

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Sagebrush Resources, LLC,	)	
	)	
Plaintiff/Appellant,	)	
	)	
vs.	)	
	)	Supreme Court No. 20130080
Daryl Peterson, Larry Peterson, and Galen	)	
Peterson,	)	
	)	
Defendants/Appellees.	)	
	)	

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Appeal from Judgment Entered on December 26, 2012  
Case No. 05-2011-cv-00064  
County of Bottineau, Northeast Judicial District  
The Honorable Michael Sturdevant, Presiding

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**REPLY BRIEF OF PLAINTIFF/APPELLANT SAGEBRUSH RESOURCES, LLC**

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## LAW AND ARGUMENT

[¶ 1] Defendants/Appellees Daryl Peterson, Larry Peterson, and Galen Peterson (“the Petersons”) contend that the judgment of the district court should be affirmed because the Complaint of Sagebrush Resources, LLC (“Sagebrush”) was frivolous, and it was reasonable to spend two hundred hours of billed time defending against it. In the process, they rely on misleading and unsupported factual assertions, and mischaracterize the applicable law. When all facts and inferences are viewed in the light most favorable to Sagebrush, as they must be at this stage, and the correct legal standard is applied, it is apparent that the district court abused its discretion when it held that the Complaint was frivolous. When Sagebrush initiated this case, it had sufficient factual and legal support for its claims such that “a reasonable person could . . . have thought a court would render judgment in that person’s favor.” N.D.C.C. § 28-26-01;<sup>1</sup> *Strand v. Cass Cnty.*, 2008 ND 149, ¶ 11, 753 N.W.2d 872 (citing *Deacon’s Dev., LLP v. Lamb*, 2006 ND 172, ¶ 12, 719 N.W.2d 379 (citing *Peterson v. Zerr*, 477 N.W.2d 230, 236 (N.D. 1991))). Accordingly, the judgment, to the extent it found the Complaint frivolous and awarded \$23,729.00 in fees to the Petersons, must be reversed.

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<sup>1</sup> Although the Petersons cite both N.D.C.C. § 28-26-01 and N.D.C.C. § 28-26-31 in their Brief, their argument focuses exclusively on whether the Complaint was frivolous. This Brief will likewise focus on the finding of frivolousness under Section 28-26-01.

**I. The Petersons' Statement of Facts Does Not Comply with the North Dakota Rules of Appellate Procedure.**

[¶ 2] The Petersons' Brief does not include a statement of facts that complies with this Court's rules. See N.D.R.App.P. 28(b)(5), (c), and (f). Indeed, the section of their brief labeled "STATEMENT OF FACTS" does not contain a single citation to the record. Rather, the Petersons simply state that they "do not agree" with the statement of facts presented by Sagebrush without offering any statement of their own. However, Rule 28 of the North Dakota Rules of Appellate Procedure requires an appellee who is unsatisfied with the appellant's statement of facts to submit its own statement, including "appropriate references to the record." N.D.R.App.P. 28(b)(6) and (c); *State v. Noack*, 2007 ND 82, ¶ 9, 732 N.W.2d 389 (explaining that it is "absolutely imperative" that a brief contain "a statement of the facts and, where those facts are disputed, references to the evidentiary record"). Because the Petersons failed to submit a statement of facts that complies with rules, the statement of facts presented by Sagebrush must be taken as true for the purpose of this appeal. See *Carpenter v. Rohrer*, 2006 ND 111, ¶ 39, 714 N.W.2d 804 (quoting *Vandeberg v. State*, 2003 ND 71, ¶ 7, 660 N.W.2d 568) ("Judges are not 'obligated to engage in unassisted searches of the record.'").

[¶ 3] Moreover, the Petersons routinely mischaracterize the evidence, without citation to the record, in an effort to bolster their arguments. For example, the Petersons state that Sagebrush was not the operator of the wells at issue when the case was initiated. See Appellees' Br., ¶¶ 13, 35, 37. That statement is false and unsupported by the record. Sagebrush was the operator of the wells at issue when it filed its Complaint. Appendix of Plaintiff/Appellant Sagebrush Resources, LLC ("App.") 5, 8, 10.

