ORIGINAL

Supreme Court File No. 20030281

20030281

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota ex rel.
WAYNE STENEHJEM, Attorney General,

Plaintiff-Appellant,

v.

BANNER HEALTH SYSTEM,
an Arizona corporation,

Defendant-Appellee.

APPEAL FROM THE JUDGMENT OF DISMISSAL OF THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA, CIVIL NO. 09-02-C-4093

THE HONORABLE GEORGIA DAWSON, JUDGE OF THE DISTRICT COURT

BRIEF OF APPELLEE BANNER HEALTH SYSTEM

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STATEMENT OF THE ISSUE

The sole issue before the Court on this appeal is whether the district court properly determined that the Complaint of North Dakota Attorney General Wayne Stenehjem ("the Attorney General") against Banner Health System ("Banner") failed to sufficiently allege the elements of a constructive trust claim.[1]

The question presented is one of considerable importance with respect to North Dakota trust law, the ability of nonprofit healthcare providers to manage and finances their operations without uncertainty, the property rights of private nonprofit corporations in general, and North Dakota's interest in serving as a hospitable environment for nonprofit healthcare. Accordingly, Banner submits that this appeal merits oral argument.

STATEMENT OF THE CASE

On November 8, 2002, the Attorney General filed a two-count Complaint against Banner in Cass County district court. (Appendix ("A") 1-8). For its first claim for relief, the Complaint seeks to impress a charitable or constructive trust over the proceeds of Banner's sale of five long-term healthcare facilities located in the North Dakota ("the Nursing Homes") for the benefit of the members of the communities where the Nursing Homes are located ("the Local Communities").

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[1] The Attorney General's principal brief ("A.G. Br.") to this Court also presents for review the question of "whether the district court erred in concluding the State failed to allege a charitable trust." A.G. Br. at 1. Banner contends that this issue is not properly before the Court on this appeal. See Point II infra.

(A3-5, 7). For its second claim for relief, the Complaint seeks to impress a charitable or constructive trust over contributions made to the Anne Carlsen Center for Children ("the Carlsen Center") in Jamestown, North Dakota – a residential facility formerly owned and operated by Banner that provides healthcare services for severely disabled children. (A5-7). Such a trust, the Complaint alleges, should exist for the benefit of the communities surrounding the Carlsen Center ("the Carlsen Center Community"). (A7, ¶ E)

Banner moved to dismiss the entire Complaint, which included the charitable and constructive trust claims addressed to both the Nursing Homes and the Carlsen Center. See generally Defendant's Memorandum of Law in Support of Motion to Dismiss.[2] With full notice of the scope of Banner's Motion, the Attorney General's brief in response to Banner's Motion failed to raise any arguments in defense of the charitable trust claim. See generally Attorney General's Response to Motion to Dismiss. Rather, the Attorney General proceeded solely with his claim for the imposition of a constructive trust. Id. Similarly, at oral argument on Banner's motion, the Attorney General's presentation focused only on the constructive trust claim and did not address at all the claim for a charitable trust – a fact later noted by the district court. (A10).

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2 Memoranda of law are not included in the Appendix. N.D.R.App.P. 30(a)(2).

After full briefing and oral argument, the district court granted Banner's Motion to Dismiss the Complaint. (A9-15). As an initial matter, the court concluded that the Attorney General had abandoned the charitable trust claim by failing to address it in either his brief in response to Banner's Motion or at oral argument: "It appears from Plaintiff's Response to Motion to Dismiss and from its oral arguments at the hearing on July 29th, 2003, that Plaintiff has abandoned its charitable trust theory and is proceeding only upon the constructive trust theory." (A9-10). With respect to the sole remaining claim – for imposition of a constructive trust – the court determined that the facts alleged in the Complaint (as elaborated by the Attorney General in briefing and argument) could never satisfy the necessary elements, i.e., a confidential relationship and unjust enrichment. (A9-15).[3] Specifically, the district court determined that there were no facts in the Complaint to establish a relationship of confidence between Banner and the members of the relevant communities. (A12). Likewise, the district court found that the Complaint failed to allege unjust enrichment because it did not contain facts demonstrating that Banner was without justification in using the sale proceeds outside of North Dakota, or that the Local Communities were without a remedy at law. (A14-15).

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[3] That the Attorney General did not believe he could ever adduce facts to properly support his claims is evident from his failure to amend the Complaint at any stage, or to seek leave from the district court to file an amended pleading.

Accordingly, on August 12, 2003, the Court entered an order granting Banner's Motion to Dismiss and, on August 26, 2003, entered a judgment dismissing the Attorney General's action. (A16). The Attorney General appealed. (A17).

STATEMENT OF THE FACTS

The record consists of the Complaint, the parties' legal memoranda in support of and in opposition to Banner's Motion to Dismiss, and the order and judgment of the district court dismissing the Attorney General's Complaint in its entirety. (A1-16).

Banner is an Arizona nonprofit corporation authorized to do business in North Dakota. (A1, ¶ 2). Until recently, Banner owned and operated five long-term healthcare facilities (the "Nursing Homes") located in the North Dakota communities of Fargo, Enderlin, Jamestown, and Valley City ("the Local Communities" alleged in the Complaint). (A2, ¶ 4). During 2001, Banner determined that, for capital and strategic considerations, it would commit its resources to markets outside of North Dakota. (A2, ¶ 6). Banner declared that it could better carry out its overall charitable mission by committing its resources to meeting the ever-expanding healthcare needs of communities in the core markets that Banner serves in Arizona and Colorado. (A3, ¶ 13).

