

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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City of Fargo, a political subdivision of the  
State of North Dakota,

Plaintiff-Appellee,

vs.

Karen C. Wieland,

Defendant-Appellant.

**Supreme Court No.: 20200100**

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APPEAL FROM THE MEMORANDUM ORDER DATED FEBRUARY 25, 2020,  
ARISING OUT OF KAREN C. WIELAND'S MOTION FOR PAYMENT OF  
JUDGMENT TOGETHER WITH INTEREST ACCRUING THEREON AND  
MOTION FOR ATTORNEY FEES DATED JANUARY 14, 2020

CASS COUNTY DISTRICT COURT, EAST CENTRAL JUDICIAL DISTRICT  
HONORABLE JOHN C. IRBY PRESIDING

CASS COUNTY CIVIL NO. 09-2017-CV-01047

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**BRIEF OF APPELLEE CITY OF FARGO**  
**Oral Argument Requested**

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## **I. STATEMENT OF ISSUES**

[¶1] Whether, after entering the Judgment and Mandate of the ND Supreme Court Affirming the 2019 Judgment, Amended Judgment and Final Order of Condemnation, the district court properly denied Appellant Karen C. Wieland's (hereinafter "Wieland") motion for payment of judgment, post-judgment interest thereon and motion for attorney's fees for bringing the motion dated January 14, 2020.

[¶2] Whether post judgment interest accrues on judgment amounts deposited with the court after a jury verdict in an eminent domain action pursuant to N.D.C.C. § 32-15-29.

## **II. STATEMENT OF THE FACTS**

### **A. 2019 Proceedings.**

[¶3] This is Wieland's third appeal in the eminent domain process the City of Fargo pursued to acquire, for permanent flood protection, the real property she formerly owned at 4033 Copperfield Court South in Fargo, North Dakota. (hereinafter "the property"). *Brandt and Wieland v. City of Fargo*, 2018 ND 26, 905 N.W.2d 764; *City of Fargo v. Wieland*, 2019 ND 286, 936 N.W.2d 55.

[¶4] In her 2019 appeal, Wieland challenged, among other things, the district court's grant of the City's partial summary judgment motion regarding the elements of N.D.C.C. § 32-15-05 and the district court's grant of a final order of condemnation, including post judgment interest issues. *Wieland*, 2019 ND 286, 936 N.W.2d 55; *Doc ID# 47, 2019 Notice of Appeal*. Wieland asserted therein that she was entitled to post judgment statutory interest on the deposited Judgment amounts. *See, Appellant's Brief in Supreme Court Case No. 20190153*, ¶ 15 ("Is a landowner entitled to post judgment statutory

interest?"). This Court affirmed the Judgment of the district court in its entirety and entered its mandate. *Wieland*, 2019 ND 286, 936 N.W.2d 55, and App. 63 (Judgment/Mandate).

[¶5] Wieland had raised the issue of post judgment interest in the district court multiple times prior to the 2019 appeal. *See, Doc ID# 430: January 4, 2019 Brief in Support of Motion for Award of Attorney Fees, Costs & Reserved Issues*, ¶ 6, (asserting that after the resolution of her motion for costs "...money judgment interest accrues on the entire money judgment amount."); *Doc ID# 469: Landowner Response in Opposition to Request for Order of Final Condemnation Authorizing the City to Take Possession Under N.D.C.C. § 32-15-29*, ¶¶ 4-5, *Wieland's Post Judgment interest calculation on Judgment and Amended Judgment*; ¶ 11, (the deposit of monies "... which includes accruing post-judgment interest until the litigation is concluded."; ¶13, (" ...first there must be payment to, or deposit of, all required monies, to include post-judgment interest...."). The district court noted in its Final Order of Condemnation that it "...received and considered the response of the defendant landowner to the request for final order of condemnation" but did not adopt Wieland's post judgment interest position. *App. 41-43*, ¶ 6. Wieland did not move for relief from the Final Order of Condemnation in the district court pursuant to N.D.R.Civ.P. 60 to pursue her claim of post judgment interest.

**B. Deposit of Judgment and Amended Judgment amounts pursuant to N.D.C.C. § 32-15-29.**

[¶6] The Judgment on Jury Verdict was signed and entered on January 15, 2019. *App.23- 24*. The City deposited the Judgment on Jury Verdict amount of \$850,000 with the court on January 16, 2019 at 11:53 a.m. *App.27*. The motion for costs and attorney's fees was decided and an Amended Judgment on Jury Verdict entered on March 13, 2019, increasing the judgment amount by \$89,044.32. *App. 31-34 (Order for Judgment) and App.*



36-37 (*Judgment*). The amended judgment amount included pre-judgment interest on the verdict amount from the date of the jury verdict (taking) to the date the funds were deposited. *App.* 37. The City deposited the amended judgment amount into the court on March 13, 2019. *App.* 40. The City deposited the Judgment and Amended Judgment amounts into the court pursuant to N.D.C.C. § 32-15-29. *App.* 24, ¶ 3 and *App.* 37, ¶ 4.

