FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 16, 2011
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20110164
Ward County Civil No. 51-09-C-01894

Richard and Elaine Benson, Bill and Mary Bliven, Don and Annette Feist, Pat Lynch, and Lloyd and Donna Tribitt,	)
Plaintiffs/Appellants,	)
vs.	)
SRT Communications Inc.,	)
Defendant/Appellee.	)

APPEAL OF THE ORDER DATED DECEMBER 29, 2010
AND JUDGMENT DATED MARCH 29, 2011
IN WARD COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

THE HONORABLE TODD L. CRESAP, PRESIDING

APPELLEE'S BRIEF

David J. Hogue (ID #04486)
PRINGLE & HERIGSTAD, P.C.
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
(701) 852-0381
Attorneys for Defendant/Appellee SRT Communications, Inc.

TABLE OF CONTENTS

¶ 1 **TABLE OF AUTHORITIES**

CASES **PARAGRAPH NO.**

STATUTES

OTHER AUTHORITIES

¶ 2 **I. STATEMENT OF THE CASE**

¶ 3 The plaintiffs/appellants (collectively "Bensons") are retired persons who for many years received post retirement health insurance benefits paid for by SRT Communications, Inc. ("SRT"), benefits that SRT decided in 2009 to terminate effective January 1, 2010. Bensons' complaint alleged contractual rights to receive and SRT's contractual obligation to provide post-retirement life-time health benefits under a 1991 collective bargaining agreement made between their union and their former employer, Northern States Power ("NSP"). When responding to SRT's motion for summary judgment before the district court, Bensons claimed their contractual right to receive lifetime health insurance benefits was derived from the Asset Purchase Agreement by which NSP sold the Minot telephone exchange. The district court concluded Bensons failed to establish a legal right to receive lifetime health benefits under any agreement or legal theory.

¶ 4 Bensons' claim necessitates distinguishing between two kinds of employee benefit plans. Under the Employee Retirement Income and Security Act, 29 USC § 1001, et.seq. ("ERISA"), employee benefit plans are divided into two distinct categories: "welfare plans" and "pension plans." Welfare plans typically provide health, life, and dental insurance benefits. Such benefits are regulated by ERISA. 29 U.S.C. § 1002(1). Pension plans provide retirement income. 29 U.S.C. § 1002(2).

¶ 5 Pension plan are subject to mandatory vesting rules; welfare plans are not subject to vesting requirements. 29 USC §§ 1051 and 1053. Anderson v. Alpha Portland Industries, Inc. 836 F.2d 1512, 1516 (8th Cir. 1988); International Union v. Skinner Engine Co., 188 F.3d 130, 137 (3rd Cir. 1999). Thus, courts are "mindful that ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits.

Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." Curtiss-Wright Corp. v Schoonejongen, 514 U.S. 73, 78 (1987).

¶ 6 SRT moved for summary judgment to dismiss the complaint under Rule 56, N.D.Civ.P. Bensons' response to summary judgment abandoned their claim based on the collective bargaining agreement ("CBA") and asserted separate contracts for health benefits. Bensons' response did not include any evidence to support their claim on either theory. Bensons' response did not present to the district court a genuine issue as to any fact material to the matters of law that govern their claim.

¶ 7 The district court dismissed the complaint. The court explained its order of dismissal in a 20 page opinion concluding "[t]he Bensons have provided no genuine issue as to any material fact and SRT has shown that they are entitled to judgment as a matter of law." Order, 20-21, App. 310-311.

¶ 8 **II. ISSUES AND STANDARDS OF REVIEW**

¶ 9 This appeal from a summary judgment under Rule 56, N.D.Civ.P. presents two issues on appeal:

1. Whether the pleadings, discovery materials and affidavits show there is no genuine issue as to any material fact so that summary judgment was appropriate.
2. When there is no genuine issue of material fact, whether the district court's decision was correct as a matter of law. In this case, the matters of substantive law are matters of federal law.

   "On appeal, we determine whether a genuine issue of fact exists and whether the law was

applied correctly. Questions of law are fully reviewable on appeal." Steiner v. Ford Motor Co., 2000 ND 31, ¶ 6, 606 N.W.2d 881. Stanley v. Turtle Mtn. Gas & Oil, Inc., 1997 ND 169, ¶ 6, 567 N.W.2d 345.

¶ 10 III. STATEMENT OF FACTS

¶ 11 The following statement of facts is supported by the Statement of Undisputed Facts filed with SRT's Rule 56, N.D.Civ.P. motion. The facts stated are shown to be undisputed by reference to pleadings, answers to interrogatories, admissions on file and affidavits. The Statement of Undisputed Facts (Dkt. 21) is absent from the appellant's appendix, so it is included in the appellee's appendix. SRT App. 1-5. Bensons' response to the summary judgment motion (Dkt. 27) did not contradict any of the facts stated in SRT's Statement of Undisputed Facts. This statement of facts is substantially identical to the district court's order's statement of facts. Order 1-3, App. 291-293.

¶ 12 A. Pre-2009 History

¶ 13 For many years the telephone business in Minot was owned by Northern States Power ("NSP"). SRT App. 2, ¶ 1. In 1990/91, NSP sold the telephone business to Minot Telephone Company, a wholly owned subsidiary of Rochester Telephone ("Rochester") based in Rochester, NY. Id., ¶ 2. The form of the 1990/91 transaction was Minot Telephone Company's purchase of NSP's assets used in its Minot telephone business, under an Asset Purchase Agreement (The "NSP Asset Purchase Agreement") contracted in 1990 and closed in early 1991 after approval from the North Dakota Public Service Commission ("PSC"). Id., ¶ 3.In 1994, Souris River

¶ 14 Telecommunications Cooperative (Souris River) purchased the Minot telephone business

from Rochester. The form of the transaction was Souris River's purchase of Rochester's stock in Minot Telephone Company, under a Stock Sale Agreement contracted in 1993 and closed in 1994 after PSC action. In 1994, Minot Telephone Company became a wholly owned subsidiary of Souris River. Souris River exercised its control of Minot Telephone Company to change its name to SRT Communications Inc. SRT Communications Inc. (formerly Minot Telephone Company) was a wholly owned subsidiary of Souris River for about 5 years. In 2000 Souris River Telecommunications Cooperative and SRT Communications Inc. completed action to merge the two companies. SRT Communications Inc. (formerly Minot Telephone Company) was the entity emerging from the merger. SRT App. 2-3, ¶ 5-9

¶ 15 The 9 plaintiffs are 4 retired employees of the telephone business in Minot, their spouses and the widow of a deceased retiree. They are residents of Florida, Montana, and North Dakota. The 5 retirees were employed in Minot under a collective bargaining agreement ("CBA") made in 1991 between their labor union and NSP. SRT App. 3, ¶¶ 10-11.

