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SUPREME COURT

20140399

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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FEB 11 2015

Randy Holkesvig, )  
Plaintiff and Appellant, )  
  
vs. )  
  
Bob Rost and )  
Linda Funkhouser, )  
Defendants and Appellees. )

STATE OF NORTH DAKOTA

) Supreme Court No. 20140399

) Grand Forks Co. No. 18-2014-CV-00519

APPEAL FROM JUDGMENT OF DISMISSAL WITHOUT PREJUDICE  
ENTERED SEPTEMBER 8, 2014

FROM THE DISTRICT COURT  
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT  
GRAND FORKS COUNTY, NORTH DAKOTA

THE HONORABLE SURROGATE JUDGE  
ALLAN L. SCHMALENBERGER PRESIDING

REPLY BRIEF

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### **STATEMENT OF ISSUES**

¶1. I. If evidence exists that indicates statewide abuse and misconduct occurred, with blatant lies being made by defense counsel with the intent to obstruct justice by their odious behavior making fraudulent claims that intentionally deceives the Court, can it infer and prove the Court abused its discretion with rulings that have no merit?

### **STATEMENT OF THE CASE**

¶2. Judge Schmalenberger should have recused himself before issuing any kind of Order that obviously indicates an abuse of discretion. This case should not have been extended to immunity/summary judgment. Gaustad failed to explain or defend the illegal, immoral and unethical acts committed by Rost and Funkhouser that includes possible destruction of evidence with the Rost assault video at the GF Sheriff's office.

### **STATEMENT OF FACTS**

¶3. Gaustad made false claims to the District Court and now he is doing in his Appellee Brief. Schmalenberger's Judicial complaint was filed on 7-1-14, **[P.App. 168-175]**. Schmalenberger should have automatically recused and/or disqualified himself and he should not have participated in the oral hearing argument or granted the scheduling order based on evidentiary facts disclosed in **[P.App. 49-167]**. Gaustad blatantly lies in **[P.App.176-179]**. Holkesvig needed to end the corruption, collusion, conspiracy and contempt by the District Court and Gaustad, **[P.App. 180-190]**. Gaustad blatantly lies again in **[P.App.191-194]**. Schmalenberger illegally issues an Order for Judgment on 9-5-14, **[P.App. 195-198]** with "arbitrary conditions attached," that indicates bias that violates due process that became an abuse of discretion.

## LAW AND ARGUMENT

¶4. Every case that Gaustad cited about Holkesvig from his [**Appellee Brief, ¶ 11**], indicates Judicial abuse by the District Court Judge and the ND Supreme Court Justices. [**P.App.81-125**] (emphasis added), [**P.App.50-80**] and [**P.App.168-190**]. Every person mentioned in [**Appellee Brief, ¶ 12-footnote 3**], had a hand in corruption, collusion, conspiracy and cover up that is proven to be true based on evidence and facts presented by Holkesvig.

¶5. N.D.C.C. § 27-02.1-02(2), Court of Appeals, states:

“An active or retired district court judge serving on the temporary court of appeals may not be assigned to hear cases in which the judge participated while serving on the district court.”

Likewise, Schmalenberger should not have presided in this case because it conflicts with the Rost abuse, material facts and evidence in GF Co. No. 18-2013-CV-00716.

Schmalenberger’s refusal to recuse/disqualify from GF Co. No. 18-2014-CV-00520 and this case obviously violates N.D. Code Jud. Conduct 2.11(A)(1), (5)(c) and (d). See prior Canon Rule 3(C)(1)(a). Baier v. Hampton, 440 N.W.2d 712, 714-715 (N.D.1989); Sargent County Bank v. Wentworth, 500 N.W.2d 862, 877 (N.D.1993); Judicial Qualifications Comm’n v. Schirado, 364 N.W.2d 50, 52-56 (N.D.1985).

