20190272
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 16, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

OPENING 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

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STATEMENT OF JURISDICTIONAL GROUNDS

[¶1] This is an appeal from a final order dismissing claims by Plaintiff against Defendants. App. 36, 51. The claims included breaches of a contract and breaches of fiduciary duty owed to a North Dakota corporation. App. 9.

[¶2] The notice of appeal from the order of dismissal was timely filed. The order dismissing the case was signed by the District Court judge and filed on August 20, 2019. App. 36. The notice of appeal was filed on September 4, 2019. App. 51.

ISSUE PRESENTED

[¶3] Did the District Court err when it dismissed all of Plaintiff's claims against Defendants?

[¶4] Did the District Court err because it did not require discovery, as requested by Plaintiff, prior to granting Defendants' motions to dismiss?

[¶5] Did the District Court err by refusing to grant summary judgment on liability to Plaintiff?

STATEMENT OF THE CASE

[¶6] Terrance Fredericks as majority owner of Native Energy Construction and derivatively on behalf of Native Energy Construction (NEC or Native Energy) filed suit in 2019, alleging Vogel Law Firm, through the individually named attorneys, committed numerous breaches of its fiduciary and contractual duties to Native Energy Construction and Mr. Fredericks; and that that Vogel and its attorneys had also committed legal malpractice for which they had liability to Native Energy and to Terry Fredericks. App. 9-17.

[¶7] The complaint also alleged that for some, but not all, of Vogel's attorney's wrongs, McCormick, Inc. was a co-conspirator, and that for some of Vogel's wrongs, McCormick,

Inc. was responsible because Vogel committed its wrongs with McCormick's approval or ratification, or for McCormick's benefit. *Id.*

[¶8] The complaint alleged that Defendants committed numerous independent breaches between 2010 and the time of filing the lawsuit, and it also alleged that the breaches were ongoing, for reasons which remain applicable to the present day. *Id*.

[¶9] Without filing an answer, the Vogel Law Firm, representing both itself and other defendants, filed motions to dismiss and for summary judgment. App. 27, 31.

[¶10] NEC opposed Defendants' motions, and NEC included a request, under North Dakota Rule of Civil Procedure 56(f) to delay decision on Defendants' motions for summary judgment pending discovery. Dkt. 50. NEC also moved for summary judgment of liability regarding claims for which the material facts had previously been admitted to, under oath, by Vogel and McCormick, Inc. App. 33; Dkt. 50.

[¶11] The District Court, Judge Borgen presiding, granted Defendants' motions to dismiss. App. 36. It did so based solely on its conclusion that NEC's claims were barred by res judicata.[1] App. 42, ¶26.

[¶12] NEC timely appealed to this Court. App. 51.

STATEMENT OF FACTS

[¶13] NEC was a North Dakota corporation. Mr. Fredericks was NEC's majority owner. App. 9.

[¶14] Under NEC's foundational documents, McCormick, Inc., was a 49% minority owner. But after NEC was founded, NEC acquired two of the three votes on NEC's Board,

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[1] Many courts, including this Court, synonymously refer to "res judicata" as "claim preclusion." *E.g.*, *Riverwood Commercial Park, LLC v. Standard Oil Co., Inc.*, 2007 ND 36 ¶13, 729 N.W.2d 101. Copying the District Court, Appellant will use the term "res judicata" throughout this brief.

and it took 5% of gross profits plus 49% of net profits from NEC. It took those 5% of profits without any written contract and without approval by Board Resolution or vote. App. 10-11, ¶¶17, 19, 20.

[¶15] One of the law firms that provides legal services to McCormick, Inc. is Vogel Law Firm. Maurice McCormick, who is closely related to officers of McCormick, Inc., and Monte Rogneby are attorneys with Vogel Law Firm who provide legal service to McCormick, Inc. App. 12, ¶23

[¶16] In 2010-2011, McCormick Inc. and Vogel Law Firm conspired to have McCormick family member Maurice McCormick, negotiate master service agreements for NEC; but to do so while providing their fiduciary duties to McCormick, Inc. instead of to NEC. App. 10, ¶¶11-13; 14 ¶40. It did not inform Mr. Fredericks of these facts at the time or at any time prior to October 2017. App. 10, ¶14 (and as also discussed below).

[¶17] In *McCormick, Inc. v. Fredericks*, Burleigh Co. case 08-2016-CV-01107, (hereinafter referred to as the "related case" or "original action"), the largest dispute in the case was whether McCormick's taking of 5% of gross profits, approximately $1,000,000, from Native Energy was wrongful. In discovery in that case, Mr. Fredericks requested all documents showing services that McCormick claimed were provided in exchange for taking $1,000,000, or which McCormick claimed were of value to NEC. App. at 11, ¶¶15-16.

