

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Ashley Feickert,
Plaintiff and Appellee,

v.

Cheryl Feickert,
Defendant and Appellant

)
)
)
)
)
)
)

Supreme Court No.: 20220102

Appeal from the *Findings of Fact, Conclusions of Law and Order for Judgment and Judgment* entered on February 16, 2022 by the Wells County District Court, Southeast Judicial District, the Honorable James D. Hovey, presiding.

Ashley Feickert v. Cheryl Feickert
Wells County Case No.: 52-2021-CV-00014

BRIEF OF APPELLEE ASHLEY FEICKERT

MICHEAL A. MULLOY (# 07239)
MULLOY LAW, PLLC
101 Slate Drive, Suite 7
Bismarck, North Dakota 58503
PH: 701-390-8580
FX: 701-639-2845
E-mail: mike@mulloylaw.com
Attorneys for Ashley Feickert

TABLE OF CONTENTS

	<u>Paragraph No.</u>
TABLE OF AUTHORITIES	1
STATEMENT OF ISSUES	2
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS	9
LAW AND ARGUMENT	18
I. The District Court Properly Concluded That Cheryl Feickert Failed to Plead a Counterclaim for Unjust Enrichment and Thus Did Not Error in Not Considering Said Claim.....	19
II. The District Court Considered the Amounts Cheryl Feickert Allegedly Paid to, or on Behalf of Ashley Feickert, and Properly Concluded that No Offset to the Damages Awarded to Ashley Feickert Was Permissible.....	30
CONCLUSION.....	36
CERTIFICATE OF COMPLIANCE.....	38

[1] **TABLE OF AUTHORITIES**

	<u>Paragraph No.</u>
<u>North Dakota Cases</u>	
<i>A & A Metal Bldgs. v. I-S, Inc.</i> , 274 N.W.2d 183 (N.D. 1978)	26
<i>Apache Corp. v. MDU Resources Group Inc.</i> , 1999 ND 247, 603 N.W.2d 891	27
<i>Cavalier County Mem'l Hosp. Ass'n v. Kartes</i> , 343 N.W.2d 781 (N.D.1984)	26
<i>Estate of Hill</i> , 492 N.W.2d 288 (N.D. 1992)	21
<i>Gowin v. Hazen Mem'l Hosp. Ass'n</i> , 311 N.W.2d 554 (N.D.1981)	21
<i>Kautzman v. Kautzman</i> , 2003 ND 140, 668 N.W.2d 59	31
<i>Matter of Estate of Zent</i> , 459 N.W.2d 795 (N.D. 1990)	27
<i>Midland Diesel Serv. and Engine Co. v. Sivertson</i> , 307 N.W.2d 555 (N.D. 1981)	26, 27
<i>Opp v. Matzke</i> , 1997 ND 32, 559 N.W.2d 837	26
<i>Riemers v. O'Halloran</i> , 2004 ND 79, 678 N.W.2d 547	31
<i>Schlichenmayer v. Luithle</i> , 221 N.W.2d 77 (N.D. 1974)	27
<i>Smestad v. Harris</i> , 2012 ND 166, 820 N.W.2d 363	21, 22, 23
<i>State v. Jensen</i> , 2000 ND 28, 606 N.W.2d 507	34
<i>Trauger v. Helm Brothers</i> , 279 N.W.2d 406 (N.D.1979)	21

<i>Williams v. State</i> , 405 N.W.2d 615 (N.D. 1987)	21
--	----

<i>Zuger v. North Dakota Ins. Guar. Ass'n</i> , 494 N.W.2d 135 (N.D. 1992)	27
---	----

North Dakota Century Code

N.D.C.C. § 14-10-09.....	FN. 3
N.D.C.C. § 30.1-29-08.....	14
N.D.C.C. § 30.1-29-18.....	14
N.D.C.C. § 30.1-29-22.....	13
N.D.C.C. § 30.1-29-25(3)	13

North Dakota Rules

N.D.R.Civ.P. 8(a).....	20, 21, 24, 29
N.D.R.Ev. 103(a)	34

[2] STATEMENT OF ISSUES

- I. Whether the District Court Properly Excluded Cheryl Feickert's Claim for Unjust Enrichment Based Upon Her Failure to Plead.
- II. Whether the District Court Properly Excluded Cheryl Feickert's Request to Reduce the Amount of Damages Awarded to Ashley Feickert.

