20190254
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 12, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

# REPLY BRIEF AND CROSS APPEAL RESPONSE BRIEF

MCCORMICK, INC., individually and derivatively on behalf of Native Energy Construction, LLC, and NORTHERN IMPROVEMENT COMPANY

Plaintiffs, Appellees, and Cross-Appellant

vs.

TERRANCE FREDERICKS, a/k/a TERRY FREDERICKS

Defendant, Appellant, and Cross-Appellee

SUPREME COURT NO. 20190254

Case No. 08-2019-CV-00489

Appeal of Order for Final Judgment dated July 1, 2019 (Index No. 513), Final Judgment dated July 1, 2019 (Index No. 514), and Order on Costs and Disbursements dated August 19, 2019 (Index No. 531), by the Honorable Judge Thomas J. Schneider, in the South Central Judicial District, Burleigh County, North Dakota

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## DISCUSSION OF LAW

### I. THE DISTRICT COURT OBVIOUSLY ERRED BY REFUSING TO PROVIDE ANY INSTRUCTION REGARDING CONTRACT.

[¶1] As preface, Mr. Fredericks notes that although this section of his reply is short, the issue in this section is the most important one in this case. The reply is short solely because the error is obvious: in a case where contract formation, contract terms, contract interpretation, statute of frauds, and related contract issues were the primary issues, the District Court refused to provide proffered standard jury instructions on each of those issues. This was obvious, and inexplicable, error, and the resulting trial was fundamentally unfair to Mr. Fredericks. McCormick made no substantial argument to the contrary. In fact, McCormick unintentionally confirmed the error in paragraph 58 of its response brief. In that paragraph, McCormick admits that when it opposed all instructions on contract law, McCormick "noted" to the District Court several arguments regarding contract issues that it planned to make to the jury. *See also* App. 267:19-24. Even if we assume McCormick's planned arguments to the jury were plausible (which they would not have been if the Judge had provided the jury with instructions, as discussed in Mr. Fredericks opening brief), the fact that the Plaintiff was planning to make, and then did make, the arguments to the jury is exactly why the jury had to be given proper instructions on the law. The jury needed the law, so that the jury could apply that law when evaluating McCormick's arguments.

### II. THE DISTRICT COURT DID NOT HAVE JURISDICTION OVER MCCORMICK'S CLAIM, RAISED AT TRIAL, THAT THERE WAS A "CONTRACT AT THE OWNERSHIP LEVEL."

[¶2] In its complaint and subsequent briefs to the District Court, McCormick asserts that Native Energy had, by Board Resolution, agreed to pay McCormick Inc. and/or Northern Improvement 5% of profits as a management fee. *E.g.*, App. 22 (Compl. ¶8.) If Native Energy had approved that fee, then one could argue to extend this Court's holding from

*Arrow Midstream Holdings, LLC v. 3 Bears Construction Co.*, 2015 N.D. 302 to provide for jurisdiction in North Dakota. But McCormick's pled claim fell apart because it was factually false. There was no resolution. McCormick then changed to an argument that Native Energy had approved the fee by not objecting to McCormick taking money. That claim fell apart because Native Energy's foundational documents contained an integration clause, and contained express terms on profit distribution which could only be modified by amendment to the written contract. Mr. Rogneby openly admitted on the record that because McCormick's two prior theories were precluded by law or facts, McCormick, at trial, was going to change to a different unpled theory that Mr. Fredericks as an individual had entered into a contract giving McCormick 5% of profits. *E.g.,* App. 268, l.10-17. McCormick had jumped from the frying pan into the fire, and now into the oven. Mr. Fredericks is an Indian, and any claim against him for the supposed breach by him as an individual would have to be brought in the MHA Nation's Court. McCormick is more than welcome to bring its claim of a supposed contract at the ownership level in the Tribe's Court. McCormick would be treated far more fairly in that Court than Mr. Fredericks was treated in the District Court in this state. But McCormick would lose because the supposed contract at the ownership level did not even exist; and because it would have been barred under the Tribe's statute of fraud, and would be in violation of other tribal law.

