20230115
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 31, 2023
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Robert Martinie Goff, Appellant, v. William Panos, Director, Department of Transportation, Appellee.	**Supreme Ct. No. 20230115** **District Ct. No. 09-2022-CV-00248**

APPEAL FROM THE APRIL 6, 2023
ORDER DENYING REQUEST FOR COSTS AND ATTORNY'S FEES OF THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT

HONORABLE STEVEN E. MCCULLOUGH

BRIEF OF APPELLEE

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STATEMENT OF ISSUES

[¶1] Whether the district court abused its discretion in denying Goff's request for attorney's fees under N.D.C.C. § 28-32-50(1)?

STATEMENT OF CASE

[¶2] Following his arrest for being in actual physical control of a vehicle while under the influence of intoxicating liquor, Robert Martinie Goff (Goff) requested an administrative hearing on the Department's intended suspension of his driving privileges. (R10:4). The hearing was held on January 20, 2022. (R11). The hearing officer suspended Goff's driving privileges for a period of 91 days finding, among other things that "Goff's vehicle was in a private area in which the public has access." (R20). Goff appealed to the Cass County District Court challenging whether the arresting officer had reasonable grounds to believe Goff violated N.D.C.C. § 39-08-01 specifically arguing that the location of his vehicle was in a place not accessible by the public. (R1).

[¶3] On April 4, 2022, Judge Marquart affirmed the hearing officer's decision and denied Goff's requests for costs and fees. (R33). On December 2, 2022, this Court reversed the district court and the Department's suspension of Goff's driving privileges for 91 days concluding the hearing officer's finding that the public has a right of access to the private parking lot at issue was not supported by a preponderance of the evidence. (R48). Because Goff had sought an award of attorney's fees and costs at the district court, this Court remanded for a determination whether the Department acted without substantial justification under N.D.C.C. § 28-32-50(1), as the district court's initial decision denying attorney's fees and costs did not provide a reason for the denial. Id.

[¶4] Following the briefing of the parties, the district court, now presided over by Judge McCullough, issued an Order Denying Request for Costs and Attorney's Fees. (R58). In doing so, the district court cited the proper standard for awarding costs and attorney's fees, along with citing cases evaluating whether an administrative agency's position is or is not "substantially justified". Id. The district court then applied the legal standard to the facts of Goff's case and stated:

> Neither party here disputes that this case presented a close question on an unsettled area of the law. More importantly, the hearing officer did not believe that the law was clear, given the North Dakota Supreme Court's recent decision in Suelzle v. North Dakota Dep't of Transp., 2020 ND 206, ¶ 14, 949 N.W.2d 862. In the end, however, the hearing officer found that Goff's vehicle was in a place where the public had a right of access for vehicular use and believed a reasonable basis in law and fact existed to uphold the arrest. The Court having been similarly convinced by the reasonableness of the Department's position upheld the decision. See Tedford, 2007 ND 142, ¶ 28, 738 N.W.2d 29 (explaining that a "strong indicator" that an agency's position was substantially justified is that it convinced a district court that its legal position was correct). Although the Department was ultimately incorrect, it nonetheless made good faith and facially reasonable arguments based on facts that were supported by case law and, therefore, it acted with substantial justification.

(R58:3). Goff appealed the denial of costs and attorney's fees to this Court. (R59).

STANDARD OF REVIEW

[¶5] This Court applies the abuse of discretion standard of review to a challenge of the denial or award of attorney fees under N.D.C.C. § 28-32-50. Little v. Traynor, 1997 ND 128, ¶ 41, 565 N.W.2d 766. A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination. J.B. v. R.B., 2018 ND 83, ¶ 5, 908 N.W.2d 687; accord In re Estate of Cashmore, 2010 ND 159, ¶ 21, 787 N.W.2d 261. An abuse of discretion by the district

court is never assumed, and the burden is on the complaining party to affirmatively establish an abuse of discretion. Cashmore, at ¶ 21 (citing Burris Carpet Plus, Inc. v. Burris, 2010 ND 118, ¶ 49, 785 N.W.2d 164; Martin v. Trinity Hosp., 2008 ND 176, ¶ 17, 755 N.W.2d 900. The party seeking relief must show more than that the district court made a "poor" decision, but that it positively abused the discretion it has. Martin, at ¶ 17; Gonzalez v. Tounijan, 2004 ND 156, ¶ 10, 684 N.W.2d 653. This Court will not overturn the district court's decision merely because it is not the decision it may have made had it decided the matter. Martin, at ¶ 17; Gonzalez, at ¶ 10.

