

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

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<p><b>State of North Dakota by Workforce Safety and Insurance,</b></p> <p style="text-align:center"><b>Plaintiff and Appellee,</b></p> <p style="text-align:center">vs.</p> <p><b>Terry Kemmet, d/b/a K &amp; K Well Drilling,</b></p> <p style="text-align:center"><b>Defendant and Appellant.</b></p>	<p><b>Supreme Court No.: 20210063</b> <b>Kidder County District Court</b> <b>Civil No.: 22-2019-CV-00059</b></p> <p style="text-align:center"><b>ORAL ARGUMENT REQUESTED</b></p>
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**BRIEF OF APPELLEE NORTH DAKOTA  
WORKFORCE SAFETY AND INSURANCE**

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**APPEAL FROM NOTICE OF ENTRY OF OPINION AND ORDER  
DATED DECEMBER 22, 2020, RE: DEFENDANT'S MOTION FOR  
RECONSIDERATION OF SUMMARY JUDGMENT  
DATED DECEMBER 18, 2020  
KIDDER COUNTY DISTRICT COURT  
CIVIL NO.: 22-2019-CV-00059  
SOUTHEAST JUDICIAL DISTRICT  
THE HONORABLE JAY SCHMITZ**

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## **STATEMENT OF THE ISSUES**

[1] Whether this appeal was timely filed.

[2] Whether the District Court properly granted the Summary Judgment in favor of Appellee Workforce Safety and Insurance (“WSI”).

## **REQUEST FOR ORAL ARGUMENT**

[3] Pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure, Appellee Workforce Safety and Insurance requests oral argument. WSI believes oral argument may assist the Court in understanding the procedural history relating to a prior administrative hearing and appeal, and issues raised during the prior proceeding. It is also believed that oral argument will assist the Court in evaluating the arguments relating to proper application of the law.

## **STATEMENT OF THE CASE**

[4] WSI commenced this collection action by service of a Summons and Complaint on Terry Kemmet d/b/a K & K Well Drilling (“Kemmet”) on September 30, 2019. (WSIAppx. 8-12) On July 14, 2020, WSI served and filed a Motion for Summary Judgment. See Docket ID # 25-42. On July 17, 2020, Appellee filed several Motions to Dismiss. See Docket ID # 43-51, 54-55. A hearing was held on the Motions on September 8, 2020. See Docket, WSIAppx. 4-7.

[5] On September 11, 2020, the District Court entered an Order Denying Defendant’s Motions to Compel Discovery and Motions to Dismiss. (WSIAppx. 13-14) On October 2, 2020, the Court issued a Memorandum Opinion and Order regarding Plaintiff’s Motion for Summary Judgment, granting WSI summary judgment on its claims. See Docket ID # 72 (WSIAppx. 15-19) Judgment was entered in favor of WSI

on October 7, 2020. (WSIAppx. 20) Notice of Entry of that Judgment was also served on October 7, 2020. (WSIAppx. 21)

[6] On October 15, 2020, Kemmet filed a Notice to Reconsider Judgment. (WSIAppx. 22-33) Kemmet filed an Amendment to that Motion on October 20, 2020. (WSIAppx. 34-39) WSI submitted a Brief in opposition to that Motion on October 21, 2020. See Docket ID # 86. On December 18, 2020, the Court entered its Opinion and Order Regarding Defendant's Motion for Reconsideration of Summary Judgment, denying the Motion. (WSIAppx. 40-44) Notice of Entry of that Order was served December 22, 2020. (WSIAppx. 45)

[7] On February 24, 2021, Kemmet filed his appeal with this Court. See Supreme Court Docket, Case No. 20210063; WSIAppx. 46-47.

### **STATEMENT OF FACTS**

[8] On October 13, 2016, WSI issued an Administrative Order wherein WSI found Kemmet was an employer under N.D.C.C. § 65-04-04 and owed premiums, penalties and interest dating back to August of 2010. (WSIAppx. 48-60) Kemmet requested rehearing from that Order. In the administrative proceeding that followed Kemmet raised issues concerning jurisdiction of WSI and the authority of the administrative law judge to hear the appeal. Several orders that addressed the legal issues raised by Kemmet were issued. (WSIAppx. 61-63, 64-65, 66-69, 70-74) On November 7, 2018, an Administrative Law Judge issued Findings of Fact, Conclusions of Law and Final Order. (WSIAppx. 75-83) The administrative law judge concluded that "the greater weight of the evidence establishes that Mr. Kemmet is an employer." (WSIAppx. 82) The ALJ affirmed that Kemmet owed premiums, penalties and interest as determined

by WSI in the amount of \$69,480.69 less an amount attributable to one individual for the period August 10, 2010, through August 1, 2016. (WSIAppx. 83)

[9] Kemmet filed an appeal to the District Court, Burleigh County, from the Findings of Fact, Conclusions of Law and Final Order of November 7, 2018. (WSI Appx. 84-97) In that appeal, Kemmet raised errors of law relating to jurisdiction, whether he was an employer, whether he personally owed anything to WSI, and constitutional issues. (Id.) On June 11, 2019, the District Court, the Honorable Cynthia M. Feland issued an Order Affirming Hearing Officer's Decision. (WSIAppx. 98-116) In that Order, the District Court addressed Kemmet's claim that he was not an "employer" of the individuals identified in the administrative law judge's decision; a service of process issue; that there was personal jurisdiction over Kemmet in the administrative proceeding; whether WSI's issuance of administrative subpoenas to obtain bank records was proper; that the administrative law judge had authority to make decisions in the administrative proceeding; and the arguments that the actions taken by WSI were unconstitutional. (Id.) The District Court rejected all Kemmet's arguments and affirmed the ALJ's decision. (Id.) Kemmet took no further appeal from that decision.