[¶3] McCormick's response is a hodgepodge of various inapplicable Indian law cases, incorrect and immaterial allegations of facts regarding performance of other contracts, and misstatements of Mr. Fredericks' argument.[1] But McCormick has not provided any basis

[1] McCormick uses straw man arguments so often that it is impossible to correct them all. Mr. Fredericks, not McCormick, defines Mr. Fredericks' claims and arguments.

for escaping the holding from *Williams v. Lee*, 358 U.S. 217 (1959). The contract that this Court arguably has jurisdiction over provides a 51/49 split of Native Energy's profits.

## III. THE DISTRICT COURT REFUSAL TO SEQUESTER WAS LEGAL ERROR.

[¶4] Through their opening and response briefs, the parties have provided this Court with the two competing arguments on a legal issue of first impression in this Court: how should this Court interpret Evidence Rule 615. The Court must analyze and pick one of those two legal interpretations. Mr. Fredericks' view is that his interpretation is better. Unlike McCormick's argument, Mr. Fredericks interpretation is supported by persuasive case law, and is based upon and supports the underlying purpose of the rule.

[¶5] McCormick makes one additional responsive argument. It asserts that this Court must accord deferential "abuse of discretion" review to the District Court's interpretation of the rule. It is wrong. As this Court has held innumerable times, this Court decides legal issues *de novo*. McCormick cites only one case for its contrary argument-- *In re T.T.*, 2011 ND 111. In *In re T.T.* a court had declared a mistrial because of a witnesses' alleged or assumed violation of the sequestration order in the first trial. The court then allowed that witness to testify at re-trial. On review from the re-trial, this Court correctly stated that under North Dakota law, "Sequestration is required if requested by either party." *Id.* at ¶9. It also issued the unremarkable holding that the District Court's decision to let the witness testify *at the second trial* was reviewed for abuse of discretion. That holding is inapposite.

[¶6] This Court should reject the two arguments that McCormick makes. It should not create a loophole through which a corporation can have two of its officers unsequestered.

## IV. THE DISTRICT COURT SUMMARY JUDGMENT ORDER WAS PLAINLY ERRONEOUS.

[¶7] In Section IV of his opening brief, Mr. Frederick discussed, in three subsections, three errors in the District Court's order of summary judgment. In section IV.C, Mr.

Fredericks discussed the District Court's erroneous judgment for $44,000 for supposed "refurbishing" after litigation was anticipated. McCormick wisely chose to concede, by not disputing, that error. The Court therefore should vacate that judgment for $44,000.

[¶8] In Sections IV.A, Mr. Fredericks discussed that the District Court erred when it ordered summary judgment for alleged unequal profit distributions between April 2013 and March 2014, based upon five checks which totaled $110,624, instead of three checks which totaled $88,144. McCormick initially moved for summary judgment based upon the higher total for all five checks, but in its reply it conceded that two of those checks did not qualify and that therefore "summary judgment is not appropriate as to [] $22,501." Dkt. 142 at ¶18. Somehow, the District Court did not notice McCormick's concession. App 65, 70 (granting summary judgment based upon the factually incorrect claims in the motion, without even mentioning McCormick's concession and retraction).

[¶9] In its response brief, McCormick merely tries to confuse this Court. It makes the non sequitur argument that because the parties agreed that the five checks totaled $110,624, the District Court did not err when it granted summary judgment on all five checks. The District Court erred. Dkt. 142 ¶18.

[¶10] In Section IV.B, Mr. Fredericks correctly discussed the North Dakota statutory and common sense rule that when an owner does not take a profit distribution, the remedy is a credit to that owner's capital account, and that the District Court erred by accepting as fact McCormick's attorney's false factual allegations. Identical to its argument to the District Court, McCormick argues, without citation to any legal authority, that instead of the company making a simple accounting notation as a remedy, this Court should hold that the remedy is to litigation and have a court order one owner to pay money to another owner.

Allowing parties to bring suit years later to recover authorized capital distributions would be a terrible, and wasteful, precedent. The Court should follow the legislature's directive, not McCormick's self-serving wish.

[¶11] McCormick' only other responsive on section IV.B is to argued Mr. Fredericks did not preserve the issue. Mr. Fredericks preserved the issue. As McCormick admits, Mr. Frederick raised the argument three times, and all three times the District Court rejected it.

