

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota ex rel. I.R.S.,)
minor child, by and through)
Markita Schafer,)
Appellee,)
V.)
Duane Landrus, Jr.,)
Appellant.)
_____)

Supreme Court No. 20110112

Burleigh Co. No. 08-10-R-00361

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 25 2011

STATE OF NORTH DAKOTA

APPEAL FROM THE JUDGMENT DENYING MOTION FOR RECONCIDERATION
ENTERED IN THE DISTRICT COURT OF THE SOUTH CENTRAL JUDICIAL
DISTRICT, THE HONORABLE DAVID E. REICH, PRESIDING.

BRIEF OF APPELLANT

Duane Landrus
P.O. Box 5521
Bismarck ND 58506

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ISSUES PRESENTED FOR REVIEW

1. Whether the Court erred in assessing Landrus' child support in violation of N.D. Admin. Code § 75-02-04.1-10: creating a bad faith situation.

2. Whether the Court violated N.D.C.C. §14-09-08.9 in denying Landrus a hearing; creating a bad faith situation.

3. Whether the Court erred in granting the Plaintiffs Motion for Default Judgment were Landrus requested additional time to prepare a Brief supporting his request for hearing were exigent circumstances existed preventing him from filing it by 12-21-2010;

4. Whether the Court violated N.D.R.Ct. Rule 55 (a) (3) were Landrus did make an appearance by way of Motion for Hearing, and Default judgment should not have been granted:

5. Whether the Court violated Landrus' 14th Amendment Right to Due Process by the forgoing challenges.

STATEMENT OF CASE AND FACTS

This is an appeal by Duane Landrus from the decision of the Burleigh County Court in Case No. 08-10-R-00361 where a judgment was entered on the 28th of February, 2011. Where the determination followed the entering of a default judgment and a Motion for Reconsideration was denied. There was no hearing allowed by the court, this is confirmed through the court reporter. The Determination of the court is that Landrus be ordered to pay child support that is higher then what the ND Admin codes states that he should be paying as an unemployed incarcerated individual with an extrapolated income of \$1100 per month.

ARGUMENT

1. Did the Court err in assessing Landrus' child support in violation of N.D. Admin. Code § 75-02-04.1-10; creating a bad faith situation?

Child support guidelines are based on N.D. Admin. Codes and therefore are the law in this matter and any failure to follow and conform to those guidelines is a violation of the law. See *K.B. v. Bauer* 2009 N.D. 45; 763 N.W. 2d 462, P11 590 N.W. 2d 215.

“If the district court fails to comply with the child support guide lines in determining an obligators child support obligation, the court errs as a matter of law”

The States failure to acknowledge any and all mention of N.D. Admin. Code § 75-02-04.1-10 in Landrus' Motion for Reconsideration of Default Judgment in effect is an admission by the state that the argument is true and correct. The number 1 issue that Landrus was showing the court states “That the Court erred in assessing Landrus' child support in violation of N.D. Admin. Code § 75-02-04.1-10;” Argument 3. Of that Motion States “There is currently a support order in place for another child that Landrus has fathered and that order should be adjusted and split between the two (2) children based on his prior W-2 form, to keep his support amount in the guidelines of N.D. Admin. Code § 75-02-04.1-10, with an arrearage assessment added.” And again in Argument 4. “The amount that the default judgment states Landrus should be paying does not follow the amounts in N.D. Admin. Code § 75-02-04.1-10.” *Serr v. Serr*, 2008 N.D. 229, P10 571 N.W. 2d 648.

“Calculation of child support based upon imputed income at the level of the obligors earning capacity under N.D. Admin. Code §75-02-04.1-07(3) , however is premised upon the presumption that “[e]arning capacity is a resource available to an obligator”

Landrus however is limited to the amount of money that can be made, and that amount is nowhere near the amount requested.

