

20090141

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
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JUNE 19, 2009
STATE OF NORTH DAKOTA

James Ziegler d/b/a Lake Region
Livestock,

Plaintiff-Appellee,

vs.

Supreme Court No. 20090141

Meadowbrook Insurance Group, Inc.,
and Star Insurance Company,

Defendants-Appellants.

**ZIEGLER'S MOTION TO DISMISS APPEAL;
NOTICE OF MOTION TO DISMISS APPEAL;
BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL; AND
SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL**

Appeal from an Order Granting Partial Summary Judgment dated March 2, 2009
The Honorable Donovan Foughty
Ramsey County District Court
Northeast Judicial District

Ramsey County Civil No. 36-8-C-252-1

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

James Ziegler d/b/a Lake Region Livestock,

Plaintiff-Appellee,

vs.

Meadowbrook Insurance Group, Inc., and
Star Insurance Company,

Defendants-Appellants.

Supreme Court No: 20090141
Ramsey County Civil No. 36-8-C-252-1

ZIEGLER’S MOTION TO DISMISS APPEAL

[¶ 1] NOW COMES Plaintiff-Appellee James Ziegler d/b/a Lake Region Livestock (“Ziegler”), through his attorney of record, Daniel M. Traynor, to make a Motion to Dismiss Appeal in accord with Rule 27, N.D.R.App.P. The motion is supported by the attached Brief in Support of Ziegler’s Motion to Dismiss Appeal and Affidavit of Daniel M. Traynor with relevant parts of the record in the district court.

[¶ 2] This Motion is based on the appealability of the Order Granting Partial Summary Judgment in Favor of the Plaintiff, dated March 2, 2009, which is not a judgment or decree constituting a final judgment of the rights of the parties or an appealable order as enumerated by statute.

[¶ 3] Ziegler asks this Court to DISMISS the appeal filed by Defendants-Appellants Meadowbrook Insurance Group, Inc., and Star Insurance Company.

[¶ 4] DATED May 15, 2009.



[¶ 5]

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

James Ziegler d/b/a Lake Region Livestock,

Plaintiff-Appellee,

vs.

Meadowbrook Insurance Group, Inc., and
Star Insurance Company,

Defendants-Appellants.

Supreme Court No: 20090141
Ramsey County Civil No. 36-8-C-252-1

NOTICE OF ZIEGLER'S MOTION TO DISMISS APPEAL

[¶ 1] TO: DEFENDANTS-APPELLANTS MEADOWBROOK INSURANCE GROUP, INC., AND STAR INSURANCE COMPANY, THROUGH THEIR ATTORNEY OF RECORD, GARY R. WOLBERG, CROWLEY FLECK PLLP, 400 E BROADWAY AVE, STE 600, PO BOX 2798, BISMARCK, NORTH DAKOTA 58502-2798.

[¶ 2] PLEASE TAKE NOTICE that Plaintiff-Appellee James Ziegler d/b/a Lake Region Livestock has made a Motion to Dismiss Appeal in accord with Rule 27, N.D.R.App.P., which is herewith served upon you.

[¶ 3] TAKE FURTHER NOTICE that unless otherwise ordered by the Court, in accord with Rule 27(f), N.D.R.App.P., the time for filing briefs on the merits is tolled. You may file a response in opposition to a motion, other than one for a procedural order, under Rule 27(b), N.D.R.App.P., within ten (10) days after service of the attached motion. Please note motions authorized by Rules 8, 9, and 41, N.D.R.App.P., may be acted upon after reasonable notice. The court may shorten or extend the time for responding to any motion.

[¶ 4] DATED May 15, 2009.



[¶ 5]

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vs.

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Defendants-Appellants.

Supreme Court No: 20090141
Ramsey County Civil No. 36-8-C-252-1

BRIEF IN SUPPORT OF ZIEGLER’S MOTION TO DISMISS APPEAL

[¶ 1]

INTRODUCTION

[¶ 2] On March 2, 2009, the Ramsey County District Court entered an Order Granting Partial Summary Judgment in Favor of the Plaintiff, concluding Defendant Star Insurance Company (“Star”) is obligated to defend and indemnify James Ziegler d/b/a Lake Region Livestock (“Ziegler”) in a pending action against him brought by Dakota West Credit Union in Dakota West Credit Union v. James Ziegler d/b/a Lake Region Livestock, Ramsey County Civil No.: 36-6-C-158-1. The district court denied a request to dismiss Defendant Meadowbrook Insurance Group, Inc., (“Meadowbrook”) concluding further discovery was needed. The court further denied Defendants’ motion to dismiss Ziegler’s claims of bad faith and repudiation of the insurance contract.

[¶ 3] On April 30, 2009, Defendants Meadowbrook and Star filed a Notice of Appeal with the Ramsey County District Court. Ziegler now files this motion to respectfully request dismissal of this appeal to allow further proceedings in the trial court and discovery between the parties.

[¶ 4] **FACTUAL HISTORY**

[¶ 5] James Ziegler d/b/a Lake Region Livestock is a defendant in a pending lawsuit with Dakota West Credit Union (“Dakota West”) in which the credit union is seeking \$950,000 from an alleged transaction between Ziegler, H & J Livestock and Horob Livestock. Order Granting Partial Summary Judgment in Favor of the Plaintiff, dated March 2, 2009, at 1-2. At all times relevant to the Dakota West-Ziegler lawsuit, Ziegler had a Stockyard Services Policy in force with Star Insurance Company. Although the policy at issue appears to have been issued by Star, Meadowbrook handled the claim for Star.

[¶ 6] After Meadowbrook and Star denied their duty to defend and indemnify Ziegler under the insurance contract, Ziegler filed the present action seeking, in part, a declaration that Meadowbrook and Star owed a duty to defend and indemnify Ziegler for the claims asserted by Dakota West in the underlying lawsuit. Following competing motions for summary judgment on the coverage issue only, the Ramsey County District Court entered an Order Granting Partial Summary Judgment in favor of Plaintiff, dated March 2, 2009, concluding Star was obligated to defend and indemnify Ziegler in the Dakota West lawsuit. The district court denied

Meadowbrook's request to be dismissed, concluding further discovery was needed. The court further denied a request to dismiss Ziegler's claims of bad faith and repudiation of contract.

[¶ 7] On April 30, 2009, Defendants Meadowbrook and Star filed a Notice of Appeal with the Ramsey County District Court. On May 4, 2009, Meadowbrook and Star filed a Motion for N.D.R.Civ.P. 54(b) Certification with the district court, ostensibly to allow expedited appellate review of the partial summary judgment. On May 14, 2009, Ziegler filed a Response to Defendants' Motion for N.D.R.Civ.P. 54(b) Certification with the trial court, observing the trial court was without jurisdiction to rule on Defendants' Rule 54(b) Motion as it was filed after the Notice of Appeal. Ziegler further requested an opportunity to respond to Defendants' Motion once the issue was properly placed before the district court.

[¶ 8] This appeal has stalled two cases pending before the Ramsey County District Court. In the instant case, needed discovery has been put on hold while the jurisdiction of the supreme court has been invoked. Ziegler questions the propriety of the Crowley Fleck PLLP law firm representing *both* Dakota West in the underlying case and Meadowbrook and Star in this case. Unfortunately, a motion for disqualification of counsel cannot be submitted to a trial court without jurisdiction. In the underlying case brought by Dakota West, a recently-filed substitution of counsel for Ziegler, which has delayed those proceedings, may require another substitution and additional delay if this appeal proceeds. Further, with the specter of

an appeal questioning the trial court's decision regarding the duty to defend, the insurer may be less apt to promptly deal with the Dakota West claim or resolve it through a settlement within the policy limits and will opt, instead, to wait out the appeal.

[¶ 9] Ziegler believes this appeal of a *partial* summary judgment that specifically *reserved* other issues pending further discovery is improperly before this Court. Ziegler respectfully requests this Court dismiss this appeal and allow further proceedings at the trial court and discovery between the parties. An appeal at this time will also result in uncertainty and delay in the underlying case between Dakota West and Ziegler.

[¶ 10] **LEGAL ARGUMENT**

[¶ 11] The right to appeal is governed by statute. Section 28-27-02, N.D.C.C., provides what orders may be reviewed by the supreme court. "Only those judgments and decrees which constitute a final judgment of the rights of the parties to the action and orders enumerated by statute are appealable." In re A.B., 2005 ND 216, ¶ 5, 707 N.W.2d 75. The right to appeal is jurisdictional. Id. Even if the parties do not question appealability, this Court will dismiss the appeal if it concludes there is no jurisdiction. Id.

[¶ 12] In the instant case, Meadowbrook and Star are attempting to appeal from an order for partial summary judgment that on its face left a number of issues open for further discovery and proceedings. In an apparent acknowledgment that the partial

summary judgment is not a final order, Meadowbrook and Star filed a Motion for N.D.R.Civ.P. 54(b) Certification with the trial court after the filing of the Notice of Appeal. While the trial court likely has no jurisdiction to rule on the Rule 54(b) Motion, this Court has already held that a Rule 54(b) Certification of a preliminary coverage issue was improvidently granted by the trial court. See Janavaras v. National Farmers Union Property, 449 N.W.2d 578, 580 (N.D. 1989) (holding immediate appeal of coverage issue improper).

[¶ 13] In Janavaras, 449 N.W.2d at 579, the trial court determined a loss payable clause in a policy applied only to real estate mortgages and did not provide coverage for a bank's interest in personal property. After first refusing to do so, the trial court certified the partial summary judgment as final under Rule 54(b), N.D.R.Civ.P. In reviewing the Rule 54(b) Certification, this Court observed that "unusual and compelling circumstances" must be demonstrated for proper Rule 54(b) Certification. Id. at 580. "[T]here must be a showing of out-of-the-ordinary circumstances or cognizable, unusual hardships to the litigants that will arise if resolution of the issues on appeal is deferred." Id. This Court observed that the adjudicated and unadjudicated claims arose from the same series of transactions and occurrences and were closely intertwined. Id. at 581. Further, the possibility that the need for review might be mooted by future developments "is a distinct argument of substantial weight supporting the normal postponement of review until the entire case shall be decided." Id. (Quoting Peterson v. Zerr, 443 N.W.2d 293, 298 (N.D. 1989)). After examining

the factors to consider in granting Rule 54(b) Certification, this Court concluded the Rule 54(b) Certification that included a preliminary coverage issue was improvidently granted and dismissed the appeal.