[¶18] Defendants worked in concert to hide the fact that Vogel had previously provided any services to NEC, and to hide that when it provided those services, it did so for the benefit of McCormick, Inc. instead of for the benefit of NEC. Complaint, App. 9, *passim*; *e.g.*, App. at 11, ¶¶15-16; 13, ¶32. Steven McCormick, an officer for McCormick, Inc. and

Defendant Rogneby both signed discovery responses for Vogel which omitted the required disclosure that Vogel provide service that were at issue/in dispute in the related case. McCormick v. Fredericks, Dkt. 232 (McCormick's Responses to Interrogatories 1 and 2). *See also* App. at 11, ¶¶15-16; 13, ¶32.

[¶19] During the first trial in the related matter, Steven McCormick let slip out in testimony that Vogel had provided those services. App. 10, ¶12.

[¶20] He asserted that the services Vogel provided were part of the justification for McCormick taking approximately $1,000,000 from Native Energy. The Court in that matter disqualified Vogel and declared a mistrial on October 3, 2017. *See McCormick v. Fredericks*, Dkt. 227 ¶2.

[¶21] After the Court disqualified Vogel from further representing McCormick, Inc. in the related action, Vogel, in an attempt to get back into the case, sought to backtrack from its prior admissions and to impeach its client and its own attorney. *McCormick v. Fredericks*, Dkt. 226, 227.

[¶22] As part of that effort, Vogel attorney Rogneby contacted the attorney that Steven McCormick had identified as NEC's attorney, i.e. Maurice McCormick. Rogneby made that contact without notice to Mr. Fredericks. Without even consulting with NEC's majority owner, Rogneby obtained affidavits from Maurice McCormick, for the benefit of Vogel, which he submitted to the Court. App. 15, ¶¶34-38.

[¶23] In support of Vogel's motion seeking to get back into the related case, Maurice McCormick serially provided two affidavits.

[¶24] In his first affidavit, App. 20, McCormick admitted he had been "**negotiating** Master Service Agreements (MSA's)." *Id.* at ¶6. He then submitted a second affidavit in

which he directly contradicted his first affidavit. In his second affidavit, he asserts "**I did not negotiate** with any person or entity any of the terms of the MSAs I was asked to review." App. 26, ¶5. *See also* Dkt. 9 at ¶29 (Monte Rogneby signs a pleading which quotes with approval the Maurice McCormick's' assertion that he had been negotiating MSAs for Native Energy.)

[¶25] Maurice McCormick's admission and Rogneby's ratification of it are identical to the prior admission under oath by Steven McCormick. Steven McCormick was at the relevant time an officer of both McCormick, Inc. and Native Energy. In his prior testimony, Steven McCormick was seeking to justify McCormick taking $1,000,000 from Native Energy even though McCormick admitted it had no written contract, and no corporate resolution or motion authorizing it to take that money. He claimed that McCormick was entitled to the money because McCormick provided the capital to pay for all of the professional services that Native Energy needed. He then let slip out that Vogel was one of the law firms that had provided legal services to Native Energy. He testified:

> And we also hired Vogel Law, which McCormick –McCormick/Northern paid all the legal fees as I considered 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.

Dkt. 25, Ex. A to Wehrman March 12 2019 Aff. at 30.

[¶26] The contracts that Steven and Maurice McCormick both admitted Vogel was negotiating were Master Service Agreements (MSAs) between Native Energy and oil service providers. App. 20, ¶2.

[¶27] Neither McCormick, Inc. nor Vogel was a party to the MSAs. *Id.*

[¶28] The negotiating that Maurice McCormick admitted to under oath was legal services on behalf of Native Energy, not McCormick, Inc. App. 20-21. Therefore, Vogel owed its fiduciary duties to Native Energy.

[¶29] Vogel admits it did not provide its fiduciary duties to Native Energy. Instead, as Maurice McCormick further admitted in his affidavits, when he was negotiating the contracts for Native Energy, he was providing his fiduciary duties to McCormick, Inc. *E.g.*, App., 20 ¶4, 25 ¶2c.

[¶30] Defendants admitted in their briefs in support of their motions for summary judgment that they did not obtain Native Energy's consent to have McCormick be a third party payor for legal services to Native Energy. E.g. Dkt. 24, ¶16.[2]

[¶31] As relates to the current malpractice and breach of duty cases against Vogel Law Firm and McCormick, Inc., Vogel had multiple clients. It had one large client, Dkt. 8, attachment 1 (redacted billing records show that only a small part of the services Vogel billed to McCormick, Inc. were those for which McCormick, Inc. was the third-party payor for NEC), and it had two small clients, Native Energy and Terry Fredericks in his capacity as majority owner of Native Energy. App. 20.

