IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Linda A. Smestad,

Plaintiff-Appellee

vs.

Bruce G. Harris,

Defendant-Appellant

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

BRIEF OF DEFENDANT-APPELLANT

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

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STATEMENT OF THE ISSUES

On Remand from this Court, the District Court was for determination of "whether Linda A. Smestad (hereafter Smestad)Smestad had requested equitable relief against Bruce G. Harris (hereafter Harris) and now should be considered by the Court". A remand mandating only Smestad's equitable relief and not Harris' is neither equitable or in the best interest of justice under the circumstances of this case.

This case involves two express verbal contracts between the parties. "there can be no implied-in-law contract when there is an express contract between the parties relative to the same subject matter BTA Oil Producers v. MDU Resources Group, (2002 ND 55), 642 N.W.2d 873. "The Plaintiffs..., are not entitled to recover under unjust enrichments

because there is an express contract between the parties relative to the same subject matter...,". Unjust enrichment is available only to cases in which there is an implied in law contract Stevens, Inc. v. 3d Printing, Inc., (2008 ND 189), 756 N.W.2d, 789 ¶1. "Whether there is an express or implied contract between the parties is also a question for the trier of fact." Comstock Construction, Inc. v. Sheyenne Disposal, Inc., (2002 N.D. 141, ¶ 13), 651 N.W.2d, 656.

Although the verbal agreements between Harris and Smestad were accepted by the Court to be in specific words to each other, there has been no ruling as to whether they qualify as contracts, or any evidence of implied contracts or implied in law contracts in the record which is a Finding that is prerequisite to a ruling for unjust enrichment. Otherwise stated, "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 Lochthowe v. C.F. Peterson Estate, (2005 N.D. 40 ¶¶ 9-10). 692 N.W.2d, 120, Syversen v. Hess, (2003 N.D.118, ¶ 11), 665 N.W.2d23.

Smestad testified that that she was to finance an addition to Harris' home for Harris providing extensive remodeling and landscaping projects at her home, the home of her brother Duane Welk, and extensive work for her relative's four-plex properties. She also testified that Harris allegedly promised to repay funds provided to him as alleged loans without offering any witness, documentation or other evidence to corroborate this claim. All of Smestad's and Harris' witnesses and testimony concurred that the work had been done by Harris and subcontractors over a fourteen month period from July 2007 until October 2008. All witnesses agree that Harris supervised the work and provided

direct labor to the projects every day under Smestad's direction and funding. There are no factually disputed issues in this synopsis.

The parties to this action are Smestad and Harris. There is no dispute regarding the parties to the action. In the Honorable Robert Wefald's Memorandum on page 5, paragraphs 2 and 3. (Appendix pg. 56) the Court acknowledges the claim that the Defendant's company Oasis was not a party in this case and therefore cannot be tried in this action.

The only issues in this Appeal before the Court are if the five criteria for unjust enrichment have been met by Smestad; if there are grounds for such a ruling; and whether or not the factually disputed issues and recently discovered new evidence merit a mistrial or a new trial in this matter to prevent injustice being done to Harris by Smestad breaching verbal contract with Harris for remuneration for work done to her family estates, and to bring lawful and equitable resolution to this case that Harris is entitled to after the four years of litigations initiated against him by Smestad.

The case has been before the Supreme Court previously, and the money Judgment was Reversed based upon the statute of frauds, but is again before the Court with the same monetary damages claimed that had been previously rejected by this Court under the newly named claim of unjust enrichment, and was improperly disposed of by the District Court making this second Appeal action a necessity. Smestad and counsel have had numerous legal remedies available to them, but failed to pursue them and cannot do so now by renaming a remedy not in their Complaint, and claiming they had no remedy available.

"A court has equitable jurisdiction to provide a remedy where none exists at law..., ...whenever the complaint sufficiently gives notice of the party's right to relief and demand for judgment pursuant to rule 8(a) N.D.R.Civ.P." (emphasis added) A&A Metal Buildings v. I-S, Inc. 274 N.W.2d183, pg. 10, ¶2, (N.D.1978) cited by the Honorable Judge Cynthia Feland on remand of this case as the **authority and standard of review** case in her Law and Decision (Appendix pg. 3-10, Order pgs. 4-8).

