

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

SWMO, LLC, a North Dakota Limited Liability  
Company,

Plaintiff/Appellant,

vs.

Eagle Rigid Spans, Inc, the General Contractor;  
Mon-Dak Plumbing and Heating, Inc.; Ronald J.  
Koch d/b/a RK Electric; Creative Image  
Concrete, Inc., and all other persons unknown,  
claiming any estate or interest in, or lien or  
encumbrance upon, the real estate described in  
the complaint,

Defendants/Appellees.

Supreme Court No.: 20180407  
District Court Case No.: 53-2015-CV-  
00749

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ON APPEAL FROM THE FROM THE (1) ORDER GRANTING PARTIAL SUMMARY  
JUDGMENT TO RONALD J. KOCH, D/B/A RK ELECTRIC AND (2) ORDER GRANTING  
PARTIAL SUMMARY JUDGMENT TO MON-DAK PLUMBING AND HEATING, INC.,  
ENTERED IN THIS ACTION ON THE 20<sup>TH</sup> DAY OF MARCH, 2018, IN THE DISTRICT  
COURT, COUNTY OF WILLIAMS, CASE NO.: 53-2015-CV-00749, BY THE  
HONORABLE PAUL JACOBSON

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APPELLANT'S BRIEF

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## STATEMENT OF THE ISSUES

- [¶1] Whether the Court erred by granting partial Summary Judgment to Defendants, Ronald J. Koch d/b/a RK Electric and Mon-Dak Plumbing & Heating, Inc., allowing for release of funds from the undertaking of funds on deposit with the Clerk of Court when discovery in this matter was not completed and issues of fact were presented by SWMO in their responsive brief.
- [¶2] Whether the Court erred by granting partial Summary Judgment to Defendants, Ronald J. Koch d/b/a RK Electric and Mon-Dak Plumbing & Heating, Inc., despite several issues of fact that were presented by SWMO and not addressed by the Court in its decision, and wherein the Court's decision only acknowledged Co-Defendant, Eagle Rigid Spans, Inc., offered no opposition.
- [¶3] Whether the Court erred by granting partial Summary Judgment to Defendants, Ronald J. Koch d/b/a RK Electric and Mon-Dak Plumbing & Heating, Inc., when RK Electric and Mon-Dak could proceed with a breach of contract claim against Eagle Rigid Spans, Inc., despite there being no contract between SWMO and the general contractor's subs, Ronald J. Koch d/b/a RK Electric and Mon-Dak Plumbing & Heating, Inc.
- [¶4] Whether the Court erred by granting partial Summary Judgment to Defendants, Ronald J. Koch d/b/a RK Electric and Mon-Dak Plumbing & Heating, Inc., when Ronald J. Koch d/b/a RK Electric's only argument was unjust enrichment as against SWMO, despite RK Electric having a valid contract with Eagle Rigid Spans, Inc., and an adequate remedy at law.

[¶5] Whether the Court erred by granting partial Summary Judgment to Defendant, Ronald J. Koch d/b/a RK Electric, when further evidence was produced by Co-Defendant Eagle Rigid Spans, the owner, just days after the Court's decision, which showed fraud by general contractor Eagle Rigid Spans, Inc.'s employees, which affected the price of the bid from RK Electric.

## STATEMENT OF THE CASE

[¶6] Plaintiff, SWMO, LLC (“SWMO”), contracted with Defendant, Eagle Rigid Spans, Inc. (“Eagle”), to construct a building in Williston, North Dakota. Eagle, the general contractor, subsequently contracted with various subcontractors, including the Appellees, Ronald J. Koch, d/b/a RK Electric (“RK”) and Mon-Dak Heating & Plumbing Inc. (“Mon-Dak”), for electrical and plumbing services. Eagle’s efforts resulted in numerous and significant construction and structural defects unrelated to the work performed by RK and Mon-Dak. After repeated requests to correct the defects, Eagle abandoned construction prior to completion of the building. SWMO was left to complete the remainder of the building on its own and was unable to correct extensive structural and construction defects implicit throughout the building.

[¶7] SWMO withheld Eagle’s final payment after Eagle refused to fix the various construction defects. After withholding final payment, SWMO discovered that Eagle had failed to pay its subcontractors the amounts Eagle had previously attested had been paid. With the general contractor, Eagle, fully paid under the contract, RK and Mon-Dak filed liens against SWMO.

