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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

CHS Inc., Plaintiff/Appellee, vs. Roland Riemers, Defendant/Appellant.	**SUPREME COURT NO. 20160131** Grand Forks County District Court Civil No. 18-2015-CV-01950

ON APPEAL FROM AMENDED JUDGMENT ENTERED MAY 24, 2016

STATE OF NORTH DAKOTA
GRAND FORKS COUNTY DISTRICT COURT
NORTHEAST CENTRAL JUDICIAL DISTRICT
HONORABLE JON J. JENSEN

APPELLEE'S BRIEF

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[¶1] The District Court had jurisdiction pursuant to N.D. Const. Art. VI § 8 and N.D.C.C. § 27-05-06. This Court has jurisdiction under N.D. Const. Art. VI, §§ 2 and 6 and N.D.C.C. § 28-27-01.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶2] Did the District Court err in finding no genuine issue of material fact precluding summary judgment in CHS Inc.'s favor?

[¶3] Did the District Court err in admitting the affidavits presented in support of CHS Inc.'s Motion for Summary Judgment?

[¶4] Did the District Court err in awarding CHS Inc. prejudgment interest?

[¶5] Did the North Dakota Supreme Court err in remanding this matter to the District Court for the limited purpose of a disposition of CHS Inc.'s Motion to Amend Judgment?

STATEMENT OF THE CASE

[¶6] Appellee/Plaintiff CHS Inc. ("CHS") began this action by a Complaint dated September 25, 2015, against Appellant/Defendant Roland Riemers ("Riemers"). Appendix (App.) 5-7. In its Complaint, CHS alleged causes of action against Riemers for unjust enrichment and payment by mistake. Riemers answered by a "Response & Demand for Jury Trial" dated October 6, 2015. App. 13-14. Thereafter, CHS filed a motion for summary judgment. App 8. A hearing on CHS's motion for summary judgment was held on January 21, 2016. App. 1. On March 4, 2016, the District Court issued its Order Granting [CHS's] Motion for Summary Judgment. App. 22-29. Judgment in CHS's favor was entered on March 21, 2016. App. 30. On March 30, 2016, CHS filed a Motion for Amendment of Judgment, requesting the award of prejudgment interest. App. 31. On April 6, 2016, Riemers filed a Notice of Appeal. App. 33. On April 20, 2016, the North Dakota Supreme Court issued an Order of Remand, returning the case to the District Court for the limited purpose of disposition of CHS's motion to amend the judgment. App. 36. On May 16, 2016, the District Court issued its order granting CHS's motion to amend judgment. App. 39. An Amended Judgment was entered in CHS's favor on May 24, 2016. App. 40. On June 12, 2016, Riemers filed an Amended Notice of Appeal. App. 42.

STATEMENT OF FACTS

[¶7] On or about March 2, 2015, CHS mistakenly issued a check in the sum of $38,763.00 to Riemers. App. 9. At the time the check was issued, no debt was owed by CHS to Riemers. Id. Riemers negotiated the check and retained the proceeds. Id.

[¶8] On August 20, 2015, CHS sent a letter by certified mail to Riemers notifying him that the March 2, 2015 check had been issued in error and requesting return of the funds. App. 11. On September 2, 2015, Riemers replied, admitting he had received the check from CHS and had retained the proceeds, however he declined to return the proceeds as requested. App. 12. Thereafter, CHS commenced suit to recover the monies it had mistakenly paid to Riemers. App. 5-7.

[¶9] In his Answer to the Summons and Complaint of CHS, Riemers did not deny receipt of the check and retention of the funds. App. 13-14. Instead, Riemers suggested the check could have represented additional compensation for a previous land sale or a donation by CHS to Riemers' "charity or political works". Id.

[¶10] The amount of the check CHS sent to Riemers equaled a debt owed by CHS to a company by the name of Meridian Manufacturing, Inc. App. 18. The only reason Riemers received the check was because there had been an error in keying in the vendor number used for issuance of the check by CHS. Id. The

vendor number for Meridian Manufacturing, Inc. is 1012276. The vendor number assigned to Riemers in CHS's system is 1011276. Id. In requesting the check for Meridian Manufacturing, Inc., the fourth digit of Meridian Manufacturing, Inc.'s vendor number was keyed incorrectly. App. 19. This resulted in the check being erroneously issued to Riemers. Id. The error was not caught initially in the payment review process and was only discovered subsequent thereto. Id. It is undisputed no debt was owed by CHS to Riemers and CHS never intended to compensate Riemers for any alleged charitable or political works. App. 10.

