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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Interiors by France, Plaintiff/Appellant, v. Mitzel Contractors, Inc. d/b/a Mitzel Homes, Mitzel Builders, Inc., Leeroy Mitzel, and individual, and Eddy Mitzel, and individual, Defendants/Appellees.	)	**Supreme Court No. 20180399** **Morton County** **Civil No. 30-2016-CV-00803**

Appeal from the *Memorandum Opinion and Order Regarding Motion by Interiors for Attorney's Fees*, entered August 27, 2018, and *Judgment*, entered on August 29, 2019, by the District Court for the South Central Judicial District, County of Morton, The Honorable Judge James S. Hill, presiding

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BRIEF OF APPELLEES MITZEL CONTRACTORS, INC. D/B/A MITZEL HOMES, MITZEL BUILDERS, INC., AND LEEROY MITZEL

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[0] **STATEMENT OF THE ISSUE**

I. Whether the District Court correctly determined legislative intent by construing the unambiguous language in N.D.C.C. § 27-08.1-04.

STATEMENT OF THE CASE

[1] This matter was originally commenced in small claims court on September 28, 2016 and captioned as "Interiors by France of Bismarck, ND 58501 (Holly Splonskowski) v. Mitzel Builders, Inc. (Leroy Mitzel)." (App. 8). Interiors by France ("IBF") alleged that it was not paid for furnishing and installing flooring materials. (App. 8–9). Mitzel Builders, Inc. ("MBI") and Leeroy Mitzel ("Leeroy") filed an answer and elected to remove the action from small claims court to district court. (App. 106–07).

[2] On November 16, 2016, Interiors by France ("IBF") moved to amend its small claims affidavit to add Mitzel Contractors, Inc. ("MCI") in place of MBI along with Leeroy. (Docket No. 12).

[3] On February 23, 2017, MBI, Leeroy, and IBF stipulated that IBF would file an amended complaint naming MCI as the sole defendant. (App. 109–14). Accordingly, IBF's first amended complaint included causes of action for: (1) breach of contract; (2) quantum meriut; and (3) unjust enrichment against MCI. (App. 110–14). MCI answered and admitted some allegations while denying others. (App. 120).

[4] IBF moved to amend its complaint for a second time on November 1, 2017. (Index No. 29–33). The District Court granted IBF's motion. (Index No. 36). Accordingly, IBF amended its complaint, yet again. (App. 141–149). What was once a two (2) paragraph small claims affidavit transformed into fifty-one (51) paragraph complaint. (App. 141–49). In addition to MCI, IBF re-alleged causes of action against MBI and Leeroy and added brand new defendant, Eddy Mitzel ("Eddy"). (App. 141–49).

The second amended complaint included causes of action for: (1) breach of contract; (2) unjust enrichment; (3) quantum meriut; and (4) piercing the corporate veil. (App. 141–49). MCI, MBI, and Leeroy ("Defendants") filed another answer. (App. 150–51).

[5] On June 29, 2018, MCI signed a confession of judgment authorizing IBF to take judgment against it in the sum of $18,967.02. (App. 165). IBF agreed to "immediately dismiss with prejudice its claims against Mitzel Builders, Inc., LeeRoy Mitzel, and Eddy Mitzel. (App. 166). As the last remaining defendant, MCI "expressly reserve[d]" the right to challenge IBF's forthcoming motion for attorney's fees. (*Id.*).

[6] On July 3, 2018, IBF moved the District Court for an award of attorney's fees in the sum $66,968.00. (App. 150–64). On August 27, 2018, the District Court issued its *Memorandum Opinion and Order Regarding Motion by Interiors by France for Attorney's Fees* ("District Court's Order" or "Order"). (App. 208–20). The District Court's Order denied IBF's request for attorney's fees in its entirety. (*Id.*). The District Court signed an *Order for Judgment*, (App. 221), and *Judgment* was entered on August 29, 2018. (App. 222).

[7] IBF filed a *Notice of Appeal* on October 30, 2018. (App. 225). IBF filed its *Appellant Brief* on February 11, 2019 along with a *Motion for An Order Increasing N.D.R.App.P. 32(a)(7)(A) Limitation*.

STATEMENT OF THE FACTS

a. IBF Sues the Wrong Party.

[8] On September 12, 2014, MCI signed a proposal requesting that IBF furnish and install flooring material in exchange for $9,770.00. (App. 103). IBF alleged that it did not receive payment for furnishing and installing the flooring material. (App. 9). However, IBF sued MBI and Leeroy in small claims court instead of MCI. (App. 8).

MBI and Leeroy denied IBF's allegations, (see App. 107), and as defendants, elected to remove the action from small claims court to district court. (App. 106).

b. IBF Identifies the Right Party.

[9] Realizing its error after removal, IBF moved the district court "to change the name of defendants to Mitzel Contractors Inc. and LeeRoy J. Mitzel" because "these are the correct names of the defendants." (Docket No. 12). One month later, the undersigned provided further clarity "that Mitzel Contractors was the correct defendant" and not either of the original two parties. (App. 177:21–23; *see also Appellant Br.*, at ¶ 11). "IBF confirmed its belief that Mitzel Contractors—not Mitzel Builders—was the correct defendant and agreed to amend its complaint accordingly." (Docket No. 152, at ¶ 6; *see also* App. 177:21–23, 179:02–05, 185:20–23). "The parties do not dispute that the flooring installation at issue in this case is between Plaintiff and MCI". (Docket No. 49, at ¶ 4). Indeed, the *Appellant Brief* confirms "Mitzel Contractors signed a proposal that requested IBF to furnish . . . flooring and carpet requested by Mitzel Contractors." (*Appellant Br.*, at ¶ 8; App. 103, 156, at ¶ 6).

c. Defendants' Conduct During Litigation.

[10] "The [District] Court finds that the conduct of defense counsel was appropriate and met the letter and spirit of an advocate under the civil rules." (App. 217–18, at ¶ 38). The conduct of defense counsel included advising IBF of which party it needed to sue, proposing alternatives to reduce litigation costs, and frequently shepherding the lawsuit toward resolution.

[11] After advising IBF of which party it needed to sue, defense counsel stipulated to the filing of IBF's first amended complaint, which named MCI as the sole defendant.

