

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

Traynor Law Firm, PC,

Plaintiff, Appellant, and Cross-Appellee,

v.

State of North Dakota, c/o Governor Doug
Burgum,

Defendant, Appellee, and Cross-Appellant.

and

The Board of Ward County Commissioners,

Defendant and Appellee.

Supreme Court No.: 20190310
Ward County No.: 51-2019-CV-00532

REPLY BRIEF OF APPELLANT

Appeal from Judgment dated August 15, 2019
In the District Court of Ward County
The Honorable Gary H. Lee, Presiding

Supreme Court No. 20190310
Ward County No. 51-2019-CV-00532

ORAL ARGUMENT WAIVED

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ARGUMENT

[¶3] This action is before the Court due to the unwillingness of the State and/or Ward County to pay for legal services rendered at the State's request and on Ward County's behalf. The central issue is not whether the fees are appropriate, but whether the Traynor Law Firm is entitled to interest. Both the State and Ward County acknowledge fees are owed but contend the district court erred in reducing interest to six percent (6%) per annum. Traynor Law Firm submits this brief to address arguments made by the State and contends interest was properly awarded, but the percentage awarded by the district court was incorrect.¹

I. Traynor Law Firm is Entitled to an Award of Interest Under N.D.C.C. § 13-01.1

[¶4] The State asks this court to sanction its decision to not pay for services rendered by claiming the Traynor Law Firm is not entitled to interest. The state argues the Court erred in awarding interest under N.D.C.C. § 47-14-05. See Brief of Appellee and Cross-Appellant, ¶ 10. In its Memorandum Order, the district court found that Traynor Law Firm is entitled to a reduced rate of 6% per annum. Traynor Law Firm submits the court was correct in awarding interest, but incorrect in reducing the interest to six percent per annum. The State argues the district court's reduction of interest to six percent was err, and instead Traynor Law firm should be awarded zero-percent interest. See generally Brief of Appellee and Cross-Appellant, ¶¶ 10-35.

[¶5] The State has the power to tax, levy, penalize late payments, and charge interest on late payments. Ironically, the State's finds itself in a similar position to many citizens it is often adverse to. Nevertheless, the State asks this Court to not only reverse the district court, but to effectively conclude the State is immune from any consequence of its willful refusal to pay the fees owed to

¹ Defendant-Appellee The Board of Ward County Commissioners did not object to Traynor Law Firm's argument regarding interest or the district court's award of interest.

Traynor Law Firm. Indeed, the district court asked the State and Ward County why they would knowingly allow interest to accrue by not paying the bill instead of paying and subsequently litigate the issue of who should pay. The State was unable to proffer an answer, other than to say it is effectively immune to interest or any other late payment penalty, which it now argues on appeal.

[¶6] The State’s chief argument against awarding interest under Chapter 13-01.1, N.D.C.C., is a law firm is not a business. Traynor Law firm respectfully submits it is a business and the State is required to pay interest to Traynor Law Firm at no less than 18% per annum.

[¶7] Chapter 13-01.1, N.D.C.C., applies to state agencies and requires payment for services received under a contract. See N.D.C.C. § 13-01.1-01. Despite the State appointing Traynor Law Firm and Traynor Law Firm providing services for the State, the State now asks this Court to sanction its *decision* to not pay its bill by negating the interest charged. Indeed, Traynor Law Firm sent bills to the State for over two years, which the State *decided* to not pay. The bills specifically provide “[a] 1.5% per month late payment charge may be assessed on any balance unpaid after 30 days from statement date.” See Appendix, 008-038. The State and Ward County deliberately chose not to timely pay for services rendered on their behalf. This Court should not sanction the State’s deliberate refusal to pay Traynor Law Firm by declining to award interest.

[¶8] The interest charged by Traynor Law Firm is sanctioned under North Dakota law. Chapter 13-01.1, N.D.C.C., prescribes payment for legal services by the State and a penalty for untimely payment. See N.D.C.C. § 13-01.1-01, 02, 03. The State asserts an award of interest pursuant to Chapter 13-01.1, N.D.C.C., cannot lie because it was not raised in the district court. See Brief of Appellee and Cross-Appellant, ¶ 30 n. 4. To the contrary, the invoices provided monthly to the State over the course of two years plainly stated interest was being charged at 18% per annum.

