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FILED
IN THE OFFICE OF THE
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DECEMBER 2, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Rodney Brossart, Susan Brossart and Thomas Brossart, Appellants/ Plaintiffs, vs. Kelly Janke, Individually and in his Official Capacity as Sheriff for Nelson County, Eric Braathen, Individually and in his Official Capacity as Deputy Sheriff for Nelson County, and Nelson County, North Dakota, Appellees/ Defendants.	)	Supreme Court No.: 20190236 Civil No.: 32-2017-CV-00059 **APPELLANTS' BRIEF** **ORAL ARGUMENT REQUESTED**

THE APPELLANTS and PLAINTIFFS

SUBMIT AN APPEAL FROM ORDERS

REGARDING A MOTION TO COMPEL AND FOREIGN JUDGMENT FILING

IN THE NORTHEAST CENTRAL JUDICIAL DISTRICT

COUNTY OF NELSON

STATE OF NORTH DAKOTA

BEFORE THE HONORABLE LOLITA G. HARTL ROMANICK

Dated: December 2, 2019

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STATEMENT OF THE ISSUES

[1] The following issues are presented for review by the Court:

a. Did the lower court misapply the law in this case regarding the enforcement of a foreign judgment?

b. Whether the lower court misinterpreted the law regarding the number of interrogatories, including subparts, in its Order granting a motion to compel?

c. Did the district court abuse its discretion by awarding attorney fees after granting a motion to compel?

STATEMENT OF THE CASE

[2] This case is appealed from Nelson County in the Northeast Central Judicial District pursuant to motions filed by the parties, one a Motion to Compel by the Appellees ("Judgment Creditors") and the other a Motion for Relief from Judgment from the Appellants ("Brossarts"). In its Memorandum Order, the lower court denied the Motion for Relief from Judgment and granted the Motion to Compel. This case involves the Uniform Enforcement of Foreign Judgments Act as codified under NDCC, Chpt. 28-20.1. It also involves violations under North Dakota's Rules of Civil Procedure.

STATEMENT OF THE FACTS

[3] The basis for this case is the enforcement of a foreign judgment, stemming from a North Dakota Federal District Court and a judgment for costs as a result of a summary judgment against the Brossarts, which was appealed to the Eighth Circuit and U.S. Supreme Court. Doc. #26-29. In this case, the timeline of events provides the relevant facts for review. The timeline, as cited in the lower court docket sheet (App. 1) is as follows:

September 12, 2017 – Foreign Judgment for $8,153.08 in federal court costs[1] from March 2, 2016, is filed in Nelson County against the Brossarts (Rodney, Susan and Thomas). (Doc. #1)

October 5, 2017 – More than 14 days later, Notice of Entry of Foreign Judgment (albeit a local judgment attached thereto vice the original foreign judgment as filed on 9/12/17, see App. 4 *cf.* App. 6) is e-filed to Attorney Lamb, but no notice was given directly to the Brossarts. (App. 5, Doc. #5)

February 1, 2019 – Attorney Lamb, out of the blue, receives 73 interrogatories for each of the Brossarts from Attorney Swanson, regarding enforcement of the Foreign Judgment filed in state court in 2017. (App. 8, Doc. #11)

February 19, 2019 – Attorney Lamb responds to Attorney Swanson by letter, stating a global objection to the interrogatories based on form, substance and an invalid filing of the foreign judgment. (Doc. #15, 19; App. 83, Tr., 24: 24-25.)

May 6, 2019 – Judgment Creditors filed a Motion to Compel in district court. (Doc. #8)

May 7, 2019 – Brossarts filed a Motion for Relief from [Foreign] Judgment pursuant to Rule 60, N.D.R.Civ.P., in district court. (Doc. #23)

May 8, 2019 – Attorney Lamb files a Notice of Representation. (App. 28, Doc. #31)

May 10, 2019 – Nelson County Clerk of Court files and serves Notice of Filing Foreign Judgment to the Brossarts and Attorney Lamb. (App. 29, Doc. #33)

[1] The Brossarts raised the issue of the costs being justified by the federal court under federal law vice state law, since the federal court is in North Dakota. App. 20, 25; Doc. #23, 48. The issue raised was whether the Judgment Creditors' costs were excessive.

