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FEBRUARY 2, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kayla Rath,	)	
	)	
	)	
Plaintiff and Appellee,	)	Supreme Court No. 20190330; Civil Case No. 08-2012-DM-00078
	)	
vs.	)	
	)	
Mark Rath,	)	
	)	
	)	
Defendant and Appellant.	)	

APPEAL FROM THE BURLEIGH COUNTY DISTRICT COURT ORDER

DATED 10/15/2019, DENYING MOTION FOR CONTEMPT

SOUTH CENTRAL JUDICIAL DISTRICT

AMENDED BRIEF OF DEFENDANT-APPELLANT,

MARK RATH

Oral Argument Requested

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[¶5] Issue 5: Whether it is reasonable to continue to deny Kayla's obstruction and resistance to the terms of the Judgment.

Statement of the Facts

[¶6] Appellant Mark Rath [Hereafter: Mark] Filed to hold Appellee Kayla Jones [Hereafter: Kayla] in contempt of the parties January 23, 2013 and June 25, 2017 parenting plan.

[¶7] Mark's contentions were that: 1.) Kayla withheld visitations from Mark on November 17, 2018 and November 18, 2018. 2.) That Kayla has intentionally interfered provision 3 of the parties Judgment. 3.) Which then caused Kayla to violate provisions 6(d) and 13 of the Judgment. 4.) That Kayla has not returned property Mark purchased 5.) That Kayla has on two separate occasions taken the children outside the state of North Dakota as prohibited by the Judgment. 8.) That Kayla's dishonesty is grounds for contempt. (App 48-80)

[¶8] On July 17, 2019 the district court issued an order requiring Kayla to respond. On July 23, 2019, Mark filed an addendum to his contempt motion (DE #1391-1394; (App 80). Raising that Kayla through omission lied to Mark for three weeks regarding the issue with H.R and her cellphone.

[¶9] On July 31, 2019, Kayla filed her response (App 87), Kayla's contentions were that 1.) Kayla could not force H.R to come to a visit with her father. 2.) That it is common for safety plans not to be known. 3.) That she cannot comply with returning items. 4.) That she attempted to seek permission to remove the children from the state on both dates. 5.) That she waited to tell Mark about the incident until July 20, 2019 because she wanted to wait until H.R had her forensic interview and wanted to give Mark time to cool down about the situation.

[¶10] On August 6, 2019, Mark filed his response to Kayla's (App 93-112), Mark's response to Kayla's claims were that: 1.) Kayla could not excuse her actions. 2.) The evidence is counter to what Kayla is trying to claim. 3.) That Mark has talked to Kayla about items traveling between the homes prior to filing for contempt and she would be able to comply had she adhered to the Judgment, so her defense is improper. 4.) That Kayla's claims about wanting to give Mark time to cool off makes absolutely no sense, since both dates were exactly 7 days from Mark's next visitation with the girls.

[¶11] On September 11, 2019, Mark filed for an emergency motion compelling Kayla to allow Mark to take the children to Fargo on September 12, 2019 for the funeral of his Grandmother, the district court granted Mark's request ordering Kayla to make the children available at 5:00 a.m.

Statement of the Case

[¶12] Mark and Kayla had court for the contempt hearing on September 16, 2019.

[¶13] Judge Grinsteiner made notice that he was taking judicial notice of the affidavits and evidence filed pre-trial by the parties. (Tr. P.2 – 4 ln. 19)

[¶14] Mark testified that regarding his grandmother's funeral, Kayla in defiance of what the court ordered on September 12, 2019, gave her phone to H.R for the sole purpose of allowing H.R to resist what the court had ordered in this matter. (Tr. P. 6 Ln. 10 -P.8 Ln 7). Mark testified that Kayla's unhealthy Guidance of the children amplifies these inappropriate decisions in the children, Mark testified that October 16, 2017, was one example of Kayla's coaching the children into these unhealthy decisions in that H.R said she had homework, but Kayla wouldn't even consider rescheduling the visitation after it was already denied. (Tr. p. 8 Ln 8-15) Drawing references into November 17 and 18, 2018 in allowing H.R to miss a visitation with her father because Mark exercised parental authority and took H.R's smartphone away from her. (Tr. p. 8 Ln. 16 – p. 9 ln 15)

[¶15] Mark further emphasized November 17 and 18, 2018 were not the only times H.R has been without a cellphone. There was June to October 2017 at which no visitations were missed and from July 5, 2019 to the date of that hearing, H.R has been at Mark's residence every visit without her cellphone (Tr. p. 10 – 11). Mark addressed the conflict resolution of the Judgment, stating that if Kayla doesn't agree with Mark's decisions, there is a laid out process she has to follow, Mark then shifted to Kayla's telling the children to disobey the rules that he established and that such things do vilify, disparage him to the children and does not promote a healthy and beneficial relationship between him and the children. (Tr. p. 11 ln 23 – p. 12 ln. 11) Mark then raised December 17, 2018 and Kayla refusing to make up the missed parenting time. (Tr. p. 12 Ln 12- p. 15 ln. 2) Mark then went into the issue of July 5, 2019, where H.R had lied to him about

what happened to her cellphone, Mark in an email relaying that message to Kayla where Kayla did not disclose the truth about why H.R had lost her cellphone and waited until July 20, 2019 (Stated as October 27, 2019 at trial by mistake) to disclose the truth about what really happened to H.R's cellphone. And that Kayla still will not fully tell Mark exactly what is going on with that situation. (Tr. p. 12 Ln 3 – p.16 Ln. 17). Mark then brought up August 2019, where again Kayla refused to reschedule the visitation.