[¶8] SWMO brought suit against Eagle for breach of contract, as well as negligent construction and defective workmanship. The various lien holders were included in the suit, with RK and Mon-Dak filing cross claims against Eagle for breach of contract, and counter claims against SWMO for unjust enrichment. After bringing suit, and by stipulation, SWMO deposited the remaining stated contract price with the District Court pending resolution by the court. During the pendency of the suit, SWMO sold the real property and building at a discount. SWMO continued to pursue damages against Eagle for breach of contract.

[¶9] Despite having a contract with the general contractor, Eagle, and not having a contract with SWMO, both RK and Mon-Dak filed for Partial Summary Judgment requesting SWMO's deposited funds be released, since the electrical and plumbing/HVAC was not defective. The District Court granted Partial Summary Judgment to RK and Mon-Dak and released SWMO's funds to RK and Mon-Dak. At trial, the Court found that Eagle had materially breached the contract, misrepresented the amounts owed to its subcontractors, and awarded damages in the amount of \$262,154.21 to SWMO. After commencement of suit, but prior to trial, a large judgment attached to Eagle. Eagle now has a significant judgment ahead of SWMO. SWMO appeals the granting of Partial Summary Judgment releasing the deposited funds to RK and Mon-Dak while there were still issues of material facts and while the subcontracts could maintain breach of contract claims available against Eagle rather than pursuing this unjust enrichment against SWMO.

## STATEMENT OF FACTS

[¶10] Eagle, the vendor and general contractor, sells, erects and constructs its proprietary wood-span steel sided buildings to the public.

[¶11] On or about November 6, 2012, Eagle entered into written contract with SWMO to construct a completed building as specified, for \$1,320,507.00, plus or minus applicable change orders. Eagle was to be the General Contractor for the building. *See*, App. 140-145.

[¶12] Eagle, the general contractor, then contracted with RK and Mon-Dak to provide electrical and plumbing/HVAC services to the building.

[¶13] SWMO did not have a contract with either RK or Mon-Dak for the services provided to and on behalf of Eagle.

[¶14] Eagle falsely certified that the periodic amounts collected from SWMO were being timely and accurately paid to Eagle's subcontractors and tradesmen for the applicable percentage of work that had been completed. *See*, App. 129-134.

[¶15] Eagle failed to construct the building in a workmanship like manner, leaving the building with serious structural and construction defects. *See*, App. 129-134.

[¶16] SWMO made numerous written requests of Eagle to remedy the construction defects prevalent throughout the building. *See*, App. 129-134.

[¶17] Eagle failed to undertake good faith efforts to remedy or correct the defects. *See*, App. 129-134.

[¶18] After paying Eagle \$1,216,568 of the adjusted contract price of \$1,435,888, SWMO withheld final payment of \$219,320, until such time as Eagle remedied the structural and construction defects.

[¶19] Prior to SWMO withholding payment, Eagle had falsely certified to SWMO that RK had been paid \$120,000 of its total \$135,075 subcontract price, leaving only \$15,075, and Mon-Dak had been paid \$135,300 of its total \$205,941 subcontract price, leaving only \$70,641. *See*, App. 129-134.

[¶20] Despite the certification by Eagle to the contrary, RK claimed it was owed \$114,242. *See*, App. 87-97.

[¶21] Despite the certification by Eagle to the contrary, Mon-Dak claimed it was owed \$125,600. *See*, App. 63-69.

[¶22] Eagle refused or otherwise abandoned the project, leaving SWMO with an incomplete building replete with structural and construction defects. *See*, App. 129-134.

[¶23] RK filed a mechanics lien against SWMO's real property for the entire amount it claimed was due and owing.

[¶24] Mon-Dak filed a mechanics lien against SWMO's real property for the entire amount it claimed was due and owing.

[¶25] Both RK and Mon-Dak had a contract with Eagle for the services provided.

[¶26] On June 23, 2014, SWMO filed a Complaint against Eagle for breach of contract, negligence, defective workmanship, and a determination as to the actual contract price after disputed adjustments. *See*, App. 12-35.

[¶27] In the same Complaint, SWMO also brought Complaint against the various lien holders, including RK and Mon-Dak asserting, among other things, lack of contract. *See*, App. 12-35.

[¶28] In an effort to mitigate damages, SWMO entered into a contract to sell the land and the defective building to a neighboring third party.

[¶29] SWMO, on July 20, 2015, during the pendency of this action, entered an Amended Order Granting Appellant SWMO Leave to Deposit Funds into Court pending resolution in exchange for a release of the liens against the real property. *See*, App. 177-178.

