

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

No. 20170195

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

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APPEAL FROM THE APRIL 24, 2017 ORDER  
CIVIL NO. 08-03-C-02228  
COUNTY OF BURLEIGH, SOUTH CENTRAL JUDICIAL DISTRICT  
HONORABLE JUDGE GAIL HAGERTY, PRESIDING

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**BRIEF OF APPELLEES  
CAROLYN TWITE AND DUANE HIRSCH**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....iii

STATEMENT OF ISSUES.....¶1

STATEMENT OF THE FACTS.....¶2

LAW AND ARGUMENT

I. The district court did not abuse its discretion in issuing its *Pre-filing Findings and Order* pursuant to North Dakota Supreme Court Administrative Rule 58.....¶8

II. The remaining issues raised by Betz in this appeal have been decided by previous appellate decisions and are precluded as a matter of law.....¶16

III. Appellees are entitled to recovery of their attorney’s fees and costs in this appeal.....¶19

CONCLUSION.....¶21

CERTIFICATE OF SERVICE.....¶22

**TABLE OF AUTHORITIES**

**CASES:**

Beeter v. Sawyer Disposal LLC, 2009 ND 153, 771 N.W.2d 282..... ¶8

Federal Land Bank of St. Paul v. Ziebarth, 520 N.W.2d 51, 56 (N.D. 1994)..... ¶9

Holkesvig v. Grove, 2014 ND 57, 844 N.W.2d 557..... ¶9

Holkesvig v. VandeWalle, 2016 ND 107, 879 N.W.2d 728..... ¶9

Holkesvig v. Welte, 2012 ND 142, 818 N.W.2d 760..... ¶9

Matter of Emelia Hirsch Trust, 2009 ND 135, 770 N.W.2d 225..... ¶¶2, 3, 4, 16, 18

Matter of Emelia Hirsch Trust, 2013 ND 63, 832 N.W.2d 334..... ¶¶2, 3, 16, 20

Matter of Emelia Hirsch Trust, 2014 ND 135, 848 N.W.2d 719..... ¶¶2, 3, 16, 20

Matter of Emelia Hirsch Trust, 2016 ND 217, 888 N.W.2d 205..... ¶¶2, 3, 4, 16, 18, 20

Missouri Breaks, LLC v. Burns, 2010 ND 221, 791 N.W.2d 33..... ¶17

Muhlhauser v. Becker, 74 N.D. 103, 20 N.W.2d 353 (1945)..... ¶17

United Bank of Bismarck v. Young, 401 N.W.2d 517, 519 (N.D. 1987)..... ¶19

**STATUTES AND RULES:**

N.D.R.App.P. 35.1(a)..... ¶18, 21

N.D.R.App.P. 38..... ¶19, 20, 21

N.D.R.App.P. 39..... ¶19

N.D. Sup. Ct. Admin. R. 58..... ¶6, 9, 10, 11, 12

## STATEMENT OF ISSUES

- [¶1] I. Whether the district court abused its discretion in issuing its *Pre-filing Findings and Order* pursuant to North Dakota Supreme Court Administrative Rule 58.
- II. Whether the remaining issues raised by Betz in this appeal are precluded as a matter of law.
- III. Whether Appellees are entitled to recovery of costs and attorney's fees in this appeal.

## STATEMENT OF THE FACTS

[¶2] Appellees Carolyn Twite and Duane Hirsch, co-trustees of the Emelia Hirsch Trust dated June 9, 1994, submit this brief in response to the *Appellant's Brief* of Timothy R. Betz ("Betz") dated June 15, 2017. The instant appeal is the latest in a long line of appeals by Betz to vacate the reformation of a trust. See Matter of Emelia Hirsch Trust, 2009 ND 135, 770 N.W.2d 225; Matter of Emelia Hirsch Trust, 2013 ND 63, 832 N.W.2d 334; Matter of Emelia Hirsch Trust, 2014 ND 135, 848 N.W.2d 719; Matter of Emelia Hirsch Trust, 2016 ND 217, 888 N.W.2d 205.