[¶ 4] Similarly, the Petersons take issue with the inferences that Sagebrush draws from the evidence that is in the record. *See* Appellees’ Br., ¶¶ 13, 30, 31, 33. However, on appeal, the evidence in the record must be viewed in the light most favorable to the non-movant, and the non-movant must be given the benefit of all favorable inferences. *Halverson v. Sentry Ins. a Mutual Co.*, 2008 ND 205, ¶ 5, 757 N.W.2d 398. As such, it must be inferred from photographs taken from a position above large oil tanks that the person who took the photographs was on top of the tank, and it must be inferred from the fact that the Petersons provided those photographs to the Industrial Commission that one of the Petersons took the photographs. *See* Appellees’ Br., ¶ 13; App. 115. Likewise, from Daryl Peterson’s statement at a landowners meeting that he had “traveled to the Kuroki Field to inspect the Kuroki Wells,” it must be inferred that Daryl Peterson entered the Kuroki well sites. Appellee’s Br., ¶ 31.

## **II. The Complaint Was Not Frivolous.**

[¶ 5] At the time Sagebrush initiated this action, there was sufficient evidence for a reasonable person to believe the Petersons had entered one or more of Sagebrush’s well sites without authorization. There was also a sufficient legal basis for a reasonable person to believe that such unauthorized entry was unlawful. Accordingly, the Complaint was not frivolous, and the district court’s conclusion to the contrary should be reversed.

### **A. It was Reasonable for Sagebrush to Believe it Had the Right to Exclude Others from its Well Sites.**

[¶ 6] North Dakota law protects the right of an oil and gas exploration and production company to use so much of the surface as reasonably necessary to explore for and produce oil and gas from beneath it. *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131,

135 (N.D. 1979). That right includes the power to exclude others, including the surface owner, from interfering with such use. *Id.* at 139. From the face of the Complaint, it is clear that Sagebrush sought an order prohibiting the Petersons from interfering with its operations, and providing compensation to Sagebrush for any such interference. Sagebrush has a right to such relief under North Dakota law and therefore, it was not frivolous to assert that right.

[¶ 7] The fact that Sagebrush labeled its claim as trespass does not render the lawsuit frivolous. After filing its Complaint, Sagebrush elected not to pursue a true trespass theory because it deemed it unlikely that, absent an express lease or other agreement, North Dakota law would recognize a possessory interest in well sites necessary to support a true trespass claim. However, this election does not constitute an admission by Sagebrush that the claim was frivolous when filed. Indeed, courts in other states have labeled unauthorized entry onto a well site trespass. *See, e.g., General Crude Oil Co. v. Aiken*, 344 S.W.2d 668, 671 (Tex. 1961) (citing *Pure Oil Co. v. Gear*, 83 P.2d 389, 395 (Okla. 1938)).<sup>2</sup> Moreover, this Court has never directly addressed whether unauthorized entry onto a well site constitutes trespass. In cases like this where the law is unsettled, parties should be free to make a strategic decision not to pursue a particular theory of liability without risking the imposition of attorneys' fees. As this Court has emphasized, Section 28-26-01 is not meant to "chill enthusiasm and creativity in

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<sup>2</sup> Contrary to the Petersons' assertion, Sagebrush did not waive its right to argue that it could reasonably believe its interest in the surface was a possessory interest that could give rise to a trespass claim. Appellees' Br., ¶ 40. Rather, Sagebrush recognized that its interest is likely not a possessory interest under North Dakota law, and therefore the Petersons' actions may not be a true trespass. Sagebrush has maintained that its trespass claim was filed with the reasonable belief that a court would enter judgment in its favor.



pursuing factual or legal theories, and a court should not use the wisdom of hindsight to determine whether claims are frivolous.” *Strand*, 2008 ND 149, ¶ 11, 753 N.W.2d 872 (quoting *Soentgen v. Quain & Ramstad Clinic*, 467 N.W.2d 73, 84-85 (N.D. 1991)). Accordingly, there was a sufficient basis under North Dakota law for Sagebrush to reasonably believe that unauthorized entry onto its well sites was actionable.