[¶30] The Order provided that \$152,620 was deposited to secure the release of Mon-Dak's lien pending resolution of the issues at trial.<sup>1</sup> *See*, App. 177-178.

[¶31] The Amended Order for Leave to Deposit provided that \$124,242.32 was deposited to secure the release of RK's lien pending resolution of the issues at trial. *See*, App. 179-181.

[¶32] Mon-Dak filed an Answer with counterclaims against SWMO, as well as cross-claims against Eagle. *See*, App. 36-43.

[¶33] RK filed an Answer with counterclaims, as well as cross-claims against both Mon-Dak and Eagle. *See*, App. 36-43.

[¶34] Both Mon-Dak and RK subsequently moved for partial summary judgment, requesting that they recover their allotted portions from the undertaking of funds deposited with the Court. The Court granted both motions on March 20, 2018, and allowed for the release of funds to each RK and Mon-Dak.

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<sup>1</sup> \$10,235 of that deposit was ordered released to Mon-Dak pursuant to stipulation of the parties and is not disputed by SWMO.

[¶35] A bench trial was held May 29, 2018 through June 1, 2018. The Court's decision held, inter alia, that "pay applications were materially misrepresented as 'certified' true amounts paid to Eagle's subcontractors". The Court found that SWMO had overpaid on the contract price and awarded SWMO \$262,154.21 in damages. *See*, App. 129-134 and App. 135-136.

[¶36] This is an appeal from the two orders, one granting partial summary judgment to Mon-Dak (*See*, App. 126-128) and one granting summary judgment to RK (*See*, App. 123-125) both Judgments of the Northwest Judicial District, Williams County, North Dakota.

### **STANDARD OF REVIEW**

[¶37] Since these matters were decided by summary judgment, the standard of review for summary judgment is applicable. Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from the undisputed facts, or if the only issues to be resolved are questions of law. Clausnitzer v. Tesoro Ref. & Mktg. Co., 2012 ND 172, ¶7, 820 N.W.2d 665. (N.D. 2012). A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Richard v. Washburn Pub. Sch., 809 N.W. 2d 288 (N.D. 2011) ND 240, ¶9, 809 N.W.2d 288) (quoting Loper v. Adams, 2011 ND 68, ¶19, 795 N.W.2d 899 795 N.W.2d 899) (N.D. 2011).) If the moving party "meets its initial burden of showing the absence of a genuine issue of material fact, the party opposing the motion may not rest on mere allegations or denials in the pleadings but must present competent admissible evidence by affidavit or other comparable means to show the existence of a genuine issue of material fact." Barbie v. Minko Constr., Inc., 2009 ND 99, ¶P6, 766 N.W.2d

458 (N.D. 2009) (quoting Alerus Fin., N.A. v. Western State Bank, 2008 ND 104, ¶17, 750 N.W.2d 412750 N.W.2d 412 (N.D. 2008)).

## LAW AND ARGUMENT

**A. The Court erred by granting partial Summary Judgment to Defendants, Ronald J. Koch d/b/a RK Electric and Mon-Dak Plumbing & Heating, Inc., allowing for release of funds from the undertaking of funds on deposit with the Clerk of Court when discovery in this matter was not completed and issues of material fact were presented by SWMO in their responsive brief.**

**i. Summary Judgment motion by RK Electric**

[¶38] The summary judgment motion filed by RK involved amounts owed to them by Eagle, and involved a contract between RK and Eagle, as shown in more detail in their Answer with Counterclaims and Cross-claims. *See*, App. 36-43. Paragraphs 35 and 36 of RK's Cross-claims set forth the following:

“35. RK and Eagle contracted for RK to perform the electrical work on the subject property. RK has completed performance under the contract, including certain change orders approved by Eagle. Eagle has failed to pay RK all amounts due and owing under the contract, including the principal amount of \$114,242.32, as well as late payment charges accruing thereon as allowed by law. Eagle has breached its contract with RK and, thereby, RK has suffered damages.

36. Based upon the allegations of the Complaint, Eagle has committed actual fraud, constructive fraud, and/or deceit with respect to the contract between Eagle and RK, and the amount properly owed to RK. Eagle submitted billing statements, known as Project Activity Breakdown Sheets, when Eagle knew, or should have known, that the amounts attributable to RK

on such billing statements were false, all unbeknownst to RK. [*See, e.g.*, Doc ID #38 – Exh. W to Complaint.] Thereby, Eagle deceived the plaintiff and RK, and gained an advantage over RK. In June 2014, RK requested assurances from Eagle as to payment in order to continue with the project, as it had received less than half of the total contract price; Eagle indicated that it was having issues with the plaintiff holding up payments, but that Eagle would pay RK regardless. When RK discovered the discrepancy of the billing statements and questioned Eagle regarding them, Eagle assured RK that it was not a problem and that RK would be paid the amount owed to it, yet Eagle has refused to do so. On information and belief, Eagle falsified said information so as to retain additional monies to which it was not entitled, but rather, which belonged to RK, and did not otherwise intend to pay RK despite promising to do so.”