In March 2002, through an arm's-length transaction, Banner agreed to sell the Nursing Homes to Sisters of Mary of the Presentation Health System

("the Sisters"), a North Dakota nonprofit corporation, at market value.[4] (A2, ¶ 7). The Complaint alleges that Banner intends to remove, or has removed, the proceeds from the sale of the Nursing Homes from North Dakota and intends to use, or is using, the proceeds to fund operations in Arizona and Colorado. (A2, ¶¶ 6, 8).

The Complaint also alleges that Banner operates the Carlsen Center in Jamestown, North Dakota for which Banner solicited and received approximately $17 million in contributions ("the Contributions").[5] (A2, ¶ 5; A3, ¶ 10). Banner

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4 The Complaint also refers to Banner's transfer of the Lisbon Medical Center in Lisbon, North Dakota to Catholic Health Initiatives, a Colorado nonprofit corporation. (A4-5, ¶¶ 4, 9). This transfer, however, is not included in the Attorney General's claim for imposition of a charitable or constructive trust (A7, Prayer for Relief), or in the Attorney General's briefs and arguments in the district court, or in his principal brief to this Court. Accordingly, no legal issues with respect to this particular transfer are before this Court on this appeal.

5 Seven months after the Complaint was filed, Banner donated its right, title, and interest in the Carlsen Center, along with the entirety of the Contributions (i.e., $17 million) to a newly-formed nonprofit corporation dedicated solely to the Carlsen Center. See Reply Memorandum in Support of Banner's Motion to Dismiss at 9. For this reason, in Banner's briefing on the Motion to Dismiss and in oral argument to the district court, Banner noted that the Attorney General's claims with respect to the Carlsen Center were moot. Id. The Attorney General never contested Banner's argument and, indeed, the district court expressed uncertainty about whether, in light of Banner's donation of the Carlsen Center, the Attorney General would persist with that portion of his Complaint. (A9 n.1). It remains Banner's position that, because Banner is no longer the owner and operator of the Carlsen Center, the Attorney General claims in the Complaint and on this appeal related to the Carlsen Center are moot. However, Banner addresses the Carlsen Center claims in its brief.

purportedly refused requests by the Carlsen Center Advisory Board to restrict the Contributions for the exclusive benefit of the Carlsen Center. (A3, ¶ 11). Allegedly, Banner has already pledged, earmarked, or restricted the Contributions by using them to satisfy "cash on hand" requirements for its debt rating, and such action by Banner creates a risk that these contributions may be subject to creditors' claims. (A3, ¶¶ 15-16). According to the Complaint, there is a substantial likelihood that Banner will use the Contributions in its operations in Arizona and Colorado. (A6, ¶ 47).

The Complaint also includes a number of allegations common to both the Nursing Homes and the Carlsen Center: (i) the various communities "invested" in the Nursing Homes and the Carlsen Center in the form of donations, bequests, gifts, and patronage (A4, ¶¶ 24-25; A5, ¶¶ 37-38); (ii) Banner's tax-exempt status enhanced the value of the Nursing Homes and the Carlsen Center by permitting Banner to retain funds that otherwise would have been used to pay taxes (A4, ¶ 26; A5, ¶ 39); and (iii) by bestowing benefits on Banner (i.e., donations, bequests, gifts, patronage, and tax-exempt status), the Local Communities and the Carlsen Center Community "placed their trust and confidence in the integrity and fidelity of Banner" (A4, ¶ 28; A6, ¶ 41).

The Complaint further alleges that Banner represented itself as a charitable, nonprofit organization committed to serving the healthcare needs within the Local Communities and the Carlsen Center Community, and that, since establishing or

acquiring the Nursing Homes and the Carlsen Center, Banner has operated and devoted the facilities to serve the healthcare needs within these communities. (A5, ¶¶ 30-31; A6, ¶¶ 43-44).

Based on the foregoing, the Complaint seeks, inter alia, the imposition of constructive or charitable trust over the Nursing Home sale proceeds and the Contributions to the Carlsen Center. (A7, Prayer for Relief).

STANDARD OF REVIEW

It is appropriate to dismiss a Complaint where "it appears beyond doubt that the plaintiff can prove no facts which would entitle him to relief." Towne v. Dinius, 1997 ND 125, ¶ 7, 565 N.W.2d 762 (internal citations and quotations omitted). Simply put, a judgment of dismissal for failure to state a claim must be affirmed if the Court "cannot discern a potential for proof to support it." Ziegelmann v. DaimlerChrysler Corp., 2002 ND 134, ¶ 5, 649 N.W.2d 556 (internal citations and quotations omitted).

