20130199
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 18, 2013
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No.: 20130199
Dickey County District Court No. 11-2010-CV-00078

Forbes Equity Exchange, Inc.,
Plaintiff/Appellee,

vs.

Keith Jensen,

Defendant/Appellant.

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BRIEF OF APPELLANT KEITH JENSEN

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APPEAL FROM THE JUDGMENT ENTERED ON THE 3RD DAY OF MAY, 2013, IN DISTRICT COURT, COUNTY OF DICKEY, STATE OF NORTH DAKOTA, THE HONORABLE JOHN T. PAULSON PRESIDING.

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STATEMENT OF THE ISSUES

[1] WHETHER THE COURT ERRED BY REJECTING APPELLANT JENSEN'S OFFSET AGAINST APPELLEE FORBES EQUITY EXCHANGE'S ASSIGNED CLAIM FROM MR. SIEH.

[2] WHETHER THE COURT ERRED BY ADMITTING SUMMARY EVIDENCE WITHOUT REQUIRING PRODUCTION OF THE UNDERLYING DOCUMENTS.

[3] WHETHER THE COURT ERRED BY FINDING IN FAVOR OF APPELLEE FORBES EQUITY EXCHANGE ON ITS ASSIGNED CLAIM AGAINST APPELLANT JENSEN.

STATEMENT OF THE CASE

[4] This case arises out of a long standing business relationship between the owner of a cattle feedlot, Appellant Keith Jensen ("Jensen"), and the individual to whom Jensen leased the feedlot, Defendant and Third-Party Defendant, Arden Sieh ("Sieh"). Appellee Forbes Equity Exchange ("FEE") initially brought this lawsuit against Sieh and Jensen for $166,015.18 worth of corn purchased by Sieh on an open account that was allegedly fed to Jensen's cattle. Upon discovering that Sieh was contemplating bankruptcy and that its claim against Sieh would likely be discharged, FEE accepted assignment on March 24, 2011, of an alleged contract claim Sieh had against Jensen for purportedly past due invoices for the feed and care of Jensen's cattle. Subsequently, FEE filed its Second Amended Complaint, which for the first time alleged Sieh's claims against Jensen. In exchange for the assignment, FEE released its causes of action against Sieh. On May 18, 2011, Jensen brought a Third-Party Complaint against Sieh for

collection of past due debts, including bounced checks, missed rent payments, unpaid loans with interest, missing cattle, damaged or missing feedlot property, and other financial obligations concerning or connected to the feedlot.

[5] On December 12, 2011, Sieh filed for Chapter 7 Bankruptcy before the United States Bankruptcy Court for the District of South Dakota, case number 11-10247. Sieh included Jensen's Third-Party Claim as a scheduled debt in his Chapter 7 bankruptcy. Sieh received a Chapter 7 discharge on April 13, 2012, which included the discharge of Jensen's creditor claim of $3,561,398.09 against Sieh. Jensen's Third Party Complaint against Sieh was not dismissed until after the trial in this matter, as Jensen continued to assert his claim against Sieh as an offset to FEE's assigned claim.

[6] A bench trial was held in this matter on November 29-30, 2012, at the Dickey County Courthouse before the Honorable John T. Paulson. On directed verdict, the District Court dismissed FEE's $166,015.18 claim against Jensen for corn sold to Sieh and allegedly fed to Jensen's cattle. On February 21, 2013, the District Court issued its Memorandum Opinion, holding that Jensen's potentially offsetting claim in the amount of $3,561,398.09 was moot because it was barred by Sieh's subsequent bankruptcy discharge and, therefore, FEE had proven its assigned claim against Jensen in the amount of $803,501.48.

[7] Jensen has appealed the final judgment. Jensen claims that the trial court erred in: (1) holding that FEE was insulated from Jensen's offsetting claim; (2) admitting summary evidence without providing the production of the underlying documents; and (3) holding that FEE had proven its assigned claim against Jensen. This brief is submitted in support of Jensen's appeal in this matter.

STATEMENT OF FACTS

[8] In or around early 1998, Jensen purchased property containing a cattle feedlot located just outside of Leola, South Dakota from Gordon Sieh, the father of Sieh. (2Tr.[1] 33). Jensen never personally operated the feedlot, instead electing to lease it to Sieh beginning on May 6, 1998. (Id. at 77). The term of the initial lease was 5 years, with rental payments of $115,000.00 per year. (Id. at 77, 79). After the written lease expired in 2003, Sieh continued with the operation of the feedlot under an oral lease with Jensen. (1Tr. 199-200). The parties vigorously disputed the terms of the oral lease at trial, with Sieh claiming that the terms of the original written lease simply carried through to the new oral lease, and Jensen asserting that the parties agreed to change the rental payment terms to $.05 per head of cattle on the feedlot per day plus $50.00 per acre, per year for 432 acres of cropland included within the feedlot property. (1Tr. 100; 2Tr 38-39, 65, 89).

