

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Jesse Dellinger,

Plaintiff,

vs.

Jeremy Young Wolf d/b/a Young Wolf
Trenching, QEP Energy Company, and
Trevor Grandchamp,

Defendants,

QEP Energy Company,

Third Party Plaintiff/Appellee,

vs.

Kinsale Insurance Company and
Legendary Field Services, LLC,

Appellant/Third Party
Defendants.

SUPREME COURT NO. 20190301

Civil No. 27-2018-CV-00032

**ON APPEAL FROM COURT'S ORDER DATED JULY 31, 2019
STATE OF NORTH DAKOTA
MCKENZIE COUNTY DISTRICT COURT
CASE NO. 27-2018-CV-00032**

NOTICE OF MOTION TO DISMISS APPEAL

TO: APPELLANT KINSALE INSURANCE COMPANY, BY AND THROUGH
THEIR ATTORNEYS OF RECORD:

[¶1] YOU ARE HEREBY NOTIFIED that Appellee QEP Energy Company moves to
dismiss this appeal pursuant to Rule 27 of the North Dakota Rules of Appellate Procedure
and N.D.C.C. § 28-27-02 for the following reasons: (1) there are multiple unresolved
claims before the District Court involving both of the parties to this appeal, (2) Appellant's

appeal is not authorized by statute, and (3) the Appellants have not obtained Rule 54(b) certification.

Dated this 30th day of January, 2020.

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INC.

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Jesse Dellinger,

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CASE NO. 27-2018-CV-00032**

MOTION TO DISMISS APPEAL

[¶1] Appellee QEP Resources Company, by and through counsel, moves this Court for an Order dismissing this appeal in accordance with Rule 27 of the North Dakota Rules of Appellate Procedure, N.D. Cent. Code § 28-27-02 and Rule 54 of the North Dakota Rules of Civil Procedure for the following reasons: (1) there are multiple unresolved claims before the District Court involving both of the parties to this appeal, (2) Appellant's appeal

is not authorized by statute, and (3) the Appellants have not obtained Rule 54(b) certification. The Order underlying this appeal is thus not ripe for appellate review and accordingly, Appellee respectfully requests the Court dismiss this appeal.

Dated this 30th day of January, 2020.

VOGEL LAW FIRM

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SUPREME COURT NO. 20190301

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**ON APPEAL FROM COURT'S ORDER DATED JULY 31, 2019
STATE OF NORTH DAKOTA
MCKENZIE COUNTY DISTRICT COURT
CASE NO. 27-2018-CV-00032**

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

[¶1] Appellee QEP Resources Company, by and through counsel, moves this Court for an Order dismissing this appeal in accordance with Rule 27(f) of the North Dakota Rules of Appellate Procedure, N.D. Cent. Code § 28-27-02, and Rule 54 of the North Dakota Rules of Civil Procedure. The foregoing appeal is not authorized by law, as there remain multiple unresolved claims before the trial court involving both of the parties to this appeal,

the Order from which Appellants appeal is not final, and the District Court specifically denied Appellants' request for Rule 54(b) certification. The Order from which the Appellants appeal is not ripe for appellate review. Accordingly, Appellee respectfully requests the Court dismiss this appeal.

I. Relevant Factual and Procedural Background

[¶2] Plaintiff Jesse Dellinger initiated this case due to the injuries he suffered from an explosion at a well site in McKenzie County, North Dakota. (Doc. #4.) Plaintiff alleges that he was burned when hydrocarbons exploded during the change out of a heater/treater fire tube at the well site. (*Id.*) Dellinger sued four Defendants, including QEP Energy Company, claiming their negligence caused his damages.

[¶3] QEP tendered its defense and indemnity to Dellinger's employer, Legendary field Services, LLC under an MSA in place at the time of the incident. (Doc. #67.) QEP also tendered its defense and indemnity to Kinsale Insurance Company pursuant to the Kinsale policy for Legendary Field Services that named QEP as an Additional Insured. (Doc. #68.) Legendary never responded to QEP's tender, and Kinsale responded and denied coverage to QEP.

[¶4] QEP commenced a third party action against Kinsale and Legendary. (Doc. #16.) Following completion of written discovery, QEP moved for partial summary judgment against Kinsale, asking the trial court to required Kinsale to defend QEP an additional insured under the Legendary policy. (Doc. #65.) Kinsale countered the Motion by filing a Motion for Summary Judgment against QEP. Kinsale relied on multiple exclusions in its Motion while arguing that there was no possible way for QEP to be covered by the Kinsale/Legendary policy given the allegations in the pleadings.

