

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

April 4, 2019

Supreme Court No. 20180443

Grand Forks County Case No. 18-2017-CV-02167

Johnston Land Company, LLC,

Appellant,

v.

Sara K. Sorenson, Individually
and Ohnstad Twichell, P.C., a
North Dakota Professional Corporation

Appellees.

APPEAL FROM THE FINAL JUDGMENT OF
THE DISTRICT COURT OF GRAND FORKS COUNTY,
NORTH DAKOTA, NORTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STACY J. LOUSER, PRESIDING

REPLY BRIEF OF APPELLANT
JOHNSTON LAND COMPANY, LLC

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 B. The District Court committed error by ruling that a self-serving “Second Affidavit” executed by Appellee Sara K. Sorenson expressly for the purpose of supporting a post-remand summary judgment motion by the Sorenson/Ohnstad Twichell parties -- as a matter of law - rendered “moot” Appellant’s petition for declaratory and injunctive relief relative to the April 1, 2015 “First Affidavit” of attorney Sara K. Sorenson which continues to cloud record title of the subject property today¶xx

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[¶1] ARGUMENT

A. The Sorenson/Ohnstad Twichell appellees in their briefing argument manage to ignore the determinative fact that regardless of whether N.D.C.C. § 35-35-05(5) might have granted the District Court discretion to award attorneys fees to them - had the appellees sought attorneys before the first appeal occurred in this case - the inescapable reality is that the appellees forfeited their rights under this statute when the sole subject matter basis for such a statutory award was conclusively excised from this case by the Supreme Court in its July 18, 2018 decision herein.¹

[¶2] Again, the instant appeal comes from post-remand proceedings in the District Court below which followed the decision of the North Dakota Supreme Court earlier this year in *Johnston Land Company, LLC v. Sara K. Sorenson, et. al.*, 2018 ND 183, 915 N.W.2d 664 (N.D. July 18, 2018), wherein the District Court's Order of September 15, 2017, was "affirmed in part, reversed in part, and remanded" to the District Court with the Supreme Court's directions for the District Court "to rule on items 'c' through 'g'" in the Johnston Land Company Petition.

[¶3] To be clear, none of "items "c" through "g" in the Johnston Land Company Petition related to the nonconsensual lien issue which had been conclusively and finally decided by the Supreme Court in its operative opinion and was never included in the matters to be considered by the District Court upon remand. *Id.* ¶¶14-15.

¹ It is the position of Appellant Johnston Land Company that the District Court's post-remand decisions filed October 8, 2018 [**Doc. 65, Appx. 127**] and November 26, 2018 [**Doc. 71, Appx. 136**] - *by which the Court awarded \$26,037.75 in attorney's fees to the Respondent* - were violative of the "**Mandate Rule**" implicated by the substance of the North Dakota Supreme Court's opinion in *Johnston Land Company, LLC v. Sara K. Sorenson, et. al.*, 2018 ND 183, 915 N.W.2d 664 (N.D. July 18, 2018), and the Judgment/Mandate entered on August 18, 2018, the latter filed with the District Court at [**Doc. 40, Appx. 044**]. See, e.g., *Carlson v. Workforce Safety & Insurance*, 2012 ND 203, ¶16; 821 N.W.2d 760, 766 (N.D. 2012); *United States v. Husband*, 312 F.3d 247, 250-251 (7th Cir. 2002); and *Doe v. Chao*, 511 F.3d 461, 466-467 (4th Cir. 2007).

[¶4] Importantly, however, the issue of whether the “Sorenson Affidavit” was a “nonconsensual common-law lien” had already been addressed by the District Court in its pre-appellate Order back on September 15, 2017, and this issue was, in turn, addressed upon the merits by the Supreme Court in the portion of the District Court’s its decision which was affirmed by the Supreme Court.

[¶5] It is a matter of incontrovertible record in this case that at no time in the pre-appellate phase of this case in the District Court - nor in the appeal - did the Respondents ever request that attorney’s fees be awarded to them pursuant to N.D.C.C. § 35-05-05(5), which provides that, “(i)f the court determines that the lien is not a nonconsensual common-law lien, the court shall issue an order so stating and may award costs and reasonable attorney’s fees to the prevailing party.” (*bold, underlined, italicized emphasis added*).

