

20100119

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

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

SEP 21 2010

Andrew Heinze
 Appellant
 vs.
 Howard Venture, LLC,
 Appellee

]
]]
]]
]]
]]
]]
]]
]]
]]
]

STATE OF NORTH DAKOTA

Supreme Court
Case No. 2010O119

**Appeal from Order of Judgement of the Barnes County District Court
Southeast Judicial District**

APPELLANTS BRIEF (Affidavit of Andrew Heinze)

The undersigned, Andrew Heinze, of his own certain knowledge and under the pain and penalty of perjury, does depose and declare that which is below is true, except that which is stated upon information and belief and that he verily believes the same to be true. The petitioner is in propria persona, not Pro Se, to present this Appeal by Affidavit from Order of Judgement of the Barnes County District Court, Southeast Judicial District, Case No. 02-10-00007.

Andrew Heinze
In want of counsel
110 7th St N.
Lamoure, ND 58459
(701)840-5264

TABLE OF CONTENTS

Table of Contents..... I

Table of Authorities..... II, III

Nature of the Proceedings..... 1

Statement of the Facts..... 2

SUMMARY..... 3

ARGUMENT

1. THE COURT ABUSED ITS DISCRETION BY NOT
REQUIRING PROOF OF NOTICE OF ALLEGED
OVERPAYMENT AND VERIFICATION THEREOF 3

2. THE COURT ABUSED ITS DISCRETION BY
NOT RULING ON TIMELY DEMAND FOR JURY
TRIAL AND NOTICE OF HEARING 5

CONCLUSION and Verified Signature..... 9, 10

TABLE OF AUTHORITIES

Table of cases

<u>Barker v. Wingo</u> , 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).....	7
<u>Burrows v. Paulson</u> , 64 N.D. 557, 254 N.W. 471 (1934)	8
<u>Dobervich v Central Cass Public Sch. Dist. No.17</u> , 283 N.W.2d 187 (N.D. 1979).	8
<u>First Nat’l Bank v. Burich</u> , 367 N.W.2d 148 (N.D. 1985).....	6
<u>First W. Bank v. Wickman</u> , 464 N.W. 2d. 195 (N.D.1990).....	4
<u>Frankenhauser v. Rizzo</u> 59 F.R.D. 339 (1973).....	7
<u>Haines v. Kerner</u> ET AL. 404 US 519.....	8
<u>Janin v. Logan</u> , 209 Ky. 811, 273 S.W. 531, 532.....	4
<u>James Riv. N’l Bnk v.Hans</u> , 73 N.D.374, 15 N.W. 2d 442, 154 A.L.R.1005 (1944)..	5
<u>Judicial Conduct Comm’n v. Wilson</u> , N.W.2d 105 (N.D.1990).....	5
<u>Kilgore V. Farmers Un. Oil Co.</u> , 74 N.D. 640, 24 N.W. 2D 26 (1946).....	6
<u>Lumber Mart, Inc. v. Hass Int’l Sales and Serv.</u> , 269 N.W.2d. 83 (N.D. 1978)..	4
<u>L.W. Wentzel Implement Co. v. State Fin. Co.</u> , 63 N.W.2d 525 (N.D. 1954)....	8
<u>McCormack v. Phillips</u> , 4 Dak. 506, 34 N.W. 39 (1887).....	8
<u>Rivinus v. Huber</u> , 74 N.D. 773, 24 N.W. 446 (1946).....	6
<u>Smith v. Anderson</u> , 415 N.W.2d 108 (N.D. 1990).....	3, 5
<u>State v. Dilger</u> , 338 N.W.2d 87, 90 (N.D. 1983).....	7
<u>State ex rel Olson v. Royal Indem. Co.</u> , 44 N.D.550, 175 N.W.625 (1920).....	6
<u>Stella v. Mosele</u> , 299 Ill.App. 53, 19 N.E. 2d 433, 435.....	4
<u>Thompson v. Zurick Ins. Co.</u> , D.C.Minn., 309 F.Supp. 1178, 1181.....	7