[¶16] Mrs. Weiler cross-examined. December 2019, (Tr. P.22 Ln. 7 – p.23. ln. 25) Mark was questioned on his evidence of Kayla talking negative about him to the children, where Mark iterated his only evidence is that Kayla admitted to telling the children to disobey him in open court on May 30, 2019, (Tr. p. 24 ln. 1 through 12). Mark iterated that Mrs. Weiler was attempting to confuse the burden of proof at trial (Tr. p. 24 ln 12 – p, 27 ln. 18).

[¶17] Mark addressed that Mrs. Weiler was attempting to put the cart before the horse in this because everything they were using to justify H.R's inappropriate decision happened after the visit was denied not before and that Mark can limit H.R's cellphone usage while with him. (Tr. 27. Ln. 19 – p. 28 ln. 16) Mrs. Weiler attempted to accuse Mark of sending inappropriate messages to H.R for Years, however, Mark responded that was actually the first time he took a direct approach with H.R. (Tr. p. 28, Ln 17-21). Mark iterated that Kayla's lie was through omission, that Kayla lying through omission only encouraged H. R's negative behavior. And that he provided his evidence where Kayla waited until July 20th, 2019 to finally correct what H.R told him. Mrs. Weiler continued to attempt to manipulate the situation where Mark objected that Mrs. Weiler

was just becoming argumentative at that point. (Tr. p. 28 ln. 22 – p. 31 ln 5) Mrs. Weiler ended with Mark's allegations relating to the funeral.

[¶18] Mark called Kayla as a witness, Kayla admitted that physical and phone visitations were missed, Kayla vaguely recalled October 16, 2017. Mrs. Weiler objected to Mark bringing up October 16, 2017 claiming that the parties have already had a contempt hearing on this specific issue, Mark responded that they have not yet addressed October 16, 2017 as an issue of contempt and that the court did not specifically address his request for contempt at the last hearing, where the court admitted that as issue of its last order it did not specifically or individually address contempt on the part of Kayla in its June 25th findings. The court stopped Mark from continuing in his line of questioning for October 16, 2017 as Mark was preparing to submit his evidence for this allegation. Mark continued to December 17th 2018, Where Kayla admitted that Mark requested to reschedule a telephone call because it was missed, where Kayla read from her responses in her emails with Mark, one being that the parties Judgment does not require the parties to actually reschedule telephone calls. Mark in response brought up "December" 22nd, 2015, (April 22, 2016), Kayla forcing Mark to reschedule a call because she wanted to attend a concert with her husband. Mrs. Weiler objected (Tr. P. 33 ln. 19 – p. 42 ln. 12)

[¶19] Mark questioned Kayla about her conversations with H.R and her discussing Mark's communication between Mrs. Weiler and, Kayla stated that she had a conversation with H.R about the text messages between Mark and H.R, Mark questioned Kayla on the consequences of violating a court order. Mark proceeded to question Kayla on what physical evidence she has that during his visitations with the minor children he

creates an unsafe environment for the minor children. Kayla proceeded to once again bring up allegations of past domestic violence, this time focusing on alleged incidents from 17 years ago. Mark attempted to object, the district court ignored Mark's objection without hearing what it was and allowed Kayla to continue. Kayla admitted that all of the allegation she had just raised were from over seven years ago. Kayla claimed that Mark is going to somehow physically harm the girls. Mark went on to try to ask Kayla to explain, where Kayla again started bringing up allegation prior to the party's separation. Kayla did admit that she allowed H.R to miss the visitation and accused Mark of being emotionally abusive to H.R because he told H.R that violating a court order carries consequences. Where Mark questioned if Kayla is going to allow H.R to make decisions, H.R didn't need to know there were consequences for inappropriate choices, Kayla agreed that all decisions carry a consequence, Kayla attempted to blame Mark for the issues, bringing up issues from when H.R was 9 years old. Mark iterated that Kayla keeps bringing up the past, but asked what recent evidence she has. The district court interjected, while giving Kayla an answer to the question the defendant was asking. Mark then continued to August 26, 2019. Mark questioned Kayla on whether or not she sees how her giving H.R the discretion she gives her fuels these issues at which Kayla attempted to blame Mark. (Tr. p. 42 – 55)

[¶20] Mark presented his closing arguments, Weiler presented her closing statements to the Court. Mark attempted to respond to Mrs. Weilers closing statements, however, though time was not the reason, the district court denied Mark's ability to respond to the new information Weiler was raising as part of her closing statements.

