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[¶1]

## STATEMENT OF ISSUES

[¶2] Did the district court err by striking portions of the appellant's claims as sanctions for failing to comply with discovery?

[¶3] Did the district court err by awarding attorney's fees as sanctions to the appellees and against the appellant and was it appropriate for that amount to be offset from the total award granted to the appellant?

[¶4] Did the district court err in making its findings of fact as to the valuation of the partnership as determined at trial?

[¶5] Did the district court err in denying the appellant's post-trial motions under Rule 52, Rule 59, and Rule 60 of the North Dakota Rules of Civil Procedure?

[¶6]

## STATEMENT OF THE CASE

[¶7] This case was initiated by Steven Nelson through the service of the Summons and Complaint upon the appellees on or about August 28, 2015. The Summons and Complaint were filed with the Court in Grand Forks County District Court on September 1, 2015 (Case No. 18-2015-CV-01513). Doc. #2. The 52 page complaint alleged numerous claims relating to the operation of the farming partnership of which the appellant (Steven Nelson) and the appellees (James Nelson, Brian Nelson, and David Nelson) were all partners. The appellees duly filed an answer to the complaint on September 18, 2015. Doc. #9.

[¶8] The Court entered an order officially dissociating Steven Nelson from the partnership as of December 31, 2015. Doc. #71.

[¶9] Due to discovery disputes between the parties, the Court ordered sanctions against Steven Nelson and struck any claims for damages he may have had based on disputed individual transactions related to the partnership. Doc. #247.

[¶10] Appellees also brought a motion for partial summary judgment to distill Steven Nelson's confusing and cumulative 52 page complaint down to an understandable set of claims to address at trial. Doc. #301-304. The complaint alleged sixteen causes of action but did not relate any of the causes of action to a set of facts which would indicate how the facts actually support a claim for relief. Additionally, many of the causes of action were "missing an essential element, [were] barred by the statute of limitation, or lack facts [and] admissible evidence [...] to support the claim." Doc. #368, ¶13. After briefing and a hearing on the matter, the Court granted the appellees' motion for partial summary judgment and ordered that trial would proceed to examine seven discrete factual scenarios alleged in the Complaint and their effect on the valuation of the partnership. Doc. #368.

[¶11] The trial was held in this matter on November 6 – 9, 2017. Findings of Fact, Conclusions of Law, and Order for Judgment were issued on April 6, 2018. Doc. #576. The Court subsequently entered an order for judgment awarding Steven Nelson \$173,397.00 for his remaining share of partnership assets, awarding appellees' costs of \$2,728.48 (25% of the appellees' attorney's fees of \$29,447.36), and awarding attorney's fees of \$33,666.00 for the costs of defending against Steven Nelson's RICO action in Minnesota federal Court. Further, the Court entered two separate orders for sanctions against Steven Nelson (Doc. #200 and 247) in the amounts of \$1,755.00 and \$1,355.00 which were applied against the attorney's fees awarded to the appellees. After the

calculations were made, the total amount due and owing on the judgment to Steven Nelson was \$113,393.63. Doc. #593. Final judgment was entered in this case on May 31, 2018. Doc. #603.

[¶12] Steven Nelson then brought a motion for a variety of post-trial relief under Rules 52, 59, and 60, including a request for a new trial. Doc. #610. The Court issued an order denying Steven Nelson's post-judgment motions on September 25, 2018. Doc. #624.

[¶13] Steven Nelson filed his Notice of Appeal on December 7, 2018, which is the appeal now before the Court. Doc. #625.

[¶14] **STATEMENT OF FACTS**

[¶15] This case has a nearly four year history and a district court docket that contains 630 separate documents as part of the record. In an attempt to narrow the issues and facts before this court, the appellees will specifically focus on the four issues that Steven Nelson raises on appeal.

[¶16] **A. Discovery Disputes and Sanctions Issues.**

[¶17] The appellees served Interrogatories and Requests for Production of Documents on Steven Nelson on May 3, 2016. Steven Nelson requested an extension of time to respond, which was granted, requiring their responses to be submitted by June 16, 2016. Steven Nelson did not respond to the discovery requests until June 21, 2016. As the response was tardy, any objections to discovery were waived at that point. Steven Nelson's responses to a number of interrogatories and requests for production of documents were deficient and the appellees' counsel attempted to work with Steven Nelson's counsel to obtain complete responses to the deficient discovery responses. Such

efforts were not successful and the appellees brought a motion to compel discovery on October 13, 2016. Doc. #168. The Court issued an order November 9, 2016, directing Steven Nelson to submit full and complete responses to the appellees' interrogatory number 7 and also to provide responsive documents to that interrogatory (Request for Production of Documents #4) (Doc. #200), no later than December 8, 2016. Sanctions were also ordered in the amount of \$1,755.00 for the reasonable costs connected to the appellees' motion to compel.

