

**20210107  
IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

Wades Welding, LLC,	)	
	)	
Plaintiff and Appellee,	)	<b>Supreme Court No.: 20210107</b>
	)	
vs.	)	<b>District Court No.: 53-2019-CV-01545</b>
	)	
Tioga Properties, LLC,	)	
	)	
Defendant and Appellant.	)	

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Appeal from Judgment dated February 17, 2021; from the Order Denying Motions to Continue dated November 24, 2020 and December 7, 2020; and from the Order Granting a Witness to Testify by Reliable Electronic Means dated December 4, 2020 all issued by the Honorable Paul W. Jacobson in the Northwest Judicial District, Williams County, North Dakota.

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**BRIEF OF DEFENDANT – APPELLANT TIOGA PROPERTIES, LLC**

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**ORAL ARGUMENT REQUESTED**

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**REQUEST FOR ORAL ARGUMENT**

¶1. Pursuant to N.D.R.App.P. 28(h), Appellant hereby requests oral argument for this appeal in order to fully explain and advocate for its claims enumerated herein.

## **JURISDICTIONAL STATEMENT**

¶2. The District Court had jurisdiction to hear the case pursuant to N.D.C.C. §27-05-06(2). Pursuant to N.D. Const. art. VI §§ 2 and 6, and N.D.C.C. §28-27-02, this Court has jurisdiction to consider this appeal.

## **STATEMENT OF THE ISSUES**

¶3. Whether the District Court erred in finding that a purported construction lien filed by Appellee against a mobile home property, owned by Appellant, was validly created and thus, whether Appellee was entitled to foreclosure of said construction lien under the theory of breach of contract.

¶4. Whether the District Court erred in awarding a \$27,669.90 monetary award to Appellee against Appellant, pertaining to both a restaurant property and a mobile home property, under the theories of unjust enrichment and breach of contract.

¶5. Whether the District Court erred when failing to award Appellant its attorney's fees, pursuant to section 35-27-24.1 of the North Dakota Century Code, for successfully defeating the purported construction lien against a restaurant property previously owned by Appellant.

¶6. Whether the District Court erred in denying Appellant's motions to continue, which were brought pursuant to North Dakota Supreme Court Administrative Order 25 due to COVID-19 related reasons.

¶7. Whether the District Court erred in permitting Susan Gordon to testify by reliable electronic means at trial despite Appellee's failure to formally motion the District Court

under Rule 3.2 of the North Dakota Rules of Court and whether the District Court erred in failing to allow Appellant to object and respond to Appellee's informal request.

### **STATEMENT OF THE FACTS**

¶8. Appellant, Tioga Properties, LLC is a limited liability company organized under the laws of the State of Alaska. Pursuant to the Alaska Secretary of State and the testimony established at trial, Janice Ellsworth is the principal and sole Member of Tioga Properties, LLC and no other agents exist for Tioga Properties, LLC. (See App. at pg. 63: Tr. at 16: 19-25; Tr. at 17: 1-16; Tr. at 17: 23-25; Tr. at 18:1; Tr. at 79: 1-25; Tr. at 80: 1-25; Tr. at 81: 1-25; Tr. at 82: 1-15; Tr. at 88: 5-6; Tr. at 92: 4-13; Tr. at 95: 1-2; Tr. at 99: 13-20; Tr. at 102: 1-20; Tr. at 105: 14-16; Tr. at 112: 3-6). Janice Ellsworth's son, John Ellsworth, Jr., was never and has never been an owner, employee, or agent of Tioga Properties, LLC. Id.

¶9. Tioga Properties, LLC currently owns the following property located in Williams County, North Dakota, hereinafter referred to as the "Mobile Home Property":

Lot 1 in Block 1, Gilbertson Addition to the City of Tioga, Williams County, North Dakota (Street Address: 124 North Gilbertson St., Tioga, ND 58852). (See App. at pg. 63: Tr. at 95: 3-10, 24-25; Tr. at 96: 1-7).

¶10. Tioga Properties, LLC is not the title owner to the following property, located in Williams County, North Dakota, and hereinafter in this brief, as the "Restaurant Property":

Lot 1 and the North 30 feet of Lot 2 Block 2, Gilbertson Addition to the City of Tioga, Williams County, North Dakota (Street Address: 121 North Gilbertson St., Tioga, ND 58852). (See App. at pg. 63: Tr. at 95: 3-10, 14-23).

¶11. The Mobile Home Property is comprised of a vacant lot, which formerly housed a mobile home, and the Restaurant Property is comprised of a restaurant. (See App. at pg. 63: Tr. at 95: 3-10).

¶12. Neither Tioga Properties, nor its sole member Janice Ellsworth, have ever had any contact or contracts with Wade’s Welding, LLC. (See App. at pg. 63: Tr. at 12:8-11. Tr. at 19:15-25. Tr. at 24:16-18. Tr. at 27:6-10, 13-14. Tr. at 28:1-7. Tr. at 30:10-16. Tr. at 67:5-11. Tr. 68:1-24. Tr. at 69:1-3, 11-12, 19-24. Tr. at 97:9-25).

¶13. Neither Tioga Properties, LLC, nor its member Janice Ellsworth, have received any bills or had any request for payment from Wade’s Welding, LLC. Id.

¶14. Susan Gordon resided on the Mobile Home Property and operated a restaurant named “Wild Catz Grill” on the Restaurant Property. (See App. at pg. 63: Tr. at 8: 7-25; Tr. at 9: 1-6). Susan Gordon, entered into a Commercial Lease Agreement with Tioga Properties, LLC for the leasing of the Restaurant Property. (See App. at pg. 7); (See App. at pg. 63: Tr. at 8: 24-25; Tr. at 9: 1-3). Under the terms of the agreement, Lessee, was solely responsible for any and all maintenance and utilities. See App. at pg. 7; (See App. at pg. 63: Tr. at 21:19-22. Tr. at 22:1-6. Tr. at 100:1-4. Tr.at 114:4-5). Tioga Properties, LLC had no knowledge of, nor ever received any information regarding repairs allegedly completed by Appellee, which were requested by Susan Gordon. (See App. at pg. 63: Tr. at 30:11-13. Tr. at 97:8-25. Tr. at 101:14-16. Tr. at 114:6-9).

¶15. Appellee filed and recorded construction liens against The Mobile Home Property and the Restaurant Property on December 5, 2017. (See App. at pgs. 15, 19); (See App. at pg. 63: Tr. at 59: 13-18).

¶16. Plaintiff filed a Complaint on October 18, 2019, seeking the foreclosure on the liens and for sale of the above-described properties. (See Apps. at pgs. 15, 19); (See App. at pg. 63: Tr. at 100: 24-25; Tr. at 101: 1-7). Plaintiff never sent a Notice of Intent to Foreclose on a Construction Lien. (See App. at pg. 63: Tr. at 100: 11-23).

¶17. In Plaintiff's complaint, Plaintiff attached several exhibits and documents. Among such, is an Invoice from Wades Welding, LLC to "Tioga Properties, LLC", using the address as "John Ellsworth Jr". The dates of work on the Invoice (#100719 are marked 12/22/17 and 12/23/17. The other Exhibits express varying dates of work, which include work done on 11/28/16. (See App. at pg. 28). It is apparent the invoices were created at a later time, as the invoice numbers are consecutive, yet the dates are not chronological. (See App. at pg. 63: Tr. at 29: 12 – 20; Tr. at 51: 25; Tr. at 52: 1 – 22).

