

**IN THE
SUPREME COURT OF NORTH DAKOTA**

**SUPREME COURT NO. 20050430
DISTRICT COURT NO. 03-05-C-00079**

**Amanda Rekkedal,
APPELLANT**

PLAINTIFF

vs.

**Amber Feist,
APPELLEE**

DEFENDANT

**APPEAL FROM ORDER GRANTING MOTION TO DISMISS
BENSON COUNTY DISTRICT COURT**

BRIEF OF APPELLEE

Carlton J. Hunke (#02855)
Robin A. Schmidt (#05940)
Vogel Law Firm
218 NP Avenue
P. O. Box 1389
Fargo, ND 58107-1389
(701) 237-6983
Attorneys for Appellee

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STATEMENT OF THE ISSUES

Whether the trial court properly determined service of the summons was void under Rule 4(c)(3)?

STATEMENT OF THE CASE

Amanda Rekkedal (“Rekkedal”) appeals from the district court’s judgment dismissing her personal injury lawsuit against Amber Feist (“Feist”) arising out of a motor vehicle accident that occurred on April 30, 1995.

On October 24, 2000, Rekkedal, served Feist, with a summons and complaint by mail. Both parties sent and answered interrogatories and requests for production of documents in spring of 2001. Feist unsuccessfully attempted to take Rekkedal’s deposition in 2002, already more than six years after the accident. The next activity in this case did not occur until January 11, 2005, when pursuant to Rule 4(c)(3), N.D.R.Civ.P., Defendant served a “DEMAND TO FILE COMPLAINT” on Rekkedal and her attorney. Rule 4(c)(3) requires the plaintiff to file the complaint within twenty(20) days of the demand, or service of the Summons is void. Rekkedal failed to file the complaint with the Court until June 10, 2005, nearly five months later. Feist then served a motion to dismiss on Rekkedal. The district court dismissed Rekkedal’s action against Feist on October 17, 2005.

STATEMENT OF THE FACTS

This case arose from a motor vehicle accident that occurred on April 30, 1995.

(Appellant Appendix at 4). Rekkedal served Feist with a summons and complaint on October 24, 2000. (Appellant Appendix at 2). Feist timely responded to Rekkedal's interrogatories and request to produce. (Appellee Appendix at 1). Feist's counsel attempted to move this case forward through letters to Rekkedal's attorney requesting a settlement demand and noticing Rekkedal's deposition. Id. Feist's counsel's attempts to resolve the case were unsuccessful because Rekkedal never made a settlement demand or appeared for her deposition. Id. Rekkedal indicates a preliminary settlement offer of \$50,000 was extended during the initial discovery. However, this assertion is wholly unsupported by the record and irrelevant.

On January 11, 2005, over four years after Rekkedal served Feist with the summons and complaint, Feist served Rekkedal with a Demand to File Complaint. (Appellant Appendix at 53). In compliance with the Rule, Feist's demand clearly stated "Pursuant to Rule 4(c)(3), you are notified that if Plaintiff does not file the Complaint within 20 days after service of this demand, service of the Summons is void." Id. Rekkedal's attorney, Todd Schwarz, acknowledged receipt of the demand within the 20 day period. (Appellee Appendix at 3). Although Rekkedal's attorney acknowledged receipt of the demand well within the 20 day period, the Complaint was not filed within 20 days after service. (Appellee Appendix at 2). Rekkedal did not file the Complaint with the Benson County Courthouse until June 10, 2005, clearly past the 20 day deadline. (Docket Entry 2).

Feist served Rekkedal with a motion to dismiss based on Rekkedal's failure to comply with Rule 4(c)(3) on September 1, 2005. (Docket Entry 8). The district court heard arguments at a hearing on October 17, 2005. After arguments, the district court dismissed Rekkedal's cause of action against Feist and judgment was entered accordingly. (Docket Entry 19 & 20).

LAW AND ARGUMENT

A. Standard of Review.

When interpreting a rule of court, principles of statutory construction are applied. State v. Lamb, 541 N.W.2d 457, 459 (N.D. 1996). Interpretation of a statute is a question of law fully reviewable on appeal. In re Juran and Moody, Inc., 2000 ND 136, ¶ 6, 613 N.W.2d 503. Accordingly, interpretation of Rule 4(c)(3), N.D.R.Civ.P. is fully reviewable.

B. Rule 4(c)(3), N.D.R.Civ.P. is Ambiguous. Accordingly, the District Court Properly Considered the Intent of the Joint Procedure Committee at the Time the Committee Adopted the Rule.

