20100046

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

R.F., individually and as Personal Representative of the Estate of E.F., deceased, Plaintiff and Appellee v. M.M. and R.J.M., a minor child, by and through her guardian, M.M., Defendant and Appellant.	**REPLY BRIEF OF APPELLANT** Supreme Court No. 20100046 District Court No. 09-09-R-00222

Appeal from the Memorandum Opinion and Order
entered February 1, 2010, and from the Judgment
entered February 19, 2010

Cass County District Court - East Central Judicial District
The Honorable Douglas Herman, Presiding

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1. I. In reply to Appellee's first issue, his action was both an action to establish paternity and an action to establish grandparent visitation. The establishment of paternity is a sine qua non for the establishment of grand parent visitation. R.F.'s lack of standing, both personally and as a representative of the estate of E.F., relates to the paternity action only.

2. II. In reply to Appellee's fourth issue, lack of standing at the commencement of the action is not "harmless error" and now effects a substantial right of M.M. and R.J.M..

ARGUMENT IN REPLY

3. **I. In reply to Appellee's first issue, his action was both an action to establish paternity and an action to establish grandparent visitation. The establishment of paternity is a sine qua non for the establishment of grand parent visitation. R.F.'s lack of standing, both personally and as a representative of the estate of E.F., relates to the paternity action only.**

4. This issue on appeal is a challenge of Plaintiff's standing to bring a paternity action pursuant to N.D.C.C. 14-20-37 and the trial court's conclusion that, "Plaintiff, R.F., has standing to pursue the paternity action as an alleged grandparent pursuant to the terms of the Uniform Parentage Act adopted by North Dakota in 2005".

5. In R.F.'s response brief, Brief of Plaintiff/Appellee, he now argues that his action is not a paternity action but, "This is an action in which Appellee, first and foremost, sought grandparental rights to visitation..." and implies the standing requirement of N.D.C.C. 14-20-37 is of no consequence. (Appellee's Brief, ¶ 22). R.F. is attempting an end run around N.D.C.C. 14-20-37 by suggesting that in addition to the Uniform Parentage Act, paternity can be alleged and proved pursuant to the grand parent visitation statute, N.D.C.C. 14-09-05.1, when he says, "Appellant

argues with her Brief that Appellee lacked standing to bring a *paternity* action under North Dakota Century Code Section 14-20-37. However, this argument is nothing but a red herring. This is because there is obviously no requirement contained within North Dakota Century Code Section 14-09-05.1 that a person bring a paternity action prior to bringing a grandparent rights action." (Brief of Appellee. ¶27).

6. Clearly, until the filing of R.F.'s Brief of Appellee, everyone, including R.F. and the trial court, considered this action to be: First, an action to establish paternity pursuant to N.D.C.C. 14-20-37; and, Secondly, if paternity was established, an action in pursuit of grandparent visitation pursuant to N.D.C.C. 14-09-05.1.

7. R.F.'s first complaint is captioned, "[R.F.], for and on behalf of [E.F.]". (Appendix, page 11). In his prayer for relief, he asks the trial court to order that, "[E.F.] be declared and adjudicated the father of the minor child, R.J.M. and for the minor child's birth certificate to be amended to reflect the same." (Appendix, page 12).

8. R.F.'s amended complaint is captioned, "[R.F.], individually and as Personal Representative of the Estate of [E.F.], deceased". (Appendix, page 41) In his amended complaint, R.F. bifurcates the paternity and visitation action by captioning each action separately as "Count I -

Paternity" and "Count II - Visitation". (Appendix, page 42). His prayer for relief again asks the trial court to order that, "[E.F.] be declared and adjudicated the father of the minor child, R.J.M. and for the minor child's birth certificate to be amended to reflect the same." (Appendix, page 42). Both captions, both prayers for relief and the division of count one and count two in his amended complaint, make it clear that R.F. recognized that these are two separate actions and that in order to pursue grandparent visitation rights, he must first establish the paternity of R.J.M..

