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MARCH 4, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Matthew Viscito, Mary Lynn Bernston, Florence Properties, LLC, Appellants v. Kevin Christianson, Pace's Lodging Corporation, Mednational, LLC, Aurora Medical Park No. 2, LLC, and Jeff Sjoquist, Appellees	Supreme Court No. 20150285

APPEAL FROM THE AUGUST 4, 2015 ORDER OF JUDGE KLEVEN, NORTH-EAST CENTRAL JUDICIAL DISTRICT, AWARDING ATTORNEY'S FEES

REPLY BRIEF OF APPELLANTS MATTHEW VISCITO, MARY LYNN BERNSTON, AND FLORENCE PROPERTIES, LLC

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I. Standard of Review

[¶1] Appellee's stated Standard of Review is based entirely upon the premise that Appellants sought a voluntary dismissal, as provided for and identified in N.D.R.Civ.P. 41(a), which provides that "an action may be dismissed at the Plaintiff's request." N.D.R.Civ.P. 41(a)(2) Whether plaintiff's response to defendant's motion to dismiss resulted in a "Plaintiff's request" under the rule is left to this Court to determine. Interpretation and application of a statute is a question of law, fully reviewable on appeal. See Smith v. Hall, 2005 N.D. 215, 707 N.W.2d 247; citing In Re: Estate of Gleeson, 2002 N.D. 211, ¶ 7, 655 N.W.2d 69.

II. Voluntary Dismissal and Fees under N.D.R.Civ.P. 41

[¶2] Appellees have attempted to assert that the fees were awarded under nearly every possible rule in Viscito v. Christianson: N.D.R.Civ. P 41(b), N.D.R.Ct. 11.5 with N.D.R.Civ.P. 16, and the court's inherent power to sanction. And now Appellees submit in their brief at ¶22 that the court relied upon N.D.R.Civ.P. 41 (a) and (d) as the authority upon which it imposed terms and conditions. As such, the analysis can very simply focus in on whether the facts in the instant case apply under those rules. The pivotal question before the court is whether Appellants requested the action to be dismissed. Appellants go into detail in section II, paragraphs 11 through 18, of Appellants Brief, so discussion here is only supplemental. In the pivotal case Appellees rely upon, Hoffman v. Berry, 139 N.W.2d 529 (N.D. 1966), the third party plaintiff made a **formal motion for voluntary dismissal on its own initiative** and the "highly instructive" analysis supports the court's efforts to set the terms and conditions when such a fact pattern exists (Appellees Brief at ¶24). Hoffman

is entirely dependent upon the movant seeking voluntary dismissal, and the rationale makes sense: if a party goes through the effort to motion the court for voluntary dismissal and then the court sets terms which are unacceptable to the movant, the movant should be allowed the opportunity to effectively withdraw that motion, or as the court stated, "if the movant finds the conditions unacceptable, he should be permitted not to accept the dismissal."

[¶3] Appellee's citation of this Court's axiom in State ex rel. Sathre v. Moodie, 65 N.D. 340, 358, 258 N.W. 558, 566 (1935) also does not apply here. In order to "abide by the consequence" Appellants would have had to "intend the facts". Appellants did not seek a voluntary dismissal under N.D.R.Civ.P. 41(a). Appellants were seeking a Motion for Extension of Time (App. 53) and Appellees were seeking a Motion to Dismiss for Appellants failure to complete arbitration by the deadline and were seeking fees under N.D.R.Ct. 11.5, which makes no reference to fees on Rule 41. (App. 60-62). Not only were Appellants unaware of the consequences spelled out in N.D.R.Civ.P. 41(a)(2) and (d), they had no reason to assume that they might apply, as neither they nor the Appellees sought the relief allowed for under those rules nor did the court rely upon or reference those rules as the basis for the award. (Appellee Brief ¶24 - ¶27) Thus, whether Appellants objected to or accepted the terms and conditions is a non-issue.

