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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Kathy Wolt, Appellee, vs. Steve Wolt, Appellant, And State of North Dakota, Appellee.	Case No. 20180304 **APPELLANT'S BRIEF**

Appeal from June 13, 2018, Memorandum and Order on the Defendant's Motion to Modify Monthly Child Support Payment and Motion to Correct Clerk of Court's Child Support Records, July 3, 2018, Third Amended Judgment, and July 17, 2018, Order Denying Defendant Motion for Sanctions
District Court of Morton
South Central Judicial District
Case No. 30-08-C-00347
The Honorable James S. Hill, District Judge, Presiding

Arnold V. Fleck (ND State Bar ID #04102)
FLECK LAW OFFICE
Attorney for Appellant
314 East Thayer Avenue, Suite 220
P.O. Box 6178
Bismarck, ND 58506-6178
Telephone: (701) 258-5256
Facsimile: (701) 258-5626
E-mail: arnfleck@usa.net

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I. Statement of Issues on Appeal

[¶1] The issues on appeal are:

1. Whether the district court erred in its determination of Steve's monthly child support payment?

2. Whether the district court erred in its decision to deny Steve's motion for sanctions?

3. Whether the district court's failure to recognize the State's argument regarding the State's calculation of Steve's monthly child support is frivolous, creates an appearance of impropriety requiring Judge Hill be removed as the judge to hear this matter on remand?

II. Statement of the Case

[¶2] This is an appeal from a *Third Amended Judgment* entered in a divorce action based on the district court's denial, in part, of a post-judgment motion to modify the monthly child support payment of appellant, Steve Wolt (Steve) and from the district court's denial of a motion for sanctions that Steve filed against Steven Podoll (Podoll), the attorney of record for State of North Dakota, and State of North Dakota (State), based on an argument the legal contentions made by the State in favor of the manner in which it calculated Steve's child support under N.D. Admin. Code §75-02-04.1-05(4), violated N.D.R.Civ.P. 11(b)(2).

III. Statement of Facts

A. Facts Regarding Relevant History of Case for All Issues

[¶3] Appellee, Kathy Wolt, (Kathy) and Steve were divorced on March 16, 2009. App., p.12 (*Judgment,* Index# 113). Kathy was awarded custody of their then three minor children, G.W. (1995), S.W. (1997), and L.W. (2003), and Steve was ordered to pay Kathy monthly child support in amount of $792 beginning on February 5, 2009. App., pp.10-11 (*Judgment*, Index# 113). In an *Amended Judgment* entered on January 15, 2013, Steve was awarded primary residential responsibility of oldest child, G.W., and, based on the split custody of the parties' children, Kathy's monthly child support for G.W. was set at $685 and Steve's monthly child support for S.W. and L.W. was set at $1643, and, using offset required by N.D. Admin. Code §75-02-04.1-03, Steve was ordered to pay monthly child support in the amount of $958, effective on January 16, 2013, and continuing on the first day of each month thereafter "until further order of the Court, the children attain the age of 19 years, or graduate from high school, whichever occurs first." App., pp.13,16-17 (*Judgment*, Index# 219). A *Second Amended Judgment* entered on November 17, 2014, only addressed parenting issues involving the two younger children, as G.W. had graduated from high school in May of 2014 at the age of 18 years, and this judgment did not change the child support provisions of the January 15, 2013, *Amended Judgment*. App., pp.19-21,34 (*Second Amended Judgment,* Index# 255, ¶¶1-9); *Affidavit of Custodial Parent,* Index# 224. S.W., the second oldest child, graduated from high school in May of 2015, also at the age of 18 years. App., p.7 (*Affidavit of Custodial Parent,* Index# 256).

[¶4] Under the mandate of N.D.C.C. §14-09-08.2., a child support obligation typically automatically terminates when a child reaches age of 18 and graduates from high school, or

attains the age of 19, whichever is the earliest to occur. See *Hallock v. Mickels*, 1997 ND 156, ¶7, 568 N.W.2d 277. Thus, it is undisputed that, since May of 2015, Steve only has had an obligation to pay child support for L.W., with the obligation continuing until the end of month in which L.W. attains the age of 18 and graduates from high school but not beyond the month in which L.W. attains the age of 19, whichever is the earliest to occur. *Id.* And, if the child support order sought to be amended was entered at least one year before filing of the motion to modify, as is situation in this case, the district court is mandated to order amendment of the child support order to conform the amount of the child support payment to that required under the child support guidelines. N.D.C.C. §14-09-08.4(4). Furthermore, "a modification of child support should be made effective from the date of the motion to modify, absent good reason to set some other date, and the court retains discretion to set some later effective date, but its reasons for doing so should be apparent or explained." *Marchus v. Marchus*, 2006 ND 81, ¶8, 712 N.W.2d 636 (quoting *Geinert v. Geinert*, 2002 ND 135, ¶10, 649 N.W.2d 237).

[¶5] Steve filed with the Clerk of the North Dakota Supreme Court a notice of appeal on August 2, 2018, that provided notice that Steve was appealing to the North Dakota Supreme Court from the *Third Amended Judgment* entered on July 3, 2018, which incorporated the conclusions of law contained within the June 13, 2018, order denying, in part, Steve's motion to modify his monthly child support payment, and from the *Order Denying Defendant's Motion for Sanctions*, that was entered on July 17, 2018, which denied in its entirety Steve's June 14, 2018, motion for sanctions. App., pp.179-180 (*Notice of Appeal*, Index# 311).

