IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Matthew Viscito, Mary Lynn Bernston, Florence Properties, LLC, Appellants v. Kevin Christianson, Pace's Lodging Corporation, Mednational, LLC, Aurora Medical Park No. 2, LLC, and Jeff Sjoquist, Appellees	))))))))))))))	Supreme Court No. 20150285

APPEAL FROM THE AUGUST 4, 2015 ORDER OF JUDGE KLEVEN, NORTH-EAST CENTRAL JUDICIAL DISTRICT, AWARDING ATTORNEY'S FEES

BRIEF OF APPELLANTS MATTHEW VISCITO, MARY LYNN BERNSTON, AND FLORENCE PROPERTIES, LLC

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STATEMENT OF THE ISSUES

I. Did The Trial Court Have Authority To Award Fees?

II. Did The Plaintiffs Request A Voluntary Dismissal?

III. Is There Any Basis in Law Upon Which The Court Did Or Could Have Relied?

IV. Did The Trial Court Abuse Its Discretion?

STATEMENT OF THE CASE

[¶1]This is an appeal of an award of attorney's fees by the trial court following remand by this Court for a determination in accordance with the holding in Viscito v. Christianson, 2015 ND 97, 862 N.W.2d 777. This Court must decide whether there was legal basis for the award of attorney's fees or whether the trial court abused its discretion when it awarded attorney's fees on remand. The finding of the trial court was entered on the 5th day of August, 2015.

STATEMENT OF THE FACTS

[¶2] Viscito sued Christianson alleging a number of claims pertaining to an agreement the parties entered to build, own, and lease a hospital. (App. 10) Christianson moved to compel arbitration, contending the agreement required that Viscito's claims be resolved through arbitration. On August 1, 2013, the trial court granted the motion to compel arbitration and ordered the parties complete arbitration within six months from the date of the order. (App. 41)

[¶3] On January 30, 2014, Viscito moved for an extension of time to complete arbitration. (App. 53) Christianson moved to dismiss with prejudice and requested an award of attorney's fees and costs under N.D.R.Ct. 11.5. (App. 60) Viscito responded with an objection

to the award of fees and reasoning why the case must not be dismissed with prejudice. (App. 63) On March 24, 2014, the trial court held a hearing on the motions. At the conclusion of the hearing, the trial court ruled from the bench that the case be dismissed without prejudice and awarded Christianson reasonable attorney's fees and costs. (App. 218) The trial court requested Christianson submit an itemized billing statement of its attorney's fees, so the court could determine the reasonableness of the fees. Christianson submitted an affidavit requesting $33,405.14, the full amount of fees and costs it had incurred defending the entire case, along with itemized billing statements documenting the work performed from July 6, 2012, to April 7, 2014, totaling the amount requested. The trial court dismissed the case without prejudice and awarded Christianson $33,405.14 in attorney's fees and costs. (App.73)

[¶4]Viscito appealed, arguing the trial court abused its discretion in awarding Christianson all of its costs and attorney's fees incurred throughout the case because the court misinterpreted the rules authorizing sanctions. This Court determined that the district court did not cite its authority for awarding attorney's fees and costs at the hearing, nor in its order or judgment, and after a thorough review of the record, was unable to determine the authority the district court relied on for awarding attorney's fees and costs. (App. 84) This Court reversed the district court's award of costs and attorney's fees incurred and remanded for a determination of authority on which the district court imposed sanctions and findings necessary to support such an award. (App. 86-87)

[¶5]On remand, Christianson moved for reconsideration of his original motion seeking costs and fees. (App. 88-97) Viscito responded, arguing that the court was without authority to issue sanctions, that defendants failed to show they suffered prejudice, that plaintiffs

did not seek a voluntary dismissal, that the arbitration claim is not duplicative litigation, and that the court is limited in its award of fees. (App. 131-144) The trial court awarded fees and costs in the amount of $33,405.14 in its order dated August 4th, 2015, stating in paragraph 11, "Viscito sought a voluntary dismissal of the case without prejudice. The Court finds that requiring Viscito to pay reasonable attorney's fees and costs to Christianson is fair in light of these findings." (App. 215)

STANDARD OF REVIEW

[¶6]The question of whether a party is entitled to fees under a particular statute or contract is a question of law subject to de novo review. Interpretation of the Rules of Court is to be conducted utilizing principles of statutory construction. See State v. Lamb, 541 N.W.2d 457 (N.D. 1996) citing State v. Schroeder, 524 N.W.2d 837 (N.D. 1994); and Walker v. Schneider, 477 N.W.2d 167 (N.D. 1991).

