

**In the Supreme Court
State Of North Dakota**

June 24, 2016

Supreme Court No. 20150301

PHI Financial Services, Inc.,

Plaintiff and Appellee,

Grand Forks County

v.

#18-2012-CV-00577

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

THE DISTRICT COURT OF GRAND FORKS, NORTH DAKOTA

NORTHEAST CENTRAL JUDICIAL DISTRICT

THE HONORABLE THOMAS E. MERRICK, PRESIDING

PETITION FOR REHEARING OF DEFENDANT, APPELLANT

JOHNSTON LAW OFFICE, P.C.

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TABLE OF CONTENTS

Grounds for Rehearing.....1

Statement of the Case.....1

Statement of Facts.....3

Argument.....4

Conclusion.....5

TABLE OF AUTHORITIES

STATUTES

¶¶

CASES

Inv'rs Title Ins. Co. v. Herzig, 2010 ND 138, ¶ 30

2, 4

In re Joint Eastern and S. Dists. Asbestos Litigation, 22 F.3d 755, 760 (7th Cir.1994)

4

MISCELLANEOUS SOURCES

15B Federal Practice & Procedure § 3916

2, 4

Moore's Federal Practice § 202.13[1] (3d ed.2009)

4

GROUND FOR REHEARING

[¶ 1] The Court erred by ending its analysis of the District Court's order holding Johnston Law Office P.C. in Contempt of Court at the validity of the District Court Order in contention. This Court should analyze the requisite intent on the part of Johnston Law. Finally, given the holding of the court is clear that there was an absence of controlling authority on the issues being presented in the appeal at those issues did bring to the court differences of opinion the required clarification from this Court.

STATEMENT OF THE CASE

[¶ 2] A discovery dispute developed between Johnston Law Office P.C. and PHI Financial Services Inc. On June 29, 2015 the District Court entered an interlocutory order compelling Johnston Law office P.C. to render responses to post trial discovery served upon it by PHI Financial Services Inc. Because the District Court's Order compelled to post judgment discovery North Dakota law did not provide Johnston Law Office P.C. with the ability to request appellate review or other legal remedy. On September 18, 2015 Johnston Law Office P.C. filed a response to PHI Financial Services request for contempt indicating that it felt the only remedy available for appellate review was upon an order of contempt from the court as set forth in Inv'rs Title Ins. Co. v. Herzig, 2010 ND 138, ¶ 30, 785 N.W.2d 863, 872 which stated "... orders granting discovery are not appealable if review is available by way of disobedience and contempt." 15B Federal Practice & Procedure § 3916... . The District Court in turn on September 22, 2015 held Johnston Law Office P.C. in contempt of court for failing to abide by its post-trial interlocutory order compelling discovery. Johnston Law office filed a timely appeal and on June 10, 2016 this Court rendered the underlying opinion found at 2016 ND 114.

STATEMENT OF FACTS

[¶ 3] The Statement of Facts previously provided in this case remain operative.

ARGUMENT

[¶ 4] **That Johnston Law Office P.C. should not be found to have intentionally disregarded a court order in the face of procedural requisites to effectuate appellate review.**

The analysis of this Court at ¶23 limits its inquiry to the validity of the underlying District Court Order. However, at ¶22 this Court notes the standard under which a contempt order must issue and that willful and inexcusable intent to violate the underlying order be present. While it is true that Johnston argued the underlying discovery matters did impact the validity of the District Court Contempt Order in its requested relief before this court, Johnston Law Office P.C. maintains that the narrow circumstances before the court should not be considered or construed to be as an attempt of willful and inexcusable intent upon the part of Johnston Law Office P.C. The process for appellate review as set forth by this court in Inv'rs Title Ins. Co. v. Herzig, 2010 ND 138, ¶ 30 is very specific and narrow in its application as set forth below:

For appellate review purposes, post-judgment proceedings have been treated as separate litigations from the action which produced the underlying judgment. See, e.g., In re Joint Eastern and S. Dists. Asbestos Litigation, 22 F.3d 755, 760 (7th Cir.1994); see also 19 James Wm. Moore & George C. Pratt, Moore's Federal Practice § 202.13[1] (3d ed.2009); 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3916 (2d ed.1992). “Orders relating to the enforcement, execution, or interpretation of a final judgment ordinarily should be final upon complete disposition of all present related issues.... Orders denying discovery in aid of execution also are appealable, **but orders granting discovery are not appealable if review is available by way of disobedience and contempt.**” 15B Federal Practice & Procedure § 3916.

Inv'rs Title Ins. Co. v. Herzig, 2010 ND 138, ¶ 30, 785 N.W.2d 863, 872. (*Emphasis added*).

This Court at ¶7 sets forth the process in which post judgment contempt proceedings are brought before this court in light of its holding in Inv'rs Title Ins. Co. v. Herzig, 2010 ND 138, ¶

30. It is requested that the court at the analysis found in ¶7 and ¶8 to the analysis in ¶22 and ¶23 to Johnston Law Office P.C. of the inexcusable and willful intent elements of the contempt order.

Given the facts in this case and the previously unsettled law brought before this Court and under the circumstances Johnston Law Office P.C. should be found to have exercised excusable and utter lack of intent to defy the District Court Order. In this case there was no process to which Johnston Law Office P.C. turn to address the remedy sought absent the District Court's Order of contempt. Given the facts and totality of the circumstances it would be inequitable to uphold the finding of civil contempt against Johnston Law Office P.C.

CONCLUSION

[¶5] For the reasons stated herein, this Court should vacate the Order of Contempt against Johnston Law Office P.C. entered by the District Court as the June 10, 2016 in the underlying appeal had been resolved in the context of the discovery dispute moving forward.

Respectfully submitted and dated this 24th day of June, 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. Petition for Rehearing

was served via **ELECTRONIC MAIL** from Grand Forks, North Dakota on this 24th day of June, 2015 to:

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Dated this 24th day of June, 2015.

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