[¶5] After oral argument, the Court entered an Order on August 1, 2019 granting QEP's motion in part and denying Kinsale's Motion in full. (Doc. #182.) The trial court ordered Kinsale to reimburse QEP's defense costs and to undertake payment of QEP's defense going forward in the underlying litigation. (*Id.*)

[¶6] Kinsale then filed and served a Motion for Rule 54(b) Certification on September 25, 2019 and soon thereafter served a Notice of Appeal of the District Court's decision denying its motion for summary judgment on September 30, 2019. On January 2, 2020, the District Court entered an Order denying Kinsale's Motion in full, stating, "Rule 54(b) certification is not warranted in this matter. Kinsale has demonstrated no cognizable reason that the Court's grant of summary judgment must be immediately reviewed." (Doc. #237.) The Court further stated that "it is highly likely that the Supreme Court would need to consider the duty to defend a second time...Defending insureds is the normal course of business for an insurance company. Therefore, this is not the rare situation that creates a hardship for Kinsale." (*Id.*)

[¶7] Given the Order from which Kinsale appeals was not intended as final and that Kinsale failed to obtain certification under Rule 54(b), QEP now respectfully requests that this Court dismiss the appeal for lack of jurisdiction.

II. Law and Argument

[¶8] The Supreme Court of North Dakota must have jurisdiction "in order to consider the merits of this appeal." *Gast Const. Co., Inc. v. Brighton Partnership*, 422 N.W.2d 389, 390 (N.D. 1988). There remain unresolved claims by and between Kinsale and QEP over Kinsale's obligations to defend and indemnify QEP for the claims brought by Dellinger. Accordingly, this Court should dismiss Kinsale's appeal.

A. **The Appeal is Not Final and Therefore Not Appealable under N.D.C.C. § 28-27-02.**

[¶9] “The right to appeal in this state is purely statutory, and if there is no statutory basis for an appeal [this Court] must take notice of the lack of jurisdiction and dismiss the appeal.” *Holverson v. Lundberg*, 2015 ND 225, ¶ 6, 225 869 N.W.2d 146. “Only judgments and decrees constituting a final judgment and specific orders enumerated by statute are appealable.” *In re Estate of Grengs*, 2015 ND 152, ¶ 18, 864 N.W.2d 424 (quoting *Investors Title Ins. Col. v. Herzog*, 2010 ND 138 ¶ 23, 785 N.W.2d 863). “Generally, the Supreme Court will not hear appeals from interlocutory orders, because such appeals are premature and the trial court may revise them at any time before the entry of final judgment adjudicating all claims.” *Frontier Enterprises, LLP v. DW Enterprises, LLP*, 2004 ND 131, ¶ 4, 682 N.W.2d 746.

[¶10] The Order from which Kinsale appeals is not a final order and the Supreme Court “will not consider interlocutory appeals unless... the underlying order was ‘meant to be, in all aspects, final.’” *White v. Altru Health System*, 2008 ND 48 ¶ 4, 746 N.W.2d 173 (quoting *Sime v. Tvenge Assoc. Architects*, 488 N.W.2d 606, 608 n. 1 (N.D. 1992).

“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 go no further and the appeal must be dismissed. *Gillan v. Saffell*, supra. If it does, then Rule 54(b), N.D.R.Civ.P, must be complied with. If it is not, we are without jurisdiction.”

Gast Construction Co., 422 N.W.2d 389 at 390.

[¶11] The North Dakota Supreme Court addressed this very issue in *Ziegler v. Meadowbrook Ins. Group, Inc.*, 2009 ND 192, 774 N.W.2d 782. In *Ziegler*, this Court considered an appeal from an order for partial summary judgment requiring an insurance company to defend its insured and concluded that the Order was not final or appealable.

Ziegler, 2009 ND 192, ¶1. This Court dismissed the *Ziegler* appeal and should do the same with this case.

¶12] Kinsale’s appeal fails under either inquiry: the order itself was not final and Kinsale has not obtained certification under Rule 54(b). Just as in *Ziegler*, the trial court in this case contemplated further discovery into the facts. In its Order denying Kinsale’s motion for rule 54(b) certification, the trial court specifically noted that the record is as of yet undeveloped, consisting only of affidavits. (Doc. #237.) The trial court also correctly recognized that after discovery and a potential trial, “the record will likely be completely developed, requiring the reviewing court to re-consider the duty to defend issue. An appeal at this point would constrain the appellate court to the limited factual record developed to date.” (*Id.*)

¶13] It is for this very same reason that the *Ziegler* Court held that the carrier’s appeal was untimely:

The district court's decision in this case contemplates further discovery and a determination on Meadowbrook's status as a real party in interest. Moreover, the court's decision did not resolve Ziegler's other claims against Star and Meadowbrook

2009 ND 192, ¶ 14.

¶14] Just as in *Ziegler*, the trial court’s decision on summary judgment in this matter was not intended to be final and is thus not appealable under N.D.C.C. § 28-27-02. The trial court intends to revisit the issues of Kinsale’s duties to defend and indemnify once the record is fully developed. There is a high likelihood that any decisions rendered by this Court would contradict further decisions by the trial court.

¶15] Kinsale’s piecemeal approach to this litigation undermines the principles of judicial economy and consistency. The trial court did not intend its order to be final and as such,

this Court need not reach the issues regarding Rule 54(b) certification. *Ziegler*, 2009 ND 192, ¶ 14. QEP respectfully requests an Order of this Court dismissing Kinsale’s appeal.

