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In the Supreme Court
State Of North Dakota

January 31, 2019

Supreme Court No. 20180443

Grand Forks County Case No. 18-2017-CV-02167

Johnston Land Company, LLC,

Appellant,

v.

Sara K. Sorenson, Individually
and Ohnstad Twichell, P.C., a
North Dakota Professional Corporation

Respondent and Appellee

APPEAL FROM THE FINAL JUDGMENT OF
THE DISTRICT COURT OF GRAND FORKS COUNTY,
NORTH DAKOTA, NORTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STACY J. LOUSER, PRESIDING

INITIAL BRIEF OF APPELLANT
JOHNSTON LAND COMPANY, LLC

DEWAYNE JOHNSTON (ND 05763)
ATTORNEY FOR APPELLANT
JOHNSTON LAW OFFICE
221 SOUTH 4TH STREET
GRAND FORKS, ND 58201
(701) 775-0082
dewayne@wedefendyou.net

DAVID CLARK THOMPSON (ND 03921)
ATTORNEY FOR APPELLANT
DAVID C. THOMPSON, P.C.
321 KITTSON AVENUE
GRAND FORKS, ND 58201
(701) 775-7012
dct@rrv.net

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[¶1] STATEMENT OF THE ISSUES

A. The District Court's impermissible *post-remand* award of attorney's fees – in favor of the Sorenson/Ohnstad Twichell Appellees and against the Petitioner – was violative of the "Mandate Rule" and this serious error requires reversal of the District Court judgment in this case on those grounds.

B. The District Court committed error by ruling that a self-serving "Second Affidavit" executed by Appellee Sara K. Sorenson expressly for the purpose of supporting a post-remand summary judgment motion by the Sorenson/Ohnstad Twichell parties – *as a matter of law* – rendered "moot" Appellant's petition for declaratory and injunctive relief relative to the April 1, 2015 "First Affidavit" of attorney Sara K. Sorenson which continues to cloud record title of the subject property today.

[¶2] **STATEMENT OF THE CASE**

[¶3] Appellant Johnston Land Company, LLC. (hereinafter "Appellant", or "Johnston", or "Johnston Land Company") appeals from a final judgment issued by Order of the District Court. **Doc #33, Appx. 031**.

[¶4] Specifically, above-captioned Appellant Johnston Land Company, LLC. Appeals to the Supreme Court from the District Court's Orders of October 8, 2018 [**Doc. 65, Appx. 127**], November 26, 2018 [**Doc. 71, Appx. 136**], and the Judgment entered thereto filed on November 27, 2018 [**Doc. 72, Appx. 142**], in proceedings which followed the remand and Mandate [**Doc. 40, Appx.44**] issued in this case by the Supreme Court in *Johnston Land Company, LLC v. Sara K. Sorenson, et. Al.*, 2018 ND 183, 915 N.W. 2d 664 (N.D. July 18, 2018*), affirming in part, and reversing in part*, the original judgment of the District Court.

[¶5] Although the Respondents/Appellees had never requested or been awarded attorney's fees or costs at the District Court or Supreme Court levels during the ***pre-remand*** phases of this case, the District Court ***post-remand*** awarded attorney's fees and costs against the Appellant Johnston Land Company and in favor of the Respondents/Appellees. *See, the record-referenced explanation set forth in ¶4, supra.*

[¶6] This ***post-remand*** attorney's fees award by the District Court was in the substantial amount of **$26,037.75**, and constituted an assessment of attorney's fees against Appellant/Respondent Johnston Land Company, LLC for claimed legal work performed by Respondents'/Appellees' counsel during ***both the pre-remand and post-remand phases of this case***. *Id.*

[¶7] The District Court's asserted legal authority to support its ***post-remand*** award of attorney's fees for both the pre-remand and post-remand phases of this case derived -- *solely and exclusively* – from N.D.C.C. §35-35-05(5) – a permissive, discretionary statutory authorization, which provides that, "(i)f the court determines that the (*claimed*) lien is not a nonconsensual common-law lien, the court shall issue an order so stating and ***may*** award costs and reasonable attorney's fees to the prevailing party." (*bold, underlined, italicized emphasis add*ed) .

[¶8] Importantly, however, ***the entire non-consensual lien issue in the instant case was never remanded back to the District Court*** in the wake of the Supreme Court's appellate adjudication in this very case. See, *Johnston Land Company, LLC v. Sara K. Sorenson, et. al*, *supra*, 2018 ND 183, 915 N.W. 2d 664 at ¶¶ 8-15.

[¶9] In its earlier decision in this case, the Supreme Court stated, in pertinent part, as follows:

> On September 15, 2017 the district court concluded Sorenson's affidavit was not a nonconsensual common-law lien under N.D.C.C. § 35-01-02 because it "does not claim an interest in the subject property; it is merely a statement to the world, akin to a *lis pendens*, that the referenced property may be pursued to satisfy the Judgment." The district court did not rule on Johnston's additional issues, writing, "In the instant action, this Court has only been asked to make a determination whether the Affidavit of Sara K. Sorenson is a nonconsensual common-law lien, which it has done." (*emphasis in original*.) Johnston appeals.
>
> Section 35-35-01, N.D.C.C., defines nonconsensual common-law lien:
>
> "[A] document that purports to assert a lien against real or personal property of any person and:
>
> a. Is not expressly provided for by a specific state or federal statute;

> b. Does not depend upon the consent of the owner of the property affected; and
> c. Is not an equitable or constructive lien imposed by a state or federal court of competent jurisdiction."

Sorenson argues her affidavit has no legal effect or harm after the district court's ruling, and Johnston has no claim without a showing of harm. However, the affidavit remains of record and it will appear in any title search of the property. At this point we can only guess at the legal or practical implications of having the affidavit appear in the chain of title, but its presence means Johnston presents an issue for a court to decide.

[¶10] III

Johnston argues Sorenson's affidavit amounts to a nonconsensual common-law lien under N.D.C.C. § 35-35-01. "Issues regarding the interpretation and application of a statute are questions of law and are fully reviewable on appeal." *In re Estate of Samuelson*, 2008 ND 190, 757 N.W.2d 44 ¶ 11. Section 35-01-02, N.D.C.C., defines a lien as "a charge imposed upon specific property by which it is made security for the performance of an act." Alternatively, a lien is "[a] legal right or interest that a creditor has in another's property, lasting usu[ally] until a debt or duty that it secures is satisfied." *Lien*, *Black's Law Dictionary* (10th ed. 2014).

