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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20220212

Williams County No. 53-2019-CV-01515

Henry Hill Oil Services LLC,

Plaintiff and Appellee,

vs.

Abner C. Tufto, Eric Ted Tufto, Darla Tufto a/k/a Darla O'Donnell, Kris Bradley Tufto,

Defendants.

AND

RWS Holdings, LLC and Regional Water Service LLC

Defendants and Appellees

AND

Lane A. Knudsen, Marcia K. Talley and David H. Talley, Trustees of the Marcia K. Talley Living Trust, Ann E. Gochnour,

Defendants and Appellants

AND

Regional Water Services LLC,

Plaintiff and Appellee

v.
Henry Hill Oil Services, LLC

Defendant and Appellee

BRIEF OF APPELLANTS MARCIA K. TALLEY AND DAVID TALLEY, TRUSTEES OF THE MARCIA K. TALLEY LIVING TRUST ANN E. GOCHNOUR

APPEAL FROM *Order Granting Summary Judgment and Denying Summary* (R100); *Order Denying Motion for Reconsideration* (R219); *Findings of Fact, Conclusions of Law, and Order for Judgment* dated May 5, 2022 (R247); and *Judgment* dated May 19, 2022 (R250).

Northwest Judicial District Court,
Williams County, North Dakota,
The Honorable Joshua Rustad
Civil No. 53-2019-CV-01515

ORAL ARGUMENT REQUESTED

Dated this 5th day of October, 2022.

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STATEMENT OF THE ISSUES

[1] Whether the District Court erred as a matter of law in denying the Marcia K. Talley and David H. Talley, Trustees for the Marcia K. Talley Living Trust (the "Trust") and Ann E. Gochnour's ("Gochnour") *Motion for Summary Judgment* and granting Henry Hill Oil Services LLC's ("Henry Hill") *Motion for Summary Judgment* when it ruled that the *Amended Construction Lien* filed by Henry Hill on real property owned by the Trust and Gochnour was a valid construction lien under N.D.C.C. Ch. 35-27, *et. seq.*

[2] Whether the District Court erred as a matter of law when it ordered Henry Hill to foreclose upon the Trust/Gochnour's fee simple interest, as opposed to only the easement rights under which Henry Hill performed work.

[3] Whether the District Court erred as a matter of law in denying the Trust and Gochnour's *Motion for Reconsideration* of the award of attorneys' fees to Henry Hill.

[4] Whether the District Court erred as a matter of law in awarding interest and attorneys' fees to Henry Hill as against the Trust and Gochnour pursuant to N.D.C.C. § 35-27-24.1.

STATEMENT OF THE CASE

[5] This case involves the failure of Regional Water Service, LLC ("RWS") and/or RWS Holdings LLC ("Holdings") to pay for services Henry Hill provided to RWS. Due to RWS's failure, Henry Hill recorded an *Amended Construction Lien* (the "Lien") against real property owned by the Trust and Gochnour in Williams County, North Dakota, specifically:

Township 154 North, Range 100 West
Section 35: S2NE4, N2SE4

(hereafter, the "Trust/Gochnour Property").

Subsequently, Henry Hill commenced this lawsuit to foreclose on the Lien, and upon other construction liens it filed against property owned by others (including Appellant Lane Knudsen).

[6] On February 18, 2020, the Trust and Gochnour moved for summary judgment, asking the District Court to rule, as a matter of law, that the Lien was invalid under N.D.C.C. Ch. 35-27 and that the Trust and Gochnour were entitled to recover attorneys' fees pursuant to N.D.C.C. § 35-27-24.1. *Brief in Support of Motion for Summary Judgment* (R55).

[7] On March 19, 2020, Henry Hill filed its cross-motion for summary judgment, arguing that due to the Trust and Gochnour's execution of a "Water Pipeline Easement and Right of Way Agreement (the "Easement") and a separate "Easement/Surface Use and Appurtenance Agreement" (the "Surface Use Agreement")(collectively, the "Agreements") between the Trust/Gochnour and Holdings, the Trust/Gochnour "authorized" Holdings to commence construction on the Trust/Gochnour Property. *Henry Hill Oil Services LLC's Brief in Opposition of Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment,* ¶ 5 (R61). Henry Hill alleged that it was retained by RWS to perform work on the Trust/Gochnour Property pursuant to the Agreements, it was not paid, and due to that failure by RWS, its Lien was valid, entitling it to foreclose upon the entirety of the Trust/Gochnour Property. *Id.* at ¶¶ 13-21. Henry Hill further argued that all of the Trust/Gochnour Property was subject to the Lien, and said Lien was not limited to the portion of the Trust/Gochnour Property where Henry Hill

actually performed services or to RWS's interests in the Trust/Gochnour Property. *Id.* at ¶ 23. Henry Hill also argued that the Trust and Gochnour were not entitled to attorneys' fees. *Id.* at ¶ 27. Henry Hill further sought an award of its attorneys' fees under N.D.C.C. § 35-27-24.1.