¶18. The dates on the invoices for work done vary from the dates asserted on the construction lien, as the construction lien is dated for work done between December 1, 2016, and December 7, 2016. Beyond this, the construction liens were dated December 1, 2017, and recorded on December 5, 2017. The last invoice (Invoice No. 100719) was dated for work done on December 22, 2017, and December 23, 2017, which occurred after the liens were filed on the properties. (See App. at pg. 28); (See App. at pg. 63: Tr. at 29: 12 – 20; Tr. at 51: 25; Tr. at 52: 1 – 22).

¶19. All invoices are marked for the address of "John Ellsworth Jr". Neither Tioga Properties nor its sole principal and member, Janice Ellsworth received the invoices. (See App. at pg. 63: Tr. at 28: 1). John Ellsworth Jr. does not work for, nor has any authority to engage in any contracts or improvements on behalf of Tioga Properties, LLC. (See App. at pg. 63: Tr. at 79:15-20. Tr. at 88:5-6). Neither Tioga Properties, LLC nor Janice



Ellsworth gave the authority for anyone to enter into a contract of make a decision on behalf of Tioga Properties, LLC. (See App. at pg. 63: Tr. at 12: 6-11; Tr. at 24:16-18; Tr. at 27: 6-10, 13-14. Tr. at 28:1-7; Tr. at 30:11-16; Tr. at 67: 2-11. Tr. 68: 22 - 25. Tr. at 69:1-3, 8-12, 19-24. Tr. at 97: 7-25).

### **PROCEDURAL HISTORY**

¶20. On November 20, 2020, the Defendant filed a Motion to Continue with the District Court. (See App. at pg. 32). Defendant filed the motion to continue because Janice Ellsworth, Defendant's primary witness, was extremely uncomfortable travelling to North Dakota due to COVID-19 risk factors. Janice Ellsworth was over the age of 65, was living in Alaska, and COVID-19 cases in North Dakota had significantly spiked to an unprecedented level. Id. In fact, in November of 2020, the number of active COVID-19 cases in North Dakota reached an all-time high as the rolling seven-day average of new active cases in North Dakota on November 20, 2020, was over 1,400 cases per day<sup>1</sup>.

¶21. Furthermore, Anchorage, Alaska and Williston, North Dakota are separated by approximately 2,600 miles.<sup>2</sup> If Janice Ellsworth attempted to drive to Williston, the trip would have lasted well-over forty-five (45) hours. If Janice Ellsworth had attempted to board an airplane, between connecting flights and layovers, the flight to Williston from Anchorage would have lasted roughly twelve (12) hours. Ultimately, Janice Ellsworth asserted that attendance and testimony at trial was absolutely imperative for a proper

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<sup>1</sup> Minot Daily News: ND COVID-19 Numbers Announced on Nov. 20, 2020; retrieved from: <https://www.minotdailynews.com/news/local-news/2020/11/nd-covid-19-numbers-announced-on-nov-20/>.

<sup>2</sup> Distance Between Cities: Williston, ND to Anchorage, AK; retrieved from: <https://www.distance-cities.com/distance-williston-nd-to-anchorage-ak>.

defense against the allegations levied against Tioga Properties, LLC. Janice Ellsworth argued that her motion to continue because of COVID-19 reasons should have been “presumptively granted” under North Dakota Supreme Court Administrative Order 25.

¶22. However, despite Janice Ellsworth’s legitimate health and safety concerns, on November 24, 2020, the District Court denied Defendant’s Motion to Continue, but allowed Janice Ellsworth to testify by reliable electronic means under Administrative Rule 52. (See App. at pg. 34). Appellant renewed their motion to continue at trial but was denied. (See App. at pg. 63; Tr. at 5: 9-19).

¶23. On December 4, 2020, three days before the commencement of the bench trial, Plaintiff filed a “request” (not a formal motion) to allow Plaintiff’s witness, Susan Gordon to testify by reliable electronic means because Ms. Gordon did not want to travel from Washington State to North Dakota. (See App. at pg. 36). Before Defendant had chance to respond to Plaintiff’s “request” (again, not a formal motion) the District Court granted Plaintiff’s “request” for Susan Gordon to testify by reliable electronic means. (See App. at pg. 38). At trial, Appellant objected to Ms. Gordon testifying by electronic means at trial but was denied. (See App. at pg. 63; Tr. at 5: 22-25; Tr. at 6: 1-4; Tr. 6: 15-21).

¶24. Susan Gordon vehemently expressed her desire to remain in the State of Washington rather than offer live testimony at the trial in North Dakota. (See App. at pg. 36). However, despite Susan Gordon’s vehement desire to refrain from travelling to North Dakota, Susan Gordon apparently had no issue providing testimony from the State of California and not her home state of Washington. (See App. at pg. 63; Tr. at 7: 25; Tr. at 8: 1).

¶25. On December 7, 2020, the bench trial commenced before the Honorable Paul W. Jacobson in Williams County District Court. On January 28, 2021, the District Court ruled for the Appellee and rubber-stamped Appellee's proposed findings of fact, conclusions of law, and order for judgement. (See App. at pg. 40).

¶26. On February 17, 2021, the District Court entered Judgment against Appellant. (See App. at pg. 52). In the Judgment, The District Court erroneously found that Appellee was entitled to a monetary award in the amount of \$27,669.90. The breakdown of the monetary award is as follows: \$19,840.00 for Appellee's construction lien on the Mobile Home Property (Williams County Recorded Document No. 842511), \$2,500.00 for Appellee's work on the Restaurant Property, \$5,249.90 as pre-judgment interest, and taxable costs of \$80.00. Id.

¶27. The District Court also erroneously ordered that Appellee was entitled to foreclosure of its purported construction lien against the Mobile Home Property as no contract between Appellant and Appellee was ever formed. The District Court correctly found that Appellee was not entitled to foreclosure of its purported construction lien against the Restaurant Property. (See App. at pg. 40). However, despite the fact that the District Court found that Appellee was not entitled to foreclosure of its purported construction lien on the Restaurant Property, the District Court ordered that Appellee was entitled to a monetary award of \$2,500.00 under the doctrine of unjust enrichment, stemming from the circumstances related Restaurant Property. Id.

¶28. The Notice of Entry of Judgement was entered on February 17, 2021. (See App. at pg. 55). Appellant timely filed its Notice of Appeal to the Supreme Court of North Dakota on April 12, 2021. (See App. at pg. 57).

¶29. The Deputy Clerk of the Supreme Court certified the Record of Appeal on April 30, 2020. (See App. at pg. 61).

¶30. Appellant hereby asks this Court to reverse the District Court's findings that erroneously ordered (1) that Appellee was entitled to foreclosure on its purported construction lien against the Mobile Home Property even though the testimony at trial indicates that no contract between Appellant and Appellee was formed; (2) that Appellee was entitled to \$27,669.90 in monetary damages under the theories of breach of contract and unjust enrichment; (3) that Appellant was not entitled to its costs and attorney's fees under section 35-27-24.1 of the North Dakota Century Code as Appellant successfully defeated the purported construction lien against the Restaurant Property and *should* have defeated the purported construction lien against the Mobile Home Property; (4) that Appellant's motions to continue due to COVID-19 related reasons were not granted; and (5) that Susan Gordon was permitted to testify by electronic means rather than requiring her to offer live testimony at trial.

