

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Bobby Bell and Heidi Roberson,)	
)	SUPREME COURT NO. 20130068
Plaintiffs,)	
_____)	
)	
Bobby Bell,)	
Appellant,)	
)	
v.)	
)	
Pro Tune Plus and Patrick Riepl,)	
)	
Defendants/Appellees.)	

APPEAL FROM THE ORDERS OF THE DISTRICT COURT, BURLEIGH COUNTY,
DATED DECEMBER 31, 2012 AND FEBRUARY 7, 2013
HONORABLE DAVID E. REICH PRESIDING
BURLEIGH COUNTY CIVIL NO: 08-2012-CV-00881

REPLY BRIEF FOR APPELLANT

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ARGUMENT

[¶1] Before the Court are two principle issued raised on appeal: (1) whether the court erred in denying Appellant Bobby Bell’s (“Bell”) Motion for Relief from the court’s order of December 31, 2012 when a clerical error caused the Claim Affidavit and Defendant’s Answer to not be properly filed in the district court, and (2) whether the orders from which Bell appeals are reviewable by the Court. In their Brief, Appellees Pro Tune Plus and Patrick Riepl (collectively “Pro Tune Plus”) concede the district court’s order of December 31, 2012, contained an error because it stated the requirements for removal of N.D.C.C. § 27-08.1-04 had not been satisfied when, in fact, Pro Tune Plus did comply with the requirements of section 27-08.1-04. See Br. of Appellee ¶ 19. Therefore, the remainder of this brief will address Pro Tune Plus’s argument regarding appealability.

[¶2] For this Court to review the district court’s order of December 31, 2012,¹ the order appealed must meet at least one of the statutory criteria of appealability set forth in N.D.C.C. § 28-27-02. Subsection one of section 28-27-02 of the North Dakota Century Code provides “[a]n 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” may be reviewed by this Court. N.D.C.C. § 28-27-02(1). The orders from which Bell appeals meet the statutory criteria of appealability described in N.D.C.C. § 28-27-02(1).

¹ This Court has long-held an order refusing relief under N.D.R.Civ.P. 60, such as the district court’s order of February 27, 2013, is itself an appealable order. Schnell v. Schnell, 252 N.W.2d 14, 17 (N.D. 1977). Although this Court has clearly held an order refusing relief under N.D.R.Civ.P. 60 is itself an appealable order, due to the interrelatedness of the district court orders, Bell reviews the appealability of both orders under section 28-27-02.

I. The orders of the district court are appealable because such orders affect a substantial right of Bell as the orders removed the action from district court and prevented Bell from availing himself of those legal rights that accompany proceeding in district court.

[¶3] In their brief, Pro Tune Plus conclude the procedural and substantive formalities of the district court, including appellate review, right to a trial by jury before a district court judge, application of the Rule of Civil Procedure and Rules of Evidence, and consequently the mechanisms for discovery “are not rights to which Bell is entitled, however, because he chose to proceed in small claims court.” Br. of Appellee ¶ 13. Pro Tune Plus further states in their brief, “If [Bell] wanted the procedural and substantive formalities afforded by the district court, he could have initiated the action in district court. As the district court explained, ‘election by the plaintiff to proceed in small claims court is irrevocable.’” Id.

[¶4] Pro Tunes Plus functionally contends Bell has no substantial rights, including the procedural and substantive formalities of the district court, as a direct consequence of his choice to proceed in small claims court. Although the election to proceed in small claims court is irrevocable by a plaintiff pursuant to N.D.C.C. § 27-08.1-04, the defendant is not bound to proceed in small claims court. The defendant has the opportunity to revoke the plaintiff’s election to proceed in small claims by removing the action to the district court pursuant to N.D.C.C. § 27-08.1-04. In the present action, Pro Tune Plus elected to remove the action to the district court. After such removal, Pro Tune Plus is unquestionably entitled to the substantive and procedural formalities of the district court. Yet, Pro Tune Plus argues Bell is entitled to the same substantive and procedural formalities of the district court after removal. Such conclusion is illogical, as well as contrary notions of due process and the precedent of this Court.

[¶5] In Raaum v. Powers, the Court addressed the effect removal of an action to the district court has upon the proceeding. 369 N.W.2d 306, 308 (N.D. 1986). In Raaum, the court consolidated two cases on appeal. In both of those cases, the district court held the defendants' removal of their action from small claims did not entitle the defendants to the substantive and procedural formalities of the district court; instead, removal only provided the defendants the right of appeal. Id. at 309. The Raaum Court determined the district court's denial of the defendants' substantive and procedural rights was inconsistent with the purpose of the Small Claims Act as the goal of the Act "was not to completely preclude small claims from being formally adjudicated but provide a forum to the public for settling minor disputes." Id. Therefore, once a defendant properly removes an action from small claims court pursuant to section 27-08.1-04, the defendant "has availed himself of all the privileges concomitant to a formal civil trial, including not only the right of appeal, but the right to secure a trial by jury and other traditional aspects of the legal process as well." Id. at 310.

[¶6] The rationale of Raaum implicitly requires the privileges concomitant to a formal civil trial extend also to the plaintiff once an action is removed to district court. In the same way, when a defendant requests a trial by jury, both the defendant and plaintiff are entitled to and proceed with a trial by jury. Such decisions are not dichotomous in nature. Although made by one party, the decisions equally affect both parties. If the privileges "concomitant to a formal civil trial" would not extend to both the plaintiff and defendant upon removal, the parties would then no longer be an on equal playing field. Accordingly, following the rationale of Raaum, once Pro Tune Plus removed the action

to district court, both Bell and Pro Tunes Plus are entitled to the same substantive and procedural formalities of the district court.

