20230115

FILED
IN THE OFFICE OF THE
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MAY 2, 2023
STATE OF NORTH DAKOTA

**IN THE SUPREME COURT**
**STATE OF NORTH DAKOTA**

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| Robert Martinie Goff,<br><br>Appellant,<br><br>vs.<br><br>William Panos, Director Department of Transportation,<br><br>Appellee. | **SUPREME COURT NO. 20230115**<br>Civil No. 09-2022-CV-00248 |

ON APPEAL FROM ORDER DENYING REQUEST FOR
COSTS AND ATTORNEY'S FEES DATED APRIL 6, 2023
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
HORNABLE STEVEN E. MCCULLOUGH PRESIDING

# BRIEF OF APPELLANT

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## STATEMENT OF ISSUE PRESENTED FOR APPEAL

[¶1] The law requires a court to award costs and attorneys' fees when an administrative decision is not substantially justified. An administrative decision lacks substantial justification if a reasonable person would not believe the decision possessed a reasonable basis in law and fact. This Court held a reasoning mind could not find the Department's decision was supported by the record. Did the district court abuse its discretion in finding the Department's decision was substantially justified when a reasonable person could not find the Department's decision was supported by the record.

## STATEMENT OF THE CASE

[¶2] This Court reversed the Department's suspension of the driving privileges of Appellant, Robert Martinie Goff ("Mr. Goff"), holding a reasonable person could not conclude the hearing officer's findings of fact were supported by the record, and remanding for consideration of an award of costs and fees. On remand, the district court denied an award of costs and fees. (R58) Mr. Goff timely appealed.

## STATEMENT OF THE FACTS

### I. The uncontradicted evidence presented at the administrative hearing showed Mr. Goff was not parked in an area where the public had the right to access for vehicular use.

[¶3] Following his arrest for DUI, Mr. Goff timely requested an administrative. (R10:4) At the hearing, the Officer Blake Omberg and John Goff testified.

> The evidence showed that [Mr.] Goff's truck was parked in the private parking lot outside of the apartment building where he lived. The building is three stories and contains 24 separate apartment units. The parking lot is on the south side of the building along with individual garages arranged in an "L" shape. John Goff testified that each tenant is assigned one garage and allowed to park in one parking space. The parking lot is accessible by a driveway located on the east side of the building, which is the only way in and out of the parking lot. The building has doors on the east and west sides. Partway up the driveway on the east side is a fence running perpendicular to the driveway. A sign on the fence reads "private property, private drive."
>
> John Goff testified his family has owned the property since its construction in 1968 and he has previously resided at the building. He testified that the parking lot is for tenants only and deliverers and visitors do not use the parking lot but instead park on the street. He acknowledged possible use of the driveway for picking people up and dropping people off up to, but not past, the fence and sign on the east side of the building. He testified that deliverers and visitors are not allowed to go beyond the sign to access the parking lot and that unauthorized vehicles parked in the parking lot have been towed over the years. John Goff further testified that he has served a notice of

> trespass upon an individual who was confronting tenants in the parking lot and reported the notice of trespass to law enforcement. He testified that the parking spot his son's truck was located in was not visible from the street or driveway when he arrived at the scene.

*Goff v. Panos*, 2022 ND 186, ¶¶ 3-4, 981 N.W.2d 909.

**II. Contrary to the undisputed testimony, the hearing officer found the public had a legal right to access the parking lot for vehicular use, misapplying relevant municipal law.**

[¶4] Despite this testimony, the Department issued its decision suspending Mr. Goff's driving privileges. (R20) Specifically, the hearing officer found Mr. "Goff's vehicle was in a private area in which the public has access." (R20:2) The hearing officer found the public had the right to access the parking lot because the "sign does not say 'no trespassing' or 'keep out[,]'" but "informed people not to park there and say[s] nothing about accessing the parking lot." (R20:2). Additionally, the hearing officer found the public had the right to access the parking lot at issue because visitors and deliverers were "able to access the area[]" "to drop off items or turn around." (R20:2)

