

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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Kayla Rath,
PLAINTIFF/APPELLEE

CIVIL No. 20130184

v.
Mark Rath,
DEFENDANT/APPELLANT

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 27, 2013
STATE OF NORTH DAKOTA

APPEAL FROM A DECISION IN CIVIL NO. 08-2012-DM-00078 ON MAY 9, 2013 DISTRICT COURT, BURLEIGH COUNTY, NORTH DAKOTA by Honorable Judge David Reich.

BREIF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities	Page 2
Statement of Issues	Page 4
Standard of Review	Page 4
Statement of Facts	Page 4
Statement of Case	Page 5
Argument	Page 10

Table of Authorities

Cases:

Glasser v. Glasser, 2006 ND 238, 724 N.W.2d 144

Vande Hoven v. Vande Hoven, 399 N.W.2d 855 (N.D. 1987)

Woodward v. Woodward, 2010 ND 143, 785 N.W.2d 902

NORTH DAKOTA CENTURY CODE

N.D.C.C §14-09-06.2

I. STATEMENT OF ISSUES PRESENTED

- A. The District Court erred in not recusing itself when requested.
- B. The District Court abused its discretion by acting Arbitrary and unreasonable and giving a party discretion to decide whether a party is in contempt of the order.
- C. Argument against Res Judicata in this specific matter.

STANDARD OF REVIEW

I. ABUSE OF DISCRETION

[¶1]The trial court's determination as to whether or not contempt has been committed is within its sound discretion, and its decision will not be reversed on appeal absent an abuse of discretion. Knoop v. Knoop, 542 N.W.2d 114, 116 (ND 1996). A trial court abuses its discretion if it acts in an arbitrary capricious or unreasonable manner or if it misinterprets or misapplies the law. Austin v. Town, 1997 ND 59 ¶8, 560 N.W.2d 895; Diller v. Bragg, 1997 ND 24 ¶9, 559 N.W.2d 225.

II. CLEARLY ERRONEOUS

[¶2]Under North Dakota Rules of Civil Procedure, a finding of fact is clearly erroneous only if it is induced by an erroneous view of the law, there is no evidence to support it, or, although there is some evidence to support it, based upon entire record the court is left with a definite and firm conviction that a mistake has been made. NDRCivP 52(a); Brown v. Brown, 1999 ND 199 ¶10, _____, N.W.2d _____; Riehl v. Riehl, 1999 ND 107, ¶7, 595 N.W.2d 10.

STATEMENT OF THE CASE

This is an appeal of the most recent Decision entered on May 9, 2013 holding the Plaintiff (Hereafter Kayla) not in contempt of the court order. The Divorce Request was entered on January 31, 2012 and an Interim Order was established on March 15, 2012. The Defendant (Hereafter Mark) was found in contempt of the Interim Order on April 16, 2012 and again on August 20, 2012.

At the August 20, 2012 Hearing, Mark was also refused his right to call Kayla as a witness to establish certain facts, after the hearing, Mark submitted a letter asking Judge Reich to recuse himself.

The Plaintiff as part of the final order, was granted Primary Residential Responsibility and Joint Decision making responsibility of the minor children, where the Defendant was awarded supervised visitations with the minor children through the family safety center because the courts find evidence that Mark was not properly being supervised by his parents, despite the facts that there were only mere allegations of the Defendant using the children to stalk the Plaintiff, continuing to talk inappropriately to the minor children, but no reports of physical harm ever coming to the children while in the care of Mark..

Mark filed his motion for Order to Show Cause on March 15, 2013, called the court administration to schedule a Hearing on April 12, 2013 and the Hearing was held on May 9, 2013.

STATEMENT OF THE FACTS

[¶1] The hearing held on May 09, 2013, started at 2:30 p.m. Kayla and Mark were present. Judge Reich claimed that Mark was not specific in what violations of the order Kayla had engaged in Tr. P. 1. Ln. 18-25., However, in Mark's motion and brief. App. 1 p. 13-17. Mark states exactly how Kayla Rath has violated the various provision outlined in Section D. App.1. P. 15. As Kayla's actions do violate every one of those provisions stated in the Divorce Judgment. Furthermore; Mark specifically alleged in his affidavit that on March 08, 2013, Kayla once again denied Mark his phone call with the parties' youngest daughter because Kayla didn't think it was very appropriate for Mark to be discussing Heather Zins and Mark's son with the oldest child.

