20200021

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 15, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Titan Machinery, Inc., Plaintiff/Appellee, vs. Renewable Resources, LLC, Defendant and Third-Party Plaintiff/Appellee, vs. 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, vs. Shawn Kluver, Defendant and Third-Party Plaintiff/Appellant, vs. Renewable Resources, LLC, Third-Party Defendant/Appellee.	Cass Cty, No. 09-2019-CV-274

ON APPEAL FROM JUDGMENT DATED JANUARY 23, 2020
STATE OF NORTH DAKOTA
CASS COUNTY
THE HONORABLE JUDGE TRISTAN VAN DE STREEK, PRESIDING

APPELLEE RENEWABLE RESOURCES, LLC'S BRIEF

Jonathan P. Sanstead #05332
Sanstead Law Office, PLLC
P. O. Box 2596
Bismarck, ND 58502
Telephone: (701) 220-2890
Email: jon@sansteadlaw.com

Attorneys for Appellee
Renewable Resources, LLC

TABLE OF CONTENTS

Paragraph Nos.

TABLE OF CONTENTS…….Page 3

TABLE OF AUTHORITIES ……..…Page 5

JURISDICTIONAL STATEMENT…….1

STATEMENT OF THE ISSUES…….…..…2

STATEMENT OF THE FACTS…….…….…….3

LAW AND ARGUMENT.…….…… 28

I. Standard of Review .……28

II. Renewable Resources limits its response to sections B(3) and 4, E, F and G of Appellants' Brief as the other sections relate to the personal guaranty issued by Shawn Kluver to Titan Machinery ……..29

III. The district court did not err in its findings of fact …….……30

A. There is overwhelming evidence that the Case CX290B excavator rented from Titan Machinery benefited Little Knife Disposal and Shawn Kluver ……30

B. The evidence supports holding Shawn Kluver responsible for Titan's pick-up charge ……..…38

IV. The district court did not err in holding Little Knife Disposal liable for use of the Case CX290B excavator, when the extended use of the excavator was necessitated by Renewable Resource's excavator being used at Little Knife Disposal and the rented excavator later being moved to the Little Knife Disposal location for use by Shawn Kluver and his company……...42

V. The district court did not err in concluding that Shawn Kluver and Little Knife Disposal are required to indemnify Renewable Resources for a portion of the sums due and owing Titan Machinery when such sums were incurred because Little Knife Disposal was using Renewable Resources' excavator and later used the rented excavator for their own benefit ……...…48

VI. The district court did not err in failing to require Renewable Resources to indemnify Shawn Kluver for his liability under the personal guaranty ……..…….55

CONCLUSION…….…….. 59

CERTIFICATE OF COMPLIANCE……..…… 60

TABLE OF AUTHORITIES

Cases **Paragraph**

Border Res., LLC v. Irish Oil & Gas, Inc.,

2015 ND 238, 869 N.W.2d 758……..…28

Fortune View Condo. Ass'n v. Fortune Star Dev. Co.,

151 Wash. 2d 534, 90 P.3d 1062, (2004)……49

GeoStar Corp. v. Parkway Petroleum, Inc.,

495 N.W.2d 61 (N.D.1993)…….48

KLE Constr., LLC v. Twalker Dev., LLC,

2016 ND 229, 887 N.W.2d 536 …….28

Lincoln Land Dev., LLP v. City of Lincoln,

2019 ND 81, 924 N.W.2d 426……28

Mann v. Zabolotny,

2000 ND 160, 615 N.W.2d 526. …….48

Nelson v. Johnson,

1999 ND 171, 599 N.W.2d 246……..…48

Peoples' Democratic Republic of Yemen v. Goodpasture, Inc.,

782 F.2d 346 (2d Cir.1986)……49

Statutes

N.D.C.C. § 3-02-12……..…50, 51

N.D.C.C. § 22–02–01……..…48

N.D.C.C. § 27-05-06……. . .1

N.D.C.C. § 28-27-01……..……1

N.D.C.C. § 34-02-14 ……50, 51

Other Authorities

N.D. Const. Art. VI § 2……1

N.D. Const. Art. VI § 6……..……1

N.D. Const. Art. VI § 8……1

Restatement of Restitution § 96 ……49

JURISDICTIONAL STATEMENT

[¶1] The district court had jurisdiction to hear and try this case under Article VI, section 8 of the North Dakota Constitution and section 27-05-06 of the North Dakota Century Code. This Court has jurisdiction to hear this appeal under Article VI, sections 2 and 6, of the North Dakota Constitution and section 28-27-01 of the North Dakota Century Code.

STATEMENT OF THE ISSUES

[¶2] The issues on appeal which relate to Renewable Resources are:

I. The district court did not err in its findings of fact.

A. There is overwhelming evidence that the Case CX290B excavator rented from Titan Machinery benefited Little Knife Disposal and Shawn Kluver.

B. The evidence supports holding Shawn Kluver responsible for Titan's Machinery's pick-up charge.

II. The district court did not err in holding Little Knife Disposal liable for use of the Case CX290B excavator, when the extended use of the excavator was necessitated by Renewable Resource's excavator being used at Little Knife Disposal and the rented excavator later being moved to the Little Knife Disposal location for use by Shawn Kluver and his company.

III. The district court did not err in concluding that Shawn Kluver and Little Knife Disposal are required to indemnify Renewable Resources for a portion of the sums due and owing Titan Machinery when such sums were incurred because

Little Knife Disposal was using Renewable Resources' excavator and later used the rented excavator for their own benefit.