[10] In February of 2019, Kemmet filed a separate action in Burleigh County District Court against two administrative law judges that were assigned to hear his appeal of WSI's Order, Governor Burgum, Attorney General Stenehjem, WSI Director Klipfel and WSI employee Barry Schumacher. (WSIAppx. 117-126) The District Court dismissed that action on April 17, 2019, as an impermissible collateral attack on the decision issued by the administrative law judge. (WSIAppx. 127-130) The dismissal of

that action was summarily affirmed by this Court. Kemmet v. Steiner, 2019 ND 267, 935 N.W.2d 258.

[11] In September of 2019, WSI commenced this action against Kemmet for collection of the amounts that had been confirmed as owing in the administrative proceeding. (WSIAppx. 8-12) WSI made calculations relating to the amount due pursuant to the administrative law judge's decision for the period August 1, 2010, through August 1, 2016. See Affidavit of Lisa Honeyman, Docket ID # 40. WSI also sought in this action premiums for three payroll periods after the ALJ decision through July 31, 2019. Id. Because Kemmet had not filed any payroll reports for those periods, WSI calculated the premium based on statute. N.D.C.C. § 65-04-19(3). Id.

[12] WSI moved for summary judgment in its favor on the amounts sought in its Complaint for time periods dating back to August of 2010 through July 31, 2019. (See Docket ID # 25-42) Kemmet filed several Motions to Dismiss the action. See Docket ID # 43-51. The Court heard arguments on the Motions on September 8, 2020. See Docket, WSIAppx. 6). The Court entered its Order denying Kemmet's Motion to Dismiss on September 10, 2020. (WSIAppx. 13-14). The Court's Order provided the following:

Defendant's Motion to Dismiss for violation of due process in obtaining evidence. The Court finds that this issue was addressed in a prior administrative proceeding, which was affirmed by the Burleigh County District Court, Case No. 08-2018-CV-03158, and is therefore res judicata.

Defendant's Motion to Dismiss for failure to state a claim upon which relief can be granted relating to subject matter jurisdiction and whether he is an "employer" under Title 65 was decided in the prior administrative proceeding, which was affirmed by the Burleigh County District Court, Case No. 08-2018-CV-03158, and therefore these issues are res judicata. The Court finds no merit to the Motion to Dismiss relating to the issue of whether a verified complaint was required in this proceeding.

Defendant's Motion to Dismiss alleging unconstitutional overreach of authority. These issues are the same as those raised in the appeal of the administrative decision, which was affirmed by the Burleigh County District Court, Case No. 08-2018-CV-03158, and therefore these issues are res judicata, and also raised in a separate action filed by Defendant, Burleigh County Case No. 08-2019-CV-593, the dismissal of which was affirmed by the Supreme Court in Kemmet v. Steiner, 2019 ND 267.

Further, the Court denies any request for relief pursuant to the "affidavit of probable cause" filed by Defendant.

(WSIAppx. 13-14). The District Court went on to grant WSI's Motion for Summary Judgment. (WSIAppx. 15-19) The Court's analysis of its decision granting WSI's Motion was as follows:

I conclude as a matter of law that Kemmet's status as an employer, and the amount of his liability for premiums, interest and penalties, for the period from 2010-2016 is res judicata by reason of the prior administrative adjudication and its affirmance by the Burleigh County District Court. Regarding the succeeding three premium periods (2016-19), WSI filed an affidavit of a WSI collections supervisor stating that Kemmet failed to file the required payroll reports, and therefore WSI assessed premiums pursuant to the statutory criteria of N.D.C.C. § 65-04-19(3). [Docket No. 40, ¶4]. The affidavit states that the total amount due for premiums, interest and penalties for the period from 2010-2019 is \$147,161.26. [See ¶ 5].

The defendant has not filed any affidavits or other evidence in opposition to the motion. In evaluating a summary judgment motion, the court may consider "the pleadings, the discovery and disclosure materials on file, and any affidavits." R.Civ.P. 56(c)(3). After reviewing all of Kemmet's pleadings, and construing them in a light most favorable to him, I cannot find any statement that can be construed as a factual assertion that he did not hire or employ others in his well-drilling business during the period 2016-2019. His argument that he is not an "employer" is based on a legalistic parsing of the meaning of the word "includes," but he never explains how a definition that says the term employer "includes . . . *Every person* [that engages or received the services of another for remuneration]" does not include him. [N.D.C.C. §65-01-02(17); see Opposition brief, Docket No. 63, ¶2.] His argument also seems to collide head-on with his ensuing, somewhat incomprehensible argument that WSI, as a "dead (state-protected) corporation," does not have standing to "sue a live person" like him. [Docket No. 63, ¶7] Pro se litigants are

entitled to some leniency in regard to procedure, but I am not allowed to excuse Kemmet entirely from meeting the requirements of Rule 56(c)(3).

