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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE

STATE OF NORTH DAKOTA

Matthew Beland, Plaintiff and Appellant, and Sarah M.Kyte Interested Party and Appellant, vs. Jeremiah Danel, Jeremiah Danel, D.D.S., P.C Defendant(s) and Appellee.	)	**APPELLANTS' REPLY BRIEF** Supreme Court No. 202220057 District Court No. 18-2021-CV-499

Appeal from Findings of Fact, Conclusions of Law and Order for Judgment dated December 8, 2021, and the Judgment dated December 28, 2021, which were issued by the Honorable Lolita Hartl Romanick, District Court Judge, Grand Forks County, Northeast Central Judicial District.

ORAL ARGUMENT REQUESTED

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APPELLANTS' REPLY BRIEF

I. Appellants Have Not Waived Their Right to Appeal.

¶1 Danel argues that Appellants have waived their right to appeal by paying the attorney's fees awarded by the district court pursuant to a writ of execution issued by upon request of attorney Jennifer Albaugh. (See ¶51of Appellee's Brief; See also R236, R237). Danel misstates the caselaw which provides: "[w]hile a party who voluntarily pays a judgment waives the right to appeal, payment of a judgment under coercion or duress is not a waiver of the right to appeal." *Lyon v. Ford Motor Company*, 2000 ND 12, 604 N.W.2d 453, ¶5, 458). Danel fails to acknowledge that this Court has repeatedly stated "payment of a judgment under duress imposed by execution is not voluntary." *Twogood v. Wentz*, 2001 ND 167, 634 N.W.2d 514, 517 (N.D. 2001); (discussing *Grady v. Hansel*, 223 N.W. 937 (N.D. 1929). The burden is on the party moving to dismiss the appeal to show the judgment was voluntarily paid and satisfied. *See Grady*, 57 N.D. at 725, 223 N.W. at 938. Moreover, Danel did not raise this issue before the district court, and therefore, cannot raise it for the first time on appeal. Danel even argues this very point in his Responsive Brief and cannot now argue contrarily. (See ¶55 of Apellee's Brief).

¶2 Danel even acknowledges in his Brief that payments made by Appellant's were done so **after** Appellants filed this appeal, filed Motions to Stay Execution, filed Ex Parte Motions to Dissolve the Writs of Execution, and while those motions were pending. (R230; R239). (See ¶ 55 of Apellee's Brief). Danel untruthfully claims that "despite having the financial capacity to do so, appellants did not file a bond in support of motion to stay." (See ¶ 55 of Apellee's Brief). In fact, Beland reached out to Danel's counsel and requested to post the funds obtained by the Sheriff's Office as a cash bond with the district

court on April 27th, 2022. However, the Sheriff's Office would not release Beland's seized funds to him unless attorney Albaugh rescinded the Writ of Execution.(R258). Without those funds, Beland was unable to obtain a supersedes bond or post a cash bond with the Court. Ms. Albaugh refused to allow Beland to obtain his money to post with the district court. Beland and Kyte were unable to pay the fees and had to borrow funds from others to avoid the Sheriff's Office seizing their vehicles and funds in attorney Kyte's trust account. (R233; R234; R259; R260). Danel's claim that attorney Kyte paid the funds for Beland is also untruthful. Attorney Kyte applied for a supersedes bond with two surety providers but was denied due to lack of two (2) years tax returns showing income from self-employment. Kyte become self employed less than two years ago. (R1, R101). Kyte also applied for a letter of credit and was denied for the same reason. The record clearly shows the Appellants funds were involuntarily obtained by the Sheriff's Office upon the Writ of Execution issued by attorney Albaugh. (R233, 234, 253, 259, 260).

¶3 Moreover, the attorney's fees at issue are incidental to the judgment and do not go to the merits of the case. Not only are the attorney's fees in this action incidental to the merits of the case, they are incidental to the imposition of sanctions. In *Twogood*, this Court held "the payment of costs which are only incidental to the judgment and do not in any way go to the merits of the case will not defeat the right to appeal." *Twogood,* at ¶5. quoting *St. Vincent's Nursing Home v. Department of Labor*, 168 N.W.2d 265, 266 (N.D. 1969). A "`judgment consists of two parts, — one on the merits, and the other for the costs. The payment and satisfaction of the latter is no bar to error proceeding to obtain the reversal' of the former." *Carroll v. Ryan*, 56 N.W.2d 682, 684 (N.D. 1953) (quoting *Woodward v. State ex rel. Thomssen*, 79 N.W. 164, 164 (Neb. 1899)). Although,

under these circumstances, there are three parts, — one on the merits, one on the collateral issue of sanctions, and one for the costs. “A motion for sanctions is "collateral to the merits of the underlying litigation." *Kellar v. Von Holtum*, 605 N.W.2d 696, 700 (Minn. 2000).