**C. 2020 Proceedings.**

[¶7] On January 14, 2020, Wieland, renewed her claim for post judgment interest at the statutory rate of 8.5 percent. *App.* 64, ¶ 1. Specifically, she claimed entitlement to post judgment interest on the Judgment on Jury Verdict amount of \$850,000 from January 15, 2019 to March 13, 2019 and post judgment interest on the Amended Judgment amount of \$939, 044.32 from March 13, 2019 to “date.” *Id.* and *App.* 111, ¶ 4. Wieland also sought attorney fees for bringing the post-appeal post judgment interest motion. *App.* 64, ¶ 2 and *App.* 111, ¶ 5. The district court denied Wieland’s motion in its entirety citing the suspension of interest accrual by payment, the law of the case doctrine and the mandate rule. *App.* 105-110, ¶¶ 3, 4-12.

[¶8] On March 24, 2020 Wieland appealed to this Court seeking post judgment interest on the Judgment amounts deposited with the district court pursuant to N.D.C.C. § 32-15-29 and attorney’s fees she incurred in bringing the motion for post judgment interest in the district court. *App.* 111. Despite the pending appeal, on March 31, 2020, the district court entered its order releasing the deposited funds to Wieland upon her request. *App.* 117. The request for the deposited funds was made on April 6, 2020. *App.* 118.

[¶9] On April 8, 2020, the City filed a motion with this Court, pursuant to N.D.R.App.P. 27(f), to dismiss the appeal with a supporting brief. Wieland filed a brief in opposition thereto. This Court determined it would consider the motion to dismiss and the

response with the merits of the appeal. (*April 24, 2020, Email to Counsel from Supreme Court Clerk*).

### **III. STANDARD OF REVIEW**

[¶10] This appeal challenges an order denying a motion for post judgment interest, and attorney's fees incurred in making the motion, following a previous eminent domain appeal in which this Court affirmed, in its entirety, the judgment of the district court.

[¶11] The standard of review for issues of law is de novo. *Stockman Bank of Montana v. AGSCO, Inc.*, 747 N.W.2d 516, 518 (N.D. 2008). Issues regarding interpretation and application of law are fully reviewable on appeal. *Wilkins v. Westby*, 2019 ND 186, ¶ 6, 931 N.W.2d 229. The primary goal in interpreting statutes is to ascertain the intent of the legislature. *Id.* Interpretation of a statute must be consistent with legislative intent and done in a manner which will accomplish the policy goals and objectives of the statutes. *Id.*

### **IV. LAW AND ARGUMENT**

#### **A. The Memorandum Order Denying Wieland's Motion for Payment of Judgment Together with Post Judgment Interest Accruing Thereon and Motion for Attorney's Fees should be affirmed.**

[¶12] In light of this Court's prior affirmance of the district court decision in *City of Fargo v. Wieland*, and the mandate it issued after the time for a petition for re-hearing had expired, the district court's denial of Wieland's Motion for Payment of Judgment Together with Post-Judgment Interest Accruing Thereon and Motion for Attorney's Fees was appropriate. *See, Wieland*, 2019 ND 286, 936 N.W.2d. 55. The district court's Memorandum and Order is properly affirmed. *App. 105-110 (February 25, 2020 Order Denying Wieland's Motion)*. Oral argument would be helpful given the lengthy history of

this litigation and interplay of facts and law at issue in the appeal and in the pending motion to dismiss.

**1. The District Court Properly Reviewed Wieland’s Post-Appeal Motion for Post Judgment Interest and Fees in Light of the Decision and Mandate of the Supreme Court.**

[¶13] The rationale for the district court’s denial of Wieland’s Motion for post judgment interest and fees is contained in its Memorandum Order. *App. 105-110*. The 2020 denial of post judgment interest is consistent with the district court’s 2019 Final Order of Condemnation in which it considered Wieland’s argument for post judgment interest but was not persuaded by it. *App. 106, ¶ 3 (Order denying Motion for Costs); App. 42, ¶ 6 (Final Order of Condemnation); and Doc ID# 469: Landowner’s Opposition to Request for Final order of Condemnation, ¶¶ 4-5, 11, 13*. Wieland’s post-appeal motion asked the district court to re-write the Judgment and Mandate of this Court to add post judgment interest and attorney fees for making that motion. *App. 51-63*. The district court properly declined to do so.

[¶14] Appellate court mandates must be strictly followed. The United States Supreme Court affirmed a Circuit Court’s decree stating, “... the Circuit Court can only record our order and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established.” *Durant v. Essex Company*, 101 U.S. 555, 556 (1879). As in the instant matter, the result of the appeal in *Durant* was an affirmance of what had been done in the court below. After appeal had been taken, the power of the court below over its own decree was gone. All it could do after that was to obey the Supreme Court’s mandate when it was sent down. *Id.*

[¶15] This Court’s mandate imposed similar restrictions on the district court whose judgment it affirmed. A district court is required to follow the decision of the

Supreme Court and enter judgment accordingly. It has no right to add or subtract from such judgment. *Wallace v. Workmen Comp. Bureau*, 293 N.W. 192, 195 (N.D. 1940). Where the mandate of the Supreme Court disposed of all the matters in controversy, the district court had no discretion and was required to enter a judgment in compliance with the decree of the Supreme Court. *Id.* (citing *Patterson Land Co., et al. v. Lynn*, 199 N.W. 766 (N.D. 1924)).