Accordingly, I conclude as a matter of law that the plaintiff has met its burden of showing that there is no triable issue as to any of these material facts: (1) Kemmet's status as an employer, and his liability for workers compensation insurance premiums, interest and penalties totaling \$69,248.96 for the period from August 1, 2010, through August 1, 2016, is res judicata by reason of the adjudication in the prior administrative action. (2) Kemmet failed to file payroll reports with WSI for the periods from August 2, 2016, through July 31, 2017; August 1, 2017, through July 31, 2018; and August 1, 2018, through July 31, 2019. (3) WSI assessed premiums for those periods in accordance with the criteria of N.D.C.C. § 65-04-19(3). (4) Kemmet has received notice of the amount due and is liable for the premiums assessed for the periods from August 2, 2016, through July 31, 2017; August 1, 2017, through July 31, 2018; and August 1, 2019, through July 31, 2019, plus interest and penalties. (5) As of July 9, 2020, the total amount owing by Terry Kemmet dba K& K Well Drilling for workers compensation premiums, interest, and penalties is \$147,161.26.

The defendant asserts that WSI's inclusion of the amounts due for the 2010-2016 constitutes "double jeopardy." I conclude that WSI has not previously obtained a judgment for those amounts; the Burleigh County order affirmed WSI's administrative orders, but did not enter a monetary judgment. Therefore, Kemmet is not exposed to any risk of "double" liability.

I decline to address the defendant's arguments regarding (1) his status as a natural or corporate person, and as a citizen or "national" of the United States or North Dakota; (2) the significance of enabling clauses, and the effect of the laws codified in the North Dakota Century Code; (3) whether WSI is a "monopoly" violative of federal antitrust laws; and (4) whether "the BAR Association control[s] the judiciary system" and whether the fact that the State uses lawyers puts persons pursuing claims against the State at an unfair disadvantage. For one thing, I don't think I understand them well enough, and probably will look foolish if I attempt to address them. For another, to the extent that I do understand them, I think they are essentially the same arguments that he advanced to the Burleigh County District Court in the administrative appeal, and I don't think I can do any better than, or even as well as Judge Feland did in addressing those contentions. Finally, and foremost, I decline to address them because I find that they are not relevant to the issues presented by the motion for summary judgment.

(WSIAppx.18-19)

[13] Pursuant to the District Court's Order, Judgment was entered in WSI's favor on October 7, 2020. (WSIAppx. 20) WSI served Notice of Entry of that Judgment the same date. (WSIAppx. 21) Kemmet then filed a Motion to Reconsider the Judgment, N.D.R. Civ. P. 12 and 60. (WSIAppx. 22-33) WSI opposed the Motion. See Docket ID # 86. On December 18, 2020, the District Court issued its Order denying that Motion for Reconsideration, explaining its analysis as follows:

Mr. Kemmet's first contention is that he is not an employer. As stated in my opinion on the summary judgment motion, that issue was fully litigated and finally determined in the prior administrative and judicial proceedings between these very same parties. Therefore, the doctrine of res judicata applies. Therefore, Mr. Kemmet and this court are bound by that prior adjudication.

Mr. Kemmet next contends that WSI did not present witnesses in court to support its claims, only "a piece of paper," denying him his right to confront his accusers. Two problems here. First, confrontation is a constitutional due process right that applies in criminal cases; this is a civil case. More to the point, I think "piece of paper" refers to affidavits: An affidavit of Lisa Honeyman, a WSI collection supervisor, stating the basis, manner and amount of the premium calculation (Docket No. 40); and an affidavit of Jacqueline Anderson, who represented WSI in this case, providing evidentiary foundation for documentary exhibits relating to the prior court and administrative proceeding. [Docket Nos. 27-39]. "Pieces of paper" are evidence on a summary judgment motion under Rule of Civil Procedure 56(c)(3): "The judgment sought shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" (emphasis added). I am required to follow the law; sworn affidavits based on affiants' personal knowledge which present relevant evidence must be considered on summary judgment. These did; I considered them. Mr. Kemmet did not submit any affidavits or evidence.

I finally figured out Mr. Kemmet's next contention, that he was not provided the "contract" which created his liability to WSI: The Notice of Assignment sent to him by the court clerk calls this a "Contract/collection" action, she he thinks WSI has to prove it had a contract with him. I will repeat what I said at the summary judgment hearing: WSI's complaint is based on Mr. Kemmet's STATUTORY

obligation under North Dakota Century Code Title 65, and as an employer doing business in North Dakota, to pay worker's compensation premiums; it never alleged that any contract existed and none of its claims were based on contract. The clerk's description is an administrative coding function, it does not determine the nature of the action.

Mr. Kemmet's next contention is a winding dissertation on his theory that K&K Drilling is not an employer, beginning with getting a bill from McDonald's and culminating in something about Amy Coney Barrett's confirmation hearing. Frankly, I think it is gibberish. I agree that not every person is an "employer"; I never said they were. I said a person "*who engages or receives the services of another person for remuneration*" is an employer (as in, "you pay other people to help you drill wells"). See N.D.C.C. § 65-01-02(17). The defendant's assertion that the definition of "employee" is limited to government workers, aliens, and minors is ludicrous. Section 65-01-02(16) defines "employee" as any "individual who performs hazardous employment for another for remuneration [unless they are independent contractors]," as in, "the people who you paid to help you drill wells." The term "includes" does not limit the general definitions of these terms, it merely identifies specific applications of the general definitions. I know Mr. Kemmet doesn't agree; I will conclude simply by saying that I think I correctly interpreted the law in rendering my decision on summary judgment.

