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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Northwest Grading, Inc. Plaintiff/Appellant,	)	
vs.	)	Supreme Court No. 20190128
North Star Water, LLC, Duane Sand, individually, and Nathan Bachman, individually, Defendants/Appellees,	)	McKenzie County Case No. 27-2016-CV-00225
North Star Water, LLC, Third-Party Plaintiff/ Appellee,	)	
vs.	)	
William Krick, Third-Party Defendant/ Appellant.	)	

ON APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT ENTERED OCTOBER 25, 2018; JUDGMENT ENTERED NOVEMBER 14, 2018; AND ORDER ON PLAINTIFF'S POST JUDGMENT MOTION ENTERED MARCH 20, 2019, FROM THE DISTRICT COURT FOR THE NORTHWEST JUDICIAL DISTRICT, MCKENZIE COUNTY, NORTH DAKOTA, THE HONORABLE ROBIN A. SCHMIDT, PRESIDING.

REPLY BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED

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[¶1] ARGUMENT

[¶2] I. Northwest Grading Made a Timely Objection to the Introduction and Admissibility of North Star's Damages and Documents that North Star Failed to Produce in Discovery.

[¶3] North Star Water, LLC ("***North Star***") argues Northwest Grading, Inc. ("***Northwest Grading***") did not timely object to Kevin Koach's testimony about North Star's documents that supported North Star's damages. A party may claim error and preserve the objection for appeal if the party timely objects or moves to strike. N.D.R.Ev. 103(a). A party must object at the time an error occurs so that the trial court may take appropriate action to remedy any prejudice that may have resulted. Piatz v. Austin Mutual Ins. Co., 2002 ND 115, ¶ 7, 646 N.W.2d 681. "Rule 103 requires an objection on a specific ground unless the reason for the objection is apparent from the context." Gonzalez v. Tounjian, 2003 ND 121, ¶ 32, 665 N.W.2d 705. "Under [Rule] 103, a court's decision to admit or exclude evidence is not reversible error unless the court's decision was objected to and the party's substantial rights were affected." Leno v. K & L Homes, Inc., 2011 ND 171, ¶ 25, 803 N.W.2d 543.

[¶4] There is a long history of cases where the North Dakota Supreme Court has stated a party must object at the time the error occurs to prevent prejudice to the party. These cases include objections under N.D.R.Ev. 103 at jury trials, which is logical to shield jurors from inadmissible evidence. If a jury were to hear Kevin Koach testify about North Star's damages, without any documents in support of the damages, the jury may take the testimony at face value and not consider the content of the underlying documents. See e.g., Nash v. United States, 54 F.2d 1006, 1007 (2nd Cir. 1932) (for a jury to disregard inadmissible evidence already stated in court requires "a mental gymnastic" beyond their powers). It is widely accepted that during a

bench trial the judge is able to separate out what evidence is admissible or inadmissible and not allow inadmissible evidence affect the judge's decisions or conclusions. See e.g., Gentile v. State Bar of Nevada, 501 U.S. 1030, 1077, 111 S.Ct. 2720, 2746 (1991) (The test for substantial prejudice of admitting inadmissible evidence "will rarely be met where the judge is the trier of fact, since trial judges often have access to inadmissible and highly prejudicial information and are presumed to be able to discount or disregard it."). Northwest Grading argues, as a matter of procedure, North Star was never permitted under the rules of civil procedure to offer any evidence, whether by document or oral testimony, of its damages at trial.

[¶5] North Star relies on two cases, discussed in more detail shortly, to support its argument that Northwest Grading failed to timely object to the testimony of Kevin Koach ("***Koach***") about North Star's damages. Each of these cases is distinguishable and are not controlling precedent to affirm the district court's mistake in permitting the use of testimony related to records that were not disclosed during discovery. Tellingly, North Star continues to deflect this Court's attention from the fact that North Star did not disclose the very documents it sought to rely upon during trial. This is a brazen violation of North Dakota's discovery rules.

[¶6] North Star relies on Westby v. Schmidt, 2010 ND 44, 779 N.W.2d 681, to support its argument that Northwest Grading must object at the time the alleged error occured to allow the court to take appropriate action. In Westby, one of the issues on appeal was whether the trial court should have allowed a witness to testify as an expert witness before a jury. The appellants in that case were not challenging the qualifications of the expert witness but rather his preferences for construction industry standards. Id., ¶ 9. The appellant objected several times during trial to the expert witness's opinions based on industry standards, which were overruled.

Id., ¶ 10. What distinguishes the Westby case from Northwest Grading's case is the appellants in Westby only objected to the *substance* of the expert witness's testimony, not whether the witness could testify as an expert. Id., ¶ 13. The actual issue presented on appeal was the weakness in the expert's opinion, which affected the expert's credibility, not *admissibility* of the opinion itself. Id. (internal citation omitted). Northwest Grading argues that Koach's testimony about North Star's damages was never admissible. Northwest Grading's argument on this issue has nothing to do with Koach's credibility.

