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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20210280
McIntosh Co. No. 2021-CV-00023

Donna Mae Wald,
Petitioner

vs.

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

RESPONDENT, GERARD WALD'S RESPONSE TO PETITION FOR SUPERVISORY WRIT FROM ORDER DENYING DEMAND FOR CHANGE OF JUDGE MCINTOSH COUNTY DISTRICT COURT SOUTHEAST JUDICIAL DISTRICT HONORABLE JAMES D. HOVEY, PRESIDING

Maring Williams Law Office, P.C.
Mary E. Batcheller (08407)
1220 Main Avenue, Suite 105
Fargo, ND 58103
(701) 241-4141
mbatcheller@maringlaw.com
Attorneys for Respondent, Gerard Wald

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STATEMENT OF THE CASE

[1] Petitioner Donna Wald ("Donna") commenced the instant action against Respondent Gerard Wald ("Gerard") for tortious conversion and unjust enrichment. On August 13, 2021, Gerard filed a Motion for Summary Judgment, and Petitioner filed her response on September 15, 2021. On September 20, 2021, the parties were notified that the case had been assigned to the Honorable Daniel D. Narum. On September 23, 2021, Donna filed a Demand for Change of Judge, seeking the removal of Judge Narum pursuant to North Dakota Century Code Section 29-15-21. On September 27, 2021, the Honorable James D. Hovey, District Judge of the Southeast Judicial District, denied Donna's Demand for Change of Judge.

[2] On September 29, 2021, Donna filed this Petition for Supervisory Writ directing the district court to vacate its Order Denying Demand for Change of Judge, grant Donna's Demand, and assign the instant matter to a new District Court Judge. On October 13, 2021, this Court invited Gerard to file a response to the Petition.

[3] Gerard files this Response to Petition for Supervisory Writ requesting this Court deny Donna's request.

STATEMENT OF THE FACTS

[4] Donna commenced the instant matter against her former husband, Gerard Wald, alleging claims of tortious conversion and unjust enrichment. The instant matter arises out of the distribution of assets in a divorce proceeding between the two parties.[1] The parties were married in 1975, and their divorce was finalized in 2019. Pursuant to the original Divorce Judgment, Donna was awarded, among other things, hay bales from the 2017 and 2018 crops. (App. 18, ¶ 21).

[5] As to its award of the hay bales, the divorce order specified: "Donna shall provide fourteen (14) days' notice of her intent to remove the bales and they shall be removed from the property awarded to Gerard within thirty (30) days of entry of Judgment." (App. 37, ¶ 8). Donna did not remove the bales from Gerard's property within the 30 days following entry of judgment. In fact, Donna never removed the bales from Gerard's property.

[6] On February 21, 2019, Donna filed a Motion for Relief from the Divorce Judgment under Rules 59 and 60 of the North Dakota Rules of Civil Procedure. (App. 44). Donna's Motion was granted in part and denied in part. (App. 46-47). An Amended Findings of Fact, Conclusions of Law and Order for Amended Judgment was entered on May 1, 2019 (App. 48-90), and the Amended Judgment of Divorce was entered on May 2, 2019 (App. 91-103). On June 3, 2019, Donna filed a Notice of Appeal to the North Dakota Supreme Court to remand the case to the district court to address another post-trial motion. (App. 104-106). The North Dakota Supreme Court ordered remand. (App. 107).

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[1] Case No. 26-2017-DM-00007.

[7] After filing her Notice of Appeal, Donna filed a motion in the district court to hold Gerard in contempt or to redistribute property in the value of $242,000. (App. 108). In her Brief in Support of Motion, Donna asserted that Gerard was in contempt of court as a result of his failure to cooperate in turning over the hay bales awarded to her in the divorce. (App. 113, ¶ 17). As an alternative to a finding of contempt, Donna requested the court order Gerard to pay her $242,216 for the value of the hay awarded to her. (App. 115, ¶ 24). A hearing on the Motion to hold Plaintiff in Contempt/Redistribute Property was held on November 18, 2019. The district court denied the motion, finding that 1) there was no evidence that Gerard failed to comply with the divorce order; 2) Gerard neither failed to disclose property or debt, nor failed to comply with a court order that distributed property or debt; and (3) Donna presented insufficient evidence for the court to determine the value of the hay bales at the time of the hearing, and therefore there was no method for the court to order redistribution. (App. 121, ¶¶ 1, 2.)

