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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Darlene Johnson, Plaintiff/Appellee, v. Menard, Inc., Defendant/Appellant.	)	**Supreme Court No. 20200126** **Civil No. 51-2017-cv-01569**

Appeal from Order Denying Defendant's Motion for Summary Judgment (dated August 10, 2019), Order Granting Attorney's Fees (dated December 2, 2019), Order as to the Amount of Attorney's Fees Recoverable and Entry of Judgment, (dated March 5, 2020), and Judgment, (dated March 9, 2020)

North Central Judicial District
Ward County
The Honorable Richard L. Hager
Civil No. 51-2017-cv-01569

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

[0] **STATEMENT OF THE ISSUE**

I. Whether Menards failed to preserve for appellate review the District Court's proper denial of summary judgment by neglecting to move for judgment as a matter of law after the case proceeded to trial.

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

III. Whether the District Court exercised appropriate discretion by awarding Darlene her reasonable attorney's fees.

STATEMENT OF THE CASE

[1] In September 2017, a 71-year-old pro se plaintiff commenced a negligence action against Menard, Inc. ("Menards") in small claims court. (App. 143). Darlene Johnson's ("Darlene") one-sentence Claim Affidavit alleged that she "fell over a gray flat bed cart, June 6, 2013 at customer service. Landing on my face and broke 7 teeth." (*Id.*). Darlene claimed $14,818.00 in damages. (*See id.*).

[2] Menards immediately retained counsel and elected to remove the action to district court. (App. 13). Menards' Answer denied any liability and asserted six affirmative defenses including Darlene's failure to state a claim and comparative fault. (App. 15–16). After Menards removed the action, Darlene also retained counsel. (Docket No. 10).

[3] In response to Menards' affirmative defenses, Darlene moved to amend her Claim Affidavit to conform to North Dakota premises liability law and the more rigorous procedural requirements of district court.[1] (Docket Nos. 12–15). Darlene's Amended Complaint referred to, adopted, and pursued the same negligence action as Darlene's

[1] *See, e.g.*, N.D.R.Ct. 3.1 (pleadings); N.D.R.Civ.P. 8 (pleading requirements generally); N.D.C.C. § 32-03.2-07 (pleading requirements for tort damages).

Claim Affidavit while alleging damages consistent with N.D.C.C. § 32-03.2-07. (Docket No. 23). Having no objection, Menards stipulated to Darlene amending her Claim Affidavit. (App. 20–21). The complaint was amended again by stipulation to further correct the date of the incident from June 6, 2013 to May 6, 2013. (App. 24–29).

[4] Menards then put up a vigorous defense in district court. Initially, there was the several-month-long discovery battle. (Docket Nos. 53–73). Menards objected to 21 of 25 interrogatories, 5 of 6 requests for production, and 2 of 3 requests for admission. (Docket No. 57). Among the many discoverable documents Menards refused to disclose included videos of the incident, witness statements regarding the incident, insurance policy information covering the incident, and numerous Menards' policies, procedures, training manuals, and documents affecting employee responsibilities relating to the incident. (Docket Nos. 58–59). The District Court properly ordered Menards to produce every document subject to the motion to compel. (Docket No. 100).

[5] Additionally, Menards moved for summary judgment on December 6, 2018, (Docket Nos. 74–83), before noticing oral argument for the motion to compel, which would not take place until December 19th. (Docket No. 72). Although the District Court ruled on the motion to compel from the bench, Menards did not disclose the discovery until January 3, 2019—four days before Darlene's answer brief was due. Due to "many" questions of fact, the District Court denied summary judgment. (App. 119–121).

[6] The trip-and-fall litigation had started to prove time consuming, however. Menards requested oral argument on the motion to compel, (Docket Nos. 67, 72), motion for summary judgment, (Docket Nos. 103, 108), and motion for attorney's fees, (Docket

Nos. 244, 252). Five depositions were conducted across three different states. (Docket Nos. 87, 127–30). Trial was continued twice. (Docket Nos. 43–44, 114–15).

[7] Darlene eventually had her day in court from August 27–29, 2019. (App. 115). The jury returned a verdict finding Menards 100% at fault for causing Darlene's injuries and awarded $36,392.00 in damages plus 3% interest. (App. 124–125). Menards never moved for judgment as a matter of law under Rule 50(b), N.D.R.Civ.P., following trial.

[8] Because Menards elected to remove the negligence action from small claims court to district court, and Darlene was the prevailing plaintiff, the District Court awarded attorney's fees to Darlene. (App. 144–147). The District Court reasoned that N.D.C.C. § 27-08.1-04 was "clear and unambiguous" requiring the mandatory award of attorney's fees to a prevailing plaintiff following the defendant's election to remove the small claims action to district court. (App. 144–45 at ¶¶ 2–5). The District Court recognized that "N.D.C.C. § 27-08.1-04 does not appear to require a degree of reasonableness as it relates to the fees" but ordered Darlene to submit an affidavit supporting the reasonableness of her attorney's fees anyway. (App. 145).

[9] On December 5, 2019, Darlene submitted an affidavit and invoice supporting the award of attorney's fees. (Docket Nos. 259–60). The invoice contained 35 pages detailing 431-time entries. (Docket No. 260). The affidavit explained, among other things, that hourly rates depended upon the timekeeper's respective experience and qualifications: $300 per hour for partners; $200 per hour for associates; and $100 per hour for paralegals. (Docket No. 259 at ¶ 5). Darlene's pre-appeal attorney's fees totaled $144,476.97. (*Id.* at ¶ 3). Menards opposed Darlene's evidence with a 16-page memorandum and affidavit, but no invoice of its own. (App. 148–163).

[10] On March 5, 2020, the District Court awarded attorney's fees to Darlene totaling $144,476.97. (App. 172). The District Court reached its decision "after having reviewed the record and filing[s]" including Darlene's affidavit and invoice. (*Id.*). The attorney's fees were added to the jury verdict and a final judgment of $184,023.90 was entered on March 9, 2020. (App. 173–74). Menards filed a notice of appeal on April 24, 2020. (App. 175–77).

STATEMENT OF THE FACTS

[11] Darlene is a retired Underwood, North Dakota resident. (App. 56 at 12:10–13:13). On May 6, 2013, intending to exchange a floor vent, Darlene traveled to the Minot, North Dakota Menards. (App. 64 at 45:25–46:10; 66 at 53:16–23; Video).

[12] The entrance of the Minot Menards contains a vestibule connecting the parking lot to the merchandise aisles inside the store. (App. 122). A customer service counter is located on the left side of the vestibule. (*Id.*). At 6:21:31 p.m. that evening, a Menards employee abandoned a gray flatbed cart adjacent to the customer service counter. (Video). The flatbed portion stretched four-and-a-half feet in length, but barely reached a foot above ground at its highest point. (App. 105). It was not supposed to be in the vestibule. (App. 71 at 73:18–74:10).

[13] Darlene entered the Menards' vestibule 34 seconds after the flatbed cart was abandoned. (Video). "It was at the height of the oilfield era", Darlene testified, and she arrived with the "after working hour" crowd during summer planting season. (App. 65 at 49:01–20). Darlene "immediately" looked to her left and saw "long lines of people". (App. 65 at 50:22–51:05). Her "attention was focused toward the customer service" counter where she "was attempting to exchange an item." (Docket No. 96 at ¶ 2).

Darlene recognized the store was "especially chaotic busy, lots of people, lots of movement." (App. 65 at 49:01–06). Darlene explained that "it was noticeably much more people and traffic movement", (*Id.* at 49:19–20), and "people were coming in, going right through the turnstiles and grabbing the carts". (App. 66 at 52:06–07). "It was the most [people Darlene had] ever seen, put it that way." (App. 65 at 51:03–11). For example, in the moments Darlene entered the vestibule searching for the "shortest" line, (App. 66 at 53:11–15; 68:15–22), the video identifies four people moving between her and the location of the abandoned flatbed cart. (Video).

