

20150350

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
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Jonathan T. Garaas,

Petitioner-Appellant

STATE OF NORTH DAKOTA

Supreme Court No. 20150350

vs.

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

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

Respondent-Appellee

BRIEF OF PETITIONER-APPELLANT

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] Does the District Court have subject matter jurisdiction concerning the decision of the Cass County Joint Water Resource District, a local governing body, under N.D.C.C. § 28-34-01, when an appeal is timely filed and served?

[¶3]

STATEMENT OF THE CASE

[¶4] On May 14, 2015, the Cass County Joint Water Resource District [hereinafter “WATER DISTRICT”], a “local governing body” as defined by law, made a determination relating to the approval of the FM Flood Risk Management District No. 1. According to the “(a)dditional minutes relating to FM Flood Risk Management District No. 1” [Appendix, page 4], the WATER DISTRICT determined that the majority of the votes filed were in favor of the creation of FM Flood Risk Management District No. 1 so that orders legally establishing FM Flood Risk Management District No. 1 could be thereafter issued. Appendix, pages 7-28, with specific reference to page 15.

[¶5] On June 12, 2015, Petitioner-Appellant Jonathan T. Garaas, a landowner residing at 62 Prairiewood, Fargo, North Dakota 58103 [hereinafter “LANDOWNER”] timely appealed to the District Court of Cass County, North Dakota, from the decision of the WATER DISTRICT pursuant to N.D.C.C. § 28-34-01 by filing a Notice of Appeal From Decision of Local Governing Body Pursuant to N.D.C.C. § 28-34-01 [with Exhibit(s)]. App., ps. 4-28.

[¶6] On June 12, 2015, at 3:36 p.m., the Notice of Appeal From Decision of Local Governing Body Pursuant to N.D.C.C. § 28-34-01 [with Exhibit(s)] was placed in the hands of the Cass County Sheriff for service of process upon WATER DISTRICT, which was accomplished at 1:45 p.m. on June 16, 2016, by “DELIVERING TO CAROL HARBEKE

LEWIS (SEC-TRES) WHO IS AUTHORIZED TO ACCEPT SERVICE OF SAID DOCUMENT AT CASS COUNTY ROAD DEPT 1201 W MAIN AVE WEST FARGO” for a sheriff’s service fee of \$28.50. App., p. 33.

[¶7] On June 18, 2015, attorneys Sean M. Fredricks and Andrew D. Cook of OHNSTAD TWICHELL, P.C., claiming to be “Attorneys for Cass County Joint Water Resource District” electronically served upon attorney Jonathan T. Garaas their “NOTICE OF APPEARANCE” bearing the signature of Sean M. Fredricks, which was also served by United States Mail upon LANDOWNER at his personal residence, 62 Prairiewood Drive, Fargo, North Dakota 58103. App., ps. 29-30. The WATER DISTRICT’S attorneys made no comment either limiting, or otherwise qualifying, their voluntary joint appearance as legal counsel for the WATER DISTRICT.

[¶8] Due to their voluntary general appearance, on the same day, June 18, 2015, LANDOWNER served attorneys Fredricks and Cook, by electronic means, the Order of Assignment and Case Number earlier issued. App., ps. 31-32; Docket Entry # 3.

[¶9] One (1) week later, on June 25, 2015, after receiving it in the mail, the Sheriff’s Return was electronically served upon WATER DISTRICT’S attorneys, and filed with the District Court. App., p. 33; Docket Entry #7.

[¶10] By documents dated July 2, 2015, bearing attorney Christopher M. McShane’s signature, attorneys Fredricks, Cook, and McShane moved to dismiss the appeal for lack of jurisdiction. App., ps. 34-43.

[¶11] On July 15, 2015, LANDOWNER again requested the Cass County Sheriff serve the Notice of Appeal From Decision of Local Governing Body Pursuant to N.D.C.C. § 28-34-01

[and Exhibit(s)] on WATER DISTRICT, which was accomplished on July 16, 2015, at 1:55 p.m. by service upon “MARK BRODSHAUG WHO IS AUTHORIZED TO ACCEPT SERVICE OF SAID DOCUMENT” at a sheriff’s service cost of \$21.00. App., p. 44.

