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20010273

Case No. 20010273
District Court No. 01-C-00015
IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JERRY L. MEIDE, INDIVIDUALLY
AND MEIDE AND SON, INCORPORATED,
A NORTH DAKOTA CORPORATION,
Appellants,

v.

WAYNE STENEHJEM, ATTORNEY
GENERAL, EX REL., STATE OF
NORTH DAKOTA, STATE HEALTH
DEPARTMENT, AND ENVIRONMENTAL
ABATEMENT SERVICES, INC.,
Appellees.

APPEAL FROM THE JUDGMENT OF THE RICHLAND COUNTY
DISTRICT COURT DATED AUGUST 23, 2001
THE HONORABLE RICHARD W. GROSZ

BRIEF OF THE APPELLEE, ENVIRONMENTAL ABATEMENT SERVICES, INC.

SUZANNE M. SCHWEIGERT (#05480)
Smith Bakke Hovland & Oppegard
116 North Second Street
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630
(701) 258-6498 (fax)
Attorneys for Appellee, Environmental
Abatement Services, Inc.

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from a Summary Judgment dismissing Appellants, Jerry L. Meide and Meide & Son Inc.'s (hereinafter "Meide) Complaint for Declaratory Judgment against the Appellees, Wayne Stenehjem, Attorney General, ex rel., State of North Dakota, State Health Department (hereinafter collectively referred to as "the State") and Environmental Abatement Services, Inc. (hereinafter referred to as "EAS"). The trial court granted Summary Judgment in favor of EAS and the State and held that the language of the Consent Agreement at issue is not ambiguous and that the disputed factual issues raised by Meide do not change the ultimate result required by law. Alternatively, the trial court also imposed the Doctrine of Judicial Estoppel against Meide.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The procedural history of this case relative to this appeal begins with Meide's Summons and Complaint dated January 17, 2001. Appellant's Appendix 4-9 [hereafter App. ___]. Meide brought a declaratory judgment action asking the Court to "determine the fair and reasonable amount" which Meide owed EAS for the asbestos abatement services EAS performed for Meide under emergency orders issued by the State. App.8. In their Answers, served on February 9. 2001, EAS and the State denied Meide's allegations and asked that the case be dismissed for failure to state a claim upon which

relief could be granted and further asserted their affirmative defenses, including that of estoppel. App.11-17.

On June 7, 2001, EAS moved the trial court for summary judgment alleging among other things that there were no genuine issues of material fact and that EAS was entitled to Summary Judgment as a matter of law. Docket #11, #12. The State filed its Brief in Response to Motion for Summary Judgment on July 9, 2001, additionally alleging among other things that Meide's claim was barred by the doctrine of judicial estoppel. Docket #22. Meide served his Brief in Opposition of Motion for Summary Judgment dated July 6, 2001. Docket #16.

Subsequently, the trial court entered its order granting EAS's Motion for Summary Judgment. The trial court issued its Order for Judgment on August 22, 2001 and the Judgment and Decree was entered on August 23, 2001. App.127-132. Notice of Entry of Summary Judgment, Statement of Costs and Disbursements and Affidavit of Identification of Judgment Debtor was served on August 31, 2001. Docket #31-33. Pursuant to the Order for Judgment, dated August 22, 2001, the trial court awarded EAS ownership of the Certificate of Deposit #805659 in the principal amount of $69,178.69, which was deposited with the Court by Meide with Meide's Summons and Complaint in this matter. App.128;Docket #4. Meide still owes EAS additional accruing interest on the debt.

On September 13, 2001, Meide served his Motion for Reconsideration of Order and Judgment, Determination of Costs, and Stay of Judgment on EAS and the State. App.137;Docket #36, #37. The State then served its Brief in Opposition to Motion for Reconsideration and Stay of Judgment on September 24, 2001, with EAS filing its Brief

in Opposition to Motion for Reconsideration and Stay of Judgment on September 26, 2001. Docket #40, #43. The Court issued its Order denying Meide's Motion for Reconsideration and Motion for Stay of Judgment. App.138-140;Docket #44. The Court did however grant Meide's objections to certain costs and disbursements, awarding EAS costs of $55.00. Id. Notice of Appeal was filed by Meide on November 1, 2001. App.141-142;Docket #46.

