

**ORIGINAL**

IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA

20030324

Phyliss Baker,

Petitioner - Appellee,

vs.

Gary Mayer,

Respondent-Appellant.

)  
) Supreme Court No. 20030324

)  
) District Court No. 03-C-50

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JAN 30 2004

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STATE OF NORTH DAKOTA

APPEAL FROM A DISORDERLY CONDUCT RESTRAINING ORDER  
NORTHEAST JUDICIAL DISTRICT

THE HONORABLE LESTER KETTERLING, PRESIDING

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**BRIEF OF APPELLANT**

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William R. Hartl (ID 05213)  
130 South Main  
P.O. Box 319  
Rugby, North Dakota 58368  
(701) 776-5150

ATTORNEY FOR APPELLANT  
Gary Mayer

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## I. STATEMENT OF CASE

Gary Mayer (Mayer) appeals the district court order granting Phyliss Baker's (Baker) Petition for Disorder Conduct Restraining Order. Phyliss Baker and Gary Mayer had a relationship which lasted for quite some time. On July 25, 2003, Baker filed a Petition for Disorderly Conduct Restraining Order against Mayer, and the court entered a Temporary Disorderly Conduct Restraining Order against Mayer.

On August 20, 2003, the court held a hearing on the Petition for Disorderly Conduct Restraining Order at which both Baker and Mayer appeared. After hearing testimony, the court took the matter under advisement and entered a Memorandum of Decision and Disorderly Conduct Restraining Order on September 10, 2003 effective until September 10, 2004. Mayer filed a Notice of Appeal on November 6, 2003.

## II. STATEMENT OF FACTS

Phyliss Baker (Baker) and Gary Mayer (Mayer) had a relationship which lasted for quite some time. Tr. 10; Appendix at 6. On July 25, 2003, Baker filed a Petition for Disorderly Conduct Restraining Order against Mayer in which Baker alleged that Mayer "follows me, he drives by my house many times slowly & looks in windows & door everywhere I go he arrives soon after I do." Appendix at 2. On July 25, 2003 the court entered a Temporary Disorderly Conduct Restraining Order against Mayer. Appendix at 4.

On August 20, 2003, the court held a hearing on the Petition for

Disorderly Conduct Restraining Order and both Baker and Mayer were present. Appendix at 6. Mayer informed the court that he disagreed with the Temporary Disorderly Conduct Restraining Order. Tr. 2. Baker did not present any additional information or testimony to the court in support of the Temporary Disorderly Conduct Restraining Order. Tr. 4.

Mayer testified that he rented a garage a block from Baker's home where he kept his pickup, and that he would pass by Baker's house when traveling from his office to his garage. Tr. 6 & 11. There are three yield signs on this street, Mayer would stop at each yield sign and look both ways for oncoming traffic, and in doing so he would be looking towards Baker's home. Id.

Mayer also testified that several people told him that Baker was moving. Tr. 10. When Mayer saw Baker at a stop sign by Rugby Homes, he stopped and asked her if she needed "a pickup, my S10 or trailer to move, and [Baker] did not answer." Tr. 7. Baker simply drove away and there were no harsh words or yelling by either person. Id. Mayer had not been served with the Disorderly Conduct Restraining Order prior to this conversation. Tr. 12.

Mayer further testified that he eats numerous meals in restaurants and has eaten some meals at The Hub restaurant. Tr. 8. When Mayer ate at The Hub, he did not know that Baker was there, or that she even worked in The Hub restaurant. Instead, Mayer believed Baker worked at The Hub motel which is a different part of The Hub complex. Id.

Prior to being served with the Disorderly Conduct Restraining Order, Mayer did not know that Baker wanted Mayer out of her life. Tr. 10. Instead, Baker and Mayer would "talk on the phone several times a month," they went to the casino together and they exchanged emails on the computer. Id. Mayer initiated most of the phone calls and going to the casino, and Baker initiated most computer correspondence. Tr. 11. When Baker went online with her computer, Mayer received a "knocking" sound on his computer which he did not understand. Tr. 12.

