(I)

APPENDIX

TABLE OF CONTENTS

STATE OF NORTH DAKOTA
COUNTY OF WALSH

IN DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT

Mitchell S. Sanderson,

Plaintiff,

vs.

Janne Myrdal,

Defendant.

Case No. 50-2023-CV-00129

Order Denying Motion for Default Judgment

[¶1] The above-entitled action came before the Court on Mitchell S. Sanderson's ("Sanderson") motion for default judgment[1]. The Court, having carefully considered Sanderson's motion, his affidavit, Janne Myrdal's ("Myrdal") answer brief, her affidavit, her exhibits, the entire record, and being fully advised on the matter, now issues the following Order Denying Motion for Default Judgment.

Factual and Procedural Background

[¶2] On May 2, 2023, Myrdal was served with the summons and complaint (Index # 3). Sanderson served Myrdal by certified mail, signed receipt. This method of service is appropriate under N.D.R.Civ.P. 4(d)(2)(A)(v). Myrdal, however, argues that service of the summons and complaint was improper as she alleges someone other than herself signed for the envelope.

[¶3] Myrdal failed to submit an answer or otherwise respond to the complaint within twenty-one days, as required by N.D.R.Civ.P. 12(a)(1)(A).

[¶4] On May 19, 2023, Sanderson filed this lawsuit with the Clerk of Court.

[¶5] On June 3, 2023, Myrdal contacted the clerk of court by email indicating an issue with the service of the summons and complaint and stated her intent to contest the proceedings (Index # 10). There is, however, no proof of service that Myrdal served Sanderson with this communication which would have put him on notice of her appearance.

[¶6] On June 12, 2023, Myrdal, though counsel, filed an answer (Index # 19).

[1] Sanderson's motion is titled a motion for Default/Summary Judgement, which implicates both Rule 55 (Default Judgment) and Rule 56 (Summary Judgment), N.D.R.Civ.P. While titled "3.2 Motion for Default/Summary Judgment," Sanderson's motion is ostensibly a motion for default judgment under N.D.R.Civ.P. 55 and this Court's analysis will not discuss Rule 56.

[¶7] On June 16, 2023, Sanderson filed this present motion for default judgment along with supporting documents (Index #s 22-27). Myrdal filed an answer to the motion for default judgment along with supporting documents (Index #s 28-32).

Legal Analysis

[¶8] On June 16, 2023, Sanderson moved this Court for entry of default judgment against Myrdal pursuant to N.D.R.Civ. P. 55(a). Sanderson asserts Myrdal was properly served with the summons and complaint on May 2, 2023 and that she failed to answer or otherwise defend within twenty-one days, as required by N.D.R.Civ.P. 12(a)(1)(A). Under N.D.R.Civ.P. 12(a)(1)(A), a defendant has twenty-one days to answer a complaint. If the defendant fails to answer or otherwise appear, a default judgment may be entered under N.D.R.Civ.P. 55(a). The district court has discretion on whether to grant a default judgment, and its decision will not be overturned unless there has been an abuse of discretion. Citibank (South Dakota) NA v. Reikowski, 2005 ND 133, ¶ 6, 699 N.W.2d 851. "A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law." Id.

[¶9] Rule 55(a), N.D.R.Civ.P., provides, in part:

> If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise appear and the failure is shown by declaration or otherwise, the court may direct the clerk to enter an appropriate default judgment in favor of the plaintiff and against the defendant....

[¶10] In United Accounts, Inc. v. Lantz, the North Dakota Supreme Court adopted the general rule that if a plaintiff does not move for default judgment after the default has accrued or within a reasonable time after the default has accrued, and the answer is subsequently filed, the plaintiff waives its right to default judgment for a defendant's failure to appear. 145 N.W.2d 488, 491 (N.D.1966) (citing 30A Am.Jur. Judgments § 203 (1940)). The Supreme Court stated:

> The entry of a default against defendant is merely a privilege which may or may not be exercised by plaintiff, and which is waived by his proceeding with the cause without taking advantage of the default in the proper time and manner, unless he was ignorant of the default at the time.

Id. (citing 49 C.J.S. Judgments § 203 (1955)).

[¶11] Information contained in Sanderson's motion is incorrect. Specifically, Sanderson's motion states "Plaintiff hereby moves the court for a default judgment against the Defendant for failing to file an answer or appearance in this matter." See 3.2 Motion for Default/Summary

Judgment, ¶ 1 (Index # 23). In reality, Myrdal, though counsel, filed an answer on June 12, 2023, four days before Sanderson served his motion for default judgment. Myrdal also contacted the clerk of court by email on June 3, 2023 indicating an issue with the service of the summons and complaint and stated her intent to contest the proceedings (Index # 10). The Court notes there is no proof of service that Myrdal served Sanderson with this communication which would have put him on notice of her appearance.

[¶12] In the instant case, and recognizing Myrdal's position regarding insufficient service of process, Myrdal's answer was untimely. Myrdal's answer, however, was filed and served prior to Sanderson's motion for default judgment. North Dakota has a strong preference for deciding cases on their merits rather than by default judgment. Filler v. Bragg, 1997 ND 24, ¶ 14, 559 N.W.2d 225. Mindful of North Dakota's strong preference that cases be decided on their merits, this Court will exercise its discretion and deny Sanderson's request for an entry of default judgment.

Order

[¶13] For the foregoing reasons, Sanderson's motion for default judgment is **DENIED.**

IT IS SO ORDERED

Dated this 10th day of July, 2023.

BY THE COURT:

Kari M. Agotness
Judge of the District Court

APPENDIX A

STATE OF NORTH DAKOTA
COUNTY OF WALSH

IN DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT

Mitchell S. Sanderson,

Plaintiff,

vs.

Janne Myrdal,

Defendant.

Case No. 50-2023-CV-00129

Order Denying Hearing on Motion to Rule on Evidence Tampering and Spoilage and Order Denying Hearing on Motion to rule on Forgery

[¶1] On August 2, 2023, Mitchell S. Sanderson ("Sanderson") filed two motions: 1) Motion to Rule on Evidence Tampering and Spoilage, and 2) Motion to Rule on Forgery. On August 30, 2023, Sanderson contacted court staff via email and requested a hearing date for these two motions.

[¶2] Upon serving and filing the motions, the opposing party then has 14 days after service of the motions within which to serve and file an answer brief. N.D.R.Ct. 3.2(a)(2). Requests for a hearing or the taking of evidence must be made not later than seven days after expiration of the time for filing the answer brief. N.D.R.Ct. 3.2(a)(3). In this case, the deadline to request a hearing was August 23, 2023. Sanderson's request for a hearing on these motions is not timely. As the request for hearing was received after the deadline, these matters are considered submitted for decision on the briefs.

[¶3] Sanderson's request for a hearing on the Motion to Rule on Evidence Tampering and Spoilage and the Motion to Rule on Forgery is **DENIED**.

IT IS SO ORDERED

Dated this 30th day of August, 2023.

BY THE COURT:

Kari M. Agotness
Judge of the District Court

APPENDIX B

STATE OF NORTH DAKOTA
COUNTY OF WALSH

IN DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT

Mitchell S. Sanderson,

Plaintiff,

vs.

Janne Myrdal,

Defendant.

Case No. 50-2023-CV-00129

Order Denying Hearing on Motion to Rule on First and Fourteenth Amendment Violations

[¶1] On August 15, 2023, Mitchell S. Sanderson ("Sanderson") filed a Motion to Rule on First and Fourteenth Amendment Violations. On October 2, 2023, Sanderson contacted court staff via email and requested a hearing date for this motion.

[¶2] Upon serving and filing a motion, the opposing parties have 14 days after service of the motion within which to serve and file answer briefs. N.D.R.Ct. 3.2(a)(2). Requests for a hearing or the taking of evidence must be made not later than seven days after expiration of the time for filing the answer briefs. N.D.R.Ct. 3.2(a)(3). In this case, the deadline to request a hearing was September 5, 2023. Sanderson's request for a hearing on this motion is not timely. As the request for hearing was received after the deadline, this matter is considered submitted for decision on the briefs.

[¶3] Sanderson's request for a hearing on the Motion to Rule on First and Fourteenth Amendment Violations is **DENIED.**

IT IS SO ORDERED

Dated this 3rd day of October, 2023.

BY THE COURT:

Kari M. Agotness
Judge of the District Court

STATE OF NORTH DAKOTA
COUNTY OF WALSH

IN DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT

Mitchell S. Sanderson,

Plaintiff,

vs.

Janne Myrdal,

Defendant.

Case No. 50-2023-CV-00129

Order Denying Motion to Rule on Forgery & Awarding Attorney Fees

[¶1] Before the Court is Mitchell S. Sanderson's ("Sanderson") Motion to Rule on Forgery filed on August 2, 2023. See Doc. No. 75. Janne Myrdal ("Myrdal") filed a response in opposition to the motion on August 15, 2023. See Doc. No. 88. Sanderson filed a reply brief on August 29, 2023. See Doc. No. 105. Neither party made a timely request for a hearing.

[¶2] The Court has carefully reviewed the entire record, the parties' filings, and the relevant law. Being fully advised on the matter, the Court now issues the following Order Denying Motion to Rule on Forgery and Awarding Attorney Fees.

Relevant Factual and Procedural Background

[¶3] Sanderson filed a Summons and Complaint with the Court alleging that Myrdal violated his First Amendment rights by blocking him from posting or commenting on Myrdal's Facebook posts. See Doc. No. 1 & 2. Sanderson alleges the exhibits he filed with the Court show he cannot access Myrdal's Facebook, which prevents him from being informed of what bills Myrdal is introducing, sponsoring, and her vote on such bills. See Doc. No. 16 & 17. Sanderson further alleges that by blocking him from Myrdal's Facebook page, she infringes on his Fourteenth Amendment, Equal Protection Rights.

[¶4] On August 2, 2023, Sanderson filed a Motion with the Court alleging Myrdal committed forgery with respect to the U.S. Mail Return/Receipt. Sanderson appears to argue that Myrdal committed forgery because someone else signed the return receipt in Myrdal's name. Myrdal submitted an affidavit to this Court stating that she was out of town when service was effectuated and did not sign the return receipt. Myrdal denies that she signed the return receipt. Sanderson alleges that Myrdal or an unknown individual changed evidence and committed forgery. Sanderson is requesting this Court to investigate and charge someone who forged Myrdal's signature with

forgery. Sanderson asserts that he was harmed by Myrdal's alleged action and such harm is in violation of his Constitutional rights.

[¶5] Myrdal filed a Brief with the Court in opposition to Sanderson's Motion to Rule on Forgery. See Doc. No. 88. Myrdal argues that Sanderson's motion must fail for several reasons, specifically 1) forgery was not included in the complaint, 2) the law cited by Sanderson does not apply to this action, nor is it controlling on this Court, and 3) the request for this Court to prosecute Myrdal or an unknown individual violates the Court's role as a neutral decision-maker.

Legal Analysis

I. Sanderson's reply brief is untimely and will not be considered by the Court.

[¶6] Sanderson filed this Motion and supporting documents with the Court on August 2, 2023. See Doc. No. 75-81. Myrdal filed a response in opposition to the motion on August 15, 2023. See Doc. No. 88. Sanderson filed a reply brief on August 29, 2023. See Doc. No. 105. North Dakota Rules of Court Rule 3.2 controls the deadlines for submitting motions in a civil action. See N.D.R.Ct. 1.1 [Scope]. Under N.D.R.Ct. 3.2, a party opposing a motion has 14 days after service of a brief to serve an answer brief and supporting papers. N.D.R.Ct. 3.2(a)(2). The moving party may serve and file a reply brief within seven days after service of the answer brief. Id. Under N.D.R.Civ.P. 6(e), three days are added after the prescribed period if service is made by mail or third-party commercial carrier.

[¶7] Here, Sanderson was served with Myrdal's answer brief on August 15, 2023 by mail. Sanderson had ten days to file and serve his reply brief (seven days under N.D.R.Ct. 3.2(a)(2) and an additional three days under N.D.R.Civ.P. 6(e)). Sanderson filed his reply brief on August 29, 2023; more than ten days after the prescribed period. As such, Sanderson's reply brief is untimely and will not be considered by the Court.

II. Sanderson failed to raise forgery in his Complaint and may not raise it by motion.

[¶8] Rule 8 of the North Dakota Rules of Civil Procedure articulates the requirements for a pleading:

> (a) Claims for Relief. A pleading that states a claim for relief--whether an original claim, a counterclaim, a crossclaim, or a third-party claim--must contain:
> (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and
> (2) a demand for the relief sought, which may include relief in the alternative or different types of relief.

N.D.R.Civ.P. 8(a). It is well settled that "a concise and non-technical complaint" is required to satisfy Rule 8(a). Feickert v. Feickert, 2022 ND 210, ¶ 12, 982 N.W.2d 316. The purpose behind the rule is to ensure that a defendant is sufficiently informed and has been provided adequate notice of the nature of Plaintiff's claim. Twete v. Mullin, 2019 ND 184, ¶ 38, 931 N.W.2d 198. The Rules of Civil Procedure provide for a liberal pleading standard for civil complaints, but does not allow a Plaintiff to raise new claims by motion. MSP Recovery Claims, Series LLC v. United Auto. Ins. Co., 60 F.4th 1314, 1319 (11th Cir. 2023).

[¶9] The North Dakota Supreme Court has long held that a "plaintiff cannot, by supplemental pleading, bring into the action a distinct cause of action arising since the beginning of the suit." Swedish-American Nat. Bank v. Dickinson Co., 69 N.W. 455, 457 (ND 1896). The Court opined that the "groundwork of this doctrine is that plaintiff cannot recover on a cause of action which does not exist when he sues. He must dismiss his action, and plead anew." Id. This also applies to the practice of changing the cause of action where the new cause of action was in existence when the suit was commenced. Id.

[¶10] The North Dakota Supreme Court has recently ruled on this issue in Feickert v. Feickert, 2022 ND 210, 982 N.W.2d 316. The Plaintiff inherited land from her father and defendant was appointed conservator. Id. at ¶ 1. Defendant leased the land but failed to provide an accounting of the leased income for twenty years. Id. The Plaintiff alleged various issues in its initial complaint and defendant subsequently filed an answer Id. at ¶ 2. Defendant included a prayer for relief but "did not include facts supporting her claimed defense, nor did it specifically include a counterclaim for unjust enrichment or a request for a damage offset." Id. at ¶ 3. A trial was held, and the district court held in favor of the plaintiff and also held that defendant "failed to properly plead the unjust enrichment counterclaim." Id. at ¶ 4. Defendant appealed the District Court's decision and argued that it properly pleaded their claim, but the North Dakota Supreme Court disagreed.

[¶11] The Court explained that the purpose of the pleading is to "inform and notify both the adversary and the court of the pleader's claim." Id. at ¶ 12. The pleading requirements outlined in N.D.R.Civ.P. 8(a) "is to apprise the opposing party of the nature of the claim." Id. at ¶ 13. All pleadings must be construed so as to do justice." Id. Substantial justice applies to both parties and if after review of a complaint "no assertion is offered that would also allow for the minimal notice required under Rule 8, the District Court may dismiss the complaint." Id. The Court held that the Defendant did not sufficiently plead its claim, nor did they plead sufficient facts in support of the

claim. Id. at ¶ 14. The Defendant did not comply with N.D.R.P. 8, so it was appropriate that their claim was dismissed.

[¶12] In the present case, Sanderson does not raise the issue of forgery in his Complaint. The purpose of N.D.R.Civ.P. 8 is to provide the opposing party with a fair and reasonable opportunity to prepare a defense. Sanderson is attempting to circumvent proper procedure by injecting a new claim in an already initiated action. It was necessary for Sanderson to amend the complaint for any new issue that had arisen. Moreover, Sanderson has had sufficient time to motion the Court for any amendment consistent with N.D.R.Civ.P. 15(a) prior to September 29, 2023.[1] Sanderson never filed a motion to amend the complaint. As Sanderson's motion does not follow proper procedure, his Motion to Rule on Forgery is denied.

III. The law cited by Sanderson does not apply to this action nor is it controlling on this Court.

A. N.D.C.C. § 12.1-24-01: Forgery or counterfeiting, does not apply to the present action because this is a civil action not a criminal case.

[¶13] Sanderson alleges that Myrdal's actions implicated N.D.C.C. § 12.1-24-01: Forgery or Counterfeiting. The above-mentioned statute states, in pertinent part:

> 1. A person is guilty of forgery or counterfeiting if, with intent to deceive or harm the government or another person, or with knowledge that the person is facilitating such deception or harm by another person, the person:
> a Knowingly and falsely makes, completes, or alters any writing; or
> b Knowingly utters or possesses a forged or counterfeited writing.

[¶14] For a conviction to be sustained, it must be proven beyond a reasonable doubt that "[a] person engages in conduct '[k]nowingly' if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so." State v. Fraser, 2000 ND 53, ¶ 4, 608 N W.2d 244. It must be proven that an individual knew that the writing was forged and had the intent to deceive another. This is a criminal statute.

[¶15] In the present case, the above-mentioned criminal statute does not apply. First, this is not a criminal proceeding. Further, Myrdal stated that she did not sign the return receipt and therefore, no action was made on her part. Furthermore, Sanderson asserts that he does not know the

[1] This Court held a Scheduling Conference on September 12, 2023 where the Court entered various deadlines after receiving feedback from the parties. Following the Scheduling Conference, a Scheduling Order was filed which set a deadline of September 29, 2023 at 5:00 pm for the parties to amend their pleadings. See Doc. No. 126.

individual that signed the return receipt, so no actual individual can be identified. It is also notable that one cannot be guilty of forgery for signing their own name on a return receipt for mail. Consequently, to the extent that Sanderson argues that Myrdal forged her own signature, the statute does not apply. In addition, the return receipt at issue does not indicate that the return receipt must be signed by Myrdal. Rather, it is Sanderson's own writing that requires it. However, in "Section 3: Service Type" on the certified mail slip, options like signature confirmation and/or restricted delivery were not selected. Sanderson did not elect to ensure that USPS restrict delivery only to Myrdal, rather, he only selected certified mail. If Sanderson wanted to ensure that Myrdal was the only individual able to accept service, he should have ensured that the appropriate measures were taken.

B. 8 U.S.C. § 1324: Penalties for Document Fraud, does not apply to the present action because it is a federal statute that governs immigration to and citizenship into the united states.

[¶16] Sanderson cites 8 U.S.C. § 1324 as another statute that Myrdal should be considered to have violated, but it is a statute specifically prohibiting conduct in order to obtain an immigration benefit. 8 U.S.C. § 1324c states, in pertinent part:

> (a) It is unlawful for any person or entity knowingly –
> (1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this chapter or to obtain a benefit under this chapter.

The statute "provides for the assessment of civil [and criminal] penalties against individuals who knowingly engage in acts of document fraud for the purpose of satisfying any requirement of the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1524 (1994)." Remileh v. I.N.S., 101 F.3d 66, 67 (8th Cir. 1996). The statute specifically applies to individuals engaging in document fraud to obtain an immigration benefit, it does not concern any issues before this Court. The statute that the Sanderson cites is irrelevant and will not be considered by this Court.

C. 18 U.S.C. §§§ 471, 472, and 473 do not apply to the pending civil action since the statutes are federal criminal statutes.

