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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

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

BRIEF OF PLAINTIFF/APPELLANT SAGEBRUSH RESOURCES, LLC

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court abused its discretion when it concluded that the Complaint was frivolous and not made in good faith, and entered judgment in favor of the Defendants for their costs and attorney's fees?

II. Whether the district court abused its discretion when it concluded that attorney's fees in the amount of $23,729.00 were reasonable?

STATEMENT OF THE CASE

[¶ 1] This appeal requires the Court to decide whether an oil and gas company's assertions in a complaint that (1) it has a legal right to prohibit unauthorized persons from entering onto its well sites and climbing on its equipment and (2) it is entitled damages for harm caused by past illegal entries were backed by such a complete absence of actual facts or law that no reasonable person would have thought a court would render judgment in the company's favor. More specifically, this Court must decide whether the district court abused its discretion when it concluded that the claims made by Sagebrush Resources, LLC ("Sagebrush"), in this lawsuit were "frivolous" and not "made in good faith" and entered judgment in favor of Defendants Daryl Peterson, Larry Peterson, and Galen Peterson ("the Petersons") for nearly $24,000 in costs and attorney's fees.

[¶ 2] Sagebrush initiated this lawsuit in March 2011 after it learned that the Petersons, without authorization, had been entering onto well sites operated by Sagebrush to inspect and photograph the equipment and materials located on the sites. (Appendix of Plaintiff/Appellant Sagebrush Resources, LLC ("App.") 13.) Because Sagebrush was concerned that the Petersons would injure themselves or damage its equipment in the

process, Sagebrush sought a court order prohibiting the Petersons from making future entries onto its well sites and interfering with its equipment and operations. (App. 12.)

[¶ 3] To that end, Sagebrush's complaint asserted two counts: first, Sagebrush asserted a trespass claim against the Petersons and sought damages (App. 11); and second, Sagebrush requested that the Court exercise its equitable authority and enter an injunction prohibiting the Petersons from entering Sagebrush's well sites (App. 12). On May 4, 2011, the Petersons served an answer to the complaint (App. 14–20). The Petersons admitted that they had entered onto certain well sites owned by Sagebrush, but claimed that they were entitled to do so. (App. 15 ¶ 12, 16 ¶ 15.) The Petersons further asserted that they were entitled to recover their costs, including reasonable attorney's fees, pursuant to Sections 28-26-01 and 28-26-31 of the North Dakota Century Code because Sagebrush's claims were frivolous and made in bad faith. (App. 18, ¶ 32.)

[¶ 4] On July 20, 2012, the Petersons filed a motion for summary judgment. (App. 2, Doc. # 10). The Petersons argued that the trespass claim asserted by Sagebrush failed as a matter of law because Sagebrush did not have a sufficient property interest in the well sites to support the claim. The Petersons also contended that Sagebrush lacked evidentiary support to demonstrate the Petersons actually entered onto the sites as Sagebrush claimed. Similarly, the Petersons argued that Sagebrush was unable to prove it was damaged by the Petersons' entry onto its well sites. Finally, the Petersons asserted Sagebrush's request for injunctive relief failed because Sagebrush had sold its interest in the wells after filing the complaint.

[¶ 5] On August 20, 2012—three days before its response to the Petersons' motion for summary judgment was due—Sagebrush received unexecuted responses to its

first set of written discovery requests. (App. 22). That same day, it filed a motion to extend the deadline to respond to the Petersons' motion for summary judgment. (App. 2, Doc. # 26.) Sagebrush asked for an additional thirty days so that it would have time to review the Petersons' discovery responses in detail. On August 21, 2012, the Petersons filed a response in opposition to Sagebrush's request for an extension. (App. 2, Doc. # 30.) At 12:01 p.m. on August 22, 2012—the day before Sagebrush's response was due—the district court denied Sagebrush's motion. (App. 3, Doc. # 34.)

[¶ 6] On August 23, 2012, Sagebrush filed a response in opposition to the Petersons' motion for summary judgment. (App. 3, Doc. # 38.) Sagebrush conceded that the Petersons' actions were likely not technical trespasses under North Dakota Law, but it asserted that there was sufficient evidence to find that the Petersons had entered onto Sagebrush's well sites without authorization, and that Sagebrush has a right to exclude them from doing so.