Section 35-35-01, N.D.C.C., defines nonconsensual common-law lien:

> "[A] document that purports to assert a lien against real or personal property of any person and:
> a. Is not expressly provided for by a specific state or federal statute;
> b. Does not depend upon the consent of the owner of the property affected; and
> c. Is not an equitable or constructive lien imposed by a state or federal court of competent jurisdiction."

Here, the district court ruled the affidavit "does not claim an interest in the subject property; it is merely a statement to the world, akin to a lis pendens, that the referenced property may be pursued . . . ." (Emphasis in original.) The affidavit does not claim an interest in the property, does not list an amount of money and does not purport to be a lien. Compared with the "Notice of Attorney Lien" in *Nusviken*,

> ***Sorenson's affidavit does not meet the requirements of a statutory or common-law nonconsensual lien***. *Nusviken v. Johnston*, 2017 ND 22, ¶ 10, 890 N.W.2d 8. ***The district court did not err in determining the affidavit is not a lien.***
>
> [¶11] IV
>
> ***Johnston argues the district court erred by not responding to its remaining claims for relief***. ***We agree***.
>
> When Sorenson filed the affidavit in 2015, there was no action affecting title to the property. The affidavit did not name the property owner, Bell Fire LLP. ***Johnston asked for a declaratory judgment striking the affidavit, an action within the power of the district court under N.D.C.C. ch. 32-23***. ***Johnston requested further relief that may be available under these facts***. ***We remand for the district court to rule on items "c" through "g" in Johnston's petition***. (*bold, underlined italicized emphasis added*).
>
> *Johnston Land Company, LLC v. Sara K. Sorenson, et. al., supra*, 2018 ND 183, 915 N.W. 2d 664 at ¶¶ 9-14

[¶12] Previously in the instant appeal, Appellant Johnston Land Company, LLC moved the Supreme Court, pursuant to Rule 35.1 of the North Dakota Rules of Appellate Procedure, for entry of an Order granting summary reversal of the Judgment of the District Court – particularly the District Court's ***post-remand*** attorney's fees award in the amount of **$26,037.75** for claimed legal work performed by Respondents'/Appellees' counsel during ***both the pre-remand and post-remand phases of this case*** – a ruling by the District Court which the Appellant asserted directly contravened the prior Mandate of the Supreme Court in this case -- thereby violating the "Mandate Rule".

[¶13] The Supreme Court summarily denied this motion ["Order of Denial" entered January 10, 2019], and the instant proceedings have followed, including full briefing by the parties upon the merits.

[¶14] **STATEMENT OF THE FACTS**

[¶15] Many of the essential material facts of record in this case are not subject to serious dispute, and most of them are narrated in the previous decision of the Supreme Court. *Johnston Land Company, LLC v. Sara K. Sorenson, et. al.*, *supra*, 2018 ND 183, 915 N.W. 2d 664 at ¶¶ 2-6.

[¶16] With the one important exception described hereafter, Appellant Johnston Land Company agrees that the facts narrated in the Supreme Court's prior decision in this case are accurately stated, and subject to that sole exception, the Appellant hereby incorporates herein by reference the Supreme Court's factual narrative from its earlier decision. *Id.*

[¶17] In its previous decision, the Supreme Court quoted the Affidavit of (Appellee) Ohnstad Twichell attorney (Appellee) Sara K. Sorenson of March 16, 2015, including the following paragraph:

> "I am an attorney with the law firm of Ohnstad Twichell, P.C., who represents petitioners Andrea Rebman Green, Carolyn Rebman, Charlene Leibold, Colin Leibold, Eric Rebman, Glen Rebman, and Jacob Leibold, in the estate entitled 'In the Matter of the Estate of Donald G. Amundson, Deceased.' Petitioners have obtained a Judgment against John E. Widdel Jr., a/k/a/ J.E. Widdel, a/k/a/ Jack Widdel, and Law Offices - North Dakota, P.C., jointly and severally, in the amount of $95,000, a true and correct copy of which Judgment is attached hereto as Exhibit 'A.'"
>
> *Johnston Land Company, LLC v. Sara K. Sorenson, et. al.*, *supra*, 2018 ND 183, 915 N.W. 2d 664 at ¶ 4

[¶18] In its decision, the Supreme Court stated that, "Ohnstad Twichell, P.C. represented ***the*** beneficiaries of Amundson's estate." (*bold, italicized emphasis added*).

[¶19] With regard to this statement by the Supreme Court, while attorney Sara K. Sorenson and her employer Ohnstad Twichell certainly did represent ***some*** [*seven (7) of the ten (10)*] beneficiaries of the Amundson Estate, at no time did these Appellees represent ***all*** of the beneficiaries of the subject Donald G. Amundson Estate. See, the "Petition for Court Determination of Reasonableness of Fees and for Settlement and Distribution of Estate", filed August 6, 2012, in *Matter of the Estate of Donald G. Amundson, Deceased*, North Dakota District Court, Grand Forks County, File No. 18-2011-PR-00144, Doc. 26 of that case, at Paragraph 1 thereof, **Appx. 144**.[1]

[¶20] Through the probate litigation in *Matter of the Estate of Donald G. Amundson, Deceased, supra,* attorney Sara K. Sorenson and her employer, the Ohnstad Twichell, P.C. Law Firm of West Fargo, obtained a judgment on September 17, 2014, on behalf of their clients—*not parties to the above-captioned action*—against North Dakota lawyer John E. Widdel Jr. [a/k/a J.E. Widdel, Jr. and Jack Widdel].[2]

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[1] The Supreme Court appellate decision in that probate case is styled, *Estate of Amundson*, 2015 ND 253, 870 N.W.2d 208 (N.D. 2015).

[2] See, Grand Forks County District Court Case Number 18–2011–PR–00144, captioned as In the *Matter of the Estate of Donald G. Amundson*, Deceased, said case having been parenthetically referenced by the Supreme Court in its prior decision in this case at *Johnston Land Company, LLC v. Sara K. Sorenson, et. al.*, *supra*, 2018 ND 183, 915 N.W. 2d 664 at ¶ ¶ 2-3.