[¶16] In *Johnston Land Co.*, a request for costs and fees was made in the district court after the Supreme Court's decision on appeal remanding a portion of the district court's decision. *Johnston Land Co., LLC v. Sorenson*, 2019 ND 165, ¶ 12, 930 N.W.2d 90. In the second appeal, the Supreme Court determined the district court had exceeded the scope of the first mandate by granting the fee and cost request. *Id.* In reversing the lower court award on the second appeal, the Supreme Court noted that the request for fees could have been made before the first appeal. *Id.*

[¶17] Similarly, Wieland could have, and in fact did, raise the post judgment interest issue in the district court. *See Doc ID# 455: Responsive Legal Brief – Attorney's Fees, Costs and Disbursements, Award of Reserved Issues*, ¶¶ 16-19; *Doc ID# 469: Landowner Response in Opposition to Request for Final Order of Condemnation Authorizing the City of Fargo to Take Possession Under N.D.C.C. 32-15-29*, ¶¶ 4, 11, 13; However, the district court was not persuaded by Wieland's post judgment interest arguments when she raised them prior to the first appeal. *Doc ID# 470: Final Order of Condemnation*, ¶ 6. This Court affirmed the district court's Judgment on appeal and issued its mandate. Importantly, this Court did not remand any issues back to the district court.

As a result, Wieland's current appeal from the Order denying her motion for post judgment interest and attorney's fees is another attempt to circumvent the mandate rule.

[¶18] This Court affirmed the district court's Judgment in its entirety on the first appeal. This Court could have remanded with instructions to the district court if it had found there had been a mistake or if it had determined that there was an unresolved issue. However, this Court did not remand with instructions to address an unresolved issue nor did it remand to correct a mistake. This Court sent the matter back to the district court directing it to do nothing more than allow taxation of the City's costs and disbursements. *App. 63 (Judgment, ¶ 4)*. The City waived those costs and disbursements. *Doc ID# 482: Waiver*. The district court lacked the authority to do anything other than file the Supreme Court's mandate consisting of its Opinion and Judgment, which it did. *App. 51-62 (Opinion) and App. 63 (Judgment)*. Simply put, when the Supreme Court affirmed the district court's Judgment in its entirety, its mandate did not permit any modification of the Judgment. The district court properly denied Wieland's Motion because it had no authority to alter this Court's mandate.

## **2. The Deposited Judgment Amounts Constitute Just Compensation.**

[¶19] The jury's verdict awarded Wieland \$850,000 for the market value of her property. There is no dispute that the City deposited the entire Judgment on Jury Verdict amount with the district court on January 16, 2019. *App. 27*. There is no dispute the City also deposited the entire Amended Judgment amount, which included pre-judgment interest from the date of the taking (December 6, 2018) until January 16, 2019, along with court approved costs, a statutory displacement amount pursuant to N.D.C.C. § 54-01.1-04 as well as moving expenses pursuant to N.D.C.C. § 54-01.1-03 and attorney's fees. *App. 37, ¶ 3 (Amended Judgment Chart)*. The City paid pre-judgment interest added to the costs

and fees awarded to Wieland in the Amended Judgment. If the calculations included an error or an omission, Wieland's remedy was to have pursued a Motion pursuant to N.D.R.Civ.P. 60 in the district court prior to her first appeal. She did not do so.

[¶20] The district court correctly rejected Wieland's continuing post judgment interest argument. *App 106: February 25, 2020 Memorandum and Order*, ¶¶ 3-4. Wieland is not entitled to any post judgment interest on the Judgment and Amended Judgment amounts the City deposited with the Court in January and March 2019 in this eminent domain proceeding. Post judgment interest is not an element of damages, but is a statutory award for delay in the payment of money actually due. *RGR, LLC v. Settle*, 764 S.E.2d 8, 28, *fn 14* (Va. 2014). Here the Judgment amounts were deposited before the City obtained the property through the Final Order of Condemnation. *See, Doc ID# 470: Final Order of Condemnation*. There was no delay of payment in this case to warrant the accrual of post judgment interest.

[¶21] This Court has determined that a party has the power to suspend the accrual of interest while an appeal is pending by tendering the amount of the original judgment into the court. *Gonzales v. Tounjian*, 2004 ND 156, ¶ 16, 684 N.W.2d 653, *citing Dick v. Dick*, 434 N.W.2d 557, 559 (N.D. 1989). Pursuant to N.D.C.C. § 32-15-26, the City deposited with the Clerk of Court each judgment amount on the day of, or the day after, each judgment's entry. *App. 27 (receipt) and App. 40 (receipt)*. Those funds were available to Wieland. The City cannot be penalized for her decision to refuse those funds because she believed she had to do so in order to appeal.

