20090145

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

D. Luke Davis,

Plaintiff-Appellant,

Case No. 20090145

vs.

Civil No. 18-18-C-00908

Pamela Gordon Davis,

Defendant-Appellee.

BRIEF OF APPELLANT D. LUKE DAVIS

APPEAL FROM JUDGMENT OF DISMISSAL DATED APRIL 8, 2009

GRAND FORKS COUNTY DISTRICT COURT
NORTHEAST CENTRAL JUDICIAL DISTRICT
HONORABLE JOEL MEDD

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ISSUES ON APPEAL

1. Is the obligor of child support entitled to the return of the excess monies received by the obligee after Social Security disability benefits are properly credited to the obligor's support obligations under N.D.A.C. § 75-02-04.1-02(11)?

2. Does the obligor of child support lose his entitlement to the return of the excess monies just because he kept his support obligation current before the disability payments were actually made by the Social Security Administration?

3. Can a district court force an obligor to make gift or voluntary payment?

STATEMENT OF THE CASE

D. Luke Davis ["LUKE"] initiated an action in the District Court of Cass County, North Dakota by service of a Summons and Complaint dated February 11, 2008 [Appendix, pages 3-34], requesting the return of monies in the possession of Pamela Gordon Davis ["PAMELA"]. The monies in the possession of PAMELA represented overpayment of child support upon PAMELA'S receipt of Social Security monies credited to disabled LUKE under the Social Security Act and the North Dakota Child Support Guidelines. LUKE and PAMELA had together two (2) children, hereinafter referred to by abbreviation or other redaction.

PAMELA was served on February 15, 2008 [Docket Entry # 2], and did not timely answer. Instead, by Notice of Motion and Motion to Dismiss for Lack of Jurisdiction dated April 3, 2008, based upon N.D.R.Civ.P. 12 and supported by legal brief, PAMELA argued

that only the divorce court had jurisdiction to modify the child support, or in the alternative, demanded that matter be moved to the District Court of Grand Forks, North Dakota. Docket Entry # 3 and Entry # 4.

LUKE filed a Response to Motion noting PAMELA'S failure to answer the Complaint, and asserted the frivolity of PAMELA'S assertion because the District Court was not being asked to modify child support. Docket Entry # 6.

By Order dated June 3, 2008, Judge Dawson changed venue to Grand Forks County pursuant to N.D.C.C. § 28-04-05. Docket Entry # 9.

PAMELA finally served an Answer dated June 10, 2008. Appendix, pages 35-37.

Following a scheduling conference on July 7, 2008, Judge Joel D. Medd issued a Scheduling Order imposing deadlines for various stages of the discovery process pending trial. Docket Entry # 20.

Written discovery was accomplished by both parties, but only LUKE'S discovery attempts are pertinent to the trial [PAMELA made no attempt to utilize LUKE'S discovery response at the trial; LUKE'S discovery responses were never filed as such were without controversy]. So as to properly prepare for trial, LUKE served a Subpoena (duces tecum) demanding delivery of certain specified documents at a pre-trial proceeding scheduled for January 8, 2009. Appendix, page 38.

On January 13, 2009, LUKE and PAMELA, through their attorneys, entered into certain "STIPULATED FACTS". Appendix, page 40. On January 13, 2009, at a bench trial before Judge Joel Medd, the district court accepted the STIPULATED FACTS and listened to the testimony of LUKE and PAMELA. All documentary evidence received by the district

court was without objection. Appendix, pages 40-150. Transcript of January 13, 2009, pages 6-8, 82-85.

Following post-trial submissions, the district court issued its Memorandum Decision, Findings of Fact, Conclusions of Law and Order for Judgment dated March 31, 2009 dismissing the action without costs to either party. Appendix, page 151.

A Judgment of Dismissal was entered on April 8, 2009, with Notice of Entry of Judgment bearing the date of April 9, 2009. Appendix, pages 159-160.

LUKE timely filed a Notice of Appeal on May 6, 2009. Appendix, page 161.

STATEMENT OF FACTS

Preliminarily, LUKE notes the district court did not honor N.D.R.Civ.P. 52(a) which requires, "(i)n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment .." Instead, (a) the district court alluded to/seemingly accepted the following facts advanced by LUKE in an action, based in conversion and/or money had and received, because such facts were without significant controversy or dispute by PAMELA, and (b) the district court ruled on a matter not yet presented or ripe for decision – how does LUKE collect on his money judgment if ever awarded?

The district court's "FACTS" are set forth in the Appendix at pages 151-153, and its generalities are actually consistent with the following facts actually presented, many the result of a stipulation [Appendix, pages 40-41] or stipulated evidence [Transcript of January 13, 2009, pages 5-8, 82-85]:

1. LUKE and PAMELA were divorced in an action filed in the District Court for Grand Forks County, North Dakota, entitled:

Pamela Gordon Davis,
Plaintiff, Civil No. 18-97-C-277
vs.

D. Luke Davis,
Defendant.

See Stipulated Facts ¶ 1 [Appendix, page 40]; Complaint ¶ 1, admitted in Answer ¶ 5.

2. Under the terms of the judgment, and a later amendment to said judgment pertinent herein, PAMELA was awarded custody of the minor children of the parties, while LUKE had a child support obligation of $425.00 per month covering both children. Exhibit Plaintiff's Exhibit 9 [Appendix, page 125]; Stipulated Facts ¶ 2 [Appendix, page 40]; Complaint ¶ 2, partially admitted in Answer ¶ 6 [Appendix, pages 4, 35].

