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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

PHI Financial Services, Inc., Plaintiff and Appellee, vs. Johnston Law Office, P.C., and Choice Financial Group, Defendant, ---------- Johnston Law Office, P.C. Appellant.	**SUPREME COURT NO. 20150301** Civil No. 18-2012-CV-00577

ON APPEAL FROM ORDER COMPELLING DISCOVERY
ENTERED JUNE 29, 2015, AND ORDER OF CONTEMPT
ENTERED SEPTEMBER 22, 2015
GRAND FORKS COUNTY DISTRICT COURT
NORTHEAST CENTRAL JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
THE HONORABLE THOMAS E. MERRICK PRESIDING

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether Appellant timely appealed the district court's Discovery Order.

II. Whether the district court's Discovery Order was properly entered.

III. Whether the district court's Contempt Order was properly entered.

STATEMENT OF THE CASE

[¶1] Defendant/Appellant, Johnston Law Office, P.C. ("Appellant"), challenges two separate post-judgment orders entered by the district court.

[¶2] Following judgment entered in favor of Plaintiff/Appellee, PHI Financial Services, Inc. ("PHI"), Appellant sought a stay from this Court when both parties appealed the rendered judgment. This Court granted Appellant's requested stay, so long as Appellant filed sufficient supersedeas bond in the amount of $80,000.

[¶3] When Appellant failed to file a supersedeas bond, PHI began to seek enforcement of its judgment. Pursuant to Rule 69 of the North Dakota Rules of Civil Procedure, PHI served post-judgment discovery on Appellant. When Appellant failed to respond, PHI filed a Motion to Compel Discovery. On June 29, 2015, the district court entered an Order Granting PHI's Motion to Compel ("Discovery Order").

[¶4] Following Entry of the Discovery Order, Appellant continued to refuse to respond to PHI's post-judgment discovery requests. PHI therefore sought an order requiring the Appellant to show cause why further sanctions should not be imposed. After a hearing on the issue, the district court concluded Appellant was without cause to ignore the Discovery Order, and entered a Contempt Order on September 21, 2015.

[¶5] Appellant now seeks to appeal from both the Discovery Order and the Contempt Order. Appellant's appeals are procedural deficient and without merit and should be dismissed and/or denied.

STATEMENT OF THE FACTS

[¶6] On March 30, 2015, PHI caused to be served upon Appellant Interrogatories and Demand for Production in Aid of Execution. Aff. of Jon R. Brakke, ¶ 2, Doc. # 461; see also Ex. A to Aff. of Jon R. Brakke, Doc. #462. Appellant responded on May 4, 2015. Aff. of Jon R. Brakke, ¶ 3, Doc. # 461; see also Ex. B to Aff. of Jon R. Brakke, Doc. #463. On May 8, 2015, counsel for PHI contacted opposing counsel to express concerns over Appellant's discovery responses. Aff. of Jon R. Brakke, ¶ 4, Doc. # 461; see also Ex. C to Aff. of Jon R. Brakke, Doc. #464. Appellant replied on May 19, 2015. Aff. of Jon R. Brakke, ¶ 5, Doc. # 461; see also Ex. D to Aff. of Jon R. Brakke, Doc. #465.

[¶7] On May 21 or 22, 2015, counsel for PHI attempted to discuss the ongoing discovery dispute with Appellant's counsel, but that attorney could not be reached. Aff. of Jon R. Brakke, ¶ 1. At that time, counsel for PHI left a message for Appellant's counsel stating PHI's counsel was available for phone conference on May 22, 23, and 24, 2015. Id., ¶ 2. On May 27, 2015, counsel for Appellant responded. Id., ¶ 3. At that time, counsel for Appellant asked if counsel for PHI could confer on May 28, 2015. Id. On the morning of May 28, 2015, counsel for PHI responded, affirming he would be available for a conference all afternoon on May 28, 2015. Id., ¶ 4. Counsel for Appellant did not respond on May 28, 2015, or any time thereafter prior to the filing of PHI's Motion to Compel Discovery on May 29, 2015. Id., ¶ 5. The district court entered the Discovery Order on June 29, 2015, granting PHI's Motion to Compel Discovery. See Order Grant'g Mot. to

Compel, Doc. #474. PHI served notice of entry of the Discovery Order on Appellant electronically on July 2, 2015. See Notice of Entry of Order, Doc. #475.