**B. Photographs Submitted to the Industrial Commission Provided a Sufficient Factual Basis for Sagebrush to Believe the Petersons Had Entered its Well Sites.**

[¶ 8] The district court accepted for the purposes of its decision that Sagebrush presented sufficient evidence for a reasonable person to conclude that the Petersons’ had entered Sagebrush’s well sites. App. 173–74. Indeed, the Petersons admit that they entered many of the well sites, or at least access roads for the well sites, identified in the Complaint. App. 77–80. With respect to the remaining wells, it was reasonable for Sagebrush to infer that the Petersons had entered its well sites from their communications with the Industrial Commission enclosing photographs of the well sites. That the Petersons later denied taking some of the photographs, does not make the Complaint frivolous. App. 85–87. This Court, like the district court, must accept Sagebrush’s evidence that the Petersons entered its well sites as sufficient for a reasonable person to believe they did enter the well sites.

**C. The Lack of Damages Does Not Make the Complaint Frivolous.**

[¶ 9] Sagebrush’s ultimate inability to prove damages does not render the Complaint frivolous. Indeed, the question of whether Sagebrush was actually able to prove damages is irrelevant. The relevant question is whether Sagebrush reasonably believed when it filed its Complaint that it would be able to prove damages. N.D.C.C.

§ 28-26-01. Sagebrush was concerned that the Petersons' unauthorized entry onto its well sites would result in personal injuries or damage to Sagebrush's equipment. Although the district court determined that sufficient evidence of such damages was not ultimately produced, Sagebrush maintained a reasonable belief that it would when the case was initiated.

**III. The Attorneys' Fees Award is Excessive.**

[¶ 10] The attorneys' fees awarded by the district court are excessive. Sagebrush is not challenging the time spent on discovery, except to the extent the time was spent reviewing irrelevant deposition transcripts that were not cited by either party. Sagebrush is challenging the inordinate amount of time spent on research, intra-office consultation, and drafting memorandums. Such tasks should not have taken nearly 100 hours of billed legal work given the Petersons' claim that the legal claims asserted by Sagebrush were frivolous. In this case, the district court abdicated its duty to review the reasonableness of the requested attorneys' fees, stating it "would be a speculative task that this court finds to be inappropriate." App. 201. Even if the Court upholds the district court's determination that the Complaint was frivolous, it should vacate the fee award and remand with instructions to review the appropriateness of the hours billed by the Petersons' attorneys.

**IV. This Appeal Is Not Frivolous.**

[¶ 11] Sagebrush filed this appeal because the district court abused its discretion when it (1) found that the Complaint was frivolous and (2) awarded unreasonable attorneys' fees. Neither claim is "flagrantly groundless or devoid of merit." N.D.R.App.P. 38; *Peterson v. DS Dispatch, Inc.*, 2008 ND 207, ¶ 3, 758 N.W.2d 909

(citations omitted). Therefore, the appeal is not frivolous and the Petersons are responsible for their own attorneys' fees.

[¶ 12] Notably, this Court has been reluctant to find an appeal frivolous. It has done so primarily in cases where the appellants have failed to cite authority in support of their position, *see, e.g., United Valley Bank v. Lamb*, 2003 ND 149, ¶ 5, 669 N.W.2d 117, or have persisted in filing a subsequent appeal from a Rule 60(b) motion to vacate a judgment that had already been appealed and affirmed, *see, e.g., In re Emelia Hirsch Trust*, 2013 ND 63, ¶ 1. Given the standard this court has adopted, this appeal is not frivolous.

### **CONCLUSION**

[¶ 13] For the foregoing reasons, Sagebrush requests that the district court's judgment be reversed to the extent it awarded attorneys' fees to the Petersons, and that the case be remanded for entry of a judgment requiring each party to bear their own fees.

DATED this 5th day of July, 2013.

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

I hereby certify that on July 5, 2013, I electronically filed with the Clerk of the North Dakota Supreme Court the REPLY BRIEF OF PLAINTIFF/APPELLANT SAGEBRUSH RESOURCES, LLC and served the same electronically as follows:

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