

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

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Steven Mark Orwig,	)	
	)	Supreme Court No.
Plaintiff / Appellee,	)	20170454
	)	
vs.	)	
	)	Dickey County Case Nos.
Mary Caroline Orwig,	)	11-2016-DM-00026
	)	11-2016-CV-00068
Defendant / Appellant.	)	

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ON APPEAL FROM: (1) AN ORDER FINDING MARY ORWIG IN CONTEMPT OF COURT ENTERED JULY 31, 2017; (2) AN ORDER GRANTING STEVEN ORWIG’S MOTION FOR CONTEMPT OF COURT AND MOTION FOR EX PARTE INTERIM ORDER ENTERED SEPTEMBER 1, 2017; (3) AN ORDER FINDING MARY ORWIG IN CONTEMPT OF COURT ENTERED OCTOBER 9, 2017; (4) AN ORDER FINDING MARY ORWIG IN CONTEMPT OF COURT ENTERED NOVEMBER 13, 2017; (5) AN ORDER DENYING MARY ORWIG’S MOTION TO VACATE CONTEMPT ORDER ENTERED DECEMBER 8, 2017

FROM THE DISTRICT COURT FOR THE SOUTHEAST JUDICIAL DISTRICT  
DICKEY COUNTY, NORTH DAKOTA  
THE HONORABLE CHERIE L. CLARK, PRESIDING

**BRIEF OF APPELLEE**

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¶1

**STATEMENT OF THE ISSUES**

¶2 Whether the District Court’s Orders for Sanctions entered July 31, 2017, October 9, 2017, and November 13, 2017 are Punitive.

¶3 Whether the District Court Violated Marcy’s Due Process Rights.

¶4 Whether Marcy Intentionally Violated the District Court’s Orders.

¶5

**STATEMENT OF THE CASE**

¶6 This is an appeal from the December 18, 2017 Order of the District Court, Southeast Judicial District, Dickey County, denying Appellant Mary Caroline Orwig’s (“Marcy”) Motion to Vacate the District Court’s Contempt Orders dated July 31, 2017, October 9, 2017, and November 13, 2017.<sup>1</sup> Appellant’s A. at 221. Appellees Orwig’s Livestock Supplements, Inc., Orwigs Tubs International Inc., and MVP Transport, Inc. (collectively, the “Corporations”) are North Dakota Business Corporations principally located in Ellendale, North Dakota. Marcy is a 50% Shareholder in the Corporations. The other 50% owner and sole Officer/Director is Appellee Steven Orwig (“Steve”). Steve and Marcy are husband and wife.

¶7 In response to Marcy’s breach of her fiduciary and statutory duties, the Corporations commenced an action via Summons and Complaint on August 23, 2016, requesting *inter alia* a temporary restraining order and preliminary injunction enjoining Marcy from transacting with the Corporations’ property or entering into any further transactions for or on behalf of the Corporations; an accounting and return of all

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<sup>1</sup> Appellant also appeals directly from the July 31, 2017, September 1, 2017, October 9, 2017, and the November 13, 2017 Orders of the District Court. Appellant’s A. at 221. Steve disputes the timeliness of the appeal from the July 31, 2017, and October 9, 2017 Orders.

funds/property wrongfully converted, misappropriated or utilized for Marcy's personal benefit; and the removal of Marcy as a Director/Officer of the Corporations pursuant to § 10-19.1-41. Appellant's A. at 8. Marcy Answered, Counterclaimed, and served a Third-Party Summons and Complaint on Steve alleging various violations of N.D.C.C. § 10-19.1. Appellant's A. at 15.

¶8 The District Court granted the Corporations a Temporary Restraining Order on September 15, 2016, and a Preliminary Injunction on October 31, 2016, affording the requested relief set forth above. Appellant's A. at 23, 66. The Preliminary Injunction Order was to remain in effect during the pendency of the proceeding, or the expiration of the period prescribed by N.D. R. Civ. P. 65(e), whichever occurred first.

¶9 Concurrently, a divorce action between Marcy and Steve was commenced styled Steven Mark Orwig v. Mary Caroline Orwig, Case No. 11-2016-DM-00026 (Dickey County) (Honorable John E. Greenwood). Appellant's A. at 227. By virtue of Marcy and Steve's sole ownership of the Corporations at issue, there existed a significant overlap between the divorce and corporate actions. The actions were consolidated on June 8, 2017. Appellant's A. at 114.

¶10 Steve and Marcy are owners via Deed of Trust of a ranch located at 2440 East Sherry Lane, San Tan Valley, Arizona 85140 (hereinafter the "Arizona Property") which is an asset of great value to the parties. Appellant's A. at 252. In the face of a balloon payment of \$730,000.00 for the property which Steve and Marcy could not afford, the District Court ordered the property be sold. Appellant's A. at 134.

¶11 Throughout this action, Marcy has been found in contempt for violating the

District Court's Orders that she return corporate property and for the sale of the Arizona Property. As a result, the District Court ordered remedial sanctions to include a period of incarceration and an award of attorneys' fees. Appellant's A. at 308. Collateral to its contempt findings, the District Court found good cause to extend the preliminary injunction throughout the pendency of these consolidated actions, and appointed a receiver over the Arizona Property to effectuate its sale. Appellant's A. at 134, 163.

