

20090266

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**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

**NOV 06 2009**

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**Supreme Court No. 20090266**

**STATE OF NORTH DAKOTA**

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Greta J. Dupay f/k/a Greta J. Bertsch, n/k/a Greta J. Powell,  
Plaintiff and Appellee

v.

Matthew A. Dupay,  
Defendant and Appellant

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**APPEAL FROM THE ORDER AMENDING JUDGMENT AND THIRD  
AMENDED JUDGMENT ENTERED ON MAY 28, 2009, AND THE ORDER  
REGARDING MOTION FOR RECONSIDERATION AND ORDER AMENDING  
JUDGMENT AND FOURTH AMENDED JUDGMENT ENTERED ON JULY 29,  
2009 IN THE DISTRICT COURT, NORTHWEST JUDICIAL DISTRICT,  
WARD COUNTY, NORTH DAKOTA,  
THE HON. RICHARD L. HAGAR, PRESIDING**

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**BRIEF OF APPELLANT**

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## **STATEMENT OF THE ISSUES**

- I. Did the trial court err in failing to address whether the effect of the windfall from the Appellant's settlement award have ceased?

## **STATEMENT OF THE CASE**

### **1. Nature of the Case**

This matter involves the modification of a child support obligation. Appellant received a personal injury settlement award in July 2002 and it was included in his income for the purpose of calculating his child support obligation in April 2005. In 2009, he sought modification of his obligation, arguing the effect of the windfall from his settlement award had ceased. The Trial Court deferred to the previous opinions and did not address whether the effect of the windfall from the settlement award has ceased. The Trial Court summarily denied Appellant's motion for reconsideration. Appellant is appealing the Trial Court's Orders failing to address whether the effect of the windfall from his settlement award has ceased. He asks that the matter be remanded to the Trial Court with instruction to grant his motion, finding that any windfall from his July 2002 settlement award has ceased, and to modify his child support obligation accordingly.

### **2. Procedural History**

Appellant Matthew Dupay (Matt) was ordered to pay child support in June 2002 for the parties' minor child. In 2004, Plaintiff Greta Powell (Greta) made a motion to change the residence of the child, and the Trial Court addressed the issue of child support while reviewing that motion. Greta then sought modification of Matt's child support obligation in April 2005, seeking an increase in child support based upon Matt's receipt of a personal injury settlement award in July 2002. Matt opposed Greta's motion, arguing that his child support obligation should be based upon his current income and should not include his settlement award. The Trial Court gave Greta the option to accept the child support calculation she submitted, which did not include Matt's settlement

award, or to request that Matt be required to supplement the record with information to allow the Trial Court to factor the net amount of the settlement award into the child support calculation. Greta chose to factor in Matt's settlement award. The Trial Court divided Matt's net settlement award by the number of months from the date of Greta's motion to the date of the child's eighteenth birthday to reach an amount to include in Matt's monthly income for purposes of calculating his child support obligation.

In April 2009, Matt sought modification of his child support obligation, arguing that the effect of the windfall from his settlement award had ceased and that his child support obligation must be reduced. A hearing was held in May 2009. The Trial Court ordered a reduction in Matt's child support obligation based upon his reduced income, but maintained his child support obligation based upon his settlement award. Matt moved the court for reconsideration, arguing that the court's Order failed to address whether the effect of the windfall from Matt's settlement award had ceased and that the evidence supported a conclusion that it had. The Trial Court corrected two unrelated errors in its previous Order, but denied Matt's motion in all other respects, without explanation.

### **3. Standard of Review**

A Trial Court's decision on a motion to modify child support is a finding of fact reviewed under the clearly erroneous standard. Lee v. Lee, 2005 ND 129 ¶ 4, 699 N.W.2d 842. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, on the entire record, the reviewing court is left with a definite and firm conviction a mistake has been made. Buchholz v. Buchholz, 1999 ND 36 ¶ 11, 590 N.W.2d 215.

