MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

1064

2005 HOUSE JUDICIARY

HB 1064

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1064

House Judiciary Committee

☐ Conference Committee

Hearing Date 1/10/05

Tape Number	Side A	Side B	Meter #
1	xx		0-24.4

Committee Clerk Signature

Minutes: 13 members present, 1 absent (Rep. Maragos).

Chairman DeKrey: Called the meeting to order. We will open the hearing on HB 1064.

Representative Klemin: Introduced the bill (see written testimony).

Chairman DeKrey: If you start out in Small Claims Court, then the Defendant takes it to District Court, then it is technically still is considered a Small Claims Court matter.

Representative Klemin: No, once the case is removed to District Court, it is no longer within the jurisdiction of the Small Claims Court and now proceeds in the District Court, as if it had started there at the beginning.

Chairman DeKrey: So if they would have sued them in the District Court, in the first place, they could have gotten attorney fees.

Representative Klemin: No.

Representative Delmore: Do you think that this will lessen the number of cases that will go before the District Court and will be settled in Small Claims Court. Is that one of your hope's for the bill.

Representative Klemin: All cases in Small Claims Court are decided one way or another. So there is no settlement. The only thing that this would do, is to take away the potential abuse that can occur when someone removes the case to the District Court just to intimidate the plaintiff, into withdrawing his claim. In the Danzl case, they had a $4,000 damage claim, but a lot of the small claims court claims are much less than that. Some are for under $1,000.00, the jurisdiction is limited to $5,000.00. You can see, in almost all of the times, it is going to cost you more in attorney fees in the District Court, then you are ever going to recover for your claim to start with. So if a defendant removes it to the District Court, typically what happens is the plaintiff, with a very small claim is just going to drop it. He's been intimated and it's not economical. Hopefully, this will keep those kinds of small claims in small claims court where they belong.

Representative Meyer: Can either party, at any time, remove a case from small claims court to the District court.

Representative Klemin: No. The plaintiff electing to proceed in small claims to start with, that is irrevocable. It must stay there. The defendant has a certain number of days to remove the claim to the district court. If he doesn't do it within that period of time, it stays in the small claims court, then that decision is irrevocable too, and they both stay there.

Representative Koppelman: Do you know, statistically or maybe just a general observation, how many cases that are removed from small claims court to district court, move on as pro se matters vs. mandatory attorney.

Representative Klemin: I don't know the answer to that question. I'm not even certain that the clerks would keep track of how many cases are pro se vs. hiring a lawyer.

Representative Koppelman: Do you feel that, when people do elect to move forward pro se, that the court would give them appropriate consideration, or do you feel that they are at a huge disadvantage.

Representative Klemin: Just because you are pro se in the district court doesn't mean that you are entitled to any special consideration. The courts have said that over and over again. Proceeding in the district court is complicated. The rules of procedures are voluminous and complex. You'd need a lawyer if you are going to be in district court. There are pro se people who represent themselves, but they are at a huge disadvantage, because the rules of evidence apply, the rules of procedure apply, if you fail to follow any of them properly, you do yourself a big disadvantage in terms of winning your case.

Representative Koppelman: If a matter initiates in district court, attorney's fees cannot be awarded.

Representative Klemin: We follow the American rule. The American rule says you pay your own way, unless a statute or some other circumstance specifically allows for attorney's fees; and there are very few statutes that allow for attorney's fees, some do. But in the general litigation, whether on contract or for negligence or whatever, for the recovery of money, which is most of these small claims court cases, there is no provision now for the award of attorney's fees in the statute; unless it is completely frivolous, which is another matter.

Chairman DeKrey: How broad change is this to the law then, that allows for attorney's fees.

Representative Klemin: It is a change to the extent that right now you can't get attorney's fees. So this would allow a court in the appropriate situation, and if the court finds it was without merit, to award attorney's fees. The court would still have to make that finding. The court is not going to be able to use this to award attorney fees to a prevailing plaintiff just because it wants to, the defense has to be without merit to start with.

Representative Zaiser: In the course of just discussing this concept with other attorneys, do some of them have the same view as you do; that it is difficult to get the lawyer fee, the defendant being able to intimidate and drop the case.

Representative Klemin: I know for a fact that this is frequently the situation, where the case is removed to district court, just to try to get rid of the case; particularly where the claims are small. It's not uncommon, in my experience, for this to happen.

Representative Zaiser: Then it is a tactical thing, that attorneys will use, recommending that the case be moved to district court.

Representative Klemin: I would think that this is probably something that is discussed every time an attorney advises a client, a small claims court matter, that you have the right to remove the case to the district court if you don't want to stay in small claims court. Certainly, it has to be taken into account in the tactics of the case.

Representative Koppelman: It looks to me that this is sort of one-sided, it allows the prevailing plaintiff to be awarded attorney's fees, if the defense is without merit. But it doesn't allow the defendant to be awarded attorney's fees if the claim is frivolous. Is that true?

Representative Klemin: That's exactly correct. I think that this is addressing the issue of the removal, rather than the merits of the case to start with. If the case has merits on both sides, they probably ought to stay in small claims court.

Representative Koppelman: You said earlier, that once the claim gets to district court, as far as the court are concerned, it is treated as any other claim initiated in district court, so aren't you putting one party at a huge disadvantage, regardless of the genesis of the claim; once it is in district court, it's in district court; now if you have somebody that is basically pursuing a frivolous claim, a defendant could get stuck with paying the attorney's fees and not having an opportunity to have them awarded by the court, whereas the person on the other side has a greater advantage, I understand your intent, I think. But does the pendulum swing too far.

Representative Klemin: The objective of this bill is to stop an abuse that has now been occurring, and has been occurring for some time. I don't know that it is intended to be fair to the abuser.

Representative Koppelman: So you don't think that the abuse can ever occur the other way around, that people can be pursued in small claims court or pursued in district court, for claims that are unjustified.

Representative Klemin: Certainly that could be the case. There's no doubt that is possible. But that is not what I am attempting to do in this thing. It's addressing this particular problem, that was recognized by the Supreme Court in the Danzl case. The Supreme Court said to take it to the Legislature, here we are. Whether this is something that we should do, will be up to the Committee and the Legislature to make that policy decision.

Chairman DeKrey: Thank you, Rep. Klemin. Rep. Sitte, you have some remarks.

Rep. Sitte: I am here in support of this bill, because the Danzls' are constituents of mine, and I believe this is just a matter of justice for the common citizen to obtain justice, without incurring prohibitive costs. I ask for your favorable consideration of the bill.

Chairman DeKrey: Further testimony in support of the bill.