[3] STATEMENT OF THE CASE

[4] This matter was commenced on March 5, 2021 by Ashley Feickert ("Ashley") against her mother, Cheryl Feickert ("Cheryl"), upon counsel for Cheryl admitting service of the *Summons, Complaint* and Exhibits 1-5. (R1-8). In her *Complaint*¹, Ashley alleged that while Cheryl was acting as her conservator, she breached her fiduciary obligations to her. (R1). Specifically, Ashley alleged that Cheryl failed to keep suitable records and provide an annual accounting, violated the prohibition against self-dealing, and failed to distribute assets held for her benefit upon reaching the age of majority. (R2). In her prayer for relief, Ashley requested damages based upon the breaches of fiduciary obligations in a just and equitable sum as ordered by the finder of fact to include proceeds from the sale of Ashley's share in real property held for her benefit and income derived from the real property after Ashley reached the age of majority. (R2).

[5] On April 1, 2021, Cheryl interposed her *Answer* to Cheryl's *Complaint*. (R13-14). In her *Answer*, Cheryl generally denied all of Ashley's allegations. (R13). Under the heading of "Affirmative Defenses", Cheryl asserted that the *Complaint* failed to state a claim upon which relief could be granted; that Ashley's claims were barred by the affirmative defenses of estoppel, waiver, laches, contributory negligence, unclean hands,

¹ Ashley's *Complaint* also asserted a constructive trust claim against Cheryl. (R2). However, the District Court did not consider the claim as Ashley elected to not pursue the claim at trial.

and unjust enrichment; and the damages, if any, were the result of Ashley's own actions or those of third parties over whom Cheryl had no control. (R13). In her prayer for relief, Cheryl requested that the District Court dismiss the action with prejudice; award her reasonable fees and costs; and "[a]ny other such relief that the Court deems just and proper." (R13). In her *Answer*, Cheryl did not assert a counterclaim against Ashley nor did she request that damages assessed against her, if any, be offset in any fashion. (R13).

[6] Prior to trial, the parties stipulated to certain facts (R24) and each party submitted pre-trial briefs. (R25-28). Trial was held on December 6, 2021 before the Honorable James D. Hovey. (R16). At trial, the District Court heard testimony from Ashley and Cheryl, and received Plaintiff's Exhibits 1-16, and Defendant's Exhibits 18, and 22-30. (R29-33). Cheryl submitted her *Closing Brief* on December 20, 2021 (R34-35) and Ashley submitted her *Closing Brief* on January 3, 2022. (R36-38).

[7] On February 16, 2022, the District Court issued its *Findings of Fact, Conclusions of Law and Order for Judgment*. (R39). In its *Conclusions of Law*, the District Court determined that Cheryl breached her fiduciary obligations of keeping suitable records and filing annual reports; that she breached her fiduciary duty prohibiting self dealing by using net proceeds from Ashley's portion of real property for her own benefit, and had transferred both real and personal property to herself without approval of the court; and that Cheryl breached her fiduciary obligation to transfer Ashley's assets to her upon reaching the age of majority. *Id.* Based upon the various breaches of fiduciary obligations, the District Court awarded damages to Ashley in the amount of \$119,994.97 plus post-judgment interest. *Id.* In pertinent part to this appeal, the District Court also found that because Cheryl failed to properly plead an unjust enrichment counterclaim, it was not going

to consider the claim. *Id.* *Judgment* was issued by the Wells County Clerk of Court on February 16, 2022 (R40) and *Notice of Entry of Judgment* was filed and served on the same date. (R42-43).