¶ 16 The 1991 CBA was assumed by Minot Telephone Company under the NSP Asset Purchase Agreement. The CBA was consummated on January 28, 1991 and effective as of January 1, 1991. The 1991 CBA included a Medical Expense Benefit Plan that expired on December 31, 1993. Complaint ¶ 120, referring to Article XII of the 1991 CBA, Complaint Exhibit 33, App. 31, 125-177; SRT App. 3, ¶¶ 12- 13. The words of Article XII of the CBA are:

> "As the result of negotiations between the Local Union and the Company there is in existence Medical Expense Benefit Plan amended effective January 1, 1991, remaining in effect to December 31, 1993." App. 152.

¶ 17 The 1991 CBA that is the basis of Bensons' claims was replaced by a new agreement

made by the union and Minot Telephone Company in December, 1993. SRT App. 2, 4, ¶¶ 7, 20-21. None of the 5 retirees was employed by Minot Telephone Company when Minot Telephone Company was acquired by Souris River, all having retired at various times before SRT acquired Minot Telephone Company. SRT App. 3-4, ¶¶ 10-19.

¶ 18 Health insurance premiums for Bensons were paid by Minot Telephone Company after their respective retirement dates. These welfare benefits were paid while Minot Telephone Company was owned by Rochester Tel, after Minot Telephone Company was acquired by Souris River, after Minot Telephone Company was renamed SRT Communications, Inc., and after Souris River and SRT Communications, Inc. were merged. Complaint ¶ 5, admitted by ¶ 5 of the Answer, App. 2-3, 285; SRT App. 4.

¶ 19 B. Facts – 2009

¶ 20 In mid-2009, SRT notified retired employees, including the Benson group, that "effective January 1, 2010, SRT will no longer offer Health, Vision or Dental Insurance Benefits to retired SRT employees, their spouses, or their dependents once the retiree has reached the age of Medicare Eligibility (currently age 65)." Complaint ¶¶ 5, 7, admitted by Answer ¶ 6, App. 2-3, 285; SRT App. 4-5, ¶ 23.

¶ 21 C. Bensons' Claim

¶ 22 Bensons' voluminous complaint (App. 1-236) alleged contractual rights to receive and SRT's contractual obligation to continue to provide life-time health benefits. Complaint ¶¶ 2, 4, 23, 27, 33, 37, 45, 48, 120, 138, 148 and 150; App. 1-38. The essence of the complaint is NSP was obliged to provide such benefits under a "union contract" or "labor agreement" and that

NSP's obligations under the 1991 collective bargaining agreement were assumed by Minot Telephone Company in 1991 and by Souris River in 1994. Complaint ¶¶ 2, 4, App. 1-2.

¶ 23 Bensons claimed a separate status from SRT's retired employees. Bensons do not consider themselves as retired employees of SRT. Bensons claimed contractual rights to post retirement health benefits they claim were owed by NSP, obligations Bensons claim to be assumed by SRT. Complaint ¶¶ 2, 4, 11, 14, 15, 148, 150; App. 1-5, 37.

¶ 24 In conventional legal terminology, Bensons' complaint alleged contract rights as third party beneficiaries. The 1990 and 1993 contracts for the sale of the Minot Telephone business did not confer third party beneficiary rights on Bensons, and they initially made no claim under those contracts. They claimed rights under the 1991 CBA. Obviously, a union collective bargaining agreement confers third party rights on employees who are union members. Bensons alleged NSP was obliged to provide life-time health benefits under the 1991 CBA and that NSP's obligations under that agreement were assumed by Rochester and Minot Telephone Company in 1991 and by Souris River in 1994.

¶ 25 D. SRT's Defense

¶ 26 Bensons have no contractual rights and SRT has no contractual obligations regarding post-retirement health benefits. Answer ¶ 6, App. 285. SRT admits that it assumed the 1991 CBA, but that does not mean that the 1991 CBA created life-time rights asserted by Bensons. Whatever rights Bensons might have had as employees under the 1991 CBA, those rights expired in December 1993, under applicable law and under the specific terms of the 1991 CBA. Health benefits that SRT provided to Bensons after they retired were provided as a matter of business discretion that is subject to change. Bensons do not have unique contractual rights

owed by SRT.

¶ 27 E. SRT's Summary Judgment Motion and Bensons' Response

¶ 28 SRT moved for summary judgment to dismiss the complaint because there is no genuine issue as to any material fact and SRT is entitled to a judgment as a matter of law. Rule 56(c), N.D.Civ.P. Dkt. 18/19. SRT's motion documents included a Statement of Undisputed Facts. SRT App. 1-5. Bensons' response (Dkt. 27) did not contradict any of the facts stated in SRT's Statement of Undisputed Facts. Bensons' response to the motion abandoned the claim based on the CBA and asserted separate contracts for health benefits. Bensons' response did not include any evidence to support either theory. Bensons' response did not present to the district court a genuine issue as to any fact material to the matters of law that govern their claims.

¶ 29 On appeal, Bensons argue there was a separate agreement, not the CBA, that forms the basis of their legal right to perpetual health benefits: "When NSP sold the business to Rochester Telephone, one major issue was whether the Plaintiffs would continue to receive the same benefits for the rest of their lives." Bensons' brief ¶6. Bensons contend on appeal they were "clearly informed" they would receive lifetime benefits and such benefits were "explicit" liabilities of NSP and Rochester. Id.

¶ 30 **IV. ARGUMENT**

¶ 31 A. Summary Judgment Principles

¶ 32 The standards governing summary judgment are well established. Summary judgment is a procedural device for promptly resolving a case on the merits when there are no "genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the

only issues to be resolved are questions of law." Barbie v. Minko Constr., Inc., 2009 ND 99, ¶ 5, 766 N.W.2d 458 (quoting Farmers Union Oil Co. v. Smetana, 2009 ND 74, ¶ 8, 764 N.W.2d 665).