[¶21] On April 1, 2015, attorney Sara K. Sorenson recorded an affidavit in the office of the Grand Forks County recorder at 9:35 a.m., bearing Document Number 751619, in which Sorenson alleged at ¶4 of her affidavit that, "(t)his affidavit is to make it known to the public that the following real property may be subject to future legal proceedings against such judgment:

> Lot Eight (8), Block Thirty-three (33), Original Townsite to the City of Grand Forks, according to the Official Plat thereof and on file within the office of the Recorder, Grand Forks County, North Dakota . . . .
>
> See, the Petition in this case District Court, at Exhibit 2 thereof, **Doc. 1, Appx. 012**.

[¶22] The judgment obtained by Sara K. Sorenson by the Ohnstad Twichell, P.C. Law Firm in *Matter of the Estate of Donald G. Amundson* provided no right or remedy as against the Yvonne J. Widdel Revocable Trust – the entity which was and is the record title owner of the above-described real property. See, **Doc. 28, Appx. 021** and **Doc. 30, Appx. at 024**.

[¶23] In an affidavit recorded on June 30, 2017, in the office of the Grand Forks County Recorder, identified as Document Number 774912, North Dakota-licensed attorney Raymond J. German stated his legal opinion under oath that John E. Widdel Jr. [a/k/a J.E. Widdel and Jack Widdel] was not an equitable owner of real property described above as of the date of September 9, 2014. See, **Doc. 3**, **Appx. 014**.

[¶24] Appellant Johnston Land Company, LLC. and the Yvonne J. Widdel Revocable Trust later entered into a purchase agreement to purchase the parcel of land identified as:

Lot Eight (8), Block Thirty-three (33), Original Townsite to the City of Grand Forks, according to the Official Plat thereof and on file within the office of the Recorder, Grand Forks County, North Dakota.
See, **Doc. 30 Appx. 024.**

[¶25] However, Appellant Johnston Land Company, LLC. was not able to obtain title insurance and purchase the real property in fee title, due to the presence of the above-described Affidavit of attorney Sara K. Sorenson, the filing of which had the effect of clouding the title of real property. Declaration of DeWayne Johnston, Exhibit 1 thereto **Doc. 54**, **Appx. 105**, including the e-mail from Grand Forks attorney Sharon M. Reis, dated September 12, 2018, in which Ms. Reis stated as follows:

> DeWayne:
>
> I ran the Proposed Order past my underwriter and he said it (*sic.*) that is signed and recorded as well as filed against the judgment along with the termination of the Notice of Lis Pendens, we could then be able to insure the property. I could issue a commitment including that requirement but that is the only thing I could do to show the requirement. Let me know. Thanks.
>
> Sharon M. Reis
> REIS LAW FIRM, P.C.
>
> **Doc. 54**, **Appx. 105**

[¶26] On August 21, 2017, Johnston Land Company, LLC. filed a Petition with the Grand Forks County District Court, which Petition named Sara K. Sorenson and the Ohnstad Twichell, P.C. law firm as co-respondents, seeking removal of the Affidavit of Sara K. Sorenson from the real property subject to the purchase agreement under alternative theories of law. See **Doc. 1, Appx. 006.**

[¶27] Sara K. Sorenson and the Ohnstad Twichell, P.C. law firm filed an Answer to the Petition on August 30, 2017 [**Doc. 15, Appx. 016**], and a supplemental answer to the petition on September 11, 2017 [**Doc. 24, Appx. 018**].

[¶28] Neither the Sorenson/Ohnstad Twichell original Answer to the Johnston Land Company Petition, nor the Appellee's Supplemental Answer, had included any request or prayer for an award of attorney's fees and costs as against Petitioner/Appellant Johnston Land Company – upon any legal grounds. See, **Doc. 15, Appx. 016,** and **Doc. 24, Appx. 018**.

[¶29] On September 11, 2017, Sara K. Sorenson filed an action[3] in the Grand Forks County District Court on behalf of ***only seven (7) of the ten (10) judgment creditors*** in Grand Forks County District Court Case number 18–2011–PR–00144 against the Yvonne J. Widdel Revocable Trust, and other individuals and companies related to the Widdel Family. The judgment creditors in Grand Forks County District Court Case No. 18–2011–PR–00144 are the putative source from which Sara K. Sorenson claims support for her Affidavit recorded against the real property record-title-held by the Yvonne J. Widdel Revocable Trust. See, **Doc. 15**, **Appx. 016**.

[¶30] On September 13, 2017, Sara K. Sorenson filed a Lis Pendens—derived from the vehicle of Grand Forks County District Court Case Number 18-2017-CV-2381—in the

[3] See, Grand Forks County District Court Case Number 18-2017-CV-2381 captioned *Charlene Leibold, Colin Leibold, Jacob Leibold, Andrea Rebman Green, Carolyn Rebman, Eric Rebman, and Glen Rebman v. Bell Fire, LLP, John E., Jr. Widdel, John E., Jr. Widdel as Trustee, John P. Widdel, Trustee, Yvonne J. Widdel, Yvonne J. Widdel, Trustee, and Yvonne J. Widdel Revocable Trust.*

office of the Grand Forks County Recorder, bearing Document Number 776986—alleging at ¶1 thereof that "***__the object of which is to levy execution on the following real property__*** … "8. (*bold, italicized emphasis added*) . See, **Doc. 45**, **Appx. 074**.