In making the foregoing determination, the court must accept only well-pleaded allegations as true. Kaylor v. Field, 661 F.2d 1177, 1183 (8th Cir. 1981).[6] "[T]he court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping conclusions cast in the form of factual

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6 Because the N.D.R.Civ.P. are modeled after their federal counterparts, "federal court interpretations of a corresponding federal rule of civil procedure are highly persuasive in construing [the North Dakota] rule." Thompson v. Peterson, 546 N.W.2d 856, 860 (N.D. 1996); see also N.D.R.Civ.P. 8, explanatory note.

allegations." Wiles v. Capitol Indemnity Corp. 280 F.3d 868, 870 (8th Cir. 2002); see also Mattes v. ABC Plastics, Inc., 323 F.3d 695, 698 (8th Cir. 2003) (the court should not give any effect to conclusory allegations of law); Parkhill v. Minn. Mut. Life Ins. Co., 286 F.3d 1051, 1058 (8th Cir. 2002) (recognizing that well-pleaded facts, not legal theories or conclusions, determine the adequacy of a complaint).

ARGUMENT

I. The District Court Properly Determined That The Complaint Failed To State A Claim For A Constructive Trust.

The sole cause of action upon which the Attorney General proceeded in the district court is the claim that Banner holds the proceeds of the Nursing Homes and the assets of the Carlsen Center in a constructive trust for the benefit of the Local Communities and the Carlsen Center Community, respectively. (A9-10). Accordingly, as set forth in Point II infra, the district court's determination as to the insufficiency of the presentation of the constructive trust claim in the Complaint is the only issue properly before this Court on appeal.

Even accepting as true the well-pleaded allegations in the Complaint – as this Court is obliged to do as a matter of law – the Complaint nonetheless fails to allege sufficient facts to establish a claim for the imposition of a constructive trust. Under North Dakota law, a claim for a constructive trust has two essential elements: a confidential relationship and unjust enrichment. Paulson v. Meinke, 389 N.W.2d 798, 801 (N.D. 1986). The Complaint does not adequately plead facts

in support of either element, and was properly dismissed by the district court. (A12-15).

A. The Complaint Failed To Allege A Confidential Relationship.

Confidential and fiduciary relationships are treated interchangeably under North Dakota law: both are defined as "something approximating business agency, professional relationship, or family tie impelling or inducing the trusting party to relax the care and vigilance he would ordinarily exercise." Bourgois v. Montana-Dakota Util. Co., 466 N.W.2d 813, 819 (N.D. 1991); Land Office Co. v. Clapp-Thomssen Co., 442 N.W.2d 401, 406 (N.D. 1989). For example, confidential relationships have been found to exist between marriage partners, Crawford v. Crawford, 524 N.W.2d 833, 836 (N.D. 1994); a parent and child, Matter of Estate of Nelson, 553 N.W.2d 771, 773 (N.D. 1996); a client and her attorney-in-fact, Matter of Estate of Dinnetz, 532 N.W.2d 672, 674-75 (N.D. 1995); a doctor and patient, Tehven v. Job Serv. N. Dak., 488 N.W.2d 48, 51 (N.D. 1992); co-tenants, Bartz v. Heringer, 322 N.W.2d 243, 244 (N.D. 1982); and long-standing business associates with interlocking financial arrangements, Wildfang-Motors, Inc. v. Miller, 186 N.W.2d 581, 584-85 (N.D. 1971). "[A] person's faith in another's honesty and integrity is insufficient to establish a fiduciary relationship." Land Office Co., 442 N.W.2d at 406.

The Complaint does not establish a confidential relationship between Banner and the members of the relevant communities. The Complaint alleges

summarily that "[t]hrough donations, bequests, patronage, and tax-exemptions," the Local Communities and the Carlsen Center Community "placed their trust and confidence in the integrity and fidelity of Banner." (A4, ¶ 28; A6, ¶ 41). As a preliminary matter, the foregoing allegation is a conclusion of law that the Court is not required to consider in determining the sufficiency of the Complaint. Wiles, 280 F.3d at 870. More importantly, however, it is an erroneous conclusion of law because the alleged circumstances – i.e., donations, bequests, patronage, and tax exemptions – do not bring Banner and the unidentified individuals who stand behind the purported "donations, bequests, patronage, and tax exemptions" into a confidential relationship.

In the first instance, donations and bequests are simple voluntary transfers of property (i.e., gifts) from one party to another that do not create a special or legal relationship, let alone one in which confidences are reposed. See N.D.C.C. §§ 47-11-06 ("A gift is a transfer of personal property made voluntarily and without consideration"). The Attorney General does not offer any authority to the contrary or any other basis for departing from North Dakota's well-settled (and codified) law of gifts.

The Attorney General also offers no legal support for the proposition that North Dakota's adherence to the nationwide policy of exempting charitable organizations from taxation somehow creates a confidential relationship between Banner and the members of the relevant communities. Nor does the Complaint

allege facts to suggest Banner is somehow not entitled to its 501(c)(3) status under the Internal Revenue Code. If anything, the Complaint alleges that Banner has, in fact, satisfied its obligations in this regard by serving the healthcare needs of residents of the State (A5, ¶ 30; A6, ¶ 43), and by acting in furtherance of its overall charitable mission. (A3, ¶ 13). Furthermore, the assertion that tax-exempt status places a non-profit entity into a confidential relationship is contrary to obvious intent of Congress not to impose such unspoken conditions on tax-exemption. Similarly, if North Dakota lawmakers had intended to condition property tax exemptions upon satisfaction of certain fiduciary obligations, the tax laws of this State would reflect this deviation from nationwide policy.[7]