B. Facts Regarding Motion to Modify Monthly Child Support Payment

[¶6] Steve has been self-employed since this action was commenced by Wolt Transport Inc. (Wolt Transfer), a Subchapter S corporation over which Steve has complete control as the president and only shareholder of the company, which at all times relevant to this appeal, represented Steve's primary employment on which he relies to support himself. App,, pp.32-33 (*Affidavit of Steve Wolt,* Index# 264, ¶¶2-3). Though Steve also started a farming operation in 2015 over which he also has complete control as the sole proprietor of the operation, he was only able to net a small profit in 2015 from that self-employment activity and has sustained large losses from that activity in both 2016 and 2017. App,, pp.33-127 [*Affidavit of Steve Wolt,* Index# 264, ¶¶3-4, & Exhibit 1, which consists of copies of Steve's 2013, 2014, 2015, 2016, and 2017 Federal & State Individual Income Tax Returns (On the first page, line 18, of Form 1040 of each of the Federal Returns for the years 2015, 2016, & 2017, lists the farm income or loss Steve incurred in each of those years from his farming activity)]. Steve also continued to run Wolt Transport on a substantially similar scale as he had operated it in the five years prior to filing his motion to modify his support payment . App., pp.32-33 (*Affidavit of Steve Wolt,* Index# 264, ¶¶3-4).

[¶7] In light of his history of self-employment and the degree to which his income from the prior years has fluctuated, the North Dakota Child Support Guidelines (*Guidelines*) require that "the average of the most recent five years of each self-employment ***activity***… must be used to determine [Steve's] self-employment income" for child support purposes. See N.D. Admin. Code §75-02-04.1-05(4) (emphasis added). The *Guidelines,* however, do contain some restrictions on the use of losses from self-employment activity to offset

obligor's gross income from self-employment income for child support purposes. See N.D. Admin. Code §75-02-04.1-05(7). As indicated in the previous paragraph, Steve incurred large losses in two of the three years (67% of the years) that he has been involved in his self-employment farming activity, and, thus, the income that Steve lost from his self-employment farming activity may not be used in the determination of his income from his other self-employment activity, i.e. his Wolt Transfer self-employment activity. Id.; see also, *Defendant's Child Support Guidelines Worksheets*, App., pp.25-31. In addition, the loss of $11,672 that Steve incurred from his Wolt Transfer self-employment activity in 2016 may not be used to reduce the income he netted from that activity in the other four years of 2013, 2014, 2015, and 2017, that were included in the determination of the average annual gross income that Steve earned from self-employment in the five year period being used to determine his income from self-employment under the *Guidelines*, because his monthly average gross income from that self-employment activity over the five years being averaged, reduced by one-twelfth of the self-employment loss from 2016, a figure of $3,199 [($250,348 net income from 5 years ÷ 60 months = $4,172 per month – ($11,672 losses in 2016 ÷ 12) = $3,199] does not equal or exceed the figure of $4,451 (which is the amount equal to 0.6 of $89,010, which is the amount reported as the statewide average earnings for persons employed in North Dakota as a transportation manager by Job Service of North Dakota in its 2017 report of *Employment and Wages by Occupation* as printed at:

https://www.ndworkforceintelligence.com/admin/gsipub/htmlarea/uploads/lmi_empwagesocc2017.pdf

÷ 12). Id.

[¶8] Proof of Steve's income over the course of the five years used to determine his average self-employment income is set forth in his 2013-2017 personal income tax returns,

that were admitted into evidence, as Exhibit 1 of the *Affidavit of Steve Wolt*, on April 30, 2018, the date of the filing of Steve's motion. See App. pp.7-8,33,35-127. These returns establish that Steve's annual income from his self-employment with Wolt Transport has fluctuated over the course of the past five years. Id. As reported in Steve's affidavit and in the *Affidavit of Jon Goodhart*, Steve's tax return preparer, which was also filed and made a part of this record on April 30, 2018, Steve's primary source of income for all of those years came from his employment with Wolt Transport, where Steve was and remains employed as the president of the company for which he is also the sole shareholder, which entitles him to receive all annual profits from the company, above and beyond that which are paid to him as wages or benefits as an employee and president of the company, by his election under 26 U.S.C. §1362(a), i.e. S corporation election, to avoid any corporate tax on those profits. App. pp.32,128 (*Affidavit of Steve Wolt* , Index# 264, ¶3; *Affidavit of Jon Goodhart*, Index# 268, ¶2). All the total income generated from the company each year, after deducting all expenses allowed by the Internal Revenue Code, are reported as corporate income on Steve's Individual Income Tax Returns. *Id*.

[¶9] Nonetheless, as shown in the calculations of Steve's net income from self-employment, in Schedule B, pages 3-6, of *Defendant's Child Support Guidelines Worksheet*, Steve's losses from his past farm self-employment activity and the losses he incurred in 2016 from his Wolt Transport self-employment activity were not used in calculating Steve's average annual income realized from self-employment in the past five years, because the farming loses and the 2016 losses from Steve's self-employment with Wolt Transfer did not meet the conditions that need to be met under Section 75-02-04.1-05(7) to be used to reduce his other income earned in those years. App., pp.8,25-31.

[¶10] In addition, though Steve does employ his mother and sister at Wolt Transfer, each is employed on part-time basis, Steve does not share his home with either his mother or sister, and neither of them are paid an amount for their services that exceeds the fair value of their services. App., pp.8,33,130-131 *(Affidavit of Steve Wolt,* Index# 264, ¶5*; Affidavit of Jon Goodhart,* Index# 268, ¶7). Furthermore, the provisions under Section 75-02-04.1-05(1)(b)(3) are not applicable to the facts of this case, in that Wolt Transfer is not a corporation that pays its own tax, in light of Steve's S corporation election.