### **LAW AND ARGUMENT**

I. **The District Court erred in finding that the purported construction lien filed by Appellee against the Mobile Home Property owned by Appellant was validly created and therefore erred in finding that Appellee was entitled to foreclosure of said construction lien under the theory of breach of contract.**

¶31. The District Court erred in finding that a purported construction lien filed by Appellee against the Mobile Home Property owned by Appellant was validly created and therefore erred in finding that Appellee was entitled to foreclosure of said construction lien under the theory of breach of contract.

a. **Standard of Review**

¶32. Appellant contends that the District Court misinterpreted and misapplied several provisions of chapter 35-27 of the North Dakota Century Code. Interpretation of statutes is a question of law, which we review de novo on appeal. Joyce v. Joyce, 2020 ND 75, 941 N.W.2d 546, State v. Chacano, 2012 ND 113, ¶ 10, 817 N.W.2d 369, State v. Ebertz, 2010 ND 79, ¶ 8, 782 N.W.2d 350.

¶33. Whether a party has breached a contract is a finding of fact subject to the clearly erroneous standard of review. Barrett v. Gilbertson, 2013 ND 35, 827 N.W.2d 831, 835. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support the finding, or if this Court is convinced, on the basis of the entire record, that a mistake has been made. Id.

**b. A contract was never formed between Wades Welding, LLC and Tioga Properties, LLC, thus Wades Welding, LLC was not entitled to a construction lien under chapter 35-27 of the North Dakota Century Code.**

¶34. A person is entitled to a construction lien if and only if that person improves real estate and is under contract with the legal property owner or an agent, contractor, or subcontractor of the owner. N.D.C.C. § 35-27-02 (2021). Relevant parts of section 35-27-02 of the North Dakota Century Code states as follows:

“Any person that improves real estate, whether under contract with the owner of such real estate or under contract with any agent, trustee, contractor, or subcontractor of the owner, has a lien upon the improvement and upon the land on which the improvement is situated or to which the improvement may be removed for the price or value of such contribution. (emphasis added).

N.D.C.C. § 35-27-02 (2021).

¶35. A “person” under section 35-27-01(6) of the North Dakota Century Code includes limited liability companies. N.D.C.C. § 35-27-01(6). Further, section 35-27-01(3) of the North Dakota Century Code explains that improvements include any repairs,

construction, removal, excavation, etc. done on real estate for its permanent benefit.

N.D.C.C. § 35-27-01(3).

¶36. An “owner” under section 35-27-01(4) of the North Dakota Century Code “means the legal or equitable owner and also every person for whose immediate use and benefit any building, erection, or improvement is made, having the capacity to contract, including guardians of minors or other persons, and including any agent, trustee, contractor, or subcontractor of such owner. N.D.C.C. § 35-27-01(4). (emphasis added).

¶37. Real or immovable property consists of: (1) Land; (2) that which is affixed to land, including manufactured homes as defined in section 41-09-02 with respect to which the requirements of subsection 6 of section 47-10-27 have been satisfied; (3) that which is incidental or appurtenant to land; and (4) that which is immovable by law. N.D.C.C. § 47-01-03.

¶38. In the present case Appellee, Wades Welding, LLC meets the definition of a “person” under section 35-27-02 of the North Dakota Century Code as it is a duly registered Limited Liability Company in the State of North Dakota. Appellant, Tioga Properties, LLC meets the definition of an “owner” under section 35-27-02 as it is the legal owner of the Mobile Home Property and the Restaurant Property. (See App. at pg. 63; Tr. at 95: 3-10. Appellant concedes that the contract entered into by Susan Gordon with Wades Welding, LLC is a contract between Susan Gordon, in her individual capacity, and Wades Welding, LLC. The Restaurant Property and the Mobile Home Property meets the definition of “real estate” under section 35-27-02 as the Mobile Home Property and Restaurant Property is considered “land” under section 47-01-03 of the North Dakota Century Code.

¶39. Despite the fact that most of the requirements of section 35-27-02 of the North Dakota Century Code are present, a critical piece is missing from the formula. The missing piece is a contract between a person (Appellee, Wades Welding, LLC) and the owner (Appellant, Tioga Properties, LLC). The absence of this contract is absolutely and unequivocally fatal for Appellee.

¶40. In order for a person to be entitled to a construction lien under section 35-27-02, the “person improving the real estate must have a contract with the owner of the property or the owner/owner’s agent. In other words, Appellee would have had to prove at trial that Wades Welding, LLC either had a contract with Tioga Properties, LLC or an agent of Tioga Properties, LLC. However, at trial it was established that Janice Ellsworth was and is the only authorized agent for Tioga Properties, LLC. See supra ¶¶ 8, 19. It was also established that Wade Sprenger, owner of Wades Welding, LLC never established or even attempted to form a contract with Janice Ellsworth of Tioga Properties. (See App. at pg. 63; Tr. at 67: 2-14; Tr. at 69: 19-24). Rather, Wade Sprenger admitted to only dealing with the tenant, Susan Gordon. Id. Because no contract was formed between Wades Welding and Janice Ellsworth, personally or as managing member of Tioga Properties, LLC, the District Court erred in finding that a contract was formed between Tioga Properties, LLC and Wades Welding, LLC.

**c. John Ellsworth Jr. and Susan Gordon are not agents of Tioga Properties, LLC and therefore lacked the contractual capacity to bind Tioga Properties, LLC to a contract with Wades Welding, LLC.**

¶41. John Ellsworth Jr. and Susan Gordon are not agents of Tioga Properties, LLC and therefore lacked the contractual capacity to bind Tioga Properties, LLC to a contract with Wades Welding, LLC. “Agency” is [a] relationship which results when one person, the

principal, authorizes another, the agent, to act for him or her in dealing with third person.

Gallinger v. Vaaler Ins., Inc., 1993, 12 F.3d 127. In Farmer's Union Oil Co. v. Wood,

301 N.W.2d 129, 134 (N.D. 1980), the North Dakota Supreme Court held that:

“In Bernard v. Madsen, 52 N.D. 822, 204 N.W. 196 (1925), the court held that an ostensible agency exists where the conduct of the supposed agent is consistent with the existence of an agency, and where, in the transaction in issue, the party with whom the supposed agent dealt was justified in assuming that the agency existed. In McLane v. F.H.Peavey & Co., 72 N.D. 469, 8 N.W.2d 308 (1943), this court set down a test to determine whether or not an apparent agency relationship existed, ‘It must rest upon conduct or communications of the principal which reasonably interpreted causes a third person to believe that the agent has authority to act for and on behalf of the principal.’”

¶42. Appellee contended at trial that even though Wades Welding, LLC never entered into a contract with Janice Ellsworth, that Tioga Properties, LLC was still bound to a contract with Wades Welding, LLC because Susan Gordon and/or John Ellsworth, Jr. consented to or authorized the repairs on behalf of Tioga Properties, LLC.

¶43. Under the holding in Vaaler, John Ellsworth, Jr. cannot be found to be an agent of Tioga Properties, LLC. There was no testimony at trial that would indicate that Janice Ellsworth had appointed John Ellsworth, Jr. as her agent. There are no signed documents indicating Janice Ellsworth intended to make John Ellsworth, Jr. her agent nor is there any signed documents indicating Janice Ellsworth had consented to the repairs/improvements. Furthermore, there was nothing established at trial that would indicate that John Ellsworth, Jr. had apparent agency power under Wood. There were no communications from Janice Ellsworth to Wades Welding, LLC that would indicate that John Ellsworth, Jr. was an agent of Tioga Properties, LLC. Any contention by Wades Welding, LLC that John Ellsworth, Jr. was an apparent agent was unreasonable under the holding in Wood.



¶44. Appellee failed to establish that John Ellsworth, Jr. was an owner and agent of Tioga Properties, LLC. See supra ¶¶ 8, 19. Because Appellee failed to establish John Ellsworth, Jr. as an agent or an owner of Tioga Properties, LLC, pursuant to Vaaler, he did not have the contractual capacity to bind Tioga Properties, LLC to a contract with Wade's Welding, LLC.