[¶ 2] Mark in his responsive brief also further explained how the actions of Kayla brought her in contempt of court, stating that Kayla refused to even have the children call on March 24, 2013. And points out statement from Kayla in her affidavit. App. 3, P. 5. Stating that Kayla's use of the minor children goes against what she even argues against Mark.

[¶3] Judge Reich though not directly stated, tries to incite Res Judicata against Mark, stating that the Judgment addressed the issues that Mark brought before the court. Tr. P. 2 Ln. 3-16. However, Mark attempted to argue that since the Judgment has been put into place, Kayla has continued to interfere with his phone visitations, has continued to force the minor children to be on speakerphone for her ability to interfere with the visitations, thus since the order directly states that Mark is allowed phone visitations with the minor children without interference from Kayla. Tr. P. 2 Ln. 17-25 and Tr. P. 3 Ln. 1-4. He had grounds to restate his arguments.

[¶ 4] Mark states he wanted to summon Kayla as a witness Tr. P. 3 Ln. 10 – 12. Judge Reich stated that the Defendant could not summon Kayla as a witness to establish facts. Tr. P.3 Ln. 13-15.

[¶ 5] Mark further stated that a fact was that Kayla has no business denying Mark any communication with their youngest daughter, and Judge Reich claims Marks comment as an argument not a fact Tr. P. 3 Ln. 16-24. Mark further retorts that the “Fact” is that Kayla will end the conversation on the parties’ oldest daughter without allowing him communication with their youngest daughter without even saying a word to the youngest daughter. Tr. P. 3. Ln 25, P.4 Ln. 1-2.

[¶ 6] Mark also states that Kayla will use the minor children to tell him things, such as when Kayla thinks something shouldn’t be discussed and when Kayla thinks something needs to be discussed through her attorney. Tr. P. 4. Ln 5-11. Judge Reich claims to not understand exactly what Mark is claiming by this specific allegation and Mark explains that Kayla is violating the order by using the minor children to argue with him according to what the Judgment states. Tr. P. 4 Ln. 12 – 20.

[¶ 7] Mark also brings up an allegation of a violation from his Motion, in that Kayla violated the order by temporarily removing the minor children without his permission or permission from the court on February 22, 2013 to take a vacation to Minnesota. Mark did establish in his Motion, Brief Affidavit and response and responsive affidavit, that the order specifically states that the children are not to be subjected to temporary removal from the state without a court order or permission from the other party, Judge Reich redirects Mark to

another allegation even though the information Mark was trying to get before the court was brought up in his motions, briefs and affidavits and was an alleged violation on Kayla's part. Tr. P 5. Ln. 4-13. App. 1 p. 13-14.

[¶ 8] Mark further argues that Kayla's violation on February 25, 2013, was because Mark asked the parties' oldest daughter about a secret conversation the child told him her and her mother engaged in. Judge Reich proceeds to tell Mark that he cannot ask those questions of the minor children stating that he cannot use the children Mark's response that was he not using the children, he was asking the children questions and that he was attempting to find out what was being told to the minor children. Tr. P. 6 Ln. 6 – 24.

[¶ 9] Judge Reich proceeded to ask Mark if there was anything else and Mark stated that Kayla had attempted to ask Mark about the children's education for the next year, which required Joint Decision making responsibility between the parties. Mark stated that he attempted to incite mediation between the parties to sit down and discuss the situation, and that Kayla denied the request for mediation because of the no-contact order. Judge Reich asked Mark if there was anything else and Mark started to bring up other allegations in his motion and brief about him reprimanding his children for lying to him and keeping secrets but stopped his argument.

[¶10] Mrs. Weiler in her rebuttal argument claims that Kayla calls every time she is supposed to and that when Mark continues to ask the children about Kayla or what they're doing that she cuts off the conversations. Tr. P. 8, Ln. 9-17. And that Kayla attempts to be reasonable, Mrs. Weiler admits that Kayla "uses" the minor children to relay information to Mark, stating that Kayla tells the children "Tell your dad that she - - he needs to talk to Bobbi" Tr. P. 8 Ln. 18-21. Mark attempts to object to Mrs. Weiler's statements but is ignored completely by Mrs. Weiler and Judge Reich. Tr. P. 8, Ln. 22.

