

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20170003

Loren Zundel and Richard Zundel,

Plaintiffs and Appellees,
and Cross-Appellants
v.

Stephen Zundel,

Defendant and Appellant.
and Cross-Appellee

On Appeal from Judgment entered on November 7, 2016
Southeast Judicial District, LaMoure County, North Dakota
LaMoure County Case No. 23-2015-CV-23

The Honorable Jay A. Schmitz

REPLY BRIEF OF APPELLEES

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INTRODUCTION

[1] The gist of Stephen Zundel's defense of the district court's decision to sharply limit the attorneys' fees awarded to Loren and Richard Zundel is that the district court acted within its discretion. While it is true that the issue is reviewed for an abuse of discretion, that does not prevent meaningful review in this case, where the decision was, in critical respects, arbitrary and misapplied the law to the facts of the case. Accordingly, the decision to reduce the fees simply because Loren and Richard brought the matter to court should be reversed and remanded.

ARGUMENT

I. LOREN AND RICHARD ARE ENTITLED TO FEES FOR ALL CLAIMS.

[2] A district court's decision regarding attorneys' fees is reviewed for an abuse of discretion. T.F. James Co. v. Vakoch, 2001 ND 112, ¶5, 628 N.W.2d 298. A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law. Id.

[3] It is clear that the district court, with Judge Narum presiding, determined that every claim asserted by Stephen Zundel was frivolous. App. 57-58. Stephen Zundel did not file a motion asking the district court to reconsider that decision, nor did the district court modify that decision. That ruling therefore stands and may not be upset, unless this Court determines that it was clearly erroneous.

[4] Thus, when the district court, with Judge Schmitz presiding, decided the amount of attorneys' fees to award, the court was required to award reasonable attorneys' fees for all claims made by Stephen Zundel. See Strand v. Cass County, 2008 ND 149, ¶ 12, 753 N.W.2d 872 (stating that "if the district court determines that a claim is

frivolous, the court must award attorney's fees"). Those claims, as explained below, were what this litigation was all about.

[5] The principal issues in deciding the reasonableness of requested attorneys' fees are (a) the hourly rate charged and (b) the amount of time spent. See Duchscherer v. W.W. Wallwork, Inc., 534 N.W.2d 13, 16-17 (N.D. 1995). Before the district court, Stephen Zundel argued that counsel's hourly rate was too high and counsel spent an unreasonable amount of time. Doc. #148. No other arguments concerning the reasonableness of the fees were advanced. Certainly, Stephen Zundel never claimed that the fees should be reduced to account for fees supposedly incurred by Loren and Richard, as *plaintiffs*.

[6] Without doubt, Stephen Zundel made no such argument because, as the district court noted, Loren and Richard Zundel's own claims, as *plaintiffs*, were simply the obverse of Stephen Zundel's frivolous claims. Supp. App. 8. The only minor exception to that was Loren and Richard's claim for about \$1,300 as Stephen's share of repair costs for the bin site. App. 60. That claim, which was pleaded in the alternative as contribution and unjust enrichment, was nothing more than a minor, tagalong-claim made incident to establishing that Loren and Richard maintained the bin site in good condition and repair. App. 11-12, 56-57. The amount of pleading, briefing, trial testimony, and attorney time spent in relation to that claim was insignificant.

[7] Thus, the issue on the cross-appeal largely is one of legal interpretation and the application of N.D.C.C. § 28-26-01. It is not one concerning the district court's discretionary determination of the reasonableness of the hourly fee charged or the amount of time spent litigating the case. In that regard, the fees awarded by the district court

were awarded at the regular hourly rates requested. Supp. App. 7, 9. Accordingly, there is no question about the reasonableness of the hourly rate sought.

[8] Furthermore, the district court made no finding or determination that counsel spent excess time on various tasks. Supp. App. 1-10. Thus, there is no question whether the various tasks involved in litigating the case should have been done more efficiently.