LAW AND ARGUMENT

The District Court did not abuse its discretion in denying Goff an award of attorney fees and costs under N.D.C.C. § 28-32-50(1).

[¶6] Section 28-32-50(1), N.D.C.C., provides:

> In any civil judicial proceeding involving as adverse parties an administrative agency and a party not an administrative agency or an agent of an administrative agency, the court must award the party not an administrative agency reasonable attorney's fees and costs if the court finds in favor of that party and, in the case of a final agency order, determines that the administrative agency acted without substantial justification.

N.D.C.C. § 28-32-50(1) requires a court to award a non-administrative agency party attorney fees and costs if the court rules in favor of that party and it determines an administrative agency acted without substantial justification in the same civil judicial proceeding. Schock v. N.D. Dep't of Transp., 2012 ND 77, ¶ 41, 815 N.W.2d 255 (emphasis in original.) "Merely because an administrative agency's actions are not upheld by a court does not mean that the agency's action was not substantially justified." Tedford v. Workforce Safety & Ins., 2007 ND 142, ¶ 25, 738 N.W.2d 29. This Court has interpreted "substantial justification" to mean "justified to a degree that could satisfy a reasonable

person." Peterson v. N.D. Dep't of Transp., 518 N.W.2d 690, 696 (N.D. 1994) (external citation omitted.) An agency's actions may be substantially justified even if they ultimately are found by a court to be erroneous, if a reasonable person could think the actions had a reasonable basis in law and fact. Id. "An administrative agency's position is substantially justified . . . if a reasonable person could think the position is correct and the position has a reasonable basis in law and fact." Dutton v. Workforce Safety & Ins., 2010 ND 99, ¶ 15, 783 N.W.2d 278.

[¶7] Only in rare and extreme circumstances has this Court upheld an award of attorney's fees under N.D.C.C. § 28-32-50, or its predecessor, N.D.C.C. § 28-32-21.1, in appeals by non-agency parties from final agency orders. See Singha v. N.D. State Bd. of Med. Exam'r, 1998 ND 42, ¶ 38, 574 N.W.2d 838 (agency "inexplicably" failed to comply with procedures in Administrative Agencies Practice Act); Walton v. N.D. Dep't Hum., Servs., 552 N.W.2d 336, 341-42 (N.D. 1996) (agency improperly allocated burden of proof, ignored relevant statutory standards, and made probable cause finding despite lack of any supporting evidence); Lamplighter Lounge, Inc. v. State ex rel. Heitkamp, 523 N.W.2d 73 (N.D. 1994) (agency required appellant to undergo a second administrative hearing while first hearing and same issue was on appeal to Supreme Court); Aggie Investments GP v. Pub. Serv. Comm'n, 470 N.W.2d 805, 813-14 (N.D. 1991) (agency failed to follow law requiring a hearing whenever interested parties are not in agreement).

[¶8] Here the district court denied Goff's request for attorney fees under N.D.C.C. § 28-32-50(1) finding the Department's decision, though ultimately reversed by this Court, was substantially justified. (R58). Goff argues the district court abused its discretion in denying his request for costs and fees by maintaining the district court applied the wrong standard

of review under N.D.C.C. § 28-32-50(1). Appellant's Br. ¶ 23. More specifically, Goff argues Judge McCullough applied a frivolous argument standard rather than whether the Department was "substantially justified". Id. at ¶ 24. Goff's argument is erroneous as Judge McCullough applied the proper standard in denying Goff's request for fees and costs.

[¶9] Nowhere in Judge McCullough's decision does he use the term frivolous as impliedly claimed by Goff. In fact, Judge McCullough's decision cites the correct statutory standard and cases applying that very standard. Simply because this Court ultimately determined the preponderance of the evidence did not support the hearing officer's decision of the routine use of the parking lot by the public and that the hearing officer misinterpreted the city ordinance does not mean the decision was not reasonable. If all an appellant had to do was prevail on appeal, there would be no "substantial justification" middle ground as the law requires.