[¶ 7] Pursuant to the Petersons' request, a hearing was held on their motion on September 7, 2012. (App. 3.) After hearing argument from the parties, the district court judge explained his decision to grant the motion from the bench. (App. 170–80, Excerpt from Transcript of Hearing Held on Sept. 7, 2012 ("Tr.") 16–26.) The district court first questioned the weight of the evidence presented by Sagebrush in support of its assertion that the Petersons had entered its well sites, but ultimately accepted it as sufficient. (App. 171–74; Tr. 17–20.) The court nevertheless granted the Petersons' motion, however, because the trespass claim failed as a matter of law and, in the district court's view, Sagebrush could not demonstrate that the Petersons interfered with its operations or that the alleged interference caused any harm to Sagebrush. (App. 174–78; Tr. 20–24.)

Although the district court did not directly address Sagebrush's request for injunctive relief, the claim was presumably dismissed because Sagebrush no longer owned an interest in the well sites at issue. Finally, the district court concluded that Sagebrush's claims were "frivolous" and "not made in good faith." (App. 178–80; Tr. 24–26.) Accordingly, the Petersons' counsel was directed to submit an affidavit detailing the costs and attorney's fees they had incurred in the action. (App. 180, Tr. 26.)

[¶ 8] On October 5, 2012, the Petersons' primary attorney submitted an affidavit to the district court indicating that two attorneys, a law clerk, and a paralegal had collectively invested 247.4 hours in the case. (App. 183–92.) He further attested that the Petersons were billed for 199.6 hours of work for a total of $24,866.50 in attorney's fees. (App. 184.) On October 22, 2012, Sagebrush filed a response in opposition to the Petersons' request for attorney's fees. (App. 3, Doc. # 44.) Sagebrush first noted that it had not been given an opportunity to brief whether its claims were frivolous. Sagebrush emphasized that there was ample evidentiary support for its assertion that the Petersons were entering onto its well site, as well as legal support for its assertion that the court could issue an injunction prohibiting the Petersons from interfering with its operations. Sagebrush also asserted that the hours billed by Petersons' counsel were excessive.

[¶ 9] On November 2, 2012, the Petersons filed a reply in support of their request for attorney's fees. (App. 3, Doc. # 48.) The Petersons argued that even though Sagebrush's claims were frivolous, the legal issues and facts of the case were complicated and justified the expenditure of time involved. The Petersons also contended—for the first time—that all of the wells at issue were transferred to a different

operator before Sagebrush initiated this lawsuit. The assertion is not correct and is unsupported by the record.

[¶ 10] On November 15, 2012, the district court entered an order confirming its earlier finding that the Petersons were entitled to recover their costs and reasonable attorney's fees. (App. 199–201.) Although the Court did not cite a specific statute, it concluded that Sagebrush's claims had "no basis in law or fact" and were made in "bad faith," and directed Sagebrush to pay $23,729 in attorney's fees. (App. 200–01.) Notably, in support of its decision, the court relied on the inaccurate assertion in the Petersons' reply brief that Sagebrush was no longer the operator of the wells at issue at the time it filed the complaint. (App. 200.)

STATEMENT OF FACTS

[¶ 11] Sagebrush is a Delaware limited liability company with its principal place of business in Highlands Ranch, Colorado. (App. 5, 14.) At the time it initiated the case, Sagebrush was engaged in the business of oil and gas exploration and production in the Bottineau County, North Dakota. (App. 6, 15.)

[¶ 12] At the time it initiated this case, Sagebrush was the operator of the Rice-State 2H well ("Rice Well"), which has a surface location at the NE/4NW/4 of Section 16, Township 161 North, Range 82 West, Bottineau County, North Dakota. (App. 6, 15.)

[¶ 13] At the time it initiated this case, Sagebrush was the operator several oil and gas wells, as well as a salt water disposal well in the Renville Field. Said wells include, but are not necessarily limited to, the following wells located in Bottineau County, North Dakota:

Well Name	**Surface Location**
Cramer 1	Township 161 North, Range 82 West Section 8: SE/4NW/4
Cramer 2	Township 161 North, Range 82 West Section 8: SE/4NW/4
Cramer 3	Township 161 North, Range 82 West Section 8: NE/4NW/4
Cramer 4	Township 161 North, Range 82 West Section 8: SW/4NW/4
Cramer 1 SWD	Township 161 North, Range 82 West Section 8: SE/4NW/4
Rice et al 1H	Township 161 North, Range 82 West Section 8: NE/4SE/4
Glessing 3	Township 161 North, Range 82 West Section 8: SW/4SW/4
Rice 8	Township 161 North, Range 82 West Section 8: SE/4SE/4
Rice Trust 1	Township 161 North, Range 82 West Section 8: NW/4SE/4
Rice 4	Township 161 North, Range 82 West Section 8: SW/4SE/4
Glessing 2	Township 161 North, Range 82 West Section 8: SE/4SW/4
Rice 5	Township 161 North, Range 82 West Section 8: NE/4SE/4
Rice 9	Township 161 North, Range 82 West Section 8: SW/4SE/4
Glessing 7-16	Township 161 North, Range 82 West Section 8: SE/4SE/4

Rice 10	Township 161 North, Range 82 West Section 8: SW/4SE/4
Rice 3	Township 161 North, Range 82 West Section 8: SW/4NE/4
Glessing 1	Township 161 North, Range 82 West Section 8: NE/4SW/4

(collectively the "Cramer Battery Wells"). (App. 6–8.)