**III. When appealed, the Department abandoned the legal rationale used by the hearing officer in initially suspending Mr. Goff's driving privileges.**

[¶5] Mr. Goff timely appealed the Department's suspension of his driving privileges. (R1) On appeal, Mr. Goff argued the hearing officer's decision erred because the applicable municipal ordinance denied the public the right to access the parking lot for vehicular use. (R22:¶¶9-11) Abandoning the reasoning used by the hearing officer, the Department conceded the municipal ordinance made it "unlawful to trespass upon by driving or parking a motor vehicle . . . upon private

property . . . where there is displayed upon said property a sign containing the words 'Private Property' or 'Private Parking'[.]" (R26:¶47) Confined by the unambiguous language of the ordinance, the Department instead advanced the novel argument that the ordinance did not apply to the parking lot because the sign at issue was not sufficiently displayed. (R26:¶47) The Department advanced this new argument despite the hearing officer applying—albeit in an incorrect manner—the ordinance to the parking lot, thereby implicitly finding the sign was displayed. (R20:2)

## IV. The district court affirmed the Department's decision based on an argument not raised by either party.

[¶6] The district court ultimately upheld the Department's decision. (R33) The district court did not accept the Department's novel argument that the municipal ordinance did not apply to the parking lot. The district court also did not accept hearing officer's—incorrect—interpretation that the ordinance did not prevent the public from accessing the parking lot. Instead, the district court upheld the hearing officer's decision because it "conclude[d] that there was adequate evidence for the hearing officer to find that there was no violation of the municipal code in the officers entering the parking lot." (R33:¶8)

[¶7] The district court's reasoning was a *non sequitur*. The Department did not argue emergency personnel's access to the parking lot was permitted under the municipal ordinance. (R26:¶¶32-48) Mr. Goff had not argued that emergency personnel violated the municipal ordinance by accessing the parking lot. (R9:64:6-

67:25;[1] R22:¶¶8-21; R30:¶¶2-8) Moreover, the hearing officer's decision did not analyze whether emergency personnel had violated the municipal ordinance by accessing the parking lot. (R26:2)

**V. When appealed to this Court, the Department continued to ignore the legal rationale used by the hearing officer in initially suspending Mr. Goff's driving privileges.**

[¶8] Mr. Goff then timely appealed to this Court. (R41) Mr. Goff again argued the hearing officer's decision erred because the applicable municipal ordinance denied the public access to the parking lot for vehicular use. The Department continued to refuse to defend the reasoning employed by the hearing officer, and instead argued its alternative theory that the ordinance did not apply to the parking lot due to inadequate displaying of the sign.

**VI. This Court overruled the Department's decision, holding a reasonable person could not have concluded the hearing officer's facts were supported by the evidence.**

[¶9] This Court reversed. *Goff*, 2022 ND 186, ¶ 17. First, this Court identified the issue of whether the public had a right to access the parking lot for vehicular use as a question of fact. *Id.* at ¶ 8. As a factual finding by the hearing officer, this Court identified that it could only reverse if a reasonable person could not "'have concluded the findings were supported by the weight of the evidence from the entire

[1] Citations in this Brief referring to the transcript reference the page number of Document Index #9, not the page designations on the bottom of the transcript.

record.'" *Id.* at ¶ 6 (quoting *Suelzle v. N.D. Dep't of Transp.*, 2020 ND 206, ¶ 12, 949 N.W.2d 862).

