

IN THE SUPREME COURT OF THE  
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

---

**APPELLEE MONDAK'S REPLY BRIEF TO APPELLANT'S BRIEF ON  
APPEAL FROM THE (1) ORDER GRANTING PARTIAL SUMMARY  
JUDGMENT TO RONALD J. KOCH, D/B/A/ RK ELECTRIC AND (2) ORDER  
GRANTING PARTIAL SUMMARY JUSGMENT 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**

---

Charles L. Neff  
Neff Eiken & Neff, P.C.  
N.D. Bar I.D. #04023  
111 East Broadway, P.O. Box 1526  
Williston, North Dakota 58802-1526  
(701) 577-2000  
[cneff@nefflawnd.com](mailto:cneff@nefflawnd.com)

Attorneys for Appellee  
Mon-Dak Plumbing and Heating, Inc.

**TABLE OF CONTENTS**

Table of Contents..... 2

Table of Authorities..... 3

Appellee’s Statement of Issues..... ¶ 1

Appellee’s Statement of the Case..... ¶ 3

Appellee’s Statement of the Facts..... ¶ 19

Standard for Review..... ¶ 27

Law and Argument..... ¶ 29

Conclusion..... ¶ 52

## TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PARAGRAPH:</u>
<i>A&amp;A Metal Buildings v. I-S, Inc.</i> , 274 N.W.2d 183, 189 (N.D. 1978)	¶ 39
<i>Abbeville Lumber Co. v. Richard</i> , 350 So.2d 1292, 1300 (La.Ct.App. 1977)	¶39
<i>American State Bank and Trust Co. of Williston v. Sorenson</i> , 539 N.W.2d 59, 62 (N.D. 1995)	¶ 32
<i>George C. Hall &amp; Sons, Inc., v. Taylor</i> , 628 A.2d 1037, 1038 (Sup. Ct. Maine 1993)	¶ 44
<i>Hale v. Ward County</i> 2012 ND 144, ¶12, 818N.W.2d 697	¶ 27
<i>Hummel v. Mid Dakota Clinic, P.C.</i> , 526 N.W.2d 704, 707 (N.D. 1995)	¶ 32
<i>Lochthowe v. C.F. Peterson Estate</i> , 2005 N.D.40, ¶10, 692 N.W.2d 120	¶ 40
<i>Matter of Estate of Hill</i> , 492 N.W.2d 288, 295 (N.D. 1992)	¶ 39
<i>Narveson v. Schmid</i> , 77 N.W.2d 814, 822, (N.D. 1951)	¶ 35
<i>Opp v. Matzke</i> , 1997 N.D. 32, ¶8, 559 N.W.2d 837	¶ 39
<i>Poppe v. Stockert</i> , 2015 ND 252, ¶4, 870 N.W.2d 187	¶ 28
<i>Superior Steel, Inc., v. Ascent at Roebling’s Bridge, LLC</i> , 540 S.W.3d 770,779 (Ky Sup. Ct. 2018)	¶ 35

<i>Sykeston Township v. Wells County</i> , 356 N.W.2d 136, 140 (N.D. 1984)	¶ 39
<i>Tarnavsky v. Rankin</i> , 2009 ND 149, ¶7, 771 N.W.2d 578	¶ 27
<i>Zaleznik v. Gulf Coast Roofing Co., Inc.</i> , 576 So.2d 776, 779 (Fla 2d DCA 1991)	¶ 44

STATUTES AND RULES

PARAGRAPH

Rule 56(f) N.D.R.Civ.P.	¶ 10, 32, 33
Rule 56(e)(2) N.D.R.Civ.P.	¶ 27
35-27-02 N.D.C.C.	¶ 35
35-21-02 N.D.C.C.	¶ 35

OTHER

PARAGRAPH

<i>Restatement (3d) of Restitution and Unjust Enrichment §25.1</i>	¶ 38
--	------

**STATEMENT OF ISSUES**

¶(1) **ISSUE ONE:** Whether partial Summary Judgment was properly Entered for MonDak and against SWMO as a matter of law?

¶(2) **ISSUE TWO:** Whether the District Court's Order of March 20, 2018 authorizing the Release of sum of \$125,600.00 from Court Escrow to MonDak was Proper as a Matter of Law?

