

**In the Supreme Court
State Of North Dakota
Supreme Court No. 20150301**

PHI Financial Services, Inc.,
Plaintiff and Appellee,

Grand Forks County
#18-2012-CV-00577

v.

Johnston Law Office, P.C., and
Choice Financial Group,
Defendant,

Johnston Law Office, P.C.,
Appellant.

APPEAL FROM ORDER COMPELLING DISCOVERY AND JUDGMENT
OF CONTEMPT IN THE DISTRICT COURT OF GRAND FORKS,
NORTH DAKOTA NORTHEAST CENTRAL JUDICIAL DISTRICT

THE HONORABLE THOMAS E. MERRICK, PRESIDING

**REPLY BRIEF OF APPELLANT,
JOHNSTON LAW OFFICE, P.C.**

FEBRUARY 2, 2016

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STATEMENT OF ISSUES

- I. Whether Appellant's Appeal Is Timely Because Johnston Law Filed Its Notice Of Appeal Within 60 Days Of Entry Of The Contempt Order.
- II. Whether The 50 Interrogatory Limit Imposed By North Dakota Rule Of Civil Procedure 33(A)(3) Applies To Phi In The Current Proceeding.
- III. Whether Rule 33 Is Not Ambiguous And Does Not Require Construction Outside The Letter Of The Law.

LAW AND ARGUMENT

I. Appellant's Appeal Is Timely Because Johnston Law Filed Its Notice Of Appeal Within 60 Days Of Entry Of The Contempt Order.

[¶1] Although the opinion is subject to a petition for rehearing this Court in PHI Fin. Servs., Inc. v. Johnston Law Office, P.C. decided this issue at ¶7 where it concluded:

We reject the argument because the nonappealable interlocutory order is reviewable as a timely appeal from a final judgment. *E.g., Security State Bank v. Orvik*, 2001 ND 197, ¶ 6, 636 N.W.2d 664. We conclude we have jurisdiction to consider the issues raised in these appeals

PHI Fin. Servs., Inc. v. Johnston Law Office, P.C., 2016 ND 20, ¶ 7

Rule 4(a)(1) of the North Dakota Rules of Appellate Procedure provides a party a 60-day time limit to file an appeal of an order or judgment. N.D.R. App.P 4(a)(1). The 60-day period for filing a notice of appeal begins to run upon “service of notice of entry of the judgment or order being appealed.” *Id.* Johnston Law did not appeal the Discovery Order within 60 days because the Discovery Order was interlocutory and not appealable. The Discovery Order is only appealable through review of the Contempt Order, an appeal of which was timely filed on October 5th, 2015.

[¶2] The district court's Discovery Order was entered on June 29, 2015. *See* Order Grant's Mot. to Compel, Doc. #474. Following Appellant's refusal to comply with the Discovery Order, on August 5, 2015, counsel for PHI filed an Affidavit seeking an Order to Show Cause. *See* Aff. in Supp. of Order to Show Cause, Doc. #480. A hearing was held and on September 21, 2015, the district court found Appellant to be in contempt of the district court's Discovery Order. *See* Contempt Order, Doc. #491. On October 5, 2015, Appellant appealed to this Court in regards to both the Discovery Order and the Contempt Order. *See* Notice of Appeal from Separate J. Proceedings, Doc. #496.

¶3 Appellee argues Johnston Law has filed an untimely appeal of the Discovery Order on the basis that Johnston Law's Notice of Appeal was not filed until 95 days after receiving notice of the judgment's entry. Appellee's argument fails because discovery orders are interlocutory and are not appealable. Grand Forks Herald v. District Court, 322 N.W.2d 850, 852 (N.D. 1982). The Discovery Order did not become appealable until the Contempt Order was entered. Johnston Law filed its appeal of the Contempt Order within the 60-day time limit allowed, thereby filing a timely appeal of the underlying Discovery Order.

¶4 The time-limit provided by Rule 4(a)(1) for an appealing an order only applies to appealable orders. Discovery orders are interlocutory and therefore are not appealable. Id. The Discovery Order was not appealable when the Order was entered on June 29th, therefore the current appeal of the Discovery Order is not untimely.