¶12 On November 17, 2017, Marcy interposed a Motion to Vacate Contempt Orders. Appellant's A. at 196. The District Court denied Marcy's Motion via Order dated December 18, 2017. Appellant's A. at 173. Notice of Appeal was filed on December 20, 2017. Appellant's A. at 221

¶13 **STATEMENT OF THE FACTS**

¶14 In a previous action styled Orwig's Livestock Supplements, Inc. et al. v. Mary C. "Marcy" Orwig, Civil No. 11-2014-CV-00048, the District Court found Marcy had engaged in numerous transactions whereby she spent hundreds of thousands of dollars of corporate funds on non-corporate matters. These expenditures were unauthorized, clearly for Marcy's personal benefit, and served no corporate purpose. As a result, the District Court enjoined Marcy from accessing Corporations' accounts or otherwise expending any sums for or on the Corporations' behalf, and required Marcy to account to Corporations for the property she had stolen. The District Court subsequently held Marcy in contempt for her failure to abide by the District Court's Orders. Appellant's A. at 8.

¶15 The above-referenced prior action was dismissed without prejudice. Since the dismissal, Marcy has made no recompense whatsoever to the Corporations of

monies/properties she has stolen or the other damage she inflicted upon their businesses. To the contrary, since the dismissal of the prior action, Marcy's deleterious actions toward the Corporations began anew, to wit:

- a. Marcy ordered credit cards under the names of the Corporations with huge credit limits, and began transacting with those credit cards for personal use;
- b. Marcy attempted to access the Corporations' bank accounts and lines of credit;
- c. Marcy transferred from the Corporations' accounts to her personal account some \$4,150.00, for personal use;
- d. On those occasions when Marcy was on Corporations' premises, she was disruptive of their businesses and verbally abusive to their employees.

Appellant's A. at 8.

¶16 Based on the foregoing conduct, the Corporations commenced action against Marcy on August 23, 2016, whereby they requested, *inter alia* a temporary restraining order and preliminary injunction enjoining Marcy from transacting with the Corporations' property or entering into any further transactions for or on behalf of the Corporations; an accounting and return of all funds/property wrongfully converted, misappropriated or utilized for Marcy's personal benefit; and the removal of Marcy as a Director/Officer of the Corporations pursuant to § 10-19.1-41. Appellant's A. at 8.

¶17 On September 7, 2016, the Corporations filed a motion for temporary restraining order and preliminary injunction whereby they sought to enjoin Marcy as follows:

- a. from transacting in any credit, funds or property of the Corporations including but not limited to bank accounts, credit cards, charge or store accounts, etc.;
- b. from transacting any business for or on behalf of any of the above-named Corporations;

- c. from being on the premises of the Corporations;
- d. from accessing or attempting to access the Corporations' property, including its computer system;
- e. from taking any action vis-à-vis the Corporations' employees, including but not limited to purporting to terminate their employment or any other adverse employment action; and
- f. removing Marcy as an Officer/Director of the Corporations pending a final determination on the merits.

[Doc ID#'s 7-16].

**[¶18]** On September 12, 2016, Marcy, represented by Attorney Erica Chisholm, filed and served a Brief in Opposition to the Corporations' Motion for Temporary Restraining Order/Preliminary Injunction. [Doc ID#'s 24-38]. The District Court granted the Corporations a Temporary Restraining Order on September 15, 2016. Appellant's A. at 22.

**[¶19]** On September 15, 2016, Marcy filed and served her Answer to the Corporations Complaint, included a Counterclaim against the Corporations, and served a Third-Party Summons and Complaint on Steve alleging various violations of N.D.C.C. Ch. 10-19.1. Appellant's A. at 15.

**[¶20]** Shortly thereafter, the Corporations filed a Motion for Return of Corporate Property. In her return to the motion dated October 19, 2016, Marcy admitted to possessing certain corporate items, denied possession of others, and disputed claims of corporate ownership to certain vehicles in her possession. Appellant's A. at 54.

**[¶21]** A duly noticed hearing was held on October 10, 2016, on the Corporations' Motion for Preliminary Injunction. Each party was present, either in person or

telephonically, and represented by Counsel. The District Court granted the Corporations' Motion for Preliminary Injunction affording them the same relief granted in the Temporary Restraining Order dated September 15, 2016. The October 31, 2016 Preliminary Injunction Order was to remain in effect during the pendency of the proceeding, or the expiration of the period prescribed by N.D. R. Civ. P. 65(e), whichever occurred first. Appellant's A. at 66.

¶22 On November 30, 2016, the Corporations noticed a telephonic hearing for December 8, 2016, at which the Corporations' Motion for Return of Corporate Property would be heard. Each party, represented by Counsel, appeared. The District Court granted the Corporations' Motion on December 13, 2016. Appellant's A. at 72.

