

1999 HOUSE JUDICIARY

HB 1218

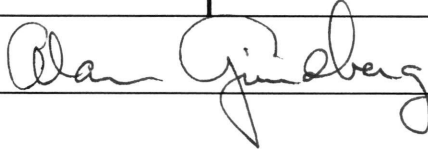
1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1218

House Judiciary Committee

Conference Committee

Hearing Date January 20, 1999

Tape Number	Side A	Side B	Meter #
Committee Clerk Signature 			

Minutes:

REP. KLEMIN: This bill is to clarify the statutes and rules regarding what are allowable costs in a legal action. It will remove some of the discretion and require that a reasonable amount be taxed. Now, if the district court refuses to tax the \$50 answering fee, the only recourse is to go to the Supreme Court where the filing fee is \$125.

COMMITTEE ACTION: January 20, 1999

REP. SVEEN moved that the committee recommend that the bill DO PASS. Rep. Koppelman seconded and the motion passed on a roll call vote with 12 ayes, 0 nays and 3 absent. Rep. Delmore was assigned to carry the bill on the floor.

FISCAL NOTE

(Return original and 10 copies)

Bill/Resolution No.: 1218 Amendment to: _____

Requested by Legislative Council Date of Request: 01/11/99

- Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, and cities.

Narrative:

House Bill No. 1218 identifies certain expenses (disbursements) that must be taxed in favor of the winning party in a civil suit. Generally, there would be no affect on public funds.

- State** fiscal effect in dollar amounts:

	1997-99 Biennium		1999-2001 Biennium		2001-03 Biennium	
	General Fund	Special Funds	General Fund	Special Funds	General Fund	Special Funds
Revenues:	0	0	0	0	0	0
Expenditures:	0	0	0	0	0	0

- What, if any, is the effect of this measure on the appropriation for your agency or department:

- For rest of 1997-99 biennium: 0
- For the 1999-2001 biennium: 0
- For the 2001-2003 biennium: 0

- County, City, and School District** fiscal effect in dollar amounts:

1997-99 Biennium			1999-2001 Biennium			2001-03 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
0	0	0	0	0	0	0	0	0

If additional space is needed,
attach a supplemental sheet.

Signed *Keith E. Nelson*

Typed Name Keith E. Nelson

Department Judicial Branch

Phone Number 328-4216

Date Prepared: 1/11/99

Date: 1/20
Roll Call Vote #: J

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

House JUDICIARY Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number 1218

Action Taken Do Pass

Motion Made By Sveen Seconded By Koppelman

Representatives	Yes	No	Representatives	Yes	No
REP. DEKREY	✓		REP. SVEEN	✓	
REP. CLEARY	✓				
REP. DELMORE	✓				
REP. DISRUD	✓				
REP. FAIRFIELD					
REP. GORDER	✓				
REP. GUNTER					
REP. HAWKEN	✓				
REP. KELSH					
REP. KLEMIN	✓				
REP. KOPPELMAN	✓				
REP. MAHONEY	✓				
REP. MARAGOS	✓				
REP. MEYER	✓				

Total (Yes) 12 No 0

Absent 3

Floor Assignment ~~Delmore~~ Delmore

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
January 21, 1999 8:48 a.m.

Module No: HR-13-0932
Carrier: Delmore
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1218: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO PASS
(12 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). HB 1218 was placed on the
Eleventh order on the calendar.

1999 SENATE JUDICIARY

HB 1218

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1218

Senate Judiciary Committee

Conference Committee

Hearing Date March 3, 1999

Tape Number	Side A	Side B	Meter #
2	x		2284 - 5449
3-9-99 2		x	1050 - 2000
Committee Clerk Signature <i>Jackie Follman</i>			

Minutes:

HB1218 relates to costs and disbursements taxed in judgments.

SENATOR STENEHJEM opened the hearing on HB1218 at 11:45 A.M.

All were present except Senator C. Nelson.

REPRESENTATIVE KLEMIN testified in support of HB1218. Testimony attached.

SENATOR TRAYNOR asked if there wasn't a procedure to tax and allow the costs of disbursements on three day notice.

REPRESENTATIVE KLEMIN stated that it doesn't work that way anymore. The rule now says that the clerk supposed to tax those costs, and then the person can object to those costs and then there is a hearing to determine whether the costs should be awarded.

SENATOR WATNE asked doesn't the court have discretion whether the experts testimony is even needed.

Page 2
Senate Judiciary Committee
Bill/Resolution Number HB1218
Hearing Date March 3, 1999

REPRESENTATIVE KLEMIN stated that there are rules on this. The Court can determine a reasonable fee.

AL WOLF, North Dakota Trial Lawyers, testified in opposition of HB1218. Testimony attached. We have no objection to the bill if Section 2 is taken out.

