

IN THE SUPREME COURT  
STATE OF NORTH DAKOTASUPREME COURT NO. 20200133  
McKenzie County No. 27-2016-CV-00530Great Plains Royalty Corporation, a North Dakota  
Corporation, Plaintiff, Appellee and Cross-Appellant

vs.

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

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**APPEAL OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
ORDER FOR JUDGMENT ENTERED ON FEBRUARY 18, 2020  
AMENDED JUDGMENT ENTERED ON REMAND, DATED MARCH 4, 2020  
AND NOTICE OF ENTRY OF AMENDED JUDGMENT ON REMAND  
ENTERED ON MARCH 5, 2020  
DISTRICT COURT OF MCKENZIE COUNTY  
CIVIL NO. 27-2016-CV-00530  
THE HONORABLE DANIEL S. EL-DWEEK, PRESIDING**

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**REPLY BRIEF OF GREAT PLAINS ROYALTY CORPORATION, PLAINTIFF,  
APPELLEE, AND CROSS-APPELLANT**

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[1]

## INTRODUCTION

[2] Great Plains Royalty Corporation (“Great Plains”), as cross-appellant, submits this Reply Brief limited to the issue of damages claimed by it for slander of title, conversion, and/or unjust enrichment on the part of the defendants. The Reply Brief of Sunbehm Gas, Inc. (“Sunbehm”) does not directly address this issue, but it does indicate that Sunbehm joins with the Schwartz Defendants (“ESCO” herein) on that issue in their Reply Brief.

[3]

## LAW AND ARGUMENT

### Timeline of Relevant Events

[5] Great Plains was incorporated on August 6, 1958. On August 6, 1958 Allen Linderman conveyed minerals in Property No. 3 to Great Plains (A: 961), subject to an Oil and Gas Lease still held today by production. Index no. 116. On March 15, 1959, Marvin Retzlaff conveyed minerals in Property No. 2 to Great Plains (A: 953). On March 22, 1959, Alfred Retzlaff conveyed minerals in Property No. 2 to Great Plains. (A: 955). In 1961 Great Plains provided an Oil and Gas Lease to Hunt Oil Company for Property No. 2. On June 13, 1961 Hunt Oil Company assigned an overriding royalty interest in Property No. 2 to Great Plains. (A: 957). The lease and assignment are today still held by production under the secondary term. Index no. 115.

At no time has any defendant produced an instrument of conveyance divesting Great Plains of these interests.

[6] The company’s creditors filed for bankruptcy on April 12, 1968. (A: 1011, at docket no. 1). Myron Atkinson was appointed as trustee of the bankruptcy estate and he

petitioned the court for the sale of company assets on December 5, 1968. (A: 1011, at docket no. 32). A Notice of Sale was published and the sale was held in Williston on June 5, 1969. (A: 367). The assets offered for sale pursuant to the Notice of Sale were sold to Earl Schwartz and the sale was confirmed by the bankruptcy referee by an order dated June 19, 1969 (A: 371) and an amended order dated February 9, 1970. (A: 377). In each case the orders were entered “nunc pro tunc”. By letter dated April 28, 1971 (A: 627) Amerada Hess Corporation alerted Earl Schwartz to the fact that there were title issues related to the properties purportedly purchased at the bankruptcy sale. In turn, Earl Schwartz expressed his concerns to Referee Gordon [Thompson] by writing upon such letter which was received by the United States Bankruptcy Court on May 4, 1971.

Having sold the assets he was able to identify, Trustee Atkinson filed his final account on July 19, 1973. (A: 1012, at docket no. 43). The case was then closed, with approximately \$5,000. remaining in unpaid claims, and the docket reflects no activity until October 20, 2009, at which time the clerk wrote to Attorney Jon Bogner regarding the electronic filing requirements. (A: 1013, docket no. 27).

[7] Royalty records obtained from Petro-Hunt, LLC show that royalties for Property No. 2 were paid to Earl Schwartz or his estate from July 1993 to September 2008. (A: 823-851). A deed of conveyance has never been produced divesting Great Plains of these mineral interests and later title opinions will show Great Plains as the owner.

[8] By a letter dated February 8, 2002, Robert Mau, ESCO’s manager, clearly indicates that he is seeking some type of “order” that he believes is in the Great Plains file which has not yet been located. (A: 661). The handwritten note of the clerk makes equally clear that Robert Mau intended to travel to Fargo and “look thru the file.”. A cash

receipt dated April 12, 2002 shows that Mau apparently did travel to the bankruptcy clerk's office and reviewed the bankruptcy case file paying for various copies and to have a record certified. (A: 662)

Despite the fact of the obvious concerns of Robert Mau, the bankruptcy docket reflects no filing on his behalf to address the concerns.

