

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

John Witzke,)	
)	
Plaintiff/Appellant,)	
)	
vs.)	Supreme Court No. 20060113
)	Burleigh Co. No. 05-C-02433
The City of Bismarck, a North Dakota)	
Municipal Corporation,)	
)	
Defendant/Appellee.)	

APPEAL FROM ORDER TO DISMISS
SOUTH CENTRAL JUDICIAL DISTRICT, COUNTY OF BURLEIGH,
STATE OF NORTH DAKOTA, HONORABLE ROBERT O. WEFALD

BRIEF OF APPELLEE

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I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Did the District Court err in granting Bismarck's motion to dismiss?

II. STATEMENT OF THE CASE

A. Course of Proceedings

2. John Witzke (hereinafter "Witzke") commenced suit against the City of Bismarck (hereinafter "Bismarck") by serving a Summons and Complaint on December 27, 2005. Supp. App. at pp. 2-4. In lieu of an answer, Bismarck filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Dakota Rules of Civil Procedure (Supp. App. at pp. 5-6) and a motion for attorney's fees and costs on January 6, 2006 (Supp. App. at pp. 7-8). Bismarck asserted the following bases for its motion to dismiss: 1) Witzke's claims are barred by res judicata and collateral estoppel, 2) Witzke's claims are barred by judicial immunity, and 3) an alleged violation of an ethical rule pertaining to attorneys does not constitute a tort and therefore fails to state a cause of action. Supp. App. at p. 5, ¶ 1. In its motion for attorney's fees and costs, Bismarck asserted Witzke's Complaint is frivolous in that: 1) the claims and contentions therein are not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law, 2) the allegations and other factual contentions contained in the Complaint lack evidentiary support and are not likely to have evidentiary support after a reasonable opportunity for discovery, and 3) the Complaint was presented for the improper purpose of harassing Bismarck and its agents and/or employees. Supp. App. at p. 7, ¶ 1.

3. The District Court of Burleigh County issued an order on Bismarck's motion to dismiss on April 7, 2005 (Supp. App. at p. 10) and issued an order on Bismarck's motion for attorney's fees and costs on April 11, 2006 (Supp. App. at p. 11). Judgment on both orders was entered on April 20, 2006. Supp. App. at p. 9.

B. Disposition Below

4. Based on collateral estoppel, the District Court of Burleigh County granted Bismarck's motion to dismiss, thereby dismissing Witzke's claims with prejudice. Supp. App. at p. 10, ¶¶ 2-3. The District Court also granted Bismarck's motion for attorney's fees and costs and awarded Bismarck \$500. Supp. App. at p. 11, ¶ 1.

III. STATEMENT OF FACTS

5. Witzke was convicted of attempted criminal mischief on April 28, 2005 in the District Court of Burleigh County, the Honorable Burt L. Riskedahl presiding. Supp. App. at p. 3, ¶ 4; App. at p. 2. The prosecutor for Bismarck in the criminal case was Attorney Paul Fraase (hereinafter "Fraase"). App. at p. 2. The conviction related to Witzke's entry upon a neighbor's property and his striking a surveillance camera located on the neighbor's property with a shovel. *Id.* at ¶ 2. Witzke is upset that his neighbor uses surveillance cameras on her property, which Witzke claims also recorded his house. Witzke Brief at p. 3, ¶ 3.
6. Witzke appealed the conviction to the North Dakota Supreme Court. Upholding the conviction, the Court's opinion provides, in its entirety, as follows:

John Witzke appeals from the trial court's criminal judgment finding him guilty of attempted criminal mischief. On appeal,

Witzke argues that the trial judge was biased against him, did not respond to his pretrial motion, and allowed the prosecutor to go beyond the scope of the trial in his examination of witnesses. Witzke also argues the prosecutor presented a case that was misleading and asked questions of witnesses he knew would result in false or misleading answers. Finally, Witzke argues three witnesses in the trial perjured themselves.

The trial court's criminal judgment is supported by substantial evidence. Witzke's arguments are frivolous and completely without merit. We summarily affirm under N.D.R.App.P. 35.1(a)(1) and (3).