[¶ 14] At the time it initiated this case, Sagebrush also owned and operated the Cramer Central Tank Battery, a.k.a. Rice-Glessing Battery, which is a series of tanks and other storage facilities, which store the production from the Cramer Battery Wells. (App. 8.)

[¶ 15] At the time of the alleged trespasses, Sagebrush was the operator of several oil and gas wells located in the Wayne Field, the majority of which is located in Township 162 North, Range 81 West, Bottineau County, North Dakota. Said wells include, but are not necessarily limited to, the following:

Well Name	**Surface Location**
Bronderslev 2	Township 162 North, Range 81 West Section 32: NE/4SW/4
Bronderslev 1	Township 162 North, Range 81 West Section 32: NW/4SW/4
Bronderslev 4H	Township 162 North, Range 81 West Section 32: NE/4SW/4
Bronderslev 3	Township 162 North, Range 81 West Section 32: SE/4SE/4
Bronderslev 5H	Township 162 North, Range 81 West Section 32: NE/4SW/4
Bronderslev 6H	Township 162 North, Range 81 West Section 32: SE/4SW/4

(collectively the "Bronderslev Wells"), as well as the following wells:

Well Name	**Surface Location**
D.G. Peterson 1	Township 162 North, Range 81 West Section 32: SW/4NE/4
Peterson 1	Township 162 North, Range 81 West Section 32: NW/4SE/4
Peterson 2	Township 162 North, Range 81 West Section 32: SW/4SE/4

(collectively the "Peterson Wells"). (App. 8–9.)

[¶ 16] At the time it initiated this case, Sagebrush was also the operator of several oil and gas wells in the Kuroki Field, which is located in Township 163 North, Range 81 West, Bottineau County, North Dakota. Said wells include, but are not necessarily limited to, the following:

Well Name	**Surface Location**
Glintz 1-15H	Township 163 North, Range 81 West Section 1: SW/4SE/4
Cameron 1 HZ	Township 163 North, Range 81 West Section 1: SW/4SW/4
Cameron 1-10H	Township 163 North, Range 81 West Section 1: NE/4SW/4
Lodoen 11-7H	Township 163 North, Range 81 West Section 11: SW/4NE/4
Stavens 1 HZ	Township 163 North, Range 81 West Section 11: SE/4SE/4
Lodoen 1	Township 163 North, Range 81 West Section 11: SE/4NE/4
Lodoen 11-8H	Township 163 North, Range 81 West Section 11: NE/4NE/4

Wright 13-12HZ	Township 163 North, Range 81 West Section 12: NW/4SW/4
Rosendahl 4	Township 163 North, Range 81 West Section 12: NE/4NW/4
Wright 12-4H	Township 163 North, Range 81 West Section 12: SW/4NW/4
Wright 12-12H	Township 163 North, Range 81 West Section 12: SW/4NW/4
Rosendahl 7	Township 163 North, Range 81 West Section 12: SE/4NW/4

(collectively the "Kuroki Wells"). (App. 10–11.)

[¶ 17] In e-mail messages to Lynn D. Helms ("Helms"), Director of the North Dakota Department of Mineral Resources ("DMR"), Daryl Peterson and Galen Peterson reported an alleged oil spill that occurred on the Rice Well site, and also included photographs of the Rice Well site that could only have been taken while on the Rice Well site. (App. 32, 112, 116.)

[¶ 18] Attached to a complaint submitted by Daryl Peterson to Helms, was a picture of the Cramer Central Tank Battery, purportedly taken on September 28, 2010. (App. 33–34.) Witnesses observed Larry Peterson leaving the Cramer Central Tank Battery in a vehicle, and Larry Peterson explained to them that he entered the Cramer Central Tank Battery for the purpose of taking photographs. (*Id.*) Larry Peterson stated to the witnesses that he was accompanied by Daryl Peterson and another man who were following him in a separate vehicle. (*Id.*)

[¶ 19] Attached to a complaint submitted by Defendants to Helms, was a picture of the storage tanks used to store oil produced by the Bronderslev wells purportedly taken

by Daryl Peterson on November 15 or 16, 2010, which could only have been taken from a position upon the tanks. (App. 35, 112, 115.)