[¶3] By way of reference, the district court's *Pre-filing Findings and Order*, provides a concise recitation of the relevant factual background of this case:

1. On July 16, 2008, this Court entered an order reforming the Emelia Hirsch Trust dated June 9, 1994. On July 16, 2009, the Supreme Court affirmed the action of the District Court in reforming the trust in *Matter of Emelia Hirsch Trust*, 2009 ND 135, 770 N.W.2d 225.
2. Since July 16, 2008, 306 documents have been filed in the district court file in this matter.
3. Mr. Betz has filed more than 20 motions and requests in this case and has filed at least five subsequent appeals.

4. Mr. Betz has also filed at least 17 motions or requests concerning the same issues in probate proceedings in Hettinger County. The file for the probate proceeding is titled *In the Matter of the Estate of Emelia Hirsch*, Hettinger County Case No. 21-10-P-0017.
5. Mr. Betz has been ordered to pay fees of more than \$16,000 in the Burleigh County case and the Hettinger County case.
6. In an Amended Order dated September 8, 2013, this court ordered a money judgment against Mr. Betz in the amount of \$5,000 plus interest and directed that neither the trust nor the trustees would be required to respond to requests or motions filed by Mr. Betz unless directed by the court.
7. The North Dakota Supreme Court ordered Mr. Betz to pay attorney's fees of \$1,000 plus double costs under N.D.R.App.P. 38 for filing frivolous appeals in this matter. See *Matter of Emelia Hirsch Trust*, 2014 ND 135, ¶ 15,848 N.W. 2d 719, see also *Matter of Emelia Hirsch Trust*, 2013 ND 63 ¶ 1, 832 N.W. 2d 334.
8. Mr. Betz has also been ordered to pay attorney's fees in the Hettinger County probate proceedings. See *In the Matter of the Estate of Emelia Hirsch*, Hettinger County Case No. 21-10-P-17. In a March 2, 2016, Order, the trustees were awarded attorney's fees of \$6,402.50 because of Mr. Betz's frivolous actions.
9. On April 19, 2016, this court awarded fees against Mr. Betz in the amount of \$1,710. In the subsequent appeal, the North Dakota Supreme Court ordered Mr. Betz to pay attorney's fees of \$1,000 plus double costs under N.D.R.App.P. 38 for filing a frivolous appeal. See *Matter of Emelia Hirsch Trust*, 2016 ND 2017 ¶ 1, 888 N.W. 2d 205.

(App. 190-192 at ¶¶ 1-9).

[¶4] Following the issuance of this Court's opinion and judgment in Matter of Emelia Hirsch Trust, 2016 ND 217, 888 N.W.2d 205, Betz continued his predictable routine of submitting frivolous filings in attempt to re-litigate issues that have been settled since Matter of the Emelia Hirsch Trust, 2009 ND 135, 770 N.W.2d 225.

[¶5] On February 8, 2017, Betz filed a *Brief in Support of Motion to Reopen* with attachments, but no motion document. (App. 16 at Docket # 577). On February 14, 2017, Betz filed a *Motion to Reopen and Amended Brief in Support of Motion to Reopen*.

(Id. at Docket # 580). On February 23, 2017, Betz filed a *Motion to Immediately Vacate the July 16, 2008 Order and Brief in Support of Motion to Immediately Vacate the July 16, 2008 Order*. (Id. at Docket # 581). Also on February 23, 2017, the district court issued a *Notice* indicating “[t]his case has resolved” and that “[i]t will not be re-opened and no further order will be entered.” (Id. at Docket # 587).