[¶18] Steven Nelson failed to provide any further responses to interrogatory number 7 or the request for production of documents number 4. After the December 8, 2016 deadline passed, appellees' counsel made further numerous requests for Steven Nelson to provide the discovery responses as ordered by the Court. Steven Nelson's continued failure to provide complete answers to discovery resulted in the appellees bringing another motion to compel discovery and to hold the plaintiff in contempt on January 4, 2017. Doc. #205. This motion was later amended the following day on January 5, 2017. Doc. #216. The Court held a hearing on the matter on March 8, 2017, and issued an order granting the appellees' motion for sanctions on March 30, 2017. Doc. #247. As part of the Court's order, the Court struck all claims for damages connected to Appellees' Interrogatory Number 7 and Request for Production of Documents Number 4. All requests for damages related to those discovery requests were disallowed. The Court ordered Steven Nelson to pay \$1,355.00 to the appellees as reimbursement for their legal costs and fees in bringing the second motion to compel.

[¶19] Interrogatory Number 7 requested Steven Nelson to "Identify each and every transaction for which you are seeking a recovery on behalf of yourself or J & S Nelson



Farms. As to each transaction, identify what was wrong with the transaction; this includes but is not limited to:

- a. The specific dollar amount you contend was mishandled;
- b. The date of the transaction;
- c. Describe how the transaction should have been handled by the partnership or partners;
- d. Identify your damages and how you calculated it;
- e. Identify all documentation and other evidence evidencing the transaction and your contention; and
- f. Identify all witnesses to the facts.

[¶20] Steven Nelson's response to this interrogatory and related request for production of documents was to provide three exhibits that he contends responded appropriately to the interrogatory. Exhibit 1 was described as a profit and loss statement of the partnership. Exhibit 2 was described as a list of over 2,000 transactions which include the date of the transaction, a brief identifier of categories, the accounts related to the transaction, and the amount of each transaction. Exhibit 3 was Steven Nelson's calculation of what he believes is the proper distribution of each partner's capital account, without identification of how the 2000 transactions affected that calculation.

[¶21] **B. Court's Award of \$63,113.37 of Attorney's Fees to the Appellees which was Subtracted from the Total Judgment due Steven Nelson.**

[¶22] The district court, in its Findings of Fact, Conclusions of Law, and Order for Judgment found that James Nelson had expended \$29,900.00 and the partnership expended \$3,766.04 in defending the RICO action brought by Steven Nelson in Minnesota federal court. Doc. #468. The Court found that James Nelson was entitled to indemnity from the partnership pursuant to Minn. Stat. §323A.0401(c) and paragraph 7 of the Partnership agreement which provides:

“Should any losses suffered by the Partnership be occasioned by the willful neglect or default of a partner, and not mere mistake or error of

judgment of said partner, losses so incurred shall be made good by the partner committing the willful neglect or default.”

Doc. #470. The Partnership contemplated losses occasioned by willful acts of a partner should be the obligation of that partner. Doc. #576, ¶120-123.

[¶23] The Court also found that an award of 25% of the appellees’ attorney’s fees in defending this action was appropriate due to Steven Nelson’s numerous frivolous claims for relief. Doc. #576, ¶124-126.

**[¶24] C. Calculation of Valuation of Partnership.**

[¶25] At trial, the Court accepted Exhibit D-7 (Doc. #411) which is the accounting provided by the appellees to Steven Nelson and his attorney showing a complete partnership accounting and each partner’s interest in the partnership. The exhibit also detailed the buyout valuation for determining Steven Nelson’s interest in the partnership.