¶ 33 On appeal, the Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which the Supreme Court reviews de novo on the entire record. Lucas v. Riverside Park Condominiums Unit Owners Ass'n, 2009 ND 217, ¶ 16, 776 N.W.2d 801.

"A party resisting a motion for summary judgment cannot merely rely on the pleadings or other unsupported conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact. 'In summary judgment proceedings, neither the trial court nor the appellate court has any obligation, duty, or responsibility to search the record for evidence opposing the motion for summary judgment.' 'The opposing party must also explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief.'" Abdullah v. State, 2009 ND 148, ¶ 9, 771 N.W.2d 246. (Citations omitted). Bensons' brief on appeal, ¶14, includes these principles recited in Abdullah.

¶ 34 The district court applied these principles and determined this case lends itself to resolution by summary judgment because Bensons failed to show a genuine factual issue as to legal issues. Order 18-21, App. 308-311.

¶ 35 B. The pleadings, discovery materials and affidavits show there is no genuine issue as to any material fact.

¶ 36 Bensons claim contract rights to life-time welfare benefits under a written contract, the 1991 CBA or the NSP Asset Purchase Agreement. The claim does not present any issues of fact.

¶ 37 It is fundamental that contract interpretation is a question of law, not an issue of fact, that an issue of fact as to contract interpretation arises only in cases of ambiguity, and that the existence or absence of an ambiguity is a question of law. Where there is no ambiguity there is no issue of fact.

¶ 38 These fundamental principles of contract law govern interpretation of collective bargaining agreements under federal law. Anderson v Alpha Portland Industries, 836 F. 2d 1512 (8th Cir. 1988); International Union v Skinner Engine Co., 188 F.3d 130, 137 (3d Cir. 1999); Rosetto v Pabst Brewing Co., 217 F.3d 539 (7th Cir 2000).

¶ 39 The entire 1991 CBA was attached to the complaint as exhibit 33. Referring to the Agreement, Complaint ¶ 120 alleged "Article XII of the Agreement makes specific reference to the Medical Expense Benefit Plan amended effective January 1, 1991" App. 31, 125-177; SRT App. 3, ¶¶ 12-13. The words of Article XII of the 1991 CBA are:

> "As the result of negotiations between the Local Union and the Company there is in existence Medical Expense Benefit Plan amended effective January 1, 1991, remaining in effect to December 31, 1993." App. 152.

These written words are undisputed material facts. There is no ambiguity in these words.

¶ 40 Whatever benefits it provided, the Medical Expense Benefit Plan under the 1991 CBA expired on December 31, 1993. "Specific durational clauses in [collective bargaining agreements] show an intent to limit benefits to the duration of the agreement." Alpha Portland, 836 F. 2d at 1519. This self-evident intent is consistent with other points of federal law

governing collective bargaining agreements. An employer's obligations under a collective bargaining agreement expire when the agreement expires. Litton Financial v NLRB, 501 U.S. 190 (1991); Laborers Health and Welfare Trust Fund v Advanced Lightweight Concrete Co.,484 U.S. 539 (1988). Collective bargaining agreements that include health benefits do not confer benefits on retired persons who are no longer "employees" under the LMRA. Mine Workers v Robinson, 455 U.S. 562 (1981); Chemical Workers v Pittsburgh Plate Glass, 404 US 157 (1971). See also Curtiss-Wright Corp. v Schoonejongen, 514 U.S. 73 (1987). (Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans.)

¶ 41 As the district court observed in its Order, this case lends itself to resolution by summary judgment because Bensons failed to show a genuine factual issue as to the legal issue of ambiguity. Order, 18, App. 308. Not only was there a failure to show ambiguity, Bensons made no claim of ambiguity. Order 15, App. 305. The 1991CBA/Labor Agreement that is the basis of Bensons' claimed contract rights—exhibit 33 of their complaint—unambiguously provided that its Medical Expense Benefit Plan expired on December 31, 1993. Complaint, App. 152; ¶¶ 12 & 13, SRT App. 3, ¶¶ 12,13; Order 17, App. 307.

¶ 42 On appeal, Bensons allege a "separate contractual agreement." They argue that their right to receive lifetime benefits is based on a "separate agreement and contract between Plaintiffs and the company they worked for when they retired. The Plaintiffs decided to retire early so as to obtain the same health benefits that were presently being provided. A separate contractual agreement was created at the time of their retirement which provided the continuation of the same health benefits." Bensons brief at ¶ 15. Further, Bensons claim there was a "clear understanding" that they would receive lifetime health care benefits. Id., ¶ 17.

¶ 43 SRT demonstrated to the district court's satisfaction that the definitive contracts affecting Bensons' claims—the CBA and the NSP Asset Purchase Agreement—left no room for the unsubstantiated claims of "separate" agreements offered by the Bensons. The Bensons failed to demonstrate there was an ambiguity in either the CBA or the NSP Asset Purchase Agreement through which their "clear understanding" could be admitted into evidence to construe the agreements.

¶ 44 Nor did Bensons show a genuine issue as to facts material to their alternative arguments, including the belated "separate contracts" theory invented in an effort to avoid the expiration of Medical Expense Benefit Plan under the 1991 CBA. Bensons' complaint was based on the 1991 CBA. Bensons' response to the Rule 56 motion "switched gears" away from the CBA to assert a new claim (not stated in the complaint) that "is based not on the union contract but instead on a separate agreement and contract between the plaintiffs and the company they worked for when they retired." Plaintiffs' May 7, 2010 brief, (Dkt. 27) 1, 2, 3, 9, 15, 17, 21, Order 14-16, App. 304-306. On appeal Bensons do not rely on the 1991 CBA; they abide by the separate contracts theory. Bensons' brief ¶¶15, 16, 24 -27, 35.

¶ 45 The essence of Bensons' separate contracts theory is that NSP made separate contracts to provide life-time health benefits to the Benson group and that NSP's obligations under separate contracts were assumed by Minot Telephone Company when it purchased the Minot telephone business in 1990/91, before that entity was later renamed SRT. It strains credulity that NSP might have made such special arrangements with the Benson group separate from the CBA with the union that included the Bensons and other NSP employees, but that is the claim – a claim not made in the complaint and a claim not supported by competent admissible evidence.