## STATEMENT OF THE CASE

¶(3) For the authorities set forth in the argument made by RK and MonDak in their respective briefs to this Court, it will be shown the guts of this case are the unopposed factual affidavits and exhibits provided by MonDak and RK to the District Court and the failure or waiver by SWMO to conduct discovery or challenge the facts established by RK and MonDak in support of their respective motions for summary judgment.

¶(4) Accordingly, MonDak adopts RK's statement of the Case, as set forth in RK's brief to this Court, but with special application to the case involving MonDak, does add the following to MonDak's Statement of the Case.

¶(5) Immediately after commencing this action, SWMO made application to the District Court to deposit sufficient funds with the Court to obtain the release of the recorded construction liens filed of record by MonDak and RK to clear title for SWMO's pending sale of the subject shop building. (Doc. ID No. 5-8). This application was made in late June of 2015.

¶(6) By stipulation between SWMO and MonDak dated July 1, 2015, SWMO agreed to deposit the sum of \$152,620.00 to release MonDak's stated lien amount of \$136,300.00 plus \$16,320.00 of prejudgment interest at 6% for a total undertaking of \$152,620.00 (Doc. ID No. 47).

¶(7) By Stipulation between SWMO and RK date July 6, 2015, SWMO agreed to deposit the sum of \$124,242.32 for RK Electric which included the base lien amount of \$114,242.32 plus \$10,000.00 of prejudgment interest. (Doc. ID No. 46).

¶(8) The District Court then signs the proposed Order for the undertaking, by Order dated July 6, 2015 (Doc. ID No. 49), which Order, was for the base amount of the MonDak lien in the sum of \$136,300.00 and base amount of the RK lien for \$114,242.32 which did not included any funds deposited for interest pursuant to the stipulations referenced above (which stipulations did include money escrowed for interest). The total amount for this Order for undertaking was in the sum of \$250,542.32.

¶(9) To address the issue of interest owed, the parties SWMO, RK and MonDak executed a third stipulation, jointly agreeing to an amended Order, to include the deposit of funds sufficient to cover the interest agreed to, which increased the undertaking escrow to \$124,242.32 for RK and \$152,620.00 for MonDak for a new number of escrowed funds to be in the amount of \$276,862.32. (Doc. ID No. 48). On July 20, 2015 the District Court then entered its Order amending the undertaking amount to reflect the increased amounts for interest. (Doc. ID No. 52).

¶(10) On June 23, 2016 (exactly one year after the case had been commenced by SWMO), MonDak moved the District Court for Summary Judgment, with a supporting affidavit and attached financial exhibits, showing the bills and payments for MonDak's work on the SWMO shop building. SWMO invoked Rule 56(f) N.D.R.Civ.P. to deny summary judgment on grounds that discovery was not complete and that "SWMO has no idea who has been paid or what amounts have been paid to MonDak by Eagle" (Doc. ID No. 79 pp. 1, 24, 29-30). The District Court did then deny MonDak's Motion for Summary Judgment as being premature pursuant to Rule 56(f) N.D.R.Civ. P. (Doc. ID No. 90).

¶(11) A Stipulated Scheduling Order was then entered in this action dated March 20, 2017, which set a deadline for discovery as of September 1, 2017. (Doc. ID No. 112 ¶5, ¶7).

¶(12) SWMO used the next year to conduct absolutely no discovery from MonDak, and did nothing, to collect information to challenge the amounts which MonDak billed for its work, nor to challenge the quality of the work performed by MonDak for the SWMO shop building. During this entire period of time to conduct discovery granted by the District Court, SWMO had the financial documents submitted by MonDak outlining the dates of work, the bills for such work by MonDak, the payment dates and amounts received by MonDak for its work on the SWMO shop building.

¶(13) SWMO did use its discovery time to conduct discovery of Eagle Rigid on the allegation Eagle Rigid did not give accurate information to SWMO regarding the bills submitted by the subcontractors to Eagle Rigid, which included the amounts owed to MonDak, RK and other workers on the subject SWMO shop project.

¶(14) By motion November 7, 2017 MonDak again moved for Summary Judgment (Doc. ID No. 131), based on the same and further financial information and affidavit evidence to support this second motion for Summary Judgment. SWMO responded to this second motion for Summary Judgment, but did not submit any evidence to challenge the financial information resubmitted by MonDak. SWMO relying instead, upon just the suggestive statement, that there was additional discovery to be taken of MonDak and RK to possibly expose a fraudulent scheme of kick backs among subcontractor and Eagle Rigid.