[¶26] The only evidence provided by Steven Nelson at trial arguing for a different accounting and valuation of the partnership was a gift tax return (Doc. #472) dated May 2014 which showed the transfer of one-half of James Nelson’s interest in the partnership to his two sons, Brian and David. The gift tax return shows each son receiving \$286,695 of value from their father as a one-sixth interest in the partnership. At trial, the appellees objected to the introduction of the gift tax return on relevancy grounds. The Court overruled the objection and conditionally admitted the gift tax return to give Steven Nelson an opportunity to show its relevance to the trial. Trial Tr. vol. I, 73:16-17, November 6, 2017. The appellees later objected again to the continued use of the gift tax return as not relevant to any of the remaining seven factual scenarios that were part of the trial. The Court sustained that objection and did not accept the gift tax return as an exhibit. Trial Tr. vol. I, 80:11-21, November 6, 2017. Steven Nelson later attempted to

introduce the gift tax return again, and the Court sustained another objection by the appellees on relevance grounds. Trial Tr. vol. I, 90:2-3, November 6, 2017. Steven Nelson then attempted to introduce the gift tax return again on the second day of trial. The appellees again objected on relevance grounds. This time, the Court accepted the gift tax return for purposes of proving any misstatements or misrepresentations to Steven Nelson but not for purposes of valuation of the partnership. Trial Tr. vol. II, 358:4-364:8, November 7, 2017.

**[¶27] ARGUMENT**

**[¶28] A. Discovery Sanction of Striking Claims.**

[¶29] Discovery sanctions are reviewed by this court under the abuse of discretion standard in light of the information available to the Court at the time the order was entered. “[The Court] determine[s] only whether, in the light of the information available to the trial court at the time, there was an abuse of discretion.” Vorachek v. Citizens State Bank of Lankin, 421 N.W.2d 45, 51-52 (N.D. 1988).

[¶30] The appellees served interrogatories and requests for production of documents upon Steven Nelson on May 3, 2016. Steven Nelson did not timely respond to discovery in the first instance and, therefore, any objections he may have had to providing discovery responses were waived at that time. N.D.R.Civ. P. 33(b)(4), see also Vorachek, 421 N.W.2d at 52 (“In the absence of an extension of time, the failure to serve an objection to an interrogatory or request for production within the thirty-day period prescribed by Rules 33 and 34 constitutes a waiver of any objection.”). The appellees brought a motion to compel discovery on October 13, 2016. Index #168. The Court held a hearing on the motion to compel on November 7, 2016, and issued an order on

November 9, 2016, granting the motion to compel and ordering Steven Nelson to fully respond to Interrogatory #7 and Request for Production of Documents #4 and imposed an award of attorney's fees in the amount of \$1755. Doc. #200.

[¶31] Throughout this time period, Steven Nelson made numerous statements that he would be retaining an expert to examine the transactions that form the basis of the information requested pursuant to Interrogatory #7 and Request for Production of Documents #4. In his response brief, Steven Nelson stated that “[t]he forensic accounting will need to be done by an expert who has been retained.” Doc. #191, ¶9. In the Declaration of DeWayne Johnston which was attached to the response brief, he stated that “the transaction will require the scrutiny of an expert before they become finalized[,]” and that “an expert will need to make the final accounting and determination of allowable business expense v. personal expense or the use of partnership assets or business purpose for personal gain.” Doc. #192, ¶6, 10. On January 31, 2017, he brought a motion to extend the expert disclosure deadline to give him more time to find and work with an expert regarding the individual transactions. Doc. #235. At the hearings on the motions to compel responses to discovery, Steven Nelson's attorney made numerous representations to the Court that he was working with an expert to analyze the individual transactions.<sup>1</sup> Steven Nelson continued to make representations

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<sup>1</sup> Mr. Johnston: What he's asking Mr. Steven Nelson to do is recreate transactions and to do them differently. That's really, even today, again what he's telling the Court is you have to redo the transaction to make it right. Well, that isn't Steven Nelson's job. That is the job of an expert, a forensic accountant, and yes, they can do that. Motion to Compel Hearing Tr., 6:10-16, November 7, 2016.

Mr. Johnston: So it's an impossibility for him to recreate what he has no idea the meaning of the transaction other than it does not appear to be a business transaction. It's

that he had been working with an expert to explain the transactions during trial without ever producing an expert report, disclosing an expert witness, or providing any witness at trial to describe allegedly suspect transactions (other than Steven Nelson's own testimony).<sup>2</sup> Tellingly, Steven Nelson's attorney also stated that Steven Nelson has no

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the best he can do. The financial forensic accountant will look at that and say, well, there is no invoice going with it.

Motion to Compel Hearing Tr., 7:22-8:2, November 7, 2016.

The Court: It's an answer to an interrogatory. Don't you want to know the answer to that before you go to trial.

Mr. Johnston: I'm going to know but it is not going to be from Steven Nelson, it's going to be from an expert, and it is going to be based upon someone who has the ability to make that determination.

Motion to Compel Hearing Tr., 22:7-13, November 7, 2016.

