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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Randy Holkesvig, Plaintiff/Appellant, v. Bob Rost, Grand Forks County Sheriff, in his individual and official capacity, Linda Funkhouser, Grand Forks Sheriff's Office Support Assistant, in her individual and official capacity, Defendants/Appellees.	SUPREME COURT NO. 20140399 GRAND FORKS COUNTY DISTRICT COURT NO. 18-2014-CV-00519

APPEAL FROM JUDGMENT OF DISMISSAL WITHOUT PREJUDICE ENTERED SEPTEMBER 8, 2014

THE HONORABLE ALLAN L. SCHMALENBERGER

NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA

BRIEF OF APPELLEES BOB ROST, GRAND FORKS COUNTY SHERIFF, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, AND LINDA FUNKHOUSER, GRAND FORKS SHERIFF'S OFFICE SUPPORT ASSISTANT, IN HER INDIVIDUAL AND OFFICIAL CAPACITY

PEARSON, CHRISTENSEN, & CLAPP, PLLP
Daniel L. Gaustad (ND Attorney ID #05282)
Joseph E. Quinn (ND Attorney ID #06538)
24 North 4th Street
P.O. Box 5758
Grand Forks, ND 58206-5758
Telephone: (701) 775-0521/Fax: (701) 775-0524
Attorneys for Appellees

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STATEMENT OF ISSUES PRESENTED

¶1. **I. Is The Order For Judgment Of Dismissal Without Prejudice Void Even Though No Actual Controversy Exists As Plaintiff Was Granted The Relief He Requested?**

¶2. **II. Did The Trial Court Properly Deny Plaintiff's Motion For Recusal Of Judge Schmalenberger As Meritless?**

¶3. **III. Did The Defendants Violate The Plaintiff's Constitutional Rights By Filing A Motion To Strike Plaintiff's Unauthorized Pleading?**

¶4. **IV. Is The Plaintiff's Appeal Frivolous Warranting An Award Of Just Damages And Double The Costs, Including Reasonable Attorney's Fees, Because The Plaintiff Has Engaged In Multiple Meritless And Frivolous Appeals?**

STANDARD OF REVIEW

¶5. The trial court's granting of a motion for voluntary dismissal lies within the sound discretion of the district court and will not be reversed on appeal absent an abuse of discretion. WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 10, 730 N.W.2d 841.

¶6. A trial 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." Holkesvig v. Welte, 2012 ND 142, ¶ 6, 818 N.W.2d 760 (citing Johnson v. Hovland, 2011 ND 64, ¶ 8, 795 N.W.2d 294).

STATEMENT OF CASE/ FACTS[1]

¶7. On April 14, 2014, Plaintiff filed a complaint against Defendants, Bob Rost, Grand Forks County Sheriff, in his individual and official capacity, and Linda Funkhouser, Grand Forks Sheriff's Office Support Assistant, in her individual and official capacity, in which Plaintiff alleges a number of violations of criminal statutes and seeks various forms of relief including equitable relief; injunctive relief; economic damages; compensatory damages for emotional distress, loss of reputation, humiliation, and mental anguish; punitive damages; and attorney's fees. Plaintiff alleges that each of the Defendants acted improperly in dealing with him at the Grand Forks County Sheriff Department's office and the Grand Forks County Courthouse resulting in confrontations concerning a number of civil lawsuits Plaintiff has commenced over the course of the last six (6) years, all of which related to the investigation of criminal charges and Plaintiff's subsequent arrest, prosecution, and guilty plea. P-App. 8-39; see also Holkesvig v. Grove, 2014 ND 57, 844 N.W.2d 557; Holkesvig v. Moore, 2013 ND 2, 828 N.W.2d 546; Holkesvig v. State, 2013 ND 1, 828 N.W.2d 546; Holkesvig v. Welte, 2012 ND 236, 823 N.W.2d 786; Holkesvig v. Grove, 2012 ND 208, 823 N.W.2d 786; Holkesvig v. Welte, 2012 ND 142, 818 N.W.2d 760; Holkesvig v. Moore, 2011 ND 199, 806 N.W.2d 438; and Holkesvig v. Welte, 2011 ND 161, 801 N.W.2d 712.