ISSUE NO. 1:

The trial court misapplied the law in considering the Law and Decision in the District Court Judgment rendered by the Honorable Cynthia Feland entered November 17, 2011 by allowing Plaintiff's (Smestad) claims under the doctrine of unjust enrichment when Smestad's Complaint does not include a claim for unjust enrichment; The District Court, twice, sua sponte included and joined Oasis Water Systems, Inc. (Oasis) as a party when it is not, while simultaneously holding the Defendant (Harris) liable for an alleged express verbal contract between Smestad and Oasis wherein payments were made to Oasis and Harris in Smestad's behalf (Appendix pg. 82, Transcript pg. 400-461) after Motion in Limine was granted by the Court (Appendix pg. 85 Transcript pg. 1-15) excluding Oasis as a party; and Smestad had alternative remedies available to her at all stages of these proceedings, but failed to employ them. From Wikipedia, the free encyclopedia, "In law, sua sponte (Latin: "of his, her, its or their own accord.") describes an act of authority taken without formal prompting from another party.

The term is usually applied to actions by a judge taken without a prior motion or request from the parties. While usually applied to actions of a court, the term may

reasonably be applied to actions by government agencies and individuals acting in official capacity. One situation in which a party might encourage a judge to move sua sponte occurs when that party is preserving a special appearance (usually to challenge jurisdiction), and therefore cannot make motions on its own behalf without making a general appearance. Common reasons for an action taken sua sponte are when the judge determines that the court does not have subject-matter jurisdiction or that the case should be moved to another judge because of a conflict of interest, even if all parties disagree." Carlisle v. United States, 517 U.S. 416 (1996). The District Court analysis, Findings of Fact and Conclusions of Law, the Court misapplied the law for unjust enrichment in that the five required criteria for an unjust enrichment ruling were not requested by Smestad nor met by Smestad as elaborated upon in this Brief.

ISSUE NO. 2:

The Order Denying Motion for New Trial (Appendix pg. 1-2) dated December 29, 2011 is a misapplication of the law for two conspicuous reasons:

A. The Motion for Relief and Motion for New Trial filed by Bruce G. Harris, Defendant/Appellant (hereafter Harris) was filed under N.D.R.Civ.P. Rule 60(b)(2) Motion Rule 60(b)(2) which clearly states in the Rule that "(b)Grounds for Relief from a final Judgment or Order" are "(1) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);" (Appendix pg. 3) (emphasis added).

B. The Court's Order Denying Motion for Relief and New Trial dated December 29, 2011, (Appendix pg. 1-2) fails to address the 59(b)(2) Rule that the Motion was

filed under. Instead the Court responds with an Order addressing Rule 59(b)(4) Motion, which was not included in Harris' 59(b)(2) Motion before the Court.

For these reasons the Motion was improperly disposed of by the Court by reasons given in the Order of "Harris has again failed to provide any evidence for the Court's consideration either in the form of sworn testimony or an affidavit." (Appendix pg. 2, ¶1). The requested new trial is the forum for the presentation of evidence such as affidavits and sworn testimony, which was clearly, particularly, and unambiguously identified in the Motion.

ISSUE NO. 3:

An unjust enrichment ruling is further barred by statute in the application of N.D.C.C. § 32-03-36, which states in part. "no person can recover a greater amount in damages for the breach of an obligation than the person could have gained by the full performance thereof.". Smestad has obviously breached her verbal agreement with Harris to finance an addition to his house (Appendix pg. 82, Transcript pgs.400-470) as her own testimony corroborates. The addition was valued at $50, 0000 according to her own testimony. No addition or funding thereof was ever provided to Harris as promised by Smestad.

ISSUE NO. 4

The District Court wrongfully disposed of this Civil Rule 59 Motion with an Order that parallels a Criminal Rule 33 (b)(1) Motion. A Civil Rule 60(b)(2) Motion or a Rule 59(b) Motion referenced in the Motion filed by Harris neither require "sworn testimony" or "an affidavit" (Appendix pg. 1-2) at the time of filing. The requested new trial is the form and venue for testimony and affidavits, if any affidavits are required.