[¶11] Wherefore, as established by the calculations set forth in *Defendant's Child Support Guidelines Worksheet* and supported by the information contained in the affidavits of Steve Wolt and his CPA, Jon Goodhart, Steve's monthly child support obligation should have been reduced to $685 a month effective May 1, 2018, with the obligation to terminate at the end of the month at which L.W., the parties' youngest child, attains the age of 18 years old and graduates from high school or at the end of the month in which L.W. attains the age of 19, whichever occurs first, unless terminated earlier by order of the court for other reasons. Nonetheless, the district court, instead of complying with the *Guidelines* simply accepted the child support calculations submitted by Podoll, which, as admitted by Podoll at the oral arguments on the motion, do not take comply with the definition of self-employment provided in Section 74-02-04.1-01(10) of the *Guidelines.* App., pp.188 (*Transcript,* p.10, l.20-24). Furthermore, the State's argument, that was presented by Podoll and accepted by the district court, also specifically ignores subpart a(1) of the provisions of §74-02-04.1-05(1) of the *Guidelines*, the very subsection of the *Guidelines* upon which Podoll claimed allowed the State to argue the wages and benefits paid to Steve by Wolt Transfer and reported as income on the annual W-2 Statement that is issued to Steve by Wolt Transfer,

are not to be treated as self-employment income in the calculation of Steve's average annual net self-employment income under the *Guidelines.* Podoll arguments also ignore the very specific instruction contained on page 1 of the *Schedule B – Self-Employment Income (N.D. Admin. Code §74-02-04.1-05)* of the *Guidelines* worksheet published by the Child Support Division of the North Dakota Department of Human Services (*Child Support*) in January of 2018, that requires, in the determination of an obligor's average annual net self-employment income, that the court only deduct from the "total income" of the obligor, which is the amount reported on each of the obligor's relevant income tax returns on the '"total income' line on the IRS form 1040; i.e., line 22 of 2014 tax return" the following three amounts:

1. "Amount of total income that is not the obligor's income -05(1)(a)(1)"
2. "Amount of total income that does not come from this self-employment -05(1)(a)(1)"
3. "Amount of total partnership or S Corporation income over which obligor does not have significant control that has not been distributed -05(1)(a)(2)"

See *Schedule B – Self-Employment Income (N.D. Admin. Code §74-02-04.1-05)* of the *Guidelines* worksheet published at:

https://childsupport.dhs.nd.gov/sites/default/files/Partners%20-%20Lawyers%20-%20Schedule%20B-2018-01.pdf

[¶12] Despite Podoll's contention to the contrary, there simply are no provisions within the *Guidelines* that allows the district court to treat the wages and benefits Steve's received from Wolt Transfer and reported as income to Steve on the annual W-2 Statement issued to Steve by Wolt Transfer in 2017, and all other years being averaged, as anything other than self-employment income, in the determination of Steve's annual net income from his self-

employment with Wolt Transfer. The definition of "self -employment" contained in Section 74-02-04.1-01(10) and the provisions of Section 74-02-04.1-05(1)(a)&(b) of the *Guidelines* simply preclude any interpretation of the relevant *Guidelines* that support the State's arguments or the district court's conclusion of law that Steve's W-2 income from Wolt Transfer is not to be treated as self-employment income under the *Guidelines.*

C. Facts Regarding Motion for Sanctions & Disqualification of Judge on Remand

[¶13] Within 5 days of being served with Podoll's frivolous argument that Steve's W-2 Statement wages and benefits from Wolt Transfer were not to be treated as self-employment income under the *Guidelines,* Steve served the State with a motion for sanctions under N.D.R.Civ.P. 11(c) based on the fact, "the legal contentions made by the State in the *State's Supplemental Response*[1]… are not warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." App., pp.181,184-191 (*Affidavit of Costs & Attorney Fees Re: Motion for Sanctions,* Index# 289, ¶¶1,2; Exhibit 1 to Affidavit, Index# 290, consisting of May 22, 2018, *Notice of Motion for Sanctions, Motion for Sanctions, Brief in Support of Motion for Sanctions).* Within his May 22, 2018, motion for sanctions, Steve notified the State that it had 21 days to withdraw the *State's Supplemental Response* or that Steve would seek "an order under Rule 11(c), N.D.R.Civ.P., that imposes an appropriate sanction on the State of North Dakota and/or

1. The State filed a supplemental response to raise their arguments against Steve's calculation of his monthly child support payment based on his averaging of his self-employment, because the State had not addressed Steve's motion to modify his child support payment in its initial response to Steve's motions, other than to assert it reserved its "right to object to Steve's child support calculations and supplement its response as necessary." App., p.8 (*State's Response to Defendant's Motion to Modify Monthly Child Support Payment,* Index# 275, ¶8).

Steven G. Podoll, the attorney of record for the State…, in an amount that reimburses (Steve) all the attorney fees, court costs, and any other expenses directly resulting to (Steve) from the legal contentions made in the *State's Supplemental Response..."* App., p.153 (*Motion for Sanctions*, Index# 288, ¶1); also see App., p.188 (*Brief in Support* of *Motion for Sanctions*, Index# 291, ¶¶2-3).

[¶14] As a result of the frivolous arguments contained in the *State's Supplemental Response*, Steve requested oral arguments be held on his motion to modify his monthly child support payment, to provide an opportunity to the State to explain how it can contend the definition provided for self-employment in N.D. Admin. Code §74-02-04.1-01(10) does not apply in the determination of Steve's average net annual income from his self-employment with Wolt Transfer. App., p.8 (*Brief in Reply to State's Supplemental Response*, Index# 276, ¶7; *Notice of Oral Arguments*, Index# 283); App., p.183 (*Transcript*, p.5, l.3-18).