City of Bismarck v. Witzke, 2005 ND 170, 709 N.W.2d 21.

7. Dissatisfied with the North Dakota Supreme Court's decision, Witzke initiated the above-entitled lawsuit alleging Fraase engaged in various incidents of alleged misconduct at Witzke's criminal trial and before the criminal trial. Supp. App. at pp. 3-4. On appeal, Witzke admits his allegations regarding alleged misconduct at trial are barred by collateral estoppel. Witzke Brief at p. 3, ¶ 2. He appeals only the District Court judgment regarding his claims of alleged misconduct prior to trial. Id. Witzke states:

Part of my complaint included issues I brought before this court and if they can't be reexamined and that is part of North Dakota law then so be it, I thought I could in Civil court. Another part of my complaint had nothing to do with my original trial. I want to hold the City of Bismarck accountable for the actions of numerous employees before my trial even started, these actions were unethical and if these people had any integrity at all they would not have taken me to trial.

Id.

8. Witzke also stated collateral estoppel does not bar his allegation that Fraase engaged in "Professional Misconduct for lying in a material proceeding to the

Mayor, City Commissioners and the good people of Bismarck and Fraase also lied in a letter to Judge Riskedahl.” Witzke Brief at p. 4, ¶ 3.

9. Witzke therefore only appeals the District Court decision as it relates to his allegations in his Complaint that:

- 1) On November 24th, 2004 the Plaintiff abated a private nuisance by redirecting a neighbors spying video surveillance camera that had been spying and video taping his property and kids for 3 years. The Bismarck City Attorneys Office and Bismarck Police Department had know [sic] about this problem and would not make his neighbors stop even though a number of City Ordinances and State Laws were being broken. Supp. App. at p. 3, ¶ 2.
- 2) Prosecutor for the City Paul Fraase knowingly misled the mayor, city administrators and city commissioners about these spying security cameras. Paul Fraase knowingly misled Judge Riskedahl [sic]... with false and misleading evidence. He did this verbally [and] with written letters... Supp. App. at p. 3, ¶ 6.
- 3) Paul Fraase broke a number of North Dakota Rules for Professional Conduct in order to win an unfair trial against the Plaintiff. He broke Rule 3.3, 3.4, 3.8, 4.1, and 8.4.... He has engaged in conduct that was prejudicial to the administration of justice. Supp. App. at p. 4, ¶ 8.

10. Witzke has presented five documents in support of his allegations. App. at pp. 1-5. These documents are part of the record on appeal under North Dakota Rule of Appellate Procedure 10(a)(1) because they were also attached to Witzke’s Brief in Support of Plaintiff’s Complaint, which was Witzke’s response to Bismarck’s motion to dismiss in the District Court. Plaintiff Exhibit # 1 is a still shot from one of the video cameras used for security purposes at Witzke’s neighbor’s home. App. at p. 1. Witzke indicates in his brief this photo is part of the video presented by Fraase to the Board of City Commissioners and introduced as evidence at Witzke’s trial. Witzke Brief at p. 5.

11. Plaintiff Exhibit # 2 is part of a letter written by Fraase to the Honorable Burt L. Riskedahl prior to Witzke's criminal trial. App. at p. 2. The letter is in response to a letter from Witzke to the judge requesting Fraase be removed as prosecutor on the case. Id. at ¶ 1. Witzke takes issue with Fraase's statement that he intends to introduce a videotape recording Witzke's criminal act and Fraase's statement that he intends to introduce four photos taken from four security cameras at Witzke's neighbor's home. Witzke Brief at p. 5.
12. In December of 2004, Witzke filed a complaint against Fraase with Bismarck and the Department of Human Resources investigated the complaint. Id. at p. 5. Bismarck responded with a written report. App. at p. 3. Witzke's complaint against Fraase related to the fact that Fraase would not prosecute Witzke's neighbor for a variety of alleged violations. Plaintiff Exhibit # 3 is a portion of that report. Id. It is important to note that Witzke states he filed the December 2004 complaint against Fraase "hoping he would realize he didn't have a case and would drop this ridiculous charge against me...." Witzke Brief at p. 5. In other words, Witzke is complaining that Fraase had insufficient evidence to bring criminal charges against him even though Witzke was later convicted by a jury and the verdict was upheld by the North Dakota Supreme Court, which found there was substantial evidence to support the criminal judgment. City of Bismarck v. Witzke, 2005 ND 170, 709 N.W.2d 21.
13. Plaintiff Exhibit #4 is a portion of Findings, Conclusions Decision and Order issued by the Bismarck Board of City Commissioners on the appeal of a complaint filed by Witzke against Fraase. App. at p. 4. A hearing on Witzke's

