

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Harold Ring,

Appellant,

v.

North Dakota Department of
Human Services

Appellee.

Supreme Ct. No. 20200072

District Ct. No. 38-2019-CV-00030

**FROM THE MARCH 4, 2021 SUPPLEMENTAL FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER DIMISSING ADMINSTRATIVE
APPEAL**

**RENVILLE COUNTY, NORTH DAKOTA
NORTHEAST JUDICIAL DISTRICT**

HONORABLE ANTHONY SWAIN BENSON

**BRIEF OF APPELLEE REGARDING
THE MATTER DECIDED ON REMAND**

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**STATEMENT OF ISSUE REGARDING THE MATTER DECIDED
ON REMAND**

[¶1] The district court properly determined that the substitution for Harold Ring (Ring) was not warranted and properly dismissed Ring’s administrative appeal.

**STATEMENT OF CASE REGARDING THE MATTER DECIDED
ON REMAND**

[¶2] This matter comes before the Court from the Supplemental Findings of Fact, Conclusions of Law, and Order Dismissing Administrative Appeal, entered in Renville County District Court on March 4, 2021. Supplemental Appendix of Appellee Regarding the Matter on Remand (Supp. App. Appellee) 006-009. This Court by unanimous decision in Ring. v. North Dakota Department of Human Services, 2020 ND 217, 950 N.W.2d 142 remanded this matter back to the district court to determine whether the underlying action survived Ring’s death, and if it did, whether substitution of a party should be ordered under N.D.R.Civ.P. 25. Ring, 2020 ND 217, ¶ 8-9, 950 N.W.2d 142.

**STATEMENT OF FACTS REGARDING THE MATTER DECIDED ON
REMAND**

[¶3] On October 21, 2021 this Court remanded this matter to the District Court of Renville County, Ring, 2020 ND 217, ¶8-9, 950 N.W.2d 142. This Court instructed the district court to determine whether the underlying action survived Ring’s death, and if it did, whether substitution of a party should be ordered under N.D.R.Civ.P. 25. The parties submitted briefing and additional information for the District Court of Renville County’s review. On March 4,

2021, the District Court entered Supplemental Findings of Fact, Conclusions of Law, and Order Dismissing Administrative Appeal, disposing of the matters for which the case was remanded. Supp. App. Appellee 006-009. The Appellant requested the opportunity to submit supplemental briefing on the decision of the district court on remand. This Court allowed the parties to file supplemental briefs regarding only the issues raised by the remand, which were due April 21, 2021. Due to emergency medical condition, counsel for Appellee requested a one-week extension for both parties to file the briefs. This Court then set April 28, 2021 as the deadline for the parties to file simultaneous supplemental briefs regarding only the issues raised by the remand.

LAW AND ARGUMENT

I. The District Court correctly focused on the Appellant’s conduct in the proceedings leading up to the Supreme Court Appeal.

[¶4] The North Dakota Department of Human Services (DHS) was first made aware of Ring’s death on February 4, 2020, when Ring’s counsel, Richard LeMay (LeMay) responded to an email from DHS’s previous counsel of record at the time, informing LeMay she was moving and would no longer be representing DHS. Previous DHS counsel informed LeMay that a new assistant attorney general would be representing DHS if LeMay chose to appeal. LeMay responded, stating “Harold Ring passed away shortly before Judge Benson issued his decision. His daughter has not responded to my inquiries, however, the nursing home has indicated they are going to appeal.”

See Supp. App. Appellee 012. The appeal in question was from the Amended Findings of Fact, Conclusions of Law, and Order Affirming Hearing Officer's Decision that District Court of Renville County Judge Benson entered on December 31, 2019. See Appendix of Appellant Harold Ring (App. of Appellant) 162-166. Ring had actually passed away on November 16, 2019, approximately 45 days prior to Judge Benson's decision. See Supp. App. Appellee 014-016.

[¶5] As soon as LeMay learned of Ring's death, he should have notified both the district court and DHS by filing a statement noting death. He failed to do so. At that time, LeMay could have filed a statement noting death, and made a motion for substitution under N.D.R.Civ.P. 25. He would have had 90 days to make a motion to substitute a party. "If the motion for substitution is not made within 90 days after service of a statement noting the death, the action by or against the decedent may be dismissed." N.D.R.Civ.P. 25(a)(1).

[¶6] Instead, LeMay waited for the issuance of Judge Benson's decision, and then on March 6, 2020, filed a notice of appeal to the Supreme Court without any client, or any legal authority to do so. March 6, 2020 was the deadline to appeal Judge Benson's decision to the Supreme Court. It is unclear to DHS who Lemay was taking direction from, but it appears he was communicating with the nursing home where Ring resided before his death, as LeMay noted in his email on February 4, 2020, that the nursing home would be appealing. The nursing home, however, did not have standing to appeal at that time. DHS's prior counsel had informed LeMay that DHS would file a notice of

substitution so the nursing home would be notified of who would be representing DHS once prior counsel left. See Supp. App. Appellee 017-018. DHS did not receive any additional communication from LeMay until March 6, 2020, when LeMay filed the notice of appeal to the North Dakota Supreme Court. App. of Appellant 168-170.

