

Supreme Court No. 20200260

State of North Dakota**In Supreme Court**

Tesoro Great Plains Gathering & Marketing, LLC
f/k/a Great Northern Gathering & Marketing LLC,

Plaintiff/Appellant,

v.

Mountain Peak Builders, LLC,

Defendant/Respondent.

An appeal from the Summary Judgment Order of March 27, 2020,
the Attorneys' Fee Order of August 5, 2020,
and the Money Judgment entered on August 10, 2010
in Case No. 27-2015-CV-00222
in McKenzie County District Court
Judge Robin A. Schmidt

APPELLANT'S BRIEF

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Dated: January 19, 2021

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

- [1] Did the district court err by granting summary judgment to allow foreclosure on a statutory pipeline lien claim where the lien amount was already paid in full, and therefore the lien moot?
- [2] Did the district court err by awarding attorneys' fees to Respondent without addressing whether such an award was available under North Dakota's pipeline lien statute, N.D.C.C. § 35-24-19, where Appellant paid the maximum amount of any lien more than ten days before trial?
- [3] Did the district court err by awarding attorneys' fees under N.D.C.C. § 35-24-19 for work that was unrelated to or performed prior to Respondent's pipeline lien foreclosure action?
- [4] Did the district court err by awarding attorneys' fees that were not charged to Respondent, and which Respondent did not pay?
- [5] Did the district court err by failing to apply reasonable, local hourly rates and instead applying Minneapolis rates when calculating attorneys' fees?

ORAL ARGUMENT REQUESTED

[6] Oral argument is appropriate because this appeal presents matters of first impression regarding attorneys' fees awarded under N.D.C.C. § 35-24-19 and the effect of full payment of a lien.

STATEMENT OF THE CASE

[7] This appeal presents legal questions relating to pipeline lien foreclosures and the district court's erroneous award of more than \$1.2 million in attorneys' fees in connection with a pipeline lien that had been paid long before the statutory deadline that prohibits an award of fees. When Great Northern satisfied an underlying judgment and paid the full amount of the pipeline lien, the lien ceased to exist and there was nothing to foreclose. The pipeline lien claim was moot. The district court erred as a

matter of law in granting Mountain Peak's summary judgment motion, which sought to foreclose a non-existent lien.

[8] The district court next erred by awarding Mountain Peak fees under the pipeline lien statute, N.D.C.C. § 35-24-19. The construction contract between Great Northern and Mountain Peak did not allow attorneys' fees to a prevailing party. The only way fees were potentially available—N.D.C.C. § 35-24-19—precludes an award if the property owner paid its maximum lien liability at least 10 days before trial.

[9] North Dakota requires pipeline lien claims to be tried like any other civil case. The district court stayed Mountain Peak's pipeline lien claim before a trial took place to allow the parties to arbitrate contract claims. The parties agreed that the amount of any pipeline lien would be determined by that arbitration. After an arbitration award in favor of Mountain Peak was confirmed, Great Northern paid the award and obtained a Satisfaction of Judgment from Mountain Peak. Because Great Northern paid the maximum lien amount more than 10 days before trial, Mountain Peak was not entitled to fees. The district court was required to deny Mountain Peak's fee request, and it erred as a matter of law by awarding fees. *See* N.D.C.C. § 35-24-19.

[10] The district court further compounded this error by awarding fees to Mountain Peak that: (1) were not incurred prosecuting the lien claim; (2) were not based on reasonable, local hourly rates (contrary to controlling North Dakota law); and (3) were written off by Mountain Peak's attorneys and never billed. On each issue, the district court abused its discretion by awarding such fees to Mountain Peak.

STATEMENT OF THE FACTS

A. Procedural History.

[11] This case arose from a dispute regarding Mountain Peak's work on the construction of a pipeline in North Dakota. In 2014, Great Northern hired Mountain Peak to provide construction services for the pipeline project. The contract between the parties did not contain an attorneys' fee provision, leaving the parties to pay their own attorneys if there was a dispute. (Index #485).

[12] Great Northern terminated the contract at the end of 2014. To represent its interests, Mountain Peak hired the Bismarck, North Dakota law firm Smith Bakke, which began billing for work in December 2014. (Index #477).¹ Mountain Peak brought the first lawsuit between the parties when it filed a federal court action on April 2, 2015. (Index #486, ¶¶ 16-41). In that action, Mountain Peak asserted claims for breach of contract, quantum meruit, unjust enrichment, fraud, and deceit. *Id.*

[13] In the federal court action, Mountain Peak claimed that Great Northern owed it at least \$13,500,000.00 plus interest. (Index #486, ¶¶ 16-41). Great Northern moved to dismiss the lawsuit. Judge Daniel L. Hovland granted that motion because Mountain Peak's lawsuit did not invoke federal jurisdiction. (Index #487).

[14] After it had been improperly sued in federal court by Mountain Peak, Great Northern started its declaratory judgment action, which is the subject of this appeal, in July 2015. (App.018-29). In August 2015, Mountain Peak answered the

¹ The firm has since changed its name but will be referred to herein as Smith Bakke.

complaint and asserted counterclaims for breach of contract, quantum meruit, unjust enrichment, fraud, and deceit. (App.030-42). Mountain Peak did not assert a pipeline lien foreclosure claim in its original counterclaim. *Id.*

[15] For nearly two years, the parties litigated the asserted claims, none of which were subject to an award of fees to the prevailing party. Smith Bakke continued to represent Mountain Peak with Sheldon Smith and other attorneys handling the litigation. (Index #477). Sheldon Smith charged Mountain Peak \$300.00 per hour, and other attorneys at his firm charged either \$200.00 or \$250.00 per hour. (Index #477). Smith Bakke attested that those rates are reasonable and comparable to other North Dakota law firms with similar skill and expertise. *Id.*

[16] In November 2016, Mountain Peak hired the Minneapolis, Minnesota law firm Fabyanske Westra Hart & Thompson (“Fabyanske”). (Index #451). Although Smith Bakke continued to represent Mountain Peak, Fabyanske was added and agreed to bill Mountain Peak up to \$205.00 per hour plus a 20% share of any recovery. *Id.*

[17] In January 2017, Mountain Peak obtained leave to amend its counterclaim and added, for the first time, a claim for pipeline lien foreclosure under N.D.C.C. § 35-24-02. (App.053-65).

