

IN THE SUPREME COURT
 STATE OF NORTH DAKOTA

State of North Dakota, and)	
Michelle A. Dworshak Rose, n/k/a)	
Michelle A. Alcaraz)	Supreme Court Case No.:
)	20180015
Plaintiff-Appellee,)	
)	District Court Case No.;
v.)	51-2011-DM-01109
)	
Joshua D. Rose,)	
)	
Defendant-Appellant,)	

APPELLEE’S SUPPLEMENTAL BRIEF ON APPEALABILITY OF ORDER

1. On January 8, 2018 the District Court issued an order denying Joshua Rose’s Motion to Reinstate Driver’s License. The contents of said order was quite basic, a total of three paragraphs containing one sentence each. It stated simply and succinctly that Mr. Rose’s motion was being denied based on the doctrine of Res Judicata.

2. The Supreme Court has asked that each party submit a Supplemental Brief on the appealability of that order.

3. It is the State’s position that the order that Mr. Rose is attempting to appeal is not an appealable order under the caselaw and statutes of the State of North Dakota.

Before we consider the merits of an appeal, we must have jurisdiction. *Choice Fin. Group v. Schellpfeffer*, 2005 ND 90, ¶ 6, 696 N.W.2d 504. *City of Grand Forks v. Lamb*, 2005 ND 103, ¶ 5, 697 N.W.2d 362, 364. If there is no right to appeal we are without jurisdiction to consider the merits and must dismiss the appeal. *State of North Dakota v. Gwyther*, 1999 ND 15, ¶ 17, 589 N.W.2d 575; *State v. Owens*, 1997 ND 212, ¶ 6, 570 N.W.2d 217. *City of Grand Forks v. Lamb*,

2005 ND 103, ¶ 5, 697 N.W.2d 362, 364. In *Gast Constr. Co., Inc. v. Brighton P'ship*, 422 N.W.2d 389, 390 (N.D.1988) (citations omitted), this Court set forth the two-part test for determining whether jurisdiction over an appeal exists:

First, the order appealed from must meet one of the statutory criteria of appealability set forth in NDCC § 28–27–02. If it does not, our inquiry need *113 go no further and the appeal must be dismissed. If it does, then Rule 54(b), NDR CivP, must be complied with. If it is not, we are without jurisdiction

Dietz v. Kautzman, 2004 ND 164, ¶ 6, 686 N.W.2d 110, 112–13

The categories of orders which are appealable is clearly laid out in NDCC § 28–27–02

What orders reviewable.

- (1) An order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;
- (2) A final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment;
- (3) An order which grants, refuses, continues, or modifies a provisional remedy, or grants, refuses, modifies, or dissolves an injunction or refuses to modify or dissolve an injunction, whether such injunction was issued in an action or special proceeding or pursuant to the provisions of section 35-22-04, or which sets aside or dismisses a writ of attachment for irregularity;
- (4) An order which grants or refuses a new trial or which sustains a demurrer;
- (5) An order which involves the merits of an action or some part thereof;
- (6) An order for judgment on application therefor on account of the frivolousness of a demurrer, answer, or reply; or
- (7) An order made by the district court or judge thereof without notice is not appealable but an order made by the district court after a hearing is had upon notice which vacates or refuses to set aside an order previously made without notice may be appealed to the supreme court when by the provisions of this chapter an appeal might have been taken from such order so made without notice, had the same been made upon notice.

4. Mr. Rose believes that NDCC § 28–27–02(1), (2), and (4) are applicable in this case, the State does not agree. Mr. Rose has not shown that a suspended driver's license is a substantial right that was affected by the District Court's order so NDCC § 28–27–02(1) would not be applicable. Regarding NDCC § 28–27–02(2) Mr. Rose has not shown that this order was

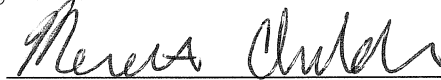
made as part of a special proceeding so this would not apply. While Mr. Rose did request that hearing be held regarding his motion a hearing on a motion is not the same as a new trial which means that NDCC § 28-27-02(4) would not be applicable either.

5. The State cannot find a single category in NDCC § 28-27-02 under which the order being appealed in this case would fall.

CONCLUSION

6. The Order which Joshua seeks to appeal is not appealable as it does not fit any of the categories of appealable orders as laid out in NDCC § 28-27-02.

Dated this 29th day of March, 2018.



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Certificate of Service

The undersigned certifies, pursuant to Rule 5(f) of the North Dakota Rules of Civil Procedure, that on March 29th, 2018, a true and correct copy of the following documents:

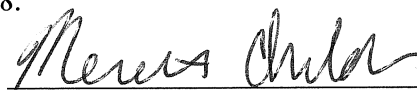
1. Appellee's Brief and Supplemental Brief

were served, via the electronic mail service, upon the following parties:

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Michelle Alcaraz
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DATED this 29th day of March, 2018.



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