[¶7]Interpretation and application of a statute is a question of law, fully reviewable on appeal. See Smith v. Hall, 2005 N.D. 215, 707 N.W.2d 247; citing In Re: Estate of Gleeson, 2002 N.D. 211, ¶ 7, 655 N.W.2d 69. Since rules of court are to be interpreted in the same manner as a statute, and the interpretation of a statute is a question of law, interpretation of a rule of court is a question of law. This Court is empowered to review questions of law on a de novo basis. See Jangula v. Jangula, 2005 ND 203, ¶ 9, 706 N.W.2d 85.

[¶8]Once a judge determines that a party is entitled to an award of attorney's fees, the standard of review on appeal for the amount of fees awarded is an abuse of discretion. However, the Judge must still act within the constraints of the law, or they are abusing their discretion. An award of attorney's fees will be overturned if the trial court abused its

discretion. See Negaard v. Negaard, 2005 ND 96,¶23, 696 N.W.2d 498. An abuse of discretion is never assumed; the burden is on a party seeking relief to affirmatively establish it. Jundt v. Jurassic Res. Dev. of North America, L.L.C., 2003 ND 9, ¶ 10, 656 N.W.2d 15.

LAW AND ARGUMENT

I. The Trial Court Was Without Authority To Award Fees

[¶9] When Judge Braaten ruled in her July 30, 2013 Order that the entirety of Plaintiffs claims against Defendants is subject to binding arbitration, the district court relinquished jurisdictional control over the proceedings going forward. Defendants requested fees in making the motion to compel arbitration, but Judge Braaten determined, "No costs or attorney fees are awarded the Defendants as the Uniform Arbitration Act does not contain any provision for such an award, and the Court does not find the Plaintiffs' contentions related to this motion to be totally without merit and frivolous" (App. 52, at ¶3)

[¶10] This Court has commonly recognized a strong state and federal policy favoring arbitration. See Schwarz v. Gierke, 2010 ND 166, ¶11, 788 N.W.2d 302. As a result, the Court "resolves any doubts concerning the scope of arbitrable issues in favor of arbitration when there is a broad arbitration clause and no exclusion clause". Id. at ¶11. While authority is granted to the trial court to determine whether an agreement to arbitrate exists or a controversy is subject to arbitration under N.D.C.C. §32-29.3-06(2), the role of the court in arbitration determinations should be limited. See McKibben v. Grigg, 582 N.W.2d 669, 671 (N.D. Ct. App. 1998) (citing State v. Stremic Const. Co., 370 N.W.2d 730, 734 N.D. 1985). Applying Schawrz and McKibben to the case at hand, this Court should determine

that once the trial court determines that the entirety of the controversy is subject to arbitration, only the arbitration panel has jurisdiction over the proceedings, including the timeline in which the parties have to complete arbitration. Applying this rule, the trial court's mandate that arbitration be completed within 6 months was outside the scope of the court's power, as well as all subsequent actions the court took following its July 30, 2013 order.

II. Plaintiffs Did Not Request A Voluntary Dismissal

[¶11] Defendants assert that Plaintiffs' requested a dismissal through an email from Planitiffs' counsel to Defendants' counsel, and on remand, rely upon N.D.R.Civ.P. 41(a) in support of their filing to "renew their motion for attorneys' fees and costs, pursuant to N.D.R.Civ.P. 41(a) and (d), and North Dakota Supreme Court Precedent interpreting said rule." (App. 90) N.D.R.Civ.P. 41(a)(2) states as follows:

> By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

It is apparent to Plaintiffs that the court relied upon this rule when awarding fees on remand. In paragraph 11 of its order awarding fees, the court stated that "Viscito sought a voluntary dismissal of the case without prejudice. The Court finds that requiring Viscito to pay reasonable attorney's fees and costs to Christianson is fair in light of these findings." (App. 215)