3. While regularly paying child support for the minor children, LUKE [also known as David Luke Davis] was applying for, and ultimately received, benefits under the Social Security Act. Under the Social Security Act, a child of an individual found to be disabled is eligible for additional monthly benefits under Title II [42 U.S.C. § 402] provided an application for child's insurance benefits is submitted. On January 24, 2007, LUKE, acting by and through his attorney, mailed a letter to attorney Rebecca Heigaard McGurran, legal counsel for PAMELA, notifying PAMELA that "K**** D***** and N*** D**** must file an application for Child's Insurance Benefits under the Social Security Act within six (6) months of November 28, 2006, to receive benefits to which they are entitled." PAMELA was advised of restrictions placed upon LUKE with respect to accessing

information. A copy of the January 24, 2007, letter was attached to the Complaint, marked Exhibit A, and incorporated by reference. Exhibit Plaintiff's Exhibit 1 [Appendix, page 42]; Complaint ¶ 3, *not admitted* in Answer ¶ 7 [on June 10, 2008; Appendix, page 35], and the failure to admit receipt of said letter was inappropriate in view of Answer to Interrogatory # 30 [Plaintiff's Exhibit 7; Appendix, page 75] which acknowledged actual knowledge of the letter in April, 2008 – months before the date of the Answer.

As noted in Stipulated Facts ¶ 4 [Appendix, page 40], LUKE applied for, and ultimately received, benefits under the Social Security Act. Under the Social Security Act, a child of an individual found to be disabled is eligible for additional monthly benefits under Title II [42 U.S.C. § 402] provided an application for child's insurance benefits is submitted. PAMELA made the appropriate application. See also, Defendant's Exhibit 5 [Appendix, page 150].

4. Neither Rebecca Heigaard McGurran nor PAMELA timely responded to the January 24, 2007, letter [Plaintiff's Exhibit 1; Appendix, page 42]. Instead, PAMELA [in addition to initiating other unrelated proceedings involving passports] wrote LUKE on March 18, 2007, acknowledging the "recent receipt of the children's Social Security benefits". A copy of the letter from PAMELA to LUKE was attached to the Complaint, marked Exhibit B, and incorporated by reference. Plaintiff's Exhibit 2; Appendix, page 43. PAMELA wrongfully attempted to intertwine unrelated, extraneous or imaginary medical expenses [and the obligation to provide income tax exemption documents]. PAMELA'S waiver of any claims immediately before trial at the pre-trial conference [Transcript of January 8, 2009, pages 5-6] evidences her wrongful attempt to intertwine unrelated, extraneous or imaginary

medical expenses. Plaintiff's Exhibit 2; Appendix, page 43. Complaint ¶ 4, not admitted in Answer ¶ 7; Appendix, pages 5, 35.

LUKE, so as to avoid "going to jail and being convicted of a felony in the State of North Dakota" for non-payment of child support, sold his equity in real property for $8,684.08 and applied the proceeds to his child support. Transcript of January 13, 2009, pages 39-40, 43, 45. These monies were paid by LUKE during the period of time for which double payment exists when the social security payments are also credited. When PAMELA would not respond to LUKE'S inquiries, he had to stop paying child support so as to avoid having his payments "considered a voluntary payment" as noted during the questioning of LUKE by PAMELA'S lawyer, Mr. Knudson [Transcript of January 13, 2009, pages 57-58]:

Q: You had to stop paying?

A: On purpose.

Q. Because of the Social Security issue?

A. Because otherwise it would be considered a voluntary payment.

Q. So in March you stopped paying the child support, because you were aware that she had been getting SOS?

A. No, I was aware she was eligible for it and had been told of that, and, to my knowledge, had done nothing about it. And any further payments that I made after that would be considered voluntary payment.

Earlier, upon being questioned by the Court and his own counsel, LUKE put it this way [Transcript of January 13, 2009, page 46]:

THE COURT: Did you ever consider it to be a gift?

A. The payments I made were not a gift, but under duress made by me.

BY MR. GARAAS:

Q. And did you want them back?

A. I wanted the payments I made back, because that's what the North Dakota Attorney General Opinion 24 states.

Q. And did you ever, ever agree to leave them in the possession of Ms. Davis for the benefit of your children?

A. No.

LUKE, being aware of the Attorney General's 2004 opinion, testified that he knew that he had to avoid the voluntary payment situation. Transcript of January 13, 2009, page 59.

As noted in Stipulated Facts ¶ 5 [Appendix, page 41], beginning in December, 2006, Social Security paid $330 a month for K**** D**** and $330 a month for N**** D****. Also, in March, 2007, Social Security paid back pay from January, 2004, for a total of $11,791 for each child – a total lump sum payment of $23,582 for the two children. Stipulated Facts ¶ 5; Appendix, page 41.

5. Upon receipt of the letter [Plaintiff's Exhibit 2; Appendix, page 43], LUKE advised PAMELA of her obligation(s) to report the children's Social Security benefits in view of legal opinions issued by the North Dakota Attorney General, a decision of the North Dakota Supreme Court, and provisions set forth in the pertinent portions of the North Dakota Administrative Code. Complaint ¶ 5 [Appendix, page 5], partially admitted in Answer ¶s 5 and 8 [Appendix, pages 35-36]; Plaintiff's Exhibit 4; Appendix, page 45; testimony of both LUKE and PAMELA; Transcript of January 13, 2009, pages 31, 75-76, 91-92.

