

No. 20190242

**In the Supreme Court
State of North Dakota**

State of North Dakota by
Workforce Safety & Insurance,

Plaintiff/Appellee,

Supreme Court No. 20190242

[District Court No. 08-2018-CV-02953]

vs.

Chris Oden,

Defendant/Appellant.

BRIEF OF APPELLANT CHRIS ODEN

Appeal from the Final Judgment entered in the
District Court, South Central Judicial District,
County of Burleigh, the Honorable James S. Hill

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TABLE OF CONTENTS

Table of Authorities	3
Statement of the Issues	5
Statement of the Case and Procedural History	¶1
Statement of the Facts	¶3
Argument	¶36

TABLE OF AUTHORITIES

Cases

<i>Arndt v. Maki</i> , 2012 ND 55, 813 NW 2d 564 (ND 2012).....	¶48
<i>Carlson v. Workforce Safety & Insurance</i> , 2009 ND 87, 765 NW 2d 691 (ND 2009)	¶¶57, 58, 59, 62, 63
<i>Estate of Nelson v. Solberg</i> , 2018 ND 118, 863 NW 2d 521 (2018)	¶41
<i>Farmers Union Oil Co. v. Smetana</i> , 2009 ND 74, 764 NW 2d 665 (ND 2009).....	¶49
<i>Gessner v. City of Minot</i> , 1998 ND 157, 583 NW 2d 90 (ND 1998)	¶79
<i>Hamilton v. Woll</i> , 2012 ND 238, 823 NW 2d 754 (ND 2012)	¶¶49, 50
<i>Lingowski v. Altendorf</i> , 2012 ND 34, 812 NW 2d 427 (ND 2012)	¶79

Statutes

North Dakota Enforcement of Foreign Judgments Act, § 28-20.1	¶1(a), 38
--	-----------

North Dakota Professional Rules of Conduct

North Dakota Professional Rule of Conduct 5.5	¶59, 63, 65
North Dakota Professional Rule of Conduct 5.5(b).....	¶58
North Dakota Professional Rule of Conduct 5.5(2).....	¶60
North Dakota Professional Rule of Conduct 5.5(3).....	¶60, 61

North Dakota Rules of Civil Procedure

North Dakota Rule of Civil Procedure 60.....	¶39
--	-----

North Dakota Rules of Evidence

North Dakota Rule of Evidence 201	¶40, 41
---	---------

United States Code

28 U.S.C. § 1738	¶37
------------------------	-----

United States Constitution

Full Faith and Credit Clause	¶1, 36
------------------------------------	--------

STATEMENT OF THE ISSUES

A. The Court’s decision granting summary judgment in favor of Petitioner is in direct contravention of the Court’s legal duty to recognize and enforce the Missouri Judgment pursuant to the Full Faith and Credit Clause of the United States Constitution; 28 U.S.C. § 1738 of the United States Code; and § 28-20.1-01 of the North Dakota Civil..... ¶35

B. Even if the District Court erred in failing to grant summary judgment on behalf of Petitioner based on the Missouri judgment now registered in the state of North Dakota, the District Court committed error by failing to recognize that a genuine issue of material fact existed with respect to the matter of whether Petitioner’s claim is barred by the legal doctrine of “accord and satisfaction.”..... ¶45

C. The District Court erred in granting summary judgment to Petitioner based on the alleged failure of Respondent to file a timely motion for the reconsideration for the following reasons:..... ¶52

(1) Respondent, through his Missouri counsel, did file a timely motion for reconsideration, as evidenced by the admission of the claims representative Ms. Heinle; and..... ¶52

(2) If Missouri counsel’s correspondence did not constitute a motion for reconsideration, this was solely attributable to the failure of Petitioner to serve proper notice on Respondent. ¶52

D. The District Court erred in denying Respondent’s motion to dismiss for insufficiency of service of process..... ¶71

STATEMENT OF THE CASE

[1] This is a civil case in which Petitioner seeks reimbursement of workers' compensation benefits paid to Petitioner in connection with a work injury which he suffered in the state of Missouri (where he is a resident) while in the employ of a North Dakota employer, Minot Builders Supply. Respondent denies liability on multiple grounds, including:

- (a) Petitioner's claim of reimbursement is barred by the full faith and credit clause of the United States Constitution and the North Dakota Enforcement of Foreign Judgments Act;
- (b) Petitioner's claim of reimbursement is barred by the legal doctrine of "accord and satisfaction";
- (c) Petitioner failed to effectuate proper service of process on Respondent;
- (d) Petitioner failed to provide proper notice to Respondent of his right to seek reconsideration of the claims representative's decision ordering the reimbursement of benefits; and
- (e) Petitioner failed to recognize that under the law the response from Respondent's Missouri counsel was sufficient to constitute a motion for reconsideration under North Dakota law.

[2] Following cross-motions for summary judgment filed by the Parties, the District Court found (1) that Respondent was subject to the jurisdiction of the court in that Petitioner had effected proper service of process on Respondent; and (2) that Petitioner was entitled to summary judgment against Respondent on its claim for reimbursement of workers' compensation benefits previously paid. These rulings were set forth in the

Court's "Memorandum and Order of Motion to Dismiss and Motions for Summary Judgment" entered on June 7, 2019 [**Doc. 78**]. Judgment was entered pursuant to that decision on June 12, 2019 [**Doc. 85**]. A Notice of Appeal was filed on August 25, 2019 [**Doc. 88**], and the current appellate proceedings have followed.