Paula Grosinger, Executive Director, ND Trial Lawyers Association: We support the bill because, anecdotally, my members have reported to me numerous instances of abuse by defendants, where they have requested removal from small claims court to the district court. Representative Koppelman asked a couple of questions which I would like to address. You asked whether or not there was data regarding how many claims have been removed from small claims court to district court. There is no such data. I am actually in charge of the Trial Lawyers Association's jury verdict research project. District court clerks generally do not generally keep any data on the trial within their systems. They keep the records from the trial, but they do not do any composite data, any sort of tallies on the actual awards, the verdicts rendered, that sort of thing. They certainly, I know from my experience, do not keep data on this particular issue. In fact, the office of the Supreme Court Administrator, has told me they have absolutely no interest in keeping any of this sort of data. So it is much up to me to go out and collect it. The other questions you asked, had to do with whether or not we could have abuses by plaintiffs bringing claims in small claims court, and then when the claim was removed to district court, could that not present an unfair situation for the defendant who might be assessed legal costs. The option rests with the defendant to have the case removed to the district court; therefore, because they have that option, it only seems to me that that is a fair tradeoff that if they are doing that without merit, be assessed the costs because they are putting an unfair burden on a plaintiff who has first

sought justice through the most expedient means, which would be the small claims court. Representative Zaiser, you asked whether or not there was tactical element when defense attorneys remove claims from small claims court to district court. Yes, that is certainly a tactic that is used. Frequently theses claims are removed to district court, simply because they know that will scare or intimate the plaintiff into dropping their case.

Chairman DeKrey: Thank you. Any further testimony in support.

Glenn Elliott: I am a resident of Mandan, testifying in favor of the bill. This has been a problem that I have been concerned for quite a while. I believe that favorable consideration should be given to the bill, because it is consistent with the purpose of the small claims court. The idea is swift procedure, finality of judgment, an emphasis on the decision of the case, merits vs. under procedural tactics. Courts favor judgments on the merits. I would emphasize here that when we are talking about removal of a case from small claims to district court, we may not be talking so much about operation of law. In other words, that the one party has more resources, not that the one party has more merit in the case. The economic argument, while we haven't had hard data prepared here, I don't think it takes a large stretch of the imagination, to imagine what the economic argument is in favor of this. If you have been involved in business at all, you probably know about opportunity costs and a risk cost. What is the chance of something happening vs. what is its cost. If you are facing a $500 judgment against you in small claims court and if you can say that by paying the $80 filing fee to get that case removed to district court, and you have a 60% chance that the guy is not going to pursue, that gives you a 40% chance that he is going to show up. 40% of $500 is $200 plus the $80 is $280. You have reduced your cost simply by going into district court. That is a procedural tactic, that's not merit

and that's what this bill is designed to address. I think that there is some kind of an idea here that defendants go to district court because small claims is some kind of kangaroo court, that they don't have an opportunity to adequately address their interests. Representative Koppelman, I think you were somewhat concerned about this. That is why the defendant has the option to go to district court. If they have rights they need to protect, they have that option. However, if they don't have a meritorious defense, if they are the one saying, "fine let's go up to the show", well if you are going to go to the show, then you should be prepared for the consequences of losing, at that level. The idea is that small claims court system was established by this body for the purposes of dispensing with these cases effectively and efficiently, minimum fuss. Representative Delmore specifically talked about whether this is going to keep cases out of the district court. Again, I believe the simple economic argument will go in favor of that. If a defendant who removes from small claims, when he has no meritorious case, knows that he is going to end up paying for the attorney's fees for that guy, I think that will help keep defendants from removing when there is no merit. Representative Koppelman, you were talking about defendant's proceeding in district court, pro se vs. In small claims. Again, I think it is somewhat obvious as Representative Klemin has said, there is a big difference. Going pro se in district court, you are still just as required to be able to know the rules of civil procedure, the statutes involved, the rules of evidence as other lawyer who walks into that courtroom. Going pro se in that forum is a big difference than two people independently going in, in an informal proceeding, and basically going in front of a judge who is just trying to get to the merit of the case. Representative Zaiser, the thing that you brought up about the tactics of removing a case from small claims court to district court. The state courts are sticklers for procedure, trust me the

federal courts are even more so. It is definitely a step up to go into that courtroom. It is a procedural fact, but again the idea of small claims, let's dispense with the procedure tactics; let's keep this up on the merits, informal, and dispense with it.

Chairman DeKrey: Thank you Glenn. Any further testimony in support.

Mel Webster, attorney: I second the remarks of Representative Klemin and I can assure you that if you had every lawyer in ND parade before your committee, they could relate a number of experiences very similar, that would give meaning to that cartoon I read in the New Yorker, a couple of years ago, where a lady came in to the attorney and said I want justice, the response of the attorney was, how much justice can you afford. I urge your favorable consideration of HB 1064.

Chairman DeKrey: Thank you. Any further testimony in support.

Sylvester Danzl: I am the reason for this case. This guy didn't have a word of testimony, even when we got in court, and yet it cost me the cost of my roof plus another doubled just because he took me to district court. It was either throw it away or pay the costs. That is not a small claims court as far as I am concerned. If you go out and talk to people and ask them if they have ever been to small claims court, they will all tell you the same thing. It is stacked against you.

Chairman DeKrey: Thank you for appearing before our committee. Any further testimony in support of HB 1064, testimony in opposition to HB 1064. We will close the hearing.

(Reopened in same session, side B)

Chairman DeKrey: We will take a look at HB 1064.

Representative Koppelman: I have some concerns about the equity of awarding fees on one side and not the other.

Chairman DeKrey: We give you a day to think about it. We'll take it up tomorrow if we have time.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1064

House Judiciary Committee

☐ Conference Committee

Hearing Date 1/12/05

Tape Number	Side A	Side B	Meter #
2		xx	50.2-end
3	xx		0-6.3

Committee Clerk Signature APenrose

Minutes: 13 members present, 1 member absent (Rep. Maragos).

Chairman DeKrey: What are the committee's wishes with regard to HB 1064.

Representative Koppelman: I have an amendment that I would like to offer (explained his amendments).

Representative Onstad: Second.

Chairman DeKrey: Motion failed.

Representative Delmore: I move a Do Pass.

Representative Zaiser: Second.

13 YES 0 NO 1 ABSENT DO PASS CARRIER: Rep. Klemin

50181.0101
Title.

Prepared by the Legislative Council staff for
Representative Koppelman
January 10, 2005

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1064

Page 1, line 21, after the underscored period insert "The district court may award attorney's fees to a prevailing defendant, as provided in section 28-26-01, if the court finds that the position of the plaintiff was frivolous."

Renumber accordingly

Motion failed

Date: 1/12/05
Roll Call Vote #:

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1064

50181.0101

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Moved Amend 1064 - Koppelman - Onstad - 2nd - Motion carried - Failed

Legislative Council Amendment Number

Action Taken Do PASS

Motion Made By Rep Delmore Seconded By Rep Zaiser

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos	A		Representative Meyer	✓	
Representative Bernstein	✓		Representative Onstad	✓	
Representative Boehning	✓		Representative Zaiser	✓	
Representative Charging	✓				
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	✓				
Representative Koppelman	✓				
Representative Kretschmar	✓				

Total (Yes) 13 No 0

Absent 1

Floor Assignment Rep. Klemin

If the vote is on an amendment, briefly indicate intent:

Date: 1/12/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1064

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass

Motion Made By Rep. Delmore Seconded By Rep. Zaiser

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos	A		Representative Meyer	✓	
Representative Bernstein	✓		Representative Onstad	✓	
Representative Boehning	✓		Representative Zaiser	✓	
Representative Charging	✓				
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	✓				
Representative Koppelman	✓				
Representative Kretschmar	✓				

Total (Yes) 13 No 0

Absent

Floor Assignment Rep. Klemin

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1064: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1064 was placed on the Eleventh order on the calendar.

