

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

CHS, Inc.,

Plaintiff-Appellee,

Supreme Court No. 20170331

vs.

District Court No. 18-2015-CV-01950

Roland Riemers,

Defendant-Appellant.

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT'S ORDER DENYING DEFENDANT'S
MOTION TO REOPEN CASE AND CLOSE JUDGMENT DATED JULY 5, 2017,
[DISTRICT COURT DOCKET ENTRY #182] AND FROM THE
JUDGMENT OF JULY 7, 2017 [DISTRICT COURT DOCKET # 183]

GRAND FORKS COUNTY DISTRICT COURT
NORTHEAST CENTRAL JUDICIAL DISTRICT
HONORABLE JOHN A. THELEN

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[¶1]

ISSUES ON APPEAL

[¶2] It appears CHS, Inc.’s listed issues for this appeal [see, Appellee’s Brief, ¶ 2 through ¶ 6], are encompassed within the issues presented by Roland Riemers [hereinafter “Riemers”].

[¶3]

STATEMENT OF THE CASE

[¶4] CHS, Inc. [hereafter “CHS”], did not express any dissatisfaction with Riemers’ Statement of the Case.

[¶5]

STATEMENT OF FACTS

[¶6] In its Appellee’s Brief, CHS ignores at least five (5) significant events that bear upon the accuracy of CHS’s Statement of Facts, and its “factual” calculation as to what Riemers might owe on the Amended Judgment dated May 24, 2016. The five (5) factual events now ignored by CHS include:

- A. On June 23, 2016, CHS filed a Partial Satisfaction of Judgment acknowledging partial satisfaction of the judgment in the amount of \$39,726.89. Appendix, page 17.
- B. On August 10, 2016, CHS filed a second Partial Satisfaction of Judgment acknowledging partial satisfaction of judgment in the additional amount of \$1,957.61. App., p. 19.
- C. On March 28, 2017, Alerus Financial remitted its check to CHS’s attorneys in the amount of \$130.00. App., ps. 80-81.
- D. On May 5, 2017, CHS filed its third Partial Satisfaction of Judgment, dated May 3, 2017, for the \$130.00 it had received from Alerus Financial on March

30, 2017. App., ps. 63, 5.

E. After CHS filed its third Partial Satisfaction of Judgment, the Clerk of District Court listed the “status” of the May 24, 2016, Amended Judgment as being “Satisfied.” App., p. 1.

[¶7] When CHS filed its first Partial Satisfaction of Judgment acknowledging payment of \$39,726.89 on June 23, 2016, CHS did not apply the acknowledged payment(s) to \$184.50 in post-judgment costs, or judgment interest in the amount of \$74.43 and \$28.58, as alleged in ¶ 9 and ¶ 10 of the Appellee’s Brief. On June 23, 2016, only \$10.00 in post-judgment costs had been docketed in the Clerk of District Court’s records. The payments collected by CHS, totaling \$39,726.89, were first applied to the \$10.00 execution fee, and the balance of the payment was applied so the principal balance owing on the monetary judgment was only \$2,076.83 as of June 23, 2016.

[¶8] When CHS filed its second Partial Satisfaction of Judgment acknowledging payment of \$1,957.61 on August 10, 2016, CHS did not apply the acknowledged payment to \$196.00 in post-judgment costs, or judgment interest in the amount of \$26.42, as alleged in ¶ 11 of the Appellee’s Brief. The payment collected by CHS – totaling \$1,957.61 – was applied to the second \$10.00 execution fee, and the balance of the payment was applied so that the principal balance owing on the amended monetary judgment was \$129.22 as of August 10, 2016. In ¶ 12 of the Appellee’s Brief, CHS acknowledges a credit in favor of Riemers, due to his prior appeal, in the amount of \$70.07. Applying the acknowledged credit of \$70.07 to reduce the principal owing on the amended monetary judgment, the principal balance owing on the judgment was **\$59.15** as of August 10, 2016.

[¶9] CHS *ignores* both its receipt of \$130.00 from Alerus Financial on March 30, 2017, and its third Partial Satisfaction of Judgment dated May 3, 2017. App., ps. 63-64. As of May 3, 2017, the only post-judgment costs reflected in the Clerk of District Court’s records were the two (2) previously paid execution fees [totaling \$20.00]. Because of CHS’s third Partial Satisfaction of Judgment, the Clerk of Court accurately listed the May 24, 2016, Amended Judgment status as being “Satisfied.” App., p 1.