[8] After *Judgment* was entered, Cheryl voluntarily paid the sum of \$20,000 toward the *Judgment* rendered against her. A *Partial Satisfaction of Judgment* was signed on March 22, 2022 and docketed with the Wells County Clerk of Court on the same date. (R44-45). On April 1, 2022, Cheryl timely filed and served her *Notice of Appeal*. (R46).

[9] **STATEMENT OF FACTS**

[10] On March 26, 1988 Mark Feickert (“Mark”), at the age of twenty-four, died intestate. (R29:2). At the time of his death, Mark was married to Cheryl and they had two minor children: Ashley and Kayla Feickert (“Kayla”). *Id.* At the time of Mark’s death, Kayla was three years old, having been born in 1984, and Ashley was ten months old, having been born in 1987. *Id.* On January 29, 1990 the court, in the probate action (Case No.: 42-1988-P-2097), issued its *Order Approving Final Account, Determination of Testacy Status, Settlement and Affirmation of Distribution of an Intestate Estate by Personal Representative*. (R29:9-12). The probate court found that Cheryl, Kayla, and Ashley were the heirs of Mark. *Id.*

[11] At the time of his death, Mark owned a 100% interest in real property located in Sheridan County. (R29:22-23). Pursuant to the probate court’s order, Cheryl was awarded an undivided one-half (1/2) interest, and Kayla and Ashley were each awarded an undivided one-fourth (1/4) interest in the following real property:

Township 149 North, Range 74 West, Sheridan County, North Dakota

Section 8: S¹/₂SW¹/₄

Section 12: SW¹/₄ and South 10 rods of NW¹/₄

Section 17: N¹/₂

(hereinafter “*Property #2*”²). (R29:9-12). Mark also owned an undivided one-half interest in Sheridan County real property with his mother, Sharon Feickert. (R29:22-23). In the probate court’s order, Cheryl was awarded an undivided one-half (1/2) interest, and Kayla and Ashley were each awarded an undivided one-fourth (1/4) interest in the following real property:

Township 149 North, Range 74 West, Sheridan County, North Dakota
Section 7: Lot 3, NE¹/₄SW¹/₄, E¹/₂SE¹/₄NE¹/₄ and E¹/₂NE¹/₄SE¹/₄

(hereinafter “*Property #3*”). (R29:9-12).

[12] Because of the award of land to Kayla and Ashley while under the age of majority, a *Petition for Appointment of Conservator* was made by Cheryl on December 18, 1989. (R29:13-16). On January 26, 1990, the court, in the conservatorship action (Case No.: 42-1989-P-2124), issued its *Order Appointing a Conservator*. (R29:1719). At trial, Cheryl acknowledged that she had fiduciary obligations to Ashley based upon her appointment as conservator. (R53:20). After the conservatorship was established, in accordance with the probate court’s order, Cheryl transferred, via a *Personal Representative’s Deed of Distribution*, a one-half (1/2) interest in *Property #2* and *Property #3* to herself individually, and a one-fourth (1/4) interest in *Property #2* and *Property #3* to each Kayla and Ashley, but subject to Cheryl being appointed as their conservator. (R29:22-23). Cheryl rented out both her interest and Kayla and Ashley’s interests to Kelly S. Feickert, and continued to do so at the time of trial. (R29:36-45). No accounting of such lease income was provided to Kayla and Ashley until September 2020. (R39:3).

² For consistency purposes, the above-referenced real property is referred to as *Property #2* and *Property #3* as the probate court, in its January 29, 1990 order, referred to the real property as *Item #2* and *Item #3*.

Furthermore, neither Kayla nor Ashley directly received any income from the lease of such property, a fact that Cheryl conceded at trial. (R39:3).