2005 SENATE JUDICIARY

HB 1064

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1064

Senate Judiciary Committee

☐ Conference Committee

Hearing Date February 16, 2005

Tape Number	Side A	Side B	Meter #
1	X		615 - 435

Committee Clerk Signature Mona L Selbey

Minutes: Relating to awarding of attorney's fees in cases removed from small claims court to district court.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

Testimony In Support of the Bill:

Rep. Lawrence R. Klemin - Dist. #47 and Attorney (meter 630) Gave Testimony- Att. #1

Sen. Trenbeath questioned what "other wised not justified" means? Rep Klemin replied, something the district court in its discretion would have to judge in a case by case determination.

Sen. Trenbeath responded that if a defendant did not prevail was he not justified? No, I do not think it would be an automatic case. There are many reasons a defendant may not prevail. Discussed amongst themselves this and the "bad faith" ruling. Statute for awarding of attorney fees on a frivolous claim, 28-26-01 sub section 2, Sect. 31-bad faith, and third is Rule 11 of ND

Rules of Civil Procedures. Debate on all cover this issue or all do not cover this bill. This bill would only add to this the term "without merit" to ruling that already exists.

Glenn A. Elliott, Private Citizen, Mandan (meter 1390) Gave Testimony - Att. #2

Mel Webster, Lawyer in Bismarck for 20 years. Removal from small claims courts are sometimes removed by some very large companies to intimidate and they will dismiss the claim. Sited cartoon. "I want justice" - "How much justice can you afford"... Small claims court is meant to keep a claim in small claims court.

Sen. Trenbeath questioned how would you differentiate "with out merit" and " frivolous"? Upon looking at this bill I thought they would be very similar. One way this bill would help is in the statement of the claim. The District court judge could award fees and by including this in the language of the small claims court act it would notify defendants of the possibility that if this claim was found with out any merit what so ever you may, not will, for attorney fees. **Sen. Trenbeath** responded that the attorney should be advising him of the merits of his claim and the downside of it being frivolous, he should amend his case to say this? Yes one would hope the attorney advising it should tell him. Should it be such, my interpretation of the rules of ethics the attorney should not take the case. My experience in asking for fees in claims that are frivolous are next to nothing.

Senator Triplett stated why would we use a different phrase, why not existing language? Personally I would be in favor of using the existing language we have, he responded.

Paula Grossinger - Lobbyist and Executive Director for the ND Trial Lawyers Assoc. (meter 2042) Referred to handout - Att. #3 This is a system that gets abused by defendants. While we have some ethical rules, that should prohibit the removal of cases to district court, defendants

still gamble on it to get people to drop the case. While I usually do not argue the against a departure from the American rule of each party paying fees, this is an exception to that. The plaintiff has already admitted the claim is not worth more then $5000 and are willing to proceed in small claims court. It gives the defendant an unfair advantage to move it to district court and force the plaintiff into additional expenses.

Claus Limke, ND Assoc. of Realtors (meter 2270) In our debate one of our members said "don't support this bill, because I, in **every case**, appeal this to district court" - is that not enough evidence?

Jon Risch, United Transportation Union, Railroad (meter 2350) Workers across ND. Relayed a story of ND Supreme Court Committee of Public Trust and Confidence, on the Civil Justice System. A large company in ND sited that there company, as a matter of practice, **takes every** small claim and automatically moves it to district court. While I do not think it is fair, or right, we do it because those are the attorneys that best handle cases and have relationships with the district courts. For this reason we support this bill. Small claims is for the middle and low class to be able to bring there claims to court.

Sen. Trenbeath stated to Jon- your arguing a change in the law that would prevent them from removing them to district court, and I am not entirely sympathetic to that, but this does not do that. Are you saying that the Attorneys from large companies are moving it to district court and that is without merit or not justified? He responded, that while he was not prohibiting the ability of moving a claim from small claims to district court, this might give the large company some encouragement to keep the claims in small claims court. Or at best have them get there attorneys

fees paid. **Sen. Trenbeath** responded that that already exists. Discussion of "bad faith" and why attorneys would move a claim up to district court.

Sylvester Daniel - Sited personal situation of this happening on a roofing issue (meter 2750) Judge did not like his description of frivolous. My $4000 roof ended up costing me $8000. Plaintiffs attorney did not know he could represent his client in a small claims court.

Kim Ridliner Weseen - Bismarck resident (meter 3040) Oct. of 2000 home purchase that was not discovered until after they moved in. Attorney fees were to high to go to District court so tried it in small claims and lost.

In Opposition of the Bill:

none

Neutral to the Bill

Joel Gilbertson - Vogal Law Firm State Bar Association (meter 3200) Here for technical assistance only. Submitted Att. #4 State Bar of Assoc. of ND board of governors vote "technical assistance" I am a liaison for the group to bring back your decisions and actions to the group. Reviewed his attachments

Sen. Trenbeath stated that what we are trying to do is disway defendants in most cases from taking advantage of dragging these things into district court? What if we truncated the language and say "if the defendant elects to remove the action from small claims court to district court, the district court may award the attorneys fees to a prevailing plaintiff." He responded that a loss should not be enough to award fees-discussed the issue. **Mr. Gilbertson** says that this language does not give "guidance" to the judge. Sen. Trenbeath stated that he had complete faith in the judge to make this decision. Mr. Gilbertson stated that if the only reasons that an attorney would

bring a claim to district court was to "up the costs" then this should be done. **Sen. Trenbeath** sited that from what we have heard today and his own personal experiences as an attorney, this is so. **Mr. Gilbertson** agreed that something should be done. We do have statutes and rules that do deal with this situation.

Senator John (Jack) T. Traynor, Chairman closed the Hearing

Carrier:

Senator John (Jack) T. Traynor, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1064

Senate Judiciary Committee

☐ Conference Committee

Hearing Date February 23, 2005

Tape Number	Side A	Side B	Meter #
1	X		2,486-3845

Committee Clerk Signature

Minutes:

Chairman Traynor opened the meeting to discuss HB 1064. All Senators were present with the exception of Senator Triplett.

Senator Trenbeath moved a Do Not Pass recommendation for the bill, but later withdrew his motion.

Senator Nelson mentioned that no one appeared in opposition to the bill at the hearing.

Senator Hacker- If a business would like to appeal to a district court, it could be damaging to their business, might be repercussions from their community.

Senator Trenbeath- There is a certain level in the law where the amount of controversy is not worth it to take it to district court. That is why there is small claims court.

Senator Syverson- If the case was moved to district court, it is likely the plaintiff would suffer economic consequences that they would not have to deal with if they were in small claims court.

Senator Trenbeath- The plaintiffs complaint is we are taking advantage of small claims, so an attorney doesn't have to be hired.