[¶21] Mark filed his closing response iterating that it was a violation to the due process of law for the court not to allow Mark to respond to what Weiler stated during her closing arguments, that everything Weiler did during her closing statements was objectional as it all was largely irrelevant whether Kayla violated the Judgment now. [DE #1413]

[¶22] Mark, did also raise that Weiler brought up a lot of issues that were not raised at the trial itself and that a majority of Weiler's closing arguments were in essence rhetoric and inflammatory testifying on the part of Weiler in an effort to create prejudice against him.

[¶23] Mark iterated, that Kayla for years has forced Mark to reschedule any phone call she has deemed not important enough to take place on the court ordered evenings, and not always because of the children's conflicting schedules, like April 22, 2016 (stated as December 2015 at trial by mistake), when Kayla wanted to attend a concert with her husband. And that Kayla's actions are creating a threat to his and the children's relationship and the stability and consistency they require. [DE #1413]

[¶24] The court entered its order denying Mark motion for contempt on the grounds 1.) Mark did not provide any evidence of his claims against Kayla. 2.) Mark dismissed his allegations of Kayla returning items to the children as Kayla has in part complied with this requirement. 3.) Mark at some unstated point at the trial, admitted that his allegations of Kayla taking the children out of the state twice without permission from him or the court was now moot and that it would be a technical violation to the Judgment. 4.) That Kayla's failure to reschedule visitations was a technical violation to the

Judgment based on Kayla's forcing Mark to reschedule visitations in the past? 5.) That Lind v. Lind applied to this case? 6.) That Kayla is excused through Mark's affidavit statements from having to comply with the Judgment. Mark filed his motion to reconsider on October 23, 2019, though Mark wrote over 60 pages of content within the petition, Mark dissected each of the district courts actions to explain how the court was acting arbitrary and misapplying the law in this matter.

Law and Argument

A. Standard of review

[¶25] *The district court has broad discretion whether to hold a person in contempt, and our review is limited to whether the court abused its discretion…. An abuse of discretion occurs when the district court acts in an arbitrary, unreasonable, or unconscionable manner or when it misinterprets or misapplies the law…An inability to comply with an order is a defense to contempt proceedings, but the alleged contemnor has the burden of proof.* Smith v. Erickson 2019 ND 48

B. Whether the district court's decision is arbitrary and misapplies the law.

[¶26] "*Under N.D.C.C. § 27-10-01.1(1)(c), contempt of court includes "[i]ntentional disobedience, resistance, or obstruction of the authority, process, or order of a court..."A party seeking a contempt sanction under N.D.C.C. ch. 27-10 must clearly and satisfactorily prove the alleged contempt was committed.*'" Upton v. Nolan, 2018 ND 919 N.W.2d 181. "*An inability to comply with an order is a defense to contempt proceedings based on a violation of that order, but the alleged contemnor has the burden*

to establish the defense and show an inability to comply." Werven v. Werven 2016 ND 60 877 N.W.2d 9

1. **Whether Mark presented evidence clearly showing contempt occurred.**

[¶27] Mark presented numerous exhibits within this matter. Including 15 separate exhibits that showed with clarity that his allegations against Kayla were true (App 62-80; 106-112; Index #254, 1342, 1415, 1416). Though a question of law presented is whether the court improperly interjected in the trial matter interfering with Mark's ability to present facts and evidence of his claims against Kayla, the court acted arbitrary and misapplied the law, especially given the courts statements in ¶7 of its order denying Mark's motion claiming that Mark did not present evidence of his claims against Kayla.

[¶28] As seen from the transcript. (Tr. p. 53 – 55) while questioning Kayla and preparing to present evidence relating to the October 16, 2017 allegations of missed parenting time Mark was not only improperly objected upon by Weiler, but the court improperly and arbitrarily interjected into the trial which then prevented Mark from presenting his evidence. "*Trial courts should not arbitrarily disallow testimony that is critical to the case, particularly when the only objection is a slight inconvenience to the court or to other parties.*" Gullickson v. Kline, 2004 ND 76, 678 N.W.2d 138. This is especially true, since Mark's burden at trial was showing that the contempt took place. "*Unless otherwise agreed or further ordered by the court, Mark shall be permitted one telephone call with the child*[ren] *every Monday.* As it is clear that Mark and Kayla did not have agreements in place that any of the three phone calls brought up would just be

missed, Kayla made a unilateral decision in direct violation to the telephone provision of the Judgment. In the whole of this situation there is inadequate evidence on the record to support Kayla's claims that it was actually H.R's sole responsibility to decide whether the Judgment was not followed and allowing children to make split second decisions when they are under stress is not appropriate or reasonable, Kayla knowing that H.R was overwhelmed with homework should have been reasonable and cooperated with Mark to try the phone call on another night when H.R did not have homework to keep her from speaking to her father.