STATEMENT OF FACTS

A. Respondent's work injury.

[3] On May 27, 2010, Respondent suffered injury to his left wrist, elbow, and shoulder while in the employ of Minot Builders Supply, a North Dakota Company. The injury occurred in the state of Missouri.¹

[4] At the time of the work injury, Respondent was a resident of the state of the Missouri, and has remained a citizen of that state at all times since.²

[5] Because Respondent's accident occurred in the state of Missouri, he was entitled to workers' compensation benefits under the laws of that state, including his right to medical treatment, temporary total disability benefits for lost time from work, and an award of permanent disability.³

[6] Because Minot Builders did not carry insurance in the state of Missouri for its workers' compensation claims, Respondent was initially forced to accept workers' compensation benefits through Petitioner or be terminated from his medical treatment. Under North Dakota law, the benefits paid by Petitioner were limited to payment of Respondent's medical bills and payment of temporary total disability benefits for his lost time from work. The benefits did not provide for an award for permanent disability.⁴

1 Affidavit of Chris Oden, Exhibit A to Defendant's Suggestions in Opposition to Plaintiff's Motion for Summary Judgment and Suggestions in Support of Defendant's Cross Motion for Summary Judgment, [Doc. 41]

2 Id.

3 Missouri Revised Statutes Section 287.010, *et. seq.*, see Sections 287.140 – 287.250.

4 Correspondence from WSI dated February 25, 2016, Exhibit K to Plaintiff's Reply to Defendant's Suggestions in Opposition to Motion for Summary Judgment and Cross-Motion for Summary Judgment, [Doc. 67]

[7] Following his release from medical treatment for the work injury, Respondent's workers' compensation benefits were terminated by Petitioner. Respondent was not offered any compensation for the permanent injury which he had sustained to his left arm, nor was he entitled to any award for permanent disability under North Dakota law.⁵

[8] Because Respondent had suffered permanent disability as a result of the work injury, Respondent retained Missouri counsel to pursue an award of benefits for permanency which were available to him under that state's law.⁶

[9] Petitioner was aware of the Missouri filing, and communicated its awareness of the filing to Respondent's Missouri counsel by way of the October 9, 2013 correspondence from claims representative Ms. Heinle.⁷

[10] Over the next three years, the Missouri worker's compensation case was litigated with the knowledge of Petitioner, with the parties exchanging medical reports regarding the nature and extent of Respondent's permanent disability.⁸

[11] On February 9, 2016, the Missouri Division of Workers' Compensation, through a duly appointed administrative law judge, approved a settlement in accordance with the dictates of Missouri law as between Respondent, Minot Builders, and NDWSI, all of whom were listed as parties on the face of the settlement document. Pursuant to the

5 Affidavit of Chris Oden, Exhibit A to Defendant's Suggestions in Opposition to Plaintiff's Motion for Summary Judgment and Suggestions in Support of Defendant's Cross Motion for Summary Judgment, **[Doc. 41]**

6 Id.

7 Notice of Decision Suspending Benefits Dated October 9, 2013, Exhibit B to Plaintiff's Motion for Summary Judgment **[Doc. 15]**.

8 Affidavit of Ronald L. Edelman, Exhibit B to Defendant's Reply Brief as to Defendant's Motion to Dismiss and the Cross-Motions for Summary Judgment **[Doc. 76]**.

terms of that settlement, Respondent received \$30,000.00 as compensation for the permanent partial disability which he sustained as a result of the work injury, plus the award of temporary total disability benefits and medical expenses previously paid.⁹

[12] The Stipulation for Compromise Settlement, which was set forth on the form issued and approved by the Missouri Division of Workers' Compensation, was prepared by Mr. John Jurcyk. Mr. Jurcyk represented himself within the terms of that document to be representing the interests of both Minot Builders NDWSI.¹⁰

[13] NDWSI was specifically listed on the Stipulation for Compromise Settlement in the box titled "insurer."¹¹

[14] NDWSI was also referenced in the terms of the settlement as being the "carrier" with respect to the Missouri claim.¹²

[15] Mr. Jurcyk signed off on the Stipulation for Compromise Settlement on the box titled "attorney for employer/insurer."¹³

[16] In addition to stating that NDWSI and Minot Builders agreed to pay the benefits to Respondent as set forth in paragraph 13 above, the court-issued Stipulation for

⁹ Id. **[Doc. 76]**; Stipulation for Compromise Settlement, Injury No. 10-044619 date February 9, 2016, Exhibit A to Plaintiff' Answer **[Doc. 29]**.

¹⁰ Affidavit of Ronald L. Edelman, Exhibit B to Defendant's Reply Brief as to Defendant's Motion to Dismiss and the Cross-Motions for Summary Judgment **[Doc. 76]**.

¹¹ Stipulation for Compromise Settlement, Injury No. 10-044619 date February 9, 2016, Exhibit A to Plaintiff' Answer **[Doc. 29]**.

¹² Id.

¹³ Id.

Compromise Settlement specifically stated that the settlement resolved “any and all issues” as between the parties.¹⁴

[17] In agreeing to the terms of the Missouri Stipulation for Compromise Settlement prepared by opposing counsel, Respondent and his attorney relied upon the representations made therein. Respondent and his counsel relied upon the fact that NDWSI was listed as a party to the agreement, and that the settlement resolved “any and all issues” as between those parties.¹⁵

[18] Respondent and his counsel further relied upon the fact that Mr. Jurcyk had authority to act on behalf of NDWSI in that he had specifically listed them as the insurer on the claim, and had executed the settlement on behalf of both NDWSI and Minot Builders.¹⁶

B. Petitioner’s claim for reimbursement of benefits.

[19] On March 8, 2016, the claims representative Ms. Heinle authored a letter to Petitioner titled, “Notice of Decision Reversing Decision, Notice of Decision Denying Benefits, Out of State,” stating that Petitioner was seeking reimbursement of the workers’ compensation benefits which it had paid for medical and temporary total disability. The letter was addressed to Respondent, and sent to 910 Colbern Drive, Belton, Missouri.¹⁷

¹⁴ Id.