[14] Darlene arrived at the customer service counter at 6:22:10 and waited until 6:22:27. (Video). Another customer allowed Darlene to move ahead of her. (App. 70 at 68:01–03). At 6:22:28, Darlene moved ahead of the other customer to the right side of the customer service counter and waited patiently until 6:22:55. (Video). At this point in time, the flatbed cart was sitting behind Darlene and out of her sight. (Video). The other customer next to Darlene confirmed that "the flatbed cart sat low to the ground and was not very noticeable". (Docket No. 95 at ¶ 5).

[15] Darlene began discussing her exchange with a Menards' employee at 6:22:55. (Video). To complete the exchange, the Menards' employee directed Darlene to enter the store through the turnstiles. (App. 71 at 74:03–06). At 6:23:02, Darlene turned to her right and left the customer service counter to enter the store through the turnstiles. (Video). By 6:23:04—two seconds later—Darlene was already on the floor. (Video).

[16] Darlene does not recall taking more than a step before she "flew over" the flatbed cart. (App. 70 at 70:23–71:17; Video). The portion of the cart that tripped her was not even a foot above the floor, (App. 105),—so low that Darlene's "shins hit the cart".

(App. 70 at 70:23–71:10). Darlene landed on her face. (App. 70 at 71:17–20). She cracked seven teeth. (App. 74 at 84:13–15). A frazzled Darlene was handed insurance paperwork to sign by one Menards' employee while the employee who directed Darlene into the store confirmed that "those carts aren't even supposed to be coming in the front door." (App. 71 at 73:18–74:10). Darlene never saw the flatbed cart. (App. 66 at 55:09; 69 at 67:06–09; Docket No. 96 at ¶ 6). She did not know what tripped her until "after [she] got up from the floor". (App. 68 at 62:22–63:03).

[17] No more than 91 seconds elapsed from the time a Menards' employee abandoned the flatbed cart until the time a Menards' customer was on the floor with seven broken teeth. Darlene explained that "from the time I entered the store to the time I fell over the flatbed cart, my attention was focused upwards, at the customer service counter, the people in line, the people entering and exiting the store, and the overall busy nature of the store." (Docket No. 96 at ¶ 5).

LAW AND ARGUMENT

I. THE DISTRICT COURT'S ORDER DENYING SUMMARY JUDGMENT IS INTERLOCUTORY AND NOT APPEALABLE.

[18] The Supreme Court should properly dismiss Menards' appeal of the District Court's order denying summary judgment. "Under Section 28-27-02 an order denying a motion for summary judgment is not appealable." *Gillan v. Saffell*, 395 N.W.2d 148, 149 (N.D. 1986). "An order denying a motion for summary judgment is merely interlocutory and, leaving the case pending for trial, it decides nothing, except that the parties may proceed with the case." *Herzog v. Yuill*, 399 N.W.2d 287, 293 (N.D. 1987).

[19] Therefore, a denial of summary judgment may not be raised on appeal after a trial on the merits. To preserve the sufficiency of evidence issue for review, Menards was

required to move for judgment as a matter of law at trial and appeal the denial. *See Berg v. Dakota Boys Ranch Ass'n*, 2001 ND 122, ¶¶ 10–11, 629 N.W.2d 563.

> Once a case proceeds to trial, the question of whether a party has met its burden as to the elements of a claim must be answered with reference to the evidence and the record as a whole, rather than by looking to the pretrial submissions alone. *See* 10 James Wm. Moore et al., *Moore's Federal Practice* § 56.41[3][d] (3d ed. 1999) (stating that the district court's judgment on the verdict after a full trial on the merits supersedes the early summary judgment proceedings).
>
> > The general rule is that all interlocutory orders in the action are merged into the final judgment and may be reviewed on appeal of that judgment. **If summary judgment is denied, however, and the case goes to judgment on the merits after a full trial, the issue of whether the pretrial, summary judgment proof was sufficient or not is moot; instead, only the sufficiency of the evidence at trial may be raised, e.g., by a properly preserved motion for judgment as a matter of law. Thus, an interlocutory denial of summary judgment may not be raised on appeal from the final judgment after a trial on the merits.** The movant can, however, preserve for appellate review the same issues raised by the summary judgment motion by making appropriate motions for judgment as a matter of law at the close of all the evidence and after the verdict is returned.

Berg, 2001 ND 122 at ¶ 10 (emphasis added).

> Thus this Court has consistently held that if a case goes to trial after a motion for summary judgment is denied, the question of whether the trial court erred in denying summary judgment is moot. In re *Estate of Vestre*, 2011 ND 144, ¶ 19, 799 N.W.2d 379; *Olander Contracting Co. v. Gail Wachter Invs.*, 2002 ND 65, ¶ 9, 643 N.W.2d 29; *Berg v. Dakota Boys Ranch Ass'n*, 2001 ND 122, ¶¶ 10–11, 629 N.W.2d 563.

Kartes v. Kartes, 2013 ND 106, ¶ 13, 831 N.W.2d 731.

[20] On appeal, Menards improperly suggests that the "MSJ Order should be reversed and this case dismissed as a matter of law." (Menards Br. ¶¶ 1, 41, 87). This case went to trial, so the question of whether the District Court erred in denying summary judgment is moot. *See Kartes*, 2013 ND 106 at ¶ 13. Although Menards could have preserved this issue for appellate review, it neglected to properly move for judgment as a matter of law

at the close of evidence and after the verdict was returned. *See Berg*, 2001 ND 122 at ¶¶ 10–11. Menards has not appealed any order addressing the sufficiency of evidence at trial and it failed to preserve for review the sufficiency of evidence issue.

[21] Accordingly, this Court is "unable to review the district court's denial of [Menards'] summary judgment motion." In re *Estate of Vestre*, 2011 ND 144 at ¶ 19; *see also* In re *Estate of Vaage*, 2016 ND 32, ¶ 20, 875 N.W.2d 527 ("To the extent that the Estate's appeal challenges the denial of its summary judgment motions, those arguments are moot and we do not address them.").

II. THE DISTRICT COURT PROPERLY IDENTIFIED THAT GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT.

[22] There is no standard of review for orders denying summary judgment.

> 'Negligence actions are ordinarily inappropriate for summary judgment because they involve issues of fact.' 'Where questions of negligence are in issue, summary judgment is improper 'if there is any doubt as to the existence of a genuine issue of material fact, or if differing inferences can be drawn from the undisputed evidence.'

Wotzka v. Minndakota Ltd. P'ship, 2013 ND 99, ¶¶ 5–6, 831 N.W.2d 722 (emphasis in original) (internal citations omitted).

> 'Under premises liability law, landowners owe a general duty to lawful entrants to maintain their property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk.' The owner of the property must exercise ordinary care to maintain the property in a reasonably safe condition. . . . A landowner may be relieved of his liability to invitees if the physical harm is caused by a dangerous condition that is open and obvious. However, this relief from liability is not absolute. 'If a landowner permits dangerous conditions to exist on the premises the landowner must take reasonable measures to prevent injury to those whose presence on the property reasonably can be foreseen.'

Wotzka, 2013 ND 99 at ¶ 9 (internal citations omitted). "Whether a duty exists is generally a preliminary question of law for the court. However, if the existence of a duty

depends upon the resolution of factual issues, the facts must be resolved by the trier of fact." *Groleau v. Bjornson Oil Co., Inc.*, 2004 ND 55, ¶ 21, 676 N.W.2d 763.