LAW AND ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN FINDING NO GENUINE ISSUE OF MATERIAL FACT PRECLUDING A SUMMARY JUDGMENT IN CHS'S FAVOR.

[¶11] This Court has well established the standard for reviewing summary judgments:

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Wenco v. EOG Resources, Inc., 2012 ND 219, ¶ 8 (quoting Arndt v. Maki, 2012 ND 55, ¶ 10, 813 N.W.2d 564). A "party opposing the motion may not simply rely on unsupported and conclusory allegations or denials in the pleadings but must set forth specific facts showing there is a genuine issue for trial." Fetch v. Quam, 2001 ND 48, ¶ 9, 623 N.W.2d 357 (citations omitted). "Mere speculation will not defeat a motion for summary judgment." Ellingson v. Knudson, 498 N.W.2d 814, 818 (N.D. 1993).

A. No genuine issues of material fact existed which precluded the District Court's grant of a summary judgment on CHS's claim for unjust enrichment.

[¶12] "Unjust enrichment is an equitable doctrine based upon a quasi or constructive contract implied by law to prevent a person from being unjustly enriched at the expense of another." Ritter, Laber & Associates, Inc. v. Koch Oil, Inc., 2004 ND 117, ¶ 26, 680 N.W.2d 634 (citing Cavalier County Mem'l Hosp. Ass'n v. Kartes, 343 N.W.2d 781, 784 (N.D.1984)). "The doctrine serves as a basis for requiring restitution of benefits conferred 'in the absence of an expressed or implied in fact contract.'" Id. (quoting Midland Diesel Serv. and Engine Co. v. Sivertson, 307 N.W.2d 555, 557 (N.D.1981)). "The doctrine of unjust enrichment may be invoked when a person has and retains money or benefits which in justice and equity belong to another." Id. (internal quotation and citations omitted). "A determination of unjust enrichment is a conclusion of law and is fully reviewable by this Court." Id. (citing Opp v. Matzke, 1997 ND 32, ¶ 8, 559 N.W.2d 837).

[¶13] Five elements must be established to succeed on a claim for unjust enrichment: enrichment; an impoverishment; a connection between the enrichment and impoverishment; absence of a justification for the enrichment and impoverishment; and an absence of a remedy provided by law[1]. A & A Metal

[1] "According to North Dakota law, a party may obtain an equitable remedy even if he has a remedy at law if the equitable remedy is better adjusted to rendering complete justice." A & A Metal Bldgs. v. I-S, Inc., 274 N.W.2d 183, 189, n.2 (N.D. 1978) (citing Graven v. Backus, 163 N.W.2d 320, 322 (N.D.1968)).

Bldgs. v. I-S, Inc., 274 N.W.2d 183, 189 (N.D. 1978) (citation omitted). It is undisputed that CHS mistakenly issued a check to Riemers and that CHS was not indebted to Riemers. App. 18-19. See also ¶ 20, infra. Riemers does not dispute he cashed the check, retained the proceeds, and spent the money on unrelated debts. App. 13. Because no debt was owed to Riemers by CHS, no basis existed for Riemers to receive payment from CHS. CHS notified Riemers of its error and requested return of the funds. App. 11. Riemers subsequently refused to return the funds. App. 12. As the District Court noted, "[t]he only appropriate remedy available to CHS is this legal action for repayment of funds." App. 25. Accordingly, the District Court did not err in finding that CHS had established all required elements of a claim of relief under a theory of unjust enrichment: enrichment (Riemers); impoverishment (CHS); a (clear) connection between the enrichment and impoverishment and the absence of a justification for the enrichment and impoverishment (the erroneous payment from CHS to Riemers when no debt was due by CHS to Riemers); and the absence of a remedy provided by law (save for commencement of CHS's suit under the theories of unjust enrichment and payment by mistake).

B. No genuine issues of material fact existed which precluded the District Court's grant of a summary judgment on CHS's claim for payment by mistake.