¹⁵ Affidavit of Ronald L. Edelman, Exhibit B to Defendant’s Reply Brief as to Defendant’s Motion to Dismiss and the Cross-Motions for Summary Judgment [**Doc. 76**]; Affidavit of Chris Oden, Exhibit A to Defendant’s Suggestions in Opposition to Plaintiff’s Motion for Summary Judgment and Suggestions in Support of Defendant’s Cross Motion for Summary Judgment, [**Doc. 41**]

¹⁶ Id.

¹⁷ Notice of Decision Reversing Decision, Notice of Decision Denying Benefits, Exhibit E to Brief in Support of Summary Judgment, [**Doc. 18**]

[20] Contemporaneously with Ms. Heinle's letter of March 8, 2016, Petitioner's counsel Ms. Jorgenson-Green authored a letter dated March 4, 2016 which was addressed to Respondent's attorney and the Missouri Department of Labor and Industrial Relations, the agency which oversees the Missouri Division of Workers' Compensation. In that correspondence, Ms. Jorgenson-Green directed the Missouri Division of Workers' Compensation not to make any further payments to Mr. Oden.¹⁸

[21] Respondent did not receive the March 8, 2016 letter from Ms. Heinle, as he no longer resided at that address.¹⁹

[22] Although Respondent's counsel did not receive a copy of Ms. Heinle's letter of March 8, 2016, he did receive Ms. Jorgenson-Green's letter dated March 4, 2016 which had also been sent to the Missouri Department of Labor and Industrial Relations. By way of his letter dated March 21, 2016 (which was sent within the 30 days that Ms. Heinle had given Respondent to file a written request for reconsideration), Respondent's counsel Edelman replied to Ms. Jorgenson-Green's letter, advising her that Missouri law allowed for Respondent to collect compensation for his permanency claim, notwithstanding her argument to the contrary.²⁰

¹⁸ Correspondence from WSI dated February 25, 2016, Exhibit K to Plaintiff's Reply to Defendant's Suggestions ion Opposition to Motion for Summary Judgment and Cross-Motion for Summary Judgment, [**Doc. 67**]

¹⁹ Affidavit of Chris Oden, Exhibit A to Defendant's Suggestions in Opposition to Plaintiff's Motion for Summary Judgment and Suggestions in Support of Defendant's Cross Motion for Summary Judgment, [**Doc. 41**]

²⁰ Correspondence from Edelman & Thompson LLC dated March 21, 2016, Exhibit M to Plaintiff's Reply to Defendant's Suggestions ion Opposition to Motion for Summary Judgment and Cross-Motion for Summary Judgment [**Doc. 69**]

[23] It is evident from the record that Ms. Jorgenson-Green passed on Mr. Edelman's correspondence to Ms. Heinle, as Ms. Heinle then sent another letter to Mr. Oden dated April 1, 2016, which stated, "Workforce Safety & Insurance (WSI) received a letter from attorney Mr. Ronald L. Edelman requesting reconsideration from the notice of decision dated 3-8-16." Despite the fact that Ms. Heinle considered Mr. Edelman's letter to be a "request for reconsideration," her correspondence to Respondent went on to state that Petitioner would not recognize Mr. Edelman's request for reconsideration in that he was not licensed to practice law in North Dakota. The letter advised Mr. Oden that he could petition for reconsideration on his own behalf or secure the services of a licensed North Dakota attorney.²¹

[24] As with the prior correspondence, Mr. Oden did not receive Ms. Heinle's letter of April 1, 2016 since he did not live at that address.²²

[25] Although the letter of April 1, 2016 from Ms. Heinle lists Mr. Edelman as receiving a carbon copy, there is no proof in the record that this was sent to Edelman. Indeed, the affidavit offered by Ms. Heinle states only that the correspondence was sent to Mr. Oden.²³

C. The lawsuit and service of process.

²¹ Letter to Chris Oden dated April 1, 2016, Exhibit F to Motion for Summary Judgment [**Doc. 19**]

²² Affidavit of Chris Oden, Exhibit A to Defendant's Suggestions in Opposition to Plaintiff's Motion for Summary Judgment and Suggestions in Support of Defendant's Cross Motion for Summary Judgment, [**Doc. 41**]

²³ Affidavit of Marlene Heinle in Support of Motion for Summary Judgment [**Doc. 13**]

[26] This Complaint was filed on June 14, 2018. The Complaint listed Respondent's address as 910 Colbern Drive, Belton, Missouri.²⁴

[27] Petitioner retained a Missouri process server, Aaron Kuhns, to serve Respondent. Mr. Kuhns' Affidavit of Service states that he served Courtney Horn, Respondent's daughter, at 104 West Calico Drive, Raymore, Missouri. In the affidavit Kuhns referred to this residence as "defendant's usual place of abode."²⁵

[28] By way of affidavit, Respondent swore under oath that he did not reside at the West Calico Drive address at the time service was made. On that date, Mr. Oden resided at 1735 Lakewood Terrace, Apartment 106, Belton, Missouri. Although Mr. Oden owned the property on Colbern Road, he leased the premises to his daughter.²⁶