Mr. Johnston: Now when we asked for more time for expert, the guy's like - - you want me to go through every one of those transactions, you're looking at 40 grand. So we have been going through distilling the material for the expert so that he can get us his report that we were initially going to get for the Court to do our summary judgments, to do our trial, but the Court has derailed us by making us go through all of these transactions.

Motion to Compel Hearing Tr., 33:5-12, March 8, 2017.

The Court: So which ones are you giving to your forensic accountant? The items in this Exhibit 009?

Mr. Johnston: They have got every one of 009 but there are also corrective journal entries and journal entries that we're going through to match up to determine which ones...

Motion to Compel Hearing Tr., 33:16-21, March 8, 2017.

<sup>2</sup> The Court: Just wait. Just wait. And so why wouldn't you have an expert that would have come in and say, I've gone through all this and clearly they're devaluating assets and here's how you can tell and here's how much they devaluated it. To give me this is not helpful to me. Why wouldn't you have an expert? You warranted to the Court at one point you'd hired Eide Bailly. You warranted that to the Court to get an extension of time to file a report.

Mr. Johnston: We did hire them.

The Court: I don't believe that you have, you warranted that you have a report. And we gave you an extension of time to get an expert to go through this stuff and say here's

accounting background or expertise and was “unable to determine what is wrong with a financial transaction from an accounting standpoint.” Doc. #192, ¶2-3. These can be considered as further admissions that the material was properly part of discovery and necessary to explain his case to the Court.

[¶32] Steven Nelson failed to cooperate with discovery after the order compelling responses to discovery and produced no further documents responsive to the discovery requests. This caused the appellees to bring a subsequent motion to compel and to hold Steven Nelson in contempt pursuant to N.D.R.Civ.P. 37 on January 4, 2017. Doc. #205 (later amended as Doc. #216 on January 5, 2017). At the hearing on the second motion to compel, Steven Nelson’s attorney stated in no uncertain terms that he not only had not paid the attorney’s fees awarded in the Court’s previous order compelling discovery responses, but refused to pay them because he viewed the Court’s order to be incorrect:

The Court: And so, Mr. Johnston, has it been paid?

Mr. Johnston: Thank you, Judge. It has not been paid. I think the Court needs to recognize we’ve asked you to relook at that.

The Court: I’m not relooking at it.

Motion to Compel Hearing Tr., 3:11-15, March 8, 2017.

[¶33] Steven Nelson’s attorney later states that the only way Steven Nelson will pay the ordered attorney’s fees is if the Court finds him in contempt.

The Court: When’s it going to be paid.

Mr. Johnston: As soon as you find him in contempt, it will be paid.

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what they’re doing. A forensic accountant, I’ve looked at all this stuff. They’re clearly devaluing all of this. Look at this particular transaction, look at this one, you can see what they’re doing, they’ve taken money out of this by devaluing the assets.

Where is the expert to explain that to me? You’re just arguing the points, you’re giving me this and saying look at it.

Trial Tr. vol. I, 250:3-24, November 6, 2017.

Motion to Compel Hearing Tr., 7:24-8:1, March 8, 2017.

[¶34] N.D.R.Civ.P. Rule 37(b)(2) allows the Court to sanction a party for failing to obey an order to provide or permit discovery. North Dakota law grants trial courts broad discretion to impose an appropriate sanction for discovery abuses. Voracheck, 421 N.W.2d at 50. Sanctions are intended to be tailored to the severity of the misconduct. Id. at 51. A party failing to respond to discovery in a complete and satisfactory manner, even after the issuance of a Court order compelling discovery, has been grounds to strike the party's pleadings and the entry of default judgment against the offending party. See Lang v. Bank of North Dakota, 530 N.W.2d 352 (N.D. 1995); Dakota Bank & Trust Co. of Fargo v. Brakke, 377 N.W.2d 553 (N.D. 1985); and Thompson v. Ziebarth, 334 N.W.2d 192 (N.D. 1983).

[¶35] “Generally, sanctions exist to further two goals. First, sanctions exist to penalize those whose conduct is deemed to warrant a sanction and second, they exist to deter others who may be tempted to behave in such a way as to warrant the imposition of a sanction.” Bachmeier v. Wallwork Truck Centers, 507 N.W.2d 527 (N.D. 1993). When determining the appropriateness of sanctions, courts follow a case-by-case analysis to examine the culpability of the offending party, prejudice against the moving party (including the impact the behavior has on the moving party's ability to defend the case), and the availability of less severe sanctions. Id.

