20120051

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Linda A. Smestad,

Plaintiff-Appellee

vs.

Supreme Court No. 20120051
District Court No. 30-09-C-0648

Bruce G. Harris,

Defendant-Appellant

APPELLANT'S REPLY BRIEF

APPEAL FROM ORIGINAL DISTRICT COURT MEMORANDUM OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT, DATED MAY 6, 2010, DISTRICT COURT JUDGMENT DATED MAY 7, 2010, SUPREME COURT REMAND ON DISTRICT COURT DATED SEPTEMBER 23, 2012, AND JUDGMENT BY DISTRICT COURT DATED NOVEMBER 17, 2011

Burleigh County District Court
South Central Judicial District
The Honorable Robert O. Wefald, Presiding in the Original Case and
The Honorable Cynthia Feland Presiding in the Remanded Case

Bruce G. Harris, Pro-se
900 2nd Street NE
Mandan, North Dakota 58554
Defendant-Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

N.D.Rules of Civil Procedure

N.D. Rules of Criminal Procedure

Case Law Citations

SUMMARY OF REPLY BRIEF

In response to the Appellee's Brief, certain clarifications are requested in their brief regarding the basis of this second appeal, which is not what is stated in the Appellee's Brief. The ongoing confusion in this case has been concisely stated in this Reply, and the points of confusion to be resolved are as follows:

1) A N.D.R.Civ.P.Rule 60(b)(2-5) Motion for New Trial was filed by Bruce Harris, Defendant/Appellee (hereafter Harris) with the District Court on November 30, 2011, (Appendix 17-27) and not a N.D.R.Civ.P.Rule Rule 59(b) Motion as stated in Appellee's Brief (p.3 ¶ 2). This combined with the fact that the Honorable Cynthia Feland (hereafter Feland) denied the 60(b)(2-5) Motion (Appendix pg. 1-2) by disposing of it with the legal justification for N.D. Rules of Criminal Procedure Rule 33(b)(1) Motion, makes the disposal of this case by the District Court a mistake. This Court is being asked to REMAND for NEW TRIAL based upon the timely and properly filed Rule 60(b) Motion. The District Court ruling is fully reviewable upon Appeal.

2) Appellee, Linda Smestad (hereafter Smestad) is attempting to re-litigate this case under a theory of unjust enrichment which does not appear in her Complaint (Appendix 43-47), and which is not a remedy at law available for a multitude of other reasons. The most important of these reasons is that throughout the history of this case, there was not an absence of remedy available to Smestad, and that is a prerequisite for an unjust enrichment ruling. The fact that Smestad failed to pursue other remedies does not equate to no remedy being available now under the endless theories she has argued. Smestad didn't appeal or cross appeal Judge Wefald's (hereafter Wefald) Memorandum and Order. Wefald's Memorandum (Appendix pg. 60 ¶2) specifically lists at least one remedy at law Smestad had available to her, which she failed to pursue.

Smestad has failed to establish impoverishment by any definition (Appendix pg. 102, lines 15-23), and the record clearly shows that she most definitely was not impoverished. This is further demonstrated by her continued attacks on Harris including this suit, and a voluntary trip to a failed North Carolina Violence proceeding she initiated

with Harris' ex-wife, which demonstrates clearly Smestad was not impoverished. Had Judge Feland "reviewed the entire record" this fact is readily apparent.

3) The criteria for unjust enrichment involves a quasi or implied contract. It was previously argued by Smestad, and Wefald ruled that there was an express verbal contract between the parties as testified throughout by Smestad (Appellee's Brief pg. 4, last line, and pg. 8 ¶ 2). The derivative problems with this scenario is that the Wefald Memorandum fails to address the verbal contract by Smestad to supply Harris with an addition to his home for the personal and supervisory services Harris provided for the Smestad estates (Appendix pg. 151-152), or any other compensation to Harris even though it has been specifically requested by Harris in his Counterclaim (Appendix pg.47-56, Counterclaim pg.4-5). This is a significant oversight by Wefald who vaguely and ambiguously without cause dismisses the Counterclaim entirety, "Based on his experience through forty years of practicing law and judging" (Appendix 58, ¶ 3) which is an inadequate basis in law for a $30.025.00 award.