¶(15) The District Court entered two Orders granting partial Summary Judgment, one to MonDak and the other to RK dated March 22, 2018. (Doc. ID Nos. 186 and 187). Each Order directed an amount of funds to be released from the undertaking provided by SWMO sufficient to satisfy the amount requested by MonDak in the base lien sum of \$125,600.00 and \$114,242.00 to RK, and reserved the issue of prejudgment interest for a later date. (Doc. ID No. 186 ¶5).

¶(16) SWMO did by motion dated March 27, 2017 move to have the District Court reconsider the two prior orders for partial Summary Judgment on grounds of “newly discovered evidence” of alleged fraud by Eagle Rigid. This motion was opposed by both RK and MonDak that there was no discovery by SWMO concerning such issues. Such a fuss between SWMO and Eagle Rigid on the issue of alleged fraud, did nothing to change or challenge the money owed to MonDak or RK for the work performed on the SWMO shop building. Particularly, that there was absolutely no evidence submitted by SWMO to the District Court of any “kickback” scheme between RK and MonDak as subcontractors and Eagle Rigid as general contractor.

¶(17) The District Court denied SWMO’s motion for reconsideration, finding no facts or discovery to support such allegations, by Order dated April 23, 2018 (Doc. ID No. 224).

¶(18) Part of SWMO’s appeal involves the review of the District Court’s granting of the two partial summary judgment Orders of March 20, 2018 and the denial of the motion to reconsider same by Order dated April 23, 2018.

## STATEMENT OF THE FACTS

¶(19) Mon-Dak Plumbing and Heating, Inc. (“MonDak”) for its Statement of the Facts, adopts those Statement of the Facts offered by Ronald J. Koch, d.b.a. RK Electric (“RK”) in his Appellee Brief, but with emphasis on those facts particular to MonDak, does here state as follows:

¶(20) MonDak was a subcontractor to the general contractor Eagle Rigid Spans, Inc. (“Eagle Rigid”) to provide plumbing services for the subject shop building owned by SWMO, L.L.C. (“SWMO”) in Williams County, North Dakota. It is admitted that MonDak did not have any written contract to provide plumbing and heating installation work for the subject shop building with SWMO, except for a small side contract for \$10,000.00 of extra work directly negotiated by SWMO with MonDak, which is not the subject of this appeal. However, SWMO’s on site manager for the building project did request several additions and corrections to the base bid plans which added a second story crew quarters, additional heat venting for the second story, additional bathroom area and on the main shop area the installation of extra trench drains to the shop building. (See Affidavit of Dennis Schow at Doc. ID No. 77, ¶¶ 3-5). These changes and additions were all properly made and installed by MonDak.

¶(21) All of the plumbing and heating work performed by MonDak for the SWMO hop building was inspected and found to meet or exceed all applicable building and plumbing codes, and was otherwise, work performed in a fit and workmanlike manner. There has been no claim in this action that the work performed by MonDak was in any way improper, not fit for code, negligent or not otherwise installed pursuant to the building plans and the changes requested by SWMO.

¶(22) The factual evidence provided to the District Court by affidavit, with attached exhibits, showed MonDak did submit bills for its work totaling the sum of \$210,600.00 for which it received one payment of \$85,000.00 leaving a balance due of \$125,600.00. (Affidavit of Dennis Schow Doc. ID No. 77 ¶¶14-15).

¶(23) After making repeated demands for payment and not being paid, MonDak went through the process of perfecting the formal filing of a construction lien by MonDak on March 4, 2015, as Document No. 802328 in the Office of the County Recorder for Williams County, North Dakota, in the sum of \$136,300.00. (See Exhibit X to SWMO Complaint at Doc. ID No. 39).

¶(24) At no time in this action, has SWMO ever challenged or disputed the quality of MonDak's work on the project, or the amount claimed owed to MonDak for such plumbing and heating work for the subject SWMO shop building.

¶(25) What SWMO has factually claimed is that Eagle Rigid was fraudulent or deceitful in its billing practices regarding the work performed by the subcontractors working on the building, including the amounts Eagle Rigid represented were owed to MonDak.