[¶7] On March 6, 2020, the last day for LeMay to file Ring's appeal, LeMay emailed DHS's substituted counsel the notice of appeal and certificate of service. Attorney Justin Hagel (Hagel) was included on the email as a carbon copy on the email correspondence. See Supp. App. Appellee 019. The notice of appeal came from LeMay on behalf of Ring, See App. of Appellant 168-170, despite DHS expecting an appeal from the nursing home after all the recent communication exchanged between the parties. Within hours after the notice of appeal was filed, DHS emailed LeMay noting his previous correspondence stating the daughter had not responded to his inquiries. See Supp. App. Appellee 022-023. DHS thought it was odd that an attorney from another law firm was copied on the notice of appeal, as Hagel was not involved in the administrative hearing or the district court hearing, had not filed a notice of representation in the case, and was employed in private practice. DHS was aware that Hagel was counsel on another case against DHS where a nursing home was requesting to be a special administrator. Hagel was hired to represent the appellant in that matter. DHS searched the North Dakota Court Records Inquiry <https://publicsearch.ndcourts.gov/default.aspx> and noticed

that on February 14, 2020 the Evangelical Lutheran Good Samaritan Society, (Good Samaritan) filed a petition to become appointed as the special administrator of Ring's Estate. See District Court of Renville County, No. 38-2020-PR-00003 (Renville County Probate). The petition stated the appointment for the special administrator was necessary "for the sole purpose of retaining legal counsel previously representing Harold Lloyd Ring to continue representation on behalf of the Estate on an administrative appeal of the North Dakota Department of Human Services" See Supp. App. Appellee 026. On February 19, 2020 an order for hearing was filed in Renville County Probate, with a hearing scheduled for March 26, 2020. On March 20, 2020, after no response to the March 6, 2020 email DHS counsel had sent to LeMay, DHS counsel again emailed LeMay indicating she wanted to be sure that we had the appropriate parties. DHS counsel also requested written confirmation from the successor, so DHS could identify who LeMay's client was. See Supp. App. Appellee 021. This should not have been a difficult question to answer, and DHS was certainly entitled to know who LeMay was representing. On March 26, 2020 LeMay replied with a vague email, stating "I did reestablish contact with Nancy Ring. Nancy was the daughter that testified at the hearing." Id. It was an odd response as DHS was very clear that it wanted written confirmation on who Lemay's client was. Counsel for DHS again emailed LeMay that same day indicating that reestablishing contact and representing someone were different, and again requested that

LeMay respond as soon as possible with clarification as to who his client was. Id. at 020. On March 30, 2020 LeMay replied by email, stating “I would look pretty silly filing a Notice of Appeal to the ND Supreme Court without a client.” Id. However, it now appears that is exactly what LeMay did. His client died, he did not have a client, and he did not substitute any party. He then filed an appeal to the North Dakota Supreme Court.

[¶8] DHS was confused why LeMay was purporting to represent Nancy Ring (Nancy), when he clearly had been in communication with Good Samaritan, who was in the process of petitioning to become a special administrator on Ring’s behalf. In a March 30, 2020 email, DHS counsel informed LeMay that DHS was wondering why Good Samaritan was opening up a probate if Nancy was claiming to be the successor for the purpose of the appeal. LeMay was asked to provide an explanation if he had one. See Supp. App. Appellee 028. DHS also informed LeMay it would seem incumbent on Nancy (who he purported to represent) to then inform the Renville County Probate that she was serving as the successor for the appeal and that the appointment of a special administrator for this purpose was not needed. Id. DHS was still confused as to why there were two parties claiming to both represent Ring. LeMay did not respond to the March 30, 2020 email. DHS, for good reason, was perplexed that Good Samaritan would move forward with the appointment of a special administrator specifically for the purposes of an appeal, when LeMay had already filed an appeal with this Court on Ring’s behalf, and the

nursing home did not have standing. It is clear from the emails and timeline, that LeMay and the nursing home had been communicating, as LeMay did not file an objection, despite being aware of the case.

[¶9] On April 15, 2020, the day the Appellant's Supreme Court brief was originally due, LeMay requested an additional 75-day extension to submit his brief. DHS checked the Renville County Probate docket to see if there were any decisions entered in the special administrator proceeding and noticed the formal hearing for the appointment of special administrator had been rescheduled to April 26, 2020. On April 16, 2020, DHS filed an Objection to the Appointment of a Special Administrator in Renville County Probate, as there were two competing parties, both claiming to represent Ring. DHS noted in the objection that LeMay had already filed a notice of appeal in this matter with this Court. DHS further noted that since the deadline for the appeal was March 6, 2020, and since Good Samaritan had not been appointed special administrator at that time, it did not have standing to appeal. It appeared to DHS that LeMay had been communicating with Good Samaritan and was trying to find some way to have them take over the appeal. DHS noted it was not proper for two parties to simultaneously represent a decedent. A stipulation was filed in Renville County Probate stating because of various issues raised, the appointment of a special administrator was not needed at that time.

