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STATE OF NORTH DAKOTA

N 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

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

APPEAL FROM *Order Granting Summary Judgment and Denying Summary Judgment* (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 16th day of November, 2022.

Ebeltoft . Sickler . Lawyers PLLC
Lawyers for Appellants Marcia K. Talley and David H. Talley, Trustees of the Marcia K. Talley Living Trust, and Ann E. Gochnour
2272 8th Street West
Dickinson, North Dakota 58601
701.225.LAWS (5297)
701.225.9650 fax
ngrant@ndlaw.com
mcerkoney@ndlaw.com

By: */s/ Nicholas C. Grant*
Nicholas C. Grant, Lawyer #07102
Marissa R. Cerkoney, Lawyer #08630

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LAW AND ARGUMENT

I. Henry Hill is Not Entitled to a Construction Lien Against the Trust/Gochnour Property.

[1] The *Amended Construction Lien* ("Lien") does not meet the requirements of N.D.C.C. § 35-27-02, rendering the Lien invalid as a matter of law.

A. The Trust/Gochnour Property was not "improved" by Henry Hill.

[2] It is well-established that, in order to have a valid construction lien, the person claiming a lien must have performed work that "improves" real estate. N.D.C.C. § 35-27-02. Henry Hill Oil Services, LLC ("Henry Hill") argues the Trust and Gochnour benefitted from Henry Hill's work because it "improved" the Trust/Gochnour Property. However, in order to meet the requirement that such work "improves" real estate, it must also be an "improvement" – which requires a showing the work was done for the real estate's "permanent benefit." N.D.C.C. § 35-27-01(3). The Lien does not meet this standard. Further, Henry Hill fails to recognize there is a legal distinction between the easement rights given to RWS Holdings, LLC ("Holdings") and the fee simple interest in the Trust/Gochnour Property.

[3] Henry Hill asks the Court to disregard *AUI Constr. Grp., LLC v. Vaessen*, 2016 IL App (2d) 160009, 409 Ill. Dec. 288, 67 N.E.3d 500, claiming that the Court should not consider case law from other jurisdictions. Rather, Henry Hill suggests that the Court rely on *Nesdahl Surveying & Eng'g, P.C. v. Ackerland Corp*, 507 N.W.2d 686 (N.D. 1993). *Nesdahl* is distinguishable because it dealt with whether a surveyor "improved" real property. *Id.* at 689. Further, the surveyor claiming the lien was hired by the owner of the property – not the holder of an easement. *Id*. This Court has not addressed whether work performed for the holder of an easement can form the basis for a construction lien against

the entire fee simple estate. As such, the Court should look to other courts that have addressed this issue.

[4] *AUI Constr. Grp., LLC v. Vaessen* was provided as persuasive authority to illustrate the issue of improvements made to easement property being distinguished from improvements made to fee property. 2016 IL App (2d) 160009, 409 Ill. Dec. 288, 67 N.E.3d 500. In that case, the court held that the fee simple interest holders were not benefitted by an improvement to the easement – the exact situation before this Court. The court in *Vaessen* found it especially persuasive that the easement holder was entitled to remove all property from the easement. Similar language is present in the Surface Use Agreement, which shows that, upon termination of the easement, Holdings was required to remove any "improvements" done to the property and restore it to its original condition. *See Surface Use Agreement*, ¶ 2; Exhibit B to *Surface Use Agreement*, ¶ 4 (R19). Thus, the work of Henry Hill could not have been for the permanent benefit of the Trust/Gochnour Property, as it had to be removed. Accordingly, the Lien is invalid, as Henry Hill's work did not "improve" the Trust/Gochnour Property under N.D.C.C. § 35-27-02.

