

**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

APPELLEES AND CROSS-APPELLANTS' BRIEF

ORAL ARGUMENT REQUESTED

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REQUEST FOR ORAL ARGUMENT

McCormick Inc. and Northern Improvement Company request oral argument. The Appellant has raised numerous issues and oral argument will be helpful to provide needed context and explanation.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err when it dismissed Fredericks' counterclaim for a judicially supervised winding up of Native Energy?
2. Did the District Court have jurisdiction to decide Fredericks' breach of fiduciary duty claim against McCormick?
3. Did the Court err in instructing the jury?
4. Did the Court err when it denied Fredericks' request to limit plaintiffs to a single corporate representative?
5. Did Fredericks waive his right to appeal the Court's Order for Summary Judgment concerning uneven distributions?
6. Did the Court err when it ordered Fredericks to authorize payment to Northern Improvement?
7. Did Fredericks have grounds to appeal admission of the Partial Judgment after he failed to object to its admission?
8. Did the Court err in refusing to disqualify Vogel?
9. Did the District Court abuse its discretion when it entered its Order for Judgment?
10. Did the District Court abuse its discretion when it entered the Final Judgment?

STATEMENT OF THE CASE

[¶1] McCormick, Inc. and Northern Improvement Company sued Plaintiff-Appellant Terrance Fredericks. (App. at 45-50.) They obtained a money judgment against Fredericks in favor of McCormick, Northern Improvement and Native Energy Construction, owned jointly by McCormick and Fredericks, of \$1,013,172.70 including a jury award of punitive damages in favor of McCormick of \$400,000 for Fredericks' actual and constructive fraud. (App. at 277-279.)

[¶2] After McCormick and Northern Improvement sued, Fredericks counterclaimed seeking damages for breach of fiduciary duty and he requested the Court judicially wind-up Native Energy. (App. at 67.) Although Native Energy has been involuntarily dissolved by the Secretary of State, it still owns assets and has debts. A judicially supervised winding-up is necessary.

[¶3] After all of the claims had been resolved by the Court and Jury, McCormick, requested the Court judicially wind-up Native Energy. (Supp. App. at 161.) Fredericks objected and indicated he desired to withdraw his request for a judicially supervised winding up. Without explanation, the Court denied McCormick's request. (Supp. App. at 181.) McCormick cross-appeals the Court's decision and seeks an order of remand to the District Court with instructions for the Court to supervise the winding-up of Native Energy.

[¶4] On April 25, 2016, McCormick, on behalf of Native Energy, and Northern Improvement, sued Fredericks for breach of contract, breach of fiduciary duty, conversion and bad faith. (App. at 22-27.)

[¶5] On June 2, 2016, Fredericks filed his Answer, Affirmative Defenses and Counter Claim of Defendant. (Supp. App. at 21.) Fredericks denied any liability to McCormick or Northern Improvement. Fredericks counter claim is for breach of fiduciary duty, unjust

enrichment, and Fredericks requested the Court wind up Native Energy under N.D.C.C. § 10-32.1-51. (Id.)

[¶6] On June 23, 2016, McCormick filed its Answer to Counterclaims denying liability. McCormick. (Supp. App. at 31.)

[¶7] On March 8, 2017, McCormick moved to amend the caption and to amend the Complaint to assert a claim of punitive damages against Fredericks. McCormick requested leave to amend the caption to make clear that it was bringing claims against Fredericks both in its own favor and derivatively on behalf of Native Energy. McCormick also requested leave to add a claim of punitive damages against Fredericks. On April 26, 2017, the Court granted the motion. (Supp. App. at 89.) The Amended Complaint was filed and served on April 26, 2017. (App. at 45.)

[¶8] All parties moved for partial summary judgment. On August 24, 2017, the Court denied Fredericks' motion for partial summary judgment and granted McCormick's motion. (App. at 64-75.) Partial Judgment was entered on September 29, 2017. (App. at 76.)

[¶9] The initial jury trial commenced on October 3, 2017. During the cross-examination of Steven McCormick, Jr., Fredericks moved for a mistrial claiming Vogel 1) previously represented Fredericks and/or Native Energy and 2) the nature of that representation was the same or similar matter as McCormick's claims. After an in chambers discussion, the Court granted the motion. (App. at 212.)

[¶10] On November 14, 2017, McCormick filed its Motion to Reconsider Disqualification of the Vogel Law Firm. (Docket at 226.)

[¶11] On December 1, 2017, Fredericks filed his Motion to Reconsider Court’s Order on Motions for Partial Summary Judgment. (Docket at 237.)

[¶12] On December 20, 2017, Fredericks moved to Amend Counterclaims and Add Third-Party claims. Fredericks requested he be allowed to seek damages on behalf of Native Energy, and to add Vogel as third-party defendant. (Docket at 258.)

[¶13] On January 18, 2018, the Court issued its Order holding Vogel was not disqualified “because neither NEC nor Fredericks were former clients of Vogel.” (App. at 213.) The Court also concluded that even if either had been former clients, “no conflict of interest would exist because the issues before this Court are not ‘materially adverse,’ or ‘the same or substantially related,’ to work that Vogel provided to McCormick.” (App. at 213-214.)

[¶14] At the motion hearing held on April 30, 2018, the Court denied Fredericks’ request to add the Vogel as a third-party defendant. (Supp. App. at 103.) The Court indicated both parties could pursue claims on behalf of Native Energy and that Fredericks should submit a proposed order and a revised proposed amended Answer and Counterclaim. (*Id.* at 103-104.) Counsel for Fredericks failed to submit a proposed order or proposed revised counterclaim.

[¶15] Fredericks unsuccessfully sought a Supervisory Writ from this Court challenging the Court’s decision that the Vogel Law Firm was not disqualified. See Supreme Court No. 20180088.

[¶16] On June 11, 2018, the Court issued a Revised Order for Partial Judgment changing some of the details of its previous summary judgment order, but not vacating it. (App. at 220-221.)

[¶17] On August 9, 2018, 34 days before trial, Fredericks filed a Third Amended Answer, Affirmative Defenses and Counterclaims. (App. at 222-241.) It included allegations against McCormick and Vogel which had been disallowed by the Court. McCormick moved to strike and on September 10, 2018, the Court entered its Order Striking the Pleadings. (Supp. App. at 119.) The Court ruled it was untimely, makes allegations against Vogel contrary to the Court's decision, and goes beyond the Court's limited leave to amend. (Id.)

