IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Henry Hill Oil Services, LLC, Plaintiff and Appellee, v. 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, and Anne E. Gochnour, Defendants and Appellants. --- Regional Water Service LLC, Plaintiff and Appellee, v. Henry Hill Oil Services LLC, Defendant and Appellee.	Supreme Court No. 20220212

Appeal from *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* dated September 1, 2020 (R100); *Order Denying Motion for Reconsideration* dated December 16, 2021 (R219); *Order Granting Henry Hill Oil Services LLC's Motion for*

Summary Judgment Against Lane A. Knudsen and Denying Lane A. Knudsen's Cross-Motion for Summary Judgment dated December 16, 2021 (R221); *Findings of Fact, Conclusions of Law, and Order for Judgment* dated May 5, 2022 (R247); and *Judgment* dated May 19, 2022 (R250).

Case No. 53-2019-CV-01515
County of Williams, Northwest Judicial District
The Honorable Joshua Rustad, District Judge, Presiding

BRIEF OF PLAINTIFF AND APPELLEE HENRY HILL OIL SERVICES, LLC

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES

[¶ 1] The District Court did not err in determining that the construction liens recorded by Henry Hill Oil Services, LLC ("Henry Hill") against the property owned by Lane A. Knudsen ("Knudsen") and the property owned by Marcia K. Talley and David H. Talley, Trustees for the Marcia K. Talley Living Trust and Ann E. Gochnour (collectively, "Talley/Gochnour") were valid under N.D.C.C. Chapter 35-27.

[¶ 2] The District Court did not err in determining that Henry Hill is entitled to foreclosure of the construction liens against the properties owned by Knudsen and Talley/Gochnour.

[¶ 3] The District Court did not err in awarding interest and attorneys' fees to Henry Hill as against Knudsen and Talley/Gochnour and allowing such fees to be added to the foreclosure judgment.

STATEMENT OF THE CASE

[¶ 4] Knudsen and Talley/Gochnour are property owners in Williams County who granted water pipeline easements to RWS Holdings, LLC ("RWS Holdings"). RWS Holdings, through its affiliate Regional Water Service LLC ("RWS"), entered into an agreement with Henry Hill for the construction of several water reservoirs on the Knudsen and Talley/Gochnour properties. Henry Hill was not paid for its construction of the water reservoirs and has been attempting to recoup its costs through construction liens against the properties.

[¶ 5] Henry Hill filed its Complaint in this action on October 14, 2019. (*See* R2). By its Complaint, Henry Hill sought a judgment ordering a decree of foreclosure on the construction liens against the Knudsen and Talley/Gochnour properties, foreclosing the

interests owned by Knudsen and Talley/Gochnour to the properties, ordering pre- and post-judgment interest, and ordering reasonable attorney's fees. (R2:8).

[¶ 6] On February 18, 2020, Talley/Gochnour filed a motion for summary judgment, seeking an order dismissing Henry Hill's foreclosure action as to Talley/Gochnour and allowing Talley/Gochnour to file a motion for attorney's fees. (R53; R55:8:¶36).

[¶ 7] Henry Hill filed a cross-motion for summary judgment against Talley/Gochnour on March 19, 2020, seeking the same relief laid out in the Complaint: an order decreeing foreclosure on the construction lien, foreclosing on interests owned by Talley/Gochnour, ordering pre- and post-judgment interest, and ordering recovery of reasonable attorney's fees. (R60:1–2:¶1).

[¶ 8] On September 2, 2020, the District Court issued an order denying Talley/Gochnour's motion for summary judgment and granting Henry Hill's cross-motion for summary judgment. (R100). Talley/Gochnour moved for reconsideration of this order on October 8, 2020, which the District Court denied on December 16, 2021. (R119; R219).

[¶ 9] On September 18, 2020, Henry Hill brought a motion for summary judgment against Knudsen. (R108). As with its motion against Talley/Gochnour and its Complaint, Henry Hill sought an order decreeing foreclosure on the construction lien, foreclosing on interests owned by Knudsen, ordering pre- and post-judgment interest, and ordering recovery of reasonable attorney's fees. (R108:2:¶1).

[¶ 10] Knudsen brought a cross-motion for summary judgment against Henry Hill on October 19, 2020. (R127).

[¶ 11] On December 16, 2021, the District Court issued an order granting Henry Hill's motion for summary judgment against Knudsen and denying Knudsen's cross-motion for summary judgment against Henry Hill. (R221).

[¶ 12] The same day, the District Court granted a motion for partial summary judgment that Knudsen had brought against RWS Holdings. (R220). RWS Holdings was directed to indemnify and defend Knudsen in this foreclosure lawsuit and to satisfy the Henry Hill construction lien within 30 days after entry of the order. (R220:5:¶13). On March 8, 2022, the District Court granted a similar motion for partial summary judgment that Talley/Gochnour had brought against RWS Holdings. (R225). An order of contempt was entered against RWS Holdings on June 24, 2022 due to noncompliance with the Knudsen indemnification order. (R273). Those indemnification orders are not presently before this Court.

