

STATE OF NORTH DAKOTA
IN THE SUPREME COURT
SUPREME COURT CASE NUMBER 20150229

Paul W. Aker,)	
)	
Plaintiff and Appellant,)	APPELLANT'S BRIEF
)	
vs.)	
)	
Diane C. Aker,)	
)	
Defendant and Appellee.)	

**Appeal from the Order Denying Plaintiff's Motion
To Amend Parenting Time Provisions dated June 11, 2015,
made by the Honorable Bradley A. Cruff,
Judge of the District Court, Richland County, North Dakota**

**District Court of the Southeast Judicial District
The Honorable Bradley A. Cruff, Presiding
District Court No. 39-2010-DM-00194**

John Wilka (Admitted Pro Hac Vice)
Amy M. Clark (North Dakota ID# 06770)
Attorneys for Appellant
Smith, Strege, Fredericksen & Butts, Ltd.
321 Dakota Avenue
P.O. Box 38
Wahpeton, North Dakota 58074
(701) 642-2668

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[¶ 1] STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶ 2] ISSUE 1: Whether the lower court erred in finding it lacked jurisdiction to address the parenting time issues raised by Plaintiff, thereafter denying Plaintiff's motion in its entirety.

[¶ 3] ISSUE 2: Whether the lower court erred in requiring Plaintiff to pay Defendant attorney fees in the amount of \$2,000.00.

[¶ 4] Trial Court Found – Issue 1: The trial court found that it lacked jurisdiction to address the parenting time issues raised by Plaintiff and denied Plaintiff's motion in its entirety.

[¶ 5] Trial Court Found – Issue 2: Plaintiff voluntarily paid the \$2,000.00 attorney fee sanction, thereby waiving this issue.

[¶ 6] STATEMENT OF THE CASE

[¶ 7] Plaintiff Paul W. Aker, hereinafter referred to as "Paul," brought a motion asking the lower court to specify exact dates and times for his parenting time; change the parenting time exchange location, or in the alternative to allow him a reduction in child support for his increased travel expenses; grant him alternating weekends during Defendant's summer parenting time; to allow Plaintiff to attend one-half of his children's activities; to compel C.L.A. to attend his holiday parenting time; and to make up for lost parenting time. Plaintiff's Appendix (hereafter "App.") at 127.

[¶ 8] There have been several previous hearings between the parties with regard to their acrimonious relationship following their divorce – specifically regarding parenting time of the parties' minor children. The original judgment was entered on July 13, 2010, based on the parties' stipulation, and it awarded the parties equal residential

responsibility of the minor children. App. at 34 - 44. It should be noted that the present holiday parenting time schedule outlined in the initial Judgment has never been specifically modified, and it is contained in paragraph 5(a)(ii) of the initial Judgment. App. 37. At the time the initial Judgment was entered, the parties lived in close proximity of one another and had equal residential responsibility of the minor children. App. at 37. An Order was entered on October 4, 2011, which placed restrictions on Paul's parenting time and imposed alcohol dependency evaluation and counseling requirements. App. at 45-46. An Ex Parte Interim Order was entered on October 5, 2011, which required supervised parenting time for Paul in Wahpeton, North Dakota. App. at 47-48. An Interim Order was entered on November 16, 2011, which set specific supervised parenting time for Paul. App. at 49 – 50. An Amended Judgment was entered on April 19, 2012. App. at 59 – 63. The Amended Judgment awarded Diane primary residential responsibility of the children, and it required Paul and Diane to follow a counselor's recommendations in determining Paul's parenting time. App. at 59. As stated in the Amended Judgment, "[t]he goal of the parties' use of [the counselor] shall be for Paul to have a regular and consistent parenting schedule with his children[.]" App. at 59-60. A Second Amended Judgment was entered on February 26, 2014. App. 83-84. The Second Amended Judgment modified Paul's child support obligation, and it required the parties to meet for exchanges of the minor children at the Milbank/Summit exit in South Dakota due to Paul's move to Sioux Falls, South Dakota. App. 83-84.

