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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
SUPREME COURT CASE NUMBER 2011 0231

Cheryl Rae Schulte, f/k/a, Cheryl Rae Kramer,	)	
Appellant,	)	**APPELLEE'S BRIEF**
-vs-	)	
Kenneth Leroy Kramer,	)	
Appellee.	)	

Appeal from Findings of Fact, Conclusions of Law and Order for Second Amended Judgment dated June 1, 2011, the Second Amended Judgment dated July 5, 2011 and the Order Denying Plaintiff's Motion dated August 2, 2011, all made by the Honorable Daniel D. Narum, Judge of the District Court, Dickey County, North Dakota.

District Court of the Southeast Judicial District
The Honorable Daniel D. Narum, Presiding
District Court No. 11-04-C-00119

Janel B. Fredericksen
Attorney for Appellee
Smith, Strege & Fredericksen, Ltd.
321 Dakota Avenue
P.O. Box 38
Wahpeton, ND 58074-0038
(701) 642-2668
North Dakota ID #05372

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STATEMENT OF ISSUES

I. Whether the trial court erred when it modified Appellee's obligation to pay Appellant spousal support, health insurance, dental insurance, and non-covered medical expenses.

Trial court found: The trial court found that the more than 50% reduction in Appellee's income eliminated his ability to pay Appellant spousal support, health insurance, dental insurance, and non-covered medical expenses. The trial court found that Appellant's monthly expenses could be reduced, she was capable of full-time employment, and she had no further need for ongoing support. The trial court found that Appellee's reduction in income was not voluntary, self-induced or made in bad faith. The trial court also found the change in Appellee's income was not contemplated by the parties at the time their divorce agreement was negotiated.

II. Whether the trial court modified the parties' property division when it eliminated Appellee's obligation to pay Appellant health insurance, dental insurance and non-covered medical expenses.

Trial court found: The trial court found that the obligations Appellee was seeking to modify were spousal support obligations. The trial court found there was no disparity in the parties' property distribution that would justify treating the obligations as property settlement payments.

III. Whether the trial court erred when it denied Appellant's request for attorney's fees.

Trial court found: The trial court did not make a specific finding denying Appellant's request for attorney's fees. However, the trial court's rationale for not awarding Appellant's fees can be inferred from the findings the court made in regard to Appellant's need and Appellee's ability to pay support to the Appellant.

STATEMENT OF THE CASE

This is an appeal from the Dickey County District Court's Findings of Fact, Conclusions of Law, and Order for Second Amended Judgment dated July 5, 2011 and an order denying Appellant's Motion to Amend the Findings of Fact and Order for Judgment and Motion for New Hearing dated July 6, 2011. Appellant's Appendix pp. 18-29. The trial court granted Appellee's motion to eliminate his spousal support obligation, obligation to provide health insurance, obligation to provide dental insurance and obligation to pay for all of Cheryl Rae Schulte's non-covered medical expenses. Appellant's Appendix at p. 18. This appeal followed.

STATEMENT OF THE FACTS

Kenneth LeRoy Kramer (hereinafter "Ken") and Cheryl Rae Schulte (hereinafter "Cheryl") were married in 1973. They entered into a legal separation agreement in May 2002. In October 2004, Cheryl provided notice to Ken that she intended to file for a divorce and have the trial court incorporate the terms of the parties' separation agreement into the judgment. Ken asked the trial court to

disregard the legal separation agreement on the basis that it was unconscionable and that it was executed as a result of undue influence when he was not represented by counsel.

The district court incorporated the terms of the legal separation agreement into the divorce judgment on May 4, 2005. Appellee's Appendix at pp. 1-9. The divorce judgment required Ken to pay Cheryl $500.00 per month in spousal support until she remarried or died, whichever occurs first. Appellee's Appendix at p. 8, paragraph 9. The judgment also required Ken to provide health insurance for Cheryl and pay all of her non-covered medical costs, including deductible and co-payments, dental costs, optometric costs, orthodontic costs, chiropractic costs and psychological/psychiatric costs. Appellee's Appendix at p. 8, paragraph 13. Ken appealed the district court's decision to this Court. This Court affirmed the district court's decision. Kramer v. Kramer, 2006 ND 64, ¶ 18, 711 N.W.2d 164.

At the time the parties entered into the legal separation agreement, which was later incorporated into the divorce judgment, Ken was working at Bobcat in Gwinner, North Dakota, earning approximately $60,000.00 per year. Tr.(1), p. 106, lines 10-16. Ken's employment at Bobcat was terminated on July 23, 2010, for removing a discarded antenna from the plant's garbage. Tr.(1), p. 69, lines 14-25, p. 70, lines 1-25, p. 71, lines 1-25, p. 72, lines 1-10.

On July 27, 2010, Ken filed a grievance through his union alleging that his punishment was too severe for the conduct. Tr.(1), p. 18, lines 3-7. On August 12, 2010, Bobcat sent Ken a letter stating that the company would allow him to apply for any open position with the company at that time. Tr.(1), p. 19, lines 2-8. If hired, Ken would have lost his seniority and been treated as a new hire. Tr. (1), p. 39, lines 13-16. Ken was not offered his maintenance position back, nor was he guaranteed a position. Ken, having taken other employment, did not apply for a new position with Bobcat. Tr.(1), p. 36, lines 1-13.

Ken sought other employment immediately following his termination with Bobcat. Ken accepted a position through Preference Personnel to work at Trail King in Fargo prior to being offered an opportunity to apply for open positions at the plant. Ken started working at Trail King on August 9, 2010, earning $14.00 per hour with a 40 hour work week. Ken was on probation until November 2010 when Trail King hired him on directly. At the time of the district court hearing, Ken was earning $14.50 per hour and was working approximately 40 hours per week. Tr.(1), p. 59, lines 20-23.

