

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kathy Wolt,)	
)	
Plaintiff and Appellee,)	
)	
vs.)	
)	
Steve Wolt,)	Supreme Court No. 20180304
)	Morton Co. No. 30-08-C-00347
Defendant and Appellant,)	
)	
and)	
)	
State of North Dakota,)	
)	
Statutory Real Party in)	
Interest and Appellee,)	

APPEAL FROM THE JUNE 12, 2018 MEMORANDUM AND ORDER AND THE
JULY 3, 2018 THIRD AMENDED JUDGMENT RESULTING FROM MOTION FOR
MODIFICATION OF CHILD SUPPORT, AND THE JULY 13, 2018 ORDER
DENYING MOTION FOR SANCTIONS ISSUED BY THE SOUTH CENTRAL
JUDICIAL DISTRICT, THE HONORABLE JAMES S. HILL

STATE OF NORTH DAKOTA'S APPELLEE BRIEF

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[2] STATEMENT OF ISSUES

[3] I. Whether the trial court erred in the calculation of Mr. Wolt's child support obligation?

[4] II. Whether the trial court erred in the denial of Mr. Wolt's Motion for Sanctions?

[5] III. Whether there has been an appearance of impropriety on the part of the trial court such that Judge Hill should be removed from future proceedings?

[6] STATEMENT OF THE CASE

[7] This is an appeal from the Third Amended Judgment entered on July 3, 2018. (App. 171-172). The Third Amended Judgment was entered after a motion for modification of his child support ("Motion to Modify") was brought by Mr. Wolt. (App. 22-140). Mr. Wolt sought to have his child support reduced from \$1,643.00 to \$685.00 per month. The State of North Dakota's Child Support Division, through the Bismarck Regional Child Support Unit, filed its response to Mr. Wolt's Motion to Modify, opposing the calculations proposed by Mr. Wolt. (App. 141-143). Oral argument on the Motion was held on June 11, 2018, after which the Trial Court issued its Memorandum and Order on Defendant's Motion to Modify Monthly Child Support Payments and Motion to Correct Clerk of Court's Child Support Records ("Memorandum and Order") on June 12, 2018. (App. 144-152). The Third Amended Judgment incorporated the Trial Court's decision that Mr. Wolt's child support obligation should be reduced to \$923.00 per month. (App. 171-172). Mr. Wolt has appealed the trial court's ruling on the calculation of his gross income and the resulting child support obligation. (App. 179-180).

[8] Subsequent to the issuance of the trial court's Memorandum and Order, Mr. Wolt filed a Motion for Sanctions, seeking sanctions against both the attorney for the Bismarck Regional Child Support Unit and the State of North Dakota's Child Support Division of the Department of Human Services. (App. 153-166). The Child Support Division, through the Bismarck Regional Child Support Unit, opposed this motion. (App. 167-170). The trial court issued its Order Denying Defendant's Motion for Sanctions on July 13, 2018. (App 173-178). Mr. Wolt is appealing the Order Denying Sanctions.

[9] Mr. Wolt also seeks to have this Court find that the rulings of the trial judge, James S. Hill, have resulted in an appearance of impropriety such that this Court should require the Judge's removal from all future matters before the trial court.

[10] STATEMENT OF THE FACTS

[11] The parties were married and had three children. The divorce judgment, entered on March 16, 2009, placed primary residential responsibility with Ms. Wolt and ordered Mr. Wolt to pay child support of \$792.00 per month. (App. 10-12). This judgment was modified with the entry of the Amended Judgment on January 15, 2013. (App. 13-18). The modification was based on the agreement of the parties that Mr. Wolt would have primary residential responsibility of the child, G.W., born in 1995, and Ms. Wolt would have primary residential responsibility of the two younger children, S.W., born in 1997 and L.W., born in 2003. (App. 13-14). With the modification of residential responsibility, the trial court also modified child support to require each parent to pay support for the children in the home of the other parent. This resulted in Ms. Wolt being ordered to pay \$685.00 per month for the child G.W., and Mr. Wolt being ordered to pay \$1,643.00 per month for S.W. and L. W. (App. 16-17). Ms. Wolt's obligation to pay child support for G.W. ended

as of May 31, 2014, as the child had reached the age of eighteen and graduated from high school. (Doc ID# 224). A second amended judgment was entered on November 17, 2014. This modification addressed changes to parenting time. (App. 19-21).