[¶36] The requested discovery goes to the heart of the dispute and Steven Nelson's damage claims against the appellees. Interrogatory #7 requested Steven Nelson to describe what was wrong with the allegedly wrongful transaction, calculate his damages therefrom, and provide the documents substantiating his allegations. All that was provided was a summary sheet of some 2,700 transactions with no explanation as to their

“inappropriate nature” or how Steven Nelson was damaged by them. The appellees requested Steven Nelson to state what was wrong with the transactions and what damage he suffered as a result. If Steven Nelson could not elucidate that response in discovery, what was he going to present to the Court at trial? Absent a discovery production of that information and documents, the Court rightly denied its use at trial. The material requested was relevant to the dispute and without it, the appellees could not have prepared for trial. They would essentially have been required to appear at trial blind as to what Steven Nelson was requesting, what he believed his damages were, or any idea of any wrongful conduct the appellees were accused of. “The use of trial by ambush is not an acceptable trial technique.” Tormaschy v. Tormaschy, 1997 ND 2, ¶ 13, 559 N.W.2d 813 citing Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc., 123 F.R.D. 603, 606 (D. Minn. 1988) see also Martin v. Trinity Hosp., 2008 ND 176, ¶ 24, 755 N.W.2d 900 (“Trial by ambush, and last minute oppression do not comport with notions of fairness, or due process.”)

[¶37] Further, these sanctions were only requested and issued after Steven’s Nelson repeated actions flouting the authority of the Court and the discovery process. He had an opportunity to fully and fairly respond to discovery when he was initially served with the discovery requests in May, 2016. He failed to do so and was then ordered to do so by the Court in November 2016. He refused to comply with the Court’s order both to provide full responses and to pay the ordered attorney’s fees. This brought about the second motion to compel discovery in January of 2017. Steven Nelson’s intransigence and disobedience to a direct court order required a response. “Where a court has issued an order, even if erroneous, the party to whom the order was issued must obey it as long as it



remains in force or until it is reversed, modified, or set aside on appeal, and the failure to obey such an order is punishable as contempt of court.” Holkesvig v. Welte, 2012 ND 14, ¶ 6, 809 N.W.2d 323. The Court attempted to use limited sanctions by awarding attorney’s fees in response to the first motion to compel. Steven Nelson’s refusal to comply with the order necessitated a sterner response, as is allowed under the statutes and case law in North Dakota which impose a duty on the Court to tailor sanctions to the offense. Voracheck, 421 N.W.2d. at 51. The Court did not abuse its discretion in ordering sanctions in this case as they were narrowly tailored to the offense and were only ordered following two separate motions to compel discovery. Therefore, the Court did not err in ordering sanctions in this matter.

**[¶38] B. Award of Attorney’s Fees and Offset of Judgment Amount.**

[¶39] The Court made findings that it had three separate grounds for awarding attorney’s fees in this case. First, as sanctions for discovery abuses. Doc. #200, 247, and 593, ¶5. Second, as fees awarded pursuant to the partnership agreement and Minnesota law. Doc. #576, ¶120. Third, as sanctions for frivolous litigation and obstructive behavior. Doc. #576, ¶123-124. They will each be addressed in turn below.

[¶40] “A court’s discretionary determinations under N.D.C.C. §28-26-01(2) will not be overturned on appeal absent an abuse of discretion.” Sagebrush Resources, LLC v. Peterson, 2014 ND 3, ¶ 15, 841 N.W.2d 705. “A district court ‘abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, when the Court misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination.’” Id. citing Barrett v. Gilbertson, 2013 ND 35, ¶ 25, 827 N.W.2d 831.

**[¶41] 1. Sanctions/Attorney’s Fees for discovery abuse**

[¶42] N.D.R.Civ. P. 37 requires the Court to award attorney’s fees to a party who successfully brings a motion to compel discovery. The appellees were successful in their motions and the Court awarded attorney’s fees as required under Rule 37. As is discussed above, there was nothing inappropriate about the award of these attorney’s fees as sanctions.