Ken was not able to make Cheryl's spousal support payment in the months following his termination from Bobcat. Tr.(1), p. 96, lines 15-22. On November 2, 2010, Ken filed a motion to modify the judgment entered on May 4, 2005. Appellee's Appendix at p. 10. Ken requested that the trial court eliminate or

reduce his spousal support obligation of $500.00 per month to Cheryl. Ken also requested that the court eliminate his obligation to provide health insurance for Cheryl and to pay for all of her non-covered medical costs, or, in the alternative, order that the parties share in the cost of Cheryl's insurance and non-covered medical costs according to their respective incomes. See Notice of Motion and Motion, Appellee's Appendix, p. 10. On April 12, 2011, Ken was able to make one payment of $950.00 to Cheryl from money he received from Bobcat. Tr.(2), p. 91, lines 17-25, p. 92, line 1.

Ken continued to pay Cheryl's monthly health insurance premium payment, dental insurance, and non-covered medical bills following his termination. Tr. (1), p. 63, line 24 to p. 64, line 8. Ken was not able to pay for health insurance for himself during this period of time. Tr. (1), p. 63, lines 15-23. Ken was only able to make these payments by cutting back on his own expenses and exhausting his available credit. He was forced to increase his overdraft protection balance to pay Cheryl's health insurance, medical bills and dental insurance. Tr.(2), p. 103, lines 22-25, p. 104, lines 1-5. At the time of the hearing in this matter, Ken's was paying $593.00 per month for Cheryl's health insurance and $40.00 per month for her dental coverage. Tr.(1), p. 64, lines 2-8, p. 97, lines 24-25, p. 98, lines 1-7. Cheryl's non-covered medical expenses averaged approximately $150.00 per month. See Defendant's Exhibit 1, Appellee's Appendix at p. 12.

Since the original decree was entered, Ken experienced a 50.2% reduction in his income. Ken exhausted all of his credit resources and was unable to meet his obligations to Cheryl. Tr.(1), p. 96, lines 7-23. At the time of the hearing in this matter, Ken's approximate net monthly income was $2,570.00. Ken's expenses were approximately $3,307.00. See Defendant's Exhibit 1, Appellee's Appendix, p. 12. The parties' divorce judgment required Ken to pay approximately $1,364.64 a month in obligations to Cheryl. At the time of the divorce, those expenses constituted 27% of Ken's net income. At the time of the hearing, 53% of Ken's net monthly income was going to these obligations. Id.

Cheryl has several part-time jobs that do not offer benefits, such as health insurance. Cheryl has approximately 30 years of experience in cleaning and 40 years of experience in painting. Tr.(2), p. 19, lines 1-25. Cheryl had not applied for several jobs in the Bismarck area that she was qualified for that offered competitive wages along with benefits. Tr.(2), p. 26, lines 1-25, p. 27, lines 1-25, p. 28, lines 1-12.

Cheryl would have to make $12.00 an hour at a full time job (approximately $25,000.00 per year) to make as much as she is making at her part time jobs. Tr. (2), p. 47, lines 2-6. Ken's income at Trail King was $14.50 an hour (approximately $30,000.00 per year). Tr. (1), p. 139, lines 5-7. Ken's obligations

to Cheryl or for her benefit totaled $1,364.64 per month (approximately $16,375.00 per year). Tr. (2), p. 117, lines 9-13.

ARGUMENT

I. The trial court did not err when it modified Appellee's obligation to pay Appellant spousal support, health insurance, dental insurance, and non-covered medical expenses.

A. Standard of Review on Appeal.

A district court's determination of whether there has been a material change in circumstances warranting modification of spousal support is a finding of fact and will not be reversed on appeal unless it is clearly erroneous. Rothberg v. Rothberg, 2006 ND 65, ¶ 10, 711 N.W.2d 219. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, there is no evidence to support it, or upon review of all the evidence, the court is left with a definite and firm conviction a mistake has been made. Ebach v. Ebach, 2005 ND 123, ¶ 10, 700 N.W.2d 684.

B. The trial court's decision to modify Appellee's obligations to Appellant, including spousal support, health insurance, dental insurance, and non-covered medical expenses, was not clearly erroneous because there had been a material change in circumstances.

The trial court retains jurisdiction over Ken's modification request under N.D. Cent. Code § 14-05-24.1 (2010). This statute provides:

> Taking into consideration the circumstances of the parties, the court may require one party to pay spousal support to the other party for any period of time. The court may modify its spousal support orders.

A motion to modify a prior divorce decree necessitates a fact-finding process before it can be determined whether a material change in circumstances has occurred. Rothberg v. Rothberg, 2006 ND 65, ¶ 13, 711 N.W.2d 219. Under N.D.R.Civ.P. 52(a), the trial court is required to make findings of fact and conclusions of law sufficient to enable the appellate court to understand the factual determinations made by the trial court and the basis for its conclusions of law and the judgment or order entered thereon. See e.g., Johnson Farms v. McEnroe, 2002 ND 122, ¶ 8, 656 N.W.2d 1; Global Acquisitions, LLC v. Broadway Park Ltd. P'ship, 2001 ND 52, ¶ 18, 623 N.W.2d 442.

In Rothberg, 2006 ND 65, ¶ 10, 711 N.W.2d 219, this Court set forth the legal standards governing a motion to modify spousal support and provided:

> When the original divorce judgment includes an award of spousal support, the district court retains jurisdiction to modify the award. The party seeking modification of spousal support bears the burden of proving there has been a material change in the financial circumstances of the parties warranting a change in the amount of support.

(internal citations omitted).

The material change in circumstances in the case at hand is that Ken had a significant reduction in income that made it financially impossible for him to pay

his court ordered obligations to Cheryl. In assessing whether a material change in circumstances has occurred, the trial court must examine several factors. This Court set forth and explained those factors in Wheeler v. Wheeler, 419 N.W.2d 923, 925 (N.D. 1988):

> To modify spousal support, circumstances must have changed materially. Slight, or even moderate, changes in the parties' relative incomes are not necessarily material. "Material change" means something which substantially affects the financial abilities or needs of a party. The reason for changes in income must be examined, as well as the extent that the changes were contemplated at the time of the agreed decree.

