

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

No. 20160189

IN THE MATTER OF THE EMELIA HIRSCH, JUNE 9, 1994 IRREVOCABLE
TRUST

APPEAL FROM THE MARCH 22, 2016 ORDER
CIVIL NO. 08-03-C-02228
COUNTY OF BURLEIGH, SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE JUDGE GAIL HAGERTY, PRESIDING

**BRIEF OF CO-TRUSTEES / APPELLEES
CAROLYN TWITE AND DUANE HIRSCH**

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STATEMENT OF ISSUES

[¶1] Whether Betz’s appeal is barred as a matter of law.

[¶2] Whether the Emelia Hirsch Trust, dated June 9, 1994, and co-trustees Carolyn Twite and Duane Hirsch, are entitled to attorney’s fees and costs on appeal.

STATEMENT OF THE CASE

[¶3] Appellees Carolyn Twite and Duane Hirsch, co-trustees of the Emelia Hirsch Trust dated June 9, 1994 (collectively referred to as the “Trustees”), submit this brief in response to the *Appellant’s Brief* of Timothy R. Betz (“Betz”) dated June 28, 2016. On February 16, 2016, Betz filed a *Brief in Support of Motion and Petition to Vacate the July 16, 2008 Reformation Order of the Emelia Hirsch June 9, 1994 Irrevocable Trust*. On March 1, 2016, Betz filed a *Brief in Support to Vacate the July 16, 2008 Reformation Order of the Emelia Hirsch June 9, 1994 Irrevocable Trust*. (Docket No. 544 and 552). Betz is appealing the district court’s March 22, 2016 *Order* denying Betz’s motions. (Appx. at 213).

STATEMENT OF FACTS

[¶4] This is a long and tortured case that has been before this Court multiple times, most recently in 2014. *See Matter of Emelia Hirsch Trust*, 2014 ND 135, 848 N.W.2d 719. In its various opinions, this Court has summarized the uncontroverted facts of this case. The following is yet another recitation of those facts.

[¶5] In 1994, a trust entitled the “Emelia Hirsch June 9, 1994, Irrevocable Trust” (the “Trust”) was created by Emelia Hirsch. Emelia Hirsh is now deceased. On July 16, 2008, the district court entered an order reforming the Trust to a revocable trust. Betz filed his first appeal (which this Court denied) in *Matter of Emelia Hirsch Trust*, 2009

ND 135, 770 N.W.2d 225. Betz then filed a petition for rehearing, which the district court denied on August 24, 2009. Since entry of this Court's August 24, 2009 *Judgment*, Betz (acting in concert with Marlene Betz and Allen Betz) have made numerous frivolous motions, petitions, and appeals in their efforts to re-litigate this matter. This appeal is yet another attempt by Betz to do the same.

[¶6] On February 11, 2011, Betz made a motion requesting that the case be reopened in order to address certain tax issues with regard to the trust. (Docket No. 306). The Trustees resisted the motion and requested that Betz pay attorney's fees expended by the trust in responding to the motion. (Docket No. 308). In its April 12, 2011 *Order*, the district court denied Betz's motion to reopen the case and ordered him to pay \$1,000 in fees incurred by the trust. (Docket No. 320). The court found that Betz's motion was "frivolous and motivated by a desire to continue to harass the Trustees." (*Id.*)

[¶7] On May 23, 2011, Betz made a motion to reconsider the April 12, 2011 *Order* of the district court. (Docket No. 326). Again, the Trustees resisted the motion and requested that Betz pay attorney's fees expended by the trust in responding to the frivolous motion. (Docket No. 327). In its June 14, 2011 *Order*, the court ordered that Betz pay an additional \$1,000 in fees to the Trustees. (Docket No. 331). Betz failed to comply with both the April 12, 2011 *Order* and June 14, 2011 *Order*.

[¶8] On January 30, 2012, the district court entered an *Order to Show Cause* directing Betz to appear and show cause as to why he should not be found in contempt for failure to comply with its April 12, 2011 and June 14, 2011 orders. (Docket No. 351). On February 1, 2012, Marlene Betz filed a request to compel the Trustees to provide her with information; on the same date, Allen Betz filed a request that the district court's July 16,

2008 order reforming the trust be vacated. On February 7, 2012, Marlene Betz filed a document titled “Response to Motion dated January 26, 2011” requesting that the district court vacate its order reforming the trust. (Docket No. 367).

[¶9] On February 27, 2012, the district court entered an *Order* stating, in part:

Based on the history of this litigation and the language and formatting of the documents, it appears that Timothy Betz, Allen Betz, and Marlene Betz are acting in concert.

