

IN THE SUPREME COURT
 STATE OF NORTH DAKOTA

)	
)	Appellant's Brief
Riverside Park Condominiums)	
Unit Owners Association, a North)	Supreme Court No. 20100344
Dakota Non-Profit Corporation)	
)	Burleigh Co. No. 02-C-1400
Plaintiff/Appellee)	
)	
vs.)	
)	
A. William Lucas)	
)	
Defendant/Appellant.)	

Appeal from
Notice of Entry of Judgment dated August 9, 2010
Amended Order dated August 6, 2010
Amended Order of Contempt dated July 12, 2010

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¶ 1 STATEMENT OF ISSUES

¶ 2 1. Was the Order of the District Court a valid legally enforceable Order?

¶ 3 2. Did Lucas violate the pet resolution on December 26, 2009 and/or February 23, 2010?

¶ 4 3. If the Order is not defective, did Lucas willfully intend to violate a court order?

¶ 5 4. If the Order was not defective, did Lucas inexcusably intend to violate the Court Order?

¶ 6 5. Did the District Court under North Dakota law have the authority to assess self-executing prospective contempt penalties for future violations of the Order?

¶ 7 6. Did the Trial Court err in awarding attorney's fees and costs to Condo Association?

¶ 8 7. Was this simply the continuation of the judicial bias and prejudice of District Judge Zane Anderson toward Lucas which was one of the Appellant's issues in the previous Appeal in this matter?

¶ 9 STATEMENT OF THE CASE

¶ 10 Plaintiff brought a Motion for an Order to Show Cause requiring Lucas to appear before the Court and show cause why he should not be held in contempt of the final Judgment in this matter dated November 10, 2003, which was affirmed by this Court in its decision at 2005 ND 26, 691 NW2d 862.

¶ 11 This is an appeal from the Amended Order of Contempt dated July 12, 2010, Order dated August 6, 2010, and the Notice of Entry of Judgment dated

August 9, 2010, holding Lucas in contempt of court and awarding the Plaintiff's attorney's fees.

¶ 12 STATEMENT OF FACTS

¶ 13 The facts provided by the Plaintiff Condo Association were set forth in the Affidavit of Jack Huseby (App. p. 26) as follows:

¶ 14 1. I am the President of the Riverside Park Condominiums Unit Owners Association.

¶ 15 2. On February 23, 2010, I witnessed Bill Lucas with a dog at his unit in violation of the Court's injunction.

¶ 16 3. On December 26, 2009, I witnessed Bill Lucas with a dog at his unit in violation of the Court's injunction.

¶ 17 The facts provided by Lucas are set forth in an affidavit of Lucas, (App. 4) the transcript of the testimony at the hearing by Lucas, and 11 exhibits offered by Lucas including 9 photographs. (Lucas Exhibits A-i) (App. p. 48-57)

¶ 18 ARGUMENT

¶ 19 The North Dakota law regarding civil contempt was very recently and concisely stated in the case of Woodward v. Woodward, 2009 ND 214, 776 NW2d 567 (ND 2009) as follows:

“ Civil contempt requires a willful and inexcusable intent to violate a court order,” and “a complainant must clearly and satisfactorily show that the alleged contempt has been committed.” Glasser v. Glasser, 2006 ND 238, ¶ 12, 724 N.W.2d 144 (quoting Montgomery v. Montgomery, 2003 ND 135, ¶ 18, 667 N.W.2d 611); see also N.D.C.C. §27-10-01.1(1)(c). “A district court has broad discretion in deciding whether to hold a person in contempt, and a court's finding of contempt will not be reversed on appeal unless there is a clear abuse of discretion.” Graner v. Graner, 2007 ND 139,

¶ 32, 738 N.W.2d 9. “A district court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law.” Vicknair v. Phelps Dodge Indus., Inc., 2009 ND 113, ¶6, 767 N.W.2d 171.”

¶ 20 The standard of review is whether the District Court abused its discretion as to each issue.

