

20070110

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Andrew M. Bertsch,)
)
 Appellee/Plaintiff,)
)
 vs.)
)
 Lynell C. Bertsch,)
)
 Appellant/Defendant.)

Supreme Court No.: 20070110

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUN 22 2007

STATE OF NORTH DAKOTA

BRIEF OF APPELLEE,
ANDREW M. BERTSCH

Appeal from District Court
Ward County District Court
Northwest Judicial District
The Honorable Judge William W. McLees, Presiding

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STATEMENT OF THE ISSUES

- I. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING LYNELL MAYNOR'S REQUEST FOR ATTORNEYS FEES?
- II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN AWARDING ANDREW BERTSCH ATTORNEYS FEES?
- III. SHOULD ATTORNEYS FEES AND SANCTIONS BE IMPOSED AGAINST THE APPELLANT AND HER ATTORNEY FOR A FRIVOLOUS APPEAL?

STATEMENT OF THE CASE/FACTS

August 15, 2001 Andrew Bertsch ("Andrew") and Lynell Bertsch ("Lynell") were divorced pursuant to a Judgment entered by the Ward County Clerk of District Court, with custody of their minor child, [REDACTED] [REDACTED] having been awarded to Lynell.

January, 2004 Lynell and Ken Maynor ("Ken") became engaged.

March 19, 2004 Lynell filed a Motion to Change Residence of the Minor Child and Adjust Visitation and Child Support.

May 3, 2004 Lynell and Ken were married.

June 29, 2004 Andrew filed a Motion to Amend Judgment for the purpose of obtaining a change of custody.

December 27, 2004 Findings of Fact, Conclusions of Law and Order for Judgment were issued by the Hon. Gary A. Holum, District Judge, wherein the court *denied* Andrew's Motion to Amend Judgment, *granted* Lynell's Motion to Change Residence of the Minor Child and permitted Lynell to make application for an award of attorney's fees pursuant to N.D.R.Civ.P. 54(e).

December 29, 2004 An Amended Judgment was entered by the Ward County Clerk of District Court.

December 30, 2004 Lynell filed a Motion for Attorney Fees.

February 25, 2005 The Court, the Hon. William W. McLees, District Judge, issued a Memorandum and Order *denying* Lynell's Motion for Attorney Fees.

May 16, 2005 The Court issued a Memorandum and Order *granting* Andrew's Motion to Reconsider and Clarify Visitation, and *denying* Andrew's Motion for Contempt and for Sanctions.

May 25, 2005 Andrew filed a Notice of Appeal from the Court's February 25, 2005 Memorandum and Order, and from its May 16, 2005, Memorandum and Order.

May 27, 2005 Lynell filed a Notice of Cross-Appeal.

August 12, 2005 The Court issued an Order for Amended Judgment, which was followed by the entry of an Amended Judgment by the Ward County Clerk of District Court.

August 31, 2005 Andrew filed a Second Notice of Appeal to Supreme Court, as to make it clear that he was appealing from the August 12, 2005, Amended Judgment as well.

September 2, 2005 Lynell filed an Amended Notice of Cross-Appeal, so as to make it clear that she was cross-appealing from the August 12, 2005, Amended Judgment as well.

February 2, 2006 The North Dakota Supreme Court issued its decision. See Bertsch v. Bertsch, 2006 ND 31, 710 N.W.2d 113.

August 31, 2006 The Court issued a ruling covering certain discovery requests made by Andrew.

September 29, 2006 Lynell filed a notice of Petition for Writ of Supervisory Jurisdiction or in the Alternative an Appeal from this Court's August 31, 2006, discovery ruling.