[¶17] Sanderson also cites 18 U.S.C. §§§ 471, 472, and 473. 18 U.S.C. § 471 states: "'[w]hoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both." 18 U.S.C. § 472 states:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 472. Finally, 18 U.S.C. § 473 states:

> Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 473. The manifest purpose of the counterfeiting statute is the protection of all currency and obligations of the United States. U.S. v. LeMon, 622 F.2d 1022, 1024 (10th Cir. 1980).

[¶18] These statutes are completely irrelevant considering the factual allegations made by Sanderson do not assert that Myrdal even attempted to counterfeit or forge currency or other obligations of the United States. Additionally, this Court has no jurisdiction over a federal criminal proceeding. Sanderson's argument involving the above-mentioned federal statutes is distorted and this Court will dismiss such arguments as frivolous.

IV. Sanderson's request for the Court to prosecute Myrdal violates the Court's role as a neutral decision-maker.

[¶19] Sanderson's prayer for relief violates the Court's role and requests this Court to make a decision that would overstep its judicial function. Sanderson requests the Court to investigate Myrdal and potentially an unknown individual who had signed the return receipt. Sanderson further requests this Court to charge that individual for what he claims is forgery and to potentially impose criminal sanctions. Again, Myrdal cannot forge her own signature establishing a violation of the asserted statute.

[¶20] The North Dakota Constitution creates the framework for our government. It "creates three branches of government and vests each branch with a distinct type of power." North Dakota Legislative Assembly v. Burgum, 2018 ND 189, ¶ 40, 916 N.W.2d 83 (citing N.D. Const. art. III § 1). N.D. Const. art. VI, § 1 creates the judiciary, by creating a unified judicial system. The basis for creating three branches of government is to ensure that no one branch of government has more power than the other. Id. The Constitution also sets the role of the judicial officers, i.e. judges. N.D. Const. art. VI, § 10 provides that judges and justices cannot engage in the practice of law,

nor shall they exercise any power of appointment except as provided in the Constitution. Id. at ¶ 41. The North Dakota Constitution is clear that the role of the judiciary is to be a neutral arbiter of the law. N.D. Code Jud. Conduct Rule 2.2. A judge's role is not to pursue criminal investigations or prosecute individuals on behalf of the state. Rather, the role of the judiciary is to ensure that all parties have the ability to be heard and cannot engage in a "manner that coerces any party into settlement." N.D. Code Jud. Conduct Rule 2.6.

[¶21] It is the role of a prosecutor to pursue criminal charges and law enforcement officers are tasked with the investigation of a crime. A prosecutor has the "responsibility of a minister of justice . . ." which is different from that of other lawyers. N.D.R. Prof. Conduct Rule 3.8. A prosecutor does not receive direction from the Court concerning who or what to charge, nor does a prosecutor confer with the Court when making charging decisions. It would be contrary to the Constitution to allow the Court to make such decisions.

[¶22] Sanderson's prayer for relief runs contrary to the democratic guarantees of both the State and Federal Constitutions. Sanderson is requesting that this Court look past its role and the relevant statutes that dictate the Court's responsibilities and force the prosecution to pursue charges against Myrdal. Moreover, Sanderson requests this Court to conduct a criminal investigation and pursue criminal charges.

V. Sanderson's Motion is frivolous and Myrdal is awarded reasonable attorney's fees.

[¶23] Under N.D.C.C. § 28-26-01(2), attorney's fees must be awarded to the prevailing party upon a finding by the court that a claim for relief was frivolous. See also N.D.R.Civ.P. 11(c)(4) (allowing an award of attorney's fees and other expenses as a sanction for frivolous claims). A claim for relief is frivolous "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 that person's favor . . ." N.D.C.C. § 28-26-01(2). An award of attorney's fees is not required when an attorney or party advances "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." Id.; see N.D.R.Civ.P. 11(b)(2). Under N.D.C.C. § 28-26-01(2), courts have discretion to determine whether a claim is frivolous and the amount and reasonableness of an award of attorney's fees. DCI Credit Services, Inc. v. Plemper, 2021 ND 215, ¶ 14, 966 N.W.2d 904. But if a court determines a claim is frivolous, it must award attorney's fees. Brossart v. Janke, 2020 ND 98, ¶ 25, 942 N.W.2d 856.

[¶24] Sanderson's arguments that Myrdal, or an unknown individual, committed the offense of forgery are wholly unsupported by the facts Sanderson alleges in his Complaint and Motion. As explained above, the law cited by Sanderson; N.D.C.C. § 12.1-24-01, 8 U.S.C. § 1324, and various sections of Title 18 of the U.S. Code; do not apply to this civil action nor are they controlling on this Court. They are completely irrelevant to Sanderson's claims. But even if they did apply to this civil action and were controlling on this Court, Sanderson failed to allege any facts that would support any alleged violation of these provisions. Thus, Sanderson's Motion is frivolous.

[¶25] Likewise, Sanderson's claim that, if the Court ruled in his favor, the Court must conduct a criminal investigation and pursue criminal charges against Myrdal and potentially an unknown individual who had signed the return receipt, is so completely unsupported under the law that no reasonable person could have thought a court would rule in his favor. In fact, the law is so clear and longstanding on the issue that Sanderson is unable to cite a single case or put forth a single good-faith argument in support of his contention. There being no legitimate basis for Sanderson's Motion against Myrdal, Sanderson's Motion is undoubtedly frivolous.

[¶26] Myrdal is awarded reasonable attorney's fees for having to respond to this Motion.

Order

[¶27] Sanderson's Motion to Rule on Forgery is DENIED.

[¶28] Sanderson's Motion to Rule on Forgery is frivolous. Myrdal is awarded reasonable attorney's fees as the motion is frivolous. Myrdal shall provide a statement outlining requested attorney's fees within ten days of the date of this order. Myrdal's statement should incorporate the factors in N.D.R. Prof. Conduct 1.5(a). Sanderson shall have ten days to respond. This Court will then issue an order on attorney's fees.

IT IS SO ORDERED

Dated this 11th day of October, 2023.

BY THE COURT:

Kari M. Agotness
Judge of the District Court

STATE OF NORTH DAKOTA
COUNTY OF WALSH

IN DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT

Mitchell S. Sanderson,

Plaintiff,

vs.

Janne Myrdal,

Defendant.

Case No. 50-2023-CV-00129

Order Denying Motion to Rule on Evidence Tampering and Spoilage & Awarding Attorney Fees

[¶1] Before the Court is Mitchell S. Sanderson's ("Sanderson") Motion to Rule on Evidence Tampering and Spoilage filed on August 2, 2023. See Doc. No. 69. Janne Myrdal ("Myrdal") filed a response in opposition to the motion on August 15, 2023. See Doc. No. 87. Sanderson filed a reply brief on August 29, 2023. See Doc. No. 106. Neither party made a timely request for a hearing.

[¶2] The Court has carefully reviewed the entire record, the parties' filings, and the relevant law. Being fully advised on the matter, the Court now issues the following Order Denying Motion to Rule on Evidence Tampering and Spoilage and Awarding Attorney Fees.

Relevant Factual and Procedural Background

[¶3] Sanderson filed a Summons and Complaint with the Court alleging that Myrdal violated his First Amendment rights by blocking him from posting or commenting on Myrdal's Facebook posts. See Doc. No. 1 & 2. Sanderson alleges the exhibits he filed with the Court show he cannot access Myrdal's Facebook, which prevents him from being informed of what bills Myrdal is introducing, sponsoring, and her vote on such bills. See Doc. No. 16 & 17. Sanderson further alleges that by blocking him from Myrdal's Facebook page, she infringes on his Fourteenth Amendment, Equal Protection Rights.

[¶4] Sanderson filed a Motion with the Court demanding a ruling on whether Myrdal changed or deleted content and if it amounts to Evidence Tampering and Spoilage. See Doc. No. 69. Sanderson cites the American Bar Association's Model Rules of Professional Conduct, various sections of Title 18 of the U.S. Code, and N.D.C.C. 12.1-09-03 in support of his argument. Sanderson filed Exhibit S as support that Myrdal had changed her designation on Facebook. See Doc. No. 72. Sanderson, however, does not provide any further support concerning whether any

information had been deleted or destroyed. Rather, Sanderson requests that this Court rule on his Motion, and if the Court rules in the affirmative, that the Court must direct the Walsh County Sheriff's Department to file charges with the Walsh County State's Attorney's Office against Myrdal.

[¶5] Myrdal filed a Brief with the Court in opposition to Sanderson's Motion to Rule on Evidence Tampering and Spoilage. See Doc. No. 87. Myrdal argues that Sanderson's motion must fail for several reasons, specifically 1) evidence tampering and spoilage were not included in the complaint, 2) the motion does not comply with the heightened evidentiary standard in the North Dakota Rules of Civil Procedure for acts alleging deceit, 3) the law cited by Sanderson does not apply to this action, nor is it controlling on this Court, and 4) the request for this Court to prosecute Myrdal violates the Court's role as a neutral decision-maker.

Legal Analysis

I. Sanderson's reply brief is untimely and will not be considered by the Court.

[¶6] Sanderson filed this Motion and supporting documents with the Court on August 2, 2023. See Doc. No. 69-72. Myrdal filed a response in opposition to the motion on August 15, 2023. See Doc. No. 87. Sanderson filed a reply brief on August 29, 2023. See Doc. No. 106. North Dakota Rules of Court Rule 3.2 controls the deadlines for submitting motions in a civil action. See N.D.R.Ct. 1.1 [Scope]. Under N.D.R.Ct. 3.2, a party opposing a motion has 14 days after service of a brief to serve an answer brief and supporting papers. N.D.R.Ct. 3.2(a)(2). The moving party may serve and file a reply brief within seven days after service of the answer brief. Id. Under N.D.R.Civ.P. 6(e), three days are added after the prescribed period if service is made by mail or third-party commercial carrier.

[¶7] Here, Sanderson was served with Myrdal's answer brief on August 15, 2023 by mail. Sanderson had ten days to file and serve his reply brief (seven days under N.D.R.Ct. 3.2(a)(2) and an additional three days under N.D.R.Civ.P. 6(e)). Sanderson filed his reply brief on August 29, 2023; more than ten days after the prescribed period. As such, Sanderson's reply brief is untimely and will not be considered by the Court.

II. Sanderson failed to raise evidence tampering and spoilage in his Complaint and may not raise it by motion.

[¶8] Rule 8 of the North Dakota Rules of Civil Procedure articulates the requirements for a pleading:

> (a) Claims for Relief. A pleading that states a claim for relief--whether an original claim, a counterclaim, a crossclaim, or a third-party claim--must contain:
> (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and
> (2) a demand for the relief sought, which may include relief in the alternative or different types of relief.

N.D.R.Civ.P. 8(a). It is well settled that "a concise and non-technical complaint" is required to satisfy Rule 8(a). Feickert v. Feickert, 2022 ND 210, ¶ 12, 982 N.W.2d 316. The purpose behind the rule is to ensure that a defendant is sufficiently informed and has been provided adequate notice of the nature of Plaintiff's claim. Twete v. Mullin, 2019 ND 184, ¶ 38, 931 N.W.2d 198. The Rules of Civil Procedure provide for a liberal pleading standard for civil complaints, but does not allow a Plaintiff to raise new claims by motion. MSP Recovery Claims, Series LLC v. United Auto. Ins. Co., 60 F.4th 1314, 1319 (11th Cir. 2023).

[¶9] The North Dakota Supreme Court has long held that a "plaintiff cannot, by supplemental pleading, bring into the action a distinct cause of action arising since the beginning of the suit." Swedish-American Nat. Bank v. Dickinson Co., 69 N.W. 455, 457 (ND 1896). The Court opined that the "groundwork of this doctrine is that plaintiff cannot recover on a cause of action which does not exist when he sues. He must dismiss his action, and plead anew." Id. This also applies to the practice of changing the cause of action where the new cause of action was in existence when the suit was commenced. Id.

[¶10] The North Dakota Supreme Court has recently ruled on this issue in Feickert v. Feickert, 2022 ND 210, 982 N.W.2d 316. The Plaintiff inherited land from her father and defendant was appointed conservator. Id. at ¶ 1. Defendant leased the land but failed to provide an accounting of the leased income for twenty years. Id. The Plaintiff alleged various issues in its initial complaint and defendant subsequently filed an answer Id. at ¶ 2. Defendant included a prayer for relief but "did not include facts supporting her claimed defense, nor did it specifically include a counterclaim for unjust enrichment or a request for a damage offset." Id. at ¶ 3. A trial was held, and the district court held in favor of the plaintiff and also held that defendant "failed to properly plead the unjust enrichment counterclaim." Id. at ¶ 4. Defendant appealed the District Court's decision and argued that it properly pleaded their claim, but the North Dakota Supreme Court disagreed.

[¶11] The Court explained that the purpose of the pleading is to "inform and notify both the adversary and the court of the pleader's claim." Id. at ¶ 12. The pleading requirements outlined in

N.D.R.Civ.P. 8(a) "is to apprise the opposing party of the nature of the claim." Id. at ¶ 13. All pleadings must be construed so as to do justice." Id. Substantial justice applies to both parties and if after review of a complaint "no assertion is offered that would also allow for the minimal notice required under Rule 8, the District Court may dismiss the complaint." Id. The Court held that the Defendant did not sufficiently plead its claim, nor did they plead sufficient facts in support of the claim. Id. at ¶ 14. The Defendant did not comply with N.D.R.P. 8, so it was appropriate that their claim was dismissed.

[¶12] In the present case, Sanderson does not raise the issue of evidence tampering or spoilage in his Complaint. The purpose of N.D.R.Civ.P. 8 is to provide the opposing party with a fair and reasonable opportunity to prepare a defense. Sanderson is attempting to circumvent proper procedure by injecting a new claim in an already initiated action. It was necessary for Sanderson to amend the complaint for any new issue that had arisen. Moreover, Sanderson has had sufficient time to motion the Court for any amendment consistent with N.D.R.Civ.P. 15(a) prior to September 29, 2023.[1] Sanderson never filed a motion to amend the complaint. As Sanderson's motion does not follow proper procedure, his Motion to Rule on Evidence Tampering and Spoilage is denied.

A. Sanderson's motion does not comply with Rule 9(b) of the North Dakota Rules of Civil Procedure's heightened evidentiary standard.

[¶13] Sanderson is claiming evidence tampering and spoilage in his Motion but also alleges fraud on the part of the Myrdal. The North Dakota Supreme Court has consistently held that fraud applies when there is a contract between the parties, rather than the term "deceit, which applies when there is no contract between the parties." WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 25, 730 N.W.2d 841. Sanderson's brief asserts a number of issues which appear to implicate allegations of deceit. Sanderson alleges that Myrdal tampered with her Facebook page in an attempt mislead the Court and/or misrepresent her political position.

[¶14] N.D.R.Civ.P. 9(b) states that when "alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." When alleging deceit, the plaintiff must

[1] This Court held a Scheduling Conference on September 12, 2023 where the Court entered various deadlines after receiving feedback from the parties. Following the Scheduling Conference, a Scheduling Order was filed which set a deadline of September 29, 2023 at 5:00 pm for the parties to amend their pleadings. See Doc. No. 126.

establish the deceit by clear and convincing evidence. WFND, LLC, 2007 ND 67 at ¶ 25. It is not merely sufficient to allege deceit, it requires the plaintiff to "state with particularity the circumstances constituting fraud." Sadek v. Weber, 2020 ND 194, ¶ 16, 948 N.W.2d 820, 825. Specifically, Rule 9(b) requires the plaintiff to "plead such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby' . . . [T]he party must typically identify the 'who, what, where, when, and how' of the alleged fraud." Kuntz v. State, 2019 ND 46, ¶ 51, 923 N W.2d 513. The requirement of alleging deceit also involves "past or present false misrepresentation[s] of a material fact." Sadek, 2020 ND 194 at ¶ 15. However, a "mere expression of an opinion in the nature of a prophecy as to the happening or non-happening of a future event is not actionable." Id. Sanderson must plead sufficient facts to support the allegations.

[¶15] In Kuntz, the Supreme Court of North Dakota held that pleading deceit requires a heightened standard where the elements of deceit may be found from reading the whole pleading. Kuntz, 2019 ND 46 at ¶ 51. The plaintiff in Kuntz requested records from State and Federal agencies regarding his ND driver's license records. Id. at ¶ 2. Along with his requests, the plaintiff submitted a written request "under the open records law to the North Dakota Attorney General, Bureau of Criminal Investigation (BCI), Criminal Justice Information Services (CJIS) Director, and the Department of Transportation (DOT) . . ." Id. After some correspondence between a representative on behalf of BCI and the plaintiff, plaintiff requested the "Attorney General to review agency noncompliance with the open records law." Id. at ¶ 5. Plaintiff commenced an action alleging that he had relief on the defendant's false and misleading representation. Id. at ¶ 6.

[¶16] The Supreme Court upheld the District Court's decision that the plaintiff failed to provide sufficient facts to support his claims. The Court reiterated that there is a "greater particularity standard under N.D.R.Civ.P. 9(b)." Id. at ¶ 50. The Court further explained that the North Dakota notice requirements necessitate "a short and plain statement of the claim showing that the pleader is entitled to relief." Id. The tort of deceit is "available when a party has breached an obligation imposed by law to honestly deal with another party." Id. Sufficient facts must be plead to support a claim of deceit, namely how the plaintiff substantially relied upon the false misrepresentation or what specific misrepresentations were made.

[¶17] In the present case, Sanderson has not provided any factual support in his Motion. The only support that Sanderson provides is a screenshot purportedly showing that Myrdal changed her

political position, but neither designation is false or misleading. Both designations were factually accurate, Myrdal is a "public figure" and a "political candidate." [Plaintiff's Exhibit S, Doc No. 72]. Sanderson also fails to provide any evidence how the alleged false and/or misleading statement caused him any harm or how he may have relied on the misleading information. There are insufficient facts alleged to support a claim that Myrdal has committed the tort of deceit or made any misleading or false statements. As a result, Sanderson's Motion is without merit.

III. The law cited by Sanderson does not apply to this action nor is it controlling on this Court.

A. The American Bar Association's Model Rules of Professional Conduct and/or the North Dakota Rules of Professional Conduct is not applicable.

[¶18] Sanderson cites numerous authorities to support his position, but none of the cited authorities are applicable or relevant. The first rule that Sanderson cites is the American Bar Association's Model Rules of Professional Conduct ("ABA Model Rules"), which serves as a model for the ethics rules for most states. It is not binding on states, but rather, a guide as to how states should draft their model rules of professional conduct. North Dakota has adopted the Model Rules and they closely resemble the ABA Model Rules. Therefore, it is appropriate to follow North Dakota Rules of Professional Conduct, since it is actually relevant to the pending action.

[¶19] Rule 3.4 of the North Dakota Rules of Professional Conduct resembles the ABA Model Rules, which states in pertinent part: "A lawyer shall not: unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." N.D.R. Prof. Conduct 3.4(a) (emphasis added). However, this Rule does not apply to Myrdal because she is not a lawyer nor was she committing such during the course of legal representation.

[¶20] The North Dakota Rules of Professional Conduct dictate that "these rules are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." Scope, N.D.R. Prof Conduct. The rules are meant to define the terms of the lawyer-client relationship, laws defining special obligations of lawyer, and substantive and procedural law in general. Id. It is not meant to be applied to the general public, nor is it meant to be used in a tort claim against a non-lawyer. The rules specifically state that "the rules simply provide a framework for the ethical practice of law." Id. It is completely inapplicable in the present case and does not

support a claim for a civil tort against a non-lawyer. Sanderson has used this Rule in the wrong context and is misguided in his attempt to use it as support for his claim.