[¶39] Despite these cross claims against Eagle, vis-a-vis summary judgment, RK requested leave of court to release SWMO’s disputed funds that had been deposited into Court.

[¶40] Appellant SWMO responded by stating that it had no way of knowing what claims or amounts owed were accurate and what were disputed as between RK and Eagle with respect to these cross-claims and the allegations as they are set forth in the motion. There was evidence that Mr. Bruce Meidinger, principal of Eagle, previously set forth different amounts due and owing to RK in his “certified” payment applications, yet RK sought differing amounts. *See, App.* 70-79.

[¶41] Since SWMO did not have a contract with RK, SWMO did not and could not know what amounts had actually been paid by Eagle to RK. Eagle provided SWMO with deliberately misleading “certified” payment applications showing that the subcontractors had been paid significantly more money than what the subcontractor alleged it had received. In the interim, Eagle kept that money knowing that it had short-changed its subcontractors, including RK and Mon-Dak, both of which would eventually file liens to coerce payment over and above the true contract amount. When RK filed the motion for summary judgment, these amounts were unknown at best, and disputed at worst. In fact, these amounts were discussed at trial, which took place two months after the motion was granted. It became clear during the trial, and in the Court’s decision, that there were issues with the payments. In fact, the Court’s findings of fact state that Eagle “materially misrepresented as “certified” the true amounts paid to Eagle’s subcontractors.” Thus, it was premature for the Court below to grant summary judgment. *See*, App. 70-79.

**ii. Cross-Claims By RK As Against Eagle Rigid Spans**

[¶42] The cross-claims of RK are based on a “contract” between RK and Eagle. There was never a contact between the land owner, SWMO, and RK. SWMO was contractually obligated to pay Eagle, and only Eagle. Eagle deposited its money into court pending resolution of the disputed contract price. RK clearly had a claim for breach of contract against Eagle, who hired them to perform electrical services. SWMO disputed the amount owed Eagle and maintained it was not obligated to pay RK. RK clearly had an adequate remedy at law against Eagle for damages arising from breach of contract. RK, however, chose to pursue its remedy of unjust enrichment against SWMO, rather than its

contract damages against Eagle. The subcontract was referenced in RK's brief in support of the motion for summary judgment, but never provided as an exhibit. *See*, App. 87-97.

[¶43] RK also maintained claims of fraud against Eagle that were seemingly germane to the motion, but for some reason not pursued by RK and ignored by the Court in its decision. *See*, App. 87-97.

[¶44] Moreover, RK's cross-claims against Eagle assert serious allegations that relate to the amounts owed, and it is clear based on these allegations of fraud and deceit that the amounts owed to RK were certainly disputed. *See*, App. 87-97.

[¶45] The Court, when granting RK's motion, held that "*in review of the record and considering the briefs and documents filed in favor of and in opposition to the motion, there appears to be no real issue of material fact contrary to RK's assertion that it did the work on the project and it entitled to be paid for that work.*" *See*, App. 123-125.

[¶46] The Court's decision to grant partial summary judgment seemed to focus on the fact that the construction defects centered around the roof, walls and other aspects of Eagle's lack of performance, rather than the electrical work provided by RK (as well as Plumbing/HVAC provided by Mon-Dak). SWMO brought claims alleging that it had contracted for a more expensive three-phase electrical system throughout the building. It was ultimately determined that Eagle had simply elicited bids for a less costly single-phase electrical system. RK's single phase electrical work was installed in a professional and workmanship like manner, free of defects, albeit, still not what SWMO believed it was getting under the contract. Moreover, there were material issues of fact regarding Eagle and their payments, or non-payments to RK, which as stated above, turned out to be true. Further, Appellant was never provided this information and was never able to verify any

payments. Thus, to hold that RK “was entitled to be paid [from SWMO’s funds] for that work as a matter of law” was error given the work done and amounts owed were clearly disputed. *See*, App. 123-125.