(Docket Nos. 21–22). IBF then moved to re-add MBI and Leeroy as defendants in addition to Eddy. (App. 141–49). Even though MCI questioned the propriety of continuing to add new parties and causes of action over a "small dispute", it did not file any objection. Mindful of North Dakota's liberal standard that leave be freely given to allow amended pleadings, MCI refrained from driving up litigation costs with a futile challenge.

[12] Continuing to further the interests of judicial economy, the collective Defendants often made joint court filings, rather than individual ones, for administrative and cost efficiency. (Docket Nos. 48, 84, 102). In fact, Eddy even joined one of Defendants' motions. (Docket No. 75). Defendants' joint filings did not state or imply any potential joint or several liability, however; and without any burden of proof, Defendants did not conduct any discovery, let alone discovery that could be otherwise characterized as harassing or vexatious. In comparison, IBF served no less than five sets of written discovery requests, (see Docket No. 60, 64, 69), and conducted four depositions. (App. 10–100). Despite a month-long hospitalization in Arizona, Leeroy managed to appear for his deposition in North Dakota just weeks after being released. (App. 14, at 10:10–13). Leeroy testified that the basis for MCI's denial of liability arose out of issues relating to finance charges and the fact that no agent of MCI actually signed the proposal. (App. 38–43, at 107–26).

[13] Additionally, Defendants proposed alternatives to reduce litigation costs throughout the proceedings. The first motion filed after IBF re-added MBI and Leeroy as defendants was Defendants' motion to bifurcate and stay discovery of IBF's new piercing the corporate veil and other equitable claims. (Docket Nos. 47–52). The District Court

recognized that after "two subsequent amendments to the complaint and the added 'new' parties", that Defendants' "bifurcation motion raised legitimate issues for consideration." (Docket No. 110, at ¶ 5). Even though Defendants may not have answered discovery according to IBF's wishes, the District Court realized "defendants had some reason to try to postpone discovery" because their motion "would have resolved the differences the parties had regarding discovery". (Docket No. 110, at ¶¶ 5–6). When Defendants filed a motion "discouraging wasteful pretrial activities", (Docket No. 101–107), the District Court also appreciated the "general merit in the argument." (Docket No. 111, at ¶ 3). IBF did not. It filed a five-page objection. (Docket No. 108). IBF's attorney made his client's intentions clear: "IBF intends to aggressively litigate this matter". (Docket No. 73, at p. 2).

[14] In spite of IBF's intentions, Defendants frequently shepherded the lawsuit toward resolution. For example, MCI deposited a $20,000.00 cashier's check into the undersigned's trust account. (Docket No. 104; *see also* App. 202:15–17). MCI deposited the funds to alleviate any concern about its ability to satisfy a potential judgment. (Docket No. 103, at ¶¶ 4–7). Accordingly, MCI filed an amended answer admitting liability. (App. 156–59). Rather than responding with a motion for judgment on the pleadings, or nothing at all, IBF filed a six-page objection and motion to strike MCI's admission of liability. (Docket Nos. 128–30). The Defendants reminded IBF that "MCI has admitted that IBF is owed money, has deposited the money and there is no need for such extensive discovery." (Docket No. 116). By "resisting the 'deposit' mechanism implanted by defendants, the plaintiff bears the burden of its strategy to undertake extensive discovery" later warned the District Court. (Docket No. 111, at ¶ 5). IBF even

admits that it "turned down a settlement for the amount owing" and, naturally, proceeded to conduct three more depositions instead. (App. 46, at 137:20–24). After completing those depositions, IBF rejected yet another one of MCI's additional written offers to confess judgment several days later. (Docket No. 140, 143).

[15] Throughout this litigation, Defendants entered into several stipulations with IBF. (Docket Nos. 18, 20, 148, 167). In fact, Defendants even stipulated to allow IBF additional time to research, draft, and file its final reply in support of its motion for attorney's fees (the current issue on appeal). (Docket No. 167). And although IBF regrettably accuses Defendants and their counsel of "vexatious and belligerent litigation tactics", (*Appellant Br.*, at ¶ 49), the District Court already concluded that "[n]othing in the record would support these accusations." (App. 217–18, at ¶ 38).

d. Removing Defendants, MBI and Leeroy, Prevail.

[16] IBF knew it mistakenly sued MBI and Leeroy a month and a half after commencing the small claims proceeding. (Docket No. 12). In district court, IBF agreed to "dismiss with prejudice its claims against Mitzel Builders, Inc., LeeRoy Mitzel, and Eddy Mitzel." (App. 162). MCI and Leeroy, as defendants, elected to remove the action from small claims court to district court, and the District Court did not award attorney's fees to the non-prevailing plaintiff, IBF. (App. 208–10).

STANDARD OF REVIEW

[17] "'Statutory interpretation is a question of law, fully reviewable on appeal.'" *State v. Bearrunner*, 2019 ND 29, ¶ 5, 921 N.W.2d 894 (quoting *Agri Indus., Inc. v. Franson*, 2018 ND 156, ¶ 6, 915 N.W.2d 146).

LAW AND ARGUMENT

[18] The Supreme Court should affirm the District Court's Order and Judgment regarding its application of the fee-shifting provision contained in the Small Claims Act. *See* N.D.C.C. § 27-08.1-04 ("Fee-Shifting Statute"). This Fee-Shifting Statute states as follows:

> If the defendant elects to remove the action to district court, the defendant must serve upon the plaintiff a notice of the removal and file with the clerk of the court to which the action is removed a copy of the claim affidavit and the defendant's answer along with the filing fee, except for an answer fee, required for civil actions. If *the defendant* elects to remove the action from small claims court to district court, the district court shall award attorney's fees to a prevailing plaintiff.

Id. (emphasis added).

[19] In this matter, IBF was not a prevailing plaintiff for purposes of the Fee-Shifting Statute. The District Court correctly interpreted the Fee-Shifting Statute based upon its explicit language. Even if the Fee-Shifting Statute was ambiguous, the District Court's interpretation was still consistent with legislative intent. Therefore, the Supreme Court should affirm the District Court's Order and Judgment.

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT IBF WAS NOT A PREVAILING PLAINTIFF FOR PURPOSES OF THE FEE-SHIFTING STATUTE.