[¶12] Following judicial recusals, on October 30, 2015, District Judge Debbie Kleven held a earlier-postponed hearing which resulted in issuance of an Order Granting Motion to Dismiss dated November 24, 2015. App., ps. 45-50. Pursuant to the directives of the District Judge, a Judgment of Dismissal was entered on December 3, 2015, “because the district court lacks subject matter jurisdiction”. App., p. 51. Following Notice of Entry of Judgment of Dismissal [App., ps. 52-53], LANDOWNER timely appealed by Notice of Appeal with a preliminary statement of issue(s) the following day, on December 4, 2015. App., ps. 54-55.

[¶13] **STATEMENT OF FACTS**

[¶14] The WATER DISTRICT sought to create a special assessment district to be called the FM Flood Risk Management District No. 1 Project which entailed a vote by affected landowners. LANDOWNER created, and filed with the WATER DISTRICT, an “Objection to FM Flood Risk Management District No. 1 Project” dated March 31, 2015, which establishes the WATER DISTRICT has “acted arbitrarily, capriciously, or unreasonably, and also, contrary to law up to (that) stage of any special assessment process.” App., p. 5.

[¶15] So as to advise the District Court of possible implications of the appeal under N.D.C.C. § 28-34-01, LANDOWNER made known the appeal “relate(s) to conditions precedent – the need for a real project, fully conceived and approved – proper apportionment upon lands or premise(s) benefited by the project in proportion to and in accordance with

benefits accruing thereto, a proper identification of funding available for the project, preparation of ‘profiles, plans, and specifications’ [not yet accomplished, nor are other required documents required by law involving the engineer’s efforts/results], inappropriate determination of benefits, and inappropriate assignment of ‘indirect benefit’ to political subdivisions violating voting rights of landowners, misrepresentation as to payment of assessments for ‘indirect benefits’ because state law identifies the method/source by which indirect benefits are paid – not including sales tax proceeds arising out of previous approvals [and which would violate constitutional prohibitions against use of public funds for private indebtedness], sham projects, attempted circumvention of mill levy caps, and other reasons primarily appearing on pages 1-12 of said ‘Objection’ [plus an attempt to divert resulting monies to Cass County, North Dakota, as referenced on page 16 which is improper]. In that Cass County Joint Water Resource District has not acted to actually attempt to assess, nor sell bonds, not all issues therein raised are ripe for review, and no attempt is made to seek an advisory opinion on those acts not yet attempted, or accomplished.” App., ps. 5-6.

[¶16] LANDOWNER’S Notice of Appeal From Decision of Local Governing Body Pursuant to N.D.C.C. § 28-34-01 [with Exhibit(s)] was filed as Docket Entry #1 on June 12, 2015. App., ps. 4-28. The document was timely filed within thirty (30) days of the May 14, 2015, WATER DISTRICT decision. N.D.C.C. § 28-34-01(1).

[¶17] On the same day as filed with the Clerk of the District Court – June 12, 2015 – at 3:36 p.m., the Notice of Appeal From Decision of Local Governing Body Pursuant to N.D.C.C. § 28-34-01 [with Exhibit(s)] was placed in the hands of the Cass County Sheriff for service of process upon WATER DISTRICT, which was accomplished at 1:45 p.m. on June 16,

2016, by “DELIVERING TO CAROL HARBEKE LEWIS (SEC-TRES) WHO IS AUTHORIZED TO ACCEPT SERVICE OF SAID DOCUMENT AT CASS COUNTY ROAD DEPT 1201 W MAIN AVE WEST FARGO” at a service fee of \$28.50. App., p. 33.

[¶18] On June 18, 2015, attorneys Sean M. Fredricks and Andrew D. Cook of Ohnstad Twichell, P.C., claiming to be “Attorneys for Cass County Joint Water Resource District” electronically served upon attorney Jonathan T. Garaas their “NOTICE OF APPEARANCE” bearing the N.D.R.Civ.P. 11 signature of Sean M. Fredricks, which documents were also served by United States Mail upon LANDOWNER at his personal residence. App., ps. 29-30. The WATER DISTRICT’S two (2) attorneys made no comment either limiting, or otherwise qualifying, the voluntary joint appearance as legal counsel for the WATER DISTRICT.