[¶18] The case was tried to a jury on September 12 – 14, 2018. (See Transcript of Jury Trial) The jury returned a special verdict in favor of McCormick and against Fredericks. The jury found Fredericks guilty of breach of fiduciary duty, actual fraud, and constructive fraud. It awarded Native Energy and McCormick damages of \$352,668.55. It awarded punitive damages against Fredericks of \$400,000. The jury found McCormick and Northern Improvement had not breached any fiduciary duties owed to Fredericks. (App. at 277-279.)

[¶19] On January 24, 2018, McCormick moved the Court for an order winding-up Native Energy consistent with Fredericks' claim for relief in his counter claim. On April 9, 2019, the Court without explanation of any kind, denied McCormick's request. (Supp. App. at 181.)

[¶20] Fredericks had indicated he intended to appeal the Court's Order on distributions. Fredericks asserted McCormick should be paid by Native Energy. To avoid an appeal, McCormick submitted a proposed Order for Final Judgment which modified the Court's previous Partial Judgment to conform to Fredericks' position. Fredericks' objected. On May 15, 2019, the Court issued its Memorandum Opinion in which it indicated that it

would not modify its previous decision absent a motion from McCormick and that the Court would entertain such a motion before signing a proposed Order for Final Judgment. (App. at 291.)

[¶21] On May 16, 2018, McCormick moved to modify the Partial Judgment to adopt Fredericks' position concerning the unequal distributions. Fredericks opposed the motion.

[¶22] On June 11, 2019, the Court denied the motion based on Fredericks' opposition noting: "Although the Defendant has all along argued that the unequal distributions are a debt of Native Energy, he now opposes Plaintiffs' Motion." (App. at 292-293.)

[¶23] On July 1, 2019, the Court issued its Order for Judgment and Judgment was entered. (App. at 298-299.) Notice of Entry was served on Fredericks on July 12, 2019. (Supp. App. at 184.) Fredericks filed his Notice of Appeal on August 20, 2019 and McCormick filed its Notice of Cross Appeal on September 3, 2019. (App. at 307-310.)

STATEMENT OF THE FACTS

[¶24] In 2010, McCormick and Fredericks formed Native Energy to perform dirt work on and off of the Fort Berthold Indian Reservation. (App. at 22.) McCormick owns a 49% and Fredericks 51%. The company's day-to-day operations were managed by Fredericks as President. (Doc. ID# 71, 38:15-18.) Fredericks and his wife were paid a salary. (See Doc. ID# 30.) In exchange for the management services, policies, procedures, and personnel supplied by McCormick, McCormick was paid 5% of gross revenue as a management fee. Initially, Native Energy was successful. By the end of 2013, however, Native Energy was mostly out of business due to Fredericks' fraud and breaches of duty.

[¶25] At Native Energy's Annual Meeting held on March 19, 2014, prior to McCormick knowing the full extent of Fredericks' fraud, Fredericks and McCormick agreed Fredericks

would buy out McCormick. The parties executed a Purchase Agreement on April 18, 2014. (Supp. App. at 95.) Fredericks was unable to complete the purchase.

[¶26] Thereafter, the parties attempted to wind up Native Energy but Fredericks refused to honor his agreements concerning the winding up, and McCormick discovered the extent and nature of Fredericks' fraud and breach of duty, which resulted in this litigation.

[¶27] Fredericks received distributions from NEC and there was no corresponding distribution made to McCormick. (App. at 65.) The North Dakota Century Code requires distributions to be made in proportion to each members interest. *See* N.D.C.C. § 10-32-60.

[¶28] Native Energy performed work for Fredericks' Uncle. Fredericks collected the amount due and converted it for his own use. (App. at 70-71.)

[¶29] McCormick and Fredericks agreed Northern Improvement would prepare Native Energy's equipment for sale at auction. (App. at 71 and 221.) Northern Improvement did so and Fredericks refused to authorize payment from Native Energy.

[¶30] Fredericks purchased equipment from Native Energy. Fredericks took possession of the equipment, transferred title to his own name, but refused to pay Native Energy. (App. at 71-74.)

[¶31] McCormick requested summary judgment on the above-listed items and the Court granted its motion. (App. at 74-75.) The Court concluded: 1) Because Fredericks received distributions from Native Energy without McCormick receiving a proportionate amount, Fredericks must pay to McCormick part of his distributions to make the distributions proportionally equal based on each's ownership of Native Energy (\$54,216.05¹); 2)

¹ This amount was reduced to \$49,795.76 prior to entry of Final Judgment. (App. at 220.)

Fredericks must repay to Native Energy the amount of the payment due to Native Energy, for funds he wrongfully converted for his personal use in violation of his duty to loyalty to Native Energy (35,104); 3) Fredericks must authorize Native Energy to pay to Northern Improvement the amounts due for the work performed by Northern Improvement in preparing Native Energy's equipment for auction (\$44,400); and 4) Fredericks must pay to Native Energy the agreed upon amounts for the equipment Fredericks purchased from Native Energy at the time Native Energy stopped doing business (\$168,879). (App. at 69-74 and 220-221.) The partial judgment reflecting these awards was presented to the jury without objection in support of McCormick's punitive damages claim.

[¶32] At trial, McCormick presented to the jury evidence of the following additional breaches of duty and acts of fraud by Fredericks:

- 1) Fredericks used Native Energy's money to personally purchase items of equipment which he then leased to Native Energy on terms favorable to himself, and unfavorable to Native Energy. Fredericks did not disclose these lease agreements to McCormick. (Transcript of Jury Trial 107; 167-170; 245.)
- 2) Fredericks, his wife Nadine Fredericks, and Fredericks' step daughter took salary advances and other improper payments from Native Energy without disclosure to McCormick and used Native Energy funds to buy personal items. (*Id.* at 172-176.)
- 3) Fredericks incorporated a new business, Firetail Energy Services, Inc. Fredericks diverted work from Native Energy to Firetail. He used Native Energy's employees equipment, and supplies to complete work for Firetail and kept all of the income, not reimbursing Native Energy for its costs. McCormick presented evidence to the

jury that Native Energy was damaged in the amount of at least \$216,849.96. (Id. at 2018-231.)

[¶33] At the close of the trial, McCormick requested the jury award it and Native Energy damages of \$352,668.55 for the items listed above and the jury awarded this amount, and also \$400,000 of punitive damages in favor of McCormick. (App. at 277-279.)