complaint was heard by the Board on April 12, 2005. Witzke Brief at p. 4, ¶ 3. The portion of the findings of fact used by Witzke as an exhibit relates to Witzke's claims that Fraase did not prosecute Witzke's neighbor for use of surveillance cameras and did not prosecute the neighbor for her dog barking. App. at p. 4. Witzke claims Fraase lied at the Board meeting. Witzke Brief at p. 4, ¶ 3.

14. Plaintiff Exhibit #5 is a police report of the crime for which Witzke was convicted. App. at p. 5. Witzke claims this police report is false (App. at p. 5) despite the fact that he was later convicted of the crime described in the report.

15. Witzke's claims based on the evidence presented are essentially that Fraase allegedly lied about the facts and circumstances and misconstrued evidence regarding the ongoing dispute between Witzke and his neighbor over the neighbor's surveillance cameras. Witzke Brief at p. 4, ¶ 3, p. 5. Witzke claims Fraase lied in his assertions that photos presented to the Board and introduced as evidence are not pointed at Witzke's house. Witzke Brief at p. 4, ¶ 3. However, a jury has already viewed the evidence presented by Fraase and was convinced otherwise.

IV. ARGUMENT

A. Standard of Review

16. Witzke responded to Bismarck's motion to dismiss with a Brief in Support of Plaintiff's Complaint. He attached to his brief Plaintiff Exhibits 1 through 6. Exhibits 1 through 5 to that brief are the same as Plaintiff Ex. #s 1 through 5 in this appeal. App. at pp. 1-5. Under North Dakota Rule of Civil Procedure 12(c):

If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

17. Since Witzke presented exhibits in the District Court that were outside the pleadings, Bismarck's motion to dismiss should be procedurally treated as a motion for summary judgment under N.D.R.Civ.P. 56. The "standard of review for summary judgment is well-established: Whether summary judgment was properly granted is a question of law which [the North Dakota Supreme Court] review[s] de novo on the entire record." Hopfauf v. Hieb, 2006 ND 72. ¶ 6. 712 N.W.2d 333.

18. In Diocese of Bismarck Trust v. Ramada, Inc., 553 N.W.2d 760, 764 (N.D. 1996), the North Dakota Supreme Court held that "[s]ummary judgment is a procedural method for promptly disposing of a lawsuit without a trial if, after viewing the evidence in the light most favorable to the party against whom it is sought and giving that party the benefit of all favorable inferences, there is no genuine dispute as to either the material facts or the inferences to be drawn from the undisputed facts, or if only a question of law is involved." Moreover, even if factual disputes exist in a given matter, "summary judgment is proper if the law is such that resolution of those factual disputes will not change the result." Id.

B. The District Court did not err in granting Bismarck's motion to dismiss.

19. Witzke's Brief lists four issues presented for review. Witzke Brief at p. 3, ¶ 1. However, this is an appeal from the District Court judgment granting

Bismarck's motion to dismiss. Whether the District Court judgment was in error is the only issue the North Dakota Supreme Court may consider.

