ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20050433

Roland C. Riemers,
Johnathan P. Riemers,

Appellants,

v.

State of North Dakota
Douglas Herman,

Appellees.

Supreme Court No.
20050433

Grand Forks County Civil No.
18-05-C-00684

APPEAL FROM THE DISTRICT COURT
GRAND FORKS COUNTY, NORTH DAKOTA
NORTHEAST CENTRAL JUDICIAL DISTRICT

HONORABLE JOEL D. MEDD

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STATE OF NORTH DAKOTA

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

The State accepts Riemers' Statement of the Case with the exception of his statement that he followed the Rules of Civil Procedure and with the following additional information.

The district court made four conclusions of law in its November 3, 2005, Memorandum Opinion. The district court concluded that 1) the Complaint failed to state a claim against Judge Herman individually; 2) that there was insufficient service of process on the state; 3) that judicial immunity barred Riemers' claims; and 4) that the issue of lack of jurisdiction based on service of demand pursuant to N.D.C.C. § 32-12.2-04 was moot based on the ruling on the previous issues. App. 27-32. Riemers appealed two issues, including whether the district court erred in dismissing the Complaint for lack of personal jurisdiction due to insufficient service of process and whether the district court erred in dismissing the Complaint because the claims were barred by judicial immunity. Appellant Brief p. 5. Riemers did not appeal the district court's conclusion that the Complaint failed to state a claim against Judge Herman individually. Appellant Brief p. 5.

ARGUMENT

I. The district court properly dismissed the Complaint for lack of personal jurisdiction.

A. The Complaint is against the State.

There is no question that the Complaint is against the State and not Judge Herman individually. Judge Herman is sued for actions taken in his capacity as a district court judge. The Complaint refers to him as District Judge Douglas Herman, and all allegations against Judge Herman relate to actions taken while presiding over a divorce related proceeding in which Riemers was a party. App. 4, 9; Compl. ¶1; Amend. Compl. ¶1. The district court concluded that "[t]his suit

is clearly against Judge Herman in his judicial and not in his individual capacity" and that "[a]ll the actions alleged relate to Herman acting as a State Trial Judge." App. 24. Riemers did not appeal this conclusion by the district court.

The claims against Judge Herman are claims against a state employee for alleged actions occurring within the scope of his employment. Thus, the lawsuit is a lawsuit against the State. Livingood v. Meece, 477 N.W.2d 183, 189 (N.D. 1991); Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989); See also N.D.C.C. § 32-12.2-03(1) (providing an action caused by the alleged actions of a state employee occurring within the scope of the employee's employment must be brought against the State, not the state employee); N.D.C.C. § 32-12.2-03(3) ("A state employee may not be held liable in the employee's personal capacity for acts or omissions of the employee occurring within the scope of the employee's employment."). Service of process, however, was not effectuated against the State.

B. Insufficient service of process requires dismissal without prejudice.

This Court has recognized the principle that "'[j]urisdiction of both the subject matter and the parties is essential to the rendition of a valid judgment.'" Smith v. City of Grand Forks, 478 N.W.2d 370, 371 (N.D. 1991) (quoting Johnson v. Johnson, 86 N.W.2d 647, 651 (N.D. 1957)). "It is also firmly established that valid service of process is necessary in order to assert personal jurisdiction over a defendant." Id. "Without personal jurisdiction, the court is powerless to do anything beyond dismissing without prejudice." Western Life Trust v. State, 536 N.W.2d 709, 712 (N.D. 1995).

This Court has explained:

> "Jurisdiction precedes adjudication. Before a court may say anything worth listening to regarding the (de)merits of a party's claim, that court must have authority to speak. That court has such authority only when the claim is one within the court's subject

> matter jurisdiction and after the court has acquired personal jurisdiction of the parties. If the court is without jurisdiction--subject matter or personal--no one is bound by anything the court may say regarding the (de)merits of the case."