[¶34] Fredericks presented his counterclaims to the jury. The main claim concerned the 5% management fee collected by McCormick. Steve McCormick, Jr., testified that he, on behalf of McCormick, and Fredericks agreed that McCormick would be paid 5% percent of the gross revenue for management services. (Id. at 70-71.) Subsequently, McCormick invoiced Native Energy for the management fee and Fredericks as President caused payment to be made for the fee. (Id. at 102-105; Exhibit 8A.) The fee was discussed at corporate meetings, and the minutes do not reflect that Fredericks ever expressed disagreement with the fee or objected to Native Energy paying it. (Id. at 140.) The Buy-Sell Agreement entered into between McCormick and Fredericks on April 18, 2014, specifically noted that as part of Fredericks purchase of Native Energy that McCormick was owed additonal sums for its management fee (referenced in the agreement as “consulting fee”), and that these amounts would be paid as part of the sale. (Supp. App. at 31.) The overwhelming evidence showed that Fredericks consented to the management fee and was responsible for paying it on behalf of Native Energy.

[¶35] Despite these facts, Fredericks contended there had not been consent for McCormick to get a management fee, that it was a breach of duty for McCormick to take the fee, and that McCormick had not performed any management services and therefore breached its obligation to him. (Transcript of Jury Trial at 478-479.) Fredericks requested

the jury return to him 51% of the total management fee as damages. (*Id.* at 494-495.) The jury rejected this and all other claims of breach of duty brought by Fredericks. (App. At 277-279.)

[¶36] During the first jury trial, immediately before the Court declared a mistrial, Fredericks' counsel cross-examined Steve McCormick, Jr., concerning the services performed by McCormick in exchange for the management fee. (Supp. App. 91-92)

During that examination, Mr. McCormick testified:

[Mr. Rasmussen] Q. Okay. Let's talk about the Master Service Agreements you were referring to. Did you do any work -- did you personally do any work related to the Master Service Agreements that Native Energy entered into?

[Mr. McCormick] A. I did.

Q. What did you do?

A. I would go through the language the best I could. I would discuss it with our bonding person Amber, and our bonding agent Tony. And we also hired Vogel Law, which McCormick/Northern paid all the legal fees, as I consider that part of our five percent providing technical expertise, and we would go back and forth with these companies and try and strike the best deal we could, still trying to get the deal down, but take out language that was harmful to us, that was unfair and one-sided.

Q. So Vogel Law was providing services to Native Energy?

A. McCormick paid the bill.

Q. That's not what I asked you. You know that, right? I asked you who they were providing the services for?

A. Native Energy working through Northern/McCormick people.

Q. Vogel Law was providing services for Native Energy?

A. Indirectly, yes.

Q: Who was their client?

Mr. Rogneby: Objection, calls for a legal conclusion.

Mr. Rasmussen: No, then we should approach, because I'm going to make a motion to recuse them. This is not okay.

The Court: Okay. We need to take a short recess. My reporter told me she needs to take a break, so we we'll take about a ten minute ten break.

(Id.)

[¶37] After an in-chamber conference, the Court declared a mistrial. Subsequently, McCormick requested the Court issue an order declaring that Vogel was not disqualified. As part of that Motion, McCormick presented evidence establishing that from approximately 2010 to 2011, Vogel, at the request of McCormick, reviewed certain master service agreements entered into between Native Energy and various oil companies. (App. At 182.) Native Energy did not pay Vogel. (Id.) The work was performed on behalf of McCormick. (Id.) At no point in time did the Vogel represent Fredericks in any capacity. (Id.) The Court concluded Vogel had not represented Native Energy or Fredericks and therefore should not be disqualified. (App. at 210.)

LAW AND ARGUMENT

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

[¶38] Because Native Energy was involuntarily dissolved, the only activities authorized are those necessary for the limited purpose of winding up. N.D.C.C. § 10-32.1-51(1). Section 10-32.1-51(5), N.D.C.C., provides that an “appropriate court may order judicial supervision of the winding up of a dissolved limited liability company, including the appointment of a person to wind up the activities of the company . . . [o]n application of a member, if the applicant establishes good cause.”

[¶39] Count III of Fredericks' counterclaim requested the Court supervise the winding up of Native Energy under N.D.C.C. §10-32-51. After the jury trial, the only issue remaining for adjudication was Fredericks' request for a judicial winding up. McCormick moved the Court for an order winding up Native Energy, supported by affidavits and other proof of Native Energy's assets and liabilities, and a proposed plan for winding up the entity. (Supp. App. at 161-175.) Fredericks objected to the request contending that issue of winding up should have been decided by the jury and that to the extent he had requested a winding up, he was withdrawing his request. (Supp. App. at 100-101.) Fredericks did not make any motion to the Court to withdraw his claim.

[¶40] The Court denied McCormick's request for a winding up without any explanation of its reasoning and in so doing abused its discretion. (Supp. App. at 181.)

[¶41] A judicial winding up is not a jury issue. N.D.C.C. § §10-32-51. The statute directs the Court to complete the winding up. Accordingly, the only grounds for the District Court's denial of McCormick's request for winding up is that it allowed Fredericks, without motion, to withdraw his claim. Such a withdrawal is governed by Rule 41(a)(2) of the North Dakota Rules of Civil Procedure. "[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). An abuse of discretion by the District Court is never assumed, and the burden is on the party seeking relief affirmatively to establish it. Flattum–Riemers v. Flattum–Riemers, 2003 ND 70, ¶ 7, 660 N.W.2d 558. The District Court abuses its discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned

determination. Id. The party seeking relief must show more than the district court made a “poor” decision, but that it positively abused the discretion it has under the rule. Flattum–Riemers, at ¶ 7.

[¶42] When a District Court does not make any specific findings of fact or give any explanation providing the evidentiary and theoretical basis for its decision and the basis is not otherwise ascertainable in the record, this Court is unable to properly review the issue because it is left to speculate the basis for the court’s decision and whether the law was properly applied. See 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.

[¶43] Regardless of the Court’s reasoning, it abused its discretion when it refused to judicially supervise the winding up of Native Energy. The issue of the winding up was not for the jury to decide and there was no motion before the Court to allow Fredericks to withdraw his claim for winding up. This Court should reverse and remand with direction for the District Court to complete the winding up as set out in Section 10-32.1-51, N.D.C.C.

