IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jonathan T. Garaas,

Petitioner-Appellant

vs.

Cass County Joint Water Resource District, a political subdivision of the State of North Dakota,

Respondent-Appellee

Supreme Court No. 20150350

Civil No. 09-2015-CV-01467
(Cass County District Court)

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# REPLY BRIEF OF PETITIONER-APPELLANT

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APPEAL FROM THE JUDGMENT OF DISMISSAL OF THE SAID DISTRICT COURT ENTERED ON DECEMBER 3, 2015

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE DEBBIE G. KLEVEN

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[¶1] **ISSUES ON APPEAL**

[¶2] The Cass County Joint Water Resource District [hereinafter "WATER DISTRICT"] never identifies the *missing* "statutory requirements for perfecting the appeal" - both filing and service were accomplished.

[¶3] **STATEMENT OF THE CASE**

[¶4] At ¶ 2 of the Appellee's Brief, WATER DISTRICT correctly makes the statement it is "a political subdivision of the State of North Dakota" without attribution to legal authority. WATER DISTRICT appears to have unqualifiedly accepted Jonathan T. Garaas' [hereinafter "LANDOWNER"] legal argument, predicated upon statute(s) [see, POINT 2(A) of Brief of Petitioner-Appellant; specifically, N.D.C.C. § 61-16.1-11(1)] mandating the existence of an "agreement" that "shall state its purpose and the powers to be exercised, and shall provide for the method by which the power or powers shall be exercised." Obviously, such agreement did allow for "Carol Harbeke Lewis to be the certified 'duly appointed, qualified, and acting Secretary-Treasurer of the Cass County Joint Water Resource District.' App., ps. 12-13", and while acting as the Secretary-Treasurer of WATER DISTRICT, she made undisputed representations of her authority to accept service of process, which was timely accomplished by the Deputy Sheriff, as noted at ¶ 35 of LANDOWNER'S Brief.

[¶5] WATER DISTRICT never disputes the Secretary-Treasurer made such representations to the Deputy Sheriff, nor does it assert that the Secretary-Treasurer had not been previously granted the authority to accept service of process as represented [a process confirmed by LANDOWNER, a party/lawyer]. The sheriff's actions are "presumptively correct"; and the WATER DISTRICT does not mention, nor distinguish, the cited Schell or Larson decisions

– each recognizing a presumption an officer performs his duty correctly and acts with ordinary caution and in good faith, which presumption prevails unless overcome by definite evidence to the contrary. N.D.C.C. § 31-11-03(15 & 32). Aware of the presumption(s) favoring a deputy sheriff for service of process, LANDOWNER properly relied upon the sheriff to do his job, which he most certainly did – he asked, she told, he served!

[¶6] Importantly, never once has WATER DISTRICT presented any "definite evidence to the contrary" [required by Schell and Larson], nor was it "contradicted by other evidence." N.D.C.C. § 31-11-03. WATER DISTRICT fails to comprehend its evidentiary burden under N.D.R.Ev. 301. See also, Matter of Mehus' Estate, 278 N.W.2d 625, 632 (N.D. 1979). WATER DISTRICT actually presented evidence to support the Secretary-Treasurer's claim of authority made to the Deputy Sheriff [App., p. 38], confirmed by WATER DISTRICT'S two (2) legal counsel – Sean M. Fredricks (with signature) and Andrew D. Cook – pursuant to N.D.R.Civ.P. 4 by "Notice of Appearance" dated June 18, 2015. App., p. 29.

[¶7] Incredibly, WATER DISTRICT totally ignores the law and facts presented in LANDOWNER'S Brief as POINT 2(B) ["Personal jurisdiction was accomplished on June 18, 2015, when voluntary general appearances were made by the attorneys for the Cass County Joint Water Resource District."], and also, ignores LANDOWNER'S Brief, ¶s 7-8. Except for generic references to Rule 4 – and never discussing a voluntary general appearance through an attorney or any other authorized person under Rule 4(b)(4) – WATER DISTRICT never mentions, nor distinguishes the law therein advanced. Under Rule 4(b)(4), personal jurisdiction was either acquired, or "re-acquired" by voluntary general appearance through an attorney as of June 18, 2015 - the same law firm now representing WATER

DISTRICT. App., ps. 29-30. Contrary to popular belief, ostriches do not bury their heads in sand to avoid danger; the duty of candor to a tribunal should not permit head burials.

[¶8] **STATEMENT OF FACTS**

[¶9] WATER DISTRICT concedes the propriety of LANDOWNER'S position(s) by recognizing the appeal involves only its "proposed project" involving a 36-mile diversion channel. Appellee's Brief, ¶ 6. The existence of "a real project, fully conceived and approved", is a condition precedent for any legal special assessment district. Notice of Appeal; App., p. 5.