(internal citations omitted).

The trial court in the case at hand heard two days of testimony and made sufficient findings in regard to each factor required in determining that a material change in circumstances had occurred, which required a modification of Ken's financial obligations to Cheryl. The trial court considered the following factors: need and ability to pay, reason for the change, the extent to which the change was contemplated at the time of the divorce, and whether the change was self-inflicted.

1. Need and ability to pay.

a. Ken's ability to pay.

Ability to pay the amount of spousal support ordered is a factor in deciding whether a material change of circumstances has occurred. Rothberg v. Rothberg, 2007 ND 24, ¶15, 727 N.W.2d 771. Ken's testimony and the exhibits entered at

the hearing proved that it was financially impossible for Ken to continue to pay the obligations ordered under the divorce decree. Even without paying the $500.00 per month in spousal support during the several months leading up to the hearings held in this matter, Ken was still unable to meet his own basic monthly needs and obligations without incurring additional debt. Tr.(1), p. 96, lines 15-25, p. 97, lines 1-5. Ken testified that he had to increase his overdraft protection limit from $500.00 to $700.00 on May 4, 2011, in order to pay Cheryl's health insurance premium for that month. Tr.(2), p. 103, lines 22-25, p. 104, lines 1-5. Ken testified that he couldn't increase his overdraft protection limit any further and he had used all of the credit available to him on his credit cards. Tr.(2), p. 107, lines 24-25, p. 108, lines 1-9.

Ken's net income at the time of the hearing was approximately $2,570.00 per month. See Defendant's Exhibit 1, Appellee's Appendix at p. 12. Ken's court ordered expenses for Cheryl totaled $1,364.64 per month. Id. With 53% of Ken's net monthly income going to Cheryl, there wasn't enough for Ken to cover his own basic living expenses. Appellant's brief alleges that Ken has $1,300.00 to $1,500.00 of disposable income after he pays his court ordered obligations to Cheryl. See Appellant's Brief p. 30, paragraph 88. The testimony referred to was in regard to Ken's disposable income after his obligations to Cheryl were paid ***prior*** to losing his job with Bobcat in July 2010.

Ken testified that he had exhausted any readily available assets or sources of cash to meet his obligations. Tr.(1), p. 99, lines 15-25, p. 99, lines 1-4. In order to make ends meet, Ken had to borrow money. That pattern could not continue, as debt simply creates more debt.

In Lucier v. Lucier, 2007 ND 3, ¶ 2, 725 N.W.2d 899, the parties entered into a stipulated agreement which ordered the parties to sell real property. The parties agreed that the husband would pay spousal support to the wife until the real property was sold. At the time of the agreement, the parties had accepted a conditional offer on the property. The buyer later rescinded the offer. The husband moved to modify his spousal support obligation approximately four months after the date of the parties' agreement, as the property remained unsold and he had exhausted all home equity line proceeds to meet his spousal support obligation. This Court found that the failure of the sale, the exhaustion of the home equity line and a reduction in the wife's living expenses constituted a material change of circumstances justifying a reduction in the husband's spousal support obligation. Id. at 10-11.

In Ketelsen v. Ketelsen, 1999 ND 148, ¶¶ 15-16, 598 N.W.2d 185, this Court affirmed the trial court's finding that a material change in circumstances occurred warranting termination of a spousal support award based on the fact that the former husband had to borrow funds from the grain elevator he owned in order

to make annual property distribution payments to the former wife. The negative financial status of the elevator constituted a significant change in circumstances warranting termination of spousal support payments to the former wife. Id. at. ¶ 13.

In the case at hand, the trial court found that Ken had net earnings from Bobcat of $26,524.01 from January 1, 2010, through July 16, 2010, and had previous gross annual earnings of approximately $60,000.00. Tr.(1), p. 106, lines 10-16, Appellant's Appendix at p. 19, paragraph 6. Based on the testimony and evidence presented at the hearings, the trial court found that Ken's gross income had been reduced more than 50% to approximately $30,000.00 per year. Appellant's Appendix at p. 20, paragraphs 11-12. The trial court further found that Ken's annual financial obligations to Cheryl were $15,336.00, which totaled more than 51% of his net income. Appellant's Appendix at p. 20, paragraph 12. The trial court found that Ken's ability to pay spousal support, health insurance, dental insurance and non-covered medical expenses had been eliminated as a result of his reduction in income. Appellant's Appendix at p. 20, paragraph 11.

Cheryl testified and submitted several exhibits at the hearings in this matter which outlined Ken's alleged spending. What she failed to tell the court was that her figures covered a period of two to three years. Cheryl submitted exhibits regarding Ken's alleged alcohol purchases over a period of almost two years,

claiming that Ken had spent $861.83 on alcohol. See Plaintiff's Exhibit 19, Appellee's Appendix at p. 15-17. Ken testified that since the date he lost his job at Bobcat on July 23, 2010 until December 5, 2010, he had spent less than $10.00 on alcohol. Tr.(2), p. 90, lines 21-24. Cheryl alleged that Ken made purchases for his motorcycle in the amount of $1,324.74. See Plaintiff's Exhibit 20, Appellee's Appendix at p. 18. In reality, since Ken had lost his job he had spent a total of $30.13 on his motorcycle. Id. The trial court found that Ken's expenditures prior to losing his job on July 23, 2010, were not relevant to the proceeding and that it was clear that Ken significantly reduced his spending following the loss of his job. Appellant's Appendix at p. 21, paragraph 16.