[9] Throughout Sieh's operation of the feedlot, Jensen utilized the feedlot for the feed and care of the cattle purchased and sold in Jensen's cattle brokering business (2Tr. 30-31). The cattle Jensen placed in the feed lot fell into two categories: (1) cattle kept for his own purposes; and (2) cattle purchased on behalf of others or with the intent of selling to others in quick succession. (2Tr. 48, 135). In the latter instance, the party who ultimately purchased the cattle from Jensen would pay the bill for the feed and care of those particular cattle. (2Tr. 48, 136).

[10] Upon a customer's delivery of cattle to the feed lot, that group of cattle would be counted, weighed, assigned a lot number, and place into pens. (1Tr. 21, 164).

[1] "1Tr." refers to the transcript of the District Court proceedings on November 29, 2012; "2Tr." refers to the transcript of the District Court proceedings on November 30, 2012.

Not all cattle within a particular lot number were kept in the same pen; at any given time, cattle from the same lot number would be scattered throughout the feedlot pens. (1Tr. 165). The daily feed and care of the cattle were tracked on a feed sheet, which is a fill-in-the-blank spreadsheet created by feedlot management to track the amount of feed supplied to each pen, as well as any veterinary care administered. (1Tr. 15; App. 133[2]). The feed sheets themselves do not track the amount of feed given to each particular lot of cattle or the price of that feed. (1Tr. 110; App. 133). After each day, the feedlot employees would give the handwritten feed sheets to feedlot bookkeeper, Cindy Lunders, who would then input the information contained on the feed sheets into a computer program known as the "Pro Mini". (1Tr. 20). The "Pro Mini" would accumulate two weeks of inputted feed sheet information and produce an invoice that listed the amount and price of feed given to each particular lot of cattle. (1Tr. 110, App. 54). All feedlot customers except Jensen received the "Pro Mini" produced invoices every two weeks. (1Tr. 87-88).

[11] Due to Jensen's unique status as owner and patron of the feed lot, he was treated differently with respect to invoicing and payment. (1Tr. 88). The reason Jensen did not receive regular invoices as other customers did is because he was the owner of the feedlot and had unique payment arrangements under the lease agreements. (1Tr. 88). Although the "Pro Mini" program generated "binders" of bi-weekly invoices for Jensen, these invoices were not sent to Jensen. (1Tr. 87-88). The "Pro Mini" generated invoices for Jensen exist, but they have never been produced in this matter despite multiple discovery requests by Jensen. (1Tr. 9-10). The computer that the "Pro Mini" program

[2] "App." refers to the Appendix filed by Jensen.

was on was also not produced in this matter despite Jensen's request because, according to Sieh, the computer has malfunctioned and is no longer available. (1Tr. 9).

[12] Instead of providing Jensen with his actual "Pro Mini" generated invoices—like those provided to all other customers—Sieh offered into evidence billing summaries created by Ms. Lunders allegedly representing the feed and care given to Jensen's cattle. (1Tr. 30-31; App. 11). Jensen and his wife, Joy Jensen, dispute receiving any billings on any type of regular basis and assert that all billings received from Sieh were paid. (2Tr. 47, 147). These billing summaries were purportedly created from the initial weigh tickets, the feed sheets, and the documents issued when the cattle are discharged. (Tr. 106-107; App. 11). However, in the frequent situation where cattle purchased by Jensen were ultimately sold to another party who paid the feed and care bill, Ms. Lunders purportedly went through Jensen's billings and subtracted out the feed and care charges by making handwritten notations on the "Pro Mini" generated invoices; it could not be done using the "Pro Mini" computer program. (1Tr. 27, 96; App. 54). According to Ms. Lunders, the assumption of feed and care charges by other customers and the subsequent manual back outs on the invoices were happening "a lot." (1Tr. 94). This backing out could not be verified before, during, or after trial because the underlying "Pro Mini" generated invoices for Jensen on which the back outs were recorded have never been produced. (1Tr. 9-10).