¶23 Based on Marcy's failure to fully comply with the October 31, 2016 Order granting preliminary injunction, and the December 13, 2016 Order granting the Motion for Return of Corporate Property, the Corporations served a Motion for Contempt on each parties' attorney on February 2, 2017. Appellant's A. at 78. As the basis for its Motion, the Corporations identified several items on the list contained in the Court's Order Granting Motion for Return of Corporate Property which had yet to be returned, along with other items clearly belonging to the Corporations or their employees. Appellant's A. at 80. Notice of hearing on the Corporations' Motion for Contempt was served on the parties' on February 21, 2017. Appellant's A. at 107. That hearing was set for April 3, 2017. However, due to an unavailable witness, the hearing was continued and Counsel were instructed to reschedule and notice a mutually agreeable hearing date. Appellees' A. 1.

¶24] Given the clear overlap between the Corporate action and concurrent Divorce action in Case No. 11-2016-DM-00026, the Corporations moved to consolidate the two matters on April 6, 2016. Appellant's A. at 108.

¶25] While the Motion to Consolidate was pending, the Arizona Property was facing a balloon payment of \$730,000.00 that Steve and Marcy could in no way afford. Facing foreclosure, Steve, in the Divorce action, filed a Motion for Ex Parte Interim Order citing exceptional circumstances exist for the District Court to grant an interim order allowing him the authority to sell the Arizona property. Appellant's A. at 252.

¶26] A hearing on the Motion for Ex Parte Interim Order was noticed for May 25, 2017. Appellant's A. at 262. Both Steve and Marcy were represented by Counsel at that hearing; however, due to concerns that its outcome could have implications for the Corporations, the hearing was continued until such time as a scheduling conference could be had with the parties of the Divorce action and the Corporate action to define the ownership interests of the real estate at issue in the Ex Parte Interim Order. Appellees' A. 3.

¶27] On May 26, 2017, Judge Greenwood emailed Counsel for Marcy, Steve, and the Corporations: 1) reiterating his concerns about proceeding in the Divorce action without Counsel for the Corporation present; 2) requesting the Corporations' Counsel prepare an Order granting the Motion to Consolidate; and 3) requesting the parties confer and schedule a hearing on the Corporations' outstanding Motion for Contempt and Preliminary Injunction and reschedule the hearing on Steve's Ex Parte Interim Order which had been continued in the Divorce action. Appellees' A. 7, 53.

¶28 On May 31, 2017, a status conference was held, per Judge Greenwood’s request, in which the Court again brought the parties’ attention to various issues pending in the related actions. A hearing on all these issues was set for June 28, 2017. In order to remind the Judge of the issues to be heard as determined at the May 31, 2017 Status Conference, Counsel for the Corporations sent correspondence to Judge Greenwood on June 23, 2017, outlining the Corporations’ position with respect to the issues it would take at the June 28, 2017 hearing.<sup>2</sup> Appellant’s A. at 183.

¶29 At the June 28, 2017 hearing, each party was present and represented by Counsel. At the onset, the District Court recognized the Motion for Contempt, amongst other pending issues would be considered at the hearing with no objection from Marcy as to inadequate notice.

10 The Court: This is District Court for  
11 Dickey County as indicated. Today is June 28, 2017,  
12 time is 9:30 a.m. Court is taking up two matters.  
13 They are file No. 11-2016-DM-26, Steven Orwig vs. Mary  
14 Orwig, and 11-2016-CV-68, Orwig Supplements, Inc.;  
15 Orwigs Tubs International Inc.; MVP Transport Inc. vs.  
16 Mary C. Orwig.  
17 Ms. Orwig is present in court and represented by  
18 Erica Chisholm, Attorney at law.

[ . . . ]

24 The court has several matters today. The motion  
25 in the divorce action is for an interim order.  
1 There’s also the motion - - the cross motion there.  
2 And in the other matter, the civil action, there is a  
3 motion for contempt. Are the parties ready to proceed  
4 here today?

[ . . . ]

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<sup>2</sup> Contrary to Marcy’s claim, the Corporations do not argue their June 23, 2017 letter should be construed as a Notice of Hearing to Marcy. However, it confirms that all parties—including Marcy through her Attorney—had actual notice and understanding of the ongoing proceedings and issues which needed to be addressed at the upcoming hearing.

8 Ms. Chisholm: Yes, your Honor.

Appellees' A. 4-5.

¶30 Additionally, it was well understood by the parties, including Marcy, that the Preliminary Injunction would also be considered at the June 28, 2017 hearing.

9 The Court: Yes. And I don't think we  
10 necessarily have to compartmentalize in separate mini  
11 hearings. I guess the issues are all interrelated,  
12 and I raised the issue in an email to counsel  
13 about the trial and the preliminary injunction. But  
14 the parties are more or less in agreement that it is  
15 intertwined with the divorce action, and there's no  
16 rush to separately try that matter.

[ . . . ]

20 The Court: Ms. Chisholm?  
21 Ms. Chisholm: I do agree with that; they are  
22 interrelated.

Appellees' A. 7.

