

## IN THE IOWA DISTRICT COURT IN AND FOR FREMONT COUNTY

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DANNY JENNINGS, SHELLEY  
JENNINGS, KRISTEN THATCHER,  
STEPHEN THATCHER, IDA VAN SCYOC,  
and TANDON VAN SCYOC,

Petitioners,

v.

FREMONT COUNTY, IOWA; BOARD OF  
SUPERVISORS OF FREMONT COUNTY,  
IOWA; CLINT BLACKBURN; CHRIS  
CLARK; RANDY HICKEY; and DUSTIN  
SHELDON,

Respondents,

and

SHENANDOAH HILLS WIND PROJECT,  
LLC,

Intervenor.

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CASE NO. EQCV025651

ORDER

This case came before the Court on January 16, 2024, for hearing regarding appropriate sanctions. Petitioners appeared by attorneys Shawn Shearer and Theodore Sporer. Respondents appeared by attorney Robert Livingston. Intervenor appeared by attorney Kristy Dahl Rogers. Upon Petitioner's motion, the Court ordered the hearing to be conducted as a hybrid proceeding, which was reported. The Court has considered the filings, the arguments of counsel, and applicable law, and now makes the following:

**FINDINGS OF FACT and PROCEDURAL HISTORY**

This case was initiated on January 25, 2023, with Petitioners asserting 23 various claims. On June 13, 2023, the Court granted judgment on the pleadings in favor of the Respondents and

Intervenor and dismissed the suit. Respondents and Intervenor then filed a Motion for Sanctions on July 13, 2023, which the Court granted in a written order filed November 7, 2023. In that order, the Court found that most of the claims asserted in this action were also asserted in *Hunter et al. v. Page County, Iowa et al.*, case number EQCV105928, which had been removed to federal court and dismissed by the United States District Court for the Southern District of Iowa prior to the filing of this case. The Court found that Petitioner's claims were based largely on untenable bases of law, that they were regarding matters already settled by Iowa court and the *Hunter* court, and that they relied upon speculation and conjecture. As a result, the Court found that counsel for Petitioners violated Rule of Civil Procedure 1.413 by filing and maintaining a frivolous suit. To give the parties an opportunity to be heard regarding the amount the Court should order as an appropriate sanction, the Court allowed the parties to submit additional briefing.

Following the January 16, 2023, hearing, counsel for Intervenor filed a supplement to its brief in support of sanctions along with an affidavit of attorney Bret A. Dublinske setting forth the work done by the Fredrikson & Byron, P.A. law firm as well as the methodology used to determine the amount of attorney fees incurred. On February 5, 2024, Petitioners filed an objection and resistance to the supplement to which Intervenor filed a reply on February 15, 2023.

### CONCLUSIONS OF LAW

A violation of Iowa Rule of Civil Procedure 1.413 requires "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 purpose of the rule is "to discourage parties and counsel from filing frivolous suits and otherwise deter misuse of pleadings, motions, or other papers." *Barnhill v. Iowa Dist. Ct.*, 765 N.W.2d 267, 273 (Iowa 2009).

Determination of an appropriate sanction rests upon consideration of four factors: (1) the reasonableness of the opposing party's attorney fees; (2) the minimum to deter; (3) the sanctioned party's ability to pay; and (4) factors related to the severity of the violation. *First American Bank v. Fobian Farms, Inc.*, 906 N.W.2d 736, 746 (Iowa 2018) (quoting *Rowedder v. Anderson* 814 N.W.2d 585, 590 (Iowa 2012)). The Iowa Supreme Court has also encouraged consideration of the following factors assembled by the ABA Section of Litigation:

- a. The good faith or bad faith of the offender;
- b. The degree of willfulness, vindictiveness, negligence or frivolousness involved in the offense;
- c. The knowledge, experience and expertise of the offender;
- d. Any prior history of sanctionable conduct on the part of the offender;
- e. The reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct;
- f. The nature and extent of prejudice, apart from out-of-pocket expenses, suffered by the offended person as a result of the misconduct;
- g. The relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that area;
- h. The risk of chilling the specific type of litigation involved;
- i. The impact of the sanction on the offender; including the offender's ability to pay a monetary sanction;
- j. The impact of the sanction on the offended party, including the offended person's need for compensation;
- k. The relative magnitude of sanction necessary to achieve the goal or goals of sanction;
- l. Burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs;
- m. The degree to which the offended person attempted to mitigate any prejudice suffered by him or her;
- n. The degree to which the offended person's own behavior caused the expenses for which recovery is sought;

- o. The extent to which the offender persisted in advancing a position while on notice that the position was not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and
- p. The time of, and circumstances surrounding, any voluntary withdrawal of a pleading, motion or other paper.

