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ORIGINAL

IN THE SUPREME COURT, STATE OF NORTH DAKOTA

Dr. Thomas P. Dowhan, Plaintiffs/Appellants, vs. Dr. Ronald J. Brockman, individually; and Valley Vision Clinic, Ltd., a North Dakota Professional Corporation, Defendants/Appellees.	)	Supreme Ct. No.: 200000249

On Appeal From a Part of the Judgment Dated July 12, 2000 and an Order Overruling Plaintiff's Objections to Award of Costs and Disbursements to Defendants

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Grand Forks County District Court
Northeast Central Judicial District
Honorable Joel D. Medd, Presiding
Case No.: 98-C-1599

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STATEMENT OF CASE

On January 31, 1996, Plaintiffs/Appellants Dr. Thomas P. Dowhan and Dina M. Dowhan (hereinafter "Dowhan") commenced suit against Defendants/Appellees Dr. Ronald Brockman and Valley Vision Clinic, Ltd. (hereinafter "Brockman" and "Valley Vision," respectively).[1] (App., pp. A6-A17). Dowhan alleged nine (9) separate counts which included breach of an employment contract on the part of Brockman and a breach of lease agreement on the part of Valley Vision; interference with prospective business advantages by both Brockman and Valley Vision; wrongful inducement of an employee to leave employment against Valley Vision; interference with physician-patient relationships by both Brockman and Valley Vision; conversion by Brockman; and loss of consortium. (App., pp. A6-A17). Brockman and Valley Vision each denied Dowhan's allegations and any wrongdoing. (App., pp. A28-A37). Brockman further brought a counterclaim against Dowhan alleging that Dowhan owed Brockman $6,249.99 in unpaid salary earned by Brockman from Dowhan prior to the date that Dowhan terminated the employment contract between the two. (App., pp. A37-A39).

On April 25, 2000, a jury trial commenced in Grand Forks County District Court, the Honorable Joel D. Medd presiding. (App., pp. A78). On May 2, 2000, the jury returned its verdict finding that Brockman did not breach a contract with Dowhan; that Brockman did not interfere with prospective business advantages of Dowhan; that Valley Vision did not violate the lease entered into with Dowhan; that Valley Vision did not interfere with prospective

[1]During trial, Dina Dowhan voluntarily dismissed her loss of consortium claim against Brockman and Valley Vision, with prejudice, and she was removed as a plaintiff from the case.

business advantages of Dowhan; and that Brockman did wrongfully convert funds and/or patient lists from Dowhan; however, the jury awarded no money damages to Dowhan for such conversion because Dowhan failed to meet his burden of proving damages from such conversion. The jury also found that Dowhan failed to fully compensate Brockman on the employment agreement and awarded Brockman $4,749.99 in damages, plus 6% interest for 4 years and 3 months on his counterclaim against Dowhan. (App., p. A66).

Following the jury's verdict, Dowhan moved the trial court to modify the damages awarded by the jury to Brockman on his counterclaim. (App., pp. A53-54). Specifically, Dowhan claimed that the jury's award of interest to Brockman on his counterclaim damage award was not allowable and was unlawful. (App., pp. A76-A77). Brockman opposed Dowhan's motion to modify the damage award. (App., pp. A69-A75). Specifically, Brockman claimed that the jury's award of interest to Brockman on his counterclaim was proper, and that even if the jury could not award said interest, Brockman was nevertheless entitled to such interest to be awarded by the trial court and made an alternative motion for that relief. (App., pp. A69-A75).

On June 26, 2000, the trial court denied Dowhan's motion to modify the damage award. (App., pp. A76-A77). The trial court specifically found that "[p]ursuant to N.D.C.C. 32-03-04 prejudgment interest in a case such as this type may be awarded." (App., p. A77). Thereafter, the trial court issued its order for judgment dismissing, with prejudice, Dowhan's complaint and all causes of action against Brockman and Valley Vision and ordering that Brockman shall have judgment on his counterclaim against Dowhan for the sum of $4,749.99 together with interest thereon at the rate of six (6%) percent per annum for the period of 4

years and 3 months, for a total judgment in favor of Brockman and against Dowhan in the amount of $5,961.23. (App., p. A79). The trial court further ordered that Brockman and Valley Vision were to be awarded their costs and disbursements against Dowhan, to be taxed and included in the judgment. (App., p. A79).

