

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 REPLY BRIEF**

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**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. State's Arguments on Appeal become even more Nonsensical as it Continues to Try to Justify Trial Court's Rulings Adopting Arguments made by State before Trial Court**

[¶1] Arguments contained in *State of North Dakota's Appellee Brief* (hereinafter "*State's Brief*") are based on distortions of this Court's rulings in *Halberg v. Halberg*, 2010 ND 20, 777 N.W.2d 872, and *Knoll v. Kuleck*, 2004 ND 199, 688 N.W.2d 370, a distortion of actual argument presented by State to Trial Court, a complete disregard of clear intent of *North Dakota Child Support Guidelines* (hereinafter "*Guidelines*"). State's argument on primary underlying issue that has been raised on appeal, i.e. whether district court erred in its determination of Steve's monthly child support payment, is stated in ¶ 15 of *State's Brief*, wherein State contends "because [Wolt Transport Inc.] paid [Steve] wages as an employee of the business, this income must be considered separate from [the amount Steve grossed from this self-employment activity] because the reported self-employment income from the corporation takes in to consideration these wages as expenses and the IRS treats the wages differently."

[¶2] This argument, as asserted by Steve both before trial court and in his *Appellant's Brief*, clearly runs afoul of the §75-02-04.1-01(10) definition of self-employment, which requires:

"[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). There is no question that Steve's employment with Wolt Transport Inc. constitutes self-employment under *Guidelines*, as it

is undisputed that Steve is president and sole shareholder of corporation and has complete authority to directly control activities of the corporation. *Compare* App., pp. 32-33 (*Affidavit of Steve Wolt*, Index# 264, ¶¶2-3) with *State's Brief*, ¶¶ 14, 16, 28, & 29. Wherefore, contrary to the State's continued contention, any and all income Steve earns, even his W-2 income, from Wolt Transport Inc. must be treated as self-employment income under the *Guidelines*. See N.D. Admin. Code §75-02-04.1-01(10).

[¶3] Though State has done and continues to do its best to confuse the issues, resolution of primary issue is as simple as applying §75-02-04.1-01(10) definition of self-employment to provisions of §75-02-04.1-05. Nowhere in *Guidelines* does it allow for ignoring definitions found in §75-02-04.1-01 when applying any of the other sections of *Guidelines* to a determination of a child support obligation in a case, and there is no reason not to apply §75-02-04.1-01(10) definition of self-employment to §75-02-04.1-05 on self-employment in this case. While, on other hand, as contended by State, not to apply it to §75-02-04.1-05 on self-employment in this case, would effectively render §75-02-04.1-01(10) meaningless. State's attempt to persuade this Court otherwise is nothing more than self-serving statements that have no support under law as promulgated in *Guidelines* and *Guidelines Worksheets*.

[¶4] A question may arise to anyone involved in this appeal, as to why would State resort to making such frivolous argument? The answer to that question, as believed by undersigned, is because State knew, from past experience with undersigned and this trial court judge, that the judge has an extreme bias in favor of the State and concluded, in advance of trial court's decision on Steve's motion, that State could make any argument, even frivolous one, and still prevail in cases in which undersigned is involved.

**A. Trial Court's Rulings are based on Conclusory Statements that offer no analysis of Law and Facts of Case**

[¶5] Trial court's rulings on Steve's motions to modify his child support payment and for sanctions consist simply of many conclusory statements that ruled in favor of the State on both motions by accepting all of the State's arguments as presented by the State without any analysis of the undisputed facts and law. Trial court's rulings offers no assistance in this appeal, other than (1) to confirm undisputed facts that the court declared the contents of the *Affidavit of Jon Goodhart* not admissible, when no party contested accuracy of contents of affidavit either by objecting to Affidavit or requesting evidentiary hearing on either motion and without court deciding, as was within its discretion, to hold evidentiary hearing on any of Steve's motions, and (2) to confirm trial court had ruled against Steve's motions. See *Appellant's Brief*, ¶ 16 & 21.