1. Witzke's claims are barred by collateral estoppel.

20. It is important to note Witzke was convicted of committing the crime of attempted criminal mischief. Supp. App. at p. 3, ¶ 4. A great deal of Witzke's brief is an attempt to persuade the Court he is innocent, but this issue has already been conclusively decided. A jury has found Witzke guilty beyond a reasonable doubt and the North Dakota Supreme Court has affirmed the conviction, holding there was substantial evidence to support the criminal judgment. City of Bismarck v. Witzke, 2005 ND 170, 709 N.W.2d 21. Under the laws of the State of North Dakota, Witzke committed the crime for which he was charged. Any attempt to convince the Court otherwise is a frivolous effort to circumvent his conviction. It is time for Witzke to accept that he was convicted of the crime of attempted criminal mischief and there is no legal forum in this state for him to attempt to convince a new trier of fact otherwise. Witzke committed the crime of attempted criminal mischief as a matter of determined fact.

21. As decided by the District Court, Witzke's claims are barred by collateral estoppel. Supp. App. at p. 10, ¶ 2. "[C]ollateral estoppel, or issue preclusion, generally forecloses the relitigation in a second action based on a different claim, of particular issues of either fact or law which were, or by logical and necessary implication must have been, litigated and determined in the prior suit." Riemers v. Anderson, 2004 ND 109, ¶ 12, 680 N.W.2d 280 (quoting Reed v. University of N.D., 1999 ND 25, ¶ 9, 589 N.W.2d 880).

22. Collateral estoppel is part of the broader doctrine of res judicata, or claim preclusion, which “prohibits the relitigation of claims or issues that were raised or could have been raised in a prior action between the same parties or their privies and which was resolved by final judgment in a court of competent jurisdiction.” Ohio Cas. Ins. Co. v. Clark, 1998 ND 153, ¶ 23, 583 N.W.2d 377 (citing Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 383 (N.D. 1992)). “Courts bar relitigation of claims and issues to promote the finality of judgments, which increases certainty, discourages multiple litigation, wards off wasteful delay and expense, and conserves judicial resources.” Riemers v. Anderson, 2004 ND 109 at ¶ 12 (quoting Ohio Cas. Ins. Co. v. Clark, 1998 ND 153, ¶ 23, 583 N.W.2d 377)).
23. Criminal convictions are given collateral estoppel effect to prevent litigation of the same issues in a later civil action. Ohio Cas. Ins. Co., 1998 ND 153 at ¶ 22 (citing 47 Am.Jur.2d, Judgments § 732 (1995)). “Generally, the higher standard of proof and numerous safeguards in criminal proceedings are given as rationale for the rule allowing judgments in criminal proceedings to have a preclusive effect in subsequent civil actions. Id.”
24. “One who argues that collateral estoppel is applicable has the burden of establishing that the issue sought to be foreclosed from consideration in the second case was resolved in his favor in the prior proceeding.” State v. Lange, 497 N.W.2d 83, 85 (N.D. 1993) (citing United States v. Seijo, 537 F.2d 694 (2d Cir. 1976)).

An issue must satisfy four tests before collateral estoppel will bar relitigation of that issue in a new proceeding: “(1) Was the issue decided in the prior adjudication identical to the one presented in the action in question?; (2) Was there a final judgment on the merits?; (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?; and (4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?”

Riemers v. Peters-Riemers, 2004 ND 153, ¶ 9, 684 N.W.2d 619 (quoting Hofsommer, 488 N.W.2d at 384).

25. There can be no dispute steps two through four are met. There was a final judgment on the merits in the criminal case and this Court affirmed the conviction. Witzke is the same party involved in the criminal trial. Finally, Witzke had every opportunity to make his case at his trial and argue his case before the North Dakota Supreme Court on appeal. Witzke cannot deny these elements of collateral estoppel have been satisfied.
26. The only issue remaining is whether the first step is met, “[w]as the issue decided in the prior adjudication identical to the one presented in the action in question?” Witzke asserts Fraase’s statements before trial, which are alleged to be lies, are not collaterally estopped because they happened before trial and were not decided at his trial. Witzke Brief at p. 4, ¶ 3. However, if the Court determined Witzke’s arguments regarding false and misleading evidence were frivolous in the context of the criminal trial, they are likewise frivolous in the context of statements prior to trial. This Court ruled Witzke’s arguments that Fraase was misleading at trial were frivolous. The Court stated, “Witzke also argues the prosecutor presented a case that was misleading and asked questions of witnesses he knew would result in false or misleading answers.” City of

Bismarck v. Witzke, 2005 ND 170, ¶ 1, 709 N.W.2d 21. The Court held that “Witzke’s arguments are frivolous and completely without merit.” Id.

