

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

Supreme Court Case No. 20210258
McKenzie County District Court No. 27-2012-PR-00293

In the Matter of the Rose Henderson Peterson Mineral Trust,
Dated March 26, 1987,

Lyle M. Henderson, Clifford Henderson,
Herbert Henderson, Emmalee McKenzie, and
Dixie J. Henderson,

Petitioners/Appellees,

v.

Dennis Henderson and James Henderson,
Individually and as co-trustees of the Rose
Henderson Peterson Mineral Trust,

Respondents/Appellants,

and

Donna Foreman, Patsy Gabbert, Kimber Henderson,
Larry Henderson, Lyleen Henderson, and Penny Pitman,

Interested Parties/Appellees.

PETITIONERS/APPELLEES' SUPPLEMENTAL APPEAL BRIEF

**Appeal from the Memorandum Decision and Order for Judgment, dated
July 22, 2021, and Judgment, dated August 18, 2021**

**THE DISTRICT COURT FOR THE NORTHWEST JUDICIAL DISTRICT
THE HONORABLE ROBIN A. SCHMIDT**

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STATEMENT OF THE ISSUES

¶1 Did the District Court correctly find that Respondents/Appellants' breach of trust was committed in bad faith or with reckless indifference to the purposes of the trust?

¶2 Did the District Court correctly find that Respondents/Appellants set forth no evidence to support a defense of laches?

STATEMENT OF THE CASE

¶3 Petitioners/Appellees rely upon the Statement of the Case within their initial Brief. [Petitioners/Appellees Br: 7:¶6]. Since that time, this Court remanded Respondents/Appellants' Appeal from the Memorandum Decision and Order for Judgment, dated July 22, 2021, and Judgment, dated August 18, 2021 back to the District Court with instructions to make specific findings of fact concerning application of the exculpatory provision and the issue of whether the doctrine of laches applies. [Opinion of the Court:11:¶300]. The District Court entered its Order on Remand on July 5, 2022 [R224].

¶4 Suffice to state the District Court's findings on remand were, appropriately, emphatic: Respondents/Appellants' behavior in flouting 1) the Trust's requirement that their compensation to be reasonable, and 2) the District Court's 2013 Order, evinced bad faith and reckless indifference to the trust's purposes. And Respondents/Appellants set forth no evidence whatsoever to support a purported "laches" defense; they were acutely aware of the District Court's 2013 Order, the enormous increase in Trust income and ergo their fees, and Petitioners/Appellees' demands that those exorbitant fees be addressed.

STATEMENT OF THE FACTS

[¶5] The District Court’s findings on these issues were clearly correct. Again, the trust clearly and unambiguously provides, in pertinent part, as follows:

[. . .][A] All income generated by the Trust shall be distributed to the Paul Henderson Grandchildren and the Lyle Henderson Grandchildren in equal shares to each grandchild. It is my intent that . . . each grandchild of mine shall receive no more or no less share of income generated, regardless of which group of grandchildren he or she is in.

. . . .
[. . .]Trustee . . . shall exercise such powers at all times **in a fiduciary capacity primarily in the interest of the beneficiary hereunder.**

. . . .
[. . .]Trustee is entitled to **reasonable** compensation, if demanded.

. . . .
[. . .] The Trustee shall not be liable for any **mistake or error of judgment** in the administration of the Trust herein created, except for willful misconduct, **so long as she continues to exercise her duties and powers in a fiduciary capacity primarily in the interest of the beneficiaries hereunder.**

[¶6] As the District Court found, the record is replete with evidence establishing that Respondents/Appellants behaved in bad faith and reckless indifference towards the foregoing purposes. Respondents/Appellants knew circumstances had changed markedly with the dramatic increase in Trust income in 2014, while their duties had not changed, and simply didn’t care:

- Beginning in 2014, the Trust saw a significant increase in income. As a result, Respondents/Appellants’ 5% yielded them exorbitant compensation, to wit:

Year	Trust Income	Fiduciary Fees
2014	6,152,939	307,547
2015	4,926,744	246,241

2016	2,207,830	110,290
2017	2,038,446	101,822
2018	3,978,640	198,856
2019	2,622,266	131,970

