

SUPREME COURT OF NORTH DAKOTA

Gray v. Berg

Gray, 2015 ND 203 (N.D. 2015) · No. 20150040 · Decided August 24, 2015

SUMMARY

The North Dakota Supreme Court reversed a judgment dismissing David Gray's claims against Terry Berg concerning alleged unlawful hunting and trespass. The court held that the district court improperly denied Gray's demand for a change of judge based solely on the demand's timeliness because allegations of judicial bias are not subject to the same deadline as peremptory demands. The case was remanded for review of the bias-based demand and further proceedings.

CASE DETAILS

COURT	Supreme Court of North Dakota
WRITING FOR THE COURT	Gerald W. VandeWalle, Chief Justice; Daniel J. Crothers; Carol Ronning Kapsner; Lisa Fair McEvers; Daniel D. Narum, District Judge
JURISDICTION	North Dakota
DECIDED	August 24, 2015
DOCKET	20150040
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Gray appealed from a final judgment dismissing his claims with prejudice after the district court granted Berg's motion for a directed verdict and denied Gray's demand for a change of judge as untimely.
PRECEDENTIAL VALUE	Published North Dakota Supreme Court opinion
PARTIES	David B. Gray v. Terry Berg

TOPICS

- civil procedure
- appellate procedure
- preservation of error
- trespass

PRACTICE AREAS

- civil procedure
- appellate procedure
- torts

QUESTIONS PRESENTED

1. Whether the district court improperly denied Gray's pretrial demand for a change of judge based on alleged judicial bias by applying the ten-day timeliness requirement for a peremptory demand under N.D.C.C. § 29-15-21.

HOLDINGS

1. A demand for a change of judge based on allegations of bias is not subject to the same ten-day timeliness constraints that apply to a peremptory demand for a change of judge.

KEY QUOTATIONS

“Allegations of bias are not subject to the same time constraints.” (¶ 9)

“If Judge Hill finds merit to the demand for change of judge, a new trial before a different judge should be ordered.” (¶ 11)

FACTUAL BACKGROUND

Gray owned property adjacent to Berg's property. After Berg shot a deer on his own property and the deer traveled onto Gray's property, Berg and others entered or sought to enter Gray's property to locate the deer, despite Gray's refusal of permission and the posting of no-trespass and no-hunting signs. A game warden later entered the property with Berg, prompting Gray to contact law enforcement. Gray alleged that these entries violated North Dakota law and constituted trespass.

PROCEDURAL HISTORY

Gray sued Berg for alleged unlawful hunting, unlawful hunting near occupied buildings, and trespass, seeking damages, fees, injunctive relief, and invalidation of N.D.C.C. § 20.1-01-19. Before trial, Gray demanded a change of judge based on alleged bias and pretrial conduct; Judge James Hill denied the demand as untimely under N.D.C.C. § 29-15-21. After a bench trial, the district court granted Berg's directed-verdict motion, dismissed Gray's claims with prejudice, and awarded Berg attorney's fees. The North Dakota Supreme Court reversed and remanded based solely on the handling of Gray's bias-based demand for a change of judge.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Judge Hill must review the demand for a change of judge based on the evidence introduced in support of it, notwithstanding N.D.C.C. § 29-15-21. If the demand has merit, a new trial before a different judge must be ordered. If it lacks merit, Judge Hill must order entry of a new judgment based on Judge Hagerty's prior order for judgment.

CASES CITED

- Evenstad v. Buchholz, 1997 ND 141, ¶ 11, 567 N.W.2d 194

- Van Sickle v. Hallmark & Assoc., Inc., 2008 ND 12, ¶ 28, 744 N.W.2d 532

OPINION

Gray v. Berg 2015 ND 203

DE WALLE, J.

