

**IN THE SUPREME COURT**  
**STATE OF NORTH DAKOTA**

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Donna Mae Wald,

Petitioner,

v.

The Honorable James D. Hovey, Judge of  
District Court, Southeast Judicial District,  
and Gerard Wald,

Respondents.

Supreme Court Case No:

District Court Case No.:  
26-2021-CV-00023

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**Petition for Supervisory Writ from  
Order Denying Demand for Change of Judge  
McIntosh County District Court  
Southeast Judicial District  
Honorable James D. Hovey, Presiding**

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## JURISDICTIONAL STATEMENT

¶1 Donna Wald petitions this Court for a supervisory writ directing the district court to vacate the September 27, 2021 Order of the Honorable James Hovey, denying Wald's Demand for Change of Judge, and assign this matter to a new District Court Judge.

¶2 This Court's "authority to issue supervisory writs is derived from N.D. Const. art. VI, § 2, and N.D.C.C. § 27-02-04. Plains Trucking, LLC v. Cresap, 2019 ND 226, ¶ 6, 932 N.W.2d 541. The Supreme Court's "authority is discretionary, and we determine whether to exercise the authority on a case-by-case basis. We exercise our authority to issue supervisory writs rarely and cautiously, and only to rectify errors and prevent injustice in extraordinary cases in which there is no adequate alternative remedy." Smithberg v. Jacobson, 2020 ND 46, ¶6, 939 N.W.2d 405.

¶3 "The supreme court . . . in its superintending control over inferior courts, may issue such original and remedial writs as are necessary to the proper exercise of such jurisdiction." Our power to issue supervisory writs is discretionary, and we use our superintending control over inferior courts "only to rectify errors and prevent injustice in extraordinary cases where no adequate alternative remedy exists." Traynor v. Leclerc, 561 N.W.2d 644, 646-647.

¶4 This Court has already determined in prior cases that orders denying demands for change of Judge are not appealable and are appropriate for purposes of exercising supervisory jurisdiction.

Although reviewable on appeal from a final judgment, orders denying demands for change of judge are not appealable. In re Estate of Ketterling, 515 N.W.2d 158, 161 (N.D. 1994). The Bureau has no alternative remedies to supervisory writs. **We conclude these cases are appropriate for exercise of our supervisory jurisdiction.**

N.D. Const., Art. VI, § 3, authorizes this court to promulgate rules on disqualifying trial court judges: The supreme court shall have authority to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state.

In NDCC 27-02-08 and 27-02-09, the Legislature has codified the superior power of the supreme court in promulgating rules." City of Fargo v. Ruether, 490 N.W.2d 481, 483 (N.D. 1992). However, as State v. Vetsch, 368 N.W.2d 547, 552 (N.D. 1985) (quoting State v. Seidel, 142 Ariz. 587, 691 P.2d 678, 682 (1984)), explained, "that we possess the rule-making power does not imply that we will never recognize a statutory rule. We will recognize 'statutory arrangements which seem reasonable and workable' and which supplement the rules we have promulgated."

.....

The change-of-judge statutes were ultimately codified in NDCC 28-13-01 and NDCC 29-15-13 for civil and criminal actions, respectively. In 1971, though, the Legislature repealed those sections and enacted a new procedure for demanding a change of judge in both civil and criminal actions. *1971 N.D. Laws, ch. 316*. That legislation, codified at NDCC 29-15-21, eliminated the former requirement of an affidavit of prejudice to get a change of judge, and adopted the present procedure that allows a party to get a change of judge by filing a written demand for change of judge, which must state that it is filed in good faith and not for the purpose of delay. State v. Zueger, 459 N.W.2d 235, 236 (N.D. 1990), explains, under NDCC 29-15-21, "a party is entitled to a peremptory challenge of an assigned judge, without alleging bias or prejudice."

Traynor v. Leclerc, 561 N.W.2d 644, 647-648 (ND 1997)(emphasis added).

¶5 Petitioner submits that this Court has already determined that denials of demands for changes of judge are appropriate situations in which to exercise supervisory jurisdiction.

## **STATEMENT OF THE ISSUES**

¶6 Did the District Court err in Denying Petitioner's Demand for Change of Judge?