27. Witzke states in his brief:

Any statements Fraase has made inside and outside the courtroom with regards to my neighbors surveillance camera angle and view not being directed towards my house is a lie. Any photo Fraase had submitted at my trial, to the city human resource director and city commissioners for input into their reports that show that my neighbors camera is not pointed at my house is a lie.

Witzke Brief at p. 4, ¶ 3.

28. Witzke claims Fraase’s statements and photo evidence were presented both at Witzke’s criminal trial and before the trial. Id. He has not pointed to any statements or evidence Fraase presented to anyone prior to trial that differ from statements or evidence presented at trial. All statements and evidence Witzke claims to be misleading have been presented to a jury that was convinced of their truth. It has already been conclusively determined Fraase’s evidence was not misleading at trial. A jury convicted Witzke and this Court upheld Witzke’s conviction. The same statements and evidence allegedly presented in advance of trial are likewise not misleading. It is difficult to understand how Witzke can assert this is false evidence when it has already been determined as fact by a jury.

29. Witzke argues the same statements and evidence Fraase relied on prior to trial are misleading despite the fact that they were not misleading at trial, as decided by the North Dakota Supreme Court. Witzke’s claim Fraase was misleading prior to trial is frivolous. Witzke is rehashing the same argument he did in his criminal appeal. The only difference is the same statements and evidence he now complains of allegedly happened prior to trial. If Fraase’s

statements and evidence presented at trial were not false or misleading, those same statements and evidence prior to trial are by necessity not false or misleading. Witzke does not argue that Fraase made statements prior to trial that differed from his case at trial. See Witzke Brief at p. 4, ¶ 3. Rather, he merely argues Fraase's statements outside the trial were false. Id. However, this Court has already held Witzke's arguments of prosecutor misconduct at trial were frivolous. City of Bismarck v. Witzke, 2005 ND 170, 709 N.W.2d 21. Witzke points to no assertion of Fraase outside of trial that was different than his assertions at trial.

30. A jury convicted Witzke of the crime and this Court upheld it. It has been conclusively established as a matter of fact that Witzke criminally struck the camera. Witzke was not denied the opportunity to assert as a defense at trial that the evidence and statements of the prosecutor were misleading. Witzke did in fact do so. However, there is no question Witzke's arguments in that regard were frivolous. The North Dakota Supreme Court has already considered the issue. A jury, the trier of fact, has already determined Witzke's guilt as a matter of fact.
31. This appeal is nothing more than an attempt to relitigate the issue of Witzke's guilt. Witzke's allegations of lies are all based on the premise that he is not guilty. Fraase's evidence and statements alleged to be lies all implicate Witzke as having committed a crime. Witzke did commit a crime. Fraase did not lie about that. A jury convicted Witzke and this Court upheld the conviction. The time for making arguments to the contrary is over. Bismarck need not address any arguments Witzke puts forth that he believes exonerate him. The issue has

already been decided. His arguments that he is not guilty have been rejected by a jury and that decision upheld on appeal. Under the laws of the State of North Dakota, Witzke committed the crime for which he was charged. It is time Witzke accepts that fact and stops attempting to relitigate the issues decided at his criminal trial.

32. Bismarck does not understand how Witzke can deny his criminal act was recorded on film. See Witzke Brief at p. 5. It is difficult to deny what has been recorded in audio and video. Regardless, a jury has already reviewed the video and other evidence and was convinced Witzke committed the crime. Fraase did not lie about Witzke's actions prior to trial because it is now clear Witzke was guilty.

2. Bismarck is immune from liability for Witzke's claims.

33. As determined by the District Court, collateral estoppel bars Witzke's claims in their entirety. Supp. App. at p. 10, ¶ 2. This Court need not address the issue of immunity if it finds collateral estoppel applies. However, even if collateral estoppel does not bar Witzke's claims, Bismarck is immune from suit for Fraase's alleged misconduct.

