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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jan Reiser, and Auto-Owners Insurance Company, Plaintiffs and Appellants, vs. Roger Thorpe d/b/a Roger's Staining and Roger's Staining, Inc., Defendants and Appellees.	}	Supreme Court No. 20120137 District Court No: 09-2010-CV-00645

REPLY BRIEF OF APPELLANTS
JAN REISER AND AUTO-OWNERS INSURANCE COMPANY

APPEAL FROM CASS COUNTY DISTRICT COURT'S DECISION
AWARDING COSTS AGAINST APPELLANTS

THE HONORABLE LISA K. FAIR MCEVERS PRESIDING

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ARGUMENT AND AUTHORITY

NO TRIAL TRANSCRIPT IS NECESSARY FOR A MEANINGFUL AND INTELLIGENT REVIEW

[¶1.] This Court has all of the resources necessary to perform a meaningful review of the district court's ruling with respect to Roger's costs and disbursements. Contrary to Appellee's repeated assertion, no trial transcript is necessary. Moreover, Reiser's issues regarding the costs and disbursements did not arise until after the trial when Appellee filed its Verified Statement of Costs and Disbursements. This is not a case where an appellant is seeking a new trial due to prejudicial errors made during the trial. The only issue is whether Roger's costs and disbursements were reasonable. There was no evidence relating to reasonableness or customary charges in the industry during the trial. The only mention of fees during the trial has been repeated by both parties here and was addressed in the hearing transcript Reiser provided. App. 160. The bulk of the fees and costs incurred by Roger's were not known to Reiser at the time of the trial.[1] There was no reason to address them during the trial and they were not relevant. Despite Appellee's contention otherwise, there was no testimony regarding the work that each expert performed as their significant invoices were not disclosed until they were attached to the Verified Statement. Any minimal mention of an expert's hourly rate, moreover, does not make a trial transcript necessary. The invoices are part of the record submitted here. Appellee's argument to the contrary is a red herring and is without merit.

[¶2.] Reiser ordered and has provided the transcript of the only hearing addressing the issue of costs and disbursements. *State v. Littlewind,* 417 N.W.2d 361, 365 (N.D.1987)("Unless the record allows for meaningful and intelligent review of an

[1] Reiser did not receive Svare's invoice totaling $11,795.00 or Rallis' most outrageous invoice of $47,994.50 until after trial.

alleged error, we will decline to review"); *Sykeston Township v. Wells County*, 356 N.W.2d 136, 137 (N.D.1984)(allowing review without a transcript); *Bye v. Elvick*, 336 N.W.2d 106, 109 (N.D.1983)(allowing review on a partial transcript). If Appellee felt it was truly impossible to show the reasonableness of its costs and disbursements without a trial transcript, Appellee could have ordered the transcript. Here, a meaningful and intelligent review based upon the record submitted is entirely possible and appropriate given the timing of the majority of the costs and disbursements being challenged. Appellee's contentions otherwise are dubious and self-serving.

[¶3.] In fact, Reiser's appeal goes to the heart of this point in that Judge McEvers did *not* hold an evidentiary hearing with respect to the expert fees and other costs and disbursements in her efforts to determine reasonableness. That was an error. *Wahl v. Northern Imp. Co.*, 2011 ND 146 ¶ 19, 800 N.W.2d 700, 705. This Court should reverse the award of costs and disbursements.

THE DISTRICT COURT SHOULD HAVE USED REISER'S EXPERTS TO DETERMINE REASONABLENESS

[¶4.] Appellee's reliance on *Duchscherer* is misplaced. First, that case related to attorney's fees awarded under a federal fee-shifting statute, not to an award of costs and disbursements and, as such, is inapposite.[2] There, the parties are aware well in advance that litigation brings the risk of a fee award and that the overriding rationale of such statutes is to allow the aggrieved claimants to retain counsel without regard to the amount of potential damages. *Id.* Here, we have private litigants with no attorney fee-

[2] This Court noted in *Duchscherer* that "when a trial court awards attorney fees under a federal fee-shifting statute…it is awarding fees against the violator of a federal law that is designed to benefit the public and to deter objectionable conduct." *Duchscherer v. W.W. Wallwork, Inc.*, 534 N.W.2d 13, 18 (N.D. 1995).

shifting statute at issue. The only issue is the award of costs and disbursements to a prevailing party. Costs are customarily substantially lower than attorney's fees. There is, moreover, no public benefit and no objectionable behavior to curtail here. As Appellee has stated, this was a hard fought case and Reiser has incurred the costs of her own experts.