[¶7] North Star also relies on Umphrey v. Deery, 48 N.W.2d 897 (N.D. 1951), to support its argument that a party need not turn over documents when verbal testimony of those documents is provided during trial. First, the issue on appeal in Umphrey related to the testimony of a witness related to a record she kept of the sale of certain items like eggs, cream, and cattle which supported the plaintiff's claims for damages. Id. at 911-12. The defendant "objected to this testimony on the ground that *unless records were kept* of the transactions and produced as evidence the testimony was purely speculative and not the best evidence." Id. at 912 (emphasis added). The Court found the testimony was not inadmissible "because the entry thereof is not made in some record and such record produced." Id. The Court, however, did not make this a bright-line rule. It further found where testimony is offered as to the profits of a commercial business involving numerous transactions, the situation may exist where testimony itself without the records is not the best evidence. Id. The distinction with the plaintiff in Umphrey is that the testimony related to "relatively few transactions," which the plaintiff had first-hand knowledge of, and "which records have subsequently been lost or destroyed." Id. North Star's records were

never lost nor destroyed. Koach testified North Star had these records; North Star simply refused to turn them over during discovery.

[¶8] Second, and arguably more important, Umphrey was decided in 1951 before the adoption of the North Dakota Rules of Civil Procedure. The North Dakota Supreme Court adopted the North Dakota Rules of Civil Procedure effective July 1, 1957. Hamilton v. Hamilton, 410 N.W.2d 508, 511 (N.D. 1987). Since that time, this Court has never condoned the behavior of a party to a civil action who failed to disclose documents requested by another as part of pretrial discovery.

[¶9] A more recent and applicable case for this Court to consider is Martin v. Trinity Hospital, 2008 ND 176, 755 N.W.2d 900. In that case, Trinity Hospital served Martin with interrogatories in May with a jury trial scheduled to begin in September. Id., ¶ 8. A month before trial, Trinity filed a motion to compel discovery arguing Martin's interrogatory answers were incomplete. Id., ¶ 9. The Martin Court included in its opinion the following passage taken from the trial court's order, which "sternly chastised" Martin's counsel:

> Lastly, Martin would be advised that he is playing with fire by his cavalier attitude toward the rules [of civil procedure]. The rules contemplate full and fair disclosure. The Court has broad discretion with regard to the imposition of sanctions against a party who plays fast and loose with those rules. Trial by ambush will not be condoned, nor does the Court intend to hold the jury for hours on end while counsel conducts courtroom discovery which should have been completed more than 15 months since this action was filed.

Id., ¶ 10. This Court agreed with the district court's characterization of Martin's "cavalier attitude toward the rules," that Martin played "fast and loose" with discovery rules, that Martin attempted to engage in a "trial by ambush," and the concern for conducting courtroom discovery. Id., ¶ 20. The fallback position that discovery matters are within the trial court's discretion

should not prevent this Court, in this immediate case, from reversing and remanding the trial court's decision when this Court has so clearly admonished a party that failed to comply with discovery rules by repeating the harsh words of a trial judge. The conduct which brought about the Martin decision is the conduct which North Star engaged in before and during trial. The purpose of pretrial discovery and conformity with the rules is to prevent trial by ambush. Transclean Corp. v. Bridgewood Services, Inc., 101 F.Supp.2d 788, 797 (D. Minn. 2000) (citing F.R.Civ.P. 26(e)(2)); see also, City of Sioux Falls v. Missouri Basin Municipal Power Agency, 675 N.W.2d 739, 744 (S.D. 2004) ("[T]he discovery statutes exist to eliminate trial by ambush."); Gale v. County of Hennepin, 609 N.W.2d 887, 891 (Minn. 2000) ("'[T]rial by ambush' fell out of favor in the courts of this state over 50 years ago."). It cannot stand that this type of behavior by North Star or any litigant or its counsel will be tolerated.

[¶10] North Star argues to this Court that Northwest Grading either should have known before trial that North Star had not disclosed all its records in discovery or that Northwest Grading should have asked for a continuance of the trial at the time it became apparent North Star did not disclose records requested in discovery. At no point has North Star ever explained its complete disregard of the rules of civil procedure. Instead, North Star offered testimony at trial about records which it clearly had in its possession yet failed to produce and now blames Northwest Grading for failing to object.

