

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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SUPREME COURT NO.: 20140128

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Riak Riak,

Petitioner and Appellant

- vs -

State of North Dakota,

Respondent and Appellee

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APPEAL FROM THE CIVIL JUDGMENT  
EAST CENTRAL JUDICIAL DISTRICT  
CASS COUNTY CR. NO. 09-2013-CV-00436  
THE HONORABLE JOHN C. IRBY PRESIDING

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BRIEF

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**STATEMENT OF THE ISSUE**

[¶1] ISSUE:

I. Were Riak Riak's Motions to Reopen his dismissed application for post conviction relief and his appeal of the Order Denying Petitioners Motion to Reopen Dismissed Application for Post Conviction Relief made timely?

ISSUE:

II. Did the Trial Judge err when he denied Mr. Riak's Motion to Reopen Dismissed Application for Post Conviction Relief?

### NATURE OF THE CASE

[¶2] On February 8, 2013 Riak Riak filed an Application for Post-Conviction Relief. Mr. Riak then filed an Application for Appointed Defense Services and was found eligible for appointed counsel. Attorney David Dusek was appointed to represent him.

[¶3] The State filed a Response requesting additional time to file its answer to Mr. Riak's Application for Post Conviction Relief. The Court entered an Order granting the State an additional 60 days.

[¶4] A post conviction hearing was held on May 9, 2013 at 3:33 pm. At the start of that hearing the State requested additional time to respond. The court granted the State 60 additional days and the hearing ended.

[¶5] On November 8, 2013 the Cass County Clerk of Court filed a Notification of Dismissal and an unsigned Order of Dismissal. Neither the State nor Mr. Riak's attorney, David Dusek filed any response to the Notification of Dismissal. On the 22<sup>nd</sup> of November, 2013 the Judge signed and Order of Dismissal.

[¶6] Mr. Riak sent a letter to the judge dated the 4th day of February, 2014. The Judge then sent a letter to Mr. Riak telling him he needed to file a proper response. That letter contained a copy of the Order to Dismiss.

[¶7] Mr. Riak then filed a Notice, Motion and Brief to Re-Open Dismissed Application for Post Conviction Relief on March 7, 2014. The State filed a Response on March 17, 2014. The Judge then entered and filed on March 3, 2014 an Order denying Petitioner's Motion to Re-open Dismissed Application for Post-Conviction Relief.

[¶8] Mr. Riak appealed the Order denying and filed that appeal on April 4, 2014. The Notice of Filing the Notice of Appeal was filed on April 10, 2014 and the Clerk's Certificate of Appeal was filed on May 8, 2014.

[¶9] This matter is now before the North Dakota Supreme Court.

### **STATEMENT OF FACTS**

[¶10] In 2009 Riak Riak plead guilty to a charge of gross sexual imposition and was sentenced to 20 years, first to serve 17 with 10 years of supervised probation to follow.

[¶11] Mr. Riak in 2010 filed an Application for ineffective assistance of counsel. He also applied for court appointed counsel to help him with his application. His application was accepted and the attorney appointed to help him with his post conviction application was David Dusek. A few months later he withdrew his application for post conviction release.

[¶12] Mr. Riak filed his second application for post conviction relief on February 6, 2013. In this application, he alleged ineffective assistance of counsel and that his sentence was too long. He also filed for court appointed counsel for this post conviction application. Again his application was accepted and again the attorney appointed for him was David Dusek.

[¶13] The State requested additional time to respond to this application App. P. 23. The court entered an Order granting the State a 60 day extension App. P. 26. When that 60 days elapsed the State still had filed no response.

[¶14] On May 9, 2013 at 3:30 p.m. a post conviction hearing began on Mr. Riak's post conviction petition. When the hearing began the State requested additional time to

respond to that application. The court granted additional time for the State to respond and then ended the hearing. The order granting the 60 days is found in the App. P. 26. The State during that 60 day period still filed no response to Mr. Riak's post conviction petition.

[¶15] The next time anything happened in this case was on November 8, 2013 when the District Clerk of Cass County signed and filed a Notification of Dismissal and Order of Dismissal. App. P. 30. That notification says "The Court has been advised that the above-entitled case has been settled or tried. To date, closing documents have not been filed. This case will be dismissed without prejudice in accordance with the Order following 14 days from the date unless the Court receives the documents required. No further notices will be sent "(emphasis added).

[¶16] Attached to and made a part of the above Notification was an unsigned Order to Dismiss. No further documentation was furnished to the Court by either the State of North Dakota or Defendant's attorney, David Dusek. So on November 22, 2013, District Judge John C. Irby signed the Order of Dismiss.