TOM DIXON, Attorney in Bismarck, testified in opposition of HB1218. Section 2 is the problem with this bill. If the problem isn't broke, don't fix it. The judges are doing a good job. I don't believe this bill serves the bill.

SANDI TABOR, State Bar Association, testified to help with some technical assistance on HB1218. There is a concern from the Association with Section 2.

SENATOR STENEHEJEM CLOSED the hearing on HB1218.

MARCH 9, 1999 TAPE 2, SIDE B

SENATOR TRAYNOR made a motion for DO NOT PASS, SENATOR WATNE seconded.

Discussion. Motion carried. 6 - 0 - 0

SENATOR STENEHJEM will carry the bill.

PROPOSED AMENDMENTS TO HOUSE BILL 1218

Page 2, line 12, remove "except to the extent provided in"

Page 2, line 12, after "discretionary" insert "when awarded under subsection
2 and 5 of"

Renumber accordingly.

Date 3-9-99
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB1218

Senate Judiciary Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Senator Traynor Seconded By Senator Watne

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson	X				
Senator John Traynor	X				
Senator Dennis Bercier	X				
SenatorCarolyn Nelson	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Stenehjem

REPORT OF STANDING COMMITTEE (410)
March 9, 1999 4:22 p.m.

Module No: SR-42-4386
Carrier: W. Stenehjem
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1218: Judiciary Committee (Sen. W. Stenehjem, Chairman) recommends DO NOT PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1218 was placed on the Fourteenth order on the calendar.

1999 TESTIMONY

HB 1218

TESTIMONY OF REPRESENTATIVE LAWRENCE R. KLEMIN
HOUSE JUDICIARY COMMITTEE
HOUSE BILL NO. 1218
JANUARY 20, 1999

NORTH DAKOTA RULES OF CIVIL PROCEDURE
VII. JUDGMENT
RULE 54. JUDGMENT--COSTS

(e) Costs; Attorneys' Fees.

(1) Costs Other Than Attorneys' Fees. **Costs and disbursements must be allowed as provided by statute.** A party awarded costs and disbursements shall submit to the clerk a detailed, verified statement thereof. Upon receipt of the statement, the clerk shall allow those costs and disbursements and insert them in the judgment. A copy of the statement must accompany the notice of entry of judgment. Objections must be served and filed with the clerk, either within 7 days after notice of entry of judgment or within such longer time the court may fix by order made within the 7 days. Objections must specify the ground thereof. If objections are filed, the clerk shall promptly submit them to the judge who ordered the judgment. The court by ex parte order shall fix a time for hearing the objections. Unless otherwise directed by the court, the parties may waive the right to hearing and submit written argument in lieu thereof within a time specified by the court.

§ 28-26-02. Amount of costs in specific cases

Costs in the district courts and in the supreme court must be as follows:

1. To the plaintiff for all proceedings before trial, ten dollars, and for each additional defendant served with process not exceeding ten, one dollar.
2. To the defendant, for all proceedings before trial, five dollars.
3. For every trial of an issue of fact, five dollars.
4. Superseded.
5. To either party for every term not exceeding five, at which the cause is necessarily on the calendar of the district court and is not tried or is postponed by order of the court, three dollars, and for every term not exceeding five, excluding the term at which the cause is argued in the supreme court, five dollars. Term fees are not taxable as costs when a cause, properly on the calendar, is not reached for trial during the term, nor in case a continuance is had upon the application of, or stipulation with, the party in whose favor costs are to be taxed.

§ 28-26-06. Disbursements taxed in judgment

In all actions and special proceedings, the clerk shall tax as a part of the judgment in favor of the prevailing party his necessary disbursements as follows:

1. The legal fees of witnesses and of referees and **other officers**;
2. The necessary expenses of taking depositions and of procuring evidence necessarily used or obtained for use on the trial;
3. The legal fees for publication, when publication is made pursuant to law;
4. The legal fees of the court reporter for a transcript of the testimony when such transcript is used on motion for a new trial or in preparing a statement of the case; and
5. The fees of expert witnesses. Such fees must be reasonable fees as determined by the court, plus his actual expense. The following are nevertheless in the sole discretion of the trial court:
 - a. The number of expert witnesses who are allowed fees or expenses;
 - b. The amount of fees to be paid such allowed expert witnesses, including an amount for time expended in preparation for trial; and
 - c. The amount of costs for actual expenses to be paid such allowed expert witnesses.

§ 28-26-07. When **costs** allowed to plaintiff

Costs must be allowed of course to the plaintiff upon a recovery in the following cases:

1. In an action for the recovery of real property or when a claim of title to real property arises on the pleadings or is certified by the court to have come in question at the trial.
2. In an action to recover the possession of personal property.