II. THE DISTRICT COURT HAD JURISDICTION TO DECIDE FREDERICKS’ BREACH OF FIDUCIARY DUTY CLAIM AGAINST MCCORMICK.

[¶44] From the start, Native Energy, acting through Fredericks, paid to McCormick a 5% management fee. The checks were written by Fredericks. (Exhibit 8-A; Doc. ID. 420.) The fee was discussed during corporate meetings. (Transcript of Jury Trial at 140.) Fredericks acknowledged the fee as part of his attempted buy-out of McCormick’s interest in Native Energy. (Supp. App. at 95.) Nonetheless, Fredericks claimed it was improper for McCormick to take the fee and urged the jury to return to him 51% of the fee for McCormick’s alleged breach of fiduciary duty. (Transcript of Jury Trial at 494.) In

defense of Fredericks' claim McCormick introduced evidence that Fredericks discussed the fee with Steve McCormick, Jr., and that the two agreed that Native Energy would pay the fee to McCormick. (Transcript of Jury Trial at 139.)

[¶45] Fredericks now contends that the issue concerning his claim against McCormick is properly categorized as "Plaintiff's unpled claim of a contract 'at the ownership level'." (Brief of Appellant at ¶ 37.) This assertion is nonsensical. All claims concerning the management fee were Fredericks' against McCormick. McCormick testified on how the fee originated and as to Fredericks' acts as an Officer and Director of Native Energy in paying the fee over time.

[¶46] For the first time on appeal, Fredericks now claims the District Court did not have jurisdiction to decide his counterclaim against McCormick for breach of fiduciary duty related to the management fee. He claims his agreement with Steve McCormick, Jr., to authorize Native Energy to pay to McCormick a management fee was "an on-Reservation contract between a non-Indian and an Indian Defendant." (Brief of Appellant at ¶ 39.) Fredericks claims that because it was a "reservation" agreement this Court "is required to vacate the judgement, because Plaintiff expressly predicated its argument for that judgment on its claim of a supposed oral contract 'at the ownership level.'" (*Id.* At ¶ 40.) McCormick is not certain what argument Fredericks is making, but assumes he is contending that this Court must dismiss this entire action in favor of a new action in Tribal Court. This request should be denied as this Court has jurisdiction and the Tribal Court does not.

[¶47] State court jurisdiction over matters involving Indian parties and conduct on Indian land is determined under the test set forth in Williams v. Lee, 358 U.S. 217 (1959). Arrow

Midstream Holdings, LLC v. 3 Bears Constr., LLC, 2015 ND 302, ¶ 10, 873 N.W.2d 16.

Under that test, “absent congressional action, the question is whether the state action infringes on the right of the reservation Indians to make their own laws and be ruled by them.” Id. at ¶ 25 (quoting Byzewski v. Byzewski, 429 N.W.2d 394, 396 (N.D. 1988); see also Gustafson v. Estate of Poitra, 2011 ND 150, ¶ 13, 800 N.W.2d 842 (“Under N.D.C.C. ch. 27-19, state courts may have jurisdiction over civil causes of action arising within the exterior boundaries of a reservation, if Indian citizens of the reservation have accepted state court jurisdiction.”). The lack of tribal court concurrent jurisdiction is a relevant factor in determining state court jurisdiction. Arrow, 2015 ND 302, ¶ 27.

[¶48] Analyzing the Williams test, this Court noted “[t]here are two categories of claims over which the United States Supreme Court has held tribal courts have exclusive civil jurisdiction under the infringement test. Included in the first category are those claims in which a non-Indian asserts a claim against an Indian for conduct occurring on that Indian’s reservation.” Roe v. Doe, 2002 ND 136, ¶ 8, 649 N.W.2d 566. “In the second category, are those claims in which all the parties are members of the same Indian tribe and the claim involves conduct occurring on that tribe’s reservation.” Id.

[¶49] Whether a tribal court has jurisdiction involves a similar, but separate, inquiry governed by Montana v. United States, 350 U.S. 544, 565 (1981). Montana sets forth the general rule that an Indian tribe lacks jurisdiction over the activities of non-members within reservation boundaries. Id. at 565-566. The Court in Montana articulated two exceptions to the general rule. First, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” Id.

Second, a tribe may exercise "civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id., at 566. These exceptions have become known as the first and second Montana exceptions. By their terms, the exceptions concern regulation of "the activities of nonmembers" or "the conduct of non-Indians on fee land." Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 328-30 (2008). Further, "[t]he second exception from Montana ... has been narrowed to conduct that must "imperil the subsistence" of the tribal community and that "tribal power must be necessary to avert catastrophic consequences." Fredericks v. Fredericks, 2016 ND 234, ¶ 9, 888 N.W.2d 177 (citing Plains Commerce, 554 U.S. at 341). "When the jurisdictional facts are not in dispute, the question of subject-matter jurisdiction is a question of law," reviewed de novo by this Court. Arrow, 2015 ND 302, ¶ 9.

[¶50] The record in this case reveals there is no dispute about the facts relevant to a determination of the jurisdictional issue. The conduct here occurred both on and off the Fort Berthold Indian Reservation. In the March 28, 2017, Affidavit of Terrance Fredericks, Fredericks acknowledges that "NEC was formed to obtain dirt construction work related to oil activities both on and off the Fort Berthold Reservation. (Supp. App. at 35.) Similarly, Fredericks' fraud occurred both on and off the Fort Berthold Indian Reservation, for instance, Fredericks acted in furtherance of his fraud off the Reservation through such acts as charging fuel obtained off the Reservation and other expenses to Native Energy, then using those supplies as part of his Firetail business. (Transcript of Jury Trial at 130-131.) The situs of Fredericks' fraud against McCormick is off the reservation, at McCormick's location. See Rule 4(b)(2)(C), N.D.R.Civ.P. This case does

not satisfy the first category of cases considered in Roe and there are not any allegations to support application of the second Roe category.

[¶51] This Court’s exercise of jurisdiction is further supported by the Tribal Court’s lack of jurisdiction over McCormick and Northern Improvement. Fredericks does not even make an attempt to argue that Montana applies to vest Tribal Court jurisdiction over Northern Improvement - a non-Indian party, which did not enter into any consensual relationships with him. Fredericks maintained his counterclaims against both McCormick and Northern Improvement. The Tribal Court cannot adjudicate Fredericks’ claims because it does not have even arguable jurisdiction over Northern Improvement.

[¶52] Relatedly, Fredericks’ counterclaim does not arise from a consensual relationship between nonmembers and the tribe or its members under the first Montana exception as Native Energy is a limited liability company formed under North Dakota law. Fredericks’ claims arise based on his ownership in the limited liability company. Regardless of the fact Fredericks, an enrolled member, owned 51% of the LLC, Native Energy was created under North Dakota state law. “The caselaw establishes it is not the particular form of business entity used by a tribe or tribal member, but whether the business entity was created under tribal law or state law that determines if the business entity should be treated as a tribe or tribal member.” Arrow, 2015 ND 302, ¶ 16-17 (“3 Bears is a limited liability company formed under North Dakota law and is not a member of the Tribe.”).