2. Did the Court violated N.D.C.C. §14-09-08.9 in denying Landrus a hearing; creating a bad faith situation?

Blacks Law Dictionary defines bad faith as: **Bad Faith.** The opposite of “good faith,” generally implying or involving actual or constructive fraud, of a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation. not prompted by an honest mistake as to ones rights or duties, but by some interested or sinister motive. Term “bad faith” is not simply bad judgment or neglect, but rather implies the conscious doing of a wrong because of dishonest purpose or moral obliquity: it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will. *Stath v. Williams, Ind. App., 367 N.E.2d 1120, 1124.* An intentional tort which results from breach of duty imposed as consequence of relationship established by contract. *Davis v. Allstate Ins.Co., 101 Wis.2d 1, 303 N.W.2d 596, 599.* The State has acknowledged that Landrus has an existing child support order in place and saw fit to reduce his payment because of that fact, then rushed the order thru the courts to get a default judgment. In his Motion for Reconsideration of Default Judgment Landrus showed the Court and the Attorney for Child Support Enforcement that N.D. Admin. Code § 75-02-

04.1-10 had been violated. See *K.B. v. Bauer* 2009 N.D. 45: 763 N.W. 2d 462, P11 590 N.W. 2d 215.

“If the district court fails to comply with the child support guide lines in determining an obligators child support obligation, the court errs as a matter of law”

In Its response the State refused to even acknowledge the Admin. Code any where in its arguments, even thoe the Admin.Code was brought up several times and it was the Number 1 issue that Landrus was showing the court in the motion.

Landrus should be paying a total of \$328 per month for child support according to N.D. Admin. Code 75-02-04.1-10_because he has two (2) children and is in the \$1100 net income bracket according to Child Support Enforcement, this amount however is an extrapolation due to that fact that Landrus is unemployed and incarcerated. *Surerus v. Matuska*. 548 N.W. 2d 384, 386 (N.D. 1996).

“While parents have a duty to support their children to the best of their abilities, the guidelines in N.D. Admin. Code §75-02-04.1-02(8) provide the district court with discretion to consider the true state of the parties financial circumstances when evidence of past income is not a reliable indicator of future earnings and to determine the obligor’s ability to support his children accordingly.”¶

Landrus Owes \$168 plus \$33.60 arrears on one and \$217 plus \$43.40 arrears on the other. coming to \$385 plus \$77 in arrears for a monthly total of \$462. which is a difference of \$57 from what the guidelines state that it should be. See *K.B. v. Bauer*, 763 N.W.2d 462, 467 at ¶15 (N.D 2009).

“In its arguments on appeal, the unit has relied upon this Courts prior cases indicating child support must be based upon earning capacity when an obligor is unemployed or underemployed, and has particularly emphasized our pronouncement in prior cases that ‘[t]he guidelines recognize that parents have a duty to support their children to the best of their abilities, not simply to there inclinations.’”

The Child Support Attorney was aware of this by and thru FINDINGS OF FACT. CONCLUSIONS OF LAW. ORDER FOR JUDGMENT papers that he sent me VI. States, "Taking into Consideration Defendants duty to support other children, the resulting child support obligation is \$217.00 per month according to North Dakota Child support Guidelines." [A1] then rushed the judgment creating bad faith.

3. **Did the Court err in granting the Plaintiffs Motion for Default Judgment were Landrus requested additional time to prepare a Brief supporting his request for hearing were exigent circumstances existed preventing him from filing it by 12-21-2010?**

The 14th Amendment is the right to due process. The State and the Court violated Landrus' 14th Amendment rights by not allowing Landrus the additional time requested to allow him a proper defense in preparing a Brief for the above stated matter, and then no hearing was held in this case. but the courts granted a default judgment. N.D.R.Ct. Rule 6 **Failure to File Opposing Affidavit** which reads:

"Court is not required, as a matter of law, to rule against a party who fails to file an affidavit in opposition to motion.

Boschee v. Boschee, 340 N.W. 2d 685 (N.D. 1983) Landrus however did not fail to file an affidavit. his request for more time to finish his brief was enough to support this.

4. **Did the Court violated N.D.R.Ct. Rule 55 (a) (3) were Landrus did make an appearance by way of Motion for Hearing, and Default**

judgment should not have been granted?

Mr. Landrus requested a hearing, and wrote a hand written letter to both the Judge and to the attorney for Child Support Enforcement asking for an extension of time so he could get his supporting brief completed, therefore the States Request for Default Judgment should have been denied under the N.D.R.Ct. Rule 6 **Failure to File Opposing Affidavit** which reads:

“Court is not required, as a matter of law, to rule against a party who fails to file an affidavit in opposition to motion.