¶4 Under the facts and circumstances presented in this case, Danel has not met his burden of showing Appellants waived their right to appeal by voluntarily paying the judgment. Contrarily, the record shows Beland, and attorney Kyte pursued statutory options to stay judgment and attempted to post supersedes bonds, and funds were obtained involuntarily by the Sherriff’s Office under Writs of Execution. (R230-235; R239-241; R251-252; R254; R258-261). Moreover, payment does not waive Appellants right to appeal regardless of whether it was voluntary or not as it is incidental to the merits.

II. Danel Failed to Follow the Requirements of Rule 11.

¶5 Danel inaccurately claims that Appellants have raised for the first time on appeal that service of Danel’s motion for sanctions was improper and not in compliance with Rule 11, N.D.R.Civ.P. Beland **did** argue improper service in his Brief to the district court stating “[Danel’s] filing of the Motion on April 30th, providing only ten days to respond during Ms. Kyte’s maternity leave was unnecessary and harassing.” (R203:¶25). Danel also inaccurately claims that Appellants argued that electronic service was ineffectual without citing to any legal authority. In truth, Appellants cited Rule 11(c)(1)(A) in their Brief which provides: “A motion for sanctions . . . must be served as provided in Rule 5, but must not be filed with or presented to the court unless, within *21 days after service* of the motion . . .” (See ¶24 of Appellants’ Brief).

¶6 Danel fails to acknowledge that strict compliance with Rule 11, N.D.R.Civ.P. and its requirements, are his burden to prove. *C & K Consulting, LLC v.*

Ward Cnty. Bd. of Comm'rs, 2020 ND 98, ¶18, 942 N.W.2d 823, 828. Moreover, Rule 11(c)(2), N.D.R.Civ.P., requires that a motion for sanctions be "served under Rule 5 which states "electronic service is not effective if the serving party learns through any means that the document did not reach the person to be served." N.D. R. Civ. P. Rule 5.

¶7 Danel untruthfully argues, for the first time on appeal, that his attorney did not have any indication that the motion was not effectively transmitted to Attorney Kyte's e-mail address. (See ¶57 of Apellee's Brief). Albaugh was notified by attorney Kyte via telephone at the beginning of March, 2021, that she would be on maternity leave from April through July and further notified, in email correspondence dated March 31, 2021, attorney Kyte would be on leave, April 7th, 2021. Additionally, attorney Albaugh was in communication with Gretchen Handy, as the attorney overseeing attorney Kyte's cases while on maternity leave, and yet she still served the Motion for Sanctions upon sarahm@hlglaw.net at 3:06 p.m. on April 7, 2021, and did not serve it upon Gretchen Handy at all. Notably, attorney Kyte did not respond to Danel's Motion – nor was any testimony elicited from her, Beland, or any other witness regarding culpability, state of mind, whether the moving party was prejudiced, the degree of prejudice, or the impact it has on presenting or defending his case, and the availability of less severe alternatives as required under the *Ringsaker* analysis. (R226) See *Ringsaker v. Workers Compensation Bureau*, 2003 ND 122, 666 N.W.2d 448, ¶¶ 11-13, 451.

¶8 Danel further argues that deviation from N.D. R. Civ. P. 11 (c)(1), which requires law firms be held jointly responsible for any violation of the rule by an associate, was warranted. Despite Danel's conclusive assertion, he has wholly failed to meet his burden in proving exceptional circumstances exist to warrant such a deviation. Contrarily,

Danel's counsel is well aware that the owner of the firm was the only one able to receive service and obligated to oversee and represent Beland during Kyte's maternity leave.