Action taken:

Senator Trenbeath moved a Do Pass recommendation for the amendment. Seconded by Senator Nelson. The amendment passed unanimously 5-0-1.

Senator Trenbeath moved a Do Pass as Amended recommendation for the bill. Seconded by Senator Syverson. The bill as amended passed unanimously, 5-0-1. Senator Traynor is the carrier of the bill.

Chairman Traynor closed the committee meeting on HB 1064.

Date: 2/23/05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1064

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Pass Amendment

Motion Made By Senator Trenbeath Seconded By Senator Nelson

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	X		Sen. Nelson	X	
Senator Syverson	X		Senator Triplett	X	
Senator Hacker	X				
Sen. Trenbeath	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Date: 2/23/05
Roll Call Vote #: 2

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1064

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass as Amended

Motion Made By Senator Trenbeath Seconded By Senator Syverson

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson	✓		Senator Triplett	✓	
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen. Traynor

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1064: Judiciary Committee (Sen. Traynor, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1064 was placed on the Sixth order on the calendar.

Page 1, line 19, replace "may" with "shall"

Page 1, line 20, remove "if the court finds that the position of the defendant was without merit or was"

Page 1, line 21, remove "otherwise not justified"

Renumber accordingly

2005 TESTIMONY

HB 1064

HOUSE BILL NO. 1064
TESTIMONY OF REP. LAWRENCE R. KLEMIN
HOUSE JUDICIARY COMMITTEE
JANUARY 10, 2005

Mr. Chairman and Members of the House Judiciary Committee. I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am here today to testify in support of House Bill 1064.

This bill relates to the Small Claims Court. The Small Claims Court was established to provide an informal forum where claims of $5,000 or less could be resolved expeditiously and without the need to hire a lawyer. Litigation is expensive and the rules and procedures in the District Court are complicated. The Small Claims Court fills a very important niche for cases that would otherwise be uneconomical and time consuming to litigate.

The Small Claims Court is not a court of record. There is no court reporter taking down every word that is said. The rules of evidence are relaxed so that persons not trained in the law can present and defend their cases. There is no right to a jury trial. There is no right of appeal. The decision in the Small Claims Court is final. Because of these factors, the use of the Small Claims Court must be voluntary by both the plaintiff and the defendant. If a defendant does not want to be in Small Claims Court, the defendant has the right to remove the case to the District Court. If a case is removed to the District Court by a defendant, the plaintiff will now need to hire a lawyer to present his claim. The expense will increase substantially ..... to a point where the cost of the litigation may be more than the amount of the claim.

A well-heeled defendant could use this disparity as a means of getting a plaintiff to withdraw his claim, rather than hiring an attorney to present it in District Court. Thus, the right to remove the case to the District Court is subject to abuse by those who have no defense or defenses that are without merit.

This was the case with Sylvester and Marian Danzl. Sylvester and Marian had a claim against a roofing company for improper installation of shingles on their roof. When the roofing company refused to replace the roof, Sylvester and Marian sued the company in Small Claims Court seeking money damages in the amount of $4,186, the cost to replace the shingles. the roofing company hired a lawyer and removed the case to the District Court. Sylvester and Marian then had to hire a lawyer themselves to represent them in District Court. Following a bench trial, the District Judge held in favor of the Danzls and awarded them damages for their roof in the amount of $4,186. The District Judge also awarded the Danzls their attorney fees in the amount of $2,389 over the objection of the defendant's attorney, who argued that the award of attorney fees in this situation

was not authorized by statute.

The roofing company then appealed the award of attorney fees to the North Dakota Supreme Court. It did not appeal the award of damages for the poor roofing job. Therefore, the only issue before the Supreme Court was the award of attorney fees.

A copy of the Supreme Court decision is attached to my testimony. In *Danzl v. Heidinger and H & R Roofing, 2004 ND 74,* the North Dakota Supreme Court reversed the decision of the District Court on the issue of attorney fees and held that the district court had no authority to award attorney fees. The Supreme Court held that there was no statutory basis for the award of attorney fees in the statutes relating to the Small Claims Court. The Supreme Court stated in paragraph 9 of the opinion:

> We recognize that the removal provisions of N.D.C.C. §27-08.1-04 may be subject to abuse by represented defendants who seek only to intimidate self-represented plaintiffs. . . . **If changes are required concerning the award of attorney fees in the context of Small Claims Court actions, those arguments should be addressed to the Legislature.**

The purpose of House Bill is to address this argument to the Legislature, as suggested by the Supreme Court. Should there be a statutory remedy when a represented defendant abuses and intimidates self-represented plaintiffs in Small Claims Court? Should there be a consequence when a meritless defense is removed to the District Court under these circumstances? Should there be a statutory basis for the award of attorney fees in this situation?

I submit that it is time to stop this abuse and return the Small Claims Court to its original purpose ....an informal forum for resolving minor disputes. If a defendant has a defense with merit, he can still remove the case to the District Court where all the procedural rights will apply. It is only where the District Court finds that the position of the defendant was without merit or was otherwise not justified that attorney fees can be awarded. I urge you to give favorable consideration to House Bill 1064.

Sylvester A. Danzl and Marian M. Danzl, Plaintiffs and Appellees v. Ron Heidinger, Defendant and H & R Construction, Inc., Defendant and Appellant
SUPREME COURT OF NORTH DAKOTA
2004 ND 74; 677 N.W.2d 924; 2004 N.D. LEXIS 168
No. 20030239
April 13, 2004, Filed

Editorial Information: Prior History

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Bruce B. Haskell, Judge.

Disposition Affirmed in part and reversed in part.

Counsel Sylvester A. Danzl and Marian M. Danzl, pro se, Bismarck, N.D.
Paul H. Myerchin, Bormann & Myerchin, LLP, Bismarck, N.D., for defendant and appellant.

Judges: Opinion of the Court by VandeWalle, Chief Justice. Gerald W. VandeWalle, C.J., Carol Ronning Kapsner, Mary Muehlen Maring, William A. Neumann, Dale V. Sandstrom.

Opinion

Opinion by: Gerald W. VandeWalle

{677 N.W.2d 925} VandeWalle, Chief Justice.

P1 H & R Construction, Inc., appealed from an amended judgment awarding Sylvester and Marian Danzl $ 4,186 in damages and $ 2,389.93 for their attorney fees in their action to recover for improperly installed shingles on their home. Because there is no authority for the award of attorney fees, we reverse the award of attorney fees and otherwise affirm the amended judgment.

I

P2 A June 2001 hailstorm damaged the roof of the Danzls' Bismarck home, and all of the shingles needed to be replaced. The Danzls hired H & R Construction to replace the shingles and paid the company $ 4,186 when the work was completed in September 2001. Following a minor hail storm one year later, the Danzls had their roof inspected by an insurance claims adjuster, who informed them the damage was caused by improper installation of the new shingles and would not be covered by insurance. Nails were protruding into and through the shingles above them causing the shingles to crack and age prematurely. Between 59 to 69 bulges were visible on the roof. The Danzls contacted Ron Heidinger, the owner of H & R Construction, to repair and reshingle the entire roof, but he offered to only repair the areas of the roof in which there were visible bulges.

