UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15-2375

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Sheldon Peters Wolfchild, *et al.*,

Plaintiffs-Appellants,

vs.

Redwood County, *et al.*,

Defendants-Appellees.

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA,
THE HONORABLE MICHAEL J. DAVIS, CHIEF JUDGE

_____

BRIEF OF APPELLEE LANDOWNERS

_____

Bradley N. Beisel (#6191)
David J. Krco (#0389382)
BEISEL & DUNLEVY, P.A.
730 2nd Avenue South, Suite 282
Minneapolis, MN 55402
Phone: 612.436.2222

and

Leif E. Rasmussen (#204006)
STEFFENS & RASMUSSEN
465 Southdale Office Centre
6600 France Avenue South
Edina, MN 55435
Phone: 952.345.8265

Attorneys for Defendants-Appellees Dennis A. Auslam and Michelle D. Auslam, Lyle Black Living Trust, Scott A. Olafson and Kimberly A. Olafson, John H. Reynolds and Jeanne A. Reynolds, Allen J Kokesch and Jacalyn S. Kokesch, Prouty Properties, LLC, Thomas J. Heiling, Paul W. Schroeder and Karen J. Schroeder, John Hogan, Bruce Robert Black, Lila L. Black, Douglas Scherer and Brenda Scherer, Charles Case, Enid Guggisberg, et al., Marlene A Platt Revocable Living Tr., William Schmidt and Norma Schmidt, Simmons Valley Trust, Willard Scherer and Eugenie Scherer, Henry G. O'Neil and Judith A. O'Neil, Lee H. Guggisberg Trust, Harold Guggisberg, Julie Anna Guggisberg, Kenneth Larsen, George F. Schottenbauer, Sandra Clarken, Keefe Family Farm LLC, John C. Simmons and Mary J. Simmons, Neil and Donna Berger Family [Trust], TJ & CC Properties, LLC, Sherman Acres, LLC, and Charles D. Neitzel

and

Robert G. Benner (#227420)
DUNLAP & SEEGER, P.A.
30 – 3rd Street SE, Suite 400
P.O. Box 549
Rochester. MN 55904-0549
Phone: 507-288-9111
Fax: 507-288-9342

Co-Attorney for Defendant-Appellee Kenneth Larsen

Richard A. Duncan (#192983)
Michelle E. Weinberg (#388771)
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Phone: 612-766-7729
Fax 612-766-1600

Attorneys for Defendants-Appellees Charles Case, Kim M. Cunningham, Elmer and Barbara Dahms, Timothy and Theresa Kerkhoff, Melvin and Kerry Maddock, Brent Prouty (Prouty Properties), and Mitchell H. Unruh

Michelle D. Christensen (#23476X)
HKM, P.A.
30 East 7th Street, Suite 3200
St. Paul, MN 55101-4919
Phone: 651.227.9411
Fax: 651-223-5199

Attorneys for Defendants-Appellees Janie K. Crooks, Rockford L. Crooks, Eugene A. Engstrom, Alice Goelz, Francis Goelz, John Goelz, John Goelz III, Nancy S. Hansen,

Patrick T. Hansen, Dawn R. Helmer, Steven R. Helmer, Cynthia Johnson, Allen J. Kokesch, Jacalyn S. Kokesch, Kelly M. Lipinski, Amy M. Lund, Chad M. Lund, Jon Lussenhop, Larry Lussenhop, and Michael R. Rasmussen

Ken D. Schueler (#190378)
Jennifer Peterson (#392956)
DUNLAP & SEEGER, P.A.
30 – 3rd Street SE, Suite 400
P.O. Box 549
Rochester, MN 55904-0549
Phone: 507-288-9111
Fax: 507-288-9342

Attorneys for Defendants-Appellees Julie Anna Guggisberg, Dale R. Hanna, Nancy Hanna, Jon Lussenhop, Lori A. Rebstock, Robert D. Rebstock, John C. Simmons, and Mary J. Simmons, Lee H. Guggisberg Trust UWT, Scott A. Olafson, and Kimberly A. Olafson

Zachary Peterson (SD #3436)
RICHARDSON, WYLY, WISE, SAUCK & HIEB, LLP
One Court Street
Post Office Box 1030
Aberdeen, SD 57402-1030
Phone: 605-225-6310
Fax: 605-225-2743

and

Kevin A. Velasquez (#387890)
BLETHEN, GAGE & KRAUSE, PLLP
127 South Second Street
Mankato, MN 56001
Phone: 507-345-1166

Attorneys for Defendant-Appellee Edward J. Gaasch

SUMMARY AND REQUEST FOR ORAL ARGUMENT

Appellants have appealed the District Court's Order of June 9, 2015 requiring Appellants to post an appellate cost bond in the amount of $200,000 pursuant to Fed. R. App. P. 7, and specifically the District Court's inclusion of $175,000 in the appellate cost bond as security for damages and costs on appeal.

The District Court was correct in its finding that a Rule 7 cost bond can include those damages provided for under Fed. R. App. P. 38 because, as has been found in other circuits, "costs on appeal" for the purposes of Rule 7 includes those costs a successful appellate litigant can recover pursuant to a specific rule or statute. The District Court's Order should therefore be affirmed and Appellants' appeal in Case No. 15-1580 should be dismissed for failure to post the bond.