¶ 46 The complaint opened with references to the 1991 CBA, and closed with reference to and

attachment of the 1991 CBA. Complaint ¶¶ 2, 4, 120 and Exhibit 33; Apx. pp.1-2, 31, 125-177. The complaint is devoid of any reference to any separate contract. Bensons' affidavits referred to in complaint and attached to the complaint asserted rights "for life" under their union contract, not to any separate contract. Complaint attachments 53-57, App. 211-234. These same affidavits (and no new ones) were re-presented in Bensons' response to SRT's Rule 56 motion as attachments 2-6. (Dkt. 27) Bensons' affidavits filed in response to the Rule 56 motion repeated reliance on their union contract, with no mention of any separate contracts. Benson affidavit, ¶ 2; Bliven affidavit, ¶ 1; Tribbitt affidavit, ¶ 5(a).) None of the other attachments mentioned any separate contracts.

¶ 47 Bensons' response to the summary judgment motion did not show a genuine issue as to any material fact affecting the separate contracts claim. Benson's brief makes no effort to show the court where in the record there is competent admissible evidence which raises an issue of any material fact with respect to the separate contract theory.

¶ 48 The only mention of separate contracts was in Bensons' brief opposing summary judgment, (Dkt. No. 27) an argument unsupported by a proper response under Rule 56(e)(2), N.D.Civ.P., an argument repeated on appeal and still unsupported by competent admissible evidence. Bensons' brief ¶¶ 15, 16, 24 - 27, 35. "Factual assertions in a brief do not raise an issue of material fact satisfying Rule 56(e). . . . If no pertinent evidence on an essential element is presented to the trial court in resistance to a motion for summary judgment, it is presumed that no such evidence exists." Zuger v. State, 2004 ND16, ¶ 8, 673 N.W.2d 615.

¶ 49 As the district court observed in its Order citing NDCC § 9-06-04, no evidence of separate contracts was produced by Bensons. The separate contracts theory was not supported as required by that statute and by Rule 56 (e)(2), N.D.Civ.P. "Quite to the contrary, the only

evidence presented to the Court on this issue was done so by SRT which referred to the 1990 Asset Purchase Agreement which specifically set out the assets and liabilities subject to the transfer. The language of that agreement clearly shows that, pursuant to ¶¶ 6, 9 and 24 the only medical benefits that were agreed to be paid and were assumed as a liability were those granted under the Collective Bargaining Agreement that expired on December 31, 1993." Order 19-20, App. 319-310. The NSP Asset Purchase Agreement is included in SRT's appendix. SRT App. 4,¶ 4, 6-178.

¶ 50 Bensons assert, lacking competent admissible evidence: "Here, the intent is clear: NSP and Rochester both clearly intended these benefits to continue past the expiration date of the labor agreement; each of the Plaintiffs had the same understanding and intent. When SRT bought the assets of the former companies, they bought the liabilities as well, and one of the liabilities was the separate contractual obligation to continue paying the health benefits as part of the retirement benefits of the Plaintiffs." Bensons' brief ¶ 27. The "bought liabilities" theory is not credible not only because it is unsupported by any competent admissible evidence; the theory is also contrary to the explicit language of the agreements, common principles of business law and is contradicted by competent admissible evidence.

¶ 51 When Minot Telephone Company (now named SRT) bought the assets of NSP's Minot telephone business, it did not buy any liabilities. It assumed some specified liabilities, not including Bensons' claimed separate contracts for health benefits as part of their retirement benefits.

¶ 52 As explained in the Statement of Facts, SRT App. 2, ¶ 3, infra, Minot Telephone Company was the corporate entity that purchased the Minot telephone business assets from NSP and that entity is now named SRT Communications, Inc. The form of the transaction was Minot

Telephone Company's purchase of NSP's assets used in its Minot telephone business, under an Asset Purchase Agreement contracted in 1990 and closed in early 1991. SRT App. 2; Order 2, App. 292. This was not an entity transaction where the purchaser of a corporation might be unpleasantly surprised to discover some liabilities after closing.

¶ 53 The words of the NSP Asset Purchase Agreement are material facts, relevant to Bensons' separate contracts theory. The words of the Agreement are undisputed. The words of the written Agreement are not ambiguous. Under the NSP Asset Purchase Agreement, SRT purchased certain assets and assumed certain liabilities. SRT did not purchase any of NSP's assets related to its electric business in Minot or elsewhere, and SRT did not assume all of NSP's liabilities related to any business anywhere.

¶ 54 The Agreement was specific as to liabilities assumed. Paragraph 6, Assumption of Liabilities, provided :

> "Purchaser shall not, by virtue of its purchase of the Real Estate and Assets, assume or become responsible for any debts, liabilities or obligations of Seller. Notwithstanding the foregoing, Purchaser covenants and agrees that on the Date of Closing it shall execute and deliver to Seller an Assumption Agreement in substantially the form of Exhibit A attached hereto pursuant to which it will assume and agree to perform and discharge the following debts, liabilities and obligations:
>
> a. All debts, liabilities and obligations arising under the Operating Contracts which accrue and become performable on and after the Date of Closing;
>
> b. All debts, liabilities and obligations identified on Schedule 6 hereto; and
>
> c. All liabilities of Seller to its employees who perform services for the business and who are employed on and after the Closing Date for vacation pay accrued as of the

date of closing."

¶ 55 Operating contracts were described in Schedule 1 (e). Nothing on that schedule describes separate contracts claimed by Bensons.

¶ 56 Under paragraph 6b, liabilities identified under Schedule 6 were assumed. Schedule 6, "List of Liabilities to Be Assumed" lists "None."

¶ 57 Separate contracts claimed by Bensons were not assumed under paragraph 6 of the Agreement. SRT App. 10, 16-17, 79, 115-118,138.

¶ 58 Paragraph 9 included NSP's representations and warranties, including subparagraph h, declaring the absence of employee benefit plans except as described in schedule 9(h). Schedule 9 (h) described several employee benefits, plans and programs, but no contracts or separate contracts for post-retirement health benefits claimed by Bensons. SRT App. 19, 23, 79, 144.

¶ 59 Paragraph 24 of the NSP Purchase Agreement is titled "Employees." Under paragraph 24a, the 1991 CBA affecting "Bargaining Unit Employees," including Bensons, was assumed. The 1991 CBA included the medical benefit plan that expired in 1993. Paragraphs 24(b), 24(e) and 24(f) dealt with Non-Bargaining Unit Employees. Under paragraphs 24c and 24d, provisions were made for two kinds of employee benefit plans, a severance plan and a retirement pension plan. Paragraph 24 made no provision for the special separate contracts for post-retirement health benefits claimed by Bensons. SRT App. 67 - 74.