[18] The parties conducted discovery and brought various motions. Some of the motion practice focused on Great Northern’s summary judgment motions, which sought to dismiss Mountain Peak’s claims, including the claims for unjust enrichment, quantum meruit, and deceit. Mountain Peak vigorously defended the motions, which were separate from its pipeline lien claim. On May 22, 2017, the district court partially

granted Great Northern's motion for summary judgment and dismissed Mountain Peak's claims for quantum meruit, unjust enrichment, and deceit. (Index #198).

[19] On two occasions, the district court concluded that fact questions existed regarding the parties' breach of contract claims and Mountain Peak's pipeline lien claim. (Index #198; Index #371, ¶ 2). Those rulings indicated that the parties' contract claims and Mountain Peak's lien claim needed to be tried. In North Dakota, pipeline lien claims must be tried like other civil matters. *See* N.D.C.C. § 35-24-15.

B. Arbitration And Payment Of Judgment.

[20] Before the statutorily required trial was set to begin in August 2018, Mountain Peak wanted to conduct more discovery, which would have resulted in a lengthy continuance of the trial. (Index #451, ¶ 12). Mountain Peak suggested that the parties arbitrate their claims instead of trying them in court. (Index #455, p. 2). Great Northern responded that it would arbitrate the contract claims if Mountain Peak dismissed its other claims and agreed to stay the pipeline lien foreclosure claim. *Id.*

[21] The parties agreed to arbitrate the contract claims in Minneapolis. They also agreed that: (1) Mountain Peak would dismiss its fraud claim, (2) the pipeline lien claim would be stayed during arbitration, and (3) the amount of Mountain Peak's lien "would be the amount of any confirmed award." (*See* App.078-84). Section 2 of the Settlement and Arbitration Agreement provided:

The Parties agree that Great Northern's claim for breach of contract, Mountain Peak's counterclaim for breach of contract, and the Parties' respective defenses to such claim and counterclaim, shall be the only issues submitted in the Arbitration The Lien Claim shall be the sole remaining claim in the Lawsuit. The Lawsuit shall be stayed pending confirmation of the Arbitration Award.... The Parties reserve all

arguments and defenses regarding the validity and enforceability of the lien, and the availability and amount of interest, fees, and costs that can be awarded in connection with the Lien Claim under applicable law.

(App.078-79). Through this agreement, the parties agreed to stay the lien claim and reserved “all arguments and defenses regarding the validity and enforceability of the lien ...” for the trial required by N.D.C.C. § 35-24-15. (App.079).

[22] Mountain Peak prevailed at arbitration but was awarded nearly two million dollars less than the original amount it sought. (App.059, ¶¶ 48-49). When it first sued Great Northern, Mountain Peak sought more than \$13,500,000.00. (Index #486). The arbitration award entered in May 2019 totaled \$11,560,000.00.

[23] Mountain Peak obtained confirmation of the award in Hennepin County District Court. On January 2, 2020, the Minnesota district court added interest and entered an amended judgment in the amount of \$15,022,299.18. (Index #490). Great Northern paid the full amount of the judgment with accrued post-judgment interest on February 13, 2020, and Mountain Peak executed a Satisfaction of Judgment on February 14, 2020. (Index #491; Index #428). The Satisfaction of Judgment was filed in the Minnesota district court on February 14, 2020. *Id.*

C. Pipeline Lien Foreclosure Claim.

[24] Because the pipeline lien claim was stayed, a new trial date had not been set and a district court order removing the stay was required. January 8, 2020, Mountain Peak moved to lift the stay of the pipeline lien claim and sought summary judgment to foreclose the lien. (Index #395-411).

[25] Mountain Peak’s summary judgment motion did not argue it was entitled

to an award of fees under the pipeline lien statute. (Index #401). It listed five sections of the pipeline lien statute in its argument that the lien is valid and should be foreclosed, but it did not argue that fees are authorized under N.D.C.C. § 35-24-19. *Id.* Mountain Peak requested “that the court issue an order permitting Mountain Peak to foreclose its pipeline construction lien *Mountain Peak further requests that it may have 21 days from the date judgment is entered to submit an application to tax its costs in this action.*” *Id.* at ¶ 32.

[26] Great Northern opposed the summary judgment motion, arguing the lien claim was moot because it already paid the full amount of the lien and had obtained and filed a Satisfaction of Judgment. (Index #425-428). In an order dated March 27, 2020, the district court granted Mountain Peak’s motion to lift the stay and granted summary judgment to foreclose the lien. (App.085-89). Although issues relating to the availability of attorneys’ fees and costs were not briefed in that motion, the district court ruled that Mountain Peak was entitled to seek such an award. *Id.*

D. Fees Requested By Mountain Peak.

[27] In a subsequent motion, Mountain Peak sought attorneys’ fees it paid to three different law firms. Fabyanske’s senior counsel, Kyle Hart, indicated his firm was paid a reduced hourly rate of \$205.00 per hour and received a 20% contingent fee in the outcome of the case. Mountain Peak essentially asked the district court to find that rates ranging from \$1,243.00 to \$1,713.00 per hour were reasonable and customary for construction disputes in McKenzie County. Those rates could be derived by taking the hourly rates and hours billed by each timekeeper (and paid by Mountain Peak) and adding them to the timekeeper’s weighted share of the \$3,047,263.20 contingent fee

sought in Mountain Peak's motion. In comparison, the senior attorney from Smith Bakke charged Mountain Peak \$300.00 per hour. (Index #477).

[28] Besides the high rates requested for the Fabyanske attorneys, Mountain Peak sought fees for work done in the two years before it asserted its lien claim, a time in which Mountain Peak only pursued claims with no fee-shifting. Mountain Peak also requested fees for work that was never billed and which it never even paid. (Index #445, ¶ 37; Index #451, ¶¶ 30-31).

[29] Great Northern opposed the fee request based on the application of N.D.C.C. § 35-24-19. Great Northern argued that if fees were to be granted, which they should not, they cannot be at a rate different from the fee customarily charged in the locality for construction matters, nor could Mountain Peak seek fees for time spent on work before the lien claim was asserted or for time that Fabyanske never billed to Mountain Peak. (Index #483, ¶¶ 37-43, 59-60, 62-66).