## **STATEMENT OF THE CASE**

¶7 Petitioner Donna Wald commenced an action against Gerard Wald, her former husband, asserting causes of action for Tortious Conversion and Unjust Enrichment. On August 13, 2021, Gerard Wald filed a Motion for Summary Judgment to which Petitioner filed a response. On September 20, 2021 the matter was assigned to the Honorable Daniel Narum. Three days later, on September 23, 2021, Petitioner filed her Demand for Change of Judge as provided by NDCC 29-15-21. (App 9). On September 27, 2021, the Honorable James D. Hovey issued an Order Denying Donna Wald's Demand for Change of Judge. (App 10)

¶8 Donna Wald herein petitions this Court for a supervisory writ directing the District Court to vacate the Order Denying Demand for Change of Judge and in said capacity, granting Petitioner's Demand.

## **STATEMENT OF THE FACTS**

¶9 Petitioner commenced the instant matter against her former husband, Gerard Wald, alleging causes of action for Unjust Enrichment and Tortious Conversion as associated with Gerald Wald's use, consumption and retention of hay bales awarded to Donna Wald in the context of the parties' divorce case. Donna Wald asserts that she has been deprived of assets valuing \$242,000 for which she seeks compensation and damages against Gerard Wald.

¶10 Donna Wald and Gerard Wald are former spouses. The Walds were married for over 42 years. The parties separated in June of 2017 and were divorced by Amended Judgment issued subsequent to a Trial on May 1, 2019.

¶11 Following the presentation of evidence at trial, at which the Honorable Daniel Narum presided, Judge Narum determined that Donna should be awarded a net marital estate of \$1,587,584.44 (accounting for 27.25% of the total estate) whereas Gerard would be awarded a net marital estate of \$4,239,534 (accounting for 72.75% of the total marital estate).

¶12 Donna appealed that decision. Following the filing of Donna's initial Notice of Appeal and Statement of Issues, Donna filed a post-Judgment Motion seeking to hold Gerard in contempt or, in the alternative, to seek a re-distribution of property. This matter was thus remanded back down to the Trial Court (Judge Narum) to address Donna's motion. Following an evidentiary hearing on December 6, 2019, the Judge Narum denied Donna's motions.

¶13 Donna also appealed that Order as well as the Judgment / Amended Judgment. This Court, in the appeal of that divorce case, upheld Judge Narum's decisions.

¶14 Donna Wald subsequently commenced a separate action against Gerard Wald seeking compensation from Gerald Wald under causes of action for Tortious Conversion and Unjust Enrichment. (App 2).

¶15 On August 13, 2021, Gerard Wald filed a Motion for Summary Judgment to which Petitioner filed a response.

¶16 On September 20, 2021 the matter was assigned to Judge Narum. Three days later, on September 23, 2021, Petitioner filed her Demand for Change of Judge as provided by NDCC 29-15-21. (App 9). On September 27, 2021, the Honorable James D. Hovey issued an Order Denying Donna Wald's Demand for Change of Judge. (App 10). The Order of Judge Hovey, in justifying the Denial of the Demand for Change of Judge, states as follows:

Plaintiff certifies that the Honorable Judge Narum has not ruled upon any matter pertaining to the proceeding herein. Judge Narum was the presiding judge in the divorce action, which facts give rise to the current lawsuit. A review of the case at bar shows your undersigned that many, if not all, of the factual issues of the case at bar were considered

and decided by Judge Narum as part of the divorce proceedings. Both plaintiff and defendant were represented by counsel and had an opportunity to be heard in the divorce proceeding. *Because Judge Narum has ruled upon matters pertaining to this action or a proceeding in which the moving party was heard or had an opportunity to be heard the demand for change of judge is denied.*

¶17 Order Denying Demand for Change of Judge, ¶2 (Index #35)(App 10)(emphasis added).

¶18 Having no other remedy for the situation, Donna Wald herein petitions this Court for a supervisory writ directing the District Court to vacate the Order Denying Demand for Change of Judge and in said capacity, granting Petitioner's Demand for Change of Judge.

### ARGUMENT

#### **A. The District Court should have Granted Petitioner's Demand for Change of Judge**

¶19 North Dakota Century Code section 29-15-21 addresses demands for change of judge, stating in relevant part as follows:

.....