[¶8] Following PHI's service of Notice, Appellant did not comply with the Discovery Order. Accordingly, on August 5, 2015, counsel for PHI filed an Affidavit seeking an Order to Show Cause. See Aff. in Supp. of Order to Show Cause, Doc. #480. The district court entered its Order to Show Cause on August 5, 2015, see Order to Show Cause, Doc. #480, and Notice was provided to Appellant on August 7, 2015, see Notice of Entry of Order to Show Cause, Doc. #482. A hearing was held before the district court on September 18, 2015. On September 21, 2015, the district court found Appellant to be in contempt of the district court's Discovery Order. See Contempt Order, Doc. #491. Notice of the Contempt Order was served on Appellant on September 25, 2015. See Notice of Entry of Order, Doc. #493.

[¶9] On October 5, 2015, Appellant appealed to this Court in regards to both the Discovery Order and the Contempt Order. See Notice of Appeal from Separate J. Proceedings, Doc. #496.

LAW AND ARGUMENT

I. Appellant's Appeal Of The Discovery Order Is Untimely And Should Be Dismissed.

[¶10] Rule 4(a)(1) of the North Dakota Rules of Appellate Procedure provides a party a 60-day time limit to file an appeal of an order or judgment. Id. The

60-day period for filing a notice of appeal begins to run upon "service of notice of entry of the judgment or order being appealed." Id.

[¶11] The district court's Discovery Order was entered on June 29, 2015. See Order Grant'g Mot. to Compel, Doc. #474. Appellant was served electronically with Notice of Entry of the Discovery Order on July 2, 2015, beginning Rule 4(a)(1)'s 60-day time limit. See Notice of Entry of Order, Doc. #475. Appellant's Notice of Appeal was filed on October 5, 2015. See Notice of Appeal from Separate J. Proceedings, Doc. #496. Appellant's Notice of Appeal, which was filed 95 days after receiving notice of the district court's Discovery Order, was filed substantially after Rule 4(a)(1)'s 60-day time limit, rendering that respect of the appeal untimely. Accordingly, the Court should not entertain Appellant's tardy appeal. See, e.g., Manning v. Manning, 2006 ND 67, ¶ 12, 711 N.W.2d 149 (dismissing appeals from second amended judgment when appeal filed in violation of N.D.R. App. P. 4(a)(1)).

[¶12] Upon dismissal of Appellant's Discovery Order appeal, the Court should summarily affirm the contempt order for the reasons set forth herein. See Section III, infra.

II. The District Court's Entry Of The Discovery Order Was Proper.

[¶13] Assuming, arguendo, the Court concludes Appellant's appeal of the Discovery Order is timely, Appellant's appeal still fails on the merits.

[¶14] A district court has broad discretion regarding the scope of discovery, and a court's discovery decisions will not be reversed on appeal unless the court abuses

its discretion. Lynch v. New Pub. Sch. Dist. No. 8, 2012 ND 88, ¶ 23, 816 N.W.2d 53. A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination. Id.

[¶15] Here, the district court granted PHI's Motion to Compel Discovery, finding that PHI complied with Rules 33 and 37 of the North Dakota Rules of Civil Procedure. See Order Grant'g Mot. to Compel, Doc. #474. In its appeal, as it did at the trial court level, Appellant challenges whether PHI posed an impermissible number of interrogatories to Appellant, and whether PHI abided by the "meet and confer" requirement of the North Dakota Rules of Civil Procedure. For the reasons already found by the district court, and for the reasons set forth herein, Appellant's arguments are without merit. Accordingly, Appellant's appeal—if even actually evaluated by the Court—should be denied.