LUKE'S admonitions to PAMELA that she apply for the children's Social Security benefits resulted the scheduling of an appointment involving PAMELA and the Social

Security Administration, which ultimately occurred on December 21, 2006. Plaintiff's Exhibit 18; Appendix, page 139. On December 21, 2006, PAMELA received a Social Security booklet [one page of which was ultimately furnished to LUKE on the date of trial; Plaintiff's Exhibit 19] at the same time that PAMELA'S "application for Social Security benefits on behalf of the child(ren) named below (was) received." Plaintiff's Exhibit 19; Appendix, page 140. Exhibits 18 and 19 [Appendix pages 139-141] document PAMELA'S actions made on behalf of the two (2) children, but also, the failure to disclose such application, the meeting, and the resulting payments to LUKE, documents an indifference and disregard for the parental rights of LUKE, the North Dakota Rules of Civil Procedure, an oath to respond truthfully in her discovery responses, and a subpoena duces tecum issued under the authority of the Court. PAMELA, and her counsel, have repeatedly displayed contempt for the parental rights of the LUKE by such actions, which, when coupled with PAMELA'S refusal to respond to other reasonable requests [no response to letters dated December 21, 2005, October 16, 2006, November 27, 2006, and January 24, 2007; Exhibit Plaintiff's Exhibit 1 [Appendix, page 42], Plaintiff's Exhibit 4 [Appendix, page 45], and Plaintiff's Exhibit 6 [Appendix, page 65], evidence intent to secrete actual circumstances. Transcript of January 13, 2009, pages 80-93. See also, LUKE'S individual efforts to secure information when PAMELA attempted to ignore reasonable inquiries. Plaintiff's Exhibit 13 [Appendix, page 131]; Plaintiff's Exhibit 15 [Appendix, page 134]; and Plaintiff's Exhibit 16 [Appendix, page 136].

6. Ultimately, and without any cooperation from PAMELA, LUKE received confirmation from Social Security Administration that "SOCIAL SECURITY IS PAYING

$330 A MONTH FOR K**** D**** AND $330 A MONTH FOR N**** D**** ON (DAVID DAVIS') RECORD. THEY WERE ALSO PAID BACK PAY FROM 1/04 IN 3/07 FOR A TOTAL OF $11791.00 EACH." A copy of the Report of Confidential Social Security Benefit Information dated May 16, 2007, was attached to the Complaint, marked Exhibit C [Appendix, page 12], and incorporated by reference. Plaintiff's Exhibit 3 [Appendix, page 44]; Plaintiff's Exhibit 13 [Appendix, page 131], Defendant's Exhibit 5 [Appendix, page 150]; Stipulated Facts ¶ 5 [Appendix, page 41]. Complaint ¶ 6, partially admitted in Answer ¶ 9 [Appendix, pages 6, 36].

As noted in Stipulated Facts ¶ 6 [Appendix, page 41], PAMELA provided written verification to the Grand Forks Regional Child Support Unit of the Social Security payments in April, 2007.

7. LUKE advised the North Dakota Department of Human Services of the payment(s) made by the Social Security Administration resulting in children's Social Security benefits which will have a legal impact upon the existing child support order set forth in the underlying judgment, as amended. LUKE was ignored by the various governmental agencies charged with the responsibility of enforcing the laws relating to child support in North Dakota. Plaintiff's Exhibit 7 [Answer to #33; Appendix, page 67]; see also, Transcript of January 13, 2009, page 29, 43-44, 55, 56.

8. On July 13, 2007, in an effort to clearly establish the burden placed upon PAMELA, LUKE caused to be sent a letter dated July 13, 2007, with enclosures including (a) two (2) pertinent Letter Opinions issued by the North Dakota Attorney General, and (b) the decision of the North Dakota Supreme Court in Tibor v. Bendrick, 1999 ND 92, 593

N.W.2d 395. A copy of the letter dated July 13, 2007, was attached to the Complaint, marked Exhibit D [Appendix, pages 13-30], and incorporated by reference. Plaintiff's Exhibit 4 [Appendix, page 45]; Complaint ¶ 8, admitted in Answer ¶ 5 [Appendix, pages 6, 35].

As of the date of the letter, LUKE calculated that he was entitled to the immediate payment of $16,325 and requested that she immediately contact "the North Dakota State Disbursement Unit to advise them of the situation so as to give proper credit to Mr. Davis – to avoid any duplication of monies, or possible collection efforts that could conceivably wrongfully deprive Mr. Davis of his liberty." A July 27, 2007, deadline for the return of the $16,325 [minimum] due LUKE was set forth. Exhibit Plaintiff's Exhibit 4 [Appendix, page 45]; Complaint ¶ 8, admitted in Answer ¶ 5 [Appendix, pages 6, 35].

9. PAMELA was advised that the effect of the greater amounts paid to her arising out of the children's benefits existing due to LUKE'S disability under the Social Security Act will substitute for his lesser child support obligation. As noted in Letter Opinion 2004-L-24, Attorney General Wayne Stenehjem wrote [Appendix, pages 16-18]:

> The North Dakota Supreme Court interpreted N.D.A.C. § 75-02-04.1-02(11) in Tibor v. Bendrick, 593 N.W.2d 395 (N.D. 1999). In Tibor, the Supreme Court stated that "the guidelines expressly provide that benefits, including social security disability dependency benefits, must be credited as a payment toward Bendrick's child support obligation for the particular months or period the payment was intended to cover." Id. At 397 (emphasis added).
>
> ..
>
> Consistent with the discussion of child support overpayments in N.D.A.G. 96-F-24, the "surplus" created by the actual collections should first be applied to any existing arrearage, but any remaining balance should not be considered a pre-payment of future child support without a court order providing that the collections should be applied to future child support rather than be refunded by the custodial parent or assignee. C.f. N.D.C.C. § 14-04-09.33(4); N.D.A.G. 96-F-24 (public policy of periodic child support payments is to

ensure that the child's needs are met on an ongoing, continuous basis).