[¶14] "[W]here a person in good faith receives money paid by another under mistake, notice of the mistake and demand for a return of the money is a condition

precedent to an action to recover such moneys." Lark Equity Exch. v. Jones, 42 N.D. 145, 171 N.W. 863, 864 (1919). It is undisputed that CHS mistakenly paid Riemers $38,763.00. App. 18-19. It is undisputed Riemers deposited the check into his bank account and retained the funds. App. 13. It is undisputed CHS sent a demand for return of the funds by certified letter dated August 20, 2015. App. 11.

[¶15] "It is the law in this jurisdiction, and in most others, that a payment made under the influence of a mistake of fact may be recovered provided that the payment has not caused the payee to change his position to his detriment." Rohrville Farmers Union Elevator Co. v. Frison, 77 N.D. 235, 238, 42 N.W.2d 354, 356 (1950) (citations omitted) (holding that plaintiff elevator was entitled to a return of funds mistakenly paid in duplicate to defendant farmer, despite defendant farmer's assertion that plaintiff elevator was negligent in paying funds and lapse of 7-10 months between payment and notice of error). See also James River Nat. Bank of Jamestown v. Weber, 19 N.D. 702, 124 N.W. 952, 953 (1910) (holding that the fact that plaintiff had the means of knowledge of the facts at his command, and negligently failed to avail himself thereof, will not defeat his recovery, where such negligence has not resulted in loss or damage to defendant).

[¶16] Here, the mistaken payment by CHS did not result in detrimental reliance by Riemers on the same, nor did it result in any loss or damage to Riemers. As the District Court noted, "[t]here is nothing in the record to suggest that Riemers

changed his position as a result of the mistaken payment of $38,763 . . . There is no evidence that any of [Riemers'] debts were incurred as a result of the mistaken payment made by CHS. Instead, the evidence supports a finding the debts paid were the result of obligations owing by Riemers to others prior to the mistaken payment." App. 28. Indeed, instead of being damaged in any way, Riemers was unjustly enriched by $38,763.00 as a result of CHS's mistake. "This is an action for money had and received. It is a legal action based upon an implied promise on the part of the defendant to refund the amount that was paid to him under a mistake of fact. The law will enforce this promise if the defendant is not in good conscience entitled to retain the payment." Rohrville Farmers Union Elevator Co. v. Frison, 77 N.D. 235, 239-40, 42 N.W.2d 354, 356-57 (1950) (citations omitted). In this case, no material fact dispute existed which would have precluded entry of judgment in favor of CHS as a matter of law. Riemers was not in good conscience or equity entitled to retain the payment mistakenly made by CHS. Accordingly, CHS is entitled to an immediate return of the funds mistakenly paid to Riemers. See James River Nat. Bank of Jamestown, 19 N.D. 702, 124 N.W. 952, 954. ("Upon the question of the right to recover moneys negligently paid to another through a mistake of fact the authorities are somewhat in conflict, but the weight of authority and, as we think, the better reasoned cases support such recovery.").

C. Riemers' objection to the timing of service of the Motion for Summary Judgment is not properly before this Court and is further unfounded.

[¶17] Riemers furthers argues, for the first time of appeal, that CHS violated N.D.R.Civ.P. 56(a) by filing its motion for summary judgment simultaneous with its Summons and Complaint. "A touchstone for an effective appeal of an issue requires the issue to be properly raised in the district court so the court can intelligently rule on the issue." Cartier v. Northwestern Elec., Inc., 2010 ND 14, ¶ 9, 777 N.W.2d 866 (citing State v. Osier, 1999 ND 28, ¶ 14, 590 N.W.2d 205). Because Riemers failed to raise the issue at the District Court, his objection is not now properly before this Court.

[¶18] Even assuming Riemers had properly raised this issue at the District Court, his objection is unfounded. N.D.R.Civ.P. 56 provides as follows:

> (a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:
>
> (1) 21 days have passed from commencement of the action; or
>
> (2) the opposing party serves a motion for summary judgment.