4.) Another reason for continued confusion is that the Memorandum fails to address the matters of law before the Court. It states without any specificity how the selected withdrawals (Appendix pg. 89), checks made to Linda Smestad cashed by her (Appendix pg. 85, 86, 87, and 88), checks to Oasis Water Systems, Inc. (Appendix pg. 91 and 92) after the Wefald Memorandum prohibits checks to Oasis (Appendix pg. pg. 60 ¶ 2-3) who is not a party to this action (Appendix pg. 113 line 23-24 Appendix pg. 118 lines 9-15) were determined from a large group presented by Smestad.

How the amount of the Judgment was calculated or derived from checks written to Oasis is a mystery as it is not stated in either the Wefald or subsequent Feland rulings. The fact

that the corporation was never afforded the opportunity to respond to a claim against it is best stated by Harris' attorney (appendix pg. 130 lines 2-7) (Appendix pg. 157).

5.) The Appellee's Brief further confuses the issues before this Court by paraphrasing and referencing a statue of limitations ruling by this Court (Appellee's Brief pg. 6 ¶ 1) which never occurred. Neither was the statement in their brief that "Smestad no longer [had] an adequate remedy of law available to her" or that "none exists at law" (Appellee's Brief pg. 7, ¶ 1). The only portion of the briefs statements that Harris concurs with is that there were no remedies available at law at the time this suit was filed, making it a frivolous suit from the onset. and making Smestad subject to sanctions and attorney fee reimbursement to Harris.

6.) The Appellee's Brief further states as a fact that "no true contract exists" (Appellee's Brief pg. 8 ¶3) which is not the case as stated in either the Wefald or Feland Memorandums. Both clearly state the exact opposite. "Absence of justification" to justify fictitious enrichment becomes a mute point when an express verbal contract exists, as stated in Appellee's Brief (pg. 6, ¶ 1).

7.) Likewise, N.D.R.Civ.P. Rule 52(A) does not apply to the N.D.R.Civ.P. Rule 60(b) Motion filed (Appendix pg. 17). Both Mr. Isakson and Judge Feland are confused; Judge Feland states that "the issue of whether there was an oral agreement or contract between the parties is irrelevant" (Appendix pg. 6) and then goes on to state that "Unjust enrichment is an equitable doctrine based upon a quasi or constructive contract implied by law" (Appendix pg. 6) which makes no sense.

8) In the Appellee's Brief it states "In each instance. the requests for funds were made for specific purposes by Harris, with a corresponding promise of repayment" (pg. 4 ¶1)

which, had counsel referred either to the transcript or this Appellant's previous brief, is a yet another misunderstanding he has (over 60 instances testified to by Smestad she didn't know where the funds were going, even though she kept Oasis' books).

9.) The Wefald Memorandum fails to address the justification or analysis that led to the conclusion that these particular amounts out of all 329 withdrawals, checks, etc. submitted by Smestad, leaving the balance of the $112,067.39 sought (Appendix pg. 44 #6) denied in both the Wefald and Feland rulings, which is very confusing. A reasonable mind can conclude that Feland's ruling mirrored the same withdrawals, self endorsed checks, non-party checks without explanation that the Wefald Memorandum did, and the amount of $30,025 became a mystical and unexplained obligation to Harris. This is done without any specific Finding or Conclusion, and without any overt rational, making both rulings capricious, arbitrary, and lacking in legal foundation, as previously asserted.