¶(26) MonDak would incorporate all remaining facts as set forth in the Brief submitted by RK in this appeal.

## STANDARD FOR REVIEW

¶(27) The legal standard for summary judgment motions has been well defined by the North Dakota Supreme Court in *Hale v. Ward County* 2012 ND 144, ¶12, 818N.W.2d 697:

“Summary Judgment is a procedural device for promptly resolving 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 undisputed facts, or if resolving factual disputes will not alter the result.” *Tarnavsky v. Rankin*, 2009 ND 149, ¶7, 771 N.W.2d 578; *see* N.D.R.Civ.P.56. “A party seeking summary judgment bears the initial burden of showing there is no genuine dispute regarding the existence of a material fact.” *Tarnavsky*, at ¶7. “When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading[.]” N.D.R.Civ.P. 56(e)(2). “Rather, the party resisting the motion must set forth specific facts by presenting competent, admissible evidence, whether by affidavit or by directing the court to relevant evidence in the record, demonstrating a genuine issue of material fact.” *Tarnavsky*, at ¶8 (citing N.D.R.Civ.P. 56(e)).

¶(28) *See also, Poppe v. Stockert*, 2015 ND 252, ¶4, 870 N.W.2d 187 (internal citations omitted).

“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 undisputed facts, or if the only issues to be resolved are questions of law. 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. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether

the district court properly granted summary judgment is a question of law which we review de novo on the entire record.”

## **LAW AND ARGUMENT**

### **ISSUE ONE**

#### **WHETHER PARTIAL SUMMARY JUDGMENT WAS PROPERLY ENTERED FOR MONDAK AND AGAINST SWMO AS A MATTER OF LAW?**

##### **Mondak provided evidence which met Standard for granting summary judgment.**

¶(29) Applying the above standard, MonDak supported both its motions for partial summary judgment, and in particular, its second motion for partial summary judgment, by sworn affidavit and billing summaries, outlining the bills and payment for MonDak’s work on the SWMO shop building. After all billing invoices and the single documented payment of \$85,000.00 had been offset, the amount due, without interest, came to the sum of \$125,600.00 (Affidavits of MonDak Dennis Schow at Doc. ID No. 133 and Doc. ID No. 77 with financial Exhibit Doc. ID No. 134 and Briefs at Doc. ID NO. 132 and Doc. ID NO. 143).

¶(30) SWMO after surviving MonDak’s first motion for summary judgment (made in June 2015), did elect to undertake **no** discovery of MonDak, over the next intervening 16 months, before MonDak’s second motion for summary judgment was made in November of 2016. No affidavit testimony or documents were submitted by SWMO to challenge the quality of the work performed by MonDak, nor challenge the

bills and payment financial documentation provided by exhibit by MonDak in support of the motion.

¶(31) Instead, SWMO challenged MonDak's Motion for partial summary judgment, on grounds that Eagle Rigid has failed to provide correct billing to SWMO and had otherwise engaged in fraud and deceitful conduct. At no time, did SWMO challenge the bills and payment information used by MonDak to support MonDak's motion for partial summary judgment, nor did SWMO provide any affidavit or documentation that the work performed by MonDak was not up to code or was otherwise improper work. SWMO was suspicious of a "kickback" scheme but wholly failed to provide any affidavit testimony or documents to support such allegation involving MonDak whatsoever.

¶(32) When considering a motion for summary judgment, mere allegations will not defeat a summary judgment when the movant has first established the non existence of any material fact, and after SWMO had 16 months to perform its discovery; "the possibility that discovery will yield evidence favorable to a party opposing summary judgment is not a ground to deny summary judgment where a party has failed to invoke Rule 56(f) procedures." *American State Bank and Trust Co. of Williston v. Sorenson*, 539 N.W.2d 59, 62 (N.D. 1995) citing, *Hummel v. Mid Dakota Clinic, P.C.*, 526 N.W.2d 704, 707 (N.D. 1995).

¶(33) Here, SWMO was given 16 months by the District Court under Rule 56(f), to undertake discovery of such issues, to see if such situation existed and if such allegations involved MonDak, (which by MonDak's billing and paperwork produced show such issue never existed).

¶(34) Accordingly, the District Court did apply the summary judgment standard correctly as to the burdens by the movant and nonmovant to MonDak's motion for partial summary judgment.