[¶12] Thus, a pivotal question on appeal is whether Plaintiffs requested the action to be dismissed. This point was heavily argued before the Supreme Court in the first appeal, but the court seemingly rejected the argument. This Court identified the procedural history as

follows: "On January 30th, 2014, Viscito moved for an extension of time to complete arbitration. Christianson moved to dismiss with prejudice and requested an award of attorney's fees and costs under N.R.R.Ct. 11.5." Viscito, 2015 ND 97, at ¶3. This court further identified:

> After Viscito moved for an extension of time to complete arbitration, Christianson moved to dismiss the case, under N.D.R.Ct. 3.2 and 11.5, and requested it be awarded "costs and fees incurred herein." Christianson filed a supplemental brief in support of the motion to dismiss, arguing Viscito's case should be dismissed with prejudice, under N.D.R.Civ.P. 41(b), for failure to prosecute or comply with a court order. Christianson further requested it be awarded "costs and attorney[']s fees incurred herein, and in compelling arbitration in the first place." Viscito responded arguing, if the court dismisses the case, it should do so without prejudice. Viscito additionally argued sanctions in the form of attorney's fees and costs were inappropriate because Christianson had not shown any prejudice resulting from Viscito's failure to complete arbitration within six months, as required by the court order.

(Viscito, 2015 ND 97 at ¶23).

[¶13] On remand, Plaintiffs again asserted that they did not seek a voluntary dismissal of the case. The trial court found "this allegation directly contradicts the statements made by Viscito's counsel during the hearing of March 23, 2013." (App. 216, ¶12) While there was no hearing on March 23, 2013, there was a hearing on March 24, 2014, where the court was set to hear Plaintiffs' Motion for Extension of Time and Defendants subsequent Motion to Dismiss with prejudice and request for fees. In preparing a response to Defendants' Motion to Dismiss with prejudice and request for fees, Plaintiffs determined that the trial court did not need to continue to supervise the case: the court had already determined the entirety of the case was subject to arbitration, the arbitration would be binding and final on the parties per the rules governing the arbitration, and only the arbitration panel had jurisdicition over the claims per Judge Braaten's previous ruling. In an email dated March 13th,

2014, Plaintiffs' counsel reached out to Defendants' attorney and offered the opportunity to stipulate to a dismissal without prejudice, stating:

> In order for each party to avoid the expense of preparing for and attending the upcoming hearings on the Motion for Extension and the Motion to Dismiss, we are prepared to agree to a dismissal of the case without prejudice. The required arbitration arises out of the member control agreement and is not otherwise ordered by the court or statute, therefore, we feel there is no longer a need to have the case siting in trial court. Please let me know if your clients are in agreement.

(App. 280)

[¶14] Defendants declined to stipulate to the proposed solution and used the email as Exhibit A in their Supplemental Brief in Support of Motion to Dismiss in an attempt to support an argument that "plaintiffs concede their case must be dismissed." (App. 281, at ¶1) Plaintiffs responded to Defendants' Supplemental Brief with their own supplemental brief in opposition of the motion to dismiss and in further support of their motion for extension of time, providing argument for why the case should not be dismissed with prejudice. (App. 63) Having presumably just read the motions and supporting briefs, Judge Kleven, sitting in on behalf of Judge Braaten due to a last minute absense, opened the March 24th hearing on Plaintiffs' Motion for Extension of Time and Defendants' Motion to Dismiss with Prejudice with the following dialogue in an attempt to reconcile Plaintffs' motion and briefs with Defendants' counsel's assertion that the proposed stipulation was an admission that the case should be dismissed:

> THE COURT: Schuetzle? Okay. And this – Judge Braaten is out; so this has been assigned to me at this point. And I will tell you that I've had a chance to read through everything that's been filed and become somewhat familiar, at least have an idea of what's gone on in this case. So we'll go ahead and proceed. And are you still requesting -- are the plaintiffs still requesting a motion of -- to extend the time for arbitration?
>
> MR. SCHUETZLE: Your Honor, we would be okay with either. If the Court chooses to continue to supervise the case, we would request an extension of

> time; actually, possibly amending that to a later date since this has been pushed back a bit. But, Your Honor, we are also comfortable with a dismissal without prejudice under the belief that this case can go on without court supervision and just be adjudicated privately via arbitration.
>
> THE COURT: Okay. Has there actually been -- there was an indication in, I think, your response brief that the law firm of Heley, Duncan & Melander in Minneapolis are going to handle the matter?
>
> MR. SCHUETZLE: Yes, ma'am. I've been conferring with them approximately once or twice a week as they're gathering more information. They're sort of trying to grasp the understanding and figuring out how many attorneys they need to bring in on this because of the complexities of the issues. Their position is that they don't want to file a demand for arbitration until they're assured to some level that this is not going to be cut from them in the Trial court. So that's why I take the position of either a dismissal without prejudice; we'll allow them to proceed with arbitration. Or an extension of time with enough room for comfort for them, Your Honor, would also allow them to proceed.