N.D.R.Civ.P. 56(a)(1) and (2). Service of CHS's Summons and Complaint upon Riemers was completed on October 2, 2015. DOC ID# 3. Pursuant to N.D.R.Civ.P. 3, "[a] civil action is commenced by the service of a summons." CHS thereafter filed its motion for summary judgment on November 2, 2015, more than twenty-one days following commencement of the action. App. 8.

Accordingly, CHS did not violate N.D.R.Civ.P. 56 in filing its motion for summary judgment.

D. No discovery was necessary prior to the District Court granting a summary judgment on CHS's claims for relief.

[¶19] Riemers objects to the District Court's grant of summary judgment, arguing that he had no opportunity to conduct discovery on CHS's claims for relief.

[¶20] "The possibility that discovery will yield evidence favorable to a party opposing summary judgment is not a ground to deny summary judgment where the party opposing the motion has failed to specifically invoke Rule 56(f) procedures." Hummel v. Mid Dakota Clinic, P.C., 526 N.W.2d 704, 708 (N.D. 1995) (citations omitted). However, "[a]lthough failure to comply with the affidavit requirement of Rule 56(f) is not fatal to a request for additional discovery, a proponent of the request must still identify with specificity 'what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained." Choice Fin. Grp. v. Schellpfeffer, 2006 ND 87, ¶ 12, 712 N.W.2d 855 (internal citations and quotations omitted). Although technical compliance with N.D.R.Civ.P. 56(f) is not required, Riemers failed to identify with specificity what particular information he sought from CHS, and how, if uncovered, it would have precluded summary judgment. Presumably, the information Riemers claims he intended to seek would support his primary argument in opposition to CHS's motion for summary judgment: "At no time since sending the check, has CHS ever indicated

to me how, who or why the check was sent to me. At no time has CHS ever presented me evidence that the check was in fact sent in error. At no time has CHS every (sic) presented me evidence why some CHS official, for whatever reason, and with the authority to do so, decided to send me the check." App. 16. Riemers did not dispute receiving the check, cashing the check and utilizing the proceeds to pay unrelated debts. App. 15-16. Furthermore, Riemers did not dispute receiving notification from CHS that the check was issued in error. Id. Riemers conceded no debt was owed to him by CHS. He surmised the payment was meant as a gift by CHS, "I operate under the assumption that if someone pays me money, gives me a gift, it's a gift or given to me for some reason, Your Honor, and I believe my affidavit, opposing affidavit, states as a matter of fact that to my knowledge and understanding the check was a gift from CHS to myself." Transcript of January 21, 2016 Motion for Summary Judgment Hearing (Tr.) at 13:22-25; 14:1-2. However, Riemers completely failed to present any evidence to support his claim as to the reason for the payment by CHS. Instead, Riemers presented mere speculation and the threadbare assertion that "The check was addressed and deliberately sent to me and was not a mistake by CHS, Inc." App. 17. This type of unsupported, unfounded, conclusory allegation was insufficient to show the existence of a genuine issue for trial, and did not preclude the Court granting CHS's motion for summary judgment. See Fetch, 623 N.W.2d at 360. See also Ellingson, 498 N.W.2d at 818. CHS clearly documented, through

its motion, affidavits and exhibits, that the payment to Riemers was issued in error and the reason for the error. App. 5-11; 18-21.

[¶21] Riemers asserts that only CHS has the ability to present evidence related to the question of whether the check was issued in error. According to Riemers, his only obligation was to point to the absence of said evidence, and that CHS offered no evidence supporting its claim the check was issued in error. Riemers' circular logic fails to support this claim, and his reliance on North Dakota case law is misplaced.

[¶22] Riemers' cites Black v. Abex Corp., 1999 ND 236, ¶ 19, 603 N.W.2d 182, regarding the difficulty of proving a negative. In discussing the discharge of the burden of proof on a party moving for summary judgment, the Black Court stated:

> The Supreme Court's holding is a recognition of the difficulty of proving a negative. If the record, after discovery, contains no evidence to support an essential element of the plaintiff's claim, there is no "evidence" the defendant can point to in support of its assertion there is no such evidence. In such a case the rule allows the defendant to put the plaintiff to its proof, without the necessity of a full trial, by merely "pointing out" to the trial court the absence of evidence to support the plaintiff's case

Black, 603 N.W.2d at 188 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) ("Instead, as we have explained, the burden on the moving party may be discharged by "showing"-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case.").