B. Neither Rule 37 of the Federal Rules of Civil Procedure nor Rule 37 of the North Dakota Rules of Civil Procedure apply to the pending action.

[¶21] Sanderson also cites Rule 37 of the Federal Rules of Civil Procedure, but since this case is not being litigated in Federal Court, Rule 37 of the Federal Rules of Civil Procedure does not apply. The Court may consider the similar North Dakota Rules of Civil Procedure. Rule 37 of the North Dakota Rules of Civil Procedure states in pertinent part:

> (a) Motion for an Order Compelling Discovery.
> (1) In General. On notice to other parties and all affected persons, a party may move for an order compelling discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to obtain it without court action.
> (2) Appropriate Court. A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty may be made in the court where the discovery is or will be taken or in the court where the action is pending.

N.D.R.Civ.P. Rule 37. This rule provides that if a party fails "to adequately respond to or supplement interrogatories [it] constitutes a discovery violation for which no sanction is provided" under the abovementioned rule. Benedict v. St. Luke's Hospital, 365 N W.2d 499, 503 (ND 1985). If a party is found to have committed a discovery violation, a "trial court has the discretionary authority to determine what sanctions, if any, are appropriate." Id. at 504. However, Sanderson's Motion is not consistent with N.D.R.Civ.P. 37. At the time of filing the Motion, the discovery process has not been completed and Myrdal has not failed to timely provide Sanderson with appropriate responses to his discovery requests. A review of the record reveals Sanderson served Myrdal with discovery on July 25, 2023 as evidenced by his certificate of service. See Doc. No. 64. A party responding to discovery has 30 days to serve their answers and objections to interrogatories under N.D.R.Civ.P. 33(b)(2), 30 days to serve their answers and objections to requests for the production of documents under N.D.R.Civ.P. 34(b)(2)(A), and 30 days to admit or deny requests for admissions under N.D.R.Civ.P. 36(a)(3). A mere 7 days later on August 1, 2023, Sanderson served this Motion "pursuant to ND Rule 37." It is possible Sanderson could be referring to discovery that was previously served on Myrdal, but his Motion and the record lack any evidence of discovery being served on Myrdal other than what was served on July 25, 2023.

But the party motioning under Rule 37 carries the burden of proof to show a violation of the rules governing discovery has occurred. Not the party responding to the motion and certainly not the Court.

[¶22] Assuming July 25, 2023 is the only date Sanderson served discovery on Myrdal, Sanderson has not adequately complied with the Rule's procedure. Sanderson has not filed certification that he has, in good faith, conferred or attempted to confer with Myrdal in an attempt to ascertain his discovery request. N.D.R.Civ.P. 37(a)(1). Sanderson does not assert that he attempted to confer with Myrdal regarding any discovery issues. Sanderson also does not assert that Myrdal has failed to disclose information, nor has Sanderson indicated that any information is missing in any discovery responses. The use of this rule is inapplicable in this Motion.

C. 18 U.S.C. §§§§ 1503, 1510, 1512, and 1519 do not apply to the pending civil action since the statutes are federal criminal statutes.

[¶23] Sanderson also cites 18 U.S.C. §§§§ 1503, 1510, 1512, and 1519. Its irrelevance will be addressed one at a time. 18 U.S.C. § 1503(a) states in pertinent part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished . . .

This provision of the Federal Criminal Code "makes it a crime to corruptly endeavor to intimidate a judicial officer in the discharge of her/his official duties." U.S. v. Joiner, 418 F.3d 863, 868 (8th Cir. 2005). A conviction requires "proof of sufficient nexus between the defendant's actions and an intent to impede judicial proceedings." Id. The nexus demands that the "act must have a relationship in time, causation, or logic with the judicial proceedings." Id.

[¶24] This statute is completely irrelevant considering the factual allegations made by Sanderson do not assert that Myrdal even attempted to influence a judicial officer during the course of an official proceeding. Sanderson has not alleged that such false statement was made during the

course of a judicial proceeding, nor did the false statement impede a judicial officer's duty. The above referenced statute is not applicable to this case, and Myrdal's actions do not implicate any part of this statute. Further, this Court does not have jurisdiction over a federal criminal proceeding.

[¶25] The other statute that Sanderson cites is 18 U.S.C. § 1510 which states: "whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator . . ." The purpose behind the statute is to "protect potential witnesses from threats and intimidation by subjects of criminal investigations." U.S. v. Fitterer, 710 F.2d 1328, 1331 (8th Cir. 1983). The statute's essential purpose is to "prohibit asking someone to make a misrepresentation to a criminal investigator . . ." Id. at 1332.

[¶26] It is clear from the language of the statute and the intent behind the statute that Myrdal's actions are not implicated. There are no allegations that Myrdal willfully attempted to prevent communication with a criminal investigator. In fact, Sanderson makes no allegation that Myrdal even spoke to a criminal investigator, nor have there been any facts to support that law enforcement is investigating Myrdal's actions at all.

[¶27] Sanderson cites 18 U.S C. § 1512, which has numerous subsections, and Sanderson is not clear about which subsection he is referring to, but based upon the factual allegations, it is likely that Sanderson is referring to 18 U.S.C. § 1512(3)(c)(1), which states: "[w]hoever corruptly alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding . . ." The statute criminalizes the "destruction . . . [of] any evidence, including contraband such as drugs," rather than just criminalizing the destruction of "objects similar to records or documents." U.S. v. Johnson, 655 F.3d 594, 603 (7th Cir. 2011). Myrdal's actions are not implicated by this statute and, as a result, this statute will not be considered by this Court. Again, this Court has no jurisdiction over a federal criminal proceeding.

[¶28] Finally, Sanderson cites 18 U.S.C. § 1519, which states:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case . . .

18 U.S.C. § 1519. The statue criminalizes falsification of records in a federal investigation. U.S. v. Normal, 87 F.Supp.3d 737 (E.D. Pa. 2015). The statute requires that the defendant have a "specific intent to impede, obstruct, or influence a federal matter . . ." U.S. v. Stevens, 771 F. Supp.2d 556 (D. Md. 2011). Moreover, the evidence must show that the "defendant's conduct has a nexus, that is, a relationship in time, caus[ed], or logic with a federal proceeding or investigation . . ." U.S. v. Russell, 639 F.Supp.2d. 226 (D. Conn. 2007).

[¶29] Myrdal did not falsify or attempt to obstruct a federal matter. Sanderson does not even make such a claim in his Motion and/or brief. The implication of this statute is misinformed and is irrelevant to the conduct alleged by Myrdal. No federal investigation had been initiated, nor had a federal proceeding been pending at the time that Myrdal had changed the information on her Facebook page. Sanderson's argument involving the above-mentioned federal statutes is distorted and this Court will dismiss such arguments as frivolous.

D. Sanderson's use of N.D.C.C. § 12.1-09-03 is inapplicable to this pending action.

[¶30] Sanderson cites N.D.C.C. § 12.1-09-03, which states that "a person is guilty of an offense if, believing an official proceeding is pending or about to be instituted . . . he alters, destroys . . . a record, document, or thing with intent to impair its verity of availability in such official proceeding . . ." N.D.C.C. § 12.1-09-03(1). The statute requires that the defendant "pervert [the] prosecution of a felony." State v. Smith, 2023 ND 6, ¶ 20, 984 N.W.2d 367. The use of this statute is inapplicable to the pending action since Myrdal had not committed any act to impede the prosecution of a crime, nor is there any criminal proceeding pending.

IV. Sanderson's request for the Court to prosecute Myrdal violates the Court's role as a neutral decision-maker.

[¶31] Sanderson's prayer for relief violates the Court's role and requests this Court to make a decision that would overstep its judicial function. Sanderson requests this Court to make a finding that Myrdal had altered her Facebook page and refer it to the Walsh County Sheriff's Office so that the Walsh County State's Attorney's Office can pursue a criminal charge.

[¶32] The North Dakota Constitution creates the framework for our government. It "creates three branches of government and vests each branch with a distinct type of power." North Dakota Legislative Assembly v. Burgum, 2018 ND 189, ¶ 40, 916 N.W.2d 83 (citing N.D. Const. art. III § 1). N.D. Const. art. VI, § 1 creates the judiciary, by creating a unified judicial system. The basis for creating three branches of government is to ensure that no one branch of government has more

power than the other. Id. The Constitution also sets the role of the judicial officers, i.e. judges. N.D. Const. art. VI, § 10 provides that judges and justices cannot engage in the practice of law, nor shall they exercise any power of appointment except as provided in the Constitution. Id. at ¶ 41. The North Dakota Constitution is clear that the role of the judiciary is to be a neutral arbiter of the law. N.D. Code Jud. Conduct Rule 2.2. A judge's role is not to pursue criminal investigations or prosecute individuals on behalf of the state. Rather, the role of the judiciary is to ensure that all parties have the ability to be heard and cannot engage in a "manner that coerces any party into settlement." N.D. Code Jud. Conduct Rule 2.6.

[¶33] It is the role of a prosecutor to pursue criminal charges and law enforcement officers are tasked with the investigation of a crime. A prosecutor has the "responsibility of a minister of justice . . ." which is different from that of other lawyers. N.D.R. Prof. Conduct Rule 3.8. A prosecutor does not receive direction from the Court concerning who or what to charge, nor does a prosecutor confer with the Court when making charging decisions. It would be contrary to the Constitution to allow the Court to make such decisions.

[¶34] Sanderson's prayer for relief runs contrary to the democratic guarantees of both the State and Federal Constitutions. Sanderson is requesting that this Court look past its role and the relevant statutes that dictate the Court's responsibilities and force the prosecution to pursue charges against Myrdal. Moreover, Sanderson requests that the Walsh County State's Attorney's Office forgo its own judgment and responsibilities to pursue criminal sanctions against Myrdal based upon Sanderson's own perceived wrong.

V. Sanderson's Motion is frivolous and Myrdal is awarded reasonable attorney's fees.

[¶35] Under N.D.C.C. § 28-26-01(2), attorney's fees must be awarded to the prevailing party upon a finding by the court that a claim for relief was frivolous. See also N.D.R.Civ.P. 11(c)(4) (allowing an award of attorney's fees and other expenses as a sanction for frivolous claims). A claim for relief is frivolous "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 that person's favor . . ." N.D.C.C. § 28-26-01(2). An award of attorney's fees is not required when an attorney or party advances "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." Id.; see N.D.R.Civ.P. 11(b)(2). Under N.D.C.C. § 28-26-01(2), courts have discretion to determine whether a claim is frivolous and the amount and reasonableness of an award of attorney's fees. DCI Credit Services, Inc. v. Plemper,

2021 ND 215, ¶ 14, 966 N.W.2d 904. But if a court determines a claim is frivolous, it must award attorney's fees. Brossart v. Janke, 2020 ND 98, ¶ 25, 942 N.W.2d 856.

[¶36] Sanderson's arguments that Myrdal committed the offense of evidence tampering and spoilage are wholly unsupported by the facts Sanderson alleges in his Complaint and Motion. As explained above, the law cited by Sanderson; the American Bar Association's Model Rules of Professional Conduct, various sections of Title 18 of the U.S. Code, and N.D.C.C. 12.1-09-03; do not apply to this civil action nor are they controlling on this Court. They are completely irrelevant to Sanderson's claims. But even if they did apply to this civil action and were controlling on this Court, Sanderson failed to allege any facts that would support any alleged violation of these provisions. Thus, Sanderson's Motion is frivolous.

[¶37] Likewise, Sanderson's claim that, if the Court ruled in his favor, the Court must direct the Walsh County Sheriff's Department to file charges with the Walsh County State's Attorney's Office against Myrdal is so completely unsupported under the law that no reasonable person could have thought a court would rule in his favor. In fact, the law is so clear and longstanding on the issue that Sanderson is unable to cite a single case or put forth a single good-faith argument in support of his contention. There being no legitimate basis for Sanderson's Motion against Myrdal, Sanderson's Motion is undoubtedly frivolous.

[¶38] Myrdal is awarded reasonable attorney's fees for having to respond to this Motion.

Order

[¶39] Sanderson's Motion to Rule on Evidence Tampering and Spoilage is DENIED.

[¶40] Sanderson's Motion to Rule on Evidence Tampering and Spoilage is frivolous. Myrdal is awarded reasonable attorney's fees as the motion is frivolous. Myrdal shall provide a statement outlining requested attorney's fees within ten days of the date of this order, incorporating the factors listed in N.D.R. Prof. Conduct 1.5(a). Sanderson shall have ten days to respond. This Court will then issue an order on attorney's fees.

IT IS SO ORDERED

Dated this 16th day of October, 2023.

BY THE COURT:

Kari M. Agotness
Judge of the District Court

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF WALSH	NORTHEAST JUDICIAL DISTRICT
Mitchell S. Sanderson, Plaintiff, vs. Janne Myrdal, Defendant.	Case No. 50-2023-CV-00129 **Order Denying Motion to Rule on Obstruction and Awarding Attorney Fees**

[¶1] Before the Court is Mitchell S. Sanderson's ("Sanderson") Motion to Rule on Obstruction filed on September 11, 2023. See Doc. No. 114. Janne Myrdal ("Myrdal") filed a response in opposition to the motion on September 19, 2023. See Doc. No. 128. On September 19, 2023, the State of North Dakota ("the State") filed a response indicating that they take no position on the motion. See Doc. No. 130. Sanderson filed a reply brief on October 10, 2023. See Doc. No. 145.

[¶2] The Court has carefully reviewed the entire record, the parties' filings, and the relevant law. Being fully advised on the matter, the Court now issues the following Order Denying Motion to Rule on Obstruction and Awarding Attorney Fees.

Relevant Factual and Procedural Background

[¶3] Sanderson filed a Summons and Complaint with the Court alleging that Myrdal violated his First Amendment rights by blocking him from posting or commenting on Myrdal's Facebook posts. See Doc. No. 1 & 2. Sanderson alleges the exhibits he filed with the Court show he cannot access Myrdal's Facebook, which prevents him from being informed of what bills Myrdal is introducing, sponsoring, and her vote on such bills. See Doc. No. 16 & 17. Sanderson further alleges that by blocking him from Myrdal's Facebook page, she infringes on his Fourteenth Amendment, Equal Protection Rights.

[¶4] On September 11, 2023, Sanderson filed a Motion with the Court alleging Myrdal committed obstruction by deleting and changing information on her Facebook page, after the service of his Summons and Complaint. Sanderson made similar arguments in his "Motion to Rule on Evidence Tampering and Spoilage." See Doc. No. 69. Sanderson cites various sections of Title 18 of the U.S. Code, N.D.C.C. 12.1-08-01, and cases from other jurisdictions in support of his arguments.

[¶5] On September 19, 2023, Myrdal filed a Brief with the Court in opposition to Sanderson's Motion to Rule on Obstruction. See Doc. No. 128. Myrdal argues that Sanderson's motion must fail because 1) obstruction was not included in the complaint and 2) the law cited by Sanderson does not apply to this action, nor is it controlling on this Court.

[¶6] On September 19, 2023, the State filed a response indicating that they take no position on the motion. See Doc. No. 130.

Legal Analysis

I. Sanderson waived his request for a hearing.

[¶7] Under N.D.R.Ct. 3.2(a)(3), a court may decide routine motions on briefs without holding a formal hearing, unless a party requests one. Breyfogle v. Braun, 460 N.W.2d 689, 693 (N.D. 1990). If a party who timely served and filed a brief requests a hearing on a motion, then "such a hearing must be held and it is not discretionary with the trial court." Anton v. Anton, 442 N.W.2d 445, 446 (N.D. 1989). "[T]he party requesting oral argument must secure a time for the argument and serve notice upon all other parties." Matter of Adoption of J.S.P.L., 532 N.W.2d 653, 657 (N.D. 1995). A request for oral argument is not complete until the requesting party has secured a time for oral argument. Bakes v. Bakes, 532 N.W.2d 666, 668 (N.D. 1995). If the party requesting a hearing fails within 14 days of the request to secure a time for the hearing, the request is waived and the matter is considered submitted for decision on the briefs. N.D.R.Ct. 3.2(a)(3).

[¶8] Sanderson requested a hearing on the motion. See Doc. No. 114, ¶3, Doc. No. 115, ¶ 3, Doc. No. 116, ¶ 14, and Doc. No. 117, ¶ 24. Sanderson also had the burden to set that hearing. Sanderson contacted court staff via email on October 2, 2023 inquiring about setting a hearing on the motion. Court staff replied back on October 3, 2023 and provided Sanderson with a number of possible dates and times. Sanderson replied back on October 5, 2023 and indicated none of those dates worked for him. Court staff replied back the same day and provided additional dates. Court staff received no further communication from Sanderson.

[¶9] Sanderson made a timely request for a hearing but failed to secure a time for the hearing within 14 days of the request. As Sanderson failed to secure a time for the hearing within 14 days of requesting the hearing, the request is waived.

II. Sanderson's reply brief is untimely and will not be considered by the Court.

[¶10] Sanderson filed this Motion and supporting documents with the Court on September 11, 2023. See Doc. No. 114-119. Myrdal filed a response in opposition to the motion on September

19, 2023. See Doc. No. 128. On September 19, 2023, the State filed a response indicating that they take no position on the motion. See Doc. No. 130. Sanderson filed a reply brief on October 10, 2023. See Doc. No. 145. North Dakota Rules of Court Rule 3.2 controls the deadlines for submitting motions in a civil action. See N.D.R.Ct. 1.1 [Scope]. Under N.D.R.Ct. 3.2, a party opposing a motion has 14 days after service of a brief to serve an answer brief and supporting papers. N.D.R.Ct. 3.2(a)(2). The moving party may serve and file a reply brief within seven days after service of the answer brief. Id. Under N.D.R.Civ.P. 6(e), three days are added after the prescribed period if service is made by mail or third-party commercial carrier.

[¶11] Here, Sanderson was served with Myrdal's answer brief on September 19, 2023 by mail. Sanderson had ten days to file and serve his reply brief (seven days under N.D.R.Ct. 3.2(a)(2) and an additional three days under N.D.R.Civ.P. 6(e)). Sanderson filed his reply brief on October 10, 2023; more than ten days after the prescribed period. As such, Sanderson's reply brief is untimely and will not be considered by the Court.

III. Sanderson failed to raise obstruction in his Complaint and may not raise it by motion.

[¶12] Rule 8 of the North Dakota Rules of Civil Procedure articulates the requirements for a pleading:

> (a) Claims for Relief. A pleading that states a claim for relief--whether an original claim, a counterclaim, a crossclaim, or a third-party claim--must contain:
> (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and
> (2) a demand for the relief sought, which may include relief in the alternative or different types of relief.

N.D.R.Civ.P. 8(a). It is well settled that "a concise and non-technical complaint" is required to satisfy Rule 8(a). Feickert v. Feickert, 2022 ND 210, ¶ 12, 982 N.W.2d 316. The purpose behind the rule is to ensure that a defendant is sufficiently informed and has been provided adequate notice of the nature of Plaintiff's claim. Twete v. Mullin, 2019 ND 184, ¶ 38, 931 N.W.2d 198. The Rules of Civil Procedure provide for a liberal pleading standard for civil complaints, but does not allow a Plaintiff to raise new claims by motion. MSP Recovery Claims, Series LLC v. United Auto. Ins. Co., 60 F.4th 1314, 1319 (11th Cir. 2023).