[¶15] At the oral arguments, the State, through Podoll, continued to assert the same arguments it had made in its *Supplemental Response.* Compare App., pp.141-143 (*State's Supplemental Response,* Index# 280, ¶¶4-8) with App., pp.185-188 (*Transcript,* p.*7*, l.10, to p.10, l.24). Since the State failed to withdraw its legal contention that the definition of self-employment contained in Section 74-02-04.1-01(10) does not apply in the determination of Steve's average net annual income from his self-employment with Wolt Transfer, that it originally had made in the *State's Supplemental Response*, within 21 days of being served with the initial motion for sanctions, Steve on June 14, 2018, filed with the district court and served the State with a formal motion for sanctions under N.D.R.Civ.P. 11(c), wherein he requested the district court impose "an appropriate sanction on the State of North Dakota and/or Steven G. Podoll, the attorney of record for the State…, in an

amount that reimburses [Steve] all the attorney fees, court costs, and any other expenses directly resulting to [Steve] from the legal contentions made in the *State's Supplemental Response…"* App., p.153 *(Motion for Sanctions*, Index# 288, ¶1).

[¶16] On the day before Steve filed his motion for sanctions, June 13, 2018, the district court entered its order denying in part Steve's motion to modify his monthly child support payment, wherein the district court accepted the State's calculation of Steve's monthly child support obligation, despite the fact the State's calculation were not in accord with the provisions of the *Guidelines* on self-employment. App., pp.144-152 (*Memorandum and Order,* Index# 285, ¶¶4-10,13-15,17,22-32,36). In its order, the district court not only concluded that all the State's arguments had merit and concluded as a matter of law the State's calculation of Steve's child support monthly payment were accurate, it also ruled that uncontested evidence that had been presented by Steve in the form of an affidavit executed by his CPA, who prepared Steve's tax returns and provided accounting and payroll services to Wolt Transfer for more than five years prior to the filing of the affidavit, was "defective," on the grounds the affidavit contained hearsay statements and was not subject to cross examination at an evidentiary hearing. App., pp.128-131,144-152 (*Affidavit of Jon Goodhart*, Index# 268, ¶¶1-7; *Memorandum and Order,* Index# 285, ¶¶5-11,13-17,22-32,36). None of the other parties objected to the contents of either of the two affidavits that Steve filed in support of his motions, nor had any of the other parties requested an evidentiary hearing on the motion and the district court did not order an evidentiary hearing be held on the motions prior to the court issuing its order denying, in part, Steve's motion to modify his monthly child support payment. App., pp.7-9 (*Register of Actions*, Index# 307, p.7, to Index# 259, p.9). The district court made

the ruling to not consider the contents of the CPA's affidavit as evidence in its June 13, 2018, order despite the fact none of the other parties objected to the court doing so and the fact the court had been notified, at the oral arguments, of the right of the parties to request an evidentiary hearing on the motion and of the authority of the court to, in its discretion, set an evidentiary hearing on the motion or to hear the motion just on affidavits, under N.D.R.Civ.P. 43(b) and N.D.R.Ct. 3.2(a)(3), but never did order that an evidentiary hearing be held on the motion. App., pp. 183-184 (*Transcript*, p.5, l.20, to p.6, l.24).

[¶17] On June 30, 2018, the State filed a response in opposition to Steve's motion for sanctions. App., pp.167-170 (*State's Response Opposing Motion for Sanctions*, Index# 298). On July 2, 2018, Steve filed a reply to the *State's Response,* and, on July 3, 2018, Steve filed an addendum to his July 2, 2018, reply to provide notification of an error that had been made to citations contained in his reply. App., pp.8-9 (*Brief in Reply to State's Response*, Index# 299; *Addendum to Brief in Reply* to *State's Response*, Index# 304). On July 10, 2018, the State filed a response to Steve's reply to the *State's Response.* App., p.9 (*State's Response to Defendant's Brief in Reply to State's Response Opposing Motion for Sanctions*, Index# 309). On July 17, 2018, the district court issued an order denying Steve's motion for sanctions, wherein the district court repeatedly criticized the undersigned for making the motion. App., pp.173-178 (*Order Denying Defendant Motion for Sanctions*, Index# 310, ¶¶2-20).

II. Law and Arguments

A. The Trial Court erred in its determination of Steve's monthly child support payment.

[¶18] "'Child support determinations involve questions of law which are subject to the de novo standard of review, findings of fact which are subject to the clearly erroneous standard of review, and may, in some limited areas, be matters of discretion subject to the abuse of discretion standard of review.'" *Halberg v. Halberg*, 2010 ND 20, ¶8, 777 N.W.2d 872 (quoting *Verhey v. McKenzie*, 2009 ND 35, ¶5, 763 N.W.2d 113).

[¶19] The *Guidelines* provide a schedule of child support amounts based on the obligor's net income. See N.D. Admin. Code §75-02-04.1-10. The scheduled amount is presumed to be the correct amount of support. N.D. Admin. Code §75-02-04.1-09. "The district court must comply with the child support guidelines to determine an obligor's child support obligation, and a court errs as a matter of law if it fails to comply with the guidelines." *Heinle v. Heinle*, 2010 ND 5, ¶36, 777 N.W.2d 590 (Emphasis added). "'The interpretation and proper application of a provision of the child support guidelines is a question of law, fully reviewable on appeal.'" Id. (Emphasis added) (quoting *State ex rel. K.B. v. Bauer*, 2009 ND 45, ¶8, 763 N.W.2d 462). "'The failure to properly apply the child support guidelines to the facts involves an error of law.'" *Heinle*, at ¶36 (Emphasis added) (quoting *Bauer*, at ¶8). An error of law is subject to the de novo standard of review on appeal. *Keita v. Keita*, 2012 ND 234, ¶15, 823 N.W.2d 726.

