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SUPREME COURT MAY 10 2011

20100407

20110027

20110061

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

Morris Tarnavsky,
Plaintiff, Appellee
vs.

McKenzie County 2001-C-085

NDSC 20100407

Edward Tarnavsky, Personally
and as Trustee of the Mary E
Tarnavsky Irrevocable Trust,
Defendant and Appellant and
Janet L Bishop,
Defendant

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 09 2011

STATE OF NORTH DAKOTA

Edward J Tarnavsky,
Plaintiff, Appellant
vs.

Ron Rankin, Sheriff of McKenzie
County, personally and in his
professional capacity, Defendant,
Appellee

McKenzie County 27-08-C-071

NDSC 20110027

The Union Bank, Plaintiff,
Appellee
vs

McKenzie County 27-06-C-090

Edward Tarnavsky, et al,
Defendant, Appellant

NDSC 20110061

APPEAL FROM RULE 60 B MOTION

MCKENZIE COUNTY DISTRICT COURT

NORTHWEST JUDICIAL DISTRICT

HONORABLE DAVID A NELSON, PRESIDING

APPELLANT BRIEF

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Statement of the Case

This appeal consists of two and perhaps a third Rule 60 B Motion consolidated from the McKenzie County District Court, Judge Nelson presiding. The two cases consolidated are Tarnavsky v Rankin, 2008-C-071 and Union Bank v Tarnavsky et al, 2006-C-090. The third case, Tarnavsky v Tschider, 53-08-C-0794, filed in Williams County, remains undecided at this time. All three cases were filed on December 6, 2010.

This appellant realized the significance of Woodward v Woodward, when the Supreme Court issued its opinion on July 15, 2010. Consequently, Rule 60 B was the basis of a motion for relief based on the precedent the Court published. This Motion, in Tarnavsky v Tarnavsky, 2001-C-085 was submitted September 25, 2010, with hearing on November 1, 2010. A full Transcript of that hearing has been obtained. While waiting for the court to finalize its decision in Tarnavsky C85, Rule 60 B was applied to the companion cases cited above.

With respect to Tarnavsky C85, the court has an appearance of impropriety that has developed slowly over the years. This appearance was evident by the court declaring possession of the Mary E Tarnavsky Irrevocable Trust and instructing the receiver to write leases. The impropriety was a certainty when the court instructed the receiver to make prohibited transfers of Trust income from this beneficiaries income.

The undersigned Appellant requests comprehensive relief from the four Motions submitted to Judge Nelson.

STANDARD OF REVIEW

The usual standard of review on a NDRCvP 60 b motion is whether or not the court abused its discretion: *State Bank of Burleigh County Trust Co v Patten*, 357 NW2d 239, (ND 1984) . The very nature of an appearance of impropriety and its sole remedy being reversal, *Sargent County Bank v. Wentworth*, 500 N.W.2d 862 (N.D. 1993) , requires de novo review.

Issues on Appeal

Does the court have an appearance of impropriety stemming from Tarnavsky C85 and Tarnavsky v Rankin?

Has the court abused its discretion in Tarnavsky C85 by awarding payment to creditors directly from this Appellants Trust income and by directing the receiver to grant easements from the Trust?

Statement of the Facts

By letter from the Clerk of the Supreme Court, dated April 4, 2011, the appeal from Union Bank v Tarnavsky et al 2006-C90 was consolidated with this appeal. The Appellant brief was submitted in Union Bank on

March 31, 2011. There has been no Appellee brief submitted at the time of this writing, May 6, 2011.

The Rule 60 B Motion submitted in Tarnavsky v Tschider, 53-08-C-0794, has not been ruled on by Judge Nelson. A letter from the Presiding Judge McLees indicates that Judge Nelson has recused himself from Tschider, with Judge Joshua Rustad now presiding. [apx p24]

At the November 1 hearing it was argued that the court had taken possession of the Trust property by its approval of leases to Ed and Morris Tarnavsky. Testimony of the receiver on July 18, 2007 (p30) indicated that he had full possession of all the Trust real property, including Ed and Janets life estate. This possession was by the court order that established the receiver.

The Plaintiff has made no objection to the fact that the E1/2 of Sec 21-147-99 along with the sec 2, 12 and 25 properties were his allocation of the Trust remainder.

By an Order defining the life estate, (affirmed on appeal, docket 165), the court expanded the Trust remainder to exclude co defendant Janet Bishop from the majority of Sec 21, and at the same time enlarged this Appellants share of the Trust remainder.

