

No. 20050444

STATE OF NORTH DAKOTA  
SUPREME COURT

Peoples State Bank of Truman,  
Inc., a Minnesota corporation,

Appellant,

vs.

Molstad Excavating, Inc.,  
a North Dakota corporation;  
and FGOH20, Inc., d/b/a Fargo  
Water Equipment,

Respondents.

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APPELLANT'S BRIEF

APPEAL FROM GRAND FORKS COUNTY DISTRICT COURT'S  
SUMMARY JUDGMENT DATED NOVEMBER 15, 2005

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
STATEMENT OF ISSUES PRESENTED .....	1
STANDARD OF REVIEW .....	2
STATEMENT OF THE CASE .....	3
STATEMENT OF FACTS .....	4
I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF FH20 BECAUSE FH20 HAD NO CONTRACT RIGHTS AGAINST THE CITY OF GRAND FORKS OR MOLSTAD. ....	8
A. FH20 Did Not Have Contractual Privity With Molstad or the City of Grand Forks.....	8
B. FH20 Was Not an Intended Third-Party Beneficiary of Either the Grand Forks-Molstad Contract or the Molstad-Haycraft Contract.....	9
1. The Molstad-Haycraft Contract was not made expressly for the Benefit of FH20.....	9
2. At the time Molstad and Haycraft created the Molstad-Haycraft Contract, neither the City of Grand Forks, Molstad or Haycraft owed an obligation to FH20.....	11
3. FH20 was not listed as a beneficiary in the Molstad-Haycraft Contract.....	12
C. The Intent of the Molstad-Haycraft Contract was to Hold Harmless and Protect Molstad and the City of Grand Forks from Claims, Not Benefit an Unnamed and Undetermined Party.....	15
D. In the Alternative, Even if FH20 was an Intended Third-Party Beneficiary, FH20 Could Only Enforce the Terms of the Molstad- Haycraft Contract Which Only Allowed Molstad to Withhold Payment to Haycraft Pending Resolution of any "Claims.".....	21
II. THE DISTRICT COURT ERRED BY DETERMINING THAT FH20 HAS "CLAIMS" AGAINST MOLSTAD BECAUSE FH20 DOES NOT HAVE A LEGAL CAUSE OF ACTION AGAINST THE CITY OF GRAND FORKS OR MOLSTAD. ....	21

A.	FH20 Has no Claim Against the Construction Bond Because it Failed to Provide Timely Notice.....	22
B.	Even if FH20 Had Provided Timely Notice, it is Barred From Making a Claim Against the Construction Bond Because It Did Not Bring a Claim Within One Year of the Project Completion.....	24
III.	THE DISTRICT COURT ERRED BECAUSE IT VIOLATED THE LAW OF THE CASE.....	26
	CONCLUSION.....	28

**TABLE OF AUTHORITIES**

Page

**CASES**

<i>Apache Corp. v. MDU Resources Group, Inc.</i> , 1999 N.D. 247, 603 N.W.2d 891 (1999) .....	9
<i>Bolinske v. Herd</i> , 2004 N.D. 217, 689 N.W.2d 397 (2004) .....	2
<i>Duluth Lumber and Plywood Company v. Delta Development, Inc.</i> , 281 N.W.2d 377 (Minn. 1979) .....	10, 11
<i>Erickson v. Scotsman, Inc.</i> , 456 N.W.2d 535 (N.D. 1990) .....	25
<i>Farmers State Bank of Gladstone v. Anton</i> , 51 N.D. 202, 199 N.W. 582 (1924) .....	10
<i>First Federal Sav. and Loan Ass'n of Bismarck v. Compass Investments, Inc.</i> , 342 N.W.2d 214 (N.D. 1983) .....	12, 13, 19
<i>Heart River Partners v. Goetzfried</i> , 2005 N.D. 149, 703 N.W.2d 330 (2005) .....	2
<i>In re Estate of Littlejohn</i> , 2005 N.D. 113, 698 N.W.2d 923 (2005) .....	13, 15, 18
<i>In re Guardianship and Conservatorship of Onstad</i> , 2005 N.D. 158, 704 N.W.2d 554 (2005) .....	26, 27
<i>Kuchenski v. Kramer Sheet Metal</i> , 377 N.W.2d 133 (N.D. 1985) .....	23, 24
<i>Lochthowe v. Peterson Estate</i> , 2005 N.D. 40, 692 N.W.2d 120 (2005) .....	9
<i>O'Connell v. Entertainment Enterprises, Inc.</i> , 317 N.W.2d 385 (N.D. 1982) .....	14, 15
<i>Parlin v. Hall</i> , 2 N.D. 473, 52 N.W. 406 (1892) .....	11, 12
<i>Rott v. Provident Life Ins. Co.</i> , 70 N.D. 758, 298 N.W. 17 (1941) .....	8
<i>State v. Sakellson</i> , 379 N.W.2d 779 (N.D. 1985) .....	10
<i>VND, LLC v. Leever Foods, Inc.</i> , 2003 N.D. 198, 672 N.W.2d 445 (2003) .....	20, 26
<i>Ziegelmann v. DaimlerChrysler Corp.</i> , 2002 N.D. 134, 649 N.W.2d 556 (2002) .....	22

**STATUTES**

N.D. CENT. CODE § 48-01-01 .....	23, 24
N.D. CENT. CODE § 48-02-15 (2002) .....	22, 23, 24
N.D. CENT. CODE § 48-02-17 (2003) .....	24, 25
N.D. CENT. CODE § 9-02-04 (2002) .....	9, 10, 20

**OTHER AUTHORITIES**

Black's Law Dictionary, 8 <sup>th</sup> Edition (2004) .....	22
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**RULES**

N.D.R. Civ. P. 12 (b) (2005) .....	22
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**STATEMENT OF ISSUES PRESENTED**

- I. DID THE DISTRICT COURT ERR BY FINDING FH20 WAS AN INTENDED BENEFICIARY OF THE MOLSTAD-HAYCRAFT CONTRACT?