Next, Mr. Kemmet's "questions of law" simply are not germane to the issues which were raised by WSI's evidence that a prior court found that K&K hired other persons to help Mr. Kemmet drill wells, or WSI's evidence that he failed or refused to turn over information for subsequent years so WSI calculated K&K's premiums based on a "default" formula authorized by N.D.C.C. § 65-04-19. This court is not a "Philosophy of Law and Government" class.

- A. WSI is more assuredly not a legal fiction, it is a governmental entity operating under the authority of the North Dakota legislature as stated in Title 65 of the North Dakota Century Code.
- B. If WSI is an illegal monopoly under federal law, I certainly have not been presented with any legal or evidentiary support for the proposition; I don't even know whether federal ant-trust law authorizes a state court judge to decide such a question.
- C. I am pretty sure that Mr. Kemmet is an "American National," though I think he thinks that carries some legal significance that I don't think it does; the important thing to me is that there was indisputable proof that he lives and works in Kidder County, North Dakota, so this court has personal jurisdiction over him.

- D. I have no inclination to address his fixation on enabling statutes, as I am as sure as I can be that the statutes compiled in the North Dakota Century Code are valid, existing laws of this state.
- E. It would be a waste of time to try to refute Mr. Kemmet's belief that the "BAR association [I assume he means the State Bar Association of North Dakota, but I'm not positive] controls the judiciary." All I get from SBAND are notices to pay dues and to provide proof of continuing education hours. I understand his insinuations perfectly, but he doesn't give any evidence for it, and paranoid conspiracy theories just aren't my thing.
- F. Double jeopardy, like confronting one's accusers, does not apply to this civil action because it is a constitutional concept applicable only in criminal cases. And, as I said in my first decision, the first proceeding was an administrative action by WSI to determine if Mr. Kemmet was an "employer" during the period from 2012-16 (sic), which finding was affirmed on appeal by the Burleigh County District Court; in this action, WSI sought a money judgment for the amount of worker's compensation premiums that Mr. Kemmet was found liable for from 2012-16 (sic), plus additional premiums assessed for 2017-19. Different issues, no double liability.

Next, I would appreciate some specifics on Mr. Kemmet's accusation that I had a "conversation" with WSI's attorney that "indicated there was a relationship of 'we against you.'" I will state categorically that no such conversation occurred, and that I have no interest – none – in who wins this case. I granted summary judgment because WSI's affidavits and evidence showed that the material facts were undisputed, Mr. Kemmet filed NO evidence to raise a dispute, and I concluded that North Dakota law says that under the undisputed facts established by WSI, Kemmet owed worker's compensation premiums. Period. If the defendant disagrees with my decision, I encourage him to appeal to the North Dakota Supreme Court; if they agree with him, I will say "my ruling was erroneous." Period. Also, he may want to be ready to give some proof for his accusation of perjury by WSI's attorney, because the bare accusation sounds a lot like libel.

The defendant has not shown any basis for relief under North Dakota Rule of Civil Procedure 60(b).

(WSIAppx. 40-44) Notice of Entry of this Order was served on December 22, 2020.

(WSIAppx.45). In a Notice of Appeal dated February 21, 2021, and filed with the Court

on February 24, 2021, Kemmet appealed from the “Summary judgment entered December 22, 2020.” (WSIAppx. 46-47)

## **LAW AND ARGUMENT**

### **I. STANDARD OF REVIEW ON APPEAL.**

[14] Whether the district court properly granted summary judgment is a question of law which this Court reviews de novo. Wenco v. EOG Resources, Inc., 2012 ND 219 ¶ 8, 822 N.W.2d 701. This Court’s standard for reviewing a district court’s grant of summary judgment is well-established:

Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Markgraf v. Welker, 2015 ND 303, ¶ 10, 873 N.W.2d 26 (quoting Hamilton v. Wolf, 2012 ND 238, ¶ 9, 823 N.W.2d 753).

### **II. THIS APPEAL WAS NOT TIMELY SERVED AND FILED AND SHOULD BE DISMISSED.**

[15] N.D.R. App. P. 4(a)(1) outlines the time for filing the Notice of Appeal is a civil case as “within 60 days from service of notice of entry of the judgment or order being appealed.” Kemmet’s Notice of Appeal reflects that it was taken from the

“Summary Judgment entered on December 22, 2020.” (WSIAppx. 46-47) On December 22, 2020, WSI served Notice of Entry of Order entered by the District Court on Kemmet’s Motion for Reconsideration of Summary Judgment that had been issued December 18, 2020. (WSIAppx. 45)

[16] Procedurally, the District Court granted WSI’s Motion for Summary Judgment on October 2, 2020. (WSIAppx. 15-19) Judgment and Notice of Entry of Judgment consistent with the Court’s decision was entered and served October 7, 2020. (WSIAppx. 20) Kemmet filed a Motion to Reconsider that decision and Judgment on October 15, 2020. See Docket ID # 82 (WSIAppx. 22-33). Under N.D.R. App. P. 4(a)(3)(A)(vi) if a party files a motion for relief under Rule 60, and that Motion is served and filed no later than 28 days after notice of entry of judgment, the time to appeal runs from service of notice of entry of the order disposing of that motion. Thus, the time for appeal from the District Court decision denying the motion to reconsider the judgment would run from December 22, 2020, the date WSI served Notice of entry of the Order denying Kemmet’s Motion to Reconsider. Kemmet, therefore, had 60 days from December 22, 2020, to file this appeal with the clerk of the supreme court.

