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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Titan Machinery, Inc., Plaintiff/Appellee, v. Renewable Resources, LLC, Defendant and Third-Party Plaintiff/Appellee, v. Shawn Kluver and Little Knife Disposal, LLC, Third-Party Defendants/Appellants.	Supreme Court No. 20200021 Cass Cty, No. 09-2017-CV-3746
Titan Machinery, Inc., Plaintiff/Appellee, v. Shawn Kluver, Defendant and Third-Party Plaintiff/Appellant, v. Renewable Resources, LLC, Third-Party Defendant/Appellee.	Cass Cty. No. 09-2019-CV-274

Appeal from Judgment dated January 23, 2020

District Court, East Central Judicial District
Cass County, North Dakota

The Honorable Judge Tristan Van de Streek, Presiding

APPELLANTS' BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES

[1] The issues on appeal are:

1. Whether the district court erred in its findings of fact
2. Whether the district court erred in holding Shawn Kluver liable on a personal guarantee, the purpose of which was to secure an account in Renewable Resources' name, after Renewable terminated his employment
3. Whether the district court erred in holding Shawn Kluver liable on the personal guarantee beyond the $15,000 limit stated in the guarantee
4. Whether the district court erred in holding Little Knife Disposal liable for use of an excavator that was rented by Renewable, used in its business, and only brought to the Little Knife site during a time when Renewable Resources and its owners had wrongfully excluded Kluver and Little Knife from the site
5. Whether the district court erred in concluding that Kluver and Little Knife are required to indemnify Renewable for debts that Renewable incurred for its own benefit
6. Whether the district court erred in failing to require Renewable to indemnify Kluver for his liability under the personal guarantee that secured Renewable's use of the rented excavator in its business

STATEMENT REGARDING ORAL ARGUMENT

[2] Oral argument would be helpful to the Court in this matter because the dispute between the parties is multifaceted. The Court will likely have questions regarding the details of the case and the complicated relationships between the parties.

STATEMENT OF THE CASE

[3] This appeal arises from two separate lawsuits that were consolidated for trial. Shawn Kluver founded Renewable Resources. Renewable's business was essentially to clean soil of hydrocarbons. Renewable needed a tracked excavator that could operate a dirt-grinding bucket at the company's location near Killdeer, North Dakota, because the excavator the company owned broke down too often. Renewable rented an excavator from Titan Rentals. Before leasing the excavator to Renewable, Titan required Kluver to execute a personal guarantee with a credit limit of $15,000.

[4] Kluver had brought in outside investors for Renewable, and the investors drove Kluver out of ownership of the company and fired him. Renewable's new manager Jeff Bennett locked Kluver and Little Knife Disposal out of the saltwater disposal site where Little Knife's business was located. During the time Kluver and Little Knife were unable to access their site, the Titan excavator was moved there. Renewable returned the excavator to Titan without the bucket. Renewable left a substantial unpaid balance with Titan.

[5] In late 2017, Titan sued Renewable to recover the unpaid rentals and damages including the value of the missing bucket.

(Complaint and Amended Complaint [A. 16 et seq.].) Renewable served a third-party complaint on Kluver and Little Knife, who timely answered. (Third-Party Complaint [A. 28 et seq.].) On October 3, 2018, the district court granted Titan summary judgment against Renewable. (Index #62.) Judgment was thereafter entered against Renewable in the amount of $140,042.83. (October 2018 Judgment [A. 57-58].) The third-party complaint proceeded to a bench trial.

[6] In late 2018, Titan commenced a separate lawsuit against Kluver, seeking to enforce the personal guarantee. (Complaint and First Amended Complaint [A. 37 et seq.].) Kluver brought a third-party complaint in that matter against Renewable, alleging unjust enrichment and equitable indemnity. (Answer and Third-Party Complaint [A. 41 et seq.].) Renewable did not file an answer to the third-party complaint. (Docket Sheet [A. 13-15].) The two pending actions were later consolidated for trial. (Index #156 in 09-2017-CV-3746, Index #53 in 09-2019-CV-274.)

[7] The district court held a bench trial on on November 12 and 13, 2019. The district court received testimony from Brandon Messer, David Lees, Jeff Bennett, John Quinn, Christopher Blount, Brandon

Cluff, and Shawn Kluver. The district court received 10 exhibits from Titan, 17 from Renewable, and 2 from Kluver and Little Knife.

[8] The parties submitted post-trial, written arguments. The district court then made findings of fact and conclusions of law and entered judgment. The district court's judgment required Kluver and Little Knife to pay Titan $140,042.83 and to indemnify Renewable in the amount of $100,731.62. (January 2020 Judgment [A. 59-60].)

[9] Kluver and Little Knife timely brought this appeal from the judgment entered against them. (Notice of Appeal [A. 62-63].) No other party has appealed from the district court's judgments.

STATEMENT OF FACTS

[10] The record has two sets of facts: those that were undisputed when Titan obtained summary judgment against Renewable Resources and those that the district court found after the bench trial.