Equally unavailing is the Attorney General's claim that patronage creates a confidential relationship between Banner and the members of the relevant communities. Patronage, which is simply the business activity associated with patrons of an establishment, is merely the public's means for paying for the use of Banner's facilities. The suggestion that such transactions give rise to legal obligations is roundly contradicted by the long-standing legal principle that "a fiduciary or confidential or other special relationship does not ordinarily exist

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7 Not only is it clear that North Dakota lawmakers did not intend that fiduciary obligations be read into property tax exemptions, it is equally clear that they did not intend for after-the-fact encumbrances or clouds upon title to real property to emanate from a party's receipt of property tax exemptions.

when businesspersons deal with each other at arm's-length." Bourgois, 466 N.W.2d at 819; Land Office Co., 442 N.W.2d at 406.

In an effort to rectify the factual insufficiency of the Complaint, the Attorney General disingenuously recasts its contents. In his brief, the Attorney General states that the Complaint "alleges Banner's conduct 'induced' people to make contributions." A.G. Br. at 8. There is no such allegation in the Complaint. Nor are there any facts in the Complaint that are susceptible to this interpretation.

The Complaint merely alleges that Banner (i) represented itself as "a charitable, nonprofit organization committed to serving the healthcare needs" of the Local Communities and the Carlsen Center Community (A5, ¶ 31; A6, ¶ 44); and (ii) "operated and devoted" the Nursing Homes and the Carlsen Center "to serve the healthcare needs within" the Local Communities and the Carlsen Center Community (A5, ¶ 30; A6, ¶ 43). Plainly, these allegations do not describe a "course of conduct" that could be credibly construed as "inducement." Notably, there is no specific allegation in the Complaint – factual or conclusory – that the "donations, bequests, patronage, and tax-exemptions" were the actual result of inducement.

Construed in favor of the Attorney General, the Complaint, at most, merely states that Banner was present in the communities and received donations from some members of the communities. (A12). The case law is unequivocal that this does not establish a confidential relationship between Banner and the relevant

communities. Because the Complaint failed to establish a confidential relationship, the district court was correct in its determination that the constructive trust claim – and the Complaint – warranted dismissal.

B. The Complaint Failed To Allege Unjust Enrichment.

The failure of the Complaint to plead facts demonstrating the existence of a confidential relationship is, by itself, fatal to the Attorney General's constructive trust claim. Furthermore, contrary to the Attorney General's arguments to this Court, the Complaint also failed to allege the second element of a constructive trust claim – unjust enrichment.

"The doctrine of unjust enrichment serves as a basis for requiring restitution of benefits conferred in the absence of an express or implied contract." D.C. Trautman Co. v. Fargo Excavating Co., Inc., 380 N.W.2d 644, 645 (N.D. 1986) (citing Sykeston Township v. Wells County, 356 N.W.2d 136, 140 (N.D. 1984)). The Attorney General has neither pleaded nor argued – to the district court or to this Court – that the proceeds of the sale of the Nursing Homes or the Carlsen Center Contributions are subject to an express or implied contract between Banner and the relevant communities. Certainly, Banner's alleged conduct with respect to the allocation of its own assets does not present a scenario traditionally associated with invocation of the doctrine of unjust enrichment. See, e.g., Sykeston Township, 356 N.W.2d at 143-44 (applying unjust enrichment to facilitate the

recovery of monies spent by the plaintiff in graveling a road for the defendant's benefit).

To establish the existence of unjust enrichment, a plaintiff must plead facts showing: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) the absence of a justification for the enrichment and the impoverishment; and (5) the absence of a remedy provided by law. D.C. Trautman Co., 380 N.W.2d at 645 (quoting A & A Metal Bldgs. v. I-S, Inc., 274 N.W.2d 183, 189 (N.D. 1978)). The district court determined that the Attorney General did not allege "sufficient facts in the Complaint to satisfy the unjust enrichment element of a constructive trust." (A15). Specifically, the district court concluded that the Complaint was devoid of factual allegations that satisfied the fourth and fifth elements of an unjust enrichment claim.[8] (A15). The

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[8] Banner submits that the Complaint also failed to allege the first three elements of a claim of unjust enrichment. See Reply Memorandum in Support of Banner's Motion to Dismiss at 6-8. For example, with respect to the impoverishment element, the allegations of the Complaint establish that, instead of an impoverishment, the communities at issue were the recipients of Banner's healthcare services. (A5, ¶ 30). More importantly, Banner's sale of the Nursing Homes did not terminate the healthcare services provided by these facilities. Rather, the Sisters continue to operate the Nursing Homes for the benefit of the communities in which they are located. And, indeed, the bricks and mortar infrastructure that comprise these facilities remain in North Dakota for the continued use by North Dakota citizens. Accordingly, Banner submits that its planned charitable uses for the sale proceeds – which come from the Sisters, not the communities – will not result in an impoverishment to the communities at issue. See Reply Memorandum in Support of Banner's Motion to Dismiss at 8.

district court's determination as to these two elements is correct and should be affirmed.

