

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

North Dakota Private Investigative and
Security Board,

Plaintiff/Appellant and Cross-
Appellee,

vs.

TigerSwan, LLC and James Patrick Reese,

Defendants/Appellees and
Cross-Appellants.

SUPREME COURT NO. 20180338

Civil No. 08-2017-CV-01873

ON APPEAL FROM ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT COUNT 3; ORDER
GRANTING TIGERSWAN'S MOTION TO DISMISS COUNTS
1 & 2; ORDER DENYING PLAINTIFF'S MOTION FOR
RECONSIDERATION; ORDER FOR JUDGMENT; AND
JUDGMENT DATED AUGUST 9, 2018
STATE OF NORTH DAKOTA
BURLEIGH COUNTY
THE HONORABLE JOHN GRINSTEINER

**APPELLANT'S REPLY BRIEF TO APPELLEE AND CROSS-APPELLANTS
SUPPLEMENTAL BRIEF**

Monte L. Rogneby (#05029)

mrogneby@vogellaw.com

Justin J. Hagel (#07470)

jhagel@vogellaw.com

VOGEL LAW FIRM

Attorneys for North Dakota Private Investigative
and Security Board

US Bank Building

200 North 3rd Street, Suite 201

PO Box 2097

Bismarck, ND 58502-2097

Telephone: 701.258.7899

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STATEMENT OF THE CASE

[¶1] Section 43-30-10, N.D.C.C., authorizes the Board to seek injunctive relief and administrative fees against TigerSwan, LLC, and James Reese (TigerSwan) for illegally providing private investigative and private security services without being licensed by the Board. In accordance with § 43-30-10, on June 12, 2017, the Board initiated this action in District Court. (Appendix (A) at 9-21.)

[¶2] The District Court dismissed the Board's request for injunctive relief. (A at 380.) The Court then concluded the Board's claim for administrative fees against TigerSwan for violating North Dakota law should be dismissed because it would be "[i]mproper for the Court to impose itself on an otherwise administrative function." (TigerSwan's Supplemental Appendix (TSA) at 50.)

[¶3] After the Court issued its order denying the Board's request for reconsideration, TigerSwan submitted a proposed order for judgment and judgment which were entered on August 9, 2018. (Register of Actions (RA) at ## 189-193, A at 7.) In response, on September 13, 2018, the Board filed its notice of appeal. (A at 403.) The Notice of appeal was filed prior to TigerSwan serving a notice of entry of judgment. On September 24, 2018, TigerSwan filed its notice of cross appeal. (RA at # 198, A at 7.)

[¶4] On October 27, 2018, 79 days after it had notice of the Board's appeal, TigerSwan served Notice of Entry of the August 9, 2018, Judgment and moved the District Court for Rule 11 sanctions and attorney fees under § 28-26-01. (RA at ##202 & 203, TSA at 9.) The Board requested a hearing on the motion. TigerSwan attempted to convert the oral argument into an evidentiary hearing so it could present evidence of its attorneys' fees. The District Court directed the hearing should be an oral argument. The

hearing was held on December 17, 2018. (Id. at 10.); See also Transcript of Motion Hearing dated December 17, 2018 (Transcript of Motion Hearing).).

[¶5] On December 19, 2018, the Court denied TigerSwan's motion, concluding the Board's case against TigerSwan was not frivolous, was brought in good faith, and that it involved legal questions of first impression in North Dakota. (TSA at 49.)

[¶6] TigerSwan appeals from the Court's order. It is not clear from TigerSwan's Supplemental Brief whether it believes the District Court abused its discretion when it made its factual findings, or whether TigerSwan believes the Court abused its discretion when it made its conclusions of law. Regardless, TigerSwan's appeal of the Court's denial of its request to sanction the Board and its Counsel should be denied.

FACTS

[¶7] TigerSwan's basis for seeking attorney's fees and sanctions against the Board and its Counsel are based in its contentions the Board "should never have brought" an action for administrative fees against TigerSwan for its multiple violations of North Dakota law and that it should not have maintained its request for an injunction after it claimed it ceased doing business in North Dakota. TigerSwan's claims of improper conduct by the Board are rooted in its inconsistent factual representations concerning the timing of the Board's initiation of this case in relation to TigerSwan's alleged cessation of business in North Dakota. The undisputed facts are as follows:

June 12, 2017 – Summons and Verified Complaint and Request for Injunction executed by the Board. (A at 9 and 11.)