[¶ 9] A temporary disorderly conduct restraining order was entered in favor of Diane and against Paul on August 28, 2014, and a disorderly conduct restraining order was subsequently entered, in related case number 39-2014-CV-00234. Diane filed a

motion in the present case at approximately the same time. A Third Amended Judgment was entered, which required supervised exchanges of the minor children in Wahpeton, North Dakota. App. 89-96. This resulted in Paul being responsible for all travel associated with parenting time exchanges, with him driving from Sioux Falls, South Dakota to Wahpeton, North Dakota. Additionally, a Memorandum Opinion dated September 22, 2014, was entered, which granted set summer parenting time to Paul. App. 85-88. The Memorandum Opinion did not specifically award weekend or holiday parenting; but the lower court did address the parties' practices in its findings of fact:

2. Pursuant to page 1, Paragraph 1(a)(i) of the Amended Judgment dated April 19, 2012, Paul's parenting time is to be determined as per Cynthia Swanson who had been providing family counseling to Paul and the children at the time.
3. The court does not believe that counseling with Ms. Swanson continues today nor that any definitive parenting plan has resulted from Ms. Swanson's counseling.
4. Whether with the assistance of Ms. Swanson or not, the parties seem to have adopted the basic default parenting plan schedule which includes alternating weekend and holiday parenting time in addition to six weeks in the summer. It is the lack of a fixed summer scheduled that has resulted in the immediate motion.

App. at 85.

[¶ 10] Due to notice issues with the prior motion, Paul filed a Rule 60(b) motion asking for reconsideration, and a Fourth Amended Judgment was subsequently entered on November 12, 2014. App. 111 – 26. The Fourth Amended Judgment did not affect the supervised exchange location in Wahpeton, North Dakota. App. 111-26. The Fourth Amended Judgment incorporated all previous orders and judgments from the lower court (prior orders and judgments did not incorporate previous versions), which included the summer parenting time provision from the Third Amended Judgment and the holiday

parenting time schedule from the initial Judgment. App. 111 – 26. No set schedule has ever been ordered that outlines weekend parenting time for Paul (despite it being the parties' informal arrangement) or that formally sets a holiday schedule other than the one set forth in the initial judgment, nor is there a reference in the Fourth Amended Judgment to parenting time based on a counsellor's recommendations.

[¶ 11] Paul then brought the present motion on March 17, 2015, which requested a set weekend and holiday parenting time schedule and a modification to the exchange location, among other things. App. 127 – 30. Diane filed an opposing motion on March 25, 2015. App. at 143-44.

[¶ 12] The lower court found that there had been no material change in circumstances since the last entry of the judgment of the court and that it lacked jurisdiction to modify the prior judgment. The lower court denied Paul's motion in its entirety, and it sanctioned Paul \$2,000.00 in attorney's fees to be paid to Defendant. App. at 230 – 34.

[¶ 13] This appeal followed. App. at 235.

[¶ 14] STATEMENT OF FACTS

[¶ 15] Paul and Diane were married on June 14, 1990, and were divorced on July 13, 2010. App. at 22-33. Paul and Diane have four children together, two of which are still minors. App. at 22. The divorce judgment was entered by stipulation of the parties, and it granted Paul and Diane equal residential responsibility of the minor children. App. at 10-21. At the time the divorce was entered, the parties lived in close proximity to one another. App. at 69.

[¶ 16] Through the course of litigation, the parties' parenting time and custodial arrangements have been modified, as outlined above. Diane now has primary residential responsibility subject to Paul's parenting time. The current parenting time schedule is as follows:

Summer Parenting Time: Plaintiff will have summer parenting time with C.R.A. from July 1st until August 14th each and every year. Defendant will have alternating weekends during this time period, commencing with the second Friday in July. Plaintiff shall coordinate and defer to C.L.A. regarding his summer parenting time with C.L.A.

The parties shall abide by the following parenting time schedule:

Memorial Day weekend: Defendant – even numbered years; Plaintiff – odd numbered years.

Labor Day weekend: Defendant – odd numbered years; Plaintiff – even numbered years.

July 4th weekend: Defendant – odd numbered years; Plaintiff – even numbered years.

Labor Day weekend: Defendant – even numbered years; Plaintiff – odd numbered years.

Thanksgiving: Defendant – odd numbered years; Plaintiff – even numbered years.

Christmas Eve: Defendant every year.

Christmas Day: Plaintiff every year.

New Year's Eve/Day: defendant – odd numbered years; Plaintiff – even numbered years.

Easter: Defendant – even numbered years; Plaintiff – odd.

App. 115 – 16. Since entry of this holiday parenting time schedule in the initial judgment, Paul has moved to Sioux Falls, South Dakota. App. at 69. It is approximately

121 miles from Sioux Falls, South Dakota to Wahpeton, North Dakota, which is where the parties currently exchange the children. App. at 135.