- November 8, 2006 The North Dakota Supreme Court *denied* Lynell's Petition for Writ of Supervisory Jurisdiction.
- November 21, 2006 The North Dakota Court Supreme Court *denied* Lynell's request for reconsideration of its November 8, 2006 Order.
- December 6, 2006 Lynell filed with the Trial Court (Hon. William W. McLees) a Motion for Reconsideration on Order for Discovery on Remand.
- January 11, 2007 The District Court issued an Order Denying Lynell Maynor's Request for Reconsideration.
- February 26, 2007 The District Court issued its decision denying Lynell Maynor's request for attorney's fees and also setting forth that Andrew Bertsch was entitled to attorney's fees under N.D.R.Civ.P. 37(d).
- April 4, 2007 The Court issued its Memorandum and Order ordering Lynell Maynor to pay Andrew Bertsch the sum of \$3,607 in attorney's fees.
- April 19, 2007 A money judgment in the amount of \$3,607 was entered against Lynell Maynor in this matter.

This appeal followed.

LAW AND ARGUMENT

I. Standard of Review.

An award of attorney fees in a divorce action under N.D.C.C. § 14-05-23 is within the sound discretion of the trial court and will not be set aside absent an abuse of discretion. Kautzman v. Kautzman, 1998 ND 192, ¶ 32, 585 N.W. 2d 561. A trial court abuses its discretion when it acts arbitrarily, unconscionably, unreasonably, or when it misinterprets or misapplies the law. Jarvis v. Jarvis, 1998 ND 163, ¶ 7, 584 N.W.2d 84.

With respect to the attorney's fees and sanctions imposed against Lynell Maynor, The Supreme Court has held that a Trial Court has broad discretion to impose an appropriate sanction for discovery abuses, and its decision will not be set aside on appeal unless there is an abuse of discretion. Thompson v. Ziebarth, 334 N.W.2d 192 (N.D. 1983); St. Aubbin v. Nelson, 329 N.W.2d 874 (N.D. 1983). The Supreme Court has stated that a court abuses its discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner. Wall v. Penn Life Ins. Co., 274 N.W.2d 208 (N.D. 1979).

In this case, Andrew respectfully submits that the trial court did not abuse its discretion in this matter.

II. The Trial Court Properly Denied Lynell Maynor any Attorneys Fees.

The Trial Court specifically ordered Lynell Maynor to provide Andrew Bertsch with various financial information so as to enable both Andrew Bertsch and the Court to analyze the issue of what her needs were with respect to any award of attorney's fees. See January 11, 2007 Memorandum of Judge McLees attached hereto as Addendum pp. 1 – 11.

Lynell Maynor repeatedly refused to do so notwithstanding the Trial Court's

Orders and notwithstanding the fact that the Court specifically stated, in its January 11, 2007 ruling, that unless Lynell Maynor complied with the Court's Order on or before February 15, 2007, the Court would be left with no alternative but to base its attorneys fees decision strictly upon the record evidence available to the Court as summarized in the Court's January 11, 2007 Order.

As a part of the Court's January 11, 2007 Order, the Court recited the following testimony which was obtained from Lynell at the November 16, 2004, hearing on her Motion to Change of Residence of the Minor Child:

“Q: But because he [Ken Maynor] is supporting the family that allows you to only work a couple hours a day, is that correct?

A: That's what I chose to work, yes.

Q: You are able to because of his – Mr. Rau's word 'substantial' income, do you recall?

A: Yes.

Q: All right. And the substantial income that you testified to, ma'am, that allowed you to go to, for example, Myrtle Beach on vacation for ten days?

A: Yes.

Q: It allowed you to go to Port Discovery, is that correct?

A: Yes.

Q: Planetarium?

A: Yes.

Q: And all other activities you described, is that correct?

A: Yes.

Q: Because of the substantial income of your husband you are able to do those things, correct ?

A: Correct.

Q: You showed us pictures of the home?

A: Yes.

Q: And the neighborhood. And you testified that because of his substantial income you don't really need to work?

A: Correct.

Q: Okay. And all of these things, this substantial income the things that you are referencing, ma'am, today before Judge Holum that was in context that time line from May of 2004 until now, correct?

A: Correct.

Q: Because that's when you were married to Mr. Maynor, correct?

A: Correct.

