20220257
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CLERK OF THE SUPREME COURT
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

David Kutcka, individually; The Estate of Austin D. Dejno, by and through Tammy Dejno, as its duly-appointed personal representative; and Tammy Dejno, individually, as wrongful Death plaintiff,	)	**Supreme Court Case No. 20220257**
Appellants,	)	**MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE BY STATE OF NORTH DAKOTA BY AND THROUGH WORKFORCE SAFETY AND INSURANCE**
vs.	)	
Gateway Building Systems, Inc.,	)	
Appellee.	)	

[1] Pursuant to N.D.R. App. P. 29(a), State of North Dakota, by and through Workforce Safety and Insurance, through its undersigned counsel, respectfully moves this Court for leave to participate as *amicus curiae* to provide an explanatory brief in the above captioned proceeding. In support of this Motion the State of North Dakota states as follows:

[2] The State of North Dakota has an appropriate interest in this matter and in filing an explanatory brief. Workforce Safety and Insurance, an administrative agency of the State of North Dakota, manages and regulates an exclusively employer financed, no-fault workers' compensation system in North Dakota which covers workplace injuries, illnesses, and deaths. In this capacity, the State of North Dakota has an interest in ensuring that legal matters, litigation and appeals uphold and follow North Dakota workers' compensation laws.

[3] The State of North Dakota has an interest in the above-captioned matter because Workforce Safety and Insurance is statutorily required to classify employments, establish premium rates, bill and collect premiums, and enforce the provisions of Title 65 of the North Dakota Century Code to ensure fair and equitable contributions to the workforce safety and insurance fund among all employers.

[4] The State of North Dakota has an interest in the above captioned matter because Workforce Safety and Insurance is required to determine whether an individual is employee for purposes of the Workers Compensation Act, whether the employer has paid the appropriate premium for the employee, and/or whether an employer is "uninsured" under N.D.C.C. § 65-01-02(34) for failure to pay premium, assessment, penalty, or interest.

[5] The determination of the employee/employer relationship by Workforce Safety and Insurance determines whether N.D.C.C. § 65-04-28 applies to the employer, an issue in this appeal.

[6] A significant question in the appeal of this action is the interpretation, application and intent of N.D.C.C. § 65-04-26.2, a statute Workforce Safety and Insurance is charged with applying in the collection of premiums. Under N.D.C.C. § 65-04-26.2, Workforce Safety and Insurance may proceed to collect premium and penalties from a general contractor and subcontractor of an independent contractor or subcontractor that does not secure the required coverage. This Court gives "deference to an administrative agency's construction of a statute in administering the law when that interpretation does not contradict clear and unambiguous statutory language." Industrial Contractors, Inc. v. Workforce Safety and Insurance, 2009 ND 159 ¶ 6, 772 N.W.2d 582.

Therefore, it is important that the Court understand the construction and application of N.D.C.C. § 65-04-26.2 by the State of North Dakota by and through Workforce Safety and Insurance.

[7] The decision from which this appeal is brought construed and applied N.D.C.C. § 65-04-26.2. That decision, if affirmed, would have profound consequences on premium collection process and the rights of subrogation under N.D.C.C. § 65-01-09. Accordingly, the State of North Dakota believes its input to the Court's analysis is relevant and desirable for consideration in the disposition of the case.

[8] Therefore, pursuant to N.D.R.App.P. 29(e), the proposed amicus brief of the State of North Dakota by and through Workforce Safety and Insurance is submitted to the Court.

[9] WHEREFORE, WSI requests that it be permitted to participate as amicus curiae in accordance with all applicable rules of the Court.

DATED this 30th day of November, 2022.

Respectfully submitted,

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

David Kutcka, individually; The Estate of Austin D. Dejno, by and through Tammy Dejno, as its duly-appointed personal representative; and Tammy Dejno, individually, as wrongful Death plaintiff,	)	**Supreme Court Case No. 20220257**
Appellants,	)	
vs.	)	
Gateway Building Systems, Inc.,	)	
Appellee.	)	

AMICUS CURIAE BRIEF OF THE STATE OF NORTH DAKOTA BY AND THROUGH WORKFORCE SAFETY AND INSURANCE

APPEAL FROM ORDER DISMISSING PLAINTIFFS' COMPLAINT DATED JULY 8, 2022, AND JUDGMENT OF DISMISSAL DATED JULY 18, 2022
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE REID A. BRADY

STATE OF NORTH DAKOTA

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INTRODUCTION

[1] Pursuant to N.D. R. App. P. 29(a)(3), the State of North Dakota by and through Workforce Safety and Insurance, respectfully submits its proposed Brief of Amicus Curiae regarding interpretation and application of N.D.C.C. § 65-04-26.2.