[13] Since the *Personal Representative's Deed of Distribution* was executed, there have been a series of purported transfers and transfers of the above-referenced properties:

- **June 13, 2002 *Quit Claim Deed*:** Cheryl, Kayla, and Ashley, in their individual capacities, transferred their entire interests in *Property #2* to Cheryl. (R29:24-26) (June 13, 2002 *Quit Claim Deed*). At the time of the transfer, Kayla had just turned 18 and Ashley was still a minor, being 15 years old³.
- **March 17, 2009 *Warranty Deed*:** Cheryl and Ashley, in their individual capacities, and Kayla and her husband, James Weinmann, Jr., transferred *Property #3* to Kelly S. and Mary Jo Feickert for the sum of \$78,000. (R29:27-29, 52-54) (March 17, 2009 *Warranty Deed* and purchase agreement documents). At the time of the transfer, Kayla was 25 and Ashley was 22. Prior to the March 17, 2009 transfer, Cheryl, in her capacity as conservator, did not transfer Kayla or Ashley's interest to them in violation of N.D.C.C. § 30.1-29-25(3). Despite reaching the age of majority, Cheryl testified that neither Ashley nor Kayla shared in the proceeds received from the sale. (R53:41); (R39:3).
- **March 3, 2010 *Conservator's Deed*:** Cheryl, in her capacity as conservator for Ashley and Kayla, transferred *Property #3* to Ashley and Kayla. (R30-

³ Ashley did not have the power to transfer real property given her minority. See N.D.C.C. § 14-10-09 (“A person under the age of eighteen may not make a contract relating to real property or any interest therein...”)

31). This transfer was made despite *Property #3* being previously transferred to Kelly S. and Mary Jo Feickert on March 17, 2009.

- **November 27, 2013:** Cheryl executed a *Conveyance of Easement for Waterfowl Management Rights* to the United States Department of the Interior U.S. Fish and Wildlife Service for \$37,250 relating to *Property #2*. (R46:51). Cheryl testified that despite reaching the age of majority, neither Ashley nor Kayla shared in the proceeds received from the easement. (R53:32).
- **April 7, 2014 *Deed of Conservator*:** Cheryl, in her capacity as conservator for Kayla and Ashley, transferred to herself, individually, *Property #2* and *Property #3*. (R29:32-33) (April 7, 2014 *Deed of Conservator*). The *Deed of Conservator* describes Kayla and Ashley as “minor children” despite Kayla and Ashley, at the time of the transfer, being 29 and 27, respectively. Cheryl testified that she did not receive approval of the transfer to herself in violation of N.D.C.C. § 30.1-29-22. (R53:35).
- **November 13, 2020 *Quit Claim Deed*:** Following Kayla and Ashley retaining counsel, Cheryl, in her individual capacity and in her capacity as Kayla and Ashley’s conservator, transferred an undivided one-fourth (1/4) interest in *Property #2* to Kayla and Ashley. (R29:34-35) (November 13, 2020 *Quit Claim Deed*).

As it relates to signing of the forgoing documents, as to the June 13, 2002 *Quit Claim Deed* (R29:24-26), Ashley testified that she thought she was signing documents to get her first car. (R53:98). Ashley testified that Cheryl did not explain to her the document that she

was signing. *Id.* As to the remaining documents, Ashley does not recall signing them. (R53:99-101).

[14] On January 29, 2020, the court, in the conservatorship action, issued a *Notice to Appear* regarding an order to show cause relating to the status of the conservatorship. (R39:4). On February 24, 2020, the court issued a *Notice*, and in accordance with N.D.C.C. § 30.1-29-08, a hearing was set to review the status of the conservatorship including the requirement for annual reports under N.D.C.C. § 30.1-29-18. On July 2, 2020, the court held a hearing, and on July 7, 2020, the court issued an *Order* requiring Cheryl “to provide a full report of accounting of the conservatorship to the court, to be filed with the court on or before September 2, 2020.” *Id.*

[15] On September 2, 2020, Cheryl filed and served her *Summary of Accounting* and supporting documents. *Id*; *see also* (R29:55). In her *Summary of Accounting*, Cheryl requested that the court “determine the conservatorship should end” and that Kayla and Ashley “directly receive their allotted share of the land rent for 2020 and all subsequent years.” (R39:4). At this time, Cheryl had not yet transferred *Property #2* to Kayla and Ashley and made no reference in her *Summary of Accounting* of doing so. In addition, Cheryl made no proposal to the court regarding the distribution of land rent received after Kayla and Ashley reached the age of majority in April 2002 and in May 2005, respectively.