Ken was unable to pay for his own health insurance from July 2010 to January 2011, as he was paying $593.00 a month for coverage for Cheryl. Tr.(1), p. 63, line 15, p. 64, line 8. Ken tried to make ends meet and pay his obligations to Cheryl by tightening his own belt. Only after he had run completely out of options did he pursue his motion before the district court.

The trial court found that Ken had no ability to pay the insurance obligations for Cheryl going forward, and to require Ken to continue paying the insurances placed Cheryl at risk, financially. Appellant's Appendix at p. 21, paragraph 17. The court found that Ken's inability to pay Cheryl's health

insurance premiums could result in a lapse in coverage, resulting in non-covered medical expenses and a threat to her eligibility for future coverage. Id.

b. Cheryl's need.

The trial court also considered Cheryl's current need for Ken to pay spousal support and provide health insurance coverage, dental insurance coverage and pay for all non-covered medical expenses. Based on Cheryl's testimony, the trial court found that her monthly expenses were approximately $2,210.00. Appellant's Appendix at p. 20, paragraph 13. The trial court found that some of the items that were included in Cheryl's monthly expenses were not necessities and that her monthly expenses could be reduced. Id. Cheryl was questioned regarding her regular monthly expenses, which included the following: a vehicle payment on her 2009 Honda Pilot, car washes, an IRA contribution, hair/skin/makeup expenses, vitamin supplements, travel insurance premiums, personal injury insurance premiums and cancer insurance premiums. Tr.(1), p. 200, line 14, to p. 207, line 24. Her testimony was that she considered these items necessities for which Ken should provide her spousal support. Tr.(1), p. 200, line 14 to p. 207; 214, line 20 to p. 215, line 19.

Cheryl has several part-time jobs that do not offer benefits, such as health and dental insurance. Cheryl has approximately 30 years of experience in cleaning and approximately 40 years experience in painting. Tr.(2), p. 19, lines 1-25.

When asked about several positions for cleaners and painters advertised in the Bismarck area for which she was qualified, offering benefits, such as health insurance coverage, vacation, and 401K, Cheryl admitted that she had not applied. Tr.(2), p. 26, lines 1-25; p. 27, lines 1-25; p. 28. lines 1-12.

Cheryl explained that most of the positions would pay less than she is making now. Tr.(2), p. 47, line 23, p. 48, line 1. Cheryl testified that she would need to earn $12.00 an hour 40 hours a week to earn what she was making at her part-time positions. Tr.(2), p. 46, lines 23-25; p. 47, lines 2-5. Based on Cheryl's testimony regarding her hourly wage, the trial court found that Cheryl could make $25,000.00 per year, which is only $5,000.00 less than what Ken is earning at his employment. Appellant's Appendix at p. 21, paragraph 14. The trial court found that Cheryl had no need for spousal support based on her necessary monthly expenses and her earnings or potential earnings as indicated in her testimony. Appellant's Appendix at p. 21, paragraph 15.

Cheryl could cut her monthly budget by eliminating the luxury or non-necessary items. The monthly expenses Cheryl considered necessities did not justify Ken going further into debt and facing future contempt charges as he no longer had the ability to pay. The trial court found that Cheryl had the ability to cover her monthly expenses, and it did not appear from the testimony and evidence

provided that she had any ongoing need for support. Appellant's Appendix at p. 22, paragraph 19.

2. Reason for change in income.

The trial court heard several hours of testimony and reviewed many exhibits pertaining to how Ken lost his job. As Ken testified, his employment at Bobcat was terminated on July 23, 2010, for removing an item that had been discarded in the Bobcat plant's garbage and taking it home with him. Tr.(1), p. 69, lines 14-25, p. 70, lines 1-25; p. 71, lines 1-25; p. 72, lines 1-10. Ken testified he was given prior permission from a supervisor at Bobcat to remove the antenna from the plant. Tr.(1), p. 70, lines 1-7; p. 72, lines 3-10. Ken had worked for Bobcat for over 13 years and was a good employee. According to the testimony of Donnie Herbst, Ken had never been placed on suspension or sent home for any type of negative conduct. Tr.(1), p. 37, lines 3-11. Ken testified that in 13 years, he had only been disciplined one time, which was for visiting with Cheryl while on the job. Tr.(1), p. 73, line 20 to p. 74, line 12.

Ken filed a grievance through his union regarding his termination, alleging that his punishment was too severe for the conduct. Tr.(1), p. 18, lines 3-7. On August 12, 2010, Bobcat sent Ken a letter stating that the company would allow him to apply for an open position with the company at that time. Tr.(1), p. 19, lines 2-6. As testified by Donnie Herbst, the labor relations supervisor at Bobcat,

Ken was not offered his maintenance position back, nor was he guaranteed a position if he chose to apply. Tr.(1), p. 36, lines 1-13. If Ken was hired back, Mr. Herbst testified that he would have likely been assigned jobs that required heavier physical labor, or if placed in the welding department, he would have been on his feet eight to ten hours a day, six days a week, in a small welding stall. Tr.(1), p. 183, lines 13-25. Ken testified that at the age of 60, he did not believe he would be able to handle those work conditions. Tr.(1), p. 184, lines 7-21.

Mr. Herbst testified that the maintenance position that Ken held before his termination was a highly coveted position within the plant. Tr.(1), p. 38, lines 22-25. He also testified that at the time of Ken's termination, there were no openings in the maintenance department. Tr.(1), p. 38, lines 7-12. He testified that as Ken would have been assigned a new seniority number, the chances of Ken getting his maintenance position back were slim, as all bids at Bobcat are seniority based. Tr.(1), p. 39, lines 1-20. In addition, Ken would not have had any vacation for the first year after re-hiring and it would have taken him six years to work back up to the three weeks vacation he was receiving prior to his termination. Tr.(1), p. 24, lines 22-25, p. 184, lines 7-21. Ken had already accepted a position through Preference Personnel with Trail King and had been working since August 9, 2010. He received written notice that he had the ability to apply for open positions at the

plant and be treated as a new hire on August 12, 2010. Taking into consideration the above facts, Ken declined Bobcat's opportunity to apply.

