IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20200122
Ward County Civil No. 51-2016-CV-01678

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., n/k/a Montana Dakota Utilities Co., a Subsidiary of MDU Resources Group, Inc.,	)
Plaintiff and Appellee,	)
vs.	)
Lavern Behm,	)
Defendant and Appellant.	)

APPELLANT'S REPLY BRIEF

On Appeal from Judgment Dated July 20, 2018 [Docket No. 89] including Order Denying Vern Behm's Motion for Summary Judgment Dated December 14, 2017 [Docket No. 42], Judgment Dated February 11, 2020 [Docket No. 176] including Order Dated January 3, 2020 [Docket No. 149], and Order Dated February 7, 2020 [Docket No. 171], the Honorable Gary H. Lee Presiding, Ward County District Court, North Central Judicial District

Lynn Boughey (04046)
lynnboughey@midconetwork.com
Attorney for Lavern Behm
P.O. Box 1202
Mandan, ND 58554-1202
(701) 751-1485

Table of Contents

Table of Authorities

Statutes

¶1 ARGUMENT

¶2 The primary argument raised by MDU is that this Court already resolved all the federal issues in the prior appeal and therefore any appeal should be rejected. However, as noted in our previous briefing, the District Court ruled in our favor on state law only grounds. As such, the federal issues were not raised below or addressed by this Court. And although there was a reference to the opportunity for this Court to also apply federal law – since the due process provisions of both state and federal law are so similar – this Court concluded that the federal issues were not raised. On remand, we very clearly raised the federal issues (for the first time to the district court) and requested jury instructions specifically employing federal law. Thus, on remand, there is no doubt that the federal issues were properly raised. Again, because the District Court made his decision entirely based on state law, the District Court previously had no occasion to address or apply federal law. On remand the federal issues were raised. This appeal therefore properly raises the federal issues relating to property rights.

¶3 MDU also asserts that it should not have to respond to the constitutional issues raised in our brief and requests attorney fees for having to do so. This is somewhat ironic. In its brief to the US Supreme Court, MDU asserted that the federal issues were not addressed below and therefore certiorari should be denied:

> This Court should deny Behm's petition. First, this Court lacks jurisdiction because Behm did not properly present any federal issue to the North Dakota Supreme Court or the district court. This Court does not consider federal issues raised for the first time in a petition for certiorari. That alone is enough to deny the petition.

MDU Brief in Opposition at 1, US Sup. Ct. No. 19-197 (Oct. 15, 2019). See also *ibid*., page 6: "The first time Behm pressed any federal claim in this case was in his petition to

this Court. That alone is enough reason to deny his petition." Now, when it is to a different advantage, MDU asserts that federal issues were indeed raised previously.

¶4 As a practical matter, it was necessary for Mr. Behm to raise all the federal and state issues so that the United States Supreme Court would be in a position to once again consider taking certiorari. The fact that at least one of the justices requested briefing by MDU indicates that there is some interest at the United States Supreme Court in reaching the merits relating to property rights. As a matter of practicality, it is therefore necessary to raise all issues at this time so that MDU cannot argue that the issues were not raised below. In addition, this Court is now in the position – by raising the additional issues before the District Court – to apply and interpret the federal due process rights and property rights that should apply to all North Dakotans.

¶5 As to the issue of attorney fees and the denial of the fees relating to the appeal to the US Supreme Court, we assert that the failure to apply the plain language of Section 32-15-32 constitutes an abuse of discretion. Refusing to follow the plain language of the statute is in of itself an arbitrary, unconscionable, and unreasonable action.

¶6 At paragraph 24 of MDU's brief, MDU asserts that we failed to comply with Rule 44 the North Dakota Rules of Appellate Procedure. However, that rule applies when we question the constitutionality of the statute. We did not question the constitutionality of the statutes relating to eminent domain, but questioned the failure to apply that valid statute properly. We do not question the constitutionality of the statute. We consider it a valid statute. It is the *ignoring* the statute – and our constitutional provisions – that has been brought into question, not the validity of the statute itself.

¶7 We are requesting that our constitutional provisions and our state laws (that apply to real property rights) be applied. We are not questioning the constitutionality of these provisions; we are asking them to be given the full force of law. We are asking that these provisions be given substance by a proper interpretation that comports with our federal constitution. When an invalid interpretation of a valid statute occurs, is appropriate to argue for the proper application of that provision, and that is not questioning the validity of that provision but attempting to require the proper enforcement and interpretation of that statute.

¶8 MDU at paragraph 29 asserts that all of the federal issues could have been raised on our first appeal. We respectfully disagree. The District Court made his decision based solely on state law, and as such raising the federal issues was not an option.

