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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

REPLY BRIEF OF APPELLANTS

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LAW AND ARGUMENT

[1] Appellee Ward County Board of Commissioners primarily seeks to distract this Court from the core issue on this appeal by making incorrect procedural arguments. As explained below, these arguments are wrong. The plain and undeniable fact is that the District Court failed to consider the required factors prior to imposing the harshest sanction available. In addition, Appellee works to justify the District Court's failure to apply the correct legal standard, which this Court should reject. Appellants address these points briefly.

I. APPELLEE'S PROCEDURAL ARGUMENTS ARE UNAVAILAING

[2] Appellee makes two primary procedural arguments: (i) that Appellants failed to appeal the underlying judgment and, as a result, the only matter on appeal is the denial of Appellants' Rule 60(b) motions; and (ii) that Rule 60(b) does not apply to this matter at all. Both claims lack merit.

[3] The basic timeline is not in dispute. The District Court entered an order dismissing these cases on May 15, and it entered judgment that same day. App. 12-14, Dkt.32. The 60-day time period within which to file an appeal from that judgment thus started on May 16. N.D. R. App. 26(a)(1)(A). Appellants filed their Rule 60(b) motions on May 22, seven days after the judgments were entered. Dkt. #35, #36, #37. The District Court denied the Rule 60 motions on August 22. App. 24-31. This appeal was taken on October 15, within 60 days of the denial of the Rule 60 motions.

[4] In arguing that the underlying judgment was not appealed, Appellee simply ignores the language of N.D. R. App. 4(a)(3)(iv). That rule provides:

> If a party files with the clerk of district court any of the following motions under the North Dakota Rules of Civil Procedure, however titled, and does so within the time allowed by those rules, the full time to file an appeal runs for all parties from service of notice of the entry of the order disposing of the last such remaining motion:
> …
>
> (vi) for relief under Rule 60 if the motion is served and filed no later than 28 days after notice of entry of judgment;

The last sentence of subdivision (vi) is met, since the Rule 60(b) motions were filed within 10 days. Thus, as a matter of law, the Rule 60 motion stopped the timeline to appeal the underlying judgments, which began to run again only after the court resolved the Rule 60(b) motions. Id.; Waslaski v. State, 2013 ND 70, ¶ 8, 830 N.W.2d 228.

[5] In virtually identical circumstances, this Court held that an appeal taken following the denial of a timely-made Rule 60 motion includes the underlying order. In re Estate of Bartelson, 2013 ND 129, ¶¶ 12-13 833 N.W.2d 522. In Bartelson, the Appellant had moved for relief under Rule 60(b) within 28 days of a judgment and appealed within 60 days of the denial of that motion. This Court explained that the underlying judgment, and not only the Rule 60(b) motion, were properly before the Court on appeal:

> In a civil case, a notice of appeal must be filed within 60 days from service of notice of entry of the order being appealed. N.D.R.App.P. 4(a). A motion to vacate an order under N.D.R.Civ.P. 60(b) does not affect the order's finality or suspend its operation. N.D.R.Civ.P. 60(c)(2). However, if a party timely files a motion for relief under N.D.R.Civ.P. 60 no later than 28 days after notice of entry of judgment, the full time to file an appeal runs from service of notice of the entry of the order disposing of the Rule 60 motion. N.D.R.App.P. 4(a)(3)(A); see also In re Hehn, 2008 ND 36, ¶ 16, 745 N.W.2d 631 (a motion for a new trial tolls the time for filing an appeal from the underlying order under N.D.R.App.P. 4(a)(3)(A)).
>
> The order denying Bartelson's petition was filed on August 21, 2012, and Bartelson's motion to vacate was filed on September 11, 2012. Bartelson's motion to vacate tolled the time for filing an appeal from the order denying his petition. Bartelson's notice of appeal was filed within 60 days of the

> entry of the order denying his motion to vacate and the order for attorney's fees. Bartelson's appeal from all three orders was timely.

Id. (emphasis added). In short, there can be no question that Appellants here timely appealed the underlying judgments. Appellee's argument is contrary to the plain language of the rules and this Court's application of them.