<u>Tn.of Bulken v. Vill.of Buhl</u> , 158 Minn. 271, 197 N.W. 266, 35 A.L.R. 470.....	7
<u>United Accounts, Inc. v. Quackenbush</u> , 434 N.W.2d 567 (N.D. 1989).....	6,8
<u>U.S. v. MacDonald</u> , 456 U.S. 1, 102 S. Ct. 1497, 1502, 71 L.Ed.2d 696(1982)...	7
<u>Van Alen v. Superior Court</u> 37 Cal. App. 696, 174 p.672.....	4
North Dakota Century Code	
29-19-02.....	7
1-04-14 - 17; 9-10-01, 9-10-06, 9-10-07.....	7
36-04-01, 02, 03, 04, and 05	8
Other Authorities	
Ames, Lectures on Legislative History, p.162.....	7
North Dakota Law Review, 69 N.D.L.Rev. 559 (1993).....	7
North Dakota Rules of Court, 3.2	4
North Dakota Rules of Civil Procedure, Rule 13(a).....	6
North Dakota Law Review, 69 N.D.L. Rev. 559 (1993).....	7
North Dakota Code of Judicial Conduct, Rule B. 5, 7, 9.....	5
United States Constitution, Amendment V	7
North Dakota Constitution, Declaration of Rights, Article I section 13.....	8

Appendix of Abbreviations

- R.O.A. Register Of Actions, case summary, index number
- p. Page number

NATURE OF THE PROCEEDINGS

This action is an appeal of the judgement and determination executed against myself from an order in District Court, Barnes County, Southeast Judicial District, Judge Thomas E. Merrick presiding, dated 02/26/ 2010 in which the court did not rule on many of my notices, motions, and claims, including my sworn testimony that I had never received notices of alleged overpayment from Howard Venture, LLC (R.O.A. 32; Transcript, p.7 lines 1-3). Howard Venture LLC, has not produced a single document I demanded . (R.O.A. ,Register of Actions #33,#60). I never had my day in court, for I was not given jury trial as demanded(R.O.A. #24; R.O.A. #58).

The case (No. 02-10-C-00007) stems from a communication from a Mr. Wagner by mail in January of 2009. This was about a year after they came and took the cattle. I didn't understand what he was talking about so I requested more information (R.O.A.10 exhibits 1,2,3). The next thing I know, I get served with a summons and complaint alleging an overpayment.

I, Andrew Heinze, do not remember much about the time the cattle were taken, for I was on strong anti-depressants, hardly ever slept, and under a doctor's care.(R.O.A. 32 p.1)

I brought forward the Notice of Demand for Change of Venue (R.O.A. 25) that was denied (R.O.A. 49). I brought forward the Amended Notice of Demand for Change of Venue (R.O.A. 57) and the Venue of Barnes County was granted (R.O.A.70).

I was also preparing for a jury trial because. In due course it is a Constitutional Right, previously twice requested and never denied. The Judge, I felt, was unfair (R.O.A. 41 and 88) because I had answered all the plaintiff's questions and they had not answered a single question I had noticed them of and so demanded of them to answer (R.O.A. 33, 59, and 66)

On the evening of February 12th, 2010, I became aware that there was a hearing scheduled for earlier that day. That which I had received was the letter requesting that the

plaintiff appear telephonically. I had not been notified nor is there an affidavit of service for the scheduled hearing (R.O.A. #78 with exhibit 1B). I was not aware of the ex parte hearing. There is no record that anyone tried to call me or inform me of the hearing. I had appeared telephonically at one of the previous hearings (R.O.A. 22) but no one had ever tried to contact me. I had never missed any other hearing, because I was made aware of every other hearing.

The judgement to be reviewed (R.O.A. 85) was filed February 26th 2010 in favor of the plaintiff for \$59,869.45.

STATEMENT OF THE FACTS

I have farmed and operated in Barnes County for 30 years or all my life. I have always been payed on time for livestock as prescribed by law, attained signed receipts of head count, verified weights, and prices verified by public auction or contract. I never received any verbal or written contracts or notices from Howard Venture LLC, and have not been overpaid as Organic Beef Prices based on parity as suggested by the United States Department of Agriculture in the Original Farm Bill for a sustainable agriculture and America (R.O.A. 69).