[9] On or about September 12, 2008, Earl Schwartz Company records an Assignment, Bill of Sale, and Conveyance (A: 513) wherein the Estate of Earl Schwartz purports to convey listed mineral interests to Earl Schwartz Company. Great Plains is the record title owner of the mineral interests in the listed Property No. 2 and no deed, including any trustee's deed, is offered at trial divesting Great Plains of those interests. In response to such filing, Petro-Hunt, LLC now pays the Property No. 2 royalties to Earl Schwartz Company from October 2008 to July 2012. (A: 852-857).

[10] As regards Property No. 3, royalty records obtained from Hess show that Sunbehm was paid royalties from that property from October 2010 to July 2015. (Exhibit P-35, Index no. 143). On June 15, 2016, Great Plains effectuated a Division Order for Property No. 3 with the attached exhibit A showing royalties held in suspense. (A: 583)

All suspended royalties are not included in the Preszler' tabulated damage claim amount. A deed of conveyance has never been produced divesting Great Plains of these mineral interests and later title opinions will show Great Plains as the owner.

[11] On June 5, 2012, a Mineral Deed covering Property No. 2 is recorded showing a conveyance from Earl Schwartz Company to Basin Minerals, LLC. (A: 515). On October 9, 2012, an Assignment of Overriding Royalty Interest covering Property No. 2 is recorded showing a conveyance from Earl Schwartz Company to Basin Minerals, LLC.

(A: 517). In response to such filings, Petro-Hunt, LLC now pays the Property No. 2 royalties to Basin Minerals, LLC from August 2012 to May 2016. (A: 858-952). After Great Plains informed Petro-Hunt of its intention to claim right to royalty prior to commencing the District Court title action, Petro-Hunt placed Property No. 2 royalties in suspense. No suspended royalties for Property No. 2 are included in the Preszler' tabulated damage claim amount.

[12] In an oil and gas title opinion for Petro-Hunt, LLC, dated May 17, 2013, regarding Property No. 2 (A: 524-539), the title examiner scheduled the ownership interest to Great Plains (A: 527), but goes on to state “Earl Schwartz and the Earl Schwartz Company are strangers to the chain of title in said lands.”

[13] According to the official clerk’s docket of the United States Bankruptcy Court, the allowed claims against Great Plains Royalty Corporation; Bankruptcy No. 68-00039, were not paid until July 24, 2015, by the filing of the Trustee’s Final Account which reflected payment of all claims in full with all accrued interest. (See docket no. 70). This the action seeking damages was commenced by service upon Basin Minerals, LLC, on December 9, 2016, commencing the action. (A: 29).

[14] Legal Analysis

[15] The law regarding claims for slander of title, conversion, and unjust enrichment is discussed in Great Plains’ primary brief in this appeal. This Reply Brief addresses the specific arguments presented by ESCO in its reply to these issues.

[16] ESCO argues that no slander of title could have taken place because none of the three instruments purport to divest Great Plains of interest. However, the statutory definition of a “slanderous notice” under N.D.C.C. §47-19.1-09 is not that narrow. The



statute prohibits the “recording any instrument affecting title to real property for the purpose of slandering the title to real estate or to harass the owner of the real estate”. We know for a fact that the filings caused Petro-Hunt to change royalty payees which caused Great Plains damage. The North Dakota Supreme Court has defined slander of title 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, 851. For purposes of slander of title, malice means deliberate conduct without reasonable cause. *Allen-Pieroni v. Pieroni*, 538 S.W.3d 631, 636 (Tex.App. 2016). The timeline of events above shows clearly that both Earl Schwartz and Robert Mau had serious concerns as to the actual title acquired from Trustee Atkinson out of the Great Plains’ bankruptcy. Instead of addressing those issues in the bankruptcy they decided upon a self-help approach despite such knowledge.

[17] ESCO next argues that any claim for slander of title is subject to a two year statute of limitations under N.D.C.C. §28-01-18. Great Plains disagrees. The “slander” contemplated by that statute is that described at N.D.C.C. §14-02-04, and as such is a defined term. A “slanderous notice” is separately defined with its own special requirements as found at N.D.C.C. §47-19.1-09. Great Plains believes that the applicable statute of limitations for slander of title would be found at N.D.C.C. §28-01-05 which allows for claims to be made for up to twenty years.

[18] In any event, any discussion of a statute of limitations is premature until the impact of the Great Plains’ bankruptcy is taken into account. In the event that North Dakota law regarding a limitation of actions is in conflict with federal bankruptcy law, state law must yield under the Supremacy Clause of the United States Constitution.

