FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 9, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

C & K Consulting, LLC; Stonebridge Villas, LLC; Stonebridge Villas II, LLC; Stonebridge Development Company, LLC; and Townhomes at Stonebridge, LLC,	)	Supreme Court No. 20190312
Appellants,	)	Supreme Court No. 20190313
	)	Supreme Court No. 20190314
v.	)	Supreme Court No. 20190315
	)	Supreme Court No. 20190316
Ward County Board of Commissioners,	)	
Appellee.	)	

Appeals from Judgments, Entered May 16, 2019, and the underlying Orders,
Dated August 22, 2019,
Case Nos. 51-2019-CV-00103, 51-2019-CV-00104, 51-2019-CV-00105,
51-2019-CV-00106, 51-2019-CV-00107
County of Ward, North Central Judicial District
The Honorable Todd L. Cresap, District Judge, Presiding

BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES

[1] Did the District Court err by dismissing this action with prejudice, without considering lesser available sanctions, for missing a deadline set by letter from the Calendar Control Clerk of which counsel for Appellants was unaware?

[2] Did the District Court err in determining that the North Dakota Rules of Appellate Procedure govern appeals to the district court from a decision by the board of county commissioners?

[3] Did the District Court err by deciding Appellee's motion to dismiss before allowing Appellants 14 days within which to respond pursuant to N.D.R.Ct. 3.2?

[4] Did the District Court err by denying Appellants' motion to vacate the judgment of dismissal under N.D.R.Civ.P. 60?

STATEMENT OF THE CASE

[5] These consolidated cases are all appeals of applications to abate or refund taxes for properties located in Ward County, North Dakota. As explained below, the District Court did not consider or rule on the merits of the cases, instead dismissing them with prejudice as a sanction after Appellants missed a briefing deadline of which they were unaware. In so doing, the District Court erred by relying on the North Dakota Rules of Appellate Procedure to dismiss the cases and by ruling without giving Appellants the full periods allowed by N.D.R.Ct. 3.2 to respond to the motion. Appellants then moved under Rule 60(b) to vacate the judgment. The District Court denied that motion. This appeal followed.

STATEMENT OF FACTS

[6] On November 1, 2018, Appellants filed applications to abate or refund taxes on properties located in Ward County, North Dakota. Dkt. #1.

[7] On December 21, 2018, the Ward County Commissioners held a hearing on the applications and acted on them, denying most but granting some in part. Id.

[8] Appellants appealed those decisions to the District Court on January 17, 2019. Id.

[9] On April 5, 2019, the Calendar Control Clerk issued a letter setting forth a briefing schedule. That letter went only to the "Lead Attorney" for each party. App. 6. [1] Unfortunately, as explained further infra, the lawyer identified as Appellant's "Lead Attorney" of record at that time had stopped working at the firm two days before.

[1] Appellants cite to the docket for Case No. 51-2019-CV 00103. All referenced materials appear in the docket for all consolidated cases with slight changes in docket numbers.

Because Appellants were unaware of the deadline, they did not file a brief within 14 days of receipt of the April 5, 2019, letter from the Calendar Control Clerk.

[10] Late on the afternoon of Friday, May 10, Appellee moved to dismiss this action, arguing that Appellants should be sanctioned. App. 7-9. That motion relied primarily on Rule 31(c) of the North Dakota Rules of Appellate Procedure. Id. It did not cite any of the cases discussed infra related to sanctioning parties for missing court-imposed deadlines and did not argue the three-factor framework established by this Court and addressed below. Id.

[11] On the following Tuesday, May 14, Appellants submitted a short brief to advise the Court promptly that they had not abandoned their appeals, were unaware of the deadline, and requested that the Court re-set the deadlines. App. 10-11. Appellants continued with their internal review to determine what had occurred.

