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STATE OF NORTH DAKOTA

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

REPLY BRIEF OF DEFENDANTS, APPELLANTS, AND CROSS APPELLEEES 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

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LAW AND ARGUMENT

I. Introduction.

[¶ 1] Great Plains' argues the District Court correctly quieted title to the Subject Properties in favor of Great Plains. Great Plains' arguments rely primarily on the law of the case doctrine and the mandate rule. Great Plains argues the Schwartz Defendants have presented "a re-hash of the same arguments" rejected by the Court in *Great Plains Royalty Corp. v. Earl Schwartz Co.*, 2019 ND 124, 927 N.W.2d 880. Alternatively, Great Plains argues the Schwartz Defendants are presenting new arguments that the Schwartz Defendants waived by not presenting to the Court in *Great Plains*. Great Plains also argues the Schwartz Defendants are barred from claiming title to any of the Subject Properties by a statute of limitations. As explained in the Schwartz Defendants' initial brief and as explained in greater detail below, these arguments are unavailing.

[¶ 2] Great Plains argues the District Court incorrectly denied Great Plains' damages claim. Great Plains contends that it has proven its claim for slander of title. Alternatively, Great Plains contends it has proven claims for conversion and unjust enrichment. Great Plains asserts that these claims entitle it to damages, but Great Plains does not specifically identify the amount of damages warranted by each claim. For the reasons set forth below, these arguments are also unavailing.

II. The Schwartz Defendants' Arguments Are Not Barred by the Law of the Case Doctrine or the Mandate Rule.

[¶ 3] Great Plains contends the arguments raised by the Schwartz Defendants on appeal are precluded under the law of the case doctrine and/or the mandate rule. But Great Plains misunderstands the law of the case doctrine and the mandate rule and

misunderstands the Schwartz Defendants' arguments. The law of the case doctrine and mandate rule have been described as follows:

> Generally, the law of the case is defined as the principle that if an appellate court has passed on a legal question and remanded the case to the court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same. In other words, the law of the case doctrine applies when an appellate court has decided a legal question and remanded to the district court for further proceedings, and a party cannot on a second appeal relitigate issues which were resolved by the Court in the first appeal or which would have been resolved had they been properly presented in the first appeal. The mandate rule, a more specific application of law of the case, requires the trial court to follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case and to carry the appellate court's mandate into effect according to its terms . . . and we retain the authority to decide whether the district court scrupulously and fully carried out our mandate's terms.

Rustad v. Baumgartner, 2020 ND 126, ¶ 6, 943 N.W.2d 786 (quoting *Carlson v. Workforce Safety & Ins.*, 2012 ND 203, ¶ 16, 821 N.W.2d 760). A statement by the Supreme Court does not automatically become the law of the case; the statement must be a determination of a legal question and expressed as such. *See, e.g.*, *Thompson v. Johnson*, 2019 ND 111, ¶ 12, 926 N.W.2d 120 (noting that the Court's statement in a prior opinion regarding the issue under consideration did not determine that issue "as a matter of law," but rather left the issue open for determination by the district court on remand). And though a district court is bound to follow the mandate of the Supreme Court, when the Supreme Court does not give specific directions in remanding for further proceedings, the district court is free to make any order not inconsistent with the Supreme Court's opinion. *See, e.g.*, *Tarver v. Tarver*, 2019 ND 189, ¶ 17, 931 N.W.2d 187. As the Supreme Court has previously stated:

> When this Court specifies a defect to be cured and remands for redetermination of an issue without specifying the procedure to be

> followed, the trial court need only rectify the defect in a manner consistent with our opinion and conformable to law and justice. . . . Thus, when we reverse and remand for a trial court to address an issue or to redetermine a matter, unless otherwise specified, the trial court may decide based on the evidence already before it or may take additional evidence.

Kautzman v. Kautzman, 2000 ND 116, ¶ 7, 611 N.W.2d 883.

