

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Heather L. Thompson,
Plaintiff/Appellant,
and
State of North Dakota,
Plaintiff/Appellee,
v.
Christopher K. Johnson,
Defendant/Appellee

Supreme Court No. 20180386Grand Forks Co. No. 49-2014-DM-10

**REPLY BRIEF OF PLAINTIFF/APPELLANT
HEATHER THOMPSON**

**APPEAL FROM THE DISTRICT COURT,
TRAILL COUNTY, NORTH DAKOTA
NORTHEAST CENTRAL JUDICIAL DISTRICT****APPEAL OF THE HONORABLE REFEREE SUSAN SOLHEIM, PRESIDING:**

- FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR SECOND AMENDED JUDGMENT DATED 8/17/2018
- SECOND AMENDED JUDGMENT DATED 10/23/2018

APPEAL OF THE HONORABLE SCOTT GRIFFETH, PRESIDING:

- ORDER FOR THIRD AMENDED JUDGMENT DATED 12/05/2018
 - THIRD AMENDED JUDGMENT DATED 12/05/2018
-

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STATEMENT OF THE ISSUES

STATEMENT OF THE ISSUES PRESENTED BY PLAINTIFF/APPELLANT

- ISSUE 1: Whether the District Courts erred as a matter of law by finding Christopher Johnson under employed for purposes of child support and imputed income. ¶1
- ISSUE 2: Whether the District Court erred as a matter of law by failing to consider Christopher Johnson’s in-kind income ¶4
- ISSUE 3: Whether the District Court erred in its finding of fact regarding Johnson’s self-employment income and failed to use a shorter period of time for computing Johnson’s self-employment Income ¶14
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- ISSUE 5: Whether the District Court erred, as a matter of law, when it Ordered Heather Thompson to reimburse Christopher Johnson child support overages..... ¶16

ARGUMENT

ISSUE 1: The District Court erred as a matter of law by finding Christopher Johnson under-employed for purposes of child support and imputed income.

[¶1] Appellee, Christopher Johnson, “Johnson” cites Frisk arguing that “the law of the case doctrine applies when an appellate court has decided a legal question and remanded to the district court for further proceedings. Whether an appeal was decided correctly or not, the questions that were raised or could have been raised in that case will not be reexamined.” Frisk v. Frisk, 2006 ND 165, ¶14, 719 N.W. 2d 332. Johnson argues that the District Court and Supreme Court found Christopher to be underemployed; that the Supreme Court previously determined income is required to be imputed to Christopher; and the Supreme Court did not determine personal expenses and a monthly budget may be used to calculate an obligor’s income, but concluded that Johnson is underemployed and income must be imputed to him pursuant to the Child Support Guidelines. Appellee Brief ¶¶24-27 (emphasis added).

[¶2] Johnson cites to the Supreme Court’s first opinion in this matter wherein the Court found, “the [District Court] failed to impute Johnson’s income or adequately explain how using his personal expenses and monthly budget satisfied the Child support guidelines.” Id. (emphasis added.) Johnson argues that the District Court did not fail to consider in-kind income; and did not err in finding that Johnson is underemployed and imputed income. Id. at ¶¶29-32. The Appellee, State of North Dakota, argued that the District Court’s findings of Johnson being under employed are supported by ND. Admin

Code §75-02-04.1-07(2)(1); and that Johnson operates his farm at a loss. Appellee State of ND Brief, ¶¶10-12.

[¶3] Johnson's arguments fail as the evidence shows, and the Court affirmed, that Johnson's tax returns are unreliable for purposes of determining child support income. In five years, Johnson's overall farm equity increased two hundred and fifty two percent (**252%**) going from \$479,137 in 2011 to \$1,209,363 in 2016. App.24, ¶14. This demonstrates that Johnson's farming operation is a lucrative farming operation making a profit. Johnson shares in that profit by co-mingling his personal expenses with his farming operation. *Id.* at ¶10. The law of case doctrine fails because this court specifically remanded allowing the district court to explain how using Johnson's personal expenses and monthly budget satisfied the Child support guidelines. The District court erred as a matter of law when it imputed income on Johnson **without first determining Johnson's in-kind income**. An obligor's earnings must include in-kind income. N.D.Admin.Code §75-02-04.1-07(1).

ISSUE 2: The District Court erred as a matter of law by failing to consider Christopher Johnson's in-kind income.

[¶4] Johnson makes the same arguments here as Issue 1 *supra* citing to the Supreme Court's first opinion in this matter wherein the Court found, "the [District Court] failed to impute Johnson's income **or** adequately explain how using his personal expenses and monthly budget satisfied the Child support guidelines." Johnson opines that the Court is not affirming that the use of personal expenses and monthly budget to calculate income has merit. Johnson again argues the law of case doctrine applies.

