

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

Loren Zundel and Richard Zundel,
Plaintiffs and Appellees.
and Cross-Appellants
v.

Stephen Zundel,
Defendant and Appellant.
and Cross-Appellee

Supreme Court No.:
20170003

District Court No.:
23-2015-CV-00023

APPELLANT'S REPLY BRIEF

Appeal of Judgment Entered on November 7th, 2016.
In District Court Case Number 23-2015-CV-00023
County of LaMoure, Southeast Judicial District
Honorable Judge Jay Schmitz, Presiding
Honorable Judge Daniel Narum, Recused

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

- [1] The District Court did not abuse its discretion by limiting the award to the defense of frivolous claims.

STATEMENT OF THE CASE

[2] The notice of entry of the judgment was served on November 11, 2016. (Reply App. #45). Stephen filed his notice of appeal on January 7, 2017 and Loren and Richard filed their notice of cross-appeal on January 12, 2017. (App. #62-63; Supp. App. #31). Loren and Richard submitted their Brief on May 17, 2017. Stephen submitted this Reply Brief on June 1, 2017.

STATEMENT OF THE FACTS

[3] Judge Narum determined Stephen's claims were frivolous under N.D.C.C. §28-26-01(2) thereby requiring an award of attorney's fees and costs to Loren and Richard for defending against the frivolous claims. (App. #57-58 ¶¶ 72-74).

[4] Loren and Richard sought \$69,773.05 in attorney's fees and \$2,018.55 in costs under N.D.C.C. §28-26-01(2) before reducing the attorney's fees request to \$67,754.50. (Reply App. #1 ¶ 1; Reply App. #15 ¶ 1). Stephen contended this was an excessive and unreasonable request. (Reply App. #7-14 ¶¶ 10-22). However, Richard initiated an ex parte communication with Judge Narum about this very case before a decision could be made. (Supp. App. #28-30; Reply App. #22-23). Richard's ex parte communication prompted Judge Narum's recusal and put Judge Schmitz in a position of deciding the request from the record. (Supp. App. #2-4 ¶¶ 10-13). Judge Schmitz applied N.D.C.C. §28-26-01(2) and used his discretion when he awarded \$19,163.50 in attorney's fees and \$2,018.50 in costs. (Supp. App. #3-9 ¶¶ 12-22).

[5] Judge Schmitz also concluded that Judge Narum should issue the final order for judgment, but Stephen contested that such an action would invalidate the judgment. (Supp. App. #10 ¶ 24; Reply App. #24-38). Loren and Richard contended, without

providing any legal justification, that the recusal was moot or alternatively that Judge Narum was allowed to issue the final order for judgment. (Reply App. #39-42). Instead, Judge Schmitz issued the final order for judgment. (Reply App. #43-44).

LAW AND ARGUMENTS

[6] Loren and Richard are only permitted to recover an award of reasonable attorney's fees and costs for defending against frivolous claims (provided any frivolous claims survive). Judge Schmitz did not abuse his discretion when he awarded \$21,182 for the defense against frivolous claims.

[7] In the Appellee's Brief, Loren and Richard alleged several contentions that diverge from the facts of this case. Pursuant to N.D.R.App.P. Rule 28(i)(2), Stephen respectfully directs this Court to specific instances in the record and the Appellant Brief that address these contentions. First, the number of tenants was presented to the District Court before trial in Docket #31 ¶ 10, during trial in Docket #133 Pages 100-103 Lines 20-3 and Docket #134 Pages 114-115 Lines 25-7, after trial in Docket #127 ¶ 47 and Docket #131 ¶ 8 and to this Court at ¶¶ 39-41 of the Appellant Brief. This is contrary to ¶ 70 of the Appellee's Brief which contend that Stephen never contested the number of tenants to the District Court. Second, evidence of the inoperability of the bin site was presented to the District Court before trial at Docket #59 ¶¶ 18-24, during trial at Docket #134 Pages 72-77 Lines 24-8, and after trial at Docket #127 ¶¶ 20-28 and Docket #131 ¶¶ 7-12, ¶¶ 28-35 and to this Court at ¶¶ 42-60 of the Appellant Brief. This is contrary to Loren's and Richard's contention that "not a shred of evidence even hinted" inoperability and that "Stephen admitted the bin site was at all times fully functional" as asserted in ¶ 73 of the Appellee's Brief. Third, evidence of the bin site being the 40 acres was

presented to the District Court at trial at Docket #134 Page 136 Lines 17-22, Docket #134 Page 172 Lines 1-17 and Docket #134 Page 190 Lines 18-20, after trial at Docket #127 ¶¶ 18 and Docket #127 ¶ 18 and ¶¶ 35-43 and to this Court at ¶ 81 of the Appellant Brief. This is contrary to Loren's and Richard's contention that "Stephen plainly testified that he knew the location of the bin site and yet he demanded repairs outside of it" as asserted in ¶ 93 of the Appellee's Brief. Finally, Loren and Richard appear to imply at ¶¶ 81-86 of the Appellee's Brief that once Stephen was found frivolous then all his further actions are frivolous thereby prohibiting his good faith and safe harbor arguments. This contention ignores Stephen's good faith arguments at Docket #131 ¶¶ 36-44 and the subsequent basis of the Appellant Brief whereby Stephen contends in good faith that the District Court's (Judge Narum's) opinion was erroneous and an abuse of discretion. (Appellant Brief ¶¶ 9-84).