The Court ordered the trust in this matter reformed. The order was appealed and the Supreme Court upheld the order reforming the trust in *Matter of Emelia Hirsch*, 2009 ND 135, 770 N.W.2d 225. This matter has been decided and will not be endlessly litigated. None of those requesting further action has presented any evidence which could not have been obtained and presented prior to reformation of the trust which would be relevant to the decision to reform the trust....

It is clear that Timothy Betz, Marlene Betz, and Allen Betz are attempting to add expense to administration of the reformed trust.... Their requests are frivolous and are calculated to cause unnecessary expenditures by the reformed trust and continue a legal proceeding which has been concluded in favor of other parties.

Counsel for the trust may submit a billing statement indicating the cost of responding to the frivolous requests made by Timothy Betz, Marlene Betz, and Allen Betz. Each will be ordered to pay one-third of the reasonable attorney fees and costs. If requested, the Court will enter a judgment against them if payment is not made within 60 days of the order for payment.

(Docket No. 375). Despite being served a copy of this order, on April 16, 2012, Marlene Betz filed yet another motion requesting the district court to revoke its July 16, 2008 order reforming the trust. (Docket No. 401).

[¶10] A hearing was held before the district court on May 7, 2012 to address the *Order to Show Cause* and all other pending motions. Notice of the hearing was provided to

Timothy Betz, Marlene Betz, and Allen Betz on February 13, 2012. Timothy Betz did not appear at this hearing.

[¶11] On May 8, 2012, the district court ordered: (1) that Timothy Betz be found in contempt of court with the trust entitled to a judgment against him in the amount of \$2,000 for the fees he failed to pay; (2) that Timothy Betz be required to pay an additional \$3,000 of the legal fees expended by the trust in responding to his motion and in preparation for the May 7, 2012 hearing; (3) that Allen Betz be required to pay \$1,000 in fees for filing a frivolous motion requesting the order reforming the trust be vacated; and (4) that Marlene Betz be required to pay \$2,000 to partially reimburse fees the trust has incurred in responding to her frivolous requests. (Docket No. 422).

[¶12] On September 25, 2012, the district court entered a *Judgment* in favor of the Emelia Hirsch Trust June 9, 1994 Trust and Trustees ordering a monetary judgment, plus interest, against each of the following individuals: (1) against Timothy Betz in the amount of \$5,000 plus interest at the rate of 6.5% from the date of entry of judgment until principle and interest are paid in full; (2) against Allen Betz in the amount of \$1,000 plus interest at the rate of 6.5% from the date of entry of judgment until principle and interest are paid in full; and (3) against Marlene Betz in the amount of \$2,000 plus interest at the rate of 6.5% from the date of entry of judgment until principle and interest are paid in full. (Docket No. 466). The September 25, 2012 *Judgment* also directed that neither the trust nor the Trustees would be required to respond to any requests or motions filed by Timothy Betz, Marlene Betz, or Allen Betz unless directed to do so by the court, including any and all actions pending at the time of entry of judgment on September 25, 2012 and any filed thereafter. (Docket No. 469).

[¶13] On October 3, 2012, Betz filed an objection to the costs ordered by the district court in its September 25, 2012 *Judgment*. (Docket No. 472). On October 5, 2012, Marlene Betz similarly filed an objection to these costs. (Docket No. 477). On October 8, 2012, the district court ordered that the September 25, 2012 *Judgment* be temporarily vacated to allow for response to the objections and consideration of the record. (Docket No. 480). The October 8, 2012 *Order* specifically states that “[t]he judgment may be reinstated at a later date if appropriate to do so.” (Docket No. 480)

[¶14] On October 30, 2012, the district court provided a *Notice* to the parties stating its intent to reinstate the May 8, 2012 *Order* and September 25, 2012 *Judgment* pending resolution of an appeal filed by Betz of the May 8, 2012 *Order*. (Docket No. 511). This Court dismissed Betz’s appeal on August 8, 2012. (Docket No. 454). After all additional appeals made in this case had been resolved by this Court, the district court entered an *Amended Order for Judgment* on September 9, 2013 and subsequent *Judgment* on September 11, 2013 reaffirming the October 30, 2012 *Notice* and reinstating its September 25, 2012 *Judgment*. (Docket No. 519 and 520).

[¶15] On September 16, 2013, Betz filed an objection to costs and interest of the district court’s September 9, 2013 *Amended Order for Judgment*. (Docket No. 524). On September 20, 2013, the undersigned sent a letter to Judge Hagerty inquiring whether the Trustees were required to file a response. (Docket No. 524). The court ordered that “[n]o response is required with regard to Timothy Betz’s Objections to Costs and Interest” and that it would not be taking action based on that documents since the court is unable to issue orders concerning Hettinger County actions. (Docket No. 527).