[13] The purported billing summaries for Jensen were introduced at trial over strenuous objection by Jensen because, in the words of Ms. Lunders:

> Q: [N]ot all the primary documents are in [the billing summaries], is that correct?
>
> A: Technically, no.

Q: Technically, no. So what you're saying is the primary documents are not in [the billing summaries]?
A: The Pro Mini part of it is not in there for the feed and yardage.
Q: Okay. So there are primary documents that are not in there?
A: Correct.

(1Tr. 112). FEE also introduced a master summary of all alleged billing summaries for Jensen, which Jensen also strenuously objected to as nothing more than a summary of summaries. (1Tr. 77; App. 9).

[14] Jensen possessed claims against Sieh in the total amount of $3,561,398.09 for past due debts, including bounced checks, missed rent payments, unpaid loans with interest, missing cattle, damaged or missing feedlot property, and other financial obligations concerning or connected to the feedlot. (App. 123). For example, in addition to the amounts owed by Sieh under the 2003 lease agreement, Jensen loaned Sieh $40,000.00 in 2004 to pay debts owed to other feedlot customers. (2Tr. 41-42). In 2005, Jensen loaned Sieh another $26,000.00 to satisfy feedlot debts. (2Tr. 45).

[15] By 2007 and 2008, Sieh was also falling behind on feedlot debts owed to parties other than Jensen. (2Tr. 9). Sieh's debt to FEE is what precipitated this lawsuit, as Sieh had accumulated a bill for $166,015.18 worth of corn purchase from FEE, for which Sieh wrote bad checks in the amounts of $75,000.00 and $91,015.18. (2Tr. 7, 14). FEE initiated this suit in this matter on December 3, 2008, to collect on the amounts owed by Sieh. (App. 55).

[16] During discovery, FEE learned that Sieh was contemplating bankruptcy and that its claim against Sieh would likely be discharged. (1Tr. 171). On March 24, 2011, FEE accepted assignment of Sieh's alleged contract claim against Jensen for purportedly past due invoices for the feed and care of Jensen's cattle. (App. 64). On March 28, 2011, FEE brought its Second Amended Complaint against Jensen, which

asserted Sieh's assigned claim against Jensen. (App. 66). Jensen asserted a Third Party Complaint against Sieh for collection of past due debts, including bounced checks, missed rent payments, unpaid loans with interest, missing cattle, damaged or missing feedlot property, and other financial obligations concerning or connected to the feedlot. (App. 69).

[17] On April 13, 2012—over a year after assigning his purported claim against Jensen to FEE—Sieh received a Chapter 7 bankruptcy discharge that included the discharge of Jensen's creditor claim of $3,561,398.09. (1Tr. 173-174). At trial, the District Court dismissed on directed verdict FEE's $166,015.18 claim for corn sold to Sieh and allegedly fed to Jensen's cattle. (2Tr. 26). In its post-trial Memorandum Opinion, the District Court held that Jensen's potentially offsetting claim in the amount of $3,561,398.09 was moot because it was barred by Sieh's subsequent bankruptcy discharge and, therefore, FEE had proven its assigned claim against Jensen in the amount of $803,501.48. (App. 113). Jensen submitted his Objection to Plaintiff's Proposed Findings of Fact, Conclusions of Law, and Order for Judgment on April 8, 2013. (App. 251). The District Court signed, without revision, Plaintiff's Proposed Findings of Fact, Conclusions of Law, and Order for Judgment on April 8, 2013—the same day Jensen filed his Objection thereto. (App. 256). Jensen brought this appeal on June 27, 2013. (App. 265). Jensen's Third Party Complaint against Sieh was not dismissed until after the trial in this matter, however, as Jensen continued to assert his claim as an offset to Sieh's assigned claim.

LAW AND ARGUMENT

1. STANDARD OF REVIEW

[18] The standard of review regarding the District Court's determinations of the impact of Sieh's post-assignment bankruptcy discharge on Jensen's ability to claim an offset against FEE's assigned claim is de novo. The issues presented by FEE's assigned claim and Jensen's offset are based on the conclusions of law made by the District Court. "When the ultimate conclusion can be arrived at only by applying rules of law the result is a conclusion of law." Earth Builders v. State, 325 N.W.2d 258, 259 (N.D. 1982). "Conclusions of law by trial court are fully reviewable on appeal." Stockmen's Ins. Agency, Inc. v. Guarantee Reserve Life Ins. Co., 217 N.W.2d 455, 462 (N.D. 1974). Even if questions of fact issues are raised within the questions of law, the standard of review remains the same. "We fully review conclusions of law and mixed questions of law and fact under the de novo standard." State v. Torgerson, 2000 ND 105, ¶ 3, 611 N.W.2d 182.