¶ 60 The NSP Asset Purchase Agreement clearly shows, under ¶¶ 6, 9 and 24, the only medical benefits that were assumed as a liability were the benefits under the CBA that expired on December 31, 1993. Order 19-20, App. 309-310.

¶ 61 As addressed under issue 2 below, the separate contracts theory of state law, even if factually supported, is pre-empted by federal law. The separate contracts theory is factually

unsupported when considered under federal law. Order 13-18, App. 303-308. A separate contracts claim might be viable if there were some genesis in the 1991 CBA, but separate contracts genesis is lacking and extraneous evidence is immaterial where the CBA is unambiguous as to expiration. Alpha Portland, 836 F. 2d at 1519. It bears repeating: Bensons did not claim ambiguity, presented no evidence to show the CBA was ambiguous as to expiration of health benefits, and presented no evidence to support the separate contracts claim. As the district court's Order stated, "There is nothing ambiguous about the terms of the Labor Agreement involved here." Order 16, App. 316.

¶ 62 The district court also dismissed Bensons' "detrimental reliance" claim, not only because that theory is pre-empted by federal law, but also because facts to support any element of the claim were not shown to exist. Order 20, App. 310. Compare the dismissal of retirees' equitable estoppel claims in Skinner,188 F.3d 130, 152 (retirees bear burden of showing key elements of estoppel, including material misrepresentation, reliance, and "extraordinary circumstances"). Id. Detrimental reliance is argued in Benson's brief, with no reference to competent admissible evidence. Bensons' brief, ¶¶ 23, 36, 39. Bensons "cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief." Abdullah, 771 N.W.2d, ¶ 9.

¶ 63 Bensons' arguments on appeal are virtually the same as their arguments to the district court, factual assertions in a brief disconnected from competent admissible evidence which raises an issue of material fact. On appeal Bensons might have argued the district court overlooked material facts in the record. Or Bensons might have asserted on appeal they overlooked material facts in the record in the district court proceedings and belatedly draw the Supreme Court's de novo attention to those facts, including an explanation of a connection between such facts and

their legal theories. Bensons make neither argument. They are consistent in both forums, presenting arguments in briefs unsupported by competent admissible evidence. See, e.g., Bensons' brief ¶25, referring to "Exhibit 51," an unidentified person's memo reciting hearsay, a memo attached to the complaint (App. 209) and referred to in the brief as if it were evidence. "Factual assertions in a brief do not raise an issue of material fact satisfying Rule 56(e). Nor may a party merely reassert the allegations in his pleadings in order to defeat a summary judgment motion." Zuger, 673 N.W.2d, ¶ 8.

¶ 64 On appeal as in the district court, Bensons' response to summary judgment does not show a genuine issue as to any material fact to support the original claim under the CBA, the NSP Asset Purchase Agreement, or to support the separate contracts theory.

¶ 65 C. The matters of substantive law in this case are matters of federal law. In the absence of genuine issues of material fact, the district court's summary judgment dismissing the complaint was correct as a matter of pre-eminent federal law.

¶ 66 Bensons alleged rights under a collective bargaining agreement made under the Labor Management Relations Act, 29 USC § 141, et.seq. (LMRA) and claim "welfare" benefits affected by the Employee Retirement Income and Security Act, 29 USC § 1001, et.seq. (ERISA). Bensons might have filed their complaint in federal court under 28 USC § 1331, or SRT might have removed the action to federal court under 28 USC § 1441. An absence of diversity of citizenship would not have permitted removal on diversity grounds. There is no federal statute providing exclusive jurisdiction in federal courts. The North Dakota District Court has concurrent subject matter jurisdiction. See 29 USC §1132 (a) and (e) (1). See also Sanders v. Gravel Products, Inc. 2008 ND 161, ¶ 20, 755 N.W.2d 826 (state courts have concurrent jurisdiction to consider claims by beneficiaries for benefits due them, including claim

related to "top hat" ERISA plan). A fundamental principle applies to Bensons' claims: federal law governs their claims, under Article VI of the United States Constitution. ERISA "comprehensively regulates employee benefit and retirement plans" and "preempts state laws which 'relate to' any employee benefit plan." Tolstad v. Tolstad, 527 N.W.2d 668, 670 (N.D. 1995). (quoting 29 USC § 1144 (a)).

¶ 67 "The issue must be decided as a matter of federal common law developed under the authority of section 301 of the Taft-Hartley Act [a popular pseudonym for the LMRA].…" Rosetto, 217 F.3d at 541. "[A] collective bargaining agreement is much more than traditional common law employment terminable at will. Rather, it is an agreement creating relationships and interests under the federal common law of labor policy." Bowen v USPS, 459 U.S. at 220 (1983).

¶ 68 Bensons' claims necessarily invoke ERISA law even though Bensons did not overtly assert an ERISA claim and even though Bensons disavow their claim is based on the CBA. Order 8- 9, App. 308-309. "Pension plans" providing retirement income are subject to vesting rules under ERISA; "welfare plans" providing health insurance benefits are not subject to vesting requirements. 29 USC §§ 1051 and 1053. Thus, courts are "mindful that ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." Curtiss-Wright, 514 U.S. at 78. [Emphasis supplied.] See also Pilot Life Insurance Co. v Dedeaux, 481 U.S. 41 (1987) (ERISA pre-empts state common law claims.)

¶ 69 Citing these and other cases, the district court opined, correctly, "that Bensons' state law claims for post-retirement welfare benefits are completely preempted and federal law controls."

Order10, App. 300.

¶ 70 The 1991 CBA was replaced in December, 1993 by a new agreement between the union and Minot Telephone Company, effective for the year 1994. SRT App. 2, 4, ¶¶ 7, 20, 21. The 1994 CBA did not provide any benefits that might be claimed by Bensons because they were retired, not employed and not covered by the 1994 CBA. Still, Bensons claim life-time rights under the expired 1991 CBA and the Medical Expense Plan that expired on December 31, 1993. That is a claim on which relief cannot be granted, as a matter of law.