[30] On August 5, 2020, the district court awarded \$1,213,355.90 in fees. (App.091-97). The award included fees for work performed before a lien claim was asserted by Mountain Peak and for work by the Fabyanske attorneys that was never billed or paid. (*See* App.096, ¶ 22). The district court also applied the full Minneapolis rate of \$450.00 per hour to the time spent by the Fabyanske attorneys, rather than the \$300.00 per hour that the Smith Bakke firm stated was customary. (App.095, ¶ 15).²

[31] The district court's order did not analyze whether Mountain Peak was entitled to fees under N.D.C.C. § 35-24-19. (*See generally* App.091-97). There is no

² \$450 per hour is the hourly rate charged by Kyle Hart in 2020. (*See* Index #445, ¶ 36).

mention of the statute in the order and no findings related to the statute's prohibition of a fee award where the full amount of the lien was paid more than 10 days before trial of the lien claim. *Id.* The district court assumed fees should be awarded, concluded without explanation that fees could be obtained for all claims because they were "intertwined" with the pipeline lien claim, and approved fees at \$450.00 per hour, even though the rate was "higher than any award th[e] court ha[d] previously granted." *Id.*

STANDARD OF REVIEW

[32] A district court's decision on a motion for summary judgment is a question of law to be reviewed *de novo*. "In determining whether summary judgment was appropriately granted, we view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences which can reasonably be drawn from the record." *EVI Columbus, LLC v. Lamb*, 2012 ND 141, ¶ 6, 818 N.W.2d 724 (citations omitted).

[33] This Court reviews *de novo* any legal issues related to an award of attorneys' fees and reviews for abuse of discretion the amount of any fees awarded. *See Gratech Co., Ltd. v. Wold Eng'g, P.C.*, 2007 ND 46, ¶ 18, 729 N.W.2d 326; *see also Roemmich v. Eagle Eye Dev., LLC*, 526 F.3d 343, 354-55 (8th Cir. 2008) (deciding whether attorneys' fees were allowed under North Dakota statute). A district court "abuses its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner, or if it misinterprets or misapplies the law." *Gratech*, ¶ 18.

ARGUMENT

I. It Was Legal Error For The District Court To Grant Summary Judgment And Allow Foreclosure Of A Pipeline Lien Where The Underlying Amount Was Already Paid, Making The Lien Moot.

[34] Mountain Peak moved for summary judgment seeking foreclosure of its pipeline lien after Great Northern paid the full amount of the lien. Once Mountain Peak was paid, there was no debt on which a lien could be based and no basis to allow foreclosure of the pipeline lien. The pipeline lien claim was moot, and the district court committed legal error when it granted Mountain Peak's motion for summary judgment.

[35] A lien is simply a method to secure payment of a debt. When the underlying debt is extinguished, so too is the security interest. After Great Northern fully paid the arbitration award, Mountain Peak's lien no longer secured payment of a debt and was moot. This legal principle is addressed in *J.C. Allen Co. v. Wisconsin Central Ltd.*, No. A17-1636, 2018 WL 2770401 (Minn. Ct. App. June 11, 2018), *review denied* (Sept. 18, 2018), in which the Minnesota Court of Appeals held:

After the district court filed its summary-judgment order, the parties settled JCA's claim for payment for the services it performed in 2013. Because JCA has been paid for all the services it performed, a mechanic's lien is unnecessary. JCA does not contend otherwise. Rather, JCA contends that the claim is not moot because it seeks attorney fees. By statute, a prevailing lienor is entitled to 'costs and disbursements.' But JCA cannot be a prevailing lienor if there is no lien. Thus, we agree with WCL that JCA's claim for a mechanic's lien is moot.

Id. at *7 (internal citations omitted); *see also Barney v. Mt. Rose Heating & Air Conditioning*, 192 P.3d 730, 735 (Nev. 2008) (finding "mechanic's lien enforcement action ends ... when the total amounts due under the judgment and [costs] are otherwise paid, and the lien is discharged or released").

[36] Similarly, in *Beach Resorts International, Inc. v. Clarmac Marine Construction Co.*, the Florida Court of Appeals determined that “[t]here was no reason to impose a mechanic’s lien, as Beach Resorts was at all times ready and willing to comply with the decision of the arbitrator and the order of the trial judge in confirming the same.” 339 So.2d 689, 692 (Fla. Dist. Ct. App. 1976). “In the absence of a refusal to abide by the trial court’s judgment, it was error to impose a mechanic’s lien and award of attorney fees attributable to the arbitration previously conducted.” *Id.*

[37] North Dakota case law supports this principle. *See, e.g., SWMO LLC v. Eagle Rigid Spans Inc.*, 2019 ND 207, ¶¶ 9, 14, 932 N.W.2d 120 (recognizing party could pursue contract action and also had the option to enforce their construction liens but, when funds were paid, the funds became a substitute for the security of the liens); *Bender v. Beverly Anne, Inc.*, 2002 ND 146, ¶ 12, 651 N.W.2d 642 (considering mechanic’s lien statute and determining “[w]here an owner has paid the full price or value of the contributions of subcontractors or laborers, any lien they file is void”); *J.D. Butler Constr., LLC v. Fuzion En. Servs., LLC*, No. 22-2016-CV-00375, 2018 WL 8732315, at *3 (N.D. Dist., Mar. 9, 2018) (“[T]he amount of a lien can only be for ‘the difference between the price paid by the owner or agent and the price or value of the contribution.’ ‘If the owner or agent has paid the full price or value of the contribution, no lien is allowed.’”) (quoting N.D.C.C. § 35-27-02).

[38] Rather than apply this principle, the district court determined “the lien isn’t extinguished until the lien foreclosure is ruled on by the trial court” (App.088, ¶ 9). The district court briefly acknowledged that Great Northern pointed to cases that

cite North Dakota lien statutes and hold when “the owner or agent has paid the full price or value of contribution, no lien is allowed.” *Id.* at ¶ 8. Yet, the district court ignored those North Dakota cases and out-of-state cases with similar holdings, and instead looked to the Michigan Supreme Court’s decision in *Ronnisch Construction Group, Inc. v. Lofts on the Nine, LLC*, 886 N.W.2d 113, 116 (Mich. 2016). (App.087-88, ¶¶ 7, 9). But *Ronnisch* discussed the issue of attorneys’ fees under Michigan’s Construction Lien Act; it did not address the foreclosure of a lien. *Ronnisch* did not even involve a motion to foreclose a lien, and thus was inapposite to the district court’s decision to grant or deny Mountain Peak’s summary judgment motion seeking foreclosure of its pipeline lien. The district court erred by relying on *Ronnisch* in its summary judgment order.

[39] Because Great Northern paid the maximum liability and obtained a Satisfaction of Judgment, Mountain Peak’s lien claim—including any associated claim for fees—was moot. The district court erred as a matter of law by granting Mountain Peak’s summary judgment motion and allowing Mountain Peak to foreclose the pipeline lien. This Court should reverse that order as the pipeline lien claim was moot.

