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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20150285
Grand Forks County District Court No. 18-2012-CV-01560

Matthew Viscito,
Mary Lynn Bernston, and
Florence Properties, LLC,

Plaintiffs/Appellants,

v.

Kevin Christianson,
PACE'S Lodging Corporation,
Mednational, LLC,
Aurora Medical Park No. 2, LLC, and
Jeff Sjoquist,

Defendants/Appellees.

BRIEF OF DEFENDANTS/APPELLEES

Appeal from the August 4, 2015 Order of The Honorable Debbie Kleven, Northeast Central Judicial District, Awarding Attorney's Fees and Costs

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STATEMENT OF ISSUES

1. **Should the District Court's August 6, 2015 Judgment be affirmed?**

STATEMENT OF THE CASE

[¶1] This is an appeal from an August 6, 2015 Judgment of the District Court, Northeast Central Judicial District, Grand Forks County. Appellants' A. at 217. Via Order For Award Of Attorney's Fees And Costs dated August 4, 2015, the District Court granted Appellees' Motion For Award of Attorneys' Fees And Costs and ordered Appellants to pay reasonable attorneys' fees to Appellee in the amount of $33,405.14. Appellants' A. at 207. Notice of Entry of Judgment was served and filed on August 6, 2015. Appellants' A. at 4. Notice of appeal was filed by Appellants on September 24, 2015. Appellants' A. at 278.

STATEMENT OF THE FACTS

[¶2] This Court is conversant in the facts underlying this action by way of a prior appeal which culminated in its decision styled Viscito v. Christianson, 2015 ND 97, 862 N.W.2d 777, reversing and remanding that portion of the District Court's May 13, 2014 Judgment awarding Appellees attorneys' fees and costs. Consequently, that background need not be completely recapitulated here. For purposes of this Appeal, it suffices to recall the following:

- Via Memorandum Decision and Order dated July 30, 2013, the District Court directed the parties to submit their claims to binding arbitration, to be completed within six months, or longer if good cause was shown.
- Appellants failed to submit their claims to arbitration within that time period.
- On January 30, 2014, Appellants moved to extend the District Court's deadline. Appellants' Counsel informed the Court he was unqualified to handle an arbitration, he had yet to locate qualified Counsel during the previous six months, and he was in the process of lining up additional parties-plaintiff.
- Appellees responded with a Motion to Dismiss Appellants' Complaint with prejudice.
- Appellants' Counsel responded to that motion by requesting a dismissal without prejudice. See infra.
- During a hearing on March 24, 2014, the District Court indicated it would grant Appellants' request for a dismissal without prejudice, but also award Appellees their attorneys' fees and costs.
- On April 7, 2014, Appellees submitted their application for costs and fees. Appellees sought their total fees and costs incurred in defending Appellants' lawsuit, which at the time were $33,405.14.
- Appellants filed no objection to Appellees' application for fees and costs.
- The District Court entered its Order for Judgment of Dismissal, directing the case be dismissed without prejudice and awarding Appellees their fees and costs on May 9, 2014.

[¶3] On November 25, 2014, Appellants finally commenced an arbitration. Appellees' A. at 100. The Statement of Claim in the arbitration arose out of the same facts and circumstances as the Complaint in this case; and alleged Breach of Contract and Breach of Fiduciary Duty claims against Appellee Christianson, as does the Appellants' Complaint in this case. However, several of the other claims contained in the Complaint herein were not pursued in the arbitration. Moreover, Appellees PACE'S Lodging Corporation (PACE'S), Mednational, LLC, Aurora Medical Park No. 2, LLC (AMP-2) and Jeff Sjoquist were not named as Respondents in the arbitration. Finally, the arbitration included several parties-Claimants who are not parties-plaintiff to this action.

[¶4] This Court issued its Opinion reversing and remanding the District Court's Order and Judgment on April 28, 2015. This Court explicitly recognized that Appellants sought a dismissal without prejudice from the District Court, to wit:

> [¶23] After Viscito moved for an extension of time to complete arbitration, Christianson moved to dismiss the case, under N.D.R.Ct. 3.2 and 11.5, and requested it be awarded "costs and fees incurred herein." Christianson filed a supplemental brief in support of the motion to dismiss, arguing Viscito's case should be dismissed with prejudice, under N.D.R.Civ.P. 41(b), for failure to prosecute or comply with a court order. Christianson further requested it be awarded "costs and attorney[']s fees incurred herein, and in compelling arbitration in the first place." ***Viscito responded arguing, if the court dismisses the case, it should do so without prejudice.***

Nevertheless, this Court held as follows:

> [¶25] Based upon a review of the record, we are unable to determine the authority the district court relied on for awarding attorney's fees and costs.
>
> . . . .

> [¶31] We reverse the district court's award of costs and attorney's fees incurred and remand for a determination of authority on which the district court imposed sanctions and findings necessary to support such an award.