[¶5.] These costs, as noted in *Duchscherer*, create "a more suitable comparison to measure the value of" Appellee's experts' work. *Id.* There, the court reasoned that the victorious claimant was entitled to a greater award of attorneys' fees and looked to the amount expended by the opposing attorney. "The rate and hours expended by opposing counsel are often probative of the reasonableness of attorney fees for prevailing counsel." *Id.*

[¶6.] The point Appellee misses in its citation to *Duchscherer* and the case it is citing, *City of Riverside*, is that the Supreme Court noted that "petitioners could have avoided liability for the bulk of the attorney's fees for which they now find themselves liable by making a reasonable settlement offer in a timely manner" *before* adding that "[t]he government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response." *City of Riverside v. Rivera*, 477 U.S. 561, 580, n. 11, 106 S.Ct. 2686, 2697, n. 11 (1986) (citation omitted). This reasoning is inapplicable here, where Reiser was the plaintiff and had no ability, short of a settlement offer from Appellee which never came, to avoid incurring attorneys' fees and costs and disbursements in proving her case.

[¶7.] These cases, then, stand for nothing more than the proposition that Reiser's expert costs are a valuable tool in determining whether Appellee's costs were reasonable as required by N.D.C.C. § 28-26-06 (5).

[¶8.] Roger's Verified Statement of Costs and Disbursements includes $90,810.89 of fees attributed to expert witness fees. [App. 2-3] This amount is fundamentally unreasonable. Reiser's experts[3] billed $41,178.38 less than Roger's expert fees of $90,810.89. [App. 135-155].

Appellee's Costs Were Unreasonable

[¶9.] In addition to advocating a comparison of Reiser's expert fees in order to determine reasonableness as the cases above suggest, Reiser cited to a host of specific instances of taxation of unreasonable costs in her opening brief. Appellee's purported excuses for its excessive expert fees are baseless. For example, Appellee's unfounded reference to the withholding of documents is patently false and misleading to this Court. There was no motion or ruling on this discovery issue and, as Reiser previously affirmed, Gary Hong never withheld any evidence and testified to the same. The ATF and Fargo Fire Inspector's reports were a matter of public record. Rutter, the ATF agent, was referenced from the outset of the investigation in 2006 in the Fargo reports and Appellee had ample opportunity to subpoena him before trial.[4]

[¶10.] Notably, however, it was Appellee's late disclosed opinions of Rallis that necessitated the hiring of Reiser's third expert, David Brien. Any disadvantage due to withholding of evidence was borne by Reiser in the payment of Brien's fees.

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[3] David Brien's fees and expenses should not be factored in since they were only incurred in response to Rallis' late disclosed opinions. If his fees were included, the difference in expert fees claimed by Roger's is still significant at $31,113.38.

[4] This also negates the expedited FedEx charges for service of a subpoena on Rutter.

[¶11.] Appellee next attempts to justify Rallis' overcharging under the guise of assisting with a *Daubert* motion. Though, in point of fact, there was only one *Daubert* motion. Rallis' input was not necessary for that motion. He didn't even submit an affidavit in support of the motion. *See* Register. Rallis was also "selecting and preparing trial exhibits", "organizing issues for trial", "summarizing motions", "discovery requests" and "reviewing motion responses"; reviewing unnamed depositions; and "organizing the trial notebook." Of course each of these days was billed at 12 hours each. [App. 19] These types of activity are counsel's responsibility, not 12 hour days of expert input. Taxable costs are not an avenue to reimburse a party for mismanaging litigation costs. *Heng v. Rotech Medical Corp.,* 2006 ND 176 ¶ 35, 720 N.W.2d 54, 65 *citing Kleinke v. Farmers Coop. Supply & Shipping,* 549 N.W.2d 714, 717-18 (Wis. 1996).

[¶12.] Further, Reiser's expert, Stephen Woodford, submitted his opinion that the total amount of Appellee's expert fees was vastly out of proportion to what would be considered fair and reasonable within the community and in relation to the complexity of this case. [App. 70 at ¶ 7] Woodford is certainly a comparably respected expert in this field yet the district court, without explanation, failed to use his invoices as a comparison to Rallis or Svare. [App. 156-162] Moreover, Reiser was the *only* party to submit any evidence on the customary fees for experts in this case.

[¶13.] Additionally, Rallis' invoices lack the detail necessary to determine if the costs are allowable and lack information needed to substantiate the meal and lodging expenses.[5] *Vanover v. Kansas City Life Ins. Co.*, 553 N.W.2d 192, 199 (N.D. 1996);

[5] The lack of description and accurate hourly accounting makes it impossible to gauge what Rallis' actual hourly rate is. He could have worked one hour on days where 12

Wahl, 2011 ND 146 ¶ 19, 800 N.W.2d at 705. Nineteen days billed at 12 hours each with such descriptions certainly deserved more scrutiny and explanation from Rallis. Rallis did not even bother to submit an affidavit vouching for the reasonableness and necessity of the fees. N.D.R.Civ.P. 54(e)(1).