[¶31] __ARGUMENT__

A. The District Court's impermissible *__post-remand__* award of attorney's fees -- in favor of the Sorenson/Ohnstad Twichell Appellees and against the Petitioner – was violative of the "Mandate Rule" and this serious error requires reversal of the District Court judgment in this case on those grounds.[4]

[¶32] The instant appeal comes from ***__post-remand__*** proceedings in the District Court below which followed a decision of the North Dakota Supreme Court earlier this year in *Johnston Land Company, LLC v. Sara K. Sorenson, et. al.*, 2018 ND 183, 915 N.W.2d 664 (N.D. July 18, 2018). In that case, the District Court's Order of September 15, 2017, was "affirmed in part, reversed in part, and remanded" to the District Court with the Supreme Court's directions for the District Court "to rule on items 'c' through 'g'" in the Johnston Land Company Petition – ***__none of which related to the nonconsensual lien issue which had been decided by the Supreme Court in its operative opinion and was__***

[4] It is the position of Appellant Johnston Land Company that the District Court's post-remand decisions filed October 8, 2018 [**Doc. 65, Appx. 127**] and November 26, 2018 [**Doc. 71, Appx. 136**] – *by which the Court awarded $26,037.75 in attorney's fees to the Respondent* – were violative of the "**__Mandate Rule__**" implicated by the substance of the North Dakota Supreme Court's opinion in *Johnston Land Company, LLC v. Sara K. Sorenson, et. al.*, 2018 ND 183, 915 N.W.2d 664 (N.D. July 18, 2018), and the Judgment/Mandate entered on August 18, 2018, the latter filed with the District Court at [**Doc. 40, Appx. 044**]. *Legal authorities and argument* in support of the Petitioner's position in this regard are presented at ¶¶22-34, *infra*. See, e.g., *Carlson v. Workforce Safety & Insurance*, 2012 ND 203, ¶16; 821 N.W.2d 760, 766 (N.D. 2012); *United States v. Husband*, 312 F.3d 247, 250-251 (7th Cir. 2002); and *Doe v. Chao*, 511 F.3d 461, 466-467 (4th Cir. 2007).

never included in the matters to be considered by the District Court upon remand. *Id.* ¶¶14-15.

[¶33] A mere seven (7) days after the Supreme Court mandate from that appeal was filed in the District Court, the Respondents filed a summary judgment motion, relative to "items 'c' through 'g'" in the Petition.

[¶34] Importantly, however, the issue of whether the "Sorenson Affidavit" was a "nonconsensual common-law lien" had already been addressed by the District Court in its pre-appellate Order of September 15, 2017, and this issue was, in turn, addressed upon the merits by the Supreme Court in the portion of its decision in which the Supreme Court ***affirmed*** the District Court.

[¶35] Without question, therefore, the issue of whether the "Sorenson Affidavit" constituted a "nonconsensual common-law lien" was subject matter which no longer remained a viable, contested issue in the ***post-remand*** phase of this case once it was returned to the District Court.

[¶36] It is a matter of incontrovertible record in this case that ***at no time in the pre-appellate phase of this case in the District Court*** – ***nor in the appeal*** – ***did the Respondents ever request that attorney's fees be awarded to them pursuant to N.D.C.C. § 35-05-05(5)***, which provides that, "(i)f the court determines that the lien is not a nonconsensual common-law lien, the court shall issue an order so stating and ***may***

award costs and reasonable attorney's fees to the prevailing party." (*bold, underlined, italicized emphasis add*ed).[5]

[¶37] It is also undisputed that the District Court in its September 15, 2017, appealed-from Order ***never*** exercised its discretion to "award costs and reasonable attorney's fees to the prevailing part(ies)" – the Appellees – who did not even request that attorney's fees awarded.

[¶38] Following the remand of this case, the issue of whether the "Sorenson Affidavit" was a "nonconsensual common-law lien" was no longer before the District Court, as that issue was, of course, not included among those matters which the Supreme Court had returned to the District Court for decision in the remanded proceedings.

[¶39] After the Respondents for the first time requested an award of attorney's fees ***post-remand*** pursuant to N.D.C.C. § 35-05-05(5) – ***this statute necessarily relating exclusively to the "nonconsensual common-law lien" issue which was no longer before***

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[5] Indeed, this fact was expressly acknowledged in the Respondent's Brief in support of their Motion for Summary Judgment in the remanded proceedings in the District Court ***after*** the filing of a Certified Copy of the Opinion and Mandate of the North Dakota Supreme Court on August 14, 2018, [**Doc. Nos. 40 & 41, Appx. 044 & 045**], which appellate decision had fully and finally resolved the issue of whether the Sara K. Sorenson Affidavit was a nonconsensual common-law lien, with the Respondents stating:

> ***Respondents did not request attorney fees before the appeal because it was assumed the case would go no further after this Court's initial determination the Sorenson affidavit is not a lien***. ***Due to the appeal, the supreme court's surprise remand***, and Johnston's persistence in pursuing a moot issue, Respondents have been forced to expend a great amount time, costs and attorney fees in defending this case. For these reasons, the Court should award Respondents their reasonable costs and attorney fees under N.D.C.C. § 35-35-05(5). (*emphasis added*).
>
> *See,* **Doc. 44**, ¶15, **Appx. 068.**

the District Court in the post-remand proceedings – the Court in its Order of November 22, 2018 justified its award of $26,037.75 in attorney's fees claimed by Appellee' counsel for legal work from August 30, 2017, to October 1, 2018, with the following analysis in that post-remand Order[6]:

> In its September 15th, 2017 Order, this Court found Sorenson's affidavit was **not** a nonconsensual common-law lien. Said finding was subsequently affirmed by the North Dakota Supreme Court in its July 18th, 2018 Opinion. Thus, pursuant to N.D.C.C. § 35-35-05(5), the court awarded costs and fees to Respondents.
>
> "Order of the Court", November 22, 2018, [**Doc. 71, Appx. 136**], at ¶5

[¶40] In the District Court's previous ***post-remand*** Order of October 8, 2018, it addressed the ***non-remanded issue*** of the matter of whether the "Sorenson Affidavit" had been a nonconsensual common-law lien", with the Court stating as follows:

> This Court issued an order finding that the Sorenson affidavit is not a nonconsensual common-law lien and the Supreme Court affirmed the ruling. *Johnston Land Co.*, 2018 ND 183 at ¶12. Based on this determination and N.D.C.C. § 35-35-05(5), the Court awards Respondents their reasonable costs and attorney fees.
>
> Order of October 8, 2018 [**Doc. 65, Appx. 127-135**], at ¶28 [7]

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[6] See, the "Order of the Court", November 22, 2018, [**Doc. 71, Appx. 136**], at ¶5.