[6] Appellee next argues that Rule 60 does not apply to this action at all. For this proposition, it cites two cases arising under the North Dakota Administrative Procedure Act, N.D. Cent. Code ch. 28-32 (the "APA"), which does not apply here. Friends of Duane Sand-2012 v. Job Service of North Dakota, 2016 ND 38, ¶ 5, 876 N.W.2d 433; Lewis v. North Dakota Workers Comp. Bureau, 2000 ND 77, ¶ 7, 609 N.W.2d 445. Duane Sand primarily relies on Lewis, in which the Court held as a general matter that the right to an appeal in an APA case is governed by the APA and so the rules of civil procedure may not apply. These cases do not bar the Rule 60 relief sought here.

[7] First, these cases are specifically limited to cases arising under the APA. See Lewis, 2000 ND 77, ¶ 14, 609 N.W. 445; Duane Sand, 2016 ND 38, ¶ 7, 876 N.W.2d 433. The APA, of course, contains a comprehensive set of rules governing contested administrative proceedings, which, as this Court noted in Lewis, function effectively as their own rules of procedure, including even a way to seek reconsideration in a fashion analogous to Rule 60. See N.D.C.C. § 28-32-40.

[8] This case does not arise under the APA. This Appeal is rather predicated on N.D.C.C. § 28-34-01, which this Court has never held alters the North Dakota Rules of Civil Procedure. The underlying procedures in the County Commission were not subject to the kinds of procedural protections that the APA guarantees. Notably, N.D.C.C. § 28-34-01(3) allows a party to seek a remand for the taking of additional evidence. While not

at issue here, the existence of this subsection undercuts the logic of applying Lewis, since it not only allows, but actually mandates, that a district court sitting in an appeal consider the underlying procedure and determine if it was adequate. This makes clear that such a rule should not, and indeed cannot, apply in cases arising under N.D.C.C. § 28-34-01.

[9] Moreover, as Appellee recognizes, even the bright line rule of Lewis, if applicable, does not apply here. The rationale of Lewis and Duane Sand is that, in an administrative appeal, a district court should not be empowered to review the trial record using a Rule 60 standard. See, e.g., Lewis, 2000 ND 77, ¶ 11, 609 N.W. at 449. That logic does not apply when a district court is reviewing its own actions, as Appellee explicitly recognizes (Appellee Br. at 9). Here, the Rule 60 motions did not challenge actions by the Appellee in the underlying procedure but rather the District Court's own orders. Thus, even if Lewis applied (though it does not), Lewis would not apply to this case, where a district court is asked to consider its own actions. Id.

[10] Appellee's efforts to avoid the merits of this appeal fail. As explained above, the underlying judgments were timely appealed. They are timely because the time for filing was extended by Appellant's motion under Rule 60, which applies to this case. Appellee must therefore meet the merits of this appeal.

II. THE SANCTION OF DISMISSAL MUST BE REVERSED

A. Appellee, as the moving party, failed to advise the District Court of the factors to be considered before imposing sanctions.

[11] Appellants' Brief adequately addresses the basic framework of the law of sanctions and its application here. Ringsaker v. N.D. Workers Comp. Bureau, 2003 ND 122, ¶ 13, 666 N.W.2d 448, 452. Appellants will not use this Reply Brief to repeat arguments raised earlier. However, one point merits a brief response.

[12] Both Appellee and the District Court made much of the fact that Appellants' initial, brief response to the motion to dismiss did not address sanctions law in the detail of its later Rule 60 motion. Appellee even characterizes this as failing to raise an argument and claims that the Appellants did not argue in their brief in opposition to the motion to dismiss that the Court had failed to engage in a reasoned analysis of the appropriate sanction. (Appellee's Br. at ¶ 17).

[13] It is unclear how the Appellants could have raised the District Court's failure to consider the relevant sanctions law in advance of the Court's May 15, 2019 Order, but this argument fundamentally misses another key point: Appellee's motion itself was not based on an accurate recitation of the law. Appellants did not raise some new and novel argument, or point to new facts, in their Rule 60 motions. Rather, they simply recited the basic law on which Appellee's own motion was based but which Appellee failed entirely to reference in its motion.