The Court's primary goal when interpreting a statute is to ascertain legislative intent. In re Juran and Moody, Inc., 2000 ND 136, ¶ 6, 613 N.W.2d 503. The Court has explained:

We look first to the language of the statute. We read statutes as a whole to give meaning to each word and phrase, whenever fairly possible. If the language is clear and unambiguous, the legislative intent is presumed clear from the face of the statute. If the language of a statute is ambiguous, the court may resort to extrinsic aids to interpret the statute. A statute is ambiguous if it is susceptible to differing

rational meanings. Ambiguity may result where the Legislature has amended portions of a statute.

Id. (citations omitted).

Rule 4(c)(3), N.D.R.Civ.P. provides:

Summons Served and Complaint Not Filed. The defendant may serve a written demand on the plaintiff to file the complaint. Service of the demand must be made under subdivision (d) on the plaintiff's attorney or on the plaintiff if the plaintiff is not represented by an attorney. If the plaintiff does not file the complaint within 20 days after service of the demand, service of the summons is void. The demand must contain notice that if the complaint is not filed within 20 days, service of the summons is void under this rule.

Rule 4(c)(3) is ambiguous. The Rule requires personal service under Rule 4(d). However, Rule 4(c)(3), N.D.R.Civ.P., requires the defendant to serve a written demand on the plaintiff's attorney if the plaintiff is represented. At the time Feist served the written demand, Rekkedal was represented by Attorney Todd A. Schwarz. Rule 4(c)(3) specifically states that if the plaintiff is represented by an attorney service of the demand must be made on the plaintiff's attorney. Furthermore, Rule 4.2, N.D.R.Prof.C. forbids an attorney from communicating with a represented party. The language of the rules suggest it would be inappropriate to personally serve Rekkedal when she was represented by counsel who had noticed his appearance in the case.

When parties are represented, their attorneys are served with documents pursuant to Rule 5, N.D.R.Civ.P. Rule 5 provides, "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney,

the service must be made upon the attorney unless service upon the party is ordered by the court.” Furthermore, Rule 4 contemplates written admission as proof of service. Rule 4(i)(5), N.D.R.Civ.P. When the Joint Procedure Committee amended Rule 4 and added Rule 4(c)(3), an ambiguity was created. See In re Juran and Moody, Inc., 2000 ND 136, ¶ 6, 613 N.W.2d 503 (stating “Ambiguity may result where the Legislature has amended portions of a statute”). Because Rule 4(c)(3) is ambiguous, it is appropriate to consider extrinsic aids to interpret the Rule. Id.

The purpose of amending Rule 4 to include subdivision (c)(3) was “to eliminate the unfairness of requiring a defendant to pay the filing fee to resolve or dispose of a case, and to prevent commencement of frivolous harassment cases.” (Appellee Appendix at 5, Synopses of Proposed Amendments submitted by the Joint Procedure Committee). “The amendment was put in Rule 4 because the preceding paragraph pertains to a demand for service of the complaint. The new paragraph pertains to a demand for filing the complaint.” (Appellee Appendix at 7, Joint Procedure Committee Minutes September 26-27, 1996).

Supporters of the amendment argued that “providing the defendant with a mechanism for getting the action filed will prevent plaintiffs from filing frivolous harassment cases.” Id. Proponents further argued,

“the proposal also protects defendants. For example, pro se litigants will file medical malpractice actions without retaining an expert. Some judges will say the ninety day period for obtaining an expert does not begin unless the case is filed. Defendants need a means for getting an

action filed. Also, a defendant cannot issue a subpoena until the action is filed.

Committee members noted the procedure does not require court involvement. If the plaintiff does not file the complaint within twenty days after service of the demand, service of the summons is void. It is not necessary to get a court order or judgment.”

Id. at 7-8 (citation omitted). Members opposed to the amendment argued the sanction was too harsh. Id. at 8. They noted, “If the statute of limitations runs, the complainant will loss [sic] its cause. The plaintiff will not be able to start the action over.” Id. Committee members noted, however, the sanction is equally severe under Rule 4(c)(2) when the plaintiff does not serve the complaint after being served with a demand for service of the complaint. Id.

The committee further discussed the proposed amendment on January 30, 1997. (Appellee Appendix at 11, Joint Procedure Committee Minutes January 30, 1997). The committee considered the problem of plaintiffs commencing actions, but not filing the complaint. Id. at 13. “Cases then sit, unless the defendant pays the filing fee to get the complaint filed.” Id. Committee members determined the amendment was a necessary addition to the rules after it fully considered the amendment’s consequences.

Committee members argued the proposal is draconian. The plaintiff could lose its case if the statute of limitations runs. The sanction is not commensurate [sic] with the harm. As an alternative it was suggested paragraph 4 should provide for additional taxation or attorney’s fees to provide a sanction more equivalent to the harm. [This proposal was ultimately rejected by the committee.]

Others argued, requiring the plaintiff to timely file is not harsh. The plaintiff is not being required to do anything more burdensome than if actions were commenced by filing. In addition, the proposal preserves commencement by service to allow a period of negotiation without court involvement. If nothing can be accomplished by not having the action filed, the defendant should be able to require the plaintiff to file the action.

