## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

# FA ND Chev, LLC v. BAPTKO, Inc.

FA ND Chev, LLC v. BAPTKO, Inc. · No. 25-1741 · Decided August 4, 2026

### SUMMARY

The Eighth Circuit affirmed a North Dakota federal district court's rulings in consolidated litigation arising from the sale of two automobile dealerships. The court upheld summary judgment requiring the Foundation parties to make $3 million in earnout payments, rejected their joint-and-several-liability argument as waived, and found no prejudicial judicial misconduct or abuse of discretion in limiting expert testimony and instructing the jury. The court also affirmed the jury's finding that BAPTKO had not breached the agreement and the award of approximately $1.09 million in attorney's fees and costs.

### CASE DETAILS

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| COURT | United States Court of Appeals for the Eighth Circuit |
| WRITING FOR THE COURT | Gruender; Colloton, Chief Judge; Gruender, Circuit Judge; Kobes, Circuit Judge |
| JURISDICTION | Federal |
| DECIDED | August 4, 2026 |
| DOCKET | 25-1741 |
| DISPOSITION | affirmed |
| PROCEDURAL POSTURE | The Foundation parties appealed from a consolidated commercial lawsuit in which the district court granted partial summary judgment to the Kupper parties, entered judgment after a jury trial, and awarded BAPTKO attorney's fees and costs. |
| STANDARD OF REVIEW | Summary judgment is reviewed de novo. Statements made during trial are reviewed for abuse of discretion if preserved and for plain error if not preserved. Limitations or exclusions of expert testimony are reviewed for abuse of discretion. Jury instructions are typically reviewed for abuse of discretion. Contract-interpretation issues concerning attorney's fees are reviewed de novo, while other aspects of a fee award are reviewed for abuse of discretion. |
| PRECEDENTIAL VALUE | published |

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| PARTIES | FA ND Chev, LLC, FA ND Sub, LLC, Foundation Automotive Corp. v. BAPTKO, Inc., Robert Kupper |

## TOPICS

breach of contract · contract interpretation · commercial litigation · appellate procedure · expert testimony

## PRACTICE AREAS

contracts · commercial litigation · appellate procedure · evidence · remedies

## QUESTIONS PRESENTED

1. Whether the district court properly granted partial summary judgment on the Foundation parties' obligation to make the earnout payments despite their alleged defense that BAPTKO's prior breaches excused performance.
2. Whether the Foundation parties waived their argument that FA ND CHEV and FA ND SUB could not be held jointly and severally liable for the earnout obligation.
3. Whether the district court's comments during trial, evidentiary rulings concerning inventory evidence and expert testimony, and jury instructions prejudiced the Foundation parties or otherwise required a new trial.
4. Whether the attorney's-fees provision authorized recovery of expenses incurred in defending Robert Kupper personally.
5. Whether the district court abused its discretion by applying a ten-percent reduction to the lodestar in calculating attorney's fees.

## HOLDINGS

1. The district court properly granted partial summary judgment because the alleged breaches did not constitute a total failure of consideration that defeated the very object of the agreement. The Foundation parties were required to make the earnout payments, and any proven breach by BAPTKO could support damages as an offset rather than excuse performance.
2. The Foundation parties waived their argument that FA ND CHEV and FA ND SUB could not be held jointly and severally liable because they first raised the issue in their renewed motion for judgment as a matter of law.
3. The district court did not abuse its discretion or plainly err through its trial comments. The comments outside the jury's presence generally could not prejudice the jury, and the isolated comments made before the jury did not disparage the Foundation parties or appeal to bias or prejudice.
4. The district court did not abuse its discretion by limiting or instructing the jury to disregard portions of Ginger Knutsen's expert testimony because the Foundation parties failed to provide a sufficient evidentiary foundation linking Robert Kupper or BAPTKO to a decision that reduced Subaru inventory.

5. The attorney's-fees provision authorized BAPTKO to recover reasonable and necessary attorney's fees and costs incurred in defending Robert Kupper personally when those expenses were part of BAPTKO's effort to enforce the agreement.
6. The district court did not abuse its discretion by calculating a lodestar and applying an across-the-board ten-percent reduction based on inadequate and confusing billing documentation.