[¶ 13] On March 22, 2022, RWS Holdings, RWS, and Henry Hill filed a *Stipulation for Entry of Judgment*, which included a stipulation as to the outstanding amounts that RWS Holdings and RWS owed to Henry Hill. (R232–33). Those amounts included $660,228.40 for unpaid invoices and service charges, $143,796.37 for prejudgment interest, and attorney's fees totaling $89,709.79. (R233:9–10:¶39). The amounts arose from the water reservoirs constructed at the properties of Knudsen and Talley/Gochnour, as well as a third property that is no longer part of this action. (R233:10:¶40; R233:5:¶18).

[¶ 14] On May 5, 2022, the District Court issued its *Findings of Fact, Conclusions of Law, and Order for Judgment* in this case. (R247). Judgment was entered on May 19, 2022. (R250).

[¶ 15] On July 20, 2022, Talley/Gochnour filed a notice of appeal to this Court. (R283). Knudsen's notice of appeal followed on July 22, 2022. (R284).

[¶ 16] Both Knudsen and Talley/Gochnour appeal the denial of their motions for summary judgment and the grant of Henry Hill's motions for summary judgment, as well as the Court's *Findings of Fact, Conclusions of Law, and Order for Judgment* from May 5, 2022, and *Judgment* from May 19, 2022. Talley/Gochnour also appeal the denial of their motion for reconsideration.

STATEMENT OF FACTS

A. Knudsen and Talley/Gochnour Own Property in North Dakota and Grant Water Pipeline Easements to RWS Holdings.

[¶ 17] Knudsen and Talley/Gochnour are the record owners of certain real property located in Williams County, North Dakota.

[¶ 18] Knudsen is the record owner of the following described real property:

Township 154 North, Range 100 West
Section 11: W/2NW/4

(the "Knudsen Property"). (Complaint, R2:3:¶16; Lane A. Knudsen's Answer, Counterclaim, and Crossclaim Against RWS Holdings, LLC ("Knudsen Answer"), R35:2:¶7).

[¶ 19] The Knudsen Property is subject to a Water Agreement and Memorandum of Understanding (the "Knudsen Water Agreement") and three Water Pipeline Easement and Right of Way Agreements (the "Knudsen Easement Agreements"). (*See* Affidavit of Lane Knudsen ("Knudsen Aff."), Exs. 1–4, R81–84).

[¶ 20] The Knudsen Water Agreement was executed by and between Knudsen and RWS Holdings on January 15, 2017. (Knudsen Aff., Ex. 1, R81:1). In the Knudsen Water Agreement, Knudsen grants RWS Holdings "the right to install and relocate any pump

houses/booster stations, pumping equipment and any other facilities deemed necessary for the Water Operations." (R81:2:¶4). He also grants RWS Holdings "the right of ingress and egress to lay, install, repair, construct and/or operate flow lines, pumping equipment and facilities, and/or any other equipment deemed necessary for the purposes of capturing, transporting, and using water, including the installation or relocation of pump houses/booster stations." (R81:3:¶5).

[¶ 21] The Knudsen Easement Agreements were executed by and between Knudsen and RWS Holdings on March 20, 2017 and recorded by the Williams County Recorder's Office on September 13, 2018 as Document Nos. 852162, 852164, and 852165. (*See* Knudsen Aff., Exs. 2–4, R82–84). The Knudsen Easement Agreements grant RWS Holdings "a temporary construction easement and right of way . . . for the purpose of constructing, laying, repairing, and removing certain pipeline, and related pipes, pumps, equipment, fixtures and other appurtenances . . . to be used to transport water on, under and across" the Knudsen Property and Talley/Gochnour Property. (R82:1:¶1; R83:1:¶1; R84:1:¶1).

[¶ 22] Talley/Gochnour are the record owners of the following described real property:

> Township 154 North, Range 100 West
> Section 35: S/2NE/4, N/2SE/4

(the "Talley/Gochnour Property"). (R2:4:¶18).

[¶ 23] The Talley/Gochnour Property is subject to an Easement/Surface Use and Appurtenance Agreement (the "Talley/Gochnour Surface Use Agreement") and a Water Pipeline Easement and Right of Way Agreement (the "Talley/Gochnour Easement Agreement"). (*See* Marcia K. Talley and David H. Talley, Trustees of the Marcia K.

Talley Living Trust, Ann E. Gochnour's Answer, Affirmative Defenses, and Crossclaims Against RWS Holdings ("Talley/Gochnour Answer"), Exs. 1–2, R18–19).

