

No. A06-2450

STATE OF MINNESOTA
IN SUPREME COURT

RONALD E. BYERS,

Relator,

vs.

COMMISSIONER OF REVENUE,

Respondent.

RELATOR'S INFORMAL REPLY BRIEF

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INTRODUCTION

The Commissioner of Revenue served his answering brief on Mr. Byers by mail on April 2, 2007.

The Commissioner's brief raises a new matter on appeal. Respondent's Brief at 16-19.

Specifically, the Commissioner now argues that Mr. Byers's Minn. R. Civ. P. 63.02 motion for removal of Minnesota Tax Court Judge Kathleen H. Sanberg for bias was untimely and thus "Mr. Byers waived his right to assert such bias." Respondent's Brief at 20.

The issue of untimeliness and waiver, however, were not raised by the Commissioner in the Minnesota Tax Court either at or before trial, on post-trial brief, or on rehearing.

Accordingly, pursuant to Minn. R.C.A.P. 128.02, Subd. 3, Mr. Byers submits this informal reply brief.

STATEMENT OF FACTS

Mr. Byers moved, under Minn. R. Civ. P. 63.02, for removal of the Honorable Kathleen H. Sanberg when his case was called from the Minnesota Tax Court calendar, but before trial therein commenced. Motion for Removal of Judge Kathleen H. Sanberg; Trial Transcript (Tr.) 4:15-17.

After Mr. Byers made his removal motion, the proceedings took place off the record so that Judge Sanberg and the Commissioner could review it. Tr. 4:22-5:1-4.

Mr. Byers's removal motion specifically noticed Judge Sanberg and the Commissioner that it was made pursuant to Minn. R. Civ. P. 63.02. Motion for Removal preamble, para. 2.

Mr. Byers's removal motion explicitly addressed the possibility that the Commissioner might object to the motion on timeliness grounds. Motion for Removal at para. 21-22.

Mr. Byers's removal motion also unmistakably noticed Judge Sanberg and the Commissioner that, if Judge Sanberg denied his removal motion, Mr. Byers would cite Minn. Gen. R. Prac. 106 and

request reconsideration of the denied removal motion by the Minnesota Tax Court Chief Judge. Motion for Removal at para. 23.

Included in Mr. Byers's removal motion was a prayer for relief that requested that his case be assigned from the Honorable Judge Kathleen H. Sanberg to the Honorable Sheryl A. Ramstad. Motion for Removal at pg. 13.

When Mr. Byers's removal motion was made, both Judge Sanberg and Judge Ramstad were actively considering Mr. Byers's tax year 2000. Minnesota Tax Court docket no. 7733-R; Tr. 16:13-25; Tr. 18:2-22.

At no time did the Commissioner argue to the Tax Court that Mr. Byers's removal motion was untimely and that he had waived his right to argue it. Entire record (post March 5, 2006).

The Tax Court did not deny Mr. Byers's removal motion because it was untimely, but rather because it found that the presiding judge was not biased.

While the Tax Court was somewhat confused at trial as to the precise rule of civil procedure under which Mr. Byers was proceeding,

the Tax Court finally decided Mr. Byers's removal motion solely on its merits. Tr. 13:22-14:3; cf. Tr. 15:4-21, 17:14-15; *Ronald E. Byers v. Commissioner*, Docket No. 7601-R, Minn. Tax Ct. (orders dated August 14, 2006 and November 2, 2006).

ARGUMENT

I. Standard of Review

Whether Mr. Byers's motion for removal of Minnesota Tax Court Judge Kathleen H. Sanberg was untimely and waived presents a question of law that this Court reviews *de novo*.

II. The Tax Court Did Not Determine That Mr. Byers's Motion To Remove The Presiding Judge Was Untimely

Unfortunately, the Commissioner on brief has distorted the record by arguing that the Tax Court denied Mr. Byers's motion to remove because it was untimely.

The trial transcript shows that the Tax Court was somewhat confused about which rule of civil procedure that Mr. Byers was proceeding under. Mr. Byers, both in his removal motion and on presentation of his motion, cited to Minn. R. Civ. P. 63.02 and presented a facial and factual showing of prejudice.