III. The District Court Misapplied the Law in Imposing Sanctions.

¶9 Danel fails to explain in his Responsive Brief how any of the district courts findings warranted sanctions under the requirements of Rule 11 or show he has met his burden of proof. Danel argues Rule 11 Sanctions were warranted against Beland and Kyte for the following reasons: 1.) Prelitigation emails, (R112); 2.) alleged appointment reminders sent via text message for two (2) of the thirteen (13) appointments. (R110); 3.) Danel allegedly discharging the children from further treatment via letter dated April 2, 2021, after repeatedly threatening to continue treatment in other emails. (R16, R35, R36); 4.) records were provided to Beland's counsel, months after the action commenced, that had never previously been provided. (R117); 5.) Beland's failure to withdraw the action upon Danel's demand - contingent upon Beland agreeing to pay Danel approximately $17,000 in alleged attorney's fees. (R152; R154); 6.) Danel's Letter stating "it is a necessary expenses . . . there is no reason to deny her the care she is seeking any more than an emergency room doctor would stop treatment if you wrote them a similar email." (R226:52); 7.) Rylander's testimony stating she did not want to share an email account with Beland to allow each of them access to their son's online portal, when no request was ever made to share an email account. (R227); and

¶10 7.) Beland's complaint to the Office of Civil Rights resulting in findings that Danel had violated Beland's rights by failing to provide him his son's medical records in violation of the Health Insurance Portability and Accountability Act. (R9)
Under HIPAA , "health information" includes "any information . . . created or received by a

health care provider . . . relat[ing] to . . . the past, present, or future payment for the provision of health care to an individual." 42 U.S.C. 1320d(4). HIPAA **requires** a covered entity to disclose protected health information for "treatment, **payment**, or health care operations[.]" 45 C.F.R. 164.502(a)(1)(ii). Danel's position, through counsel, was that only the mother had a right to request those records; (R8:2) (Noting that Danel's counsel did not even know the correct acronym for HIP**AA** and referred to it as HIPPA).

¶11 Danel has not proffered a single argument that Beland's Amended Complaint violated Rule 11 or that Beland or attorney Kyte had been provided proper notice of what was alleged to be in violation of the Rule. Moreover, Danel argues to this Court that no *Ringsaker* analysis is required to impose sanctions, and yet he previously argued to the district court to the contrary. *Id*. (R33:3:8). (*Krenz v. XTO Energy, Inc.,* 2017 ND 19, ¶ 33, 890 N.W.2d 222 providing that judicial estoppel prohibits a party from assuming inconsistent or contradictory positions during the course of litigation). Danel has failed to meet his burden in proving sanctions were warranted, and his meritless argument that the *Ringsaker* analysis was not required is prohibited by judicial estoppel.

IV. <u>The Excessive Sanctions Violate Appellants' Constitutional Rights.</u>

¶12 Danel argues in his Responsive Brief that the amount of sanctions was warranted without showing any correlation between fees allegedly incurred due to alleged violations of the Rule. In *State by & through Workforce Safety & Ins. v. Boechler, PC*, 2022 ND 98, ¶ 15, this Court noted the excessive fines clause, U.S. Const. amend. VIII, applies to "judgments about the appropriate punishment for an offense belong in the first instance to the legislature. . ." *Id.* at 336. In *United States v. Bajakajian*, 524 U.S. 321, 334 (1998), the United States Supreme Court concluded the federal excessive fines clause

is violated if the fine is "grossly disproportional to the gravity of a defendant's offense." Here, the record shows **NONE** of the monetary sanctions were incurred for responding to the Complaint – while others were incurred even prior to litigation commencing— and that the amount was erroneously overinflated. (R157); (R158); (R199); (R200).

V. Sanctions Against Danel and his Counsel are Warranted.

¶13 Here, the record is filled with examples of misleading claims, harassment towards process servers, improper insertions of irrelevant and defamatory claims directed towards attorney Kyte and Beland, showing Danel's desire to detract from the merits of this case, unnecessarily increase costs, and bully Beland to withdraw the action. (R16, R21-26, R33-38, R42-R44, R47, R49, R54, R68, R74, R151-154, R197, R233-234, R236-237).

¶14 Danel argues that attorney Kyte's relationship with her client is "irrelevant," however, in the same Brief he contrarily argues attorney Kyte's relationship with Beland is relevant to support his false allegation that she is "too personally involved" for purposes of sanctions against Beland and Kyte. Notably, Rule 1.7(c), N.D. R. Prof. Cond., does not afford Danel standing to make such an argument. In fact, Rule 1.8(j), N.D. R. Prof. Cond., explicitly permit attorneys to represent their spouse. Beland's choice to retain his wife is his constitutionally protected choice to make, safeguarded by the Sixth Amendment. (R260); See also *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

¶15 The sole purpose of Danel's inclusion of irrelevant information regarding attorney Kyte's relationship status, was to arouse prejudice from the district court towards Beland and his counsel– which is precisely the response it obtained. (R61:10:3, R207:45:111). See also *State v. Paulson*, 477 N.W.2d 208, 210 (N.D. 1991) (stating "[r]emarks by counsel that are made for the purpose of arousing sympathy or prejudice

are improper and counsel must refrain from such action.") See also *Blessum v. Shelver*, 567 N.W.2d 844, ¶32, 851 (N.D. 1997) (stating: "[p]ersonal attacks on opposing parties and their attorneys, whether outright or by insinuation, constitute misconduct.")

