

STATE OF NORTH DAKOTA
MORTON COUNTY

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CASE NO. 04-

John J. Gosbee,)	
)	
Plaintiff,)	PLAINTIFF'S MOTION
)	
vs.)	FOR RULE 11 SANCTIONS,
)	
Rob Martinson, a/k/a Robert)	WITH BRIEF IN SUPPORT
)	
Martinson, et al.,)	OF MOTION
)	
Defendants)	

NOTICE

The parties are notified that the Plaintiff, John J. Gosbee (Gosbee), brings this motion for sanctions under Rule 11, NDRCivP. In accordance with Rule 11(c)(1)(A), the motion will not be filed or presented to the court if the challenged part of the Answer is withdrawn. If it becomes necessary to file and present this motion, appropriate notice of a hearing will be provided.

MOTION

Gosbee moves that Rule 11 sanctions be imposed on the Defendant, Rob Martinson (Martinson), for asserting a frivolous defense in ¶X of his Answer - that as a corporate officer Martinson "is not a proper party defendant and should be dismissed from this lawsuit." In support of his motion, Gosbee submits the brief that follows.

BRIEF

As outlined in the Complaint, this lawsuit involves one of the scourges of today's computer world, programs that hijack people's computers from afar, infest the computers with unwanted programs, plague the innocent with popup ads, and fling open the CD trays of harried computer users, literally around the world. Complaint, ¶5. Proving those contentions will come later in the lawsuit.

Of relevance now is that Martinson is accused of personally designing and spreading the Spy Wiper program. Complaint, ¶3. Not surprisingly, Martinson denies any culpability. Answer, ¶¶I, II, IV, VI, VII. Thus, he fairly puts on Gosbee the burden of proving the claim. No quarrel there. Rule 11 imposes no duty to surrender.

Inexplicably, Martinson also asserts:

... That at all relevant times Martinson was acting in the course and scope of employment as an officer of the corporate defendants. Therefore, Rob Martinson is not a proper party defendant and should be dismissed from this lawsuit.

Answer, ¶X. That assertion bespeaks a fundamental misunderstanding of the law, so fundamental that it crosses the line over to frivolity. It has long been the law of North Dakota and other jurisdictions that each of us is personally liable for our own torts. By both statute and decisional law, "I was just following orders" is not a defense.

An agent acting for his principal is liable to third parties if the agent's "acts are wrongful in their nature." NDCC §3-04-02(3). Our Supreme Court recognized this statutory assignment of responsibility in a case involving aerial application of an herbicide, in which the pilot was sued in his personal capacity.

... The district court ruled that dismissal [of Schroeder, the pilot and president of the corporate defendant] was proper because "Schroeder was at all times, acting on behalf of the corporation"

An individual is personally responsible "for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person." Section 9-10-06, N.D.C.C. *It is well settled that "[a] corporate agent cannot shield himself from personal liability for a tort he personally commits or participates in by hiding behind the corporate entity; if he is shown to have been acting for the corporation, the corporation also may be liable, but the individual is not thereby relieved of his own responsibility.*

Wills v. Schroeder Aviation, 390 N.W.2d 544, 547 (N.D. 1986), emphasis added, citations omitted. In support of its description of the point as "well settled," our Supreme Court *cited Schlosser v. Great Northern Ry. Co.*, 20 N.D. 406, 127 N.W. 502, 504 (1910).

The signature of Martinson's counsel on the Answer is a certification that:

to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances ... the ... defenses [] and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Rule 11(b)(2), NDR CivP. Unquestionably, the position that Martinson is not a proper party defendant is not "warranted by existing law," as the position is directly contrary not only to *Schroeder Aviation*, but to NDCC §§3-04-02(3) and 9-10-06. It is hard to imagine a non-frivolous argument that corporate officers should be relieved of responsibility for their own torts.

Making a good faith argument for changing that law is a daunting task. Not only would our Supreme Court have to be convinced that "hiding behind the corporate entity"¹ can now be a good defense, the legislature would also have to be convinced that NDCC §§3-04-02(3) and 9-10-6 should be repealed. One can only imagine the sorry political fate² of a legislator foolish enough to propose, let alone hope to prevail on the concept, that hiding behind a corporate shield is good public policy.

¹ Its use of a loaded word such as "hiding," while citing *Oxmans' Erwin Meat Co. v. Blacketer*, 86 Wis.2d 683, 273 N.W.2d 285, 289 (1979)), which had used the milder word "shielded," suggests how unlikely our Supreme Court is to change its mind.

² On the other hand, political cartoonists would welcome the proposal. It would become cannon fodder for editorial pages stuffed with caricatures of officials of Enron, Microsoft, and Wal-Mart hiding behind the apron strings of their corporate employers. We would see sketches of portly, cigar-chomping executives, each carrying a briefcase labeled "corporate shield law" disdainfully looking at workers who lost their pensions, computer users fuming at locked-up computers, and shoppers waiting in interminable lines.

Because no good-faith argument could possibly be made that a corporate officer or employee can hide behind the corporate shield, ¶X of the Answer is frivolous.

Gosbee asks that the Court award costs and attorney fees of at least \$1,000.00 "to *deter repetition* of such conduct or comparable conduct by others similarly situated." Rule 11(c)(2), NDR CivP, emphasis added.

Dated April 16, 2004.



John J. Gosbee

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CERTIFICATE OF SERVICE

In accordance with Rule 5(f), NDR CivP, I certify that I have served the "Motion for Rule 11 Sanctions, with Supporting Brief and Notice of Motion" by faxing a copy of that document to:

Scott Porsborg, Esq.
Smith Bakke et al.
[fax only to 258-6498]

Dated April 16, 2004.



John J. Gosbee