IN THE COURT OF APPEALS OF IOWA

No. 2-1122 / 12-0633
Filed February 13, 2013

STICKS, Inc., an Iowa Corporation
And SARAH GRANT, A Single Person,
Plaintiff-Appellants,

vs.

MICHAEL HEFNER, C.P.A., C.F.P.,
And HEFNER FINANCIAL, Inc., an
Iowa Corporation,
Defendant-Appellees.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

Attorney for the plaintiffs appeals the district court decision imposing sanctions. **REVERSED.**

James R. Cook, West Des Moines, for appellant.

Michael W. Ellwanger of Rawlings, Ellwanger, Jacobs, Mohrhauser & Nelson, L.L.P., Sioux City, for appellee.

Heard by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

James Cook—attorney for the plaintiffs Sticks, Inc., and its owner Sarah Grant—appeals the district court's order imposing sanctions against him. Cook claims no sanction should have been imposed because he, on behalf of Sticks and Grant, urged a good faith extension of the existing case law following their first professional negligence suit against Michael Hefner and Hefner Financial, L.L.C. (collectively Hefner), who had been acting as Sticks' Chief Financial Officer. Cook also argues on appeal that if any sanction is to be imposed, the amount of the sanction determined by the district court violates the "American Rule" that the losing litigant does not ordinarily pay the victor's attorney fees, and is contrary to settled case law in Iowa. Because we find the district court abused its discretion in determining sanctions were warranted, we reverse the award of sanctions.

I. Background Facts and Procedure

This case arose after a jury returned a verdict in September 2009, finding Hefner liable for professional malpractice and breach of its fiduciary duty to Sticks and Grant. On October 9, the parties reached a compromised settlement of the verdict in the amount of $150,000, which was paid by check written to "Sticks, INC. & Sarah Grant" in satisfaction of the judgment.

In January 2010, both Sticks and Grant received an Internal Revenue Service (I.R.S.) Form 1099 Miscellaneous Income (Form 1099) from Hefner reporting each had received "other income" of $150,000 from Hefner. The next day, Cook contacted Hefner's trial attorney claiming the Form 1099s should not have been issued at all. He also told Cook he no longer represented Hefner.

According to Cook, the attorney stated he would pass on Cook's concerns to Hefner. Sticks, Grant, and Cook never contacted Hefner directly about the two Form 1099s.

During the next few days, Cook consulted with an expert, David Hove, who was familiar with Hefner and the 2009 malpractice litigation. The expert was a certified public accountant, with twenty-three years of experience as a tax accountant and four years experience as an IRS field agent. Cook, Grant, and Hove signed a letter[1] sent to the IRS Office of Professional Responsibility in February 2010, claiming the two Form 1099s were a "deliberate attempt to harass Ms. Grant and Sticks, Inc. because of the outcome of the lawsuit."

In March 2010, Sticks and Grant filed this lawsuit claiming professional negligence against Hefner, seeking compensatory damages for conduct described as "gross negligence, intentional acts, and professional malpractice" for "improper and invalid 1099-Misc income reporting" as well as seeking punitive damages and costs. The claim of Sticks and Grant was that Hefner's fiduciary duty to Sticks and Grant survived the first lawsuit, imposing on Hefner a greater responsibility in issuing the Form 1099s than another individual might owe. In its answer, Hefner counterclaimed pursuant to Iowa Rule of Civil Procedure 1.413(1) for sanctions "including legal fees and expenses and other amounts as are appropriate."

Hefner filed a motion for summary judgment in October of 2010, stating Sticks and Grant did not contact them regarding amending the Form 1099s and

[1] The letter, which the district court did not mention in its ruling, contained some factual misstatements.

that the issuance of two forms was appropriate. It referred the court to affidavits of experts James Monroe and Bruce Cahill. The motion concluded with the statement, "This action is frivolous and sanctions should be awarded."

Sticks and Grant filed a resistance to the motion, including affidavits from two experts: Hove and another CPA named Stephen Thielking. Hove opined that Hefner knew through his work with Sticks and the first lawsuit that part of the settlement was to reimburse Sticks for expenses and was not taxable. He also stated that the IRS regulations regarding the preparation of Form 1099's were unclear where more than one recipient had received funds, but that the code requires reporting of payments to joint payees separately only if one of the payees is an attorney. His affidavit also included a statement regarding penalties imposed when improper returns forms are filed, and penalties which can be incurred when forms are fraudulent.