[¶ 14] While no Rule 54(b) Certification exists, a brief analysis of the factors to consider for Rule 54(b) Certification show an appeal of the coverage issue at this early stage will result in a delay of two pending actions; the present case and the underlying case between Dakota West Credit Union and Ziegler. The following non-inclusive factors are taken from Janavaras, 449 N.W.2d at 581, for consideration of Rule 54(b) Certification by a trial court:

[¶ 15] (1) “the relationship between the adjudicated and unadjudicated claims”

[¶ 16] Under the express terms of the Order Granting Partial Summary Judgment in Favor of the Plaintiff, the issue of whether Meadowbrook is a proper Defendant remains open pending further discovery. Indeed, it is anticipated that further discovery will reveal additional claims and will likely involve a motion to allow punitive damages. It is evident the order granting partial summary judgment is an interlocutory order. “This Court’s refusal to hear appeals arising from interlocutory orders conserves judicial resources by promoting a policy against piecemeal appeals.” Frontier Enterprises, LLP v. DW Enterprises, LLP, 2004 ND 131, ¶ 4, 682 N.W.2d 746.

[¶ 17] (2) “the possibility that the need for review might or might not be mooted by future developments in the district court”

[¶ 18] The indemnification required under the insurance contract will only exist if Ziegler is found liable in the underlying case brought by Dakota West. If there is no liability for Ziegler, there is no indemnification required on the part of Meadowbrook and Star. The fact that developments in the trial court might render the indemnity required moot does not warrant Rule 54(b) Certification or an appeal of the coverage issue at this time. See State v. Hansen, 2006 ND 139, ¶ 7, 717 N.W.2d 541 (observing the supreme court does not render advisory opinions and will dismiss an appeal if the issues become moot or so academic that no actual controversy is left to be decided). Because the issue of whether indemnification will be needed is undecided, Ziegler submits this appeal should be dismissed.

[¶ 19] (3) “the possibility that the reviewing court might be obliged to consider the same issue a second time”

[¶ 20] Depending on the outcome of discovery and the underlying case, the liability of Meadowbrook as a Defendant would result in consideration of essentially the same issues. Assuming Meadowbrook is a proper defendant and owed a duty to Ziegler in its claims handling, it is arguable that Meadowbrook would be viewed as an insurer, unlicensed under North Dakota law. Discovery will tell and should be allowed to proceed. Further, it is possible that additional discovery will reveal evidence of bad faith and violations of North Dakota’s Unfair Claims Practices Act. The denial of coverage, based upon no investigation by the insurers, is the foundation of and intertwined with the coverage issue here.

[¶ 21] (4) “the presence or absence of a claim or counterclaim which would result in setoff against the judgment sought to be made final”

[¶ 22] As already observed, the outcome of the underlying case between Dakota West and Ziegler will determine if any indemnification will be needed.

[¶ 23] (5) “miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like”

[¶ 24] Appeal of the coverage issue at this time will cause uncertainty and delay in two pending cases in the Ramsey County District Court; the present case and the underlying case between Dakota West and Ziegler. Indeed, in the unlikely event that the coverage determination is overturned, the underlying case would be significantly delayed and will result in uncertainty, another change of counsel for Ziegler, and unnecessary expense and delay for Ziegler and Dakota West. Further, the insurer will be less likely to aggressively defend or attempt to resolve the underlying case brought by Dakota West through settlement. The insurer will likely wait until this Court makes a decision on the duty to defend and indemnify.

[¶ 25] Moreover, this appeal has prevented Ziegler from challenging the qualification of the Crowley Fleck PLLP law firm who now represents both Ziegler’s insurers and Dakota West. A remand of this case to consider the Rule 54(b) Certification alone will not allow Ziegler to challenge this obvious conflict with the same firm representing his accuser and his insurer.

[¶ 26] Here, there is no Rule 54(b) Certification and no final judgment. In City of

Minot v. Central Ave. News, Inc., 325 N.W.2d 243, 244-245 (N.D. 1982), this Court dismissed an appeal in which all issues had not been decided and no certification had been made. Generally, this Court will not hear appeals of interlocutory orders because the trial court can revise the order at any time before the entry of judgment. Dimond v. State ex rel. State Bd. of Higher Educ., 1999 ND 66, ¶ 9, 603 N.W.2d 66. To invoke appellate jurisdiction of an interlocutory order, an appeal must be authorized by statute and the trial court must certify there is no reason to delay an appeal and direct entry of judgment. Id. at ¶ 10. Neither has occurred in this case. Ziegler respectfully requests this Court dismiss this appeal to allow further proceedings to occur in the trial court.

[¶ 27]

CONCLUSION

[¶ 28] For the foregoing reasons, Plaintiff-Appellee James Ziegler d/b/a Lake Region Livestock, respectfully requests this Court DISMISS this appeal and REMAND this case to the Ramsey County District Court for further proceedings.

[¶ 29] DATED May 15, 2009.



[¶ 30]

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Ramsey County Civil No. 36-8-C-252-1

**SUPPLEMENTAL BRIEF IN SUPPORT OF
ZIEGLER’S MOTION TO DISMISS APPEAL**

[¶ 1]

INTRODUCTION

[¶ 2] On May 15, 2009, Plaintiff-Appellee James Ziegler d/b/a Lake Region Livestock, (“Ziegler”) interposed a Motion to Dismiss Appeal with this Court. On May 26, 2009, Defendants-Appellants Meadowbrook Insurance Group, Inc., and Star Insurance Company, (collectively, “Meadowbrook and Star”) filed a Brief in Opposition to Appellee’s Motion to Dismiss. In email correspondence, dated June 3, 2009, North Dakota Supreme Court Clerk Penny Miller advised the parties the Motion to Dismiss with supporting and opposing briefs was referred to the Court. Clerk Miller further advised the Court requested supplemental briefing on the pending motion, “including the impact of N.D.C.C. § 32-23-06 on this Court’s N.D.R.Civ.P. 54(b) jurisprudence.” Ziegler now files this supplemental brief, as requested by the

Court.¹

[¶ 3]

FACTUAL HISTORY

[¶ 4] The factual history of this case and the pending Dakota West Credit Union v. James Ziegler d/b/a Lake Region Livestock, Ramsey County Civil No.: 36-6-C-158-1, is discussed in the Brief in Support of Ziegler's Motion to Dismiss Appeal on file with this Court.

[¶ 5]

LEGAL ARGUMENT

[¶ 6] The right to appeal is governed by statute, not by this Court. See First Trust Co. of North Dakota v. Conway, 345 N.W.2d 838, 840 (N.D. 1984). Section 28-27-02, N.D.C.C., provides what orders may be reviewed by the supreme court. The right to appeal is an important right and statutes conferring the right to appeal are liberally construed. Conway, 345 N.W.2d at 840-841 (citing State v. Howe, 247 N.W.2d 647 (N.D. 1976)). Before considering the merits of an appeal, the North Dakota Supreme Court must consider whether it has jurisdiction. Mann v. N.D. Tax Comm'r, 2005 ND 36, ¶ 7, 692 N.W.2d 490.

[¶ 7] This Court has embraced a two-part test for determining whether jurisdiction over an appeal exists:

¹ This brief is prepared as a brief supporting the pending Ziegler's Motion to Dismiss filed with this Court on May 15, 2009. Because it is a brief in support of a motion, this document has not been formatted as an appellate brief under Rules 28 and 32(a), N.D.R.App.P. If compliance with these rules is preferred, the undersigned will happily reformat this document as directed by the Clerk of the Supreme Court.

“First, the order appealed from must meet one of the statutory criteria of appealability set forth in NDCC § 28-27-02. If it does not, our inquiry need go no further and the appeal must be dismissed. If it does, then Rule 54(b), NDR CivP, must be complied with. If it is not, we are without jurisdiction.”

Id. (Quoting Gast Constr. Co., Inc. v. Brighton Partnership, 422 N.W.2d 389, 390 (N.D. 1988)). Only final judgments or orders enumerated by statute are appealable.

Mann, 2005 ND 36 at ¶ 8.

[¶ 8] Ziegler submits neither part of this two-part test is satisfied in the present case.

Section 28-27-02, N.D.C.C., provides the statutory basis for an appeal to the supreme court.

28-27-02. What orders reviewable

The following orders when made by the court may be carried to the supreme court:

1. An order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;

2. A final order affecting a substantial right made in special proceeding or upon a summary application in an action after judgment;

3. An order which grants, refuses, continues, or modifies a provisional remedy, or grants, refuses, modifies, or dissolves an injunction or refuses to modify or dissolve an injunction, whether such injunction was issued in an action or special proceeding or pursuant to the provisions of section 35-22-04, or which sets aside or dismisses a writ of attachment for irregularity;

4. An order which grants or refuses a new trial or which sustains a demurrer;

5. An order which involves the merits of an action or some part thereof;

6. An order for judgment on application therefor on account of the frivolousness of a demurrer, answer, or reply; or

7. An order made by the district court or judge thereof without notice is not appealable, but an order made by the district court after a

hearing is had upon notice which vacates or refuses to set aside an order previously made without notice may be appealed to the supreme court when by the provisions of this chapter an appeal might have been taken from such order so made without notice, had the same be made upon notice.

N.D.C.C. § 28-27-02.

[¶ 9] In the present case, Meadowbrook and Star point to no specific provision of section 28-27-02, N.D.C.C., which would confer a right to appeal from a partial summary judgment on a coverage issue. Indeed, no statutory grounds exist. The partial summary judgment is not a final order or a final determination of the merits of the action. See N.D.C.C. § 28-27-02(5).

[¶ 10] Despite the lack of statutory grounds for an appeal, Meadowbrook and Star argue the issues of a duty to defend and indemnify are “separate and distinct” from the issues of bad faith, breach of contract, or an underlying case. Brief in Opposition to Appellee’s Motion to Dismiss, dated May 26, 2009, at 3-4. This argument ignores the fact that no indemnity will be required in the event the underlying Dakota West case is resolved in Ziegler’s favor. Moreover, by requiring an insurer to hire defense counsel and conduct the investigation it failed to do when the claim was submitted, the issues involved in this case might be mooted with the insurer concluding, after a good faith investigation, that it does have a duty to defend and indemnify their insured in the underlying case. See Janavaras v. National Farmers Union Property, 449 N.W.2d 578, 581 (N.D. 1989) (observing the possibility that the need for review might be mooted by future developments gives substantial weight to postponement

of review until the entire case is decided).

[¶ 11] Ziegler submits this interlocutory order made by the district court cannot be appealed at this time. It is not a final order and does not come to this Court as a final determination of the merits of the action. Because there is no statutory basis for an appeal, the inquiry need go no further and the appeal should be dismissed. See Mann, 2005 ND 36 at ¶ 7 (noting that where no statutory grounds exist, the two-part inquiry is at an end and the appeal should be dismissed).