¶ 21 Defendant's (Lucas') Exhibits A-I are explained by Lucas (tr. p. 4-9) and are included in the Appendix at p. 49-57. The photo exhibits show Sugar, (App p. 48) the “infamous” small dog owned by my former spouse, Elizabeth Burke Lucas, and the many dogs kept, raised and maintained by my next door condo owner, (App. p. 48-57) including the dog bathroom on the condo common area and the damage to our lawn caused by the many large dogs.

¶ 22 **Issue 1. Was the Order of the District Court a valid legally enforceable Order?**

¶ 23 The amended restrictive covenant of the Condo Association relating to pet ownership states at paragraph XVI:

“No animals, livestock, poultry of any kind, or domestic pets, shall be raised, bred, or kept by any unit owner or unit resident, except that any domestic pet residing with the unit owner or unit resident on the date of the execution of this amendment shall be excluded from this prohibition and shall be permitted to reside with said unit owner or unit resident.”

¶ 24 The Court's amended Order of Contempt dated July 12, 2010 on page 2, states:

“Based on the Court's Findings of Fact, the Court makes the following Conclusions of Law:

1. Lucas is in contempt of this Court's Judgment and permanent injunction

Based on the foregoing, this Court issues the following Order:

1. The terms of the November 10, 2003 final Judgment, prohibits Lucas from having, keeping, or otherwise maintaining a dog in or at his unit or upon the common areas of the Association. Lucas is not allowed to have a dog upon the Association's property at anytime."

¶ 25 The question is how did the restriction language contained in the Condo Associations restrictions of no pets "shall be raised, bred, or kept" become an order that prohibits Lucas from "having, keeping, or otherwise maintaining a dog in or at his unit or upon the common areas of the Association. Lucas is not allowed to have a dog upon the Association's property at any time". See Lucas' testimony, (Tr. p. 11 l.9-25)

¶ 26 Clearly the attorney for the Condo Association embellished the Order and inserted his own restrictions which were not part of the Condo Associations restrictions and had not been approved by Board of Directors or the owners. It appears that Attorney Rogneby intentionally misled the Court and prepared an Order and Judgment that did not correctly reflect the restriction intended by the condo owners. Lucas should not be held in contempt of an Order which violates the pet restriction upon which the Order is based!

¶ 27 Issue 2. Did Lucas violate the pet resolution on December 26, 2009 and or February 23, 2010?

¶ 28 This Court's decision on the original Appeal of this matter affirmed the Trial Court's decision visits two times a month by Sugar at the condo owned by

Lucas, did constitute a “kept” pet. The Condo Association argued but provided no evidence that there may have been four visits a month. Whatever number of visits was affirmed by this Court as constituting a “kept”, the issue is unresolved as to whether a visit one time a year would constitute a “kept” pet in violation of the condos’ pet restriction. With all due respect to the prior decision of this Court, I submit that a visiting dog living full time at another residence is not a “kept” pet and certainly that a visit one time a year should not constitute a “kept” pet in violation of the condos’ restriction. See Lucas’ testimony. (Tr. p. 11 l. 9)

¶ 29 **Issue 3. If the Order is not defective, did Lucas willfully intend to violate a court order?**

¶ 30 There was no willful intent by Lucas to violate a Court Order. Lucas testified at the hearing (tr. p.3 l.8):

¶“Mr. Lucas: Well I tried to comply with the Judgment and the orders and I believe I have complied. We’re talking about a dog, Sugar. It’s a West Highland white terrier, probably about 18 pounds. She’s now about 11 years old. I have set it up so Sugar visits me at the office. I’ll pick her up and take her to my office. When I travel—I have a lot of depositions in Fargo, Grand Forks, Minot, Minnesota, and I take her along for visitation when I do that. I also take her on vacations when I go see my grandkids in Montana, and then I try to have day visits at my office and take Sugar for walks. Now I’ve got some exhibits and I can give Mr. Rogneby a copy;”

¶ 31 Lucas also testified that he bought a trailer so that he could visit with Sugar off the premises of the Condo Association, and testified (tr. p. 4 l.4)

” Mr. Lucas: Okay. Anyway, Defendants Exhibit A is a copy of - – I bought a trailer so that I could visit with Sugar in town and I had written to the Association two different times to ask about parking that trailer. Occasionally what I planned to do is park it at Sibley Island Park or someplace

around Bismarck where I can have Sugar at night and then in the daytime I'll just take her to the office. The second picture on Defendant' Exhibit A is - -“

Lucas intended to and thought he was complying with the Order of the Trial Court.