(App. 219-221)

[¶15] This court has discussed Rule 41(a)(2) before. In <u>Commonweatlth Land Title Ins. Co. v Pugh</u>, 555 N.W.2d 576 (N.D. 1996), Commonwealth **moved for voluntary dismissal** of its fore-closure action under Rule 41(a)(2). In <u>Hilzendager v. Skwarok</u>, 335 N.W.2d 768 (N.D. 1983), Hilzendager and defendant Oldernburg "**entered into a stipulation for dismissal** with prejudice basd on a settlement agreement between the parties pursuant to Rule 41(a)(2)" [emphasis added]. In <u>Hoffman v. Berry</u>, 139 N.W.2d. 529 (N.D. 1966), a **third party plaintiff made a motion to dismiss** the complaint against them without prejudice and without costs to either party [emphasis added]. In each situation where this rule has been applied, the Plaintiff made a motion or entered into a stipulation.

[¶16] This Court further held in <u>Hoffman v. Berry</u> that:

> If the movant finds the conditions [the court sets] unacceptable, he should be permitted not to accept the dismissal. In other words, where the movant stipulates the conditions upon which he asks for a dismissal and the court in the exercise of its judicial discretion decides it will grant the dismissal, but upon terms and conditions other than those stipulated by the movant, then

> the order of the court ordering a dismissal of the action should be conditioned on the acceptance of the terms and conditions imposed by the court before judgment may be entered, or, as an alternative, it could refuse to grant the motion for dismissal until the terms and conditions as determined by the court are met.

Hoffman v. Berry, 139 N.W.2d. 529, 533 (N.D. 1966).

[¶17] The facts of the case at present clearly differ from those which have previously appeared before this court. Here, Plaintiffs did not make a motion, written or oral, did not enter into a stipulation for dismissal, nor did they even make a request of the court to dismiss the action. Rather, they simply explained to the court their rationale for extending the invitation to defendants to agree to a dismissal: that they are comfortable with the case proceeding without court supervision via a dismissal without prejudice and that they are taking the position that a either a dismissal without prejudice or an extension of time would be required for them to proceed with arbitration. Had Defendants been open to the idea of a dismissal without prejudice and responded to Plaintiffs' Counsel's email accordingly, Plaintiffs and Defendants would have been free to stipulate to the terms of the dismissal as provided by N.D.R.Civ.P. 41(a)(1)(A)(ii), which may have included terms governing payment of attorney's fees. Unfortunately, there was no such agreement, and to hold Plaintiffs private invitiation to stipulate to an agreement as a "request" of the court to dismiss the action is a gross misinterpretation and misapplication of the law.

[¶18] N.D.R.Civ.P. 41 is derived from Fed.R.Civ.P.41 and other states have adopted state rules derived from the same Fed.R.Civ. P.41. (*See Explanatory Note 1, N.D.R.Civ.P. 41*) Louisianna Code of Civil Procedure Article 1671 'Voluntary Dismissal' is one of those rules. It reads:

> A judgment dismissing an action without prejudice shall be rendered upon application of the plaintiff and upon his payment of all costs, if the application is made prior to any appearance of record by the defendant. If the application is made after such appearance, the court may refuse to grant the judgment of dismissal except with prejudice.

LA Code Civ Pro 1671

In Dahan Novelties & Co., LLC v. Ohio Cas. Ins. Co., The Louisana Supreme Court applied that rule to the facts of the case and determined that because Plaintiffs Dahan and JMS did not apply for the dismissal, voluntary dismissal is inapplicable. They held that "The motion of the party plaintiff is required for voluntary dismissal." Dahan Novelties & Co., LLC v. Ohio Cas. Ins. Co., 51 So. 3d 129, 135 (La. Ct. App. 2010) see also Spencer v. Children's Hospital, 432 So.2d 823, 824–825 (La.1983). Defendants are requesting this Court adopt a new standard whereby the mere explanation of intentions, discussion with the trial judge, or attempt at stipulating to an agreement runs the risk of making a "request" under N.D.R.Civ.P. 41(a)(2) and rises to the same status as filing a formal motion seeking the same. This is an improper expansion with detrimental effects on parties' abilities to solve problems in litigation without court involvement. This Court should rule that a motion specifically requesting dismissal by the plaintiff is required, or at the very least, the facts in the case at hand do not support the finding that plaintiffs requested a voluntary dismissal from the court.