[¶11] Mrs. Weiler continues to state that Mark makes decision making difficult, however, does not even reference the email verbatim, claiming that Kayla did not refuse mediation because of the no-contact order, but because of cost. Tr. P. 9 Ln.2-22.

[¶12] Mark begins his rebuttal argument by stating that Mrs. Weiler did specifically state they would not go through mediation and that they did not mention anything about costs

until their affidavit, and that Mark using the minor children to obtain information was a completely subject view of the questions. Judge Reich responds that all of that had been addressed earlier and that Judge Reich does not agree with Mark's view and that he believes the questions to be geared towards finding out information the courts stated Mark did not need to obtain. Tr. P. 9 Ln. 24-25 and Tr. P 10 Ln. 1-8.

[¶13] Mark rebutted this statement by asking Judge Reich exactly what statements the courts have told Mark he could not know and that Kayla has never really specifically provided a statement that Mark did not have a right to know regarding the minor children. Mark goes further into argument, referencing the Exhibit filed with his response, that he asks the children where they sleep, not where Kayla or her boyfriend sleep but where his children sleep and then the children tell Mark all of the information Kayla does not want him to know and that it's not inappropriate for Mark to ask his children these questions but it's the children are discussing things Kayla does not like. Tr. P. 10 Ln. 13-25 and P. 11 Ln. 1-7. Judge Reich again interrupts Mark's argument, as this court will realize Judge Reich does a lot during this hearing, stating that a subjective view of the statements does not equal an intentional interference of the phone calls. Tr. P 11, Ln. 7-14. and that he was refusing to hold Kayla in contempt for denying Mark the phone call with the parties' youngest daughter and then switches the topic on Mark, going back to the school issue.

[¶14T] Mrs. Weiler, the court and Mark go into details about mediation and that Mark wanted mediation because he wanted to actually sit down and discuss the issue of education with Kayla. Mrs. Weiler states that Mark will not discuss matters with her regarding the children and Mark rebutted the statement stating that he does sometimes refuse to speak to Mrs. Weiler on issues because of how deceptive she has been regarding the minor children. Tr. P. 11 Ln. 21 through P.14 Ln. 25.

[¶15] Judge Reich admits that there is a restraining order in this matter and that the communication between the parties is to be handled through the attorney's and that because Mark sometimes refused to speak to Bobbi, that he is not doing what the order states. Tr. P.15, Ln. 1-12.

[¶16] Mrs. Weiler, asks the court to clarify the Judgment regarding the provision Mark was trying to bring up earlier in argument as stated in ¶7. Where the order states that the children are not to be subjected to temporary removal from the state without permission from the other party or an order of the court. Tr. P. 16, Ln. 16, through P. 17 Ln.23. Judge Reich reads verbatim exactly what the order says “Neither parent will permit the child to be subjected to temporary removal of the children from the state unless agreed by the parties or authorized by the court.” Tr. P 17. Ln. 20-23. Judge Reich than changes what the order stated so that both parties can take the minor children out of the state during their parenting time as long as it did not interfere with the other parent’s visitations.

[¶17] Mark than proceeds to argue that Kayla checking up on her facebook as she admitted to doing multiple times, constitutes stalking and harassment of Mark, **Judge Reich argues that there was no provision in the order stating Kayla could not view his profile page and if it was not written in the order it did not constitute a violation of a court order.** (emphasis added for later argument.) Tr. P. 19 Ln. 5 through P. 21. Ln 25.

[¶18] Mark than once again asks Judge Reich to recuse himself, Mark begins the argument on the basis that Judge Reich’s reasonability is in question based on the second motion for contempt against Mark on August 20, 2012 and an order revoking Mark’s probation on August 28, 2012. Where Judge Reich found Mark in contempt of court for Kayla claiming she saw somebody but was unsure entirely if it was mark and also revoked Mark’s probation as he is the Judge in Mark’s case requiring him to be on probation as well. Judge Reich stated immediately he was denying Mark’s motion, Mark than rebutted an argument that Judge Reich was not allowing Mark to finish his argument. Judge Reich than stated that Mark has brought all of this up before. However, Mark brings up the need for an appeal and the need to object, Judge Reich than allows Mark to continue his argument. Tr. P 22 Ln. 2-20

[¶19] Mark continues his argument, stating that Judge Reich allows Kayla to interfere with his phone visitations, where Judge Reich interferes once again with Mark’s argument stating that, that was not what he was finding, Mark rebutted this by stating that was one of the reasons Mark was asking Judge Reich to recuse himself. That Kayla’s views were completely

subjective and that it did not give Kayla a right to interfere with the phone calls, even if he hasn't said anything inappropriate to the child. Tr. P. 22 Ln. 21 through P. 15.