### III. ISSUES

1. DID BAKER DEMONSTRATE REASONABLE GROUNDS WHICH SHOW THAT MAYER ENGAGED IN DISORDERLY CONDUCT?

### IV. LAW AND ARGUMENT

1. BAKER DID NOT DEMONSTRATE REASONABLE GROUNDS WHICH SHOW THAT MAYER ENGAGED IN DISORDERLY CONDUCT.

A district court may issue a disorderly conduct restraining order under North Dakota Century Code §12.1-31.2-01(5) only upon finding "reasonable grounds to believe that the respondent has engaged in disorderly conduct."

North Dakota Century Code §12.1-31.2-01(5)(d) (Supp. 2003). Tibor v. Lund, 1999 ND 176, ¶6, 599 N.W.2d 301.

Disorderly conduct is defined as:

intrusive or unwanted acts, words or gestures that are intended to adversely affect the safety, security, or privacy of another person.

Disorderly conduct does not include constitutionally protected activity.

North Dakota Century Code §12.1-31.2-01(1) (Supp. 2003).

To support a request for a disorderly conduct restraining order, the petitioner must present evidence of specific acts or threats constituting disorderly conduct, and 'subjective fear' is not sufficient to support an order.

Tibor v. Lund, 1999 ND 176, ¶17, 599 N.W.2d 301, citing Wishnatsky v. Huey, 1997 ND 35, ¶14, 560 N.W.2d 878 and Williams v. Spilovoy, 536 N.W.2d 383, 384-85 (N.D. 1995). Thus, a petitioner seeking a disorderly conduct restraining order must present evidence of specific acts or threats made by the respondent and which were intended to adversely affect the safety, security or privacy of another person. Tibor v. Lund, 1999 ND 176, ¶19, 599 N.W.2d 301

There is absolutely no evidence and not even an allegation that Mayer directed physical or verbal abuse towards Baker. There is also no evidence that Mayer intended that his actions would adversely affect the safety, security or privacy of Baker. Furthermore, Baker did not allege, and the evidence did not show that Mayer's conduct was threatening, harassing, or intimidating.

Mayer had a legitimate purpose in driving past Baker's home since it was on the route to a garage rented by Mayer. Tr. 6 & 11. There were three yield signs on this route, one of which was apparently near Baker's home, and Mayer would stop at the yield signs as required by law and look both directions

for oncoming traffic. Id. In doing so, Mayer apparently looked in the direction of Baker's home. However, there is no evidence to show that in driving to his garage, or in looking both directions for oncoming traffic, that Mayer intended to adversely affect the safety, security or privacy of Baker. Mayer simply obeyed traffic control devices, and in doing so, acted as a safe prudent driver would. There is no evidence that Mayer's driving or looking both ways for oncoming traffic actually did affect Baker's safety, security or privacy.

Mayer also had a legitimate purpose in eating at public restaurants. Mayer testified that he had eaten 57 meals in the last two months at restaurants, but that only 19% of his restaurant meals had been eaten at The Hub. Tr. 8. Mayer did not know Baker worked at The Hub restaurant. Id.

Baker is considered "a floater" and she works all over The Hub complex, including both the restaurant and the motel. Tr. 12. Baker estimated that she spends about one-half of her work time in the restaurant. Tr. 13. However, Baker does not do any waitressing. Instead, Baker does prep work in the kitchen and assists with dishwashing and putting dishes away. Tr. 14. Unless Baker came out of The Hub kitchen while Mayer was eating at the Hub Restaurant, Mayer and Baker would not have any contact with each other at The Hub restaurant. Id. In addition, Baker's name is not even on The Hub restaurant employee schedule, Tr. 12, so even if Mayer did ask another Hub restaurant employee whether or not Baker was working on a particular day, Mayer would not be able to obtain that information.



Baker did not demonstrate that Mayer's eating at The Hub, or that his asking if Baker was working on a particular day, was intended by Mayer to adversely affect Baker's safety, security or privacy. Furthermore, Baker did not demonstrate or provide evidence which would indicate that Mayer's actions affected her safety, security or privacy. Finally, Baker did not allege, nor was there any evidence, that Mayer's conduct "had become a 'pattern of intimidation.'" Tibor v. Lund, 1999 ND 176, ¶11, 599 N.W.2d 301, citing, Cave v. Wetzel, 545 N.W.2d 149, 150 (N.D. 1996). There is no evidence whatsoever that Baker was fearful of Mayer, or that she felt intimidated by Mayer's actions.