¶31 In Support of the Corporations' Motion for Contempt for Marcy's failure to comply with the Order for Return of Corporate Property dated December 13, 2016, General Manager of Orwig's Tubs International Inc., Kathryn Peterson ("Peterson") testified to the following missing property:

7 What's still missing that the companies need returned?  
8 A. Well, all of these items on the list are  
9 still missing. The most important things would be the  
10 hard drive and the DVR, the Scheels credit card  
11 binders, the IRS binders, the 1099s and the W2s. The  
12 login and password for the website.

13 Q. And why - - without spending too much time,  
14 why don't you tell the Court why each of these items  
15 matter to the companies. Why their return matters.

16 A. Well, for starters we are going through an  
17 IRS audit, and they need all of these documents.

[ . . . ]

3 Q. Okay. Go on.

4 A. The website login and password for the New

5 Concept Nutrition Website.  
[ . . . ]

14 Q. Go on.

15 A. The hard drive for the DVR. If that were  
16 returned, we would be able to see where all the  
17 missing pieces went.

[ . . . ]  
1 A. Just the DVR was found.

Appellees' A. 9-10.

**[¶32]** In Support of the Corporations' request to extend the time in which a trial must be held on the Preliminary Injunction, pursuant to N.D. R. Civ. P 65(e), Peterson testified to Marcy's deleterious actions towards the Corporations and the precarious position they are in as a result, to wit:

17 Q. Now, have you, on behalf of the companies,  
18 kept track of the funds, monies, et cetera, that Ms. Orwig  
19 has taken or diverted from the companies?

20 A. Yes.  
[ . . . ]

25 Q. What is the amount of that note receivable  
1 sitting here today to your recollection?

2 A. Approximately 455,000.

3 Q. What does that consist of for the Court?

4 A. A couple of loads of tubs that were sent down to  
5 Arizona, and Marcy said she would be the Arizona  
6 distributor. We did not see a dime from the tubs.  
7 \$80,000 of it was, I believe, personal items for the  
8 house in Arizona. The rest of it is like, \$105,000  
9 she took out of her bank account. 60 to \$70,000 of  
10 furniture for the Arizona house and other  
11 miscellaneous items. She was making personal credit  
12 card payments out of the company accounts.

[ . . . ]  
18 Q. Since the Court imposed the restrictions it  
19 imposed on Ms. Orwig's ability to transact business  
20 with the company assets, company bank accounts, has that  
21 stopped this conduct in large part?

22 A. Yes.

23 Q. Okay. If that conduct were to reoccur, what  
24 would happen to the businesses?

25 A. Well, we have been informed by bankers that  
1 if Marcy has anything to do with the company, they  
2 will quit doing business with us.

[ . . . ]

1 Q. And so if the current restrictions that the  
2 Court has imposed stay in place, do you feel confident  
3 that we can - - an no additional substantial  
4 unforeseen expenses are incurred - - are you reasonably  
5 confident that we can stay afloat until business picks  
6 up again?

7 A. Yes.

Appellees' A. 12-14, 16.

[¶33] On cross examination, Marcy failed to provide any credible evidence or other explanation as to why the corporate property that the District Court ordered to be returned had not been returned, to wit:

14 Q. In fact, you admitted that you have returned  
15 some of the very property that you denied having in  
16 the first place; right? That's your testimony?

17 A. I don't have it now. You keep saying I have  
18 this, and I don't have this.

19 Q. But some of the property that was removed,  
20 you did have, didn't you?

21 A. And it was returned within the time frame.

22. Q. And so you are expecting the Court to believe  
23 that while you acknowledge taking this corporate  
24 property, you didn't take that corporate property, and  
25 you have no idea where it is?

1 A. She can make up whatever kind of crap she  
1 wants to make up. That's pretty much what she's done  
3 since the very beginning.

4 Q. Where is the hard drive for the security  
5 system, Ms. Orwig? Where is it?

6 A. I have no clue.

7 Q. But you returned the box?

8 A. Where is the DVR?

9 Q. You returned it.

10 A. Where is the DVR? No, I didn't return it. I  
11 left it in a shed for them to go get it.

Appellees' A. 17-18.

[¶34] As a result, the Corporations requested the District Court find Marcy in contempt for her failure to return corporate property. Importantly, the Corporations did not ask for a contempt sanction. Instead, the Corporations argued Marcy's violation of the District Court's Order compelling her to return corporate property constituted good cause to extend the preliminary injunction under N.D. R. Civ. P. 65(e). Appellees' A. 22-24. Although the Corporations took no position relative to Steve's Motion for Ex Parte Interim Relief, the Corporations did support the sale of the Arizona Property insofar as Steve and Marcy's personal financial health impacted the Corporations. Appellees' A. 30-32. Via Order dated July 31, 2017, the Court solemnized its rulings granting the Corporations' Motion for Contempt and Steve's Motion for Ex Parte Interim Order. Appellant's A. at 134. Additionally, the District Court found good cause pursuant to N.D. R. Civ. P. 65(e) to extend preliminary injunction for the pendency of the consolidated actions. Notice of Entry of this Order was filed and served on August 15, 2017. Appellant's A. at 139.