*Barnhill*, 765 N.W.2d at 276-77 (quoting *Standards and Guidelines for Practice under Rule 11 of the Federal Rules of Civil Procedure* (1988), reprinted in 121 F.R.D. 101, 125-26 (1988)). Fee-based sanctions are limited to those improper filings. *Fobian Farms, Inc.*, 906 N.W.2d at 751.

### ANALYSIS

The Court begins by first determining which of Petitioners' filings are frivolous, and therefore, sanctionable. Petitioners assert that only the amended petition is sanctionable, but the Court disagrees with this position. Petitioners' claims that were frivolous were repeated throughout the case through various procedural mechanisms that required Respondents and Intervenor to respond. Because the Court previously found that Petitioners' claims were frivolous as they were either already decided in *Hunter*, were already resolved by settled Iowa law, or relied upon speculation and conjecture, the Court finds the following filings sanctionable:

- Amended Petition (D0008) filed February 8, 2023;
- Emergency Motion for Temporary Restraining Order (D0017) filed March 21, 2023 and supporting brief (D0018) filed March 22, 2023;
- Request for Emergency Hearing (D0031) filed March 22, 2023;
- Motion for Immediate Emergency Hearing on Petitioners' Motion for Temporary Restraining Order (D0047) filed March 27, 2023;
- Petitioners' Motion for Partial Judgment on the Pleadings (D0056) filed April 5, 2023;
- Petitioners' Combined Resistance to Intervenor's Motion to Dismiss and Respondents Motion for Judgment on the Pleadings (D0064) filed May 5, 2023;
- Petitioners' Reply in Support of Motion for Partial Judgment on the Pleadings (D0066) filed May 12, 2023;

- Resistance to Motion for Sanctions Against Petitioners' Counsel Pursuant to Rule 1.413 (D0078) filed July 24, 2023;
- Reply in Support of Motion to Strike (D80) filed August 8, 2023;
- Supplement to Resistance to Motion for Sanctions Against Petitioners' Counsel Pursuant to Rule 1.413 (D0084) filed August 24, 2023;

While the Court finds that much of what is contained within the filings related to the determination of a sanction to be sanctionable as counsel for Petitioners continue to proffer arguments that the Court has rejected, the Court acknowledges that counsel have an interest in defending themselves and so the Court declines to consider those filings for the purposes of this order.

#### **I. Reasonableness of the opposing party's attorney fees**

A reasonable attorney fee is typically calculated by multiplying the number of hours reasonably expending times a reasonable hourly rate. *Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829 (Iowa 2009).

"The reasonableness of the hours expended and the hourly rate depends, of course, upon the facts of each case." *Id.* at 832. Factors to be considered are:

Time necessarily spent, the nature and extent of the service, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and the results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar service.

*Id.* at 832-33 (quoting *Schaffer v. Frank Moyer Constr. Inc.*, 628 N.W.2d 11, 24 (Iowa 2001)).

"Reductions may be made, however, for such things as partial success, duplicative hours or hours not reasonably expended." *Id.* (quoting *Sherman v. Kasotakis*, 314 F.Supp.2d 843, 881 (N.D.Iowa 2004)).

The Dublinske affidavit does not specify how many hours counsel for Intervenor spent working on this case but estimates a total attorney fee amount of \$145,700. The hourly rates of the Fredrikson & Byron attorneys are significantly higher than the average hourly rate for attorneys who practice in the southwestern Iowa. However, the Court notes that the legal issues present in

this case are not commonly handled by local attorneys necessitating attorneys with a specialized practice, which naturally carries with it a higher hourly rate. Counsel for Respondent's hourly rate is in line with the local average hourly rates and the number of hours reported is reasonable. The reported total attorney fees for Respondent's counsel is \$14,625.00. The Court finds the attorney fees incurred by counsel for Intervenor and Respondents are reasonable.

## **II. Minimum to deter**

There is "no mathematical formula for calibrating sanctions to the optimal sum that will preserve a deterrent effect while imposing no more a burden on the parties or attorneys than is necessary." *Fobian Farms, Inc.*, 906 N.W.2d at 748 (quoting *Lamboy-Ortiz v. Ortiz-Vélez*, 630 F.3d 228, 248 (1st Cir. 2010)). Factors to be considered are:

Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; ... whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; [and] what amount is needed to deter similar activity by other litigants.