¶8. On May 5, 2014, the Defendants served and filed an answer to Plaintiff's complaint which denied, in all material respects, Plaintiff's allegations, set forth a number of affirmative defenses, and requested all of Plaintiff's claims be dismissed with

[1] To avoid unnecessary repetition, the Statement of the Case and the Statement of Facts have been combined. Plaintiff's appeal is an appeal from the district court's order granting Plaintiff's motion to voluntarily dismiss his action. As a result, the Statement of the Case contains all of the facts pertinent to this appeal.

prejudice. P-App. 41-48. [2] Following submission of the answer, Plaintiff filed numerous documents with the trial court: Motion to File One Document for Both Defendants and the Grand Forks District Court in Order to Prevent a Serious Conflict and/or Retaliation by Rost, Funkhouser or by Selective Deputies of the Grand Forks Sheriff's Office or by Other County Sheriff's Office or by Selective Members of the Grand Forks Police Department or By Certain Grand Forks Judges or by Appointed Judges or by the Grand Forks County States Attorneys Office (Court Doc. 15); Plaintiff's Reply to Defendants Answer (P-App. 50-107); Motion for Oral Hearing (Court Doc. 34); Motion to Strike Defendants Reply to Plaintiff's Answer (P-App. 108-25); Motion to File Hearing Notice Receipts (Court Doc. 40); Motion to Strike Defendants Reply Brief in Support of Motion to Strike Plaintiff's Reply to Defendants Answer (Court Doc. 43); and Motion of Contempt of Court by Gaustad and Fraud upon the Court by Schmalenberger (P-App. 132-42).

¶9. The Plaintiff then filed a Motion to Dismiss Without Prejudice. P-App. 180-90. The Plaintiff's stated reason for seeking this voluntary dismissal was so he could refile his complaint in federal court. Id. at 190. The Defendants resisted Plaintiff's motion to dismiss without prejudice. Id. at 191-94.

¶10. The district court granted Plaintiff's voluntary motion to dismiss without prejudice on the condition that Plaintiff not refile the complaint in any North Dakota state district court. Id. at 195-96. Plaintiff has appealed the Judgment of Dismissal Without Prejudice.

[2] Defendants will refer to documents filed within Plaintiff's Appendix as "P-App." followed by the page number.

LAW AND ARGUMENT

¶11. As a preliminary matter, it is evident from a review of the Appellant Brief, the Plaintiff continues with an inappropriate onslaught upon various Grand Forks County public officials, the judicial system, and the undersigned by presenting fabrications of facts and misconceptions of the law – a tactic that was employed by Plaintiff and rejected in the numerous lawsuits Plaintiff has initiated as a means to re-litigate his 2008 criminal conviction for stalking (obtained through his voluntary guilty plea), and also to have a re-do of the 1998 and 2008 restraining orders that were obtained by Heather Eastling (in 1998 and 2008) and Christine Moore (in 2008). See Holkesvig v. Grove, 2014 ND 57; Holkesvig v. Moore, 2013 ND 2; Holkesvig v. State, 2013 ND 1; Holkesvig v. Welte, 2012 ND 236; Holkesvig v. Grove, 2012 ND 208; Holkesvig v. Welte, 2012 ND 142; Holkesvig v. Moore, 2011 ND 199; and Holkesvig v. Welte, 2011 ND 161.