Alternatively, even if the District Court's inclusion of $175,000 for the estimated damages to Appellees for Appellants' frivolous appeal was improper, Appellants' appeal in Case No. 15-1580 should still be dismissed. Appellants do not argue that the District Court abused its discretion in ordering a $25,000 cost bond. Because Appellants failed to post the uncontested portion of the bond, Appellants' appeal in Case No. 15-1580 should be dismissed.

Oral argument has been set for December 17, 2015.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Civil Appellate Procedure and Eighth Circuit Rule 26.1A, certain Landowner Appellees make the required corporate disclosures:

Defendant-Appellee Prouty Properties, LLC makes the following disclosure:

For non-governmental corporate parties please list all parent corporations: NONE.

For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: NONE.

If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: NONE.

Defendant-Appellee Kenneth Larsen, makes the following disclosure:

1. For non-governmental corporate parties please list all parent corporations: NONE.

2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: NONE.

3. If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of

the proceeding, please identify all such parties and specify the nature of the financial interest or interests: NONE.

Defendants-Appellees Robert D. Rebstock, Lori A. Rebstock, Jon Lussenhop, Dale R. Hanna, Nancy Hanna, John C. Simmons, Mary J. Simmons, Julie Anna Guggisberg, Lee H. Guggisberg Trust UWT, Scott A. Olafson and Kimberly A. Olafson, make the following disclosure:

1. For non-governmental corporate parties please list all parent corporations: NONE.

2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: NONE.

3. If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: NONE.

Defendant-Appellee Neil and Donna Berger Family Trust makes the following disclosure:

1. For non-governmental corporate parties please list all parent corporations: NONE.

2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: NONE.

3. If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: NONE.

Defendant-Appellee Keefe Family Farm, LLC makes the following disclosure:

1. For non-governmental corporate parties please list all parent corporations: NONE.

2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: NONE.

3. If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: NONE.

Defendant-Appellee Lyle Black Living Trust makes the following disclosure:

1. For non-governmental corporate parties please list all parent corporations: NONE.

2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: NONE.

3. If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: NONE.

Defendant-Appellee Marlene A. Platt Revocable Living Trust makes the following disclosure:

1. For non-governmental corporate parties please list all parent corporations: NONE.

2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: NONE.

3. If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: NONE.

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STATEMENT OF ISSUE

I. Whether the District Court's order requiring Appellants to post an appellate cost bond in the amount of $200,000 was proper under Fed. R. App. P. 7, when $175,000 of that bond was the reasonable estimate of the potential damages Appellees would incur on appeal as a result of Appellants' frivolous appeal under Fed. R. App. P. 38.

Most Apposite cases:

Sckolnick v. Harlow, 820 F.2d 13 (1st Cir. 1987)

Adsani v. Miller, 139 F.3d 67 (2d Cir. 1998)

Hill v. State St. Corp., No. CIV.A.09-12146-GAO, 2015 WL 1734996 (D. Mass. Apr. 16, 2015) (slip copy)

In re Gen. Elec. Co. Sec. Litig., 998 F. Supp. 2d 145 (S.D.N.Y. 2014)

Apposite Statutes:

Fed. R. App. P. 7

Fed. R. App. P. 38

STATEMENT OF THE CASE

Appellants brought this action in the District Court asserting exclusive title and rights of occupancy to a purported 12-square-mile "reservation" in parts of Sibley, Renville, and Redwood Counties in south-central Minnesota. *See generally* First Amended Complaint, Docket No. 120 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 57). Appellants named as defendants numerous private landowners, the Lower Sioux Indian Community, Renville, Redwood and Sibley Counties, the Townships of Paxton, Sherman, Honner, Birch Cooley, and Moltke, and the Episcopal Diocese of Minnesota. *Id*. (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 57). Appellants argued, as they had in previous failed litigation, that the Act of February 16, 1863, 12 Stat. 652 (the "1863 Act"), and subsequent actions of the Secretary of the Interior set aside and conveyed the 12 square miles to their purported ancestors. *Id*. (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 57).

Appellees brought motions to dismiss which were granted by the District Court on March 5, 2015. Memorandum of Law & Order, Docket No. 196 (Appellants' Appendix in Case No. 15-1580, p. 1). In dismissing Appellants' claims against the individual private landowner defendants, the District Court found Appellants failed to assert a claim upon which relief may be granted. *Id.* at 17 (Appellants' Appendix in Case No. 15-1580, p. 17). The District Court found

Appellants' claims arise under the 1863 Act, which does not provide for a private right of action. *Id*. (Appellants' Appendix in Case No. 15-1580, p. 17). The District Court also found that even if a claim for relief had been stated, Appellants' claims were barred as a result of Appellants' unreasonable delay in bringing the action under the *Sherrill* doctrine. *Id*. at 20-28 (Appellants' Appendix in Case No. 1580, pps. 20-28).