There exists no court order that provides that the resulting overpayment of $16,325 [minimum] be applied to future child support, so it should have been "refunded by the custodial parent .." Plaintiff's Exhibit 4 [Appendix, page 45]; Complaint ¶ 9, not admitted in Answer ¶s 11 and 12 [Appendix, pages 7, 36], and the failure to admit being so advised was inappropriate in view of Answer ¶ 5 [Appendix, page 35] which acknowledged receipt of the letter including those identified comments of the Attorney General.

10. In a telephone call with LUKE, PAMELA claimed to have placed the monies received by her from the Social Security Administration resulting from the children's benefits due to the disability of LUKE into an interest-bearing Certificate of Deposit that would cause loss of interest and penalty for early withdrawal. LUKE consented to the delay in return of his monies until the early part of October, 2007. Plaintiff's Exhibit 5 [Appendix, page 64], Defendant's Exhibit 3 [Appendix, page 142], Defendant's Exhibit 4 [Appendix, page 146]; Stipulated Facts ¶ 7 [Appendix, page 41]. Complaint ¶ 10, admitted in Answer ¶ 5 [Appendix, pages 7-8, 35]. At time of trial, PAMELA actually testified – under questioning by her own lawyer [Transcript of January 13, 2009, page 73; the testimony was confirmed by LUKE, pages 33-34]:

> Q. Okay. Now, at some point, you and Mr. Davis came to an agreement. Well, why don't you tell me what the agreement was.
>
> A. When Mr. Davis and I spoke in mid to late July, we agreed that I would pay him the money sometime in October. I don't recall the specific date. And I told him that was when the amount of interest earned on the CDs would equal the penalties that would be charged for withdrawing the money early.

As noted in Stipulated Facts ¶ 7 [Appendix, page 41], on March 30, 2007, PAMELA

created two separate $10,000.00 Certificates of Deposit [CD 256825-20 for KAD; Defendant's Exhibit 4; Appendix, page 146; and CD 256841-20 for NTD; Defendant's Exhibit 3; Appendix, page 142] whereby she was recognized as Custodian Under the North Dakota Uniform Transfers to Minors Act.

11. As of October 19, 2007, LUKE had not been paid the monies due him by PAMELA which prompted the letter bearing said date which was attached to the Complaint, marked Exhibit E, and incorporated by reference [Plaintiff's Exhibit 5; Appendix, page 64]. By letter dated November 29, 2007, a copy of which attached to the Complaint as Exhibit F [Plaintiff's Exhibit 6; Appendix, page 33], LUKE reiterated his demand for the return of the $16,325 to an attorney claiming to be acting for PAMELA, but refused to respond for over 40 days, and as of February 7, 2008, attorney Bradley W. Parrish then asserted, by letter, that his "firm no longer represents Pamela Davis in her dispute with Mr. Davis regarding child support reimbursement." Plaintiff's Exhibit 6 [Appendix, page 65]; Complaint ¶ 11, but not admitted in Answer ¶s 11 and 12 [Appendix, pages 8, 36], which was inappropriate in that PAMELA was fully aware that she had not paid him the monies, that LUKE was again demanding such monies, and she had to be aware of which lawyer was no longer representing her.

12. PAMELA failed or refused to return monies in her possession for the period of January, 2004, through March, 2007, in the minimum amount of $16,325.[1] The detriment caused by the wrongful conversion of said personal property is presumed to be $16,325 with

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[1] The amount is slightly different based upon the actual month identified in the underlying inquiry. **$15,727.97** is the stipulated amount for the designated time without interest.

additional interest, when the overpayment was recognized by receipt of the Social Security monies credited to disabled LUKE under the Social Security Act and the North Dakota Child Support Guidelines. Plaintiff's Exhibit 4 [Appendix, page 45]; Stipulated Fact ¶ 3 [Appendix, page 40]; Complaint ¶ 12, not admitted in Answer ¶ 13 [Appendix, pages 8, 36] which was inappropriate in view of her receipt of child support monies as noted in Stipulated Facts ¶ 3 – before interest is calculated:

> From January, 2004, through February, 2007, D. Luke Davis made child support payments totaling **$15,727.97** through the Grand Forks Regional Child Support Unit; an amount equal to thirty-seven (37) months at $425/month + $2.97 [so as to be current through January, 2007, with $2.97 paid toward the February, 2007, child support obligation; $425 X 37 = $15,725 + $2.97 = $15,727.97].

13. That PAMELA'S actions and inactions, including her unwillingness to do any act that could conceivably benefit LUKE, was made manifest when it became apparent that she had even failed to honor North Dakota's discovery rules [while under oath], and even failed to fully honor a subpoena for documents clearly within her possession relating to the Social Security claim and resulting monies paid for the benefit of the children. Plaintiff's Exhibit 7 [Appendix, page 67], Plaintiff's Exhibit 8A [Appendix, page 121]; Plaintiff's Exhibit 8B [Appendix, page 128]; Plaintiff's Exhibit 18 [Appendix, page 139]; Plaintiff's Exhibit 19 [Appendix, page 140]; Testimony of PAMELA including stepping down from the witness chair to secure documents previously furnished her legal counsel – but not supplied to LUKE pursuant to discovery request or subpoena. Transcript of January 13, 2009, pages 80-93.

