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ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Walter D. Wagner,	)	
	)	Supreme Court No. 980395 STATE OF NORTH DAKOTA
Plaintiff/Appellee,	)	Emmons County District Court
	)	Civil No. 93-C-61
vs.	)	
	)	
Bernadette Wagner,	)	
	)	
Defendant/Appellant.	)	

APPEAL FROM ORDER DATED OCTOBER 26, 1998,
AND THE MEMORANDUM OPINION AND ORDER
DATED OCTOBER 21, 1998, DISTRICT COURT,
EMMONS COUNTY, NORTH DAKOTA
THE HONORABLE BURT L. RISKEDAHL, PRESIDING

BRIEF OF APPELLEE

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4. Did the District Court err in determining that Walter had followed the Stipulation?

5. Did the District Court err in failing to enter judgment nunc pro tunc?

STATEMENT OF CASE

A. Nature of the Case

The appellant's statement of the nature of the case is substantially accurate and is adopted here.

B. Statement of the Relevant Facts

Here we differ.

Appellant correctly recites the procedural posture. However, the following chronology may be of use:

May 1994 until March 1996–Trials held that ultimately divorced the parties.

3/15/96	Divorce Judgment entered.
5/22/97	Walter's motion to reduce support.
6/26/97	Motion denied by one line decision of Judge Haskell.
7/9/97	Walter files notice of appeal to Supreme Court.
11/19/97	Supreme Court remanded to District Court. Wagner v. Wagner, 1998 ND 117, 579 NW 2d 207, 208 (ND 1998), explained, ". . . we remanded to the district court for a determination of Walter Wagner's income, the presumptively correct amount of support under the guidelines, and whether

the presumptively correct amount has been rebutted. We retained jurisdiction under N.D.R. App. P. 35 (b), and held the appeal in abeyance until determination of the issue by the district court." (Underlining added.)

1/9/98 Stipulation for Settlement and Dismissal With Prejudice executed by the parties in the United States Bankruptcy Court. (Appx. 24).

1/19/98 Bernadette files, in the District Court, a Motion For Order on Remand, in which she relied virtually exclusively upon the terms of the Stipulation. The motion begins, "Bernadette Wagner through her attorney, hereby moves the Court for an Order on Remand incorporating the Stipulation for Settlement and Dismissal with Prejudice executed by Bernadette Wagner and Walter Wagner in an adversary proceeding in U.S. Bankruptcy Court for the District of North Dakota, Bankruptcy No. 97-30510, Adversary No. 97-7049." A copy of the Stipulation was attached to the Motion and the Motion relied exclusively upon such Stipulation. The motion concludes by stating, "This Motion is based upon the attached Stipulation of the parties. . . " (Register of Actions, Document No. 291, Appx. 14)

1/23/98 Order of United States Bankruptcy Judge confirming the Stipulation for Settlement and Dismissal With Prejudice, also

	ordering that it does not over-ride the jurisdiction of the District Court with respect to child support and spousal support, and ordering the parties to perform in accordance with the Stipulation.
1/23/98	Judgment of the United States Bankruptcy Court which follows the Order of the Court.
3/4/98	Auction sale of machinery and farm land.
3/12/98	District Court issued its Findings of Fact and Conclusions of Law which set the child support amount precisely in accordance with the terms of the Stipulation. (Register of Actions. Document No.297 Appx. 14; and Appx. 25).
3/27/98	Bernadette's Emergency Motion For Ex Parte Restraining Order.
3/27/98	Judge Haskell signed the Ex Parte Interim Order, restraining Walter from closing on the sale of the farm land.
3/31/98	Bernadette's Motion to extinguish or rescind the Stipulation made in the Bankruptcy Court.
4/22/98	Record returned to Supreme Court.
5/26/98	Judge Haskell recuses himself and Judge Riskedahl is assigned.
6/4/98	Supreme Court decision in Wagner v. Wagner, Supra., issued.
8/7/98	Hearing on Motions to Vacate Ex Parte Interim Order and to Extinguish or Rescind Stipulation, before Judge Riskedahl.
9/18/98	Judge Riskedahl's Memorandum Opinion, denying Motion to

Extinguish or Rescind Stipulation in Bankruptcy Court and for Order Nunc Pro Tunc and granting Motion to Vacate Ex parte Interim Order.

9/23/98 Bernadette's Request for Reconsideration.

10/21/98 Memorandum Opinion denying Request for Reconsideration.

10/22/98 Walter's Response.

10/26/98 Judge Riskedahl's Order Regarding Motions, denying Bernadette's Motion to Extinguish or Rescind Stipulation in the Bankruptcy Court; granting Walter's Motion to Vacate the Ex Parte Restraining Order and directing concluding the sale of the real estate sold at auction in March 1998; and denying Bernadette's request for Judgment Nunc Pro Tunc.