I. IDENTITY AND INTEREST OF AMICI.

A. Identity of Amici.

[2] Workforce Safety and Insurance, an administrative agency of the State of North Dakota, manages and regulates an exclusively employer financed, no-fault workers' compensation system in North Dakota which covers workplace injuries, illnesses, and deaths. Pursuant to statute, Workforce Safety and Insurance classifies employments, fixes the rate of premiums, calculates premiums due by employers, bills and collects premiums due, determines employer and employee status, and administers and enforces the requirements of N.D.C.C. ch. 65-04 to ensure fair and equitable contributions to the workforce safety and insurance fund.

B. Interest of Amici.

[3] This appeal raises issues pertaining to the exclusive remedy provision of the North Dakota Workforce Safety and Insurance Act, N.D.C.C. Title 65. Specifically, there are arguments made in the case relating to who is an employer for purposes of immunity from suit under N.D.C.C. § 65-04-28. The State of North Dakota believes it is necessary to file this Amicus Brief in order for the Court to understand the construction and application of N.D.C.C. § 65-04-26.2 advanced by Workforce Safety and Insurance to solely collect premiums from a subcontractor or independent contractor that "does not secure required coverage or pay the premiums owing."

[4] The purpose of this amicus brief is to outline for the Court the State of North Dakota's s interpretation and analysis of N.D.C.C. § 65-04-26.2, how the District Court's interpretation and analysis is contrary to that interpretation and application of that statute, and how affirmance of the District Court's interpretation would impact the State of North Dakota's ability to obtain reimbursement from negligent third parties under N.D.C.C. § 65-01-09.

C. Statement of Authorship and Contributions

[5] No party's counsel authored this Brief in whole or in part. No party's counsel, or any other person, contributed money that was intended to fund preparing or submitting this Brief.

II. LAW AND ARGUMENT

[6] David Kutcka ("Kutcka") was injured, and Austin Dejno ("Dejno") lost his life on December 6, 2019, in a workplace accident. (R2:2:7; R2:2:9) At the time of the workplace accident, both Kutcka and Dejno were employed by MC Mill Workers. (R99:1:5; R99:1:6) MC Mill Workers paid premiums to Workforce Safety and Insurance and had coverage in place for its employees at the time of this workplace accident. (R65; R99:1:4) Claims for benefits were filed with Workforce Safety and Insurance by both Kutcka and Dejno. (R105; R106) Those claims were accepted. (R71; R103) MC Mill Workers was acting as a subcontractor for Gateway Building Systems ("Gateway") on the project where the workplace accident occurred. (R73; R74; R99:2:8)

[7] This action was commenced against Gateway for the injuries sustained to Kutcka and the death of Denjo.[1] (R2) Gateway moved to dismiss the claims asserting it was the statutory employer of Kutcka and Denjo under N.D.C.C. § 65-04-26.2. (R60; R61) On July 8, 2022, the District Court, The Honorable Reid A. Brady, granted Gateway's Motion for Summary Judgment, holding as follows:

> To summarize, Plaintiffs were employees of Gateway's subcontractor and thus were also deemed employees of the general contractor Gateway under N.D.C.C. § 65-04-26.2(1). Further Gateway was compliant with N.D.C.C. ch. 65-04 and is therefore entitled to immunity from Plaintiffs' actions under N.D.C.C. § 65-04-28. Because Gateway is entitled to immunity under N.D.C.C. § 65-04-28, it is unnecessary to determine whether Gateway would also be entitled to immunity under N.D.C.C. § 65-01-08(1).

(R114:10:17) It is from this decision that this appeal originates.