[¶20] Judge Reich then proceeds to suggest legal counsel to Mark, stating that Mark does not argue the issues accurately, that Mark's arguments do not help his situation, Mark attempted to rebut Judge Reich's statement but is once again interrupted by the Judge. Tr. P. 24 Ln. 7-24.

[¶21] Mark then proceeded to confront Judge Reich on his rulings, asking Judge Reich if he was giving Kayla permission to interfere with his visitations, Judge Reich responded no to each of the questions Mark asked. Tr. P. 24 Ln. 24 through P. 25 Ln. 14.

[¶22] Mark then tries to argue that Kayla should not have the discretion to decide whether or not Mark gets to communicate with his youngest daughter based on his conversation with the oldest daughter. Judge Reich responds that he is giving Kayla that discretion and that Mark upsetting the children gives Kayla permission to interfere with his rights to communication with the children. Tr. P. Ln 18 through P.27 Ln 20

Argument on the Issues

A. Whether the District Court committed reversible error when it refused to recuse itself in this case?

The law by presumption alone finds a Judge to be un-biased, un-prejudiced and impartial woodward at [¶9]. A fact that a Judge has ruled against a party does not constitute partiality, prejudice and bias against that party Id; however, the question stems in this specific case what is reasonable and unreasonable, are Judge Reich's decisions to give Kayla such vast permission to interfere with Mark's relationship with the minor children on entirely subjective perceptions acceptable as a matter of law? Tr. P. Ln 18 through P.27 Ln 20, Even if Mark has not said a word to the parties' youngest daughter as Mark states and Kayla does not deny and was admitted to by Kayla's attorney, doesn't Judge Reich abuse his discretion by stating what Kayla is doing is okay?

Does Judge Reich abuse his discretion when he changes an unambiguous order? Tr. P 17. Ln. 20-23 Mark has continually brought up one specific case law by this court in all of his motions for contempt. "Glasser at ¶10. Stating "Interpretation of a judgment is a question of law, and an unambiguous judgment may not be modified, enlarged, restricted, or diminished. The question whether a judgment is ambiguous is a question of law. There is an ambiguity when language can be reasonably construed as having at least two alternative meanings." Greenwood v. Greenwood, 1999 ND 126, ¶ 8, 596 N.W.2d 317 (citation omitted)". If a judgment's language is ambiguous, construction is allowed. Sullivan v. Quist, 506 N.W.2d 394, 401 (N.D. 1993). If the language is unambiguous and plain, neither construction nor interpretation is allowed, and the effect of the language must be based on the language's literal meaning. Id.

The Provision which Judge Reich even read out loud at the trial, reference ¶16 of Statement of the Facts. In that "Neither parent will permit the child to be subjected to temporary removal of the children from the state unless agreed by the parties or authorized by the court." Judge Reich diminished to change the meaning of the provision, even though the provision is very plain and has only one meaning that which is written on the Judgment. Cited in quotations above.

By changing the Order to have an alternative meaning Judge Reich abused his discretion as provided by case law. An unambiguous order as stated in multiple case laws, however quoted from Glasser meant neither Judge Reich nor Kayla or Mrs. Weiler, had a legal premise for choosing how they interpreted the order regarding the specified provision. The Fact of the matter is, Mark denied Kayla's request, Kayla did not have his permission and did not seek permission from the court to subject the minor children to temporary removal from the state and Mark did raise his objection with enough time for Kayla to ask permission from the court as argued in his Motions and Brief, thus bringing Kayla in contempt of that specific provision of the order and Judge Reich choosing a new diminished meaning of the order meant Kayla would not be found in contempt of court, when she clearly should have been and could not be found in contempt for future violations of the wording of the order.