[¶ 12] Even if statutory grounds may be strained from section 28-27-02, N.D.C.C., Ziegler submits the lack of certification under Rule 54(b), N.D.R.Civ.P., requires a dismissal of this appeal. Rule 54(b), N.D.R.Civ.P., relates to finality but does not supercede the statutory control of appellate jurisdiction. Conway, 345 N.W.2d at 841.

Rule 54. Judgment – Costs

* * *

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. If more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or if multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment. In the absence of that determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties does not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

N.D.R.Civ.P. 54(b).

[¶ 13] Recently, in Eberle v. Eberle, 2009 ND 107, ¶ 13, this Court confirmed that interlocutory orders are not appealable and may be revised or reconsidered any time before a final order or judgment is entered. Indeed, without a Rule 54(b) certification, the trial court is able to modify or vacate any previous order, based upon the record before the Court. See, e.g., Mann 2005 ND 36 at 9 (observing appeal from an order for judgment improper because a trial court may change the terms of the order for judgment before judgment is entered); Security State Bank of North Dakota v. Orvik, 2001 ND 197, ¶ 6, 636 N.W.2d 644 (holding appeal from subsequent final judgment was timely and earlier partial summary judgment was not appealable at the time it was entered); and Dimond v. State ex rel. State Bd. of Higher Educ., 1999 ND 228, ¶ 9, 603 N.W.2d 66 (noting orders entered before judgment may be revised at any time before the entry of final judgment). Cf. Thet Mah and Associates, Inc. v. First Bank of North Dakota, 336 N.W.2d 134, 136 fn. 1 (N.D. 1983) (observing trial court erroneously concluded memorandum opinion entered in declaratory judgment action was erroneously treated as a final judgment under section 28-27-02, N.D.C.C.).

[¶ 14] In essence, Rule 54(b) certification is the trial judge's "scout's honor"² that he or she will not revise or reconsider an issue. Without it, this Court risks review of a

² The Boy Scout Oath (or Promise) states: "On my honor I will do my best To do my duty to god and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight." Boy Scouts of America, Boy Scout Oath, (visited June 18, 2009) <<http://www.scouting.org/sitecore/content/Home/Media/FactSheets/02-503a.aspx>>.

decision that is not final and may be modified or vacated, based upon further proceedings in the trial court. As already observed, if Ziegler is successful in the underlying Dakota West claim, there would be no reason to indemnify. If Dakota West's original claims for fraud or other intentional wrongdoing by Ziegler are revived in the underlying case, there may be no duty to indemnify Ziegler for part or all of the claim. N.D.C.C. §§ 9-08-02, 26.1-32-04 (providing indemnity for willful acts void for on the basis of public policy). But see Continental Cas. Co. v. Kinsey, 499 N.W.2d 574, 582 (N.D. 1993) (holding insurer was obligated to pay punitive damage award up to its policy limits). Indeed, if the intentional claims against Ziegler are revived, there may be no duty to defend. Nodak Mut. Ins. Co. v. Heim, 1997 ND 36, ¶ 32, 559 N.W.2d 846 (holding insurer owed no duty to defend or indemnify intentional claims).

[¶ 15] In the case at bar, the liability of Meadowbrook as the party performing the claims investigation remains unresolved. The issues of bad faith relate to the insurers' failure to properly investigate this claim. Once these intertwining issues are resolved, they too may be ready for appellate review. Finally, as already noted, after an actual investigation of the claim, these insurers might think better of their decision to deny coverage and agree with Ziegler and the trial court that there is a duty to defend and indemnify. Based on the posture of this case, the trial court's decision to grant partial summary judgment on the coverage issue is not a final order and may be reconsidered or revised in light of further proceedings in this case and the underlying Dakota West

claim.

[¶ 16] It appears that on four prior occasions this Court has considered an appeal of a preliminary coverage issue in the context of a declaratory judgment action. In each case, this Court concluded that review prior to a final judgment was improper. Section 32-23-01, N.D.C.C., authorizes declaratory judgment actions by a court of record. Section 32-23-02, N.D.C.C., further provides that the declaration may construe a written contract, including an insurance contract. Section 32-23-06, N.D.C.C., provides, with certain exception, it is within the discretion of the court to grant a declaratory judgment. Section 32-23-12, N.D.C.C., provides declaratory relief should be liberally granted to afford relief from uncertainty and insecurity. Ziegler submits the trial court was correct in granting partial summary judgment on the duty to defend and indemnify, but the issue is not final for purposes of an immediate appeal.

[¶ 17] In United Pacific Ins. Co. v. Aetna Ins. Co., 311 N.W.2d 170, 174 (N.D. 1981), this Court held no justiciable controversy existed warranting a declaration of the duty to defend and indemnify where the question of indemnity and contribution in an underlying case was undetermined. In that case, United Pacific provided a contractors' comprehensive liability policy to Cochran. Id. at 171. Aetna provided worker's compensation and employer's liability coverages for Cochran. Id. The underlying case involved a claim by Cochran's employee, Schelske, against Martin Electric, the lessor of a truck leased to Cochran. Id. Martin Electric initiated a third-

party action against Cochran, alleging that if it were held liable for damages to Schelske, it was entitled to contribution or indemnity from Cochran. Id. The supreme court observed the liability was an open question. Id. at 173. “United Pacific and Aetna may be held liable for contribution or indemnity to Cochran Electric only if the district court enters a judgment against Cochran Electric in favor of Martin Engineering.” Id.

[¶18] In reasoning that a justiciable controversy did not exist, the court noted liability by either insurer was contingent upon the outcome of an action which was still pending in the district court. Id. With regard to the question of indemnity, the supreme court and the trial court lacked jurisdiction to decide the issue of liability between the two insurers. Id. at 174. Despite an insightful dissent arguing the duty to defend was not speculative but existed as a result of the pending action, see id. at 174-175 (Vande Walle, J., dissenting), a majority of this Court held no justiciable controversy existed on the issue of which insurance company had a duty to defend Cochran in the underlying case. Id. The supreme court observed the better policy in an action between insurance companies is to await final adjudication of the underlying litigation to prevent decisions based upon incomplete facts. Id. This Court embraced the notion that “[t]he determinative factor is whether the declaratory action will probably result in a just and more expeditious and economical determination of the entire controversy.” Id. (Quoting Aetna Ins. Co. v. Transamerica Ins. Co., 262 F.Supp.731, 732 (E.D. Tenn. 1967)). The court observed that combining the issues

of the duty to defend and indemnify once liability is determined will foster judicial economy and provide a better factual record. Id. This Court concluded any decision on liability or duty to defend while the underlying case was pending would be based on speculation of that result. Id.

[¶ 19] In Aberle v. Karn, 316 N.W.2d 799, 783-784 (N.D. 1982), the North Dakota Supreme Court reached a similar conclusion, reversing a declaratory judgment ruling made before suits by negligence plaintiffs had been tried or settled. The underlying actions were brought in separate suits, one initiated by Ralph Aberle and another brought by Mary Aberle. Id. at 780. The defendants in both actions were Kevin Karns, the driver of the vehicle, and Mutschler Farms, the owner of the vehicle Karns was driving at the time Ralph Aberle was injured. Id. at 781. Mutschler Farms brought third-party actions against Commercial Insurance Company and St. Paul Fire and Marine Insurance Company, each of whom had apparently denied the duty to defend Mutschler Farms. Id. Mutschler Farms and the two insurers each moved for summary judgment. Id.

[¶ 20] On appeal, the supreme court concluded that any declaration of a duty to defend and indemnify was premature while the underlying claim was pending. Id. The supreme court noted that “[c]ourts may, under proper circumstances, grant declaratory relief even though the declaration would not terminate the underlying controversy, if it can be of some help to end the controversy.” Id. at 782. In providing guidance to trial courts, the supreme court observed that it would be helpful

for a trial court to show how the declaration aids in the disposition of the basic controversy, even though it does not dispose of the underlying dispute. Id. This court cautioned that a declaratory decree entered while an underlying case was pending causes a trial court to act upon a pleading that can be readily amended or upon a case which may be dismissed. Id. at 783. With regard to both insurers, the supreme court reversed the trial court's determination as to the duty of each insurer to defend. Id. The court remanded the case for trial, after which the trial court could answer the question of coverage and the duty to defend. Id.

[¶ 21] After the supreme court's 1981 decision in United Pacific and 1982 decision in Aberle, the 1983 North Dakota legislature amended section 32-23-06, N.D.C.C., to require a court to declare whether there is "liability . . . to defend, or duty to defend," even though the insured's liability has not been determined. The amended statute provides:

32-23-06. Entering of declaratory judgment discretionary with court – Exception. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. However, the court shall render or enter a declaratory judgment or decree in an action brought by or against an insurance company to determine liability of the insurance company to the insured to defend, or duty to defend, although the insured's liability for the loss may not have been determined.

N.D.C.C. § 32-23-06. See 1983 N.D. Sess. Laws Ch. 377, § 1 (amending and reenacting section 32-23-06, N.D.C.C., to require a court to declare a duty to defend even though liability for an underlying case is undecided). This amendment was

enacted to reverse this Court's holdings in United Pacific and Aberle. Blackburn, Nickels & Smith, Inc. v. National Farmer Union Property & Cas. Co., 452 N.W.2d 319, 323 (N.D. 1990) (observing statutory amendment as overruling prior holdings).

[¶ 22] Consistent with the legislature's amendment of section 32-23-06, N.D.C.C., Ziegler submits the trial court properly determined Star owed a duty to defend and indemnify him in the underlying Dakota West action. See Blackburn, Nickels & Smith, Inc., 452 N.W.2d at 323 (construing amendment to section 32-23-06, N.D.C.C., as requiring court to declare coverage and duty to defend, whether or not the insured liability has been determined). Ziegler further submits the trial court's ruling, that Star owes a duty to defend and indemnify him, is consistent with the purpose of North Dakota's declaratory judgment law. Section 32-23-12, N.D.C.C., provides the chapter allowing declaratory judgments should be liberally construed for the purpose of effecting settlement and avoiding uncertainty and insecurity.

32-23-12. Construction of chapter. This chapter is remedial. Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be construed and administered liberally.

N.D.C.C. § 32-23-12.