*Id.*

In analyzing deterrence, the Court must balance the need to discourage future frivolous filings, while not inhibiting valid pursuits to vindicate individual rights. The Court finds that the filing and pursuing of frivolous claims was a willful act, particularly in light of counsel for Intervenor warning counsel for Petitioners the claims were frivolous early in this case's lifetime. Certainly, this litigation has vexed the wind farm's progress, but there is no evidence the case was designed to injure. While the filing of this suit has caused significant expense for Intervenor and Respondents, the Court does not believe that the amount of attorneys fees requested is the minimum amount necessary to deter.

## **III. Sanctioned party's ability to pay**

There is little in the record to determine the ability to pay by counsel for Petitioners. It appears to the Court that both counsel are solo practitioners, and counsel report to the Court that the amount requested by Intervenor and Respondents far exceeds any revenue obtained by Petitioners' counsel. While the Court believes that counsel for Petitioners do have the ability to pay some monetary sanction, the Court finds the nature of their practices and limited income as it relates to this case supports a sanction less than that of what is sought by Intervenor and Respondent.

#### **IV. Factors related to the severity of the violation**

There is no exhaustive list of factors the Court should consider related to the severity of the violation. Rather, this factor allows the Court the necessary latitude to address any particular conduct that bears upon sanctions. The Court takes this opportunity to consider the ABA factors.

##### **a. The good or bad faith of the offender**

As stated previously, many of Petitioners' claims were either identical to claims already decided or lacked a basis for their assertion. However, what is most concerning to the Court regarding good or bad faith of Petitioners' counsel is the repeated allegation that the counsel for Intervenor somehow had advanced knowledge of EDMS filings quite possibly with the assistance of the Court. Even after the attorneys had discussion of how EDMS notifications work prior to filings being accepted by the Clerk, counsel for Petitioners continued to offhandedly assert some sort of improper behavior by opposing counsel without proof, including at the January 16 hearing. It is unacceptable for counsel to lodge complaints of misconduct in open court without evidence

##### **b. The degree of willfulness, vindictiveness, negligence or frivolousness involved in the offense**

As stated above, counsel for Intervenor informed Petitioners' counsel of their belief that the claims were frivolous and were resolved by *Hunter*. While the Court does not expect an attorney to

necessarily agree with every opinion of opposing counsel, such a warning should have put Petitioners' counsel on notice, which indicates to the Court a willfulness to continue despite the defects in the pleadings. It is also indicative of willfulness that Petitioners continue to assert that *Hunter* was wrongfully decided and are attempting to collaterally attack that judgment in this action demonstrating an intentionality to assert the same claims.

**c. The knowledge, experience and expertise of the offender**

In the Court's November 7, 2023, order, the Court found the Petitioners' counsel were experienced attorneys have practices law in Iowa and other states for a significant number of years. Similarly, there was argument at hearing demonstrating that Petitioners' counsel are highly experienced and knowledgeable, which makes the fact that frivolous claims were filed more egregious.

**d. Any prior history of sanctionable conduct on the part of the offender**

There is no history of sanctionable conduct in the record.

**e. The reasonableness and necessity of the out-of-pocket expenses incurred by the offended person as a result of the misconduct**

Because Petitioners' claims, if unopposed, could prevent the wind farm project from moving forward ending years of work and rendering the expenses incurred a waste, Intervenor and Respondents were compelled to respond to Petitioners' filings. While the filings themselves were frivolous, it was necessary and reasonable for Intervenor and Respondents to respond appropriately. Further, there is no evidence that Intervenor and Respondents took on unnecessary expenses in order to defend their interests.

**f. The nature and extent of prejudice, apart from out-of-pocket expenses, suffered by the offended person as a result of the misconduct**



The Court sees little prejudice suffered by Intervenor and Respondents apart from the expenses. While the wind farm project has been stalled during this litigation, there is little to suggest this delay has resulted in extensive prejudice.

**g. The relative culpability of client and counsel, and the impact on their privileged relationship of an inquiry into that area**

In this case, there does not appear to be any culpability on behalf of the Petitioners themselves as the sanctionable conduct relates to unfounded legal arguments. Legal arguments are the territory of counsel, and therefore, any issue in that regard is solely the responsibility of counsel.

