STATE OF NORTH DAKOTA	DISTRICT COURT
COUNTY OF BURLEIGH	SOUTH CENTRAL JUDICIAL DISTRICT
APH Farms, Arden Hagerott, Jonathan Hagerott, Janel Olson, Valera Hayen, Kari Curran, Scott Irmen, Mary Jo Irmen, Leon Mallberg, Staroba Revocable Living Trust, Loren Staroba, Diane Staroba, James Tiegs, Appellants, v. North Dakota Public Service Commission, SCS Carbon Transport, LLC, John H. Warford, Jr. Revocable Trust, Chad Wachter, Chad Moldenhauer, City of Bismarck, Laborers District Council of Minnesota and North Dakota, Emmons County, and Burleigh County, Appellees.	Case No.: 08-2024-CV-03622 **EMMONS COUNTY'S RESPONSE TO SCS CARBON TRANSPORT LLC'S MOTION TO DISMISS**

[¶1] Emmons County submits its response brief in opposition to SCS Carbon Transport's ("SCS") Motion to Dismiss.

I. Appellants served their Notice of Appeal in compliance with N.D.C.C. § 28-32-42.

[¶2] SCS's hypertechnical arguments about service miss the forest for the trees. In Sections I, II, and III of its brief, SCS makes numerous arguments about how service of the Notice of Appeal did not comply with the rules of civil procedure. *See generally,* Index #36, ¶¶ 29-40. But the statute controls over the rules, not vice versa as SCS argues. The North Dakota Supreme Court has said:

> This Court has recognized the rules of civil procedure apply to administrative appeals to the extent the rules are not inconsistent with applicable statutes. *Sande v. State*, 440 N.W.2d 264, 266 (N.D. 1989); *City of Casselton v. N.D. Pub. Serv. Comm'n*, 307 N.W.2d 849, 852 (N.D. 1981); *Schroeder v. Burleigh Cty. Bd. of Comm'rs*, 252 N.W.2d 893, 895 (N.D. 1977); *Reliance Ins. Co. v. Pub. Serv. Comm'n*, 250 N.W.2d 918, 920-21 (N.D. 1977); N.D.R.Civ.P. 81(b) (civil rules

> govern procedure and practice relating to appeals to district courts to the extent the rules are not in conflict with the statutes). Under the rules of civil procedure, we have recognized that "service" of a notice of appeal may be by mail and is complete upon mailing. *Sande*, at 266; *City of Casselton*, at 852; *Reliance Ins. Co.*, at 920-21.

Opp v. Dir., N.D. DOT, 2017 ND 101, ¶ 12, 892 N.W.2d 891 (emphasis added).

[¶3] This passage both recognizes that the rules of civil procedure cannot supersede the plain language of N.D.C.C. § 28-32-42, and also states clearly that service by mail is allowed for a notice of appeal in an administrative appeal. This passage was written in 2017, years after Rule 5 was amended to require electronic service. *See, e.g.*, *Dakota Heritage Bank v. Iaccone*, 2014 ND 150, ¶ 10, 849 N.W.2d 219, 222 ("The electronic service requirement was included in an amendment to the Rule, which became effective on April 1, 2013….").

[¶4] Service by mail is still allowed as provided for in Rule 5(b), as is personal service. SCS's arguments that electronic service is necessary are simply contrary to law. The reason this is allowed despite Rule 5's command to serve electronically is that the jurisdictional requirement is contained in the *statute*, not in the rules, as argued by SCS. N.D.C.C. § 28-32-42 requires "service," and the cases where courts have found jurisdiction lacking are never cases where parties were actually served as they were here. *Altru Specialty Servs. v. N.D. Dep't of Human Servs.*, 2017 ND 270, ¶ 17, 903 N.W.2d 721; *see also MacDonald v. N.D. Comm'n on Med. Competency*, 492 N.W.2d 94, 96 (N.D. 1992).

[¶5] Appellants complied with the statutory requirement which is not true of the litigants in the cases cited by SCS. This is why the North Dakota Supreme Court speaks permissively when it references the rules of civil procedure and their application here: "This Court has approved the use of service under N.D.R.Civ.P. 5 for service of a notice of appeal from an administrative agency's

decision upon a party or a party's attorney." *Inwards v. N.D. Workforce Safety & Ins.*, 2014 ND 163, ¶ 9, 851 N.W.2d 693 (emphasis added).