II. The District Court Erred As A Matter Of Law By Awarding Fees When The Pipeline Lien Statute Prohibited Such Award Where Great Northern Paid The Maximum Lien Amount More Than 10 Days Before Trial.

[40] The district court also committed error by not addressing N.D.C.C. § 35-24-19, which prohibited a fee award because the maximum lien amount was paid more than 10 days before trial. Great Northern paid the lien, obtained a Satisfaction of Judgment, and filed that pleading in the appropriate court. Doing so divested the district court of the ability to award fees under the pipeline lien statute. This Court

should reverse the fee order because N.D.C.C. § 35-24-19 prohibited that award.

[41] Even if the lien claim was not mooted by Great Northern's satisfaction of the arbitration award, which it was, the district court was prohibited from awarding fees. North Dakota generally follows the "American Rule" of fees, which "assumes each party to a lawsuit bears its own attorney fees." *Deacon's Dev., LLP v. Lamb*, 2006 ND 172, ¶ 11, 719 N.W.2d 379; see *Rocky Mtn. Steel Found., Inc. v. Brockett Co., LLC*, 2019 ND 252, ¶ 9, 934 N.W.2d 531. "Therefore, successful litigants are not allowed to recover attorneys' fees unless authorized by contract or statute." *Deacon's Dev.*, ¶ 11.

[42] The contract between Mountain Peak and Great Northern contained no fee-shifting provision, leaving the North Dakota pipeline lien statute as the only possible way Mountain Peak could be awarded attorneys' fees. That statute, however, precludes fees when the property owner pays the maximum amount of its lien liability more than 10 days before trial of the pipeline lien claim. See N.D.C.C. § 35-24-19. Great Northern paid its maximum liability for the lien and obtained a Satisfaction of Judgment more than 10 days before any trial on Mountain Peak's pipeline lien claim. Attorneys' fees could not be awarded under North Dakota's pipeline lien statute and the district court erred as a matter of law when it awarded fees to Mountain Peak.

[43] The district court cited N.D.C.C. § 35-24-19 in its summary judgment order but did not mention the statute in its fee order. (*Compare* App.086-87, ¶ 5 (acknowledging that, under Section 35-24-19, the party for whom judgment is rendered in an action to enforce a pipeline lien is entitled to attorneys' fees unless the owner pays the lien amount at least 10 days before trial), *with* App.091-97 (awarding attorneys' fees

without considering whether fees were even allowed under Section 35-24-19)).

[44] Rather than analyze whether Mountain Peak was entitled to fees under North Dakota’s pipeline lien statute, the district court seemed to apply the factors used in deciding a reasonable fee to determine if a fee award was warranted in the first place. (*See, e.g.*, App.094-95, ¶ 13 (looking at time and labor required, novelty and difficulty of questions involved, and skill required to perform legal service and stating that “[t]his factor weighs in favor of a fee award”); App.095, ¶ 18 (“The court does not find anything persuasive regarding the nature and length of the professional relationship with the client that would either militate for or against an award of attorney fees.”)). The district court missed a step and should have considered if fees were even allowed under Section 35-24-19 when Great Northern had fully satisfied the amount of the lien.

[45] North Dakota’s pipeline lien statute allows the prevailing party to seek fees as part of the taxation of costs with an important exception, which applied here:

In any action brought to enforce a lien prescribed by this chapter, the party for whom judgment is rendered is entitled to recover a reasonable attorney’s fee, to be fixed by the court, which must be taxed as costs in the action. **No costs may be taxed against the owner when the owner has paid into court, at least ten days before trial, the maximum amount of the owner’s liability as limited under section 35-24-07.**

N.D.C.C. § 35-24-19 (emphasis added). Pipeline lien claims, like the one asserted by Mountain Peak, *must* be tried like any other civil case. *See* N.D.C.C. § 35-24-15.

[46] In August 2018, the parties were close to trying all claims that had survived earlier summary judgment motions. But facing a lengthy continuance of the trial because it wanted to conduct more discovery, Mountain Peak suggested that the

parties submit their claims to arbitration. (Index #455, p. 2). The parties agreed to stay Mountain Peak's lien claim while they arbitrated the contract claims. (App.078-84). They also agreed the arbitration award would only set the *amount* of any lien. *Id.* The parties did not arbitrate issues regarding the validity and enforceability of the lien claim, which needed to be tried like other civil cases. *Id.*

[47] Mountain Peak partially prevailed on its contract claim at the arbitration. Great Northern paid the full amount of the amended arbitration award on February 13, 2020, and Mountain Peak executed a Satisfaction of Judgment the next day. (Index #491). By February 13, 2020, Great Northern had paid the maximum amount it could have owed under the pipeline lien statute. Because the lien claim was stayed in the district court when Great Northern paid the judgment, Great Northern paid the maximum amount owed more than 10 days before any trial on the lien claim.³

[48] Mountain Peak's lien claim was explicitly stayed and not arbitrated, so the lien claim did not go to "trial" in the arbitration. Although the parties agreed to resolve the amount of any lien at arbitration, they reserved all arguments and defenses regarding the validity and enforceability of the pipeline lien for later resolution in district court. (App.078-84). The pipeline lien statute required that the lien claim be tried following the conclusion of the arbitration, thereby requiring the district court to reset the lien claim for trial. *See* N.D.C.C. § 35-24-15.

[49] The North Dakota legislature made it clear in Section 35-24-19 that fees

³ Great Northern's payment was also made more than 10 days before the district court heard Mountain Peak's summary judgment motion on February 28, 2020 and nearly 6 weeks before it granted the motion on March 27, 2020. (App.085-89).

cannot be awarded if the full lien amount is paid at least 10 days before trial. The statute reflects the American Rule that parties are responsible for their own attorneys' fees but adds an incentive to resolve lien claims without trial. If the property owner pays the lien claim more than 10 days before trial, it cannot be assessed the other party's fees. Despite the district court or Mountain Peak disagreeing with the perceived fairness of the statute, Great Northern's payment of the full lien amount and filing of a Satisfaction of Judgment invoked the prohibition against awarding fees in N.D.C.C. § 35-24-19.

[50] The exception to fee-shifting allowed by Section 35-24-19 applies here and the district court lacked authority to award attorneys' fees to Mountain Peak. The district court did not have discretion to depart from the clear language of the only statute under which Mountain Peak could arguably be entitled to a fee award. There was no legal basis for an award of attorneys' fees, and the district court erred in granting Mountain Peak's request for fees. This Court should reverse that order.

