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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Daniel Tarver, Plaintiff, Appellee, and Cross-Appellant, vs. Sarah Tarver, Defendant, Appellant, and Cross-Appellee.	)	Supreme Court No. 20190073; District Court Case No. 08-2017-DM-00569

APPEAL FROM THE BURLEIGH COUNTY DISTRICT COURT MEMORANDUM OPINION AND ORDER DATED NOVEMBER 29, 2018 AND JUDGMENT DATED JANUARY 4, 2019

SOUTH CENTRAL JUDICIAL DISTRICT

REPLY BRIEF OF DEFENDANT, APPELLANT, AND CROSS-APPELLEE,

SARAH TARVER

ORAL ARGUMENT REQUESTED

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I. LAW AND ARGUMENT AND ORAL ARGUMENT STATEMENT.

A. [1] The Agreement Which Was Read into the Record.

1. Standard of Review of the District Court's Interpretation of North Dakota Rule of Court 11.3.

[2] Defendant-Appellant is requesting Oral Argument as the interpretation of Rule 11.3 of the North Dakota Rules of Court appears to be a case of first impression with this Court. Sarah maintains that this Court should be reviewing the interpretation of Rule 11.3, and not the application of the Rule as Daniel asserts. Brief of Cross-Appellant Daniel Tarver, ¶¶ 29- 31. As noted by both parties, the interpretation of the requirements of Rule 11.3 have rarely been addressed by this Court previously. Regarding this issue, the District Court ruled:

> From the record, it is clear that the parties were hopeful that a final settlement would be reached. However, both parties requested that the Court schedule another trial date as quickly as possible if a final agreement could not be reached. More negotiations were necessary. An agreement was not reached.

Memorandum Opinion, Appendix of Appellant, 66, ¶ 9. Although somewhat ambiguous from the Court's ruling, the language used by the District Court appears to coincide with Daniel's argument, to wit: that a full and final settlement must be reached before district court's can accept an agreement pursuant to Rule 11.3. See Brief of Cross-Appellant Daniel Tarver, ¶¶ 32-35. There can be no doubt in this case that regarding most issues which need be addressed in a divorce, that the parties in this case reached an agreement. See Brief of Defendant and Appellant, ¶ 15 for a recitation of the transcript regarding the agreements made between the parties. Therefore, the issue presented is whether the District Court in this case properly interpreted Rule 11.3, and as such, the court should apply de novo review.

[3] Even assuming that the review at this court is application of the Rule and thus reviewed pursuant to a clearly erroneous standard of review, Sarah Tarver maintains that the District Court was induced by an erroneous view of the law. See Crandall v. Crandall, 2011 ND 136, ¶ 19, 799 N.W.2d 388, quoting Lorenz v. Lorenz, 2007 ND 49, ¶ 5, 729 N.W.2d 692. As will be fully set forth below, Sarah maintains that Rule 11.3 does not require a full settlement or consent, and that partial settlements or consents are permitted by the Rule, and as such for those items which were agreed to, the District Court should have entered Judgment according to the agreements made by the parties on the record.

2. There is No Requirement Under Rule 11.3 for a Full and Complete Oral Agreement to Be Read Into the Record.

[4] Daniel maintains "…precedent in North Dakota does indicate when a full and final agreement is read into the record in open court it is enforceable." Brief of Cross-Appellant Daniel Tarver, ¶ 25. Daniel argues that the District Court did not err in rejecting Sarah's position that an agreement was reached on most issues because a full and final agreement was not reached. In support of this argument, Daniel cites primarily to Bohlman v. Big River Oil Co., (124 N.W.2d 835 (N.D. 1963)). The argument by Daniel therefore presents the issue as whether the interpretation of Rule 11.3 requires a full agreement or consent, or whether partial agreements or consents are permitted under the Rule. Sarah urges this Court to recognize the enforceability of partial settlements or agreements under the law.

