20160281
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 12, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	
County of Cass, ex. Rel.	)	Supreme Court No.
Plaintiff,	)	20160281
	)	
and	)	
	)	
Jessica Lynn Klein,	)	Cass County District Number.
Plaintiff and Appellant,	)	09-04-C-01558
	)	
vs.	)	
	)	
Micah Lehi Winegar,	)	
	)	
Defendant/Appellee.	)	

ON APPEAL FROM ORDER OF DISTRICT COURT
FOR THE EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY, NORTH DAKOTA
THE HONORABLE SUSAN J. SOLHEIM, PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

[¶1] ISSUE #1— whether Plaintiff's appeal is untimely. Defendant says YES.

[¶2] ISSUE #2—whether Plaintiff waived her right to claim North Dakota does not have jurisdiction over this matter by availing herself of North Dakota's jurisdiction and by stipulating that North Dakota did have jurisdiction. Defendant says YES.

[¶3] ISSUE #3—whether the district court erred in finding that North Dakota had exclusive, continuing jurisdiction of this matter under North Dakota Century Code section 14-14.1-13. Defendant says NO.

[¶4] ISSUE #4—whether the district court abused its discretion in its inconvenient forum analysis under N.D.C.C. § 14-14.1-18. Defendant says NO.

[¶5] ISSUE #5—whether the Court should award reasonable attorney's fees to Defendant. Defendant says YES.

STATEMENT OF THE FACTS

[¶6] The defendant disputes the plaintiff's assertion that Z.J.W. had declined academically. The defendant asserts that Z.J.W.'s "involvement with social services" in Iowa was prompted by the plaintiff as part of her campaign of alienation, which has caused significant trauma in Z.J.W. See Def.'s Br. in Support of Mot. To Modify Parenting Time and Amend Judgment, Doc. ID # 1046. The plaintiff's quotation that, "[T]he majority of the most recent evidence is in Iowa because Z.J.W. has lived and attended school in Iowa for the last two years" was taken out of context.

ARGUMENTS

ISSUE #1—The Plaintiff's Appeal is Untimely.

[¶7] On January 7, 2016, Judge Webb made his Order on Request for Review (App. 150-59). The plaintiff filed her notice of appeal on August 12, 2016. Because the Order on Request for Review was a final order, the plaintiff's appeal is untimely and should be dismissed.

[¶8] The notice of appeal "must be filed with the clerk of the supreme court within 60 days from service of notice of entry of the judgment or order being appealed." N.D.R.App.P. 4(a)(1). Of course, there was no notice of entry of order for the Order on Request for Review. See (App. 38, 150-59). However, doing a search for "notice of entry" on the docket reveals that there are entries of orders for matters that seem much less final than an order that denies transferring jurisdiction. See, e.g., (App. 30 (indicating a Notice of Entry of Order for Withdrawal as Counsel)). The explanatory note to Rule 4 states,

> The time for civil appeals runs from 'service of notice of entry' of the order or judgment. However, service of notice of entry of judgment is not necessary to start the time running for filing a post-judgment motion or appeal if the record clearly evidences actual knowledge of entry of judgment by the affirmative action of the moving or appealing party.

N.D.R.App.P. 4.

[¶9] North Dakota Century Code section 28-27-02 sets forth what orders are reviewable. "(1) An order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an

appeal might be taken." This case would have been closed in North Dakota if jurisdiction was transferred to Iowa. It in effect would have prevented a judgment to appeal (at least in North Dakota).

Here, the trial Court had not decided the cross motions to modify parenting time when the Order on Review was determined. While, it is true that "[g]enerally, where the trial court has made a determination on less than all of the claims in an action, this Court is without appellate jurisdiction." Sime v. Tvenge Assoc. Architects & Planners, P.C., 488 N.W.2d 606, 608 (1992), the Court should find that there is an overriding policy against simultaneous custody proceedings in two states. See Zimmerman v. Newton, 1997 ND 197, ¶ 11, 569 N.W.2d 700; see also Kostrzewski v. Frisinger, 2004 ND 108, ¶¶ 6, 10, 11, 680 N.W.2d 271 (finding an order denying Kostrzewski's motion objecting to the filing of a foreign judgment from Minnesota was a final order because "confirmation of a foreign child custody judgment decides the validity of a foreign child custody judgment for registration and enforcement purposes").

