

SUPREME COURT OF NORTH DAKOTA

Case No. 20120393

IRET Properties,
Plaintiff and Appellee,
vs.
Josef Falkenstein, Connie
Falkenstein, and
Steven Falkenstein,
Defendants and Appellants

APPELLANTS' REPLY BRIEF

APPEAL FROM THE SOUTH CENTRAL DISTRICT COURT,
BURLEIGH COUNTY,
HONORABLE DAVID REICH, PRESIDING

For the APPELLANTS:
John J. Gosbee, Esq.
Gosbee Law Office
P.O. Box 474
Fort Yates, ND 58538-0474
(701) 663-2225

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I. ARGUMENT IN REPLY - INTRODUCTION.

[¶01] The Falkensteins (also referred to as "Tenants") submit this reply brief in response to that of the Landlord.

[¶02] The heart-wrenching tragedy of this case is reflected in a little over two lines of transcript: "**there had been a court date which I wasn't even aware of, and that's when I contacted you to see what to do.**" Testimony of Connie Falkenstein, Transcript II, 13:05-07, emphasis added.

II. RULE 4 AND NDCC §47-32-02.

[¶03] Landlord suggests that NDCC §47-32-02¹ accords a tenant fewer rights than the tenant has under Rule 4, NDR CivP. A careful analysis of the statute reveals that it affords rights additional to those under Rule 4 - as befitting the summary nature of an eviction proceeding.

[¶04] A summons for eviction must be served **in person**: "*Service by delivery of a copy of the summons to the defendant in person within the county must be made at least three days before [the eviction hearing.]*" NDCC §47-32-02, sentence 5, emphasis added. If the tenant cannot be found, only then is door posting

¹ The statute is reproduced as an addendum to this brief, with the sentences numbered.

allowed. And even then, the landlord has to mail a copy of the summons to the tenant and ask the court for permission. *Ibid.*, sentence 2. The minimum period before a hearing is increased to seven days instead of three. *Ibid.*, sentence 6.

[¶05] Landlord inaccurately asserts, "In North Dakota, an eviction action is not subject to the strict service of process requirements set forth in [Rule 4]." Landlord's Brief, p. 8. Landlord argues that "posting the summons upon the door" is allowed in this case. *Ibid.*, p. 8, citing NDCC §47-32-02 and *Nelson v. Johnson*, 2010 ND 23, 778 N.W.2d 773.

[¶06] Tenants acknowledge that, in *Nelson*, this Court stated, "We therefore reject [the tenant's] argument that service of the notice of intention to evict must comply with [Rule 4]." *Nelson*, ¶17. In *Nelson*, the notice of intention was taped to the tenant's door. *Nelson*, ¶5. Here, of course, nothing was taped. Indeed, had door-posting been used as allowed under *Nelson*, Connie probably would have found out in time to do something about the matter.

[¶07] Further, NDCC §47-32-02 is not a license for a process server to just shrug his shoulders and post a notice on the door. "Door-posting-service" is allowed only "if the party cannot be found" after at least one attempt between 6 and 10 P.M. NDCC §47-32-02, sentence 2. Nothing in §47-32-02 says anything about

whether the defendant can be "conveniently found." Yet that is the standard employed by Process Server Jim Hulm. For each substitute service, Hulm said the person not then at home "could not be conveniently found." Docs. 4, 5, 7, 8. Appx., pp. 8, 9, 11, 12.

[¶108] Due process is not designed for the convenience of the process server. Its purpose is to provide fair notice to the tenant that the landlord is about to evict the tenant unless the tenant takes swift action. This notice Connie never received.

[¶109] Connie wasn't missing or unable to be found. The problem is that the process server twice delivered the papers to someone without suitable discretion.

III. STEVEN'S AND JOSEF'S LACK OF DISCRETION.

[¶110] Landlord evades another critical issue in this case - whether Steven and Josef Falkenstein had suitable "discretion" to qualify as recipients of process addressed to other members of their household. It is undisputed that neither Steven nor Josef gave the documents to Connie.

