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STATE OF NORTH DAKOTA

In the Supreme Court

State Of North Dakota

Supreme Court No. 20180421

Steven Nelson, individually, and in the right of and for the benefit of J & S Nelson Farms, LLP,

Plaintiffs and Appellants,

v.

James Nelson, Brian Nelson, David Nelson, and J & S Nelson Farms, LLP,

Defendants and Appellees.

APPEAL FROM THE JUDGMENT OF THE NORTH DAKOTA DISTRICT COURT, NORTHEAST CENTRAL JUDICIAL DISTRICT, GRAND FORKS COUNTY, HONORABLE JOHN A. THELEN, DISTRICT JUDGE

PETITION FOR REHEARING BY APPELLANT

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A. While the Supreme Court correctly held that the District Court had abused its discretion by reducing the amount that Steven Nelson was due for his interest in the J & S Nelson Partnership by the sum of $33,666.04 for attorney's fees incurred – rehearing should be granted because the Supreme Court in its decision did not recognize that the District Court also abused its discretion by failing to accurately identify specific portions in the trial court record to justify its conclusory finding that appellant Steven Nelson had engaged in "vexatious litigation" to thereby justify the District Court's imposition of "inherent power" sanctions.[1]

[¶1] In its August 22, 2019 decision in this case, the Supreme Court held that, "(t)he district court did not act in an arbitrary, unreasonable, or unconscionable manner by awarding the defendants ($29,447.00) in attorney's fees in this action as a sanction against Steven for vexatious litigation"—and that the District Court thus "did not abuse its discretion" by doing so. *Nelson v. Nelson*, *supra*, at ¶29.

[¶2] Leading up to that conclusion, the Supreme Court in its opinion presented **two conclusory block quotes** from the District Court's "Findings of Fact, Conclusions of Law, and Order for Judgment" document [**Doc._576**,**Appx._2219-2268**] – **the second such quote having been drawn from a corresponding "proposed" document that had been adopted by the District Court verbatim from a proposed version written and submitted by defense counsel** Kip Kaler. Compare, the District Court's "Findings of Fact, Conclusions of Law, and Order for Judgment" document [**Doc.576_¶¶125-126**,**Appx._2265**], with defense

[1] *Nelson v. Nelson*, 2019 ND 221, ¶¶26-29; 932 N.W.2d 386 (N.D. August 22, 2019).

counsel's corresponding proposed document [**Doc.560_¶¶166-117,Appx._2214-2215**].[2] See, also, Footnote 15 of *Appellant's Initial Brief*.

[¶3] Stated as directly as possible, at no time during the pendency of the proceedings below -- prior to the District Court's adoption of the defense counsel-drafted "Findings of Fact, Conclusions of Law and Order for Judgment" document [**Doc.576**] at the end of the case -- did the District Court ever properly rule that the Appellant was engaging in "vexatious litigation" warranting the imposition of "inherent power" sanctions.

[¶4] Egregiously, in a key example which was mistakenly relied upon by the Supreme Court in its decision in this case, the District Court purported to identify an instance of "vexatious litigation" on the part of appellant Steven Nelson, as described in the Supreme Court opinion as follows:

> "[Steven Nelson's] behavior in the conduct of this litigation was unnecessarily expensive and detrimental to the defendants in its presentation and adversely and significantly impacted defendants by having to repeatedly defend baseless arguments." **The court gave several examples, including that Steven Nelson moved to compel the partnership to pay the full amount of the value of his interest on April 1, 2016**; **the court denied the request**; and **Steven Nelson reasserted the demand in subsequent pleadings and at trial, which were denied**. (*emphasis added*).
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> 2019 ND 221 at ¶ 28

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[2] Indeed, appellant expressly advised the Supreme Court in his Initial Brief in this appeal that the "inherent power" sanctions portion of the District Court's decision [**Doc.576**] was "functionally identical" in its language to defense counsel's proposed "Findings of Fact, Conclusions of Law and Order for Judgment" [**Doc.560**]. See, Footnote, 14 of *Appellant's Initial Brief*, and the reference in that footnote to the "Adobe Compare Document" program comparison of the two corresponding documents, filed in the District Court at [**Doc.619,Appx._2946-3134,specifically Appx._3124**].