¶6. N.D.C.C. § 27-17-03 contains the Surrogate Judges Oath which Schmalenberger violated that obviously conflicts with the ND and U.S. Constitution. He failed to explain and address his recusal that “compounds the problem of perceived partiality, even if he was not actually biased.” Reems v. St. Joseph’s Hosp., 536 N.W.2d 666, 674 (N.D.1995). The Fourteenth Amendment to the U.S. Constitution and Due Process can be used, when,

“under all circumstances, probable risk of actual bias is too high to be constitutionally tolerable.” Withrow v. Larkin, 421 U.S. 35, 47 (1975);

Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872 (2009). The U.S. Supreme Court characterized the Due Process Clause as the “constitutional floor on recusal claims, with ceiling set by common law, statutes, or the professional standards of the bar and bench.”

This case sank beneath the “constitutional floor.” See Caperton, supra, at 889 (quoting Bracy v. Gramley, 520 U.S. 899, 904 (1997)). “A fair trial in a fair tribunal is a basic requirement of due process.” In re Murchison, 349 U.S. 133, 136 (1955).

¶7. The N.D. Code Jud. Conduct Rules were changed on 7-1-12. Canon 3(E)(1)(a) regarding disqualification must be viewed within the context of Canon 2.

Graves v. State Bd. of Law Exam'rs, 2004 ND 64, ¶¶ 11-12, 677 N.W.2d 215;

State v. Stockert, 2004 ND 146, ¶ 45, 684 N.W.2d 605;

State v. Murchison, 2004 ND 193, ¶ 13, 687 N.W.2d 725;

State v. Jacobson, 2008 ND 73, ¶ 13, 747 N.W.2d 481. Schmalenberger had a duty to recuse and refused. Circumstances can automatically and immediately disqualify the judge from presiding over a case. See James J. Alfini et al., *Judicial Conduct and Ethics* § 4.04, at 4-10 (4th ed. 2007), Jacobson, supra, at ¶’s 30-32. A “recusal is required under the Fourteenth Amendment's Due Process Clause when the judge is actually biased or there is a constitutionally intolerable probability of actual bias.”

State v. Sawyer, 297 Kan. 902, 905-09, 305 P.3d 608 (2013), (emphasis added). Orders issued by Schmalenberger are void. Jacobson, supra, at ¶ 33; Matter of Estate of Risovi, 429 N.W.2d 404, 407 (N.D.1988).



¶8. Gaustad's deception is indicated throughout his [Appellee Brief, ¶'s 7-20], that contains false and misleading allegations. Gaustad cannot sit there and deceive the court with "lack of service of process," [P.App.40], and ironically, argue that "service was acquired with personal jurisdiction." [Appellee Brief, ¶'s 17-19]. Gaustad's argument is repulsive to justice. In Sanderson v. Walsh County, 2006 ND 83, ¶ 13, 712 N.W.2d 842, states: "Absent valid service of process, even actual knowledge of the existence of a lawsuit is insufficient to effectuate personal jurisdiction over a defendant. Muhammed v. Welch, 2004 ND 46, ¶ 11, 675 N.W.2d 402. Without valid service of process, any judgment is void because the court lacks personal jurisdiction. Smith v. City of Grand Forks, 478 N.W.2d 370, 371 (N.D.1991)." The only person telling the truth is Holkesvig. [P.App.50-200]. Simply put, Schmalenberger did not have authority to preside in or have jurisdiction that now must be void and vacated. Holkesvig recognized the abusive misconduct by Schmalenberger and Gaustad, citing "WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 10, 730 N.W.2d 841." The Court failed to address N.D.R.Civ.P. 5 "service" and N.D.R.Civ.P. 52(a)(c) controls "partial findings." See N.D.C.C. § 28-27-02. The Courts Order, [P.App.195-198] was biased, arbitrary, capricious and unreasonable, based "on the condition it is not refiled in any ND District Court." It was vindictive and retaliatory. An order of dismissing a complaint without prejudice is not an appealable. Runck v. Brakke, 421 N.W.2d 487, 488 (N.D.1988). However, Constitutional errors conflicts with Schmalenberger's bias and arbitrarily inserting "conditions," meant it can't be refiled in any ND District Court. Holkesvig can refile in District Court and commence further action by first establishing

proper service of process on the Defendants. “Either side may commence another action after a civil complaint is dismissed without prejudice, the order dismissing the action neither “determines the action” nor “prevents a judgment from which an appeal might be taken,” as required under N.D.C.C. § 28-27-02(1),

Triple Quest, Inc. v. Cleveland Gear Co., Inc., 2001 ND 101, ¶¶ 9-11, 627 N.W.2d 379.