[¶6] A review of the caselaw on this issue shows that when the Court has discussed the minutiae of service under the rules, it relates always to whether a party was served (at all) because failing to serve the agency or party at all would not comply with the statute. Here, SCS does not and cannot allege that it or other parties were not served – they were (and it largely agrees). *See* SCS Brief, Index #36, ¶¶ 14-16 ("Appellants served the Commission with their Notice of Appeal…" and "Appellants served the North Dakota Attorney General with their Notice of Appeal…" and "Appellants served Summit with their Notice of Appeal…."). SCS nonetheless quibbles with the *form* of service under the *rules of civil procedure*, forgetting that compliance must be with the *statute*, which merely requires that all parties be served. And they were.

[¶7] The pertinent statutory requirement that applies here states:

> An appeal shall be taken by serving a notice of appeal and specifications of error specifying the grounds on which the appeal is taken, upon the administrative agency concerned, upon the attorney general or an assistant attorney general, and upon all the parties to the proceeding before the administrative agency, and by filing the notice of appeal and specifications of error together with proof of service of the notice of appeal, and the undertaking required by this section, with the clerk of the district court to which the appeal is taken.

N.D.C.C. § 28-32-42 (emphasis added). In this case, the Appellants complied with each requirement in this statute. SCS's complaints are with the manner of compliance, and that has never been the subject of a case holding as represented by SCS.

[¶8] For example, the Court said in *Altru* that the appellant failed to serve the agency and could not claim that service on an assistant attorney general was sufficient as service on the agency under Rule 4(d)(2)(F). But this needs to be understood in context. The appellant had not served the agency *at all* and claimed that serving the attorney general was nonetheless sufficient "because it

served an assistant attorney general and the Attorney General's Office represents administrative agencies in appeals before the district court." *Altru Specialty Servs. v. N.D. Dep't of Human Servs.*, 2017 ND 270, ¶ 13, 903 N.W.2d 721. But N.D.C.C. § 28-32-42 requires service "upon the administrative agency concerned, [**and**] upon the attorney general or an assistant attorney general…." If Rule 4 or Rule 5 trumped the plain language of the statute requiring service on *both* the agency and the assistant attorney general, it would lead to an absurd result in that the statute would have redundant and unnecessary language and service requirements. The Court in *Altru* recognized this when it said: "Furthermore, the statutory requirement to serve both the agency and the attorney general would be rendered inoperative or superfluous if N.D.R.Civ.P. 4 and 5 control and permit service of a notice of appeal on an agency by serving the attorney general or any assistant attorney general in all appeals from agency orders." *Altru Specialty Servs. v. N.D. Dep't of Human Servs.*, 2017 ND 270, ¶ 17, 903 N.W.2d 721 (emphasis added). The Court said "if N.D.R.Civ.P. 4 and 5 control" and confirmed that they do not – the statute does.

[¶9] The Court in *Altru* also explained its ruling in *Sande v. State*, 440 N.W.2d 264 (N.D. 1989):

> In *Sande*, 440 N.W.2d at 266, this Court decided whether an administrative agency was properly served with a notice of appeal. Under N.D.C.C. § 28-32-15, now codified at N.D.C.C. § 28-32-42, the appealing party was required to serve the notice of appeal and specification of errors upon the administrative agency, the attorney general or assistant attorney general, and all parties to the proceeding. *Id.* The notice of appeal and specification of errors were not directly served on any member of the agency, but the documents were timely served on an assistant attorney general who represented the agency and the State in the administrative proceedings. *Id.* This Court held service on the assistant attorney general was proper service on the agency under N.D.R.Civ.P. 5(b) because the assistant attorney general represented the agency and the State in the administrative proceedings. *Id.* at 266-67.

Altru Specialty Servs. v. N.D. Dep't of Human Servs., 2017 ND 270, ¶ 15, 903 N.W.2d 721. In another case, the district court did not have authority to extend the time for the Appellant Opp to file a notice of appeal with the district court under N.D.C.C. §§ 39-20-06 and 39-06.2-10.7. The

decision in *Opp v. Dir., N.D. DOT* is inapposite because the appellant did not timely file the appeal, and that is not an issue here. 2017 ND 101, 892 N.W.2d 891 ("the district court did not have authority to extend the time for Opp to file a notice of appeal with the district court under N.D.C.C. §§ 39-20-06 and 39-06.2-10.7."). In the decision in *Inwards v. N.D. Workforce Safety & Ins.*, however, the Court actually approved an extension based on attempted service through the Odyssey filing system and assertions of technical issues. The Court said: "It is unclear why electronic service was not accomplished. The court found Inwards was not prejudiced and determined good cause existed to grant WSI appropriate relief. Under the circumstances, we conclude the district court did not abuse its discretion in allowing WSI additional time to electronically serve Inwards with the notice of appeal and specification of errors." *Inwards v. N.D. Workforce Safety & Ins.*, 2014 ND 163, ¶¶ 14-15, 851 N.W.2d 693.