[20] Regardless of the Fee-Shifting Statute's ambiguity, or lack thereof, IBF is only entitled to attorney's fees if it was a prevailing plaintiff for purposes of the Fee-Shifting Statute. The District Court correctly concluded that IBF cannot meet this threshold because IBF did not prevail against the defendants that elected to remove the action from small claims court to district court. (App. 216, at ¶ 31).

[21] "Our case law for deciding a 'prevailing party' for costs and disbursements under N.D.C.C. § 28-26-06 provides some guidance for construing the same term under"

statutes awarding attorney's fees. *Van Sickle v. Hallmark Assocs., Inc.*, 2013 ND 218, ¶¶ 44–46, 840 N.W.2d 92 (interpreting attorney's fees-shifting provision in N.D.C.C. § 47-16-39.1). "The determination of who is a prevailing party entitled to recover necessary disbursements under the statute is based upon success on the merits, not damages." *WFND, LLC v. Fargo Marc, LLC*, 2007 ND 67, ¶ 49, 730 N.W.2d 841. "To be deemed the prevailing party, typically, a party must successfully prosecute or defend the primary issue", *N. Excavating Co., Inc. v. Sisters of Mary of Presentation Long Term Care*, 2012 ND 78, ¶ 14, 815 N.W.2d 280, but "[w]hen each party has prevailed on certain issues, however, there is no prevailing party." *Biteler's Tower Serv., Inc. v. Guderian*, 466 N.W.2d 141 (N.D. 1991). "This Court has often said when opposing litigants each prevail on some issues, there may not be a single prevailing party for whom disbursements may be taxed." *WFND, LLC*, 2007 ND 67, at ¶ 49. Accordingly, for purposes of the Fee-Shifting Statute, a prevailing plaintiff is one who prevails against the defendant that elected to remove the action from small claims court to district court.

[22] Here, the District Court correctly concluded that neither the prevailing defendants, MBI and Leeroy, nor the defendants added after removal, MCI and Eddy, were liable for attorney's fees. (App. 216, at ¶ 31). MBI and Leeroy, as the defendants, elected to remove the action from smalls claims court to district court. (App. 106). At district court, IBF dismissed with prejudice its claims in the small claims affidavit. (App. 166); *Towne v. Dinius*, 1997 ND 125, ¶ 7 n.2, 565 N.W.2d 762 ("If the action is removed to district court, this informal claim affidavit becomes the complaint."). MBI and Leeroy, therefore, are the prevailing parties. (App. 216, at, ¶ 31). On the other hand, IBF necessarily "was not a prevailing plaintiff in this matter and is not entitled to attorney's

fees". *Entzel v. Moritz Sport & Marine*, 2014 ND 12, ¶ 13, 841 N.W.2d 774 (denying award of attorney's fees under Fee-Shifting Statute to non-prevailing plaintiff).

[23] Consequently, IBF's quest to hold MBI and Leeroy liable for attorney's fees is obviously problematic. (*Appellant Br.*, at ¶¶ 22, 27, 29, 33, 40). IBF is reneging on the parties' specific agreement set forth in the Confession of Judgment. (App. 165–68). As the lone remaining defendant, MCI "expressly reserve[d]" the right to contest IBF's claim for attorney's fees. (App. 166). The Confession of Judgment neither reserved nor contemplated that MBI or Leeroy would contest attorney's fees. After all, IBF "immediately dismiss[ed]" its claims against MBI and Leeroy in the Confession of Judgment and before the issue of attorney's fees was even decided. (*Id.*). Therefore, the District Court correctly concluded that MBI and Leeroy cannot be held liable for attorney's fees. (App. 215, at ¶¶ 29–31). "To hold otherwise would subject persons without the potential of legal liability for an alleged wrong to mandatory [attorney's fees] against them. Such an interpretation does not conform with the traditional meaning of 'prevailing party.'" *Andrews v. O'Hearn*, 387 N.W.2d 716, 732 (N.D. 1986) (citing eight cases).

[24] With respect to MCI, IBF concedes that the Fee-Shifting Statute "is not written to apply to situations" where the defendant(s) that elects to remove the action from small claims court to district court prevails, but the plaintiff later obtains a judgment against a new defendant that was not an original party. (*Appellant Br.*, at ¶ 33; *see also* App. 175:02–176:08). Such is the case here. However, IBF's recovery of damages from MCI is immaterial for purposes of determining the prevailing party. *See WFND, LLC*, 2007 ND 67, at ¶ 49 (prevailing party is based upon primary issue, "not damages"). Indeed,

the primary issue in this lawsuit was always identifying the responsible party, not the amount of damages. Accordingly, the District Court correctly concluded that the Fee-Shifting Statute did not apply to MCI, who was neither a party to nor the party that removed the small claims proceeding. (App. 214, at ¶¶ 26, 33, 35). MCI is not liable for attorney's fees.

[25] In summary, the District Court correctly held that IBF is not entitled to attorney's fees because it was not a prevailing plaintiff for purposes of the Fee-Shifting Statute. (App. 216, at ¶¶ 26, 30–31, 33, 35). MCI and Leeroy, as defendants, elected to remove the action from small claims court to district court, and the District Court did not award attorney's fee to the non-prevailing plaintiff, IBF. (App. 208–10).

II. THE DISTRICT COURT CORRECTLY INTERPRETED THE FEE-SHIFTING STATUTE.

[26] The language of the Fee-Shifting Statute is explicit; it is not ambiguous. Even if the Fee-Shifting Statute was ambiguous, reliance on extrinsic aids support the District Court's interpretation. (App. 208–20).

A. The Fee-Shifting Statute Is Not Ambiguous.

[27] "The primary purpose in interpreting a statute is to determine legislative intent, as expressed in the language of the statute." *Stuber v. Engel*, 2017 ND 198, ¶ 5, 900 N.W.2d 230.

> In doing so, the legislature's intent must be sought initially from the statutory language. If the language of the statute is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit because the legislative intent is presumed clear from the face of the statute. Words in a statute are to be understood in their ordinary sense, unless a contrary intention plainly appears.

Olson v. Job Serv. of N.D., 2013 ND 24, ¶ 5, 827 N.W.2d 36 (internal citations omitted); *see also* N.D.C.C. §§ 1-02-02, 05.