Other facts have been erroneously portrayed by Bernadette and should be more accurately explained. Some facts have been omitted from her recitation that are significant.

At pages 3 and 4 she suggests land values and equities. However, those are based upon opinions expressed by her trial witness. The market place apparently differs from his opinions. At page 4 she talks of 1360 acres of land on which the parties had a contract for deed. There was a default on the contract. However, during the period of redemption, both Bernadette and Walter had redemption rights. If the land had the value, or equity, that she and her expert claimed, then the question quickly comes to mind, why did she not find one of these purchasers for the high value she claimed, redeem the land and sell it to that purchaser for a profit? The

answer is obvious–his numbers were wrong.

Similarly, she claims throughout that the land sold too cheaply at the March 1998 auction. The Trial Court found otherwise.

In fact, the Trial Court made many findings of fact, most of which Bernadette wants to disagree with. These include:

1. "As a result of his (Walter's) inability to respond to various creditor claims and inability to comply with provisions of the divorce decree as it related to property settlements, the plaintiff sought the protection of the U.S. Bankruptcy Court in 1997. As a result of her (Bernadette's) interests in the property subject to bankruptcy proceedings, the defendant asserted claims as a creditor in the bankruptcy proceeding." (Appx. 148-149)

2. "The record has failed to establish that the plaintiff did not intend to fulfill the agreement entered into, even though his default occurred very quickly thereafter. Mr. Smith's testimony indicated that the agreement was entered into after extensive negotiations in the belief that it could be performed and that the plaintiff's failure to perform was related to his inability to obtain proper operating financing." (Appx 152)

3. "The testimony taken as a whole does not substantiate the defendant's claims that the auction was improperly conducted or involved illegal collaboration between the plaintiff, the auctioneer and/or others to deflate the price received at auction." (Appx. 153)

4. "The Court has reviewed the video tape of the auction (Plaintiff's Exhibit 6, Document 336a, Appx. 133) which was received into the court record. The auctioneer worked strenuously and took considerable time in an attempt to obtain the

highest bid possible for the land that was sold." (Appx 153)

5. " The defendant's testimony and that of Norm Steinle indicating the possibility that the land could have sold for higher prices had it been parceled out differently is rebutted by the testimony of Dean Schwartz, who has considerable real estate expertise and who believes the prices received for the land were commensurate with other comparable sales." (Appx 153)

6. "The record indicates further, that Jerome Senger was an arm's length purchaser in spite of defendant's contentions." (Appx 153)

7. "Mr. Senger has now entered into sales and lease agreements regarding the property he purchased at the auction which he perceives are income producing for himself." (Appx 153)

8. "Finally, those provisions of the stipulated agreement which set forth the manner in which the sale would be held, the auctioneer selection process and other considerations have been adhered to." (Appx 153)

9. "Although the price received for the land is lower than the defendant believed was reasonable, there is no evidence before the Court on which to base a finding that grounds for rescission exist in this case." (Appx 153)

With respect to the request of Defendant for an order nunc pro tunc, the Court also, in addition to the recitation of legal reasons for not granting the requested relief, found:

10. "If the relief which the defendant seeks was granted, it would have the effect of significantly altering the rights of the parties, as opposed to being an order to correct or clarify." (Appx 155)

LAW AND ARGUMENT

ISSUE:

1. Did the District Court have jurisdiction?

The first issue, not dealt with below, concerns the jurisdiction of the trial court. It appears that the trial court lacked subject matter jurisdiction at the time of the making of the initial Emergency Motion for Ex Parte Restraining Order on March 27, 1998. (Appx 17), at the time of issuing the Ex Parte Interim Order on March 27, 1998 (Appx 37) and the time of the making of the underlying Motion on March 31, 1998 (Appx 39)

While ordinarily this Honorable Court does not address issues not raised below or by the parties on appeal, this is not the case with respect to the issue of jurisdiction. As stated in Allstate Ins. Co. v. Nodak Mutual Ins. Co., 540 NW 2d 614, 616 (ND 1995), "Although the parties do not address on appeal the trial court's authority to rule on the statute of limitations question, we may review issues involving subject matter jurisdiction on our own initiative."

Additionally, it was held in Larson v. Dunn, 474 NW 2d 34,39 (ND 1991), that, "Subject matter jurisdiction cannot be conferred by the parties' agreement, consent or waiver; however a party's right to object to personal jurisdiction may be waived....A judgment or order entered without the requisite jurisdiction is void. . .and it may be collaterally attacked at any time by a party claiming an interest in the subject matter affected."