[¶10] Incredibly, SCS cites to a federal practice treatise and a Second Circuit federal decision to argue that its tortured reading of the rules of civil procedure supersede the plain language of N.D.C.C. § 28-32-42. *See* Index #36, ¶ 34. While courts may look to federal courts interpreting federal rules for rules that are the same as their North Dakota counterpart, that is not support for what SCS actually argues, which is that the rules somehow supersede the statute's plain language despite what the ND Supreme Court has said. They do not.

[¶11] Finally, SCS cobbles together a quote from *Dakota Heritage Bank v. Iaccone*, 2014 ND 150, ¶10, 849 N.W.2d 219 that stretches the case's holding past the breaking point. Index #36, ¶ 38. To begin, the case has nothing to do with N.D.C.C. § 28-32-42. Rule 5 was mentioned in passing in a wholly different context.

> Although notice of entry of judgment was not filed until April 16, 2014, the Bank claims it served notice of entry of judgment by mail on July 19, 2013. The Bank filed an affidavit and attached documents to support its claim. Under N.D.R.Civ.P. 58(b), the prevailing party must serve notice of entry of judgment within 14 days

> after entry of judgment. Rule 5(b), N.D.R.Civ.P., provides the procedural requirements for proper service and states, "A document that is required to be filed must be served electronically . . . ." The electronic service requirement was included in an amendment to the Rule, which became effective on April 1, 2013, prior to the service of the notice of entry of judgment in this case. See N.D.R.Civ.P. 5, explanatory note. The Bank's service by mail on July 19, 2013, did not comply with the procedural requirements for service and notice and, therefore, was not sufficient to start the time period for an appeal.

Dakota Heritage Bank v. Iaccone, 2014 ND 150, ¶10, 849 N.W.2d 219.

[¶12] The Court was merely determining whether the service was sufficient because the appellant in that case claimed he did not receive the notice of entry. *Id.*, 2014 ND 150, ¶ 7, 849 N.W.2d 219 ("On January 10, 2014, Christi Pankonin filed a notice of appeal from the July 18, 2013, judgment awarding the Bank attorney's fees. The notice stated the appeal was timely under N.D.R.App.P. 4(a)(1) because Lamb did not receive notice of entry of [] judgment and because notice was not filed with the district court.") (emphasis added). Ultimately the holding was that the appellant "Pankonin was not properly served with notice of entry of the judgment and no evidence establishes Pankonin's actual knowledge of entry of the judgment until November 19, 2013. We conclude Pankonin's appeal is timely, and we deny the Bank's motion to dismiss." *Id.* at ¶ 12.

[¶13] SCS claims in its brief that this case stands for the proposition that failing to serve under Rule 5 when serving a notice of appeal under N.D.C.C. § 28-32-42 means that service is "insufficient." *See* Index #36, ¶ 38. That is clearly not what the North Dakota Supreme Court said, and the quote SCS cobbles together with its "modifications" for its parenthetical is disingenuous and attempts to mislead this Court.

[¶14] As can be seen when the cases are reviewed in detail, they simply do not contain the minutiae SCS claims they do – they require simple compliance with the statute. And the statute merely requires service on the agency, the attorney general or an assistant attorney general, and the parties. The statute's plain language controls, not the rules of civil procedure. *Altru Specialty*

Servs. v. N.D. Dep't of Human Servs., 2017 ND 270, ¶ 17, 903 N.W.2d 721; *see also MacDonald v. N.D. Comm'n on Med. Competency*, 492 N.W.2d 94, 96 (N.D. 1992) (emphasis added) ("Thus, we hold that the filing of a document showing proof of *some* service is sufficient under section 28-32-15 to confer jurisdiction on the district court…." and "We noted that the Administrative Agencies Practice Act did not specify *how* service of a notice of appeal is to be made on an administrative agency…."). To the extent SCS attempts to argue that the statute does not state *how* service is to be made, it must be reiterated that if it is possible to accomplish service that satisfies the plain language of the statute but not SCS's tortured reading of civil rules, then the rules conflict and the statute controls.

