

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Great Plains Royalty Corporation, a North
Dakota corporation,

Plaintiff, Appellee and
Cross-Appellant,

v.

Earl Schwartz Company, a North Dakota
partnership, Basin Minerals, LLC, a North
Dakota limited liability company,
SunBehm Gas, Inc., a North Dakota
corporation, and Kay Schwartz York,
Kathy Schwartz Mau, and Kara Schwartz
Johnson, as the Co-Personal Representative
of the Estate of Earl N. Schwartz,

Defendants, Appellants and
Cross-Appellees.

Supreme Court No. 20200133

Appeal from the Findings of Fact, Conclusions of Law, and Order for
Judgment, Entered February 18, 2020, and the Amended Judgment on
Remand, Dated March 4, 2020,
Case No. 27-2016-CV-00530
County of McKenzie, Northwest Judicial District
The Honorable Daniel El-Dweek, District Judge, Presiding

**BRIEF OF DEFENDANTS, APPELLANTS, AND CROSS APPELLEES EARL
SCHWARTZ COMPANY, BASIN MINERALS, LLC, AND KAY SCHWARTZ
YORK, KATHY SCHWARTZ MAU, AND KARA SCHWARTZ JOHNSON AS
THE CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF EARL N.
SCHWARTZ**

FREDRIKSON & BYRON, P.A.

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

*Attorneys for Defendants, Appellants, and
Cross-Appellees Earl Schwartz Company,
Basin Minerals, LLC, and Kay Schwartz
York, Kathy Schwartz Mau, and Kara
Schwartz Johnson as the Co-Personal
Representatives of the Estate of Earl N.
Schwartz*

TABLE OF CONTENTS

	<u>Paragraph</u>
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS	4
I. The Properties at Issue	4
II. The Bankruptcy Proceedings and Sale	8
III. The Noticed Properties and the Unnoticed Properties	12
STANDARD OF REVIEW	14
LAW AND ARGUMENT	15
I. Introduction.....	16
II. The District Court Erred in Quieting Title to the Subject Properties in Favor of Great Plains	19
A. Title to the Noticed Properties Should Have Been Quieted in Favor of the Schwartz Defendants and Sunbehm.....	20
1. The Partial Amended Order Confirming Sale of Assets (Nunc Pro Tunc) Conveyed Title to Earl Schwartz.....	21
2. All Great Plains’ Interests in the Lands Referenced on the Notice of Sale Were Included in Notice of Sale.....	22
B. The District Court Erred in Its Application of Collateral Estoppel.....	29
C. Great Plains is Judicially Estopped from Claiming an Interest in the Subject Properties.	32
D. The Scope of the District Court’s Order Quieting Title to the Subject Properties Is Unclear.....	34

III.	The District Court Did Not Err in Denying Great Plains’ Claim for Damages.....	35
A.	The Schwartz Defendants and Sunbehm Are Not Obligated to Pay Great Plains Royalties or Interest Under N.D.C.C. § 47-16-39.1.....	36
B.	Great Plains Is Not Entitled to Damages for Slander of Title.....	38
C.	Great Plains Is Not Entitled to Damages for Conversion.	41
	CONCLUSION.....	45
	CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Paragraph

CASES

<i>Acoma Oil Corp. v. Wilson</i> , 471 N.W.2d 476 (N.D. 1991)	43
<i>Autos, Inc. v. Gowin</i> , 244 F. App'x 885 (10th Cir. 2007)	32
<i>Blaustein v. Aiello</i> , 229 Md. 131, 182 A.2d 353 (1962)	21
<i>Briggs v. Coykendall</i> , 57 N.D. 785, 788, 224 N.W. 202	38
<i>BTA Oil Producers v. MDU Res. Grp., Inc.</i> , 2002 ND 55, 642 N.W.2d 873	33
<i>Coffaro v. Crespo</i> , 721 F. Supp. 2d 141 (E.D.N.Y. 2010).....	32
<i>Coulter v. Blieden</i> , 104 F.2d 29 (8th Cir. 1939)	21
<i>Dunn v. N. Dakota Dep't of Transp.</i> , 2010 ND 41, 779 N.W.2d 628.....	33
<i>Fernow v. Gubser</i> , 1945 OK 265, 196 Okla. 63, 162 P.2d 535.....	23
<i>Gekas v. Pipin (In re Met–L–Wood Corp.)</i> , 861 F.2d 1012 (7th Cir. 1988).....	21
<i>Golden v. SM Energy Co.</i> , 2013 ND 17, 826 N.W.2d 610.....	43
<i>Great Plains Royalty Corporation v. Earl Schwartz Co.</i> , 2019 ND 124, 927 N.W.2d 880.....	29
<i>Hamilton v. State Farm Fire & Cas. Co.</i> , 270 F.3d 778 (9th Cir. 2001).....	32
<i>Holland & Knight, LLP v. Deatley</i> , 357 F. App'x 83 (9th Cir. 2009).....	32
<i>In re Blue Coal Corp.</i> , 168 B.R. 553 (Bankr. M.D. Pa. 1994)	21
<i>In re Burr Mfg. & Supply Co.</i> , 217 F. 16 (2d Cir. 1914)	21
<i>In re Coastal Plains, Inc.</i> , 179 F.3d 197 (5th Cir. 1999)	32
<i>In re Hereford Biofuels, L.P.</i> , 466 B.R. 841 (Bankr. N.D. Tex. 2012).....	21
<i>In re John Lakis, Inc.</i> , 228 F.Supp. 918 (S.D.N.Y.1964)	32
<i>In re Karpe</i> , 84 B.R. 926 (Bankr. M.D. Pa. 1988).....	23

<i>In re Semel</i> , 411 F.2d 195 (3d Cir. 1969)	27
<i>Investors Title Ins. Co. v. Herzig</i> , 2010 ND 169, 788 N.W.2d 312	14
<i>Irish Oil & Gas, Inc. v. Riemer</i> , 2011 ND 22, 794 N.W.2d 715	36
<i>Kavanaugh v. Clay</i> , 275 S.W.2d 938 (Ky. 1955)	26
<i>Maragos v. Union Oil Co. of California</i> , 1998 ND 180, 584 N.W.2d 850	38, 39
<i>Miller v. Schwartz</i> , 354 N.W.2d 685 (N.D. 1984)	25
<i>Napoleon Livesock Auction, Inc. v. Rohrich</i> , 406 N.W.2d 346 (N.D. 1987).....	41
<i>Sanders v. Gravel Prods., Inc.</i> , 2008 ND 161, 755 N.W.2d 826.....	14
<i>Stuber v. Engel</i> , 2017 ND 198, 900 N.W.2d 230.....	14
<i>Wilson v. Rigby</i> , 909 F.3d 306 (9th Cir. 2018)	27

STATUTES AND COURT RULES

N.D.C.C. § 28-01-16.....	44
N.D.C.C. § 28-01-18.....	38, 40
N.D.C.C. § 31-11-05.....	27
N.D.C.C. § 38-08-08.....	36
N.D.C.C. § 47-16-39.1.....	37
N.D.C.C. § 47-19-19.....	27
11 U.S.C. § 541.....	32
Fed. R. Bankr. P. 2002.....	23

SECONDARY SOURCES

Black’s Law Dictionary (8th ed. 2004).....	24
W. Page Keeton et al., <i>Prosser and Keeton on the Law of Torts</i> § 128 (5th ed. 1984)	38

STATEMENT OF ISSUES

¶ 1] Whether the district court erred in quieting title to the properties at issue in this action in favor of Plaintiff, Appellee, and Cross-Appellant Great Plains Royalty Corporation (“Great Plains”).

¶ 2] Whether the district court erred in denying Great Plains’ claim for damages against Defendants, Appellants and Cross-Appellees Earl Schwartz Company, Basin Minerals, LLC, and Kay Schwartz York, Kathy Schwartz Mau, and Kara Schwartz Johnson, as the Co-Personal Representative of the Estate of Earl N. Schwartz (collectively, the “Schwartz Defendants”) and Defendant, Appellant, and Cross-Appellee SunBehm Gas, Inc. (“Sunbehm”).

STATEMENT OF THE CASE

¶ 3] The Schwartz Defendants join in and adopt by reference the Statement of the Case set forth in the Brief of Appellant Sunbehm Gas, Inc.