[7] Incongruently, and quite ironically, the District Court in this same October 8, 2018, "Order Granting Respondent's Motion for Summary Judgment and Attorney Fees and Order for Judgment" held as follows:

> Johnston seeks attorney's fees, costs, and disbursements in item "f". The Court is left again to guess at the authority for this relief. N.D.C.C. § 35-35-05(3) and N.D.C.C. § 35-35-06 both provide for costs and reasonable attorney's fees, but both of ***these statutes apply to nonconsensual common-law liens, and there has been a final determination that Sorenson's first affidavit is not a nonconsensual common-law lien***. (*emphasis added*).

[¶41] Interestingly, the District Court's **post-remand** decision to award attorney's fees to the Respondents based on N.D.C.C. § 35-35-05(5)—and upon the further basis of the portion of the Supreme Court's decision which had affirmed the District Court's holding relative to the "Sorenson Affidavit" not being a "nonconsensual common-law lien"—comes within the context of the Supreme Court itself having considered Petitioner Johnston Land Company—not the Respondents/Appellees—to have been the prevailing party in the appeal -- with Johnston Land Company having been awarded its costs and disbursements in the appeal.[8]

[¶42] Conversely, nowhere within the Supreme Court's opinion in this case was there any assessment of attorney's fees against Appellant Johnston Land Company pursuant to N.D.C.C. § 35-35-05(5), assent approval to an award of attorney's fees against Johnston Land Company under that statute in the forthcoming proceedings upon remand, or any other signification by the Supreme Court that the District Court could properly award attorney's fees to the Respondents in the remanded case, wherein the

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Order of October 8, 2018 [**Doc. 65, Appx. 127-135**], at ¶ 21

[8] See, the Mandate issued by the Supreme Court in this case on July 18, 2018, filed in the District Court on August 14, 2018, at [**Doc. 40, Appx. 044**]. As the Supreme Court stated at ¶4 of its Mandate in this case:

> IT IS FURTHER ORDERED AND ADJUDGED that Johnston Land Company, LLC have and recover from Sara K. Sorenson, Individually and Ohnstad Twichell, P.C., a North Dakota Professional Corporation, costs and disbursements on this appeal under Rule 39, mn.d.R.App.P., to be taxed and allowed in the court below.

already-decided issue of whether the "Sorenson Affidavit" was a "nonconsensual common-law lien" could no longer have even been permissibly addressed.

[¶43] By awarding to the Respondents attorney's fees deriving exclusively from the statutory authority of N.D.C.C. § 35-35-05(5) after the issue of whether the "Sorenson Affidavit" was a "nonconsensual common-law lien" was conclusively decided by the North Dakota Supreme Court and thus not part of the remand of this case—the District Court has violated the "**Mandate Rule**".

[¶44] The Judgment and Mandate entered by the North Dakota Supreme Court in this case on August 14, 2018 stated, in pertinent part, as follows:

> (T)he Court having considered the appeal, it is ORDERED AND ADJUDGED that the order of the district court is AFFIRMED in part, REVERSED in part, and REMANDED ***for further proceedings consistent with the opinion***. (*capitalization in original, bold, italicized emphasis added*).

[¶45] The relevant facts relating to the above-captioned District Court's post-remand award of attorney's fees to the Respondents ostensibly pursuant to N.D.C.C. § 35-35-05(5) are set forth above herein at [**Doc. 71**, **Appx. 136**].

[¶46] As stated above, nowhere within the Supreme Court's opinion in this case was there any assessment of attorney's fees against Appellant Johnston Land Company pursuant to N.D.C.C. § 35-35-05(5), assent or approval for an award of attorney's fees against Johnston Land Company under that statute in the forthcoming proceedings upon remand, or any other signification by the Supreme Court that the District Court could properly award attorney's fees to the Respondents in the remanded case, wherein

the already-decided issue of whether the "Sorenson Affidavit" was a "nonconsensual common-law lien" could no longer even be addressed on remand under the "Mandate Rule".

[¶47] It is undisputed that the District Court in its September 15, 2017, appealed-from Order never exercised its discretion to "award costs and reasonable attorney's fees to the prevailing part(ies)"—the Appellees—who did not even request that attorney's fees be awarded. See, Footnote 4, *supra*.

[¶48] Following the remand of this case, the issue of whether the "Sorenson Affidavit" was a "nonconsensual common-law lien" was no longer before the District Court, as that issue was, of course, not included among those matters which the Supreme Court had returned to the District Court for decision.

[¶49] The "**Mandate Rule**" is recognized in our jurisprudence here in North Dakota, just as it is in all other American state and federal jurisdictions. See, e.g., *Carlson v. Workforce Safety & Insurance*, 2012 ND 203, ¶16; 821 N.W.2d 760, 766 (N.D. 2012), where the North Dakota Supreme Court elaborated as follows with respect to the "**Mandate Rule**" being a more specific application of the "Law of the Case Doctrine":

> "Generally, the law of the case is defined as 'the principle that if an appellate court has passed on a legal question and remanded the case to the court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same.'" *Robertson v. North Dakota Workers Comp. Bureau*, 2000 ND 167, 616 N.W.2d 844, ¶ 18 (*quotation omitted*). In other words, "[t]he law of the case doctrine applies when an appellate court has decided a legal question and remanded to the district court for further proceedings," and "[a] party cannot on a second appeal relitigate issues which were resolved by the Court in the first appeal **or which would have been**

resolved had they been properly presented in the first appeal." *Kortum v. Johnson*, 2010 ND 153, 786 N.W.2d 702, ¶ 9 (*quotations omitted*) (*emphasis added*); *see also State ex rel. Dep't of Labor v. Riemers*, 2010 ND 43, 779 N.W.2d 649, ¶ 11, *Frisk v. Frisk*, 2006 ND 165, 719 N.W.2d 332, ¶ 14; *Jundt v. Jurassic Res. Dev.*, 2004 ND 65, 677 N.W.2d 209, ¶ 7; *State v. Burckhard*, 1999 ND 64, 592 N.W.2d 523, ¶ 7; *Tom Beuchler Constr., Inc. v. City of Williston*, 413 N.W.2d 336, 339 (N.D. 1987). "***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.*** . . . and we retain the authority to decide whether the district court scrupulously and fully carried out our mandate's terms." *Burckhard*, at ¶ 7 . (*Bold, underlined, un-italicized emphasis here signifies underlined emphasis in original. Bold, underlined, italicized emphasis added*).