34. N.D.C.C. § 32-12.1-03 limits the liability of political subdivisions like the City of Bismarck. Under the statute:

1. Each political subdivision is liable for money damages for injuries when the injuries are proximately caused by the negligence or wrongful act or omission of any employee acting within the scope of the employee's employment or office under circumstances where the employee would be personally liable to a claimant in accordance with the laws of this state, or injury caused from some condition or use of tangible property, real or personal, under circumstances where the political subdivision, if a private person,

would be liable to the claimant. The enactment of a law, rule, regulation, or ordinance to protect any person's health, safety, property, or welfare does not create a duty of care on the part of the political subdivision, its employees, or its agents, if that duty would not otherwise exist.

...

2. A political subdivision or a political subdivision employee may not be held liable under this chapter for any of the following claims:

...

- c. The decision to undertake or the refusal to undertake any judicial or quasi-judicial act, including the decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.
- d. The decision to perform or the refusal to exercise or perform a discretionary function or duty, whether or not such discretion is abused and whether or not the statute, charter, ordinance, order, resolution, regulation, or resolve under which the discretionary function or duty is performed is valid or invalid.

....

35. Bismarck can only be liable if Fraase would be personally liable to Witzke in accordance with the laws of North Dakota. See N.D.C.C. § 32-12.1-03(1). It is well-established law in North Dakota that prosecutors are quasi-judicial officers and are judicially immune from civil liability for the exercise of their discretionary functions. E.g. Kittler v. Kelsch, 216 N.W. 898, 904-905 (N.D. 1927). As stated by the North Dakota Supreme Court in Kittler:

The state's attorney acts for the state. His act in passing upon the sufficiency of evidence as the basis of a criminal prosecution is the act of the state, and if he makes a mistake (as he sometimes will) it is the mistake of the state. Judges of all courts, high and low, county commissioners, justices of the peace, and grand jurors are not liable in a civil action for their judicial mistakes, and it would be strange, indeed, if the state's attorneys of this state, who are *charged with responsibilities of grand jurors in the prosecution of*

crime, in their respective counties, are not exempt from civil liability for judicial mistakes.

Id. at 904 (italics in original). In reaching the above conclusion, the North Dakota Supreme Court quoted the following case law from California as being directly on point to the issue:

I prefer to place the decision on the broad ground, that **no public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it.** Such acts when corrupt, may be punished criminally, but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty. The rule extends to judges, from the highest to the lowest, to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power.

Id. at 902 (quoting Turpen v. Booth, 56 Cal. 65, 68 (Cal. 1880)(bold added)). Kittler is directly on point with Witzke's claims in this case. Although Kittler is an old case (1927) and may be the only North Dakota case directly addressing judicial immunity of prosecutors, Kittler continues to be cited in more recent cases as support for the application of judicial immunity to other quasi-judicial officers. E.g. Loran v. Isler, 373 N.W.2d 870, 874 (N.D. 1985)(finding state administrative hearing officer entitled to judicial immunity and citing Kittler as support, noting prosecutors entitled to judicial immunity). Judges, prosecutors and witnesses are absolutely immune from liability for damages relative to their involvement in judicial proceedings. Lawrence v. Roberdeau, 2003 ND 124, ¶ 11, 665 N.W.2d 719; Loran v. Iszler, 373 N.W.2d at 874; Kittler v. Kelsch, 216 N.W. at 904-905. As stated in Lawrence v. Roberdeau,

Because losers in one forum often seek another forum to assail participants in the first forum, absolute immunity is essential to

assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation. At the same time, the safeguards built into the judicial process tend to reduce the need for private damage actions.

2003 ND 124, ¶ 11, 665 N.W.2d 719 (quotation and citation omitted). In fact, the United States Supreme Court in Imbler v. Pachtman, 424 U.S. 409, 429-31 (1976) held a prosecutor is absolutely immune from suit alleging malicious prosecution, for initiating prosecution, and for actions taken in presenting the state's case.