Q. And when did you first become aware that there was a lawsuit brought by IRET against your family?

A. Thursday night when I got off work.

* * *

Q. So that's September 6th[, 2012]?

A. Yes.

* * *

Q. ... Did you eventually learn that Josef was served with a three-day notice?

A. Yes. As soon as I got home, I contacted Mike [, a manager at IRET]².

* * *

A. ... I found out from Mike, I believe it was, that there had been a three-day notice served on Josef. I found out that there had been papers served on Steven and that **there had been a court date which I wasn't even aware of, and that's when I contacted you to see what to do.**

Transcript II, 11:19-21, 11:25-12:01, 12:09-11, 13:02-07, emphasis added.

[¶11] As the Minnesota Supreme Court observed, "It may well be that a 13-year-old, or for that matter a person of any age, is not a person of suitable age and discretion for the purpose of the rule." *Holmen v. Miller*, 296 Minn. 99, 104; 206 N.W.2d 916 (1973).³ In *Holmen*, the party served failed to offer any evidence that his 13-year-old daughter lacked suitable discretion, and so substitute

² See Transcript II, 12:12-14.

³ At p. 10 of its brief, Landlord cites *Holmen* for the proposition that Tenants bear the burden of showing lack of discretion. Tenants believe they have done so.

service was upheld. "Contestee has made no attempt to establish that his 13-year-old daughter, Jean, is not a person of suitable discretion[.]" *Ibid.*, at 103. The daughter was served at 8:30 P.M. on November 27, 1972, and the father learned of it at about 7 A.M. the next day. *Ibid.*, at 103, n. 1. What separates our case from *Holmen* is that Connie Falkenstein never learned of the eviction until judgment had been entered.

[¶12] Two documents had to be served in accordance with NDCC §47-32-02 and Rule 4. The Notice of Intention to Evict was served on Josef personally and as proxy for his mother Connie and stepfather Steven. Docs. #3, 4, 5. Appx., pp. 7-9. The Summons and Complaint for Eviction were served on Steven personally and as proxy for his wife Connie and his stepson Josef. Docs. 7, 8, 9. Appx., pp. 10-12. Significantly, not one of the substitute service documents stated the recipient was of suitable age or discretion. Docs. 4, 5, 7, 8. Appx., pp. 8, 9, 11, 12.

[¶13] As to the lack of discretion of Steven and Josef, the question isn't whether Steven has a GED, can hold a job through Pride, or have a driver's license. It is whether he has the *discretion* to handle an important document properly - by getting it to the attention of Connie or Josef.

[¶14] On this sensitive topic, Connie had to bare her

family's burden before the trial court, and now sadly, anybody who reads this brief on the Internet.

Steven works for Pride. He has -

Honey, I'm sorry to do this to you --

He has alcohol fetal syndrome with mild mental retardation and adjustment disorder, meaning any stresses in his life, and so forth, he does not comprehend or understand. He has to be redirected quite a bit.

I'm so sorry, honey.

* * *

Steven has a reading and learning comprehension problem. He does not read at proper age very simple words. He does not understand anything of what's going on..

Transcript II, 14:07-13, 16:14-16.

[¶15] The same issue applies to Josef - whether he had the discretion to get another important document (that the rent hadn't been paid and only 3 days were left to pay it) to the attention of his stepfather and his mother.

And Josef has a learning disability. He has retardation. He has ADHD and borderline personality/possible bipolar. He has an IEP all through school. He has a CTRE, which is similar to a special education resource room.

Transcript II, 17:07-10.

IV. LANDLORD'S REQUEST FOR COSTS AND ATTORNEY FEES.

[¶16] At page 24 of its brief, Landlord asks for costs on appeal, claiming "this Court has previously addressed the

Falkensteins' substantive positions and denied the same in *Flex Credit, Inc. [v. Winkowitsch]*, 428 N.W.2d [236] at 240 n.4 [N.D. 1988] and in *Nelson [v. Johnson]*, 2010 ND 23 at ¶¶ 14, 17." True, as Landlord says at p. 17 of its brief, discussion of *Flex Credit* is "noticeably absent" from Tenants' brief.

[¶17] That's because Landlord's cited footnote in *Flex Credit* deals with Rule 55. Tenants never argued Rule 55 in their brief; their argument deals with Rule 54. Appellants' Brief, ¶¶27-28. So footnote 4 of *Flex Credit* is hardly dispositive. What's more important is that, in *Nelson*, this Court **applied** Rule 4 and found it obeyed.