¶ 32 **Issue 4. If the Order was not defective, did Lucas inexcusably intend to violate the Court Order.**

¶ 33 If the Order was not defective and if Lucas did violate the Court Order any violation by Lucas was excusable for many reasons as follows:

¶ 34 1. The alleged violation on December 26, 2009, was explained by Lucas that his former brother-in-law John Burke arrived at his former spouse's residence on Christmas Eve and because John Burke has very many serious allergy problems and because of the large number of people staying over night at my former spouse's home, my former spouse Elizabeth Lucas asked if I could take Sugar home for the evening. I left the house probably at approximately midnight Christmas Eve and returned very early in the morning to be present when my grandchildren to see what Santa Claus had left for them. (Tr. p. 13 l. 17)

¶ 35 2, The alleged violation on February 23, 2010 was explained that the former spouse of Lucas was gone on an extended trip and that Lucas picked up the dog kennel but was unable to return the dog by 5:00 so Lucas did keep the dog overnight on that occasion. (Tr. p. 14 l.1)

¶ 36 3. Lucas testified and believed that there had been a change of policy or a change regarding enforcement of the pet restriction because of the many other condominium owners that were keeping dogs at their condominium

units. Mr. Huseby had told Mr. Lucas that it was too bad that he moved in next door to Tom because it was always his way or the highway and that it was inferred that there would have been no dog issue had Lucas not moved in next to Tom Prischman. (Tr. p. 12 l.3) Tom Prischman moved and sold the unit. The new owners immediately adjacent to Lucas' condo had at various times had up to five dogs at their unit and two dogs were kept on a full time basis for more than six months. Lucas introduced photographs showing a four feet by four feet area outside the front entrance of the unit next door to him, which was then used as a dog bathroom. Lucas showed pictures of the dead grass in the spring from the dog bathroom area. (Defendant's (Lucas') Exhibit H App. p. 55-56) Lucas introduced photographs of various dogs that were next door including one dog defecating on the common areas. (Defendant's (Lucas') Exhibits B, C, D, E App. p 49-50) The next door neighbor at the time was a member of the Board of Directors and therefore with my condominium unit between their unit and the unit occupied by our president Jack Huseby. See Lucas' testimony (Tr. p. 12 l. 12) Lucas therefore believed that there must have been a change in policy. It is hard to understand how a board member can have up to five dogs and at least two dogs full time for six months and use our common areas for a dog bathroom, with no concern by the board or the association while Lucas is prosecuted for having a dog on the premises overnight on two occasions in two different years.

¶ 37 4. During this time there was pending since September 9, 2004, Lucas' Fifth Request for a Reasonable Accommodation under the Federal and

North Dakota fair housing laws. Because that request was pending, that also created an excusable violation if there was a violation. See Lucas' Exhibit K and Lucas' testimony. (Tr. p. 10 l. 18)

¶ 38 Although the pending request for a reasonable accommodation was extremely relevant to the contempt issues and provided an excuse for the two dog visits, the trial Judge refused to admit the Lucas' Exhibit K, a copy of Lucas' fifth request for a reasonable accommodation into evidence. (Tr. p.11 l.7)

¶ 39 5. The fact that the condo association fails to enforce the pet restriction against other condominium owners, including board members, while selectively enforcing the pet restriction against Lucas, provides another basis for the violation being excusable for Lucas. Out of twenty six condo owners, why does the pet restriction only apply to me? I don't even own a dog!

¶ 40 **Issue 5. Did the District Court under North Dakota law have the authority to assess a self-executing prospective contempt penalties for future violations of the Order?**

¶ 41 The Amended Order of Contempt dated July 12, 2010 in paragraph 2, on page 3 provided:

"2. If Lucas again violates this Court's Order; the Court will impose a remedial sanction for each violation of \$500.00 per day, plus the possibility of awarding to the Association costs and attorney fees for brining any further violation to the attention of the Court."

