This represents a fundamentally flawed view of the law, as well as the purposes behind the doctrine of res judicata. It also misconstrues the concept/claim of "ownership" of the NPRI with theories as to why Robert believes he is entitled to ownership of it.

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it therefore reaches the substantive issues of the claim. See *May v. Transworld Drilling Co.*, 786 F.2d 1261, 1263 (5th Cir. 1986). Conversely, a dismissal for lack of jurisdiction or improper venue is not considered a final judgment on the merits because the judgment does not reach the substantive issues of the claim. See Restatement (Second) of Judgments §20(1)(a) (1980).

B. This action involves the same parties, or their privies, as Case. No. 53-11-C-00120.

i. Privity to the Estate of Myles Hall exists.

[26] "Privity exists if a person is so identified in interest with another that he represents the same legal right." *Recovery Res., LLC v. Cupido*, 2012 ND 143, ¶ 10, 818 N.W.2d 787. This Court has noted that intestate heirs of a decedent are in privity with the decedent. *Noss v. Hagen*, 274 N.W.2d 228, 232 (N.D. 1979). Likewise, other courts in the 8th Circuit have found, that for the purposes of res judicata, privity exists between a testator and his remote heirs. (*Hardie v. Estate of Davis*, 312 Ark. 189, 848 S.W.2d 417 (1993)); (*Ocean Acc. & Guarantee Corp. v. Southwestern Bell Tel. Co.*, 100 F.2d 441, 444 (8th Cir. 1939)("Privity of contract denotes mutual or successive relationship to the same right of property or subject-matter, such as 'personal representatives, heirs, devisees, legatees, assignees….)(internal citations omitted)).

[27] None of the parties dispute that Robert M. Hall, John F. Hall, Deborah E. Hall, and Leslie Hall a/k/a Leslie Hall Butzer are all heirs of the Estate of Myles Hall. There is no authority for the premise that a person must be named in a lawsuit to be in privity with a named party. Based on well settled precedent, the district court correctly found that the heirs of Myles Hall were in privity with his estate.

[28] The district court also recognized that, even if Robert was not in privity with the Estate of Myles Hall, Robert would have been joined in the first quiet title action as an unknown person having title or interest which does

not appear of record. In that capacity, he could have asserted his claim to the NPRI as adverse to Myles Hall and the heirs to the Estate

ii. The *Kulczyk* decision is inapplicable.

[29] Robert's reliance on *Kulczyk v. Tioga Redy Mix Co.*, 2017 ND 218, 902 N.W.2d 485, case is unfounded. In *Kulczyk*, William and Rhonda Kulczyk ("Kulczyks") sold Tioga Ready Mix ("TRM") to Bernard Vculek ("Vculek") in December 2011. *Id.* at ¶ 2. TRM executed a promissory note for $1.4 million and a mortgage on TRM's property to, and in favor of, the Kulczyks. *Id.* Vculek and his wife executed a $1.4 million personal guaranty to be personally responsible for TRM's debt to the Kulczyks. Scott Financial Corporation ("SFC") acted as Vculek's financial advisor and assisted in the transaction between the parties. *Id.*

[30] In May of 2012, TRM was sued for payment for rock aggregate product supplied to it by another company, Triple Aggregate, LLC ("Triple"). *Id.* at ¶ 3. TRM counterclaimed and brought a third-party claim against William Kulczyk, claiming that he negligently allowed use of substandard materials when he was manager of TRM, prior to it being sold. *Id.* Triple and TRM settled their claim prior to trial. *Id.* at ¶ 4.

[31] After the settlement, TRM amended its third-party complaint and added additional parties to the action. *Id.* The Vculeks were added as additional plaintiffs, and Rhonda Kulczyk was added as a defendant. *Id.* The amended complaint alleged breach of contract, fraud, and negligence. *Id.* The

Kulczyks counterclaimed against TRM for breach of contract and against the Vculeks for breach of the personal guarantee. *Id.* After the trial in October of 2014, the district court ruled that TRM was in default of its obligations under the promissory note and the Vculeks were liable under the personal guaranty. *Id.* at ¶ 5.

