

**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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REPLY 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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**Ryan C. McCamy, ND ID 06420
Benjamin J. Williams, ND ID 06945
Nilles Law Firm
1800 Radisson Tower
201 North 5th Street
P. O. Box 2626
Fargo, ND 58108
Phone: (701) 237-5544
E-Mail: rmccamy@nilleslaw.com
ATTORNEYS FOR APPELLANT**

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LAW AND ARGUMENT

[1] Appellant Keith Jensen (“Jensen”) submits this Reply brief in response to the arguments raised by Appellee Forbes Equity Exchange’s (“FEE”) Response brief. This Reply is offered to address only the most crucial issues raised in FEE’s Appellee Brief and does not by omission accept the validity of any argument made therein. Completely contrary to FEE’s assertions, the District Court’s incorrect legal determinations with respect to the effect of Defendant Arden Seih’s (“Sieh”) bankruptcy was at the core of the District Court’s ruling. Additionally, despite FEE repeatedly labeling its damage summaries “primary documents”, the reality remains that they are summaries for which the underlying documents have never been produced.

I. THE DISTRICT COURT’S ERRONEOUS INTERPRETATION AND APPLICATION OF BANKRUPTCY LAW TO JENSEN’S OFFSETTING CLAIM WAS AT THE HEART OF ITS RULING.

[2] With respect to Jensen’s offsetting claim against FEE through the assignment from Sieh, the District Court’s entire holding is encompassed by the following:

This Court finds that the offsets that Jensen claims against Sieh have been discharged by the bankruptcy court. Jensen’s claims against Forbes Equity Exchange are not mutual. In accordance with USC §553, the assignment is trumped by the code. In this action between Forbes and Jensen the set off would be triangular which is not permissible in this action since Sieh filed for and was discharged in bankruptcy. ***This court finds that any set off numbers provided by Jensen are not applicable in this case.***

(App. 120) (emphasis added). In other words, the District Court failed to even consider Jensen’s offset claim against Sieh. The District Court’s failure to give due consideration to Jensen’s offset claim is further demonstrated by the statement that, “[t]he Court’s consideration of D11 is moot; Defendant is precluded from receiving an offset by the US Code.” (App. 120-121). The information contained on Exhibit D11 is Jensen’s offset

claim. (App. 123). Thus, the District Court simply did not evaluate Jensen's offset claim due to its incorrect interpretation of law that the claim was barred by Sieh's bankruptcy discharge.

[3] Implicitly recognizing the District Court's mistake of law regarding the effect of Sieh's bankruptcy discharge on Jensen's offset claim, FEE spends a significant amount of its brief trying to hide behind the Court's "findings of fact". In sharp contrast with reality, FEE states, "[t]he trial court found as a matter of fact that Jensen had no claims against Sieh, and thus the bankruptcy discharge was not an essential element of the court's decision." (Brief of Appellee Forbes Equity Exchange, Inc. at ¶ 44). This Court need only look to the Memorandum Opinion to realize that Sieh's bankruptcy discharge was *the* essential element of the District Court's decision with respect to Jensen's offset claim. (See App. 120-121).

[4] The Memorandum Opinion contains none of the specific findings regarding Jensen's offset claim that are included in the Findings of Fact, Conclusions of Law, and Order for Judgment drafted by FEE. (See App. 113-122). In fact, some of the "Findings of Fact" are expressly contrary to the Memorandum Opinion. For example, Finding #13 states, "The Jensen claim against Sieh was discharged by Sieh's Bankruptcy (Exhibit #64), but that is moot, because Jensen presented no credible claims at trial." (App. 262). This "finding" is the complete inverse of District Court's actual holding, which was that consideration of Jensen's offset claim is "moot" because Jensen "precluded from receiving an offset by the US Code." (App. 120-121). This is not surprising, given the fact that the Findings of Fact, Conclusions of Law, and Order for Judgment were drafted by FEE and signed by the Court *without any modification* and on the same day Jensen

filed his Objection thereto. (Compare App. 256 with Supplemental Appendix 1-8; See App. 251).