[¶10] In Service Oil, Inc. v. State, 479 N.W.2d 815 (N.D. 1992), the district court had found the State's position on the interpretation of a state tax statute was not "substantially justified" and awarded attorney's fees. In reversing that award, this Court stated:

> This case involves complicated issues about whether or not a judicial decision declaring a state taxing scheme unconstitutionally applies retroactively and, if so, the appropriate relief. Although we have not upheld the State's position on the merits of those issues, our decision does not mean that the State acted without substantial justification . . . .
>
> Although McKesson sets the minimum requirements for relief as a matter of federal constitutional law, the unsettled and complex constitutional issues involved in this case establish that the State's position, while not persuasive, was "justified to a degree that could allow a reasonable person" to believe that it had a "reasonable basis in law and fact." Aggie supra, 470 N.W.2d at 814. See Minot Farmers Elevator v. Conrad, 386 N.W.2d 463 (N.D. 1986) [Tax Commissioner did not act without substantial justification where his interpretation of statute, while not persuasive, was reasonable]. **A contrary conclusion would deter administrative agencies from making good faith arguments for creditable extensions**

> **and interpretations of the law. We do not believe that Section 28-32-21.1, N.D.C.C., was intended to restrict administrative agencies in that manner.**

Service Oil, 479 N.W.2d at 825 (Emphasis added).

[¶11] This Court's denial of an award of attorney's fees in Peterson, likewise, supports the Department's position that Goff failed to prove the hearing officer acted without substantial justification in finding that Goff was operating his vehicle on a highway or on a public or private areas to which the public has a right of access to for vehicular use in this state. 518 N.W.2d 690, 696 (N.D. 1994). In Peterson, the three appellants asked for administrative hearings in response to notices that the Department intended to suspend their driving privileges for allegedly displaying or possessing altered driver's licenses. 518 N.W.2d at 691. The hearing officer suspended the appellants' driving privileges and a district court subsequently affirmed the suspensions. Id. at 692.

[¶12] The Court reversed the administrative suspension of the appellants' driving privileges. Peterson, 518 N.W.2d at 695. The Court also considered the appellants' motion for attorney's fees. Id. at 695-96. The Court noted the only evidence relied upon by the Department appeared to be unsigned and uncertified documents from an unspecified Minnesota agency. Counsel for the Department "candidly admitted at oral argument that she does not know where the documents came from, although she speculated that they were sent by either the Moorhead police department or the Minnesota driver's licensing authority." Id. at 692.

[¶13] The Court observed that "DOT's position is apparently that any document placed in a driver's file becomes a 'regularly kept record.'" Id. at 693. The Court noted, however, that the "DOT does not cite, nor are we aware of, any statute defining unsigned, uncertified

documents as 'regularly kept records . . . .'" Id. at 694. The Court added that the "DOT has failed to cite any persuasive support for its assertion that these documents are 'regularly kept records of the director' merely because they have been placed in a driver's file." Id.

[¶14] The Court summarized the relevant facts and concluded as follows:

> The documents admitted in this case are unsigned and uncertified; they bear no seal, letterhead, or other indication of official capacity; the separate 'supplements' could have been prepared on any typewriter or word processor; and the record contains no evidence establishing where the documents came from. In short, these documents bear no reliable, verifiable indicia that they are in fact true and correct copies of Minnesota police records. Although the Legislature has liberalized some evidentiary requirements in administrative driver's license suspension proceedings [see Salter v. Hjelle, supra], we do not believe the Legislature intended the procedural rules to become so lax as to allow admission of what is essentially an anonymous letter merely because it has found its way into a driver's file at DOT. Under these circumstances, we conclude that these documents are not self-authenticated as 'regularly kept records of the director.'

Id. at 694-95 (emphasis added.)

[¶15] The Court concluded that the authenticity of the documents also had not been established by extrinsic evidence, observing "admission of the unsigned, uncertified police records in this case is inconsistent with our decision in Langer v. N.D. State Highway Comm'r, 409 N.W.2d 635 (N.D. 1987)." Peterson, 518 N.W.2d at 695. Notwithstanding these clear suggestions that the Court viewed the Department's case as threadbare, the appellants' motions for attorney's fees were denied, with this Court simply observing that "[a]though we have rejected DOT's arguments in this case, we believe they have a reasonable basis in law and fact." Id. at 696.