A. PHI did not exceed the number of permissive interrogatories under Rule 33 of the North Dakota Rules of Civil Procedure.

[¶16] Appellant argues PHI posed an excessive number of interrogatories to Appellant, in violation of Rule 33 of the North Dakota Rules of Civil Procedure. Appellant is incorrect.

1. The fifty-interrogatory limit is inapplicable to this case.

[¶17] Currently, under the North Dakota Rules of Civil Procedure, a party is limited to serving fifty (50) interrogatories. See N.D.R. Civ. P. 33(a)(3).

However, prior to adoption of current Rule 33 in 2012, the number of interrogatories permitted by the North Dakota Rules of Civil Procedure was unlimited. See generally Minutes of the Joint Procedure Comm. 20-22 (Jan. 26-27, 2012), available at http://www.ndcourts.gov/court/JP/Minutes/jan2012.htm#p20, (discussing the existing lack of limits on interrogatories under Rule 33). The Joint Procedure Committee recommended adopting a fifty interrogatory limit to discovery, id., and this amendment was adopted by this Court on November 20, 2012, becoming effective on March 1, 2013. See Order of Adoption No. 20120300 (N.D. 2012), available at http://www.ndcourts.gov/Court/Notices/20120300/Order.htm.

[¶18] This case was commenced on April 17, 2012, see generally Compl., Doc. #1, prior to the effective date of the current version of Rule 33. Because this Court did not order retroactive application of the 2012 amendment to Rule 33, see Order of Adoption No. 20120300 (N.D. 2012), available at http://www.ndcourts.gov/Court/Notices/20120300/Order.htm, this action is instead governed by the prior version of Rule 33 which did not impose a limit on the number of interrogatories. Appellant, therefore, has no substantive grounds to challenge the number of interrogatories posed by PHI. Accordingly, this Court should find Appellant is not shielded by any 50-interrogatory limit and uphold the district court's Discovery Order.

2. Even if applicable, PHI did not violate the fifty-interrogatory limit.

[¶19] Even if the Court finds the 2012 revision to Rule 33 to be applicable to this case—limiting PHI to fifty interrogatories—PHI has not exceeded this number.

[¶20] Contrary to its argument to the district court, the Appellant does not contend that PHI's post-judgment interrogatories, by themselves, exceed fifty discrete inquiries. Rather, for the first time Appellant argues the post-judgment interrogatories, when combined with PHI's prejudgment litigation interrogatories, exceed fifty in number. Compare Def.'s Resp. in Opp'n of Mot. to Compel Disc. & for Award of Att'y's Fees, Doc. 470, at 12-15 (arguing PHI's post-judgment interrogatories "greatly exceed[] the 50-interrogatory cap because each question [Appellant] considers a discrete subpart can stand alone and be answered irrespective of the answer to the others. [Appellant] does not need to delve into explaining the error in each interrogatory because [PHI] exceeds the cap in their interrogatory 4 request."), with Appellant's Br., at 10 ("The [post-judgment interrogatories] included 25 main questions and 12 subparts, resulting in 37 interrogatories. Throughout this litigation and post-judgment proceedings, PHI has served upon [Appellant] over 124 interrogatories, far exceeding the limitations of Rule 33(a)(3)."). [1] Appellant argues Rule 33 unambiguously limits all

[1] In addition to being untimely, Appellant's appeal should be dismissed as not properly before the Court. As routinely recognized, "[t]his Court's 'review is limited to issues raised before the district court.'" State v. Smith, 2014 ND 152, ¶ 6, 849 N.W.2d 599 (citation omitted). As Appellant only argued below PHI's post-judgment interrogatories alone exceeded the number of interrogatories

interrogatories—including litigation and post-judgment—to fifty interrogatories, and that the district court abused its discretion in holding PHI's post-judgment interrogatories did not run afoul of Rule 33. See Appellant's Br., at 10-11.[2] Contrary to Appellant's argument, the district court correctly interpreted Rules 33 and 69.