[¶6] In response to Betz’s frivolous filings, Appellees submitted a *Motion for Rule 58 Pre-Filing Order* on March 1, 2017, requesting the district court to enter a pre-filing order under N.D. Sup. Ct. Admin. R. 58 prohibiting Betz from filing any new litigation or any new documents in existing litigation in the courts of this state as a self-represented party without first obtaining leave of a judge of the court in the district where the litigation or documents are proposed to be filed. (App. 17 at Docket # 589-594). On March 3, 2017, Betz filed an *Objection to the Notice and Motion to Reopen, Brief in Support of Motion to Reopen*. (Id. at Docket # 602). On March 16, 2017, Betz filed a *Response to Motion for Rule 58 Pre-Filing Order*. (Id. at Docket # 603). A hearing on this motion was held on April 3, 2017; however, Betz failed to appear (either in person or by representation from counsel) and therefore abandoned his opportunity to address Judge Hagerty concerning his opposition to Appellees’ request for a pre-filing order. (App. 17).

[¶7] On April 5, 2017, the district court issued notice of its proposed pre-filing findings and order in accordance with Administrative Rule 58. (App. 17 at Docket # 608). Betz submitted his response thereto on April 21, 2017. (Id. at Docket # 609). Thereafter, the district court entered its *Pre-filing Findings and Order* on April 24, 2017, finding Betz to be a “vexatious litigant” and ordering Betz be prohibited from filing any

new litigation or any new documents in existing litigation in the courts of this state as a self-represented party without first obtaining leave of a judge of the court in the district where the litigation or documents are proposed to be filed, in accordance with Administrative Rule 58. (App. 190-193). A *Notice of Appeal* was filed by Betz on June 8, 2017, in which Betz appeals the district court's *Pre-filing Findings and Order*, together with numerous other frivolous issues to which previous appellate decisions in this matter are dispositive. (App. 194).

### **LAW AND ARGUMENT**

**I. The district court did not abuse its discretion in issuing its *Pre-filing Findings and Order* pursuant to North Dakota Supreme Court Administrative Rule 58.**

[¶8] Betz appeals the district court's *Pre-filing Findings and Order*; however, it is unclear on what grounds due to Betz's recycling of old arguments concerning reformation of the irrevocable trust previously addressed by this Court. *See* Appellant's Brief at ¶¶ 43-51. Insofar as the Appellants are able to discern from the *Appellant's Brief*, it appears Betz's challenge of the pre-filing order is based upon Rule 60(b) (which sets forth the grounds for relief from a final judgment or order) despite not having first submitted such a motion with the district court. (*Id.*) "This Court has repeatedly and consistently held that issues or contentions not raised or considered in the district court cannot be raised for the first time on appeal from a judgment or order, and this Court will not address issues raised for the first time on appeal." Beeter v. Sawyer Disposal LLC, 2009 ND 153, ¶ 20, 771 N.W.2d 282. Betz' appeal of the district court's *Pre-filing Findings and Order* should be dismissed on these grounds alone.

[¶9] Even if this Court considers Betz’s appeal of this issue, the district court did not err in issuing the pre-filing order pursuant to the requirements of N.D. Sup. Ct. Admin. R. 58 prohibiting Betz from filing any new litigation or any new documents in existing litigation in the courts of this state without first obtaining leave of a judge of the court in the district where the litigation or documents are proposed to be filed. (App. 190-193). This Court has previously held that orders prohibiting such conduct are reviewed under an abuse of discretion standard. *See Holkesvig v. Grove*, 2014 ND 57, ¶ 7, 844 N.W.2d 557; *See also Holkesvig v. Welte*, 2012 ND 142, ¶ 6, 818 N.W.2d 760; *Federal Land Bank of St. Paul v. Ziebarth*, 520 N.W.2d 51, 56 (N.D. 1994). “A district court abuses its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner, if its decision is not the product of a rational mental process leading to a reasonable determination, or if it misinterprets or misapplies the law.” *Holkesvig v. VandeWalle*, 2016 ND 107, ¶ 17, 879 N.W.2d 728.