As reflected above, this Court had jurisdiction over this case from the time of

the filing of the Notice of Appeal that led to Wagner v. Wagner, 1998 ND 117, 579 NW 2d 207 (ND 1998), Supra. That Notice of Appeal was filed July 10, 1997 (Register of Actions Document No. 279, Appx. 13). The case was remanded to the district court on November 19, 1997, with this Court retaining jurisdiction, through the return of the record to the Supreme Court on April 22, 1998, and the issuance of the decision on June 4, 1998.

From this time line, it appears clear that the district court's Ex Parte Interim Order of March 27, 1998 was void, having been issued without jurisdiction.

Arguably, the Orders which are now appealed are also void, having been issued with respect to Motions made at the same time, when the district court was without jurisdiction. Granted, the Orders were issued after the conclusion of the previous appeal.

However, this case is analogous to State v. Osier, 1999 ND 28, 590 NW 2d 205 (ND 1999). In that case, after the defendant's convictions were reversed on appeal and the case remanded for a new trial. By the time of the new trial there was also a new prosecutor and a new trial judge. The defendant sought to rely on a pretrial motion filed in the first trial. The district court judge refused to allow the defendant to rely on the earlier motion. On appeal, this Honorable Court held, at page 209, that, "With a new trial, a new prosecutor, and a new judge, we conclude the trial court did not abuse its discretion in requiring a new motion. . . "

It seems that the fact of a new prosecutor is irrelevant. It is still the State of North Dakota doing the prosecuting. Therefore, we have a new proceeding and a new judge. This is precisely the situation with the case at bar. After Judge Haskell

signed the Ex Parte Interim Order, without jurisdiction, he recused himself. It seems that motions made while the district court was without jurisdiction should not be catapulted into validity without having been made at a time when the court was with jurisdiction, notwithstanding the fact that the hearing and the rulings took place when it clearly was with jurisdiction.

Similarly, at footnote 3 in Anderson v. Richland County Water Resources Board, 506 NW 2d 362, 365 (ND 1993), is found the following, "Since the landowners filed their notice of appeal to this Court before the district court issued its order denying the motions, that order was void for lack of jurisdiction and the landowners' motions were still pending at the time of oral argument. We remanded the case so we may address all of the issues raised and to avoid a separate appeal of the district court's order." Thus, it seems that the motions made in this case, at a time when another appeal was pending, with jurisdiction clearly lodged with the Supreme Court, must be viewed as nullities.

ISSUES:

2. Did the District Court err in finding the evidence did not establish that Walter fraudulently induced Bernadette to enter into the Stipulation?

3. Did the District Court err in failing to void the sales at auction as fraudulent transfers?

4. Did the District Court err in determining that Walter had followed the Stipulation?

It seems that these three issues, as delineated by the Appellant, Bernadette, are really only three different approaches to the same theme, and therefore can all be

dealt with together. Essentially, these are only attacks on the findings of fact of the district court. The approach taken by Bernadette is that she would like a trial de novo before this Honorable Court. something, of course, to which she is not entitled. The facts simply did not support her claims.

The Appellant has a heavy burden to bear before this Honorable Court. As recently reiterated in Schmaltz v. Schmaltz, 1998 ND 212, 586 N.W.2d 852, 854 (N.D. 1998), "A trial court's . . . finding of fact will not be set aside on appeal unless it is clearly erroneous. A trial court's findings of fact are presumptively correct. The complaining party bears the burden of demonstrating on appeal that a finding of fact is clearly erroneous. In reviewing findings of fact, we must view the evidence in the light most favorable to the findings. A choice between two permissible views of the evidence is not clearly erroneous. Simply because we might view the evidence differently does not entitle us to reverse the trial court. A finding of fact is clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made."

It has long been appreciated that the trial court is in the best position to weigh evidence and make factual determinations. As stated in Orwick v. Orwick, 152, NW 2d 95,97 (ND 1967), "The trial court has the advantage of taking testimony and examining into the necessary facts upon which to make an advised decision."

Though in the context of a criminal case, this Court reaffirmed this position two months ago in State v. Overby, 1999 ND 47, 590 NW 2d 703, 705 (ND 1999), and held that, "We will defer to a trial court's findings of fact in the disposition of a motion to suppress. Conflicts in testimony will be resolved in favor of affirmance, as

we recognize the trial court is in a superior position to assess credibility of witnesses and weigh the evidence."

It was held in Alumni Association of the University of North Dakota v. Hart Agency, Inc., 283 NW 2d 119 (ND 1979), that if there is conflicting evidence, findings of fact by the trial court in an equitable action are not subject to reexamination on appeal.

It has been stated many times by this Court that the fact that the Supreme Court may have viewed the facts differently if it had been the initial trier of fact does not entitle the Supreme Court to reverse the lower court. See, for example, Edwards v. Thompson, 336 NW 2d 612 (ND 1983). In this same case, at Footnote 6 on page 616, we are reminded that, "It is elementary that the purpose of an appeal is to review the trial court's actions and not to allow an appellant to develop and expound upon new strategies or theories."