STATEMENT OF FACTS

¶ 4] The Schwartz Defendants join in and adopt by reference the Statement of the Facts set forth in the Brief of Appellant Sunbehm Gas, Inc., and present the following in addition thereto:

I. The Properties at Issue

¶ 5] In its Complaint, Great Plains asserted claims and sought a determination of title as to the oil, gas, and other minerals in and under the following lands situated in McKenzie County, North Dakota:

Township 153 North, Range 95 West
Section 7: S1/2SE1/4 and NW1/4SE1/4
Section 8: S1/2SE1/4 and SW1/4SW1/4
Section 17: N1/2NE1/4

(“Property No. 1”)

Township 152 North, Range 96 West

Section 24: NW1/4

(“Property No. 2”)

Township 152 North, Range 95 West

Section 16: NW1/4

(“Property No. 3”).

See Appendix of Defendants, Appellants, and Cross-Appellees Earl Schwartz Company, Basin Minerals, LLC, and Kay Schwartz York, Kathy Schwartz Mau, and Kara Schwartz Johnson as the Co-Personal Representatives of the Estate of Earl N. Schwartz (“Schwartz App.”), pp. 16–23. In its Amended Complaint, Great Plains requested that its claim for a judgment quieting title as to Property No. 1 be dismissed. *Id.*, pp. 40–41.

[¶ 6] In their Counterclaim, The Schwartz Defendants asserted claims and sought a determination of title as to the oil gas and other minerals in and under the following lands situated in various counties in North Dakota:

Township 152 North, Range 95 West, McKenzie County, North Dakota

Section 16: NW1/4

Township 152 North, Range 96 West, McKenzie County, North Dakota

Section 24: NW1/4

Township 153 North, Range 95 West, McKenzie County, North Dakota

Section 7: S1/2SE1/4, NW1/4SE1/4

Section 8: S1/2SE1/4, SW1/4SW1/4

Section 17: NE1/4NE1/4

Township 158 North, Range 95 West, Williams County, North Dakota

Section 11: E1/2SE1/4

Section 12: W1/2SW1/4

Township 159 North, Range 95 West, Williams County, North Dakota

Section 7: Lots 3, 4, SW1/4

Section 18: Lots 3, 4, SW1/4

Section 20: NE1/4SW1/4, SW1/4NE1/4, N1/2SE1/4
Section 31: N1/2
Section 32: NW1/4

Township 160 North, Range 91 West, Burke County, North Dakota

Section 3: SW1/4NW1/4, NW1/4SW1/4
Section 4: SE1/4NE1/4, NE1/4SE1/4
Section 10: N1/2NW1/4, NE1/4, NE1/4SW1/4, SE1/4NW1/4,
W1/2SE1/4
Section 11: W1/2NW1/4

Township 161 North, Range 78 West, Bottineau County, North Dakota

Section 20: NW1/4NE1/4, SW1/4NE1/4

Township 161 North, Range 81 West, Bottineau County, North Dakota

Section 20: S1/2
Section 29: N1/2
Section 30: NE1/4

Township 161 North, Range 91 West, Burke County, North Dakota

Section 5: SE1/4
Section 8: E1/2

Township 162 North, Range 80 West, Bottineau County, North Dakota

Section 10: S1/2
Section 15: E1/2NW1/4, NE1/4, SE1/4
Section 16: SE1/4

Township 162 North, Range 91 West, Burke County, North Dakota

Section 7: Lots 1 and 2, E1/2NE1/4, E1/2NW1/4 lying north of the
Great Northern Railway Co. Right-of-way less two acres
owned by the Swedish Evangelical Lutheran Bethany
Church

Township 162 North, Range 92 West, Burke County, North Dakota

Section 1: SE1/4
Section 4: NE1/4
Section 12: NE1/4

Township 163 North, Range 92 West, Burke County, North Dakota

Section 34: E1/2
Section 35: SW1/4

(collectively, the "Subject Properties")

Id., pp. 31–38. By its Answer and Counterclaim in response to Great Plains’ Amended Complaint, SunBehm asserted claims and sought a determination of title as to Property No. 3. *Id.*, pp. 24–25. The Schwartz Defendants and SunBehm do not dispute between themselves that The Schwartz Defendants claim ownership of Property No. 2 as successors in interest to Earl Schwartz and SunBehm claims ownership of Property No. 3 as successor in interest to Earl Schwartz.

[¶ 7] Basin and Earl Schwartz Co. served their Counterclaim on Great Plains on January 20, 2017. *Id.*, p. 38. Basin and Earl Schwartz Co. asserted interests in all the Subject Properties superior to that of Great Plains and sought a quiet title judgment and declaratory judgment to that effect. *Id.* At no point prior to trial did Great Plains assert or claim an interest as to any of the Subject Properties beyond Property No. 2 and Property No. 3. *Id.*, pp. 266–275.

II. The Bankruptcy Proceedings and Sale

[¶ 8] Great Plains was declared a “bankrupt” in or about 1968 and the bankruptcy court appointed Myron Atkinson as trustee to liquidate the defunct company’s assets for the benefit of its creditors. *Id.*, pp. 66–67. Myron Atkinson (“Atkinson”) and the attorney for the bankruptcy estate, Frank Jestrab (“Jestrab”), worked to identify Great Plains’ assets and offer them for sale. *Id.*, pp. 68–70. Representatives of Great Plains either failed or refused to cooperate with Atkinson and Jestrab in scheduling Great Plains’ assets for purposes of the bankruptcy proceedings. *Id.*, p. 69. Atkinson described available records for Great Plains at the time of the bankruptcy as “[v]ery little” and “a mess.” *Id.* Atkinson and Jestrab prepared an inventory of the assets controlled by the bankruptcy estate, but due to the lack of cooperation from Great Plains’ principals and the generally poor condition of Great Plains’ records, many of the

real property interests listed on the inventory were incorrectly or imprecisely described. *Id.*, 63–65, 158–178.

[¶ 9] In May and June of 1969, Atkinson advertised that a public auction featuring all Great Plains’ assets he had located would take place at the Plainsman Hotel in Williston on June 5, 1969. *Id.*, pp. 51–54, 249–57. Following the sale on June 5, 1969, the bankruptcy trustee petitioned the district court for an order confirming the sale of all the assets of Great Plains for \$225,000. *Id.*, p. 261. Later that month, the Referee in Bankruptcy Gordon Thompson issued an Order Confirming Sale of Assets (Nunc Pro Tunc) that “confirm[ed] the sale of all of the assets of the bankrupt corporation to Earl Schwartz.” *Id.*, pp. 55–57. In February of 1970, Thompson issued a Partial Amended Order Confirming Sale of Assets (Nunc Pro Tunc), which amended the previous order to “confirm[] the sale of all assets of the bankrupt corporation included in the Notice of Sale to Earl Schwartz.” *Id.*, pp. 58–59. After administration of the bankruptcy estate was completed, the case was closed and the trustee was discharged on July 25, 1974, having paid off all but approximately five percent of Great Plains’ unsecured creditors. *Id.*, p. 162.

[¶ 10] On May 3, 2013, the United States Bankruptcy Court for the District of North Dakota reopened Great Plains’ bankruptcy case. *Id.*, p. 115. In October 2013, Great Plains commenced an adversary proceeding against Earl Schwartz Company and Basin Minerals, LLC to determine the ownership of certain disputed assets. *Id.* Those assets were fee or leasehold interests in the oil and gas in and under the following lands:

Township 159 North, Range 94 West, Burke County North Dakota
Section 8: NW1/4

(“Tract No. 1”)

Township 164 North, Range 92 West, Burke County, North Dakota
Section 34: S1/2, S1/2NE1/4

(“Tract No. 2”)

Township 161 North, Range 81 West, Bottineau County, North Dakota
Section 20: S1/2
Section 29: N1/2, SW1/4
Section 30: NE1/4

(“Tract No. 3”)

Township 163 North, Range 95 West, Divide County, North Dakota
Section 15: S1/2NW1/4, SW1/4

(“Tract No. 4”)

Township 163 North, Range 95 West, Divide County, North Dakota
Section 22: SW1/4
Section 27: NW1/4

(“Tract No. 5”)

Id., pp. 115–16. Tract No. 3, in which Great Plains owned a leasehold interest, is included in the Subject Properties at issue in this action.

