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July 21, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Blume Construction, Inc., Petitioner/Appellant, vs. State of North Dakota by Job Service North Dakota, Respondent/Appellee.	**SUPREME COURT NO. 20150103** Civil No. 08-2014-CV-01823

ON APPEAL FROM THE DISTRICT COURT JUDGMENT
ENTERED MARCH 30, 2015

STATE OF NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

THE HONORABLE DAVID E. REICH

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph

TABLE OF CASES

[¶1] **ARGUMENT**

[¶2] **I. Job Service's interpretation of North Dakota Rule of Professional Conduct 5.5(b)(3) and Admission to Practice Rule 3(A) is not in accordance with the law.**

[¶3] As noted by Job Service, Rule 5.5(b)(3) states:

> (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:
>
> . . .;
>
> (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 . . . .

N.D.R. Prof. Conduct, 5.5(b)(3).

[¶4] Rule 3(A) of the Admission to Practice Rules requires pro hac vice admission for nonresident attorneys who engage in the practice of law by appearing, signing pleadings, or by being designated as counsel in administrative agency actions. Admission to Practice R. 3(A). A motion for pro hac vice admission must be filed no later than 45 days after service of the pleading, motion, or other paper. Id. at R.3(A)(2).

[¶5] Thus, Rule 5.5(b)(3) recognizes that certain preparatory activities, prior to application for pro hac vice admission under Rule 3(A), may be necessary.

[¶6] It is important to put this matter in context. Upon receipt of the November 8, 2013, Determination, Blume Construction had less than 15 days, due to mailing, to file the Request Form. After preserving the appeal timeline, Fidler then sought pro hac vice admission, which he ultimately was unable to attain as he could not secure a sponsoring attorney. Fidler took the only step necessary to preserve the appeal timeline.

[¶7] Rule 5.5(b)(3) and Rule 3(A) each recognize that a nonresident lawyer may take preparatory action first and later seek pro hac vice admission. Rule 5.5(b)(3) provides a safe harbor so long as "the lawyer reasonably expects to be . . . authorized." Indeed, Rule 3(A) provides that a motion for pro hac vice admission must be filed no later than 45 days after service of the pleading, motion, or other paper. Recognizing that the Rules of Professional Conduct are "[r]ules of reason," the better interpretation and one in keeping with "the purposes of legal representation and of the law itself" is that preparatory action that is within the safe harbor of Rule 5.5(b)(3) is not voided when a nonresident lawyer is unable to secure the pro hac vice admission that had been reasonably anticipated. N.D.R.Prof. Conduct, Scope [1].

[¶8] Job Service appears to argue that had Filder been successful in attaining pro hac vice admission, Blume's appeal would have been perfected. But, that is not what Rule 5.5(b)(3) and Rule 3(A) require. Rule 5.5(b)(3) allows activities "for a matter in which the lawyer reasonable expects to be so authorized." The record is devoid of evidence suggesting Fidler did not reasonably expect to be authorized; rather, he simply could not get a sponsoring attorney.

[¶9] Assuming, without conceding, Fidler's submission of the online Request Form required pro hac vice admission, Fidler had 45 days to request admission. As this case illustrates, a problem arises when: (1) an out-of-state attorney reasonable expects to be admitted pro hac vice; (2) files a pleading, motion, or other paper; (3) but is subsequently is unable to secure pro hac vice licensure because the attorney is unable to secure a sponsoring North Dakota attorney.

[¶10] Under Job Service's interpretation—an interpretation of rules it does not administer—there is no safe harbor if the attorney is unable to secure a sponsoring North Dakota attorney. The documents are "void from the beginning" if the attorney cannot achieve pro hac vice status. See Wetzel v. Schlenvogt, 2005 ND 190, ¶ 13, 705 N.W.2d 836. Job Service's interpretation, in this context, nullifies the phrase "reasonably expects to be so authorized" for pro hac vice admission under Rule 5.5(b)(3). N.D.R. Prof. Conduct 5.5(b)(3).