See N.D.C.C. § 28-27-02(2)(3)(5)(6)(7); N.D. Constitution: Art. I, §§ 4, 9, 12, 15, 21, 23, 24; Art. VI, § 11; Art. XI, §§ 4, 10.

¶9. Gaustad lies and deceives the Court in [**Appellee Brief ¶’s 21-27**]. One legal issue to consider is whether Schmalenberger has a lawful duty to preside in this case. He doesn’t. In fact, Schmalenberger should not have said anything other than “dismissed without prejudice,” and Holkesvig appealed because he “inserted conditions” into his ruling. See [**Appellant Brief, ¶’s 25-31**], [**P.App.50-200**]. Gaustad’s odious ruse continues with false claims and misleading accusations in [**Appellee Brief ¶’s 28-33**]. Schmalenberger struck [**Index #23**] from the record to cover up the State’s repugnant and abhorrent abuse, [**P.App.50-125**], including Gaustad’s blatant lies from his Answer Brief, [**P.App.40-49**].

¶10. Gaustad’s deception continues in [**Appellee Brief, ¶’s 34-42**]. Holkesvig has never stated or implied, “¶36, ‘...arguments on appeal make it clear that his goal...etc...,’” is a blatant lie concocted by Wickham Corwin and Gaustad in the Welte cases. The Justices intentionally retaliate with blatant lies and false allegations identical to this rhetoric. Their odious behavior and illegal rulings actually conflicts with state rules, statutes and Federal law. They will just ignore Holkesvig’s evidence and falsely say “it is irrelevant,

unnecessary, without merit or not considered.” Try finding ND Supreme Court Case No. 20140101. Schmalenberger intentionally covered up Rost’s abuse by presiding in GF Co. No. 18-2013-CV-00716. Edison illegally covered up Gaustad’s trust account violation. Edison illegally covered up +80 Judicial and Disciplinary complaints that includes former Justice Maring’s Judicial Complaint which 3 Justices and VandeWalle witnessed Maring’s comments. Maring resigned while the other Justices continue their vindictive and retaliatory assault on Holkesvig’s due process rights. Gaustad lies about the Rost assault and frivolous comments inserted in the “Service Order” from May 2013. Gaustad and the State cannot cover it up or retaliate against Holkesvig for telling the truth. Gaustad’s failure to address “strictest proof thereof,” magnifies his deception, denials and blatant lies. Serious due process, equal protection and access to the courts was ignored by Schmalenberger even though he presided in 2 other cases and had prior knowledge of evidentiary facts that is highly relevant to this lawsuit.

¶11. Gaustad now wants cash/fees/costs and protection from the Justices to block a future lawsuit being filed against him for fraud, unjust enrichment, trust account violations, etc...all associated with his illegal, immoral and unethical misconduct in defending Welte, Grove and Rost. The integrity and dignity of the Court and justice was tarnished, tainted and corrupted by Gaustad’s regular use of lies, fraud, deceit and doublespeak. N.D.C.C. §§ 28-26-01 and 28-26-31 prevents Gaustad from profiting using frivolous and meritless tactics in bad faith with untrue pleadings, that conflicts with Holkesvig’s good faith arguments, truth, evidence and justice.

¶12. Gaustad makes several false statements “concerning material information with the

intent to deceive the court.” Disciplinary Bd. v. Kaiser, 484 N.W.2d 102, 103-109 (N.D.1992). “Truth and candor are synonymous with justice, and honesty is an implicit characteristic of the legal profession. ABA, The Judicial Response to Lawyer Misconduct, III.1, III.3 (1984). The primary function of our judicial system is to find the truth to reach a just conclusion. Our courts are almost wholly dependent on members of the bar to marshal and present the true facts.” Dodd v. The Florida Bar, 118 So.2d 17, 19 (Fla.1960); Disciplinary Bd. v. Lamont, 1997 ND 63, ¶ 12, 561 N.W.2d 650.