Mayer asked Baker if she needed Mayer's trailer, his S10 Blazer or a pickup to move. Tr. 7. This occurred on a public street prior to Mayer being served with the Disorderly Conduct Restraining Order, both parties were in their vehicles, and there were no harsh words or yelling by either person. Tr. 7, 12. The district court found that

[w]hile she [Baker] was stopped at a stop sign, he [Mayer] made a left turn and stopped in his lane of traffic parallel with Baker. He [Mayer] offered the use of his pickup for the move. She [Baker] ignored him.

Appendix at 7-8. While the record is devoid of any testimony regarding Mayer making a left turn and stopping in his lane, it is noteworthy that Mayer acted legally and did not block Baker's lane of travel. Nothing about this exchange indicates, nor does the evidence show, that Mayer intended Baker's safety,

security or privacy to be adversely affected, or that Baker's safety, security or privacy was affected in any way at all.

The district court found that Baker wanted to break off the relationship with Mayer, that "Baker has politely tried to make it clear that the relationship is at an end, and that Mayer's conduct "is intrusive and unwanted, that is intended to adversely affect Baker's privacy". Appendix at 7. However, "[i]t is not enough under the statute that the petitioner for a restraining order wants the other person out of the petitioner's life." Williams v. Spilovoy, 536 N.W.2d 383, 385 (N.D. 1995); Tibor v. Lund, 199 ND 176, ¶12, 599 N.W.2d 301. Instead, a petitioner seeking a disorderly conduct restraining order must present evidence of specific acts or threats made by the respondent which were intended to adversely affect the safety, security or privacy of another person. Tibor v. Lund, 1999 ND 176, ¶9, 599 N.W.2d 301. Baker has failed to do this.

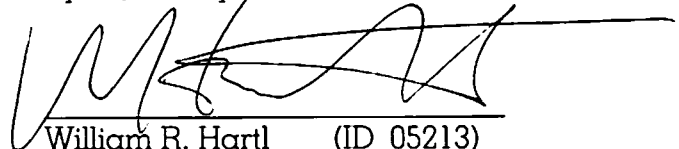
Mayer's conduct must be viewed in context. Id. at ¶10. Mayer and Baker had a relationship which lasted for quite some time. Prior to being served with the Disorderly Conduct Restraining Order, Mayer did not know that Baker wanted him out of her life. Tr. 10. Why should Mayer know or have reason to believe that Baker wanted him out of her life? Within the year preceding the Disorderly Conduct Restraining Order, Mayer and Baker would talk on the phone several times a month and Baker accompanied Mayer to casinos on numerous occasions. Id. Baker's conversing with Mayer on the telephone and her accompanying Mayer to casinos certainly would not give a reasonable

person the impression that Baker wanted Mayer out of her life, or that Baker feared for her safety or security, or that Mayer was interfering with Baker's privacy. In fact, none of Mayer's actions demonstrate that Mayer intended to adversely affect Baker's safety, security or privacy.

#### V. CONCLUSION

Mayer did not threaten Baker, and the evidence does not show that he acted with an intent to adversely affect the safety, security or privacy of Baker. Since the evidence does not show that Mayer engaged in a pattern of disorderly conduct as defined in North Dakota Century Code §12.1-31.2-01(1) a Disorderly Conduct Restraining Order is not authorized. Williams v. Spilovoy, 536 N.W.2d 383, 385(N.D. 1995). Therefore, the North Dakota Supreme Court should REVERSE the Disorderly Conduct Restraining Order entered by the district court.

Respectfully submitted this 30th day of January, 2004.



William R. Hartl (ID 05213)  
P.O. Box 319  
130 South Main  
Rugby, North Dakota 58368  
(701) 76-5150

Attorney for Respondent-Appellant  
Gary Mayer