¶5 The Discovery Order is currently appealable through the Contempt Order. The Contempt Order is appealable through N.D. Cent. Code § 27-10-01.3(3), which states: "any order or judgment finding a person guilty of contempt may be appealed to the North Dakota Supreme Court, which is a final order or judgment for purposes of appeal." Inv'rs Title Ins. Co. v. Herzig, 2010 ND 138, ¶ 1, 785 N.W.2d 863.

¶6 A party that is willing to be found in contempt of a court's order is offered the benefit of instant review of the underlying order upon appeal of the contempt order.

If a party is willing to pay the price of being punished for contempt (or suffering an equivalent sanction such as dismissal of the complaint) if the validity of the order he has disobeyed is ultimately upheld, he can get immediate review of that order by appealing from the contempt judgment.

Marrese v. Am. Acad. of Orthopaedic Surgeons, 726 F.2d 1150, 1157 (7th Cir. 1984) (citing United States v. Ryan, 402 U.S. 530, 532-33, 29 L. Ed. 2d 85, 91 S. Ct. 1580 (1971); Ryan v. Commissioner, 517 F.2d 13, 19-20 (7th Cir. 1975); Hanley v. James

McHugh Construction Co., 419 F.2d 955, 957 (7th Cir. 1969). Cf. National Utility Service, Inc. v. Northwestern Steel & Wire Serv., Inc., 426 F.2d 222 (7th Cir. 1970); Hastings v. North East Independent School Dist., 615 F.2d 628, 631 (5th Cir. 1980). If the underlying order is invalidated, the contempt judgment falls with it. *See* Hanley v. James McHugh Construction Co., *supra*, 419 F.2d at 956, 958; *cf.* United States v. Ryan, *supra*, 402 U.S. at 533.).

¶7 The Contempt Order was issued due to Johnston Law's purported failure to abide by the Discovery Order. Johnston Law was required to be punished for contempt in order to obtain review of the Discovery Order. The Contempt Order was entered on September 21st, 2015, and Johnston Law appealed the Contempt Order within the 60-days on October 5th. Johnston Law filed a timely appeal of the Contempt Order through which Johnston Law obtained the right to appeal the underlying Discovery Order. The appeal of the Discovery Order is timely because the appeal of the Contempt Order is timely.

II. The 50 Interrogatory Limit Imposed By North Dakota Rule Of Civil Procedure 33(A)(3) Applies To Phi In The Current Proceeding.

¶8 The North Dakota Rule of Civil Procedure 33(a)(3) limits interrogatories in a case to 50 with more interrogatories allowed only upon approval of the court. Prior to 2012, there were no limitations on interrogatories served during litigation. This case was commenced on April 17th, 2012, prior to the effective date of the 2012 amendment of Rule 33(a)(3) which first enacted the 50 interrogatory limit. Because this case was commenced prior to the rules enactment, PHI claims the rule does not apply in this case. However, amendments to the rules of civil procedure apply to pending litigation unless their application would not be feasible or would work an injustice. None of these factors are present in this case, therefore Rule 33(a)(3) and the 50 interrogatory limitation apply to PHI.

[¶9] The North Dakota Supreme Court determines when rules of civil procedure apply to pending litigation:

Article VI, Section 3 of the North Dakota Constitution and N.D.C.C. § 27-02 authorize the North Dakota Supreme Court to promulgate rules of procedure. It is solely within the discretion of the Supreme Court to determine the effective date of a rule of procedure not affecting substantive rights. *See Larson v. Independent School District No. 314*, 305 Minn. 358, 233 N.W.2d 744, 747 (Minn. 1975). Pursuant to Rule 86, N.D.R.Civ.P., the North Dakota Rules of Civil Procedure became effective on July 1, 1957, and governed "all further proceedings in actions then pending" unless the presiding court believed their application would not be feasible or would work an injustice, "in which event the procedure existing at the time the action was brought applies." Our Court has maintained this practice "as the existing rules are amended or new rules are added because it establishes a uniform pattern which civil actions can follow but still permits the court to apply prior rules in pending cases where fairness and justice so warrant.

Paxton v. Wiebe, 1998 ND 169, ¶ 22, 584 N.W.2d 72, 77.

[¶10] The majority of amendments to the Rules of Civil Procedure apply to pending litigation.