The interest is statutory and contemplated in N.D.C.C. § 13-01.1. The court should note the State never objected to the interest charged until Traynor Law Firm's was forced to initiate this action to collect its fees.

[¶9] The State's reliance upon Johnson v. North Dakota Workers Compensation Bureau, 428 N.W.2d 514 (N.D. 1988) is misplaced. The State cites Johnson to support its position that Traynor Law Firm is not a "business" as defined in Chapter 13-01.1, N.D.C.C., because it provides legal services. See Brief of Appellee and Cross-Appellant, ¶¶ 22-26. Chapter 13-01.1 does not define the term "business." "When reviewing statutory provisions, we attempt to give meaning to every word, phrase, and sentence." State v. Comes, 2019 ND 290, ¶ 7, 936 N.W.2d 114. "When a provision at issue is unambiguous, we look to the plain language of the statute to ascertain its meanings." Schulke v. Panos, 2020 ND 53, ¶ 8.

[¶10] The term "business" is defined as "the activity of buying and selling commodities, products, or services. . . . a specific occupation or pursuit." The American Heritage Dictionary 252 (5th ed.). "Commercial or mercantile activity engaged in as a means of livelihood . . . dealings or transactions [sic] of an economic nature." Merriam-Webster's Collegiate Dictionary 167 (11th ed. 2020). Traynor Law Firm is a for-profit business that offers legal services in exchange for a fee.

[¶11] The State's reliance on Johnson is not applicable to this matter because the Johnson court applied Chapter 13-01.1, N.D.C.C., as it related to Section 65-02-08. See Johnson, 428 N.W.2d at 519. Here, Chapter 13-01.1 should not be read in conjunction or analyzed with Title 65—Workforce Safety and Insurance—because this claim does not involve any provision of Title 65. Furthermore, Johnson involved an adverse claimant—a person who was denied WSI benefits requested attorney's fees and interest accumulated in appealing the decision of denial. Here, the State appointed Traynor Law Firm, which rendered its services for the State for money. The State

chose not to pay the bills it received and it *chose* not to dispute the interest for more than two years. The only question to be decided by this Court is whether a contract existed between Traynor Law Firm and the State/Ward County.

[¶12] The State asserts there was no contract between Traynor Law Firm and the State, therefore, Traynor Law Firm is not entitled to the 18% interest it seeks. The bills/invoices submitted to the State, together with the letter appointing Traynor Law Firm to assist with Ward County's legal issues, are evidence of a contractual relationship. There is no requirement under the law that formation of a contract involving legal services hinges on whether a retainer agreement was signed.

[¶13] A contract is either express or implied. N.D.C.C. § 9-06-01. The terms of an express contract are stated in words. See id. An implied contract's terms are manifested by conduct. See id. In some circumstances, "silence and inaction" may operate as acceptance." B.J. Kadrmas, Inc. v. Oxbow Energy, LLC, 2007 ND 12, ¶ 13, 727 N.W.2d 270 (citing 17A Am. Jur. 2d Contracts § 103 (1991)). A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known or ought to be known to the person accepting. Id. (citing N.D.C.C. § 9-03-25).

[¶14] Here, the State appointed Traynor Law Firm as special prosecutor, Traynor Law Firm accepted and performed those duties with the expectation of payment. Appendix, 007. Upon completion, Traynor Law Firm furnished a written invoice to the State which includes a written notification on each of the thirty-one (31) pages of that invoice stating "[a] 1.5% per month late payment charge may be assessed on any balance unpaid after 30 days from statement date." See Appendix, 008-038.

[¶15] The letter appointing Traynor Law Firm memorialized the appointment of Traynor Law Firm as special prosecutor and the itemized invoices provided a memorialization of each activity undertaken by Traynor Law Firm in its prosecution of this matter . See Appendix at 007-038.

[¶16] Under North Dakota law, Traynor Law Firm is not only entitled to interest at a rate of 18% per annum, but that said interest must be compounded and to be-calculated beginning no later than forty-five (45) days after the issuance of the first bill received by the State.