[12] Mr. Wolt filed his recent Motion to Modify Defendant's Monthly Child Support Payment on April 30, 2018. (App 22-140). In his motion papers, Mr. Wolt asked the trial court to reduce his child support for the one remaining minor child to \$658. (App. 22-24). He provided income documentation in the form of tax documents for the years 2013 through 2017, as well as proposed child support calculations. (App. 25-31; 35-127). The State, through the Child Support Division's Bismarck Regional Child Support Unit ("the State"), filed a response to this Motion as well as the separate motion filed by Mr. Wolt concerning the payment records in this case. (Doc ID# 275; App. 141-143). Mr. Wolt has not appealed the trial court's ruling on his separate motion.

[13] Oral argument on the Motion to Modify Mr. Wolt's child support obligation was requested by Mr. Wolt. (Doc. ID## 276 and 282). This hearing was held on June 11, 2018, at which time both counsel for Mr. Wolt and for the State provided argument. (See Transcript).

[14] Mr. Wolt is sole owner of Wolt Transport, Inc., which is operated as a subchapter S corporation. (App. 32). Mr. Wolt receives wages from this business which are reported to the Internal Revenue Service on a W-2 form. (App. 52, 67, 92, 111, and 127). In addition, as the sole owner of all of the shares of this business, Mr. Wolt also reports on his tax returns the pass-through income and the allowable section 179 expenses reported by Wolt Transport, Inc. on IRS Schedule K-1 (Form 1120-S). (App. 49, 64, 89, 108 and

125). Mr. Wolt pays taxes on the pass-through income. The business pays no taxes on its profits.

[15] Mr. Wolt, in his motion documents and at oral argument, took the position that the wages reported on the W-2 form are to be included in the calculation of his net income from self-employment and should not be treated as separate earnings. (App. 22-31; Doc ID# 282; Tr. 9-10, 12). The State's position was that, because the corporation paid Mr. Wolt wages as an employee of the business, this income must be considered separately from the net income from the self-employment because the reported self-employment income from the corporation takes into consideration these wages as expenses and the IRS treats the wages differently. (App. 141-143; Tr. 7-8, 10-11). The trial court took the matter under advisement and issued its Memorandum and Order on the modification motion on June 12, 2018. (App. 144-152).

[16] In this Memorandum and Order, the trial court reviewed the arguments of each party and found that there was no dispute that Mr. Wolt was the sole owner of Wolt Transport, Inc. and had sole control over the business. (App. 145-146, ¶ 8). The trial court also found the State's argument to be both factually and legally persuasive. (App. 147, ¶ 15). The trial court was not persuaded by Mr. Wolt's argument that the failure of the IRS to tax the W-2 wages as self-employment should have no bearing on whether the income should be considered self-employment income for child support purposes. (App. 149, ¶ 23). The trial court held that, "if an individual's W-2 wages are not included in net earnings from self-employment, they must be included separately as regular earning and not self-employment income." (App. 150, ¶ 26).

[17] The trial court also took into consideration the fact that Wolt Transport, Inc. included the amount of W-2 wages paid to Mr. Wolt when it calculated its expenses. (App. 150, ¶ 29). “The Court concludes that retaining the same expenses included in defendant’s worksheet would produce an improper reflection of his self-employment expenses, and would result in an improper child support calculation.” (Id.)

[18] The result of the trial court’s analysis of the arguments of all parties, and the evidence presented in the form of Mr. Wolt’s Affidavit and his 2013 through 2017 tax documents, was that the W-2 wages paid to Mr. Wolt were to be treated separately from the income reported as self-employment income from Wolt Transport. (App. 150, ¶ 26). The resulting gross income adopted by the trial court was the amount calculated by the State. The net monthly income was determined to be \$5,054.00, resulting in a child support obligation of \$923.00 per month. (App. 150-151, ¶ 30; 152, ¶ 36). The Third Amended Judgment, reflecting this modification, was entered on July 3, 2018. (App. 171-172).