[17] The Court’s docket and the Court’s stamp of when filed with the Court reflects that Kemmet’s appeal was filed February 24, 2021. (WSIAppx. 46) Sixty days from December 22, 2020, is February 20, 2021. However, because February 20, 2021, was a Saturday, the time for filing the appeal would have been extended to February 22, 2021 under N.D.R. App. P. 26(a)(1)(C). Kemmet’s appeal, therefore, was not filed within 60 days and is therefore untimely because it was not filed until February 24, 2021.

[18] “The time for filing an appeal is jurisdictional.” LaRocque v. LaRocque, 1998 ND 143 ¶ 4, 582 N.W.2d 645. Because Kemmet’s appeal was not filed with this Court within 60 days of Notice of entry of the Order, this Court is without jurisdiction to consider the appeal and the same must be dismissed. Id. ¶ 9.

**III. THE DISTRICT COURT PROPERLY GRANTED WSI’S MOTION FOR SUMMARY JUDGMENT AND DENIED KEMMET’S MOTION TO RECONSIDER.**

[19] In this collection action brought by WSI, it sought premiums, penalties, and interest through July 31, 2019. As the facts outlined above reflect, part of those premiums, penalties and interest were for the period August 10, 2010, through August 1, 2016, that had been determined due and owing in an administrative proceeding before an administrative law judge. (WSIAppx. 70-83) Kemmet appealed that decision to the District Court (WSIAppx. 84-97), which affirmed the ALJ’s decision. (WSIAppx. 98-116)

[20] The remaining premium, penalties and interest from August 2, 2016, through July 31, 2019, were calculated based on N.D.C.C. § 65-04-19 because no accurate and reliable payroll information was provided by Kemmet. See Affidavit of Lisa Honeyman, Docket ID # 40-41.

[21] In response to WSI’s claims in this action, the only defenses raised by Kemmet were those he raised in the administrative proceeding before the administrative law judge and the subsequent appeal to the District Court. In the administrative proceeding, the administrative law judge determined that Kemmet was an employer under Title 65 of the North Dakota Century Code and was liable for unpaid premiums, penalties, and interest through August 1, 2016. (WSIAppx. 70-83) As to these

premiums, penalties and interest that were the subject of the administrative proceeding, the District Court concluded that Kemmet's status as an employer and liability for those amounts was res judicata by reason of that prior administrative action. (WSIAppx. 17) This decision is in accordance with the law and should be affirmed.

[22] The issue of application of res judicata and collateral estoppel is a question of law for determination by the Court and appropriate for determination on summary judgment. See Ungar v. North Dakota State University, 2006 ND 185, 721 N.W.2d 16 (affirming summary judgment dismissing claims based on res judicata and collateral estoppel). In Ungar, this Court outlined the principles and application of res judicata and collateral estoppel as follows:

The doctrines of res judicata and collateral estoppel bar courts from relitigating claims and issues in order to promote the finality of judgments, which increases certainty, avoids multiple litigation, wasteful delay and expense, and ultimately conserves judicial resources. Simpson v. Chicago Pneumatic Tool Co., 2005 ND 55, ¶ 8, 693 N.W.2d 612; Riemers v. Peters-Riemers, 2004 ND 153, ¶ 9, 684 N.W.2d 619. The applicability of res judicata or collateral estoppel is a question of law . . . . See Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 383 (N.D. 1992).

“Although collateral estoppel is a branch of the broader law of res judicata, the doctrines are not the same.” Id. Res judicata, or claim preclusion prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies. Id. Thus, res judicata means a valid, existing final judgment from a court of competent jurisdiction is conclusive with regard to claims raised, or those that could have been raised and determined, as to their parties and their privies in all other actions. Peacock v. Sundre Twp., 372 N.W.2d 877, 878 (N.D. 1985) Res judicata applies even if subsequent claims are based upon a different legal theory. See Littlefield v. Union State Bank, 500 N.W.2d 881, 884 (N.D. 1993). Collateral estoppel, or issue preclusion, forecloses relitigation of issues of either fact or law in a second action based on a different claim, which were necessarily litigated, or by logical and necessary implication must have been litigated, and decided in the prior action. Hofsommer, 488 N.W.2d at 383. For purposes of both res

judicata and collateral estoppel, only parties or their privies are bound by an earlier judgment. Id. at 384.

2006 ND 185 ¶¶ 10-11, 721 N.W.2d 16.

[23] Under N.D.C.C. § 65-05-03, a final decision of WSI “is entitled to the same faith and credit as a judgment of a court of record.” See Witcher v. North Dakota Workers Compensation Bureau, 1999 ND 225 ¶ 17, 602 N.W.2d 704, (noting that [u]nder N.D.C.C. § 65-05-03, a final Bureau decision is entitled to full faith and credit); Plains Trucking, LLC v. Cresap, 2019 ND 226 ¶ 17, 932 N.W.2d 541 (confirming final WSI decision is res judicata).

