

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

| | | |
|---------------------------|---|---|
| Randy Holkesvig, |) | |
| Plaintiff and Appellant, |) | |
| |) | Supreme Court No. 20140399 |
| vs. |) | |
| |) | Grand Forks Co. No. 18-2014-CV-00519 |
| Bob Rost and |) | |
| Linda Funkhouser, |) | |
| Defendants and Appellees. |) | |

**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**

PETITION FOR REHEARING

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

TABLE OF CONTENTS

| | <u>Para.</u> |
|---|---------------------|
| Table of Authorities.....(Page)..... | ii |
| Statement of Issues: | |
| I. Did the North Dakota Judiciary illegally, knowingly, willingly and wantonly retaliate against Holkesvig with corruption, collusion, conspiracy and cover up that obviously violates their Judicial Oath, the North Dakota Constitution and the Fifth and Fourteenth Amendment of the U.S. Constitution?..... | 1 |
| Statement of the Case..... | 2 |
| Statement of Facts..... | 3 |
| Law and Argument..... | 5 |
| Conclusion..... | 13 |
| Certificate of Compliance..... | 14 |

TABLE OF AUTHORITIES

| <u>CASE LAW:</u> | <u>Para.</u> |
|--|--------------|
| <u>Federal and U.S. Supreme Court:</u> | |
| <u>Bracy v. Gramley</u> , 520 U.S. 899 (1997)..... | 12 |
| <u>Chambers v. NASCO, Inc.</u> , 501 U.S. 32, 44 (1991)..... | 8 |
| <u>Marbury v. Madison</u> , 1 Cranch 137, 5 U.S. 137, 177-179 2 L.Ed. 60 (1803)..... | 9 |
| <u>Pfizer, Inc. v. International Rectifier Corp.</u> , 538 F.2d 180, 195 (8th Cir.1976)..... | 8 |
| <u>Ryland v. Shapiro</u> , 708 F.2d 967, 971-972 (5th Cir.1983)..... | 7 |
| <u>United States v. Maloney</u> , 71 F.3d 645 (7th Cir.1995)..... | 12 |
| <u>U.S. v. Tweel</u> , 550 F.2d. 297, 299-300 (1977)..... | 8 |
| <u>Wilson v. Thompson</u> , 593 F.2d 1375, 1387 (5th Cir. 1979)..... | 7 |
| <u>North Dakota:</u> | |
| <u>Albrecht v. Metro Area Ambulance</u> , 1998 ND 132, ¶ 17, 580 N.W.2d 583..... | 10 |
| <u>Fischer v. Knapp</u> , 332 N.W.2d 76 (N.D.1983)..... | 10 |
| <u>Goetz v. Gunsch</u> , 80 N.W.2d 548, 553-554 (N.D.1956)..... | 12 |
| <u>In re Estate of Jensen</u> , 162 N.W.2d 861, 876 (1968)..... | 10 |
| <u>Larson v. Dunn</u> , 474 N.W.2d 34, 38 (N.D.1991)..... | 10 |
| <u>Matter of Disciplinary Action Against Wilson</u> , 461 N.W.2d 105 (N.D.1990)..... | 7 |
| <u>Matter of Estate of Risovi</u> , 429 N.W.2d 404, 407 (N.D.1988)..... | 10 |
| <u>Pifer v. McDermott</u> , 2012 ND 90, 816 N.W.2d 88..... | 6 |
| <u>Pifer v. McDermott</u> , 2013 ND 153, 836 N.W.2d 432..... | 6 |

| | |
|---|---|
| <u>Stutsman County v. Westereng</u> , 2001 ND 114, ¶ 8, 628 N.W.2d 305..... | 7 |
|---|---|