[19] On June 13, 2018, one day after the issuance of the trial court’s Memorandum and Order, Mr. Wolt filed a Motion for Sanctions, seeking sanctions against both the attorney for the Bismarck Regional Child Support Unit and the Child Support Division. (App. 153-166). The basis for his motion was that State’s position on the treatment of W-2 wages paid to Mr. Wolt by Mr. Wolt’s business was frivolous. (App. 153-154). The State opposed Mr. Wolt’s Motion for Sanctions, explaining why its position was supported by the North Dakota Child Support Guidelines and how it did, in fact, consider and apply the definition of self-employment found at N.D. Admin. Code § 75-02-04.1-01(10) (App. 167-170). No hearing was requested on Mr. Wolt’s Motion for Sanctions and the trial court

issued its Order Denying Defendant’s Motion for Sanctions on July 13, 2018. (App. 173-178).

[20] In its Order Denying Defendant’s Motion for Sanctions, the trial court reviewed the procedural history of the recent motions, the arguments made by each party, and its own Memorandum and Order. The trial court found that Attorney Fleck was not legally persuasive at the time of the hearing on the Motion to Modify his client’s child support obligation, and did not prevail on the legal premise he offered. (App. 174, ¶ 5). The trial court went on to note that Attorney Fleck “offers the unfounded assertion that the Court was biased in favor of the State which apparently, (in his mind) explains why the Court adopted an ‘unfounded legal theory’ offered by the State...” (Id.). The court held that its ruling “occurred because he [Attorney Fleck] could not, as a matter of law, convince the Court that his legal theory was the correct legal theory upon which the Court should have ruled.” (Id.).

[21] The trial court concluded that its prior ruling stands as it was not confused by the arguments offered by the parties and was not misled by the attorney for the Child Support Division, despite the inference made by Mr. Wolt in his Brief in Reply to State’s Response Opposing Motion for Sanctions. (App. 175, ¶ 9; Doc ID# 299, ¶ 5). Further, the trial court found that Mr. Fleck did not prove that sanctions were appropriate. (Id.). “[A] fair and reasonable view proves Attorney Fleck to be wholly wrong on his assertion of misconduct on the part of Attorney Podoll, his legal adversary.” (App. 176, ¶ 12). The trial court’s analysis found that the State did address the definition of self-employment in its written and oral arguments. (App. 176, ¶ 13-177, ¶ 16).

[22] As a result, the trial court concluded that “the record overwhelmingly shows that the State of North Dakota and Attorney Podoll is not in violation of Rule 11(b)(2), N.D.R.Civ. P., as asserted by Attorney Fleck.” (App. 178, ¶ 19). Therefore, Mr. Wolt’s Motion for Sanctions was, in all things, denied. (App. 178, ¶ 20). Mr. Wolt filed his Notice of Appeal on August 2, 2018. (App.179-180).

[23] LAW AND ARGUMENT

[24] **ISSUE I:** Whether the trial court erred in the calculation of Mr. Wolt’s child support obligation?

[25] A child support determination involves “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 instances, be matters of discretion that are subject to the abuse of discretion standard of review.” Halberg v. Halberg, 2010 ND 20, ¶ 8, 777 N.W.2d 872 (citations omitted). A trial court errs as a matter of law if it does not comply with the requirements of the child support guidelines. Id.

[26] Mr. Wolt argues that the trial court, when calculating his income, did not properly apply the Child Support Guidelines, specifically N.D. Admin. Code §§ 75-02-04.1-01(10) and 75-02-04.1-05. Therefore, the standard of review is the de novo standard. Upon review of the facts and their application to the North Dakota Child Support Guidelines, the trial court did not err as a matter of law. The calculations adopted by the trial court correctly treated the W-2 wages earned by Mr. Wolt separately from the pass-through income from his business.

[27] Child support calculations are to be based on income that is “sufficiently documented through the use of tax returns, current wage statements, and other information

to fully apprise the court of all gross income.” N.D. Admin. Code § 75-02-04.1-02(7). This subsection goes on to provide that “[w]hen gross income is subject to fluctuation, regardless of whether the obligor is employed or self-employed, information reflecting and covering a period of time sufficient to reveal the likely extent of fluctuations must be provided.” *Id.* When net income from self-employment is being determined, “[t]o the extent that information is reasonably available, the average of the most recent five years of each self-employment activity, . . . must be used to determine self-employment income. N.D. Admin. Code § 75-02-04.1-05(4). Once the gross annual income is determined, the trial court must then determine the obligor’s net monthly income under the child support guidelines, and make an adequate finding to show how this amount was determined. *Halberg*, at ¶ 10.