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[2] Attorneys are not permitted to take money from a third party payor without informed consent from the client. R. Prof. Cond. 1.8(f).

[¶32] The complaint in this case alleges that when Defendants Rogneby, Vogel and McCormick, Inc. each had a duty to disclose the fact that Vogel had provided legal services related to Native Energy, all of them failed to disclose that fact. Their failure to disclose was a violation of discovery, but it was also, and separately, a violation of their fiduciary duties to Native Energy and to its majority owner, and an attempt to hide all Defendants' prior wrongdoing from Native Energy and Native Energy's majority owner. App. 13, ¶32; 15¶48.

[¶33] All defendants continue, to this day, to hide from Native Energy and its majority owner the scope of their conflicted representation of Native Energy. Dkt. 50, ¶34-38

[¶34] Despite Maurice McCormick's admission that he had been negotiating Master Service Agreements for NEC, and despite the fact that Vogel/McCormick had been caught trying to hide that discoverable information from Mr. Frederick, the Court in the related case vacated its order disqualifying Vogel. App. 37 ¶8.

[¶35] After Maurice and Steven McCormick made their admissions, Mr. Fredericks moved to amend his complaint in the related case.

[¶36] The Court in that case denied the motion to add claims against Vogel or claim for which Vogel has potential legal liability. App. 38 ¶9.

[¶37] The District Court in the captioned matter was aware that the District Court in the related case had refused to allow Mr. Fredericks and NEC to bring claims against Vogel, *id.*, but it dismissed Plaintiff's complaint in this case. It did so solely based upon its decision that the claims were barred by res judicata. App. 42 ¶26.

LAW AND ARGUMENT

[1] Claims preclusion, synonymously referred to as res judicata, has four elements.

1. The parties must be the same as in the prior suit.

2. The claim was brought or could have been brought in the prior case.

3. The court must have had subject matter jurisdiction in the prior suit.

4. The prior suit must have resulted in a final judgment on the merits.

I. IF MR. FREDERICKS PREVAILS IN HIS APPEAL IN THE RELATED CASE, THIS COURT WOULD BE REQUIRED TO VACATE THE ORDER OF DISMISSAL IN THIS CASE.

[¶38] If this Court vacates the judgment in the related case, then the fourth element of claims preclusion would be missing, and this Court would be required to vacate the appealed order in this case, and should proceed to the question of whether the District Court erred when it denied Mr. Fredericks' motion for summary judgment of liability, discussed in section V of this brief.

[¶39] Additionally, Mr. Fredericks argues that the District Court in the related case laced subject matter jurisdiction over Defendant McCormick's new claim, asserted at trial in the related case, of an oral contract at the ownership level. If Mr. Fredericks prevails on that issue, then this Court should also vacate the appealed order because third element for res judicata would not be established. The Court should then proceed to Mr. Fredericks summary judgment argument or remand for further consideration in light of this Court's jurisdictional ruling in the related case.

II. BECAUSE THE COURT IN THE RELATED CASE HAD DENIED MR. FREDERICKS' MOTION TO ADD CLAIMS AGAINST VOGEL IN THAT CASE, THE DISTRICT COURT IN THIS CASE ERRED WHEN IT HELD THAT MR. FREDERICKS COULD HAVE AND SHOULD HAVE BROUGHT HIS CLAIMS IN THE RELATED CASE.

[¶40] In the related case, the District Court held that Native Energy and Mr. Fredericks could **not** bring claims against Vogel in that prior related case.

[¶41] But in the present case, the District Court dismissed NEC's claims because it held Mr. Fredericks and Native Energy should have and could have brought its claims against Vogel in the prior case.

[¶42] This Court must vacate at least one of those two decisions—Mr. Fredericks and Native Energy must be permitted to bring their claims against Vogel in one case or the other. As Mr. Fredericks discusses in the related case, this Court should vacate the decision by Judge Schneider in the related case, and remand with instructions to disqualify Vogel Law Firm in that case. Then, NEC could bring all of its claims—those that were hidden until 2017 and those that have arisen since 2017--as part of that case.

[¶43] The District Court held: "Mr. Fredericks' claims in the current matter were capable of being, and should have been, raised as part of the Original Action [i.e. the related case that is set to be heard by this Court on the same date as the current appeal]. By failing to do so, Fredericks's claims are now barred under the doctrine of res judicata. For these reasons, Plaintiff's complaint is hereby DISMISSED with prejudice." App. at 42¶26-27.

