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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court Case No. 20220057
Grand Forks District Court No. 18-2021-CV-00499

Matthew Beland,

Plaintiff/Appellant,

and

Sarah M. Kyte,

Interested Party/Appellant

v.

Jeremiah Danel, Jeremiah Danel, D.D.S., P.C.,

Defendants/Appellees

BRIEF OF DEFENDANTS/APPELLEES – ORAL ARGUMENT REQUESTED

Appeal from the Order Regarding Action for Injunction and on Reciprocal Motions for Sanctions and Attorneys' Fees, dated December 8, 2021, and Judgment, dated December 28, 2021

THE DISTRICT COURT FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE LOLITA G. HARTL ROMANICK

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STATEMENT OF THE ISSUES[1]

[¶1] Whether the district court fully adjudicated all claims and properly entered final Judgment.

[¶2] Whether the district court abused its discretion by granting Appellees' motion for Rule 11 sanctions.

[¶3] Whether the district court abused its discretion by denying Appellants' motion for Rule 11 Sanctions.

[1] Appellees respectfully disagree with Appellants' characterization that the district court "sua sponte" dismissed the underlying action. Therefore, Appellee's offer their own Statement of Issues pursuant to N.D.R.App.P. 28(c).

STATEMENT OF THE CASE

[¶4] Respectfully, Appellants' Statement of the Case is inaccurate, and omits critical facts from the course of the proceedings. Accordingly, pursuant to N.D. R. App. 28(c), Appellees submit the following corrections and additions:

[¶5] Appellees Jeremiah Danel ("Danel"), Jeremiah Danel, D.D.S., P.C., ("Danel Dental") are the latest victims of Appellant Matthew Beland's ("Beland") vexatious divorce litigation.

[¶6] In March 2021, Beland filed an action for injunctive relief against Appellees to, *inter alia*, prevent them from performing further dental/orthodontic work on Beland's children. (R:2). Beland later filed an Amended Complaint that sought materially identical injunctive relief and attorney's fees. (R:53). Beland contemporaneously moved for a TRO seeking to enjoin Appellees from "commencing dental or orthodontic treatment upon [Beland's] minor children . . . ." (R:3)

[¶7] On March 23, 2021, the Minnesota Court issued an Ex Parte Order granting Beland's ex-wife, Heidi Rylander ("Rylander") temporary sole legal custody regarding the children's dental/orthodontic care, effectively mooting several of Beland's requests for injunctive relief. (R:34).

[¶8] From and after March 24, 2021, Appellees' Counsel attempt to get Appellants to withdraw the moot/unfounded complaint for injunctive relief. (R:78-86). On or about March 27, 2021, Appellees' Counsel informed Appellants that Appellees decided to dismiss the children from further treatment based on Beland's conduct. (R: 83:7).

[¶9] On March 29, 2021, Beland commenced his action for injunctive relief via service of the Summons and Complaint. (R:52).

[¶10] On April 7, 2021, after additional failed attempts to convince Appellants to withdraw the stale lawsuit, Appellants filed an Answer, Response to motion for TRO, and a motion to dismiss. (R:57-58, 60).

[¶11] Appellees contemporaneously served Appellants with a Rule 11 motion for sanctions. (R:87). On April 30, 2021, after Appellants were afforded the protection of the safe harbor, Appellees filed the motion. (R:88).

[¶12] On May 7, 2021, Appellants served a retaliatory motion for Rule 11 sanctions, which was later filed on May 28, 2021. (R:101-102). Appellants' motion for sanctions was based on various (irrelevant) and purported misstatements by Appellees. (R:100).

[¶13] An evidentiary hearing on the merits was held on July 16, 2021, and August 16, 2021. Each party offered several exhibits and elicited testimony from witnesses relative to each of Beland's requests for injunctive relief set forth in the pleadings. (R:105-118, 120-146).

[¶14] On December 8, 2021, the district court entered a 49-page order denying Beland's motion for TRO, denying Beland's motion for Rule 11 sanctions and attorney's fees, and granting, in part, Appellees' motion for Rule 11 sanctions and attorney's fees. (R:207:49).

[¶15] On December 28, 2021, the district court entered judgment in accordance with its December 8, 2021, order. (R:210).

[¶16] On March 2, 2022, Appellants filed a notice of appeal. (R:215).

[¶17] On March 4, 2022, this Court directed the parties to respond to whether final judgment had been entered, whether 54(b) certification was necessary to support the

appeal, whether the appeal should be dismissed for lack of a final judgment, and whether the case should be remanded for Rule 54(b) certification. (R:219).

[¶18] On March 10, 2022, the parties filed a joint letter representing to this Court that the "Judgment adjudicated all issues in this case and the parties agree that no other issues are pending before the district court." (R:220).

[¶19] Based on the parties' joint representation, this Court issued an Order of Remand directing the district court to enter an Amended Judgment clarifying that all claims have been adjudicated and none remain pending. (R:219).

[¶20] On March 11, 2022, the district court entered an Amended Judgment clarifying that the December 28, 2022, Judgment was a final judgment that adjudicated all claims that were pending before it. (R:221-222).