[¶16] On October 10, 2013, Betz made a *Motion for Hearing under Rule 54; Objections to Cost; A Motion for Hearings on the October 5, 2012 Motion for Relief from the Order for Judgment dated September 25, 2012 and the October 16, 2012 Motion for Relief from the May 8, 2012 Order*. (Docket No. 531). This motion was denied by the district court pursuant to its October 10, 2013 *Order*. (Docket No. 532). The court stated therein that “[t]his matter has been fully litigated and reviewed and is closed.” (Docket No. 532) A notice of appeal was filed by Timothy Betz on November 12, 2013, appealing the September 9, 2013 *Amended Order for Judgment* and October 10, 2013 *Order*. (Docket No. 534).

[¶17] The North Dakota Supreme Court entered an *Opinion* dated June 26, 2014, in which the September 9, 2013 *Amended Order for Judgment* and October 10, 2013 *Order* were affirmed by the Court. (Docket No. 541).

[¶18] On February 25, 2016, Betz filed a *Brief in Support of Motion and Petition to Vacate the July 16, 2008 Reformation Order of the Emelia Hirsch June 9, 1994 Irrevocable Trust* with the district court. (Docket No. 544). The Trustees filed a *Response and Objection to Timothy Betz’s Brief in Support of Motion and Petition to Vacate the July 16 2008 Reformation Order of Emelia Hirsch June 9, 1994 Irrevocable Trust* on February 25, 2016. (Docket No. 545). On March 1, 2016, Betz filed a *Brief in Support to Vacate the July 16, 2008 Reformation Order of the Emelia Hirsch June 9, 1994 Irrevocable Trust*. (Docket No. 549). Betz responded to the Trustees on March 2, 2016, by filing a *Response and Objection to Carolyn Twite’s and Duane Hirsch’s Response and Objection to Timothy Betz’s Brief in Support of Motion and Petition to*

Vacate the July 16, 2008 Reformation Order of the Emelia Hirsch June 9, 1994 Irrevocable Trust. (Docket No. 552).

[¶19] The district court entered an *Order* on March 22, 2016, denying the motions submitted by Betz. (Docket No. 553). Betz filed a *Motion to Reconsider the March 22, 2016 Order in the Emelia Hirsch June 9, 1994 Irrevocable Trust.* (Docket No. 555). The Trustees responded with a *Letter* to the district court, dated April 5, 2016, identifying the *Affidavit of Sheldon A. Smith* and *Exhibit A* disclosing to the Court the attorney's fees incurred by the Trustees in compliance with the Court's *Order*, dated March 22, 2016. (Docket No. 556, 557, and 558). The Trustees further informed the district court of their intention not to respond to Betz's motion, unless requested to do so by the court. The district court entered an *Order for Attorney's Fees* on April 14, 2016, awarding the Trustees attorney's fees in the amount of \$1,710.00. (Docket No. 561). On May 3, 2016, the district court denied the motion to reconsider by an *Order*. (Docket No. 562). Betz filed his appeal on May 19, 2016, evidenced by the *Notice of Appeal*. (Docket No. 565).

I. BETZ'S APPEAL IS BARRED AS A MATTER OF LAW

[¶20] This appeal by Betz is an indisputable attempt to re-litigate a matter that has been settled since Matter of the Emelia Hirsch Trust, 2009 ND 135, 770 N.W.2d 225. The district court's *Order* on March 22, 2016, surmises the situation succinctly: "Timothy Betz once again filed a request that the Court's July 16, 2008 Order in this matter be vacated. There is no new evidence in this matter. Mr. Betz's actions years after the Order was entered do not create grounds to vacate." (Docket No. 553). Betz filed a *Motion to Reconsider the March 22, 2016 Order in the Emelia Hirsch June 9, 1994 Irrevocable Trust*, objecting to the district court's denial of his request and threatening to

file an action in federal court. (Docket No. 555 at ¶ 5). The district court issued an *Order* dated May 3, 2016, denying Betz's motion. (Docket No. 562).

[¶21] As early as 1945, this Court has held that “[q]uestions fairly raised and decided on former appeal in same action are not open for consideration on subsequent appeal, but become ‘law of the case’ and are binding upon parties in all subsequent stages of litigation. Muhlhauser v. Becker, 74 N.D. 103, 20 N.W.2d 353 (1945). “The doctrine of ‘law of the case’ is based upon theory of res judicata and is necessarily applied to the issue determined.” Id. Principles of res judicata prevents courts from relitigating claims “in order to promote finality of judgments, which increases certainty, avoids multiple litigation, wasteful delay and expense, and ultimately conserves judicial resources.” Missouri Breaks, LLC v. Burns, 2010 ND 221, ¶ 10, 791 N.W.2d 33. Here, Betz is simply recycling arguments on issues that have been decided, appealed, affirmed, subject to additional motion practice, denied reconsideration, appealed, affirmed, etc. No new issues have been raised, no new arguments have been made, and this is simply a continued effort by Betz to harass the trustees. The law of the case doctrine is a clear bar to this appeal. Consistent with the underlying principles of promoting the finality of judgments, avoiding multiple litigation, and conservation of judicial resources, the Trustees respectfully request that this appeal be denied in its entirety.

