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IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20070325
and 20070326

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IN THE OFFICE OF THE
CLERK OF SUPREME COURT

DEC 07 2007

STATE OF NORTH DAKOTA

Milo Buchholz,)
)
Plaintiff- Appellant,)
)
vs.)
)
Barnes County Water Board,)
H. Myron and Mary Nelson,)
and James A. Hendrickson.)
)
Defendants,)
Appellees.)

APPEAL FROM THE DISTRICT COURT
BARNES COUNTY, NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT
CIVIL NO. 02-07-C-00060
and 02-07-C-00063
THE HONORABLE DANIEL D. NARUM, PRESIDING

APPELLANT'S BRIEF

Milo Buchholz
12329 45th Street S. E.
Fingal, ND 58031

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

First Issue:

DID THE DISTRICT COURT ERROR IN DENYING APPELLANT THE EQUITY
(FUNDAMENTAL) FAIRNESS REQUIRED BY DUE JPROCESS?

Second Issue:

DID THE APPELLANT NOT FOLLOW PROPER PROCEDURE IN FILING
CHARGES AGAINST THE APPELLEES?

Third Issue:

DID THE BCWB ERROR IN THEIR ASSESSMENT OF SAID WATERCOURSE?

STATEMENT OF THE CASE

This is an appeal from a Memorandum Opinion and Order of the Southeast Judicial District, Barnes County, affirming the decision of the Barnes County Water Board (hereinafter "BCWB") and the downstream landowners. Namely H. Myron and Mary Nelson and James A. Hendrickson. Here referred to as Nelson and Hendrickson.

Judge Daniel D. Narum ruled strictly from the Appellants Deposition where Judge Narum stated that the Appellant had no material fact. (Memorandum Opinion, App. # 26). Several pictures were exhibited and so named for the court record; namely the picture that shows eighteen inches of water in the Nelson driveway culvert. App. #9. In the fall of 2006 looking south from the Nelson driveway showing a heavily grassed watercourse, App. # 15. Looking north from the Nelson driveway, more heavy grassed watercourse and you can see a big slough farther north, and the Appellant's farmstead farther north, App. # 16. Again looking north on the Hendrickson land more un-kept watercourse, App.# 17. Then in a dated picture, '04 11 15, (November 15, 2004) it proves that the Appellant farmed right to the road ditch, App. # 18. In the surveyors map of Appellant's land the inundated land is way north of the Appellants property line, (note blue area on App. # 11, ex. 1) that was caused from negligent maintaining of the watercourse from the Nelson's and Hendrickson, App. # 11, ex. 2.

The Appellant has a constitutional right to have a trial by jury pursuant to Amendment VII of the Constitution of the United States of America, the Supreme Law of this country.

The state of North Dakota Courts must insure that the priority of contract is not impaired which is part of Due Process.

In this case no trial or even a hearing was allowed, with Judge Daniel D. Narum ruling on a one sided deposition.

The Supreme Court should take notice that in 1987, the Barnes County Water Board

(BCWB) contracted with the Appellant and downstream landowners, App. # 12, pg. 27 line 18 through line 25 pg. 28. That the additional water allowed will be kept moving downstream. The BCWB now state that they have no jurisdiction on downstream landowners. Those landowners being negligent on keeping that additional water moving in an established, natural watercourse that has been cleaned by man in prior years.

That the negligence of the downstream landowners, namely H. Myron and Mary Nelson and James A. Hendrickson, have caused water to back onto the Appellant's property causing loss of land and income.

That the above named persons now say that they have done nothing to stop said water from moving down their watercourse. Yet they made a verbal contract with the BCWB to take the additional water, and vowed to keep it moving.

The Supreme Court should take Notice that this contract would never end as long as there is water. Appellant states that the District Court Did Error ruling solely from a deposition.

That the Appellant truly believes this is a conspiracy against a certified organic farmer and that the BCWB and downstream landowners have ganged up to flood him out. With Pat Hurley, from the BCWB, going so far as writing a false unsigned statement for the Appellees. App. # 28.

The vague appearance of due process of law in this case was a charade as due process, equity, fairness, good faith and fair dealing was never intended.