[29] In other sworn testimony, Ms. Horn confirmed that she rented the property on West Calico Drive from her father, and that Respondent did not reside there at the time of service. Ms. Horn further swore under oath that process server Kuhns failed to ask her if Respondent actually resided at the address.²⁷

[30] On April 26, 2019, approximately 9 months after attempting service, Kuhns signed an additional affidavit, stating, "To the best of my recollection, the individual I left the documents with confirmed the defendant Chris Oden resided at the address, 104 West Calico Drive, Raymore, Missouri 64083, and was as co-resident, and daughter of

²⁴ Complaint [**Doc. 1**]

²⁵ Affidavit of Service [**Doc. 3**],

²⁶ Affidavit of Chris Oden, Exhibit A to Defendant's Suggestions in Opposition to Plaintiff's Motion for Summary Judgment and Suggestions in Support of Defendant's Cross Motion for Summary Judgment, [**Doc. 41**]

²⁷ Affidavit of Courtney Horn, Exhibit A to Defendant's Reply Brief as to Defendant's Motion to Dismiss and the Cross Motions for Summary Judgment [**Doc. 75**]

the defendant Chris Oden.” In addition, the affidavit stated, “I think I remember her telling me that Chris Oden was out of town because of his employment as a trucker.”²⁸

D. The Missouri judgment and enforcement of the judgment in North Dakota.

[31] Subsequent to the District Court’s granting of summary judgment, Respondent petitioned the Circuit Court of Dunklin County, Missouri to issue a state judgment in conformity with the award of the Missouri Division of Workers’ Compensation. Petitioner was provided notice of this filing by Respondent.

[32] On July 30, 2019, the Circuit Court of Dunklin County issued a judgment in favor of Respondent and against Petitioner. The judgment required payment by Petitioner and Minot Builders of the benefits set forth in the ruling from the Missouri Division of Workers’ Compensation. The Dunklin County Circuit Court’s order further stated, “This is a full and final judgment as to any and all ind claims as between the Plaintiff and these Defendants.”

[33] Petitioner was provided with a copy of the Court’s judgment. Pursuant to Rule 81.05(a) of the Missouri Rules of Civil Procedure, Respondent had 30 days before the time the judgment became final in order to intervene and seek to overturn the judgment. When Respondent failed to do so, the judgment became final on August 30, 2019.

[34] Pursuant to Rule 81.04 of the Missouri Rules of Civil Procedure, Respondent then had 10 days from the date when the judgment became final to appeal the judgment to the

²⁸ Affidavit of Attempted Service by Process Server Aaron Kuhns, Exhibit A to Corrected Suggestions in Support of Defendant’s Motion to Dismiss for Lack of Service of Process [**Doc. 53**]

Missouri Court of Appeals. Neither the Petitioner nor Minot Builders appealed the judgment.

[35] On November 6, 2019, Respondent's North Dakota counsel registered the Missouri judgment in the District Court of Grand Forks County, North Dakota. Petitioner has also been notified of this filing.²⁹

ARGUMENT

A. The Court's decision granting summary judgment in favor of Petitioner is in direct contravention of the Court's legal duty to recognize and enforce the Missouri judgment pursuant to the Full Faith and Credit Clause of the United States Constitution; 28 U.S.C. § 1738 of the United States Code; and § 28-20.1-01 of the North Dakota Civil.

[36] The full faith and credit clause of the United States Constitution states in relevant part: "Full faith and credit shall be given in each state to the public Acts, Records, and Judicial Proceedings of every other state. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

[37] 28 U.S.C. § 1738 states in relevant part: "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, Records and Judicial Proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and

29 Application for Foreign Judgment Service [**Appendix Doc 9a**]; Service Document on Minot Builders Supply and ND WS&I [**Appendix Doc 9d**]

Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”

[38] Section 28-20.1-02 of the North Dakota Code states: “A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state may be filed in the office of the clerk of any district court of any county of this state. The clerk shall treat the foreign judgment in the same manner as a judgment of the district court of any county of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a district court of any county of this state and may be enforced or satisfied in like manner.”

[39] Pursuant to Rule 60 of the North Dakota Rules of Civil Procedure, a final judgment may be reopened, vacated, or stayed only if the moving party can show one of the following:

- (1) Mistake, inadvertence, surprise, or excusable neglect;
- (2) Fraud;
- (3) The judgment is irregular;
- (4) The judgment is void; or
- (5) The judgment has been satisfied, released, or discharged, or is based on a prior judgment that has been reversed or other vacated.

[40] Rule 201 of the North Dakota Rules of Evidence titled “Judicial Notice of Adjudicative Facts” requires this Court to take judicial notice of the public filings which have resulted in Respondent now having a final judgment enforceable in the state of North Dakota against Petitioner. Pursuant to Section (c)(2) of the Rule, it is mandatory for a court to take judicial notice of facts if requested by a party and if the court is

supplied with the necessary information. Pursuant to Section (b) of the Rule, facts subject to judicial notice are facts which can be “accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Pursuant to Section (d) of the Rule, judicial notice of facts may be taken at any stage of the proceeding, even on appeal.