ISSUE #2—The Plaintiff Waived Her Argument By Availing Herself of North Dakota's Jurisdiction and By Stipulating That the Court has Jurisdiction Over the Parties

[¶10] When an Italian mother who had asked New York to modify the Italian court's order and alleging abuse by the father fled to Italy two days before the abuse allegations were unsubstantiated, and later argued the court lacked jurisdiction, the court found "the mother purposely availed herself of this state's jurisdiction" and

was therefore subject to its jurisdiction. 507, Michael McC. v. Manuela A., 848 N.Y.S.2d 147, 48 A.D.3d 91, 98 (N.Y. App. Div. 2007).

[¶11] Likewise, the Plaintiff has waived her arguments about North Dakota's Subject Matter Jurisdiction to hear this case because she purposely availed herself of North Dakota's jurisdiction. On October 1, 2015, Plaintiff filed an Application for Ex Parte Interim Order. (Supp. App. at 3-5.) She filed her Motion to Transfer Jurisdiction on November 11, 2015. (App. at 72-77.) Then she filed her Motion to Modify Primary Residential Responsibility on December 10, 2015. (Supp. App. at 28-37.) She had notice of the fact the hearing on her Motion to Transfer Jurisdiction was scheduled for December 14, 2016, at least when she filed her second Motion. However, instead of waiting for the Referee's decision or even for the hearing, she purposely availed herself of North Dakota's jurisdiction in filing her own motion. She never did file a response to the Defendant's Motion to Modify Primary Residential Responsibility. Instead she filed her own counter motion. If she was so sure that North Dakota did not have subject matter jurisdiction she should have argued that in a timely response to the defendant's motion, then filed her Motion to Transfer Jurisdiction, and treated the denial like the final order it was by appealing then and there.

[¶12] Not only did the plaintiff purposely avail herself of North Dakota's jurisdiction, she specifically stipulated to it in the June 6, 2016 Stipulation for Temporary Order. The very first substantive line of the Stipulation is, "The parties

agree as follows: [1] That the Court has jurisdiction over the parties and over the subject matter."[1] (App. at 161.)

[¶13] It is obvious why Plaintiff entered into this stipulation. The Referee had seen first-hand the damage Plaintiff was willing to inflict upon Z.J.W. by subjecting him to a forensic psychological assessment during his March visit without telling Defendant and in direct defiance court orders, the Seventh Amended Judgment, and his best interests. See Seventh Amended Judgment (App. at 56 ("Micah shall have sole decision-making responsibility for Z.W.'s mental health care while Z.W. is in his care August through May. Therefore Micah shall choose Z.W.'s psychologist or psychiatrist during the school year . . . . Neither party shall overshare information with Z.W.'s psychologist or psychiatrist, including bad mouthing the other parent or attempting to build his/her custody case")); (Supp. App. at 67 (denying Plaintiff's request for the appointment of an Independent Psychologist because the court found there were "legitimate concerns raised that subjecting the child to another psychologist would cause further disruption" and "further psychological testing would not be in ZJW's best interest")); Pl.'s Witness and Exhibit Lists, (Supp. App. 75 (identifying a potential exhibit as "Forensic Interview and Assessment of Z.J.W., minor child, dated March 17, 2016, performed by Dr. R.R. Ascano, PhD")); see also Def.'s Br. in Support of Protective Order (Supp. App. at 68-72).

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1. Importantly, the plaintiff never mentioned the clause about stipulating to jurisdiction, despite exhausting negotiations that extended even into Monday morning the first day the trial was scheduled.