My progression in due course was a Motion to Dismiss by Affidavit dated 1/26/10 (R.O.A. 75), was filed by mail on 2/11/10, but was not heard at the ex parte hearing on 2/12/10, as the transcript attests to (Transcript pages 7 and 8). Whereas, by Plaintiff's (Howard Venture LLC) own admission, also filed the same day, argued and responded, that this motion is premature (R.O.A. 76 pg.3). In the Motion to Dismiss by Affidavit, I preserved all rights (R.O.A. 75 p.4) including right to jury trial as previously preserved and demanded (R.O.A.; 5 p.4, R.O.A.24, 58).

The alleged overpayment transfer was put into a bank's loan account and I received no notice of that account. I was not given notice of the electronic transfer(transcript p.7), and thus I

had no notice given of any accounting, nor was I given any notice from plaintiff of electronic transfer or a receipt that the electronic transfer was correct (Transcript p. 7R.O.A. 75 p.5).

SUMMARY

On March 23rd, 2009, I received a Summons and a Complaint that failed to state a claim. The complaint was incomplete because it stated documents important to the case were available, but were actually omitted and never produced even when I demanded them(R.O.A. 33, 66). I have yet to this date received any copy of any type of notice of overpayment, as Howard Venture LLC claims that I had received notice (Transcript p. 4 line 4 p.7 lines 1-3).

ARGUMENT

1. THE COURT ABUSED ITS DISCRETION BY NOT REQUIRING PROOF OF NOTICE OF ALLEGED OVERPAYMENT, VERIFICATION THEREOF AND NOTICE OF HEARING UPON THE MATTERS

A trial court abuses its discretion when it acts arbitrarily, capriciously, or unreasonably.

Smith v. Anderson, 415 N.W.2d 108 (N.D. 1990).

In the facts set forth by the court in its Memorandum Opinion, (Decision, R.O.A. 81 p.1) the court suggests two contracts exist but they have never been produced. The alleged overpayment wired to my bank account, was actually put into a bank loan account. I have no record of receiving any notice of an amount that is alleged to be incorrect and there is no record of notice, and the testimony that I had never received notice was never challenged (R.O.A. 10 p.7 item III), but Howard Venture, LLC claims to have sent a letter to me (Transcript p. 4 line 4, p.7 lines 1-3) but the plaintiff has never produced it.

Nowhere is there any documentation on how the price paid for the cattle was arrived

upon. Contacts made after the facts giving rise to the cause of action in an attempt to settle the dispute, and not directly related to the cause of action, were not sufficient contacts to establish jurisdiction. Lumber Mart, Inc. v. Hass Int'l Sales and Serv., Inc., 269 N.W.2d. 83 (N.D. 1978), but I was handed an unsigned, incomplete, unverified document (R.O.A. 63 exhibit 4), about 2 years after the fact, that did not state any price agreed upon or how a price was discovered.

I was not given notice of the time of oral argument as required by N.D.R.Ct. 3.2 (R.O.A. 78) I did not receive Notice of Hearing on Renewed Motion for Summary Judgement (R.O.A. 74). There has been no offer of proof that the notice was ever sent to me. The last Notice of Hearing (R.O.A. 64) and the last Affidavit of Service by Mail (R.O.A. 65) that I received and did not include or even mention the hearing held the 12th day of February, 2010. The hearing required to be noticed is governed by N.D.R.Ct. 3.2; this rule authorizes the hearing of routine motions on brief without oral arguments, but does not dispense with the requirement that a motion must be noticed and a time of hearing announced. A judgement entered on motion of one party without proper notice and the opportunity to be heard by the other party is contrary to fundamental principles of justice, First W. Bank v. Wickman, 464 N.W.2d. 195 (N.D. 1990); and a judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested. Janin v. Logan, 209 Ky. 811, 273 S.W. 531, 532; Van Alen v. Superior Court in and for Los Angeles County, 37 Cal. App. 696, 174P. 672; Stella v. Mosele, 299 Ill.App. 53, 19 N.E.2d 433, 435, but on the evening of the hearing I did receive a letter from the Vogel Law Firm addressed to the Barnes County Clerk of Court referring to a hearing (R.O.A. 78 exhibit 1B). This letter does not appear in the Register of Actions.