[19] The standard of review regarding the admittance of FEE's summary documents under Rule 1006 of the North Dakota Rules of Evidence is abuse of discretion. The North Dakota Supreme Court applies an abuse of discretion standard of review to the District Court's evidentiary rulings. State v. Paul, 2009 ND 120, ¶ 12, 769 N.W.2d 416. The District Court abuses its discretion "when it acts in an arbitrary, unreasonable, or unconscionable manner." Peterson v. Ramsey County, 1997 ND 92, ¶ 18, 563 N.W.2d 103. A District Court's misinterpretation or misapplication of the law is an abuse of discretion. See Palmer v. State, 2012 ND 98, ¶ 5, 816 N.W.2d 807.

[20] The standard of review for the District Court's findings of fact is clearly erroneous. A finding is clearly erroneous if "it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although there is some evidence to support it, on the entire record there is a definite and firm conviction a mistake has been made." Rhodes v. Rhodes, 2005 ND 157, ¶ 3, 692 N.W.2d 157; Fladeland v. Gudbranson, 2004 ND 118, ¶ 7, 681 N.W.2d 431.

2. THE COURT ERRED AS A MATTER OF LAW BY HOLDING FORBES EQUITY EXCHANGE WAS INSULATED FROM JENSEN'S OFFSETTING CLAIM.

[21] The district court erroneously interpreted and applied the United States Bankruptcy Code to the factual relationship between Sieh and FEE. (App. 113, 117-120). At the time of assignment, Sieh owed Jensen in excess of three million dollars for past due debts including bounced checks, missed rent payments, unpaid loans with interest, missing cattle, and other financial obligations concerning or connected to the feedlot. (App. 123). Jensen brought a Third-Party Complaint against Sieh in this matter after FEE dismissed its claims against Sieh. (App. 69). It was not until December 12, 2011—8 months **after** the assignment—that Sieh filed for Chapter 7 Bankruptcy. (1Tr. 171).

A. The "Law of Assignment" Permits Jensen an Offset against FEE.

[22] North Dakota courts recognize and apply the Law of Assignment. Global Financial Services, Inc. v. Duttenhefner, 1998 ND 53, ¶ 19, 575 N.W.2d 667. The North Dakota Supreme Court has "often said an assignee acquires no greater rights than those of the assignor, and simply stands in the shoes of the assignor." Id.; see also First National Bank, Bismarck v. O'Callaghan, 143 N.W.2d 104, 106 (N.D. 1966). The party receiving the assignment "takes subject to any defenses existing at the time of the assignment or before notice of the assignment." Global, 1998 ND 53, ¶ 19, 575 N.W.2d

667; see also Pioneer State Bank v. Johnsrud, 284 N.W.2d 292, 296 (N.D. 1979) ("This court has held in the past that an assignee of a chose in action takes subject to any defenses existing at the time of the assignment or before notice of the assignment."); Farmers Ins. Exchange v. Arlt, 61 N.W.2d 429, 437 (N.D. 1953). In Farmers, cited favorably in Global, the Court stated:

> [t]he rule on the defenses available against an assignee of a nonnegotiable cause of action is stated as follows:
>
> an assignee's right against the obligor is subject to all limitations of the obligee's right, **to all absolute and temporary and defenses thereto, and to all set-offs and counterclaims of the obligor which would have been available against the obligee had there been no assignment, provided that such defenses and set-offs are based on facts existing at the time of the assignment**, or are based on facts arising thereafter prior to knowledge of the assignment by the obligor.

Id. at 437 (internal citations omitted) (emphasis added).

[23] The court in Collection Center, Inc. v. Bydal, 2011 ND 63, ¶ 15, 795 N.W.2d 667, acknowledges that setoffs are valid after an assignment:

> Because an assignee acquires no greater rights than were possessed by the assignor, in an action on the claim assigned, the assignee of a chose in action is ordinarily subject to any setoff or counterclaim available to the obligor against the assignor, and to all other defenses and equities that could have been asserted against the assignor at the time of the assignment.