[¶53] The second Montana exception is not applicable either. “[T]he Tribe has not intervened or made an appearance in this action. This Court has ruled that a private party has no standing to advance a tribe’s interests when the tribe itself fails to appear.” Id. at ¶ 22. Moreover, “[t]he subject matter of this lawsuit is far too attenuated to constitute any

threat to the political integrity, economic security, or health or welfare of the Tribe.” Id. at ¶ 23.

[¶54] At best, Fredericks established concurrent jurisdiction between this Court and the Tribal Court and under these circumstances, where there are no issues of Tribal Law, this Court is not required to defer to the Tribal Court on principles of comity.

[¶55] This Court has subject matter jurisdiction.

III. THE COURT DID NOT ERR IN INSTRUCTING THE JURY

[¶56] Fredericks claims the Court committed reversible error when it refused to give his requested contract-related jury instructions.

[¶57] As part of the concluding instructions, Fredericks requested the Court submit certain contract-related instructions to the jury in support of his breach of duty claim. McCormick objected noting that Fredericks wanted to make two inconsistent claims to the jury at the same time: that there was no agreement for McCormick to receive a management fee and that McCormick breached its duties to provide management services when it allegedly failed to provide any services. (Transcript of Jury Trial at 423.) During this discussion Fredericks’ counsel refused to explain to the Court his legal theory of liability: “If he doesn’t understand [our theory], that’s not my problem.” (Id. at 423-424.)

[¶58] McCormick also noted the management fee issue was not simply an issue of contract because it had been consistently paid by Fredericks on behalf of Native Energy to McCormick and it had been discussed at corporate meetings that Fredericks attended, and he never objected. McCormick had acted in reliance on Fredericks’ actions. Finally, McCormick maintained the fee was fair to Native Energy.

[¶59] McCormick urged the Court to instruct the jury as to the law of limited liability companies, which it did. North Dakota law recognizes that members of a limited liability

company are entitled to rely on information, including financial information, presented by one or more managers or employees if the manager reasonably believe the materials to be reliable. N.D.C.C. § 10-32-86(2)(a) (Repealed 2015) and §10-32.1-41(3). A manager who is present at a meeting of the board when action is approved by the affirmative vote of a majority of the managers present is presumed to have assented to the action approved unless the manager votes against the action at the meeting. N.D.C.C. §10-32-86(4) (Repealed 2015). The managers of a limited liability company may authorize or ratify after full disclosure of all of the material facts a specific act or transaction that would otherwise violate the duty of loyalty. N.D.C.C. § 10-32.1-41(6). Finally, it is a defense to a claim of self-dealing that the transaction was fair to the limited liability company. N.D.C.C. § 10-32-87(2)(a) (Repealed 2015) and §10-32.1-41(5). McCormick requested the Court instruct the Jury as to each of these principles of law and the Court approved McCormick's instructions. (Transcript of Jury Trial at 427.) The Court explained its decision: "[W]hat I got from some of the testimony was that – that your client was saying that they [McCormick] didn't provide the services in order to earn the 5 percent." (Id.)

[¶60] What Fredericks apparently wanted was an instruction that if the jury found there was no agreement then McCormick would have to return the management fee. But the Court disagreed, concluding that all issues concerning the management fee would be decided within the context of the fiduciary duties members of a limited liability company owe to each other. These duties are more protective of Fredericks than the contract instructions he requested. (See Supp. App. at 143-145.)

[¶61] Jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury. When considering the correctness of jury

instructions, this Court will view them as a whole. The instructions will be affirmed if they fairly advise the jury of the law on the essential issues in the case. In evaluating whether the district court abused its discretion in instructing the jury, this Court will first determine whether the district court committed error in its instruction, and then, if so, whether that error was harmless. Rittenour v. Gibson, 2003 ND 14, ¶ 15, 656 N.W.2d 691 (citations and quotation marks omitted). In Haider v. Moen, 2018 ND 174, ¶ 6, 914 N.W.2d 520, 522–23, this Court explained the harmless-error standard in civil cases:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Id.

[¶62] Here, the District Court concluded that the duties owed by the parties to each other were based on their status as members of the limited liability company. Accordingly, the Court advised the Jury as to the duties the members of a limited liability company owed to each other. The District Court did not err when it concluded that Fredericks’ breach of duty claim was properly analyzed based on the law governing the duties members of a limited liability company owe to each other and not based on contract law.

[¶63] Even if, however, the District court erred in not giving Fredericks’ proposed contract-related instructions, Fredericks has not shown that the error affected any substantial right. Fredericks states that the issue was whether the management fee was authorized. Fredericks, however, urges this Court to ignore that he voluntarily paid the fee

and that he never objected to its fairness. Given these facts, whether an actual enforceable contract was formed between McCormick and Fredericks was mostly irrelevant given the provisions of the limited liability statute concerning reliance and ratification. Based on these facts, the issue was not simply an issue fiduciary duties, of contract, it was also an issue of ratification and whether McCormick could rely on Fredericks actions in paying the fee.

[¶64] The Court did not err in refusing to give Fredericks contract-related instructions in this case where his claim was premised on a breach of fiduciary duty.

IV. THE COURT DID NOT ERR WHEN IT DENIED FREDERICKS' REQUEST TO LIMIT PLAINTIFFS TO A SINGLE CORPORATE REPRESENTATIVE.

[¶65] Plaintiff requested the Court not allow each Plaintiff to have a designated corporate representative at trial. Plaintiffs indicated if Fredericks agreed to dismiss Northern Improvement, there would only be a need for a single representative. Fredericks refused indicating that he intended to press claims against each entity. (Transcript of Jury Trial at 6-14.)

[¶66] McCormick and Northern Improvement argued that Rule 615, N.D.R.Ev. expressly allowed each to have a corporate representative and that it was essential that both Steve McCormick, Jr., and Jay Kjos be present to assist counsel with the defense of Fredericks claims. Each on behalf of one of the entities. The Court agreed and denied the request.

[¶67] In support of his novel reading of Rule 615, Fredericks cites to Ferreira v. Penzone, 2018 WL 2087569 (D. Ariz. May 4, 2018). The situation here, however, is factually different. In Ferreira, the Defendants were two named individuals in their official capacities and one entity (Maricopa County, Maricopa County Sheriff Paul Penzone in his official capacity, and Maricopa County Correctional Health Services Medical Director

Jeffrey Alvarez in his official capacity). Defendants had named three representatives none of them were the named individuals:

Although the premise of Defendants' request is that there are three Defendants remaining, Defendants then shift their request to represent “categories” of claims and offer up two representatives from the Maricopa County Sheriff’s Office and one from Correctional Health Services to match each purported category of claim. (Doc. 307 at 2).