The summons (R.O.A. 1) did not specify the court in which the hearing was held and the

summons did not specify the venue in which the action was taken (R.O.A.75 p.4 item 1) The summons must specify the court in which the action was brought. James River Nat'l Bank v. Haas 73 N.D. 374, 15 N.W. 2d 442, 154 A.L.R. 1005 (1944).

Before February 12th 2010, I filed by mail (Register Of Actions #75), Motion to Dismiss by Affidavit, that yet again I challenged that jurisdiction has not been properly argued by Howard Venture, LLC. In the proceedings of the ex parte hearing the court did not state that it had the proper jurisdiction to continue (Transcript of February 12th 2010).

An ex parte communication, *advice* from Thomas E. Merrick, stepping out of his duty as Judge and advising counsel for the plaintiff, Howard Venture LLC.(R.O.A. 88 paragraph 3), that this would more appropriately brought as a conversion action (Transcript p.6 lines 4-6). The N.D. Code Jud. Conduct states in part, (B.5) "A judge shall perform judicial duties without bias or prejudice....., (B.7)A judge shall not initiate, permit or consider ex parte communications, or consider other communications made to the judge outside the parties concerning a pending or impending proceeding (B.9) make any public comment that might reasonably be expected to affect its outcome or impair its fairness, but motion procedure, including notice and hearing may be employed under Rule 60(a) and supreme court suggests that in^{the} future to avoid accusations of improper ex parte contacts, notice and hearing procedure be employed. Judicial Conduct Comm'n v. Wilson 461 N.W.2d 105 (N.D. 1990).

b. THE COURT ABUSED ITS DISCRETION BY
NOT RULING ON TIMELY DEMAND FOR
JURY TRIAL.

A trial court abuses its discretion when it acts arbitrarily, capriciously, or unreasonably.

Smith v. Anderson, 415 N.W.2d 108 (N.D. 1990).

If in the facts set forth by the court in its Memorandum Decision (R.O.A. 81 p. 1,2), Judge Merritt suggests two contracts were made, then they should be able to be discovered and a counterclaim could be brought forward for breach of contract and an action for damages for breach of contract is triable by jury. Kilgore v. Farmers Union Oil Co. 74 N.D. 640, 24 N.W.2d 26 (1946). No contracts were discovered, and that unresolved factual dispute is not pertinent to Howard Venture, LLC claim (R.O.A. 1), then the price paid should be a verifiable fact of the parties, but the facts were brought into question (R.O.A. 10 p.4,5 and R.O.A.69 p1-4), and the trial court, in its order denying a motion to dismiss, had no discretionary authority to refuse to allow defendant the right to demand a jury trial and file a counterclaim under the rules, where the time had not expired to exercise those rights. United Accounts, Inc. v. Quackenbush, 434 N.W.2d 567 (N.D. 1989), then in the Summary Judgement the court claims I have failed to respond with competent evidence establishing a genuine issue of material fact but issues of fact in an equity case may be submitted by the trial court to a jury for an advisory verdict, State ex rel. Olson v. Royal Indem. Co. 44 N.D.550, 175 N.W. 625 (1920) and under R.C. 1943, SS 28- 1206, an issue of fact in an action for the recovery of money only was required to be tried by jury, unless a jury was waived. Rivinius v. Huber 74 N.D. 773, 24 N. W. 446 (1946) and if the purpose of N.D.R.Civ.P. 13 (a) is to promote judicial economy by preventing multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters, First Nat'l Bank v. Burich, 367 N.W.2d 148 (N.D. 1985), then Howard Venture, LLC, failed to state in any pleading, the alleged violation of any law, code, statute, or ordinance. The plaintiff, in the complaint, did not expose which law is sought to be enforced against me. The plaintiff failed to assert the legal affect of an occurrence in terms of redress or failed to aver a situation at law. A