With this case law background, it is interesting to review the Appellant's work product at the trial court level. Her lengthy and esoteric argument to this Court is filled with citation to 16 cases and almost 30 pages of argument. With respect to the issues that she did raise to the trial court, they have been soundly rejected. To the extent that new issues are raised at this level, they must be rejected.

Her Emergency Motion for Ex Parte Restraining Order (Appx 17) did not contain a single citation to case authority.

Her Affidavit (Appx 19) did not contain a single citation to case authority.

Her Motion (Appx 39) did not contain a single citation to case authority.

Finally, her lengthy Brief in Support of Motion (Appx 41) did not contain a

single citation to case authority.

Ultimately, when the Supplemental Brief Regarding Nunc Pro Tunc Entry of Judgment is made (Appx 141). 3 of the long list of cases now cited for the first time were cited. That issue will be dealt with below.

There is no legal or factual basis for this Court to disturb the trial court's disposition.

We must start with a review of the Stipulation for Settlement and Dismissal with Prejudice (Appx 24). After extensive negotiations. each side being represented by capable and experienced counsel. "The Stipulation was entered into between the parties as a settlement of all obligations between them." (Page 3 of Attorney Garrity's Brief in Support of Motion. Appx 43).

After it was signed, both parties relied upon it and acted in accordance with its terms. On 1/19/98 Bernadette relied upon it to ask the trial court to set child support exactly in accordance with its terms. Ten days after she made this Motion for Order on Remand. Walter. on 1/29/98. also in accordance with the Stipulation, sent a letter to Bernadette (Appx 33) setting out the list of three auctioneers from whom he asked her to choose and explaining that the land and machinery would be sold at auction.

In an exchange of correspondence between Bernadette's and Walter's attorneys Ruff and Smith (Appx 112) Bernadette selected the auctioneer that was used, saying, through counsel, "Bernadette does not intend to violate the Stipulation, and . . . he can proceed to have Milton Brandner conduct the auction." We now have not only the stipulation, we also have this additional agreement between the parties to go ahead with the auction which she now is trying to set aside.

The auction was not "quickly put together." (Appellant's brief page 6). It was held on March 4, 1998, just under a month after the agreement to do so in attorney Ruff's letter to attorney Smith of February 10. 1998.

There was excellent attendance at the sale. Bidder's numbers were issued to 153 bidders. (Appx 135-139). It is likely that there were others in attendance who were not issued bidder's numbers. A video tape (Appx 133) was made of the auction and the trial court found that "the auctioneer worked strenuously and took considerable time in an attempt to obtain the highest bid possible for the land that was sold." (Appx 153)

Bernadette's efforts here are only a transparent effort to collaterally attack the final judgment entered in the Bankruptcy Court and should not be allowed. The auction sale was a good faith sale in accordance with the terms of the Stipulation and subsequent agreement of the parties. Stipulations are accorded great weight in North Dakota. Recently in Koch Oil Co., a div of Koch Industries, Inc. v. Hanson, 536 NW 2d 702 (ND 1995), it was held that stipulations eliminating important questions of fact in a a trial are looked upon with favor and cannot be treated lightly; they are conclusive upon the parties.

The relief that Bernadette requests would wreak havoc with many who are not parties to these proceedings. The machinery was sold to many people. The land is now in the second crop year since the sale, likely planted to new crops long before oral argument is heard. No stay was ever sought or granted. If the sale were to be set aside at this time it would take more fingers than Peter had at the dike to fix all of the inequities thereby created, and pursue all of the people that Bernadette wants to

embroil in this controversy. The list of what would be encompassed if the court were to "rescind the Stipulation", as she requests, is endless. More significantly, it is neither required, nor allowed, by the facts and the law in this case.

ISSUE:

5. Did the District Court err in failing to enter judgment nunc pro tunc?

Simply put, no.

The trial court correctly and succinctly addressed this issue when it said. "A review of case law dealing with issuance of *nunc pro tunc* orders indicates that they are intended to clarify or be entered in order to express accurately what was intended in the original judgment, as opposed to a modification. A clarification is allowed where the terms of the judgment might be ambiguous or indefinite. In Anderson v. Anderson, 522 NW 2d 476 (ND 1994), the Court stated at 748, 'A clarification does not result in a judgment different from that originally ordered, but serves only to express accurately the thoughts which the original judgment intended to convey.' " (Appx 154-155)

CONCLUSIONS

The trial court committed no reversible error.

The trial court should be affirmed in all things.

Dated the 7th day of May, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of May, 1999, a true and correct copy of the foregoing document was placed in the United States mail, postage prepaid, to the following:

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