[¶5] On May 6, 2015 Appellees interposed a Motion For Award Of Attorneys' Fees And Costs On Remand. Appellants' A. at 88. Appellees argued the District Court's award of attorneys' fees and costs was clearly and ultimately a term and condition of voluntary dismissal pursuant to N.D. R. Civ. P. 41 (a)(2) and (d), because Appellants had in fact sought and received that relief. Accordingly, Appellees argued N.D. R. Civ. P. 41(a)(2) and (d) and this Court's precedent not only empowered, but compelled the District Court to award Appellees their costs and fees as a condition of granting Appellants a voluntary dismissal. Appellees' A. at 90.

[¶6] Appellants responded by arguing they never requested a voluntary dismissal. They also for the first time attacked the reasonableness of the amount of Appellees' attorneys' fees. Appellants' A at 131. This despite Appellants' Counsel's previous representations to the District Court and this Court that Appellants had no objection to the amount of Appellees' attorneys' fees. Most notable of these representations is the following quote from Appellants' Reply Brief to this Court in their prior appeal:

> Having already stated objections to the award of attorney fees, ***and finding no particular objectionable items within Mr. Andrews' affidavit of fees,*** Plaintiffs relied upon the Judge's ability to determine the reasonableness of the fees, taking into consideration the arguments Plaintiff's had already proffered and the procedural history of the case. ***Plaintiffs are not arguing on appeal that anyone or more particular item within the fees was unreasonable***, as is the common appealable issue before this court.

Appellants' A. at 193.

[¶7] A hearing was held on Appellees' Motion For Award Of Attorneys' Fees And Costs On Remand on June 22, 2015. Appellees elicited testimony from Kyle Freier, Chief Operating Officer of Appellee PACE'S Lodging Corp., regarding the prejudice to Appellees as a result of Appellants' receipt of a dismissal without prejudice.[1] Also at that hearing, Appellees' Counsel and the Court inquired of Appellants' willingness to dismiss with prejudice their claims against PACE'S, Mednational, AMP-2 and Jeff Sjoquist, because these defendants/Appellees were not named in the Arbitration. Appellants' A. at 235. Appellants' Counsel ultimately refused to do so. Appellees' A. at 1-2.

[¶8] The District Court issued its Order For Award Of Attorney's Fees And Costs on August 4, 2015. This nearly 10-page Order goes well above and beyond this Court's directive to provide the legal basis for the award, and the findings which support it. While the Order speaks for itself, the following excerpts are particularly notable:

> d. Six months after Judge Braaten issued the order to compel arbitration and on the last day for completion of arbitration, Viscito filed a motion to extend the deadline. In support of the motion, Viscito's attorney,

[1] In addition to the attorneys' fees and costs incurred in conjunction with Appellants' proceeding with this lawsuit despite the fact that they and their Attorney were admittedly unprepared to do so, Freier testified 1) AMP-2 has been forced to remain active solely due to the pendency of claims against it. It could have been dissolved and its remaining funds distributed but for the pendency of this lawsuit; 2) AMP-2 has incurred additional tax and accounting fees as a result of remaining active, to the tune of up to $2,000/year; 3) PACE'S has incurred increased borrowing costs, has been denied credit enhancements, and has operated at the risk of being declared in default of loan obligations as a result of the pendency of this lawsuit and the threat of a future action against it by virtue of the dismissal without prejudice of Appellants' claims; and 4) Mednational had an insurance premium increase as a result of the claims against it.

Jordan Schuetzle, filed an Affidavit stating he explained to his clients in early September of 2013 that he was not experienced in handling arbitration claims, that other investors were interested in joining the claim, and that he would assist the clients with finding experienced arbitration counsel. ***It was not until late December and early January, however, that Mr. Schuetzle attempted to find legal counsel to represent plaintiffs in this action.***

. . . .

e. When arbitration was not completed by January 30, 2014, the deadline imposed by Judge Braaten, Christianson filed a Motion to Dismiss with Prejudice and requested "attorneys fees" and costs. ***Viscito, in response, urged this Court to dismiss the case without prejudice.*** A hearing on the two motions was held on March 24, 2014. At the start of the hearing, the Court inquired to counsel:

> THE COURT: . . . .So we'll go ahead and proceed. ***And are you still requesting – are the plaintiffs still requesting a motion of – to extend the time for arbitration?***
>
> ***MR. SCHUETZLE: Your Honor, we would be okay with either. If the Court chooses to continue to supervise the case, we would request an extension of time; actually, possibly amending that to a later date since this has been pushed back a bit.***
>
> ***But, Your Honor, we are also comfortable with a dismissal without prejudice under the belief that this case can go on without court supervision and just be adjudicated privately via arbitration.***
>
> ***. . . .***
>
> ***MR. SCHUETZLE:***
> ***So that's why I take the position of either a dismissal without prejudice; we'll allow them to proceed with arbitration. Or an extension of time with enough room for comfort for them, You Honor, would also allow them to proceed.***

Tr. At 2-3. Clearly, this Court was left with the impression Viscito was seeking either an extension of the deadline for completion of arbitration or a dismissal of the case without prejudice.