A. Reasonable Minds Could Conclude that Under the Surrounding Circumstances the Flatbed Cart Was Not Open and Obvious to a Person in Darlene's Position.

[23] "[Menards] may be relieved of [its] liability to invitees if the physical harm is caused by a dangerous condition that is open and obvious." *Wotzka*, at ¶ 9. "The determination of whether a dangerous condition is open and obvious, limiting the landowner's duty, is generally a question of fact for the trier of fact, and becomes a question of law only when reasonable minds could reach but one conclusion." *Groleau*, 2004 ND 55 at ¶ 21; *see also Wotzka*, at ¶ 11.

[24] Menards argues that the flatbed cart was open and obvious as a matter of law. Whether the flatbed cart was open and obvious "cannot be answered by merely viewing the condition in the abstract, wholly apart from the circumstances in which it existed." *Groleau*, at ¶ 21 (quoting *Ward v. K Mart Corp.*, 554 N.E.2d 223, 232 (Ill. 1990)). The "surrounding circumstances must be considered in assessing the obviousness of the dangerous condition." *Id.* at ¶ 21. When considering those surrounding circumstances, the question becomes whether the dangerous condition "would be appreciated by a reasonable person in the plaintiff's position", not others. *Id.* at ¶ 22 (quoting *Simmons v. Am. Drug Stores, Inc.*, 768 N.E.2d 46, 51–52 (Ill. 2002) (emphasis added)). Open and obvious "means that both the condition and the risk are apparent to and would be recognized by a reasonable man in the *position of the visitor*, exercising perception, intelligence, and judgment." *Id.* at ¶ 21 (quoting Restatement (Second) of Torts § 343A, cmt. b (1965) (emphasis added)).

[25] For example, *Groleau v. Bjornson Oil Company, Incorporated* involved a trip-and-fall incident with a much more obvious condition—a gas pump island affixed to the ground. *See* 2004 ND 55. The relevant facts were: "Groleau went inside the station to use the restroom and pay for the gas while her husband filled the pickup. When Groleau left the station, she walked back towards the pickup and tripped over the first gas pump island." *Id.* at ¶¶ 2–3. The trial court relied on photographs to determine the gas pump island was open and obvious. *Id.* at ¶ 23. But, this Court found the photographs less "decisive"; instead, it considered the plaintiff's own testimony that she did not see the elevated gas pump island in light of her surrounding circumstances. *Id.* at ¶¶ 2–3, 23–24 ("conclud[ing] the trial court erred in determining that the dangerous condition of the elevated gas pump island was open and obvious as a matter of law"); *see, e.g.*, *Alqadhi v. Standard Parking, Inc.*, 938 N.E.2d 584, 588 (Ill. Ct. App. 2010) ("[W]here there is a dispute about the condition's physical nature, such as its visibility, the question of whether a condition is open and obvious is factual.").

[26] Thus, "it is not enough, as [Menards] contends, to say that all [flatbed carts] are open and obvious[,] the surrounding circumstances must be considered in assessing the obviousness of the dangerous condition." *Groleau,* at ¶ 22. Ignoring the surrounding circumstances, Menards argues that the "dimensions and characteristics" of the flatbed cart rendered it "not hiding and inconspicuous." (Menards Br. at ¶ 27). It even extrapolates one single-paragraph opinion from New York state to allege that "courts have found similar carts obvious as a matter of law." (*Id.*). The *Stern v. Costco Wholesale* court found that a "shopping cart in the aisle"—where it was supposed to be—"painted bright orange" was open and obvious. 882 N.Y.S.2d 266, 267 (App. Div. 2009).

[27] However, subsequent New York courts declined to follow *Stern* citing different surrounding circumstances that, not unlike here, involve low carts that were abandoned in improper places. *See, e.g.*, *Russo v. Home Goods, Inc.*, 990 NY.S.2d 95, 97–98 (App. Div. 2014) (recognizing that the "pallet jack was not supposed to be left unattended" and "was low to the ground and empty, had no distinguishing features"); *Gradwohl v. Stop & Shop Supermarket Co., LLC*, 896 N.Y.S.2d 85, 86 (App. Div. 2010) (recognizing that dolly was dark-colored, low to ground, and was not to be left on merchandise floor).

[28] Here, reasonable minds could conclude that the flatbed cart was not open and obvious to a "person in plaintiff's position" under the "surrounding circumstances". *Groleau*, at ¶¶ 21–22 (quoting Restatement (Second) of Torts § 343A, cmt. b). There is no genuine despite that the flatbed cart should not have been brought into the vestibule in the first place. (App. 71 at 73:18–74:10). So while Darlene had previously avoided flatbed carts when she "saw somebody pushing it or loading it" in the store, (App. 66 at 54:05–09, 55:01–04), there is no evidence in the record that Darlene had ever encountered a flatbed cart in the vestibule despite previously patronizing Menards over 100 times before. (App. 67 at 56:12–17). The flatbed portion that tripped Darlene was less than a foot above ground and gray in color. (App. 103–05). And unlike a shopping cart in an aisle, a juror could reasonably infer that the low-profile, neutral-color flatbed cart tucked next to a counter blended in with its surroundings. Indeed, the person standing next to Darlene confirmed that the flatbed cart "was not very noticeable" and was the only one in the vestibule. (Docket No. 95 at ¶¶ 4–5). This evidence alone and the reasonable inferences to be drawn therefrom were enough to preclude summary judgment. *See, e.g.*, *Russo*, 990 NY.S.2d at 97–98; *Gradwohl*, 896 N.Y.S.2d at 86;

Decker v. Target Corp., No. 1:16-cv-00171-JNP-BCW, 2018 WL 7350627, at *1 (D. Utah Oct. 12, 2018) (Plaintiff "tripped and fell over a low-profile, flatbed cart that had been left in the aisle by a Target employee.").

[29] Perhaps more importantly, "[a] reasonable juror could find that under the circumstances of a busy store[,] the flatbed cart was not an obvious danger." *Gansar v. Lowe's HIW, Inc.*, No. CV 12-122 DSF (OPx), 2012 WL 12878660, at *4 (C.D. Cal. Oct. 9, 2012) (denying summary judgment where customer tripped over abandoned flatbed cart left adjacent to customer service counter). This is especially true in Darlene's case.

[30] The Menards store was busy on May 6, 2013. (App. 65). "It was the height of the oil" boom, "after work[]", and during planting season. (App. 65 at 49:01–20). Darlene testified that the store was "especially chaotic busy, lots of people, lots of movement." (*Id.* at 49:01–06). Darlene explained that "it was noticeably much more people and traffic movement", (*id.* at 49:19–20), and "people were coming in, going right through the turnstiles and grabbing the carts". (App. 66 at 52:06–07). It was the most people Darlene had seen at Menards. (App. 65 at 51:10–11).

[31] From Darlene's position, she "immediately" looked left when she entered the vestibule. (*Id.* at 50:22–51:05). After all, Darlene's "attention was focused toward the customer service" counter to the left because that was where she "was attempting to exchange an item." (Docket No. 96 at ¶ 2). Even if Darlene looked to her right upon entering, the Video identifies four people generally moving between, if not obstructing, her view of the flatbed cart. (Video). As Darlene made her way through the line to the customer service counter, the flatbed cart sat lurking behind her—out of her sight. (Video). Again, she had never encountered a flatbed cart in Menards' vestibule on over

100 prior visits, (App. 67 at 56:12–17), and she did not see this one. (App. 66 at 55:09; 69 at 67:06–09; Docket No. 96 at ¶ 6). At all relevant times, like any reasonable person in her position, Darlene was exercising appropriate perception, judgment, and intelligence by remaining conscious of the busy store, searching for the shortest line, and completing her exchange. A Menards employee directed Darlene to enter the store, (App. 71 at 74:03–06), and immediately upon doing so, Darlene tripped over the flatbed cart. (Video). Under these surrounding circumstances, reasonable minds could conclude that the flatbed cart was not open and obvious to a person in Darlene's position.