[¶ 23] In the present case, the trial court has entered a partial summary judgment, concluding Star owes a duty to defend and indemnify Ziegler for the underlying claim brought by Dakota West. Combining the issues of the duty to defend and indemnify fosters judicial economy and provides the trial court with a broader factual

perspective upon which to make its ruling. See United Pac. Inc. Co., 311 N.W.2d at 174. Indeed, by ruling specifically that Star owes a duty to indemnify, the trial court has encouraged settlement of the Dakota West case for an amount within Ziegler's policy limits in order to avoid excess liability to the insured. See Blackburn, Nickels & Smith, Inc., 452 N.W.2d at 323 (noting that declaration of duty to defend and indemnify "encourages settlement of claims by providing an avenue for speedy judicial resolution of viable disputes over underlying liabilities"). Cf. Bender v. Time Ins. Co., 286 N.W.2d 489, 493 (N.D. 1979) (observing an insurer owes a duty to settle claims in good faith on behalf of their insured). Ziegler submits the trial court's decision was properly made and is consistent with the purpose of the relief authorized in North Dakota's declaratory judgment chapter. See N.D.C.C. § 32-23-12; see also Aberle, 316 N.W.2d at 782 (observing declaratory relief is proper even where it does not end the controversy if it can be of some help to end the controversy).

[¶ 24] While the trial court decision was properly made, based upon the facts existing at the time, that does not mean the partial summary judgment is immediately reviewable on appeal. The declaratory judgment chapter does not govern appellate review. See, e.g., Thet Mah and Associates, Inc., 336 N.W.2d at 136 fn. 1 (observing that entry of a declaratory decree does not dispense with the formal entry of a judgment or decree required by the statute setting out the appellate jurisdiction of the supreme court). As noted above, without Rule 54(b) certification the trial court's decision may be revisited at any time prior to entry of judgment as the evidence drawn

from the underlying case warrants. Indeed, it would be improvident for a trial court to certify a partial summary judgment as final while evidence and issues were still being meted out in the present case or in an underlying proceeding. Ziegler submits the appeal sought by Meadowbrook and Star should be dismissed, in light of the non-appealable partial summary judgment which has not been and should not be certified as final by the trial court.

[¶ 25] As noted in Ziegler’s opening brief, in Janavaras v. National Farmers Union Property, 449 N.W.2d 578, 581 (N.D. 1989), this Court concluded the Rule 54(b) certification of an order, that included a preliminary coverage issue, was improvidently granted and dismissed the appeal. In their response, Meadowbrook and Star assert Ziegler has misstated the holding of Janavaras. Brief in Opposition to Appellee’s Motion to Dismiss, dated May 26, 2009, at 6. In Janavaras, the trial court “determined that the loss payable clause in the policy applied only to real estate mortgages and did not provide coverage for . . . interest in personal property.” Janavaras, 449 N.W.2d at 579. The trial court reversed a prior decision regarding Rule 54(b) certification and certified the partial summary judgment, that included the coverage determination, as final. Id. While the primary issue on appeal was the trial court’s dismissal of the bad faith claims, this Court concluded the trial court failed to properly weigh the juridical concerns of the adjudicated and unadjudicated claims and possibility of future developments rendering an issue moot against the inequity of an immediate appeal. Id. at 582. The appeal was dismissed, even though it plainly

included a preliminary coverage determination by the trial court. Id.

[¶ 26] In Bjornson v. Guaranty Nat. Ins. Co., 510 N.W.2d 622, 623 (N.D. 1994), this Court considered Rule 54(b) certification granted after the trial court construed the Uninsured Motorist (UM) and Underinsured Motorist (UIM) coverages in a policy issued by Guaranty National Insurance Company. In that case, similar coverages were provided in a separate policy issued by Farmers Insurance Exchange. Id. The trial court's decision was based upon facts stipulated by Guaranty and its insured. Id. Farmers, however, refused to stipulate to the facts, which prevented a summary decision on the availability of UM and UIM coverage. Id. The factual issues needed for a coverage determination under the Farmers policy was set for trial. Id.

[¶ 27] On appeal, the supreme court observed that no party requested Rule 54(b) certification. Id. The district court entered certification on its own initiative. Id. During oral argument the parties conceded that a determination of the issues raised in the appeal would impact Farmers' liability for UM and UIM coverage. Id. Farmers was not a party to the partial judgment and was not represented at the appeal. Id. The supreme court dismissed the appeal, observing the trial court failed to identify any unusual or compelling circumstances requiring immediate appellate review before all claims were resolved against all parties. Id. None of the parties demonstrated that someone would suffer hardship or prejudice if the immediate appeal did not proceed. Id.

[¶ 28] In this case, Meadowbrook and Star claim they are in an untenable position and

point to the hardship imposed at having to pay an attorney to defend Ziegler in Dakota West claim. Brief in Opposition to Appellee's Motion to Dismiss, dated May 26, 2009, at 4. The insurers also claim that insurers risk astonishing losses by not being able to appeal a preliminary decision regarding the duty to indemnify. Id. The fact is someone is going to have to pay an attorney to defend Jim Ziegler in the Dakota West claim. Someone has to be at risk to pay potential damages in the underlying claim brought by Dakota West. These hardships exist for either Ziegler or his insurers. Jim Ziegler has paid years of premiums to these companies with an expectation that they would defend him in this type of situation. "The insured pays premiums to receive protection, not a lawsuit from its insurer." State Farm Fire and Cas. Co. v. Sigman, 508 N.W.2d 323, 328 (N.D. 1993). In balancing the inequities between the two parties, Ziegler submits it is better for the insurers to pay an attorney and bear the risk of loss. Cf. N.D.C.C. § 32-23-06 (stating the duty to defend should be determined even though liability of the insured is not decided); and Kylo v. Northland Chemical Co., 209 N.W.2d 629, 631 (N.D. 1973) (stating, in syllabus by the court, that doubt as to whether a duty to defend is present is resolved in favor of the insured).

[¶ 29] That does not mean, however, that an actual loss will occur or that the trial court's decision is not subject to an eventual review. The magnificent and astonishing losses of which Meadowbrook and Star warn are merely speculative and forget that appellate review will eventually be available as a matter of right. Assuming the

partial summary judgment is not reconsidered or revised, a final judgment will be entered in this case and the insurer will have a full opportunity for review of the partial summary judgment granted by the trial court. See Orvik, 2001 ND 197 at ¶ 6 (observing a partial summary judgment granted earlier in a case is properly appealable once a final judgment is entered).

[¶ 30] In their brief, Meadowbrook and Star argue that other states have concluded that a direct appeal of coverage decisions is appropriate. Brief in Opposition to Appellee’s Motion to Dismiss, dated May 26, 2009, at 3 (citing authorities from 2 states holding that immediate appellate review is appropriate). Most jurisdictions have maintained that a preliminary coverage determination does not warrant an immediate appeal, particularly where not all claims or issues have been decided or where the preliminary decision is not certified as final. See Diane M. Allen, Annotation, Modern status of state court rules governing entry of judgment on multiple claims, 80 A.L.R.4th 707, § 47 (Supp. 2009).

[¶ 31] In Travelers Indemnity Co. v. Schenden, 356 S.E.2d 761, 762 (Ga. App. 1987), the Georgia Court of Appeals considered whether a default judgment relating to an insurer’s failure to pay under a policy of insurance was properly before the court where a separate claim for actual and punitive damages against the insurer remained. “[C]ourts do not favor piece-meal review.” Id. Where the order was neither final or certified as such, the appeals court concluded the appeal was premature and dismissed the appeal. Id.

[¶ 32] In Smith v. Whittier, 695 P.2d 1245, 1247 (Idaho 1985), the Idaho Supreme Court considered a trial court’s certification of a partial summary judgment in a case involving multiple defendants and containing multiple counts. The supreme court concluded the trial court abused its discretion in certifying the partial summary judgment as final. The appellate court noted “as we view the intertwining allegations in the various counts against the various defendants, testimony regarding one or some may bear upon the liability of others, and the district judge may feel compelled to change or modify his ruling upon the summary judgment at issue here.” Id. The Idaho Supreme Court dismissed the appeal. Id.

[¶ 33] In Allstate Ins. Co. v. Angeletti, 524 A.2d 798, 805 (Md. App. 1987), the Maryland Court of Special Appeals held a trial judge abused his discretion in certifying an order entered in a declaratory judgment action as final in a case brought by an insurance company to determine coverage under a homeowner’s insurance policy. Neighbors sued the insured for damages alleging that he had shot and injured a husband and wife during a backyard argument. Id. at 799. The insured claimed coverage under his homeowner’s insurance policy. Id. The issue of whether the insured intentionally shot his neighbors was tried before a jury. Id. at 800. The jury was unable to reach a verdict as to whether the insured intentionally shot the husband, but returned the verdict that he had not intentionally shot the wife. Id. The trial court concluded the insurer owed a duty to defend and indemnify the insured for claims brought by the wife. Id. On appeal, the court reasoned that even if it were to review

the declaratory judgment regarding the duty to defend and indemnify the claims of the wife, a later appeal concerning the shooting of the husband will involve close scrutiny of the same issues and much of the same evidence. Id. at 804. “[A]n appeal at this time clearly weighs against the interests of judicial economy and the policy against piecemeal appeals.” Id. The appellate court dismissed the appeal. Id. at 805.

[¶ 34] In their brief, Meadowbrook and Star argue this Court should exercise its supervisory jurisdiction to consider the trial court’s coverage decision. Brief in Opposition to Appellee’s Motion to Dismiss, dated May 26, 2009, at 4-5. The authority to issue supervisory writs derives from Article VI, Section 2, of the North Dakota Constitution and section 27-02-04, N.D.C.C. The authority to issue supervisory writs is discretionary and cannot be invoked as a matter of right. Mann, 2005 ND 36 at ¶ 20. ““We exercise our supervisory jurisdiction rarely to rectify errors or to prevent injustice where no adequate alternative remedies exist.”” Id. (Quoting Saefke v. Stenehjem, 2003 ND 202, ¶ 20, 673 N.W.2d 41). Supervisory jurisdiction is not exercised where a proper remedy is an appeal even though the appeal may come after increased expenses and an inconvenient delay. Roe v. Rothe-Seeger, 2000 ND 63, ¶ 5, 608 N.W.2d 289.

[¶ 35] Meadowbrook and Star will have their chance to appeal the trial court’s decision regarding the duty to defend and indemnify. But without a final order and a Rule 54(b) certification, the appeal should not come at this time. The posture of this case does not warrant this Court’s appellate or supervisory jurisdiction. Ziegler

submits this appeal should be dismissed.

[¶ 36]

CONCLUSION

[¶ 37] For the foregoing reasons, Plaintiff-Appellee James Ziegler d/b/a Lake Region Livestock, respectfully requests this Court DISMISS this appeal and REMAND this case to the Ramsey County District Court for further proceedings.