Other Cases:

| | |
|---|----|
| Case No. 08-2015-CV-00676..... | 7 |
| Case No. 08-2015-CV-00677..... | 7 |
| Case No. 08-2015-CV-00679..... | 7 |
| GF Co. Case No. 18-2013-CV-00716..... | 7 |
| <u>Grant v. State</u> , 700 S.W.2d 170, 171 (Mo.App.1985)..... | 10 |
| Holkesvig v. Grove, GF Co. Case No.18- 2011-CV-00040..... | 7 |
| ND Supreme Court Case No. 20140101..... | 12 |
| <u>Petters v. Petters</u> , 560 So.2d 722, 723 (Miss.1990)..... | 10 |
| <u>State v. Sawyer</u> , 305 P.3d 608, 616 (Kan.2013)..... | 9 |
| <u>Tierney v. Four H Land Co.</u> , 798 N.W.2d 586, 591 (Neb.2011)..... | 8 |

STATUTES, CONSTITUTION, RULES, OTHER:

North Dakota Century Code:

| | |
|---|---|
| N.D.C.C. § 12.1-08-03(1)(c), (d), (e), (2)(a), (b)..... | 2 |
| N.D.C.C. § 12.1-08-04(1), (2)(a), (b)..... | 2 |
| N.D.C.C. § 12.1-14-01..... | 2 |
| N.D.C.C. § 12.1-14-04(1), (2)..... | 2 |
| N.D.C.C. § 12.1-14-05..... | 2 |
| N.D.C.C. § 12.1-17-01..... | 2 |
| N.D.C.C. § 28-01-18(1)..... | 2 |

North Dakota Constitution:

Art. VI, § 8..... 10

Article XI Section 4..... 7, 9

Article XI Sections 10 and 11..... 7

North Dakota Rules:

Canon 1..... 4

N.D. Code Jud. Conduct Rule 1.1..... 2

N.D. Code Jud. Conduct Rule 1.2..... 4

N.D. Code. Jud. Conduct Rule 2.7..... 2

N.D. Code. Jud. Conduct Rule 2.11..... 2, 4

N.D. Code Jud. Conduct Rules 2.11(A)(1) and (5)(d)..... 3

N.D. Code Jud. Conduct Rules 2.13, 2.15, 2.16, 3.6 and 4.3..... 4

U.S. Constitution:

First Amendment..... 7

Fifth Amendment..... 1

Fourteenth Amendment..... 1, 9

Other:

1 Freeman on Judgments, 5th Ed., Section 232, p.460..... 12

46 Am.Jur.2d Judgments §§ 49, 50..... 10

STATEMENT OF ISSUES

¶1. I. Did the North Dakota Judiciary illegally, knowingly, willingly and wantonly retaliate against Holkesvig with corruption, collusion, conspiracy and cover up that obviously violates their Judicial Oath, the North Dakota Constitution and the Fifth and Fourteenth Amendments of the U.S. Constitution?

STATEMENT OF THE CASE

¶2. On 4-18-13 Grand Forks County Sheriff Bob Rost knowingly and intentionally assaulted Holkesvig in violation of N.D.C.C. § 12.1-17-01. Rost roughly shoved Holkesvig's mid-back area in a hasty manner that caused injuries. Assault has a 2 year statute, N.D.C.C. § 28-01-18(1). Funkhouser witnessed the assault and lied about it in violation of N.D.C.C. § 12.1-08-03(1)(c), (d), (e), (2)(a), (b), N.D.C.C. § 12.1-08-04(1), (2)(a), (b). Official oppression was violated, N.D.C.C. § 12.1-14-01. Funkhouser and Rost discriminated against Holkesvig in violation of N.D.C.C. § 12.1-14-04(1), (2). They prevented Holkesvig from exercising his civil rights in clear and obvious violation of N.D.C.C. § 12.1-14-05. On 4-18-13 Rost illegally prevented Holkesvig from filing court documents that violated N.D.C.C. § 12.1-08-03(1)(c), (e). Rost physically obstructed Holkesvig's right to file a Sheriff's complaint. Rost hindered the investigation by destroying the office video of the actual assault. Simple assault occurs when you "willfully" cause "any kind of bodily injury" to another person. Willful conduct is an act that's done intentionally, knowingly, or recklessly. When people act recklessly, they do so with a clear disregard of the consequences. Compliance with the Law obviously failed under N.D. Code Jud. Conduct Rule 1.1; "A judge shall comply with the law,

including the Code of Judicial Conduct.” A Judge’s responsibility to decide rests under N.D. Code. Jud. Conduct Rule 2.7; “A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.” The “law” includes, “court rules as well as statutes, constitutional provisions, and decisional law. See N.D. Code Jud. Conduct Rules; “Terminology.”