[12] The Court granted Appellee's motion the very next day, only five days after Appellee had moved to dismiss all of the cases with prejudice. App. 12-14. The Order dismissing the cases was issued within the 14-day period within which Appellants were allowed to file opposition materials under N.D.R.Ct. 3.2, and the 21-day period within which Appellants were allowed to request a hearing under the same rule. App. 15. The Court's three-page order cited only Rule 11.5 of the North Dakota Rules of Court and Rule 31(c) of the North Dakota Rules of Appellate Procedure. App. 12-14. It also cited a Google search indicating that Appellants' law firm was a large one with several offices, which it used to justify the harshest sanction available to it. Id. The Court entered judgment that same day in favor of Appellee and against Appellants. Dkt. #32.

[13] Within ten days of the Court's Order and Judgment, and within the 14-day response period to the Appellee's original motion, Appellants moved to vacate the judgments against them under N.D.R.Civ.P. Rule 60(b). Dkt. #35, #36, #37. Appellants filed affidavits from counsel and staff at their law firm which outlined the results of the internal review conducted immediately after Appellee moved to dismiss the cases.

[14] Those affidavits, which have never been disputed, explained the circumstances surrounding the matter. Specifically, they showed that, following the departure of Brandt Doerr, who had been identified on the docket as "Lead Counsel," and after coordinating with the lawyers working with Mr. Doerr, the Office Manager for Fredrikson's Fargo office took control of his email account. She monitored emails that were sent to his account and directed them to others within the firm to address, as needed. App. 18-19. Mr. Doerr was co-counsel on various cases and received numerous court filings. Included in those filings were some related to various tax appeals throughout North Dakota on which Mr. Doerr was working with Attorney Michael S. Raum. Id.; App. 16-17.

[15] Given the large volume of these emails, the Office Manager conferred with Mr. Raum's Legal Administrative Assistant, Dana L. Taylor. App. 18-19; App. 22-23. Ms. Taylor advised the Office Manager that both she and Mr. Raum were receiving service copies of the filings in the tax appeal cases and therefore the Office Manager did not need to forward copies of those filings to her. Id. The Office Manager therefore did not forward copies of filings in these cases to Ms. Taylor or Mr. Raum, believing that copies of filings were being provided to them directly. App. 18-19. Mr. Raum also believed he was receiving copies of filed documents directly. App. 16-17.

[16] In short, it was not known by Appellants' counsel's staff that letters from the Calendar Control Clerk would only go to one of the attorneys of record. If this had been known, the Office Manager would have forwarded the filings to Ms. Taylor to make sure that nothing was missed. App. 18-19; App. 22-23; App. 16-17.

[17] The District Court denied the motion. App. 24-31. The District Court held that Appellants had not argued that the law did not justify imposition of such a severe sanction. Id. It also justified its reliance on the size of Appellants' law firm as stated in its original order. Id. This appeal followed.

LEGAL ARGUMENT

I. The District Court erred when it dismissed these cases as a sanction.

[18] This Court reviews a district court's order for sanctions under the abuse of discretion standard. Bachmeier v. Wallwork Truck Centers, 507 N.W.2d 527, 533 (N.D. 1993); accord Gohner v. Zundel, 411 N.W.2d 75, 79-80 (N.D. 1987). A trial court abuses its discretion "if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law." Grinnell Mut. Reinsurance Co. v. Center Mut. Ins. Co., 2003 ND 50, ¶ 51, 658 N.W.2d 363. This Court has explained that "a trial court acts in an arbitrary, unreasonable, or unconscionable manner when its decision is not the product of a rational mental process by which the facts and law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination." Kopp v. Kopp, 2001 ND 41, ¶ 7, 622 N.W.2d 726.

A. The District Court misinterpreted and misapplied the law.

[19] The District Court misinterpreted or misapplied the law when it did not engage in a reasoned analysis of the appropriate sanction. As the Court has held,

"sanctions must be reasonably proportionate to the misconduct." Dronen v. Dronen, 2009 ND 70, ¶ 52, 764 N.W.2d 675. To ensure that sanctions meet this test, the Court has established a three-factor test for evaluating the propriety of a sanction:

> When using its inherent power to sanction a party, a case-by-case analysis of all the circumstances presented in the case is required. While all the circumstances must be considered, we have focused on three factors--the culpability, or state of mind, of the party against whom sanctions are being imposed; a finding of prejudice against the moving party, and the degree of this prejudice, including the impact it has on presenting or defending the case; and, the availability of less severe alternative sanctions.