[¶ 11] During the bankruptcy adversary proceeding, the bankruptcy court issued an order granting partial summary judgment and an order for judgment following trial. The order for partial summary judgment dismissed Earl Schwartz Company and Basin Minerals, LLC’s claim that Earl Schwartz had purchased 100% of the assets owned by Great Plains at the time of the bankruptcy proceeding, based on the parties’ concession. *Id.*, pp. 105–06, 108. But the bankruptcy court rejected Great Plains argument that Earl Schwartz acquired only those interests specifically described in the Notice of Sale and subsequent trustee conveyances. *Id.*, pp. 106–09. The bankruptcy court’s order for judgment following trial thus undertook separate analyses for each of the Tracts 1-5 to

determine ownership. *Id.*, pp. 139–55. For Tracts 1 and 2, the Court ruled in Great Plains favor, concluding that Atkinson conveyed to Earl Schwartz the interests exactly as described in the trustee’s assignment and the Notice of Sale, even though Great Plains owned greater interests in Tracts 1 and 2. *Id.*, pp. 141–50. For Tract 3, the bankruptcy court ruled in favor of Earl Schwartz Company and Basin Minerals, LLC, concluding Atkinson should have conveyed to Earl Schwartz all Great Plains’ interest in Tract 3, despite the trustee’s assignment and Notice of Sale describing a lesser interest. *Id.*, pp. 150–52. For Tracts 4 and 5, the bankruptcy court again ruled in favor of Earl Schwartz Company and Basin Minerals, LLC, concluding Atkinson should have conveyed to Earl Schwartz all Great Plains’ interest in Tracts 4 and 5, despite the trustee’s assignment and Notice of Sale describing a different quantity net mineral acreage. *Id.*, pp. 152–54.

III. The Noticed Properties and the Unnoticed Properties

[¶ 12] The following table compares the property descriptions contained in (1) the Schwartz’ Defendants counterclaim, (2) the bankruptcy inventory prepared by Atkinson and Jestrab, and (3) the Notice of Sale:

Property Descriptions			
<i>Counterclaim</i>	Township 152 North, Range 95 West, McKenzie County, North Dakota Section 16: NW1/4		
<i>Inventory</i>	<u>Blue Buttes Field</u> Clayton Sorenson	NW1/4 of Section 16, Township 152 N, Range 95 W	.003125
<i>Notice of Sale</i>	Clayton Sorenson, Hawkeye Field, McKenzie County, 152N, 95W, Section 16: NW1/4 (Parcel No. 31)		Royalty (identified as a “W.I.” in the published Notice of Sale)
			.003125

<i>Counterclaim</i>	<u>Township 152 North, Range 96 West, McKenzie County, North Dakota</u> Section 24: NW1/4		
<i>Inventory</i>	<u>Clear Creek Field</u> Harry M. Dickey	NW1/4 of Section 24, Township 152 N, Range 96 W	.021973
<i>Notice of Sale</i>	Harry M. Dickey, Clear Creek Field, McKenzie County, (Madison Unit) T152N, R96W, Section 24: NW1/4 (Parcel No. 29)	Royalty (identified as a "W.I." in the published Notice of Sale)	.021973
<hr/>			
<i>Counterclaim</i>	<u>Township 153 North, Range 95 West, McKenzie County, North Dakota</u> Section 7: S1/2SE1/4, NW1/4SE1/4 Section 8: S1/2SE1/4, SW1/4SW1/4 Section 17: NE1/4NE1/4		
<i>Inventory</i>	<u>Charlson Field</u> G.L. Thompson Ole Haugen John Isaacson	NW1/4SE1/4 and S1/2SE1/4 of Section 7; S1/2SE1/4 and SW1/4SW1/4 of Section 8; NE1/4NE1/4 of Section 17 all in Township 153 N, Range 95 W	.0391
<i>Notice of Sale</i>	G.L. Thompson #1, Charlson Field, McKenzie County, (Madison Unit) T153N, R95W, Section 7: NW1/4SE1/4, S1/2SE1/4 (Parcel No. 28)	Royalty	
	Ole Haugen #1, Charlson Field, McKenzie County, (Madison Unit) T153N, R95W, Section 8: S1/2SE1/4, SW1/4SW1/4 (Parcel No. 28)	Royalty (identified as a "W.I" in the published notice of sale)	.0391
	John Isaacson #1, Charlson Field, McKenzie County, (Madison Unit) T153N, R95W, Section 17: NE1/4NE1/4 (Parcel No. 28)	Royalty (identified as a "W.I" in the published notice of sale)	
<hr/>			
<i>Counterclaim</i>	<u>Township 158 North, Range 95 West, Williams County, North Dakota</u> Section 11: E1/2SE1/4 Section 12: W1/2SW1/4		

<i>Inventory</i>	Tioga Unit C.W. Williams	E1/2SE1/4 of Section 11 all in Township 158 N, Range 95 W and W1/2SW1/4 of Section 12 all in Township 158 N, Range 95 W	.0062
<i>Notice of Sale</i>	C.W. Williams, Tioga Field (Madison Unit) Williams County, North Dakota – E1/2SE1/4 Sec. 11; W1/2SW1/4 Sec. 12 – 158N-95W (Parcel No. 39)	Royalty (No description of interest in published Notice of Sale)	.0062
<hr/>			
<i>Counterclaim</i>	<u>Township 159 North, Range 95 West, Williams County, North Dakota</u> Section 7: Lots 3, 4, SW1/4 Section 18: Lots 3, 4, SW1/4 Section 20: NE1/4SW1/4, SW1/4NE1/4, N1/2SE1/4 Section 31: N1/2 Section 32: NW1/4		
<i>Inventory</i>	<u>Northwest McGregor Field</u> Oscar E. Westberg	N1/2NE1/4 of Section 31, Township 159 N, Range 95 W	.0062
	<u>Northwest McGregor Field</u> <u>Base Lease</u>	SW1/4 7; W1/2 18; SW1/4NE1/4; NE1/4SW1/4; N1/2SE1/4 20- 159N-95W	.726113201
	#1 Melford Gudvangen	NW1/4NW1/4 18-159N-95W	
<i>Notice of Sale</i>	Oscar E. Westberg #1 – Northwest McGregor Field, Williams County, North Dakota – N1/2, NE1/4 Sec. 31-159N-95W (Parcel No. 35)	Royalty	.0668
	Melford Gudvangen #1, NW McGregor Field, Williams County, North Dakota – NW1/4 Sec. 18 159 N., 95 W. (Parcel No. 13)	W.I.	.19140625
<hr/>			
<i>Counterclaim</i>	<u>Township 160 North, Range 91 West, Burke County, North Dakota</u> Section 3: SW1/4NW1/4, NW1/4SW1/4 Section 4: SE1/4NE1/4, NE1/4SE1/4 Section 10: N1/2NW1/4, NE1/4, NE1/4SW1/4, SE1/4NW1/4, W1/2SE1/4 Section 11: W1/2NW1/4		
<i>Inventory</i>	<u>Diamond Field</u> Swenson Unit	SW1/4SW1/4 Section 10, Township 160 N, Range 91 W	.0977
<i>Notice of Sale</i>	Swenson Unit, Diamond Field, Burke County, T160N, R91W, Section 10: SW1/4SW1/4 (Parcel No. 30)	Royalty	.0977
<hr/>			
<i>Counterclaim</i>	<u>Township 161 North, Range 78 West, Bottineau County, North Dakota</u> Section 20: NW1/4NE1/4, SW1/4NE1/4		
<i>Inventory</i>	<u>Starbuck Field</u> <u>Base Lease</u>	SE1/4NE1/4; N1/2NE1/4; NE1/4SW1/4 20-161N-78W	
	Johnson-Lillegard	SW1/4NE1/4 20-161N-78W	.109375