[¶ 20] At a landowners association meeting attended by Brad Gilbertson, Daryl Peterson stated that he had traveled to the Kuroki Field to inspect the Kuroki Wells operated by Sagebrush. (App. 36.)

[¶ 21] Daryl Peterson admitted that on January 3, 2009, he entered the Peterson saltwater disposal site, and returned to the site at various times through May of 2009. Daryl Peterson admits that he entered the well site again in August 2010, in the fall of 2010, and on September 28, 2012. (App. 77–79.)

[¶ 22] In August 2009, Galen Peterson and Daryl Peterson admit that they entered well sites operated by Sagebrush in the Wayne Field, including the Bronderslev Wells and Peterson Wells. Daryl Peterson admits that he entered a well site associated with the Bronderslev Wells again in the fall of 2010. (App. 77–79.)

[¶ 23] On or about March 8, 2011, Larry Peterson and Daryl Peterson admit that they entered the Cramer Central Tank Battery. (App. 77–79.)

[¶ 24] Defendants admit taking numerous photographs of properties operated by Sagebrush in Bottineau County, North Dakota. (App. 85–87.)

LAW AND ARGUMENT

I. Statement of the Standard of Review.

[¶ 25] The determination of whether a particular claim is "frivolous" under N.D.C.C. § 28-26-01 is within the discretion of the district court. *Hartleib v. Simes*, 2009 ND 205, ¶ 44, 776 N.W.2d 217 (citing *City of Fargo v. Malme*, 2008 ND 172, ¶ 8, 756 N.W.2d 197; *Strand v. Cass County*, 2008 ND 149, ¶ 13, 753 N.W.2d 872). "An award

of costs and attorney fees under N.D.C.C. § 28-26-31 lies entirely within the discretion of the district court." *Id.* (citing *Strand*, 2008 ND 149, ¶ 14). In either case, an award of attorney's fees will be overturned if the district court abused its discretion. *See Negaard v. Negaard*, 2005 ND 96, ¶ 23, 696 N.W.2d 498. "A court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, or when its decision is not the product of a rational mental process leading to a reasoned determination." *Hartleib*, 2009 ND 205, ¶ 44 (citing *Malme*, 2008 ND 172, ¶ 8). Similarly, a misinterpretation or misapplication of the law is an abuse of discretion. *Shull v. Walcker*, 2009 ND 142, ¶ 13, 770 N.W.2d 274 (citing *US Bank Nat'l Ass'n v. Arnold*, 2001 ND 130, ¶ 21, 631 N.W.2d 150); *Strand*, 2008 ND 149, ¶ 18 (citation omitted); *Dixon v. McKenzie Cnty. Grazing Ass'n*, 2004 ND 40, ¶ 29, 675 N.W.2d 414 (citing *Olander Contracting Co. v. Gail Wachter Inv.*, 2003 ND 100, ¶ 8, 663 N.W.2d 204).

II. The District Court Abused its Discretion when it Concluded that the Petersons Were Entitled to Costs and Attorney's Fees Because the Claims Asserted in the Complaint Were "Frivolous" and "Not Made in Good Faith."

[¶ 26] Based on passing requests made in the introduction and conclusion of the Petersons' memorandum in support of their motion for summary judgment, the district court concluded Sagebrush's complaint was "frivolous" and "not made in good faith" and awarded the Petersons nearly $25,000 in attorney's fees and costs. The court's decision fails to identify the statutory basis for the award. Nevertheless, it is not justified by either statute cited by the Petersons in their complaint and memorandum in support of their motion for summary judgment. *See* N.D.C.C. §§ 28-26-01 and 28-26-31. A claim is not frivolous merely because it lacks sufficient evidentiary or legal support to survive a motion for summary judgment; a claim is frivolous only if at the time it was made there

was "such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in that person's favor." N.D.C.C. § 28-26-01; *Strand*, 2008 ND 149, ¶ 11 (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))). Similarly, even if the district court's conclusion that a single allegation in the complaint was "false" or not supported by the record, that finding cannot justify the judgment in favor of the Petersons for all of their reasonable attorney's fees. *See* N.D.C.C. § 28-26-31

[¶ 27] Here, when Sagebrush initiated this case there was sufficient evidence and legal precedent for a reasonable person to believe the Petersons had entered onto Sagebrush's well sites and that their entry was unlawful. That it was later discovered that there was insufficient evidence of damages and that the entry onto the well sites may not have constituted a technical trespass under North Dakota Law, does not mean the Complaint was frivolous. Notably, Sagebrush also sought to enjoin the Petersons from continuing to enter onto its well sites: it cannot be frivolous for an oil and gas company to assert that it has a right to exclude the public from its well sites. Accordingly, because the district court misapplied the law, its judgment, to the extent it awarded attorney's fees to the Petersons, should be reversed.