. . . .

h. In deciding whether Christianson's attorney's fees were reasonable, this Court considered the fact that ***it became very apparent at the March 23, 2014, hearing that Viscito was not prepared to go forward with the case.*** This case is replete with evidence to illustrate this fact: The same day the Complaint was filed with the Court, Viscito filed a Motion to Amend the Complaint to Add Plaintiffs. Additionally, Plaintiff's Response to Motion to Compel Arbitration is void of any legal analysis. The brief appears to contain case law that is cut and pasted from its source. There is no legal analysis to establish why the case is pertinent to the facts at hand, and the document is not even edited to use a consistent font. As Judge Braaten stated in the *Memorandum Decision & Order Granting Defendants' Motion to Compel Arbitration and Staying Case at ¶12*, the "brief does not set forth the Plaintiffs' position other than to state that the Defendants' motion should be denied and the award of costs would be inappropriate. The brief simply cites to certain case law relevant to arbitration."

i. After this Court learned during the hearing held on March 23, 2014, that Viscito just recently found an attorney who was experienced enough to handle the case, that Christianson has not yet received a notice of appearance from new counsel or a demand for arbitration, and that the potential arbitration claim contained new parties and new claims, it became very apparent this case was prematurely commenced by Viscito. ***This information, along with Mr. Schuetzle's acknowledgement that he was not experienced enough to handle the case, was known to Viscito as early as September of 2013. Yet, Viscito continued to pursue the matter until he requested the Court to dismiss the case without prejudice at the hearing held on March 23, 2014. At his point, the Court granted Viscito's request for dismissal without prejudice but also determined Christianson was entitled to an award of reasonable attorney's fees and costs as a proper condition of the dismissal.***

. . . .

¶6. ***N.D.R.Civ.P. 41 provides for voluntary dismissal of an action by the Plaintiff or by Court Order. Although it would have been much wiser for Viscito to have pursued a stipulation to dismiss this action in September of 2013 when it was apparent his attorney was not experienced enough to handle the case***

and when it was determined arbitration was going to be completed in accordance with Judge Braaten's order, Viscito failed to do so. Instead, Viscito sought a last-minute extension of the Court's order. As a result, Christianson incurred attorney's fees for not only responding to the last-minute order, but also in defending a claim that was prematurely filed.

¶7. Here, Viscito simply sat on Judge Braaten's order and provided no information to Christianson as to the status of the case and the arbitration order until December of 2013, after an inquiry from Christianson. The information provided to Christianson by Viscito in December was the same information provided to the Court during the March 24, 2014, hearing: Viscito's counsel was not experienced in handling an arbitration claim, other potential plaintiffs existed who may want to join in the case, and other claims may also exist. This information should have been brought to the attention of Christianson and the Court well in advance of the deadline in which to complete arbitration. Although Viscito alleges good cause existed for an extension of time in which to comply with the Court's order, this Court did not agree, and instead granted Viscito's alternative request to dismiss the case without prejudice, but on terms the Court felt proper. Specifically, this Court stated at the hearing that waiting until the deadline to comply with the Court's order does not constitute good cause when the reasons for an extension were known to Viscito shortly after Judge Braaten's order was issued. Tr. At 11-16.

The Affidavits filed by plaintiffs' Counsel in conjunction with their Motion for Extension of Time explicitly aver the plaintiffs and their Counsel were unequipped and unprepared to proceed with an arbitration. The above-captioned action clearly should not have been commenced under these circumstances. April 7, 2014 *Affidavit of Michael T. Andrews in Support of Award of Attorneys Fees and Costs* at ¶4. Additionally, Christianson argues "[a]lthough the Court denied defendants' request for costs and fees incurred in conjunction with defendants' Motion to Compel arbitration, plaintiffs' Counsel subsequent dilatory conduct and violation of this Court's Order compelling arbitration casts new light on the issue, as it appears the primary reason plaintiffs resisted defendants' Motion to Compel arbitration is they were unprepared to move forward with an arbitration." Id. at ¶5. ***As previously indicated, Viscito did not file any response to this Affidavit.***

. . . .