[¶ 4] The Schwartz Defendants' initial brief argued The District Court should have quieted title to all Great Plains' interest in the lands described on the Notice of Sale (referred to as the "Noticed Properties") in favor of the Schwartz Defendants and Sunbehm. The law of the case doctrine does not apply to this argument. In its opinion, the Supreme Court stated "The evidence does not support the district court's finding that the parties to the bankruptcy sale intended to sell all of Great Plains' assets to Earl Schwartz at the auction sale, including property that had not been identified." *Great Plains*, 2019 ND 124, ¶ 38. Nowhere in the opinion does the Supreme Court determine "as a matter of law" what properties were conveyed to Earl Schwartz. *Cf. Thompson*, 2019 ND 111, ¶ 12. Instead, the "prior opinion left the question open and directed the district court to adequately explain its prior decision." *Id.* Thus on remand the Schwartz Defendants presented arguments as to what properties were "included" in the Notice of Sale, per the language of the bankruptcy Court's Amended Order Confirming Sale of Assets (Nunc Pro Tunc). The Supreme Court's opinion did not direct the District Court to construe the Notice of Sale or the Amended Order in any particular way. *Cf. Matter of Curtiss A. Hogen Tr. B*, 2020 ND 71, ¶ 11, 940 N.W.2d 635. The foregoing argument was also not implicitly ruled on in the previous appeal. The District Court had previously ruled Earl Schwartz acquired all of Great Plains assets as a result of the bankruptcy sale, and had neither ruled for or against the arguments now presented. *Great Plains*, 2019 ND 124, ¶ 7. There was no reason for the Schwartz Defendants to argue on appeal that Earl

Schwartz had received a lesser quantity of interests, as they do now in seeking a determination that Earl Schwartz purchased all Great Plains' interest in the Noticed Properties. Thus, the Schwartz Defendants are not precluded from making such an argument now.

[¶ 5] The Schwartz Defendants also argued the District Court erred in quieting title to all the Subject Properties in favor of Great Plains because it is undisputed that, at a minimum, those interests expressly described on the Notice of Sale were sold to Earl Schwartz at Great Plains' bankruptcy sale. For the reasons already set forth above, this issue was not decided as a matter of law by the Supreme Court but was instead left open for determination on remand. It has never been genuinely disputed by the parties that Earl Schwartz, and ultimately the Schwartz Defendants, acquired at least some interest in the Noticed Properties as a result of the bankruptcy sale. The dispute in this case has concerned (1) how to interpret the Notice of Sale and Amended Order Confirming Sale of Assets (Nunc Pro Tunc) to determine the interests acquired by Earl Schwartz from Great Plains' bankruptcy estate (the subject of the current appeal), and (2) whether interests not included in the Notice of Sale were acquired by Earl Schwartz (the subject of the previous appeal). Great Plains' disingenuous representations in its brief to the contrary should be disregarded.

[¶ 6] The mandate rule also does not apply to any of the foregoing arguments. The only mandate articulated by the Supreme Court in its prior opinion was to "remand for further proceedings to determine the parties' claims and ownership of the properties consistent with this opinion." *Great Plains*, 2019 ND 124, ¶ 46. Nothing about this mandate precluded the District Court from considering the Schwartz Defendants'

arguments in support of their claim to the Noticed Properties, and likewise the mandate rule does not preclude the Supreme Court from considering those arguments in the present appeal. If anything, the Supreme Court's mandate *required* the District Court to hear and decide the Schwartz Defendants' claims to the Noticed Properties; ignoring these claims on the basis of collateral estoppel, as urged by Great Plains, represents a failure to carry out the Supreme Court's mandate.

