

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

McCormick, Inc. individually and derivatively
on behalf of Native Energy Construction,
LLC, and Northern Improvement Company,

Plaintiffs/Appellees and Cross-
Appellants,

vs.

Terrance Fredericks, a/k/a Terry Fredericks,

Defendant/Appellant and
Cross-Appellee.

SUPREME COURT NO. 20190254

Civil No. 08-2016-CV-01107

APPEAL FROM ORDER FOR JUDGMENT AND JUDGMENT
DATED JULY 1, 2019

APPEAL FROM ORDER DATED AUGUST 19, 2019

CROSS APPEAL FROM ORDER DATED APRIL 9, 2019

BURLEIGH COUNTY DISTRICT COURT
STATE OF NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE THOMAS J. SCHNEIDER

CROSS-APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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LAW AND ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DISMISSED FREDERICKS' COUNTERCLAIM FOR A JUDICIALLY SUPERVISED WINDING UP OF NATIVE ENERGY.

[¶1] Fredericks acknowledges that in Count III of his Counterclaims he requested the Court windup Native Energy under N.D.C.C. §10-32-51 and he acknowledges the District Court provided no explanation for why it refused to windup Native Energy. Fredericks then makes various unpersuasive and unsupported contentions why this Court should not reverse the District Court's decision and remand with instructions to windup Native Energy.

[¶2] First, Fredericks contends if his appeal is successful, and this Court reverses the money judgment in favor of a new trial, then the issue of winding up becomes moot. Fredericks is wrong. Regardless of whether or not his appeal is successful, a court will have to windup Native Energy, sooner or later, as Native Energy has assets and debts which need to be disposed of. A remand for a new trial without decision on this issue will create confusion as to whether the District Court's refusal to windup Native Energy is the law of the case or whether McCormick would be able to pursue this remedy via amended pleadings or otherwise as part of any order for a new trial. There are no possible outcomes of the issues before this Court in which the issue of the winding up of Native Energy is moot.

[¶3] Fredericks next contends McCormick failed to preserve this appeal issue because McCormick initially opposed his Counterclaim for the winding up of Native Energy as part of McCormick's answer to the Counterclaims. What Fredericks appears to be contending is that because he requested winding up in his Counterclaims and McCormick opposed it in its response, he is allowed complete discretion to dismiss the claim at any time, for any

reason, and that the District Court's order denying McCormick's motion is not subject to review on appeal. But this is not the law in North Dakota. A party can seek to dismiss his claim, by motion, and the District Court has discretion to allow the dismissal: "[A] motion for voluntary dismissal under Rule 41(a)(2) is within the sound judicial discretion of the court and the order is reviewable only for abuse of discretion." Commonwealth Land Title Ins. Co. v. Pugh, 555 N.W.2d 576, 578 (N.D.1996). Here, there was no motion.

[¶4] Consistent with the pleadings, McCormick moved the Court for an order winding up Native Energy and supported that request with affidavits and a plan for distributing Native Energy's assets and debts. (Appellee and Cross-Appellants' Supplemental Appendix ("SA") at 161-180.) Fredericks filed a brief in opposition to McCormick's motion in which he contended the winding up of Native Energy should have been a jury question, that the Court should reduce the punitive damages awarded by the jury (this issue was not before the Court), and he objected, generally, to McCormick's proposal for the division of Native Energy's assets and debts. (Index #449.)

[¶5] During the subsequent oral argument on McCormick's motion, Fredericks indicated that he wished to withdraw his counterclaim concerning the winding up of Native Energy. McCormick objected to this request. After the hearing, the Court allowed supplemental briefing on the issue of how to distribute Native Energy's assets. Fredericks submitted a Supplemental Brief Opposing Motion for Judicially Supervised Winding up of Native Energy and Opposing Distribution of Assets to Plaintiffs. (Index #465.) As to whether the issue of the winding up was properly before the Court, Fredericks contended without support: "Mr. Fredericks did not pursue that request for judicial supervision. . . . Mr. Fredericks has also now withdrawn his request for judicially supervised winding-up of

the company. There is not a complaint/petition before this Court for judicially supervised winding up.” (Id. at ¶ 5.) Nothing in the record supports Fredericks’ factual assertion.

[¶6] As part of its supplemental brief, McCormick noted that although Fredericks was attempting to avoid a winding up the Court should do so as requested. (Index #459.)

[¶7] McCormick preserved this issue for appeal and review by this Court and did not waive it.