¶45. Appellee also asserts that Susan Gordon was a tenant of Tioga Properties, LLC, and therefore is an agent of Tioga Properties, LLC. However, the mere existence of a landlord-tenant relationship does not generally make the lessee the agent of the lessor. 53 Am.Jr.2d, Mechanics' Liens, Sections 144-146 (1996). An individual generally is presumed to be acting for him or herself, rather than as acting as an agent of another. Hector v. Metro Centers, Inc., 498 N.W.2d 113, 118 (N.D. 1993). The determination of the existence or absence of agency is a fact-based inquiry, and the party claiming agency must prove the existence of the agency relationship by clear and convincing evidence. Struksnes v. Kevin's Plumbing & heating, Inc., 572 N.W.2d 815, 818 (N.D. 1997).

¶46. While it is true that Susan Gordon as a tenant can contract with, and hire, a contractor to work on the property, it does not make the owner of the property liable for payment of the bill, unless the owner consented, or the tenant is considered an agent, trustee, contractor, or subcontractor of the owner. N.D.C.C. § 35-27-02. The trial testimony is clear, Susan Gordon was never an agent of Tioga Properties, LLC. See supra ¶¶ 8, 19.

¶47. Susan Gordon is the only person responsible for the repairs, improvements, and maintenance. See supra ¶14. Susan Gordon resided on the above-described property, and per the agreement with Tioga Properties, LLC, she was responsible for all

maintenance and utilities. See supra ¶14. The testimony established the parties had entered into a written lease on the Restaurant Property and had orally agreed the same provisions would apply on the Mobile Home Property. (See App. at pg. 63: Tr. at 22: 18-25; Tr. at 23: 1-21).

¶48. There was no testimony at trial that would indicate that Janice Ellsworth had appointed Susan Gordon as her agent. There are no signed documents indicating Janice Ellsworth intended to make Susan Gordon her agent nor is there any signed documents indicating Janice Ellsworth had consented to the repairs/improvements.

¶49. Here, simply because Susan Gordon is a tenant of Tioga Properties does not make her an agent of Tioga Properties. Susan Gordon, like the holding in Hector, was acting on her own behalf and should be presumed to be acting on her own behalf. Susan Gordon was never and has never been an agent for Tioga Properties, but rather is merely a tenant. There have been no communications between Susan Gordon and Tioga Properties that create an agency relationship. Therefore, in the present case, no owner consented to or benefitted from the improvements done to the above-described properties. The liens cannot be valid or accurate as to and against Tioga Properties.

**d. Janice Ellsworth, the sole agent of Tioga Properties, LLC, did not have knowledge of the repairs made by Wades Welding, LLC until after the repairs were completed.**

¶50. “[The general rule that] an owner shall be presumed to have consented to an improvement if he had knowledge thereof and did not give notice of his objections, [was] held not to apply to a case where the improvement was completed before the knowledge of [the performed work] was acquired.” Price v. Burke, 27 N.D. 65, 145 N.W. 405 (1914) (emphasis added). North Dakota Century Code Section 35-27-07 states: “. . . [a]s

against a lessor no lien is given for repairs made by or at the instance of the lessor's lessee, unless the lessor has actual or constructive notice thereof and does not object thereto." N.D.C.C. § 35-27-07. (emphasis added).

¶51. The North Dakota Supreme Court has invalidated liens that purport to improve real property due to the owner's lack of knowledge. In, McKechnie v. Bismarck Lumber Co., 114 N.W.2d 709 (N.D. 1962), the Court held that "unless a material man deals directly with the owner, he must give the owner notice that he is about to furnish materials to the contractor and the probable cost thereof, in order to lay a foundation for the filing of a valid lien and that if he fails to give such notice, a filed lien will be invalid." Id. Furthermore, in Christianson v. Hughes, 122 N.W. 384 (N.D. 1909), a husband, without the knowledge or consent of his wife, contracted for and purchased materials to paint a house on land owned by the wife, the North Dakota Supreme Court held that, although the wife had failed to give such written notice to the person doing work, the materialman could not put a valid lien on the property. The Christianson holding was based on the wife's lack of any knowledge, constructive or real, about the improvements made to property. Id.

¶52. Wade's Welding, LLC allegedly performed varying amounts of improvements to the above-described "Mobile Home Property" and "Restaurant Property" from 2016-2017. Appellee never had had a contract with, or any communications with, the actual owner of Tioga Properties, LLC. See supra ¶12; (See App. at pg. 63: Tr. at 119: 9-14 (Q: Mr. Sprenger, again, who hired you to do the work on the sewer line into the property with the mobile home? A. Susan Gordon. Q. Okay. So you weren't hired by either of the Ellsworths? A. No)). (See App. at pg. 63: Tr.at 69:10-12 (Q...Did you specifically

have a contract with Tioga Properties, LLC? A. No)). Appellee additionally knew the proper owner of the property was Janice Ellsworth, as sole member of Tioga Properties, LLC. (See App. at pg. 63: Tr. at 67: 4-11. (Q...Have you ever talked to Janice Ellsworth? A. No. Q. Were you aware that Janice Ellsworth owns Tioga Properties, LLC? A. Yes. Q. And were you aware that she is the only owner of Tioga Properties, LLC? A. Yes)). Appellee never performed any improvements (and had no contract) with the actual owner or any agent, trustee, contractor, or subcontractor of the owner. Rather, the tenant, not connected or authorized by Tioga Properties, LLC, independently contacted the Appellee for purported improvements. Appellee also admitted at trial that she did not ask for approval. (See App. at pg. 63: Tr. at 29: 21-25 and 30:1-16 (stating Q: Did you ever present these three bills to Janice Ellsworth? A: No I did not. Q: Did you ever present these bills to John Ellsworth, Jr.? A: I did not have these bills)).

¶53. There was no evidence presented at the trial that the owner consented to the improvements. The evidence at trial solidified the fact that Tioga Properties, LLC had no knowledge of the improvements. See *supra* ¶12. Further, the evidence presented at trial solidified the fact that Susan Gordon knew any improvements, repairs or maintenance was her responsibility. See *supra* ¶12. See also App. at pg. 63: Tr. at 43: 7-10; Tr. at 119: 9-14; Tr. at 21:19-22 (Q: Are you aware that the terms provide that you are supposed to pay all repairs, maintenance or replacement during the term of your lease? A: I do know that. (See App. at pg. 63: Tr. at 27: 6-9 (A: So in a way, is what you're saying, you felt you had authority to do it. But if John Ellsworth, Jr. testifies that he never gave you approval for this, what would your reaction be? A. That is correct, I didn't ask him for approval)).

¶54. Appellee additionally seems to make the argument that John Ellsworth had knowledge of the alleged repairs, and therefore, Tioga Properties, LLC is liable for the costs of the repairs. This is erroneous for many reasons, as a nexus cannot be made between agreeing to pay for improvements and having basic knowledge improvements are being made. John Ellsworth, Jr. testified that he was aware work was being done but not the extent of the work, who ordered it, and definitely did not consent to binding Tioga Properties, LLC to the bill for it. (See App. at pg. 63: Tr. at 80: 13-14. Tr. at 80: 22-25, 81:1-25, 82: 1-10.84: 2-14).