[¶13] The North Dakota Supreme Court has long held that a "plaintiff cannot, by supplemental pleading, bring into the action a distinct cause of action arising since the beginning of the suit." Swedish-American Nat. Bank v. Dickinson Co., 69 N.W. 455, 457 (ND 1896). The Court opined

that the "groundwork of this doctrine is that plaintiff cannot recover on a cause of action which does not exist when he sues. He must dismiss his action, and plead anew." Id. This also applies to the practice of changing the cause of action where the new cause of action was in existence when the suit was commenced. Id.

[¶14] The North Dakota Supreme Court has recently ruled on this issue in Feickert v. Feickert, 2022 ND 210, 982 N.W.2d 316. The Plaintiff inherited land from her father and defendant was appointed conservator. Id. at ¶ 1. Defendant leased the land but failed to provide an accounting of the leased income for twenty years. Id. The Plaintiff alleged various issues in its initial complaint and defendant subsequently filed an answer Id. at ¶ 2. Defendant included a prayer for relief but "did not include facts supporting her claimed defense, nor did it specifically include a counterclaim for unjust enrichment or a request for a damage offset." Id. at ¶ 3. A trial was held, and the district court held in favor of the plaintiff and also held that defendant "failed to properly plead the unjust enrichment counterclaim." Id. at ¶ 4. Defendant appealed the District Court's decision and argued that it properly pleaded their claim, but the North Dakota Supreme Court disagreed.

[¶15] The Court explained that the purpose of the pleading is to "inform and notify both the adversary and the court of the pleader's claim." Id. at ¶ 12. The pleading requirements outlined in N.D.R.Civ.P. 8(a) "is to apprise the opposing party of the nature of the claim." Id. at ¶ 13. All pleadings must be construed so as to do justice." Id. Substantial justice applies to both parties and if after review of a complaint "no assertion is offered that would also allow for the minimal notice required under Rule 8, the District Court may dismiss the complaint." Id. The Court held that the Defendant did not sufficiently plead its claim, nor did they plead sufficient facts in support of the claim. Id. at ¶ 14. The Defendant did not comply with N.D.R.Civ.P. 8, so it was appropriate that their claim was dismissed.

[¶16] In the present case, Sanderson does not raise the issue of obstruction in his Complaint. The purpose of N.D.R.Civ.P. 8 is to provide the opposing party with a fair and reasonable opportunity to prepare a defense. Sanderson is attempting to circumvent proper procedure by injecting a new claim in an already initiated action. It was necessary for Sanderson to amend the complaint for any new issue that had arisen. Moreover, Sanderson has had sufficient time to motion the Court for

any amendment consistent with N.D.R.Civ.P. 15(a) prior to September 29, 2023.[1] Sanderson never filed a motion to amend the complaint. As Sanderson's motion does not follow proper procedure, his Motion to Rule on Obstruction is denied.

IV. The law cited by Sanderson does not apply to this action nor is it controlling on this Court.

A. N.D.C.C. 12.1-08-01: Physical obstruction of government function, does not apply to the present action because this is a civil action not a criminal case.

[¶17] Sanderson alleges that Myrdal's actions implicated N.D.C.C. § 12.1-08-01: Physical obstruction of government function. The above-mentioned statute states:

> 1. A person is guilty of a class A misdemeanor if he intentionally obstructs, impairs, impedes, hinders, prevents, or perverts the administration of law or other governmental function.
> 2. This section does not apply to the conduct of a person obstructing arrest of himself, but such conduct is subject to section 12.1-08-02. This section does apply to the conduct of a person obstructing arrest of another. Inapplicability under this subsection is a defense.
> 3. It is a defense to a prosecution under this section that the administration of law or other government function was not lawful, but it is no defense that the defendant mistakenly believed that the administration of law or other government function was not lawful. For the purposes of this subsection, the conduct of a public servant acting in good faith and under color of law in the execution of a warrant or other process for arrest or search and seizure shall be deemed lawful.

[¶18] Section 12.1-08-01, N.D.C.C., is a criminal statute. This is not a criminal proceeding and the use of this rule is inapplicable in this Motion.

B. 18 U.S.C. §§ 1503, 1512, and 1519 do not apply to the pending civil action since the statutes are federal criminal statutes.

[¶19] Sanderson also cites 18 U.S.C. §§ 1503, 1512, and 1519. Its irrelevance will be addressed one at a time. 18 U.S.C. § 1503(a) states in pertinent part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or

[1] This Court held a Scheduling Conference on September 12, 2023 where the Court entered various deadlines after receiving feedback from the parties. Following the Scheduling Conference, a Scheduling Order was filed which set a deadline of September 29, 2023 at 5:00 pm for the parties to amend their pleadings. See Doc. No. 126.

> indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished . . .

This provision of the Federal Criminal Code "makes it a crime to corruptly endeavor to intimidate a judicial officer in the discharge of her/his official duties." U.S. v. Joiner, 418 F.3d 863, 868 (8th Cir. 2005). A conviction requires "proof of sufficient nexus between the defendant's actions and an intent to impede judicial proceedings." Id. The nexus demands that the "act must have a relationship in time, causation, or logic with the judicial proceedings." Id.

[¶20] This statute is completely irrelevant considering the factual allegations made by Sanderson do not assert that Myrdal even attempted to influence a judicial officer during the course of an official proceeding. Sanderson has not alleged that such false statement was made during the course of a judicial proceeding, nor did the false statement impede a judicial officer's duty. The above referenced statute is not applicable to this case, and Myrdal's actions do not implicate any part of this statute. Further, this Court does not have jurisdiction over a federal criminal proceeding.

[¶21] Sanderson cites 18 U.S C. § 1512, which has numerous subsections, and Sanderson is not clear about which subsection he is referring to, but based upon the factual allegations, it is likely that Sanderson is referring to 18 U.S.C. § 1512(3)(c)(1), which states: "[w]hoever corruptly alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding . . ." The statute criminalizes the "destruction . . . [of] any evidence, including contraband such as drugs," rather than just criminalizing the destruction of "objects similar to records or documents." U.S. v. Johnson, 655 F.3d 594, 603 (7th Cir. 2011). Myrdal's actions are not implicated by this statute and, as a result, this statute will not be considered by this Court. Again, this Court has no jurisdiction over a federal criminal proceeding.

[¶22] Finally, Sanderson cites 18 U.S.C. § 1519, which states:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case . . .

18 U.S.C. § 1519. The statue criminalizes falsification of records in a federal investigation. U.S. v. Normal, 87 F.Supp.3d 737 (E.D. Pa. 2015). The statute requires that the defendant have a "specific intent to impede, obstruct, or influence a federal matter . . ." U.S. v. Stevens, 771 F. Supp.2d 556 (D. Md. 2011). Moreover, the evidence must show that the "defendant's conduct has a nexus, that is, a relationship in time, caus[ed], or logic with a federal proceeding or investigation . . ." U.S. v. Russell, 639 F.Supp.2d. 226 (D. Conn. 2007).

[¶23] Myrdal did not falsify or attempt to obstruct a federal matter. Sanderson does not even make such a claim in his Motion and/or brief. The implication of this statute is misinformed and is irrelevant to the conduct alleged by Myrdal. No federal investigation had been initiated, nor had a federal proceeding been pending at the time that Myrdal had changed the information on her Facebook page. Sanderson's argument involving the above-mentioned federal statutes is distorted and this Court will dismiss such arguments as frivolous.

C. 18 U.S. Code Chapter 73 does not apply to the pending civil action since the chapter refers to federal criminal statutes.

[¶24] Sanderson also cites 18 U.S. Code Chapter 73 but he did not cite to a specific section of this chapter. Title 18 U.S. Code Chapter 73 contains sections 1501 to 1521; several of which this Court has addressed in this order and prior orders. Based on the context of the motion, it is likely that Sanderson is referring to 18 U.S.C. § 1503(a), which provides, in relevant part, that "[w]hoever corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice" is guilty of a criminal violation. Myrdal's actions are not implicated by this statute and, as a result, this statute will not be considered by this Court. Again, this Court has no jurisdiction over a federal criminal proceeding.

V. Sanderson's request for the Court to making a finding whether or not Myrdal violated a federal or state criminal statute violates the Court's role as a neutral decision-maker.

[¶25] Sanderson's prayer for relief violates the Court's role and requests this Court to make a decision that would overstep its judicial function. Sanderson requests this Court to make a finding that Myrdal had altered her Facebook page. While Sanderson does not specifically request this Court to refer this matter to Walsh County Sheriff's Office so that the Walsh County State's Attorney's Office can pursue a criminal charge as he had requested in prior motions, he

nevertheless asks this Court to make a finding the Myrdal had committed a violation of a federal and/or North Dakota criminal statutes.

[¶26] The North Dakota Constitution creates the framework for our government. It "creates three branches of government and vests each branch with a distinct type of power." North Dakota Legislative Assembly v. Burgum, 2018 ND 189, ¶ 40, 916 N.W.2d 83 (citing N.D. Const. art. III § 1). N.D. Const. art. VI, § 1 creates the judiciary, by creating a unified judicial system. The basis for creating three branches of government is to ensure that no one branch of government has more power than the other. Id. The Constitution also sets the role of the judicial officers, i.e. judges. N.D. Const. art. VI, § 10 provides that judges and justices cannot engage in the practice of law, nor shall they exercise any power of appointment except as provided in the Constitution. Id. at ¶ 41. The North Dakota Constitution is clear that the role of the judiciary is to be a neutral arbiter of the law. N.D. Code Jud. Conduct Rule 2.2. A judge's role is not to pursue criminal investigations or prosecute individuals on behalf of the state. Rather, the role of the judiciary is to ensure that all parties have the ability to be heard and cannot engage in a "manner that coerces any party into settlement." N.D. Code Jud. Conduct Rule 2.6.

[¶27] It is the role of a prosecutor to pursue criminal charges and law enforcement officers are tasked with the investigation of a crime. A prosecutor has the "responsibility of a minister of justice . . ." which is different from that of other lawyers. N.D.R. Prof. Conduct Rule 3.8. A prosecutor does not receive direction from the Court concerning who or what to charge, nor does a prosecutor confer with the Court when making charging decisions. It would be contrary to the Constitution to allow the Court to make such decisions.

[¶28] Sanderson's prayer for relief runs contrary to the democratic guarantees of both the State and Federal Constitutions. Sanderson is requesting that this Court look past its role and the relevant statutes that dictate the Court's responsibilities and find that Myrdal had committed a violation of federal and North Dakota criminal statutes. It cannot be stressed enough that this is a civil action. Any alleged violation of federal or North Dakota criminal statutes is outside the scope of this lawsuit.

VI. Sanderson's Motion is frivolous and Myrdal is awarded reasonable attorney's fees.

[¶29] Under N.D.C.C. § 28-26-01(2), attorney's fees must be awarded to the prevailing party upon a finding by the court that a claim for relief was frivolous. See also N.D.R.Civ.P. 11(c)(4) (allowing an award of attorney's fees and other expenses as a sanction for frivolous claims). A

claim for relief is frivolous "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 that person's favor . . ." N.D.C.C. § 28-26-01(2). An award of attorney's fees is not required when an attorney or party advances "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." Id.; see N.D.R.Civ.P. 11(b)(2). Under N.D.C.C. § 28-26-01(2), courts have discretion to determine whether a claim is frivolous and the amount and reasonableness of an award of attorney's fees. DCI Credit Services, Inc. v. Plemper, 2021 ND 215, ¶ 14, 966 N.W.2d 904. But if a court determines a claim is frivolous, it must award attorney's fees. Brossart v. Janke, 2020 ND 98, ¶ 25, 942 N.W.2d 856.

[¶30] Sanderson's arguments that Myrdal committed the offense of obstruction are wholly unsupported by the facts Sanderson alleges in his Complaint and Motion. As explained above, the law cited by Sanderson; N.D.C.C. 12.1-08-01 and various sections of Title 18 of the U.S. Code; do not apply to this civil action nor are they controlling on this Court. They are completely irrelevant to Sanderson's claims. But even if they did apply to this civil action and were controlling on this Court, Sanderson failed to allege any facts that would support any alleged violation of these provisions. Thus, Sanderson's Motion is frivolous.

[¶31] Likewise, Sanderson's prayer for relief violates the Court's role as a neutral decision-maker to make a decision that would overstep its judicial function. Sanderson requests this Court to make a finding that Myrdal had altered her Facebook page in violation of various federal and state criminal statutes. This request bypasses the role of law enforcement to investigate an alleged violation of a criminal law and as well as the role of the prosecutor to pursue criminal charges following an investigation by law enforcement. Sanderson's prayer for relief runs contrary to the democratic guarantees of both the State and Federal Constitutions. Sanderson's argument is so completely unsupported under the law that no reasonable person could have thought a court would rule in his favor. In fact, the law is so clear and longstanding on the issue that Sanderson is unable to cite a single case or put forth a single good-faith argument in support of his contention. There being no legitimate basis for Sanderson's Motion against Myrdal, Sanderson's Motion is undoubtedly frivolous.

[¶32] Myrdal is awarded reasonable attorney's fees for having to respond to this Motion.

Order

[¶33] Sanderson's Motion to Rule on Obstruction is DENIED.

[¶34] Sanderson's Motion to Rule on Obstruction is frivolous. Myrdal is awarded reasonable attorney's fees as the motion is frivolous. Myrdal shall provide a statement outlining requested attorney's fees within ten days of the date of this order, incorporating the factors listed in N.D.R. Prof. Conduct 1.5(a). Sanderson shall have ten days to respond. This Court will then issue an order on attorney's fees.

IT IS SO ORDERED

Dated this 17th day of October, 2023.

BY THE COURT:

Kari M. Agotness

Kari M. Agotness
Judge of the District Court

STATE OF NORTH DAKOTA
COUNTY OF WALSH

IN DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT

Mitchell S. Sanderson,
Plaintiff,
vs.
Janne Myrdal,
Defendant.

Case No. 50-2023-CV-00129

Order Denying Hearing on Motion to Rule on Public Forum and Color of Law

[¶1] On September 29, 2023, Mitchell S. Sanderson ("Sanderson") filed a Motion to Rule on Public Forum and Color of Law. Sanderson requested a hearing on the motion. See Doc. No. 134, ¶3, Doc. No. 135, ¶ 3, Doc. No. 136, ¶ 44, and Doc. No. 137, ¶ 54. On October 2, 2023, Sanderson contacted court staff via email and requested a hearing date for this motion. Court staff replied back on October 3, 2023 and provided Sanderson with a number of possible dates and times. Sanderson replied back on October 5, 2023 and indicated none of those dates worked for him. Court staff replied back the same day and provided additional dates. Sanderson replied back on October 19, 2023 indicating his availability.

[¶2] Under N.D.R.Ct. 3.2(a)(3), a court may decide routine motions on briefs without holding a formal hearing, unless a party requests one. Breyfogle v. Braun, 460 N.W.2d 689, 693 (N.D. 1990). If a party who timely served and filed a brief requests a hearing on a motion, then "such a hearing must be held and it is not discretionary with the trial court." Anton v. Anton, 442 N.W.2d 445, 446 (N.D. 1989). "[T]he party requesting oral argument must secure a time for the argument and serve notice upon all other parties." Matter of Adoption of J.S.P.L., 532 N.W.2d 653, 657 (N.D. 1995). A request for oral argument is not complete until the requesting party has secured a time for oral argument. Bakes v. Bakes, 532 N.W.2d 666, 668 (N.D. 1995). If the party requesting a hearing fails within 14 days of the request to secure a time for the hearing, the request is waived and the matter is considered submitted for decision on the briefs. N.D.R.Ct. 3.2(a)(3).

[¶3] Sanderson failed to secure a time for a hearing on the motion within 14 days of his request. As Sanderson failed to secure a time for the hearing within 14 days of requesting the hearing, the request is waived and the motion will be decided on briefs.

IT IS SO ORDERED

Dated this 7th day of November, 2023.

BY THE COURT:

Kari M. Agotness

Kari M. Agotness
Judge of the District Court

APPENDIX G

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF WALSH	NORTHEAST JUDICIAL DISTRICT
Mitchell S. Sanderson, Plaintiff, vs. Janne Myrdal, Defendant.	Case No. 50-2023-CV-00129

Order Regarding Attorney's Fees

[¶1] On October 16 and 17, 2023, this Court issued three orders finding three motions filed by Mitchell S. Sanderson ("Sanderson") to be frivolous. See Doc No. 156, 158, and 160. Under, N.D.C.C. § 28-26-01(2), upon a finding that a claim for relief was frivolous, the court is required to award reasonable actual and statutory costs, including reasonable attorney's fees to the prevailing party. As part of its Orders, the Court directed counsel for Janne Myrdal ("Myrdal") to file a statement outlining his requested attorney's fees. The Orders required that he file these statements within ten days of each respective order. Thereupon, Sanderson would have ten days to respond. Myrdal's counsel filed and served his statements on October 23, 2023. No response was received from Sanderson.

Analysis

[¶2] "An award of attorney's fees is within the district court's discretion and will only be disturbed on appeal if the district court abuses its discretion." Datz v. Dosch, 2014 ND 102, ¶ 22, 846 N.W.2d 724. "A court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned decision, or if it misinterprets or misapplies the law." Id. (quoting Wolt v. Wolt, 2011 ND 170, ¶ 26, 803 N.W.2d 534). "The trial court is considered an expert in determining the amount of attorney fees." State Farm Fire and Cas. Co. v. Sigman, 508 N.W.2d 323, 327 (N.D.1993). "There are numerous factors for the trial court to consider in determining the reasonableness of

attorney fees, including: the time and labor required; the novelty and difficulty of the questions involved; the skill required to properly perform the legal services; the customary fee; and the result obtained." Id. "An itemized bill may be used to establish attorney's fees." Riemers v. State, 2008 ND 101, ¶ 15, 750 N.W.2d 407. See also Tillich v. Bruce, 2017 ND 21, ¶ 11, 889 N.W.2d 899 (holding the predominant factors for determining reasonable attorney's fees are the number of hours spent in total and the rate per hour).

[¶3] The North Dakota Supreme Court has indicated the factors listed in N.D.R.Prof. Conduct 1.5(a) guide a district court in determining the reasonableness of an award of attorney fees. T.F. James Co. v. Vakoch, 2001 ND 112, ¶ 23, 628 N.W.2d 298. Rule 1.5(a), N.D.R.Prof. Conduct, lists the following factors to be considered:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

[¶4] Myrdal's counsel billed his time at a rate of $350.00 per hour, $250.00 per hour for an associate attorney, and $175.00 per hour for a paralegal. All of these rates are reasonable for attorney's and their legal staff practicing defense of constitutional claims in North Dakota. Between the three motions, Myrdal was billed a total of $4,920.00. While the underlying issue in this case – 42 U.S.C. § 1983 litigation in the context of social media – is novel, the issues in the motions which this Court found frivolous were not unique and were relatively straightforward. This is evident in the relatively minimal hours Myrdal was billed by her counsel and her counsel's staff. The time spent on these three motions for the results obtained are appropriate.

[¶5] Myrdal shall be awarded $4,920.00 as and for reasonable attorney's fees.

Order

[¶6] **IT IS HEREBY ORDERED** that:

1) Myrdal's request for attorney's fees is **GRANTED**. She shall be awarded $4,920.00 as and for reasonable attorney's fees.

IT IS SO ORDERED.

Dated this 4th day of December, 2023.