[¶ 24] The Talley/Gochnour Easement Agreement and Talley/Gochnour Surface Use Agreement were executed by and between Talley/Gochnour and RWS Holdings on May 24, 2018. (R18:3–4; R19:4–5). As with the Knudsen Easement Agreements, the Talley/Gochnour Easement Agreement grants RWS Holdings "a temporary construction easement and right of way . . . for the purpose of constructing, laying, repairing, and removing certain pipeline, and related pipes, pumps, equipment, fixtures and other appurtenances . . . to be used to transport water on, under and across" the Talley/Gochnour Property. (R18:1:¶1).

[¶ 25] The Talley/Gochnour Surface Use Agreement grants RWS Holding's agents and subcontractors "the right to access and use the Property for the purpose of constructing, installing, maintaining, operating, repairing, inspecting, replacing and removing the facilities along in, to, on, under, over and across" the Property. (R19:1:¶1). The "facilities" include "a freshwater reservoir and all related ancillary facilities required for operation of such." (R19:1:¶1).

[¶ 26] Therefore, pursuant to their various agreements, Knudsen and Talley/Gochnour authorized RWS Holdings to commence building a water pipeline and associated facilities and appurtenances on the Knudsen and Talley/Gochnour properties. (*See* R81–R84; R18–R19.)

[¶ 27] Thereafter, RWS Holdings authorized RWS to commence the construction of certain water pipelines and reservoirs on the properties. (*See* Complaint, R2:4:¶20;

Defendants RWS Holdings, LLC and Regional Water Service, LLC's Original Answer and Affirmative Defenses ("RWS Answer"), R21:3:¶¶16–17).

B. Henry Hill Constructs Water Reservoirs on the Knudsen Property and Talley/Gochnour Property and Is Not Paid.

[¶ 28] In approximately June of 2018, RWS requested that Henry Hill build certain water reservoirs on the Knudsen Property and Talley/Gochnour Property. (*See* Affidavit of Jake Burton ("Burton Aff."), R62:2:¶2; Declaration of Jake Burton ("Burton Decl."), R110:2:¶4).

[¶ 29] Henry Hill worked on the Knudsen Property from approximately August 25, 2018 to October 24, 2018. (Burton Decl., R110:2:¶5). It worked on the Talley/Gochnour Property from June 25, 2018 to September 11, 2018. (Burton Aff., R62:2:¶3). Henry Hill was never compensated by RWS (or Knudsen or Talley/Gochnour) for this work. (Burton Aff., R62:2:¶3; Burton Decl., R110:2:¶5.)

C. Henry Hill Records Construction Liens.

[¶ 30] Henry Hill served a Notice of Construction Lien on Knudsen on March 15, 2019. (Burton Decl., R110:2–3:¶6; Complaint, R2:5:¶26; Complaint, Ex. A, R3). On April 8, 2019, Henry Hill recorded a construction lien against the Knudsen Property with the Williams County Recorder's Office as Document No. 859315. (Burton Decl., R110:3:¶6; Complaint, R2:5–6:¶27; Complaint, Ex. B, R4). The construction lien covers the furnishing of services, materials, or other improvements made to the Knudsen Property in the amount of $360,000.00 plus accruing interest. (Burton Decl., R110:3:¶8; Complaint, R2:6:¶28; Complaint, Ex. B, R4).

[¶ 31] Henry Hill served a Notice of Amended Construction Lien on Talley/Gochnour on July 11, 2019. (Burton Aff., R62:2:¶5; Complaint, R2:¶29;

Complaint, Ex. C, R5). And, on August 8, 2019, Henry Hill recorded the amended construction lien with the Williams County Recorder's Office as Document No. 864243. (Burton Aff., R62:2:¶5; Complaint, R2:6:30; Complaint, Ex. D, R6). The amended construction lien covers the furnishing of services, materials, or other improvements made to the Talley/Gochnour Property in the amount of $178,335.00, plus accruing interest. (Complaint, R2:6:¶31; Complaint, Ex. D, R6).

[¶ 32] On August 13, 2019, Henry Hill served both Knudsen and Talley/Gochnour with a Notice of Intention to Enforce Construction Lien. (Burton Decl., R110:3:¶19; Burton Aff., R62:2:¶6; *see* Complaint, Ex. E, R7).

[¶ 33] Henry Hill filed the Complaint in this action on October 14, 2019, seeking foreclosure to enforce the construction liens. (R2).

[¶ 34] Summary judgment was granted in favor of Henry Hill. (R100; R221).

STANDARD OF REVIEW

[¶ 35] This Court reviews a district court's decision to grant summary judgment de novo. *Hamilton v. Woll*, 2012 ND 238, ¶ 9, 823 N.W.2d 754. "Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law." *Id.* A disputed fact is only "material" if the resolution of the factual dispute will, under the law, alter the ultimate result. *Frey v. City of Jamestown*, 548 N.W.2d 784, 787 (N.D. 1996). The court "must view the evidence in the light most favorable to the party opposing the motion," giving that party "the benefit of all favorable inferences which can reasonably be drawn from the record." *Come Big or Stay Home, LLC v. EOG Resources, Inc.*, 2012 ND 91, ¶ 6, 812 N.W.2d 80. On appeal, the North Dakota Supreme Court "decides whether

the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law." *Hamilton*, 2012 ND 238, ¶ 9, 823 N.W.2d 754.