III. Abuse of Discretion

[¶4] This Court stated "We reverse the district court's award of costs and attorney's fees incurred and remand for a determination of authority on which the district court imposed sanctions and findings necessary to support such an award." Viscito v. Christianson, at

¶31 As Appellees point out, upon remand, the District Court provided a lengthy order explaining its legal basis for the award, which not only inappropriately included new information not known to the court at the time, but also, along with the accompanying hearing on remand, revealed information which suggests it may have acted in an arbitrary, unreasonable, or unconscionable manner, to wit:

a. The Trial Court did not have Adequate Time to Develop a Reasoned and Reasonable Determination.

[¶5] Judge Kleven had very little time to review the history of this case prior to ruling on the award of attorney fees, as she was appointed the morning of the hearing to substitute for another Judge. Nevertheless, Judge Kleven assured Plaintiffs' counsel during the hearing that "I've had a chance to read through everything that's been filed and become somewhat familiar, at least have an idea of what's gone on in this case." (App. 219) At that same hearing, the judge decided that "I'm going to dismiss the case without prejudice, but I am going to award the defendants their costs and reasonable attorney fees in this matter" (App. 232). Judge Kleven further alluded to the lack of time and resources available to her to fully understand the cases before her in her statement at the June 22nd hearing on remand, stating, "And we're short judges, and I'm supposed to go do the research for the plaintiffs' case…and I told my reporter this morning, if I write a decision in this, the Supreme Court may very well have me removed from office, because I'm not here to do work for the parties. And that's my frustration is I didn't have time... I didn't know everything about this case and what all it entails." (App. 275)

[¶6] This court held in Matter of Conservatorship of Kinney that "A trial court abuses its discretion when its decision is not the product of a rationale mental process by which the

facts and law relied on are stated and considered together for the purpose of achieving a reasoned and reasonable determination" (495 N.W.2d 69, 71) Here, Appellants contend that the trial judge was unable to dedicate the time required to develop a rationale mental process by which the facts and law relied on could be considered together to achieve a reasoned determination prior to rendering its decision to award fees.

b. The Trial Court relied upon a gross misrepresentation of the facts and procedural history when awarding attorney's fees.

[¶7] Unfortunately, the same standard in Matter of Conservatorship of Kinney can also be applied to the Court's order and judgment issued on August 4 and 5. The Trial Court's Order following remand is so respite with errors, it appears that the court still did not fully review the record before rendering a second opinion. The court alleges that "Viscito responded to Christianson's Motion to Compel Arbitration by filing a Motion to Amend Complaint as part of Plaintiff's Response to Motion to Compel Arbiration." (App. 208). A review of the Docket Sheet, as well as the pleadings themselves, reveals this simply is not true. Viscito filed the motion to amend complaint on October 16th, 2012. (App. 5, 23). Defendants' filed their Motion to Compel Arbitration on November 20, 2012, nearly a month later. (App. 5)

[¶8] The trial court further states that "Viscito did not file an affidavit in support of the request, but rather submitted a brief citing case law on questions of arbitrabiltiy. Viscito did not include any legal analysis in support of his position that the case should not be submitted to arbitration." (App. 208).While Plaintiffs' did not submit an affidavit, as one did not appear to be necessary, Plaintiffs' Response did include 12 pages of background, law and argument questioning the legal standards, including validity of the arbitration

clause, the question of arbitrabilty, the scope of the member control agreement, and the arbitration clause therein, questions of mutuality and assent, questions of prejudice, and questions relating to attorney fees. (App. 29)

[¶9] The Trial Court also states "when arbitration was not completed by January 30th, 2014… Christianson filed a motion to Dismiss with Prejudice and requested attorney's fees and costs. Viscito, in response, urged this Court to dismiss the case without prejudice." (App. 210). A review of the Docket Sheet, as well as the pleadings themselves, reveals this simply is not true. On January 30, 2014, Plaintiffs' filed a Motion for Extension of Time. On February 3, Defendants' filed a response in Opposition to Motion for Extension of Time and a Motion to Dismiss. On March 20, Defendants filed a supplemental brief in support of motion to dismiss wherein they included email correspondence from Plaintiff's counsel suggesting that the hearing may not be necessary, as the district court may not have nor require authority. (App. 6)

[¶10] While it may be acceptable for certain facts to be overlooked, Appellants argue that when a trial court relies upon those facts in making a determination to award fees, the trial court must show a complete and thorough understanding of the facts before rendering a decision, otherwise the court's decision is "not the product of a rational mental process leading to a reasoned determination".