1. The Complaint Does Not Plead Facts Demonstrating The Fourth Element Of An Unjust Enrichment Claim.

The Attorney General contends that the Complaint adequately pleads "the absence of justification for the enrichment and the impoverishment" – the fourth element required for a showing of unjust enrichment. A.G. Br. at 7. According to the Attorney General, the Complaint satisfies this element by alleging (i) that Banner, through conduct and statements, made representations regarding its commitment to the Local Communities; (ii) that these representations induced the Local Communities to make contributions to the Nursing Homes; and (iii) that "funds attributable to the Local Communities are inequitably diverted into Banner's operations in Arizona and Colorado." A.G. Br. at 7 (quoting A5, ¶ 33). From these allegations, the Attorney General claims, "[o]ne can discern a potential for proof of an absence of justification for the enrichment and impoverishment." A.G. Br. at 7. The Attorney General is mistaken.

The Attorney General's rhetorical description of the Complaint bears little resemblance to the content of the Complaint itself. The Complaint makes only two allegations about Banner's so-called representations and "course of conduct": (i) that "Banner operated and devoted" the Nursing Homes and the Carlsen Center "to serve the healthcare needs" within the local communities (A5, ¶ 30; A6, ¶ 43); and

(ii) that "Banner represented itself as a charitable, nonprofit organization committed to serving the healthcare needs" within the local communities, (A5, ¶ 31; A6, ¶ 44). As noted in Point I.A. infra, contrary to the Attorney General's claim, the Complaint nowhere alleges that any conduct or representations by Banner – let alone either of the foregoing – "induced the Local Communities to make contributions." A.G. Br. at 7. Nor does the Complaint or the Attorney General's brief provide, by way of facts or explanation, how Banner's mere "operat[ion] and devot[ion]" of the Nursing Homes and the Carlsen Center "to serve healthcare needs" could or did act as an inducement to anyone. (A5, ¶ 30; A6, ¶ 43). As the district court rightly concluded, "[a]ll that has been established here is that the persons in the communities where the nursing homes and the Center are located made donations" to Banner. (A12). Thus, the Attorney General's attempt to demonstrate an "absence of justification for the enrichment and impoverishment" by relying on Banner's alleged "inducement" of contribution from the local communities is unavailing.

The Attorney General also attempts to satisfy the fourth element by reference to the bare conclusory allegation that "Banner's use or intended use of the Nursing Home sale proceeds outside of North Dakota results in unjust enrichment because funds attributable to the Local Communities are inequitably diverted to Banner's operations in Arizona and Colorado." (A5, ¶ 33). This allegation is pure tautology: It states that Banner's conduct constitutes unjust

enrichment because it is inequitable. Clearly, such a conclusory statement is bereft of the necessary factual support to permit a finding that the fourth element has been satisfied. (A14).

Moreover, the case authorities are clear that "[a] determination of unjust enrichment is necessarily a conclusion of law because it holds that a certain state of facts is contrary to equity." Matter of Estate of Zent, 459 N.W.2d 795, 798 (N.D. 1990) (citing Midland Diesel Serv. & Engine Co. v. Silvertson, 307 N.W.2d 555, 557 (N.D. 1981)). Accordingly, the Attorney General's summary allegation about the existence of unjust enrichment is not a factual allegation that this Court must accept. Apache Corp v. MDU Resources Group, Inc., 1999 ND 247, ¶ 13, 603 N.W.2d 891. Ultimately, the Complaint offers nothing by way of factual allegations to establish why the alleged diversion of funds is inequitable – particularly in light of allegations elsewhere in the Complaint that demonstrate that the funds are to be used to carry out Banner's overall charitable mission. (A3, ¶ 13).

The absence of well-pleaded facts, as opposed to conclusions of law, in support of the fourth element of a claim of unjust enrichment dooms the Attorney General's constructive trust claim. The district court's dismissal of the Attorney General's Complaint should be affirmed.

2. The Complaint Does Not Plead Facts Demonstrating The Fifth Element Of An Unjust Enrichment Claim.

To satisfy the fifth element of a claim of unjust enrichment, the pleader must state facts demonstrating the absence of a remedy provided by law. D.C. Trautman Co., 380 N.W.2d at 645. This, the Complaint fails to do, as the district court found. (A14). The Attorney General suggests that the Complaint properly alleges the absence of a remedy provided by law by stating that "a constructive trust arises, under N.D.C.C. § 59-01-06, to protect the interests of equitable owners of property which is held by another party that has legal title." (A4, ¶ 21). On its face, this allegation does not speak to the unavailability of a legal remedy, but only reiterates that the Complaint seeks equitable relief. Accordingly, it clearly does not satisfy the fifth element of a claim for unjust enrichment. Nor are there any other allegations in the Complaint that address why money damages would be inadequate to redress the purported injuries suffered by the relevant communities.

Because the Complaint does not allege any facts to demonstrate the absence of a remedy provided by law, the Attorney General failed to adequately plead the existence of unjust enrichment. As a consequence, the constructive trust claim, as

a whole, is defective and was properly dismissed by the district court.[9]

II. The Attorney General Abandoned His Charitable Trust Claim And Cannot Now Present It To This Court For Review.

In the Statement of Issues presented by the Attorney General to this Court in his brief, the Attorney General seeks review of "[w]hether the district court erred in concluding that the State failed to allege a charitable trust." A.G. Br. at Statement of Issue. This attempt by the Attorney General to revive his charitable trust theory on appeal is improper and should not be countenanced by this Court. The proceedings before the district court were not a mere dress rehearsal for this appeal, and the Attorney General was obligated to present all his arguments to the district court for its consideration. His failure to do so is a knowing and voluntary waiver of unraised arguments.