¶55. Similar to the owners in Christianson and McKechnie, Tioga Properties, LLC had no knowledge, constructive or actual, that any improvements were being made on her property. See supra ¶12. Actions taken by Susan Gordon were taken in her individual capacity. Furthermore, the argument that Susan Gordon and John Ellsworth, Jr. had knowledge of the work being performed somehow makes Tioga Properties, LLC liable under section 35-27-07, is wholly without merit. This argument is wholly without merit because it defies the testimony offered at trial. The testimony at trial is clear: Janice Ellsworth did not authorize Susan Gordon and John Ellsworth Jr. to act on behalf of Tioga Properties, LLC. See supra ¶ ¶ 8, 19. Because they did not have the power to act as authorized agents, any knowledge they possess cannot be imputed onto Janice Ellsworth or Tioga Properties, LLC.

¶56. It is clear the two requirements in section 35-27-02 were not fulfilled. (1) a contract was never formed with (2) an agent, trustee, contractor, or subcontractor of the owner. The testimony at trial is clear, Susan Gordon, a tenant of Tioga Properties, LLC, and John Ellsworth Jr., Janice Ellsworth's son, did not have the capacity to bind Tioga

Properties, LLC to a contract with Wades Welding, LLC. Because no contract was formed between Wades Welding, LLC and Tioga Properties, LLC, Wades Welding is not entitled to either of its purported construction liens under section 35-27-02 of the North Dakota Century Code.

¶57. Furthermore, the fact that Susan Gordon or John Ellsworth, Jr. may have had knowledge of the repairs to the Mobile Home Property and the Restaurant Property is wholly irrelevant for purposes relevant to section 35-27-02 of the North Dakota Century Code. Any knowledge by Susan Gordon and John Ellsworth, Jr. is wholly irrelevant because neither of them are owners, employees, or authorized agents of Tioga Properties, LLC as the statute requires. Contrary to the testimony offered at trial, the District Court essentially charged Janice Ellsworth, sole owner of Tioga Properties, LLC with having constructive or actual knowledge because her tenant ordered the repairs and because her son may have seen the work being performed. These findings were clearly erroneous.

¶58. From a public policy perspective, this Court also must take into consideration, the net effect of a ruling based on the Appellee's position. The ramifications of ruling that a tenant can order repairs to be paid by the landlord/property owner with no input as to the choice of contractor, price, etc. would be detrimental to landlord/tenant relationships across the State of North Dakota. Additionally, a ruling where a disinterested third party with a family relationship but no agency authority, can make a property owner liable by merely observing work being done, would be catastrophic and not founded in law. It was clearly established at trial that the owner of the property is Tioga Properties, LLC which is solely owned by Janice Ellsworth. Thus, the record is clear. Janice Ellsworth is the only person that can bind Tioga Properties, LLC to a contract. Thus, the District Court

erred in finding that Wades Welding was entitled to foreclose on its construction lien against Tioga Properties, LLC.

**II. The District Court erred in awarding \$27,669.90 in monetary damages against Tioga Properties, pertaining to both a restaurant property and a mobile home property, under the theories of unjust enrichment and breach of contract.**

¶59. The District Court erred in awarding \$27,669.90 in monetary damages against Tioga Properties, pertaining to both a restaurant property and a mobile home property, under the theories of unjust enrichment and breach of contract.

**a. Standard of Review – Breach of Contract**

¶60. The District Court erred in awarding \$25,169.00 in monetary damages against Tioga Properties, LLC pertaining to the Mobile Home Property, under the theory of breach of contract.

¶61. “A [district] court's determination of the amount of damages caused by a breach of contract is a finding of fact subject to the clearly erroneous standard of review.” Keller v. Bolding, 2004 ND 80, ¶ 22, 678 N.W.2d 578. A finding is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, on the entire record, we are left with a definite and firm conviction a mistake has been made. *Id.* at ¶ 15. Hanson v. Boeder, 2007 ND 20, 727 N.W.2d 280

**b. Merits the Argument – Breach of Contract**

¶62. A review of North Dakota law on the formation of and breach of a contract can only lead to one conclusion: there was no contract formed. North Dakota Century Code Section 9-01-01 defines a valid, enforceable contract as follows: A contract is an agreement to do or not to do a certain thing. An obligation is a legal duty by which a person is bound to do or not to do a certain thing. N.D.C.C. § 09-01-01. For a contract to

spring into existence, there must be parties capable of giving consent, consent of all parties involved, a lawful object, and sufficient cause or consideration. N.D.C.C. § 9-01-02. North Dakota law establishes the elements for a prima facie case of breach of contract as: “(1) the existence of a contract; (2) breach of the contract; and (3) damages which flow from the breach.” WFND, LLC v. Fargo Marc, LLC, 730 N.W.2d 841, 848 (N.D. 2007); Kuhn v. Marquart, 178 N.W. 428, 429 (N.D. 1920).

¶63. To create an enforceable contract, there must be a mutual intent to create a legal obligation.” Lire, Inc. v. Bob's Pizza Inn Restaurants, Inc., 541 N.W.2d 432, 434 (N.D.1995). “The parties' mutual assent to a contract is determined by their objective manifestations of contractual assent.” Moen v. Meidinger, 1998 ND 161, ¶ 6, 583 N.W.2d 634. “It is the words of the contract and the manifestations of assent which govern, not the secret intentions of the parties.” Amann v. Frederick, 257 N.W.2d 436, 439 (N.D.1977).

¶64. Neither Tioga Properties, LLC nor Janice Ellsworth, the sole employee, member, and principal of Tioga Properties, had any contract for improvements made to the property or by Wade’s Welding, LLC, nor did Janice Ellsworth or Tioga Properties contract to pay for said improvements. See supra ¶12. The testimony at trial established very little other than the fact that Susan Gordon ordered the repairs and had the responsibility to pay for them, both by her lease, and by her actions. See supra ¶14. Ms. Gordon testified at trial that she did not get permission but that John Ellsworth Jr, a non-owner, and Janice Ellsworth, the actual property owner, should have known about it. (See App. at pg. 63: Tr. at 12:6-11. (Stating, Q: As far as you’re aware, was either John Ellsworth Jr., or Janice Ellsworth aware of that work? A: Not to the terms of me



requesting it)). See App. at pg. 63: Tr. at 27:6-14 (stating A: So in a way, is what you're saying, you felt you had authority to do it. But if John Ellsworth, Jr. testifies that he never gave you approval for this, what would your reaction be? A. That is correct, I didn't ask him for approval)). See also App. 18: Tr. at 28:1-7. Tr. at 30:11-13.

¶65. The main issue here is that Appellee is confusing knowledge and consent and regardless, there was no consent and assumption of responsibility for payment by the property owner. Even if Janice Ellsworth had knowledge of the repairs, which she did not, and consented to Susan Gordon hiring the repair, which she also did not, does not mean she assumed the responsibility to pay, absent some agreement. There was a lease in place, on these properties, which indicated Ms. Gordon is responsible for all repairs and maintenance. See supra ¶14.

¶66. Legally, there cannot be a breach of contract between Wades Welding, LLC and Tioga Properties, LLC, as Wades Welding, LLC never entered into an actual contract with Tioga Properties, LLC. The information established at trial was insufficient to determine as much. Because of those reasons, the District Court erred in finding that Wades Welding, LLC was entitled to damages under the theory of breach of contract.

#### **c. Standard of Review – Unjust Enrichment**

¶67. The District Court also erred in finding for Wades Welding, LLC under the theory unjust enrichment. Appellee failed to prove all of the elements for unjust enrichment and therefore, the facts established at trial do not support the claim for unjust enrichment. Unjust Enrichment is a conclusion of law and is fully reviewable by this Court. Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc., 2004 ND 117, 680 N.W.2d 634.