[¶10] On December 26, 2016, the Supreme Court adopted North Dakota Supreme Court Administrative Rule 58 regarding vexatious litigants at the request of the Joint Procedure Committee. *See Order of Adoption*, Supreme Court No. 20170237. The rule became effective March 1, 2017. *Id.* The purpose of Administrative Rule 58 is to address “vexatious litigation, which impedes the proper functioning of the courts, while protecting reasonable access to the courts.” N.D. Sup. Ct. Admin. R. 58, Section 1. A vexatious litigant is defined as “a person who habitually, persistently, and without reasonable grounds engages in conduct that: (1) serves primarily to harass or maliciously injure another party in litigation; (2) is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing



law; (3) is imposed solely for delay; (4) hinders the effective administration of justice; (5) imposes an unacceptable burden on judicial personnel and resources; or (6) impedes the normal and essential functioning of the judicial process.” Id. at Section 2(b).

[¶11] Administrative Rule 58 authorizes the presiding judge to “enter a pre-filing order prohibiting a vexatious litigant from filing any new litigation or any new documents in existing litigation in the courts of this state as a self-represented party without first obtaining leave of a judge of the court in the district where the litigation is proposed to be filed.” Id. at Section 3(a). “A pre-filing order must contain an exception allowing the person subject to the order to file an application seeking leave to file.” Id.

A presiding judge may find a person to be a vexatious litigant based on a finding that:

(a) in the immediately preceding seven-year period the person has commenced, prosecuted or maintained as a self-represented party at least three litigations, other than in small claims court, that have been finally determined adversely to that person; or

(b) after a litigation has been finally determined against the person, the person has repeatedly relitigated or attempted to relitigate, as a self-represented party, either (1) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined; or (2) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined; or

(c) in any litigation while acting as a self-represented party, the person repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary burden, expense or delay; or

(d) the person has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding.

Id. at Section 4.

[¶12] Procedurally, “[i]f the presiding judge finds that there is a basis to conclude that a person is a vexatious litigant and that a pre-filing order should be issued, the presiding judge must issue a proposed pre-filing order along with the proposed findings supporting the issuance of the pre-filing order.” Id. at Section 5. “The person who would be designated as a vexatious litigant in the proposed order will have 14 days to file a written response to the proposed order and findings...[and] [i]f a response is filed, the presiding judge may, in the judge’s discretion, grant a hearing on the proposed order. Id. “If no response is filed within 14 days, or if the presiding judge concludes following a response and any subsequent hearing that there is a basis for issuing the order, the presiding judge may issue the pre-filing order.” Id.

[¶13] In this case, Appellees submitted their *Motion for Rule 58 Pre-Filing Order* on March 1, 2017, to which Betz filed a response on March 16, 2017. (App. 17 at Docket # 589-594, 603). As indicated above, a hearing was held on this motion on April 3, 2017, at which Betz did not appear. (App. 17). In accordance with the procedural requirements of Administrative Rule 58, Section 5, the district court issued notice of its proposed pre-filing findings and order on April 5, 2017. (App. 17 at Docket # 608). Betz submitted a response thereto on April 21, 2017. (Id. at Docket # 609). The district court entered its *Pre-filing Findings and Order* on April 24, 2017, concluding there was a basis for issuing a pre-filing order in that based on Betz’s response to the proposed pre-filing findings and

order, “it is clear that Mr. Betz will continue to file frivolous and unmerited litigation if an order is not entered.” (App. 190).

[¶14] Based upon its review of Betz’s conduct as summarized by the facts in support of its order (App. 190-192 at ¶¶ 1-10), the district court made the following findings:

1. Mr. Betz is a vexatious litigant in that he has persistently and without reasonable grounds filed motions and requests not warranted under existing law and which cannot be supported by any good faith argument. His actions have served primarily to harass or injure other parties to litigation. Mr. Betz’s actions have imposed an unacceptable burden on other parties and judicial personnel and resources.
2. After litigation concerning the Emelia Hirsch Trust was finally determined, Mr. Betz has repeatedly re-litigated or attempted to re-litigate the matter as a self-represented party against the same parties as to whom the litigation was determined.
3. Mr. Betz, acting as a self-represented party, has repeatedly filed unmeritorious motions, pleadings, or other papers and has engaged in tactics which are frivolous and solely intended to cause unnecessary burden.