[¶20] In this case, it is obvious that the district court failed to comply with the *Guidelines* in determining Steve' child support obligation. The district court simply accepted the State's arguments about how to properly calculate Steve's income from self-employment,

without regard to the key provisions of the *Guidelines* applicable to how to determine income form self-employment, and then, for reasons not fully understood by the undersigned, also ruled the affidavit from Steve's CPA of "little evidentiary value" and declared "to the extent that the argument of the [undersigned] is based upon the affidavit "testimony" of [Steve's CPA], the argument is defective." App., pp. 144-152 (*Memorandum and Order*, Index# 285, ¶¶4-10,13-15,17,22-32,36).

[¶21] Steve presented his motion based on the testimony contained in each of the two affidavits, his own and his CPA's, that were filed with the motion, and indicated, at the time he filed his motion, he would request an evidentiary hearing on the motion if any of the other parties contested any of the facts alleged in the affidavits. App., p.7 (*Notice of Motions to Modify Monthly Child Support Payment & to Correct Clerk of Court's Child Support Records*, Index 259, ¶2). Neither the State or Kathy ever contested the contents of either affidavit, and neither requested an evidentiary hearing on the motion and the district court also did not order that an evidentiary hearing be held on the motion, even though the court was notified at the June 11, 2018, oral arguments on the motion that, under N.D.R.Civ.P. 43 (b), the district court had the authority to order an evidentiary hearing on the motion. App., pp.7-9,183-184 (*Register of Actions*, Index## 259-307; *Transcript*, p.5, l.20, to p.6, l.22). To the extent the factual allegations contained in either of the affidavits, Steve's or his CPA's, may be contested in this appeal by either of the Appellees, such arguments must be dismissed as having been waived at the district court level, due to the failure to object to the affidavits and/or the failure to request an evidentiary hearing on the motion at the district court level. See *Miller v. Mees*, 2011 ND 166, ¶8, 802 N.W.2d 153 (Our rules allow evidence to be submitted by affidavits for some motions); See also *Law v. Whittet*, 2014 ND 69, ¶10, 844 N.W.2d 885 (quoting

State v. Nelson, 488 N.W.2d 600, 604 (N.D. 1992) ("While credibility of witnesses is normally the province of the trial court, a trial court cannot disregard testimony that is uncontradicted and unchallenged where no basis for doing so appears in the record.").

[¶22] The State contented, contrary to Steve's position, and the district court agreed that, that portion of Steve's gross income each year that is reported as income to the Internal Revenue Service on the annual W-2 Wage and Tax Statement that Steve receives from Wolt Transfer each year, "may not be included as self-employment income…" when calculating Steve's average annual net income from his 2013-2017 Wolt Transfer self-employment activity under N.D. Admin. Code §75-02-04.1-05. App., pp.141-152,185 (*State's Supplemental Response*, Index# 280, ¶4; *Memorandum and Order*, Index# 285, ¶¶14-15,23,26; *Transcript*, p.7, l.21-25). The State claimed the following two arguments supported its position that the State does not need to apply the definition of self-employment contained in N.D. Admin. Code §75-02-04.1-01(10) in the determination of Steve's child support payment based on his self-employment income: (1) the provisions of a Federal statute, 26 U.S. Code §1402(b)(1), that defines self-employment income for IRS purposes, excludes W-2 wages as self-employment income; and (2) a misinterpretation/misapplication of the provisions contained in N.D. Admin. Code §§75-02-04.1-01(4)(b) and 75-02-04.1-05(1) of the *Guidelines*, which the State contends "states the determination of net income from self-employment requires the use of the Internal Revenue Service's definition of net income from self-employment." App., pp.141-143,186 (*State's Supplemental Response*, Index# 280, ¶¶5-6; *Transcript*, p.8, l.1-14).

[¶23] Administrative regulations are derivatives of statutes and are construed under rules of statutory construction. *Sloan v. North Dakota Workforce Safety & Ins.*, 2011 ND 194,

¶14, 804 N.W.2d 184. Statutory interpretation is a question of law, fully reviewable on appeal. *GO Comm. ex rel. Hale v. City of Minot*, 2005 ND 136, ¶9, 701 N.W.2d 865. The objective in interpreting regulations is to determine the drafter's intent by first looking at the language itself. *Boumont v. Boumont*, 2005 ND 20, ¶8, 691 N.W.2d 278. Words are given their plain, ordinary, and commonly understood meaning, unless defined or unless a contrary intent plainly appears. Id. See N.D.C.C. §1-02-02. Regulations are construed as a whole and are harmonized to give meaning to related provisions. *Boumont*, at ¶8; See N.D.C.C. §1-02-07. If the relevant language is clear and unambiguous, "the letter of it is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. §1-02-05. If the relevant language is susceptible to different, rational meanings, it is ambiguous. *Amerada Hess Corp. v. State ex rel. Tax Comm'r*, 2005 ND 155, ¶12, 704 N.W.2d 8. If the relevant language is ambiguous or doubtful in meaning, a court may consider extrinsic aids, including history, to determine intent. N.D.C.C. §1-02-39.