¶16 Additionally, Danel's Motion for Rule 11 Sanctions was meritless, as shown by the fact that it was filed in conjunction with, and replicated the claims in his Motion to Dismiss, which were denied by the district court. (R 60; R77; R205) Danel's Motion for Rule 11 Sanctions was filed for the improper purposes of bullying Beland to dismiss his meritorious complaint and entrap Beland into paying Danel's attorney's fees. (R152, R154). Danel's counsel's use of filing motions for Rule 11 Sanctions is a repeating pattern of abusive use of the motion as a trial tactic. *Lizakowski v. Lizakowski*, 2019 ND 177, 930 N.W.2d 609. The Third Circuit, in analyzing this scenario under Rule 11 Sanctions, stated:

> The use of Rule 11 as an additional tactic of intimidation and harassment has become part of the so-called "hardball" litigation techniques espoused by some firms and their clients. Those practitioners are cautioned that they invite retribution from courts which are far from enchanted with such abusive conduct. A court may impose sanctions on its own initiative when the Rule is invoked for an improper purpose.
>
> *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 485 (3d Cir. 1987)

VI. It Was an Abuse of Discretion to Sua Sponte Dismiss the Action.

¶17 Danel argues the joint letter filed by counsel for the parties to this appeal stating "[t]he Judgment adjudicated all issues in this case and the parties agree that no other issues are pending before the district court" (R:220) contradicts Appellants' argument that the district court abused its discretion by adjudicating all issues without notice. (See ¶18 of Appellee's Brief). Danel's claim is without merit. Clearly Appellant agrees that the district court adjudicated all issues rendering the case a final appealable order/judgment. However, Beland appeals the sua sponte dismissal as he was deprived notice the court may dismiss

the action. The notice of hearing issued by Danel's counsel states: "PLEASE TAKE NOTICE that a hearing on Plaintiff's Motion for Temporary Restraining Order and Defendant's Motion to Dismiss has been scheduled . . ." (R68) This hearing was scheduled by attorney Albaugh without prior notice to Kyte during times Albaugh knew Kyte was unavailable. (R69, R233). Danel's claim that Beland voluntarily litigated preliminary and permanent injunctive relief is without merit and directly contradicted by N.D. R. Civ. P. 65 which requires the parties to stipulate to combining the hearings – which did not occur.

¶18 Moreover, Danel's argument that Beland voluntarily litigated all issues (in one hour) is without merit as it fails to acknowledge that Beland was deprived the opportunity to request more time due to the lack of notice and the fact that N.D. R. Civ. P. 65(d)(1) requires the district court to receive evidence by way of declaration in determining TROs. As such, Beland was never on notice and deprived due process when the district court dismissed the action without providing Beland notice or an opportunity to respond. *Zink v. Enzminger Steel, LLC*, 2011 ND 122, 798 N.W.2d 863, ¶17, 869 (N.D. 2011).

CONCLUSION

¶19 For the foregoing reasons, this Court should grant the relief requested in Appellants' Initial Brief and deny Danel's Motion for attorney's fees as it is entirely without merit.

Dated this 27th day of June, 2022.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for Appellant, in the above captioned matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, the above brief was prepared with proportional type face and does not exceed 12 pages.

Dated this 27th day of June, 2022.

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Matthew Beland, Plaintiff and Appellant, and Sarah M.Kyte Interested Party and Appellant, vs. Jeremiah Danel, Jeremiah Danel, D.D.S., P.C Defendant(s) and Appellee.	)))))))))	**CERTIFICATE OF SERVICE** Supreme Court No. 202220057 District Court No. 18-2021-CV-499

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[1] The undersigned, being of legal age, being first duly sworn deposes and says that he served true copies of the following documents:

1. Appellants' Reply Brief with Certificate of Compliance

And that said copies were served upon:

Jennifer Albaugh, jalbaugh@abstlaw.net

Matthew Kirschenmann, mkirschenmann@abstlaw.net

by electronically filing said documents through the court's electronic filing system.

Dated this 27th day of June, 2022.

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