[32] Consequently, Menards' argument that the flatbed cart was open and obvious because *other* customers avoided it is irrelevant. To accept Menards' argument would mean that no trip-and-fall case would ever survive summary judgment so long as someone else had previously avoided the dangerous condition. This is why the question of whether the flatbed cart was open and obvious must be viewed by a "reasonable person in plaintiff's position" under the "surrounding circumstances". *Groleau*, at ¶¶ 21–22 (quoting Restatement (Second) of Torts § 343A, cmt. b). These other customers were not in Darlene's position. None of these customers walked the same path as Darlene, but they each had a better vantage point because they approached the flatbed cart from afar. From their respective positions, these other customers were able to avoid the flatbed cart. And, of course customers were able to avoid the flatbed cart after Darlene fell—a lady was on the ground with seven broken teeth and a scene of people around her.

[33] On the other hand, Darlene was the first customer to leave the right side of customer service counter and enter the store after the flatbed cart was abandoned.[2] (Video). Unlike the other customers, the flatbed cart was already at Darlene's feet by the time she encountered it. (Video). Darlene did not have an opportunity to take a "wide turn[]" like the other customers who approached the flatbed cart from afar. (Menards Br. ¶ 28). If anything, the fact that 10 or more people passed by the flatbed cart in just 91 seconds underscores the busy nature of Menards that day, and that it only took 91 seconds for someone to trip and fall underscores how dangerous the condition truly was.

[34] Accordingly, the District Court did not err in concluding that "[r]easonable minds could reach different conclusions as to whether this particular cart, at that particular time, was an open and obvious danger. These questions renders summary judgment inappropriate." (App. 121 at ¶ 7).

B. Even if the Flatbed Cart Was Open and Obvious, Reasonable Minds Could Conclude that Menards Should Have Anticipated Harm.

[35] "[T]he trial court's conclusion that a condition is open and obvious does not end the inquiry into whether the landowner owes a duty to its lawful entrants", however. *Wotzka*, at ¶ 12 ("A possessor of land is not liable to in his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor of land should anticipate the harm despite such knowledge or obviousness*." (quoting Restatement (Second) of Torts, § 343A(1)

[2] At 6:21:04, a gentleman in the same "position" as Darlene exited the customer service counter to enter the store. (Video). The gentleman did not stop and look around for dangerous conditions; rather, he made a 180 degree turn and started walking toward the store, just like Darlene reasonably attempted at 6:23:02. Fortunately for the gentlemen, the flatbed cart was not abandoned until 26 seconds later. (*Id*).

(emphasis in original))). "The comments to § 343A clarify that *a landowner may nevertheless owe a duty to entrants if the landowner should anticipate that the condition will cause harm notwithstanding the known or obvious nature of the danger*." *Id.* at (citing Restatement (Second) of Torts, § 343A cmt. f (emphasis in original)). Comment f states, in relevant part, as follows:

> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, . . . is not . . . conclusive in determining the duty of the possessor, or whether he has acted reasonable under the circumstances.

Restatement (Second) of Torts, § 343A cmt. f. In other words, a "landowner is not relieved from his duty to keep the premises reasonably safe under the circumstances" if it anticipates the "open and obvious danger" will cause harm. *Wotzka*, at ¶ 13.

[36] Initially, Menards owed a duty to Darlene because reasonable minds could conclude that Darlene was distracted. *See, e.g.*, *Harfield v. Tate*, 1999 ND 166, ¶ 7, 598 N.W.2d 166 (discussing store distractions); *Johanson v. Nash Finch Co.*, 216 N.W.2d 271, 277 (N.D. 1974) (same). "Ordinarily the customer has a right to assume the floor is free of obstructions and pitfalls." *Schuller v. Hy-Vee Food Stores, Inc.*, 328 N.W.2d 328, 332 (Iowa 1982). For example, a flatbed cart "that is open an obvious 'may be rendered a trap for the unwary where the condition is obscured by crowds or the *plaintiff's attention is otherwise distracted*." *Gradwohl*, 896 N.Y.S.2d at 86–87 (emphasis in original) (reversing summary judgment where customer had turned around to select merchandise but tripped over six-foot long blue dolly abandoned on merchandise floor).

[37] Here, reasonable minds could conclude that Darlene was distracted by the busy store. *See Van Gordon v. Herzog*, 410 N.W.2d 405, 407–09 (Minn. Ct. App. 1987) (holding "crowded and noisy" bar "operated to distract" customer from open window). Darlene described the store as "chaotic busy, lots of people, lots of movement." (App. 65 at 49:01–06). Darlene's "attention was focused toward the customer service" area and finding the "shortest line" because that was where she "was attempting to exchange an item." (Docket No. 96 at ¶ 2). Thus, her attention was otherwise distracted by the busy store, and reasonable minds could conclude that the other customers helped further obscure the flatbed cart from Darlene's distracted frame of view. *See Gradwohl*, at 86.

[38] Additionally, Menards owed a duty to Darlene because it directed her to encounter the dangerous condition. "When a landowner has reason to anticipate that an invitee will proceed to encounter a condition, despite its open and obvious nature, the factfinder must still consider whether the landowner acted reasonably under the circumstances." *Wotzka*, at ¶ 16. Denying summary judgment in another trip-in-fall case under similar circumstances, one California federal court recognized as follows:

> [A]ssuming the flatbed cart was an obvious danger, a reasonable juror could conclude that it was foreseeable that the Plaintiff would choose to go to the Customer Service area and the cash register in order to complete her transaction. The juror could further conclude that the Defendant's burden in preventing an unattended cart from sitting directly adjacent to a cash register is very small.

Gansar, 2012 WL 12878660, at *1–4. Because flatbed carts were not typically abandoned next to the customer service counter, the *Gansar* Court held that "a reasonable juror could conclude Defendant breached its duty of care to Plaintiff even if the flatbed cart was an obvious danger." *Gansar*, at *2–4.

[39] Similarly, here, Menards had reason to anticipate that Darlene would proceed to encounter the flatbed cart even assuming its open and obvious nature. Menards knowingly abandoned a single flatbed cart where it was not supposed to be, (App. 71 at 73:18–74:10), and also knew that Darlene necessarily had to encounter the flatbed cart to access the store from the customer service counter. Indeed, a Menards employee directed Darlene to enter the store from the counter. (*Id.* at 74:03–06). Darlene immediately tripped over the flatbed cart the moment she turned to leave the customer service counter, which belies Menards' belief that she had "ample room" to avoid the disaster. (Menards Br. at ¶ 35). The jury must consider whether Menards acted reasonably under the circumstances. It could conclude that Menards' burden in preventing an abandoned flatbed cart from sitting adjacent to the customer service counter is very small and, therefore, Menards' breached its duty to Darlene. *See Gansar*, at * 3.

[40] In summary, even if the District court erred in concluding that the flatbed cart was not open and obvious as a matter of law, (App. 121 at ¶ 7), the end result was still correct because reasonable minds could conclude that Menards should have anticipated that the flatbed cart would cause harm to Darlene notwithstanding its open and obvious nature.

III. THE DISTRICT COURT CORRECTLY DETERMINED LEGISLATIVE INTENT BY CONSTRUING THE CLEAR AND UNAMBIGUOUS LEANGUAGE OF N.D.C.C. § 27-08.1-04.

[41] The District Court correctly interpreted N.D.C.C. § 27-08.1-04 ("Fee-Shifting Statute") by awarding attorney's fees to Darlene following Menard's removal of the action from small claims court. "Statutory interpretation is a question of law, fully reviewable on appeal." *State v. Bearrunner*, 2019 ND 29, ¶ 5, 921 N.W.2d 894.