9. Furthermore, R.F. acknowledged in his April 20, 2009, letter brief to the trial court, that the standing requirement of N.D.C.C. 14-20-37 applies in this case. In that letter brief, R.F. states, "In this regard, counsel [for R.F.] believes there are actually two different standing requirements applicable to this case. The first is [R.F.]'s standing to bring a paternity action on behalf of his son, [E.F.]. The second is [R.F.]'s standing to bring an action for grandparental visitation. The UPA is applicable to the first standing requirement and N.D.C.C. § 14-09-05.1 is applicable tot he second standing requirement." (Appendix p. 29)

10. In addition, the trial court clearly approached the issue of standing from the standpoint of N.D.C.C. 14-20-37 when, in denying M.M.'s Rule 12b motion to dismiss, ruled, "Plaintiff, [R.F.], has standing to pursue the

paternity action as an alleged grandparent pursuant to the terms of the Uniform Parentage Act adopted by North Dakota in 2005. See, N.D.C.C. § 14-20-01 through 14-20-66 (2005, Ch. 135)." (Appendix p. 34).

11. N.D.C.C. 14-20-02 defines "parent" as, "...an individual who has established a parent-child relationship under § 14-20-07". Whether this action was entitled "paternity action" or "grandparent visitation action", by all accounts, even R.F.'s newest argument, the action first and foremost encompasses "a proceeding to adjudicate parentage" and, consequently, standing defined by N.D.C.C. 14-20-37, is required.

12. II. In reply to Appellee's fourth issue, lack of standing at the commencement of the action is not "harmless error" and now affects a substantial right of M.M. and R.J.M.

13. R.F. argues that, if the trial court's denial of M.M.'s motion to dismiss on grounds of lack of standing, was error, it was a harmless error claiming that, "...there is no prejudice to Appellant because, *admittedly,* Appellee currently has standing now to litigate this action." (Appellee's Brief ¶ 47)

14. R.F., however, overlooks the fact that whether or not he now has standing to bring this action, North Dakota is no longer the home state of R.J.M. as she, along with M.M. and M.C., moved to South Carolina in

December, 2009. (Appendix page 104). Consequently, the trial court could not gain personal jurisdiction over M.M. and R.J.M. and if R.F. wished to now pursue grandparent visitation, he would have to do so in R.J.M.'s home state of South Carolina where court ordered grandparent visitation takes second place behind the decision of a parent.

15. Should this case be remanded for dismissal due to lack of standing and R.F. then brought a similar action in R.J.M.'s home state of South Carolina, the likelihood of a favorable ruling would be slight. In Camburn v. Smith, the Supreme Court of South Carolina clearly articulated the standard to be applied in awarding grand parent visitation. In that case, the Supreme Court of South Carolina stated, "A court considering grandparents' visitation over a parent's objection must allow a presumption that a fit parent's decision is in the child's best interest...so long as a parent adequately cares for his or her children, there will normally be no reason for the State to inject itself in to the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children...[t]he presumption that a fit parent's decision is in the best interest of the child may be overcome only by showing compelling circumstances, such as significant harm to the child, if visitation is not granted...[t]he fact that a

child may benefit from contact with the grandparent, or that the parent's refusal is simply not reasonable in the court's view, does not justify government interference in the parental decision...[i]n sum, parents and grandparents are not on an equal footing in a contest over visitation...". Camburn v. Smith, 586 SE 2d 565, 579-580, 355 SC 574 - SC: Supreme Court, 2003.

16. The trial court's error regarding R.F.'s standing or lack-there-of, is anything but harmless. Should this Court remand with instructions to grant M.M.'s 12b motion to dismiss, the ultimate result will be that M.M.'s decision regarding R.J.M.'s upbringing will almost certainly be protected by the laws of her home state of South Carolina and the child rearing decisions of M.M. will not subjected to second guessing and government interference. Thus, the trial court's error clearly affects a substantial right of M.M. and R.J.M.

CONCLUSION

17. In the matter now before this Court, the Defendant respectfully requests this Court remand this matter to the District Court with instructions to grant Defendant's pretrial order for dismissal on the grounds that Plaintiff lacked standing to bring the paternity action or, in the alternative, remand to the District Court with instructions to enter findings consistent with the evidence and deny Plaintiff's request for grand parent visitation pursuant to N.D.C.C. 14-09-05.1.

Dated this 28th day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Defendant/Appellant was served electronically on this 28th day of June, 2010, addressed to:

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/s/ Stephen Dawson
Stephen Dawson