ARGUMENT AND REBUTTAL OF FACTS

As stated in Appellee's Brief pg. 6, ¶1, the basis for the award by both Wefald and Feland is "an equitable award to Smestad in the amount originally determined to have constituted damages associated with the oral contract between the parties." Counsel then refers to "achieving justice" "where no true contract exists." Appellee's Brief pg. 8, ¶ 3) which is confusing as either there is a contract or not, if so it is express, implied, or implied in fact, and the trier of fact needs to determine these equally critical issues of law before "damages" could be assessed.

It is inappropriate for opposing counsel to make this determination without it being stated as a finding of fact, conclusion of law, or order from the trier of fact in this case. "There can be no implied in law contract to prevent unjust enrichment when there is

an express or implied in fact contract between the parties relating to the same subject matter", stated in Appellant's Brief pg. 5, ¶ 2, and in Comstock Construction, Inc. v. Sheyenne Disposal, Inc., (2002 N.D. 141, ¶13.) 651 N.W.2d, 656, Lockthowe v. C.F. Petersons Estate, (2005 ND 40) 692 N.W.2d 120, and Syverson v. Hess (2003 N.D. 118), 665 N.W.2d, 23.

The underlying problem is that the Smestad failed to follow civil procedure (Appendix pg. 127 lines 2-9), and has now resorted to deceiving the Courts. The only possibility of Harris being enriched is if he had taken funds from Smestad for paying the workers, and kept the funds for himself. Both parties have testified this was not the case (Appendix pg. 155, line 1-4) (Appendix pg. 151, lines 7-17) (Appendix 100-101, 147).

The introduction of improper Plaintiff's Exhibit 8 remains the key evidence in the case and unanswered question of law in this case, who paid $30,025 for the workers? Counsel has testified to this Court that there were checks and testimony to support his improperly introduced Plaintiff's Exhibit 8, and for justice to be served in this case, he must supply the Court with the information where in the transcript this false statement can be verified, (Appendix pg. 110 line 16 [through transcript pg. 4 line 1 same page] because it can't.

In serving the interest of justice, a clear and concise determination whether that contract which has previously been rejected by this Court is acceptable under another name, and whether that contract over the same subject matter as the previous Judgments falls under the doctrine of res judica as in Comstock Construction, Inc. v. Sheyenne Disposal, Inc., (2002 N.D. 141 ¶13.) 651 N.W.2d, 656, Lockthowe v. C.F. Petersons Estate, (2005 ND 40) 692 N.W.2d 120, and Syverson v. Hess (2003 N.D. 118), 665

N.W.2d, 23 which explain "Res judicata, or claim preclusion, is the more sweeping doctrine that prohibits the re-litigation of claims or issues that were raised or could have been raised in a prior action between the same parties.... ...On the other hand, collateral estoppel, or issue preclusion, generally forecloses the re-litigation, in a second action based on a different claim, of particular issues of either fact or law which were, or by logical and necessity are included in the original claim. The applicability of res judicata or collateral estoppel is a question of law fully reviewable on appeal.

This case closely parallels a similar case, Hofsommer v. Hoffsommer Excavating, Inc. (N.D. 1992), 488 N.W.2d 380. The factual allegations Smestad relies upon to establish her claim in this case are identical to the factual allegations litigated originally and determined in the prior suit similar to Hofsommer, at 383. Originally there was no finding of unjust enrichment, and that is precluded by both res judica and estoppel doctrines found in Harris' Counterclaim (Appendix 48) and well established by this Court. A party cannot re-litigate this issue under a different name, after it has been established that a contractual relationship was present, the same subject matter is not subject to re-litigation under a different theory.

The other main point of law which has not been properly addressed is whether or not the criteria for unjust enrichment has been met, which it has not. With or without a new trial, it is factually incorrect how Harris was enriched, in fact, quite the opposite is true. Harris was not paid anything for 14 months of work he completed on Smestad's estates in spite of her testimony that he would be remunerated (Appendix 151-152) for such work. Harris has further been ordered by this Court to pay Workers Compensation

for employees the District Court has accepted were Smestad's employees (Appendix pg. 57, Wefald Memorandum Opinion).