[8] On September 1, 2020, Judge Rustad issued his *Order Granting Plaintiff Henry Hill Oil Services LLC's Cross Motion for Summary Judgment and Denying Defendants Marcia K. Talley and David H. Talley, Trustees of the Marcia K. Talley Living Trust, and Ann E. Gochnour's Motion for Summary Judgment* (R100)("*Summary Judgment Order*"), wherein he ruled as a matter of law that a) the Trust/Gochnour were "owners" of the Trust/Gochnour Property; b) the Trust/Gochnour authorized Henry Hill to work on the Trust/Gochnour Property via the Agreements; and c) the entire Trust/Gochnour Property was subject to the Lien, which was valid under North Dakota law. Judge Rustad then ordered that the Lien be foreclosed, that Henry Hill be awarded pre- and post-judgment interest as allowed by North Dakota law, and that Henry Hill recover its attorneys' fees. *Id.* at ¶ 15. The *Summary Judgment Order* provides no analysis or discussion of N.D.C.C. § 35-27-24.1, which allows an owner who successfully contests the accuracy or validity of lien to recover attorneys' fees.

[9] Subsequently, on October 8, 2020, the Trust and Gochnour moved for reconsideration of the Order pursuant to N.D.R.Civ.P. 59(j), asking the Court to reconsider its award of attorneys' fees to Henry Hill, its order that the Lien was valid and could be foreclosed against the entirety of the Trust/Gochnour Property, and further that the Trust and Gochnour authorized Henry Hill's work. *Brief in Support of Motion for*

Reconsideration (R120). Oral argument was held on the Trust/Gochnour's Motion for Reconsideration on December 8, 2020. Over a year later, on December 16, 2021, the Court issued its *Order Denying Motion for Reconsideration* (R219), wherein it denied all of the relief sought by the Trust and Gochnour.

[10] Subsequently, on March 22, 2022, Henry Hill and RWS entered into a "Stipulation for Entry of Judgment", wherein Henry Hill and RWS stipulated that proposed *Findings of Fact, Conclusions of Law, and Order for Judgment* (and resulting Judgment) should be entered by the District Court on May 2, 2022 (R232). The District Court adopted this Stipulation on April 6, 2022. *Order Adopting Stipulation* (R237). Thereafter, the District Court adopted and issued the *Findings of Fact, Conclusions of Law, and Order for Judgment* submitted via stipulation between Henry Hill and RWS (R247). On May 19, 2022, the Clerk of District Court entered its *Judgment* based on the *Findings of Fact, Conclusions of Law, and Order for Judgment,* wherein it awarded Henry Hill the right to foreclose upon the Lien via public auction and to recover from such sale the following amounts: $178,335.00 in principal, pre-judgment interest through March 17, 2022 of $40,682.31, and attorneys' fees and costs of $29,903.26. *Judgment,* ¶ 7 (R250).

[11] The Trust and Gochnour now appeal from the *Summary Judgment Order*, the *Order Denying Motion for Reconsideration,* the *Findings of Fact, Conclusions of Law, and Order for Judgment,* and *Judgment,* all of which contains errors of law requiring the Court to reverse and remand this matter to the District Court.

STATEMENT OF FACTS

[12] This case involves an action by Henry Hill to foreclose several construction liens it recorded against several different properties, including the Trust/Gochnour Property.

[13] In commencing this action, Henry Hill sought foreclosure of the entirety of the Trust/Gochnour Property.

[14] Holdings executed the Surface Use Agreement with the Trust/Gochnour, which was recorded in Williams County on September 13, 2018 as Document #852176. *Surface Use Agreement* (R19).

[15] The Surface Use Agreement granted Holdings "the right to access and use the Property for the purposes of constructing, installing, maintaining, operating, repairing, inspecting, replacing and removing the facilities along in, to, on, under, over and across…[the Talley and Gochnour Lands]". *Surface Use Agreement,* ¶1 (R19). It also granted Holdings "the easement rights to use the Property for pedestrian, vehicular and equipment access, ingress and egress to and from the facilities for the purpose of carrying out Grantee's Water Operations." *Id*. The "facilities" are defined in the Surface Use Easement as "a freshwater reservoir and all related ancillary facilities required for operation of such." *Id.*

[16] Per the *Complaint*, Henry Hill was hired by RWS after Holdings had obtained the Surface Use Agreement, which relates specifically to the construction of a freshwater reservoir, and work performed by Henry Hill was clearly in furtherance of the rights obtained by Holdings under the Surface Use Agreement. *Complaint,* ¶ 19 (R2).