LUKE has not yet secured the return of the stipulated amount of overpayment, and the district court was afraid that PAMELA might use social security monies entrusted to her

to satisfy her indebtedness to LUKE, so declined to award any judgment favoring LUKE.

LAW AND ARGUMENT

Legal Background

The North Dakota Supreme Court's decision in Tibor v. Bendrick, 1999 ND 92, 593 N.W.2d 395 [later followed in Nelson v. Nelson, 2000 ND 118, 617 N.W.2d 131], draws a line directing disregard for all case law pre-dating the 1995 amendments to North Dakota Administrative Code § 75-02-04.1-02. Thereafter, the issue presented – the same issue despite PAMELA'S intransigence and the refusal of the district court to follow – was supposed to have been resolved as follows [*id.*, ¶ 7]:

> "Under the current child support guidelines: 11. A payment of children's benefits made to or on behalf of a child who is not living with the obligor must be credited as a payment toward the obligor's child support obligation in the month (or other period) the payment is intended to cover, but may not be credited as a payment toward the child support obligation for any other month or period. N.D. Admin. Code § 75-02-04.1-02(11). Thus, the guidelines expressly provide that benefits, including social security disability dependency benefits, must be credited as a payment toward (the obligor's) child support obligation for the particular months or period the payment was intended to cover."

LUKE is unaware of any change in law, statutory or customary, altering the obvious – an action for money had and received will lie whenever one party has possession of money that in equity belongs to another and which such party, in good conscience, should restore. Richland County v. State, 180 N.W.2d 649, 655 (N.D. 1970), citing Gust v. Wilson, 79 N.D. 865 60 N.W.2d 202 (N.D. 1953) ["The rule is that an action for money had and received will lie whenever one person has possession of money which in equity belongs to another and 'which he should in equity and good conscience restore.' (cases cited)"]. See also, Norris v. Cohen, 27 N.W.2d 277 (Minn. 1947) cited in Gust, page 875: "An action for money had

and received will lie whenever one party has in his possession money which in equity belongs to another and ought to be delivered to such party. An action for money had and received is in the nature of an equitable remedy to compel a party unjustly enriched at the expense of another to disgorge that which it thus has received and deliver it to the one untitled thereto."].

LUKE'S Request for Refund of Overpayment

LUKE merely requests the return of his monies in view of the mandatory, dollar for dollar credit arising out of benefits paid by social security due to his disability. PAMELA received all of the monies, and LUKE should have the return of the actual amount paid by him during the same period of time – the monies were duplicated. In addition, LUKE should have interest from the date of the payment in March, 2007. For ease of calculation, LUKE has proposed use of April 1, 2007, as the starting point using the rate fixed pursuant to N.D.C.C. § 14-09-25 [11.5% for 2007]. LUKE is entitled to the return of his paid duplicated child support for the designated time period in the amount of $15,727.97 at 11.5% per annum. As of February 1, 2009, LUKE is entitled to judgment in the amount of $15,727.97 plus $3,321.45 in interest [$15,727.97 X .115 = $1,808.72 ÷ 365 = $4.95/day X 671 days = $3,321.45]. The amount due LUKE increases at the rate of $4.95 per day after February 1, 2009.

Standard of Review

In Livinggood v. Balsdon, 2006 ND 215, ¶ 14, 722 N.W.2d 716, the standard of review in an appeal challenging a trial court's award of damages was identified as follows:

> [¶ 14] "The appropriate standard of review in an appeal challenging a trial court's award of damages in a bench trial is whether the trial court's findings

> of fact on damages are clearly erroneous." *Buri v. Ramsey,* 2005 ND 65, ¶ 17, 693 N.W.2d 619 (citations omitted). "Under N.D.R.Civ.P. 52(a), a finding of fact is clearly erroneous if there is no evidence to support it, if it is clear to the reviewing court that a mistake has been made, or if the finding is induced by an erroneous view of the law." *Id.* (citation omitted).

LUKE should have been awarded damages; but for the erroneous view of the law by the district court, LUKE would have been awarded the same.

POINT 1. The North Dakota Child Support Guidelines Should Control.

A. The "gist" of the district court's error.

In the beginning of his legal argument, LUKE points out the two (2) sentence error at the end of the district court's legal argument [Appendix, page 157]:

> "The Defendant [PAMELA] is not required to pay *these funds* to the Plaintiff [LUKE]. *They* are being used for the children's benefit." [*Emphasis* added to recognize the district court was concerned only with the lump sum social security disability dependency benefit payments]

This same erroneous argument – PAMELA might use the social security monies – is advanced by the district court as the primary legal basis for denying LUKE any money judgment. Memorandum Decision Findings of Fact, Conclusions of Law and Order for Judgment, pages 6-7 [Appendix, pages 156-157].

Put another way, the district court should have recognized LUKE'S right to entry of a judgment [N.D.R.Civ.P. 52; N.D.C.C. Chap. 28-20; Constitution of North Dakota, Article VI, Section 8; among other legal principles/statutes], instead of worrying about whether PAMELA could be compelled to pay the judgment using social security funds under her control. N.D.C.C. Chap. 28-31 [entitled, "Execution of the Judgment"] as affected by 42 U.S.C. § 407 under interpretation of *Philpott v. Essex County Welfare Board,* 409 U.S. 413 (1973) [interpreting 42 U.S.C. § 407 so as to make the social security monies not subject to

execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law].