B. The Trust and Gochnour are not "owners" against whom the Lien may be enforced.

[5] Henry Hill concedes it did not contract with the Trust/Gochnour, and that it only contracted with Regional Water Service, LLC ("RWS") and Holdings. *Brief of Plaintiff and Appellee Henry Hill Oil Services, LLC*, ¶ 51. Despite this concession, Henry Hill argues that the "owner" requirement of N.D.C.C. § 35-27-02 is satisfied simply because the Trust and Gochnour are the legal owners of the Trust/Gochnour Property. However, this Court has recognized that just because someone may be an "owner" of property does not mean that a construction lien can be enforced against them.

[6] In *Salzer Lumber Co. v. Claflin*, this Court ultimately held that a construction lien was not enforceable against the fee simple title holder when the lienor contracted with another party with an interest in the property for the improvement property. 16 N.D. 601, 603-04, 113 N.W. 1036, 1036 (1907). This holding was affirmed in *Johnson v. Soliday*, as well as more recently in *Mid-America Steel v. Bjone*, where the Court held the term "owner" was not meant to include a vendor under a contract for deed. *See Johnson v. Soliday*, 19 N.D. 463, 465, 126 N.W. 99, 100 (1910); *see also Mid-America Steel v. Bjone*, 414 N.W.2d 591 (N.D. 1987). Henry Hill cites to *Mid-America Steel* to support its contention 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." However, Henry Hill fails to recognize that the Court in *Mid-America Steel* also stressed that the definition of "owner" must be read in conjunction with the following statute:

> 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.

N.D.C.C. § 35-27-19 (emphasis added). This statute is identical to its current form. Thus, the lien only attaches to the right, title and interest of the "owner" for show immediate use and benefit the work is performed, not the right, title and interest of any person who is an "owner."

[7] Henry Hill further argues the Trust and Gochnour's reliance on *Viker v. Beggs* and *Johnson v. Soliday* is misplaced because those cases interpreted prior law. *Viker* and *Johnson* both support the contention that an "owner" must have some capacity to contract with regard to the subject matter of the lien. However, the current statutory definition of

the term "owner" still recognizes that an "owner" must have capacity to contract: "'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 . . ." N.D.C.C. § 35-27-01(5) (emphasis added). Thus, in order to be considered an "owner" against whom a construction lien may be enforced, that party must have capacity to contract with regard to the subject matter of the lien. The Trust and Gochnour do not meet this standard.

C. An easement does not create an agency relationship.

[8] Henry Hill argues that the Agreements "authorized" Holdings to contract for the alleged improvements on behalf of the Trust and Gochnour. Henry Hill makes this argument as if the Agreements were construction contracts, which they are not. When the Trust and Gochnour granted the easements, they only gave Holdings a possessory interest it could develop as it saw fit. These Agreements were not contracts to perform any particular services in any particular time for the benefit of the Trust and Gochnour. Holdings did not become an agent or contractor of the Trust and Gochnour through the Agreements. Rather, Holdings became an owner of the easement rights conveyed in the Agreements. To claim that Henry Hill was somehow a subcontractor of the Trust and Gochnour is to ignore the plain language of the Agreements.

[9] Additionally, Henry Hill's argument ignores the statutory language of N.D.C.C. § 35-27-02, which provides that a construction lien is available to a person "under contract with the owner of such real estate or under contract with any agent, trustee, contractor, or subcontractor of the owner. . ." This list does not include an easement holder. Neither RWS nor Holdings has any of these enumerated relationships with the Trust or Gochnour. The

Trust and Gochnour granted Holdings an easement, which did not include appointing Holding as their "agent" for any reason. Thus, the Trust and Gochnour did not authorize the alleged improvements, and the Lien is unenforceable against the Trust/Gochnour Property.

D. Conclusion

[10] Henry Hill has not satisfied the requirements of N.D.C.C. § 35-27-02. Henry Hill's work did not "improve" the Trust/Gochnour Property, rendering the Lien invalid. Additionally, the Trust and Gochnour are not "owners" for the purposes of the Lien, as Henry Hill did not contract with the Trust and Gochnour and the Trust and Gochnour did not have capacity to contract with Henry Hill. Further, 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 as their "agent" for the purposes of hiring Henry Hill. Therefore, the Lien is invalid.