Likewise, the case cited by Smestad's counsel Charles Isakson (hereafter Isakson), is Johnson v. Johnson, (2001 ND 109, ¶ 6), 627 N.W.2d, 779, a marital property division case, in which the trial court erroneously awarded a party a new trial. This cite is irrelevant to this express verbal contract case under the Rule 60(b)(2) Motion filed. The Johnson award of new trial was later reversed by the Supreme Court and Remanded to the District Court for further proceedings because of a misapplication of the law by the District Court, as in the instant case. Harris' Motion for New Trial was therefore wrongfully disposed of.

ISSUE NO. 5:

IF the Criminal Rule 33(b)(1) Order Denying Motions for Relief and New Trial is affirmed, Appellant Harris alleges that in the interest of justice, this case be Remanded, and Harris be afforded the opportunity to file an Amended Motion tailored to the response provided by the Court and file "sworn testimony or an affidavit" as suggested by the Judge, and further Amend the Motion to included newly discovered evidence stated in the Motion to include all N.D.R.Civ.P. Rules 59 (b) (1),(5),(6),(7),(8), in the Amended Motion. Harris hereby moves the Supreme Court to issue a mandate in this matter and Remand for New Trial for presentation of new evidence to address the allegations of fraud and deceit introduced in the Motion for New Trial by Harris.

The only logical supposition that can be made by review of The Honorable Cynthia Feland's Judgment is that she mirrored the previous ruling and amount without further consideration to the mandate from the Supreme Court "for determination whether Smestad has requested equitable relief against Harris that now should be considered by the court." (Appendix pg. Supreme Court Judgment pg. 5 ¶ 4). This Judgment does not

authorize or imply that the District Court should make a ruling on this determination on it's own accord or sua sponte, it specifically says for a determination by the Court to determine if Smestad has requested it. In her Complaint Smestad requests such other and further relief as the Court deems just and equitable just as Harris does in his Answer and Counterclaim. This is standard wording that can in Complaints, Answers, Counterclaims. Replies, and numerous other Court filings. It is inequitable to reverse on behalf of the prevailing party on Appeal, and remand to address the non-prevailing party's claims suffering from lack of foundation and inadequate filing of their suit.

STATEMENT OF CASE

1.) Smestad and Harris were involved in verbal contracts with each other.

2.) Smestad for repayment of alleged loans made to Oasis, Harris, and several other parties alleged by Smestad to be to Harris' enrichment.

3.) Smestad owes Harris a $50,000 payment (Appendix pg. 82, Transcript pgs. 200-470) for an addition to his house she agreed to and breached contract on.

4.) Smestad filed a suit that fell short in merit for an award and is excluded from doing so by the statute of frauds.

5.) Smestad has filed a frivolous suit and has manufactured evidence to attempt to support it, which has failed to do so.

6.) Smestad is now attempting to obtain an award under the theory of unjust enrichment which is not included in her suit.

This case was filed against Bruce G. Harris, personally, by Smestad in the form of a Complaint dated February 5, 2009, Filed August 17, 2009, a claim for the amount of $112,067.39 Appendix pg. 43) after a Demand to file Complaint was filed by Harris after

nine months of threatening to do so by Smestad. Nine months is ample time to prepare a proper and comprehensive Complaint including all anticipated relief sought.

The Complaint does not contain a claim for unjust enrichment. The claim did include a claim for business related funds, which were disallowed by the Court as the business was not a party to the suit (Appendix pg. 100). The Complaint alleged fraud which was not a finding by the Court. The claim included personal property items which Harris provided receipts for and proof of ownership for each and every item listed.

Smestad claimed false statements were made by Harris to law enforcement, but that was not a finding of the Court either. The filing occurred only after Smestad made contact with each and every personal friend, family member, and business associate known to Harris in the Bismarck/Mandan and North Caroloina area, defaming him to all.

In addition, Smestad made several internet postings further defaming Harris by making false and unfounded statements. She further filed a false complaint with the ND Secretary of State regarding Harris operating a business in which a two year investigation by them concluded that Harris was operating his business legitimately, and two years after repeated requests from Harris, identified Smestad as the party filing the false complaint.