[¶16] If grounds for an award attorney's fees was not present in Peterson, grounds for an award of attorney's fees is not present in this matter. Although the Court reversed the Hearing Officer's Decision finding the hearing officer's finding that the public has a right

of access to the private parking lot, the fact that Goff finally prevailed does not end the inquiry on whether he is entitled to attorney fees. Goff must show that the Department acted without substantial justification. Goff's argument that the Department acted without substantial justification is based entirely on this Court ruling against the Department. Goff simply argues because the Department was wrong on the law he is entitled to attorney's fees. Goff, however, sets the threshold of reasonableness unreasonably high and misses the mark. The Department's interpretation of the facts as they applied to the law regarding whether Goff's vehicle was in a place where the public had a right of access for vehicular use was reasonable, although later determined not supported by a preponderance of the evidence, by this Court.

[¶17] At the time the Department made its arguments to the district court the law was not settled regarding whether an apartment complex's private parking lot was a private area to which the public had a right of access to for vehicular use. In fact, this Court's prior precedents had found the following locations to fall within the scope of N.D.C.C. § 39-08-01: State v. Novak, 338 N.W.2d 637 (N.D. 1983) (finding a motorist parked on the edge of a field beyond the ditch was within the purview of N.D.C.C. § 39-08-01); State v. Thomas, 420 N.W.2d 747 (N.D. 1988) (vehicle located in the parking lot of a private gun club was within purview of N.D.C.C. § 39-08-01); Wiederholt v. Dir., N.D. Dep't of Transp., 462 N.W.2d 445 (N.D. 1990) (motorist found passed out in his vehicle in his farmyard approximately 100 feet from the roadway was properly arrested for actual physical control); Fetzer v. Dir., N.D. Dep't of Transp., 474 N.W.2d 71 (N.D. 1991) (motorist found asleep in a vehicle parked on a hill in an undeveloped area within the city could have his driving privileges suspended).

[¶18] This Court's two most recent cases, prior to its opinion in Goff, came to different conclusions in this area of law. In State v. Mayland, 2017 ND 244, 902 N.W.2d 762, the Supreme Court concluded a motorist parked in the driveway of his private home was within the purview of N.D.C.C. § 39-08-01. On the other hand, in Suelzle vs. N.D. Dep't of Transp., 2020 ND 206, 949 N.W.2d 862, where the motorist's vehicle was found parked in the grass lawn beyond the driveway of his improved residential yard, the Supreme Court reversed the Department's decision. Id. at ¶ 2. Yet in reversing the Department in Suelzle, the Court did not explicitly conclude the location of Suelzle's vehicle to be outside the scope of N.D.C.C. § 39-08-01 but instead reversed because the Department did not properly consider the appropriate factors identified in Mayland regarding whether the public has a right of access to Suelzle's grass lawn for driving or parking. Id. at ¶ 17.

[¶19] Here Goff's vehicle, unlike Suelzle's vehicle, was parked in a private parking lot, paved for that purpose, and like the vehicle in Mayland was located at the motorist's residence. But in contrast to Mayland Goff's residence is an apartment building and not a private home, which a reasonable person could find to be less restrictive to public access than a private home would be. Also, in contrast to Suelzle the hearing officer did analyze the Mayland factors before coming to the reasonable determination that Goff's vehicle was located in a place where the public had a right of access, notwithstanding the Fargo municipal parking ordinance. See (R20).

[¶20] As Judge McCullough's decision properly points out, this case presented close questions on unsettled areas of the law and Judge Marquart accepted the Department's legal and factual arguments and affirmed the hearing officer's decision. This Court's reversal of the district court judgment and rejection of the Department's position is based

on a fact specific scenario which required the weighing of factors to determine whether the public has a right of access for vehicular use to the described private area. The hearing officer reasonably analyzed those factors even though ultimately reversed by this Court.