**iii. Summary Judgment Motion filed by Mon-Dak**

[¶47] Mon-Dak’s motion for summary judgment also involves amounts owed to them by Eagle, the general contractor, as shown in more detail in their cross-claims contained in their Answer. *See*, App. 51-56. That invoice reflects the amounts owed and that “*Mon-Dak is owed the sum of \$125,000...from Eagle under the sub-contractor contract between Eagle and Mon-Dak.*” *See*, ¶18 of Mon-Dak’s cross-claim. *See*, App. 51-56.

[¶48] Again, Appellant SWMO had no way of knowing what claims or amounts owed were accurate and what was disputed as between Mon-Dak and Eagle with respect to these cross-claims. Further, there was evidence presented by Appellant SWMO in the response to the motion that Mr. Bruce Meidinger, principal of Eagle, had previously set forth different amounts due and owing to Mon-Dak, which ultimately would affect the amount set aside with the court – and necessitated denial of Mon-Dak’s motion. *See*, App. 70-79.

[¶49] Appellant SWMO again argued they had no idea who had been paid or what amounts had been paid to Mon-Dak by Eagle. Despite requests, no copies of payments or checks were provided and no accounting of any kind has been done or presented to the Court by Mon-Dak to support their motion. *See*, App. 70-79.

[¶50] The pay application annexed to Appellant SWMO’s Complaint as Exhibit “W (*See*, App. 12-35), was submitted and signed by Mr. Bruce Meidinger, principal of Eagle. Said pay applications shows a request for final payment for Mon-Dak in the amount of \$14,375, which brings Mon-Dak’s total amounts for the project much lower than the amounts

claimed by Mon-Dak in their motion. Again, this is but one of several issues of fact that warranted denial of the motion.

**iv. Cross-Claims By Mon-Dak As Against Eagle Rigid Spans**

[¶51] The cross-claims were based on a “subcontractor contract” between Mon-Dak and Eagle. The subcontract is referenced in Mon-Dak’s cross-claim, but is not provided as an exhibit, nor has Mon-Dak provided it to the parties. *See*, App. 51-56.

[¶52] This is a crucial document that was never provided as part of the motion. *See*, App. 51-56.

[¶53] Eagle filed an Answer to the Crossclaims on November 21, 2017, which attempts to validate the amounts owed, but Eagle’s answer indicates these amounts are owed by SWMO, despite a contract between Eagle and Mon-Dak. The Answer also denies that Eagle requested many of the “changes” and attempts to pass responsibility to SWMO. Eagle requests the crossclaims be dismissed. These are just additional disputed issues of fact that warranted denial of the motion.

[¶54] Taken together, these multiple issues of fact made it impossible for Mon-Dak to meet their burden on a motion for summary judgment. Despite this, the Court held in paragraph 4 of the decision that “it appears there is no just reason to deny Mon-Dak’s motion at this time, at least insofar as the principal amount due.” *See*, App. 126-128. Appellant respectfully submits that this is not only the incorrect standard on a motion for summary judgment, but assuming *arguendo* it were, there were several just reasons for denial, including allegation of fraud, disputed amounts owed and privity of contract issues.

**B. Whether the Court erred by granting partial Summary Judgment to Defendants, Ronald J. Koch d/b/a RK Electric and Mon-Dak Plumbing & Heating, Inc., despite several issues of fact that were presented by SWMO and not addressed by the Court in its decision, and wherein the Court's decision only acknowledged Co-Defendant, Eagle Rigid Spans, Inc., offered no opposition.**

[¶55] As set forth above, there were several issues of material fact presented to the Court by SWMO, including but not limited to:

1. The amount SWMO owed Eagle was central to this dispute;
2. SWMO had no idea how much Eagle had actually paid to its subcontractors because of the misrepresentations contained in Eagle's "certified" pay requests;
3. There were allegations of fraud by RK against Eagle; and
4. Since no contract existed between SWMO and Eagle's subcontractor, RK and Mon-Dak, there was no evidence proving the elements of unjust enrichment before releasing SWMO's funds to Eagle's subcontractors.

[¶56] The Court, in granting summary judgment to both Mon-Dak and RK, does not once acknowledge Appellant SWMO's ultimate dispute as to the final contract price, the cross-claims, allegations of fraud, disparities in pay applications or any other material issue of fact raised by Appellant SWMO. In RK's decisions, the court actually states there "appears to be no real issue of fact". *See*, App. 126-128. That was simply not the case. It follows that a summary judgment should be granted only if there is no genuine issue of material fact and there is no conflicting inference from the facts. It also appears that whenever the court must make a finding of fact, summary judgment is inappropriate. Albers v. NoDak Racing Club, Inc., 256 N.W.2d 355, 358 (N.D. 1977).