[4] A hearing was held on July 8, 2019. A transcript of the hearing is provided in the Appendix. App. 69 - 96. Discussion at the hearing focused on the two motions before the court, that is, the motion to compel and the motion for relief from judgment. During the hearing, Attorney Swanson admitted on several occasions: "I should have served 50 [interrogatories] on each of them. I exceeded the number 50." App. 83, Tr. 24:9-10. When asked how to reduce the number, counsel replied, "We believe that the appropriate number would be on page 7 [of the 10 pages of interrogatories] up to No. 50." App. 91, Tr. 32:21-22. Then, the Court asked the undersigned, who requested time to think about it, and the Court directed both counsel to provide post-hearing briefs to the Court regarding the issue of the number of appropriate interrogatories. App. 94, Tr. 35:6-9. Briefs were provided to the Court. Doc. #59, 63. A redo of the interrogatories was completed as an exhibit to the Judgment Creditors' brief, which consolidated all 73 interrogatories into 50, and the trial court bought it and allowed all of the interrogatories in its Order granting the Motion to Compel. App. 30, 43-46.

STATEMENT OF THE STANDARD OF REVIEW

[5] De novo review by this Court is the standard for issues involving interpretation of the Constitution, statutes or other state rules. Pettinger v. Carroll, 2018 ND 140, ¶ 7, 912 NW2d 305. A district court "abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned decision." State v. Campbell, 2017 ND 246, ¶ 6, 903 NW2d 479.

STATEMENT EXPLAINING ORAL ARGUMENT REQUEST

[6] Oral argument is the time and place where the appellant's appeal is heard before this aghast body of appellate court justices. It provides a forum to discuss the salient issues before the Court in a meaningful, candid, forthright and intelligent manner. In this case, there are facts presented in the lower court which may be a matter of first impression for this Court's consideration, therefore, oral argument is important to present arguments by the parties' attorneys to persuade the Court in making its determination and is appropriate in this case.

ARGUMENT

1. The trial court misapplied the law under the Beck standard regarding lack of proper notice in foreign judgment filings, which requires a stay of any enforcement of the judgment until proper notice is given.

[7] It is an undisputed fact that the Brossarts were served with Interrogatories well before they were served with the Notice of Filing of Foreign Judgment. The Interrogatories are dated February 1, 2019; and the Notice of Filing of Foreign Judgment was served on May 10, 2019. Indeed, the Judgment Creditors filed their Motion to Compel well before the Notice of Filing.

[8] The effect of lack of notice on a foreign judgment is a stay of the proceedings until the notice is properly given.[2] Beck v. Smith, 296 N.W.2d 886 (N.D. 1980).

[2] This argument was brought in the lower court by the Brossarts as part and partial to their Motion for Relief from Judgment and response to the Motion to Compel (Doc. #25, 35, 48, 75). However, the trial court ignored the argument, and consequently, the law.

[9] Beck is very nearly identical to the present case. In that case, the foreign judgment, which was sought to be enforced, was a Maryland child custody decree. Exactly as in the present case, the defendant in Beck was NOT given proper notice of the judgment as required by the Uniform Enforcement of Foreign Judgments Act, as it existed at the time. But what is most important for our purposes is the remedy the Court granted for that error: the Court ordered that enforcement of the judgment be stayed until proper notice was given and the ten day automatic stay following notice had expired. Beck at 893. The Court reasoned that abatement of the judgment, that is, refusing to enforce it altogether at least until another custody determination had been made, was not warranted and would have had the effect of condoning the violations of the judgment which had already been committed.

[10] In short, it is true that notice must be given under the Uniform Enforcement of Foreign Judgments Act before a judgment may be enforced. The remedy will be a stay of enforcement until notice can be given. Lack of notice is an error which must be corrected, which was done in the instant case well after service of the Interrogatories and after the Motion to Compel was filed. Granted, it may not be a reason to grant relief from a foreign judgment altogether, but staying the proceedings is what the Beck precedent held.

[11] In Beck, this Court opined on the Uniform Enforcement of Foreign Judgments Act as adopted by the state and codifed under NDCC § 28-20.1-01, which requires notice of the filing of the judgment to the judgment debtor. Beck at 892. In the Opinion filed on August 29, 1980, the Court found: "We hereby continue the stay of the July 14, 1980, [foreign judgment] until [the Petitioner] is given notice of the filing of the Maryland [judgment]." *Id.* at 296. Moreover, the Court wrote: "We note that procedure for

enforcement of judgments of this state under Rule 62(a) and 77(d) of the North Dakota Rules of Civil Procedure is very similar to the procedure for enforcement of foreign judgments under Chapter 28-20.1. […] Rule 77(d), N.D.R.Civ.P., requires that the prevailing party shall serve notice upon the adverse party of the entry of a judgment within 10 days after its entry." *Id.*, Note 2.