III. The District Court Erred By Relying On *Ronnisch* To Award Attorneys' Fees As It Does Not Apply North Dakota Law And Is Distinguishable.

[51] In allowing attorneys' fees, the district court applied the analysis of the Michigan Supreme Court in *Ronnisch Construction Group, Inc. v. Lofts on the Nine, LLC*, 886 N.W.2d 113, 116 (Mich. 2016). (App.087-88, ¶¶ 7, 9).

[52] But *Ronnisch* did not apply, or even consider, controlling North Dakota law. In *Ronnisch*, RGC filed suit against LOTN, seeking foreclosure of a construction lien and raising claims for breach of contract and unjust enrichment. The parties agreed to stay the proceedings to arbitrate. An award was issued in RCG's favor, and LOTN paid the award in full. RGC filed a motion asking the trial court to lift the stay, confirm

the arbitration award, and award RCG its attorneys' fees pursuant to the lien statute. The trial court denied RCG's motion, concluding that at no point in the proceedings had RCG's lien claim ever been adjudicated—either in arbitration or the trial court. The trial court also concluded that RCG's lien claim was extinguished when RCG accepted full payment from LOTN before proceeding on the lien claim. This ruling was appealed, and the majority opinion allowed an award of attorneys' fees.

[53] Unlike North Dakota's pipeline lien statute, the Michigan construction lien act at issue in *Ronnisch* does not contain language preventing the recovery of fees when the owner has paid its liability. The Michigan statute provides: "In an action to enforce a construction lien through foreclosure, the court shall examine each claim and defense that is presented and determine the amount, if any, due to each lien claimant The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party." MCL § 570.1118(2).

[54] In contrast, North Dakota's pipeline lien statute specifically states: "No costs may be taxed against the owner when the owner has paid into court, at least ten days before trial, the maximum amount of the owner's liability" N.D.C.C. § 35-24-19. The Michigan statute lacks such an exception, making *Ronnisch* inapplicable. The district court should not have relied on this foreign decision. *See, e.g., Nesdahl Surveying & Eng'g, P.C. v. Ackerland Corp.*, 507 N.W.2d 686, 690 (N.D. 1993) (noting lien laws vary by state and, due to those differences, courts may find case law from other jurisdictions to be persuasive but "it is not always of assistance because interpretation of the North Dakota [] lien statutes is specific to our statute and legislative purpose").

[55] The district court, like the majority opinion in *Ronnisch*, also failed to acknowledge that Mountain Peak was never more than a presumptive lien claimant. Mountain Peak received payment for the full amount of the lien, which extinguished the lien before the legal validity of its pipeline lien claim was ever determined. The district court overlooked the fact that Mountain Peak did not have a right to foreclose the pipeline lien at the time of its summary judgment motion and allowed Mountain Peak's recovery of attorneys' fees for prevailing on a contract claim in the arbitration.

[56] The district court thought this decision furthered the purpose of the lien statute, which protects those who contribute labor, skill, or materials. (App.088, ¶ 9). But the district court's decision morphed the statutory framework for pipeline liens into an instrument for attorneys' fees wholly detached from success on a lien foreclosure claim. According to the district court, success on the lien claim is no longer a necessary requirement to an award of fees under the pipeline lien statute. The district court created an expansive holding in favor of a general right to attorneys' fees on any claim brought with a pipeline lien claim. As explained by the dissent in *Ronnisch*,

[A]t common law, a contractor always had a contract claim for any unpaid bills but no entitlement to attorney fees. So, the effect of the majority's construction of the [statute] is to undercut the lien foreclosure statutory process and attorney fees remedy entirely to permit the recovery of attorney fees based on a simple common-law contract claim.

886 N.W.2d at 581 (opining "it doubtful that the Legislature created an unnecessary lien foreclosure process with the intention of establishing a new route to recover attorney fees for an existing common-law contract claim").

[57] Here, the legal validity of the pipeline lien claim had not even been tried

when the district court decided that Mountain Peak could recover fees for **all** the claims it asserted in this action. But the parties did not contractually agree that attorneys' fees could be awarded to a prevailing party and the pipeline lien claim, which might allow an award of fees, was stayed pending the arbitration of contract claims. Thus, the district court erred by relying on *Ronnisch* and awarding fees. The district court bypassed any finding, through trial as required by North Dakota statute, that Mountain Peak prevailed on the legal aspects of the pipeline lien claim and did not analyze whether fees could be awarded.⁴ This Court should apply the plain language of Section 35-24-19 and reverse the fee order.

IV. The District Court Erred When It Awarded Fees Under N.D.C.C. § 35-24-19 For Work Unrelated To Mountain Peak's Pipeline Lien Claim.

[58] Mountain Peak was not entitled to fees under N.D.C.C. § 35-24-19, but the district court compounded its error by not limiting fees to those expended on the pipeline lien claim. *N. Excavating Co., Inc. v. Sisters of Mary of Presentation Long Term Care*, 815 N.W.2d 280, 285 (N.D. 2012). The party seeking fees “bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). It is required to exercise “billing judgment” with respect to hours worked and “should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.” *Id.*

[59] Mountain Peak was required to “submit evidence supporting the hours

⁴The arbitration fixed only the lien **amount**. It did not establish the validity of the lien or any right to fees. (App.079 (reserving “arguments and defenses regarding the validity and enforceability of the lien, and the availability and amount of interest, fees, and costs that can be awarded in connection with the Lien Claim under applicable law”)).

worked and rates claimed. Where the documentation of hours is inadequate, the [trial] court may reduce the award accordingly.” *Tolin v. Comm’r of Internal Revenue*, 929 F.3d 548, 553 (8th Cir. 2019) (quoting *Hensley*, 461 U.S. at 433); *Duchscherer v. W.W. Wallwork, Inc.*, 534 N.W.2d 13, 18 (N.D. 1995) (“To enable calculation of the lodestar amount, the prevailing party must document the hours expended on the case and the rate charged, and if the documentation is inadequate or the claimed hours were not reasonably expended, an award may be reduced accordingly.”)

[60] As the party seeking an award of fees, Mountain Peak needed to provide proper documentation that provided the district court the ability to assess what work should and should not be awarded. Mountain Peak did not offer such documentation and instead provided billing records that lumped together work on claims that could not be reimbursed under the pipeline lien statute.