[¶5] This "example" cited by the Supreme Court was drawn from the conclusory language of ¶91 of the "Findings of Fact, Conclusions of Law and Order for Judgment" document [**Doc.576,Appx._2252**]–**language which was drafted word-for-word by defense counsel**. See, particularly, the "Adobe Compare Document" at **Appx.3078-3079**.

[¶6] As a matter of law, Steven was simply – **and correctly** -- asserting his rights under Minnesota statutory law §323A.0701(e), which provides as follows:

> **(e)** If no agreement for the purchase of a dissociated partner's interest is reached within 120 days after a written demand for payment, the partnership shall pay, or cause to be paid, in cash to the dissociated partner the amount the partnership estimates to be the buyout price and accrued interest, reduced by any offsets and accrued interest under subsection (c).

[¶7] In an Order entered on July 6, 2015 [**Doc.161_¶¶3-6,Appx._145**], the District Court stated the following factual basis:

1. As of December 31, 2015, the Court had "disassociated" Steven Nelson from J & S Nelson Farms, LLC. *Id.* ¶3;

2. On December 29, 2015, Steven Nelson had "served Defendants with his written demand for payment" for his interest in the partnership; *Id.* at ¶ 4;

3. On April 4, 2016, "Defendants served Steven Nelson with a letter estimating Steven's interest in the partnership to be approximately **$515,064.00**." (*emphasis added*). *Id.* ¶5; and

4. On April 26, 2016, "the partnership tendered Steven a buyout payment in the amount of **$371,000**", reflecting "the estimated buyout price minus setoffs."(*emphasis added*). *Id.* ¶6.

[¶8] The Supreme Court relied substantially upon the District Court's defense-counsel-drafted "Findings of Fact, Conclusions of Law and Order for Judgment"

on this subject as an example of Steven's allegedly "vexatious litigation", issue, stating that, "(t)he (district) court gave several examples (of vexatious litigation), including that Steven Nelson moved to compel the partnership to pay the **full amount of the value of his interest on April 1, 2016**; the court denied the request; and Steven Nelson reasserted the demand in subsequent pleadings and at trial, which were denied." (*emphasis added*). *Nelson v. Nelson*, *supra*, at ¶ 28.

[¶9] In fact, the "full value" to which Steven was referring was the **$515,064.00** value plus interest that had been placed upon Steven's partnership interest by the defendants themselves pursuant to Minn.Stat. §323A.0701(e)].

[¶10] Importantly, in this same Order of July 6, 2016, the District Court itself expressly recognized the disputed "offset" difference between **$515,064.00** and **$371,000.00** by stating that:

> … . **Offsets proposed by the Defendants are disputed and remain as items in contest for future determination**." (*emphasis added*).
>
> July 6, 2015 Order [**Doc.161_**¶25,**Appx.149**].

Under these circumstances, Steven simply proceeded appropriately in litigating the issue of the offset as an "(item) in contest for future determination."

[¶11] The principal "evil" of the inaccurate, conclusory, defense-counsel-drafted "Findings of Fact, Conclusions of Law and Order for Judgment" document – as mistakenly relied upon by the Supreme Court in its opinion – is the very conclusory nature of the document itself – a document which is demonstrably unfaithful to the actual record of the District Court proceedings in this case.

[¶12] Put directly, the Supreme Court was mistaken in relying upon the defense-counsel-drafted "Findings of Fact, Conclusions of Law and Order for Judgment" document – **a document which Appellant had specifically emphasized in his original appellate briefing was defective by being conclusory and not being in conformance with the actual record of this case**. *See, Initial Brief of Appellant* ¶35 *thereof, including Footnote 8.*

[¶13] While the Supreme Court observed that, "'(t)he district court has authority to stem abuses of the judicial process . . . . . 'from the court's inherent power to control its docket and to protect its jurisdiction and judgments, the integrity of the court, and the orderly and expeditious administration of justice'", **a district court's exercise of this "inherent authority" to sanction** – at the very minimum – **must be justified by findings which specifically and accurately address the offending conduct by express references to relevant portions of the trial court record – not through generalized, inaccurate, after-the-fact conclusory statements in an Order for Judgment**. See,e.g., *Ringsaker v. North Dakota Workers Comp. Bureau*, 2003 ND 122, ¶¶12-14.

