

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

**Supreme Court No. 20190369
Divide Co. Court No. 12-2016-CV-00042**

Ronald Smithberg,)
)
Petitioner,)
)
vs.)
)
Honorable Paul Jacobson, Judge of the)
District Court, Northwest Judicial District,)
Gary Smithberg, James Smithberg, and)
Smithberg Brothers, Inc.,)
)
Respondents.)

RE: RONALD SMITHBERG V. GARY SMITHBERG, JAMES SMITHBERG, AND SMITHBERG BROTHERS, INC., DIVIDE COUNTY DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT, THE HONORABLE PAUL JACOBSON, PRESIDING, AND JUDGE JACOBSON'S *ORDER FOR BENCH TRIAL* ISSUED OCTOBER 18, 2019.

RESPONSE TO PETITION FOR SUPERVISORY WRIT

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9 C. Wright & Miller, Federal Prac., § 2334 (1971) ¶19

9Fed. Prac. & Proc. Civ. § 2321 ¶18

I. Statement of Issues

[¶1] Whether this Court should issue a supervisory writ directing the district court to try the remaining issues to a jury instead of proceeding with the bench trial scheduled for September 2020.

II. Statement of Case

[¶2] This case is a dispute among shareholders of a closely-held farming corporation based in Divide County. In May 2016, Ronald Smithberg (“Ron”) initiated this action against Defendants Gary Smithberg (“Gary”), James Smithberg (“Jim”), and Smithberg Brothers, Inc. (“the Corporation”), alleging thirteen separate causes of action. Doc ID #1. The parties conducted written discovery and depositions of Ron, Gary, and Jim in August 2017. Doc ID ##54-56, 68, 71, 151, and 165. In November 2017, Defendants moved the district court for partial summary judgment against Ron. Doc ID ##47-58. Oral arguments on this motion were held before Judge Jacobson in December 2017 and the district court granted partial summary judgment in favor of Gary, Jim, and the Corporation in January 2018. Doc ID# 93.

[¶3] A few days after partial summary judgment was granted, Ron prematurely filed an appeal to this Court. Doc ID# 100; see Supreme Court No. 20180042. That appeal was dismissed on the grounds that the partial summary judgment was interlocutory and not authorized by law. Doc ID #103; See Supreme Court No. 20180042. This first appeal is an example of Ron’s disregard for procedure and an obvious attempt to delay the trial scheduled shortly thereafter. After the matter was handed back to the district court, Ron filed a motion for reconsideration that was denied. Doc ID# 140.

[¶4] The parties proceeded to a bench trial before Judge Jacobson in April 2018. Doc ID #252. At trial, despite the fact that the sole issue to be decided was the value of Ron's interest in the Corporation under N.D.C.C. § 10-06.1-26, and because this was a bench trial, Judge Jacobson freely permitted Ron to enter exhibits relating to his thirteen causes of action. Id. See Doc. ID ##165-224. Following extensive briefing by the parties, the district court issued its Findings of Facts, Conclusions of Law, and Order for Judgment in October 2018. Id. Ron appealed the judgment to this Court and after oral arguments in April 2019, an opinion was issued in July 2019. See Smithberg v. Smithberg, et al., 2019 ND 195, 931 N.W.2d 211. In its opinion, this Court reversed the district court's grant of summary judgment dismissal of Ron's thirteen causes of action and also reversed the district court's valuation of Ron's interest in the Corporation to the extent the value of the Corporation increased due to any recovery on Ron's derivative claims. Id. at ¶29. Importantly, the opinion also provided guidance to the district court on issues that were anticipated to arise on remand. Id. at ¶17. This Court found that the district court did not abuse its discretion in determining the valuation date of Ron's share of Smithberg Brothers as of June 16, 2016 (i.e. the date Ron commenced his action), whereas Ron was requesting a valuation date of December 31, 2011. Id. at ¶21. Additionally, the district court's methodology in valuing Ron's share (based on the Defendants' expert opinion) was also not clearly erroneous. Id. at ¶27.

