

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Ashley Feickert,)	
Plaintiff and Appellee,)	
)	
v.)	Supreme Court No.: 20220102
)	
Cheryl Feickert,)	
Defendant and Appellant)	

Appeal from the *Findings of Fact, Conclusions of Law and Order for Judgment and Judgment* entered on February 16, 2022 by the Wells County District Court, Southeast Judicial District, the Honorable James D. Hovey, presiding.

***Ashley Feickert v. Cheryl Feickert*
Wells County Case No.: 52-2021-CV-00014**

APPELLEE’S NOTICE OF MOTION TO DISMISS APPEAL AND MOTION TO DISMISS APPEAL

[1] NOTICE OF MOTION TO DISMISS APPEAL

[2] NOTICE IS HEREBY GIVEN that Plaintiff and Appellee Ashley Feickert (“Ashley”), by and through her attorney of record, Micheal A. Mulloy of Mulloy Law, PLLC, brings the attached *Motion to Dismiss Appeal* pursuant to the provisions of Rules 27 and 42 of the North Dakota Rules of Appellate Procedure. Ashley argues that Defendant and Appellant Cheryl Feickert (“Cheryl”) voluntarily partially satisfied the *Judgment* entered by the Wells County Clerk of Court on February 16, 2022 and thus waived her right to appeal.

[3] Cheryl is specifically given notice of N.D.R.App.P. 27(b), which provides:

Any party may file a response in opposition to a motion other than one for a procedural order (see subdivision (c)) within 14 days after service of the

motion, but motions authorized by Rules 8, 9, and 41 may be acted upon after reasonable notice. The court may shorten or extend the time for responding to any motion.

[4] **MOTION TO DISMISS APPEAL**

[5] COMES NOW Plaintiff and Appellee Ashley Feickert (“Ashley”), by and through her attorney of record, Micheal A. Mulloy of Mulloy Law, PLLC, who moves the Court to dismiss Defendant and Appellant Cheryl Feickert’s (“Cheryl”) appeal on the basis that Cheryl voluntarily partially satisfied the *Judgment* entered by the Wells County Clerk of Court on February 16, 2022 and thus waived her right to appeal.

[6] This *Motion to Dismiss Appeal* is based upon the attached *Brief in Support of Motion to Dismiss Appeal*, and all other documents, exhibits, and records in this matter.

Respectfully submitted this 18th day of August.

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/s/ Micheal A. Mulloy (ID# 07239)

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APPELLEE’S BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

[1] INTRODUCTION

[2] COMES NOW, Plaintiff and Appellee Ashley Feickert (“Ashley”), by and through her attorney of record, Micheal A. Mulloy of Mulloy Law, PLLC, who brings the attached *Motion to Dismiss Appeal* pursuant to the provisions of Rules 27 and 42 of the North Dakota Rules of Appellate Procedure. Defendant and Appellant Cheryl Feickert’s (“Cheryl”) appeal should be dismissed because she voluntarily partially satisfied the *Judgment* entered by the Wells County Clerk of Court on February 16, 2022 and thus waived her right to appeal.

[3] This *Motion to Dismiss Appeal* is based upon the following *Brief in Support of Motion to Dismiss Appeal*, and all other documents, exhibits, and records in this matter.

[4] **PROCEDURAL HISTORY AND FACTS**

[5] For a thorough recitation of the procedural history and facts relating to this matter, please refer to ¶¶ 3-17 of the *Brief of Appellee Ashley Feickert* filed concurrently with this *Motion to Dismiss Appeal*. The specific procedural history and facts relevant to this motion are as follows:

[6] This matter was commenced on March 5, 2021 by Ashley against her mother, Cheryl, upon counsel for Cheryl admitting service of the *Summons, Complaint*, and Exhibits 1-5. (R1-8). In her *Complaint*, Ashley alleged that while Cheryl was acting as her conservator, she breached her fiduciary obligations to her. (R1). Trial was held on December 6, 2021 before the Honorable James D. Hovey. (R16). At trial, the District Court heard testimony from Ashley and Cheryl, and received Plaintiff's Exhibits 1-16, and Defendant's Exhibits 18, and 22-30. (R29-33).

[7] On February 16, 2022, the District Court issued its *Findings of Fact, Conclusions of Law and Order for Judgment*. (R39). In its *Conclusions of Law*, the District Court determined that Cheryl breached her fiduciary obligations of keeping suitable records and filing annual reports; that she breached her fiduciary duty prohibiting self dealing by using net proceeds from Ashley's portion of real property for her own benefit, and had transferred both real and personal property to herself without approval of the court; and that Cheryl breached her fiduciary obligation to transfer Ashley's assets to her upon reaching the age of majority. *Id.* Based upon the various breaches of fiduciary obligations, the District Court awarded damages to Ashley in the amount of \$119,994.97 plus post-judgment interest. *Id.*

[8] *Judgment* was issued by the Wells County Clerk of Court on February 16, 2022 (R40) and *Notice of Entry of Judgment* was filed and served on the same date. (R42-43). After *Judgment* was entered, Cheryl voluntarily paid the sum of \$20,000 toward the *Judgment* rendered against her. A *Partial Satisfaction of Judgment* was signed on March 22, 2022 and docketed with the Wells County Clerk of Court on the same date. (R44-45). On April 1, 2022, Cheryl timely filed and served her *Notice of Appeal*. (R46). On appeal, Cheryl argues that the District Court erred in not considering her claim for unjust enrichment and failing to reduce the amount of damages awarded to Ashley.