IV. The district court did not err in failing to require Renewable Resources to indemnify Shawn Kluver for his liability under the personal guaranty

STATEMENT OF THE FACTS

[¶3] Renewable is a North Dakota limited liability company that was engaged in the treatment of oilfield waste. At all relevant times, the general manager of Renewable was Shawn Kluver. In or about 2016, Renewable's permit to treat oilfield waste was not renewed resulting in the ceasing of all business operations. (Trans. 1/90:6-11.) Dave Lees, an employee of Renewable, testified at trial that he and other Renewable employees were charged with decommissioning Renewable's treatment plant which decommissioning was completed in September 2016. (Trans. 1/91:6-11; 1/92:8-13.) Once the plant decommissioning was completed, the only work remaining at Renewable was the removal of dirt and other related oilfield waste requiring the use of heavy equipment, including an excavator.

[¶4] Renewable and/or its sister company, Environmental Driven Solutions, LLC ("EDS"), owned one or more payloaders as well as two excavators, a John Deere 270 tracked excavator and a John Deere 210 rubber tire excavator. (Trans. 1/170:1-18.) The John Deere 270 had, prior to June 21, 2016, been used by Renewable to operate its treatment plant. (Trans. 2/17:8-15.) According to the trial testimony of Shawn Kluver and John Quinn, a former Renewable employee and current Little Knife Disposal employee, the final drive on the John Deere 270 went out and was

in need of repair. (Trans. 2/17:22-23.) Because of pressure being asserted by the North Dakota Department of Health to get the Renewable plant cleaned up, the decision was made by Shawn Kluver to rent a Case excavator from Titan while the John Deere 270 was being repaired. (Trans. 2/17:16-25; 2/17:1-4.) On or about June 21, 2016 Shawn Kluver rented a Case CX290B tracked excavator from Titan under the name of Renewable. (Renewable App. 1.)

[¶5] The Case CX290B was picked up by John Quinn on June 21, 2016 from Titan's Dickinson, North Dakota facility and delivered to Renewable's treatment plant near Killdeer, North Dakota. (Trans. 1/160:21.) Pursuant to the Rental Agreement, the Case CX290B was to be rented for one week by Renewable and returned on or about June 28, 2016. (Renewable App. 1.) Based upon the return date set forth in the Rental Agreement, it was anticipated by Renewable that the repairs to the John Deere 270 would be completed within a week at which time the John Deere 270 could be again used at the Renewable plant and the Case CX290B could be returned to Titan.

[¶6] The payment terms for the rental of the Case CX290B was prepay only. (Trans. 1/19:11-13.) According to Brandon Messer, the Titan representative who managed the Renewable rental account, payment was to be made in advance for the time in which the equipment was in the custody of Renewable. Id. Believing that the Case CX290B would be rented for a short period of time while the John Deere 270 was being repaired, the owners of Renewable approved the initial rental payments to Titan.

[¶7] Unbeknownst to the owners of Renewable, on or about July 20, 2016, Courtney Kluver, Shawn Kluver's daughter, inquired about Renewable setting up a line of credit with Titan. (Renewable App. 4.) Brandon Messer forwarded a credit application to Ms. Kluver for completion. Id. The credit application was returned to Titan with only the top half completed which related exclusively to Renewable. Id. On July 21, 2016, Brandon Messer sent an e-mail to Courtney Kluver explaining that the personal guaranty section also needed to be completed since Titan would not agree to extend credit to Renewable. In particular, the July 21, 2016 e-mail stated, in relevant part, as follows:

> Can I have you please fill out the Personal Guaranty section of this application. See below from comments from our Rental Credit Dept.
>
> After finding a match for this company in the D&B database, I resubmitted the information and it came back as declined. I completed a manual review, and also reviewed information from the Secretary of State. Due to the years in business and the very limited information that is reporting to D&B, I would recommend the primary business owner complete the personal guaranty section of the application. Please let me know if/when this is completed.

Id.

[¶8] As Shawn Kluver was well aware, he held absolutely no ownership interest in Renewable in 2016. Instead of asking one of Renewable's owners, Gary Olsen or Jayce Howell, to complete the personal guaranty, Shawn Kluver elected to name himself as the personal guarantor. When asked at trial if he had ever requested that Mr. Olsen or Mr. Howell sign the personal guaranty, Shawn Kluver responded that he had not asked them and that he knew they would not have agreed to sign such a guaranty. (Trans. 2/33:25; 34:1-5.)

[¶9] Shawn Kluver had previously represented to Mr. Olsen and Mr. Howell that the rental of the Case CX290B would be for a very short period of time while the John Deere 270 was being repaired. Had Mr. Kluver asked either Mr. Olsen or Mr. Howell to sign a personal guaranty, questions would have undoubtedly been asked regarding the necessity of a credit account when the Case CX290B was only being leased for a short period. Questions that Shawn Kluver clearly did not want to have to answer.

[¶10] The personal guaranty signed by Shawn Kluver states, in relevant part regarding the responsibility of the guarantor, as follows:

> 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 . . .

(App. 64.)

[¶11] At trial, Shawn Kluver contended that the signature on the personal guaranty was not his but that of his daughter. (Trans. 2/33:8-9.) Mr. Kluver's contention that he did not sign the guaranty was challenged through his prior testimony from a November 27, 2018 evidentiary hearing on a motion for preliminary injunction in the matter of *Environmental Driven Solutions, LLC and Renewable Resources, LLC vs. Shawn Kluver, et al*, Civil No. 13-2018-CV-00006, North Dakota District Court, Southwest Judicial District. At the November 27, 2018 evidentiary hearing, Mr. Kluver was presented with a copy of the guaranty and then testified "[i]t looks like

my signature . . .” (Trans. 2/60:16-24.) Ironically, nearly a year later as Titan sought to enforce the guaranty, Shawn Kluver changed his story and contended that he did not sign the guaranty and that his daughter signed the guaranty on his behalf.