¶10. Despite the fact Viscito commenced this action in July of 2012, Viscito was not prepared to move forward with this case. It is clear to this Court that Viscito's counsel was not familiar enough with the claims to even detail to the Court an argument as to which claims were not subject to the arbitration clause in the Member Control Agreement. ***Despite this lack of knowledge and familiarity with the law, Viscito continued to pursue the claim to the financial detriment of Defendants. It also became apparent during the hearing that several claims made by Viscito in this action are not being pursued in the arbitration case. Similarly, four of the Defendants named in this case are not even named as parties in the arbitration case. Quite simply, this Court found at the hearing and still finds Viscito initiated and pursued this case long before Plaintiffs and their counsel were prepared to handle the matter. As a result, Defendants incurred unnecessary attorney's fees and costs from the inspection of the case. Finally, since this Court dismissed the case without prejudice and four of the Defendants are not named in the arbitration claim, these four Defendants will continue to face the potential of having to relitigate the case in the future and incur additional attorney's fees.***

¶11. The Court has once again reviewed the itemized billing statement of Anderson, Bottrell, Sanden & Thompson and finds attorney's fees and costs in the amount of $33,405.14 are reasonable ***in light of the finding that Christianson was required to defend a lawsuit for which Viscito was unprepared and unable to pursue. Viscito sought a voluntary dismissal of the case without prejudice. The Court finds that requiring Viscito to pay reasonable attorney's fees and costs to Christianson is fair in light of these findings.***

¶12. ***Viscito, in his Reply Brief on Remand, now asserts that he did not seek a voluntary dismissal of the case. The Court finds this allegation directly contradicts the statements made by Viscito's counsel during the hearing of March 23, 2013.***

Appellants' A. at 207-16.

[¶9] Finally, this Court should take judicial notice of the fact that the above-referenced arbitration is complete, and resulted in an Award in favor of the Respondents on January 18, 2016.[2] See N.D. R. Evid. 201.

LAW AND ARGUMENT

I. THE DISTRICT COURT'S AUGUST 6, 2014 JUDGMENT SHOULD BE AFFIRMED.

A. Standard of Review

[¶10] Appellants cite the incorrect standard of review in their Brief. It is well-settled that a voluntary dismissal under Rule 41(a)(2) is within the sound judicial discretion of the District Court, and the Order is reviewable only for abuse of discretion. Hoffman v. Berry, 139 N.W.2d 529, 532 (N.D.1966). So, too, is the District Court's determination as to the terms and conditions to be imposed as a condition of that dismissal. Id. Indeed, that discretion is explicitly provided for in N.D. R. Civ. P. 41. See infra. "A 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 decision, or if it misinterprets or misapplies the law." Datz v. Dosch, 2014 ND 102, ¶ 22, 846 N.W.2d 724.

B. The District Court Had "Authority" To Award Attorneys Fees And Costs As A Condition Of Voluntary Dismissal.

[¶11] Appellants first argue the District Court was "without authority" to award Appellees their attorneys fees and costs, because it no longer had "subject matter jurisdiction" after compelling the matter to arbitration. Appellants argue that once

[2] Although Counsel for the parties to the arbitration have agreed the Award need not be judicially confirmed, Appellees will gladly file a copy of the Award with this Court upon request.

the District Court compelled arbitration, it was "without authority" to require the arbitration to be completed within 6 months, or take any other action vis-à-vis this case. In other words, Appellants now effectively challenge the legality of the District Court's July 30, 2013 Order.

[¶12] Of course, Appellants never raised this argument before in the District Court, or in their first Appeal. As such, it is clearly waived.

[¶13] Moreover, Appellants' contention that the District Court no longer had "jurisdiction" over this case once it compelled arbitration is decidedly incorrect. N.D. Cent. Code § 32-29.3-07 provides, in pertinent part, "If the court orders arbitration, the court ***on just terms*** shall stay any judicial proceeding that involves a claim subject to the arbitration." (emphasis added). This provision clearly and unambiguously empowers the District Court to set the terms of the stay afforded the parties. More generally, North Dakota's version of the Uniform Arbitration Act clearly provides for continuing jurisdiction over a matter in arbitration. It is replete with provisions empowering the District Court to take direct actions in an arbitration both during the process and at its conclusion, with the obvious intention being to further the goals of the Uniform Act. See, e.g., §§ 32-29.3-08 (District Court may afford provisional remedies where Arbitrator cannot act or provide adequate remedy); 32-29.3-10 (District Court may consolidate arbitration proceedings); 32-29.3-11 (District Court may appoint Arbitrator); 32-29.3-12 (District Court may vacate award where Arbitrator has conflict); 32-29.3-15 (District Court may direct Arbitrator to promptly conduct a hearing and render a decision); 32-29.3-17 (District Court enforcement of Arbitrator subpoenae); 32-29.3-18 (judicial

enforcement of preaward rulings); 32-29.3-19 (District Court control of the timing of an award); 32-29.3-22, 32-29.3-23, 32-29.3-24 (District Court confirmation, vacation and modification/correction of award); 32-29.3-25 (Judgment on award); 32-29.3-26 (District Court jurisdiction to enforce and agreement to arbitrate).