BY THE COURT:

Kari M. Agotness
Judge of the District Court

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF WALSH	NORTHEAST JUDICIAL DISTRICT

Mitchell S. Sanderson, Plaintiff, vs. Janne Myrdal, Defendant.	Case No. 50-2023-CV-00129

Order Regarding Motion for Declaratory Judgment

[¶1] On December 14th 2023, this Court entered an Order Granting Motion for Summary Judgment, Order Denying Motion to Rule on First and Fourteenth Amendment Violations, Order Denying Motion to Rule on Qualified Immunity, and Order Denying Motion to Rule on Public Forum and Color of Law. This Order fully resolved the pending claims in this action. The Motion for Declaratory Judgment is moot and it is not necessary for the Court to address this motion.

Order

[¶2] **IT IS HEREBY ORDERED** that:

1) The Motion for Declaratory Judgment is moot and no decision will be issued; and
2) The hearing on the Motion for Declaratory Judgment scheduled for January 30, 2024 at 1:00 PM is cancelled.

IT IS SO ORDERED.

Dated this 14th day of December, 2023.

BY THE COURT:

Kari M. Agotness
Judge of the District Court

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF WALSH	NORTHEAST JUDICIAL DISTRICT
Mitchell S. Sanderson, Plaintiff, vs. Janne Myrdal, Defendant.	Case No. 50-2023-CV-00129

Order Granting Motion for Summary Judgment, Order Denying Motion to Rule on First and Fourteenth Amendment Violations, Order Denying Motion to Rule on Qualified Immunity, and Order Denying Motion to Rule on Public Forum and Color of Law

[¶1] Before the Court are three motions filed by Mitchell S. Sanderson ("Sanderson"): Motion to Rule on First and Fourteenth Amendment Violations (Doc. No. 91), Motion to Rule on Qualified Immunity (Doc. No. 100), and Motion to Rule on Public Forum and Color of Law (Doc. No. 134). Also before the Court is a Motion for Summary Judgment filed by Janne Myrdal ("Myrdal"). Doc. No. 150. Neither party made a timely request for a hearing on any of the motions nor timely secured a date and time for a hearing after requesting a hearing.

[¶2] The Court has carefully reviewed the entire record (except as specifically noted below), the parties' filings, and the relevant law. Being fully advised on the matter, the Court now issues the following Order Granting Motion for Summary Judgment, Order Denying Motion to Rule on First and Fourteenth Amendment Violations, Order Denying Motion to Rule on Qualified Immunity, and Order Denying Motion to Rule on Public Forum and Color of Law.

Factual and Procedural Background

[¶3] Myrdal is a North Dakota State Senator. Doc. No. 152, ¶ 2. Before being elected to the North Dakota Senate, Myrdal created a Facebook page on December 29, 2015. Id. Myrdal's Facebook page is titled "Myrdal ND Senate." Id. She is the sole administrator of the account. Id. at ¶¶ 11-12. The page identified Myrdal as a "Public Figure;" not as a "Public Official," "Government Official," or "Politician." Doc. No. 46, Exhibit E. At an unspecified date, this

identification changed to "Political Candidate." Id. at Exhibit F. Myrdal utilized her Facebook page in her original election campaign. Doc. No. 152, ¶ 4. She continues to use it in her reelection efforts to the North Dakota Senate. Id. Myrdal would continue to exercise exclusive control over this account even if she ceased to be a North Dakota State Senator. Id. at ¶ 6.

[¶4] After being elected in November 2016, Myrdal, presumably, changed her page to add her title of "North Dakota District 10 Senator" and her government email address. Doc. No. 46, Exhibit E. "North Dakota District 10 Senator" and Myrdal's government email address were later removed from the page. Id. at Exhibit F.

[¶5] Myrdal used her account for personal use and to advance and promote her political interests, including her candidacy for the North Dakota Senate. Doc. No. 152, ¶ 3. She used her account to solicit campaign contributions. Id. at ¶ 17. Although Myrdal posted about North Dakota Senate activities, the overall content of her posts had a strong tendency toward her personal beliefs and philosophies, not those of the State of North Dakota. Id. at ¶¶ 7 and 24.

[¶6] Myrdal operated the Facebook page herself – "[n]o officer, employee, or staff of the State of North Dakota has any role in the administration, posting, operation, support, maintenance, or management of [her] Facebook page." Id. at ¶ 12. The State of North Dakota provides no financial support or authorization for the Facebook page. Id. at ¶ 10. Nor is the page subject to any management of control by the State of North Dakota. Id. at ¶ 13. No law, policy, custom, or practice makes social media activity part of Myrdal's official role. Id. ¶ 5, 8, 18, and 19.

[¶7] Sanderson alleges Myrdal blocked his profile from her page. Doc. No. 1, ¶ 6. He alleges he was previously able to post on Myrdal's page, but not anymore. Id. He further alleges other individuals are able to post on her page, while he cannot. Id. Sanderson filed suit under 42 U.S.C. 1983, alleging the blocking of his profile violated his rights under the First Amendment. Id. at ¶¶ 6-7.

Legal Analysis

I. Sanderson's Motions to Rule on First and Fourteenth Amendment Violations, Qualified Immunity, and Public Forum and Color of Law will be analyzed as motions for summary judgment.

[¶8] On August 15, 2023, Sanderson filed a motion titled "Motion to Rule on First and Fourteenth Amendment Violations" with supporting documentation. Doc. No. 90-93. On August 29, 2023, Sanderson filed a motion titled "Motion to Rule on Qualified Immunity" with supporting

documentation. Doc. No. 100-103. On September 29, 2023, Sanderson filed a motion titled "Motion to Rule on Public Forum and Color of Law" with supporting documentation. Doc. No. 134-138. Sanderson cites no provision of the North Dakota Rules of Civil Procedure in support of his motions. The essence of his motions, however, is to seek final disposition of the allegations in his Complaint.

[¶9] A deprivation of a federal right and whether the person who deprived the plaintiff of that right acted under color of state law are essential elements in a claim under 42 U.S.C. § 1983. Qualified immunity is a defense to a claim under 42 U.S.C. § 1983. The Court will consider Sanderson's above-mentioned motions as motions for summary judgment under N.D.R.Civ.P. 56. See Stearns v. Twin Butte Public School Dist. No. 1, 185 N.W.2d 641, 645 (N.D. 1971) (holding the nature of the claim and relief sought is controlling, not the name of the pleading).

II. Timeliness of Myrdal's and the State's answer briefs.

[¶10] Sanderson argues the answer briefs filed and served by Myrdal and the State in response to his Motion to Rule on First and Fourteenth Amendment Violations and Motion to Rule on Qualified Immunity are not timely so the Court cannot consider them. Doc. No. 142, ¶ 3; Doc. No. 144, ¶ 3; Doc. No. 147, ¶ 3. Sanderson does not cite to any particular rule but indicates "[t]he Plaintiff is being held to all Rules of Court and so Shall the defendant!" Doc. No. 142, ¶ 3; Doc. No. 144, ¶ 3; Doc. No. 147, ¶ 3. This Court believes Sanderson is referring to this Court's earlier order denying his request for a hearing. Doc. No. 107. The Court denied Sanderson's request for a hearing as his request was not timely under N.D.R.Ct. 3.2(a)(3).

[¶11] As pertains to the deadline for filing briefs, N.D.R.Ct. 3.2(a)(2) states:

> (2) Briefs. Upon serving and filing a motion, the moving party must serve and file a brief and other supporting papers and the opposing party must have 14 days after service of a brief within which to serve and file an answer brief and other supporting papers. The moving party may serve and file a reply brief within seven days after service of the answer brief. Upon the filing of briefs, or upon expiration of the time for filing, the motion is considered submitted to the court unless counsel for any party requests a hearing on the motion.

Rule 3.2(f)(1), N.D.R.Ct., states: "[t]his rule does not apply to the extent it conflicts with another rule adopted by the Supreme Court." There is a rule that conflicts with N.D.R.Ct. 3.2(a)(2), namely N.D.R.Civ.P. 56(c)(1), which states:

> The motion and supporting documents must be filed at least 90 days before the day set for trial and 45 days before the day set for the hearing unless otherwise ordered.

> An opposing party has 30 days after service of a brief to serve and file an answer brief and supporting documents. The moving party has 14 days to serve and file a reply brief.

As the Court considers the Motion to Rule on First and Fourteenth Amendment Violations and the Motion to Rule on Qualified Immunity to be motions for summary judgment, N.D.R.Civ.P. 56(c)(1) instead of N.D.R.Ct. 3.2(a)(2) applies for the filing and serving of briefs, answer briefs, and reply briefs.

[¶12] On August 14, 2023, Sanderson served a motion, by mail, titled "Motion to Rule on First and Fourteenth Amendment Violations" with supporting documentation. Doc. No. 90-93. These documents were filed with the Court on August 15, 2023. Under N.D.R.Civ.P. 6(e), three days are added after the prescribed period if service is made by mail or third-party commercial carrier. Myrdal filed and served an answer brief on September 13, 2023. Doc. No. 121. Myrdal's answer brief is timely. The State filed and served an answer brief on September 13, 2023. Doc. No. 123. The State's answer brief is timely.

[¶13] On August 28, 2023, Sanderson served a motion, by mail, titled "Motion to Rule on Qualified Immunity" with supporting documentation. Doc. No. 100-103. These documents were filed with the Court on August 29, 2023. Under N.D.R.Civ.P. 6(e), three days are added after the prescribed period if service is made by mail or third-party commercial carrier. Myrdal filed and served an answer brief on September 13, 2023. Doc. No. 121. Myrdal's answer brief is timely. The State filed and served an answer brief on September 27, 2023. Doc. No. 132. The State's answer brief is timely.

III. Timeliness of Sanderson's reply briefs.

[¶14] After a party opposing a motion for summary judgment files and serves their answer brief, the moving party has 14 days to serve and file a reply brief. N.D.R.Civ.P. 56(c)(1). Under N.D.R.Civ.P. 6(e), three days are added after the prescribed period if service is made by mail or third-party commercial carrier.

[¶15] Myrdal filed and served her answer brief to the Motion to Rule on First and Fourteenth Amendment Violations and the Motion to Rule on Qualified Immunity on September 13, 2023. Doc. No. 121. It was served on Sanderson by mail. Sanderson had 17 days to file and serve his reply brief (14 days under N.D.R.Civ.P. 56(c)(1) and an additional three days under N.D.R.Civ.P. 6(e)). Sanderson served his reply brief on October 6, 2023 and filed his reply brief on October 10,

2023. Both of these events occurred more than 17 days after the prescribed period. As such, Sanderson's reply brief is untimely and will not be considered by the Court.

[¶16] The State filed and served their answer brief to the Motion to Rule on First and Fourteenth Amendment Violations on September 13, 2023. Doc. No. 123. It was served on Sanderson by mail. Sanderson had 17 days to file and serve his reply brief (14 days under N.D.R.Civ.P. 56(c)(1) and an additional three days under N.D.R.Civ.P. 6(e)). Sanderson served his reply brief on October 6, 2023 and filed his reply brief on October 10, 2023. Both of these events occurred more than 17 days after the prescribed period. As such, Sanderson's reply brief is untimely and will not be considered by the Court.

IV. Summary judgment legal standards.

[¶17] A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. N.D.R.Civ.P. 56(a). Our standard of review for summary judgments is well established:

> Summary judgment is a procedural device under N.D.R.Civ.P. 56(c) for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. The party seeking summary judgment must demonstrate there are no genuine issues of material fact and the case is appropriate for judgment as a matter of law. In deciding whether the district court appropriately granted summary judgment, we view the evidence in the light most favorable to the opposing party, giving that party the benefit of all favorable inferences which can reasonably be drawn from the record. A party opposing a motion for summary judgment cannot simply rely on the pleadings or on unsupported conclusory allegations. Rather, a party opposing a summary judgment motion must present competent admissible evidence by affidavit or other comparable means that raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record raising an issue of material fact. When reasonable persons can reach only one conclusion from the evidence, a question of fact may become a matter of law for the court to decide.

N.D. Private Investigative & Sec. Bd. v. TigerSwan, LLC, 2019 ND 219, ¶ 8, 932 N.W.2d 756 (citations omitted).

V. Analysis of Myrdal's capacity to be sued.

[¶18] Sanderson's Complaint does not designate whether he is bringing suit against Myrdal in her official capacity or her personal capacity. Sanderson's Complaint continuously refers to Myrdal as "Senator" or "Senator Janne Myrdal". Sanderson's Complaint further alleges Myrdal's conduct was wrongful as a governmental action. These allegations indicate he is seeking to sue

C.B.S., Inc. v. Democratic Nat'l Committee, 412 U.S. 94, 114 (1973) (citation omitted); see Manhattan Community Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019) ("The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors."); Lugar v. Edmondson Oil Co., 457 U.S. 922, 924 (1982) ("Because the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'"). Similarly, 42 U.S.C. § 1983 authorizes a cause of action to enforce constitutional guarantees only against persons who act "under color of" state law. Those limitations generally "converge" when, "as here, deprivations of rights under the Fourteenth Amendment are alleged." American Manufacturers Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 50 n.8 (1999).

[¶37] The distinction between state action and private conduct is vital to the correct application of the First Amendment, as incorporated against the States by the Fourteenth Amendment, and to the preservation of individual liberty. "[S]tate action requires both an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,' and that 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" Sullivan, 526 U.S. at 50 (citation omitted; emphasis in original). Although those "two principles are not the same," they are interrelated and generally "collapse into each other" when the defendant is a public official rather than a private party. Lugar, 457 U.S. at 937;and 928 n.8 (noting lower court's recognition that when "the defendant is a public official . . . there is no distinction between state action and action under color of state law").

[¶38] Under those principles, being a public official is neither necessary nor sufficient to engage in state action. It is not necessary because "a private entity can qualify as a state actor in a few limited circumstances," such as when the government compels it to act, the government acts jointly with the private entity, or the private entity "exercises a function 'traditionally exclusively reserved to the State.'" Halleck, 139 S. Ct. at 1926, 1928 (citation omitted) and 1929 n.1.

[¶39] Conversely, because every public official is also a private citizen, merely being a public official is not sufficient to establish that the official has engaged in state action. Instead, public officials engage in state action that is subject to constitutional scrutiny only when they exercise "power 'possessed by virtue of state law,'" such that their actions are "made possible only because [they are] clothed with the authority of state law." West v. Atkins, 487 U.S. 42, 49 (1988) (citation omitted). That standard is generally satisfied when a public official acts "in his official capacity"

her in her official capacity as a North Dakota State Senator. The North Dakota Supreme Court has specifically held that the State, an entity with Eleventh Amendment immunity, may not be sued under 42 U.S.C. § 1983, nor may State officials be sued in their official capacity. Perry Center, Inc. v. Heitkamp, 1998 ND 78, ¶ 37, 576 N.W.2d 505. Neither the State, nor the official, are subject to suit under 42 U.S.C. § 1983 in federal or state court. Id.

[¶19] State officials sued for damages in their personal or individual capacities, however, are "persons" under 42 U.S.C. § 1983. See Livingood v. Meece, 477 N.W.2d 183, 191 (N.D.1991). State officials sued in their individual capacities may assert a qualified immunity from liability, which is intended "to protect public officials from undue interference with their duties and from potentially disabling threats of liability." Wishnatsky v. Bergquist, 550 N.W.2d 394, 403 (N.D. 1996). The doctrine "recognizes the need of government officials to be free from harassing lawsuits and apprehension of personal liability when they exercise authority and discretion while performing their jobs in the public interest." Livingood, at 192.

[¶20] As these are motions for summary judgment, this Court will infer that Sanderson is suing Myrdal in her personal or individual capacity and proceed with an analysis under § 1983 and the defense of qualified immunity.

VI. Elements for a section 1983 claim.

[¶21] Sanderson's only claim in his Complaint is an alleged violation of 42 U.S.C. § 1983. Section 1983 provides, in relevant part, that every person who subjects any citizen "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . ." 42 U.S.C. § 1983. The Supreme Court has identified two elements of a § 1983 claim. The plaintiff must establish both (1) a deprivation of a federal right, and (2) that the person who deprived the plaintiff of that right acted under color of state law. Flagg Bros. v. Brooks, 436 U.S. 149, 155 (1978).

VII. Deprivation of a federal right.

[¶22] The first element of a § 1983 claim is the establishment of a violation of a federally protected right. Flagg Bros. v. Brooks, 436 U.S. 149, 155 (1978). The Fourteenth Amendment creates numerous rights enforceable under § 1983, namely substantive and procedural due process, the equal protection of the laws, and those rights in the Bill of Rights incorporated by the Due Process Clause of the Fourteenth Amendment. Martin A. Schwartz, et al., Federal Judicial Center,

Section 1983 Litigation § 5 (3rd ed. 2014). These incorporated rights include rights protected by the First Amendment, including the free speech clause. Id.

[¶23] Sanderson alleges Myrdal deprived him of his rights under the First Amendment by blocking him on Facebook, thus limiting his access to Myrdal's Facebook page. Myrdal argues her Facebook page is not public property or private property dedicated to public use, such that Sanderson's access to it is not protected by the First Amendment.

[¶24] The issue of whether Sanderson was deprived of his right to free speech under the First Amendment involves three considerations. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985). First, the Court must determine that the speech in which Sanderson engaged, or seeks to engage, is protected speech. Id. Second, if the speech at issue is protected speech, then the Court considers whether the "place" where Sanderson would seek to engage in the speech at issue is susceptible to forum analysis. Id.; Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998). Third, if the place at issue is subject to forum analysis, then the Court must determine the type of forum. Cornelius, 473 U.S. at 797. Determination of the type of forum is important because the type of forum corresponds with the limits on the government's power to regulate speech without running afoul of the First Amendment. Id. at 800.

A. Sanderson's Facebook post(s) is protected speech.

[¶25] "As a general matter, government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 791 (2011) (citing Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573 (2002)). Certain narrow legal categories of speech, such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, are not protected under the First Amendment. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 383 (1992).

[¶26] Speech on matters of public concern fall within the core of First Amendment protection. Engquist v. Ore. Dep't of Agric., 553 U.S. 591, 600 (2008). Additionally, as a general premise, social media is entitled to the same First Amendment protections as other forms of media. Packingham v. North Carolina, 582 U.S. 98, 104-106 (2017) (holding a state statute preventing registered sex offenders from accessing social media sites invalid and describing social media use as "protected First Amendment activity").

[¶27] In this case, the speech at issue is Sanderson's inability to access and interact with other Facebook users relative to Myrdal's Facebook account. The record does not suggest that this

speech falls within any of the unprotected categories of speech listed above. Therefore, the Court concludes the speech at issue is protected.

B. The interactive space of Myrdal's Facebook account is not subject to forum analysis.

[¶28] Next, having concluded the speech at issue is protected by the First Amendment, the Court must determine whether the interactive space of Myrdal's Facebook account is susceptible to forum analysis.

[¶29] While not specifically stated, Sanderson appears to seek access to the interactive space of Myrdal's Facebook page. Cornelius, 473 U.S. at 801 (isolating the putative forum through reference to "the access sought by the speaker"). The Court must resolve, in the absence of binding authority, whether the interactive space of Myrdal's Facebook posts is subject to forum analysis, in that the interactive space of Myrdal's Facebook account is owned or controlled by the government. See Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 679 (2010) ("[A] space may be a forum based on government control even absent legal ownership.").