[¶10] Because CHS ignores the \$130.00 payment it received from Alerus Financial on March 30, 2017, it makes the same glaring mathematical mistake the District Court Judge did when it claims “the correct outstanding balance” is \$679.08 as of July 5, 2017. Appellee’s Brief, Footnote 1 to ¶ 9; ¶ 12. To determine the correct amount due on the judgment, one cannot add \$130.00 to the judgment’s principal *unless one first subtracts \$130.00 from the judgment amount due to the payment received on March 30, 2017.*

[¶11] In reference to ¶ 13 of the Appellee’s Brief, Riemers recognizes there is a monetary judgment against him in the amount of \$1,628.55 “for the reasonable attorneys’ fees and costs incurred by Plaintiff [CHS, Inc.] in responding to the Defendant’s [Riemers’] Motion.” App., p. 95. The entire amount of the judgment for \$1,628.55 involves attorney’s fees calculated on the attorney’s time spent on the case. App., ps. 83-84. It appears that CHS did not incur any “costs” or expenses, other than the attorney’s time, when it responded to Riemers’ March 17, 2017, Motion. Riemers makes this distinction so it is clear – \$482.50 of the \$502.50 *never-taxed* “costs” incurred by CHS in its *never-filed* garnishment proceedings, do not make up any portion of the \$1,628.55 monetary judgment. Riemers makes this distinction to clarify one issue before this Supreme Court: Is Riemers, a judgment

debtor, liable for \$482.50 in *never-taxed* “costs” that were incurred in *never-filed* garnishment proceedings?

[¶12] **LAW AND ARGUMENT**

[¶13] **1. Standard of Review.**

[¶14] The parties appear to agree this appeal is governed by an abuse of discretion standard of review.

[¶15] **2. The lower court abused its discretion in shifting CHS’s incurred attorney fees to Riemers as a sanction against him.**

[¶16] **A. The language used by the lower court, in its flawed reasoning for sanctioning Riemers, can be traced to N.D.R.Civ.P. 11.**

[¶17] Recognizing Riemers was not afforded the procedural protections of N.D.R.Civ.P. 11, CHS argues the sanction imposed upon Riemers was “made pursuant to N.D.C.C. § 28-26-01(2)”. Appellee’s Brief, ¶21. CHS also argues, “[i]t is well established in North Dakota that attorney fees under N.D.C.C. § 28-26-01(2), upon a finding as to the *frivolous nature of a motion*”. Brief of Appellee, ¶ 21. *Italics* provided by Riemers for emphasis. Riemers, respectfully submits, it is well established in North Dakota that only “claims for relief” in “pleadings” identified in N.D.R.Civ. P. 7(a) are subject to potential sanctions under N.D.C.C. § 28-26-01(2). See, Deacon’s Development, LLP v. Lamb, 2006 ND 172, ¶15, 719 N.W.2d 379. Riemers’ “motion” was not a “pleading”.

[¶18] **B. The lower court abused its discretion when sanctioning Riemers without affording him the procedural protections of N.D.R.Civ. P. 11.**

[¶19] CHS does not address this issue because it mistakenly believed N.D.C.C. § 28-26-01(2) could be relied upon by the lower court to sanction Riemers for his post-judgment motion. Riemers respectfully submits, the lower court abused its discretion when it sanctioned him, without the procedural protections of N.D.R.Civ.P. 11, for merely bringing a post-judgment motion that questioned the propriety of CHS’s post-judgment collection efforts, and whether the monetary judgment had been paid, as shown by public records.

[¶20] **C. Riemers’ legal contentions were not frivolous, but warranted by existing statutory law.**

[¶21] **i. CHS did not follow statutes relating to the garnishment remedy.**

[¶22] Contrary to CHS’s appellate argument [Appellee’s Brief, ¶ 31] Riemers did raise the issue of whether CHS was following state law when garnishing bank accounts. Part of the relief requested by Riemers was an order requiring CHS, “to follow state laws and the Rules of Court in garnishing bank accounts”. App., p. 24. In his affidavit supporting his motion, Riemers informed the lower court that the Clerk of District Court listed a judgment balance of \$129.00, and CHS was then garnishing an additional \$1,042.00 [an amount, eight (8) times the judgment balance]. Since garnishment law [N.D.C.C. § 32-09.1-07(1)(b)] restricts the amount that can be garnished, Riemers’ motion and affidavit raised the issue of whether CHS was complying with garnishment laws in its collection efforts. Contrary to CHS’s assertions at ¶ 33 of its brief, it is CHS who errs in its determination of the amount owed on the monetary judgment – not Riemers. Because CHS clings to its mistaken notion that it does not need to obtain a garnishment judgment to tax its expenditures in garnishment, as set forth

in N.D.R.Civ.P. 54, it exaggerates the amount that Riemers may still owe on the May 24, 2016, Amended Judgment.