On July 7, 2000, Brockman and Valley Vision served and filed their Verified Statement of Costs and Disbursements setting forth their costs and disbursements incurred in the amount of $5,762.79. (App., pp. A82-A84). On July 12, 2000, judgment was entered dismissing, with prejudice, Dowhan's complaint and all causes of action contained therein; adjudging that Brockman shall have judgment on his counterclaim against Dowhan in the amount of $5,961.23; and adjudging that Brockman and Valley Vision, jointly, shall have judgment against Dowhan for their costs and disbursement in the amount of $5,762.79. (App., p. A85).

On July 18, 2000, Dowhan objected to the trial court's award of costs and disbursements to Brockman and Valley Vision. (App., p. A88). Dowhan contended that "Defendants' (sic) do not constitute a 'prevailing party' under chapter 28-26 of the North Dakota Century Code." (App., p. A88). Alternatively, Dowhan contended that "Defendants' requested costs and disbursements are 'unreasonable' and 'excessive.'" (App., p. A88). Brockman and Valley Vision resisted and opposed Dowhan's objections to the awarded costs and disbursements. (App., p. A91). On August 21, 2000, the trial court issued its order overruling Dowhan's objections to the award of costs and disbursements to Brockman and Valley Vision, and further found that the costs and disbursements were fair and reasonable. (App., pp. A91-A93).

On August 28, 2000, following the trial court's order overruling Dowhan's objections to the award of costs and disbursements, Dowhan filed a notice of appeal to this Court. (App., p. A96).

LAW AND ARGUMENT

Standard of Review

Dowhan moved the trial court to modify the damage award to Brockman on his counterclaim and has also appealed from the judgment dated and entered on July 12, 2000, wherein it is adjudged, determined and decreed that Dowhan's complaint and all causes of action are dismissed, with prejudice, and on its merits; that Brockman shall have judgment on his counterclaim against Dowhan in the amount of $5,961.23; and that Brockman and Valley Vision, jointly, shall have judgment against Dowhan for their costs and disbursements in the amount of $5,762.79. (App., p. A85). The trial court found, as a matter of law, in its order denying Dowhan's motion to modify the damage award, that "[p]ursuant to N.D.C.C. 32-03-04 prejudgment interest in a case such as this type may be awarded." (App., pp. A76-A77).

The interpretation of a statute is a question of law fully reviewable on appeal. See Peterson v. Traill County, 1999 ND 197, ¶ 10, 601 N.W.2d 268. This Court's primary objective in construing a statute is to ascertain the intent of the legislature by looking at the language of the statute itself and giving it its plain, ordinary and commonly understood meaning. See N.D.C.C. § 1-02-02; see also Falcon v. State, 1997 ND 200, ¶ 9, 570 N.W.2d 719. Statutes must be construed as a whole to determine the legislative intent, and the intent must be derived from the whole statute. See N.D.C.C. §§ 1-02-07 and 1-02-38(2); see also Narum v. Faxx Foods, Inc., 1999 ND 45, ¶ 18, 590 N.W.2d 454.

On appeal, the allowance of costs and disbursements under N.D.C.C. §§ 28-26-02 and 28-26-06 lies within the sole discretion of the trial court and will not be overturned on appeal absent an abuse of discretion. See Schwartz v. Ghaly, 318 N.W.2d 294 (N.D. 1982) and Richter v. Jones, 378 N.W.2d 209 (N.D. 1985); see also Patterson v. Hutchens, 529 N.W.2d 561 (N.D. 1995). A trial court abuses its discretion only when it acts in an arbitrary, unreasonable or unconscionable manner or when its decision is not the product of a rational mental process leading to a reasoned determination. See Berg v. Berg, 2000 ND 36, ¶ 22, 606 N.W.2d 895.

In the matter now before this Court, N.D.C.C. § 32-03-04 authorizes and permits the jury award of prejudgment interest on the Brockman counterclaim. Moreover, the trial court did not abuse its discretion in awarding Brockman and Valley Vision their costs and disbursements against Dowhan.

I. The Trial Court Did Not Err in Upholding the Jury's Award of Prejudgment Interest on Brockman's Counterclaim.

Dowhan contends that the jury was not empowered to award Brockman prejudgment interest on his counterclaim award. (Appellant Br., p. 5). Dowhan, on the one hand, seemingly contends that N.D.C.C. § 32-03-05 solely governs when the trier of fact, including a jury, has the discretion to award prejudgment interest, (Appellant Br., p. 5), and, on the other hand, specifically contends that "N.D.C.C. § 32-03-04 generally governs prejudgment interest in contract cases." (Appellant Br., p. 5).