Ringsaker v. N.D. Workers Comp. Bureau, 2003 ND 122, ¶ 13, 666 N.W.2d 448, 452 (citing Bachmeier, 507 N.W.2d at 533).

[20] As the Court has held several times, a district court abuses its discretion as a matter of law when it fails to address all three factors. For example, in Ringsaker the Court reversed the imposition of sanctions because the district court had failed to address all of the sanction factors and the Court's analysis was, therefore, necessarily incomplete. As the Court in Ringsaker explained:

> [T]he trial court considered only culpability and did not address prejudice or the availability of less severe sanctions than requiring the Bureau to accept Ringsaker's claim and provide benefits. Without consideration of prejudice and the availability of less severe sanctions, the trial court's analysis is incomplete. We conclude the trial court's analysis was incomplete and it abused its discretion in sanctioning the Bureau as it did.

Ringsaker, 2003 ND 122, ¶ 14 (internal citations omitted); Viscito v. Christianson, 2015 ND 97, 862 N.W.2d 777; Belgarde v. Askim, 2001 ND 206, ¶ 7, 636 N.W.2d 916.

[21] This standard is met here. The Order granting Appellee's motions to dismiss does not address any of the three factors. At most, the Order impliedly considers culpability by noting that Appellants' law firm is a large one, though it does not explain why the size of a firm should impact a potential sanction. Nothing in the Order can be

plausibly construed to address the question of prejudice to Appellee or the availability of lesser sanctions. This is significant given that the district court imposed the harshest possible sanction, which, as discussed in detail infra, this Court has held "should generally be imposed only 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).

[22] The District Court's failure to address these points is perhaps not entirely surprising, as Appellee's Motion to Dismiss did not address them either. That Motion was predicated on the North Dakota Rules of Appellate Procedure, which do not apply to actions in the District Court. See N.D.R.App.P. 1 ("These rules govern procedure in the supreme court of North Dakota."). The Order also cited generally to N.D.R.Ct. 11.5, which allows sanctions, but only those sanctions "limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated[.]" Appellee did not cite this case law in seeking a sanction, even though as the moving party it necessarily bore the burden of establishing entitlement to a sanction.

[23] The initial response filed by Appellants promptly upon receiving Appellee's motion to dismiss was admittedly brief. Appellants were concerned with immediately advising the District Court that they had not abandoned the appeals and simply did not know of the deadline. Appellants' response also explained why this error occurred, which certainly goes to the factor of a party's culpability. It also emphasized explicitly that it was not neglecting the cases, specifically noting the expense it had incurred in the matter. It also noted that Appellee had not even contacted Appellants' counsel, which goes to the extent of Appellee's prejudice; Appellee had not claimed in its

motion to incur any costs or suffer any hardships as a result of the missed deadline. Appellants also offered to file their substantive brief promptly, which also would have limited any putative prejudice Appellee could suffer. While short, the response provided the District Court with the facts that would allow it to perform a reasoned analysis of the three factors, which Appellee – who filed the motion – did not address.

[24] At an absolute minimum, then, the District Court's order should be reversed because it simply does not address the relevant factors. Ringsaker, 2003 ND 122, ¶ 14. In addition, as explained in the next section, the Court can determine from the record that dismissal is an inappropriate sanction and order the District Court to impose no sanction or a lesser sanction.

B. There is no evidence in the record justifying dismissal as a sanction.

[25] In several pre-Bachmeier cases, the Court reversed the sanction of dismissal as too harsh based on the same basic factors as later outlined in Bachmeier. Thompson, 334 N.W.2d at 195 (reversing trial court's dismissal as an abuse of discretion and remanding to determine an appropriate sanction "if necessary"); Gohner, 411 N.W.2d at 81 (holding that the district court "went too far" in striking a party's answer as a sanction); Vorachek v. Citizen's State Bank of Lankin, 421 N.W. 2d 45, 56 (N.D. 1988) (reversing to impose sanctions less than a dismissal for "flagrant violations of the rules"). As explained below, the Court here has adequate information in the record to allow it to apply these principles and hold that dismissal is an excessive sanction under these facts, based on the three-factor test for sanctions.