[¶35] With the good cause extension of the Preliminary Injunction firmly in place, the Corporations no longer anticipated taking an active role in the litigation as the remaining issues would likely be resolved via the consolidated divorce proceeding. See Grinaker v. Grinaker, 553 N.W.2d 200 (N.D. 1996) (waste of judicial resources when wife who was involved in divorce initiated separate actions for equitable relief, seeking to protect her half interest in corporation owned by husband and wife; proper procedure was to seek relief as part of pending divorce action). However, Marcy's continued contempt of the District Court's Order required additional appearances at great expense to the Appellees.

[¶36] A Scheduling Conference was set by request of newly assigned Judge, the Honorable Cherie Clark, for September 28, 2017. Notice of Hearing was served on the parties on September 5, 2017. Appellant's A. at 147. Attorney Chisholm appeared telephonically on behalf of Marcy, who was not initially present. In response to the District Court's inquiry regarding the sale of the Arizona Property, Attorney Chisholm stated the following:

14 Ms. Chisholm: I assume the problem  
15 that the parties are having, your Honor, is that my  
16 client is prohibiting access to the ranch with respect  
17 to the realtor, and I have spoken to my client about  
18 that, and I think - - I won't speak for the other  
19 attorneys. I think we did all anticipate that  
20 Ms. Orwig was going to be an issue with respect to  
21 selling this ranch.

Appellees' A. 30. In response to confirmation of Marcy's failure to allow the realtor access, the District Court stated as follows:

4 The Court: So the  
5 Court is going to find Ms. Orwig in contempt of the  
6 prior contempt order. I'm going to order that she  
7 allow the realtors on the property within a two-week  
8 period. And I'm going to order, while knowing that it  
9 may not be complied with, the sheriff's department to  
10 assist the realtor if necessary.

Appellees' A. 36.

[¶37] Moments after Judge Clark issued her Order, Marcy joined the hearing, telephonically. Judge Clark reiterated to Marcy that she had been found in contempt of Judge Greenwood's Order that the Arizona property be sold. In response, Marcy fired Attorney Chisholm and the hearing continued. Marcy was reprimanded on a number of occasions for disruptive behavior. Notably, when questioned by the District Court

regarding allegations she was preventing the sale of the Arizona property, Marcy confirmed her unwillingness to comply with the Court's directive, to wit:

25 The Court: Next issue that we discussed before you entered  
1 the hearing is the sale of the Arizona Property. In  
2 Judge Greenwood's order, he ordered you to sell that  
3 property. It has come to the Court's attention that  
4 you have not allowed the realtor on the property, or  
5 you have not engaged in the process. Can you answer  
6 for that ma'am?

7 Ms. Orwig: I do not want to sell my home,  
[ . . . ]

12 I do not feel it is necessary to  
13 sell this property.

[ . . . ]  
19 The Court: Okay. Well, for today's  
20 purposes, I'm finding you in contempt for not  
21 complying with the prior Court order

[ . . . ]  
1 The Court: I'm ordering you to comply with  
2 the sale of your house, to allow a realtor onto the  
3 property. If you do not do so willingly, I'm  
4 authorizing or ordering the Maricopa Sheriff's  
5 Department to help the realtor do so. I'm ordering  
6 that we have a hearing in three weeks to make sure  
7 that's done. If that has not been done, we will  
8 consider further sanctions including but not limited  
9 to default or jail time in three weeks, ma'am.

Appellees' A. 42-44.

[¶38] At no point during this hearing was Marcy subject to any contempt sanctions which would result in a loss of liberty, and her ability to avoid sanction was clearly predicated upon her compliance with the Court's directives. Appellees' A. 44. Judge Clark's oral Order was confirmed via written Order dated October 9, 2017. Appellant's A. at 154. Pursuant to Judge Clark's request at the prior hearing, a Status Conference was set for October 19, 2017, for the purpose of gauging Marcy's compliance with the

July 31, 2017 Order. Appellees' A. 44. Notice of hearing was mailed to Marcy on October 10, 2017, at the address she provided in open Court. Appellant's A. at 156.

¶39] Despite being notified on the record and having notice of hearing served upon her, Marcy failed to appear at the October 19, 2017 hearing. At the hearing, Steve's Divorce Attorney conveyed his understanding that Marcy was continuing to thwart the realtor's efforts to list the Arizona property. Appellees' A. 45-46. Based on Marcy's continuing contempt, Steve's Divorce Attorney requested a receiver be appointed to oversee the sale of the Arizona property, and proposed a period of incarceration as a remedial sanction. The Corporations joined the request for a receiver, but not the request for incarceration. Appellees' A. 50. Briefs were submitted on the issues in accordance with the District Court's request. Doc ID #'s 176, 177, 179.