If this were not enough, Smestad then wrote a letter (Appendix pg.68) to Harris' ex-wife in North Carolina terrorizing her and Harris' children by telling them he was going there to kill them. Smestad even went so far as to appear in North Carolina in that case, which was voluntarily dismissed for lack of any evidence of the threat, and Harris' ex-wife after paying thousands of dollars to litigate the case, was found in Contempt of Court for failing to let him see his children for over a year, and during a Christmas visit

Harris was entitled to by Court Order in North Carolina. Harris then filed a Disorderly Conduct Restraining Order in North Dakota, and Smestad continued contact with Harris' ex-wife thereafter.

The last item addressed in the Plaintiff Smestad's Trial Brief was the cite from Red River Wings v. Hoot, Inc., 751 N.W.2d 206. (2008 N.D. 117) which asserts an "alter ego doctrine" in an attempt to include Harris' corporation as a party, which was also rejected by the Court as the corporation was not named as a party.

In summary, Smestad has filed a claim for which no relief is available. which by law qualifies as a frivolous claim. Smestad is attempting to include unjust enrichment to her claim and relitigate an issue missed in her Complaint, which claim was introduced for the first time on the first Supreme Court Appeal. which is also barred.

STATEMENT OF THE FACTS

There are no lawful grounds for an unjust enrichment ruling in this case because the five point criteria required for such a ruling has not been met Ritter, Laber, and Assoc. V Koch Oil, Inc., (2004 N.D.117), 68 N.W.2d 634 ¶26, Lord & Stevens, Inc. v. 3D Printing, Inc., (2008 N.D. 189), 756 N.W.2d, 789 ¶ 9. Smestad had remedies available to her. but failed even upon Remand to pursue them. It has not been properly established that Smestad was impoverished, that Harris was enriched, or that the impoverishment and enrichment could be related. Smestad never claimed to be impoverished and therefore that is not a fact that the Court can rely upon, or determine without it being in the record. The Wefald Memorandum acknowledges Harris' justification for the "enrichment" was justified by Smestad providing the funds mostly for remodeling her home and the Welk and Krebsbach landscapes.

ARGUMENT

The ruling is made as a matter of law, "Although the findings of fact and conclusions of law should be stated with sufficient specificity to assist us and afford us a clear understanding of the trial court's decision. we understand from the findings the factual basis for the trial court's determination, the findings are adequately specified." Schneider v. Klein544 N.W.2d, 176, ¶2. Specific findings are difficult, if not impossible when discovery rules are not followed, and new, unannounced exhibits and witnesses appear at trial as was the tactic employed by Smestad in the District Court.

Had the Plaintiff cooperated in discovery we could have better prepared our case and marshaled our evidence. The purpose of open and mutual discovery is meant to be resolved amongst the parties and disclose what they have and let the court know they have received everything they requested. That is not what happened in this case. Laches [negligence or delay in doing something, especially in pursuing a legal claim] were present in the onset of this action, and continue today in the form correcting false statements made to the Court by Plaintiff's counsel.

The District Court has "misinterpreted or misapplied the law" Grager v. Shudar, 770 N.W.2d692, (2009 ND 140 ¶ 3) through a proposed Judgment dated November 8, 2001 (Burleigh County Case Summary, Index #69) (Appendix pg. 11) authored by Smestad's counsel which was not served upon Harris by Smestad as is required. The Burleigh County Court Administrator Donna Wunderlich was notified by Harris and was unable to explain why Harris had not been served and afforded an opportunity to respond to the Proposed Judgment. or this matter would not be on Appeal. Harris was notified by

publication on the Supreme Court as is evidenced by Harris' Defendant's Affidavit of Service by Publication (Burleigh County Case Summary Index #75) (Appendix pg.11)

Rule 52(a), N.D.R. Civ. P "We have said that conclusory [convincing, but not to the extent that it cannot be contradicted], general findings of fact which merely state that a party has failed to meet its burden of proof are inadequate under Rule 52(a), N.D.R. Civ. P" the trial court's finding that a party "failed in its burden" of proof with very little additional explanation did not comply with Rule 52(a)]; trial court's dismissal of case with an order stating that the plaintiff "failed to carry the burden of proof" was insufficient" Schneider vs. Klein. "A trial Court's findings should be stated with sufficient specificity to enable a reviewing court to understand the factual basis for the trial court's decision In RE: Griffey, 652 N.W.2d, 351, (2002 N.D.160 ¶8).