II. THE EMELIA HIRSCH TRUST, DATED JUNE 9, 1994, AND CO-TRUSTEES, CAROLYN TWITE AND DUANE HIRSCH, ARE ENTITLED TO ATTORNEY'S FEES AND COSTS ON APPEAL.

[¶22] North Dakota law prohibits filing of frivolous appeals and allows for an award of attorney fees and costs in matters such as this appeal filed by Betz. *See* N.D.R.App.P.38; *see also* N.D.R.App.P.39. “If the court determines that an appeal is frivolous, or that any

party has been dilatory in prosecuting the appeal, it may award just damages and single or double costs, including reasonable attorney's fees." See N.D.R.App.P.38.

Frivolous appeals unjustly burden the resources of the court and the government. The devotion of limited resources and time to these meritless cases causes deserving litigants to wait. In addition, the opposite party is delayed in receiving the just benefits of the trial court's judgment until the appeal is concluded. Justice delayed is justice denied. Sanctions are imposed to deter such suits.

United Bank of Bismarck v. Young, 401 N.W.2d 517, 519 (N.D. 1987)

[¶23] In the district court's February 27, 2012 Order, Judge Hagerty stated: "The matter has been decided and will not be endlessly litigated..." (Docket No. 375). In August 2012, the district court stated: "Timothy Betz has requested the Court vacate the July 16, 2008 reformation order in this matter. He has appealed that order and lost. The matter has been fully litigated." (Docket No. 455). Yet again in October 2013, the Court stated: "This matter has been fully litigated and reviewed and is closed..." (Docket No. 532). Betz's frivolous motions in the district court and appeals of the district court's orders to the North Dakota Supreme Court are continuing to burden the court system and continued hardship on the Trustees to defend against Betz's actions. "Open access to the courts is not synonymous with unlimited license to burden with flagrantly groundless claims the resources of the judiciary and opposing parties." United Bank of Bismarck, 401 N.W.2d at 519. In Holkesvig v. Rost, the Supreme Court found "Holkesvig's continued and clear pattern of bringing frivolous and repetitious litigation we order that he may not commence any actions in North Dakota state court without prior approval of the presiding district court judge..." See Holkesvig v. Rost, 2015 ND 67, 861 N.W.2d 488.

[¶24] In this case, the district court has found the actions taken by Betz to be frivolous causing unnecessary expenditures by the reformed trust and in order to continue a legal proceeding which has been concluded in favor of the Trustees. (Docket No. 375). This appeal is Betz's most recent attempt to do the same. The actions of Betz (acting in concert with Marlene Betz and Allen Betz) in this case are very troubling to the Trustees who have spent substantial time and incurred significant expense in responding to Betz's unjustified claims, including this frivolous appeal. Accordingly, the Emelia Hirsch Trust, dated June 9, 1994, and its co-trustees, Carolyn Twite and Duane Hirsch, are entitled to attorney's fees and costs. Additionally, the Trustees request this Court enter an order similar to the Hokesvig case, barring Betz, Marlene Betz, and Allen Betz from commencing future actions in the State of North Dakota, or filing further motions or appeals in this case without prior approval of a presiding district court judge.

CONCLUSION

[¶25] For the reasons discussed herein, Appellees Carolyn Twite and Duane Hirsch, co-trustees of the Emelia Hirsch Trust dated June 9, 1994, respectfully request that this Court: (1) affirm the district court's March 22, 2016 *Order*; (2) affirm the district court's July 16, 2008 *Order*; (3) grant the Appellees attorney fees and costs incurred in this matter; and (4) bar Betz, Marlene Betz, and Allen Betz from commencing future actions in the State of North Dakota, or filing further motions or appeals in this case without prior approval of a presiding district court judge.

Dated: July 27, 2016.

SMITH BAKKE PORSBORG
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CERTIFICATE OF SERVICE

[¶26] I hereby certify that a true and correct copy of the foregoing corrected brief was on the 27th day of July, 2016, electronically filed with the Clerk of the North Dakota Supreme Court and e-mailed to the following:

Timothy Betz
tbetz@embarqmail.com

By: /s/ Sheldon A. Smith
Sheldon A. Smith