**[¶43] 2. Fees Awarded Per Partnership Agreement/Statute for Malfeasance**

[¶44] Before the state court action was filed in North Dakota, Steven Nelson brought a RICO action in Minnesota federal court alleging virtually identical claims (case no. 14-cv-04854). This case was dismissed on the pleadings. Doc. #460. Steven Nelson appealed and the 8<sup>th</sup> Circuit affirmed the decision as it found that Steven Nelson failed to state a cause of action. Doc. #461. In two unrelated partnership dissolution disputes, Steven Nelson’s attorney brought a RICO action in North Dakota federal court and both were dismissed on the pleadings. Doc. #462-465. This Nelson RICO action was dismissed in an identical manner. James Nelson incurred costs in defending the RICO action and is entitled to indemnity from the partnership pursuant to the paragraph 7 of the partnership agreement. Doc. #470 (“Should any losses suffered by the partnership be occasioned by the willful neglect or default of a partner, and not mere mistake or error of judgment of said partner, losses so incurred shall be made good by the partner committing the willful neglect or default.”). The Court also cited to Minnesota law which states that, “[a] partnership shall reimburse a partner for payments made and indemnify a partner for liabilities incurred by the partner in the ordinary course of business of the partnership or for the preservation of its business or property.” Minn.

Stat. §323A.0401(c). See also Moren ex rel. Moren v. JAX Restaurant, 679 N.W.2d 165 (Minn. Ct. App. 2004). Doc. #576, ¶120.

[¶45] The Court found that the RICO claims were baseless, misguided, and inappropriate, with no reasonable prospect for success. James Nelson and the partnership incurred expenses in defending against Steven Nelson's litigation. James Nelson had a duty towards the partnership to preserve the partnership's business and property. Doc. #576, ¶121-122. As such, the legal fees related to the RICO action in the amount of \$33,666.04 were deducted from the final amount of the distribution to Steven Nelson of his partnership interest.

**[¶46] 3. Frivolous/Obstructive Behavior in Litigation**

[¶47] Awards of attorney's fees are governed by N.D.C.C. § 28-26-01 where the Court is allowed to award attorney's fees to the prevailing party in a response to frivolous actions. "A district court has discretion under N.D.C.C. § 28-26-01(2) to decide whether a claim is frivolous and the amount and reasonableness of an award of attorney's fees but when the Court decides a claim is frivolous, the Court must award attorney's fees." Gray v. Berg, 2016 ND 82, ¶ 14, 878 N.W.2d 79, citing Estate of Pedro v. Scheeler, 2014 ND 237, ¶ 14, 856 N.W.2d 775. "A claim is frivolous if a reasonable person could not expect to prevail based upon an absence of supporting facts or law." Id. citing Sagebrush, 2014 ND 3, 841 N.W.2d 705. An award of attorney's fees in response to frivolous claims is within the discretion of the trial court. Barrett, 2013 ND 35, 827 N.W.2d 831.

[¶48] The record in this case is replete with instances of frivolous litigation tactics by Steven Nelson. See court's Findings of Fact, Conclusions of Law, and Order for Judgment, Doc. #576, ¶91-99. For instance, Steven Nelson requested that the Court

order full payment of the amount of his partnership interest before trial on April 1, 2016. Doc. #78. The Court denied this request. Doc. # 161. Steven Nelson made another demand for the same relief in subsequent pleadings (Doc. #278) and again at trial. Additionally, as is described above, the Court was forced to hold two separate hearings on motions to compel discovery involving the same discovery responses.

[¶49] After sanctions (Doc. #247) and partial summary judgment were entered (Doc. #368), Steven Nelson's attorney either failed to read or did not understand the Court's orders. The order for discovery sanctions (Doc. #247) specifically stated that the individual transactions Steven Nelson claimed were inappropriate were struck as sanctions would not be considered for damages purposes. The order granting summary judgment (Doc. #368) eliminated a significant number of transactions identified by Steven Nelson. Therefore, the trial would focus on the seven factual scenarios alleged in the complaint that survived summary judgment and their impact on the valuation on the partnership. In spite of the Court's orders, Steven Nelson made repeated attempts to introduce the excluded evidence and factual scenarios.<sup>3</sup>

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<sup>3</sup> As an example for the Court, the appellees have pulled out two of the many instances where Steven Nelson's attorney appeared to not understand the Court's summary judgment order.

The Court: So what's the, what's this connected to, what part of the factual scenario damages or-

Mr. Johnston: I'm still confused, what are you talking about factual scenarios? What are you referring to?

Trial Tr. vol. I, 177:8-13, November 6, 2017.

The Court: To which factual scenario, though. Is it Anna Hawkinson?

Mr. Johnston: Factual scenario. What are you talking about?

Trial Tr. vol. I, 227:23-222:1, November 6, 2017.