1. Appellants and their counsel's culpability does not merit sanction.

[26] The first factor is Appellants' culpability. Bachmeier, 507 N.W.2d at 533. As the uncontested affidavits submitted to the District Court show, Appellants here simply made an unfortunate error. The facts show that Appellants' law firm worked diligently to handle the transition caused by a departing lawyer, exactly as the District Court suggests it should have. Those affidavits make clear that this mistake occurred only because the law firm was unaware that the Odyssey system does not serve letters from the Calendar Control Clerk on anyone other than the "lead attorney," even though the other attorney received notice of all other filings. This is not the sort of culpability – like willfully and serially disregarding orders – that justifies such a severe sanction.

[27] This Court has been sensitive to the harshness of this remedy and has held, in the discovery context, that it "should generally be imposed only where there is a deliberate or bad faith non-compliance which constitutes a flagrant abuse of or disregard for the discovery rules." Thompson, 334 N.W.2d at 194. In Thompson, the party against whom sanctions were sought had failed to appear for scheduled depositions three times and failed to pay expenses ordered by the court as a sanction for those failures. Id. Despite these repeated failures, this Court reversed dismissal of the claims in part because the party against whom sanctions were sought offered explanations, and even if counsel did not use "recommended law office practice," the explanations undercut any claim of the kind of "deliberate abuse of or flagrant bad faith disregard for the rules" that would justify dismissal of the case. Id. at 195.

[28] Especially instructive are those cases in which the Court has affirmed dismissal as a sanction. For example, in Dakota Bank & Trust Co. of Fargo v. Brakke,

377 N.W.2d 553, 558 (N.D. 1985) the Court distinguished Thompson and upheld dismissal as a discovery sanction based on a party's "abuses of the discovery process and his failure to appear or present evidence to explain his conduct[.]" The Court reached a similar conclusion in Federal Land Bank of St. Paul v. Woell, 415 N.W.2d 500, 503-04 (N.D. 1987) when a party intentionally failed to attend multiple depositions and to submit any explanation for his repeated absences.

[29] North Dakota law is thus clear that dismissal should only be used when the conduct is deliberate, in bad faith, or flagrantly abusive. Thompson, 334 N.W.2d at 194. The District Court effectively determined that it is impossible to be more culpable than Appellants were based on its imposition of the most severe possible sanction on Appellants. While Appellants and their counsel very much regret the mistake they made and said as much to the District Court, their mistake was not the kind of flagrant abuse that justifies the harshest sanction allowed by law.

[30] The first factor therefore weighs against any sanction at all, and certainly against dismissal of all claims with prejudice.

2. There is no prejudice to Appellee.

[31] The second factor is prejudice to Appellee caused by Appellants' missing the filing deadline set by a letter from the calendar control clerk. Bachmeier, 507 N.W.2d at 533. The Court has emphasized that this factor implicates "the impact [the sanctionable conduct] has on presenting or defending the case[.]" Id. Many of the cases addressing this factor are, like Bachmeier, concerned with spoliation of evidence, in which a party loses its substantive ability to defend a case. Id. When the only issue is one of time, the Court has emphasized that the district court must find some actual prejudice caused by the delay. In Viscito, for example, this Court remanded for further proceedings when "the

district court did not address any prejudice Christianson suffered as a result of Viscito's failure to comply with the court order compelling arbitration be completed within six months." Viscito, 2015 ND 97, ¶ 30, 862 N.W.2d 777. In other words, delay itself is not a sufficient basis to impose such a severe sanction – that delay must result in some concrete and identifiable prejudice.

[32] It is impossible to conceive of any prejudice to Appellee here. This matter is an appeal from a County Commission action, so no discovery or other deadlines have been impacted. There was no pending trial date. Appellee had not previously shown an interest in haste; rather, Appellee requested that it be afforded additional time to file its record on appeal, to which the Appellants had stipulated. Dkt. #9.

[33] The second factor therefore weighs against any sanction at all, and certainly against dismissal with prejudice.