[¶22] The language of N.D.C.C. § 28-20-34 indicates post judgment interest accrues only on unpaid judgments. It specifically contains a reference to its applicability

to unpaid child support obligations. *N.D.C.C. § 28-20-34 (emphasis added)*. Post judgment interest continues to accrue only on unpaid installments of child support. *Darling v. Gosselin*, 1999 ND 8, ¶9, 589 N.W.2d 192 (*emphasis added*). A judgment bears an interest rate from the date of its original entry ... until paid. *Geier v. Tjaden, et al.*, 84 N.W.2d 582, 583 (N.D. 1957) (*emphasis added*). An obligor has the power to suspend the accrual of interest on a judgment by “tendering the amount of the original judgment into the court.” *Gonzalez*, 2004 N.D. 156, ¶ 16, 684 N.W.2d 653. Despite Wieland’s arguments to the contrary, North Dakota law clearly provides that no post judgment interest accrued in this case because the Judgment and Amended Judgment amounts were properly paid into the court. In citing a partial quote from *Swanson v. Flynn*, for the proposition that post judgment interest is an “obligation implied or imposed by law,” Wieland omitted important language. *Swanson v. Flynn*, 31 N.W.2d 320, 323 (N.D. 1948). The *Swanson* court limited the application of post judgment interest accrual stating, “It is generally recognized that interest allowed for *nonpayment* of judgments is in the nature of statutory damages...” *Id.* (*emphasis added*). Unlike the facts in *Swanson*, the City paid the entire amount of the original Judgment and Amended Judgment by depositing the funds with the court on January 16, 2019 and March 13, 2019.

### **3. Wieland’s Reliance on Decisions from other Jurisdictions is Misplaced.**

[¶23] Wieland supports the argument that she is entitled to post judgment interest as part of just compensation in the instant eminent domain case by relying almost exclusively on caselaw from other jurisdictions. This reliance is misplaced as the cases do not support her argument that post judgment interest accrues on the deposited eminent domain judgment amounts in this case.

[¶24] At least three of the federal cases she relies on state that interest may be appropriate when the taking occurs before payment and that the taking and payment should be contemporaneous. *U.S. v. Thayer West Point Hotel Co.*, 329 U.S. 585, 400 (1947); *Phelps v. U.S.*, 274 U.S. 341, 344 (1927); *Seaboard Air Line Ry Co. et al v. U.S.*, 261 U.S. 299, 306 (1923). Payment is the key word, not receipt. It should be noted that Wieland was awarded pre-judgment interest for the period of time between the jury verdict (taking) and the Judgment and the Amended Judgment. Also, the City made payment through deposit as required by the Judgment and Amended Judgment. See, *Wieland*, 2019 ND 286 ¶ 28, 936 N.W.2d 55. The City did not obtain the property until after the Final Order of Condemnation following a court trial, a jury trial and payment of the judgment amounts. “If the government pays the owner before or at the time the property is taken, no interest is due on the award.” *Kirby Forest Industries, Inc v. U.S.*, 467 U.S. 1, 10 (1984). The Kirby Court determined the landowner failed to show its interests were impaired in any constitutionally significant way before the government tendered payment and acquired title and because the award was paid on the date of taking, no interest was due thereon. *Id.* at 15. There simply was no delay in payment in this case. Finally, *Giese v. Transmission Co. LLC* involved another state’s interpretation of its own specific eminent domain post judgment interest statute and the impact of the parties’ cross-appeals, thus it is factually dissimilar from the instant case. *Giese v. Transmission Co. LLC*, 853 N.W.2d 564 (Wis. 2014). Even so, the *Giese* court determined that post judgment interest accrues only when the judgment required to be paid is not paid. *Id.* at 573-574. Finally, Wieland’s reference to *Pugh Coal Co. v. State*, for justification of pre-judgment interest as part of just



compensation is unnecessary since the City paid all pre-judgment interest awarded in the Amended Judgment. *Pugh Coal Co. v. State*, 460 N.W.2d 787, 792.

[¶25] Eminent domain proceedings in North Dakota, other than a “quick-take” procedure, which is not at issue in this matter, do not allow the condemning authority to take the land after depositing an estimate of its value with the court. Yet the cases Wieland cites in her brief are predominantly cases in which the condemning authority does just that and are, therefore, wholly unpersuasive.