[¶14] Not surprisingly, Courts interpreting the Uniform Act or Federal Arbitration Act universally hold that a trial court retains continuing jurisdiction over an action pending an arbitration. See Smart v. Sunshine Potato Flakes, L.L.C., 307 F.3d 684 (8th Cir. 2002); see also Com. ex rel. Kane v. Philip Morris, Inc., No. 2422 C.D. 2014, 2015 WL 7264569, at *5 (Pa. Commw. Ct. Nov. 18, 2015)(when trial court compels arbitration, the action is stayed pending arbitration, and trial court retains jurisdiction and supervision over the arbitration); Roberts v. Packard, Packard & Johnson, 159 Cal. Rptr. 3d 180 (Cal. Ct. App. 2013)(trial court retains jurisdiction to entertain a motion by a defendant to dismiss arbitration where plaintiff has failed to exercise a reasonable diligence in moving the dispute to a conclusion); Everett Shipyard, Inc. v. Puget Sound Envtl. Corp., 231 P.3d 200 (Wash. Ct. App. 2010)(Order compelling arbitration and staying proceedings pending arbitration did not cause trial court to lose subject matter jurisdiction over subcontractor's breach of contract action against contractor, and thus trial court, following entry of stay, could order dismissal of action and award attorney fees in favor of contractor after arbitrator closed arbitration of dispute on grounds that subcontractor had failed to pay mandatory deposit for arbitration); Frank v. American Gen. Fin., Inc., 23 F.Supp.2d 1346, 1350 (S.D. Ala. 1998) (order

compelling arbitration under FAA does not divest the court, whether state or federal, of jurisdiction).

[¶15] By far most importantly, Appellants' arguments as to the District Court's "authority" or "jurisdiction" to limit the time to complete an arbitration are completely hypothetical, and irrelevant to the issue before this Court. At issue here is Appellants' undisputed failure to abide by the District Court's Order ***compelling*** arbitration in the first place, and what happened as a result of this undisputed failure. Along these lines, Courts have serially upheld the dismissal of claims ***with prejudice*** where, as here, a party has ignored or otherwise failed to comply with an Order compelling arbitration. See, e.g., Krinsk v. Suntrust Bank, No. 8:09–cv–00909–T–27MA, 2014 WL 202032 (M.D. Fla. Jan. 17, 2014) (dismissing claims with prejudice where the Court had ordered plaintiffs to commence arbitration within twenty-one days but plaintiffs failed to initiate arbitration for 17 months, pursuant to inherent authority and for failure to prosecute pursuant to Fed. R. Civ. P. 41); James v. McDonald's Corp., 417 F.3d 672 (7th Cir. 2005)(affirming dismissal of plaintiff's Complaint with prejudice for failure to comply with an Order compelling arbitration; "Once a party invokes the judicial system by filing a lawsuit, it must abide by the rules of the court; a party can not decide for itself when it feels like pressing its action and when it feels like taking a break because trial judges have a responsibility to litigants to keep their court calendars as current as humanly possible."); Mangiafico v. Street, 767 So. 2d 1103 (Ala. 2000) (affirming dismissal with prejudice due to plaintiffs' failure to initiate arbitration and failure to comply with the Court's order); see also Gonino v. UNICARE Life & Health Ins. Co., No.

Civ.A. 302CV2501G, 2005 WL 608158, at *3 (N.D. Tex. Mar.16, 2005) (dismissing case with prejudice after plaintiff did not initiate arbitration for nineteen months); Ames v. Standard Oil Co., 108 F.R.D. 299 (D.D.C. 1985) (action was subject to dismissal because of plaintiffs' failure to prosecute and blatant disregard of court orders and rules).

[¶16] An instructive analysis can be found in Morris v. Morgan Stanley & Co., 942 F.2d 648, 652 (9th Cir. 1991), wherein the United States Court of Appeals for the Ninth Circuit affirmed a dismissal with prejudice after the plaintiff did not initiate arbitration for two years following an Order compelling arbitration. The Ninth Circuit held a stay pending arbitration did not divest the District Court of its jurisdiction to dismiss the plaintiff's claims for failure to prosecute. The Court reasoned the District Court was asked to dismiss the entire action because the plaintiffs had no intention of going forward with arbitration in good faith after more than two years. Further, Courts retain jurisdiction over a matter after compelling arbitration "to the extent necessary to prevent a complete breakdown of the process." Id. at 653. Although the Federal Arbitration Act and the federal policy favoring arbitration generally prevent courts from interfering with the ***conduct*** of arbitration once a matter is referred to an arbitrator, the Ninth Circuit declared that Courts retain the power to protect "the sanctity of the arbitral process itself. If plaintiffs could simply refuse to go forward and the district court was without power to influence that choice, the opportunity to undermine a valid agreement to arbitrate would be enormous." Id. Of particular relevance here, the Ninth Circuit concluded the application of Fed. R. Civ. P. 41 to be "wholly outside the scope of the

arbitration process and[,] . . . fundamentally, an issue within proper federal jurisdiction." Id.

