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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jennifer L. Dickson,	)	
	)	
Plaintiff and Appellant,	)	Supreme Court No. 20170334
	)	
	)	
vs.	)	
	)	
Brent D. Dickson,	)	
	)	
	)	
Defendant and Appellee.	)	

BRIEF OF PLAINTIFF/APPELLANT, JENNIFER L. DICKSON

Appeal from District Court of Williams County
North West Judicial Court
District Court No. 53-2016-DM-00340
The Honorable Josh B. Rustad

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

I. STATEMENT OF THE ISSUES

[¶1] Whether the District Court erred in denying the Plaintiff's Motion for Modification of Primary Residential Responsibility when the Court:

A. Failed to enter any specific findings with regard to any of the best interest factors under N.D.C.C. 14-09-6.2.

B. Failed to apply the rebuttable presumption under N.D.C.C. 14-09-6.2(j). Specifically, the Court noted on the record that this rebuttable presumption was in effect, based on the Domestic Violence Restraining Order against the Defendant, and then failed to even mention this presumption in its Order, or enter specific findings as required by N.D.C.C. 14-09-6.2 (j).

C. Made Findings of Fact directly contradicted by the testimony of the Defendant.

D. Determined that the Defendant's conduct was an isolated incident, despite the Defendant's sworn testimony that he had engaged in two similar incidents, and despite there being no evidence in the record proving that the Defendant had actually obtained counselling or therapy.

II. STATEMENT OF THE CASE

[¶2] The Parties in this case were divorced on August 30, 2106.

[¶3] The Plaintiff brought a Petition for a Domestic Violence Restraining Order in this case on October 27, 2016, in Case Number 53-2016-DM-00437.

[¶4] On November 9, and after a hearing on the matter, the Court entered a Domestic Violence Restraining Order against the Defendant in that case.

[¶5] On March 10, 2017, the Plaintiff filed her Motion for Modification of the Parties' Parenting Plan, for a finding of Contempt against the Defendant, and for sanctions.

[¶6] On July 13, 2017, the Court entered an Order denying this motion.

[¶7] On July 28, 2017, the Plaintiff filed her motion for a Stay of the Court's Order Pending Appeal.

[¶8] The Court denied this Motion on August 14, 2017, and this appeal followed.

[¶9] On August 25, 2017, in case number 53-2016-CR-2009, the Defendant in this case plead guilty to violating the Domestic Violence Restraining Order entered in case number 53-2016-DM-00437.

III. STATEMENT OF THE FACTS

[¶10] The parties were divorced on August 26, 2017. They have two children, and their divorce judgment provides for equal parental and residential responsibility shared between them. (Doc Id. #10). Sometime after midnight on October 26, 2016, the Defendant began to drunkenly call and text the Plaintiff, first demanding that she meet with him, and then threatening to kill himself. This threat included a "selfie" which is a picture taken of oneself using a cell phone camera, sent to the Plaintiff. In this selfie, the Defendant photographed himself with a rifle in his mouth. A copy of this photo is listed as Doc Id.#19. In this disgusting text message, the Defendant told the Plaintiff that he was going to kill himself and that she needed to come pick up the parties two children. *Id.* The Defendant further texted that the photo with the gun in his mouth was, "The last thing you will ever get from me. Goodbye." *Id.*

[¶11] After sending this text, the Defendant made multiple phone calls to the Plaintiff, and shortly after 3:00 A.M., the Plaintiff agreed to meet the Defendant in a Wal-Mart parking lot to discuss the situation. (Doc. Id #20 at ¶5). During this meeting, the Defendant picked up a firearm and demanded that the Plaintiff go to his house to retrieve the couple's two children. Id. at ¶9. The Plaintiff refused, and the Defendant drove away when a security guard approached. Id. at ¶10. After the Defendant left this meeting, the Plaintiff remained in the parking lot until 3:46 A.M., when she received a phone call from her 16 year old daughter, who informed the Plaintiff that the Defendant had woken the two children up, and had taken them to the Plaintiff's house. Id. at ¶11

[¶12] The Plaintiff called the Williston Police Department on her way home, and was met there by Officers Ware and Satermo, along with several other officers. (Trial Tr. at

56).

