

IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTAANNA LYNN CARROLL,  
Plaintiff/Appellee

SUPREME COURT NO. 20170292

v

ROBERT LEE CARROLL,  
Defendant/Appellantand STATE OF NORTH DAKOTA  
STATUTORY REAL PARTY IN INTEREST,  
Plaintiff/Appellee

Appeal from AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT ON REMAND FROM THE SUPREME COURT DATED June 2, 2017 resulting from a telephonic Status Conference held on May 30, 2017, and appeal from ORDER ON HEARING FOR MOTION FOR REVIEW AND AMENDMENT OF CHILD SUPPORT held on August 1, 2017 and dated August 22, 2017.

Appealed from Stark County District Court  
Southwest Judicial District  
The Honorable William Herauf  
Case No. 45-2015-DM-00222

## BRIEF OF APPELLANT

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## TABLE OF AUTHORITIES

### CASE LAW:

Berge v Berge 2006 N.D. 46 ¶8, 710 N.W.2D 417  
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Bucholz v Bucholz 1999 ND 36 ¶12, 590 N.W.2D 215  
Christoffersen v Giese 2005 ND 17 ¶8, 691 N.W.2D 195  
Fleck v Fleck 2010 ND 24 ¶1, 778 N.W.2D 572  
Heinle v Heinle 2010 ND 5 ¶38, 777 N.W.2D 590  
Investor's Telle In Co v Herzig, 2013 ND 13 ¶10, 826 N.W.2D 310  
Korynta v Korynta, 2006 ND 24 ¶17, 708 N.W.2D 895  
Law v Whittet, 2015 ND 16, 858 N.W.2D 636  
Logan v Bush, 2000 ND 203 ¶21, 621 N.W.2D 314  
Pember v Shapiro, 2011 ND 31 ¶35, 794 N.W.2D 435  
Schleicherv Schleicher, 551 N.W.2D 766, 769 (nd 1996)  
Schweitzer v Mattingley 2016, ND 231, 887, N.W.2D 541  
Sonnenberg v Sonnenberg 2010 ND 24, ¶12, 782 N.W.2D 654  
Walstad v Walstad 2013 ND 176 ¶9, 837 N.W.2D 911  
Wolfe v Wolfe 557 N.W.2D 742, 744 (ND 1996)

### ADMINISTRATIVE RULES:

N.D. Admin. Code 75-02-04.1  
N.D. Admin. Code 75-02-04.1-07(3)  
N.D. Admin. Code 75-02-04.1-01(7)  
N.D. Admin. Code 75-02-04.1-07(9)  
N.D. Admin. Code 75-02-04.1-02(10)

## I. Statement of the Issues

- (1) The District Court erred in the amount of its award of child support
- (2) The District Court erred in failing to follow the child support guidelines
- (3) The District Court erred by not following the mandate of the Supreme Court issued on March 30, 2017
- (4) The District Court erred in using three and one-half months of paystubs to calculate what R Carroll's gross income for the year 2017 might be during the August 1, 2017 hearing
- (5) The District Court abused its discretion in allowing the use of paystubs that clearly had the wrong social security number listed at the August 1, 2017 hearing
- (6) The District Court erred in not following the child support guidelines by stating a gross amount of income and not the net income used or reciting the guideline it used to determine the child support amount

## II. Statement of the Case

- (7) On August 15, 2015, A Carroll filed a Complaint and Summons seeking a divorce from R Carroll. The parties had been married for three (3) years prior to the filing of the complaint. R Carroll filed pro se documents to secure specified visitation and child support based on R Carroll's earnings in 2015 after the loss of his Baker Hughes job in August, 2014.
- (8) The trial in this case occurred on February 19, 2016 before Judge William Herauf, District Court Judge of Stark County. R Carroll did not attend the hearing due to inclement weather preventing traveling to North Dakota.
- (9) On February 24, 2016, the District Court filed its Finding of Fact, Conclusions of Law and Order for Judgment. On February 26, 2016 a Notice of Judgment and Judgment were filed. The District Court set child support at \$1,387.00 per month retroactive to January 1, 2015 based on a finding of gross income in 2014 of \$80,412.00 and a net monthly income of \$4,922.00.