[¶19] Long after the voluntary general appearance of WATER DISTRICT by attorneys Fredricks and Cook, its law firm of Ohnstad Twichell, P.C., acting by the same two (2) attorneys *plus* fellow-Ohnstad Twichell, P.C., attorney Christopher M. McShane, moved for dismissal under N.D.R.Civ.P. 12 “for lack of jurisdiction.” App., p. 34. WATER DISTRICT’S attorneys’ confusion about the nature of jurisdiction was fleshed out by brief stating, “Garaas failed to effectuate sufficient service of process on Cass County Joint WRD because he did not serve a member of Cass County Joint WRD’s governing board, as required under N.D.C.C. § 28-34-01 and N.D.R.Civ.P. 4(d)(2)(E). Under these circumstances, the Court lacks subject matter jurisdiction over this matter. Alternatively, the Court lacks personal jurisdiction over Cass County Joint WRD because Garaas failed to properly serve a member of the governing board under N.D.R.Civ.P. 4(d)(2)(E). Under

either scenario, the Court has no jurisdiction to consider the appeal, and the appeal must be dismissed.” Docket Entry # 12.

[¶20] LANDOWNER confirmed with a representative of the Service of Process Department of the Cass County Sheriff on July 15, 2015, that the Secretary Treasurer of the Cass County Joint Water Resource District had confirmed that service of process upon her [Carol Harbeke Lewis] would be sufficient on the date of service [June 16, 2015], or the Deputy Sheriff would not have left the documents with her, and would instead have served a member of the Board. Docket Entry # 15; Transcript of October 30, 2015, page 9, line 9 through page 10, line 14; App., p. 33 showing representation that authority existed made to Deputy Sheriff Bruce Renshaw, all done under the authority of Sheriff Paul D. Laney.

[¶21] On July 15, 2015, LANDOWNER again requested the Cass County Sheriff serve the Notice of Appeal From Decision of Local Governing Body Pursuant to N.D.C.C. § 28-34-01 [and Exhibit(s)] on WATER DISTRICT, which was accomplished on July 16, 2015, at 1:55 p.m. by service upon “MARK BRODSHAUG WHO IS AUTHORIZED TO ACCEPT SERVICE OF SAID DOCUMENT” at a cost of \$21.00. App., p. 44.

[¶22] It is undisputed that LANDOWNER timely filed the notice of appeal within thirty (30) days after the decision of the local governing body [thereby establishing subject matter jurisdiction; see, POINT 1], and that “(a) copy of the notice of appeal (was) served on the local governing body in the manner provided by rule 4 of the North Dakota Rules of Civil Procedure.” N.D.C.C. § 28-34-01(1).

[¶23]

LAW AND ARGUMENT

[¶24]

Standard of Review

[¶25] As recently noted by the North Dakota Supreme Court decision of In re Estate of Vaage, 2016 ND 32, ¶ 14, __ N.W.2d __:

When jurisdictional facts are not disputed, the issue of subject matter jurisdiction is a question of law, which we review de novo. *In re Estate of Bartelson*, 2011 ND 219, ¶ 8, 806 N.W.2d 199. Here, the jurisdictional facts are not in dispute and we review the issue de novo.

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

[¶27] LANDOWNER asserts that subject matter jurisdiction exists – without dispute – because of the timely filing of the Notice of Appeal From Decision of Local Governing Body Pursuant to N.D.C.C. § 28-34-01 [and Exhibit(s)] on June 12, 2015 – less than thirty (30) days from the decision appealed from. App., ps. 4-28; Docket Entries #1 & 2; App., p. 1. See, Smith v. Burleigh County Bd. Of Comm’rs, 1998 ND 105, ¶s 6 & 7, 578 N.W.2d 533:

“Article VI, § 8, N.D. Const., vests the district court with ‘such appellate jurisdiction as may be provided by law.’ ‘[F]or a court to have subject matter jurisdiction over an appeal, the appellant must meet the statutory requirements for perfecting the appeal.’ (citing *Reliable, Inc. v. Stutsman County Comm’n*, 409 N.W.2d 632, 634 (N.D. 1987)). Timely filing of an appeal is mandatory and jurisdictional. *E.g., State v. DuPaul*, 527 N.W.2d 238, 243 (N.D. 1995); *Production Credit Ass’n v. Burk*, 427 N.W.2d 108, 110 (N.D. 1988). ... In an appeal from a local governing body, ‘[t]he notice of appeal must be filed with the clerk of court within thirty days after the decision of the local governing body.’ N.D.C.C. § 28-34-01(1).”