[5] At the outset, Sarah urges this Court to recognize that Daniel's reliance on Bohlman is misplaced. In the Bohlman case, the District Court had thrown out the agreement between the parties, and this Court ***reinstated*** the agreement between the parties, finding: "[t]he parties having stipulated for settlement of the case under such

circumstances, the agreement of settlement is final and should be upheld without regard to the merits of the original controversy between the parties." Bohlman v. Big River Oil Co., 124 N.W.2d 835, 839 (N.D. 1963). "The original controversy between the parties resulted in an agreement to the effect that the litigation then being tried was settled and finally terminated." Id., (citation omitted). The District Court in Bohlman, in the view of the North Dakota Supreme Court, relied on the Iowa case of Van Donselaar v. Van Donselaar (249 Iowa 504, 87 N.W.2d 311) to come to the conclusion that the settlement entered into at the District Court level could be set aside. However, contrary to the assertion by Daniel, this Court in Bohlman did not conclude that complete and final agreement must be made between the parties in order to be recognized by the trial court.

[6] Of note, Von Donselaar has since been overturned in Iowa in the case of In the Matter of the Property Seized On Or About November 14-15, 1989 (501 N.W.2d 482 (Iowa 1993)). In that case, a partial settlement was reached regarding certain property which was to be seized by the State of Iowa in a criminal trial. Subsequently, the Defendant, one Mr. French, attempted to repudiate the partial stipulation, or agreement. The Iowa Supreme Court ruled: "[t]o the extent that our decision in Van Donselaar v. Van Donselaar, 249 Iowa 504, 87 N.W.2d 311 (1958), suggests that consent to judgment may be withdrawn as of right at any time prior to actual entry of judgment, that view is now specifically disapproved." Id, 486 (Iowa 1993). "We have recognized that a stipulation for disposition of an entire ***issue*** is entitled to all of the sanctity of an ordinary contract if supported by legal consideration." Id., (emphasis added) citing Graen's Mens Wear, Inc. v. Stille-Pierce Agency, 329 N.W.2d 295, 300 (Iowa 1983).

[7] Similar to the Iowa Supreme Court, this Court in Bohlman noted,

> Thus the rule in this State, as well as in a majority of jurisdictions, is that parties to a controversy may not go behind ***a compromise or settlement of such controversy made in good faith before trial***. If the settlement of such controversy is free from fraud or any of the other grounds for which a contract can be set aside in equity, it is final even though the parties may have been ignorant at the time of the settlement of the full extent of their rights.

Bohlman, 837, citing 11 Am.Jur., 'Compromise and Settlement.' Sec. 25, p. 272. This Court discussed stipulations, in Wagner v. Wagner (1999 ND 169, 598 N.W.2d 855). It is noteworthy that Rule 11.3 is entitled "Stipulations." After discussing the difference between procedural and contractual stipulations, this Court explained "[i]n essence, a contractual stipulation is a contract and is entitled to all the sanctity of a conventional contract." Id. (citations omitted). Further instructive as to the issue of stipulations is the case of Bjerken v. Ames Sand & Gravel Co. (206 N.W.2d 884, 888 (N.D. 1973)) where this court, citing to legal authority now more than a century old found:

> 'The making of such stipulations should be encouraged rather than discouraged by the courts, and enforced unless good cause is shown to the contrary, and applications to be relieved from stipulations should be seasonably made. Parties will not be relieved from such stipulations in the absence of a clear showing that the fact or facts stipulated are untrue, and then only when the application for such relief is seasonably made, and good cause is shown for the granting of such relief.'

Bjerken, 888, citing Northern Pac. Ry. Co. v. Barlow, 20 N.D. 197, 126 N.W. 233 (1910). The Bjerken court continued:

> 'Stipulations entered into dealing with important phases of a lawsuit cannot be lightly treated. ***They are solemn and binding obligations of the parties***. If relief is sought it must be upon a proper showing of diligence and justice. * * * In this case the stipulation was made in open court between counsel during the progress of the trial on July 21, 1943.