- (10) R Carroll filed a Motion and Request to Set Aside Default/Vacate Default Judgment on March 16, 2016 which was denied on March 31, 2016.
- (11) On April 22, 2016 R Carroll filed a Motion for New Trail which was denied on May 2, 2016.
- (12) Notice of Appeal was filed on May 24, 2016 to this Honorable Court.
- (13) The case was reversed and remanded dated March 30, 2017.
- (14) A telephonic Status Conference was held on May 30, 2017 with the District Court, the State's Attorney Steven Podoll and R Carroll attending.
- (15) The District Court entered an Amended Findings of Fact, Conclusions of Law and Order for Judgment on Remand from the Supreme Court on June 2, 2017
- (16) R Carroll had to file a Motion to Review and Amend Child Support on June 16, 2017.
- (17) A hearing was held on August 1, 2017 and Judgment was entered on August 22, 2017
- (18) The Notice of Appeal for the June 2, 2017 judgment was timely filed and the Notice of Appeal for the judgment entered on August 22, 2017 was timely filed by R Carroll.
- (19) Upon receipt of the transcript for the August 1, 2017 hearing, R Carroll filed a Motion to Correct the Transcript to the District Court on October 26, 2017.

### III. Statement of Facts

- (20). R Carroll and A Carroll were married on August 6, 2010 and separated on January 5, 2014. Two children were born during that time. Their ages are currently 7 and 5. R Carroll has no scheduled visitation with the children. A Carroll filed her Complaint on August 21, 2015 and a judgment for divorce was entered February 25, 2016.
- (21). During the marriage, R Carroll worked for Baker Hughes making a high salary, but was fired in August, 2014. He attempted to locate other jobs similar to the Baker Hughes job, but was unsuccessful. R Carroll moved to Texas in 2015. The pay scale in Texas is much less than North Dakota so his income was drastically reduced.

(22). R Carroll was ordered to pay \$1,387.00 per month, retroactive to January, 2015 for two children based on a statement of earnings from Baker Hughes that did not include a social security number identifying the earnings were those of R Carroll.

(23). A notice of appeal to the North Dakota Supreme Court was filed on May 24, 2016 resulting in the case being reversed and remanded for additional findings on April 21, 2017.

(24). On May 30, 2017 a telephonic Status Conference was held with the court, Steven Podoll and R Carroll. As a result of that conference the court entered Amended Findings of Fact, Conclusions of Law and Order for Judgment on Remand from the Supreme Court on June 2, 2017.

(25) On June 16, 2017 R Carroll filed a Motion for Review and Amend Child Support. A hearing was held on August 1, 2017 and Judgment was entered August 22, 2017. R Carroll was ordered to pay \$818.00 per month for the support of the two children which was based on three and one-half months of paystubs.

#### IV. Argument

A. The District Court erred in the amount of its award of child support.

(26) The court imputed figures of gross annual income of \$89,350.14 in 2014 and a total gross amount of \$80,412.00 with a net monthly income for child support purposes of \$4,922.00 pursuant to N.D.A.C. 75-02-04.1-07 (3)(c). While the court attempts to rectify the Conclusions of Law in the June 2, 2017 Judgment pursuant to the Mandate of this Honorable Court, it fails to specify how the net income was determined. The figure of \$80,412.00 does not correctly comport, when divided by nine months or twelve months, to be a net monthly income of \$4,922.00. N.D.A.C. 75-02-04.1-07 (3)(c) states that an amount equal to ninety percent of the obligor's greatest average gross monthly earnings, in any twelve consecutive months included in the current calendar year and the two previous calendar years before commencement of the

proceeding before the court, for which reliable evidence is provided must be used. The court erred as a matter of law when it failed to comply with the child support guidelines in determining R Carroll's child support obligation.

