

**IN THE SUPREME COURT
 STATE OF NORTH DAKOTA
 SUPREME COURT NO. 20160281**

State of North Dakota,)
 County of Cass, ex. rel.,)
)
 Plaintiff,)
)
 Jessica Lynn Klein,)
)
 Plaintiff/Appellant,)
)
 vs.)
)
 Micah Lehi Winegar,)
)
 Defendant/Appellee.)

**REPLY BRIEF OF APPELLANT
 JESSICA L. KLEIN**

**On Appeal from Order of the District Court
 East Central Judicial District
 Cass County, North Dakota
 Cass County Civil No. 09-04-C-01558
 The Honorable Susan J. Solheim**

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LAW AND ARGUMENT

1. The plaintiffs appeal is timely.

[¶1] Defendant (“Winegar”) argues that the Plaintiff’s (“Klein”) appeal as to the subject matter jurisdiction of the North Dakota courts in this matter is untimely because the District Court’s Order on Request for Review, entered January 7, 2016, was not an interlocutory order pursuant to N.D.C.C. §28-27-02 and therefore, should have been appealed following entry of the District Court’s Order on Request for Review, as opposed to after the entry of the parties’ final stipulated Order.

[¶2] The issue as to whether the District Court’s Order on Request for Review falls within the purview of N.D.C.C. §28-27-02 is irrelevant. As the North Dakota Supreme Court aptly noted in *Harshberger v. Harshberger*, “[s]ubject matter jurisdiction is the court’s power to hear and decide the general subject involved in the action. [. . .] *issues involving subject matter jurisdiction can be raised at any time.* 2006 ND 245, ¶ 15, 724 N.W.2d 148, 153-154 (emphasis added). Accordingly, because subject matter can be raised at any time in the course of proceedings, Klein’s decision to wait to appeal the issue of subject matter jurisdiction until after the issuance of the final stipulated Order in this matter was appropriate and timely.

2. The plaintiff did not waive the ability to raise subject matter jurisdiction on appeal by availing herself of North Dakota’s jurisdiction and by stipulating to the Court’s jurisdiction over the parties.

[¶3] Winegar next contends that Klein waived her ability to raise the issue of North Dakota’s subject matter jurisdiction on appeal because she availed herself of the jurisdiction of the North Dakota Court and stipulated to the Court’s subject matter jurisdiction in the final stipulated Order. Winegar’s arguments are without merit.

[¶4] Winegar argues that Klein cannot raise the issue of subject matter jurisdiction because she availed herself of the jurisdiction of North Dakota Courts to decide issues of custody after filing her Motion to Transfer Jurisdiction. Winegar cites to a New York case, *Michael McC. v. Manuela A.*, 848 N.Y.S.2d 147 (N.Y. App. Div. 1st Dept. 2007), for the proposition that an individual who purposely avails herself of the jurisdiction of a state loses the ability to challenge subject matter jurisdiction on appeal. A careful review of *Michael McC.* reveals that the Court's discussed a party's decision to avail themselves of the jurisdiction of a state in the context of simultaneous custody proceedings, may play a factor in deciding whether a state is an inconvenient forum. The Court in *Michael McC.* did not hold or suggest that an individual who avails herself of the jurisdiction of a Court loses the ability to later challenge the subject matter jurisdiction of that court. Winegar's citation of *Michael McC.* in support of his argument is extremely misleading and flies in the face of well-established case law in North Dakota.

[¶5] In *Harshberger*, the Court unequivocally held that “[s]ubject matter jurisdiction cannot be conferred by agreement, consent, or waiver [. . .].” 2006 ND 245, ¶ 15, 724 N.W.2d 148, 153-154 (emphasis added). Thus, the fact that Klein filed motions pertaining to custody of the minor child herein while her Motion to Transfer Jurisdiction was pending, thereby availing herself of the jurisdiction of the North Dakota courts, is simply irrelevant to the present appeal.