[17] Henry Hill had no contract with the Trust or Gochnour, and did not receive any direction from the Trust or Gochnour regarding the work performed on the Trust/Gochnour Property. *Affidavit of Marcia Talley*, ¶ 4 (R54).

[18] Holdings was not acting as agent, trustee, contractor, or subcontractor of the Trust or Gochnour when it hired Henry Hill to perform work on the Trust/Gochnour Property. *Affidavit of Marcia Talley*, ¶ 6 (R54).

[19] There is no allegation in the *Complaint* that RWS or Holdings was acting as the agent, trustee, contractor, or subcontractor of the Trust or Gochnour.

[20] Henry Hill filed the Lien against the Trust/Gochnour Property on August 8, 2019, as Document #864243, nearly a year after its last contribution, and also nearly a year after the Surface Use Agreement had been recorded. *Amended Construction Lien* (R6).

LAW AND ARGUMENT

I. The District Court erred as a matter of law when it issued the Summary Judgment Order, which must be reversed.

[21] The District Court erred as a matter of law when it granted Henry Hill's Motion for Summary Judgment and denied the Trust/Gochnour's Motion for Summary Judgment. The undisputed facts before the District Court clearly demonstrated that the Lien was invalid under N.D.C.C. Ch. 35-27, yet the District Court found it valid, authorized foreclosure of the Trust/Gochnour's fee simple interest in the Trust/Gochnour Property, as opposed to only Holdings' easement rights, and awarded Henry Hill attorneys' fees – all of which are decisions that contain errors of law.

A. Standard of Review for Summary Judgment

[22] This Court reviews the District Court's decision to grant summary judgment *de novo*. *Dunford v. Tryhus*, 2008 ND 212, ¶ 5, 776 N.W.2d 539. Summary judgment is a procedural device which can be used to promptly and expeditiously dispose of a controversy without a trial, if there is no dispute as to any material issue of fact or inferences which may be drawn from undisputed facts, or when only a question of law is involved. *United Electric Service & Supply, Inc. v. Powers*, 464 N.W.2d 818, 819 (N.D. 1991); *State Farm Mut. Auto. Ins. Co. v. LaRoque*, 486 N.W.2d 235, 237 (N.D. 1992). Specifically, Rule 56(b), N.D.R.Civ.P. states: "[a] party against whom a claim, counterclaim, or cross-claim is asserted, or a declaratory judgment is sought may move, at any time, with or without supporting affidavits, for summary judgment."

[23] A movant for summary judgment must show that there is no dispute as to either the material facts or the inferences to be drawn from the undisputed facts, and that she is entitled to judgment as a matter of law on the facts shown. *Spier v. Power Concrete, Inc.*, 304 N.W.2d 68, 72 (N.D. 1981). "Although the party seeking summary judgment bears the initial burden . . . the party opposing the motion may not simply rely upon the pleadings, but must present competent admissible evidence which raises an issue of material fact." *Black v. Abex Corp.*, 1999 ND 236, ¶ 20, 603 N.W.2d 182. The policy of summary judgment is "best served by allowing the defendant to put the plaintiff to its proof when the record contains no evidence on an essential element of the plaintiff's claim." *Id.* "Summary judgment is appropriate against a party who fails to establish the existence of a factual dispute on an essential

element of a claim on which they will bear the burden of proof at trial." *Heart River Partners v. Goetzfried*, 2005 ND 149, ¶ 8, 703 N.W.2d 330.

B. Applicable North Dakota Law Governing Construction Liens

[24] Title 35, Chapter 27, of the North Dakota Century Code governs construction liens. Section 35-27-02, N.D.C.C., governs the rights of all persons, including subcontractors, to file a construction lien. It reads, in pertinent part:

> "Any person that **improves** real estate, whether under contract with the **owner** of such real estate or under contract with any agent, trustee, contractor, or subcontractor of the **owner**, has a lien upon **the improvement** and upon the land on which the improvement is situated or to which the improvement may be removed for the price or value of such contribution. Provided, however, that the amount of the lien is only for the difference between the price paid by the owner or agent and the price or value of the contribution. If the owner or agent has paid the full price or value of the contribution, no lien is allowed. Provided further that if the owner or an agent of the owner has received a waiver of lien signed by the person that improves the real estate, a lien is not allowed. . . .