LAW AND ARGUMENT

I. Henry Hill is Entitled to Construction Liens Against the Knudsen Property and Talley/Gochnour Property.

[¶ 36] Chapter 35-27 of the North Dakota Century Code governs the construction lien process in North Dakota, including the persons who are entitled to a construction lien, the land that is subject to a construction lien, and the process for enforcing a construction lien. Chapter 35-27 is remedial and must be "liberally construed to effectuate its purpose," which is "to protect those persons who improve real estate by the contribution of labor, skill, or materials." *Nesdahl Surveying & Eng'g, P.C. v. Ackerland Corp.*, 507 N.W.2d 686, 689 (N.D. 1993); *see also North Dakota Mineral Interests, Inc. v. Berger*, 509 N.W.2d 251, 255 (N.D. 1993). The right to a construction lien is "purely a creature of statute, and the statutory requirements must be fairly met" for a construction lien to be valid. *Spier v. Power Concrete*, 304 N.W.2d 68, 73 (N.D. 1981).

[¶ 37] Section 35-27-02 of the North Dakota Century Code provides, in relevant 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.
>
> ***
>
> Written notice that a lien will be claimed must be given to the owner of the real estate by certified mail at least ten days before the recording of the construction lien.

[¶ 38] In other words, to be entitled to a construction lien, a person must (1) improve the subject property, (2) be under contract directly with the owner of the subject property or with an agent, trustee, contractor, or subcontractor of the owner, and (3) provide written notice to the owner of the subject property that a construction lien will be claimed.

[¶ 39] Because Henry Hill has fairly met the requirements of N.D.C.C. § 35-27-02, it is entitled to the construction liens against Knudsen and Talley/Gochnour. These requirements will be discussed in turn.

A. Henry Hill Has "Improved" the Knudsen Property and Talley/Gochnour Property.

[¶ 40] To establish the validity of its liens, Henry Hill must first show that it has improved the Knudsen Property and Talley/Gochnour Property. Under Chapter 35-27, the definition of "improve" is a comprehensive one. To "improve" means, in relevant part:

> 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 . . . .

N.D.C.C. § 35-27-01(2). Relatedly, an "improvement" on a property is defined as:

> 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. § 25-27-01(3).

[¶ 41] Here, there can be no reasonable dispute that Henry Hill's work in constructing the water reservoirs—performed over the course of several months—falls into one or more of these broad categories as a general matter. Knudsen and Talley/Gochnour instead hone in on the narrow argument that Henry Hill's construction of the water

reservoirs was not performed for the "permanent benefit" of their properties, and is therefore not an "improvement." The case law and record do not support this argument.

[¶ 42] In *Nesdahl*, this Court found that activities physically altering and affecting the landowner's property were enough to constitute a permanent improvement under N.D.C.C. § 35-2, regardless of the fact that those activities were never completed. *Nesdahl*, 507 N.W.2d at 687–88. Here, the construction of the water reservoirs physically altered and affected the property of both Knudsen and Talley/Gochnour.

[¶ 43] Further, the water pipeline easements that Knudsen and Talley/Gochnour granted to RWS Holdings under their respective agreements also clearly demonstrate that there is significant value to the Knudsen and Talley/Gochnour properties in their water rights. Knudsen and Talley/Gochnour presumably entered into their respective agreements with RWS Holdings because of the financial benefits they received by signing and because of the increased value to their land due to the water pipelines and the associated facilities and appurtenances used by RWS Holdings in carrying out its purpose. It is disingenuous for Knudsen and Talley/Gochnour to now claim that the associated facilities and appurtenances do not work a permanent benefit to their property.

[¶ 44] Citing a case from the Illinois Appellate Court, Talley/Gochnour claim that an improvement made at the direction of the owner of an easement is not a permanent benefit to the fee owner. (Brief of Appellants Marcia K. Talley and David Talley, Trustees of the Marcia K. Talley Living Trust, Ann E. Gochnour ("Talley/Gochnour Brief"), at 18). As an initial matter, this Court has explicitly declined to consider the case law of other jurisdictions in interpreting Chapter 35-27, noting that "laws of each of the states are known for the extent to which they vary from each other in both application and operation."