2012 ND 203 at ¶16; 821 N.W.2d at 766

[¶50] In one of the most widely-cited reported decisions on the subject, the Seventh Circuit Court of Appeals explained as follows, in discussing the limitations on the scope of remanded proceedings in *United States v. Husband*, 312 F.3d 247, 250-251 (7th Cir. 2002):

There are two major limitations on the scope of a remand.

[Footnote 3: ***The general principle that the district court can only hear a case within the scope of the remand is derived from the "law of the case" doctrine***. *See United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001) ("***The 'law of the case' generally requires [the district court] to confine its discussion to the issues remanded***."). (*bold, italicized emphasis added*).

First, any issue that could have been but was not raised on appeal is waived and thus not remanded. *See United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001) ("***Parties cannot use the accident of remand as an opportunity to reopen waived issues***."); *Parker*, 101 F.3d at 528 ("A party cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal."); *see also Barrow v. Falck*, 11 F.3d 729, 730 (7th Cir. 1993) ("***An argument bypassed by the litigants, and therefore not presented in the court of appeals, may not be resurrected on remand*** and used as a reason to disregard the court of appeals' decision."). Second, any issue conclusively decided by this court on the first appeal is not remanded. *Morris*, 259 F.3d at 898. To determine

> whether an issue falls within the second limitation the opinion needs to be looked at as whole. The court may explicitly remand certain issues exclusive of all others; but the same result may also be accomplished implicitly. *Parker*, 101 F.3d at 528 ("The scope of the remand is determined not by formula, but by inference from the opinion as a whole."). For example "***if the opinion identifies a discrete, particular error that can be corrected on remand without the need for a redetermination of other issues, the district court is limited to correcting that error***." *Parker*, 101 F.3d at 528; *see also* *Barrow*, 11 F.3d at 730. In such a case the implication is that for arguments not addressed in the remanding opinion the two possibilities are that "we thought so little of the point that we did not see a need to discuss it, or [the party] did not invoke . . . and thereby waived the point." *Barrow*, 11 F.3d at 730-31. The court's silence on the argument implies that it is not available for consideration on remand. *See* *Barrow*, 11 F.3d at 731 ("***Whether the argument was rejected sub silentio or was surrendered, it was unavailable on remand***."). (*bold, italicized emphasis added*).
>
> 312 F.3d at 250-251

[¶51] It is beyond clear that the 'Mandate Rule" applies specifically to untimely and long-waived requests for attorney's fees awards. In *Doe v. Chao*, 511 F.3d 461, 466-467 (4th Cir. 2007), the Fourth Circuit explained as follows in a "Mandate Rule" case involving a claim for attorney's fees with facts far better for the fees claimant than exist in the record of the instant case for Respondents Sorenson and Onstad Twichell:

> ***Because the mandate rule "forecloses litigation of issues decided by the district court but foregone on appeal or otherwise waived," the district court was not free to deviate from this court's mandate by reconsidering Buck Doe's claims for attorneys' fees that it had denied before appeal and that had not been raised by Buck Doe on cross-appeal***. *Bell*, 5 F.3d at 66; see also, e.g., *S. Atlantic Ltd. P'ship of Tenn.*, 356 F.3d at 584.
>
> ***Second, the scope of the remand of this court in Doe V did not permit the district court to broach the entirely new issue of whether Buck Doe was entitled to an award of attorneys' fees for work performed on the earlier appellate phase of the merits litigation***. ***Buck Doe never even requested fees for the appellate phase of the merits litigation that***

> ***<u>concluded with the Supreme Court's decision in February 2004</u>***. *Doe III*, 540 U.S. 614, 124 S. Ct. 1204, 157 L. Ed. 2d 1122. In fact, after the Supreme Court affirmed the decision of this court in *Doe III*, Buck Doe and the other Doe plaintiffs filed a motion for attorneys' fees that did not include documentation of hours worked on the appellate phase of the merits litigation. Given that Buck Doe never requested fees for appellate work at that or any other time, he clearly waived any such claim. Indeed, because of Buck Doe's waiver, the Secretary had no opportunity to litigate the issue, and the district court likewise had no proper basis to make an award. The district court was not free to use this court's remand on a totally separate issue as an opportunity to breathe life into Buck Doe's long abandoned claim.
>
> This court remanded in *Doe V* for the limited purpose of requiring the district court to assess the reasonableness of Buck Doe's fee award under the Privacy Act for work performed on summary judgment. Once the district court determined that the reasonable fee for that work was zero, the mandate rule required that it go no further. (*bold, italicized emphasis added*).
>
> 511 F.3d at 466-467

[¶52] In its opposition to the Respondents' Motion for Summary Judgment, Petitioner Johnston Land Company specifically argued to the District Court in the instant ***<u>post-remand</u>*** proceedings as follows:

> ***<u>In this matter the Supreme Court of North Dakota settled the claims regarding the non-consensual common law lien and any accessory issues associated with the same – such as attorney fees</u>***. ***<u>No question was left for the District Court to resolve related to that claim</u>***. (*bold, italicized emphasis added*).
>
> Petitioner Johnston Land Company's Brief in Opposition to Respondents' Summary Judgment/Request for Attorney Fees etc., [**Doc. 49**, **Appx. 079**], at ¶32

[¶53] Therefore, it is a matter of record that Johnston Land Company, LLC had specifically advised the District Court ***<u>post-remand</u>*** that all matters relating to non-consensual lien issue in this case had not been included within the scope of the

Supreme Court's remand of this case back to the District Court, certainly including any award of attorney's fees.

B. The District Court committed error by ruling that a self-serving "Second Affidavit" executed by Appellee Sara K. Sorenson expressly for the purpose of supporting a post-remand summary judgment motion by the Sorenson/Ohnstad Twichell parties -- ***as a matter of law*** **– rendered "moot" Appellant's petition for declaratory and injunctive relief relative to the April 1, 2015 "First Affidavit" of attorney Sara K. Sorenson which continues to cloud record title of the subject property today.**

[¶54] While the Supreme Court held conclusively in the prior appeal in this case that the April 1, 2015 Sorenson Affidavit, "does not meet the requirements of a statutory or common-law nonconsensual lien" and that "(t)he district court did not err in determining the affidavit is not a lien"—the Court also squarely rejected the Sorenson/Ohnstad Twichell Appellees' argument that Appellant Johnston Land Company's appeal should be dismissed "for lack of a justiciable controversy." *Johnston Land Company, LLC v. Sara K. Sorenson, et. al.*, *supra*, 2018 ND 183, 915 N.W. 2d 664 at ¶8.