Yes. FH20 was not listed in the contract, provided no consideration to the Molstad-Haycraft Contract, was not owed a duty by either part to the Molstad-Haycraft Contract at the time the contract was created and the intent of the parties was not to benefit FH20.

**Most apposite authorities:**

*First Federal Sav. and Loan Ass'n of Bismarck v. Compass Investments, Inc.*, 342 N.W.2d 214 (N.D. 1983);  
*O'Connell v. Entertainment Enterprises, Inc.*, 317 N.W.2d 385 (N.D. 1982);  
*Parlin v. Hall*, 2 N.D. 473, 52 N.W. 406 (1892);  
*Apache Corp. v. MDU Resources Group, Inc.*, 603 N.W.2d 891 (N.D. 1999).

- II. DID THE DISTRICT COURT ERR BY DETERMINING THAT FH20 HAD "CLAIMS" AGAINST MOLSTAD?

Yes. FH20 did not have a contractual claim against Molstad nor did it have a construction bond claim against the Project's construction bond.

**Most apposite authorities:**

*Ziegelmann v. DaimlerChrysler Corp.*, 649 N.W.2d 556 (N.D. 2002);  
*Kuchenski v. Kramer Sheet Metal*, 377 N.W.2d 133 (N.D. 1985);  
*Erickson v. Scotsman, Inc.*, 456 N.W.2d 535 (N.D. 1990);  
N.D. Cent. Code § 48-02-15 (2002);  
N.D. Cent. Code § 48-02-17 (2002)

- III. DID THE DISTRICT COURT ERR BY VIOLATING THE LAW OF THE CASE?

Yes. Judge Braaten's October 5, 2004, Judgment specifically held that the Molstad-Haycraft Contract only allowed Molstad to withhold funds but eventually Molstad had to pay Haycraft or its assigns.

**Most apposite authorities:**

*In re Guardianship and Conservatorship of Onstad*, 704 N.W.2d 554 (N.D. 2005).

## STANDARD OF REVIEW

"Summary judgment is a procedural device for promptly disposing of a lawsuit without a trial if there are no genuine issues of material fact or inferences which can be reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law." *Heart River Partners v. Goetzfried*, 2005 N.D. 149, ¶8, 703 N.W.2d 330, 336 (2005). Summary judgment is a question of law, *id.*, and the North Dakota Supreme Court reviews question of law *de novo*. *Bolinske v. Herd*, 2004 N.D. 217, ¶7, 689 N.W.2d 397, 400 (2004); *Goetzfried*, 2005 N.D. 149 at ¶8, 703 N.W.2d at 336.

### STATEMENT OF THE CASE

Appellant Profinium Financial, formerly known as Peoples State Bank of Truman (the "Bank") initiated this action against Molstad Excavating, Inc. ("Molstad"), on or about December 16, 2003. On June 1, 2004, plaintiff served a motion for summary judgment, Molstad counter-moved for summary judgment, and on July 13, 2004, the Honorable Karen Braaten, Judge of District Court, heard counsel's arguments for summary judgment. On September 20, 2004, Judge Braaten partially granted the Bank's motion for summary judgment and dismissed the remainder of its claims against Molstad.

On February 26, 2005, Fargo Water Equipment ("FH20") and the Bank stipulated for their intervention into the lawsuit with Molstad in order to determine if FH20 had any claims against Molstad or the City of Grand Forks. On June 30, 2005, the Bank made a motion for summary judgment against FH20 and FH20 counter-moved for summary judgment on July 11, 2005. Arguments were heard on September 12, 2005, before the Honorable Debbie Kleven of the Grand Forks County District Court. On October 21, 2005, Judge Kleven granted FH20's motion for summary judgment. On or about November 17, 2005, FH20 served Notice of Entry of Judgment and Judgment upon the Bank and on December 20, 2005, the Bank filed and served its Notice of Appeal.

## STATEMENT OF FACTS

Profinium Financial, f/k/a Peoples State Bank of Truman, is a Minnesota Banking Corporation authorized to transact business in the State of Minnesota. (A-1) Haycraft Construction, Inc. ("Haycraft") is a Minnesota corporation duly organized pursuant to the laws of Minnesota and authorized to transact business in Minnesota. (A-2) Over time, the Bank made numerous loans to Haycraft and as of January 22, 2003, Haycraft's total indebtedness to the Bank totaled over \$450,000.00. (A-2) To secure this indebtedness, the Bank entered into valid, validly executed Security Agreements securing, among other things, Haycraft's present and future inventory, present and future accounts, present and future contract rights and all machinery, equipment, vehicles, furniture and fixtures then known or thereafter acquired. (A-2,9) The Bank perfected these security interests by filing a Financing Statement with the Minnesota Secretary of State's office on May 18, 1992. (A-2,10,11) Using the Bank's money, Haycraft operated its construction business in Minnesota and other states including North Dakota. (A-2)

Sometime in late 2001 or early 2002, the City of Grand Forks awarded Molstad a contract to replace certain transmission pipelines and residual force mains for City Project Nos. 4648.3 and 4948.2 (the "Project"). (A-2) On February 26, 2002, Haycraft and Molstad entered into a subcontract whereby Haycraft agreed to provide certain labor

and materials for the Project (hereinafter referred to as the "Contract" or the "Molstad-Haycraft Contract"). (A-3,14-17,42)