[28] There is no question of law that the Fee-Shifting Statute is not ambiguous. IBF inevitably concludes that "the District Court interpreted the statute based upon its explicit language." (*Appellant's Br.*, at ¶ 51) (emphasis added). "When the Legislature uses explicit statutory language, this Court is not permitted to declare the language ambiguous." *Hughes v. N.D. Crime Victims Reparations Bd.*, 246 N.W.2d 774, 775, syl. 3, 776, 778 (N.D. 1976) (emphasis added). "Explicit is defined by Webster's International Dictionary 2nd. ed., as 'Not implied merely, or conveyed by implication; distinctly stated; plain in language; clear; not ambiguous; express; unequivocal.'" *Hvidsten v. N. Pac. Ry. Co.*, 33 N.W.2d 615, 619 (N.D. 1948) (emphasis added).

[29] Accordingly, the District Court's Order correctly held that the statutory language was "clear" and "not ambiguous". (App. 214–15, at ¶¶ 27–28, 32, 36 ("The words of the statute are not ambiguous.")). The Order confirmed that the statute "contemplates payment of attorney's fees by a defendant who removes a Small Claims matter to a 'prevailing plaintiff.'" (App. 216, at ¶ 30). Put another way, if a defendant removes a case to district court and losses, the defendant has to pay the prevailing plaintiff's attorney's fees. *See* N.D.C.C. § 27-08.1-04. The statute is not ambiguous, and the District Court's Order sets forth the only plausible interpretation.

B. Canons of Statutory Interpretation Support the District Court's Order.

[30] The District Court's Order is consistent with our canons of statutory interpretation. "However," each of the following, "is but a canon of statutory interpretation to aid in interpreting statutes to ascertain legislative intent. It is not an end

in itself. Like any rule of construction," each canon "is subservient to the goal of statutory interpretation; to ascertain and effectuate legislative intent." *State v. Davenport*, 536 N.W.2d 686, 688 (N.D. 1995).

1. *The District Court Gave Meaning and Effect to Every Word and Phrase of the Fee-Shifting Statute*.

[31] "In ascertaining legislative intent, we first look to the statutory language and give the language its plain, ordinary and commonly understood meaning. We interpret statutes to give meaning and effect to every word, phrase, and sentence, and do not adopt a construction which would render part of the statute mere surplusage." *State v. Laib*, 2002 ND 95, ¶ 13, 644 N.W.2d 878 (internal citation omitted). This Court must "construe the statute as a whole and give effect to each of its provisions if possible." *Shiek v. North Dakota Workers Comp. Bureau*, 2002 ND 85, ¶ 12, 643 N.W.2d 721; *see also* N.D.C.C. § 1-02-38(2) (presuming "entire statute is intended to be effective").

[32] Here, the District Court's Order gave meaning and effect to every word, phrase, and sentence of the Fee-Shifting Statute and Small Claims Act. The applicable sentence of the Fee-Shifting Statute contains two phrases. The two phrases correspond to two parties: (1) the original defendant that elected to remove the action; and (2) and the plaintiff that prevails at district court. *See* N.D.C.C. § 27-08.1-04. When construed as a whole, the District Court gave meaning and effect to both phrases before concluding that the plain language only requires an award of attorney's fees if the original defendant that elects to remove the action "loses to the plaintiff". (App. 216, at ¶ 31). Unlike the District Court's interpretation, however, IBF's interpretation exclusively focuses upon the second phrase's "prevailing party" language and ignores its obvious relationship to the first phrase, which addresses the defendant that elects to remove the action.

2. *IBF's Implausible Interpretation Leads to an Absurd Result.*

[33] Courts "also construe statutes in a practical manner and presume the legislature did not intend an absurd or ludicrous result." *Marhula v. Grand Forks Curling Club, Inc.*, 2015 ND 130, ¶ 5, 863 N.W.2d 503. "A statute must be construed to avoid ludicrous and absurd results." *State v. Sorensen*, 482 N.W.2d 596, 598 (N.D. 1992); *see also* N.D.C.C. § 1-02-38(3) (presuming "a just and reasonable result").

[34] Initially, there is nothing absurd about the result of the District Court's Order or the interpretation of the Fee-Shifting Statute. The Defendants that elected to remove the action prevailed. There is nothing absurd or ludicrous about a district court denying attorney's fees when the defendants that elected to remove the action from small claims to district court prevailed. However, IBF alleges the court's interpretation produced an absurd result because it enables defendants to "nullify" the Fee-Shifting Statute by "careful manipulation". (*Appellant Br.*, at ¶ 47). IBF's argument is fundamentally flawed for two reasons. First, the argument presupposes the plaintiff will err and sue the wrong defendant in the first place. The plaintiff simply needs to sue the correct party to avoid this result. Second, even if the plaintiff still errs, the plaintiff can always commence a new action in small claims court against the correct defendant. (App. 176:16–19, 216, at ¶¶ 33, 44).

[35] Unlike the result in the District Court's Order, IBF's interpretation of the explicit Fee-Shifting Statute leads to an absurd result. Clearly implausible, that interpretation give trial courts arbitrary discretion to choose which party to assess attorney's fees against including, but not limited to, the prevailing defendants. (*Appellant Br.*, at ¶¶ 22, 27, 29, 33, 40 (requesting alternative relief against the prevailing defendants)). This

Court identified absurdity in similar situations. *See, e.g.*, *Van Sickle v. Hallmark Assocs., Inc.*, 2013 ND 218, 840 N.W.2d 92; *N. Excavating Co.*, 2012 ND 78, 815 N.W.2d 280.

[36] In *Northern Excavating*, this Court interpreted a fee-shifting statute that awarded the "full amount" of attorney's fees to land owners that successfully contested the validity or accuracy of a construction lien. *See* 2012 ND 78, 815 N.W.2d 280 (interpreting N.D.C.C. § 35-27-24.1). This Court indicated that it did "not believe that Legislature intended to award an owner literally all of the costs and attorney's fees arising out of a lawsuit when challenging a lien was not the only disputed cause of action." *Id.*, at ¶ 11 (emphasis added) (prevailing party "limited to recovering only those costs and fees reasonably expended in contesting the lien"). Accordingly, IBF's interpretation is not plausible because it will "lead to the absurd result that a party in a multiple-claim suit . . . would be liable for all attorney's fees of the other party even if the other party" was unsuccessful on its other claims. *Id.*, at ¶ 10 (quoting *LSV, Inc. v. Pinnacle Creek, LLC*, 996 P.2d 188, 191 (Colo. Ct. App. 1999)).