[16] On October 6, 2020 the court, in the conservatorship action, held a second hearing in regard to the status of the conservatorship. At the hearing, the court ordered that Cheryl provide information to the court regarding the assets currently being held for Kayla and Ashley’s benefit, a proposal as to the distribution of said assets, and whether the conservatorship could be terminated. On November 16, 2020, Cheryl filed and served her

Amended Summary of Accounting, the History of Conservatorship Assets, and her proposed Findings of Fact, Conclusions of Law; and Order to Close Conservatorship. (R31); *see also* (R39:5). In her *Amended Summary of Accounting*, Cheryl advised the Court that *Property #2* had been transferred to Kayla and Ashley and “[t]herefore all assets of the conservatorship had been distributed.” (R31:¶17). However, at the trial in this matter, Cheryl testified that she was still holding \$20,000 for Ashley’s benefit. (R53:50). Cheryl made no proposal to the court regarding the distribution of the rental income received after Kayla and Ashley reached the age of majority in April 2002 and in May 2005, respectively. Because Cheryl alleged that no assets were left to be distributed, she requested that “the Court determine that the conservatorship should end, and order the conservatorship closed.” (R31:¶18). This action was subsequently commenced by Ashley against Cheryl on March 5, 2021 when the court, in the conservatorship action, opined that a separate action had to be commenced regarding allegations of breaches of fiduciary obligations. (R1-8).

[17] At trial, based upon Cheryl’s breach of her fiduciary obligations to her, Ashley requested that she be awarded \$119,994.97, which represented the income that has been produced by the real property held for her benefit from the time she turned 18 in May 2005 through 2019. (R29:56). Cheryl alleged at trial that she paid, for Ashley’s benefit, the sum of \$34,411.56. (R39:11). However, all of these expenditures were made after Ashley turned 18 in May 2005. In addition, Cheryl alleged in her *Closing Brief* that she expended \$70,848 to raise Ashley’s son, A.F., and allegedly lost \$30,500 in business income based upon Ashley allegedly living in Cheryl’s motel for two years. (R34). No evidence was

submitted to the Court to support the funds allegedly used for A.F.'s benefit or the lost business income.

[18] **LAW AND ARGUMENT**

[19] **I. The District Court Properly Concluded That Cheryl Failed to Plead a Counterclaim for Unjust Enrichment and Thus Did Not Error in Not Considering Said Claim.**

[20] At issue is whether the District Court erred in failing to consider Cheryl's claim for unjust enrichment based upon her failure to properly plead under Rule 8(a) of the North Dakota Rules of Civil Procedure. Because Cheryl failed to comply with N.D.R.Civ.P. 8(a), the District Court properly excluded her claim for unjust enrichment.

[21] Rule 8(a) of the North Dakota Rules of Civil Procedure provides:

(a) Claims for Relief. A pleading that states a claim for relief – whether an original claim, a counterclaim, a crossclaim, or a third-party claim – *must* contain:

- (1) a short and plain statement of the claim showing that the pleader is entitled to relief; *and*
- (2) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(emphasis added). The purpose of N.D.R.Civ.P. 8(a) is to put the opposing party on notice as to the nature of the claim. *Williams v. State*, 405 N.W.2d 615, 621 (N.D. 1987). If the pleadings indicate generally the type of claim involved, they satisfy the spirit of N.D.R.Civ.P. 8(a). *Gowin v. Hazen Mem'l Hosp. Ass'n*, 311 N.W.2d 554, 556 (N.D.1981). While a concise and non-technical complaint is all that is required by N.D.R.Civ.P. 8(a), nevertheless, it must be sufficient to inform and notify both the adversary and the court of the pleader's claim. *Trauger v. Helm Brothers*, 279 N.W.2d 406, 412 (N.D.1979). This Court has further explained,