[8] Donna subsequently appealed both the Amended Divorce Judgment and the Order denying the Motion for Contempt or Redistribution of Property to this Court. This Court affirmed both district court decisions, concluding the district court did not clearly err in valuing and distributing the parties' marital property, nor did it abuse its discretion by denying the Motion to Hold Plaintiff in Contempt or Redistribute Property. (App. ¶¶ 14, 17, 22, 31). This Court concluded that "Donna Wald failed to exercise her rights under the judgment relating to the hay bales." (App. 130, ¶ 31).

[9] Undeterred by this Court's decision with regards to the divorce order and the Motion for Contempt or Redistribution of Property, Donna then served Gerard with a

Complaint in the instant matter, alleging claims for tortious conversion and unjust enrichment. In the Complaint, Donna alleges that Gerard "has been unjustly enriched as a result of the use, control, sale, and/or disposition (via feeding to cattle) of the 2017 and 2018 hay bales which were awarded to the plaintiff," and that she was "impoverished and deprived of the use, control, sale and value of $242,000 in hay (1,913 bales)." (App. 135, ¶¶22, 23). She also alleges that Gerard "wrongfully kept, retained and/or fed assets which were awarded to [Donna] in the divorce case, thus converting those assets to his own use, benefit and gain and depriving [Donna] of the benefit of these assets." (App. 136, ¶ 28).

[10] Gerard filed an Answer denying Donna's allegations and asserting several affirmative defenses, including res judicata, collateral estoppel, abandonment, laches, and title to the hay transferred to Gerard. (App. 138-143).

[11] Gerard also filed a Motion for Summary Judgment, asserting that there is no genuine issue of material fact with respect to the defenses of res judicata and collateral estoppel, and that he is entitled to judgment as a matter of law. (App. 144-169). Donna filed a response. (App. 170-188). On September 20, 2021, the matter was assigned to the Honorable Judge Daniel Narum. (App. 189). Donna filed a Demand for Change of Judge three days later, on September 23, 2021. (App. 190). On September 27, 2021, the Honorable James Hovey of the Southeast Judicial District issued an Order Denying Donna Wald's Demand for Change of Judge. In the Order, Judge Hovey provided:

> Plaintiff certifies that the Honorable Judge Narum has not ruled upon any matter pertaining 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*.**

App. 191-92, ¶ 2). Donna asserts that she has no other remedy than to petition this Court for a Supervisory Writ.

ARGUMENT

I. The District Court did not err in denying Donna's Demand for Change of Judge.

[12] Any party in a civil case may demand a change of judge, pursuant to North Dakota Century Code Section 29-15-21, by filing the demand with the clerk of the court in which the action or proceeding is pending. N.D.C.C. § 29-15-21(1). The statute also provides, in relevant part:

> 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.***
>
> ***
>
> 6. … If the presiding judge thereafter invalidates the demand because it was not timely filed ***or for other reasons***, the judge sought to be disqualified shall resume jurisdiction in the case and hear and determine the case to conclusion.

N.D.C.C. § 29-15-21 (emphasis added).

[13] Donna asserts that the District Court erred in denying her Demand for Change of Judge because (1) she complied with the provisions required by section 29-15-21(4), and (2) Judge Hovey incorrectly concluded that Judge Narum had ruled upon matters "pertaining to this action or a proceeding in which the moving party was heard or had an opportunity to be heard." (App. 200, ¶ 20; App. 201, ¶ 21).

[14] However, a party does not have an unlimited right to a change of judge under section 29-15-21, even if that party satisfies the requirements established under subsection four. In addition, Judge Hovey's assertion that Judge Narum has ruled on matters pertaining to this action is correct. Therefore, the District Court did not err in denying Donna's Demand for Change of Judge.

A. Donna's right to change of judge is not unlimited.

[15] First, Donna contends that Judge Hovey made no assertion that she failed to comply with the provisions of section 29-15-21(4), which require the following:

1. The demand must state it is filed in good faith and not for purposes of delay;
2. It must indicate the nature of the action or proceeding;
3. It must designate the judge sought to be disqualified;
4. it must 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.

