

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/Appellee.

---

**Mountain Peak Builders LLC's Petition for**  
**I. Rehearing on Issue of Fees and**  
**II. Clarification of Case Disposition**

---

Appeal from Summary Judgment Order of March 27, 2020, Attorneys' Fee Order of  
August 5, 2020, and Judgment entered on August 10, 2020

Dist. Ct. No. 27-2015-cv-00222  
McKenzie County District Court  
The Honorable Robin A. Schmidt, Presiding

---

FABYANSKE, WESTRA, HART & THOMSON,  
P.A.

Matthew T. Collins (#07295)  
Kyle E. Hart (#P00227)  
Nathan R. Sellers (#P01195)  
333 South Seventh Street, Suite 2600  
Minneapolis, MN 55402  
(612) 359-7600

Attorneys For Appellee

Dated: June 21, 2021

## Table of Contents

<b>Table of Authorities</b> .....	p. 3
<b>Part I – Petition for Rehearing on Issue of Attorneys’ Fees</b> .....	[¶ 1]
a. Background .....	[¶ 1]
b. Contents of Petition for Rehearing .....	[¶ 3]
c. Argument .....	[¶ 4]
<b>Part II – Petition for Clarification of Case Disposition</b> .....	[¶ 22]
<b>Certificate of Compliance</b> .....	p. 11

## Table of Authorities

### Cases

<i>Dakota Heritage Bank v. Iacone</i> , 2013 ND 15, 828 N.W.2d 54 .....	[¶ 24]
<i>Dowhan v. Brockman</i> , 2001 ND 70, 624 N.W.2d 690 .....	[¶¶ 9, 15]
<i>Lemer v. Campbell</i> , 1999 ND 223, 602 N.W.2d 686.....	[¶ 20]
<i>Montana-Dakota Utilities Co. v. Amann</i> , 81 N.W.2d 628 (N.D. 1957) .....	[¶ 24]
<i>Sanders v. Gravel Prods., Inc.</i> 2008 ND 161, 755 N.W.2d 826.....	[¶ 21]
<i>Snider v. Dickinson Elks Bldg., LLC</i> , 2016 ND 162, 883 N.W.2d 475 ...	[¶¶ 16, 17, 18, 19]
<i>Strand v. Cass Cnty.</i> , 2008 ND 149, 753 N.W.2d 872 .....	[¶ 7]
<i>Van Klootwyk v. Baptist Home, Inc.</i> , 2003 ND 112, 665 N.W.2d 679.....	[¶ 8]
<i>Van Sickle v. Hallmark &amp; Assocs.</i> , 2013 ND 218, 840 N.W.2d 92 .....	[¶ 9]

### Statutes

N.D.C.C. § 28-20-11 .....	[¶ 6]
N.D.C.C. § 28-26-01 .....	[¶ 7]
N.D.C.C. § 28-26-06.....	[¶ 25]
N.D.C.C. § 32-01-02.....	[¶ 4]
N.D.C.C. § 32-01-06.....	[¶ 4]
N.D.C.C. § 35-24-14.....	[¶ 10]
N.D.C.C. § 35-24-15.....	[¶ 10]
N.D.C.C. § 35-24-16.....	[¶ 10]
N.D.C.C. § 35-24-17.....	[¶ 10]
N.D.C.C. § 35-24-19.....	[¶¶ 3, 11, 12, 15]

### Other Authorities

<i>Black's Law Dictionary</i> (6th ed. 1990).....	[¶ 8]
<i>Black's Law Dictionary</i> (14th ed. 2014).....	[¶ 8]

### Rules

N.D.R.Civ.P. 54(b) .....	[¶¶ 6, 18]
--------------------------	------------

## **Part I – Petition for Rehearing on Issue of Attorneys’ Fees**

### **a. Background**

[¶ 1] In February 2020, after Mountain Peak had moved for summary judgment on its lien foreclosure claim, Great Northern paid Mountain Peak the full amount owed under the parties’ contract. App.086 ¶ 4. The trial court nonetheless granted summary judgment on the lien foreclosure claim. App.085–089. The trial court thereafter amended its judgment to award Mountain Peak its attorneys’ fees, under N.D.C.C. § 35-24-19. App.091–097. Great Northern appealed.

[¶ 2] On June 3, 2021, this Court held that the trial court erred as a matter of law when it ordered the lien foreclosed. Op. ¶ 10. The Court further held that because the trial court entered summary judgment on the lien claim in error, an award of fees under Section 35-24-19 could not be sustained. *Id.* ¶¶ 13-14.