Recognizing the purpose of our notice pleading requirements, we have stated the district courts “have jurisdiction to provide a remedy where none exists at law – even if the parties have not specifically requested an equitable remedy – whenever the pleadings sufficiently give notice of the party's right and demand a judgment pursuant to Rule 8, NDRCivP.” *Estate of Hill*, 492 N.W.2d at 296. “Therefore, if the original complaint shows reason to grant relief, the court may consider and determine all equitable matters that are properly incidental to the complete determination of the subject matter of the case and to do complete justice between the parties.” *Id.* at 296–97.

Smestad v. Harris, 2012 ND 166, ¶ 11, 820 N.W.2d 363.

[22] In *Smestad*, Bruce G. Harris and Linda A. Smestad were involved in a personal and business relationship. *Id.* at ¶ 2. Harris owned and operated Oasis Water Systems, Inc. *Id.* During the relationship, Smestad wrote numerous checks to Harris, Oasis, and others on behalf of Harris and Oasis. *Id.* After the relationship ended, Smestad brought action seeking repayment of more than \$112,000. *Id.* In her complaint, Smestad alleged she was entitled to repayment of loans made to Harris during their relationship and demanded a money judgment and “such other and further relief as the Court deems just and equitable.” *Id.* at ¶ 12. Smestad did not specifically demand relief for unjust enrichment. *Id.* Following a bench trial, the district court found Harris orally agreed to repay Smestad some of the loans to Harris and awarded Smestad \$30,025 plus interest. *Id.* at ¶ 2.

[23] On appeal, Harris argued that the district court erred by considering whether Smestad was entitled to equitable relief because Smestad’s complaint did not include an unjust enrichment claim. *Id.* at ¶ 9. Smestad argued that the district court properly considered her unjust enrichment claim because her complaint included a demand for “such other and further relief as the Court deems just and equitable.” *Id.* In affirming the decision of the district court, this Court found that Smestad’s complaint gave Harris fair notice that

she may be entitled to recover her money loaned to Harris by way of equitable relief. *Id* at ¶ 12.

[24] In this case, unlike *Smestad*, Cheryl's *Answer* does not satisfy the N.D.R.Civ.P. 8(a) requirements of asserting any counterclaim. (R13). Cheryl's *Answer* alleges, in relevant part, "Plaintiff's claims are barred by the affirmative defense of: . . . unjust enrichment." *Id*. In her prayer for relief, Cheryl simply asked that the District Court "[d]ismiss the action with prejudice; [a]ward the Defendant her reasonable fees and costs; and [a]ny other such relief that the Court deems just and proper." *Id*. The body of Cheryl's *Answer* does not contain a short and plain statement of a claim showing she is entitled to relief, nor does it contain a demand for the relief that Cheryl sought from the District Court – to offset the damages awarded to Ashley with expenses Cheryl allegedly paid for Ashley (after reaching the age of majority) and for Ashley's son.

[25] Cheryl argues in her *Appellant's Brief* at ¶ 42 that because her *Answer* included unjust enrichment as an affirmative defense and the broad assertion for "[a]ny other such relief that the Court deems just and proper[]", Ashley was put on notice of such claim, and therefore, justice required that Cheryl be allowed to proceed with such claim. Cheryl's argument is without merit. A thorough review of Cheryl's *Answer* clearly indicates that no reference was made to requesting an offset of damages if Ashley prevailed on her breach of fiduciary claim and awarded damages. Simply stating that Ashley's claims are barred by the erroneously labeled affirmative defense of unjust enrichment, did not, and does not, put Ashley on notice that Cheryl was seeking an offset of damages, or an awarded of damages for expenses Cheryl allegedly paid for Ashley (after reaching the age of majority) and for Ashley's son.

