

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

REPLY BRIEF

TERRANCE FREDERICKS, in his personal capacity, as majority owner of Native Energy Construction, and derivatively on behalf of Native Energy Construction

Plaintiff, Appellant

vs.

VOGEL LAW FIRM, MAURICE G. MCCORMICK, MONTE L. ROGNEBY,
MCCORMICK, INC., and NORTHERN IMPROVEMENT COMPANY, INC.

Defendants, Appellees,

SUPREME COURT NO. 20190272

Case No. 08-2019-CV-00489

Appeal of Order dismissing case dated August 20, 2019 (Dkt. 103),
by the Honorable Judge Daniel Borgen, Burleigh County, North Dakota

Thomas W. Fredericks (ND Bar # 03031)
Jeffrey S. Rasmussen, *Pro Hac Vice* Admission
FREDERICKS PEEBLES & PATTERSON LLP
1900 Plaza Drive
Louisville, CO 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: tfredericks@ndnlaw.com
Email: jrasmussen@ndnlaw.com

Attorneys for Plaintiff/Appellant Terrance Fredericks

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DISCUSSION OF LAW

[¶1] If this Court vacates the judgment in the related, case, the only other issue this Court needs to resolve is whether the District Court erred when it failed to grant Mr. Fredericks' motion for summary judgment on liability. In Section I of this brief, Mr. Fredericks discusses why this is so, and in Section II, he discusses why this Court should remand with instruction to grant Mr. Fredericks' motion for summary judgment of liability. Section III discusses the other issues, that the Court should not need to reach.

I. BECAUSE A REQUIRED ELEMENT OF RES JUDICATA IS THAT THERE IS A PRIOR FINAL ORDER, IF THIS COURT VACATED THE FINAL ORDER IN THE RELATED CASE, THE COURT MUST VACATE THE DEPENDENT ORDER OF DISMISSAL IN THIS CASE.

[¶2] As Mr. Fredericks correctly discussed in his opening brief, reversal of the judgment in the earlier case necessarily requires reversal of the judgment in this case. That is so because a final order from a prior case is an element for res judicata. Therefore, where, as here, both orders are kept alive by appeal, a decision to vacate the prior order results in vacating the dependent order.

[¶3] As with many of the Appellees' response arguments, they do not dispute Mr. Fredericks' correct discussion that a final order is an element for res judicata, but they assert solely based upon their prepossession that this Court should hold that a final judgment is not an element. They do not cite any case supporting their assertion, and case law is uniformly contrary to their assertion. *Butler v. Eaton*, 141 U.S. 240 (1891); *Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 181, 185 (Iowa 2007); *Sandy City v. Salt Lake Cty.*, 827 P.2d 227, 230-231 (Utah 1992); 18A Wright & Miller, *Fed. Prac. & Proc. Juris.* § 4433 (3d ed.) (citing numerous cases which establish that "a second judgment based upon the preclusive effects of the first judgment should not stand if the first judgment is

reversed”). *See also* N.D. R. Civ. Proc. 60(b)(5) (one ground for a Rule 60 motion is that the judgment “is based on an earlier judgment that has been reversed or vacated.”).

II. THIS COURT MUST REMAND WITH INSTRUCTIONS THAT THE DISTRICT COURT ENTER SUMMARY JUDGMENT OF LIABILITY AGAINST APPELLEES, BASED UPON APPELLEES’ SWORN STATEMENTS THAT VOGEL NEGOTIATED CONTRACTS FOR NEC.

[¶4] The core legal issue raised in Mr. Fredericks’ motion for summary judgment, and in section V of Mr. Fredericks opening brief to this Court is: where a party admits an allegation under oath and then submits a second statement contradicting its prior admission, do the competing affidavits create a factual dispute sufficient to avoid summary judgment?

[¶5] The uniform holdings of all courts answers that question for us. The decision on summary judgment must be based upon the first statements under oath, and self-serving attempts to retract are, or are deemed as a matter of law, immaterial. Mr. Fredericks cited numerous state and federal court cases, and he directed the Court to citations from every federal circuit, all of which apply this rule of law. Opening Br. ¶80.

[¶6] Given the overwhelming legal authority supporting Mr. Fredericks legal argument, Appellees conspicuously chose not dispute that rule of law, nor do they distinguish the cited case law. But then, as they do on many other issues where they do not have case law support, Appellees’ primary argument is contrary to the undisputed legal rule.