The Molstad-Haycraft Contract is a standard form Associated General Contractors of North Dakota Agreement containing numerous protections for the property owners and contractors. (A-14-17) For example, the Molstad-Haycraft Contract contained the following clauses benefiting the City of Grand Forks and Molstad:

2. That if notification of any claims have been made against the Sub-Contractor or the Contractor arising out of labor or materials furnished the Project or otherwise on account of any actions or failures to act by the Sub-Contractor in the performance of this Sub-Contract, the Contractor may, at his discretion, withhold such amounts otherwise due or to become due hereunder to cover said claims and any cost or expense arising or to arise in connection therewith pending settlement thereof. The exercise of this right by the Contractor shall not bar the exercise of any other rights of the Contractor herein or by law provided.

. . . . .

II.(a) To furnish, in strict accordance with the terms and conditions of the General Contract and at the unit prices hereinbefore specified, all labor, material, supplies, tools equipment and services including field measurements necessary to complete the portions of the work specified in paragraph 1. under the heading "THE CONTRACTOR AGREES AS FOLLOWS"; (b) to pay all costs in connection therewith as bills therefore become due; (c) to save harmless the Contractor, the Owner and the Project from claims and mechanics' liens on account thereof; including without limiting the generality of the foregoing, legal fees and disbursements paid or incurred by the Contractor to enforce the provision of this paragraph; and (d) to furnish to the Contractor, when and as often as requested, satisfactory evidence that he has complied with the preceding clause.

. . . . .

V. To obtain and furnish to the Contractor and maintain in effect during the life of this Sub-Contract, unless waived by the Contractor, an acceptable surety bond in amount equal to the sub-contract price conditioned upon and covering the faithful performance of and compliance with all the terms, provisions and conditions of this Sub-Contract, the premium to be paid by \_\_\_\_\_.

. . . . .

VI. To protect his work of construction adequately and properly by lights, barriers, supports, signs and guards so as to avoid injury or damage to persons or property and to be directly responsible for damages to persons and property occasioned by failure so to do, or by any negligence of the Sub-Contractor or any of this officers, agents or employees in the performance of his work. The standards of protection shall be not less than those required by law or required by the Engineer in accordance with the terms of the General Contract.

. . . . .

IX. To guarantee his work against all defects of materials or workmanship as provided for in the General Contract, it being understood that such guarantee shall remain in full force and effect until the expiration of the Contractor's guaranty under the General Contract.

. . . . .

E. This Sub-Contract constitutes the entire agreement between the parties and supersedes all prior proposals and agreements.

(A-14-17) (emphasis added).

After Molstad let the Molstad-Haycraft Contract, Haycraft contracted with FH20 to provide the casing chock and seals for the Project. (A-4,42,43) FH20 delivered these materials on or about May 23, 2002, to the Project Site. (A-32,39,41) FH20 neither delivered nor performed any other services to or for Haycraft in relation to the Project.

Haycraft performed all labor pursuant to the contractual terms of the agreement. (A-65,80) Molstad benefited from the materials installed by Haycraft in the amount of \$450,741.72. (A-18) Molstad only paid Haycraft \$427,454.63. (A-18) Subtracting \$750.00 and \$1,503.37 for various expenses left \$21,033.72 that Molstad failed to pay Haycraft. (A-18,43)

Haycraft paid FH20 \$15,570.92 on or about September 5, 2002. (A-43) On March 29, 2003, the Bank and Haycraft entered into a valid assignment of Haycraft's accounts receivable including the amount Molstad owed to Haycraft. (A-19-21) On June 27, 2003, FH20 finally sent notice of its potential claim against the construction bond to Molstad. (A-43) This was some 403 days after it had delivered its last goods to the site. (A-39,41,43)

Molstad has been paid in full by the City of Grand Forks for the Project and currently retains \$20,000.00 of the Bank's collateral pursuant to Judge Braaten's October 5, 2004, Judgment. (A-45,71,72)

Judge Braaten's October 5, 2004, Judgment correctly held that Molstad was entitled to retain the \$20,000.00 in proceeds until the FH20 claim is settled. (A-71,72) The Bank and FH20 conducted extensive negotiations in an attempt to settle the dispute. (A-80) Failing to reach agreement, the Bank and FH20 stipulated for FH20's intervention to the current lawsuit in order for the District Court to decide if FH20 had any claims against Molstad or the City of Grand Forks. (A-73-76)

## ARGUMENT

### **I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF FH20 BECAUSE FH20 HAD NO CONTRACT RIGHTS AGAINST THE CITY OF GRAND FORKS OR MOLSTAD.**

#### **A. FH20 Did Not Have Contractual Privity With Molstad or the City of Grand Forks.**

The elements of a contract in North Dakota are offer, acceptance, consideration and a legal purpose. *Rott v. Provident Life Ins. Co.*, 70 N.D. 758, 773, 298 N.W. 17, 24 (1941). It is axiomatic that before there can be a breach of contract, there must be a contract.

In this matter, after the City of Grand Forks awarded Molstad the contract for the Project, Molstad in turn contracted with Haycraft to furnish and install steel casing and place carrier pipe and casing, casing spacers and end scales. Haycraft was required to provide its own materials.