[8] The District Court based its decision to grant summary judgment in favor of Gateway on its construction of N.D.C.C. § 65-05-26.2, specifically amendments to that statute made in 2019. On appeal, "[q]uestions of law, including the interpretation of a statute, are fully reviewable." Barnes v. Workforce Safety and Insurance, 2003 ND 141 ¶ 9, 668 N.W.2d 290. "The primary objective of statutory construction is to ascertain the intent of the legislature." Witcher v. North Dakota Workers Compensation Bureau, 1999 ND 225 ¶ 11, 602 N.W.2d 704, 708; Ash v. Traynor, 2000 ND 75 ¶ 6, 609 N.W.2d 96, 98. In doing so, courts look first to the language of the statute and give it its plain, ordinary, and commonly understood meaning. Baity v. Workforce Safety and Insurance, 2004 ND 184 ¶ 12, 687 N.W.2d 714, 717; Goodleft v. Gullickson, 556 N.W.2d 303, 306

[1]As a result of these claims, WSI would have a right of subrogation under N.D.C.C. § 65-01-09.

(N.D. 1996). Statutes are construed "as a whole to harmonize and give meaning to each word and phrase." Baity ¶ 12, 687 N.W.2d at 717; Witcher, ¶ 11, 602 N.W.2d at 78; Ash, ¶ 6, 609 N.W.2d at 99. In addition, "[t]he practical application of a statute by the agency enforcing it is entitled to some weight in construing the statute, especially where the agency interpretation does not contradict clear and unambiguous statutory language." Effertz v. North Dakota Workers Compensation Bureau, 481 N.W.2d 218, 220 (N.D. 1992); see also Smith v. North Dakota Workers Compensation Bureau, 447 N.W.2d 250 (N.D. 1989); Holtz v. North Dakota Workers Compensation Bureau, 479 N.W.2d 469 (N.D. 1992). See also Houn v. Workforce Safety and Insurance, 2005 ND 115 ¶ 4 (noting administrative construction of statute entitled to some deference).

[9] A statute is ambiguous when it is "susceptible to differing but rational meanings." Ash ¶ 6, 609 N.W.2d at 96, citing Werlinger v. Champion Healthcare Corp., 1999 ND 173 ¶ 44, 598 N.W.2d 820. "Although courts may resort to extrinsic aids to interpret a statute if it is ambiguous," it must "look first to the statutory language, and if the language is clear and unambiguous, the legislative intent is presumed clear." McDowell v. Gille, 2001 ND 91 ¶ 11, 626 N.W.2d 666, 671. "When the meaning of the statute is clear on its face, there is no room for construction." Baity ¶ 12, 687 N.W.2d at 718. As this Court has reaffirmed on numerous occasions:

> When a statute is clear and unambiguous it is **improper** for the courts to attempt to construe the provision so as to legislate that which the words of the statute do not themselves provide. Haggard v. Meier, 368 N.W.2d 539 (N.D.1985).

Haider v. Montgomery, 423 N.W.2d 494, 495 (N.D. 1988) (emphasis supplied). Accord: State v. Grenz, 437 N.W.2d 851, 853 (N.D. 1989); Schaefer v. North Dakota Workers

Compensation Bureau, 462 N.W.2d 179, 181 (N.D. 1990); Peterson v. Heitkamp, 442 N.W.2d 219, 221, 222 (N.D. 1989); State v. Beilke, 489 N.W.2d 589, 591 (N.D. 1992); Hayden v. North Dakota Workers Compensation Bureau, 447 N.W.2d 489, 496 (N.D. 1989). In addition, when a statute is clear and unambiguous, "the letter of it is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05; see Bjerke v. North Dakota Workers Compensation Bureau, 1999 ND 180, 599 N.W.2d 329.

N.D.C.C. § 65-04-26.2(1) provides as follows:

> An individual employed by a subcontractor or by an independent contractor operating under an agreement with a general contractor is deemed to be an employee of the general contractor and any subcontractor that supplied work to the subcontractor or independent contractor. A general contractor and a subcontractor are liable for payment of premium and any applicable penalty for an employee of a subcontractor or independent contractor that does not secure required coverage or pay the premium owing. The general contractor and a subcontractor are liable for payment of this premium and penalty until the subcontractor or independent contractor pays this premium and penalty. The liability imposed on a general contractor and a subcontractor under this section for the payment of premium and penalties under this title which are not paid by a subcontractor or independent contractor is limited to work performed under that general contractor.

The District Court's construction of N.D.C.C. § 65-04-26.2(1) would deem employees of a subcontractor employees of the general contractor for all purposes under Title 65, including immunity from liability under N.D.C.C. § 65-04-28. (R114:5:9) The District Court's analysis was that by operation of its subcontractor agreement "Gateway ensured that Plaintiffs' workforce safety and insurance premiums were covered (by MCMW) – an acceptable practice under N.D.C.C. § 65-04-26.2(1)." (Id.) The District Court's construction is not consistent with the State of North Dakota's construction and application of N.D.C.C. § 65-04-26.2(1).

