

ORIGINAL

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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

APR 30 1999

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

Diane Hendrickson,)
)
 Plaintiff,)
)
 vs.)
)
 Mark Hendrickson.)
)
 Defendant.)

STATE OF NORTH DAKOTA

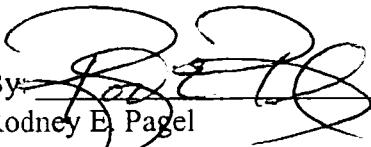
SUPREME COURT NO. _____

**PETITION / MOTION
FOR WRIT OF MANDAMUS**

Movant and Petitioner, Diane Hendrickson, moves the Supreme Court of the State of North Dakota for a Writ of Mandamus pursuant to North Dakota Century Code Chapter 32-34. Said Petition and Motion is founded upon the Brief in Support of Petition / Motion for Writ of Mandamus attached hereto.

DATED this 29th day of April, 1999.

PAGEL WEIKUM, PLLP
400 East Broadway Avenue, Suite 402
Bismarck, ND 58501
(701) 250-1369

By: 
Rodney E. Pagel
ND License No.: 05090

ATTORNEY FOR PLAINTIFF

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

Diane Hendrickson,)
)
 Plaintiff.)
)
 vs.)
)
 Mark Hendrickson,)
)
 Defendant.)

SUPREME COURT NO. _____

**AFFIDAVIT OF DIANE
HENDRICKSON**

Your Affiant, being duly sworn under oath, deposes and states as follows:

1) On April 9, 1998, subsequent to defendant moving the lower court for a change of custody, your affiant immediately filed a Demand for Change of Judge as is permitted by North Dakota law.

2) On April 16, 1998 a Notice of Assignment of Judge Upon Demand was filed, confirming that the Honorable Ronald Hilden had been replaced and the case had been assigned to the Honorable Allan Schmalenberger. See Exhibit A attached hereto.

3) Thereafter, I filed several motions concerning this matter which were not heard during the pendency of appellate proceedings.

4) On March 19, 1999 Judge Schmalengerber wrote to the parties advising us that if the Motion for Change of Custody by defendant was withdrawn, the matter could be re-assigned to Judge Hilden. See Exhibit B attached hereto.

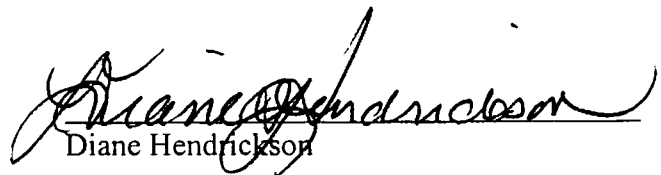
5) Although your affiant noted her concerns and objections in a letter, See Exhibit C attached hereto, subsequent to receipt of Judge Schmalenberger's March 19,

1999 letter, the defendant withdrew his motion for change of custody and on April 5, 1999 Judge Schmalenberger vacated his previous order and re-assigned the case to Judge Hilden. See Exhibit D attached hereto..

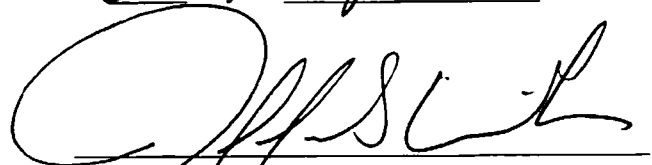
6) On April 13, 1999 your affiant again filed a demand for change of judge which was denied by Judge Schmalenberger on April 15, 1999. See Exhibit E attached hereto.

7) It is your affiant's opinion that based on the aforementioned lower court proceedings, there is no other plain, speedy or adequate remedy to require the lower court to change the trial judge as required by North Dakota law. Accordingly, your affiant requests this Court's consideration in issuing a writ of mandamus on this issue.

FURTHER YOUR AFFIANT SAYETH NOT.


Diane Hendrickson

Subscribed and sworn to before me this 29th day of April, 1999.


Notary Public
My Commission Expires: 1/21/04

STATE OF NORTH DAKOTA
COUNTY OF STARK

IN DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT

Diane Hendrickson,

Plaintiff,

FILED

CASE NO. 94C-019

vs.