"Improve", "Improvement", and "Owner" are all defined terms:

> "Improve" means to build, erect, place, make, alter, remove, repair, or demolish any improvement upon, connected with, or beneath the surface of any land, or excavate any land, or furnish materials for any of such purposes, or dig or construct any fences, wells, or drains upon such improvement, or perform any labor or services upon such improvement; or perform any architectural services, construction staking, engineering, land surveying, mapping, or soil testing upon or in connection with the improvement; or perform any labor or services or furnish any materials in laying upon the real estate or in the adjoining street or alley any pipes, wires, fences, curbs, gutters, paving, sewer pipes or conduit, or sidewalks, or in grading, seeding, sodding, or planting for landscaping purposes, or in equipping any such improvement with fixtures or permanent apparatus."
>
> "Improvement" means any building, structure, erection, construction, alteration, repair, removal, demolition, excavation, landscaping, or any part thereof, existing, built, erected, improved, placed, made, or done on real estate for its permanent benefit."
>
> "Owner" means the legal or equitable owner and also every person for whose immediate use and benefit any building, erection, or improvement is made, having

> the capacity to contract, including guardians of minors or other persons, and including any agent, trustee, contractor, or subcontractor of such owner.

N.D.C.C. § 35-27-01(2), (3), and (5).

[25] As indicated, in order to be entitled to a construction lien, the following requirements must be met:

1. The person filing the lien must have performed work that "improves" real estate;
2. That person must be under contract with the "owner" of such real estate or an agent, trustee, contractor or subcontractor of the owner with capacity to contract for the "improvements";
3. The lien attaches to the "improvement" and the land upon which the "improvement" is situated.

[26] Further, under N.D.C.C. § 35-27-24.1, "any owner that successfully contests the accuracy and validity of a construction lien by any action in district court must be awarded the full amount of all costs and reasonable attorneys' fees incurred by the owner."

C. Henry Hill did not "improve" the Trust/Gochnour Property under contract with the "owner" of the Trust/Gochnour Property, nor did the Trust/Gochnour authorize Henry Hill's work, rendering the Lien invalid.

[27] It is undisputed that the Lien relates to Henry Hill's efforts in constructing a freshwater reservoir for use by RWS and/or Holdings – not the Trust or Gochnour. It is further undisputed that under the Surface Use Agreement, RWS's right to access the Trust/Gochnour Property was not permanent. Rather, it was for a period of twenty years with an option for a ten-year renewal term, so a total of 30 years. *Surface Use Agreement,* ¶ 2 (R19). It is further undisputed that the Trust/Gochnour did not "authorize" RWS to contact with Henry Hill. Nevertheless, the District Court ruled as a matter of law that the Lien was invalid. This decision was an error of law, and should be reversed on appeal.

1. Henry Hill's work did not "improve" the Trust/Gochnour Property.

[28] In order for a construction lien to be valid, the person must show they "improved" real estate, which requires establishing they built, erected, placed, made, altered, removed, repaired, or demolished an **"improvement."** N.D.C.C. § 35-27-01(2). "Improvement" means any building, structure, erection, construction, alteration, repair, removal, demolition, excavation, landscaping, or any part thereof, existing, built, erected, improved, placed, made, or done on real estate for **its permanent benefit**. N.D.C.C. § 35-27-01(3)(emphasis added). The key factor is whether the work was done to permanently benefit the real estate. If it is not, then the person's work did not "improve" real estate, and no lien is allowed. Here, the subject work by Henry Hill, construction of a freshwater reservoir, was not a permanent benefit to the Trust/Gochnour Property. This work was done by Henry Hill at the direction of RWS, who had an easement upon the Trust/Gochnour Property for a specific, limited purpose, and for a specific, limited period of time. RWS and/or Holdings easement rights in the Trust/Gochnour Property were not permanent. The District Court erred as a matter of law when it held that the Lien is valid, as Henry Hill did not perform any work that "improved" the Trust/Gochnour Property, as its work did not benefit, permanently or otherwise, the Trust/Gochnour Property.

[29] Even of the Lien is valid, it does not attach to the Trust/Gochnour's fee simple interest. North Dakota law specifies that land is subject to a construction lien only "to the extent of all the right, title, and interest of the owner for whose immediate use or benefit the labor was done or the materials furnished." N.D.C.C. §35-27-19. The North Dakota Supreme Court has not yet directly addressed this language in the context of an alleged

improvement to a fee simple interest where the improvement was made at the behest of the owner of an easement in the parcel. However, other courts have done so.