[¶44] "Res judicata is a question of law, which we review de novo. *See, e.g.*, *Chapman v. Wells*, 557 N.W.2d 725, 728 (N.D. 1996)." *Botteicher v. Becker*, 2018 ND 111, ¶ 8, 910 N.W.2d 861, 864.

[¶45] Because res judicata applies to a claim, each claim must be separately analyzed. *E.g. Fettig v. Estate of Fettig*, 2019 N.D. 261, ¶18, 934 N.W.2d 547, 554.

[¶46] Much of the District Court's discussion of the law of res judicata in the appealed order is correct. In fact, the District Court's analysis in the present matter effectively shows why the Judge's decision allowing Vogel back into the original action and then barring the claims involving Vogel in the original action was erroneous.

[¶47] Mr. Fredericks agrees with the District Court in this case that the better way of proceeding would be to permit all of Mr. Fredericks and Native Energy's claims against Vogel, its attorneys.

[¶48] But the District Court was, for two independent reasons, plainly wrong when it held, under the facts and procedural posture before it, that Mr. Fredericks could have and should have brought his claims in the original action. As discussed in this section of the brief, the District Court was wrong because a Court Order in the other case barred him from bringing the claims in that case. Then as discussed in the next section of this brief, Mr. Fredericks could not bring claims which did not even exist when he brought his counterclaims in the related case, or which had been wrongfully hidden from him when he brought those counterclaims.

[¶49] In the appealed order in this case, the District Court itself noted that the applicable procedural fact in <u>this case</u> was that Mr. Fredericks had attempted to bring his claims against Vogel in the original action and the Judge in that case had denied that motion. App. 40, ¶17. Mr. Fredericks was <u>barred</u> from bringing his claims in the original action. Therefore, and axiomatically, the District Court in this case was wrong when it held that Mr. Fredericks could have and should have brought the claims in the original action.

[¶50] In fact, Vogel's own attorney, on the record, <u>expressly acknowledged that NEC's claims against Vogel were not barred by res judicata</u>. It made that concession in its response to the Court's express question "whether or not" Vogel was asserting claims preclusion. Vogel responded that because "the breach of duty and legal malpractice

claims" against Vogel "were not allowed to be brought by Judge Schneider," claims preclusion "is not [asserted] as to that issue." App. 46-47 (T. at 23:19-24:17).[3]

III. THE DISTRICT COURT INDEPENDENTLY ERRED WHEN IT HELD THAT CLAIMS THAT AROSE OR WERE DISCOVERED LONG AFTER THE ORIGINAL ACTION WAS FILED HAD TO BE BROUGHT IN THE ORIGINAL ACTION.

[¶51] The District Court's order was also erroneous because it barred claims that arose or were discovered long after the counterclaim in the original action was filed.

[¶52] The applicable legal rule is that where claims arise or are discovered after a party has filed its complaint (i.e. here after Mr. Fredericks filed his counterclaims in the original action), res judicata does not apply if the claims are brought in a new case.

[2] This Court has expressly held that the legal analysis for this second element of res judicata is the same analysis the Court applies for compulsory counterclaims. *E.g., Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc.*, 2007 N.D. 36 ¶13 (quoting *Ungar v. N.D. State Univ.*, 2006 N.D. 185 ¶10-11).

[¶53] North Dakota defines by written rule when a claim is a "compulsory counterclaim." That rule states:

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[3] At the hearing where Vogel made that concession, the District Court then set a single round of simultaneous supplemental briefing "strictly on the issue of res judicata," "so that no one reads anyone else's brief on this." App. 47-48 (T. at 24: 22-25:3). Because of Vogel's concession that it was not even asserting res judicata, NEC's supplemental brief regarding Vogel contained only a single paragraph noting that Vogel had conceded the issue. Without prior notice to Native Energy, and knowing that the Court had not provided for any responsive briefing, Vogel then provided a supplemental brief in which, without mentioning its prior concession, it argued for dismissal based upon res judicata.

> (a) Compulsory Counterclaim
> (1) *In General.* A pleading must state as a counterclaim any claim that--*at the time of its service*--the pleader has against any opposing party, if the claim:
>
> > (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and
> > (B) *does not require adding another party over whom the court cannot acquire jurisdiction.*

A. THE CLAIMS ARE NOT BARRED BECAUSE THEY DID NOT EXIST, OR WERE NOT KNOW "AT THE TIME OF [] SERVICE" OF THE COUNTERCLAIMS.