[¶28] Citing the legal directives of Smith, the North Dakota Supreme Court stated in Grand Forks Homes, Inc. v. State ex rel. State Bd. Of Equalization, 2011 ND 65, ¶ 20, 795 N.W.2d 335:

“Under N.D.C.C. § 28–34–01(1), the ‘notice of appeal must be filed with the clerk of the court within thirty days after the decision of the local governing body.’ Timely filing of an appeal from a decision of a board of county commissioners is mandatory to invoke a district court's appellate subject matter jurisdiction over the appeal.”

[¶29] Contrary to the decision of the district court invited by WATER DISTRICT'S counsel, by statute, “subject matter jurisdiction” instantly existed in the Cass County District Court as of June 12, 2015. App., ps. 1 {Docket Entry #1}; 4-28. Consistent with such observation is Reliable, Inc. v. Stutsman County Com'n, 409 N.W.2d 632, 634 (N.D. 1987), a case arising out of a “failure to distinguish between personal jurisdiction and subject matter jurisdiction”:

Jurisdiction over the subject matter and jurisdiction over the parties are essential for a court to properly act in a case. *See generally* 20 Am.Jur.2d Courts § 105 (1965). A court has subject matter jurisdiction if it has the authority, under the constitution and laws, to hear and determine cases of the general class to which the particular action belongs. *Bryan v. Miller, supra; Schillerstrom v. Schillerstrom*, 75 N.D. 667, 32 N.W.2d 106, 1222 (1948). The source and the limits of subject matter jurisdiction are derived from the constitution and cannot be conferred by consent of the parties. *Bryan v. Miller, supra; Schillerstrom v. Schillerstrom, supra*. If the law gives the court jurisdiction of the subject matter, jurisdiction of the parties may be conferred by consent. *Bryan v. Miller, supra*, 16 N.W.2d at 283.

[¶30] As a matter of law, the district court had subject matter jurisdiction granted by N.D.C.C. § 28-34-01 to determine an appeal from the decision of the local governing body, in this case, an entity claiming legal status under some form of “joint water resource districts”. The lower court fails to properly differentiate between subject matter jurisdiction and personal jurisdiction at ¶ 14 of the Order Granting Motion to Dismiss. App., p. 50. Contrary to the lower court's assertion relying upon Reliable, 409 N.W.2d at 634, the voluntary general appearance by the WATER DISTRICT'S lawyers by “Notice of

Appearance” [App., ps. 29-30] relates to acquisition of “personal jurisdiction”, and not *subject matter jurisdiction* – LANDOWNER agrees subject matter jurisdiction cannot be conferred by agreement, consent, or waiver. See discussion in ¶29 above. Neither WATER DISTRICT, nor the lower court understands jurisdiction – the statute confers subject matter jurisdiction upon the district court by timely filing the notice of appeal; the appeal is perfected by acquiring personal jurisdiction over all of the parties, which can be done by service of process, agreement, consent, or waiver. LANDOWNER perfected the appeal by providing for acquisition of personal jurisdiction at least three (3) ways.

[¶31] POINT 2. The Cass County District Court acquired “personal jurisdiction” over all of the parties.

[¶32] N.D.C.C. § 28-34-01(1) has two (2) components – the first (1st) component requiring timely filing of the notice of appeal, and the second (2nd) component relates to service:

1. The notice of appeal must be filed with the clerk of the court within thirty days after the decision of the local governing body. A copy of the notice of appeal must be served on the local governing body in the manner provided by rule 4 of the North Dakota Rules of Civil Procedure.

[¶33] LANDOWNER timely accomplished service under N.D.R.Civ.P. 4 in several ways – the district court, already having subject matter jurisdiction [see, POINT 1], acquired personal jurisdiction over all of the parties by service under the rule’s multiple terms.

[¶34] 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.