[¶17] As Morris and these numerous other cases make clear, the District Court would have been well within its purview to dismiss Appellants' Complaint with prejudice, given its voluminous findings establishing that Appellants failed to establish good cause for their violation of the District Court's Order compelling arbitration. In all events, the propriety of the District Court's deadline to complete arbitration is completely irrelevant and in fact was never raised, because Appellants violated the District Court's predicate Order that the case be submitted to Arbitration in the first place. Appellees never sought District Court interference with the ***conduct*** of arbitration (indeed by definition they ultimately cooperated with that process as an arbitration was in fact conducted and completed). Rather, Appellees sought a ruling regarding their rights as litigants to have the claims against them either prosecuted by way of arbitration or dismissed. The serial decisions above establish that the District Court clearly retained jurisdiction to address these issues.

[¶18] Indeed, ***Appellants themselves*** also sought relief from the District Court, by first requesting an extension of the stay, and then a dismissal without prejudice. Having themselves sought action from the District Court, Appellants cannot now argue the District Court was without authority to take such action, simply because it came with terms and conditions with which they did not agree.

C. Appellants Clearly And Repeatedly Requested A Voluntary Dismissal

[¶19] Appellants' argument that they did not request a voluntary dismissal from the District Court merits little discussion, as it is completely at odds with the record as found by the District Court and this Court. Further, their argument that their request for a voluntary dismissal did not constitute an "application" or "motion" is unavailing. N.D. R. Civ. P. 7(b), entitled "Motions and Other Papers", provides, in pertinent part, "A request for a court order must be made by motion. The motion must . . . . be in writing, ***unless made during a hearing or trial***[] . . . ." See Minto Grain, LLC v. Tibert, 2009 ND 213, ¶ 31, 776 N.W.2d 549 ("We note that our Rule 7(b)(1), N.D.R.Civ.P., is based on F.R.Civ.P. 7(b)(1), both of which do not require motions made during a hearing or trial to be in writing."). Appellants' Counsel explicitly and unmistakably requested a voluntary dismissal in open Court.

[¶20] What's more, Appellants' Counsel also made that request in writing, via a "Supplemental Brief In Opposition To Motion To Dismiss And In Support Of Plaintiffs' Motion For Extension Of Time", filed with the District Court on March 22, 2014:

> For all the reasons stated above, Plaintiffs ask that ***either*** their motion for Extension of Time be granted and further amended to allow until October 31st, 2014 for completion, ***or that their cause of action be dismissed without prejudice to allow the arbitration action to commence without issue.***

Appellants' A. at 70. This Court has held a motion may be valid even though it fails to meet the particularity requirement on its face, "if supporting papers or briefs filed contemporaneous with the motion detail grounds with specificity." Riemers v. Mahar, 2008 ND 95, 748 N.W.2d 714. This Court has also repeatedly made clear

that "[t]he paramount purpose of Rule 7(b), N.D.R.Civ.P., as well as the other procedural rules governing pleadings and motions, is to inform a party of the nature of the claims being asserted against him and the relief demanded by his adversary." In re N.C.C., 2000 ND 129, ¶ 11, 612 N.W.2d 561 (citations omitted). [¶21] Appellants' requests for a voluntary dismissal clearly met this standard. They were made both in writing and in open Court, and were unmistakable. Appellants' *post hoc* attempt to disavow those requests is completely disingenuous.

D. The Terms And Conditions Imposed By The District Court Were Proper

[¶22] The District Court has identified N.D.R. Civ. P. 41 as the authority upon which it imposed terms and conditions upon its voluntary dismissal, and very forcefully and thoroughly marshaled the findings necessary to support those terms and conditions. N.D. R. Civ. P. 41 provides, in pertinent part:

> **(a) Voluntary Dismissal**
>
> **. . . .**
>
> (2) *By Court Order; Effect*. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request ***only by court order, on terms that the court considers proper.*** [. . .] Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.
>
> **. . . .**
>
> ***(d) Costs of a Previously Dismissed Action. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:***
>
> ***(1) may order the plaintiff to pay all or part of the costs of that previous action; and***

(2) may stay the proceedings until the plaintiff has complied.

(emphases added).

[¶23] The above-emphasized language makes clear the District Court may condition a voluntary dismissal upon any terms it considers proper, including the payment of costs and fees. It also makes clear that these terms are discretionary with the District Court.