[¶54] Here, Defendants did not argue and could not have argued that the claims in this case were ripe at the time of service of the answer in the prior related case. The claims are therefore not compulsory counterclaims. N.D. R. Civ. Proc. 13(a)(1). As this Court succinctly stated when it rejected the exact argument that McCormick made, and the District Court adopted in the appealed order:

> This assertion is without merit. Rule 13(a), N.D.R.Civ.P., provides in part that "[a] pleading shall state as a counterclaim any claim *which at the time of serving the pleading the pleader has against any opposing party, ...*" [Emphasis added by N.D. Supreme Court.] A party is not required to assert a counterclaim that has not matured at the time he serves his pleading. 6 C. Wright and A. Miller, Federal Practice and Procedure: Civil § 1411 (1971). The prior proceeding was commenced in 1980. The present action seeks rent for use of the land in 1981. This claim had not matured at the time LeRoy and Marie served their answer in the prior proceeding.

Schwarting v. Schwarting, 354 N.W.2d 706, 708 (N.D. 1984).

[¶55] As set out in detail in the discussion of facts above, NEC's complaint in this case alleged that Defendants breached duties long after the counterclaims in the related case was filed. Those claims did not exist when NEC filed its counterclaims in the related case.

[¶56] The complaint alleges other breaches that occurred prior to the filing of the related case, but as alleged in the complaint and as is indisputable (as discussed above), Defendants wrongly hid those breaches from discovery until October 2017. NEC therefore did not know of those claims when it filed its counterclaims in the related case.

[¶57] Defendants' breaches included improperly concealing prior breaches. The alleged wrongful concealment is, itself, one of Defendants' many violations of fiduciary duties and malpractice, *e.g.*, R. Prof. Resp. 4.1; ABA Comm. On Ethics and Prof'l Resp. Formal Op. 94-380 (1994), *Trousdale v. Henry*, 261 S.W.3d 221 (Tex. App. 2016) (wrongful concealment of prior wrong is itself a breach of fiduciary duties). The complaint alleges that Vogel's actions to conceal also resulted in additional damages to Native Energy. Damages from wrongful concealment are, of course, common in malpractice and breach of duty cases. The wrongful concealment occurred at least through October 2017, and is alleged to be occurring to this day.

B. THE CLAIMS ARE NOT COMPULSORY COUNTERCLAIMS BECAUSE THE DISTRICT COURT HAD BARRED NEC FROM ADDING CLAIMS AGAINST VOGEL.

[¶58] Additionally, the claims against McCormick are intertwined with the claims against Vogel, but when Mr. Fredericks did seek to bring the claims in the prior case, Vogel/McCormick opposed that motion and the Court denied the request to add Vogel as a party. The claims therefore were not compulsory counterclaims in the prior suit because they required an additional party. N.D. R. Civ. Proc. 13((a)(1)(B).

C. THE CLAIMS ARE NOT COMPULSORY COUNTERCLAIMS BECAUSE THEY DID NOT ARISE OUT OF THE TRANSACTION OR OCCURRENCE THAT IS THE SUBJECT OF THE PRIOR SUIT.

[¶59] Defendants did not even have a legal argument regarding the two elements contained in the definition of "compulsory counterclaim," discussed above, and therefore the Court should not even need to consider their claim meet the one other primary element. If this Court were to review that element, it would find that Defendants also could not satisfy that one remaining primary element contained in Rule 13(a)(1)(A).

[¶60] In *In re Martin*, 358 S.W.3d 767 (Tex. App. 2012), the court held, under facts remarkably similar to the present case, that claims by a corporation in a second suit did not arise out of the same transaction or occurrence as the prior case, and therefore were not compulsory counterclaims in a prior-filed suit. As here, the disputes in both suits in *In re Martin* were effectively between the two founders/major stockholders in a closely held corporation. In the first suit, one owner (Scott) brought suit against the corporation and the other owner (Reuben) for breaches of fiduciary duty. In a second suit filed two years later, the corporation brought claims against Scott, alleging that Scott's prior suit and other actions after that suit had been filed were breaches of fiduciary duty. Scott moved to dismiss the second suit, alleging that the breaches were compulsory counterclaims to the first suit. The trial court denied that motion, and the appellate court affirmed the trial court's ruling. The court noted that the two suits were related, but held that because the claims in the second suit included alleged wrongs which occurred after the first suit had been filed, the claims were not compulsory counterclaims in the first suit.

[¶61] As in *In re Martin*, the claims in this case each include wrongful actions that occurred well after the prior suit was filed: after that suit was filed, McCormick and Vogel conspired to hide facts regarding Vogel's conflict of interest; then when one of McCormick's officers let the existence of the suppressed information slip out at trial, McCormick and Vogel worked in concert to further violate their duties to Native Energy and Mr. Fredericks. The damages from Defendant's wrongful actions occurred during the pendency of the related case, and continue to occur to this day because McCormick continues to work with Native Energy's attorney (i.e. Vogel) to further McCormick and

Vogel's interests at the expense of Native Energy. The claims therefore were not compulsory counterclaims in the prior suit. *In re Martin*, 358 S.W.3d 767.