[¶13] The events of October 26, 2016 resulted in the Defendant being arrested by the Williston Police Department and being transported to Bismarck for psychiatric evaluation. (Doc Id #20 at 14). The next day, the Plaintiff filed for a Domestic Violence Protection Order, which was eventually made permanent on November 8, 2016. In her affidavit in Support of the Domestic Violence Protection Order, the Plaintiff describes two similar incidents of domestic violence by the Defendant. In August of 2016, while the parties were divorcing but still living together, the Defendant, while very intoxicated, laid out all of the Plaintiff's underwear, and while armed with a firearm, demanded that the Plaintiff pick a pair, so that he would know what she was wearing when she cheated on him. (Doc Id. 20 at 17, Doc Id. 38 at ¶7). The Defendant then stated that he was going to kill himself. (Doc. Id. 20 at 17). In his own affidavit, the Defendant admits to this incident, but denies he had a firearm at that time. (Doc Id. 38 at ¶7).

[¶14] The other incident was in April of 2015, when the Plaintiff testifies that the Defendant sent her a picture of a gun via text, with the words, "This is what you have made me do, and it will be done by 11 AM." (Doc Id. 20 at ¶18). In his own affidavit, the Defendant admits this incident occurred. (Doc Id. 38 at ¶8).

[¶15] Several months after receiving a Permanent Domestic Violence Restraining Order protecting her from the Defendant, the Plaintiff initiated this present action to modify the parties parenting plan, and requested that the Court grant her primary residential and parental responsibility, based on the Defendant's having committed domestic violence. (See Doc Id. 13).

[¶16] At the hearing on this Motion, the Defendant testified that he is a truthful person,

that he had told the truth in making his affidavit, that he had told the truth to the police officers on October 26, and that he was aware he was required to tell the truth while under oath. (Trial Tr. at 17-18). He testified that on October 26, 2016, that he sent the photo with the gun in his mouth to the Plaintiff as a scare tactic and to "get her attention". (Trial Tr. at 19). More specifically, the Defendant stated that, "That night I did use it as a scare tactic to manipulate Jenny (the Defendant) so I could talk to her." (Trial Tr. at 20). The Defendant testified that he did not intend to kill himself on October 26, 2016. (Trial Tr. at 21). He further testified that he never told Officer Craig Ware that he intended to kill himself on October 26, 2016. (Trial Tr. at 25).

[¶17] When asked why, if he was not intending to kill himself as he had texted to the Plaintiff, the Defendant would wake his children up in the middle of the night and bring them to the Plaintiff's house at nearly 4:00 AM, the Defendant stated he wanted to make sure they could go to school the next day, and that he intended to go back to his apartment and drink some more beer. (Trial Tr. at 26).

[¶18] In his testimony, Officer Craig Ware of the Williston Police Department stated that he arrived at the Plaintiff's home at approximately 3:59 AM and found the Defendant and the parties two children in front of the home. (Trial Tr. at 56). Officer Ware testified that the Defendant told him he intended to drop his children off at the Plaintiff's, and then go home and shoot himself. (Trial Tr. at 57). Officer Ware testified that he recorded his interview with the Defendant. Id. A copy of this recording was then played in the Courtroom, and Officer Ware testified that this was a true and accurate recording of his interview with the Defendant. (Trial Tr. at 58-59). This recording was entered as Doc Id. 53.

[¶19] In this recording, the Defendant states, on four separate occasions, that he intended to kill himself. Doc Id. 53 at 00:02:30-00:05:00. Further, he specifically mentions dropping the two children off at the Plaintiff's, so that he could go home and shoot himself. In this audio recording, the Defendant also states that he quit seeing his therapist because talking to the counselor made his anger problems worse. Id. at 00:04:30. Officer Ware also testified to recovering a gun from the Defendant's vehicle at the scene, and that the Defendant appeared intoxicated (Trial Tr. at 59-60).