[26] Even if the District Court allowed a counterclaim for unjust enrichment to proceed, Cheryl did not meet her burden. 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. *Cavalier County Mem'l Hosp. Ass'n v. Kartes*, 343 N.W.2d 781, 784 (N.D.1984). The doctrine serves as a basis for requiring restitution of benefits conferred “in the absence of an expressed or implied in fact contract.” *Midland Diesel Serv. and Engine Co. v. Sivertson*, 307 N.W.2d 555, 557 (N.D. 1981). A determination of unjust enrichment is a conclusion of law and is fully reviewable by the Court. *Opp v. Matzke*, 1997 ND 32, ¶ 8, 559 N.W.2d 837. Unjust enrichment requires: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) an absence of justification for the enrichment and impoverishment; and (5) an absence of remedy provided by law. *A & A Metal Bldgs. v. I-S, Inc.*, 274 N.W.2d 183, 189 (N.D. 1978).

[27] The doctrine of unjust enrichment may be invoked ““when a person has and retains money or benefits which in justice and equity belong to another.”” *Sivertson*, 307 N.W.2d at 557 (quoting *Schlichenmayer v. Luithle*, 221 N.W.2d 77, 83 (N.D. 1974)). A determination of unjust enrichment “holds that a certain state of facts is contrary to equity.” *Matter of Estate of Zent*, 459 N.W.2d 795, 798 (N.D. 1990). An essential element of recovery under unjust enrichment is the receipt of a benefit by the defendant from the plaintiff that would be inequitable to retain without paying for its value. *Zuger v. North Dakota Ins. Guar. Ass'n*, 494 N.W.2d 135, 138 (N.D. 1992). Even when a person has received a benefit from another, that person is liable only if the circumstances of the receipt or retention are such that, as between the two persons, it is unjust to retain the

benefit. *Apache Corp. v. MDU Resources Group Inc.*, 1999 ND 247, ¶ 14, 603 N.W.2d 891.

[28] Cheryl's unjust enrichment claim, if allowed by the Court, fails as a matter of law. Based upon the previously discussed facts, Cheryl cannot meet the elements as outlined in *A & A Metal Buildings*. Cheryl argues that Ashley received an enrichment in the terms of \$135,759.56 that "Cheryl expended after Ashley reached the age of 18" on Ashley's expenses (\$34,411.56); expenses of Ashley's son, A.F. (\$70,848), and for Ashley's alleged use of a hotel room at a hotel owned by Cheryl (\$30,500). *Appellants Brief* at ¶ 45. However, the District Court properly concluded that Cheryl provided no evidence, i.e., an accounting or other documentation, substantiating the claim of \$70,848 allegedly expended on A.F., no evidence regarding the \$30,500 for Ashley's alleged use of a hotel room, or any legal authority requiring Ashley to pay back the funds alleged used for Ashley's expenses after she turned eighteen. (R39:10-11).

[29] Based upon the forgoing, Ashley respectfully requests that this Court affirm the decision of the District Court that Cheryl failed to comply with N.D.R.Civ.P. 8(a) and thus properly excluded her claim for unjust enrichment.

[30] **II. The District Court Considered the Amounts Cheryl Allegedly Paid to, or on Behalf of Ashley, and Properly Concluded that No Offset to the Damages Awarded to Ashley Was Permissible.**

[31] Cheryl next argues that the District Court failed to consider the amounts Cheryl paid to, or on behalf of Ashley, to reduce the damages awarded to Ashley. *Appellant's Brief* at ¶ 47. This argument seems to be similar to that of the unjust enrichment claim Cheryl asserts. It should first be noted that Cheryl cites to no legal authority that supports a theory that the damages assessed against her should be reduced; the District

Court similarly found that Cheryl failed to cite to any authority to support her requested relief. (R39:10). This Court has said “a party waives an issue by not providing supporting argument and, without supportive reasoning or citations to relevant authorities, an argument is without merit.” *Riemers v. O'Halloran*, 2004 ND 79, ¶ 6, 678 N.W.2d 547 (quoting *Kautzman v. Kautzman*, 2003 ND 140, ¶ 15, 668 N.W.2d 59). For this reason alone, this Court should find that Cheryl’s argument is without merit and disregard the same.