[24] The issues of whether Kemmet was an employer subject to Title 65 and owed premiums, penalties and interest through August of 2016 were fully litigated in the prior administrative proceeding. The administrative law judge determined that Kemmet was an employer and was liable for the premiums, penalties and interest as calculated by WSI through August 1, 2016, with one minor adjustment. (WSIAppx. 83) WSI made that adjustment and the amount due for that period. See Affidavit of Lisa Honeyman, Docket ID # 40. Based on the principles of res judicata and collateral estoppel as a matter of law, Kemmet’s claims asserted in this case were precluded and the District Court properly concluded WSI was entitled to judgment as a matter of law as to premiums, penalties and interest owed through August 1 2016, based on the final decision of the administrative law judge issued November 7, 2018.

[25] In this proceeding, Kemmet raised the same defenses he raised in the prior administrative proceeding as well as a separate lawsuit he brought against the two administrative law judges who had been assigned to hear his appeal, and other members of WSI. This is the action that is alluded to in Paragraph 9 of Kemmet’s Answer in this

action. See Docket ID # 11. Kemmet's claims in that action were dismissed by the District Court and affirmed on appeal by this Court. Kemmet v. Steiner, et al., 2019 ND 267. These claims, therefore, are also precluded by res judicata and collateral estoppel.

[26] The only other issue raised by Kemmet in his Answer was that WSI is "pulling figures from thin air and trying to force Defendant into a contract that cannot exist through fraud and intimidation." See Answer ¶ 5, Docket ID # 11. In his Answer, Kemmet admits that he "never filed a payroll report for August 1, 2017, through July 31, 2018." Id. In fact, Kemmet failed to provide payroll reports for any payroll periods after August of 2016. See Affidavit of Lisa Honeyman, Docket ID # 40. If an employer fails to provide an annual payroll report, N.D.C.C. § 65-04-19(3) applies. That statute provides as follows:

If the organization does not receive the annual payroll report or, in the case of a noncompliance employer, the organization does not receive reliable and accurate payroll information, the organization may calculate premium using the wage cap in effect per employee reported in the previous payroll report, using information obtained through the organization's investigative process, or using data obtained from job service North Dakota.

WSI's claims for premiums for the periods encompassing August 2, 2016 through July 31, 2019, were based on this statute. Based on Kemmet's admission in his Answer that he did not supply the required payroll reports, and the fact that in response to WSI's summary judgment motion, Kemmet filed no factual affidavit to contest WSI's calculations, the District Court concluded WSI was entitled to summary judgment on its claims for premiums, penalties, and interest for those periods. (WSIAppx. 17-19) This decision should be affirmed. See Workforce Safety and Insurance v. Oden, 2020 ND

243, 951 N.W.2d 187 (affirming summary judgment in favor of WSI where defendant failed to raise genuine issue of material fact).

[27] After entry of Judgment in favor of WSI on its claims for premiums, penalties and interest as sought in its Complaint, Kemmet filed a Motion with the Court to Reconsider and a subsequent “Amendment” to that Motion. (WSIAppx. 22-39) The District Court properly denied that Motion. (WSIAppx. 40-45)

[28] The power of a court to vacate or otherwise grant relief from a judgment in the interest of justice has long been recognized, and the adoption of N.D. R. Civ. P. 60(b) has expanded that long-standing principle. Kopp v. Kopp, 2001 ND 41 ¶ 9, 622 N.W.2d 726. A motion for relief from a judgment or order under Rule 60(b) is left to the sound discretion of the trial court. Kautzman v. Doll, 2018 ND 23 ¶ 9, 905 N.W.2d 744; Kopp, 2001 ND 41 ¶ 7. In its Motion filed with the District Court, Kemmet raised several legal challenges to the entry of Judgment. However, “the fact that a court may have made a mistake in the law when entering judgment ... does not justify setting it aside.” In Re Estate of Jensen, 162 N.W.2d 861, 874 (N.D. 1968). Rule 60 is not to be used as a substitute to an appeal. Hefty v. Aldrich, 220 N.W.2d 840, 846 (N.D. 1974). Rule 60 “is not a vehicle for relitigating matters that have already been litigated and decided . . . .” Grueble v. Grueble, 338 N.W.2d 805, 811 (N.D. 1983).

[29] In the Motion to Reconsider, Kemmet again raised issues pertaining to subject matter jurisdiction which had no support in fact or law and were nothing more than a restatement of prior arguments advanced in the administrative proceeding and before the District Court in Motions to dismiss that were properly denied by the Court. “Subject matter jurisdiction is the court’s legal authority to hear and determine the

general subject involved in an action.” Continental Resources, Inc. v. Counce Energy BC #1, LLC, 2018 ND 10 ¶6, 905 N.W.2d 768. The North Dakota Constitution, Article 6 § 8 provides as follows: “The district court shall have original jurisdiction of all causes, except as otherwise provided by law . . . .” N.D.C.C. § 27-05-06 confirms that the district courts have “power to hear and determine all civil actions and proceedings.” The District Court unquestionably had the power to adjudicate WSI’s claims.