III. There Is No Other Basis In Law For An Award of Attorney's Fees Upon Which The Court Did, Or Could Have Relied.

[¶19] Christianson has made multiple attempts at requesting fees and the district court has had multiple chances to state the basis for the award of fees. Through the first appeal, this Court previously considered three possible authorities for the award of fees: N.D.R.Civ. P 41(b), N.D.R.Ct. 11.5 with N.D.R.Civ.P. 16, and the court's inherent power to sanction.

On remand, Christianson filed a motion to "renew their motion for attorneys' fees and costs, pursuant to N.D.R.Civ.P. 41(a) and (d)." (App 88-90)

[¶20] N.D.R.Civ.P. 41(b) may not be relied upon as the basis for an award of fees as the rule does not provide for the awarding of fees. This Court previously determined that it was not applicable to the case at hand, stating, "Because N.D.R.Civ.P. 41(b) does not explicitly authorize an award of attorney's fees and costs, and the trial court dismissed without prejudice, it appears the trial court did not award attorney's fees and costs under this rule." Viscito, 2015 ND 97, at ¶25. N.D.R.Civ. P 41(b) states:

> (b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

[¶21] N.D.R.Ct. 11.5 with N.D.R.Civ.P. 16, and any other of the associated rules of Civil Procedure was not the basis for the award of fees, as the district court declined to limit the award to those incurred as a result of the violation of the court order. This Court stated, "If N.D.R.Civ.P. 16 is the basis for the sanction, the trial court should have limited its award of attorney's fees and costs to those incurred as a result of Viscito's violation of the court order compelling arbitration be completed within six months." Viscito, 2015 ND 97, at ¶27. Although the trial court made some references to the calculation of fees and costs and the failure to comply with the court order, the trial court did not apply any such limitations in the August 4, 2015 order. Similarly, neither N.D.R.Ct. 11.5 nor N.D.R.Civ.P. 16 is mentioned in the order. N.D.R.Ct. 11.5 states:

> The trial court may take any appropriate action against any person failing to perform an act required by the rules or required by court order. Appropriate action

> includes a sanction provided by Rules 5, 11, 16, 25, 30, 37, 40, 45, or 56, N.D.R.Civ.P.

The relevant section of rule 16, N.D.R.Civ.P. 16(f)(2) states:

> Imposing Fees and Costs. Instead of or in addition to any other sanction, the judge must order the party, its attorney, or both to pay the reasonable expenses, including attorney fees, incurred because of any noncompliance with this rule, unless the non-compliance was substantially justified or that other circumstances make an award of expenses unjust.

[¶22] It is evident the distrirct court did not rely upon its inherent power to award sanctions: 1) the court did not undergo the necessary analysis to award sanctions when it first awarded fees, 2) after significant consideration and discussion of inherent powers Viscito, 2015 ND 97, including a clear mandate for the court to specifically identify the power and authority upon which it relied, the court made no reference to its inherent power to sanction, and 3) chose to not complete the full analysis required if it was relying upon its inherent authority. "Inherent power sanctions require case-by-case analysis of all the circumstances presented in the case." Bachmeier v. Wallwork Truck Ctrs., 507 N.W.2d 527, 534 (N.D. 1993). Sanctions must be reasonably proportionate to the misconduct. When sanctioning a party, the trial court should consider the culpability, or state of mind, of the party against whom sanctions are being imposed; a finding of prejudice against the moving party, and the degree of this prejudice, including the impact it has on presenting or defending the case; and the availability of less severe alternative sanctions. Viscito, 2015 ND 97, at ¶29 (citing Dronen v. Dronen, 2009 ND 70, 764 N.W.2d 675) Here, the trial court heard testimony of Kyle Freier, Chief Operating Officer of Paces Lodging Corporation, regarding the prejudice suffered as a result of Plaintiffs' failure to comply with the court order, which was minimal. (App. 251-261). The trial court was specifically informed of the need for considering less alternative sanctions analysis in this Court's previous opinion at paragraph 30, "Without

consideration of prejudice and the availability of less severe sanctions, the trial court's analysis is incomplete." Viscito, 2015 ND 97, at ¶30, (citing Ringsaker v. N.D. Workers Comp. Bureau, 2003 ND 122, ¶ 14, 666 N.W.2d 448.) It is clear that the trial court considered the requirements surrounding sanctions and determined that sanctions under the court's inherent authority were improper.