[9] Ashley now moves this Court to dismiss Cheryl's appeal based upon Cheryl voluntarily partially satisfying the *Judgment*.

[10] **LAW AND ARGUMENT**

[11] At issue is whether Cheryl waived her right to appeal given that she voluntarily partially satisfied the *Judgment* entered against her. This Court follows the rule that "a party who voluntarily pays a judgment against him waives the right to appeal from the judgment." *Ramsey Fin. Corp. v. Haugland*, 2006 ND 167, ¶ 9, 719 N.W.2d 346; *see also Mr. G's Turtle Mountain Lodge, Inc. v. Roland Twp.*, 2002 ND 140, ¶ 11, 651 N.W.2d 625; *DeCoteau v. Nodak Mut. Ins. Co.*, 2001 ND 182, ¶ 10, 636 N.W.2d 432; *Twogood v. Wentz*, 2001 ND 167, ¶ 5, 634 N.W.2d 514; *Lyon v. Ford Motor Co.*, 2000 ND 12, ¶ 13, 604 N.W.2d 453. This Court, however, has not specifically addressed whether a voluntary partial payment or satisfaction of a judgment for damages constitutes a waiver of the right to appeal. *State ex rel. Storbakken v. Scott's Electric, Inc.*, 2014 ND 97, ¶ 6, 846 N.W.2d 327. Courts in other jurisdictions have reached divergent results depending on the particular facts and circumstances of the case. *See, e.g.*, E.H. Schopler, Annotation,

Defeated party's payment or satisfaction of, or other compliance with, civil judgment as barring his right to appeal, 39 A.L.R.2d 153, § 12 (1955); 4 C.J.S. *Appeal and Error* § 280 (2007).

[12] In *Scott's Electric*, this Court elected to not resolve the issue because cases addressing the question generally involve situations where the partially satisfied portion of the judgment remains disputed in the appeal. 2014 ND 97 at ¶ 6. In *Scott's Electric*, the partial payment relates to wages, penalties, and interest Scott's represented to be an "undisputed" liability. *Id.* In this case, however, the Cheryl argues that the damages assessed against her in the amount of \$119,994.97 plus post-judgment interest should be offset or reduced by funds allegedly paid to Ashley, or on her behalf. Accordingly, the partially satisfied portion of the *Judgment* remains disputed in the appeal.

[13] Courts across the nation have held that partial voluntary performance of a judgment has the same effect in barring an appeal as complete performance, if it is of such a character as to constitute acquiescence in the judgment. *Liberty Mut. Ins. Co. v. Morgan*, 199 Ga. 179, 33 S.E.2d 336 (1945); *See also Sisk v. Edmonston*, 163 Kan. 394, 182 P.2d 891 (1947); *Varner v. Gulf Ins. Co.*, 254 Kan. 492, 866 P.2d 1044 (1994). It has also been held that whether payment of a portion of the judgment upon execution was involuntary depends on the particular facts. *Vanover v. Vanover*, 26 Kan. App. 2d 186, 987 P.2d 1105 (1999). Similar to the court in Kansas, this Court has held that while voluntary payment of a judgment waives the right to appeal, payment of a judgment under coercion or duress does not constitute a waiver. *Twogood*, 2001 ND 167, ¶ 5.

[14] In this case, Cheryl voluntarily paid \$20,000 toward the \$119,994.97 *Judgment* that was entered against her. (R44-45). Cheryl was not coerced into making this

payment, nor did Ashley seek any execution against any property owned by Cheryl to partially satisfy the *Judgment*. Despite making this voluntary payment, Cheryl argues to this Court that the District Court should have offset the judgment rendered against her in the amount of \$135,759.56 based upon allegedly expending \$34,411.56 on Ashley's expenses, \$70,848 on alleged expenses associated with Ashley's son, A.F., and for \$30,500 for Ashley's alleged use of a hotel room owned by Cheryl. Accordingly, the partially satisfied portion of the judgment remains disputed in the appeal.

[15] Given that this appears to be a matter of first impression, Ashley urges this Court to adopt a rule that a party who voluntarily partially satisfies a judgment rendered against him or her on a judgment that remains disputed in an appeal, waives his or her right to an appeal.

Respectfully submitted this 18th day of August, 2022.

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CERTIFICATE OF SERVICE BY ELECTRONIC FILING

Micheal A. Mulloy states that on the 18th day of August, 2022 a true and correct copy of the *Appellee’s Notice of Motion to Dismiss Appeal and Motion to Dismiss Appeal; Appellee’s Brief in Support of Motion to Dismiss Appeal; and Brief of Appellee Ashley Feickert* were filed and served electronically with the North Dakota Supreme Court Clerk through the North Dakota Supreme Court’s Electronic File & Serve (“EFS”), and that EFS will send a Service Notification to the following:

Jennifer M. Gooss
Solem Law Office
beulaw3@westriv.com

Dated this 18th day of August, 2022.

MICHEAL A. MULLOY
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