APR 16 1998

NOTICE OF ASSIGNMENT OF JUDGE
UPON DEMAND

Mark Hendrickson,

Defendant.

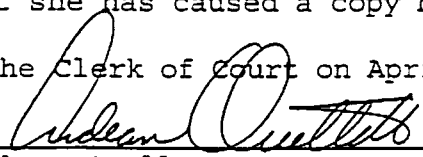
DISTRICT COURT, STARK CO.

The above-named Diane Hendrickson having filed a demand for change of judge against the Hon. Ronald L. Hilden, before whom this matter is scheduled to be heard;

PLEASE TAKE NOTICE, that pursuant to Administrative Rule 2-1981 and Section 29-15-21 of the North Dakota Century Code, Allan Schmalenberger, Presiding Judge, has designated and assigned the Hon. Allan Schmalenberger, one of the judges of the Southwest Judicial District, to hear and act upon all further matters of this cause.

The Clerk of the above-named Court is directed to mail copies of this Notice of Assignment of Judge to the Clerk of the Supreme Court, the Hon. Allan Schmalenberger and to all attorneys of record in this case and the Clerk of the above-named Court shall also inform the assigned Judge of the names of all attorneys in this case.

The undersigned certifies that she has caused a copy hereof to be personally delivered or mailed to the Clerk of Court on April 16, 1998.



Ardean Ouellette
District Court Administrator
P.O. Box 1507
Dickinson, ND 58602-1507
Telephone: (701) 264-7660

State of North Dakota

ALLAN SCHMALENBERGER
District Judge
KIMBERLY L. SCHWARTZ
Court Reporter
Tel: (701) 264-7658 ext. 22

DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
P. O. Box 1507
DICKINSON, ND 58602-1507

ARDEAN OUELLETTE
District Court Administrator
Tel: (701) 264-7660 ext. 25
Toll Free 1-877-233-4261

March 19, 1999

Diane Hendrickson
P. O. Box 7463
Bismarck, ND 58507-7463

William Herauf
Attorney at Law
Drawer K
Dickinson, ND 58602-8305

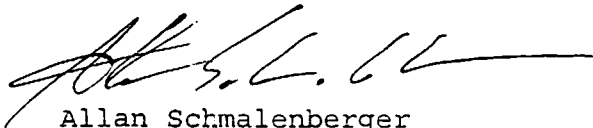
RE: Hendrickson v. Hendrickson
Stark County Case No. 94C-19

I received Attorney Herauf's March 16, 1999, letter. Procedurally, this case is somewhat confusing because of the interplay of the appeal, the North Dakota Supreme Court opinion, and pending motions that have not been disposed of.

Although the file has not been returned from the Supreme Court, I will try to address the concerns set forth in your letter. It is my recollection Mark Hendrickson filed a motion for change of child custody, and, as authorized by N.D.C.C. §29-15-21, Diane Hendrickson filed a demand for change of judge. Except for the pending motion for change of custody, the case would have been remanded to Judge Hilden pursuant to the Supreme Court's direction. Since there is a motion for change of custody pending, it would appear to be more efficient to have the currently assigned judge handle all matters. If the motion was withdrawn, administratively, the demand could be invalidated and the case reassigned to Judge Hilden to carry out the directions of the Supreme Court.

Before any matters are scheduled, I would appreciate your comments on these procedural issues.

Very truly yours,



Allan Schmalenberger
District Judge

cc: Clerk of District Court w/enc.
Hon. Ronald L. Hilden

Exhibit B

PO Box 7463
Bismarck, ND 58507-7463
March 23, 1999

Hon. Allan Schmalenberger
District Judge
PO Box 1507
Dickinson, ND 58602-1507

Dear Judge Schmalenberger:

I received your letter dated March 19, 1999. Please clarify for me just exactly what you mean as to the procedural issues in this case with regard to the remand and the pending motions (i.e. which judge will handle what). Please remember that I do not have the luxury of an attorney to confer with such as the other side of this case does. You indicate there is a Change of Custody Motion pending. There are several other motions pending.

It would be my position that all remands and pending issues would be handled by the currently assigned Judge in the case, which is you, pursuant to the Notice of Assignment of Judge Upon Demand dated and filed April 16, 1998. Further acknowledged by your letter dated April 27, 1998, indicating you "have been assigned as the trial judge in this case". I believe the clarification spells itself out within the contents of your letter.