[¶50] Steven Nelson brought two separate motions to disqualify Judge Thelen from presiding over the case. Doc. #311 and #371. The first hearing was held on September 18, 2017 and was denied. Doc #351. Steven Nelson’s second motion to disqualify Judge Thelen was filed on October 13, 2017 (Doc. #371) and largely argued the same set of facts as the motion that had been denied less than two months before. This time the hearing was held by Judge Hager, the presiding judge in the Northeast Central Judicial District. Once again, the motion was dismissed as baseless. Doc. #383.

[¶51] Finally, as the Court states in its Findings of Fact, Conclusions of Law, and Order for Judgment (Doc. #576, ¶124), it has the “inherent power to control its docket and to protect its jurisdiction and judgments, the integrity of the Court, and the orderly, expeditious administration of judgment.” Rath v. Rath, 2016 ND 105, ¶ 6, 879 N.W.2d 735 citing Federal Land Bank v. Ziebarth, 520 N.W.2d 51, 58 (N.D. 1994). Additionally, N.D.C.C. § 28-26-31 allows the Court to order attorney’s fees as sanctions for “[a]llegations and denials in any pleadings in court, made without reasonable cause and not in good faith, and found to be untrue[.]” This is sufficient authority with which to grant an award of attorney’s fees, which it did by ordering an award of 25% of the costs and fees incurred by the appellees in defending this action. Doc. #576, ¶126.

[¶52] The Court made sufficient findings regarding frivolous behavior on the part of Steven Nelson that warranted sanction. Specifically:

[125] The docket in this case is replete with numerous instances where Steven made frivolous claims and motions, requested relief already ruled on by the Court, failed to act in accordance with previous court rulings, failed to abide by the Court’s order for sanctions, and failed to make a good faith effort to work with opposing parties or this court in narrowing the real issues needed to be tried. The behavior exhibited by the plaintiff ranged from simple unpreparedness to an abuse of the Court system (e.g. repeated challenges to orders previously issued, failed to clarify the

plaintiff's claims (forcing the Court to define plaintiff's "factual scenarios" for trial and then professing a lack of understanding of what was to be tried, but not offering an analysis of the issues for trial), and employing tactics that could not be successful while multiplying the proceedings (offering witnesses that produced no useful testimony for plaintiff, and objections to evidence that had no basis, etc.).

[124] Therefore, the Court orders that the defendants be awarded 25% of their actual costs and fees, as compensation for defending this action in response to unnecessary and duplicitous proceedings in this matter.

Doc. #576, ¶125-126.

**¶53] C. Valuation of Partnership.**

¶54] The Court's determination of the value of the partnership is a matter of finding of fact. "The appropriate standard of review for findings of fact from a bench trial is whether the findings of fact are clearly erroneous." Tormaschy v. Tormaschy, 1999 ND 131, ¶ 11, 596 N.W.2d 337. Citing Roise v. Kurtz, 1998 ND 228, ¶ 6, 587 N.W.2d 573. "A finding of fact is clearly erroneous only if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, upon review of the entire evidence, we are left with a definite and firm conviction a mistake has been made." Id.

¶55] In this case, the record is replete with numerous instances where either direct testimony or information contained in exhibits exist, which support the findings of fact regarding the valuation of the partnership disputed by Steven Nelson. Steven Nelson may disagree with the findings the Court made, but the Court's findings are not clearly erroneous. Steven Nelson did not produce expert testimony which could have explained their accounting theories. The partnership accounting produced by the appellees is the only documentation relating to the partnership's valuation as of the date of Steven Nelson's dissociation of December 31, 2015 at trial. Doc. #411. Further, the appellee Brian Nelson is an accountant, handled the partnership's finances, and has both the skillset and knowledge to testify competently to the partnership's accounting. No evidence was

produced that showed the partnership accounting was improperly or fraudulently maintained. Steven Nelson's opinion to the contrary does not make the Court's Finding of Fact erroneous.

[¶56] “The credibility of witnesses [...] and the weight to be given their testimony, is for the trier of facts.” Klundt v. Pfeifle, 77 N.D. 132, 140, 41 N.W.2d 416, 420 (1950). The Court is within its discretion to determine the weight and credibility to give to the testimony in this case. Much of the testimony referred to by Steven Nelson in his brief is refuted by competing testimony or evidence from the appellees. The appellees presented Exhibit D-7 (Doc. #411), which was a complete accounting of the value of the partnership at the time of Steven Nelson's dissociation. The exhibit was accepted by the Court. The Court also relied on the partnership tax returns and individual K-1 tax forms of each party which showed their individual share of the capital of the partnership (Doc. #429-439, 543-549). These showed that Steven Nelson had a 33.33% share of the partnership. The final calculation of Steven Nelson's partnership interest found by the Court reflected the information contained in the exhibits accepted by the Court. The fact that the Court weighed the evidence in the appellees' favor does not mean that it is clearly erroneous. Steven Nelson must demonstrate that there is no evidence to support the Court's findings. Steven Nelson's failure to provide compelling testimony or evidence in support of his claims is not the basis of an appeal to find the Court's findings erroneous.