[32] In October of 2015, the Kulczyks sued TRM, Scott, and Triple, seeking to foreclose its mortgage; alleging that TRM failed to make payments under the promissory note. *Id.* at ¶ 6. The Kulczyks claimed that, although the Vculeks paid the $1.4 million under the note, that they still owed some principle and interest under the note and mortgage. *Id.* They also alleged the mortgage was superior to two mortgages that Scott held against the property. *Id.* TRM moved for summary judgment, arguing that the foreclosure action was barred by res judicata and collateral estoppel, as it was not raised in the earlier lawsuit between the parties. *Id.* Scott testified in the first action, but was not made a party thereto. The district court granted the motion, ruling that because TRM was a party to the earlier action and numerous issues arising from the sale of TRM to the Vculeks were litigated in that action, that the Kulczyks should have raised the foreclosure claim in the earlier lawsuit. *Id.* The Kulczyks appealed, arguing that the district court erred in concluding that res judicata applied.

[33] This Court determined that Scott was an additional party that was not included in the first action, and that the Kulczyks were not required

to include Scott in that suit. *Id.* at ¶ 19. Because the promissory note and mortgages were not litigated in the prior action, and because Scott was not a party to the initial action, the district court was reversed.

[34] Unlike the *Kulczyk* case, Robert actively participated in the first case. He did so on behalf of the Estate. This is unlike Scott, who was simply a witness in the first matter. *Kulczyk* is also distinguishable because Scott held mortgages on the property that were separate and distinct from the issues that were litigated by the parties to the prior litigation. In the instant case, ownership of the NPRI is the only issue to be decided. That issue was decided in the prior action, and it involves the same parties or those in privity with those parties.

iii. The Ungar decision favors Leslie and Deborah.

[35] In his Brief, Robert mentions *Ungar v. North Dakota State University*, 2006 ND 185, ¶ 12, 721 N.W.2d 16. In that case, the Court stated that:

> The strict rule that a judgment is operative, under the doctrine of res judicata, only in regard to parties and privies, **is sometimes expanded to include as parties, or privies, a person who is not technically a party to a judgment, or in privity with him**, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein, at least where such right is actively exercised by prosecution of the action, employment of counsel, control of the defense, filing of an answer, payment of expense or costs of the action, the taking of an appeal, or the doing of such other acts as are generally done by the parties.

(citing *Hofsommer v. Hofsommer Excavating, Inc.,* 488 N.W.2d 384 (N.D. 1992)(quoting Stetson v. Investors Oil, Inc., 176 N.W,2d 643, 651 (N.D. 1970))(emphasis added). Robert's reliance on *Ungar* is somewhat mystifying, as *Ungar* argues for **expanding** who is seen as a party or privy to a prior judgment.

[36] Again, North Dakota has long recognized that heirs are in privity with an Estate. There is no requirement that an heir participate in litigation to maintain their privity to an estate. That would defeat the purposes of res judicata. *Ungar* stands for the premise that a person who participated in the prior action can be bound by it, even though that person was not a party or privy to that action.

[37] Leslie and Deborah fully maintain that Robert was in privity with the Estate of Myles Hall. However, even if he was not, *Ungar* makes an even stronger case that he should be bound by the final judgment in the prior action because he fully participated in it and did "such other acts as are generally done by the parties."

[38] Robert had every opportunity to make his claim to the NPRI in the prior action. He failed to do so. As an heir to Myles Hall, Robert was in privity with the Estate. Even if he was not, *Ungar* requires that he be bound by the prior action because of his participation therein.

C. This action raises an issue that was actually litigated, or should have been litigated in the prior action.

[39] A quiet title action is "[a] proceeding to establish a plaintiff's title to land by compelling the adverse claimant to establish a claim or be forever estopped from asserting it." ACTION, Black's Law Dictionary (11th ed. 2019). This Court has held that "[a]n action to quiet title is a statutory procedure by which adverse claims to real property are settled." *Sabot v. Fox*, 272 N.W.2d 280, 283 (N.D. 1978)(*citing* NDCC, § 32-17-01).

[40] It is undisputed that Case No. 53-2011-C-00120 was an action to quiet title to certain interests which included the 1.04% NPRI. [appellant brief at ¶ 2-3.] The plaintiff in the prior action sought to claim ownership of the NPRI via the DMA. [App. 40.] Robert's Appellant Brief also admits that the case at bar is a quiet title action that seeks to determine ownership of the NPRI. Appellant Br. at ¶ 2.