¶12. Plaintiff's contentions can be fairly summarized as follows: Plaintiff is the only one involved in these underlying actions that tells the truth, all others, including those even tangentially involved[3], have lied, and therefore, Plaintiff's actions did not warrant his guilty plea and conviction for stalking or the issuance of the restraining orders. The

[3] The list of persons targeted by the Plaintiff includes, but is not limited to, Sheriff Rost, former Sheriff Dan Hill, Gary Grove, Chris Smith, Defendant Funkhouser, Peter Welte, Meredith Larson, Nancy Yon, Judge Clapp, Magistrate Vigeland, Magistrate Thelen, Judge Medd, Judge Jahnke, Judge Fontaine, Judge Corwin, Judge Marquart, Judge Christofferson, Detectives Vigness and Duane Simon, Traill County Sheriff Mike Crocker, Deputy Earnst, former North Dakota Supreme Court Justice Maring, North Dakota Supreme Court Justice Kapsner, North Dakota Supreme Court Justice Sandstrom, North Dakota Supreme Court Justice McEvers, North Dakota Supreme Court Justice Crothers, North Dakota Supreme Court Chief Justice VandeWalle, Brent Edison, Paul Jacobson, Kara Johnson, members of the Disciplinary Counsel Board, members of the Judicial Conduct Commission, Wayne Stenehjem, Governor Jack Dalrymple. P-App. 51-53, 56.

Plaintiff's contentions are not only devoid of any merit, they are not properly before this Court.

I. The Order For Judgment Of Dismissal Without Prejudice Is Not Void Because No Actual Controversy Exists As Plaintiff Was Granted The Relief He Requested.

¶13. Plaintiff seeks to void the trial court's order granting Plaintiff's motion for voluntary dismissal without prejudice.[4] Appellant Brief, ¶¶ 30-31. A motion for voluntary dismissal pursuant to N.D.R. Civ. P. 41 lies within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 10, 730 N.W.2d 841. A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law. City of Bismarck v. Mariner Constr., Inc., 2006 ND 108, ¶ 8, 714 N.W.2d 484. In the present case, the trial court did not abuse its discretion as the decision to grant the Plaintiff's motion for voluntary dismissal was the result of a rational mental process leading to a reasoned determination—Plaintiff stated a desire to proceed in federal court and, in view of this fact, the motion was granted with the condition the complaint not be re-filed in state court. P-App. 196.

[4] Oddly, the Plaintiff seeks to unwind a decision which granted him the very relief he requested of the trial court in the first instance – a dismissal without prejudice – while on the other hand the Defendants, who resisted this motion, request this Court to reject Plaintiff's appeal. It should be noted the Defendants resisted Plaintiff's motion to dismiss because they sought the trial court render a decision on the claims, rather than having the case dismissed without prejudice to then force the Defendants to defend yet another lawsuit with the same claims in another venue. P-App. 191-94. The Defendants seek to have this Court reject Plaintiff's appeal to avoid repetitive and meritless claims the Plaintiff will inevitably continue to make with the trial court, that only serve to improperly clog and tax the state judicial system.

¶14. Ordinarily, a plaintiff has no reason or right to appeal the grant of a voluntary dismissal since the plaintiff would have received the relief requested. Parker v. Freightliner Corp., 940 F.2d 1019, 1023 (7th Cir. 1991). The Defendants recognize that a "plaintiff could appeal a voluntary dismissal that was entered with prejudice." § 2367 Voluntary Dismissal—Effect of Dismissal, 9 Fed. Prac. & Proc. Civ. § 2367 (3d ed.). However, in the present case, Plaintiff's complaint was not dismissed with prejudice, rather it was dismissed without prejudice with the condition that it not be refiled in state court, a condition that simply held Plaintiff to conditions of his motion—Plaintiff's stated reason for filing the motion was so he could proceed in federal court. P-App. 196. For this reason, the Plaintiff's appeal must be rejected.

¶15. In addition to the failure to demonstrate the trial court's decision was an abuse of discretion, the Plaintiff's appeal fails because the issues raised present no actual controversy and therefore it is being improperly requested to issue an advisory opinion. Alliance Pipeline L.P. v. Smith, 2013 ND 117, ¶ 21, 833 N.W.2d 464 (citing In re E.T., 2000 ND 174, ¶ 5, 617 N.W.2d 470); see also Ramsey Fin. Corp. v. Haugland, 2006 ND 167, ¶ 8, 719 N.W.2d 346 ("We will dismiss an appeal if the issues become moot or academic and no actual controversy is left to be determined"). "No actual controversy exists if events have occurred which make it impossible to provide relief, or when the lapse of time has made the issue moot." Id. (citing In re W.O., 2004 ND 8, ¶ 10, 673 N.W.2d 264). However, if the controversy is of great public interest and involves the power and authority of public officials, or if the controversy is capable of repetition, while evading review, this Court can determine a moot issue instead of dismissal. Id.

