

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

Paul W. Aker,)	
)	
Plaintiff and Appellant,)	
)	APPELLEE'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**

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[¶ 1] STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶ 2] ISSUE 1: The Lower Court did not error in finding that there was no material change of circumstances, therefore, lacked jurisdiction to address the Plaintiff's Motion.

[¶ 3] Trial Court Found- Issue 1: Trial Court found that it lacked jurisdiction to address the parenting time issues raised by Plaintiff and denied Plaintiff's Motion in it's entirety.

[¶ 4] STATEMENT OF THE CASE

[¶ 5] Plaintiff Paul W. Aker, hereinafter referred to as "Paul" submitted a Motion on March 17, 2015. Appellant's Appendix (hereafter "App.") 127-30. Defendant, Diane C. Aker, n/k/a Diane C. Neiber, hereinafter referred to as "Diane", submitted an Opposing Motion on March 25, 2015. Appellant's App. at 143-44.

[¶ 6] Diane filed a Notice of Motion and Motion to Amend Amended Judgment dated August 28, 2014. App. 1-3. Diane's Motion sought to amend paragraph 2 of the Second Amended Judgment dated February 26, 2014 and paragraph 5(a)(i) and 5(r) set forth in the Amended Judgment dated April 19, 2012 . App. 1-3; Appellant's App. 59-63. Diane submitted a Brief in Support of Defendant's Motion dated August 28, 2014. App. 4-8. Said Brief specifically discusses modification of the parties parenting rights and responsibilities of children subsequent to any divorce pursuant to North Dakota Century Code Section 14-05-22. App. 5.

[¶ 7] In support of Diane's Motion, she submitted the Affidavit of Diane C. Aker in Support of Motion dated August 27, 2014. App. 9-14.

[¶ 8] In paragraph 32 of said Affidavit, Diane requests that all of Paul's parenting time be modified to supervised parenting time. App. 13.

[¶ 9] Diane submitted a Supplemental Affidavit of Diane C. Aker in Support of Motion dated August 28, 2014. App. 15-17.

[¶ 10] In paragraph 12 of said Affidavit, Diane requests that all of Paul's parenting time be supervised at Kids Konnection. App. 17.

[¶ 11] Paul submitted a document entitled Plaintiff's Final Argument on August 29, 2014. App. 18-21. Within said document, Paul requests the Court to delineate a specific parenting time schedule. App. 18-21.

[¶ 12] Diane submitted a document entitled Defendant's Final Argument dated September 2, 2014. Said document specifically discusses amending Paul's parenting plan. App. 22-24.

[¶ 13] A Memorandum of Opinion dated September 22, 2014, was entered, which modified Paul's parenting time. Appellant's App. 85-88. The Memorandum Opinion considered Paul's Motion with supporting documentation, and Diane's Motion, with supporting documentation, all of which discuss a modification of Paul's parenting plan. App. 1-24.

[¶ 14] Findings of Fact and Order for Third Amended Judgment was entered on September 23, 2014. Appellant's App. 89-96. Pursuant to said Findings of Fact and Order for Third Amended Judgment, Paul, or his in-state counsel, Janel B. Fredericksen, did not respond to Diane's Motion, and therefore, was found in default. Appellant's App. 89.

[¶ 15] A Third Amended Judgment was entered on September 24, 2014. Appellant's App. 97-98. Said Third Amended Judgment modified Paul's parenting time. Appellant's App. 89-98.

[¶ 16] Paul filed a Rule 60(b) Motion asking for reconsideration, and a Fourth

Amended Judgment was subsequently entered on November 12, 2014. Appellant's App. 111-126. The Fourth Amended Judgment confirmed the modification to Paul's parenting time as was set forth in the Third Amended Judgment. Appellant's App. 111-126.

[¶ 17] Paul's weekend parenting time schedule was set forth in the original Judgment dated July 13, 2010. Appellant's App. 34-44. It was, once again, confirmed in the Fourth Amended Judgment dated November 12, 2014. Appellant's App. 111-126.

[¶ 18] The District Court found that there had been no material change in circumstances since the last entry of Judgment of the Court and that it lacked jurisdiction to modify the prior Judgment. Appellant's App. 230-234. 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 Diane. Appellant's App. at 230-34.

[¶ 19] Paul appealed the District Court's Judgment. Appellant's App. at 235.

[¶ 20] STATEMENT OF FACTS

[¶ 21] Paul and Diane were married on June 14, 1990, and were divorced on July 13, 2010. Appellant's App. 22-33. Paul and Diane have four children together, two of which are still minors. Appellant's App. 22. The Divorce Judgment was entered by Stipulation of the parties, and it granted Paul and Diane equal residential responsibility of the minor children. Appellant's App. 10-21.