- Q: So I want to make sure I understand this. You have got this substantial income to do all these things, work part-time and maybe not even get a job if you are allowed to move to Maryland, is that correct?
- A: Yes.
- Q: Why do you believe Andy should be responsible for your attorney's fees, ma'am?
- A: Because he was the one that took this to court. I tried to settle this out of court.
- Q: So are you telling us that given he opposed it and it has now come before a court, that you feel he should pay your attorney's fees?
- A: This could have been settled a long time ago but Andy was getting different attorneys and prolonging this. The attorney's fees that I have are phenomenal. I can't afford that.
- Q: Despite the financial circumstances you described earlier of Mr. Maynor?
- A: Right."

See Memorandum and Order of District Judge William W. McLees dated January 11, 2007 (Add. pp. 6 – 7).

Judge McLees held that:

"A reasonable reading of the evidence is that Lynell was the beneficiary of Ken's "substantial income" for most of the time the Motion to Change Residence of the Minor Child was pending before the Court. Ken's contribution to the family's finances are relevant, not because these contributions *increase Lynell's income*, but because they *decrease her overall expenses*, and have a positive effect on her general financial condition. Unless and until Lynell fully complies with the Court's discovery ruling, the Court will have no choice but to base its ruling on the record evidence available to the Court."

Even after being specifically told and advised by the Court in its January 11, 2007 ruling that she must comply with the Court's Orders and that if she did not do so, the Court would base its decision based upon the record evidence available to it (as thoroughly detailed in the Court's January 11, 2007 Memorandum and Order), Lynell Maynor chose not to comply with the Court and chose instead to disobey the Court's Orders.

While she did provide the information contained at Appendix pp. 68 – 75, such information was utterly useless and was not in compliance with the Court's Order. Again, absolutely no financial information regarding the substantial income that she was enjoying throughout the litigation process (which allowed her to decide per her sworn testimony, whether to work or not) was ever provided even though Ordered by the Court.

The information that Judge Mclees ordered to be produced was intended to lead to the discovery of admissible evidence under N.D.R.Civ.P. 26.

As the Trial Court aptly stated at page 10 of its February 26, 2007 Memorandum and Order (App. p. 85):

“As Mr. Pippin pointed out in earlier correspondence to the Court, “What attorney Rau continues to urge the Court to do is to analyze this situation with blinders on and to completely ignore the financial realities of the situation.” “...essentially what Attorney Rau suggests is that a party could claim they had significant ‘needs’ for attorney’s fees despite being married to a multi millionaire and not having any income of their own. Such a situation would result in a legal absurdity.”

In this case, not only did Lynell Maynor deliberately disobey the Court's Orders (on a repeated basis), but she continues to seek attorneys fees from Andrew Bertsch despite the fact that she herself has testified, under sworn oath, as to the substantial income of her husband that allows her to pick and choose whether or not she is even going to work. Instead, she refused to obey the Court Orders and chose not to disclose her husband's income (in what appears to be some type of hide and seek game) in what only can be construed as an attempt to trick the Trial Court into awarding her fees when in fact no fees are justified.

It must also be noted that while Lynell Maynor on appeal raises all kinds of issues regarding confidentiality, etc., at no time did she ever request of the Court a protective

order, an in camera inspection, or anything else that would otherwise be designed to protect any alleged personal confidential information. Furthermore, at no time did Lynell Maynor or her attorney ever provide income tax returns with social security numbers crossed out or take any steps to attempt to comply with the Court's Orders in this regard.

To the contrary, Lynell Maynor simply thumbed her nose at the Court's Orders but now cries foul at the Supreme Court level even though it is her own conduct that resulted in the decision that she now complains of.

It is a longstanding maxim of jurisprudence under North Dakota statutory law that a person cannot benefit from his own wrong. N.D.C.C. Section 31-11-05 (8). That is exactly what Lynell Maynor attempts to do in this matter.

The Trial Court's very thorough and well reasoned Memorandum and Orders in this matter clearly indicate that the Court did not act arbitrarily, unconscionably, or unreasonably in rendering its decision in this matter. The Trial Court did not abuse its discretion and accordingly, the Trial Court's decision should be summarily affirmed under N.D.R.App.P. 35.1.