On March 17, 2015, Appellants filed their Notice of Appeal, appealing the decision and judgment of the District Court (Case No. 15-1580). Notice of Appeal, Docket No. 198 (Appellees' Second Joint Appendix ("ASJA"), p. 83).

Following the District Court's dismissal of Appellants' claims, Appellee the Lower Sioux Indian Community, the Appellee Municipalities, and certain Appellee Landowners filed motions for sanctions, and all Appellees, except the Episcopal Diocese of Minnesota, filed a motion for appeal bond with the District Court. *See* Joint Motion for Rule 7 Appeal Bond, Docket No. 215 (ASJA, p. 173). In an order dated June 9, 2015, the District Court granted the motions for sanctions, finding "the claims asserted in this case are so completely frivolous and without a factual or legal basis that they had to have been brought in bad faith . . . such conduct warrants severe sanctions against both Plaintiffs and their counsel." Memorandum of Law & Order, Docket No. 291, at 3 (Appellants' Appendix in Case Nos. 15-2375/125-3225, p. 3). The District Court ordered Appellants and their counsel to

pay the moving Appellees their reasonable attorneys' fees and costs as sanctions. *Id*. at 25-26 (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 25-26).

The District Court also granted all moving Appellees' motion for an appellate cost bond, ordering Appellants to post an appeal bond in the amount of $200,000 pursuant to Fed. R. App. P. 7 to protect Appellees from any costs incurred because of an unsuccessful appeal. *Id*. at 26-30 (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 26-30). In determining the amount of the appeal bond, the District Court found reasonable the Appellees' estimate that the costs associated with the generation and reproduction of the record, preparation of briefs, and other costs, will be at least $25,000. *Id*. at 26-27 (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 26-27). The District Court found that to be a reasonable estimate given the fact that there were 84 named defendants, 27 attorneys, and the docket at that time consisted of 270 docket entries. *Id*. (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 26-27).

With regard to the other $175,000, the District Court found "there can be little merit to Plaintiffs' appeal and that such appeal was brought in bad faith." *Id*. at 29 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 29). The District Court recognized that pursuant to Fed. R. App. P. 38, an appeal bond can include damages to the appellees for the filing of a frivolous appeal, and that $175,000 was a reasonable estimate of the potential damages Appellees could incur as a result of

Appellants' frivolous appeal. *Id.* at 26-30 (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 26-30). The District Court based its damages determination in part on evidence of actual damages in the amount of $97,912.08 sustained by certain Landowner Appellees because of the cloud this frivolous litigation has placed on the title to their lands. *Id.* at 27-28 (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 27-28).

On June 15, 2015, along with their motion for expedited appeal, Appellee Landowners moved this Court to dismiss Appellants' appeal in Case No. 15-1580 should Appellants fail to post the $200,000 appeal bond prior to the filing of their reply brief.[1] (Appellee Landowners' Motion for Expedited Appeal and Motion to Dismiss filed on June 15, 2015, No. 15-1580.)

On June 25, 2015, Appellants moved the District Court pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure for a stay pending appeal of the court's June 9, 2015 Order requiring Appellants to file the $200,000 appellate cost bond. Motion to Stay, Docket No. 293 (ASJA, p. 380). On that same date, Appellants filed a notice of appeal from the June 9, 2015 Order. Notice of Appeal from June 9, 2015 Order, Docket No. 292 (ASJA, p. 376). An Amended Notice of Appeal from the June 9, 2015 Order was filed on July 9, 2015 (Case No. 15-

[1]The appeal in Case No. 15-1580 was fully briefed as of July 20, 2015. (*See* Appellants' Reply Brief filed on July 20, 2015, No. 15-1580.)

2375).[2] Amended Notice of Appeal from June 9, 2015 Order, Docket No. 314 (ASJA, p. 401).

In an Order dated June 30, 2015, this Court held that "Appellees' motion to dismiss for failure to file a bond will be held in abeyance pending the district court's disposition of appellants' motion to stay the bond order pending appeal." (Order of June 30, 2015, at 1, No. 15-1580.) On July 16, 2015, the District Court denied Appellants' motion to stay the bond order. Memorandum of Law & Order, Docket No. 317 (ASJA, p. 405). Appellants then filed their motion to stay imposition of the appellate cost bond in this Court. (Appellants' Motion to Stay Imposition of Appellate Cost Bond filed on July 25, 2015, No. 15-1580 & No. 15-2375.)

On August 4, 2015, Appellants filed a motion seeking to consolidate the hearings in Case Nos. 15-1580 and 15-2375. (Appellants' Motion to Consolidate

[2]Appellees filed motions to dismiss Appellants' second appeal for lack of jurisdiction. (*See* The Lower Sioux Indian Community's Motion to Dismiss Appellants' Amended Appeal of the June 9, 2015 Order for Lack of Jurisdiction filed on July 14, 2015, No. 15-2375; Appellee Landowners' Motion to Dismiss Appellants' Amended Appeal of the June 9, 2015 Order filed on July 14, 2015, No. 15-2375; Motion to Dismiss Appellants' Appeal of the June 9, 2015 Order by Appellees Redwood County, Paxton Township, Sherman Township, Honner Township, Renville County, Birch Cooley Township, Sibley County and Moltke Township filed on July 14, 2015, No. 15-2375.)