[¶21] On March 29, 2022, Appellants filed a motion to stay enforcement of the judgment pending appeal. (R:230). On April 1, 2022, executions issued against Appellants. (R:236-37). On April 4, 2022, Appellants filed an ex parte motion to dissolve the executions. (R:239). After communications with the Sheriff's Office, Attorney Kyte presented a check for $7,5255.88 to satisfy Beland's portion of the money judgment. (R:259).

[¶22] On April 22, 2022, the district court granted Appellants' motion to stay execution and to dissolve the writs of execution conditioned on Appellants posting bond for $7,800.00, each, within twenty-one days pursuant to N.D.R.Civ.P. 62(b) and N.D.R.App.P. 7(a). (R:254:26).

[¶23] To date, Appellants have failed to post a bond.

STATEMENT OF THE FACTS

[¶24] Appellants' "Statement of Facts" is also pocked with misstatements and omits the vast majority of the record. This is understandable, as the evidence in this matter overwhelmingly supported the district court's decision. Set forth below is a thorough rendition of the evidence heard by the district court:

A. Beland's Requests for Information and Other Demands

[¶25] Beland and Rylander have two children together, JNB and KAB. (R:207:5). Danel Dental provided dental/orthodontic services for JNB for two years. (R:226:56:23-25, 60:1).

[¶26] In May 2020, Beland requested access to JNB's "patient portal" so that he could access medical records. (R:8). Jana Danel ("Jana"), Danel Dental's office manager, attested that Beland was provided copies of his children's medical records in June 2020, and "multiple times" after. (R:63:2; 226-92:22-23:). Jana also explained that Beland's access to the "patient portal" was not restricted, but that the portal only allowed one registered email address, which had already been registered by Rylander. (R:63:2). Jana also informed Beland that the patient portal does not contain medical record history, but only payment history. (R:63:2; 226:91-92).

[¶27] On February 25, 2021, Attorney Kyte emailed Appellees' Counsel and requested Counsel to confirm that no medical care would be provided to the children, without both his and Rylander's consent. (R:79:7). Beland then requested information regarding JNB's upcoming appointments from Appellees. (R:10:1). Appellees informed Beland of upcoming appointments and added Beland to Danel Dental's text reminders list. (R:10:2).

[¶28] On March 2, 2021, Appellees' Counsel responded to Attorney Kyte and explained that Danel Dental is not bound by the verbiage in the parties' Judgment and would be providing service for Beland's children, as scheduled, and requested by Rylander. (R:79:5). The same day, Attorney Kyte emailed Appellees' Counsel and informed him that if Danel Dental failed to abide by Beland's request that "further legal action" would be taken against the Defendant. (R:79:4). Attorney Kyte gave Appellees until 5:00 p.m. on March 3, 2021, to agree to cease treatment on the minor children, unless Beland expressly consented to the same. (R:79:3)

[¶29] On March 10, 2021, Beland sent an email to the Appellees informing them that he did not consent to any "future treatments/appointments" of his two children, unless he gave express consent. He also indicated that if Appellees did not comply with his demand that he would seek "further action against Danel Orthodontics." (R:80:2-3).

[¶30] On March 15, 2021, Appellees sent correspondence to Beland via email. (R:80). In this email, Appellees explained that the orthodontic care was necessary and in the best interests of Beland's children. (R:80:1). Appellees further explained that they did not wish to be involved in any dispute between Beland and Rylander, and would continue serving the children, absent a court order prohibiting the same. (R:80:1). The letter went on to explain that the Plaintiff's bullying tactics would not be tolerated. (R:80:2).

B. Ex Parte Order Granting Rylander Temporary Legal Custody and Appellees' Dismissal of the Children from Further Treatment

[¶31] On March 23, 2021, based on Beland's actions detrimental to the children's treatment, Rylander obtained an Ex Parte Order from the Minnesota Court handling their divorce proceeding. (R:81). That Ex Parte Order granted Rylander temporary legal custody regarding the children's dental/orthodontic care, restrained Beland from physically going to Appellee's office, and restricted Beland to contact Appellees via mail only to request billing information, medical records, or to provide payment. (R:81:2). The Minnesota Court also ordered that "any discovery issues shall be addressed through the Discovery Conference ordered by the Court in a subsequent order." (R:81:2).

[¶32] The same day the Ex Parte Order issued Appellees' Counsel contacted Attorney Kyte to inform her that Rylander now had sole legal custody regarding the children's dental/orthodontic care. (R:82:2). The next day Appellees' Counsel followed up with Attorney Kyte regarding the unserved Complaint and motion for TRO. Counsel, again, informed Attorney Kyte that the unserved documents were frivolous considering the Ex Parte Order. (R:82:1).

[¶33] On March 27, 2021, Appellees' Counsel emailed Attorney Kyte and informed her that the Appellees decided to dismiss the children from the orthodontic practice due to Beland's actions, despite the issuance of the foregoing Ex Parte Order. (R:83:7). Jana testified that despite Danel Dental "frequently" treating children of divorced parents, Danel Dental has never had to dismiss children from treatment due to litigation and threats made by one parent against

the practice. (R:226:94-95:1-2). Appellees' Counsel requested the action against the Appellees be dismissed. (R:83:7).