situation which would entitle the party to sustain action and give the party right to seek a judicial remedy in the parties behalf, *See Thompson v. Zurick Ins Co.*, D.C.Minn.,309F. Supp.1178,1181, but an accusation of unjust enrichment of one person at the expense of another is said to be the equitable principle which lies at the foundation of the great bulk of quasi contracts. *Ames, Lectures on Legislative History*, (p.162.) and it is what was formerly known as the contract implied in law; it has no reference to the intentions or expressions of the parties. the obligation is imposed despite, and frequently in frustration of their intention. *Town of Bulken v. Village of Buhl*, 158 Minn. 271, 197 N.W. 266, 35 A.L.R. 470.

If the court and Judge Merrick would have set trial for the earliest 'practicable' time after considering the time necessary for the parties to adequately prepare, *See section 29-19-02 NDCC*, and if he would have explained the right to a jury trial in equitable cases, *See 69 N.D.L. Rev. 559 (1993)*, and if he had recognized the *Fifth Amendment* protection that I may not be deprived of life, liberty, or property, without due process of law and/or the substantive or procedural rights that protect myself, the defendant, against prejudice due merely to passage of time, *see United States v. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 1502, 71 L.Ed.2d 696 (1982); *Barker v. Wingo*, 407 U.S.514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); and *State v. Dilger*, 338 N.W.2d 87, 90 (N.D. 1983). For everyone owes a duty without contract to refrain from injuring the person or property of another or infringing upon any rights of another. The conversion of personal property of another is a violation of this duty. Everyone is responsible not only for injury caused by willful acts but also for injury to another person caused by ordinary negligence or gross negligence in the management of one's property or person. *See NDCC 1-01-14 - 17; 9-10-01, 9-10-06, 9-10-07.*

Even if criminal acts are discovered the distinction between actions at law and suits in

equity is a change in form rather than in substance, and the distinction between legal rights and remedies remains; Burrows v. Paulson, 64 N.D. 557, 254 N.W. 471 (1934), and all actions for enforcing or protecting private rights, or for redressing or preventing private wrongs, are to be brought in the one form of a “civil action”, whether the issues raised are legal or equitable, or both. McCormack v. Phillips, 4 Dak. 506, 34 N.W. 39 (1887); L.W. Wentzel Implement Co. v. State Fin. Co., 63 N.W.2d 525 (N.D. 1954), and the trial court in its order denying a motion to dismiss, had no discretionary authority to refuse to allow defendant the right to demand a jury trial and file a counterclaim under the Rules, where the time had not expired for defendant to exercise those rights, United Accounts, Inc. v. Quackenbush, 434 N.W.2d 567 (N.D. 1989), but a distinction exists as the right to jury trial is concerned, Article I section 13 of the ND Constitution preserves trial by jury in all cases in which it could have been demanded as a matter of right at common law, Dobervich v. Central Cass Public School District No. 17, 283 N.W.2d 187 (N.D. 1979),

The United States Supreme Court said that, “The only issue before us is petitioner’s contention that the District Court erred in dismissing his pro se complaint without allowing him to present evidence on his claims,” and that, “allegations such as those asserted by petitioner, however in-artfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, *which we hold to less stringent standards than formal pleadings drafted by lawyers*”, and finally, “we conclude that he is entitled to an opportunity to offer proof”. See Haines v. Kerner ET AL. 404 US 519.

CONCLUSION

The Summons and the Complaint was served upon myself, the defendant, at the same

instance as I was noticing and demanding production of documents (R.O.A 10 exhibit 1) in preparation to bring an action against Dakota Beef, LLC for failure to produce a copy of the contract (purchase agreement), Bill of Sale and agreed price, to produce verified a copy of the weight tickets, identification of animals, and head count, to produce a copy of the bill of laden or truck scale tickets, to produce a copy of scale certification, to produce a copy of Dealer's License and Bond as required by North Dakota Century Code 36-04-01, 02, 03, 04, and 05 or any proof of Dealer's Licence or Bond and/ or what lawful right they have to take cattle without a Licence or bond from my farm, to produce a copy of the bankruptcy of Dakota Beef, LLC, or takeover by Howard Venture, LLC, and the discharge of any alleged debts ensuing such bankruptcy or takeover, and the contract Howard Venture, LLC has to have to purchase Dakota Beef, LLC.