CONCLUSION

The Supreme Court has previously heard this matter and has not made a ruling that Smestad had no remedy at law as Judge Feland stated in her Order. Judge Feland fails to demonstrate where Smestad has requested equitable relief against Harris that now should be considered, she didn't even after being afforded the exclusive ability to request a hearing or new trial. The Supreme Court specifically give Judge Feland the authority to Order a new trial, and Harris properly and timely requested on which was improperly denied by Judge Feland.

No court should base a judgment on improperly introduced and unsupported evidence. No court should examine two parties bank record evidence and conclude that one is more credible than another for any reason. No court should overlook obvious

evidence of fabricated records simply because an officer of the court stated that they weren't. That is what has occurred in this case.

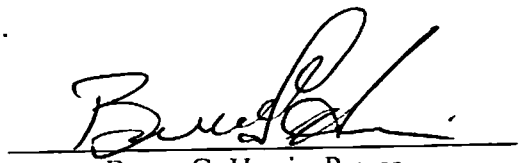
The only conclusion that can be drawn is that The Honorable Judge Robert Wefald based his decision upon "over forty years of judging" (Appendix pgs.56-64) as stated in his Memorandum, Findings of Fact, Conclusions of Law, which is not a basis in law for a $30,025 judgment. Judge Feland should not be allowed to just follow suit, she is required to address the allegations of fraud and deceit alleged by Harris in this case, and at minimal hear the specifics of the allegations out fully.

The rulings by both Wefald and the Honorable Cynthia Feland are both conclusory in nature, and are unsupported by fact, preponderance of evidence, and without merit. The suit filed by Smestad is an action for which no relief is available, and is therefore a frivolous suit, and Harris is entitled to reimbursement of attorneys fees for Smestad's failed suit under N.D.R.Civ. P. Rule 11, and any other and further relief as the Court deems just and equitable including a finding for unjust enrichment which Harris specifically included in his Counterclaim.

The Supreme Court should Reverse the inappropriate findings to as far as extent as the law allows, and Remand this case for New Trial as properly motioned to the District Court by Harris. The Remand should be in a different venue for an impartial Trial where Plaintiff's counsel is not a Judge in the District, the inclusion of all evidence, and a ruling based upon all evidence, and conclusion to matters of law repeatedly presented by Harris, and to bring closure to Harris's long continued open issues stated herein. The Plaintiff and attorney should be sanctioned for forgoing the outlined civil and discovery processes as presented to the courts. Attorney's fees for their flagrant disregard of the law

should be awarded Defendant and future sanctions for noncompliance should be outlined in accordance with N.D.R.Civ.P. Rule 37 in the Remand by the Supreme Court.

Dated this 21st day of February 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	)	Supreme Court Case No. 20100216 Morton County Case No. 09-C-00648
vs.	)	
Bruce G. Harris Defendant and Appellant	)	**AFFIDAVIT OF SERVICE AND FILING**

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

I, Bruce G. Harris, Defendant/Appellant, depose and swear that on this 22nd day of February, 2012 eight true and correct copy of the **APPELLANT'S BRIEF** in the above entitled matter, were hand delivered to the ND Supreme Court, and an electronic copy was sent via e-mail to both the North Dakota Supreme Court and to Charles Isakson, attorney of Plaintiff/Appellee. Additionally, one hard copy was mailed U.S. Postal Service Certified Mail to Charles Isakson at 103 South 3rd Street, 2nd Floor, Bismarck, ND 58501.

Dated this 22nd day of February, 2011.

Bruce G. Harris
Pro-se
PO Box 2652
Bismarck, ND 58502-2652

Subscribed and sworn to before me in this County of Morton, State of North Dakota, this 22nd day of February, 2012.

Notary Public

JASON BAYER
Notary Public
State of North Dakota
My Commission Expires Nov. 9, 2017