[30] As to the issue of personal jurisdiction, it is acquired over a party by service of process in compliance with N.D.R. Civ. P. 4. Alliance Pipeline L.P. v. Smith, 2013 ND 117 ¶ 18, 833 N.W.2d 464. Docket ID # 3 in this action is an Affidavit from the Sheriff of Kidder County confirming personal service of the Summons and Complaint in this action upon Defendant on October 5, 2019. No evidence was presented challenging the appropriateness of the service of the Summons and Complaint in this action in this proceeding. Rather, Kemmet simply reiterated arguments made to the Administrative Law Judge in the underlying administrative proceeding, as well as to the District Court in the appeal of the ALJ decision and in the separate proceeding dismissed on appeal. See Kemmet v. Steiner, 2019 ND 267, 935 N.W.2d 258. As noted above, a Rule 60 Motion is not to be used to relitigate matters already decided. Grueble, 338 N.W.2d 805, 811 (N.D. 1983).

[31] Kemmet then claimed “fraud” relates to an initial filing by WSI for a default judgment.<sup>1</sup> On that issue, the District Court entered its Order on October 29, 2019, denying WSI’s Motion because an appearance and Answer had been made by Kemmet in the proceeding. See Docket ID #14. There is nothing about these pleadings

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<sup>1</sup> Now characterized in briefing to this Court as “lying under oath – jurisdiction.”

or this process that precluded summary judgment from subsequently being entered in favor of WSI.

[32] On reconsideration, Kemmet again asserted he is not an “employer,” under N.D.C.C. Ch. 65, and other arguments relating to construction of statutes in Title 65 regarding definitions of employee and employer. As fully outlined above, the issue of whether he was an employer under Title 65 was decided by the administrative law judge in the administrative proceeding and affirmed on appeal. (WSIAppx. 75-83) Kemmet cannot raise these issues again as they are res judicata. See Argument, supra.

[33] With respect to the allegation regarding a “contract” issue, the District Court construed this argument to relate to the categorical designation by the Court as to the nature of the action and having no basis for precluding summary judgment. (WSI Appx. 41) To the extent it is a legal argument to challenge WSI’s actions, this Court has confirmed that workers compensation issues are not grounded in contract; rather, it is an obligation imposed by law and arises out of the relationship between employer and employee. Effertz v. North Dakota Workers Compensation Bureau, 481 N.W.2d 223, 225 (N.D. 1992). This Court rejected that contract principles are applicable to this type of proceeding. Id.

[34] As to the issue of verified complaint, under Rule 11(a) of the North Dakota Rules of Civil Procedure, verification is not required “unless a rule or statute specifically states otherwise.” Kemmet cited no statutory provision, nor does one exist, that requires a verified complaint when seeking recoupment of amounts owed by WSI. “In North Dakota a complaint generally needs to contain only a short and plain statement of the plaintiff’s claim. Rule 8(a) N.D.R.Civ.P. We believe that modern pleading rules

were intended to address this issue: Does the pleader have a cause of action rather than did he skillfully plead one? A complaint is adequate if the allegations entitle the pleader to relief under any possible theory.” Johnson v. Haugland, 303 N.W.2d 533, 541 (N.D. 1981). WSI’s Complaint met this standard.

[35] Kemmet’s claims asserted to the District Court and in briefing to this Court regarding purported constitutional issues are precluded by res judicata. The District Court in Kemmet v. Workforce Safety and Insurance, Burleigh County Case No. 08-2018-CV-03158, the administrative appeal from the ALJ’s decision, addressed those arguments as follows:

[¶40] Kemmet makes broad assertions challenging WSI’s actions and its authority to act in this case, essentially asserting WSI’s actions and rulemaking are unconstitutional. Kemmet, however, has failed to support his arguments with law and facts. When he does cite to law, Kemmet’s interpretation is based on a misunderstanding of the law.

[¶41] “Courts cannot be expected to search through the record and applicable case law to discover deprivation of a constitutional magnitude when the party attempting to claim a constitutional violation has not bothered to do so.” Overboe v. Farm Credit Services of Fargo, 2001 ND 58, ¶ 13, 623 N.W.2D 371. “A party pursuing a constitutional claim must therefore make a strong case supported by both fact and law or forego the claim.” Weeks v. WSI, 2011 ND 188, ¶ 8, 803 N.W.2d 602 (internal quotations omitted). Courts are only to decide issues “which have been thoroughly briefed and argued . . . and a party waives an issue by not providing adequate supporting arguments.” Olson v. Workforce Safety and Insurance, 2008 ND 59, ¶ 26, 747 N.W.2d 79.

[¶42] It is well settled that states are provided with “police power” in order to protect the general welfare of its citizens. See State v. Cromwell, 72 N.D. 565, 575, 9 N.W.2d 914, 919 (1943). In Haney v. North Dakota Workers Compensation Bureau, 518 N.W.2d 195, 197 (N.D. 1994), the North Dakota Supreme Court determined that although not an obligation of the State, the State is lawfully able to establish a worker’s compensation system under their police powers.

(WSIAppx. 112-113)

[36] Kemmet's Brief to this Court is a mishmash of arguments made in the administrative proceeding and appeal including the constitutionality of WSI's monopolistic status, his "status," whether statutes are properly enacted and other citations purporting to be constitutional arguments. Kemmet had an opportunity to and did raise many of these arguments and so-called constitutional challenges in his appeal to District Court following the administrative proceeding in which the ALJ concluded he was an employer under Title 65 and owed premiums and penalties for failure to obtain workers compensation coverage. Kemmet may not now raise the same or any other new claims concerning constitutionality of WSI's actions or status in this proceeding because of administrative res judicata and collateral estoppel. See Ungar, 2006 ND 185 ¶ 16, 721 N.W.2d 16 (confirming res judicata applies to claims made and those that could have been made in prior proceeding); Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 383 (N.D. 1992). Accordingly, the Court should reject those arguments on that basis.