[¶ 38] DATED June 19, 2009.



[¶ 39]

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APPELLEE JAMES ZIEGLER D/B/A
LAKE REGION LIVESTOCK

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

James Ziegler d/b/a Lake Region
Livestock,

Plaintiff-Appellee,

vs.

Meadowbrook Insurance Group, Inc.,
and Star Insurance Company,

Defendants-Appellants.

Supreme Court No. 20090141

ADDENDUM

Appeal from an Order Granting Partial Summary Judgment dated March 2, 2009
The Honorable Donovan Foughty
Ramsey County District Court
Northeast Judicial District

Ramsey County Civil No. 36-8-C-252-1

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Attorneys for Plaintiff/Appellee
James Ziegler d/b/a Lake Region Livestock.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

James Ziegler d/b/a Lake Region Livestock,

Plaintiff-Appellee,

vs.

Meadowbrook Insurance Group, Inc., and
Star Insurance Company,

Defendants-Appellants.

Supreme Court No: 20090141
Ramsey County Civil No. 36-8-C-252-1

AFFIDAVIT OF DANIEL M. TRAYNOR

STATE OF NORTH DAKOTA

COUNTY OF RAMSEY

ss

[¶ 1] After being duly sworn and upon his oath, Daniel M. Traynor, deposes and states as follows:

[¶ 2] 1. I am the attorney for Plaintiff-Appellee James Ziegler d/b/a Lake Region Livestock (“Ziegler”) in the above-captioned matter. I give this affidavit of my personal knowledge, except as stated upon information and belief. As to those statements, I am informed and believe them to be true and correct. I am competent to give this affidavit.

[¶ 3] 2. This appeal has stalled two cases pending before the Ramsey County District Court. In the instant case, needed discovery has been put on hold while the jurisdiction of the supreme court has been invoked. I question the propriety of the Crowley Fleck PLLP law firm representing *both* Dakota West in the underlying case and Meadowbrook and Star in this case. Unfortunately, a motion for disqualification of counsel for this conflict cannot be

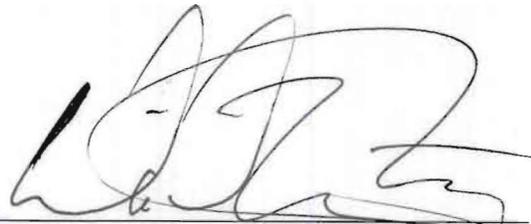
submitted to a trial court without jurisdiction. In the underlying case brought by Dakota West, a recently-filed substitution of counsel for Ziegler, which has delayed those proceedings, may require another substitution and additional delay if this appeal proceeds. Further, with the specter of an appeal questioning the trial court's decision regarding the duty to defend, the insurer may be less apt to promptly deal with the Dakota West claim or resolve it through a settlement within the policy limits and will opt, instead, to wait out the appeal.

[¶ 4] 3. The following table contains the Docket Number, Description, and Date Filed for true and correct copies of the attached documents from the record of the Ramsey County District Court in James Ziegler d/b/a Lake Region Livestock v. Meadowbrook Insurance Group, Inc., and Star Insurance Company, Ramsey County Civil No.: 36-8-C-252-1:

[¶ 5]	<u>Docket No.:</u>	<u>Description</u>	<u>Date Filed</u>
	26	Order Granting Partial Summary Judgment in Favor of Plaintiff	March 2, 2009
	28	Notice of Entry of Order Granting Partial Summary Judgment in Favor of Plaintiff	March 5, 2009
	30	Notice of Appeal	April 30, 2009
	33	Motion for N.D.R.Civ.P. 54(b) Certification	May 4, 2009
	34	Brief in Support of Motion for N.D.R.Civ.P. 54(b) Certification	May 4, 2009
	35	Affidavit of Amy L. Foster	May 4, 2009
	36	Ziegler's Response to Defendants' Motion for N.D.R.Civ.P. 54(b) Certification	May 14, 2009

[¶ 6] DATED May 15, 2009.

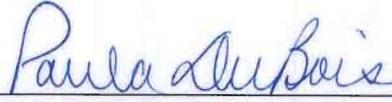
[¶ 7]



Daniel M. Traynor (N.D. ID#05395)

[¶ 8] Subscribed and sworn to before me on May 15, 2009.

[¶ 9]



Paula DuBois, Notary Public

PAULA DUBOIS
Notary Public, State of North Dakota
My Commission Expires Nov 17, 2013

FILED

MAR 02 2009

RAMSEY COUNTY
COURT OF DIST. CT.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF RAMSEY

NORTHEAST JUDICIAL DISTRICT

James Ziegler, d/b/a Lake Region Livestock,)
)
 Plaintiff,)
)
 vs.)
)
 Meadowbrook Insurance Group, Inc.,)
 and Star Insurance Company,)
)
 Defendants)

**ORDER GRANTING PARTIAL
 SUMMARY JUDGMENT IN FAVOR
 OF THE PLAINTIFF**
 Civil Case No. 36-08-C-00252

Before the court are two opposing Motions for Summary Judgment. The Plaintiff Ziegler, d/b/a Lake Region Livestock is requesting an order granting partial summary judgment in that the Defendants Meadowbrook Insurance Group Inc. And Star Insurance Company have a duty to defend and indemnify Ziegler under the stock yard service policy issued by the Defendants. The Defendants resist this motion.

The Defendants' Motion for Summary Judgment is requesting a dismissal of the action on the grounds that there is no coverage under the policy because there was no bonafide consignment sale of livestock.

The Court hearing arguments on January 23, 2009; Ziegler was represented by Daniel Traynor and Meadowbrook & Star Insurance were represented by Gary Wolberg.

RELEVANT FACTS

Ziegler is the defendant in a pending lawsuit with Dakota West Credit Union (DWCU) in which the bank is seeking \$950,000.00 from an alleged transaction between Ziegler, H & J

Livestock and Horob Livestock. Todd Horob owns Horob Livestock and is part-owner of H & J Livestock. Dakota West loaned H & J Livestock \$950,000.00 in 2005 to purchase feeder/pasture cattle. Horob allegedly told Ziegler that he needed Ziegler to act as a middle man for a transaction between Horob Livestock and H & J Livestock to allow the sale of cattle from Horob Livestock to H & J Livestock. Ziegler states that based on his history with Horob he believed this to be a legitimate transaction. Ziegler asked Horob to provide the appropriate paperwork to demonstrate the transaction. No cattle were brought to the sales ring.

At the time of the alleged transaction between Horob Livestock and H & J, Ziegler was apparently unaware of any liens that might be on the cattle. Farm Credit Services and Wells Fargo Bank maintained a collateral interest in all livestock owned or acquired by Horob personally or by Horob Livestock. When the promissory note from Dakota West became due, H & J Livestock did not pay off the loan. Dakota West had no security in the cattle purportedly sold to H & J Livestock. Todd Horob filed for bankruptcy in Montana shortly thereafter, and Dakota West has not been able to recover on its loan.

The pending claim of Dakota West against Ziegler is a negligence claim wherein it is alleged by Dakota West that Ziegler knew or should have known that there was no legitimate reason for a cash transfer from H & J Livestock to Lake Region Livestock with funds being transferred back to Horob Livestock from Lake Region Livestock, and Ziegler knew or should have known that a third party was being placed at risk of loss as a result of Ziegler's participation in the transaction.

INSURANCE COVERAGE

The Plaintiff does not appear to have coverage under part 1A of his insurance policy.

Under part 1B, Ziegler would have coverage as a result of “sale and/or purchase by the named insured of livestock consigned for sale and sold by him upon which there was a valid mortgage or lien, where the net proceeds of such sale was diverted to use other than the application of such valid mortgage or lien.”

The Defendant argues that there was no consignment sale and Dakota West’s complaint did not allege one occurred only that a “sham transaction” occurred. Plaintiff asks this Court to look beyond the face of the complaint, similar to what the district court did in Ohio Casualty Ins. Co. V. Clark, 1998 ND 583 NW2d 377, and look to the underlying “sham transaction.” Again, it should be noted that there appear to be no North Dakota cases that explain how far beyond the complaint a court can look to determine whether or not an insurer should provide coverage. The North Dakota Supreme Court in Clark said the district court did not err in looking beyond the complaint to the underlying facts of the act. In Farmers Union Mutual Ins. Co. V. Decker, 2005 ND 704 NW2d 857, the Court said the allegations of the complaint should be reasonably interpreted in determining whether the claims are within the coverage and any doubt or ambiguity resolved in the insured’s favor. So it appears that looking at the underlying transaction that is allegedly a “sham” would be reasonable, considering that “sham transaction” is a broad descriptive statement.

Under the facts of this case it would be reasonable to conclude that Dakota West loaned the funds to H & J Livestock under the assumption that H & J was purchasing cattle from Ziegler on consignment. Although it was concluded later by Dakota West that the transaction was a “sham” it was the belief of Dakota West initially that there was a valid consignment sale from a sales ring to H & J. Although Ziegler may have been negligent in the way he conducted his

business with Horob the transaction between Horob Livestock, Ziegler and H & J Livestock would best be described as a consignment sale albeit it was a "sham." Absence proof of a conspiracy between Horob and Ziegler Star Insurance is obligated to defend and indemnify Ziegler.

MEADOWBROOK DISMISSAL

The Plaintiff's request for further discovery to determine whether Meadowbrook is an interested party is reasonable at this time.

BASED ON THE REASONING SET OUT THE COURT RULES:

1. Meadowbrook's Motion to be Dismissed from the action is denied.
2. Ziegler is granted a Partial summary Judgment. The Defendants have a duty to defend and indemnify Ziegler under the stock yard services policy issued by Star Insurance Company. Specifically, they are to indemnify and defend Ziegler in the pending action with Dakota West Credit Union.
3. Defendants' Motion to Dismiss is hereby denied.

IT IS SO ORDERED.

Dated this 2nd day of March, 2009.

BY THE COURT:



DONOVAN FOUGHTY
DISTRICT COURT JUDGE

PC: Daniel Traynor
Gary Wolberg

FILED
MAR 09 2009
RAMSEY COUNTY
CLERK OF DIST. CT.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF RAMSEY

NORTHEAST JUDICIAL DISTRICT

James Ziegler d/b/a Lake Region Livestock,

Plaintiff,

Ramsey County Civil No. 36-08-C-00252
Case Type: Declaratory Judgment

vs.

Meadowbrook Insurance Group, Inc., and
Star Insurance Company,

Defendants.