[¶10] This Court concluded a reasonable person could not reasonably find the public had the right to access the parking lot for vehicular use. First, this Court found the municipal ordinance "establishe[d] that the public ha[d] no right of access to this particular parking lot for vehicular use." *Id.* at ¶ 15. Moreover, the other "factors as a whole confirm that the parking lot [wa]s a private area to which the public d[id] not have a right of access for vehicular use." *Id.*

[¶11] Despite the reversal, this Court did not analyze whether Mr. Goff was entitled to his costs and fees. This Court assumed the district court denied Mr. Goff's initial request for costs and fees because it had affirmed the Department's decision. *Id.* at ¶ 16 ("The district court denied costs and attorney's fees without providing a reason. Presumably, the court's reason was that Goff was not the prevailing party."). Accordingly, this Court "remand[ed] to the district court to determine in the first instance whether the Department acted without substantial justification requiring an award of costs and attorney's fees to [Mr.] Goff[,]" *id.*, recognizing this decision would be subject to "an abuse of discretion standard on appeal." *Id.* (citation omitted).

## VII. The Department's argument that its decision was substantially justified because the law was unsettled regarding whether private apartment parking lots are accessible to the public for vehicular use is a strawman.

[¶12] On remand, Mr. Goff argued the Department's initial decision was not substantially justified, requiring the imposition of costs and fees. (R45)

Specifically, Mr. Goff argued the decision was not substantially justified because—as identified by this Court—a reasonable person could not reasonably conclude the public had the right to access the parking lot for vehicular use, and the Department abandoned the rationale employed by the hearing officer. (R45:¶¶7-12)

[¶13] In response, the Department argued administrative decisions only lack substantial justification "in rare and extreme circumstances[.]" (R50:¶3) The Department argued this case did not present such a rare and extreme circumstance because "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 to access to for vehicular use." (R50:¶10)

[¶14] This argument was a strawman. Mr. Goff did not argue all apartment complexes' private parking lots were private areas to which the public lacked a right to access for vehicular use. (R9:64:6-67:25; R22:¶¶8-21; R30:¶¶2-8) Instead, Mr. Goff argued the plain language of the municipal ordinance established the public lacked a right to access this particular parking lot for vehicular use. (R9:64:6-67:25; R22:¶¶8-21; R30:¶¶2-8) Indeed, contrary to the hearing officer's decision, the Department admitted the municipal ordinance made it illegal for the public to access the parking lot for vehicular use. (R26:¶47) In other words, the Department failed to explain how the hearing officer was substantially justified in finding the municipal ordinance did not prohibit the public from accessing the parking lot—a finding the Department has not once defended throughout these proceedings. (R50:¶10).

**VIII. The district court used the wrong standard when denying Mr. Goff his costs and fees.**

[¶15] The district court denied awarding Mr. Goff his costs and fees, finding the Department acted with substantial justification. (R58:¶6) The district court found the Department acted with substantial justification because, "[a]lthough the Department was ultimately incorrect, it nonetheless made good faith and facially reasonable arguments based on facts that were supported by case law[.]" (R58:¶6) Mr. Goff then timely appealed to this Court. (R59)

## LAW AND ARGUMENT

**I. The Department lacked substantial justification for its decision suspending Mr. Goff's driving privileges because—as already held by this Court—no reasonable person could have concluded the hearing officer's findings were supported by the record.**

[¶16] The law requires the courts to grant costs and fees if an administrative decision lacks substantial justification. *See* N.D.C.C. § 28-32-50(1). Mr. Goff successfully appealed the Department's decision to suspend his driving privileges. *See Goff*, 2022 ND 186, ¶ 17. Therefore, Mr. Goff is entitled to his costs and fees if the Department's decision was not substantially justified. N.D.C.C. § 28-32-50(1).

[¶17] This Court has provided guidance regarding when a decision is substantially justified. A decision is "substantially justified" if "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person. A position may be justified, despite being incorrect, so long as a reasonable person could think that it has a reasonable basis in law and fact." *Lamplighter Lounge, Inc., v. State ex*

*rel. Heitkamp*, 523 N.W.2d 73, 75 (N.D. 1994) (citations and internal quotations omitted). In other words, a decision is not substantially justified if a reasonable person would not find a reasonable basis in law and fact for the decision. *See Tedford v. Workforce Safety & Ins.*, 2007 ND 142, ¶ 25, 738 N.W.2d 29 (an agency lacks substantial justification if a reasonable person would find no reasonable basis in law and fact for the decision). So understood, "[s]ubstantial justification represents a middle ground between the automatic award of fees to the prevailing party on one side, and awarding fees only when a position is frivolous or completely without merit on the other." *Lamplighter Lounger*, 523 N.W.2d at 75 (citation omitted).