[¶21] "Interpretation of a court rule, like the interpretation of a statute, is a question of law." State v. Ebertz, 2010 ND 79, ¶ 8, 782 N.W.2d 350. This Court reviews questions of law de novo. In re K.H., 2006 ND 156, ¶ 7, 718 N.W.2d 575 (citation omitted). When interpreting court rules, the Court applies principles of

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permitted under Rule 33, see generally Def.'s Resp. in Opp'n of Mot. to Compel Disc. & for Award of Att'y's Fees, Doc. 470, at 12-15, whether the combined number of litigation and post-judgment interrogatories exceeded the number of interrogatories permitted Rule 33 is not before the Court, and Appellant's appeal should be dismissed.

2 Appellant also argues PHI's litigation interrogatories alone exceeded the permissible number of interrogatories. See Appellant's Br., at 10 ("The first set of interrogatories contained 15 main questions and 32 subparts. Under Rule 33(a)(3), all discrete subparts are included in the 50 written interrogatories limitation; therefore the interrogatories in the first set totaled 47. In the second set of interrogatories, PHI included 17 main questions and 23 subparts, totaling 40 interrogatories. Even before PHI served [Appellant] with its post-judgment interrogatories, PHI had already exceeded the discovery limitations imposed by Rule 33(a)(3)."). PHI disputes Appellant's tabulation of the number of litigation interrogatories posed, and notes the Appellant's calculations are its own and were not endorsed by the district court. Cf. Order Grant'g Mot. to Compel, Doc. #474 (taking no position on the number of litigation interrogatories). However, whether PHI posed 32 interrogatories as enumerated, or 87 as claimed by Appellant, the total number of interrogatories posed by PHI would be in excess of 50 if both litigation and post-judgment interrogatories are tabulated. Accordingly, PHI does not argue with Appellant about the number of litigation interrogatories as the question is moot.

statutory construction to ascertain intent of the rule. In re J.D.F., 2010 ND 160, ¶ 11, 787 N.W.2d 738. The Court first attempts to determine intent by looking at the specific language of the rule and giving words their plain, ordinary, and commonly understood meaning. Id. The Court construes the rules "to harmonize related provision to give meaning to each provision if possible." Datz v. Dosch, 2014 ND 102, ¶ 9, 846 N.W.2d 724. But, "[i]f a rule is ambiguous, [the Court] may resort to extrinsic aids, including the rule's historical development, to construe it." State v. Lamb, 541 N.W.2d 457, 461 (N.D. 1996) (citation omitted).

[¶22] Here, Rule 69 of the North Dakota Rules of Civil Procedure reads, in relevant part, that: "In aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person, including the judgment debtor, as provided in these rules." N.D.R. Civ. P. 69(b). Appellant appears to argue that Rule 69's requirement that execution discovery be conducted as "provided in these rules" unambiguously means that Rule 33 of the North Dakota Rules of Civil Procedure limits interrogatories—no matter when filed—to number no more than fifty.[3] Appellant's reading is incorrect because Rules 33 and 69, when read together, are at least ambiguous, and the historical development of Rule 33, as well as practical implementation, weighs against Appellant's interpretation.

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3 Rule 33 reads, in relevant part, that "Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 50 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1)(B)." N.D.R. Civ. P. 33(a)(3).

[¶23] A rule is ambiguous if it is susceptible to meanings that are different, but rational. State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60 (referring to statutes). As outlined above, Rule 69 provides for discovery in aid of execution of a money judgment. See generally N.D.R. Civ. P. 69. A judgment creditor can obtain discovery "as provided in these rules." Id. A rational reading of this provision is that a judgment creditor can obtain new discovery pertinent to aiding the execution of a money judgment by following the procedural requirements set forth in the North Dakota Rules of Civil Procedure. See, e.g., N.D.R. Civ. P. 5 (outlining service under the rules); N.D.R. Civ. P. 6 (setting forth computation of time under the rules); N.D.R. Civ. P. 26 (generally setting forth discovery procedures). Arguendo, Rule 69 may also rationally be read to mean that discovery obtained via Rule 69 is a continuation of the original action and remains subject to all Rules of Civil Procedure and subject to any limitations already reached in discovery. Under the first reading, pursuant to Rules 33 and 69, a judgment creditor could pose up to fifty interrogatories to aid in the execution of a money judgment. Under the second reading, a judgment creditor, when seeking to aid in the execution of a money judgment, would be limited to asking fifty interrogatories, minus whatever interrogatories had already been asked when originally securing the money judgment. Because there are—arguably—two rational readings of Rules 33 and 69, the Court should consider extrinsic evidence when determining how to apply Rules 33 and 69 in this case.