[61] The district court did not require evidence from Mountain Peak to support its fee request. Instead, the district court found sufficient Mountain Peak’s assertion that it “tried to eliminate time entries for excessive, redundant, or otherwise unnecessary fees.” (App.096, ¶ 21). This was not enough. *See, e.g., Tri County Landfill Ass’n, Inc. v. Brule County*, 619 N.W.2d 663, 675 (S.D. 2000) (reviewing 200 pages of billing statements and noting prevailing party failed to meet burden because the records lacked descriptions of work being done and were lumped in a manner that made the task of completing a detailed inquiry almost impossible). The district court needed to scrutinize billing information and make detailed findings about what was, and what was not, potentially allowed under the pipeline lien statute. This Court has previously stated:

An award of attorney fees must generally be supported by evidence upon which the court can determine the requested fees are reasonable and legitimate.... [T]here is no evidentiary basis upon which the court could determine the reasonableness or legitimacy of the requested attorney fees. Under these circumstances, we conclude the trial court abused its discretion in awarding attorney fees to [the attorney] unsupported by proper documentation.

Whitmire v. Whitmire, 1999 ND 56, ¶¶ 14-15, 591 N.W.2d 126. Thus, by failing to adequately review billing information and awarding fees unsupported by proper documentation, the district court abused its discretion.

A. The District Court Abused its Discretion by Awarding Fees for the Two Years Before the Lien Claim Was Asserted.

[62] The district court improperly granted fees for work done during the two years *before* Mountain Peak asserted the pipeline lien claim. Mountain Peak did not assert a lien claim until January 17, 2017. (App.053-65). There was no “action brought to enforce a lien” before that time and over 96% of the fees charged by Smith Bakke were not incurred in an action to enforce a lien. Fees incurred before the lien claim cannot be recovered from Great Northern. *N. Excavating*, ¶ 11 (explaining party is entitled to fees for work done to challenge or enforce lien, even if such work is relevant to other causes of action, but not for work on unrelated claims); *see Rocky Mtn.*, ¶ 10.

[63] A similar fact pattern was addressed in *Arrow Midstream Holdings, LLC v. 3 Bears Construction, LLC*, No. 13-2014-CV-00084, 2019 WL 2718741 (N.D. Dist. June 17, 2019). One issue addressed by the court was whether the pipeline lien holder, Tesla, sufficiently pled foreclosure of its pipeline lien within the 2-year period required by N.D.C.C. § 35-24-14. *Id.* at ¶ 10. Like Great Northern, Arrow brought a declaratory judgment action seeking a determination of the validity and amount of Tesla’s pipeline

lien. *Id.* at ¶ 11. Like Mountain Peak, Tesla’s original Answer and Crossclaim failed to include a claim for foreclosure of its pipeline lien. *Id.* at ¶¶ 11-12.

[64] After having its lien claim dismissed, Tesla argued that its original Answer and Crossclaim gave “notice” to Arrow of its intent to foreclose its pipeline lien because: a) the validity of the lien was alleged, b) it sought recovery of the amount of the lien, and c) it claimed the right to attorneys’ fees under Section 35-24-19. *Id.* at ¶ 12. The district court dismissed that argument and went on to rule:

The Court finds Tesla’s original Answer and Cross-claim insufficient to ‘inform and notify’ Arrow and the Court of Tesla’s intent to foreclose the pipeline lien. There is no prayer for relief requesting dispersal of the property subject to the lien. While Tesla does state a claim against both 3 Bears and Tesla, that claim is consistent with N.D.C.C. § 35-24-20, which specifically addresses the right of ‘any person to whom a debt may be due for work performed or materials or services furnished to maintain a personal action against the person liable for such debt.’

Id. at ¶ 15.

[65] Before January 17, 2017, Mountain Peak had not asserted an action to foreclose its pipeline lien. Mountain Peak did not even mention a pipeline lien in its original Counterclaim and did not claim a right to recover fees under N.D.C.C. § 35-24-19. Thus, Mountain Peak cannot recover fees incurred prior to January 17, 2017. This removes 65.6 hours from Fabyanske’s billing and 738.8 hours from Smith Bakke’s billing. At Fabyanske’s hourly rate, this equates to a reduction of \$8,818.75 (at Fabyanske’s ½ rates) and, at Smith Bakke’s hourly rate, this equates to a reduction of \$164,295.00 from the \$1,213,355.90 in fees awarded to Mountain Peak. (*See* Index #493). The district court abused its discretion in awarding fees for the two years before Mountain Peak’s pipeline lien claim was asserted, and it must be reversed.

B. Fees Related to Claims Other Than the Lien Are Not Recoverable.

[66] Only fees attributable to prosecuting the pipeline lien claim can be awarded. This is consistent with the holding in *Rocky Mountain* where this Court held that a lien claimant may only recover fees and costs associated with prosecuting the lien claim—it is not entitled to fees related to other claims. *Rocky Mtn.*, ¶ 10.

[67] This Court has rejected the argument that work for all claims can be recovered in a lien action: “We do not believe the Legislature intended to award an owner literally all of the costs and attorney’s fees arising out of a lawsuit when challenging a lien was not the only disputed cause of action.” *N. Excavating*, ¶ 11 (“[A] party who successfully contests the accuracy or validity of a construction lien is limited to recovering only those costs and fees reasonably expended contesting the lien.”); *see also Rocky Mtn.*, ¶ 14 (allowing a party to recover all fees and costs could lead to an absurd result because the party who successfully contests or enforces a lien could be awarded all of their attorneys’ fees even if they do not prevail on any other claim).

[68] The district court previously dismissed three of Mountain Peak’s claims on summary judgment—unjust enrichment, quantum meruit, and deceit. Any time spent supporting those claims and defending the summary judgment motion that dismissed those three claims should have been removed from the award of attorneys’ fees.⁵ The district court did not have authority to group everything together and award

⁵ For example, Fabyanske’s records showed a total of 112.06 hours spent responding to Great Northern’s summary judgment motion. (Index #493). Mountain Peak’s memorandum in opposition to Great Northern’s summary judgment motion had 16 pages of legal argument, of which 8 pages were dedicated to defending Mountain Peak’s right to pursue its claims for unjust enrichment, quantum meruit, and deceit. (Index

attorneys' fees for the work on all of Mountain Peak's claims. The district court committed legal error by not limiting the award to work on the pipeline lien claim.