A. <u>Sagebrush's Claims Were Not Frivolous Under N.D.C.C. § 28-26-01</u>.

[¶ 28] Pursuant to Section 28-26-01 of the North Dakota Century Code, if the Court determines that a claim was "frivolous," it "shall . . . award reasonable actual and statutory costs, including reasonable attorney's fees to the prevailing party." Importantly, however, a claim is not frivolous unless "there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in

that person's favor." N.D.C.C. § 28-26-01. *See also City of Fargo v. Malme*, 2008 ND 172, ¶ 8, 756 N.W.2d 197 (explaining that a claim is not frivolous under the statute unless the "complete absence of actual facts or law" standard is met). Section 28-26-01 is not meant to "chill enthusiasm and creativity in pursuing factual or legal theories, and a court should not use the wisdom of hindsight to determine whether claims are frivolous." *Strand v. Cass County*, 2008 ND 149, ¶ 11, 753 N.W.2d 872 (quoting *Soentgen v. Quain & Ramstad Clinic, P.C.*, 467 N.W.2d 73, 84 (N.D. 1991)). Dismissal of a claim at the summary judgment phase does not mean the claim was frivolous. *Peterson v. Zerr*, 477 N.W.2d 230, 236 (N.D. 1991) (citing *Soentgen*, 467 N.W.2d at 85). It is "more likely that a party might reasonably expect to prevail" on a claim where the law is "unclear or unsettled." *Strand*, 2008 ND 149, ¶ 11.

[¶ 29] Sagebrush's claims were not frivolous. Sagebrush's complaint asserted separate claims for trespass and injunctive relief, but the thrust of the lawsuit was an effort to keep the Petersons off its well sites to protect their safety and Sagebrush's equipment and operations. Sagebrush was concerned that the Petersons' unauthorized entries onto its well sites would lead to injuries and, potentially, liability for damages. It was not frivolous for Sagebrush to initiate this lawsuit in an effort to avoid those consequences.

[¶ 30] The fact that Sagebrush ultimately conceded that the Petersons' conduct was probably not technically a "trespass" under North Dakota law does not mean the claims were frivolous. First, there is ample factual support for Sagebrush's assertion that the Petersons were entering its well sites. (*See, e.g.*, App. 29–39, 43, 77–79, 85–87, 112–16, 159–66.) Indeed, the Petersons admitted that they repeatedly entered onto

Sagebrush's well sites, and that they submitted photographs to the North Dakota Industrial Commission that could only have been taken from locations on the well sites and, in some cases, from locations upon Sagebrush's equipment. (App. 77–79, 85–87, 112–16, 159–66.) The Petersons later denied that they took some of the photographs, but it was not unreasonable for Sagebrush to infer from the fact that they submitted the photographs to the North Dakota Industrial Commission that they took them.

[¶ 31] Sagebrush provided legal support for its claims as well. As Sagebrush emphasized before the district court, even though the Petersons entry onto the well sites may not technically constitute trespass under North Dakota law, Sagebrush does have a legally recognized property interest in the well sites and is it is entitled to bring a lawsuit in state district court against anyone who interferes with that interest. *See Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 (N.D. 1979) (citations omitted). In *Kerbaugh*, the Supreme Court expressly held that district courts have the authority to prohibit landowners from interfering with oil and gas development on their land. *Id.* 133–35. The fact that the complaint labeled the claim as a trespass claim rather than a claim for interference with Sagebrush's implied right to use so much of the surface as reasonably necessary to extract oil and gas from beneath it does not make the claim frivolous.

[¶ 32] Although the district court acknowledged that oil and gas lessees have a right to use so much of the surface as reasonably necessary to extract the minerals from beneath it, and to prohibit landowners from interfering with that right, it concluded that the claim was nevertheless frivolous because no reasonable person could have believed from the evidence presented by Sagebrush that the Petersons' conduct constituted interference with Sagebrush's surface rights. Again, the Petersons do not dispute that

they were entering onto Sagebrush's well sites. (App. 77–79, 85–87.) In Sagebrush's view, the act of entering the well sites at all constitutes interference with its right to use the surface of the property for a well site—regardless of whether the Petersons' owned the property or were accompanied by local or state officials. Property owners have no more right to interfere with oil and gas development on their property than third parties, s*ee Kerbaugh*, 283 N.W.2d at 133–35, and officials, even those authorized to enter the well sites, are not necessarily authorized to bring whomever they please along with, *see, e.g.*, *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994) (concluding a secret service agent violated the Fourth Amendment by permitting a television crew to film the search of a home conducted pursuant to a valid warrant).