[¶24] The historical enactment of the 2012 amendment weighs against Appellant's reading. As previously cited, prior to the 2012 revisions to Rule 33, the number of permissible interrogatories in North Dakota was unlimited. See generally Minutes of the Joint Procedure Comm. 20-22 (Jan. 26-27, 2012), available at http://www.ndcourts.gov/court/JP/Minutes/jan2012.htm#p20, (discussing the existing lack of limits on interrogatories under Rule 33). As outlined by the Joint Procedures Committee, the purpose of the 2012 revision to Rule 33 was to address a burgeoning problem of parties offering excessive—i.e., hundreds—of interrogatories in relatively routine cases, and when the requested information was otherwise subject to disclosure pursuant to Rule 8.3. Id. At no time did the Joint Procedures Committee consider the issue of limiting post-judgment discovery addressed—presumably because post-discovery interrogatories were not problematic to the Joint Procedures Committee. Id. In fact, the Joint Procedures Committee outlined that "interrogatories are supposed to give attorneys a start on discovery with follow up done in depositions." Id. As depositions to aid in the execution of a money judgment are atypical, the logical conclusion is the Joint Procedural Committee's proposed amendment did not contemplate limiting post-judgment interrogatories. Accordingly, based on the historical development of Rule 33, the proper intent of Rule 33 is not to limit interrogatories posed in aid of execution of a money judgment by the number of interrogatories posed during litigation. This proper reading—reached by the district court—is only bolstered by the similar conclusion reached by Federal

courts that have encountered the same question. See, i.e., Scioto Constr., Inc. v. Morris, No. 4:99-CV-83, 2007 WL 108906, at *3 (E.D. Tenn. Jan. 9, 2007) ("Plaintiff served 52-post judgment interrogatories upon Defendant. This number exceeds the 25 interrogatories permitted under Fed. R. Civ. P. 33. However, Plaintiff's post-judgment interrogatories were propounded pursuant to Fed. R. Civ. P. 69, which governs post-judgment discovery and contains no such limitation."); see also U.S. Bancorp Equipment Finance, Inc. v. Babylon Transit, Inc., 270 F.R.D. 136 (E.D.N.Y. 2010) (permitting twenty-two new post-judgment interrogatories, pursuant to F.R. Civ. P. 69, after a default on a settlement agreement which was, presumably, reached after interrogatories were exchanged during litigation).

[¶25] Conversely, Appellant's reading of Rules 33 and 69 would lead to absurd results. Mertz v. City of Elgin, Grant Cnty., 2011 ND 148, ¶ 7, 800 N.W.2d 710 ("This Court 'construe[s] statutes to avoid absurd or illogical results,' and a court may resort to extrinsic aids to interpret a statute and avoid an absurd result." (alteration in original) (citations omitted)). Under Appellant's offered reading, potential judgment creditors would be faced with a Catch-22: either use all necessary and available interrogatories to prepare for trial in order to secure a money judgment but risk not having adequate interrogatories available after trial to aid in execution of any money judgment, or refrain from using necessary interrogatories to adequately prepare for trial so as to retain potential interrogatories to aid in execution of any money judgment. Such a conundrum is

contrary to the very purpose of the discovery rules—"to clarify the issues, eliminate surprises, and achieve truth," Simpson v. Chicago Pneumatic Tool Co., 2003 ND 31, ¶ 13, 657 N.W.2d 261 (citation omitted). Appellant's reading, therefore, is unreasonable.