[¶21] Based on the facts and law as recognized at the time Goff's hearing was held, the district court affirmed the Department's decision. See (R58). As cited by Judge McCullough, the fact that the district court initially affirmed the hearing officer's decision is strong evidence that the Department acted with substantial justification. In Tedford the Supreme Court stated:

> The fact that WSI convinced one district judge that its legal position was correct is a strong indicator that "a reasonable person could think the position is correct, and the position has a reasonable basis in law and fact." Rojas, 2006 ND 221, ¶ 17, 723 N.W.2d 403. Federal courts construing the EAJA have recognized that acceptance of the government's position by another federal judge, even if the position is ultimately found to be incorrect, is persuasive evidence that the position was substantially justified. See e.g., Herman v. Schwent, 177 F.3d 1063, 1065 (8th Cir. 1999); Friends of Boundary Waters Wilderness v. Thomas, 53 F.3d 881, 885 (8th Cir. 1995); Sierra Club v. Secretary of Army, 820 F.2d 513, 519 (1st Cir. 1987). The court in Herman noted that "the Government's ability to convince federal judges of the reasonableness of its position, even if the judges' and Government's position is ultimately rejected in a final decision on the merits, is 'the most powerful indicator of the reasonableness of an ultimately rejected position.'" Herman, 177 F.3d at 1065 (quoting Friends of Boundary Waters, 53 F.3d at 885).

2007 ND 142, at ¶ 27. As mentioned above the prior administrative and district court proceedings presented close questions on an unsettled or at least unclear area of the law.

[¶22] Where both sides present reasonable interpretations of the law as applied to the facts, "the closeness of the question is itself evidence of substantial justification." United States v. Gears, 835 F. Supp. 1093, 1101 (N.D. Ind. 1993), (citing Cummings v. Sullivan, 950 F.2d 492, 498 (7th Cir. 1991)). Here, the Department convinced independent decision makers of the reasonableness of its position that Goff's vehicle was in a place where the

public had a right of access for vehicular use (Hearing Officer Fagerlund and Judge Marquart). This is a "powerful indicator of the reasonableness" of the position. See Tedford, 2007 ND 142, at ¶ 27; Dutton, 2010 ND 99, at ¶ 15.

[¶23] This simply is not the "rare case" where the Department was not "substantially justified." A contrary holding would fly in the face of both North Dakota case law interpreting N.D.C.C. § 28-32-50 and this Court's divided decisions interpreting where the public has a right of access for vehicular use.

[¶24] The Department's arguments presented a facially reasonable, although concededly incorrect, interpretation of the law. This Court should also take into consideration the district court's initial agreement with and acceptance of the Department's position such that this Court should conclude the Department's decision had a reasonable basis in law and fact.

[¶25] At the end of the day, Judge McCullough properly exercised his discretion in concluding that the position of the Department was "substantially justified" thus precluding an award of attorney's fees and costs under N.D.C.C. § 38-32-50(1). This Court does not review the decision of Judge McCullough *de novo* but, rather, under the highly deferential "abuse of discretion" standard of review and, on that standard, the decision of Judge McCullough must be affirmed.

CONCLUSION

[¶26] The Department requests this Court affirm the district court's decision denying attorney's fees under N.D.C.C. § 28-32-50.

Dated this 31st day of May, 2023.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Robert Martinie Goff, Appellant, v. William T. Panos, Director, Department of Transportation, Appellee.	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20230115** **District Ct. No. 09-2022-CV-00248**

[¶1] The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the Brief of Appellee contains 17 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 word processing software in Times New Roman 12 point font.

Dated this 31st day of May, 2023.

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IN THE SUPREME COURT

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Robert Martinie Goff, Appellee, v. William T. Panos, Director, Department of Transportation, Appellant.	**CERTIFICATE OF SERVICE** **Supreme Ct. No. 20230115** **District Ct. No. 09-2022-CV-00248**

[¶1] I hereby certify that on May 31, 2023, the following documents: **BRIEF OF APPELLEE and CERTIFICATE OF COMPLIANCE** were filed electronically with the Clerk of Supreme Court through the North Dakota Supreme Court E-Filing Portal. I further certify that the foregoing documents were served electronically through the North Dakota Supreme Court E-Filing Portal upon Mark A. Friese at mfriese@vogellaw.com and Drew J. Hushka at dhushka@vogellaw.com.

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