20170331

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

CHS, Inc.,

Plaintiff-Appellee,

vs.

Roland Riemers,

Defendant-Appellant.

Supreme Court No. 20170331

District Court No. 18-2015-CV-01950

PETITION FOR REHEARING

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] **Petition for Rehearing**

[¶2] Petitioner Roland Riemers [hereafter, "Riemers"] respectfully petitions this Court for a rehearing to review this Court's rejection of his positions in CHS, Inc. v. Riemers, 2018 ND 101, __ N.W.2d___, and the Constitution.

[¶3] Riemers' Petition for Rehearing is based upon the following grounds:

[¶4] **Ground 1: Neither court applied the correct statutory standard when determining the sanction imposed upon Riemers under N.D.C.C. § 28-26-01.**

[¶5] As noted by the Honorable Gary H. Lee, District Judge, in his dissent, "A motion is frivolous only if there is such a complete absence of actual fact or law, a reasonable person could not have expected a court would render a judgment in that person's favor." CHS, Inc. V. Riemers, *supra.*, ¶ 25, citing Estate of Pedro, 2014 ND 237, ¶ 14, 856 N.W.2d 775. The lower court, when sanctioning Riemers, focused upon the "claims presented in support of his Motion", his "arguments," and his "lack of verification" concerning one (1) mathematical amount identified by Riemers in his initial legal brief supporting his motion. App., ps. 91-94. This Court similarly asserts, "Likewise, Riemers may be assessed attorney's fees and costs under § 28-26-01(2) for moving to reopen the case if his arguments were frivolous."

[¶6] Reimers respectfully submits that N.D.C.C. § 28-26-01(2) does not authorize sanctions against a litigant for frivolous *arguments*. Rather, the statutory prerequisite for a sanction requires a showing the pleading [or motion?] is made with "a complete absence of actual facts" or a "complete absence of actual law" so that a "reasonable person" would not believe he could prevail.

[¶7] **A. No one can say there was a "complete absence of actual facts" for**

Riemers' motion.

[¶8] Below, CHS, Inc., had the burden to show the "complete absence of actual facts". It did not do so. Neither the lower court, nor this Court, made a determination that Riemers' Motion to Reopen was based upon "a complete absence of fact" – nor could any reasonable court make such mandatory finding to support a sanction under N.D.C.C. § 28-26-01. At the time of Riemers' March 17, 2017, Motion to Reopen, the Clerk of District Court's records revealed only $129.22 owing on the judgment – before applying the $70.07 credit due from Riemers' prior appeal. When making his motion, Riemers had actual knowledge of this $70.07 credit, and the lower court's records revealing only $129.22 was owed. App., ps. 31-32. At the time of Riemers' motion, Riemers testified CHS, Inc., "had again garnished, but not collected $130.00 from Richard's Alerus account." App., p. 32. In his Motion to Reopen, Riemers did not request the $130.00 be returned to him, or to his son. With the collected $130.00 already garnished from the Alerus account, there were "facts" in the record for Riemers to reasonably believe the amended judgment, as modified by the prior appeal, would be satisfied when the $130.00 of garnished funds when executed by CHS, Inc. [*which happened on March 27, 2017*; App., p. 49]. When bringing his motion, Riemers also knew that CHS, Inc., wrongfully "...request(ed) costs for their garnishments, with no documentation to support those costs, and which likely include(d) costs associated with their repeated fumbled attempts of garnishment." App., 46.