Dowhan's contention that the jury was not empowered to award prejudgment interest to Brockman on his counterclaim for employment contract damages (unpaid salary) in this

matter is in error. It is well settled North Dakota law that interest is proper in breach of contract cases. See Troutman v. Pierce, Inc., 402 N.W.2d 920 (N.D. 1987). It is also well recognized that a jury can award interest on damages in breach of contract cases. See id. at 923-924; see also North American Pump Corp. v. Clay Equipment Corp., 199 N.W.2d 888, 897 (N.D. 1972).

Dowhan contends that the jury cannot award prejudgment interest on the damages and "maintains that in this case prejudgment interest is in the province for the court to decide, not the trier of fact." (Appellant Br., p. 6). Dowhan directs the Court's attention to N.D.C.C. § 32-03-05 which provides:

> In an action for the breach of an obligation ***not arising from contract*** and in every case of oppression, fraud, or malice, ***interest may be given in the discretion of the court or jury.***

(Emphasis added). The relevance of Dowhan's reference to N.D.C.C. § 32-03-05 is unknown. As the Court can see, N.D.C.C. § 32-03-05 does not even govern the awarding of damages for breach of contract and simply does not apply to the present matter.

This Court has previously held that N.D.C.C. § 32-03-04 "generally governs prejudgment interest in contract cases." Roise v. Kurtz, 1998 ND 228, ¶ 8, 587 N.W.2d 573. Nonetheless, Dowhan seems to interpret § 32-03-05 as exclusively limiting what actions a jury can award interest on. However, as the Court can see, N.D.C.C. § 32-03-05 governs prejudgment interest in tort cases, which gives the fact finder discretion to award interest. See id. (prejudgment interest in tort cases is governed by N.D.C.C. § 32-03-05.) The language of N.D.C.C. § 32-03-05 simply does not apply to this case and is not authority to argue that the jury improperly awarded prejudgment interest to Brockman on his counterclaim.

Even if the language of N.D.C.C. § 32-03-05 somehow governed the award of interest in the present matter, § 32-03-05 does not exclusively limit on what damages a jury can award interest. To the contrary, § 32-03-05 states what actions the court or a jury may, ***in its discretion***, award interest on. There is absolutely no language in § 32-03-05 which states the jury cannot award interest on damages for breach of contract because § 32-03-05 does not even apply to interest in breach of contract actions. The thrust of § 32-03-05 is to give the court or the jury discretion to award interest in every action for breach of an obligation not arising from contract, and in every action for oppression, fraud or malice, if they so choose to, in their discretion.

Dowhan contends that N.D.C.C. § 32-03-05 "has generally been viewed as applying to tort cases." (Appellant Br., p. 5). This contention is not in dispute. However, the language of § 32-03-05, limiting what cases a court or jury ***in its discretion may*** award interest on, cannot be read into § 32-03-04. The allowance of interest under § 32-03-05 is a question for the jury. See Johnson v. Northern Pac. Ry., 1 N.D. 354, 48 N.W. 227 (1890); see also Storley v. Armour & Co., 107 F.2d 499 (8th Cir. (N.D.) 1939). Clearly, the court or jury is not mandated to award interest on damages for these types of actions set forth in § 32-03-05, but it may in its discretion. Section 32-03-05 seeks to give a court or jury discretion in awarding interest; it does not seek to limit what actions a jury can award interest on.

As noted above, N.D.C.C. § 32-03-04 governs the awarding of interest in a breach of contract claim. See Roise, 1998 ND 228 at ¶ 8. Section 32-03-04 provides, in pertinent part:

> Every person who is entitled to recover damages certain or capable of being made certain by calculation, the right to recover which is vested in the person upon a particular day, also ***is entitled to recover interest thereon*** from that day, . . .

(Emphasis added). The language of N.D.C.C. § 32-03-04 expressly limits the discretion in awarding interest for breach of contract actions. In breach of contract actions there is no discretion involved in awarding interest on damages. Every person entitled to recover such damages is entitled to recover interest thereon so long as the damages are capable of being made certain by calculation. See N.D.C.C. § 32-03-04. It is clear that Dowhan's confusion relative to the jury award of interest on the counterclaim stems from his misreading of N.D.C.C. § 32-03-05, which gives a court or jury discretion in awarding interest and does not even apply to this case.