You will recall that when the Supreme Court remanded the 1st case in September, 1996, you at that time directed that the remand AND all pending issues be forwarded to the then assigned judge. In order to dispense justice and stay consistent with the patterns previously outlined in this case, it would be proper that you, the now assigned judge, handle the remand and pending motions, reference again to your letter dated April 27, 1998, upon jurisdiction being vested with the trial court.

In other matters, I had contacted Ms. Reule, Clerk of Court today, and inquired as to when she would be returning the child support funds that were mistakenly withheld from the children. She stated to me that she would need a "Motion" to do this. As I read the Supreme Court Opinion, I believe it is self-explanatory that "reverse the portion of the order directing the clerk of court place the child support payments into a separate account", is an indication that she merely do as she did prior to this erroneous act. Perhaps the Court (you as currently assigned judge) on its own Motion, if necessary, could merely enter an Order taking care of this matter immediately. Again, I do not have the luxury of an attorney to do this and I can assure you, the children have been denied and refused many "necessities in their lives" for the last year and a half. I can see no reason for the constant unnecessary delay after delay, motion after motion.

Sincerely,

Diane F. Hendrickson
pc William Heruaf

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF STARK

SOUTHWEST JUDICIAL DISTRICT

Diane Hendrickson,)
)
 Plaintiff,)
)
 -vs-)
)
 Mark Hendrickson,)
)
 Defendant.)

ORDER

Civil No. 94C-019

On March 19, 1999, the Court invited the parties to comment on the procedural issues in this case. Now, both parties have responded to the letter.

From a review of the file, the Court finds the following pending motions:

1. Defendant's motion to change custody dated April 9, 1998.
2. Plaintiff's motion for change of venue dated April 23, 1998.
3. Plaintiff's motion for homestudies dated April 23, 1998.
4. Plaintiff's motion for contempt, motion for order to show cause, motion on remand, motion to amend and brief in support of motion dated June 26, 1998.
5. Defendant's motion to require disclosure of children's current address and phone number dated November 3, 1998.

6. Plaintiff's motion for change of venue dated March 11, 1999.

After the defendant filed his April 9, 1998, motion to change custody, the plaintiff filed a demand for change of judge. Because of the pending motion to change custody and the resulting demand, a different judge was assigned to the case. Now, the defendant has withdrawn his motion for change of custody.

N.D.C.C. § 29-15-21 provides:

2. The demand is invalid unless it is filed with the clerk of the court not later than ten days after the occurrence of the earliest of any one of the following events:
 - a. The date of the notice of assignment or reassignment of a judge for trial of the case;
 - b. The date of notice that a trial has been scheduled; or
 - c. The date of service of any ex parte order in the case signed by the judge against whom the demand is filed.
3. . . . Any 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.

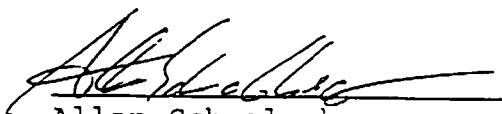
Since the defendant has withdrawn his motion which allowed a change of judge, the subsequent assignment now has become moot. Also, the North Dakota Supreme Court affirmed the Hon. Ronald L.

Hilden's award of attorney fees, reversed the portion of his order directing the Clerk of Court place the child support payments into a separate account, and remanded it for further proceedings consistent with its opinion. Since Judge Hilden presided over those proceedings, he is in the best position to understand the case and to carry out the directions of the North Dakota Supreme Court.

THEREFORE, IT IS HEREBY ORDERED the defendant's motion to change custody is deemed dismissed because of the withdrawal, the demand is invalidated, the assignment to Judge Schmalenberger is vacated, and the Hon. Ronald L. Hilden shall resume jurisdiction of this case and hear and determine it to conclusion.

Dated: April 5, 1999.