The trial court found that Ken's reduction in income was not voluntary, self-induced or made in bad faith. Appellant's Appendix at p. 19, paragraph 9. Although Ken's actions led to his termination and resulting reduction of income, the trial court found that his employer's response was not foreseeable and Ken's actions did not foreseeably jeopardize his employment. Id.

3. The extent that the changes were contemplated at the time of the agreed decree.

Another factor the trial court examined when determining whether a material change in circumstances had occurred was the extent the changes were contemplated at the time of the agreed decree. The Court in Lucier v. Lucier, 2007 ND 3, ¶ 7, 725 N.W.2d 899 discussed contemplated changes:

> A change that was contemplated by the parties at the time of the initial decree is not a material change in circumstances. Gibb v. Sepe, 2004 ND 227, ¶ 7, 690 N.W.2d 230. A contemplated change is one the parties considered when entering a termination agreement or one the district court considered in fashioning its original decree, but a change is not necessarily contemplated simply because it can now be called foreseeable with the benefit of hindsight. Quamme v. Bellino, 2002 ND 159, ¶ 14, 652 N.W.2d 360.

Ken and Cheryl did not contemplate at the time they entered into their legal separation agreement in 2002 that Ken would lose his job at Bobcat. Ken had been

working for Bobcat for 5 years at the time they entered into their separation agreement and had significantly greater earnings than Cheryl at that time. Ken obtained his maintenance position in 2001 after three to four years of working at Bobcat. Tr.(1), p. 75, lines 13-25. The position Donnie Herbst admitted, was a very coveted position. Tr.(1), p. 38, lines 22-25. Ken testified that he loved his maintenance position. Tr.(1), p. 119, lines 17-21. Ken was making approximately $60,000.00 per year at Bobcat. Tr.(1), p. 134, lines 4-20. The parties did not contemplate that at the age of 60, Ken would be making 50% less than he had in 2002. The parties did not contemplate that Ken would lose his maintenance position for taking an item out of the garbage for which he had been given permission a few weeks prior, especially considering he had only one prior incident in his 13 years of employment. Tr.(1), p. 97, lines 17-23.

In Meyer v. Meyer, 2004 ND 89, ¶ 7, 679 N.W.2d 273, this Court affirmed the trial court's finding that a material change in circumstances existed when the former husband's income was involuntarily reduced when the company he was employed by was sold. This Court held that the trial court took into consideration that the original spousal support obligation was based upon a stipulation of the parties and that, although a reduction in income from a voluntary change in employment was foreseeable, it was not contemplated that the company he worked for would be sold, thereby reducing his income.

In the present case, the parties did not contemplate that the cost of providing health insurance would double since the parties entered into their separation agreement. Ken was paying approximately $300.00 per month at the time they entered into their agreement. Ken was paying $593.00 per month at the time of the hearing. Tr.(1), p. 97, lines 24-25, p. 98, lines 1-7.

The trial court found that the change in Ken's income was not contemplated by the parties at the time their agreement was negotiated. Appellant's Appendix at pp. 21-22, ¶¶ 18, 19. The trial court also found that the parties did not contemplate that the cost of health coverage Ken was ordered to provide for Cheryl would double in cost. Id. at paragraph 18. The parties could not have anticipated that the support obligations ordered by the Court totaling 27% of Ken's net income at the time of the divorce would later consume 53% of his net monthly income.

4. Self-induced reduction of income.

Cheryl's counsel asked Ken numerous questions regarding his "self-induced actions" at the hearing in this matter. The argument that Ken is precluded from seeking a modification of his obligations because Ken's physical action of removing an antenna from the garbage led to his firing is without merit. Ken testified that he does not understand the legal implications of the words "self-induced" as they pertain to a reduction of income. Tr.(2), p. 88, lines 4-15. Cheryl's counsel's line of inquiry of Ken inserted the words "self-induced" in

place of the word "action". Getting affirmations to "Your removal of the antenna was self-induced" and "your failure to abide by the plant policy was self-induced" does not constitute "therefore the reduction of your income was self-induced". If that logic were applied to other scenarios, it becomes ridiculous. It would be illogical to indicate that an ex-husband is precluded from a modification of his support obligation based on the fact that he was left disabled from a car accident because he was the driver. Under Cheryl's argument, this would be a self-induced injury, precluding modification. Actions by their very nature are self-induced; the unintended and unforeseeable consequences of those actions are not.

In order to fully address this issue, the Court must review the allegation of self-induced changes in a legal context and not just in the extrapolated context that Cheryl asked the Court to apply. This Court in Mahoney v. Mahoney, 516 N.W.2d 656, (N.D. 1994) addressed the issue of self-induced changes:

> While it is true that the "change of circumstances" necessary to warrant modification is one based primarily on a change in financial circumstances, Cook v. Cook, 364 N.W.2d 74 (N.D. 1985), it is also true that not every change in financial circumstances justifies a modification. Bloom v. Fyllesvold, [420 N.W.2d 327 (N.D. 1988)]. When the change is ***voluntary*** or self-induced, no modification is warranted because the obligor, by voluntarily placing herself or himself in a less financially secure position, is without clean hands and precluded from seeking equity. Even though the law never requires impossibilities, NDCC § 31-22-05(22), one who ***voluntarily*** dissipates or reduces income is not

> protected either from the consequences of such conduct or by equitable maxims. Muehler [v. Muehler, 333 N.W.2d 432 (N.D. 1983)]; Foster [v. Nelson, 206 N.W.2d 649 (N.D. 1973)].