[¶24] This Court interpreted the rule in Hoffman v. Berry, 139 N.W.2d 529 (N.D. 1966). There, a third-party defendant appealed from a judgment dismissing the third-party complaint without prejudice and without costs to either party. The motion for voluntary dismissal was made by third-party plaintiff under Rule 41(a)(2), and was resisted by the third-party defendant. On appeal, this Court held the District Court erred in refusing to exercise its discretion to provide as a condition of dismissal that costs and reasonable expenses incurred be paid by the third party plaintiff. This Court's analysis of the rule is highly instructive:

> [. . . .]The 'terms and conditions' that may be imposed upon the granting of a motion for a voluntary dismissal are for the protection of the defendant and the philosophy which should govern the courts in passing on such requests is well stated in 36 Minnesota Law Review, page 673:
>
> > '* * * Under this latter section, the dismissal with the consent of court is usually without prejudice, but may be made on terms that will tend to prevent the laxity with which suits are often prosecuted and the harassment which often results to litigants by suits that are commenced without any intention of actually proceeding to trial. * * * Where a dismissal is made only upon obtaining consent of the Court, conditions may be provided and costs allowed, ***and those costs should not be only nominal. They should recognize the extent of the preparation that defendant has been subjected to in preparing his answer and getting ready for trial, and if the courts follow the practice of assessing substantial costs,***

> ***such practice will tend materially to lessen the institution of frivolous and unmeritorious lawsuits.'***
>
> ***The purpose of the rule was to eliminate the evils resulting from the unqualified right of the plaintiff in most cases to take a voluntary nonsuit at any time before trial,*** as permitted before the adoption of the North Dakota Rules of Civil Procedure by Section 28-0801, N.D.R.C. of 1943.
>
> In this case the third-party plaintiff moved for a dismissal upon the conditions that it be granted without prejudice and without costs to either party. Thus he stipulated the conditions and dismissal would not be voluntary if more onerous conditions are imposed by the court. ***We believe that under such circumstances the trial court, in exercising its discretion in granting a dismissal, may nevertheless impose such terms and conditions as it deems proper under the circumstances. However, if the movant finds the conditions unacceptable, he should be permitted not to accept the dismissal. In other words, where the movant stipulates the conditions upon which he asks for a dismissal and the court in the exercise of its judicial discretion decides it will grant the dismissal, but upon terms and conditions other than those stipulated by the movant, then the order of the court ordering a dismissal of the action should be conditioned on the acceptance of the terms and conditions imposed by the court before judgment may be entered, or, as an alternative, it could refuse to grant the motion for dismissal until the terms and conditions as determined by the court are met. The terms and conditions of a dismissal may include an assessment of costs but such assessment is not governed by the statute on costs and disbursements in civil actions. The rule places no such limitation upon the court. In determining what is proper, the trial court should consider the extent of the preparation to defend the action and the reasonable expenses that the adversary has incurred in relation thereto, together with any other facts and circumstances of the case and the parties that will assist the court in making a proper determination.***

Id. at 532-34 (emphases added). Subsequently, in State Farm Fire and Cas. Co. v. Sigman, 508 N.W.2d 323, 326 (N.D. 1993), this Court reaffirmed Berry and commented "an award of attorney fees to the defendant would have been a proper

part of the 'terms and conditions' imposed by the court in ordering a voluntary dismissal."

[¶25] Applying Hoffman reveals the District Court's August 4, 2015 Order was completely appropriate and well within its discretion. At the March, 2014 hearing it granted Appellants' request for a voluntary dismissal, but informed Appellants' Counsel that conditions would be imposed, and directed Appellees to submit proposed conditions. Appellees did so. While this Court has held Appellants preserved their objection to an award of ***sanctions*** pursuant to N.D. Court Rule 11.5, it also found—and it cannot be disputed—that Appellants never objected to the actual terms and conditions of the voluntary dismissal they received. Thus, the District Court acted appropriately in entering its Order for Judgment and Judgment dismissing the case without prejudice. Appellants subsequently reaped the benefit of this voluntary dismissal by commencing an arbitration.

[¶26] Not insignificantly, the above-emphasized findings of the District Court make clear what its disposition would have been had Appellants objected to those terms and conditions. The District Court clearly found that Appellants did not establish good cause for their failure to submit their claims to arbitration. It clearly would have dismissed Appellants' claims with prejudice had it not granted Appellants the relief they sought.

[¶27] To that end, this Court recently reaffirmed the axiom "'When you intend the facts to which the law attaches a consequence, you must abide the consequence whether you intend it or not.' " Finstad v. Gord, 2014 ND 72, ¶ 17, 844 N.W.2d 913 (quoting Estate of Duemeland, 528 N.W.2d 369, 371 (N.D.1995) (quoting State ex

rel. Sathre v. Moodie, 65 N.D. 340, 358, 258 N.W. 558, 566 (1935)). This squarely applies here. Appellants asked for and received a dismissal without prejudice; a request that was opposed by Appellees. They benefitted from that relief in that their arbitration was allowed to proceed. N.D. R. Civ. P. 41(a)(2) and (d) clearly and unambiguously spells out the consequences attendant such relief. The Rule is there for all to see. While Appellants' Counsel may have been unaware of those consequences, it was neither Appellees' nor the District Court's responsibility to educate him. This Court should at long last require Appellants to bear those consequences.