[¶18] Here, in reversing the Department's decision, this Court identified the hearing officer's factual finding could only be set aside if a reasonable person could not "'have concluded the findings were supported by the weight of the evidence from the entire record.'" *Goff*, 2022 ND 186, ¶ 6 (citation omitted). Applying this standard, this Court found the hearing officer's decision was unfounded in at least two aspects. First, this Court found the displayed sign and municipal ordinance clearly "establishe[d] that the public ha[d] no right of access to this particular parking lot for vehicular use." *Id.* at ¶ 15. Second, even if the ordinance did not definitively bar the public from accessing the parking lot for vehicular use, this Court found "th[e] uncontradicted testimony d[id] not support a finding that there [wa]s routine use of the parking lot by the public not specifically invited to use the property." *Id.* at ¶ 14.

[¶19] A decision is not substantially justified if a reasonable person would not find a reasonable basis in law and fact for the decision. *Tedford*, 2007 ND 142, ¶ 25. A reasonable person would not find a reasonable basis in law and fact to conclude the municipal ordinance would permit the public to access the parking lot. *Goff*, 2022 ND 186, ¶¶ 12 & 15. A reasonable person would not find a reasonable basis in the record to conclude the public had a right to access the parking lot for vehicular use. *Id.* at ¶¶ 14-15. In other words, the Department's decision was not substantially justified.

## II. The district court abused its discretion in finding the Department was substantially justified by misapplying the law.

[¶20] Despite this Court already holding a reasonable person would not believe the hearing officer's findings were supported by the record, the district court denied Mr. Goff's request for an award of his incurred costs and fees. (R58) In doing so, the district court abused its discretion.

[¶21] This Court reviews a district court's decision on the imposition of costs and fees under Section 28-32-50 for abuse of discretion. *See Goff*, 2022 ND 186, ¶ 16. A district court abuses its discretion if it misinterprets or misapplies the law. *See, e.g.*, *State v. Tyler*, 2019 ND 246, ¶ 5, 933 N.W.2d 918 ("An abuse of discretion may occur when the district court misinterprets or misapplies the law, or when the district court acts in an arbitrary, unreasonable, or capricious manner." (citation omitted)). Here, the district court abused its discretion by misapplying the law.

[¶22] The district court found the Department's decision was substantially justified because, "[a]lthough the Department was ultimately incorrect, it nonetheless made good faith and facially reasonable arguments based on facts that were supported by case law . . . ." (R58:¶6) This reasoning misapplies the law by applying an incorrect legal standard.

[¶23] An argument is frivolous if made in bad faith, or facially lacking a reasonable basis. *Cf. Blacks Law Dictionary* 739 (9th ed. 2009) (defining "frivolous" as "[l]acking a legal basis or legal merit; not serious; not reasonably purposeful"); *cf. also id.* at 113 (defining "frivolous appeal" as "[a]n appeal having no legal basis, usu. filed for delay to induce a judgment creditor to settle or to avoid payment of a judgment"); *id.* at 1572 (defining "frivolous suit" as "[a] lawsuit having no legal basis often filed to harass or extort money from the defendant"). Substantial justification requires more than non-frivolity. *Cf. Peterson v. North Dakota Dep't of Transp.*, 518 N.W.2d 690, 696 (N.D. 1994) ("Substantial justification thus represents a middle ground between an automatic award of attorney's fees to a prevailing party and an award of attorney's fees for frivolous claims." (citation and internal quotation omitted)). Instead, substantial justification requires a basis satisfying a reasonable person that the position has a reasonable basis in law and fact. *Lamplighter Lounge*, 523 N.W.2d at 75. The district court erred in holding the Department's decision was substantially justified simply because it was arguably non-frivolous.