- Respondents/Appellants paid themselves a whopping **\$1,096,726** during 2014-19, averaging annual compensation of nearly **\$182,788.00**.
- In every year during 2014-19, Respondents/Appellants' compensation was significantly higher than in 2011-13, when it had been previously reviewed by the District Court.
- Respondents/Appellants **duties** did not change one iota, however. They claimed they spend "5-20" hours performing services for the trust. But they keep no records of their time, and so could not corroborate this number, or the services they provide, other than distributing income to beneficiaries. Thus, the Court concluded 5 hours was a reasonable amount of time devoted to their purported duties. Ergo in 2014, for example, Respondents/Appellants paid themselves **\$5,125.78/hour**. [2021 Tr. at 17-24, 114: 21-25; 115: 1-25].
- Respondents/Appellants admitted the Trust's circumstances changed significantly with the increase in revenue in 2014, and so bore no resemblance to those reviewed by the District Court in 2013. [2021 Tr. at 113: 2-12, 204: 10-16, 205: 1-9]. But they construed the District Court's 2013 Order as *carte blanche* to take 5% of the trust's income, regardless how much work they did, or how much compensation would result. When asked whether there was any limit to the amount of compensation they could accept in accordance with their fiduciary

duties, they answered **no**. Dennis Henderson testified his compensation is an **entitlement**. [2021 Tr. at 116: 1-17, 199: 1-9].

- The evidence also established that Respondents/Appellants thumbed their noses at the District Court's 2013 Order. Respondents/Appellants offered no competent, admissible evidence whatsoever that they "continue[d] to evaluate and assess their rate of compensation on a reasonable basis and communicate[d] such rates to beneficiaries" as required by the 2013 Order. [2021 Tr. at 117-119, 190: 20-25, 191: 1-23]. In fact, Respondents/Appellants admitted they ignored this requirement, both in testimony and in response to discovery. [Index #128, page 10]. The same was true for the District Court's admonition that Respondents/Appellants "solicit input from the beneficiaries for future charges to the Trust". [Id, page 11; 2021 Tr. at 138: 16-25, 139: 1-9, 203; 14-25, 204: 1-9].

- Petitioners/Appellees introduced correspondence which made clear that Rocky Henderson repeatedly demanded Respondents/Appellants reevaluate their compensation during 2014-19, with Respondents/Appellants either responding "no", or not responding at all. The evidence established that Respondents/Appellants ignored Rocky's communications. [Index #131, page 4; 2021 Tr. at 140: 24-25, 141: 1-25, 142: 1-4, 183: 7-25, 184: 1-4].

- Dennis Henderson admitted there is animus between him and Rocky. [2021 Tr. at 133: 25, 134: 1-2]. This animus is apparent in Respondents/Appellants' responses (or lack thereof) to Rocky's repeated requests that they reassess their compensation in compliance with the law and the District Court's Order. [2021 Tr. at 134: 24-25, 135: 1-9]. James Henderson also admitted he had obtained information regarding the economic life of the oil wells owned by the Trust, which was obviously

material to the beneficiaries' interests, yet failed to disclose that information to the beneficiaries. [2021 Tr. at 206: 25, 207: 1-25, 208: 1-25, 209: 1-7].

[¶7] Thus, the District Court is correct: there is ample evidence that Respondents/Appellants behaved in bad faith and were recklessly indifferent to the purpose of the Trust, which is that “each grandchild of” the Settlor “shall receive no more or no less share of income generated, regardless of which group of grandchildren he or she is in.”

[¶8] The District Court also correctly concluded there is no evidence whatsoever to support a laches defense. In fact, there was no evidence of any delay whatsoever in the Petitioners/Appellees' attempts to get the Respondents/Appellants to adhere to their fiduciary duties and the 2013 Order, let alone any evidence of prejudice to the Respondents/Appellants. Along those lines, the District Court Judgment allows Respondents/Appellants to satisfy their obligations to the Trust via deduction of their future Trust income. Their claim on appeal that they were somehow prejudiced by paying income taxes on the money they received is therefore completely unsupported. Respondents/Appellants never so much as mentioned income taxes during the trial, let alone whether they may have income tax relief available under 26 U.S.C. § 1341 . . . if they even need it given their ability to use future Trust income to repay the Trust. The simple fact is Respondents/Appellants knew or should have known of the risk that they might be required to repay compensation in the event they breached the Trust or their fiduciary duties when they took on their roles. N.D. Cent. Code Section § 59-18-02 furnishes such notice to every Trustee of a North Dakota Trust.