II. Even if it is determined that the Lien is valid, its enforcement should be limited to the property covered by the easement rather than to the Trust/Gochnour Property in its entirety.

[11] The Trust and Gochnour maintain that Henry Hill has not satisfied the requirements of N.D.C.C. § 35-27-02; however, if the Court determines the Lien is valid, then its enforcement should be limited to the easement rights granted to Holdings rather than to the Trust/Gochnour Property in its entirety. Henry Hill argues that the Trust and Gochnour are the legal owners of the entirety of the fee simple estate, including the area where the alleged improvements were made, and, therefore, Henry Hill is entitled to foreclose upon the entire tract. Despite making this argument, Henry Hill concedes that all of its dealings were with

Holdings. Further, as addressed above, any work by Henry Hill did not benefit, permanently or otherwise, the Trust/Gochnour Property, nor was it for the immediate use or benefit of the Trust/Gochnour, rendering the Lien invalid.

[12] Henry Hill claims that that it is authorized to foreclose on the entirety of the Trust/Gochnour Property because the language of N.D.C.C. § 35-27-19 allows for construction liens to be recorded against:

> 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). However, Henry Hill does not explain how its position is affected by the emphasized portion above, which clearly limits a construction lien to the "right, title, and interest of the owner for whose immediate use or benefit" the work was performed. Here, that "owner" is RWS, and their "right, title, and interest" is an easement – not a fee simple interest in the entire Trust/Gochnour Property. Thus, even if the Lien is valid, it only attaches to Holdings' easement rights, and nothing more, as that is the only right, title or interest Holdings had in the Trust/Gochnour Property.

[13] Henry Hill's attempt to foreclose on the entire Trust/Gochnour Property is clearly not supported by the law of North Dakota. If Henry Hill's position were the law, then any contractor performing services for the holder of an easement could foreclose upon the entire tract of land, including when work did not improve the real estate and when the lienholder had no contract with the owner of the entire tract, as is the case before this Court. While the construction lien statutes are remedial in nature, Henry Hill's interpretation

renders them punitive against an innocent landowner who did nothing more than grant an easement. This is not, and should not be, the law of North Dakota.

III. It is a clear error of law to award attorney fees incurred in enforcing a construction lien.

[14] Henry Hill argues that N.D.C.C. § 35-27-24.1 is ambiguous as to whether it is an "owner" entitled to attorneys' fees. It relies on *Oil & Gas Transfer L.L.C. v. Karr*, which mentions, in dicta, that the statute in questions provides for a fee award 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." 929 F.3d 949 (8th Cir. 2019). Henry Hill focuses its analysis on the first portion of the quotation: "owners of construction projects." However, it entirely ignores the remainder of the quotation, which recognizes that the award of attorney fees is reserved for an owner successfully "contest[ing] the validity or accuracy of a construction lien[.]" N.D.C.C. § 35-27-24.1. The plain language clearly does not support awarding attorneys' fees to the lienor.

[15] The North Dakota Supreme Court has not directly examined what "contest" means in N.D.C.C. § 35-27-24.1. However, it has provided insight into what it means to "contest" in other situations. In *Langer v. Pender*, 2009 ND 51, ¶¶ 32-33, 764 N.W.2d 159, the Court found that a party seeking to enforce the terms of a trust agreement did not "contest" the trust for purposes of triggering a no-contest clause. The Court relied in part on the Black's Law Dictionary definition, which includes: "[t]o litigate or call into question; challenge." *Id*. at ¶ 32. Accordingly, the party challenging or calling into question the validity or accuracy of a lien is entitled to attorney fees if successful – not the party asserting the lien. N.D.C.C. § 35-27-24.1.

