

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

Supreme Court Case No. 20210324

In the Matter of the Emelia Hirsch, June 9, 1994, Irrevocable Trust)	
)	
Timothy Betz,)	
Respondent and Appellant,)	
)	
v.)	
)	BRIEF OF APPELLEES CAROLYN
Emelia A. Hirsch, aka Emelia Hirsch, aka)	TWITE AND DUANE HIRSCH
Emilia Hirsch, Carolyn Twite and Duane)	
Hirsch,)	
Petitioners and Appellees,)	
)	
and)	
)	
Marlene Betz,)	
Interested Party,)	
)	
and)	
)	
Allen Betz,)	
Interested Party and Appellant.)	

APPEAL FROM THE SEPTEMBER 30, 2021 ORDER AND JULY 16, 2008 ORDER
OF THE BURLEIGH COUNTY DISTRICT COURT, CASE NO. 08-03-C-02228

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STATEMENT OF ISSUES

- [¶1] I. Whether the district court erred in issuing a pre-filing order against Allen Betz.
- II. Whether the remaining issues raised in this appeal are precluded as a matter of law.
- III. Whether Appellees are entitled to recovery of costs and attorney's fees in this appeal.

STATEMENT OF FACTS

[¶2] Appellees Carolyn Twite and Duane Hirsch, co-trustees of the Emelia Hirsch Trust dated June 9, 1994 (“Trustees”), submit this brief in response to the *Appellant’s Brief* of Allen Betz (“Allen”), dated December 13, 2021. The instant appeal is the latest in a long line of attempts to vacate the reformation of the Emelia Hirsch Trust dated June 9, 1994, which this Court affirmed in Matter of Emelia Hirsch Trust, 2009 ND 135, 770 N.W.2d 225. See Matter of Emelia Hirsch Trust, 2021 ND 142, 963 N.W.2d 259; Matter of Emelia Hirsch Trust, 2020 ND 129, 944 N.W.2d 335; Matter of Emelia Hirsch Trust, Supreme Court Case No. 20190115 (Order of Dismissal); Matter of Emelia Hirsch Trust, 2019 ND 264, 935 N.W.2d 255; Matter of Emelia Hirsch Trust, 2017 ND 291, 904 N.W.2d 740; Matter of Emelia Hirsch Trust, 2016 ND 217, 888 N.W.2d 205; Matter of Emelia Hirsch Trust, 2014 ND 135, 848 N.W.2d 719; Matter of Emelia Hirsch Trust, 2013 ND 63, 832 N.W.2d 334; Matter of Emelia Hirsch Trust, Supreme Court Case No. 20120241 (Order of Dismissal); Matter of Emelia Hirsch Trust, Supreme Court Case No. 20120141 (Order of Dismissal).

[¶3] The Honorable Judge Bobbi Weiler was assigned to this case following the retirement of the Honorable Judge Gail Hagerty in March 2020. As indicated by the *Order*, dated September 30, 2021 (“September 2021 Order”), Marlene Betz (“Marlene”), Timothy

Betz (“Tim”), and Allen have continued in their frivolous efforts to re-litigate this case, having submitted the following documents to the district court since July 2020 (dates indicate when the district court received the documents):

1. July 30, 2020: Motion and Documents requesting the Court vacate Judge Hagerty’s Order from July 16, 2008.
2. August 18, 2020: Motion and Documents requesting the Court vacate Judge Hagerty’s Order from July 16, 2008.
3. August 24, 2020: Motion and Documents requesting the Court vacate Judge Hagerty’s Order from July 16, 2008.
4. August 28, 2020: Motion and Documents requesting the Court vacate Judge Hagerty’s Order from July 16, 2008.
5. September 8, 2020: Motion and Documents requesting the Court vacate Judge Hagerty’s Order from July 16, 2008.
6. September 23, 2020: Motion and Documents requesting the Court vacate Judge Hagerty’s Order from July 16, 2008.
7. October 5, 2020: Motion and Documents requesting the Court vacate Judge Hagerty’s Order from July 16, 2008.
8. October 23, 2020: Motion and Documents requesting the Court vacate Judge Hagerty’s Order from July 16, 2008.
9. November 6, 2020: Motion and Documents requesting the Court vacate Judge Hagerty’s Order from July 16, 2008.
10. November 12, 2020: Motion and Documents requesting the Court vacate Judge Hagerty’s Order from July 16, 2008.
11. December 17, 2020: Motion and Documents requesting the Court vacate Judge Hagerty’s Order from July 16, 2008.
12. December 18, 2020: Motion and Documents requesting the Court vacate Judge Hagerty’s Order from July 16, 2008.
13. January 12, 2021: Motion and Documents requesting the Court vacate Judge Hagerty’s Order from July 16, 2008.