[10] The State of North Dakota does not consider a general contractor to be the employer of employees of a subcontractor merely because there is a written subcontractor agreement that requires subcontractors to have workers compensation coverage in place. That alone is insufficient. Rather, a general contractor is deemed to be the employer of the employees of a subcontractor in the event the subcontractor "does not secure required coverage" or "pay the premiums owing" as set forth in N.D.C.C. § 65-04-26.2(1). The State of North Dakota utilizes N.D.C.C. § 65-04-26.2(1) as a compliance tool to impose liability on a general contractor for premiums and penalties of its subcontractors **only when** the subcontractor does not secure the required coverage or has not paid the required premiums. Furthermore, that liability attaches only as to "work performed under that general contractor" and "only until the subcontractor or independent contractor pays the premium and penalty."

[11] The application of this statute is illustrated in Brendel Construction, Inc. v. Workforce Safety and Insurance, 2021 ND 3, 953 N.W.2d 612. In Brendel, Workforce Safety and Insurance sought payment from Brendel, the general contractor, for unpaid premiums of two uninsured subcontractors. Id. ¶ 4. Brendel hired two subcontractors to perform work where Brendel was the general contractor. However, neither of the two subcontractors secured coverage from Workforce Safety and Insurance. After attempts to bring those uninsured subcontractors into compliance and pay premiums, Workforce Safety and Insurance sought payment from the general contractor, Brendel, for the premiums and penalties due from those uninsured subcontractors. In affirming the decision of the administrative law judge that heard Brendel's appeal of the Order holding it liable under N.D.C.C. § 65-04-26.2(1), this Court stated:

> Individuals employed by a subcontractor may be deemed to be the employees of a general contractor, and the general contractor may be held liable for any unpaid premiums and penalties associated with the subcontractor's failure to secure insurance coverage for those employees. N.D.C.C. § 65-04-26.2(1).

Brendel, 2021 ND 3 ¶ 17. In a subsequent appeal after remand as to one of the subcontractors, this Court reaffirmed that under N.D.C.C. § 65-04-26.2(1) "employees of a subcontractor may be deemed employees of a general contractor for purposes of determining unpaid workforce insurance premiums and penalties." Brendel Construction, Inc. v. Workforce Safety and Insurance, 2022 ND 10 ¶ 7, 969 N.W.2d 202. Both of these cases were decided under the 2019 version of N.D.C.C. § 65-04-26.2 which is the subject of this appeal. See Brendel, 2021 ND 3 ¶ 20.

[12] N.D.C.C. § 65-04-26.2(1), as construed and applied by the State of North Dakota, is a means to ensure compliance with Title 65. It is not enough for a general contractor to simply require, via its written agreement, that the subcontractor secure workers coverage for its employees. Rather, subcontractors must actually obtain coverage and pay the premiums to Workforce Safety and Insurance for those employees. This ensures there is coverage in place for workplace injuries for employees. If the subcontractor does not do so, liability attaches to the general contractor for the premiums and penalties owed for employees of the subcontractor. WSI's construction and application is consistent with the title of N.D.C.C. § 65-04-26.2 which is "General contractor **liability** for subcontractors and independent contractors." (Emphasis supplied.)

[13] There is nothing in this record to reflect that MC Mill Workers had not secured the required coverage or paid the premium owing to WSI. In fact, the record reflects otherwise – that MC Mill Workers had secured coverage for its employees

Kutcka and Dejno. (R65; R99:1:4) Therefore, the State of North Dakota would have no basis for seeking payment of premiums and penalties from Gateway under N.D.C.C. § 65-04-26.2, because its subcontractor MC Mill Workers, had the required coverage in place.