A. The Fee-Shifting Statute Is Not Ambiguous.

[42] "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).

[43] The relevant statutory language states that "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." N.D.C.C. § 27-08.1-04. This mandatory award of attorney's fees is triggered by two conditions precedent: (1) the defendant elects to remove the action; and (2) the plaintiff prevails. If both occur, the district court is required to award attorney's fees. Put another way, the statute "provides for the mandatory recovery of attorney's fees to a prevailing plaintiff following the defendant's removal of a small claims court case to the district court." *Interiors by France v. Mitzel Contractors, Inc.*, 2019 ND 158, ¶ 1, 930 N.W.2d 133.

[44] Here, Menards elected to remove the action, (App. 13), and Darlene was the prevailing plaintiff, (App. 173); therefore, the District Court was required to award attorney's fees in this case. *See Interiors by France*, 2019 ND 158 at ¶ 1 (citing N.D.C.C. § 27-08.1-04). Accordingly, the District Court appropriately awarded attorney's fees to the prevailing plaintiff following the defendant's election to remove the action. The District Court correctly interpreted N.D.C.C. § 27-08.1-04.

B. Even if the Fee-Shifting Statute was Ambiguous, the Legislative History Supports the District Court's Correct Interpretation.

[45] This Court recently affirmed that the Fee-Shifting Statute is "clear and unambiguous". *Interiors by France*, at ¶¶ 1, 5 (affirming order interpreting the "clear and unambiguous language of N.D.C.C. § 27-08.1-04"). "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); *see also, e.g.*, *SE. Cass. Water Res. Dist. v. Burlington N. R.R. Co.*, 527 N.W.2d 884, 888 (N.D. 1995) ("Only if the language of a statute is ambiguous will extrinsic aids be used to ascertain the Legislature's intent."); N.D.C.C. § 1-02-05 ("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.").

[46] "A statute is ambiguous if it is susceptible to meanings that are different, but rational." *Harter v. N.D. Dep't of Transp.*, 2005 ND 70, ¶ 7, 694 N.W.2d 677. At District Court, Menards did not argue that the Fee-Shifting State was ambiguous. (App. 126–140). On appeal, Menards still does not argue that the Fee-Shifting Statute is susceptible to different meanings. Instead, Menards invites this Court to unnecessarily and inappropriately delve into the legislative history to adopt a different meaning to a statute that is clear and unambiguous on its face.

[47] To the extent this Court accepts Menards invitation, it would find the legislative history further supports the District Court's interpretation: "The objective of this bill is to stop an abuse" by defendants; it is not "intended to be fair to" defendants. Hr'g H. J. Comm. 2, 5 (Jan. 10, 2005) (statements by Rep. Klemin) ("tak[ing] away the potential abuse that can occur when someone removes the case" because the plaintiff has "been

intimidated and it's not economical"). When specifically asked about abuse by plaintiffs, Representative Klemin explained that the Fee-Shifting Statute was not attempting to address any "abuse" by plaintiffs. (*See id.* at 5–6). "Senator Trenbeath stated that what we are trying to do is disway (sic) defendants in most cases from taking advantage of dragging these things into district court." Hr'g S.J. Comm. 4 (Feb. 16, 2005). The District Court's interpretation of the Fee-Shifting Statute was consistent with legislative history and furthered the purpose of the statute. *See 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").

[48] On the other hand, Menards' attempt to summarize the "spirit" of the Fee-Shifting Statute completely misinterprets the legislative history and fails to interpret the final bill that was passed and signed into law. For example, Menards neglects to point out that the oral testimony it cites involves the original bill, HB 1064, which proposed different language. As originally proposed, the bill provided that "the district court <u>may</u> award attorney's fees to a prevailing plaintiff <u>if the court finds that the position of the defendant was without merit or was otherwise not justified</u>." (Docket No. 248 (emphasis added)). In other words, the original bill gave district courts discretion to award attorneys' fees, but only if the defense was without merit.[3] (Docket No. 248).

[3] In response to the original house bill, Senator Trenbeath suggested "[w]hat if we truncated the language and say 'if the defendant elects to remove the action from small claims court to district court, the district court may award the attorney's fees to a prevailing plaintiff.'" Hr'g S.J. Comm. 4 (Feb. 16, 2005). On February 23, 2005, the Senate Judiciary Committee went a step further and amended the bill to change "may" to "shall," which eliminated the district court's discretion entirely. (Docket No. 249). The Senate's amendments to the original bill were approved by both chambers and signed into law in its current form. (Docket No. 250).

[49] Menards misconstrues the legislative history in an attempt to persuade this Court that removing this action "made sense". (Menards Br. at ¶ 50). Menards post-hoc justifications for removal do not make sense, however. Menards initially justifies removal because it "was unsure how Johnson was assessing the amount of damages". Thus, Menards suggests that spending $70,000 in attorney's fees and costs "made sense" so it could assess Darlene's $14,000 of economic damages. *But see Danzl v. Heidinger*, 2004 ND 74, ¶ 9, 677 N.W.2d 924 ("recogniz[ing] that the removal provisions of N.D.C.C. § 27-08.1-04 may be subject to abuse by represented defendants who seek only to intimidate self-represented plaintiffs"). Menards next justifies removal because it could "no[t] have the case heard by a jury" in small claims court. This is disingenuous. Menards moved for summary judgment and continues to argue on appeal that this case is not proper for a jury. Menards finally justifies removal because it "could not appeal a decision rendered in the small claims court". Again, this is disingenuous. Menards waived its right to appeal the merits of the case. *See Berg*, 2001 ND 122 at ¶ 10. If Menards was legitimately concerned about proceeding in small claims court, it should have moved to dismiss the action without prejudice. *See* N.D.C.C. § 27-08.1-04.1 (authorizing dismissal of actions that "may not be fairly disposed of in small claims court"). Menards' justifications for removal do not make sense.

[50] In addition, Menards still fails to appreciate that its purported "defense" lacked merit. The District Court rejected Menards' motion for summary judgment because there were "many questions of fact". (App. 119–121). To be certain, all nine jurors soundly rejected Menards' theory of liability at trial. (App. 124). The jury found Menards 100% at fault. (*Id.*). Menards' purported "defense" never had merit.

[51] Consequently, Menards resorts to turning the Fee-Shifting Statute on its head by warning that the District Court's interpretation will lead to "abuse" by plaintiffs. (Menards Br. at ¶ 54). It warns that, upon removal to district court, plaintiffs will add new causes of action "distinctly different from the action in small claims court". This argument is fundamentally flawed for two reasons. First, in this case, the negligence action Darlene commenced in small claims court is the same one she pursued to recovery in district court. Darlene did not prevail on a "distinctly different" action. Second, the "abuse" Menards warns about would require plaintiffs to irrevocably elect to proceed in small claims court with enough confidence that defendants would remove the action to district court and then stipulate to the plaintiffs' "distinctly different" action before losing on the merits, thus, entitling those plaintiffs to attorney's fees. To avoid this "abuse", the defendant can elect to not remove the action; i.e., do nothing. If the defendant elects to remove, it should object to any attempt by a plaintiff to recover on a distinctly different action. Menards elected to both remove the action to district court and stipulate to Darlene's amended complaints once it got there. (App. 13, 20–21, 24–25). By doing nothing and keeping the action in small claims court, Menards had complete control to avoid a verdict exceeding $15,000 or paying Darlene's attorney's fees. Menards cannot be heard to complain about the consequences of its own actions.