P3 In January 2003, the Danzls sued Heidinger and H & R Construction in small claims court, alleging the shingles were improperly installed and seeking $ 4,186 in damages. Heidinger and H & R Construction hired an attorney who had the case removed to district court, and the Danzls then hired an attorney to represent them in the case. Following a bench trial, the district court found "more likely than not the entire roof was installed improperly and needs to be replaced." The court found no personal liability on the part of Heidinger, but awarded the Danzls $ 4,186 in damages against H & R Construction "for replacement of the shingles."

P4 The Danzls' attorney also requested an award of attorney fees under a theory of "unjust impoverishment." The attorney for H & R Construction argued an award of attorney fees was not authorized by statute. In awarding the Danzls $ 2,389.93 for their attorney fees, the district court reasoned:

> I agree Mr. Myerchin, for what it's worth, a hundred percent with your argument that there isn't a statutory basis to do is [sic]. However I have to say that I'm almost always bothered by cases that are relatively small dollar amounts when somebody chooses to remove it to district court simply because they put the plaintiff in the position of either having to proceed without an attorney at {677 N.W.2d 926} marked disadvantage or having to pay attorneys fees and I just don't think that's right. I think the whole purpose of small claims court, as we've said -- as both parties have said, is to resolve relatively simple dollar amount and factual matters in a cheap and informal basis. I think Mr. Danzl made good faith efforts to do that. Please don't get me wrong Mr. Myerchin, I'm not accusing you of bad faith in any way. I'm just saying that I think better judgment by your client would have been to resolve the matter in small claims court and I think if we're using the term punishment or penalty, it shouldn't be the plaintiff that should be penalized, particularly if the plaintiff prevails in the matter. In this case, just for a legal basis, I do think that Mr. Danzl would be unjustly impoverished if he were forced to pay the attorneys fees.

II

P5 The only issue raised by H & R Construction on appeal is whether the district court erred in awarding the Danzls their attorney fees. A district court's decision regarding an award of attorney fees will not be overturned on appeal unless the court has abused its discretion. *In re Estate of Hass*, 2002 ND 82, P 22, 643 N.W.2d 713 .

P6 We have consistently held that, absent statutory or contractual authority, the American Rule assumes each party to a lawsuit bears its own attorney fees. *See, e.g., Western Nat'l Mut. Ins. Co. v. University of North Dakota*, 2002 ND 63, P 49, 643 N.W.2d 4 ; *Fisher v. American Family Mut. Ins. Co.*, 1998 ND 109, P 23, 579 N.W.2d 599 ; *Zuern v. Jensen*, 336 N.W.2d 329, 330 (N.D. 1983) . Consequently, in the absence of express statutory or contractual authorization, attorney fees incurred by a plaintiff in litigation are not recoverable as an item of damages, *see Nord v. Herrman*, 1998 ND 91, P 27, 577 N.W.2d 782 , because attorney fees "are not a legitimate consequence of the tort or breach of contract." *Farmers Union Oil Co. v. Maixner*, 376 N.W.2d 43, 48 (N.D. 1985) . *See also Barsness v. General Diesel & Equip. Co., Inc.*, 422 N.W.2d 819, 827 (N.D. 1988) (recognizing attorney fees and expenses may be recovered if they constitute damages from the breach of a contract, but not if they are incurred in proving the breach). Successful litigants are also not automatically entitled to attorney fees unless authorized by contract or statute. *See In re Estate of Lutz*, 2000 ND 226, P 33, 620 N.W.2d 589 .

P7 In this case, the district court did not find that H & R Construction's pleadings were frivolous or that it acted in bad faith, but based the award of attorney fees on the doctrine of "unjust impoverishment." The Danzls did not cite to the district court or to this Court, nor have we found, any authority for awarding attorney fees under a theory of "unjust impoverishment." This Court has said that unjust enrichment may serve as the basis for an award of attorney fees. *See Nygaard v. Robinson*, 341 N.W.2d 349, 360 (N.D. 1983) ; *Winkler v. Gilmore & Tatge Mfg. Co., Inc.*, 334 N.W.2d 837, 838 (N.D. 1983) ; *Conrad v. Suhr*, 274 N.W.2d 571, 575 (N.D. 1979) . However, among the elements required to establish unjust enrichment are an enrichment to the defendant, an impoverishment to the plaintiff, and a connection between the enrichment and the impoverishment. *See Zuger v. North Dakota Ins. Guar. Ass'n*, 494 N.W.2d 135, 138 (N.D. 1992) . Although the Danzls may have been impoverished to the extent of the legal fees paid for representation in district court, H & R Construction certainly experienced no enrichment connected to that impoverishment. Therefore,

the doctrine {677 N.W.2d 927} of unjust enrichment cannot support the award of attorney fees.

P8 The basic premise for the award of attorney fees appears to be the district court's perception of unfairness to the Danzls for hiring and paying an attorney to represent them only after H & R Construction, through an attorney, removed the case from small claims court to district court, coupled with the court's belief that the case should have remained in small claims court. We agree the procedure under the Small Claims Act, N.D.C.C. ch. 27-08.1 , is intended to be simple and informal. *See Freed v. Unruh*, 1998 ND 34, P 8, 575 N.W.2d 433 ; *Towne v. Dinius*, 1997 ND 125, P 7 n.2, 565 N.W.2d 762 . The Act "establishes an informal forum for resolving minor disputes" and "eliminates several legal formalities that encumber the usual lawsuit." *Svanes v. Grenz*, 492 N.W.2d 576, 578 (N.D. 1992) . However, the Act balances the procedural rights of a plaintiff and a defendant concerning the choice of a formal or an informal forum. Although the plaintiff is given the initial choice of forum to commence an action in small claims court, N.D.C.C. § 27-08.1-04 provides the defendant with the opportunity to decide whether a more formal legal process is used so the defendant is not "unilaterally precluded by the plaintiff from seeking the protections of a formal civil hearing." *Raaum v. Powers*, 396 N.W.2d 306, 310 (N.D. 1986) . A defendant has the right to seek removal of an action from small claims court to "avail[ ] himself of all the privileges concomitant to a formal civil trial, including not only the right of appeal, but the right to secure a trial by jury and other traditional aspects of the legal process as well." *Id.* These rights are lost if the action remains in small claims court. *See Whitaker v. Century 21*, 466 N.W.2d 114 (N.D. 1991) ; *Kostelecky v. Engelter*, 278 N.W.2d 776, 779 (N.D. 1979) .

P9 We recognize that the removal provisions of N.D.C.C. § 27-08.1-04 may be subject to abuse by represented defendants who seek only to intimidate self-represented plaintiffs. Here, the district court specifically found H & R Construction did not act in bad faith. Furthermore, being "forced to incur 'attorney's fees and expenses'" to prosecute or defend a legal action does not alone justify an award of attorney fees. *State Farm Mut. Auto. Ins. Co. v. Estate of Gabel*, 539 N.W.2d 290, 294 (N.D. 1995). If changes are required concerning the award of attorney fees in the context of small claims court actions, those arguments should be addressed to the Legislature.