[41] The public records contained in the Appendix to this Brief clearly fit within the parameters of Rule 201. Indeed, this court in *Estate of Nelson v. Solberg*, 863 NW 2d 521 (ND 2015) took judicial notice of court pleadings from a separate probate proceeding even though they were not a part of the underlying court’s record on appeal.³⁰

[42] In conformity with Missouri law, Respondent secured a judgment against Petitioner in Missouri Circuit Court which provided for payment to Respondent of all benefits due and owing to him, including payment of medical bills, temporary total disability benefits, and the award of permanent disability. The judgment further stated that the court’s decision resolved “all issues and claims” as between these parties.

[43] Petitioner was provided with a copy of Respondent’s petition for judgment, and a copy of the Missouri court’s final judgment. Despite having notice of the judgment, Petitioner took no action to appeal the Missouri court’s determination.

[44] The Missouri court’s judgment has now been registered in North Dakota. As a final judgment, it may be reopened, vacated, or stayed only if Petitioner were able to show that the judgment was rendered as a result of mistake or fraud, or that the judgment was irregular or void. Having been provided with adequate notice and an opportunity to be heard, Petitioner can make no such showing under these facts.³¹

30 See Appendix Documents **[Appendix Docs 9a to 9f]**

31 Docket Sheet Noting Disposition – Money Judgment Entered **[Appendix Doc 9f]**

[45] The District Court's granting of summary judgment in favor of Petitioner is clearly inconsistent with, and in contravention of, the judgment which is now binding on Petitioner pursuant to state and federal law. As a result, the District Court's decision should be reversed with the Court entering judgment in favor of Respondent.

B. Even if the District Court erred in failing to grant summary judgment on behalf of Petitioner based on the Missouri judgment now registered in the state of North Dakota, the District Court committed error by failing to recognize that a genuine issue of material fact existed with respect to the matter of whether Petitioner's claim is barred by the legal doctrine of "accord and satisfaction."

[46] In its "Memorandum and Order on Motion to Dismiss and Motions for Summary Judgment," the District Court made the ultimate factual finding (without the benefit of a trial at which all evidence could be presented) that Respondent was not a party to the Missouri workers' compensation settlement which closed "any and all issues" as between the parties. In so finding, the Court limited its consideration simply to the affidavits filed by Respondent's Missouri counsel and the affidavit of Petitioner's counsel. The Court ruled: "This court deems the affidavit of Anne Jorgenson-Green to be competent and admissible evidence, unlike the affidavit of Edelman. Green's affidavit does not consist of hearsay statements. Rather, Green, as counsel for WSI, states that WSI did not retain counsel in connection with the Missouri settlement, and no attorney was authorized to settle WSI's claim for reimbursement."³²

[47] In so ruling, the Court disregarded the settlement document itself, notwithstanding the fact that it fully supported the affidavit of Respondent's Missouri counsel, and was contrary to the affidavit of Petitioner's counsel. ³³

³² Memorandum and Order on Motion to Dismiss and Motions for Summary Judgment dated June 7, 2019 [**Doc. 78**]

³³ Affidavit of Ronald L. Edelman [**Doc 76**]; Affidavit of Anne Jorgenson Green [**Doc**

[48] In making its determination, the Court clearly erred in failing to apply the proper standard required by this Court in disposing of motions for summary judgment. That basic standard requires a Court to view the evidence in the light most favorable to Respondent, and to provide Respondent with the benefit of all favorable inferences which can reasonably be drawn from the record. *Arndt v. Maki*, 813 NW 2d 564 (ND 2012).

[49] A motion for summary judgment is not an opportunity to conduct a mini-trial. *Farmers Union Oil Co. v. Smetana*, 764 NW 2d 665 (ND 2009). This Court has repeatedly held that summary judgment is inappropriate if the court must draw inferences and make findings on disputed facts to support the judgment. *Hamilton v. Woll*, 823 NW 2d 754 (ND 2012).

[50] This Court has also held that summary judgment is inappropriate when material facts exist based on the contents of documentary evidence. Indeed, in *Hamilton v. Woll*, this court held, “A motion for summary judgment is not an opportunity to conduct a mini-trial. (Cite omitted) This court has repeatedly held that summary judgment is inappropriate if the court must draw inferences and make findings on disputed facts to support the judgment. . . . Those standards preclude summary judgment when material issues of fact exists – even if arising from written documents.” *Hamilton, Supra*, at P. 760. (Emphasis added.)

[51] When the evidence is viewed in the light most favorable to Respondent, and Respondent is given the benefit of all favorable inferences which can be drawn from his affidavit, his attorney’s affidavit, and the settlement document from the Missouri Division of Workers’ Compensation, it is clear that an issue of fact exists as to whether or not Petitioner should be bound by the Missouri judgment. Petitioner is specifically listed

as a party on the court-approved settlement document; the document clearly states that the settlement resolves “all issues” as between the parties; and Mr. Jurcyk specifically represents to the Missouri court that he is authorized to act on behalf of both Minot Builders and Petitioner.³⁴

[52] When this evidence is viewed in the light most favorable to Respondent, the only reasonable conclusion is that Petitioner was in fact a party to the Missouri settlement, and that summary judgment should be granted in favor of Respondent. The affidavit of Petitioner’s counsel may raise genuine issues of fact as to the scope of Mr. Jurcyk’s authority to bind Petitioner, whether or not Petitioner was in fact a party to the settlement, or whether Mr. Jurcyk acted on his own and without any authority from Petitioner, but it cannot serve as the basis for granting summary judgment in the face of the conflicting evidence. This issue can only be fleshed out through additional discovery, including the deposition of Mr. Jurcyk.