[¶8] Fredericks claims McCormick has failed to meet its burden of demonstrating the District Court abused its discretion when it denied McCormick’s request to wind up Native Energy. As part of this contention, Fredericks takes issue with McCormick’s reliance on Gratech Co., Ltd. v. Wold Engineering, P.C., 2007 ND 46, ¶ 19, 729 N.W.2d 326. “If the district court does not provide a rationale for its decision, we are unable to determine whether the court abused its discretion.” Gratech, at ¶ 20. Fredericks cites to Rule 52(a)(3) of the North Dakota Rules of Civil Procedure for the proposition that the District Court in this case did not need to explain why it denied McCormick’s motion for winding up.

[¶9] Rule 52(a)(3) does not limit this Court’s holding in Gratech. Recently, in Caster v. State, 931 N.W.2d 223, 2019 ND 187, this Court cited Rule 52(a)(3) and explained that “[i]n ‘a rare instance,’ this Court affirmed an order devoid of reasoning where the Court could easily ascertain the district court’s reasoning and basis for granting a motion for summary judgment.” Id. at ¶ 7, citing Gonzales v. State, 893 N.W.2d 473, 2017 ND 109 ¶ 11. When the District Court’s reasoning, however, is not clear from its order or from the record, remand is appropriate. Id. at ¶¶ 6 and 10. Here, for instance, it is unknown whether the Court dismissed the counterclaim, whether the dismissal (if that was intended) was with or without prejudice or whether the court denied the request for some other reason.

Remand is appropriate in situations like this when this Court is unable to ascertain the District Court's reasoning.

[¶10] The only question for this Court is whether a remand is necessary for the sole purpose of the District Court explaining its decision; or whether this Court should remand with direction that the District Court complete the winding up of Native Energy.

[¶11] McCormick advocates for remand with direction to wind up Native Energy.

[¶12] Fredericks also contends McCormick has not shown, and cannot show, that the District court erred when it denied the motion for a winding up. Fredericks asserts McCormick's motion for a winding up of Native Energy, which included affidavits and proposals for dividing Native Energy's assets and liabilities, was not a request to wind up Native Energy, but was instead "to protect *Vogel Law Firm, Rogneby, and Maurice McCromick* [sic] from malpractice and other claims (to the detriment of NEC, Mr. Fredericks and *McCormick, Inc.*) by having [the Court] assigning those claims a value of \$1.00!" (Emphasis in original.) (Reply Brief and Cross Appeal Response Brief at ¶ 21.) Fredericks also asserts 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." (Id.)

[¶13] Fredericks' arguments misunderstand the issue on appeal. The issue on appeal is not how Native Energy's assets and debts should be distributed or how the winding up should be completed, but rather only whether or not the District Court should have followed the process in Chapter 10-32-51 for the winding up of Native Energy. As to this issue, Fredericks offers no argument, except his unsupported legal assertion that he has an

absolute right to have the Court dismiss his request for a judicial winding up of Native Energy without filing a motion under Rule 41.

[¶14] It is undisputed that Native Energy was involuntarily dissolved by the North Dakota Secretary of State. It is undisputed that Native Energy has assets and debts which need to be distributed, as required by law. The available evidence suggests that Fredericks will not cooperate with a non-judicial winding up. Court supervision will be necessary. The only issue is whether the winding up should be completed as part of this action, or whether McCormick or Fredericks will need to initiate new litigation.

[¶15] Neither the District Court nor Fredericks has provided any rationale for why the winding up should not be completed as part of this case, based on this record. Fredericks made a request for a judicially supervised winding up. No motion was made by Fredericks for permission to voluntarily dismiss this request. No order was entered dismissing the claim. McCormick relied on the request and moved the Court for an order winding up the business.

[¶16] Under these circumstances, this Court should reverse the District Court's order denying McCormick's motion for a judicial winding up and remand for directions for the District Court to complete the winding up as set out in Chapter 10-32.

Respectfully submitted February 26, 2020.

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MCCORMICK, INC. AND NORTHERN
IMPROVEMENT COMPANY

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 10 pages.

Dated this 26 day of February, 2020.

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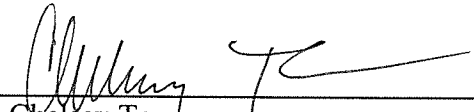
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STATE OF NORTH DAKOTA)
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COUNTY OF BURLEIGH)


Chelsey Ternes, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on February 26, 2020, **Cross-Appellants' Reply Brief** was filed electronically with the Clerk of Court of the North Dakota Supreme Court through the Supreme Court E-Filing Portal, and that the same documents were electronically served through the portal:

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Chelsey Ternes

Subscribed and sworn to before me this 26th day of February, 2020.


Notary Public