14. February 18, 2021: Motion and Documents requesting the Court vacate Judge Hagerty's Order from July 16, 2008.
15. February 23, 2021: Motion and Documents requesting the Court vacate Judge Hagerty's Order from July 16, 2008.
16. February 25, 2021: Motion and Documents requesting the Court vacate Judge Hagerty's Order from July 16, 2008.
17. March 3, 2021: Motion and Documents requesting the Court vacate Judge Hagerty's Order from July 16, 2008.
18. March 11, 2021: Motion and Documents requesting the Court vacate Judge Hagerty's Order from July 16, 2008.
19. March 16, 2021: Motion and Documents requesting the Court vacate Judge Hagerty's Order from July 16, 2008.
20. March 17, 2021: Motion to vacate Judge Hagerty's Order from July 16, 2008.
21. Appeal: Pending May 2021 – August 2021.
22. September 8, 2021: Relief from Judge Hagerty's Order from September 7, 2005.
23. September 14, 2021: Relief from Judge Hagerty's Order from September 7, 2005.
24. September 20, 2021: Motion for Relief from Judge Hagerty's Order from July 16, 2008.

(App. 90-92).

[¶4] The September 2021 Order further describes the Betzs' continuing conduct as vexatious litigants in this matter:

The typical process of Timothy and Allen Betz is that one will file a request and shortly after that request is denied, the other one will file the same or similar request. Marlene Betz will then sometimes join in the same request. It is a never-ending cycle. Shortly after the Supreme Court issued its latest Opinion on August 5, 2021, the Betzs started the process again. First, Timothy Betz filed his request on September 8, 2021, which the Court sent back. Then Allen

Betz filed the same or similar request on September 14, 2021.

The Betzs have been ordered to pay substantial fees, both with the district courts and with the Supreme Court in North Dakota. However, this has not stopped the Betzs from filing frivolous Motions.

Timothy, Allen, and Marlene Betz are vexatious litigants in that they have persistently and without reasonable grounds filed motions and requests not warranted under existing law and which cannot be supported by any good faith argument. Their actions have served primarily to harass and injure other parties to litigation. Their actions have imposed an unacceptable burden on other parties and judicial personnel and resources.

After several appeals that were unsuccessful, all three Betzs have repeatedly relitigated or attempted to re-litigate the matter as self-represented parties against the same parties as to whom the litigation was determined.

All three Betzs have repeatedly filed unmeritorious motions, pleadings, or other papers and have engaged in tactics which are frivolous and solely intended to cause unnecessary burden.

(App. 92-93). Accordingly, the September 2021 Order provides that Tim, Marlene, and Allen “are prohibiting (sic) from filing any new litigation or any new documents in existing litigation in the courts of this state as self-represented parties without first obtaining leave of the judge of the court in the district where the litigation is proposed to be filed.” (App. 93). The September 2021 Order further clarifies “[t]hey may file an application seeking leave to file documents.” (Id.) Pre-filing orders against Tim and Marlene had been previously entered by the district court and upheld by this Court on appeal. See Matter of Emelia Hirsch Trust, 2017 ND 291, 904 N.W.2d 740; Matter of Emelia Hirsch Trust, 2020 ND 129, 944 N.W.2d 335.

[¶5] Of additional relevance to the instant appeal is the *Order* entered by Judge Hagerty on January 31, 2020 (“January 2020 Order”), wherein the district court identified Allen as a “vexatious litigant” following a motion for pre-filing order submitted by the Trustees on January 16, 2020. (Appellee App. 49-50). In connection with the January 2020 Order, and in accordance with N.D. Sup.Ct. Admin. R. 58, Judge Hagerty issued a *Notice and Proposed Pre-Filing Findings and Order* against Allen on January 31, 2020. (Appellee App. 45-48). As indicated therein, Allen was notified of the district court’s proposed pre-filing order, and that he had fourteen (14) days to file a written response to the same. (*Id.*) There was no response or objection from Allen. (*Id.* at 22). With the intervening appellate proceedings and retirement of Judge Hagerty, it was not until after this Court’s opinion in Matter of Emelia Hirsch Trust, 2020 ND 129, 944 N.W.2d 335, that Judge Weiler was assigned to this case and began issuing orders in response to the Betzs’ continued filings. (*Id.* at 51-56). The pre-filing order against Allen was addressed by the September 2021 Order, discussed above. (App. 90-94).