**NOTICE OF ENTRY OF ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN
FAVOR OF THE PLAINTIFF**

**TO: DEFENDANTS MEADOWBROOK INSURANCE GROUP, INC., AND STAR
INSURANCE COMPANY THROUGH THEIR ATTORNEY OF RECORD GARY R.
WOLBERG, CROWLEY FLECK PLLP, P.O. BOX 2798, BISMARCK, ND 58502-
2798**

PLEASE TAKE NOTICE that on March 2, 2009, an Order Granting Partial Summary
Judgment in Favor of the Plaintiff was filed in the office of the Clerk of District Court, Ramsey
County, Devils Lake, North Dakota, a copy of which is attached hereto.

DATED March 5, 2009.



Daniel M. Traynor (N.D. ID#05395)
TRAYNOR LAW FIRM, PC
509 5th Street NE, Ste. 1 - P.O. Box 838
Devils Lake, ND 58301-0838
Telephone: (701) 662-4077
Email: dantraynor@traynorlaw.com
Attorneys Plaintiff James Ziegler d/b/a Lake
Region Livestock

FILED
APR 30 2009
RAMSEY COUNTY
CLERK OF DIST. CT.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF RAMSEY

NORTHEAST JUDICIAL DISTRICT

CIVIL NO. 36-08-C-00252

James Ziegler d/b/a Lake Region Livestock,)

Plaintiff,)

v.)

Meadowbrook Insurance Group, Inc. and)
Star Insurance Company,)

Defendants.)

NOTICE OF APPEAL

TO: THE ABOVE-NAMED COURT

PLEASE TAKE NOTICE that Defendants Star Insurance Company and Meadowbrook Insurance Group hereby appeal to the North Dakota Supreme Court from the Court's "Order for Partial Summary Judgment in Favor of Plaintiff" dated March 2, 2009. Defendants appeal the part of such order granting Ziegler a partial summary judgment and ordering Defendants to indemnify and defend Ziegler in the pending action, Dakota West Credit Union v. Ziegler, District Court for Ramsey County, North Dakota, Civil No. 36-06-C-00158, and denying Defendants' motion to dismiss on the ground that there is no duty to defend or indemnify under the stockyard services policy issued by Star Insurance company to Ziegler.

Dated at Bismarck, North Dakota, this 30th day of April, 2009.

CROWLEY FLECK PLLP
Attorneys for Defendants
400 E. Broadway, Suite 600
P.O. Box 2798
Bismarck, ND 58502-2798

By *Gary R. Wolberg*
GARY R. WOLBERG (ID #03355)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was on the 30th day of April, 2009, served via facsimile and U.S. mail on the following:

Daniel M. Traynor
TRAYNOR LAW FIRM, PC
509 5th Street NE, Suite 1
P.O. Box 838
Devils Lake, ND 58301-0838
Facsimile: 701-662-7537

Gary R. Wolberg
GARY R. WOLBERG

FILED

MAY 04 2009

STATE OF NORTH DAKOTA

IN DISTRICT COURT
RAMSEY COUNTY
CLERK OF DIST. CT.

COUNTY OF RAMSEY

NORTHEAST JUDICIAL DISTRICT

CIVIL NO. 36-08-C-00252

James Ziegler d/b/a Lake Region Livestock,)
)
 Plaintiff,)
)
 v.)
)
 Meadowbrook Insurance Group, Inc. and)
 Star Insurance Company,)
)
 Defendants.)

MOTION FOR N.D.R.CIV.P. 54(b) CERTIFICATION

Defendants, Meadowbrook Insurance Group, Inc. and Star Insurance Company, respectfully move this Court pursuant to N.D.R.Civ.P. 54(b) and N.D.R.Ct. 3.2 to certify its March 2, 2009, Order on Motion for Summary Judgment as a final judgment, allowing them to seek expedited appellate review of the Order.

This motion is based on the accompanying affidavit, brief, and the remainder of the file herein.

CROWLEY FLECK PLLP
 Attorneys for Defendants
 400 E. Broadway, Suite 600
 P.O. Box 2798
 Bismarck, ND 58502-2798

By *Gary R. Wolberg*
 GARY R. WOLBERG (ID #03355)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was on the 4th day of May, 2009, served via facsimile and U.S. Mail to the following:

Daniel M. Traynor
TRAYNOR LAW FIRM, PC
509 5th Street NE, Suite 1
P.O. Box 838
Devils Lake, ND 58301-0838



GARY R. WOLBERG

FILED

MAY 04 2009

STATE OF NORTH DAKOTA

IN DISTRICT COURT
COUNTY CLERK OF DIST. CT.

COUNTY OF RAMSEY

NORTHEAST JUDICIAL DISTRICT

CIVIL NO. 36-08-C-00252

James Ziegler d/b/a Lake Region Livestock,)
)
 Plaintiff,)
)
 v.)
)
 Meadowbrook Insurance Group, Inc. and)
 Star Insurance Company,)
)
 Defendants.)

BRIEF IN SUPPORT OF MOTION FOR N.D.R.CIV.P. 54(b) CERTIFICATION

Defendants, Meadowbrook Insurance Group, Inc. and Star Insurance Company ("Defendants"), move this Court pursuant to N.D.R.Civ.P. 54(b), to certify its March 2, 2009, Order Granting Partial Summary Judgment in Favor of the Plaintiff as a final judgment, allowing them to seek expedited appellate review of the Order. Defendants submit this brief in support of their motion.

FACTS

The facts in this case are well outlined in the Defendants' Brief in Support of Motion for Summary Judgment. Briefly, the insured, Ziegler d/b/a Lake Region ("Ziegler"), was sued by Dakota West for negligence, and other claims that were subsequently dismissed. Ziegler requested that Defendants defend the lawsuit and indemnify him against any judgment obtained by Dakota West. Defendants denied the demand on the ground that the insurance policy provided no duty to defend or indemnity as against the allegations in Dakota West's complaint. Ziegler then brought this action against Defendants for bad faith and/or repudiation of contract

and for a declaratory judgment that Defendants have a duty to defend and indemnify him in the underlying action.

All parties moved for summary judgment regarding the issues in this case. This Court entered an Order Granting Partial Summary Judgment in Favor of the Plaintiff on March 2, 2009. A Notice of Entry of Judgment was served on March 5, 2009. This Court concluded that Star has a duty to defend and indemnify Ziegler in the underlying action against Dakota West Credit Union and that the question of whether Meadowbrook is an interested party raised a genuine issue of fact precluding summary judgment. The issue of bad faith and/or repudiation of contract was not decided by summary judgment.

ARGUMENT

Rule 54 certification of the Court's Order on Motion for Summary Judgment dated April 5, 2007 ("Order") is appropriate in this case because there is no just reason for delay and because the inability to appeal this Order absent certification or a supervisory writ would create demonstrated prejudice or hardship to the Defendants.

I. Rule 54 Certification

Defendants concede that only judgments and decrees which constitute a final judgment of the rights of the parties to the action and orders enumerated by statute are appealable. Brummund v. Brummund, 2008 ND 224, ¶ 6, 758 N.W.2d 735. In this case, the Court entered an Order granting partial summary judgment, which would ordinarily not be appealable. However, N.D.R.Civ.P. 54(b) authorizes a trial court to enter a final judgment adjudicating fewer than all of the claims of all of the parties upon an express determination by the trial court "that there is no just reason for delay and upon an express direction for the entry of judgment." The

moving party holds the burden to demonstrate extraordinary circumstances or unusual hardship. Wimbledon Grain, 2003 ND 104, ¶ 8, 663 N.W.2d 186.

This Court has discretion to certify the Order entered as final under Rule 54, and its decision will not be reversed absent an abuse of that discretion. Choice Financial Group v. Schellpfeffer, 2005 ND 90, ¶ 7, 696 N.W.2d 504. Rule 54 certification should be reserved for unusual circumstances where the party seeking certification demonstrates that without it, prejudice or hardship would result. While there is a strong policy against piecemeal litigation and Rule 54(b) certification is not favored, it is appropriate in this case. Mann v. North Dakota Tax Comm'r, 2005 ND 36, ¶ 12, 692 N.W.2d 490. When granting a motion for Rule 54 certification, the district court must delineate in its order the unusual or compelling circumstances justifying certification. Sickler v. Kirkwood, 1997 ND 40, ¶¶ 6-7, 560 N.W.2d 532.

The North Dakota Supreme Court has identified factors for trial courts to consider when granting Rule 54 certification. They are:

1. the relationship between the adjudicated and unadjudicated claims;
2. the possibility that the need for review might or might not be mooted by future developments in the district court;
3. the possibility that the reviewing court might be obliged to consider the same issue a second time;
4. the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and
5. miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Hansen v. Scott, 2002 ND 101, ¶ 9, 645 N.W.2d 223.

The North Dakota Supreme Court has not addressed this particular issue in relation to a Rule 54 certification. However, the Eighth Circuit Court of Appeals and other jurisdictions have allowed Rule 54 certification on this issue. See, e.g., Westfield Ins. Co. v. Kroiss, 694 N.W.2d 102 (Minn. App. Ct. 2005) (allowing Rule 54 certification of duty to defend) (unpublished); Pacific Ins. Co. v. Burnet Title, Inc., 380 F.3d 1061 (8th Cir. 2004) (same); John Deere Ins. Co. v. Shamrock Indus., 929 F.2d 413, 419 (8th Cir.1991) (same); Steadfast Ins. Co. v. Caremark Rx, Inc., 869 N.E.2d 910 (Ill. App. Ct. 2007) (same); Allianz Ins. Co. v. Guidant Corp., 387 Ill.App.3d 1008, 900 N.E.2d 1218 (Ill. App. Ct. 2008) (same); General Acc. Ins. Co. v. Insurance Co. of North America, 540 N.E.2d 266 (Ohio 1989); Trammell Crow Residential Co. v. Virginia Sur. Co., Inc., 2008 WL 5062132 (Tex. 2008) (same) (slip copy); Horn v. Transcon Lines, Inc., 898 F.2d 589 (7th Cir. 1990) (same); Avondale Industries, Inc. v. Travelers Indem. Co., 123 F.R.D. 80 (S.D.N.Y. 1988) (same).

II. Evaluation of the Factors

Although the Supreme Court has not addressed Rule 54 certification on the duty to defend, examination of the factors shows that each favors certification in this case.