Hearings in Appeal No. 15-1580 and No. 15-2375 filed on August 4, 2015, No. 15-1580 & No. 15-2375.)

In an Order of this Court dated September 2, 2015, Appellants' Motion to Stay Imposition of Appellate Cost Bond Pending Appeal was denied and the appeals in Case Nos. 15-1580 and 15-2375 were consolidated. (Order of September 2, 2015, at 1, No. 15-2375.) In another Order of this Court dated September 30, 2015, the Court dismissed Appellants' appeal of the District Court's award of sanctions as premature. (Order of September 30, 2015, at 1, No. 15-2375.) The Court reserved ruling on Appellees' motions to dismiss Case No. 15-1580 for Appellants' failure to post an appeal bond, pending briefing and resolution of this appeal. (*Id.* at 2.)

Since that time, the District Court issued its final judgment on sanctions, awarding attorneys' fees and costs to the moving Appellees. Amended Judgment in a Civil Case, Docket No. 364 (ASJA, p. 500). On October 1, 2015, Appellants filed their notice of appeal of that judgment (Case No. 15-3225). Notice of Appeal from September 29, 2015 Amended Order, Docket No. 366 (ASJA, p. 501). That appeal was consolidated with the appeal in this case. (Correspondence from Clerk of Court Dated October 6, 2015, No. 15-3225.)

As of this date, Appellants have failed to post any appellate cost bond, and there is no stay in place on that obligation.

SUMMARY OF LANDOWNERS' ARGUMENT

The District Court did not err in including the potential damages Appellees could incur as a result of Appellants' frivolous appeal under Fed. R. App. P. 38 in the Fed. R. App. P. 7 appellate cost bond.

The phrase "costs on appeal" is not defined in Rule 7 and its interpretation is a matter of first impression in this Court. The minority view of the circuits, and the interpretation that is advocated by Appellants, is that a Rule 7 cost bond can only include those costs mentioned in Fed. R. App. P. 39 ("Rule 39"). However, as has been found by other circuits confronted with this issue, Rule 7 is not limited by Rule 39 because nowhere does Rule 39, which only mentions costs in the context in which they should be taxed, purport to provide the definition of "costs" for all of the Federal Rules of Appellate Procedure. The majority of the circuits to have interpreted "costs" under Rule 7 have uniformly linked "costs on appeal" for the purposes of Rule 7 to costs that a successful appellate litigant can recover pursuant to a specific rule or statute. Rule 38 allows the court of appeals to award an appellee "damages and . . . costs" resulting from a frivolous appeal that include, according to that rule's advisory committee note, "damages, attorney's fees and other expenses incurred by an appellee." These are costs that are properly

awardable to an appellee and are therefore within the scope of inclusion in a Rule 7 appellate cost bond.

The District Court therefore did not err in its inclusion of $175,000 in the Rule 7 cost bond as a reasonable estimate of the potential damages Appellees could incur under Rule 38 as a result of Appellants' frivolous appeal. The District Court's Order requiring Appellants to post a $200,000 appellate cost bond should be affirmed and Appellants' appeal in Case No. 15-1580 should be dismissed for failure to post the ordered bond.

Alternatively, Appellants do not contest that at least a $25,000 appellate cost bond was proper. Since Appellants have failed to post an appeal bond in at least that amount, Appellees' motions to dismiss Case No. 15-1580 should be granted even if the Court finds the District Court's inclusion of potential damages to Appellees under Rule 38 in the bond amount was improper.

ARGUMENT

I. STANDARD OF REVIEW

The determination of the nature and amount of a Fed. R. App. P. 7 cost bond is a matter left to the sound discretion of the district court and such determinations are therefore reviewed for an abuse of discretion. *Sckolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987); *Westinghouse Credit Corp. v. Bader & Dufty*, 627 F.2d 221, 224 (10th Cir. 1980). However, a trial court's legal determination as to the proper

interpretation of Fed. R. App. P. 7's language is reviewed *de novo*.[3] *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1328 (11th Cir. 2002).

II. THE DISTRICT COURT CORRECTLY FOUND THAT A FED. R. APP. P. 7 APPELLATE COST BOND CAN INCLUDE DAMAGES TO THE APPELLEES FOR THE FILING OF A FRIVOLOUS APPEAL UNDER FED. R. APP. P. 38

Appellants appeal the District Court's June 9, 2015 Order requiring Appellants to file an appellate cost bond in the amount of $200,000 pursuant to Fed. R. App. P. 7 ("Rule 7"). Appellants do not argue that the District Court erred in requiring them to post an appellate cost bond, but instead argue only that the District Court erred in its determination of the amount of the bond. (*See* Appellants' Br. at 59-61.) Even more specifically, Appellants only dispute that

[3]In their Brief, Appellants state the District Court's "interpretation that Rule 7 encompasses damages *and attorneys' fees* in the term 'costs' is reviewed *de novo*." (Appellants' Br. at 19 (emphasis added).) Appellants' standard of review is a misstatement because the District Court did not interpret the Rule 7 appellate cost bond in this case to include attorneys' fees. However, attorneys' fees are included as "damages and . . . costs" sustained by appellees for frivolous appeals pursuant to Fed. R. App. P. 38. *See* Fed. R. App. P. 38 Advisory Committee Note (1967 Adoption). Appellee Landowners are not waiving their right to seek their attorneys' fees pursuant to Rule 38 should the Court find any of Appellants' appeals are frivolous.