[¶10] In the Supplemental Findings of Fact, Conclusions of Law, and Order Dismissing Administrative Appeal, the district court determined that “[r]eview of the timeline and communication between the attorneys establishes fairly apparent obfuscation as to the actual client being represented by Appellant’s counsel following the death of Ring up to the filing of the notice of appeal to the North Dakota Supreme Court.” Supp. App. Appellee 007 ¶9. The district court focused on the Appellant’s conduct leading up to the appeal, noting Ring died November 16, 2019 and the first notice of Ring’s death established in the record was not until the North Dakota Supreme Court’s opinion filed October 21, 2020. LeMay failed to mention Ring’s death in his briefing on appeal to this Court, but DHS did mention that Ring died prior to the District Court affirming the ALJ’s findings in its briefing filed with this Court.

II. The District Court correctly determined neither the letter nor the spirit of Rule 25 of the North Dakota Rules of Civil Procedure was followed after the passing of Ring.

[¶11] A motion under N.D.R.Civ.P. 25 is discretionary, as the court may order substitution, but it is not required to do so. In fact, if the issue was not timely raised, it can be denied. In Dixon v. Dixon, the district court denied a motion under Rule 25 stating the lawyer was “playing lawyer games” and he should have addressed the issue before the morning of trial, and it was not timely raised. Dixon, 2017 ND 174, ¶ 29, 898 N.W.2d 706. Here, LeMay was aware Ring had died over a year ago and is only now requesting to substitute a party. In addition, he failed to respond to important issues such as who he was

representing and was providing vague answers to opposing counsel. LeMay had been communicating with Good Samaritan and filed a notice of appeal after Good Samaritan had already requested to start a formal appointment of a special administrator. The district court properly concluded lawyer games were being played. “When considering the history of the proceedings in this action following the death of Harold Ring, it appears that lawyer games have indeed been played.” Supp. App. Appellee 008, ¶13.

[¶12] This Court noted that neither side filed a notice of death nor moved to substitute a party in the district court proceeding. Ring, 2020 ND 217, ¶8, 950 N.W.2d 142. DHS could not have possibly filed a notice on something they were not made aware of. LeMay’s client Ring died approximately 45 days prior to the district court decision. LeMay waited to notify DHS until February 4, 2020, approximately 90 days after Ring died, and only in response to an email from prior DHS counsel informing him that she had accepted a different job and new DHS counsel would be taking over. This Court noted that the district court did not determine whether this action survived Ring’s death, and if it did, whether a proper successor was available. Id. The district court was not able to determine those issues prior to the appeal to this Court, because LeMay did not inform the district court that Ring had died before a decision was made. Both the district court and DHS were unaware of Ring’s death. LeMay should have filed a notice of Ring’s death and a motion for substitution prior to the decision by the district court. The district court then could have made a

determination at that time if the claim survived, and if a party should have been substituted. Instead, LeMay waited until a decision was entered by the district court, and then filed an unauthorized appeal to this Court. A new party cannot retroactively file or approve an appeal filed by an unauthorized party.

[¶13] The district court properly determined that LeMay was not relieved from the procedural requirements of N.D.R.Civ.P. 25, which requires that a motion for substitution be filed 90 days after service of a statement noting the death of Ring. No such motion was ever filed in this matter following Ring's death. Supp. App. Appellee 008, ¶ 14.

CONCLUSION

[¶14] DHS requests this Court uphold the Supplemental Findings of Fact, Conclusions of Law, and Order Dismissing Administrative Appeal entered in Renville County District Court and dismiss this appeal in its entirety.

Dated this 28th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

Supreme Ct. No. 20200072

District Ct. No. 38-2019-CV-00030

[¶1] The undersigned certifies pursuant to N.D. R. App. P. 32(a)(8)(A), that the Appellee's Brief contains 13 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365-word processing software in Century 12-point font.

Dated this 28th day of April, 2021.

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CERTIFICATE OF SERVICE

Supreme Ct. No. 20200072

District Ct. No. 38-2019-CV-00030

[¶1] I hereby certify that on April 28, 2021, the following documents: **BRIEF OF APPELLEE REGARDING THE MATTER DECIDED ON REMAND, CERTIFICATE OF COMPLIANCE, and SUPPLEMENTAL APPENDIX OF APPELLEE REGARDING THE MATTER ON REMAND** were served upon Harold Ring, by and through his attorney, Richard R. Lemay at rlemay@legalassist.org.

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