Nesdahl, 507 N.W.2d at 690. The Court stated that its interpretation was "specific to our statute and legislative purpose." *Id.*

[¶ 45] Moreover, the easement agreement at issue in the Illinois case explicitly provided that all property installed by the easement holder would remain the easement holder's property and would be dismantled and removed upon termination of the agreement. *AUI Const. Grp., LLC v. Vaessen*, 2016 IL App (2d) 160009, ¶ 20, 67 N.E.3d 500, 505. Here, there is no similar agreement for the removal of the water pipeline or the associated facilities or appurtenances, including the water reservoirs constructed by Henry Hill. Tellingly, *Vaessen* also discusses another Illinois case where a dam was built on property leased for an amusement park and explains that the dam was considered an improvement for the permanent benefit of the fee owner, whereas the remaining amusement park structures were not. *See id.* at ¶ 31 (citing *E.R. Darlington Lumber Co. v. Burton*, 156 Ill.App. 82, 86–87 (1910)). The court emphasized that the key considerations are whether the parties consider the improvement to be temporary, and if so, whether the improvement "really cannot be removed." *Id.* at ¶ 32. Here, not only did the parties not consider the water pipeline and associated facilities and appurtenances to be temporary, but the water reservoirs are physically permanent.

[¶ 46] It is inconsequential that the easement itself may only last for 30 years, as Talley/Gochnour note. (Talley/Gochnour Brief, at 16). The water reservoirs support RWS Holdings' purposes under the easement, but they are not intrinsically tied to the easement and will not be removed, filled in, or altered once the easement ends. It does not matter that the easement was temporary, as Talley/Gochnour suggest, but whether the *improvement* was temporary. The water reservoirs are not.

[¶ 47] Thus, Henry Hill has "improved" the Knudsen Property and Talley/Gochnour Property.

B. Henry Hill's Improvements were Performed Pursuant to a Contract with an Owner or Agent of an Owner of the Knudsen Property and Talley/Gochnour Property.

[¶ 48] Next, Henry Hill must show that the improvements to the Knudsen Property and Talley/Gochnour Property were made under contract either directly with the owner of the subject property or with an agent, trustee, contractor, or subcontractor of the owner. *See* N.D.C.C. § 35-27-02. An "owner" is defined as "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 . . . and including any agent, trustee, contractor, or subcontractor of such owner." N.D.C.C. § 35-27-01(5).

[¶ 49] Despite their protests to the contrary, Knudsen and Talley/Gochnour are inarguably "owners" under the North Dakota construction lien laws. They are the legal owners of the Knudsen Property and Talley/Gochnour Property, respectively, which is sufficient on its own to satisfy the statutory definition. (*See* Complaint, R2:3–4:¶¶16, 18; Knudsen Answer, R35:2:¶7; Talley/Gochnour Answer, R17:2:¶6). The easements Knudsen and Talley/Gochnour granted to RWS Holdings are legally irrelevant. *See Otter Tail Power Co. v. Malme*, 92 N.W.2d 514, 523–24 (N.D. 1958) (explaining that a fee owner retains legal title even when an easement holder has the right to use certain property for "all uses directly or incidentally conducive to the advancement of the purpose for which the right of way was acquired").

[¶ 50] Talley/Gochnour's reliance on *Viker v. Beggs* and *Johnson v. Soliday* to assert that it is not an owner of the Talley/Gochnour Property is misplaced. *Viker* and *Johnson* were decided in 1925 and 1910, respectively, when North Dakota's construction

lien laws limited the definition of an "owner" to "[e]very person for whose immediate use and benefit any building, erection, or improvement is made . . . ." *Johnson v. Soliday*, 19 N.D. 463, 126 N.W. 99, 100 (1910) (citing N.D. Rev. Codes 1905, § 6248). However, North Dakota's current construction lien laws expanded upon the original meaning of "owner" to include the legal owner and equitable owner, as well. N.D.C.C. § 35-27-01(5); *see also Viker v. Beggs*, 53 N.D. 858, 208 N.W. 383 (1925); *Mid-America Steel, Inc. v. Bjone*, 414 N.W.2d 591, 595 (N.D. 1987) ("We believe that the Legislature's intent in amending the definition of 'owner' was to clarify that 'owner' could mean the legal title holder, the equitable owner, or any other person 'for whose immediate use and benefit' the improvement is made.") Thus, Knudsen and Talley/Gochnour are owners under N.D.C.C. § 35-27-01(5). Talley/Gochnour make the additional argument that they did not have "the capacity to contract," so they cannot be owners. But, as the District Court noted, their capacity to contract is evidenced by the Knudsen Easement Agreements and Talley/Gochnour Easement Agreement themselves. (R219:6:¶12).

[¶ 51] Moreover, while it is clear that Henry Hill did not contract directly with Knudsen or Talley/Gochnour, Henry Hill *did* contract with RWS and RWS Holdings. Knudsen and Talley/Gochnour argue that RWS was not their agent for the purpose of building the water reservoirs because they did not specifically authorize the water reservoir construction, in their agreements with RWS Holdings or otherwise. The plain language of the agreements states otherwise.