STATEMENT OF FACTS

¶3. Schmalenberger’s refusal to recuse and/or disqualify obviously violates due process that contradicts and violates his Judicial Oath, the N.D. and U.S. Constitution and N.D. Code Jud. Conduct Rules 2.11(A)(1) and (5)(d);

Disqualification Rule 2.11(A), A judge shall disqualify in any proceeding in which the judge’s impartiality might reasonably be questioned, including the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding and (5) The judge: (d) previously presided as a judge over the matter in another court.

¶4. “Impropriety” includes conduct that violates the law, court rules, or provisions of this Code and conduct that undermines a judge’s independence, integrity, or impartiality. “Integrity” means probity, fairness, honesty, uprightness, and soundness of character. (Canon 1 and Rule 1.2). “Knowingly” means actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances. (Canon Rules 2.11, 2.13, 2.15, 2.16, 3.6 and 4.3).

LAW AND ARGUMENT

¶5. Schmalenberger blurred the lines between a Judge’s “ethical obligation to recuse,” a “statutory and mandatory requirement to recuse” and a “compulsion under the Due

Process Clause to recuse.” This is an extraordinary circumstance in which, by their Judicial Oath, constitutional law, statute, Judicial Canon Rule and Due Process Clause, requires an automatic mandatory recusal and/or disqualification by Schmalenberger and the ND Supreme Court Justices, (hereinafter, NDSCJ).

¶6. A prime example of favoritism, collusion, conspiracy, corruption and cover up by the NDSCJ occurred in Pifer v. McDermott, 2012 ND 90, 816 N.W.2d 88 and Pifer v. McDermott, 2013 ND 153, 836 N.W.2d 432. Crothers worked at Nilles Law Firm in Fargo from January 1987 to June 2005 that served as Pifer’s Legal Counsel. Crothers authored the 2nd opinion even though he previously disqualified himself from participating in the 1st Appellate decision. Sandstrom is a “Facebook friend of Pifer.” Sandstrom authored the 1st opinion by denying McDermott justice.

¶7. In Burleigh County, lawsuits were filed against Chief Justice VandeWalle, Case No. 08-2015-CV-00676; former Justice Mary Maring, Case No. 08-2015-CV-00677; Brent Edison/Kara Johnson, Case No. 08-2015-CV-00679. Justice Kapsner turned a blind eye and intentionally ignored Judicial abuses, improprieties and ambiguities by Schmalenberger and the NDSCJ in this case, but acting as an Attorney in 1990, Kapsner “manipulated Judge Wilson's language in order to change, to favor her client, an ambiguity in the judge's direction.” Matter of Disciplinary Action Against Wilson, 461 N.W.2d 105 (N.D.1990). Stenehjem and Dalrymple know about the illegal, immoral and unethical behavior by Rost, his Deputies and the Trail Co. Sheriff’s Department. They are well aware of the illegal and retaliatory acts by the NDSCJ and the ongoing corruption in Grand Forks County by numerous Judges, Magistrates, Clerks and