C. The Arbitration Did Not Seek Enforcement of a Lien.

[69] The attorneys' fee provision of North Dakota's pipeline lien statute, N.D.C.C. § 35-24-19, only allows the prevailing party to seek attorneys' fees as part of the taxation of costs for an "action brought to enforce a lien prescribed by this chapter." The arbitration between the parties here only involved their respective contract claims while the lien claim was stayed. It was legal error for the district court to award Mountain Peak attorneys' fees for the time spent preparing for and participating in the arbitration and post-arbitration proceedings.

[70] Similar language in another section of the pipeline lien statute was recently addressed in *Rocky Mountain*. This Court held that a lien claimant is only entitled to fees and costs associated with prosecuting the lien claim—not claims unrelated to

#133). Because roughly 50% of its legal arguments were dedicated to claims unrelated to the enforcement of its pipeline lien, Fabyanske's recoverable hours should have been reduced by 50%, or 56.03 hours.

There were also time entries in both Fabyanske's and Smith Bakke's invoices that are unrelated to Mountain Peak's pipeline lien claim. These time entries totaled 12.85 hours for Fabyanske and 12.2 hours for Smith Bakke. (*See* Index #493). The district court was "not persuaded by Great Northern's argument or the exhibit" that "purported to remove any entries that were not directly related to the lien foreclosure." (App.096, ¶ 21). Rather, the district court held that "[t]hese matters were so closely intertwined, it was impossible to consider one without the other." *Id.* The district court took at face value Mountain Peak's statement that it "tried to eliminate time entries for excessive, redundant, or otherwise unnecessary fees." *Id.* But because the time entries identified in the highlighted billing records (Index #493) were for unrelated claims or activities, those amounts were not recoverable by Mountain Peak in this action. *See, e.g., Rocky Mtn.*, ¶ 10; *N. Excavating*, ¶ 11.

the lien claim. *Rocky Mtn.*, ¶ 10. Section 35-24-19 is narrow and only allows fees for work specific to an action to enforce a pipeline lien.

[71] Construing Section 35-24-19 alongside other provisions of North Dakota's lien statutes confirms it was not meant to allow the recovery of attorneys' fees in actions that do not adjudicate enforcement of the lien. *See Oil & Gas Transfer LLC v. Karr*, 929 F.3d 949, 951 (8th Cir. 2019). For example, N.D.C.C. § 35-27-24.1 provides for an award of attorneys' fees to owners of construction projects who succeed in actions that "contest[] the validity or accuracy of a construction lien by any action in district court." By contrast, Section 35-24-19 applies only to actions brought to "enforce a lien." Construing it to apply to actions that "contest the validity or accuracy" of a lien would frustrate related lien statutes. *Id.* (noting that application of Section 35-24-19 to actions determining the validity or accuracy of a lien would contradict the court's duty to harmonize related statutory provisions).

[72] Mountain Peak did not seek to enforce a lien in the arbitration. The arbitration involved only breach of contract claims. (*See App.078-84*). While the parties agreed that the amount of the arbitration award would be considered the lien amount, "it [is] a stretch to believe asking for the amount of money stated in a pipeline lien constitutes a foreclosure of the pipeline lien." *Arrow Midstream Holdings*, 2019 WL 2718741, at *3 (suggesting Section 35-24-19 does not apply when the party would have to institute another action to foreclose on the lien). Because the arbitration did not address the lien foreclosure, those fees cannot be recovered. The district court committed legal error by including hours for work unrelated to the pipeline lien claim.

V. The District Court Abused Its Discretion In Awarding Attorneys' Fees That Were Neither Charged To Nor Paid By Mountain Peak.

[73] Mountain Peak requested nearly \$100,000 in fees that Fabyanske never billed and Mountain Peak never paid. (Index #451). Fabyanske suggested it would be “unconscionable” to not make Great Northern pay these never billed, never paid “fees.” *Id.* at ¶ 31. The district court accepted that argument and directed Great Northern to pay fees that Mountain Peak was not billed for and did not pay.

[74] The district court abused its discretion by awarding fees that were not billed or paid by Mountain Peak. *See Duchscherer*, 534 N.W.2d at 19 (acknowledging that hours not billed to one’s client also should not be billed to one’s adversary pursuant to statutory authority); *Coleman v. Block*, 589 F. Supp. 1411, 1418 (D.N.D. 1984) (focus of evaluating the reasonable hours expended on a case is “whether the hours would be properly billed to one’s client”); *see also, Menlo Logistics, Inc. v. W. Express, Inc.*, No. C-04-4684 JCS, 2006 WL 436150, at *6, *8 (N.D. Cal. Feb. 21, 2006) (excluding from fee request amounts written off as an accommodation to plaintiff); *Stormans Inc. v. Selecky*, 906 F. Supp. 2d 1093, 1099-101, 1107 (W.D. Wash. 2012) (excluding hours written off from lodestar, allowing only amounts client would be charged, and noting “[b]ecause a party prevails, it does not mean that every expense and hour expended to prepare the case may be passed onto the losing party”); *TAMP Realty Co., LLC v. Amber Japanese Restaurant, Inc.*, No. 158658/2015, 2016 WL 4529039, at *6 (N.Y. Aug. 30, 2016) (excluding fees written off as an accommodation and considering only the amount incurred and paid by plaintiff, as plaintiff was not entitled to a windfall).

[75] The district court lacked legal authority to shift unbilled and unpaid fees

to an adverse party. If an attorney's own client has not approved the work and was not asked to pay the fees, there is no basis to ask an opposing party to pay for what the attorney's own client would not pay. Allowing such awards would encourage attorneys to overbill and overwork cases knowing that their own clients would never pay the bills but keeping open the possibility that the opposing party would pay for the otherwise unrecoverable fees. North Dakota public policy does not support encouraging such conduct.

VI. The District Court Failed To Apply Reasonable, Local Hourly Rates, And Improperly Applied Minneapolis Rates When Calculating Attorneys' Fees.

[76] Even if the fees incurred arbitrating the breach of contract claims could be recovered under Section 35-24-19, the district court awarded an amount that was inflated and contrary to North Dakota case law. The starting point in considering a request for attorney fees where available is the lodestar, which is calculated by multiplying the number of hours reasonably expended by the reasonable hourly rate. A court considers the following factors:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. The fee customarily charged in the locality for similar legal services;
4. The amount involved and the results obtained;
5. The time limitations imposed by the client or circumstances;

6. The nature and length of the professional relationship with the client;
7. The experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. Whether the fee is fixed or contingent.