P10 Because there is no authority for the award of attorney fees, we conclude the district court abused its discretion in awarding the Danzls attorney fees in this case.

III

P11 We reverse the amended judgment insofar as it awards the Danzls $ 2,389.93 in attorney fees. The amended judgment is otherwise affirmed.

P12 Gerald W. VandeWalle, C.J.

Carol Ronning Kapsner

Mary Muehlen Maring

William A. Neumann

Dale V. Sandstrom

Att #1

HOUSE BILL NO. 1064
TESTIMONY OF REP. LAWRENCE R. KLEMIN
SENATE JUDICIARY COMMITTEE
FEBRUARY 16, 2005

Mr. Chairman and Members of the Senate Judiciary Committee. I am Lawrence R. Klemin, Representative from District 47 in Bismarck. I am here today to testify in support of House Bill 1064.

This bill relates to the Small Claims Court. The Small Claims Court was established to provide an informal forum where claims of $5,000 or less could be resolved expeditiously and without the need to hire a lawyer. Litigation is expensive and the rules and procedures in the District Court are complicated. The Small Claims Court fills a very important niche for cases that would otherwise be uneconomical and time consuming to litigate.

The Small Claims Court is not a court of record. There is no court reporter taking down every word that is said. The rules of evidence are relaxed so that persons not trained in the law can present and defend their cases. There is no right to a jury trial. There is no right of appeal. The decision in the Small Claims Court is final. Because of these factors, the use of the Small Claims Court must be voluntary by both the plaintiff and the defendant. If a defendant does not want to be in Small Claims Court, the defendant has the right to remove the case to the District Court. If a case is removed to the District Court by a defendant, the plaintiff will now need to hire a lawyer to present his claim. The expense will increase substantially ..... to a point where the cost of the litigation may be more than the amount of the claim.

A defendant could use this disparity as a means of getting a plaintiff to withdraw his claim, rather than hiring an attorney to present it in District Court. Thus, the right to remove the case to the District Court is subject to abuse by those who have no defense or defenses that are without merit.

This was the case with Sylvester and Marian Danzl. Sylvester and Marian had a claim against a roofing company for improper installation of shingles on their roof. When the roofing company refused to replace the roof, Sylvester and Marian sued the company in Small Claims Court seeking money damages in the amount of $4,186, the cost to replace the shingles. The roofing company hired a lawyer and removed the case to the District Court. Sylvester and Marian then had to hire a lawyer themselves to represent them in District Court. Following a bench trial, the District Judge held in favor of the Danzls and awarded them damages for their roof in the amount of $4,186. The District Judge also awarded the Danzls their attorney fees in the amount of $2,389 over the objection of the defendant's

attorney, who argued that the award of attorney fees in this situation was not authorized by statute.

The roofing company then appealed the award of attorney fees to the North Dakota Supreme Court. It did not appeal the award of damages for the poor roofing job. Therefore, the only issue before the Supreme Court was the award of attorney fees.

A copy of the Supreme Court decision is attached to my testimony. In *Danzl v. Heidinger and H & R Roofing, 2004 ND 74,* the North Dakota Supreme Court reversed the decision of the District Court on the issue of attorney fees and held that the District Court had no authority to award attorney fees. The Supreme Court held that there was no statutory basis for the award of attorney fees in the statutes relating to the Small Claims Court. The Supreme Court stated in paragraph 9 of the opinion:

> We recognize that the removal provisions of N.D.C.C. §27-08.1-04 may be subject to abuse by represented defendants who seek only to intimidate self-represented plaintiffs. . . . **If changes are required concerning the award of attorney fees in the context of Small Claims Court actions, those arguments should be addressed to the Legislature.**

The purpose of House Bill is to address this argument to the Legislature, as suggested by the Supreme Court. Should there be a statutory remedy when a represented defendant abuses and intimidates self-represented plaintiffs in Small Claims Court? Should there be a consequence when a meritless defense is removed to the District Court under these circumstances? Should there be a statutory basis for the award of attorney fees in this situation?

I submit that it is time to stop this abuse and return the Small Claims Court to its original purpose ....an informal forum for resolving minor disputes. If a defendant has a defense with merit, he can still remove the case to the District Court where all the procedural rights will apply. It is only where the District Court finds that the position of the defendant was without merit or was otherwise not justified that attorney fees can be awarded. I urge you to give favorable consideration to House Bill 1064.

AH #2

Testimony in Favor of House Bill 1064

by Glenn A. Elliott, a private citizen and resident of Mandan, North Dakota, appearing on his own behalf on Wednesday, 16 February 2005

Before the Judiciary Committee of the North Dakota Senate

Mr. Chairman and Senators of the Committee:

I submit this testimony and appear before the Committee in favor of House Bill 1064, to allow a prevailing plaintiff in a small claims case that is removed to District Court to be awarded attorney fees "if the court finds that the defendant's position was without merit or otherwise not justified" (Lines 18-21, HB 1064).

When I first looked into small claims procedures in general, I was uneasy to see that the prevailing procedures allowed any defendant in a small claims action to have the case removed to the next higher court solely upon the defendant's election. As I understand, the purpose of small claims court is to allow a plaintiff with a small but monetarily certain or determinable amount in controversy the opportunity to timely recover at least a significant part of that amount at minimal expense.

If a small claims defendant can have a case removed to District Court at will, without any penalty even if the defendant defaults, the defendant can work both public and private injustice with impunity:

1. If the plaintiff chooses to proceed, the plaintiff must expend time and money in varying amounts, either in retaining and working with an attorney, or in researching the relevant statutory and case law, along with the general rules of court, civil procedure, and evidence, to formulate and present a convincing pro se case. This is especially exacerbated if the defendant has considerable means to retain counsel and exploit the nuances of procedure to the plaintiff's disadvantage.

2. If the plaintiff cannot afford the time or money to properly proceed in District Court, the plaintiff is required, for all practical purposes, to drop the action before proceedings commence. Failure to do so could expose the plaintiff to sanctions, or liability for the defendant's costs, including attorney fees in certain circumstances.

3. A defendant who forces removal of a case to District Court without underlying good cause burdens the court system and frustrates public policy, as expressed by the North Dakota Legislature when it enacted the North Dakota Small Claims Court Act (Chapter 27-08.1 of the North Dakota Century Code).

House Bill 1064 encourages defendants to proceed in small claims court. This is consistent with the objectives of the small claims system, namely swiftness of procedure, finality of judgment, and emphasis on merits of the case versus tactics of procedure. That emphasis on merit is also consistent with the express policy of the North Dakota courts that judgment on the merits is favored.

House Bill 1064 is not hostile to removal, only its abuse. Certain procedures that may be central to establishing a defense, such as the use of subpoenas, are not available in small claims court. Also, when House Bill 1064 was under consideration by the House Judiciary Committee, Representative Kim Koppelman related to me that several of his constituents complained to him that small claims referees in Cass County had not decided cases according to the demonstrated facts and law. Regardless of whatever judicial complaint options may be available, if an attorney can gather enough evidence to show that the defendant had reasonable apprehension of this possibility, I do not believe that a District Judge would hold that the defendant did not have good cause for removal.