[¶12] The erroneous premise of McCormick's waiver argument is its assertion that the District Court would have changed its legal ruling if only Mr. Fredericks had agreed to McCormick's procedurally and substantively deficient motion to amend the judgment. That argument has numerous obvious major flaws. First, McCormick is misstating the procedural facts. When the issue was raised for the third time, Mr. Fredericks did argue the District Court erred, but McCormick argued the existing order was legally correct. The District Court then, for the third time, agreed with McCormick on that point. Second, it is based upon allegations of McCormick's counsel. Those allegations are not of record, and are not facts. Third, McCormick is wrong on the law. The well-settled legal rule is that the Court determines the law, and parties cannot stipulate to law. *E.g., Jensen v. N.W. Underwriters Assoc.*, 159 N.W. 611, 613 (N.D. 1916).

## V. THE PUNITIVE DAMAGE AWARD MUST BE VACATED.

[¶13] As discussed in Mr. Frederick's opening brief, if this Court agrees with any of Mr. Fredericks' arguments in this case regarding errors at or before trial, this Court must vacate the Jury's dependent punitive damages order. *Olmstead v. Miller*, 383, N.W.2d 817 (N.D. 1986). For all but one of the alleged errors at or before trial, McCormick concedes that Mr. Fredericks' "if/then" argument is correct. The one exception is that McCormick asserts that its use of the erroneous summary judgment order on profit distributions is not enough,

in itself, to require vacating the punitive damage award. It is wrong. McCormick used the Judge's erroneous summary judgment order as a powerful ally in its argument for punitive damages. *E.g.*, T. at 501:1-3 (In closing, McCormick assert that punitive damages are appropriate because Mr. Fredericks continued to disagree with the partial summary judgment order: "Even the things in the judgment that the Court has already decided against him, he would not acknowledge any of those obligations as being his." (emphasis added)). McCormick knew the risk of arguing for punitive damages based upon that legally unsupported order. It chose to throw caution to the wind, in this as on many issues.

[¶14] McCormick also asserts that even though Mr. Fredericks had strongly opposed the Court entering the order of partial summary judgment, he was required to make yet another motion to reconsider the partial summary judgment at trial. Its sole case citation is an inapposite case regarding preservation of error regarding a jury walkthrough of a house.

## VI. THE DISTRICT COURT ERRED WHEN IT ALLOWED VOGEL BACK INTO THIS CASE.

[¶15] Mr. Fredericks provided a detailed discussion of the District Courts' legally erroneous analysis of whether to allow Vogel back into this case. In an almost humorously transparent use of straw man arguments, McCormick "responds to" an argument that is plainly not in Mr. Fredericks brief, and Vogel then asserts that the straw man argument it makes for Mr. Fredericks is "nonsensical." Resp. Brief ¶88. The arguments Mr. Fredericks actually made, as opposed to those McCormick responds to, are correct; and as Mr. Fredericks correctly discussed, his arguments present issues of law, which this Court reviews de novo. Had the District Court applied the correct legal rule, it would not have allowed Vogel, a co-conspirator in the core allegations against McCormick, back into this case, and then would not have issued the later related orders barring Mr. Fredericks from

producing evidence of McCormick/Vogel's joint efforts to deceive and harm Native Energy and Mr. Fredericks.

**VII. THE DISTRICT COURT ERRED BY NOT ADOPTING MCCORMICK'S CONCESSION REGARDING ACTUAL DAMAGES, DKT. 470¶7(C);[2] BY ADOPTING MCCORMICK'S EMBELLISHMENTS OF THE JURY VERDICT; AND BY MODIFYING ITS EXISTING, ENTERED, PARTIAL JUDGMENT WITHOUT A RULE 59 OR 60 MOTION OR LEGAL BASIS.**

[¶16] The remaining errors all related to McCormick's post-trial motions to restructure the jury decision and the Courts' prior judgments to harm Native Energy and benefit McCormick. Because of the other errors which require vacating the judgement in to, the Court should not need to reach these remaining issues. But if it does, Defendant's opening brief adequately discusses those issues.

**VIII. MCCORMICK'S CROSS APPEAL IS WITHOUT MERIT FOR MULTIPLE REASONS.**

[¶17] McCormick's sole argument on cross-appeal is that the District Court erred when it denied a motion that McCormick filed after trial. Because it should reverse the Judgment in to, the Court should deny McCormick's appeal as moot. If the Court does decide the merits of McCormick's appeal, it should deny the appeal for multiple reasons.