3. If sanctions are required, a less severe sanction would suffice.

[34] Finally, assuming sanctions needed to be imposed at all, the District Court did not consider less severe sanctions. Bachmeier, 507 N.W.2d at 533. The Court has held that "sanctions must be reasonably proportionate to the misconduct." Dronen, 2009 ND 70, ¶ 52, 764 N.W.2d 675. As noted above, the conduct at issue here was a good-faith, though lamentable, mistake. Under these facts, if any sanction was required, an appropriate sanction could have included a shortened briefing schedule for the Appellants or requiring Appellants to pay the attorneys' fees incurred by Appellee to file its motion to dismiss. Instead, the most severe possible sanction was imposed: ending the case on the merits.

[35] The Court has consistently expressed its disapproval of resolving cases on procedural motions as opposed to on the merits: "Because we prefer decisions on the merits, trial courts should be more lenient when entertaining motions to vacate default judgments as distinguished from judgments entered after a trial on the merits." State v. $33,000.00 U.S. Currency, 2008 ND 96, ¶ 6, 748 N.W.2d 420 (citing US Bank Nat'l Assoc. v. Arnold, 2001 ND 130, ¶ 21, 631 N.W.2d 150).

[36] In this context, the Court has repeatedly cautioned against applying the dramatic sanction of dismissal except in the most unusual cases. See, e.g., Bachmeier, 507 N.W.2d at 535 ("[T]rial courts have the duty to impose the least restrictive sanction in light of the circumstances."); Thompson, 334 N.W.2d at 194 ("Dismissal of an action or entry of a default judgment as a sanction for discovery abuse should generally be imposed only where there is a deliberate or bad faith non-compliance which constitutes a flagrant abuse of or disregard for the discovery rules."); Gronland v. Gronland, 2015 ND 251, 870 N.W.2d 217 (imposing $1,000 sanction for "failure to comply with the Rules of Appellate Procedure in numerous respects"). In furtherance of this goal, the Court requires district courts to engage in a reasoned analysis and to consider less draconian measures before dismissing a case on the merits as a sanction. Ringsaker, 2003 ND 122, ¶ 14 Here, the Court did not consider a more limited sanction. The third factor therefore weighs against any sanction at all, and certainly against dismissal with prejudice.

4. The undisputed facts here cannot justify dismissal.

[37] As the foregoing analysis shows, dismissal is unjustified by the facts here. Dismissal is the most severe sanction available to a district court and the facts here could not justify its imposition. As a result, the Court should reverse the imposition of a

sanction dismissing all claims and remand with instructions to consider if any sanction short of dismissal is needed or appropriate.

C. The District Court erred in imposing a sanction based on failure to follow a letter from the Calendar Control Clerk.

[38] The District Court presumably imposed the sanction under Rule 11.5, which provides:

> Rule 11.5 SANCTIONS
>
> The trial court may take any appropriate action against any person failing to perform an act required by the rules or required by court order. Appropriate action includes a sanction provided by Rules 5, 11, 16, 25, 30, 37, 40, 45, or 56, N.D.R.Civ.P.

Id.

[39] Rule 11.5 makes clear that sanctions can be imposed for failing to follow the rules or a "court order." As a technical matter, a letter from the Calendar Control Clerk is not a "court order." A letter from a court clerk is different from a formal scheduling order a party receives under Rule 16. See N.D.R.Civ.P. 16(d) (governing scheduling conferences and scheduling orders). While the undersigned certainly comply with letters from a court clerk of which it is aware, with respect to the imposition of sanctions, there is an important technical difference between a Court order and a letter from a court clerk, and that important difference undercuts the basis for dismissing Appellants' actions with prejudice instead of resolving them on the merits.

II. The District Court erred when it determined that the North Dakota Rules of Appellate Procedure applied to these cases in the District Court.