C. Appellants' Commencement and Continuation of the Frivolous Lawsuit and Cross-Motions for Rule 11 Sanctions

[¶34] On March 29, 2021, the Summons and Complaint was served on the Appellees, despite the Ex Parte Order granting Rylander temporary legal custody regarding dental/orthodontic decisions, and despite Appellees' dismissal of the children from treatment.[2] (R:52). Appellees' Counsel again asked Attorney Kyte if Beland would dismiss the pending action. (R:83:3-4).

[¶35] On March 29, 2021, Attorney Kyte contradicted Beland's earlier demand and stated "[m]y client is absolutely unequivocally not requesting any necessary treatment cease." (R:83:3). However, she did not indicate whether her client intended to dismiss the pending action. On March 29, 2021, Appellees' Counsel renewed his request that the Beland dismiss the pending action, and if he failed to do so explained the Appellees would file an answer and request attorney's fees. (R:83:2-3).

[¶36] On March 30, 2021, Attorney Kyte responded and indicated that Beland would not be "withdrawing his action as the relief is appropriate and per his right unless your client would simply like to provide the relief requested." (R:83:1).

[2] It appears that the Amended Complaint was not served in accordance with N.D.R.Civ.P. 4. Rather, Appellants filed a "Notice of Filing" of the Amended Complaint on April 6, 2021. Regardless, the claims for injunctive relief that the district court adjudicated are materially identical to those in the Complaint. (R:2, 55).

Appellees' Counsel then addressed each of Beland's requests for relief and explained why the same were moot or factually unfounded:

- **Request**: Appellees provide Beland all unredacted medical records of the children and provide access to their online account portal for the purpose of accessing medical records. **Response**: Beland was already provided the children's medical records in June 2020 with only personal identifying information relating to the children, Rylander, and Rylander's husband redacted. (R:85:1).
- **Request**: Appellees send information and correspondence sent to Rylander to Beland, including all text messages for appointment reminders. **Response**: Appellees explained that they only send "opening" and "closing" letters and that Beland had already been added to the text notification system. Appellees also explained this request was moot due to Appellees dismissing the children from treatment. (R:85:1).
- **Request**: Appellees be enjoined from commencing treatment on the children without first receiving Beland's express written consent, or a Court order, and that all work be performed competently and without discriminatory or harassing conduct. **Response**: Appellees explained this request was moot due to Appellees dismissing the children from treatment. (R:85:1).
- **Request**: Appellees be enjoined from filing any insurance claims through Delta Dental without Beland's express written consent. **Response**: Appellees explained this request was moot due to Appellees dismissing the

children from treatment. (R:85:1).

- **Request**: Appellees be enjoined from making defamatory statements about Beland. **Response**: Appellees had not made any defamatory statements against Beland. (R:85:1).
- **Request**: Appellees be enjoined from trespassing Beland from their place of business. **Response**: Appellees explained this request was moot due to Appellees dismissing the children from treatment. (R:85:2).
- **Request**: Appellees reimburse Beland his attorney's fees and costs associated with the underlying action. **Response**: Appellees refused this request as entirely without merit. (R:85:2).

[¶37] Appellees' Counsel again requested that the frivolous action be dismissed. (R:85:2). Appellants refused to withdraw the claims forcing Appellees to interpose an Answer, Response to Motion for TRO, and Motion to Dismiss. (R:57-58, 60, 86). Appellees filed Jana's Declaration that corroborated each of Counsel's responses above. (R:63). Jana filed a subsequent declaration attesting that Beland made several duplicative requests for information that had already been satisfied, but Beland's requests continued. (R:89).

[¶38] Based on Appellants' refusal to dismiss the frivolous litigation, Appellees served a Rule 11 motion asserting that the Amended Complaint violated Rule 11(b)(1) – (3). (R:87; 207:104). On April 30, 2021, after Appellants were afforded the protection of the safe harbor, Appellees filed the motion after Appellants again refused to dismiss the lawsuit. (R:88).

[¶39] On May 5, 2021, during a phone call that she secretly recorded, Attorney Kyte threatened to file a Rule 11 motion if Appellees refused to withdraw their pending motion for sanctions. (R:152:5-6). On May 7, 2021, Appellants served a motion for Rule 11 sanctions. (R:101). Appellants' motion for sanctions was based on the following purported allegations/misstatements by Appellees: (1) they had treated Beland's children for several years; (2) Beland had been provided with his children's dental records; (3) in his correspondence Beland was disrespectful to staff at Danel Dental; (4) Appellees had evaluated Beland's daughter and stated that treatment was "necessary"; (5) Appellees were unwilling to provide Beland access to his children's dental record; and (6) Danel stated that Attorney Kyte was Beland's girlfriend. (R:100; 207:71). Over an abundance of caution due to Beland's litigious nature, Appellees' counsel clarified that only one of the children had been treated by Danel Dental for "several years". (R:96). However, a cursory review of the record did not support any of Beland's other contentions. (R:104:7-12).

D. The Evidentiary Hearing and 49-Page Order Fully Adjudicating All Claims

[¶40] In preparation for the July 16, 2021, evidentiary hearing, both sides electronically filed their proposed exhibits. (R:105-118, 120-146). Those exhibits addressed all Beland's claims for relief, not just the motion for TRO.