¶16. In the instant case, no actual controversy is left to be determined. Alliance Pipeline, 2013 ND 117, ¶ 21; Ramsey Fin. Corp., 2006 ND 167, ¶ 8. The Plaintiff made a calculated decision to seek a voluntary dismissal of the state court action in order to proceed in federal court. Appellant Brief, ¶ 3. Although the trial court limited Plaintiff's ability to refile the complaint in a North Dakota district court, such limitation does nothing to Plaintiff, given his representation to the trial court, that he sought the voluntary dismissal to refile the complaint in federal court. P-App. 195-96. By including the provision of not re-filing in state court, the trial court simply took Plaintiff at his word for his reasons in seeking a voluntary dismissal. Id. Accordingly, Plaintiff was granted the very relief he requested. Id. This shows the preposterous position of the Plaintiff in this appeal.

¶17. Plaintiff also argued there was a lack of personal jurisdiction over the Defendants due to improper service of process. Appellant Brief, ¶ 30. Ironically, Plaintiff claims the trial court lacked personal jurisdiction over the Defendants because he failed to properly serve the Defendants with the summons and complaint. Id. Plaintiff's argument has no merit and illustrates his lack of understanding of the judicial system.

¶18. "A court has personal jurisdiction over a party if the party has reasonable notice that an action has been brought and sufficient connection with the forum state to make it fair to require defense of the action in the state." Alliance Pipeline, 2013 ND 117, ¶ 18. Personal jurisdiction over a party most often is acquired by service of process in compliance with Rule 4 of the North Dakota Rules of Civil Procedure, however, "[a] party may waive issues about personal jurisdiction." Id.

¶19. Personal jurisdiction is exactly that, personal. It is a right of the Defendants, not the Plaintiff, to assert or waive. Even if Plaintiff could assert the personal jurisdiction rights of the Defendants, which he cannot, the result is the same – a dismissal without prejudice. Riemers v. State, 2006 ND 162, ¶ 10, 718 N.W.2d 566.

¶20. For the foregoing reasons, Plaintiff's appeal lacks any merit as the trial court's order granted to Plaintiff the exact relief he sought. Indeed, Plaintiff's appeal serves no purpose.

II. The Trial Court Properly Denied Plaintiff's Motion For The Recusal Of Judge Schmalenberger As Meritless.

¶21. On appeal, Plaintiff argues that Judge Schmalenberger violated his judicial oath by refusing to recuse himself and that the refusal to grant the Plaintiff's requested recusal was an abuse of discretion. Appellant Brief, ¶¶ 4-15. Given the trial court's dismissal, without prejudice, this is a moot issue as the dismissal resolved whatever issues, if any, may have existed. See Alliance Pipeline, 2013 ND 117, ¶ 21; Ramsey Fin. Corp., 2006 ND 167, ¶ 8. However, the Defendants present the following response only to the extent this Court does not find the issue to be moot.

¶22. According to N.D.C.C. § 29-15-21, any party may obtain a change of judge by filing a written demand for change of judge. However, such a demand is invalid if it is filed more than ten days after the occurrence of the earliest of any one of the following events:

a. The date of the notice of assignment or reassignment of a judge for trial of the case;
b. The date of notice that a trial has been scheduled; or
c. The date of service of any ex parte order in the case signed by the judge against whom the demand is filed.

N.D.C.C. § 29-15-21. In the present case, the order assigning Judge Schmalenberger was issued on May 8, 2014. P-App. at 49. However, Plaintiff's motion for recusal, dated July 3, 2014, was well outside the time allowed by statute to demand a new judge. See Id. at 132-142.