[28] Mr. Wolt repeatedly argues the State ignores the definition of “self-employment” found in N.D. Admin. Code § 75-02-04.1-01(10) because the State did not apply this section when determining Mr. Wolt’s net income from self-employment. Mr. Wolt’s position is based on a flawed application of section 75-02-04.1-01(10). Section 75-02-04.1-01(10)¹ defines “self-employment” as:

employment 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.

¹ The child support guidelines in effect and applied by the trial court were the guidelines that became effective on January 1, 2018. As of January 1, 2019, there are new guidelines in effect. Sections 75-02-04.1-01(10) and 75-02-04.1-05 were unchanged with the adoption of the 2019 Guidelines.

This section is applied when there is a question as to whether a certain income-generating activity should be considered “self-employment” for the purpose of calculating a child support obligation. In this case, it was undisputed that Mr. Wolt has income from a self-employment activity, namely Wolt Transport, Inc., as the business is a subchapter S corporation over which Mr. Wolt has complete control. (App. 32-34) The State considered this business to be one that generates self-employment income for Mr. Wolt. Therefore, Mr. Wolt’s argument that the State did not properly consider and apply N.D. Admin. Code § 75-02-04.1-01(10) is not supported. At no time did the State fail to apply the definition found at N.D. Admin. Code § 75-02-04.1-01(10). While the State may not have specifically cited this subsection of the guidelines in its briefs or at oral argument, nothing in its pleadings or at the hearing on June 11, 2018, can be construed to be an argument that the subsection was not applied, or that it does not need to be applied. To apply section 75-02-04.1-01(10) with regard to how the self-employment income was to be calculated, as Mr. Wolt argues should have been done, would have been a misapplication of the guidelines.

[29] Since it was undisputed that Wolt Transport, Inc. was a self-employment activity , the child support guidelines provide for the application of section 75-02-04.1-05 to determine how to calculate the net income from this self-employment activity. When calculating the net income from a self-employment activity, N.D. Admin. Code § 75-02-04.1-05 requires that the calculation start with the amount listed as the obligor’s total income for internal revenue service purposes. N.D. Admin. Code § 75-02-04.1-05(1). This amount is then “[r]educed by that amount, if any, of:

- (1) That total income that is not the obligor's income or that is otherwise included in gross income; and
- (2) With respect to a partnership or a small business corporation for which an election under 26 U.S.C. section 1362(a) is in effect and over which the obligor is not able to exercise direct or indirect control to a significant

extent, that income of the partnership or small business corporation which is not available, and has not yet been distributed, to the obligor; and

N.D. Admin. Code § 75-02-04.1-05(1)(a). (Emphasis added). The State contends that the wages paid to Mr. Wolt as an employee of Wolt Transport, Inc., and reported on a W-2 form, fit within subsection (1)(a)(1) of this section as the wages are income that “is otherwise included in gross income”. This Court, in Halberg v. Halberg, considered a similar situation where a self-employed obligor also received a wage from the corporation in which he had an ownership interest, and determined that the child support guidelines require that “[a]ll other types of income, including in-kind income, must be added to the net income from self-employment to calculate the obligor’s gross income....” 2010 ND 20, ¶ 17.

[30] The IRS 1040 form filed by Mr. Wolt reports two to three types of income: wages, salaries, tips, etc. (Line 7), rental real estate, royalties, partnerships, S corporations, trusts, etc. (Line 17) and farm income (Line 18). (App. 35, 53, 68, 93 and 112). His wages were reported by the S corporation on a W-2 form, and a Schedule K-1 (Form 1120-S) was used to report Mr. Wolt’s share of the business’ income, deductions, credits, etc. As the wages earned by Mr. Wolt are in addition to the income reported as being generated by the subchapter S corporation, the wages qualify as income “that is otherwise included in gross income...” N.D. Admin. Code § 75-02-04.1-05(1)(a)(1). This additional W-2 wage income is to be added to the net income from self-employment after the net income from self-employment has been calculated, not before. Halberg at ¶ 17.