$175,000 of the $200,000 appellate cost bond ordered is improper.[4] *Id.* In other words, Appellants do not argue that the District Court erred in ordering an appellate cost bond in the amount of $25,000.

With regard to $175,000 of the appellate cost bond, the District Court found "there can be little merit to Plaintiffs' appeal and that such appeal was brought in bad faith." Memorandum of Law & Order, Docket No. 291, at 29 (Appellants' Appendix in Case Nos. 15-2375/15-3225, p. 29). The District Court recognized that pursuant to Fed. R. App. P. 38 ("Rule 38"), an appeal bond can include damages to the appellees for the filing of a frivolous appeal, and that $175,000 was a reasonable estimate of the potential damages Appellees could incur as a result of Appellants' frivolous appeal. *Id.* at 26-30 (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 26-30).

[4]In their appeal brief, Appellants only take issue with the District Court's inclusion of $175,000 in the appellate cost bond, which the District Court found to be a reasonable estimate of the potential damages Appellees could incur as a result of Appellants' frivolous appeal under Rule 38. (*See* Appellants' Br. at 59-61.) Nowhere do Appellants dispute the other $25,000, which the District Court found to be a reasonable estimate of Appellees' costs associated with the generation and reproduction of the record, preparation of briefs, and other costs. (*See id.*) As such, Appellants have waived the ability to challenge that $25,000 of the appeal bond was properly ordered. *See Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1306 n. 3 (8th Cir. 1997) (noting that, generally, the Court will consider an issue not raised or briefed to the Court waived).

The District Court based its damages determination in part on evidence of actual damages sustained by certain Landowner Appellees because of the cloud this litigation has placed on the title to their lands. *Id.* at 27-28 (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 27-28). While the total amount of damages cannot be determined exactly, Landowners estimate potential damages could range from $175,000 to $1,000,000. Affidavit of Ken D. Schueler in Support of Motion for Rule 7 Appeal Bond, Docket No. 218, at ¶¶ 4, 5 (ASJA, p. 178). This is based on the fact that as just one example, Landowner Kenneth Larsen's application to the Board of Water and Soil Resources for an easement on his property was denied "due to the property lying within the area being contested under lawsuit being pursued by the decedents of the Dakota Indians." Affidavit of Kenneth Larsen, Docket No. 203, at Exh. 1 (ASJA, p. 93). The easement payment Mr. Larsen lost out on as a result of Appellants' frivolous lawsuit would have totaled $95,308.58. *Id.* (ASJA, p. 93). As another example, Landowner Gary Guggisberg submitted an affidavit stating that in order to sell a parcel of land that was included in the lawsuit, he and the other owners of the property were required to purchase an owner's title insurance policy for the buyer for $2,603.50. Affidavit of Gary Guggisberg, Docket No. 219 (ASJA, p. 179).

Pursuant to Rule 7, "[i]n a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of *costs on appeal*." Fed. R. App. P. 7 (emphasis added). Rule 7 does not define "costs on appeal" and the Eighth Circuit has not yet had the opportunity to provide its interpretation of that phrase.

Appellants argue Rule 7 is limited to requiring an appellant to post a bond for "costs" on appeal, which only includes such items as printing and reproducing the brief under Local Rule 39A, and that the District Court erred by finding it could include other damages the Appellees would incur on appeal under Rule 38. (*See* Appellants' Br. at 59-61.) Appellants claim there is no support for the District Court's position and that every other circuit confronted with this issue has expressly rejected the ability of the district court to impose such a bond. (*Id.* at 60.) This is not true.

While the Eighth Circuit has not specifically ruled on the scope of a Rule 7 cost bond, many of the other circuits have had the opportunity to examine "costs" for the purposes of Rule 7. Although the circuits disagree as to precisely what costs a Rule 7 appeal bond can cover, the circuits that have addressed this issue have consistently linked "costs on appeal" to costs that a successful appellate litigant can recover pursuant to a specific rule or statute. *Tennille v. W. Union Co.*, 774 F.3d 1249, 1254 (10th Cir. 2014).

The older, minority rule, used by the Courts of Appeals for the District of Columbia and the Third Circuit (in an unpublished opinion), and the position advocated by Appellants in this appeal, is that "costs on appeal" for the purposes of Rule 7 are only those that may be taxed against an unsuccessful litigant under Rule 39. *See In re Am. President Lines, Inc.*, 779 F.2d 714, 716 (D.C. Cir. 1985); *Hirschensohn v. Lawyers Title Ins. Corp.*, No. 96–7312, 1997 WL 307777, at *1-3 (3d Cir. June 10, 1997); *see also Vaughn v. Am. Honda Motor Co., Inc.*, 507 F.3d 295, 298-99 (5th Cir. 2007) (while not addressing the issue of whether a Rule 7 cost bond can only include those costs mentioned in Rule 39, the Fifth Circuit did hold an appeal bond cannot cover appellate attorneys' fees under Rule 38).