[37] In *Van Sickle*, the Court interpreted a fee-shifting statute that awarded attorney's fees to mineral rights' owners for unpaid royalties. *See* 2013 ND 218, 840 N.W.2d 92 (interpreting N.D.C.C. § 47-16-39.1). This Court affirmed the trial court's "setoff" (or reduction) in its award for attorney's fees arising out of separate claims. *Van Sickle*, 2013 ND 218, at ¶ 42. In doing so, it "recognize[d] the significant amount of litigation the Van Sickles dedicated to other unsuccessful causes of action . . . and against parties held not liable." *Van Sickle*, 2013 ND 218, at ¶ 49. In this case, it would be as absurd to require MCI to pay attorney's fees relating to IBF's dismissed claims against Eddy as it

would be ludicrous to require Leeroy to pay for attorney's fees relating to IBF's dismissed claims against MBI.

3. *The District Court's Interpretation is in Harmony with the Purpose of the Small Claims Act.*

[38] "In construing a statutory provision we consider the entire enactment of which it is a part and, to the extent possible, interpret the provision to be consistent with the intent and purpose of the entire Act." *Werlinger v. Champion Healthcare Corp.*, 1999 ND 173, ¶ 43, 598 N.W.2d 820; *see also Denault v. State*, 2017 ND 167, ¶ 10, 898 N.W.2d 452 ("giving consideration to the context of the statutes and the purpose for which they were enacted"). "Statutes are construed as a whole and, if possible, are harmonized to give meaning to related provisions." *Stuber v. Engel*, 2017 ND 198, ¶ 15, 900 N.W.2d 230 (citing N.D.C.C. § 1-02-07).

[39] Although the relief sought by a layperson is construed liberally, *see Svanes v. Grenz*, 492 N.W.2d 576, 578 (N.D. 1992), "the Small Claims Act will be construed in favor of maintaining its simplicity and informality." *Raaum v. Powers*, 396 N.W.2d 306, 309 (N.D. 1986); *Danzl v. Heidinger*, 2004 ND 74, ¶ 8, 677 N.W.2d 924 ("informal forum for resolving minor disputes").

[40] In this case, the District Court's Order is consistent with the simplicity and informality of the Small Claims Act. Again, the District Court noted that the applicable sentence in the Fee-Shifting Statute identified two parties: (1) the plaintiff; and (2) the original defendant(s). (App. 216, at ¶ 31). To be certain, the Small Claims Act refers to that same "defendant" no less than thirty times. N.D.C.C. Ch. 27-08.1. It does not reference new defendants added after removal. The Small Claims Act explicitly distinguishes between defendants who are an "individual" and defendants who are "a

corporation, limited liability company, or a partnership." N.D.C.C. 27-08.1-1(2), (3). It does not authorize plaintiffs to ignore the corporate form and sue shareholders directly.

[41] Accordingly, the District Court rejected IBF's invitation to overcomplicate the Fee-Shifting Statute. IBF attempts to interject attorney's fees arising out of two heavily fact specific alter ego claims against new defendants into the simplicity and informality of the Small Claims Act. For example, the District Court provided that:

> "Upon removal, this case has been ***transformed*** and now is an action which has been ***amended twice*** by IBF to assert claims against what IBF concedes is '***a new set of defendants'***. Mitzel Contractors, Inc., Mitzel Builders, Inc., Leeroy Mitzel, and Eddy Mitzel. [DE 30 and 32] As now the present action includes ***equitable claims*** by IBF that ***were not part*** of the small claims action ***and likely could not have been asserted in the small claims court venue***. N.D.C.C. § 27-08-01."

(Docket No. 111, at ¶ 4) (emphasis added).

[42] "North Dakota recognizes that 'alter ego' approach to piercing the corporate veil [but] resolving the issue is heavily fact-specific". *Solid Comfort, Inc. v. Hatchett Hosp., Inc.*, 2013 ND 152, ¶ 18, 836 N.W.2d 415. This Court recently clarified the elements of that heavily fact-specific analysis: "we require an examination of the *Hilzendager-Jablonsky* factors as part of the analysis for deciding whether to pierce the corporate veil under the alter ego doctrine. In addition to those factors, an overall element of injustice, inequity, or fundamental unfairness must also be established before veil piercing is appropriate." *Taszarek v. Lakeview Excavating, Inc.*, 2016 ND 172, ¶ 12, 883 N.W.2d 880. For example, even if a district court "found all nine factors favor piercing the corporate veil", it still must find that additional element. *Coughlin Const. Co., Inc. v. Nu-Tec Indus., Inc.*, 2008 ND 163, ¶ 22, 26–28, 755 N.W.2d 867 ("The district court made extensive findings under each of the *Hilzendager-Jablonsky* factors."); *see also Intercept*

Corp. v. Calima Fin., LLC., 2007 ND 180, ¶ 16, 741 N.W.2d 209 ("The district court made numerous findings on the issue of piercing the corporate veil" in addition to an element of "fraudulent acts").

[43] Litigants should not expect small claims court to fairly dispose of piercing the corporate veil claims. *See* N.D.C.C. § 27-08.1-04.1 (allowing dismissal of cases that may do not "fairly disposed of" due to the "complexity of factual or legal issues"). Nor should litigants expect that the Fee-Shifting Statute would apply to recovery attorney's fees for a piercing the corporate veil claim that was ultimately dismissed. As such, IBF's decision to transform its lawsuit belies the simplicity and informality of small claims court proceedings. IBF's implausible interpretation would "erode the effect of the small claims court by complicating the informal procedures involved." *Raaum v. Powers*, 396 N.W.2d 306, 311 (N.D. 1986) (interpreting Fee-Shifting Statute).

[44] Additionally, IBF's reliance on relation-back amendments pursuant to N.D.R.Civ.P. 15(c) is misplaced for three reasons. First, the Small Claims Act is a special statutory proceeding. Second, Rule 15(c), N.D.R.Civ.P., is intended to safeguard against statute of limitations' defenses. Third, relation back does not change the fact that MCI did not elect to remove the action from small claims court to district court.