¶ 71 The controlling precedent in the 8th Circuit is Alpha Portland, 836 F. 2d 1512. The 8th Circuit court acknowledged that "welfare benefits do not automatically vest as a matter of law," and analyzed whether "the parties intended [that] retirees' benefits would be vested and not tied to the agreement which created them" and affirmed the trial court's decision "that retiree welfare benefits were intended to last only for the duration of the CBA [collective bargaining agreement]." 836 F. 2d at 1517.

¶ 72 The 8th Circuit Court's decision in Alpha Portland is in accordance with other circuits. See, e.g. Senior v NSTAR Electric and Gas Corp.,499 F. 3d 206 (1st Cir. 2006); Joyce v Curtiss-Wright Corp.,171 F.3d 130 (2d Cir. 1999); International Union v Skinner Engine Co., 188 F.3d 130 (3d Cir. 1999); United Mine Workers v Royal Coal Company, 768 F. 2d 588 (4th Cir 1985); International Association of Machinists and Aerospace Workers v Masonite Corp.,122 F. 3d 228 (5th Cir 1997); Barnett v American Corp.,436 F.3d. 830 (7th Cir 2006); Rosetto v Pabst Brewing Co., 217 F.3d 539 (7th Cir 2000); Pabst Brewing Co. v Corrao, 161 F.3d 434 (7th Cir 1998) Bidlack v Wheelabrator Corporation, 993 F.2d. 603 (7th Cir 1993); Stewart v KHD Deutz of America, 980 F.2d 2d 698 (11th Cir. 1993.)

¶ 73 The Alpha Portland Court made the point: "Specific durational clauses in [collective

bargaining agreements] show an intent to limit benefits to the duration of the agreement. It would render the durational clauses nugatory to hold that benefits continue for life even though the agreement which provides the benefits expires on a certain date." 836 F.2d at 1519.

¶ 74 All of these cases support SRT's position—and the district court's decision—that Bensons' rights under the 1991 CBA expired when that agreement and the Medical Expense Benefit Plan referred to in the agreement expired in December 1993.

¶ 75 All these cases dealing with retired union employees' claims to health benefits are consistent with other principles of federal labor law. An employer's obligations under a collective bargaining agreement expire when the agreement expires. Litton and Laborers Health, supra. Collective bargaining agreements under the LMRA that include health benefits do not confer benefits on retired persons who are no longer "employees" under the Act. Mine Workers and Chemical Workers, supra. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. Curtiss-Wright. See also Stearns v. NCR Corporation, 297 F.3d 706 (8th Cir. 2002), one more in the consistent line of federal cases rejecting state law contract claims to post-retirement health benefits. In that case, non-union retirees asserted their former employer's termination of a welfare benefits policy breached contract rights to post-retirement health benefits. The court rejected the breach of contract claim, because employers' freedom to reduce welfare benefits is preserved under ERISA and ERISA's "remedial provisions completely preempt state law remedies for breach of contract." Id. at 710. All these cases show Bensons' reliance on theories of "equitable estoppel" and "general contract law," Bensons brief ¶ 23, are not viable claims as a matter of pre-emptive federal law.

¶ 76 Much of the complaint and affidavits and arguments in their brief (¶¶ 24 - 27) indicate

Bensons hoped to make their case by evidence of extraneous communications that contradict the principle that an employer's obligations under a CBA expire when the agreement expires. Extrinsic evidence to support these claims is exactly the kind of evidence that is inadmissible to contradict the unambiguous 1991 CBA or to add to the Agreement rights to benefits extending beyond the December 31, 1993 expiration date. All such extrinsic evidence is not admissible material evidence, and so is not sufficient to withstand summary judgment. Where the CBA is not ambiguous, extrinsic evidence cannot be admitted to "manufacture" an ambiguity; "the text itself must create a disputed fact as to vesting." Joyce, 171 F.3d at 134.

¶ 77 Skinner is notable for rejecting employer executives' testimony sympathetic to retired employees' cause, where the oral testimony contradicted the unambiguous text of the CBA. "Oral testimony certainly may be necessary when the terms of the written documents are ambiguous. But when the language itself is not ambiguous, oral testimony may not be used to alter or add terms to a collective bargaining agreement which is otherwise complete. That is the case here, and the appellants' contention that the various deposition testimonies create an ambiguity in the CBAs must be rejected." Skinner 188 F.3d at 145.

¶ 78 Bensons' extraneous evidence arguments include reference to SRT's accounting records under FASB 106. Bensons' brief ¶ 22. (The relevant record reference is an excerpt from a deposition of SRT's present manager who was first employed by SRT in 1994. "The sale had already taken place." He testified about SRT's accounting for "the policy that SRT had regarding health benefits - post retirement benefits." He testified about a policy, not about a contract. The entire deposition transcript is Dkt. 29; an excerpt was attachment 1 to Bensons' response to SRT's summary judgment motion, Dkt. 27, not included in Bensons' appendix.)

¶ 79 Skinner recognized that an employer that had implemented FASB 106 in its financial

records was not restricted from later acting on its belief that it was financially beneficial to reduce the benefits it provided to active employees and retirees. 188 F.3d 130, 136. See also Wise v El Paso Natural Gas Co., 986 F.2d. 929 n.3 (5th Cir. 1993). To the same effect but without mentioning FASB accounting standards, the Supreme Court has recognized "The flexibility an employer enjoys to amend or eliminate its welfare plan is not an accident; Congress recognized that requir[ing] the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans.' (Citation omitted). Giving employers this flexibility also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour." Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry., 520 U.S. 510, 515 (1997). "Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." Curtiss-Wright, 514 U.S. at 78.

¶ 80 Bensons' reference to accounting records does not show a genuine issue as to any material fact because there are no factual issues where there is no ambiguity under the CBA that is the basis of Bensons' claims. Bensons' reference to accounting records is only one more way they seek to use extrinsic evidence to contradict the unambiguous words of Article XII of the 1991 CBA:

> "As the result of negotiations between the Local Union and the Company there is in existence Medical Expense Benefit Plan amended effective January 1, 1991, remaining in effect to December 31, 1993." Apx. pp. 152

¶ 81 As the district court's Order stated, "There is nothing ambiguous about the terms of the Labor Agreement involved here." Order p. 16, Apx. p. 316. Thus, the "entitlement to [health care benefits] expires with the agreement, as a matter of law . . ." Rossetto at 547.