[¶6] A *Notice of Appeal* was submitted by Allen on November 22, 2021, and his *Appellant’s Brief* was submitted on December 13, 2021. (Docket # 1, 8). A *Notice of Appeal* was also permitted to be filed by Tim and his *Appellant Brief* was submitted on January 7, 2022. (Docket ## 15, 18, 20). The Trustees now submit this brief in opposition to the frivolous appeal taken by Allen and Tim. For the reasons explained, the district court did not err in issuing a pre-filing order against Allen, and the remaining issues raised in this appeal are precluded as a matter of law. The Trustees are further entitled to an award of their costs and attorney’s fees incurred in relation to this appeal.

LAW AND ARGUMENT

I. The district court did not err in issuing a pre-filing order against Allen Betz.

[¶7] In prior appeals, this Court affirmed pre-filing orders against Tim and Marlene applying an abuse of discretion standard. Matter of Emelia Hirsch Trust, 2017 ND 291, 904 N.W.2d 740; Matter of Emelia Hirsch Trust, 2020 ND 129, 944 N.W.2d 335. “A district court abuses its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner, if its decision is not the product of a rational mental process leading to a reasonable determination, or if it misinterprets or misapplies the law.” Holkesvig v. VandeWalle, 2016 ND 107, ¶ 17, 879 N.W.2d 728.

[¶8] This Court adopted N.D. Sup. Ct. Admin. R. 58 to address “vexatious litigation, which impedes the proper functioning of the courts, while protecting reasonable access to the courts.” Everett v. State, 2017 ND 93, ¶ 3 n.1, 892 N.W.2d 898 (quoting N.D. Sup. Ct. Admin. R. 58(1)). A vexatious litigant is defined as “a person who habitually, persistently, and without reasonable grounds engages in conduct that: (1) serves primarily to harass or maliciously injure another party in litigation; (2) is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law; (3) is imposed solely for delay; (4) hinders the effective administration of justice; (5) imposes an unacceptable burden on judicial personnel and resources; or (6) impedes the normal and essential functioning of the judicial process.” N.D. Sup. Ct. Admin. R. 58(2)(b).

[¶9] Administrative Rule 58 authorizes the presiding judge to “enter a pre-filing order prohibiting a vexatious litigant from filing any new litigation or any new documents in existing litigation in the courts of this state as a self-represented party without first

obtaining leave of a judge of the court in the district where the litigation is proposed to be filed.” N.D. Sup. Ct. Admin. R. 58(3)(a). “A pre-filing order must contain an exception allowing the person subject to the order to file an application seeking leave to file.” Id.

A presiding judge may find a person to be a vexatious litigant based on a finding that:

(a) in the immediately preceding seven-year period the person has commenced, prosecuted or maintained as a self-represented party at least three litigations, other than in small claims court, that have been finally determined adversely to that person; or

(b) after a litigation has been finally determined against the person, the person has repeatedly relitigated or attempted to relitigate, as a self-represented party, either (1) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined; or (2) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined; or

(c) in any litigation while acting as a self-represented party, the person repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary burden, expense or delay; or

(d) the person has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding.

N.D. Sup. Ct. Admin. R. 58(4).

[¶10] “If the presiding judge finds that there is a basis to conclude that a person is a vexatious litigant and that a pre-filing order should be issued, the presiding judge must issue a proposed pre-filing order along with the proposed findings supporting the issuance of the pre-filing order.” N.D. Sup. Ct. Admin. R. 58(5). “The person who would be designated as a vexatious litigant in the proposed order will have 14 days to file a written

response to the proposed order and findings...[and] [i]f a response is filed, the presiding judge may, in the judge's discretion, grant a hearing on the proposed order. Id. "If no response is filed within 14 days, or if the presiding judge concludes following a response and any subsequent hearing that there is a basis for issuing the order, the presiding judge may issue the pre-filing order." Id.