[30] In *AUI Constr. Grp., LLC v. Vaessen*, 2016 IL App (2d) 160009, 409 Ill. Dec. 288, 67 N.E.3d 500, the Appellate Court of Illinois was presented a similar set of facts to the present circumstance. In *Vaessen*, the defendant landowners granted an easement over their land to a wind farm developer. The developer later entered into contracts with contractors for the construction of a wind farm. These contractors entered into subcontracts to install and supply certain portions of a windmill. The plaintiff was one of the subcontractors, with a contract for the construction of the foundation and tower of a wind turbine. *Id.* at ¶ 5. A payment dispute arose, and plaintiff filed a mechanics lien on the defendants' property. Plaintiff later sought to foreclose the mechanics lien, which defendants resisted. *Id.* at ¶¶ 9-10. The Illinois court dismissed plaintiff's complaint against the defendants on the basis that it was not entitled to a mechanics lien against the defendants' fee simple interest in the property. The court centered its analysis on whether the work performed by the plaintiff was an improvement and benefit to the defendants' fee simple interest in the property. There were several factors considered, but the most important factor was the intent of the parties—did the parties intend for the wind project to permanently benefit the land or was it a mere trade fixture? The court ultimately concluded the improvement was a trade fixture on the easement, rather than a permanent benefit to the defendants' property.

> If [plaintiff's] mechanic's lien were allowed to attach to the real estate and [developer] chose to terminate the easement and removed all of its property brought onto the premises as allowed by the easement agreement, the lien would remain upon the real estate after removal of the benefit upon which the lien was based. Therefore, to allow [plaintiff's] filing of a mechanic's

> lien to attach to the real estate where removal of the fixture is allowed would produce an absurd result not intended by the lien act.

Id. at ¶ 11. The appellate court affirmed this analysis. North Dakota law similarly provides that an "improvement" must be "placed, made, or done on real estate for its permanent benefit." N.D.C.C. § 35-27-01(3)(emphasis added).

[31] Henry Hill's work was not for the permanent benefit of the Trust/Gochnour's fee simple interest in the Trust/Gochnour Property. The Trust and Gochnour received no immediate use or permanent benefit from Henry Hill's work. In fact, the Surface Use Agreement made clear that it is for a limited term, namely "[t]wenty (20) years, or until Grantee permanently removes the facilities from the Property . . ." *Surface Use Agreement,* ¶ 2 (R19). It is clearly the intent of the parties that the reservoir remain the property of Holdings, was constructed for the immediate use and benefit Holdings, and was not intended to become a permanent fixture on the Trust/Gochnour Property. Accordingly, under North Dakota law, the Lien, if valid at all, only attaches to RWS's easement interest, and not to the Trust/Gochnour's fee simple interest, as the Lien only attaches to the right, title and interest of Holdings. *See, e.g.,* N.D.C.C. §35-27-19.

2. The Trust/Gochnour are not "owners" under the construction lien statute.

[32] Even if the Court finds that the work of Henry Hill constitutes an "improvement", the Lien is still invalid as against the Trust and Gochnour. In order to be entitled to a construction lien, Henry Hill had to establish it contracted with the "owner" of the Trust/Gochnour Property or an agent, trustee, contractor, or subcontractor of the "owner."

N.D.C.C. § 35-27-02. The "owner" is the person "for whose immediate use and benefit the improvement is erected." *Johnson v. Soliday*, 19 N.D. 463, 126 N.W. 99 (N.D. 1910).

[33] The District Court erred as a matter of law when it held "the fact that Talley/Gochnour are the legal owners of the Talley/Gochnour Property is enough to make them 'owners' for purposes of Chapter 35-27 of the North Dakota Century Code." *Summary Judgment Order*, ¶ 13 (R100). This analysis is incomplete, as the statute mandates that the person filing the lien contract with the "owner", an agent of the "owner", and that such "owner" has capacity to contract. The District Court relied on on *Salzer Lumber Co. v. Claflin*, 16 N.D. 601, 113 N.W. 1036 (1907), to support its position that "owner" must be read broadly enough to include allowing a lien against a fee simple interest holder when the improvements were done at the request of a person owning a lesser interest (i.e. the holder of an easement). However, *Salzer* and its progeny do not support the determination that fee simple ownership is sufficient to establish a party as an owner under the construction lien statutes.