[40] In its order, the District Court stated that it "found the authority and reasoning set forth in the Appellee's brief compelling." App. 12-14. As noted above, that brief explicitly relied on N.D.R.App.P. 31(c), which allows (but does not require)

dismissal of an appeal when a party fails to file a brief. However, the North Dakota Rules of Appellate Procedure do not apply to actions in the District Court. See N.D.R.App.P. 1 ("These rules govern procedure in the supreme court of North Dakota."). Therefore, the District Court erred as a matter of law in relying on the appellate rules to dismiss Appellants' cases.[2]

III. The District Court erred when it decided Appellee's motion to dismiss before allowing Appellants 14 days within which to respond pursuant to N.D.R.Ct. 3.2.

[41] Appellee moved to dismiss on May 10. Under N.D.R.Ct. 3.2, Appellants had 14 days from that date to file "a brief and other supporting papers." (emphasis added). Appellants also had seven days after expiration of that time to request oral argument. Id.

[42] As noted supra, Appellants immediately advised the District Court that counsel had not received notice from the Calendar Control Clerk of the deadline and that they were not abandoning their appeals. App. 10-11. Counsel also requested that they be permitted to file their substantive briefs promptly. Id. Appellants then undertook an internal review of the matter to determine how the deadline had been missed. That review was ongoing within the timelines for filing supporting papers and to make a request for oral argument under Rule 3.2 of the North Dakota Rules of Court. The District Court's May 15, 2019 Order, signed five days after Appellee moved to dismiss and only one day after Appellants advised the Court that they were unaware of the deadline, eliminated the

[2] Moreover, N.D.R.Ct. 11.5, the only plausibly applicable rule on which the District Court relied, notably cross references Rules 5, 11, 16, 25, 30, 37, 40, 45, and 56 of the North Dakota Rules of Civil Procedure, which among them lay out a wide array of possible sanctions and none of which mandates dismissal of an action. These rules are all governed by the three-part analysis addressed supra.

opportunity for Appellants to file supplemental materials (including affidavits) and to request an argument to address the motion.

[43] This Court has previously reversed decisions issued prior to the time for requesting oral argument. Matter of Guardianship and Conservatorship of Norman, 521 N.W.2d 395, 397 (N.D. 1994). The same logic applies to decisions issued before the deadline for filing "other supporting papers." The District Court's order eliminated Appellants' opportunity to have the matter fully developed and argued. Appellants were therefore denied their substantive rights to present information and oral argument (and potentially testimony), which may have impacted the District Court's determination.

IV. The District Court erred by denying Appellants' motion to vacate the judgment of dismissal under N.D.R.Civ.P. 60.

[44] Pursuant to N.D.R.Civ.P. 60(b), the district court may provide relief from a final judgment or order in the following instances:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

N.D.R.Civ.P. 60(b)(1)-(6).

[45] A District Court's denial of a Rule 60 motion is reviewed for abuse of discretion. As noted above, a trial court abuses its discretion "if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law." Grinnell Mut. Reinsurance Co., 2003 ND 50, ¶ 51, 658 N.W.2d 363. This occurs

"when its decision is not the product of a rational mental process by which the facts and law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination." Kopp, 2001 ND 41, ¶ 7, 622 N.W.2d 726. These standards are met here.

[46] Appellants primarily rely on the arguments they make in Section I, supra. Denying the motion to vacate the judgment abused the District Court's discretion for the same reasons the underlying decision abused its discretion: the District Court simply failed to apply the law applicable to sanctions. However, a few points in the order denying the motion to vacate require a brief response.

[47] First, the District Court characterized Appellants' initial response as inadequate. As noted above, however, the District Court issued its order during the time period when Appellants were permitted to submit additional materials and request argument (or testimony).

[48] Second, the District Court went to lengths to argue that it was not required to do research to determine the standards for sanctions and would have been acting unethically had it done so. Appellants respectfully disagree.

[49] As the moving party, Appellee bore the burden of establishing that sanctions were warranted and that the sanctions requested complied with North Dakota law. Appellee did not set out the law governing the imposition of sanctions, including whether it had suffered prejudice as a result of the missed deadline, if lesser available sanctions were available, or the Appellants' culpability. Notwithstanding that fact, the District Court held that its failure to be advised of controlling North Dakota law on the imposition of sanctions should be held against *Appellants*.