Gaustad’s deceptive behavior is “antithetical to the oath, the standards, and the ideals of the legal profession.” Disciplinary Bd. v. McDonald, 2000 ND 87, ¶ 36, 609 N.W.2d 418.

¶13. Schmalenberger breached his duty by violating his Oath and refusing to recuse. He “sat in as a replacement Justice,” +75 times or more since 1982. The sham appointment by VandeWalle was illegal, immoral and unethical that implies a breach of duty to his Oath, due process, justice and public trust. Gaustad’s fees/costs request must also be void, based on 14th Amendment due process violations, odious retaliation by Justices 2013-2014 Judicial complaints and “bitter controversies,” Mayberry v. Pennsylvania, 400 U.S. 455, 465-466 (1971); Johnson v. Mississippi, 403 U.S. 212, 215-216 (1971).

“If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.” Olmstead v. United States, 277 U.S. 438, 485 (1928). “No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.” United States v. Lee, 106 U.S. 196, 220 (1882).

## CONCLUSION

¶14. Schmalenberger's failure to address, recuse and/or disqualify also meant he could not, by law, insert "fraudulent conditions," into his Order. The court abused its discretion. Holkesvig is entitled costs. When the probability of actual bias is too high to be constitutionally tolerable, the Due Process Clause requires judicial recusal. His order must be void and vacated.

Dated this 11<sup>th</sup> day of February, 2015.

Randy Holkesvig  
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**CERTIFICATE OF COMPLIANCE**

¶15. The undersigned, as a Pro Se Plaintiff and Appellant in the above named matter and as author of the above named brief, hereby certifies, in compliance with N.D.R.App.P. 32(a)(8), the above named brief was prepared in times new roman 12, excluding the number of words in the table of contents, table of authorities and certificate of compliance, paragraph numbers, etc...does not exceed 2,000 words.

Dated this 11<sup>th</sup> day of February, 2015.

Randy Holkesvig  
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Cell # 701-430-0914

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

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Randy Holkesvig,	)	
Plaintiff and Appellant,	)	
	)	<b>Supreme Court No. 20140399</b>
vs.	)	
	)	<b>Grand Forks Co. No. 18-2014-CV-00519</b>
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**APPEAL FROM JUDGMENT OF DISMISSAL WITHOUT PREJUDICE  
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**FROM THE DISTRICT COURT  
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GRAND FORKS COUNTY, NORTH DAKOTA**

**THE HONORABLE SURROGATE JUDGE  
ALLAN L. SCHMALENBERGER PRESIDING**

---

**AFFIDAVIT OF SERVICE**

---

Randy Holkesvig, the Plaintiff and Appellant in the above named matter, being first duly sworn, deposes and says: that he is of legal age and a citizen of the United States, that on February ~~11~~<sup>17</sup>, 2015, he served by U.S. Mail with postage prepaid from a UPS store in Fargo, ND with tracking, a true and correct copy of the following documents filed with the ND Supreme Court in the above-entitled matter:

- > Reply Brief
- > Affidavit of Service

addressed and mailed to:

Daniel Lee Gaustad  
Attorney at Law  
Pearson Christensen & Clapp, PLLP  
24 N. 4th St.  
P.O. Box 5758  
Grand Forks, ND 58206-5758

To the best of your affiant's knowledge, information and belief, the actual address of the lawyer/party intended to be served is the actual address that was served in accordance to the North Dakota Rules of Civil Procedure and also under the rules of perjury.

Dated this 11<sup>th</sup> day of February, 2015.

Randy Holkesvig  
Randy Holkesvig  
P.O. Box 82  
Fargo, ND 58107-0082  
Cell # 701-430-0914

Subscribed and sworn before me on this 11 day of February, 2015 in  
Cass County, North Dakota, by Randy Holkesvig.

Sloane Peterson  
Notary Public