[¶9] When accused by CHS, Inc., that his March 17 motion was frivolous due its later April 3, 2017, accounting [App., ps. 24-37], Riemers responded claiming his motion was not frivolous because "...the Vogel Law Firm has made repeated garnishments on bank accounts

with half of them rejected by the banks for improper service." App., p. 46. Riemers claimed he was not frivolous, "...when the Vogel Law Firm requests costs for their garnishments, with no documentation to support those costs, and which likely includes costs associated with their repeated fumbled attempts of garnishment." *Id.* In his response to an *unsupported claim* his motion was frivolous, Riemers acknowledged CHS, Inc., claimed it was owed $562.00, but informed the lower court that its clerk's records showed a balance owing of "**$129** (should be $59)." App., p. 48. Riemers then accounted to the lower court as to what he determined would be owing, based upon known payments made to CHS, Inc., and its two (2) partial satisfactions of judgments already then filed. With the known payments, two (2) satisfactions, and the $130.00 known payment to CHS, Inc., Riemers concluded there had been "...a **$71.00 overpayment** (this is without post judgment interest or prejudgment credits)". App., p. 50.

[¶10] The above-stated *facts* establish a factual basis for Riemers' motion. With a motion having a known factual basis, CHS, Inc., fails in its burden to show Riemers' motion was based upon "a complete absence of actual facts". Unless there is "complete absence of actual facts" established by the moving party's proof [not argument], attorney fees cannot be awarded under N.D.C.C. § 28-26-01(2). The statutory prerequisite to sanction Riemers, does not exist.

[¶11] **B. No one can say there was a "complete absence of law" for Riemers' motion.**

[¶12] Again, Riemers claimed his Motion to Reopen was not frivolous because CHS, Inc., failed to document its costs incurred in its "repeated fumbled attempts of garnishment".

App., p. 46. Riemers' response caused CHS, Inc., to file a supplemental brief wherein it asserted, without citation to legal authority, "Plaintiff is not required by law to seek the Court's approval for taxation of post-judgment costs incurred in recovering on a judgment." App., p. 65. CHS, Inc., claimed it acted in full compliance with N.D.C.C. § 28-21-04.2, and is not governed by N.D.C.C. § 28-21-07 that requires a sheriff to return an execution within sixty (60) days after its receipt. During the hearing, Riemers disputed CHS, Inc.'s position that it need not tax post-judgment costs, and that it was following proper execution procedure. To rebut CHS, Inc.'s position, Riemers relied upon the following statutes and/or rule of civil procedure rule ["law"]: N.D.C.C. § 28-26-16; N.D.C.C. § 28-26-19; N.D.C.C. § 28-21-10; N.D.C.C. § 28-21-04.2; and N.D.R.Civ.P. 54(e). Tr. of May 16, 2017, ps. 11, 14, & 19.

[¶13] Riemers' reliance upon established "law" shows Riemers' motion was not based upon a "complete absence of law" - an argument made by CHS, Inc., but with lack of verification. The provisions of N.D.C.C. § 28-26-19 reads, "In all actions, motions, and proceedings in the supreme and district courts, the costs of the parties must be taxed and entered on record separately." This unequivocal statute, and the other "law" cited by Riemers, provides him a reasonable belief – based upon "law"– that CHS, Inc., must have its garnishment costs taxed on the record, and its attorney must timely return a execution , in garnishment, with its stated costs similar to the duties of a sheriff when levying execution. Other that a bold declaration of frivolity, CHS, Inc., offers nothing – in this Court or below – to refute Riemers' "law".

[¶14] To sanction Riemers, CHS, Inc., had the burden to show the motion was based upon

a "complete absence of law". CHS, Inc., fails in its burden. Riemers' "law" negates the prerequisite to sanction.

[¶15] **C. Both courts failed to adopt a "reasonable person" standard when sanctioning Riemers.**

[¶16] The courts must apply a "reasonable person" standard to whatever facts, or law, a litigant relies upon when presenting his motion. N.D.C.C. § 28-26-01(2). It is respectfully submitted the *facts* and the "law", mentioned above, establish that Riemers could reasonably believe he was entitled to favorable relief. In this appeal, Riemers informed this Court the lower court's record listed the Amended Judgment as satisfied when CHS, Inc., filed its third Partial Satisfaction of Judgment for $130.00. Riemers' purpose, when mentioning the Clerk of District Court's satisfaction of the judgment, was not to present an appellate issue concerning the truth of the satisfaction [not raised below], but to establish sanctions are precluded against Riemers under the "reasonable person" standard as evidenced by the court record. See ¶ 29 of the Reply Brief of Appellant. *Riemers is entitled to rely upon the lower court records when presenting his motion below, and should be able to rely upon the lower court's records when presenting his appeal.* The lower court's sanction was based upon its "review of this file" [App., p. 94], thus all matters in the record before the lower court's decision can be addressed by Riemers in his appeal.