#### **d. Merits of the Argument – Unjust Enrichment**

¶68. Unjust enrichment is an equitable doctrine based upon a quasi or constructive contract implied by law to prevent a person from being unjustly enriched at the expense of another. The doctrine serves as a basis for requiring restitution of benefits conferred “in the absence of an expressed or implied in fact contract.” Id.(citing: Midland Diesel Serv. and Engine Co. v. Sivertson, 307 N.W.2d 555, 557 (N.D.1981). The North Dakota Supreme Court has held that unjust enrichment is a question of law. Albrecht v. Walter, 572 N.W.2d 809 (N.D. 1997). The five elements for a claim of unjust enrichment, under North Dakota law, are as follows:

“There are five elements necessary for unjust enrichment—an enrichment, an impoverishment, a connection between the enrichment and the impoverishment, absence of a justification for the enrichment and impoverishment, and absence of a remedy provided by law.”

Id.

¶69. In order to recover on the theory of quasi contracts, the plaintiff must prove that there was a receipt of a benefit by defendant from plaintiff, which such benefit is inequitable for the defendant to retain. Gate City Sav. And Loan Ass’n, 213 N.W.2d at 893. (emphasis added). See: Schroeder v. Buchholz, 622 N.W.2d 202 (N.D. 2001)(stating that unjust enrichment occurs when the receipt of a benefit by the defendant from the plaintiff is inequitable for the defendant to preserve without paying for its value. The broad and equitable doctrine of unjust enrichment hinges on a quasi or constructive contract(s) implied by law, which prevents an individual from unjustly enriching themselves at the expense of another. Nelson v. Mattson, 910 N.W.2d 171, 177 (N.D. 2018); Smestad v. Harris, 820 N.W.2d 363 (N.D. 2012).

¶70. Most importantly, the fifth element, that the law provides no other remedy, has not been met. Contrary to the erroneous findings of the District Court, the Appellee does

in fact have another course of action. The Appellee can bring a claim against the individual who ordered the repairs, which was, Susan Gordon the tenant of Tioga Properties. See supra ¶14.

¶71. In Struksnes v. Kevin's Plumbing and Heating, the same issues were presented to the Court. A claim for the foreclosure of a lien was made by the Plaintiff. In the event the lien could not be foreclosed, the Plaintiff argued in the alternative that the Plaintiff was entitled to damages under the doctrine of unjust enrichment. The Court held that the lessee was not the agent of the lessor and thus, denied the lien. The facts in Struksnes were similar in that a company was not paid for repairs that they made per a sublessee's request. The Court found the Plumbing and Heating company failed to show that they had been unjustly enriched. The Court ruled Kevin's Plumbing had not demonstrated the Trust was enriched as the sublessor of the property. They further ruled that if the Trust was enriched, or if the enrichment was not justified, that nonpayment of the bills by the lessor would be contrary to equity. Struksnes, 572 N.W.2d at 819. The Struksnes Court held that the company did not have a valid claim for unjust enrichment.

¶72. Here, Tioga Properties has not been unjustly enriched by Appellee's alleged improvement to the Mobile Home Property and Restaurant Property. Tioga Properties, LLC has not received any enrichment based on the repairs. The property is not worth anything more than it was at the time of the repairs. In fact, it is worth less. (See App. at pg. 63: Tr. at 114: 16-25; Tr. at 115: 1-7). Tioga Properties, LLC should not be held responsible for the repairs based upon Appellee's poor business practices. Appellee has also shown they have attempted to be paid by the contractor Susan Gordon. Appellee is choosing to bring their claim against Appellant, as they are the more prosperous entity

with deeper pockets. The complete lack of knowledge, lack of contractual obligations, and lack of communications from Appellee precludes Appellee from recovering in both law and equity from the purported construction liens.

¶73. An equitable claim for persons providing improvements would only be appropriate under factual circumstances where the owner had knowledge or had knowledge and quietly acquiesced to such improvements. Christianson, 122 N.W. at 386. Similar to Christianson, Tioga Properties, LLC had no knowledge, actual or constructive, of the alleged improvements done by the Appellee. In no way did Tioga Properties, LLC quietly approve or accept the improvements. Rather, after obtaining knowledge of the work completed by Wades Welding, LLC, Tioga Properties, LLC objected multiple times, and through various communications with counsel for the Appellee, expressed not having any knowledge of the alleged improvements. (See App. at pg. 63: Tr. at 97; 19-25; Tr. at 98: 1-21).

¶74. The District Court's judgment for unjust enrichment against Tioga Properties, LLC cannot be allowed to stand. Tioga Properties, LLC had no knowledge, actual or constructive, of the properties that were completed to the above-described properties. Appellee should have and can still bring their claim against the proper party: Susan Gordon. Because of the foregoing reasons, the District Court erred in finding that Appellee was entitled to damages under the doctrine of unjust enrichment.

**III. The District Court erred when failing to award Appellant's attorney fees for successfully challenging the construction lien against the Mobile Home Property and the Restaurant Property.**

¶75. The District Court erred when failing to award Appellant’s attorney fees for successfully challenging the purported construction lien against the Mobile Home Property.

**a. Standard of Review – Attorney Fees**

¶76. The North Dakota Supreme Court reviews a district court's decision on attorney fees under the abuse of discretion standard. Lincoln Land Dev., LLP v. City of Lincoln, 2019 ND 81, 924 N.W.2d 426. “A trial court's decision on fees and costs ... will not be overturned on appeal unless an abuse of discretion is shown.” Lemer v. Campbell, 1999 ND 223, ¶ 6, 602 N.W.2d 686. A district court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law. Thompson v. Schmitz, 2011 ND 70, ¶ 18, 795 N.W.2d 913.

**b. Merits of the Argument – Attorney Fees**

¶77. The applicable section of the North Dakota Century Code states: Any owner that successfully contests the validity or accuracy of a construction lien by any action in district court must be awarded the full amount of all costs and reasonable attorney's fees incurred by the owner. N.D.C.C. § 35-27-24.1 (2021).

¶78. Appellant, Tioga Properties, LLC has incurred numerous costs and attorney’s fees on a property that they do not own and have not owned since July 2019, prior to the Summons and Complaint in this Action. Furthermore, Appellant successfully defeated Appellee’s construction lien against the Restaurant Property. In paragraph 22 of the Findings of Fact, Conclusions of Law and Order for Judgement, the District Court stated the following:

“Wades Welding concedes in its post-trial brief that the lien cannot be foreclosed upon because Wades Welding did not serve notice of the foreclosure action on the current property owners . . . . Since the current property owners were not noticed as required by statute, the lien cannot be foreclosed upon at this time. The lien foreclosure claim against the restaurant property is therefore dismissed without prejudice.”

(See App. at pg. 40).

¶79. The District Court misapplied section 35-27-24.1 by not awarding costs and attorney’s fees when Appellant successfully defeated Appellee’s construction lien on the Restaurant Property. As such, the District Court abused its discretion and attorney’s fees and costs should have been awarded to Tioga Properties, LLC, pursuant to section 35-27-24.1 of the North Dakota Century Code.

¶80. Furthermore, this Court should find that the purported construction lien on the Mobile Home Property was in fact invalid because no contract was formed between Wades Welding, LLC and Tioga Properties, LLC and also due to the fact that Tioga Properties, LLC did not have knowledge of the repairs until after they were completed. (See App. at pg. 63; Tr. at 97: 22-25). Therefore, Appellant also requests this Court to find that Appellant is also entitled to its costs and attorney’s fees for defeating the purported construction lien on the Mobile Home Property, pursuant to section 35-27-24.1 of the North Dakota Century Code.