<i>Notice of Sale</i>	Johnson-Lillegard #1, Starbuck Field, Bottineau County, T161N, R78W, Section 20: SW1/4NE1/4 (Parcel No. 22)	Royalty	.109375
<hr/>			
<i>Counterclaim</i>	<u>Township 161 North, Range 81 West, Bottineau County, North Dakota</u> Section 20: S1/2 Section 29: N1/2 Section 30: NE1/4		
<i>Inventory</i>	<u>Base Lease</u>	S1/2 20; SW1/4, N1/2 29; NE1/4 30-161N-81W	
	#1 Gusty Fossum	SW1/4NE1/4 30-161N-81W	
	#2-3 Gusty Fossum	(2) NE1/4NE1/4 30-161-N-81W (3) SW1/4NW1/4 29-161N-81W	
<i>Notice of Sale</i>	Gusty Fossum #1, Wiley Field, Bottineau County, North Dakota – S1/2NE1/4 Sec. 30-161 N., 81 W. (Parcel No. 1)	W.I.	.57421875
	Gusty Fossum #2, Wiley Field, Bottineau County, North Dakota – N1/2NW1/4 Sec. 30-161 N., 81 W. (Parcel No. 2)	W.I.	.547885
	Gusty Fossum #3, Wiley Field, Bottineau County, North Dakota – S1/2NW1/4 Sec. 29-161 N., 81 W. (Parcel No. 2)	W.I.	.547885
	Fossum-FLB #1, Wiley Field, Bottineau County, T161N, R81W, Section 29: NE1/4SW1/4 (Parcel No. 27)	WI	.2871094
	Fossum-FLB #1, Wiley Field, Bottineau County, T161N, R81W, Section 29: SW1/4SW1/4 (Parcel No. 27)	WI	.2871094
<hr/>			
<i>Counterclaim</i>	<u>Township 161 North, Range 91 West, Burke County, North Dakota</u> Section 5: SE1/4 Section 8: E1/2		
<i>Inventory</i>	<u>Northeast Foothills Field</u> H. Remington	SE1/4 of Section 5; NE1/4SE1/4 of Section 8 Township 161 N, Range 91 W	.041667
<i>Notice of Sale</i>	H. Remington – Northeast Foothills Field, Burke County, North Dakota – SE1/4 Sec. 5; NE1/4SE1/4 Sec. 8-161N-91W (Parcel No. 34)	Royalty	.041667
<hr/>			
<i>Counterclaim</i>	<u>Township 162 North, Range 80 West, Bottineau County, North Dakota</u> Section 10: S1/2 Section 15: E1/2NW1/4, NE1/4, SE1/4 Section 16: SE1/4		
<i>Inventory</i>	<u>South Westhope Field</u> <u>Base Lease</u>	W1/2NE1/4 16; W1/2NW1/4 15; SE1/4 16-162N-80W	
	#1 Federal Houman	SW1/4NW1/4 15-162N-80W	
<i>Notice of Sale</i>	Federal-Houman #1, South Westhope Field, Bottineau County, T162N, R80W, Section 15: SW1/4NW1/4 (Parcel No. 21)	WI	.41000
<hr/>			

<i>Counterclaim</i>	<u>Township 162 North, Range 91 West, Burke County, North Dakota</u> Section 7: Lots 1 and 2, E1/2NE1/4, E1/2NW1/4 lying north of the Great Northern Railway Co. Right-of-way less two acres owned by the Swedish Evangelical Lutheran Bethany Church		
<i>Inventory</i>	<u>Lignite Field</u> E. Haldorson	E1/2NE1/4 of Section 7, Township 162 N, Range 91 W	.3958
<i>Notice of Sale</i>	E. Haldorson, Lignite Field, Burke County, T162N, R91W, Section 7: E1/2NE1/4 (Parcel No. 32)	Royalty	.3958

<i>Counterclaim</i>	<u>Township 162 North, Range 92 West, Burke County, North Dakota</u> Section 1: SE1/4 Section 4: NE1/4 Section 12: NE1/4		
<i>Inventory</i>	Rival Unit Knutson Tract 69	NE1/4 Section 12, Township 162 N, Range 92 W	.03828125
	Rival Unit Christina Roos (Tracts 68 & 73)	SE1/4 of Section 1, Township 162 N, Range 92 W & NW1/4 of Section 7, Township 162 N, Range 91 W, less 2 acres	.025
<i>Notice of Sale</i>	Knutson Tract 69, Rival Field, Burke County, north Dakota – NE1/4 Sec. 12-162N-92W (Parcel No. 37)	Royalty	.03828125
	Christina Roos Tract 68 - 73, Rival Field, Burke County, north Dakota – SE1/4 Sec. 1, NW1/4 Sec. 7-162N-92W (Parcel No. 37)	Royalty	.025

<i>Counterclaim</i>	<u>Township 163 North, Range 92 West, Burke County, North Dakota</u> Section 34: E1/2 Section 35: SW1/4		
<i>Inventory</i>	Rival Unit Arthur Martin Tract 33	SE1/4 of Section 34, Township 163 N, Range 92 W	.000301
	Rival Unit Arthur Martin Tract 40	SW1/4 of Section 35, Township 163 N, Range 92 W	.000301
	Rival Unit Arthur Martin Tract 32	NE1/4 of Section 34, Township 163 N, Range 92 W	.0002005
<i>Notice of Sale</i>	Arthur Martin Tract 32, Rival Field (Madison Unit) Burke County, North Dakota – SW1/4 Sec. 34-162N-93W (Parcel No. 37)	Royalty	.0002005
	Arthur Martin Tract 33, Rival Field (Madison Unit) Burke County, North Dakota – SE1/4 Sec. 34-162N-93W (Parcel No. 37)	Royalty	.000301
	Arthur Martin Tract 40, Rival Field (Madison Unit) Burke County, North Dakota – SW1/4 Sec. 35-162N-93W (Parcel No. 37)	Royalty	.000301

See *id.*, pp. 33–34, 51–54, 163–83, 249–57.

[¶ 13] Per the descriptions set forth in the Inventory and Notice of Sale, the following portions of the Subject Properties were included in the Notice of Sale:

Township 152 North, Range 95 West, McKenzie County, North Dakota
Section 16: NW1/4

Township 152 North, Range 96 West, McKenzie County, North Dakota
Section 24: NW1/4

Township 153 North, Range 95 West, McKenzie County, North Dakota
Section 7: S1/2SE1/4, NW1/4SE1/4
Section 8: S1/2SE1/4, SW1/4SW1/4
Section 17: NE1/4NE1/4

Township 158 North, Range 95 West, Williams County, North Dakota
Section 11: E1/2SE1/4
Section 12: W1/2SW1/4

Township 159 North, Range 95 West, Williams County, North Dakota
Section 7: Lots 3, 4, SW1/4¹
Section 18: Lots 3, 4, SW1/4²
Section 20: NE1/4SW1/4, SW1/4NE1/4, N1/2SE1/4
Section 31: N1/2

Township 160 North, Range 91 West, Burke County, North Dakota
Section 3: SW1/4NW1/4, NW1/4SW1/4
Section 4: SE1/4NE1/4, NE1/4SE1/4
Section 10: N1/2NW1/4, NE1/4, NE1/4SW1/4, SE1/4NW1/4,
W1/2SE1/4
Section 11: W1/2NW1/4

Township 161 North, Range 78 West, Bottineau County, North Dakota
Section 20: NW1/4NE1/4, SW1/4NE1/4

Township 161 North, Range 81 West, Bottineau County, North Dakota
Section 20: S1/2
Section 29: N1/2
Section 30: NE1/4

Township 161 North, Range 91 West, Burke County, North Dakota

¹ Lots 3 and 4 form part of the SW1/4 of Section 7. *See* Schwartz App., pp. 321–24.

² Lots 3 and 4 form part of the SW1/4 of Section 18. *See id.*

Section 5: SE1/4
Section 8: NE1/4SE1/4

Township 162 North, Range 80 West, Bottineau County, North Dakota
Section 16: SE1/4

Township 162 North, Range 91 West, Burke County, North Dakota
Section 7: E1/2NE1/4

Township 162 North, Range 92 West, Burke County, North Dakota
Section 1: SE1/4
Section 12: NE1/4

Township 163 North, Range 92 West, Burke County, North Dakota
Section 34: E1/2
Section 35: SW1/4

(collectively, the “Noticed Properties”). The following portions of the Subject Properties were not included in the Notice of Sale:

Township 159 North, Range 95 West, Williams County, North Dakota
Section 32: NW1/4

Township 160 North, Range 91 West, Burke County, North Dakota
Section 3: SW1/4NW1/4, NW1/4SW1/4
Section 4: SE1/4NE1/4, NE1/4SE1/4
Section 10: N1/2NW1/4, NE1/4, NE1/4SW1/4, SE1/4NW1/4,
W1/2SE1/4
Section 11: W1/2NW1/4

Township 161 North, Range 91 West, Burke County, North Dakota
Section 8: NE1/4, W1/2SE1/4, SE1/4SE1/4

Township 162 North, Range 80 West, Bottineau County, North Dakota
Section 15: E1/2NW1/4, NE1/4, SE1/4

Township 162 North, Range 91 West, Burke County, North Dakota
Section 7: Lots 1 and 2, E1/2NW1/4 lying north of the Great Northern
Railway Co. Right-of-way less two acres owned by
the Swedish Evangelical Lutheran Bethany Church

Township 162 North, Range 80 West, Bottineau County, North Dakota
Section 10: S1/2

Township 162 North, Range 92 West, Burke County, North Dakota

Section 4: NE1/4

(collectively, the “Unnoticed Properties”). The testimony of Great Plains’ witness, Gary Preszler, indicated that all the Noticed Properties were described on the Notice of Sale. *See id.*, pp. 263–65, 292–320.