[¶14.] Here, Rallis' description of work is overly general, i.e. "file review" and "file organize" and did not allow for proper analysis on whether the time spent on these activities was reasonable. In fact, there was no evidence submitted as to what work was actually accomplished in the vague entries such as "file organize" or whether that work was properly charged at expert rates versus more appropriate administrative rates. Similarly, the invoices from Svare lack any receipts supporting expenses and are overly vague and lack any description of what he did, yet total more than $33,300. Most entries merely state "discuss file" and "review documents." [App. 25-30] These generalized narratives do not lend enough information to determine whether they were necessary, reasonable and appropriate charges to provide the expert opinion being sought. *Whitmire v. Whitmire*, 1999 ND 56, ¶ 15, 591 N.W.2d 126, 130, *Wahl*, 2011 ND 146 ¶ 19, 800 N.W.2d at 705.

[¶15.] Appellee's excuse for such vagary is unavailing. In the face of Reiser's post-trial challenge to these items, more specific entries could have been produced or further testimony could have been elicited at an evidentiary hearing.[6]

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hours were block billed, making his effective rate $1,800 per hour which is indisputably unreasonable.

[6] Any concern over unfair advantage, moreover, could have been alleviated with an *in camera* review in lieu of disclosure to Reiser giving Judge McEvers the ability to determine reasonableness.

[¶16.] Appellee's reference to *Taghon* is similarly ineffective. The court held that "[s]ince the Taghons offered no evidence contradicting the reasonableness of Berg's fees, we conclude that the trial court did not abuse its discretion." *Taghon v. Kuhn*, 497 N.W.2d 403, 407 (N.D. 1993). The district court should have required an evidentiary hearing where specific items were being challenged and yet there was no personal attestation from the respective experts, only verification from counsel that the invoices were true and correct copies of those submitted. This is not sufficient here, where Reiser presented ample evidence contradicting the reasonableness of Appellee's expert fees.

Expert Depositions

[¶17.] As set forth in Reiser's Appellate Brief, on September 16th Rallis billed for an 11½ hour day totaling $2,325, even though there was an agreement that each party would pay for its own expert. This is analogous to an award of mediation fees where the parties agreed to split the costs equally which was found to be an abuse of discretion. *Heng v. Rotech Medical Corp.*, 2006 ND 176 ¶ 35, 720 N.W.2d 54, 66. Instead of offering any legal analysis, Appellee uses a childish tactic in the realm of "if they won they would have asked for it too, so it should be allowed." This argument is irrelevant and unpersuasive. The parties had an agreement. It is unreasonable, then, to include that cost here and was an abuse of discretion.

Trial Attendance

[¶18.] As in the lower court, Appellee again incorrectly paraphrases Reiser's argument with respect to expert trial attendance. Reiser has never asserted that Rallis should *only* be paid for days that he was testifying. To the contrary, Reiser made the points that Rallis' invoices itemize 12 hours per day even though trial itself lasted at most

8 hours per day, less breaks in the morning and afternoon and for lunch, motions, etc., and further that it was unnecessary for Rallis to attend trial on days where *no experts* were testifying *and* order of witnesses was known. Once again, this argument is consistent with the holding in *Byron v. Gerring Indus., Inc.*, 328 N.W.2d 819, 824 (N.D.1982) (the expert's presence during *expert* testimony was permissible so he could "listen to, and subsequently counter," plaintiff's *expert*).

[¶19.] In contrast to *Byron*, however, Rallis attended the entire trial. The district court made no express finding that it was reasonable for Rallis to attend trial even on days where none of Reiser's experts were testifying and bill 24 hours of time totaling $3,600. It was erroneous, and contrary to *Byron*, to tax Rallis' fees for those days.

Miscellaneous

[¶20.] Appellee's failure to address the number of copies and actual cost of the copies is telling. Reiser took issue with the fact that there is no back up documentation to support Roger's claimed charges for photocopies and color photocopies for "Trial Exhibits." Here, the copies were generated in-house. The charges, then, were completely within Appellee's control and there was no evidence as to the per copy cost versus the per copy charge. Any amount billed above the true mechanical cost per copy is typically for the overhead used in making the copy and is not allowed. *Westchem v. Agricultural Chemicals, Inc. v. Engel*, 300 N.W.2d 856, 859 (N.D. 1980). *See also, Uren v. Dakota Dust-Tex, Inc.*, 2002 ND 81 ¶ 34, 643 N.W.2d 678 (computer-aided research or attorney travel expenses are "part of the attorney's fees and expenses which are normally reimbursed by the client."); *Braunberger v. Interstate Eng'g, Inc.*, 2000 ND 45 ¶ 20, 607 N.W.2d 904 (finding an abuse of discretion to award attorney hotel and meal expenses as

costs) and *Heng*, 2006 ND 176 ¶ 37, 720 N.W.2d 54 ("electronic legal research fees are a component of attorney fees and cannot be separately taxed as costs.")

[¶21.] Here, the district court erred in including the copying charges in Roger's taxed costs. Moreover, the district court made no express finding with respect to the reasonableness of the copy charges. [App. 161] It was erroneous to tax the $1,725.80.

CONCLUSION

[¶22.] Appellants respectfully request that the Court reverse the award of costs and disbursements and order an evidentiary hearing on the reasonableness and necessity of the claimed costs.

Respectfully submitted,

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