Smith, 478 N.W.2d at 373 (quoting Petters v. Petters, 560 So.2d 722, 723 (Miss. 1990)). "Rule 4 deals extensively with service of original process, which is the means of securing jurisdiction by the court over the defendant's person . . . ." Id. at 371 (citation omitted); See also Grey Bear v. North Dakota Dep't of Human Servs., 2002 ND 139, ¶ 30, 651 N.W.2d 611, cert. denied, 539 U.S. 960 (2003).

A court does not have personal jurisdiction over a defendant simply because the defendant has notice of a lawsuit. Indeed, this court has observed, "[a]bsent valid service of process, even actual knowledge of the existence of a lawsuit is insufficient for personal jurisdiction over a defendant." Helmers v. Sortino, 545 N.W.2d 796, 799 (N.D. 1996). In this case, the district court did not have personal jurisdiction over the State because there was no valid service of process on it.

C. Service was not effectuated upon the State.

The district court dismissed the Complaint for lack of personal jurisdiction over the State because Riemers' attempted service by certified mail did not effectuate service of the Summons and Complaint upon the State. App. 30. The district court correctly held service of process was not effectuated upon the State.

Rule 4(d)(2), N.D.R.Civ.P. states, in part, as follows:

> Personal service of process within the state must be made as follows:
> ...
> (F) upon the state, by delivering a copy of the summons to the governor or attorney general or an assistant attorney general and, upon an agency of the state, such as the Bank of North Dakota or the State Mill and Elevator Association, by delivering a copy of the summons to the managing head of the agency or to the attorney general or an assistant attorney general[.]

The only attempted service alleged by Riemers is mailing the Summons and Complaint by certified mail. Rule 4(d)(2)(F) requires personal service of process upon the State be effectuated by "delivering" a summons to the governor, attorney general, or an assistant attorney general.

It is well established that mailing does not constitute "delivering." See e.g., Gabriel v. United States, 30 F.3d 75, 77 (7th Cir. 1994) (holding the requirement of "delivering" a copy of the summons and of the complaint to the United States Attorney makes no provision for service by mail, but requires the United States Attorney be personally served); Barrett v. City of Allentown, 152 F.R.D. 46, 48 (E.D. Pa. 1993) (stating Fed.R.Civ.P. 4 "does not authorize service by mail on a city or municipal corporation"); Robbins v. Brady, 149 F.R.D. 154, 155 (C.D. Ill. 1993) (holding plaintiff did not deliver copy of summons and complaint to the United States Attorney when they were sent via certified mail); Rodriguez v. Tisch, 688 F.Supp. 1530, 1531 (S.D. Fla. 1988) (sending summons and complaint by certified mail does not constitute "delivery"); Rankel v. Town of Greenburgh, 117 F.R.D. 50, 53 (S.D.N.Y. 1987) (mailing copy of summons and complaint to town attorney did not constitute "delivery" to the town). The North Dakota Rules of Civil Procedure make a textual distinction between mailing and delivering.

Specifically, N.D.R.Civ.P. 4(d)(2)(A)(v) authorizes personal service of process of a summons upon an individual by mail, provided there is a signed receipt, and provided that the mailing results "in delivery to that individual." Mailing, thus, does not constitute delivery.

On the other hand, N.D.R.Civ.P. 4(d)(2)(F) does not refer to the mailing of a summons to the State. Rather, N.D.R.Civ.P. 4(d)(2)(F) authorizes personal service of process upon the State only by "delivering" a copy of a summons to the governor, attorney general, or an assistant attorney general. The textual

distinction between mailing and "delivering" in N.D.R.Civ.P. 4 indicates that personal service of process is effectuated under N.D.R.Civ.P. 4(d)(2)(F) only by personal delivery to the governor, attorney general, or an assistant attorney general. This Court previously affirmed a district court's holding that certified mail does not constitute effective service upon the State or a state employee sued in his official capacity. Riemers v. Anderson, 2004 ND 109, ¶5, 680 N.W.2d 280.