[¶ 33] Moreover, although Sagebrush did not argue the Petersons' conduct was a technical trespass or that it has a possessory interest in the well sites, that does not mean, as the district court seemed to imply, that the Petersons' legal position was obviously correct. Courts in other jurisdictions have held that well operators have a possessory interest in their well sites. *See, e.g.*, *Mingo Oil Producers v. Kamp Cattle Co.*, 776 P.2d 736, 741 (Wyo. 1989) ("Under the rule of reasonable necessity, the mineral owner is entitled to *possess* that portion of the surface estate 'reasonably necessary' to the production and storage of the mineral . . . ." (emphasis added) (quoting *Sanford v. Arjay Oil Co.*, 686 P.2d 566, 572 (Wyo. 1984))) (additional citations omitted); *Getty Oil Co. v. Royal*, 422 S.W.2d 591, 593 (Tex. Ct. Civ. App. 1967) ("The mineral lessee, as the owner of the dominant estate, has the right to the use and *possession* of so much of the surface as is reasonably required in the operation of his mineral lease." (emphasis added) (citing *Warren Petroleum Corp. v. Martin*, 271 S.W.2d 410, 411 (Tex. 1954))). If the surface

owner, or the surface owner's livestock, enters onto the well site in possession of the lessee, the surface owner is a trespasser. *See, e.g.*, *General Crude Oil Co. v. Aiken*, 344 S.W.2d 668, 671 (Tex. 1961) (noting that the general rule in cases brought by landowners against mineral lessee's for injuries to livestock "likens wandering cattle and other domestic animals to trespassers upon the legitimate area of operations of the oil driller or producer" (citing *Pure Oil Co. v. Gear*, 83 P.2d 389, 395 (Okla. 1938))). In *Gear*, the Oklahoma Supreme Court expressly held that an oil and gas lessee was not liable for injuries to a landowner's cattle, which had wandered onto a production site and consumed saltwater from a drainage ditch, because the cattle were trespassers on the lessee's production site. *Gear*, P.2d at 395. After noting that the lessee had the "exclusive right of possession" of the saltwater ditch, the court held that the landowner's cattle, in drinking from the ditch, were trespassing and therefore the lessee was not liable for their injuries. *Id.* at 394–95.

[¶ 34] In light of the undisputed evidence that the Petersons were entering onto Sagebrush's well sites and the case law from Wyoming, Oklahoma, and Texas holding that a lessee's interest in a well site is a possessory interest and a landowner's entry onto that well site is a trespass, it was an abuse of discretion for the district court to hold that Sagebrush's complaint was frivolous. Sagebrush elected not to argue that the Petersons' entries onto its well sites were trespasses in light of this Court's conclusion in *Kerbaugh* that a lessee's interest in the surface is akin to an implied easement, rather than a possessory interest, but that does not mean it was frivolous to label the conduct a trespass in the Complaint. Notably, this Court has never directly addressed whether oil and gas lessees have the legal right to exclude landowners from their wells sites, and there is no

case law from North Dakota holding that mere entry onto a well site does not constitute the type of interference prohibited by *Kerbaugh*. Given the uncertain state of the law in this regard it cannot be said that no reasonable person would have believed that they could prevail on the claims asserted in the Complaint.

[¶ 35] Finally, to the extent that the district court based its conclusion that the Complaint was frivolous on Sagebrush's inability to prove that it was damaged by the Petersons' actions, the district court erred for two reasons. First, had Sagebrush pursued its trespass claim, proof of actual damages is not necessary. *Adams v. Canterra Petroleum, Inc.*, 439 N.W.2d 540, 546 (N.D. 1989); *see also* 75 Am. Jur. 2d Trespass § 10 (noting an "action for intentional trespass is directed at vindicating a legal right, []regardless of any appreciable injury"). A suit for trespass can be maintained in the absence of any actual harm. *Adams*, 493 N.W.2d at 546. Second, and more importantly, the thrust of the lawsuit was Sagebrush's request for equitable relief. Although it was unclear at the time Sagebrush initiated the suit the extent of the harm that had resulted from the Petersons' entries onto its well sites, Sagebrush's primary goal was to prohibit future entries by the Petersons. (App. 12.)