[¶12] Although the personal guaranty was signed by Shawn Kluver on July 20, 2016 and sent to Titan on July 22, 2016, Titan did not begin applying rental expenses to the line of credit until after December 6, 2016. (Trans. 1/44:13-17.) According to Titan, the delay in applying rent payments to the line of credit was caused by Titan performing its due diligence and approving the personal guaranty of Shawn Kluver.

[¶13] From June 21, 2016 through December 6, 2016, Renewable paid all amounts due to Titan for the rental of the Case CX290B. Id.; (Renewable App. 8.) Given the fact that the Case CX290B was only to be leased for a week while Renewable’s John Deere 270 excavator was repaired, Renewable began asking questions of Shawn Kluver and his daughter as the payments to Titan continued. In an email dated September 27, 2016, Renewable’s bookkeeper, Gary Pilgrim, was unwilling to issue further payment to Titan without approval from Renewable’s principal owner, Gary Olsen, since the owners were unaware that the Case CX290B would be rented for such a long period of time. (Renewable App. 9.)

[¶14] The purpose for holding on to the Case CX290B beyond the time necessary for Renewable’s John Deere 270 to be repaired became apparent during the trial of this matter. The Case CX290B was not returned because Shawn Kluver had an unrelated use for Renewable’s John Deere 270. In particular, Mr. Kluver wanted to

use the John Deere 270 at his new business, Little Knife Disposal. Thus, Shawn Kluver had Renewable continue using the Case CX290B at its plant location while he used the repaired John Deere 270 at Little Knife Disposal.

[¶15] While Renewable was in the process of decommissioning its plant, Shawn Kluver was negotiating with the owner of the Branch Energy disposal site near Mandaree, North Dakota for the purchase or leasing of the site. The site was eventually renamed by Mr. Kluver to Little Knife Disposal ("Little Knife").

[¶16] Dave Lees, a Renewable employee, testified that from and after October 2016 he and other Renewable employees were directed by Shawn Kluver to work at the Branch Energy/Little Knife site to clean and prepare the site for operations. (Trans. 1/94:14-25; 95:1-4.) According to Mr. Lees and John Quinn, a former Renewable employee and current Little Knife employee, numerous pieces of Renewable's equipment were moved to the Little Knife location. (Trans. 1/95:17-19.) Among the pieces of equipment moved to Little Knife were Renewable's rubber tire excavator and John Deere 270 excavator. (Trans. 1/100:9-11; 1/108:18-22; 1/168:15-20; 1/178:17-24.)

[¶17] While Renewable's John Deere 270 excavator was being used at Little Knife, the Case CX290B excavator was being used at the Renewable plant to remove and load oilfield waste. Unfortunately, a precise date of when an excavator was no longer needed at the Renewable plant is unknown. According to John Quinn, it took between 6 and 7 months to remove the oilfield waste from the Renewable plant. (Trans. 1/164:22-25; 1/165:1-2.) Thus, an excavator would no longer have been

needed by December 2016 or, at the latest, January 2017. More importantly, however, is that Renewable's John Deere 270, once repaired, could have and should have been put to work at the Renewable plant to complete the decommissioning instead of being hauled to the Little Knife site. Had the repaired John Deere 270 been put back to work at the Renewable plant, the Case CX290B could have been returned to Titan.

[¶18] Once an excavator was no longer required at the Renewable plant, the Case CX290B was also moved to the Little Knife site. According to the testimony of Mr. Lees, he recalled seeing the Case CX290B in use at the Little Knife site. (Trans. 1/95:10-12; 1/97:14-17.) Once the Case CX290B arrived at the Little Knife site, it remained at the location until it was picked up by Titan on October 10, 2017.

[¶19] The use of Renewable's John Deere 270 instead of the Case CX290B at the Little Knife site would have been acceptable had Little Knife Disposal, LLC been owned by Gary Olsen and Jayce Howell as the parties had agreed. Initially, Mr. Kluver had proposed that the Branch Energy site be purchased by Renewable. (Trans. 1/120:16-19.) When purchasing the Branch Energy site did not come to fruition, Shawn Kluver, Gary Olsen and Jayce Howell decided to create Little Knife Disposal, LLC to lease the Branch Energy site. It was agreed by and between Mr. Kluver, Mr. Olsen and Mr. Howell, that Little Knife Disposal, LLC would be a wholly owned subsidiary of 3DP, LLC, a company owned by Mr. Olsen and Mr. Howell. (Trans. 2/52:5-16.)

[¶20] In accordance with the understanding of Gary Olsen and Jayce Howell, Shawn Kluver negotiated a Lease Agreement with Option to Purchase the Branch Energy site naming as the lessee "Little Knife Disposal, LLC a North Dakota limited liability company and wholly owned subsidiary of 3DP, LLC, and/or Assigns." (Renewable App. 11.) In addition, the lease sought to reimburse Little Knife Disposal, LLC for the cleanup expenses through generous rent waivers and reductions. Id. Thus, the Titan rental expenses being incurred by initially leaving the John Deere 270 at the Little Knife site and then also moving the Case CX290B to the Little Knife site would have been recovered through the various rent reductions and waivers contained in the lease.

[¶21] In or about September 2017, Gary Olsen and Jayce Howell brought Jeff Bennett on board to examine the operations of Renewable, EDS and Little Knife after having invested more than $15 Million in the companies. (Trans. 1/119:9-16.) As Mr. Bennett testified at trial, it was his understanding in September of 2017 that Little Knife was owned by 3DP, LLC, a company owned by Gary Olsen and Jayce Howell. (Trans. 1/121:14-19.) Mr. Bennett's understanding was based upon representations made by Shawn Kluver as well as the draft Lease Agreement with Option to Purchase. During his testimony, Mr. Bennett revealed that when he and Gary Olsen traveled to North Dakota, Shawn Kluver met them at the airport and insisted on driving them directly to the Little Knife site to show off the site in operation. (Trans. 1/122:7-25; 1/123:1-2.) Mr. Bennett clearly recalled seeing the Case CX290B at the Little Knife site being used to mix dirt and waste. Id.