[¶57] In the Court’s decision regarding Mon-Dak, the court only finds that “there is no unjust reason to withhold the money.” *See*, App. 126-128. For the several reasons set forth above, coupled with well-established case law, summary judgment should have been denied and the funds should not have been released.

**C. Whether the Court erred by granting partial Summary Judgment to Defendants, Ronald J. Koch d/b/a RK Electric and Mon-Dak Plumbing & Heating, Inc., when no contract existed with SWMO, and the subcontractors’ claim against SWMO rests solely in “unjust enrichment.”**

[¶58] Unjust Enrichment requires a plaintiff to show “(1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) absence of a justification for the enrichment and impoverishment; and (5) an absence of a remedy provided by law.” *Hayden v. Medcenter One, Inc.*, 2013 ND 46, ¶14, 828 N.W.2d 775. “The essential element in recovering under [unjust enrichment] is the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value.” *Id* (citing *Zuger v. North Dakota Ins. Guar. Ass’n*, 494 N.W.2d 135, 138 (N.D. 1992)) “The doctrine is applied in the absence of an express or implied contract.” *Id*.

[¶59] There was simply no contract, either express or implied, between either RK Electric, Mon-Dak, and Appellant SWMO. The general contractor Eagle, however, made the decision to hire both RK and Mon-Dak, and entered into a contract to retain their services. Eagle then marked up their services and requested various payments from SWMO.

[¶60] Generally, a third party is not liable under unjust enrichment simply for benefitting from a contract between two other parties. *See, Haggard Drilling, Inc. v. Greene*, 236 N.W.2d 841, 846 (Neb. 1975). (“The mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi contract, unjust enrichment, or restitution.”). Moreover, where a third- party benefits from a contract entered

into by two other parties, the failure to perform by one of the contracting parties does not give rise to a right of restitution against the third party, absent some misleading act by the third party.

Id.

[¶61] SWMO was the consumer in this transaction with “clean hands.” SWMO entered into a contract with Eagle to purchase and construct a building on SWMO’s real property. Eagle hired its subcontractors, namely RK and Mon-Dak to perform services on Eagle’s behalf. Eagle, then marked up RK and Mon-Dak’s services and charged SWMO pursuant to the contract between SWMO and Eagle. SWMO stood ready, willing, and able to pay Eagle had Eagle performed as required under the contract. Unfortunately, Eagle failed to perform and unbeknownst to SWMO, provided SWMO with materially misleading payment applications, so it could keep for itself and shortchange its subcontractors, who would be forced to file liens or sue Eagle for breach of contract. SWMO did not act in any misleading fashion to put either RK or Mon-Dak in the impoverishment they suffered. There is nothing unjust in allowing SWMO to retain the full value of what it contracted for.

[¶62] Moreover, if a “defendant has committed only a breach of contract, he is liable only to those with whom he has contracted.” Layman v. Braunschweigische Maschinenbauanstalt, Inc., 343 N.W.2d 334, 341 (N.D. 1983). SWMO’s only obligation was to pay Eagle and Eagle failed to perform under that contract. Ultimately, it was determined that SWMO overpaid under the contract, and the amount SWMO set to deposit with the Court should have been returned to SWMO. RK and Mon-Dak’s claim against SWMO rests with “unjust enrichment,” yet each chose to ignore their breach of contract claim against Eagle, which is *an adequate remedy provided by law*.

[¶63] Finally, SWMO can only be liable under North Dakota law to the extent they are liable under the contract with Eagle. At trial, SWMO was able to show they overpaid under their contract with Eagle. The plain wording of N.D.C.C. §§ 35-24-04 and -07 protects an owner from liability greater than the original contract unless that owner receives notice of a subcontractor's lien and subsequently pays the general contractor rather than the subcontractor. *See*, N.D.C.C. § 35-24-04. Rocky Mountain Steel Foundations, Inc. v. Brockett Co., LLC, 2018 ND 96, ¶ 7, 909 N.W.2d 671.