selective Law Enforcement Officials. Lawrence Jahnke, Joel Medd, Sonia Clapp, David Vigeland, Peter Welte, Tom Falk, Dennis Herbeck and Dan Hill have all quit or abruptly resigned as a direct result of their blatant lies and corruptive acts that occurred between 12-20-07 and 4-1-15. Article XI Sections 4, 10 and 11 in the ND Constitution were knowingly and intentionally violated by corrupt conduct, malfeasance and misdemeanor in office by Dalrymple, Stenehjem, Schmalenberger, NDSCJ, Rost and Funkhouser. On 4-18-13 Rost ordered 2 Deputies to block and deny Holkesvig his Constitutional right to access the Court to file important documents in Holkesvig v. Grove, GF Co. Case No.18- 2011-CV-00040. Schmalenberger knew about Rost's illegal conduct in GF Co. Case No. 18-2013-CV-00716. "Of what avail is it to the individual to arm him with a panoply of constitutional rights if, when he seeks to vindicate them, the courtroom can be hermetically sealed against him by a functionary who, by refusal or neglect impedes the filing of his papers?" Ryland v. Shapiro, 708 F.2d 967, 971-972 (5th Cir.1983). This fact alone, lawfully defeats the "odious and frivolous claims in the NDSCJ Opinion." Access to the courts is protected by the First Amendment right to petition for redress of grievances. Wilson v. Thompson, 593 F.2d 1375, 1387 (5th Cir. 1979). A person is denied due process when defects in the procedure employed might lead to a denial of justice. Stutsman County v. Westereng, 2001 ND 114, ¶ 8, 628 N.W.2d 305.

¶8. "Fraud on the court" is characterized as "a scheme to interfere with the judicial machinery performing the task of impartial adjudication, as by preventing the opposing party from fairly presenting his case or defense."

Pfizer, Inc. v. International Rectifier Corp., 538 F.2d 180, 195 (8th Cir.1976). A

miscarriage of justice would have been averted if Schmalenberger and the NDSCJ had recused and disqualified themselves. See Tierney v. Four H Land Co., 798 N.W.2d 586, 591 (Neb.2011). Based on principles of integrity, dignity and due process a refusal to recuse is repugnant to the justice system. The Opinion deviates dramatically from these principles because of illegal retaliation with fraud that violates due process. A federal court has the inherent power “to vacate its own judgment upon proof that a fraud has been perpetrated upon the court.” Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991). VandeWalle assigns Schmalenberger who’s refusal to recuse and disqualify is repugnant to justice. It’s equivalent to fraud, extortion and retaliation. There is a legal, moral and ethical obligation for the NDSCJ to lawfully address the video, disqualification, recusal and the illegal lower court ruling. The animosity, hatred and retaliation is revealed in their Opinion. “Silence can only be equated with fraud when there is a legal and moral duty to speak or when an inquiry left unanswered would be intentionally misleading.” U.S. v. Tweel, 550 F.2d. 297, 299-300 (1977). The NDSCJ silence is malicious and intentionally left unanswered that obviously plays a vital role in their retaliatory Opinion/Judgment that is highly illegal, immoral and unethical. It actually opens the door for additional abuse and corruption against Holkesvig by State Officials.

¶9. 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, 305 P.3d 608, 616 (Kan.2013), (Emphasis added). Schmalenberger and the NDSCJ have a legal obligation to fulfill the trust placed in the state’s judiciary and to use the respective office and power in a manner that is consistent with the truth,

candor and justice. The Oath of Office under Article XI, Section 4 must comply with the ND and U.S. Constitution. Schmalenberger and the NDSCJ failed to abide by their solemn oath to uphold the dignity, integrity and honor of their profession and of the legal system. Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 177-179 2 L.Ed. 60 (1803).

¶10. Any and all orders or rulings made by a disqualified judge must be vacated.

Grant v. State, 700 S.W.2d 170, 171 (Mo.App.1985). The Judgment, [¶¶3-6] is flawed and meritless. It's vindictive and retaliatory. Schmalenberger's Orders are void and they cannot be adjudicated or enhanced by the frivolous and corruptive rulings by the NDSCJ on appeal. Retaliation is illegal. The NDSCJ cannot legally award costs or fees.