[¶11] In response to a motion filed by Allen on January 6, 2020 to vacate the July 2008 trust reformation order, the Trustees submitted a cross-motion for a pre-filing order against Allen on January 16, 2020. (Appellee App. 25-31). Allen filed a response to the Trustees motion on January 27, 2020. (Id. at 32-44). In denying Allen's motion, the district court entered its January 2020 Order finding that Allen was acting in collusion with Marlene and Tim (who had pre-filing orders against them already), and specifically identified Allen as a "vexatious litigant." (Id. at 49-50).

[¶12] In accordance with Rule 58, the district court also issued a *Notice and Proposed Pre-Filing Findings and Order* against Allen on January 31, 2020, concluding as follows:

1. Allen Betz is a vexatious litigant in that he has persistently and without reasonable grounds filed motions and requests not warranted under existing law and which cannot be supported by any good faith argument. Allen Betz's actions have imposed an unacceptable burden on other parties and judicial personnel and resources.
2. After litigation concerning the Emelia Hirsch Trust was finally determined, Allen Betz has repeatedly re-litigated or attempted to re-litigate the matter as a self-represented party against the same parties as to whom the litigation was determined.
3. Allen Betz, acting as a self-represented party, has repeatedly filed unmeritorious motions, pleadings, or other papers and has engaged in tactics which are frivolous and solely intended to cause unnecessary burden.

(Appellee App. 45-48). As further contained therein, Allen was notified that he had fourteen (14) days to file a written response to the proposed order and findings. (Id. at 45).

There was no response from Allen. (Id. at 22).

[¶13] Given the intervening appellate proceedings and assignment of Judge Weiler to this case following Judge Hagerty's retirement, the pre-filing order against Allen was effectuated via the September 2021 Order echoing the pre-filing orders which had been entered against Tim and Marlene (upheld on appeal), and the uncontested proposed findings and order against Allen:

Timothy, Allen, and Marlene Betz are vexatious litigants in that they have persistently and without reasonable grounds filed motions and requests not warranted under existing law and which cannot be supported by any good faith argument. Their actions have served primarily to harass and injure other parties to litigation. Their actions have imposed an unacceptable burden on other parties and judicial personnel and resources.

After several appeals that were unsuccessful, all three Betzs have repeatedly relitigated or attempted to re-litigate the matter as self-represented parties against the same parties as to whom the litigation was determined.

All three Betzs have repeatedly filed unmeritorious motions, pleadings, or other papers and have engaged in tactics which are frivolous and solely intended to cause unnecessary burden.

(App. 93). Accordingly, the district court ordered that Tim, Marlene, and Allen "are prohibiting (sic) from filing any new litigation or any new documents in existing litigation in the courts of this state as self-represented parties without first obtaining leave of the judge of the court in the district where the litigation is proposed to be filed." (Id.) The September 2021 Order further clarifies "[t]hey may file an application seeking leave to file documents" as required by N.D. Sup. Ct. Admin. R. 58(3)(a). (Id.)

[¶14] Based on the foregoing, the district court did not err in issuing a pre-filing order against Allen, and the Trustees respectfully request this Court to issue a summary affirmance pursuant to N.D.R.App.P. 35.1(a)(4).

II. The remaining issues raised in this appeal are precluded as a matter of law.

[¶15] This Court has routinely rejected prior attempts to re-litigate the district court's reformation of the Emelia Hirsch Trust dated June 9, 1994, as affirmed by this Court in Matter of Emelia Hirsch Trust, 2009 ND 135, 770 N.W.2d 225. See Matter of Emelia Hirsch Trust, 2021 ND 142, 963 N.W.2d 259; Matter of Emelia Hirsch Trust, 2020 ND 129, 944 N.W.2d 335; Matter of Emelia Hirsch Trust, Supreme Court Case No. 20190115 (Order of Dismissal); Matter of Emelia Hirsch Trust, 2019 ND 264, 935 N.W.2d 255; Matter of Emelia Hirsch Trust, 2017 ND 291, 904 N.W.2d 740; Matter of Emelia Hirsch Trust, 2016 ND 217, 888 N.W.2d 205; Matter of Emelia Hirsch Trust, 2014 ND 135, 848 N.W.2d 719; Matter of Emelia Hirsch Trust, 2013 ND 63, 832 N.W.2d 334; Matter of Emelia Hirsch Trust, Supreme Court Case No. 20120241 (Order of Dismissal); Matter of Emelia Hirsch Trust, Supreme Court Case No. 20120141 (Order of Dismissal).