C. STATEMENT OF THE FACTS

This case is the result of Meide's intentional violation of the Consent Agreement and Judgment of this Court, filed on January 25, 1999, entitled Heidi Heitkamp, Attorney General, ex rel., State of North Dakota, State Department of Health v. Meide and Son, Incorporated, a North Dakota corporation, Jerry L. Meide, Individually, and RRABB, Inc., a North Dakota Corporation, Civil No. 99-C-0028. Pursuant to subparagraph 1 of paragraph XX of the Consent Agreement, Meide was to "satisfy any monetary obligations owing to...Environmental Abatement Services of N.D., the environmental remediation contractor who performed the asbestos cleanup on the identified buildings in Wahpeton, North Dakota within two years of the date of entry of judgment herein." App.52. At the time of Judgment, Meide owed EAS $60,835.00 plus interest from July 16, 1998. App.22. Meide had two years or until January 25, 2001 to satisfy "any monetary obligations owing" to EAS. App.52. One of the conditions of the Consent Agreement was that if Meide did not make his payment to EAS and Nova within the two years, Meide would be assessed a civil penalty of $225,000.00 by the State, which would be immediately due and payable. App.52-53. Meide waited until January 19, 2001, 6 days before his deadline to pay EAS and before implementation of the $225,000 penalty,

to file this declaratory judgment action. App.4-10. Meide failed to timely satisfy his monetary obligation to EAS. App.22.

The facts leading up to the Judgment at issue herein, are as follows. In December of 1997, the State began an investigation into reports that there had been asbestos-containing materials from Meide's properties improperly removed and stored by Meide. App.45-49. Although Jerry Meide initially denied it, the State's investigation found that the asbestos containing materials were illegally removed at the direction of Jerry Meide from buildings owned or controlled by Meide. Exhibit B, paragraph 1, Department's Addendum, p.12. Meide was then ordered by the State, by way of the February 24. 1998 emergency order, to develop a cleanup and decontamination plan. February 24, 1998 emergency order, Department's Addendum, p.4. Meide hired Nova Environmental Services, Inc. as the asbestos abatement designer to inspect the buildings and develop a cleanup and decontamination plan. App.32-33. Meide was also given a deadline of 5:00 p.m. on March 9, 1998 to have the cleanup and decontamination completed. February 24, 1998 emergency order, Department's Addendum, p.4.

In approximately January of 1998, Tom Gentzkow of Nova contacted David Anklam of EAS, soliciting bids on behalf of Jerry Meide and Meide & Son, Inc., for emergency cleanup of the asbestos material from Meide's property in Wahpeton, North Dakota. App.18,29-30. Mr. Gentzkow informed Mr. Anklam that the estimate for the cleanup project was to be an all-inclusive time and material price, which is standard in the abatement business. Id. In addition to the all-inclusive nature of the bid, Mr. Gentzkow also informed Mr. Anklam that there was a strict time limit in which Meide needed to have the asbestos removed and disposed of. App.18-19,30. Tom Gentzkow

also solicited 4 other abatement contractors for bids on this project, but they all refused to even submit a bid because of Meide's reputation for not paying his bills. App.124. EAS was the only contractor that was willing to accept the risk. Id.

On February 26, 1998, EAS submitted a bid proposal in the amount of $51,000.00 for the project to Nova. App.19,23. After reviewing the bid, Gentzkow contacted Meide and discussed in detail the bid proposal with him. App.30. Gentzkow made it clear to Meide that EAS would charge an all-inclusive time and material price and accordingly the final price would be determined by how many hours were spent on the project. App.125. Further, Gentzkow quoted Meide an estimated fee of $12,000.00 - $15,000.00 for Nova to put together the original Plan of Action for the Health Department and the subsequent decontamination specification; the $12,000.00 - $15,000.00 had nothing to do with EAS or the services it was to provide, as alleged by Meide in his Affidavit. App.33, 123. Jerry Meide expressed his approval of EAS' bid proposal to Gentzkow and accepted the terms thereof. App.30. Gentzkow then contacted Anklam of EAS and informed him of Meide's acceptance of the terms of the bid proposal and the scope of the work to be done. App.19,30.