See N.D.C.C. § 29-15-21(4). Donna's contention is true, in that Judge Hovey did not assert that Donna failed to complete the administrative prerequisites for filing a petition. However, submitting a petition in the proper format does not result in an automatic grant of one's demand. A party's right to a peremptory challenge of an assigned judge is not unlimited. Giese v. Giese, 2002 ND 194, ¶ 5; 653 N.W.2d 663, 666; Traynor v. Leclerc, 1997 ND 47, ¶ 17, 561 N.W.2d 644, 649 (quoting State v. Zueger, 459 N.W.2d 235, 236 (N.D. 1990)). Rather, the statute is clear that a demand for change of judge may be denied "for other reasons," see N.D.C.C. § 29-15-21(6), including failure to satisfy the express requirements of subsection (4). While this Court has abstained from determining what additional "other reasons" may entail, it has held open the possibility that other reasons may exist. See Traynor, 1997 ND 47, ¶ 18 (internal citations omitted) ("The court in State v. City Court of City of Tucson, dealt with a series of requests for change of judge that it deemed 'an improper attempt to influence a judge in his judicial

decisions' and 'an abuse of the rules and a threat to the independence and integrity of the judiciary.' We need not decide in this case if 'other reasons' might include such factors, although not specified in NDCC 29-15-21.").

B. Judge Narum ruled on a matter pertaining to this action, and thus, Donna cannot satisfy the requirements of N.D.C.C. § 29-15-21(3).

[16] Donna also asserts that Judge Hovey erred in determining that Judge Narum had already "ruled upon matters pertaining to this action or a proceeding in which the moving party was heard or had an opportunity to be heard." (App. 201, ¶ 21). Rather, Donna asserts that Judge Narum ruled on issues related to the parties' divorce, but has not made any rulings on the instant causes of action for tortious conversion and unjust enrichment.

[17] Donna's reading of the statute is too narrow. She is referring to the clause in subsection (4) that requires the party filing the demand to certify that the judge whom they seek to disqualify "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.C.C. § 29-15-21(4) (emphasis added). There are two critical words at issue in the aforementioned clause: "any" and "pertaining."

[18] This Court considered the meaning of "any" in State v. Zueger. 459 N.W.2d 235 (N.D. 1990). In that case, the judge whom the defendant, Zueger, sought to replace had ruled on Zueger's motion to expedite his trial date prior to the defendant filing the demand for change of judge. Id. at 236. The defendant's demand was denied on the ground that the judge, Judge Hodny, had "ruled in this proceeding." Id. (internal quotations omitted). Zueger appealed to this Court and argued, among other things, that

"the ruling was ministerial in nature, or was on a matter so inconsequential that it should not affect his right to demand a change of judge." Id.

[19] This Court rejected Zueger's argument. Id. at 237. In its decision, this Court provided:

> The statute does not state that only a ruling on a material or discretionary matter defeats the right to demand a change of judge. Instead, the statutory language refers to ruling upon "any matter pertaining to the action or proceeding." Words in a statute are to be understood in their ordinary sense. NDCC § 1-02-02. The word "any" is a general word and may have a diversity of meanings, its meaning in any particular case depending largely on the context and subject matter of the statute or instrument in which is it used. *501 DeMers, Inc. v. Fink*, 148 N.W.2d 820, 825 (N.D. 1967). **However, the word "any" in statutes is generally used in the sense of "all" or "every" and its meaning is comprehensive in scope and inclusive in range.** *E.g., In re Belefski's Estate*, 196 A.2d 850 (Pa. 1964); 3A Words and Phrases 59-67 (1953). *Cf. Midwest Federal Sav. Bank v. Symington*, 423 N.W.2d 797 (N.D. 1988) [construing the word "all"].
>
> …Giving the word "any" its ordinary and comprehensive meaning, we conclude it reasonably means "all" or "every" in the context of the statute under study.