This Court has expressly stated that where the amount due for breach of contract was ascertainable by calculation in accordance with the terms of the contractual agreement, ***interest was payable on such amount from the date of the breach***. See Metcalf v. Security Int'l. Ins. Co., 261 N.W.2d 795 (N.D. 1977). Moreover, the legal rate of interest is allowable by way of compensation as damages for breach of contract. See Stutsman County v. Dakota Trust Co., 47 N.D. 228, 181 N.W. 586 (1921). Clearly, because N.D.C.C. § 32-03-04 takes away the issue of "discretion" in awarding interest on damages, there can be no dispute that the jury's award of interest on Brockman's counterclaim damage award for unpaid wages on the employment contract was justified and proper, as was the district court's confirmation of it. The jury's award of interest on the counterclaim damage award to Brockman is expressly

permitted pursuant to N.D.C.C. § 32-03-04, was neither impermissible nor unlawful, and the trial court's decision to uphold the same was not erroneous.

In the conclusion of Dowhan's brief, he asks this Court to reverse and remand the July 12, 2000 judgment of the district court and instruct the trial court to make appropriate findings as to how much, if any, prejudgment interest Brockman should be awarded on his counterclaim recovery. (Appellant Br., p. 14). Dowhan therefore concedes that interest on the damages awarded to Brockman on his counterclaim may be awarded and are recoverable. Dowhan simply contends that the ***jury*** was not empowered to award that interest, only the trial court.

Assuming, for the sake of argument, that Dowhan is correct, it would not be necessary, and in fact, would be a waste of important time and judicial resources to remand this issue back to the district court for a determination as to how much, if any, prejudgment interest Brockman should be awarded on his counterclaim. In denying Dowhan's motion to modify the counterclaim damage award with respect to the interest awarded by the jury thereon, and in upholding the jury award of interest, the trial court has already ruled and determined that Brockman was entitled to 6% prejudgment interest on his counterclaim damages for the period determined by the jury. (App., pp. A76-A77). Furthermore, in Brockman's response to Dowhan's motion to modify the damage award with respect to the interest, in addition to requesting that the motion be denied, Brockman brought an alternative motion of his own for interest to be awarded on his counterclaim damages. (App., pp. A69-A75). Therefore, in ruling upon and denying Dowhan's motion to modify the counterclaim damage award, the district court necessarily determined that Brockman was entitled to 6%

prejudgment interest on his counterclaim damages, and that the period determined by the jury for that interest was appropriate. Accordingly, it would not be necessary for this Court to remand this matter and instruct the district court to do what the district court has already done, particularly since Dowhan does not dispute that Brockman may properly be awarded interest on his counterclaim damages. For this additional reason, this Court must affirm the district court's order allowing interest to Brockman on his counterclaim damages.

II. The Trial Court Did Not Err in Finding That Dowhan Was Not a Prevailing Party Under N.D.C.C. § 28-26-06.

As the Court is well aware, the allowance of costs and disbursements under N.D.C.C. § 28-26-06 lies within the sound discretion of the trial court, which is in the better position to determine the reasonableness and necessity of the disbursements sought by the prevailing party, and the trial court's decision will be overturned on appeal ***only if*** an abuse of discretion is shown. See Richter v. Jones, 378 N.W.2d 209 (N.D. 1985); see also Patterson v. Hutchens, 529 N.W.2d 561 (N.D. 1995). A trial court abuses its discretion only when it acts in an arbitrary, unreasonable or unconscionable manner. See Lacher v. Anderson, 526 N.W.2d 108 (N.D. 1994). In the matter now before this Court, the trial court's awarding Brockman and Valley Vision their costs and disbursements was not an abuse of discretion.

Dowhan contends that "Dowhan is a 'Prevailing Party' under Section 28-26-06 of the N.D. Century Code" and that "the trial court abused its discretion in awarding Defendants' costs and disbursements." (Appellant Br., p. 9). Dowhan supports this contention by claiming that since "both sides have prevailed on claims, neither side should have been awarded costs and disbursements." (Appellant Br., p. 9). Dowhan claims that the jury found for Dowhan

on his claim of conversion and for Brockman on his counterclaim for unpaid wages on the employment agreement. (Appellant Br., p. 10).

As this Court has stated, "if opposing litigants each prevail on some issues, there may not be a single prevailing party against whom disbursements may be taxed." Liebelt v. Saby, 279 N.W.2d 881, 888 (N.D. 1979). Dowhan seems to contend that the awarding of costs and disbursements to Brockman and Valley Vision, when Dowhan allegedly prevailed on his conversion claim, would be an abuse of discretion. (Appellant Br., pp. 9-10) (citing Liebelt v. Saby, 279 N.W. 2d 881, 888 (N.D. 1979) and Earthworks, Inc. v. Sehn, 553 N.W.2d 490, 496 (N.D. 1996).