B. The district court erred in failing to follow the Child Support Guidelines

(27) This court has held N.D.A.C. 75-02-04.1-07(9) requires the court to calculate imputed income based on an obligor's actual income in a prior twelve-month period in the current calendar year, and a court cannot use income earned during less than a twelve-month period and "extrapolate that to a twelve-month figure". Logan v Bush, 2000 ND 203, ¶21, 621 N.W.2d 314, Christoffersen v Giese, 2005 ND 17 ¶8, 691 N.W.2d 195. R Carroll is somewhat confused as to how the court concluded that \$89,350.14 was his gross amount of income or the timeline it used for such determination or what the net annual salary was for determination of a net monthly income. The court erred as a matter of law when it failed to comply with the child support guidelines and in determining R Carroll's child support obligation based on an earnings statement from Baker Hughes that does not recite a social security number identifying the wages were those of R Carroll.

(28) The child support guidelines define "net income" as an obligor's gross annual income less federal and state tax obligations and other expenses. N.D. Admin. Code ¶ 75-02-04.1-1(7). The award cannot be sustained in the absence of specific findings under N.D. Admin. Code § 75-02-04.1-02(10): ("Each child support order must include a statement of the net income of the obligor used to determine the child support obligation, and how that net income was determined"). Taxes would include federal withholding, Medicare, and Social Security payments withheld from obligor's pay. R Carroll is not required to pay state taxes in Texas.

C. The District Court erred by not following the mandate of the Supreme Court

(29) This Honorable Court's opinion states:

“Based on our review, we conclude the district court failed to make sufficient factual findings to support its income determination for the award of child support under the child support guidelines. Specifically, the court failed to make findings showing how it calculated Robert Carroll’s income and under which guidelines it was applying. Although Robert Carroll claims the court improperly “extrapolated” his income, see, e.g., Fleck v. Fleck, 2010 ND 24, ¶ 15, 778 N.W.2d 572; Heinle v. Heinle, 2010 ND 5, ¶ 38, 777 N.W.2d 590; Korynta v. Korynta, 2006 ND 17, ¶ 17, 708 N.W.2d 895, he hindered his own case when he did not appear at trial and present competent evidence of his income, leaving the court with only the evidence of the 2014 wages presented by the State. Compare N.D. Admin. Code § 75-02-04.1-07(3), with N.D. Admin. Code § 75-02-04.1-07(9). Moreover, we note it is also not clear which version of the guidelines the court applied. While the State on appeal quotes from the current version of N.D. Admin. Code § 75-02-04.1-07, that section was amended effective September 1, 2015, while this matter was pending. We therefore conclude the court abused its discretion in denying Robert Carroll’s motions, insofar as they challenged the findings supporting its child support award. We reverse and remand for further findings consistent with this opinion.” (Opinion Para 27, Page 9-10)(App. 12)

(30) During the status conference hearing, the trial court seemed confused as to what further findings it was to make, and took direction from the State’s Attorney. The court referenced paragraph 65 of the Opinion of this Honorable Court which is the dissent of the Honorable Judge Kaspar. In Law v. Whittet, 2015 ND 16, 858 N.W.2d 636, Law argues the district court violated the mandate rule by not following the pronouncement of this Court. As in this case R Carroll argues that the district court did not follow the mandate rule. The Amended Findings of Fact and Conclusions of Law state: “(17) CHILD SUPPORT: Defendant is unemployed. Therefore, it is necessary to impute income to Defendant equal to 90% of his greatest income for a 12-month period in the last 24 months. The district court finds that Robert Carroll received