In other words, the district court was worried about possible impact on PAMELA arising out of LUKE'S post-judgment collection efforts; the district court errs by not awarding LUKE his money judgment on the basis of the facts and law at issue – the action at hand; not the bird in the bush. The district court got wrapped up in post-judgment proceedings – future proceedings which were not being presented to the district court for decision; the district court could not have jurisdiction over that which has not been presented for decision.

The district court erred – factually and legally – because he believed he was being asked to oversee the disbursement of the Social Security monies – LUKE has never made such request of the court, nor could he do so. As of February 1, 2009, LUKE was entitled to judgment in the amount of $19,049.42, including interest – he merely sought a judgment against PAMELA as a result of her unwillingness to return the overpayment resulting from the mandatory credit for such social security payments under the North Dakota Child Support Guidelines, and resulting decisions of the North Dakota Supreme Court.

B. The district court acts to repudiate the North Dakota Child Support Guidelines.

LUKE does not make any argument contesting the applicability of the North Dakota Child Support Guidelines; the district court did not error by so recognizing the applicability of N.D.A.C. § 75-02-04.1-02(11) [Appendix, pages 153-154]. Unfortunately, the district court failed to honor the presumptively correct child support amount previously ordered by

final amended judgment, paid by LUKE, and re-paid by social security but legally credited to LUKE.

The present controversy arises only because PAMELA, and her various legal representatives, and now the district court, fail to understand which monies are actually due LUKE – an amount equal to his overpayment [plus interest]. In the process, the district court acts to repudiate the established child support guidelines that are presumptively correct. N.D.C.C. § 14-09-09.7; N.D.A.C. § 75-02-04.1-09.

When the child support is paid twice, there exists an overpayment; LUKE wants his money back. There exists no legal basis for denying entry of a money judgment based upon a judgment debtor's future possible difficulties associated with probable levy and execution. See also, Mahoney v. Mahoney, 538 N.W.2d 189, 195-196 (N.D. 1995); N.D.C.C. § 14-08.1-05; N.D.A.C. § 75-02-04.1-09 which would disallow any attempt to retroactively modify the presumptively correct child support amount.

LUKE repeatedly tried to alert PAMELA that the Social Security benefits were available upon her proper application because it was clear that the children would receive more monies as a result of the disability benefits than they would receive under the NDCSG/Judgment [N.D.A.C. Chap. 75-02-04.1]. Unfortunately, PAMELA chose to pretend non-response to LUKE'S initial attempts communicating the need for rather immediate action with respect to claiming the Social Security benefits favoring the children. In that PAMELA, and also her attorney(s), repeatedly ignored verbal and written communications from both LUKE and his legal counsel, LUKE felt compelled to make only a token payment toward the February, 2007, child support obligation so as to guard against

any legal argument that the child support payments could be construed as "voluntary" payments,[2] and also, to force her, and the system, to address the issue raised by these larger Social Security payments, which also go back in time for up to 36 months resulting in duplication of payment credited to LUKE – again, he merely seeks the return of the overpayment. LUKE took steps to insure no one could successfully argue voluntary overpayment, or gift – none was intended, none was accomplished.

Compelled child support payments will never satisfy North Dakota's statutory definition of "gift" – "a transfer of personal property made voluntarily and without consideration." N.D.C.C. § 47-11-06; Kohler v. Flynn, 493 N.W.2d. 647, 649-650 (N.D. 1992).

To the extent the intent of the donor is involved in making a "gift", LUKE made clear no gift or voluntary payment was possible – he wanted his overpayment returned. Rosenau v. Merchants' Nat. Bank of Dickinson, 216 N.W. 335 (N.D. 1927).

At no time has LUKE, nor has PAMELA, ever initiated any litigation that sought judicial recognition his child support payments were to be regarded as additional "voluntary" child support payment. In fact, the Summons and Complaint, and each referenced letter attached as an exhibit [Appendix, pages 10-34], would be the antithesis of such argument for it seeks the return of the overpayment – a principal amount stipulated by LUKE and PAMELA to be $15,727.97, without regard to interest.

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[2] The district court synopsized PAMELA'S ultimate position, "On the other hand, Pamela's position is that the disability benefit lump sum payment is money in excess of Luke's arrearages, if any, for the period in question and that it should be treated as a voluntary payment in the form of a gift or gratuity for the immediate benefit of the supported children." Appendix, page 153.

If an amount is paid twice, the return of one-half (½) of the amount paid is the "overpayment" sought. To the extent PAMELA, her counsel(s), and even the child support workers thought LUKE sought the greater amounts paid by Social Security – they were dead wrong; they did not listen. LUKE merely requested the return of the duplicated payment(s). Contrary to comments often said, *possession is not 9/10ths of the law,* and PAMELA may not retain the duplicated monies:

> "It is often said that 'possession is 9/10ths of the law.' However, it is actually more accurate to say that 'possession is **ONLY** 9/10ths of the law.' While possession is certainly an important consideration in determining what a particular party's rights may be with respect to an item of property, bare possession alone is seldom sufficient to create a substantive legal right. There must always be at least another '1/10th' before the law recognizes a right." In re Macomb Occupational Health Care, LLC, 300 B.R. 270, 280 (US Bankruptcy Court, E.D. Michigan).