The Tax Court initially denied Mr. Byers's motion to remove on its merits. A little later, apparently in a mistaken belief that Mr. Byers was moving only under the "automatic" removal provision of

Minn. R. Civ. P. 63.03, the Tax Court denied Mr. Byers's motion as untimely. In both of its orders issued in this case, however, dated August 14, 2006 and November 2, 2006, respectively, the Tax Court unmistakably denied Mr. Byers's motion to remove on its merits. Neither Tax Court order mentioned that Mr. Byers's motion to remove was untimely or waived.

A. The Commissioner Should Not Be Heard To Argue For The First Time On Appeal That Mr. Byers's Motion To Remove Was Untimely And Waived.

For the first time since Mr. Byers made his motion to remove Judge Kathleen H. Sanberg from his Minnesota Tax Court case, the Commissioner contends that the motion was untimely and that Mr. Byers waived his right to make it.

This Court generally does not entertain arguments raised for the first time on appeal. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). The interests of justice do not require that the Court make an exception here.

First, although Mr. Byers's motion for removal expressly anticipated that the Commissioner's response might include an

untimeliness objection, the trial transcript reveals that the Commissioner failed to mention either untimeliness or waiver.

Next, in four and one-half pages of his post-trial Tax Court brief, the Commissioner argued in support of the Tax Court's denial of Mr. Byers's motion for removal solely on its merits. [1]

Finally, in his memorandum opposing Mr. Byers's post-trial motions, the Commissioner addressed Mr. Byers's renewed argument on his removal motion only by incorporating by reference his own post-trial brief argument. Again, the Commissioner on post-trial brief argued extensively in support of the Tax Court's denial of Mr. Byers's

[1] In fairness, it should be noted the Commissioner did complain that:

"Although two pre-trial conferences were held the week before trial and each time the parties were asked if they had other matters to bring before the Court, [Mr. Byers] waited until the commencement of trial to file an un-noticed motion to remove the Judge."
Commissioner's Post-Trial Brief at pgs. 5-9 (April 17, 2006)

In reading this one sentence complaint of the Commissioner, however, one cannot discern at all, let alone clearly, that the Commissioner's contention was that the removal motion was untimely or that waiver applied. At best, the Commissioner's complaint seems to be his lament that at the brink of trial he had to argue against the removal motion.

removal motion, but his arguments included neither untimeliness nor waiver. Commissioner's Memorandum Opposing Appellant's Post-Trial Motions at para. III (September 8, 2006).

B. Even If The Commissioner's Untimeliness and Waiver Argument Is Properly Before The Court, It Must Fail Because Under The Circumstances Mr. Byers's Motion To Remove Was Timely And Waiver Is Inapplicable.

Should this Court consider the Commissioner's untimeliness and waiver argument properly before it, it should reject it on its merits because, under the circumstances, Mr. Byers's motion for removal was timely and Mr. Byers in no way waived his right to remove Judge Sanberg from his Minnesota Tax Court case.

The cases that the Commissioner cites as authorities for his contention that Mr. Byers's removal motion was untimely and waived actually stand in support of Mr. Byers.

In fact, the glaring differences between what these cases say, and what the Commissioner claims they say, are so plain that one wonders if the Commissioner's counsel has knowingly misrepresented this case law.

Weed v. Commissioner, 550 N.W. 2d 285 (Minn. 1996)

The Commissioner cites *Weed* as "indicating" that Minn. R. Civ. P. 63.02 implicitly provides that a motion to remove a presiding judge be made before trial. Respondent's Brief at 17.

Setting aside the question of the "precise timing" of Mr. Byers's motion to remove, *see* Respondent's Brief at 16, n. 6, *Weed* does not even begin to help the Commissioner's cause.

Weed came to this Court after the relator there, as a Minnesota Tax Court appellant, had filed a post-trial, post-briefing and post-decision motion for, *inter alia*, removal of the presiding Tax Court judge.

Despite the fact that the presiding Tax Court judge ultimately denied *Weed*'s removal motion, she did not hold that the removal motion was untimely and that *Weed* had waived his right to make it.

Instead, the presiding Tax Court judge simply recognized that *Weed* was too late in asking for her removal under the "automatic removal" provision of Minn. R. Civ. P. 63.03.

Contrary to the Commissioner's position, notwithstanding that

Weed's removal motion was not made until after trial, briefing and decision, the presiding Tax Court judge still considered Weed's removal motion under an "affirmative showing of prejudice" standard.

The presiding Tax Court judge concluded that Weed's removal argument (that she was biased against Weed merely because she was the incumbent Commissioner of Revenue when the order of tax assessment in dispute was issued) did not constitute an affirmative showing of prejudice warranting her removal.