[¶24] In the interpretation of N.D. Admin. Code §§75-02-04.1-01(4)(b) and 75-02-04.1-05(1), in regards to the question of whether or not Steve's W-2 income from Wolt Transfer should be treated as self-employment income from Wolt Transfer in the calculation of Steve's average net monthly income for child support purposes, it is important to note that the *Guidelines* define "self-employment" to mean:

> "[E]mployment that results in *an obligor earning income from any business organization or entity which the obligor is, to a significant extent, able to directly or indirectly control.* For purposes of this chapter, *it also includes any activity that generates income from* rental property, royalties, business gains, partnerships, trusts, *corporations, and any other organization or entity regardless of form* and *regardless of whether such activity would be considered self-employment activity under the Internal Revenue Code*."

N.D. Admin. Code §75-02-04.1-01(10) (Emphasis added). The State not only completely ignored this definition in presenting its arguments to the district court, but also acknowledged that it did so at the oral arguments on the motion. App., pp.141-143,208 (*State's Supplemental Response,* Index# 280, ¶¶3-8; *Transcript,* p.8, l.1-2). The State justified this departure from the *Guidelines* by claiming §§75-02-04.1-01(4)(b) and 75-02-04.1-05(1) mandated the departure and claiming the departure was reasonable because "[i]ncluding line 7 wages as self-employment income while retaining the same expenses included in Defendant's worksheet would produce an improper reflection of his self-employment expenses, which would result in an improper child support calculation." App., pp.141-143,186 (*State's Supplemental Response*, Index# 280, ¶5-6; *Transcript*, p.8, l.1-14). The State's arguments, upon a reading of §§75-02-04.1-01(4)(b) and 75-02-04.1-05(1), and using common sense, are neither reasonable or sensical.

[¶25] Section 75-02-04.1-01(4)(b) defines gross income as "income from any source" and provides a nonexclusive listing of items properly included in gross income. See *Lawrence v. Delkamp*, 1998 ND 178, ¶15, 584 N.W.2d 515. Though it is true, as pointed out by the State, that "salaries" and "wages" are listed in the nonexclusive listing of items properly included in gross income, the State fails to also acknowledge the list also includes "net income from self-employment" and nothing in §75-02-04.1-01(4)(b) or elsewhere in the *Guidelines* allows for or mandates not applying the definition of self-employment in the determination of Steve's average net yearly income from his self-employment activity under §75-02-04.1-05(4). See N.D. Admin. Code §§75-02-04.1-01(4)(b), 75-02-04.1-01(10), and 75-02-04.1-05(1). Like all the arguments of the State that contradicted Steve's positions at the district court level, each such argument is nothing more than a red herring, i.e. a false

statement made with the likely intent to confuse the district court. The extent of the intent to confuse, becomes even more apparent when Section 75-02-04.1-05(1) is read in its entirety and the directives contained in Subsection 1(a) of Section 75-02-04.1-05 are compared with the directives set forth on page 1 of the *Schedule B – Self-Employment Income (N.D. Admin. Code §74-02-04.1-05)* of the *Guidelines* worksheet, which was published by the Child Support Division of the North Dakota Department of Human Services in January 2018 and is currently set forth on the Internet at:

https://childsupport.dhs.nd.gov/sites/default/files/Partners%20-%20Lawyers%20-%20Schedule%20B-2018-01.pdf

[¶26] Though the State contended before the district court, during oral arguments on the motion, that the provisions of Section 75-02-04.1-05 provided the mandate under the *Guidelines* to disregard the definition of self-employment contained in Section 75-02-04.1-01(10) in the determination of Steve's average annual income from self-employment, Section 75-02-04.1-05(1) simply provides the method that should be followed in calculating Steve's average annual income from self-employment and Section 75-02-04.1-05 does <u>not</u> provide any provisions authorizing anyone to disregard the definition of self-employment contained in Section 75-02-04.1-01(10) in the determination of Steve's average annual income from self-employment. See App., p.186 (*Transcript,* p 8, l.1-14); N.D. Admin. Code §75-02-04.1-05. The directives in Section 75-02-04.1-05(1) and on *Schedule B – Self-Employment Income (N.D. Admin. Code §74-02-04.1-05)* of the *Guidelines* worksheet, simply indicate that in determining Steve's net income from self-employment for each of the five years being averaged, you start with the total income reported on the tax return for the year, i.e. "use the 'total income' line on the IRS form 1040; i.e., line 22 of 2014 tax

return"; then, as directed in Section 75-02-04.1-05(1)(a), you deduct from that total income the "[a]mount of total income that is not the obligor's income," the "[a]mount of total income that does not come from this self-employment," and the "[a]mount of income from partnership or S corporation over which obligor does not have significant control." And then, as directed in Section 75-02-04.1-05(1)(b), you add the "[b]usiness expenses attributable to the obligor or a member of the obligor's household for benefits, pensions, and profit-sharing plans," the "[p]ayments made from the obligor's self-employment activity to a member of the obligor's household, other than the obligor, to the extent the payments exceeds the fair market value of the service furnished by the household member," and "[w]ith respect to a corporation the pays its own tax over which the obligor is able to exercise direct or in direct control to a significant extent, the taxable income of the corporation, less the corporation's federal income tax, multiplied by seventy percent of the obligor's ownership interest in the corporation." Contrary to the State's arguments, there is nothing in Section 75-02-04.1-05(1) that allows the district court to treat the income Steve received from Wolt Tranfer as W-2 income in each of the years being averaged under Section 75-02-04.1-05(4) as anything but self-employment received from his Wolt Transfer self-employment activity. Though determining net income from self-employment is a little more complex than that, based on restrictions placed under the *Guidelines* on the use of losses from a self-employment activity to offset income from other years where there were profits, this is all that needs to be explained in this appeal, in that the State, contrary to the directives contained in Section 75-02-04.1-05(1)(a)(1), in its determination of Steve's average net income from his self-employment with Wolt Transfer, treated Steve's W-2 income from his Wolt Transfer self-employment activity as income that Steve received