**IV. The District Court erred in denying Tioga Properties’ motion to continue, due to COVID-19 related reasons.**

**a. Standard of Review – Motions to Continue**

¶81. The District Court erred in denying Tioga Properties’ motion to continue, due to COVID-19 related reasons. The decision to grant or deny a continuance is in the court's discretion and the court's decision will be reviewed for an abuse of discretion. State v.

Watson, 2019 ND 164, 930 N.W.2d 145, 149 (citing: State v. Ripley, 2009 ND 105, ¶ 12, 766 N.W.2d 465; Everett v. State, 2008 ND 199, ¶ 25, 757 N.W.2d 530). A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law. *Id.* at 149-150 (citing: State v. Hinojosa, 2011 ND 116, ¶ 7, 798 N.W.2d 634).

**b. Merits of the Argument – Motions to Continue**

¶82. North Dakota Supreme Court Administrative Order 25 was entered by the North Dakota Supreme Court “in an effort to slow the spread of COVID-19 and minimize the health risks for those who visit or work in courts.” ND R ADMIN AO 25. Pursuant to Administrative Order 25, “Civil and Criminal bench trials and hearings [were] not suspended.” *Id.* at ¶5 sec. 3. However, the order afforded presiding Judges “discretion” to continue bench trials or hearings. *Id.* Finally Administrative Order 25 stated that, “continuances and extension requests related to COVID-19 should be presumptively granted.” *Id.* at ¶5 sec. 6 (emphasis added).

¶83. Appellant filed a motion to continue with the District Court on November 20, 2020. During the time of Appellant’s motion to continue, Administrative Order 25, which was enacted on March 17, 2020, and was repealed on April 1, 2021, was in full effect. During the time period of Appellant’s motion to continue, Janice Ellsworth, managing member of Tioga Properties, LLC, resided in Alaska and was over the age of 65, which put her at higher risk for COVID-19. As stated in Appellant’s brief in support of motion to continue, Ms. Ellsworth felt uncomfortable traveling to North Dakota for the hearing due to the rapid spike in COVID-19 cases in North Dakota. The District Court denied Appellant’s motion to continue on November 24, 2020. See supra ¶ 20.

¶84. The District Court abused its discretion by denying Appellant’s motion to continue due to COVID-19 related reasons. First, travel to North Dakota from Alaska would have been dangerous, unwise, and nearly impossible for Ms. Ellsworth. On March 20, 2020 the United States Government and the Canadian Government closed the border between the two countries for non-essential travel<sup>3</sup>. In order for Ms. Ellsworth to travel from Alaska to North Dakota by land, Ms. Ellsworth would have had to cross an international border twice. This would have been a major inconvenience in normal circumstances, let alone during the middle of a global pandemic. Furthermore, The Center for Disease Control and the North Dakota Department of Health strongly advised against all non-essential travel by air. Even if Ms. Ellsworth would have been able to board a flight from Alaska to North Dakota, As stated above, this would have been a major inconvenience and would have placed an undue burden on the Appellant’s primary witness, Janice Ellsworth.

¶85. Finally, the Administrative Order 25 stated that any motions to continue related to COVID-19 should be presumptively granted. In Defendant’s brief in support of a motion to continue, Defendant cited several reasons related to COVID-19 for the continuance. Ms. Ellsworth’s location in proximity to North Dakota, Ms. Ellsworth’s age, and the spike in COVID-19 cases in the State of North Dakota were all reasons that Ms. Ellsworth provided for the continuance. Furthermore, Ms. Ellsworth believed that attendance and testimony at trial was necessary for a proper defense against the Plaintiff’s Complaint. As the Appellant’s sole owner and agent, Ms. Ellsworth was

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<sup>3</sup> Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada; 85 CFR 16548, March 20, 2020



absolutely entitled to appear in person, at trial, to defend her name and reputation. In addition to defending Appellant's reputation, the District Court would have been able to fully observe Ms. Ellsworth's testimony and her propensity for truthfulness. The reasons cited in Defendant's motion to continue were specific reasons related to COVID-19. Thus, the District Court should have presumptively granted Defendant's motion to continue until it was somewhat safe to travel to North Dakota.

¶86. Despite Defendant's legitimate COVID-19 related reasons provided by Ms. Ellsworth, the District Court failed to presumptively grant defendant's motion. While the District Court did in fact permit Ms. Ellsworth to testify via electronic means under Rule 52 of the North Dakota Administrative Rules, the trial transcript is littered with sentence breaks, fragmented phrases, and indiscernible statements by Ms. Ellsworth. (See App. at pg. 63; Tr. at 94:19; Tr. at 95:20; Tr. at 96: 22; Tr. at 97: 2; Tr. at 97: 18; Tr. at 98: 3; Tr. at 98: 15; Tr. at 101: 1; Tr. at 105: 3; Tr. at 108: 9; Tr. at 110: 5; Tr. at 111: 13; Tr. at 112: 12; Tr. at 113: 1).

¶87. The District Court essentially disregarded and ignored Ms. Ellsworth's legitimate safety, health, and procedural concerns. Because the District Court disregarded the concerns listed in Defendant's motion, the telephonic testimony resulted in an incomplete trial transcript and record. The District Court abused its discretion in denying Defendant's motion to continue and Defendant should be awarded a new bench trial.

V. **The District Court erred in allowing Susan Gordon to testify by telephone at trial despite Appellee's failure to provide notice to Defendant of such request and for Appellee's failure to file a formal motion pursuant to the North Dakota Rules of Court.**

¶88. The District Court erred in allowing Susan Gordon to testify by telephone at trial despite Appellee's failure to provide notice to Defendant of such request and for

Appellee's failure to file a formal motion pursuant to the North Dakota Rules of Civil Procedure.

**a. Standard of Review – Motion for Testimony by Electronic Means**

¶89. Sworn testimony at trial is considered evidence. Meier v. Said, 2007 ND 18, 726 N.W.2d 852, 858. The district court has broad discretion in deciding evidentiary matters. Cody v. Cody, 2019 ND 14, 921 N.W.2d 679, 680 (citing: Regan v. Lervold, 2014 ND 56, ¶ 8, 844 N.W.2d 576). We will overturn the district court's admission or exclusion of evidence only when the district court has abused its discretion. *Id.* A district court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, or when its decision is not based on a rational mental process. *Id.*

**b. Merits of the Argument – Motion for Testimony by Electronic Means**

¶90. For a witness to testify via reliable electronic means in a civil proceeding, the requesting party must serve a motion upon the opposing party. ND R ADMIN AR 52(2)(A). Sections 2-3 of North Dakota Administrative Rule 52 states the following:

“Section 2. In General.

(A) Subject to the limitations in Sections 3, 4 and 5, a district or municipal court may conduct a proceeding by reliable electronic means on its own motion or on a party's motion.

(B) A party wishing to use reliable electronic means must obtain prior approval from the court after providing notice to other parties.

(C) Parties must coordinate approved reliable electronic means proceedings with the court to facilitate scheduling and ensure equipment compatibility.

(D) Each site where reliable electronic means are used in a court proceeding must provide equipment or facilities for confidential attorney-client communication.

(E) A method for electronic transmission of documents must be available at each site where reliable electronic means are used in a court proceeding for use in conjunction with the proceeding.

### Section 3. Civil Action.

In a civil action, a district or municipal court may conduct a hearing, conference, or other proceeding, or take testimony, by reliable electronic means.”

(ND R ADMIN AR 52)

¶91. Rule 3.2 of the North Dakota Rules of Court governs Motions filed by a party in a civil matter. The relevant parts of Rule 3.2 states as follows:

#### “RULE 3.2 MOTIONS

##### (a) Submission of Motion.

(1) Notice. Notice must be served and filed with a motion. The notice must indicate the time of oral argument, or that the motion will be decided on briefs unless oral argument is timely requested.