IV. THE DISTRICT COURT ERRED WHEN IT REFUSED TO DELAY A DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PENDING DISCOVERY.

[¶62] For the reasons discussed above, the date of Defendants' various breaches and the facts regarding its concealment of conflict are material to whether any claims are barred by res judicata. Fredericks and NEC have not been provided discovery regarding those facts. In the District Court, Fredericks and NEC requested that the Court not grant summary judgment to Defendants until the relevant discovery had been provided. If this Court does not vacate the order of dismissal for reasons stated above, it should vacate the decision and remand to require discovery. The District Court should not have made a determination that the claims in this case could have been brought in the prior related case without discovery regarding the dates and the scope of Defendants' wrongdoing.

[¶63] Summary judgement is appropriate only after the non-moving party has had a reasonable opportunity for discovery to develop its position. *Aho v. Maragos*, 579 N.W. 2d 165 (N.D. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)). North Dakota rules of civil procedure allow for additional discovery before summary judgment is granted. The applicable rule states:

> [i]f a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) deny the motion; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order.

N.D.R.Civ.P. 56(f). "Although not binding, federal court interpretations of a corresponding fed rule of civil procedure are highly persuasive in construing [Rule

56(f)]."[4] *Choice Fin. v. Schellpfeffer*, 712 N.W.2d 855, 859 (N.D. 2006) (quoting *Thompson v. Peterson*, 546 N.W. 2d 856, 860 (N.D. 1996)).

[¶64] Under Rule 56(f), a court may order a continuance to allow additional discovery before deciding a motion for summary judgement. *Horob*, 777 N.W. 2d at 615; *see also Toben v. Bridgestone Retail Operations, LLC*, 751 F.3d 888, 894 (8th Cir. 2014) ("Pursuant to Rule 56(d), a party opposing summary judgment may move for a continuance until adequate discovery has been completed") (internal quotations omitted). The rule is intended to "safeguard against judges swinging the summary judgement axe too hastily." *Aho*, 579 N.W.2d at 167.

[¶65] A court's primary concern under 56(f) is ensuring that parties are given full and fair opportunity to conduct necessary discovery before being required to meet a motion for summary judgment. *Id.*; *see also Jackson v. Riebold*, 815 F.3d 1114, 1121 (8th Cir. 2016) ("The general rule is that summary judgment is appropriate only after the nonmovant has had adequate time for discovery") (internal quotations omitted).

[¶66] Rule 56(f) must be applied liberally. *Id.* "[T]he purpose of subdivision (f) is to provide an additional safeguard against an improvident or premature grant of summary judgment and the rule generally has been applied to achieve that objective. Consistent with this purpose, courts have stated that . . . [the rule] should be applied with a spirit of liberality." *Id.* (quoting *Johnson Farms v. McEnroe*, 568 N.W.2d 920 (N.D. 1997)). Furthermore, "where the facts are in possession of the moving party a continuance of a

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[4] The corresponding federal rule is F.R.Civ.P. 56(d), which states "[w]hen Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order."

motion for summary judgement for purposes of discovery should be granted almost as a matter of course." *Choice Fin.*, 712 N.W. 2d at 860 (quoting *Costlow v. United States*, 552 F.2d 560, 564 (3d Cir. 1977)). Here, facts which were relevant to Defendants' summary judgment motions were and still are solely in Defendants' possession. To date, and contrary to the core reason that court rules provide for discovery, Defendants have only selectively disclosed small parts of the information which furthers their narrative, while they have sought to conceal the information which would contradict their narrative. They moved for summary judgment based upon their own highly selective disclosure.

[¶67] As part of its opposition to summary judgment, NEC argued the Court should have denied Defendant's motion for summary judgment or held that motion in abeyance until Defendants provided discovery related to the following issues:

[¶68] All communications between and among defendants regarding any Vogel attorney's work on behalf of Native Energy. Plaintiff's attorney expects that discovery will show that: Maurice McCormick's first affidavit was truthful and his second self-serving affidavit was not; McCormick, Inc.'s attorney worked with Maurice McCormick to word his second affidavit to benefit McCormick, Inc. and to harm the interests of Native Energy; 3) further evidence showing that Maurice McCormick did not have Native Energy's authorization to disclose any information from his representation of Native Energy to McCormick Inc. or McCormick Inc.'s attorneys.

[¶69] All communications between Defendants regarding their efforts to conceal the fact that Vogel had negotiated contracts for Native Energy. Plaintiff's attorney expects that discovery will show that Vogel and McCormick knew that Vogel had a conflict which prevented it from representing McCormick in a suit against Mr. Frederick, and that Vogel

and McCormick purposefully concealed the conflict by failing to include the fact in discovery, by failing to include it in Maurice McCormick's communications to Mr. Fredericks attorneys, and by continuing to fail to provide information regarding the conflict to this day.