¶ 82 Bensons' detrimental reliance theory (Bensons' brief, ¶¶ 23, 36, 39) indicates an unstated recognition that contract claims, both the 1991 CBA and the separate contracts theory, are unsupported by competent admissible evidence. The detrimental reliance argument is not only unsupported by competent admissible evidence (Order 20, App. 310), it is also pre-empted by federal law. Benson's theory that SRT's policy and practice of providing post retirement welfare benefits has somehow transformed from a discretionary policy into a legal obligation limited only by the lives of beneficiaries is a theory overruled by federal law. "Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." Curtiss-Wright, 514 U.S. at 78.

¶ 83 Even if Bensons' affidavits about benefits "for life" were accorded some attention, it must be concluded they are insufficient to withstand summary dismissal, for several reasons. First, there is the basic principle of contract law, both state and federal law, that an unambiguous written agreement cannot be modified by extraneous communications. "The rules function as gatekeepers [excluding from admission as evidence] a story about what the contract really meant but didn't say." Rosetto, 217 F.3d 539, 547 (when a CBA explicitly limits benefits to a date certain, plaintiffs' claim of lifetime benefits should be dismissed as a matter of law in absence of latent ambiguity). Bensons' arguments are unsupported by competent admissible evidence which raises an issue of material fact.

¶ 84 Second, Bensons' affidavits address the 1991 CBA that they eschew in favor of the separate contracts theory. The affidavits were first attached to the Complaint (Apx. pp. 211-234) and some were presented without change in response to SRT's Rule 56 motion (Dkt. 27). Some are quoted at length in their brief on appeal. ¶ 24. By their own terms, the affidavits do not address the claimed separate contracts theory that was invented in response to SRT's Rule

56, N.D.Civ.P. motion. Related attachments to the complaint, described as "internal correspondence" in 1990 and 1991 between Bensons as NSP employees and NSP managers, addressed retirement issues under the union contract. (See list of Documents Attached to Complaint, Apx. pp. 41- 42, describing items 14, 15, 21, 23, 24.) These hearsay attachments to the complaint were not re-presented in response to SRT's summary judgment motion and should be ignored, under Rule 56 (e) N.D.Civ.P. Bensons did not present any competent admissible evidence to support the separate contracts claim. "The Bensons were given an opportunity to produce such contracts and no such contracts were produced." Order 20 App. 310.

¶ 85 Third, the affidavits describe internal correspondence in 1990 and 1991 between NSP employees (Bensons) and NSP managers about the pending sale to Minot Telephone Company. The inadmissible internal correspondence reflects employees' worries about their status and managers' endeavors to resolve worries. It strains credulity that NSP might have made special separate contracts with a few union employees in the context of the pending sale. Even if that happened, Bensons' affidavits do not show or assert that either Rochester Telephone or its subsidiary Minot Telephone Company (now SRT) was a party to these internal communications that Bensons assert culminated in special contracts separate from the union collective bargaining agreement. There is no factual nexus—none asserted and none shown—connecting SRT to any separate contract made between Bensons and NSP 20 years ago.

¶ 86 Fourth, and assuming *arguendo* that North Dakota law applies and is not preempted by federal law, the separate contracts/state law claim is "invalid" under North Dakota law. NDCC § 9-06-04, requires written evidence to prove the separate contracts claim. In 2009, Bensons commenced this action seeking benefits under the 1991 CBA and in the course of litigation "switched gears" to allege separate contracts made between them and NSP. "An agreement that

by its terms is not to be performed within one year from the making thereof" is "invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by the party's agent." NDCC § 9-06-04 (1). Bensons' response to the motion for summary judgment (Dkt. 27) did not include any written or signed evidence of separate contracts between made between them and NSP 20 years ago and providing life-time health benefits.

¶ 87 Bensons' claim that NSP's 20 year old alleged separate contracts are now SRT's obligations is also invalid under North Dakota law. "A special promise to answer for the debt, default or miscarriage of another" is "invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by the party's agent." N.D.C.C. § 9-06-04 (2). Bensons' response to the motion for summary judgment (Dkt. 27) did not include any written or signed evidence of SRT's assumption of alleged separate contracts between made between Bensons and NSP providing life-time health benefits. Quite the contrary and as specifically noted in the Order, the only evidence bearing on the separate contracts theory was SRT's evidence that the NSP Purchase Agreement shows that the only assumed medical benefits obligation was the medical benefits plan under the CBA that expired in 1993. See Order 19-20, App. 309-310.

¶ 88 Bensons' separate contracts theory fails on the facts and on the law. Bensons did not present any writing or other evidence of an issue of material fact as required by Rule 56, N.D.Civ.P. and by N.D.C.C. § 9-06-04. There is no written evidence of separate contracts made by NSP and there is no evidence of SRT's written assumption of separate contracts. Under N.D.C.C § 9-06-04, the separate contracts alleged by Bensons are "invalid" as a matter of law.

¶ 89 Bensons' affidavits written in 2009 describe their subjective understandings about the 1991 CBA, but their briefs addressed to the district court and to the Supreme Court have re-

written the history of those understandings to support the separate contracts theory. Whichever version of the Bensons' story is considered, SRT is not responsible for Bensons' old or new subjective understandings and claims that are contradicted by the unambiguous words of the 1991 CBA and the NSP Asset Purchase Agreement. SRT does not impugn the sincerity of Bensons' claims, but their sincerity does not make their claim meritorious. They believe what they believe, but what they believe is not supported by competent admissible evidence as to material facts and lacks merit as a matter of law. In sum, Bensons' affidavits are insufficient to alter the unambiguous words of the 1991 CBA and its 1993 expiration date, and are insufficient to present a genuine issue as to the existence of separate contracts.

¶ 90 SRT has avoided extended quotations from the several cited federal cases which the court may read for itself. But some quotation is pertinent here, as in the district court's Order 18-19, App. 308-309

> "There is no doubt that the plight of the retirees in this case is unfortunate. The Seventh Circuit recognized the difficult circumstances in which retirees are placed when benefits are eliminated. 'We are well aware that it can be a terrible hardship for an elderly person who has been receiving benefits from a former employer suddenly to find the rug pulled out from under her. There is an element of betrayal as well, if the retiree/former employee understood that the "lifetime" health benefits were a form of deferred compensation for her work. But written agreements exist precisely because subjective understandings can vary so much from individual to individual. . . . We are cognizant of the need when a collective bargaining agreement is at issue to respect the specialized usages of the workplace. . . . On the other hand, as we have stressed in [various] cases . . . the written word must prevail over subjective understandings unless

one of those gaps "crying out to be filled" exists or the agreement is genuinely ambiguous.' Pabst Brewing Co. v. Carrao, 161 F.3d. 434, 442 (7th Cir. 1998).