In this case, PAMELA had no "right" to retain the resulting overpayment, nor did LUKE ever agree that it could be retained or otherwise disposed of by PAMELA longer than necessary [an after the fact concession, later retracted but not here asserted, so as to equate the earned interest with the penalty imposed by early withdrawal from the Certificates of Deposit . N.D.C.C. § 12.1-23-04(2)]. All of the monies under PAMELA'S control were available for payment of PAMELA'S debts. LUKE acknowledges that the social security monies could have been used by PAMELA – if PAMELA so decided – to satisfy her indebtedness to LUKE, and he probably hoped she would do so. But there is one simple legal fact, short of voluntary payment by PAMELA for the indebtedness,[3] LUKE'S only legal

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[3] PAMELA has the right to disburse monies as she deems appropriate. Just as an obligor has no right to dictate how support monies are utilized by the obligee, PAMELA cannot be faulted for using monies under her control as she deems appropriate.

recourse is the judicial system – and the district court failed him when it believed that only disbursement of the social security monies were at issue. After judgment, LUKE may have other controversies involving execution, levy, and the ultimate satisfaction of what should have been – a money judgment against PAMELA.

LUKE rejects the concept advanced by this district court judge at the invitation of the recipient of the overpayment – neither the recipient, nor the court can determine what "gifts" LUKE will make.

Under the existing facts – facts also stipulated to by both parties – LUKE was actually current in his child support during the period of January, 2004, through part of February, 2007, because of his actual payments – the Social Security disability dependants benefits duplicated LUKE'S payments of $15,727.97, and also, exceeded LUKE'S payments by $7,854.03. While PAMELA, her attorney(s), and state officials were concerned about the $7,854.03 believing that LUKE was demanding its return [the district court saw through such argument advanced by PAMELA and made no findings of fact or conclusions of law that would permit such argument to be advanced; PAMELA did not appeal from the district court decision] – LUKE has never made such a claim. He merely wanted the return of the $15,727.97 [plus interest] that was mandatorily credited to him, by law and by fact of actual payment.

This simple claim for return of monies overpaid should have been easily understood by PAMELA by merely reading that which was provided her by letter [Plaintiff's Exhibit 4; Appendix, page 45] with the enclosed Letter Opinion of Attorney General Wayne Stenehjem. At page 2 of the Letter Opinion, Attorney General Stenehjem emphasized by underlining a

portion of N.D.A.C. § 75-02-04.1-02(11) recognizing that the most common form of "children's benefits" are social security disability dependency benefits and such payments "must be credited as a payment toward the obligor's child support obligation in the month (or other period) the payment is intended to cover, but may not be credited as a payment toward the child support obligation for any other month or period." Attorney General Stenehjem also pointed out the mandatory nature for such credit as set forth in the Tibor decision, and then cited N.D.A.C. § 75-02-04.1-02(11)'s recognition that the payment of children's benefits "is the equivalent of cash and must be applied dollar-for-dollar to the obligor's child support obligation." Attorney General Stenehjem noted, "(t)he rule, particularly as interpreted in Tibor, does not leave any room for discretion to refuse to give the obligor credit for children's benefits up to the amount due in the period covered by the benefits." Appendix, page 49.

After informing the Executive Director of the North Dakota Department of Human Services that it is not necessary to obtain a court order to revise the official child support payment records when sufficient documentation from credible sources for such payment(s) exists, the Attorney General set forth language apparently never read by PAMELA [with the legal nugget(s) underlined, *italicized*, and/or **bolded**]:

> I understand an obligor who has not yet received credit for children's benefits as permitted in this opinion has often made full or partial child support payments during a time period that is covered by those benefits. Once the credit for the children's benefits is given for prior months, a "surplus" may be created for those months as a result of the actual collections. *Consistent with the discussion of child support overpayments in N.D.A.G. 96-F-24, the "surplus" created by the actual collections should first be applied to any existing arrearage, but any remaining balance should not be considered a pre-payment of future child support without a court order providing that the collections should be applied to future support* ***rather than be refunded by***

the custodial parent or assignee. C.F. N.D.C.C. § 14-09-09.33(4); N.D.A.G. 96-F-24 (public policy of periodic child support payments is to ensure that the child's needs are met on an ongoing, continuous basis).

In the instant case, the "surplus" could not be applied to the existing arrearage – there was none; LUKE had paid $15,727.97 during the designated period of time.

In the instant case, no individual or entity ever sought a court order asking that the remaining balance be considered a pre-payment of future child support, nor was a court order ever issued providing that the collections should be applied to future support.[4]

In the instant case, LUKE clearly asked for, and has been denied, a **refund by the custodial parent**. The custodial parent has received the same amount twice – one-half of it must be refunded. Even Attorney General's Opinion 96-F-24, the opinion referenced by Attorney General Stenehjem, recognizes only two (2) possibilities for excess funds received by the clerk [with the following numbers inserted by Garaas for ease of examination]: "the amount of funds received by the clerk in excess of the obligor's monthly child support obligation must be applied to reduce any child support arrears owed by the obligor when the funds are received and (1) may otherwise be returned to the obligor or (2) treated as a voluntary payment for the immediate benefit of the supported child or children, but may not be treated as a prepayment of future monthly child support obligations."

