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SUPREME COURT OF THE STATE OF NORTH DAKOTA
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Robert A. Kautzman,)
)
) Appellant and)
) Cross-Appellee,)
)
) v.)
)
 Rachel M. Kautzman,)
)
) Appellee and)
) Cross-Appellant,)
)

JUN 25 1998

STATE OF NORTH DAKOTA

Supreme Court No. 980004

APPELLANT'S REPLY BRIEF

APPEAL FROM JUDGMENT OF THE DISTRICT COURT,
CASE NO. CV-95-00115 COUNTY OF CASS
EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE LAWRENCE A. LECLERC

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STATEMENT OF THE ISSUES

- I. THE TRIAL COURT CORRECTLY DENIED PLAINTIFF'S MOTION TO AMEND.
- II. THE TRIAL COURT CORRECTLY DENIED PLAINTIFF'S REQUEST FOR AN AWARD OF ATTORNEY FEES.
- III. PLAINTIFF'S REQUEST FOR AN AWARD OF ATTORNEY FEES ON APPEAL SHOULD BE DENIED.

ARGUMENT

- I. THE TRIAL COURT CORRECTLY DENIED PLAINTIFF'S MOTION TO AMEND.

With a few very minor changes, the trial court adopted verbatim the very lengthy proposed findings of fact and conclusions of law attached to Plaintiff's post-trial brief. Compare DN 354 with DN 362. This after lengthy proceedings which the trial court found complex enough to order a Special Master. Even after the court chose to adopt verbatim the findings and conclusions proposed by Plaintiff in her argumentative, advocative document, she moved to amend those findings.

Plaintiff finds fault with the trial court's denial of her request to add unnecessary language to the judgment. The trial court made very clear that Robert was obligated to pay to Rachel those amounts awarded in the judgment. (Transcript on Appeal - Hearing on Motions to Amend, December 19, 1997, at pages 10-14). Robert acknowledged through his attorney that he understood those obligations. (Id). Plaintiff cites to no new evidence on which to base her fears that Robert will not abide by the judgment once a final judgment ends these

proceedings. Courts must base their rulings on factual evidence, and not the fears of one party. The trial court properly denied Plaintiff's motion to amend.

II. THE TRIAL COURT CORRECTLY DENIED PLAINTIFF'S REQUEST FOR AN AWARD OF ATTORNEY FEES.

In order to obtain a reversal of a trial court's denial of an award of attorney fees, an "appellant must affirmatively establish[] that the trial court abused its discretion." Lill v. Lill, 520 N.W.2d 855, 858 (N.D. 1994). The "principal standards guiding a trial court's award of attorney fees in a divorce action are one party's need and the other party's ability to pay." Id. Appropriate considerations are the property owned by each party, the liquidity of the assets awarded each party, and "whether one party's actions unreasonably increased the time spent on the case." Quamme v. Bellino, 540 N.W.2d 142, 148 (N.D. 1995).

The trial court awarded Rachel the cash from the marital estate, and an incredible amount of spousal support. Robert's award consists largely of real estate and his business corporation, which the judgment itself places encumbrances upon. The court's denial of an award of attorney fees properly reflects the large award of assets to Plaintiff and the liquidity and income-producing capacity of those assets.

Robert was already required to pay the exorbitant fees of the Special Master. The Special Master could have valued the business merely by looking at tax returns and valuing the company's basic equipment. Instead he adopted the suspicions

of Plaintiff and her counsel and sought substantial, inappropriate discovery. A great deal of attorney time was expended responding to unnecessary, repetitive requests for discovery based on nothing but the suspicions of Plaintiff and her counsel. The trial court apparently regarded its property division and spousal support award as punishment enough for the perceived sins of Robert, and apparently considered the extra time spent responding to Plaintiff's chasing of fictions.

The judgment did not leave Plaintiff the victim of "a marked inequality of the parties' assets and income." E.g., Lill, 520 N.W.2d at 858. The trial court's denial of Plaintiff's request for attorney fees was proper.

III. PLAINTIFF'S REQUEST FOR AN AWARD OF ATTORNEY FEES ON APPEAL SHOULD BE DENIED.

This court should maintain its preference for allowing the trial court to make decisions regarding attorney fees. E.g., Boen v. Boen, 438 N.W.2d 170, 174(N.D. 1989). The trial court awarded Rachel very substantial amounts of cash assets with a very large potential to produce income.

CONCLUSION

The trial court properly denied Plaintiff's motion to amend and her request for attorney fees. This court should affirm those decisions of the trial court and deny Plaintiff's motion to this court for attorney fees.

Dated this 25th day of June, 1998.

RESPECTFULLY SUBMITTED:

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