[31] While references to sections of the complex Internal Revenue Code can be made, the most compelling evidence of how the IRS distinguishes between wages and net income

is by looking to the IRS tax forms. These forms require that Mr. Wolt's wages be reported separately from the net income from the subchapter S corporation, Wolt Transport, Inc. The child support guidelines do not require a different treatment when calculating total gross income for child support purposes. The trial court agreed.

[32] The pass-through income from Wolt Transport, Inc., as reported on the K-1 (Form 1120-S), is the income earned by the business, less its expenses, which would include the payment of the wages to Mr. Wolt, along with any other expenses that the corporation would have to pay for an employee. This would likely include the corporation's share of Social Security and Medicare taxes for the employee, as well as unemployment and workers compensation premiums. See N.D.C.C. §§ 52-04-01 and 65-04-04.

[33] The position taken by Mr. Wolt, that the wages are really to be treated as self-employment income, requires the re-calculation of the corporation's expenses as those expenses included a deduction for the wages paid to Mr. Wolt, as well as the corporation's contributions for Social Security and Medicare taxes and unemployment and worker's compensation premiums. To require such a recalculation is not supported by the child support guidelines. The guidelines and case law express the fact that reliance on tax documents is a preference for determining the income. N.D. Admin. Code § 75-02-04.1-02(7). Knoll v. Kuleck, 2004 ND 199, ¶ 5, 688 N.W.2d 370. If it is shown that the tax returns are not reliable, a trial court can use other income information to calculate the obligor's income. "Section 75-02-04.1-05(3), N.D. Admin. Code, requires alternative documentation of self-employment income: 'If the tax returns are not available or do not reasonably reflect the income from self-employment, profit and loss statements which more accurately reflect the current status must be used.'" Id. Mr. Wolt's position would

require the trial court to ignore the tax returns whenever there is a subchapter S corporation owned by the obligor, where the obligor is also paid a wage from that business. Such a requirement is contrary to the intent of the guidelines and the holdings of this Court. Even if it weren't contrary to the guidelines, Mr. Wolt would have had to provide alternative evidence to reflect the income he argues was received as a result of his self-employment. He provided no such evidence.

[34] What little specific additional information that was made available by Mr. Wolt was in the form of an Affidavit from his CPA, Jon Goodhart. (App. 128-131). The trial court found this Affidavit to contain hearsay, and was not made subject to cross-examination as Mr. Wolt did not schedule an evidentiary hearing. Mr. Wolt does not agree with the trial court's disregard for the information in the Affidavit, but the court has the discretion to weigh the credibility of the "witness" and the testimony provided.

[35] Even if the trial court had considered the "testimony" offered by Mr. Goodhart, it only supports the State's position that Mr. Wolt's argument requires the complete recalculation of the corporation's income and expenses. Mr. Goodhart discussed the different types of expenses the corporation had as a result of paying Mr. Wolt wages. (App. 128-192, ¶3; 130, ¶ 5 – 6). These various amounts would need to be removed from the expenses of the corporation and added back into the corporation's income.

[36] That is why the State's position, that merely including the wages as self-employment income without a corresponding recalculation of the corporation's expenses, would result in an improper child support calculation. (App. 142, ¶ 6). The trial court also found this to be true. (App. 150, ¶ 29). Too, the calculation of Mr. Wolt's tax deductions,

specifically the Social Security and Medicare tax deductions, would need to be changed on the child support worksheet.

[37] Because the self-employment income is received from a subchapter S corporation, Mr. Wolt is not required to pay self-employment tax on the income. (See Line 27 on the IRS 1040 forms). If the wages are really self-employment income, as argued by Mr. Wolt, then he also would have no Social Security and Medicare deduction on his child support worksheet. By changing the nature of the earnings from wages to self-employment income, Mr. Wolt must also acknowledge the fact that he needs to change the types of deductions to which he is entitled. Based on his proposed child support calculations, Mr. Wolt has not acknowledged this as his calculations clearly show a deduction for a wage-earner's Social Security and Medicare contributions. (App. 25-26). Mr. Wolt cannot pick and choose how the W-2 earnings are treated. Either they are wages or they are self-employment earnings.