[¶26] Because PHI and the district court's reading of Rules 33 and 69 is reasonable in light of historical development, and is necessary to avoid absurd or illogical results, PHI and the district court's interpretation is the proper reading. Accordingly, Appellant's appeal must be denied as advocating an improper reading.

B. PHI made a good faith attempt to meet and confer with Appellant prior to filing the relevant Motion to Compel Discovery.

[¶27] Appellant also argues PHI failed to comport with the "meet and confer" requirement of Rule 37 of the North Dakota Rules of Civil Procedure. In relevant part, Rule 37 of the North Dakota Rules of Civil Procedure reads:

> On notice to other parties and all affected persons, a party may move for an order compelling discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to obtain it without court action.

N.D. Civ. P. 37(a)(1). Appellant argues, in essence, PHI's repeated attempts to contact Appellant were not a "good faith . . . attempt[] to confer" with Appellant. Appellant's argument fails.

[¶28] Neither Rule 37, nor this Court, defines the term "good faith" as used in Rule 37. Rather, application of the term is intensively fact specific. For example,

in RLI Ins. Co. v. Conseco, Inc., 477 F. Supp. 2d 741 (E.D. Va. 2007), the District Court of Virginia held the movant met its obligation to attempt to meet and confer in good faith when counsel contacted opposing counsel multiple times prior to filing motion to compel. Id. at 746 (applying Fed. R. Civ. P. 37). Likewise, in Dauska v. Green Bay Packaging Inc., 291 F.R.D. 251 (E.D. Wisc. 2013), the District Court of Wisconsin held the movant meet its obligation to attempt to meet and confer in good faith when counsel contacted opposing counsel "by telephone, letter and email on numerous occasions" during the one-month period leading up to filing the motion to compel. Id. at 258 (applying Fed. R. Civ. P. 37); see also Black Hills Molding, Inc. v. Brandom Holdings, LLC, 295 F.R.D. 403, 409-10 (D.S.D. 2013) (movant met requirement to attempt to meet and confer in good faith when movant attempted to contact opposing counsel at least seven times prior to filing motion to compel).

[¶29] In this case, counsel for PHI initially contacted Appellant's counsel on May 8, 2015, expressing concerns over Appellant's responses to discovery. Ex. C to Aff. of Jon R. Brakke, Doc. #464. Opposing counsel did not respond for over a week, finally answering on May 19, 2015. Ex. D to Aff. of Jon R. Brakke, Doc. #465. Counsel for PHI then attempted to discuss the dispute with opposing counsel by calling him on either May 21 or 22, 2015. Opposing counsel could not, or would not, accept counsel's phone call. Aff. of Jon R. Brakke, ¶ 1. Counsel for PHI, therefore, left a message advising as to his availability to meet and confer on May 22, 23, and 24, 2015. Id., ¶ 2. Despite counsel for PHI's willingness to

confer, counsel for Appellant did not respond until May 27, 2015, when Appellant's counsel asked via email if counsel for PHI would be available to confer on May 28, 2015. Id., ¶ 3. Counsel for PHI timely responded the morning of May 28, stating he would be available for a conference all afternoon. Id., ¶ 4. However, counsel for Appellant never attempted to contact PHI's attorney. Id., ¶ 5. Only after Appellant's counsel again failed to timely contact counsel for PHI did PHI file the Motion to Compel Discovery.

[¶30] The district court—correctly—concluded PHI complied in good faith with the meet and confer requirement. As aptly reasoned:

> The voicemail [counsel for PHI] left does constitute a good faith effort to confer with [Appellant] and avoid court action. It appears PHI waited a week for a response to the voice mail [sic] before filing the motion, so they did make at least a minimal effort to avoid court involvement. Had [Appellant] responded in some way to the call, I might have agreed that PHI's efforts were insufficient, and PHI lacked good faith in filing ht emotion. But since there was no response, PHI took the logical next step. They do not have to go through an elaborate mating dance before filing a motion to compel.

Order Grant'g Mot. to Compel, Doc. #474 (emphasis added).