[¶29] As this court has stated: "*The visitation statute is not designed to place into the hands of children power over the occurrence, length, time, or place of the visits.* [citation omitted]*("The children should not have the power to veto visitation anymore than they should be allowed to exercise veto power over other important matters in their lives—such as attending school on a daily basis.").*" Sevland v. Sevland 2002 ND 110 646 N.W.2d 689. Though children of significant maturity are given the opportunity at the time of establishing visitations or modifying visitations to state a preference, they also had this ability in 2002, the statute has not drastically changed since 2002 to warrant a different understanding or stated intent.

[¶30] When it comes to the missed visitations, this is especially true. Kayla denying a visit for the reasons she has is subject to human error, neglect and abuse not an inability to comply with a Judgment. H.R not having her homework done, could be procrastination on her part or having chores that needed to be done.

2. **Whether Kayla adequately showed her defense at trial.**

[¶31] Mark's allegations were that Kayla has denied visitations that she should not have denied. To support these claims, Mark provided the messages between him and Kayla where Kayla admitted she just wasn't even going to attempt to allow the phone calls to happen, where one of the emails (Index #1415), Kayla even went as far as to claim that she didn't have to reschedule the phone call because the Judgment itself does not require her to, along with using the children having a program later in the week and Mark and A.R having family therapy as a reason why that visit would not be made up neither of the three excuses Kayla gave are correct or permissible as a matter of law and show her intent to violate the Judgment.

[¶32] "*Unless otherwise agreed or further ordered by the court, Mark shall be permitted one telephone call every Monday…and every other Friday and Sunday he does not have the children.*" This provision of the Judgment is not ambiguous, regarding Monday phone calls, it doesn't matter if Mark saw the children from 6-7 for whatever reason or was going to see the children later in the week, the order clearly and unambiguously states that "*unless otherwise agreed or further order by the court, Mark shall be permitted one telephone call every Monday*". "*an unambiguous judgment may not be modified, enlarged, restricted, or diminished*." Infra. The Judgment may not be diminished, for this reason, as Monday visitations are the only issue Mark raised with telephone calls, "*Unless otherwise agreed or further ordered by the court"* is a substantial clarification that Kayla may not make unilateral decisions that those phone calls would just not occur or be rescheduled if missed for any other reason than Mark's own neglect or agreement between the two, Kayla failed to show either occurred, in fact

not even Mark knows why the December phone call was not had, it just didn't occur, and Kayla is just trying to transfer any responsibility of visitations onto the children themselves, this form of behavior on Kayla's part is adultification of the children and highly detrimental to their wellbeing. Kayla cannot give decision-making authority over the terms of the Judgment to the children, this also is a wholly different can of worms than a child simply refusing a visitation with their parent.

[¶33] As can be seen from the testimony at trial, Kayla's actual justifications are not appropriate. Mark attempted three times to get Kayla to produce facts and evidence that would lead a fact finder to deduce that these allegations of Mark creating an unsafe environment for the children were justified and not just the product of irrationality on the part of Kayla herself or as Mark claimed, Emotional Blackmail from a 13 year old child who didn't want to lose her phone. The first time, Kayla started bringing up 17 years ago, Mark did attempt to object, however, the district court arbitrarily stopped Mark from even stating what his objection was, but if Mark asked the very specific question as "*What evidence do you have that during visitations, during physical visitations, I am a dangerous person to our children"* and Kayla starts going off on a rant about 17 years ago, as H.R is only 14, the court's refusal to hear Mark's objection and allowing Kayla to proceed in her irrelevant narrative was arbitrary. Mark's objection would have been relevancy, Kayla was attempting to offer information beyond the scope of what was asked for, and Kayla went into a narrative without actually answering the question. The district court abused its discretion in allowing this type of testimony as it had nothing to do with what Mark actually asked. Mark did attempt to state his objection not once but

twice and was completely ignored by the district court and told Kayla had to be allowed to answer the question. (Tr. P. 44 Ln. 23 – p. 51. Ln. 20). The testimony of Kayla should have been limited to facts relevant to a time frame even considered reasonable given the overall prejudicial effect and fact that allowing these interferences diminish the terms of the Judgment. Infra.

[¶34] Though it is not known either at this trial or the May 30, 2019 trial exactly why or when this safety plan was put into place. DE #1342, showing that Kayla herself had requested that a Safety plan be put into place back in 2015, not Sarah or H.R, based on past allegations and Kayla's overall lack of ability to testify to any recent events within the past two years at the trial matter. (Tr. 45 – 55), does indicate this whole safety plan nonsense, could just as well be like all of Kayla's other allegations, moot, inappropriate and allegations from 5 years ago and greater. Kayla had the burden of providing specific facts and evidence to support her claims. 1.) That H. R's feeling unsafe was not only rational. And 2.) But that Mark has actually done something wrong to warrant the interference in his visitations. It is even safe and legally sound to say, that because of June through October 2017, Kayla's window of burden was so narrow that she had to meet and anything outside of the window of October 2017 up to November 16, 2018, could not justify or support Kayla's decision or claims.