A. The Relationship Between the Adjudicated and Unadjudicated Claims

The relationship between the adjudicated and unadjudicated claims in this case favors Rule 54 certification. Ziegler raised two issues, bad faith and/or repudiation of contract and the duty to defend and indemnity. This Court entered an Order granting partial summary judgment to the Plaintiff. The adjudicated claim is that Defendant, Star, has a duty to defend and indemnify Ziegler. The unadjudicated claims are whether Meadowbrook is liable as well and whether Defendants engaged in bad faith.

Star has been determined to have a duty to defend and indemnify in the underlying negligence action. Whether Meadowbrook is also liable is inconsequential to an appeal of the duty to defend and indemnify as its liability is based on Star's liability. Furthermore, Star has already reimbursed Ziegler for his attorney's fees and costs and retained an attorney to represent him in order to comply with the Court's directive. Affidavit of Amy L. Foster at ¶ 4.

The alleged bad faith of Defendants has no relationship to Defendants' duty to defend or indemnify Ziegler in the underlying negligence action. The duty to defend and indemnify is a separate determination conducive to a Rule 54 certification for all the reasons outlined in this motion. The adjudication of underlying factual issues relating to bad faith does not impact the Court's conclusions of law that Defendants have a duty to defend and indemnify Ziegler. The unique relationship between the claims in this case supports Rule 54 certification.

B. The Possibility that the Need for Review Might or Might not be Mooted by Future Developments in the District Court

There is no possibility that future developments would moot an appeal of the duty to defend and indemnify. In actuality, if Defendants are successful on appeal of the issue of the duty to defend and indemnify, the remaining issues in *this* action would be moot. If the Supreme Court determines that Star has no duty to defend under the policy in question, Meadowbrook cannot be liable, and there can be no bad faith. Allowing appeal at this time will ultimately save the resources of the parties and of the judiciary. Therefore, this factor favors Rule 54 certification.

C. The Possibility that the Reviewing Court might be Obligated to Consider the Same Issue a Second Time

Similarly, there is no possibility that the reviewing court might be obliged to consider the same issue a second time. If the Supreme Court addresses the duty to defend and indemnify

now, it will not be possible for the issue to arise again. Indeed, as stated above, resolution of this issue now will save the resources of the parties and of the judiciary. Therefore, this factor favors Rule 54 certification.

D. The Presence or Absence of a Claim or Counterclaim Which Could Result in Setoff Against the Judgment Sought to be Made Final

There is no claim or counterclaim that would result in setoff of the Order granting partial summary judgment. Therefore, this factor favors Rule 54 certification.

E. Miscellaneous Factors such as Delay, Economic and Solvency Considerations, Shortening the Time of Trial, Frivolity of Competing Claims, Expense, and the Like

The most compelling arguments in favor of Rule 54 certification fall under this factor and favor Rule 54 certification. The unique nature of the issue of duty to defend and indemnify make the consequences of the inability to appeal absent Rule 54 certification or a supervisory writ significant in this case. A delay is outweighed by the prejudice and hardship to the Defendants if they are not granted certification. Under the current procedural posture of this case, no legal remedy exists to prevent this prejudice and hardship.

The inability to appeal this Court's Order absent Rule 54 certification or a supervisory writ causes significant prejudice and hardship to Defendants. The Court found that Defendants have a duty to defend and indemnify Ziegler in the underlying action. Pursuant to that Order, Star has paid \$70,985.80 for attorney fees and costs incurred by Ziegler in defending the claims made against him by West Dakota Credit Union in the underlying action. Affidavit of Amy F. Foster at ¶ 4, and copy of check attached thereto. This includes principal in the amount of \$65,934.81 and interest at the rate of six percent per annum in the amount of \$5,050.99 through April 20, 2009. Id. Star paid this amount even though it has not yet received from Ziegler's

attorneys copies of their invoices for attorney fees and costs in the underlying action. Id. While it is impossible to estimate future legal costs with certainty, Star has set aside \$25,000 for the future defense of that action. Id. at ¶ 6. The final amount could be greater than \$25,000. Id. In addition, significant administrative time and costs would be required of Star's employees to manage the defense of the underlying action. Id.

The Court's Order not only concluded that a duty to defend exists, but that Defendants have a duty to indemnify Ziegler in the underlying action. It is possible that a trial in the underlying action would result in an outcome where indemnity is not actually required. If so, there is no coverage under the policy regardless of a duty to defend. However, because this Court has already concluded that Defendants must indemnify Ziegler, Defendants are left in an untenable position.

Defendants have no legal remedy available to them to avoid incurring the already significant costs involved in defending the underlying action and prejudice to them. Because only partial summary judgment was entered, Defendants will be required wait until a trial in this action is concluded and a judgment entered to appeal the partial summary judgment decision. It is possible that the underlying action will conclude before this case does. At that point, Defendants' only option is to appeal and, if successful, attempt to recover the costs of defense and any judgment from Ziegler. Considering the fact situation upon which this case is based, it is unlikely that Defendants would be able to recover those funds from Ziegler.

An immediate appeal will not inappropriately delay this case or the underlying action. The remaining issue of bad faith is predicated on Defendants first having a duty to defend or indemnify in this case. A delay to determine these issues is warranted under the circumstances of this case. Furthermore, a delay in the underlying action is likely even if Rule 54 certification

is not granted. Defendants have retained counsel for Ziegler and that counsel has already moved for a continuance of the action to allow him time to prepare the case. Affidavit of Amy F. Foster at ¶ 5.

Although the Supreme Court has not addressed this particular issue in relation to a Rule 54 certification, other cases regarding Rule 54 certification are instructive. See Symington v. Walle Mut. Ins. Co., 1997 ND 93, 563 N.W.2d 400; Wyatt v. Adams, 551 N.W.2d 775 (N.D. 1996); Gessner v. City of Minot, 529 N.W.2d 868, 870 (N.D.1995). Symington, is particularly relevant. In Symington an insured sued his insurer alleging his farm policy provided coverage for his loss. Symington at ¶ 8. Alternatively, the insured claimed his agent negligently failed to procure coverage and misrepresented that coverage had been provided. Id. The trial court granted partial summary judgment for the insurer, concluding no coverage existed for the loss under the policy, but did not decide the claim against the agent. Id. at ¶ 4. The trial court granted Rule 54 certification and the Supreme Court concluded that it did not abuse its discretion. The Supreme Court stated that no matter how the remaining claim of liability against the agent is decided, the coverage issue will always need to be resolved and will never be mooted by future developments in the trial court. The Supreme Court commented that the opposite is true. A decision on the remaining claims is moot if the appeal is reversed. Id. at ¶ 8. The Supreme Court agreed that while the insured's remaining claims against the insurer were contingent upon a determination that the farm policy did not provide coverage, they are separate and distinct from the issue of coverage.

Similarly, the issue of the duty to defend and indemnify is an issue that will always need to be resolved and will never mooted by further developments in the trial court related to bad faith/repudiation of contract. The remaining claim of bad faith/repudiation of contract or liability

of Meadowbrook are contingent on whether a duty to defend or indemnify exists, but they are separate and distinct from the issue of coverage.

CONCLUSION

Rule 54 certification of the Court's Order on Motion for Summary Judgment dated March 2, 2009, is appropriate in this case. There is no just reason for delay, the inability to appeal this Order absent Rule 54 certification or a supervisory writ would create demonstrated prejudice or hardship to the Defendants, and no legal remedy exists for Defendants to obtain appellate review of this issue.

Defendants respectfully request the Court enter an Order certifying its March 2, 2009, Order Granting Partial Summary Judgment in Favor of the Plaintiff as a final judgment, allowing them to seek expedited appellate review of the decisions therein.

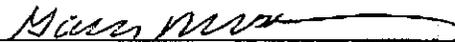
CROWLEY FLECK PLLP
Attorneys for Defendants
400 E. Broadway, Suite 600
P.O. Box 2798
Bismarck, ND 58502-2798

By 
GARY R. WOLBERG (ID #03355)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was on the 4th day of May, 2009, served via facsimile and U.S. Mail to the following:

Daniel M. Traynor
TRAYNOR LAW FIRM, PC
509 5th Street NE, Suite 1
P.O. Box 838
Devils Lake, ND 58301-0838



GARY R. WOLBERG

FILED
MAY 04 2009
RAMSEY COUNTY
CLERK OF DIST. CT.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF RAMSEY

NORTHEAST JUDICIAL DISTRICT

CIVIL NO. 36-08-C-00252

James Ziegler d/b/a Lake Region Livestock,)

Plaintiff,)

v.)

Meadowbrook Insurance Group, Inc. and)

Star Insurance Company,)

Defendants.)

AFFIDAVIT OF AMY L. FOSTER

STATE OF KANSAS)
)SS
COUNTY OF JOHNSON)

AMY L. FOSTER deposes and states:

1. I am a Senior Claims Representative for Star Insurance Company, one of the above-named defendants. I am of lawful age and am personally knowledgeable concerning the matters herein.

2. Star Insurance Company is a wholly owned subsidiary of Meadowbrook Insurance Group, Inc., which also is a named defendant in the above action. Star maintains its principal place of business in Kansas City, Missouri. Meadowbrook does business only through its wholly owned subsidiaries, including Star Insurance Company, and does not itself insure any person or business.

3. By an "Order Granting Partial Summary Judgment in Favor of the Plaintiff" dated March 2, 2009, this Court ordered Star to "defend and indemnify" James Ziegler in the underlying action, Dakota West Credit Union v. James Ziegler, District Court for Ramsey County, North Dakota, Civil No. 36-06-C-00158. This Court concluded that there was a duty to "defend and indemnify" James Ziegler pursuant to a stockyard services policy that was issued by Star to Ziegler, Policy No. LT 010 01 43.

4. Pursuant to the Court's order, Star has reimbursed James Ziegler in the amount of \$70,985.80 for attorney fees and costs incurred by Ziegler in defending the claims made against him by West Dakota Credit Union in Case No. 36-06-C-00158. This includes principal in the amount of \$65,934.81 and interest at the rate of six per cent per annum in the amount of \$5,050.99 through April 20, 2009. Star paid this amount even though it has not yet received from Ziegler's attorneys copies of their invoices for attorney fees and costs in the underlying action.

5. In addition, Star has retained attorney Allen J. Flaten of Grand Forks, North Dakota, to assume the defense of the underlying action, Case No. 36-06-C-00158. Mr. Flaten has moved for a continuance of the trial now scheduled in that matter for June 16, 2009, and a substitution of counsel has been filed. The motion for continuance was filed on or about April 24, 2009. Star will defend Ziegler under a reservation of rights.

6. It is impossible at this time to estimate the cost of defense of the underlying action by Mr. Flaten and his law firm. However, Star has set aside \$25,000 to date for the defense. The final amount could be greater than \$25,000. In addition, significant administrative time and costs would be required of Star's employees to manage the defense of the underlying litigation.