¶40] Via its Order dated November 13, 2017, the District Court found Marcy in contempt of the October 9, 2017 Order. In support of its Order imposing the remedial sanctions of imprisonment and awarding attorneys fees, the District Court concluded:

In the case at hand, Marcy has been found in contempt on two separate occasions. Marcy continues to intentionally disregard Orders of the Court. She has refused to facilitate the sale of the parties' Arizona property, and expresses an intention not to sell the property. In addition, Marcy refuses to allow the parties' realtor, Kim Williamson, to enter the property. Consequently, Marcy is in contempt of Court for intentionally disobeying an Order of the Court under N.D.C.C. § 27-10-.1.1(1)(c). Furthermore, it is apparent certain remedial sanctions have not had an effect on Marcy's behavior. Therefore, the Court deems it necessary to impose the remedial sanction of imprisonment under N.D.C.C. § 27-10-01.4(1)(b), for a duration of six (6) months or until Marcy complies with the Order dated October 9, 2017, whichever is shorter. The Court believes such time will be effectual to terminate the continuing contempt, especially in consideration of the other directives entered by the Court in this Order.

In addition, Marcy shall be responsible for the opposing parties' attorney's fees pursuant to N.D.C.C. § 27-10-01.4(1)(a). The opposing parties should not have to bear the financial burden for Marcy's continued contempt. Marcy has consistently and clearly engaged in willful disobedience, which has led to additional hearings and increased filings in this matter.

¶41 In support of its Order appointing a receiver to manage the sale of the Arizona Property the District Court concluded:

Here the appointment of a receiver is appropriate because the property is "in danger of being lost, removed, or materially injured." N.D.C.C. § 32-10-01(1). Specifically, if the balloon payment on December 17, 2017 is not made, a foreclosure will occur. Marcy has not taken any action to facilitate the sale of the property and has expressed an intention not to sell the property. Further, Marcy refuses to allow the parties' realtor, Kim Williamson, to enter the property, thereby stymieing the sale process. Therefore, judicial intervention by means of a receivership appointment is necessary to salvage the parties' interest in the property, and enable the conveyance of the property.

Appellant's A. at 163. Notice of Entry of Order was served on November 13, 2017.

Appellant's A. at 171.

¶42 On November 17, 2017, newly retained Counsel for Marcy interposed a Motion to Vacate Contempt Orders, challenging the July 31, 2017 Order Granting Plaintiff's Motion for Contempt and Plaintiff's Motion for Ex Parte Interim Order, the September 1, 2017 Order Granting Plaintiff's Motion for Contempt and Plaintiff's Motion for Ex Parte Interim Order; the October 9, 2017 Order holding Marcy in contempt for her failure to comply with the July 31, 2017 Order, and the November 13, 2017 Order imposing remedial sanctions for Marcy's contempt of the October 9, 2017 Order. Appellant's A. at 196.

¶43 On November 28, 2017, the District Court signed a civil Bench Warrant which

commanded Marcy's arrest for a period of six months, or until compliance with the Court's Order dated October 9, 2017 is achieved. Appellant's A. at 199. A status conference was held on December 13, 2017, in which a trial date was agreed upon.

[¶44] After extensively reviewing the entire record, including listening to the recording of the June 28, 2017 hearing before Judge Greenwood, the District Court denied Marcy's Motion to Vacate via Order dated December 18, 2017. Appellant's A. at 381.

[¶45] **STANDARD OF REVIEW**

[¶46] "The district court has broad discretion in making contempt determinations. [The Supreme] Court will only disturb a district court's contempt determination if the court abused its discretion." Rath v. Rath, 2016 ND 83, ¶ 4, 878 N.W.2d 85 (internal citations omitted).

A trial court abuses its discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination. The party seeking relief must show more than that the trial court made a "poor" decision, but that it positively abused the discretion it has under the rule.

Flattum-Riemers v. Flattum-Reimers, 2003 ND 70, ¶7, 660 N.W.2d 558. The Supreme Court will not overturn the district court's decision merely because it is not the decision the Court would have made. Id.

[¶47] **ARGUMENT**

[¶48] **I. The District Court Orders for Sanctions entered July 31, 2017, October 9, 2017, and November 13, 2017 are Not Punitive.**

[¶49] A District Court has broad discretion to make contempt determinations. Rath,

2016 ND 46, ¶ 7, 876 N.W.2d 474. Even if the District Court’s order was erroneous, failure to follow the order is still contempt of court. Flattum-Riemers v. Flattum Riemers, 1999 ND 146, ¶ 11, 598 N.W.2d 499; see also State v. Sevigny, 2006 ND 211, ¶ 37, 722 N.W.2d 515 (“Intentional disobedience of a court order constitutes contempt, and absent a showing that an order is transparently invalid or frivolous, the order must be obeyed until stayed or reversed by orderly review.”); Holkesvig v. Welte, 2012 ND 14, ¶ 6, 809 N.W.2d 323. The party resisting a contempt order has the burden to mount a defense and show an inability to comply with the District Court’s order. Prchal v. Prchal, 2011 ND 62, ¶ 5, 795 N.W.2d 693.

**[¶50]** Marcy alleges that the July 31, 2017, October 9, 2017, and November 13, 2017, Orders are void because they are punitive. This is incorrect. The District Court must decide whether the sanction imposed for contempt will be punitive or remedial. A “punitive sanction” includes a sanction of imprisonment if the sentence is for a definite period of time. N.D.C.C. § 27-10-01.1(3). In comparison, a “remedial sanction” is conditioned upon performance or nonperformance of an act ordered by the court. N.D.C.C. § 27-10-01.1(4). Imprisonment may be a remedial sanction. N.D.C.C. § 27-10-01.4(1)(b). The Orders entered by the District Court against Marcy are remedial sanctions, not punitive sanctions.