[¶35] Kayla's allegations show exactly how irrational she has become and just how much of a danger she possesses to Mark and his children's relationship. (Tr. P. 44 Ln. 23 – p. 51. Ln. 20), however, based on the testimony prior, the most egregious interference and violation by the district court was its interjection:

Q: Okay, so what evidence do you have that she was actually unsafe?
A: I think I've made that perfectly clear
Q: Okay. You keep bringing up the past, Ms. Jones. I'm talking about during physical visitations, what evidence do you have to support you defense that the children are unsafe with me?
THE COURT: Well, We've gone circular, and why I say that is the witness is just going to answer the same way she did; that maybe the physical violence hasn't continued, but the emotional abuse that she just talked about is the answer. So, is there a different line of questioning you want to pursue with this witness, Mr. Rath?

at (Tr. p. 51 Ln 8 – 20), Kayla did not provide competent evidence of emotional abuse, the district court under no circumstance should have given Kayla the answer to the question, as Mark was asking about specific evidence that occurred during his physical visitations with the children that would conclude that he was a threat to his daughters, unproven and unsubstantiated allegations of "emotional abuse" that carry no creditability such as specific statements made by Mark that would be inducive to emotional abuse, is not even an appropriate answer to the question Mark asked. Neither is the other facts Kayla testified to, all from over 5 years ago.

[¶36] Even if Kayla did somehow and, in some fashion, provide enough factual support on H.R having authority at 13 to decide whether visits occur or do not occur, though her entire rationalization process seems to be based off incidents occurring at minimum five years prior, However, the parties Judgment is very unambiguous about the other factor, and that is that "*The parties shall communicate with each other information pertinent to the health, well-being and care of the child*". Mark did state this in his brief and affidavit for the trial.

[¶37] Because this motion of contempt is directly stemming from the events that occurred at the May 30, 2019 trial. Including the allegation of contempt that Kayla directly interfered with Mark's right to have sole decision-making authority of the minor children regarding their day to day care and control while they were with him pursuant provision three of the Judgment, and the fact that Mark alleged in his affidavit that this issue of contempt regarding November 17, 2018 and November 18, 2018 is stemming directly from Kayla's initial contempt of the Judgment being the direct violation of Kayla, by refusing to disclose information "*pertinent to the health, well-being and care of the child*", and waiting until it was most advantageous for Kayla to bring up that information. Mark could have actually wholly avoided this issue all together and it wouldn't have led to missed parenting time between Mark and H.R, so ultimately even though Kayla admitted at trial she allowed H.R to decide if the visit occurred or didn't, the fact the visitation was missed in the first place is still solely caused by Kayla's lack of communicating information to Mark needed to make the best possible decisions for his parenting time he could. Where the third issue of contempt stemming from this is when Kayla admitted at that trial,

> *Q. Okay. And, Ms. Jones, despite you knowing very well that one of my rules while the children are with me is no cell phones, you still allow and encourage H., to bring her cell phone to my residence; don't you?*
> *A. It's part of her safety plan.*
> *Q. So you encourage her to break my rules?*
> *A. As per recommendations of her counselor.*

[May 30, 2019 transcript [Hereafter Tr.2] P. 89. Ln. 8-14], as all of these issues of contempt have built upon each other in a fashion, no fact presented at any trial since

Mark has been awarded unsupervised visitations with the children, can be used to rationalize this overall issue.

[¶38] "*Either parent is authorized to make decisions regarding the day to day care and control of the children while the children are with that parent*" and because "*Interpretation of a judgment is a question of law, and an unambiguous judgment may not be modified, enlarged, restricted, or diminished*." Hoverson v. Hoverson 2017 ND 27 889 N.W.2d 858. Separately and wholly, there is no other way to interpret this portion of the Judgment, it is very clear that all issues pertaining to the day to day care and control of the children and all decision-making authority pertaining to those issues are solely the liberty of the parent exercising their visitation to make. Kayla and/or H.R deciding to skip a visitation with Mark because they do not agree with a rule he has established, not only is contempt of the court order regarding the visitation schedule, but is also contempt regarding all provisions that prohibit Kayla from 1.) Vilifying Mark to the minor children. 2.) Disparaging Mark to the minor children and 3.) demeaning Mark to the minor children. as well as resistance and disobedience of provision 3 of the parties Judgment. The children are going to have rules at their fathers, just as they will have rules while at their moms. The children and Kayla disagreeing with rules Mark establishes is not a justifiable reason to go against the Judgment. And unless Kayla can show she actually attempted to discuss her concerns with Mark, allowing the children to miss a visitation on a decision made by Mark when he didn't know everything and Kayla was actually withholding information from him…is not just inappropriate, it is arbitrary and unreasonable.