[¶41] An evidentiary hearing was held on July 16, 2021, and on August 16, 2021. Again, the parties elicited testimony related to all Beland's claims and the cross-motions for Rule 11 sanctions. (R:226-227). Following the evidentiary hearing, the district court entered a detailed, 49-page order. (R:207).

[¶42] In its order, the district court denied Beland's requests for injunctive relief determining that the requests were without basis in fact or law or were moot following Appellees' dismissal of the children from further treatment. (R:207:46-47, 49). In fact, the district court found it "puzzling" that Beland continued to seek a TRO after Appellees dismissed the children from treatment. (R:207:55). The district court also found that Appellees suffered more than just economic harm from Beland's "escalating" and "threatening" actions, and the continued pursuit of the underlying litigation. (R:207:34, 45, 58, 80).

[¶43] The district court made detailed findings of fact supporting its determination on the parties' cross-motions for Rule 11 sanctions. (R:207:28-48). Pertinently, the district court found that:

- Beland's motion does not describe how each claim violates Rule 11(b). (R:207:71, 74, 78, 85, 91, 102-103).
- At most, the Answer was ambiguous as to whether both or only one child received treatment at Danel Dental. Counsel provided clarification that only one child received treatment. Beland's own representations suggested that both children could have been receiving treatment. (R:115:90-91; 207:75).
- Beland's contentions regarding the online patient portal access were frivolous. Beland was informed several times that access could only be made using one email, which Rylander possessed. Beland was also informed that the portal contained limited content because the account was paid in full. (R:207:81).
- Appellees' contention that Beland was "incredibly rude and uncivil" was

contained in a pre-litigation communication and was supported by testimony and e-mail evidence. (R:207:82)

- The evidence corroborated the Beland was provided all records that he requested prior the litigation being commenced. The district court found that Beland's testimony that he did not receive attachments to be credible because he did not respond to Appellees' emails once indicating records had not been provided. (R:207:87).
- There was such a complete absence of actual facts regarding Beland's ongoing litigation and continued pursuit of orthodontic records when they had been provided previously, that a reasonable person could not have thought that a court would render judgment in Beland's favor. (R:207:90).
- Beland's refusal to accept that Appellees could not give him access to the on-line portal because a password had already been set up by Rylander, his repeated efforts to involve Appellees in his disputes with Rylander, and his repeated requests for records that had been provided previously, were done for the improper purpose of attempting to get information, access, and control through Appellees that he could not get through the Minnesota divorce court; and without factual evidence to support his position. (R:207:84).
- Appellees' claim that the children's treatment was "necessary and urgent" was in a pre-litigation communication. It was also a "reasonable" analogy that did not justify the issuance of Rule 11 sanctions. The district court also found that the "reasonable" response would have been for Beland to

request a clarification of what Appellees meant by “urgent”. (R:207:97).

- Appellees’ representation that Attorney Kyte was Beland’s “girlfriend” was based on a truth that the two were involved in a relationship. The district court also found that Beland failed to establish how this was relevant to the litigation or “harassing”. (R:207:99).
- The timing of Beland’s Motion for Sanctions was troubling, but the district court did not determine it to be retaliatory. (R:207:103).
- Appellees had treated JNB for nearly two years and was evaluating KAB for treatment. Based on the Ex Parte Order, Appellees could have continued treating the children, but due to Beland’s actions, the children were dismissed from further treatment. (R:207:106).
- The weight of the evidence does not support the ongoing litigation of this case. Appellees dismissed the children from the practice and Beland had been provided records prior to the limitation being commenced. Yet Beland continued the lawsuit for the improper purpose of gaining control over Rylander’s actions and choices which he was unable to do in the Minnesota divorce case. (R:207:109).
- Beland improperly asserted facts in his closing brief to which no evidence was proffered, which amounted to misleading assertions, and support that Attorney Kyte was “too personally involved in this case.” (R:207:111).
- Beland persisted in trying to embroil Appellees in his conflicts with Rylander with his ongoing, repetitive requests for online portal access. Beland did not afford himself of the opportunity offered by Appellees to come into their

office to observe how online patient portal access works and what is contained in that portal. (R:207:114).

- The district court found that the factual contentions raised by Beland did not have evidentiary support to justify continuing the litigation, and that a reasonable person having knowledge of the evidence which was presented to the district court would not believe a court would find in his favor. (R:207:115).

[¶44] Based on the foregoing, and other considerations, the district court denied Beland's motion for Rule 11 sanctions, and granted, in part, Appellees' motion for Rule 11 sanctions. (R:207:49). The district court ordered Beland and Attorney Kyte to equally pay $13,658.75 in sanctions to Appellees. (R:207:49).

[¶45] Based on the foregoing, and Paragraph 59, *infra*, ample record evidence supports the district court's factual findings and entry of a final Judgment.