“[A] void judgment is regarded as a nullity. It leaves the parties litigant in the same position they were in before the trial. The general rule is that a judgment which is void cannot be cured by subsequent proceedings,” 46 Am.Jur.2d Judgments §§ 49, 50, Id., where disqualification cannot be remitted, a judge must immediately withdraw and any subsequent order is void. Matter of Estate of Risovi, 429 N.W.2d 404, 407 (N.D.1988).

The Constitutional issue regarding due process and the recusals must be legally addressed by vacating the Order issued. In re Estate of Jensen, 162 N.W.2d 861, 876 (1968). “A rule of law should not be interpreted so as to benefit or reward the wrongdoer or to shield the perpetrator.” Fischer v. Knapp, 332 N.W.2d 76 (N.D.1983). A court has subject matter jurisdiction to hear a proceeding if authorized by the constitution and law to hear it. Larson v. Dunn, 474 N.W.2d 34, 38 (N.D.1991). Under N.D. Const. art. VI, § 8, a district court has original jurisdiction of all causes, except as otherwise provided by law. The refusal to recuse/disqualify by Schmalenberger and the NDSCJ violates subject

matter jurisdiction, state law, the ND and U.S. Constitution, Judicial Canons and Judicial Oath. The judgment and opinion issued by Schmalenberger and the NDSCJ must be void and vacated. Albrecht v. Metro Area Ambulance, 1998 ND 132, ¶ 17, 580 N.W.2d 583.

“Jurisdiction precedes adjudication.” Petters v. Petters, 560 So.2d 722, 723 (Miss.1990).

¶11. The Opinion issued, [¶¶1-6] clearly violates due process with bias and illegal retaliation that is unconstitutional. VandeWalle, Maring and Edison/Johnson are using this “Opinion and Judgment,” illegally, for their “lawsuit pleading replies.”

¶12. “Operation Greylord” revealed pervasive corruption in Cook County Illinois courts during the 1980’s. Bracy v. Gramley, 520 U.S. 899 (1997); United States v. Maloney, 71 F.3d 645 (7th Cir.1995). Fraud, judicial corruption, collusion, conspiracy and cover up occurred with every Judge and the NDSCJ that involved every Holkesvig appeal. “Fraud vitiates everything” is applicable to judgments. 1 Freeman on Judgments, 5th Ed., Section 232, p.460; Goetz v. Gunsch, 80 N.W.2d 548, 553-554 (N.D.1956). If Holkesvig doesn’t expose the Judicial and Law Enforcement corruption, who will? If those involved think Holkesvig is lying, file a lawsuit. ND Supreme Court Case No. 20140101 contains evidence of Judicial retaliation, fraud, corruption, collusion, conspiracy and cover up.

CONCLUSION

¶13. The quality of justice is not measured by what our best judges can do, it’s measured by what the worst judges have already done. The NDSCJ are preventing, blocking, fixing and pre-judging old and new civil cases and all appeals by issuing illegal, immoral and unethical orders to conceal their past illegal, immoral and unethical rulings and opinions that involves collusion, corruption, conspiracy and cover up. It becomes obstruction of

justice with retaliation and malice that is fraud upon the court with miscarriage of justice.

Respectfully submitted on May ____, 2015.

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

CERTIFICATE OF COMPLIANCE

¶14. 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. 40, 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, does not exceed 2,000 words.

Dated this __ day of May, 2015.

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

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

| | | |
|---------------------------|---|---|
| Randy Holkesvig, |) | |
| Plaintiff and Appellant, |) | |
| |) | Supreme Court No. 20140399 |
| vs. |) | |
| |) | Grand Forks Co. No. 18-2014-CV-00519 |
| Bob Rost and |) | |
| Linda Funkhouser, |) | |
| Defendants and Appellees. |) | |

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

AFFIDAVIT OF SERVICE

Randy Holkesvig, 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 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:

- > **Petition For Rehearing**
- > **Affidavit of Service**

addressed and mailed to:

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

and:

Clerk of the Supreme Court
State Capitol
600 E. Boulevard Ave.
Bismarck, ND 58505-0530

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 ___ day of May, 2015.

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

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

Notary Public