[¶22] Once Mr. Bennett began reviewing the books and records of Renewable, he discovered the outstanding balances due and owing Titan for the Case CX290B. Jeff Bennett asked Mr. Kluver if the Case CX290B was needed or could instead be returned so as to stop the ongoing lease charges. (Trans. 1/123:9-25; 1/124:1-5.) According to Mr. Bennett, Shawn Kluver immediately responded to the question by stating that the Case excavator was needed for the operations of Little Knife. Id.

[¶23] With the unpaid balance continuing to increase, Titan finally elected to recover the Case excavator. Thereafter, Titan contacted Jeff Bennett to see if he knew of the excavator's location as Titan was aware that the excavator was not located at Renewable's site. Mr. Bennett directed Titan to Little Knife's location. On or about October 10, 2017, Mr. Bennett received a call from a Renewable employee working at the Little Knife site confirming that Titan had picked up the Case CX290B.

[¶24] Unbeknownst to Renewable and its owners, Little Knife Disposal, LLC was not owned by 3DP, LLC as had been represented by Shawn Kluver. Instead, Little Knife Disposal, LLC was, at all times, owned 100% by Shawn Kluver. Mr. Bennett testified at trial as follows regarding the ownership of Little Knife Disposal:

> Q. At what point did you become aware that the ownership of Little Knife Disposal was not in the name of 3DP, LLC?
> A. I believe that would have been -- it would have had to have been sometime after November 14th, when -- I believe that was the date that Shawn showed up with the property owner and the McKenzie County Sheriff, and documents that we hadn't seen before.
> Q. And documents you hadn't seen before which showed what?
> A. That showed that Shawn had created his own, separate entity with himself as the sole member and had signed -- that modified the lease that he

had forwarded while undergoing negotiations and changed the ownership from 3DP to Little Knife Disposal, I believe LLC or Inc.

Q. So instead of Little Knife Disposal being a wholly owned subsidiary of 3DP, LLC as shown in Exhibit 102, in fact, Little Knife Disposal, LLC was solely owned by Mr. Kluver?

A. That is correct.

Q. And did you learn that it had been that way since the inception of Little Knife Disposal?

A. Well, I believe that that happened in February, so there had been months and months and months where Renewable Resources and EDS had been covering all the costs of cleanup. And so, there was a time, I guess, when it was operating still under Branch. But yes, that was the first time that I was aware that it was a different entity.

(Trans. 1/126:4-25; 1/127:1-4.)

[¶25] Pursuant to Little Knife Disposal, LLC's February 17, 2017 Operating Agreement, Shawn Kluver was and continues to be its sole member. (Renewable App. 30.) When asked if he informed Gary Olsen or Jayce Howell that he owned 100% of Little Knife Disposal, LLC, Shawn Kluver testified that he never informed either Gary Olsen or Jayce Howell of his ownership of Little Knife. (Trans. 2/57:10-13.) Mr. Kluver's decision to deceive Mr. Olsen and Mr. Howell was not a mere oversight but was a calculated decision so Mr. Kluver could benefit himself at the expense of Renewable, Mr. Olsen and Mr. Howell.

[¶26] By leading Mr. Olsen and Mr. Howell to believe that Little Knife Disposal, LLC was wholly owned by their company, 3DP, LLC, Shawn Kluver knew that he could use the personnel, equipment and resources of Renewable and EDS to clean up and then operate Little Knife Disposal, LLC. Thus, instead of transferring the Titan lease to Little Knife Disposal after the John Deere 270 had been repaired and ready to return to service at Renewable, Shawn Kluver had the John Deere 270

delivered to the Little Knife Disposal site so that the Case CX290B would continue to be needed at Renewable. Even after the Case CX290B was moved to Little Knife Disposal, Mr. Kluver allowed the lease to continue under the name of Renewable. The actions of Shawn Kluver as they relate to Little Knife Disposal, Renewable and Titan are not an anomaly. As explained by Jeff Bennett during his testimony:

> Q (Mr. Sanstead) Through your work on behalf of EDS and Renewable Resources, have you found other instances when Renewable Resources was charged or invoiced for items or services that exclusively benefited Little Knife?
> A Yes.
> Q And what other services or equipment was Renewable invoiced for that was exclusively benefiting Little Knife?
> A Command Center would be one of those instances, where employees were hired to go up and assist in the cleanup, and then Shawn and Courtney directed Renewable Resources to pay, you know, for those bills. There is also equipment rentals, such as generators, fuel, supplies, fly ash, centrifuge rentals, all kinds of basic disposal expenses, because we were spending -- until November 14 of 2017, we were covering 100% of the expenses of Little Knife Disposal through Renewable Resources and EDS.
> Q And did Command Center bring an action against Renewable Resources to recover sums due and owing?
> A Yes.
> Q And a trial was held in that matter?
> A Yes.
> Q And are you familiar with the outcome of that trial?
> A I think so.
> Q What is your understanding of the outcome of that trial?
> . . .
> A I'm not an attorney, but it's my understanding that Shawn Kluver was required to reimburse Command Center and Renewable Resources for those expenses.

(Trans. 1/130:8-25; 1/131:1-21.)