LAW AND ARGUMENT

A. The District Court Fully Adjudicated All Claims And Properly Entered Final Judgment

[¶46] Initially, Appellants contradict their prior representations to this Court and now apparently contend that a final judgment was not entered and that issues remain to be adjudicated by the district court. The parties filed a joint submission representing to this Court that "the Judgment and the 49-page Order directing entry of judgment are reviewable" and ***"[t]he Judgment adjudicated all issues in this case and the parties agree that no other issues are pending before the district court***." (R:220) (emphasis added). Appellants cannot contradict their earlier representations to this Court. See Matter of Est. of Lindvig, 2020 ND 236, ¶ 20, 951 N.W.2d 214 reh'g denied (Jan. 12, 2021) (quoting Krenz v. XTO Energy, Inc., 2017 ND 19, ¶ 33, 890 N.W.2d 222) ("Judicial estoppel prohibits a party from assuming inconsistent or contradictory positions during the course of litigation.").

[¶47] Appellants now argue that the district court disposed of their lawsuit sua sponte and that they were not afforded due process. Obviously, the record does not support Appellants' arguments. Indeed, the district court indisputably did not dismiss their action pursuant to Rule 12(b)(6) or Rule 56. Nor did the district court dismiss Appellants' lawsuit as a sanction. Rather, the district court directed entry of a final judgment following an evidentiary hearing on the merits in a 49-page order. (R:207). The district court affirmed the finality of its judgment following the Appellants' representation that all issues before the district court were adjudicated. (R:220, 222:7-8).

[¶48] Beland argues that he was only on notice that his motion for TRO would be tried at the evidentiary hearing, not all his claims for relief. However, his argument is belied by the scope of his prehearing submission of exhibits and testimony offered at trial. Most tellingly, Beland did not limit the scope of his closing argument to the motion for TRO and the cross-motions for Rule 11 sanctions. Indeed, Beland's closing brief argues extensively why he should be afforded injunctive relief on each of his claims. (R:203:8-14).

[¶49] But more fundamentally, whether Beland was on notice that all claims would be adjudicated at the hearing is inconsequential because they are now moot. "It is well settled law that the courts cannot give advisory opinions and that an appeal will be dismissed if the issues therein become moot or academic, leaving no actual controversy to be determined." Peoples State Bank of Velva v. State Bank of Towner, 258 N.W.2d 144, 145 (N.D. 1977). Appellees' furnishing of records and dismissal of the children from further treatment rendered Beland's several requests for injunctive relief moot. See Gosbee v. Bendish, 512 N.W.2d 450, 453 (N.D. 1994) ("One way an appeal can become moot is the occurrence of events that result in the court's inability to render effective relief."); Brace v. Steele Cnty., 77 N.D. 276, 283, 42 N.W.2d 672, 677 (1950) (installation of culvert which obviated the possibility of obstruction to waterway rendered moot appeal from preliminary injunction enjoining party from obstructing waterway).

[¶50] The district court did not err by directing entry of Judgment following the July 16, 2021, and August 16, 2021, evidentiary hearing.

B. The District Court did not Abuse Its Discretion by Entering Rule 11 Sanctions Against Appellants

1. *Appellants Waived Their Right to Appeal the Sanctions Entered Against Beland*

[¶51] This Court has held an attempted appeal from a judgment that has been properly satisfied of record fails for lack of jurisdiction. Mr. G's Turtle Mountain Lodge, Inc. v. Roland Tp., 2002 ND 140, 651 N.W.2d 625. A judgment that has been paid and satisfied of record ceases to have any existence. Lyon v. Ford Motor Co., 2000 ND 12, ¶ 10, 604 N.W.2d 453; see also N.D.C.C. § 28-05-10. This Court has further concluded that "a party who voluntarily pays a judgment against him waives the right to appeal from the judgment." Lyon, 2000 ND 12, ¶ 13, 604 N.W.2d 453. The Judgment herein has undisputedly been partially satisfied. (R:259).

[¶52] Appellants cannot argue that they paid under coercion or duress because monies were paid to the Sheriff armed with an execution. See e.g., Grady v. Hansel, 57 N.D. 722, 223 N.W. 937, 938 (1929). Here, Appellants made payment while their motion to stay and an ex parte motion to dissolve the writ of execution were pending. See Mr. G's Turtle Mountain Lodge, Inc., 2002 ND 140, ¶ 13; Cf. Twogood v. Wentz, 2001 ND 167, 634 N.W.2d 514.

[¶53] On March 29, 2022, Appellants filed a motion to stay enforcement of the Judgment pending appeal. (R:230). On April 1, 2022, a writ of execution issued. (R:233, 234). Appellants then filed an ex parte motion to dissolve the writ of execution pending adjudication of their motion to stay. (R:239). Despite having the financial capacity to do so, Appellants did not file a bond in support of their

motion to stay. (R:254:6). Rather than deposit the proceeds into the clerk of district court in support of their pending motion to stay in accordance with N.D.R.Civ.P. 62(b), on April 14, 2022, Attorney Kyte wrote a check in satisfaction of Beland's portion of the Judgment. (R:259). The Sheriff's Return reflects that Appellant Beland's portion of the Judgment was "wholly satisfied." (R:259). Under these circumstances, where Appellants have the financial wherewithal to post bond and they instead voluntarily write a check to the Sheriff's office, the payment should be considered to have been made voluntarily. Lyon v. Ford Motor Co., 2000 ND 12, ¶ 8, 604 N.W.2d 453 ("[I]f, as a matter of right, the payer could have posted a supersedeas bond, he must show that he was unable to post such a bond, or his payment of the judgment is deemed voluntary.").