[12] Of course, now Rule 58 requires the service of notice. Rule 58(b), N.D.R.Civ.P. It states in pertinent part:

> **(b) Notice of Entry of Judgment.**
>
> (1) In General. A notice of entry of judgment must identify the docket number and the date the judgment was signed.
>
> (2) Service. Within 14 days after entry of judgment in an action in which an appearance has been made, notice of entry of judgment in compliance with Rule 58(b)(1) must be served by the prevailing party on the opposing party. A copy of the judgment must be served with the notice of entry.

Rule 58(b), N.D.R.Civ.P.

[13] In this instance, the undersigned, although he was not serving as counsel for the Brossarts at the time for this case, he received the notice in this particular state case. He was nonetheless given notice well after the 14-day required timeframe for notice of entry of judgment. The underscored fact here is that the Brossarts, the judgment debtors, were not served with the notice of filing the foreign judgment until May 10, 2019, well after proceedings were taken for its enforcement. At the hearing, it was argued that, "This is a continuation of the federal action. It's simply the entry of the federal judgment in a state court." App. 71, Tr. 12:15-18. The trial court accepted that argument and denied the Motion for Relief from Judgment. App. 30, 47.

[14] The other procedural mistake of the clerk's failure to send notice at the time of the filing is a basis to do anything but stay the matter until the mistake is corrected, and this is

consistent with the analysis from the Samuelson[3] case, in which a challenge to the validity of a judgment is distinguished from a challenge to the procedure used to enforce it.

[15] Additionally, the foreign judgment statute itself provides that "[l]ack of mailing notice of filing by the clerk shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed." N.D.C.C. § 28-20.1-03. Therefore, under Beck and the plain reading of the statute, until proof of the mailing of the Notice of Filing by the clerk or judgment creditor on the judgment debtor is filed, enforcement of the proceedings, including Interrogatories and Motion to Compel, must be stayed. In this case, proof of mailing the Notice of Filing Foreign Judgment to the Brossarts was not done until May 10, 2019.

[16] Again, the correction by the clerk of court to mail the Notice of Filing occurred well after the Judgment Creditors served their Interrogatories in aid of execution of the foreign judgment and after the Motion to Compel was filed, therefore those legal papers should not carry any validity, since, under Beck, there was an effective stay of the proceedings at the time. Likewise, the Interrogatories served on the undersigned were invalid and void of any legal bearing due to the flaw in the notice requirement.

[17] Therefore, the trial court misapplied the law and abused its discretion in its Order granting the Motion to Compel, and this Court should reverse it.

2. The trial court misapplied the law regarding the number of interrogatories, including subparts, in its Order granting a Motion to Compel.

[3] 1st Summit Bank v. Samuelson, 1998 ND 113, 580 N.W.2d 132.

[18] The facts are undisputed that there were at least 73 interrogatories listed in the Interrogatories in Aid of Judgment or Execution served on the Brossarts. App. 8 - 17, Doc. #11, 12, 13. Rodney and Susan are husband and wife, and Thomas is their son. At the outset, it is unreasonable to serve each family member a set of basically the same interrogatories.

[19] Obviously, if this Court finds that there was a lack of notice in filing the foreign judgment in this case and follows the remedy as in Beck to stay the proceedings until May 10, 2019, when the Notice of Filing Foreign Judgment was served and filed, then this issue is moot.

[20] For the sake of argument, the Brossarts object to the number of interrogatories, including subparts, that the lower court granted in the Motion to Compel. The interrogatories are pursuant to Rule 69, N.D.R.Civ.P. However, this Court has ruled that Rule 69 is subject to the same parameters set forth in Rule 33(a)(3), N.D.R.Civ.P. regarding the number of interrogatories, including subparts. PHI Financial Services, Inc. v. Johnston Law Office, 2016 ND 114, ¶ 18, 881 N.W.2d 216. Rule 33(a)(3) states in pertinent part:

> "(3) Number. Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 50 written interrogatories. Interrogatory subparts are not counted as separate interrogatories if they are logically or factually subsumed within and necessarily related to the primary question."

Rule 33(a)3, N.D.R.Civ.P., emphasis added.

[21] Of note is the commentary to this rule, which states: "Paragraph (a)(3) was added, effective March 1, 2013, to limit the number of interrogatories on any other party, but must obtain leave of court (or a stipulation from the opposing party) to serve a larger number. Parties cannot evade this limitation by joining as 'subparts' questions that seek information

about discrete separate subjects. However, a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication." *Id.*, Explanatory Note, emphasis added.