**[¶51]** **A. July 31, 2017 Order.**

**[¶52]** A plain reading of the July 31, 2017 Order shows there are no punitive sanctions. App. 134-137. The District Court held Marcy in contempt and ordered she return certain corporate property. The return of property taken from a corporation is not punitive. This

sanction did not include imprisonment for a definite period of time or payment of money not conditioned upon an act.

[¶53] In addition, although not related to the argument as to whether the Order was punitive, Marcy appears to allege the Motion for Interim Order was issued without a hearing, presumably because it was titled “Ex Parte.” This is, at a minimum, misleading. There was a hearing on this matter as shown by Marcy’s appearance at and testimony provided at the same. See June 28, 2017, Transcript.

[¶54] In fact, Steve’s Divorce Attorney actually went beyond what is required by North Dakota Rule of Court 8.2(a) (Ex Parte Interim Orders) and served Marcy’s attorney with the motion. Appellee’s App. 56.

[¶55] The July 31, 2017 Order was not obtained by trick or deceit and is clearly absent of any punitive sanctions against Marcy.

**[¶56] B. October 9, 2017 Order.**

[¶57] The District Court held Marcy in contempt and ordered: 1) Marcy allow the realtor on the property within two weeks of the Order and 2) Marcy not in any way prevent the listing of the property. App. 150. These sanctions imposed by the District Court are not punitive pursuant to North Dakota law. See N.D.C.C Ch. 27-10.

**[¶58] C. November 13, 2017 Order.**

[¶59] The District Court held Marcy in contempt of Court and ordered: 1) Marcy be imprisoned for a period of six months, or until compliance with the aforementioned Order is achieved, whichever is shorter; 2) payment of attorney’s fees in an amount to be determined later; and 3) that a receiver be appointed to facilitate the sale of the property.

Appellant's App. 169.

¶60] The first sanction states Marcy is to be imprisoned. However, the District Court also states that Marcy could purge the contempt once she complied with the Order from October 9, 2017. The October 9 Order, listed previously, simply requires Marcy allow a realtor on the Arizona property and not prevent the listing of the property. The term of imprisonment was not for a definite period of time. It was absolutely within Marcy's control to have a shorter imprisonment by complying with previous court orders. In essence, she held the keys to her own jail cell. This is a remedial sanction according to North Dakota Century Code sections 27-10-1.1 and 27-10-1.4.

¶61] **II. The District Court Did Not Violate Marcy's Due Process Rights.**

¶62] The District Court orders holding Marcy in contempt do not violate Marcy's due process rights. "Procedural due process generally entails notice and a meaningful opportunity for a hearing *appropriate for the nature of the case.*" Dieterle v. Dieterle, 2016 ND 36, ¶15, 875 N.W.2d 479. (emphasis added). Marcy received notice and was provided a meaningful opportunity to participate before each order was entered.

¶63] **A. July 31, 2017 Order.**

¶64] Notice of the Corporations' original Motion for Contempt was served on each parties' attorney on February 2, 2017 – nearly 5 months prior to the hearing which resulted in the July 31, 2017 Order. Appellant's App. 82. Although there were some continuances, Marcy's attorney was given notice of the hearing giving rise to the July 31, 2017 Order. See Appellant's App. 107, 112-113, 116-117, 124-126. Additionally, Marcy did not object to the contempt action being heard on the date of the hearing.

24 The court has several matters today. The motion

25 in the divorce action is for an interim order.  
1 There's also the motion - - the cross motion there.  
2 And in the other matter, the civil action, there is a  
3 motion for contempt. Are the parties ready to proceed  
4 here today?

[ . . . ]  
8 Ms. Chisholm: Yes, your Honor.

June 28, 2017 Transcript Pgs. 5-6. Marcy cannot claim that she did not receive notice nor a meaningful opportunity to be heard because her attorney was present and proceeded without objection.

**[¶65] B. October 9, 2017 Order.**

[¶66] The hearing which led to the October 9, 2017 Order took place on September 28, 2017. Notice for the same was served on September 5, 2017 by the Court. App. 147. Marcy's counsel was present, and although Marcy alleged during the hearing she was not given notice, she still appeared. See September 28, 2017, Transcript Pg. 13, Lines 4-5.

[¶67] During this hearing Marcy's attorney "[didn't] disagree" that the request for an order allowing a sheriff accompany the realtor on the property "[was] appropriate." See Id. Pg. 11, Lines 13-19. In fact, she stated: "I think that's the best way to encourage my client to allow the realtor on the property." Id.

[¶68] The October 9, 2017 Order simply orders Marcy to allow the realtor on the property within two weeks and that the realtor may have the sheriff accompany her if she so chooses. There was no sanction of imprisonment or a monetary fine imposed with this order. The District Court was simply revising the prior Order of the Court to ensure Marcy's compliance. This Order does not violate due process rights.