Id. at *1.

[¶68] The Court concluded that Defendant could not designate two representatives from the Maricopa County Sheriff’s Office: “Accordingly, Sheriff Penzone and Medical Director Alvarez are allowed one and only one client representative each.” Id. This holding is consistent with what the Court ordered in this case. Each Plaintiff was allowed one corporate representative.

[¶69] Furthermore, even if it was error, such error is harmless. Fredericks has failed to show any prejudice from allowing both Mr. Kjos and Mr. McCormick to remain for the trial. In re T.T., 2011 ND 111, ¶¶ 9-10, 798 N.W.2d 678, 680–81(to show an abuse of discretion requires a showing of prejudice).

V. FREDERICKS WAIVED HIS RIGHT TO APPEAL THE COURT’S ORDER FOR SUMMARY JUDGMENT CONCERNING UNEVEN DISTRIBUTIONS.

[¶70] Fredericks received unequal distributions from the profits of Native Energy. Based on Fredericks’ admissions and discovery responses, McCormick moved for summary judgment on this issue and the Court granted the motion. Fredericks’ position at that time was different than it is now. Subsequently, as discovery progressed, Fredericks sought to disavow his initial discovery responses and arguments to the Court.

[¶71] McCormick opposed any change to the Court's order correctly decided the motion based on Fredericks' discovery responses and initial arguments. McCormick also contended the Court had equitable power to require Fredericks to make payment to McCormick. The Court agreed and refused to change its decision, except to correct a slight error in the amount due.

[¶72] After trial, Fredericks indicated he intended to appeal based on this issue. In an effort to avoid the cost of an appeal, McCormick submitted a proposed order for judgment consistent with Fredericks' position, that the unequal distributions should be reflected as an amount due from Native Energy to McCormick. Fredericks objected. The Court then suggested McCormick file a motion to modify, which it did. Fredericks filed a brief in opposition to the motion. The Court noted that Fredericks had previously urged the relief requested by McCormick, but refused to make the change based on Fredericks' objection. Fredericks is now requesting on appeal the exact relief McCormick offered below.

[¶73] The issue Fredericks now raises could have been resolved if he had presented it to the District Court as part of McCormick's motion to amend the partial judgment. All he would have needed to do is agree that the Court could make the change requested by McCormick. Instead, Fredericks invited this alleged error which acts as a waiver on his ability to present this issue for review. Requiring a party to first present an issue to the trial court prevents litigants from inviting the trial court to make an error and then seeking to prevail upon appellate review of the invited error. In such an instance, the appeal issue is waived. Mahoney v. Mahoney, 1997 ND 149, ¶ 13, 567 N.W.2d 206, 210–11.

[¶74] If this Court reaches the merits of Fredericks' claim, then it should be denied. The amount of distributions, which Fredericks now challenges was established from his

discovery responses and admissions. Under N.D.R.Civ.P. 36(b), the effect of an admission is to conclusively establish the matter admitted. Fredericks' subsequent attempts to contradict his own admissions as part of his motion for reconsideration below and his appeal here does not create a genuine issue of material fact requiring this Court to vacate the Judgment as to this issue.

[¶75] As to the appropriateness of the remedy chosen by the District Court, North Dakota Century Code Section 10-32-60 requires distributions of cash to members be “allocated in proportion to the value of the contributions of the members reflected in the required records.” Fredericks admits to receiving \$110,624.00 for which no corresponding distribution was made to McCormick.² As a remedy, the Court ordered Fredericks to pay to McCormick its share of the distributions. As an alternative remedy the Court could have ordered Fredericks to repay 100% of the sums to the accounts of Native Energy. Given Native Energy's debt to McCormick, this is probably the more appropriate remedy. The Court did not err in ordering Fredericks pay McCormick for distributions.

[¶76] Even assuming Fredericks is correct that McCormick has the status as a creditor as a result of the one-sided distributions, the Court still properly granted summary judgment. Fredericks requested a judicial supervision concerning the winding up of the affairs of Native Energy. The District Court was authorized to grant “any equitable relief it considers just and reasonable in the circumstances or may dissolve, wind up, and terminate a limited liability company” in an action by a creditor when it is established that the limited liability

² Fredericks admitted to one-sided distributions from Native Energy of \$110,624.00. (Doc. ID# 96.)

company is unable to pay its just debts. N.D.C.C. § 10-32-119(c)(2). In determining appropriate relief under N.D.C.C. § 10-32-119, the Court:

shall take into consideration the duty that all members in a closely held limited liability company owe one another to act in an honest, fair, and reasonable manner in the operation of the limited liability company and the reasonable expectations of the members as they exist at the inception and develop during the course of the members' relationship with the limited liability company and with each other.

N.D.C.C. § 10-32-119(4).

[¶77] The District Court's Order is consistent with Fredericks' discovery responses and admissions and within the Court's authority under Chapter 10-32 of the North Dakota Century Code. It should be affirmed.

VI. THE COURT DID NOT ERR WHEN IT ORDERED FREDERICKS TO AUTHORIZE PAYMENT TO NORTHERN IMPROVEMENT.

[¶78] The undisputed facts established that the parties agreed that Northern Improvement would perform services for Native Energy and Native Energy would pay for those services. Northern Improvement provided the services and submitted an invoice to Native Energy. Fredericks refused to authorize payment from Native Energy's remaining funds. As part of his response to the motion for summary judgment, Fredericks admitted that money was owed to Northern Improvement, but he claimed the amount was less than the amount claimed. He never indicated what amount was appropriate to be paid.

[¶79] In support of its motion, Northern Improvement provided its invoice and details of the work performed. Except for claiming the bill was not supported, Fredericks offered no factual information to challenge Northern's claim. Similarly on appeal, Fredericks does not cite to anything in the record which creates a fact question as to the amount owed. Judges, whether trial or appellate, are not ferrets, obligated to engage in unassisted searches

of the record for evidence to support a litigant's position. See Linrud v. Linrud, 552 N.W.2d 342, 345 (N.D.1996); First Nat. Bank & Trust Co. v. Jacobsen, 431 N.W.2d 284, 288 (N.D.1988). Fredericks failed to raise a material issue of fact. The Court's order requiring Fredericks to authorize payment to Northern Improvement from Native Energy should be affirmed.