STATEMENT OF THE FACTS

Because this case was allowed no trial or hearing, no transcript is available, and not all the material fact got into the record. The Appellant respectfully asks the High Court for the use of the actual document from other material fact and will be referred to as an undocumented exhibit. (Allowing the Appellant use of Rule 32 because of this situation where Appellant was denied trial or even a hearing.) With appropriate numbering and listed as undocumented, so as to be found in the Appellant's Appendix. (App.) This is a consolidated case from two civil cases, The Defendant, Barnes County Water Board , (BCWB), 02-07-C-00060, for ease of reference case # 60. The Defendants, James A. Hendrickson and H. Myron and Mary Nelson is, 02-07-C-00063, for ease of reference, case # 63.

In October of 2003 the Appellant met with James A. Hendrickson, and we discussed blockage in his watercourse. The Appellant asked for written permission to go onto his land and clean his watercourse. James A. Hendrickson said that he would give verbal permission but would sign nothing.

On 24 October, 2003, the Appellant sent James A. Hendrickson a certified letter with a return receipt (App. #1) (Undocketed) (also referred to in Case #60 docket #27, exhibit 1, pg. 43, line 12 through line 19, also pg. 71 line 6 through line 11, also pg. 99 line 15 through 17, in the Appellant's Deposition). That James A. Hendrickson was given Notice of blockage in his watercourse. That he also was given a copy of the North Dakota Statute 61-01-07, the statute that is supposed to protect upstream landowners.

That the Appellant did also meet with H. Myron Nelson (App. #2,) also (Case #60,

docket 27, ex. 1, pg. 73, line 15 through pg. 74 line 14.) that he was also given a copy of North Dakota Statute 61-01-07, and told of the blockage in his portion of said watercourse. (App. 3)

That the Defendants in case #63 did nothing, so in the fall of 2005 the Appellant met with the BCWB (App. #4) also (case # 60, docket 27, ex 1, pg. 31, line 9 thro line 18 pg. 32, also pg. 100 line10 through line 14, also pg. 35 line 9 through pg. 36 line 4.) that they could help me with our water problems.

That the BCWB ruled that I could clean if I hired and paid a contractor and also put down a 500 dollar bond cleaning of said watercourse can proceed. (App. # 5) (case # 60, docket 9, att. 2)

That on 1 March 2006, the Appellant wrote to the BCWB, (App. # 5 (case # 60, docket 9, att. 3) that the Appellant had talked to a fellow by the name of Jim Landseth from the State Water Commission (App. #6)(Case #60, docket 27, pg. 125, line 5 through 16) and he assured the Appellant that it certainly wasn't the Appellant responsibility to pay for the cleaning someone else's watercourse. That Mr. Landseth had never heard of people like James A. Hendrickson and H. Myron and Mary Nelson. That Mr. Landseth listed the North Dakota Statutes namely 61-01-07 and the statute that was put in place for the remedy of downstream negligence namely 61-21-43.1. That BCWB had the authority to make the statutes work. (App. # 6)

That in the BCWB minutes (App. #7 pg 2) (undocketed), that Jim Hendrickson has not yet filled out a form 1026 with the NRCS. The Board visited this area and the water is

flowing at this point. We will continue to work with the State, Milo (Appellant) and the NRCS to solve this issue.

That in the minutes of the BCWB dated June 12, 2006, it is stated that elevation shots would be done. That these elevation shots have never materialized to the Appellant's knowledge. (App.# 8) . Again at the July 10, 2006 meeting the Appellant called in to say that the water had stopped moving and there was eighteen inches (18) of water at a dead standstill in the Nelson driveway culvert, holding 18 inches or more of water back on the Appellant. (App. # 9) At the September 11, 2006 meeting it states that Pat Hurley of the Board stopped by the Appellants slough drain. The culverts were dry. "There are obviously high spots that need to be removed. Pat will contact Scott Cummings to give a price on the cleanout. The landowners contacted." (App. # 10, page 2) Nothing was done.

That on August 1, 2006, the Appellant received a letter from Bradley Cruff, Barnes County States Attorney (App. # 5) (case #60, docket 9, att 1) that elevation shots on said drain have been shot. And the spraying of cattails was authorized. But nothing was done.

That in an unsigned letter dated January 11, 2007, Pat Hurley supposedly states to James A. Hendrickson that he did not find any obstruction in the above mentioned drain. Also stating that no records of measurements are found. The Appellant understands these said measurements to be the elevation shots mentioned in the above (App. # 11) (paragraph IV case # 60, docket 32, pg. 2, and case # 60, docket 9, att. 1.) also (App. #5) that were never completed.