Thielking opined that joint payees frequently receive a single Form 1099 and that no exception existed to warrant the issuance of two in this case. He also opined that issuing two Form 1099s of $150,000 would be clearly misleading as it would represent the incorrect sum of $300,000. The resistance also stated that counsel for Sticks and Grant had contacted Hefner's counsel regarding the forms. It also argued that only thirty-five percent of the original judgment was a taxable event—$12,000 for the return of a consulting fee and $72,000 for punitive damages.

Hefner replied to the resistance of the motion for summary judgment, alleging the resistance was untimely, any communication with Hefner's former attorney regarding the forms did not constitute notifying Hefner, that Hefner did

not need to analyze the parts of the settlement to determine what was taxable, that no code section prohibits the issuance of two Form 1099s, that the cases cited by Hove regarding fraudulent returns are distinguishable, and Thielking's affidavit was incorrect in stating the issuance of two Form 1099s doubled the amount reported. Hefner contended that Grant and Sticks' expert opinions were insufficient to generate a question of material fact, and its own experts had concluded there was no specific guidance from the Treasury Department addressing the issue in question. Hefner included in his reply that Grant and Sticks' expert opinions were insufficient to establish a breach of the standard of care in his profession.

The district court denied Hefner's motion in February of 2011, finding Grant and Sticks sufficiently had raised disputed issues of material facts. Judge Romano found "[t]he Plaintiffs, through counsel, requested to Defendant's counsel, that the Defendants withdraw or amend the 1099-MISC forms, to which the Defendants, through counsel, declined." The court summarized the Sticks and Grant's argument to be that

> [O]nly a portion of the settlement amount, if any, is taxable and the 1099-MISC forms should not have contained the entire $150,000.00" [and] . . . there should not have been two 1099-MISC forms issued which made it appear that each Plaintiff had received $150,000.00 for a total amount of $300,000.00.

It summarized Hefner's motion for summary judgment as stating "these facts are undisputed and the only issue is whether it was legally appropriate for the 1099-MISC forms to be issued. The Defendants also allege that this entire action is frivolous and sanctions should be awarded."

In June 2011, Hefner filed a motion to dismiss alleging the court lacked subject matter jurisdiction as the amount of damages sought would not exceed the jurisdictional limitation for small claims court. Sticks and Grant resisted this motion, stating that they sought punitive damages in addition to compensatory damages of $844.75. At the hearing regarding the motion to dismiss, Hefner asked the court to reconsider its prior summary judgment ruling. The court denied the motion to dismiss and did not reconsider the motion for summary judgment. Judge Romano wrote: "[T]he court finds that the Plaintiffs' Petition adequately pleads a punitive damages claim. It is conceivable that the Plaintiffs' evidence could support a punitive damages award which would exceed the jurisdiction of small claims."

The case proceeded to trial before Judge Romano and a jury later that same month. Both parties filed trial briefs and for two days, Sticks and Grant presented their case. At the conclusion of the presentation of their evidence, Hefner filed a motion for directed verdict. The court granted this motion, finding insufficient evidence of negligence or violation of a standard of care, no fiduciary relationship between the parties at the time the Form 1099s were issued, and no support for punitive damages.

Hefner then filed a motion for sanctions against Cook[2] along with a supporting brief and an attorney fee affidavit seeking payment for over $11,000 in attorney fees and more than $5000 in expert witness fees. The motion alleged the action was groundless and that neither plaintiffsustained damages. Cook

[2] The caption read "Sticks, Inc." and "Sarah Grant," and the motion asked for relief against "Plaintiffs." The substance of the motion, however, was asking for sanctions against Cook.

countered by claiming sanctions were inappropriate because he was seeking an extension of existing case law regarding the continuation of a fiduciary duty.