[¶55] As the Supreme Court explained, as it discussed the Sorenson Affidavit:

> Sorenson moved to dismiss Johnston's appeal for lack of a justiciable controversy. Sorenson argues the district court's determination that the affidavit is in the nature of a *lis pendens* means it does not claim or create any lien or interest in the property. Sorenson relies on *McKenzie Cty. v. Casady*, 55 N.D. 475, 484, 214 N.W. 461, 465 (1927), for the rule that "the notice of lis pendens does not of itself create in the party recording it any lien or interest in the property," and thus does not create a cloud on title. Johnston relies on *State ex rel. Emps. of State Penitentiary v. Jensen*, 331 N.W.2d 42, 47 (N.D. 1983), for the proposition that purported liens "effectively inhibit the alienability of [ ] property" and "this unwarranted cloud on the title could result in damages which would be difficult to ascertain and could cause irreparable harm . . . ." . . . .
>
> ***Sorenson argues her affidavit has no legal effect or harm after the district court's ruling, and Johnston has no claim without a showing of harm***. ***However, the affidavit remains of record and it will appear in any title search of the property.***

> ***At this point we can only guess at the legal or practical implications of having the affidavit appear in the chain of title, but its presence means Johnston presents an issue for a court to decide*** . . . .
>
> ***Johnston argues the district court erred by not responding to its remaining claims for relief***. ***We agree***.
>
> ***When Sorenson filed the affidavit in 2015, there was no action affecting title to the property***. The affidavit did not name the property owner, Bell Fire LLP. ***Johnston asked for a declaratory judgment striking the affidavit, an action within the power of the district court under N.D.C.C. ch. 32-23***. ***Johnston requested further relief that may be available under these facts.*** We remand for the district court to rule on items "c" through "g" in Johnston's petition. (*emphasis added*).
>
> *Johnston Land Company, LLC v. Sara K. Sorenson, et. al.*, *supra*, 2018 ND 183, 915 N.W. 2d 664 at ¶¶ 8-9 and 13-14

[¶56] Despite this clear language within the Supreme Court's opinion, the District Court erroneously failed to apprehend the portion of the Supreme Court's decision wherein it ***distinguished*** from its nonconsensual common-law lien ruling from Johnston Land Company's additional position that it was potentially entitled to "declaratory" and other equitable and injunctive relief in the form of a Court-ordered "striking (of) the affidavit of Sara K. Sorenson on file in the office of the Grand Forks County Recorder bearing Document Number 751619." See, *Johnston Land Company, LLC v. Sara K. Sorenson, et. al.*, *supra*, 2018 ND 183, 915 N.W. 2d 664 at ¶¶ 5, 9, and 13-14.

[¶57] The District Court mistakenly asserted in its October 8, 2018 "Order Granting Respondent's Motion for Summary Judgment and Attorney Fees and Order for Judgment" that, "Johnston's sole legal theory (justifying relief) . . . . was that the

"Sorenson) affidavit was a nonconsensual lien." District Court Order of October 8, 2018

[**Doc. 65, Appx. 127**], at ¶3.

[¶58] However, the Supreme Court actually noted as follows:

> On August 18, 2017 Johnston filed a "Petition for Ex Parte Order Directing Lien Claimant to Appear and Show Cause." Johnston listed its claims for relief:
>
> "a. ***For an order commanding Sara K[.] Sorenson and Ohnstad Twichell [sic], P.C. to appear and show cause why the lien should not be declared void and the relief provided for by section 35-35-06 granted to the petitioner***[;]
> b. For an order determining that the affidavit of Sara K[.] Sorenson is a nonconsensual common-law lien;
> c. ***A declaratory judgment striking the affidavit of Sara K[.] Sorenson on file in the office of the Grand Forks County Recorder bearing Document Number 751619***;
> d. ***For its actual damages***;
> e. For damages in the amount of $1,000.00 should its actual damages be less than $1,000.00;
> f. ***Attorney's fees, costs and disbursements***; and
> g. ***Such other and further relief as the Court may deem appropriate and that relief that is just and equitable within the confines of law***."
>
> *Johnston Land Company, LLC v. Sara K. Sorenson, et. al., supra*, 2018 ND 183, 915 N.W. 2d 664 at ¶ 5

[¶59] Missing the fact that Johnston Land Company's "nonconsensual common-law lien" argument was presented by the appellant in the ***disjunctive***—being simply one potential asserted basis for relief, the District Court erroneously stated as follows in its order granting summary judgment to the Sorenson/Ohnstad Twichell parties:

> Johnston has maintained throughout this case that the Sorenson affidavit is a nonconsensual common-law lien. Both this Court and the Supreme Court have held, however, that the Sorenson affidavit is not a consensual common-law lien. Because Johnston's singular legal theory in support of its petition to strike the Sorenson affidavit has been rejected and because Johnston has provided no other legal theory for striking the affidavit, summary judgment in favor of Respondent on this claim is proper.
>
> District Court Order of October 8, 2018 [**Doc. 65, Appx. 127**], at ¶12

[¶60] Stated simply and clearly – if, as the District Court evidently believed -- the Supreme Court's holding that the Sorenson Affidavit was not a nonconsensual common-law lien necessarily precluded the alternative equitable declaratory and

injunctive relief sought by Johnston Land Company – then in that event, the Supreme Court's specifically-directed remand of this case back to the District Court would have been a pointless exercise – something which the Supreme Court clearly did ***not*** intend.

[¶61] Additionally, the District Court concluded that the remanded, surviving claims by Johnston Land Company were rendered "moot" by a "second affidavit" of attorney Sara K. Sorenson's – a self-serving document which Sorenson generated and filed on August 20, 2018 (just over a month after the Supreme Court's July 18, 2018 decision in this case) ***specifically for the purpose of supporting the Sorenson/Ohnstad Twichell parties' post-remand summary judgment motion***. District Court Order of October 8, 2018 [**Doc. 65, Appx. 127**], at ¶¶13-14. See, the "second" Sara K. Sorenson Affidavit, **Doc. 46, Appx. 077**.