[8] Loren and Richard also inaccurately depicted the law and facts at Appellee's Brief ¶¶ 54-59. The Blix Court said "[w]e, therefore, conclude that the term of the life of Ruth Anderson or at least a period of ten years should she live that long." [Anderson v. Blixt](#), 72 N.W.2d 799, 805 (N.D. 1955). Therefore, the concern in Blixt and Lyons was whether a contingency would occur within the remaining time to end a lease before the ten year threshold. [Anderson v. Lyons](#), 2014 ND 61, ¶¶ 13-17, 845 N.W.2d 1; [Blixt](#), 72 N.W.2d 799, 805 (N.D. 1955). In Blixt, one of two contingencies (Ruth Anderson death or sale of her interest) could occur within the five years preceding the threshold. 72 N.W.2d at 802-807. In Lyons one of three contingencies (death of Lyons or relinquishment of his interest through sale or the anytime opt out provision) could occur within the four years preceding the threshold. 2014 ND 61, ¶ 17, 845 N.W.2d 1. Here,

eight of twenty-four contingencies (each of the eight tenants: sell their interest or relinquish their interest through eviction or death) would have to occur within the less than two months before the ten year threshold. (App. # 14-18; App. #45 ¶ 16).

Therefore, this case is distinguishable from Lyons and Blixt because of the timing and number of contingencies needed to end the Lease.

[9] The contention at ¶ 50 of the Appellee's Brief misconstrues the impact overturning the April 4, 2016 opinion would have on agricultural leases as demonstrated at ¶¶ 24- 27 of the Appellant Brief. Loren's and Richard's contention also misconstrues the impact on CRP land which is governed by 16 U.S. Code § 3831 and supersedes §47-16-02 through Article VI of the U.S. Constitution. Instead there would be a chilling impact if the District Court's opinion is sustained because it leaves §47-16-02 meaningless by allowing a party to escape its coverage with the use of: "land not suitable for farming"; an indefinite number of tenants; an indefinite amount of time; or a specification that rent is not derived from the land being rented. (App. #36-40 ¶¶ 11-26).

STANDARD OF REVIEW: REGARDING ATTORNEY'S FEES

[10] "A court's discretionary determinations under N.D.C.C. §28-26-01(2) will not be overturned on appeal absent an abuse of discretion." [Sagebrush Res., LLC v. Peterson](#), 2014 ND 3, ¶ 15, 841 N.W.2d 705. A district 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. [Tillich v. Bruce](#), 2017 ND 21, ¶ 7, 889 N.W.2d 899; [Sagebrush](#), 2014 ND 3, ¶ 17, 841 N.W.2d 705.

I. Loren's and Richard's attorney's fees and costs are limited to defending frivolous claims under N.D.C.C. §28-26-01(2).

[11] Judge Schmitz did not abuse his discretion by only awarding attorney's fees and costs for defending frivolous claims (provided any of the frivolous claims survive).

[12] The American Rule presumptively requires Loren and Richard pay their own attorney's fees and costs. [Danzl v. Heidinger](#), 2004 ND 74, ¶ 6, 677 N.W. 2d 924.

However, an exception to this rule is N.D.C.C. §28-26-01(2) whereby a reasonable award of attorney's fees and costs will be granted for defending against claims a court determines to be frivolous. Id. Judge Narum determined Stephen's claims were frivolous under N.D.C.C. §28-26-01(2) which allowed Loren and Richard to request reasonable attorney's fees and costs. (App. #57-58 ¶¶ 72-73). However, Richard's ex parte communication resulted in Judge Narum's recusal and put Judge Schmitz in the position of determining what a reasonable request is based on his reading of the record. (Supp. App. #3 ¶¶ 11-12).

[13] As such, Judge Schmitz did not abuse his discretion when he applied N.D.C.C. §28-26-01(2) to the request of \$69,773.05 for all attorney's fees and costs. First, Judge Schmitz did not address Judge Narum's findings of frivolousness. (Supp. App. #5 ¶ 11). Second, Loren and Richard quoted Judge Narum's findings of attorney's fees and costs under N.D.C.C. §28-26-01(2) (which Judge Schmitz applied). (App. #57-58 ¶¶ 72-74; Reply App. #1-3 ¶ 2). Third, Judge Schmitz pointed out that Loren and Richard failed to request attorney's fees and costs under N.D.C.C. §28-26-31, which they now raise for the first time on appeal at ¶¶ 101-102 of the Appellee's Brief. (Supp. App. #5-6 ¶¶ 15-17).