LAW AND ARGUMENT

A. The District Court Correctly Concluded That Respondents/Appellants Acted In Bad Faith And With Reckless Disregard

[¶9] Petitioners/Appellees continue to maintain that because the District Court found that Respondents/Appellants breached their fiduciary duties, it did not need any additional findings of bad faith or reckless indifference to conclude the exculpatory clause did not apply. Because the exculpatory clause clearly and unambiguously does **not** exculpate a breach of fiduciary duties, it affords Respondents/Appellants no protection here. That issue is now mooted by the District Court's emphatic findings. Along those lines, Section 59-18-08(1) provides, in pertinent part:

A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that the term relieves the trustee of liability for breach of trust committed in **bad faith** or with **reckless indifference** to the purposes of the trust

[¶10] This provision permits the use of an exculpatory clause, “but . . . confirms that a trustee must always act in good faith in the interests of the trust and its beneficiaries.” Bogert's The Law of Trusts and Trustees § 542 (citing Unif. Trust Code § 1008). “Good faith” is defined by our statutes as “an honest intention to abstain from taking any unconscientious advantage of another even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious.” N.D. Cent. Code § 1-01-21. The District Court marshaled ample (yet not even close to all) the record evidence establishing that Respondents/Appellants did not behave in good faith. “Recklessness” is knowledge of a high degree of probability that damage will result

and action with deliberate disregard of that probability, or a conscious disregard of the probable results. NDJI - Civil C - 20.40. Again, the District Court marshaled ample record evidence of Respondents/Appellants' reckless indifference to their duties as Trustees.

[¶11] In its prior Opinion this Court declared “[t]he degree of a trustees’ culpability is a question of fact for the trier of fact.” Matter of Rose Henderson Peterson Mineral Tr. dated March 26, 1987, 2022 ND 92, ¶ 21, 974 N.W.2d 372 (citing Newcomer v. Nat’l City Bank, 19 N.E.3d 492, 503-04 (Ohio Ct. App. 2014)). The District Court’s findings in these regards cannot possibly be deemed “clearly erroneous”. See Passero v. Fitzsimmons, 81 N.E.3d 814 (Mass. App. Ct. 2017)(exculpatory clause did not shield trustees from liability for committing a breach of trust; statute rendered a trustee exculpatory clause unenforceable to the extent that it relieved a trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purpose of the trust or the interests of the beneficiaries, and trial judge expressly found that trustees “breach of trust was committed with reckless indifference to the interests of the beneficiaries.”).

B. The District Court Correctly Concluded Respondents/Appellants Provided No Evidence To Support A Defense Of Laches

[¶12] The same is true for the District Court’s finding that Respondents/Appellants utterly failed to support a laches defense. “The party against whom laches is sought to be invoked must be actually or presumptively aware of his rights and must fail to assert them against a party who in good faith permitted his position to become so changed that he could not be restored to his former state.” Fredericks v. Fredericks, 2016 ND 234, ¶ 29, 888 N.W.2d 177. The equitable

doctrines of estoppel and laches are unavailable to a party who does not come to Court with clean hands. Id. Ergo, the District Court's finding that Respondents/Appellants behaved in bad faith axiomatically prevents them from asserting the equitable defense of laches.

CONCLUSION

[¶13] Petitioners/Appellees wish to reemphasize that Respondents/Appellants scarcely even put on a case in the District Court. They proffered no expert testimony in support of their exorbitant fees. They offered no documentation or records to justify or substantiate their exorbitant fees.

[¶14] Trustees bear the burden of establishing their compensation is 1) "fair to the beneficiaries"; and 2) "reasonable". N.D.C.C. § 59-16-02(8); Mehus v. Mehus, 278 N.W.2d 625, 634 (N.D.1979) ("If [a fiduciary] is to receive the benefits from a good faith transaction with [the] principal or beneficiary, [the fiduciary] must also assume the burden of developing a record sufficient to satisfy the requirements of law). This burden is solemnized by Section § 59-18-01.1, entitled "Presumption against trustee":

A transaction between a trustee and the trust's beneficiary during the existence of the trust . . . by which the trustee obtains any advantage from the trust's beneficiary is presumed to be entered by the trust's beneficiary without sufficient consideration and under undue influence. This presumption is a rebuttable presumption.

[¶15] These Trustees didn't just fail to meet their burden; they ignored it entirely.

The District Court's Judgment should be affirmed.

Dated this 19th day of August, 2022.

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CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that this document complies with this Court's July 20, 2022 correspondence, this Supplemental Brief does not exceed 12 pages.

Dated this 19th day of August, 2022.

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