[¶5] Dissatisfied with the opinion of this Court, Ron filed a Petition for Rehearing in July 2019, which was denied in August. On remand, the district court held a telephonic scheduling conference in September 2019. See Doc. ID #278. At that conference, the parties disagreed on whether it was appropriate for the matter to proceed to a bench trial

(argued by Gary, Jim, and Smithberg Brothers) or a jury trial (argued by Ron) and the district court ordered the parties to submit briefs on the same. See Doc. ID #281. The parties submitted briefs on October 8, 2019, and the district court issued its order for a bench trial ten days later on October 18, 2019. See Doc. ID #286. Ron subsequently filed his petition for a supervisory writ on November 25, 2019, and this Court requested this response.

III. Statement of Relevant Facts

[¶6] Ron has petitioned this Court for a supervisory writ, requesting the Court (1) remove Judge Jacobson from this case; (2) instruct a new judge to hold a scheduling conference to set deadlines; and (3) direct the new judge to schedule a jury trial to address the issues remanded from this Court in Smithberg v. Smithberg, et al., 2019 ND 195, 931 N.W.2d 211. For the reasons discussed below, Respondents Gary Smithberg (“Gary”), James Smithberg (“Jim”), and Smithberg Brothers, Inc. (“Smithberg Brothers”) request the Court deny Ron’s petition in its entirety.

[¶7] The general facts of this dispute are outlined in the Supreme Court’s opinion in Smithberg v. Smithberg, et al., 2019 ND 195, 931 N.W.2d 211. The facts relevant to Ron’s petition for a supervisory writ are significantly narrower. When this action was initiated by Ron against Gary, Jim, and the Corporation, the sole reference to a jury demand was in the title of the complaint. See Doc. ID #1. The text of the complaint does not reference this demand, nor was any subsequent pleading making such demand filed before the scheduling conference with Judge Jacobson was held on February 17, 2017. While this may be evidence of sloppiness, it is not ultimately relevant because the district court set a jury trial for October 1, 2019. See Doc. ID #26. What is relevant is that Ron

subsequently stipulated to waive his right to a jury trial by submitting, or permitting his attorneys to submit, a stipulation in compliance with Rule 39(a)(1) of the North Dakota Rules of Civil Procedure. See Doc. ID #38.

[¶8] All discovery was completed before Judge Jacobson granted partial summary judgment in January 2018. At that point, the parties were prepared, or should have been prepared, to proceed to a bench trial in February 2018. After a ruling that was unfavorable to his client, Ron's attorney began efforts to re-assert a jury demand. On January 29, 2018, days after the partial summary judgment order, Ron's attorney filed his premature first appeal. On January 30, 2018, the district court issued a notice that the trial scheduled for February 2018 was cancelled due to the appeal and rescheduled the trial for April 2018. The same day, Ron's attorney filed an objection to this notice, within which he "reserved his right to a jury trial." Nevertheless, after the premature appeal was dismissed, the parties proceeded to a bench trial in April 2018.

[¶9] According to Ron's petition for this supervisory writ, Ron again requested a jury trial in his appellate briefing; however, the only mention regarding a jury trial was in the conclusion of Ron's appellate brief (¶90) and the conclusion of Ron's reply brief (¶23). No legal authority was cited in either brief which would permit Ron to withdraw his waiver, and no argument was made other than the blanket demand for a jury trial. In issuing the opinion in the second appeal, this Court did not address Ron's request for a jury demand, nor was the district court directed to proceed with a jury trial versus a bench or court trial. In his petition for rehearing, which followed this Court's opinion, Ron did not raise this issue.