## KEY QUOTATIONS

> *"A total failure of consideration will occur where a party has failed to perform a substantial part of its obligation, so as to defeat the very object of the agreement."* (-8-)

> *"The remedy for a total failure of consideration is to excuse the non-breaching party from performance of its obligations under the agreement."* (-8-)

> *"An appellate court should be slow to reverse a case for the alleged misconduct of the trial court, unless it appears that the conduct complained of was intended or calculated to disparage [a party] in the eyes of the jury and to prevent the jury from exercising an impartial judgment upon the merits."* (-10-)

> *"An expert witness's testimony requires some foundation in record evidence to support the opinions the expert offers."* (-12-)

> *"There is a strong presumption that the lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor."* (-16-)

## FACTUAL BACKGROUND

BAPTKO sold a Subaru dealership and a Chevrolet dealership to Foundation Automotive Corp. under an amended asset-purchase agreement that included inventory-management obligations, annual earnout payments, and an attorney's-fees provision. Foundation Automotive assigned its rights and obligations under the agreement to FA ND CHEV and FA ND SUB. After the transaction, Foundation parties withheld earnout payments despite the dealerships' meeting the specified earnings targets, while alleging that BAPTKO had breached the agreement by failing to maintain inventory levels and by other conduct. The jury ultimately found that BAPTKO had not breached the agreement.

## PROCEDURAL HISTORY

FA ND CHEV and FA ND SUB sued Robert Kupper, Bismarck Motor Company, and BMC Marine for claims including breach of a noncompete provision and tortious interference. BAPTKO separately sued the Foundation parties for unpaid earnout payments, and the Foundation parties asserted counterclaims alleging, among other things, breach of the inventory-management obligation. The district court consolidated the actions, granted partial summary judgment to the Kupper parties on the earnout-payment obligation and dismissed most of the Foundation parties' affirmative claims, then submitted the remaining breach and damages issues to a jury. The jury found that BAPTKO had not breached the agreement, and the district court awarded BAPTKO attorney's fees and costs before denying the Foundation parties' post-trial motions.

## DISPOSITION

affirmed

CASES CITED

- Hanna v. Plumer, 380 U.S. 460, 465 (1965)
- Green Plains Otter Tail, LLC v. Pro-Env't Inc., 953 F.3d 541, 545 (8th Cir. 2020)
- Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc)
- Check Control, Inc. v. Shepherd, 462 N.W.2d 644, 647 (N.D. 1990)
- Nassar v. Jackson, 779 F.3d 547, 551 (8th Cir. 2015)
- Rush v. Smith, 56 F.3d 918, 922-23 (8th Cir. 1995) (en banc)
- La Barge Water Well Supply Co. v. United States, 325 F.2d 798, 802 (8th Cir. 1963)
- United States v. Turner, 975 F.2d 490, 493 (8th Cir. 1992)
- United States v. Singer, 710 F.2d 431, 436 (8th Cir. 1983)
- Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993)
- Gen. Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997)
- Computrol, Inc. v. Newtrend, L.P., 203 F.3d 1064, 1070 (8th Cir. 2000)
- Weisgram v. Marley Co., 169 F.3d 514, 519 (8th Cir. 1999)
- In re Estate of Littlejohn, 698 N.W.2d 923, 925-26 (N.D. 2005)
- Hall v. BNSF Railway Co., 958 F.3d 672, 674 (8th Cir. 2020)
- Associated Elec. Coop., Inc. v. Sw. Power Pool, Inc., 111 F.4th 914, 917 (8th Cir. 2024)
- Jensen v. Clarke, 94 F.3d 1191, 1203 (8th Cir. 1996)
- Jet Midwest Int'l Co. v. Jet Midwest Grp., LLC, 93 F.4th 408, 420 (8th Cir. 2024)
- Olson v. Fairview Health Servs. of Minn., 831 F.3d 1063, 1075 (8th Cir. 2016)