[¶27] The purpose of Shawn Kluver and Little Knife Disposal's wrongful acts are quite obvious. Having Renewable directly provide the labor and/or equipment for

Little Knife Disposal meant that Mr. Kluver would have little to no expense in cleaning up the Little Knife Disposal site and operating the site. Likewise, having Renewable enter into third-party agreements for labor or equipment to be used at Little Knife Disposal would result in Renewable paying the various invoices and allow Mr. Kluver to evade any responsibility. Furthermore, Little Knife Disposal, LLC, not 3DP, LLC or Renewable, would receive the rent reductions and waivers under the Lease Agreement that were being provided "to offset the cost of site clean up Lessee completed on the demised premises." (Renewable App. 11-12.) In other words, Mr. Olsen, Mr. Howell, Renewable and EDS would pay for the cleanup and operation of Little Knife while Shawn Kluver kept the revenues and other benefits for himself.

LAW AND ARGUMENT

I. Standard of Review

[¶28] In *KLE Constr., LLC v. Twalker Dev., LLC*, 2016 ND 229, ¶ 5, 887 N.W.2d 536 (*quoting Border Res., LLC v. Irish Oil & Gas, Inc.*, 2015 ND 238, ¶ 14, 869 N.W.2d 758), the North Dakota Supreme Court explained the standard of review for an appeal from a bench trial:

> [T]he 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. 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, we are left with a definite and firm conviction a mistake has been made. 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.

This Court will not reverse a judgment supported by findings of fact which are not clearly erroneous and which are not induced by an erroneous view of the law. *Lincoln Land Dev., LLP v. City of Lincoln*, 2019 ND 81, ¶ 13, 924 N.W.2d 426, 431.

II. Renewable Resources limits its response to sections B(3) and 4, E, F and G of Appellants' Brief

[¶29] With respect to those arguments of Shawn Kluver and Little Knife Disposal that are not addressed by Renewable Resources herein, Renewable Resources incorporates herein by reference those arguments set forth in Titan Machinery's Appellee Brief.

III. The district court did not err in its findings of fact

A. There is overwhelming evidence that the Case CX290B excavator rented from Titan Machinery benefited Little Knife Disposal and Shawn Kluver

[¶30] The Appellants erroneously contend that the district court disregarded evidence of Mr. Olsen, Mr. Howell or someone else from Renewable slipping the Case CX290B on to the property of Little Knife Disposal and that the Case CX290B was never used by or benefitted Little Knife Disposal or Shawn Kluver. Such assertions wholly ignore the evidence introduced at the trial of this matter and rely upon facts which don't exist and were never introduced at trial.

[¶31] The arguments put forth by the Appellants are premised on the belief that Mr. Kluver and Little Knife Disposal could have only benefitted from the Case CX290B rented from Titan during the time at which the excavator was actually located on the grounds of Little Knife Disposal. The District Court did not take such a narrow focus of the benefits bestowed upon Little Knife Disposal and Shawn Kluver.

[¶32] The uncontroverted evidence introduced at trial established that Renewable owned a John Deere 270 tracked excavator and a John Deere wheeled excavator. The John Deere 270 had, at all relevant times, been used by Renewable to clean its plant which included the use of the grinding bucket to mix the oilfield waste. In or about June 2016, the John Deere 270 broke down resulting in Mr. Kluver deciding to rent the CX290B from Titan while Renewable's John Deere 270 was repaired. Based upon a rental term running from June 21, 2016 to June 28, 2016, it would

appear that Mr. Kluver anticipated the John Deere 270 to be repaired within a week and ready to return to service at Renewable's plant. (Renewable App. 1.)

[¶33] Unfortunately, neither Mr. Kluver nor John Quinn could recall precisely when the John Deere 270 repairs had been completed. However, both Mr. Kluver and Mr. Quinn confirmed that the John Deere 270 had been repaired and put back into service. The John Deere 270 was not, however, put back to service at the Renewable plant. Instead, the John Deere 270 was transported, likely at Shawn Kluver's direction, to the Little Knife Disposal site. At the trial of this matter, Shawn Kluver, John Quinn and Dave Lees all confirmed that the John Deere 270 was operating at the Little Knife Disposal site. (Trans. 1/108:6-24; 2/71:2-6.) At trial, John Quinn offered the following testimony regarding use of Renewable's John Deere 270 at Little Knife Disposal:

> Q. This John Deere 270. That was owned by Renewable Resources; correct?
> A. EDS/Renewable. Yes.
> Q. So instead of taking the Case to the Little Knife Disposal site, you took the John Deere 270 that was owned by Renewable Resources to the Little Knife Disposal site; is that right?
> A. Yes.

(Trans. 1/175:20-25; 1/176:1-2.)

[¶34] With Shawn Kluver directing Renewable's John Deere 270 to be stationed and used at Little Knife Disposal after the repairs had been completed and with an excavator being needed at the Renewable plant, Mr. Kluver continued to rent the Case CX290B in the name of Renewable. Had, however, the John Deere 270 been returned to the Renewable plant and put back into service, the Case CX290B could

have and should have been returned to Titan. Thus, by keeping the Case CX290B beyond the time after which Renewable's John Deere 270 had been repaired, Little Knife Disposal and Shawn Kluver benefitted in that they had the unfettered use of the John Deere 270 to cleanup, improve and operate the Little Knife Disposal site. Put another way, had the repaired John Deere 270 been returned to the Renewable plant and the Case CX290B returned to Titan, Little Knife Disposal and Shawn Kluver would have been without an excavator to use at the Little Knife Disposal site. Accordingly, the evidence at trial clearly established that Shawn Kluver and Little Knife Disposal benefitted from the Case CX290B even while the excavator was located at the Renewable plant.