[¶17] Under the "reasonable person" standard, Riemers is not charged "with the wisdom of hindsight." Strand v. Cass County, 2008 ND 148, ¶ 11, 753 N.W.2d 872. Not charged with such wisdom, Riemers was not expected to know a litigant "is not required by law to seek the Court's approval for taxation of post-judgment costs" incurred in garnishment

proceedings. App., ps. 65, 94. Not charged with such wisdom, Riemers had no reason to know the lower court was under the mistaken belief the provisions of N.D.C.C. Chapter 32-09.1 were limited to cases involving garnishment of earnings. App., p. 87. The major difference between the parties' accounting were the untaxed costs incurred in garnishment proceedings, and accruing interest thereon. With wisdom of hindsight, Riemers would have thoroughly briefed garnishment laws to the lower court, so that the uninformed lower court would not dismiss the law relied upon by Riemers so cavalierly. But for this Court to state, in ¶9 of its decision, that Riemers is subject to sanction "... for moving to reopen the case if his arguments are frivolous", yet still knowing such sanction is based upon a misapprehension of law, is *unconscionable.*

[¶18] Affirming a sanction because of Riemers's "lack of verification" for his "argument", while knowing the claim of a "frivolous motion" is due to litigant's *subsequent argument*, itself lacking in verification, that one does not need to tax garnishment costs [and therefore its accounting is accurate], smacks of penalizing Riemers in violation of his constitutional right to free speech. "Prior restraint of expression bears a heavy presumption against constitutional validity." Farm Credit Bank of St. Paul v. Brakke, 483 N.W.2d 167 (N.D. 1992); and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). To sanction a *litigant's argument* is a form of prior restraint of free speech – and this Court's decision undermines the statutory protection afforded litigants so that now a litigant can be sanctioned solely upon a mere unsupported claim there was a "complete absence of actual facts and law". This Court's decision chills a litigant's attempt to reverse, modify or establish new law, for every such motion is subject to a claim of "frivolous argument". The right of

Riemers to petition his government for relief in a judicial forum is safeguarded by the First Amendment to the Constitution of the United States, and Article 1, § 9, of the Constitution of North Dakota. This right is abridged when any court is authorized to sanction Riemers, or any litigant, upon a mere declaration an "argument" is frivolous, even though supported by facts and law.

[¶19] **Ground 2. All issues Riemers raised in this appeal were earlier raised.**

[¶20] In the lower court Riemers argued CHS, Inc., had not followed garnishment procedures, and it was not fair to award costs to CHS, Inc, for its "fumbled" or rejected garnishment procedures. App., p. 46, 48-49. Riemers had argued CHS, Inc., must tax its post judgment costs, incurred in the garnishment proceedings, in the judgment [context: *Garnishment judgment*]. Tr., ps. 19-20. Riemers' accounting relied upon partial satisfactions of record, and the lower court's decision was based upon its "review of this file". App., ps. 50, 96. Riemers raised issues as to whether it was fair to have a judgment accrue interest upon $1,842.61 of monies in CHS, Inc.'s attorneys' trust account. App., p. 48. Since the entire dispute below involves *garnishment*, all issues raised by Riemers in his appeal were validly raised, contrary to this erroneous opinion.

Respectfully submitted this 30th day of April, 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 30th day of April, 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: **Petition for Rehearing**.

[¶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 30th day of April, 2018.

Notary Public

DAVID GARAAS
Notary Public
State of North Dakota
My Commission Expires July 19, 2023