[¶ 22] An Amended Judgment was entered on April 19, 2012. Appellant's App. 59-63. A Second Amended Judgment was entered on February 26, 2014. Appellant's App. 83-84. A Third Amended Judgment was entered on September 24, 2014. Appellant's App. 97-98.

[¶ 23] A Fourth Amended Judgment was entered on November 12, 2014. Appellant's App. 111-126.

[¶ 24] Paul's weekend parenting time schedule was set forth in the original Judgment dated July 13, 2010, and it remains the same as set forth in the Fourth Amended Judgment dated November 12, 2014. Appellant's App. 34-44; 111-126.

[¶ 25] Diane submitted a Notice of Motion and Motion to Amend Amended Judgment dated August 28, 2014. App. 1-3. Diane requested that all of Paul's parenting time be supervised, which included a modification of Paul's weekend parenting time schedule. App. 1-3.

[¶ 26] Paul did not respond to Diane's Motion to modify Paul's parenting time (including his weekend parenting time schedule). Appellant's App. 89.

[¶ 27] Thereafter, not being satisfied with the Court's decision, 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. Appellant's App. 127-130. Diane filed an opposing Motion on March 25, 2015. Appellant's App. 143-144.

[¶ 28] As the District Court had already considered this very same issue, resulting in the Third Amended Judgment and Fourth Amended Judgment, the Court concluded that no material change in circumstances since the last entry of Judgment of the Court had occurred, and therefore, it lacked jurisdiction to modify the prior Judgment. Appellant's App. 230-234.

[¶ 29] ARGUMENT

[¶ 30] 1. THE TRIAL COURT DID NOT ERROR BY HOLDING THAT THERE HAD BEEN NO MATERIAL CHANGE OF CIRCUMSTANCES SINCE THE ENTRANCE OF THE COURT'S MOST RECENT ORDER.

[¶ 31] a. Standard of Review.

[¶ 32] The proper standard of review is the clearly erroneous standard. 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.

[¶ 33] b. The Lower Court did not error in finding no material change of circumstances had occurred.

[¶ 34] The Lower Court did not error in finding that no material change of circumstances had occurred. The Court entered Judgment on November 12, 2014 that addressed parenting time issues. Appellant's App. 111-126. This was specifically stated in the Court's Order Denying Plaintiff's Motion to Amend Parenting Time Provisions. Appellant's App. 230-234.

[¶ 35] The Court found that Paul did not present any evidence that he was shortened on any of his parenting time since the previous order. Appellant's App. 233.

[¶ 36] The Court further found that, "dates and times for parenting time and exchanges are set by the parties and Kids Konnection are specific." Appellant's App. 233.

[¶ 37] The Court further found that Paul's current Motion was without merit, and as such, ordered him to pay \$2,000.00 in attorney's fees. Appellant's App. 234. Paul waived the issue regarding the Court's order that he pay \$2,000.00 in attorney's fees, and as such, that issue is not before the Court. Appellant's Brief, p.1.

[¶ 38] The Court had already addressed Paul's parenting time as Diane submitted a Notice of Motion and Motion to Amend Amended Judgment dated August

28, 2014 requesting that all of Paul's parenting time be supervised, which included Paul's weekend parenting time schedule. App. 1-3.

[¶ 39] Paul did not respond to the Motion. Appellant's App. 89. Despite Paul's failure to respond to the Motion, the Court reviewed all of Paul's parenting time, including his weekend parenting time schedule. Appellant's App. 89-96.

[¶ 40] CONCLUSION

[¶ 41] For the foregoing reasons, Appellee respectfully requests this Court to affirm the District Court's Order dated June 11, 2015.

[¶ 42] Respectfully submitted this ____ day of _____, 2015.

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[¶ 43] CERTIFICATE OF COMPLIANCE

[¶ 44] The undersigned, as attorney for Appellee, Diane C. Neiber, f/k/a Diane C. Aker, hereby certifies that Appellee's Brief was prepared with proportional typeface and that Appellee's Brief does not exceed 8,000 words.

[¶ 45] Dated this _____ day of _____, 2015.

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[¶ 46] CERTIFICATE OF SERVICE

[¶ 47] I hereby certify that on the ____ day of December, 2015, true and correct copies of Appellee's Brief and Appellee's Appendix were served electronically upon John Wilka and Janel B. Fredericksen, attorneys for Appellant, at the following e-mail address: john@wilkawelterlaw.com and janelfredericksen@smithstrege.com.

[¶ 48] Dated this ____ day of December, 2015.

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