C. Darlene Pursued the Same Negligence Action in Small Claims Court and District Court.

[52] Menards finally argues that the District Court committed "legal error" awarding attorney's fees because Darlene's original Claim Affidavit was abandoned, withdrawn, and ceased to be part of the record because Darlene's amended pleadings requested damages in excess of $15,000.

[53] In doing so, Menards reaches back to an overruled case from 1932 that held a *dismissed* claim was abandoned, withdrawn, and ceased to be part of the record because it was not re-alleged in an amended pleading. *Dahl v. Winter-Truesdell-Diercks Co.*, 243 N.W. 812, 813 (N.D. 1932) (Dahl II), *overruled by Wangler v. Lerol*, 2003 ND 164, ¶ 27, 670 N.W.2d 830. *Dahl II* is inapposite for the three reasons explained below.

[54] First, *Dahl II* is factually unique because it only contemplated dismissed claims. The original complaint for claim and delivery was dismissed for failure to state a claim. *See Dahl v. Winter-Truesdell-Diercks Co.*, 237 N.W. 202, 205 (N.D. 1931) (Dahl I) (claiming delivery of grain from lost storage tickets). Plaintiff later filed a second amended complaint, but there was "no allegation in the complaint, or claim therein, that the storage tickets are lost. It is an action for conversion of grain". *Dahl II*, 243 N.W.2d at 813. Thus, the original pleading in *Dahl I* was for claim and delivery and the amended pleading in *Dahl II* was for conversion, and the Court held that the original claim was effectively abandoned, withdrawn, and ceased to be part of the record. *Id.* at 813 ("In the second amended complaint there is no reference whatever to any former pleadings.").

[55] Accordingly, and second, *Dahl II* only applied if the amended pleading was "complete in itself and does not refer to, or adopt, the prior pleading". *Id.* at 812–13 (amended complaint for conversion did not refer to original complaint for claim and delivery). On the other hand, Darlene's amended pleadings refer to the exact same negligence action as her Claim Affidavit. *See* N.D.R.Civ.P. 15(c)(1)(B) ("relat[ing] back" to original pleading if the "amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading").

[56] Third, and finally, *Dahl II* has been overruled. *See Wangler*, 2003 ND 164 at ¶ 27. In doing so, the *Wangler* Court held that "a plaintiff need not replead dismissed claims in an amended complaint to preserve the right to appeal the dismissal. To the extent *Dahl* is inconsistent with our conclusion, it is expressly overruled." *Id.* Even before *Wangler*, the Supreme Court in *State Bank of Kenmare v. Lindberg*, 471 N.W.2d 470 (N.D. 1991) had already "reviewed the merits of the appellants' argument contained in their original counterclaim even though it was not raised in their amended complaint." *Id.* at ¶ 26 (citing *Lindberg*, 471 N.W.2d at 475).

[57] Consequently, Menards' belief that Darlene's Claim Affidavit was abandoned, withdrawn, and ceased to be part of the record is woefully without merit. This overruled "proposition" from *Dahl II* only applied where claims were dismissed and never raised in subsequent pleadings. *Wangler*, 2003 ND 164 at ¶ 25. Darlene's Claim Affidavit was never dismissed, and her amended pleadings refer to the same negligence action.

[58] Additionally, Menards' argument conflates an *action* with an *allegation*. This Court distinguished an "action" from an "allegation" in *Van Klootwyk v. Baptist Home, Inc.*, 2003 ND 112, ¶ 16, 665 N.W.2d 679. "An action 'in its usual legal sense means a lawsuit brought in a court.'" *Van Klootwyk*, 2003 ND 112 at ¶ 16 (quoting Black's Law Dictionary 28 (6th ed. 1990) and N.D.C.C. § 32-01-02). On the other hand, "an '*allegation*' is the 'assertion, claim, declaration, or statement of a party to an *action*, made in a pleading, setting out what he expects to prove.'" *Van Klootwyk*, at ¶ 16. Therefore, Darlene may have amended an *allegation* with respect to her damages, but she consistently pursued a negligence action in both small claims court and district court.

[59] More importantly, Menards fails to appreciate that "the rights afforded by the district court were vested in both parties" once it "removed the case to district court". *Bell v. Pro Tune Plus*, 2013 ND 147, ¶ 5, 835 N.W.2d 858. Darlene had every right to amend her Claim Affidavit. Thus, while Darlene originally opted to accept less than $15,000 for a swift resolution in small claims court, she did not "admit" that her action or damages were less than that amount.

[60] In fact, claim affidavits are routinely amended after removal to district court. *See, e.g.*, *Bakke v. Magi-Touch Carpet One Floor & Home, Inc.*, 2018 ND 273, ¶ 3, 920 N.W.2d 726; *Bell*, 2013 ND 147; *Towne v. Dinius*, 1997 ND 125, 565 N.W.2d 762. After all, the "small claims court affidavit only requires a general description of the claim". *Bakke*, 2018 ND 273 at ¶ 3. "At the time the plaintiff drafts the claim affidavit, there is no way of knowing the case may be subject to formal proceedings in an action in district court", and "it may be more appropriate to grant the plaintiff leave to amend the complaint. This procedure should be applied when the 'complaint' is a claim affidavit originally filed in small claims court." *Towne*, 1997 ND 125, at ¶ 7 n.2.

[61] As importantly, there are no post-removal contingencies, qualifications, or exceptions that would otherwise preclude an award of attorney's fees in the event the prevailing plaintiff amended her claim affidavit, nor is there any case law to suggest as much. To the contrary, yet another district court agreed that amending a claim affidavit after removal does not affect the mandatory award of attorney's fees. (Docket No. 247). Certainly, the Legislature could have included an 'amended complaint' exception to the directive that attorney's fees be awarded to a prevailing plaintiff in a case removed from small claims court. *See Danzl*, 2004 ND 74 at ¶ 9 ("If changes are required concerning

the award of attorney's fees in the context of small claims court action, those arguments should be addressed to the Legislature.")

[62] In summary, Darlene amended her Claim Affidavit, (App. 18–29), but she consistently pursued the same negligence action. *See Svanes v. Grenz*, 492 N.W.2d 576, 578 (N.D. 1992) (holding that small claims court has "jurisdiction" to hear "tort claims").

IV. THE DISTRICT COURT EXERCISED APPROPRIATE DISCRETION BY AWARDING DARLENE HER ATTORNEY'S FEES.

[63] "We will not overturn an award of attorney's fees unless the appellant affirmatively establishes the trial court abused its discretion." *Quamme v. Bellino*, 540 N.W.2d 142, 148 (N.D. 1995).

> A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law. An abuse of discretion by the district court is never assumed, and the burden is on the complaining party to affirmatively establish an abuse of discretion. The party seeking relief must show more than that the district court made a 'poor' decision, but that it positively abused the discretion it has.

In re Estate of Cashmore, 2010 ND 159, ¶ 21, 787 N.W.2d 261 (internal citations omitted) (affirming award of attorney's fees).

[64] A district court exercises appropriate discretion by awarding attorney's fees based upon the evidence in the record. *See, e.g.*, *Brossart v. Janke*, 2020 ND 98, ¶ 26, 942 N.W.2d 856 ("award[ing] the defendants $2,340 in attorney's fees based on estimates submitted to the court by the defendants' attorney"); *Reimers v. State*, 2008 ND 101, ¶ 15, 750 N.W.2d 407 ("It is clear from the record that the district court based its determination of attorney's fees on Matzke's affidavit and in so doing did not abuse its discretion."); *D.M. v. W.J.S.*, 315 N.W.2d 683, 687 (N.D. 1982) (invoice); *see also* In re *Estate of Amundson*, 2015 ND 253, ¶ 12, 870 N.W.2d 208 (evidence in record).

