

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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Supreme Court No. 20170231  
Ward County District Case No. 51-2017-CV-00434

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SUSAN DIANE BREKKE-WENTZ,

*Petitioner and Appellee*

v.

THOMAS ARTHUR WENTZ, JR.,

*Respondent and Appellant,*

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APPEAL OF AMENDED DISORDERLY CONDUCT RESTRAINING ORDER ENTERED  
APRIL 18, 2017 BY THE DISTRICT COURT, NORTH CENTRAL JUDICIAL DISTRICT,  
WARD COUNTY, STATE OF NORTH DAKOTA

THE HONORABLE KIRSTEN M. SJUE, DISTRICT JUDGE

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REPLY BRIEF OF RESPONDENT/APPELLANT THOMAS ARTHUR WENTZ, JR.

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## [¶1.] LAW AND ARGUMENT

### **I. It is factually undisputed that Tom contacted Susan prior to going to the marital home on March 10, 2017, and that his actions were consistent with the Interim Order.**

[¶2.] Susan asserts that “[i]t is undisputed that Tom entered the marital home without contacting Susan and without receiving permission from Susan.” Brief of Plaintiff/Appellee ¶ 6. The record of the proceedings contradicts this argument.

[¶3.] The Parties’ Interim Order stipulates that:

If Thomas requires anything from the marital home, he shall contact Susan and let her know when he plans to come to the marital home. The parties agree that Thomas shall have use of the following items of personal property pending finalization of their divorce, and that he may remove them from the marital home upon advance notice to Susan: ...”

App. 37.

[¶4.] Tom testified during the evidentiary hearing that his past practices for contacting Susan when he needed to retrieve something from the marital home was to call or email Susan directly. App. 114. Alternatively, he would relay a message to Susan through the Parties’ oldest daughter. Id. Tom would generally not receive any communication back from Susan, but it would be obvious that she received the messages because the requested property would be set out in the garage, or the requested mail would be set out on the porch. App. 159. Susan made no objection to this manner of communication. She never affirmatively granted permission to Tom to pick the property up, but affirmative permission is not required to be given under the applicable provisions of the Interim Order.

[¶5.] Regarding Tom’s visit to the marital home while Susan was away on March 10, 2017, Tom testified that he needed several boxes of financial documents from his old office in the home and followed the same communication practices he had used in the past. He called Susan and left a voicemail, while also contacting the Parties’ oldest daughter, who Tom knew was traveling with

Susan in Arizona. App. 156. Susan complains that she did not receive the voicemail, but went on to testify that she had actually blocked Tom's phone number. App. 122, 156. Susan cannot contest that Tom had communicated the visit to the Parties' oldest daughter. App. 116-117.

[¶6.] Argument is also made that Tom should have been aware that Susan was blocking incoming communications from him. Brief of Plaintiff/Appellee ¶ 6 (citing email correspondence dated March 14, 2017 discussing blocked phone calls). However, the date of the cited email is four days after Tom's complained-of visit to the marital home on March 10. In fact, Tom specifically mentions the underlying visit in the email, as well as his messages to Susan on the day in question, prior to the visit. App. 54. Susan has offered no evidence that she actually informed Tom she was blocking his communications on March 10. Her argument that Tom should have somehow been aware is entirely unsupported by the factual record. The fact that Tom figured it out later, by March 14, 2017, and after Susan called the police, does not demonstrate any knowledge by Tom on March 10. In fact, the only thing the March 14 email tends to prove is that Susan was actually receiving communications from Tom on that date.

**II. The specific provisions of the Interim Order allowing Tom access to the marital home to retrieve property, provided he give advance notice to Susan, controls over the general provisions awarding Susan "exclusive use" of the marital home.**

[¶7.] Susan's response brief argues the Interim Order provision granting her "temporary exclusive use and possession of the parties' marital home" imposes a requirement upon Tom to receive her explicit permission before he can come to the home to retrieve any property. This argument ignores the specific provision of the Interim Order governing Tom's access to certain property and establishing procedures: "If Thomas requires anything from the marital home, he shall contact Susan and let her know when he plans to come to the marital home. The parties agree that Thomas shall have use of the following items of personal property pending finalization of

their divorce, and that he may remove them from the marital home upon advance notice to Susan:  
...

[¶8.] The argument advanced by Susan is essentially that the general “exclusive use and possession” provision controls over the specific provision on Tom’s access to retrieve his allotted property. “If conflict exists between the specific provision and a general provision in a contract, the specific provision qualifies the general. Oakes Farming Ass’n v. Martinson Bros., 318 N.W.2d 897, 908 (N.D. 1982). The Interim Order specifically establishes that Tom may retrieve certain property items from the marital home, and that he need only “contact Susan and let her know when he plans to come to the marital home” before he does so. The evidence of the case is undisputed in that Tom followed this specific provision by contacting Susan before he went to the home to retrieve property. Susan has now complained that Tom’s communication to her was ineffective because she had blocked his calls. This argument is unpersuasive for two reasons. First, Susan did not communicate her blocking of communications to Tom. Second, and perhaps more importantly, her actions blocking Tom were a deliberate frustration of the scheme established in the Interim Order for Tom to retrieve property from the home. Susan should not now be rewarded with a restraining order in her favor.

**III. Tom did not stipulate to allowing unlimited hearsay evidence to be presented by Susan regarding alleged communications from Verizon.**

[¶9.] Susan’s Response Brief points out that Tom stipulated to the entry of a text message exhibit she argues was received from Verizon. See App. 50-51. The short text message states “Your Verizon Messages Account was recently accessed from a new browser or device.” App. 51. A temporary password was also texted. App. 50.

[¶10.] While true that Tom stipulated to the entry of these text messages into evidence, he did not stipulate to the additional layers of hearsay leading to Susan’s testimony that her IP provider

had linked the text messages to Tom, and the texts were the product Tom hacking into her Verizon account. The District Court erred in eventually relying on these hearsay communications to make it final ruling.

[¶11.] **CONCLUSION**

[¶12.] Based on the aforementioned law and reasoning, Appellant Thomas Wentz Jr. respectfully requests the Supreme Court abused its discretion by entering the disorderly conduct restraining order in favor of the Petitioner.

DATED this 4<sup>th</sup> day of October, 2017.

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**CERTIFICATE OF SERVICE**

[¶13.] I hereby certify that, on October 4th, 2017, I served the foregoing document on the following by electronic mail transmission:

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