§ 28-26-08. **Costs** specially limited

In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, if the plaintiff recovers less than fifty dollars damages, he may recover no more costs and disbursements than damages. In an action to recover the possession of personal property, if the plaintiff recovers less than fifty dollars damages, he may recover no more costs and disbursements than damages, unless he recovers property also, the value of which with the damages amounts to fifty dollars, or the possession of property is adjudged to him, the value of which with the damages amounts to fifty dollars. Such value must be determined by the jury, court, or referee by whom the action is tried. When several actions are brought on one bond, recognizance, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same claim for relief against several parties who might have been joined as defendants in the same action, no costs other than disbursements may be allowed to the plaintiff in more than

one of such actions, which must be at his election, if the party or parties proceeded against in such action or actions, at the time of the commencement of the previous action or actions, has been openly within this state and not secreted.

§ 28-26-09. When **costs** allowed to defendant

Costs must be allowed of course to the defendant in the actions mentioned in sections 28-26-07 and 28-26-08 unless the plaintiff is entitled to costs therein.

§ 28-26-10. **Costs in discretion of court**

In actions other than those specified in sections 28-26-07, 28-26-08, and 28-26-09, **costs** may be allowed for or against either party **in the discretion of the court**. In all actions, when there are several defendants not united in interest and making separate defenses by separate answers and the plaintiff fails to recover judgment against all, the court may award **costs** to such of the defendants as have judgment in their favor.

§ 28-26-11. **Costs of appeal--When discretionary**

In the following cases the **costs** of an appeal are in the **discretion of the court**:

1. When a new trial is ordered; or
2. When a judgment is affirmed in part and reversed in part.

§ 28-26-12. **Costs** on dismissal of action

When an action is dismissed from any court for want of jurisdiction or because it has not been transferred regularly from an inferior to a superior court, **the costs must be adjudged against the party attempting to institute or bring up the action.**

§ 11-17-04. **Fees to be charged by the clerk of the district court**

1. The clerk of the district court shall charge and collect the following fees in civil cases:
 - a. For filing a case for decision that is not a small claims action, eighty dollars.
 - (1) Fifteen dollars of this fee must be paid by the clerk of court to the state treasurer for deposit in

the civil legal services fund. Any fees collected under this paragraph which exceed four hundred thousand dollars in any biennium must be paid by the clerk of court to the state treasurer for deposit in the state general fund.

(2) For the filing of a petition for dissolution of marriage, annulment, or separation from bed and board, fifty dollars of this fee must be paid by the clerk of court to the state treasurer for deposit in the displaced homemaker account created by section 14-06.1-14.

(3) For all other filings, forty-five dollars of this fee must be paid by the clerk of court to the state treasurer for deposit in the state general fund.

b. **For filing an answer to a case that is not a small claims action, fifty dollars.** The clerk shall deposit this fee with the state treasurer for deposit in the general fund in the state treasury.

c. For filing a small claims action in district court, ten dollars.

d. For filing any matter authorized to be filed in the office of the clerk of court other than under subdivision a, b, or c, ten dollars.

e. For preparing, certifying, issuing, or transmitting any document, ten dollars; or a lesser fee as may be set by the state court administrator.

f. For filing a motion or an answer to a motion to modify an order for alimony, property division, child support, or child custody, thirty dollars. The clerk shall deposit this fee with the state treasurer for deposit in the general fund of the state treasury.

2. Section 27-01-07 applies to fees charged under this section. The clerk of court may not charge or collect any fee, prescribed by this or any other section, from the state or an agency thereof or from a political subdivision or agency thereof.

§ 27-03-05. Fees to be charged and collected by clerk of supreme court

The clerk of the supreme court shall charge and collect in advance a fee of **one hundred twenty-five dollars** upon the filing in the supreme court of the record in any cause upon appeal, or upon the filing in such court of a petition in any cause seeking the exercise of the original jurisdiction thereof.

TESTIMONY BY ALBERT A. WOLF
ON BEHALF OF
NORTH DAKOTA TRIAL LAWYERS ASSN.
BEFORE
SENATE JUDICIARY COMMITTEE
March 3, 1999

HB 1218

Chairman Stenehjem and members of the Committee.

The North Dakota Trial Lawyers Association has taken a position in opposition to HB 1218.

While reading Section 1 of this bill it would appear that the discretionary powers of the trial court are retained insofar as ordering costs and disbursements as to the items solicited in Section 1. The language of lines 6 and 7, page 1, combined with the new language of lines 12 and 13 of page 2, removes the discretion of the court in making those awards.

Under the present statutory provisions of Section 28-26-06, the court can exercise its discretion in determining what costs or disbursements were reasonable and necessary before they are awarded to be paid by the opposing party.