**h. The risk of chilling the specific type of litigation involved**

The Court is mindful of the inherent power imbalance between individual property owners and government and corporate entities. As such, disputes between these parties could be particularly susceptible to a chilling effect. However, there does not appear to be a specific chilling effect in this case as the Court is not sanctioning the Petitioners themselves, and the sanctionable conduct is the filing of frivolous claims, which is a separate issue from the type of case that is being brought which has merit. Petitioners assert that a sanction would chill their political speech conveyed through their petition. The Court is unaware of any case that would suggest that the filing of frivolous lawsuits is protected by the First Amendment's guarantee of free speech.

**i. The impact of the sanction on the offender, including the offender's ability to pay a monetary sanction**

The Court has already addressed the ability to pay a sanction above. That analysis is incorporated herein. Regarding other impacts, the Court finds them to be of less significance. The purpose of sanctions is to deter similar misconduct in the future. This necessarily requires there be some negative impact upon the offending party.

**j. The impact of the sanction on the offended party, including the offended person's need for compensation**

The record does not indicate that Intervenor or Respondents have any great need for compensation or that a sanction will have any other significant impact upon them.

**k. The relative magnitude of sanction necessary to achieve the goal or goals of the sanction**

The Court finds that a high-value sanction is not necessary to achieve deterrence. A monetary sanction of a reasonable amount in addition to the dismissal of the action is sufficient to deter future frivolous filings.

**l. Burdens on the court system attributable to the misconduct, including consumption of judicial time and incurrence of juror fees and other court costs**

This case has required multiple court hearings and considerable time expended on behalf of the Court to review the voluminous filings. However, there have been no juror fees and the time expended has not been excessive.

**m. The degree to which the offended person attempted to mitigation any prejudice suffered**

Counsel for Intervenor attempted to warn Petitioners' counsel of the belief the petition contained frivolous claims. Intervenor and Respondents also sought to end the litigation sooner by filing the Motion to Dismiss and Motion for Judgment on the Pleadings, which mitigated the duration the case remained pending and expenses incurred.

**n. The degree to which the offended person's own behavior caused the expenses for which recovery is sought**

The Court finds that Intervenor and Respondents are not at all responsible for the expenses incurred as they only acted to protect their interests as was necessary by Petitioners' actions.

- o. The extent to which the offender persisted in advancing a position while on notice that the position was not well ground in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law**

Counsel for Intervenor warned Petitioners' counsel of the frivolity in the claims. An amended petition was filed, but it did not address the defects identified by Intervenor's counsel. Therefore, the Court finds that Petitioners' counsel did persist despite being on notice.

- p. The time of, and circumstances surrounding, any voluntary withdrawal of a pleading, motion or other paper**

This factor is inapplicable as there was no withdrawal.

As a final matter, the Court acknowledges that on March 28, 2023, the District Court filed an order restrained Respondents from taking permanent action on matters pending before the Court until a hearing on the Petitioners' Emergency Motion for Temporary Restraining Order could be had. However, the Court ultimately addressed the Motion for Temporary Injunction in its Ruling on Pending Motions filed June 13, 2023. Regardless, there was certainly never a finding made by the District Court that Petitioners were likely to succeed on the merits.

### **CONCLUSION**

Having considered all the factors set forth in our case law, the Court finds that a monetary sanction is appropriate based upon the fact that the case was plagued by numerous legal arguments that were unfounded and frivolous. These defects continued throughout the case's lifetime necessitating responses by Respondents and Intervenor to defend their interests. While the Court finds that the expenses incurred by Respondents and Intervenor to be reasonable, including the

reported attorney fees, the Court finds these values exceed the minimum necessary for deterrence. The Court finds that a monetary sanction against Petitioners' counsel in the amount of \$30,000 to be an appropriate sanction.

### **JUDGMENT**

**IT IS THEREFORE ORDERED** that Petitioner's counsel shall pay monetary sanctions totaling \$30,000 with \$20,000 to be paid to the Intervenor and \$10,000 to be paid to the Respondents.



State of Iowa Courts

**Case Number**  
EQCV025651  
**Type:**

**Case Title**  
JENNINGS ET AL VS FREMONT COUNTY IOWA ET AL  
OTHER ORDER

So Ordered

A handwritten signature in black ink, appearing to read "Eric J. Nelson", written over a horizontal line.

Eric J. Nelson, District Court Judge,  
Fourth Judicial District of Iowa

Electronically signed on 2024-03-07 11:09:08