[¶17] In the Register of Actions there is no service document showing that the Order of Dismiss has ever been served on the defendant's attorney, David Dusek, or the Defendant, Riak Riak.

[¶18] Mr. Riak, in a letter dated February 18, 28, 2014 to the Cass County Clerk of Court stated he had been informed that his post conviction application had been dismissed. App. P. 41.

[¶19] A letter dated February 25, 2014 from District Judge John C. Irby to Mr. Riak stated: "I am unable to act on your request made by letter dated February 4, 2014."



This was dismissed, without prejudice, by Order dated November 22, 2013. A copy is enclosed. You will need to make and serve an appropriate motion. App. P. 46.

Therefore when Mr. Riak was informed in writing about the Order of Dismissal and when he received a copy of that Order was when Judge Irby's letter dated February 25, 2014 was delivered to him.

[¶20] On March 4, 2014 Mr. Riak signed and sent to the Cass County Clerk of Court a Motion to Reopen Dismissed Application for Post conviction relief and a Brief in support of that Motion. The Motion and Brief were filed on March 7, 2014. App. P's 49, 51, 53.

[¶21] Mr. Riak's brief in support of his motion to reopen explained why he didn't file anything. His reasons were:

1. That he had told attorney Dusek to continue with his post conviction relief action after attorney Dusek told him that attorney Dusek couldn't handle his immigration case;

2. That he believed attorney Dusek would continue his post conviction relief action.

3. That he believed attorney Dusek would be representing him in an evidentiary hearing on his post conviction application in the future.

4. That neither attorney Dusek or his office ever informed him his post conviction application had been dismissed without prejudice;

[¶22] That the above allegations against attorney Dusek are filed as explanations why Mr. Riak didn't file a response to the Notification of Dismissal and Order of Dismissal.

[¶23] The State filed a Response and a brief to Mr Riak's Motion to Reopen. In that brief the State concluded with a request for summary disposition of the allegations against attorney Dusek and/or attorney Beauchene under §29-32.1-09 or 29-32.1-12. As an alternative to summary disposition the State requested a hearing to address the accusations under NDCC §29-32.1-09(4). Nothing in the State's brief mentioned anything about the Order to Dismiss.

[¶24] Also the State's brief makes no mention about Mr. Riak's motion to reopen the Order of Dismiss and whether that Motion should be granted or dismissed.

[¶25] The Judge's Order Denying Petitioners Motion to Reopen Dismissed Application for Post Conviction Relief is found at App. P. 62. Paragraph 1 of that order states that the February 6, 2013 post conviction relief was dismissed on November 22, 2013. Paragraph 2 of that order states the factual reasons why Mr. Rial didn't respond to Notification of Dismissal and Order of Dismissal. Paragraph 3 of that order states legal reasons for dismissing Mr. Riak's post conviction for relief application. None of the above legal reasons were mentioned as the legal reasons the Notification of Dismissal and Order of Dismissal or Order of Dismiss. Paragraph 4 of the order dismisses Mr. Riak's application for post conviction relief.

[¶26] Nowhere in the above Order Denying Mr. Riak's Motion to Reopen does the trial judge ever explain the language in the Notification of Dismissal and Order of Dismissal or Order to Dismiss which states that the reason for dismissal were that the court had been advised the case has been settled or tried and therefore the case will be dismissed after 14 days if the required documents aren't filed with the court.

## ISSUES

**[¶27] ISSUE I. Were Riak Riak's Motions to Reopen his dismissed application for post conviction relief and his appeal of the Order Denying Petitioners Motion to Reopen Dismissed Application for Post Conviction Relief made timely?**

## ARGUMENT

[¶28] In all civil cases in North Dakota the prevailing party is supposed to serve a notice of entry of judgment or order on the opposing party.

[¶29] The state was the prevailing party in the case after the court signed the Order of Dismiss on November 22, 2013. To this date the state hasn't sent a Notice of Entry of that Order or an Order of Dismiss to Mr. Riak.

[¶30] According to Thorson vs. Thorson 541 NW 2d 692 (ND 1996) "Where counsel for the prevailing party failed to serve notice of the entry of order dismissing action, the running of the time for appeal did not commence until appealing party had actual knowledge of the entry of the order, and the finding of when that party had actual knowledge required action evident on the record on the part of the appealing party."

[¶31] In the Register of Actions the letter from the Judge to Mr. Riak dated February 25, 2014 App. P. 46 indicates a Notification of Dismissal and Order of Dismissal and Order of Dismiss were enclosed. Therefore after that letter was received by Mr. Riak he was aware of the Order of Dismiss.