[¶16] “Under the doctrine of res judicata, a valid, existing final judgment from a court of competent jurisdiction is conclusive on the parties . . . in all other actions with regard to the issues raised, or those that could have been raised, and determined therein.” Glass v. Glass, 2018 ND 14, ¶ 5, 906 N.W.2d 81 (quoting Jundt v. Jurassic Res. Dev., N. Am., L.L.C., 2004 ND 65, ¶ 6, 677 N.W.2d 209). Principles of res judicata prevents courts from re-litigating claims that were raised or could have been raised “in order to promote finality of judgments, which increases certainty, avoids multiple litigation, wasteful delay and

expense, and ultimately conserves judicial resources.” Missouri Breaks, LLC v. Burns, 2010 ND 221, ¶ 10, 791 N.W.2d 33.

[¶17] As explained, the instant appeal is merely another attempt to re-litigate reformation of the Emelia Hirsch Trust dated June 9, 1994 as decided by Matter of the Emelia Hirsch Trust, 2009 ND 135, 770 N.W.2d 225. Because it is apparent that Allen and Tim are utilizing this appeal as yet another frivolous opportunity to re-litigate matters which prior controlling appellate decisions from this Court are dispositive, the Trustees respectfully request this Court to issue a summary affirmance pursuant to N.D.R.App.P. 35.1(a)(1) and (7).

III. Appellees are entitled to recovery of their costs and attorney’s fees in this appeal.

[¶18] North Dakota law prohibits the filing of frivolous appeals and allows for an award of attorney fees and costs in matters such as this appeal filed by Allen. See N.D.R.App.P. 38 and 39. “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.” N.D.R.App.P.38.

Frivolous appeals unjustly burden the resources of the court and the government. The devotion of limited resources and time to these meritless cases causes deserving litigants to wait. In addition, the opposite party is delayed in receiving the just benefits of the trial court's judgment until the appeal is concluded. Justice delayed is justice denied. Sanctions are imposed to deter such suits.

United Bank of Bismarck v. Young, 401 N.W.2d 517, 519 (N.D. 1987).

[¶19] As indicated above, the instant appeal by Allen and Tim is merely the latest of many frivolous attempts to re-litigate the district court’s reformation of the Emelia Hirsch Trust as upheld by this Court in Matter of Emelia Hirsch Trust, 2009 ND 135, 770 N.W.2d 225.

Prior attempts to re-litigate such matters have been found frivolous and without merit by this Court warranting attorney's fees and double costs under N.D.R.App.P. 38. The Trustees are again entitled to recovery of double costs and attorney's fees in this appeal.

CONCLUSION

[¶20] For the reasons discussed herein, Appellees Carolyn Twite and Duane Hirsch respectfully request this Court to: (1) summarily affirm the *Order*, dated September 30, 2021, pursuant to N.D.R.App.P. 35.1(a)(4); (2) summarily affirm the dismissal of the remaining issues raised in this appeal pursuant to N.D.R.App.P. 35.1(a)(1) and (7); and (3) award the Appellees double costs and attorney fees pursuant to N.D.R.App.P. 38.

Dated: February 7, 2022.

SMITH PORSBORG SCHWEIGERT
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CERTIFICATE OF COMPLIANCE

[¶21] I hereby certify that this document complies with the page limitation prescribed under N.D.R.App.P. 32(a)(8).

Dated: February 7, 2022.

SMITH PORSBORG SCHWEIGERT
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CERTIFICATE OF SERVICE

[¶22] I hereby certify that a true and correct copy of the foregoing appendix was filed electronically with the Clerk of the North Dakota Supreme Court on the 7th day of February, 2022, and e-mailed to **Allen Betz** (adbetz@gmail.com), **Marlene Betz** (famassist@aol.com) and **Timothy Betz** (tbetz@embarqmail.com).

Dated: February 7, 2022.

SMITH PORSBORG SCHWEIGERT
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