I had not received any production of the above stated documents demanded (R.O.A.33,60). Without these documents Dakota Beef, LLC or Howard Venture LLC has no standing, thus the court can not obtain subject matter jurisdiction without an agreement or contract. Likewise, they have not been licenced to do business in North or South Dakota and are delinquent in all their filings and fees throughout the United States (R.O.A 103, 2 pages). They are not authorized to transact business as a foreign corporation or any other manner in the State of North Dakota or South Dakota but if they were licensed to do business they did not care for, slaughter, nor pay for the animals properly all while knowingly hiring illegal immigrants (R.O.A.. 69 p. 2).

In preparation for trial, I made timely and often referenced demand for jury trial as a matter of substantive and procedural right. The specific demands for jury trial were properly recorded (R.O.A. 24 and 58) and were never challenged.

I did not receive notice of hearing nor did I get my day in court to discover what appears to be a contradiction in my ex-wife's testimony (R.O.A. 67 p.1), where she signed and created

four documents (R.O.A. 67 p. 4,5,6,7) when Dakota Beef (Howard Venture LLC) took the cattle, but she claims she “ never delivered any cattle”.

The issues presented by myself are as applicable now as they were before the court order. My lawful right to appear in court to protect my rights in this matter as I felt it necessary, albeit under protest, for want of jurisdiction. There is sufficient public interest for the court to re-examine and find if I had ever entered into a contract with Howard Venture, LLC, and if the unresolved factual disputes claimed by the court are an essential element of the case (ROA 81 p.2).

I reiterate my complaint in the form to offer a verified counterclaim and be given opportunity to offer proof upon proper legal notice. That I have the legal right to attain counsel, the right to cross-examine witnesses, a jury trial of right, and I have the right that the evidence that I present is given equal weight in any decisions or opinions of the court.

The court’s decision, order, and judgement of February 26, 2010, upon myself of an unjust enrichment, should be reversed.

Date: 9-21-10

Respectfully submitted,

Andrew Heinze

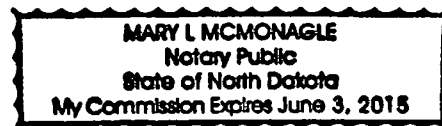
Andrew Heinze, In want of counsel

The above named Andrew Heinze, being personally known to me did appear before me and then and there did affix his signature to the attached document.

Mary L MCMONAGLE

Notary for the State of North Dakota

My commission expires _____



RECEIVED BY CLERK
SUPREME COURT
SEP 22 2010

RE: Andrew Heinze, Appellant v. Howard Venture, LLC, Appellee

Case No. 20100119

STATE OF North Dakota)

) SS AFFIDAVIT OF SERVICE BY MAIL

COUNTY OF Barnes)

Andrew Heinze, does depose and state that he is of legal age and on the date of September 21st, 2010, Affiant deposited in the United States Post Office at Valley City North Dakota, a true and correct copy of the Appellants Brief.

A copy of the foregoing was securely enclosed in an envelope with postage duly prepaid and addressed as follows: 1 copy and 1 original and 7 copies

Vogel Law Firm
218 NP Ave
P.O. Box 1389
Fargo, ND 58107-1389

Supreme Court of ND
600 E Blvd. Ave.
Bismarck, ND 58505-0530

To best of affiants knowledge, the address above given was the actual post office address of the party intended to be served. The above document was duly mailed in accordance with the provisions of the Rules of Appellate Procedure.

Andrew Heinze
Andrew Heinze

Subscribed and sworn to before me this 21st day of September, 2010.

Mary L. McMonagle

(SEAL)

Notary Public, Barnes County, State of ND