4. The demand for change of judge must state that it is filed in good faith and not for the purposes of delay. It must indicate the nature of the action or proceeding, designate the judge sought to be disqualified, and certify that that judge has not ruled upon any matter pertaining to the action or proceeding in which the moving party was heard or had an opportunity to be heard.

N.D. Cent. Code, § 29-15-21

¶20 On September 20, 2021 the matter was assigned to Judge Narum. Three days later, on September 23, 2021, Petitioner filed her Demand for Change of Judge as provided by NDCC 29-15-21 and which complied with all of the requirements of N.D.C.C. 29-15-21. (App 9). There is no assertion by Judge Hovey nor any respondent that Petitioner did not comply with the provisions of N.D.C.C. 29-15-21.

¶21 Rather, Judge Hovey denied the Demand for Change of Judge because “Judge Narum has ruled upon matters pertaining to this action or a proceeding in which the moving party was heard or had an opportunity to be heard” Order Denying Demand for Change of Judge, ¶2 (Index #35)(App 10).

¶22 The instant matter is an action brought by Donna Wald against Gerard Wald based upon causes of action of Tortious Conversion and Unjust Enrichment. It is not the divorce action. It is not a motion for contempt, not a motion to redistribute property, not a motion to amend the Judgment or otherwise as associated with the divorce action. In fact, as this court is aware, even under certain motions to amend the Judgment in divorce actions, some of those motions are considered to be new and separate proceedings which allow for a Demand for Change of Judge to be granted. Subsection 3 of N.D.C.C. §29-15-21 provides that “[a]ny proceeding to modify an order for alimony, property division, or child support pursuant to section 14-05-24 or an order for child custody pursuant to section 14-05-22 must be considered a proceeding separate from the original action and the fact that the judge sought to be disqualified made any ruling in the original action does not bar a demand for a change of judge.” N.D. Cent. Code, § 29-15-21(3).

¶23 If indeed matters of the nature addressed in subsection (3) are separate proceedings and considered distinct from the original action, it is difficult to conceive how an entirely distinct and separate complaint asserting causes of action for unjust enrichment and tortious conversion is not a separate proceeding entitling a party to have their demand for change of Judge granted when that demand for change of judge is filed in conformance with N.D. Cent. Code, § 29-15-21.

¶24 The issue as to whether the matter is barred by the legal concepts of res judicata and/or collateral estoppel is the subject of a motion for summary judgment which is pending in the underlying matter. At this point, however, the only issue is whether Judge Narum has ruled on

any matters pertaining to “*this action or a proceeding in which the moving party was heard or had an opportunity to be heard*”. N.D. Cent. Code, § 29-15-21(4)(emphasis added).

¶25 This action is an action for unjust enrichment and / or tortious conversion. It is NOT an action for divorce, not an action for contempt and not an action for re-distribution or to amend the divorce Judgment. Further, *in this action and in this proceeding*, no moving party has been heard on any motion and no moving party has had the opportunity to be heard on any motion. Respectfully, Judge Hovey is intermingling and pulling the parties back into their divorce action when that action is in fact separate and distinct from an action for unjust enrichment and/or tortious conversion.

### **CONCLUSION**

¶26 Based on the aforementioned law and reasoning, Petitioner respectfully request that this Court issue a supervisory writ directing the District Court to vacate the Order Denying Demand for Change of Judge and in said capacity, granting Petitioner’s Demand for Change of Judge.

### **CERTIFICATION OF COMPLIANCE**

¶27 The undersigned certifies that this Brief complies with the page limitations as provided by Rule 32.

Dated this 29<sup>th</sup> day of September, 2021.

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By: /s/ Rodney E. Pagel  
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ATTORNEYS FOR PETITIONER

**CERTIFICATE OF SERVICE**

¶28 I hereby certify that on September 29, 2021, I caused to be electronically filed the Petition for Supervisory Writ and Petitioner’s Appendix with the Clerk of the North Dakota Supreme Court via the North Dakota Supreme Court E-Filing Portal and served the same on Mary Batcheller, attorney for Gerard Wald, and the Honorable James D. Hovey via the North Dakota Supreme Court E-Filing Portal as follows:

Email to Mary Batcheller at: mbatcheller@maringlaw.com

Email to Honorable James D. Hovey at: jhovey@ndcourts.gov

Dated this 29<sup>th</sup> day of September, 2021.

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