¶ 42 In the North Dakota case of Vande Hoven v. Vande Hoven, 399

NW2d 855 (ND 1987) the District Court had ordered that:

"In the event that the Plaintiff fails to abide by the visitation set forth herein, the Plaintiff shall be held in contempt of court and shall be fined the amount of \$5,000 for each time that he fails to deliver the children to visit the Defendant ...

- ¶ 43 This Court stated:
“On appeal from this supplemental judgment, Sharon asserts that the district court did not have the authority under state law to assess self-executing prospective contempt penalties for future violations of the court’s January 1986 judgment. We agree.”

Although criminal and civil contempts committed in the presence of the trial court may be punished summarily, where the alleged contemptuous conduct occurs out of the court’s presence, the one charged must be afforded a full opportunity to appear, explain, and defend, and is entitled to a presumption of innocence. LePera v. Snider, 240 N.W.2d 862, 867 (N.D.1976). These guarantees of notice and an opportunity to be heard are implemented in this state through comprehensive procedural schemes governing the adjudication and punishment of both civil contempts [See Chapter 27-10, N.D.C.C.]

- ¶ 44 The Vande Hoven court stated at page 858:
“A court in this state may not use a self-executing order to delegate to a private party its adjudicatory contempt powers for future violations of that order”. See Gaschk v. Kohler,

The Vande Hoven case also cited with approval of a 1901 case which stated that:

“The law of the state does not, in contempt proceedings, permit sums of money in amounts arbitrarily fixed by the court to be paid over by one suitor to another under the compulsion of an order of the court. The amount to be paid over must in some way be ascertained in some way judicially, and this means that the same must be ascertained by a consideration of testimony bearing upon the matter.”

- ¶ 45 The provision of the court of a sanction of \$500 per day plus attorney’s fees and costs for each future violation is clearly contrary to North Dakota law and invalid and outside the power of the District Court.

- ¶ 46 **Issue 6. Did the Trial Court err in awarding attorney’s fees and costs to Condo Association?**

¶ 47 The Condo Association's Motion for Contempt was not brought for any need or any purpose or benefit of the Condo Association, but was a discretionary decision by certain individuals to continue an agenda of harassment. The Condo Association did not bring any action in regard to the next door neighbor of Lucas who had up to five large dogs at their condo at various times and had two dogs at their condo for at least six months. There was no reason and no necessity for the Condo Association to bring a Motion for Contempt and they should not be awarded attorney's fees for bringing the contempt action. To the credit of the trial Judge, the initial attorney fee and cost statements submitted by the Condo Association lawyer was inflated to obtain additional punishment, and the trial Judge substantially reduced the initial attorney fee and cost statement.

¶ 48 Issue 7. Was this simply the continuation of the judicial misconduct, bias and prejudice of the District Judge toward Lucas that was one of the Appellant's issues in the previous Appeal?

¶ 49 One of the issues raised by Lucas in the appeal from the Judgment in this case, was judicial misconduct, bias and prejudice of the District Judge Zane Anderson. Mindful of the extreme burden to prove that conduct, Lucas submits that the facts and mistakes of the District Judge Anderson in his finding of contempt, clearly shows his continuation of judicial misconduct, bias and prejudice .

¶ 50 If Judge Anderson participated and approved the change in the language of the pet restriction from "no pets" shall be raised, bred or kept" to "having, keeping or otherwise maintaining a dog in or at his unit or upon the common

areas of the Association,” and that “Lucas is not allowed to have a dog upon the Association’s property at any time”, it would again show his judicial misconduct, bias and prejudicial against Lucas

¶ 51 CONCLUSION

¶ 52 The Trial Court’s contempt orders and judgment should be reversed in all respects.

¶ 53 Dated this 7th day of February, 2011

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¶ 54 Certificate of Service by E-Mail

I hereby certify that on the 7th day of February, 2011 true and correct copies of Appellant’s Brief were served electronically upon the following:

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/s/ A. William Lucas
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