STANDARD OF REVIEW

[¶ 14] This Court has described its standard of review following a bench trial as follows:

This Court reviews the district court’s factual findings after a bench trial under the clearly erroneous standard. 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 the finding, or if, on the entire record, we are left with a definite and firm conviction a mistake has been made. We do not reweigh conflicts in evidence, and the district court’s choice between two permissible views of the weight of the evidence is not clearly erroneous. The district court’s conclusions of law are fully reviewable.

Stuber v. Engel, 2017 ND 198, ¶ 10, 900 N.W.2d 230 (citations omitted). This Court has also stated that it will not set aside a correct result where the district court’s reasoning is incorrect “if the result is the same under the correct law and reasoning.” *Investors Title Ins. Co. v. Herzig*, 2010 ND 169, ¶ 40, 788 N.W.2d 312 (quoting *Sanders v. Gravel Prods., Inc.*, 2008 ND 161, ¶ 9, 755 N.W.2d 826).

LAW AND ARGUMENT

[¶ 15] The Schwartz Defendants join in and adopt by reference the Law and Argument set forth in the Brief of Appellant Sunbehm Gas, Inc., and present the following in addition thereto:

I. Introduction.

[¶ 16] The decision of the District Court in this case should be reversed in part, specifically its determination that title to the Subject Properties should be quieted in favor

of Great Plains. The District Court's determination of title is in error for several reasons. First, the District Court misapplied the doctrine of collateral estoppel. Second, the District Court should have concluded Great Plains is judicially estopped from claiming title to the Subject Properties. And third, the District Court should not have quieted title to all the Subject Properties in favor of Great Plains, if that is in fact the effect of the District Court's order.

[¶ 17] The decision of the District Court should also be affirmed in part, specifically its determination that Great Plains is not entitled to an award of damages. The District Court correctly concluded that neither Sunbehm nor the Schwartz Defendants are the proper parties from whom Great Plains should seek recovery of allegedly underpaid royalties. The District court also correctly concluded that Great Plains had failed to prove it was entitled to damages for slander of title. The District court also correctly concluded that Great Plains had failed to prove it was entitled to damages for conversion.

[¶ 18] The Schwartz Defendants' arguments in support of the foregoing are set forth in detail below:

II. The District Court Erred in Quietening Title to the Subject Properties in Favor of Great Plains.

[¶ 19] The Order Confirming Sale of Assets (Nunc Pro Tunc) issued by the Referee in Bankruptcy following the 1969 sale of Great Plains' assets "confirm[ed] the sale of all of the assets of the bankrupt corporation to Earl Schwartz." Schwartz App., pp. 56–57. The Partial Amended Order Confirming Sale of Assets (Nunc Pro Tunc), issued by the Referee in Bankruptcy in 1970, amended the previous order to "confirm[] the sale of all assets of the bankrupt corporation included in the Notice of Sale to Earl Schwartz."

Id., p. 58. As explained below, the Notice of Sale references, but incorrectly describes, interests that the bankruptcy trustee would have been aware of had he consulted relevant public records. Because the bankruptcy trustee is chargeable with notice of the true extent of Great Plains' interests, and because a Notice of Sale is not required to contain an exact description of the property to be sold, the District Court should have concluded the trustee sold the full and actual interests owned by Great Plains in the lands described in the Notice of Sale. Accordingly, the Schwartz Defendants' request the Court reverse the District Court's determination of title and direct entry of judgment quieting title to the Noticed Properties in favor of the Schwartz Defendants and Sunbehm.

A. Title to the Noticed Properties Should Have Been Quieted in Favor of the Schwartz Defendants and Sunbehm.

[¶ 20] On remand the Schwartz Defendants argued that, per the Partial Amended Order Confirming Sale of Assets (Nunc Pro Tunc), Earl Schwartz acquired all Great Plains' interests in the properties "included in the Notice of Sale." The descriptions contained in the Notice of Sale, though incorrect or incomplete, would have been sufficient to allow a buyer, such as Earl Schwartz, to identify the nature and scope of Great Plains' interests in the lands described by reference to, among other things, county property records. Thus when the bankruptcy referee issued the Partial Amended Order Confirming Sale of Assets (Nunc Pro Tunc), title to Great Plains' interests in those portions of the Subject Properties referenced in the Notice of Sale vested in Earl Schwartz, regardless of whether the proper deeds, assignments, or other instruments of conveyance have yet been executed. Accordingly, the Schwartz Defendants respectfully disagree with the District Court's decision and request this Court reverse that decision and direct entry of judgment in accordingly.

1. The Partial Amended Order Confirming Sale of Assets (Nunc Pro Tunc) Conveyed Title to Earl Schwartz.

[¶ 21] The Partial Amended Order Confirming Sale of Assets (Nunc Pro Tunc) had the effect of conveying title to “all assets of [Great Plains] included in the Notice of Sale to Earl Schwartz.” *Id.* “[A] proceeding for judicial approval of a sale of a debtor’s assets is an *in rem* proceeding; it transfers property rights, and property rights are good against the world, not just against parties to judgment or persons with notice of proceeding.” *In re Hereford Biofuels, L.P.*, 466 B.R. 841, 859 (Bankr. N.D. Tex. 2012) (citing *Gekas v. Pipin (In re Met–L–Wood Corp.)*, 861 F.2d 1012, 1016–19 (7th Cir. 1988)). “[O]nce a sale made by a trustee in bankruptcy is confirmed by an order of the bankruptcy court, the sale becomes complete and whatever interest or estate the bankrupt debtor formerly had in the property passes from the trustee and the estate of the bankrupt to the purchaser.” *Blaustein v. Aiello*, 229 Md. 131, 135, 182 A.2d 353, 355 (1962) (citing *Coulter v. Blieden*, 104 F.2d 29 (8th Cir. 1939)). “[A] confirmation has the effect of completing the sale, and while it does not pass the legal title it vests the full equitable title to the property in the purchaser, even though the deed executed in pursuance thereof is irregular, and even if no deed whatever is made.” *In re Blue Coal Corp.*, 168 B.R. 553, 564 (Bankr. M.D. Pa. 1994) (quoting *In re Burr Mfg. & Supply Co.*, 217 F. 16, 19 (2d Cir. 1914)). Accordingly, the Partial Amended Order Confirming Sale of Assets (Nunc Pro Tunc) vested title in Earl Schwartz to all Great Plains assets that were included in the Notice of Sale, and that title has now passed to the Schwartz Defendants as his successors in interest.

2. All Great Plains' Interests in the Lands Referenced on the Notice of Sale Were Included in Notice of Sale.

[¶ 22] Great Plains' interests in the Subject Properties were incorrectly or incompletely described in the Inventory and subsequent Notice of Sale prepared by Atkinson. Great Plains has argued that these incorrect descriptions are determinative of the interests conveyed to Earl Schwartz. The Schwartz Defendants disagree. Because a notice of bankruptcy sale is intended only to provide a general description of the property being sold, the descriptions contained in the Notice of Sale in this case do not determine the nature and scope of the property interests conveyed. Further, because many of the Subject Properties were referenced, at least in part, in the Notice of Sale, and because a person of ordinary diligence could have ascertained Great Plains' interest in the properties by review of county property records, all of Great Plains' interests in the lands described on the Notice of Sale were included in the Notice of Sale.