As recognized by the district court, the Attorney General declined to pursue

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9 The Complaint likewise failed to plead facts to support the imposition of a statutory implied trust pursuant to N.D.C.C. § 59-01-06. Nowhere does the Complaint allege that Banner "wrongfully detains" its North Dakota property. N.D.C.C. § 59-01-06(1). Nor does the Complaint claim that Banner acquired the Nursing Homes or the Carlsen Center "by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act" or "in violation of a trust." N.D.C.C. § 59-01-06(2) and (3). The Complaint is similarly devoid of any factual allegation that the Nursing Homes or the Carlsen Center were transferred to Banner while "the consideration therefor [was] paid by or for another." N.D.C.C. § 59-01-06(4). Absent a single allegation of wrongdoing, the Complaint simply does not state a claim under N.D.C.C. § 59-01-06, particularly when accompanied by the failure of the Complaint to allege a confidential relationship between Banner and the relevant local communities.

his charitable trust claim in the trial court and, therefore, expressly abandoned that theory of liability. (A10) (finding "that Plaintiff has abandoned its charitable trust theory"). Indeed, as a consequence, the district court did not pass on the question of whether or not the Complaint sufficiently alleged the elements of a charitable trust. (A9-15). However, had the district court done so, it would have necessarily concluded that the Complaint failed to state a claim under applicable charitable trust law.

A. Because the Attorney General Failed To Pursue A Charitable Trust Theory In The District Court, This Court Should Not Review It.

"[I]ssues not presented to the trial court cannot be considered for the first time on appeal." Farmers State Bank of Leeds v. Thompson, 372 N.W.2d 862, 865 n.3 (N.D. 1985) (internal citations omitted). For this reason, the Attorney General's failure to defend his charitable trust claim in the district court precludes the Attorney General from asserting any such claim on appeal.

In the brief filed by the Attorney General in response to Banner's Motion to Dismiss, the Attorney General failed to address any theory of liability other than his defective constructive trust claim. See generally Attorney General's Response to Motion to Dismiss. In addition, the Attorney General declined to present any charitable trust theory to the Court during oral argument at the July 29, 2003 hearing on Banner's Motion. (A10). Accordingly, the district court found "that Plaintiff has abandoned [his] charitable trust theory" (A10), and the Attorney

General has conspicuously failed to argue to this Court that the district court erred in finding abandonment. If the Attorney General had any meritorious arguments on this issue, they would have been raised in the Attorney General's opening brief here.

As noted, this Court has consistently held that it "will not consider issues raised by the parties for the first time on appeal." Roise v. Kurtz, 1998 ND 228, ¶ 9, 587 N.W.2d 573; see also Robert v. Aircraft Inv. Co., Inc., 1998 ND 62, ¶ 14, 575 N.W.2d 672; Messer v. Bender, 1997 ND 103, ¶ 10, 564 N.W.2d 291, cert. denied, 522 U.S. 918. Indeed, "[t]he purpose of an appeal is to review the actions of the trial court, not to grant the appellant the opportunity to develop and expound on new strategies or theories." In re Estate of Peterson, 1997 ND 48, ¶ 19, 561 N.W.2d 618. Therefore, "questions that were not presented to the trial court and that are raised for the first time on appeal" are not considered by this Court. Overboe v. Farm Credit Serv. of Fargo, 2001 ND 58, ¶ 11, 623 N.W.2d 372 (holding that because plaintiff "did not resist the defendants' motion for summary judgment on [statute of limitation] ground in the trial court, the issue is not reviewable on appeal").

There is no question that the Attorney General failed to defend his charitable trust claim in the district court. (A10). It is equally clear that the Attorney General's decision not to defend the charitable trust claim was a deliberate and overt act and not a matter of mere inadvertence or omission. Ample

support for this conclusion is found in the Attorney General's Response to Motion to Dismiss where he argues to the district court that because the decision in In re Myra Found., 112 N.W.2d 552 (N.D. 1961) involves a charitable trust – and not a constructive trust – its holding "is therefore irrelevant to this matter." Attorney General's Response to Motion to Dismiss at 6. By expressly waiving the presentation of any charitable trust theory or arguments to the district court, the Attorney General's assignment of error relating to the dismissal of his charitable trust claim is not proper and should not be considered by this Court. State ex rel. Indus. Comm'n v. Harlan, 413 N.W.2d 355, 357 (N.D. 1987); Overboe, 2001 ND 58, ¶ 11, 623 N.W.2d 372.

B. For The Same Reason, This Court Should Not Pass On The Attorney General's Request For Recognition Of A Common Law Constructive Charitable Trust.

The Attorney General asks this Court to recognize a heretofore undisclosed common law constructive charitable trust theory. A.G. Br. at 9-11. Insofar as this theory arises out of, or is in some way a derivative of, any charitable trust theory, it is not properly before this Court by virtue of the Attorney General's failure to present that theory to the district court. See Point II.A. supra.