The district court found the original lawsuit appeared to have been "very emotional and personal" for Grant, and that the second suit was filed "in part, due to the animosity and anger" over the circumstances that led to the first lawsuit. The court acknowledged that sanctions are available based upon an objective standard of reasonableness and are determined at the time the pleading is filed, citing *Barnhill v*. *Iowa Dist*. *Ct*., 765 N.W.2d 267, 272–73 (Iowa 2009) Polk County and *Weigel v*. *Weigel*, 467 N.W.2d 277, 280 (Iowa 1991). Referring to the trial evidence,[3] the court stated: "There was no expert who supported the allegation that [Hefner] violated any standard of care for a financial Advisor or accountant, or any IRS regulation. The most [Sticks and Grant's] expert could say was that the I.R.S. Regulations on this issue are 'a gray area.'" The district court found the filing of the professional negligence petition violated Iowa Code section 619.19 (2009)and Iowa Rule of Civil Procedure 1.413(1), concluding monetary sanctions were appropriate. However, the court found it was "an isolated incident in Mr. Cook's career" and ruled the appropriate sanction against Cook was $10,341: $5341 for Hefner's expert witness fees, and $5000 for attorney fees. After a denied application to reconsider, Cook appeals.

II. Standard of Review

The proper means to review a district court's order imposing sanctions is by writ of certiorari. *Mathias v*. *Glandon*, 448 N.W.2d 443, 445 (Iowa 1989).

[3] Cook did not provide us with a transcript of the trial evidence, but both parties agree that Hove was the expert witness for Sticks and Grant.

Thus, although this action is styled as an appeal, we treat it as a petition for a writ of certiorari to the extent it challenges the award of sanctions in this matter. *See* Iowa R. App. P. 6.108; *see Everly v*. *Knoxville Cmty*. *Sch*. *Dist*., 774 N.W.2d 488, 492 (Iowa 2009).

A district court's order imposing sanctions under our rules of civil procedure is reviewable for an abuse of discretion. *Mathias*, 448 N.W.2d at 445. We will find an abuse "when the district court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Schettler v*. *Iowa Dist*. *Ct*., 509 N.W.2d 459, 464 (Iowa 1993). Although our review is for an abuse of discretion, we will correct erroneous applications of law. *Everly*, 774 N.W.2d at 492. The district court's findings of fact are binding if supported by substantial evidence, particularly because it is in a better position to evaluate counsel's actions and motivations. *Barnhill*, 765 N.W.2d at 272.

III. Good Faith Extension of Law

The district court found Cook violated Iowa Rule of Civil Procedure 1.413, which provides in pertinent part:

> Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: counsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation . . . . If a motion, pleading, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee.

The district court also found a violation of Iowa Code section 619.19, which mirrors the rule in substance. The rule is intended to discourage parties and counsel from filing frivolous suits and otherwise deter misuse of pleadings, motions, or other papers. *Hearity v. Iowa Dist. Ct.*, 440 N.W.2d 860, 864 (Iowa 1989). An attorney's actions are measured objectively for reasonableness under the circumstances. *Weigel*, 467 N.W.2d at 80. We make that objective determination by analyzing a number of factors including the amount of time available to the signer to investigate the facts and research the legal issues, the complexity of the issues, the plausibility of the legal issues asserted, the clarity or ambiguity of existing case law, and the extent to which facts were not readily available to the signer. *Barnhill*, 765 N.W.2d at 273.

Cook first asserts the sanction against him was not appropriate because he was arguing in good faith for an extension of the existing case law when Sticks and Grant alleged Hefner breached the continuing fiduciary relationship that had been determined to exist in the original civil case. He argues, in part, that because he relied upon an expert's opinion, he should not be sanctioned.[4]

In *Barnhill*, our supreme court noted:

> An attorney making a good-faith challenge to existing law may still rely on notice pleading. But there comes a point in every case-usually in response to a motion for summary judgment-when the attorney must acknowledge controlling precedent with "candor and honesty" while asserting reasons to modify or change existing law. Such arguments need not be successful to avoid sanctions. However, we will not allow an attorney to act incompetently or stubbornly persistent, contrary to the law or facts, and then later

[4] The testimony of David Hove was not transcribed and therefore not in the record before us. His affidavit, while not in the appendix, was in the district court record from summary judgment proceedings.

> attempt to avoid sanctions by arguing he or she was merely trying to expand or reverse existing case law.