income of \$89,350.14 in 2014 and therefore, consistent with N.D. Admin. Code § 75-02-04.1-07 (3)(c), \$80,412.00 is used as the total gross income. Based on a total gross annual income of \$80,412.00 and a net monthly income for child support purposes of \$4,922.00 and pursuant to the North Dakota Child Support Guidelines, Defendant shall pay the sum of One Thousand Three Hundred Eight Seven Dollars (\$1,387.00) per month for the continuing support of S.L.C. (YOB: 2011) and B.L.C. (YOB: 2012) commencing January 1, 2015, and continuing on or before the first day of each month thereafter until the minor child reaches the age of 18." The court does not state the net yearly income from which the net monthly income is derived for the purpose of establishing a monthly child support amount. The figures used do not support the court's findings of \$1,387.00 per month child support obligation. The district court failed to make adequate findings. (App 6) In the Opinion at paragraph 27 (App. 12) the Court stated: "We therefore conclude the court abused its discretion in denying Robert Carroll's motions, insofar as they challenged the findings supporting its child support award. We reverse and remand for further findings consistent with this opinion". R Carroll construes this to mean a new hearing should have been held to determine child support. The district court held a telephonic status conference only.

(31) In this case the district court violated the mandate rule by not following the pronouncement of this Court. In Walstad v Walstad, 2013 ND 176, ¶ 9, 837 N.W.2d 911 this Court states: "On remand, district courts must follow the mandate rule. "The mandate rule....requires the trial court to follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case and to carry the (appellate court's) mandate into effect according to its terms." "We retain the authority to decide whether the district court fully carried out our mandate's terms." Investors Title Ins. Co. v Herzig, 2013 ND 13, ¶ 10, 826 N.W.2d 310.

D. The District Court erred in using three months of paystubs to calculate what R Carroll's gross income for the year 2017 would be during the August 2, 2017 hearing

(32) In the district court's Order on Hearing for Motion for Review and Amendment of Child Support dated August 22, 2017 its Finding of Facts states:

3. Defendant submitted child support calculations for 2015 based on W-2 tax forms from that year.
4. Defendant submitted child support calculations for 2016 based on W-2 tax forms from that year.
5. On March 20, 2017, Defendant began working for James D. Goode Construction. Defendant continues to work for this company.
6. The State of North Dakota submitted child support calculations based on paystubs Defendant provided from James D. Goode Construction for the pay period ending July 20, 2017.
7. Defendant admitted under oath that the name and address on the paystub match his name and address, and the amount of money indicated on the paystub matches the income he has received from James D. Goode Construction.
8. Because defendant has changed employers since 2015 and 2016, tax returns for those years do not adequately reflect the obligor's income and are not a reliable indicator of future income. Therefore, based on annualizing income from his paystub from the pay period ending July 20, 2017, Defendant has a total gross annual income of \$43,948.00 and a net monthly income, for child support purposes, of \$2,948.00. Defendant has a child support obligation of \$818.00

(33) R Carroll admits receiving the sum of \$14,362.80 less withholding tax, Medicare tax, and Social Security tax from his employer. Steven Podoll, nor did the district court, take into consideration that ten (10) to eleven (11) hours of overtime were incurred some weeks, over

which R Carroll has no control under N.D.A.C. § 75-02-04.1-4(a)(4) and for which consideration should have been given by the district court. R Carroll is in the construction business and inclement weather has a bearing on work that is done and the number of hours he will work. Earnings will be less in winter months than in Spring and Summer months.