Haycraft contracted with FH20 to provide the necessary materials for the Project. Neither the City of Grand Forks nor Molstad had separate contract with FH20 to deliver the products Haycraft would install. Accordingly, FH20 does not stand in contractual privity with Molstad or the City of Grand Forks and therefore FH20 can have no breach of contract claim against either. Thus, neither Molstad or the City of Grand Forks owed any duty to FH20.

FH20 had two remedies, neither of which it pursued: (1) make a claim against the construction bond; and (2) sue Haycraft for breach of contract. Since FH20 had contractual privity with Haycraft, there can be no unjust enrichment or other equitable claim against the City of Grand Forks,

Molstad or the Bank. See *Lochthowe v. Peterson Estate*, 2005 N.D. 40, ¶9, 692 N.W.2d 120, 124 (2005) (“[u]njust enrichment is an equitable doctrine, applied in the absence of an express or implied contract ... to recover under a theory of unjust enrichment, one must prove ... (5) an absence of a remedy provided by law”).

**B. FH20 Was Not an Intended Third-Party Beneficiary of Either the Grand Forks-Molstad Contract or the Molstad-Haycraft Contract.**

A nonparty has no contract rights unless they are an intended third-party beneficiary of the contract. *Apache Corp. v. MDU Resources Group, Inc.*, 1999 N.D. 247, ¶10, 603 N.W.2d 891, 894 (1999) (“[t]o enforce a contract between two others, a third party must have been intended by the contracting parties to be benefited by the contract”). Incidental benefits do not give rise to contract rights in those incidentally endowed. *Id.* (“[m]erely because a third party may derive a benefit, purely incidental and not contemplated by the contracting parties, from the performance of a contract does not entitle him to sue to enforce the contract”).

**1. The Molstad-Haycraft Contract was not made expressly for the Benefit of FH20.**

A party is an intended third-party beneficiary of a contract *only* where the contract is made expressly for the benefit of the third person. See N.D. CENT. CODE §9-02-04 (2002) (“A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it”). “The mere fact that a third

party may derive a benefit, purely incidental and not within the contemplation of the parties, from the performance of a contract, does not entitle him to maintain an action thereon in his own name with the provision of section 5841, Comp. Laws 1913, giving the beneficiary the right to enforce a contract made expressly for his benefit." *Farmers State Bank of Gladstone v. Anton*, 51 N.D. 202, 199 N.W. 582 (1924) (emphasis added).

Here, the District Court held that "[c]learly [FH20] was an intended third party beneficiary, as the benefit that they could receive, compensation for the materials they provided, was 'within the contemplation' of Molstad and Haycraft... Paragraph 2 did not incidentally benefit [FH20], because it specifically provided for [FH20] in the event that it was not compensated for the materials it provided to the project." (A-84)

In arriving at this legal conclusion, the District Court did not find that FH20 was expressly listed in the Molstad-Haycraft Contract. Instead, it relied heavily on *Duluth Lumber and Plywood Company v. Delta Development, Inc.*, 281 N.W.2d 377, 385 (Minn. 1979). (A-83-85) However, a Minnesota Supreme Court case on considerably distinguishable facts, the *Duluth* case is not binding precedent on North Dakota courts and may not be even persuasive. See *State v. Sakellson*, 379 N.W.2d 779, 784 n.4 (N.D. 1985) (refusing to follow North Carolina and South Dakota cases on point). Notably, Minnesota does not have a

corollary statute to N.D. CENT. CODE §9-02-04 (2002) or precedent such as *Hall*, which not only require a contract to be made expressly for the benefit of the supposed third-party beneficiary, but also that "there must have existed at the time thereof such an obligation on the part of the promisor towards the third person." *Hall*, 52 N.W. at 407. Most significantly, unlike in *Duluth*, where the materialmen had no other remedy, FH20 could have sued Haycraft or made a claim against the construction bond. Neither of which it did. Finally, *Parlin v. Hall*, 2 N.D. 473, 52 N.W. 406, 407 (1892) requires that at the time of contracting an obligation exist on behalf of the promisor owing to the third-party beneficiary. This requirement precludes reliance on the *Duluth* case.

2. **At the time Molstad and Haycraft created the Molstad-Haycraft Contract, neither the City of Grand Forks, Molstad or Haycraft owed an obligation to FH20.**

Most significantly, "[h]e must have been the party intended to be benefited by the promise, and there must have existed at the time thereof such an obligation on the part of the promisor towards the third person as gives him at least an equitable right to the benefits of the promise." *Parlin*, 52 N.W. at 407 (emphasis added).

Here, the record does not show that either Molstad or the City of Grand Forks owed FH20 an obligation at the time that the parties executed the Molstad-Haycraft Contract. The record is completely devoid of any proof that either Molstad or Haycraft had hired, contacted or owed FH20

anything when Molstad awarded Haycraft the contract. Accordingly, the District Court erred by finding "[c]learly [FH20] was an intended third party beneficiary" of the Molstad-Haycraft Contract. (A-84) See *Hall*, 52 N.W. at 407 (holding that at the time of contracting, the promisor must owe the third-party an obligation before the third-party will be considered an intended third-party beneficiary).

3. **FH20 was not listed as a beneficiary in the Molstad-Haycraft Contract.**

A contract made expressly for the benefit of a third party requires even more than simply being listed in the contract: "the mention of one's name in an agreement does not give rise to a right to sue for enforcement of the agreement where that person is only incidentally benefited." *First Federal Sav. and Loan Ass'n of Bismarck v. Compass Investments, Inc.*, 342 N.W.2d 214, 218 (N.D. 1983).