[65] For example, an "itemized bill may be used to establish attorney's fees." *Reimers*, 2008 ND 101 at ¶ 15; *see also D.M.*, 315 N.W.2d at 687. Indeed, the "number of hours spent in total and the rate per hour are the predominant facts in determining reasonable attorney's fees." *Tillich v Bruce*, 2017 ND 21, ¶ 11, 889 N.W.2d 899.

[66] Here, Darlene submitted an invoice and affidavit to establish her attorney's fees. (Docket Nos. 259–60). The invoice contained 35 pages detailing 431-time entries. (Docket No. 260). The affidavit explained, among other things, that hourly rates depended upon experience and qualifications: $300 per hour for partners; $200 per hour for associates; and $100 per hour for paralegals. (Docket No. 259 at ¶ 5). Further, based on the final order, it is clear the District Court considered the affidavit, invoice, and the entire record as a whole, (App. 172), and this Court "presume[s] the district court considered all the evidence presented" even if "the court may not have specifically mentioned in its findings every single piece of evidence presented by the parties." *Estate of Amundson*, 2015 ND 253 at ¶ 12 (affirming award of attorney's fees).

[67] Further, a District Court is not required to consider additional evidence particularly where, as the expert, it had knowledge of the character of the lawsuit.

> It is not necessary of the trial court to receive additional evidence in support of the motion where it presided at the trial and heard evidence on the question of reasonable attorney's fee at the end of the trial. The court is an expert on what is a reasonable fee. The trial judge before whom the action was tried had knowledge of the character of the litigation, the preparation and skill of the presentation and the results obtained, and could make an appraisal of the reasonable value of services rendered with or without the aid of additional testimony. It may consider its own knowledge and experience in making an appraisal of the reasonable value of the services rendered.

Morton Cnty. Bd. of Park Comm'rs v. Wetsch, 142 N.W.2d 751, 753 (N.D. 1966) (holding that "appellant has not sustained the burden of proof and has not affirmatively established an abuse of discretion on the part of the trial court in making the award").

[68] Accordingly, in addition Darlene's affidavit and invoice, the District Court observed and appraised the character of litigation, the preparation and skill of the presentation, and the results obtained. When Menards initially refused to provide evidence, Darlene's motion to compel was granted. (Docket No. 100). Menards then tried to keep Darlene from her day in court, but its summary judgment motion was denied. (App. 119–121). And at trial, the jury soundly rejected Menards' liability defense and awarded damages to Darlene instead. (App. 124–25). The District Court "is an expert on what is a reasonable fee", *Wetsch*, 142 N.W.2d at 753, and after appraising the preparation and skill of Darlene's attorneys and the results they obtained in light of Darlene's affidavit and invoice, (Docket Nos. 259–60), it exercised appropriate discretion by awarding attorney's fees.

A. Menards Failed to Affirmatively Establish that the District Court Abused its Discretion by Awarding Attorney's Fees.

[69] Under this Court's "deferential standard of review", an appellant cannot affirmatively establish an abuse of discretion by complaining that the trial "court did not examine the number of hours claimed [and] did not evaluate whether that number of hours was reasonable in light of the nature of the case." *Sagebrush Res., LLC v. Peterson*, 2014 ND 3, ¶¶ 27–28, 841 N.W.2d 705. However, Menards does just that.

[70] Although this Court has "followed 'lodestar' procedure in other contexts", *City of Medora v. Golberg*, 1997 ND 190, ¶ 20, 569 N.W.2d 257, those cases "specifically addressed awarding fees under the Magnuson-Moss Warranty Act". *Palmer v. Gentek*

Bldg. Prods., Inc., 2019 ND 306, ¶ 24, 936 N.W.2d 552 (quoting *Fode v. Capital RV Ctr., Inc.*, 1998 ND 65, ¶¶ 34–35, 575 N.W.2d 682). "[T]he United States Supreme Court stated that the method for calculating awards of reasonable attorneys for prevailing parties under federal fee-shifting statutes" required the lodestar procedure. *Duchscherer v. W.W. Wallwork, Inc.*, 534 N.W.2d 13, 16 (N.D. 1995) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Darlene never sought damages under a federal fee-shifting statute; the jury awarded damages according to North Dakota law. For this reason, the cases Menards cites—*Palmer*, *Fode*, and *Duchscherer*—are inapposite.

[71] Accordingly, and although a district court exercises appropriate discretion by utilizing lodestar procedure, it is not necessary for a district court to do so. *See Thompson v. Schmitz*, 2011 ND 70, ¶¶ 7–8, 18, 20–21, 795 N.W.2d 913 (affirming award of attorney's fees even though "record does not indicate the district court calculated a specific lodestar amount or compared the hours and rates charges by opposing counsel").

[72] Additionally, of the factors that "guide" an award of attorney's fees, Menards' analysis misconstrues some to the exclusion of others. *Heng v. Rotech Med. Corp.*, 2006 ND 176, ¶ 30, 720 N.W.2d 54 ("[A]ll factors must be considered, and no single factor controls."). Menards spends ten paragraphs analyzing factor one ("time and labor", "novelty and difficulty", and "skill requisite"), before largely ignoring factors two, five, and six. (Menards Br. at ¶¶ 64–73). Menards spends a disproportionate amount of time on factor one but chose not to include Darlene's affidavit and the 35-page invoice in the appendix. *See* N.D.R.App. 30(a)(1)(J) (Appellant's responsibility to include relevant parts of the record). Despite its burden, Menards cites its own district court memorandum to establish an abuse of discretion as opposed to the evidence in the record.

[73] In doing so, Menards initially complains that attorney's fees relating to Darlene's amended complaint were excessive because it alleged the same negligence action as the Claim Affidavit. However, Menards neglects to consider that the Claim Affidavit was amended to add the elements of negligence, conform to North Dakota premises liability law, and adhere to the more rigorous procedural requirements of District Court.

[74] Menards similarly states that an award of attorney's fees for the second amended complaint was inappropriate because clients are not commonly billed for attorney oversight. Candidly, the oversight was made in the original Claim Affidavit, not by Darlene's attorneys. Further, had Menards actually included the invoice in its appendix, the Court would see that Menards is improperly adding time entries for e-mails with opposing counsel, drafting damages memorandum, revising discovery, etc. under the umbrella of amending the complaint.

[75] Menards next proclaims that attorney's fees relating to the stipulated scheduling order were "more than enough". Menards offers no "citations to authority" to affirmatively establish the District Court abused its discretion in this regard, *Urlaub v. Urlaub*, 348 N.W.2d 454, 457 (N.D. 1984), and Menards failed to state, let alone argue, what the reasonable fee should have been. *See* In re *Estate of Amundson*, 2015 ND 253 at ¶ 11 (affirming district court's reliance on expert witnesses to determine specific line items were unreasonable or excessive).

[76] Similarly, without citation to authority, its own invoice, or an expert in the industry, Menards brazenly states that the attorney's fees for drafting the meet-and-confer letter "would not be billed to a client in the industry" and the time Darlene spent on motion practice was "very high compared to what would actually be billed to or paid by a

client in the industry". (Menards Br. at ¶¶ 71–72). Required under Rule 37(a)(1), the six-page letter addressed outstanding discovery for 18 interrogatories, 5 requests for production, and 2 requests for admission in addition to Menards' meritless "trade secret" objections. (Docket No. 57). Darlene's counsel engaged in three meet-and-confer phone calls with its adversary to address these issues. (Docket No. 55 at ¶ 4). However, Menards' continued discovery obstruction resulted in Darlene filing two briefs totaling 29 pages in addition to preparing for an arguing the motion at a hearing. (Docket Nos. 54, 69). The District Court agreed with Darlene that, among other things, the surveillance video of the Menards' employee abandoning the flatbed cart next to the customer service counter was not, as Menards claims, a "trade secret". (Docket No. 100). Additionally, Darlene revised her summary judgment answer brief because Menards waited until four days before Darlene's response deadline to finally disclose the video.