BY THE COURT:



Allan Schmalenberger
Presiding District Judge

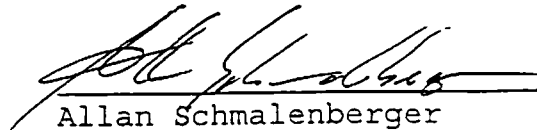
Certificate of Service

A copy of this document was on April 5, 1999, mailed or hand delivered to:

Diane F. Hendrickson
P. O. Box 7463
Bismarck, ND 58507-7463

William Herauf
Attorney at Law
Drawer K
Dickinson, ND 58602-8305

Hon. Ronald L. Hilden
District Court Judge
P. O. Box 1507
Dickinson, ND 58602-1507


Allan Schmalenberger

cc: Paulette Reule, Clerk of District Court
Ardean Ouellette, Court Administrator

APR 16 1999

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF STARK

SOUTHWEST JUDICIAL DISTRICT

Diane Hendrickson,)
)
 Plaintiff,)
)
 vs.)
)
 Mark Hendrickson,)
)
 Defendant.)

CASE NO. 94C-019

ORDER INVALIDATING
DEMAND FOR CHANGE OF JUDGE

On April 14, 1999, the plaintiff, Diane Hendrickson, filed a demand for change of judge. The Court denies the demand for change of judge.

N.D.C.C. §29-15-21 provides:

The demand is invalid unless it is filed with the clerk of the court not later than ten days after the occurrence of the earliest of any one of the following events:

- a. The date of the notice of assignment or reassignment of a judge for trial of the case;
- b. The date of notice that a trial has been scheduled; or
- c. The date of service of any ex parte order in the case signed by the judge against whom the demand is filed.

3. Any party who has been added, voluntarily or involuntarily, to the action or proceeding after the date of any occurrence in subsection 2 has the right to file a demand for change of judge within ten days after any remaining event occurs or, if all of those events have already occurred, within ten days after that party has been added. In any event, no demand for a change of judge may be made after the judge sought to be disqualified has ruled upon any matter pertaining to the action or proceeding in which the demanding party was heard or had an opportunity to be heard. Any proceeding to modify an order for alimony, property division, or child support pursuant to section 14-05-24 or an order for child

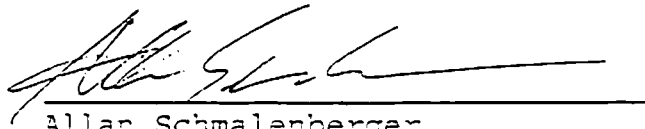
custody pursuant to section 14-05-22 must be considered a proceeding separate from the original action and the fact that the judge sought to be disqualified made any ruling in the original action does not bar a demand for a change of judge.

Since this demand does not comport with this section, it is invalid.

THEREFORE, IT IS HEREBY ORDERED that the demand is invalidated and the Hon. Ronald L. Hilden shall resume jurisdiction of this case and hear and determine it to conclusion.

Dated: April 15, 1999.

BY THE COURT:



Allan Schmalenberger
Presiding District Judge

Certificate of Service

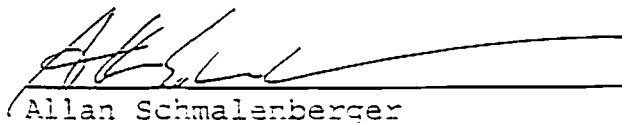
A copy of this document was on April 15, 1999, mailed or personally delivered to:

Diane Hendrickson
1905 11th Ave. NE
Jamestown, ND 58401

William A. Herauf
Attorney at Law
P.O. Box K
Dickinson, ND 58502-8305

Hon. Ronald L. Hilden
District Court Judge
P.O. Box 1507
Dickinson, ND 58602-1507

Kent M. Morrow
Attorney at Law
P.O. Box 2155
Bismarck, ND 58502-2155



Allan Schmalenberger

cc: Ardean Cuelllette, Court Administrator

APR 30 1999

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Diane Hendrickson,)	STATE OF NORTH DAKOTA
)	SUPREME COURT NO. _____
Plaintiff,)	
)	
vs.)	BRIEF IN SUPPORT OF
)	PETITION / MOTION
Mark Hendrickson,)	FOR WRIT OF MANDAMUS
)	
Defendant.)	

ISSUE

Whether a Writ of Mandamus should be issued directing the lower court to grant petitioner's demand for a change of judge at the lower court level and to vacate the orders of the lower court subsequent to such demand for change of judge.

