

Supreme Court No. 20090104
District Court No. 18-07-C-01441

20090104

State of North Dakota

In the Supreme Court

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 23, 2009
STATE OF NORTH DAKOTA

Burris Carpet Plus, Inc.,

Plaintiff/Appellant/Cross Appellee.

vs.

Jerrod Burris, Derek Burris, and Dan Burris,

Defendants/Appellees/Cross Appellants.

APPEAL FROM
ORDER DENYING PLAINTIFFS MOTION FOR SUMMARY JUDGMENT;
ORDER AND JUDGEMENT GRANTING DEFENDANTS' MOTIONS FOR
SUMMARY DISMISSAL OF COUNTS II & IV OF PLAINTIFF'S CLAIMS; AND
ORDER DISMISSING DISCOVERY MOTIONS
AND
CROSS APPEAL OF ORDER & JUDGEMENT DENYING ATTORNEY FEES FOR
DEFENDANTS
DISTRICT COURT, GRAND FORKS COUNTY, NORTH DAKOTA

REPLY BRIEF OF APPELLEES/CROSS APPELLANTS
JERROD BURRIS AND DAN BURRIS

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LAW & ARGUMENT

¶ 1 Appellant BCP submitted a Reply Brief in which it addresses the Appellees' Cross Appeal of the District Courts denial of attorney's fees at Issue III of its brief titled "Cross Claim for Attorneys Fees." BCP Reply Brief, ¶6.

¶ 2 Appellant BCP's Reply Brief stated erroneously that the District Court found "that even though summary judgment was found in favor of the Defendants, it could not find that BCP's claims were lacking in basis that a reasonable person could not have thought a Court would render judgment in its favor." BCP Reply Brief, ¶6. This sentence takes out of context the District Courts actual statement that "[this Court] cannot find that BCP's claims are so lacking in basis that a reasonable person could not have thought a Court would render judgment in BCP's favor." (App 99) (emphasis added)). The contextual difference between BCP's rendition of the District Courts statement and the District Courts' actual statement is dramatic. The District Court recognized that BCP's claims *were* lacking basis as evidenced by the summary dismissal of BCP's claims, but declined to find that the claims were *so* lacking in basis to determine all BCP's claims were outright frivolous, stating, "[this Court] cannot find that all of BCP's claims or counts are frivolous." (App 99). The District Court determined the claims were not frivolous because "BCP raised significant issues with regard to its claim of a valid trademark and trade name and upon which its conspiracy claim and some of its other claims were partially based." (App 100).

¶ 3 As pointed out in the Brief in support of Appellees Cross Appeal, "raising an issue" does not excuse a plaintiff from the requirement of having "actual facts or law" to support the claim. BCP has failed to show that it has either facts or law to support its

claim to a trademark of “Burris” the word, or any form of ownership of “Burris” the word, from which all of BCP’s claims arise.

¶ 4 In BCP’s Reply Brief, and throughout this case, BCP has tried to put the cart before the horse and argue that BCP’s rights have been infringed without showing or attempting to show how or why BCP had a protected ownership interest of the “Burris” name. BCP instead relies again on the unsupported and blind assertion that BCP owns a protected interest in “Burris” which appears to have been made without attempting to understand the law of trademarks. In fact, it has appeared throughout this litigation that BCP’s claim to a trademark of “Burris” (the word) was made for no other reason than as a predicate for litigation against the Appellees. Because BCP has no facts or law to support its claims of infringement, this lawsuit is de facto frivolous in nature.

¶ 5 Thus, it stands to reason that BCP is frivolously pursuing the appeal of the District Courts dismissal of all of its claims. On appeal, the Supreme Court may award just damages and single or double costs, including reasonable attorney's fees when an appeal is frivolous. N.D.R.App.P. Rule 38. “An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which evidences bad faith.” *Matter of Emelia Hirsch Trust*, 2009 ND 135, ¶ 15. BCP’s appeal against the Appellees based upon the unsupported and false premise that BCP owns a protected right to sole use of the surname “Burris” is not only groundless and malicious, but is clearly frivolous and based upon a family dispute.

¶ 6 Accordingly, it is proper that this Court award attorney’s fees to Appellees accrued as a result of this frivolous appeal and award attorneys fees to Appellees as requested on Cross Appeal.

Dated this 23rd day of July, 2009.

/S/

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CERTIFICATE OF SERVICE

I, Patrick W. Fisher, hereby certify that on the 23rd day of July, 2009, I served copies of the **Reply Brief Of Appellees/Cross Appellants Jerrod Burris And Dan Burris** on the following parties by electronic submission (email);UPS;overnight mail;e-mail;fax,etc.:

1. DeWayne Johnston (dewayne@wedefendyou.net);
2. William Harrie (wharrie@nilleslaw.com.)

Dated this 23rd day of July, 2009.

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