[11] There was a rental agreement between Renewable Resources and Titan. (Order on Summary Judgment [Index #62], ¶ 7.) Renewable Resources did not make all of the payments under the rental agreement with Titan. Ibid. As of the time summary judgment was granted, Renewable owed Titan $104,788.35 for unpaid rentals and finance charges, $29,714.00 in repair and replacement costs, $4,105.98 in

additional finance charges, and approximately $1,314.50 in attorney fees. Ibid. Shawn Kluver was a manager and an agent of Renewable Resources, with authority to bind Renewable Resources to contracts. Id. at ¶¶ 8-9. Renewable never communicated to Titan that there was any limitation on Kluver's authority to act on its behalf. Id. at ¶ 10. Renewable made some payments on the rental agreement. Ibid.

[12] After trial, the district court made additional findings of fact. The remainder of the facts stated here follow those findings and identify those that are erroneous.

[13] Titan is engaged in, among other things, the leasing of heavy equipment. (Findings of Fact, Conclusions of Law, and Order for Judgment [Index #240; hereinafter "Findings"], ¶ 3 [A. 49].) Renewable Resources is a North Dakota limited liability company that had previously engaged in the treatment of oilfield waste. Id. at ¶ 4. Shawn Kluver is a resident of the State of North Dakota and the sole member of Little Knife Disposal. Id. at ¶ 5. Little Knife Disposal, LLC is a North Dakota limited liability company engaged in the operation of a treatment plant located near Mandaree, North Dakota. Id. at ¶ 6.

[14] On June 21, 2016, Renewable Resources executed a rental agreement for the lease of an excavator and related equipment from

Titan. Id. at ¶ 7. The agreement was executed at Kluver's request and direction. Ibid. On July 20, 2016, Kluver and Renewable submitted a credit application to Titan. Id. at ¶ 8. Ibid. Kluver also executed a personal guarantee in conjunction with the credit application and rental agreement. Ibid. The application was submitted to establish a charge account so that Renewable would not need to prepay for use of the leased equipment. Ibid. A charge account was subsequently established for Renewable. Ibid. The district court erroneously found that the rental agreement, credit application and guarantee, and all their terms, were commercially reasonable. Id. at ¶ 12.

[15] Renewable did not return the leased equipment until October 10, 2017. Id. at ¶ 13. The excavator was damaged while it was out on lease and Renewable did not return the bucket. Id. at ¶¶ 14-15.

[16] Titan obtained a judgment against Renewable on October 16, 2018, in the amount of $140,042.83, consisting of unpaid rentals and finance charges in the sum of $104,788.35, repair expenses and finance charges on the same in the amount of $33,819.98, attorney's fees in the amount of $1,314.50, and costs in the amount of $120.00. Id. at ¶ 17. Renewable has not made any payments toward the judgment it owes Titan. Id. at ¶ 18.

[17] Renewable made payments for the rented excavator between June 21, 2016 and December 6, 2016, but did not make any payments after the credit account was established. Id. at ¶ 20. Titan recovered the excavator from the Branch Energy/Little Knife Disposal site near Mandaree, North Dakota. Id. at ¶ 21.

[18] The district court expressly found that "[t]he evidence at trial did not establish by a preponderance of the evidence precisely which pieces of Renewable Resources equipment were used at Little Knife and when the equipment was so used." Id. at ¶ 25. The district court knew that it was "impossible to reconstruct what pieces of equipment were at the Killdeer site or the Little Knife site and when the pieces of equipment were at the sites." Id. at ¶ 33. Despite the acknowledged lack of evidence, the district court erroneously found that Shawn Kluver "directed the transfer of various pieces of equipment from Renewable to the Branch Energy site." Id. at ¶ 23. Erroneous also is the district court's finding that "Shawn Kluver used the personnel, equipment and resources of Renewable to clean up and operate Little Knife." Id. at ¶ 30.

[19] The district court found that the rented excavator "benefited both Renewable Resources and Little Knife/Kluver." Id. at ¶ 32. The

finding that the excavator benefited Little Knife and/or Kluver is not supported by the evidence. The district court noted that "the evidence does not establish when the Leased Equipment was on the Little Knife site or precisely what pieces of equipment were being used for what purpose." Id. at ¶ 35. The district court then made the non sequitur, erroneous finding that Kluver signing the operating agreement for Little Knife Disposal on February 17, 2017, "is the best evidence establishing by a preponderance of the evidence when Kluver began using the Leased Equipment to benefit his Little Knife operation." Ibid.

[20] The rental cost for the leased equipment was $7,800.00 every four weeks plus a $10.00 environmental charge and $507.65 tax for each four-week period. Id. at ¶ 36. Renewable incurred a $900.00 pickup charge because Renewable did not return the equipment to Titan. Id. at ¶ 37. The district court found, erroneously, that Kluver caused this charge "as a result of taking the Leased Equipment to the Little Knife site and using it for his own purposes." Ibid.

[21] The district court also found that "Kluver and Little Knife benefitted from the Leased Equipment from February 17, 2017 until it was returned on October 10, 2017." Id. at ¶ 38. That finding is erroneous. The district court then calculated that the rental costs

during that time were $70,117.62, using its own formula. Id. at ¶ 39. The district court similarly found that "Kluver is responsible for the loss [of the excavator bucket] because he was using the Leased Equipment for his own purposes and would have known or directed the placement of the now missing excavator bucket." Id. at ¶ 40. That finding is also in error.[1] The expense of repairing and replacing the bucket was $29,714.00. Ibid.