Judge Reich's unreasonableness is riddled in the transcript, saying Kayla has the discretion to use the minor children to communicate her disapproval through the minor children Tr. P. Ln 18 through P.27 Ln 20, but then stating Mark cannot use the children to allegedly gather information from the children, Tr. P. 9 Ln. 24-25 and Tr. P 10 Ln. 1-8. but then admitting that there is a restraining order and all communication is supposed to go through Kayla's Attorney and email Tr. P.15, Ln. 1-12.

So the Question needs to be answered on the facts alone, Why is Kayla given such discretion to go against the order in this matter by Judge Reich and though Mark's arguments may not have been worded to perfection, is Judge Reich refusing to see that he is in fact being highly partial in this matter and extremely unreasonable in his rulings?

B. The District Court abused its discretion by acting Arbitrary and unreasonable and giving a party discretion to decide whether a party is in contempt of the order.

(Argument A applies here as well to avoid repeating the same arguments over for space)

Mark attempted to raise a very specific argument with Judge Reich, however, Judge Reich continuously interfered with Mark wording the argument the way it needed to be raised. Judge Reich even claims that he was not giving permission for Kayla to just so flagrantly interfere with Mark's rights and that despite the fact the order states Kayla is not to interfere with the visitations of Mark, Judge Reich will not hold Kayla in contempt for doing exactly what the order states Kayla was not supposed to do.

Mrs. Weiler will argue that Kayla attempts to be reasonable, however, teaching the minor children to lie to Mark, teaching the minor children to talk back to Mark and keep secrets from Mark which causes these arguments between Mark and the children and causes Mark to exert his parental authority over the children is not being reasonable at all. Kayla does not raise the issues with Mark, instead she argues with Mark through the children, where there is a restraining order and all communication is supposed to go through Mrs. Weiler, even Kayla's communication with Mark. Judge Reich for the last year has allowed Kayla to violate the no-contact order to state her objections through the minor children instead of through her attorney.

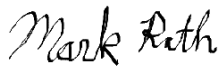
However, that was exactly what Judge Reich was giving Kayla permission to do. Though this argument is going to probably be rejected since Mark was not able to raise it until after the hearing properly and fully, Judge Reich basically gave Kayla Rath the discretion to decide whether Mark was in contempt of the court order and gave Kayla a verbal executing order to punish Mark there on the spot.

Where in Vande Hoven v. Vande Hoven, 399 N.W.2d 855 (N.D. 1987) this court cited case precedence from Gaschk v. Kohler, 70 N.D. 358, 294 N.W. 441 (1940) and § 27-10-14, N.D.C.C “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”. Mark raises this argument because that is exactly what Judge Reich does in this matter and has been doing for over the past year, giving Kayla this discretion. Again probably to be rebutted as not being raised before the court in this specific matter, Mark was attempting to argue this with Judge Reich, that Kayla does not have a right to interfere with his phone visitations, does not have the right to refuse a phone call with the parties’ youngest because Kayla does not agree with what Mark is saying to the oldest child, that Kayla needs to follow the “chain of command” if you will. By first trying to raise the issue through her attorney or filing a motion for contempt instead of being allowed to use the minor children the way she does and deciding right then and there that Mark is in violation of the Order.

The only thing Mark did not raise was that Judge Reich could not give Kayla the discretion he was giving her, because it gave Kayla the sole discretion to decide whether or not Mark was in contempt of court at that specific time and punish Mark for that contempt. So this argument does have a factual basis on the attempted argument of Mark at the hearing and Mark asks this court to allow this specific argument, because it further states Judge Reich’s abuse of the law in this matter, his arbitrary and unreasonable support of Kayla’s violations to Mark and the children’s rights.

CONCLUSION

Therefore; Mark prays as a matter of law and all facts set forth herein, that Judge Reich's order not finding Kayla Rath in contempt be reversed and remanded to the district court for appropriate ruling on the stipulations Mark requested in his motion. Judge Reich be remanded for his partiality and unreasonability in this matter and remanded to recuse himself



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CONFESSION OF SERVICE

I MARK RATH HEREBY CERTIFY THAT PER RULE 25(c)(D) I HAVE ELECTRONICALLY SUBMITTED A COPY OF THIS APPELLANT BRIEF AND APPENDIX TO THE OPPOSING PARTIES ATTACHED AS A CC: TO THE ELECTRONIC SUBMISSION OF THIS FILE.

Bobbi Weiler, at bweilerjt@gmail.com on Tuesday, August 27, 2013.



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