[14] "Title 65, N.D.C.C., is a legislatively created compromise for claims between injured workers and their employers." Plains Trucking, LLC v. Cresap, 2019 ND 226 ¶ 9, 932 N.W.2d 541. Under Title 65, "an employee 'gives up the right to sue the employer in exchange for sure and certain benefits for all workplace injuries, regardless of fault." Id. ¶ 10, quoting Trinity Hosps. v. Mattson, 2006 ND 231 ¶ 11, 723 N.W.2d 684. In concluding that Kutcka and Dejno were employees of Gateway for purposes of giving up their right to sue was based on the District Court's construction of N.D.C.C. § 65-04-26.2(1) and the legislative changes made in 2019 to the statute. Prior to the legislative changes made in 2019, N.D.C.C. § 65-04-25.2(1) stated as follows:

> An individual employed by a subcontractor or by an independent contractor operating under an agreement with a general contractor is deemed to be an employee of the general contractor if the subcontractor or independent contractor does not secure coverage as required under this title. A general contractor is liable for payment of premium and any applicable penalty for an employee of a subcontractor or independent contractor that does not secure required coverage. The general contractor is liable for payment of this premium and penalty until the subcontractor or independent contractor pays this premium and penalty. The liability imposed on a general contractor under this section for the payment of premium and penalties under this title which are not paid by a subcontractor or independent contractor is limited to work performed under that general contractor.

See R107 for reference to changes made from the 2017 to the 2019 version. The District Court's analysis discussed the change in language made by the legislature in 2019 and concluded that the amendment modified the definition of an employer for which

immunity under N.D.C.C. § 65-04-28 attaches. (R114:5:9) It was the District Court's analysis that because there was no limiting provision in N.D.C.C. § 65-04-26.2(1), its applicability was not limited to just that section. (R114:6:11) The District Court held that the second sentence in N.D.C.C. § 65-04-26.2(1) imposes liability for payment of premiums and penalties for a subcontractor that does not provide the required coverage. (R:114:6:10) Thus, the District Court's analysis takes the first sentence of N.D.C.C. § 65-04-26.2 and makes employees of a subcontractor those of the general contractor for all purposes under Title 65, with resulting immunity under N.D.C.C. § 65-04-28.

[15] In Trinity Hospitals, this Court discussed its construction of the "exclusive remedy provisions" including when the above-cited statutory language precludes employees from suing another business in tort. Id. ¶¶ 11, 12. In doing so, this Court reaffirmed what it had held in Cervantes v. Drayton Foods, L.L.C., 1998 ND 138 ¶ 6, 582 N.W.2d 2, that a "contributing employer" under N.D.C.C. § 65-01-08 "is the entity who pays the WSI premium to secure workers compensation coverage for the employee and, in turn, receives immunity form legal liability for injuries to the employee." Trinity Hospitals, 2006 ND 231 ¶ 12, citing Cervantes, 1998 ND 138 ¶ 9 (emphasis supplied). This Court acknowledged that N.D.C.C. § 65-01-08 had since been amended to provide both a client company and a staffing service are entitled to immunity when the workers compensation statutes have been met, but nonetheless, reaffirmed that Cervantes provided the "basic statutory framework for analyzing the parties claims in this case." Trinity Hospitals, 2006 ND 231 ¶ 12. The issue in Trinity Hospitals was whether the immunity extended to a related corporation of Trinity Health, who it was undisputed was a "contributing employer" having paid the premiums for workers compensation coverage.

Id. ¶ 13. In Trinity Health, it was unrefuted that Trinity Health paid the premiums for all employees in the Trinity Health System. Id. ¶ 19.

[16] In the case before the Court, only MC Mill Workers paid premiums for Kutcka and Denjo. (R65; R99:1:4) While Gateway had workers compensation coverage in place, they did not pay premiums to Workforce Safety and Insurance for Kutcka or Denjo. The District Court's analysis was that "Gateway ensured that Plaintiffs' workforce safety and insurance premiums were covered (by MCMW) – an acceptable practice under N.D.C.C. § 65-04-26.2(1)." (R114:5:¶9) The District Court's also noted that there was no assertion Gateway violated provisions in N.D.C.C. ch. 65-04 (R114:5:¶9) The District Court's construction is directly contrary to this Court's decision in Trinity Health, which construed the provisions relating to immunity from liability and reaffirmed that it is the entity that pays the premiums for the employees that is entitled to the immunity. In this case, therefore, the only entity that is immune from liability is MC Mill Workers.