Id. at 279. Unlike the attorney in Barnhill, Cook and his clients successfully resisted Hefner's motion for summary judgment, which alleged the facts were undisputed and that the only issue is whether it was "legally appropriate for the 1099-Misc. forms to be issued." Cook and his clients also survived a motion to dismiss regarding the amount of damages which could be recovered. In its answer and motions, Hefner asked for sanctions alleging the action was frivolous. The district court denied these requests until after Cook and his clients were halfway through trial.

Sticks and Grant's resistance to summary judgment relied upon Hove's expert affidavit in which Hove reviews Hefner's familiarity with the tax code and with Sticks, and outlines IRS regulations regarding the preparation of Form 1099s. Hove cites cases falling under regulations regarding false or fraudulent returns and a regulation allowing a civil action for damages against a person who files a false or fraudulent Form 1099. Hove discusses the possible expense to a payee having to explain a Form 1099 to the I.R.S. However, the affidavit does not include an opinion on standard of care or breach of a standard.

After hearing, Judge Romano denied the motion for summary judgment finding genuine issues of material fact. The ruling denying summary judgment was the watershed moment in this litigation, "'the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events.'" *Rowedder v*. *Anderson*, 814 N.W.2d 585, 594 (Iowa 2012) (citation omitted). Sticks and Grant presented the affidavit

of their expert and it was ruled sufficient to allow the case to proceed to trial. There is no suggestion here that the evidence at trial was even less persuasive than the summary judgment record.

Here, the court did not dismiss the lawsuit until the expert's trial testimony fell short of the mark in apparently failing to establish a breach by Hefner of the standard of care. However, the arguments presented by Sticks and Grant survived the motion for summary judgment, although there was no expert opinion regarding the standard of care submitted in resistance to the motion for summary judgment. The court permitted the case to proceed to trial, and awarded sanctions when the trial evidence did not improve from the summary judgment evidence. The district court abused its discretion in ruling that the failure of proof at trial retroactively rendered the initial claims to be frivolous in violation of the rule and statute. Compliance with the rule is determined objectively as of the time the petition is filed. Sticks and Grant survived Hefner's motion to dismiss and motion for summary judgment—both requesting sanctions. The district court abused its discretion in awarding sanctions on the basis of the trial evidence, well after denying the motions.

REVERSED.

Doyle, J., concurs; Vogel, P.J., dissents.

VOGEL, P.J. (dissenting)

I must respectfully dissent. I find the district court did not abuse its discretion in determining sanctions were warranted. When reviewing a sanctions ruling, we should find an abuse of discretion only "when the district court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Schettler*, 509 N.W.2d at 464. The district court's decision is far from unreasonable.

The district court specifically found the entrenched animosity between Sticks/Grant and Cook towards Hefner clouded Cook's judgment, and his failure to research the IRS regulations led to filing the lawsuit without an adequate basis in fact or law. It is improper for us to now reassess Cook's demeanor and motive for filing suit so quickly. *See Barnhill*, 765 N.W.2d at 272 (holding a district court's findings of fact are binding if supported by substantial evidence, particularly because it is in a better position to evaluate counsel's actions and motivations).

The district court correctly used Iowa Rule of Civil Procedure 1.413 to deter the misuse of pleadings. *See Hearity*, 440 N.W.2d at 864. An attorney's actions are to be measured objectively for reasonableness under the circumstances at the time the pleading was signed. *Weigel*, 467 N.W.2d at 80. The majority puts great weight in Sticks's survival at the summary judgment stage for not imposing sanctions. This reasoning is flawed for two reasons. First, we look at the pleading at the time it was filed, not when the party has had months to attempt to support a case. Second, the entirety of the district court's analysis at summary judgment, beyond a recitation of facts is as follows: "The

court finds that there are genuine issues of material fact in this case which precludes summary judgment." This can hardly be seen as a significant commentary on the merits outweighing the court's unequivocal finding through the directed verdict and the order on sanctions that the suit was not based in fact and law.[5]