PROCEDURAL HISTORY

The instant matter involves ongoing litigation between movant/plaintiff and defendant concerning various issues stemming from their divorce. Foremost among those issues is the custody of the four minor children of the marriage. Subsequent to two orders by the lower court in December of 1997 and February of 1998 that plaintiff was alienating the affections of the minor children towards their father, the non-custodial parent; on April 9, 1998 defendant moved the lower court for a change of custody. Thereafter, plaintiff immediately filed a Demand for Change of Judge as is permitted by North Dakota law. On April 16, 1998 a Notice of Assignment of Judge Upon Demand was filed, confirming that the Honorable Ronald Hilden had been replaced and the case had been assigned to the Honorable Allan Schmalenberger. (See Exhibit A attached to

the Affidavit of Daine Hendrickson). Thereafter, several motions were filed but were not heard during the pendency of appellate proceedings. On March 19, 1999 Judge Schmalengerber wrote to the parties advising them that if the Motion for Change of Custody by Defendant was withdrawn, the matter could be re-assigned to Judge Hilden. (See Exhibit B attached to the Affidavit of Daine Hendrickson). Although plaintiff noted her concerns and objections, (See Exhibit C attached to the Affidavit of Daine Hendrickson), not surprisingly, subsequent to receipt of Judge Schmalenberger's March 19, 1999 letter, the defendant withdrew his motion for change of custody and on April 5, 1999 Judge Schmalenberger vacated his previous order and re-assigned the case to Judge Hilden. (See Exhibit D attached to the Affidavit of Daine Hendrickson). On April 13, 1999 plaintiff again filed a demand for change of judge which was denied by Judge Schmalenberger on April 15, 1999. (See Exhibit E attached to the Affidavit of Daine Hendrickson).

DISCUSSION / ARGUMENT

Article VI, Section 2 of the Constitution of the State of North Dakota provides the Supreme Court with the authority to hear matters, including the instant Petition / Motion for Writ of Mandamus. As stated in such section, "[t]he supreme court shall be the highest court of the state. It shall have appellate jurisdiction, and shall also have original jurisdiction with authority to issue, hear, and determine such original and remedial writs as may be necessary to properly exercise its jurisdiction." Art. VI, §2, N.D. Constitution. As further stated by N.D.C.C. §27-02-05, "[t]he supreme court is vested with full power and authority necessary to carry into complete execution all its judgments, decrees, and determinations in the matters over which it has jurisdiction and for the exercise of its

jurisdiction as the supreme judicial tribunal of this state."

North Dakota Century Code section 32-34-01 provides for the propriety of the Supreme Court to issue Writs of Mandamus to inferior courts, by stating

The writ of mandamus may be issued by the supreme and district courts to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is precluded unlawfully by such inferior tribunal, corporation, board or person.

N.D.C.C. § 32-34-01.

As outlined in the case of State ex. rel. Red River Brick Corp. v. District Court, 138 N.W. 988 (N.D. 1912), the Supreme Court is empowered with superintending control over lower courts and it is proper to issue writs of mandamus to direct the control of the lower court where there is no other adequate remedy at law. The authority of the Supreme Court to issue writs of mandamus to require lower courts to exercise their duties is further exhibited in State ex rel. Rayl v. Hettinger County, 467 N.W.2d 98 (N.D. 1991).

Writs of Mandamus must be issued in situations where there is no other "plain, speedy and adequate remedy in the ordinary course of law." N.D.C.C. § 32-34-02. See also Christianson v. City of Bismarck, 476 N.W.2d 688 (N.D. 1991). Plaintiff herein asserts that the lower courts have refused to grant her demand for change of judge, resulting in there being no other remedy than a writ of mandamus to the Supreme Court requiring the lower court to apply the law relevant to demands to change judges. The propriety of these types of writs in cases involving demands for changes of judges has been recently illustrated by the case of Traynor v. LeClerc, 561 N.W.2d 644 (N.D. 1997), a case in which a demand for change of judge had been denied but the Supreme

Court. on Supervisory Writ, deemed that such denial was improper.