Small claims court is not a "kangaroo court." While procedure is relaxed, it is not absent. The normal standard of proof by preponderance of the evidence applies, and both plaintiff and defendant have opportunity to present evidence favorable to them and challenge evidence not favorable. The North Dakota Legislature established the small claims court system for good reason, and the North Dakota Senate should join the North Dakota House in passing House Bill 1064 to prevent the unmerited evasion of small claims jurisdiction.

I respectfully request the Senate Judiciary Committee to vote "do pass" on House Bill 1064.

AH #3

North Dakota Supreme Court News ▲?
North Dakota Courts Annual Report 2003

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District Court Caseload

District court filings decreased slightly in 2003, showing a .8% decrease over 2002 filings.

Civil filings were down 1.8% from 2002 and small claims filings decreased 11.8%. Criminal filings reflect a slight increase of 1.1% from 2002 levels. Formal juvenile filings show a 3.5% increase.

District Court Caseload for Calendar Year 2002 and 2003

Case Filings	2002	2003	Change in Filings 2002/2003
New Filings Total	156,521	155,176	-.8%
Civil			-1.8%
Small Claims	25,876	25,405	-11.8%
Criminal	7,111	6,268	1.1%
Juvenile	30,707	31,058	3.5%
Admin. Traffic	2,358	2,441	-.5%
	90,469	90,004	

Case Dispositions	2002	2003	
Dispositions Total	168,036	174,786	4.0%
Civil			9.9%
Small Claims	32,339	35,564	-4.4%
Criminal	6,899	6,597	10.7%
Juvenile	35,514	39,342	68%
Admin. Traffic	2,358	3,971	-1.8%
	90,926	89,312	

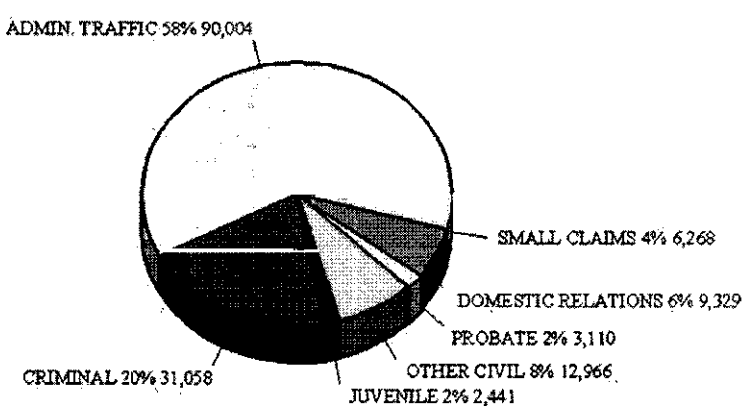
District Court Case Filings by Type - 2003

CIVIL		CRIMINAL	
Case Type	**Filings**	**Case Type**	**Filings**
Property Damage	174		
Personal Injury	263		
Malpractice	39		
Divorce	2,301		

Adult Prot. Order	1,050
Custody	115
Support Proceedings	4,506
Adoption	281
Paternity	701
Termination of Parental Rights	19
Disord. Cond. Restr. Order	356
Administrative Appeal	156
Appeal Other	19
Contract/Collect	8,748
Quiet Title	95
Condemnation	26
Forcible Detain	681
Foreclosure	564
Change of Name	180
Special Proceedings	41
Trust	71
Foreign Judgment	233
Other	683
Conservator/ Guardianship	425
Protective Proceedings	59
Probate	2,555
Mental Health	1,064
Small Claims	6,268
State Total	31,673

Felony	4,144
Misdemeanor	23,228
Infraction	3,686
State Total	31,058

TYPES OF CASES FILED IN DISTRICT COURT DURING 2003



Joel Gilbertson att # 4

CHAPTER 28-26
COSTS AND DISBURSEMENTS

28-26-01. Attorney's fees by agreement - Exceptions - Awarding of costs and attorney's fees to prevailing party.

1. Except as provided in subsection 2, the amount of fees of attorneys in civil actions must be left to the agreement, express or implied, of the parties.

2. In civil actions the court shall, upon a finding that a claim for relief was frivolous, award reasonable actual and statutory costs, including reasonable attorney's fees to the prevailing party. Such costs must be awarded regardless of the good faith of the attorney or party making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their favor, providing the prevailing party has in responsive pleading alleged the frivolous nature of the claim. This subsection does not require the award of costs or fees against an attorney or party advancing a claim unwarranted under existing law, if it is supported by a good faith argument for an extension, modification, or reversal of the existing law.

28-26-02. Amount of costs in specific cases. Costs in the district courts and in the supreme court must be as follows:

1. To the plaintiff for all proceedings before trial, ten dollars, and for each additional defendant served with process not exceeding ten, one dollar.

2. To the defendant, for all proceedings before trial, five dollars.

3. For every trial of an issue of fact, five dollars.

4. Superseded by N.D.R.App.P., Rule 38.

5. To either party for every term not exceeding five, at which the cause is necessarily on the calendar of the district court and is not tried or is postponed by order of the court, three dollars, and for every term not exceeding five, excluding the term at which the cause is argued in the supreme court, five dollars. Term fees are not taxable as costs when a cause, properly on the calendar, is not reached for trial during the term, nor in case a continuance is had upon the application of, or stipulation with, the party in whose favor costs are to be taxed.

28-26-03. Costs on appeal from county justice. Repealed by S.L. 1981, ch. 320, § 111, effective January 1, 1983.

28-26-04. Attorney's fee in instrument void. Any provision contained in any note, bond, mortgage, security agreement, or other evidence of debt for the payment of an attorney's fee in case of default in payment or in proceedings had to collect such note, bond, or evidence of debt, or to foreclose such mortgage or security agreement, is against public policy and void.

28-26-05. Costs on foreclosure of liens. Repealed by S.L. 1975, ch. 106, § 673.

28-26-06. Disbursements taxed in judgment. In all actions and special proceedings, the clerk of district court shall tax as a part of the judgment in favor of the prevailing party the following necessary disbursements:

1. The legal fees of witnesses; sheriffs; clerks of district court; the clerk of the supreme court, if ordered by the supreme court; process servers; and of referees and other officers;

be recovered of the state until after execution is issued therefor against such private party and returned unsatisfied.

28-26-23. Action in name of state - Costs charged against party in interest. In an action prosecuted in the name of the state for the recovery of money or property, or to establish a right or claim for the benefit of any corporation, limited liability company, or person, costs awarded against the party plaintiff must be charged against the party for whose benefit the action was prosecuted and not against the state.

28-26-24. Liability for costs on judgment against assignee. In an action in which the claim for relief, by assignment after the commencement of the action or in any other manner, becomes the property of a person not a party to the action, such person is liable for the costs in the same manner as if he were a party.

28-26-25. Nonresident must furnish surety. Repealed by S.L. 1983, ch. 364, § 1.