### **b. Contents of Petition for Rehearing**

[¶ 3] Mountain Peak believes the Court misapprehended the following:

- a. It is well settled that the term “civil action” or “action” is broader than the term “claim.” An “action” may be comprised of several claims or counterclaims.
- b. The operative term in Chapter 35-24 is “civil action” or “action.” Specifically, the plain language of N.D.C.C. § 35-24-19 mandates an award of a reasonable attorney’s fee to the prevailing party in “the action.”
- c. This Court should give the term “action” its plain, ordinary meaning and should not unduly narrow it to mean “claim.” Thus, even if Mountain Peak was not entitled to foreclose its lien claim, Mountain Peak could still be the prevailing party in “the action.”
- d. This Court should (i) remand to the trial court to determine whether Mountain Peak was the prevailing party in “the action” even if it did not prevail on its lien foreclosure claim, (ii) request reargument or resubmission regarding the question, or (iii) rule as a matter of law that Mountain Peak was the prevailing party in “the action.”

### c. Argument

[¶ 4] “An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.” N.D.C.C. § 32-01-02 (defining “action”). “A civil action is any action other than a criminal action.” *Id.* § 32-01-06 (defining “civil action”).

[¶ 5] In numerous contexts, the Legislature, the drafters of the Rules of Civil Procedure, and this Court have recognized that “action” is not synonymous with “claim.” Instead, a “civil action” or “action” is broader than “claim” and encompasses *all* of the claims for relief asserted by the parties.

[¶ 6] For example, under statute and procedural rule, a “judgment” refers to final resolution of all *claims* in the *action*. According to N.D.C.C. ch. 28-20, which governs Judgments, “The judgment must specify clearly the relief granted or other determination of *the action*.” N.D.C.C. § 28-20-11. The Rules of Civil procedure further clarify that entry of judgment generally resolves all of the claims for relief in the case:

*If an action presents more than one claim for relief, . . . the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.*

N.D.R.Civ.P. 54(b) (emphasis added).

[¶ 7] Other statutes recognize the same distinction: “action” is broader than “claim.” Section 28-26-01, N.D.C.C., provides, “In civil actions” the court must award costs and reasonable attorney’s fees upon a finding that “a claim for relief” was frivolous.

*See also Strand v. Cass Cnty.*, 2008 ND 149, ¶ 20–22, 753 N.W.2d 872 (explaining that a single frivolous request for relief—i.e., claim—may warrant an award of fees under Section 28-26-01 to the prevailing party in the action).

[¶ 8] The dictionary definitions of “action” and “claim” lend further support. As previously recognized by this court, “An action ‘in its usual legal sense means a lawsuit brought in a court.’ ” *Van Klootwyk v. Baptist Home, Inc.*, 2003 ND 112, ¶ 16, 665 N.W.2d 679 (quoting *Black’s Law Dictionary* 28 (6th ed. 1990)). In *Van Klootwyk*, this court explained, “An ‘allegation’ is not synonymous with an ‘action.’ ” *Ibid.* The same can be said for a “claim.” *Black’s* defines “claim” as “the part of a complaint in a civil action specifying what relief the plaintiff asks for.” *Black’s Law Dictionary* 301 (10th ed. 2014). In other words, a “claim” is one part and “the action” is the whole.

[¶ 9] Lastly, in the context of a prevailing party determination, such as the one at issue here, this court has held that even where both parties below prevail on some claims, determination of the prevailing party must be made based upon which party prevails on the significant issues in the “action.” *Dowhan v. Brockman*, 2001 ND 70 ¶¶ 4, 11, 13, 624 N.W.2d 690; *see also Van Sickle v. Hallmark & Assocs.*, 2013 ND 218, ¶¶ 41–45, 840 N.W.2d 92. That is consistent with the language of N.D.C.C. § 28-26-06, which provides, “In all *actions*,” the district court clerk must tax certain disbursements “as part of the judgment in favor of the prevailing party.” (Emphasis added.) Costs are not taxed on a claim-by-claim basis, but based on the party who prevailed in *the case*.

[¶ 10] Turning to the statute at issue here, N.D.C.C. ch. 35-24 addresses suits to foreclose a lien beginning in Section 35-24-14. That section refers specifically to enforcement by “civil action”:

Any lien provided for by this chapter may be enforced by *civil action* in the district court . . . . *Such action* must be brought within two years from the time of the filing of the lien statement . . . .