(App. 192-193 at ¶¶ 1-3). Therefore, in accordance with Administrative Rule 58, the district court ordered that Betz be “prohibited from filing any new litigation or any new documents in existing litigation in the courts of this state as a self-represented party without first obtaining leave of a judge of the court in the district where the litigation is proposed to be filed.” (App. 193). The district court further clarified that Betz “may file an application seeking leave to file documents” as further required by Administrative Rule 58, Section 3(a).

[¶15] Based on the foregoing, the district court did not act in an arbitrary or unreasonable manner and complied with the requirements of Administrative Rule 58 in

issuing its *Pre-filing Findings and Order*, dated April 24, 2017. Such an order is necessary to prevent Betz's frivolous filings and harassing conduct toward the Appellees in this matter.

**II. The remaining issues raised by Betz in this appeal have been decided by previous appellate decisions and are precluded as a matter of law.**

[¶16] In addition to challenging the district court's pre-filing order, Betz uses this appeal as an opportunity to again raise issues (identified as issues 2-5 of the *Appellant's Brief*) that have been decided by this Court in previous appellate decisions. See Matter of Emelia Hirsch Trust, 2009 ND 135, 770 N.W.2d 225; Matter of Emelia Hirsch Trust, 2013 ND 63, 832 N.W.2d 334; Matter of Emelia Hirsch Trust, 2014 ND 135, 848 N.W.2d 719; Matter of Emelia Hirsch Trust, 2016 ND 217, 888 N.W.2d 205.

[¶17] 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.

[¶18] As determined in Betz's most recent appeal, this Court affirmed under N.D.R.App.P. 35.1(a)(1) and (7) concluding Betz's appeal was "frivolous and completely without merit" and that "a previous controlling appellate decision [was] dispositive of the appeal[.]" Matter of Emelia Hirsch Trust, 2016 ND 217, 888 N.W.2d 205 (citing In re

Emelia Hirsch, June 9, 1994, Irrevocable Trust, 2009 ND 135, 770 N.W.2d 225). The instant appeal is no different in that Betz is again recycling 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 Appellees. The law of the case doctrine is a clear bar to issues 2-5 raised by Betz in his *Appellant's Brief*. Consistent with the underlying principles of promoting the finality of judgments, avoiding multiple litigation, and conservation of judicial resources, Appellees respectfully request those issues be denied in their entirety.

**III. Appellees are entitled to recovery of their attorney's fees and costs in this appeal.**

[¶19] 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).

[¶20] As indicated above, the only appealable issue in this matter concerns the district court's pre-filing order discussed in Section I above. The remaining issues raised by Betz in this appeal have been fully litigated and previous attempts to re-litigate those issues

have been found frivolous and without merit by this Court warranting attorney's fees and double costs under N.D.R.App.P. 38. See Matter of Emelia Hirsch Trust, 2013 ND 63, 832 N.W.2d 334; Matter of Emelia Hirsch Trust, 2014 ND 135, 848 N.W.2d 719; Matter of Emelia Hirsch Trust, 2016 ND 217, 888 N.W.2d 205. Appellees are again entitled to recovery of double costs and attorney's fees in this appeal.

### **CONCLUSION**

[¶21] For the reasons discussed herein, Appellees respectfully request this Court to: (1) affirm the district court's *Pre-filing Findings and Order*, dated April 24, 2017; (2) affirm by summary opinion the issues raised by Betz previously decided by this Court under N.D.R.App.P. 35.1(a)(1) and (7); and (3) award Appellees double costs and attorney fees pursuant to N.D.R.App.P. 38.

Dated: July 14, 2017.

SMITH PORSBORG SCHWEIGERT  
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*/s/ Sheldon A. Smith*

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**CERTIFICATE OF SERVICE**

[¶22] I hereby certify that a true and correct copy of the foregoing corrected brief was on the 14th day of July, 2017, electronically filed with the Clerk of the North Dakota Supreme Court and e-mailed to the following:

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