A closer reading of Liebelt, however, clearly indicates that it is simply within the trial court's sole discretion to refuse to award costs and disbursements if opposing litigants each prevail on some issues. Liebelt certainly does not stand for the proposition that the trial court's choosing to award costs to a particular party when each have prevailed on certain issues is an abuse of discretion. Id. Likewise, this Court in Earthworks held that the trial court "need not" award costs to either party if each prevails on certain parts of a lawsuit. Earthworks, Inc. does not hold that a trial court abuses its discretion when it chooses to do so.

This Court has recently addressed the issue of a prevailing party. In Brunberger v. Interstate Engineering, Inc., 2000 ND 45, ¶ 14, 607 N.W.2d 904, this Court stated:

> In *Lemer*, we explained our definition of a prevailing party and its relation to costs and disbursements. Under N.D.R.Civ.P. 54(e), costs and disbursements must be allowed as provided by statute. Section 28-26-02, N.D.C.C., provides for the recovery of certain costs. Section 28-26-06, N.D.C.C., provides the clerk shall tax as a part of the judgment in favor of the

> prevailing party his necessary disbursements his legal fees for publication, witnesses, referees, and other officers for transcripts for necessary expense of taking depositions and procuring evidence, for the reasonable fees of expert witnesses, and for the actual expenses of expert witnesses.
>
> A trial court's decision on fees and costs under N.D.C.C. § 28-26-06 will not be overturned on appeal unless an abuse of discretion is shown. A trial court abuses its discretion when it acts in arbitrary, unreasonable, or unconscionable manner.
>
> Costs ordinarily are assessed in favor of winners and against losers. If opposing litigants each prevail on some issues, there may not be a single prevailing party against whom disbursements may be taxed.
>
> In order to be considered a prevailing party in a tort action, a party must prevail at least on the issues of negligence and proximate cause. To hold otherwise would subject persons without the potential of the legal liability of an alleged wrong to mandatory costs against them. Such an interpretation does not conform with the traditional meaning of prevailing party.
>
> Generally, the prevailing party to a suit, for the purpose of determining who is entitled to costs, ***is the one who successfully prosecutes the action or successfully defends against it, prevailing on the merits of the main issue, in other words, the prevailing party is the one in whose favor the decision or verdict is rendered and the judgment entered.***

Brunberger, 2000 ND 45, at ¶ 14. (emphasis added). (citations omitted).

In the matter before the Court, there can be absolutely no dispute that Brockman and Valley Vision were the prevailing parties. Brockman and Valley Vision successfully defended Dowhan's action against them, ***prevailing on the merits of the main issues***, and are the ones in whose favor the decision or verdict was rendered and the judgment entered for both a dismissal of Dowhan's complaint, with prejudice, and on the merits, and an award of damages to Brockman on his counterclaim. (App., p. A85). It must be noted that Dowhan is not appealing from the district court judgment to the extent that it dismissed his claims and causes of action against Brockman and Valley Vision, with prejudice and on the merits. The only

issues raised by Dowhan in this appeal are the award of interest to Brockman on his counterclaim damages and the costs and disbursements awarded to Brockman and Valley Vision. Dowhan is ***not*** claiming that it was error for the district court to dismiss his claims and causes of action with prejudice. Surely, Brockman and Valley Vision are the winners in this matter and in whose favor costs should be assessed, as Dowhan received no damages for his claims and his case was dismissed, while Brockman did receive a damage award.

While the jury found that Brockman wrongfully converted funds and/or patient lists from Dowhan, proximately causing damages to Dowhan, the jury awarded Dowhan no money damages for the conversion because Dowhan failed in his burden of proving damages for such conversion. (App., p. A51). A provable damage would be an essential element or aspect of Dowhan's claim for conversion. See e.g., American Banders Mortgage Corp. v. Federal Home Loan Mortgage Corp., 75 F.3d 1401, 1411 (9th Cir. 1995) (to establish a conversion, plaintiff must prove three elements: 1) plaintiff's ownership or right to possession of the property at the time of the conversion; 2) defendant's conversion by a wrongful act or a disposition of the plaintiff's property right; and 3) damages); see also Snead v. First Nat'l. Bank & Trust Co. of Minneapolis, 261 N.W. 700 (Minn. 1935) (damages are an "essential element" in a conversion action); Cruz v. Cruz, 198 B.R. 330, 333 (1996) (to prevail in an action for conversion under California state law, plaintiff must prove: 1) plaintiff's ownership or right to possession of tangible property at the time of conversion; 2) defendant's conversion; and 3) damages) (citing 5 Witken, pleading, § 653 (supp. 1996)); Hodges v. Byars, 1992 W.L. 113027 (Ohio App.) LEXIS 2742 (Ohio Ct. App. 1992) (to prove the elements of the tort of conversion, the plaintiff must show: 1) plaintiff has ownership interest