[¶64] In Rocky Mountain, one of the parties asserts the owners' payment extinguished liability, thus extinguishing Mitchell's or Rocky Mountain's entitlement to file a lien. Citing the Oklahoma Supreme Court's interpretation of a similar oil and gas construction lien statute, Mitchell's contends: (1) if an owner has no liability to a general contractor, the general contractor may not file a lien; (2) a subcontractor's ability to file a lien is the same as a general contractor; and (3) therefore, if the general contractor may not file a lien, a subcontractor may not file a lien. In Josey Oil Co. v. Ledden, a drilling contractor abandoned its work when it still owed payment to various subcontractors. 1933 OK 185, 20 P.2d 582. The Oklahoma Supreme Court held, "When it is shown that the original contractor cannot have a lien upon the property of the owner ... then his subcontractors can have no lien upon specific property under the subcontractor's lien statute." *Id.* at 583. The three Oklahoma cases cited by *Mitchell's Rocky Mountain* follow a similar pattern: (1) the general contractor abandoned drilling a well or breached the contract, (2) the subcontractor did not receive payment, (3) the subcontractor filed a lien, and (4) the court invalidated the subcontractor's lien because the general contractor was not entitled to a lien. *See*, Conservation Oil Co. v. Graper, 1935 OK 626, 46 P.2d 441, 443-44; Brenner Oil Co. v. Dickason-Goodman Lumber Co., 108 Okla. 257,

236 P. 44, 45 (1925); Cameron Ref. Co. v. Jerman, 1925 OK 340, 238 P. 437, 437–48 (1925).  
Rocky Mountain Steel Foundations, Inc. v. Brockett Co., LLC, 2018 ND 96, ¶ 9, 909 N.W.2d  
671.

[¶65] While the facts of that case were different, they are similarly relevant in that it nevertheless raises the issue of privity of contract and the right to enforce the lien of RK and Mon-Dak. What Rocky Mountain raises is the issue of how Appellant SWMO can be summarily liable as a matter of law to Mon-Dak and/or RK when its contract was with Eagle. This is especially perplexing given that Eagle was found to be liable to SWMO for breach of contract, and the findings of fact confirmed material misrepresentations to the true amounts paid to subcontractors. *See*, App 129-134.

[¶66] Thus, aside from the other material issues of fact, it was improper to decide as a matter of law, that both RK and Mon-Dak were entitled to a release of SWMO's funds when the Court did so. This especially true given the ultimate outcome of the case.

**D. Whether the Court erred by granting partial Summary Judgment to Defendants, Ronald J. Koch d/b/a RK Electric and Mon-Dak Plumbing & Heating, Inc., when Ronald J. Koch d/b/a RK Electric only argued unjust enrichment as against SWMO, but the Court did not acknowledge SWMO's opposition in its decision.**

[¶67] As stated above, the Court ignored many material issues of fact. The Court held that Mon-Dak was entitled to release of funds based on their unjust enrichment theory. Assuming *arguendo*, that there was not a contract between Mon-Dak and Eagle, which there was, the amounts at issue were still disputed by SWMO. *See*, App. 123-125. The Appellant, pointing this out in their brief, argued that given the numerous issues of fact, with or without a contract, renders summary judgment impossible. *See*, App. 70-79.

[¶68] The Court's decision does not mention one single argument or evidence that was submitted by Appellant SWMO, including the pay applications which turned out to be false

as found by the Court itself. *See*, App. 129-134. It follows that a summary judgment should be granted only if there is no genuine issue of fact and there is no conflicting inference from the facts. *See*, Albers v. NoDak Racing Club, Inc., 256 N.W.2d 355, 358 (N.D. 1977) (“[i]t also appears that whenever the court must make a finding of fact, summary judgment is inappropriate. *See also*, Saltsman v. Sharp, 2011 ND 172, ¶ 5, 803 N.W.2d 553 (“Even undisputed facts do not justify summary judgment if reasonable differences of opinion exist as to the inferences to be drawn from those facts.”))

**E. Whether the Court erred by granting partial Summary Judgment to Defendant, Ronald J. Koch d/b/a RK Electric, when further evidence was produced by Co-Defendant Eagle Rigid Spans, the owner, just days after the Court’s decision, which showed fraud by general contractor Eagle Rigid Span employees, which affected the price of the bid from RK Electric.**

[¶69] On March 23, 2018, some three days after the motions were granted, Eagle strategically served its discovery responses upon RK Electric. *See*, App 157-176. Aside from the many other issues of fact that arise from these responses (four discs were served by Eagle, with hundreds of emails, plans specifications, drawings, contracts etc., that are being reviewed) which demonstrate issues of fact, Interrogatory 11 sets forth the following:

“ . . . Eagle Rigid Spans, Inc. is aware of RK Electric’s other contracts with the Plaintiff, and to the extent their claim against Eagle Rigid Spans, Inc. also incorporates the same amount of damage, those are not Eagle Rigid Spans, Inc.’s responsibility.