[¶7] Appellees argue that Maurice McCormick’s second affidavit not only defeats summary judgment, but that it proves, without need for McCormick and Vogel to provide discovery, that Maurice McCormick and Steven McCormick were both wrong when they stated under oath that Vogel negotiated MSAs for NEC. Under the legal rule that Appellees did not dispute, the Maurice McCormick’s second affidavit is immaterial when deciding if there is a factual dispute precluding summary judgment in favor of Mr. Fredericks.

[¶8] Appellees also argue, patently incorrectly but with their standard ad homonym arguments against the Indian plaintiff and his attorney, that Maurice McCormick’s first affidavit does not say what it says. Vogel Br. ¶26.¹ That affidavit is in the Court file, in black and white. Thinking he was assisting his relatives’ company and his law firm, he also admitted he had been “negotiating Master Services Agreements (MSA’s)” for NEC, while providing his fiduciary duties to his relatives’ company. He further admitted that he did not think there was anything wrong with that. His legal assertion regarding the duties owed when a third party pays the bill was, of course, wrong. *E.g.*, N.D.R. Prof. Resp. 1.8. After Mr. Fredericks provided a brief discussing the consequences of Maurice McCormick’s admission, he tried to backtrack, now averring “I did not negotiate . . . MSAs.” Opening Br. ¶24. The case law Mr. Fredericks cites discusses the sound policy supporting the holding that the second, self-serving attempt to retract is immaterial.

[¶9] Finally, Appellees inexplicably continue to argue that because McCormick, Inc. was paying the bill, it receives the attorneys’ loyalty and other fiduciary benefits; Vogel Br. ¶10, and Vogel admits it did not get NEC’s informed consent to negotiate contracts for NEC. It even asserts that the fact it was negotiating contracts for NEC, for the benefit of McCormick and without NEC’s knowledge or consent somehow shows that it did not violate fiduciary duties. *Id.* at ¶¶11, 29. That argument would get an ‘F’ grade in a law school professional responsibility exam. N.D.R. Prof. Resp. 1.8. Appellees Rogneby and

¹ Paragraphs 23-26 of Vogel’s brief are, ostensible, part of Vogel’s statement of facts. Those paragraphs, two pages of their brief, do not contain a single citation to the record for the supposed facts. Many of the allegations in those paragraph (and in many other parts of Defendant’s statement of “fact,” *e.g.*, all or parts of ¶10, 11, 12, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, and 26, are false, or lack factual citation because there is simply no evidence of record which could be cited, or are incorrect legal arguments.

Maurice McCormick's failure to understand that very basic rule caused them to compound, over and over, their breaches of duty to NEC. No matter how many times they claim that the person paying the bill receives the fiduciary duties, they are plainly, and very consequentially, wrong.

[¶10] Under summary judgment law, Steven and Maurice McCormick's first statements under oath are binding--Vogel was NEC's attorney, it negotiated contracts for NEC without NEC's permission. This violated fiduciary duties to NEC, including the duty to keep the client informed. As Vogel brags to this Court, it provided its fiduciary duties to McCormick, Inc. when it was doing that work. It violated the duty of loyalty to NEC. Vogel and McCormick continued to hide that fact from NEC until McCormick's witness slipped up at trial. This was an additional, independent violation of the duties to keep the client informed and duty of loyalty (and one that Appellees do not even try to justify to this Court, because they, bluntly, were caught red handed when Steven McCormick testified to that previously undisclosed fact).

[¶11] After the facts related to those breaches slipped out, Vogel and McCormick worked together to get an affidavit from NEC's attorney, without NEC's permission. This violated approximately every fiduciary duty that Vogel and McCormick owed to NEC. Vogel represented McCormick, Inc. against its client NEC, and continued to represent after its conflict of interests became public and after it had conspired with McCormick to harm NEC's interests. This violated the duty of loyalty. Vogel and McCormick have liability, and this Court should so hold and should remand for determination of the amount of damages.

III. APPELLEES' REMAINING ARGUMENTS ARE WITHOUT MERIT.

[¶12] The legal rules defining when res judicata apply have been around, largely unchanged and standardized throughout the United States, since this Nation was founded. As Mr. Fredericks correctly discussed in his opening brief, under that settled law, there are multiple elements for a claim of res judicata. This Court reviews res judicata as an issue of law, and if any element is not shown, or was not ripe for decision, the appealed order in this case must be reversed and this matter remanded.

[¶13] Appellees do not dispute any of the above, and they do not present any non-frivolous argument supporting the District Court's erroneous res judicata decision. The District Court Appellees do not provide any argument that they met all of the elements of res judicata, and their response brief only discusses whether the claims in the present case are somewhat related to the prior case. That simply is not enough to dismiss based upon res judicata.