[38] Contrary to the allegation by Mr. Wolt, that the State's argument is nothing more than a red herring, the position of the State is in compliance with the North Dakota Child Support Guidelines, the facts presented by Mr. Wolt and the tax documents he filed. Therefore, the trial court did not err in finding that the State's position is supported by the facts and the law. The trial court properly interpreted and applied the Child Support Guidelines and the modification ordered by the trial court should be affirmed.

[39] **Issue II:** Whether the trial court erred in the denial of Mr. Wolt's Motion for Sanctions?

[40] The review of a trial court's decision on an alleged violation of N.D.R.Civ. P. 11(b) is the abuse of discretion standard. Dietz v. Kautzman, 2004 ND 119, ¶ 15, 681 N.W.2d 437. A trial court abuses its discretion when the trial court acts in an arbitrary,

unreasonable, or unconscionable manner or when it misinterprets or misapplies the law. Giese v. Giese, 2004 ND 58, ¶ 8, 676 N.W.2d 794 (citations omitted).

[41] Mr. Wolt sought sanctions against both the attorney for the Bismarck Regional Child Support Unit and the State of North Dakota, arguing that the State’s position on the treatment of the W-2 wages paid to Mr. Wolt from his business was frivolous. Under N.D.R.Civ. P. 11(b), the filing of a pleading by an attorney or self-represented party is a certification that,

to the best of the person’s knowledge, information and belief, formed after an inquiry reasonable under the circumstances:

....

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing a new law;....

N.D.R.Civ. P. 11(b)(2). A claim or defense is frivolous if there is a “complete absence of actual facts or law that a reasonable person could not have expected that a court would render judgment in his favor.” Peterson v. Zerr, 477 N.W.2d 230, 236 (N.D. 1991).

[42] As has been shown in the discussion of the prior issue, the State had both a factual and a legal basis for the arguments made on the treatment of the W-2 income as wages and not as included in the calculation of Mr. Wolt’s net income from self-employment. The arguments put forth by the State were not frivolous. The facts relied on by the State were those proffered by Mr. Wolt in the form of his Affidavit and his 2013 through 2017 tax documents. The law relied upon was the North Dakota Child Support Guidelines. A reasonable person can understand the interpretation expressed by the State, as well as why Mr. Wolt’s position is problematic and contrary to the intent of the Child Support Guidelines. The fact that Mr. Wolt does not agree with the State’s position, or the trial

court's ruling, does not mean that the State's arguments were frivolous or sanctionable. The State's position was supported by existing law.

[43] The trial court did not abuse its discretion in denying Mr. Wolt's request for sanctions. In its Order Denying Defendant's Motion for Sanctions, the trial court thoroughly reviewed the procedural history of the recently decided motion, its analysis of each side's argument, and its own reasoning for its prior ruling. The trial court specifically found that it had not been convinced that Mr. Wolt's position was the correct legal theory on which to decide the issue presented. (App. 174-175, ¶ 5). The trial court found that the contentions made by the State in its arguments were warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. (App. 176, ¶ 11). Therefore, there was no violation of N.D.R.Civ. P. 11(b)(2). (Id.). "A fair and reasonable view proves Attorney Fleck to be wholly wrong in his assertion of misconduct on the part of Attorney Podoll, his legal adversary." (App. 176, ¶ 12).

[44] The trial court explained, in detail, why it believed Mr. Wolt's requests for sanctions to be incorrect. Mr. Wolt has failed to show how the trial court abused its discretion in its decision finding no violation of N.D.R.Civ. P. 11(b)(2) and its denial of the imposition of sanctions. Accordingly, the trial court's Order Denying Sanctions should be affirmed and no attorney's fees or costs should be awarded to Mr. Wolt.

[45] **Issue III:** Whether there has been an appearance of impropriety on the part of the trial court such that Judge Hill should be removed from future proceedings?

[46] Mr. Wolt, for the first time, is formally seeking the removal of the trial judge, James S. Hill, from hearing this matter. Mr. Wolt has alleged that the judge's impartiality should

be questioned based on the trial court's recent rulings. While Mr. Wolt, in his Brief in Reply to State's Response to Motion for Sanctions, not only made unfounded accusations about the attorneys for the Child Support Division, he also alleged bias on the part of Judge Hill. (Doc ID# 299, ¶ 5).