[32] Even if this Court were to entertain Cheryl’s argument that there should be a reduction of damages, the District Court, after receiving numerous exhibits and evidence regarding funds allegedly expended by Cheryl, properly concluded that a reduction of damages was not permissible as there was no legal authority to support it. (R39:17, 19, 21). At trial, the District Court received Defendant’s Exhibits 22-30, which were purported to be proof of expenses Cheryl allegedly paid to, or on behalf of, Ashley. (R30, 32-33). Cheryl erroneously argues that the District Court limited questioning and testimony regarding an unjust enrichment claim and payments allegedly made to Ashley or on her behalf. *Appellant’s Brief* at ¶ 47. However, as noted in the trial transcript (R53), Cheryl freely testified to these exhibits and the purposes they were admitted into evidence. Simply because the District Court ruled against Cheryl does not mean that it did not consider the exhibits submitted.

[33] The only testimony of Cheryl that was sustained regarding her request for a reduction of damages came at the conclusion of Ashley’s testimony when she was questioned about Cheryl allegedly providing care for her son, A.F., and Ashley allegedly living at Cheryl’s hotel. (R53:110-113). As it relates to those two lines of questioning, the

District Court inquired with counsel for Cheryl what legal authority she had relating to the payment of expenses after Ashley turned eighteen and what legal authority she had that would reduce the damages awarded to Ashley; counsel for Cheryl provided none and thus the questions were sustained. *Id.*

[34] Upon the line of questioning being sustained, Cheryl failed to make an offer of proof. Rule 103 of the North Dakota Rules of Evidence provides:

Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

- (A) timely objects or moves to strike; and
- (B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

N.D.R.Ev. 103(a). By failing to make an offer of proof, Cheryl did not preserve the issue for appeal. “Error cannot be predicated upon a ruling which excludes evidence unless the party offering the evidence makes an offer of proof, or the substance of the evidence is apparent from the context in which the question was asked.” *State v. Jensen*, 2000 ND 28, ¶ 17, 606 N.W.2d 507 (citing N.D.R.Ev. 103). Given that no offer of proof was made, the evidentiary issues that Cheryl raises are not properly before the Court.

[35] Based upon the forgoing, Ashley respectfully requests that this Court affirm the decision of the District Court and find that it properly concluded that no offset or reduction to the damages awarded to Ashley was permissible.

[36] **CONCLUSION**

[37] For the foregoing reasons, Ashley respectfully requests that this Court affirm the District Court's decision and award Ashley costs incurred in this appeal.

Respectfully submitted this 19th day of August.

MICHEAL A. MULLOY
MULLOY LAW, PLLC
Attorneys for Ashley Feickert
101 Slate Drive, Suite 7
Bismarck, ND 58503
PH: 701-390-8580
FX: 701-639-2845
Email: mike@mulloylaw.com

/s/ Micheal A. Mulloy (ID# 07239)

[38] **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(d) of the North Dakota Rules of Appellate Procedure, the undersigned certifies that the foregoing brief complies with the N.D.R.App.P. 32(a)(8)(A). The total pages of the *Brief of Appellee Ashley Feickert*, including this *Certificate of Compliance*, totals twenty pages.

Dated this 19th day of August, 2022 .

MICHEAL A. MULLOY
MULLOY LAW, PLLC
Attorneys for Ashely Feickert
101 Slate Drive, Suite 7
Bismarck, ND 58503
PH: 701-390-8580
FX: 701-639-2845
Email: mike@mulloylaw.com

/s/ Micheal A. Mulloy (ID# 07239)