¶23. Because Plaintiff's motion was untimely, Plaintiff was required to establish justification for the disqualification. "The law presumes a judge is unbiased and not prejudiced." Woodward v. Woodward, 2010 ND 143, ¶ 9, 785 N.W.2d 902 (citing Farm Credit Bank v. Brakke, 512 N.W.2d 718, 720 (N.D.1994)). This Court has held "[a] ruling adverse to a party in the same or prior proceeding does not render a judge biased so as to require disqualification." Id. "The test for the appearance of impartiality is one of reasonableness and recusal is not required in response to spurious or vague charges of impartiality." Id.

¶24. Plaintiff's requested recusal failed to address the presumption Judge Schmalenberger is unbiased and unprejudiced. Rather, Plaintiff simply cites to the North Dakota Code of Judicial Conduct and federal law to support his factually unsupported allegations that Judge Schmalenberger is biased and the trial court's adverse rulings were prejudicial. See P-App. 132 ("there has to be a sense of bias and prejudice to strike [Plaintiff's reply to the Defendants' answer]"); Id. at 133 ("[Judge] Schmalenberger . . . should have resigned upon notice of the Order issued by VandeWalle on 5-7-14"); Id. at 138 (citation to federal law not applicable to the facts of this case); Id. at 139 (baseless allegations that Judge Schmalenberger "has illegally ruled on a matter" and "[Plaintiff] was not properly heard and his claims were ignored"); Id. at 141 ("It is virtually 100% impossible for [Plaintiff] to get a fair hearing in this State").

¶25. Although the amount of rhetoric has increased through this appeal, Plaintiff continues to make meritless accusations in a futile attempt to establish an abuse of discretion. Appellant Brief, ¶ 6 ("Judge Schmalenberger presided in the 2013 GF Case No. 18-2013-CV-00716 . . . [so Judge] Schmalenberger was privy to the factual evidence, blatant lies and denials that [Defendants] did to [Plaintiff] in 2013"); ¶ 7 ("The Assignment by [this Court] in the 2014 lawsuit was nothing but a sham set up"); ¶ 14 ("This is why 'executives' violated my due process rights because the Judges and Justices can and will violate their oath and look the other way and ignore these violations"). In fact, Plaintiff inappropriately continues a baseless attack of his 2008 state law conviction for stalking, which was upheld by this Court. Id. at ¶ 15 ("With 'no executive branch and no oath,' it implies that the arrests and charges from 2008 are fraudulent based on the exculpatory evidence that is missing that I obtained after the 6-5-08 hearing"); see also Holkesvig v. State, 2013 ND 1, ¶ 1.

¶26. In short, Plaintiff was required to establish just cause for the recusal because his request for recusal was untimely. However, as Plaintiff has made clear, the only basis for the request that Judge Schmalenberger recuse himself was the adverse rulings made in this matter. This does not establish the requisite cause necessary to demand recusal. See Woodward, 2010 ND 143, ¶ 9.

¶27. Accordingly, the trial court's denial of Plaintiff's motion to recuse was warranted and must be affirmed.

III. The Defendants Did Not Violate The Plaintiff's Constitutional Rights By Filing A Motion To Strike Plaintiff's Unauthorized Pleading.

¶28. Plaintiff's second issue is captioned "Did the [D]efendants act in bad faith with malice and malicious intent by violating the constitutional rights of the [P]laintiff?"

Appellant Brief, ¶¶ 16-31. A cursory review reveals that Plaintiff has not presented a constitutional issue. Rather, Plaintiff's appeal attempts to couch the trial court's ruling to strike the unauthorized pleading entitled Plaintiff's Reply to Defendants' Answer as a ruling of constitutional magnitude, which it is not. Id. at ¶ 16 ("[Plaintiff's] reply, [P-App. 50-107], should not have been stricken from the record because it was [a] legal motion and [Judge] Schmalenberger struck it which is akin to a serious Constitutional violation that is relevant to N.D.R.Civ.P. 11(b)(1-4) and also to one or more of the following under the North Dakota Constitution, Article I, Declaration of Rights, Sections 3, 4, 5, 9, 12, 15, 17, 20, 21, 22, 23 and 24").