[¶14] Under the settled legal rules for res judicata, a claim is simply not barred if the claim arose or was discovered after the pleadings were set in the prior case. Opening Brief III. The District Court erred by failing to apply this legal rule. Each of Mr. Fredericks claims in this case arose after the mistrial, or was not discovered until the previously hidden facts came out at the mistrial.

[¶15] Appellees have no non-frivolous argument to the contrary.

[¶16] Under the settled legal rules for res judicata, a court cannot bar a claim if that claim could not be brought in the prior action. The District Court erred by failing to apply this legal rule. Here, Judge Schneider barred the claim in the prior action, directing that the claim would have to be brought in a separate suit. That order per se establishes that the

claims could not be brought in the prior action. Additionally, and also per se, a claim which arose after a prior action could not be brought in the prior action. Opening Br. II.

[¶17] Appellees have no no-frivolous argument to the contrary.

[¶18] To attempt to get around the fact that they cannot support the District Court's erroneous order, Appellees engage in some of the most open use of straw man arguments that this Court will ever see. At paragraph 45 of its brief, McCormick purports to state five claims that are brought against it in Mr. Fredericks complaint. Numbers 2, 3, and 4 are simply and obviously not claims in Mr. Fredericks' complaint. Number 5 is not a claim in Mr. Fredericks complaint, but it is one of the facts alleged regarding damages. Compl. ¶ 53.² Number 1, regarding discovery, is a mis-framing of one small part of Mr. Fredericks' claim that NEC's fiduciary agents violated their duties to keep their principal informed and to be honest. The failure to provide discovery was, under the current facts, not merely a failure to provide discovery. It was also a continuing and a new breach of fiduciary duty to NEC and NEC's majority owner. That allegation also shows that the claim was not discovered until the mistrial (and therefore, that, for the reasons discussed above, it did not have to be brought in Mr. Fredericks previously filed counterclaims in the related case.)

[¶19] Appellees waste numerous pages on an immaterial discussion of the obvious fact that many of the background allegations of facts in this case were the same as those in the related case. Resp. Br. ¶¶35-44. The allegations of fact in those paragraphs are immaterial to claims preclusion, which is the issue in this appeal. Depending on the results in these

² Defendants assert that Mr. Fredericks did not prove damages. That argument is redundant of their other arguments, because it is dependent upon their assertions that they did not owe any fiduciary duties to NEC. Mr. Fredericks complaint alleges that if Appellees owed those duties, they breached them, resulting in harm.

two related appeals, some of the paragraphs might or might not eventually be of interest when considering assertions of issue preclusion by Mr. Fredericks or Appellees—i.e. they are not yet ripe and not relevant to this appeal. Mr. Fredericks claims in this case are, plain and simple, not barred because of overlap of background facts.

[¶20] Mr. Fredericks’ claims in this case are primarily about facts, admitted by Maurice McCormick, that Vogel and McCormick had Vogel provide fiduciary duties to McCormick, when they (either directly or as McCormick’s agent) owed those duties to NEC and Mr. Fredericks; and their conspiracy to cover-up the fact and their compounding of damages by continuing to conspire after their witness slipped up at the first trial.

[¶21] Vogel and McCormick’s response to this Court is merely a continuation of Vogel’s attempt to avoid the consequences of its wrong and its frantic attempt to avoid providing the discovery regarding the scope of Vogel and McCormick’s wrongs.

[¶22] Appellees also make a legally incorrect and circular argument that because Judge Schneider, stated as one of multiple reasons for letting Vogel back into the case before him, that Vogel was not NEC or Mr. Fredericks attorney, that bars all of the claims in this case. That argument is wrong for numerous reasons.

[¶23] First, one element of res judicata is that the prior order must be on the merits of a case. Without case citation, Appellees assert they meet that element. They are wrong. “The matter of disqualification of counsel is unquestionably collateral to the merits of the case.” *Meehan v. Hopps*, 288 P.2d 267, 270 (Cal. 1955) (stating that this is so obvious that it needs no argument). *See also, e.g., Richardson–Merrell v. Koeller*, 472 U.S. 424, 430 (1985) (“An order disqualifying counsel in a civil case is not a final judgment on the merits of the litigation.”); *Apeldyn Corp. v. Samsung Elecs. Co.*, 693 F. Supp. 2d 399,

408 (D. Del. 2010). *Gomes v. Kauwe's Heirs*, 472 P.2d 119, 120 (Haw. 1970) (holding that denial of a motion to disqualify counsel is not a decision on the merits of a case).