N.D.C.C. § 35-24-14 (emphasis added). The statutory sections that follow refer to “such actions,” “such action,” “several actions,” “any action,” and “actions.” *See* N.D.C.C. §§ 35-24-15, 35-24-16, 35-24-17. Although these sections do not use the specific term “civil action,” the obvious and necessary implication is that use of the word “action” in these sections refers to the “civil action” first identified in the Section 35-24-14.

[¶ 11] That brings us to Section 35-24-19, which provides, “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*.” N.D.C.C. § 35-24-19 (emphasis added). The Legislature could have limited recovery of attorney’s fees to the party prevailing on the lien foreclosure *claim*. But the Legislature did not do so.<sup>1</sup>

[¶ 12] Instead, as shown above, the plain, ordinary meaning of “civil action” or “action” is the entire proceeding in the district court, encompassing all claims between the parties. Because section 35-24-19 prescribes recovery of fees to the party for whom judgment is rendered in *the action*, recovery of fees is not dependent on prevailing specifically on the lien foreclosure *claim*.

---

<sup>1</sup> The Legislature has demonstrated within Chapter 35-24 that, where necessary, it can distinguish between the action (as a whole), and its various components. Namely, section 35-24-15 provides that in a civil action brought to foreclose a well or pipeline construction lien by someone other than an original contractor, the owner may withhold from the original contractor the expenses of defending the claim “[u]ntil all *claims, costs, and expenses* are finally adjudicated.” N.D.C.C. § 35-24-15 (emphasis added).

[¶ 13] Mountain Peak made this argument in its brief. *See* MP Br. ¶¶ 35-45. It appears, however, that this Court overlooked or misapprehended the argument.

[¶ 14] This Court’s opinion says, “Mountain Peak claims it is entitled to an award of fees and costs because it prevailed when the parties arbitrated their breach of contract claims.” Op. ¶ 10. The Court then rejects that claim, reasoning, “Nor can the judgment Mountain Peak obtained in the Minnesota case support an award of fees and costs.” Op. ¶ 14.

[¶ 15] Mountain Peak did not and does not argue that the judgment in the Minnesota case alone provides a basis for an award of fees under Section 35-24-19. Instead, Mountain Peak’s argument—based on this court’s precedent—is that determination of a prevailing party is based on which party prevails on the “significant issues” in the “action.” *See Dowhan*, 2001 ND 70, ¶ 13. *See also* MP Br. ¶¶ 41, 44. When considering the action as a whole, Mountain Peak contends it was the winner and Great Northern was the loser. And because Section 35-24-19 mandates a reasonable attorneys’ fee in favor of the party for whom judgment is rendered in “the action,” Mountain Peak is entitled to recover its fees regardless of whether it could foreclose its lien.

[¶ 16] In its Opinion, this Court cites *Snider v. Dickinson Elks Bldg., LLC*, 2016 ND 162, ¶ 12, 883 N.W.2d 475, for the proposition that “Claims for enforcement of a lien are separate and distinct from an underlying breach of contract claim.” Op. ¶ 14. Mountain Peak agrees with the stated proposition. But that proposition and *Snider* support an award of fees in the case rather than defeat it.

[¶ 17] In *Snider* (which was not cited by either party in briefing), a contractor sued a property owner seeking foreclosure of its construction lien and a money judgment.



2016 ND 162, ¶ 2. The district court granted summary judgment to the owner on the lien claim and awarded the owner fees. ¶ 4. The summary judgment order, however, did not resolve the contractor's claim for money judgment. *Id.* ¶ 11.

[¶ 18] This Court dismissed the owner's appeal because the judgment below was not final. *Id.* ¶ 7. After setting forth N.D.R.Civ.P. 54(b), this court explained: “ ‘A party seeking to appeal must wait until the end of *the case*, when all *claims* have been resolved and final judgment has been entered, before filing an appeal.’ ” *Id.* ¶ 6 (emphasis added) (quoting N.D.R.Civ.P. 54, Explanatory Note). And because the contractor's *claim* for money judgment remained unresolved, the *case* below was not over. *Id.* ¶ 12.

[¶ 19] In short, *Snider* substantiates the notion that “the action” = “the case” and “the action” ≠ “claim.” “The action” encompasses all of the “claims.” And given that “claims for enforcement of a lien are separate and distinct from an underlying breach of contract claim,” the logical inference is that a party's failure to prevail on its lien claim does not necessarily mean that the party failed to prevail in “the action.”