At the time of the assignment, Sieh claimed that Jensen owed him money for the feeding and care of cattle, while Jensen simultaneously possessed claims against Sieh for past due debts, including bounced checks, missed rent payments, unpaid loans with interest, missing cattle, damaged or missing feedlot property, and other financial obligations concerning or connected to the feed. (App. 123). The claims alleged by Sieh against Jensen were in excess of $800,000, while the claims by Jensen against Sieh were in excess of $3,000,000—a classic case of offsetting claims. What is dispositive is that at

the time of the assignment, Sieh had not filed for bankruptcy protection, meaning FEE "stepped into the shoes" of Sieh and was subject to all claims and defenses available to Jensen at that time, including Jensen's offset claim. Sieh's ***subsequent*** filing for bankruptcy protection has no bearing or impact upon the assignment, as Jensen's claims and defenses are measured at the ***time of the assignment***. Global, 1998 ND 53, ¶ 19, 575 N.W.2d 667. Upon assignment of the claims, FEE stepped into the shoes of Sieh and subjected itself to all claims and defenses that the Jensen had against Sieh, including the offsetting claim.

B. The District Court Erred in Denying Jensen's Offset Claims under the United State Bankruptcy Code.

[24] The North Dakota Supreme Court explained the connection between offset and bankruptcy in Dakota Partners, L.L.P. v. Glopak, Inc., 2001 ND 168, ¶ 21, 634 N.W.2d 520, stating:

> Offset is defined as something (such as an amount or claim) that balances or compensates for something else. **Offset is synonymous with setoff**. Setoff is defined as a defendant's counter demand against the plaintiff, arising out of a transaction independent of the plaintiff's claim or a debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor. **The doctrine of setoff is an equitable doctrine requiring that the demands of mutually indebted parties be set off against each other and that only the balance be recovered**. In a bankruptcy proceeding, setoff allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A.

Id. (internal citations omitted) (emphasis added). The Bankruptcy Code does not create a Federal right of setoff, but 11 USC § 553(a) preserves, with certain exceptions, any right of setoff that otherwise exists. In re Alvstad, 223 B.R. 733, 740 (Bnkr. D.N.D. 1998) (citing Citizens Bank of Md. v. Strumpf, 516 U.S. 16, 18, 116 S.Ct. 286, 289 (1995)); accord United States v. Gerth, 991 F.2d 1428, 1430 (8th Cir. 1993). Under Section

553(a), to establish a right of setoff, the creditor must establish the following three elements:

> 1) A debt exists from the creditor to the debtor and that debt arose prior to the commencement of the bankruptcy case;
>
> 2) The creditor has a claim against the debtor which arose prior to the commencement of the bankruptcy case; and
>
> 3) The debt and the claim are mutual obligations.

Alvstad, 223 B.R. at 741 (citing Gerth, 991 F.2d at 1431). Simply put, "it is necessary only that the debt and the claim both arose prepetition and are mutual." Gerth, 991 F.2d at 1431. It is undisputed that the offsetting claims of Sieh and Jensen both arose prepetition. (1Tr. 171; App. 66, 69). However, the District Court erred in applying the mutuality component of Section 553(a) when it stated in its Memorandum Opinion that "Jensen's claims against Forbes Equity Exchange are not mutual." (App. 113, 120).

[25] In Collection Center, the Court stated that:

> Under the first type of assignment, the creditor/assignor . . . transfers his or her claim against a debtor in such a way as to effect a complete sale of the claim. Such an absolute assignment divests the assignor of all control and right to a cause of action against the original debtor; the assignee is entitled to control and to receive the benefits of the contract between the original debtor and the assignor. Such an assignment can create mutuality for setoff purposes, as follows:
>
> Under principles of contract law, when party A pays B's debt to C and obtains a valid assignment of C's rights against B, party A may now 'step into the shoes' of C and assert all rights C had against B. **By way of assignment, there are mutual debts now owing between parties A and B**.

2011 ND 63, ¶ 157 795 N.W.2d 667 (internal citations omitted) (emphasis added). When Sieh assigned his claims to FEE, FEE stepped into the shoes of Sieh for purposes of mutuality. (App. 64-65). Under Section 553(a), the debts arose prepetition, the claims are

mutual and, therefore, Jensen should have been entitled to offset his claim against FEE at trial.