[22] The subject interrogatories failed to comply with Rules 33 and 69, N.D.R.Civ.P., and this Court explained in PHI that interrogatories seeking answers to 73 inquires per judgment debtor far exceeds the 50 written interrogatory limit by a judgment creditor. *Id.*, PHI Financial Services, Inc., *supra*. All totaled, the judgment creditor in this case before the Court sought 219 interrogatories (Doc. ## 11, 12, 13), which is 169 above the legal limit. Specifically, the Supreme Court found as follows:

> Under N.D.R.Civ.P. 69(b), a judgment creditor may seek post-judgment discovery insofar "as provided in these rules." Because N.D.R.Civ.P. 33(a)(3) is one such rule, the limitations and requirements contained therein apply to post-judgment discovery under N.D.R.Civ.P. 69(b). *See* Inv. Title Ins. Co. v. Herzig, 2010 ND 169, ¶ 39, 788 N.W.2d 312 (applying the requirements of N.D.R.Civ.P. 45 to post-judgment discovery served under N.D.R.Civ.P. 69(b)). Accordingly, in post-judgment discovery, a judgment creditor may serve "no more than 50 written interrogatories, including all discrete subparts," absent a stipulation or court order to the contrary. N.D.R.Civ.P. 33(a)(3). This permits post-judgment discovery to the full extent allowed under the rules of civil procedure and is independent of any limits exhausted during pre-judgment discovery because N.D.R.Civ.P. 69(b) ensures judgment creditors access to all discovery devices. *See* N.D.R.Civ.P. 69 Explanatory Note (stating "[N.D.R.Civ.P. 69(b)] was amended in 1971 to make clear that all discovery procedures are available in aid of execution.").

PHI Financial Services, Inc. at ¶ 18, emphasis added.

[23] In this case, the lower court found that the 73 interrogatories originally made in the Motion to Compel were actually less than 50, so no harm done.[4] App. 43-47. The district

[4] What is alarming and disturbing about this outcome is that the Motion to Compel was essentially modified without taking leave of court or filing an amended motion by the

court cited federal law outside this jurisdiction from 2005 to 2008, since there was nothing on point under this state's common law. App. 43 - 44. Unfortunately, PHI did not address the issue of what it means to determine a "discrete" subpart of an interrogatory to find whether it should be treated as a "single interrogatory" as Rule 33(a)(3) Explanatory Note suggests. So, this merits an unprecedented issue or case of first impression for this Court should it take it on.

[24] Should this Court look for guidance in making a reasonable state rule in this instance, a 2017 slip opinion from a U.S. District Court in Seattle, WA, may offer a good foundation, finding the following:

> Pursuant to Fed. R. Civ. P. 33(a), a party "may serve on any other party no more than 25 written interrogatories, including all discrete subparts." The 1993 Advisory Committee Notes explains that the rule is intended to prohibit parties from "joining as `subparts' questions that seek information about discrete separate subjects," but suggests that a single inquiry seeking information about, for example, particular types of communications counts as only one interrogatory even though a complete response will require numerous statements of fact regarding the time, place, participants, and content of the communication. Courts have formulated various tests for determining when subparts are actually a separate interrogatory. Interrogatory subparts are counted as a single interrogatory if "they are logically or factually subsumed within and necessarily related to the primary question." Safeco of Am. v. Rawstron, 181 F.R.D. 441, 445 (C.D. Cal. 1998). "A single question asking for several bits of information related to the same topic counts as one interrogatory. (E.g., `State the name, address and telephone number of each person present at the meeting.')" Hasan v. Johnson, No. 1:08-cv-00381-GSA-PC, 2012 WL 569370, at *4 (E.D. Cal. Feb. 21, 2012). If, however, the interrogatory poses a question that can be answered fully and completely without answering the second question, then the subparts are discrete. Walech v. Target Corp., No. C11-0254RAJ, 2012 WL 1068068, at *3 (W.D. Wash. Mar. 28, 2012); Estate of Manship v. U.S., 232 F.R.D. 552, 555 (M.D. La. 2005). Similarly, an inquiry requesting the same information regarding disparate claims, defenses, or events counts as multiple interrogatories. Jovanovich v. Redden Marine Supply, Inc., No. C10-0924RSM, 2011 WL 4459171, at *3 (W.D. Wash. Sept. 26,

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Judgment Creditor movants, since the number of Interrogatories were suddenly made to fit the 50-interrogatory limit.