Id. at ¶34. Johnson’s argument fails as the Supreme Court gave the District Court a choice, to “**EITHER** impute income, **OR** explain how using Johnson’s personal expenses and monthly budget satisfied the child support guidelines.” If the latter option was without merit, it would not have been listed as an option on remand. The law of case doctrine does not apply as the District Court has not determined in-kind income paid by Johnson’s farming operation.

[¶5] Johnson further argues that if personal expenses were intended to be considered income, the child support guidelines would have included these expenses in the broad definition of “Gross income” *citing* N.D.Admin.Code §75-02-04.1-01(4)(a); that the Child Support Guidelines include specific instructions for calculating self-employment income citing to N.D. Admin. Code §75-02-04.1-05; that Thompson failed to demonstrate how the personal expenses satisfy N.D. Admin. Code §75-02-04.1-05(1)(b)(1),(2),or(3); and that Thompson is attempting to make a new fourth category of expenses (personal expenses) when calculating self-employment income. Appellee Brief ¶¶35-36.

[¶6] Rather than looking at the guidelines as a whole, Johnson bifurcates each section of the Administrative Code citing only to sections on determining gross income and self-employment income, but failing to consider Johnson’s in-kind income. Admin. Code §75-02-04.1-07(1) (stating an obligor's earnings **must** include in-kind income) (emphasis added.) Johnson also failed to recognize that the child support guidelines require the District court to **first determine Johnson’s in-kind income** before imputing income. Halberg v. Halberg, 2010 ND 20, ¶15, 777 N.W. 2d 872 (stating “before a

court can find an obligor is underemployed and impute his income, the court **must** first determine the obligor's gross income from earnings. N.D.Admin.Code §75-02-04.1-07(2)(emphasis added.)

[¶7] Johnson argues that Thompson is double dipping, as the income used to pay personal expenses is the same income reported on this unreliable taxes; that depositing income into his bank account does not create income; and that the farm operating loan or farm income deposited into his bank account to pay his personal expenses is not in-kind income. Appellee Brief ¶¶37-39. Johnson relies on Lohstreter v. Lohstreter, 2001 ND 45, ¶25, 623 N.W. 2d 35 in support of his argument.

[¶8] Johnson earns and spends over \$100,000 on personal expenses annually demonstrating this income flows directly to him as outlined in his account's journal. App.99-231. Lohstreter is distinguishable, as Bruce Lohstreter received a loan from his parents to pay living expenses and child support. Id. Therefore, the Court found it was not relevant to the projection of future income as it was a one-time loan. Id. However, in the case at hand, Johnson testified that he takes out an operating line of credit at the beginning of each year, borrowing close to a million dollars to cover crops and living expenses, then pays it back at the end of the year when he sells his crops. Tr.228;see also doc.136,pg.17-9.This is a reoccurring annual event, not a one-time loan. Further, a line of credit is distinguishable from a loan. A loan is typically used to purchase a large asset such as a car or home; whereas a line of credit is a pool of available money to meet short-term needs, such as in this case. When Johnson repays this line of credit at the end of the year, it becomes income to him.

[¶9] Regarding in-kind income of housing, utilities, gasoline, or monthly expenses, Johnson argues that any mortgage interest is minimal, only the utilities attributable to the farm operation are deducted on taxes, and fuel is incidental; that no evidence was presented that his monthly expenses were inappropriate or what source of income was used to pay these expenses; or that the income used to pay these expenses had not already been reflected on Johnson's tax return. Appellee Brief, ¶¶42-43.

[¶10] Thompson does not include mortgage interest as in-kind income or claim Johnson's monthly expenses are inappropriate, but rather that Johnson is receiving free housing, fuel, and utilities as a benefit of his farming operation which must be included as in-kind income. "A presumption that a child support obligor is underemployed if he or she is earning less than 60% of the relevant prevailing wage in the community is rebuttable, and may be overcome by contrary evidence weighed by the judge." Nelson v. Nelson, 547 N.W. 2d 741 (N.D. 1996). A trial court has considerable discretion in determining whether an obligor meets the guideline definition of underemployed. Henry v. Henry, 1998 ND 141, 581 N.W. 2d 921; Richter v. Houser, 1999 ND 147, 598 N.W. 2d 193. It is clear from the evidence in this case, that Johnson has income flowing through his farming account totaling \$100,716, some of which is in-kind. App.99-230-Exhibit 25-A (Johnson's accountant documented expenses as family living, personal or operating –highlighted in yellow.) The totals on the bottom of each page reflect the total family living/personal expenses paid by Johnson's farming operation and are over double what the court has imputed as income to Johnson. Further, Johnson testified that his

monthly personal living expenses total \$8,367, which are paid from his farming income. This demonstrates that Johnson has annual income of over \$100,000. App. 231.