[¶ 23] It is generally recognized as a matter of bankruptcy law that “[a] description [in a notice of sale] is sufficient if the property is described with reasonable certainty so as to enable prospective bidders, in the exercise of ordinary diligence, to identify it.” *Fernow v. Gubser*, 1945 OK 265, 196 Okla. 63, 66, 162 P.2d 535, 538; *see also In re Karpe*, 84 B.R. 926, 930 (Bankr. M.D. Pa. 1988) (“The purpose of the notice is to provide an opportunity for objections and hearing before the court if there are objections. A notice is sufficient if it includes the terms and conditions of the sale, if it states the time for filing objections, and if the estate is selling real estate, it generally describes the property.”); Fed. R. Bankr. P. 2002 (“The notice of a proposed use, sale, or lease of property, including real estate, is sufficient if it generally describes

the property.”). In other words, a notice of sale does not ordinarily contain an exact description of the property to be sold.

[¶ 24] The Notice of Sale in this case included a list of “parcels” described with reference to a particular oil and gas field, an oil and gas well or wells, a legal description of property on which the wells were located, a “base lease,” and indication of whether the parcel included a working interest or royalty interest, and a decimal interest in the production from the lands referenced. The word “parcel” is ordinarily used to designate “[a] tract of land,” especially “a continuous tract or plot of land in one possession, no part of which is separated from the rest by intervening land in another’s possession.” Black’s Law Dictionary 1144 (8th ed. 2004). Given these descriptions, a prospective bidder, in the exercise of reasonable diligence, would have been able to determine the extent Great Plains’ interest in the parcel(s) described by review of publicly available county property records. The testimony of Gary Preszler confirms this. *See Schwartz App.*, pp. 263–65, 292–320.

[¶ 25] Great Plains has argued that references on the notice of sale to a “royalty” or “W.I.” meant that the bankruptcy trustee only intended to transfer a royalty in a specific well or a working interest in a specific well. But the phrases “royalty interest” or “working interest” could refer to the underlying leasehold or mineral interest owned by Great Plains that gave rise to its working or royalty-only interest in the wells identified. The North Dakota Supreme Court has recognized as much with respect to the term “working interest”:

[I]t is clear that the use of the term “working interest” does not, in itself, limit the interest conveyed to only a share of the oil and gas produced by the two wells in existence at the time the assignment was executed. Syllabus 1 of this Court’s decision in *Corbett v. La Bere*, 68 N.W.2d 211

(N.D. 1955), states: “The interest acquired by the lessee under an ordinary oil and gas lease is known as a working interest and is an interest in real property.” A “working interest” has also been defined as “[t]he operating interest under an oil and gas lease. The owner of the working interest has the exclusive right to exploit the minerals on the land.” 8 H. Williams and C. Meyers, *Oil and Gas Law*, Manual of Terms, pp. 838–838.1 (1982). See also *Slawson v. North Dakota Industrial Commission*, 339 N.W.2d 772, 776 n. 3 (N.D. 1983). Thus, it appears that the term “working interest”, as commonly used in the oil industry, is generally synonymous with the term “leasehold interest.” See 8 H. Williams and C. Meyers, *supra*, at pp. 392–393.

Miller v. Schwartz, 354 N.W.2d 685, 689 (N.D. 1984). There is no indication from the Notice of Sale, or from any other testimony or documents of record in this case, that the bankruptcy trustee intended to convey less than Great Plains’ full interest in the properties noticed.

[¶ 26] The Schwartz Defendants also draw the Court’s attention to the decision of Court of Appeals of Kentucky in *Kavanaugh v. Clay*, 275 S.W.2d 938 (Ky. 1955). The *Kavanaugh* Court considered whether a conveyance of property from a bankrupt’s estate transferred a full mineral interest or only a royalty. *Id.* at 939. The language of the deed referred only to an “undivided 1/64 oil and gas royalty in what is known as the Tom Booth farm lying in Lee County,” but the grantees under the deed contended that they had obtained fee simple title to all mineral interests in the referenced property. The description of the property in the deed had been taken from the bankruptcy schedule, which had been prepared using an appraisal report that had mistakenly identified the debtor as owning only a royalty interest in the property, rather than mineral rights subject to leases. *See id.* at 939–40. The *Kavanaugh* Court reasoned that “[t]he trustee was not only vested with title, but he was charged with knowledge that [the debtor] owned fee simple title to the mineral rights because the source of title was given in the deed and reference to those public records would have disclosed [the debtor’s] entire interest.” *Id.*

at 940. The *Kavanaugh* Court ultimately concluded that the deed did convey the debtor's full mineral interest, despite the mistaken description in the deed and the schedule, noting "[i]t would be a strange result if we assumed, under the circumstances of this case, that [the debtor], with the acquiescence of the trustee, fraudulently withheld assets from the bankruptcy proceedings so that, after his death, his devisee might be benefited." *Id.*

[¶ 27] The issues presented in this case parallel those presented in *Kavanaugh*. Many of the Subject Properties were described as royalty or working interests when in fact Great Plains owned full mineral or leasehold interests in the lands identified. Even though Atkinson himself elected not to review record title to the lands he was able to identify, he was nonetheless charged with knowledge of the full scope of Great Plains interests as disclosed by county records. *See* N.D.C.C. § 47-19-19. Any person bidding on the properties listed in the Notice of Sale would have likewise been free to review the applicable county property records and ascertain for himself the true nature and scope of Great Plains' interests. It would also be contrary to North Dakota law and policy if the Court allowed Great Plains to benefit from Atkinson's mistaken and inadequate identification of Great Plains' assets, when this appears to have been a direct result of Great Plains refusal to provide a schedule of its assets or otherwise cooperate in its own bankruptcy. *See* N.D.C.C. § 31-11-05(8) ("A person cannot take advantage of that person's own wrong."); Schwartz App., pp. 68–70 (indicating that Great Plains did not cooperate with Atkinson in during its bankruptcy); *see also, e.g., Wilson v. Rigby*, 909 F.3d 306, 311 (9th Cir. 2018) (noting that a debtor must act in good faith in completing bankruptcy schedules); *In re Semel*, 411 F.2d 195, 197 (3d Cir. 1969) ("A petitioner may not seek the benefits of the Bankruptcy Act and at the same time be allowed to refuse to

furnish a complete and accurate schedule of his assets.”). Accordingly, the Court should conclude, as the *Kavanaugh* Court did, that the Notice of Sale included all Great Plains’ interest in those portions of the Subject Properties referenced therein, and not merely the limited or incorrectly described interests expressed thereby.

[¶ 28] Based on the foregoing, the Court should conclude the Noticed Properties, set forth in detail in the Statement of Facts, *supra*, were included in the Notice of Sale. The Court should likewise conclude the Unnoticed Properties were not included in the Notice of Sale. Because Earl Schwartz would have acquired equitable title to the Noticed Properties by virtue of the bankruptcy court’s Partial Amended Order Confirming Sale of Assets (Nunc Pro Tunc), title to Great Plains’ interest in the Noticed Properties should be quieted in favor of the Schwartz Defendants and Sunbehm, as Earl Schwartz’s successors in interest.

B. The District Court Erred in Its Application of Collateral Estoppel.

[¶ 29] The District Court rejected the foregoing arguments as barred by collateral estoppel. There is a four-part test that must be satisfied for a court to apply the doctrine of collateral estoppel:

- (1) Was the issue decided in the prior adjudication identical to the one presented in the action in question?;
- (2) Was there a final judgment on the merits?;
- (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?; and
- (4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Great Plains Royalty Corporation v. Earl Schwartz Co., 2019 ND 124, ¶ 13, 927 N.W.2d

880. The District Court concluded the following with respect to the first prong of the collateral estoppel test:

In both the bankruptcy adversary case and this case, the issue decided was whether Earl Schwartz purchased all the assets Great Plains owned when the bankruptcy proceeding began, including assets that were not listed in the notice of sale. The factual issue in this case is identical to the factual issue decided in the prior bankruptcy adversary court proceeding. The facts were ‘necessarily decided’ in the bankruptcy case. The issue was actually litigated and was essential to the prior decision. The first test is satisfied.

Schwartz. App., pp. 338–39.