The court's statement is particularly apt here, where the retirees apparently believed that their life and medical insurance benefits would continue for their lifetimes. There is no dispute as to this. But based on the discussion provided above, we are compelled to affirm the district court's summary judgment in favor of Skinner." Skinner, 188 F.3d at 147.

Similarly, the Barnett Court noted:

"We are mindful of the difficulties faced by those who have worked hard their whole lives only to be saddled during retirement with the additional pressure of unexpected increases in the cost (and in other instances the outright termination) of health-care benefits. However, we are bound to determine only whether a legally sufficient agreement between the parties exists to support the plaintiffs' claim. Finding none, we must affirm the ruling of the district court granting summary judgment for Ameren." Barnett, 436 F.3d at 835.

¶ 91 In 1994, SRT was mindful of difficulties faced by Bensons. They were early retirees (receiving vested pension benefits) before SRT acquired the Minot telephone business. Having retired early, they were no longer employees under a CBA that provided health benefits. They were not in a unique situation. They were like millions of early retirees (younger than Medicare eligible age 65) concerned about the health insurance. Their former employers (NSP and Minot Telephone Company and owned by Rochester) had policies of paying for a portion of retired employees' health insurance – a policy, not a not an obligation under any contract. When the

corporate ownership of Minot Telephone Company changed in 1994, the new owner, SRT, decided to include Bensons (then retired) in SRT's policy of paying for retired employees' health insurance – a policy, not an obligation under any contract. SRT's decision in 1994 to provide these retirees with health benefits was action taken as a matter of management discretion, not as a matter of contractual obligation. See Affidavit of Steve Lysne re Motion for Summary Judgment ¶¶ 22, Dkt. 21. That conduct does not manifest SRT's intent to undertake an obligation to provide retiree benefits for their lifetimes. Skinner, 188 F.3d at 144.

¶ 92 The situation in 2009 was similar to the situation in 1994. SRT's 1994 decision to pay for Bensons' health insurance before they were age eligible for Medicare was action based on management discretion, not legal obligation. Bensons acknowledge that SRT was given legal advice at the time it purchased the Minot telephone business in 1994 that it had no legal obligation to provide health benefits to the Bensons. Complaint, ¶ 10, App. 4. SRT's discretionary action in 1994 to pay health care benefits did not limit SRT's management authority to make a different decision in any later year, as it decided in 2009.

¶ 93 After SRT's action in 2009 to terminate payments for health insurance for Medicare eligible retirees, Bensons—and SRT's other Medicare eligible retirees—were like most retired Americans, receiving government provided Medicare insurance and eligible to purchase Medicare Supplement Insurance from private insurance companies.

¶ 94 **SUMMARY AND CONCLUSION**

¶ 95 Bensons' complaint alleged rights to life-time health benefits under an expired collective bargaining agreement. SRT moved for summary judgment to dismiss the complaint because there is no genuine issue as to any material fact and SRT is entitled to a judgment as a matter of

law. Rule 56 (c), N.D.Civ.P.

¶ 96 It is axiomatic that Bensons as plaintiffs have the burden of proof. A corollary rule applies where their claim is challenged under Rule 56. Bensons must present competent admissible evidence to show the existence of a genuine issue of material fact. SRT's motion documents included a Statement of Undisputed Facts. Bensons' response to the motion did not contradict any of the facts stated in SRT's Statement of Undisputed Facts. Bensons abandoned the claim based on the collective bargaining agreement and asserted separate contracts for health benefits. Bensons' response did not include any competent admissible evidence to support either theory. Bensons' response to SRT's summary judgment motion did not present to the district court a genuine issue as to any fact material to the matters of law that govern their claim.

¶ 97 There is no genuine issue as to any material fact affecting the separate contracts claim. SRT assumed the unambiguous 1991 CBA, and it did not assume any special separate contracts to provide health benefits to Bensons. The separate contracts theory is unsupported by competent admissible evidence. The theory is disproven by competent admissible evidence, and the theory is pre-empted by federal law affecting the CBA.

¶ 98 SRT's payment of health benefits for retired employees was a matter of business discretion, not contractual obligation. SRT's action in 2009 to terminate postretirement benefits for all its Medicare eligible retired employees, including the Bensons, was a matter of management discretion, not a violation of a contractual obligation under the 1991 CBA or any separate contracts, and not a violation of any law. SRT's action to terminate health insurance for its retired employees was in accordance with the federal statutes and federal court precedents that employers are generally free for any reason at any time, to adopt, modify, or terminate welfare plans.

¶ 99 The pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact.

¶ 100 The complaint was properly dismissed as a matter of law under Rule 56.

Dated this 15th day of September, 2011.

Pringle and Herigstad, P.C.

/s/ David J. Hogue
David J. Hogue (#04486)
2525 Elk Drive
P.O. Box 1000
Minot, ND 58701-1000
Phone: (701) 852-0381
Fax: (701) 857-1361
Attorneys for SRT Communications, Inc.

¶ 101 **CERTIFICATE OF COMPLIANCE ON WORD COUNT**

¶ 102 I hereby certify that this brief complies with NDAPP 32(a)(7)(A); the word count is 9,166.

Dated this 15th day of September, 2011.

Pringle and Herigstad, P.C.

/s/ David J. Hogue
David J. Hogue (#04486)
2525 Elk Drive
P.O. Box 1000
Minot, ND 58701-1000
Phone: (701) 852-0381
Fax: (701) 857-1361
Attorneys for SRT Communications, Inc.

¶ 103 **CERTIFICATE OF WORD PROCESSING PROGRAM**

¶ 104 The word-processing program is Microsoft Office Word 2003.

Dated this 15th day of September, 2011.

Pringle and Herigstad, P.C.

/s/ David J. Hogue
David J. Hogue (#04486)
2525 Elk Drive
P.O. Box 1000
Minot, ND 58701-1000
Phone: (701) 852-0381
Fax: (701) 857-1361
Attorneys for SRT Communications, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the ***Appellee's Brief*** and ***Appellee's Appendix*** were, on the 15th day of September, 2011 served upon the following:

Lynn Boughey
lynnboughey@midconetwork.com

/s/ Kristi L. Bailie
Kristi L. Bailie