C. This is Not a Case of Triangular Setoff.

[26] The district court erred as a matter of law in determining that the offset claim of Jensen against FEE was a triangular setoff that was "not permissible in this action since Sieh filed for and was discharged in bankruptcy" and because "Jensen's claims against Forbes Equity Exchange are not mutual." (App. 113, 120). The District Court, therefore, improperly held that "in accordance with U.S.C. § 553, the assignment is trumped by the code." (App. 113, 120). Although "mutuality" is to be strictly construed for purposes of determining setoff rights under Section 553(a) of the Bankruptcy Code, the Code does not define the term leaving it subject to interpretation. In re Koch, 224 B.R. 572, 575 (Bnkr. E.D.Va. 1998). Generally, courts are in agreement that an assignment of rights can create mutuality for setoff purposes. See e.g., In re U.S. Aeroteam, Inc., 327 B.R. 852, 865 (Bnkr. S.D.Ohio 2005). In Aeroteam, it was argued that the party from whom the debt was sought "lost the defenses to payment" through the assignment, and the party seeking to collection now stood in a better position. Id. However, the Aeroteam court disagreed and stated that all defenses could still be asserted against the assignee. Id. at fn. 10.

[27] The District Court erroneously combined Jensen's right of setoff with the theory of triangular setoff. A triangular setoff occurs when "a creditor attempts to setoff its debt to the debtor with the latter's debt to a third party." Matter of United States of America, Inc., 893 F.2d 720, 723 (5th Cir. 1990). In other words, Jensen would have to be attempting to offset his alleged debt to Sieh with Sieh's debt to FEE to have an

impermissible triangular setoff. In this case, however, Jensen is attempting to offset his alleged debt to Sieh—now assigned to FEE—with Sieh's debt to Jensen, thereby satisfying the mutuality element of Section 553(a). Jensen is, therefore, entitled to a setoff against FEE under the Law of Assignment and Section 553(a). Thus, the District Court's clear misinterpretation of law regarding the enforceability of Jensen's offset must be reversed.

D. Jensen was Improperly Denied the Ability to Show the Setoff.

[28] At trial, Jensen introduced into evidence Exhibit D11, which was the basis for Jensen's offset claims. (App. 123). The District Court failed to give any consideration to Exhibit D11, however, holding that such consideration was "moot" because of the erroneous legal conclusion that "defendant is precluded from receiving an offset by US Code." (App. 113, 121). Therefore, at a minimum, this matter must be reversed and remanded for retrial on Jensen's offsetting claim.

3. THE COURT ERRED BY ADMITTING FEE'S SUMMARY EVIDENCE WITHOUT REQUIRING PRODUCTION OF THE UNDERLYING DOCUMENTS.

[29] The district court ignored the North Dakota Rules of Evidence in admitting FEE's summaries without the production of underlying documents despite Jensen's repeated requests and demands for these documents before, during, and after trial. (1Tr. 2; App. 88). FEE, during its case-in-chief, introduced Exhibit P5 (the "master summary") as a summation of the multiple billing summaries (the "mini summaries") that allegedly demonstrated the basis of what Sieh claims was owed by Jensen. (1Tr. 30-31, 77). Jensen had previously made a pre-trial Motion in Limine, which was overruled at trial, seeking to exclude the master summary and mini summaries as improper summaries based on a failure to provide the underlying documents on which the summaries were

based. (1Tr. 2). At trial, Jensen renewed his objection to the master summary and the mini summaries and was overruled by the Court. (1Tr. 77, 112). FEE's case-in-chief rests solely on the master summary and mini summaries as its proof of damages against Jensen. (1Tr. 239).

[30] Rule 1006 of the North Dakota Rules of Evidence permits summaries to be used at trial, assuming certain foundational prerequisites have been met. Most notably, the party compiling and offering the summaries "shall make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place." N.D.R.Ev. 1006 (emphasis added). As the Explanatory Note to Rule 1006 further mandates:

> It is a condition precedent to the invocation of the rule that the component parts of the summary be made available for examination or copying. This is intended to give the party against whom the summary is offered a chance to analyze the underlying data and prepare any challenges to the summary he may wish to make. The court may direct that the original writings be produced at trial. **This would be necessary, for example, should the opposing party wish to introduce the originals in an attack on the accuracy of the summary**. (emphasis added).

[31] In Wishek v. U.S. Fidelity & Guaranty Co. of Baltimore, Md., 213 N.W. 488 (N.D. 1927)[3], the North Dakota Supreme Court addressed the use of summaries where the underlying documents were produced. The use of summaries was permitted at trial to show damages in Wishek because the plaintiff "produced and offered in evidence the scale tickets, storage tickets, checks, reports by Freund as to purchases, shipments, and sales, reports on account of consignments, and all other documents made by Freund pertaining to the business and transmitted to the principal office." Id. at 489. The summary admitted in Wishek was an audit performed after reviewing the underlying

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[3] Rule 1006 was not in existence at the time of the Wishek decision; however, the analysis is instructive to the interpretation of Rule 1006 on the use of summaries at trial.

documents, which were also ultimately introduced at trial. Id. at 491. Regarding the underlying documents, the Wishek court noted "[t]here was very many of them and identification was only general, without segregation and examination of each particular item or instrument." Id. at 491. In other words, all documents necessary to form the summary were in evidence. Id.