[47] The North Dakota Code of Judicial Conduct outlines the canons and rules of judicial ethics to be observed by judges. Canon 2 states that "[a] judge shall perform the duties of judicial office impartially, competently and diligently. Rule 2.11 addresses the disqualification of a judge and states, in part:

A. A judge shall disqualify in any proceeding in which the judge's impartiality might reasonably be questioned, including the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding....

N.D. Code Jud. Conduct 2.11(A)(1). The term, "impartiality", is defined in the Code as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." The term, "knowledge", is also defined in the Code. It is the "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

[48] Mr. Wolt did not, in the trial court, file a demand for change of judge under N.D.C.C. § 29-15-21, even though he would have been able to do so at the time he filed his Motion to Modify. Mr. Wolt also did not seek a recusal for cause after filing his Motion to Modify. Therefore, Judge Hill had no opportunity to consider recusing himself, or to explain why he did not need to recuse himself. This issue of Judge Hill's impartiality, or lack thereof, first came to the attention of the trial court and the State as a basis for Mr.

Wolt's requesting sanctions against his opposing counsel and the State. As no formal action was taken in the trial court to seek the recusal of Judge Hill, this issue does not seem to be properly before this Court. Even if it is appropriate to raise the issue when there is no lower court order denying recusal, the relief requested by Mr. Wolt is not supported and it should be denied.

[49] The standard of review when there has been a trial court order denying a request for recusal is the abuse of discretion standard. Rath v. Rath, 2013 ND 243, ¶ 14, 840 N.W.2d 656. Typically, this Court would review whether the trial court acted in an arbitrary, unreasonable, or unconscionable manner or misinterpreted or misapplied the law. The only trial court finding or order on the issue of its impartiality is in its Order Denying Defendant's Motion for Sanctions. (App. 173-178). In Paragraph 5 of this Order, the trial court states:

Furthermore, and rather astoundingly, Attorney Fleck offers the unfounded assertion that the Court was biased in favor of the State [DE 299, ¶ 5] which apparently (in his mind) explains why the Court adopted an 'unfounded legal theory' offered by the State to defeat the *Motion to Modify Child Support Payment* [DE 260]...This, contrarily to Attorney Fleck's assertions, all occurred because he could not, as a matter of law, convince the Court that his legal theory was the correct legal theory upon which this Court should have ruled.

(App. 174-175, ¶5).

[50] The law presumes that judges are unbiased, and adverse or erroneous rulings do not, by themselves, demonstrate bias. Rath v. Rath, 2018 ND 138, ¶ 25, 911 N.W.2d 919 (quoting Schweitzer v Mattingley, 2016 ND 231, ¶ 12, 867 N.W.2d 541). "When making a recusal decision, a 'judge must determine whether a reasonable person could, on the basis of all the facts, reasonably question the judge's impartiality.'" Id. (quoting Rath v. Rath,

2016 ND 46, ¶ 31, 876 N.W.2d 414). “Although a judge has a duty to recuse when required by the Code of Judicial Conduct, a judge also has an equally strong duty not to recuse when the circumstances do not require recusal. Id.

[51] Mr. Wolt has failed to show how the trial judge was biased or impartial in either his ruling on his initial Motion to Modify or his subsequent Motion for Sanctions. In fact, the grounds presented in this appeal are predominantly based on the fact that the trial judge issued an order that was adverse to Mr. Wolt’s position. No bias or impartiality has been shown. Mr. Wolt, other than making generalized statements of what he believes Judge Hill’s relationship is with the attorneys for the State, he provided no evidence to show that Judge Hill is somehow biased against any party or counsel that opposes the child support program. The trial judge’s ruling on the Motion to Modify “was the product of a rational mental process leading to a reasoned determination, and it did not misinterpret or misapply the law”. Rath v. Rath, 2018 ND at ¶ 28. The rulings in this case do not substantiate his claim or warrant a removal of Judge Hill from future proceedings in this matter and his request should be denied.

[52] CONCLUSION

[53] The trial court’s treatment of Mr. Wolt’s W-2 wages, paid to him by his subchapter S corporation, Wolt Transport, Inc., was proper. The child support guidelines require that W-2 wages received from a business are to be treated separately from the net income from self-employment the obligor may receive from that same business, even if the obligor is the sole owner of the business. Therefore, the trial court’s order should be affirmed.