[34] In *Salzer* , the plaintiff furnished lumber to the vendee of an executory contract to purchase real estate. The vendee was in actual possession of the property. Plaintiff filed and sought to foreclose a mechanics lien against the property. In the meantime, the vendee had defaulted on the executory contract. Plaintiff also sought to foreclose against the vendor of the contract, who remained the fee simple owner. The vendor resisted foreclosure. The North Dakota Supreme Court recognized that the term "owner" should be construed broadly, and determined the plaintiff was entitled to a lien in the vendee's interest in the property. The vendor, after cancellation of the contract, acquired the vendee's

interest subject to the plaintiff's lien. *Id.* at 606-07. However, plaintiff was not entitled to foreclose upon any more than the vendee's interest in the property. *Id.* The vendor's interest was not subject to the lien. Thus, the plaintiff in *Salzer* was not entitled to foreclosure of the entire fee simple interest in the property by virtue of a contract with a holder of less than the fee simple interest. The Supreme Court has affirmed this interpretation. *See Johnson v. Soliday*, 19 N.D. 463, 465, 126 N.W. 99, 100 (1910) (holding that "the owner meant is the person who owns an interest therein, and for whose immediate use and benefit the improvement is erected, and with whom the contract is made.").

[35] The North Dakota Supreme Court has also addressed the definition of "owner" under other circumstances. For example, in *Viker v. Beggs*, the Court was asked whether a construction lien was enforceable against a tenant in common, where the contractor only entered a contract with the other tenant. The court ultimately concluded that the lien was enforceable against both tenants:

> We think it cannot be said that a beneficial owner of an undivided interest in land, as a tenant in common, is not a person for whose immediate use and benefit an improvement is made or labor performed, within §§ 6823 and 6828, supra. Section 6168, Comp. Laws 1913, ... We are of the opinion that it is the evident purpose of the statute to consider every person an owner who has capacity to contract respecting the subject matter . . . .

Viker v. Beggs, 53 N.D. 858, 869, 208 N.W. 383, 387 (1925) (emphasis added). Central to the Court's analysis in this case was that both tenants directly benefitted from the

improvement, and that the tenant who had not contracted for the improvement had the capacity to contract for the improvements in question.[1]

[36] The Trust and Gochnour own the fee simple interest in the Trust/Gochnour Property, subject to the rights granted under the Agreements. However, as established above, their fee simple ownership is insufficient to establish Henry Hill's right to foreclose the Lien against the entirety of the Trust/Gochnour Property. While the Trust/Gochnour are the fee simple owners of the Trust/Gochnour Property, they are not an "owner" under the construction lien statute, as the work of Henry Hill was not done for their "immediate use and benefit", nor did Henry Hill contract with the Trust/Gochnour or any of their agents. Thus, assuming for sake of argument that the Lien is valid, it only attaches to RWS's easement rights under the Surface Use Agreement.

[37] Further, the Trust and Gochnour do not have other characteristics of an "owner" under the construction lien statutes as to the improvements made by Henry Hill under contract with RWS. Importantly, the Trust/Gochnour did not have the capacity to contract with any party regarding the work done under the Agreements. In fact, the Surface Use Agreement expressly provides that the Trust and Gochnour "shall not build, construct or create an obstruction, building, engineering works or other structures on, over or under" the property subject to the easement. *Surface Use Agreement,* ¶ 6 (R19). Thus, the Trust and Gochnour are not "owners" for the purposes of the Lien, as they did not have capacity to contract with Henry Hill for the work that is the subject of the Lien.

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[1] The definition of "owner" specifically includes the statement "having the capacity to contract" when defining which persons may be considered an "owner" under the construction lien statutes.

3. The Trust/Gochnour did not "authorize" Henry Hill's work.

[38] The *Summary Judgment Order* held that the Trust/Gochnour authorized Henry Hill to work on the Trust/Gochnour Property when it executed the Agreements. This was an error of law by the District Court, as there were not facts in the record to support this conclusion. The Trust and Gochnour did not make RWS or Holdings their agent for the purpose of contracting in relation to their fee simple interest in the Trust/Gochnour Property.

[39] In addition to the requirements that the person filing a lien has performed work that "improves" real estate, the construction lien statutes provide that the person must do so "under contract with the owner of such real estate *or under contract with any agent, trustee, contractor, or subcontractor of the owner*." N.D.C.C. § 35-27-02 (emphasis added). As established above, the Trust and Gochnour are not an "owner" under the construction lien statute for the purposes of Henry Hill's work. However, and importantly, N.D.C.C. § 35-27-02 does not hinge on whether an individual was "authorized" or had a right to make the improvements. Rather, the analysis focuses on the relationship between the alleged owner and the party with whom the contract was made. Thus, a more general agency analysis is appropriate. "Agency is the relationship which results where one person, called the principal, authorizes another person, called the agent, to act for him in dealing with third persons." *Farmers Union Oil Co. v. Wood*, 301 N.W.2d 129, 133 (N.D. 1980) (citing N.D.C.C. § 3-01-01).