Although the presiding Tax Court judge denied Weed's late removal motion (a denial which this Court upheld), the Tax Court boldly stated in its final order that Weed appealed to this Court:

"We have seriously considered Appellant's arguments and recognize the importance of the public's right to an impartial hearing." *Weed v. Commissioner of Revenue*, Minnesota Tax Court Docket No. 6603 (February 8, 1996), *aff'd Weed v. Commissioner*, 550 N.W. 2d 285 (Minn. 1996). [Emphasis added.]

Baskerville v. Baskerville, 246 Minn. 496, 75 N.W. 762 (Minn.1956).

Next, the Commissioner alleges that "[t]he *Weed* opinion thus implicitly confirmed that a 'litigant who, in the absence of fraud or other controlling circumstance, elects to go to trial without taking

timely and appropriate action to disqualify a judge for bias waives his right to assert such bias."

In support of this allegation, the Commissioner cites favorably to *Baskerville*. Respondent's Brief at 17.

This Court explicitly noted, however, that the relator in *Baskerville* never made a removal motion based on an affirmative showing of prejudice.

Indeed, the *Baskerville* relator had removed the original trial judge when she properly invoked the "automatic" judge removal provision in Minn. R. Civ. P. 63.03 by filing a timely affidavit of prejudice. However, it was not that removal that brought the *Baskerville* relator to this Court.

After another judge was assigned to the case, the *Baskerville* relator made an "oral ex parte request" that the substituted judge be removed for bias. The substituted trial judge then indicated that, if she wished to do so, the *Baskerville* relator could file an affidavit of prejudice.

Yet, as this Court stated:

"Without more, the case came on for trial, and the issue of bias was not again raised until defendant made a motion for a mistrial near the close of the case." *Baskerville, supra*. [Emphasis added.]

Thus, the *Baskerville* relator appealed to this Court, not from a denial of a removal motion, but rather from a denial of her motion for mistrial that included a bare allegation of bias. "Whether a mistrial may ever be declared for actual bias we need not here determine since the record herein fails to disclose such bias." *Baskerville, supra*.

The Commissioner, then, has inexplicably described *Baskerville* as "analyzing [a] motion to disqualify a substituted judge under Rule 63.02 after 'a litigant has once disqualified a presiding judge as a matter of right under Rule 63.03.'" Respondent's Brief at 17. [Emphasis added.]

Placed in its correct context, the Court's *Baskerville* quote that the Commissioner includes in his parenthetical description of that case reads fully:

"After a litigant has once disqualified a presiding judge as a matter of right under Rule 63.03, he may disqualify the substituted judge under Rule 63.02 but only by making an affirmative showing of prejudice and by seasonably implementing such showing by appropriate motion or by obtaining a writ of prohibition....In the instant case the defendant went to trial without taking any affirmative action whatever to disqualify the substituted judge for bias, and she is now in no position to complain." [Emphases added.]

It is difficult to discern how the Commissioner's contention that Mr. Byers's removal motion was untimely and waived is supported by *Baskerville*, a case in which no motion for removal of a trial judge was even at issue.

Jones v. Jones, 242 Minn. 251, 64 N.W.2d 508 (Minn. 1954).

The Commissioner also cites favorably, and yet again inexplicably, to another case from this Court, *Jones*. Respondent's Brief at 19.

According to the Commissioner, Mr. Byers's motion for removal is untimely and waived because *Jones* states:

"[T]he purpose of the timeliness requirement for removal of a judge under a closely related rule [to Minn. R. Civ. P. 63.02], Minn. R. Civ. P. 63.03, 'is to guard against unreasonable delay, expense, surprise, and inconvenience to the court and litigants.'" Respondent's Brief at 19 (internal quote from *Jones*, 242 Minn. at 261, 64 N.W.2d at 514).

Actually, *Jones* completely supports Mr. Byers's position that his removal motion was timely and was not waived.

During child custody/child support proceedings, the *Jones* relator sought removal of the presiding judge by filing an affidavit of prejudice under Minn. R. Civ. P. 63.03, but only after the term of court had commenced.

The *Jones* Court seemed to chide Jones when it stated that it was

"...[H]is duty to assert such right [to remove the presiding judge] in timely fashion to the end that there be no unnecessary delay in the orderly administration of justice. This fundamental right may be waived by failure to seasonably assert it." *Jones, supra*.