To the extent that the Attorney General's common law constructive charitable trust claim is not an offshoot of his abandoned charitable trust theory, it constitutes a different or new theory, which he did not put forth to the district court. As such, it is not properly before this Court. See, e.g., Mattis v. Mattis, 274

N.W.2d 201, 204 (N.D. 1979) (recognizing that new theories are not allowed because the appellant "is bound by the record he made" in the trial court); City of Enderlin v. Pontiac Township, 242 N.W. 117, 120 (N.D. 1932) ("It is fundamental that the theory thus adopted in the trial court must be adhered to on appeal.").

As this Court has stated:

> The rule is elementary that where the parties act upon a particular theory in the trial court, they will not be permitted to depart therefrom when the case is brought up for appellate review. This is true of the construction placed upon pleadings. It is true as to the relief sought and the grounds therefor. It is true generally as to the theories acted upon by the parties in the court below. A party cannot proceed with a trial upon one theory, and advance another and inconsistent theory on appeal.

Lindberg v. Burton, 171 N.W. 616, 620 (N.D. 1918) (internal citations omitted). The law is clear: the Attorney General is precluded from asserting his new common law constructive charitable trust theory on appeal.

Nevertheless, if the common law constructive charitable trust theory is somehow based on the Attorney General's constructive trust claim, it fails for the same reasons that the district court properly concluded that the constructive trust claim fails. To wit, the allegations do not establish a confidential relationship and they fail to sufficiently allege unjust enrichment. See Point I supra.

C. The Complaint Fails To State A Claim For A Charitable Trust.

Assuming, arguendo, that the Attorney General's charitable trust theory is properly sub judice on this appeal, this Court should nonetheless conclude that the

Complaint fails to state a claim establishing a charitable trust over the sale proceeds. At least three reasons compel this result. First, Banner's use of the proceeds in other jurisdictions to further its charitable purposes is specifically permitted under North Dakota law. Second, absent an express declaration of intent to create such a trust, no charitable trust ever arose, or could arise, over the proceeds of the Nursing Homes' sale. Finally, the Attorney General's sole basis for its purported common law charitable trust theory is not applicable to this case.

Pursuant to the North Dakota nonprofit corporation statute, Banner, as a nonprofit corporation licensed to do business in North Dakota (A1, ¶ 2), is expressly permitted to "own, hold, improve, use and otherwise deal in and with real or personal property," N.D.C.C. § 10-33-21(4), and to "sell, convey, mortgage, create a security interest in, lease, exchange, transfer, or otherwise dispose of all or any part of its real or personal property, or any interest in property, wherever situated." N.D.C.C. § 10-33-21(5). Moreover, this Court has previously held that a charitable corporation, like Banner, "does not hold [its] property in trust except as governed by its articles and bylaws." In re Myra Found., 112 N.W.2d 552, 556 (N.D. 1961).

In Myra, acting pursuant to a statute permitting court supervision of trusts, the Attorney General sued to impose judicial supervision over a charitable corporation, which had been created by a will, and to which the testator's residuary estate had been transferred. Id. at 553-54. Even though it was not disputed that

the foundation at issue was a charitable corporation, or that it devoted its property to the charitable purposes for which the corporation was created, the Attorney General nevertheless alleged that the foundation held its property in trust and therefore was subject to the statutory trust supervision provisions. Id. at 554-56. This Court, however, did not agree:

> A corporation created in accordance with the provisions of a will and to which the testator's residuary estate is transferred by the county court, as directed by the will to be used by it for the purposes for which the corporation was created, does not hold the property in trust in the true sense of the term. It holds the property as its own to be devoted to the purposes for which it was formed.

Id. at 556 (emphasis added).

The Court's comments from the Myra decision are directly applicable to this case. In this case, there is no dispute over Banner's nonprofit corporate status and there is no allegation in the Complaint that Banner is using, or intends to use, the proceeds from the Nursing Homes' sale for anything other than the charitable purposes for which Banner was formed. Because the nonprofit statute and this Court's precedent authorize Banner to deploy its assets – including the proceeds from the sale of the Nursing Homes – to further its charitable purposes in other states, the Complaint cannot, a matter of law, state a claim that establishes a charitable trust over those proceeds.

Contrary to the Attorney General's incorrect conclusions of law, a charitable trust does not arise through "investment" in a nonprofit corporation.

(A4, ¶¶ 19, 24-25). In North Dakota, a charitable trust is an express trust, which constitutes a "a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it." Matter of Conservatorship of Sickles, 518 N.W.2d 673, 680 (N.D. 1994) (quoting Restatement (Second) of Trusts § 348 (1959)) (emphasis added). As an express trust, a charitable trust cannot exist without an expression of the "trustee's acceptance of the trust or acknowledgement made upon sufficient consideration of its existence [and] the subject, purpose, and beneficiary of the trust." N.D.C.C. § 59-01-04(2) (setting forth the elements of an express trust).

The Complaint, however, is bereft of any factual allegations establishing the existence of a charitable trust under North Dakota law. Among other things, the Attorney General failed to allege any: (1) expression of intent to create a trust; (2) acceptance or acknowledgement of the trust by Banner (as purported trustee); or (3) a subject or purpose of the alleged charitable trust. In fact, the Complaint's only "allegation" with respect to a charitable trust is the naked (and erroneous) legal conclusion that "[a] charitable trust arises without any express declaration by those who contribute funds to a charitable corporation." (A4, ¶ 20). This conclusory and incorrect statement is entitled to no weight in determining the sufficiency of the claim. Mattes, 323 F.3d at 698; Parkhill, 286 F.3d at 1058. Without even the bare minimum facts needed to allege a charitable trust, the Complaint falls woefully short of stating a claim.