EAS put several projects on hold, mobilized its crew to Wahpeton and began work on the emergency cleanup project shortly after Meide accepted the bid proposal. App.19. The asbestos-containing materials were removed and disposed of by EAS according to all local, state, and federal regulations. App.20. Due to Meide's failure to disclose all of the asbestos in the buildings prior to the work beginning, EAS was forced to expend numerous additional hours removing the asbestos, which was more than originally anticipated. App.20,24,125. After the work was completed, EAS sent an

invoice in the amount of $58,160.00, which was slightly more than the original bid proposal of $51,000.00, due to the additional work and overtime required. App.20. In regard to the overtime required, it should be mentioned that pursuant to the Emergency Cleanup Orders, efforts had to be made to "reasonably accommodate the ongoing retail businesses to the extent that it does not endanger public health." Department's Addendum pp. 4,9. To that extent, EAS was required to work nights and weekends, times that would accommodate the retail businesses, to get the work done by Meide's deadline with the State, thus accumulating many hours of overtime. App.24,30-31,122. Further, due to Meide's failure to disclose all of the hidden asbestos from the beginning, there was more work than EAS had originally anticipated in the original bid. App.125. Thus, it cost Meide more in the end; not because EAS overcharged Meide as he alleges, but because Meide failed to disclose his additional illegal actions. App.34,125.

A few weeks after completion of the first phase of the cleanup project, Anklam of EAS received a telephone call from Gentzkow of Nova stating that the State found additional buildings owned by Meide, not included in the first phase of the cleanup project, in which Meide illegally concealed asbestos in the interiors of the buildings, which had to be abated immediately. App.20,30. Gentzkow asked if EAS would come back to abate the additional buildings and Anklam informed him that EAS had not received a payment for the first phase of the cleanup project and that EAS would not return for additional work until arrangements were made to have EAS paid for the work it had already performed. App.20,30-31. Gentzkow informed Anklam that Nova had not received any more money either and said he would inform Meide of EAS' position. Id. Anklam then received a telephone call from Jerry Meide personally, asking if EAS would

perform the additional work. Id. Anklam told Meide that EAS would not do any further work until EAS' first invoice was paid. App.20. Meide said he would pay a portion of the first invoice at that time and then pay for the rest of Phase One and the additional work on Phase Two in full after the work was completed. Id. Believing Mr. Meide and trusting that he would stand by his word, EAS agreed to those terms. Id. On March 31, 1998, Meide paid a portion of the invoice to Nova who in turn paid EAS $10,000.00. Id. As a result, EAS hesitantly agreed to do the asbestos removal and disposal on Phase II of the project. App.21,31.

EAS mobilized back to Wahpeton and performed Phase II of the cleanup. Once again, the State imposed a strict deadline for the removal. Id. EAS removed and disposed of the asbestos in a professional and timely manner as hired to do, but once again was forced to incur many hours of overtime to get the project done by Meide's deadline. App.31. EAS charged the same rates for Phase II of the project that it charged for the initial cleanup. App.21. Once Phase II was completed EAS sent the invoice, dated May 5, 1998, for the work performed on Phase II in the amount of $42,675.00. App.21,26. Thereafter, Meide paid another portion of the first invoice, or an additional $10,000.00. App.21. This time the check was made out to Nova and EAS. Id. Gentzkow, on behalf of Nova, signed the entire check over to EAS. Id.