[¶23] On Remand, Defendants' filed a motion, brief, and supporting affidavits to "renew their motion for attorney's fees and costs, pursuant to N.D.R.Civ.P. 41(a) and (d), and North Dakota Supreme Court Precedent interpreting said rule." (App. 90) N.D.R.Civ.P. 41(d) states as follows:

> Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:
>
> (1) may order the plaintiff to pay all or part of the costs of that previous action; and
>
> (2) may stay the proceedings until the plaintiff has complied.

[¶24] The trial court seemingly did not rely upon this rule in its August 4, 2015 order, but neverthess did identify it by citation and presumably considered it. N.D.R.Civ.P. 41(d) does not apply to the case at hand for a number of reasons, principally that Plaintiffs' have not "previously dismissed an action." Here, Defendants seem to argue that the arbitration action is the "same claim against the same defendant" and is "not only duplicative, but also vexatious, litigation against the defendant", ignoring the fact that they demanded the claims go to arbitration in the first place, and are simultaneously complaining about how different the parties and claims in the demand for arbitration are from the original complaint filed with the trial court. (App. 94 at ¶14, App. 98 at ¶3) Plaintiffs are attempting to benefit from stating the claims are similar in this instance and from stating the claims are different in their argument for fees generally. For N.D.R.Civ.P. 41(d) to be applied correctly, this

Court would first have to determine that Plaintiffs "previously dismissed an action" and were not forced into arbitration by court order. Plaintiffs would then have to file an entirely new claim "based on or including the same claim against the same defendant", at which point, but not prior to, the court "may order the plaintiff to pay all or part of the costs of that previous action". N.D.R.Civ.P. 41(d)

[¶25] Because all of the requested and available authoritative options for awarding fees have been considered by the trial court, no further remand is necessary, and this Court should reverse the trial court decision.

IV. The Trial Court Abused Its Discretion When It Failed To Follow The Supreme Court Mandate And Misapplied The Law

[¶26] The trial court abused its discretion it awarding attorney's fees because it failed to follow this Court's mandate on remand, and there is no factual or legal basis for such an award. This Court has determined a trial court abuses its discretion when it acts in "an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law." Berg v. Berg, 2000 ND 37, ¶ 10, 606 N.W.2d 903. See also, Hartleib v. Simes, 2009 ND 205, ¶ 44, 776 N.W.2d 217 (citing City of Fargo v. Malme, 2008 ND 172, ¶8, 756 N.W.2d 197, and Walstad v. Walstad, 2013 ND 176, ¶ 29, 837 N.W.2d 911) The court failed to follow the Supreme Court mandate by failing to award costs on appeal, broadened the scope of remand by considering and relying upon evidence not in the court's possession at the time of the award of fees, and misinterpreted and misapplied the law in the award of fees.

[¶27] The district court abused its discretion in not awarding costs on appeal because it failed to follow this Court's mandate on remand. On remand, district courts must follow the mandate rule. Investors Title Ins. Co. v. Herzig, 2013 ND 13, ¶ 10, 826 N.W.2d 310

(citing State v. Burckhard, 1999 ND 64, ¶ 7, 592 N.W.2d 523 (On remand, the trial court must follow the pronouncements of the Supreme Court and scrupulously and fully carry its mandate into effect according to its terms.)) "The mandate rule, a more specific application of law of the case, requires the trial court to follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case and to carry the [appellate court's] mandate into effect according to its terms." Carlson v. Workforce Safety & Ins., 2012 ND 203, ¶ 16, 821 N.W.2d 760. This Court, in its Judgment dated April 28th, 2015 ordered that "Appellants have and recover from Appellees costs and disbursements on this appeal under Rule 39, N.D.R.App.P. to be taxed and allowed in the court below. (App. 150) Plaintiffs requested the trial court to tax these costs as directed by the Judgment of the Supreme Court but the request was ignored in its entirety by the trial court. (App. 151). The Judgment must be overturned to allow for the Appelant's recovery of costs from Appellees.