[¶15] Citations to authority about whether a party has standing to take an appeal are also inapposite here, where the question is whether they were parties for purposes of needing to serve them with a notice of appeal under N.D.C.C. § 28-32-42. Compare *Minn-Kota Ag Prods. v. N.D. Pub. Serv. Comm'n*, 2020 ND 12, ¶ 1, 938 N.W.2d 118 ("company had standing to appeal the North Dakota Public Service Commission's (PSC) decision denying an electric public utility's application for a certificate of public convenience and necessity") with *Inwards v. N.D. Workforce Safety & Ins.*, 2014 ND 163, ¶ 17, 851 N.W.2d 693, 698 ("This Court has construed 'parties' under N.D.C.C. § 28-32-15 [currently N.D.C.C. § 28-32-42] to mean a real party in interest as well as an adverse party.") (emphasis added). Regarding the employer, Bobcat, in the *Inwards* case, the Court recognized that "[t]he legislature has recognized the employer's status as an interested party." *Inwards v. N.D. Workforce Safety & Ins.*, 2014 ND 163, ¶ 17, 851 N.W.2d 693. Despite this explicit *statutory* recognition as an "interested party," it nonetheless indicated under the factual circumstances of that case and based on that court's discretion, it was not necessary to serve Bobcat

the employer with the notice of appeal in that proceeding for jurisdiction to attach. *Id.* This decision is well within the discretion of the district court.

[¶16] Finally, SCS literally refers to individuals no longer participating in the proceeding as "the 'Non-Participating Parties" and then nonetheless argues that they also must be served. Except that this is contrary to law. "[A]ny person who is directly interested in the proceedings before an administrative agency who may be factually aggrieved by the decision of the agency, and who participates in the proceeding before such agency, is a 'party' to any proceedings for the purposes of taking an appeal from the decision." *Inwards v. N.D. Workforce Safety & Ins.*, 2014 ND 163, ¶ 17, 851 N.W.2d 693 (emphasis added). The withdrawals were withdrawals of participation as recognized by SCS's choice of labels for them. And their withdrawals were literally the effective legal manner by which to indicate they are no longer a party and intend to cease participation in this proceeding. Based on SCS's own definition of these individuals as "Non-Participating Parties" they did not need to be served. SCS argues the statute says nothing about parties who withdraw, but that is because it does not need to say anything – by the literal definition of what they are doing, their withdrawal indicates they are no longer parties requiring service.

[¶17] Finally, Emmons County joins in the arguments made in the briefing filed by Appellants herein, and also specifically agrees that the PSC was required serve its final order on all parties, and to the extent there are any deficiencies with the parties' service of the notice of appeal they are the same issues that exist in the PSC's service of its final order. As such, if the Court gives any credibility and weight to SCS's arguments, it must also remand for the PSC to properly serve its final order. If SCS is right, then the PSC never properly served its final order and no appeal period has started to run.

II. SCS's argument that the appeal should be dismissed because Appellants did not designate all other parties as appellees is frivolous.

[¶18] SCS argues that the Appellants did not name as appellees the Warford Trust, Wachter, and Moldenhauer, and consequently the appeal should be dismissed. This is wrong as a matter of law. SCS is throwing things at the wall to see what might stick.

[¶19] First, these individuals are not parties who needed to be served because they withdrew. Further, SCS's argument is contrary to clear law. *MacDonald v. N.D. Comm'n on Med. Competency*, 492 N.W.2d 94, 97 (N.D. 1992) ("We conclude that MacDonald's failure to name the Board as an appellee in his timely-filed notice of appeal is not a jurisdictional defect, but may be corrected, with leave of court, after the 30-day period for filing the notice of appeal has expired if no other party's rights are prejudiced. The district court erred in dismissing MacDonald's appeal on this basis.").

III. Emmons County is a party to this appeal and as indicated herein does not agree with SCS's conjecture about its dismissals.

[¶20] SCS argues that the dismissal of parallel appeals by Emmons County somehow has bearing on the issues pertinent in this matter. They do not. The parties, *sans* SCS, agreed to consolidate these proceedings in order to conserve judicial resources. SCS has filed parallel motions in numerous actions because it was lying in wait while the other parties discussed a cooperative way to consolidate these cases. SCS's motion creates a potential for conflicting rulings if both this and the parallel Burleigh County matter move forward simultaneously. Consolidation made sense, and SCS is determined to avoid efficiency in the name of draining its opposition's resources, but it is now draining judicial resources as well. Emmons County has significantly mitigated that issue and has appeared in this matter to address the merits, and respectfully requests that this Court deny SCS's motion to dismiss and proceed with a briefing schedule for the substantive issues on appeal.

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Respectfully submitted,

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