IV. Argument

A. Legal Standard of Supervisory Writs

[¶10] Recently, in *Plains Trucking, LLC v. Cresap, et al.*, 2019 ND 226, 932 N.W.2d 541, the standard for exercising supervisory jurisdiction was restated:

Our authority to issue supervisory writs derives from N.D. Const. art. VI, § 2, and N.D.C.C. § 27-02-04. The authority to issue supervisory writs is discretionary; it cannot be invoked as a matter of right. This Court determines whether it should exercise its original jurisdiction to issue remedial writs on a case-by-case basis. Courts generally will not exercise supervisory jurisdiction where the proper remedy is an appeal merely because the appeal may involve an increase of expenses or an inconvenient delay. We exercise our authority to issue supervisory writs rarely and cautiously, and only to rectify errors and prevent injustice in extraordinary cases in which there is no adequate alternative remedy.

Id. at ¶6 (citations omitted). We contend Ron’s petition fails to satisfy this standard.

B. Ron’s Request for Removal of Judge Jacobson

[¶11] Ron argues in his petition that Judge Jacobson should be removed and a new judge should be assigned. Gary, Jim, and Corporation fail to see how the removal of Judge Jacobson is necessary to “rectify errors and prevent injustice in extraordinary cases in which there is no adequate alternative remedy,” as required by the standard for exercising supervisory jurisdiction. In fact, Ron made this request in his appellate briefing and this Court addressed his request in its opinion, finding no facts supporting bias by Judge Jacobson. *Smithberg* at ¶28. This Court went further:

To the extent he is asserting judicial impropriety based on the judge’s misapplication of the law, “we have stated that ‘[a]n erroneous opinion as to the merits of the case or the law relating to the proceedings is not evidence of bias.’” *State v. Craig*, 2019 ND 123, 10, 927 N.W.2d 99 (quoting *Datz v. Dosch*, 2014 ND 102, ¶ 17, 846 N.W.2d 724).

Id. Since the remand, the only thing that has transpired is Judge Jacobson's ruling on proceeding to a court trial and not a jury trial. While we do not believe Judge Jacobson abused his discretion or made an error in making this determination, if this Court finds he misapplied the law, the same reasoning would apply: misapplication of law is not evidence of bias.

[¶12] Instead, Ron's counsel attempts to manufacture evidence where there is none. First, he relies on faulty logic by arguing that this case has been before the Supreme Court three times. The first time was Ron's premature appeal in January/February 2018. The second time was the appeal this Court heard. It is noteworthy that the Supreme Court did not find abuses of discretion in issues tried to Judge Jacobson in April of 2018. Rather the remand directs findings on Ron's thirteen causes of action dismissed on summary judgment and the valuation of the Corporation to the extent the Corporation is entitled to remuneration through derivative claims. The third time is this petition for a supervisory writ. Two false starts by Ron do not fall on Judge Jacobson, rather Ron's attorney's impulsiveness.

[¶13] Additionally, Ron asserts "[a] change of judge is also warranted where there is a "inability or unwillingness to follow" the Supreme Court's mandate as well as "out of concern for the tumult from and cost of litigation." Law v. Whittet, 2015 ND 16, ¶ 12, 858 N.W.2d 636. There is no evidence that this has occurred. Judge Jacobson hasn't been given the opportunity to follow the mandate because this writ was filed before the proceedings occurred. There is nothing in the Court's remand that directs the matter to be tried to a jury. This issue is outside of the directives in the remand. This blame-the-

judge strategy employed by Ron is in itself a separate cause of the tumult and increased cost in litigation, which this Court was trying to avoid in Law v. Whittet.

C. Ron's Request for a Jury Trial

[¶14] The true concern of Ron's petition is whether this Court should issue a supervisory writ directing the district court to try the remaining issues to a jury. As indicated above, Gary, Jim, and the Corporation do not dispute that Ron initially demanded a jury trial. The sufficiency of his demand in his complaint is irrelevant because the district court scheduled a jury trial for October 2018. Notably, however, Ron then waived his jury demand by entering into a stipulation to proceed with a bench trial in February 2018. The vast majority of all of the authorities cited in Ron's petition do not involve a situation similar to this. Also of importance is that Ron's petition does not provide this Court with an accurate depiction of North Dakota law, pulling heavily from other states and federal law from outside the Eighth Circuit. Rather than creating new law, we contend that applying the facts of this matter to current North Dakota law, this Court will reach the proper conclusion on Ron's petition.