In *First Federal*, this Court found that a guarantee that specifically listed a First Federal as a third-party was not made expressly for the third-party's benefit. *First Federal*, 342 N.W.2d at 219 ("First Federal is an incidental third-party beneficiary. We conclude that as an incidental beneficiary of the guaranty in issue First Federal has no right to enforce the provisions of the guarantee"). First Federal had a stronger argument than FH20 does here because First Federal was listed in the guarantee and was owed an obligation at the time the guarantee was created. *Id.* Moreover, the *First Federal* guarantee expressed an intention to benefit First Federal. *Id.* at 216 ("the undersigned, as

guarantors, jointly and severally guaranty . . . for the use and benefit of all persons, firms and corporations interested including First Federal Savings and Loan Association of Bismarck as the named mortgagee, the full completion of said apartment complex"). However, the Court found the guarantee ambiguous and determined the intent of the parties from facts introduced at trial showed that the parties to the guarantee did not, in fact, intend the guarantee to benefit First Federal. *Id.* at 219 ("[t]he record does not indicate that First Federal was the party intended to benefit from the guaranty, nor does it indicate that the guarantors or the Trust intended to confer upon First Federal a right to enforce the guaranty").

Here, the Contract is unambiguous and the "clear and explicit language of [the] contract governs its interpretation." *Littlejohn*, 2005 N.D. 113, ¶7, 698 N.W.2d, 923, 925 (2005). The language of the Contract does not show an intent to benefit FH20; instead, it simply shows an intent to benefit the City of Grand Forks and Molstad by requiring that Haycraft hold the City of Grand Forks and Molstad harmless. Accordingly, the District Court erred in finding "the plain meaning of this language indicates that the intent of the parties was to ensure that materialmen, such as [FH20], could be compensated for materials that they provided to the project." The language of the Contract only shows that Molstad was protecting the project, itself and the City of Grand Forks from claims that could increase the

costs of the Project. Nowhere did the parties manifest an intent that materialmen be protected and benefited by the Contract.

If the parties wanted to endow FH20 or other material suppliers with a benefit, they would have provided that Molstad directly pay material suppliers instead of limiting their rights to merely withholding money to cover potential "claims" against the Project, the City of Grand Forks or Molstad.

In *O'Connell v. Entertainment Enterprises, Inc.*, 317 N.W.2d 385 (N.D. 1982), a case more similar to the instant matter, the North Dakota Supreme Court held that a contract that did not mention a third-party but incidentally benefited such party did not endow the third-party with a right to enforce the contract. 317 N.W.2d at 388 ("[t]he contract does not expressly mention O'Connell or any other employee; rather, it empowers First Federal to take steps necessary to continue operating the business during the life of the agreement. . . [t]here was no expressed intent to benefit O'Connell in any way"). In the second contract at issue in *O'Connell*, the Supreme Court found that "[a]lthough payment of the claimed debt owed to him by Entertainment Enterprises would be an incidental benefit, such payment was not expressly provided for." *Id.*

Again, O'Connell had a stronger argument for intended third-party status than FH20, because at the time of the second contract, he was already owed an obligation by one of

the contracting parties. *Id.* However, the North Dakota Supreme Court correctly held that “[t]he contracts, therefore, did not give rise to an obligation on the part of First Federal and Erin Hotels toward Mr. O’Connell” partly because “such payment was not expressly provided for.” *Id.*

Here, the Molstad-Haycraft Contract did not expressly list FH20 or provide for Molstad to make FH20’s payment. Instead, the Contract only provided Molstad with the right to “withhold” payment to Haycraft “in its discretion” and “pending resolution of claims.” Thus, FH20’s third-party beneficiary argument is weaker than even O’Connell’s who this Court determined was an incidental beneficiary. *Id.*

**C. The Intent of the Molstad-Haycraft Contract was to Hold Harmless and Protect Molstad and the City of Grand Forks from Claims, Not Benefit an Unnamed and Undetermined Party.**

“The clear and explicit language of a contract governs its interpretation and words are construed in their ordinary sense. The interpretation of a written contract is a question of law. If the parties’ intent can be ascertained from the agreement alone, the interpretation of the contract is a question of law.” *In re Estate of Littlejohn*, 2005 N.D. 113, ¶7, 698 N.W.2d 923, 925 (2005) (citations omitted).

Here, the intent of Molstad and Haycraft can be ascertained from the agreement alone and its clear and explicit language shows that the intent of the Molstad-Haycraft Contract is to protect and hold harmless the City of Grand Forks and Molstad, not benefit FH20. The Molstad-Haycraft Contract contained the following language:

2. That if notification of any claims have been made against the Sub-Contractor or the Contractor arising out of labor or materials furnished the Project or otherwise on account of any actions or failures to act by the Sub-Contractor in the performance of this Sub-Contract, the Contractor may, at his discretion, withhold such amounts otherwise due or to become due hereunder to cover said claims and any cost or expense arising or to arise in connection therewith pending settlement thereof. The exercise of this right by the Contractor shall not bar the exercise of any other rights of the Contractor herein or by law provided.

. . . . .

II. (a) To furnish, in strict accordance with the terms and conditions of the General Contract and at the unit prices hereinbefore specified, all labor, material, supplies, tools equipment and services including field measurements necessary to complete the portions of the work specified in paragraph 1. under the heading "THE CONTRACTOR AGREES AS FOLLOWS"; (b) to pay all costs in connection therewith as bills therefore become due; (c) to save harmless the Contractor, the Owner and the Project from claims and mechanics' liens on account thereof; including without limiting the generality of the foregoing, legal fees and disbursements paid or incurred by the Contractor to enforce the provision of this paragraph; and (d) to furnish to the Contractor, when and as often as requested, satisfactory evidence that he has complied with the preceding clause.