**B. Attorney for State did in fact Admit to Trial Court that State's Argument is not in Accord with definition of Self-Employment set forth in N.D. Admin. Code § 75-02-04.1-01(10)**

[¶6] In ¶ 19 of *State's Brief*, State contends that, at Trial Court level, State had, "in fact, consider[ed] and appl[ied] the definition of self-employment found at N.D. Admin. Code §75-02-04.1-01(10)," when the State explained to trial court why State's position was supported by the *Guidelines*. State cites to "App. 167-170" to support that position, which is *State's Response Opposing Motion for Sanctions* that was filed by State on June 30, 2018, in response to Steve's June 14, 2018, *Motion for Sanctions*. *State's Response Opposing Motion for Sanctions* was filed 47 days after State had submitted its arguments in opposition to Steve's *Motion to Modify Monthly Child Support Payment* in *State's Supplemental Response to Defendant's Motion to Modify Monthly Support Payment*, that was filed on

May 17, 2018, and 17 days after trial court had already ruled in favor of all of State's arguments in trial court's *Memorandum and Order on Defendant's Motion to Modify Monthly Support Payment* that was entered on June 13, 2017. Though the contention State now makes on appeal about its treatment of §75-02-04.1-01(10) definition of self-employment in its argument to trial court, may have some truth to it, it appears statement was made to deceive this Court into believing State had made a rational explanation about its treatment of §75-02-04.1-01(10) definition of self-employment to the trial court prior to court having made its decision to accept all arguments of the State. However, fact remains that State has never reasonably explained, at any time before trial court or on appeal, how State's arguments are in accord with § 75-02-04.1-01(10) definition of self-employment. Even explanation offered in ¶¶ 4-5 of the *State's Response Opposing Motion for Sanctions* is vague and obscure, just as is more expanded explanation now being offered in the *State's Brief*.

[¶7] The essence of State's argument is that provisions of § 75-02-04.1-05 on self-employment override the definition of self-employment contained in N.D. Admin. Code §75-02-04.1-01(10), but even that argument is not based on reasonable interpretation of §75-02-04.1-05 or actual instructions published by Child Support Division of the North Dakota Department of Human Services on how to calculate self-employment income set forth on *Schedule B – Self-Employment Income (N.D. Admin. Code §74-02-04.1-05)* of the *Guidelines* worksheets. See *Appellant's Brief*, ¶¶ 25-26.

**C. There was no attempt by State or Trial Court to seek any additional information from Steve or to request an evidentiary hearing on Steve' Motion to Modify Monthly Child Support Payment**

[¶8] In ¶¶ 33-37 of *State's Brief*, State contends for first time that expenses incurred by Wolt Transfer Inc. for Social Security and Medicare Taxes and unemployment and worker's compensation premiums in connection with its employment of Steve should have been included in the income attributable to income Steve received from his self-employment with Wolt Transfer Inc. However, §75-02-04.1-05 on self-employment does not require such an accounting and neither State or Ms. Wolt had requested that Steve produce anything other than his 2013-2017 income tax returns, so even if there was an issue here, State and Ms. Wolt waived it by not seeking production of any evidence beyond Steve's tax returns and evidence contained in Steve's and Jon Goodhart's affidavits. See, *Knoll v. Kuleck*, 2004 ND 199, ¶ 14, 688 N.W.2d 370 (J. Sandstrom, concurring) (Regional Child Support Enforcement Units are charged with the public interest in seeing that the correct amount of child support is determined under the statutes and guidelines, and then that amount is paid. N.D.C.C. §14-09-09.27. The units' lawyers are to be seekers of truth and justice. Their goal must not be to stick an obligor with a higher or lesser obligation than is appropriate. Their goal must be to present the courts with all relevant evidence."); Also see, *Hadland v. Schroeder*, 326 N.W.2d 709, 714 (N.D. 1982); *Williston Co-op. Credit Union v. Fossum*, 427 N.W.2d 804, 806 (N.D. 1988) (Without timely objection, otherwise inadmissible evidence may be considered by the court.).