Filed 8/24/15 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2015 ND 203 David B. Gray, Plaintiff and Appellant v. Terry Berg, Defendant and Appellee No. 20150040 Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Gail Hagerty, Judge. REVERSED AND REMANDED. Opinion of the Court by VandeWalle, Chief Justice. David B. Gray, self-represented, 3800 93rd St. SE, Bismarck, ND 58504, plaintiff and appellant. Laura C. Ringsak (argued) and William C. Severin (appeared), 411 N. Fourth St., Bismarck, ND 58501, for defendant and appellee. Gray v. Berg No. 20150040 VandeWalle, Chief Justice. [¶1] David Gray appealed from a final judgment dismissing his claims with prejudice against Terry Berg for unlawful hunting on posted land, unlawful hunting near occupied buildings, and trespass. We reverse the judgment and remand for further proceedings. I [¶2] The following facts come from testimony at trial and findings of the district court. Gray owns property located adjacent to property owned by Berg. On October 27, 2013, Berg shot a deer in season on his property. That deer traveled onto Gray's property. Berg entered Gray's property unarmed to recover the deer. He was unable to locate the deer. [¶3] The following day, Berg entered Gray's property again with the company of his son and Cole Giese in an attempt to locate the deer. They failed to locate the deer. Giese approached Gray's home seeking permission to search closer to his residence. Gray refused to give permission to search. On November 1, Gray posted no trespass or hunting signs on his property, and Berg's subsequent requests to search the property were all denied. [¶4] Berg contacted the North Dakota Game and Fish Department for assistance in entering onto the property to locate the deer. Game Warden Jackie Lundstrom contacted Gray informing him that she and Berg would be entering his property. On December 23, they entered Gray's property. Gray demanded they leave and contacted the Burleigh County Sheriff's office. Burleigh County Sheriff's deputies responded and did not remove Lundstrom or Berg. A short search was conducted, but no deer was found. [¶5] Gray filed a complaint alleging Berg entered upon his legally posted property for the purpose of hunting and pursuing deer in violation of North Dakota statute. He sought monetary relief for the use of his property, costs and fees, and injunctive relief to prevent further trespass and hunting activities. He also sought to invalidate N.D.C.C. § 20.1-01-19. [¶6] Prior to trial, Gray filed a demand for a change of judge, alleging that Judge Gail Hagerty was biased, that she had ex parte communications with possible witnesses, and that she ordered those witnesses to not communicate with Gray but provided him with no notice of such an order. Judge James Hill denied the demand stating it was not timely

made under N.D.C.C. § 29-15-21. [¶7] At the bench trial, Berg moved for a directed verdict. The district court granted the motion finding that Gray provided insufficient evidence of any trespass or damages occurring in this matter. In its findings of fact and conclusions of law, the district court found Berg had lawfully entered Gray's property to recover game shot on his property under Section 20.1-01-19, and had acted reasonably throughout the attempts to recover the deer. The court also found that Gray's claims were not made in good faith, and dismissed them with prejudice and awarded Berg attorney's fees. II [¶8] On appeal we address only one issue of the several issues raised by Gray, that of his request for removal, before trial, of the assigned trial judge due to bias; we do so on a procedural basis. [¶9] We distinguish peremptory demands for a change of judge from a demand for a change of judge based on bias. *Evenstad v. Buchholz*, 1997 ND 141, ¶ 11, 567 N.W.2d 194. Peremptory demands under N.D.C.C. § 29-15-21 are untimely if filed more than 10 days after notice that trial had been scheduled, notice of assignment or reassignment of a judge for trial of the case, or date of service of any ex parte order in the case signed by the judge against whom the demand is filed. *Evenstad*, at ¶ 11; N.D.C.C. § 29-15-21(2). Allegations of bias are not subject to the same time constraints. *Evenstad*, at ¶ 11. Because the demand for change of judge in this matter was based on allegations of actions of the assigned judge prior to trial, the district court erred in denying the demand based solely on its timeliness.

III

[¶10] Gray argues the district court erred in failing to enforce trespass statutes against Berg, failing to enjoin Berg from baiting deer, failing to invalidate N.D.C.C. § 20.1-01-19, and failing to award him compensation. We do not reach these issues because we reverse the district court's denial of the demand for change of judge and remand for further proceedings. Any opinion we may give on these issues would be advisory only, and we do not issue advisory opinions. *Van Sickle v. Hallmark & Assoc., Inc.*, 2008 ND 12, ¶ 28, 744 N.W.2d 532. IV [¶11] We reverse the judgment and remand for further proceedings. Because the demand for change of judge was referred by the assigned trial judge to Judge Hill to determine, on remand Judge Hill should review the demand based on evidence introduced in support of the demand, notwithstanding N.D.C.C. § 29-15-21. If Judge Hill finds merit to the demand for change of judge, a new trial before a different judge should be ordered. If Judge Hill finds no merit to the demand, he should order entry of a new judgment based on Judge Hagerty's prior order for judgment. Gray may appeal from a new judgment and, if warranted, include the other issues he raises in this appeal. [¶12] Gerald W. VandeWalle, C.J. Daniel J. Crothers Carol Ronning Kapsner Lisa Fair McEvers Daniel D. Narum, D.J. [¶13] The Honorable Daniel D. Narum, D.J., sitting in place of Sandstrom, J., disqualified.