[9] Instead, the district court sharply reduced Loren's and Richard's fee request because the court assumed, or inferred, that some significant amount of time must have been spent advancing their own claims rather than defending Stephen Zundel's claims. Supp. App. 6-9. That decision had the practical effect of reversing Judge Narum's prior ruling. The district court made that determination without presiding over the case and without reviewing the trial transcript. Supp. App. 4. But the record in the case, and the entirety of the trial transcript, show that (with the insignificant exception concerning repair costs), the entirety of the case involved litigating Stephen Zundel's frivolous attempt to kick his brothers off the family's longstanding bin site.

II. THE DECISION TO SHARPLY REDUCE THE FEE RECOVERY WAS ARBITRARY.

[10] The district court's decision to severely limit Loren's and Richard's fee recovery, on the basis that they were plaintiffs, was arbitrary and thus an abuse of discretion. The arbitrariness of the decision is highlighted in key parts of the district court's memorandum order, discussed below.

[11] First, the district court noted in its decision that it "recounted [the] procedural history because the context in which I am deciding this case is itself a factor in its outcome." Supp. App. 3. In other words, the district court acknowledged that its

unfamiliarity with all the proceedings played a role in its decision to sharply cut the attorneys' fees requested.

[12] Second, the district court stated, "I did not try to sort through the entire 437-page trial transcript (Docket #133 & 134) because after reading the opening statements, I concluded that it wouldn't be particularly helpful anyway." Supp. App. 4. A review of the trial transcript, however, shows that a critical assumption or inference made by the district court in deciding the attorneys' fee motion was incorrect.

[13] In that regard, the district court stated, "It is reasonable to infer the plaintiffs would not, or should not, have had to spend two [trial] days refuting a single, frivolous counterclaim." Supp. App. 8. But the transcript shows that two trial days were, in fact, spent trying the issue of whether Loren and Richard maintained the bin site in good condition and repair, and whether Stephen Zundel was entitled to kick them off the family's longstanding bin site. Doc. #133, 134. Simply stated, the district court's unfamiliarity with the trial resulted in an arbitrary and erroneous decision.

[14] Third, the district court stated, "I also had to make some assumptions and estimates due to inadequacies of the record." Supp. App. 4. It was arbitrary and unreasonable to make unfounded assumptions and estimates, rather than to request further submissions, briefing, or evidence from the parties. In fact, given the unenviable position in which Judge Schmitz found himself – having to decide the attorneys' fee issue on a cold record, without having presided over any other part of the proceedings – it would seem that additional argument, submissions, or evidence from the parties would be necessary, particularly in light of the fact that the district court did not review the lengthy trial transcript.

[15] Accordingly, the district court's decision reducing the fees requested rested on arbitrary erroneous grounds. It therefore should be reversed and remanded.

III. THE DECISION TO SHARPLY REDUCE THE FEE RECOVERY MISAPPLIED THE LAW.

[16] The district court misapplied the law, and thus abused its discretion, by severely limiting Loren and Richard Zundel's attorneys' fee recovery simply because they first brought Stephen Zundel's frivolous claim for eviction to the court to obtain a declaratory judgment. Again, with the minor exception of Loren's and Richard's claim for repair costs, each and every claim advanced in this case related to Stephen's frivolous attempt to evict Loren and Richard from the family's longstanding bin site. That – and that alone – was the real issue litigated. It was therefore a misapplication of the law to reduce Loren's and Richard's fee recovery simply because they were the plaintiffs.

[17] Stated differently, based on numerous meritless legal grounds, Stephen claimed he was entitled to kick his brothers off the family's longstanding bin site. Stephen forced this matter to court when he had the sheriff serve Loren and Richard with eviction notices. Doc. #93-95. Stephen advanced his claim, under various legal theories, throughout this proceeding, including through the entirety of trial. Subject to the minor exception for repair costs, Loren's and Richard's role in this case, as plaintiffs, consisted of nothing more than bringing the dispute to the court's attention and requesting a declaratory judgment that was the "obverse" of Stephen Zundel's frivolous claims.

[18] Nothing in § 28-26-01 would limit recovery of fees for frivolous claims merely because the victim of those claims initially brought them to court in a request for a declaratory judgment. The fee reduction therefore should be reversed and remanded.