[¶14] This Court explained in *Ringsaker* that "**in determining when sanctions are appropriate, and what sanction to impose, a trial court must consider several factors**". (*emphasis added*). Citing *Belgarde v. Askim*, 2001 ND 206, ¶ 7, this Court explained:

> '**When using its inherent power to sanction a party, a "case-by-case analysis of all the circumstances presented in the case" is required**. *Bachmeier I*, 507 N.W.2d at 534. **While all the circumstances must be considered, we have**

> **focused on three factors--"the culpability, or state of mind, of the party against whom sanctions are being imposed; a finding of prejudice against the moving party, and the degree of this prejudice, including the impact it has on presenting or defending the case; and, the availability of less severe alternative sanctions**." *Id.* (*emphasis added*).
>
> 2003 ND 122at ¶13.[3]

[¶15] The Supreme Court should grant rehearing in this case, because where the serious matter of "inherent power" sanctions is implicated, the District Court's defense-counsel-drafted "Findings of Fact, Conclusions of Law and Order for Judgment" not only failed to undertake the indispensable analysis required by Supreme Court decisional law – but was inaccurate and erroneous in its description of the District Court proceedings themselves. Findings of Fact, Conclusions of Law, and Order for Judgment" document [**Doc.576**,**Appx._2219-2268**], and the "Adobe Compare Document" program comparison of the two corresponding documents, filed in the District Court at [**Doc.619,Appx._2946-3134,specifically Appx.3124**].

[3] The standard has been consistently employed by the Supreme Court. See, e.g., *Kelly v. Kelly*, 2011 ND 167, ¶ 35 ["**When ("inherent power") sanctioning a party for misconduct, a district court should** consider and **make findings** . . . ".]. *Kelly* is cited and relied upon in *Lizakowski v. Lizakowski*, 2019 ND 177, ¶18, the latter case being cited by the Supreme Court in its opinion in the instant case. *Nelson v. Nelson*, *supra*, 2019 ND 221, ¶27.

B. Rehearing should be granted because the Supreme Court should not have embraced the District Court's conclusory "Findings of Fact, Conclusions of Law and Order for Judgment" where the District Court never made any specific finding that any of Steven Nelson's claims in this case were "frivolous".

[¶16] Adopting wholesale the broad, inaccurate conclusory language of the defense counsel-drafted "Findings of Fact, Conclusions of Law and Order for Judgment" document filed by the District Court, the Supreme Court mistakenly concluded that the District Court did not abuse its discretion by awarding the defendants attorney's fees in this action. *Nelson v. Nelson*, *supra*, ¶¶28-29.

[¶17] Relying upon N.D.C.C. §28-26-01 and three prior reported decisions[4], the Supreme Court block-quoted and relied substantially upon a portion of the District Court's "Findings of Fact, Conclusions of Law and Order for Judgment" which began stating, "(t)he docket in this case is replete with numerous instances where Steven made **frivolous claims and motions**." (*emphasis added*). *Id.* ¶28. **Significantly, however, the District Court never made any specific findings in the instant case that any of Steven's claims in this action were "frivolous**".

[4] N.D.C.C. §28-26-01 provides, in pertinent part, that, "2. In civil actions the court shall, **upon a finding that a claim for relief was frivolous**, award reasonable actual and statutory costs, including reasonable attorney's fees to the prevailing party . . . . ". (*emphasis added*). **Significantly, the District Court made no finding in the instant case that any of Steven's claims in this action were "frivolous**".

C. The Supreme Court should grant rehearing in this case because it never addressed appellant Steven Nelson's constitutional argument that the District Court's imposition of "inherent power" sanctions striking his pleadings for alleged discovery abuse outside of the procedures of Rule 37 N.D.R.Civ.P. violated principles of Federal Due Process.