[¶57] The Court denied admitting the gift tax return for purposes of valuation on grounds of relevance. Pursuant to N.D.R.Ev. 401 “evidence is relevant if ‘it has any tendency to make a fact more or less probably than it would be without the evidence’ and the fact is ‘of consequence in determining the action.’” Linstrom v. Normile, 2017 ND

194, ¶ 14, 899 N.W.2d 287. Here, the gift tax return describes the transfer of James Nelson's interest in the partnership to his sons Brian and David in May 2014. Steven Nelson was not dissociated from the partnership until December 31, 2015, one-and-a-half years after the gift tax return had any applicability. The date of the valuation of Steven Nelson's share of the partnership is his date of dissociation. N.D.C.C. § 45-19-01(2). The accounting provided as part of Exhibit D-7 (Doc. #411) is calculated from that date. As such, the gift tax return is not temporally relevant to the valuation of Steven Nelson's share of the partnership as of the date of his dissociation. In addition, there was no competent testimony describing what the tax return meant, in terms of value. Value for tax purposes does not equate with value for partnership valuation.

[¶58] Further, failure to admit the gift tax return would be harmless error.

“Unless justice requires otherwise, no error in admitting or excluding evidence, or any other error by the Court or a party, is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the Court must disregard all errors and defects that do not affect any party's substantial rights.”

N.D.R.Civ.P. 61. The gift tax valuation shows a gift value of \$286,695 to each son for a one-sixth interest in the partnership. This means that a one-third interest in the partnership in 2014 was \$573,391. The Court's findings, utilizing the accounting provided in Exhibit D-7 (Doc. #411), show a gross value of Steven Nelson's one-third interest in the partnership to be \$544,397. Doc. #576, ¶129. This is a difference of \$28,994. Failure to admit the gift tax return as an exhibit is harmless error as Steven Nelson's substantial rights were not affected. Steven Nelson failed to provide any other testimony or exhibits to refute that accounting as improper. Further, the eighteen-month gap in time from the gift tax return valuation to the actual date of dissociation limits any



real applicability of its information. They are stale numbers that have little bearing on the value of the partnership as of December 31, 2015.

**[¶59] D. Post-trial relief denied by District Court.**

[¶60] Steven Nelson stated “The District Court committed error by denying Steven Nelson’s post-trial motions under Rule 52, Rule 59, and Rule 60 of the North Dakota Pules [sic] of Civil Procedure” in the Statement of the Issues contained in his Appellant Brief. In the body of the brief, Steven Nelson devotes only two paragraphs to the issue, the first restating the motions made by Steven Nelson requesting post-trial relief. The second states in its entirety: “The District Court committed error by denying these motions by Order entered on September 25, 2018 [Doc. #624].” No argument is made, no case law is cited, and no other references are made to this issue in the brief.

[¶61] Where a party does not brief or argue an issue on appeal, it is waived. Guthmiller Farms, LLP v. Guthmiller, 2013 N.D. 248, ¶ 20, 840 N.W.2d 636. Steven Nelson does not explain how the district court erred in denying his motions for post-trial relief, does not cite any case law or statute to guide this Court’s decision or to indicate what relief he is requesting. It is improper and unfair for the appellees to guess what issues Steven Nelson might be raising. Pursuant to Guthmiller Farms, the appellees request that the Court consider this issue to be waived by Steven Nelson.

**[¶62] CONCLUSION**

[¶63] In conclusion, Steven Nelson has not provided this Court with a sufficient basis by which it can overcome the high standard of review to find the district court made any errors in its decisions in this matter. Therefore, based on the above arguments, the

appellees respectfully request the Court to affirm the decisions of the lower court and deny the relief requested by Steven Nelson.

Dated this 17<sup>th</sup> day of May, 2019.

*/s/ Patrick J. Sinner*

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 17, 2019, the following document:

**Appellees' Brief**

was filed electronically with the Clerk of Court through North Dakota Supreme Court E-Filing Portal and a copy of the above listed document was sent electronically to the following:

dewayne@wedefendyou.net

Dated this 21<sup>st</sup> day of May, 2019.

*/s/ Patrick J. Sinner*

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