[¶ 36] Notably, the Petersons asserted—for the first time in their reply brief on the issue of attorney's fees (App. 3 Docs. # 45, 48, and 49)—that Sagebrush's request for an injunction was frivolous because Sagebrush had transferred all of its interests in the wells at issue to another operator before initiating this lawsuit (*see* App. 197–98). Although Sagebrush ultimately did transfer its interest in all of the wells to another operator—as Sagebrush admitted in response to the Petersons' motion for summary judgment—the transfer had not been completed when this lawsuit was initiated and nothing in the record

demonstrates otherwise. The Petersons attached to their final reply brief an order approving the transfer of certain wells from Sagebrush to Petro Harvester Operating Company, LLC ("Petro Harvester"), but they did not attach the exhibit to that order that actually identifies the wells transferred. (*See* App. 197–98.) Had they, it would show that not all of the wells at issue had been transferred to Petro Harvester when this case was initiated. Indeed, the transfer of several wells at issue in this proceeding was specifically delayed because of the Petersons' repeated complaints to the Industrial Commission. Accordingly, the Petersons' assertion, and the district court's conclusion in its order granting the Petersons attorney's fees, that Sagebrush had already transferred all of its interests in the wells to Petro Harvester is incorrect and unsupported by the record.

B. An Award of Costs and Attorney's Fees Under N.D.C.C. § 28-26-31 Is Not Justified on this Record.

[¶ 37] Section 28-26-31 of the North Dakota Century Code also does not support an award of attorney's fees in this action. Section 28-26-31 provides:

> Allegations and denials in any pleadings in court, made without reasonable cause and not in good faith, and found to be untrue, subject the party pleading them to the payment of all expenses, actually incurred by the other party by reason of the untrue pleading, including a reasonable attorney's fee, to be summarily taxed by the court at the trial or upon dismissal of the action.

Thus, before awarding attorney's fees under the statute the district court must find a specific allegation in the pleadings was (1) made without reasonable cause; (2) not made in good faith; (3) untrue; and (4) the fees were actually incurred by reason of the untrue allegation. N.D.C.C. § 28-26-31; *see Westchem v. Engel*, 300 N.W.2d 856, 859–60 (N.D. 1980).

[¶ 38] In this case, the district court found one allegation in the complaint was "false." Namely, the allegation that Daryl Peterson "was seen" at the Kuroki well site. As the district court noted, Sagebrush did not produce a witness who testified that he or she "saw" Daryl Peterson at the Kuroki well site. (App. 179; Tr. 25.) Notably, however, Sagebrush did identify a witness who overheard Daryl Peterson say he planned to inspect the Kuroki wells. (App. 36.) The key fact is not whether someone *saw* Daryl Peterson at the well site, but whether he *was* there. Moreover, although the district court made a general finding that the lawsuit was brought "in bad faith," there is no support for that conclusion in the record. (App. 178–80.) The finding was based on the district judge's personal knowledge of a different lawsuit involving some of the same parties, and his unsupported assumption, discussed above, that Sagebrush had transferred all of its interests in the wells at issue to Petro Harvester before initiating the lawsuit. (App. 179–80, 200.)

[¶ 39] Finally, even if the district court's conclusion was supported by the record, the Petersons did not incur nearly $25,000 in attorney's fees "by reason of" that specific allegation. Section 28-26-31 of the North Dakota Century Code simply does not permit the district court to award a party to a lawsuit 100% of the reasonable attorney's fees incurred by that party during the course of a lawsuit based on a single allegation in the pleadings.

III. The Attorney's Fees Claimed by the Petersons Are Not Reasonable.

[¶ 40] Even if the Court were to conclude that the district court did not abuse its discretion when it concluded that the Complaint was "frivolous" or that attorney's fees were appropriate under N.D.C.C. § 28-26-31, the fees awarded by the district court were

excessive and must be reduced. In addition to the pleadings, which were brief and straightforward, the parties each served and responded to one set of written discovery, the Petersons served a motion for summary judgment, Sagebrush responded to the motion, and the Petersons replied. Neither party deposed any witnesses, nor were there any discovery disputes or particularly burdensome discovery requests. Yet, despite the straightforward and brief nature of this case, the Petersons contend that their attorneys worked on this case for almost 250 hours, 199.6 of which they now assert were reasonable and billed to their clients. (App. 183–92.) In the Affidavit in support of their request for attorney fees, the Petersons overstate the number of hours their attorneys reasonably could have worked on this case.

[¶ 41] The Petersons attorneys have simply billed an excessive number of hours on this case. Their argument is contradictory on its face. It is not reasonable to invest 250 hours of work—more than six forty-hour workweeks—on a case they claim was frivolous when it was filed. Although approximately fifty hours were apparently not billed, it is still unreasonable to bill 199.6 hours—five forty-hour workweeks—on an allegedly frivolous proceeding.