[¶14] With only a handful of days before trial, Defendant filed two emergency motions, one seeking suppression and/or a continuance, and one seeking to severely restrict Plaintiff's summer 2016 visitation schedule to one weekend and one week. (Supp. App. at 77-85.) Accordingly, the judge made factual findings on the record and restricted the Plaintiff's 2016 summer visitation to one weekend and one full week. See Tr. of Scheduling Conference (Supp. App. at 86-88 (suppressing Dr. Ascano's report as it relates to the minor child, finding "that it is necessary to order the supervised parenting time as outlined in the motion and request for relief of Mr. Winegar. I do believe the evidence indicates at this point that the child's health needs are jeopardized and there's a need for this order in order to protect the child. I believe I have proposed orders from you, Ms. Ankers, but I might need a little bit of tweaking. I'm going to ask you to prepare those")).

[¶15] It is clear that the plaintiff entered into this stipulation to regain some of the visitation over the summer that she had lost by taking ZJW to a forensic psychologist against the court's order. The defendant conceded a great deal in the agreement, especially considering he had an order restricting Plaintiff's visitation so drastically. The Order only lasts two years, and the defendant expected Plaintiff was agreeing to not bring up the jurisdictional question until the end of those two years. Now, she is asking to get the benefit of the bargain, without having to pay its costs.

ISSUE #3—The District Court Did Not Err in finding that North Dakota had exclusive, continuing jurisdiction of this matter under North Dakota Century Code section 14-14.1-13

3a. Clearly erroneous standard of review.

[¶16] The standard of review is "clearly erroneous" because there is only an issue of fact on appeal. In paragraph 24 of her brief, Plaintiff concedes that there is only a finding of fact that is in dispute here: "Therefore, on appeal, the only issue before this court is 1) whether Z.J.W. has significant connections with North Dakota and 2) whether substantial evidence is available in North Dakota concerning Z.J.W.'s health, well-being, and welfare." While questions of law are subject to de novo review, "findings of fact [are] subject to the clearly erroneous standard of review." Wigginton v. Wigginton, 2005 ND 31, ¶ 13, 692 N.W.2d 108. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, upon review of the entire record, this Court believes a mistake has been made." Id. (citing Berg v. Berg, 2002 ND 69, ¶ 4, 642 N.W.2d 899). In the alternative, even upon a de novo review, this Court should affirm Judge Webb's Order on Request for Review.

3b. Analysis.

[¶17] There is ample evidence to support Referee Solheim's and Judge Webb's findings. A review of the parties' motions demonstrates that both sides cite to evidence in Iowa and to evidence in North Dakota. And there is no doubt that this case is beyond voluminous in its twelve plus years of litigation, most of which has taken place while Z.J.W., the defendant, and the plaintiff all lived in North Dakota.

[¶18] Even under a de novo review this Court should affirm the District Court's findings. The defendant's arguments for this are well formulated in his brief opposing transfer of jurisdiction and are incorporated by reference here. (App. at 84-94.) Notably, the guardian ad litem also opposed transfer of jurisdiction. (App. at 78-83.)

ISSUE #4—The District Court Did Not Abuse its Discretion in its Inconvenient Forum Analysis Under N.D.C.C. § 14-14.1-18

4a. Abuse of discretion standard of review.

[¶19] "It is well settled that the decision whether to decline to exercise jurisdiction on inconvenient forum grounds lies entirely within the trial court's discretion and its decision will be reversed on appeal only for an abuse of discretion." Dennis v. Dennis, 387 N.W.2d 234, 235 (N.D. 1986). "A district court abuses its discretion if it acts in an arbitrary, capricious, or unreasonable manner, or if it misinterprets or misapplies the law." Bertsch v. Bertsch, 2007 ND 168, ¶ 10, 740 N.W.2d 388.

4b. Analysis.

[¶20] If anything, Referee Solheim demonstrated the height of discretion as well as her commitment to the spirit of the UCCJEA by not finding North Dakota an inconvenient forum under North Dakota Century Code section 14-14.1-18(2) factors. She steadfastly allowed an opportunity to dump this monster on Iowa's doorstep pass her by because she is the one who is most familiar with a case whose docket sheet is over forty pages long and contains 1361 entries.