**MonDak was owed payment by SWMO under both  
lien law and unjust enrichment**

¶(35) North Dakota statute allows a subcontractor who has not been paid on a construction job to file a lien for nonpayment against the subject property 35-27-02 N.D.C.C.. SWMO knew this and opted to get the liens filed by MonDak and RK released of record using the procedures set forth in Chapter 35-21 N.D.C.C.. The undertaking then replaces cash for the right to foreclose the lien, providing the lien holder with the same security, but in a different form as was held by the lien holder pursuant to 35-21-02 N.D.C.C.. *Narveson v. Schmid*, 77 N.W.2d 814, 822, (N.D. 1951).

¶(36) The undertaking procedure was one of two direct routes for MonDak's claim against SWMO for its share of the money of the undertaking funds deposited with the Court.

¶(37) The other theory MonDak relied upon in this case, for its claim against SWMO, is the equitable claim for unjust enrichment. It is obvious that the plumbing and heating work performed by MonDak was essential to the building and contributed to the ability of SWMO to sell the shop building for a handsome profit.

¶(38) The draft of the *Restatement (Third) of Restitution and Unjust Enrichment* captures the essence of this equitable restitution claim as was cited in *Superior Steel, Inc., v. Ascent at Roebbling's Bridge, LLC*, 540 S.W.3d 770,779 (Ky Sup. Ct. 2018):

“If the claimant renders to a third person a contractual performance for which the claimant does not receive the promised compensation, and the effect of the claimant’s uncompensated performance is to confer a benefit on the defendant, the claimant is entitled to restitution from the defendant as necessary to prevent unjust enrichment.” *Restatement (3d) of Restitution and Unjust Enrichment* §25.1

¶(39) North Dakota has a five element test for application of unjust enrichment, as was set forth in the case of *Opp v. Matzke*, 1997 N.D. 32, ¶8, 559 N.W.2d 837.

There are five essential elements necessary to prove unjust enrichment, *A&A Metal Buildings v. I-S, Inc.*, 274 N.W.2d 183, 189 (N.D. 1978). These five elements are: “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.” *Id.* At 189 (citing *Abbeville Lumber Co. v. Richard*, 350 So.2d 1292, 1300 (La.Ct.App. 1977)). The principle of unjust enrichment provides a basis for requiring restitution of benefits conferred in the absence of an expressed or implied contract. *Sykeston Township v. Wells County*, 356 N.W.2d 136, 140 (N.D. 1984). A trial court’s finding of unjust enrichment is a matter of law and is fully reviewable by this court. *Matter of Estate of Hill*, 492 N.W.2d 288, 295 (N.D. 1992).

¶(40) The use of unjust enrichment is generally implied in absence of a contract between the parties where the third party derived benefit from a contractual agreement between others and the third party participated somehow in the transaction through which the benefit is obtained. *Lochthowe v. C.F. Peterson Estate*, 2005 N.D.40, ¶10, 692 N.W.2d 120 (internal citations omitted).

¶(41) Such elements fit exactly to the facts of this case, where SWMO was the owner who contracted with Eagle Rigid to build the subject shop building for which MonDak installed the plumbing and heating. This work benefitted SWMO to complete a building improvement on the property for which SWMO sold for a profit. The detriment to MonDak for nonpayment of MonDak’s work is obvious. There was no direct contract



between SWMO and MonDak for the amount sought by MonDak in its partial summary judgment motion. (There was a small bill for \$10,700.00 paid by SWMO to MonDak for other side work directly contracted between SWMO and MonDak.) SWMO obtained the benefit of the plumbing and heating work on the building and used that benefit to support the sale of the shop building which required the release of MonDak's lien to convey marketable title and a building complete with code compliant plumbing and heating.

¶(42) These five elements for applying the doctrine of unjust enrichment in this case to SWMO fits like the five fingers of the proverbial glove.

¶(43) This is especially true where it was known Eagle Rigid had a prior very large Judgment against it making it unlikely MonDak could ever recover any funds in a direct judgment against Eagle Rigid.<sup>1</sup>

¶(44) Cases involving unjust enrichment have found the doctrine to be especially applicable where the direct party contracting is judgment proof or experiencing financial difficulties to allow the payment owed to be paid. *See Zaleznik v. Gulf Coast Roofing Co., Inc.*, 576 So.2d 776, 779 (Fla 2d DCA 1991)(internal citations omitted); *George C. Hall & Sons, Inc., v. Taylor*, 628 A.2d 1037, 1038 (Sup. Ct. Maine 1993).