[¶54] Thus, Appellants waived their right to appeal that the portion of the Judgment requiring Beland to pay Rule 11 sanctions to Appellees.

2. Appellants assert for the first time on appeal that Appellees' Rule 11 motion was improperly served

[¶55] "It is well established that arguments not raised before the district court cannot be raised for the first time on appeal." N.B. v. Terwilliger, 2021 ND 74, ¶ 20, 958 N.W.2d 48 (quoting Morris v. Moller, 2012 ND 74, ¶ 8, 815 N.W.2d 266). Appellants argue for the first time on appeal (and without citation to legal authority) that Appellees' electronic service of their Rule 11 motion on Attorney Kyte through Odyssey was ineffectual because she was on maternity leave. Appellants argue that the first time they were served with the Rule 11 motion was on April 30, 2021, when the same was filed with the Court and, therefore, were not afforded the

protection of the 21-day safe harbor. These arguments are not asserted in Appellants' closing brief. (R:203:15-23).

[¶56] Despite having waived these arguments, they are without merit. Rule 11(c)(2), N.D.R.Civ.P., require that a motion for sanctions be "served under Rule 5, but must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn . . . within 21 days after service . . . ." Rule 5(b)(1), N.D.R.Civ.P., provides, in pertinent part:

> Electronic service on an attorney must be made to the designated e-mail service address posted on the N.D. Supreme Court website. Electronic service is complete on transmission. Except as provided in N.D.R.Ct. 3.5(e)(4), electronic service is not effective if the serving party learns through any means that the document did not reach the person to be served.

[¶57] Appellee never received a "bounce back" indicating that the motion was not effectively transmitted to Attorney Kye's e-mail address posted on the North Dakota Supreme Court's website. Although Appellants, for the first time on appeal, intimate that Attorney Kyte did not review the electronic transmission because she was on maternity leave, Attorney Kyte's failure to open the electronic transmission is good service and Appellants were afforded the 21-day safe harbor. N.D.R.Ct. 3.5(e)(4) ("If an attorney who is not exempt from electronic service fails to . . . accept or open electronically served e-mail, the server's attempt at electronic service constitutes delivery.").

3. The district court's entry of sanctions against Appellants is supported by the record

[¶58] The determination of whether to impose sanctions for a Rule 11 violation lies within the sound discretion of the district court and will not be disturbed on

appeal absent an abuse of discretion. In re Pederson Tr., 2008 ND 210, ¶ 22, 757 N.W.2d 740. "If there are any factual determinations relevant to the sanctions issue, this Court reviews the district court's findings under the clearly erroneous standard." In re Pederson Tr., 2008 ND 210, ¶ 22, 757 N.W.2d 740. This Court does not reweigh evidence or reassess credibility nor reexamine findings of fact made upon conflicting testimony. Hartman v. Grager, 2021 ND 160, ¶ 14, 964 N.W.2d 482, 489.

[¶59] As set forth in Paragraph 43, the district court analyzed the Amended Complaint pursuant to Rule 11(b)(1)-(3). The district court's entry of sanctions was the product of a fact-intensive analysis of the record. As set forth in Paragraph 43, *supra*, the district court made several factual determinations, which are supported by the following (and other) record evidence:

- **The exhibits offered and admitted at trial:**
    - Appellees submitted 45 pages of emails documenting their communications with Beland. These emails establish the frequency and nature of Beland's requests/demands of Appellees, along with Appellees' responses from July 18, 2019, to March 2021. (R:111-12).
    - Beland was added to their text message notification system on November 5, 2020, and that he was sent appointment reminders from that date forward. (R:114).
    - Danel wrote an email to Beland explaining the necessity of the care plan for the children, and that Beland needed to work with Rylander

with respect to authorizing treatment and not to get Appellees caught in the middle. Danel also informed Beland that if his bullying tactics continued Appellees would seek a restraining order. (R:115).

- Appellees discharged the children from further treatment via letter dated April 2, 2021. The letter indicates that despite Rylander obtaining an Ex Parte Order for temporary legal custody that Beland's behavior has not ceased and has only increased. "Ultimately, [Beland] is seeking a court order prohibiting us from treating your children, even though we are no longer treating them." "Despite attempting to address Mr. Beland's incessant and repetitive demands there was simply no pleasing him." (R:116).
- On May 4, 2021, Appellees' Counsel responded to Beland's latest records request by providing everything he requested, "the vast majority" of which was previously provided. (R:117).
- On May 5, 2021, Appellees' Counsel supplemented with an appointment list for the children and reiterated the position that it was "extremely unfortunate that Mr. Beland continues to litigate a frivolous action . . . ." (R:118).

- **Danel's testimony:**
  - Danel's only direct communication with Beland was the email [R:115] sent in response to Beland's demand that all treatment for the children to stop. (R:226:78:7-9).
  - Beland made several threats to Appellees' practice, including

reporting them to law enforcement if Appellees billed Beland's insurance. (R:226:78:19-23). This created feelings of frustration, intimidation, and disbelief. (R:226:79).

- Beland never stated that the children's care was "medically necessary". (R:226:79-80).
- Beland filed a complaint with the Orthodontic Board alleging access to records violations, insurance fraud, and patient abandonment. The Orthodontic Board dismissed Beland's complaint after finding no violations occurred. (R:226:81-83).