[¶ 42] The excessiveness of the overall number of hours billed is illustrated by a close examination of the Affidavit and its attachment. A review of the line items in the Affidavit reveals several specific examples of unreasonable usage of attorney time. For example, the Petersons contend that their counsel invested more than 100 hours—approximately 80 of which were billed—into research of the claims, drafting memos, and drafting a single summary judgment brief. (App. 186–92.) That brief was twenty-four pages long, but more than half of it was devoted to discussing and quoting at length the

interrogatories and other written discovery that was exchanged in this case. It is not reasonable to bill for two full forty-hour workweeks for the production of a twenty-four page brief focused on factual issues and without any particularly difficult legal analysis.

[¶ 43] Sagebrush's complaint was also short and its claims were not complex. Much of the nine-page Complaint was devoted to identifying the property at issue. There were two claims: a claim for trespass and a claim for injunctive relief. Eighty hours of research, memo writing, and brief writing concerning those claims is not reasonable. Similarly, the Petersons contend that a paralegal expended nearly 30 hours reviewing and summarizing depositions taken in a different matter even though not a single witness was deposed in this matter and no party cited to said deposition transcripts in support of or in opposition to the motion for summary judgment. (App. 186–92.)

[¶ 44] Notably, the district court did not even attempt to analyze whether the attorney's fees apparently incurred by the Petersons in this proceeding were reasonable. *See Hughes v. N.D. Crime Victims Reparations Bd.*, 246 N.W.2d 774, 777 (N.D. 1976) (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)) (adopting guidelines for consideration of whether attorney's fees are reasonable). Rather, the district court merely stated that it was impressed with the quality of the parties' briefs, and it would not "arbitrarily cut" the number of hours. (App. 201.) Contrary to the district court's comments in this regard, it was required to examine the number of hours expended by the Petersons' counsel, and evaluate whether those hours were reasonable in light of the nature of the case. *Hughes*, 246 N.W.2d at 777.

CONCLUSION

[¶ 45] This was not a frivolous case brought by Sagebrush in bad faith. Rather, it was a legitimate effort, supported by evidence and legal authority, to keep the Petersons off Sagebrush's property. And it worked: there is no evidence that the Petersons entered onto Sagebrush's well sites after this lawsuit was initiated.

[¶ 46] The district court abused its discretion when it concluded that the Complaint was "frivolous" and "not made in good faith." As the hearing transcript demonstrates, the decision was based, at least in part, on the district court judge's personal knowledge of a different lawsuit involving some of the same parties and his assumption that this was a tactical lawsuit designed to intimidate the Petersons. First, nothing in the record supports this conclusion. Notwithstanding, there is no law which bars tactical lawsuits or provides for an award of attorney's fees to the prevailing party if the Complaint is ultimately dismissed on the merits. The only question is whether the filing party's claims are supported by sufficient facts and law such that a reasonable person could believe there was a chance of success on the merits. Because there were sufficient actual facts and law for a reasonable person to believe that Sagebrush could prevail on the merits when it initiated this lawsuit, the district court's conclusion that the lawsuit was frivolous was an abuse of discretion and must be reversed.

DATED this 15th day of May, 2013.

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ADDENDUM

28-26-01. Attorney's fees by agreement - Exceptions - Awarding of costs and attorney's fees to prevailing party.

1. Except as provided in subsection 2, the amount of fees of attorneys in civil actions must be left to the agreement, express or implied, of the parties.
2. In civil actions the court shall, upon a finding that a claim for relief was frivolous, award reasonable actual and statutory costs, including reasonable attorney's fees to the prevailing party. Such costs must be awarded regardless of the good faith of the attorney or party making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in that person's favor, providing the prevailing party has in responsive pleading alleged the frivolous nature of the claim. This subsection does not require the award of costs or fees against an attorney or party advancing a claim unwarranted under existing law, if it is supported by a good-faith argument for an extension, modification, or reversal of the existing law.

28-26-31. Pleadings not made in good faith.

Allegations and denials in any pleadings in court, made without reasonable cause and not in good faith, and found to be untrue, subject the party pleading them to the payment of all expenses, actually incurred by the other party by reason of the untrue pleading, including a reasonable attorney's fee, to be summarily taxed by the court at the trial or upon dismissal of the action.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

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

I hereby certify that on May 15th, 2013, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

1. Brief of Plaintiff/Appellant Sagebrush Resources, LLC; and,

2. Appendix of Plaintiff/Appellant Sagebrush Resources, LLC,

and served the same electronically as follows:

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