IV. Duplicative Litigation

[¶11] Each of the cases Appellees rely upon in their claim that the litigation was "duplicative" and "vexatious" relies upon two key premises that are missing in the present case: **that the case was voluntarily dismissed at the Plaintiff's request and that a new case was later filed**. See, e.g., Robinson v. Bank of Am., N.A., 553 Fed. Appx. 648 (8th Cir.

2014) (**mortgagors voluntarily dismissed their prior action**) Kent v. Bank of Am., N.A., 518 Fed. Appx. 514 (8th Cir. 2013) (**re-filed after dismissal of previously filed action**) Russell-Brown v. Jerry, II, 270 F.R.D. 654 (N.D. Fla. 2010) (**voluntary dismissal**) See Plaintiffs Reply Brief on Remand for further distinction between these cases. (App. 131, 137-139).

[¶12] Here, Appellants did not seek voluntary dismissal nor did they file duplicative suits, rather were required by the District Court's July 30th, 2013 Order to submit their claims to arbitration. (App. 41). Moreover, in the cases Appellees rely on, the fees were granted during the second case, not the first, as is the case here. Appellants could find no precedent, in any jurisdiction, where a court determined that an arbitration proceeding stemming from a court's early finding that arbitration was required, was considered duplicative or vexatious.

V. Supreme Court Mandate on Remand

[¶13] Appellants did object to Defendant's Motion for Award of Attorneys' Fees and Costs on Remand at the remand hearing. (App.267) However, whether or not an objection was made is of no bearing. This court clearly remanded "for a determination of authority on which the district court imposed sanctions" in its May 9th, 2014 Judgment. Viscito, at ¶31. Although the court learned additional information on the present status of the case at that hearing, it should not have included that information as its basis for awarding fees one year later, nor did Appellants have a reasonable belief it would have, having clearly communicated this Court's scope on remand in Appellants Reply Brief and supporting documents. On remand, the trial court must follow the pronouncements of the Supreme Court and scrupulously and fully carry its mandate into effect according to its

terms. State v. Burckhard, 1999 ND 64, ¶ 7, 592 N.W.2d 523. Because the trial court did not follow the mandate, the award should be reversed.

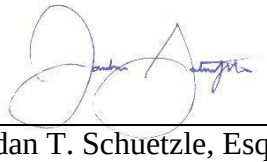
VI. Challenge of Fees on Remand

[¶14] Appellees are correct in their assertion that Appellants did not respond to the **particularities of the fees** until remand (Appellees' Brief at ¶6). This Court provided clear direction that if N.D.R.Civ.P. 16 is the basis for the sanction the district court should have limited is award of attorney's fees and costs to those incurred as a result of Viscito's violation of the court order compelling arbitration be completed within six months. Appellants took this opportunity to assist the court in identifying which fees were the result of the failure to complete arbitration, and which were outside the scope. (App. 140, 237-238, 266-268)

CONCLUSION

[¶15]For the reasons argued above, and to avoid injustice to Plaintiffs, we implore the Court to reverse the trial court's award of attorney's fees and direct the Defendants to return the amount of the satisfied judgment, $33,415.14, plus costs in the original appeal of $237, and costs of this appeal, to Plaintiffs.

Dated: March 4th, 2016



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CERTIFICATE OF SERVICE

The undersigned states that he is an attorney for the Plaintiffs and Appellants herein and that on the 4th day of March 2016, he filed the Appellants Reply Brief with the Clerk of the Supreme Court at supclerkofcourt@ndcourts.gov, with a carbon copy to the Defendant and Appellees attorney of record Michael T. Andrews at mandrews@andersonbottrell.com.

Dated this the 4th day of March, 2016.

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