. . . . .

V. To obtain and furnish to the Contractor and maintain in effect during the life of this Sub-Contract, unless waived by the Contractor, an acceptable surety bond in amount equal to the sub-contract price conditioned upon and covering the faithful performance of and compliance with all the terms, provisions and conditions of this Sub-Contract, the premium to be paid by \_\_\_\_\_.

. . . . .

VI. To protect his work of construction adequately and properly by lights, barriers, supports, signs and guards so as to avoid injury or damage to persons or property and to be directly responsible for damages to persons and property occasioned by failure so to do, or by any negligence of the Sub-

Contractor or any of this officers, agents or employees in the performance of his work. The standards of protection shall be not less than those required by law or required by the Engineer in accordance with the terms of the General Contract.

. . . . .

IX. To guarantee his work against all defects of materials or workmanship as provided for in the General Contract, it being understood that such guarantee shall remain in full force and effect until the expiration of the Contractor's guaranty under the General Contract.

. . . . .

E. This Sub-Contract constitutes the entire agreement between the parties and supersedes all prior proposals and agreements.

(A-14-17) (emphasis added).

Clearly, the intent of these provisions is to protect the Project, the City of Grand Forks and Molstad (the General Contractor) from any claims, whether the claims are mechanics' liens, personal injury claims from the construction, claims from defects in Haycraft's work or claims against the construction bond. These are hold harmless provisions, not a manifestation of intent to benefit FH20 or other material suppliers.

The intent of these provisions is not to benefit FH20 as the District Court erroneously held. Nowhere does the Molstad-Haycraft Contract include FH20's name or say that the intent of the parties is to protect materialmen. If the parties intended to expressly benefit materialmen, they could have included any number of clauses into the Molstad-Haycraft Contract stating materialmen or suppliers have the

right to enforce the provisions of the contract. Without such provisions, the clear and explicit language must control interpretation of the Molstad-Haycraft Contract. *Littlejohn*, 2005 N.D. 113 at ¶7, 698 N.W.2d at 925.

A close look at paragraph 2 of the Contract shows that Haycraft was not only required to hold Molstad harmless from the costs of material claims, but also to hold Molstad harmless from "any costs or expense arising or to arise in connection therewith pending settlement thereof." Clearly this shows the intent of the parties' to protect Molstad from costs associated with non-payment of materialmen but it does not show that the parties intended to protect materialmen. If the intent of the Contract was to protect FH20 as the District Court held, the Contract would have also required Haycraft to pay FH20's legal costs and expenses in conjunction with Molstad's.

In addition, if the parties had intended materialmen or suppliers to benefit from the Molstad-Haycraft Contract, they would have specifically provided Molstad with the right to directly pay the materialmen or suppliers. Instead, Molstad and Haycraft agreed that "the Contractor may, at his discretion, withhold such amounts otherwise due or to become due . . . pending settlement thereof." (A-14) (emphasis added) As Judge Braaten correctly held, Molstad's only right under the Molstad-Haycraft Contract was to withhold the payment pending settlement of any claims, not short circuit Haycraft or its assigns from an account receivable.

Moreover, inclusion of the phrase "at his discretion" precludes a finding that the intent was to benefit materialmen because Molstad could have "in its discretion," released the money to Haycraft. How would that benefit FH20?

Furthermore, it cannot be held that the intent of the Contract was to benefit FH20 because at the time the parties executed the Molstad-Haycraft Contract, no one knew FH20 would be the supplier. Again, this shows that reference to payment of materialmen as a class was to protect the Project, the City of Grand Forks and Molstad from materialmen claims, and not to specifically benefit FH20. See *First Federal*, 342 N.W.2d at 219 ("[t]he record does not indicate that First Federal was the party intended to benefit from the guaranty, nor does it indicate that the guarantors or the Trust intended to confer upon First Federal a right to enforce the guaranty"). Accordingly, FH20 is simply an incidental beneficiary with no rights in the Molstad-Haycraft Contract. See *id.* at 218 ("the mere fact that a third party may derive a benefit, purely incidental and not within the contemplation of the parties, from the performance of a contract, does not entitle him to maintain an action thereon in his own name").

If the District Court is correct, every standard form AGC Construction Agreement in North Dakota would create intended third-party beneficiary status on every materialman, supplier, sub-contractor, employee and personal

injury plaintiff that had even a tacit relationship to the Project. This would allow every one of these individuals or entities to enforce a contract that they are not named in, provided no consideration for, were owed no obligation by any of the contracting parties and who were not even specifically known by the contracting parties. This simply cannot be the legislative intent of N.D. CENT. CODE §9-02-04 (2002) or its progeny.

It is important to remember that FH20 had a contract with Haycraft and a claim against the construction bond. It could have pursued the bond or a breach of contract remedy against Haycraft instead of doing nothing.<sup>1</sup> Instead, it has not pursued its strongest remedies but has sat on its rights and now attempts to barge its way into a foreign contract. Failure to pursue its remedies may have been fatal to FH20's recovery.

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<sup>1</sup> Although the issue is not before this Court, it was argued below that FH20 should not be rewarded for its laches while the Bank has zealously negotiated, pursued and litigated its right to the \$20,000.00 based on solid, recognized causes of action. See *VND, LLC v. Leever's Foods, Inc.*, 2003 N.D. 198, ¶45, 672 N.W.2d 445, 455 (2003) ("[l]aches does not arise from the passage of time alone, but is a delay in enforcing one's right which is prejudicial to another"). Meanwhile, FH20 sat idly by choosing not to pursue its contract remedies against Haycraft and not to pursue the construction bond in this matter all while the Bank expelled attorney fees and passed up other collateral of Haycraft in reliance on this account from Molstad.