Unfortunately, legislation is sometimes proposed to deal with specific concerns or adverse results under present law by proponents of the legislation. It appears quite clearly that HB 1218 arises from litigation that the sponsor was involved in with a Grand Forks attorney in Burleigh County District Court involving

an asbestos claim.

Attached is a copy of the order dismissing an action against a defendant wherein Judge Riskedahl disallowed the costs in favor of the defendant. There were extensive briefs filed by both sides on the question of how the court should exercise its discretion in awarding or denying assessment of costs and disbursements in this case.

In ruling on the motion for reconsideration of the court's denial of the court's denial of costs and disbursements, the court reaffirmed its decision in recognition of prior decisions rendered in similar asbestos cases. The issues were apparently very close and both sides had substantial merit in the case.

Section 28-26-06 was enacted by this legislature many years ago and has been kept intact by the legislature with the discretionary powers of the courts being preserved. And the North Dakota Rules of Civil Procedure were adopted many years ago after extensive review of child procedure provisions. The rulemakers also left intact the language of Section 28-26-06, NDCC.

This discretionary power must be preserved to be exercised in various types of situations not only involving asbestos cases, but all kinds of civil actions involving personal injuries, business relations and other types of actions. This type of legislation would penalize small business in North Dakota who may have to litigate against larger businesses which market various products in the state of North Dakota where the larger corporation could have unlimited access to funds

for depositions and expert witnesses throughout the country, while the smaller business in North Dakota would have to be fearful of having all those costs incurred by the larger corporation or insurance company assessed against it in the event it did not prevail in the trial of the action. To impose that type of a burden on our local businessmen and individuals in North Dakota who choose to exercise their constitutional rights to pursue a claim they feel valid against another party and then face the assessment of costs incurred without the right of a North Dakota judge to exercise discretion in determining what costs were reasonable and what costs were necessarily incurred in the defense of this action. This could also work a hardship and an injustice against a small business or individual persons in North Dakota who are sued by a large corporation which will not only pursue the claim but incur extensive costs for experts and depositions throughout the country and then have those costs assessed, without any discretion by the trial court, along with the judgment on the action itself.

Chapter 28-26 includes other sections which do provide for situations where costs must be allowed to the plaintiff upon recovery, such as Section 28-26-07 where an action for recovery of real property or claim of title to real property arises, or in an action to recover the possession of personal property.

Section 28-26-01, NDCC provides that in civil actions the court shall, upon a finding that a claim was frivolous, award reasonable, actual and statutory costs, including reasonable attorneys fees to the prevailing party. Such costs must be

awarded regardless of the good faith of the attorney or party making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their favor.

Section 28-26-31, NDCC, provides that when allegations or denials are made in pleadings filed with the court without reasonable cause and not in good faith, and found to be untrue, the party pleading them can be ordered to pay all expenses actually incurred by the other party by reason of the untrue pleading, including a reasonable attorneys fees to be summarily taxed by the court at the trial or upon dismissal of the action.

Therefore, there are already provisions in the law which allow the court to exercise its discretion and award the payment of all costs and disbursements against the losing party under the conditions provided for in those sections.

Thus the mandatory assessment of costs and disbursements in the cases covered by Section 28-26-06, NDCC, without any exercise of discretion by the trial court, is totally uncalled for and not necessary to preserve the rights of the parties.

There is another concern which must be brought to the Committee's attention in enacting HB 1218, and that is that it puts the parties to a lawsuit in a defensive position at all times when the other party proposes taking depositions or calling expert witnesses or taking other actions in preparation for or in the actual trial of the case. That would result in motions being brought before the court to have the trial court review these various proceedings and actions by

opposing counsel and thereby incurring considerable time to the court system and costs to the parties.

Also, there might be appeal taken from an order of the court where its discretion is exercised in awarding or denying costs and disbursements to a prevailing party - in fact I understand there was an appeal taken from Judge Riskedahl's order by Mr. Klemin in this case, and the cost issue was settled before the appeal was argued before the Supreme Court.

HB 1218 would create a tremendous change in the practice of law in North Dakota and in the process by which the rights of the parties are determined after the litigation has been concluded. Such a major change in the law is usually made after a considerable study by the Bar Association committees in charge of these matters, such as the Rules Committee, which is in session on an on-going basis, or the Judicial Conference which includes judges and attorneys as well as other persons in reviewing the judicial proceedings by which trials are conducted.

The proposed changes in HB 1218 have not been brought to the attention of the North Dakota Bar Association or any other body which would ordinarily deal with these proceedings and these concerns. Therefore it does not appear that there is a crying need for any changes in the present proceedings, nor is there a need to remove the discretionary powers of the trial court in this very essential area where individualized decisions must be made based on the facts, the legal issues and the nature of the action in each case.