[¶20] After Officer Ware's testimony, the Defendant did not take the stand again. He called his fiancé, Lisa Reinholdt, to testify on his behalf. She stated that the Defendant had received counseling in Bismarck after the incident on October 26, and that he seemed better. (Trial Tr. at 113). The Defendant also called his sister-in-law, Alyson Dickson, who testified that she felt her brother-in-law had gotten better mentally since October. (Trial Tr. at 124). She further testified that she had no degree in psychology or any expertise that would allow her to evaluate whether the Defendant actually was better mentally. (Trial Tr. at 125-126). No other evidence as to the Defendant being rehabilitated was offered.

[¶21] At the beginning of the hearing, Judge Rustad indicated that the rebuttable presumption under North Dakota Century Code 14-09-6.2, that the Court cannot award primary residential responsibility to a party that commits domestic violence, was in effect. (Trial Tr. at 11). The Court entered its Order denying the Plaintiff's Motion on July 13, 2017. This Order fails to mention the rebuttable presumption codified in 14-09-6.2, and fails to establish what evidence, if any, the Court viewed as being sufficient to overcome this presumption. *See* Doc Id. 55.

[¶22] The District Court's findings are as follows:

> 3. Essentially, the evidence submitted at hearing showed that Mr. Dickson had sent a text message with a photo of him with a firearm, which suggested that he was suicidal. Mr. Dickson promptly delivered his children to Ms. Dickson on that October evening based upon what other witnesses described as Mr. Dickson being in a very "dark place". Witnesses for both parties, a law enforcement officer and Mr. Dickson's fiancé stated that Mr. Dickson's mental state on that evening was compromised. Mr. Dickson submitted to a voluntary committal, however, and testified that he had received counseling and therapy after the events of late October, 2016.
>
> 4. Thereafter, Ms. Dickson moved for a restraining order in collateral case number 53-2016-DM-00463, which resulted in an Order that provided, "Until April 9, 2016, the Respondent shall have supervised visitation with the parties' minor children…". See paragraph 3 of Order dated November 15, 2016. Ms. Dickson testified at hearing that the present Motion to Modify is premised exclusively on the events of October 2016. There was no testimony to suggest that Mr. Dickson violated the restraining provisions relevant to his children following issuance of the Restraining Order. The Court in connection with the Restraining Order, which was given in relation to the identical facts now before the Court clearly believed that the April 9, 2017 term of expiration of the Order was sufficient to protect Ms. Dickson and the children. Ms. Dickson did not approach this Court in this filing for a Motion to Modify and instead waited until the Restraining Order was nearing expiration. While the Court does not agree with Attorney Pendlay's assertion that the effect of the Restraining Order in a collateral filing presents a res judicata effect in the above-captioned case and instant Motion, the Court does find that Mr. Dickson's compliance with the collateral Restraining Order and Ms. Dickson's testimony that no new allegations have come to pass since the issuance of the November 15, 2016 Restraining Order, that the Motion to Modify Custody is not in the children's best interest and that the collateral Restraining Order, coupled Mr. Dickson's compliance with the same, together with voluntary committal, therapy, and counseling Mr. Dickson received suggests that a return to the terms of the original Judgment dated August 26, 2016 filed in this matter, rather than the modification proposed by the Plaintiff, is in the best interest of the children. The October events appear to be an isolated incident and Mr. Dickson's actions in attempting to better himself and his mental health suggest that the Original Judgment remains in the children's best interest. Doc Id. 55.

IV. STANDARD OF REVIEW

[¶23] Findings on matters of child custody are findings of fact, which the Supreme Court does not reverse unless clearly erroneous. *See* McDonough v. Murphy, 539 N.W.2d 313 (N.D. 1995). A finding of fact is clearly erroneous "if it is induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made. Heck v. Reed, 529 N.W. 2d, 155 (N.D. 1995).