**D. In the Alternative, Even if FH20 was an Intended Third-Party Beneficiary, FH20 Could Only Enforce the Terms of the Molstad-Haycraft Contract Which Only Allowed Molstad to Withhold Payment to Haycraft Pending Resolution of any "Claims."**

Again, the specific language of the Molstad-Haycraft Contract provides that "the Contractor may, at his discretion, withhold such amounts otherwise due or to become due hereunder to cover said claims and any cost or expense arising or to arise in connection therewith pending settlement thereof." (A-14) Nowhere does the Contract allow Molstad to make payment directly to FH20 or any other material supplier. The District Court simply erred by ordering Molstad to pay FH20 in violation of the Molstad-Haycraft Contract. If this Court finds that FH20 is entitled to enforce the Molstad-Haycraft Contract, Molstad still cannot pay FH20 directly as the District Court erroneously ordered because its only right under the Contract is to "withhold" payment until the "claims" are settled. Therefore, the District Court erred in ordering Molstad to pay FH20 directly.<sup>2</sup>

**II. THE DISTRICT COURT ERRED BY DETERMINING THAT FH20 HAS "CLAIMS" AGAINST MOLSTAD BECAUSE FH20 DOES NOT HAVE A LEGAL CAUSE OF ACTION AGAINST THE CITY OF GRAND FORKS OR MOLSTAD.**

Claim is defined as "[t]he aggregate of operative facts giving rise to a right enforceable by a court. Also termed

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<sup>2</sup> The District Court also erred by violating Judge Braaten's October 6, 2004 Judgment which specifically required Molstad to pay the Bank. See Section III *infra*.

claim for relief." Black's Law Dictionary, p.264 8<sup>th</sup> Edition (2004) (first emphasis added). The North Dakota Rules of Civil Procedure do not allow a party to litigate where they cannot state a claim upon which relief can be granted. See N.D.R. Civ. P. 12 (b) (2005) (defining failure to state a claim upon which relief can be granted as a defense to action); *Ziegelmann v. DaimlerChrysler Corp.*, 2002 N.D. 134, ¶5, 649 N.W.2d 556, 559 (2002) ("[w]e will affirm a judgment dismissing a complaint for failure to state a claim if we cannot discern a potential for proof to support it").

In this matter, although FH20 never filed a complaint or other pleading laying forth a specific cause of action, the Bank has shown that FH20 has no claims against the City of Grand Forks or Molstad. As discussed *supra*, FH20 does not have a contract claim against Molstad, the City of Grand Forks or the Bank. Without any recognizable "claims," Molstad can release the \$20,000.00 to the Bank.

**A. FH20 Has no Claim Against the Construction Bond Because it Failed to Provide Timely Notice.**

As argued to the District Court, N.D. CENT. CODE § 48-02-15 (2002) provides:

**48-02-15. Claim for work or improvement—suit on contractor's bond.** Any person who has furnished labor or material for any work or improvement for the state, any of its departments, or any school district, city, county, or township in the State in respect of which a bond is furnished under this chapter and who has not been paid in full within 90 days after completion of the contribution of labor or materials, may sue on the bond for the amount unpaid at the time of the institution of the suit.

However, any person having a direct contractual relationship with a subcontractor, but no contractual relationship with a contractor furnishing the bond, does not have a claim for relief upon the bond unless that person has given written notice to the contractor, within 90 days from the date on which the person completed the contribution, stating with substantial accuracy the amount claimed and the name of the person for whom the contribution was performed. Each notice must be served by registered mail, postage prepaid, in an envelope addressed to the contractor at any place the contractor maintains an office, conducts business or has a residence.

N.D. CENT. CODE § 48-02-15 (2002) (emphasis added).

In this case, FH20 shipped its products to the construction site on May 23, 2002. Thus, N.D. CENT. CODE §48-02-15 requires FH20 to have given notice to Molstad of its outstanding balance due by August 21, 2002. FH20 missed this date by some 313 days! Failing to meet this clear requirement, FH20 is absolutely barred from recovering under the contractor's bond in this matter.

In a case with very similar facts, the North Dakota Supreme Court applied N.D. CENT. CODE §48-02-15 and barred an entity from any relief from the construction bond because notice was not provided within the 90-day period. See *Kuchenski v. Kramer Sheet Metal*, 377 N.W.2d 133, 135 (N.D. 1985) (holding plumbing contractor had no relief where it failed to provide 90-day notice to general contractor). The plaintiff in *Kuchenski* attempted to argue that N.D. CENT. CODE § 48-01-01 placed an affirmative duty upon the general contractor to see that subcontractors are paid regardless of compliance with section 48-02-15. See *id.* at 136. The court quickly dismissed the argument. *Id.* ("[r]ecovery

from a bond furnished pursuant to section 48-01-01 is expressly conditioned by the notice requirement contained in section 48-02-15. Timely notice by a subcontractor is therefore a condition precedent to recovery against the bond) (emphasis added).

Here, FH20's failure to provide notice within the 90-day period bars any recovery they may have against the construction bond in this matter. See *id.* This result is not inconsistent with the purpose of N.D. CENT. CODE § 48-01-01. Thus, the District Court erred by not determining that FH20 is barred from construction bond relief.