[45] Initially, the Small Claims Act is a special statutory proceeding. *See* N.D.R.Civ.P. 81(a). Indeed, IBF's brief repeatedly draws a distinction between "informal" proceedings in small claims court and "formal" civil actions in district court. (*Appellant Br.,* at ¶ 26). Special statutory proceedings "are excluded from" the rules of civil procedure to the extent there is any inconsistency. N.D.R.Civ.P. 81(a). Should one exist between the Small Claims Act and Rule 15(c), N.D.R.Civ.P., the Small Claims Act

is "excluded from" that rule. *See, e.g.*, *Nelson v. Johnson*, 2010 ND 23, ¶¶ 14–17, 778 N.W.2d 773 (excluding statutory eviction proceeding from Rules 4(m) and 12); *City of Jamestown v. Leevers Supermarkets, Inc.*, 552 N.W.2d 365, 375 (N.D. 1996) excluding statutory eminent domain proceeding from Rule 68(a)).

[46] Second, 15(c) provides a safeguard against statute of limitations' defenses. "The purpose behind the 1966 amendment to our Rule 15(c) was to modify harsh results occurring when a plaintiff sued the wrong party and upon discovering the proper party was barred from amending the complaint by the statute of limitations." *Gutierrez v. Ramond Intern., Inc.*, 86 F.R.D. 684, 685 (S.D. Tex. 1980). "The purpose of Rule 15(c) is to provide the opportunity for a claim to be tried on its merits, rather than being dismissed on procedural technicalities, when the policy behind the statute of limitations has been addressed." *Goodman v. Praxair, Inc.*, 494 F.3d 458, 468 (4th Cir. 2007) (quoting 3 James Wm. Moore, et al., *Moore's Federal Practice* § 15.19[3][a] (3d ed. 1997)).

[47] Consequently, the "harsh results" that Rule 15(c) were intended to modify or address are not present here. IBF was not barred from amending its complaint by the statute of limitations. Instead, it amended its complaint twice. IBF pursued its claim on the merits; the claim was not dismissed on procedural technicalities. Instead of a tool to avoid the statute of limitations, IBF attempts to utilize Rule 15(c), N.D.R.Civ.P., as a retroactive measure to save its attorney's fees claim.

[48] Finally, even with relation back, IBF still fails to grasp that MCI did not elect to remove the action. The Fee-Shifting Statute only applies to defendants that elect to remove actions from small claims court to district court. Additionally, IBF's Rule 15(c),

N.D.R.Civ.P., argument belies its attempt to conflate MCI, MBI, and Leeroy as one in the same. (*Appellant Br.*, at ¶ 15–16). IBF cannot claim that it failed to sue the "proper party" while argue that MCI, MBI, and Leeroy are all one in same anyway.

[49] In Summary, MCI does not dispute IBF's contention that "the District Court interpreted the statute based upon its explicit language", and this Court should affirm the same. (*Appellant Br.*, at ¶ 51).

III. EVEN IF THE FEE-SHIFTING STATUTE WAS AMBIGUOUS, THE DISTRICT COURT'S ORDER WAS CONSISTENT WITH LEGISLATIVE INTENT.

[50] IBF failed to argue that the Fee-Shifting Statute was ambiguous in its twenty-seven (27) pages of briefing to the District Court. (Docket No. 152, 171). That fact is particularly curious considering ambiguity is the gravamen of IBF's appeal. Nonetheless, IBF's appellant brief posits that the Fee-Shifting Statute is ambiguous because "the statute does not specify or identify the party that would be responsible for paying." (*Appellant Br.*, at ¶ 33). If this alleged "failure to specify or identify" the payor is the barometer for ambiguity, all other statutes shifting attorney's fees to the "prevailing" party are hereby on notice. [1]

[1] *See, e.g.*, N.D.C.C. § 28-26-01(2) ("including reasonable *attorney's fees to the prevailing party*."); N.D.C.C. § 28-32-33(4) ("The judge may award *attorney's fees to the prevailing party* in an application under this subsection."); N.D.C.C. § 32-42-03(6) ("including part or all of the *attorney's fees to the prevailing party or parties*."); N.D.C.C. § 34-01-20(3) ("In any action under this section, the court may award reasonably *attorney's fees to the prevailing party* as party of the costs of litigation."); N.D.C.C. § 35-32-06 ("The court in a suit brought under this chapter may award reasonable *attorney's fees to the prevailing party*."); N.D.C.C. § 35-35-04(5) ("award[ing] costs and reasonable *attorney's fees to the prevailing party*."); N.D.C.C. § 35-35-05(5) ("award[ing] costs and reasonable *attorney's fees to the prevailing party*."); N.D.C.C. § 47-16-13.6 ("award[ing] reasonable *attorney's fees to the prevailing party.*"); N.D.C.C. § 47-25.1-04 ("award[ing] reasonable *attorney's fees to the prevailing party*.");

[51] Yet, in all reality, IBF concedes that the Fee-Shifting Statute just "lacks the express language needed to apply to the present case". (*Appellant Br.*, at ¶ 33). Stated more succinctly, the Fee-Shifting Statute does not apply. *Selzler v. Selzler*, 2001 ND 138, ¶ 18, 631 N.W.2d 654 ("presume[ing] the Legislature intended all that it said, and that it said all that it intended to say"). The fact that the Fee-Shifting Statute does not apply to the present case, however, does not mean it is ambiguous. IBF cannot manufacture ambiguity by merely stating that it reads the Fee-Shifting Statute a different way or by casting doubt upon the plain meaning of a statute where none exists. *See State v. Fasteen*, 2007 ND 162, ¶ 10, 740 N.W.2d 60 ("While the statute is not a shining example of good draftsmanship, we nevertheless, conclude the language is sufficiently clear to allow a reasonable interpretation which gives meaning to every word."). With respect to IBF's position, the District "Court finds its interpretation of that statute is a contortion of the plain words". (App. 216, at ¶ 32).

[52] "When the wording of a statute is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05. "Only if the language of a statute is ambiguous will extrinsic aids be used to ascertain the Legislature's intent." *SE. Cass. Water Res. Dist. v. Burlington N. R.R. Co.*, 527 N.W.2d 884, 888 (N.D. 1995). To the extent this Court finds the explicit Fee-Shifting Statute is ambiguous, it may consider, among other things, the object sought to be attained, legislative history, and the consequences of a particular construction when determining legislative intent. N.D.C.C. § 1-02-39(1), (3), (5). Courts are not obligated to consider

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N.D.C.C. § 62.1-02-13(5) ("In any action brought under this section, the court shall award all court costs and *attorney's fees to the prevailing party*.").

extrinsic aids when interpreting an ambiguous statute, however. Therefore, IBF's position that the District Court "misapplied the law" by "refusing to consider extrinsic aids" is a misstatement of law. (*Appellant Br.*, at ¶ 36).