[¶35] The benefit to Shawn Kluver and Little Knife Disposal continued after the Case CX290B had been moved to the Little Knife Disposal site. While Appellants assert that someone stealthily moved the Case CX290B to the Little Knife Disposal site while Mr. Kluver was absent in October of 2017, there was absolutely no credible evidence introduced at trial to support such an outlandish assertion. In reality, the evidence revealed that the Case CX290B was moved to the Little Knife Disposal site prior to August of 2017. During his testimony, Shawn Kluver acknowledged that the Case CX290B may have been brought up to the Little Knife Disposal site. (Trans. 2/60:8-15.) In addition, Jeff Bennett testified as to seeing the Case CX290B not only located at the Little Knife Disposal site but actually being used:

> Q In August of 2017, when you went and visited the Little Knife Disposal site with Mr. Olson, do you recall seeing an excavator that was similar to the one depicted in Exhibit 101?
> A Yes.
> Q And what was the excavator doing at the Little Knife Disposal site, if you recall?
> A I believe it was mixing up dirt and waste.

(Trans. 1/122:20-25; 1/123:1-2.)

[¶36] As further proof that the Case CX290B had not been hurriedly moved by Renewable to the Little Knife Disposal site while Mr. Kluver was away in early October is the testimony of Brandon Messer, the Titan representative. According to Mr. Messer, Titan had visited the Renewable plant location in late September or early October looking for the Case CX290B. According to Mr. Messer, the CX290B was not located at the Renewable site. (Trans. 1/52:17-22.) The Case CX290B was ultimately located and retrieved by Titan from the Little Knife Disposal site on October 10, 2017. (Trans. 1/28:13-18.) At the time the excavator was picked up by Titan, Shawn Kluver had removed the original excavator bucket and failed to inform Titan of its whereabouts.

[¶37] As set forth above, Little Knife Disposal and Shawn Kluver benefitted directly from the rental of the Case CX290B. Accordingly, the District Court's findings that both Mr. Kluver and Little Knife Disposal benefitted from the Case CX290B are not clearly erroneous.

B. The evidence supports holding Shawn Kluver responsible for Titan's pick-up charge

[¶38] The district court found Shawn Kluver responsible for the $900.00 charge levied by Titan for having to pickup the Case CX290B from the Little Knife Disposal site. (Findings ¶ 37 [App. 53].) Shawn Kluver appears to argue on appeal that holding him responsible for the fee is inappropriate and unsupported by the record. In particular, Mr. Kluver resorts to his flawed argument that the Case CX290B was mysteriously placed at Little Knife Disposal by someone from Renewable while he was away.

[¶39] As discussed above in detail, the evidence presented at trial established that the dirt work at the Renewable plant was started in or about June 2016 and completed within 6 or 7 months. (Trans. 1/164:25; 165:1-7.) Thus, the need for the Case CX290B at the Renewable plant ended in December 2016 or January 2017. No longer needing the Case CX290B at the Renewable plant, Shawn Kluver directed it be used at the Little Knife Disposal site so he could get his new disposal business up and running.

[¶40] While the district court found that the Case CX290B was benefitting Little Knife Disposal from February 17, 2017, the facts would indicate that Shawn Kluver was using the Case CX290B at the Little Knife Disposal site prior to February 17, 2017. (Mr. Kluver did not deny at trial that the Case CX290B may have been moved to the Little Knife Disposal site and Jeff Bennett confirmed that the Case CX290B was at Little Knife Disposal and being use for Little Knife Disposal's operations. (Trans. 2/60:8-15; 1/122:20-25; 1/123:1-2.)

[¶41] Since Shawn Kluver is the only individual who could have or would have directed that the Case CX290B be moved to the Little Knife Disposal site instead of being returned to Titan, Shawn Kluver should be held responsible for the fee incurred in retrieving the Case CX290B from the Little Knife Disposal site. Accordingly, the district court's finding that Shawn Kluver is responsible for the Titan pick-up charge is not clearly erroneous.

IV. the district court did not err in holding Little Knife Disposal liable for use of the Case CX290B excavator, when the extended use of such rented excavator was necessitated by Renewable's excavator being used at Little Knife Disposal and the rented excavator later being moved to Little Knife Disposal for use by Shawn Kluver and his company

[¶42] In their fourth appeal issue, Shawn Kluver and Little Knife Disposal again assert that they received no benefit from the Case CX290B and, therefore, should not be held liable for the sums due and owing Titan. The district court found that "[t]he preponderance of the evidence demonstrates that Kluver and Little Knife benefitted from the Leased Equipment from February 17, 2017 until it was returned on October 10, 2017." (Findings ¶ 38 [App. 53].) Shawn Kluver and Little Knife Disposal assert that, at most, it benefitted from the Case CX290B for 36 days.

[¶43] Shawn Kluver and Little Knife Disposal's witness, John Quinn, testified at trial that the decommissioning of the Renewable plant, including removal of the waste dirt, was completed within 6 or 7 months. (Trans. 1/164:25; 165:1-7.) According to Shawn Kluver, the decommissioning started in the summer of 2016. (Trans. 2/22:13-24.) Based on the evidence introduced by Shawn Kluver and Little

Knife Disposal, the removal of the waste dirt from the Renewable plant was completed by December 2016 or January 2017.

[¶44] Once the decommissioning work was completed at the Renewable plant, the Case CX290B should have been returned to Titan. After all, Renewable had absolutely no interest in retaining the Case CX290B beyond the completion of the decommissioning. In fact, it was in Renewable's best interests to return the Case CX290B and stop the rental charges. The evidence at trial, however, clearly established that the Case CX290B excavator was not returned until October 10, 2017. (Trans. 1/28:13-18.)