That the Appellant hired Jim Jung from the surveying company, Kadramus, Lee, and

Jackson. Mr. Jung surveyed the land that was flooded from downstream negligence, (App. # 11) (case # 60 docket 32, ex. 1). Mr. Jung also surveyed the water in H. Myron and Mary Nelson's driveway and found that water was moving one tenth of an inch above thirty inches of blockage. (App. # 11) (case # 60 docket 32, ex. 2) That caused the 52.87 acres of lost land for the Appellant.

That in 1987 when John O. Anderson was being flooded out by upstream landowners the BCWB asked for downstream landowners permission to dig a manmade ditch to give relief to John O. Anderson. The Appellant stated at that time that he lived in a flat area and will that extra 5500 acres of watershed area adding to our existing 3500 watershed, if in fact that water will be kept going. There was a unanimous YES. (App. # 12 pg. 27 line 5 through pg. 28 line 25).

That the Appellant will attach two affidavits from John. O. Anderson Sr. and Eldon Maasjo that state that the Appellees from both cases did agree to the extra water and also agreed to keep it going. That in their affidavits they pointed out that the BCWB, James A. Hendrickson and H. Myron Nelson did agree to the extra water. (App. #13 and #14, undocketed) also (case 60 docket 27 ex 1. Pg 15 line 10 through line 21, also pg. 20 line 11 through line 23, also pg. 21 line 1 through 4).

That pictures prove the negligence from the downstream Appellees. The Nelson driveway culvert showing eighteen inches (18) at a dead stop in July of 2006. (App. # 9)(case #60 docket # 27, ex. 1, pg. 109 line 18-20, Deposition exhibit #6). In the fall of 2006 looking south from the Nelson Driveway, a plugged and grassed in watercourse. (App. # 15,) (case #

60 docket 27, ex.1, pg. 110, line 20, Deposition ex. # 7). Looking north on Nelson driveway fall of 2006, plugged and grassed in watercourse. (App. # 16,) (case # 60, docket 27, ex. 1, pg. 106, line 5 and 6, Deposition exhibit # 2). Looking north on James A. Hendrickson land, a grassed in and un-kept watercourse, taken in the fall of 2006. (App. # 17)(case # 60, docket 27, ex. 1, pg. 107, line 3-6, Deposition exhibit # 3)

That in 2004 looking west you can see a soybean field cropped and combined with a small amount of water on the Appellants side of road. A date stamped picture. (App. #18)(Case # 60, docket 27, ex. 1, pg. 112, line 14-20. Deposition exhibit # 8)

That on the 26, August, 2007, dated picture with the same date as App. #11, ex 2, shows absolutely no restrictions to the water running on the Appellant. (App. # 19, undocketed)

That the Appellant can prove his lost acres (App. # 11, ex 1), that the Appellant can prove his average yield per acre with his Schedule of Insurance and Production Certification, (App. # 20, undocketed), that the Appellant can prove his organic contracted price for the year 2006, Soybeans (App. # 21, undocketed) of fourteen dollars and fifty cents per bushel, (14.50), oats at three dollars and sixty cents (3.60), (App. # 22, undocketed) and wheat at seven dollars and seventy-five cents per bushel, (App. # 23, undocketed). That multiplying the price paid per bushel for those three crops times the acres lost, times the proven yield gives a total loss of thirty four thousand three hundred and seventy-three dollars, (34373) divided by the three years, equals a loss of eleven thousand four hundred fifty seven dollars per year. (11457) The price paid for certified organic products are much higher in 2007.

WHEREFORE: Appellant Prays this High Court review the facts and render justice for Appellant in this matter. May the Court grant any other such other relief as it deems appropriate for the Appellant.

First Issue:

DID THE DISTRICT COURT ERROR IN DENYING APPELLANT THE EQUITY (FUNDAMENTAL) FAIRNESS REQUIRED BY DUE PROCESS?

ARGUMENT

“EQUITY” pursuant to Black’s Law Dictionary, Sixth Edition, Page 540, is defined as “justice administered according to fairness”. (Gilles v. Department of Human Services Development, 11 Cal. 3d 313, 113 Cal. Rptr. 374 380, 521 P. 2d 110.