[16] This interpretation is supported by the legislative history of the statute, which this Court has found persuasive in the past. *N. Excavating Co. v. Sisters of Mary of the Presentation Long Term Care*, 2012 ND 78, 815 N.W.2d 280. "Under this statute, the person claiming the lien bears the risk of filing a lien that is inaccurate or invalid." *Id.* at ¶ 16. The statute is meant to protect the owners of the real property from inaccurate or invalid liens. Any other interpretation is contrary to its plain language and produces an absurd result. The District Court erred in awarding Henry Hill attorneys' fees, and this decision should be reversed.

CONCLUSION

[17] For the reasons set forth herein, the Trust and Gochnour respectfully request the Court reverse the District Court's *Order Granting Summary Judgment and Denying Summary Judgment, Order Denying Motion for Reconsideration,* and *Findings of Fact, Conclusions of Law and Order for Judgment,* order the *Judgment* be vacated with respect to the Trust/Gochnour, and remand 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 16th day of November, 2022.

Ebeltoft . Sickler . Lawyers PLLC
Lawyers for Appellants Marcia K. Talley and David H. Talley, Trustees of the Marcia K. Talley Living Trust, Ann E. Gochnour
2272 8th Street West
Dickinson, North Dakota 58601
701.225.LAWS (5297)
701.225.9650 fax
ngrant@ndlaw.com
mcerkoney@ndlaw.com

By: */s/ Nicholas C. Grant*
Nicholas C. Grant, Lawyer #07102
Marissa R. Cerkoney, Lawyer #08630

CERTIFICATE OF COMPLIANCE

[18] 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' Reply Brief, hereby certifies that the total number of pages of Appellants' Reply Brief complies with North Dakota Rule of Appellate Procedure 32(a)(8), as Appellants' Reply Brief is 12 pages long, excluding this Certificate of Compliance.

Dated this 16th day of November, 2022.

Ebeltoft . Sickler . Lawyers PLLC
Lawyers for Appellants Marcia K. Talley and David H. Talley, Trustees of the Marcia K. Talley Living Trust, Ann E. Gochnour
2272 8th Street West
Dickinson, North Dakota 58601
701.225.LAWS (5297)
701.225.9650 fax
ngrant@ndlaw.com

By: */s/ Nicholas C. Grant*
Nicholas C. Grant, Lawyer #07102

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I hereby certify that on November 16, 2022, a true and correct copy of the following:

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

was filed electronically through the Supreme Court's e-filing program, and addressed to the following persons:

Lawrence Bender
Tyler J. Guldt
Mark William Vyvyan
Fredrickson & Byron, PA
Email: lbender@fredlaw.com
tgludt@fredlaw.com
mvyvyan@fredlaw.com

Attorney for Plaintiff

Erich M. Grant
McGee, Hankla & Backes
Email: egrant@mcgeelaw.com

Attorney for Defendant Lane A. Knudsen

Dated: November 16, 2022.

Ebeltoft . Sickler . Lawyers PLLC
Lawyers for Defendants Marcia K. Talley and David H. Talley, Trustees of the Marcia K. Talley Living Trust, Ann E. Gochnour
2272 8th Street West
Dickinson, North Dakota 58601
701.225.LAWS (5297)
701.225.9650 fax
ngrant@ndlaw.com

By: */s/ Nicholas C. Grant*
Nicholas C. Grant, Lawyer #07102

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

RWS Holdings, LLC
1001 S Main Street, Suite 49
Kalispell MT 59901

Regional Water Service LLC
3003 32nd Ave S, Suite 240
Fargo ND 58103-6118

Dated: November 16, 2022.

Ebeltoft . Sickler . Lawyers PLLC
Lawyers for Defendants Marcia K. Talley and David H. Talley, Trustees of the Marcia K. Talley Living Trust, Ann E. Gochnour
2272 8th Street West
Dickinson, North Dakota 58601
701.225.LAWS (5297)
701.225.9650 fax
ngrant@ndlaw.com

By: */s/ Nicholas C. Grant*
Nicholas C. Grant, Lawyer #07102