[¶23] Black is inapplicable to Riemers' resistance of CHS's motion for summary judgment. What Riemers is essentially arguing is that CHS was required to prove for what purpose the check was sent. However, since the check was sent in error it was not sent for any purpose.

[¶24] Riemers failed to present proof that he needed additional information to defend against CHS's claims, or how, if obtained, such information would have precluded summary judgment. Choice, 2006 ND 87, ¶ 12. Furthermore, his speculation and conclusory allegations were insufficient to create a genuine issue of material fact for trial. See Fetch, 623 N.W.2d at 360. Accordingly, the District Court did not err in finding that no material factual dispute existed in this matter which would preclude CHS from obtaining relief on its claims for unjust enrichment and payment by mistake.

II. THE DISTRICT COURT DID NOT ERR IN ADMITTING THE AFFIDAVITS PRESENTED IN SUPPORT OF CHS INC.'S MOTION FOR SUMMARY JUDGMENT.

[¶25] Riemers attacks the validity of the evidence presented by CHS, arguing that the affidavits submitted by CHS in support of its motion for summary judgment and the exhibits annexed thereto failed to comply with the requirements of N.D.R.Civ.P. 56(e). "The standard of review of a district court's evidentiary rulings is abuse of discretion." State v. Schmeets, 2009 ND 163, ¶ 7, 772 N.W.2d 623 (citing State v. Jaster, 2004 ND 223, ¶ 12, 690 N.W.2d 213). "A district court

abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law." Id.

[¶26] Riemers asserts that the Affidavit of Ann Young (the "Young Affidavit") was inadmissible in that it failed to meet the requirements of N.D.R.Civ.P. 56(e)(1), as Young did not make the affidavit on her own personal knowledge and is therefore not competent to testify to the matters thereto. "Affidavits on behalf of corporations may be made by any duly authorized officer or agent having knowledge of the facts verified." Federal Land Bank of Saint Paul v. Anderson, 401 N.W.2d 709, 712 (N.D. 1987) (finding that affidavit in support of motion for summary judgment in foreclosure action was not defective on the ground that it was not signed by the loan officer with whom defendant-mortgagor had personally dealt with in regard to loan transaction). Young's sworn affidavit clearly stated that she is "an employee of CHS Inc., personally familiar with [Riemers'] account and makes this affidavit on her personal knowledge." App. 9. The Young Affidavit, therefore, set forth facts admissible in evidence and was sufficient to support CHS's motion for summary judgment.

[¶27] Riemers asserts that Exhibit 1 to the Young Affidavit - the August 20, 2015 letter to Riemers from CHS via certified mail - was inadmissible in that it was neither sworn nor certified. This argument is without basis. As the District Court noted, the exhibit in question was attached to a sworn affidavit. App. 9-12. Riemers does not dispute that he received this correspondence. App. 16.

Furthermore, Young identified and explained the exhibit in her affidavit that the exhibit was a copy of the letter sent from CHS to Riemers on August 20, 2015, via certified mail, notifying Riemers that the check was issued in error and requesting return of the proceeds. App. 9. This was not a conclusory allegation regarding an essential element of CHS's claims; rather, it was a precise statement of fact relevant to CHS's claims for relief. Accordingly, Riemers' claim that Young's affidavit was insufficient and inadmissible is without merit, and the District Court did not abuse its discretion in admitting and considering the Young Affidavit. "In considering a motion for summary judgment, a court may examine the pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn from that evidence to determine whether summary judgment is appropriate." Swenson v. Raumin, 1998 ND 150, ¶ 9, 583 N.W.2d 102 (citing Matter of Estate of Otto, 494 N.W.2d 169, 171 (N.D.1992)).

[¶28] Riemers alleges that Exhibit 2 to the Young Affidavit – the September 2, 2015 letter from Riemers to CHS – constituted an offer to compromise and as such was inadmissible pursuant to N.D.R.Evid. 408, which provides as follows:

> (a) Prohibited Uses. Evidence of the following is not admissible, on behalf of any party, either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) furnishing, promising, offering, accepting, promising to accept, or offering to accept a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or a statement made during compromise negotiations.

> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. The court need not exclude evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

N.D.R.Ev. 408. Even assuming, *arguendo*, that Riemers' September 2, 2015 letter constituted an offer to compromise, it was not offered by CHS to prove or disprove the validity or amount of a disputed claim, or to impeach by a prior inconsistent statement or contradiction. Rather, the letter was offered to show that Riemers did in fact receive CHS's letter dated August 20, 2015, notifying Riemers of the payment in error and requesting a return of the funds. As noted previously, Riemers did not dispute his receipt of this correspondence from CHS. App. 16.

[¶29] Riemers argues that the District Court "erred in accepting CHS affidavits that were not timely presented". The affidavit of which Riemers complains is the Supplemental Affidavit of Julie Price in Support of Motion for Summary Judgment (the "Price Affidavit") and Exhibit A thereto. His objection is unfounded. N.D.R.Civ.P. 56(e) provides as follows:

> (1) In General. A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. *The court may permit an affidavit to be supplemented or opposed by* depositions, answers to interrogatories, or *additional affidavits.*

N.D.R.Civ.P. 56(e)(1) (emphasis added). At the hearing held on CHS's motion for summary judgment, Riemers objected to admission of the Price Affidavit as untimely under N.D.R.Civ.P. 56. Tr. 3:7-11. The District Court overruled Riemers' objection, finding that the Price Affidavit was timely and admissible. Tr. 5:6-8. In doing so, both counsel for CHS and the District Court noted that the Price Affidavit was submitted in response to the Reply Brief (DOC ID # 36) and Affidavit (App. 17) filed by Riemers on January 5, 2016, more than thirty days following service of CHS's motion for summary judgment:

> THE COURT: But look at your reply brief. The last paragraph. "I believe CHS has a legal and moral duty to explain and prove the check was a mistake, and why they have not remotely attempted to do so is a mystery to me." Isn't that a follow-up to what you asked for?
>
> MR. RIEMERS: Yeah, I believe so, Your Honor.

Tr. 13:4-9.

[¶30] Even assuming that the Price Affidavit was not timely submitted (despite the plain language of N.D.R.Civ.P. 56(e)(1)), its admission by the District Court constitutes harmless error. "[T]he erroneous presentation of an affidavit that does not meet Rule 56(e) standards does not require reversal of the summary judgment if other evidence in the record supports summary judgment." See Swenson, 1998 ND 150, ¶ 11 (citing Luithle v. Taverna, 214 N.W.2d 117, 124 (N.D.1973)). The contents of the Price Affidavit were of no surprise to Riemers. Riemers never disputed that he received a check for $38,763.00 from CHS. App. 15. Riemers

did not deny that CHS had previously notified him the check was sent in error, nor does he deny that CHS requested a return of the proceeds. App. 16. In response to Riemers' own demand, the Price Affidavit simply clarified the reason for the erroneous payment. Accordingly, the District Court did not abuse its discretion in admitting and considering the Price Affidavit in determining that summary judgment was appropriate.

III. THE DISTRICT COURT DID NOT ERR IN AWARDING CHS INC. PREJUDGMENT INTEREST.

[¶31] The North Dakota Supreme Court reviews decisions applying the statute governing prejudgment interest under the abuse of discretion standard. PHI Fin. Servs., Inc. v. Johnston Law Office, P.C., 2016 ND 20, ¶ 32, 874 N.W.2d 910, reh'g denied (Mar. 28, 2016). "[I]n this context, a court abuses its discretion 'if it misinterprets or misapplies the law.'" (quoting Roise v. Kurtz, 1998 ND 228, ¶ 24, 587 N.W.2d 573).

[¶32] N.D.C.C. § 32-03-04 (the statute governing prejudgment interest) provides:

> Every person who is entitled to recover damages certain or capable of being made certain by calculation, the right to recover which is vested in the person upon a particular day, also is entitled to recover interest thereon from that day, except for such time as the debtor is prevented by law or by the act of the creditor from paying the debt.