Testimony of the receiver was that he had made no trust distributions to this Appellant.

By Order dated October 16, 2009 [apx 30] the receiver was directed to pay to Ed the income from his allocation that was leased to other individuals. At the May 27, 2010 hearing the receiver testified that he had

made no payments of income as per the court order. May 27-2010
Transcript p16.

The receiver acknowledged at the May 27 hearing that Ed's Mortgage was in prior existence to his appointment, and that all trust income was subject to the Union Bank's UCC Lien.

Court docket #82, Dec, 21, 2004 was an Order dismissing the Plaintiff's initial complaint, but retaining the receiver. This was at the Plaintiff's request.

Argument

The transcripts along with the Defendants Exhibits provide sufficient reason to state that the court has an appearance of impropriety, if not the commission of a mis-application of entrusted property.

First there is the court's sudden recusal shortly after the submission of the Transcripts in this case along with the Appellant Brief in Union Bank. This recusal, in and of itself, without prior notice or explanation is a tacit admission of the court having an appearance of impropriety. Since the recusal was made in Tschider and since Mr. Tschider is intimately involved in Tarnavsky C85 and also Union Bank, it would appear that there exists a serious conflict. Judge Nelson is correct that this Appellant has made complaint to the Judicial Conduct Commission. The Transcripts of May 14 and May 27, 2010 deal with the Motion for recusal. The court refused to recuse itself based on the arguments of Mr. Tschider (judge shopping).

This Appellant provided the court with the US Supreme Court decision of *Caperton v Massey*, [docket #242] and made the argument that Judge Nelson was acting as a "one man jury".

This is a case where the court has assumed control (possession) through its receiver and has leased a portion of this Appellants Trust remainder Allocation (sec 21-147-99) to the other beneficiary, Morris Tarnavsky, who is the Plaintiff. The receiver has also leased another portion of Ed's Allocation to a Mr. Fleck. With all this leasing the receiver has testified that he has made no trust distributions to this Appellant. With the passage of the new Trust Code NDCC chapter 59, effective on August 1, 2007, all actions of the court must be reviewed under those statutes. The precedent set in the Matter of the Trust of Pederson, 2008 ND 210, 757 NW2d 740 requires the court to adhere to the contents of the Trust document [apx 44]. The Mary E. Tarnavsky Irrevocable Trust dated May 8, 1991, listed the original trustees As Joyce Hoffman and Edward Tarnavsky. Joyce Hoffman resigned in October 1991 due to a brain cancer, and died in January 1992. Morris Tarnavsky never sought appointment as a co-trustee.

By affidavit 2005? [apx 51] wherein it was stated that Ed's Allocation of the Trust Remainder was described as the E1/2 of Sec 21-147-99, including his life estate, Sec 2-146-99, sec 12-147-99 and sec 25-146-99

The receiver's testimony regarding the size and location of the Life Estate held by Ed and his sister Janet now leaves the issue of life estate extent more ambiguous than ever.

Morris Tarnavsky has obtained a Judgment of Contribution against Ed Tarnavsky, Sept 2002, and has used this case to effect deprivation and harassment against the sole Trustee. (see Tarnavsky v Tarnavsky 2001-C-022, 2003 ND)

Judge Nelson had presided on *Investors Title Co. v Herzig*, 2010 ND 169, 788 NW2d 312, another case concerning a judgment and a Trust with a spendthrift agreement. The Supreme Court held in that case the decision of whether or not to appoint a receiver was within the *sound* discretion of the court. The net result from Investors Title was that the creditor was denied, under NDCC 59-13-02, access to the body of that Trust and a receiver to liquidate said Trust. With Judge Nelson's intimate knowledge of Investors Title the reappointment of the receiver in this case becomes a case where the court is in a direct violation of Canon 3 E (1) (c).

With respect to NDCC 59-13-02, how does one characterize the court's order of making prohibited transfers of Trust property? Certainly it is an abuse of discretion, and certainly it is judicial misconduct. Making prohibited transfers also meets the full requirements of the felony misapplication of entrusted property, NDCC 12.1-23-07(1). [¶14, *State v Blunt*, 2010 ND 144, 785 NW2d 909]

Sabo v Keidel, 2008 ND 41, 745 NW2d 661, was a case affirming Summary Judgment dismissing the claims of the Sabos where the Sabos disputed the grant of a life estate to the Keidels. This case directly contradicts this court's decision in 2006 where it found the grant of the life estate to Ed and Janet ambiguous and reduced it to an uncertain size and

location. More importantly, the Sabo decision [¶ 12] cites Shroeder v Buchholz, 2001 ND 36, ¶21, 622 NW2d 202:

A life estate holder's interest in the property includes both the right to possession and use including the right to profits generated by the property during the tenant's life.