[¶26] There is no support for Wieland’s position in *People v. Loop*, 161 Ca. App. 2d 466 (Ca. 1958). In that case, decided under an earlier eminent domain statute, the Department of Public Works took possession of property sought to be condemned pursuant to court order and kept possession until the eminent domain trial resulted in a jury verdict one year later. *Id.* at 469. The property owners received an increases property valuation after appeal. *Id.* at 470-471. The court awarded post judgment interest during the pendency of the appeal because defendants could not take the deposited funds without giving up their right to appeal the valuation of the property “and thus surrendering the possibility of an increased award.” *Id.* at 478. *See, Wieland Brief*, ¶ 38. The court allowed post judgment interest, because benefits awarded landowners “were put in jeopardy” by their appeal since compensation awarded in the new trial may have been lower than that in the first trial. *Id.*

[¶27] Unlike the Loop property owners, Wieland always had the right to appeal the jury verdict Judgment amount AND remove the deposited funds under N.D.C.C. § 32-15-29. There was never any risk to Wieland’s jury award because, while she appealed the issue of increased compensation based on post judgment interest, she never appealed the jury’s valuation of her property. In light of the City’s full deposit of the Judgment and

Amended Judgment amounts, and the affirmance of those Judgments on appeal, there is no justification to award post judgment interest in the instant case.

[¶28] The case of Alloway v. City of Nashville, is also too factually dissimilar to be of any persuasive value. Alloway v. City of Nashville, 13 S.W. 123 (Tenn. 1890). The eminent domain process allowed the condemning authority to take the property after the “jury of view” assessed the damages. Id. at 123, 127. The landowners appealed the “jury of view” “report” of value, obtained a circuit court trial and jury verdict which increased the value of the property. Id. at 123. The landowners moved the circuit court to add interest before judgment on the verdict was entered but the motion was denied. Id. at 127. On appeal, interest was awarded because the City of Nashville had not deposited the “jury of view” report amount, with interest and costs added, for a year after the taking and the amount deposited was more than \$2,000 less than the amount determined the trial jury. Id. at 127. In contrast, the City of Fargo deposited the full Judgment and Amended Judgment amounts immediately, so there was no partial payment or partial tender and no delay in payment.

[¶29] The Florida eminent domain process at issue in Hartleb v. Department of Transportation is also dissimilar to North Dakota’s, so the case is distinguishable. Hartleb v. Dept. of Transportation, 778 S. 2d 1063 (Fla. 2001). Florida’s eminent domain process allows the condemning authority to deposit an estimate of value and obtain a court order permitting the taking before judgment is entered. Fla. Stat. § 72.031; § 74.051; § 74.061. In the Hartleb case, Fla. Stat. § 73.131 required that the landowner’s appeal be dismissed if he withdrew deposited funds. Id. at 1064. The Hartleb court, using Florida’s general post judgment interest statute Fla. Stat. § 55.03, allowed the landowner interest from the date

of the judgment to the date he withdrew the funds. *Id.* at 1064. In addition, Florida law specifically allows post judgment interest in eminent domain actions “...at the same rate as provided in all circuit court judgments....” *Fla Stat § 74.061*. Because North Dakota’s eminent domain statutes do not allow a condemning authority to take possession until after the value of the property has been determined by a jury and deposited with the court, another state’s interpretation of its vastly different process is not helpful. Additionally, unlike Florida, North Dakota’s eminent domain statute does allow the withdrawal of deposited funds when an appeal includes compensation issues. *N.D.C.C. § 32-15-29*.

**4. No Post Judgment Interest Accrued on January 15, 2019.**

[¶30] In affirming the district court’s Final Order of Condemnation in Wieland’s 2019 appeal, this Court determined that the City complied with the requirement of *N.D.C.C. § 32-15-25* “by its deposits into court on January 16 and March 13, 2019.” *App. 10, ¶ 28; App. 27 (Receipt), and App. 40 (Receipt)*. Wieland first raised her claimed entitlement to one day of post judgment interest in her post-appeal motion. Wieland alleges that she was entitled to post judgment interest for one day because the City did not deposit the \$850,000 judgment amount on the same day Judgment was entered. *Appellant’s Brief, ¶ 37*. Wieland is simply wrong.

[¶31] The City received the court’s electronic “Notification of Documents Filed” the morning of January 15, 2019, advising that the Order for Judgment and Judgment had been entered. The City prepared and electronically submitted a Notice of Entry of Order for Judgment and Judgment shortly thereafter on January 15, 2019. *App. 19-24*. The court clerk received the City’s deposit of the Judgment amount of \$850,000 at 11:53 a.m. the next day, January 16, 2019. *App. 27 (Receipt)*. No post judgment interest accrued on the Judgment date of January 15, 2019, because the day of the triggering event is not counted.

*N.D.R.Civ.P. 6(A)(1)*. This rule applies when computing any time period specified in any rule, court order or statute that does not specify a method of computing time. *Id.* The time in which any act provided by law is to be done “is computed by excluding the first day and including the last...” *N.D.C.C. § 1-02-15*. Fractions of a day are to be disregarded in computations which include more than one day and involve no question of priority. *N.D.C.C. § 1-01-33*. No post judgment interest accrued on the \$850,000 deposit between the entry of Judgment and date of deposit.