V. ARGUMENT

1. The District Court Erred in Failing to Analyze Any of the Best Interest Factors Required By North Dakota Law, Including the Domestic Violence Presumption

[¶24] In primary residential responsibility decisions, a court has broad discretion; however, the court must consider all of the best interest factors under N.D.C.C. § 14-09-06.2(1). Rustad v. Rustad, 2013 ND 185, ¶6, 838 N.W.2d 421 (N.D. 2013). "Although a separate finding is not required for each statutory factor, the court's findings must contain sufficient specificity to show the factual basis for the custody decision." Wolt v. Wolt, 2010 ND 26, ¶9, 778 N.W.2d 786 (N.D. 2010). Further, "It is not enough for the district court merely to recite or summarize testimony presented at trial to satisfy the requirement that findings of fact be stated with sufficient specificity." Datz v. Dosch, 2013 ND 148, ¶9, 836 N.W.2d 598 (N.D. 2013). The court must make specific findings explaining how the statutory factors apply. *Id.* A court's findings are adequate if the court is able to discern the factual basis for the court's decision, and the findings afford a clear understanding of its decision. *Id.*

[¶25] In this case, the Court did not address or consider any of the best interest factors under N.D.C.C. § 14-09-06.2(1).

[¶26] The court further did not consider best interest factor (j) in the N.D.C.C. § 14-09-06.2(1). The statute reads:

> **Evidence of domestic violence.** In determining parental rights and responsibilities, the court shall consider evidence of domestic violence. If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded residential responsibility for the child. This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent have residential responsibility. The court shall cite specific findings of fact to show that the residential responsibility best protects the child and the parent or other family or household member who is the victim of domestic violence. If necessary to protect the welfare of the child, residential responsibility for a child may be awarded to a suitable third person, provided that the person would not allow access to a violent parent except as ordered by the court. If the court awards residential responsibility to a third person, the court shall give priority to the child's nearest suitable adult relative. The fact that the abused parent suffers from the effects of the abuse may not be grounds for denying that parent residential responsibility. As used in this subdivision, "domestic violence" means domestic violence as defined in section 14-07.1-01. A court may consider, but is not bound by, a finding of domestic violence in another proceeding under chapter 14-07.1.

N.D.C.C. § 14-09-06.2(1).

> "Domestic violence" includes physical harm, bodily injury, sexual activity compelled by physical force, assault, or the infliction of fear of imminent physical harm, bodily injury, sexual activity compelled by physical force, or assault, not committed in self-defense, on the complaining family or household members.

N.D.C.C. § 14-07.1-01 (West)

[¶27] In the case of O'Hara v. Schneider, an act of domestic violence was perpetrated by O'Hara and resulted in a domestic violence restraining order against him. O'Hara v.

Schneider, 2017 ND 159, ¶2-5, 897 N.W.2d 326 (N.D. 2017). On appeal, the court found that any act of domestic violence, regardless of whether the child is directly threatened, cannot be discounted. *Id.* Further, the court held that in parenting time cases involving allegations of domestic violence, the domestic violence factor is the dominant best interest factor. *Id.* Once raised, the presumption requires the district court to "allow only supervised parenting time with that parent unless there is a showing by clear and convincing evidence that unsupervised parenting time would not endanger the child's physical or emotional health." *Id.* Further, "[T]his presumption creates a difficult evidentiary obstacle for the violent parent to overcome, and the legislature created this obstacle for sound policy reasons thoroughly explained in Heck v. Reed, 529 N.W.2d 155, 161-65 (N.D. 1995)." *Id.*

[¶28] In this case, at the hearing for these motions on June 7, 2017, Judge Rustad stated that this rebuttable presumption was in effect for the case, due to the act of domestic violence that occurred on October 26, 2016, and the subsequent Domestic Violence Protection Order that was signed on November 15, 2016. Even if Judge Rustad had not stated that this presumption was in effect, the facts of the case make it clear that the Defendant has a pattern of committing domestic violence in order to try and enforce his will on the Plaintiff. As the Supreme Court noted in the Heck case,