In the order on sanctions, the district court made the objective determination by analyzing a number of factors including the amount of time available to the signer to investigate the facts and research the legal issues, the complexity of the issues, the plausibility of the legal issues asserted, the clarity or ambiguity of existing case law, and the extent to which facts were not readily available to the signer. *See Barnhill*, 765 N.W.2d at 273. Cook claims the sanction against him was inappropriate because he was arguing in good faith for an extension of the existing case law. Our supreme court held in *Barnhill,* "we will not allow an attorney to act incompetently or stubbornly persistent, contrary to the law or facts, and then later attempt to avoid sanctions by arguing he or she was merely trying to expand or reverse existing case law." *Id.* at 279. Cook did not demonstrate to the district court he knowingly made a "good faith argument for the extension, modification, or reversal of existing law." Iowa R. Civ. P. 1.413. Rather, he claims Hefner's fiduciary duty to Sticks and Grant did not terminate with the prior adverse judgment, but continued on, such that Hefner should have issued the correct 1099-Misc forms. He specifically focuses his argument on the

[5] We cannot even rely on what was said at the summary judgment hearing as a transcript was not provided to the court. To surmise what was said would be putting value not only on a cold record, but on no record at all.

contention that he relied upon an expert's opinion and therefore should not be sanctioned.[6]

Cook argues a practicing attorney should be able to rely upon expert witnesses without fear of sanctions if the experts are incorrect in their analysis and opinion. While an expert may possess information in a particular field, the attorney must still determine if what the expert maintains supports the legal position of the lawsuit he is filing. *See* Iowa R. Civ. P. 1.413(1) (providing it is the attorney, through his signature, certifying the action is well grounded in fact and law, based on a standard of reasonableness); *see also Mathais*, 448 N.W.2d at 445 ("Under our statute and rule an attorney must conduct a reasonable inquiry as to the facts and the law before the petition is signed and filed."). Here, it does not. While an expert may provide his or her opinions, the rule mandates it is always the attorney's responsibility to determine whether there is any basis in law for the case to proceed. Cook filed this lawsuit with no basis in law to support the extension of the fiduciary duty, nor has he provided cases that would support a breach even if there were a fiduciary duty.

Even if we assume there was a continuing fiduciary duty of Hefner to Sticks/Grant there is no evidence of a breach based on tax law. Hove's affidavit provided at the summary judgment stage pointed out there is a lack of clear direction regarding issuing 1099-Misc. forms in the IRS code and regulations. However, contrary to Sticks/Grant's position, the case law cited in Hove's affidavit made it clear it was not a defendant's duty to determine the potential

[6] To do so, Cook cited expert opinion of David Hove, C.P.A., to support his argument that Hefner sending two 1099-Misc. was inappropriate. His affidavit, while not in the appendix, was in the district court record from summary judgment proceedings.

taxability of damages, but rather the responsibility of the recipient of the award as ultimately accepted or rejected by the IRS. *See Ward v*. *American Family Life Assurance Co*., 444 F.Supp.2d 540, 544 (D.S.C. 2006) (holding an insurer did not breach the settlement agreement by filing a 1099 form with the IRS because it was the insured's responsibility to determine the award's taxability). The other cases cited in the Hove affidavit allegedly in support of Sticks/Grant's position were completely inapplicable as they were criminal prosecutions of tax evaders who sent bogus 1099-Misc. forms.[7] Contrary to Cook's argument, none of the case law cited supports the argument the 1099-Misc. forms sent from Hefner were incorrect, but rather the *Ward* case provided by Cook through the affidavit of his expert is exactly to the contrary. Moreover, these cases provided the court with no information as to whether there was legal basis for the professional negligence lawsuit against Hefner. At no point did Cook acknowledge the case law against his position, nor did he provide any case law supporting his position. Any attorney who does tax work would know, as Hove noted in his affidavit, if an incorrect Form 1099-Misc is issued, the tax filer can prepare and attach additional statements to the affected tax return to explain any adjustments made to the income reported on the incorrect 1099. Again, it is the responsibility of the payee on a 1099 Misc to correctly report taxable income. *See id.* These are facts Cook was not able to work into his rational for filing suit so quickly.

[7] The cases cited in the affidavit were all Posse Comitatus cases completely inapplicable to the case at hand. *See U.S. v. Kuball*, 976 F.2d 529, 531 (9th Circ. 1992) (affirming a conviction of a defendant who sent false 1099 forms to IRS agents); *see also U.S. v. Citrowske*, 951 F.2d 899, 902 (8th Circ. 1991) (affirming a conviction of a defendant who sent false 1099 forms to government and bank officials who foreclosed on his farm); *see also U.S. v. Rosnow*, 977 F.2d 399, 410 (8th Circ. 1992) (affirming convictions for filing false 1099 forms imputing fictitious income to several people the defendants wanted to harass).