B. Kinsale Has Not Obtained Rule 54(b) Certification and Unresolved Claims Between These Parties Remain Before the Trial Court.

[¶16] Even if this matter were appealable under N.D.C.C. § 28-27-02, Kinsale has not obtained Rule 54(b) certification. In fact, the trial court specifically denied Kinsale’s request to do so. The parties each have claims pending before the trial court. The trial court’s own Orders contemplate further discovery and trial of facts with respect to Kinsale and QEP’s cross claims. Accordingly, without certification under Rule 54(b), this Court should dismiss Kinsale’s appeal.

[¶17] The purpose of Rule 54(b) is to discourage piecemeal disposal of multi-claim litigation. *Union State Bank v. Woell*, 357 N.W.2d 234 (N.D.1984). Rule 54(b) provides that “[i]f more than one claim for relief is presented in an action...or if multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.” “In the absence of such a determination, an appeal may not be taken in multi-claim litigation which leaves some claims un-adjudicated.” *Gillmore v. Morelli*, 425 N.W.2d 369 (N.D. 1988).

[¶18] The trial court may in its discretion release final decisions for appeal upon one or more, but less than all, claims in actions involving multiple claims. However, the Supreme Court leaves the timing of this release “vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay.” *Mitzel v. Schatz*, 167 N.W.2d 519, 524 (N.D. 1968). The rare appeal ripe for separate review only arises in the “infrequent, harsh case” when a unique prejudice

or hardship will result without immediate appeal. *Union State Bank v. Woell*, 357 N.W.2d 234, 237-238 (N.D. 1984). This is not one of those unique or rare cases.

[¶19] In actuality, this case is standard of those involving the construction of an insurance policy and the application of its terms to an underlying accident. Kinsale received an adverse ruling that is not final. Although Kinsale may not agree with the trial court's analysis, Kinsale must wait for the final resolution of all claims involving Kinsale before bringing an appeal.

[¶20] This approach meets with the well-developed standard in favor of judicial economy and against piecemeal appeals. To allow an appeal in this case would bring the underlying case to a halt, prejudice all parties not involved in this appeal by causing undue delay, bring to this Court's attention a matter that may come right back for appellate review a second time, and only allow a review of a very limited record that requires further development. All the while causing the parties to incur significant expense arguing this piecemeal, superfluous appeal.

[¶21] This case does not present the unique, infrequent, harsh circumstance contemplated by the rule. A final decision on all claims and issues, including Kinsale's duty to defend, is pending a decision by the factfinder at trial. Just as the trial court reasoned: "Rule 54(b) certification is not warranted in this matter. Kinsale has demonstrated no cognizable reason that the Court's grant of summary judgment must be immediately reviewed." (Doc. #237.) The Court further stated, "It is highly likely that the Supreme Court would need to consider the duty to defend a second time." (*Id.*) "Defending insureds is the normal course of business for an insurance company. Therefore, this is not the rare situation that creates a hardship for Kinsale." (*Id.*)

[¶22] The issues raised in this appeal may be mooted by future developments before the trial court. If this Court undertakes Kinsale's duty to defend now, there is a high likelihood that this Court will review the same issue between the same parties twice. Finally, there is a great likelihood that the courts will reach conflicting decisions given the relationship between Kinsale's dual obligations to defend and indemnify.

[¶23] The Order from which Kinsale purports to appeal is interlocutory, not final. Accordingly, pursuant to the well-established precedent set by this Court, Kinsale's appeal should be dismissed for lack of jurisdiction.

III. Conclusion

[¶24] This Court's jurisdiction arises only pursuant to statute. This case does not meet any of the criteria listed in N.D.C.C. § 28-27-02. Furthermore, this Court does not have jurisdiction to hear this appeal as it has not been certified as final by the trial court. Not only did the trial court make it clear that it did not intend this order to be final (and thus not appealable), it specifically rejected Kinsale's request for Rule 54(b) certification. QEP Energy Company therefore respectfully requests that the Supreme Court dismiss the appeal and remand to the trial court for further proceedings.

Dated this 30th day of January, 2020.

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ATTORNEYS FOR THIRD PARTY PLAINTIFF
AND APPELLEE, QEP ENERGY SERVICES,
INC.

**MOTION TO DISMISS APPEAL;
NOTICE OF MOTION TO DISMISS APPEAL; AND
BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL**

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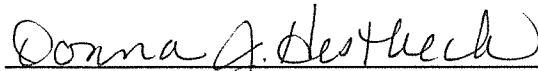
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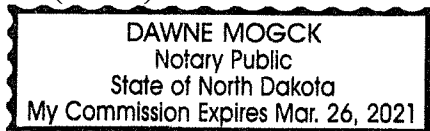
To the best of Affiant's knowledge, the email addresses above given are the actual email addresses of the parties intended to be so served.

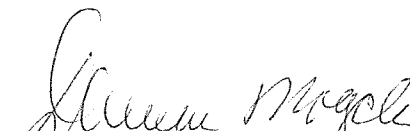


Donna J. Hestbeck

Subscribed and sworn to before me this 31st day of January, 2020.

(SEAL)





Notary Public