[¶ 52] The Knudsen Easement Agreements and Talley/Gochnour Easement Agreement grant RWS Holdings "a temporary construction easement and right of way . . . for the purpose of constructing, laying, repairing, and removing certain pipeline, and

related pipes, pumps, equipment, fixtures and *other appurtenances* . . . to be used to transport water on, under and across" their properties. (Talley/Gochnour Answer, Ex. 1, R18:1:¶1; Knudsen Aff., Exs. 2–4, R82:1:¶1; R83:1:¶1; R84:1:¶1) (emphasis added).

[¶ 53] The other agreements support the construction of the water reservoirs as well. In the Knudsen Water Agreement, Knudsen granted RWS Holdings "the right to install and relocate any pump houses/booster stations, pumping equipment and *any other facilities deemed necessary for the Water Operations*" and "the right of ingress and egress to lay, install, repair, construct and/or operate flow lines, pumping equipment and facilities, and/or any other equipment deemed necessary for the purposes of capturing, transporting, and using water, including the installation or relocation of pump houses/booster stations." (Knudsen Aff., Ex. 1, R81:2–3:¶¶4–5) (emphasis added). And in the Talley/Gochnour Surface Use Agreement, Talley/Gochnour granted RWS Holding's agents and subcontractors "the right to access and use the Property for the purpose of *constructing*, installing, maintaining, operating, repairing, inspecting, replacing and removing *the facilities* along in, to, on, under, over and across" the Property. (Talley/Gochnour Answer, Ex. 2, R19:1:¶1) (emphasis added). The "facilities" consisted of "a freshwater reservoir and all related ancillary facilities required for operation of such." (Talley/Gochnour Answer, Ex. 2, R19:1:¶1).

[¶ 54] Henry Hill constructed the water reservoirs on the Knudsen and Talley/Gochnour properties as part of its overall purpose of building a pipeline for the transportation of water. The water reservoirs were associated facilities and/or appurtenances supporting this purpose. *See* APPURTENANCE, Black's Law Dictionary (11th ed. 2019) ("Something that belongs or is attached to something else; esp., something

that is part of something else that is more important."). The work was therefore authorized under the various agreements executed by Knudsen and Talley/Gochnour. No further analysis is needed or required under N.D.C.C. § 35-27-02.

[¶ 55] It is not of legal consequence that Knudsen or Talley/Gochnour did not provide their separate approval for this particular construction. *Christian v. Hughes*, cited by Knudsen for the proposition that the construction of the water reservoir was unauthorized, is inapposite. 18 N.D. 282, 122 N.W. 384 (N.D. 1909). In *Christian*, a husband purchased paint from the plaintiff for a home belonging to his wife. The plaintiff did not allege that he had any contractual relationship with the wife, or that the wife's husband was acting as her agent, trustee, contractor, or subcontractor. *Id.* at 385. Instead, he claimed that the wife "impliedly consented to the furnishing of the materials," which at that time was part of the construction lien statute. *Id.*; *see also* N.D. Rev. Codes 1905, § 6237 (allowing a lien to a person acting "with consent of such owner," including situations where the owner "had knowledge [of any such labor or making of any such improvement], and did not give notice of his objection thereto"). The Court found persuasive that the wife "objected to the improvements; her husband was not her agent; the contract was not made by her, or on her behalf, and she agreed to none of the terms, conditions, or agreements thereof." *Christianson*, 122 N.W. at 385. This is directly contrary to the facts of this case, where the water reservoirs were constructed pursuant to written agreements that Knudsen had already executed for the construction of water pipelines and related facilities and appurtenances.

C. Henry Hill Provided Written Notice to Knudsen and Talley/Gochnour That a Lien Would be Claimed.

[¶ 56] If a person is entitled to a construction lien under Section 35-27-02 of the North Dakota Century Code, it is also required that they send the property owner written notice that a lien will be claimed by certified mail at least ten days before the recording of the construction lien. N.D.C.C. § 35-27-02. Henry Hill has complied with this requirement.

[¶ 57] Henry Hill served a Notice of Construction Lien on Knudsen by certified mail on March 15, 2019. (Burton Decl., R110:2–3:¶6; Complaint, R2:5:¶26; Complaint, Ex. A, R3). Henry Hill did not record the Knudsen Construction Lien until April 8, 2019—24 days after service of the Notice of Construction Lien. (Burton Decl., R110:3:¶6; Complaint, R2:5:¶27; Complaint, Ex. B, R6). Henry Hill served a Notice of Amended Construction Lien on Talley/Gochnour by certified mail on July 11, 2019. (Burton Aff., R62:2:¶5; Complaint, R2:6:¶29; Complaint, Ex. C, R5). Henry Hill did not record the Talley/Gochnour Construction Lien until August 8, 2019—28 days after service of the Amended Notice of Construction Lien. (*See* Burton Aff., R62:2:¶5; Complaint, R2:6:¶30; Complaint, Ex. D, R6).