June 15, 2017 – Summons and Verified Complaint served by certified mail on TigerSwan. (RA at #6, A at 2.)

June 27, 2017 – Board files the Summons and Verified Complaint with the District Court. (RA at #1, A at 1.)

June 30, 2017 – TigerSwan’s then attorney, Rob Forward, sends to the Board a letter claiming TigerSwan had ceased doing business in North Dakota and removed all of its personnel from North Dakota as of June 23, 2017. (A at 138.)

[¶8] As noted in its Supplemental Brief, TigerSwan admits it was conducting business in North Dakota at the time it was served with the Summons and Verified Complaint and only allegedly ceased doing business here after this action was initiated. As part of this contention, TigerSwan misrepresents the law, contending, without citation, that an action in North Dakota commences upon filing of the pleadings: “[t]hus, at the time the Court had any jurisdiction in this case (i.e., on the date of the filing of the Summons and the Complaint) TigerSwan and its employees were no longer in the state.” (Supplemental Brief at ¶ 7.)

[¶9] TigerSwan argued different facts and law during the argument to the District Court on December 17, 2018:

[Mr. Boughey:] They mention about they sued it while people were still in the state. I direct the Court to Rule 3 of the Rules of Civil Procedure. Rule 3 clearly provides that an action is commenced by the service of a summons. They might have signed it in Mr. Rogneby's office and they might have sat around on it for a while and then finally decided to serve it, but the matter was not served. By the time it was served when this action was commenced, we were out of state and they were advised that by Attorney Forward and they still proceeded in this manner.

I've already mentioned Rule 3. This action did not begin until service and service didn't happen. We were out of the state by then.

(Transcript of Motion Hearing at 27 & 33.)

LAW AND ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED TIGERSWAN'S MOTION FOR SANCTIONS AND ATTORNEY'S FEES.

[¶10] “Under North Dakota law, each party generally bears its own attorney fees.” Strand v. Cass County, 2008 ND 149, ¶ 9, 753 N.W.2d 872. Rule 11, N.D.R.Civ.P., creates an exception if an attorney presents a pleading, written motion, or other paper to a court, in violation of the provisions of the Rule. “If a district court determines a party has violated N.D.R.Civ.P. 11(b), it may sanction the party, attorney, or law firm.” In re Pederson Trust, 2008 ND 210, ¶ 22, 2008 ND 210 (citing Rule 11(c), N.D.R.Civ.P.). “The determination whether to impose sanctions for a N.D.R.Civ.P. 11 violation lies within the sound discretion of the district court. Id. “A district court’s decision regarding N.D.R.Civ.P. 11 sanctions will not be disturbed unless this Court determines the district court abused its discretion. Id. “[I]f there are any factual determinations relevant to the sanctions issue, this Court reviews the district court’s findings under the clearly erroneous standard.” Id.

[¶11] A Court is also entitled to award attorney’s fees under N.D.C.C. § 28-26-01(2) if the Court finds that a claim for relief was frivolous. This Court has explained that “[t]he plain language of this statute requires courts in civil actions to award costs and fees, including attorney’s fees, upon a finding a claim for relief was frivolous, providing the prevailing party pled the alleged frivolousness of the claim. Strand v. Cass County, 2008 ND 149, ¶ 11, 753 N.W.2d 872. “Frivolous claims are those which have such a complete absence of actual facts or law that a reasonable person could not have expected that a court would render judgment in [that person’s] favor.” Id. (internal citations and quotations omitted). “When a party requests attorney’s fees under N.D.C.C. § 28-26-

01(2), the court must first determine whether the claim is frivolous. If the court makes that determination, the court must then award reasonable attorney's fees to the prevailing party." Id. (internal citations and quotations omitted). "An award under N.D.C.C. § 28-26-02 is within the discretion of the district court and will only be disturbed on appeal for an abuse of that discretions. Id. (citing Deacon's Development, LLP, v. Lamb, 2006 ND 172, ¶ 12, 719 N.W.2d 379).