> "Domestic violence is "a pattern of assaulting and controlling behavior" committed by one household member against another. Anne Ganley, et al., The Impact of Domestic Violence on the Defendant and the Victim in the Courtroom, *Domestic Violence: The Crucial Role of the Judge in Criminal Court Cases. A National Model for Judicial Education*, The Family Violence Prevention Fund, 1991. Domestic violence is not caused by stress in the perpetrator's life, alcohol consumption, or a particular victim's propensity to push a perpetrator's buttons. Ganley, *supra.* Rather, domestic violence is a learned pattern of behavior aimed at gaining a victim's compliance. Ganley, *supra.*" Heck v. Reed, 529 N.W.2d 155, 164 (N.D. 1995)

In this case, the Defendant's behavior is absolutely assaulting and controlling. Both the Plaintiff and the Defendant have testified that at least three incidents of this sort of behavior occurred, and the parties both agree that two of the incidents involved the Defendant sending texts to the Plaintiff with pictures of firearms and messages indicating that he was about to kill himself, and that this was the Plaintiff's fault. The Court does not have to wonder as to the Defendant's intent in sending these messages, as he testified that he did so in order to manipulate the Plaintiff. (Trial Tr. at 20). Clearly, this is domestic violence, and the Court should remember that a permanent domestic violence restraining order was entered against the Defendant as a result of this behavior. The Plaintiff and Defendant agree that three incidents in total occurred, and that at least two of them involved a firearm. This is clearly a pattern of behavior which also involves the use of a dangerous weapon.

[¶29] With the application of this rebuttable presumption— that a parent who has perpetrated domestic violence may not be awarded residential responsibility for the child— the Defendant has the burden of proof to not only overcome this presumption, but prove that some circumstances require that the perpetrator have custody of the children. "Competing considerations may exist, but the statutory presumption against awarding custody to a perpetrator of domestic violence is a presumption which can be overcome only by clear and convincing evidence that other circumstances require the child be placed with the violent parent." Owan v. Owan, 541 N.W.2d 719 (N.D.1996). In the case at hand, the only evidence that was presented at the hearing was by the Plaintiff. (Doc ID# 52, 53). The Defendant presented no clear and convincing evidence that the best interests of the child require that the Defendant have residential responsibility or that there is any reason why the children cannot reside solely with their mother.

[¶30] The only testimony presented on behalf of the Defendant was made by his fiancé and his sister-in-law. Neither party was present on the night of October 26, but both testified that he seemed better mentally afterwards. The fiancé did testify that the Defendant had received some sort of therapy, but she did not testify that she was present during the therapy, and did not present any actual proof that this therapy occurred. See Trial Tr. at 107-117. The North Dakota Supreme Court has addressed this situation in the Heck case, and wrote that:

> Perpetrators can "unlearn" the pattern of domestic violence; however, this requires sufficient motivation for changing their violent behavior. Ganley, *supra*. The most recent episode of domestic violence by Shane occurred less than two years prior to the custody hearing. Shane introduced no evidence at the hearing that he had considered or participated in any form of treatment program or counseling related to domestic violence. Absent such proof of rehabilitation, it was clearly erroneous to conclude, as the trial judge did here, that Shane will no longer use domestic violence as a means of controlling his intimate partners Heck v. Reed, 529 N.W.2d 155, 165 (N.D. 1995)

[¶31] In this case, the only evidence that the Defendant participated in any sort of treatment program is from witness testimony. As the cases cited above indicate, the Defendant needs to prove by clear and convincing evidence that circumstances require him to have parental responsibility over the children. This testimony does not provide clear and convincing evidence of any rehabilitation, and just as in the Heck case, it was clearly erroneous for the District Court to conclude that, "the October events appear to be an isolated incident." The Court made no reference to, or any findings that establish any factor or evidence requires that the children reside with the Defendant. As the Court noted in the O'Hara case, unless that evidentiary hurdle is met, the Court can only allow supervised parenting time with the Defendant. The Court clearly, unquestionably erred in denying the Plaintiff's Motion for Modification of Primary Residential Responsibility.