[22] The district court stated that "Kluver did not testify credibly about his signature on the guarantee," but gave no explanation for what part of Kluver's testimony lacked credibility. Id. at ¶ 31. Kluver testified consistently that the signature on the personal guarantee was not his, but he must have authorized a Renewable employee to sign his name on it. (R. 2/33:3-15.)[2] When issues were being argued during motions practice, Kluver never contended that he had not signed the guarantee. (R. 2/39:22-25.) He testified that he had assumed he was

[1] The record below shows without question that the bucket was last seen at Renewable Resources' yard near Killdeer. The mystery of the bucket was solved in another lawsuit pending between some of these parties: Renewable Resources' sister company Environmental Driven Solutions apparently sold Titan's excavator bucket at an auction. (See Br. in Supp. of Mot. to Compel, Index #159 in 13-2018-CV-105, ¶ 16.)

[2] The trial below consisted of two days of testimony, transcribed separately. References to the trial transcript herein are formatted as R. Day/Page:Line.

subject to the agreement because he authorized someone to sign his name to it. (R. 2/48:8-13.) No part of this testimony lacks credibility, and Kluver's candor regarding an agreement that he had no knowledge of until he was sued to enforce it certainly cannot stand as reason to take anything else he says at less than face value. (R. 2/34:16-20.)

[23] In making its findings, the district court disregarded abundant evidence that showed the excavator was moved to the Little Knife facility by the owners of Renewable, that it was never used by or for the benefit of Little Knife or Kluver, and that the "missing" bucket was always at Renewable's yard near Killdeer. In particular, the district court's judgment holding Kluver and Little Knife responsible for all of amounts Renewable should have paid Titan is at odds with its finding that Renewable used and benefitted from the excavator.

ARGUMENT

A. Standard of review

[24] The standard of review in this matter, as an appeal from a bench trial, is well-established:

> "In an appeal from a bench trial, the trial court's findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a) and its conclusions of law are fully reviewable. Fargo Foods, Inc. v. Bernabucci, 1999 ND 120, ¶ 10, 596 N.W.2d 38. A finding of fact is clearly erroneous if it is

> induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, [this Court] is left with a definite and firm conviction a mistake has been made. Moen v. Thomas, 2001 ND 95, ¶ 19, 627 N.W.2d 146. 'In a bench trial, the trial court is "the determiner of credibility issues and we do not second-guess the trial court on its credibility determinations."' Id. at ¶ 20.

Service Oil, Inc. v. Gjestvang, 2015 ND 77, ¶ 12, 861 N.W.2d 490 (quoting Brash v. Gulleson, 2013 ND 156, ¶ 7, 835 N.W.2d 798). The district court's "findings are adequate if the record enables [this Court] to understand the [district] court's factual determinations and the basis for its conclusions of law and judgment." Id., ¶ 13 (citing Almont Lumber & Equip., Co. v. Dirk, 1998 ND 187, ¶ 13, 585 N.W.2d 798; First Am. Bank W. v. Berdahl, 556 N.W.2d 63, 65 (N.D. 1996)). Thus, if the record does not enable this Court to understand the basis of the district court's decision, then the findings are not adequate.

B. The district court erred in its findings of fact

1. Some "findings of fact" are actually conclusions of law

[25] The district court's decision stated at least three conclusions of law under the heading "findings of fact." The district court found that the personal guarantee "unconditionally, absolutely, and irrevocably guarantees the prompt and full payment and performance of all of

Renewable Resources' obligations under the Rental Agreement." (Findings, ¶ 9 [A. 49].) This statement goes to the interpretation of the document as well as to its enforceability against Kluver. The interpretation of a contract is a question of law, which this Court independently examines and construes. Moen v. Meidinger, 547 N.W.2d 544, 546 (N.D. 1996) (citing General Elec. Credit Corp. v. Larson, 387 N.W.2d 734, 736 (N.D. 1986)). The question of whether a contract is unconscionable is also a question of law. Rutherford v. BNSF Ry. Co., 2009 ND 88, ¶ 21, 765 N.W.2d 705 (citing Strand v. U.S. Bank Nat'l Ass'n ND, 2005 ND 68, ¶ 5, 693 N.W.2d 918).

[26] The district court also decided that the personal guarantee "further waives notice of any modifications, amendments, or extensions of the [Rental] Agreement, and of Renewable Resources' non-performance or breach of the Agreement." (Findings, ¶ 10 [A. 49].) These are further questions of interpretation and enforceability, which are questions of law. Moen v. Meidinger, 547 N.W.2d at 546; Rutherford v. BNSF Ry. Co., 2009 ND 88 at ¶ 21.

[27] The district court also stated that "[n]o testimony or evidence regarding the formation of the Rental Agreement and the subsequent extension of credit evidences or establishes unfair surprise, inequality

of bargaining power, or oppression." (Findings, ¶ 11 [A. 49].) Unconscionability is the nearest doctrine to this conclusion, and that is a question of law. Rutherford v. BNSF Ry. Co., 2009 ND 88 at ¶ 21.