The Appellant, a citizen of the united States of America cannot be deprived without due process of law under the 14th Amendment.

These two cases are cases of total negligence, according to the North Dakota Century Code, Rule 56b, under the Federal Rules Civil Procedure. Negligence. Ordinarily a summary judgment will not be granted in negligence case.

That the Appellant was denied Due Process when Judge Daniel D. Narum ruled solely from the Deposition of the Appellant, without trial or a hearing of any kind.

Second Issue:

Did the Appellant not follow proper procedure in filing charges against the Appellees?

The Appellant sent notice to James A. Hendrickson about the blockage in his watercourse and gave verbal notice to H. Myron and Mary Nelson in October of 2003. After 3 inches of water stood in a watercourse culvert. The Appellees did absolutely nothing to correct the blockage in their watercourses.

Under North Dakota Statute 61-01-07 makes the Appellees liable to maintain their watercourse. Black’s Law, Sixth Edition, pg. 914, states “Liability”; condition of being actually or potentially subject to an obligation; condition of being responsible for a possible or actual loss, penalty, evil, expense, or burden; condition which creates a duty to perform an act

immediately or in the future, Union Oil Co. of California v. Basalt Rock Co., 30 Cal. App.2d 317, 86 P.2d 139, 141;.

The Appellant has proved his loss of land by hiring a surveying company, namely Kardramus, Lee and Jackson (App. # 11, ex. 1)(case # 60 docket 32, ex. 1). The Appellant has further proven the Appellees negligence by the picture holding 30 inches of water, in a flat area that holds 30 inches or more of water back on the Appellant. (App. 11, ex 2)(case # 60 docket 32, ex. 2)

The Appellant did everything possible to keep this case out of the court system, even offering the Appellees One thousand dollars (1000.) an acre to purchase the narrow strip of land, including said watercourse running parallel with a north/south township road, so Appellant could take care of that watercourse, plus other considerations. (App. # 24)(case #63 docket 7) It appears the Appellees would rather fight than work with the Appellant.

The Appellant sent notice, gave proposals, offered to clean said watercourse for nothing except for written permission to be on the Appellees land. When this all failed the Appellant went to the Barnes County Water Board (BCWB) to get the issue corrected. The BCWB promised to do several things but nothing got done. The Appellant attended several water board meetings from the fall of 2005 through the late fall of 2006 and asked if anything was going to be done. The board members shook their heads. The Appellant then asked if the BCWB would back the Appellant in a legal case and the board gave a unanimous NO. (undocketed, App. # 25 pg. 2.)

According to Jim Landseth from the State Water Commission states that the BCWB has the authority to correct the negligence from downstream landowners. That the BCWB has done nothing to correct downstream negligence makes them also liable to the Appellant.

Third Issue:

Did the BCWB error in their assessment of said watercourse?

That the Appellant believed any person paid to work on watershed problems would be

able to see that a mostly plugged culvert on a WATERCOURSE would know beyond the preponderance of a doubt that there is restriction on that said watercourse. (App. #11, ex 2)

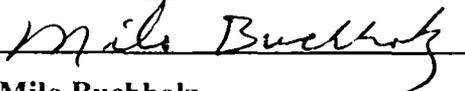
That the BCWB could look at that grassed in and negligently maintained watercourse and state that there is nothing wrong is totally absurd. They agreed in 1987 that that water would be kept moving. Now the board members are different people but still bound by the verbal contract of the board in 1987.

CONCLUSION

That the Appellant was brought up in a era where a man's word was gospel, so nothing was in writing back in 1987 when the BCWB met with the downstream landowners and the Appellant to agree to the 5500 acres of additional watershed. All the Appellant has originally asked for was that the BCWB and downstream landowners work together to keep that watercourse maintained. That nothing has been accomplished, the Appellees have forced this Appellant into a legal battle.

For the foregoing reasons, the Appellant prays that this High Court in the interest of Justice, will reverse the District Court's Memorandum Opinion and Order, and if this High Court sees fit, remand these Cases for a Jury Trial with instructions that this Appellant be awarded his costs and fees. May the Court grant such other relief as it deems appropriate for the Appellant.

Dated this 7 day of December, 2007



Milo Buchholz

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ORAL ARGUMENT REQUESTED