III. The Trial Court Properly Awarded Attorneys Fees to Andrew Bertsch in this Matter.

As stated, *infra*, the Supreme Court has held that a Trial Court has broad discretion to impose an appropriate sanction for discovery abuses, and its decision will not be set aside on appeal unless there is an abuse of discretion. Thompson v. Ziebarth, 334 N.W.2d 192 (N.D. 1983); St. Aubbin v. Nelson, 329 N.W.2d 874 (N.D. 1983). The Supreme Court has stated that a court abuses its discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner. Wall v. Penn Life Ins. Co., 274 N.W.2d 208 (N.D. 1979).

Lynell Maynor repeatedly failed to comply with multiple Court Orders in this matter by not only refusing to provide evidence as to her husband's income, but also in making absolutely no attempt to do so through a request for a protective order, in camera inspection, or any other mechanism designed to safeguard against her alleged concerns regarding confidentiality and privacy issues.

As aptly stated by Judge McLees in his Orders, N.D.R.Civ.P. 37 indicates that attorneys fees and sanctions must be imposed in such circumstances which is exactly what the Trial Court did in this matter.

Now, after she has been dealt with the ramifications of her own conduct, she now cries foul to the Supreme Court. Again, a person cannot benefit from his own wrong and Lynell Maynor has never provided any evidence to the Trial Court with respect to any type of good faith attempt to comply with the Court's Orders.

To the contrary, she engaged in a continued repeated pattern of obstruction and disobedience of the Court's Orders which ultimately resulted in her being ordered to pay Andrew Bertsch attorneys fees.

The fees and costs incurred in this matter by Andrew, were incurred as a direct result of the decision of Attorney Rau and his client to not comply with the discovery requests. The fees included being forced to address motions before the Trial Court (multiple), motions and petitions before the Supreme Court (multiple), and numerous letters and correspondence all in an effort to get what the Court ordered in the first place that Lynell Maynor was to produce.

The Trial Court properly awarded attorneys fees and sanctions against her and in no way, shape or form did the Trial Court abuse its discretion in this matter.

The Supreme Court should summarily affirm the Trial Court's decision in this regard pursuant to N.D.R.App.P. 35.1.

IV. Sanctions and Fees under N.D.R.App.P. 38 should be Imposed against Lynell Maynor and her Attorney.

Under N.D.R.App.P. 38, this Court may award "just damages and single or double costs, including reasonable attorney's fees" if we determine "an appeal is frivolous, or that any party has been dilatory in prosecuting the appeal." A frivolous appeal is one in which there is such a complete absence of facts or law that a reasonable person could not have expected that a court would render judgment in his or her favor. See Torgerson v. Torgerson, 2003 ND 150, ¶ 23, 669 N.W.2d 98.

As stated by the Supreme Court in Mitchell v. Preusse, 358 N.W. 2d 511 (N.D. 1984), N.D.R.App.P. 38 acknowledges the necessity of controlling the appellate process by allowing this Court to award just damages and single or double costs, including reasonable attorney's fees, if an appeal is deemed frivolous. An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which could be seen as evidence of bad faith. Danks v. Holland, 246 N.W.2d 86, 91 (N.D. 1976); see also Schnitker v. Schnitker, 646 S.W.2d 123, 126 (Mo. App. 1983); Reid v. United States, 715 F.2d 1148, 1154 (7 Cir. 1983).

There exists absolutely no basis for this appeal in this matter. Lynell Maynor and her attorney were specifically informed of exactly what the Trial Court intended to do and what evidence the Trial Court was going to base its decision on absent her complying with the Court Orders in this matter. See January 11, 2007 Memorandum and Order of Judge McLees (Add. p. 10) wherein he lays out, in extensive detail, as far as what evidence was before the Court and how he would base his decision if Lynell Maynor did

not comply with the Court Orders.

Furthermore, it was Lynell Maynor who testified as to her husband's "substantial income" but thereafter chose to hide the details of the "substantial income" in an effort to get attorneys fees paid to her by Andrew Bertsch.