2. There is no evidence to support a finding that the contracts are commercially reasonable

[28] The district court found that the Titan rental agreement, credit application, and personal guarantee and all of the terms therein "are commercially reasonable." (Findings, ¶ 12 [A. 49].) There is no evidence in the record to support this finding. The district court's determination of this fact cannot be understood from the record, and it is therefore clearly erroneous. Service Oil, Inc. v. Gjestvang, 2015 ND 77 at ¶ 12-13. In particular, it is clear that a mistake has been made as to the commercial reasonableness of the personal guarantee. The document, as written, has no limitations whatsoever. It purports to bind not only Kluver but also his heirs, forever. (Personal Guarantee [Trial Ex. 2; A. 64].) It can be extended to any amount of money, without even notifying Kluver. Ibid. The document, on its face, holds Kluver and his heirs for all time liable for the debts that Renewable—a company with which he no longer has any connection—incurs with Titan. That outcome is beyond unreasonable: it is absurd.

[29] In practice, the unreasonableness of the guarantee played out nearly to that extreme. Kluver formed Renewable Resources in 2010 or 2011. (R. 2/13:1-3.) In 2015 or 2016, his outside investors convinced him to give up ownership of Renewable and its sister company, Environmental Driven Solutions. (R. 1/89:2-3, 2/48:14-49:7.) The company then used Kluver's personal guarantee to escape liability for its own debts and force Kluver to bear them to the extent of ten times what he had agreed to in the first place. The judgment against Kluver is an absurd result and clearly erroneous.

3. There is no evidence that the excavator benefited Little Knife or Kluver

[30] In making its findings, the district court disregarded abundant evidence that showed the excavator was moved to the Little Knife facility by the owners of Renewable, that it was never used by Little Knife or Kluver, and that the missing bucket was always at Renewable's yard near Killdeer. The district court also improperly shifted the burden of proof to Kluver and Little Knife. It found that the evidence "did not establish by a preponderance of the evidence precisely which pieces of Renewable Resources equipment were used at Little Knife and when the equipment was so used" and that it was

"impossible to reconstruct what pieces of equipment were at the Killdeer site or the Little Knife site and when the pieces of equipment were at the sites." (Findings, ¶¶ 25 and 33 [A. 7-8].)

[31] But then, despite acknowledging the evidence was insufficient, the district court found as fact that the excavator "benefited both Renewable Resources and Little Knife/Kluver. When the Leased Equipment was at the Renewable site it was used to further the operations of Renewable Resources. When it was at the Killdeer site and [sic] benefitted Little Knife and Kluver." (Findings, ¶ 32 [A. 52].)[3] The district court also made the non sequitur finding of fact that, because Little Knife Disposal, LLC, was formed on February 17, 2017, Titan's excavator must have benefitted Little Knife starting on that date. (Findings, ¶ 35 [A. 53].) The district court found as fact that "Kluver and Little Knife benefitted from the Leased Equipment from February 17, 2017 until it was returned on October 10, 2017." (Findings, ¶ 38 [A. 53].) These facts are not supported by the evidence.

[32] Little Knife's facility is 25 miles from Killdeer, near Mandaree. (R. 2/32:2-3.) Renewable's facility is near Killdeer. (R. 1/83:10-84:2, 1/161:10-15, 2/6:9-24.) The testimony makes it clear that

[3] The Killdeer site is Renewable's site. Little Knife's site is near Mandaree. See ¶ 32, infra.

Titan's excavator was used at Renewable's facility from its original rental in June 2016 until sometime in the autumn of 2017, and that it benefited only Renewable. It was moved to the Little Knife facility during the time when Jeff Bennett, acting on behalf of Renewable Resources, had excluded Kluver and Little Knife from the Little Knife facility. To the extent it was ever used at the Little Knife facility, the excavator was still being used by Renewable for its own benefit.

[33] Titan's lease of the excavator to Renewable began with a rental agreement dated June 21, 2016. (R. 1/12:24-13:1.) It was out on the lease from June 21, 2016, until October 10, 2017. (R. 1/28:13-18.) The credit application was dated July 20, 2016. (R. 1/18:20-22.) Renewable made payments until the charge account was created on or about December 6, 2016. (R. 1/44:25-45:5.)

[34] Renewable rented the excavator because its John Deere 270 tracked excavator had broken down; specifically, the drive had gone out of it. (R. 1/1086-14, 1/162:3-11, 1/162:20-22, 2/10:2-8, 2/17:20-18:4.) The Case excavator was better than the John Deere because it did not break down and also had the ability to run Renewable's grinding bucket in reverse to clear jams. (R. 2/73:4-17.) Kluver had John Quinn go to

Dickinson to bring the Case excavator from Titan to Renewable's Killdeer facility. (R. 1/161:10-15.)