[¶ 58] Because Henry Hill has met the requirements of Section 35-27-02 of the North Dakota Century Code, it is entitled to the Knudsen Construction Lien and Talley/Gochnour Construction Lien.

II. Henry Hill Has Complied with the Requirements for Enforcing the Knudsen Construction Lien and Talley/Gochnour Construction Lien.

[¶ 59] Not only has Henry Hill established its entitlement to the Knudsen Construction Lien and Talley/Gochnour Construction Lien, it has also established its right

to enforce those liens through this lawsuit. Section 35-27-24 of the North Dakota Century Code provides:

> Any person having a lien by virtue of this chapter may bring an action to enforce the lien in the district court of the county in which the property is situated. . . . Before a lienholder may enforce a lien, the lienholder shall give written notice of the lienholder's intention so to do, which notice must be given by personal service upon the record owner of the property affected at least ten days before an action to enforce the lien is commenced, or by registered mail directed to the owner's last known address at least twenty days before the action is commenced.

[¶ 60] On August 13, 2019, Henry Hill served Knudsen and Talley/Gochnour with a Notice of Intention to Enforce Construction Lien by registered mail. (Burton Decl., R110:3:¶9; Burton Aff., R62:2:¶6; Complaint, Ex. E, R7). On October 14, 2019—62 days later—Henry Hill filed its Complaint in this action in the Williams County District Court, where both the Knudsen Property and Talley/Gochnour Property are located.

[¶ 61] Accordingly, Henry Hill has complied with the requirements of N.D.C.C. § 35-27-24 and may enforce the Knudsen Construction Lien and Talley/Gochnour Construction Lien and foreclose on the Knudsen Property and Talley/Gochnour Property.

III. The Knudsen Property and Talley/Gochnour Property are Both Subject to the Construction Liens in Their Entirety.

[¶ 62] Both Knudsen and Talley/Gochnour claim that the construction liens should be limited to RWS Holding's easement because they—and their properties as a whole—were not the immediate users or beneficiaries of Henry Hill's work. As discussed in more detail above, these claims are disingenuous. Henry Hill built the water reservoirs to further RWS Holdings' purposes of building a pipeline for the transportation of water under the agreements, which were entered into by Knudsen and Talley/Gochnour for their own personal benefit. The various agreements contemplate the construction of water pipelines and associated facilities and appurtenances on the properties in order to effectuate the

purpose of the agreements, and thus, Knudsen and Talley/Gochnour are the clear beneficiaries of the construction of those facilities and appurtenances.

[¶ 63] Moreover, the construction lien statute was intended to offer a broader right of recovery for a lienholder than just the area of improvement. Section 35-27-19 of the North Dakota Century Code, which describes the lands subject to a construction lien, provides:

> The *entire land* upon which any building, structure, or other improvement is situated, or to improve which labor is done or materials furnished, *including that portion of the land not covered thereby*, is subject to all liens created under this chapter to the extent of all the right, title, and interest of the owner for whose immediate use or benefit the labor was done or materials furnished.

(Emphasis added).

[¶ 64] Constraining a lienholder's recovery to the area of improvement or the easement holder's use interest, as Knudsen and Talley/Gochnour urge the Court to do, would lead to absurd results. Not only would the fee owner unduly benefit from improvements made to their property without assuming any risk, but lienholders may be held to a remarkably small potential for recovery. In the example provided by Knudsen, for instance, a contractor who had performed an expensive repair to a damaged power line would be entitled to nothing more than a lien on the power line itself, or perhaps a ditch or other path. (*See* Brief of Defendant and Appellant Lane A. Knudsen, at 14:¶39).

[¶ 65] This stingy interpretation stands in direct conflict with the remedial purpose of Chapter 35-27 and its overriding purpose of "protect[ing] those persons who improve real estate by the contribution of labor, skill, or materials." *Nesdahl*, 507 N.W.2d at 689. If there is an equitable argument to be made here, it is not that Henry Hill should be denied reasonable possibility of recovery for work that it performed by limiting its construction

liens to the easement itself. It is that RWS Holdings and/or RWS should indemnify Knudsen and Talley/Gochnour for any liabilities arising from their role in the nonpayment—a decision which has *already been made* by the District Court and has not been appealed to this Court. (*See* R220; R225).

[¶ 66] Because Knudsen and Talley/Gochnour benefitted from the water reservoirs and their legal title includes the entire Knudsen Property and Talley/Gochnour Property, Henry Hill's inclusion of those entire properties in its construction liens and this subsequent foreclosure action is explicitly authorized by North Dakota law.