Bjerken, 889 (N.D. 1973) (emphasis added). The stipulation in Bjerken was, as it is here, a partial stipulation. Therefore, Sarah would urge this court that the greater weight of authorities accept and encourage partial stipulations to address, as the Iowa Supreme

Court did, disposition of an entire *issue*. Daniel continues by citing to Matter of Estate of Eberle (505 N.W.2d 767 (S.D. 1993)) for the idea that an oral agreement and stipulation must be specific and comprehensive to constitute a contract. The facts of Eberle are similar to the facts in this case. An agreement was put on the record by the parties, the parties then noted to the court that a written stipulation and agreement would be presented to the court. Several months went by, and ultimately one party refused to sign the drafted agreements. The actual holding in Eberle states "[t]he oral agreement made on the record covered the major areas that were at issue in this action." Id., 771. The South Dakota Supreme Court upheld the District Court's decision that the agreement on the record was binding. Similarly, in this case, the stipulations entered onto the record covered the major areas at issue. See Brief of Defendant and Appellant, ¶ 15.

[8] Daniel next relies on the assertion that the dialogue within the transcript supports that no agreement was reached as to all issues. See Brief of Cross-Appellant Daniel Tarver, ¶¶ 32. However, as set forth above, it is not necessary to reach an agreement on all issues. Further, Sarah urges this court to recognize that most of the statements cited do not support Daniel's position. For instance, the district court's comments regarding "getting into the details" (App. 163, p. 18, lns. 4-5) support Sarah's position that the district court was induced by an erroneous view of the law. It is not the details that matter in stipulations, it is whether it is possible to ascertain the full meaning of the stipulation with reasonable certainty. Eberle, 771. Daniel's citations to other parts of the transcript are taken out of context. For instance, App. 154, p. 9, lns. 1-2, Sarah's trial counsel is discussing the language regarding retirement, not as asserted by Daniel, the entire agreement. The next comment, App. 156, p. 11, lns. 17-21 is only referencing

those items which "…if we can't get this worked out…". This premise is supported by Daniel's citation to the record App. 157, p. 12, ln. 7, the full exchange of which is:

> The Court: Right, are you looking – let's just say that things fall apart, okay? Are you looking at two days again?
> Mr. Bolinske: I don't think so. **I think we've got an agreement on most of the issues.**
> The Court: Okay.
> Mr. Bolinske: **Except the ones that fall apart**.

App., 157, p. 12, lns. 1-7 (emphasis added).

[9] As noted, stipulations by this court are interpreted under contractual principles. In North Dakota, such stipulation may be treated as an "agreement to agree." "…if the terms of an 'agreement to agree' are reasonably certain and definite, it is enforceable." Lire, Inc. v. Bob's Pizza Inn Restaurants, Inc., 541 N.W.2d 432, 434 (N.D. 1995). Sarah maintains that, as in Eberle, the major areas at issue were addressed, and as such, the partial stipulations entered in the record should be enforceable.

3. Trial Counsel Preserved the Record Regarding The Disputed Items After the Agreement was Read into the Record, Even if He did Not, the Record is Clear Which Items Still Required the Court's Consideration.

[10] Daniel argues that the Appellant's Brief relies on evidence presented for an inadmissible purpose. Brief of Cross-Appellant Daniel Tarver, ¶¶ 42-45. At the outset, Sarah urges this court to recognize that, as set forth in the Brief of Defendant and Appellant, ¶ 15, the major areas of the Agreement were put into the record. Nevertheless, Sarah's trial counsel made a record as an offer of proof, regarding the disputed items at the lower court. Trial Tr. 189:25-190:20. As such, this court may consider exhibit 4, Appendix of Appellant, 126 as part of the appeal. See State v. Beltran, 2018 ND 166, ¶ 12, 914 N.W.2d 488, 492.

B. Sufficient Evidence of the Present Value of Sarah's Pension Exists in the Record.

[11] Daniel correctly notes that Sarah testified that the value of her pension was $27,000.00. Trial Tr. 196:10-11. This is the only evidence of the present value; Daniel having testified that he does not know the present value. Trial Tr. 147:22-148:12. Testimony is evidence given orally. State v. Winney, 21 N.D. 72, 128 N.W. 680, 681 (1910). In the absence of Daniel having knowledge of a present-day value, Sarah's testimony was sufficient to establish the present value of the pension.