**4. Statement of the Facts**

Matt and Greta have one child together, MJD, born 1998. (Tr. p. 3.) Near the time of the birth of the parties' child, Matt was involved in an accident while performing the duties of his job as a grain inspector. Specifically, Matt was electrocuted when he came in contact with a power line. Matt suffered burns to various portions of his body, had some of his toes amputated, endured significant pain in his feet that continues to this day, and has dealt with psychological effects. As a result of the accident, he has a sixty-one percent permanent bodily impairment. (Tr. pp. 5-6.) Matt's injury has limited his ability to perform certain jobs – he must be sitting and he cannot perform manual labor or a job that requires him to stand for an extended period of time or require a significant amount of stamina. (Tr. p. 9.) Additionally, Matt has had to take considerable amount of leave time from work. (Tr. p. 8.) Subsequent to his injury, Matt commenced a personal injury action. A settlement was reached in July 2002 and he received \$250,000.00, as his share. (Tr. p. 9.)

In November 2002, with the proceeds of his settlement award, Matt purchased a home for approximately \$100,000.00. He also invested \$50,000.00 in an investment account, finished the basement of his home at a cost of \$5,000.00, purchased furniture for his home at an estimated cost of \$10,000.00, made a down payment for a 2005 Trail Blazer, and used \$6,000.00 to pay medical bills. Matt used the remaining portion of the settlement proceeds to make up for his lost wages as a result of his consistent absences from his employment due to his injury. (Tr. pp. 20-23.) At times, because of the leave Matt had to take, his wages would not cover his living expenses and/or child support

obligation. (Tr. p. 34.) The investment account, at the time of hearing, had a balance of \$6,000.00, which included withdrawals by Matt. (Tr. p. 32.)

In April 2009 Matt moved the Court to modify his child support obligation on the basis that the windfall from his settlement award had ceased. The Trial Court deferred to the 2005 opinions, authored by a different district judge, and did not address the issue. Matt made a motion for reconsideration and the Court made two unrelated amendments to the Order, but summarily denied the argument that the Trial Court failed to address whether the effect of the windfall had ceased. Matt now appeals the Trial Court's Orders denying his request that his child support obligation be modified.

### **ARGUMENT**

Although a personal injury settlement is a nonrecurring payment to be included as income for the purpose of calculating child support, Otterson v. Otterson, 1997 ND 232 ¶ 20, 571 N.W.2d 648, a District Court should exercise its discretion and consider awarding the child some portion of the [non-recurring income] while *also ordering a future reduction in support when the effect of the windfall ceases*. Longtine v. Yeado, 1997 ND 166 ¶ 8, 567 N.W.2d 819 (citing Helbling v. Helbling, 541 N.W.2d 443 (N.D. 1995)).

Helbling is the landmark case holding that a child support obligation must be reduced when the effect of the windfall from the non-recurring payment ceases. In Helbling, the obligor received relocation reimbursement payments, which the Trial Court did not include as income to the obligor in calculating his child support obligation. Id. at 446. On appeal, the obligee argued that the Trial Court should have included any excess reimbursed relocation payments in the obligor's net income regardless of whether the



obligor's receipt of the payments was a one-time occurrence. Id. at 447. The Supreme Court reversed the Trial Court. Id. The Supreme Court directed that, "on remand, if the district court determines that the past payments are unlikely to recur, it should exercise its discretion and consider awarding the children some portion of those excess relocation payments while also ordering a future reduction in support when the effect of the windfall ceases." Id.

Longtime v. Yeado, *supra*, is the sole North Dakota case applying the Helbling principles. In Longtime, the obligee sought a modification of the obligor's child support obligation based upon the obligor's receipt of more than \$60,000.00 from an auction sale and \$70,000.00 in insurance proceeds. Id. at ¶ 3. The Trial Court determined the net income to the obligor from the non-recurring income and increased the obligor's child support obligation for a period of twelve months. Id. at ¶ 4. The Trial Court reasoned that because the income was received in a single year, the obligor's child support obligation should be increased for a period of one year. Id. The Trial Court specifically declined to make any attempt to spread the income out over two or more years, as it would be arbitrary and would serve no benefit to the children. Id. To calculate the obligor's child support obligation, the Trial Court calculated the obligation based upon his income including the non-recurring income and then reduced it by his obligation based upon his regular income. Id. On appeal, the Supreme Court noted that "the referee recognized the likely future circumstances that those proceeds were nonrecurring and increased [the obligor's] child support obligation for one year to provide his children with a benefit from those proceeds," and affirmed the Trial Court's order. Id. at ¶ 13.