C. The District Court erred in granting summary judgment to Petitioner based on the alleged failure of Respondent to file a timely motion for the reconsideration for the following reasons:

(1) Respondent, through his Missouri counsel, did file a timely motion for reconsideration, as evidenced by the admission of the claims representative Ms. Heinle; and

(2) If Missouri counsel’s correspondence did not constitute a motion for reconsideration, this was solely attributable to the failure of Petitioner to serve proper notice on Respondent.

1. Respondent’s compliance with his alleged duty to file a motion for reconsideration.

34 Affidavit of Ronald L. Edelman, Exhibit B to Defendant’s Reply as to Defendant’s Motion to Dismiss and the Cross-Motions for Summary Judgment. P3 [**Doc. 76**], Stipulation for Compromise Settlement, Injury No. 10-044619 date February 9, 2016, Exhibit A to Plaintiff’s Answer [**Doc. 29**].

[53] Petitioner’s motion for summary judgment is premised on Respondent’s alleged failure to submit a request for reconsideration of Petitioner’s decision ordering Respondent to reimburse Petitioner.³⁵

[54] Petitioner contends that because it did not receive a letter requesting reconsideration from either Mr. Oden or a North Dakota attorney, that plaintiff failed to preserve his right to an administrative appeal.³⁶

[55] However, in Ms. Heinle’s second correspondence to Respondent dated April 1, 2016, Ms. Heinle concedes that Mr. Edelman’s letter to Ms. Jorgenson-Green (in response to her correspondence to him) did in fact constitute a motion for reconsideration under North Dakota law. Ms. Heinle’s letter states: “Workforce Safety & Insurance (WSI) received a letter from attorney Mr. Ronald L. Edelman requesting reconsideration from the notice of decision dated 3-8-16.”³⁷ (Emphasis added.)

[56] Petitioner concedes that Mr. Edelman’s letter would be sufficient to constitute a motion for reconsideration, but that it had no legal effect since he is an out-of-state attorney.³⁸

[57] In support of its position, Petitioner cites *Carlson v. Workforce Safety & Insurance*, 765 NW 2d 691 (ND 2009). *Carlson* involved a dispute between an employer and an injured worker as to how he should be classified under the law. The worker alleged that he was an employee entitled to workers’ compensation benefits. The employer claimed that he was an independent contractor and therefore not entitled to

35 Motion for Summary Judgment, p. 2 [**Doc. 11**]

36 Id. at p. 4 – 6.

37 Letter to Chris Oden dated April 1, 2016, Exhibit F to Motion for Summary Judgment [**Doc. 19**]

38 Id.

benefits. Following a decision by NDWSI that the worker was an employee, the employer filed a motion for reconsideration through out-of-state counsel.

[58] This court in *Carlson* found that the out-of-state attorney's request for reconsideration was a nullity. In so holding, the court relied upon the fact that the out-of-state counsel had not only stated its intent to be involved in the litigation, but had also filed a legal brief and designated itself as counsel in the proceeding. The court held: "We conclude GMR's non-resident attorney's activities in making a request for reconsideration, filing a legal brief, and being designated as counsel in the WSI proceeding were not protected by the safe harbor provisions of N.D.R. Prof. Conduct 5.5(b)."

[59] North Dakota Professional Rule of Conduct 5.5 (the "safe harbor provisions" discussed in *Carlson*) sets forth multiple situations in which an out-of-state attorney may perform legal services in North Dakota without engaging in the unauthorized practice of law. While none of these exceptions applied to counsel in *Carlson*, two of the exceptions apply in this case:

"(b) A lawyer admitted to practice in another jurisdiction and not in this jurisdiction who performs legal services in this jurisdiction on a temporary basis does not engage in the unauthorized practice of law in this jurisdiction when:

(2) The lawyer acts with respect to a matter that arises out of the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice, except for work for which pro hac vice admission or registration under Admission to Practice R.3 is required. Emphasis supplied.)

(or)

(3) With respect to matters for which registration or pro hac vice admission is available under Admission to Practice R.3, the lawyer is authorized to represent a client or is preparing for a matter in which the lawyer reasonably expects to be so

authorized.”

[60] The conduct of Respondent’s Missouri counsel Mr. Edelman fits squarely into the exceptions under Rule 5.5(2) and (3). Mr. Edelman was clearly acting with respect to a matter that arose out of his representation of Respondent in a jurisdiction in which he was admitted to practice. Indeed, Edelman’s conduct in contacting Petitioner was identical in nature to the conduct of Petitioner’s counsel Mr. Jorgensen-Green in contacting the Missouri Division of Workers’ Compensation on behalf of her client. (See letter of Jorgenson-Green dated March 4, 2016).³⁹

[61] Attorney Edelman’s conduct also fits squarely within the parameters of Rule 5.5(3) in that pro hac vice admission would be available to him, and he was authorized to act on Respondent’s behalf.⁴⁰

[62] The instant case is clearly distinguishable from *Carlson*. *Carlson* involved a dispute between two parties which was to be adjudicated by NDWSI, while here NDWSI is a party to the dispute. Moreover, in its capacity as a party to the dispute, its representative Ms. Heinle specifically admitted that Mr. Edelman’s correspondence did in fact qualify under the law as a “motion for reconsideration.”⁴¹

[63] *Carlson* is further distinguishable based on the actions of the out-of-state attorneys in each case. In *Carlson*, the attorneys had entered their appearance and filed

39 WSI North Dakota Workforce Safety & Insurance, Exhibit C to Defendant’s Suggestions in Opposition to Plaintiff’s Motion for Summary Judgment and Suggestions in Support of Defendant’s Cross Motion for Summary Judgment [**Doc 43**]

40 Affidavit of Ronald L. Edelman, Exhibit B to Defendant’s Reply as to Defendant’s Motion to Dismiss and the Cross-Motions for Summary Judgment. P3 [**Doc. 76**]

41 Letter to Chris Oden dated April 1, 2016, Exhibit F to Motion for Summary Judgment [**Doc. 19**]

legal briefs without seeking admission pro hac vice. Edelman's conduct was clearly preliminary and preparatory in nature, in accordance with Rule 5.5.

