

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Shannon R. Dieterle,)	
)	
Plaintiff-Appellee,)	Supreme Court Case No.:
)	20150087
)	
v.)	District Court Case No.:
)	42-2011-DM-00021
Angela L. Hansen,)	
)	
Defendant-Appellant.)	

APPEAL FROM THE FINDINGS AND ORDER (CORRECTED)
DATED MARCH 9, 2015
THE HON. DAVID E. REICH, PRESIDING
SOUTH CENTRAL JUDICIAL DISTRICT

REPLY BRIEF OF APPELLANT

Respectfully submitted by:

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PRELIMINARY STATEMENT

1. Appellee Shannon R. Dieterle (hereafter, “Shannon”) bases his entire argument on a few simple claims, all of them baseless. First, he claims that Appellant (hereafter, “Angela”) has failed to present a showing that the trial court committed legal errors. (Appellee’s Brief, para. 7.) Second, he argues that he bears no obligation of presenting evidence that Angela was in contempt of court. (Appellee’s Brief, paras. 9-10.) Third, he claims that Angela’s alleged noncompliance with an order *at a time when her motion for a stay of that order was pending before this Court* was willful as a matter of law because the stay was later denied. (Appellee’s Brief, para. 11.) Fourth, he argues that although Angela admittedly had no notice of the trial court’s intent to hold an evidentiary hearing, Angela’s rights were not violated because she knew the trial court would hear oral argument on that date. (Appellee’s Brief, para. 13.)

2. Each of these assertions is incorrect. In fact, the trial court committed several legal errors in reaching its finding holding Angela in contempt, as will be detailed further below. Shannon misstates the law when he suggests he is under no obligation to present evidence establishing Angela’s contempt of court. In addition, Shannon’s claim that Angela’s good-faith, pending motion for a stay of an order she allegedly violated is irrelevant to a finding of contempt is incorrect as a matter of law.

LAW AND ARGUMENT

A. Appellant Was Denied Due Process of Law Due to Lack of Notice of an Evidentiary Hearing

3. Angela was denied due process of law, since she never received notice of the evidentiary hearing conducted by the trial court, at which she was found in contempt of court. This violation alone requires reversal.

4. The facts are not in dispute. Shannon admits that Angela “was prepared for oral argument but not for an evidentiary hearing on the matter.” (Appellee’s Brief, para. 13.) There is not the slightest evidence that Angela was ever notified of the trial court’s intent to take additional evidence in support of Shannon’s motion.

5. Indeed, Angela’s lack of notice of an evidentiary hearing is plainly evident from the record. When the trial court indicated it was taking testimony, Angela pointed out that she had not been notified that any new evidence was to be taken: “I wasn’t advised this would be an evidentiary hearing”; rather, she understood the court was only taking “oral arguments on his motion because there’s nothing in the motion papers or order [notifying her of the court appearance] which says that this would be an evidentiary hearing.” (Transcript, p. 4 ll. 9-13.)

6. Significantly, the trial court did not deny this; the trial judge merely told Angela – for the first time – that at this hearing Shannon would attempt to “show me the basis for his application that you’re not complying with the judgment.” (*Id.*, p. 4, ll. 14-16.) Clearly, Angela lacked notice of the purpose of the hearing. The trial court’s insistence upon proceeding with an evidentiary despite Angela’s lack of notice violated her right to due process of law. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Indeed, this principle has been specifically affirmed by this Court: “The right to a fair hearing comporting with due process includes reasonable notice or opportunity to know of the claims of opposing parties and

an opportunity to meet them.” *Municipal Servs. Corp. v. North Dakota Dept. of Health and Consol. Lab.*, 483 N.W.2d 560, 564 (N.D., 1992).

7. The trial judge compounded the error by insisting that the hearing go forward immediately, not giving Angela any time at all to prepare to cross-examine Shannon. (Transcript, p. 4 l. 20 – p. 5 l. 6.) The trial judge even limited the time during which Angela could present her case – after having given her no notice that she would have to present one and no time in which to prepare it. (*Id.*, p. 30 ll. 23-24; p. 37 l. 25 – p. 38 l. 1; p. 49 ll. 19-20.) On top of that, the trial judge prevented Angela from presenting important evidence tending to prove she had not violated the trial court’s order, on the grounds that “that’s hearsay because that person isn’t here to testify.” (*Id.*, p. 30 l. 21.) Obviously, she could not bring witnesses to a hearing she did not know would occur! This also disproves Shannon’s disingenuous claim that Angela was fully prepared for the hearing even without notice. (Appellee’s Brief, para. 13.)¹ Clearly, the trial court’s error of law had serious consequences for Angela.