III. The Schwartz Defendants' Claims Are Not Barred by a Statute of Limitation.

[¶ 7] Great Plains argues the Schwartz Defendants' claims to the Noticed Properties are barred by the statute of limitations. Great Plains asserts the Schwartz Defendants had "at most, 20 years within which to request documents of conveyance from the bankruptcy trustee or petition for confirmation of its interests resulting from the bankruptcy sale." But Great Plains does not identify the date on which this alleged twenty-year limitation period began to run. Great Plains' omission is significant because, as Great Plains is aware, no adverse claim to the Schwartz Defendants' interests would have been asserted until *after* Great Plains was reinstated in 2011. The present action was commenced in 2016 and the Schwartz Defendants served their counterclaim in 2017, well within twenty years of Great Plains asserting its adverse claims.

[¶ 8] Perhaps more importantly, Great Plains fails to explain why it was necessary for the Schwartz Defendants to commence an action at all. As explained in the Schwartz Defendants' initial brief, the Amended Order Confirming Sale of Assets (Nunc Pro Tunc) conveyed equitable title to the assets included in the Notice of Sale. Equitable title is superior to legal title. *See, e.g.*, 33 C.J.S. *Exchange of Property* § 43 (2020); *see also Hokanson v. Ziegler*, 2017 ND 197, ¶ 19, 900 N.W.2d 48. Neither Great Plains nor

its bankruptcy estate asserted any claim to the Subject Properties until after Great Plains' reinstatement in 2011; during the preceding decades the bankruptcy estate was closed and Great Plains was "civilly dead." *See In re Great Plains Royalty Corp.*, 471 F.2d 1261, 1264–65 (8th Cir. 1973) ("A corporation which has formally dissolved or become bankrupt leaving an estate to be administered for the benefit of its shareholders and creditors becomes civilly dead."). As the superior title holder, there was no need for the Schwartz Defendants to seek confirmation of their title until Great Plains making adverse claims to the Schwartz Defendants' interests following its reinstatement. Accordingly, Great Plains' argument that the Schwartz Defendants claims are barred by a statute of limitation is erroneous and unavailing.

IV. Great Plains Is Not Entitled to Damages.

[¶ 9] Great Plains argues it is entitled to damages for slander of title. As noted in the Schwartz Defendants' initial brief, the three documents complained are conveyances among the Schwartz Defendants; none of the three documents purports to divest Great Plains of any interest. Moreover, all three documents were placed of record more than two years before the commencement of this action, and thus any claim for slander of title based on these documents is barred by the statute of limitations. *See* N.D.C.C. § 28-01-18(1). Accordingly, Great Plains did not and cannot prove it is entitled to damages for slander of title.

[¶ 10] Great Plains also argues it is entitled to damages for conversion and, for the first time in this litigation, unjust enrichment. *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."), p. 47 (requesting

damages for "defendants' acts of slander of title and conversion"). The arguments regarding conversion were addressed in the Schwartz Defendants' initial brief. Regarding unjust enrichment, Great Plains asserts the fact that it may be able to seek compensation from others should not bar its claims, citing *KLE Construction, LLC v. Twalker Development, LLC*, 2016 ND 229, ¶ 6, 887 N.W.2d 536. The authority cited does not support Great Plains assertion; to the contrary, the *KLE Construction* decision, like other unjust enrichment cases, reiterates the rule that a party cannot prevail on an unjust enrichment claim when it has other, adequate remedies available at law. As Great Plains now appears to concede it does have other remedies available to it for recovering the amounts it claims to have lost. Even if the Supreme Court were to consider Great Plains' arguments regarding unjust enrichment, *but see, e.g.*, *Heng v. Rotech Medical Corp.*, 2006 ND 176, ¶ 9, 720 N.W.2d 54, these arguments would still be unavailing, as Great Plains cannot prove unjust enrichment while other remedies remain available to it.

CONCLUSION

[¶ 11] For the reasons stated above, and for the reasons set forth in the other briefs filed by the Schwartz Defendants and Sunbehm, 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 6th day of January, 2021.

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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 Appellate Procedure, this Reply Brief contains 12 total pages.

Dated this 6th day of January, 2021.

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

CERTIFICATE OF SERVICE

[¶ 1] I hereby certify that on January 6th, 2021, I electronically filed the following documents:

> Reply 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; and

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