These changes in the rules would impose a tremendous responsibility on courts and juries in deciding close cases where the losing party would be required not only to pay all costs and disbursements and attorneys fees incurred by that party, but also all costs and disbursements incurred by the prevailing party, without any discretion on the part of the trial court in determining whether such costs and disbursements were reasonably and necessarily incurred in the trial of the action.

Of primary concern, of course, is that the changed rules would have a chain effect on parties in bringing civil actions to the courts to seek an appropriate remedy, knowing that they could be assessed all costs and disbursements regardless of the amount incurred by the other party if an adverse decision were rendered by a court or jury, even if there were no frivolous or bad faith pleadings filed by the party.

This Judiciary Committee should recommend a DO NOT PASS for HB 1218.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Re: Burleigh County Asbestos Litigation - Set 8
Harvey Boen
Eugene Courts
LuVerne Hellem
Judd Myers
Larry Naasz

Civil No. 96-C-1002
96-C-1004
96-C-1005
96-C-1008
96-C-1009

**ORDER DENYING GARDNER DENVER MACHINERY INC.'S
MOTION FOR RECONSIDERATION OF DENIAL OF COSTS AND DISBURSEMENTS**

The above captioned actions came on for hearing before the above-named Court, by telephone conference on June 8, 1998, on defendant Gardner Denver Machinery Inc.'s motion for reconsideration of its denial of taxation of costs and disbursements in conjunction with summary judgments in these cases. Lawrence Klemin appeared on behalf of defendant Gardner Denver Machinery, Inc., Jeanette T. Boechler, appeared on behalf of plaintiffs. Based on the arguments of counsel, and all of the records, files and proceedings herein, and in recognition of prior decisions on this basis under the Deeming Order,

IT IS HEREBY ORDERED that defendant Gardner Denver Machinery Inc.'s motion for an award of costs and disbursements is denied.

IT IS HEREBY ORDERED that the above-entitled actions, be and hereby are dismissed with prejudice as to separate defendant Gardner Denver Machinery, Inc., without costs or disbursements.

Let Judgment be entered in accordance herewith.

Dated: June 15 1998

BY THE COURT:

Burt E. Riskedahl
Burt E. Riskedahl
Judge of the District Court

RECEIVED & FILED
JUN 16 1998
Ct. of Cr. Burleigh Co.

COUNTY OF BU

JUDICIAL DISTRICT

Harvey Boen,

Civil No. 96-C-1002

Plaintiff,

v.

ORDER FOR DISMISSAL OF
GARDNER DENVER MACHINERY
INC., AS SUCCESSOR-IN-INTEREST
TO JOY TECHNOLOGIES, INC.

ACandS, Inc.,
a Delaware corporation,
(individually and as
successor-in-interest to
Armstrong Contracting & Supply,
Inc., and Keasby & Mattison
Company), et al,

Defendants.

In accordance with the Memorandum Opinion issued on March 26, 1998, the Court hereby ORDERS that the Defendant Gardner Denver Machinery Inc., as Successor-in-Interest to Joy Technologies, Inc. ("Gardner"), does have judgment against the plaintiff, dismissing the action with prejudice, and with costs in favor of Gardner to be taxed and allowed by the Clerk. *BCR*

Dated this 7th day of April, 1998.

BY THE COURT:

Burt C. Ruckelshaus
District Judge

1102150-001\dlserd.doc

RECEIVED & FILED

APR 09 1998

Cik. of Crt. Burleigh Co.

52

TESTIMONY OF REPRESENTATIVE LAWRENCE R. KLEMIN
SENATE JUDICIARY COMMITTEE
HOUSE BILL NO. 1218
MARCH 3, 1999

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. I AM LAWRENCE R. KLEMIN, REPRESENTATIVE FROM DISTRICT 47 IN BISMARCK. I INTRODUCED HOUSE BILL 1218 IN ORDER TO CLARIFY WHAT IS INCLUDED IN THE "COSTS" AND "DISBURSEMENTS" THAT A COURT CAN AWARD TO A PREVAILING PARTY IN A LAWSUIT, AS WELL AS TO SET OUT WHICH "COSTS" AND "DISBURSEMENTS" ARE DISCRETIONARY WITH THE COURT AND WHICH ARE NOT.

THE TERMS "COSTS" AND "DISBURSEMENTS" ARE SEPARATE TERMS IN THE NORTH DAKOTA CENTURY CODE AND ARE COVERED IN DIFFERENT SECTIONS. ATTACHED TO MY TESTIMONY ARE THE SECTIONS WHERE "COSTS" AND "DISBURSEMENTS" ARE COVERED IN CHAPTER 28-26. I HAVE ALSO INCLUDED THE TEXT OF RULE 54 (e)(1) OF THE NORTH DAKOTA RULES OF CIVIL PROCEDURE TO SHOW THAT THE *TYPES* OF "COSTS" AND "DISBURSEMENTS" ARE NOT SOMETHING THAT A COURT ITSELF CAN DETERMINE. A COURT CAN ONLY AWARD "COSTS" AND "DISBURSEMENTS" TO THE EXTENT AND OF THE TYPE SPECIFICALLY PROVIDED BY THE LEGISLATURE BY STATUTE.