36. Witzke also claims Fraase failed to enforce Bismarck ordinances and other laws relative to Witzke's neighbor. Supp. App. at p. 3, ¶ 2. Judicial immunity applies not only to a prosecutor's actions within the courtroom, but also to any actions taken by the prosecutor in furtherance of his role as prosecutor, which includes the process of deciding whether to prosecute in the first place. See Kittler v. Kelsch, 216 N.W. 898, 904 (N.D. 1927)(stating prosecutor's "act in passing upon the sufficiency of evidence as the basis of a criminal prosecution is the act of the state, and if he makes a mistake (as he sometimes will) it is the mistake of the state"). In addition, even assuming, arguendo, the prosecutor's decision was erroneous or motivated by malice, which Bismarck denies, no civil claim against the prosecutor exists. Id. at 902 (quoting Turpen v. Booth, 56 Cal. 65, 68 (Cal. 1880)). Therefore, even assuming Witzke's neighbor violated a City ordinance or other law, which Bismarck denies occurred, Fraase's decision not to prosecute Witzke's neighbor would none-the-less be protected by judicial immunity.

3. **An alleged violation of the North Dakota Rules of Professional Conduct does not constitute the basis of a claim for relief.**

37. If the Court determines all of Witzke's claims are barred by collateral estoppel or immunity, it need not consider Witzke's claim that Fraase allegedly violated rules of professional conduct. However, even if the Court considers Witzke's allegations regarding the North Dakota Rules of Professional Conduct, there is no recognized claim in North Dakota based on an alleged violation of ethical rules. It is well established that an attorney's alleged violation of an ethics rule, i.e. North Dakota Rules of Professional Conduct, in and of itself, does not constitute a tort or otherwise render an attorney liable for damages. E.g. Olson v. Fraase, 421 N.W.2d 820, 827 (N.D. 1988)(citing Martinson Bros. v. Hjellum, 359 N.W.2d 865, 875 (N.D.1985)). The North Dakota Supreme Court has "agree[d] with the host of courts which hold that a violation of the Code does not itself form the basis for a claim for relief for damages against a wrongdoing attorney." Olson v. Fraase, 421 N.W.2d 820, 827 (citations omitted). It is only the underlying conduct that may give rise to liability, not a violation of the Rules. Id. However, there was no underlying conduct in this case that could give rise to liability.

38. As indicated above, Bismarck's motion to dismiss should be treated as a motion for summary judgment because Witzke has brought forth evidence he asserts supports his claims. However, Witzke has brought forth no evidence indicating Fraase engaged in improper conduct. There is no indication Fraase's statements or evidence brought forth prior to trial were false. In fact, a jury was convinced of the evidence and convicted Witzke. Witzke relies solely on written comments on his exhibits that the contents are false (App. at pp. 3-5) and

assertions in his brief that Fraase's statements and evidence are lies (App. at p. 4,

¶ 3). According to Riemers v. Omdahl, 2004 ND 188, ¶ 4, 687 N.W.2d 445:

A party resisting a motion for summary judgment may not simply rely upon the pleadings or upon unsupported, conclusory allegations. "Factual assertions in a brief do not raise an issue of material fact satisfying Rule 56(e)." "Nor may a party merely reassert the allegations in his pleadings in order to defeat a summary judgment motion."

The resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact.

39. Witzke has brought forth no admissible evidence to prove Fraase's statements and evidence were false. Witzke cannot support any of his claims if he has no evidence Fraase's statements and evidence were false and Witzke has no such evidence.

40. Witzke has not brought forth any affidavits or other evidence showing Fraase's statements and evidence were false. While it is clear based on the previous jury determination and prior North Dakota Supreme Court ruling that the statements and evidence were accurate, even if they were false, there is no evidence Fraase knew or should have known of the falsity and therefore did nothing wrong. Bismarck asserts and this Court agreed in its ruling on the criminal appeal that there was substantial evidence to convict Witzke. If Witzke had evidence of falsity, he should have raised it at trial. In fact, he did raise it and a jury did not believe him. A jury believed Fraase's substantial evidence and Fraase had every reason to believe he was representing the truth. In fact, given

that Witzke's criminal act was caught on film. Bismarck asserts it is extremely frivolous to argue the prosecutor Fraase misrepresented anything. Anyone who viewed the video could come to an independent conclusion regardless of Fraase's assertions.