[¶17] Finally, the State argues Traynor Law Firm should not be awarded interest because such an award would violate Rule 1.5(a) of the North Dakota Rules of Professional Conduct. See Brief of Appellee and Cross-Appellant, ¶ 29. The State acknowledges this Court has never addressed the limits of Rule 1.5(a), and cites non-binding authority supporting its position. Id. at ¶ 30. Traynor Law Firm submits its fees and the interest are reasonable, and the State consented to the late payment interest rate by failing to object to it until Traynor Law Firm was forced to initiate suit to collect its fees. Notably, the State never contacted Traynor Law Firm to inquire about paying its bill or object to the interest charged. Accordingly, Traynor Law Firm should be accorded interest at a rate of no less than 18% per annum.

[¶18] As of the filing of this brief and attachments, the principal amount has gone unpaid for more than two and a half years since Traynor Law Firm rendered its services pursuant to written memorializations of the appointment and fees related thereto. No objection was lodged to the interest rate as stated upon the invoice until nearly two years after Traynor Law Firm rendered legal services, and only after action was commenced in the court below.

[¶19] As a result, the State is in violation of Chapter 13-01.1. Accordingly, Appellant is entitled to compounding interest on the principal dating back to thirty (30) days after the State was furnished with the invoice or, at the very least an interest rate of 18% per annum.

[¶20] If this Court finds Traynor Law Firm is not entitled to 18% interest, the Court should uphold the district court’s award of 6% per annum interest under N.D.C.C. § 47-14-05. The State argues the district court’s award of interest pursuant to Section § 47-14-05, N.D.C.C., was *sua sponte*. See Brief of Appellee and Cross-Appellant, ¶¶ 10-13. The State purports to be disadvantaged by the district court’s decision because it: (1) did not allow the State an opportunity to respond; and (2) the district court’s decision “favors [Traynor] over the [State].” *Id.* at ¶¶ 10, 12 (citing *Trottier v. Bird*, 2001 ND 177, ¶ 5, 635 N.W.2d 157.

[¶21] Traynor Law Firm submits the State was not disadvantaged by the district court’s decision. The district court lowered the per annum rate by twelve percent. That is not a *favorable* decision to Traynor Law Firm, nor is it a decision that disadvantaged the State.

CONCLUSION

[¶22] For the reasons set forth herein, Appellant Traynor Law Firm respectfully requests this Court REVERSE the district court’s Judgment with respect to its determination on the interest owed to Traynor Law Firm and CONCLUDE as a matter of law that Traynor Law Firm, PC, is entitled to all interest which has accrued since thirty (30) days after it issued its invoice to the State of North Dakota pursuant to and in accord with Chapter 13-01.1, N.D.C.C. Traynor Law Firm requests that all other portions of the Judgment be AFFIRMED.

[¶23] Respectfully Submitted this 6th day of March, 2020.

/s/ Jonathon F. Yunker
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CERTIFICATE OF COMPLIANCE

I, Jack Yunker, hereby certify that the above Brief of Appellant complies with the page limitation set forth under Rule 32(a)(8)(A) N.D.R.App.P. I further certify that the Reply Brief of Appellant contains nine (9) pages.

DATED this 6th day of March, 2020.

/s/ Jonathon F. Yunker

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Supreme Court No. 20190310
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AFFIDAVIT OF SERVICE

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

[¶1] Andrea Johnson being first duly sworn on oath, does depose and say: she is a legal resident of the State of North Dakota, of legal age, and not a party to the above-entitled matter.

[¶2] That on March 6, 2020, affiant filed and served via electronic means, a true and correct copy of the following document(s):

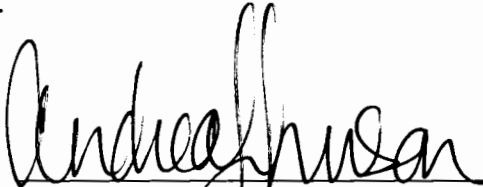
1. Reply Brief of Appellant

[¶3] The copies of the foregoing were securely sent via electronic mail to the addresses as follows:

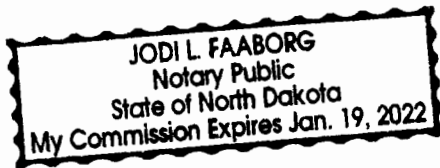
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[¶4] To the best of affiant's knowledge, the address above given was the actual electronic mail address of the party intended to be served. The above documents were duly served in accordance with the provisions of the Rules of Civil Procedure.


Andrea Johnson

[¶5] Subscribed and sworn to before me, a Notary Public, this 6th day of March, 2020.




Notary Public