A. IBF's Implausible Interpretation Does Not Support the Object Sought to be Obtained by the Fee-Shifting Statute.

[53] If a statute is ambiguous, in determining the intention of the legislation, courts "may consider" the "object sought to be attained." N.D.C.C. § 1-02-39(1). The District Court cautioned that IBF's "exceedingly broad" interpretation "does not promote the statute's remedy, promote justice, nor does it effectuate the purpose of N.D.C.C. § 27-08.1-04." (App. 218, at ¶ 41). Even assuming "the object of the Legislature . . . would be thwarted by a strict construction", courts "are not permitted to declare the language ambiguous . . . when the Legislature uses such explicit terms". *Hughes*, 246 N.W.2d at 776 (emphasis added). Again, IBF concedes that "the district court interpreted the statute based upon its explicit language." (*Appellant Br.*, at ¶ 51) (emphasis added). IBF's implausible interpretation does not support the object sought to be obtained by the Fee-Shifting Statute.

B. The Legislative History Supports the District Court's Order.

[54] "When statutory language is free from ambiguity, it is neither necessary nor appropriate to delve into legislative history to determine legislative intent." *Born v. Mayers*, 514 N.W.2d 687, 689 (N.D. 1994). Nonetheless, if a statute is ambiguous, in determining the intention of the legislation, courts "may consider" the "legislative history." N.D.C.C. § 1-02-38(3).

[55] Here, the legislative history fully supports the District Court's Order. The only defendant discussed in the legislative history is the one that elects to remove the action

from small claims court to district court. (App. 226–69). Nothing in the legislative history supports application of the Fee-Shifting Statute when that defendant prevails. Likewise, there is nothing in the legislative history that remotely suggests application of the statue to new defendants and new claims that were added or commenced, respectively, *after* the case was removed. Put another way, there is nothing in the legislative history that supports IBF's implausible interpretation.

[56] Yet, IBF places heavy weight upon the Fee-Shifting Statute's legislative history. IBF contends that the legislative history mandates an interpretation that "discourage[s] parties from improperly utilizing the statute's removal provisions." (*Appellant Br.*, at ¶ 40). IBF goes too far, however, and its implausible interpretation has a chilling effect on defendants' statutory right to remove small claims proceedings to district court. (App. 226–269). For example, in what the District Court labeled a "desperate effort" that was "wildly speculative and without support", (App. 216–17, at ¶ 34), IBF audaciously blamed Leeroy for not "moving to dismiss the lawsuit against Mitzel Builders in small claims court for IBFs failure to name the correct party, which surely would have been granted." (*Appellant Br.*, at ¶ 20). The District Court's position is well-grounded in authority.

[57] In *Winter v. Solheim*, a plaintiff sued Raymond Winter in small claims court alleging that Winter sold defective goods. 2015 ND 210, ¶ 2, 868 N.W.2d 842. Winter answered, alleging that "he was not a party to the contracts" that were actually between "his employer" and the plaintiff. *Id.* Winter did not remove the action, unfortunately, and "the small claims court entered a $15,000 judgment against Winter." *Id.* On appeal,

Winter argued that the plaintiff "should have sued Pro Pallet, Inc.", which was the name of Winter's employer. *Id.*, at ¶ 8. This Court issued the following admonishment:

> Winter had a right to remove the case to district court under N.D.C.C. § 27-08.1-04. The district court may have reached the same result, but Winter would have been able to appeal the decision. N.D.C.C. § 28-27-01. Having failed to remove the action from small claims court, Winter cannot now argue that we must exercise our supervisory jurisdiction to review the small claims court judgment. As this Court has stated, while we trust that the decisions reached in small-claims courts are, for the most part, legally and factually correct, N.D.C.C. § 27-08.1-04, does not guarantee that result should a defendant not decide to exercise his right to remove the case to another court whose decision is subject to appeal.

Id., at ¶ 12; *see also Svanes*, 492 N.W.2d at 579 ("A writ of certiorari may not be used to assert that a small claims court made an erroneous decision.").

[58] Without the opportunity for appellate review, Leeroy "do[es] not do small claims court" for good reason. (App. 24, at 49:05). Instead, he hires an attorney to successfully defend lawsuits against him in district court—just like he did here—in order to avoid the same fate suffered by Raymond Winter. Therefore, Leeroy did not "improperly" utilize the statute's removal provision; IBF just sued the wrong the party. MBI and Leeroy avoided the fee-shifting statute not by careful manipulation, but by prevailing; and the District Court's Order is not contrary to the legislative history or its intent.

C. The Consequences of IBF's Particular Construction Are Problematic.

[59] Courts "may consider" the "consequences of a particular construction" in determining the legislative intent of ambiguous statutes. N.D.C.C. § 1-02-39(5). Not unlike IBF, Defendants can also set forth a litigation blueprint for how plaintiffs will manipulate the Fee-Shifting Statute pursuant to IBF's particular construction. Employing the statute as a sword, plaintiffs could add several defendants after removal, run up

attorney's fees, and collect all those fees so long as plaintiff prevailed against just one of the new defendants.

[60] The consequence of IBF's particular construction is problematic because it invites an abuse of the fee-shifting provision.[2] (Docket No. 73, at p. 3) (intending to "incur fees as high as possible"). For example, in this case, IBF alleges this is a "simple dispute", (*Appellant Br.*, at ¶ 49), but it never filed a dispositive motion and it admittedly "turned down a settlement for the amount owing". (App. 46, at 137:20–24). Not just implausible, IBF's interpretation and actions are entirely inconsistent with a plaintiff's attempt to resolve a simple dispute informally in small claims court.