A more recent, majority rule with respect to whether appellate attorneys' fees can be included in a Rule 7 cost bond, is that a district court may order that such fees be included in the appeal bond if the attorneys' fees would be recoverable costs under an applicable fee-shifting statute. *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 953-54, 960 (9th Cir. 2007) (concluding the drafters of Rule 7 likely intended for "costs" to refer to all costs properly awardable at the conclusion of the appeal, but finding that a district court cannot include appellate attorneys' fees that might be awarded by the court of appeals under Rule 38); *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 817-18 (6th Cir. 2004) (finding state statute shifting fees to prevailing defendants supported

including attorneys' fees in a Rule 7 bond); *Pedraza*, 313 F.3d at 1329-30 (holding that a Rule 7 bond may include appellate attorneys' fees if they could be recoverable to the appellee under the governing statute); *Adsani v. Miller*, 139 F.3d 67, 71-75 (2d Cir. 1998) (holding that Rule 39 does not exhaustively define "costs on appeal" and that a Rule 7 cost bond can include a possible award of attorneys' fees and costs on appeal).

In its 2014 decision in *Tennille v. Western Union Co.*, a case relied on by Appellants, the Tenth Circuit gave a comprehensive overview of the then-existing state of the law on this issue and noted that the circuit courts consistently define "costs on appeal" for Rule 7 purposes as appellate costs expressly provided for by a rule or statute, but found the plaintiffs in that case had not identified any rule or statute that permitted them to recover the costs of notifying class members or to recover the cost of maintaining class settlement funds. 774 F.3d at 1255-56. The Tenth Circuit did not address the issue presented in this case of whether damages provided for by Rule 38 can be included in a Rule 7 cost bond.

Finally, in *Sckolnick v. Harlow*, 820 F.2d 13 (1st Cir. 1987), one of the cases relied on by the District Court in denying Appellants' motion to stay the imposition of the appellate cost bond, the First Circuit directly addressed the issue that is presented in this case of whether a Rule 7 appellate cost bond can include Rule 38 damages for a frivolous appeal. The First Circuit held that a district court may

require a Rule 7 cost bond covering costs on appeal, including attorneys' fees, if it concludes that the court of appeals might award attorney's fees as costs under Rule 38 because the appeal is frivolous. *Id.* at 15. The First Circuit affirmed the district court's Rule 7 cost bond, stating that the district court's decision to set the bond amount

> implied a view that the appeal might be frivolous and that an award of sanctions against plaintiff on appeal was a real possibility. Without in any way presaging our ultimate disposition of plaintiff's appeal . . . on preliminary examination of the merits of that appeal we cannot say that the district court abused its discretion in judging it to be frivolous.

Id.; *see also Hill v. State St. Corp.*, No. CIV.A.09-12146-GAO, 2015 WL 1734996 (D. Mass. Apr. 16, 2015) (slip copy) (setting the amount of the Rule 7 cost bond based on attorney's fees, expenses and administrative costs that were awardable pursuant to Rule 38 where the expected arguments to be raised on appeal were frivolous); *In re Gen. Elec. Co. Sec. Litig.*, 998 F. Supp. 2d 145, 150-51 (S.D.N.Y. 2014) (in finding that damages awarded pursuant to Rule 38 can be included in a Rule 7 bond, the court stated "[t]he texts of the relevant rules of procedure and the precedent addressed to those rules . . . demonstrate that the Court of Appeals may impose an award of damages on an appellant pursuing a frivolous appeal, and a district court may consider that likelihood is [sic] assessing the scope and amount of a Rule 7 Bond").

Here, the District Court's Order that included potential Rule 38 damages in the Rule 7 Bond is not only in line with and supported by the decision of the First Circuit in *Sckolnick*, but is also supported by the decisions of the other circuits discussed above that have consistently found that the costs on appeal included in a Rule 7 cost bond are not limited to those mentioned in Rule 39.

As an example, in *Adsani*, the Second Circuit found that Rule 39 does not define costs for all of the Federal Rules of Appellate Procedure. 139 F.3d at 74; *see also Azizian*, 499 F.3d at 958-59 ("[t]here is no indication that the rule's drafters intended Rule 39 to define costs for purposes of Rule 7 or for any other appellate rule"). The provisions of Rule 39 concern the procedures for taxing costs and nowhere does Rule 39 purport to define costs. *Adsani*, 139 F.3d at 74. "Specific costs are mentioned only in the context of how that cost should be taxed, procedurally speaking."[5] *Id.* In finding that a Rule 7 cost bond can include potential attorney's fees that may be awarded on appeal, the Second Circuit stated "[w]e do not think it either bizarre or anomalous for the amount of the bond to track the amount the appellee stands to have reimbursed." *Id.* at 75. Citing to