¶29. Given the trial court's dismissal, without prejudice, this is a moot issue as the dismissal resolved whatever issues may have existed. See Alliance Pipeline, 2013 ND 117, ¶ 21; Ramsey Fin. Corp., 2006 ND 167, ¶ 8. However, the Defendants present the following response only to the extent this Court does not find the issue to be moot.

¶30. Plaintiff's argument has no merit and further illustrates his lack of understanding of the judicial system. The trial court correctly struck Plaintiff's Reply to Defendant's Answer because there is no responsive pleading permitted in response to the Defendant's answer to the Plaintiff's complaint. North Dakota Rules of Civil Procedure enumerates the listed pleadings that are allowed:

> (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) ***if the court orders one, a reply to an answer or a third-party answer***.

N.D.R. Civ. P. 7(a) (emphasis added). There was no order or other authorization from the trial court permitting Plaintiff to file a reply. In all material respects, Defendant's answer denied Plaintiff's allegations, set out affirmative defenses, and requested the

claims be dismissed. P-App. 41-48. Thus, there was nothing that created any basis for a reply.

¶31. Plaintiff's Reply to Defendant's Answer was properly stricken from the record because it was redundant, superfluous, and served no legitimate purpose. Id. at 129-130; see also N.D.R. Civ. P. 12(f) (any matter that is redundant, immaterial, or impertinent may be stricken); Nunley v. Kloehn, 158 F.R.D. 614, 620 (E.D. Wis. 1994) (plaintiff's reply to defendant's answer was not a permissible pleading under equivalent Rule 7 Fed.R.Civ.P., which does not authorize the filing of a response to affirmative defenses, and was stricken from the record); Carpenter v. Rohm & Haas Co., 75 F. Supp. 732, 733-34 (D. Del. 1948) aff'd sub nom. Carpenter v. Rohm & Haas Co., 170 F.2d 146 (3d Cir. 1948) (under equivalent Rule 7 Fed.R.Civ.P., the reply and supplementary reply were not ordered by the court, were largely irrelevant and objectionable, were not allowed and were not to be considered); 61A Am. Jur. 2d Pleading § 365 ("a reply is superfluous and improper where the answer does not contain a counterclaim denominated as such and where the court has not ordered a reply to be made [and] it may be stricken, or the court may simply disregard it").

¶32. Plaintiff's argument on appeal, ignoring the continued personal attacks on the undersigned, is that, "however in-artfully pleaded", this reply should have been allowed pursuant to the North Dakota Rules of Evidence because he "must be held to less stringent standards than formal pleadings drafted by lawyers." Appellant Brief, ¶¶ 16, 23. None of the rules, statutes, or cases cited by Plaintiff supports the position that a *pro se* litigant must be allowed to file pleadings not authorized by the rules. The defendants recognize that *pro se* individuals are held to a lesser standard, however, "[i]t is a

fundamental duty of a trial court to assure that basic rules of procedure are followed [and] rules cannot be applied differently merely because a party not learned in the law is acting pro se." McWethy v. McWethy, 366 N.W.2d 796, 798 (N.D. 1985) (citing Hennebry v. Hoy, 343 N.W.2d 87 (N.D.1983)).

¶33. Accordingly, the trial court's decision to strike Plaintiff's Reply to Defendants' Answer was warranted and must be affirmed.

IV. Plaintiff's Appeal Is Frivolous Warranting An Award Of Just Damages And Double The Costs, Including Reasonable Attorney's Fees, Because Plaintiff Has Engaged In Multiple Meritless And Frivolous Appeals.