[¶ 17] Of important note is that for many of the main holidays (Christmas, Thanksgiving, etc.), Paul is only awarded a period of 24 hours of parenting time. App. at 115-16. Also, Paul has never officially been granted weekend parenting time with the minor children, despite it being the parties' practice. App. at 85, 115 – 16; see 160 – 64 (Kids Konnection schedule). Additionally, no there are no set times ordered for exchanges for holiday or weekend parenting time. App. at 115-16. Following his move to Sioux Falls, Paul and Diane would mutually agree to additional parenting time for Paul, and they would meet in the middle for exchanges. App. at 83-85. This changed upon entry of a restraining order in related case number 39-2014-CV-234.

[¶ 18] Upon entry of the restraining order, the parties' exchange location for pick up and drop off of the minor children is Wahpeton, North Dakota, meaning that Paul now does all of the driving. App. at 116. Additionally, on multiple occasions since issuance of the restraining order, Diane has refused to follow the parties' informal arrangement to allow Paul greater durations of parenting time than what has been specifically court ordered, as set forth below. T. p. 15, l. 18-21. This means that Paul is doing significant amounts of driving for very little amounts of parenting time.

[¶ 19] Throughout the course of the litigation, the parties have made various and sundry allegations of wrongdoing on the other party's part. The case has been in near constant litigation since its inception. The trial court has noted at various times that the parties will likely be in litigation until the youngest child of the parties, currently age 7, turns 18.

[¶ 20] The present appeal concerns Paul's motion that requested a concrete schedule with set exchange times. Paul alleges that Diane has denied him parenting time on a number of instances, specifically, the Thanksgiving holiday of 2014 and a week in Easter of 2015. App. 131-36; T. p. 9, l. 18-25; T. p. 10, l. 1-3; T. p. 12, l. 1-25; T. p. 13, l. 1-25. Paul alleges, which Diane denies, that Diane has embarked upon a course of conduct of alienating the parties' minor children from Paul. App. 131-136; T. p. 9, l. 18-25; T. p. 10, l. 1-3; T. p. 12, l. 1-25; T. p. 13, l. 1-25. Paul also requested in his affidavit that he be allowed to attend the extracurricular activities of the parties' daughter, CLA's. App. at 131-36. Paul also claims that the order for protection, and the new strictures attendant upon the same, have resulted in a de facto reduction of his parenting time. App. at App. 131-36; T. p. 9, l. 18-25; T. p. 10, l. 1-3; T. p. 12, l. 1-25; T. p. 13, l. 1-25.

[¶ 21] Paul testified that, in the months following the court's most recent order, C.L.A. had not come to visit him at all in Sioux Falls, South Dakota during the 2014 - 2015 school year. This was in spite of the fact that he had put in a request every week throughout the year to have her do so. Transcript of Hearing dated June 3, 2015 (hereafter "T."), p. 8, l. 4-14. Also, for the first time since the parties' divorce, Paul had to spend Thanksgiving away from the rest of his family because Diane would only give him visitation with C.R.A. on the day of Thanksgiving. He chose to travel all the way to North Dakota to spend time with C.R.A. on just Thanksgiving Day, which resulted in he and C.R.A. missing Thanksgiving activities with the rest of Paul's family. T. p. 9, l. 19-24. This had never occurred at any time since the parties' divorce, and only occurred subsequent the court's most previous order. This one day Thanksgiving holiday had never occurred before. T. pp. 9-10. The parties live over 200 miles apart, and Paul had

to choose between a one day holiday with C.R.A. and spending time with his new family on Thanksgiving. He chose time with C.R.A. T. p. 9-10.

[¶ 22] Although the parties had previously agreed that Paul would get extended holiday parenting time for Memorial Day, 2015, Diane only arranged for Paul to have parenting time on Memorial Day itself. T. 38-39. Even though she claimed that she was not alienating, and had not alienated the parties' minor children from Paul, Diane directly admitted that she did not want Paul to have the ability to attend C.L.A.'s extracurricular activities. T. p. 58, l. 10-11. While denying that she is to blame for the situation, Diane does admit that Paul has become alienated from the minor children one by one as time and distance go by. T. p. 60, l. 2-5.

[¶ 23] Although the parties offered divergent opinions, Paul was adamant that following the court's entrance of the disorderly conduct order for protection that Diane not only continued with a course of alienating the children from him, but increased said alienation. T. p. 18, l. 15-24. It was for this reason that the Paul sought very clear and concise parenting time, removing any ambiguity. T. p. 18, l. 15-24.

[¶ 24] In spite of the fact that she resisted Paul's instant motion in its totality, on cross-examination, Diane admitted time after time that it would be in the best interests of the children and the parties to have a concrete, specifically explicit parenting time schedule. T. p. 62, l. 69-70.