[32] The District Court was apparently mistaken that the documents forming the basis for the master summary and mini summaries were admitted at trial. On cross-examination, Ms. Lunders admitted that the "Pro Mini" generated invoices for Jensen exist, but were not produced in discovery or at trial. (1Tr. 112). Ms. Lunders also testified that despite the existence of the "Pro-Mini" computer program, she had to manually make handwritten changes to the invoices, and that those manual changes were only reflected on the invoices. (1Tr. 27, 96). The manual back outs could not be verified before, during, or after trial because the "binders" containing the underlying "Pro Mini" generated invoices for Jensen on which the back outs were recorded have never been produced. (1Tr. 9-10). The "Pro Mini" generated invoices for Jensen are also the only source of information showing the amount of feed consumed by Jensen cattle, the cost of said feed, whether the feed was attributed to another customer through a back out, and whether the invoice was sent to Jensen. (1Tr. 30-31, 87-88, 106-107, 110, 112). In the words of Ms. Lunders:

> Q: [N]ot all the primary documents are in [the billing summaries], is that correct?
> A: Technically, no.
> Q: Technically, no. So what you're saying is the primary documents are not in [the billing summaries]?
> A: The Pro Mini part of it is not in there for the feed and yardage.
> Q: Okay. So there are primary documents that are not in there?
> A: Correct.

(1Tr. 112). Unlike Wishek, in which the summary was an independently produced audit by a third-party based upon a review of documents in evidence, the master summary and mini summaries were not based on documents in evidence.

[33] As is contemplated in the Explanatory Note to Rule 1006, Jensen was not and has not been given the opportunity to "analyze the underlying data and prepare any challenges to the summary he may wish to make." At the beginning of trial, the District Court states "well, and if they don't get those documents and can't produce them to the satisfaction of the court, maybe your dismissal is in order, but I haven't seen that yet." (1Tr. 9). Later, the District Court admitted that the underlying documents were not produced or in evidence when it stated "[f]irst of all, there's been no documentation in support of testimony that the -- the supporting documents within the particular billing -- no testimony whatsoever that they are in error. There's been testimony that they were in error but no documentation." (2Tr. 181). Yet, the District Court also recognized that the necessary documents had not been produced:

> THE COURT: . . . With respect to those documents, the binders and so forth, you know, these things should have been at least tried to focus on in discovery. I can't say that its Mr. Tamm's responsibility to produce it since Mr. Sieh was a third-party Defendant. Even though he's basing it on - - basing his claim on those documents.

(2Tr. 25). The District Court placed Jensen in the proverbial "Catch-22"; it expected Jensen to discredit the summaries without any ammunition to do so because the ammunition was held solely by Sieh and never produced. This action by the District Court effectively switched the burden of proof to Jensen to disprove FEE's claims, rather than properly requiring FEE to prove its claims. Therefore, the District Court abused its discretion by admitting the summaries without underlying documentation and

subsequently basing its findings solely on those summaries. Thus, the District Court's conclusion of law that Jensen is liable to FEE on the assigned claims must be reversed.

4. THE COURT ERRED IN FINDING IN FAVOR OF FEE ON ITS ASSIGNED CLAIM AGAINST JENSEN.

[34] The District Court's findings of fact with respect to the validity of FEE's assigned claim amount are clearly erroneous. In addition to the aforementioned lack of foundational support for the master summary and mini summaries, Sieh himself does not believe in the accuracy or veracity of the amount assigned to FEE. According to Sieh, FEE's entire claim is based on what is contained on the master summary, which he describes as "just a summary of the business that [he and Jensen] did." (1Tr. 213, 239). Yet, when asked about the validity of the master summary, Sieh responded that he thought it was "a starting point for [he and Jensen] to negotiate something." (1Tr. 236). Despite being his responsibility alone, Sieh cannot even state with certainty whether he was billing Jensen for or even aware of the alleged massive running totals until the master summary was created:

Q: Prior to creating [the master summary], you had no . . . idea much that you claimed [Jensen] owed you?
A: Explain that again. Rephrase it or something.
Q: Would it help to look at your deposition?
A: Sure.
. . .
Q: Question, "with the yearly totals on [the master summary], which go from 2003 to 2008, do you know, was Jensen ever sent a bill for the yearly totals?" Answer, "I don't know." Question, "how about for the running totals? Was he ever sent a bill for those?" Answer, "I don't know if it was sent to him or not." Question, "okay, prior to this document being created, this document being [the master summary], were you aware of these amounts that you claim were due?" Answer, "**I don't remember just how I remember how much was owed**." Do you see that?
A: Yes.
. . .
Q: Okay. So in [2003] the running total was $69,466.40, correct?