Id. (emphasis added). Thus, "any" must be read to include **rulings on every and all matters** pertaining to the instant action. Similarly, the word "pertaining" must be understood in its ordinary sense. See N.D.C.C. § 1-02-02. Both Black's Law Dictionary and colloquial dictionaries like Merriam Webster define "pertaining" as related to, applicable to, or to concern or have to do with.[2] Therefore, a petition must certify that the judge he or she seeks to disqualify has not made any rulings on any matters related to,

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[2] See *Pertain*, Black's Law Dictionary (11th ed. 2019) (To relate directly to; to concern or have to do with.); *Pertain*, http://merriam-webster.com/dictionary/pertain (last visited Oct. 26, 2021) ("to be appropriate to something"; "to have reference"); *Pertain*, http://lexico.com/en/definition/pertain (last visited Oct. 26, 2021) ("be appropriate, related, or applicable").

applicable to, or concerning the instant action. Donna cannot make such a certification here.

[20] Prior to the instant matter, i.e., the Complaint for tortious conversion and unjust enrichment, Judge Narum presided over the parties' divorce. In that context, he ruled on matters related to, applicable to, and/or concerning the instant action, which is premised on Donna's alleged rights in the hay hales. That includes ruling on the equitable distribution of marital property and, in the context of a motion for contempt or redistribution of property, ruling that **Donna was not entitled to redistribution of money or property in the value of $242,000.** (App. 122, ¶¶ 1, 2).

[21] Despite her failure to prevail on the Motion for Contempt or Redistribution of Property, Donna's present action is essentially an attempt to "enforce" the distribution of property under the divorce decree, as in Giese v. Giese. 2002 ND 194, ¶ 6. In that case, the ex-husband, Robert, appealed from a district court order denying his demand for change of judge, among other things. Id. at ¶ 1. The district court had previously awarded the ex-wife, Eva, 20 percent of Robert's retirement account in the marital property distribution. Id. at ¶ 2. The court order provided a specific directive for transferring the funds to Eva, but the directive was not followed. Id. Eva then filed a motion to enforce the retirement split under the divorce judgment, requesting the court to order Robert's attorney to prepare the appropriate paperwork or provide information necessary for her own attorney to prepare the paperwork. Id. at ¶ 3. Robert filed a motion for change of judge, which the court denied. Id. The court granted Eva's motion and directed Robert's attorney to provide the information necessary to prepare the paperwork for the transfer. Id. Robert filed a motion for reconsideration, which the trial

court again denied. Id. Finally, Robert appealed the denial of the demand for change of judge to this Court. Id. at ¶ 1. This Court affirmed the district court's denial, reasoning that,

> The judge Robert sought to disqualify presided over the original divorce proceedings and had, therefore, ruled on matters in those proceedings where Robert appeared and was heard. The presiding judge, in denying Robert's demand for a change of judge, considered Eva's motion to be "merely a further hearing on the judgment entered previously." Robert asserts Eva's motion was to modify the property division, thereby invoking a separate proceeding from the original divorce proceedings, for which Robert is entitled to a change of judge. We conclude Eva's motion was for the purpose of enforcing the divorce decree, not to amend it. Eva requested the court to specify a procedure to be followed by the attorneys for preparing a QDRO to accomplish the 80/20 split of Robert's retirement account, as required by the divorce judgment. Eva asked the court to direct Robert's attorney to either prepare the QDRO or to furnish information necessary for Eva's attorney to prepare it. **We conclude Eva's motion did not invoke a proceeding to modify the property division of the original divorce decree, but rather initiated a proceeding to enforce that decree. Therefore, Robert was not entitled to a change of judge under N.D.C.C. § 29-15-21(3).**

Id. at ¶ 6.

[22] The present situation is nearly identical to Giese v. Giese. Here, Donna seeks to enforce the property distribution provided in the divorce order – distribution to her of hay bales valued at $242,000. The divorce order created her rights to the hay bales, and she is seeking to enforce those rights (i.e., receive the money or property) through the instant action. Even though the instant action is styled as a "separate" and "distinct" proceeding, in that Donna has filed a Complaint seeking damages pursuant to different legal theories than those available to her within the divorce proceedings, it is still a **matter pertaining to** the underlying divorce action. This becomes even more apparent when one considers that Donna: first, failed to exercise her rights under the

divorce order as directed; second, attempted other ways to enforce her rights, and lost; and third, is seeking the exact same remedy in the Complaint as she sought in the Motion for Contempt and/or Redistribution. Ironically, the present situation is the reverse of the situation in Giese. In Giese, the ex-husband failed to cooperate, forcing the ex-wife to move to enforce the distribution. Here, Donna has failed to cooperate, and she now seeks a third try at enforcing the distribution of assets. Unfortunately for Donna, Judge Narum has already ruled – twice – that the distribution is fair, that Gerard is not in contempt of court and that Donna is not entitled to a redistribution of property or money in the value of $242,000.