[35] Quinn was one of three main people who operated the Case excavator. (R. 1/162:23-25, 1/163:13-17.) The excavator was used for various tasks, including burning dirt and loading trucks. (R. 1/163:1-6.) Burning dirt, also known as thermal treatment, removes hydrocarbons from contaminated soil so it can be re-used. (R. 2/13:15-17, 2/14:10-21.) The excavator was particularly used with a grinder bucket to blend materials for thermal treatment. (R. 2/16:5-22.) Renewable removed the normal bucket that came on the excavator from Titan and attached a grinder bucket immediately after receiving the excavator in 2016. (R. 2/16:5-22, 2/16:23-17:4, 2/18:13-19:1.)

[36] About two weeks after Renewable rented the excavator, the health department issued the company a cease and desist. Renewable's permit was terminated in late summer 2016. (R. 1/90:6-11.) After that, Renewable was able to continue burning dirt for a period of time. (R. 2/49:20-50:10.) The company finally had to stop burning dirt in the spring of 2017. (R. 2/50:23-51:4.) The Case excavator was one of the machines that Renewable used to load dirt to haul off of the Renewable site, which lasted a period of 6 or 7 months. (R. 1/164:15-165:7.) Chris

Blount testified that he saw the excavator preparing material to be loaded and hauled off the Renewable site. (R. 1/183:12-17.) Invoices to Renewable reflect that Blount Trucking was one of the companies that hauled dirt from the Renewable site. (R. 2/71:16-72:10.) Similarly, Brandon Cluff worked at Renewable's dirt burning facility and saw the Case excavator at Renewable, near Killdeer. (R. 2/5:19-24, 2/6:9-24.) Cluff operated both the John Deere and Case tracked excavators at Renewable. (R. 2/7:9-15.) He testified that the Case excavator was used to stack dirt in Renewable's building and feed the dirt burner hopper up until he left at the end of August 2017. (R. 2/7:16-14.) He specifically remembered using the Case excavator to load trucks at Renewable in February 2017 and August 2017. (R. 2/8:3-17, 2/8:18-23.)

[37] When Quinn left for a job in Montana around August 2017, the excavator was still being used at the Renewable yard. (R. 1/164:5-11.) Renewable was still sending loads of dirt to Republic, a disposal company, as of July 13, 2017, and September 5, 2017. (R. 2/27:14-3, 2/30:12-31:2.) On October 6, 2017, Jeff Bennett fired Kluver from his job at Renewable. (R. 1/135:6-10.) At that time, there was still dirt at Renewable's yard that needed to be loaded and removed. (R. 2/23:5-18.)

[38] Kluver last saw the Case excavator at Renewable's yard. (R. 2/32:18-25.) He never saw the excavator at the Little Knife facility. (R. 2/37:20-38:2.) He did not haul it there, ask anyone to haul it there, or know who hauled it there. Ibid. Quinn never saw the Case excavator operated outside of Renewable's yard. (R. 1/163:7-12.)

[39] For a period of about two months, Jeff Bennett kept Kluver and Little Knife from accessing the Little Knife Disposal facility. (R. 2/32:6-17, 1/138:24-139:12.) That period began when he fired Kluver on October 6, 2017, and continued until sometime in November 2017. Ibid. Bennett had begun working for Renewable and Environmental Driven Solutions in late August 2017. (R. 1/119:9-11.) His first trip to North Dakota was on or about September 13, 2017. (R. 1/135:17-136:8.) Bennett told Brandon Messer of Titan that he did not know where the excavator was, but that it was in Kluver's hands. (R. 1/52:12-22.) Messer's first contact with Bennett was in September or October 2017. (R. 1/55:4-14.) The excavator was collected from the Little Knife facility on October 10, 2017. (R. 1/28:13-18.) The only person who testified that he had personal knowledge of the excavator being at Little Knife at some specific point prior to October 10, 2017, was David Lees, who had previously quit working for Renewable in lieu of taking a drug test at

Kluver's request. (R. 1/111:23-25.) Lees testified that the excavator was not at Little Knife in August 2017. (R. 1/102:4-7.) He did not have much knowledge about excavators because he worked on a different part of Renewable's operation. (R. 1/97:23-98:3, 100:12-21.) He testified that he did not know when the excavator showed up at Little Knife. (R. 1/95:10-16, 97:18-22.) He did not know that the excavator was actually used for anything at Little Knife. (R. 1/99:1-6.) He worked inside most of the time and the excavator was used outside. (R. 1/97:23-98:3.)

[40] The owners of Renewable and Environmental Driven Solutions testified in another matter in North Dakota that they opened a bank account in Little Knife Disposal's name, told Little Knife's customers to pay them instead, and then drained over $400,000.00 of money from their account into an Environmental Driven Solutions bank account. (R. 2/73:18-74:9.) They have never paid any of the expenses of Little Knife Disposal. (R. 2/80:1-9.) Renewable has never invoiced Little Knife for work that it claims Renewable, its employees, or its equipment performed for Little Knife. (R. 1/148:21-23.)