[19] Great Plains filed for bankruptcy protection on April 12, 1968. From the moment of that filing a statutory stay came into being. 11 U.S.C. §362. Such stay is extremely broad and includes a stay of “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;”. 11 U.S.C. §362(a)(3). A reading of this section leaves no doubt that its application is universal and is not limited to parties deemed creditors of the debtor.

[20] In turn, 11 U.S.C. §541 makes clear what constitutes “property of the estate”

(a)The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

[21] This means that the stay covered the entirety of Great Plains’ assets, including the entire mineral estate and all prospective royalties under lease and assignment agreements, at the time of filing and it covered all assets not sold by Trustee Atkinson during administration. In the prior appeal at *Great Plains Royalty Corporation v Earl Schwartz Co.*, 2019 ND 124, 927 N.W.2d 880, it was determined that the only assets sold to the defendants herein were those listed on the Notice of Sale and no other. Accordingly, the stay remained in force for those unsold assets. Does the stay cover extracted oil and gas and the proceeds thereof? The clear answer is yes.

Pursuant to § 541(a)(6), that interest also included any profits earned or to be earned from the sale of the extracted oil unless the profits were the result of post-petition services performed by the debtors. 11 U.S.C. § 541(a)(6).

*In re Johnson*, 513 B.R. 333, 339 (2014)

[22] So how long does the stay remain in force? Bankruptcy law also makes this clear. Because Great Plains is not an individual it can never be discharged of its debts. 11 U.S.C. §727(a)(1). Any property subject to the stay remains so until all allowed claims are paid in full, with interest. *In re Dunning Bros. Co.*, 410 B.R. 877, 879. We know that claims in the Great Plains' bankruptcy were not paid in full until July 24, 2015. When the outstanding claims were paid with interest the remaining assets of Great Plains were re-invested in the debtor. 11 U.S.C. §726(a)(6). Until that occurred 11 U.S.C. §362(c)(1) provides:

....the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

[23] As a result of the stay, which takes precedence over any state statute, every royalty dollar misappropriated out of the bankruptcy estate by Sunbehm, Earl Schwartz, his estate, Earl Schwartz Company, and Basin Minerals, LLC was taken in violation of the federally mandated stay.

In order to sustain an action for a violation of § 362(a)(3), three elements must be shown: (1) a property interest is involved; (2) the property interest is estate property; and (3) there occurred either an act to obtain possession of the estate property or there existed an act to exercise control over estate property.

*In re Harchar*, 393 B.R. 160, 167-168 (2008)

[24] What then is the result of a violation of the stay under 11 U.S.C. §362? The Bankruptcy Appellate Panel for the 8<sup>th</sup> Circuit Court of Appeals has made that

clear.

We are persuaded by the rationales offered by the Schwartz and Soares courts, and align ourselves with the majority position. We hold that an action taken in violation of the automatic stay is **void ab initio** (emphasis added).

*In re Vierkant*, 240 B.R. 317, 325 (Cir.BAP (Minn.))

[25] Based on the foregoing, the inescapable conclusion is that Great Plains is entitled to a return of every dollar misappropriated by the defendants with a minimum of six percent interest from the date of misappropriation. None of the defendants are entitled to avail themselves of any statute of limitations set forth in North Dakota law. The actions of defendants were deliberate and such actions caused damage to Great Plains' bankruptcy estate and to Great Plains.

[26] CONCLUSION

[27] WHEREFORE, Great Plains respectfully requests that this Court determine that ESCO and Sunbehm slandered the title to Great Plains' properties, award damages, costs, and attorney fees according to statute or adjudge that ESCO and Sunbehm are liable for damages for royalties misappropriated by them along with interest, grant costs and disbursements, reasonable attorney's fees, and such other relief as the court deems fair and equitable.

[28] Dated this 20<sup>th</sup> day of January, 2021.

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**CERTIFICATE OF COMPLIANCE**

[29] The undersigned, as attorney for Great Plains Royalty Corporation, a North Dakota Corporation, Plaintiff, Appellee, and Cross-Appellant, in the above matter, and as the author of the Plaintiff, Appellee, and Cross-Appellant's reply brief, hereby certifies, in compliance with Rules 28 and 32 of the North Dakota Rules of Appellate Procedure, that the Plaintiff, Appellee, and Cross-Appellant's reply brief, excluding this certificate of compliance and the certificate of service comprises 12 pages, or less.

[30] Dated this 20<sup>th</sup> January, 2021.

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CERTIFICATE OF ELECTRONIC SERVICE

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