- **Jana's testimony**:
  - Jana testified that she called Beland and explained to him that Appellees sent all the records he requested and that only confidential identifiers were redacted (e.g., step-father's social security number and insurance information). Jana testified that she would send everything again and Beland represented during the call that receipt of an email copy of the information was fine. (R:226:91).
  - Jana described Beland's emails generally as "persistent" and got to the point where they were repetitive and sometimes "threatening." (R:226:92).
  - Appellees provided records that Beland requested "multiple times". (R:226:92:22-23).
  - The children were dismissed from the practice because of Beland's threats against the practice. Despite treating the children of divorced

parents, Appellees have never had to dismiss a patient due to a parent's behavior. (R:226:94-95).

- **Michelle Bosma's testimony:**
  - Michelle Bosma ("Bosma") is the financial coordinator of Danel Dental. (R:226:95:25, 96:1-2). She testified that the only insurance on file for the children was carried by the children's step-father, and that Danel Dental did not have Beland's insurance information on file, and had never billed Beland's insurance. (R:226:96).
  - Bosma testified that she sent multiple emails to Beland with attachments and appointment slips. (R:226:99-100).
  - Bosma testified that she was unable to grant Beland access to the online portal because the computer software only allows for one email address which was used by Rylander. Bosma explained this to Beland several times. Bosma also explained that the information on the online portal was limited to appointment dates and "limited" billing records such as payments made. (R:226:100).
  - Bosma testified that she provided Beland copies of receipts and records for his children. After April 2020 Beland did not request additional records. (R:226:101).
  - Bosma testified that she added Beland to Appellees text message reminder system and that reminders were sent to the phone number 701-330-0574. (R:226:103-106).
  - Bosma testified that Beland's requests for records were "persistent"

and “aggressive” and that they made her feel uneasy because she was “unsure of what exactly [Beland] was wanting”. (R:226:107).

- **Rylander’s Testimony:**
  - Rylander testified that she set up the patient portal using her email address and that she did not want a shared email address with Beland. (R:227:7).
- **Beland’s testimony:**
  - Beland testified that Bosma was “pretty good” at responding to his several emails. (R:226:39:2). Bosma sent Beland receipts for payments made for the treatments. (R:226:39:13-15).
  - Bosma explained to Beland what information was present on the online portal in April 2020. (R:226:41).
  - Beland conceded that he had never provided his insurance information to Danel Dental. (R:226:46-47).
  - Beland conceded that his phone number is 701-330-0574, which is the same number added to Appellees’ text message reminder system. (R:114; 226:55:16)

[¶60] Because the above record evidence supports the district court’s findings of fact, those findings pertaining to its entry of Rule 11 sanctions against Appellants are not clearly erroneous.

[¶61] Appellants nevertheless argue that the district court abused its discretion by failing to impose less severe sanctions than a monetary award equal to one half of Appellees’ attorney fees incurred. Once the district court has determined that a

Rule 11 violation has occurred, it may, *inter alia*, order payment to the movant of part or all the reasonable attorney's fees and expenses resulting from the violation. N.D.R.Civ.P. 11(c)(4). The district court determined that the factual circumstances of this case, including Beland's continued litigation, and pursuit of online portal access and the children's orthodontic records, were without evidentiary support and violated Rule 11(b)(1) and (3), and warranted an award of attorney's fees to deter repetition. (R:207:116). See Kartes v. Kartes, 2013 ND 106, ¶ 36, 831 N.W.2d 731 ("[W]e do not reweigh the evidence or reassess the credibility of witnesses."); Strand v. Cass Cnty., 2008 ND 149, ¶ 17, 753 N.W.2d 872 ("[W]e will not disturb a district court's decision on sanctions under N.D.R.Civ.P. 11 unless the court has abused its discretion.").

[¶62] Appellees also suggest that the district court abused its discretion in sanctioning Attorney Kyte, personally, rather than Handy Law Group, PLLC. However, there is record evidence to support the district court's decision to sanction Attorney Kyte and Beland, but not Handy Law Group, PLLC, including, *inter alia*, Attorney Kyte's personal relationship with Beland. (R:207:111) (citing evidence that supports Attorney Kyte "is too personally involved in this case.") Kartes, 2013 ND 106 at ¶ 36.

[¶63] The district court's entry of Rule 11 sanctions against Appellants was not an abuse of discretion.

C. The District Court Did Not Abuse Its Discretion by Denying Appellants' Motion Rule 11 Motion

[¶64] Contrary to Appellants' argument, the district court made detailed findings based on record evidence that supported its decision to deny Appellants' motion

for Rule 11 sanctions. Paragraphs 43 and 59, *supra*. As the district court correctly noted, the parties' cross-motions for Rule 11 sanctions involve overlapping evidence and arguments. (R:207:72). As set forth above, the district court's findings are not clearly erroneous and the district court's denial of Appellants' motion for Rule 11 sanctions was not an abuse of discretion.