[¶24] Second, Judge Schneider's statement was not a necessary determination, because Judge Schneider expressly held that it was one of multiple grounds for his decision. In fact, if it had been a merits issue, Judge Schneider would have had to have submitted it to the jury, because even Judge Schneider admitted that one could read Steven McCormick's testimony as an admission that Vogel had been NEC's attorney.

[¶25] Third, Judge Schneider made his ruling on the collateral matter solely based upon the information that Vogel and McCormick very selectively chose to provide to him, i.e. a very heavily redacted alleged billing statement. App. 27-32. Whether that was proper under the procedural posture before Judge Schneider is debatable, but regardless it renders his decision insufficient for preclusion of claims in this case. The process for determining a claim requires Vogel and McCormick to provide all relevant discovery. Vogel is attempting to win without every providing discovery regarding its actions. For example, Appellees acknowledge that they have written documents regarding the allegedly wrongful actions by Vogel. *E.g.*, App. 27-32. Vogel and McCormick did not provide Judge Schneider with any of the contracts or other documents that the Vogel attorney obtained or reviewed, or what edits that attorney made to them, or notes of his calls. Instead, the attorney said he negotiated contracts for NEC, and then said he did not, and Judge Schneider based his decision on the retraction, without the underlying information which, in a trial process, would be used to test which of Maurice McCormick's sworn statements was true and which was false.

[¶26] Third, and simplest, Mr. Fredericks' claims are not dependent on Vogel being NEC's attorney. Appellees defense to liability is dependent on that issue, but Mr. Fredericks' claims are not.

IV. APPELLEE'S REQUEST FOR SANCTIONS IS FRIVOLOUS.

[¶27] "Unfounded requests for sanctions are themselves frivolous and sanctionable." *Atl. Thermoplastics Co., Inc. v. Faytex Corp.*, 970 F.2d 834, 835 n.1 (Fed. Cir. 1992). That is because "unwarranted accusations of frivolousness, and the satellite litigation generated by unsupported requests for sanctions, are no less burdensome to the court and the parties than are authentically frivolous appeals." *Hoechst Celanese Corp. v. BP Chem. Ltd.*, 78 F.3d 1575, 157 (Fed. Cir. 1996).

[¶28] For reasons adequately discussed above Appellees do not even have a basis for prevailing in this appeal, let alone prevailing in a claim that the appeal is frivolous. In fact, before Vogel came up with the inventive arguments it is making here, Vogel admitted to the District Court that did not even have a basis for asserting res judicata. App. 78. (T. 78).

[¶29] As a way of sending a clear message to the bar not to use allegations of frivolousness as a defensive tactic, this Court should impose sanctions against Appellees, payable to the Court, in an amount determined by the Court.³ The Court would show that even a big law firm in the state, one that apparently views itself as above the law, needs to provide arguments, not ad homonym attacks and arguments without citations.

CONCLUSION

[¶30] 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.

³ Mr. Fredericks fees to respond to the request for sanctions was under \$100. He does not view that as a sufficient sanction for Appellee's defensive use of a request for sanctions.

DATED February 18, 2020

/s/ Thomas W. Fredericks

Thomas W. Fredericks (ND Bar # 03031)
Jeffrey S. Rasmussen
FREDERICKS PEEBLES & PATTERSON LLP
1900 Plaza Drive
Louisville, CO 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: tfredericks@ndnlaw.com
Email: jrasmussen@ndnlaw.com

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

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

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Defendants/Appellees.

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**DECLARATION OF
JEFFREY S. RASMUSSEN IN SUPPORT
OF REPLY BRIEF OF
DEFENDANT/APPELLANT**

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 18, 2020 declarant submitted the attached brief to the Court's electronic filing system and that on February 21, 2020, in accordance with the provisions of the North Dakota Rules of Civil Procedure, declarant served upon the person hereinafter named a true and correct copy of the following documents via email:

1. **Reply Brief of Defendant/Appellant**
2. **Declaration of Service by E-File and Serve and E-Mail**

at the addresses below:

Monte L. Rogneby (#05029)
Diane M. Wehrman (#06421)
Vogel Law Firm
US Bank Building
200 North 3rd Street, Suite 201
P.O. Box 2097
Bismarck, ND 58502-2097
701.258.7899
Email: mrogneby@vogellaw.com
dwehrman@vogellaw.com

*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/ Jeffrey Rasmussen
Jeffrey Rasmussen