Boschee v. Boschee. 340 N.W. 2d 685 (N.D. 1983)

5. Did the Court violate Landrus’ 14th Amendment Right to Due Process by the forgoing?

The 14th Amendment is the right to due process. The State and the Court violated Landrus’ 14th Amendment rights by there misapplication of N.D. Admin. Code § 75-02-04.1-10 where no hearing was held in this case. [A2 A3 A4 A5] There is also a 14th Amendment violation of equal protection clause violated. [A1] Were Landrus as a prisoner did not surrender his rights to equal protection at prison gates, see Williams v. Lane 851 F.2d 867, rehearing denied 109S.ct. 879. 488 U.S. 1047, 102 L.Ed.2d 1001, and class for purposes of equal protection analysis, can consist of a single member, see U.S.C.A. Const.Amend. 5, 14. Indiana State Teachers Ass’n v. Board of School Com’rs of the City of Indianapolis, 101 F.3d 1179. See K.B. v. Bauer 2009 N.D. 45: 763 N.W. 2d 462. P11 590 N.W. 2d 215

“If the district court fails to comply with the child support guide lines in determining an obligators child support obligation, the court errs as a matter of law”

The misapplication creates debt that is state created in the first place, creating Debtors Prison because Landrus faces Prison time for unpaid child support and the interest created on that debt that does not go to the child but instead to the state and the Bank of North Dakota, the creator of the original debt. See K.B. v. Bauer 2009 N.D. 45: 763 N.W. 2d 462, P11 590 N.W. 2d 215.

The Debtor’s act of 1869 and N.D. Const. Art. 1, § 15. Make it illegal to imprison a person for debts. The state of North Dakota does exactly that when you don’t make your child support payments, by charging the debtor 20% interest on the principle owed to the child. N.D. Const. Art. 1, § 15. states:

“No person shall be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of his creditors. in such manner as shall be prescribed by law; or in cases of tort; or where there is strong presumption of fraud.”

That interest is not given to the child but rather to the state which uses the money to pay for its involvement in the matter, thru the bank of North Dakota. a state owned bank. The state of North Dakota also uses the threat of imprisonment to help them in there task of retrieving said child support.

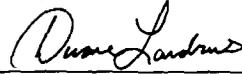
CONCLUSION

The relief that Landrus is seeking is that his Child support be reduced to the price that is stated in N.D. Admin. Code § 75-02-04.1-10 for two children which is a total of \$328. So the Order in this case needs to be reduced by \$57 to keep it in line with N.D. Admin.Code § 75-02-04.1-10. The Case Summary [A6] supports this.

Wherefore, Respondent asks the Court to grant this motion in its entirety.

Dated this 23 day of May, 2010.

Respectfully submitted,



Duane E. Landrus Jr.
P.O. Box 5521
Bismarck, N.D. 58506

IN THE SUPREME COURT OF NORTH DAKOTA

DUANE LANDRUS JR..)
)
 Appellant/Petitioner.)
)
 vs.)
)
 STATE OF NORTH DAKOTA,)
)
 Appellee/Respondent.)
)

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SUPREME COURT
MAY 26 2011

Supreme Court No. 20110112
Burleigh Co. No. 08-10-R-00361

CERTIFICATE OF NON-COMPLIANCE

COMES NOW, Duane Landrus, appellant in the above-noted action and respectfully submits this Certificate of Non-Compliance and shows to the Court the following:

1. That the appellant, Duane Landrus is an inmate at the North Dakota Department of Corrections in Bismarck and does not have access to the Internet or any type of electronic storage devices such as diskettes;
2. That Landrus has contacted the prison staff and requested that an electronic file be sent to the Clerk of the Supreme Court of North Dakota as to comply with the Rules of Appellate Procedure;
3. That the prison staff denied Landrus' request and instructed him to file the Certificate of Non-Compliance in its place.

Wherefore, Landrus requests that due to the constraints placed upon him by way of his incarceration that the Court accept this Certificate of Non-Compliance and waive N.D.R.App.P. Rule 31(b)(1)(C) requiring him to file an electronic copy of his Appellant Brief and Appendix.

Dated this 24th day of May, 2011

Respectfully submitted,

A handwritten signature in cursive script that reads "Duane Landrus".

Duane Landrus Jr.
Petitioner-Appellant
P.O. Box 5521
Bismarck, ND 58506-5521