[¶31] The district court's conclusion that repeated attempts to contract Appellant were a good faith attempt to meet and confer is sound and supported by a factual basis. As this Court only reviews discovery decisions for abuse of discretion, Lynch, 2012 ND 88, ¶ 23, and the district court's decision was not arbitrary, unreasonable, or unconscionable, the Court should uphold the district court's determination and find PHI complied with Rule 37 prior to filing its Motion to Compel Discovery.

III. The District Court's Entry Of The Contempt Order Was Proper.

> In a civil contempt proceeding, a complainant must clearly and satisfactorily show that the alleged contempt has been committed. Civil contempt requires a willful and inexcusable intent to violate a court order. When reviewing a contempt sentence, the ultimate determination of whether or not a contempt has been committed is within the trial court's sound discretion. A trial court's finding of contempt will not be overturned unless there is a clear abuse of discretion. An abuse of discretion occurs when the trial court acts in an arbitrary, unreasonable, or unconscionable manner or when it misinterprets or misapplies the law.

Flattum-Riemers v. Flattum-Riemers, 1999 ND 146, ¶ 5, 598 N.W.2d 499 (citations omitted)

[¶32] Two conditions must be present to establish contempt of a previous court order. BeauLac v. BeauLac, 2002 ND 126, ¶ 10, 649 N.W.2d 210. The first prerequisite for contempt is the person must have actual notice or knowledge of the order violated. Id. (citation omitted). Second, the order must be willfully and inexcusably violated. Id. Appellant does not argue lack of notice or knowledge. See Appellant's Br., at 15-16. Rather, Appellant apparently argues a lack of willful and inexcusable violation. Id. at 15 ("However, a part [sic] is under no obligation to adhere to a void order."). Appellant's argument fails.

[¶33] PHI does not disagree "it is not contempt to disobey a void order." Dahlen v. Dahlen, 393 N.W.2d 769, 770 (N.D. 1986) (citations omitted). However, as also explained by this Court, "court orders may not simply be ignored with impunity." Investors Title Ins. Co. v. Herzig, 2010 ND 138, ¶ 61, 785 N.W.2d

863 (citation omitted). Appellant seeks to do just that—ignore a court order with impunity. The Court should not permit Appellant to do so.

[¶34] As already detailed, Appellant failed to timely appeal the Order Compelling Discovery. If Appellant believed the Discovery Order to be invalidly entered the proper course of action was not to ignore the Discovery Order until found in contempt—Appellant's proper course of action was to appeal to this Court in a timely manner. Appellant failed to do so. Instead, Appellant willfully disobeyed the Discovery Order by ignoring it until the district court found Appellant to be in contempt. Appellant's behavior is not "excusable," and is an affront to the Rules of Civil Procedure and the Rules of Appellate Procedure. Appellant's untimely appeal, entered only when faced with the Contempt Order, should not, and cannot, be permitted to be found to be "excused" behavior. Accordingly, Appellant's appeal should be denied.

[¶35] Appellant also appears to argue its willful refusal to appeal or comply with the Discovery Order was excusable because it was "substantially justified" to refuse to comply with the Discovery Order due Appellant's belief that order was incorrect. See Appellant's Br., at 15-16 (citing Athridge v. Aetna Cas. & Sur. Co., 184 F.R.D. 200, 205 (D.D.C. 1998)). Appellant's cited case and argument is completely inapplicable. In Athridge, the district court was considering whether a party was substantially justified is a resisting discovery request, or whether the party should be ordered to pay expenses under Federal Rule of Civil Procedure 37(a)(4)(A). See 184 F.R.D. at 205. The court found a party is substantially

justified to resist a discovery request—not a court order—if "there is an absence of controlling authority, and the issue presented is one not free from doubt and could engender a responsible difference of opinion among conscientious diligent but reasonable advocates . . . ." Id. (citations omitted).