D. Appellant's Appeal is Frivolous

[¶65] Rule 38, N.D.R.App.P., confers discretion on this Court to award reasonable attorney's fees if an appeal is found to be frivolous. "'An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which could be seen as evidence of bad faith.'" Sagebrush Res., LLC v. Peterson, 2014 ND 3, ¶ 30, 841 N.W.2d 705 (quoting Lucas v. Porter, 2008 ND 160, ¶ 28, 755 N.W.2d 88).

[¶66] This appeal, which is a continuation of Appellants' attempt obtain moot injunctive relief, is frivolous. Williams v. State, 405 N.W.2d 615, 625 (N.D. 1987) ("Appeals must have some legitimate basis in fact and law . . . [o]therwise courts and litigants, especially appellees, are forced to engage in the disposition, costly in terms of both time and money, of trifling and unnecessarily bothersome claims.") (citation omitted).

[¶67] What's more, various of Appellants arguments asserted on appeal were waived because they were either not asserted below (Paragraphs 55-57, *supra*), waived based on voluntary payment of the Judgment (Paragraphs 51-54, *supra*), or are otherwise unsupported by legal citation or the record. See Harty Ins., Inc. v. Holmes, 2022 ND 45, ¶ 2, 971 N.W.2d 400, 401, reh'g denied (Mar. 24, 2022)

("Holmes' arguments, without any citations to relevant authority, are flagrantly groundless and are without merit."); Gaede v. Bertsch, 2017 ND 69, ¶ 18, 891 N.W.2d 760 ("A party must do more than submit bare assertions, and an argument is without merit if the party does not provide supportive reasoning or citations to relevant authorities."). For example, Appellants appear to argue without citation to authority that attorneys are not subject to electronic service while on maternity leave. Appellant Br., ¶ 14. Appellants also argue that the district court sua sponte dismissed the underlying action pursuant to Rule 12 (Appellant Br., ¶¶ 70-71), dismissed the action pursuant to Rule 56 (Appellant Br. ¶¶ 72-74), dismissed the action as a sanction (Appellant Br. ¶¶ 75-76), and dismissed the action without affording Beland due process (Appellant Br. ¶¶ 77-78), all of which are contrary to the overwhelming evidence in the record.

[¶68] This Court should award Appellees their reasonable attorney's fees incurred defending this frivolous appeal as set forth in the concurrently-filed motion for attorney fees and supporting declaration.

CONCLUSION

[¶69] Appellees respectfully request that the district court's Judgment be affirmed and they be awarded their reasonably attorney's fees incurred defending this frivolous appeal.

ORAL ARGUMENT REQUESTED

[¶70] Pursuant to N.D. R. App. 28(h), oral argument will be helpful to answer any questions the Court may have, especially considering Appellees' contention that Appellants' appeal is frivolous.

Dated this 1st day of June, 2022.

/s/ Matthew D. Kirschenmann

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CERTIFICATION OF COMPLIANCE

[¶71] The undersigned hereby certifies that this document complies with N.D. Rules of Appellate Procedure 32(e); this Brief contains 34 pages, inclusive of the Certification of Compliance.

Dated this 1st day of June, 2022.

/s/ Matthew D. Kirschenmann

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Matthew Beland, Plaintiff-Appellant, and Sarah M. Kyte, Interested Party and Appellant, vs. Jeremiah Danel, Jeremiah Danel, D.D.C., P.C., Defendant-Appellee.	)	File No. 18-2021-CV-00499 Supreme Court No.: 20220057 **UNSWORN DECLARATION OF SERVICE**

[¶1] Jennifer A. Ernst, states that she is of legal age, not a party to nor interested in this action, and that on the June 1, 2022, she served the following:

1. **Brief of Defendants/Appellees – Oral Argument Requested**
2. **Motion for Attorney's Fees**
3. **Declaration of Matthew D. Kirschenmann**

by sending a correct copy thereof by electronic means through the Supreme Court E-filing Portal to the parties listed below:

Tyler J. Morrow **tyler@morrowlawfirms.com**

[¶2] To the best of affiant's knowledge, information and belief, such addresses as given above was the actual address of the party intended to be served.

[¶3] I declare under penalty of perjury that the foregoing is true and correct. Executed on June 1, 2022 in Fargo, Cass County, North Dakota.

/s/ Jennifer A. Ernst
Jennifer A. Ernst

20220057
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 2, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Matthew Beland, Plaintiff-Appellant, and Sarah M. Kyte, Interested Party and Appellant, vs. Jeremiah Danel, Jeremiah Danel, D.D.C., P.C., Defendant-Appellee.	)	File No. 18-2021-CV-00499 Supreme Court No.: 20220057 **UNSWORN DECLARATION OF SERVICE**

[¶1] Jennifer A. Ernst, states that she is of legal age, not a party to nor interested in this action, and that on the June 2, 2022, she served the following:

1. **Brief of Defendants/Appellees – Oral Argument Requested**

by sending a correct copy thereof by electronic means through the Supreme Court E-filing Portal to the parties listed below:

Tyler J. Morrow **tyler@morrowlawfirms.com**

[¶2] To the best of affiant's knowledge, information and belief, such addresses as given above was the actual address of the party intended to be served.

[¶3] I declare under penalty of perjury that the foregoing is true and correct. Executed on June 2, 2022 in Fargo, Cass County, North Dakota.

/s/ Jennifer A. Ernst
Jennifer A. Ernst