EAS did not see any payments from Meide for quite some time thereafter even though Anklam made attempts to collect the debt by calling Jerry Meide and sending him past due invoices on a regular basis. Id. Finally, in approximately July, 1998, Meide agreed to meet Anklam and Gentzkow in Fargo and presented Anklam with four post-dated checks made payable to EAS in the aggregate amount of $38,160.00. App.21,27-

28. Meide told Anklam to deposit two checks immediately and the other two checks in 30 days. App.21. The first two checks were dated July 16, 1998 and were in the amount of $10,000.00 each, and were deposited in EAS account on that date. App.21,27. However, there were not enough funds in Meide's account to cover the checks until August 4, 1998 for one of the checks and until August 10, 1998 for the other. Id. EAS attempted to cash the last two checks dated August 16, 1998, in the amounts of $10,000.00 and $8,160.00 at Mr. Meide's bank and EAS was informed that a stop payment had been put on both of the checks. App.21,28. No further payments had been made at the time of the declaratory judgment action. App.22.

Never once did Meide express his dissatisfaction with EAS' work or with the amount he had been charged for the asbestos cleanup to Anklam, as Meide alleges in his affidavit. App.22,34,120-121. Meide also did not complain to Gentzkow or anyone at Nova about the price charged by EAS in removing and disposing of the asbestos, as Meide further alleges in his affidavit. App.31,33-34,124. Furthermore, Meide did not attempt to negotiate a resolution of the bills with EAS "over the period of the next several months" as alleged in paragraph 14 of his affidavit. App.34,121. It was not until after the Consent Agreement and Judgment was entered, giving Meide an additional two years to pay EAS, that EAS was first made aware that Meide wanted to compromise on the amount of the outstanding debt. App.22,121.

ARGUMENT

A. Summary Judgment was appropriate in this case

EAS seeks summary judgment in this case under Rule 56, N.D.R.Civ.P. This Court has explained that:

> Summary judgment is a procedural device for the prompt and expeditious disposition of a controversy without a trial. Hall Family Living Trust v. Mutual Service Life Ins. Co., 2001 ND 46, ¶ 6, 623 N.W.2d 32. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.D.R.Civ.P. 56(c). The party opposing summary judgment cannot simply rely on factual assertions in a brief or pleadings and cannot rely on unsupported allegations; such conclusory assertions are insufficient to raise an issue of material fact. Jones v. Barnett, 2000 ND 207, ¶ 5, 619 N.W.2d 490. However, the evidence must be viewed in the light most favorable to the party opposing the motion, who must be given the benefit of all favorable inferences which can reasonably be drawn from the evidence. Mandan Educ. Ass'n v. Mandan Public School Dist. No. 1, 2000 ND 92, ¶ 6, 610 N.W.2d 64. Whether the trial judge properly granted summary judgment is a question of law subject to de novo review. Garofalo v. St. Joseph's Hosp., 2000 ND 149, ¶ 6, 615 N.W.2d 160.

Warner & Co. v. Solberg, 2001 ND 156, ¶ 10, 634 N.W.2d 65. In this case, even when the scant evidence presented by Meide is viewed in the most favorable light, there is no genuine issue of **material** fact.

Also pertinent to this case are several principles discussed by this Court in Black v. Abex Corp., 1999 ND 236, 603 N.W.2d 182, 189. The Black Court stated that "[a]lthough the party seeking summary judgment bears the initial burden of showing there is no genuine issue of material fact, the party opposing the motion may not simply rely upon the pleadings, but must present competent admissible evidence which raises an issue of material fact." Id. The Black Court held that a party opposing summary judgment must establish "the existence of a factual dispute on an essential element of her claim and on which she will bear the burden of proof at trial." Id. A defendant seeking summary judgment does not have to show that no evidence exists to support the plaintiff's claims. Id. at 188. Instead, the defendant may put the plaintiff to its proof, and

to avoid summary judgment the plaintiff must show that evidence exists to support the essential elements of plaintiff's claims. Id.