¶34. According to Rule 38 of the North Dakota Rules of Appellate Procedure, if an appeal is frivolous this Court "may award just damages and single or double costs, including reasonable attorney's fees." N.D.R. App. P. 38. As determined by this Court in Williams v. State, "the use of punitive sanctions . . . for an unmeritorious appeal should be utilized with the effect that such sanctions have on the concept of open access to the courts, but with a recognition that ***sanctions must be imposed when an appeal is frivolous and interferes with the proper administration of justice.***" 405 N.W.2d 615, 625 (N.D. 1987) (emphasis added). To hold otherwise forces litigants, mostly appellees, to "engage in the disposition, costly in terms of both time and money, of trifling and unnecessarily bothersome claims." Id.

¶35. Although litigants have the statutory right to appeal adverse decisions of the trial court, the principle of open access to the courts "must be balanced against the need to conserve judicial resources." United Bank of Bismarck v. Young, 401 N.W.2d 517, 518 (N.D. 1987). In fact, this Court has stated when an appellant persists in presenting his claims, even after being informed of their frivolous nature by the lower court, the appellant is liable for sanctions according to Rule 38. Id. Furthermore, costs and fees are

properly awarded when arguments on appeal are repetitious and so devoid of merit that the party appellant should have been aware of the impossibility of success on appeal. Lithun v. DuPaul, 449 N.W.2d 810, 811 (N.D. 1989).

¶36. "An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which evidences bad faith." Holbach v. Holbach, 2010 ND 116, ¶ 17, 784 N.W.2d 472 (quoting Healy v. Healy, 397 N.W.2d 71, 76 (N.D.1986)). The trial court granted Plaintiff the relief he requested. Plaintiff's arguments on appeal make clear that his goal is to continue to make life as difficult and expensive as possible for the Defendants because his arguments are "so factually and legally devoid of merit that he should have been aware of the impossibility of success on appeal." Questa Res., Inc. v. Stott, 2003 ND 51, ¶ 8, 658 N.W.2d 756. This appeal represents yet another chapter in Plaintiff's lengthy pattern of frivolous, repetitious litigation. See Holkesvig v. Grove, 2014 ND 57; Holkesvig v. Moore, 2013 ND 2; Holkesvig v. State, 2013 ND 1; Holkesvig v. Welte, 2012 ND 236; Holkesvig v. Grove, 2012 ND 208; Holkesvig v. Welte, 2012 ND 142; Holkesvig v. Moore, 2011 ND 199; and Holkesvig v. Welte, 2011 ND 161.

¶37. Importantly, Plaintiff has been sanctioned three times on appeal by this Court for the filing of frivolous appeals. See Holkesvig v. Grove, 2014 ND 57, ¶ 21 ("We order Holkesvig to pay double costs and $1,000 in attorney fees for this appeal under N.D.R.App.P. 38"); Holkesvig v. Welte, 2012 ND 236, ¶ 1 ("We summarily affirm . . . and order Holkesvig to pay double costs and $1,000 in attorney fees for raising these issues in this appeal"); Holkesvig v. Grove, 2012 ND 208, ¶ 3 ("We affirm the judgment and orders . . . and order Holkesvig to pay double costs and $1,000 in attorney fees for

this appeal"). It is clear from the frivolous nature of Plaintiff's current appeal—an appeal that seeks reversal of the very relief Plaintiff sought in the first instance—an award of more than nominal attorneys' fees is warranted to discourage such frivolous filings and interference with the proper administration of justice. See Williams, 405 N.W.2d at 625.

¶38. Because of the Plaintiff's continued persistence with presenting claims having no merit, despite sanctions by this Court on three separate occasions, the Defendants respectfully request this Court issue an order limiting the Plaintiff's ability to continue to file and serve frivolous and meritless lawsuits and appeals without having prior court approval. Plaintiff has established through his numerous frivolous appeals that monetary sanctions are not sufficient to prevent frivolous and meritless appeals. See Holkesvig v. Grove, 2014 ND 57, ¶ 21; Holkesvig v. Grove, 2012 ND 208; Holkesvig v. Welte, 2012 ND 236. As such, the Defendant requests this court exercise its inherent authority to sanction the continued vexatious conduct of continuing with this frivolous litigation by Plaintiff. See Ziebarth, 520 N.W.2d at 56 (citing Farm Credit Bank of St. Paul v. Brakke, 483 N.W.2d 167, 172–173; Andrews v. O'Hearn, 387 N.W.2d 716, 723 (N.D.1986)).