. . .

A: Okay.

Q: Okay. And then in - - end of 2004, that's up to $245,667.67?

A: Yes:

Q: And then after 2005, $361,467.73?

A: Yes.

Q: And then after 2006, $411,167.38?

A: Yes.

Q: So in that period of time, which you claim Mr. Jensen owed you, was . . . escalating rather quickly?

A: Yes, it was.

Q: Okay. And your testimony was that you weren't even aware of these numbers until you created the document?

A: Until I had a summary, yes?

(1Tr. 211, 241-243) (emphasis added). Sieh would not even stand by the total amount he assigned to FEE. When asked whether he actually believed Jensen owed him in excess of $872,000.00, Sieh replied, "I'm not convinced of anything anymore." (1Tr. 236).

[35] In sharp contrast to the testimony of Sieh, Jensen's wife and bookkeeper, Joy, was adamant that she paid **all** bills received from Sieh:

Q: How often would you receive invoiced [sic] from the feedlot for Jensen cattle?

A: Not very often.

Q: Okay. And when - - when you would receive those invoices, what did you do with them?

A: We paid them.

(2Tr. 137). Regarding the master summary and mini summaries, Mrs. Jensen stated that she "didn't have bills for a good number of" them. (2Tr. 167). When asked on cross examination by counsel for FEE about bills Jensen had actually received from Sieh, Mrs. Jensen stated:

Q: They have never been -- you never received bills every two weeks?

A: No.

Q: How -- how frequently would a bill be received?

A: We probably got four or five, total.

Q: You mean four or five for the entire time from 2003 through 2008?

A: Yes.

. . .

Q: . . . Were there ever -- did you ever write back -- something to indicate that well, I disagree with this billing because of so -- and -- so?

A: No. We paid those bills that we received.

Q: **So, every bill that you repay -- received from -- Sieh was paid**?

A: **Yes**.

(2Tr. 170, 171) (emphasis added). Evaluating the totality of the contrasting testimony in conjunction with aforementioned foundational deficiencies with the summaries—containing FEE's only evidence of damages—the District Court's finding in favor of FEE on its assigned claim against Jensen is clearly erroneous. Accordingly, the District Court's decision must be reversed.

CONCLUSION

[36] For the foregoing reasons, Appellant Keith Jensen respectfully requests that the District Court's Order and Judgment be reversed and directed in favor of Jensen.

DATED this 18th day of September, 2013.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellant, Keith Jensen, and the author of the Brief of Appellant Keith Jensen hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 6,061 words from the portion of the brief entitled "Statement of the Issue" through the signature block. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

DATED this 18th day of September, 2013.

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20130199
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 18, 2013
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No.: 20130199
Dickey County District Court No. 11-2010-CV-00078

Forbes Equity Exchange, Inc.,
Plaintiff/Appellee,

vs.

Keith Jensen,

Defendant/Appellant.

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AFFIDAVIT OF SERVICE
++

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

RACHEL D. HENRY, Being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Cass County, North Dakota, not a party to nor interested in the action; that she served the attached:

1. **BRIEF OF APPELLANT**

2. **APPENDIX OF DEFENDANT/APPELLANT KEITH JENSEN**

on the following person by electronic mail only on September 18, 2013:

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and on the following by U.S. Mail only on September 18, 2013:

None

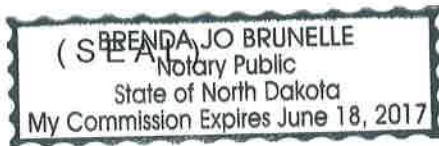
To the best of Affiant's knowledge, the e-mail and post office addresses above given are the actual electronic mail and U.S. Mail addresses of the parties

intended to be so served. The above documents are e-mailed and mailed by U.S. Mail in accordance with the provisions of the North Dakota Rules of Civil Procedure.

RACHEL D. HENRY

SUBSCRIBED AND SWORN TO before me on September 18, 2013.

(S E A L)



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