41. Further, even if the Court could consider alleged violations of the North Dakota Rules of Professional Conduct alone, which it cannot, Fraase committed no violations. Witzke claims Fraase violated Rules 3.3, 3.4, 3.8 and 4.1. Supp. App. at p. 4, ¶ 8. Rule 3.3 governs candor toward the tribunal. As indicated above, there is no evidence Fraase ever lied. Rule 3.4 governs fairness to the opposing party. Witzke has no evidence Fraase ever engaged in any conduct unfair to Witzke's case. Fraase merely presented accurate evidence that resulted in Witzke's conviction. Rule 3.8 creates special responsibilities for a prosecutor. Witzke must be referencing Rule 3.8(a), which states a prosecutor shall "not prosecute a charge that the prosecutor knows is not supported by probable cause. Once again, a jury has already found Witzke guilty beyond a reasonable doubt and the judgment was upheld. Rule 4.1 requires truthfulness in statements to others. Witzke has no evidence Fraase ever made an untruthful statement. Fraase did not violate any Rules of Professional Conduct.

C. The Court should award Bismarck double costs, including reasonable attorney's fees for Bismarck's defense of this appeal because Witzke's appeal is frivolous.

42. According to North Dakota Rule of Appellate Procedure 38, "If the court determines that an appeal is frivolous, or that any party has been dilatory in prosecuting the appeal, it may award just damages and single or double costs,

including reasonable attorney's fees." "An appeal is frivolous under Rule 38, N.D.R.App.P., if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which could be seen as evidence of bad faith." Riemers v. Peters-Riemers, 2004 ND 153, ¶ 38, 684 N.W.2d 619 (quoting Riemers v. O'Halloran, 2004 ND 79, ¶ 16, 678 N.W.2d 547)). Bismarck respectfully requests the Court award double costs, including reasonable attorney's fees for Bismarck's defense of this appeal.

43. In Bellon v. Bellon, 237 N.W.2d 163 (N.D. 1976), this Court awarded reasonable attorney's fees on appeal under N.D.R.App.P. 38. The Court held the appeal was frivolous because it was purely a collateral attack on a judgment when the court in the prior action had proper jurisdiction. Id. at 165. This Court has already determined Witzke's arguments were frivolous in the prior criminal appeal. A collateral attack on that decision is even more frivolous and demonstrates Witzke's persistence in the course of litigation that is evidence of bad faith. As was the case in his criminal appeal, Witzke's arguments in the present case are flagrantly groundless and devoid of merit. Witzke asserts Fraase lied about matters that lead to Witzke's conviction. Witzke Brief at p. 4, ¶ 3. This Court has already determined the evidence against Witzke was substantial and Witzke's arguments regarding an allegedly misleading prosecution were deemed frivolous. The lower court granted Bismarck's request for attorney's fees and costs and awarded \$500 because Witzke's present action is frivolous. Supp. App. at p. 11. Witzke has appealed the lower court decision even though his action is clearly frivolous.

44. Witzke himself stated his true purpose in his own brief. Witzke stated, "I wish I knew how to get around a conviction of a crime for which I did not commit. I'm still trying to figure that one out." Witzke Brief at p. 6, ¶ 4. Witzke's appeal in this action is merely an attempt to circumvent his criminal conviction, which was upheld by this Court. An award of double costs, including attorney's fees, is appropriate in this case, given Witzke's transparent attempt to get around his criminal conviction.

V. CONCLUSION

45. Bismarck requests the Court uphold the District Court judgment dismissing Witzke's claims with prejudice and award Bismarck double costs, including attorney's fees.

Dated this 18th day of May, 2006.

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CERTIFICATE OF COMPLIANCE

46. The undersigned, as attorneys for the Defendant/Appellee, in the above-referenced matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 6022.

Dated this 18th day of May, 2006.

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CERTIFICATE OF SERVICE

47. I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** and **SUPPLEMENTAL APPENDIX OF APPELLEE** were on the 18th day of May, 2006, mailed to the following:

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Appellee Brief