This appeal wreaks of utter frivolity. Andrew submits that the Supreme Court should not only summarily affirm the Trial Court's decisions under N.D.R.App.P. 35.1, but also impose attorneys fees, cost and sanctions pursuant to N.D.R.App.P. 38, as well as settled North Dakota case law.

Andrew Bertsch would request the minimum sum of \$2,000 to be imposed jointly against Lynell Maynor and her attorney as a consequence of this completely frivolous appeal.

CONCLUSION

For the foregoing reasons, and based upon the record before the Court, Andrew Bertsch respectfully submits that the Supreme Court should summarily affirm the Trial Court's decisions in this regard and also impose sanctions and attorneys fees under N.D.R.App.P. 38 for what is clearly a frivolous appeal that has absolutely no merit or basis to it.

RESPECTFULLY SUBMITTED this 22nd day of June, 2007.

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BY: _____
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N.D. Id. # 04682

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellee, Andrew Bertsch, was served by U.S. first class mail on this 22nd day of June, 2007 addressed to:

Robert Rau
Attorney at Law
PO Box 939
Minot, ND 58702-0939

H. Malcolm Pippin

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF WARD

NORTHWEST JUDICIAL DISTRICT

Andrew Bertsch,

Plaintiff,

v.

Lynell Maynor, f/k/a Lynell Bertsch,

Defendant.

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MEMORANDUM AND ORDER

Case No. 2000-C-0745

ISSUE

Lynell Maynor's "Motion for Reconsideration on Order for Discovery on Remand"

CHRONOLOGY OF EVENTS

- August 15, 2001 Andrew Bertsch ("Andrew") and Lynell Bertsch ("Lynell") were divorced pursuant to a Judgment entered by the Ward County Clerk of District Court, with custody of their minor child, [REDACTED] having been awarded to Lynell.
- January, 2004 Lynell and Ken Maynor ("Ken") became engaged.
- March 19, 2004 Lynell filed a Motion to Change Residence of the Minor Child and Adjust Visitation and Child Support.
- May, 2004 Lynell and Ken were married.
- June 29, 2004 Andrew filed a Motion to Amend Judgment for the purpose of obtaining a change of custody.
- December 27, 2004 Findings of Fact, Conclusions of Law and Order for Judgment were issued by the Hon. Gary A. Holum, District Judge, wherein the Court *denied* Andrew's Motion to Amend Judgment, *granted* Lynell's Motion to Change Residence of the Minor Child and permitted Lynell to make application for an award of attorney's fees pursuant to Rule 54(e), N.D.R.Civ.P.
- December 29, 2004 An Amended Judgment was entered by the Ward County Clerk of District

Court.

- December 30, 2004 Lynell filed a Motion for Attorney Fees.
- February 25, 2005 The Court, the Hon. William W. McLees, District Judge, issued a Memorandum and Order *denying* Lynell's Motion for Attorney Fees.
- May 16, 2005 The Court issued a Memorandum and Order *granting* Andrew's Motion to Reconsider and Clarify Visitation, and *denying* Andrew's Motion for Contempt and for Sanctions.
- May 25, 2005 Andrew filed a Notice of Appeal from the Court's February 25, 2005, Memorandum and Order, and from its May 16, 2005, Memorandum and Order.
- May 27, 2005 Lynell filed a Notice of Cross-Appeal.
- August 12, 2005 The Court issued an Order for Amended Judgment, which was followed by the entry of an Amended Judgment by the Ward County Clerk of District Court.
- August 31, 2005 Andrew filed a Second Notice of Appeal to Supreme Court, so as to make it clear that he was appealing from the August 12, 2005, Amended Judgment as well.
- September 2, 2005 Lynell filed an Amended Notice of Cross-Appeal, so as to make it clear that she was cross-appealing from the August 12, 2005, Amended Judgment as well.
- February 2, 2006 The North Dakota Supreme Court issued its decision. See: *Bertsch v. Bertsch*, 2006 ND 31, 710 N.W.2d 113.
- August 31, 2006 This Court issued a ruling covering certain discovery requests made by Andrew.
- September 29, 2006 Lynell filed a Notice of Petition for Writ of Supervisory Jurisdiction or in the Alternative an Appeal from this Court's August 31, 2006, discovery ruling.
- November 8, 2006 The North Dakota Supreme Court *denied* Lynell's Petition for Writ of Supervisory Jurisdiction.
- November 21, 2006 The North Dakota Supreme Court *denied* Lynell's request for reconsideration of its November 8, 2006, Order.