[¶30] Forum analysis applies where a speaker seeks "access to public property, or private property dedicated to public use." Cornelius, 473 U.S. at 801. Public property is that "which ha[s] immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 469 (2009) (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)); Lehman v. City of Shaker Heights, 418 U.S. 298, 303 (1974) (listing open spaces, meeting halls, parks, street corners, and thoroughfares as potential public property). Private property dedicated to public use is that which is not owned by the government, but that which is still controlled by the government, particularly with respect to whether the "[g]overnment can control access." Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (finding a public forum in a privately-owned theater under long-term lease to city).

[¶31] There is no dispute that Meta Platforms, Inc., owns Myrdal's Facebook account, such that the account is not owned by the government. Therefore, under the circumstances of this case, forum analysis applies to the interactive space of Myrdal's Facebook only if the government controls it.

[¶32] Myrdal controls the content of her posts and can, through blocking, prevent other Facebook users like Sanderson from accessing the interactive space of her posts. Even though Myrdal does not control the functions available on Facebook, Myrdal has control over the use of those functions, including the block function, which ultimately allows Myrdal to curate the interactive space on her account. Consequently, Myrdal controls access to the interactive space of her posts.

[¶33] As explained more thoroughly below in the next section [VIII. State action], Myrdal's control of her Facebook page, under the circumstance of this case, does not equate to government control. Myrdal created her Facebook page on December 29, 2015 before being elected to the North Dakota State Senate. Doc. No. 152, ¶ 2. Myrdal utilized her Facebook page in her original election campaign. Doc. No. 152, ¶ 4. She continues to use it in her reelection efforts to the North Dakota Senate. Id. Myrdal would continue to exercise exclusive control over this account even if she ceased to be a North Dakota State Senator. Id. at ¶ 6. Myrdal is the sole administrator of the account. Id.; see Id. at ¶¶ 11-12. Myrdal operated the Facebook page herself – "[n]o officer, employee, or staff of the State of North Dakota has any role in the administration, posting, operation, support, maintenance, or management of [her] Facebook page." Id. at ¶ 12. The State of North Dakota provides no financial support or authorization for the Facebook page. Id. at ¶ 10. Nor is the page subject to any management of control by the State of North Dakota. Id. at ¶ 13. No law, policy, custom, or practice makes social media activity part of Myrdal's official role. Id. at 5, 8, 18, and 19.

[¶34] The Court finds that the interactive space of Myrdal's Facebook posts to which Sandeson seeks access are controlled by Myrdal in her individual capacity, such that the interactive space is not government-controlled and not subject to forum analysis. As the Court finds that the interactive space of Myrdal's Facebook posts is not subject to forum analysis, it is not necessary to analyze the type of forum. See Cornelius, 473 U.S. at 797.

VIII. State action.

[¶35] The second element of a § 1983 claim is that the defendant acted under color of state law. Flagg Bros. v. Brooks, 436 U.S. 149, 155 (1978). Accordingly, the issue in this case is whether Myrdal was acting under color of state law when she blocked Sanderson from her Facebook page.

A. General principles.

[¶36] The First Amendment's command "[t]hat 'Congress shall make no law abridging the freedom of speech, or of the press' is a restraint on government action, not that of private persons."

C.B.S., Inc. v. Democratic Nat'l Committee, 412 U.S. 94, 114 (1973) (citation omitted); see Manhattan Community Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019) ("The Free Speech Clause of the First Amendment constrains governmental actors and protects private actors."); Lugar v. Edmondson Oil Co., 457 U.S. 922, 924 (1982) ("Because the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'"). Similarly, 42 U.S.C. § 1983 authorizes a cause of action to enforce constitutional guarantees only against persons who act "under color of" state law. Those limitations generally "converge" when, "as here, deprivations of rights under the Fourteenth Amendment are alleged." American Manufacturers Mutual Ins. Co. v. Sullivan, 526 U.S. 40, 50 n.8 (1999).

[¶37] The distinction between state action and private conduct is vital to the correct application of the First Amendment, as incorporated against the States by the Fourteenth Amendment, and to the preservation of individual liberty. "[S]tate action requires both an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,' and that 'the party charged with the deprivation must be a person who may fairly be said to be a state actor.'" Sullivan, 526 U.S. at 50 (citation omitted; emphasis in original). Although those "two principles are not the same," they are interrelated and generally "collapse into each other" when the defendant is a public official rather than a private party. Lugar, 457 U.S. at 937;and 928 n.8 (noting lower court's recognition that when "the defendant is a public official . . . there is no distinction between state action and action under color of state law").

[¶38] Under those principles, being a public official is neither necessary nor sufficient to engage in state action. It is not necessary because "a private entity can qualify as a state actor in a few limited circumstances," such as when the government compels it to act, the government acts jointly with the private entity, or the private entity "exercises a function 'traditionally exclusively reserved to the State.'" Halleck, 139 S. Ct. at 1926, 1928 (citation omitted) and 1929 n.1.

[¶39] Conversely, because every public official is also a private citizen, merely being a public official is not sufficient to establish that the official has engaged in state action. Instead, public officials engage in state action that is subject to constitutional scrutiny only when they exercise "power 'possessed by virtue of state law,'" such that their actions are "made possible only because [they are] clothed with the authority of state law." West v. Atkins, 487 U.S. 42, 49 (1988) (citation omitted). That standard is generally satisfied when a public official acts "in his official capacity"

or "exercis[es] his responsibilities pursuant to state law." Id. at 50. In contrast, actions taken by officials "in the ambit of their personal pursuits" – that is, actions that require neither powers possessed by virtue of state law nor being clothed with the authority of state law – are "plainly excluded" from constitutional scrutiny. Screws v. United States, 325 U.S. 91, 111 (1945).

[¶40] Determining whether any particular conduct is an exercise of government-granted authority or in the ambit of personal pursuits can be difficult. For that reason, rather than set forth a unified or comprehensive test for state action, the Supreme Court "has articulated a number of different factors or tests," each to be applied "in different contexts." Lugar, 457 U.S. at 939.

B. Application of Campbell v. Reisch.

[¶41] The United States Supreme Court has yet to address the situation where a public official is sued by a constituent for blocking that constituent on social media. The United States Supreme Court, however, has recently granted certiorari for two cases to clarify the issue. Lindke v. Freed, 143 S. Ct. 1780 (2023); O'Connor-Ratcliff v. Garnier, 143 S. Ct. 1779 (2023). As of drafting this order, the Supreme Court has not rendered a decision in either of those two cases. Additionally, neither the North Dakota Supreme Court nor any federal district court in the State of North Dakota have addressed this issue. The Eighth Circuit Court of Appeals, however, has rendered a decision under facts substantially similar to those in this case. See Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021). Consequently, the Eighth Circuit Court of Appeals' decision in Campbell is controlling law for this Court to apply in this case.

[¶42] In Campbell, the plaintiff sued a state representative, Reisch, for a violation of § 1983 after Reisch blocked him from her Twitter account. Campbell, 986 F.3d at 823. Reisch maintained she was not acting under the color of state law when she blocked him, and the Eighth Circuit agreed. Id. at 824. The Court found Reisch was not acting under the color of law and examined the Twitter account to find several facts persuasive to their holding. First, Reisch created her Twitter account before she was elected as a public official. Id. at 823-24 "[I]t seems safe to say that someone who isn't a public official cannot create an official governmental account." Id. at 826. Second, the account was used "overwhelmingly for campaign purposes: she created the account the day she announced her candidacy; she solicited donations to her campaign on the account; and, for over a year, she sought to convince her audience to support her election bid." Id. There was no "magical" alteration in the character or use of the account after Reisch was elected, and it never evolved into something different. Id. After Reisch won her election, she "tweeted about her work as a state

representative and posted pictures of herself on the House floor or standing with other elected officials." Id. at 824. She posted tweets about specific legislation, testifying before the state senate, visits from the governor, and about her performance as a representative. Id. The account did not become "an organ of official business" which would alter a personal account to a government one. Id. at 826. "The overall theme of Reisch's tweets – that she's the right person for the job – largely remained the same after her electoral victory." Id. Using the account to show one's success or fulfilling the promises made during campaigning or using the account for the main purpose of promoting oneself and positioning oneself for more electoral success, does not turn an account into a governmental one. Id. Posts relating to state legislation, where one stands on relevant political issues, or how enacted laws affect the state are consistent with advancing a legislative agenda and "fulfilling campaign promises." Id. Reisch's use of the account post-election and pre-election are too similar to suggest that it had morphed into something different. Id. Occasionally using an account to provide updates regarding "where certain bills were in the legislative process or the effect certain recently enacted laws had had on the state" does not turn an account into an "organ of official business" when those posts are consistent with how the account was being used during campaigning and consistent with the way one would use the account to promote themselves. Id. at 824. Further, "occasional stray messages that might conceivably be characterized as conducting the public's business are not enough to convert" a private social media account into something different. Id. at 827.

[¶43] Campbell instructs lower courts to evaluate social media accounts owned by individuals who happen to be public officials on a deeper level, recognizing that not all social media accounts owned by a public official triggers § 1983 liability. The Eighth Circuit's analysis is the correct analysis to apply to this case. It requires this Court to take a deeper dive into the purposes of the social media accounts and make distinctions between true government accounts that serve as an "organ of official business" and Facebook pages that simply are used to show followers that campaign promises are being kept and promoting themselves to continue the job in the future, as well as other personal posts. As the Eighth Circuit highlighted throughout their opinion, campaigning is a private action, not a public, governmental action. Campbell, 986 F.3d at 826. Running for public office is a unique activity that requires a unique application process to get selected for their role, and part of that is to manage social media accounts before they are officially

elected into office and throughout their term in hopes for re-election. This a private purpose, not a government purpose.

C. Myrdal's blocking of Sanderson was not state action.

[¶44] Under the foregoing principles, Myrdal's blocking of Sanderson from her Facebook account was not state action. Here, a public official has denied access to private property over which the government lacks ownership or control. Myrdal's Facebook account is unquestionably private property. Myrdal created that account on December 19, 2015, prior to being elected to the North Dakota Senate. Doc. No. 152, ¶ 2. Myrdal used her Facebook account to advance her candidacy for the North Dakota Senate and for personal use. Id. at ¶¶ 3, 7, 16, and 22. She used her account to solicit campaign contributions. Id. at ¶ 17. Following her appointment, Myrdal continued to use her Facebook account for personal use and to advance her candidacy for reelection. Id. at ¶ 4. Myrdal would continue to exercise exclusive control over that account even if she ceased to be a North Dakota State Senator. Id. at ¶ 6. Myrdal's position as a North Dakota State Senator does not require her to operate a Facebook page. Id. at ¶ 6, 8, and 21. Myrdal did not use government resources to maintain her Facebook page. Id. at ¶ 10 and 14. Myrdal is the sole administrator of her Facebook page. Id. at ¶¶ 11-12. As purely private property beyond the State's control, Myrdal's Facebook account is unlike an official government-controlled account.

[¶45] Nor can it be said that in using that nongovernmental account to communicate with constituents, Myrdal was performing a traditional, exclusive public function. Of course, public officials have a long tradition of communicating with the public about matters of public concern. But the Supreme Court has explained that "to qualify as a traditional, exclusive public function within the meaning of [the Supreme Court's] state-action precedents, the government must have traditionally and exclusively performed the function." Halleck, 139 S. Ct. at 1929 (emphasis added). When public officials communicate with the public, they do not "exercise[] 'powers traditionally exclusively reserved to the State.'" Id. at 1928 (emphasis added; citation omitted). Quite the contrary. The First Amendment expressly prohibits the government from reserving such powers to itself. And others – including nonincumbent seekers of public office, members of the media, and private citizens – also communicate with the public about the work of public officials and employees.

[¶46] Myrdal's operation of her Facebook account thus does not constitute "the exercise of some right or privilege created by the State." Sullivan, 526 U.S. at 50 (citation omitted). Instead, any

right or privilege Myrdal has to operate that account – including to block Sanderson – flows from her personal ownership or control of the account (per the terms of service and functionality provided by Facebook), irrespective of her status as a North Dakota State Senator.

[¶47] For the same reason, Myrdal cannot "fairly be said" to have been a state actor when she blocked Sanderson. Halleck, 526 U.S. at 50 (citation omitted). Although Myrdal was a public official at the time, her power to operate her personal social media account was neither a "power 'possessed by virtue of state law,'" nor one that was "made possible only because [Myrdal was] clothed with the authority of state law." West, 487 U.S. at 49 (citation omitted). Nor was Myrdal acting in her official capacity to "exercis[e] [her] responsibilities pursuant to state law" when she operated her Facebook page, including when blocking Sanderson. Id. at 49-50. Instead, like many individuals, Myrdal sought to inform others about her work and to address issues of public concern – in part to further her own political career – and she chose to use her personal social media page as a means of communication.

[¶48] To be sure, some of the content on Myrdal's Facebook page reflect her unique status as a North Dakota State Senator and/or government employee such as identifying herself as "North Dakota District 10 Senator" and listing her government email address. Doc. No. 46, Exhibit E. Sometime after it was listed, the identifier "North Dakota District 10 Senator" and Myrdal's government email address were removed from Myrdal's Facebook page. Doc. No. 46, Exhibit F. Myrdal also posted about North Dakota Senate activities. Doc. No. 152, ¶ 24. But as the Eighth Circuit Court of Appeals said: "occasional stray messages that might conceivably be characterized as conducting the public's business are not enough to convert" an account "into something different . . ." Campbell, 986 F.3d at 827. Public officials, no less than private individuals, retain the right in their private capacities to engage in speech "'commenting upon matters of public concern,'" including discussing "information acquired by virtue of [their] public employment." Lane v. Franks, 573 U.S. 228, 231, 240 (2014) (citation omitted). And in that private capacity, they retain the rights private individuals and entities enjoy to "exercise editorial control over speech and speakers on their properties or platforms." Halleck, 139 S. Ct. at 1932.

[¶49] For those reasons, excluding Sanderson from those conversations, when held on properties over which the government lacks ownership or control, is not state action. Cf. Biden v. Knight First Amendment Institute, 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring) ("[G]overnment officials who informally gather with constituents in a hotel bar can ask the hotel to remove a pesky

patron who elbows into the gathering to loudly voice his views."). That conclusion should not change simply because the private property at issue here is virtual rather than physical: Just as Myrdal would be free to remove a dinner guest from her home for expressing unwanted views, Myrdal was free to block Sanderson from her personal Facebook page.

IX. Qualified immunity.

[¶50] Qualified immunity shields a government official from liability and the burdens of litigation unless the conduct violates a "clearly established statutory or constitutional right of which a reasonable person would have known." Loch v. City of Litchfield, 689 F.3d 961, 965 (8th Cir. 2012). Qualified immunity is a question of law and offers "immunity from suit rather than a mere defense to liability." Mitchell v. Forsyth, 472 U.S. 511, 526 (1959). Whether the defense of qualified immunity applies requires the court to consider: (1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right; and (2) whether that right was clearly established at the time of the defendant's alleged misconduct." Truong v. Hassan, 829 F.3d 627, 630 (8th Cir. 2016). A defendant is entitled to qualified immunity unless both elements are answered in the affirmative. Jenkins v. Univ. of Minnesota, 838 F.3d 938, 944 (8th Cir. 2016).

A. Sanderson does not make out a violation of a constitutional or statutory right.

[¶51] The question this case presents to the Court is whether Myrdal acted under color of state law when she blocked Sanderson from accessing her Facebook account. As an initial matter, Sanderson does not set forth any facts in support of his Motion to Rule on Qualified Immunity, rather most of his briefing and affidavit set forth excerpts of case law. Simply, there is not a scintilla of evidence proffered by Sanderson to support his Motion. Moreover, while Sanderson alleges a violation of his First and Fourteenth Amendment rights when Myrdal allegedly blocked him from her Facebook page, the prevailing caselaw militates against finding a violation of a constitutional right occurred.

[¶52] "The First Amendment, by its terms, prohibits only governmental abridgment of speech." Campbell, 986 F.3d at 824. For a § 1983 claim to survive "a defendant must have acted under color of state law" and purely private conduct is excluded from § 1983's reach. Id. (internal quotations omitted). In Campbell, a plaintiff claimed his First Amendment right had been violated when a state legislator blocked him from her Facebook account. The Eighth Circuit held a state legislator's social media page, initially created to be a private account used for private purposes then later used for campaigning for public office and to promote her performance as a legislator, did not amount

to a public forum or evolve into a governmental account by the mere fact that the individual held a governmental position. Campbell, 986 F.3d at 826. Sanderson's Motion, resting on its own merit, does not establish that Myrdal's conduct was anything other than private conduct. If Myrdal's conduct was purely private, then the First Amendment does not apply because there is not a government abridgment of speech. Sanderson has failed to establish Myrdal acted under the color of state law and has failed to establish a genuine issue of material fact.

B. The right advanced by Sanderson is not clearly established.

[¶53] The right Sanderson advances is not clearly established for purposes of §1983 liability. Again, Campbell controls. Because it is the prevailing precedent, Sanderson's claims are severely undercut if not altogether moot. Myrdal's assertions set forth in her responsive briefing to the Sanderson's Motion concerning the nature and use of her Facebook page indicate the Facebook page is factually on all fours with the holding in Campbell. The issue turns on whether Myrdal was acting under color of state law when she allegedly blocked Sanderson from her Facebook account. The Motion is bare of any factual assertions, supported by evidence, to clearly establish Sanderson possessed a First Amendment right with respect to commenting and viewing Myrdal's Facebook page based on the facts of this case. If Myrdal is not acting as a government actor, Sanderson does not have First Amendment right and § 1983 does not reach Myrdal's purely private conduct. In that case, as the Campbell court explained, just because Myrdal's posts may open up an interactive space where other users may comment or speak, that does that does not mean Myrdal cannot control who gets to speak or what gets posted. Id. at 827-28. To the extent Sanderson raises other circuit precedent, this Court is persuaded by Campbell.

[¶54] Sanderson has not established undisputed facts, nor that there is not a genuine dispute as to any material facts. Sanderson certainly has not established, as a matter of law, he is entitled to summary judgment on the issue of qualified immunity because he cannot even satisfy the two-part test in his Motion nor distinguish this matter from Campbell.

Order

[¶55] **IT IS HEREBY ORDERED** that:

1) Myrdal's Motion for Summary Judgment is in all things **GRANTED**;
2) Sanderson's Motion to Rule on First and Fourteenth Amendment Violations is **DENIED**;

3) Sanderson's Motion to Rule on Qualified Immunity is **DENIED**;
4) Sanderson's Motion to Rule on Public Forum and Color of Law is **DENIED**;
5) Counsel for Myrdal shall prepare a Judgment consistent with this Order; and
6) The parties shall proceed according to N.D.R.Civ.P. 54(e) and applicable statutes to obtain a determination of costs and disbursements to be inserted into the judgment.

LET SUMMARY JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 14th day of December, 2023.

BY THE COURT:

Kari M. Agotness
Judge of the District Court

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF WALSH	NORTHEAST JUDICIAL DISTRICT

Mitchell S. Sanderson, Plaintiff, vs. Janne Myrdal, Defendant.	Case No. 50-2023-CV-00129

Order Denying Plaintiff's "Objection to Dismissal with Prejudice and Attorney Fees. Vacate Judgment/Release from Order"

[¶1] Before the Court is Mitchell S. Sanderson's ("Sanderson") "Objection to Dismissal with Prejudice and Attorney Fees. Vacate Judgment/Release from Order" filed on February 9, 2024. Doc. No. 209. Janne Myrdal ("Myrdal") filed a response in opposition to the motion on February 12, 2024. Doc. No. 213. The State of North Dakota ("the State") did not file a response. Sanderson filed a reply to Myrdal's response on February 29, 2024. Doc. No. 215. Sanderson made a timely request for a hearing but did not secure a date and time for a hearing.