[¶11] Northwest Grading's objection to Koach's testimony affected the admissibility of the evidence itself, not Koach's credibility. Northwest Grading's attorney made the purpose for the objection clear on the record:

> MR. GROSSMAN: Your Honor, I would move to strike all evidence that Mr. Koach has testified to regarding Oasis Petroleum. This is very clearly a violation of Rule 26. And this would fall under appropriate sanctions under Rule

> 37. We have been through this discovery battle for two years. And if they are going to talk about damages that they have from water sales, we very clearly asked them to produce that information before coming into trial.
>
> So if he's going to testify to numbers, I would like to see how those numbers are backed up. It certainly affects the way that my client and I prepare for trial and whether or not we want to even take this case to trial. So if they don't have evidence to prove their damages, then you should strike all testimony from Mr. Koach regarding lost sales to Oasis Petroleum.

Id., 55:8 to 55:22; Appendix, 144. In response, North Star's attorney claimed she did not have these records either. Id., 56:4 to 56:7; Appendix, 145.

[¶12] Severe sanctions are appropriate "where there is a deliberate or bad faith non-compliance which constitutes a flagrant abuse of or disregard for the discovery rules." Thompson v. Ziebarth, 334 N.W.2d 192, 194 (N.D. 1983). Under the Federal Rules of Civil Procedure, a party is required to disclose documents and supplement disclosures in a timely manner. F.R.Civ.P. 26(a); Hoffman v. Constr. Protective Servs., Inc., 541 F.3d 1175, 1179 (9th Cir. 2008) as amended (Sept. 16, 2008). Federal Rule 37 forbids a party to use a document at trial that the party did not disclose during discovery. F.R.Civ.P. 37(c)(1). North Dakota adopted its rules of civil procedure from the Federal Rules of Civil Procedure. "[W]e did so with knowledge of the interpretations placed upon them by the Federal courts, and although we are not compelled to follow those interpretations, they are highly persuasive and, in the interest of uniform interpretation, we should be guided by them." Unemployment Comp. Div. of Employment Sec. Bureau v. Bjornsrud, 261 N.W.2d 396, 398 (N.D. 1977).

[¶13] The objection made by Northwest Grading during Koach's testimony was not related to his credibility as a witness or his ability to recite the purported damages suffered by North Star. The objection was made because North Star had blatantly violated the discovery

rules regarding production of documents. When Northwest Grading's attorney had an opportunity to question Koach about these documents, and learned for the first time that North Star had possession of these documents and had given these documents to its own counsel before trial, Northwest Grading made a timely objection for the court to disregard Koach's testimony and strike any evidence of these damages. The fact that Koach's testimony spanned the course of two days does not mean Northwest Grading's objection was not timely. The objection was made while Koach was still under oath as a witness called by North Star during its case in chief.

[¶14] **CONCLUSION**

[¶15] North Star violated the rules of discovery by failing to produce documents to Northwest Grading prior to trial that North Star intended to use as evidence at trial. This is a violation of the discovery rules because Northwest Grading clearly requested these documents through interrogatories and requests for production of documents prior to trial. The trial court erred by failing to impose sanctions against North Star for its blatant disregard of the rules of civil procedure. Instead, the trial court awarded North Star damages of $39,328.29 when only $3,663.43 of these damages were supported by documents produced in discovery. The remaining damages were supported by documents North Star never produced in discovery. North Star should only be limited to damages of $3,663.43 on its counterclaim.

[¶16] The trial court erred in determining there was no written contract between the parties. Northwest Grading presented its written terms and conditions to North Star. The parties proceeded with their business relationship under the these terms and conditions. The parties are bound by the written provisions of this contract.

[¶17] The trial court erred in finding Krick was not permitted to repossess the pipeline. The terms and conditions that bind the parties permit Northwest Grading to take possession of the pipeline if North Star did not pay for the pipeline. The trial court found North Star did not pay $91,072.99 to Northwest Grading for its work. This permitted Krick, who was acting as president of Northwest Grading, to take possession of the pipeline. Under this theory, North Star is not entitled to any damages on its counterclaim.

[¶18] Dated this 28th day of October, 2019.

/s/ Lee M. Grossman

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[¶19] CERTIFICATE OF COMPLIANCE

[¶20] The undersigned, as attorney representing Appellants Northwest Grading, Inc. and William Krick, and author of the Reply Brief of Appellant, hereby certifies that said reply brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that the number of pages from cover page to certificate of compliance totals 12 pages and does not exceed 12 pages. This count is automatically calculated by electronic document.

[¶21] Dated this 28th day of October, 2019.

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CERTIFICATE OF SERVICE

[¶1] I, Lee M. Grossman, an attorney licensed in the State of North Dakota, hereby certify that on **October 28, 2019,** the following document was filed with the North Dakota Supreme Clerk of Court:

1. **Reply Brief of Appellant (Oral Argument Requested).**

[¶2] A copy of this document was served electronically on all separately represented parties at the e-mail addresses listed below:

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[¶3] This service has been made pursuant to N.D.R.App.P. 25 and N.D.R.Ct. 3.5.

[¶4] Dated: October 28, 2019.

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