28-26-26. Responsibility of surety. The surety for costs is bound for the payment of all costs which may be adjudged against the plaintiff in the court in which the action is brought or in any other to which it may be carried, and for costs of the plaintiff's witnesses, whether the plaintiff obtains judgment or not.

28-26-27. Dismissal when surety not given. An action in which surety for costs is required and has not been given must be dismissed on motion and notice by the defendant at any proper time before judgment, unless in a reasonable time to be allowed by the court such surety for costs is given.

28-26-28. Surety on becoming nonresident. If the plaintiff in an action after its commencement becomes a nonresident of the state, he shall give surety for costs in the same manner as is required of a nonresident in commencing an action.

28-26-29. When additional surety demanded. In an action in which surety for costs has been given, the defendant at any time before judgment, after reasonable notice to the plaintiff, may move the court for additional surety on the part of the plaintiff, and if on such motion the court is satisfied that the surety has removed from this state or is not sufficient, the action may be dismissed, unless in a reasonable time to be fixed by the court sufficient surety is given by the plaintiff.

28-26-30. Judgment against surety. After final judgment has been rendered in an action in which surety for costs has been given as required by this chapter, the court, on motion of the defendant, or any other person having a right to such costs or any part thereof, after ten days' notice of such motion, may enter judgment in the name of the defendant or his legal representatives against the surety for costs, or against his executors or administrators, for the amount of the costs adjudged against the plaintiff, or so much thereof as may be unpaid. Execution may be issued on such judgment as in other cases for the use and benefit of the person entitled to such costs.

28-26-31. Pleadings not made in good faith. Allegations and denials in any pleadings in court, made without reasonable cause and not in good faith, and found to be untrue, subject the party pleading them to the payment of all expenses, actually incurred by the other party by reason of the untrue pleading, including a reasonable attorney's fee, to be summarily taxed by the court at the trial or upon dismissal of the action.

any right derived therefrom, the laws of another jurisdiction, it is sufficient to refer to the ordinance, regulation, statute, or law by its title and date of its approval or in some other manner with convenient certainty.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Name of Party. When the pleader shall be ignorant of the name of a party, such party may be designated in any pleading or proceeding by any name and when the true name shall be discovered, the pleading or proceeding may be amended accordingly.

[Amended effective March 1, 1990.]

EXPLANATORY NOTE

Rule 9 is adapted *from* Fed.R.Civ.P. 9. Deviations from this federal rule are the deletion of a reference to showing jurisdiction of the court in subdivision (a); addition to subdivision (d) of procedure for pleading ordinances, regulations, and the like, of political subdivisions of this State or another jurisdiction; and substitution of procedure to be followed when the name of a party is unknown for the federal provision dealing with admiralty and maritime claims in subdivision (h).

Subdivision (a) was amended, effective March 1, 1990. The amendments are *technical* in nature and no substantive change is intended.

SOURCES: Joint Procedure Committee Minutes of April 20, 1989, page 2; December 3, 1987, page 11; September 20–21, 1979, page 7; Fed.R.Civ.P. 9.

STATUTES AFFECTED:

SUPERSEDED: N.D.R.C. §§ 10-1401, 28-0723, 28-0720, 28-0728, 28-0730, (1943).

CROSS REFERENCE: N.D.R.Civ.P. 8 (General Rules of Pleading), N.D.R.Civ.P. 10 (Form of Pleadings), N.D.R.Civ.P. 12 (Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings), and N.D.R.Civ.P. 15 (Amended and Supplemental Pleadings).

RULE 10. FORM OF PLEADINGS

(a) Caption—Names of Parties. Every pleading shall contain a caption setting forth the name of the court and the county in which the action is brought, the title of the action, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

Whenever a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

(b) Paragraphs—Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by Reference—Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. An exhibit annexed to a pleading is a part thereof for all purposes.

[Amended effective July 1, 1980; amended July 1, 1981.]

EXPLANATORY NOTE

Subdivision (a) is adapted from Fed.R.Civ.P. 10, with the addition of requiring the name of the county in which the action is brought to be included in the caption and deleting the federal requirement of including the file number of the case as part of the caption. Even though the filing number is not required, its use is encouraged because it is helpful to the court and the clerk. Also, Rule 25(d)(2) was moved to subdivision (a) [effective July 1, 1980]. It governs the situation in which a public officer sues or is sued in his official capacity and is identical to Fed.R.Civ.P. 25(d)(2).

Subdivisions (b) and (c) are identical to the same subdivisions of Fed.R.Civ.P. 10.

SOURCES: Joint Procedure Committee Minutes of November 29–30, 1979, page 4; September 20–21, 1979, pages 7 and 19; Fed.R.Civ.P. 10.

STATUTES AFFECTED:

SUPERSEDED: N.D.R.C. §§ 28-0701, 28-0702, 28-0715 (1943).

CROSS REFERENCE: N.D.R.Civ.P. 7 (Pleadings Allowed—Form of Motions), N.D.R.Civ.P. 8 (General Rules of Pleadings), and N.D.R.Civ.P. 25 (Substitution of Parties); N.D.R.Ct. 3.1 (Pleadings).

RULE 11. SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, must be signed by the party. Each paper must contain the signer's address and telephone number, if any. If the person signing the paper is an attorney, the paper must also contain the attorney's State Board of Law Examiners identification number. Except when otherwise specifically provided by rule or

statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper must be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) **Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or are reasonably based on a lack of information or belief.

(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How Initiated.*

(A) By Motion. A motion for sanctions under this rule must be made separately from other motions or requests and must describe the specific conduct alleged to violate subdivision (b). The motion, brief, and any other supporting papers, 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 (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. The respondent shall have 10 days after a motion for sanctions is filed to serve and file an answer brief and other supporting papers. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule must be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) **Inapplicability to Discovery.** Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

[Amended effective March 1, 1986; March 1, 1990; March 1, 1996; March 1, 1997.]

EXPLANATORY NOTE

Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1, 1996; March 1, 1997.

Rule 11 governs to the extent N.D.R.Ct. 11 and N.D.R.Ct. 3.2, conflict.

Rule 11 was revised, effective March 1, 1996, in response to the 1993 revision of Fed.R.Civ.P. 11. North Dakota's rule differs from the federal rule in the following respects: 1) North Dakota's rule requires attorneys to cite their State Board of Law Examiners identification number when signing papers; and 2) North Dakota's rule does not require allegations or denials to be specifically identified when immediate evidentiary support is lacking.

SOURCES: Joint Procedure Committee Minutes of September 28–29, 1995, pages 2–3; April 27–28, 1995, pages 3–4; January 26–27, 1995, pages 8–10; September 29–30, 1994, pages 24–26; April 20, 1989, page 2; December 3, 1987, page 11; April 26, 1984, pages 25–26; January 20, 1984, pages 16–18; September 20–21, 1979, page 7; Fed.R.Civ.P. 11.

STATUTES AFFECTED:

SUPERSEDED: N.D.R.C. §§ 28-0720, 28-3001 (1943).

CROSS REFERENCE: N.D.R.Ct. 11.1 (Nonresident Attorneys); N.D.C.C. §§ 28-26-01 (Attorney's Fees by Agree-