1. Right to a trial by jury; waiver of trial by jury.

[¶15] We do not dispute that Ron initially had a right to try this matter to a jury. The North Dakota Constitution clearly states, "The right of trial by jury shall be secured to all, and remain inviolate." N.D. Const. Art. I, § 13. We also recognize that there is case law in North Dakota in which a supervisory writ has been granted where courts have denied a litigant access to a trial by jury. See Reimers v. Eslinger, et al., 2010 ND 76, 781 N.W. 2d 632. However, the parties executed a stipulation, waiving the jury trial set for October 2018, in favor of a non-jury trial in February 2018, in compliance with Rule 39 of the

North Dakota Rules of Civil Procedure. See N.D.R.Civ.P. Rule 39(a)(1). Ron’s petition fails to cite relevant, controlling authority for his argument that his waiver was only effective for a trial scheduled for February 2018. Ron asserts that following the district court’s grant of partial summary judgment against Ron, he “immediately reserved the right to a jury trial on remand and noted the same in his briefs on appeal.” See Petition at ¶34. In essence, Ron filed an objection (i.e. a pleading) reasserting a demand for a jury trial. See Doc ID #98. Under North Dakota law, this is insufficient to revive his jury demand. “Once a party waives the right to trial by jury on any issue under Rule 38(b) and (d), F.R.Civ.P., the right to trial by jury on that issue cannot be revived by amending or supplementing a pleading.” Land Office Co. v. Clapp-Thomssen Co., 442 N.W.2d 401, 403 (1989). While Rule 38 deals with waiver of a jury trial by failure to make a demand, an explicit waiver under Rule 39(a)(1) follows the same legal rationale. Simply reasserting a demand through a pleading has not been found to be sufficient to withdraw a waiver of the right to a trial by jury.

[¶16] Ron’s contention that he raised the issue on appeal (by requesting a jury trial in his appellate brief) ignores several important facts. First, neither his appellate brief nor his reply brief cites any authority or contains any argument regarding a withdrawal of the waiver. Second, the parties did proceed to a bench trial in April 2018. Third, the Supreme Court did not address his request for a jury trial in its opinion and did not direct the further proceedings to be before a jury. Finally, Ron did not raise the issue in his petition for rehearing. If Ron contends he should have been entitled to withdraw his waiver, this petition should have been filed before the parties went to trial, or it should have been clearly outlined in his appellate briefs, or it should have been addressed in his

petition for rehearing when this Court did not find that the waiver was withdrawn or remand for a jury trial. The authorities Ron relies upon are from Texas, Oklahoma, and the 9th Federal Circuit of Appeals. Ron ignores our own case law, which permits a trial court (and Judge Jacobson) broad discretion “to grant relief from the waiver of the right to a jury trial,” and the standard of review for the same, that this Court “will not reverse the denial of a request for a jury trial under Rule 39(b), unless the trial court abused its discretion.” Land Office Co. at 405.

2. The district court did not abuse its discretion in denying Ron’s request to withdraw his waiver.

[¶17] “A trial court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably. We will not find a trial court's decision to be arbitrary, unconscionable, or unreasonable if the decision is the product of a rational mental process in which the facts and law are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.” McMurl v. Minch, 506 N.W.2d 413, 414 (1993). This Court has previously upheld district court judges’ decisions to deny jury trials when they were not properly demanded under a prior version of Rule 39 of the North Dakota Rules of Civil Procedure. Id. The explanatory note to Rule 39, indicates the Rule was amended in 2011 “in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.” N. D. R. Civ. P. Rule 39 (Explanatory Note).