[¶6] Following the remand of this case, the issue of whether the “Sorenson Affidavit” was a “nonconsensual common-law lien” was no longer before the District Court, as that issue was, of course, not included among those matters which the Supreme Court had returned to the District Court for decision in the remanded proceedings.

[¶7] After the Respondents for the first time requested an award of attorney’s fees post-remand pursuant to N.D.C.C. § 35-05-05(5) - this statute necessarily relating exclusively to the “nonconsensual common-law lien” issue which was no longer before the District Court in the post-remand proceedings - the Court in its Order of November 22, 2018 justified its award of \$26,037.75 in attorney’s fees claimed by Appellee’ counsel

for legal work from August 30, 2017, to October 1, 2018, with the following analysis in that post-remand Order²:

In its September 15th, 2017 Order, this Court found Sorenson's affidavit was **not** a nonconsensual common-law lien. Said finding was subsequently affirmed by the North Dakota Supreme Court in its July 18th, 2018 Opinion. Thus, pursuant to N.D.C.C. § 35-35-05(5), the court awarded costs and fees to Respondents.

"Order of the Court", November 22, 2018, [Doc. 71, Appx. 136], at ¶5 [¶8] In the District Court's previous *post-remand* Order of October 8, 2018, it addressed the *non-remanded issue* of the matter of whether the "Sorenson Affidavit" had been a nonconsensual common-law lien", with the Court stating as follows:

This Court issued an order finding that the Sorenson affidavit is not a nonconsensual common-law lien and *the Supreme Court affirmed the ruling.* *Johnston Land Co.*, 2018 ND 183 at ¶12. *Based on this determination* and N.D.C.C. § 35-35-05(5), *the Court awards Respondents their reasonable costs and attorney fees.* (emphasis added).

Order of October 8, 2018 [Doc. 65, Appx. 127-135], at ¶28³

² See, the "Order of the Court", November 22, 2018, [Doc. 71, Appx. 136], at ¶5.

³ Incongruently, and quite ironically, the District Court in this same October 8, 2018, "Order Granting Respondent's Motion for Summary Judgment and Attorney Fees and Order for Judgment" held as follows:

Johnston seeks attorney's fees, costs, and disbursements in item "f". The Court is left again to guess at the authority for this relief. N.D.C.C. § 35-35-05(3) and N.D.C.C. § 35-35-06 both provide for costs and reasonable attorney's fees, but both of *these statutes apply to nonconsensual common-law liens, and there has been a final determination that Sorenson's first affidavit is not a nonconsensual common-law lien.* (emphasis added).

Order of October 8, 2018 [Doc. 65, Appx. 127-135], at ¶ 21

[¶9] Interestingly, the District Court’s **post-remand** decision to award attorney’s fees to the Respondents based on N.D.C.C. § 35-35-05(5) – and upon the further basis of the portion of the Supreme Court’s decision which had affirmed the District Court’s holding relative to the “Sorenson Affidavit” not being a “nonconsensual common-law lien” – comes within the context of the Supreme Court itself having considered Petitioner Johnston Land Company – not the Respondents/ Appellees – to have been the prevailing party in the appeal -- with Johnston Land Company having been awarded its costs and disbursements in the appeal.

[¶10] By awarding to the Respondents attorney’s fees exclusively from the statutory authority of N.D.C.C. § 35-35-05(5) -- after the issue of whether the “Sorenson Affidavit” was a “nonconsensual common-law lien” had been conclusively decided by the North Dakota Supreme Court and thus no part of the remanded proceedings of this case – the District Court violated the “**Mandate Rule**”.

[¶11] The “**Mandate Rule**” is recognized in our jurisprudence here in North Dakota, just as it is in all other American state and federal jurisdictions. See, e.g., *Carlson v. Workforce Safety & Insurance*, 2012 ND 203, ¶16; 821 N.W.2d 760, 766 (N.D. 2012).