N.D.C.C. § 32-03-04. "Ordinarily, recovery based on unjust enrichment is an equitable allowance expressly unrelated to any previous obligation, and therefore, the right to recover is not vested. In such situations, an award of prejudgment interest is not appropriate." United Hosp. v. D'Annunzio, 514 N.W.2d 681, 686

(N.D. 1994) (citing Midland Diesel, 307 N.W.2d at 558). In D'Annunzio, the North Dakota Supreme Court held, in part, that, because the statutory language addressing a governmental entity's responsibility to pay for inmate medical expenses was ambiguous, and not previously construed by the Court, "the hospitals' claims were uncertain and unliquidated." Id. See also Super Hooper, Inc. v. Dietrich & Sons, Inc., 347 N.W.2d 152, 156 (N.D. 1984) (if the terms of a contract are ambiguous, a claim is unliquidated and prejudgment interest is not appropriately awarded). However, "[p]rejudgment interest is required by N.D.C.C. § 32-03-04 if damages are certain or capable of being made certain by calculation." Huber v. Farmers Union Serv. Ass'n of N. Dakota, 2010 ND 151, ¶ 25, 787 N.W.2d 268 (citing Village West Assocs. v. Boeder, 488 N.W.2d 376, 380 (N.D.1992)). Here, the damages incurred by CHS, the $38,763.00 erroneously sent to Riemers, were capable of being made certain. Additionally, this is an action for the breach of an obligation not arising from contract and thus is governed by N.D.C.C. § 32-03-05, which provides as follows:

> In an action for the breach of an obligation not arising from contract and in every case of oppression, fraud, or malice, interest may be given in the discretion of the court or jury.

N.D.C.C. § 32-03-05.

[¶33] "Prejudgment interest in tort cases is governed by N.D.C.C. § 32–03–05 . . . Under the statute, the trier of fact, whether court or jury, has broad discretion in determining whether to award prejudgment interest." Gonzalez v. Tounjian, 2003

ND 121, ¶ 37, 665 N.W.2d 705 (citations omitted). See also Swain v. Harvest States Cooperatives, 469 N.W.2d 571, 574 (N.D. 1991) ("That statute gives the trier of fact the discretion to award prejudgment interest for the breach of an obligation not arising from contract."). CHS sued not only for unjust enrichment, but also for payment by mistake, upon which the District Court also granted summary judgment. App. 28.

[¶34] It was thus within the broad discretion of the District Court to award CHS prejudgment interest, commencing on the date upon which CHS erroneously issued the check to Riemers, at which point CHS had a vested right to recover the funds erroneously paid (in an amount certain) to Riemers. That CHS did not specifically seek *prejudgment* interest in its Complaint is not fatal to this request. CHS clearly sought relief including "interest as allowed by law." App. 6. The award of prejudgment interest, within the broad discretion of the District Court, is clearly allowed by law.

[¶35] Riemers has failed to present any evidence that prejudgment interest was awarded at the rate of 6.5% per annum. The Execution of Judgment indicates interest accruing at 6.5% per annum from and after the date of the Judgment. App. 41. Post judgment interest is entirely distinct from the award of prejudgment interest calculated from March 2, 2015 to the date of entry of the amended judgment. App. 39.

IV. THE NORTH DAKOTA SUPREME COURT DID NOT ERR IN REMANDING THIS MATTER TO THE DISTRICT COURT FOR THE LIMITED PURPOSE OF A DISPOSITION OF CHS INC.'S MOTION TO AMEND JUDGMENT.

[¶36] On March 30, 2016, CHS filed a Motion for Amendment of Judgment (the "motion to amend"), seeking the assessment of prejudgment interest in its favor at the statutory rate of 6% per annum. App. 31-32. Notice of CHS's motion to amend was sent to Riemers by email through Odyssey. App. 32. Riemers filed his initial Notice of Appeal on April 6, 2016. App. 33. Thereafter, Riemers moved to strike CHS's motion to amend on the basis that he had been served via electronic means. App. 34. CHS once again served Riemers via mail with the motion to amend. App. 35. On April 20, 2016, this Court issued its Order of Remand, temporarily remanding the case to the District Court for no longer than sixty days for the limited purpose of consideration and disposition of CHS's pending motion to amend. App. 36. The District Court thereafter granted CHS's motion to amend. App. 39-40.