[50] In addition, Appellants do not agree that the Court would have violated the Canons of the North Dakota Code of Judicial Conduct by considering the factors to be evaluated when imposing a sanction. See App. 24-31. Appellants do not seek to have the Court act as an advocate. However, the District Court's order to sanction a party must comply with the law, specifically the well-established three-factor test for sanctions. The District Court failed to consider the required factors when imposing the sanctions. The District Court instead relied on inapplicable law and condemned Appellants' law firm as large and out-of-state.

[51] The District Court sought to justify its emphasis in its original order on the size and location of Appellants' law firm.[3] The District Court's explanation – that it was ensuring Appellants' law firm was not held to a lower standard than other firms – is flawed. A court imposing an identical standard on all law firms simply does not need to mention any characteristics of the law firms before it. It seems evident that the District Court was motivated, at least to some degree, by animus against a large law firm not based in Minot. That is an improper consideration and is not relevant to deciding whether the law firm's clients should have all of their claims dismissed with prejudice. Relying on this factor was an abuse of discretion.

[3] The only other consideration upon which the District Court relied was that two attorneys from the firm – Michael Raum and Aubrey Zuger – were listed as attorneys of record and that one of them should have learned of the deadline emailed to Attorney Doerr by the Calendar Control Clerk. The reliance by the District Court on this fact was also in error as Attorney Zuger was not an attorney on this file until after Appellee moved to dismiss the cases. See Dkt. #26. Contrary to the District Court's Order, only one other attorney was representing Appellants and, as explained, he was not notified of the deadline.

CONCLUSION

[52] These cases should be resolved on their merits, not as a sanction for missing a deadline imposed in a letter, particularly when the District Court did not perform the sanctions analysis required by law and instead relied on inapplicable law. As set forth above, this Court must, at an absolute minimum, remand this case so the District Court can consider an appropriate sanction. In so doing, however, the Court should find that dismissal is an excessive sanction and prohibit the District Court from imposing that sanction on remand.

Dated: December 9, 2019

/s/ Michael S. Raum

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for Appellants C & K Consulting, LLC, Stonebridge Villas, LLC, Stonebridge Villas II, LLC, Stonebridge Development Company, LLC, and Townhomes at Stonebridge, LLC, in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 5,056.

Dated: December 9, 2019

/s/ Michael S. Raum

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v.	)	Supreme Court No. 20190315
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Appellee.	)	

CERTIFICATE OF SERVICE

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[1] I certify that on December 9, 2019, the following was filed:

Brief of Appellants C & K Consulting, LLC, Stonebridge Villas, LLC, Stonebridge Villas II, LLC, Stonebridge Development Company, LLC, and Townhomes at Stonebridge, LLC.

[2] Copies of the foregoing were served via email, as follows:

Clerk of Supreme Court supclerkofcourt@ndcourts.gov	Mitch D. Armstrong marmstrong@smithporsborg.com
Brian D. Schmidt bschmidt@smiothporsborg.com	Sara E. Wall swall@smithporsborg.com

[3] The above documents were duly served in accordance with the provisions of the North Dakota Rules of Appellate and Civil Procedure.

Dated: December 9, 2019

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Appellants,	)	Supreme Court No. 20190313 Supreme Court No. 20190314
v.	)	Supreme Court No. 20190315
Ward County Board of Commissioners,	)	Supreme Court No. 20190316
Appellee.	)	

CERTIFICATE OF SERVICE

[1] I certify that on December 11, 2019, the following was filed:

Brief of Appellants C & K Consulting, LLC, Stonebridge Villas, LLC, Stonebridge Villas II, LLC, Stonebridge Development Company, LLC, and Townhomes at Stonebridge, LLC.

[2] Copies of the foregoing were served via email, as follows:

Clerk of Supreme Court supclerkofcourt@ndcourts.gov	Mitch D. Armstrong marmstrong@smithporsborg.com
Brian D. Schmidt bschmidt@smiothporsborg.com	Sara E. Wall swall@smithporsborg.com

[3] The above documents were duly served in accordance with the provisions of the North Dakota Rules of Appellate and Civil Procedure.

Dated: December 11, 2019

/s/ Michael S. Raum

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