[¶28] This Court provided a clear directive to the trial court: "…remand for a determination of authority **on which the district court imposed sanctions** and findings necessary to support such an award."[Emphasis added] Viscito, 2015 ND 97, at ¶31. The Court was "unable to determine the authority the district court relied on for awarding attorney's fees and costs" and remanded back to the district court to clarify what information it relied upon when it made the decision to award costs during the hearing on March 24, 2014. Viscito, 2015 ND 97, at ¶25. However, the district court, in its order for award of attorney's fees and costs dated August 4, 2015, relies upon several facts that would not have been known to the court at the time of the award, including: "several claims made by Viscito in this action are not being pursued in the arbitration case," and "four of the Defendants named in this case are not even names as parties in the arbitration case." (App. 215, at ¶10). The

district court exceeded the scope of remand by reconsidering new evidence and once again awarding fees.

[¶29]Lastly, if this Court determines that the law relied upon in awarding fees was misinterpreted or misapplied, it must overturn the award of fees. Not only is this the precedent established in Berg, numerous other states have adopted similar holdings. Berg v. Berg, 2000 ND 37, 606 N.W.2d 903, (A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law) In Richards, Watson & Gershon v. King, 39 Cal.App.4th 1176 (1995), the court abused its discretion in dismissing an action by an attorney to collect fees because it erroneously interpreted a statute as barring the action. See also G. Heileman Brewing Co. v. Christian Schmidt Brewing Co., 753 F.2d 1354, 1356 (6th Cir. 1985), cert. dismissed (A trial court will be held to have abused its discretion when it makes an erroneous interpretation of the law.) Broad discretion is abused when the trial court misinterprets the law. Heaton v. State, 984 N.E.2d 614, 616 (Ind. 2013) (The lower court misinterpreted the applicable law regarding civil-contempt orders and therefore abused its discretion.) Here, in the initial action and the action on remand, the district court abused its discretion when it misinterpreted and misapplied various rules on which it based its award of fees, and as such abused its discretion.

CONCLUSION

[¶30]For the reasons argued above, and to avoid injustice to Plaintiffs, we implore the Court to reverse the trial court's award of attorney's fees and direct the Defendants to return the amount of the satisfied judgment, $33,415.14, plus costs in the original appeal of $237, and costs of this appeal, to Plaintiffs.

Dated: January 4, 2016

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Matthew Viscito, Mary Lynn Bernston, Florence Properties, LLC, Appellants v. Kevin Christianson, Pace's Lodging Corporation, Mednational, LLC, Aurora Medical Park No. 2, LLC, and Jeff Sjoquist, Appellees	)))))))))))))	Supreme Court No. 20150285

APPEAL FROM ORDER AWARDING ATTORNEY FEES

CERTIFICATE OF SERVICE

The undersigned states that he is an attorney for the Plaintiffs and Appellants herein and that on the 4th day of January 2016, he filed the Appellants Brief and Appendix electronically with the Clerk of the Supreme Court at supclerkofcourt@ndcourts.gov, with a carbon copy to the Defendant and Appellees attorney of record Michael T. Andrews at mandrews@andersonbottrell.com.

Dated this the 4th day of January, 2016.

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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 6, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Matthew Viscito, Mary Lynn Bernston, Florence Properties, LLC, Appellants v. Kevin Christianson, Pace's Lodging Corporation, Mednational, LLC, Aurora Medical Park No. 2, LLC, and Jeff Sjoquist, Appellees	)))))))))))))	Supreme Court No. 20150285

APPEAL FROM THE AUGUST 4, 2015 ORDER OF JUDGE KLEVEN, NORTHEAST CENTRAL JUDICIAL DISTRICT, AWARDING ATTORNEY FEES

CERTIFICATE OF SERVICE

The undersigned states that he is an attorney for the Plaintiffs and Appellants herein and that on the 6th day of January 2016, he filed the Appellants Brief and Appendix electronically with the Clerk of the Supreme Court at supclerkofcourt@ndcourts.gov, with a carbon copy to the Defendant and Appellees attorney of record Michael T. Andrews at mandrews@andersonbottrell.com.

Dated this the 6th day of January, 2016.

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