The receiver has testified that he has made no payments to Ed. The lease of the E ½ sec 21 to Morris constitutes both a deprivation and a prohibited transfer of Trust property, due to Morris' Judgment of contribution and the existence of the Trust spendthrift clause.

When the above citation is viewed in conjunction with Canon 3 C (3) and 3 C (5) the court automatically manifests it's appearance of impropriety.

With respect to the court authorizing the receiver to grant easements for a power line, this issue is a violation of due process, as the testimony/argument at the November 1 hearing indicated that this Appellant had no knowledge of the details of the proposed project. The receiver and his attorney are in violation of the August 25, 2009 court order [apx pp29] as the court had directed the submission of all issues at least five days before the hearing.

This issue also becomes a violation of Canon 3 C (3), where :

(3) A judge shall require* staff, court officials and others subject to the judge's direction and control to observe the high standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

The lack of fidelity on the part of the receiver is particularly apparent with regard to Defendant's Exhibit F, [apx 53]a letter from the Office of

Senator Dorgan. In that letter the Farm Service Agency details its reasons for denying program benefits to this Appellant. Upon cross examination, the receiver denied any knowledge of that letter. [Transcript May14, 2010 pp34- 36] The receiver's lack of diligence in constructing the court ordered fence around the "yard area" was a direct cause of the pollution to this Appellant's water supply in March of 2009. The court, by its October 16,2009 Order has denied all responsibility for the damages to this Appellant. Likewise the court has dismissed the damages caused by the Fleck lease, where this Appellant had already committed to the production of winter wheat on Sec 25.

CONCLUSION TARNAVSKY C85

The arguments of Mr. Tschider on May 27 [Transcript May 27, p68 line17] in regard to "slowing Ed down" precisely state the intent of the Plaintiff. The intent of this law suit was to stop Ed from making payment on his mortgage by having the court appoint a receiver, who was to "write leases" and "grant easements". The fact that this Appellant Motioned the court for the accounting of the receiver (docket# 167) and the fact that the court denied that Motion are clear indications of the court's appearance of impropriety.

Furthermore, under Canon 3 D (2) the court had a duty to:

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge having knowledge* that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.

Judge Nelson's sudden recusal in the Tschider Rule 60 B Motion, without explanation, is a tacit admission that Judge Nelson has knowledge that Mr. Tschider has violated the Rules of Professional Conduct (conflict of interest, material misrepresentation and the like). This Appellant has no evidence that Judge Nelson made any effort to inform the appropriate authority of Mr. Tschider's fitness as a lawyer. The same is true with regard to Mr. Reiersen.

The Supreme Court can dismiss this Appeal, as it has done in the past with previous appeals from this Appellant. This will confirm to this Appellant that the court system in the Northwest Judicial district is completely devoid of any integrity.

Or, in the alternative the Court can direct the district court to provide comprehensive relief to this appellant, by following the precedent set in Sargent County Bank v Wentworth.

Comprehensive relief in this case requires restitution and the damages from the forcible exclusion of this Appellant from his Trust allocation and life estate.

Comprehensive relief in Union Bank case requires the return of this Appellants Real Estate, as the Assignment of Rents and Leases to the Union Bank was more than sufficient to satisfy the Judgment of foreclosure. As noted above in the Statement of Facts, Union Bank has not responded with an Appellee Brief, at the time of this writing

As for the Tschider case, it is unlikely that Judge Joshua Rustad, would be willing to rule on Judge Nelson's appearance of impropriety, and therefore grant the reversal of Judge Nelson's Summary Judgment. It is

requested that the Supreme Court exercise its supervisory authority to grant the relief requested in the Tschider Rule 60 B Motion.

RANKIN FACTS AND ARGUMENT

As was noted above, identical Rule 60 B Motions were served on December 6, 2010 on the companion cases.

The issue that could have precluded summary judgment was resolved in Union Bank, where there has been no objection or rebuttal to the fact that the Order Confirming sale was never entered by either the court or by the Union Bank.

