

**ORIGINAL**

IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA  
Supreme Court No. \_\_\_\_\_

20070297

Pembina County Water Resource District,

Petitioner,

vs.

The Honorable Laurie A. Fontaine,  
Judge of the District Court,  
Northeast Judicial District

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

OCT 5 2007

and

STATE OF NORTH DAKOTA

Johnson Farms,

Respondents.

**BRIEF**

**SUPERVISORY WRIT**

NEIL W. FLEMING  
Attorney ID # 02887  
For: Fleming, DuBois & Fleming, PLLP  
Attorneys at Law  
PO Box 633  
Cavalier, North Dakota 58220  
Telephone No. (701) 265-8446  
Facsimile No. (701) 265-8947  
Attorney for the Pembina County Water Resource District

## TABLE OF CONTENTS

Table of Authorities .....	ii
Jurisdictional Statement .....	1
Statement of Issues .....	2
Standard of Review .....	3
Statement of the Case .....	4
Statement of Facts .....	5
Argument .....	6
Conclusion .....	9

**TABLE OF AUTHORITIES**

Cases

Diamond vs. State Board of Higher Education, 1999 N.D. 238 at  
603 N.W2d 66 ..... 3

Other Authorities

N.D. Cent. Code Chapter 61-16.1-53 ..... 6  
N.D. Cent. Code Chapter 61-16.1-54 ..... 7  
N.D. Const. art. VI §2 ..... 1  
N.D.R. App. P. 21 ..... 1

## **JURISDICTIONAL STATEMENT**

This is a request to the North Dakota Supreme Court to exercise its original jurisdiction and issue a supervisory writ pursuant to Article VI Section 2 of the North Dakota Constitution; North Dakota Century Code §27-02-04; and Rule 21 of the North Dakota Rules of Appellate Procedure.

## STATEMENT OF ISSUES

1. Whether the District Court had the authority to enter an order allowing a party to take the deposition of the chairman of the water board who acted as the finders of fact in the determination of a water dispute when the deposition is to be used during the appeal of that decision to the district court and

2. Whether a motion in limine was the proper procedural vehicle in this case.

## STANDARD OF REVIEW

A supervisory writ is issued only in extra-ordinary cases to rectify errors and to prevent injustice when no adequate alternative remedy exists. Diamond vs. State Board of Higher Education, 1999 N.D. 238 at 603 N.W.2d 66.

## STATEMENT OF THE CASE

This is a case where the Pembina County Water Resource board of managers requests that the Supreme Court of North Dakota exercise its original jurisdiction.

Norma Cameron and her renter Kirk Stockton had filed a complaint alleging that an illegal dike had been constructed by Johnson Farms.

The Pembina County Water Resource District board then proceeded in accordance with Chapter 60-16.1 of the North Dakota Century Code and conducted an investigation. After the initial investigation Johnson Farms was notified that the complaint had been filed and that there was an obstruction at the complained of location and Johnson Farms was ordered to remove it. In accordance with Section 61-16.1-53 of the North Dakota Century Code Johnson Farms was also advised that they had the right to request a hearing within 15 days. A hearing was requested. The Pembina County Water Resource District after a full hearing found that a dike\obstruction existed and ordered its removal.

Johnson Farms then appealed this order.

The Pembina County Water Resource District prepared and filed with the district court a record of the proceedings.

Johnson Farms then made a motion in limine requesting that the District Court order the depositions of the chairman of the water resource board and its secretary. The water resource district resisted such a motion and the district court issued its order authorizing the taking of the deposition of the chairman of the water resource board.

From that order the Pembina County Water Resource Board request relief through the form of a supervisory writ.

## STATEMENT OF FACTS

### FACTS

The Pembina County Water Resource Board received a complaint dated December 10, 2005 alleging that an illegal dike had been constructed on the South Half (S½) of Section 25 and the Northeast Quarter (NE¼) of Section 36, Township 164, Range 54 by Johnson Farms. (Appendix Pg. 1). The land in question is located in Pembina County, North Dakota. The board investigated the complaint and found that there was a dike constructed on the location in violation of Title 61 of the North Dakota Century Code. A notice was sent to Johnson Farms on April 12, 2006 directing Johnson Farms to remove the offending structure and also advising Johnson Farms of its right to demand a hearing. (Appendix Pg. 2).

On June 13, 2006 a hearing was held at the Pembina County Water Resource District Offices. At that hearing testimony was received from both Johnson Farms and the complainant. In addition testimony was received from Dan Fischer, a registered surveyor. The hearing was continued until further information could be received from an engineer. The hearing was reconvened on September 19, 2006. Testimony was taken from Carey Backstrand, P.E. of Engineering Consultant Services who had filed a report and testified. Based upon the testimony and evidence presented at the hearing, the Pembina County Water Resource District Board issued its findings and Johnson Farms was ordered to remove the obstruction to level of 830.45 MSL by June 1, 2007. (Appendix Pg. 3).

Johnson Farms filed a notice of appeal dated January 18, 2007. (Appendix Pg. 5). A record of the proceedings was prepared by the Pembina County Water Resource board



and filed with the Clerk of the District Court.