[¶18] The issue is not as clearly defined as Landlord claims. *Flex Credit, Inc. v. Winkowitsch*, 428 N.W.2d 236 (N.D. 1988) does not stand for the proposition that Rule 4 does not apply to eviction cases. Indeed, in *Flex Credit* this Court applied Rule 4 and found it satisfied - because the papers were "merely left on the floor of the entryway to their residence" after the tenant "was [observed] inside the home, refused to come to [the] door, defendants were told the papers were being left." 428 N.W.2d at 239. If Connie Falkenstein had been home during either of Hulm's visits, she would have taken prompt action - as she clearly demonstrated when she did find out.

[¶19] Landlord compounds its error by erroneously citing (in footnote 3 on its brief) *EVI Columbus, LLC v. Lamb*, 2012 ND 41, ¶16; 818 N.W.2d 724, for the proposition that this Court has awarded costs and reasonable attorney fees for a “flagrantly groundless” appeal. In fact, the appellee in *Lamb* asked for attorney fees - but this Court denied the request. “We do not believe the Lambs’ arguments were wholly without merit; and thus, we decline to award double costs and attorney’s fees.” *Lamb*, ¶17.

[¶20] Landlord has wasted this Court’s time in even raising this issue. Claims of frivolous appeals should not be boilerplate thrown into appellees’ briefs. Tenants ask this Court to discourage such wasting of judicial resources by awarding double costs and attorney fees to Tenants for having to deal with this egregious claim of frivolity.

V. SUMMARY AND STATEMENT OF RELIEF REQUESTED.

[¶21] Because Connie never received the documents, and Steven and Josef lacked the discretion to make sure she did, Tenants ask for the relief requested in the Appellants’ Brief. In addition, Tenants ask for an award of costs and attorney fees because of Landlord’s frivolous claim of frivolity.

[¶22] Signature page follows.

[¶23] Dated April 29, 2013.

 /s/ **John J. Gosbee**
John J. Gosbee (#3967)
Attorney for Appellants
P.O. Box 474
Fort Yates, ND 58538-0474
(701) 663-2225

CERTIFICATE OF SERVICE

[¶24] In accordance with Rule 25(d), NDRAppP, and Administrative Order 14, I certify that I have served the Appellants' Reply Brief by e-mail to:

David D. Schweigert, Esq.
dschweigert@bkmpc.com

Tyler J. Siewert, Esq.
tsiewert@bkmpc.com

[¶25] I certify that I have tested the e-mail to the Clerk of the North Dakota Supreme Court, and the e-mail to opposing counsel, for viruses, and the virus-check reported none.

[¶26] Dated April 29, 2013.

 /s/ **John J. Gosbee**
John J. Gosbee

ADDENDUM

47-32-02. Appearance - Notice of intention to evict - When required - When and how served.

[Sentence 1] In any action for eviction the time specified in the summons for the appearance of the defendant may not be fewer than three nor more than fifteen days from the date on which the summons is issued.

[Sentence 2] If the person cannot be found in the county, of which the return of the sheriff or process server is prima facie proof, and service has been attempted at least once between the hours of six p.m. and ten p.m. upon the filing of an affidavit of the plaintiff or the plaintiff's attorney stating that the defendant cannot be found or on belief that the defendant is not in this state and a copy of the summons has been mailed to the defendant at the defendant's last-known address if any is known to the plaintiff, service of the summons may be made upon the defendant by the sheriff or process server posting the summons upon the door of the residential unit.

[Sentence 3] In all cases arising under subsections 4, 5, 6, and 8 of section 47-32-01, three days' written notice of intention to evict must be given to the lessee, subtenant, or party in possession, before proceedings can be instituted.

[Sentence 4] The notice may be served and returned as a summons is served and returned or, if the party cannot be found, then by the sheriff of the county or a process server posting the notice conspicuously upon the premises.

[Sentence 5] Service by delivery of a copy of the summons to the defendant in person within the county must be made at least three days before the time fixed for the appearance of the defendant.

[Sentence 6] Service elsewhere or personal service in any other mode must be made at least seven days before the time fixed for the appearance of the defendant.

**Addendum
April 29, 2013**