Mahoney v. Mahoney, 516 N.W.2d at 661 (quoting Koch v. Williams, 456 N.W.2d 299, 301 (N.D. 1990) (emphasis added). The Court further provided: ***Absent a substantial showing of good faith or cause***, a self-induced decline in income does not constitute such an exceptional change in circumstances as to afford the required basis for modifying a child support or spousal support award. Mahoney, at 661. (emphasis added).

There was substantial testimony given by Ken regarding the loss of his employment. Ken testified that he loved his job, as he had a highly coveted position at Bobcat and never imagined that he would have lost that position for taking an item out of the garbage. Tr.(1), p.71, lines 14-21. This is not a voluntary reduction according to the test set forth in Mahoney. The evidence and testimony presented in this case show that Ken's reduction in income was not voluntary or made in bad faith to reduce his spousal support and other financial obligations. The cause of the reduction was beyond Ken's control and he obtained a lesser paying job in good faith to attempt to keep up with his obligations to Cheryl.

The Mahoney case is also factually distinguishable from the case at hand. In Mahoney, the obligor ex-husband was a surgeon who sought to modify his

spousal support and child support obligations due to a decrease in his income. Dr. Mahoney had resigned from his position with a medical clinic to open his own practice. As a managing partner or shareholder, he controlled his own salary. Mahoney involved a voluntary change in employment, which significantly decreased income, and the moving party had control over his own income. The district court in that case denied the motion to reduce his obligations and Dr. Mahoney appealed. This Court remanded for a new hearing on the husband's motion so the district court could apply the correct legal standard. Mahoney at 662.

On remand, the district court reduced Dr. Mahoney's support obligations and the wife appealed. This Court in Mahoney v. Mahoney, 538 N.W.2d 189 (N.D. 1995), affirmed the trial court's findings that a material change in circumstances had occurred authorizing a reduction in Dr. Mahoney's spousal support obligation and that he had not acted unreasonably or in bad faith in resigning from his position at a medical clinic. Id. at 193.

Even with the facts in Mahoney, including that a doctor voluntarily quit his position at a medical clinic to start his own practice, this Court held that a material change of circumstances had occurred that warranted a reduction in the husband's obligations. In the case at hand, Ken did not make a voluntary change in his employment. It is true that Ken, through his own actions, took an antenna out of

the garbage. However, the reduction of Ken's income was not self-induced because the consequences were unforeseeable and unintended. The reduction of income was the result of matters beyond Ken's control. Ken challenged his termination. He made reasonable efforts to be reinstated to his maintenance position, but was unsuccessful. He obtained new employment as soon as possible following his termination in an to attempt to keep up with his obligations to Cheryl. At all times, Ken acted in good faith toward his support obligations.

Cheryl's counsel presented testimony through Donnie Herbst, a Human Resources representative from Bobcat, as to what Ken would have made had he been hired as a new hire at Bobcat. Tr.(1), p. 28, line 14 to p. 30, line 13. Ken was questioned repeatedly about whether or not he tried to get his job back and how much money he walked away from. These arguments make it appear that Cheryl is arguing to impute income to Ken. There is no case law or statutory support for imputing income in a spousal support modification case. Ken didn't walk away from a position. He walked away from an opportunity to apply for a job he likely couldn't physically handle at the age of 60, while losing his 13 years of seniority and the benefits that go along with that status.

This Court has said that "earned income is not the sole consideration in determining a party's ability to pay support. Rather, the court must consider a party's net worth, including the extent of his assets and his earning ability as

demonstrated by past income." Schmitz v. Schmitz, 2001 ND 19, ¶ 10, 622 N.W.2d 176 (citations omitted); see also McDowell v. McDowell, 2001 ND 176, ¶ 13, 635 N.W.2d 139; Hager v. Hager, 539 N.W.2d 304, 306 (N.D. 1995). Testimony was given by Ken about his assets, debts and net worth. He testified that he has his retirement with Bobcat, his 2001 Harley Davison, and a 1994 Chevrolet Suburban. Tr.(1), p. 100, lines 5-7. Ken didn't have any assets that he could draw from or liquidate in order to pay his obligations to Cheryl. He did not have a savings account, certificate of deposit or any other investment type asset that he could liquidate to continue paying his support obligations to Cheryl. Tr.(1), p. 99, lines 15-25, p. 99, lines 1-4. Ken testified about his credit card debts and vehicle loan. Tr.(1), p. 90, lines 4-25, p. 91, lines 1-25, p. 92, lines 1-16. Ken exhausted all of his credit resources and was unable to meet his obligations to Cheryl without relying on credit. Tr.(1), p. 96, lines 7-23. Ken ran out of credit and he ran out of options.

Ken has a high school diploma. His work experience is in construction and manufacturing as a manual laborer. Immediately after he was fired from Bobcat, he looked for other employment for which he would be qualified. Ken testified that he inquired at Case IH in Fargo, North Dakota as he understood that it offered higher wages, but it was not hiring at that time. Tr.(1), p. 68, lines 12-25, p. 69, lines 1-2. He also testified that he understood his income would be that of a new

hire at Bobcat, significantly less than what he was making prior to his dismissal. Tr.(1), p. 157, lines 6-13, p. 189, lines 1-4. Having not heard from Bobcat, he took a position making $14.00 an hour at Trail King on August 9, 2010. Ken was offered the opportunity to apply for a position at Bobcat as a new hire on August 12, 2010.

Ken was questioned repeatedly at the hearing in this matter about not continuing his maintenance position with Swanson Apartments in Gwinner, North Dakota. Cheryl testified that she had the position prior to Ken and that she too gave up the income from Swanson Apartments when she moved to Bismarck, because it would not have been cost effective to continue. Tr.(2), p.14, lines 6-25, p. 15, lines 1-6. The same was true for Ken. He took a position in Fargo and later moved there. It wasn't cost effective for Ken to continue the maintenance position in Gwinner, North Dakota and drive to Fargo for his primary employment. Ken didn't have a second job when the divorce was negotiated or finalized. He shouldn't be required to obtain a second job to meet his obligations as a 60 year old man.

