

IN THE SUPREME COURT
 STATE OF NORTH DAKOTA

Johnston Land Company, LLC,

Petitioner and Appellant,

vs.

Sara K. Sorenson, Individually
 and Ohnstad Twichell, P.C., a
 North Dakota Professional Corporation,

Respondent and Appellee.

) Supreme Court No. 20170403
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Grand Forks County Case
 No. 18-2017-CV-02167

APPEAL FROM FINAL JUDGMENT OF THE DISTRICT COURT OF
 GRAND FORKS COUNTY, NORTH DAKOTA, NORTHEAST CENTRAL
 JUDICIAL DISTRICT, THE HONORABLE STACY J. LOUSER, PRESIDING

APPELLEES' BRIEF

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STATEMENT OF THE ISSUES

[¶1] This Court must have jurisdiction before deciding the merits of an appeal. Jurisdiction requires a justiciable controversy between the parties. Must this appeal be dismissed when there is no justiciable controversy between the parties because the appellant received the relief it was seeking in the district court?

[¶2] If the Court reaches the merits of the appeal, did the district court correctly determine an affidavit recorded on the property that merely provided notice of potential future litigation regarding the property was not a lien?

[¶3] Should the Court award double costs and attorney fees for this frivolous appeal?

STATEMENT OF THE CASE

[¶4] In this case, appellants, prospective buyers of real property, sought to have the district court invalidate an affidavit regarding the property as a "non-consensual lien" so the affidavit would not constitute a lien on the property. The district court determined the affidavit was not a lien. Rather than being pleased with an unencumbered title, appellants appeal, seeking to declare the affidavit a lien, so it can be invalidated, so the affidavit will not constitute a lien on the property. There is no justiciable controversy: the district court already determined the affidavit does not constitute a lien. This appeal is foolish and should be dismissed for lack of jurisdiction. But if the Court reaches the merits, the district court should be affirmed.

STATEMENT OF THE FACTS

[¶5] This matter began in an estate case, In the Matter of the Estate of Donald G. Amundson, Deceased, Grand Forks County Case No. 18-2011-PR-00144 (the "Estate

case”).¹ John E. Widdel, Jr., was the attorney for the personal representative in the Estate case. Beneficiaries of the estate retained Appellees Sara Sorenson and Ohnstad Twichell, P.C., to bring a petition in the Estate case asking for a disgorgement of Widdel’s excessive attorney fees. (App. p. 11.) Widdel sought to charge \$150,000.00 in attorney fees. The district court found that the administration of the estate was not complex and the fees Widdel sought to charge were “highly egregious.” (See Estate case Doc. ID #252, ¶ 46.) The district court in the Estate case ordered Widdel to return \$95,000.00 “for attorney’s fees that were not reasonable.” (App. p. 12.) This decision was affirmed on appeal. Estate of Amundson, 2015 ND 253, ¶ 12, 870 N.W.2d 208; see also Disciplinary Board v. Widdel, 2017 ND 182 ¶ 11, 899 N.W.2d 278 (where attorney Widdel was disciplined for his unethical actions and ordered to make the payments ordered in the Estate case Judgment).

[¶6] During the pendency of the litigation regarding Widdel’s unreasonable fees, Widdel engaged in a number of eyebrow-raising transactions. First, property that he owned as a general partner of Bell Fire LLP was transferred to a revocable living trust in the name of his wife, Yvonne Widdel (the Trust). (App. p. 75.) The Trust was created during the pendency of the litigation. (App. p. 61.) Now, the Trust is seeking to sell a portion of the property transferred during the litigation to appellant, Johnston Land Company, LLC.

¹ Appellees request the Court take judicial notice of all documents filed in the district court in Grand Forks County Case No. 18-2011-PR-00144 pursuant to Rule 201 of the North Dakota Rules of Evidence. Although Johnston Land Company contends this Court is incapable of taking judicial notice, such a contention is unfounded because this Court has taken judicial notice numerous times. See, e.g., Old Broadway Corp. v. Backes, 450 N.W.2d 734, 737 (N.D. 1990) (“We take judicial notice of the language of the permits from those records.” (citing N.D.R.Ev. 201)); Patten v. Green, 397 N.W.2d 458, 459 (N.D. 1986) (“We take judicial notice of the record in the divorce action and the opinions issued in related cases that were appealed to this Court.”); Leno v. Ehli, 339 N.W.2d 92, 99 (N.D. 1983) (“We take judicial notice that people have been cooking and eating poultry for hundreds of years . . .”).