[77] "[Menards] strong defense clearly made [Darlene] reasonably expend more time to establish" her claim, and a "party 'cannot litigate tenaciously and then be heard to complain about the time necessarily spent' overcoming its vigorous defense." *Duchscherer*, 534 N.W.2d at 19 (N.D. 1995) (quoting *City of Riverside*, 477 U.S. 560, 580, n. 11 (1986)) (finding abuse of discretion where district court awarded less attorney's fees than requested); In re *Kjorvestad's Estates*, 287 N.W.2d 465, 470 (N.D. 1980) (affirming award of attorney's fees when "much of the work was necessitated by [appellant's] own actions"). Thus, even if the "amount of approved attorney's fees is substantial, [] 'that fact, standing alone, does not make them unreasonable.'" In re *Estate of Flaherty*, 484 N.W.2d 515, 520 (N.D. 1992) (quoting In re *Estate of Kjorvestad*, 375 N.W.2d 160, 170 (N.D. 1985)). After all, Darlene had the burden of proof.

[78] Menards' last complaint is that Darlene billed for duplicative fees. This Court recently stated that it will "leave it to the district court's sound discretion to award reasonable attorney's fees, regardless of whether a party hires one or multiple attorneys." *N.D. Dept. of Transp. v. Rosie Glow, LLC*, 2018 ND 123, ¶ 10, 911 N.W.2d 334 ("reject[ing] argument that a landowner may not recover fees for more than one attorney"). Menards again does not cite to evidence in the record; but rather, it cites its own district court memorandum to allege duplicative fees. On the other hand, the District Court observed that Darlene's attorneys both handled witness testimony at trial, while at other times, Attorney Ihland assisted with running video equipment and exhibit preparation while Attorney Schweigert examined witnesses.

[79] Menards further misstates the fourth factor ("amount involved and results obtained") and attempts to place some type of significance on Darlene's request to the jury compared to her ultimate recovery. Yet, reducing attorney's fees based "upon proportionality to the jury verdict" is improper and could have a "chilling effect" on litigants. *City of Medora*, 1997 ND 190 at ¶ 22; *see also Thompson*, 2011 ND 70 at ¶¶ 7–21 (affirming award of approximately $600,000 after recovery of only $250,000).

[80] Menards then cites the seventh factor ("experience, reputation, and ability") to complain that the District Court erred by not accommodating for Attorney Ihland's perceived inexperience. However, Darlene provided the District Court with evidence that the reduced billing rate already accounted for any inexperience. (Docket No. 259, at ¶ 5).

[81] Finally, Menards misconstrues the eighth factor ("fixed or contingent" fee) to question whether Darlene "has paid or is required to pay" fees. (Menards Br. at ¶ 82). Yet, the eighth factor does not consider whether the attorney's fees have actually been

paid or not. *See Reimers*, 2008 ND 101 at ¶ 15 (awarding attorney's fees based upon affidavit and invoice even though prevailing party "did not prove it paid" attorney's fees).

[82] At most, Menards argues that the District Court may have made a "poor" decision, but it failed to provide any evidence or authority to meet its burden to affirmatively establish that the District Court abused its discretion.

B. The Fee-Shifting Statute Does Not Include the Word "Reasonable".

[83] Menards asks this Court to rewrite and qualify the Legislature's language by introducing the word "reasonable" into the Fee-Shifting Statute. In doing so, Menards cites a dozen different fee-shifting statutes that merely authorize discretionary awards of "reasonable" attorney's fees. To the contrary, Section 27-08.1-04, N.D.C.C., expressly provides that "the district court ***shall award attorney's fees*** to a prevailing plaintiff." N.D.C.C. § 27-08.1-04 (emphasis added). The Legislature did not give district courts discretion in the award, nor did it prescribe the reasonable attorney-fee standard. When engaging in statutory interpretation, this Court recognized that "it must be presumed the legislature intended all that it said, said all that it intended to say, and means what it has plainly expressed." *Estate of Christenson v. Gilstad*, 2013 ND 50, ¶ 12, 829 N.W.2d 453. The Legislature was well aware of and certainly knew about those other fee-shifting statutes that delegated discretion to trial courts to assess the reasonableness of those attorney's fees. *See Tharaldson v. Unsatisfied Judgment Fund*, 225 N.W.2d 39, 45 (N.D. 1974) ("'It is a reasonable presumption that all laws are passed with a knowledge of those already existing . . . ."). In fact, the original house bill gave district courts discretion whether to award attorney's fees after removal. (Docket No. 248). The senate amended the house bill and stripped away that discretion before both chambers signed it into law.

(Docket Nos. 249–50). The Legislature obviously chose not to delegate that discretion or prescribe the reasonable attorney-fee standard.

[84] Therefore, the district court reached the right result even if it erred in conducting the "reasonableness" analysis. Under the correct law and reasoning, the result is the same. "When the trial court errs, we will not set aside a correct result merely because the trial court assigned an incorrect reason if the result is the same under the correct law and reasoning." *State Bank & Trust of Kenmare v. Brekke*, 1999 ND 212, ¶ 8, 602 N.W.2d 681. This standard applies to an award of attorney's fees. *See CHS Inc. v. Reimers*, 2018 ND 101, ¶ 8, 910 N.W.2d 189. Therefore, this Court should affirm the District Court's award of attorney's fees.

CONCLUSION

[85] For all the foregoing reasons, Darlene respectfully requests that the Supreme Court AFFIRM the District Court's Orders and Judgment but remand to District Court for an award of attorney's fees on appeal to Darlene. *See Reinecke v. Griffeth*, 533 N.W.2d 695, 702 (N.D. 1995) ("Although we have concurrent jurisdiction with the trial court to award attorney's fees on appeal, we prefer the trial court decide the issue.").

Dated this 22nd day of July, 2020.

SCHWEIGERT, KLEMIN & McBRIDE, P.C.

By: /s/ Tyler J. Siewert
Tyler J. Siewert (ND# 06910)
Meggi R. Ihland (ND#06910)
Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

[86] The undersigned certifies pursuant to N.D. R. App. P. 32(e), that the above *Brief of Appellee* complies with the page limitations set forth in Rule 32(a)(8)(A), N.D.R.App.P. I further certify that the total number of pages herein, excluding the certificate of service, is 38 pages.

Dated this 22nd day of July, 2020.

SCHWEIGERT, KLEMIN & McBRIDE, P.C.

By: /s/ Tyler J. Siewert
Tyler J. Siewert (ND# 06910)
Meggi R. Ihland (ND#06910)
Attorneys for Appellee

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Darlene Johnson,	)	
	)	
Plaintiff/Appellee,	)	
	)	**Supreme Court No. 20200126**
v.	)	
	)	**Civil No. 51-2017-cv-01569**
Menard, Inc.,	)	
	)	
Defendants/Appellees.	)	

AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

STATE OF NORTH DAKOTA)
:SS
COUNTY OF BURLEIGH)

[1] Shannon Barth, being first duly sworn upon oath, deposes and says: That she is a citizen of the United States, of legal age, and not a party to nor interested in the above-entitled matter. That on the 22nd day of July, 2020, 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 APPELLEE; AND**

2. **AFFIDAVIT OF SERVICE.**

by causing the same to be e-mailed to the following person(s):

Lisa M. Six
lsix@crowleyfleck.com

supclerkofcourt@ndcourts.gov

Shannon Barth

Subscribed and sworn to before me this 22nd day of July, 2020.

(SEAL)

BETH E. RIPPLINGER
Notary Public
State of North Dakota
My Commission Expires January 13, 2022

Notary Public
Burleigh County, North Dakota