[23] Donna seeks to differentiate the instant action from the divorce action in another way as well. She asserts that section 29-15-21, subsection (3), excepts certain actions from the requirement that the judge not have ruled on any proceedings. (App. 201, ¶¶ 22-23). The statute provides that these specific types of proceedings[3] are to be considered proceedings "separate from the original action and the fact that the judge sought to be disqualified made any ruling in the original actions does not bar a demand for a change of judge." N.D.C.C. § 29-15-21(3). Donna argues that if "matters of the nature addressed in subsection (3)" are separate and distinct, then it would be non-sensical that her "entirely distinct and separate complaint" asserting claims of unjust enrichment and tortious conversion is not separate and distinct. (App. 201, ¶ 23). This is a false comparison. The specific proceedings listed under section (3) are not "matters" of a certain "nature" qualifying them for exception. They are specific exceptions, and there

[3] These specific actions are proceedings to modify an order for alimony, property division, or child support pursuant to section 14-05-24, or an order for child support pursuant to section 14-05-22. N.D.C.C. § 29-15-21(3).

is no specific exception listed for a situation like Donna's. If the legislature wanted to exclude domestic matters generally, or any other specific type of proceeding from the requirement, it could have done so. It did not.[4] Therefore, the fact that other exceptions are listed in subsection (3) does not help Donna's cause. The instant matter does not fall within one of the distinct actions excepted under section 29-15-21(3).

III. CONCLUSION.

[24] Donna's right to a peremptory strike of Judge Narum is not unlimited. Judge Hovey did not err in denying the Donna's Demand for Change of Judge because Donna cannot meet the requirement of N.D.C.C. 29-15-21(4), that the judge seeking to be disqualified 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. As such, this Court should deny Donna's Petition for Supervisory Writ requesting this Court to vacate the

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[4] See In Int. of M.S., 2017 ND 208, ¶ 8, 900 N.W.2d 805, 806–07.

> M.S. argues the filing of a petition for a continuing treatment order under N.D.C.C. § 25–03.1–23 creates a new different action. M.S. argues mental health cases such as his are analogous to the domestic relations proceedings discussed in N.D.C.C. § 29–15–21(3) that are considered separate from the original action. We disagree.
>
> Section 29–15–21, N.D.C.C., is a "statutory arrangement for permitting a litigant to obtain a change of judge, thereby assuring fair trials and promoting the ***807** fairness and integrity of the courts." *Traynor v. Leclerc*, 1997 ND 47, ¶ 14, 561 N.W.2d 644. As M.S. argues, although mental health proceedings are subject to being reopened often, **the legislature did not exempt mental health proceedings from N.D.C.C. § 29–15–21(3)** if the judge sought to be disqualified has made a ruling pertaining to the proceeding.

District Court's Order Denying Demand for Change of Judge and grant Donna's Demand for Change of Judge.

IV. CERTIFICATE OF COMPLIANCE.

[25] The undersigned certifies that this Brief complies with the page limitations as provided by N.D.R. App. P. 32.

[26] Dated: October 27, 2021.

[27] MARING WILLIAMS LAW OFFICE, P.C.

By: /s/ Mary E. Batcheller

Mary E. Batcheller (08407)
1220 Main Avenue, Suite 105
Fargo, ND 58103
Telephone: (701) 241-4141
mbatcheller@maringlaw.com
Attorneys for Respondent, Gerard Wald

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Respondents

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2021, a true and correct copy of the following:

1. Response to Petition for Supervisory Writ
2. Appendix

were filed and served on all parties via electronic means or U.S. Mail to the following:

Rodney Pagel
rpagel@pagelweikum.com

Dated: October 27, 2021

MARING WILLIAMS LAW OFFICE, P.C.

By: /s/ Mary E. Batcheller
Mary E. Batcheller (08407)
1220 Main Avenue, Suite 105
Fargo, ND 58103
Telephone: (701) 241-4141
mbatcheller@maringlaw.com
Attorneys for Respondent, Gerard Wald