(App. p. 57.) During a deposition to collect the debt (App. p. 64), Widdel indicated that he essentially had no assets; he lived in an apartment in his office, which was owned by the Trust; he paid no rent. (App. p. 77.) The car he drove was owned by his wife, and the insurance was paid by Bell Fire LLP, an organization that he and his wife formed, and for which all checks from the organization were written by him. (App. pp. 81-82.) Bell Fire LLP never had annual meetings or any corporate records except for the annual report prepared by Widdel and filed with the North Dakota Secretary of State. (App. p. 83.)

[¶7] Concerned Widdel would continue to transfer assets to avoid the judgment before her clients could commence a lawsuit, following the deposition, Sorenson filed an affidavit on behalf of her clients to provide notification that the property at issue may be the subject of future legal proceedings. (App. pp. 9-10.) There is a lawsuit currently pending in which the judgment-holders are alleging that Widdel fraudulently transferred his interest in the property through his alter egos, Bell Fire LLP and the Trust, to avoid paying the judgment. See Rebman Green et. al. v. John E. Widdel, Jr., et al., Grand Forks County Case No. 18-2017-CV-02381 (the “Fraudulent Transfer case”).² A lis pendens was recorded on the property at issue in the Fraudulent Transfer case, the same property at issue here. The district court in the Fraudulent Transfer case also issued a preliminary injunction, concluding that the judgment-holders were likely to prove that Widdel and his alter egos fraudulently transferred the property to avoid paying the \$95,000.00 judgment. (See Fraudulent Transfer case Doc. ID #47, ¶ 9.) Per the district court’s order in the Fraudulent Transfer case, the proceeds of any sale of the land must be deposited into an

²Appellees request the Court take judicial notice of all documents filed in the district court in Grand Forks County Case No. 18-2017-CV-02381 pursuant to Rule 201 of the North Dakota Rules of Evidence.

interest-bearing account pending the resolution of the case. (See Fraudulent Transfer case Doc. ID #66.)

[¶8] Johnston Land Company, LLC, an entity operated by Widdel's attorney and the intended purchaser of the property, brought the instant action alleging Sorenson's affidavit is a nonconsensual common-law lien and that the district court should strike the lien as a cloud on the title. (App. p. 93.) The district court did Johnston Land Company one better, properly finding that the affidavit is not a lien at all, so the title was never clouded in the first place. (App. p. 97.) Johnston Land Company is left with an unclouded title, as it claims to want, yet it has appealed anyway. Because there is no justiciable controversy, this Court is left without jurisdiction, and the appeal should be dismissed. But if the Court reaches the merits of the appeal, the district court should be affirmed because the Sorenson affidavit is not a lien.

ARGUMENT

I. This appeal must be dismissed because there is no justiciable controversy to give the Court jurisdiction.

[¶9] Before this Court considers the merits of an appeal, it must have jurisdiction, and an attempted appeal will be dismissed if it fails for lack of jurisdiction. Nodak Mut. Ins. Co. v. Stegman, 2002 ND 113, ¶ 6, 647 N.W.2d 133. "There must be an actual and justiciable controversy for a court to exercise its appellate jurisdiction." Gregory v. North Dakota Workers Comp. Bureau, 1998 ND 94, ¶ 22, 578 N.W.2d 101. "This Court has often held [it] cannot render advisory opinions, and [it] will dismiss appeals if the issues become moot or so academic that no actual controversy is left to be determined." Sposato v. Sposato, 1997 ND 207, ¶ 8, 570 N.W.2d 212. "The prohibition of advisory opinions requires there be an actual controversy to be determined before a court can properly

adjudicate.” Id. (quotation omitted). “An appeal is moot when an appellate court is unable to give effective relief because of a lapse of time or the occurrence of related events.” Gregory, 1998 ND 94, ¶ 22, 578 N.W.2d 101.

[¶10] No justiciable controversy exists in this appeal. Johnston Land Company brought this lawsuit to remove Sorenson’s affidavit, which Johnston Land Company alleged was a lien, so the title to the property would be unclouded. The district court determined the affidavit was not a lien at all. The relief that Johnston Land Company sought has therefore been granted: the title to the property is not encumbered by a lien because the district court has determined the affidavit is not a lien.

[¶11] The district court concluded the Sorenson affidavit “is not a nonconsensual common-law lien. It does not claim an interest in the subject property; it is merely a statement to the world, akin to a *lis pendens*, that the referenced property *may* be pursued to satisfy the Judgment.” (App. p. 97.) The district court’s determination that the affidavit is not a lien is consistent with North Dakota precedent. The North Dakota Supreme Court has long held that “the notice of *lis pendens* does not of itself create in the party recording it any lien or interest in the property.” McKenzie County v. Casady, 55 N.D. 475, 214 N.W. 461, 465 (1927). This affidavit is no different.