[¶32] North Dakota caselaw requires that domestic violence be treated as the predominate factor once it has been raised, but in this case the District Court did not even mention it. As such, the Supreme Court must reverse the Court's ruling, and remand the case to the District Court with the instruction that the District Court apply the presumption as is required by law.

2. <u>The District Court's Order is Based on an Erroneous View of the Law, and Does Not Reflect the Actual Evidence Presented at the Hearing.</u>

[¶33] As is noted above, a finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake has been made. The Court's ruling in this case is that "the Motion to Modify Custody is not in the children's best interest and that the collateral Restraining Order, coupled Mr. Dickson's compliance with the same, together with voluntary committal, therapy, and counseling Mr. Dickson received suggests that a return to the terms of the original Judgment dated August 26, 2016 filed in this matter, rather than the modification proposed by the Plaintiff, is in the best interest of the children." In this case, the District Court's Order, when scrutinized against the actual transcript of the hearing in this matter, is completely, utterly, and inexplicably wrong.

[¶34] Consider the first two sentences of the Court's ruling in this matter: "Essentially, the evidence submitted at hearing showed that Mr. Dickson had sent a text message with a photo of him with a firearm, which suggested that he was suicidal. Mr. Dickson promptly delivered his children to Ms. Dickson on that October evening based upon what other witnesses described as Mr. Dickson being in a very "dark place"." (Doc Id. 55).

[¶35] The District Court makes no mention of the testimony of the Defendant that he was not suicidal, or his own words, as captured by Officer Ware, where he indicates that he wished to kill himself four times. There is no mention of the Defendant's intent, which was stated in his own testimony, to manipulate the Plaintiff with this message.

[¶36] The next sentence is even worse. The Court writes that the Defendant "promptly delivered his children to Ms. Dickson on that October evening" as if the Defendant was out taking a stroll. What actually happened is that the Defendant woke his children from their slumber, and then took them to their mother's house after 3:00 A.M. on a school night. How he managed to do this "promptly" is unclear. Not to be outdone by its own inexplicable word choice, the District Court then writes that this delivery was "based upon what other witnesses described as Mr. Dickson being in a very "dark place." The Court here does not refer to Mr. Dickson's actual testimony as to what he was doing and instead relies on the testimony of his fiancé and sister-in-law, neither of whom was present during the incident. Mr. Dickson's actual testimony is as contained in the transcript, and he states that he brought the children to the Plaintiff's house at 3:00AM "Because I was dropping them off so they could go to school, because I knew I was going to go back to my apartment and drink some more beer and I didn't want them there." (Trial Tr. at 26-27). He also admitted that the children were asleep, and that he woke them up to bring them to her house. (Trial Tr. at 27).

[¶37] The Defendant's testimony here is obviously in direct contradiction to his stated intent in the text message to the Plaintiff, and his recorded statements to the Williston Police, that he intended to drop the children off so he could kill himself. (See Doc Id. 19

and Doc Id. 53). The District Court mentions none of this in its Order, which is incredible given that these contradictions completely destroy the Defendant's credibility.

[¶38] After ignoring the Defendant's contradictory testimony regarding his intentions, the District Court next goes so far as to actually deny the existence of the Defendant's statements. Discussing the collateral restraining order filed in case number 53-2016-DM-00437, the Court writes that in the present case, "There was no testimony to suggest that Mr. Dickson violated the restraining provisions relevant to his children following issuance of the Restraining Order." This is an amazing statement, given that the Judge was present during the hearing when Mr. Dickson testified that he had violated the restraining order provisions relevant to his children. Mr. Dickson testified that on November 10, 2016, he texted his daughter and asked her to meet him at a restaurant. (Trial Tr. at 47). He further testified that he knew the restraining order entered against him required him to refrain from contacting his children, and that he did so in violation of the restraining order. (Trial Tr. at 48). Mr. Dickson was explicitly asked "So you arranged this meeting in violation of that restraining order?" to which he responded, "Yes." (Trial Tr. at 48). Despite the District Court's statement, there is testimony suggesting the Defendant violated the restraining order, and it came from the Defendant himself, and was supported by a text message entered into evidence. (Trial Tr. at 47-48). In fact, the Defendant was on trial for this violation at the time of the hearing in this matter. See 53-2016-CR-2009.