**5. No Post Judgment Interest Accrued on Costs, Fees and Disbursements Because the Amounts were Unknown until the Amended Judgment was Entered.**

[¶32] To bolster her claim that the City failed to fully pay the amount of the Judgment on Jury Verdict when it deposited the \$850,000 Judgment amount on January 16, 2016, Wieland argues that the City should have contemporaneously deposited the amount of her requested costs and fees that it did not intend to challenge. *Appellant’s Brief*, ¶ 37. Wieland filed her motion for costs and fees on January 4, 2019 pursuant to Local Rule 3.2. *Doc ID# 428*. The City was entitled to 14 days under that rule, or until January 18, 2019 to file its response to the motion. *Doc ID# 452: City Objections to Motions for Attorney’s Fees, Costs Disbursements and Reserved Issues*. The City had every right to challenge costs, fees and requests on the reserved issues and to await the resolution of those requests through the entry of an amended judgment. The Amended Judgment awarding costs and fees was not entered until March 13, 2019. *App. 31-34*. Until the Amended Judgment awarding costs, fees and statutory amounts was entered, they were not “awarded” pursuant to *N.D.C.C. § 32-15-32*.

[¶33] Without that Amended Judgment having been entered, there could be no accrual of prejudgment interest on those undetermined amounts. “If damages are by their

nature incapable of exact determination, both in time and amount, prejudgment interest is not an item of recovery.” *City of Bryant v. Boone*, 564 S.W.3d 550, 554 (Ark. App. 2018). Until the Amended Judgment awarding costs, disbursements, statutory amounts for moving, displacement and attorney fees was entered on March 13, 2019, the exact amounts were unknown and no post judgment interest could accrue thereon. Even after the Amended Judgment was entered on March 13, 2019, no post judgment interest could accrue thereon because the City deposited the full amount of the Amended Judgment on the same day it was entered. *App. 40 (Receipt)*. Wieland’s assertion that the City’s deposit of the amounts specified in the Judgment and Amended Judgment were insufficient is wholly without merit.

**B. Amounts Deposited Satisfied North Dakota’s Constitution and Eminent Domain Statutes Making Post Judgment Interest Inappropriate.**

[¶34] North Dakota’s Constitution states that private property shall not be taken for public use *without just compensation having been first made to, or paid into court for the owner. N.D. Const. Article 1, Section 16. (emphasis added)*. North Dakota requires a court trial to determine compliance with N.D.C.C. § 32-15-05, followed by a jury trial (if one has not been waived) to determine “the value of the property sought to be condemned.” *N.D.C.C. § 32-15-22(1)*. The words “value of the property” in that section of the statute mean its fair market value. *City of Hazelton v. Daugherty*, 275 N.W.2d 624, 627 (N.D. 1979). The right to compensation “shall be deemed to have accrued at the date of the taking and its actual value at that date shall be the measure of compensation for all property actually to be taken....” *N.D.C.C. § 32-15-23*. The time of the taking is to be determined by the court. *Id.* Only after a final judgment is entered on the jury’s verdict as to value, does the condemning authority deposit the amount so determined. *N.D.C.C. § 32-15-25*.

This Court has already determined that the City paid the Judgment amounts. Wieland, 2019 ND 286, ¶ 28, 936 N.W.2d 55.

**1. Neither N.D.C.C. Ch. 32-15 nor N.D.C.C. § 28-20-34 Provide for Post Judgment Interest on Deposited Judgment Amounts.**

[¶35] N.D.C.C. Ch. 32-15 does not specifically provide for post judgment interest. It does not address whether a landowner's appeal, or motion for a new trial, in lieu of accepting deposited judgment funds, requires the condemning authority to pay post judgment interest during the pendency of that appeal or new trial. Wieland, 2019 ND 286, ¶ 29, 936 N.W.2d 55. But no post judgment interest is warranted in this case because there was no delay in payment and, because Wieland's 2019 appeal sought, among other things, an award of post judgment interest to increase her claimed just compensation. Thus, the deposited funds were available to her without abandoning her defenses or waiving her right to appeal.

[¶36] While N.D.C.C. § 32-15-32 gives the district court discretion to award pre-judgment interest, there is no provision for continuing interest on judgment amounts paid into court under N.D.C.C. § 32-15-29. The legislature could have added a provision that specifically provided for post judgment interest for judgments on jury verdict amounts deposited with the court in eminent domain cases during the time a landowner pursued a challenge other than one for greater compensation. But, tellingly, the legislature did not do so. It is presumed the drafters of North Dakota's eminent domain statutes intended all that they said, and they said all that they intended to say. Disciplinary Action against Feland, 2012 ND 174, ¶ 21, 820 N.W.2d 672 (citations omitted). When the Code is silent on a particular issue, the common-law then prevails. Traynor Law Firm v. State of North Dakota, 2020 ND 108 ¶ 10, \_ N.W.2d \_ . A statute will be construed as a continuation of

the common law and will not exclude the common law on that part of the subject not covered by statute. *Reeves & Co. v. Russell*, 148 N.W. 654 (N.D. 1914). Evidence of the common law is found in the decisions of the courts. N.D.C.C. § 1-01-05.