Ken talked about the other tangible benefits of his new employment. He is now working in a position with supervisory responsibilities and he is able to work on different tasks and change positions throughout the day, in contrast to welding in a confined area at Bobcat. Tr.(1), p. 183, lines 9-25, p. 184, lines 1-6. He

testified about the benefits he receives that are similar and, in some instances, better than those available to him at Bobcat. Tr.(1), p. 182, lines 2-25. Based on the treatment he received leading up to his termination, Ken was concerned about being treated fairly and the security of his position if he were to return to Bobcat. Tr.(1), p. 189, lines 8-14.

The trial court found that the evidence and testimony presented in this case showed that Ken's reduction in income was not voluntary, self-induced, or made in bad faith to reduce his spousal support and other financial obligations. Appellant's Appendix at p. 19, paragraph 9.

C. The trial court's analysis.

The trial court did what was required under the law. The trial court provided an extensive analysis of the factors that need to be proven when determining whether or not a material change of circumstances has occurred. The trial court assessed Ken's ability to pay, Cheryl's need for support, the reason for change in income and the extent the changes were contemplated at the time of the agreed decree. The trial court's decision to modify Ken's obligations to Cheryl was not clearly erroneous.

II. The trial court did not modify the parties' property division when it modified Appellee's obligation to provide Appellant's health insurance, dental insurance and obligation to pay all non-covered medical expenses.

A. Standard of Review on Appeal.

Stipulations in divorce proceedings concerning the division of property and spousal support are governed by the law of contracts. Redlin v. Redlin, 436 N.W.2d 5, 7 (N.D. 1989); Seabloom v. Seabloom, 348 N.W.2d 920, 924 (N.D. 1984); Coulter v. Coulter, 328 N.W.2d 232, 241 (N.D. 1982). Contract interpretation is a matter of law and must be determined by the court. Bridgeford v. Bridgeford, 281 N.W.2d 583, 586 (N.D. 1979). If the contract is ambiguous, the court may attempt to ascertain the intent of the parties from the contract as a whole or, if the intent of the parties cannot be gleaned from the contract, it may hear other evidence regarding the parties' intent. Whether provisions in a contract are ambiguous is a question of law. Production Credit Ass'n of Fargo v. Foss, 391 N.W.2d 622, 625 (N.D. 1986). Interpretation of a contract is a question of law if the intent of the parties can be ascertained from the writing alone. Zitzow v. Diederich, 337 N.W.2d 799, 801 (N.D. 1983). But the parties' intent in a written contract is a question of fact if extrinsic evidence must be used. Id. Similarly, if extrinsic evidence must be used to determine the intent of the parties, whether the payments in question are spousal support or a division of property is a question of fact. Consequently, the ruling of a trial court must be upheld unless this court concludes that the trial court's findings were clearly erroneous. N.D.R.Civ.P. Rule 52(a).

B. The trial court's determination that the Appellee's obligations to the Appellant were spousal support obligations and not property division was not clearly erroneous, as the obligations were meant to equalize income disparity at the time of the parties' divorce agreement.

Cheryl argues that the payments Ken made in regard to her health insurance, dental insurance and non-covered medical expenses were part of the parties' property division and are thereby nonmodifiable. In discerning whether an amount paid by one spouse to the other is property division or spousal support, several factors must be considered. Factors that may indicate that the payments are distributions of property include: payments that do not terminate after the obligee dies; payments that do not terminate after the obligee remarries; a large disparity in the property divided which is otherwise unexplained; and payments that do not terminate on the obligor's death. Redlin v. Redlin, 436 N.W.2d 5, 8 (N.D. 1989). The attributes of spousal support, rather than property division, are indicated if the divorce payments are directed to be monthly, unsecured, and terminable upon designated events, such as death or remarriage of the obligee. Baker v. Baker, 1997 ND 135, ¶ 8, 566 N.W.2d 806. In addition, security for payment may tend to indicate property distribution because deferred-property payments are dischargeable in bankruptcy, unlike spousal-support payments. Redlin, 436 N.W.2d at 8.

Any of these factors, standing alone, does not necessarily show whether the amount paid is a property division or spousal support. Rather all factors must be

considered together along with the specific facts of the case in order to determine the status of the assets in dispute. Id. at 9.

The insurance and non-covered medical expenses in the case at hand are not specifically labeled in the divorce judgment as spousal support, but it is clear that these payments were designated to be additional spousal support for Cheryl if one reviews the terms of the entire agreement. The payments for Cheryl's health insurance and non-covered medical expenses are all monthly, unsecured payments. The payments were being made to compensate for the disparity in income at the time the parties entered into their agreement. They were not being made to compensate Cheryl for a disparity in the division of the parties' assets. Cheryl received one-half of the proceeds from the sale of the marital home, one-half of all of Ken's retirement accounts, including his Ironworkers pension, Bobcat pension, and 401k. Cheryl also received a 1981 Chevrolet Malibu which was paid for by Ken with a value of $15,000.00 to $20,000.00, and one-half of the parties personal property. Ken received one-half of the house proceeds, one-half of his retirement accounts and pensions, a 2001 Harley Davidson motorcycle, a 1991 S-10 pickup and a 1998 pickup. See Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree, Appellee's Appendix at p. 1-9. Had there been a major disparity in assets with Cheryl receiving the short end of the deal, it could be argued that the provision of non-covered medical expenses, the health

insurance and the dental insurance provisions were to address that imbalance. That was not the case in Ken and Cheryl's divorce. At the time of the agreement, there was a significant disparity in the parties' incomes, which warranted an award of spousal support and Ken's obligation to provide health insurance and non-covered medical expenses for Cheryl. These awards were purely support awards that are modifiable by this Court.