Sound reasons exist why N.D.R.Civ.P. 4(d)(2)(F) specifies a particular method of service (delivery) upon the State and designates particular recipients to receive delivery of service on behalf of the State. Requiring delivery (i.e., personal service) on a designated recipient assures the Attorney General or Executive Officer receives the service of process. Due to the size of state government, the number of employees in state government, an the amount of mail received by state government, mail, even certified mail, can become lost, misplaced, or misfiled. See Byrd v. District of Columbia, 230 F.R.D. 56, 59 (D.D.C. 2005); Oltremari v. Kansas Soc. & Rehab. Serv., 871 F.Supp. 1331, 1353 (D. Kan. 1994). An unauthorized state employee who receives a summons may not know what to do with the summons, causing the Summons not to come to the attention of the Attorney General in a timely manner or not at all. The requirements of N.D.R.Civ.P. 4(d)(2)(F) help assure that when an individual or entity seeks to initiate suit against the State, the summons will be timely brought to the attention of the Attorney General. Cf. Eldridge v. District of Columbia, 866 A.2d 786, 787 (D.C. 2004).

Riemers cites two cases which he asserts support the position that mailing constitutes delivery. But neither case stands for that proposition.

Helmers v. Sortino, 545 N.W.2d 796 (N.D. 1996), addressed whether service upon an individual by Federal Express constituted valid service by mail.

This Court held it did not. Id. at 799. Although service by mail was authorized by the applicable rule, the rule also required the mail be addressed to the person to be served, require a signed receipt, and result in delivery to the person. Id. The Federal Express process did not require a return receipt, and thus did not meet the requirements of valid service by mail. Id. Significantly, the case did not deal with service upon the State where Rule 4 does not authorize service by mail but requires "delivering a copy of the summons" to specifically designated individuals. N.D.R.Civ.P. 4(d)(2)(F).

Similarly, Code v. Gaunce, 315 N.W.2d 304 (N.D. 1982), also cited by Riemers, deals with service of an individual residing outside of North Dakota, where the applicable rule specifically authorized service by mail. Id. at 306. Code does not address the meaning of "delivering" as used in N.D.R.Civ.P. 4(d)(2)(F).

Riemers did not effectuate personal service upon the State (Judge Herman). Accordingly, the district court properly dismissed the Complaint. The State concedes that if the district court lacked personal jurisdiction, the Complaint should have been dismissed without prejudice. Smith, 478 N.W.2d at 371. If, however, this Court determines that the district court had personal jurisdiction, dismissal with prejudice based on the doctrine of judicial immunity was appropriate.

II. The doctrine of judicial immunity bars the claims against the state.

Riemers' Complaint was properly dismissed because it was barred by the doctrine of judicial immunity. App. 32. The Courts have long recognized the doctrine that judges may not be held civilly liable for judicial acts within their jurisdiction.

> Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it

> adopted the doctrine, in Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.

Pierson v. Ray, 386 U.S. 547, 553-54 (1967) (quoting Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868)).

As early as 1897, the North Dakota Supreme Court adopted the doctrine of absolute judicial immunity in Root v. Rose, 72 N.W. 1022 (N.D. 1897). In Root, the court explained that a judge can never be held responsible in a civil action for damages for any judicial act, even when the judge acts corruptly. Id. at 1024. The court explained that it would be against the public interest to permit any exceptions to the doctrine of absolute immunity, and that under no facts can a judge be held civilly liable for misconduct in the performance of his judicial duties. Id. at 1025.

The North Dakota Supreme Court addressed the issue of judicial immunity again in Landseidel v. Culeman, 181 N.W. 593 (N.D. 1921), where the court explained:

> It is elementary that judicial officers are not liable for the erroneous exercise of the judicial powers vested in them. This immunity from liability is based upon considerations of public policy. To hold judicial officers personally liable for errors of judgment concerning either questions of law or fact would be subversive of both independence and efficiency in the administration of justice. This rule of public policy applies as well to inferior courts of limited jurisdiction as to superior courts of general jurisdiction. . . .
>
> If a judge acts within his jurisdiction, it has been held that he is not even liable civilly though he act both maliciously and corruptly.

Id. at 595. See also Gottschalck v. Shepperd, 260 N.W. 573, 575 (N.D. 1935) (that judicial officers cannot be held personally liable for exercising their judicial powers is settled beyond controversy). Judges are, thus, entitled to immunity from liability for judicial acts within their jurisdiction.