[¶39] The District Court also wrote that, "the Defendant testified that he had received counseling and therapy after the events of late October, 2016." In actuality, the Defendant's only testimony about counseling or therapy at the hearing was testimony he

made with regard to a text message he sent to his daughter. In this message, the Defendant tells his daughter that his therapist doesn't want him to text his daughter anymore, until he can get his anger issues under control. (Trial Tr. at 41). Despite this, he continued to text her, and did not follow his therapist's advice. (Trial Tr. at 42). In an affidavit filed in opposition to the Plaintiff's Motion, the Defendant states that he did go to therapy, but states that this therapy was a result of the first incident where he sent a picture of a gun to the Plaintiff, which occurred prior to the incident discussed in this case where he sent a photo with a gun in his mouth. (Doc Id. 38 at ¶8). At no point does the Defendant ever testify that he went to counselling or therapy as a result of this incident with the gun in his mouth, and further provides no evidence probative of this therapy.

[¶40] So, to summarize, the District Court denied the Plaintiff's Motion based on the finding that the Defendant had abided by the terms of the restraining order and attended therapy after his actions on October 26. However, the actual evidence in this case proves that the Defendant did not abide by the restraining order, and in fact intentionally violated it. Further, the Defendant has never actually testified to attending therapy after the incidents of October 26, and the only testimony he did provide was to tell his daughter that his therapist said he wasn't supposed to text her anymore, advice he admits he ignored. Obviously, there is clear error here. The District Court has made a ruling which is not based on the actual evidence of this case, and has compounded that error by ignoring the contradictory testimony of the Defendant which undermines this ruling and destroys the Defendant's credibility. This Ruling also ignores the presumption under North Dakota Law that a perpetrator of Domestic Violence cannot have unsupervised parenting time.

[¶41] Further, the District Court also writes that, "The October events appear to be an isolated incident and Mr. Dickson's actions in attempting to better himself and his mental health suggest that the Original Judgment remains in the children's best interest." Given that the only evidence Mr. Dickson offers as to bettering his mental health was made by his fiancé and sister, neither of whom testified to attending that therapy, this is an erroneous finding for the Court to make. Even worse is the fact that the Plaintiff and Defendant both agree that two similar incidents occurred prior to the October 26 incident. The Court does not mention either incident, despite the only dispute being whether or not a gun was present at the second incident, as was discussed above. In light of all of this, the Court must be left with the definite and firm conviction that a mistake has been made by the District Court.

VI. CONCLUSION

[¶42] In failing to discuss the presumption against awarding unsupervised parenting time to perpetrators of domestic violence, the District Court has committed clear error. There can be no denying that the Defendant's behavior constitutes domestic violence, and as such the presumption, as the District Court noted, must be in effect.

[¶43] Further, the District Court's ruling in this case is based on evidence that does not exist, and in making it, the Court ignored the Defendant's own testimony as to his motivations and intentions.

[¶44] For all these reasons, the Supreme Court must reverse the District Court's decision, and remand this case to the District Court with instructions to apply the statutory presumption and enter an order granting full residential responsibility to the Plaintiff, with the Defendant receiving supervised parenting time.

RESPECTFULLY SUBMITTED this 16th day of January, 2018.

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CERTIFICATE OF SERVICE

[¶45] I hereby certify that a true and correct copy of the foregoing Brief of Plaintiff/Appellant together with the Appendix was served electronically on this 16th day of January addressed to:

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