Therefore, Judge Schmitz did not abuse his discretion by limiting the award to attorney's fees and costs for defending frivolous claims under N.D.C.C. §28-26-01(2).

II. Judge Schmitz retained discretion to set the award to what he believed was reasonable.

[14] Judge Schmitz did not abuse his discretion when he applied N.D.C.C §28-26-01(2) and articulated his rationale his award of attorney's fees and costs to reflect what he believed to be a reasonable amount for defending against the frivolous claims.

[15] Like any other presiding judge, it was within Judge Schmitz's "discretion to determine the amount and reasonableness of attorney's fees and costs after" there was a finding that a claim was frivolous. [Tillich](#), 2017 ND 21, ¶ 9, 889 N.W.2d 899.

Furthermore, Judge Schmitz is considered an expert in determining a reasonable attorney's fees and costs. *Id.* at ¶ 11. Judge Schmitz was not constrained by an amount that must be awarded for attorney's fees and costs, although North Dakota Rules of Professional Conduct Rule 1.5(a) may serve as persuasive guidance. [T.F. James Co. v. Vakoch](#), 2001 ND 112, ¶ 23, 628 N.W.2d 298. Judge Schmitz was only constrained insofar as the award must be more than nothing. [Tillich](#), 2017 ND 21, ¶ 9, 889 N.W.2d 899.

[16] Judge Schmitz did not abuse his discretion because N.D.C.C. §28-26-01(2) left him with a discretionary determination of reasonableness and he articulated the rationale for award. Loren and Richard cannot recover for attorney's fees and costs for their own claims. [Tillich](#), 2017 ND 21, ¶ 7, 889 N.W.2d 899; [Sagebrush](#), 2014 ND 3, ¶ 17, 841 N.W.2d 705; (Supp. App. #5-6 ¶¶ 15-17). Loren and Richard commenced the action and only sought recovery of attorney's fees and costs under N.D.C.C. §28-26-01(2) which

limits their recovery only to defending Stephen’s frivolous claims. N.D.R.Civ.P. [Rule 3](#); (Supp. App. #5-6 ¶¶ 15-17). Judge Schmitz spilt the frivolous claims into two groups: 1) the June 2015-November 2015 period and 2) trial and post-trial period. (Supp. App. #6-9 ¶¶ 17-21). Judge Schmitz articulated why he awarded \$14,588.50 for the first group and \$4,575 for the second group. Id. Judge Schmitz found Loren’s and Richard’s request to be “clearly excessive.” (Supp. App. #9 ¶ 21). It was within Judge Schmitz’s discretion (and would remain within his discretion if remanded) to set, or on remand, reduce the award to reflect the excessive nature of the request and the recusal. (Supp. App. #9 ¶ 21; Supp. App. #3-4 ¶ 12-13; Reply App. #22-43). Therefore, Judge Schmitz had discretion and did not abuse his discretion when he awarded \$21,182 because he followed N.D.C.C. §28-26-01(2) and he articulated the rationale behind his decision.

CONCLUSION

[17] For the foregoing reasons, Stephen asks (provided that any frivolous claims survive) this Court to affirm Judge Schmitz’s decision on attorney’s fees and costs.

Dated this date 15th of June, 2017.


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CERTIFICATE OF COMPLIANCE

[18] The undersigned, as attorney for the Appellant, Stephen Zundel, in this matter, and as author of the above Brief, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the Reply of the Appellant was prepared with proportional typeface and the total number of words in the above Reply, excluding words in the table of contents, table of authorities, statement of issues, signature block, certificate of service and this compliance, totals 1,952 words.

Dated this date 1st of June, 2017.



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Affidavit of Electronic Mailing

SS:

[1] David McCallum, being first duly sworn, does depose and state that he is of legal age and not a party to the above-entitled manner.

[2] On the 1st day of June, 2017 Affiant served by Electronic Mailing from Lisbon, North Dakota, a true and correct copy of the following documents:

1. Appellant's Reply Brief;
2. Appellant's Reply Appendix; and
3. Affidavit of Electronic Mailing.

On: **Benjamin Hasbrouck**

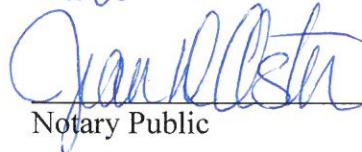
E-mail Address: **bhasbrouck@fredlaw.com**

[3] To the best of Affiant's knowledge, the e-mail addresses, above given were the actual addresses of the parties intended to be served.



David McCallum

Subscribed and sworn before me this 1 of June, 2017.


Notary Public