[41] The district court noted that Robert's ownership of the NPRI, due to his alleged 1988 purchase of the NPRI, was not litigated in the prior action. App. 268-269. However, the district judge recognized that Robert's ownership claim predated the 2011 quiet title action. *Id.* The court's Order noted that Robert was aware of and involved in the first matter as the personal representative of the Estate of Myles Hall. *Id.*

[42] The district court wisely noted that if Robert had purchased the NPRI in 1988, the prior action would have been a claim against Robert's ownership interest in the NPRI, and **not** the Estate's. *Id.* This is because Robert's purchase of the NPRI from Myles would have divested Myles and his

estate of ownership of the NPRI. *Id.* Pursuant to N.D.C.C. § 32-17-06, Robert would have been a Defendant in the first action as "an unknown person having title or interest which does not appear of record," since Robert never filed anything with the county Recorder's Office which indicated he had succeeded to ownership of the NPRI. *Id.* The district court correctly found that Robert, as the alleged owner of the NPRI, could have denied that the plaintiff had an estate or interest in the NPRI. *Id.* He could have fully set forth the origin, nature, and extent of his claim to the NPRI, or he could have set forth his rights in the NPRI as a counterclaimant and demanded affirmative relief against the plaintiff and any co-defendant. *Id.* The district court correctly found that the third element of res judicata applied because Robert could have, and should have, litigated the matter in the first action.

[43] Again, res judicata bars claims which were tried or could have been tried in prior proceedings. *Laib, supra*. Res judicata promotes finality, increases certainty, avoids multiple litigation, avoids wasteful delay and expense, and conserves judicial resources." *Lucas, supra*. Robert knew of his potential claim to the NPRI at the time of the prior action. Raising his claim during that action would have met all of the goals promoted by the doctrine of res judicata.

D. There is an identity of causes of action in both this case and the prior action.

[44] "Res judicata applies even if subsequent claims are based upon a different legal theory." *Ungar* at ¶ 11. "The usual tests of identity of actions

are whether a final judgment or decree in one action would operate as a bar to the other; or whether the same evidence will support both actions." *Meagher v. Quale*, 77 N.W.2d 878, 880 (N.D. 1956).

[45] Had Robert litigated his claim to the NPRI in the prior action, a final judgment on the merits would have barred this action to determine his ownership interest against the Estate of Myles Hall and those in privity with the Estate. Robert would have relied on the same evidence to advance his claim to the NPRI by virtue of the alleged purchase and the alleged notation on Myles' Assignment of Royalty. As such, the district court correctly found that there is an identity of the causes of action.

[46] The DMA was but one possible theory that a claimant could use to decide the actual issue of who owned the NPRI. Robert's alleged purchase of the NPRI is another theory to decide that exact same issue of who owned the NPRI. It is not a separate issue that bars the application of res judicata.

[47] To support his faulty view of the law, Robert relies on a misapplication and misinterpretation of *Sundance Oil and Gas, LLC v. Hess Corporation*, 2017 ND 269, ¶ 3, 903 N.W.2d 712. In *Sundance*, Sundance Oil & Gas, LLC ("Sundance") sued Hess Corporation ("Hess") and the owners of disputed mineral rights ("Owners"). *Id.* at ¶ 2. Edward Brown acquired an interest in mineral rights in 1952. *Id.* Edward and his wife died intestate and no probate proceedings were conducted until 2013. *Id.* The Owners were the daughters of Edward and his wife. Hess obtained a lease from the Owners in

2011. *Id.* In April of 2013, Sundance petitioned the district court to create a trust for Edward as an unlocatable mineral owner. *Id.* at ¶ 3. The district court created the trust. *Id.* The trustee executed a lease of the property to Sundance in 2013. *Id.* Sundance brought an action against Hess to quiet title to the lease interest. *Id.* at ¶ 4. The court found that the trust action was res judicata and entered judgment for Hess. *Id.* Hess appealed.

[48] In ruling that res judicata did not apply, this Court noted that "the trustee's lease of the mineral rights to Sundance was an incidental result of the district court's creation of the trust." *Id.* at ¶ 7. The *Sundance* Court further ruled that "[t]his decision and quiet title action will not result in relitigation of claims that were raised, **or could have been raised**, in the trust action because the trust action did not determine who has a superior leasehold interest…" *Id.* at ¶ 8 (emphasis added). Again, Sundance did not execute its lease until after the trust case was decided.

[49] *Sundance* is clearly distinguishable from the instant case. The prior case did not seek to make a trust for the NPRI; it sought to determine whether the Estate was entitled to ownership of the NPRI. Additionally, the *Sundance* case was brought subsequent to the trust case to determine who had superior rights to competing leases: one that was executed prior to the trust case, and one that was executed by the trust after the trust case. The present matter was brought to determine who owns the NPRI that was the subject of the prior case. It is the exact same issue decided in the prior case.