[¶ 30] The District Court’s reasoning is both conclusory and incorrect. The arguments presented immediately above were the arguments presented by the Schwartz Defendants and Sunbehm on remand. They do not raise the issue of whether Earl Schwartz purchased “all” the assets Great Plains owned prior to its bankruptcy; instead, they raise the separate issue of what interests were “included” in the Notice of Sale, and therefore passed to Earl Schwartz upon the bankruptcy referee’s confirmation of the trustee’s sale. The first issue would not require any analysis of the Partial Amended Order Confirming Sale of Assets (Nunc Pro Tunc) or the Notice of Sale; the second issue accepts the Partial Amended Order as binding and requires legal analysis of the Notice of Sale, which is set forth above. Hence the Schwartz Defendants are only claiming title to the Noticed Properties, not to all the Subject Properties. The District Court’s order offers no explanation of how these two issues are “identical,” and to affirm the District Court’s order on this point would be a gross mischaracterization of the arguments presented below by the Schwartz Defendants and Sunbehm.

[¶ 31] One significant error committed by the District Court's order is that it relies exclusively on the bankruptcy court's summary judgment order and fails to consider the bankruptcy court's order following trial, which provides at least as much support for the arguments raised below by the Schwartz Defendants and Sunbehm. As noted in the Statement of Facts, *supra*, the bankruptcy court's order for judgment following trial considered five separate tracts of land in which Great Plains held oil and gas interests prior to its bankruptcy. For three of those five tracts, the bankruptcy court agreed with the Schwartz Defendants that the bankruptcy trustee should have conveyed all Great Plains' interest to Earl Schwartz, rather than the incorrect or incompletely described interest contained in the Notice of Sale and trustee's assignment. In fact, despite the bankruptcy court awarding all Great Plains' interest in Tract 3 to the Schwartz Defendants, the District Court's order now purports to award those interests to Great Plains, directly contradicting the bankruptcy court's decision. The District Court's order thus erred in applying the doctrine of collateral estoppel to the Schwartz Defendants' arguments on remand. The bankruptcy court never decided which of Great Plains' interests were "included" in the Notice of Sale, and thus collateral estoppel does not apply in this case. For this reason, the District Court's decision should be reversed.

C. Great Plains is Judicially Estopped from Claiming an Interest in the Subject Properties.

[¶ 32] The District Court also erred in quieting title to the Subject Properties in favor of Great Plains because Great Plains failed to disclose these assets in its bankruptcy and therefore should be judicially estopped from claiming any interest in the Subject Properties. A debtor in a bankruptcy proceeding is required to disclose a schedule of assets. *See, e.g., In re John Lakis, Inc.*, 228 F.Supp. 918, 920 (S.D.N.Y.1964); *see also* 11

U.S.C. § 541(a)(1)(B)(i). Numerous courts have held that when a debtor in bankruptcy fails to schedule an asset, the debtor may be judicially estopped from claiming that asset in future proceedings. *See generally In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999); *Coffaro v. Crespo*, 721 F. Supp. 2d 141 (E.D.N.Y. 2010); *see also Holland & Knight, LLP v. Deatley*, 357 F. App'x 83, 84 (9th Cir. 2009) (“Failure to list an asset or interest on the bankruptcy schedules causes the debtor to be judicially estopped from pursuing a claim to recover that interest after discharge.” (citing *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783, 785 (9th Cir. 2001))); *Autos, Inc. v. Gowin*, 244 F. App'x 885, 890 (10th Cir. 2007) (“Numerous courts have agreed that the omission of a cause of action as an asset in bankruptcy provides an appropriate basis for imposing judicial estoppel.”).

[¶ 33] The doctrine of judicial estoppel is recognized in North Dakota. *See Dunn v. N. Dakota Dep't of Transp.*, 2010 ND 41, ¶ 11, 779 N.W.2d 628. This Court has described the doctrine of judicial estoppel as follows:

The fundamental concept of judicial estoppel is that a party in a judicial proceeding is barred from denying or contradicting sworn statements made therein. Judicial estoppel is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent, conflicts with, or is contrary to one that she has previously asserted in the same or in a previous proceeding; it is designed to prevent litigants and their counsel from playing fast and loose with the courts, and to protect the integrity of the judicial process. Judicial estoppel doctrine is equitable and is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories. The purpose of the doctrine of judicial estoppel is to reduce fraud in the legal process by forcing a modicum of consistency on the repeating litigant.

The doctrine applies only where a party's subsequent position is totally inconsistent with its original position, and does not apply where distinct or different issues or facts are involved.

BTA Oil Producers v. MDU Res. Grp., Inc., 2002 ND 55, ¶ 14, 642 N.W.2d 873. Great Plains' current claim that it owns an interest in the Subject Properties, especially any interest beyond that described in the Notice of Sale, is directly contrary to its failure to prepare a schedule of assets during bankruptcy. Had Great Plains prepared a schedule of assets as required by law, the Court likely would not have the present case before it today. Accordingly, the District Court should have concluded Great Plains is judicially estopped from claiming any interest in the Subject Properties and should have quieted title to the Noticed Properties in favor of the Schwartz Defendants and Sunbehm. For this reason, the District Court's decision should be reversed.

D. The Scope of the District Court's Order Quietening Title to the Subject Properties Is Unclear.

[¶ 34] Even if this Court affirms the District Court's decision as to title, remand is necessary so that the District Court can clarify the meaning and scope of its order. In particular, the District Court's order quiets title to "the Subject Properties" in favor of Great Plains, *see* Schwartz App., p. 344, yet the District Court's order only discusses Great Plains evidence as to Property No. 2 and Property No. 3, and Great Plains never claimed an interest in any of the Subject Properties other than Property No. 2 and Property No. 3. Furthermore, the Court's order appears to quiet title to all interests held by Great Plains prior to bankruptcy in favor of Great Plains. Yet the Schwartz Defendants and Sunbehm must have acquired at least some interest in the Noticed Properties by virtue of their being included in the Notice of Sale, even if the Court determines they did not acquire all Great Plains' interest.

III. The District Court Did Not Err in Denying Great Plains' Claim for Damages.

[¶ 35] The District Court correctly concluded that Great Plains is not entitled to damages in this case. Great Plains sought damages against Sunbehm in the amount of \$61,055.84 and against the Schwartz Defendants in the amount of \$1,175,021.58, supposedly comprised of royalty payments and interest thereon. Great Plains claim fails for several reasons, as outlined below.

A. The Schwartz Defendants and Sunbehm Are Not Obligated to Pay Great Plains Royalties or Interest Under N.D.C.C. § 47-16-39.1.

[¶ 36] As correctly noted by the District Court, there has been no evidence presented in this case to show that the Schwartz Defendants are obligated to pay these royalties. Under an oil and gas lease, the lessee is obligated to pay the mineral owner royalties. *See, e.g., Irish Oil & Gas, Inc. v. Riemer*, 2011 ND 22, ¶ 22, 794 N.W.2d 715. When no oil and gas lease is in place, the operator of any well producing from the lands in question is obligated to pay the mineral owner royalties pursuant to N.D.C.C. § 38-08-08(1). It has never been suggested by any party that the Schwartz Defendants are lessees of Great Plains or operators of wells producing from the Subject Properties. If title to any of the Subject Properties were quieted in favor of Great Plains in this action, Great Plains would be thereafter free to seek recovery of its royalties from any lessees or operators that have produced oil and gas from the Subject Properties. Accordingly, Great Plains has not shown that any obligation to pay royalties exists as to any of the Schwartz Defendants or Sunbehm, and for this reason the District Court correctly denied Great Plains' claim for damages.

[¶ 37] The District Court also correctly rejected Great Plains for interest under N.D.C.C. § 47-16-39.1. Great Plains sought payment of an 18% interest penalty on

royalty payments under N.D.C.C. § 47-16-39.1. But this obligation extends only to an operator under an oil and gas lease. As noted above, neither the Schwartz Defendants nor Sunbehm are operators of oil and gas wells on the Subject Properties. Accordingly, there is no basis for imposing the late payment penalty provided for in N.D.C.C. § 47-16-39.1 on any of the defendants in this action.