[¶7] The order of the district court precludes Bell from exercising the procedural and substantive formalities which he is entitled to as he is no longer able to proceed in district court. Further, Bell is no longer able to exercise his statutory rights within N.D.C.C. § 27-08.1-04. The orders of the district court are decisive of as to Bell's right to proceed in district court and Bell's statutory right to attorney fees. Therefore, pursuant to the holding of Schaff v. Schaff, the orders of the district court affect a substantial right of Bell. 69 N.W.2d 777, 780 (N.D. 1955). As such, the orders of the district court are appealable under section 28-27-02(1).

II. The orders of the district court are appealable because they effectively determined the action and prevented a judgment from which an appeal may be taken as a party may not appeal judgment entered by the small claims court.

[¶8] In their Brief, Pro Tune Plus states that because the district court, in its order, noted Bell's ability to seek dismissal of the small claims action and commence another action in district court, "the dismissal of the current action from district court was without prejudice." Br. of Appellee ¶ 12. Pro Tune Plus, concludes "[t]he district court's orders are, therefore, not appealable. Id. However, such conclusion over-simplifies the procedural mechanisms of the action. Instead, the district court's order of December 31, 2012, is better characterized as an order remanding the action to small claims court. After remanding the action to small claims court, no action remained in district court, effectively dismissing the action from district court. The parties are left only with the action in small claims court. Because no final judgment will arise in the small claims

action in which this Court could review the district court's orders, the orders of the district court prevent a judgment from which an appeal may be taken.

[¶9] In Runck v. Brakke, this Court concluded an order dismissing an action without prejudice is not appealable under N.D.C.C. § 28-27-02 because such order does not determine the action and does not prevent a judgment from which an appeal might be taken. 421 N.W.2d 487, 488 (N.D. 1988). In the present action, even if the court were to characterize the orders of the district court as dismissal "without prejudice," the orders remain appealable under section 28-27-02 because they decisively determine the district court action and prevent a judgment from which an appeal might be taken. As discussed extensively within section II.A. of Appellant's Brief, the orders of the district court determine the action because said orders permanently terminated the action in the district court. Further, the orders of the district court prevent a judgment might be taken because the orders moved the action to a non-appealable forum with no action remaining in the district court. Accordingly, regardless of the characterization of the district court's order remanding the action to small claims, the order is appealable pursuant to section 28-27-02(1).

[¶10] Under Pro Tune Plus's rationale, no party would have the right to ever appeal a district court's order remanding a case to small claims court. For illustrative purposes, consider the hypothetical situation in which a district court determined a plaintiff's action filed in district court would be better determined in small claims court. Under Pro Tune Plus's argument, an order sending the action to small claims court would not be appealable because such order would be without prejudice and the plaintiff still has an available forum. However, there is no case law to support the argument that the

plaintiff could not appeal the district court's decisions. In the present action, applying Pro Tune Plus's rationale would create a circumstance in which a district court's order would at no time be reviewable by this Court.

CONCLUSION

[¶11] For the foregoing reasons, Appellant Bell respectfully requests this Court reverse the district court's order of February 7, 2013, denying the Appellant's motion for relief under N.D.R.Civ.P. 60(a) from the district court's order of December 31, 2013, and consequently vacate the district court's order of December 31, 2013, remanding the action to small claims court.

Dated this 24th day of May, 2013.

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BY: /s/ Rebecca L. Binstock
Rebecca L. Binstock (ID# 07238)

CERTIFICATE OF COMPLIANCE

[¶12] The undersigned, as attorneys for the Appellant Bobby Bell, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure,

that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service, and certificate of compliance totals 1742.

Dated this 24th day of May, 2013.

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STATE OF NORTH DAKOTA

Bobby Bell and Heidi Roberson,)
) SUPREME COURT NO. 20130068
 Plaintiffs,)
)
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 Bobby Bell,)
 Appellant,)
) **AFFIDAVIT OF SERVICE**
 v.) **BY EMAIL**
)
 Pro Tune Plus and Patrick Riepl,)
)
 Defendants/Appellees.)

STATE OF NORTH DAKOTA)
)ss
 COUNTY OF BURLEIGH)

The undersigned, being first duly sworn, deposes and says that she served the attached

REPLY BRIEF FOR APPELLANT

on May 24, 2013, by email as follows, to-wit:

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To the best of affiant’s knowledge, the email address above given is the actual email address of the party intended to be so served. The above documents were emailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

/s/Kelsey Backhaus
Kelsey Backhaus

Subscribed and sworn to before me this 24th day of May, 2013.

/s/Valerie A. Leapaldt
Notary Public, Valerie A. Leapaldt
Burleigh County, North Dakota
My Commission Expires: 9.5.16

(SEAL)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Bobby Bell and Heidi Roberson,)
) SUPREME COURT NO. 20130068
 Plaintiffs,)
)
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 Bobby Bell,)
 Appellant,)
)
 v.) **AFFIDAVIT OF MAILING**
)
 Pro Tune Plus and Patrick Riepl,)
)
 Defendants/Appellees.)

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

The undersigned, being duly sworn and of legal age, deposes and says that: I am a United States citizen, over 18 years of age, and on May 28, 2013, I served a copy of the attached:

REPLY BRIEF FOR APPELLANT

by placing a true copy in a postage paid envelope or envelopes addressed to each person named below, at the address stated below, which is the last known address of the addressee, and by depositing said envelope in the United States mail at Bismarck, North Dakota.

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/s/Kelsey Backhaus
Kelsey Backhaus

Subscribed and sworn to before me this 24th day of May, 2013.

/s/Valerie A. Leapaldt
Notary Public, Valerie A. Leapaldt
Burleigh County, North Dakota
My Commission Expires: 9.5.16

(SEAL)