VII. FREDERICKS FAILED TO OBJECT TO INTRODUCTION OF THE PARTIAL JUDGMENT AND THEREFORE HAS NO GROUNDS TO APPEAL ITS ADMISSION.

[¶80] North Dakota law allows for bifurcation in cases involving punitive damages. N.D.C.C. §32-03.2-11(2). Counsel for Fredericks did not request bifurcation. Accordingly, it was necessary for McCormick to introduce evidence of Fredericks' liability and evidence in support of McCormick's claim for punitive damages at the same time.

[¶81] Because the Court granted McCormick summary judgment on some of its claims against Fredericks prior to the jury trial, McCormick introduced the partial judgment as a trial exhibit to show the jury some of Fredericks' actions towards McCormick. The partial judgment was introduced without objection. (Transcript of Jury Trial at 131-132; Supp. App. at 117.)

[¶82] Fredericks now claims the partial judgment included two errors concerning the unequal distributions and the authorization of payment to Northern Improvement. Fredericks claims the punitive damage award would have been smaller and therefore the judgment should be vacated. Fredericks' counsel, however, failed to preserve any issues related to the introduction of the Partial Judgment because he did not object.

[¶83] This Court has long held that an effective appeal of any issue must be appropriately raised in the trial court in order for the court to intelligently rule on it. State v. Steen, 2015 ND 66, ¶ 5, 860 N.W.2d 470 (citation omitted). "In general, a party must object at the time

the alleged irregularity occurs; failure to object acts as a waiver of the claim of error.” Andrews v. O’Hearn, 387 N.W.2d 716, 730 (N.D. 1986) (citations omitted). The party must object at the time the error occurs during trial so “the trial court may take appropriate action if possible to remedy any prejudice that may have resulted.” Piatz v. Austin Mutual Ins. Co., 2002 ND 115, ¶ 7, 646 N.W.2d 681. Even if a party has raised an objection prior to trial, “[a] renewed objection at the time the evidence is offered focuses the court on the objection in the trial context at which time both the relevance and the potential for prejudice will be more discernable.” Linstrom v. Normile, 2017 ND 194, ¶ 10, 899 N.W.2d 287, 291 (citations omitted).

[¶84] Fredericks waived his evidentiary objections to the Revised Partial Judgment when he failed to raise them.

[¶85] Further, even if these issues had been preserved, Fredericks has failed demonstrate prejudice. He had a full opportunity to introduce whatever other evidence he wished to introduce and he could have asked for a limiting instruction. He claims without analysis that but for entry of the partial judgment the punitive damage award would have been less. In so doing, he ignore the magnitude of his fraud and the overwhelming evidence of his guilt. The jury found that he had defrauded Native Energy and McCormick out of over \$350,000 by repeated acts of dishonesty and out right theft. “Error is never presumed upon appeal. The burden resting upon appellant is not sustained by showing mere error; he must show the error was prejudicial.” Schollmeyer v. Saxowsky, 211 N.W.2d 377, 385 (N.D. 1973). Given the overwhelming evidence of Fredericks fraud, he has failed to show introduction of the partial judgment was prejudicial.

VIII. THE COURT DID NOT ERR IN REFUSING TO DISQUALIFY VOGEL.

[¶86] At the time of the first mistrial, Fredericks contended Vogel was disqualified because it had acted as Native Energy/Fredericks lawyers and that this case was the same or similar matter. (App. at 212.) McCormick moved the Court for reconsideration and provided additional factual and legal materials which were not available during the first trial. Fredericks presented no factual information and relied completely on Steve McCormick, Jr.'s truncated cross-examination. After allowing McCormick to make a record on these issues the District Court concluded Vogel had not represented Native Energy or Fredericks and that this case was not the same or similar to Vogel's review of master service agreements on behalf of McCormick. The Court concluded that Vogel was not disqualified. (App. at 213.)

[¶87] A trial Court's decision on a disqualification motion will only be reversed for an abuse of discretion. Thompson v. Goetz, 455 N.W.2d 580, 587 (N.D. 1990); Sargent Cty. Bank v. Wentworth, 500 N.W.2d 862, 871 (N.D. 1993). The burden to show an abuse of discretion is on Fredericks. He fails to do so.

[¶88] Fredericks' first assignment of error is not discernable. He contends the District Court abused its discretion when it failed to disqualify Vogel based on his threats to sue Vogel. "the question is whether the planned claims against Vogel create a sufficient risk that Vogel's decision-making would be influenced by the legal claims that would or could be brought against it." (Brief of Appellant at 27.) Apparently, Fredericks believes the Court erred because after it found there was not a conflict of interest, it did not disqualify Vogel anyway because of his threats of litigation and his new claim of a conflict between Vogel and McCormick. This is nonsensical and Fredericks lacks standing to assert a claim on behalf of McCormick. It would make no sense for the Court, after concluding there was

no conflict between Vogel and Native Energy and Fredericks, to disqualify Vogel based on a conflict between Vogel and McCormick based on Fredericks' threat of litigation.

[¶89] Fredericks claims the District Court abused its discretion when it concluded Vogel had not previously represented Native Energy or Fredericks. The District Court carefully reviewed the entire factual record before it and made multiple factual findings in support of its conclusion. Fredericks ignores all of the Court's factual findings and focuses entirely on his mischaracterization of the truncated cross-examination of Steve McCormick, Jr. Fredericks claims that testimony establishes Vogel reviewed master service agreements on behalf of Native Energy as Native Energy's attorney. The District Court, however, properly found that McCormick hired Vogel. McCormick paid Vogel's bills. There was no agreement between Vogel and Native Energy and Vogel never communicated with Native Energy or Fredericks. Based on these facts, the Court did not abuse its discretion in concluding Vogel did not represent Native Energy or Fredericks. (App. at 213-219.)

[¶90] Fredericks challenges as an abuse of discretion the Court's conclusion that Vogel was not adverse to Native Energy, but offers no facts or analysis to demonstrate why the Court's finding is wrong. Native was not a party to the litigation and, as noted by the Court, McCormick brought several of its claims on behalf of Native Energy. (*Id.*)

[¶91] Chapter 10-32.1 of the North Dakota Century Code recognizes that a direct action may be brought by a member of a limited liability company for an actual injury suffered "that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company." N.D.C.C. § 10-32.1-33(2). North Dakota law also recognizes that a member may institute a derivative action on behalf of the limited liability company to enforce a right specific to the limited liability company itself. N.D.C.C. § 10-32.1-34; see

also Schumacher v. Schumacher, 469 N.W.2d 793, 798 (N.D. 1991) (Recognizing “as a matter of general corporate law, shareholders alleging injury to the corporation must bring an action on behalf of the corporation within the context of a derivative action”). A derivative action, by its very nature, is brought on behalf of the limited liability company and not against it. McCormick’s claims against Fredericks were derivative on behalf of Native Energy. The District Court properly concluded Vogel is not adverse to Native Energy.