[41] Renewable's employees in North Dakota, including Kluver, always had to get approval from Gary Olson or Gary Pilgrim in Idaho before paying any bills for Renewable or Environmental Driven

Solutions. (R. 1/141:22-142:6, 2/34:21-35:25.) The Titan rental bill was on the monthly spreadsheet or calendar that was sent to Idaho for approval, and some but not all payments were approved. (R. 2/37:4-12.) Management in Idaho never gave Kluver a specific reason why they would not pay Titan's full invoice. (R. 2/37:13-19.) Even Jeff Bennett could not explain why Gary Olson and Gary Pilgrim did not want to pay the Titan rental invoices. (R. 1/142:22-143:1.) Renewable never objected to the invoice amounts and nobody from Renewable ever told Titan that they did not know where the excavator was, that they could not access it, or that they could not use it. (R. 1/27:5-7. 1/38:4-8.)

[42] Titan serviced the excavator at Renewable's yard in September 2016. (R. 1/53:1-11.) Titan never had trouble finding the machine, which was at the Renewable shop near Killdeer. (R. 1/83:10-84:2.) The bucket that was never returned to Titan was in fact always at Renewable's yard near Killdeer. (R. 1/57:20-25. See also n. 1, supra.)

[43] There was no evidence at trial that Little Knife or Kluver ever received a benefit from the rented excavator. The evidence is that Renewable needed, rented, and used the excavator from June 2016 until October 2017. While the excavator was moved to the Little Knife facility at some point on or before October 10, 2017, there was no

evidence at all to show the actual date when that took place. All the testimony consistently established that the excavator was moved to Little Knife while Bennett, Renewable, and Environmental Driven Solutions had taken over the site.

[44] The excavator was still being used at Renewable's Killdeer facility as late as August 2017. No testimony from anyone who professed to have personal knowledge established that the excavator was actually used by Little Knife. The fact that Renewable, Environmental Driven Solutions, and their owners not only excluded Kluver and his company from the Little Knife facility but also admitted under oath to taking over $400,000.00 of Little Knife's customer payments for their own benefit shows beyond any doubt that, even if the excavator had been used for something at Little Knife, it was for the benefit of others and not for Kluver or Little Knife Disposal, LLC.

4. There is no evidence that Kluver caused Renewable Resources to incur a pickup charge for the excavator

[45] The district court found that "Kluver caused Renewable Resources to incur a $900.00 pickup charge as a result of taking the Leased Equipment to the Little Knife site and using it for his own purposes." (Findings, ¶ 37 [A. 53].) There is no support in the record for

this finding. The excavator was taken to the Little Knife facility by some mechanism other than Kluver, and he could not return it to Titan when Bennett had fired him and then excluded him from the Little Knife facility where the excavator was eventually picked up.

C. The district court erred in holding Kluver liable on the personal guarantee

[46] The personal guarantee in this case is part of Titan's credit application form. (A. 64.) The form has three sections. The first is entitled "Commercial Request Information (Business)." Ibid. The second, left blank in this instance, is entitled "Proprietor Information (Individual)." Ibid. The third is entitled "Personal Guaranty (Optional)." Ibid. The form was filled out by hand to provide Titan with information about Renewable Resources, LLC, and Shawn Kluver. Ibid. There is some fine print in the last section of the document, which states in its entirety:

> If an Account is opened in response to the foregoing application, in consideration of Lender granting Applicant the Account, the undersigned Guarantor hereby unconditionally, absolutely and irrevocably guarantees the prompt and full payment and performance of all Applicant's obligations under the agreement establishing the Account (the "Agreement"), and further agrees, in the event of any default under the Agreement, to pay the total balance due on the Account upon demand, without requiring Lender or its assignees to make demand and/or

> proceed first to enforce the Agreement against the Applicant. The Guarantor hereby waives notice of any modifications, amendments, or extensions of the Agreement, and of Applicant's non-performance or breach of the Agreement.
>
> The payment obligations of the Guarantor are the direct, primary and continuing obligations of the Guarantor and Guarantor's heirs, successors and assigns, and not merely a guaranty of collection. By signing below the Guarantor also agrees, individually and not on behalf of Applicant, that Lender or its designee may obtain credit reports on said Guarantor from credit reporting agencies, and otherwise investigate the credit of said Guarantor, and hereby instructs all credit reporting agencies to provide Lender with such credit reports upon request.

(A. 64.) This is the contract that Titan seeks to enforce against Kluver.

[47] The facts are stark. Kluver founded Renewable Resources. He brought in outside investors, who took control of the company. He signed a personal guarantee that was necessary for Renewable to continue renting the excavator, which it used to clean up its site as ordered by the Department of Health. The outside investors forced him out of the company, first as an owner and then as an employee. Then Renewable refused to pay Titan and fed Kluver to the wolves.

[48] Personal guarantees have a place in commerce. However, they should not be a permanent millstone around an ex-employee's neck. The district court's judgment accomplishes exactly that. The

foundation of the personal guarantee was that Kluver, as Renewable's manager, agreed to guarantee a portion of the company's debt to Titan. That foundation ceased to exist when Renewable fired him, damaged the excavator, lost or sold the bucket, refused to return the machine to Titan, and refused to pay the agreed rental amounts. The law should not endorse such conduct by punishing the guarantor.