December 6, 2006 Lynell filed (with this Court) a Motion for Reconsideration on Order for Discovery on Remand.

DISCUSSION

Having twice failed to persuade the North Dakota Supreme Court to exercise its supervisory jurisdiction over an inferior tribunal (i.e., the district court) and overturn this Court's August 31, 2006, discovery ruling, Lynell is now back before this Court asking it to *reconsider* its August 31, 2006, ruling.

The Court's August 31, 2006, ruling compelled Lynell to provide Andrew with certain information concerning her financial situation----including income information for her husband, Ken----so as to enable the Court to determine Lynell's need for an award of attorney's fees in this case. The Court stated in its ruling that:

"While Ken Maynor's income is not factored in on a dollar-for-dollar basis in the Court's determination of the Defendant's need for an award of attorneys' fees in this case, it is certainly permissible for the Court to consider Mr. Maynor's contributions toward the Defendant's well-being to the extent that those contributions enable her to avoid having to incur expenditures for the necessities of daily living --- such as food, clothing, shelter, medical care, etc."

The Court has not changed its position on this point.

In a letter dated November 29, 2006, Ken states, "I have been informed by counsel here in Maryland, that I am under no obligation to provide this information given that I am not a party to the litigation between my wife and Andrew Bertsch." See: attachment to *Lynell's Motion and Brief for Reconsideration on Order for Discovery on Remand*. While this Court recognizes that it has no jurisdiction over Ken and cannot require him to provide Andrew with the income information ordered by the Court, the effect of Ken's refusal to allow Lynell to provide this information to the

Court is to render Lynell non-compliant with the Court's August 31, 2006, discovery ruling and leave her vulnerable to the imposition of sanctions. In addition, without this information, the Court is not in a position to make an informed determination as to Lynell's need for an award of attorney's fees in this case.

Rule 37(b) of the North Dakota Rules of Civil Procedure provides:

"If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure that are just, and among others the following:

- (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

In its August 31, 2006, discovery ruling, the Court found that Ken's income *is* relevant in assessing Lynell's need for an award of attorneys' fees in this case. As a result of Lynell's failure to provide this information to Andrew, the Court does not feel that it is in a position to make an informed determination as to Lynell's need for an award of attorney's fees. Lacking this income information, the Court is unable to determine the extent to which Ken's contributions toward Lynell's well-being enable her to avoid having to incur expenditures for the necessities of daily living-----such as food, clothing, shelter, medical care, etc. Lacking this income information, the Court is left to determine Lynell's need for an award of attorney's fees based upon the following information which was communicated to the Court:

A. Financial information.

Lynell filed her Motion to Change Residence of the Minor Child on March 19, 2004. At that time, she and Ken were not yet married. On March 10, 2004, Lynell reported a monthly income of \$2,248.23 and monthly expenses of \$2,073.61. See: Financial Affidavit of Lynell C. Bertsch. According to Andrew's Tax Returns, he had an adjusted gross income of \$84,659 in 2002 and \$91,954 in 2003.

According to Lynell's testimony during the November 16, 2004, hearing, she and Ken were married in May, 2004. See: Transcript of Cross-Examination of Lynell C. Bertsch, pg. 84, ll. 23. Lynell's argument that attorneys' fees should be awarded to her is based on her contention that Ken has no obligation to pay those fees in her behalf. Lynell relies on N.D.C.C. 14-07-08(2), which states that "the earnings of one spouse are not liable for the debts of the other spouse;" and, N.D.C.C. 14-07-08(4), which states that, "the separate property of the husband or wife is not liable for the debts of the other spouse but each is liable for their own debts contracted before or after marriage." Lynell's reliance on N.D.C.C. 14-07-08 is misplaced. N.D.C.C. 14-07-08 deals with debts of husbands and wives *at the time of divorce*, and has no application under the facts of this case.