[¶28] As to whether the District Court properly exercised its discretion in determining the terms and conditions it imposed, Appellees cannot improve upon the District Court's 10-page Order laying out chapter and verse the findings upon which they were based. Simply put, the record establishes that Appellants and their Attorney engaged not only in duplicative, but also vexatious, litigation against the Appellees. Numerous courts have upheld an award of attorneys' fees as a condition for a voluntary dismissal under such circumstances. See, e.g., Robinson v. Bank of Am., N.A., 553 Fed. Appx. 648 (8th Cir. 2014)(mortgagees were entitled to award of attorney fees due to vexatious conduct by mortgagors, in action challenging foreclosure proceedings, where the mortgagors voluntarily dismissed their prior action asserting the same claims against the mortgagees, and the second action was virtually identical, except that additional Appellants were named in the later action); Kent v. Bank of Am., N.A., 518 Fed. Appx. 514 (8th Cir. 2013) (mortgagees and mortgage servicers were entitled to award of attorney fees from

mortgagors, under rule authorizing district court to order plaintiff to pay all or part of costs of action that was re-filed after dismissal of previously filed action based on or including same claim against same defendant, where mortgagors' voluntary dismissal of action and then refiling of action against same mortgagees and mortgage servicers constituted forum shopping and vexatious litigation); Russell-Brown v. Jerry, II, 270 F.R.D. 654 (N.D. Fla. 2010) (voluntary dismissal of law school instructor's employment discrimination action, after Appellees' answer, would be granted only on condition that instructor reimburse Appellees' reasonable costs and attorney's fees for not only instant action, but previously-dismissed case which raised same claims in same Florida district court, to protect Appellees from unfairness of duplicative litigation).

E. The District Court Appropriately Carried Out This Court's Mandate[3]

[¶29] Appellants finally argue the District Court violated this Court's mandate by considering new evidence not available to it at the time of its original rulings which gave rise to the first appeal in this case; namely that the arbitration which eventually was commenced by Appellants did not involve four of the five Appellees. This Court has repeatedly held that absent specific instructions from it, a District Court deciding an issue on remand must exercise its discretion when determining the procedure to follow:

> "When this Court specifies a defect to be cured and remands for redetermination of an issue without specifying the procedure to be followed, the trial court need only rectify the defect in a manner consistent with our opinion and conformable to law and justice.... Thus, when we reverse and

[3] The District Court's failure to deduct the costs of Appellants' prior appeal from its August 6, 2015 Judgment was clearly an oversight which can be easily corrected.

> remand for a trial court to address an issue ... unless otherwise specified, the trial court may decide based on the evidence already before it or may take additional evidence. The decision on taking additional evidence will be reversed only if the trial court abused its discretion."

Livinggood v. Balsdon, 2006 ND 215, ¶ 5, 722 N.W.2d 716 (quoting Kautzman v. Kautzman, 2000 ND 116, ¶ 7, 611 N.W.2d 883 (internal citations omitted)). This Court prescribed no procedure on remand, but rather requested the Court provide the legal authority and factual findings for its determination. The status of the arbitration was made known to the District Court, and, yet again, no objection was made by Appellants below to the District Court's consideration of this information. [¶30] The notion that the District Court be prohibited from considering this information—which conclusively establishes its terms and conditions were entirely appropriate and indeed prescient—strains all reason. Appellants are correct that as of May 9, 2014, they had yet to commence their arbitration. Thus, the District Court at that time did not know whether they would ever commence one; or if they did, whether there would be different parties, claims, etc. It was precisely for this reason that the District Court imposed its terms and conditions. That Appellants' arbitration named only one Appellee as a Respondent establishes that the District Court was not only correct that this lawsuit was premature, but also that four of the five Appellees should not have been sued at all. It was clearly appropriate for the District Court to consider that information, amongst the voluminous other information it marshaled, for its conclusion that Appellants never should have commenced their lawsuit against Appellees in the first place.

CONCLUSION

[¶31] Based upon the foregoing, Appellees respectfully request the District Court's August 6, 2015 Judgment be affirmed.

Dated this 10th day of February, 2016.

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AFFIDAVIT OF SERVICE BY E-MAIL

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

The undersigned, being first sworn, says upon her oath that on February 10, 2016, she delivered via e-mail a true and correct copy of each of the following:

Brief and Appendix of Defendants/Appellees

A copy of the foregoing was securely e-mailed to the address(es) as follows:

Jordan T. Schuetzle
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To the best of Affiant's knowledge, the e-mail addresses above given are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail.

Dated this 10th day of February, 2016.

Liza A. Gion

Subscribed and sworn to before me this 10th day of February, 2016.

JENNIFER A. ERNST
Notary Public
State of North Dakota
My Commission Expires Aug. 19, 2021

Notary Public