CONCLUSION

The basis of this Appeal and the requested REVERSAL and REMAND are the complete lack of evidence that there were "loans" and the rational basis for the selected amounts. Smestad's own testimony refutes that the withdrawals, self-endorsed checks, were loans (Appendix pg. 155, line 1-4). A claim for relief is frivolous if there is such a complete absence of actual facts or law that a reasonable person could not have expected a court would render a judgment in his favor. In Re Estate of Dion, 2001 ND 53, 623 N.W.2d 720 (N.D. 2001) as in this case.

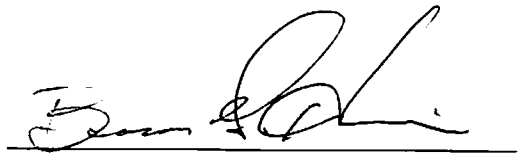
The other equitable remedy available to insure that this grave injustice is not done to Harris would be to REMAND in a venue where opposing counsel is not a judge in the district as the rules of professional conduct would dictate, for determination a) of the nature of this contract between the two parties b) if Smestad had alternative legal remedies available to her c) what the legal basis for the award is, and d) whether Plaintiff's Exhibit 8 is fraudulent as repeatedly and adamantly stated by Harris. If any one of these requirements failed the appropriate and applicable tests of law with a competent trier of fact, Smestad has in fact filed a frivolous suit, and both her and her attorney should be sanctioned and Harris awarded reimbursement for his enormous attorney's fees and hardships associated with these many litigations.

The monetary damages sought by Smestad and her attorney have previously been rejected by this Court, and rejected in their entirety, as there is no lawful basis for such award. Therefore, this Court is asked to answer the clear and concise questions before it,

to REVERSE the misunderstandings of the District Court, AWARD attorneys' fees in the amount of double the fees Harris has had to pay to defend against this frivolous lawsuit filed by an attorney who does or should know better. The main observation that offends traditional notions of justice and fair play in this case is the fact that Plaintiffs counsel, both an attorney at law and a Municipal Judge, honor bound and ethically bound, to observe and uphold the law, and legal agreements, shamelessly flouted both, and continues to support the unlawful behavior of his client.

The Appellee's Brief further references a "long and winding road" (Appellee's Brief pg. 12 ¶ 2) which Harris agrees opposing counsel has taken us all down. Harris is entitled to justice and closure in this very convoluted case.

Dated this 10th day of April, 2012.



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STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF MORTON SOUTH CENTRAL JUDICIAL DISTRICT

Linda A. Smestad
Plaintiff and Appellee

vs.

Bruce G. Harris
Defendant and Appellant

Supreme Court Case No. 20120051
Morton County Case No. 30-09-C-00648

AFFIDAVIT OF SERVICE AND FILING

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF Burleigh)

I, Bruce G. Harris, Defendant/Appellant, depose and swear that on this 10th day of April, 2012, seven bound and one unbound copy the Appellants' Reply Brief in the above entitled matter, were hand delivered to the ND Supreme Court at 600 E. Boulevard Avenue, Bismarck, North Dakota 58501 and one copy was mailed by US mail to Charles Isakson at 103 South 3rd Street, Bismarck, North Dakota 58501, the above information was also sent via e-mail to both the North Dakota Supreme Court at SupClerkofCourt@ndcourts.gov. and to Charles Isakson at chaplawchuck@bitnet.net attorney of Plaintiff/Appellee on April 10th, 2012.

Dated this 10th day of April, 2012.

Bruce G. Harris
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Subscribed and sworn to before me in this County of Burleigh, State of North Dakota, this 10th day of April, 2012.

SHERRY KLEINGARTNER
Notary Public
State of North Dakota
My Commission Expires Dec. 4, 2017

Notary Public