> A person is presumed to act for himself and not as the agent of another. *Johnson v. Production Credit Ass'n*, 345 N.W.2d 371 (N.D. 1984); *Lander v. Hartson*, 77 N.D. 923, 47 N.W.2d 211 (1951). Agency will never be presumed. *Lander v. Hartson*, *supra*. "Agency is a matter of

> fact." *Fleck v. Jacques Seed Co.*, 445 N.W.2d 649, 651 (N.D. 1989). If an agency relationship is denied, the party alleging agency must establish it by clear and convincing evidence. *Id.*; *Johnson v. Production Credit Ass'n*, *supra*.

Hector v. Metro Ctrs., 498 N.W.2d 113, 118 (N.D. 1993). Agency is not presumed between the grantor and grantee of an easement.

[40] Henry Hill bears the burden of proving that the Trust and Gochnour made Holdings or RWS their agent for the purpose of constructing the reservoir that is the subject of the Lien. Neither of the Agreements makes Holdings or RWS the agent, trustee, contractor, or subcontractor of Trust or Gochnour. These documents do not require or direct RWS or Holdings to take any action with regard to the Trust/Gochnour Property. They merely give Holdings the right to construct the reservoir pursuant to the Surface Use Easement, which it owns, on its own behalf. In fact, these documents make clear that the Trust and Gochnour do not own an interest in the reservoir or any other work performed under the Agreements. Thus, neither Holdings nor RWS could have acted on behalf of the Trust or Gochnour when it contracted with Henry Hill to perform work for the sole benefit of Holdings and RWS.

4. Conclusion

[41] It is undisputed that Henry Hill's work did not permanently benefit the Trust/Gochnour property. Accordingly, the Lien is invalid, as Henry Hill did not do anything to "improve" the Trust/Gochnour Property, rendering the Lien invalid. Further, the Trust and Gochnour are not "owners" for the purposes of the Lien, as it is undisputed that Henry Hill did not contract with the Trust or Gochnour, the Trust and Gochnour did not have capacity to contract with Henry Hill, and the work performed by Henry Hill was for the "immediate use and benefit" of RWS and/or Holdings – not the Trust or Gochnour.

It is also undisputed that the Trust and Gochnour did not enter into a contract with Henry Hill, and further that they did not authorize Holdings or RWS to act at their "agent" for the purposes of hiring Henry Hill. Accordingly, the Lien is invalid, as Henry Hill's work did not "improve" the Trust/Gochnour Property, nor is the Trust/Gochnour an "owner" under the construction lien statutes. Thus, the District Court erred a matter of law when it granted Henry Hill summary judgment holding the Lien was valid and allowing Henry Hill to foreclose upon it.

II. The District Court erred as a matter of law when it awarded Henry Hill its attorneys' fees under N.D.C.C. § 35-27-24.1.

[42] The District Court, in what appears to be a misapprehension of the law, awarded Henry Hill its attorneys' fees, the party who filed a construction lien and who was seeking to establish, not contest, its accuracy and validity. Henry Hill erroneously claimed it was entitled to attorneys' fees under N.D.C.C. § 35-27-24.1, which provides:

> Any owner that successfully contests the validity or accuracy of a construction lien by any action in district court must be awarded the full amount of all costs and reasonable attorney's fees incurred by the owner."

This statute is silent as to an award of attorneys' fees to a lienor enforcing its lien. "Absent statutory authority, the 'American Rule' requires each party to a lawsuit to bear its own attorney fees." *Palmer v. Gentek Bldg. Prods.*, 2019 ND 306, ¶ 24, 936 N.W.2d 552. The statutory language in this case does not expressly provide for an award of attorneys' fees to a party enforcing a lien—only to an owner contesting the validity or accuracy of a lien. Moreover, if the legislature had intended to provide attorney fees to the party enforcing a lien, it could have easily included language indicating this intent in the statute. *See* N.D.C.C. 35-24-19, which provides: "[i]n any action brought to enforce a lien prescribed

by this chapter, the party for whom judgment is rendered is entitled to recover a reasonable attorney's fee . . ." Similar language is not found in the construction lien statutes.

[43] In the only reported case interpreting this statute, this Court held that it was enacted in an effort "to prevent situations where construction liens were threatened, or actually filed, in order to coerce an owner into settling, rather than litigating, a dispute." *N. Excavating Co. v. Sisters of Mary of the Presentation of Long Term Care,* 2012 ND 78, ¶ 6, 815 N.W.2d 280. Clearly, this statute, by its clear, unambiguous language and legislative history, was not intended to allow the entity or person filing a construction lien to recover attorneys' fees, as determined by the District Court. Such an interpretation is ludicrous, as it would incentivize, rather than discourage, the filing of construction liens.