B. Great Plains Is Not Entitled to Damages for Slander of Title.

[¶ 38] The District Court correctly concluded that Great Plains' is not entitled to damages under the theory of slander of title. Slander of title is defined as "a false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, and causing him special damage." *Maragos v. Union Oil Co. of California*, 1998 ND 180, ¶ 4, 584 N.W.2d 850 (quoting *Briggs v. Coykendall*, 57 N.D. 785, 788, 224 N.W. 202, 204). In order to sustain an action for slander of title, the plaintiff must demonstrate that the defendant "acted with malice, intending to injure, vex, or annoy the plaintiff." *Id.* The plaintiff must also prove special damages. *Id.* at ¶ 5. "In slander of title cases, '[t]he chief characteristic of special damages is a realized loss.'" *Id.* at ¶ 6 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 128, at 971 n.3 (5th ed.1984)). An action for libel or slander must be commenced within two years after the claim for relief has accrued. *See* N.D.C.C. § 28-01-18(1).

[¶ 39] Great Plains has not shown special damages necessary to sustain its claim for slander of title. "Special damages" for purposes of a slander of title claim consist of a realized loss, such as a specific lost sale. *See Maragos*, 1998 ND 180, ¶¶ 5, 6. Great Plains has no evidence of a lost sale or other comparable realized loss. The only damage Great Plains has alleged is unpaid royalties, which could have been sought from its lessees or from any oil and gas well operator producing from the Subject Properties.

[¶ 40] Great Plains has also not shown that any of the Schwartz Defendants acted with intent to injure, vex, or annoy Great Plains. The only documents that Great Plains identified as slanderous are three conveyances amongst the Schwartz Defendants themselves, happening between 2008 and 2012. *See* Schwartz App., pp. 156–61. None of these documents make any specific reference to Great Plains or its interests. The testimony presented at trial indicated that these documents were intended to merely transfer assets among the Schwartz Defendants. *See, e.g.*, Schwartz App., pp. 276–91. Thus, there is no indication that these documents were filed for the purpose of vexing, injuring, or annoying Great Plains. Furthermore, these documents were filed between 2008 and 2012, more than two years before the present action was initiated, and any claim for slander of title based on these actions would be barred by the applicable statute of limitations. *See* N.D.C.C. § 28-01-18(1).

C. Great Plains Is Not Entitled to Damages for Conversion.

[¶ 41] The District Court correctly determined Great Plains is not entitled to damages under a theory of conversion. The North Dakota Supreme Court has concluded that “to maintain a claim for conversion, an interest in specific identifiable personalty must be pleaded and proved.” *Napoleon Livesock Auction, Inc. v. Rohrich*, 406 N.W.2d 346, 354 (N.D. 1987) (emphasis added). In *Napoleon Livestock*, the North Dakota Supreme Court considered whether the district court properly instructed the jury regarding plaintiff’s claim that its 700 calves had been converted. *Id.* The court concluded that to prove a claim for conversion, the plaintiff was required to identify the 700 calves with reasonable specificity. *Id.* In allowing the calves to be commingled, the plaintiff made its conversion claim substantially more difficult to prove:

Napoleon Livestock acknowledges that the date of the alleged conversion against the Bank and Clemens was on or after April 2, 1984. Napoleon Livestock apparently did not take any action to strengthen its interest in the 700 calves. It did not brand or record the brand of the cattle, nor did it direct Pius to segregate the 700 calves from other cattle. Rather than strengthening its interest, Napoleon Livestock's actions served to weaken it. Because Napoleon Livestock allowed Pius to retain possession considerably past the contemplated delivery date, the subsequent commingling of the 700 calves with other cattle made Napoleon Livestock's burden of identifying its cattle more difficult. Actually, Napoleon Livestock made little effort at trial to identify its 700 head of cattle as of April 2, 1984.

Id. Reasoning by analogy, Great Plains must likewise identify the actual money to which it claims a right of possession with reasonable specificity; the fact that such money has been commingled with other money received and held by the Schwartz Defendants does not alleviate Great Plains burden.

[¶ 42] Great Plains has not met its burden of proving an interest in “specific identifiable property” to prevail on a claim of conversion. At trial and in its pleadings and briefs, Great Plains alleges that payments were made to the Schwartz Defendants and Sunbehm. But instead of identifying the money to which it claims a right of possession, Great Plains relied upon its witness’s calculation of an amount of payments made to the Schwartz Defendants as the basis for its claim of damages. Mere calculation of an amount of money paid is not the same as actual identification of money taken. There is no evidence in the record of any attempt by Great Plains to specifically identify the “property” to which it claims a right of possession. Accordingly, under the Supreme Court’s reasoning in *Napoleon Livestock*, Great Plains’ claim for conversion fails.

[¶ 43] This Court’s handling of unpaid royalty claims in other decisions further confirms that Great Plains cannot succeed on its claim of conversion. Beginning with its decision in *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476 (N.D. 1991), and reiterated more

recently in *Golden v. SM Energy Co.*, 2013 ND 17, 826 N.W.2d 610, this Court has held that an underpaid royalty owner's right of recovery is against a well operator, unless payments were made pursuant to executed division orders. If the owners executed division orders, the underpaid owner's right to recover "depends upon the equitable principles of detrimental reliance and unjust enrichment." *Golden*, 2013 ND 17, ¶ 25. Great Plains presented no evidence showing that the royalty payments it now seeks were made pursuant to an executed division order. Nor has Great Plains ever asserted a claim against any of the defendants for unjust enrichment.

[¶ 44] Finally, the unpaid royalties claimed by Great Plains go back to 1974. The statute of limitation for conversion is only six years, and Great Plains did not serve its Amended Complaint until August 23, 2017. *See* N.D.C.C. § 28-01-16(4); Schwartz App., pp. 39–48. Great Plains has made no attempt to separate out which portion of its claimed damages accrued within six years of the date of its Amended Complaint. For this additional reason, the award of the damages requested by Great Plains was properly denied by the District Court.

CONCLUSION

[¶ 45] For the reasons stated above, and for the reasons set forth in Sunbehm's brief, the Schwartz Defendants respectfully request that the Court reverse the District Court's decision as to title and affirm the District Court's decision as to damages and direct that judgment be entered dismissing Great Plains' Complaint in its entirety and quieting title to the Noticed Properties in favor of the Schwartz Defendants and Sunbehm.

Dated this 16th day of October, 2020.

FREDRIKSON & BYRON, P.A.

By: /s/ Lawrence Bender

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

*Attorneys for Defendants, Appellants, and
Cross-Appellees Earl Schwartz Company,
Basin Minerals, LLC, and Kay Schwartz
York, Kathy Schwartz Mau, and Kara
Schwartz Johnson as the Co-Personal
Representatives of the Estate of Earl N.
Schwartz*

CERTIFICATE OF COMPLIANCE

[¶ 1] The undersigned, as attorney for the Defendants, Appellants, and Cross-Appellees Earl Schwartz Company, Basin Minerals, LLC, and Kay Schwartz York, Kathy Schwartz Mau, and Kara Schwartz Johnson as the Co-Personal Representatives of the Estate of Earl N. Schwartz in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellant Procedure, the Brief of Appellant contains 38 total pages.

Dated this 16th day of October, 2020.

FREDRIKSON & BYRON, P.A.

By: /s/ Lawrence Bender

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

Attorneys for Defendants, Appellants, and Cross-Appellees Earl Schwartz Company, Basin Minerals, LLC, and Kay Schwartz York, Kathy Schwartz Mau, and Kara Schwartz Johnson as the Co-Personal Representatives of the Estate of Earl N. Schwartz

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

Daniel H. Oster
dan@kopcemail.com

Jon Bogner
jonbogner@ndsupernet.com

James J. Coles
coleslaw@colespc.com

Jordan Selinger
jordanselinger@ndsupernet.com

Dated this 16th day of October, 2020.

FREDRIKSON & BYRON, P.A.

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

Attorneys for Defendants, Appellants, and Cross-Appellees Earl Schwartz Company, Basin Minerals, LLC, and Kay Schwartz York, Kathy Schwartz Mau, and Kara Schwartz Johnson as the Co-Personal Representatives of the Estate of Earl N. Schwartz

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

Daniel H. Oster
dan@kopcemail.com

Jon Bogner
jonbogner@ndsupernet.com

James J. Coles
coleslaw@birch.net

Jordan Selinger
jordanselinger@ndsupernet.com

FREDRIKSON & BYRON, P.A.

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

Attorneys for Defendants, Appellants, and Cross-Appellees Earl Schwartz Company, Basin Minerals, LLC, and Kay Schwartz York, Kathy Schwartz Mau, and Kara Schwartz Johnson as the Co-Personal Representatives of the Estate of Earl N. Schwartz