[¶35] The Cass County Joint Water Resource District is presumptively the result of an

“agreement” between two or more districts, jointly or cooperatively exercising any power authorized by a water resource board under Title 61, all as authorized by N.D.C.C. § 61-16.1-11. If that presumption is correct, that statute requires the joint boards to have 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.” Apparently, that “agreement” provided 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. Acting under the “agreement” mandated by statute to exist, when asked by Deputy Sheriff Bruce C. Renshaw at 1:45 p.m. on June 16, 2015, said Secretary-Treasurer represented that she was “AUTHORIZED TO ACCEPT SERVICE OF SAID DOCUMENT at CASS COUNTY ROAD DEPT 1201 W MAIN AVE WEST FARGO”, as noted in the Sheriff’s Return. App., p. 33. Under the “agreement” mandated to exist by N.D.C.C. § 61-16.1-11, “(a) joint board created under this section is a *political subdivision* of the state” (*emphasis added*), and it may well provide authority to its officer(s) exactly as claimed by its Secretary-Treasurer. The sheriff’s actions, first making inquiry, and upon learning the Secretary-Treasurer was authorized to be served, properly served the documents – the sheriff’s actions were presumptively correct. Schell v. Collis, 83 N.W.2d 422, 426 (N.D. 1957); State v. Larson, 554 N.W.2d 655, 657 (N.D. 1996). See also, Transcript of October 30, 2015, page 21; Docket Entry # 15, ¶ 5.¹ Not only were the sheriff’s actions

¹ Representation by LANDOWNER: “[¶5] The undersigned has confirmed with a representative of the Service of Process Department of the Cass County Sheriff on July 15, 2015, that the Secretary Treasurer of the Cass County Joint Water Resource District had confirmed that service of process upon her would be sufficient on the date of service [June 16, 2015], or the Deputy Sheriff would not have left the documents with her, and

presumptively correct, WATER RESOURCE made no attempt to present either argument or evidence: (a) that Secretary-Treasurer Carol Harbeke Lewis did not make the representations to the deputy sheriff exactly as stated in the Sheriff's Return; or (b) that Secretary-Treasurer Carol Harbeke Lewis did not have the authority to accept service as represented to the deputy sheriff as stated in the Sheriff's Return.

[¶36] If the Secretary-Treasurer had authority to accept service, personal jurisdiction over all of the parties would then exist – (a) over LANDOWNER by inviting the court's jurisdiction upon timely filing an appeal under N.D.C.C. § 28-34-01(1), and (b) over the Cass County Joint Water Resource District by service upon its officer authorized to accept service. The district court's account of the underlying "Facts" to justify the dismissal for lack of subject matter jurisdiction [App., ps. 49 at ¶ 13; 51; 53] limits itself to a single attempt at service, at ¶ 2 [App., ps. 45-46], deemed insufficient:

"Garaas, through the Cass County Sheriff's Department, served a notice of appeal on Carol Harbeke Lewis (Lewis), the Secretary-Treasurer of the WRD, on June 16, 2015. Lewis not a member of the WRD governing board. (Doc. 1, 2)."

[¶37] The district court relies solely upon N.D.R.Civ.P. 4(d)(2)(E) [¶ 8; App., ps. 47-48] to suggest that service requires "delivering a copy of the summons to any member of its governing board." LANDOWNER suggests that this rule subsection is not involved, as the rule clearly states it involves only "a city, township, school district, park district, county, or

would instead have served a member of the Board. The Cass County Sheriff is undoubtedly well aware of the adverse implications imposed upon his office by law under N.D.C.C. § 11-15-18, which says, if the "sheriff does not return a notice or process with the necessary endorsement thereon without delay, or within the time period required by law, the sheriff is liable to the party aggrieved for all damages sustained by that party."

any other municipal or public corporation ..” Never does the rule utilize the statutory language determining what this joint board actually is – a political subdivision. N.D.C.C. § 61-16.1-11. Under N.D.R.Civ.P. 4(d), personal service can be accomplished several different ways, to include service upon a “partnership or other unincorporated association, by: (i) delivering a copy .. to an officer .. or general agent .. or to an agent authorized by appointment .. to receive service of process on its behalf, or to one who acted as an agent for the defendant with respect to the matter on which the plaintiff’s claims is based and who was an agent of the defendant at the time of service ..” [redacted to cover the likely several circumstances identified as possibly by LANDOWNER]. Obviously the rule does not use the statutory term – “political subdivision”. The district court erred in applying one subsection of Rule 4, when another subsection is equally possible which would recognize accomplished service, and the immediate acquisition of personal jurisdiction over all of the parties.

[¶38] 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.