In the instant matter, plaintiff has very valid grounds for a writ of mandamus. As outlined in the procedural history, on April 9, 1998 defendant moved the lower court for a change of custody. Thereafter, plaintiff immediately filed a Demand for Change of Judge as is permitted by North Dakota law. In particular, Section 29-15-20 provides the applicable law for demanding a change of judge, stating that "[s]ubject to the provisions of this section, any party to a civil or criminal action or proceeding pending in the district court or any county court in this state may obtain a change of the judge before whom the trial or any proceeding with respect thereto is to be heard by filing with the clerk of the court in which the action or proceeding is pending a written demand for change of judge..." N.D.C.C. § 29-15-21. Subsection three (3) of such section clearly provides that a demand for change of judge must be granted where there are proceedings to modify child custody, stating 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 change of judge." N.D.C.C. § 29-15-21(3).

Defendant' Motion for Change of Custody was indeed a separate proceeding, after which plaintiff had ten days to present a demand for change of judge under the laws. Plaintiff submitted a demand for change of judge well within this time frame, and on 4/16/98 a Notice of Assignment of Judge Upon Demand was filed, confirming that the Honorable Ronald Hilden had been replaced and the case had been assigned to the Honorable Allan Schmalenberger. Clearly, at this point, a different judge had been

assigned to the case and Judge Hilden was no longer the judge assigned to the case, as is appropriate under North Dakota law. There has been no subsequent demand by any party to change the judge from Judge Schmalenberger to another judge. For this reason alone, plaintiff's motion for writ should be granted.

Subsequent to such change of judge, plaintiff filed several motions, some of which concerned property, child support and custody. These motions were not heard during the pendency of appellate proceedings. It should, however, be contemplated by the court that these additional motions, in conjunction with the demand for change of judge, provided additional basis for the change of judge under N.D.C.C. § 29-15-21(3).

Subsequent to the appellate ruling, on March 19, 1999 Judge Schmalenberger wrote to the parties advising them that if the Motion for Change of Custody by defendant was withdrawn, the matter could be re-assigned to Judge Hilden. Although plaintiff noted her concerns and objections, not surprisingly defendant thereafter withdrew his motion for change of custody and on April 5, 1999 Judge Schmalenberger vacated his previous order and re-assigned the case to Judge Hilden. On April 13, 1999 plaintiff again filed a demand for change of judge which was denied by Judge Schmalenberger on April 15, 1999.

Plaintiff asserts that N.D.C.C. § 29-15-21(2)(a) provides further grounds for her demand for change of judge filed on April 13, 1999. As provided by such section, a demand for change of judge is valid if it is filed within ten days of the "date of the notice of assignment or reassignment of a judge for trial of a case." Judge Schmalenberger's vacation of his order and assignment of Judge Hilden was indeed a reassignment which occurred on April 5, 1999. On April 13, well within the ten (10) day period, plaintiff

filed a further demand for change of judge which should have been granted under the law. For this further reason plaintiff respectfully requests the granting of a writ of mandamus directing the lower court to grant plaintiff's demand for change of judge.

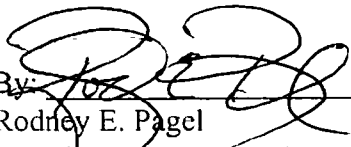
Writs of Mandamus must be issued in situations where there is no other "plain, speedy and adequate remedy in the ordinary course of law." N.D.C.C. § 32-34-02. Here, plaintiff's requests for a change of judge have been twice denied and there is quite clearly no other remedy available for her. Further, it is important to allow the Supreme Court to adequately interpret the law as applies to demands to change judges since there is nothing in the law which indicates that a reassignment may occur once a judge has been removed from a case, even if the motion which causes the removal is subsequently withdrawn.

CONCLUSION

Based on the aforementioned law and reasoning, plaintiff and movant respectfully requests the Supreme Court issue a writ of mandamus directing the lower court to grant her demand for change of judge and vacating all orders of the Honorable Ron Hilden subsequent to the filing of the demand for change of judge

DATED this 29th day of April, 1999.

PAGEL WEIKUM, PLLP
400 East Broadway Avenue, Suite 402
Bismarck, ND 58501
(701) 250-1369

By: 
Rodney E. Pagel
ND License No.: 05090

ATTORNEY FOR PLAINTIFF