[¶6] In the alternative, Winegar argues that because Klein signed the final stipulated order, which contains a clause whereby the parties agree that the Court has jurisdiction over the parties and the subject matter of this action, that Klein should be barred from

raising subject matter jurisdiction on appeal. App. at 161. As previously cited, *Harshberger* holds that subject matter cannot be conferred upon a Court by consent. 2006 ND 245, ¶ 15, 724 N.W.2d 148, 153-154. As such, Klein's agreement as to subject matter jurisdiction in the parties' final stipulated Order is also irrelevant to the pending appeal. Notably, Winegar provides the Court with a detailed history of the events leading up to the signing of the stipulated final Order in a thinly veiled attempt to cast Klein as a devious individual --to distract the Court from focusing on the substantive issues at hand on appeal. These additional facts are irrelevant to the pending appeal on subject matter jurisdiction. Winegar was represented by counsel at the time of the negotiation of the stipulated final Order. As such, Winegar knew, or should have known, that any agreement regarding the Court's subject jurisdiction would not be enforceable under North Dakota law and the UCCJEA. Klein is merely exercising her right to raise subject matter jurisdiction as an issue on appeal in a manner consistent with existing law.

3. **The defendant offers no compelling arguments on appeal as to how North Dakota retains exclusive continuing jurisdiction of this matter under N.D.C.C. 14-14.1-13.**

[¶7] On appeal, Winegar fails to articulate any reasoned analysis in his Brief as to why the District Court did not err in determining that North Dakota retains exclusive, continuing jurisdiction of this matter under N.D.C.C. 14-14.1-13. Instead, Winegar refers to his brief opposing transfer of jurisdiction as set forth in the appendix and incorporates the arguments made therein by reference, in violation of N.D.R.App. P.28(b), (c) and specifically, N.D.R.App. P. 28(b)(7)(A).

[¶8] In fact, Winegar's only argument on appeal, as set forth in his Appeal Brief, is as follows:

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.

Appellee's Brief, ¶17.

Winegar's arguments, such as they are, are without merit. As Klein set forth in her Brief in section two (2), because the District Court found that Winegar no longer had a connection with North Dakota, the only issues on appeal are 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. Appellant's Brief, ¶ 24. It is undisputed by the parties that Z.J.W. moved from North Dakota to Iowa to live with his father in 2013. On appeal, the Court must determine whether significant connections with North Dakota exist since that time. Similarly, the Court must determine whether substantial evidence is available in North Dakota concerning Z.J.W.'s health, well-being, and welfare since the minor child's move to Iowa in 2013.

3a. The standard of review is de novo.

[¶9] Winegar asserts the standard of review for this issue should be the "clearly erroneous" standard because there is only an issue of fact on appeal. Appellee's Brief, ¶16. Klein disagrees. In Klein's Appellant Brief, she argued that the standard of review was a mixed standard of de novo review and the clearly erroneous standard as a result of disputed facts surrounding her challenge of the court's subject matter jurisdiction. Appellant's Brief, ¶ 23. However, after further consideration, Klein contends that the applicable standard of review is, in fact, de novo, as the parties do not dispute the

underlying facts related to jurisdiction, but rather how the court should treat those facts under N.D.C.C. 14-14.1-13. Indeed, it is well settled under North Dakota law that challenges to a district court's subject matter jurisdiction are reviewed de novo when the jurisdictional facts are not in dispute. *Harshberger*, 2006 ND 245, ¶ 16, 724 N.W.2d 148.

4. **The district court abused its discretion in failing to consider the relevant factors as set forth in N.D.C.C. §14-14.1-18(2) as to whether North Dakota was an inconvenient forum and therefore failed to comply with the UCCJEA.**

[¶10] Winegar praises Referee Solheim for not finding North Dakota an inconvenient forum because:

[s]he 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 is over forty pages long and contains 1361 entries.

Appellee's Brief, ¶20.