[50] In *Sundance*, the issue of whose leasehold interest was superior could not have been tried at the time of the first action because Sundance did not execute a lease until **after** the trust action. This is clearly distinguishable from the instant case because the issue of the alleged conveyance would have existed at the time of the prior case. As such, it could have been, and should have been, litigated in the prior action. Robert's analysis of *Sundance* is faulty, and his reliance on the same is misplaced.

[51] Robert confuses separate legal arguments with separate causes of action. Plain and simple, ownership of the NPRI was determined in the prior action. That is the same issue that is being litigated in this action. The application of the DMA is a legal argument to determine ownership. The alleged sale of the NPRI is another legal argument to determine ownership. They are different sides of the same coin. The alleged sale argument could have, and should have, been made in the prior action.

[52] Should the Court accept Robert's flawed interpretation of what constitutes an action that is "incidental" to a prior action, then a litigant would be able to institute a new lawsuit under each legal theory he could think of. This would upend the doctrine of res judicata and frustrate the very nuisances the doctrine seeks to avoid.

CONCLUSION

[53] The district court properly found that: (1) Case No. 53-2011-C-00120 reached a final decision on the merits; (2) the instant case involves the

same parties, or their privies, as the prior action; (3) the instant case raises an issue that was, or which should have been litigated in the prior action; and (4) that an identity of issues exists for both cases. As such, the district court was correct to determine that Robert's claim to the NPRI was barred as res judicata.

[54] THEREFORE, this Court should affirm the district court's Judgment of January 16, 2019, and its Order of January 31, 2019.

[55] Respectfully submitted September 5, 2019.

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CERTIFICATE OF COMPLIANCE

[56] The undersigned, as attorney for the Defendant/Appellee in the above matter, hereby certifies, in compliance with N.D.R.App.P. 32, that the above brief was prepared with proportionally spaced, 12-point font typeface, and the total number of pages of the above Brief totals 26 pages, inclusive.

Dated September 6, 2019.

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wblack@bismarcklaw.com

/s/ William C. Black
By: William C. Black (07284)

CERTIFICATE OF SERVICE

[57] I hereby certify that on September 6, 2019 I filed and served the foregoing document on the following by electronic mail transmission, pursuant to N.D.R.App.P. 25 and 31:

Benjamin Keup
Attorney for Robert M. Hall
bwk@pearce-durick.com

Clerk of the Supreme Court
supclerkofcourt@ndcourts.gov

LARSON LATHAM HUETTL LLP
Attorneys for Appellees Deborah E. Hall and Leslie Hall, a/k/a Leslie Butzer Hall
1100 College Dr.
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/s/ William C. Black
By: William C. Black (07284)

20190169
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 9, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Robert M. Hall, Plaintiff and Appellant v. John F. Hall, Deborah E. Hall, Leslie Hall, a/k/a Leslie Hall Butzer, and all unknown heirs, devisees, successors, and creditors of Myles Franklin Hall, Myles F. Hall, a/k/a Myles Hall, deceased, and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint, Defendants and Appellees.	**AFFIDAVIT OF SERVICE** Williams County Civil No.: 53-2018-CV-00744 Supreme Court No. 20190169 Submitted by Larson Latham Huettl LLP, William C. Black (#07284), 1100 College Drive, Bismarck, ND 58502-2056, (701) 223-5300 Attorneys for Plaintiffs/Appellees

[1] I, Sarah Broker, being duly sworn, deposes and says that I am of legal age and not a party to this action, and that I served the following document(s):

1. **Brief of Appellees Deborah E. Hall and Leslie Hall, a/k/a Leslie Hall Butzer; and**
2. **Affidavit of Service.**

[2] On September 9, 2019, by sending a true and correct copy thereof by electronic means only to the following email addresses, to wit:

Benjamin Keup
bwk@pearce-durick.com

[3] To the best of affiant's knowledge, the email address above given is the actual email address of the party intended to be served. The above documents were emailed in accordance with the provision of the Rules of Civil Procedure.

[4] I further certify that copy of the foregoing documents will be mailed first class mail, postage paid, to the following non E-filing participants:

None.

[5] The addresses of each party served are the last reasonably ascertainable post office address of such party.

Rosanne Ogden

Subscribed and sworn to before me this 9th day of September, 2019.

SARAH BROKER
Notary Public
State of North Dakota
My Commission Expires November 16, 2021

Notary Public