[¶39] Or Mark's allegations that Kayla took the children out of the state twice without permission or authorization from the court. In March-April 2018, Kayla sent three messages, seeking permission, however, Mark did not receive those messages and the third Message is Kayla admitting she was just going to go without his permission or motioning the court. (App 73-77). Kayla could not combat whether Mark actually saw her messages or not, she would have no foundation to state what Mark did or did not see and Mark submitted his texts from both incidents, he never received them and Kayla made no other effort to ask or seek authorization. She chose just to violate the Judgment. Kayla also raised another situation, which the court focuses on, in that Mark once again did not receive Kayla's request, however, in that situation, Kayla followed it up with an email, at which both parties came to an agreement about the issue. However, the May 2018 issue of contempt, Mark attempted to discuss the out of state portion of the Judgment, Kayla chose to wholly ignore Mark's objection to the children leaving the state if that meant, H.R, who at that time already had over 90 Absences from school, had to miss anymore school. But again Kayla chose to just ignore Mark's objection and still proceeded to leave the state without his permission or authorization from the court.

3. **The courts reliance on Lind and Rath 2016 is not appropriate**

[¶40] There are serious ramifications to this court adopting Kayla's justification. The biggest, is that this could become a pattern of behavior to disagree with rules Mark establishes with the children. This court has stated in another case between Mark and Kayla that circumstantial evidence is sufficient to show intent, in this matter the circumstantial evidence does not tell the story Kayla is tried to convince the court of.

[¶41] And this is where all of the other evidence and facts Mark presented at trial have the greatest impact. Especially when the district court's reasonability is highly in question. 1.) H.R has been without a cellphone prior. 2.) H.R following as also been without her cellphone. 3.) At no point in time during either of these events, has H.R refused a visit with her father because she is afraid to not have her cellphone while at her dads. 4.) Kayla has failed to provide any substantiated facts about this alleged safety plan to determine it is even a relevant issue, such as that what significantly happened since June 2017. 5.) Mark has provided evidence that this safety plan may have been put into place as far back as 2015. DE# 1342, in which fact 1 has the greatest impact. 6.) Kayla needed this conflict in her allegations against Mark increasing in visitations with the children. 7.) Provision 3 of the parties Judgment allows Mark to do what he did. 8.) Kayla had the time to discuss the cellphone with H.R but didn't even bother to talk to Mark telling him information she clearly had available to her, that could have prevented the entire situation from occurring. 8.) There is ample evidence with circumstantial evidence to show that Kayla falsifies allegations of Harm or alleged Harm against the children.

[¶42] Despite Kayla wholly not being able to prove that the missed visitations were not caused by her own failure to properly communicate or ensure homework was done before Mark's visitation time, either as she admitted at trial, allowing H.R to just decide if the visits took place. The court misapplies the law and attaches the rationale of Lind v. Lind 2016 ND 71 877 N.W.2d 298. To wit, the factual circumstances are wholly different.

[¶43] The most notable difference, is that G.L was 16 at the time of his testimony, H.R was only 13 at the time. G.L testified, while H.R was not made available to testify for some reason, The second difference, is there is evidence that Kayla is causing some of these issues and due to her admittance at the May 30, 2019 hearing, is encouraging the children to reject their father and disobey his rules that he establishes. That is substantial evidence that Kayla is degrading and vilifying Mark to the children. So, on these shown circumstances, it becomes even more inappropriate to attach to the rationale of Lind in this matter. In Lind, the district court stated Milligan v. Milligan, No. 2120574, 2014 WL 783504 at *4 (Ala. Civ. App. Feb. 28, 2014), Where specifically in Milligan, the court stated "*this court held that it was not in the best interest of a 15–year–old child to be able to determine when that child would visit with the noncustodial parent absent extreme circumstances.*" Id. In this matter, H.R had a chance to state her preferences to the district court at the May 30, 2019 trial. However, as stated in the court's findings, H.R was not able to show a maturity to be able to rationalize those preferences.

[¶44] whereas; notably, most cases where this court has decided that the court did not abuse its discretion in allowing the children to determine if visitations occurred or not the children were over the age of 16 with the exception of Montgomery v. Montgomery 2003 ND 135 667 N.W.2d 611 where the child was 14, however, it was the father who wasn't making time for his children and wasn't partaking in phone calls with the children or even returning the calls the children made to him that led the court to determine the mother wasn't in contempt, and though Mark wholly disagrees on the courts specific reliance in ¶12 of the courts order stating "*the Mother 'supported the children's decision*

to whether they wanted to visit their father or not" as a matter of law this is an impermissible view. Relying on Sevland, "*children should not have the power to veto visitation anymore than they should be allowed to exercise veto power over other important matters in their lives—such as attending school on a daily basis.*" Sevland; Milligan.

[¶45] The mere definition of contempt does not support the courts reliance, if any parent, is supporting the children's disobedience of the lawful orders of this court, then that parent is willfully themselves resisting the orders of the court. Id. Because the order can always be modified, parents must not be permitted to periodically disregard the order just because they disagree with something, there needs to be a significant reason why visitations are missed Id. Though the defense of these parents is that they cannot "Force" children, this defense is illogical, children are frequently forced to do things, eating the food prepared at mealtimes, doing house chores, going to church, visiting other family. Parent's moving, forcing the children to uproot their school and entire lives at the whim of their parents. Where the law forces parents not to allow certain behaviors such as Drinking, Smoking, School attendance, the law punishes children if these rules are broken and if the parents support the children breaking these rules, the parents are often eligible for punishment through accessory charges or contribution charges. N.D.C.C § 27-10 and N.D.C.C § 14-09-24 and N.D.C.C § 12.1-10-05, are all statutory examples indicating that violating a court order is against the law.