[¶12] Johnston Land Company claims the case of State ex rel. Emps. of State Penitentiary v. Jensen, 331 N.W.2d 42 (N.D. 1983), stands for the proposition that “a notice of *lis pendens* is in fact a cloud on title.” (Appellant’s Br. in Opp’n to Appellees’ Mot. to Dismiss at ¶ 9). This is simply not true. Nowhere in that case is there any discussion of the doctrine of *lis pendens*. In fact, a search of the text of Jensen shows the term “*lis pendens*”

is not mentioned anywhere in the opinion. See generally State ex rel. Empls. of State Penitentiary v. Jensen, 331 N.W.2d 42 (N.D. 1983).

[¶13] Jensen instead deals with liens and is inapplicable to this case. The Sorenson affidavit is not a lien. It does not purport to be a lien. And the district court specifically found that it is not a lien. The Sorenson affidavit is akin to a lis pendens and therefore not a cloud on title because a “lis pendens does not of itself create in the party recording it any lien or interest in the property.” Casady, 214 N.W. at 465.

[¶14] This appeal is also mooted by the Fraudulent Transfer case currently pending against Widdel and his alter egos in Grand Forks County District Court. While the Sorenson affidavit provided notice to the world that the property *may* be the subject of a lawsuit, the lis pendens that has been recorded in the Fraudulent Transfer case provides notice that the property *is* currently the subject of a lawsuit.

[¶15] The Sorenson affidavit, being in the nature of a lis pendens, did not claim or create any lien or interest in the property. As the district court found, the affidavit merely put the world on notice that the land may be the subject of future legal proceedings, and the land is now in fact the subject of legal proceedings in the Fraudulent Transfer case. Johnston Land Company has nothing to challenge on appeal because it now has a judicial determination that the land is not encumbered by any lien. Because Johnston Land Company has a judicial determination that the property is not encumbered by any lien, there is no justiciable controversy to give this Court jurisdiction. The appeal must therefore be dismissed.

II. The district court correctly found that the Sorenson affidavit is not a lien.

[¶16] If the Court reaches the merits of the appeal, the district court ought to be affirmed because it correctly determined the Sorenson affidavit is not a lien. Issues involving interpretation and application of lien statutes are questions of law fully reviewable on appeal. Nusviken v. Johnston, 2017 ND 22, ¶ 5, 890 N.W.2d 8.

[¶17] The Sorenson affidavit at issue here states the following:

I am an attorney with the law firm of Ohnstad Twichell, P.C., who represents petitioners Andrea Rebman Green, Carolyn Rebman, Charlene Leibold, Colin Leibold, Eric Rebman, Glen Rebman, and Jacob Leibold, in the estate entitled “In the Matter of the Estate of Donald G. Amundson, Deceased.” Petitioners have obtained a Judgment against John E. Widdel Jr., a/k/a J. E. Widdel, a/k/a Jack Widdel, and Law Offices - North Dakota, P.C., jointly and severally, in the amount of \$95,000, a true and correct copy of which Judgment is attached hereto as Exhibit “A.”

On March 10, 2015, the undersigned deposed John E. Widdel Jr., a/k/a J. E. Widdel, a/k/a Jack Widdel, in an effort to obtain information about the nature and extent of assets held by him. At the deposition, the undersigned discovered that John E. Widdel Jr., a/k/a J. E. Widdel, a/k/a Jack Widdel, previously had an interest in the real property described herein, which real property may be pursued to satisfy the attached Judgment.

This affidavit is to make it known to the public that the following real property may be subject to future legal proceedings regarding said Judgment: [legal description of the property].

(App. p. 9.)

[¶18] Johnston Land Company claims this affidavit is a “nonconsensual common-law lien.” A nonconsensual common-law lien is defined by statute as “a document that purports to assert a lien against real or personal property of any person” and (1) is not expressly provided for by a specific statute; (2) does not depend upon the property owner’s consent; and (3) is not an equitable or constructive lien imposed by a court. N.D.C.C. § 35-35-01(2) (emphasis added).

[¶19] The threshold determination that must be made in order for a document to constitute a nonconsensual common-law lien, then, is that the document at issue must first “purport[] to assert a lien.” *Id.* “A lien is a charge imposed upon specific property by which it is made security for the performance of an act.” N.D.C.C. § 35-01-02.