or right to possession of the property at the time of the conversion; 2) the defendant's conversion was by a wrongful act of disposition of plaintiff's property rights; and 3) as a result of defendant's action, plaintiff suffered damages); Lane v. Dunkle, 753 P.2d 321, 323 (Mont. 1988) (to prove the essential elements of an action for conversion under Montana law, plaintiff must prove: 1) ownership of the property; 2) right of possession; and 3) unauthorized dominion over the property by another resulting in damages); Blais-Porter, Inc. v. Simboli, 521 N.E.2d 1013, 1017 (Mass. 1988) (damages are an essential element for the plaintiff to prove in an action for conversion); and White v. Weber-Workman Co., 591 P.2d 348, 349 (Okla. 1979) (in terms of essential elements, when seeking damages for conversion, a plaintiff must plead and prove that he owns or has a right to possess the property in question, the defendant wrongfully interfered with such property right, and the extent of damages). Clearly, notwithstanding Dowhan's contention, damages are an element which must be established to prevail on a claim for conversion.

Dowhan contends that "like a claim for common law trespass, a conversion action can be sustained even though no substantial damages were caused or proven." (Appellant Br., p. 12) (citing 18 Am.Jur.2d Conversion, § 115; 22 Am.Jur.2d Damages, § 20). Dowhan's reliance on this precept is misplaced. In the matter now before the Court, not only were "substantial damages" not proven, Dowhan wholly failed to prove any damages whatsoever. Clearly, inasmuch as Dowhan failed to prove any damages whatsoever in his claim for conversion, Dowhan failed to meet his burden of proof with respect to the same and cannot be determined to be the prevailing party thereon.

It was Dowhan's burden to prove damages for such conversion. The jury determined that he did not and accordingly awarded no damages for the conversion. Therefore, Dowhan ultimately received no damages on any of his claims against Brockman or Valley Vision, and the Court properly ordered that Dowhan's complaint and all causes of action be dismissed, with prejudice, and on the merits. As such, Brockman and Valley Vision were clearly the prevailing parties in this action.

Dowhan relies on Lemer v. Campbell, 1999 ND 223, 602 N.W.2d 686 as authority for his argument that he can be considered a "prevailing party" on his conversion claim, and therefore, neither he nor Brockman should have been awarded costs and disbursements. (Appellant Br., pp. 9-11). As the Court will recall, this writer represented the defendant in Lemer and is intimately familiar with the case. Lemer is distinguishable from the present case and is not support for Dowhan's claim that he was a "prevailing party" on his conversion claim.

In Lemer, this Court stated that "a prevailing party plaintiff may recover costs upon a money verdict which is rendered in his favor, even though the ultimate judgment is zero after deductions for settlements." Id. at ¶ 9. In Lemer, plaintiff had already been paid in excess of $25,000 from her own no-fault insurer for past medical expenses. Id. at ¶ 3. The jury awarded plaintiff only $3,000 in past medical expenses and no other damages. Id. at ¶ 2. Because the jury's award of $3,000 in past medical expenses was within the amount of medical expenses her no-fault insurer had already paid her, that sum was deducted prior to entry of judgment, and the ultimate judgment entered awarded plaintiff no damages. Id. at ¶ 3.

In determining that Lemer was the prevailing party entitled to costs, this Court relied upon Syverson v. Heitmann, 214 Cal.Rptr. 581 (1985), wherein the plaintiff's recovery against one defendant (at trial) was completely offset by a settlement plaintiff made with another tortfeasor, thereby reducing plaintiff's net judgment against the non-settling defendant to zero. Lemer, at ¶ 10. The California court found that plaintiff was entitled to costs against the non-settling defendant, because the fact that plaintiff was not entitled to recover damages from the non-settling defendant is due not to a failure to "make out his case," but solely to the fortuitous fact that the damages assessed by the jury equaled the sums previously received in settlement. Id. Relying upon Syverson, this Court stated that Lemer's inability to recover damages from Campbell in accordance with the jury verdict (awarding her $3,000 in past medical expenses) was due "solely to the fortuitous fact that the damages assessed by the jury" were offset by medical expense payments already paid to Lemer by a no-fault insurer under N.D.C.C. § 26.1-41-08. Lemer, at ¶ 11. This Court, therefore, concluded that Lemer was a prevailing party, and that the trial court did not abuse its discretion in awarding her costs. Id.