[¶37] The lack of a specific eminent domain statutory post judgment interest provision means that there is no special post judgment interest treatment for judgments entered on jury verdicts in eminent domain cases. The general post judgment interest statute specifically references the unpaid nature of some child support amounts. N.D.C.C. § 28-20-34. Only if a judgment amount is unpaid during an appeal does it accrue interest from the date of its original entry. *Dick v. Dick*, 434 N.W.2d 557, 559 (N.D. 1989)(*an appellee has the ability to tender the amount of judgment into court to stop the accrual of post judgment interest while an appeal is pending*). Like any other judgment debtor, a condemning authority that has paid its judgment obligation into court as permitted by N.D.C.C. § 32-15-29 must be entitled to the same rights that permit any judgment creditor to suspend the accrual of interest on a judgment by tendering the amount of the judgment into court. *Gonzalez*, 2004 ND 156, ¶ 16, 684 N.W.2d 653, ¶ 6.

**2. Wieland’s 2019 Appeal Sought Greater Compensation Which Permitted the Withdrawal of Deposited Funds Without Waiver of Appeal Rights.**

[¶38] N.D.C.C. § 32-15-29 provides that payment to the defendant landowner of the judgment amounts deposited with the court shall:

“...be held to be an abandonment by such defendant of all defenses interposed by the defendant, except the defendant’s claim for greater compensation.”

N.D.C.C. § 32-15-29 (*emphasis added*). The statute does not limit this provision to the jury’s market value determination. Instead it specifically broadens its applicability to claims for “greater compensation.” Wieland asserts that she could not take the deposited

funds without waiving her civil right to appeal. *Appellant's Brief*, ¶ 35. This assertion belies the fact that her 2019 appeal sought post judgment interest as part of her claimed “just compensation.” *See, Doc ID #478, Notice of Appeal and Appellant's Brief in Supreme Court Case No. 20190153*, ¶ 15. If a landowner seeks a new trial, or appeals, because she maintains greater compensation is owed, she may receive the deposited judgment amount without abandoning her defenses. *See, N.D.C.C. § 32-15-29*.

[¶39] In addition, the eminent domain statutes provide the opportunity for pre and post judgment interest if warranted by a new judgment following appeal. “Any money which shall have been deposited, as provided in N.D.C.C. § 32-15-29, shall be applied to the recovery upon a new trial and the remainder, if there is any, shall be returned to the plaintiff. *N.D.C.C. § 32-15-34*. If the appeal, or new trial, results in a new judgment, the question of pre-judgment interest on an increased amount can be addressed pursuant to N.D.C.C. § 32-15-32. And, if payment is delayed after the new judgment is entered, the applicability of post judgment interest can be addressed pursuant to N.D.C.C. § 28-20-34. If compensation is not increased following appeal, no post judgment interest is warranted. Wieland could have withdrawn the funds and pursued her appeal which included the issue of greater compensation. She did not withdraw the funds and she did not prevail on appeal. There is no justification for post judgment interest on the deposited Judgment amounts.

[¶40] Moreover, a provision allowing the accrual of post judgment interest on eminent domain judgments deposits during landowner appeals of non-compensation issues is unnecessary and imprudent. The purpose of the eminent domain chapter “indicates that all the issues shall be tried and determined as quickly as possible.” *State ex. rel. Northern States Power Co. v. Teigen*, 80 N.W.2d 110, 113 (N.D. 1956). A specific statutory provision



which allows the accrual of post judgment interest when a landowner challenges non-compensation issues may encourage appeals because there would be no risk of a reduced award (as there is when the compensation amount is appealed). If such a post judgment interest provision existed, even landowners who do not prevail on their appeals of non-compensation issues would receive more money simply through the accrual of interest brought on by the landowner's own choice to delay. A landowner who avails himself of his right to have his claims judicially determined must bear a burden of litigation. Feltz v. Central Nebraska Public Power & Irrigation District, 124 F. 2d 578, 585 (8<sup>th</sup> Cir. 1942). Pending appeal, the landowner may have to go without either his land or his money, and if his litigation is unsuccessful, there is no compensation by way of interest. Id. Indeed, Wieland, who did not prevail on the appeal of any of her issues, asserts she is entitled to \$218 dollars a day since March 13, 2019. *Appellant's Brief*, ¶ 37. There is no justification for such a post judgment interest award.

[¶41] A specific statutory provision for post judgment interest on appeals of non-compensation issues is unnecessary because if an eminent domain judgment is reversed on non-compensation issues, thereby wholly undoing the underlying eminent domain process, the landowner would get a new trial or the return of the property. If the property is not available to be returned, the landowner would have an inverse condemnation action for damages against the condemning authority (above what had previously been deposited with the court). In that scenario, if the inverse condemnation damages are greater than the amounts previously deposited, interest may be available.