[¶20] The Sorenson affidavit does not purport to assert a lien. It does not say the property is security for the performance of an act. It does not even say judgment-debtor Widdel owns the property. It merely states judgment-debtor Widdel previously had an interest in the property, and the property may be subject to future legal proceedings.

[¶21] It is more accurate to say, as the district court determined, that the Sorenson affidavit is akin to a *lis pendens*, putting the world on notice that the property may be the subject of future litigation. The district court determined that the affidavit “is not a nonconsensual common-law lien. It does not claim an interest in the subject property; it is merely a statement to the world, akin to a *lis pendens*, that the referenced property *may* be pursued to satisfy the Judgment.” (App. p. 97.) The district court’s reasoning is sound because the court’s determination that the affidavit is not a lien is consistent with North Dakota precedent. The North Dakota Supreme Court has long held “the notice of *lis pendens* does not of itself create in the party recording it any lien or interest in the property.” *Casady*, 214 N.W. at 465. The Sorenson affidavit, being in the nature of a *lis pendens*, did not claim a lien or interest in the property, and did not purport to be a lien.

[¶22] Because the Sorenson affidavit does not purport to be a lien, it cannot be a nonconsensual common-law lien. The district court correctly determined that the affidavit is neither a lien nor a nonconsensual common-law lien and should be affirmed. Appellees renew their Motion to Dismiss Appeal filed at Supreme Court Docket #13.

III. The Court should award double costs and attorney fees under N.D.R.App.P. 38 because this appeal is frivolous.

[¶23] Appellees request attorney fees and double costs for this appeal under N.D.R.App.P. 38. This Court has set out the following standard for awarding such fees and costs:

Rule 38, N.D.R.App.P., authorizes this Court to award just damages and single or double costs including reasonable attorney's fees if the Court determines an appeal is frivolous. An appeal is frivolous when it is flagrantly groundless. Where the appellant's arguments are both factually and legally so devoid of merit that he should have been aware of the impossibility of success on appeal, an assessment of costs and attorney fees is proper.

Matter of Hirsch, 2017 ND 291, ¶ 14, 904 N.W.2d 740 (internal quotation marks and citations omitted). This Court has stated the amount of the attorney fees requested can be documented by an affidavit accompanying the request, id., or they can be determined by the district court on remand. Medd v. Fonder, 543 N.W.2d 483, 488 (N.D. 1996).

[¶24] This appeal is flagrantly groundless as well as factually and legally devoid of merit because Johnston Land Company obtained the relief it was seeking in the district court yet still appealed. It is impossible for Johnston Land Company to succeed in this appeal because it has already succeeded in the district court by obtaining a determination that the Sorenson affidavit is not a lien. For these reasons, double costs and attorney fees are warranted for this appeal.

CONCLUSION

[¶25] Johnston Land Company brought this lawsuit to remove what it thought was a lien from the title of property it wishes to purchase. The district court determined that the property is not encumbered by a lien because the Sorenson affidavit is not a lien. Because Johnston Land Company has a judicial determination that the property is not encumbered by

any lien, there is no justiciable controversy to give this Court jurisdiction. The appeal must therefore be dismissed. But if the Court reaches the merits, the district court should be affirmed because it correctly determined the Sorenson affidavit is not a nonconsensual common-law lien. In either event, the Court should remand to the district court to determine the amount of attorney fees to award under N.D.R.App.P. 38 for this frivolous appeal.

Dated: April 26, 2018.

/s/ Robert G. Hoy

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and Ohnstad Twichell, P.C., a)	COMPLIANCE
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Respondent and Appellee.)	

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JUDICIAL DISTRICT, THE HONORABLE STACY J. LOUSER, PRESIDING

[¶26] The undersigned attorney for the respondents and appellees in the above-entitled matter hereby certifies, in compliance with Rule 32(a)(8)(A), N.D.R.App.P., that the above brief contains 2,967 words (excluding words contained in (1) the table of contents, (2) the table of citations, and (3) this certificate), which is within the limit of 8,000 words.

/s/ Robert G. Hoy

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GRAND FORKS COUNTY, NORTH DAKOTA, NORTHEAST CENTRAL
JUDICIAL DISTRICT, THE HONORABLE STACY J. LOUSER, PRESIDING

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

[¶27] I hereby certify that on April 26, 2018, I caused to be electronically filed the **Appellees' Brief** with the Clerk of the North Dakota Supreme Court (at supclerkofcourt@ndcourts.gov) and served the same electronically as follows:

By e-mail:

DeWayne Johnston dewayne@wedefendyou.net

Dated: April 26, 2018.

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