C. The Trial Court's Failure to Address Insurance as Security for the Spousal/Child Support is an Abuse of Discretion.

[12] Daniel argues that because the Judgment granted each party their own respective life insurance policies, that the Judgment addresses this issue. Sarah notes that there is a distinct difference between the life insurance policies owned by the parties, and requiring as set forth in Seay v. Seay (2012 ND 179, 820 N.W.2d 705), reasonable security for child and spousal support payments. "A district court abuses its discretion when it fails to address nonfrivolous issues presented to the court." Hilgers v. Hilgers, 2004 ND 95, ¶ 25, 679 N.W.2d 447, 454 (citations omitted). Ensuring security for spousal support and child support is not a frivolous issue, and the trial court should have addressed it. Awarding the parties' their respective life insurance policies is not the same as addressing the issue of security for spousal and child support. The District Court abused its discretion in not addressing security for spousal/child support and the case should be remanded back to the District Court to address this issue.

D. Daniel's Spousal Support Obligation.

[13] Daniel, on cross-appeal, argues two points regarding his spousal support obligation, (a) that $8,800.00 is reasonable for limited duration (Brief of Cross-Appellant Daniel Tarver, ¶¶ 70-77), and (b) that Daniel's retirement is a material change in

circumstances necessitating a change in spousal support (Brief of Cross-Appellant Daniel Tarver, ¶¶ 78-82).

[14] Regarding the argument that the spousal support be made for a limited duration, Daniel's argument appears to hinge on the fact that he did not always make $500,000.00 to $600,000.00.

[15] While true Daniel has not historically made more than half of a million dollars per year, Daniel misrepresents his historical earnings. For instance, extrapolating his 2014 St. A's income for a full year results in a salary of $490,000.00. Further, it has long been held by this court that the earning ability of a party is part of the Ruff-Fischer analysis and should be considered by the trial court. Conzemius v. Conzemius, 2014 ND 5, ¶ 17, 841 N.W.2d 716, 722 (citations omitted). Daniel cites to no cases, nor could the undersigned find any, where the historical income of Daniel should be taken into account. In her dissenting opinion in Conzemius, the Honorable Justice Maring, in dicta, indicated that the court should consider income from the recent past in setting spousal support. Conzemius, ¶ 65. Sarah urges this court to consider Justice Maring's dissenting opinion the law regarding consideration of recent income for purposes of spousal support considerations. Daniel's current income of more than one-half million dollars per year should have been used for purposes of determining spousal support.

[16] Regarding the argument that Daniel's retirement is a material change in circumstances, his request of a prospective ruling on this issue is premature. Generally, "[t]he 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." Krueger v. Krueger, 2013 ND 245, ¶ 6, 840 N.W.2d 613, 616 (citations omitted).

[17] In Krueger v. Krueger (2013 ND 245, 840 N.W.2d 613), Albert Krueger sought at the district court to modify his spousal support based upon a desire to retire. This court noted that Albert had not yet retired at the time of the evidentiary hearing in the case, and as such, the district court did not err in continuing his spousal support. This court specifically noted that: "[o]ur opinion does not mean Albert Krueger may not seek modification of his spousal support obligation when he does retire; but rather, that the record in this case merely shows that he has not yet actually retired." Krueger ¶ 15, 618. Krueger makes it clear that "permanent" spousal support is not "permanent." It is permanent only until further modification by the court. See N.D.C.C. § 14-05-24.1. Therefore, similar to Krueger, Daniel has not yet retired, and as such, his requested modification should be denied.

II. CONCLUSION.

[18] For the foregoing reasons, Sarah urges this court to reverse and remand the decision of the District Court.

Dated this 10th day of June, 2019.

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I hereby certify that a true and correct copy of the foregoing Reply Brief of Defendant, Appellant, and Cross-Appellee, Sarah Tarver was on the 7th day of June, 2019, served electronically to the following:

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