In this case, it was EAS and the State's position that Meide's claims were wholly without evidentiary support and that EAS was entitled to judgment as a matter of law. When put to its proof by EAS's summary judgment motion, Meide failed to prove evidence existed to support the essential elements of its claims against EAS and the State, namely that Meide owed EAS some lesser amount other than that "owing" to EAS at the time Meide entered into the Consent Agreement with the State. Docket #16,17,30. Further, Meide was unable to raise an issue of material fact. Although the trial court recognized that there were clearly factual disputes raised by Meide, the trial court found that the "...factual disputes are not relevant and do not change the result required by law because the issue, interpretation of the contract language and whether this language is ambiguous, are solely matters of law." App.130;Docket #30. Therefore, EAS concludes that summary judgment was appropriate in this matter and that the trial court's decision to dismiss Meide's claims against EAS and the State should be upheld.

B. The Trial Court did not err in determining that subparagraph 1 of paragraph XX of the Consent Agreement was not ambiguous as a matter of law.

Interpretation of a judgment is a question of law for the court. Sullivan v. Quist, 506 N.W.2d 394,398, 401 (N.D.1993). When a judgment is clarified by the same trial judge who entered it, "we should afford such a clarification considerable deference.... On the other hand, when one court interprets the decree of another court, the interpreting court is in no better position than we are to determine the original judge's intentions should the decree contain ambiguities. This Court reviews such interpretations *de novo.*"

Anderson v. Anderson, 522 N.W.2d 476, 478-479 (N.D.1994). In the case at hand, the trial judge who entered the original decree is the same judge interpreting the meaning of the consent agreement and therefore, such clarification by the trial judge should be given considerable deference. The trial judge was fully aware of all the facts leading up to the consent agreement. The trial judge is clearly in the best position to determine the intent of the judgment.

Pursuant to N.D.C.C. § 9-07-02, the language of a contract governs its interpretation if the language is clear and explicit and does not involve an absurdity. N.D.C.C. § 9-07-02; paragraph 3, 8/22/01 Order for Judgment, App.128. Under N.D.C.C. § 9-07-03, the court must interpret the contract so as to give effect to the mutual intentions of the parties as it existed at the time of contracting so long as the intent is ascertainable and lawful. N.D.C.C. § 9-07-03; paragraph 3, 8/22/01 Order for Judgment, App.128. Further, according to N.D.C.C. § 9-07-04, the intention of the parties to a written contract must be ascertained from the writing alone, if possible. N.D.C.C. § 9-07-04; paragraph 3, 8/22/01 Order for Judgment, App.128-129. If a written contract is unambiguous, the court determines the intent of the parties from the instrument itself, and extrinsic evidence is considered only if an ambiguity exists. Stracka v. Peterson, 377 N.W.2d 580, 582 (N.D. 1985); paragraph 3, 8/22/01 Order for Judgment, App.128-129. However, if a written contract is ambiguous, extrinsic evidence may be considered to show the parties' intent. Id. Whether or not a contract is ambiguous is a question of law. Id.

The construction of a written contract to determine its legal effect is a question of law. See Jones v. Pringle & Herigstad, P.C., 546 N.W.2d 837, 842 (N.D.1996).

> Contracts are construed to give effect to the mutual intention of the parties at the time of contracting. The parties' intention must be ascertained from the writing alone if possible. A contract must be construed as a whole to give effect to each provision, if reasonably practicable. We construe contracts to be definite and capable of being carried into effect, unless doing so violates the intention of the parties. Unless used by the parties in a technical sense, words in a contract are construed in their ordinary and popular sense, rather than according to their strict legal meaning.
>
> If a written contract is unambiguous, extrinsic evidence is not admissible to contradict the written language. However, if a written contract is ambiguous, extrinsic evidence may be considered to show the parties' intent. Whether or not a contract is ambiguous is a question of law. An ambiguity exists when rational arguments can be made in support of contrary positions as to the meaning of the language in question.

Lire, Inc. v. Bob's Pizza Inn Restaurants, Inc., 541 N.W.2d 433, 433-34 (citations omitted).

Section 9-06-07, N.D.C.C., in part, codifies the parol evidence rule, see Gajewski v. Bratcher, 221 N.W.2d 614, 626 (N.D. 1974), and provides:

> The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

The parol evidence rule is a rule of substantive law and precludes use of evidence of prior oral negotiations and agreements to vary the terms expressed in a written contract. Radspinner v. Charlesworth, 369 N.W.2d 109, 112 (N.D. 1985); Bye v. Elvick, 336 N.W.2d 106 (N.D. 1983); Gajewski, at 626.