[¶11] Finally, Johnson argues that the cases cited by Thompson are distinguishable as follows: Cook v. Eggers, 1999 ND 97, 593 N.W. 2d 781 (benefits paid by a third party, not employer); Schurmann v. Schurmann, 2016 ND 69, ¶21, 877 N.W. 2d 20, overruled Cook, (finding in-kind income is limited to that received “from employment or income-producing activity,” precluding gifts); Halberg v. Halberg, 2010 ND 20, 777 N.W. 2d 872 (the business was incorporated, ownership was shared with Halberg’s father, the corporation owned all the assets, and Halberg was an employee); and Wilhelm v. Wilhelm, 1998 ND 140, 582 N.W. 2d 6 (support obligation was increased due to “free use of corporation ‘toys.’”) Appellee Brief, ¶¶46-48. The Appellee, State of North Dakota, “State” argued similar to Johnson on issues 2 & 3.

[¶12] Johnson relied on a technical umbrella to compare nuances between a sole proprietorship and corporation claiming that expenses paid to him from his farming account are not in-kind income, because they do not flow to him through a business entity. However, the exact opposite is true. First, a sole proprietor is a business entity. Further, all income from Johnson’s farming operation is considered personal income as it all flows through him as the sole proprietor who has sole discretion over all expenses paid by his farming operation. Therefore, any benefit paid to Johnson through his farming operation is in-kind income, making Halberg directly on point. Halberg, 2010 ND 20, 777 N.W. 2d 872; see also, N.D. Admin. Code §75-02-04.1-01(5). Here, like in Halberg, the Court is faced with a difficult task of determining income when Johnson co-

mingled his personal finances with his business finances. Id. at ¶18. The Court in Halberg, found that it was not limited to considering income claimed on Halberg’s unreliable tax return, but that income may be “documented through the use of tax returns, current wage statements, **and other information** to fully apprise the Court of all gross income.” Id.; see also, N.D. Admin. Code §75-02-04.1-02(7)(emphasis added.) If a court finds that the owner has significant influence or control over the nature and amount of the employer-paid benefits, the benefits must be included in gross income. Halberg, 2010 ND 20, ¶18 & ¶21; Cook, 1999 ND 97, ¶8; Wilhelm v. Wilhelm, 1998 ND 140, ¶¶ 7-9; N.D. Admin. Code §75-02-04.1-01(6).

[¶13] Because this case has been Appealed twice, in lieu of remanding to the District Court, Thompson requests the Supreme Court determine Johnson’s in-kind income and assess the appropriate child support.

ISSUE 3: The district court erred in its finding of facts regarding Johnson’s self-employment income and failed to use a shorter period of time for computing Johnson’s self-employment income.

[¶14] Thompson has no reply.

ISSUE 4: The District court erred, as a matter of law, when it modified the upward deviation.

[¶15] The State argued that the Court “must also make a finding that a deviation from the guideline amount is in the best interest of the child. The State also argued that Nuveen and Hoverson were distinguishable from the case at hand due to “Michael Nuveen and Carl Hoverson each [having] net monthly income of at least \$12,500.” Appellee State of ND Brief

¶¶28-29. Thompson disagrees because Johnson's true income, including in-kind, would more than likely be equivalent to \$12,500, if not greater. Further, Johnson has significant assets as well as large depreciation. Both of which can be used to determine upward deviation.

ISSUE 5: The District court erred, as a matter of law, when it ordered Thompson to reimburse Johnson child support overages.

[¶16] Thompson has no reply.

CONCLUSION

[¶17] **Because this case has been Appealed twice, in lieu of remanding to the District Court, Thompson respectfully requests this court determine Johnson's in-kind income and assess a child support obligation.**

Respectfully submitted this 22nd day of February, 2019.

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IN THE SUPREME COURT, STATE OF NORTH DAKOTA

Heather L. Thompson, and State of North Dakota, v. Christopher K. Johnson,	Plaintiff/Appellant, Plaintiff/Appellee, Defendant/Appellee.
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Supreme Court No: 20180386

Civil Case #: 49-2014-DM-10

CERTIFICATE OF SERVICE

I, **Pamela Coleman**, attorney for the Plaintiff/Appellant and officer of the court, hereby certify that a true and correct copy of the foregoing:

1. APPELLANT REPLY BRIEF (Adobe file)

was served via **ODYSSEY** on this 22nd day of February, 2019 to the following address:

Clerk of Court – ND Supreme Court - SupClerkofCourt@ndcourts.gov
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Dated this 22nd day of February, 2019.

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