Because "there comes a point in every case—usually in response to a motion for summary judgment—when the attorney must acknowledge controlling precedent with candor and honesty while asserting reasons to modify or change existing law" and Cook failed to do so here, I would conclude the district court did not abuse its discretion in finding the Sticks/Grant suit against Hefner was "neither grounded in fact nor warranted by existing law or a good faith argument for extending existing law" and thereby imposed sanctions. *See Barnhill*, 765 N.W.2d at 279 (citation omitted).

The district court specifically found the action was the product of "animosity of the Plaintiffs and counsel towards the Defendants from the facts and circumstances surrounding the original lawsuit." One of the factors under *Barnhill*, we look at in analyzing sanctions is the amount of time the attorney had to analyze the facts and the law prior to filing suit.[8] In this case, Cook chose to write the IRS just days after the 1099s were received and then filed the suit only thirty-four days after receipt. While he arguably had a basis in fact to proceed following his expert's advice, he should have researched issuance of the questionable 1099-Misc forms to realize the legal basis of the claim was frivolous.

[8] The factors in determining reasonableness are as follows: (a) the amount of time available to investigate the facts and research and analyze the relevant legal issues; (b) the complexity of the factual and legal issues; (c) the extent to which pre-signing investigation was feasible; (d) the extent to which pertinent facts were in the possession of the opponent or third parties or otherwise not readily available to the signer; (e) the clarity or ambiguity of existing law; (f) the plausibility of the legal positions asserted; (g) the knowledge of the signer; (h) whether the signer is an attorney or pro se litigant; (i) the extent to which counsel relied upon his or her client for the facts underlying the pleading; (j) the extent to which counsel had to rely upon his or her client for facts underlying the pleading, motion, or other paper; and (k) the resources available to devote to the inquiries. *Barnhill*, 765 N.W.2d at 273.

Finally, on appeal, Cook has the burden to show the trial court abused its discretion. I believe he has failed to carry that burden in part because of the incomplete record before us. The district court based its decision to sanction on the testimony it heard at trial—Sarah Grant, Mike Hefner, and David Hove. We do not know what the court heard because Cook does not include any trial testimony in the appendix, nor is it in the court record transferred to us. Nonetheless, the district court's fact findings are binding on us on appeal if supported by substantial evidence. *See id.* at 272.

Cook alternatively claimed if sanctions are warranted the amount determined by the district court violated the "American Rule" and is contrary to settled case law.[9] However, Cook does not provide us any authority as to why or how this rule violates the "American Rule," but rather focused the entirety of this argument on the reasonableness of the amount of the sanction. Hefner requested $11,819.31 in attorney fees and $5341.10 in expert fees, totaling $17,160.41. The district court granted the $5341 for expert fees, but limited the amount of attorney fees to $5000 for a total sanction of $10,341.

Sanctioning Cook is not to "stifle the creativity of attorneys or [to] deter attorneys from challenging or attempting to expand existing precedent" but rather supports the longstanding requirement an attorney only bring competently researched suits as to not waste resources and prevent this from happening again in the future. *See id.* at 279. The district court properly applied the factors

[9] The "American Rule" is the common law rule that the losing litigant does not normally pay the victor's attorney's fees. *Alyeska Pipeling Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Therefore, any sanction or shifting of fees and cost which is made, need not reflect actual expenditures. *Rowedder*, 814 N.W.2d at 590.

from case law in a way that is not clearly untenable or to an extent clearly unreasonable.[10]

Because the claim was frivolous and not a good faith extension of law, I believe the sanction imposed by the district court was not an unreasonable abuse of discretion as the majority determined. The district court properly balanced the factors in determining the amount of the sanction and I find no abuse of discretion there either. For all these reasons, I respectfully dissent and would affirm the district court's well reasoned decision imposing sanctions against Cook.

[10] The district court, to determine the appropriate amount of a sanction, made specific findings as to "(1) the reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) the ability to pay; and (4) factors related to the severity of the violation." *Rowedder*, 814 N.W.2d at 590 (internal quotations and citations omitted).