[¶10] Without doubt, and contrary to WATER DISTRICT'S repeated assertion, their chairman, Mark Brodshaug was served on July 16, 2015. App., p. 44. WATER DISTRICT'S assertion of "attempted" service [Appellee's Brief, ¶s 9, 32, 40, 41, 49, and 52] is historical revisionism, at its worst; it attempts to pervade the judicial process with falsehood – the WATER DISTRICT'S chairman was actually served by a Deputy Sheriff, as was its Secretary-Treasurer, both under Rule 4. Thrice was "attempted service" fully accomplished – twice by Deputy Sheriff, once by "voluntary general appearance .. through an attorney" -- all under Rule 4.

[¶11] **LAW AND ARGUMENT**

[¶12] **Standard of Review**

[¶13] WATER DISTRICT correctly relies upon In re Estate of Vaage, 2016 ND 32, 875 N.W.2d 527, but incorrectly paraphrases and cites ¶ 30 instead of ¶ 14. Similarly, citing Douville v. Pembina County Water Resource Dist., 2000 ND 124, ¶ 5, 612 N.W.2d 270 [Appellee's Brief, ¶ 11], WATER DISTRICT omits the legal significance of the citation

mentioned – "(i)nterpretation of a statute is a question of law, which is fully reviewable by this Court."

[¶14] **POINT 1. The Cass County District Court acquired "subject matter jurisdiction" immediately upon timely filing of the notice of appeal.**

[¶15] Pervasively, and erroneously, WATER DISTRICT cites inapplicable case law – cases arising out of appeals from "administrative decisions", or even appeals arising out of prior judicially-litigated actions, are irrelevant. This Court should disregard WATER DISTRICT'S citation(s) to statutory "administrative appeals" such as Investment Rarities, Inc. v. Bottineau County Water Res. District, 396 N.W.2d 746 (N.D. 1986); MacDonald v. North Dakota Com'n on Medical Competency, 492 N.W.2d 94 (N.D. 1992); Klindt v. Pembina County Water Resource Bd., 2005 ND 106, ¶ 9, 697 N.W.2d 339; Daniels v. Ziegler, 2013 ND 157, 835 N.W.2d 852; DuPaul v. N.D. Dep't of Transp., 2003 ND 201, 672 N.W.2d 680; Meier v. N.D. Dep't of Human Services, 2012 ND 134, 818 N.W.2d 774; and Benson v. Workforce Safety and Insurance, 2003 ND 640, 672 N.W.2d 640. WATER DISTRICT'S citation to Klindt, at ¶ 50, is frivolous – that discussion related to an administrative appeal to the State Engineer under N.D.C.C. § 61-16.1-23; never N.D.C.C. § 28-34-01.

[¶16] Appeals from judicially-litigated actions are similarly irrelevant. See discussion under POINT 2(C) [¶s 22-24].

[¶17] **POINT 2. The Cass County District Court acquired "personal jurisdiction" over all of the parties.**

[¶18] **A. Service of the notice of appeal upon the Cass County Joint Water**

**Resource District by sheriff was accomplished on June 16, 2015, upon delivery to its Secretary-Treasurer.**

[¶19] N.D.C.C. § 28-34-01(1) provides for subject matter jurisdiction by filing the notice of appeal with the clerk of court within thirty (30) days after the decision of the local governing body. Personal jurisdiction is accomplished by service under N.D.R.Civ.P. 4, accomplished thrice, by service of process, agreement, consent or waiver: (1) sheriff's service upon the Secretary-Treasurer, presumptively correct; (2) voluntary general appearance by its attorney(s); and (3) sheriff's service upon the chairman of its board, presumptively correct.

[¶20] **B. Personal jurisdiction was accomplished on June 18, 2015, when voluntary general appearances were made by the attorneys for the Cass County Joint Water Resource District.**

[¶21] WATER DISTRICT totally ignores the voluntary general appearance by its legal counsel under N.D.R.Civ.P. 4(b)(4), which should act as a concession.

[¶22] **C. Service of the notice of appeal upon the Cass County Joint Water Resource District by sheriff was accomplished on July 16, 2015, upon delivery to "Mark Brodshaug".**