[¶37] Riemers now argues that this Court lacked the authority to remand the matter for disposition of CHS's motion to amend by the District Court. As noted in its Order of Remand, the North Dakota Supreme Court has a "longstanding policy against 'piecemeal appeals.'" See Sime v. Tvenge Associates Architects & Planners, P.C., 488 N.W.2d 606, 608, n.1 (N.D. 1992). Furthermore, "'[t]he right of appeal in North Dakota is governed by statute, and is a jurisdictional matter which the Supreme Court will consider sua sponte.'" Lynnes v. Lynnes, 2008 ND

71, ¶ 11, 747 N.W.2d 93 (quoting Sabot v. Fargo Women's Health Org., Inc., 500 N.W.2d 889, 895 (N.D.1993)). See also Thornton v. Klose, 2010 ND 141, ¶ 7, 785 N.W.2d 891 ("Before we consider the merits of an appeal, we must determine whether we have jurisdiction.") (citations omitted).

[¶38] CHS's motion to amend was served and filed in advance of Riemers' initial Notice of Appeal. App. 31-32. Riemers' claim that he was not subject to electronic service with respect to CHS's motion to amend is not consistent with the fact that electronic service information for Riemers appears in the records of the District Court. App. 13-14; 3334. Additionally, it is clear that Riemers received a copy of CHS's motion to amend. App. 34. In order to avoid any doubt proper service occurred, CHS re-served its motion to amend on Riemers by mail. App. 35. Finally, this Court has the clear authority to order a temporary and limited remand for the purpose of disposing of motions filed prior to any Notice of Appeal. Riemers' assertion to the contrary is without merit.

CONCLUSION

[¶39] The District Court did not err in finding that no material factual dispute existed which would preclude entry of summary judgment in favor of CHS on its claims for unjust enrichment and payment by mistake. Furthermore, the District Court did not abuse its discretion in considering the affidavits and exhibits submitted by CHS in support of its motion for summary judgment, nor did it abuse its broad discretion in awarding CHS prejudgment interest as allowed by law.

Finally, this Court acted well within its authority when it remanded this matter to the District Court for the limited purpose of disposition of CHS's motion to amend. For the foregoing reasons, this Court should affirm the Order and Judgment of the District Court.

Dated this 19th day of August, 2016.

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FILED
IN THE OFFICE OF THE
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AUGUST 22, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

CHS Inc., Plaintiff/Appellee, vs. Roland Riemers, Defendant/Appellant.	**SUPREME COURT NO. 20160131** Grand Forks County District Court Civil No. 18-2015-CV-01950

ON APPEAL FROM AMENDED JUDGMENT ENTERED MAY 24, 2016

STATE OF NORTH DAKOTA
GRAND FORKS COUNTY DISTRICT COURT
NORTHEAST CENTRAL JUDICIAL DISTRICT
HONORABLE JON J. JENSEN

AFFIDAVIT OF SERVICE

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

Lori Danielson, being first duly sworn upon oath, deposes and says that she is of legal age and not a party to the above-entitled matter.

On August 22, 2016, Affiant delivered **via e-mail and U.S. Mail** a true and correct copy of the following documents:

APPELLEE'S BRIEF

A copy of the foregoing was securely e-mailed and mailed to the address as follows:

Roland Riemers
P.O. Box 14702
Grand Forks, ND 58208
riemers@juno.com

Lori Danielson

Subscribed and sworn to before me this 22nd day of August, 2016.

(SEAL)

LORI THRALL
Notary Public
State of North Dakota
My Commission Expires Feb. 1, 2021

Notary Public, Cass County, North Dakota

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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AFFIDAVIT OF SERVICE

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

Lori Danielson, being first duly sworn upon oath, deposes and says that she is of legal age and not a party to the above-entitled matter.

On August 19, 2016, Affiant delivered **via e-mail and U.S. Mail** a true and correct copy of the following documents:

APPELLEE'S BRIEF

A copy of the foregoing was securely e-mailed and mailed to the address as follows:

Roland Riemers
P.O. Box 14702
Grand Forks, ND 58208
riemers@juno.com

Lori Danielson

Subscribed and sworn to before me this 19th day of August, 2016.

(SEAL)

SONIE J. THOMPSON
Notary Public
State of North Dakota
My Commission Expires Aug. 13, 2022

Notary Public, Cass County, North Dakota