[¶62] Specifically, attorney Sorenson's "second affidavit" states simply as follows, after reciting the legal description of the subject real property:

> A Notice of Lis Pendens describing the property and giving notice of the pendency of legal proceedings in Grand Forks County, North Dakota, District Court, in the action identified as Civ. No. 18-2017-CV02381, was filed in the Grand Forks County, North Dakota, Recorder's Office, and recorded on September 13, 2017, as Document No. 776986 (the "Notice of Lis Pendens".
>
> The Notice of Lis Pendens supersedes the (First Sorenson) Affidavit.
>
> The "second" Sara K. Sorenson Affidavit, **Doc. 46, Appx. 077**

[¶63] The central problem with the erroneous "mootness" conclusion by the District Court is that the commencement of the separate Lis Pendens action—commenced back on September 13, 2017—was necessarily known to the Supreme Court, long before its July 18, 2018 decision, specifically because the existence of the Lis Pendens was used in

the Sorenson/Ohnstad Twichell parties' ***unsuccessful*** motion to dismiss the first appeal in this case upon the purported grounds that Appellant Johnston Land Company had presented a "justiciable controversy to give (the Supreme) Court jurisdiction" and that "Johnston Land Company has nothing to challenge on appeal because it now has a judicial determination that the land is not encumbered by any lien." See, the "Brief in Support of Motion to Dismiss Appeal", dated March 26, 2018, and filed with the Supreme Court at pages 3-4.

> Of course, in denying the Sorenson/Ohnstad Twichell parties' "Motion to Dismiss Appeal", the Supreme Court reversed part of the District Court's decision, stating that, "Johnston argues the district court erred by not responding to its remaining claims for relief. We agree . . . . We remand for the district court to rule on items "c" through "g" in Johnston's petition."
>
> *Johnston Land Company, LLC v. Sara K. Sorenson, et. al.*, *supra*, 2018 ND 183, 915 N.W. 2d 664 at ¶¶13-14.

[¶64] **CONCLUSION**

[¶65] On the basis of the foregoing recitation of facts, legal authorities and argument, it is respectfully submitted by Appellant Johnston Land Company that the Supreme Court should ***reverse*** the judgment of the District Court – entered upon summary judgment – upon the following grounds:

1. The District Court committed error in its ***post-remand*** award of attorney's fees [purportedly pursuant to N.D.C.C. § 35-35-05(5)]—in favor of the Sorenson/Ohnstad Twichell Appellees and against the Appellant Johnston Land Company—because the issue of whether the "Sorenson Affidavit" was a nonconsensual common-law lien had been conclusively adjudicated in the first Supreme Court appeal

in this case, with the nonconsensual common-law lien issue having never been remanded back to the District Court. Under these circumstances, the District Court's post-remand award of attorney's fees against the Appellant was violative of the "***Mandate Rule***", thereby requiring reversal of the District Court judgment on those grounds; and

2. The District Court committed error by ruling that a self-serving "Second Affidavit" executed by Appellee Sara K. Sorenson expressly for the purpose of supporting a post-remand summary judgment motion by the Sorenson/Ohnstad Twichell parties—*as a matter of law*—rendered "moot" Appellant's petition for declaratory and injunctive relief relative to the April 1, 2015 "First Affidavit" of attorney Sara K. Sorenson, the presence of which continues to cloud record title of the subject property today.

Dated this 31st day of January, 2019.

JOHNSTON LAW OFFICE

/s/ DeWayne Johnston
DeWayne Johnston, ND #5763
dewayne@wedefendyou.net
221 South Fourth Street
Grand Forks, ND 58201
Telephone: 701-775-0082
Fax: 701-775-2230

DAVID C. THOMPSON, P.C.

/s/ David Clark Thompson
David Clark Thompson, ND #03921
dct@rrv.net
321 Kittson Avenue
Grand Forks, ND, 58201
Telephone; 701-775-7012
Fax: 701-775-2520

COUNSEL FOR APPELLANT

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In the Supreme Court
State Of North Dakota

January 31, 2019

Supreme Court No. 20180443

Grand Forks County Case No. 18-2017-CV-02167

Johnston Land Company, LLC,

Petitioner and Appellant,

v.

Sara K. Sorenson, Individually
and Ohnstad Twichell, P.C., a
North Dakota Professional Corporation

Respondent and Appellee

CERTIFICATE OF ELECTRONIC SERVICE

I, **DeWayne Johnston**, attorney for the Petitioner and Appellant, and officer of the court, hereby certify that a true and correct copy of the foregoing:

1. **Initial Brief of Petitioner and Appellant; and**
2. **Appendix of Petitioner and Appellant.**

were served via **ELECTRONIC MAIL** on the 31st day of January, 2019 to:

Robert Hoy
rhoy@ohnstadlaw.com

Dated this 31st day of January, 2019.

JOHNSTON LAW OFFICE

/s/ DeWayne Johnston
DeWayne A. Johnston (ND#5763)
dewayne@wedefendyou.net

Attorney at Law
221 South Fourth Street
Grand Forks, ND 58201
P: (701) 775-0082
F: (701) 775-2230
Counsel for Appellant

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Respondent and Appellee

CERTIFICATE OF ELECTRONIC SERVICE

I, **DeWayne Johnston**, attorney for the Petitioner and Appellant, and officer of the court, hereby certify that a true and correct copy of the foregoing:

1. **Corrected Initial Brief of Petitioner and Appellant; and**
2. **Corrected Appendix of Petitioner and Appellant.**

were served via **ELECTRONIC MAIL** on the 8th day of February, 2019 to:

Robert Hoy
rhoy@ohnstadlaw.com

Dated this 12th day of February, 2019.

JOHNSTON LAW OFFICE

/s/ DeWayne Johnston
DeWayne A. Johnston (ND#5763)
dewayne@wedefendyou.net
Attorney at Law
221 South Fourth Street
Grand Forks, ND 58201
P: (701) 775-0082
F: (701) 775-2230
Counsel for Appellant