Id. The timing of the amendment to Rule 33 therefore does not excuse PHI from adhering to the 50 interrogatory limit. The only justification from excusing application of amended Rule 33 would be issues of fairness and justice, none of which apply to this case. Pursuant to Rule 86, the 50 interrogatory limitation applies to PHI in the current litigation.

III. Rule 33 Is Not Ambiguous And Does Not Require Construction Outside The Letter Of The Law.

[¶11] PHI requests that the Court interpret Rule 33 to exclude post-judgment discovery from the 50-interrogatory limit on the basis that the statute is ambiguous and, as interpreted by Johnston Law, would lead to absurd results. For the Court to interpret the statute, the statute must first be ambiguous. *See State v. Fasteen*, 2007 ND 162, ¶ 1, 740 N.W.2d 60 ("When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. N.D. Cent. Code § 1-02-05"). Rule 33 is not ambiguous and therefore the letter of the Rule cannot be disregarded.

[¶12] Post-judgment interrogatories are governed by the Rules of Civil Procedure. N.D.R. Civ.P 69(b). Rule 33(a)(3) limits interrogatories to 50 without further approval of the court, stating: “Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 50 written interrogatories, including all discrete subparts.”

[¶13] Though neither Rule 33 nor Rule 69 hint that post-judgment discovery is exempt from discovery limitations, PHI alleges that Rules are ambiguous. "A statute is ambiguous if it is susceptible to meanings that are different, but rational." This Court... "construes statutes in a practical manner and gives consideration to the context of the statutes and the purposes for which they were enacted." Amerada Hess Corp. v. State ex rel. Fong, 2005 ND 155, ¶ 12, 704 N.W.2d 8.

[¶14] PHI argues the language allows for two different readings: one where post-judgment interrogatories are included in the 50-interrogatory limit and one where post-judgment discovery has no limit. PHI's interpretation ignores the written context and letter of the Rules of Civil Procedure. Nowhere in the Rules of Civil Procedure does it suggest post-judgment discovery is exempt from Rule 33. Rule 33 makes clear that all interrogatories are included in the 50-interrogatory limitation. Without even a suggestion that post-judgment discovery is exempt from this limitation, the statute cannot be ambiguous.

[¶15] Furthermore, PHI's interpretation violates the purpose behind Rule 33. The 50-interrogatory limitation was enacted in order to limit frivolous and costly interrogatories. *See Minutes of the Joint Procedure Comm.* 20-22 (Jan. 26-27, 2012), available at <http://www.ndcourts.gov/court/JP/Minutes/jan2012.htm#p20> . While PHI argues the Committee never mentioned post-judgment discovery in their discussions of Rule 33, thereby excluding post-judgment discovery from the limitations of Rule 33, the argument falls both ways. Post-

judgment interrogatories are costly and burdensome just like pre-judgment interrogatories. There is nothing inherent to post-judgment discovery that differentiates it from pre-judgment interrogatories, and if the Committee intended to exclude post-judgment interrogatories from the limitation, the Committee would have indicated so.

[¶16] Finally, PHI argues strict adherence to Rule 33 will result in an absurd result, forcing parties to limit pre-judgment interrogatories in order to serve post-judgment interrogatories in aid of recovering a judgment. Rule 33 does not require such a result as it allows the court to order additional interrogatories to the extent consistent with Rule 26. To be clear, it has never been Johnston Law's stance that PHI could not serve post-judgment interrogatories. Johnston Law has only objected to PHI's continued disregard for post-judgment procedure (violating the stay, ignoring the "meet and confer" requirement, serving excess interrogatories). To serve more than 50 interrogatories, PHI must first request leave to serve additional interrogatories. PHI failed to do so, therefore the post-judgment interrogatories violate Rule 33.

CONCLUSION

[¶17] For the aforementioned reasons, Johnston Law requests the Court reverse the Discovery Order and Contempt Order entered by the district court.

Respectfully submitted this 2nd day of February 2016.

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CERTIFICATE OF ELECTRONIC SERVICE

I, **DeWayne Johnston**, attorney for the Defendant\Appellant, and officer of the court, hereby certify that a true and correct copy of the foregoing:

1. Plaintiff/Appellant's Reply Brief

was served via **ELECTRONIC MAIL** from Grand Forks, North Dakota on this 2nd day of February, 2016 to:

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