The situation is much different in the present case. First of all, the fact that Dowhan was not entitled to recover damages from Brockman on his conversion claim ***was*** due to a failure on his part to make out his case, in light of the fact that Dowhan failed in his burden of proving damages from the conversion. The burden of proving damages from Brockman's conversion was part of Dowhan's case on the conversion claim, as a separate line on the verdict form was devoted to damages on that particular claim. (App., p. A67). Therefore, unlike Syverson v. Heitmann, *supra*, relied upon by this Court in Lemer, Dowhan, the plaintiff

in this case, failed to "make out his case" for conversion because he failed to satisfy his burden of proving damages for the same. This fact distinguishes this case from the Syverson case, so heavily relied upon by this Court in Lemer, as well as the Lemer case itself.

In Lemer, the jury awarded plaintiff $3,000 in past medical expenses, but because of the no-fault offset, plaintiff's net judgment was for no damages. Lemer, at ¶ 3. This Court concluded that Lemer's inability to recover damages from Campbell in accordance with the jury verdict was due "solely to the fortuitous fact that the damages assessed by the jury" were offset by medical expense payments already paid by a no-fault automobile insurer under N.D.C.C. § 26.1-41-08. Id. at ¶ 11. This Court found that because of that, Lemer could still be considered a prevailing party entitled to costs. Id. That situation, however, is not present in the case at bar. The jury, in its verdict, awarded Dowhan no damages on his conversion claim because he failed in his burden of proving the same. Therefore, Dowhan's inability to recover damages from Brockman was not due "solely to the fortuitous fact that the damages assessed by the jury" were offset because of a payment from another source; but rather, the jury never awarded damages to Dowhan in the first place on his conversion claim because they determined he did not carry his burden of proving the same. This fact renders this case completely distinguishable from Lemer. Lemer does not apply to prevent Brockman from receiving costs and disbursements against Dowhan because the jury never awarded Dowhan any damages in the first place on his conversion claim. Dowhan's inability to recover damages from Brockman was not due solely to subsequent offsets from the verdict. He simply received no damages from the jury to begin with because he failed to prove any amount of damages.

Therefore, because the offset against the award of damages by the jury was the reason this Court concluded that Lemer was still the prevailing party and entitled to costs in Lemer, 1999 ND 223, 602 N.W.2d 686, inasmuch as the jury did award her damages in the first place, the Lemer case is completely distinguishable from the present case and does not apply. Lemer is not authority to prevent Brockman and Valley Vision from being awarded their costs and disbursements against Dowhan.

Moreover, this Court in Lemer expressly held that "the determination of who is a prevailing or successful party is based upon ***success upon the merits***, not upon damages, and a party may be a prevailing party although he recovers no award of damages." Id. at ¶ 9. (emphasis added). In this case, Brockman and Valley Vision prevailed on the merits. The trial court's order for judgment and the judgment ultimately entered and now appealed from specifically ordered, adjudged and decreed that "[t]he complaint, and all causes of action contained therein, of Plaintiff Dr. Thomas Dowhan against the Defendants is **DISMISSED, WITH PREJUDICE**, *and on its merits*." (App., p. A85) (bold original) (italics and underscore added). Lemer is clearly distinguishable from the present matter. Brockman and Valley Vision prevailed on the merits and are entitled to their costs and disbursements in this matter. The trial court did not abuse its discretion in granting the same.

In Reichert v. Union Fidelity Life Ins. Co., 360 N.W.2d 664, 667 (Minn. Ct. App. 1985), where the defendant insurance company had obtained a dismissal of the plaintiff's complaint against it, with prejudice, the Minnesota Court of Appeals stated:

> Although there are no Minnesota cases, a finding that Union Fidelity, by obtaining dismissal with prejudice, has succeeded in the action, would be within the trial court's discretion.

Again, Dowhan is not claiming in this appeal that it was improper for the district court to dismiss his claims and causes of action against Brockman and Valley Vision, with prejudice and on their merits. Accordingly, because Brockman and Valley Vision obtained such a dismissal, they necessarily succeeded in this action, were the prevailing parties, and were therefore entitled to costs and disbursements.

It should also be pointed out here that in Lemer the judgment did not dismiss Lemer's claims against Campbell with prejudice and on their merits. The judgment did in the present action. This fact further distinguishes this case from Lemer.