[¶18] As a threshold issue, McCormick did not preserve the issue for appeal. Mr. Fredericks pled a claim for winding up of Native Energy, but McCormick not only did not plead a claim for winding up, it went further and opposed Mr. Fredericks claim. App.554, ¶9. Thereafter, neither McCormick nor Mr. Fredericks took any of the procedural steps necessary to preserve a claim for winding up. For example, neither provided notice to outstanding or potentially unknown creditors. N.D.C.C. 10-32.1-53; 10-32.1-54.

[2] McCormick argues to this Court that it did not make the concession, based upon its assertion that the words that are there for all to see in docket 470 are not actually there. McCormick was forced to make that concession because of its own ambiguously worded jury verdict form. Mr. Fredericks humbly submits that this Court should reject McCormick's argument that a document does not say what that document actually says.

[¶19] McCormick also did not meet its burden to show that the District Court erred. Instead it argues that it does not have the burden to show error because, it claims, an appellant wins if the appealed order does not contain conclusions of law. North Dakota Rule of Civil Procedure 52 defeats McCormick's argument. It states the general rule: "The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise on any other motion." District courts frequently issue orders denying motions, but those orders do not relieve an appellant of its burden to show error. *Atkins v. State*, 2017 N.D. 290 ¶10 (VandeWalle writing for a unanimous court). If McCormick's proposed rule were the law, this Court would end up vacating nearly every judgment that comes before it.

[¶20] Rule 52 expressly states a general rule and a narrow exception, but McCormick asserts the narrow exception is the rule. McCormick does not even cite Rule 52 and appears to not be aware of its content. This results in McCormick citing cases that come within the exception to Rule 52, and McCormick asserting those cases define the rule, instead of the exception. The cases it cites are all on the narrow issue of whether this Court reverses orders for attorney fees if those orders do not contain findings of fact. The cases McCormick cites explain why this Court requires findings in that context. But those cases are inapposite to McCormick's argument that it automatically wins on appeal because the appealed order denying its motion does not contain conclusions of law.

[¶21] Finally, McCormick has not shown, and cannot show, that the District Court erred when it denied McCormick's motion. As Mr. Fredericks argued to the District Court, the motion was denominated a motion for winding up but it was not, at all, a motion for winding up. Instead, the primary purpose of the motion presented by Mr. Rogneby

ostensibly as McCormick, Inc.'s attorney was to *protect Vogel Law Firm, Rogneby, and Maurice McCromick* from malpractice and other claims (to the detriment of NEC, Mr. Fredericks *and McCormick, Inc.*) by having Judge Schneider assigning those claims a value of $1.00! Dkt. 463, ¶12. Those malpractice and other claim were, at the time, pending before a different judge, and had not even proceeded to discovery. The secondary purposes of the motion was to obtain additional financial relief beyond what the jury had awarded, and then to collect, without notice to other known priority creditors or potential creditors. McCormick's motion was not a serious motion, and the District Court was not required to do anything more than state that the motion was denied. McCormick has not met its burden to show that the order was erroneous, and its attempt to avoid that burden is without merit.

**CONCLUSION**

[¶22] For nearly every major issue in this case, the District Court adopted McCormick's position, often without doing the difficult work of grappling with Mr. Fredericks' responsive arguments. This case does not stand out because of that. That sometimes happens in cases. Instead this case stands out because, after this pattern became clear, McCormick began asking for increasing indefensible orders and decisions. It obtained a partial summary judgment for more than it even sought, and based upon allegations that its own witnesses stated were untrue. Things degraded from there, with the Court refusing to correct its plainly erroneous summary judgment order, with Vogel being allowed back into the case when it should not have been, etc. It culminated in McCormick opposing jury instruction on contract in a contract case, and then having the judge restructure the verdict to benefit McCormick and harm Native Energy.

[¶23] For all of the reasons stated above, this Court must vacate the appealed order and remand with appropriate orders based upon the discussion of law above.

DATED February 12, 2020.

*/s/ Thomas W. Fredericks*
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## CERTIFICATE OF COMPLIANCE

The undersigned attorney for Appellant certifies that attached brief complies with the page limitation stated in North Dakota Appellate Court Rule 32(a)(8)(A). The page count of the filed electronic document states that the document contains 12 pages.

/s_____
Jeffrey S. Rasmussen

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

**DECLARATION OF SERVICE BY E-FILE AND SERVE AND E-MAIL**

MCCORMICK, INC., individually and derivatively on behalf of Native Energy Construction, LLC, and NORTHERN IMPROVEMENT COMPANY

Plaintiffs/Appellants,

vs.