In Gajewski, 221 N.W.2d at 627, the North Dakota Supreme Court concluded oral testimony was incompetent and inadmissible (1) to vary or contradict an executed and delivered quitclaim deed; (2) to prove the deed was security for repayment of a loan; and (3) to nullify the grant contained in the deed. The Court further said:

> The parol evidence rule has been variously defined and has been best stated as follows:
>
> > """Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement:' . . . 'all preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract . . . and "unless fraud, accident, or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence."""" Associated Hardware Supply Co. v. Big Wheel Distributing Company, 355 F.2d 114, 119 (3d Cir. 1966), 17 A.L.R.3d 998.
>
> . . . .
>
> The parol evidence rule is founded on experience and public policy and created by necessity, and it is designed to give certainty to a transaction which had been reduced to writing by protecting the parties against the doubtful veracity and the uncertain memory of interested witnesses. Hanes v. Mitchell, [78 N.D. 341, 49 N.W.2d 606 (1951)]; 32A C.J.S. Evidence §851.
>
> We have approved and applied this rule in the interpretation of § 9-06-07, N.D.C.C., and have held:
>
> > "Where a written contract is complete in itself, is clear and unambiguous in its language and contains mutual contractual covenants agreed upon, such parts cannot be changed by parol testimony, nor new terms added thereto, in the absence of a clear showing of fraud, mistake or accident." Larson v. Wood, 75 N.D. 9, 25 N.W.2d 100 (1946).

Gajewski, 221 N.W.2d at 626 (emphasis in original).

In the case at hand, the trial court found that the contract language of ¶XX(1) of the Consent Agreement is not ambiguous. App. 129;Docket #30. The court further held that the language is "clear and explicit and does not involve an absurdity," that the language can be interpreted to give effect to the mutual intentions of the parties as it existed at the time the Consent Agreement was entered into, and that the mutual intent of

the parties can be ascertained soley from the language used. Id. In so finding, the trial court held that by use of the language "shall satisfy any monetary obligations **owing,**" Meide bound himself to satisfy EAS as to any and all amounts presently due and owing to EAS at the time Meide signed the Consent Agreement (January 11, 1999). (emphasis added). The word "owing" used in its popular sense would be the amount owing at that time. The amount owing at that time was $60,835.00 plus interest from July 16, 1998, accruing at a rate of six percent. App. 22. As held by the court, the language did not include any future tense or conditional payment terms or any language that negotiations were going to continue on in the future on the amount due. App.129;Docket #30. Because the language was not ambiguous, extrinsic evidence is not admissible to contradict the written language, as Meide is attempting to do. Id. The parties used the word "owing" and therefore that language supersedes all the oral negotiations, which preceded or accompanied the execution of the consent agreement. Id. Thus, the trial court was correct and did not err when it determined that the language of subparagraph 1 of paragraph XX of the Consent Agreement in Civil No. 99-C-0028 was not ambiguous as a matter of law.

C. The Trial Court did not err in finding that Meide's declaratory judgment action was barred by the doctrine of judicial estoppel.

"[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." Davis v. Wakelee, 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895). This rule, known as judicial estoppel, "generally

prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." Pegram v. Herdrich, 530 U.S. 211, 227, n. 8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000); See 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory"). Because the rule is intended to prevent "improper use of judicial machinery," Konstantinidis v. Chen, 626 F.2d 933, 938 (C.A.D.C.1980), judicial estoppel "is an equitable doctrine invoked by a court at its discretion," Russell v. Rolfs, 893 F.2d 1033, 1037 (C.A.9 1990) (citation omitted).