[54] The trial court’s order finding no violation of N.D.R.Civ. P. 11(b)(2) by counsel for the Bismarck Regional Child Support Unit and the State’s Child Support Division was also

proper. The State's arguments on the treatment of Mr. Wolt's wages in the calculation of his gross income were supported by existing law and the trial court did not abuse its discretion in not sanctioning the State or awarding costs and attorney's fees to Mr. Wolt. Therefore, the trial court's order should be affirmed.

[55] Finally, Mr. Wolt has failed to show that Judge James S. Hill lacked impartiality in the decisions made in this case, and the speculative allegations of bias are wholly unsupported by the record. Therefore, Mr. Wolt's request to have Judge Hill removed from future proceedings in this case should be denied.

Dated this 11th day of January, 2019.

/s/Sheila K. Keller
Sheila K. Keller
Special Assistant Attorney General
Bar ID Number: 04509
Bismarck Regional Child Support Unit
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Bismarck ND 58507-7310
Telephone No. 701-328-0955
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Attorney for Child Support

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

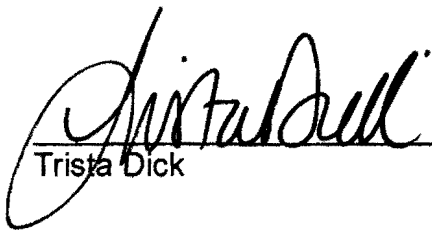
Kathy Wolt,)
)
 Plaintiff and Appellee,)
)
 vs.)
)
 Steve Wolt,) Supreme Court No. 20180304
) Morton Co. No. 30-08-C-00347
 Defendant and Appellant,)
)
 and)
)
 State of North Dakota,)
)
 Statutory Real Party in)
 Interest and Appellee,)

APPEAL FROM THE JUNE 12, 2018 MEMORANDUM AND ORDER AND THE JULY 3, 2018 THIRD AMENDED JUDGMENT RESULTING FROM MOTION FOR MODIFICATION OF CHILD SUPPORT, AND THE JULY 13, 2018 ORDER DENYING MOTION FOR SANCTIONS ISSUED BY THE SOUTH CENTRAL JUDICIAL DISTRICT, THE HONORABLE JAMES S. HILL

AFFIDAVIT OF SERVICE

[1] Trista Dick, being duly sworn on oath, deposes and states that she is of legal age and that on January 11, 2019, she served the State of North Dakota's Appellee's Brief in the above matter electronically as follows:


Arnold V. Fleck, Attorney for Defendant arnfleck@usa.net


Trista Dick

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Subscribed and sworn to before me this 11th day of January, 2019.

CYNTHIA BECHTOLD
Notary Public
State of North Dakota
My Commission Expires March 28, 2019


Notary Public

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Kathy Wolt,)	
)	
Plaintiff and Appellee,)	
)	
vs.)	
)	
Steve Wolt,)	Supreme Court No. 20180304
)	Morton Co. No. 30-08-C-00347
Defendant and Appellant,)	
)	
and)	
)	
State of North Dakota,)	
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Statutory Real Party in)	
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AFFIDAVIT OF SERVICE

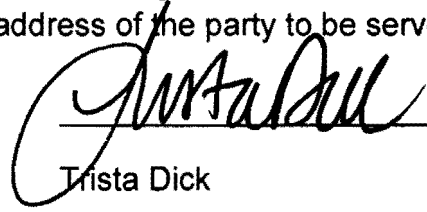
[1] Trista Dick, being duly sworn on oath, deposes and states that she is of legal age and that on January 11, 2019, she placed in the United States mail at Bismarck, North Dakota, a true and correct copy of the following documents filed in the above entitled action:

State of North Dakota Appellee's Brief

[2] That copies of the above papers were securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

KATHY E WOLT
4909 E ROUGHRIDER CIR
MANDAN ND 58554-1036

[3] That to the best of your affiant's knowledge, information and belief, such address is the last reasonably ascertainable address of the party to be served.



Trista Dick

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Subscribed and sworn to before me this 11th day of January, 2019.

CYNTHIA BECHTOLD
Notary Public
State of North Dakota
My Commission Expires March 28, 2019



Notary Public