[17] While the District Court compared the language between the prior and current version of N.D.C.C. § 65-04-26.2(1), the Court did not look to the legislative history of the changes to determine if, in fact, the legislature intended to make such a significant change to the definition of employer under the Act to include immunity under N.D.C.C. § 65-04-28. Nothing in the plain language of N.D.C.C. § 65-04-26.2(1), when read as a whole as is required for statutory construction, reflects the intent to cloak the general contractor with immunity from claims under N.D.C.C. § 65-04-28 when it does not in fact pay premiums, essentially overruling Cervantes and Trinity Hospitals. When looking at the entirety of N.D.C.C. § 65-04-26.2(1), nothing suggests that the legislature intended to alter Title 65 by expanding the applicability of the definition of employer and

grant immunity under N.D.C.C. § 65-04-28. See Zueger v. North Dakota Workers Compensation Bureau, 1998 ND 175 ¶ 9, 584 N.W.2d 530 (stating "[i]n ascertaining legislative intent, we look first to the language of the statutes **as a whole** . . .") In addition to making significant changes on who is an employer for purposes of immunity, the District Court's analysis would also eliminate the subrogation rights of the State of North Dakota in certain instances under N.D.C.C. § 65-01-09. The District Court acknowledged that some third party claims would be eliminated under its construction of N.D.C.C. § 65-04-26.2(1). (R114:9:¶16) "The consequences of a particular construction matter." Zueger, 1998 ND 175 ¶ 12, citing N.D.C.C. § 1-02-39(5).

[18] The District Court's analysis of N.D.C.C. § 65-04-26.2(1) concluded Gateway was entitled to immunity because the first sentence of the section makes the general contractor the employer of the employees of a subcontractor. Therefore, because Kutcka and Dejno were employees of Gateway's subcontractor, MC Mill Workers, under N.D.C.C. § 65-04-28, Gateway had otherwise complied with the provisions of Chapter 65-04, it is entitled to immunity in this suit. Clearly, the plain language of N.D.C.C. § 65-04-26.2(1) does not specifically state N.D.C.C. § 65-04-28 applies in this situation. WSI's construction of N.D.C.C. § 65-04-26.2(1) limits application of the employment relationship to that statute alone. If a statute is susceptible to differing but rational meanings, it is considered ambiguous, and the Court is to look to extrinsic aids to construe it. Medcenter One, Inc. v. North Dakota State Board of Pharmacy, 1997 ND 54 ¶ 13, 561 N.W.2d 634. Further, if adherence to a statute would lead to absurd or ludicrous results, a court may resort to extrinsic aids. Shiek v. North Dakota Workers Compensation Bureau, 2002 ND 85 ¶ 12, 643 N.W.2d 721.

[19] The legislative history to the 2019 amendments to N.D.C.C. § 65-04-26.2 reflects that change in language was to strengthen WSI's ability to "assess liability against a general contractor for the workers compensation debt of their uninsured subcontractors or independent contractors." 2019 H.B. 1072, Testimony of Anne Jorgenson Green before House Industry, Business and Labor Committee, Jan. 7. 2019. (R108:2) The amendments were not made to make employees of subcontractors the employees of general contractors for all purposes under the Workers Compensation Act. Rather, the legislative history goes on to confirm that the proposed changes were to address a specific issue identified during the application of this new statute implemented in 2017. The proposed amendments were intended to expand the ability of WSI to impose liability for premiums and penalties to subcontractors that also subcontract away parts of their work. These tiered subcontractors "must also be responsible for ensuring that those they bring onto the projects are insured with WSI." Id. The legislative history, therefore, confirms that the intent of the statute is to impose liability to general contractors and subcontractors for premiums and penalties if they bring a subcontractor onto a project that "does not secure required coverage or pay the premium owing." N.D.C.C. § 65-04-26.2(1). This has been how the State of North Dakota by and through Workforce Safety and Insurance has construed and applied N.D.C.C. § 65-04-26.2(1).

[20] Further, there is absolutely nothing in the legislative history to support expanding the application of the scope of the statute to make general contractors immune from suit. Based on the legislative history, this Court should reject the District Court's construction that extends immunity under N.D.C.C. § 65-04-28 to general contractors in a situation such as in the present case, effectively overruling this Court's construction of

Title 65 as to who is a "contributing employer" for purposes of immunity as outlined in Trinity Hospitals and Cervantes. See Zimmerman v. North Dakota Workforce Safety and Ins. Fund, 2010 ND 42 ¶ 13, 779 N.W.2d 372 (declining to add, amend or rewrite statute to provide benefits inconsistent with legislative history); Singha v. North Dakota State Board of Medical Examiners, 1998 ND 42 ¶ 20, 574 N.W.2d 838 (rejecting construction of a statute which would lead to a result not intended by the legislature).