This Rule 60 B Motion seeks relief on the basis of the court's appearance of impropriety. It is clear that the court in its adjudication of Tarnavsky C 85 is fully responsible for the actions of its receiver, who has denied this appellant the income to service his mortgage with Union Bank. The lack of income lead to default and foreclosure. The court ordered the Sheriff to sell the real property first. The Sheriff ignored this Appellants Affidavit of Exemptions. This Appellant had previously made an Assignment of Rents and Leases to Union Bank in an amount that exceeded the high bid received at the Sheriff Sale. On that basis this lawsuit evolved.

As argued above, the court is responsible for the actions of its court officials of which the Sheriff is a member. (Canon 3 C (3)).

In response to this Appellant's December 6, 2010 Rule 60 B Motion, the Sheriff's attorney requested Rule 11 B sanctions which the court granted

without the benefit of the requirements of Rule 11 C procedure. [apx p 66]

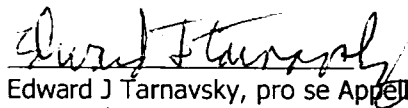
The court's finding that this Appellant's Motion was frivolous was in itself an appearance of impropriety as argued in Union Bank. The Appellant Brief in that case was submitted March 31, 2011. As of this writing there has been no Appellee Brief from Union Bank.

Unless the Clerk or the Supreme Court directs otherwise, the lack of Appellee Brief indicates that the Union Bank has conceded to the granting of relief on their Rule 60 B Motion.

CONCLUSION RANKIN

With the court's tacit admission of an appearance of impropriety derived from its sudden recusal in Tschider, and with the Union Bank reluctant to make rebuttal arguments, The Court should grant relief from the Rule 60B in this case. Anything less would demonstrate bias.

Respectfully submitted this 6th day of May, 2011


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IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

<p>Morris Tarnavsky, Plaintiff, Appellee vs. Edward Tarnavsky, Personally and as Trustee of the Mary E Tarnavsky Irrevocable Trust, Defendant and Appellant and Janet L Bishop, Defendant</p> <p>Edward J Tarnavsky, Plaintiff, Appellant vs. Ron Rankin, Sheriff of McKenzie County, personally and in his professional capacity, Defendant, Appellee</p> <p>The Union Bank, Plaintiff, Appellee vs Edward Tarnavsky, et al, Defendant, Appellant</p>	<p>McKenzie County 2001-C-085 NDSC 20100407</p> <p>McKenzie County 27-08-C-071 NDSC 20110027</p> <p>McKenzie County 27-06-C-090 NDSC 20110061</p>
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AFFIDAVIT OF SERVICE BY MAIL

I, Edward Tarnavsky, pro se Defendant, being duly sworn on oath, deposes and says as follows:

I am of legal age and personally knowledgeable of the facts stated herein:

I have mailed a true and correct copy of the following documents filed in the above captioned action:

- 1 One original and seven bound copies of the Appellant Brief
- 2 8 bound copies of the Appellant's Appendix
- 3 One 3.5 diskette of the Appellant Brief

That copies of the above documents were securely enclosed in an envelope with postage duly prepaid and addresses as follows:

Ms. Penny Miller
Clerk of the Supreme Court
600 East Boulevard Ave, Dept 180
Bismarck ND 58505-0530

In like fashion, I have mailed to:

Roger J Minch, Attorney for Union Bank
Serkland Law Firm
PO Box 6017
Fargo ND 58108-6017

- 1 One bound copy of the Appellant Brief
- 1 One bound copy of the Appellant's Appendix

Also in like fashion, I have mailed to:

David A Tschider, Attorney for Co-defendant, Morris Tarnavsky
418 East Rosser Ave., Suite 200
Bismarck ND 58501

- 1 One bound copy of the Appellant Brief
- 2 One bound copy of the Appellant Appendix

And I have mailed to:

Scott K Porsberg
116 North 2nd St
PO Box 460
Bismarck ND 58502-0460

- 1 One bound copy of the Appellant Brief
- 2 One bound copy of the Appellant Appendix

Dated this 6th day of May, 2011

Edward J. Tarnavsky

Edward J. Tarnavsky, pro se,

Appellant

12951 8th St NW

Grassy Butte ND 58634

701-863-6834

Subscribed and sworn to me this 6th day of May, 2011

STATE OF NORTH DAKOTA)

COUNTY OF MCKENZIE)

:ss

On the 6 day of May, 2011, before

Me personally appeared Edward

Tarnavsky, known to me to be the person

who is described in, and who executed the within

instrument and acknowledged to me that he

executed the same.

Denae M. Hoffmann

Notary Public

My Commission expires _____