In Stump v. Sparkman, 435 U.S. 349 (1978), the United States Supreme Court held that the doctrine of judicial immunity must be applied broadly. In its decision the Supreme Court set forth the following test for determining the application of the judicial immunity doctrine:

> [T]he necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him. Because "some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction . . . ," Bradley, . . . the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction." 13 Wall., at 351.

Id. at 356-57 (footnote omitted). See also Liles v. Reagan, 804 F.2d 493, 495 (8th Cir. 1986) ("[A] judge is entitled to absolute immunity if the acts complained of were 'judicial acts' and were not taken in the 'clear absence of all jurisdiction.'").

The test enunciated in Stump is consistent with North Dakota case law. For example, in Root the North Dakota Supreme Court held a judge can never be held civilly liable for judicial acts. 72 N.W. at 1024. The court further explained that even if the judge lacked jurisdiction over the matter the judge was immune except in those rare instances where the judge could not possibly believe he was acting within his jurisdictional limits:

> Where there is a palpable want of jurisdiction over the subject-matter, -as in case a county judge should try a person for murder, - it might be claimed that he did not in fact act as a judge, and could not have considered that he was so acting. But we do not wish to be understood as holding that in every case where the court has no jurisdiction of the subject-matter the judge thereof is liable for acts performed by him as judge. It will not do to assert that he never can act as judge where he has no jurisdiction of the subject-matter, as the question whether such jurisdiction exists is not infrequently a question difficult of solution, and in every instance a judge does in fact act as a judge in determining whether, in the particular case, jurisdiction over the subject-matter exists, unless perhaps in those

> rare instances in which the assumption of jurisdiction is so extravagant as to preclude any possibility that the judge ever thought he was acting as such.

Id. at 1025 (emphasis added). Thus, under North Dakota law judges are immune from suit for damages for "judicial acts" not done in the clear absence of all jurisdiction. Cf. Loran v. Iszler, 373 N.W.2d 870, 876 (N.D. 1985) ("[A]n administrative hearing officer is immune from suit for damages for his discretionary acts not done in the clear absence of all jurisdiction."); Perry Ctr., Inc. v. Heitkamp, 1998 ND 78, ¶ 22, 576 N.W.2d 505 (receiver entitled to absolute judicial immunity unless the receiver's "ultimate actions were not judicial or were clearly beyond the scope of the receiver's jurisdiction.").

The Complaint arises out of a divorce related proceeding in which Riemers was a party and Judge Herman presided. Id. Presiding over divorce proceedings is a function normally performed by a district court judge. See N.D.C.C. § 27-05-06(2); N.D.C.C. ch. 14-05. Judge Herman's only alleged interaction with Riemers was presiding over matters arising from the divorce proceeding. Thus, Judge Herman's only interaction with Riemers was in his judicial capacity.

The district court concluded that Riemers' "suit is clearly against Judge Herman in his judicial capacity and not in his individual capacity." App. 28. "All actions alleged relate to Herman acting as a State Trial Judge." Id. These conclusions of the district court have not been appealed.

Because presiding over a divorce proceeding is a function normally performed by a district court judge, Judge Herman's alleged actions were not taken in the "clear absence of all jurisdiction." District courts in North Dakota are courts of general jurisdiction. N.D. Const. art. VI, § 8; N.D.C.C. § 27-05-06. This includes the jurisdiction to preside over divorce proceedings. N.D.C.C. ch. 14-05. Judge

Herman was, therefore, acting within his jurisdiction as a district court judge when he presided over the matters arising from the divorce proceeding.

Riemers suggests that the doctrine of judicial immunity no longer exists in North Dakota after this Court's opinion in Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632 (N.D. 1994). That is simply not the case. Judicial immunity remains a well-recognized doctrine prohibiting claims for monetary damages arising from judge like acts. The doctrine continues to be recognized in both statute and case law. In fact, when this Court abrogated sovereign immunity, it specifically stated that it was not abrogating judicial immunity. Id. at 640 (explaining that its decision to abolish state sovereign immunity from tort liability "should not be interpreted as imposing tort liability on the State for the exercise of discretionary acts in its official capacity, including ... judicial ... functions.").