8. In fact, no such hearing should have been held in the first place. Shannon’s supporting affidavit nowhere stated, on Shannon’s personal knowledge, any violation of the trial court’s orders. This was demonstrated in Angela’s motion papers presented in the trial court below. (See Doc ID # 599.) Angela also raised the issue specifically during the evidentiary hearing itself. (Transcript, p. 39 ll. 7-12, ll. 18-24.) Since Shannon’s motion sought a modification of custody together with a finding of contempt, this precluded an evidentiary hearing: “A party seeking modification of an order concerning primary residential responsibility shall serve and file moving papers and supporting affidavits... The court shall...deny the motion unless the court finds the moving party has established a prima facie case justifying

¹ The trial court’s action in this instance was doubly unfair, because Shannon was permitted to introduce hearsay testimony during the same hearing. (Transcript, p. 22 ll. 4-14.)

modification.” *Marsden v. Koop*, 2010 N.D. 199 (2010), para. 6. Accordingly, the holding of this evidentiary hearing without adequate notice violated Angela’s rights and requires reversal.

B. Appellant Was Denied Due Process of Law Due to the Trial Court’s Consideration of Evidence That Was Not Included in Plaintiff-Appellee’s Affidavit

9. The trial court also erred by accepting extensive testimony from Shannon on the key issue to be decided – namely, whether Angela had violated a court order – that fell well outside the evidence Shannon had presented in his supporting affidavit.

10. As noted above, Shannon’s affidavit provided no first-hand evidence of any violation by Angela. However, the trial court allowed him to present testimony of precisely that nature at the evidentiary hearing. (Transcript, p. 6 ll. 15-23; p. 18 l. 13 – p. 21 l. 15.) The trial court later relied on the evidence taken – which fell outside what was contained in Shannon’s affidavit – rather than relying, as the law requires, on evidence within “the four corners of the affidavit,” thus violating Angela’s rights. *See State v. Schmalz*, 2008 N.D. 27 (2008), para. 13; *State v. Roth*, 2004 N.D. 23 (2004), para. 25; *State v. Apland*, 2015 N.D. 29 (2015), para. 11. This was an error of law requiring reversal.

11. Moreover, “[a]ffidavits are not competent if they fail to show a basis for actual personal knowledge, or if they state conclusions without the support of evidentiary facts.” *Jensen v. Jensen*, 2013 N.D. 144 (2013), para. 8, *citing Thompson v. Thompson*, 2012 N.D. 15, 809 N.W.2d 331 (2012), para. 6.

12. Since the trial court improperly took evidence outside Shannon’s affidavit, Angela’s right to due process was violated; and the remaining evidence was insufficient as a matter of law.

13. For both reasons, this Court must reverse.

C. Appellant Was Denied Due Process of Law Due to the Extensive Use of Leading Questions at the Hearing

14. Shannon’s counsel repeatedly led and primed Shannon in order to get the testimony he wanted. His questions included the following:

“[D]id you and myself as your attorney make efforts to try to get both the personal property exchanged and to get Angela to sign the listing agreement?” (Transcript, p. 5 ll. 10-12.)

“If she would just drop off your daughter at Head Start in the morning when she’s supposed to so she can enjoy the Head Start day, and pick her up after Head Start gets done so she can enjoy the day? Would you have any problem if she did that?” (*Id.*, p. 23 ll. 2-6.)

If she didn’t keep your daughter for ten days, if she just followed the Court’s order, would you be fine with all of that?” (*Id.*, p. 23 ll. 13-15.)

15. Allowing these leading question was erroneous as a matter of law. “A leading question is one that suggests to the witness the answer desired by the examiner.” *Leno v. N.D. Dept. of Transportation*, 2015 N.D. 255 (2015), para. 15. Clearly, the questions cited above – all of which were central to the evidence of contempt the trial court relied on – were precisely such leading questions.

16. Such questions are forbidden under North Dakota Rule of Evidence 611(c). It was therefore clearly error, as a matter of law, for the trial court to allow such questions.² Reversal is required.