TERRANCE FREDERICKS, a/k/a TERRY FREDERICKS

Defendants/Appellees.

SUPREME COURT NO. 20190254

Case No. 08-2019-CV-00489

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STATE OF COLORADO

COUNTY OF BOULDER

[¶1.] Jeffrey Rasmussen declares under penalty of perjury: He is a citizen of the United States, of legal age, and not a party to nor interested in the above-styled action.

[¶2.] That on the February 12, 2020, in accordance with the provisions of the North Dakota Rules of Civil Procedure, he served upon the person hereinafter named a true and correct copy of the following documents in said matter:

**1. Reply Brief of Defendant/Appellant**

**2. Declaration of Service by E-File and Serve and E-Mail**

and caused the same to be e-served through the Court's e-filing program and E-mail, addressed to the following persons:

Monte L. Rogneby (#05029)
Diane M. Wehrman (#06421)
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*Attorneys for Plaintiffs/Appellees, McCormick, Inc. and Northern Improvement Company*

[¶3.] That to the best of declarant's knowledge, information, and belief, such contact information as given above is of the party intended to be so served.

Respectfully submitted this 20th day of February, 2020.

_____
Jeffrey S. Rasmussen

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

**AFFIDAVIT OF SERVICE BY E-MAIL**

MCCORMICK, INC., individually and derivatively on behalf of Native Energy Construction, LLC, and NORTHERN IMPROVEMENT COMPANY

Plaintiffs, Appellees, and Cross-Appellant

vs.

TERRANCE FREDERICKS, a/k/a TERRY FREDERICKS

Defendant, Appellant, and Cross-Appellee

SUPREME COURT NO. 20190254

Case No. 08-2016-CV-001107

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

**DECLARATION OF SERVICE BY E-FILE AND SERVE AND E-MAIL**

MCCORMICK, INC., individually and derivatively on behalf of Native Energy Construction, LLC, and NORTHERN IMPROVEMENT COMPANY

Plaintiffs/Appellants,

vs.

TERRANCE FREDERICKS, a/k/a TERRY FREDERICKS

Defendants/Appellees.

SUPREME COURT NO. 20190254

Case No. 08-2019-CV-00489

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*Attorneys for Terrance Fredericks, a/k/a/ Terry Fredericks.*

STATE OF COLORADO

COUNTY OF BOULDER

[¶1.] Jeffrey Rasmussen declares under penalty of perjury: He is a citizen of the United States, of legal age, and not a party to nor interested in the above-styled action.

[¶2.] That on the February 12, 2020, in accordance with the provisions of the North Dakota Rules of Civil Procedure, he served upon the person hereinafter named a true and correct copy of the following documents in said matter:

**1. Reply Brief of Defendant/Appellant**

**2. Declaration of Service by E-File and Serve and E-Mail**

and caused the same to be e-served through the Court's e-filing program and E-mail, addressed to the following persons:

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*Attorneys for Plaintiffs/Appellees, McCormick, Inc. and Northern Improvement Company*

[¶3.] That to the best of declarant's knowledge, information, and belief, such contact information as given above is of the party intended to be so served.

Respectfully submitted this 21st day of February, 2020.

_/s_____
Heather Arzola, Legal Assistant

STATE OF COLORADO

COUNTY OF BOULDER

[¶1.] Heather Arzola, being first duly sworn, deposes and says: That she is a citizen of the United States, of legal age, and not a party to nor interested in the above-styled action.

[¶2.] That on the 20th day of February, 2020, in accordance with the provisions of the North Dakota Supreme Court Rules and instructions from the Court, the affiant served upon the person hereinafter named a true and correct copy of the following documents in said matter:

**1. Response Brief Corrected Table of Authorities**

and caused the same to be served via E-mail, addressed to the following persons:

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[¶3.] That to the best of affiant's knowledge, information, and belief, such contact information as given above is of the party intended to be so served.

Respectfully submitted this 20th day of February, 2020.

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Subscribed and sworn to before me this 20th day of February, 2020.

Elizabeth Miller
Notary Public
My Commission Expires: Mar 22, 2022

ELIZABETH MILLER
Notary Public - State of Colorado
Notary ID 20184013180
My Commission Expires Mar 22, 2022