Judicial immunity is distinct from sovereign immunity and was not intended to be abolished. Id.; See also Sullins v. American Medical Response of Oklahoma, Inc., 23 P.3d 259, 267 n.11 (Ok. 2001) (stating that "[c]ommon-law protection of judges from tort liability is a rubric entirely distinct from 'governmental tort immunity.'"). Furthermore, in response to the Bulman decision, the North Dakota Legislative Assembly adopted N.D.C.C. ch. 32-12.2. Section 32-12.2-02(3)(d) provides:

> 3. Neither the state nor a state employee may be held liable under this chapter for any of the following claims:
>
> ...
>
> d. A claim resulting from a decision to undertake or a refusal to undertake any judicial or quasi-judicial act, including a decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.

The fact that Bulman did not abolish judicial immunity is clear based on this Court's application of judicial and quasi-judicial immunity in post-Bulman cases. See Perry Center, Inc. v. Heitkamp, 1998 ND 78, ¶21, 576 N.W.2d 505;

Lang v. State, 2001 ND App 2, ¶7, 622 N.W.2d 238; Lawrence v. Roberdeau, 2003 ND 124, ¶11, 665 N.W.2d 719. This Court continues to recognize judicial immunity in light of Bulman and N.D.C.C. ch. 32-12.2.

Riemers contends that his claim for injunctive relief and costs should not be dismissed under federal law based on Pulliam v. Allen, 456 U.S. 522 (1984). Pulliam "held that a judge was not absolutely immune from a suit pursuant to Section 1983 for prospective injunctive relief." Kuhn v. Thompson, 304 F.Supp.2d 1313, 1322 (M.D. Ala. 2004). Riemers neglects to explain, however, that the Court's holding was abrogated in this respect by the legislature. Id.; L.B. v. The Town of Chester, 232 F.Supp.2d 227, 238 (S.D.N.Y. 2002) (explaining that "in 1996 Congress passed the Federal Courts Improvement Act ("FCIA") which legislatively reversed *Pulliam* in certain respects."). Subsequent to the holding in Pulliam, "Congress responded by amending Section 1983 and restoring judicial immunity from suits brought pursuant to Section 1983 for injunctive relief." Kuhn, 304 F.Supp.2d at 1322.

Riemers' argument is based on the holding from a case that has been abrogated by statute. L.B., 232 F.Supp.2d at 238 (explaining that in 1996 Congress passed legislation that "reversed *Pulliam* in certain respects."). This abrogated holding does not support Riemers' claim. In addition to barring claims for suit from monetary damages, "[j]udicial immunity also shields judges from suit for injunctive relief." Ashford v. Kaplan, No. 05-3592 JLL, 2006 WL 314532, slip op. at 4 (D.N.J. Feb. 9, 2006).

Judge Herman is entitled to judicial immunity in this suit because his challenged actions were "judicial acts" not taken in the "clear absence of all jurisdiction." Accordingly, if the district court had jurisdiction, the Complaint was properly dismissed with prejudice.

CONCLUSION

The State of North Dakota and the Honorable Douglas Herman respectfully request that this Court affirm the decision of the district court that it lacked personal jurisdiction over the Defendants and hold that the Complaint be dismissed without prejudice. In the alternative, Defendants request that if the district court had personal jurisdiction, that this Court affirm the November 18, 2005, Judgment dismissing with prejudice the Complaint against them.

Dated this 9th day March, 2006.

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STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Dianne Achtenberg states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 9th day of March, 2006, I served the attached **BRIEF OF APPELLEE** upon Roland C. Riemers and Johnathon P. Riemers, by placing a true and correct copy to Roland C. Riemers and Johnathon P. Riemers, by placing a true and correct copy thereof in an envelope addressed as follows:

Roland C. Riemers and
Johnathon P. Riemers
108 Cairns Avenue
Emerado, ND 58228

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Dianne Achtenberg
Dianne Achtenberg

Subscribed and sworn to before me
this 9th day of March, 2006.

Notary Public

DONNA J. CONNOR
Notary Public
State of North Dakota
My Commission Expires Aug. 6, 2009