[37] As to any other assertions made by Kemmet in his Brief to this Court, unsupported and conclusory allegations do not preclude summary judgment. Investors Trust Real Estate Properties, Inc. v. Terra Pacific Midwest, Inc., 2004 ND 164 ¶ 5, 686 N.W.2d 140. "Factual assertions in a brief **do not raise** an issue of material fact satisfying Rule 56(e)." Kemp v. City of Grand Forks, 523 N.W.2d 406, 408 (N.D.1994). Accordingly, the District Court properly entered Judgment in favor of WSI, and this Court should affirm that decision. See Zuger v. State, 2004 ND 16, 673 N.W.2d 615 (affirming summary judgment where court left to divine what the argument in opposition

to summary judgment was, briefing did not highlight a genuine issue of material fact and did not explain significance of evidence).

### CONCLUSION

[38] For the foregoing reasons, WSI respectfully requests that this Court affirm the District Court grant of summary judgment in favor of WSI on its claims for unpaid premiums, penalties and interest from August 10, 2010 through July 31, 2019 as entered on October 7, 2020. (WSIAppx. 20)

DATED this 9<sup>th</sup> day of June, 2021.

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**CERTIFICATE OF COMPLIANCE**

The undersigned, as attorney for the Appellee, North Dakota Workforce Safety and Insurance, in this matter, and as the author of the above Brief of Appellee, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellate Procedure, that the Brief of Appellant was prepared with proportional typeface and the total number of pages in the above Brief totals 26.

DATED this 9<sup>th</sup> day of June, 2021.

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

State of North Dakota by and through  
Workforce Safety and Insurance,

Plaintiff and Appellee,

vs.

Terry Kemmet d/b/a K &K Well Drilling,

Defendant and Appellant.

Supreme Court Case No.: 20210063

Kidder County No. 2019-CV-000059

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA )

)ss.

COUNTY OF CASS )

Laurie A. Grimm, being first duly sworn on oath, deposes and says that she is of legal age, is a resident of Moorhead, Minnesota, not a party to nor interested in the action, and that she served the attached:

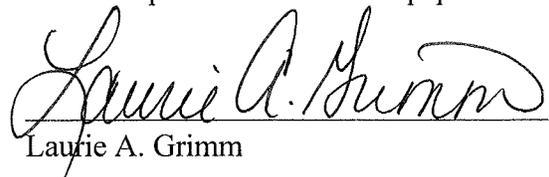
1. Brief of Appellee North Dakota Workforce Safety & Insurance; and
2. Appendix of Appellee North Dakota Workforce Safety & Insurance

on the following person:

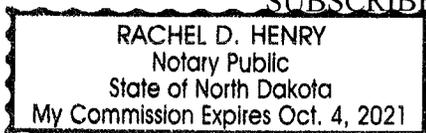
**Terry Alan Kemmet**  
**3949 38<sup>th</sup> Ave. SE**  
**Tappen, ND 58487**

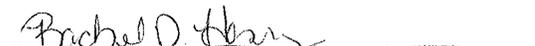
by depositing in the United States Post Office at Fargo, North Dakota, on June 9, 2021, true and correct copies thereof, enclosed in a separate sealed envelope, with postage thereon fully prepaid for First Class Mail addressed to each person above named at the above address.

That the undersigned knows the person served to be the person named in the papers served and the person intended to be served.

  
Laurie A. Grimm

SUBSCRIBED AND SWORN to before me on June 9, 2021.



  
Notary Public

IN THE SUPREME COURT  
STATE OF NORTH DAKOTAState of North Dakota by and through  
Workforce Safety and Insurance,

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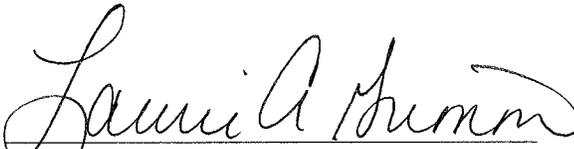
[1] Laurie A. Grimm, being first duly sworn on oath, deposes and says that she is of legal age, is a resident of Moorhead, Minnesota, not a party to nor interested in the action, and that on June 9, 2021, she served via email the following documents:

1. Brief of Appellee North Dakota Workforce Safety & Insurance; and
2. Appendix of Appellee North Dakota Workforce Safety & Insurance

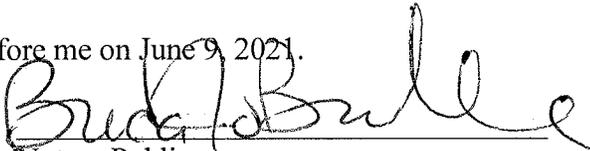
on the following person:

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Laurie A. Grimm

SUBSCRIBED AND SWORN to before me on June 9, 2021.

  
Notary Public

BRENDA JO BRUNELLE  
Notary Public  
State of North Dakota  
My Commission Expires June 18, 2023