Id.

Requiring personal service under Rule 4(c)(3) is a precautionary measure designed to ensure a plaintiff is aware of the potential consequences of not filing the complaint. (Appellee Appendix at 4, Synopses of Proposed Amendments submitted by the Joint Procedure Committee) (stating “To ensure a plaintiff is aware of the potential consequences, the proposal requires the demand to contain a cautionary notice that if the complaint is not filed within 20 days, service of the summons is void. As another precautionary measure, the proposal also requires personal service of the demand under Rule 4.”). During the Joint Procedure Committee’s consideration of the amendment, it is clear members were concerned that a plaintiff might be unaware of the harsh consequences of the amendment. Requiring personal service under Rule 4, specifically that a signed receipt is included with any form of mail, ensures that an unrepresented person would actually receive the demand with the notice that service of the summons is void if the complaint is not filed within 20 days. In the present case, that purpose was served. Plaintiffs attorney of record was notified and should have been aware of the consequences of a failure to file from the clear language of the

demand. There is no claim here that a naive pro se litigant was deprived of knowledge or deprived access to the courthouse steps.

C. The District Court Correctly Determined Feist Complied with Rule 4(c)(3).

Attorney Schwarz was notified of the potential consequences and acknowledged receipt of the demand in his letter dated January 26, 2005. In fact, Attorney Schwarz unsuccessfully attempted to locate his client. (Appellee Appendix at 4). Rekkedal failed to keep her attorney informed of her current address. Id. Therefore, Attorney Schwarz's letter notifying her of the demand was returned as not deliverable. Id. Under Rule 5(b), service is complete upon mailing to a party's last known address. If Rekkedal were unrepresented, it is clear why personal service under Rule 4 would be necessary. Rekkedal would not have received proper notice under Rule 5(b) because her last known address was inadequate. The extra protections of Rule 4 requiring a signed receipt when an individual is served by mail would have been warranted. However, as noted above, Feist complied with the purpose of Rule 4(c)(3). Attorney Schwarz acknowledged receipt of the demand. Rekkedal had notice of the demand. The North Dakota Supreme Court has stated, "a client is bound by the inaction of counsel, and 'cannot now avoid the consequences of the acts or omissions of this freely selected agent.'" Sturdevant v. Fargo Culvert Co., 501 N.W.2d 762, 764 (N.D. 1993) (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 633-34 (1962)). Likewise, Rekkedal cannot avoid the consequences of Attorney

Schwarz's inaction. Accordingly, Rekkedal's service of the summons is void under the rule.

D. Whether a \$50,000 Settlement Offer was Extended by the Insurer is Wholly Irrelevant and Unsupported by the Record.

Through her attorney, Rekkedal asserts a \$50,000 settlement offer was made by the insurer. This assertion is only supported by hearsay in Mr. Quinton's affidavit. The form of the affidavit of Mr. Quinton is directly contrary to the rules provided by the North Dakota Supreme Court on what an attorney may or may not say in an affidavit. In Hummel v. Mid-Dakota Clinic, P.C., 526 N.W.2d 704, 708 (N.D. 1995), the North Dakota Supreme Court noted that an affidavit of counsel stating information "made on information and belief does not comply with Rule 56e." Furthermore, the Court specifically noted that "an attorney's affidavit is admissible only to prove facts that are within his personal knowledge and as to which he is competent to testify; an affidavit stating what the attorney believes or intends to believe to prove at trial will be disregarded." Id. Further, the Hummel Court stated that "an attorney's hearsay affidavit is not a substitute for the personal knowledge of a party." Id. The Court has an obligation to refuse that portion of Mr. Quinton's affidavit and to give no consideration whatsoever to any suggestion there was any settlement offer made in this case. The North Dakota Supreme Court reiterated this rule in the case of Swenson v. Raumin, 1998 ND 150, ¶11, 583 N.W.2d 102 when it stated, "We have often noted an affidavit of counsel in support of or resistance to a motion for summary

judgment made on information and belief does not comply with N.D.R.Civ.P. 56(e) because an attorney's hearsay affidavit is not a substitute for the personal knowledge of a party." Accordingly, the Court should disregard the factually unsupported assertion of Rekkedal's counsel.

CONCLUSION

Based on the foregoing, the district court's Order dismissing Rekkedal's claim for failure to file the complaint within 20 days of the Rule 4(c)(3) demand should be affirmed.

Dated this ____ day of February, 2006.

VOGEL LAW FIRM

By _____
Carlton J. Hunke (02855)
Robin A. Schmidt (05940)
218 NP Avenue
P.O. Box 1389
Fargo, North Dakota 58107-1389
(701) 237-6983
ATTORNEYS FOR APPELLEE