[¶45] The only individual who had a need to hold on to the Case CX290B was Shawn Kluver so he could utilize it in the operations of Little Knife Disposal. At trial, Jeff Bennett provided the following testimony regarding his conversation with Shawn Kluver regarding the Case CX290B:

> Q Did you have occasion to discuss the lease agreement -- well, let me -- did you have occasion to discuss the lease agreement with Mr. Kluver?
> A Yes.
> Q And can you tell me about that discussion?
> A Yes. The first question I asked is why hadn't we been paying -- making any payments on it, to which he deferred that to the corporate office. He said it wasn't his responsibility.
> Q Was there any discussion as far as the need to continue to lease the CASE excavator?
> A Yes. Shawn told me that it was needed for the operation up at Little Knife.

(Trans. 1/123:18-25; 1/124:1-5.)

[¶46] While the evidence indicates that the Case CX290B was no longer needed at the Renewable plant as late as January 2017, the district court only held Shawn

Kluver and Little Knife Disposal liable for the period from February 17, 2017 to October 10, 2017. (Findings ¶ 38 [App. 53].) Use of February 17, 2017 appears to be based on the Little Knife Disposal Operating Agreement of the same date. (Renewable App. 30.) The Little Knife Disposal Operating Agreement unequivocally established that Shawn Kluver owned 100% of Little Knife Disposal despite his prior representations that Little Knife Disposal was a wholly owned subsidiary of 3DP, LLC. (Renewable App. 11, 30.)

[¶47] As the preponderance of the evidence introduced at trial clearly revealed, the Case CX290B was kept and not returned to Titan from February 17, 2017 to October 10, 2017 for the sole and exclusive benefit of Shawn Kluver and Little Knife Disposal. Therefore, the district court's findings and conclusions that Mr. Kluver and Little Knife Disposal benefitted from the Case CX290B from February 17, 2017 to October 10, 2017 are not clearly erroneous.

V. The district court did not err in concluding that Shawn Kluver and Little Knife Disposal are required to indemnify Renewable for a portion of the sums due and owing Titan Machinery when such sums were incurred because Little Knife Disposal was using Renewable Resources' excavator and later used the rented excavator for its own benefit

[¶48] Shawn Kluver and Little Knife Disposal also contend on appeal that there is no basis under North Dakota law to require them to indemnify Renewable. "Indemnification is a remedy which allows a party to recover reimbursement from another for the discharge of a liability which, as between them, should have been discharged by the other." *Mann v. Zabolotny*, 2000 ND 160, ¶ 7, 615 N.W.2d 526 (citing N.D.C.C. § 22–02–01; *Nelson v. Johnson*, 1999 ND 171, ¶ 19 n. 3, 599

N.W.2d 246; *GeoStar Corp. v. Parkway Petroleum, Inc.*, 495 N.W.2d 61, 68 (N.D.1993). The right of indemnity may arise in an express agreement or it may be implied. Id. at ¶ 8 (*citing GeoStar*, 495 N.W.2d at 68).

[¶49] This Court has described the two bases for implied indemnity as follows:

> When, as here, there is no express agreement creating a right to indemnification, an implied right to indemnification can still be found in either of two sets of circumstances. In one, an implied right to indemnification may be based on the special nature of a contractual relationship between parties. This has been called an "implied contract theory" of indemnity, or an "implied in fact" indemnity. A second set of circumstances in which indemnity may be found has been called "implied in law" indemnity. This is a tort-based right to indemnification found when there is a great disparity in the fault of two tortfeasors, and one of the tortfeasors has paid for a loss that was primarily the responsibility of the other.

Id. (*quoting Peoples' Democratic Republic of Yemen v. Goodpasture, Inc.*, 782 F.2d 346, 351 (2d Cir.1986)). *See also Fortune View Condo. Ass'n v. Fortune Star Dev. Co.*, 151 Wash. 2d 534, 544–45, 90 P.3d 1062, 1067 (2004) (*quoting Restatement of Restitution* § 96) ("The tort-based type of indemnity has also been described as follows: 'A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of liability.' ")

[¶50] The district court concluded that Shawn Kluver owed a duty to Renewable to "act in the best interests of Renewable and to not undertake any wrongful acts for the benefit of himself and to the detriment of Renewable" under N.D.C.C. § 34-02-14. (Findings ¶ 48 [App. 55-56].) In addition, the District Court concluded that Shawn Kluver "owed a duty to Renewable Resources to use ordinary diligence to

keep Renewable Resources informed of his acts" under N.D.C.C. § 3-02-12. (Findings ¶ 48 [App. 56].) Based on the evidence introduced at trial, the district court found that Shawn Kluver breached the duties he owed to Renewable under both Section 34-02-14 and Section 3-02-12. (Findings ¶ 49 [App. 56].) As a result of such breaches, the district court concluded that Shawn Kluver and his company, Little Knife Disposal, were obligated to indemnify Renewable in the amount of $100,731.62. (Findings ¶ 50 [App. 56].)

[¶51] Neither Shawn Kluver nor Little Knife Disposal appear to challenge on appeal the district court's conclusions that Mr. Kluver violated Sections 34-02-14 and 3-02-12. Instead, Mr. Kluver and Little Knife Disposal reiterate their unsupported argument that they received no benefit from the Case CX290B and, therefore, it would be inequitable to hold them liable for the sums due and owing Titan.

[¶52] Without restating what has been stated above, Shawn Kluver and Little Knife Disposal unquestionably benefitted from the Case CX290B. In the first instance, Shawn Kluver and Little Knife Disposal benefitted by using Renewable's repaired John Deere 270 at Little Knife Disposal while Renewable continued to pay for the rental of the Case CX290B for use at its plant. Second, through Shawn Kluver and Little Knife Disposal's own witnesses, it was established that as early as December 2016 or January 2017 the Case CX290B was no longer needed at the Renewable plant. Nevertheless, Mr. Kluver failed to return the Case CX290B to Titan but instead represented that he needed it at the Little Knife Disposal site.