The payment of Cheryl's health insurance, dental insurance and non-covered medical costs were not meant to compensate Cheryl for her share of the marital estate. Cheryl received her share of the estate through personal property, bank accounts, vehicles and one-half of Ken's retirement accounts and pensions. The health insurance and non-covered medical payments ordered at the time of the parties' divorce agreement were made simply because Ken was making approximately $60,000.00 and Cheryl was making anywhere from $21,000.00 to $35,000.00. Appellee's Appendix at p. 5, paragraph 20.

The trial court found that the obligations Ken was seeking to modify were spousal support obligations, because there was no disparity in the property distribution between the parties that would justify treating the obligations as property settlement payments. The disparity that existed when the settlement was negotiated was in the parties' income alone. Appellant's Appendix at p. 20, paragraph 10.

This Court has already found that the parties' agreement was not unconscionable. Kramer v. Kramer, 2006 ND 64, ¶ 18, 711 N.W.2d 164. Cheryl has never argued before the trial court or in this appeal that the parties' settlement agreement would be unconscionable, unequal or inequitable if the health insurance and non-covered medical payments were eliminated. It was Ken who argued before this Court that the parties' divorce judgment was unconscionable as it provided for an unequal distribution of the parties' assets in Cheryl's favor, and Cheryl defended the distribution of the marital estate. This Court reviewed the record and the parties' financial circumstances and affirmed the trial court's decision that the agreement was a fair and reasonable disposition of the parties' property. Id.

III. The trial court did not err when it did not award Appellant attorney fees.

A. Standard of Review on Appeal.

Under N.D. Cent. Code § 14-05-23 (2009), a district court has discretion to award attorney fees in divorce proceedings, including proceedings on motions to modify spousal support. Gibb v. Sepe, 2004 ND 227, ¶ 11, 690 N.W.2d 230. An award of attorney fees under N.D. Cent. Code § 14-05-23 lies within the sound discretion of the district court and will not be set aside on appeal absent an abuse of discretion. Id. ¶ 11; Oldham v. Oldham, 2004 ND 62, ¶ 16, 677 N.W.2d 196. A

district court abuses its discretion if it misinterprets or misapplies the law. Bertsch v. Bertsch, 2006 ND 31, ¶ 8, 710 N.W.2d 113.

B. The trial court did not abuse its discretion when it did not award Appellant attorney fees.

In deciding whether to award attorney fees under N.D. Cent. Code § 14-05-23, the trial court must balance the parties' financial needs and ability to pay. Rothberg v. Rothberg, 2007 ND 24 ¶ 20, 727 N.W.2d 771. The trial court did not make a specific finding in the Findings of Fact, Conclusions of Law and Order for Second Amended Judgment dated June 1, 2011, supporting its denial of Cheryl's request for attorney fees. However, this Court in Wheeler v. Wheeler, 548 N.W.2d 27, 30 (N.D. 1996) provided: "We may rely upon implied findings of fact when the record enables us to understand the factual determinations made by the [district] court and the basis for its conclusions of law and judgment."

This Court can see the trial court's rationale for its decision in the case at hand based on the several findings made by the trial court regarding the parties' respective need and ability to pay, which support no award of attorney fees. The evidence of Ken's inability to pay spousal support, insurances and attorney fees was overwhelming. Ken was not able to pay the fees as owing to his own attorney, which at the time of the hearings totaled approximately $10,000.00. Tr.(2), p. 149, lines 10-18. Ken filed a motion with the court because of his inability to pay all of the financial obligations to Cheryl. He was already borrowing money in an effort

to make his obligations to Cheryl; it would have been financially impossible for him to pay her fees.

This Court has provided that a trial court's decision as to whether or not attorney fees will be awarded will not be interfered with on appeal unless the appealing party affirmatively establishes that the trial court has abused its discretion. See Bohnenkamp v. Bohnenkamp, 253 N.W.2d 439, 443 (N.D. 1977); Hoster v. Hoster, 216 N.W.2d 698, 703 (N.D. 1974). Cheryl has not established that the trial court abused its discretion in denying her request for attorney fees. The trial court's denial of Cheryl's request for attorney fees should be affirmed.

CONCLUSION

The trial court's decision to modify Ken's obligations to Cheryl was not clearly erroneous because a material change in circumstances occurred. The trial court provided an extensive analysis of the factors it needed to consider in determining whether a material change of circumstances occurred. The trial court assessed Ken's ability to pay, Cheryl's need for support, the reason for the change in income, the extent the changes were contemplated at the time of the agreed decree, and whether the change was self-inflicted. This Court should affirm the trial court's modification of the amended judgment.

The trial court did not modify the parties' property division when it modified Ken's obligation to pay Cheryl's health insurance, dental insurance and

non-covered medical expenses. There was no disparity in the property distribution between the parties that justified treating the obligations as property settlement payments. The disparity at the time of the parties' agreement was in their respective incomes. As this Court has already ruled in Kramer v. Kramer, 2006 ND 64, 711 N.W.2d 164, the parties' divorce judgment was not unconscionable, unequal or inequitable. This Court should affirm the trial court's finding that the obligations Ken was seeking to modify were spousal support obligations and not property distribution.

The trial court did not abuse its discretion when it did not award Cheryl attorney's fees. In deciding whether to award attorney fees the court must balance the parties' financial needs and ability to pay. The testimony and evidence presented demonstrated that Ken did not have the ability to pay Cheryl's attorney's fees. This Court should affirm the trial court's denial of Cheryl's request for attorney's fees.

Respectfully submitted this 17th day of October, 2011.

SMITH, STREGE & FREDERICKSEN, LTD.
321 Dakota Avenue
P.O. Box 38
Wahpeton, North Dakota 58074
(701)642-2668 (Phone)
(701)642-4729 (Fax)

By _____
Janel B. Fredericksen
Attorney for Appellee
North Dakota ID #05372