[¶2] The Court has carefully reviewed the entire record, the parties' filings, and the relevant law. Being fully advised on the matter, the Court now issues the following Order Denying Plaintiff's "Objection to Dismissal with Prejudice and Attorney Fees. Vacate Judgment/Release from Order."

Relevant Factual and Procedural Background

[¶3] Sanderson filed a Summons and Complaint alleging Myrdal violated his First Amendment rights in violation of 42 U.S.C. § 1983 by blocking him from posting or commenting on Myrdal's Facebook page. Doc. Nos. 1-2.

[¶4] The Court issued an order granting summary judgment in favor of Myrdal on December 14, 2023. Doc. No. 188. Summary Judgment was issued on January 30, 2024. Doc. No. 203.

[¶5] Sanderson filed this present motion on February 9, 2024. Doc. No. 209.

Legal Analysis

I. Timeliness of Sanderson's reply brief.

[¶6] Sanderson served his motion and supporting documents on February 8, 2024 and filed them with the Court on February 9, 2024. Doc. Nos. 208-212. Upon serving and filing a motion, Myrdal and the State had 14 days to serve and file an answer brief and other supporting papers. N.D.R.Ct. 3.2(a)(2). Under N.D.R.Civ.P. 6(e), three days are added after the prescribed period if service is made by mail or third-party commercial carrier. Myrdal and the State were served by mail on February 8, 2024. Myrdal and the State had until February 26, 2024[1] to file and serve an answer brief with supporting documentation. Myrdal filed and served an answer brief on February 12, 2024. Doc. No. 213. The State did not file an answer brief.

[¶7] After being served with Myrdal's answer brief, Sanderson had the option to serve and file a reply brief within seven days. N.D.R.Ct. 3.2(a)(2). Under N.D.R.Civ.P. 6(e), three days are added after the prescribed period if service is made by mail or third-party commercial carrier. Sanderson was served with Myrdal's answer brief by mail so his deadline to file a reply brief was February 22, 2024. Sanderson filed his reply brief on February 29, 2024. Sanderson's reply brief is untimely and will not be considered by the Court.

II. Rule 60(b) motion.

[¶8] Sanderson's motion does not identify under what rule or authority he brought the motion. In his motion, he states: "[w]herefore, Plaintiff respectfully moves the Court for Relief from Judgment on its order . . ." Doc. No. 209, ¶ 2[2]. He mentions Rule 60(b) in his brief and that there has been neglect, mistake, and errors of law. Doc. No. 210, ¶¶ 11-12. This Court will consider Sanderson's motion as a motion under N.D.R.Civ.P. 60(b). There are six reasons for relief from a final order under N.D.R.Civ.P. 60(b):

(1) mistake, inadvertence, surprise, or excusable neglect;
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by opposing party;
(4) the judgment is void;

[1] The 17th day following service of Sanderson's motion was Sunday, February 25, 2024. Since the last day is a Sunday, Myrdal and the State had until the next day that is not a Saturday, Sunday, or legal holiday in which to file and serve their answer briefs and supporting documentation. See N.D.R.Civ.P. 6(a)(1)(C).

[2] Sanderson's motion has two paragraphs numbered as 2. This Court is referring to the last paragraph on page 1.

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.

"A motion under Rule 60(b) must be made within a reasonable time, and for reasons (1), (2), and (3), no more than a year after notice of entry of the judgment or order . . ." N.D.R.Civ.P. 60(c)(1). Sanderson's motion was timely filed with the Court.

I. Rule 60(b) legal standards.

[¶9] Relief under N.D.R.Civ.P. 60(b) is extraordinary. US Bank Nat'l Ass'n v. Arnold, 2001 ND 130, ¶ 12, 631 N.W.2d 150. A determination of whether or not to grant a party Rule 60(b) relief is within the district court's sound discretion. American Bank Center v. Schuh, 2010 ND 124, ¶ 9, 784 N.W.2d 468. The moving party bears the burden of establishing sufficient grounds for disturbing the finality of the judgment, and relief should be granted only in exceptional circumstances. Shull v. Walcker, 2009 ND 142, ¶ 14, 770 N.W.2d 274. Additionally, "neither [the Supreme Court] nor the district court has any duty or obligation to ferret through the record to locate evidence to support factual allegations." Peterson v. Zerr, 477 N.W.2d 230, 235 (N.D. 1991).

II. Sanderson is not entitled to relief under Rule 60(b)(1).

A. Judicial errors of law.

[¶10] The Supreme Court of the United States recently decided Kemp v. United States, 596 U.S. 528 (2022). In Kemp, the Supreme Court held the term "mistake" in Federal Rules of Rule Civil Procedure 60(b)(1) includes a judge's errors of law. Id. at 533-34. The Court specifically rejected the notion that "mistake" should be limited to "obvious errors" of law such as overlooking controlling statutes or case law. Id. at 333. The Court also rejected the notion that mistake should be limited to non-judicial, non-legal errors. Id.

[¶11] Interpretations of the Federal Rules of Civil Procedure are not binding, but are considered persuasive when interpreting similar North Dakota Rules of Civil Procedure. E.g., N.D.R.Civ.P. 1, Explanatory Note. This Court has been unable to locate any North Dakota case law that addresses whether a trial judge's mistake of law is a "mistake" for purposes of N.D.R.Civ.P. 60(b)(1). In finding none, it is appropriate to rely on the federal interpretation for the present motion.

[¶12] As the parties are well aware, the claim in Sanderson's Complaint deals in law that is unsettled and not yet thoroughly developed. While the United States Supreme Court has recently granted certiorari for two cases to clarify the issue, a decision has yet to be issued in either case. See Lindke v. Freed, 143 S.Ct. 1780 (2023), see also O'Connor-Ratcliff v. Garnier, 143 S. Ct. 1779 (2023). Neither the North Dakota Supreme Court nor any federal district in the State of North Dakota have addressed this issue either. Absent any other controlling authority, this Court relied on the Eighth Circuit Court of Appeal's decision in Campbell v. Reisch, 986 F.3d 822 as the controlling law to apply in this case. Notably, Sanderson's arguments are not that the Court failed to follow controlling case law as it relates to his 42 U.S.C. § 1983 claim; rather, his arguments focus on improper service of process, this Court's denial of his motion for default judgment, this Court's orders finding some of his motions to be frivolous and awarding attorney's fees to Myrdal, the undersigned's alleged bias against him for not recusing, and the Clerk of Court allegedly lacking an oath of office.

i. Denial of Sanderson's Motion for Default Judgment.

[¶13] Sanderson argues the Court erred when it denied his motion for default judgment. Sanderson served Myrdal with the Summons and Complaint on May 2, 2023. Doc. No. 3. Myrdal failed to timely answer within 21 days as required by N.D.R.Civ.P. 12(a)(1)(A). Myrdal filed and served her Answer on June 12, 2023. Doc. No. 19. Sanderson served his motion for default judgment with supporting documentation on June 16, 2023. Doc. Nos. 22-27. They were filed with the Court on June 20, 2023. Myrdal filed a response to the motion for default judgment with supporting documentation on June 28, 2023. Doc. Nos. 28-32. This Court issued its Order Denying Motion for Default Judgment on July 11, 2023. Doc. No. 39.

[¶14] A district court may enter default judgment against a party who fails to plead or otherwise appear. N.D.R.Civ.P. 55(a). Once an opposing party has appeared in an action, N.D.R.Civ.P. 55(a)(3) requires the party be given notice and served with the motion for default judgment according to N.D.R.Ct. 3.2(a). The opposing party has 14 days after service to "serve and file an answer brief and other supporting papers." N.D.R.Ct. 3.2(a)(2). Once the opposing party's fourteen day time period to respond has passed, the court may grant default judgment.

[¶15] Here, Myrdal was provided notice of the motion for default judgment as required under N.D.R.Civ.P. 55(a)(3) and N.D.R.Ct. 3.2(a). "[T]he default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive

party." Perdue v. Sherman, 246 N.W.2d 491, 495 (N.D. 1976). Here, the record shows Myrdal filed and served her Answer before Sanderson filed his Motion for Default Judgment. After Myrdal was served with Sanderson's Motion for Default Judgment, she then filed a response in opposition. Mydral's actions were not that of an unresponsive party. Sanderson's motion for relief from judgment as it relates to the Order Denying Motion for Default Judgment is denied.

ii. Frivolous filings and attorney's fees.

[¶16] On three separate occasions, this Court found Sanderson made frivolous motions and ordered him to pay Myrdal's reasonable attorney's fees under N.D.C.C. § 28-26-01(2). See Doc. No. 156, 158, and 160. In his present motion, all Sanderson provides are generalized statements that he filed nothing frivolous and everything he filed was backed up with evidence and case law. There are no references to the record or even to what particular exhibit(s) he wants to draw to the Court's attention to show that he filed nothing frivolous. As mentioned above, Sanderson, as the moving party bears the burden of establishing sufficient grounds for disturbing the finality of the judgment. Additionally, the district court has no duty or obligation to ferret through the record to locate evidence to support factual allegations. Peterson v. Zerr, 477 N.W.2d 230, 235 (N.D. 1991). It appears Sanderson is asking this court to do his work for him when he says: "Sanderson also demands that this judge clearly demonstrate that Sanderson has filed any frivolous filings with the court and support it in conclusions of law and findings of fact." Doc. No. 210, ¶ 10. Sanderson's motion for relief from judgment as it relates this Court's orders finding that he filed frivolous motions and ordered him to pay Myrdal's reasonable attorney's fees is denied.

iii. The undersigned's refusal to recuse.

[¶17] This case was originally assigned to the Honorable Barbara Whelan on May 19, 2023. Doc. No. 6. On May 24, 2023, Sanderson made a request for the Honorable Barbara Whelan to recuse from this case. Doc. No. 7. The Honorable Barbara Whelan did recuse and the undersigned was assigned on June 7, 2023. Doc. No. 13. On June 13, 2023, Sanderson filed a request for the undersigned to recuse. Doc. No. 21. Sanderson argued the undersigned is biased again him because of prior rulings in Mitchell S. Sanderson vs. NDGOP (case no. 50-2022-CV-00069) and because he filed a complaint against the undersigned with the Judicial Conduct Commission. Id. After doing an appropriate analysis, the undersigned determined recusal was not necessary under these circumstances and denied Sanderson's request. Doc. No. 37.

[¶18] On October 19, 2023, Sanderson served the undersigned with a Summons and Complaint in an action titled Mitchell S. Sanderson vs. Judge Kari Agotness (50-2023-CV-00287). While Sanderson did not specially make a request for the undersigned to recuse after commencing the lawsuit, the Court felt it necessary to analyze the recusal analysis again. Ultimately, the undersigned determined recusal was not necessary despite being named a defendant in a lawsuit brought by Sanderson. See Doc No. 181.

[¶19] Sanderson provides generalized and self-serving statements that the undersigned is biased against him. He states there is bias because the undersigned refused to recuse when he initially requested on June 13, 2023. Doc. No. 210, ¶ 5. The undersigned addressed this very concern in its order dated July 10, 2023. Doc. No. 37. Sanderson also states there is case law from the United States Supreme Court that if a judge is being sued, they cannot preside over that person's case. Doc. No. 210, ¶ 5. Specifically, Sanderson relies on Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986). Aetna is a case where a state supreme court justice had a pending lawsuit which turned on the same legal issue as the case before him on appeal. Id. at 813. The issue in this present action is an alleged violation of Sanderson's First Amendment rights in violation of 42 U.S.C. § 1983. The basis for Sanderson's lawsuit against the undersigned result from his dissatisfaction in this case.

[¶20] In conclusion, Sanderson has not stated with any specificity an alleged bias of the undersigned against him. As such, Sanderson's request for relief from judgment as it relates this Court's alleged bias against him is denied.

B. Mistake, inadvertence, surprise, or excusable neglect of Sanderson.

[¶21] Rule 60(b)(1), N.D.R.Civ.P., allows the Court to grant relief for mistake, inadvertence, surprise, or excusable neglect of the party seeking relief. Sanderson argues the judgment should be vacated as he failed to properly serve Myrdal and the State with service of process.

[¶22] Under N.D.R.Civ.P. 3, "[a] civil action is commenced by the service of a summons." Rule 4, N.D.R.Civ.P., governs service of process. "[P]ersonal jurisdiction over a party is acquired by service of process in compliance with N.D.R.Civ.P. 4." Alliance Pipeline L.P. v. Smith, 2013 ND 117, ¶ 18, 833 N.W.2d 464). A party must "strictly comply" with the specific requirements under N.D.R.Civ.P. 4 for service of process. Franciere v. City of Mandan, 2020 ND 143, ¶ 10, 945 N.W.2d 251 (affirming dismissal for lack of personal jurisdiction because of inadequate service of process on the city under N.D.R.Civ.P. 4(d)(2)(E)). "Valid service of process is necessary to assert personal jurisdiction over a defendant." Gessner v. City of Minot, 1998 ND 157, ¶ 5, 583 N.W.2d

90. Without valid service of process, even actual knowledge of the lawsuit's existence is insufficient to obtain personal jurisdiction over a defendant. Olsrud v. Bismarck-Mandan Orchestral Ass'n, 2007 ND 91, ¶ 9, 733 N.W.2d 256.

[¶23] Service of process within North Dakota is authorized "on an individual 14 or more years of age by: . . . any form of mail or third-party commercial delivery addressed to the individual to be served and requiring a signed receipt and resulting in delivery to that individual." N.D.R.Civ.P. 4(d)(2)(A)(v). This case commenced with the service of a Summons and Complaint. Myrdal was served by certified mail. The envelope was addressed to her and a signed receipt was filed into the record. Doc. No. ¶ 4. In Myrdal's Answer, she alleges service of process was insufficient as the signature represented on the return receipt is not hers. Doc. No. 19, ¶ 7.

[¶24] Insufficient process is a defense that may be asserted to a claim for relief in any pleading or by motion. N.D.R.Civ.P. 12(b)(4). Aside from asserting this defense in her Answer, Myrdal never filed a motion to dismiss for insufficient process, nor did she provide any evidence that someone other than her signed for the Summons and Complaint. Notably, after Myrdal filed her Answer, Sanderson filed an Answer to Counterclaim where he suggests service of process was complete under N.D.R.Civ.P. 4(d)(2)(A)(ii), (iii), or (v). Doc. No. 34, ¶ 7. Insufficient process is a defense that may be asserted by a defendant. It would go against public policy for a plaintiff to raise the defense of insufficient service of process after litigating the case for months and after various orders are issued against him. Even if the rules allowed Sanderson to assert the defense of insufficient process for his failure to properly serve Myrdal and the State, he waived this defense by failing to raise it in a timely manner. See N.D.R.Civ.P. 12(h)(1). Sanderson's request for relief from judgment due to his alleged improper service of process on Myrdal is denied. Likewise, Sanderson's request for relief from judgment due to his alleged improper service of process on the State is also denied.

III. Sanderson is not entitled to relief under Rule 60(b)(2).

[¶25] Rule 60(b)(2), N.D.R.Civ.P., allows the Court to grant relief in instances where newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b). Sanderson does not specifically make this argument nor is this Court able to infer that this argument had been made.

IV. Sanderson is not entitled to relief under Rule 60(b)(3).

[¶26] Rule 60(b)(3), N.D.R.Civ.P., allows the Court to grant relief in situations of fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party. Sanderson accuses Myrdal's husband of forgery by signing her name on the envelope which contained the Summons and Complaint. Aside from these bare allegations, there is nothing in his motion indicating who signed for the mail, let alone if that alleged signing was fraudulent. Sanderson has failed to show he is entitled to relief under Rule 60(b)(3).

V. Sanderson is not entitled to relief under Rule 60(b)(4).

[¶27] The North Dakota Supreme Court has limited the scope of the term "void" for the purpose of granting relief under N.D.R.Civ.P. 60(b)(4) if the district court lacked either subject-matter jurisdiction or personal jurisdiction over the parties. See, e.g. Dockter v. Dockter, 2018 ND 219, ¶ 13, 918 N.W.2.d 35, Monster Heavy Haulers, LLC v. Goliath Energy Servs., LLC, 2016 ND 176, ¶¶ 11-12, 883 N.W.2d 917; Alliance Pipeline L.P. v. Smith, 2013 ND 117, ¶ 18, 833 N.W.2d 464. Subject-matter jurisdiction refers to the court's power to hear and determine the general subject involved in the action, while personal jurisdiction refers to the court's power over a party. Albrecht v. Metro Area Ambulance, 1998 ND 132, ¶ 10, 580 N.W.2d 583; Larson v. Dunn, 474 N.W.2d 34, 38 (N.D.1991). A court has subject-matter jurisdiction over a proceeding if the constitution and laws authorize the court to hear that type of proceeding. Albrecht at ¶ 10; Larson at 38; Smith v. Smith, 459 N.W.2d 785, 789 (N.D. 1990). Generally, personal jurisdiction over a party is acquired by service of process in compliance with N.D.R.Civ.P. 4. Larson at 39. See also Wallwork Lease & Rental Co. v. Schermerhorn, 398 N.W.2d 127, 129 (N.D.1986). A party may waive issues about personal jurisdiction, but subject-matter jurisdiction cannot be conferred by agreement, consent, or waiver. Albrecht at ¶ 10.

[¶28] Our case law is clear that relief under N.D.R.Civ.P. 60(b)(4) may only be sought if the district court lacked either subject-matter jurisdiction or personal jurisdiction over the parties. Nowhere in the record does Sanderson allege this Court lacks subject matter jurisdiction. Sanderson alleges, however, that this Court lacks personal jurisdiction over Myrdal and the State. Just with the defense of insufficient service, lack of personal jurisdiction is a defense that may be asserted to a claim for relief in any pleading or by motion. N.D.R.Civ.P. 12(b)(2). Lack of personal jurisdiction is a defense that may be asserted by a defendant. It would go against public policy for a plaintiff to raise the defense of lack of personal jurisdiction after litigating the case for months

and after various orders are issued against him. Even if the rules allowed Sanderson to asset the defense of lack of personal jurisdiction for his failure to properly serve Myrdal and the State, he waived this defense by failing to raise it in a timely manner. See N.D.R.Civ.P. 12(h)(1). Sanderson's request for relief from judgment due to lack of personal jurisdiction is denied.

VI. Sanderson is not entitled to relief under Rule 60(b)(5).

[¶29] Rule 60(b)(5), N.D.R.Civ.P., allows the Court to grant relief in instances where the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable. Sanderson does not specifically make this argument nor is this Court able to infer that this argument had been made.

VII. Sanderson is not entitled to relief under Rule 60(b)(6).

[¶30] Although the North Dakota Supreme Court has referred to N.D.R.Civ.P. 60(b)(6) as a "catch-all" provision, it should only be invoked "when extraordinary circumstances are present." Kautzman v. Doll, 2018 ND 23, ¶ 14, 905 N.W.2d 744. Further, N.D.R.Civ.P. 60(b)(6) it is not without limitations:

> [T]he use of the rule is limited in many considerations. It is not to be used as a substitute for appeal. It is not to be used to relieve a party from free, calculated, and deliberate choices he has made. It is not to be used in cases where subdivisions (1) to (5) of Rule 60(b) might be employed—it and they are mutually exclusive. **Yet 60(b)(6) can be used where the grounds for vacating a judgment or order are within any of subdivisions (1) to (5), but something more or extraordinary which justifies relief from the operation of the judgment must be present.**

Hildebrand, 2016 ND 225, ¶ 16, 888 N.W.2d 197) (citations omitted, emphasis added). The moving party bears the burden of establishing sufficient grounds for disturbing the finality of the judgment, and relief should be granted only in exceptional circumstances. Follman, 2000 ND 72, ¶ 10, 609 N.W.2d 90. Having sought a remedy under N.D.R.Civ.P. 60(b)(1) due to mistake, inadvertence, surprise, or excusable neglect, Sanderson must establish "something more" or "extraordinary" besides the grounds for mistake, inadvertence, surprise, or excusable neglect justifying relief from the judgement. Hildebrand, 2016 ND 225, ¶ 16, 888 N.W.2d 197.