¶39. Although the undersigned was unable to locate a North Dakota Supreme Court decision in which such a sanction was requested, this type of sanction is not without support. In Ziebarth, this Court recognized the use of injunctions limiting a litigant's access to appellate courts following repeated meritless and frivolous appeals. See Id. at 58 (citing Hartford Textile Corp., 659 F.2d 299, 305 (2d Cir. 1981)). This Court noted that courts "are not powerless to protect the public, including litigants who appear before the Courts, from the depredations of those ... who abuse the process of the Courts to harass and annoy others with meritless, frivolous, vexatious or repetitive appeals and

other proceedings." Id. This Court cited to "the court's inherent power to control its docket and to protect its jurisdiction and judgments, the integrity of the court, and the orderly and expeditious administration of justice." Id.

¶40. Plaintiff's continued pursuit of meritless and frivolous claims is no different than the repeated challenges in Proctor v. State, 869 So.2d 752, 753 (Fla. Dist. Ct. App. 2004). In Proctor, the appellate court determined a finding of no merit, coupled with successive filings making the same challenges, constituted an abuse of the judicial system. Id. The Defendants recognize the instant request may appear extreme, but Plaintiff's actions have resulted in Defendants requesting this remedy in the interest of justice and judicial economy. To continue to allow Plaintiff to file meritless and frivolous actions will result in the Defendants and others similarly situated, having to respond, which is costly in terms of both time and money, to trifling and unnecessarily bothersome actions. See Williams, 405 N.W.2d at 625

¶41. Defendants are entitled to an award of damages and costs, including reasonable attorney's fees[5], because Plaintiff's appeal not only interferes with the proper administration of justice, but wastes judicial resources and forces Defendants to waste time and money defending against another frivolous appeal. In addition to an award of damages and costs, Defendants are entitled to an order prohibiting Plaintiff from filing any further lawsuits or appeals without express leave of this Court.

[5] Attached as Exhibit A to the Affidavit of Daniel L. Gaustad is documentation of the work performed on this appeal to enable this Court to calculate an amount of reasonable attorney's fees to be assessed pursuant to First Trust Co. of N.D. v. Conway, 423 N.W.2d 795, 797 (N.D.1988); United Bank of Bismarck, 401 N.W.2d at 519, n. 1.

CONCLUSION

¶42. For the foregoing reasons, the Defendants respectfully request this Court reject Plaintiff's appeal, award damages and costs, including reasonable attorneys' fees, to the Defendants for having to respond to this frivolous appeal, and issue an order to limit Plaintiff's ability to commence further actions without express leave of this Court.

Dated this 4th day of February, 2015.

PEARSON CHRISTENSEN & CLAPP, PLLP

/s/ Daniel L. Gaustad
DANIEL L. GAUSTAD, ND ID #05282
JOSEPH E. QUINN, ND ID #06538
24 North 4th Street
P.O. Box 5758
Grand Forks, North Dakota 58206-5758
(701) 775-0521/FAX (701) 775-0524
Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

¶43. The undersigned, as attorney for Defendants Bob Rost, Grand Forks County Sheriff, in his individual and official capacity, and Linda Funkhouser, Grand Forks Sheriff's Office Support Assistant, in her individual and official capacity in the above matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellate Procedure, the above brief was prepared with proportional type face and the number of words in the above brief, excluding words in the table of contents, table of authorities, and certificate of compliance, total 4,996 words.

Dated this 4th day of February, 2015.

PEARSON CHRISTENSEN & CLAPP, PLLP

/s/ Daniel L. Gaustad
DANIEL L. GAUSTAD, ND ID #05282
JOSEPH E. QUINN, ND ID #06538
24 North 4th Street
P.O. Box 5758
Grand Forks, North Dakota 58206-5758
(701) 775-0521/FAX (701) 775-0524
Attorneys for Appellees