SECTION 1

THE TYPES OF "DISBURSEMENTS" ARE LISTED IN SECTION 28-26-06. THIS SECTION IS BEING AMENDED TO SPECIFICALLY INCLUDE THE FEES OF CLERKS OF COURT, SHERIFFS AND PROCESS SERVERS IN SUBSECTION 2. IT HAD BEEN THOUGHT THAT THESE TYPES OF FEES WERE INCLUDED WITHIN THE TERM "OTHER OFFICERS" IN SUBSECTION 1. HOWEVER, THERE HAVE BEEN A NUMBER OF CASES RECENTLY WHERE THE LOSING PARTY SUCCESSFULLY ARGUED THAT THESE TYPES OF FEES WERE NOT ALLOWED AS "DISBURSEMENTS" BECAUSE THEY WERE NOT SPECIFICALLY MENTIONED IN THE STATUTE. THERE ARE NO REPORTED CASES COVERING THIS PARTICULAR SUBJECT IN NORTH DAKOTA. THE PROPOSED AMENDMENT CLARIFIES THAT THESE FEES ARE INCLUDED AS "DISBURSEMENTS." AS A RESULT OF THE AMENDMENT TO SECTION 28-26-10 COVERED IN SECTION 2 OF THE BILL, WHICH I WILL DISCUSS IN A MOMENT, THESE FEES ARE NOT SUBJECT TO THE DISCRETION OF THE COURT BUT MUST BE AWARDED TO THE PREVAILING PARTY. IN OTHER WORDS, THE COURT CANNOT DECIDE THAT THE PREVAILING PARTY IS NOT ENTITLED TO THESE TYPES OF FEES.

SUBSECTION 3 IS BEING ADDED TO INCLUDE AS "DISBURSEMENTS" THE REASONABLE FEES OF RECEIVERS, MASTERS, AND TRUSTEES APPOINTED BY

THE COURT. THESE FEES HAVE TRADITIONALLY BEEN SUBJECT TO THE DISCRETION OF THE COURT AND THIS DISCRETION IS AFFIRMED IN SUBSECTION 3.

THE CHANGE IN SUBSECTION 7 IS A FORM AND STYLE CHANGE MADE BY THE LEGISLATIVE COUNCIL AND IS NOT A SUBSTANTIVE CHANGE.

SECTION 2

SECTION 28-26-10 OF THE NORTH DAKOTA CENTURY CODE STATES THAT THE "COSTS" AWARDED TO A PREVAILING PARTY ARE IN THE DISCRETION OF THE COURT. THIS SECTION IS BEING AMENDED TO PROVIDE THAT "DISBURSEMENTS" ARE *NOT* DISCRETIONARY, EXCEPT TO THE EXTENT PROVIDED IN SECTION 28-26-06. THIS IS TO CLARIFY WHICH "DISBURSEMENTS" ARE SUBJECT TO THE DISCRETION OF THE TRIAL COURT AND WHICH ARE NOT. THIS IS SIMILAR TO EXISTING SECTION 28-26-11, SHOWN IN THE ATTACHMENT, WHICH SETS OUT *WHEN* "COSTS OF APPEAL" ARE DISCRETIONARY WITH THE SUPREME COURT AND, BY IMPLICATION, WHEN THEY ARE NOT.

EXAMPLE OF NONDISCRETIONARY DISBURSEMENTS UNDER THIS BILL:

WHEN A PARTY IS SUED, THAT PARTY, AS THE DEFENDANT, MUST PAY A \$50 FILING FEE TO THE CLERK OF COURT IN ORDER TO FILE AN ANSWER TO A COMPLAINT OR TO FILE A MOTION TO DISMISS. *SEE* SECTION 11-17-04 IN THE ATTACHMENT. IF THE DEFENDANT WINS THE CASE, THE COURT WOULD NOT HAVE THE DISCRETION TO DENY AN AWARD OF THE \$50 FILING FEE TO THE PREVAILING DEFENDANT. UNDER THE EXISTING LAW, IF THE TRIAL COURT DOES DENY AN AWARD OF THE FILING FEE, THE ONLY RECOURSE THE PREVAILING DEFENDANT HAS IS TO APPEAL TO THE SUPREME COURT AND TO PAY THE \$125 FILING FEE REQUIRED FOR AN APPEAL. *SEE* SECTION 27-03-05 IN THE ATTACHMENT. THIS IS NOT AN ECONOMIC PROPOSITION SO THE PREVAILING PARTY REALLY HAS NO RECOURSE. THIS EXAMPLE MAY BE SIMPLISTIC, BUT IT IS THE TYPE OF SITUATION THAT CAN HAPPEN WITHOUT THE CLARIFICATION IN THE LAW PROPOSED IN THIS BILL.