[¶ 20] This Court seems to have misapprehended that principle. In its Opinion, the Court reasoned, “Even if Mountain Peak prevailed on its contract claim, no valid judgment was entered in its favor in action brought to enforce a pipeline lien under N.D.C.C. ch. 35-24.” Op. ¶ 14. That contravenes the plain, ordinary meaning of “action” and “claim.” Even if Mountain Peak did not prevail on its lien foreclosure *claim*, it can still be considered a prevailing party in the *action* if the contract claim resolved the “main issue” in the case. *Lemer v. Campbell*, 1999 ND 223, ¶ 9, 602 N.W.2d 686.

[¶ 21] Because the trial court granted summary judgment in favor of Mountain Peak on its lien foreclosure claim, it did not pass on the question whether Mountain Peak

was the prevailing party in the action even if it could not foreclose its lien. Hence, this Court may remand to the trial court for determination of the issue or may restore the case for reargument or resubmission. *See* N.D.R.App.P. 35(a)(3)(B), 40(a)(4)(B). Or this Court may affirm the Judgment on the grounds that Mountain Peak was the party who prevailed on the merits of the main issue in the case. *See* MP Br. ¶¶ 40–44 (citing *Sanders v. Gravel Prods., Inc.* 2008 ND 161, ¶ 9, 755 N.W.2d 826).

## **Part II – Petition for Clarification of Case Disposition**

[¶ 22] In the trial court, Mountain Peak moved for an award of costs and disbursements under N.D.C.C. ch. 28-26. *See* Index #446. The trial court awarded Mountain Peak costs and disbursements in the amount of \$165,696.90, App.097 ¶ 25, and entered judgment in Mountain Peak’s favor in that amount, App.098 ¶ 2.

[¶ 23] Great Northern did not appeal the awarded costs and disbursements. *See* App. 099-100. Notably, Great Northern’s Notice of Appeal and Brief do not mention the costs and disbursements and do not even reference N.D.C.C. ch. 28-26.

[¶ 24] Issues not raised on appeal are not before this Court. *See Montana-Dakota Utilities Co. v. Amann*, 81 N.W.2d 628, 633 (N.D. 1957) (“On appeal from part of a judgment, order or decree, the part not appealed from is not before the appellate court for review.”); *see also Dakota Heritage Bank v. Iaccone*, 2013 ND 15, ¶ 2, 828 N.W.2d 546 (“[T]hat order was not appealed, so it is not before us, and we do not decide it.”).

[¶ 25] Therefore, regardless of how this Court resolves Mountain Peak’s foregoing Petition for Rehearing on Issue of Attorneys’ Fees, this Court should clarify its June 3, 2021 Opinion to reflect that the trial court’s award of disbursements under N.D.C.C. § 28-26-06 is not altered.

**FABYANSKE, WESTRA, HART & THOMSON,  
P.A.**

Dated: June 21, 2021

By: s/ Kyle E. Hart

Matthew T. Collins (#07295)  
Kyle E. Hart (#P00227)  
Nathan R. Sellers (#P01195)  
333 South Seventh Street, Suite 2600  
Minneapolis, MN 55402  
(612) 359-7600  
[mcollins@fwhtlaw.com](mailto:mcollins@fwhtlaw.com)  
[khart@fwhtlaw.com](mailto:khart@fwhtlaw.com)  
[nsellers@fwhtlaw.com](mailto:nsellers@fwhtlaw.com)

Attorneys For Appellee

### **Certificate of Compliance**

In accordance with Rules 32(e) and 40(b), the undersigned hereby certifies that the above petition contains 10 pages, which is within the page limit of 10 pages.

**FABYANSKE, WESTRA, HART & THOMSON,  
P.A.**

Dated: June 21, 2021

By: s/ Kyle E. Hart

Matthew T. Collins (#07295)  
Kyle E. Hart (#P00227)  
Nathan R. Sellers (#P01195)  
333 South Seventh Street, Suite 2600  
Minneapolis, MN 55402  
(612) 359-7600  
[mcollins@fwhtlaw.com](mailto:mcollins@fwhtlaw.com)  
[khart@fwhtlaw.com](mailto:khart@fwhtlaw.com)  
[nsellers@fwhtlaw.com](mailto:nsellers@fwhtlaw.com)

Attorneys For Appellee