[¶23] Riemers’ position [concerning the taxing of garnishment costs, and/or interpretation of N.D.C.C. § 28-21-04.2], is not a “strained” argument nor “contrary” to the plain meaning of law as alleged by CHS in ¶34 and ¶ 35 of its brief. Further, if the two (2) 2016 executions [directed only to the sheriff] can be deemed executions made under N.D.C.C. § 28-21-04.2, CHS’s attorney was required “to proceed in all other respects like the sheriff making a similar execution.” These quoted words, from N.D.C.C. § 28-21-04.2, require the garnishment execution to be returned within sixty (60) days as set forth in N.D.C.C. § 28-21-07.

[¶24] **ii. CHS, did not follow statutory procedure to obtain its incurred costs and disbursements in the garnishment proceedings.**

[¶25] CHS is confused as to what is necessary to obtain payment for its incurred “costs” in garnishment proceedings, as revealed by its discussion at ¶37 and ¶ 38 of its brief. Of its \$502.50 of documented expenditures [App., p. 69], the amount of \$482.50 relate to expenditures in *never-filed* garnishment proceedings. CHS’s expenditures in the garnishment proceedings are not post-judgment costs incurred in the main action, rather, they are expenditures incurred in seven (7) separate, but *never-filed* garnishment actions. Each of CHS’s garnishment proceedings was a separate action, and each ancillary to the [main] action that resulted in the monetary judgment against Riemers. There is no provision in the garnishment statutes that allows costs incurred in a garnishment action to be taxed as post-

judgment costs in the main action against a judgment debtor. In garnishment proceedings, if the judgment creditor successfully obtains a judgment in his favor in the ancillary garnishment action, the judgment creditor's costs are taxed and allowed only against the *garnishee* – not the judgment debtor. N.D.C.C. § 32-09.1-15. The total garnishment judgment against the *garnishee*, with taxed costs, will not exceed the required retention amount. *Id.* CHS's documented expenses [App., p. 69], for its seven (7) separate ancillary garnishment actions, are actually **pre-judgment costs** – they precede the garnishment judgments [also, judgments *never-existing*], and these costs can only be taxed [if at all] in the ancillary garnishment action in which they were incurred. *Id.*

[¶26] **iii. Riemers' contentions concerning post-judgment amounts due on principal and interest has support in law.**

[¶27] CHS ignores its three (3) Partial Satisfactions of Judgment that resulted in the Clerk of District Court's records reflecting the monetary judgment against Riemers was paid on May 3, 2017. App., p. 1.

[¶28] **D. Riemers' factual contentions were not frivolous, but were warranted on the evidence below.**

[¶29] It would seem that the Clerk of District Court's records, based upon partial satisfactions of record, established the monetary judgment against Riemers had been "Satisfied" on May 3, 2017, which should be sufficient "verification" to establish Riemers' motion was not frivolous, having both legal and factual support. Even Riemers' claims concerning the compounding of interest has support in CHS's spreadsheet. App., p. 82. In its spreadsheet, CHS applies this Court's *ordered reduction* of the monetary judgment by

\$70.07 to interest of \$13.34 and to principal of \$56.73. To avoid impermissible compounding, the entire \$70.07 should have been applied to reduce the principal owing on the Amended Judgment. Sufficient evidence exists to sustain Riemers' factual allegations as to the amount due on the monetary judgment. Based upon the same court records that Riemers relies upon, the Clerk of District Court listed the Amended Judgment's status as "Satisfied" as of May 5, 2017. App., ps. 1; 49-50.

[¶30] **3. This Court should reject the lower court's position concerning the taxation of post-judgment costs.**

[¶31] CHS's attempt to collect garnishment action expenses in the main action establishes the need for this Court to address the taxation of costs in garnishment actions.

[¶32] **CONCLUSION**

[¶33] Riemers should not have been sanctioned, and he is entitled to his previously requested relief.

Respectfully submitted this 15th day of January, 2018.

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AFFIDAVIT OF MAILING

State of North Dakota
County of Cass

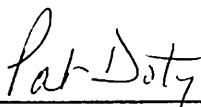
[¶1] Pat Doty, being first duly sworn on oath, deposes and says: Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

[¶2] On the 16th day of January, 2018, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: REPLY BRIEF OF APPELLANT.

[¶3] The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:


Jon Brakke
Vogel Law Firm
P.O. Box 1389
Fargo, ND 58107-1389

[¶4] To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.



Pat Doty

Subscribed and sworn to before me this 16th day of January, 2018.



Notary Public