[¶39] Obviously, the Secretary-Treasurer of the Cass County Joint Water Resource District acted responsibly following service of process, because two (2) attorneys from the law firm known as Ohnstad Twitchell, P.C., later made voluntary general appearances as the lawyers for their common client as authorized under Rule 4(b)(4) of the North Dakota Rules of Civil Procedure [emphasis added]:

“(4) Acquisition of jurisdiction. A court of this state may acquire personal

jurisdiction over any person through service of process as provided in this rule or by statute, or by voluntary general appearance in an action by any person either personally or through an attorney or any other authorized person.”

[¶40] Actually, the last five (5) words of the same rule – “or any other authorized person” – could even apply to the representations/actions of Carol Harbeke Lewis, the Secretary-Treasurer claiming authority to be served documents by the deputy sheriff. See discussion above at ¶s 35-37.

[¶41] The district court – apparently because of an inability to explain away the voluntary general appearances of the two (2) attorneys, never addressed the June 18, 2015, Notice of Appearance duly signed by attorney Sean M. Fredricks under N.D.R.Civ.P. 11 entering “an appearance on behalf of Respondent - Appellee Cass County Joint Water Resource District” as its “Attorneys”. App., p. 29-30. Clearly, both lawyers claimed such legal status for the common client, and upon filing, the district court has clearly acquired personal jurisdiction under Rule 4. Neither attorney representing the WATER DISTRICT claimed “limited representation” status under N.D.R.Civ.P. 11(e). If not claimed, then forever waived, as discussed hereafter.

[¶42] Rule 4(b)(4) of the North Dakota Rules of Civil Procedure is specifically cited in Hansen v. Scott, 2002 ND 101, ¶ 16, 645 N.W.2d 223: “Under N.D.R.Civ.P. 4(b)(4), a court of this state may acquire personal jurisdiction over any person by service of process as provided in Rule 4, or by a voluntary general appearance.” The concept, and effect of, a general appearance by an attorney for a party – without any objection or evidence of intent to appear specially – was earlier discussed in Wallwork Lease & Rental Co., Inc. v.

Schermerhorn, 398 N.W.2d 127, 129 (N.D. 1986), and made clear: a voluntary general appearance is a submission to the jurisdiction of the court pursuant to Rule 4(b)(4). In Footnote 3, at page 130, there exists the opinion that if a party has clearly “recognized the case as in court”, they have thereby entered a voluntary general appearance which confers jurisdiction on the court. Wallwork, in Footnote 3, makes another judicial observation that LANDOWNER believes to be significant in view of the duly served and filed voluntary general appearances by WATER DISTRICT’S two (2) different lawyers from the same law firm [*emphasis added*] giving rise to the position, “never claimed, forever waived”:

We also note that our decision is consistent with Rule 12(h), N.D.R.Civ.P., which states that failure to raise the defense of lack of personal jurisdiction in a Rule 12 motion or in a responsive pleading constitutes a waiver of the defense. Reading Rule 4(b)(4) and Rule 12(h) together, it is clear that a court acquires jurisdiction over a party who makes a voluntary general appearance in the action prior to raising the defense by motion or responsive pleading. *Thus, a party cannot resurrect a personal jurisdiction defense once the court has acquired personal jurisdiction under Rule 4(b)(4) through a voluntary general appearance.*

[¶43] See also, Grey Bear v. North Dakota Dept. Of Human Services, 2002 ND 139, ¶ 30, 651 N.W.2d 611 [“In the absence of a previously made and properly preserved objection to the jurisdiction of the trial court, a general appearance amounts to a waiver of the right to object to the jurisdiction of the court over the person of the appearing party.”]; Investors Title Ins. Co. v. Herzig, 2010 ND 138, ¶s 63-64, 785 N.W.2d 863; In re T.H., 2012 ND 38, ¶ 16, 812 N.W.2d 373.

[¶44] All of the WATER DISTRICT’S machinations after June 18, 2015, to avoid judicial review should be disregarded as disregard or misunderstanding of statutes, procedures, and rights of landowners for judicial review and remedy protected by two (2) Constitutions.