[5]The Second Circuit also found that the Supreme Court's decision in *Marek v. Chesny*, 473 U.S. 1 (1985), supported its view that Rule 39 does not exhaustively define "costs." *Adsani*, 139 F.3d at 74. There, the Supreme Court construed the meaning of the same word—"costs"—in a Rule of Civil Procedure rather than a Rule of Appellate Procedure. *Id.* The Federal Rules of Civil Procedure also have a Rule devoted to procedures relating to costs, Fed. R. Civ. P. 54(d), but that Rule played no part in the Supreme Court's analysis in *Marek*. *Id.*

Sckolnick, the Second Circuit also found that in setting the amount of a Rule 7 Bond, it is appropriate for the district court to prejudge the case's chances on appeal because the district court, familiar with the contours of the case appealed, has the discretion to impose a bond which reflects its determination of the likely outcome of the appeal. *Id.*

The purpose of a Rule 7 appeal bond is to ensure that the appellant, if he is unsuccessful on appeal, can pay the "costs on appeal" incurred by his opponent; "that is, costs which 'the appellee stands to have reimbursed' should he prevail on appeal." *Tennille*, 774 F.3d at 1254 (quoting *Adsani*, 139 F.3d at 75). "In other words, all costs properly awardable in an action are to be considered within the scope of [the] Rule.'" *In re Gen. Elec. Co. Sec. Litig.*, 998 F. Supp. 2d at 151 (quoting *Adsani*, 139 F.3d at 72 (applying the Supreme Court's discussion in *Marek*, 473 U.S. at 9, of Fed. R. Civ. P. 68 to Rule 7)).

Costs that are awardable to a party prevailing on appeal include those that are provided for under Rule 38. Pursuant to Rule 38, the court of appeals may award "damages and . . . costs," which include, according to that rule's advisory committee note, "damages, attorney's fees and other expenses incurred by an appellee." Fed. R. App. P. 38; Fed. R. App. P. 38 Advisory Committee Note (1967 Adoption).

Given its familiarity with a case and the discretion given to it, a district court should be able to include those damages it finds appellees may suffer as the result of a frivolous appeal in a Rule 7 cost bond. Allowing the inclusion of potential Rule 38 damages in a Rule 7 bond promotes the purpose of an appellate cost bond, which is to ensure that appellees are able to recover any costs to which they are entitled should the appellant be unsuccessful on appeal, and is consistent with the language of Rules 7 and 38 and the decisions of many of the other circuits that have already interpreted the phrase "costs on appeal" for the purposes of Rule 7.

The District Court's Order requiring Appellants to post an appellate cost bond including the potential damages Appellees could incur as a result of Appellants' frivolous appeal under Rule 38 should therefore be affirmed and Appellees' motions to dismiss Appellants' appeal in Case No. 15-1580 for failure to post the ordered bond should be granted.

III. EVEN IF THE DISTRICT COURT'S INCLUSION OF POTENTIAL FED. R. APP. P. 38 DAMAGES IN THE FED. R. APP. P. 7 COST BOND WAS IMPROPER, APPELLANTS' APPEAL IN CASE NO. 15-1580 SHOULD STILL BE DISMISSED BECAUSE APPELLANTS HAVE FAILED TO POST AN APPELLATE COST BOND IN THE UNDISPUTED AMOUNT OF $25,000

As discussed above, Appellants only raise issue in their appeal brief as to the District Court's inclusion of $175,000 in the Rule 7 cost bond, which the District Court found to be a reasonable estimate of the potential damages Appellees could incur as a result of Appellants' frivolous appeal under Rule 38. (*See* Appellants'

Br. at 59-61.) Appellants do not argue that the District Court abused its discretion in ordering $25,000 of the cost bond, which the District Court found to be a reasonable estimate of Appellees' costs associated with the generation and reproduction of the record, preparation of briefs, and other costs. (*See* Appellants' Br. at 59-61.) The District Court found that figure to be a reasonable estimate given the fact that there were 84 named defendants, 27 attorneys, and the docket at that time consisted of 270 docket entries. Memorandum of Law & Order, Docket No. 291, at 26-27 (Appellants' Appendix in Case Nos. 15-2375/15-3225, pps. 26-27). This Court has previously upheld a cost bond of $25,000 for taxable costs in an appeal that involved a large number of attorneys, more than one appeal, and a large docket. *See In re Uponor, Inc., F1807 Plumbing Fittings Products Liab. Litig.*, 716 F.3d 1057, 1062 (8th Cir. 2013) (noting that the Court did not stay imposition of a cost bond in excess of $25,000 in a case that involved the appearance of twenty-four law firms, the filing of two separate appeals, and a large MDL and underlying docket).

As of this date, Appellants have not filed any appellate cost bond. Since Appellants do not contest that they must post at least a $25,000 bond and have not done so, and neither this Court nor the District Court have granted a stay, Appellees' motions to dismiss Appellants' appeal in Case No. 15-1580 for failure to post the ordered cost bond should be granted.

CONCLUSION

For the foregoing reasons, Appellee Landowners respectfully request that the Court affirm the District Court's June 9, 2015 Order requiring Appellants to post an appellate cost bond in the amount of $200,000. Since Appellants have failed to post the required cost bond, Appellees further request that Appellants' appeal in Case No. 15-1580 be dismissed.