Lynell also relies on a finding by Judge Holum that "Lynell Bertsch has insufficient assets and resources in order to underwrite this litigation and that Andrew Bertsch has substantial income and the ability to pay." See: Findings of Fact, Conclusions of Law and Order for Judgment, ¶ 7. However, Judge Holum's Conclusions of Law read as follows:

"The court concludes that Lynell Bertsch, n/k/a Lynell Maynor, herewith make her application for attorney fees pursuant to Rule 54(e), NDRCP. Upon receipt of that application, the Court will decide what amount, *if any*, should be shifted to the Plaintiff Andrew Bertsch." (Emphasis added).

Id., ¶ V.

B. Lynell's testimony.

The following testimony was obtained from Lynell at the November 16, 2004, hearing on her

Motion to Change of Residence of the Minor Child:

Q: But because he [Ken Maynor] is supporting the family that allows you to only work a couple hours a day, is that correct?

A: That's what I chose to work, yes.

Q: You are able to because of his -- Mr. Rau's word 'substantial' income, do you recall?

A: Yes.

Q: All right. And the substantial income that you testified to, ma'am, that allowed you to go to, for example, Myrtle Beach on vacation for ten days?

A: Yes.

Q: It allowed you to go to Port Discovery, is that correct?

A: Yes.

Q: Planetarium?

A: Yes.

Q: And all other activities you described, is that correct?

A: Yes.

Q: Because of the substantial income of your husband you are able to do those things, correct?

A: Correct.

Q: You showed us pictures of the home?

A: Yes.

Q: And the neighborhood. And you testified that because of his substantial income you don't really need to work?

A: Correct.

Q: Okay. And all of these things, this substantial income the things that you are referencing, ma'am, today before Judge Holum that was in context that time line from May of 2004 until now, correct?

A: Correct.

Q: Because that's when you were married to Mr. Maynor, correct?

A: Correct.

Q: So I want to make sure I understand this. You have got this substantial income to do all these things, work part-time and maybe not even get a job if you are allowed to move to Maryland, is that correct?

A: Yes."

See: Transcript of the Cross-Examination of Lynell C. Bertsch, at the hearing held on November 16, 2004, pp 56-57.

“Q: Why do you believe Andy should be responsible for your attorney's fees, ma'am?

A: Because he was the one that took this to court. I tried to settle this out of court.

Q: So are you telling us that given he opposed it and it has now come before a court, that you feel he should pay your attorney's fees?

A: This could have been settled a long time ago but Andy was getting different attorneys and prolonging this. The attorney's fees that I have are phenomenal. I can't afford that.

Q: Despite the financial circumstances you described earlier of Mr. Maynor?

A: Right.”

Id., pg. 101, ll. 10-23.

C. The remand from the North Dakota Supreme Court.

The North Dakota Supreme Court remanded the case to the trial court on the issue of attorney's fees, directing this Court to balance Lynell's needs against Andrew's ability to pay. In

Reiser v. Reiser, 2001 ND 6, ¶ 15, 621 N.W.2d 348, the Supreme Court said:

"The district court has discretion under N.D.C.C. § 14-05-23, to award attorney fees in divorce proceedings. An award of attorney fees is within the sound discretion of the trial court and will not be set aside on appeal absent an abuse of discretion. In deciding whether to award attorney fees in a divorce action, the trial court must balance one parties' needs against the other parties' ability to pay. The court should consider the property owned by each party, their relative incomes, whether property is liquid or fixed assets, and whether the action of either party unreasonably increased the time spent on the case. An award of attorney fees requires specific findings supported by evidence of the parties' financial conditions and needs." (citations omitted).

At the time Lynell filed her Motion to Change Residence of the Minor Child, Lynell and Andrew had been divorced for approximately three years---and Lynell was engaged to Ken.