[49] The extent of a contract is limited to those things about which it appears the parties intended to contract. N.D.C.C. § 9-07-13. One of the elements of a contract is the mutual consent of the parties. N.D.C.C. § 9-01-02(2). "Consent is not mutual unless the parties all agree upon the same thing in the same sense." N.D.C.C. § 9-03-16. Kluver cannot be said to have consented to himself and his heirs forever being liable to Titan for every amount that Renewable ever incurs, even without Titan needing to ask Renewable to pay it first, but that is what the district court's judgment requires.

[50] Unconscionability, a doctrine under which unfair contracts are held unenforceable, is a question of law. Rutherford v. BNSF Ry. Co., 2009 ND 88, ¶ 21, 765 N.W.2d 705 (citing Strand v. U.S. Bank Nat'l Ass'n ND, 2005 ND 68, ¶ 5. 693 N.W.2d 918). For a court to decline enforcement of terms of a contract, they must be both

procedurally and substantively unconscionable. Factors underlying procedural unconscionability are unfair surprise, oppression, and inequality in bargaining power. Rutherford, 2009 ND 88 at ¶ 22. Titan's decision to impose financial obligations of approximately 10 times what Kluver had agreed to without so much as advance notice is an unfair surprise. Titan never informed Kluver that it would ask him to pay more than the $15,000 that he agreed to. (R. 1/75:5-10.)[4] Titan clearly had greater bargaining power than Kluver, inasmuch as it was able to turn his $15,000 personal guarantee into a debt of over $140,000. The magnitude of the change is clearly oppressive.

[51] The personal guarantee is also substantively unconscionable. This prong of the Court's analysis "focuses upon the harshness or one-sidedness of the contractual provision in question." Rutherford, 2009 ND 88 at ¶ 22 (quoting Strand, 2005 ND 68 at ¶ 7). The personal guarantee is one-sided, giving no benefit or power at all to Kluver and all the benefit and power to Titan. There is no part of the written terms that would allow Kluver or his heirs ever to escape their servitude, and Renewable can always run up debts and force Kluver and his heirs for

[4] The actual credit limit that Titan approved was only $10,000. (R. 1/71:11-18.)

all eternity to pay them, even though Renewable fired Kluver in October 2017. The personal guarantee is unconscionable.

D. The district court erred in extending Kluver's liability under the personal guarantee beyond the amount stated on its face

[52] The top of the credit application form has a line entitled "Requested Credit Limit," which is filled in with the hand-written amount 15,000.00. (A. 64.) Handwritten terms control over preprinted words in a form. N.D.C.C. § 9-07-16. All terms of a contract must be given meaning when interpreting it. N.D.C.C. § 9-07-06. If there is any uncertainty in a contract, it should be resolved against the party causing it. N.D.C.C. § 9-07-19.

[53] Shawn Kluver testified that his understanding of the personal guarantee was that no more than $15,000 would be extended as credit for Renewable. (R. 2/34:6-10.) No evidence was presented to show that Kluver was ever informed that he and his heirs would be held liable for 10 times that amount. His personal liability, if any, should be limited to what he reasonably understood to be the meaning of the contract, the sum of $15,000.00.

E. The district court erred in holding Little Knife liable for use of an excavator that was rented and used by Renewable and brought to Little Knife's facility during a time when Renewable had excluded Kluver and Little Knife from the site

[54] As explained above, Renewable and its owners received all the benefit of the rented excavator. The earliest that the excavator could have been at Little Knife was the end of August 2017, when it was seen in use at Renewable's yard. (R. 1/164:5-11, 2/7:16-24, 2/8:18-23, 1/102:4-7.) Kluver was fired and excluded from Little Knife on October 6, 2017, and the excavator was returned before he regained access. (R. 1/135:6-10, 1/138:24-139:12.) The excavator could not have been at Little Knife's facility before September 1, 2017. Kluver and Little Knife could not have benefitted from it after October 6, 2017. The maximum period from which any rational person could conclude Kluver and Little Knife might have benefited from the rented excavator is 36 days. Yet, the district court's judgment holds Little Knife and Kluver liable for all rentals of the excavator from June 21, 2016, through October 10, 2017, a period of 476 days, more than 13 times the maximum time the excavator could have been at Little Knife's facility. That is clearly erroneous.

F. The district court erred in requiring Kluver and Little Knife to indemnify Renewable for debts that Renewable incurred for its own benefit

[55] The district court recognized that Renewable actually did benefit from the rented excavator. (Findings, ¶ 32 [A. 52].) But it held Kluver and Little Knife liable to indemnify Renewable for the entire amount that it paid to Titan. (January 2020 Judgment, ¶ 2 [A. 60].) That legal conclusion is not justified by the facts of the case.

1. Renewable received all the benefit of the excavator

[56] As explained above, Renewable and its owners were the sole parties to benefit from the excavator. No evidence supports the conclusion that Kluver or Little Knife Disposal, LLC, received any benefit from the excavator. It is inequitable for a company like Renewable to obtain all of the benefit of something while forcing its ex-employee to bear all of the cost of that thing. Kluver has been adjudged liable to Titan for $140,042.83 and to Renewable for $100,731.62. (January 2020 Judgment, ¶ 2 [A. 60].) In other words, even though Renewable obtained the benefit of the excavator, Kluver is held responsible for the entire cost of it.