from an employer who did not meet the definition of self-employment, by improperly deducting Steve's W-2 income from Wolt Transfer from his total annual income for each of the five years averaged in its determination of the amount of income Steve netted from his Wolt Transfer self-employment activity and then improperly treated Steve's 2017 W-2 Statement income from Wolt Transfer as ordinary annual reoccurring income for purposes of determining Steve's projected future income under the *Guidelines.* *Compare* N.D. Admin. Code §75-02-04.1-05(1)(a), *Schedule B - Self-Employment Income (N.D. Admin. Code §74-02-04.1-05)* of the *Guidelines* worksheets, & App., pp.132-140 (*State's Child Support Guidelines Worksheets,* Index# 279), *Schedule B - Self-Employment Income (N.D. Admin. Code §74-02-04.1-05)* of the *Guidelines* worksheets, Steve's W-2 income from Wolt Transfer (Steve's Income Tax Returns, Index## 265-166), *with* App., pp.25-31 (*Defendant's Child Support Guidelines Worksheets/Calculations,* Index# 263). Under the definition of self-employment contained in Section 75-02-04.1-01(10) and the directives contained in Section 75-02-04.1-05(1), Steve's W-2 income from Wolt Transfer must be included with all the other income he earned from his Wolt Transfer self-employment activity for each of the five years that were included in the averaging under Section 75-02-04.1-05(4), and not be treated as ordinary annual reoccurring income. See N.D. Admin. Code §§75-02-04.1-01(10), 75-02-04.1-05(1)(a), & *Schedule B - Self-Employment Income (N.D. Admin. Code §74-02-04.1-05)* of the *Guidelines* worksheets.

[¶27] In addition, the State's argument, that is set forth in App., p. 142, in the last sentence of ¶6 of the *State's Supplemental Response,* Index# 280, that "[i]ncluding line 7 wages as self-employment income while retaining the same expenses included in Defendant's worksheet would produce an improper reflection of his self-employment expenses, which would result in

an improper child support calculation," is also nonsensical. The statement lacks clarity as to what expenses the State is referring to in the statement and there is no explanation, anywhere in the State's argument, on how the Steve's worksheets produces an improper reflection of Steve's self-employment expenses. The truth of the matter is that, from a common sense view of the self-employment *Guidelines*, Steve's W-2 income from Wolt Transfer needs to be treated as income from his Wolt Transfer self-employment activity for each of the five years being averaged to come up with a fairly accurate average of the annual gross income Steve received from his Wolt Transfer self-employment activity during the five years being averaged, since Steve's W-2 income from Wolt Transfer constituted expenses to the company in each of the years being averaged, and his W-2 income from Wolt Transfer needs to be included in the annual gross income Steve received from Wolt Transfer to produce an accurate total of the income he received from Wolt Transfer in each of the five years being averaged. The failure to include his W-2 income as income received from his Wolt Transfer self-employment income would produce an average that is less than the total income he actually received from Wolt Transfer in each of the years being averaged. Furthermore, if for some reason beyond the undersigned comprehension, this Court were to approve of the State's argument on this issue, it would create a scenario that would allow self-employed obligor's to manipulate their self-employment income by creating a Subchapter S corporation to run his or her self-employment activity and then taking most of their income from the self-employment in the form of W-2 income in the first few years to be averaged and then in the final year to be averaged significantly reduce his or her W-2 income to create a lower average income from the self-employment activity than in reality the obligor had actually received in the years being averaged, while at the same time

reducing that which is reportable as ordinary annual reoccurring income on the obligor's child support worksheets.

[¶28] The State's arguments are not in accord with a reasonable interpretation of the applicable *Guidelines* and are nonsensical. It is therefore respectfully requested this Court reverse the district court's decision to the contrary and remand this issue back to the district court with instructions to enter an order directing that a third amended judgment be entered that sets Steve's monthly child support payment at $685 effective retroactively to May 1, 2018, with the obligation to terminate at the end of the month at which the parties' youngest child, L.W. (2003), attains the age of 18 years old and graduates from high school or at the end of the month in which L.W. attains the age of 19 years old, whichever occurs first, unless terminated earlier by order of the court for other reasons.

B. The Trial Court erred in its decision to deny Steve's motion for sanctions.

[¶29] As explained in the preceding argument, all of the State's arguments in support of its position, that, for child support purposes, Steve's W-2 income from Wolt Transfer is not to be considered self-employment income received from his employment with Wolt Transfer, are nothing more than red herrings, i.e. false statements that were likely made with the intent to confuse the district court. Having no basis under the law, the State's arguments violated N.D.R.Civ.P. 11(b)(2) and Steve's motion for sanctions should have been granted by the district court.

[¶30] Wherefore, it is respectfully requested this Court reverse the district court's decision denying Steve's motion for sanctions on the grounds the court abused its discretion in denying the motion, because its decision is unreasonable and not the product of a rational mental

process, See *Krueger v. Grand Forks Cnty*., 2014 ND 170, ¶13, 852 N.W.2d 354, and remand this issue back to the district court with instructions to enter an order directing that a third amended judgment be entered that awards Steve, after a hearing or receiving affidavits on the amount to be awarded, i.e. the reasonable attorney fees and costs Steve has and will incur in prosecuting his motion for sanctions against the State of North Dakota and Podoll, jointly and severally, before the district court prior to this appeal, before this Court while on appeal, and through the proceedings on remand to the district court.