IV. Henry Hill is Entitled to Statutory Attorney's Fees.

[¶ 67] "North Dakota generally applies the 'American Rule' for attorney's fees and assumes each party to the lawsuit will bear its own attorney's fees." *Rocky Mountain Steel Foundations, Inc. v. Brockett Company, LLC*, 2019 ND 252, ¶ 9, 934 N.W.2d 531 (citing *Deacon's Dev., LLP v. Lamb*, 2006 ND 172, ¶ 11, 719 N.W.2d 379). "Successful litigants are not allowed to recover attorney fees unless authorized by contract or statute." *Id.* If a statute allowing for an award of attorneys' fees is ambiguous, the deciding court may consider extrinsic aids to interpret that statute. *Id.* at ¶ 11. "A statute is ambiguous when it is subject to different, but rational meanings." *Id.* (citing *N. Excavating Co., Inc. v. Sisters of Mary of the Presentation Long Term Care*, 2012 ND 78, ¶ 4, 815 N.W.2d 280). "A district court's decision regarding attorney fees will not be set aside on appeal, absent an abuse of discretion." *T.F. James Co. v. Vakoch*, 2001 ND 112, ¶ 5, 628 N.W.2d 298.

[¶ 68] Chapter 35-27 was enacted to protect "those persons who improve real estate by contribution of labor, skill, or materials" and "should be liberally construed to effectuate its purpose." *Nesdahl*, 507 N.W.2d at 689. Section 35-27-24.1 of the North Dakota Century Code does not overtly state that a lienor may be awarded its attorneys' fees

when successfully enforcing its construction lien. The language used therein is broad, however, and covers an award of attorneys' fees incurred by *any* owner.

[¶ 69] While the breadth of this attorney's fees statute has not been specifically addressed by the North Dakota Supreme court, the Eighth Circuit Court of Appeals discussed N.D.C.C. § 35-27-24.1 in *Oil & Gas Transfer L.L.C. v. Karr* as an example of a broad attorney's fees provision. 929 F.3d 949, 951 (8th Cir. 2019) (comparing N.D.C.C. § 35-24-19, which applies only to actions brought to enforce a lien, and N.D.C.C. § 35-27-24.1, which applies to actions contesting the validity or accuracy of a construction lien, and holding an award of attorney's fees is not available in a quiet title action brought under N.D.C.C. § 34-24-19). There, the Court stated that N.D.C.C. § 35-27-24.1 "provides for an award of attorney's fees to *owners of construction projects* who succeed in actions—like quiet title actions—that 'contest[] the validity or accuracy of a construction lien by any action in district court.' " *Id.* (emphasis added). The Eighth Circuit's inclusion of "owners of construction projects" indicates that the phrase "[a]ny owner" in N.D.C.C. § 35-27-24.1 is broad and inclusive, and that it applies to more than merely owners of land.

[¶ 70] Because this language has only been discussed by a reviewing court in a tangential manner, N.D.C.C. § 35-27-24.1, at best, specifically allows for an award of attorneys' fees to Henry Hill. At worst, it is ambiguous because it is subject to "different, but rational meanings." *Rocky Mountain Steel Foundation*, 2019 ND 252, ¶ 11, 934 N.W.2d 531. Either way, this Court did not abuse its discretion in awarding Henry Hill its attorney's fees and its order on this issue should not be reversed.

CONCLUSION

[¶ 71] For the reasons stated above, Appellee Henry Hill respectfully requests that the Court affirm the District Court's decisions in all respects.

REQUEST FOR ORAL ARGUMENT

[¶ 72] Appellee Henry Hill requests oral argument. Oral argument would be helpful to the Court in deciding the issues presented in this matter and would allow the Court to raise any concerns with the parties related to these issues not otherwise addressed in the parties' briefing.

Dated this 4th day of November, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Plaintiff and Appellee Henry Hill Oil Services, LLC, hereby certifies the above brief is in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure. The total number of pages in the brief, excluding the certificate of service and this certificate of compliance, is 27 pages.

Dated this 4th day of November, 2022.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Henry Hill Oil Services, LLC, Plaintiff and Appellee, v. 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, and Anne E. Gochnour, Defendants and Appellants. --- Regional Water Service LLC, Plaintiff and Appellee, v. Henry Hill Oil Services LLC, Defendant and Appellee.	Supreme Court No. 20220212

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

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on November 4th, 2022, I electronically filed and served the Brief of Plaintiff and Appellee Henry Hill Oil Services, LLC with the Clerk of the North Dakota Supreme Court and served by E-mail on the following:

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Henry Hill Oil Services, LLC, Plaintiff and Appellee, v. 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, and Anne E. Gochnour, Defendants and Appellants. --- Regional Water Service LLC, Plaintiff and Appellee, v. Henry Hill Oil Services LLC, Defendant and Appellee.	Supreme Court No. 20220212

I, the undersigned, hereby certify that a true and correct copy of the following:

BRIEF OF PLAINTIFF AND APPELLEE HENRY HILL OIL SERVICES, LLC

was served by causing the same to be deposited in the United States Mail at Minneapolis, Minnesota, securely enclosed in a sealed envelope, mailed by U.S. Postal Service, with postage duly prepaid, and addressed to the following person(s):

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