Here, Matt made a motion for modification of his child support obligation on the basis that the effect of the windfall from his settlement award had ceased, obligating the Trial Court to reduce his child support obligation. Despite Matt's request that the Court determine whether the windfall had ceased, the Trial Court did not address the issue. Rather, the Trial Court stated it had previously "calculated the value of the windfall." Such a conclusion, however, is unsupported. None of the Trial Court's three letter opinions or Second Amended Judgment issued in 2005 give any indication that it determined when the effect of the windfall from Matt's settlement award would cease. None of those opinions mention the word "windfall" or cite the principles of the applicable case law on the issue, namely Helbling and Longtine. Although the Trial Court's Second Letter Opinion determined an "amount of settlement money deemed to be available to Matt on a monthly basis for the balance of the [child's] minority," the amount appears to be nothing more than a numeric calculation prorating the settlement award over the child's minority. While the Trial Court provided a date when the increased child support would terminate, the Trial Court was statutorily obligated to terminate Matt's child support obligation at that time because the child would be graduating from high school. See N.D.C.C. § 14-09-08.2 (stating a judgment or order requiring the payment of child support until the child attains majority continues until the child is graduated from high school). Nothing supports a finding that the Trial Court made any analysis to determine when the effect of the windfall from Matt's settlement award would cease.

The issue addressed by the Trial Court's 2005 opinions was not when the effect of the windfall from Matt's settlement award would cease. The issue before the Trial

Court was whether Matt's settlement award should be included in his income in calculating his child support obligation. The issue is supported by the Trial Court's first letter opinion wherein it relied upon Otterson v. Otterson, *supra*, which held that a net personal injury settlement must be considered in determining an obligor's income. The issue in Otterson was whether the obligor's personal injury settlement payments were income to the obligor for the purpose of calculating child support. The Trial Court's option to Greta to include the settlement award to calculate Matt's obligation also supports a finding that the issue in April 2005 was whether to include the settlement award in Matt's income.

Because the Trial Court's previous orders failed to address when the effect of the windfall from Matt's settlement award would cease, it was imperative upon the Trial Court to do so when Matt brought his motion to modify his child support obligation on that basis. In evaluating Matt's motion, the evidence supports a finding that the windfall from Matt's settlement award has ceased. Matt received his settlement award as a lump sum payment over seven years ago and has not and will not receive any additional payment from his award. All but six thousand dollars of the award has been expended. Although Matt acquired assets from some of the settlement proceeds, the child support guidelines do not contemplate liquidating assets of an obligor. See N.D.C.S.G. 75-02-04.1-01 (definition of gross income) and N.D.C.S.G. 75-02-04.1-09(3) (stating assets may not be considered for an upward deviation to the extent the assets are: 1) exempt under N.D.C.C. §47-18-01 (homestead exemption), 2) consist of necessary household goods and furnishings, or 3) include one motor vehicle in which the obligor owns an equity not in excess of twenty thousand dollars). There is no evidence to support that

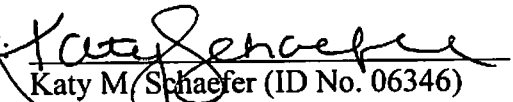
Matt is presently receiving any windfall from his 2002 settlement award. While the Trial Court found that Matt “continues to receive benefits” from the settlement award, the record is void of any evidence to support that conclusion. Greta must believe the same to be true, as she has offered no evidence that Matt is presently receiving a windfall from his settlement award despite having submitted two briefs to the Trial Court and the opportunity to present evidence at a hearing. Although the Trial Court states that Matt could have placed a portion of the settlement in savings to be used for future child support payments, such an assertion is misplaced. The North Dakota Child Support Guidelines do not direct how any obligor spends his or her income, regardless of the source of that income.

The Trial Court had a responsibility to identify when the effect of the windfall from Matt’s settlement award would cease when it determined that it was income to him for the purpose of calculating his child support obligation. The Trial Court, however, has failed to fulfill that responsibility despite Matt’s motion asking the trial court to do so. Regardless, a review of the evidence supports a conclusion that the windfall from Matt’s settlement award has ceased, obligating the Court to exclude it from Matt’s income for the purpose of calculating his child support obligation.

### **CONCLUSION**

Based on the forgoing law and argument, the matter should be remanded to the Trial court with instruction to grant Appellant’s motion, finding that any windfall from his July 2002 settlement award has ceased, and to modify his obligation accordingly.

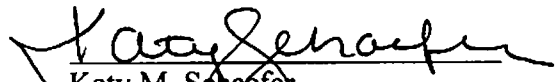
Dated this 6 day of November, 2009.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was, on the  
6 day of November, 2009, mailed to:

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