[5] The District Court gave no indication that it had even considered Jensen's Objection before signing a carbon-copy of FEE's proposed Findings of Fact, Conclusions of Law, and Order for Judgment. (See App. 256). The District Court's apparent lack of due diligence given to parsing out proposed findings that are contrary to its own Memorandum Opinion is contrary to North Dakota law. See Gonzalez v. Gonzalez, 2005 ND 131, ¶ 5, 700 N.W.2d 711 (stating that a district court must "carefully consider the findings proposed by counsel" and not simply "'rubber stamp' them or sign them without giving due regard"). Accordingly, the proper focus is on the District Court's Memorandum Opinion, which expressly states the District Court did *not* consider the merits of Jensen's offset due to an incorrect interpretation of bankruptcy law.

II. FEE'S DAMAGE SUMMARIES ARE DEVOID OF NECESSARY PRIMARY DOCUMENTS.

A. The Primary Documents Consisting of Jensen Invoices have never been Disclosed.

[6] FEE's Brief concerning its use of summaries at trial consists of a one page of analysis that is devoid of any legal citations or explanations for why the summaries are based on proper foundation. (Appellee Brief at ¶ 47). Instead, FEE attempts to once again place the burden of discovery concerning its assignor Sieh's documents upon Jensen. During discovery, Jensen specifically requested the documents that were used as the basis for creating the summaries:

5. ... Please state with specificity what this document is, when this document was created, what it purports to show, and by whom this document was created. Please provide any documents used in creating

Exhibit 8, any documents used in calculating Exhibit 8, and any documents that Exhibit 8 is based upon.

ANSWER: These are based upon the number of cattle fed. Mr. Tamm sent you a copy of basis of this exhibit.

(Supp. App. 10). Notably, Sieh states that it is FEE's attorney who was to provide the basis for the Master Summary. (Supp. App. 10). Sieh's testimony was that all documents used to create the "Master Summary", known as Exhibit P-5, had been disclosed *except for* the underlying invoices. (Supp. App. 16). Jensen again requested the basis for the Master Summary and stated that its use would be objected to at trial, to which FEE replied that FEE would be "bring[ing] a box of documents to trial on Wednesday morning." (Supp. App. 22, 23). The District Court ordered that trial be continued approximately one month for the parties to obtain the proper discovery. (Supp. App. 25). Justifiably, Jensen sought dismissal of Sieh's assigned claim to FEE on spoliation, as well as the exclusion of the Master Summary in a pretrial motion *in limine*, based upon FEE's failure to produce the underlying documents. (Supp. App. 26-33, 35-45).

[7] FEE's Brief attempts to argue that at trial "Jensen could have inquired whether there was adequate documentation for each of the invoices Lunders offered as evidence." (Appellee Brief at ¶ 47). Jensen did, in fact, inquire on cross-examination about these missing invoices and Lunders admitted that not all the primary documents used to create the summaries were present:

Q: Um, but ultimately you needed the invoices to tell you the amount of feed and the cost of the feed, correct?
A: Correct.

(1Tr. 102). As artfully explained by Lunders concerning the lack of primary documents:

Q: Okay, so if you testified that you created that summary based on the P18 documents, and all of the other ones we went through I believe there are 50 of them, and you said all the primary documents are here, not all the primary documents are in there, is that correct?

A: **Technically, no.**

Q: Technically, no? So, what you're saying is the primary documents are not in there?

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. 108) (emphasis added). In recap, Exhibit P-5 is undeniably a summary of Exhibits P6-P56, which are themselves summaries of the underlying financial data. Despite FEE's contention that all the "primary documents" used to create Exhibits P6-P56 are present, it is a feat of accounting impossibility to compute FEE's purported damages using only those documents. As Ms. Lunders admitted on cross examination, and fatal to FEE's argument, the invoices for Jensen are the necessary to compute Exhibits P6-P56, and none of those invoices are in evidence or have ever been produced. (1Tr. 102, 108). The fact is, the only invoice ever disclosed and in evidence supports Jensen's argument that *other* customers were paying Jensen's invoices. (See Supp. App. 34).