[¶21] The plaintiff fails to show how Referee Solheim or Judge Webb abused their discretion by exercising jurisdiction over this matter. Plaintiff contends that Judge Webb needed to make separate findings instead of adopting Referee Solheim's findings. But the plaintiff does not cite to any authority to show that a district judge needs to make separate findings, independent of those made by the Referee. This would make no sense if the Judge agreed with the referee's analysis. A party need look no further than the referee's order for a record of the court's rationale. Moreover, Judge Webb *did* make his own independent findings. (App. at 157-58 ("First, the original custody determination took place in North Dakota. Next, Jessica continues to live in North Dakota. Further, there has been approximately twelve years of litigation involving these two parties in North Dakota, and there are presently many motions from the parties pending review in this jurisdiction. Finally, the minor child spends a considerable amount of time in North Dakota.").)

[¶22] Plaintiff also contends that Judge Webb utilized improper factors under the repealed UCCJA statute. She contends, "The District Court relies heavily on Luna v. Luna in support of its conclusion that North Dakota is not an inconvenient forum." Appellant Br., ¶ 43. Plaintiff is referring to Luna v. Luna, 1999 ND 79, 592 N.W.2d 557. The district court only cites Luna on page eight of its Order. (App. at 157.) Moreover just because a case is decided under a predecessor statute that involves slightly different factors does not mean that its rationale is flawed.

ISSUE #5—The Court Should Award Reasonable Attorney's Fees to Defendant

[¶23] "If the court determines that an appeal is frivolous, or that any party has been dilatory in prosecuting the appeal, it may award just damages and single or double costs, including reasonable attorney's fees." N.D.R.App.P. 38. Punitive sanctions for an unmeritorious appeal should balance considerations regarding open access to the courts "with a recognition that sanctions must be imposed when an appeal is frivolous and interferes with the proper administration of justice." Williams v. State, 405 N.W.2d 615, 625 (N.D. 1987). "An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which evidences bad faith." Healy v. Healy, 397 N.W.2d 71, 76 (N.D. 1986).

[¶24] As Referee Solheim has indicated time and time again, the litigation in this case is daunting. The fact that Plaintiff stipulated to jurisdiction in this case and then appealed her own stipulation evidences bad faith. Cf. First Trust Co. v. Conway, 423 N.W.2d 795 (N.D. 1988), cert. denied, 488 U.S. 982 (1988) ("Conway's extremely litigious nature, her determination to continuously rehash the entire course of the probate proceedings, and the vitriolic nature of her arguments, which only minimally touched on the merits of the order at issue in this case, demonstrate 'persistence in the course of litigation which [can] be seen as evidence of bad faith.")). Just as in Conway, the Plaintiff is maliciously litigious, to the point that she will appeal on a matter that she agreed and stipulated to. Her level of vitriol can certainly be seen on a cursory view of both Appendices. Consider that she took Z.J.W. to a psychologist for forensic development of her case in defiance of several

court orders and in direct contravention of Z.J.W.'s best interests. There needs to be some sanction in place or she will continue in this pattern and subject Z.J.W., the defendant, the attorneys, and the courts to five more years of this poison.

CONCLUSION

[¶25] For these reasons, the defendant respectfully requests that the Court affirm the District Court's Order on Request for Review. The defendant also requests that the Court award reasonable attorney's fees and the costs of appeal.

Dated: January 25, 2017

Respectfully submitted,

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Jessica Lynn Klein,	)	Cass County District Number.
Plaintiff and Appellant,	)	09-04-C-01558
	)	
vs.	)	
	)	
Micah Lehi Winegar,	)	
	)	
Defendant/Appellee.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that on January 25, 2017, I served the following documents, which have not received any substantive changes but have been corrected as requested by the Clerk of Court and which were originally filed on January 12, 2017:

(1) Brief of Appellee, and

(2) Supplemental Appendix,

electronically as authorized by Rule 25 of North Dakota Rules of Appellate Procedure on the following individuals:

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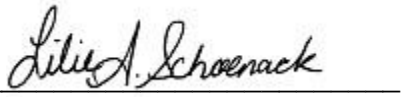

Dated this 25th day of January, 2017.

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