[61] More broadly, IBF's particular construction is problematic in the context of alter ego claims where "equitable owners" can be personally liable for corporate debt. *See Solid Comfort, Inc. v Hatchet Hosp., Inc.*, 2013 ND 152, ¶¶ 18, 20–30, 836 N.W.2d 415 (confirming that non-owners and even separate entities can be held liable as "equitable owners"). Notwithstanding the fact that "courts generally apply the alter ego with great

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[2] THE COURT: But aren't I—would I not be holding you and your tactics on behalf of these clients in the district court accountable for the actions that you took there? I mean, isn't that what we're talking about here? You made decisions to add parties, you made decisions to amend your complaint to add different causes of action, you made your decisions to engage in aspects of discovery, you made a decision not to go back to small claims for it when you were clear in your mind that Contractors, Inc., was the party that should have been sued.

I mean, you're the one who made all of these decisions on behalf of Interiors by France in the district court level. Aren't I holding you accountable for that action and conduct?

MR. ASKEW: Yes, Your Honor.

(App. 197:09–23).

caution and reluctance", *Taszarek*, 2016 ND 172, at ¶ 12, IBF's implausible interpretation sets a precedent that allows plaintiffs to sue shareholders directly, dismiss the shareholder in lieu of the corporation after removal, and use the Fee-Shifting Statute to automatically extract attorney's fees in a piercing the corporate veil action. IBF actually goes a step further in "contorting the corporate veil piercing process from a 'rare exception' in cases of fraud or other exceptional circumstances to a general rule of finding individual liability." *Taszarek*, at ¶ 37 (Crothers, J., dissenting).

[62] In summary, and once again, IBF acknowledges that the Fee-Shifting Statute is "explicit". (*Appellant Br.*, at ¶ 51). IBF also agrees that Defendants and the District Court's interpretation of the Fee-Shifting Statute is "both plausible, and arguably persuasive". (*Appellant Br.*, at ¶ 35). If the District Court's interpretation of the explicit Fee-Shifting Statute is both plausible and persuasive, it necessarily follows that IBF's interpretation is neither plausible nor persuasive.

IV. THE DISTRICT COURT DID NOT DETERMINE THE REASONABLENESS OF IBF'S ALLEGED ATTORNEY'S FEES.

[63] The District Court reserved the issue of whether IBF's alleged attorney's fees were reasonable: "[n]or does the Court get to the question whether it is allowed under the statute to interpret 'reasonable' attorney's fees." (App. 220, at ¶ 46). "A trial court is considered an expert in determining the amount of attorney's fees." *Van Beek v. Umber*, 2010 ND 47, ¶ 5, 780 N.W.2d 52.

[64] Here, the District Court's Order recognized that "the attorney's fees allegedly incurred by Interiors by France" appear "excessive". (App. 220, at ¶ 46). IBF "seeks desperately to have N.D.C.C. § 27-08.1-04 apply so as to receive $66,980.00 in attorney's fees", (App. 216, at ¶ 32), because "this amount dwarfs the actual amount in

dispute". (*Appellant Br.*, at ¶ 49). Throughout this litigation, the District "Court d[id] not find that amount of attorney's fees expended was reasonable or justified considering the simple issued presented" because "the amount requested by IBF is extremely disproportionate to the breach of contract claim IBF is actually making." (Docket No. 110, at ¶ 6). It further explained that IBF seemed "distracted by the eventual result it seeks" and had "greatly exceed[ed] in attorney's fees what it could reasonably obtain, should they prove the existence of a contract." (Docket No. 111, at ¶ 3).

> Interiors by France spent an extraordinary amount of attorney time attempting to pierce the corporate veil notwithstanding the reality that there had been an offer by Mitzel Contractors to pay the principle balance plus interest. [DE 154, p. 137, lines 20–24] The dollars that were eventually used by Mitzel Contractors to pay the confessed judgment had been held for a considerable period of time in the trust account of Mitzel Contractors' attorneys. [DE 111, ¶2] Counsel for Interiors by France made a tactical decision in not accepting the offer from Mitzel Contractors . . . . Interiors by France, upon refusing Mitzel Contractors' offer to pay the contract amount alleged, pursued a costly and intense discovery plan designed to pierce the corporate veil so they could collect from Leeroy Mitzel, individually, the money that had already been offered directly. They must live with this unusual litigation tactic. <u>It certainly does not enhance or improve their argument that N.D.C.C. § 27-08.1-04 requires the payment of attorney's fees by a party that was not named in the underlying Small Claims affidavit</u>.

(App. 218, at ¶¶ 39–40) (emphasis added).

CONCLUSION

[65] For all the foregoing reasons, Defendants respectfully request that the Supreme Court AFFIRM the District Court's Order and Judgment.

Dated this 13th day of March, 2019.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Interiors by France, Plaintiff/Appellant, v. Mitzel Contractors, Inc. d/b/a Mitzel Homes, Mitzel Builders, Inc., Leeroy Mitzel, and individual, and Eddy Mitzel, and individual, Defendants/Appellees.	)	**Supreme Court No. 20180399** **Morton County** **Civil No. 30-2016-CV-00803**

Affidavit of Service

STATE OF NORTH DAKOTA)
)ss
COUNTY OF BURLEIGH)

[1] I, Amanda Fischer, being first dully sworn upon oath, deposes and says: That she is a citizen of the United State, of legal age, and a legal assistant in the office of Schweigert, Klemin, & McBride, P.C. Attorneys at Law, 116 North 2nd Street, Post Office Box 955, Bismarck, North Dakota 58502-0955.

[2] That on the 13th day of March 2019, in accordance with the provisions of the North Dakota Rules of Civil Procedure, this affiant served upon the persons hereinafter named a true and correct copy of the following document(s) in said matter:

1) **Brief of Appellees Mitzel Contractors, Inc. d/b/a Mitzel Homes, Mitzel Builders, Inc., and Leeroy Mitzel; and**

2) **Affidavit of Service**

were file electronically by e-mail with the Clerk of the North Dakota Supreme Court at supclerkofcourt@ndcourts.gov and were served electronically on the following:

Andrew L. Askew
alaefile@pearce-durick.com

Christopher J. Nyhus
chris@nyhuslaw.com

Amanda Fischer

Subscribed and sworn to before me this 13th day of March 2019.

(SEAL)

SHANNON BARTH
Notary Public
State of North Dakota
My Commission Expires November 25, 2021

Notary Public
State of North Dakota

COMMD 4566.15 Mitzel v. IBF \11. AOS 3-13-19