In the present case, as an alternative ground for dismissal of Meide's claim and at the court's discretion, the trial court imposed the Doctrine of Judicial Estoppel against Meide. App. 131, paragraph 5. Although the North Dakota Supreme Court has not yet set forth the elements that are to be used to evaluate whether or not judicial estoppel should be imposed, it did recognize the doctrine in Littlefield v. Union State Bank, 500 N.W.2d 881, 883 (N.D. 1993). Id. Thus, the Trial Court looked to other jurisdictions and relied on New Hampshire v. Maine, 121 S.Ct. 1801, 1815, 149 L.Ed.2d 968, 978 (2001), to set forth the elements to be used. The trail court held as follows:

> All of the New Hampshire factors militate towards imposing the doctrine against Plaintiffs. The first factor, whether or not a parties later position is clearly inconsistent with its earlier position is clearly satisfied. See Paragraphs 3 and 4 above. Second, whether or not the party has succeeded in persuading a Court to accept that parties earlier position. Clearly the Court accepted the contractual language at issue by

> incorporating it into the Order For Judgment and Judgment. Third, whether or not the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. Clearly, EAS would face an unfair detriment by having to fully litigate a contract claim when the plain language of the Consent Agreement clearly indicates that Plaintiffs agreed to pay what was "owing". Obviously, this would be an unfair advantage to Plaintiffs to be able to have "a second bite of the apple".

August 22, 2001 Order, App. 131, paragraph 5. In enumerating these factors, there are not established inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts.

As the trial court held, it would clearly impose an unfair detriment to EAS and the State if Meide were allowed to assert the position that he now owes less than what was owing at the time he entered into the Consent Agreement. Meide's actions leading up to the Consent Agreement clearly evidence his knowledge and intent in regard to the outstanding bills to EAS. Meide acknowledged receiving a copy of the first bill and knew the exact cost for Phase I of the cleanup project, prior to hiring EAS to do the work on Phase II of the cleanup. App.33-34. When Meide failed to pay his bill, EAS refused to do any more work. App.20,30-31. Meide did not express his dissatisfaction with the bill to EAS or Nova at that time as he alleges, which would only make sense. App. 22,31. Meide needed additional services from EAS to protect his own interest, thus he made a small payment to EAS and a promise to pay the remaining outstanding debt in full once the work was completed in an effort to induce EAS to do the work for him on Phase II of the project, and it worked. App.20. If in fact Meide would have expressed his dissatisfaction as he alleges, it is doubtful that EAS would have did any more work for him at that point. Meide even went as far as giving EAS post-dated checks in the

amount of $38,160.00. App. 21. However, once the work was completed and Meide had satisfied the State's cleanup requirements, thanks to the timely and professional services of EAS, Meide put a stop payment on the two remaining checks to EAS. Id. If in fact Meide was dissatisfied with the amount charged in the first bill as he alleges, he fraudulently concealed that information until after he got everything he could from EAS. App.34. Further, EAS did not know that Meide was contesting its bill until after the Consent Agreement was entered. App.22. Thus, the amount "owing" at the time of the Consent Agreement was $60,835.00 plus interest accruing from July 16, 1998. Id.

The intent of the parties to the Consent Agreement, according to Kenneth Wangler, on behalf of the State, was that this amount would be paid within two years, which it was not. Affidavit of Kenneth Wangler, Department's Addendum, p.21. The deciding factor behind the two-year deadline stemmed from Meide's reputation for not paying his bills and the State's concern that EAS would not be paid by Meide in a timely manner, therefore, the State felt compelled to include the language at issue in the Consent Agreement. Id. According to Kenneth Wangler of the North Dakota Department of Health, the purpose of the two-year deadline was to "avoid the type of delay and protracted litigation Meide has now initiated in this matter." Department's Addendum, p. 22. In addition, the State has also delayed enforcement and collection of the civil penalties against Meide, to its detriment. Thus, if there was ever a case for judicial estoppel, this is it. It is clear that judicial estoppel was correctly imposed by the trial court and to find otherwise would surely give Meide an unfair advantage, to the detriment of EAS and the State.

D. Due to the fact that the State was a named party to this action, Meide's declaratory judgment action is precluded by the doctrine of res judicata or collateral estoppel.