(2) Briefs. Upon serving and filing a motion, the moving party must serve and file a brief and other supporting papers and the opposing party must have 14 days after service of a brief within which to serve and file an answer brief and other supporting papers. The moving party may serve and file a reply brief within seven days after service of the answer brief. Upon the filing of briefs, or upon expiration of the time for filing, the motion is considered submitted to the court unless counsel for any party requests oral argument on the motion.

(c) Failure to File Briefs. Failure to file a brief by the moving party may be deemed an admission that, in the opinion of party or counsel, the motion is without merit. Failure to file a brief by the opposing party may be deemed an admission that, in the opinion of party or counsel, the motion is meritorious. Even if an answer brief is not filed, the moving party must still demonstrate to the court that it is entitled to the relief requested.”

(N.D.R.Ct. 3.2 (a) & (c)).

¶92. On December 4, 2020, three days before the beginning of the bench trial, Appellee served upon the Defendant and the court a “Request for Witness to Testify by

Reliable Electronic Means.” (See App. at pg. 36) Appellee did not include a notice of motion as required under North Dakota Rules of Court 3.2(a)(1). Appellee also failed to file a brief as required under North Dakota Rules of Court 3.2(a)(2). Thus, pursuant to North Dakota Rule of Court 3.2(c), failure to file the brief in support of the motion should have rendered the motion meritless, and thus should have been denied. However, three days before trial, and before Defendant could file a response to Appellee’s motion, the District Court granted Appellee’s motion to allow a witness to testify by reliable electronic means. The Defendant not given adequate time under Rule 3.2(a)(2) of the North Dakota Rules of Court to properly oppose the motion. That fact alone should render the District Court’s decision erroneous.

¶93. The means in which Susan Gordon testified was less than reliable. Throughout Susan Gordon’s testimony, the trial transcript is littered with sentence breaks, fragmented phrases, and answers that are not discernable due to Susan Gordon’s unreliable electronic means. (See App. at pg. 63: Tr. at 7: 18; Tr. at 8: 1; Tr. at 8:10; Tr. at 8: 17; Tr. at 10: 10; Tr. at 12: 11; Tr. at 14: 9; Tr. at 15: 3; Tr. at 16: 16; Tr. at 16: 25; Tr. at 20: 3; Tr. at 24:14; Tr.at 24: 22; Tr. at 25: 2; Tr. at 27: 4; Tr. at 28: 13, 14, 19; Tr. at 29: 2; Tr. at 31:3). Because Ms. Gordon was permitted to testify via telephone, the trial transcript is incomplete, and the record is unclear. Furthermore, Appellant was also robbed of the opportunity to fully observe Susan Gordon’s credibility and propensity for truthfulness at trial. Appellant was unable to view Susan Gordon’s body language, facial expressions, and non-verbal reactions throughout her testimony. Susan Gordon was Appellee’s primary and material witness at trial and Appellant contends that they were not afforded the adequate opportunity to fully cross-examine Susan Gordon.

¶94. Thus, for the foregoing reasons, the District Court erred in granting Appellee's motion as Appellee failed to follow formal motion procedures under Rule 3.2 of the North Dakota Rules of Court and also erred by allowing Susan Gordon to testify via telephone as the testimony proved to be incomplete, indiscernible, and unreliable.

### **CONCLUSION**

¶95. The District Court erred in finding that Appellee's construction lien on the Mobile Home Property was valid as a contract was never formed between Wades Welding, LLC and Tioga Properties, which is required under section 35-27-02 of the North Dakota Century Code. Because no contract was formed between Wades Welding, LLC and Tioga Properties, LLC the District Court erred in finding that Wades Welding, LLC was entitled to foreclose on its purported construction lien on the Mobile Home Property.

¶96. The District Court erred in awarding \$25,169.90 in monetary damages against Tioga Properties, pertaining to both a restaurant property and a mobile home property, under the theory of breach of contract as a contract was never formed between Appellant and Appellee. The District Court erred in awarding \$2,500.00 in monetary damages against Tioga Properties, pertaining to the Restaurant Property under the theory of unjust enrichment as Wades Welding, LLC has not exhausted all its available remedies under the law, including attempting to collect with the contractor, Susan Gordon.

¶97. The District Court erred when failing to award Appellant its attorney's fees, under section 35-27-24.1 of the North Dakota Century Code, for successfully defeating the construction lien of the Restaurant Property. Additionally, should this Court find that the purported construction lien on the Mobile Home Property is invalid because no contract was formed between Wades Welding, LLC and Tioga Properties, LLC, Appellant

requests this Court to find that Appellant is entitled to its costs and attorney's fees pursuant to section 35-27-24.1 of the North Dakota Century Code for defending the purported construction lien on the Mobile Home Property.

¶98. The District Court erred by failing to presumptively grant, Tioga Properties, LLC's motions to continue, under Administrative Order 25 due to Ms. Ellsworth's legitimate health and safety reasons regarding COVID-19.

¶99. The District Court erred in permitting Appellee's primary and material witness, Susan Gordon, to testify by telephone at trial despite Appellee's failure to formally motion the District Court pursuant to Rule 3.2 of the North Dakota Rules of Court. Appellant was not provided formal notice of the request, and the District Court failed to allow Appellant an opportunity to object and respond to such request before permitting Susan Gordon's telephonic testimony.

¶100. Appellant hereby asks this Court to reverse the District Court's findings that erroneously ordered (1) that Appellee was entitled to foreclosure on its purported construction lien against the Mobile Home Property as no contract was formed; (2) that Appellee was entitled to \$27,669.90 in monetary damages under the theories of breach of contract and unjust enrichment; (3) that Appellant was not entitled to its costs and attorney's fees under section 35-27-24.1 of the North Dakota Century Code as Appellant successfully defeated the purported construction lien against the Restaurant Property and *should* have defeated the purported construction lien against the Mobile Home Property; (4) that Appellant's motions to continue due to COVID-19 related reasons were not granted; and (5) that Susan Gordon was permitted to testify by electronic means rather than requiring her to offer live testimony at trial.

**CERTIFICATE OF COMPLIANCE**

¶101. Pursuant to N.D.R.App.P. 32(a)(8)(A), undersigned counsel certifies that this brief complies with the page limitation. This brief contains 38 pages.

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**CERTIFICATE OF SERVICE**

¶102. Undersigned counsel hereby certifies that on May 27, 2021, he filed this brief and appendix electronically, using the North Dakota Supreme Court's E-filing Portal. Through this portal, counsel has served appellee a copy of the brief and appendix, at egrant@mcgeelaw.com.

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

Wades Welding, LLC,

Plaintiff,

Supreme Court No. 20210107  
District Court No.. 53-2019-CV-01545

vs.

Tioga Properties, LLC,

Defendants

**AFFIDAVIT OF SERVICE**

STATE OF NORTH DAKOTA    )  
  ): ss  
COUNTY OF WILLIAMS        )

¶1. I, **Mattie Booth**, being first duly sworn, state that on the 2 day of June, 2021, this affiant served the following documents:

1. Brief of Defendant- Appellant Tioga Properties, LLC
2. Appellant's Appendix
3. Letter to Supreme Court Clerk regarding corrections to brief

Upon:

Erich Grant  
egrant@mcgeelaw.com

¶2. The above documents were served by electronic mail in an attachment and addressed to the above-named attorney at the e-mail address listed above.

/s/ Mattie Booth

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Mattie Booth