I WOULD BE HAPPY TO ANSWER ANY QUESTIONS THAT YOU HAVE.

NORTH DAKOTA RULES OF CIVIL PROCEDURE
VII. JUDGMENT
RULE 54. JUDGMENT--COSTS

(e) Costs; Attorneys' Fees.

(1) Costs Other Than Attorneys' Fees. **Costs and disbursements must be allowed as provided by statute.** A party awarded costs and disbursements shall submit to the clerk a detailed, verified statement thereof. Upon receipt of the statement, the clerk shall allow those costs and disbursements and insert them in the judgment. A copy of the statement must accompany the notice of entry of judgment. Objections must be served and filed with the clerk, either within 7 days after notice of entry of judgment or within such longer time the court may fix by order made within the 7 days. Objections must specify the ground thereof. If objections are filed, the clerk shall promptly submit them to the judge who ordered the judgment. The court by ex parte order shall fix a time for hearing the objections. Unless otherwise directed by the court, the parties may waive the right to hearing and submit written argument in lieu thereof within a time specified by the court.

NORTH DAKOTA CENTURY CODE

§ 11-17-04. **Fees to be charged by the clerk of the district court**

1. The clerk of the district court shall charge and collect the following fees in civil cases:

a. For filing a case for decision that is not a small claims action, eighty dollars.

(1) Fifteen dollars of this fee must be paid by the clerk of court to the state treasurer for deposit in the civil legal services fund. Any fees collected under this paragraph which exceed four hundred thousand dollars in any biennium must be paid by the clerk of court to the state treasurer for deposit in the state general fund.

(2) For the filing of a petition for dissolution of marriage, annulment, or separation from bed and board, fifty dollars of this fee must be paid by the clerk of court to the state treasurer for deposit in the displaced homemaker account created by section 14-06.1-14.

(3) For all other filings, forty-five dollars of this fee must be paid by the clerk of court to the state treasurer for deposit in the state general fund.

b. **For filing an answer to a case that is not a small claims action, *fifty dollars*.** The clerk shall deposit this fee with the state treasurer for deposit in the general fund in the state treasury.

c. For filing a small claims action in district court, ten dollars.

d. For filing any matter authorized to be filed in the office of the clerk of court other than under

subdivision a, b, or c, ten dollars.

e. For preparing, certifying, issuing, or transmitting any document, ten dollars; or a lesser fee as may be set by the state court administrator.

f. For filing a motion or an answer to a motion to modify an order for alimony, property division, child support, or child custody, thirty dollars. The clerk shall deposit this fee with the state treasurer for deposit in the general fund of the state treasury.

2. Section 27-01-07 applies to fees charged under this section. The clerk of court may not charge or collect any fee, prescribed by this or any other section, from the state or an agency thereof or from a political subdivision or agency thereof.

§ 27-03-05. Fees to be charged and collected by clerk of supreme court

The clerk of the supreme court shall charge and collect in advance a fee of **one hundred twenty-five dollars** upon the filing in the supreme court of the record in any cause upon appeal, or upon the filing in such court of a petition in any cause seeking the exercise of the original jurisdiction thereof.

§ 28-26-02. Amount of **costs** in specific cases

Costs in the district courts and in the supreme court must be as follows:

1. To the plaintiff for all proceedings before trial, ten dollars, and for each additional defendant served with process not exceeding ten, one dollar.
2. To the defendant, for all proceedings before trial, five dollars.
3. For every trial of an issue of fact, five dollars.
4. Superseded.
5. To either party for every term not exceeding five, at which the cause is necessarily on the calendar of the district court and is not tried or is postponed by order of the court, three dollars, and for every term not exceeding five, excluding the term at which the cause is argued in the supreme court, five dollars. Term fees are not taxable as costs when a cause, properly on the calendar, is not reached for trial during the term, nor in case a continuance is had upon the application of, or stipulation with, the party in whose favor costs are to be taxed.

§ 28-26-06. **Disbursements** taxed in judgment

In all actions and special proceedings, the clerk **shall tax as a part of the judgment in favor of the prevailing party his necessary disbursements as follows:**

1. The legal fees of witnesses and of referees and **other officers**;
2. The necessary expenses of taking depositions and of procuring evidence necessarily used or obtained for use on the trial;

3. The legal fees for publication, when publication is made pursuant to law;
4. The legal fees of the court reporter for a transcript of the testimony when such transcript is used on motion for a new trial or in preparing a statement of the case; and
5. The fees of expert witnesses. Such fees must be reasonable fees as determined by the court, plus his actual expense. The following are nevertheless in the sole discretion of the trial court:
 - a. The number of expert witnesses who are allowed fees or expenses;
 - b. The amount of fees to be paid such allowed expert witnesses, including an amount for time expended in preparation for trial; and
 - c. The amount of costs for actual expenses to be paid such allowed expert witnesses.