[¶ 25] ARGUMENT

[¶ 26] 1. THE TRIAL COURT ERRED BY HOLDING THAT THERE HAD BEEN NO MATERIAL CHANGE OF CIRCUMSTANCE SINCE THE ENTRANCE OF THE COURT'S MOST RECENT ORDER

[¶ 27] a. Standard of Review.

[¶ 28] The proper standard of review is the clearly erroneous standard. A district court's determination on a material change in circumstances warranting modification of spousal support is a finding of fact and will not be reversed on appeal unless clearly erroneous. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, a reviewing court is left with a definite and firm conviction the trial court made a mistake. Hoverson v. Hoverson, 2015 ND 38, ¶ 16, 859 N.W.2d 390

[¶ 29] b. The Lower Court Erred in Finding No Material Change of Circumstances Had Occurred.

[¶ 30] The lower court erred in finding that no material change of circumstances had occurred. Namely, the ongoing conflict between the parties pertaining to Paul's parenting time constitutes a material change in circumstances, along the effects of the entry of a recent restraining order. The case of Hoverson is directly on point with the instant case. In the instant case, the lower court has noted that there is significant conflict, which is ongoing between the parties. In Hoverson,

The district court modified the parties' parenting time after making findings about the parties' conflict and lack of agreement in implementing [the father's] parenting time. We recognize conflict may be a change in circumstances warranting modification of parenting time.

Id. ¶ 22.

[¶ 31] In the present case, even though both parties testified that there was alienation between the father and the parties' minor children, and even though the parties agreed that there was bickering and fighting regarding parenting time following the court's most recent order, the court nonetheless found that there was no material change of circumstances. App. at 234. Both parties admitted that alienation had occurred. T. p.

60, l. 2-9. There was disagreement however, regarding who was to blame. T. p. 60, l. 2-9. The lower court's finding that there was no material change of circumstances was clearly erroneous. As this court stated in Hoverson, conflict can be a change of circumstances. Id. ¶ 22. In addition to conflict, the parties in the present case are now dealing with the entry of a restraining order, which (a) modified the exchange location (making Paul solely responsible for the significant travel obligations) without any adjustment to the parenting time schedule, (b) affected the ability of the parties to discuss and modify the parenting time schedule, as they'd done in the past, and (c) following the entry of the restraining order, Diane (on multiple occasions), refused to allow Paul more than the court ordered amount of parenting time for holidays in accordance with the parties' prior practice.

[¶ 32] Alienation is also a factor that a court should be aware of. See, generally Martiré v. Martiré, 2012 ND 197, 822 N.W.2d 450. It is submitted that alienation is a process and not an event. Common sense dictates this. Both parties acknowledge bickering. Both parties acknowledge bickering following the court's most recent order. T. p. 18, l. 6-9. Both parties acknowledge a continuing and increasing amount of alienation between Paul and the minor children. T. p. 18, l. 6-9. Alienation has continued following the court's most recent order. T. p. 18, l. 6-9. A change of circumstances that is material has occurred.

[¶ 33] The only question now, which the court did not address, is whether Paul's request for specific relief regarding parenting time is in the best interest of the children. Over and over during cross-examination, Diane agreed that the requested changes would

LOCAL COUNSEL:

SMITH, STREGE,
FREDERICKSEN & BUTTS, LTD.
321 Dakota Avenue
P.O. Box 38
Wahpeton, North Dakota 58074
(701) 642-2668
(701) 642-4729 (Fax)

By /s/ Amy M. Clark

Amy M. Clark
Attorney for Plaintiff/Appellant
North Dakota ID #06770
amyclark@smithstrege.com

[¶ 39] CERTIFICATE OF COMPLIANCE

[¶ 40] The undersigned, as attorney for Appellant, Paul W. Aker, hereby certifies that Appellant's Brief was prepared with proportional typeface and that Appellant's Brief does not exceed 8,000 words.

[¶ 41] Dated this 18th day of November, 2015.

WILKA & WELTER, LLP
300 N. Dakota Avenue, Ste. 510
Sioux Falls, SD 57104
(605) 338-9711

By /s/ John M. Wilka
John M. Wilka
Attorney for Plaintiff/Appellant
Admitted Pro Hac Vice
john@wilkawelterlaw.com

[¶ 42] CERTIFICATE OF SERVICE

[¶ 43] I hereby certify that on the 18th day of November, 2015, true and correct copies of Appellant's Brief and Appellant's Appendix were served electronically upon Sam Johnson, attorney for Appellee, at the following e-mail address: jlo@702com.net.

[¶ 44] Dated this 18th day of November, 2015.

/s/ Amy Clark
Amy Clark (#06770)