[64] Since Petitioner through its authorized representative has admitted that Mr. Edelman's correspondence was sufficient to constitute a valid motion for reconsideration under the law, the only issue for determination is whether or not it was appropriate for Petitioner to reject the "motion" based on Mr. Edelman's status as an out-of-state attorney.

[65] It is clear that under the North Dakota Rules of Professional Conduct that Mr. Edelman's "motion for reconsideration" did not constitute the unauthorized practice of law under Rule 5.5.

[66] As a result, if this Court determines that Petitioner's claims are not barred by res judicata or the doctrine of accord and satisfaction, the case should be remanded to an administrative law judge for further proceedings on the validity of Petitioner's claim of reimbursement.

(2) The Court erred in granting summary judgment on behalf of Petitioner because the Respondent never received notice of his right to file a motion for reconsideration.

[67] Should the Court find that the letter from attorney Edelman did not qualify as a proper motion for reconsideration, notwithstanding Petitioner's admission to the contrary, summary judgment in favor of Petitioner is still inappropriate for the reason that neither Respondent nor his counsel ever received Ms. Heinle's correspondence.⁴²

42 Affidavit of Chris Oden, Exhibit A to Defendant's Suggestions in Opposition to Plaintiff's Motion for Summary Judgment and Suggestions in Support of Defendant's Cross Motion for Summary Judgment **[Doc. 41]**

[68] It is undisputed that the letters from Ms. Heinle advising him of his right to petition for reconsideration were sent to an address at which Respondent no longer resided. While the second correspondence referenced a “cc” to attorney Edelman, Ms. Heinle’s affidavit states that the letter was sent only to Respondent’s incorrect address.⁴³

[69] There is no evidence that attorney Edelman ever received Ms. Heinle’s letters, and he denies receiving them. The only letters attorney Edelman received were from Ms. Jorgenson-Green. As the record reflects, these letters were responded to in a timely fashion.⁴⁴

[70] The evidentiary record supports Respondent’s position that he did not receive notice of his right to seek reconsideration of Petitioner’s decision.⁴⁵ As a result, he was denied his basic right of due process to contest the Petitioner’s decision.

[71] The District Court’s decision in granting summary judgment in favor of Petitioner based on Respondent’s alleged failure to file a timely motion for reconsideration is without any evidentiary support in the record, as well as a denial of Respondent’s due process rights. There is no evidence to support Petitioner’s position that the correspondence from the claims representative Ms. Heinle was sent to the correct address. In fact, the unrefuted evidence is to the contrary.

D. The District Court erred in denying Respondent’s motion to dismiss for insufficiency of service of process.

43 Affidavit of Marlene Heinle in Support of Motion for Summary Judgment, p. 3 [**Doc. 13**]

44 Affidavit of Ronald L. Edelman, Exhibit B to Defendant’s Reply Brief as to Defendant’s Motion to Dismiss and the Cross-Motions for Summary Judgment [**Doc. 76**]

45 Affidavit of Chris Oden, Exhibit A to Defendant’s Suggestions in Opposition to Plaintiff’s Motion for Summary Judgment and Suggestions in Support of Defendant’s Cross Motion for Summary Judgment, p. 3 [**Doc. 41**]

[72] Respondent has sworn by affidavit that he did not reside at the address where service was attempted.⁴⁶

[73] Respondent's daughter, Courtney Horn, similarly swore under oath that Respondent did not live at the address where service was attempted. Ms. Horn further swore under oath that although her father owned the premises, that she and her husband leased the premises from her father but lived there alone.⁴⁷

[74] Ms. Horn further testified under oath that the process server did not ask her if Respondent resided at the address. He simply knocked on the door and inquired as to whether or not her father "was there." She informed the process server that her father did not live with her and her husband. The process server told Ms. Horn that she was still obligated to accept the summons and petition, even though Respondent did not live there.⁴⁸

[75] The original "form" return of service from process server Kuhns states that he had served Respondent at his usual place of abode. However, his subsequent affidavit shows him to be far less than certain as to what transpired:

"To the best of my recollection, the individual I left the documents with confirmed the defendant Chris Oden resided at the address, 104 W. Calico Drive, Raymore, Missouri 64083, and was a co-resident and daughter of the defendant Chris Oden." (Emphasis supplied.)⁴⁹

46 Id.

47 Affidavit of Courtney Horn, Exhibit A to Defendant's Reply Brief as to Defendant's Motion to Dismiss and the Cross Motions for Summary Judgment [**Doc. 75**]

48 Id.

49 Affidavit of Attempted Service by Process Server Aaron Kuhns, Exhibit A to Corrected Suggestions in Support of Defendant's Motion to Dismiss for Lack of Service of Process [**Doc. 53**]

[76] Recognizing that he was unable to state with certainty as to exactly what he was told by Ms. Horn, process server Kuhns went on to recite in his affidavit “other factors” which he relied upon in stating his “best recollection.” Yet, even as to these “other factors” he is far less than certain, as evidenced by his employing the words “I think”:

“I think I remember her telling me Chris Oden was out of town because of his employment as a trucker. After service I did look her up on Facebook which revealed her maiden name as Oden, helping to confirm that I had the right person. The only extra detail I can remember was a vehicle present that matched the description of one of the vehicles provided to me.” (Emphasis added.)⁵⁰

[77] The uncertainty which permeates Mr. Kuhns’ affidavit, taken together with the subsequent steps that he took in order to attempt to justify his speculation that proper service was made, begs the obvious question: Why would Mr. Kuhns feel the need to further verify that the residence was in fact Respondent’s usual place of abode if Ms. Horn had clearly and unequivocally informed him that it was?⁵¹

[78] Indeed, as Ms. Horn states in her affidavit, the additional facts relied upon by Mr. Kuhns were simply inaccurate. The vehicle which was present in the driveway that matched the description of the vehicle relied upon by Mr. Kuhns belonged to her mother, and not to Mr. Oden.⁵²

[79] North Dakota law requires a party to strictly comply with the specific requirements of Rule 4 in order to effectuate service of process. *Lingowski v. Altendorf*, 812 NW 2d 427 (ND 2012). If those specific procedural requirements of the rule have

50 Id.

51 Id.

52 Affidavit of Courtney Horn, Exhibit A to Defendant’s Reply Brief as to Defendant’s Motion to Dismiss and the Cross Motions for Summary Judgment [**Doc. 75**]

not been adhered to, any judgment rendered against a party is null and void. *Gessner v. City of Minot*, 583 NW 2d 90 (ND 1998).

[80] Despite the District Court’s ruling to the contrary, it is clear from the record that the overwhelming weight of the evidence on the issue of service of process is clearly on the side of respondent. Respondent has clearly satisfied his burden under the law of proving by clear and convincing evidence that the statements made by the process server in his original Return of Service were simply incorrect. Moreover, the process server’s own follow-up affidavit makes it clear that he is far less than certain as to what transpired.⁵³

[81] In fact, in its written response to Respondent’s motion to dismiss, Petitioner acknowledged the insufficiency of its evidence on the issue of service, stating, “Alternatively, the Affidavit of the Process Server creates a substantial question of fact as to whether Defendant was served at his usual place of abode. If the court so concludes, Plaintiff requests the motion to dismiss be denied, and further discovery undertaken on the issues of the usual place of abode or residence of Defendant and the facts surrounding service of the Summons and Complaint upon Plaintiff’s daughter for the court to make a determination on whether the service comports with Rule 4.”⁵⁴

[82] In his reply brief on the issue, the Petitioner agreed, asking the court for additional time to conduct discovery on the issue, stating, “Defendant would certainly wish to take the deposition of Mr. Kuhns.” Despite the requests from both parties for additional

53 Id.; Affidavit of Chris Oden, Exhibit A to Defendant’s Suggestions in Opposition to Plaintiff’s Motion for Summary Judgment and Suggestions in Support of Defendant’s Cross Motion for Summary Judgment, **[Doc. 41]**

54 Plaintiff’s Response in Opposition to Motion to Dismiss for Lack of Service of Process, p. 4 **[Doc. 59]**

discovery on the issue, the court denied Respondent's motion to dismiss based on limited facts and information.⁵⁵

[83] Any judgment rendered by a court without jurisdiction is a nullity and subject to collateral attack (*Gessner, Supra*). As a result, should his matter not be decided on other grounds by this Court, it would serve the interest of justice for the Court to remand this matter to the District Court for further discovery on the issue of service.

/s/ David Clark Thompson

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55 Defendant's Reply Brief as to Defendant's Motion to Dismiss and the Cross Motions for Summary Judgment, p. 4 [**Doc. 74**]

CERTIFICATE OF COMPLIANCE

Pursuant to N.D. R. App. P. 32(a)(7), the undersigned counsel hereby certifies that this document complies with the 10,500-word limit set forth in N.D. R. App. P. 32(a)(7), as it contains 6,916 countable words, not including those items which are excluded from brief length limit by N.D. R. App. P. 32(a) 7. This brief has been prepared using Microsoft Word, Times New Roman Font in 12 point.

Dated this 29th day of November 2019.

/s/ David Clark Thompson
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COUNSEL FOR APPELLANT CHRIS ODEN

In the Supreme Court State Of North Dakota

Supreme Court No. 20190242
District Court No. 08-2018-CV-02953

State of North Dakota by
Workforce Safety & Insurance,

Petitioner,

v.

Chris Oden,

Respondent.

DECLARATION OF SERVICE BY ELECTRONIC MEANS PURSUANT TO RULE 25 OF THE NORTH DAKOTA RULES OF APPELLATE PROCEDURE

[1] Pursuant to Rule 25(d) of the North Dakota Rules of Appellate Procedure, I hereby certify that I served the documents identified hereafter today by electronic means in compliance with Rule 25(a)(2)(c) of the North Dakota Rules of Appellate Procedure upon the following counsel for Appellee North Dakota Workforce Safety & Insurance: Anne Jorgenson Green [agreen@nd.gov] and Jacqueline Sue Anderson [janderson@nilleslaw.com]:

BRIEF OF APPELLANT CHRIS ODEN

APPENDIX OF APPELLANT CHRIS ODEN

Dated this 19th day of November, 2019,

/s/ David Clark Thompson

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BRIEF OF APPELLANT CHRIS ODEN

APPENDIX OF APPELLANT CHRIS ODEN

Dated this 26th day of November, 2019,

/s/ David Clark Thompson

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