IV. THE DECISION OF JUDGE NARUM TO AWARD FEES FOR ALL CLAIMS IS SUPPORTED BY ALTERNATIVE GROUNDS.

[19] In its decision severely reducing Loren and Richard Zundel's fee recovery, the district court stated that "[a]n award of all plaintiffs' attorney's fees may have been appropriate under Section 28-26-31, which authorizes an award of attorney's fees to the opposing party for 'allegations and denials . . . made without reasonable cause and not in good faith, and found to be untrue.'" Supp. App. 6. The district court declined to award fees under that provision, however, because it stated that "[n]o such findings were requested or made." Supp. App. 6.

[20] While it is true that no request for fees was made under § 28-26-31, there was no reason to make the request. The district court, with Judge Narum presiding, determined that every claim made by Stephen Zundel, which encompassed the entirety of the case, was frivolous and warranted the award of attorneys' fees. App. 57-58. The only remaining issue was the reasonableness of the fees requested. The only objection by Stephen Zundel to the requested fees was the reasonableness of counsel's hourly rate and the reasonableness of the amount of time spent. Doc. #148. If any challenge to the court's legal authority to grant fees for the entire action had been raised, then § 28-26-31 certainly could have and would have been advanced.

[21] Furthermore, the predicate findings for an award of attorneys' fees under N.D.C.C. § 28-26-31 were made. The gist of Stephen Zundel's claims was that Loren and Richard Zundel had breached the lease agreement and that Stephen Zundel was entitled, for numerous reasons, to kick them off the family bin site. The district court specifically found that those allegations were meritless and therefore untrue. App. 47-56. The district court also specifically found that those allegations were not made in good

faith. App. 57-58. Indeed, after hearing all of the evidence, the district court determined that “the evidence showed that Stephen did not make the claims in good faith, but to harass his brothers because of unrelated disputes and family tensions.” App. 58.

[22] A district court’s correct decision may be affirmed on alternative grounds on appeal. See Investors Title Ins. Co. v. Herzig, 2010 ND 169, ¶ 40, 788 N.W.2d 312 (stating that this Court “will not set aside a correct result merely because the district court’s reasoning is incorrect if the result is the same under the correct law and reasoning”). Judge Narum’s decision to award attorneys’ fees with respect to the entire case should, in the alternative, be affirmed under N.D.C.C. § 28-26-31.

[23] The case then should be remanded for a determination of the reasonableness of the fees for the entire action without an arbitrary reduction for the fact that Loren and Richard Zundel were plaintiffs.

CONCLUSION

[24] Loren and Richard Zundel respectfully request that the Court affirm the judgment, in all respects, except for ¶ 6 of the judgment which granted Loren and Richard attorneys’ fees for only part of the action. With respect to that part of the judgment, Loren and Richard respectfully request that the Court reverse the judgment and remand the case to the district court for a determination of the reasonableness of their fees with respect to the entire action.

Dated: June 9, 2017

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for Loren and Richard Zundel in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 1,989.

Dated: June 9, 2017

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AFFIDAVIT OF SERVICE

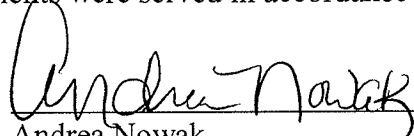
Andrea Nowak, being first duly sworn on oath, deposes and states that she is a resident of the City of West Fargo, North Dakota, of legal age, and not a party to the above-entitled matter. On June 9, 2017, affiant served a true and correct copy of the following:

Reply Brief of Appellees

Copies of the foregoing were served, via email, as follows:

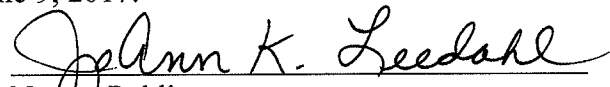
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To the best of affiant's knowledge, the address above given was the actual address of the party intended to be so served. The above documents were served in accordance with the provisions of the Rules of Civil Procedure.



Andrea Nowak

Subscribed and sworn to before me on June 9, 2017.



Notary Public