Alternatively, even if this Court finds the District Court's inclusion of $175,000 in the appellate cost bond was improper, Appellees request that Appellants' appeal in Case No. 15-1580 still be dismissed. Appellants have failed to post an appeal bond in the amount of $25,000, which the District Court found to be a reasonable estimate of Appellees' costs associated with the generation and reproduction of the record, preparation of briefs, and other costs, and Appellants have not contested this amount of the ordered cost bond.

Dated: November 23, 2015.

BEISEL & DUNLEVY, P.A.

s/ Bradley N. Beisel
Bradley N. Beisel (#6191)
David J. Krco (#0389382)
730 2nd Avenue South, Suite 282
Minneapolis, MN 55402
Phone: 612.436.2222

and

STEFFENS & RASMUSSEN

s/ Leif E. Rasmussen
Leif E. Rasmussen (#204006)
465 Southdale Office Centre
6600 France Avenue South
Edina, MN 55435
Phone: 952.345.8265

Attorneys for Defendants-Appellees Dennis A. Auslam and Michelle D. Auslam, Lyle Black Living Trust, Scott A. Olafson and Kimberly A. Olafson, John H. Reynolds and Jeanne A. Reynolds, Allen J Kokesch and Jacalyn S. Kokesch, Prouty Properties, LLC, Thomas J. Heiling, Paul W. Schroeder and Karen J. Schroeder, John Hogan, Bruce Robert Black, Líla L. Black, Douglas Scherer and Brenda Scherer, Charles Case, Enid Guggisberg, et al., Marlene A Platt Revocable Living Tr., William Schmidt and Norma Schmidt, Simmons Valley Trust, Willard Scherer and Eugenie Scherer, Henry G. O'Neil and Judith A. O'Neil, Lee H. Guggisberg Trust, Harold Guggisberg, Julie Anna Guggisberg, Kenneth Larsen, George F. Schottenbauer, Sandra Clarken, Keefe Family Farm LLC, John C. Simmons and Mary J. Simmons, Neil and Donna Berger Family [Trust], TJ & CC Properties, LLC, Sherman Acres, LLC, and Charles D. Neitzel

and

DUNLAP & SEEGER, P.A.

Robert G. Benner (#227420)
30 – 3rd Street SE, Suite 400
P.O. Box 549
Rochester. MN 55904-0549
Phone: 507-288-9111
Fax: 507-288-9342

Co-Attorneys for Defendant-Appellee Kenneth Larsen

FAEGRE BAKER DANIELS LLP

s/ Richard A. Duncan
Richard A. Duncan (#192983)
Michelle E. Weinberg (#388771)
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Phone: 612-766-7729
Fax 612-766-1600

Attorneys for Defendants-Appellees Charles Case, Kim M. Cunningham, Elmer and Barbara Dahms, Timothy and Theresa Kerkhoff, Melvin and Kerry Maddock, Brent Prouty (Prouty Properties), and Mitchell H. Unruh

HKM, P.A.

s/ Michelle D. Christensen
Michelle D. Christensen (#23476X)
30 East 7th Street, Suite 3200
St. Paul, MN 55101-4919
Phone: 651.227.9411
Fax: 651-223-5199

Attorneys for Defendants-Appellees Janie K. Crooks, Rockford L. Crooks, Eugene A. Engstrom, Alice Goelz, Francis Goelz, John Goelz, John Goelz III, Nancy S. Hansen, Patrick T. Hansen, Dawn R. Helmer, Steven R. Helmer, Cynthia Johnson, Allen J. Kokesch, Jacalyn S. Kokesch, Kelly M. Lipinski, Amy M. Lund, Chad M. Lund, Jon Lussenhop, Larry Lussenhop, and Michael R. Rasmussen

DUNLAP & SEEGER, P.A.

s/ Ken D. Schueler
Ken D. Schueler (#190378)
Jennifer Peterson (#392956)
30 – 3rd Street SE, Suite 400
P.O. Box 549
Rochester, MN 55904-0549
Phone: 507-288-9111
Fax: 507-288-9342

Attorneys for Defendants-Appellees Julie Anna Guggisberg, Dale R. Hanna, Nancy Hanna, Jon Lussenhop, Lori A. Rebstock, Robert D. Rebstock, John C. Simmons, and Mary J. Simmons, Lee H. Guggisberg Trust UWT, Scott A. Olafson, and Kimberly A. Olafson

RICHARDSON, WYLY, WISE, SAUCK & HIEB, LLP

s/ Zachary Peterson
Zachary Peterson (SD #3436)
One Court Street
Post Office Box 1030
Aberdeen, SD 57402-1030
Phone: 605-225-6310
Fax: 605-225-2743

and

BLETHEN, GAGE & KRAUSE, PLLP
Kevin A. Velasquez (#387890)
127 South Second Street
Mankato, MN 56001
Phone: 507-345-1166

Attorneys for Defendant-Appellee Edward J. Gaasch

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a) AND LOCAL RULE 28A(h)(2)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated: November 23, 2015

s/ Ken D. Schueler

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

Mr. Allan D. Eller
33991 Noble Avenue
Redwood Falls, MN 56283

s/ Ken D. Schueler