[21] This Court has made clear that in enacting a statute, "[w]e presume the legislature did not intend an absurd or ludicrous result or unjust consequences, and we construe statutes in a practical manner, giving consideration to the context of the statutes and the purpose for which they were enacted." State v. Fasteen, 2007 ND 162 ¶ 8, 740 N.W.2d 60. N.D.C.C. § 65-04-26.2(1) has been utilized by the State of North Dakota, as intended under the above-cited legislative history, that being as a tool to assess liability against general contractors, and after the 2019 amendments, to subcontractors for workers compensation debt of uninsured subcontractors or independent contractors. (R108:2) There is no mention of granting immunity under N.D.C.C. § 65-04-28; no mention of eliminating a class of third party liability cases where WSI cannot seek subrogation under N.D.C.C. § 65-01-09; and no reference to who is primarily responsible for premiums when both the general and subcontractor are the employer of the employees under N.D.C.C. § 65-04-26.1(1). It is an absurd to believe that the legislature intended to create wholesale and dramatic changes to the workers compensation law as reflected in the District Court's analysis without some mention of or reference to such changes in the language of N.D.C.C. § 65-04-26.2(1) and the legislative history. Because none exist, the District Court's analysis is flawed and not in accordance with the law.

[22] Under the State of North Dakota's application, construction, and implementation of N.D.C.C. § 65-04-26.2(1), there is no basis for it to apply in this case. Gateway's subcontractor, MC Mill Workers had secured coverage and had paid premiums. (R65; R99:1:4) Accordingly, because N.D.C.C. § 65-04-26.2(2) does not apply here, none of the employees of MC Mill Workers, including Kutcka and Dejno, are employees of Gateway. Therefore, their claims against Gateway in this action are not barred by N.D.C.C. § 65-04-28.

III. CONCLUSION

[23] N.D.C.C. § 65-04-26.2(1) is an important and narrowly crafted tool to ensure general contractors and subcontractors who utilize other subcontractors or independent contractors are accountable for the action or inaction of their business partners. If the appropriate workers compensation coverage is not secured and paid, the State of North Dakota by and through Workforce Safety and Insurance is permitted to seek payment from the general contractor or subcontractor for the premiums and penalties of the uninsured subcontractor. The sole intent of N.D.C.C. § 65-04-26.2(1) is to deem a general contractor or tiered subcontractor an employer for purposes of collection of premium under the statute.

[24] The construction, application, and implementation of N.D.C.C. § 65-04-26.2(1) by the State of North Dakota is entirely consistent with that intent, as reflected in the legislative history. The District Court's construction and application of N.D.C.C. § 65-04-26.2(1), extending immunity to a general contractor is not in accordance with the law.

DATED this 30th day of November, 2022.

Respectfully submitted,

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Counsel for Amicus Curiae
State of North Dakota by and Through
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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Amicus Curiae, the State of North Dakota by and through Workforce Safety and Insurance, in this matter, and as the author of the above Brief, hereby certifies, in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, that the Brief of Amicus Curiae was prepared with proportional typeface and the total number of pages in the above Brief totals 21.

DATED this 30th day of November, 2022.

/s/ Jacqueline S. Anderson

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

David Kutcka, individually; The Estate of Austin D. Dejno, by and through Tammy Dejno, as its duly-appointed personal representative; and Tammy Dejno, individually, as wrongful Death plaintiff, **Appellants,** **vs.** **Gateway Building Systems, Inc.,** **Appellee,**	**Supreme Court No.: 20220257**

CERTIFICATE OF SERVICE

[1] I, Laurie A. Grimm, being duly sworn, deposes and says that I am of legal age and not a party to this action, and that I served the following document(s):

1. **Motion for Leave to Participate as Amicus Curiae By State of North Dakota by and through Workforce Safety and Insurance; and**
2. ***Amicus Curiae* Brief of the State of North Dakota by and through Workforce Safety and Insurance**

[2] On November 30, 2022, by sending a true and correct copy thereof by electronic means only to the following email address, to wit:

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[3] To the best of affiant's knowledge, the email addresses above given is the actual email addresses of the party intended to be served. The above document was emailed in accordance with the provision of the Rules of Civil Procedure.

[4] I further certify that a copy of the foregoing document will be mailed first class mail, postage paid, to the following non-E-filing participants:

N/A

[5] The address of each party served are the last reasonably ascertainable post office address of such party.

Laurie A. Grimm

Subscribed and sworn to before me this 30th day of November, 2022.

Notary Public

BRENDA JO BRUNELLE
Notary Public
State of North Dakota
My Commission Expires June 18, 2023