[¶12] This Court has previously explained that § 28-26-01(2) and Rule 11 relate to the same subject matter and that it is appropriate to apply the same standard of review in analyzing a district court's application of the statute and the rule. See Napoleon Livestock Auction, Inc. v. Rohrich, 406 N.W.2d 346, 361 (N.D.1987). Thus, in this case, this Court must determine whether the District Court abused its discretion when it concluded the Board's action was not frivolous and was brought in good faith. "A court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned decision, or it misinterprets or misapplies the law." Dixon v. McKenzie Co. Grazing Association, 2004 ND 40, ¶ 29, 675 N.W.2d 414.

[¶13] Here, the District Court did not abuse its discretion.

[¶14] The Board is tasked with protecting the public by ensuring that those who provide private investigative and private security services in North Dakota are licensed by the Board. The District Court denied TigerSwan's motion for summary judgment finding that fact questions existed as to whether TigerSwan illegally provided private investigative and/or private security services. (A at 364.) Accordingly, for the purposes of this Court's analysis, this Court must accept as true the allegations contained in the

Verified Complaint and must draw all inferences from those allegations in favor the Board.

[¶15] TigerSwan admits that it was conducting business in North Dakota at the time it was served with the Verified Complaint. (A at 138.)

[¶16] The Board did not act inappropriately in seeking injunctive relief based on TigerSwan's conducting business in North Dakota at the time the Complaint was served.

[¶17] TigerSwan claims the Board should have voluntarily dismissed its Complaint based on TigerSwan's assertions that it ceased doing business and did not intend to return. In essence TigerSwan is contending that a State regulatory board must abandon injunctive relief based on the unsworn allegations of the violators' attorney. TigerSwan claims this alleged requirement is so engrained in North Dakota's jurisprudence that the Board and its Counsel abandonment should be sanctioned for not recognizing it. Yet TigerSwan does not cite a single legal source supporting this alleged duty. As the District Court properly found, the Board relied on the provisions of § 43-30-10 and cases from other jurisdictions which hold that proof of a continuing violation is not necessary to secure injunctive relief. This is one of the appeal issues before this Court. It is worth noting that TigerSwan has not contested the Board's legal citations from other states in support of this issue of first impression in North Dakota.

[¶18] The Board did not act improperly in continuing to pursue injunctive relief after receiving TigerSwan's allegations of withdrawal.

[¶19] TigerSwan contends the Board acted inappropriately when it initiated this action in District Court rather than as an administrative action. Chapter 43-30, however, explicitly authorizes the Board to seek injunctive relief and administrative fees in District

Court. The Board's legal position is enshrined in statute, TigerSwan's position, which was adopted by the District Court, is that the Board's action amounted to a request for the District Court to "[i]mproper[ly] . . . impose itself on an otherwise administrative function." This position is not supported by the governing statute or any of this Court's decisions. TigerSwan in fact is requesting that this Court, for the first time, establish a new doctrine of administrative law similar to abstention. The Board did not act inappropriately in relying on the plain language of the statute.

[¶20] Finally, TigerSwan contends the Board acted inappropriately because it claims it was inappropriate for the Board to conduct discovery in this civil case. TigerSwan contends the fact that the Board attempted to conduct discovery is proof of the Board's bad faith or improper motive because, according to TigerSwan, the Board must have all of the fact necessary to present its case to the Court before it initiates an enforcement action. Again, for this rather novel contention, TigerSwan cites to no case law or statutes.

[¶21] A much stronger argument exists that TigerSwan's motion for sanction and this supplemental appeal are a violation of Rule 11 than any claim made by TigerSwan against the Board. In any event, the District Court did not abuse its discretion in denying TigerSwan's motion.

II. THE DISTRICT COURT'S DECISION SHOULD BE UPHELD BECAUSE TIGERSWAN FAILED TO PLEAD § 28-26-01(2).

[¶22] For a party to recover under Section 28-26-01(2) the party must, in its responsive pleading, allege the frivolous nature of the claim." N.D.C.C. § 28-26-01(2). Here, TigerSwan and Reese did not raise the issue of frivolousness in their respective Answers

as required. (A at 75 and 83). The District Court should not even of considered this request because the pre-requisite to making the claim was not met.