[¶18] Following this Court’s remand, the parties participated in a scheduling conference where Ron raised the issue of proceeding with a jury trial versus a bench trial. The

district court requested the parties brief the matter and ultimately issued an order to proceed with a bench trial. Within the Court's order, it indicated:

The stipulation to waive a jury trial does not reflect that it was contingent on any particular circumstance, although there is no question that the scheduling of a bench trial would be at a much earlier date than a jury trial. That consideration would undoubtedly be the same now that the case has been remanded. "Once the opportunity to demand a jury trial effectively is waived, the right to jury trial is not revived by a reversal on appeal or by the grant of a new trial. It is within the discretion of the trial court under Rule 39(b) whether to grant a jury trial in this situation to a party who previously waived that trial right." Waiver of Jury Trial, 9Fed. Prac. & Proc. Civ. § 2321 (3d ed.). Our Rule 39(b) appears to be the same as the Federal Rule 39(b). Trial courts are given broad discretion in determining whether to allow a jury trial under 39(b). Hanson v. Williams County, 452 N.W. 2d 313,314-315 (N.D. 1990).

In deciding whether to exercise that discretion, this Court has considered that it is, at this point, reasonably familiar with the issues in the case, that a bench trial will resolve the issues sooner than a jury trial, that some of Plaintiffs thirteen claims appear equitable in nature and one bench trial on all the issues would serve judicial economy. For these reasons the case will be set as a bench trial.

See Doc. ID #286 ¶¶3-5.

[¶19] In reaching its decision, the district court reviewed the language of the waiver, the timing of a trial date, the district court's familiarity with the issues, and judicial economy. The district court also relied on a treatise by Wright and Miller to reach his determination (where there is no clear guiding case law in North Dakota). We contend that these factors clearly show a decision that is "the product of a rational mental process in which the facts and law are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." McMurl at 414. Additionally, given the evidence that was heard by Judge Jacobson at trial, and potential complications from the

remand, this matter would be significantly complicated for a jury. Based on the foregoing, Judge Jacobson did not abuse his discretion in determining to proceed with a bench trial as opposed to a jury trial.

V. Conclusion

[¶20] Ron argues in his petition that this “is not a situation where a jury was requested, then waived, and then prior to the same trial a party sought to revoke a waiver in an effort to game the system. See Petition at ¶43. We disagree. We think this is exactly that situation. From the premature appeal to the petition for rehearing to this request for a supervisory writ, Ron has attempted to delay, obfuscate, and game the system at every turn. Ron had alternative remedies available to him. Ron could have (and should have): filed this petition before the parties proceeded to the bench trial; properly raised this issue on appeal; or raised this issue in his petition for rehearing. He did not. When he finally followed the proper procedure and raised this issue to Judge Jacobson, the district court did not abuse its discretion in determining that in the interests of the parties and judicial economy, to proceed with a bench trial. This Court exercises its authority to issue supervisory writs rarely and cautiously, and only to rectify errors and prevent injustice in extraordinary cases in which there is no adequate alternative remedy. This is not that case.

CERTIFICATE OF COMPLIANCE

[¶21] The undersigned certifies that the Response complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure the Response contains 14 pages, excluding this Certificate of Compliance.

Dated: December 18, 2019.

SMITH PORSBORG SCHWEIGERT
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AFFIDAVIT OF SERVICE

[¶1] On the 18th day of December, 2019, I, Rachel DeRung, served the party(s) described below with the document(s) also described below by electronically filing the document(s) with the North Dakota Supreme Court Clerk of Court. The email addresses of each such party served are taken from the North Dakota Supreme Court website. I am over the age of eighteen and not a party in this matter.

[¶2] **Document(s) Served:**

1. Response to Petition for Supervisory Writ.

[¶3] **Names & Address of Party(s) Served:**

Joel Fremstad
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Honorable Paul W. Jacobson
pjacobson@ndcourts.gov

Rachel DeRung

Rachel DeRung

Subscribed and sworn to before me
this 18th day of December, 2019.

Carissa Lewis

Notary Public / Burleigh County