The following pertinent testimony was obtained from Lynell at the November 16, 2004, hearing:

"Q: So I want to make sure I understand this. You have got this substantial income to do all these things, work part-time and maybe not even get a job if you are allowed to move to Maryland, is that correct?

A: Yes.

Q. But notwithstanding that testimony, you are telling Judge Holum that when you moved to Carrington from Minot -- that every week Andy went to see [REDACTED] and when he requested to see her -- you could not afford to drive and meet halfway, or even afford to drive to Minot. Is that what you are telling us?

MR. RAU:

I am going to object to the form of the question. The question is not whether Mr. Maynor has income to travel back and forth from Carrington to Minot, the question is does Ms. Bertsch have the income.

MR. PIPPIN:

She can't have it both ways. They just spent 45 minutes talking about their income and how it is a family unit. He is supporting her. You can't pick and choose. Either you do or don't have money for what you do.

THE COURT:

Good point. You may proceed.

Q: So that you are telling us you have got this family unit, Mr. Maynor and you have this money to do all kinds of things, right, but you don't have any money to make any effort at all to transport [REDACTED] or make any part of the drive from Minot to Carrington. Is that what you are telling us, ma'am?

A: Correct.

MR. RAU:

I object. There is another reason. There is nothing in the judgment that puts the travel obligation on Ms. Bertsch.

THE COURT:

Overruled.

Q: That is what you are telling Judge Holum?

A: Yes.

Q: Let's go through the weekly schedule -- because Andy -- let's start with the weekend. If Andy has [REDACTED] on a weekend, then he has to drive from Minot to Carrington so she is in school Monday morning, right?

A: Correct.

Q: Then he has to drive back to Minot from Carrington on Monday.

A: Correct.

Q: You don't take any part in that, right?

A: Correct.

Q: You are unwilling to take any part in that, correct -- because of financial concerns -- correct?

A: Because of finances --

Q: You --

Q: All of that traveling, you have been unwilling, despite the requests, to assist?

A: Not unwilling.

Q: You said to Mr. Rau's question you refused, correct?

A: I don't have the money to do that.

Q: But you have money to go to Myrtle Beach for ten days?

A: That was Ken's money."

Transcript of November 16, 2004, hearing, pp. 57-61.

Although at the time of the divorce and upon the filing of the Motion to Change Residence of the Minor Child there was a substantial disparity in the incomes of Lynell and Andrew, Lynell testified in support of her motion that Ken had a "substantial income" that would allow her to work *part-time* or not work *at all*. A reasonable reading of the evidence is that Lynell was the beneficiary of Ken's "substantial income" for most of the time the Motion to Change Residence of the Minor Child was pending before the Court. Ken's contributions to the family's finances are relevant, not because these contributions *increase Lynell's income*, but because they *decrease her overall expenses*, and have a positive effect on her general financial condition. Unless and until Lynell fully complies with the Court's discovery ruling, the Court will have no choice but to base its ruling on the record evidence available to the Court.

Finally, Lynell's assertion that Andrew's actions somehow delayed the Court's decision on her Motion to Change Residence of the Minor Child, as well as its decision on the issue of attorneys' fees----thereby causing Lynell to incur additional attorney's fees----is without merit. Through no fault of his own, Andrew had to change attorneys after the filing of Lynell's Motion to Change Residence of the Minor Child. In addition, despite Lynell's contention that an out-of-court settlement would have brought this matter to a conclusion much sooner, Andrew was under no

obligation to settle the matter out of court. The Motion to Change Residence of the Minor Child was filed by *Lynell*, and no credible evidence of bad faith on the part of Andrew in opposing this motion has been presented to this Court.

CONCLUSION

Unless Lynell fully complies with the Court's August 31, 2006, discovery ruling not later than February 15, 2007, the Court will be left with no alternative but to base its attorney's fees decision strictly upon the record evidence available to the Court (as summarized above).

Lynell's Motion for Reconsideration on Order for Discovery on Remand is *denied*.

Dated at Minot, North Dakota, this 11th day of January, 2007.

BY THE COURT:



William W. McLees
District Judge