(34) State's Attorney uses the term annualizing income for a three month period for the gross annual income of \$43,948.00 for the year of 2017. In Brandner v. Brandner, 2005 ND 111, 698 N.W.2d 259 the trial court's method of calculating Allan's imputed income does not comport with any of the three methods outlined in N.D. Admin. Code § 75-02-04.1-07(3). Nor does the method used comply with the exception set forth in N.D. Admin. Code § 75-02-04.1-07(9) allowing imputation of income when the obligor makes a voluntary change in employment. This Court has that the held N.D. Admin. Code § 75-02-04.1-07(9) requires the court to calculate imputed income based on the obligor's actual income in a prior twelve-month period, and a court cannot use income earned during less than the twelve-month period and "extrapolate that to a twelve-month figure." Logan v. Bush, 2000 ND 203, 621 N.W.2d 314. The district court should have considered R Carroll's wages for the year 2016 which reflected twelve consecutive months' earnings. The use of three months of wages and extrapolating that to a twelve month annual income is error.

E. The District Court abused its discretion in allowing the use of paystubs that clearly had the wrong social security number listed at the August 2, 2017 hearing

(35) During trial, State's Attorney, S. Podoll, pointed out that the Social Security number on the paystubs put into evidence (Exhibit A App. 54) had a different Social Security number than R Carroll's Social Security number. R Carroll received the funds, but cannot conclude that the funds received were actually his pay for hours worked and not those of another employee. R Carroll found no case law or Rules of Evidence to address this situation.

F. The District Court erred in not following the child support guidelines by stating a gross amount of income and not the net income used or reciting the guideline it used to determine the child support amount

(36) At the hearing of August 1, 2017, the district court did not make independent specific findings on the record that R Carroll voluntarily changed jobs or that he had limited his work hours that would make the 2015 and 2016 W-2 forms an inadequate reflection of his earnings or that the wages were not a reliable indicator of future income. Before disregarding such information, the district court must make specific findings on the reliability or adequacy of tax returns. The district court vaguely mentioned the 2015 and 2016 figures, but did not state that they were not an accurate indication of income. (Transcript Page 27, Line 23-25). R Carroll never made a voluntary change in employment. The August 22, 2017 order was drafted by State's Attorney and therein annualized income from a paystub for the pay period beginning March 23, 2017 ending on July 20, 2017. Failing to state what that net income figure is and how he derived a net monthly income of \$2,948.00 pursuant to the North Dakota Child Support Guidelines. In Korynta v Korynta, 2006 ND 17, ¶ 18, 708 N.W.2d 895 "The failure to properly apply the child support guidelines to the facts involves an error of law." It is well-established that a district court's failure to provide sufficient detail regarding its net income calculation in determining the child support obligation constitutes reversible error. See Pember v. Shapiro, 2011 ND 31, ¶ 35, 794 N.W.2d 435; Berge v. Berge, 2006 ND 46, ¶ 8, 710 N.W.2d 417; Buchholz, 1999 ND 36, ¶ 12, 590 N.W.2d 215; Wolf v. Wolf, 557 N.W.2d 742, 744 (N.D. 1996). "A proper finding of net income is essential to a determination of the correct amount of child support under the guidelines." Schleicher v Schleicher, 551 N.W.2d 766, 769 (ND 1996) (emphasis added). Even when the court uses vague figures based on adequate evidence introduced in court, there is insufficient detail to support the calculation, and we will reverse."

As Justice Kapsner wrote for the Court in Entzie v Entzie, "Under the child support guidelines, each child support order must include a statement of the net income of the obligor used to determine the child support obligation, and how that net income was determined." 2010 ND 194, ¶ 6, 789 N.W.2d 550 (quotation and citation omitted). As Justice Kapsner further explained for the Court in Sonnenberg v Sonnenberg, 2010 ND 94, ¶12, 782 N.W.2d 654, "The district court violated N.D. Admin. Code § 75-02-04.1-02(10), because it failed to state how it determined the parties' net income." In Schweitzer v Mattingley, 2016 ND 231, 887 N.W.2d 541, which is very similar to this case, Mattingley argues the district court failed to follow the law and miscalculated child support. He argues that in finding his income, the court erroneously used an averaging method and failed to consider his overtime pay was not guaranteed. As is noted by NDAC 75-02-04.1-01 (4)(a)(40 gross income does not include atypical overtime wages or non recurring bonuses over which the employee does not have influence or control. The district court failed to consider and or discuss this issue in its ruling although testimony was given and evidence was presented to the court. "Each child support order must include a statement of the net income of the obligor used to determine the child support obligation, and how that net income was determined." N.D. Admin. Code § 75-02-04.1-02(10). A proper finding of net income is essential to calculate the correct amount of child support under the child support guidelines, and as a matter of law, a district court must clearly set forth how it arrived at the amount of income and support. Berge v Berge, 2006 ND 46 ¶8, 710 N.W.2d 417