§ 28-26-07. When **costs** allowed to plaintiff

Costs must be allowed of course to the plaintiff upon a recovery in the following cases:

1. In an action for the recovery of real property or when a claim of title to real property arises on the pleadings or is certified by the court to have come in question at the trial.
2. In an action to recover the possession of personal property.

§ 28-26-08. **Costs** specially limited

In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, if the plaintiff recovers less than fifty dollars damages, he may recover no more costs and disbursements than damages. In an action to recover the possession of personal property, if the plaintiff recovers less than fifty dollars damages, he may recover no more costs and disbursements than damages, unless he recovers property also, the value of which with the damages amounts to fifty dollars, or the possession of property is adjudged to him, the value of which with the damages amounts to fifty dollars. Such value must be determined by the jury, court, or referee by whom the action is tried. When several actions are brought on one bond, recognizance, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same claim for relief against several parties who might have been joined as defendants in the same action, no costs other than disbursements may be allowed to the plaintiff in more than one of such actions, which must be at his election, if the party or parties proceeded against in such action or actions, at the time of the commencement of the previous action or actions, has been openly within this state and not secreted.

§ 28-26-09. When **costs** allowed to defendant

Costs must be allowed of course to the defendant in the actions mentioned in sections 28-26-07 and 28-26-08 unless the plaintiff is entitled to costs therein.

§ 28-26-10. **Costs in discretion of court**

In actions other than those specified in sections 28-26-07, 28-26-08, and 28-26-09, **costs** may be allowed for or against either party **in the discretion of the court**. In all actions, when there are several defendants not united in interest and making separate defenses by separate answers and the plaintiff fails to recover judgment against all, the court may award **costs** to such of the defendants as have judgment in their favor.

§ 28-26-11. **Costs of appeal—When discretionary**

In the following cases the **costs** of an appeal are in the **discretion of the court**:

1. When a new trial is ordered; or
2. When a judgment is affirmed in part and reversed in part.

§ 28-26-12. **Costs** on dismissal of action

When an action is dismissed from any court for want of jurisdiction or because it has not been transferred regularly from an inferior to a superior court, **the costs must be adjudged against the party attempting to institute or bring up the action.**

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Harvey Boen,

Civil No. 96-C-1002

Plaintiff,

v.

**JUDGMENT OF DISMISSAL OF
GARDNER DENVER MACHINERY
INC., AS SUCCESSOR-IN-INTEREST
TO JOY TECHNOLOGIES, INC.**

ACandS, Inc.,
a Delaware corporation,
(individually and as
successor-in-interest to
Armstrong Contracting & Supply,
Inc., and Keasby & Mattison
Company), et al,

Defendants.

A Memorandum Opinion having been issued by the Honorable Bert L. Riskedahl on March 26, 1998, and the Court on April 7, 1998, having ordered that a judgment of dismissal with prejudice be entered for Defendant, Gardner Denver Machinery Inc., as Successor-in-Interest to Joy Technologies, Inc. ("Gardner"), and that Gardner recover of the plaintiff its costs and disbursements,

It is ORDERED AND ADJUDGED that the Plaintiff's action against Gardner is hereby dismissed with prejudice, ~~and that Gardner recover of the plaintiff its costs and disbursements taxed and allowed in the sum of Two Hundred and 10/100 Dollars (\$200.10).~~

Dated this 9th day of April, 1998.

Debra Simenson
Clerk of the District Court

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Clk. of Crt. Burleigh Co.

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March 8, 1999

Senator Wayne Stenehjem
Senate Judiciary Committee
State Capitol
Bismarck, ND 58505

RE: HB 1218

Dear Senator Stenehjem and Members of the Committee:

You have suggested some amendments which might deal with the specific concerns expressed by Rep. Klemin at the hearing.

The ND Trial Lawyers Association still opposes HB 1218, but if you feel that the bill should be amended and passed with the specific filing fees and service costs reimbursable without discretion, the attached amendments should accomplish that purpose.

Hopefully, the House Judiciary Committee and Rep. Klemin will concur that these amendments to the bill will accomplish what Rep. Klemin intended to accomplish, without disrupting the court's discretionary actions under the other subsections, which are very essential, and should be retained.

Sincerely,

WHEELER WOLF LAW FIRM



Albert A. Wolf

AAW:ko
Encl.