[¶31] Sanderson's brief in support of his motion does not specify which facts actually apply to relief under N.D.R.Civ.P. 60(b)(6). "A mere recitation of the grounds set forth to Rule 60(b), N.D.R.Civ.P., without specific details underlying such assertions, is not sufficient to afford relief." Hatch, 484 N.W.2d 283, 286 (N.D. 1992) (quoting Fleck v. Fleck, 337 N.W.2d 786, 790 (N.D.

1983)). The burden on a Rule 60(b) motion is on the moving party to present a legal argument with factual support – not for the court to guess or make assumptions. As noted by the North Dakota Supreme Court, "neither this court nor the district court has any duty or obligation to ferret through the record to locate evidence to support factual allegations." Peterson v. Zerr, 477 N.W.2d 230, 235 (N.D. 1991). Because Sanderson failed to meet his burden, his request for relief based on all assertions, considered under N.D.R.Civ.P. 60(b)(6) is denied.

Order

[¶32] Sanderson's request for relief is in all things **DENIED**.

Dated this 4th day of March, 2024.

BY THE COURT:

Kari M. Agotness
Judge of the District Court

APPENDIX K

20240091 - Filed 11-08-2024
NORTH DAKOTA SUPREME COURT

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2024 ND 202

Mitchell S. Sanderson, Plaintiff and Appellant

v.

Janne Myrdal, Defendant and Appellee

and

The State of North Dakota, Intervenor and Appellee

No. 20240091

Appeal from the District Court of Walsh County, Northeast Judicial District, the Honorable Kari M. Agotness, Judge.

AFFIRMED.

Opinion of the Court by Tufte, Justice.

Mitchell S. Sanderson, self-represented, Park River, N.D., plaintiff and appellant.

Howard D. Swanson, Grand Forks, N.D., for defendant and appellee.

Courtney R. Titus, Assistant Attorney General, Bismarck, N.D., for intervenor and appellee.

Sanderson v. Myrdal et al.
No. 20240091

Tufte, Justice.

[¶1] Mitchell Sanderson appeals from a district court judgment dismissing his complaint with prejudice and from an order denying relief from judgment. On appeal, Sanderson argues that the district court erred in granting summary judgment in favor of Myrdal and dismissing his complaint with prejudice. Sanderson also argues that the district court abused its discretion in (1) denying his various motions; (2) denying his requests for hearings on those motions; and (3) awarding Myrdal attorney's fees. We affirm.

I

[¶2] On May 1, 2023, Sanderson brought an action against North Dakota state senator Janne Myrdal under 42 U.S.C. § 1983, alleging that Myrdal had violated his First Amendment rights when she blocked him on Facebook. Sanderson argued that Myrdal's Facebook page constituted a public forum and that he had a First Amendment right to see her posts and comment on them. Sanderson sought compensatory and punitive damages as well as injunctive relief enabling him to see, share, and comment on Myrdal's Facebook posts.

[¶3] On June 12, Myrdal filed and served her answer, denying that Sanderson was entitled to relief and alleging that her Facebook page was not an official State website. Four days later, Sanderson filed a motion for default judgment pursuant to N.D.R.Civ.P. 55(a), asserting that Myrdal had failed to answer within twenty-one days of being served with the summons and complaint. Myrdal responded that Sanderson was not entitled to default judgment because he had been served with her answer before he moved for default judgment. In an affidavit filed with the motion, Myrdal stated that Sanderson served her with the summons and complaint by mail on May 2, 2023, but she was out of state and did not become aware of the suit until late May when she received notification and assignment of its case number. Immediately thereafter, she contacted the county clerk and her attorney. The district court denied Sanderson's motion for default judgment.

The State of North Dakota moved to intervene and the district court granted intervention as a matter of right.

[¶4] Sanderson filed numerous motions seeking rulings on his allegations relating to evidence tampering and spoilage, forgery, First and Fourteenth Amendment violations, qualified immunity, obstruction, and public forum and color of law. The district court denied each of Sanderson's requests for a hearing because he failed to either timely request or schedule a hearing. The district court found three of Sanderson's motions frivolous (evidence tampering and spoilage, obstruction, and forgery) and awarded Myrdal attorney's fees for having to respond to them. The district court construed the other three motions as motions for summary judgment and denied them in its order granting summary judgment in favor of Myrdal.

[¶5] The district court concluded that Sanderson had raised no genuine issue of material fact and that the § 1983 claim failed as a matter of law. Because its order granting summary judgment in favor of Myrdal resolved all pending claims, the district court dismissed the State's motion for declaratory judgment as moot. The district court then dismissed Sanderson's complaint with prejudice.

II

[¶6] We first address Sanderson's challenge to the judgment on jurisdictional grounds. Sanderson argues the district court lacked personal jurisdiction over Myrdal due to Sanderson's insufficient service of process on Myrdal. The district court rejected this argument in its denial of Sanderson's motion for relief from judgment. The district court's ruling regarding personal jurisdiction is a question of law that we review de novo. *Wilkens v. Westby*, 2019 ND 186, ¶ 4, 931 N.W.2d 229.

[¶7] A district court "may acquire personal jurisdiction over any person through service of process as provided in this rule or by statute, or by voluntary general appearance in an action by any person either personally or through an attorney or any other authorized person." N.D.R.Civ.P. 4(b)(4). Sanderson alleged in his complaint that the district court had personal jurisdiction over him and Myrdal; Myrdal admitted to personal jurisdiction over both parties in her

answer. Although initial service of process on Myrdal was improper, under N.D.R.Civ.P. 12(h)(1), any "lack-of-personal-jurisdiction defense is waived if it is neither made by motion nor included in a responsive pleading." *Intercept Corp. v. Calima Financial, LLC*, 2007 ND 180, ¶ 10, 741 N.W.2d 209.

[¶8] A plaintiff who commences an action alleging a district court has personal jurisdiction over a defendant cannot later challenge that court's personal jurisdiction over the defendant. Here, Sanderson chose to initiate his action against Myrdal in district court. The court acquired personal jurisdiction over Myrdal under N.D.R.Civ.P. 4(b)(4) when she answered the complaint, admitting the jurisdictional allegations in the complaint about both parties and submitting herself to the court's jurisdiction. *United Accounts, Inc. v. Lantz*, 145 N.W.2d 488, 491 (N.D. 1966) ("The service of an answer . . . constitutes a general appearance when such answer . . . does not object to the jurisdiction of the court."). Sanderson cites decisions holding a *defendant* may defeat personal jurisdiction for lack of personal service *on the defendant*. We are aware of no authority for the proposition that a plaintiff may challenge the court's jurisdiction over a defendant who admits personal jurisdiction on the basis of defects in the plaintiff's service of process on the defendant. Sanderson's jurisdiction argument is without merit.

III

[¶9] Sanderson argues that the district court erred in denying his motion for default judgment.

[¶10] We review a district court's denial of a motion for default judgment for an abuse of discretion. *Suburban Sales and Service, Inc. v. District Court of Ramsey Cnty.*, 290 N.W.2d 247, 251 (N.D. 1980). The court abuses its discretion when it "acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law." *State v. $33,000 U.S. Currency*, 2008 ND 96, ¶ 6, 748 N.W.2d 420.

[¶11] On May 2, 2023, Sanderson attempted service of the summons and complaint on Myrdal by mail. Myrdal was out of state at that time, and someone else at her residence signed Myrdal's name on the return receipt. Myrdal first

became aware of the suit in late May when she received notification and assignment of its case number. Immediately thereafter, she contacted the county clerk and her attorney. On June 12, 2023, Myrdal filed and served her answer. Four days later, Sanderson filed a motion for default judgment pursuant to N.D.R.Civ.P. 55(a), asserting that Myrdal had failed to answer within twenty-one days of being served with the summons and complaint.

[¶12] Under Rule 55(a), a district court has discretion to direct entry of default judgment. Here, the district court noted that Sanderson moved for entry of default judgment after receiving Myrdal's answer, and that under our precedent, a plaintiff is generally not entitled to default judgment when the plaintiff moves for default judgment after being served the defendant's answer. *See United Accounts, Inc.*, 145 N.W.2d at 491 ("The service of an answer to a complaint invokes the authority of the court to determine a controversy on its merits . . . ."). The district court also noted "North Dakota's strong preference that cases be decided on their merits." *See Filler v. Bragg*, 1997 ND 24, ¶ 14, 559 N.W.2d 225. The district court did not abuse its discretion in denying Sanderson's motion for default judgment.

IV

[¶13] Sanderson argues that the district court erred in granting summary judgment in favor of Myrdal.

[¶14] Summary judgment allows for the prompt resolution of a controversy on the merits without trial when there are no disputed issues of material fact or disputed inferences to be drawn from undisputed facts. *Lupo v. McNeeley*, 2019 ND 104, ¶ 4, 925 N.W.2d 457.

> The party moving for summary judgment has the burden of establishing that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. In deciding whether the district court appropriately granted summary judgment, this Court views the evidence in the light most favorable to the party opposing the motion, and the opposing party will be given the benefit of all favorable inferences that can reasonably be drawn from the record. On appeal, we decide whether the

> information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether a district court properly granted summary judgment is a question of law this Court reviews de novo on the entire record.

Id.

A

[¶15] The district court properly concluded that there were no genuine issues of material fact. In support of her motion for summary judgment, Myrdal filed an unsworn declaration stating facts that are consistent with Sanderson's statement of facts in his affidavit in support of his complaint. Sanderson never claimed existence of a genuine issue of fact, neither in his appellate brief nor his district court filings.

[¶16] The undisputed facts show that Myrdal is a North Dakota state senator who created her "Myrdal ND Senate" Facebook page in December 2015 to promote her political interests and candidacy for the North Dakota Senate. Since then, Myrdal has used the Facebook page to communicate with her constituents. Myrdal has described herself on her Facebook page as a "North Dakota District 10 Senator," using the labels "Political Candidate" and, alternatively, "Public Figure." Since her election to the North Dakota Senate, Myrdal has used her Facebook page to promote her reelection efforts and share local events, religious beliefs, and political views.

[¶17] Myrdal maintains sole control of the Facebook page and the State is not involved in the administration of the page. Myrdal's Facebook page is not required by any State law; is not held out as an official communication from the State or North Dakota Senate; is not funded in any way by the State or public funds; is not subject to State management or control; nor is it part of Myrdal's official duties as a state senator. Although Myrdal listed her nd.gov email address on the Facebook page, she uses her personal phone number rather than a State-issued number. In its motion for declaratory judgment, the State confirmed it is not involved in any way with the administration of Myrdal's Facebook page.

B

[¶18] The district court properly concluded that Sanderson's § 1983 claim fails as a matter of law. The undisputed facts fit squarely within controlling caselaw dictating that Myrdal's Facebook page is not a public forum and that her blocking Sanderson from her page is not state action.

[¶19] "Section 1983 provides a cause of action against '[e]very person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State*' deprives someone of a federal constitutional or statutory right. As its text makes clear, this provision protects against acts attributable to a State, not those of a private person. This limit tracks that of the Fourteenth Amendment, which obligates *States* to honor the constitutional rights that § 1983 protects." *Lindke v. Freed*, 601 U.S. 187, 194 (2024) (quoting 42 U.S.C. § 1983) (emphasis in original).

[¶20] The Court held in *Lindke* that "a public official's social-media activity constitutes state action under § 1983 only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media." *Id.* at 198. "The first prong of this test is grounded in the bedrock requirement that 'the conduct allegedly causing the deprivation of a federal right be *fairly attributable to the State*.' An act is not attributable to a State unless it is traceable to the State's power or authority. Private action—no matter how 'official' it looks—lacks the necessary lineage." *Id.* (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). To succeed on a § 1983 claim, the plaintiff must show that the state official had "actual authority rooted in written law or longstanding custom to speak for the State. That authority must extend to speech of the sort that caused the alleged rights deprivation. If the plaintiff cannot make this threshold showing of authority, he cannot establish state action." *Id.* at 201. Even if a plaintiff can show the state official did have actual authority to speak for the state, his claim will still fail unless he can show, under the second prong, that the state official purported to use that actual authority to deprive the plaintiff of a federal right. *Id.*

[¶21] *Lindke* was decided after the district court issued its order granting summary judgment in favor of Myrdal. The district court relied on the Eighth

Circuit's decision in *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021). The court held in *Campbell* that a public official did not engage in state action when she blocked the plaintiff on Twitter, because the official had created her Twitter account as a campaign tool prior to being elected and continued to use it "overwhelmingly for campaign purposes" after her election. 986 F.3d at 826. The court explained that "[a] private account can turn into a governmental one if it becomes an organ of official business, but that is not what happened here." *Id.*

[¶22] The district court's analysis is consistent with *Lindke*. The court concluded that "Myrdal's blocking of Sanderson from her Facebook account was not state action. Here, a public official has denied access to private property over which the government lacks ownership or control." The court noted that Myrdal created her Facebook page as a campaign tool prior to her election to the North Dakota Senate and that she continued to use the page for her ongoing reelection efforts. Myrdal created the page in her private capacity, she has always had exclusive control over the page, and she would continue to have exclusive control over the page even if she were no longer a state senator. Quoting *West v. Atkins*, 487 U.S. 42, 49 (1988), the court explained that Myrdal's "power to operate her personal social media account was neither a 'power possessed by virtue of state law,' nor one that was 'made possible only because [Myrdal was] clothed by the authority of state law.'" The court concluded that Myrdal's blocking of Sanderson cannot be construed as state action, because Myrdal acted in her private capacity when she did so; Myrdal has no authority to act on behalf of the State in the administration of her Facebook page.

[¶23] To avoid summary judgment on his § 1983 claim, Sanderson was required to raise a fact issue that Myrdal deprived him of a federal right while acting under color of state law. The undisputed facts do not leave unresolved any dispute that Myrdal "(1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when [she] spoke on social media." *Lindke*, 601 U.S. at 198. As both the State and Myrdal have stated, Myrdal does not possess actual authority to speak on the State's behalf. Sanderson does not dispute these essential facts, and thus his claim fails as a matter of law.

V

[¶24] Sanderson argues that the district court erred in denying his requests for hearings on his motions. We review such denials for an abuse of discretion. *Hoffman v. Jevne*, 2019 ND 156, ¶ 8, 930 N.W.2d 95.

[¶25] Rule 3.2(a) provides:

> If any party who has timely served and filed a brief requests a hearing, the request must be granted. A timely request for a hearing must be granted even if the moving party has previously served notice indicating that the motion is to be decided on briefs. The party requesting a hearing must secure a time for the hearing and serve notice upon all other parties. Requests for a hearing or the taking of evidence must be made not later than seven days after expiration of the time for filing the answer brief. If the party requesting a hearing fails within 14 days of the request to secure a time for the hearing, the request is waived and the matter is considered submitted for decision on the briefs. If an evidentiary hearing is requested in a civil action, notice must be served at least 21 days before the time specified for the hearing.

N.D.R.Ct. 3.2(a)(3). "A Rule 3.2 request for oral argument must be granted to any requesting party . . . who has timely served and filed a brief. Rule 3.2, however, requires that the party requesting oral argument must secure a time for the argument and serve notice upon all other parties. . . . Failure to secure a time for oral argument renders the request incomplete." *In re Adoption of J.S.P.L.*, 532 N.W.2d 653, 657 (N.D. 1995) (cleaned up).

[¶26] The record shows Sanderson either filed his requests after the seven-day deadline or failed to schedule hearings within the required 14-day period. The district court therefore properly denied the requests under Rule 3.2(a).

VI

[¶27] Sanderson argues that the district court erred in awarding Myrdal attorney's fees. We review an award of attorney's fees for an abuse of discretion. *Sagebrush Res., LLC v. Peterson*, 2014 ND 3, ¶ 15, 841 N.W.2d 705 ("A court's

discretionary determinations under N.D.C.C. § 28-26-01(2) will not be overturned on appeal absent an abuse of discretion.").

[¶28] Section 28-26-01(2), N.D.C.C., provides:

> 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 that person's favor, providing the prevailing party has in responsive pleading alleged the frivolous nature of the claim.

A district court has discretion under N.D.C.C. § 28-26-01(2) to determine whether a claim is frivolous and how much to award. *McCarvel v. Perhus*, 2020 ND 267, ¶ 19, 952 N.W.2d 86. "Frivolous claims are those which have such a complete absence of actual facts or law that a reasonable person could not have expected that a court would render judgment in that person's favor." *Sagebrush*, 2014 ND 3, ¶ 15 (cleaned up). The district court must award costs and attorney's fees if it finds the claim is frivolous. *McCarvel*, 2020 ND 267, ¶ 19.

[¶29] The district court found three of Sanderson's motions frivolous and awarded Myrdal attorney's fees under N.D.C.C. § 28-26-01(2) for responding to them. Our review of the record shows that the district court did not abuse its discretion in finding Sanderson's motions frivolous and awarding attorney's fees. The district court addressed each provision of law that Sanderson cited, explaining why the provisions were inapplicable to the claims at issue. All legal authority Sanderson cited was irrelevant to the claims at issue. As the district court correctly pointed out—even if the laws Sanderson cited were applicable to the claims—he failed to allege facts sufficient to bring any claim under those laws.

VII

[¶30] All other issues raised by Sanderson are inadequately briefed, without merit, or unnecessary to our decision. We affirm.

[¶31] Jon J. Jensen, C.J.
Daniel J. Crothers
Lisa Fair McEvers
Jerod E. Tufte
Douglas A. Bahr

20240091 - Filed 11-08-2024
NORTH DAKOTA SUPREME COUR

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUDGMENT

Supreme Court No. 20240091
Walsh No. 50-2023-CV-00129

Mitchell S. Sanderson, — **Plaintiff and Appellant**
v.
Janne Myrdal, — **Defendant and Appellee**
and
The State of North Dakota, — **Intervenor and Appellee**

[¶1] This appeal was considered by the Court at the September Term of Court and an opinion was filed. The Court considered the matter, and

[¶2] IT IS ORDERED AND ADJUDGED that the judgment of the district court is AFFIRMED.

[¶3] IT IS FURTHER ORDERED AND ADJUDGED that Janne Myrdal and the State of North Dakota have and recover from Mitchell S. Sanderson costs and disbursements on this appeal under N.D.R.App.P. 39, to be taxed and allowed in the court below. [¶4] This judgment will be final upon disposition of a petition for rehearing, if any is filed, or when the time for filing such petition has expired and the mandate of this Court issued.

[¶5] This judgment, together with the opinion of the Court, constitutes the mandate of the Supreme Court on the date it is issued to the district court under N.D.R.App.P. 41.

[¶6] Dated: 11/8/2024

Jon J. Jensen
Chief Justice

Attest:
Petra H. Mandigo Hulm
Clerk