(37) In paragraph 8 (App. 51) of the Order On Hearing For Motion For Review and Amendment Of Child Support the district court states that Defendant has a child support obligation of \$818.00 per month according to the North Dakota Child Support Guidelines, but fails to state on the record the net annual income that formed the basis of that obligation.

(38) Plaintiff's Exhibit B (App. 55) is a copy of a year to date paystub, beginning March 23, 2017 to July 20, 2017, bearing R Carroll's name and address for a year to date total of \$14,362.80 less Federal Withholding, Medicare, and Social Security deductions for a year to date total of \$2,795.75 for a net amount of \$11,567.05 and a year to date overtime amount of \$2,703.80. Plaintiff's Exhibit C (App 56) is a copy of Child Support Guidelines Worksheet showing annual gross income of \$43,948.00 less Federal Income Tax obligations of \$4,573.00, State Income Tax of \$640.00 and Fica/Medicare of \$3,362.00 for a total net income of \$35,373.00. Schedule 1, attached to the worksheet sets out an annual gross income of \$43,948.00 less a Federal Income Tax deduction of \$6300.00 and one exemption for obligor of \$4050.00 for a total of \$10,350 deductions with a gross annual amount of \$33,598, and a tax table amount for a single individual of \$4,573.00. According to Schedule 1, line 9 in the amount of \$4,573.00 is to be deducted from line 8; the sum of \$33,598.00 less \$4,753.00 for a total net annual income of \$29,025.00. (App) This amount is \$6,368.00 less than the figures the State's Attorney based his calculations on for the child support obligation and does not follow the guidelines in N.D. Admin. Code 75-02-04.1. Looking at Plaintiff's Exhibit B (App. 55) which are copies of paystubs showing the year to date deductions for three months, which are more than one-half of the deductions for just three months than those used in the annualized amounts that State's Attorney calculated for R Carroll's child support obligation. R Carroll should not be ordered to pay child support on income that went directly to the Federal government and not to him. R Carroll should not be required to pay support on future annualized overtime hours earned in a three month period. R Carroll argues that the figures compiled by the State's Attorney are erroneous and for the district court to allow the use of extrapolated figures is error.

Heinle v Heinle, 2010 ND 5, 777 N.W.2d 590

V. CONCLUSION

(39) R Carroll respectfully requests that this Honorable Court reverse the judgment of the district court and remand this action to the district court for further hearings regarding the earnings of R Carroll and the amount of child support obligation determined at the August 1, 2017 hearing. Further, R Carroll respectfully requests that the order entered June 2, 2017 be reversed and remand for further and specific findings of R Carroll's true earning capacity. R Carroll used little reference to the Transcript for both hearings as R Carroll believes the transcript to contain recitations that did not occur.

DATED THIS 20<sup>th</sup> day of December, 2017.

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CERTIFICATE OF SERVICE

I, ROBERT LEE CARROLL, certify that I have this date transmitted a copy of Appellant's Brief together with Appendix to Steven Podoll, State's Attorney for North Dakota, by electronic transmission to [spodoll@ns.gov](mailto:spodoll@ns.gov) and to Anna Lynn carroll at 1620 Abraham Pky, #6, Dickinson, North Dakota 58601 by US Mail.

DATED THIS 20<sup>th</sup> day of December, 2017



Robert Lee Carroll