[¶45] 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”.**

[¶46] While superfluous, “(p)ersonal service” under N.D.R.Civ.P. 4(d)(2)(D) and/or N.D.R.Civ.P. 4(d)(2)(E) was also accomplished on July 16, 2015, when sheriff’s service was accomplished on “MARK BRODSHAUG WHO IS AUTHORIZED TO ACCEPT SERVICE OF SAID DOCUMENT at CASS COUNTY COURTHOUSE.” App., p. 44. Obviously, a different deputy sheriff also made inquiry of, and certified in his Sheriff’s Return that this named individual was authorized to accept service. App., p. 44.

[¶47] The district court, apparently because of an inability to explain away the service upon Mark Brodshaug [no one has questioned his authority to act under N.D.R.Civ.P. 4], never even addressed the July 16, 2015, service by Deputy Sheriff Greg Dawkins, except to seemingly verbally agree with attorney McShanes’ misrepresentation of law as discussed hereafter. App., p. 44.

[¶48] LANDOWNER first (1st) notes that N.D.C.C. § 28-34-01 does not contain any time period within which service under Rule 4 of the North Dakota Rules of Civil Procedure must occur. LANDOWNER secondly (2nd) notes that attorney Christopher M. McShane four (4) times misrepresented the words of the cited statute, always claiming (a) the filing of the notice of appeal, and (b) service of the notice of appeal, **both** must be accomplished within thirty (30) days of the decision appealed from:

[¶49] A. Transcript of October 30, 2015, page 4, lines 21-24, attorney McShane speaking:

“With that, the lack of service on a board member within the 30 day time frame of the statute, therefore, divests this Court or denies this Court subject matter jurisdiction to even hear the appeal.”

[¶50] B. Transcript of October 30, 2015, page 6, lines 3-6, attorney McShane speaking:

“So there was no proper service under Rule 4 within the time period of the 30-day window which is required for an appeal under 28-34-01 that is subject matter jurisdiction.”

[¶51] C. Transcript of October 30, 2015, page 6, lines 3-6, attorney McShane speaking:

“Mr. Garaas provided a notice of appeal to the Cass County Sheriff. That sheriff did provide that to a member of the board, but that providing that to the member of the board was well after the 30 day time period in which to serve.

THE COURT: Okay. And that’s what I thought, the date was after.

MR. McSHANE: Yes.

THE COURT: Okay.

MR. McSHANE: And I don’t believe there was any argument by Mr. Garaas that it was well outside the 30-day period. It came after our motion to dismiss was filed and after we pointed out that he had failed to properly serve a member of the board.”

[¶52] D. Transcript of October 30, 2015, page 19, lines 3-7, attorney McShane speaking:

And the time frame set forth by the statute is 30 days. There is no argument by Mr. Garaas that there was proper service upon and in accordance with Rule 4 upon the Cass County Joint Water Resource District within the 30 days.

[¶53] LANDOWNER’S corrections proved unsuccessful. Transcript of October 30, 2015, page 8, line 8, to page 9, line 8; page 15, line 23, to page 16, line 2; lines 19-22; page 17, lines 7-12.

[¶54] Attorney McShane's not only misread and misrepresented the statute, he confused the roles/responsibilities – there are two (2) statutory references to a thirty (30) day time period: (1) thirty (30) days to file the notice of appeal, which was timely done by LANDOWNER [N.D.C.C. § 28-34-01(1)], and (2) within thirty (30) days , or such longer time as the court by order may direct, the underlying documents are to be filed by the local governing body [N.D.C.C. § 28-34-01(2)] – which was never done by WATER DISTRICT. LANDOWNER complied with his thirty (30) day filing deadline, while WATER DISTRICT never even attempted so to do, *nor has it ever sought an extension of time* – probably knowing that the LANDOWNER'S March 31, 2015, filed objection [App., p. 5] proves the impropriety, and illegality, of their underlying proceedings.

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

[¶56] Under N.D.R.Civ.P. 4(h), the court may allow any process or proof of service to be amended at any time on notice and just terms, unless it clearly appears that the substantial rights of the party against whom the process was issued would be materially prejudiced. WATER DISTRICT makes no claim of any material prejudice, nor could it – its own Secretary-Treasurer made the original representation to the deputy sheriff that she was authorized to receive service of process [later only impliedly retracted by an attorney's representation unsupported by argument or evidence]. WATER DISTRICT created any confusion, but no problem/prejudice was asserted to exist. However, the district court never got to the point of understanding the requirements relating to service of process in the first place, probably due to WATER DISTRICT'S counsel(s) inability to differentiate between

types of appeals possible to be heard by district court judges. Neither the WATER DISTRICT, nor the lower court understand that appellate procedures will always differ because of different statutory mandates arising out of different statutory appeal processes.