[¶53] During the periods in which Renewable's John Deere 270 and/or the rented Case CX290B were being used at the Little Knife Disposal site, Mr. Kluver was leading the owners of Renewable, Gary Olsen and Jayce Howell, to believe that they owned Little Knife Disposal. In reality, however, Shawn Kluver was well aware that he owned 100% of Little Knife Disposal and was misleading Mr. Olsen and Mr. Howell so that he could use Renewable's personnel, equipment and resources to prepare, operate and grow Little Knife Disposal for his sole and exclusive benefit.

[¶54] Based upon the evidence introduced clearly establishing such unauthorized and wrongful conduct by Shawn Kluver, the district court properly concluded that Shawn Kluver and Little Knife Disposal were obligated to indemnity Renewable for the sums paid to Titan under the Rental Agreement. Accordingly, the District Court's conclusions requiring Shawn Kluver and Little Knife Disposal to indemnify Renewable are not clearly erroneous.

VI. The district court did not err in failing to require Renewable Resources to indemnify Shawn Kluver for his liability under the personal guaranty

[¶55] The final argument presented by Shawn Kluver and Little Knife Disposal on appeal is that the district court erred in not requiring Renewable to indemnify Shawn Kluver for his liability under the personal guaranty. Such an argument is devoid of any supporting evidence or facts and seeks to reward Shawn Kluver and Little Knife Disposal for their wrongful conduct.

[¶56] The evidence at trial revealed that Shawn Kluver prepared and signed the Titan Credit Application, including the personal guaranty, without any approval

from or knowledge of the Renewable owners. In fact, the personal guaranty required that the guarantor be an owner or corporate officer of Renewable. (App. 64.) Shawn Kluver was neither an owner nor an officer of Renewable at the time he signed the guaranty. Furthermore, when asked at trial why an owner never signed the guaranty, Mr. Kluver responded "I know they wouldn't have." (Trans. 2/33:25; 2/34:1-3.) Thus, Renewable should not be required to indemnify Mr. Kluver for an act that was not approved and, in reality, undertaken without the knowledge of the Renewable owners which was clearly not in the best interests of Renewable.

[¶57] Moreover, the debt incurred under the credit account for which Mr. Kluver is responsible through his personal guaranty was incurred almost exclusively after the Case CX290B was no longer needed at the Renewable plant. As discussed above, John Quinn testified at trial that the decommissioning of the Renewable plant, including removal of the oilfield waste, was completed within 6 or 7 months which would equate to December 2016 or January 2017. (Trans. 1/164:25; 1/165:1-2.) From June 21, 2016 to December 6, 2016, rental of the Case CX290B was on a prepay basis with Renewable having paid all of the prepay amounts due and owing. (Trans. 1/44:13-17.)

[¶58] As the amounts incurred on the credit account relate to periods after which the Case CX290B should have been returned to Titan but was instead retained for the exclusive benefit of Shawn Kluver and Little Knife Disposal, there exists no legal basis for requiring Renewable to indemnify Mr. Kluver. To require Renewable to indemnify Shawn Kluver would be to reward wrongdoing and pervert

the goal of implied indemnification. Therefore, the district court's conclusion that Shawn Kluver was not entitled to indemnification was not clearly erroneous.

CONCLUSION

[¶59] For the reasons stated above, this Court should affirm the district court's order and judgment.

Respectfully submitted this 15th day of June, 2019.

SANSTEAD LAW OFFICES, PLLC

/s/ *Jonathan P. Sanstead*

Jonathan P. Sanstead
ND Bar Id. No. 05332
P. O. Box 2596
Bismarck, ND 58502
Telephone: (701) 220-2890
Email: jon@sansteadlaw.com

Attorneys for Renewable Resources, LLC

CERTIFICATE OF COMPLIANCE

[¶60] The undersigned hereby certifies, in compliance with N.D.R.App.P. 32(e), that the Brief of Appellee Renewable Resources, LLC was prepared with Times New Roman proportional typeface, 13 pt. font, and complies with the page limitation and consists of 33 pages.

Dated this 15th day of June, 2019.

SANSTEAD LAW OFFICES, PLLC

/s/ *Jonathan P. Sanstead*

Jonathan P. Sanstead
ND Bar Id. No. 05332
P. O. Box 2596
Bismarck, ND 58502
Telephone: (701) 220-2890
Email: jon@sansteadlaw.com

Attorneys for Renewable Resources, LLC

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Titan Machinery, Inc., Plaintiff/Appellee, vs. Renewable Resources, LLC, Defendant and Third-Party Plaintiff/Appellee, vs. 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, vs. Shawn Kluver, Defendant and Third-Party Plaintiff/Appellant, vs. Renewable Resources, LLC, Third-Party Defendant/Appellee.	Cass Cty, No. 09-2019-CV-274

ON APPEAL FROM JUDGMENT DATED JANUARY 23, 2020
STATE OF NORTH DAKOTA
CASS COUNTY
THE HONORABLE JUDGE TRISTAN VAN DE STREEK, PRESIDING

CERTIFICATE OF SERVICE

[¶1] I hereby certify that on June 21, 2020, the following documents:

Appellee Renewable Resources, LLC's Brief; and
Appellee Renewable Resources, LLC's Appendix

were served via electronic email on the following:

Ariston E. Johnson
ari@dakotalawdogs.com
Attorney for Shawn Kluver and Little Knife Disposal

James M. Cailao
jcailao@vogellaw.com
Attorney for Titan Machinery

Dated this 21st day of June, 2020.

SANSTEAD LAW OFFICES, PLLC

/s/ *Jonathan P. Sanstead*
Jonathan P. Sanstead
ND Bar Id. No. 05332
P. O. Box 2596
Bismarck, ND 58502
Telephone: (701) 220-2890
Email: jon@sansteadlaw.com

Attorneys for Renewable Resources, LLC