Similarly, in Lehman v. Hansord Pontiac Co., Inc., 74 N.W.2d 305 (Minn. 1955), where a used automobile dealership buyer brought an action against a seller for fraud and deceit and the trial court determined that while the buyer had been defrauded he had suffered no monetary damages, the Minnesota Supreme Court affirmed the trial court's entering judgment in favor of the seller holding that buyer was not entitled to recover costs and disbursements upon entry of judgment if ordered in accordance with the findings of fact which found the buyer not damaged. Specifically, the Minnesota Supreme Court stated:

> The plaintiff was not the prevailing party and was not entitled to recover costs and disbursements upon entry of judgment if ordered in accordance with the findings of fact. There was no money recovery, and he was not legally the prevailing party.

Lehman, 74 N.W.2d at 312. Accordingly, inasmuch as Dowhan completely failed to prove any amount damages as a result of the conversion, and therefore was awarded no monetary recovery, it was completely within the trial court's province to declare that Dowhan was not

a prevailing party, and that Brockman and Valley Vision were entitled to their costs and disbursements herein.

Alternatively, if the Court concludes that Dowhan prevailed on some issues in this action, notwithstanding the fact that he failed to carry his burden of proving damages on the conversion claim, then, at the very least, Valley Vision should be entitled to its costs and disbursements against Dowhan. N.D.C.C. § 28-26-10 governs this very issue and provides in pertinent part as follows:

> In all actions, when there are several defendants not united in interests and making separate defenses by separate answers and the plaintiff fails to recover judgment against all, the court may award costs to such defendants as have judgment in their favor.

While Dowhan contends that "[e]ssentially, Valley Vision Clinic and Brockman have cooperated hand-in-hand since day one of this litigation," it is unmistakenly clear that separate and distinct claims were made by Dowhan against Brockman and Valley Vision. (App., pp. A6-A17). Separate questions were placed on the special verdict form with respect to Dowhan's separate claims against Brockman and Valley Vision. (App., pp. A66-A68). No claims were included on the special verdict form against Brockman and Valley Vision jointly. Therefore, even if the Court concludes that, as between Dowhan and Brockman, both of those parties prevailed on certain issues such that neither should be entitled to costs or disbursements against the other, it is undisputed that Valley Vision clearly prevailed on all of the claims made against it by Dowhan.

Even though Brockman and Valley Vision were represented by the same counsel, they had separate interests in this lawsuit. Separate interests, however, do not equate to a conflict

of interest in representing both Brockman and Valley Vision, because the interests of Brockman and Valley Vision were not adverse to each other. They were adverse, however, to Dowhan. Even though only one answer was submitted on behalf of both Brockman and Valley Vision, separate defenses in the answer applied to Brockman and Valley Vision separately, as their interests appeared. (App., pp. A28-A37). Pursuant to N.D.C.C. § 28-26-10, if this Court concludes that Dowhan was a prevailing party on his conversion claim against Brockman, which he was not, Valley Vision is still entitled to an award of one-half of the costs and disbursements taxed and entered in the judgment below.

Therefore, for the reasons stated above, Brockman and Valley Vision respectfully request that the trial court's order overruling Dowhan's objections to the award of costs and disbursements to Brockman and Valley Vision be completely affirmed, and that the costs as taxed and included in the judgment stand. Alternatively, at the very least, this Court should uphold and affirm half of the taxed costs and disbursements and allow them to remain as a judgment against Dowhan, in favor of Valley Vision.

CONCLUSION

Based on the foregoing facts, law and argument, Brockman and Valley Vision respectfully request that this Court, in all things, affirm the trial court's judgment upholding the jury awarded prejudgment interest on the Brockman counterclaim and affirm the trial court's order overruling Dowhan's objections to the award of costs and disbursements to Brockman and Valley Vision.

Respectfully submitted this 1 day of November, 2000.

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COUNTY OF GRAND FORKS)

AFFIDAVIT OF SERVICE
BY MAIL
Case No.: 200000249

The undersigned, being first duly sworn, deposes and states that a copy of:

Appellees' Brief

was served on November 1, 2000 by placing a true and correct copy thereof in an envelope as follows, to-wit:

Larry Richards
RICHARDS LAW OFFICE
711 N Washington St Ste 202
Grand Forks ND 58203

and depositing the same with prepaid postage in the United States mail at Grand Forks, North Dakota.

To the best of affiant's knowledge, the address above given is the actual post office address of the party intended to be so served. The above documents are mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Vicki Kramer

SUBSCRIBED AND SWORN to before me this 1st day of November, 2000.

Kellie S. Burgess

Kellie S. Burgess, Notary Public
My Commission Expires: 1/12/06

(SEAL)