[¶32] On March 4, 2014 Mr. Riak made a Motion to Re-Open Dismiss Application for Post Conviction Relief and a Brief in support of that Motion. These documents were filed on March 7, 2014. App. P. 49.

[¶33] The February 25, 2014 letter of the trial Judge also told Mr. Riak he needed to make and serve an appropriate motion. Mr. Riak must have made the appropriate motion because neither the Judge's ruling or the States Brief that responded to Mr. Riak's March 4, 2014 motion made any statement to indicate that they questioned whether or not Mr. Riak's March 4, 2014, motion was timely or inappropriate.

**[¶34] ISSUE II. Did the Trial Judge err when he denied Mr. Riak's Motion to Reopen Dismissed Application for Post Conviction Relief?**

[¶35] In the case now before the court Mr. Riak grounds for relief from the Trial Judge's Order of Dismiss are found in Rule 60 of the ND Rule of Civil Procedure. Mr. Riak's grounds can be found in either 60(b)(1) or 60(b)(6). 60 (b)(1) allows for excusable neglect. In this case Mr. Riak was in contact with his Attorney David Dusek. He told Attorney Dusek to proceed with the Post Convictions Application. Attorney Dusek told him that he was proceeding said application. Therefore Mr. Riaks negligence was excusable because he was relying on what his civil appointed attorney, David Dusek told him.

[¶36] Mr. Riak could also use as a ground for relief 60(b)(6). Mr. Riak believes 60(b)(6) would also be applicable because he was relying on his attorney, David Dusek who was appointed for him by the commission of Legal Counsel for Indigent Defense to do what he was appointed to do, represent him on a post conviction application and keep him informed on what was going on with his appeal. Instead of attorney Dusek acting in accordance with that appointment, attorney Dusek did nothing and let Mr. Riak's petition be dismissed.

[¶37] The standard of review in an Appeal from an N.D.R.Civ. P.60(b) order is whether or not the trial court abused its discretion. *Watne vs. Watne* 391 NW 2d 636 (N.D. 1986) *Guskjolen v.s Guskjolen* 391 NW 2d 639 (ND 1986).

[¶38] In the case now before the court Mr. Riak is trying to re-open an Order of Dismiss App. P. 33. That Order of Dismiss was issued because the matter had been tried or settled and the parties failed to file closing documents within 14 days of being notified to do so. No where in the Register of Actions is there anything to indicate that this case had been tried or settled by agreement.

[¶39] Mr. Riak in his Motion to Re-open did all he could do under the circumstances. He told the court what had occurred between him and his attorney why he believed his attorney was proceeding with his post conviction application and he made his motion to reopen once he learned of the Motion to Dismiss.

[¶40] The State response to Mr. Riak's motion was to treat Mr. Riak's Motion as if it is a third application for post conviction relief and the court should on its own motion dismiss Mr. Riak's application.

[¶41] The Court's Order Denying Petitioners Motion to Re-open Dismiss Application for Post Conviction Relief make no mention of the Order of Dismissal and gives no reason why said Order was entered. The Courts order refers to Mr. Riak's multiple applications for post conviction relief and the fact that the applications lack factual support and legal basis. No mention is made of the fact the Court allowed a post conviction hearing to begin on May 9, 2014, and the fact it was continued because that State requested additional time to respond.

[¶42] In this case there is nothing in the record to support the courts Motion to Dismiss. When there is nothing in the record to support a dismissal it is an abuse of discretion for a judge to sign such a dismissal.

**CONCLUSION**

[¶43] For all of the reasons stated above this case should be remanded to the District Court with an order requiring that Court to grant Mr. Riak's motion to re-open Mr. Riak's dismissal application for post conviction relief and to have a hearing on his application for post conviction relief.

DATED this \_\_\_\_\_ day of August, 2014.

/s/ Benjamin C. Pulkrabek \_\_\_\_\_  
Benjamin C. Pulkrabek, ID #02908

**CERTIFICATE OF SERVICE BY MAIL**

[¶44] The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on August **13th**, 2014, she served, by e-mail and mailed a copy of the following:

**APPELLEES APPENDIX AND BRIEF**

to: Birch Peterson Burdick  
Burdickb@casscountynd.gov

Mailed to: Riak Riak  
JRCC  
2521 Circle Dr.  
Jamestown, ND 58401

The undersigned further certifies that on August **13th**, 2014, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLEES APPENDIX AND BRIEF.

      /s/Sharon Renfrow        
Sharon Renfrow, Admin. Legal Assistant  
Pulkrabek Law Office