¶9 Beginning at paragraph 43 MDU asserts that the appeal to the United States Supreme Court was improvident. Behm was in reality required to appeal at that time because the North Dakota Supreme Court asserted that the federal issues were raised, but insufficiently raised. Because of that decision – that the federal issues were presented to the North Dakota Supreme Court – we were obligated to petition for certiorari at that time so that we did not end up having another argument from MDU that we waived the federal issues. But the plain language of Section 32-15-32 refers to "all proceedings," and the appeal to the United States Supreme Court is a proceeding in this case. In addition, the fact that the United States Supreme Court requested briefing by MDU indicates, at the very least, that the appeal was being seriously considered by at least one justice, which in our factually supports our contention that the appeal was not improvident.

¶10 At paragraph 45 MDU refers to the District Court's opinion in which the lower court opined that "[a] petition to the United States Supreme Court is not proceeding contemplated in Chapter 32-15." MDU Brief ¶45, quoting from App. 242-43. It is difficult to discern how District Court is able to conclude what the legislature contemplated or was thinking when it passed Chapter 32-15. We do not believe that a proper rule of construction, when the language is plain, is to have the District Court decide cases based on what the judges think the legislature was thinking.

¶11 Beginning at paragraph 48, MDU asserts that it was appropriate for the District Court, an awarding "reasonable" fees, to award no fees whatsoever. A complete denial fees is not in awarded "reasonable attorney" fees. In applying the reasonableness standard, one must actually be reasonable, and not use that word as a basis for denying all fees.

¶12 Beginning at paragraph 53, MDU asserts that this appeal is frivolous. We respectfully disagree. First of all, we raised additional issues below to the District Court, and as such the appeal of those issues is certainly appropriate. In addition, given the fact that MDU has already argued before the United States Supreme Court that the federal issues were not raised below, at either the Supreme Court or District Court, is certainly appropriate to raise those federal issues as part of this appeal. Had we not raised the federal issues in this appeal, MDU would next assert that we waive those federal issues in response to any subsequent petition for certiorari.

Dated this 30th day of July, 2020.

/s/
Lynn M. Boughey (04046)
lynnboughey@midconetwork.com

Attorney for Appellant Vern Behm
P.O. Box 1202
Mandan, ND 58554-1202
(701) 751-1485

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

¶13 I certify that this Reply Brief complies with the page number rule of N.D.R.App.P. 32 in that the brief is 8 pages.

/s/
Lynn M. Boughey (04046)
lynnboughey@midconetwork.com
Attorney for Appellant Vern Behm
P.O. Box 1202
Mandan, ND 58554-1202
(701) 751-1485

20200122
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 30, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20200122
Ward County Civil No. 51-2016-CV-01678

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., n/k/a Montana-Dakota Utilities Co., a Subsidiary of MDU Resources Group, Inc.,

Plaintiff and Appellee,

vs.

Lavern Behm,

Defendant and Appellant.

APPELLANT'S CERTIFICATE OF SERVICE

¶1 Defendant-Appellant Vern Behm has served the following documents:

(1) Appellant's Reply Brief; and
(2) Certificate of Service 7-30-20.

The aforementioned documents were served on the 30th day of July, 2020, by email to the following:

Malcolm H. Brown	mbrown@crowleyfleck.com
Zachary R. Eiken	zeiken@crowleyfleck.com

¶2 Dated this 30th day of July, 2020.

/s/

Lynn M. Boughey (04046)
lynnboughey@midconetwork.com
Attorney for Defendant-Appellant
Vern Behm
P.O. Box 1202
Mandan, ND 58554-1202
(701) 751-1485

20200122
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 3, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20200122
Ward County Civil No. 51-2016-CV-01678

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc., n/k/a Montana-Dakota Utilities Co., a Subsidiary of MDU Resources Group, Inc.,	)
Plaintiff and Appellee,	)
vs.	)
Lavern Behm,	)
Defendant and Appellant.	)

APPELLANT'S CERTIFICATE OF SERVICE

¶1 Defendant-Appellant Vern Behm has served the following documents:

(1) Corrected title page to Appellant's Reply Brief;
(2) Certificate of Compliance; and
(3) Certificate of Service 8-3-20.

The aforementioned documents were served on the 3rd day of August, 2020, by email to the following:

Zachary R. Eiken zeiken@crowleyfleck.com

¶2 Dated this 3rd day of August, 2020.

/s/

Lynn M. Boughey (04046)
lynnboughey@midconetwork.com
Attorney for Defendant-Appellant
Vern Behm
P.O. Box 1202
Mandan, ND 58554-1202
(701) 751-1485