[57] The district court's judgment forces Kluver to pay Titan all money that Renewable owes it and to pay Renewable back all of the money it paid to Titan. That conclusion is not supported by the facts or by any source of law. Renewable received the benefit of the excavator. There is no reason why Kluver should be forced to pay for Renewable's use of the machine. This Court looks with skepticism even at piercing a corporate veil and forcing the officers or directors of a corporation to pay the company's debts. Axtmann v. Chillemi, 2007 ND 179, ¶ 12, 740 N.W.2d 838 (citing Jablonsky v. Klemm, 377 N.W.2d 560, 563 (N.D. 1985); Hilzendager v. Skwarok, 335 N.W.2d 768, 774 (N.D. 1983)). "Organizing a corporation to avoid personal liability is a legitimate goal and is one of the primary advantages of doing business in the corporate form." Ibid. (citing Hanewald v. Bryan's Inc., 429 N.W.2d 414, 415 (N.D. 1988). But the district court's judgment, without legal analysis of this Court's prescribed factors for piercing the corporate veil, required an ex-employee of Renewable to pay its expenses.

2. Renewable certainly received some benefit from the excavator

[58] Assuming arguendo that there were some evidence that Kluver or Little Knife benefitted from use of the excavator, the district

court's judgment is nevertheless in error because it requires Kluver and Little Knife to pay for all of the use of the excavator, including the portion from which Renewable benefitted. As explained above, there is absolutely no evidence in the record to support a finding that Kluver or Little Knife benefitted from the excavator before September 1, 2017, or after October 6, 2017. That period of 36 days is the maximum for which Kluver and Little Knife can equitably or legally be held responsible.

G. The district court erred in failing to require Renewable to indemnify Kluver for his liability under the personal guarantee that secured Renewable's use of the rented excavator

[59] "Indemnity is an equitable doctrine not amenable to hard and fast rules, and rather than using strict standards, courts must examine carefully both parties' conduct in light of general notions of justice." Grinnell Mut. Reinsurance Co. v. Center Mut. Ins. Co., 2003 ND 50, ¶ 40, 658 N.W.2d 363 (citing Nelson v. Johnson, 1999 ND 171, ¶ 20, 599 N.W.2d 246). "A party who acts in good faith in making payment under a reasonable belief that it is necessary to his protection is entitled to indemnity." Grinnell Mut., 2003 ND 50 at ¶ 41 (quoting Aetna Life & Cas. Co. v. Ford Motor Co., 50 Cal.App.3d 49, 122 Cal.Rptr. 852, 854 (1975)). The prerequisite of the law is "an actual

monetary loss through payment of a judgment or settlement." Grinnell Mut., 2003 ND 50 at ¶ 48 (quoting Christian v. County of Los Angeles, 176 Cal.App.3d 466, 222 Cal.Rptr. 76, 78 (1986)).

[60] If Kluver is required to pay anything to Titan, notions of justice require that Renewable indemnify him. He made the personal guarantee to Titan so that Renewable could rent the excavator and use it, both in operating its business and in decommissioning its business when the health department took away its permit. Renewable should indemnify Kluver for not only the judgment Titan received against him but also his cost of defending himself from Titan's litigation herein.

[61] Renewable did not file its pleading to answer the third-party complaint that Kluver brought against it, seeking indemnity and compensation for unjust enrichment if the personal guarantee is enforced against him. Even if Renewable had filed its pleading, the district court erred by refusing to require Renewable to indemnify Kluver for the personal guarantee he executed solely for the benefit of his former employer, Renewable Resources.

CONCLUSION

[62] For the foregoing reasons, the judgment should be reversed with instructions to hold Renewable alone liable for the excavator and

require Renewable to indemnify Kluver for all amounts he is required to pay under the personal guarantee, if any, and his costs of defense in this matter.

Respectfully submitted this 14th day of May, 2020.

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CERTIFICATE OF COMPLIANCE

[63] The foregoing brief complies with the typeface and page limitations of N.D.R.App.P. 32(a). The foregoing brief is set in 13-point Century Schoolbook print for 8-1/2" by 11" paper, with margins of 1-1/2" on the left and 1" on all other edges, and is 38 pages long.

Dated this 14th day of May, 2020.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Titan Machinery, Inc., Plaintiff/Appellee, v. Renewable Resources, LLC, Defendant and Third-Party Plaintiff/Appellee, v. Shawn Kluver and Little Knife Disposal, LLC, Third-Party Defendants/Appellants.	)	Supreme Court No. 20200021 Cass County No. 09-2017-CV-3746
Titan Machinery, Inc., Plaintiff/Appellee, v. Shawn Kluver, Defendant and Third-Party Plaintiff/Appellant, v. Renewable Resources, LLC, Third-Party Defendant/Appellee.	)	Cass County No. 09-2019-CV-274

Appeal from Judgment dated January 23, 2020

District Court, East Central Judicial District
Cass County, North Dakota

The Honorable Judge Tristan Van de Streek, Presiding

CERTIFICATE OF SERVICE

[1] I hereby certify that, on today's date, I served the Appellants' Brief, Appellants' Appendix, and this certificate of service on the following persons by electronic mail:

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