> 2011); Collaboration Props., Inc. v. Polycom, Inc., 224 F.R.D. 473, 475 (N.D. Cal. 2004). "Since many of these formulations are difficult to apply or perhaps even conflicting, some courts have taken a `pragmatic approach,' looking to see if an interrogatory threatens the purpose of Rule 33 by combining into one interrogatory several lines of inquiry that should be kept separate." Paananen v. Cellco Partnership, 2009 WL 3327227, at *2 (W.D. Wash. Oct. 8, 2009) (citing Willingham v. Ashcroft, 226 F.R.D. 57, 59 (D.D.C. 2005), and Banks v. Office of Senate Sergeant-at-Arms, 222 F.R.D. 7, 10 (D.D.C. 2004)).

Diversified Lenders, LLC v. Amazon Logistics, Inc. (2017 U.S. Dist. Ct., W.D. Washington, Seattle).

[25] In this federal case, the court denied the motion to compel since the plaintiff had exceeded the limit of 25 interrogatories under Rule 33(a), Fed.R.Civ.P. Of particular note in this analysis is the rule that "[if] the interrogatory poses a question that can be answered fully and completely without answering the second question, then the subparts are discrete." Otherwise, they should be treated as a separate interrogatories. In this case, if one reviews the 73 interrogatories served on the Brossarts,[5] there should be little doubt that by any measure they exceeded the 50-interrogatory limitation under Rule 33(a)(3), N.D.R.Civ.P., and therefore the Motion to Compel should have been denied.

[26] The trial court misapplied the law in its Order granting the Motion to Compel, and this Court should reversed and remand this matter.

[5] A reasonable inference can be drawn from the concurrent, ongoing correspondence between Howard Swanson, Judgment Creditors' attorney, and James Wang, an attorney working for the Bank of North Dakota regarding a bank consolidation loan for the Brossarts' 3,500-acre farmstead. The Judgment Creditors were adamant that the Bank's loan was inferior to the foreign judgment, since it was filed before the loan was finalized. However, the Brossarts were not aware of the foreign judgment at the time nor was the County Recorder, apparently. Doc. #37-40, 68. The inference is that the Judgment Creditors already had the information they needed to enforce the foreign judgment. The interrogatories were essentially unnecessary.

3. The lower court abused its discretion by awarding attorney fees to the Judgment Creditors after granting a Motion to Compel.

[27] The trial court awarded $2,340.00 in attorney fees after granting the Judgment Creditors' Motion to Compel. The award is based upon the issues brought by the Brossarts as being frivolous and without merit. App. 42-3, 47. That is simply not the case. The issues with a flawed notice in the filing of the foreign judgment and the interrogatory limitation being exceeded are not meritless. As the learned courts note in the cites above, these issues are problematic and complex. They are in no way frivolous. Granting attorney fees under these circumstances is an abuse of discretion by the trial court and this Court should reverse that decision.

CONCLUSION

[28] For the reasons stated above, the Court should reverse the lower court's decision, deny attorney fees for the Appellees from the lower court, and reduce the amount of the foreign judgment to reasonable costs allowed under state law.

Dated this 2nd day of December, 2019.

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CERTIFICATE OF COMPLIANCE

I, Timothy C. Lamb, ESQ., hereby certify that the number of pages contained in this Appellants' Brief complies with Rule 32(a)(8)(A), N.D.R.App.P., regarding page limitation not exceeding 38 pages. The principle brief contains 12 pages.

Dated this 2nd day of December, 2019.

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CERTIFICATE OF SERVICE

I, Timothy C. Lamb, ESQ., a licensed attorney in the State of North Dakota and officer of the court, do hereby certify that on this date a true and correct copy of the following:

Appellants' Brief, and

Appendix,

was served by e-file to the opposing party to the name and address as follows:

Howard D. Swanson
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Dated this 2nd day of December, 2019.

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CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

Supreme Court No. 20190253
Oliver County Case No. 33-2017-DM-00018

Ben Gerving

Plaintiff and Appellee,

v.

Janet Gerving

Defendant and Appellant,

and

State of North Dakota,

Statutory Real Party in Interest and Appellee.

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

The undersigned, being first duly sworn, deposes and says that a true and correct copy of the

BRIEF OF APPELLANT
APPENDIX

was, on December 2nd, 2019, served by electronic mail to the following:

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To the best of affiant's knowledge, the email address above given is the actual email address of the party intended to be so served. The above documents were emailed in accordance with the provisions of the North Dakota Rules of Appellate Procedure.

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