Heng v. Rotech Med. Corp., 2006 ND 176, ¶ 30, 720 N.W.2d 54 (citing N.D.R. Prof. Conduct 1.5(a)). All factors must be considered in determining the reasonableness of attorneys' fees; no single factor controls. *Id.*

[77] North Dakota courts also consider the twelve factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) when analyzing a fee request. *Hughes v. North Dakota Crime Victims Rep. Bd.*, 246 N.W.2d 774, 777 (N.D. 1976). A court should review, and where appropriate, decrease the fees sought after analyzing the twelve *Johnson* factors. *See, e.g., Lincoln Land Dev., LLC v. City of Lincoln*, No. 08-2015-CV-00348, 2018 WL 3818998, at *6 (D.N.D. Mar. 12, 2018) (citing *Hughes*, 246 N.W.2d at 777); *see also Cass County Joint Water Resource Dist. v. Erickson*, 2018 ND 228, ¶ 29, 918 N.W.2d 371. “The party seeking an award of attorney’s fees bears the burden of producing sufficient evidence ‘that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.’” *Alexander WF, LLC v. Lewis & Clark Expedition LLC*, No. 4:14-cv-68, 2015 WL 12803622, at *2 (D.N.D. Apr. 22, 2015) (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)).

[78] Here, the district court determined that the full hourly rates of Mountain Peak’s Minneapolis attorneys was reasonable “[a]lthough \$450 per hour is higher than

any award this court has previously granted.” (App.095, ¶ 15). The district court’s award is contrary to other North Dakota decisions:

When a plaintiff employs both in-state and out-of-state counsel, the in-state market is the relevant market by which attorney’s fees are to be measured. It is appropriate to reduce the hourly rate charged to that of the in-state attorney.

Alexander WF, 2015 WL 12803622, at *3 (reducing fees requested by plaintiff for work done by out-of-state attorneys). Mountain Peak did not provide a single North Dakota decision that supported an award of \$450.00 per hour for this type of work in North Dakota, and the district court cited none. Indeed, Mountain Peak’s North Dakota counsel provided an affidavit stating that the reasonable hourly rate for this type of work in North Dakota is \$300.00 per hour for senior lawyers. (Index #477).

[79] When calculating the lodestar amount, North Dakota courts apply the rates customarily charged by local attorneys for similar work. Smith Bakke charged at most \$300.00 an hour for its work. North Dakota law required the district court to apply rates customary to the area. Generally, a reasonable hourly rate is the prevailing market rate—that is, “the ordinary rate for similar work in the community where the case has been litigated.” *Alexander WF*, 2015 WL 12803622, at *2; *Duchscherer*, 534 N.W.2d at 17 (“[R]easonable attorney fees must be calculated according to the prevailing market rate in the relevant legal community.”); see *Morton County Bd. of Park Com’rs v. Wetsch*, 142 N.W.2d 751, 753 (N.D. 1966) (finding district court properly awarded a reasonable fee after considering the customary fee for legal services in the State of North Dakota). In determining the reasonable hourly rate, the district court should have looked to the prevailing rate for similar work in North Dakota.

[80] Comparing the hourly rates sought by Fabyanske and the rates charged by Smith Bakke proved that the billing rates Mountain Peak requested for the Fabyanske attorneys were not the ordinary rates for similar work in North Dakota. Smith Bakke handled this matter for two years and did so at rates between \$200.00 and \$300.00 per hour. (Index #477). Smith Bakke is a well-regarded law firm located in Bismarck, North Dakota. The rates charged by Smith Bakke are in line with what is charged in the area, and thus constitute “the fees typically charged in the locality for similar legal services.” The reasonable rates for a lodestar calculation for Mountain Peak’s attorneys was therefore between \$200.00 and \$300.00 per hour. *Id.*

[81] Mountain Peak’s decision to go outside the local market, where skilled counsel was available at a lower cost, does not alter the fee analysis required under North Dakota law. Mountain Peak was only entitled to the rates customarily charged by lawyers in the local market. *Alexander WF*, 2015 WL 12803622, at *3 (reducing fees requested by plaintiff for work done by out-of-state attorneys). Mountain Peak must bear the difference between the fees it agreed to pay and what local lawyers charge. *Id.*

[82] The district court should have reduced any recoverable attorneys’ fees to \$200.00-\$300.00 per hour; the award of fees at \$450.00 per hour was an abuse of discretion. To the extent this Court finds that any fees should have been awarded, the matter should be remanded with direction that the district court must recalculate fees at a rate not to exceed the Smith Bakke rate of \$300.00 per hour.

CONCLUSION

[83] The district court erred in awarding \$1,213,355.90 in attorneys' fees to Mountain Peak. Mountain Peak was not even entitled to an award of attorneys' fees and costs because Great Northern paid the full amount of its potential lien liability more than 10 days before any trial of the pipeline lien claim. Even if Mountain Peak had been entitled to a fee award, the reasonable and customary local hourly rate was at most \$300.00 per hour. North Dakota law requires that rate to be applied only to the time spent pursuing the statutory pipeline lien claim, and hours worked on other claims and amounts waived cannot be recovered.

Dated: January 19, 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Brief complies with the page limitations contained in Rule 32(a)(8)(A) of the North Dakota Rules of Civil Appellate Procedure.

I further certify that Appellant's Brief, including all footnotes and endnotes, is 38 pages in length.

Dated: January 19, 2021

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Supreme Court No. 20200260

State of North Dakota**In Supreme Court**

Tesoro Great Plains Gathering & Marketing, LLC
f/k/a Great Northern Gathering & Marketing LLC,

Plaintiff/Appellant,

v.

Mountain Peak Builders, LLC,

Defendant/Respondent.

I hereby certify that on January 8, 2021, I caused the following documents:

1. Appellant's Brief; and
2. Appellant's Appendix

to be electronically filed with the Clerk of Supreme Court through the North Dakota Supreme Court E-Filing Portal and that an electronic copy of the same was sent to the following:

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In Supreme Court

Tesoro Great Plains Gathering & Marketing, LLC
f/k/a Great Northern Gathering & Marketing LLC,

Plaintiff/Appellant,

v.

Mountain Peak Builders, LLC,

Defendant/Respondent.

I hereby certify that on January 19, 2021, I caused the following **corrected** documents:

1. Appellant's Brief; and
2. Appellant's Appendix

to be electronically filed with the Clerk of Supreme Court through the North Dakota Supreme Court E-Filing Portal and that an electronic copy of the same was sent to the following:

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Supreme Court No. 20200260

State of North Dakota

In Supreme Court

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Defendant/Respondent.

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1. Appellant's Brief; and
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