[¶12] Not surprisingly, the Sorenson/Ohnstad Twichell appellees do not cite *Carlson v. Workforce Safety & Insurance*, *supra*, in their briefing in this appeal, because *Carlson* – and the authorities referenced in it, including *Kortum v. Johnson*, 2010 ND 153, 786 N.W.2d 702, ¶ 9 – because these authorities stand for the proposition that the “Mandate Rule” precludes parties from re-litigating “issues which were resolved in the first appeal or which would have been resolved had they been properly presented in the first

appeal.” (bold, underlined text in original Supreme Court opinion in). *Carlson v. Workforce Safety & Insurance, supra*, 2012 ND 203 at ¶16; 821 N.W.2d at 766. See, also, *State ex rel. Dep't of Labor v. Riemers*, 2010 ND 43, 779 N.W.2d 649, ¶ 11; *Frisk v. Frisk*, 2006 ND 165, 719 N.W.2d 332, ¶ 14; *Jundt v. Jurassic Res. Dev.*, 2004 ND 65, 677 N.W.2d 209, ¶ 7; *State v. Burckhard*, 1999 ND 64, 592 N.W.2d 523, ¶ 7; and *Tom Beuchler Constr., Inc. v. City of Williston*, 413 N.W.2d 336, 339 (N.D. 1987).

[¶13] In the face of these authorities - none of which are cited by the Sorenson/Ohnstad Twitchell parties in their briefing - the appellees nevertheless claim that, “(t)he mandate rule does not apply in this situation”, supposedly because “(n)either the district court nor this Court rules upon a request for attorney fees before the remand” Brief of Appellees at ¶11. One must ask—what about the above quoted-from language - underlined by the Supreme Court itself in *Carlson* - that, “[a] party cannot on a second appeal relitigate issues which were resolved by the Court in the first appeal **or which would have been resolved had they been properly presented in the first appeal.**” (underlined emphasis in original Supreme Court opinion text). *Carlson v. Workforce Safety & Insurance, supra*, 2012 ND 203 at ¶16; 821 N.W.2d at 766, citing *Kortum v. Johnson, supra*, 2010 ND 153, 786 N.W.2d 702, ¶ 9.

[¶14] It is beyond clear that the ‘Mandate Rule’ applies specifically to untimely and long-waived requests for attorney’s fees awards. *Doe v. Chao*, 511 F.3d 461, 466-467 (4th Cir. 2007).

[¶15] In its opposition to the Respondents' Motion for Summary Judgment, Petitioner Johnston Land Company specifically argued to the District Court in the instant post-remand proceedings as follows:

In this matter the Supreme Court of North Dakota settled the claims regarding the non-consensual common law lien and any accessory issues associated with the same - such as attorney fees. No question was left for the District Court to resolve related to that claim. (bold, italicized emphasis added).

Petitioner Johnston Land Company's Brief in Opposition to Respondents' Summary Judgment/Request for Attorney Fees etc., [Doc. 49, Appx. 079], at ¶32

[¶16] Therefore, it is a matter of record that Johnston Land Company, LLC had specifically advised the District Court post-remand that all matters relating to non-consensual lien issue in this case had not been included within the scope of the Supreme Court's remand of this case back to the District Court, certainly including any award of attorney's fees.

B. The Sorenson/Ohnstad Twitchell appellees offer no legal justification to rebut the appellant's assertion that the District Court committed error by ruling that the Appellant's Petition for declaratory and injunctive relief relative to the April 1, 2015 "First Affidavit" of appellee Sara K. Sorenson was rendered moot by a self-serving, "Second Affidavit" executed by Ms. Sorenson - filed with the Grand Forks County Recorder on August 21, 2018 just seven (7) days after the Supreme Court Mandate issued in this case on August 14, 2018 -- said "Second Affidavit" having been designed exclusively for the purpose of supporting a summary judgment motion by the Sorenson/Ohnstad Twichell parties filed on August 20, 2018 - even as Ms. Sorenson's "First Affidavit" continues to cloud record title of the subject property today.

[*Note: Because the Sorenson/Ohnstad Twitchell appellees do not effectively address the substantive arguments which were presented in the appellant Johnston Land Company, LLC's Main Brief, appellant hereby references its Main Brief on the issue of alleged "mootness"/"non-justiciable controversy" in reply to the appellees' briefing argument on this issue.]

Dated this 4th day of April, 2019.

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CERTIFICATE OF COMPLIANCE

I, **DeWayne Johnston**, attorney for the Petitioner and Appellant, and officer of the court, hereby certify that the Reply Brief of the Appellant complies with N.D.R. App. P. Rule 32(a)(8)(A) as required by N.D.R. App. P. Rule 32(e).

Dated this 4th day of April, 2019.

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CERTIFICATE OF ELECTRONIC SERVICE

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

1. Reply Brief of Petitioner and Appellant

were served via **ELECTRONIC MAIL** on the 4th day of April, 2019 to:

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