[¶92] Fredericks claims the Court abused its discretion when it concluded that under North Dakota law, a lawyer who represents an entity does not also represent its members. In support of this position, Fredericks cites to several out of state cases which are not precedent in North Dakota and ignores North Dakota’s contrary precedent. Fredericks fails to demonstrate how the District Court abused its discretion when it followed North Dakota law. (App. at 215.).

[¶93] Finally, Fredericks claims the District Court abused its discretion when it concluded that even if Vogel is deemed to have previously represented Native Energy, this case is not the same or similar matter. The Court, after reviewing the factual materials concluded Vogel only reviewed master service agreements between Native Energy and other oil companies on behalf of McCormick and that none of the agreements are at issue in this case. The Court specifically concluded McCormick had refuted Fredericks’ claims that Vogel had obtained confidential information and the Court found that it had not received any evidence from either party showing Fredericks ever communicated with Vogel, which would have given him reasonable belief that Vogel represented him. (App. at 218.) Based

on these findings, the Court concluded that Vogel was not representing Plaintiffs concerning the same or a substantially related matter.

[¶94] Fredericks attempts to challenge these findings, however, he does not direct this Court to any contrary evidence, which is his obligation. He also fails to provide any argument as to how review of the Master Service Agreements is relevant to this action.

[¶95] Finally, Fredericks makes no request for relief associated with his claim that the Court erred when it failed to disqualify the Vogel Firm. Presumably, Fredericks is claiming that Vogel would be disqualified from representing McCormick on a going-forward basis. To the extent, however, that Fredericks is claiming that some portion of the Judgment in this matter must be reversed, he has failed to establish that any error by the District Court has resulted in any prejudice.

IX. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT ENTERED ITS ORDER FOR JUDGMENT.

[¶96] The District Court as part of its Order for Judgment ordered that “Terrance Fredericks shall pay to McCormick, Inc., \$400,000, being the exemplary damages awarded by the Jury on September 14, 2018 for actual and constructive fraud. Judgment shall be entered against Terry Fredericks and in favor of McCormick, Inc., in the amount of \$400,000.” (App. at 296.)

[¶97] Fredericks claims the District Court erred when it included in its Order that the exemplary damages were for “actual and constructive” fraud. Fredericks asserts “that addition was simply not part of the jury’s verdict.” The Jury, however, did specifically find that Fredericks was guilty of actual and constructive fraud. (App. at 277.)

[¶98] The language of the Order for Judgment is in the same discretion of the Court, which sat through the trial.

[¶99] To prevail, Fredericks must demonstrate that the Court abused its discretion in completing the Order for Judgment and that the error was prejudicial. Haider v. Finken, 239 N.W.2d 508, 518 (N.D.1976). Fredericks had done neither.

X. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT ENTERED THE FINAL JUDGMENT.

[¶100] Fredericks claims the District Court abused its discretion when it entered the final judgment in this matter, and, consistent with the Jury verdict ordered Fredericks to pay to Native Energy and McCormick the sum of \$352,668.55. Fredericks' claims the District Court erred in following the Jury verdict because he claims McCormick "conceded" the Jury verdict could be ignored.

[¶101] There was no such concession. (See Doc. Id. #478, Plaintiffs' Reply to Fredericks' Objection to Plaintiffs' Proposed Order of Judgment and Plaintiffs' Proposed Judgment at ¶ 11.) McCormick submitted a proposed judgment which applied an accounting and awarded the verdict amount to only to Native Energy. But Fredericks objected so McCormick submitted a revised judgment. There was no concession. Furthermore, Fredericks waived this issue when he failed to raise it with the Court by motion.

[¶102] The District Court did not abuse its discretion when it entered Judgment in favor of Native Energy and McCormick consistent with the Jury verdict.

[¶103] Fredericks also challenges the portion of the Judgment whereby the Court ordered Fredericks to cooperate with the transfer of \$44,000 from the financial accounts of Native Energy to Northern Improvement to pay Northern for the work completed for Native Energy.

[¶104] The Court's previously entered summary judgment granted Northern Improvement's motion to require Fredericks to authorize the payment. As the remaining

cash of Native Energy is held in escrow, Northern Improvement requested that the Court order Fredericks' cooperation and if he would not cooperate that the Judgment would be sufficient to authorize payment.

[¶105] Fredericks makes arguments to this Court why the requested relief should not have been granted by the District Court. He makes no showing that the Court's decision was an abuse of discretion or legally prohibited.

[¶106] The District Court did not abuse its discretion

CONCLUSION

[¶107] This Court should affirm the Judgment and remand this matter to the District Court for the winding up of Native Energy.

Respectfully submitted January 17, 2020.

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CERTIFICATE OF NON- COMPLIANCE

This brief does not comply with the page limitation and consists of 40 pages and is being served with a motion for relief to file in excess of page limitation.

Dated this 17th day of January, 2020.

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APPELLEES AND CROSS APPELLANTS,

MCCORMICK, INC. AND NORTHERN

IMPROVEMENT COMPANY

**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-
Appellant,

v.

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

AFFIDAVIT OF SERVICE

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Bismarck, ND 58502-2097

Telephone: 701.258.7899

STATE OF NORTH DAKOTA)

) SS.

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 January 17, 2020, **Motion for Relief to File in Excess of Page Limitation, Appellees and Cross-Appellants' Brief, and Appellee and Cross-Appellants' Supplemental Appendix** 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:

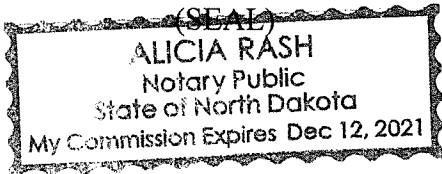
Thomas W. Fredericks
tfredericks@ndnlaw.com

Jeffrey Rasmussen
JRasmussen@ndnlaw.com


Chelsea Ternes

Subscribed and sworn to before me this 17th day of January, 2020.


Notary Public



**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-
Appellant,

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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 January 29, 2020, **Appellees and Cross-Appellants' Brief, and Appellee and Cross-Appellants' Supplemental Appendix** 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 Termes

Subscribed and sworn to before me this 29th day of January, 2020.


Notary Public