[¶23] Without any legal substantiation, WATER DISTRICT claims "Garaas's (sic) second attempt to perfect his appeal was no more valid than the first." Appellee's Brief, ¶ 32. While seeming abandoning the previously asserted obligation to both file and serve within thirty (30) days of the decision by the local governing body [*four (4) times attorney McShane misrepresented the words of the cited statute as noted in LANDOWNER'S Brief, ¶s 48-54*],

but then falls back and relies upon an inapplicable case involving Reub's Minot Camera, Inc. – determined in 1972 arising out of a statute relating to appeals of judicially-litigated actions, now superseded by rule, which once contained "two steps for taking a civil appeal". Appellee's Brief, ¶s 34-35. The former statute required "service" on the adverse party **[under N.D.R.Civ.P. 5, which applies to service of documents other than "process"]**, and the "filing" with the Court. The statute specifically provided "(t)he appeal shall be deemed taken by the service of a notice of the appeal and perfected on service" of the statutory undertaking, deposit of money, or a waiver by law. *Id.*, p. 879. In a subsequent appeal decided in 1973, the evidence established "no notice of appeal was ever served upon Reub's or its counsel .." Reub's Minot Camera, Inc. v. General Electric Credit Corporation, 209 N.W.2d 635, 637 (N.D. 1973) – a statutory predicate, not existing with respect to this appeal never involving prior judicially-litigated proceedings, or attorneys. See also, Hanson v. Zoller, 174 N.W.2d 354, 357-358 (N.D. 1970), which then still permitted subject matter jurisdiction "to reverse or modify such judgment when a reversal or modification will not affect the legal rights of the party not served with the notice of appeal."

[¶24] LANDOWNER does not dispute that "(j)urisdiction precedes adjudication". Smith v. City of Grand Forks, 478 N.W.2d 370, 373 (N.D. 1991). This case, cited by WATER DISTRICT, is irrelevant because it involves an appeal from a judicially-litigated action, and not an appeal from a decision of a local governing body; even Plaintiff Smith conceded insufficient service of process under Rule 4 [*id.*, p. 371]. Equally irrelevant are any appeals arising out of other judicially-litigated action(s) with the plaintiff's concession of non-service such as Gessner v. City of Minot, 1998 ND 157, ¶ 7, 583 N.W.2d 90, or determined non-

service such as Farrington v. Swenson, 210 N.W.2d 82 (N.D. 1973), or missed statute(s) of limitation and/or failed service such as Nissen v. City of Fargo, 338 N.W.2d 655 (N.D. 1983), and Sanderson v. Walsh County, 2006 ND 83, 712 N.W.2d 842. WATER DISTRICT'S similar reliance upon Elliot v. Drayton Public School Dist. No. 19, 406 N.W.2d 655, 657-659 (N.D. 1987) is probably also ill-advised – a judicially-litigated action to contest an election may not have been timely commenced by service on the clerk within the fourteen (14) days [N.D.C.C. § 16.1-16-04], but it was timely filed, and the Court recognized the applicability of time-for-service-expansion in N.D.C.C. § 28-01-38, a "statute of general application", whereby "(a)n attempt to commence an action is equivalent to the commencement thereof" upon delivery to the sheriff with service accomplished within sixty (60) days – a time deadline certainly honored in the instant case, and earlier confirmed by a voluntary general appearance by its attorneys. App., ps. 33 and 44; 29-30.

[¶25] **D. The district court failed to understand the spirit of the law – service of process contemporaneous with filing notice of appeal is not required.**

[¶26] The misquoted statute [N.D.C.C. § 28-34-01] does not contain any language compelling both service and filing within thirty (30) days of the adverse decision. To do so would encourage legal mischief – would it not be economically expedient/wise for WATER DISTRICT to pay for the temporary exile of its entire governing body in another state for thirty-one (31) days at a cost of – perhaps $31,000 – so that no one could ever appeal from this "proposed project" yet imposing hundreds of millions of dollars of special assessments upon LANDOWNER, and others like him?

[¶27] WATER DISTRICT'S references to N.D.R.Civ.P. 4(h) [Appellee's Brief, ¶ 43] is ill-

advised. LANDOWNER has no need to seek amendment of either Sheriff's Return [App., ps. 33, 44]; each document states the truth known to the Deputy Sheriff, and the typographical errors or abbreviations have no significance. Only WATER DISTRICT wants to excise its own Officer's representations to the Deputy Sheriff – with correct service timely accomplished.

[¶28] **CONCLUSION**

[¶29] The lower court erred; the appeal was timely filed and thrice served under Rule 4.

Respectfully submitted this 14th day of April, 2016.

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Jonathan T. Garaas,

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**AFFIDAVIT OF SERVICE BY MAIL**

Supreme Court No. 20150350

Civil No. 09-2015-CV-01467
(Cass County District Court)

State of North Dakota
County of Cass

[¶1] Pat Doty, being first duly sworn on oath, deposes and says: Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

[¶2] On the 14th day of April, 2016, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: Reply Brief of Petitioner-Appellant.

[¶3] The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

Sean M. Fredricks
Christopher M. McShane
Andrew D. Cook
Ohnstad Twichell, P.C.
901 13th Avenue East
P.O. Box 458
West Fargo, ND 58078-0458

[¶4] To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Pat Doty

Pat Doty

Subscribed and sworn to before me this 14th day of April, 2016.

JONATHAN T. GARAAS
Notary Public
State of North Dakota
My Commission Expires Dec. 28, 2021

Notary Public