[¶46] Kayla is responsible for ensuring the Judgment is adhered to in this matter not only for herself, but the children. Because Kayla has never attempted to modify the

party's Judgment her intent to disregard the Judgment periodically is more that obvious. In fact, during the November issue, the parties had a motion to modify, yet Kayla specifically asked, that the judgment be kept as it is. And there is ample evidence on this record to indicate Kayla may be indirectly, directly influencing the children's decisions. And one of those incidents are indicative that she did so only for personal gain in this case.

[¶47] Because this isn't a creditability issue between the parties. Mark had every authority of the Judgment to state that H.R could not have a smartphone and was reasonable and compromising in saying that H.R could have a non-smartphone if that was going to be an issue. However, knowing what she knew, though Mark should have been the party to discuss the issue with his daughter during their next visit, Kayla found the time to discuss it with H.R herself, rather than take the time to disclose facts pertinent to the well-being, health and care of the children as commanded in Provision 6(d) to Mark that would have avoided this situation all together, not to mention Mark and H.R could have come to a different agreement themselves regarding the cellphone… and then, she committed further contempt and allowed H.R to just say she wasn't going to the visit, not only did this violate the visitation schedule, but it appears to have been in resistance to Mark's authority under provision 3. To the contempt progressed by actually telling her to just ignore her father's rule. Violating not only most portions of Provision 6(d) of the Judgment but Provision 13, in a further attempt to resist and disobey provision 3.

[¶48] Then when it came time to provide a reason why she was justified. Kayla violated the tenants of Res Judicata which states "*Under res judicata principles, it is*

inappropriate to rehash issues which were tried or could have been tried by the court in prior proceedings." Sall v. Sall 2013 ND 108 833 N.W.2d 417. As in a matter for contempt, a majority of the things Kayla testified to, such as incidents from allegedly over 17 years ago, not only were considered in two separate hearings but…were before the children were even born and would have had absolutely no impact on whether Kayla was or was not in contempt, except for the prejudicial effect they would have had. Then on top of this issue, Kayla in regard to the December 2018 issue of contempt, violated the Judicial Doctrine of Estoppel, which states, "'*The doctrine applies only where a party's subsequent position is totally inconsistent with its original position"*' DeMers v. DeMers 2006 ND 142 717 N.W.2d 545. Where Kayla's attempted Justification for why she chose not to reschedule the visitation in December 2018, is wholly contradictive to her own actions in this matter.

C. **Whether the district court erred in not allowing Mark to respond to Weiler's closing and whether it is reasonable to continue to deny Kayla's obstruction and resistance to this Judgment.**

[¶49] Whereas further on this matter, this court has excused a lot of actions by Kayla 1.) In 2013, this court utilized a void order to justify Kayla's contempt of denying Mark over 9 telephone calls, utilizing a void order to justify her actions. Other courts have held that an order supplanted by another order is in all things void. In re Stenson, No. 14-06-00094-CV Tex. App. May. 11, 2006. 2.) Then the court modified the Judgment as part of its contempt finding to make what Kayla did not contempt in the future. 3.) Then it found Mark in contempt for speaking to the children once outside of

Kayla's control during that period of denied visitations. 4.) Then started saying Kayla forcing Mark to reschedule visits for her own personal schedule was just a technical violation to the Judgment. Even though to date, Kayla still has not made up a single one of those phone calls she "rescheduled" 5.) To ignoring wholly, that Kayla is lying to this court, which would resolve these "creditability" issues in favor of Mark, like she did in March/April 2015 falsely telling the court she scheduled visits she couldn't have scheduled. DE# 625, Kayla didn't schedule or discuss scheduling visits with the staff as she claimed, DE#1013 (P. 67) 6.) Allowing Kayla to create frustrations with scheduling Mark's parenting time, by forcing Mark to do things in order to obtain his time with the children, such as April 16, 2015. DE#1013 (P. 71) though the policy of the FSC is that all changes in visitations must be made 24 hours prior, the staff tried lying to Mark saying the visit that was confirmed on April 9th, 2015, wasn't, and staff admitted Mark paid in full. (P. 70) all citations Supra. But that situation, where Mark was rightfully upset and frustrated with FSC violating their own policies to allow Kayla to deny Mark time with the children was his fault, because he spoke out against the abuse he endured from the FSC in them violating a monetary contract. 7.) Or the new evidence that Kayla is trying to lie to pass off old issues as new issues, such as this safety plan nonsense, which Mark has substantial evidence to support it was Kayla who pushed the therapist to put one in place in 2015. DE #1342 8.) Or the mysterious appearance of new allegations of domestic violence that no previous document on this record supports, as both times Kayla has been documented conversing about past domestic violence DE #254; 1338; 1367, only one issue has ever come up, but now that a new Judge is on the case who isn't familiar with