Although Meide raised and discussed the issues of res judicata and collateral estoppel in his brief in this appeal, the trial court did not rely on those doctrines in its holding dismissing Meide's claim, so in the interest of judicial economy, EAS will just touch briefly on this issue. Appellant's Brief, pp. 7-10.

For purposes of both res judicata and collateral estoppel in this state, only parties or their privies may take advantage of or be bound by the former judgment. Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 384 (N.D.1992). In general, privity exists if a person is "so identified in interest with another that he represents the same legal right." Id. quoting 46 Am.Jur.2d *Judgments* §532, at p. 683 (1969). In the case at hand, although the trial court found that there may not have been privity between EAS and the State, Meide named the State as a party to this action, thus there is no need to discuss the privity issue. Due to the fact that both Meide and the State are named parties to this action and were both named parties in the former judgment or Consent Agreement, both parties are bound by the terms of the Consent Agreement. Thus, the State has an interest in enforcing the terms of the Consent Agreement. It is clear from Kenneth Wangler's Affidavit that the State and Meide agreed that the amount "owing" to EAS would be paid within two years of the Consent Agreement. Department's Addendum, p. 21-22. The State felt compelled to include such language to insure that EAS would get paid. Department's Addendum, p. 21. If such amount was not paid, there would be stiff penalties imposed by the State, to its benefit. App.52-53. There is no dispute that both parties agreed that any monetary amounts owing EAS would be paid within two years.

However, Meide failed to comply with the Judgment. This issue was already decided in Civil No. 99-C-0028, which the State and Meide were parties to and therefore this issue must be precluded from relitigation.

CONCLUSION

For the reasons stated above, the decision of the Trial Court dismissing Meide's declaratory judgment action should be affirmed.

DATED this 27th day of February, 2002.

SMITH BAKKE HOVLAND & OPPEGARD

By: _____

Suzanne M. Schweigert (ID #05480)
116 North Second Street
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630
Attorneys for Appellee, Environmental Abatement Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct cop of the foregoing **BRIEF FOR APPELLEE, ENVIRONMENTAL ABATEMENT SERVICES, INC.,** was on the 27th day of February, 2002, mailed to the following:

Lyle Witham
Attorney at Law
500 North 9th Street
Bismarck, ND 58501-4509

Joseph A. Turman
Attorney at Law
P.O. Box 110
Fargo, ND 58107-0110

_____
Suzanne M. Schweigert

CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellee, Environmental Abatement Services, Inc., in the above matter, and as the author of the above brief, hereby certify, in compliance with Rule 28(g) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, including words in the table of contents, table of authorities, and certificate of compliance totals 6,618.

DATED this 27th day of February, 2002.

SMITH BAKKE HOVLAND & OPPEGARD

By: Suzanne M. Schweigert

Suzanne M. Schweigert (ID #05480)
116 North Second Street
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630
Attorneys for Appellee, Environmental Abatement Services, Inc.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jerry L. Meide, Individually and Meide & Son, Incorporated, a North Dakota Corporation, Appellants, vs. Wayne Stenehjem, Attorney General, ex rel., State of North Dakota, State Health Department, and Environmental Abatement Services, Inc. Appellees.	**AFFIDAVIT OF SERVICE BY MAIL** **Appellate Case No. 20010273** **District Court No. 01-C-00015**

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

Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 25th day of February, 2002, I served the attached **APPELLEES BRIEF** upon Joseph A. Turman and Suzanne M. Schweigert, by placing a true and correct copy thereof in an envelope addressed as follows:

Mr. Joseph A. Turman
Attorney at Law
DeMars & Turman
PO Box 110
Fargo, ND 58107-0110

Suzanne M. Schweigert
Attorney at Law
116 North Second Street
PO Box 460
Bismarck, ND 58502-0460

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Donna J. Connor

Subscribed and sworn to before me
this 25th day of February, 2002.

Notary Public

JOLENE J. THIEL
Notary Public, State of North Dakota
My Commission Expires APRIL 5, 2005
STATE OF NORTH DAKOTA
NOTARY PUBLIC SEAL