[¶70] All communications between Vogel Law Firm and those that it was negotiating with on the MSAs to which Native Energy was a party. Plaintiff's attorney expects that discovery will show that Vogel claimed in those discussions that it was Native Energy's attorney.

[¶71] Discovery related to the credibility of Maurice McCormick, Monty Rogneby, and other Vogel attorneys who worked to represent McCormick against Mr. Fredericks. Plaintiff's attorney expect that discovery will provide relevant evidence regarding credibility.

[¶72] In short, Defendants for years failed and refused to provide discovery regarding Vogel's prior work negotiating contracts for NEC. That discovery would include evidence which would be directly related to res judicata elements discussed above.

[¶73] NEC's position, as discussed above, is that even with the limited facts that Defendants have unintentionally or intentionally disclosed regarding their wrongdoing, there was enough to reject Defendant's claim of res judicata. But if this Court were to disagree, it should at the very least, vacate and remand for discovery.

V. THE DISTRICT COURT ERRED WHEN IT DENIED SUMMARY JUDGMENT OF LIABILITY TO NEC.

[¶74] In its order, the District Court states that NEC's cross-motion for summary judgment was before the Court for decision. App. 36, ¶1. NEC's understanding is that the Court, *sub silento*, denied that motion as moot when the Court dismissed the case.

[¶75] Mr. Fredericks' motion presented a single, straightforward legal issue for summary judgment: Is summary judgment appropriate based upon a Defendants' admissions under oath, even if Defendants then submit later statements contradicting those admissions?

[¶76] Plaintiff moved for summary judgment of liability, and showed that summary judgment of liability was proper if Vogel had been NEC's attorney. As discussed above, Steven McCormick's testimony and Maurice McCormick had admitted under oath that Vogel had been NEC's attorney. After Plaintiff discussed that the McCormicks' admissions established that Defendants had breached duties to Plaintiff, Maurice McCormick submitted a second affidavit in which he asserted that and his relative's prior testimony had been false. In his second affidavit he claimed he had not been NEC's attorney.

[¶77] Application of summary judgment law to these undisputed facts shows that Maurice McCormick's attempted retraction is insufficient to create a material factual dispute on summary judgment.

[¶78] In its complaint, Native Energy asserted that all defendants breached numerous fiduciary duties to Native Energy. Native Energy also asserted that because Vogel's breaches were in its role as an attorney, some of its wrongful actions constitute legal malpractice. Defendants cannot dispute, and effectively admitted that if Vogel was Native Energy's attorney, then the remaining elements of these breaches are proven. That is, in its affidavits and even in its filings in this case, Vogel openly admits that it never accorded fiduciary duties to Native Energy. If it owed those duties to Native Energy, then it breached them. With McCormick's' knowledge and approval, Vogel worked at all time to further

the interests of McCormick. It was loyal to McCormick, and it used information in its position to further McCormick and Vogel's interests.

A. THIS COURT MUST HOLD THAT VOGEL WAS NATIVE ENERGY'S ATTORNEY, BASED UPON THE STATEMENTS UNDER OATH OF MAURICE MCCORMICK AND THE CORROBORATING TESTIMONY UNDER OATH OF STEVEN MCCORMICK.

[¶79] As discussed above, the fact in this case is that Maurice McCormick and Steven McCormick have both stated under oath that Maurice McCormick was negotiating major contracts for Native Energy. Where a party has admitted a fact under oath, that fact is established for purposes of summary judgment based upon that admission. N.D. R. Civ. Proc. 56.

[¶80] That rule applies even where the party making the admission later creates a self-serving affidavit which contradicts that party's prior admission under oath.

> In reviewing motions for summary judgment, courts have long tended to treat affidavits repudiating previous testimony as irrelevant, inadmissible, or evasive. The rule is equally applicable to a conflict between the affidavit and the deposition testimony of a single witness.

5 Am. Jur. Trials 105. *See also* Christine Neylon O'Brien, *The United States Supreme Court Resolves the Effect of Disability Benefit Claims Upon Americans with Disabilities Act Complaints in Cleveland v. Policy Management Systems Corporation*, 17 Hofstra Lab. & Emp. L.J. 115, 127 n. 68 (1999) (citing cases from <u>every federal circuit court of appeals</u> supporting the rule of law that summary judgment is required based upon the party's admission against interest in sworn testimony, even when the party makes a later self-serving attempt to retract.).[5]

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[5] Because the standard for summary judgment in North Dakota is the same as the standard in the federal system, federal case law under Rule 56 is strongly persuasive and frequently relied upon in North Dakota state courts. *E.g., Perius v. Nodak Mut. Ins. Co.*, 2010 ND 355¶21.