² Since Angela represented herself and is not an attorney, her failure to object did not relieve the trial court of its obligation to bar improper questions or illegally presented evidence. See *State v. White Bird*, 2015 N.D. 41 (2015), para. 25.

D. Appellant Was Wrongly Held in Contempt, As a Matter of Law, Since at the Time She Was Seeking in Good Faith a Stay of the Order She Allegedly Violated, Rendering Her Actions Not Contemptuous

17. Shannon argues that Angela’s pending motion before this Court for a stay of the order she was accused of violating was irrelevant. (Appellee’s Brief, para. 11.) But Shannon overlooks the legal definition of contempt. “To warrant a remedial sanction for contempt, there must be a willful and inexcusable intent to violate a court order.” *Bachmeier v. Bachmeier*, 2013 N.D. 76, 830 N.W.2d 546 (2013), para. 5. Since Shannon concedes that Angela was engaged in a good-faith effort to have the order stayed at the time he accuses her of violating it, he must admit that Angela’s alleged violation could not have been willful – and thus could not have constituted contempt. That the stay was later denied is irrelevant. Again, the trial court’s error on this central point requires reversal.

E. No Adequate Proof of Contempt Was Submitted to the Court

18. Angela submitted evidence showing that she had attempted to cooperate with Shannon in the sale of the ranch. (Transcript, p. 36 l. 5 – p. 37 l. 14; *see* p. 39 ll. 1-2.) She also submitted evidence, in part via Shannon’s own testimony, that she had not willfully failed to exchange the child with Shannon in keeping with the terms of the trial court’s orders. (*Id.*, p. 29 ll. 13-18.)

19. What is more, there is significant evidence in the record – referred to by Angela at the evidentiary hearing (Transcript, p. 39 l. 23 – p. 40 l. 2) – that the minor child is very reluctant to separate from Angela, thus making exchanges difficult. (See Doc ID # 599.)

20. These facts show that no proof of contempt was ever submitted to the trial court, since it was precisely these two provisions of the trial court’s order – cooperating in the sale of the ranch and timely exchanges of the minor child – that Angela allegedly violated.

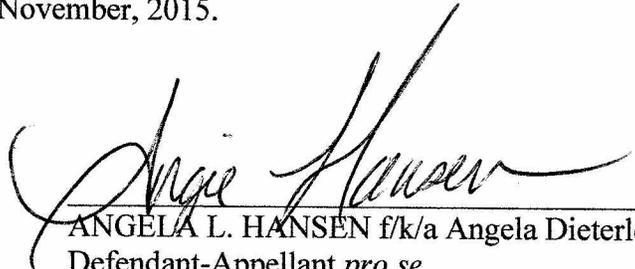
21. With respect to the sale of the ranch, it is remarkable that even at the evidentiary hearing, Shannon's counsel admitted that Angela signed a sale agreement in the form required by the trial court, simply adding details the reasonableness of which he did not deny, only stating that he and his client did not wish to negotiate. (Transcript, p. 45 l. 11 – p. 46 l. 2.) This does not amount to the willful noncompliance required by law.

22. The trial court never took into account Angela's emphatic denials that she willfully violated any court orders – nor did it allow her to explore Shannon's own violations. (Transcript, p. 37 ll. 22-25.) Under these circumstances, as argued in Angela's original brief, there was simply no competent proof before the trial court that she violated the orders in question. The trial court's finding that held her in contempt was insufficiently supported, as a matter of law, and requires reversal.

CONCLUSION

23. Appellant, Angela, again asks this Court to reverse the judgment below and to award her costs on this appeal.

Respectfully submitted this 18th day of November, 2015.



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CERTIFICATE OF SERVICE

The undersigned certifies, pursuant to Rule 5(f) of the North Dakota Rules of Civil Procedure, that on November 18, 2015, a true and correct copy of the following documents:

1. Appellant's Reply Brief
2. Appendix of Appellant
3. Certificate of Service of above

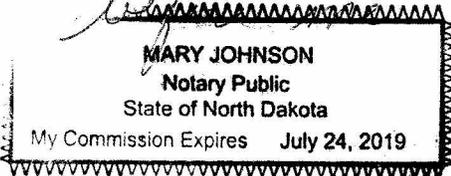
– were served, via United States mail, upon the following:

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November 18, 2015

11-18-15 Angie Hansen appear before me.



Mary Johnson