[¶42] But where, as here, the landowner's appeal of both compensation and non-compensation issues resulted in absolutely no change to the district court's Final Order of

Condemnation, and no change to the Judgment and Amended Judgments, there is no basis to award post judgment interest. Wieland previously acknowledged, “The deposit of the money probably terminates Defendant Wieland’s right to claim interest on that deposited amount (thinking/writing equitably) ...” and “While she may not accept the jury award without waiving her appeal issue(s), the City cannot pay anything less than the jury award PLUS statutory interest until paid (or possibly deposited under N.D.C.C. § 32-15-26....” *Doc ID# 455: January 23, 2019, Wieland Responsive Legal Brief on Attorney’s fees, Costs and Disbursements*, ¶¶ 16, 19. Even with that acknowledgement, Wieland appealed the Judgment and Amended Judgments in part in an attempt to obtain greater compensation through post judgment interest. *Doc ID# 478: Notice of Appeal in Supreme Court Case No. 20190153*. She could have withdrawn the deposited funds without waiving any appeal right. She chose not to, at least in part, because she did not want to waive the accruing interest on the Judgments. *Appellants Brief*, ¶ 37. Wieland initiated the appeal and caused delay in this litigation. She is not entitled to post judgment interest.

**3. When there is No Delay in Payment of Eminent Domain Judgments, “Just Compensation” Does Not Include Interest.**

[¶43] Once a jury has determined the property’s value, the condemnor must be allowed to discharge its obligation by payment into court and the amount deposited constitutes a fund which is a substitute to the landowners for the land, of which they have been deprived, and for their damage. *Central Nebraska Public Power and Irrigation District v. Fairchild*, 126 F.2d 302, 307 (8<sup>th</sup> Cir. 1942). In eminent domain cases, “just compensation” awarded to the landowner only includes interest necessary to compensate for any delay in payment after the condemning authority has taken possession of the property. *Miller v. U.S.*, 620 F.2d 812, 839 (Ct. Cl 1980). A landowner is not entitled to

interest when the condemning authority pays the full amount into court contemporaneously with the taking, but the landowner refuses the award in order to pursue an appeal which is ultimately unsuccessful. *City of Sac City v. Bentsen*, 329 N.W.2d 675, 677 (Iowa 1982).

[¶44] When the postponement of the actual compensation award is attributed entirely to the landowner who pursues a meritless appeal, due process does not entitle a landowner to interest. *Id.* at 678; *See also*, N.D.C.C. § 31-11-05(11). The full property valuation as of the date of the taking, with pre-judgment interest, as well as attorney's fees, statutory costs and disbursements were deposited with the court over one year ago. Wieland exercised her right to appeal, including the greater compensation post judgment interest issue, which meant she did not need to choose between an appeal or withdrawal of funds. Wieland's unsuccessful appeal delayed her withdrawal of deposited funds. Post judgment interest on the deposited Judgment amounts is not appropriate.

**4. Wieland had the Opportunity to Place the Deposited Funds in an Interest-Bearing Account.**

[¶45] The applicable statutes regarding payment of deposits into court in eminent domain cases are N.D.C.C. § 32-15-25; N.D.C.C. § 32-15-26; N.D.C.C. § 32-15-27 and N.D.C.C. § 32-15-29. N.D.R.Civ.P. 67(b) gives the district court authority, upon request, to place such funds in an interest-bearing account pending the outcome of the litigation. Here, there is no dispute that the deposited Judgment and Amended Judgment funds belong to Wieland, so Ch. 32-11 does not apply. Nonetheless, N.D.R.Civ.P. 67 provides a litigant with an opportunity to ask the court to place the deposited funds in an interest-bearing account. Wieland did not seek that opportunity.

## V. CONCLUSION

[¶46] The district court properly applied the rule of the case doctrine and the mandate rule in denying Wieland's motion for payment of judgment with interest and fees. The City had the right to stop the accrual of post judgment interest by depositing the Judgment amounts with the court. No North Dakota statute or caselaw supports Wieland's claim to post judgment interest on the deposited Judgment amounts in this matter.

[¶47] The City of Fargo respectfully requests that the Court grant its Motion to Dismiss the appeal. Alternatively, the City requests that the district court's Memorandum and Order denying Wieland's motion for payment of judgment with interest and fees be affirmed and that she be allowed neither post judgment interest nor attorney fees.

Dated this 22nd day of May, 2020.

/s/ Jane L. Dynes

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**CERTIFICATE OF COMPLIANCE**

Pursuant to N.D.R.App.P. 32(a)(8)(a), the undersigned, as attorney for Appellee City of Fargo and as the author of this Brief, hereby certifies that the total number of pages of the above Brief, excluding this certificate of compliance and the following certificate of service, is **28** pages.

Dated this 22nd day of May, 2020.

*/s/ Jane L. Dynes*

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**City of Fargo**

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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City of Fargo, a political subdivision of the  
State of North Dakota,

Plaintiff-Appellee,

vs.

Karen C. Wieland,

Defendant-Appellant.

**Supreme Court No.: 20200100**

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**CERTIFICATE OF SERVICE**

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I hereby certify that on May 22, 2020, the following:

**BRIEF OF APPELLEE CITY OF FARGO**

was filed electronically with the Clerk of the Supreme Court through the Supreme Court E-Filing Portal system for electronic service through the E-Filing Portal system upon the following:

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**GARAAS LAW FIRM**  
**garaaslawfirm@ideaone.net**

Dated: May 22, 2020

/s/ Jane L. Dynes

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