[¶57] The lower court’s repeated reliance upon Meier v. North Dakota Department of Human Services, 2012 ND 134, 818 N.W.2d 774 [App., ps. 46, 48, 49, and similar cases involving specific statutory appeals with jurisdictional predicates], is misplaced. In Meier, the contemporaneous filing of the notice of appeal and “proof of service of the notice of appeal” [among other things] within thirty (30) days to establish subject matter jurisdiction was required by statute [N.D.C.C. § 28-32-42 {subsection 4 identifying that which must be contemporaneously filed}, and N.D.C.C. § 54-44.3-12.2, both noted at Meier, ¶ 5]. Simply put, the Meier appeal required simultaneous filing of several documents, or documents with special components, within thirty (30) days; there was not just the simple and singular act of timely filing the notice of appeal as required by N.D.C.C. § 28-34-01. Subject matter jurisdiction in Meier would not exist until the following documents were filed with the clerk of the district court to accomplish all of the statutory requirements – all within thirty (30) days: (1) notice of appeal, (2) specifications of error, (3) proof of service of the notice of appeal, (4) undertaking required by section 28-32-42, and (5) proof of proper service upon the Human Resource Management Services. While undoubtedly some of the five (5) types of documents may be combined into one or more documents, there is no comparable requirement(s) under N.D.C.C. § 28-34-01, involved herein – perfection of the appeal by service of the notice of appeal will almost always follow; there is no statutory requirement that service be contemporaneous or previous. In many of the appeals made possible by

N.D.C.C. § 28-34-01, there will be no readily-accessible record comparable to a clerk's docket system [or administrative file] establishing names, addresses, attorney representation, and documents/records; and the applicable statute does not require an appealing party to do what may well be impossible to accomplish within thirty (30) days [certainly service by publication is out the window, and if members of any board are given a thirty (30) day vacation in Moorhead, Minnesota, at public expense, to avoid service of process following a controversial decision – LANDOWNER may applaud the absence of airplane fare(s) at public expense, but will condemn the process preventing judicial review] making invocation of judicial review an illusion. LANDOWNER timely perfected his appeal with service under N.D.R.Civ.P. 4 at least three (3) times.

[¶58] While LANDOWNER never delayed in attempting service of process, N.D.C.C. § 28-01-38 also makes clear that an attempt to commence an action is equivalent to the commencement thereof when delivered to the sheriff for service so long as service is accomplished within sixty (60) days. LANDOWNER accomplished three (3) types of authorized service under Rule 4, any of which established personal jurisdiction in the court – all within sixty (60) days of the June 12, 2015, filing: (1) sheriff service upon the Secretary-Treasurer claiming authority to be so served; (2) voluntary general appearance by two (2) attorneys, and (3) sheriff service upon a member of the local governing body.

[¶59]

CONCLUSION

[¶60] The lower court failed to act under an erroneous view of the law; the judgment of the court should be reversed and the matter remanded back to the district court for proceedings consistent with due process of law. LANDOWNER further requests costs and disbursements

to be taxed in the lower court.

Respectfully submitted this 3rd day of March, 2016.

Garaas Law Firm



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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.

State of North Dakota
County of Cass

**AFFIDAVIT OF SERVICE
BY MAIL**

Supreme Court No. 20150350

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

[¶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 3rd day of March, 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: Brief of Petitioner-Appellant and Appendix to Brief of Petitioner-Appellant

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

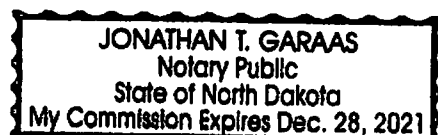
Sean M. Fredricks
Christopher M. McShane
Andrew D. Cook
Ohnstad Twichell, P.C.
901 13th Avenue East
P.O. Box 458
West Fargo, ND 58078-0458

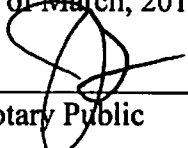
[¶4] To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.



Pat Doty

Subscribed and sworn to before me this 3rd day of March, 2016.





Notary Public