Also, it is believed that RK Electric was paying Eagle Rigid Spans, Inc.’s salesman an unauthorized kickback for subcontracts that RK was awarded by the salesman. Emails substantiating this belief are attached as Exhibit 1. It is further believed that the increase in price of electrical work on this project

incorporates the kickback that is believed to have been contemplated to Eagle Rigid Spans, Inc.'s salesman.”

[¶70] Further, Eagle also exchanged an email dated August 1, 2014, and an accompanying 1099. The email and 1099 indicate that an employee of Eagle was fraudulently making “back-door” deals with RK, wherein he would receive a “kick-back” for work, and that fee would be included in the price of the job. *See, App.* 157-176.

[¶71] This evidence was not exchanged until three days after the court granted the motions for summary judgment to RK Electric and Mon-Dak. The entire premise of the Court's decision was the undisputed nature and price of the work performed. Aside from Appellant SWMO's arguments set forth in their initial brief, with this evidence, it is clear that there are many issues of fact relating to the price of the jobs and the payments thereof and certainly relating to fraud. Despite this additional evidence, unavailable at the time of the motion's decision, the court failed to reconsider releasing SWMO's deposited funds.

### CONCLUSION

[¶72] SWMO not only disputed the amount owed under its contract with Eagle, but alleged significant and substantial construction defects throughout the project. Under the contract between Eagle and SWMO, SWMO's only obligation was to pay Eagle for Eagle's services. Not only did Eagle charge a construction management fee on the services provided by its subcontractors, including RK and Mon-Dak, but SWMO had no involvement with either RK or Mon-Dak.

[¶73] Both RK and Mon-Dak were aware that the only contract each had was solely with Eagle; not SWMO. In addition, both RK and Mon-Dak became aware that Eagle had, in fact, provided to SWMO materially misleading and inaccurate “certified” payment requests,

showing that Eagle had kept for itself the money SWMO had “ostensibly paid” for electrical and plumbing/HVAC services. Despite this knowledge, both RK and Mon-Dak elected to pursue SWMO under the theory of “unjust enrichment” rather than its breach of contract claims against Eagle because of collection challenges.

[¶74] Notwithstanding the above, the consumer and purchaser, SWMO, cannot be held liable for breach of contract claims between the general contractor and its subcontractors. Ultimately it was found that SWMO overpaid under its contract with Eagle. At the time the court granted partial summary judgment and released SWMO’s funds to RK and Mon-Dak, there clearly remained material issues of fact not only between Eagle and SWMO, but between Eagle and its subcontractors, RK and Mon-Dak. The granting of partial summary judgment in favor of Eagle’s subcontractors, RK and Mon-Dak, was improper.

Dated: January 22, 2019

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

SWMO, LLC, a North Dakota Limited Liability  
Company,

Plaintiff/Appellant,

vs.

Eagle Rigid Spans, Inc, the General Contractor;  
Mon-Dak Plumbing and Heating, Inc.; Ronald J.  
Koch d/b/a RK Electric; Creative Image  
Concrete, Inc., and all other persons unknown,  
claiming any estate or interest in, or lien or  
encumbrance upon, the real estate described in  
the complaint,

Defendants/Appellees.

**CERTIFICATE OF SERVICE**

Supreme Court No.: 20180407  
District Court Case No.: 53-2015-CV-00749

[¶1] I hereby certify that on the 22<sup>nd</sup> day of January, 2019, the following documents:

- 1. Appellant's Brief; and**
- 2. Appellant's Appendix.**

was served, via email, upon the sfollowing:

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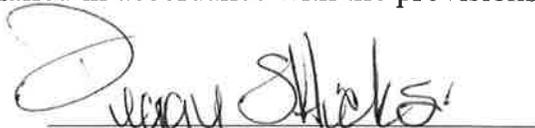
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Dated: January 22, 2019

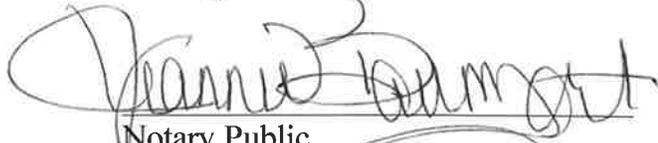
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That the above documents were duly mailed in accordance with the provisions of the *North Dakota Rules of Civil Procedure*.

  
Peggy Hicks

Subscribed and sworn to before me on the 29<sup>th</sup> day of January, 2019.

  
Notary Public