[14] As the moving party, Appellee bore the burden of establishing that sanctions were warranted and that the sanctions requested complied with North Dakota law. North Dakota law plainly requires that district courts must consider the factors this Court has prescribed. See, e.g., Ringsaker, 2003 ND 122, ¶ 14, 666 N.W.2d at 452 (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.

[15] In context, Appellee's conduct here is startling for any party and especially for a government. It sought the most draconian possible sanction, but 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. Instead, it relied solely on an inapplicable rule of Appellate Procedure. Appellants then responded to the motion and met the arguments Appellee actually made. Appellee now pivots and faults Appellants for not making Appellee's case by addressing in detail the law supporting Appellee's motion, which it left out of its own moving papers. The undisputed fact is that the District Court did not consider the three required factors before imposing sanctions on the Appellants. It therefore failed to comply with North Dakota law, and the District Court's Order dismissing Appellants' appeals should be reversed.

B. The Appellee effectively concedes it is unable to defend the District Court's Order dismissing Appellants' appeals.

[16] Appellee acknowledges that the Ringsaker factors govern and require that a district court must consider (1) the culpability of a party; (2) whether a party has suffered prejudice as a result of the conduct; and (3) whether less severe sanctions are available. Although it argues that the District Court's May 15, 2019 Order should be affirmed, Appellee appears to acknowledge that the District Court failed in that Order to consider these factors and attempts to supplement the May 15, 2019 Order with policy arguments and analysis not found in that Order.

[17] First, Appellee argues that the District Court considered the "culpability" of the Appellants by deeming that Appellants had provided an "insufficient justification"[1] to explain how Appellants did not know of the briefing schedule. Presumably recognizing that the Court had not analyzed the Appellants' culpability for this clerical mistake, the

[1] Respectfully, it is hard to understand how attorneys personally not receiving notice of the deadline is an insufficient justification. The Appellee does not dispute that the undersigned did not receive notice of this deadline and that the only attorney who did was one who had just left the law firm. Again, this was a mistake for which Appellants are responsible and regretful – but a mistake that the Appellants explained to the District Court.

Appellee then turned to the District Court's Rule 60 Order to provide a *post hac* justification for the District Court's May 15, 2019 Order. Appellee's Br. at ¶ 21. But even that reference to the Rule 60 Order merely highlights that the District Court did not consider the Appellants' culpability and was, instead, the District Court's attempt to deny that it had improperly considered the size of the law firm when imposing sanctions. Plainly stated, the District Court failed to consider that this was an innocent – though unfortunate – mistake and that there was no evidence of intentional misconduct by Appellants.

[18] Second, the Appellee argues that a finding of prejudice should be made – not because the District Court reached that conclusion – but because "in appeals from local governing body's decisions, the legislature has enacted laws stressing the importance of prompt resolution" and there is "inherent prejudice" to the government when a deadline is not met. Appellee Br. at ¶ 22. The District Court considered neither of these arguments and made no finding with respect to prejudice to the Appellee.

[19] Third, the Appellee argues that this sanction is appropriate because a deadline was missed. Notably, when making this argument, Appellee does not even attempt to reference the District Court's Order on this factor, nor provide any justification for imposing the most severe sanction. Appellee argues instead that appellate courts are permitted under the Appellate Rules to dismiss cases for failing to file a brief. Appellee does not dispute that the District Court failed to consider whether a lesser sanction would have been sufficient.

[20] The District Court did not consider the three sanction factors when deciding to dismiss these five cases. Ringsaker controls and makes clear that an order imposing such sanctions should be reversed if a district court fails to consider these factors.

CONCLUSION

[21] For the reasons set forth above and in Appellants' Brief, Appellants respectfully request that the Court reverse the District Court's Order and either determine that no sanction, or a lesser sanction, should be imposed.

Dated: January 22, 2020

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney 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 author of the above brief, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief contains no more than 38 pages.

Dated: January 22, 2020

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IN THE SUPREME COURT
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CERTIFICATE OF SERVICE

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[1] I certify that on January 22, 2020, the following was filed:

Reply Brief of Appellants

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

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

Dated: January 22, 2020

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