7. In addition, Dakota West Credit Union is asserting a claim in the underlying action of almost \$1 million. While the liability of Ziegler to Dakota West will not be determined until the conclusion of trial, it is apparent that the potential exposure to Star is very significant. For these reasons, Star and Meadowbrook request that this Court certify the partial summary judgment dated March 2, 2009, as a final judgment pursuant to Rule 54, North Dakota Rules of Civil Procedure.

8. Star and Meadowbrook also have filed a notice of appeal to the North Dakota Supreme Court from the partial summary judgment dated March 2, 2009. Star and Meadowbrook believe that the Supreme Court is more likely to hear their appeal if this Court grants certification of the partial summary judgment as a final order or judgment. There has been no settlement between Star, Meadowbrook and Ziegler in this action. Star has reimbursed Ziegler for attorney fees and costs and has retained Mr. Flaten to defend Ziegler in order to comply with the Court's order dated March 2, 2009, pending a final determination of the issues on appeal.

Dated this 24 day of April, 2009.



AMY L. FOSTER

Subscribed and sworn to before me this 29 day of April, 2009.



Dazell Ward
Notary Public
Johnson County, Kansas
My commission expires:

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was on the 4th day of April,
2009, mailed to the following:
served via facsimile and U.S. Mail

Daniel M. Traynor
TRAYNOR LAW FIRM, PC
509 5th Street NE, Suite 1
P.O. Box 838
Devils Lake, ND 58301-0838

Gary R. Wolberg
GARY R. WOLBERG

FILED

2009

RAMSEY COUNTY
CLERK OF DISTRICT COURT

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF RAMSEY

NORTHEAST JUDICIAL DISTRICT

James Ziegler d/b/a Lake Region Livestock,
Plaintiff,

Ramsey County Civil No. 36-8-C-252-1
Case Type: Declaratory Judgment

vs.

Meadowbrook Insurance Group, Inc., and
Star Insurance Company,
Defendants.

**ZIEGLER'S RESPONSE TO DEFENDANTS'
MOTION FOR N.D.R.CIV.P. 54(b) CERTIFICATION**

INTRODUCTION

On March 2, 2009, this Court entered an Order Granting Partial Summary Judgment in Favor of the Plaintiff. On March 5, 2009, a Notice of Entry of Order Granting Partial Summary Judgment in Favor of the Plaintiff was served upon Defendants. On April 30, 2009, Defendants Meadowbrook Insurance Group, Inc., ("Meadowbrook") and Star Insurance Company, ("Star") filed a Notice of Appeal, ostensibly appealing the partial summary judgment entered by the District Court. On May 4, 2009, Defendants interposed a Motion for N.D.R.Civ.P. 54(b) Certification, asking this Court to certify the Order Granting Partial Summary Judgment as a final judgment, to allow Defendants to seek expedited appellate review of the Order.

Plaintiff James Zieger d/b/a Lake Region Livestock ("Ziegler") now serves this

26

Response to Defendants' request for Rule 54(b) Certification. Because Defendants' Motion was filed after the Notice of Appeal, Ziegler observes it is well settled this Court no longer has jurisdiction to rule on Defendants' proffered Motion. Ziegler believes any decision made at this time would be void. In the event this Court concludes it has jurisdiction or if jurisdiction is later acquired, Ziegler welcomes the opportunity to respond to a motion properly placed before this Court.¹

¹ Rule 54(b) Certification should not be granted after the partial summary judgment entered by this Court. Defendants Meadowbrook and Star cannot show the "unusual and compelling circumstances" needed to allow for Rule 54(b) Certification. See Janavaras v. National Farmers Union Property, 449 N.W.2d 578, 580 (N.D. 1989) (holding immediate appeal of coverage issue improper).

Indeed, a brief analysis of the factors to consider for Rule 54(b) Certification show an appeal of the coverage issue at this early stage will result in a delay of two pending actions; the present case and the underlying case between Dakota West Credit Union and Ziegler:

- (1) "the relationship between the adjudicated and unadjudicated claims" – The issue of whether Meadowbrook is a proper Defendant remains open pending further discovery. Indeed, it is anticipated that further discovery will reveal additional claims and will likely involve a motion to allow punitive damages.
- (2) "the possibility that the need for review might or might not be mooted by future developments in the district court" – If a judgment in the underlying case between Dakota West Credit Union and Ziegler results in no award to Dakota West, the need to indemnify would not exist.
- (3) "the possibility that the reviewing court might be obliged to consider the same issue a second time" – Depending on the outcome of discovery and the underlying case, the liability of Meadowbrook as a Defendant would result in consideration of essentially the same issues.
- (4) "the presence or absence of a claim or counterclaim which would result in setoff against the judgment sought to be made final" – The outcome of the underlying case between Dakota West and Ziegler would determine if any indemnification would be needed.
- (5) "miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims,

LEGAL ARGUMENT

Defendants' Motion for N.D.R.Civ.P. 54(b) Certification was filed in the District Court after the Notice of Appeal. "Jurisdiction of the supreme court attaches upon the filing of the appeal, and the trial court has no further jurisdiction in the matter." Buzzell v. Libi, 340 N.W.2d 36, 42 (N.D. 1983). The supreme court's jurisdiction attaches to the entire cause of action, not just to the specific order or judgment appealed from. J.S.S. v. P.M.Z., 429 N.W.2d 425, 429 (N.D. 1988).

In Buzzell, an objection to costs and disbursements was filed six days before the notice of appeal. Id. The trial court had not yet ruled on the objection. Id. On appeal, the supreme court observed trial court properly determined that it was without jurisdiction to consider the objections to costs after the notice of appeal was filed. Id. While it affirmed the other respects of the underlying judgment, the supreme court remanded the costs objection to the trial court in the supreme court's opinion. Id. at 43.

It is well settled that the jurisdiction of the supreme court attaches upon the filing of a notice of appeal and orders entered thereafter are void or ineffectual. State ex rel. Heitkamp

expense, and the like" – Appeal of the coverage issue at this time will delay two pending cases, the present case and the underlying case between Dakota West and Ziegler. Indeed, in the unlikely event that the coverage determination is overturned, the underlying case will be hopelessly delayed and will result in uncertainty, another change of counsel for Ziegler and unnecessary expense and delay for Ziegler and Dakota West.

See Janavaras, 449 N.W.2d at 581 (providing non-inclusive factors for a trial court to consider in Rule 54(b) Certification issues).

v. Family Life Services, Inc., 2000 ND 166, ¶ 54, 616 N.W.2d 826 (noting written observation by trial court judge to the supreme court may be viewed as improper); Vorachek v. Citizens State Bank of Lankin, 421 N.W.2d 45, 48-49 (N.D. 1988) (observing order correcting clerical errors was ineffectual because it was entered after notice of appeal was filed); J.S.S., 429 N.W.2d at 429 (holding judgment void where it was entered after notice of appeal filed); Harwood v. Harwood, 283 N.W.2d 144, 145 (N.D. 1979) (stating “trial court order made after appeal is void for lack of jurisdiction”); and Buzzell v. Libi, 340 N.W.2d 36 (observing trial court properly avoided ruling on objections while appeal was pending).

There may be exceptions to the general rule that the trial court loses jurisdiction upon the filing of a notice of appeal. See N.D.C.C. § 28-27-24 (stating district court may enter further orders relating to perishable property); United Accounts, Inc. v. Teladvantage, Inc., 499 N.W.2d 115, 119 (N.D. 1993) (concluding trial court retains jurisdiction where appeal is patently frivolous on its face); and Orwick v. Orwick, 152 N.W.2d 95, 97 (N.D. 1967) (granting leave to submit motion to trial court for temporary alimony, support money, and attorneys fees and costs pending appeal). But see J.S.S., 429 N.W.2d at 429 (observing trial court’s amended judgment, entered after notice of appeal was filed, was improperly entered while appeal was pending). But nowhere is a request for Rule 54(b) Certification among the exceptions to this rule.

While a district court may retain jurisdiction with the filing of a frivolous appeal, in United Accounts, 499 N.W.2d at 119, the North Dakota Supreme Court indicated a trial court proceeds “at its own peril” after a notice of appeal is filed. Ziegler submits this Court should

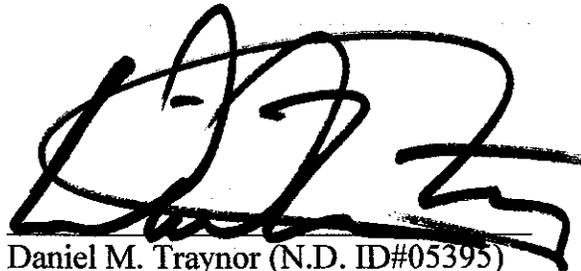
conclude it has no jurisdiction to decide Defendants' Motion for Rule 54(b) Certification.

In the instant case, Defendants Meadowbrook and Star have filed a notice of appeal to the North Dakota Supreme Court. Defendants' later-filed Motion for N.D.R.Civ.P. 54(b) Certification cannot be considered as this Court is without jurisdiction. In the event this Court determines it has jurisdiction or if jurisdiction is later acquired, Ziegler respectfully requests an opportunity to respond and oppose Defendants' request for Rule 54(b) Certification.

CONCLUSION

For the foregoing reasons, Plaintiff James Ziegler d/b/a Lake Region Livestock respectfully requests this Court CONCLUDE it has no jurisdiction to consider the Motion for N.D.R.Civ.P. 54(b) Certification filed by Defendants Meadowbrook Insurance Group, Inc., and Star Insurance Company.

DATED May 14, 2009.



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ATTORNEYS FOR PLAINTIFF JAMES ZIEGLER

D/B/A LAKE REGION LIVESTOCK

[¶ 1]

CERTIFICATE OF SERVICE

[¶ 2] I hereby certify that a true and correct copy of the foregoing document was filed electronically with the Clerk of the Supreme Court as provided in Administrative Order 14, and that on the date signed below the undersigned provided a copy of the document filed electronically to the following recipient's e-mail address as published in the supreme court's online directory as provided in Administrative Order 14(D):

Mr. Gary R. Wolberg
Crowley Fleck PLLP
400 E. Broadway Ave., Ste 600
P.O. Box 2798
Bismarck, ND 58502-2798
Email: gwolberg@crowleyfleck.com

[¶ 3] DATED June 22, 2009.

A handwritten signature in black ink, appearing to read 'D. Traynor', written over a horizontal line.

[¶ 4]

Daniel M. Traynor (N.D. ID#05395)