D. The Attorney General's Request For Recognition Of A Common Law Constructive Charitable Trust Must Fail.

In what can only be construed as last-ditch effort to cure the factual inadequacies and legal deficiencies of his charitable trust theory under applicable law, the Attorney General has imported a new theory, which is neither appropriately raised on this appeal (see Point II.B. supra) nor recognized in North Dakota: a common law constructive charitable trust. Based upon a single decision by an Ohio court on very different facts, Brown v. Concerned Citizens for Sickle Cell Anemia, Inc., 382 N.E.2d 1155 (Ohio 1978), the Attorney General urges this Court to accept his bizarre freshly-minted theory, which would permit him to impose a trust on Banner's property without satisfying the elements for either a constructive trust or a charitable trust. To this blatant attempt to end-run settled principles of North Dakota law and long-standing pleading requirements, the Attorney General asks this Court to lend credence. Banner respectfully requests that this Court deny the request.

In addition to the fact that Brown does not reflect the law of North Dakota (as discussed infra), its facts are wholly distinguishable from the record in this case. In Brown, the Ohio attorney general, invoking his statutory and common law powers, filed suit against a corporation and certain individuals to enforce a charitable trust. Brown, 382 N.E.2d at 1155. The attorney general alleged that the defendants had conducted a sham bingo operation and collected proceeds therefrom. Id. at 1156-57. The attorney general further alleged that the defendants

had advertised in local newspapers that the proceeds of the bingo game would go solely to charitable purposes. Id. At issue was whether the Ohio attorney general could impose a constructive trust on funds collected for charitable purposes but which were diverted for other, non-charitable uses, including the private enrichment of the bingo operators. Id. at 1158. On that issue, the Brown court affirmed the trial court's order that the funds must be used exclusively for charitable purposes. Id.

In stark contrast to the facts of Brown, the Attorney General has not alleged that Banner used, or plans to use, the proceeds from the sale of the Nursing Homes for non-charitable purposes. Indeed, the Complaint affirmatively alleges that Banner's planned use for the proceeds is to "better carry out its overall charitable mission." (A3, ¶ 13). There is certainly no allegation in the Complaint that Banner has used or intends to use the proceeds for its own private gain – like the Brown defendants.

The Attorney General posits that "[t]he constructive charitable trust would arise in all situations where a charitable entity induces donations and then divert such funds to purposes or markets inconsistent with the entity's representations." A.G. Br. at 10. Putting aside the overly-broad nature of this purported trust theory, the Complaint does not allege that the funds donated or otherwise gifted to Banner were given under any sort of inducement – let alone pursuant to representations or advertisements of the sort at issue in Brown. See Point I supra. The Attorney

General's claims to contrary are belied by the plain allegations of the Complaint. See Point I supra. In sum, the Brown decision is entirely inapposite to the facts and issues sub judice and is of no persuasive import to the Attorney General's belated request for recognition of a so-called common law constructive charitable trust.

The common law constructive charitable trust theory espoused by the Attorney General is not the law of North Dakota. The theory is, quite obviously, a constructive trust claim that has been evacuated of its substantive legal content. According to the Attorney General, under his new theory he is not required to demonstrate a confidential relationship in order for a court to find that Banner's assets are subject to a charitable trust. A.G. Br. at 10. Notably, the Attorney General cites no authority for this proposition; indeed, it is contradicted by prevailing case law. See Paulson, 389 N.W.2d at 801 (a claim for a constructive trust has two essential elements: a confidential relationship and unjust enrichment).

For these reasons, should this Court determine to entertain the Attorney General's common law constructive charitable trust theory for review, the Court should nonetheless determine that such a claim is not recognized by or viable under North Dakota law, nor is it properly alleged in the Attorney General's Complaint.

III. Conclusion

For the foregoing reasons, the order and judgment of the district court dismissing the Complaint of the North Dakota Attorney General against Banner Health System should be affirmed.

Dated: December 4, 2003

Respectfully submitted,

BANNER HEALTH SYSTEM

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Supreme Court File No. 20030281

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota ex rel. WAYNE STENEHJEM, Attorney General. Plaintiff-Appellant. v. BANNER HEALTH SYSTEM, an Arizona corporation, Defendant-Appellee.	)	**PROOF OF SERVICE BY MAIL**

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

The undersigned, being first duly sworn, states that a copy of the attached **BRIEF OF APPELLEE BANNER HEALTH SYSTEM** was served upon:

Douglas A. Bahr
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by enclosing same in an envelope addressed to said attorney at the above address with postage fully prepaid and by depositing said envelope in a United States Postal Service mailbox in Chicago, Illinois, on the 4th day of December, 2003.

Rosemary G. Feit

Subscribed and sworn to before me
this 4th day of December, 2003

Notary Public

Official Seal
Maribel L. Torres
Notary Public State of Illinois
My Commission Expires 08/12/07

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