Clearly, LUKE asked for, and was denied his "refund" – he also clearly acted so as to dispel any argument that the surplus could be regarded as a "voluntary payment for the immediate benefit of the supported child or children". He merely wanted PAMELA to

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[4] On October 9, 2008, a Third Amended Judgment was issued to reflect child support predicated upon the Social Security benefits without crediting any such payments to future child support, without opposition from LUKE.

acknowledge receipt of the Social Security monies so as to dispel any future attempt by her, or those purporting to act on her behalf, to find him in contempt or otherwise deprive him of his liberty. LUKE should not be disadvantaged by borrowing money to keep his child support obligation current; should the North Dakota Supreme Court accept the district court's decision, no one with a pending social security disability claim will pay one penny toward court-ordered child support. If they beg or borrow to keep current in child support obligations, they will be forever without recourse for the return of the overpayment; the scalawag that refuses to pay child support will be fully credited for the social security payment later paid to the credit of the obligor. What equal protection of the laws would exist under such district court scheme?

PAMELA advanced, and the district court accepted the invitation, to apply the decision in Filon v. Green, 2006 WL 2683516 (Ohio App. 9 Distr.). The Filon case stands alone, along with a West Law notice that it is not reported in N.E.2d and that one should check the Ohio Supreme Court rules for reporting of opinions and weight of legal authority, but also merely represents a decision whereby the appellate court could not "say that the trial court abused its discretion in finding that it was inequitable for (the obligee) to repay (the obligor)." In Filon, the obligee was not informed of the circumstances by the obligor who had taken the position that the application for social security benefits "was none of (the obligee's) concern and that she 'was not getting any more money and that was that.'" *Id.*, p. 4. In the instant case the roles are reversed, the obligor [LUKE] tried to advise PAMELA, who repeatedly ignored his verbal and written alerts, while secretly making application for the benefits in December, 2006 [Plaintiff's Exhibit 18; Appendix, page 139; Plaintiff's

Exhibit 19, Appendix, page 140; each document produced at trial when the existence of both were previously not disclosed at time of Answer, at time of Answers to Interrogatory, at time of Request for Production of records, or at time of response to a Subpoena] while publically claiming not to know anything about the subject matter as she had not received the January 24, 2007, letter [Plaintiff's Exhibit 1; Appendix, page 42] – apparently blaming her prior attorney.[5]

LUKE respectfully submits the applicable provision of the North Dakota Administrative Code and the Tibor decision would mandate the credit. In the instant case, there is no question that PAMELA actually received $39,309.97 – $15,727.97 too much, and it should be refunded. An action for money had and received will lie whenever one party has possession of money that in equity belongs to another and which such party, in good conscience, should restore. Richland County v. State, 180 N.W.2d 649, 655 (N.D. 1970); Gust v. Wilson, 60 N.W.2d 202, 207 (N.D. 1953); Norris v. Cohen, 27 N.W.2d 277 (Minn. 1947).

LUKE merely requests the return of his monies in view of the mandatory, dollar for dollar credit arising out of benefits due to his disability. PAMELA received all of the monies, and LUKE should have the return of the actual amount paid by him during the

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[5] Which does not jive with her January 9, 2009, Trial Memorandum, page 1 [Docket Entry # 28], which noted under "Facts" that "(o)n approximately January, 2007, D. Luke Davis indicated to Pam Davis that her children may be eligible for Social Security benefits." Even PAMELA testified to the prior communications from LUKE {or a mystery man}, and the dates of the secreted Plaintiff's Exhibit 18 and Plaintiff's Exhibit 19 would belie such knowledge arising for the first time in January, 2007. It had to have arisen on December 1, 2006, or earlier, according to Exhibit Plaintiff's Exhibit 18 identifying such date as the "Rescheduled Appointment Confirmation" establishing December 21, 2006.

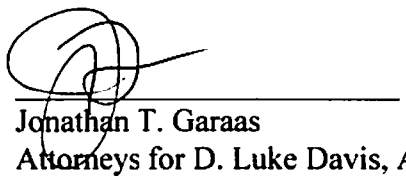
period of time. In addition, LUKE should have interest from the date of the payment in March, 2007. For ease of calculation, LUKE proposes use of April 1, 2007, as the starting point using the rate fixed pursuant to N.D.C.C. § 14-09-25 [11.5% for 2007].

CONCLUSION

LUKE paid substantial monies pursuant to obligation to support his children and avoid loss of his liberty; upon payment of monies credited to him as a matter of law, LUKE has double paid such obligation. PAMELA once agreed to repay the overpayment, and reneged. The district court refused to enter judgment for the stipulated amount [plus interest and costs], decided a factual and legal matter not even presented, and in essence, decreed a "gift" or "voluntary payment" when LUKE testified he made no gift, nor voluntary payment. The North Dakota Supreme Court should order entry of money judgment so as to do justice; if LUKE wants to spend his monies to benefit his children, he has such right – neither PAMELA, nor the district court, have the right to make gifts for LUKE without LUKE'S concurrence.

Respectfully submitted this 28th day of July, 2009.

Garaas Law Firm



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IN THE DISTRICT COURT FOR GRAND FORKS COUNTY, NORTH DAKOTA

D. Luke Davis,

Plaintiff,

CIVIL NO. 18-08-C-00908

vs.

AFFIDAVIT OF MAILING

Pamela Gordon Davis,

Defendant.

State of North Dakota
County of Cass

Jonathan T. Garaas, being first duly sworn on oath, deposes and says: Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

On the 28th day of July, 2009, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: **Brief of Appellant D. Luke Davis and Appendix to Brief of Appellant D. Luke Davis.**

The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

Jay D. Knudson
Reichert Armstrong Law Office
218 South 3rd Street
Grand Forks, ND 58201

To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Jonathan T. Garaas

Subscribed and sworn to before me this 28th day of July, 2009.

Notary Public

DAVID GARAAS
Notary Public
State of North Dakota
My Commission Expires July 2, 2011

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