III. TIGERSWAN FAILED TO TIMELY FILE ITS MOTION FOR SANCTIONS AND ATTORNEYS' FEES.

[¶23] “A claim for attorneys’ fees and related nontaxable expenses not determined by the judgment must be made by motion” and such a motion “must be served and filed within 21 days after notice of entry of judgment.” N.D.R.Civ.P. 54(e)(3). TigerSwan failed to its motion until October 27, 2018, 79 days after the Board filed its appeal. TigerSwan’s motion is untimely, regardless of when TigerSwan filed the Notice of Entry.

[¶24] Rule 11 is patterned after the federal rule, and federal court interpretations of Rule 11 are highly persuasive to interpretations of North Dakota’s rule. Dietz v. Kautzman, 2004 ND 119, ¶ 7, 681 N.W.2d 437. In a case very similar in procedural posture as this matter, a federal court determined that the party seeking Rule 11 sanctions had failed to timely file the motion. Monahan Corp. N.V. v. Whitty, 319 F.Supp.2d 227, 232 (D.Mass. 2004). As stated by the federal district court, Rule 11 does not have a timing requirement on its face, but the advisory notes establish that a party seeking to file a Rule 11 motion must do so promptly. Id. (citing Fed.R.Civ.P. Rule 11 (1993 advisory notes); Kaplan v. Zenner, 956 F.2d 149, 150-51 (7th Cir. 1992)). Under the 1993 Amendment, the Advisory Committee includes for the comments to subdivisions (b) and (c) of the federal rule the following:

Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the “safe harbor” provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Fed.R.Civ.P. Rule 11, Notes of Advisory Committee (1993 Amendment).

[¶25] Here, TigerSwan failed to timely file its motion for Rule 11 sanctions and Attorneys' fees.

IV. THE BOARD IS ENTITLED TO ITS ATTORNEYS FEES FOR HAVING TO DEFEND AGAINST THIS FRIVOLOUS APPEAL.

[¶26] TigerSwan's appeal of the order denying it sanctions and attorneys's fees is not well grounded in law. It is in fact frivolous. TigerSwan does not recognize the standard of review governing its appeal, and does not cite to a single legal source in its supplemental brief in favor of its contentions that the Board's legal positions are not grounded in law.

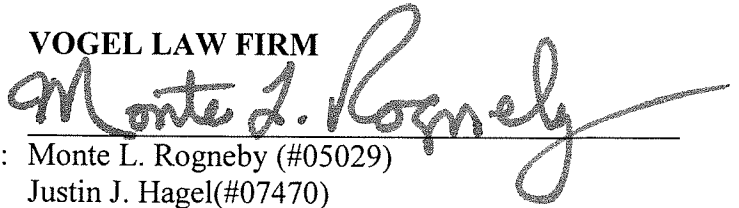
[¶27] This Court should allow the Board to submit its costs and attorney fees for having to respond to TigerSwan's appeal of the District Court's order and this Court should order TigerSwan to pay them. See Rule 38, N.D. R.App.P.

CONCLUSION

[¶28] TigerSwan's appeal of the Court's denial of its motion for sanctions and attorneys' fees should be denied and the Board should be awarded its attorneys' fees in responding to TigerSwan's appeal of the Order denying the Motion.

Respectfully submitted April ^{12th}12, 2019.

VOGEL LAW FIRM



BY: Monte L. Rogneby (#05029)

Justin J. Hagel (#07470)

Special Assistant Attorney General for the State
of North Dakota

US Bank Building

200 North 3rd Street, Suite 201

PO Box 2097

Bismarck, ND 58502-2097

Telephone: 701.258.7899

Facsimile: 701.258.9705


Email: mrogneby@vogellaw.com
jhagel@vogellaw.com

ATTORNEYS FOR NORTH DAKOTA
PRIVATE INVESTIGATORS SECURITY
BOARD

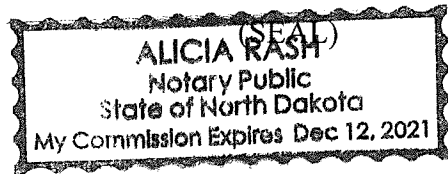
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AFFIDAVIT OF SERVICE

Chelsey Ternes, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on April 12, 2019, **Appellant's Reply Brief to Appellee and Cross-Appellants Supplemental Brief** was filed electronically with the Clerk of Court of the North Dakota Supreme Court through email, and that the same documents were electronically served through email upon:


Chelsey Ternes

Subscribed and sworn to before me this 12 day of April, 2019.




Notary Public