[¶24] And even if the district court had applied the correct legal standard, it applied it incorrectly because the Department's initial decision was not facially reasonable. The Department's initial decision—the hearing officer's decision—was the public had a right to access the parking lot for vehicular use because the municipal ordinance only prevented the public from parking in the parking lot. (R20:2) This rationale was not facially reasonable. We know this rationale was not facially reasonable because the Department has never even attempted to defend this rationale at any point after issuance of the hearing officer's decision. Indeed, this rationale is facially indefensible as outlined by this Court:

> Section 8-1011 provides, "It shall be unlawful to trespass upon by driving or parking a motor vehicle or trailer or vehicle of any kind upon private property within the city limits where there is displayed upon said property a sign containing the words 'Private Property' or 'Private Parking', without first obtaining permission in writing from the owner or lessee thereof." Because the sign in this case contains the words "private property," Section 8-1011 makes it unlawful to drive or park upon the parking lot without prior written permission. The hearing officer misinterpreted this ordinance as prohibiting the public only from parking in the parking lot. Contrary to the hearing officer's analysis, in the context of this ordinance, a sign stating "private property" means "no trespassing" and "keep out."

*Goff*, 2022 ND 186, ¶ 12. It was not facially reasonable for the hearing officer to find the municipal ordinance only prevented the public from parking in the parking lot. The district court abused its discretion by misapplying the law.

[¶25] Alternatively, the district court found the Department's decision was substantially justified because the district court initially affirmed the decision. (R58:¶6) While an initial affirmance may show substantial justification, "the fact

that the [Department] prevailed at earlier stages of the litigation 'does not automatically grant the government immunity from" an award of costs and fees. *Tedford*, 2007 ND 142, ¶ 27 (quoting *United States Secs. & Exch. Comm'n v. Zahareas*, 374 F.3d 624, 628 (8th Cir. 2004)); *see also id.* ("Although acceptance of the government's position at earlier stages is some evidence of substantial justification, it is not dispositive and a separate analysis of the reasonableness of the government's position is required." (citation omitted)).

[¶26] Here, the district court's initial affirmation of the Department's decision does not evidence substantial justification. The district court initially affirmed the Department's decision by reasoning "there was adequate evidence for the hearing officer to find that there was no violation of the municipal code in the officers entering the parking lot." (R33:¶8) This decision does not evidence substantial justification because it is a *non sequitur*. Mr. Goff did not argue that emergency personnel violated the municipal ordinance by accessing the parking lot. (R9:64:6-67:25; R22:¶¶8-21; R30:¶¶2-8) More importantly, the hearing officer did not find emergency personnel had not violated the municipal ordinance by accessing the parking lot. (R20:2) The district court's initial affirmation does not show the Department's initial decision was substantially justified—the district court's initial decision does not support the hearing officer's incorrect findings that the municipal ordinance only prohibited the public from parking in the parking lot, and that the public routinely used the parking lot. That the district court separately misapplied the law does not bless the Department's initial unsubstantiated decision.

## CONCLUSION

[¶27] "Substantial justification" is not an insurmountable burden. Instead, it is simply a "middle ground." *Lamplighter Lounge*, 523 N.W.2d at 75 (citation omitted). While substantial justification does not require an automatic award of fees to a prevailing party, it also does not limit an award of fees to "only when a position is frivolous or completely without merit[.]" *Id.* (citation omitted)

[¶28] Here, the district court held the Department's decision was substantially justified because it was not frivolous or completely without merit. (R58:¶6) In doing so, the district court misapplied the law—the district court abused its discretion. Because the district court abused its discretion, this Court should reverse, and grant Mr. Goff his costs and fees.

Respectfully submitted May 4, 2023.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 19 pages.

Dated this 4th day of May, 2023.

**VOGEL LAW FIRM**

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## CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2023, the following document:

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was served via electronic mail on the following:

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