[¶69] In fact, this is something any judge can do at any time without violating a party's

due process rights. In this regard the District Court can, literally, issue any “appropriate” sanction it wants against a person failing to perform an act required by court order -without having to find them in contempt. See North Dakota Rule of Court 11.5. Rule 11.5 states the “appropriate action” a Court can take “*includes* a sanction provided by Rules 5, 11, 16, 25, 30, 37, 40, 45, or 56, N.D.R.Civ.P.” Id. (emphasis added).

[¶70] The term “includes” is ordinarily “not a term of limitation, but a term of enlargement.” See Amerada Hess Corp. v. State ex rel. Tax Com’r, 2005 ND 155 citing Hilton v. North Dakota Educ. Ass’n, 2002 ND 209, ¶ 12, 655 N.W.2d 60; Thompson v. Associated Potato Growers, Inc., 2000 ND 95, ¶12, 610 N.W.2d 53; and Lucke v. Lucke, 300 N.W.2d 231, 234 (N.D. 1980).

[¶71] Therefore, utilizing the plain language of North Dakota Rule of Court 11.5, the District Court can use anything it deems “appropriate,” whether contained within the Rules of Civil Procedure or the North Dakota Century Code, to curb Marcy’s open and obvious violations of the prior court order.

[¶72] **C. November 13, 2017 Order**

[¶73] Marcy argues that a pro se litigant cannot be imprisoned for contempt pursuant to Peters-Reimers v. Riemers, 2003 ND 96, ¶24, 663 N.W.2d 657. Marcy misapplies the holding of this case. The Supreme Court held that a pro se defendant must be informed of a right to appointed counsel “in a contempt proceeding in which the defendant faces potential incarceration[.]” Id. The Supreme Court did not hold that pro se defendants can never be sanctioned with imprisonment for contempt. There is a significant difference.

[¶74] On September 28, 2017, Marcy was told directly that she may face imprisonment

at the upcoming hearing. See September 28, 2017 Transcript Pg. 20 Lines 5-9. In this regard, the Court stated directly to Marcy, “I’m ordering that we have a hearing in three weeks to make sure that’s done. If that has not been done, we will consider further sanctions including but not limited to default or jail time in three weeks, ma’am.” Id. In addition to being told directly by the Court of the upcoming hearing and the issues to be addressed there, Marcy was also served written notice of the hearing at the address she provided in court on September 28, 2017. Id. at Pg. 17 Lines 19-25 and App. 156.

[¶75] Marcy argues that the Court did not notify her of the right to counsel prior to the imprisonment sanction being imposed. Simply put, the Court didn’t need to. At this same hearing, Marcy was informed (1) of an upcoming hearing, and (2) she may face imprisonment. Marcy made it clear she knew she had the right to an attorney. In fact, Marcy stated on four separate occasions during the hearing that she wanted to get counsel. Transc. September 28, 2017 Hearing Pg. 14 lines 19-20, Pg. 18 lines 9-11 and 19-20; and Pg. 20 lines 20-21. The District Court’s omission to notify Marcy of her right to counsel is not an abuse of discretion because it is clear from the record that Marcy knew she had a right to counsel and knew she was in contempt of court.

[¶76] **III. Marcy Intentionally Violated the District Court’s Orders.**

[¶77] Determining whether a contempt has been committed lies within the district court's sound discretion, which will not be overturned on appeal absent an abuse of that discretion. Millang v. Hahn, 1998 ND 152, ¶7, 582 N.W.2d 665. “[A] court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner or when it misinterprets or misapplies the law.” Id.

**[¶78]** In Jochim v. Jochim, 306 N.W.2d 196, 199 (N.D.1981), the Supreme Court stated:

“When there is conflicting testimony, the reviewing court will give considerable weight to the findings of the trial court because the trial court is able to see and hear the witnesses, and the reviewing court is not. [Citation omitted.] The judge at the trial court level is in a better position to accept one version of the facts over another because he is able to listen to and observe the demeanor of the witnesses, where this Court, bound by a cold reading of the transcript, cannot do so.”

**[¶79]** Here, the Court did not abuse its discretion when it found Marcy had intentionally disobeyed the Court’s Orders. The District Court had the opportunity to observe Marcy and hear the tones and inflections in her voice. Based on these observations, it was apparent to the District Court that Marcy had no intention to comply with the orders.

**[¶80]** The District Court’s findings are not an abuse of discretion. The findings are not arbitrary, unreasonable, or unconscionable. The District Court’s findings are grounded in the testimony provided by the witnesses, and in particular Marcy’s testimony and her actions or inactions.

**[¶81]** **CONCLUSION**

**[¶82]** The District Court did not abuse its discretion when it imposed contempt sanctions against Marcy, including imprisonment. The imprisonment sanction is remedial, not punitive, because Marcy has the power to purge the contempt by her own actions. Steve requests this Court affirm the District Court’s orders as stated herein.

**[¶83]** The Appellee respectfully prays that the Court grant the relief requested.

Dated this 22nd day of May, 2018.

/s/Greg Liebl

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[¶3] I declare under penalty of perjury that the foregoing is true and correct. Executed on the 22nd day of May, 2018.

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Rachel Martin, Affiant