[¶11] The Referee's one-page analysis fails to recognize this distinction because the Referee simply applied Carlson I's holding without applying this Court's analysis in Carlson I. Indeed, the Referee stated: "To properly address the issue of Mr. Fidler's filing of the appeal on behalf of the employer, the Appeals Referee must defer to the findings of the court in . . . . [Carlson I]." [App. 10]

[¶12] In sum, Job Service's interpretation of Rule 5.5(b)(3) and Rule 3(A) result in a profound gamble for an employer who has less than 15 days to submit an online Request Form. Indeed, even if the employer's out-of-state attorney reasonably expects and attempts to attain pro hac vice admission, which Rule 5.5(b)(3) contemplates, the validity of an employer's appeal hinges on whether the attorney is actually granted pro hac vice admission. This Court should reject such an interpretation.

[¶13] II. Fidler did not engage in the unauthorized practice of law by submitting Job Service's rudimentary online Request Form.

[¶14] Fidler performed a function an unlicensed person could do, in accordance with Rule 5.5(b)(5). Yet, Job Service continues to claim "[a]ll of Fidler's actions involved legal training, judgment and skill and reasonably were considered by Job Service to be the unauthorized practice of law." [Appellee Brief, at ¶ 17] Therefore, Job

Service reasons, Fidler's submittal of the online Request Form "should be considered ineffective and void under the reasoning of Carlson I." [Appellee Brief, at ¶ 20]

[¶15] Breaking down the online Request Form Fidler submitted illustrates Job Service's assertion is erroneous. Paragraph breaks have been added to the text of the Request Form for clarity:

> [1] This is an appeal by Blume Construction, Inc. (BCI) of the Notice of Determination by Job Service North Dakota (JSND) dated November 8, 2013, of Assignment of Penalty Tax rate due to the transfer of Ownership and Payroll for the Purposes of Obtaining a Lower UI Tax Rate. JSND assigned BCI the highest maximum tax rate of 9.78 for 2013 and the highest rate assignable for the next three rate years (2014, 2015 and 2016).
>
> [2] JSND assigned the penalty tax rate against BCI because it determined that a transfer of ownership and payroll from Gido Enterprises, LLC (Gido) was knowingly done to obtain a lower tax rate for North Dakota Unemployment Insurance under North Dakota Century Code (N.D.C.C.) 52-04-08.2(3)(a). That section provides that: If a person knowingly acts or attempts to transfer or acquire a trade or business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate or knowingly violates any other provision of this chapter related to determining the assignment of an unemployment insurance tax rate, or if a person knowingly advises another person in a way that results in a violation of those provisions, the person is subject to the civil penalties provided in this subsection. a. If the person is an employer, the employer must be assigned, in lieu of that employer's experience rate, the highest rate assignable under this chapter for the rate year during which the violation or attempted violation occurred and the three rate years immediately following that rate year. However, if the employer's experience rate is already at the highest rate for any year of that four-year period or if the amount of increase in the person's experience rate imposed under this subdivision would be less than two percent for any year of the four-year period or if the amount of increase in the person's experience rate imposed under this subdivision would be less than two percent for any year of the four-year period, the penalty unemployment insurance tax rate for the year must be determined by adding a rate increment of two percent of taxable wages to the calculated experience rate.
>
> [3] Knowingly is defined in N.D.C.C. 52-04-00.1(3) as having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.

> [4] Contrary to the JSND Notice of Determination, BCI did not acquire Gido on May 18, 2013. Neither was a change in payroll from Gido to BCI done solely or primarily for the purpose of obtaining a lower tax rate for North Dakota Unemployment Insurance.
>
> [5] Therefore the Notice of Determination should be reversed and BCI should be able to keep its already existing 2013 UI rate of .017. BCI will be submitting additional documents in this regard.

App. 18.