[¶18] In his briefing in this appeal, Appellant argued that that it was error for the District Court to impose the severe sanction upon Steven Nelson by striking his principal claims in this case. *Initial Brief of Appellant* ¶¶56-58 and Footnote 12.

[¶19] The Supreme Court did not address this constitutional argument in its opinion filed in this case.

[¶20] The District Court did not reference Rule 37 as having been the legal authority under which the severe sanction of striking plaintiff's principal claims from his Complaint was purportedly justified. *Initial Brief of Appellant*, footnote 12.

[¶21] Instead, the District Court was relying upon that which it considered to be its "inherent power" to level those sanctions against the plaintiff. *Id.* This was error. See, e.g., *Perius v. Nodak Mutual Insurance Co*., 2012 ND 54, ¶34 [" legal scholars have pointed out that **"[w]hen an appropriate sanction for a specific abuse exists under the Rules, a court may not resort to its inherent sanctioning power but must use the sanctions available under the Rules**." 6 James Wm. Moore et al., *Moore's Federal Practice* ¶26.06[2] (3d ed. 2011); 8B Charles Alan Wright et al., *Federal Practice and Procedure* § 2282, at 422 (3d ed. 2010) (noting that the United States Supreme Court in *Societe Internationale*, 357 U.S. 197, 207, (1958), made it clear that **it is ordinarily inappropriate to look beyond the clearly**

delineated procedures of Rule 37 for the imposition of sanctions in the discovery context)."(*emphasis added*). Maring, Justice, concurring specially.

[¶22] Additionally, "when a trial court strikes a party's pleadings . . . . for abuse of the discovery process, the court adjudicates the party's claims without regard to their merits but based instead upon the parties' conduct of discovery . . . '(t)here are constitutional limitations upon the power of courts . . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.'" (*emphasis added*). *Transamerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991), citing *Societe Internationale v. Rogers*, 357 U.S. 197, 209-210 (1958); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-351 (1909*); Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705-706 (1982); *Hovey v. Elliott*, 167 U.S. 409 (1897); and *National Hockey League v. Metropolitan Hockey Club, Inc*., 456 U.S. 639 (1976). "Discovery sanctions cannot be used to adjudicate the merits of a party's claims or defenses unless a party's hindrance of the discovery process justifies a presumption that its claims lack merit . . . Although punishment and deterrence are legitimate purposes for sanctions (*citations omitted*), they do not justify trial by sanctions. (*citations omitted*). Sanctions which are so severe as to preclude presentations of the merits of the case should not be assessed absent a party's flagrant bad faith . . . ". (*emphasis added*). *Transamerican Natural Gas Corp. v. Powell*, *supra*, 811 S.W.2d at 918.

[¶23] The District Court made no finding of "bad faith" on the part of Steven Nelson in this case. To the contrary, the District Court expressly noted that, "(i)t appears to the court that the plaintiff himself has been attempting to make an effort to provide the discovery information requested . . . he has been working hundreds of hours going through all of the financial information provided to him." [**Doc.247,¶7**].

[¶24] It was error of federal Due Process constitutional dimension for the District Court to impose the severe "inherent power" sanction upon Steven of striking his principal claims in this case derivative from discovery issues, outside of the clearly delineated procedures of Rule 37 of the North Dakota Rules of Civil Procedure. See, e.g., *Transamerican Natural Gas Corp. v. Powell*, *supra*, 811 S.W.2d at 917.

Dated this 23rd day of September, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on September 23rd, 2019, the following document:

1. **PETITION FOR REHEARING, and**
2. **MOTION TO FILE THE PETITION FOR REHEARING IN EXCESS OF 2,000 WORDS**

was filed electronically with the Clerk of Court through the ELECTRONIC FILING PORTAL OF THE NORTH DAKOTA SUPREME COUIRT, with like service of the above listed documents to the following:

Kip Kaler (kip@kaler-doeling.com)
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Dated this 23rd day of September, 2019,

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