> The rationale behind the holding was explained by the First Department in Fernandez v. VLA Really LLC:
>
> Issues of fact and credibility are not ordinarily determined on a motion for summary judgment. But where self-serving statements are submitted by plaintiff in opposition that "clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of h[is] earlier testimony, they are insufficient to raise a triable issue of fact to defeat defendant's motion for summary judgment" (citation omitted).

David Paul Horowitz, *Stay in the Zone*, N.Y. St. B.J., October 2017, at 36, 37.

[¶81] As discussed above, Maurice McCormick's two statements clearly contradict each other. In the first he says he was negotiating the MSAs for Native Energy. After realizing the consequences of that admission, he says he was not negotiating the MSAs for Native Energy.

[¶82] Native Energy's position is that it is particularly important that the rule of law discussed above apply to attorneys. Attorneys are officers of the Court, they fully understand how affidavits are used in courts, and they should not be permitted to change their affidavit testimony to try to get themselves out of the consequences of their prior admissions.

[¶83] For the reasons stated above, this Court should conclude that Vogel was negotiating contracts for Native Energy.

B. VOGEL BREACHED ITS FIDUCIARY DUTIES TO NATIVE ENERGY AND COMMITTED MALPRACTICE.

[¶84] In his affidavits, Maurice McCormick admits the facts which establish that if he was Native Energy's attorney, the Vogel Law Firm breached his duties to Native Energy.

[¶85] Maurice McCormick admits in his affidavit that when he was negotiating the MSAs for Native Energy, he was treating McCormick as his sole client. He was looking out solely

for the best interest of McCormick. This is a breach of the duty of loyalty owed to Native Energy.

[¶86] Maurice McCormick admits in his affidavit that he used information from his prior representation to benefit McCormick and Vogel. That is a breach of the duty of confidentiality. In fact, his submission of an affidavit in support of Vogel and McCormick, Inc. is itself a violation of the duty of confidentiality.

[¶87] Defendants further admit that they never consulted with Mr. Fredericks in his capacity as CEO and majority owner of Native Energy. Instead, they consulted with their bigger client, McCormick and did McCormick's bidding.

[¶88] Defendants attempt to justify these breaches of duty and malpractice based upon their later contention that Native Energy was not Vogel client—therefore, Defendants claim, they were free to use the information Vogel had acquired without Native Energy's permission, and were free to negotiate the MSAs for the benefit of McCormick instead of for the benefit of Native Energy. His attempted justification is merely an admission of the remaining elements of Counts I and II of the complaint.

[¶89] Based upon the above, the District Court should have not only denied Defendant's motions to dismiss but should have affirmatively granted Plaintiff's motion for summary judgment of liability to Native Energy. Vogel abused its position as attorney for Native Energy and Terry Fredericks to benefit its large client, McCormick. McCormick was a willing conspirator in Vogel's gross violation of its duties to loyalty to Native Energy. The Court should then remand for discovery and then trial to determine the damages to Native Energy from Defendants' breaches of duties and from Defendants' subsequent attempts concealment of their breaches.

CONCLUSION

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

DATED December16, 2019.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney for Appellant certifies that attached brief complies with the page limitation stated in North Dakota Appellate Court Rule 32(a)(8)(A). The page count of the filed electronic document states that the document contains 26 pages.

/s/ Thomas W. Fredericks
Thomas W. Fredericks

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

AFFIDAVIT OF SERVICE BY E-FILE AND SERVE AND E-MAIL

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

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STATE OF COLORADO

COUNTY OF BOULDER

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

[¶2.] That on the 16th day of December, 2019, in accordance with the provisions of the North Dakota Rules of Civil Procedure, the affiant served upon the person hereinafter named a true and correct copy of the following documents in said matter:

1. **Opening Brief**
2. **Appendix to Appellant's Opening Brief**
3. **Affidavit of Service by E-File and Serve and E-Mail**

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

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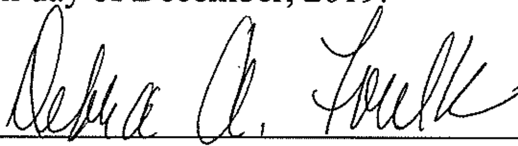
[¶3.] That to the best of affiant's knowledge, information, and belief, such contact information as given above is of the party intended to be so served.

Respectfully submitted this 16th day of December, 2019.



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Subscribed and sworn to before me this 16th day of December, 2019.

Notary Public
My Commission Expires: Mar 22, 2022