¶(45) Accordingly, the District Court in this case had two valid grounds for imposing partial summary judgment in favor of MonDak and against SWMO in this action, while partial summary judgment supported the District Court's Order to release of \$125,600.00 of the undertaking funds (no interest awarded) to MonDak.

---

<sup>1</sup> See Case No. 21-2013-CV-00016 *Brandon and Constance Jalbert vs. Eagle Rigid Spans, Inc.* Judgment Doc. ID No. 401. Judgment and Opinion of North Dakota Supreme Court April 15, 2017. Supreme Court Docket No. 20160173.

## ISSUE TWO

### WHETHER THE DISTRICT COURT'S ORDER OF MARCH 20, 2018 AUTHORIZING THE RELEASE OF SUM OF \$125,600.00 FROM COURT ESCROW TO MONDAK WAS PROPER AS A MATTER OF LAW?

**The amount released to MonDak was just and proper under the Stipulations made for the escrow of funds to release lien and include no interest paid to MonDak.**

¶(46) One of the side issues in this appeal is the position that MonDak should have been awarded less than its base lien amount or to repay some amount in order to pay the full interest amount RK claims it is owed in this case by Eagle Rigid or SWMO in this case.

¶(47) Here the record reflects that RK stipulated to the amounts to be escrowed for MonDak and RK which included the base amount of the liens plus interest. (See Stipulation of July 7, 2015 at Doc. ID Nos. 47 and 48).

¶(48) The District Court in its Order granting partial summary judgment, only entered judgment and released escrow funds equal to the base lien of MonDak and RK and did not release any interest funds, reserving the question of interest owed for trial. (Order of March 20, 2018 at Doc. ID Nos. 186 and 187).

¶(49) Such action by the trial Court was in the discretion of the trial Court and MonDak has not received any funds for interest in this case. Those funds have gone to RK in this action. The District Court did then grant RK a judgment against Eagle Rigid for any small shortfall.

¶(50) Here in this case, where RK agreed to the amount of undertaking to be deposited for the benefit of MonDak, it follows RK cannot now claim MonDak should now invade the base amount of its agreed undertaking to give additional interest to RK where RK has been awarded a judgment amount against other parties for any additional interest.

¶(51) Accordingly, the amount released to MonDak was proper.

### CONCLUSION

¶(52) For the authorities and argument set forth above, the partial summary judgment in favor of MonDak and final judgment entered by the District Court should be AFFIRMED.

Dated this 21st day of February, 2019.

NEFF EIKEN & NEFF, P.C.

By: /s/ Charles L. Neff  
CHARLES L. NEFF  
N.D. Bar I.D. #04023  
Attorneys for the Defendant/  
Appellee Mon-Dak  
111 East Broadway  
P.O. Box 1526  
Williston, ND 58802-1526  
(701) 577-2000  
cneff@nefflawnd.com

**CERTIFICATE OF SERVICE**

¶(53) Due to server error on February 21, 2019, I filed and served the foregoing document on the following by electronic mail transmission on February 22, 2019, pursuant to N.D.R.App.P. 25 and 31:

Daniel Frisk  
Attorney for SWMO, LLC  
[dan@stflawfirm.com](mailto:dan@stflawfirm.com)

Samuel G. Larson  
Attorney for RK Electric  
[slarson@bismarcklaw.com](mailto:slarson@bismarcklaw.com)

Christopher J. Nyhus  
Attorney for Eagle Rigid Spans, Inc.  
[chris@nyhuslaw.com](mailto:chris@nyhuslaw.com)

Clerk of the Supreme Court  
[supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov)

Dated this 22nd day of February, 2019.

NEFF EIKEN & NEFF, P.C.

By: /s/ Charles L. Neff  
CHARLES L. NEFF  
N.D. Bar I.D. #04023  
Attorneys for the Defendant/  
Appellee Mon-Dak  
111 East Broadway  
P.O. Box 1526  
Williston, ND 58802-1526  
(701) 577-2000  
[cneff@nefflawnd.com](mailto:cneff@nefflawnd.com)