C. The Trial Court's failure to recognize the State's argument regarding the State's calculation of Steve's monthly child support is frivolous creates an appearance of impropriety requiring The Honorable James S. Hill, the District Court Judge who presided over the post-judgment proceedings from which this appeal is taken, be removed as the judge to hear this matter on remand.

[¶31] When a district court may do something, it is generally a matter of discretion. *Buchholz v. Buchholz*, 1999 ND 36, ¶11, 590 N.W.2d 215. A district court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination. *Krueger v. Grand Forks Cnty*., 2014 ND 170, ¶13, 852 N.W.2d 354. "The party seeking relief must show that the court positively abused its discretion and not that the court made a 'poor' decision." *Id.*

[¶32] The Canons under the Judicial Code of Conduct govern the disqualification of a judge for bias or prejudice. *Grasser v. Grasser*, 2018 ND 85, ¶9, 909 N.W.2d 99. Under *N.D. Code Jud. Conduct Canon 3(E)(1)(a):*

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceedings.

A judge is required to disqualify himself if the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceedings. Id. When making recusal decisions, the judge must determine whether a reasonable person could, on the basis of all the facts, reasonably question the judge's impartiality. *Farm Credit Bank of St. Paul v. Brakke,* 512 N.W.2d 718, 721 (N.D. 1994). Recusal is not required in response to spurious or vague charges of partiality. Id. The inquiry here is whether a reasonable person could, on the basis of the objective facts, reasonably question the judge's impartiality. See *Sargent County Bank v. Wentworth*, 500 N.W.2d 862, 878 (N.D. 1993).

[¶33] Though this Court has held unfavorable rulings are insufficient to demonstrate bias, *Evenstad v. Buchholz*, 1997 ND 141, ¶11, 567 N.W.2d 194, that holding should be held not to apply in circumstances when the district court judge has ruled in the other parties' favor based on a conclusion of law that is not warranted by existing law in violation of N.D.R.Civ.P. 11(b)(2). In this instance, the State's arguments at the district court level were so devoid of merit that the State should have been aware of the impossibility of success on appeal if the district court judge were to accept the State's arguments on how to determine Steve's income under the *Guidelines*. See *Thompson v. Molde*, 2018 ND 245, ¶15 (quoting *Lithun v. DuPaul*, 449 N.W.2d 810, 811 (ND 1989). And the failure of the district court judge to be able to discern that fact, i.e. the impossibility of success on appeal if the district court judge were to accept the State's arguments, should constitute an

objective fact from which the district court judge's impartiality may be reasonably questioned.

[¶34] The foregoing exception to this Court's ruling in *Evenstad v. Buchholz*, 1997 ND 141, ¶11, 567 N.W.2d 194, that unfavorable rulings are insufficient to demonstrate bias, is needed to provide incentives for district court judges to do their job properly. Such an exception would discourage laziness, bias, and prejudice among our district court judges and create a reasonable basis to discourage inept people from wanting to serve as district court judges.

[¶35] Wherefore, it is respectfully requested this Court, upon reversing the decisions of the district court denying Steve's motions to modify his child support payment and for sanctions, in its remand include instructions that the Honorable James S. Hill, District Court Judge, recuse himself from presiding over the proceedings on remand.

V. Conclusion and Prayer for Relief

[¶36] For the above sated reasons, it is respectfully requested this Court reverse that part of the June 13, 2018, *Memorandum and Order* and July 3, 2018, *Third Amended Judgment* that denied, in part, Steve's April 30, 2018, motion to modify his monthly child support payment, and reverse the July 17, 2018, *Order Denying Defendant Motion for Sanctions*, and remand the matter to the district court with instructions that the Honorable James S. Hill, District Court Judge, recuse himself from presiding over the proceedings on remand, and directing that the district court judge assigned to replace Judge Hill on remand enter an order directing that a third amended judgment be entered that sets Steve's monthly child support payment at $685 effective retroactively to May 1, 2018, with the obligation to

terminate at the end of the month at which the parties' youngest child, L.W. (2003), attains the age of 18 years old and graduates from high school or at the end of the month in which L.W. attains the age of 19 years old, whichever occurs first, unless terminated earlier by order of the court for other reasons, and that awards Steve, after an evidentiary hearing or submission of affidavits, whatever the district judge assigned to this case on remand in his or her discretion decides is needed to produce sufficiently reliable evidence of the amount to be awarded to Steve as the reasonable attorney fees and costs Steve incurred in prosecuting his *Motion for Sanctions* against the State of North Dakota and Podoll, jointly and severally, that were and will be incurred before the district court prior to this appeal, before this Court while on appeal, and through the proceedings on remand to the district court.

[¶37] Respectfully submitted this 7th day of December, 2018.

FLECK LAW OFFICE
Attorney for Appellant/Cross-Appellee
314 East Thayer Avenue, Suite 220
P.O. Box 6178
Bismarck, ND 58506-6178
Phone: (701) 258-5256
Email: arnfleck@usa.net

/s/ Arnold V. Fleck .
By: Arnold V. Fleck (ND Bar ID# 04102)

Certificate of Service

[¶38] I hereby certify that on the 7th day of December, 2018, the foregoing Appellant's Brief and accompanying Appellant's Appendix were served on Sheila Keller, the attorney of record for the State of North Dakota, Appellee, and Kathy Wolt, the other Appellee in this case, by emailing electronic drafts of each document to bismarckcse@nd.gov and by

mailing by first class mail a copy of each document to the last known mailing address of the Kathy Wolt, which is set forth below with proper postage affixed to the envelope that contained a copy of each such document:

Kathy Wolt
4909 E Roughrider Circle
Mandan, ND 58554

/s/ Arnold V. Fleck _ .
Arnold V. Fleck (ND Bar ID# 04102)