In fact, Referee Solheim's Findings of Fact and Order Denying Motion to Transfer demonstrate a profound lack of understanding as to how each factor set forth in N.D.C.C. §14-14.1-18(2) applied to the facts of this case. Indeed, out of the eight (8) factors that must be considered by the Court, Referee Solheim found that only one (1) factor, Factor H (the familiarity of the court of each state with the facts and issues in the pending litigation) favored either party (Winegar). Peculiarly, all other factors were determined to be "neutral." Referee Solheim's analysis of the factors mandated by N.D.C.C. §14-14.1-18(2) is arbitrary, capricious, and unreasonable.

[¶11] Winegar claims that Klein did not cite to any authority for the proposition that a district judge must make independent findings from the Referee. Appellee's Brief, ¶21. On the contrary, Klein cited to N.D.C.C. §14-14.1-18(2), which requires a court to consider all relevant factors set forth in that statute. The District Court, upon de novo

review, performed an incomplete analysis and did not consider each of the eight (8) factors. Furthermore, the District Court's analysis relied heavily on the repealed UCCJA factors as set forth in *Luna v. Luna*, 1999 ND 79, 592 N.W.2d 557. Winegar claims the District Court "only cites to *Luna* on page eight of its Order." Appellee's Brief, ¶22. However, the dispositive issue is that the District Court utilized the factors in *Luna* rather than those set forth in N.D.C.C. §14-14.1-18(2). Winegar claims that "[j]ust because a case is decided under a predecessor statute that involves slightly different factors does not mean its rationale is flawed." Appellee's Brief, ¶21. In actuality, the fact that the District Court failed to conduct an analysis with the required factors pursuant to N.D.C.C. §14-14.1-18(2) means precisely that the District Court's rationale is flawed, and furthermore constitutes a clear abuse of discretion.

5. **The defendant should not be awarded attorney fees. If successful on appeal, plaintiff should be awarded attorney fees.**

[¶12] Winegar contends that Klein should pay his appellate attorney fees because Klein filed a frivolous appeal in bad faith. Winegar cites to Klein's stipulation to subject matter jurisdiction and then appealing subject matter jurisdiction as evidence of her alleged bad faith. Appellee's Brief, ¶24. As referenced in ¶6 of this Brief, Klein has a legal right to raise subject matter jurisdiction at any time, and she was not bound by the final stipulated Order. Winegar was represented by counsel at the time of the negotiation of the stipulation, and knew, or should have known, that any agreement as to subject matter was not binding on Klein. In effect, Winegar wants to punish Klein for exercising her legal rights under existing case law and the UCCJEA.

[¶13] If Klein is successful on appeal, she requests that Winegar be responsible for her appellate attorney fees incurred in this matter. As a result of the erroneous rulings of Referee Solheim and the District Court, Klein was forced to both prosecute and defend motions for change in primary residential responsibility in North Dakota.

CONCLUSION

[¶14] For the reasons stated above, Klein respectfully requests that this Court **REVERSE** the January 7, 2016, Order On Request for Review finding that North Dakota had exclusive, continuing jurisdiction pursuant to N.D.C.C. §14-14.1-13(1)(a). In the alternative, if this Court finds that North Dakota has exclusive, continuing jurisdiction pursuant to N.D.C.C. §14-14.1-13(1)(a), the Court should **REVERSE** the District Court's determination that North Dakota is a convenient forum to adjudicate this matter.

Dated this 25th day of January, 2017.

/s/

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorneys representing Appellant and the authors of the Reply Brief of Jessica L. Klein, hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 1,997 words from the portion of the brief entitled Legal Argument through the Conclusion. This word count was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

Dated this 25th day of January, 2017.

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1. Reply Brief of Appellant Jessica L. Klein

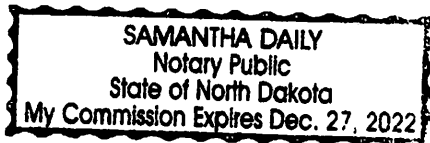
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That she knows the person served to be the person named in the papers served and the person intended to be served.

Rachel Martin
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SUBSCRIBED AND SWORN TO before me this 25th day of January, 2017.



Samantha Daily
Notary Public
Cass County, North Dakota