[44] Henry Hill is not an owner contesting the validity or accuracy of its construction lien—it is a contractor attempting to enforce a Lien. Stated otherwise, it is the entity trying to "establish" the accuracy and validity of the Lien, not contest it. North Dakota law does not allow for recovery of attorney fees by a contractor attempting to enforce a construction lien under Chapter 35-27 of the Century Code. The District Court erred as a matter of law when it awarded Henry Hill its attorneys' fees, and the Trust/Gochnour respectfully request that the Court reverse the *Summary Judgment Order* and *Findings of Fact, Conclusions of Law, and Order for Judgment,* and further order the *Judgment* be vacated with respect to the award of attorneys' fees to Henry Hill.

III. The District Court abused its discretion when it denied the Trust and Gochnour's Motion for Reconsideration.

A. Standard of Review for Motions for Reconsideration

[45] The District Court abused its discretion in denying the Trust and Gochour's Motion for Reconsideration of the *Order Granting Summary Judgment.* "A district court's "denial of a motion for reconsideration will not be reversed on appeal absent a manifest abuse of discretion." *Larson v. Larson*, 2002 ND 196, ¶ 11, 653 N.W.2d 869 (citation omitted). "A trial court abuses its discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination." *Id.* (citation omitted).

B. The District Court abused its discretion in denying the Motion for Reconsideration with respect to the award of attorneys' fees to Henry Hill.

[46] The District Court abused its discretion in denying the Motion for Reconsideration, as it acted arbitrarily, unreasonably, and its decision was not the result of a rational mental process. First and foremost, the award of attorneys' fees to Henry Hill, which is contrary to the plain language of N.D.C.C. §35-27-24.1, the legislative history of the statute, and North Dakota case law, is clearly not the result of a rational mental process. Further, it is contrary to the well-defined rules of statutory interpretation, which include a prohibition on interpreting it in a manner that would produce an absurd and ludicrous result. *State v. Brown*, 2009 ND 150, ¶ 15, 771 N.W.2d 267 (citations omitted).

[47] In the *Summary Judgment Order,* there is zero discussion or analysis of the applicable statute and its application to Henry Hill's claim for attorneys' fees, yet Henry Hill was awarded those fees. Then, in denying the Motion for Reconsideration, the Court

engaged in some analysis, but ultimately decided it was "ambiguous", finding that the contractor filing the lien is entitled to attorneys' fees under N.D.C.C. § 35-27-24. *Order Denying Motion for Reconsideration,* ¶¶ 7-9 (R219). This is an absurd result, considering the party filing the lien must establish they contracted with the "owner" to have a valid lien, not that they are the owner. Moreover, the District Court's interpretation re-writes the statute by expanding the class of persons entitled to attorney's fees beyond the "owner" contesting the lien to the person filing the lien. Even if the statute is ambiguous, and it is not, that interpretation contradicts the legislative history of the statute, which was to dissuade the filing of liens to force settlement. The District Court's ruling encourages the filing of liens. Accordingly, the District Court abused its discretion in denying the Motion for Reconsideration with respect to the award of attorneys' fees to Henry Hill, and it should be reversed. Further, the Court should direct that the District Court award the Trust and Gochnour their attorneys' fees under N.D.C.C. § 35-27-24.1, as they have successfully contested the accuracy and validity of the Lien.

REQUEST FOR ORAL ARGUMENT

[48] The Trust and Gochnour request oral argument. Oral argument will assist the Court by allowing counsel to explain the facts and law and to address any questions from the Court.

CONCLUSION

[49] For the reasons set forth herein, the Trust and Gochnour respectfully request that Court reverse the District Court's *Summary Judgment Order, Order Denying Motion for Reconsideration,* and *Findings of Fact, Conclusions of Law and Order for Judgment,* and

further that it order the *Judgment* be vacated, and this matter remanded to the District Court with instructions to enter summary judgment in favor of the Trust and Gochnour and award them their attorneys' fees.

Dated this 5th day of October, 2022.

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CERTIFICATE OF COMPLIANCE

[50] The undersigned, as attorney for Marcia K. Talley and David H. Talley, Trustees for the Marcia K. Talley Living Trust and Ann E. Gochnour, the Appellants in this matter, and as author of this Appellants' Brief, hereby certifies that the total number of pages of Appellants' Brief complies with North Dakota Rule of Appellate Procedure 32(a)(8), as Appellants' Brief is 28 pages long, excluding this Certificate of Compliance.

Dated this 5th day of October, 2022.

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