**B. Even if FH20 Had Provided Timely Notice, it is Barred From Making a Claim Against the Construction Bond Because It Did Not Bring a Claim Within One Year of the Project Completion.**

FH20 is further barred from making a claim against the contractor's bond because it did not bring a claim within one year of the completion and acceptance date of the project. See N.D. CENT. CODE § 48-02-17 (2003). The pertinent parts of that section are as follows:

All claims for any labor, material or supplies furnished for improvements, upon which suit is not commenced within one year after completion and acceptance of a project, shall be barred as liens or claims against the contractor and the contractor's surety. . . . Nothing in this chapter in any manner shall bar the right of any person who has furnished labor, supplies or materials to any subcontractors to enforce the same against the subcontractor.

N.D. CENT. CODE § 48-02-17 (2003).

Here, the GF Project was completed and accepted on May 3, 2004. Accordingly, FH20 would have had to bring its

claim for relief against the bond by May 3, 2005. Although FH20 has been allowed to intervene in the present action, it did not bring its own claim against the contractor or the contractor's surety. FH20 chose not to file a compliant, counterclaim, cross claim or some other pleading or type of claim against the Construction Bond. Accordingly, pursuant to the clear language of the statute requiring a claim to be brought against the contractor and the contractor's surety, FH20 is barred from recovering against the contractor's bond.

N.D. CENT. CODE § 48-02-17 serves as a statute of limitations. The purpose of a statute of limitations is to prevent enforcement of stale claims. See *Erickson v. Scotsman, Inc.*, 456 N.W.2d 535 (N.D. 1990). Although FH20 has joined the instant action, the scope of this action is set by the pleadings and that is the priority of a perfected security interest versus rights created in a contract. There has been no allegation or claim against the contractor's bond. Accordingly, FH20 failed to bring a lawsuit within one year of the project completion and acceptance. Thus, in addition to its failure to give timely notice, the one-year statute of limitations bars any claim it may have against the contractor or its surety.

Although FH20 is barred from recovering its alleged damages, FH20 had sufficient opportunity to pursue its claim against Haycraft. They failed to do so. Even with knowledge of the current proceeding, FH20 failed to

intervene until after judgment had been entered.

Accordingly, their fate has been secured by their own laches and delay and the Court should not reward FH20 for sitting on their rights while the Bank has zealously fought for its recovery. See *Leevers*, 2003 N.D. 198 at ¶45, 692 N.W.2d at 455.

**III. THE DISTRICT COURT ERRED BECAUSE IT VIOLATED THE LAW OF THE CASE.**

"[A] successor judge should respect the law of the case and orderly functioning of the judicial process requires that judges of coordinate jurisdiction honor one another's orders and revisit them only in special circumstances." In *re Guardianship and Conservatorship of Onstad*, 2005 N.D. 158, ¶11, 704 N.W.2d 554, 557-58 (2005) (quotation omitted).

On September 20, 2004, the District Court Ordered that "[b]ecause Haycraft failed to pay [FH20] for supplies it used in completing the project Molstad sub-contracted it to do and because Molstad received notice from [FH20] about Haycraft's failure to pay, Molstad is entitled to withhold the amount due and owing by Haycraft to [FH20] because this is what Haycraft agreed to when it entered into the sub-contract with Molstad." (A-69) The District Court's October 6, 2004 Judgment provided: "[Molstad] is entitled to withhold the \$20,000.00 from [the Bank] until such time as the [FH20] claim is settled. At that time, Molstad [] is to release the remaining \$20,000.00 to [the Bank]." (A-71)

In so holding, Judge Braaten correctly interpreted that portion of the Molstad-Haycraft Contract providing that

"[Molstad, ]the Contractor [, ]may, at his discretion, withhold such amounts otherwise due or to become due hereunder to cover said claims and any costs or expense arising or to arise in connection therewith pending settlement thereof." (A-14,69)

Judge Braaten already decided that Molstad cannot pay the \$20,000.00 directly to FH20 but must instead pay the money to the Bank following resolution of any "claims" FH20 may have had. As demonstrated in Sections I & II *supra*, FH20 no longer has any claims against Molstad or the City of Grand Forks. Therefore, Judge Kleven erred first by finding that FH20 had a "claim" against Molstad or the City of Grand Forks, second by misconstruing the Molstad-Haycraft Contract and third by releasing the \$20,000.00 to FH20 in violation of Judge Braaten's earlier order and judgment. See *Onstad*, 2005 N.D. 158 at ¶11, 704 N.W.2d at 557-58 ("that a successor judge should respect the law of the case and orderly functioning of the judicial process requires that judges of coordinate jurisdiction honor one another's orders and revisit them only in special circumstances") (quotation omitted).

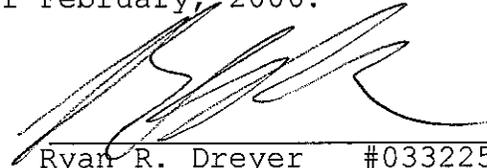
CONCLUSION

In Conclusion, FH20 did not have a contract with the City of Grand Forks, Molstad or the Bank and the Molstad-Haycraft Contract was not made expressly for FH20's benefit.

Therefore, FH20 does not have a contract claim against the City of Grand Forks, Molstad or the Bank. FH20 also failed to provide timely notice of its construction bond claim and therefore FH20 does not have any remaining claims against the City of Grand Forks, Molstad or the Bank.

Accordingly, the Bank respectfully requests that the Supreme Court reverse Judge Kleven's October 21, 2005 Summary Judgment and remand the case for summary judgment in favor of the Bank.

Dated this \_\_\_\_\_ day of February, 2006.



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