In his defense, the *Jones* relator claimed that he had filed his affidavit of prejudice after the commencement of the judicial term because,

"[W]hile some of the occurrences...created some doubt in his mind as to whether he could receive a fair trial before the presiding judge at said term, he was not sufficiently satisfied that he would not receive a fair trial to justify the filing of an affidavit of prejudice before the term convened." *Jones, supra*. [Emphasis added.]

The *Jones* relator further claimed that it was not until he had received, studied and considered certain findings and an order of the

presiding judge that "...he became satisfied that he would be unable to obtain a fair and impartial trial...." *Jones, supra*.

Moreover, the *Jones* relator argued that he thereupon acted promptly by having his counsel call the matter to the court's attention and request that the case be tried before another judge. When the request was refused, it was only then that the *Jones* relator filed an affidavit of prejudice.

Applying the Commissioner's untimeliness and waiver argument against Mr. Byers's removal motion, which the Commissioner supports with a citation to, and a quotation from, *Jones*, it would seem to follow that the *Jones* relator was at least as deserving as Mr. Byers of having his denied motion for removal upheld for being untimely and waived. Fortunately, this Court held otherwise:

"...[T]he underlying principle of preserving the confidence of litigants as well as the public in our judicial system compels us to hold that under the controlling circumstances here after the term commenced, which need not be further detailed, the affidavit was timely filed and the trial should have been assigned to another judge." *Jones, supra*. [Emphasis added.]

The *Jones* Court went further. It found that no delay in the trial of the case would have occurred had the presiding judge been removed and that "even if it had there is no showing that the parties would have suffered any harm or inconvenience."

Likewise, the Commissioner here has not shown that any harm or inconvenience to the parties would have resulted had Mr. Byers's motion for removal been granted and, as Mr. Byers had requested therein, the case had been assigned to Judge Ramstad, who was also hearing Mr. Byers's taxable year 2000 in docket number 7733-R.

Finally, because the Commissioner cites *Jones* approvingly, he must agree with this Court, and with Mr. Byers, that,

"Where the ability of a judge to try a cause fairly and impartially is questioned, he should have no reluctance in stepping aside. Where any doubt exists as to whether a judge has been properly disqualified [under Rule 63.02], that doubt should be resolved in favor of his disqualification. *Jones, supra.* [Emphasis added.]

CONCLUSION

Mr. Byers files this reply brief because the Commissioner raises a new matter on appeal.

The Commissioner contends for the first time that Mr. Byers's motion to remove his presiding Tax Court judge was untimely under Minn. R. Civ. P. 63.02 and waived.

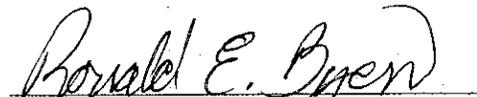
Despite the Commissioner's assertions, the Tax Court did not decide that Mr. Byers's motion to remove was untimely and waived. After a brief period of confusion at trial respecting the precise rule of civil procedure under which Mr. Byers was proceeding, the Tax Court denied Mr. Byers's motion to remove on its merits. Neither the Tax Court's order dated August 14, 2006, nor its order dated November 2, 2006, mentioned that Mr. Byers's motion to remove was untimely or waived.

The Commissioner cites three cases which he claims are authorities on which this Court may rely to decide that Mr. Byers's motion to remove was untimely and waived. Yet all three cases actually stand in support of Mr. Byers's motion.

Accordingly, in addition to granting the requests for relief set forth in his opening brief, Mr. Byers respectfully requests that the Court conclude that the Commissioner's untimeliness and waiver argument is not properly before it, or alternatively, rule that such argument is without merit and that Mr. Byers's motion to remove was timely filed.

Dated: April 12, 2007

Respectfully submitted,


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IN SUPREME COURT

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RELATOR'S AFFIDAVIT OF SERVICE BY MAIL

I, RONALD E. BYERS, Relator in the above-captioned case, being first duly sworn, depose and say that on the date of April 12th 2007, I served the attached RELATOR'S INFORMAL REPLY BRIEF on counsel for the Respondent by sending to him two copies thereof, enclosed in an envelope, postage pre-paid, and by depositing the same in the United States Mail, properly addressed as follows:

Patrick A. Shrake
Assistant Attorney General
445 Minnesota Street, Suite 900
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DATE: April 12th 2007

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