[¶36] Arthridge is inapplicable to this case because Appellant was not resisting a discovery request but an actual order entered by the district court. Appellant was not "substantially justified" in disagreeing with "a reasonable difference of opinion among conscientious diligent but reasonable advocates," Appellant was disagreeing with the district court's reading of law and the Discovery Order. Appellant did not disagree permissively by correctly filing a timely appeal of the Discovery Order to this Court. Instead, Appellant ignored the district court until the district court found Appellant to be in contempt. Cf. Athridge, 184 F.R.D. at 207 ("Simply put, running from the fight by ignoring what one's opponent has said is not a substantially justified position for a litigant to take."). The Court should not accept Appellant's appeal for clemency by finding Appellant's disregard of the Discovery Order--and of appellate procedures—to be excusable. Were the Court to hold so, it would invite dissatisfied parties to become judges onto themselves—ignoring court orders with which they disagree until found in contempt, and then shielded from liability by filing a tardy notice of appeal. Such a holding would corrupt of the rule of law and cannot be allowed. Accordingly, as the district court's Contempt Order was not arbitrary, unreasonable, or unconscionable in light of Appellant's knowledge of the Discovery Order, and in

light of Appellant's willful unexcused response to the Order, this Court should uphold the district court's Contempt Order and deny Appellant's appeal from the same.

CONCLUSION

[¶37] For the foregoing reasons, PHI respectfully requests the Court dismiss Appellant's Appeal. Arguendo, if the Court reaches the merits of Appellant's arguments, PHI respectfully requests the Court deny Appellant's appeal and uphold the Discovery Order and Contempt Order entered by the district court.

Respectfully submitted January 19, 2016.

VOGEL LAW FIRM

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ATTORNEYS FOR PLAINTIFF/APPELLEE
PHI FINANCIAL SERVICES, INC.

[¶38]
RE: PHI Financial Services, Inc. v Johnston Law Office
Supreme Court Case No.: **20150301**
Cass County District Court No.: 18-2012-cv-00577

STATE OF NORTH DAKOTA)
) SS **AFFIDAVIT OF SERVICE BY EMAIL**
COUNTY OF CASS)

Sonie J Thompson, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter.

On January 21, 2016, I served the following document:

APPELLEE'S BRIEF.

On the following individuals by electronic means under N.D.R.Ct. 3.5:

DeWayne Johnston
dewayne@wedefendyou.net

Richard P. Olson
rpolson@minotlw.com

To the best of Affiant's knowledge, the email address above given is the actual email address of the parties intended to be so served. The above document was duly emailed in accordance with the provisions of the Rules of Civil Procedure.

/s/ Sonie J Thompson .
Sonie J Thompson

Subscribed and sworn to before me this 21st day of January, 2016.

/s/ Lori Thrall
(SEAL) Notary Public, Cass County, North Dakota

[¶38]
RE: PHI Financial Services, Inc. v Johnston Law Office
Supreme Court Case No.: **20150301**
Cass County District Court No.: 18-2012-cv-00577

STATE OF NORTH DAKOTA)
) SS **AFFIDAVIT OF SERVICE BY EMAIL**
COUNTY OF CASS)

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On the following individuals by electronic means under N.D.R.Ct. 3.5:

DeWayne Johnston
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To the best of Affiant's knowledge, the email address above given is the actual email address of the parties intended to be so served. The above document was duly emailed in accordance with the provisions of the Rules of Civil Procedure.

/s/ Sonie J Thompson .
Sonie J Thompson

Subscribed and sworn to before me this 19th day of January, 2016.

/s/ Lori Thrall
(SEAL) Notary Public, Cass County, North Dakota

[¶39]

CERTIFICATE OF COMPLIANCE

I, Jon R. Brakke, attorney for the Appellee PHI Financial Services, Inc., do hereby certify that the above brief complies with all type-volume limitations as set forth in the North Dakota Rules of Appellate Procedure.

I further certify that the attached Brief contains fewer than 8,000 words, and was prepared using Microsoft Office Word 2007, Times New Roman font size 13.

Dated this 19th day of January, 2016.

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By: /s/ Jon R. Brakke

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