[¶16] The first paragraph is factual information taken directly—and largely quoted—from the November 8, 2013, Notice of Determination. [App. 15-17] Simply reciting factual information provided by Job Service is not legal analysis, contrary to Job Service's claims. Similarly, the second paragraph is a verbatim quote of the statute Blume is accused of violating. The fact that Fidler "cited" to the statute is of no consequence because Job Service provided Blume the statutory citation and verbatim statutory language in the November 8, 2013, Notice of Determination. [App. 17, Applicable Law] The third paragraph is a one-sentence definition of "knowingly."

[¶17] The fourth paragraph is simply a denial of Job Service's factual allegations. Blume, through Fidler, denied the date on which Job Service claimed Blume acquired Gido Enterprises, LLC. Blume also denied making payroll changes to obtain a lower tax rate. Simply denying Job Service's factual allegations is not legal analysis or specifying errors, as Job Service alleges.

[¶18] Finally, the fifth paragraph simply states that the Notice of Determination should be reversed, leaving the current unemployment insurance rate in place. Fidler states additional documentation will be coming. Fidler did not submit additional documents.

[¶19] Thus, once the online Request Form is parsed, it becomes clear Fidler was not citing statutes, making legal arguments, and specifying errors. Fidler's actions bear no resemblance to the actions of the attorneys in Carlson I. Carlson I did not specifically address whether submitting the appeal notice alone constituted the practice of law, as the combination of actions of the attorneys was clearly sufficient to be considered legal representation, and therefore, the unauthorized practice of law.

[¶20] The only portion of the online Request Form that has an appearance of analysis is the third sentence, defining "knowingly." This definition was not provided in the Notice of Determination, but Fidler's inclusion of it can hardly be enough to transform Fidler's rote recitation of the information Job Service provided, along with general denials of Job Service's factual allegations, into legal analysis on par with that of the attorneys in Carlson I.

[¶21] Job Service continues to rely upon a Missouri case, Strong v. Gilster Mary Lee Corp., "to show the impact of the failure to obtain pro hac vice status in an administrative agency proceeding." [Appellee Brief, at ¶ 20]

[¶22] For the same reasons Job Service's reliance Carlson I is erroneous, Job Service's reliance on Strong is erroneous. In Strong, the court determined the out-of-state attorney was engaged in the unauthorized practice of law, as the attorney: (1) prepared and filled out an "application for review," which explicitly stated it must be signed by an "attorney licensed in Missouri"; (2) filed three motions; (3) and appeared at a hearing, advocating for his client. See Strong 23 S.W.3d 234, 238-40 (Mo.Ct.App. 2000). Ultimately, the Strong court correctly held the out-of-state attorney's activities

"amount to the practice of law . . . because those activities involved the application of legal knowledge and skill and the assertion of legal rights and claims." Strong, at 239.

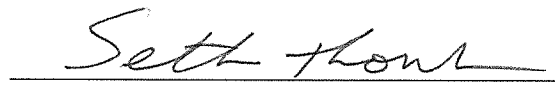
[¶23] Strong does not support Job Service's position in this matter because Fidler's actions bear no resemblance to those of the attorney in Strong—or Carlson I. Fidler simply submitted the online Request Form.

[¶24] **III. Conclusion**

[¶25] For the reasons set forth above, and in Blume's brief on the merits, the District Court judgment affirming Job Service's November 8, 2013, Determination, should be reversed and this matter should be remanded to Job Service for a hearing on the merits of Blume's appeal.

[¶26] Respectfully submitted July 21, 2015.

VOGEL LAW FIRM

By: 

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BURLEIGH COUNTY

AFFIDAVIT OF ELECTRONIC SERVICE

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

Alicia Rash, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter. Affiant states that on July 21, 2015, **Appellant's Reply Brief** was filed electronically with the Clerk of Court of the North Dakota Supreme Court through email, and that the same documents were electronically served through email upon:

Michael Pitcher
mtpitcher@nd.gov

Alicia Rash
Alicia Rash

Subscribed and sworn to before me this 21 day of July, 2015.

Julie Kinnischtzke
Notary Public

(SEAL)

JULIE KINNISCHTZKE
Notary Public
State of North Dakota
My Commission Expires Nov. 23, 2016