B. The Findings of Fact, drafted by FEE, Acknowledge Jensen Being Harmed by the Non-Disclosure of Primary Documents.

[8] FEE cites to Finding of Fact #7 for the proposition that Jensen "introduced no documentation to discredit the Exhibit P-5 Summary, or any bills from Sieh to Jensen that Lunders introduced into evidence." (Appellee's Brief at ¶ 47). However, this Finding of Fact is not supported by the evidence and was correctly objected to by Jensen. (App. 251-256). FEE remarkably attempts to place the burden upon Jensen to challenge the contents of a summary at trial without having the underlying documents that the summary was based upon. However, Rule 1006 is clear that prior to a summary being

admissible, “it is a condition precedent...that the component parts of the summary be made available for examination or copying.” N.D.R.Evid. 1006, Explanatory Note. Therefore, the burden was on FEE to produce the component parts of the Master Summary and Mini-Summaries *prior* to the summaries being admitted by the District Court. Instead, the District Court erred by admitting the summaries without this mandatory production. Such an error was prejudicial error in its own right, and further compounded by the fact that it appears FEE’s sole argument is that Jensen should have defended his case with documents Jensen never received because FEE never produced them.

[9] The District Court was also confused on whether FEE was to produce documents held by Sieh in discovery. (1Tr. 8). The District Court accurately stated that “assignee takes in the shoes of the assignor”, which FEE has not disagreed with in its Brief. (2Tr. 60). Further, Sieh’s interrogatory responses state that the basis for any summaries was to come from FEE; it was FEE’s burden to produce evidence to support its claim, assigned or not. Jensen made multiple attempts to obtain the underlying documents for the summaries through discovery, sought to dismiss the assigned claims pre-trial based on spoliation, sought to exclude the summaries pre-trial, objected to the introduction of the summaries at trial, and then continued to object at trial and post-trial. (2Tr. 179, App. 88-113). The District Court itself contemplated dismissal due to the lack of production of the underlying documents when it stated, “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). For FEE to not produce the required primary documents for purposes of using a summary at trial is prejudicial as it prevented Jensen

from analyzing the basis of FEE's claims and from asserting his defenses. For the District Court to not prevent the introduction of the summaries was prejudicial error, especially in light of Jensen's constant and continued objections, the testimony of Mr. and Mrs. Jensen in support of not receiving invoices, and the testimony of FEE's own witnesses that the underlying documents have not been produced and are not in evidence.

CONCLUSION

[10] 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 October, 2013.

/s/ Ryan C. McCamy
Ryan C. McCamy, ND ID#06420
Benjamin J. Williams, ND ID#06945
Nilles Law Firm
1800 Radisson Tower
201 North 5th Street
P. O. Box 2626
Fargo, ND 58108
Phone: (701) 237-5544
E-Mail: rmccamy@nilleslaw.com
ATTORNEYS FOR APPELLANTS

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 1,963 words from the portion of the brief entitled “Statutes and Rules” 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 October, 2013.

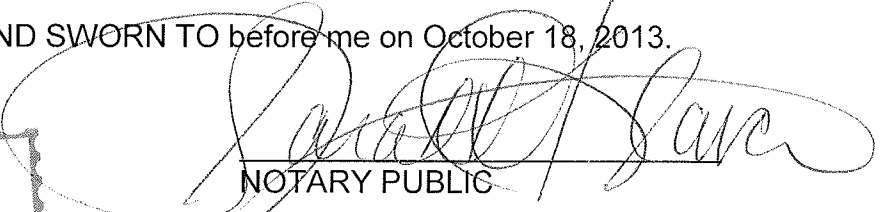
/s/ Ryan C. McCamy _____
Ryan C. McCamy, ND ID#06420
Benjamin J. Williams, ND ID#06945
Nilles Law Firm
1800 Radisson Tower
201 North 5th Street
P. O. Box 2626
Fargo, ND 58108
Phone: (701) 237-5544
E-Mail: rmccamy@nilleslaw.com
ATTORNEYS FOR APPELLANTS

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RACHEL D. HENRY

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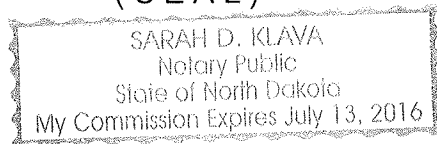

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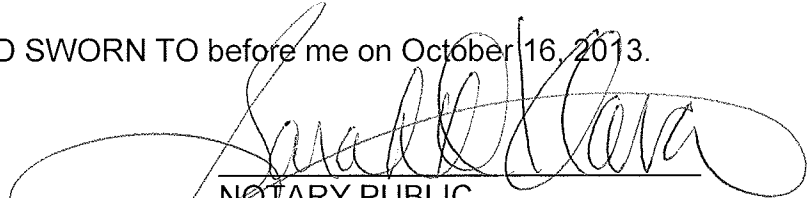
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RACHEL D. HENRY

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