Duane Schurman, of behalf of Johnson Farms, then served a motion in limine requesting permission to take the depositions of the chairman of the Pembina County Water Resource board and the secretary of the Pembina County Water Resource board. (Appendix Pg. 8). The Pembina County Water Resource board is a local governing body charged with the duty to investigate complaints of illegal dikes. The board must then take testimony, determine the facts, and issue findings of fact. The water resource district board is then required to issue an appropriate order. The request by Johnson Farms to take these depositions was objected to by the Pembina County Water Resource District board of managers. (Appendix Pg. 11 and Pg. 12). Various proceedings were held which resulted in the issuance of the district court order of September 10, 2007. (Appendix Pg. 14).

## **ARGUMENT**

Issue 1: Chapter 61-16.1-53 of the North Dakota Century Code provides as follows:

Upon receipt of a complaint of unauthorized construction of a dike, dam, or other device for water conservation, flood control, regulation, watershed improvement, or storage of water, the water resource board shall promptly investigate and make a determination thereon. If the board determines that a dam or other device, capable of retaining, obstructing, or diverting more than fifty acre-feet [61674.08 cubic meters] of water or twenty-five acre-foot [30837.04 cubic meters] of water for a medium-hazard or high-hazard dam, has been established or constructed by a landowner or tenant contrary to this title or any rules adopted by the board, the board shall notify the landowner by registered mail at the landowner's post-office address of record. A copy of the notice must also be sent to the tenant, if any. The notice must specify the nature and extent of the noncompliance and must

state that if the dike, dam, or other device is not removed within the period the board determines, but not less than fifteen days, the board shall cause the removal of the dike, dam, or other device and assess the cost of the removal, or the portion the board determines, against the property of the landowner responsible. The notice must also state that the affected landowner, within fifteen days of the date of notice is mailed, may demand, in writing, a hearing upon the matter. Upon receipt of the demand, the board shall set a hearing date within fifteen days from the date the demand is received.

An initial investigation was conducted. A letter was sent to Johnson Farms informing it of the results of the Pembina County Water Resource board's initial determination.

(Appendix Pg. 2). Johnson Farms requested a hearing in accordance with Section 61-16.1-53. A hearing was conducted by the Pembina County Water Resource board and the board, as a result of the evidence and information gathered at that hearing, issued its Findings and Order. (Appendix Pg. 3). Johnson Farms appealed this order in accordance with Section 61-16.1-54 of the North Dakota Century Code. Section 61-16.1-54 in part reads as follows:

The appeal must be taken to the District Court of the county in which the land claimed to be affected adversely by the order or decision appealed from is located and is governed by the procedure provided in Section 28-34-01.

The Pembina County Water Resource board is a "local governing body" as defined in Section 28-34-01.

The water resource board prepared and filed in the office of the clerk of court a certified copy of the entire proceedings. The appeal from a local governing body must be based upon the record. Section 28-34-01 of the North Dakota Century Code. If the court determines that additional evidence is necessary it may refer the matter back to the local

governing board for additional information and the governing body then may amend or modify its decision and file with the court a transcript of the additional evidence together with its modified decision. The court then can review the additional evidence. Section 28-34-01 of the North Dakota Century Code.

The District Court, under Chapter 28-34 of the North Dakota Century Code, cannot itself hear the additional evidence. If the District Court requires additional information the matter must be referred to the local governing body to obtain such information and if necessary the local governing body may make additional findings and modify its initial decision.

What Johnson Farms is attempting to do is to depose the finder of fact. In this case the Pembina County Water board is the finder of fact. The reason that the finder of fact should not be allowed to be deposed should be obvious. It would have a very detrimental and chilling affect upon the deliberations of the local governing board. In this instance the Pembina County Water Resource Board is charged with the responsibility of making finding the facts and issuing an appropriate order based upon these findings.

If from the records the court was to find that the proper procedure had not been followed by the water resource district, then the court could remand the matter back to the water resource board to follow the correct procedure.

There are many instances in my 40 years of experience why I would like to be able to depose the trier of fact (in most instances a judge), to determine why such a decision was made. The reasons for the board's decision are outlined in its findings. I can't depose a judge and neither should Johnson Farms be able to depose the members of

the water resource district board of managers who are the finders of fact.

Issue 2: A motion in limine is not the proper vehicle to address this issue with the District Court. Black's Law Dictionary Sixth Edition defines motion in limine as follows:

“A pre-trial motion requesting court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to moving party that curative instructions cannot prevent pre-dispositional effect on jury”. (Appendix Pg. 15).

Furthermore. West Legal Thesaurus\Dictionary defines motion in limine as follows:

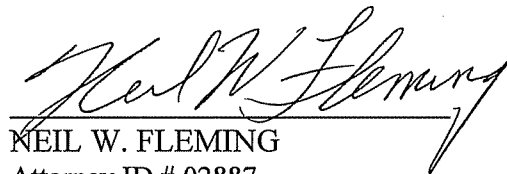
A motion made before or after the beginning of a jury trial for a protective order against the potential use of prejudicial statements or questions by the other side”. (Appendix Pg. 16)

Clearly a motion in limine is clearly improper and not applicable in this case.

#### CONCLUSION

The supervisory writ should be granted and the order of the district court dated September 10, 2007 be ordered vacated.

Respectfully submitted this 4th day of October, 2007.



NEIL W. FLEMING

Attorney ID # 02887

For: Fleming, DuBois & Fleming, PLLP

Attorneys at Law

PO Box 633

Cavalier, North Dakota 58220

Telephone No. (701) 265-8446

Facsimile No. (701) 265-8947

Attorney for the Pembina County

Water Resource District