her past testimony, she abuses the system to make new allegations against Mark that couldn't have ever occurred. 9.) Or Kayla claiming Mark is a threat to his children, but then her herself, leaving them home alone for hours at end, allowing one of the children to disappear for unknown periods of time and then leaving one of the children in the care of someone who decided to get intoxicated which caused that child to fear for their safety. While ignoring the fact, Mark has had unsupervised visitations with his son for 14 years, in the manner he is requesting from this court, and never once has he hurt that child or done anything that would cause his visitations with that child to be limited.

[¶50] And though there is no case law that can be found per se, regarding Mrs. Weiler's closing statements, (Tr. P. 62-64), Weiler raised a lot of issues that were not being reported correctly or were being raised for the first time during her closing arguments to create prejudice. "*due process requires a parent receive adequate notice and a fair opportunity to be heard*" Upton v. Nolan 2018 ND 2439 19 N.W.2d 181. Fair, is not allowing closing argument to raise new issues that were not properly briefed, asserted in an affidavit, or raised at the trial itself and then not allow the other party to respond. Mrs. Weiler was allowed to testify during her closing arguments to manipulated facts, issues that had no bearing on whether Kayla violated the Judgment and served clear purpose to only create prejudice.

D. **Conclusion of Law**

[¶51] The court and Kayla, have both put the Cart before the horse in this matter, which is arbitrary and an abuse of discretion. Kayla's obsession with the past as a means to justify the present interferences she is causing with Mark and the

children's relationship, is not only unhealthy for the children, but for herself. Mark can only take a realist's approach, It has been over 5 years since anything significant has happened between Mark and Kayla or Mark and the children, that could be deemed worthy enough to consider in a child custody matter in her favor, and this constant reliance on the past to somehow demean and detract from the observable facts that Kayla is causing these issues now and is in contempt is unfounded and unsound, and is only furthering the animosity between these two at this point. This court has to realize and accept that by indirectly allowing these issues to continue, Kayla will continue to create these problems between Mark and the children. She will not motion to modify the Judgment as actually required by law, why would she? By the court failing to enforce the Judgment itself indirectly modifies the Judgment, telling Kayla that though the Judgment strictly prohibits or requires the actions she is doing or failing to do, she can do so at her will and does not have to follow the requirements everyone else, including Mark has to follow. Though Mark believes the court is entering into serious violations to the equal protection clause at this point.

[¶52] Even if the court wanted to say that H.R has a right to refuse visitations, even if her reasoning is questionable, even if the court wanted to say that Kayla can continue to take the children outside of the state without knowingly discussing it with Mark and even if the court wanted to say that Kayla is justified in Lying to Mark for over 3 weeks about something serious happening to their daughter. All of these issues could have been wholly avoided had Kayla just said something or made sure she initiated contact with Mark. November could have been entirely avoided, had she not

strategically waited. And Kayla only furthers the animosity between the two by lying, falsifying allegations, to where not even this court can say Mark's frustration and growing anger is misplaced, such as Weiler trying at trial to wholly ignore evidence Mark submitted to manipulate the situation in her and Kayla's favor, in her line of questioning about July 6, 2019, where she asked if Kayla knew that H.R lied to him (App 106-112) Mark made it very clear that H.R stated her cellphone was broken and Kayla made the decision to support their daughters lie until she felt like telling him the truth, yet Kayla is encouraging a Healthy and beneficial relationship? When further evidence clearly shows that there is also an undeniable probability that Kayla is now falsifying allegation against Mark, lying to him and lying to this court? Yet this court will attempt to ask or say this is a creditability issue between these parties? While fully ignoring the evidence that Weiler herself lies to the court, Kayla lies not only to Mark but this court as well and all Kayla and Weiler are attempting to do is make this court feel sorry for them so it rules in their favor.

[¶53] Therefore; Mark prays that the order of the court be reversed and remanded to hold Kayla in contempt of the court order, Mark prays that costs of this appeal be taxed in his favor.

Dated this 2nd day of February 2020

/s/Mark Rath

Mark Rath

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Defendant – Appellant and Appendix of the Appellant, Mark Rath, was on the 2nd day of February 2020, served electronically to the following:

Kayla Jones – KaylaJones87@outlook.com

/s/Mark Rath

Mark Rath

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Defendant – Appellant and Appendix of the Appellant, Mark Rath, was on the 11th day of February 2020, served electronically to the following:

Kayla Jones – KaylaJones87@outlook.com

Rule 32(e) Compliance

I Mark Rath hereby certify that the above brief is in compliance to N.D.R.App.P. Rule 32(a)(8) that this brief including this certificate page is 30 pages, 8 pages under the 38 page limitation set forth by N.D.R.App.P. Rule 32(a)(8).

/s/Mark Rath

Mark Rath