[¶9] Furthermore, as was done in Steve's calculation of his monthly child support payment in these proceedings, N.D. Admin. Code §75-02-04.1-05(9) specifically allowed Steve to deduct various hypothetical amounts allowed in §75-02-04.1-01(6) regarding



income, Social Security, and Medicare taxes from his average net income from his self-employment with Wolt Transfer Inc., prior to arriving at his actual net income under *Guidelines*. Purpose of *Guidelines* was to simplify the process of determining child support, not to make it overly complex and confusing as the State now contends.

**D. This Court's holding in *Halberg v. Halberg*, 2010 ND 20, 777 N.W.2d 872, does not Support State's Arguments, but in fact Supports Steve's Arguments**

[¶ 10] In ¶¶ 29-30 of *State's Brief*, State contends that holding in *Halberg* requires that Wolt's W-2 income from his self-employment with Wolt Transport Inc. must be treated as income that is "otherwise included in gross income" under §75-02--04.1-05(1)(a)(1). The State's interpretation of §75-02-04.1-05(1)(a)(1) is not reasonable in that it goes against both § 75-02-02-04.1-1(10) definition of self-employment and instructions the Child Support Division has included on *Schedule B – Self-Employment Income (N.D. Admin. Code §74-02-04.1-05)* of the *Guidelines* worksheets. To meet conditions of §75-02-04.1-1(10), any reduction from Steve's annual gross income that is reported on his income tax returns to arrive at Steve's net income from his self-employment activity with Wolt Transfer Inc., as required by §75-02-04.1-05(1)(a)(1), must relate to any other income that Steve, or any other self-employed obligor, earned from activities that are not related to his or her self-employment activity. In this case, all of Steve's income from 2013-2017 came from his self-employment with Wolt Transport Inc., so no deduction under §75-02-04.1-05(1)(a)(1) was required by the *Guidelines*, despite the State's argument to the contrary.

[¶ 11] *Halberg* involved a self-employed truck driver who was declared underemployed by trial court, in which the issue on appeal was whether the trial court had properly included all of obligor's in-kind income he had received from his self-employment in calculating his

net income from self-employment under the *Guidelines*. *Halberg*, 2010 ND 20. The obligor had been paying personal expenses from his self-employment accounts and, unlike this case where no such claim was raised, the obligee had claimed the obligor's tax return was unreliable and did not accurately reflect his actual income because he received benefits from the corporation that he did not include in his personal income. *Id.* This Court concluded, in *Halberg*, trial court had failed to properly calculate the obligor's gross income before finding he was underemployed and reversed the court's child support decision and remanded the case for the court to recompute obligor's gross and net incomes and then redetermine his child support. *Id.* ¶ 25.

[¶ 12] To the limited degree *Halberg* addressed the calculation of self-employment income under the guidelines, this Court made it clear that §74-02-04.1-01(10) definition of self-employment applies to application of §74-02-04.1-05 in determining an obligor's net income under *Guidelines*. See *Halberg*, ¶ 11.

**E. This Court's holding in *Knoll v. Kuleck*, 2004 ND 199, 688 N.W.2d 370, also does not Support State's Arguments, but in fact Supports Steve's Arguments**

[¶ 13] In ¶ 33 of State's Brief, State contends that this Court's holding in *Knoll v. Kuleck*, supports a conclusion that "reliance on tax documents is a preference for determining income." Steve wholly agrees with that statement, that is why Steven filed his 2013 through 2017 Federal and State Income Tax Returns, with supporting W-2 Statements and K-1 Schedules, with his affidavits, in support of his motion, and was willing to have an evidentiary hearing on his motion if either of the Appellees wanted to contest any of the factual allegations Steve had made in support of his motion. See, *Notice of Motion to Modify Defendant's Monthly Child Support Payment*, Index # 259, ¶2. And, though State

for first time in these post-judgment proceedings is now contending Steve needed to file additional documentation to support his claims, no such claim, allegation, or request for additional documentation was made by either appellant while these proceedings were pending before trial court. The failure to raise such factual issues in these post-judgment proceedings before trial court precludes State from being able to raise the issues in this appeal or any future proceedings in this action. See *Riemers v. State*, 2008 ND 101, ¶ 7, 750 N.W.2d 407 (quoting *Ungar v. North Dakota State Univ.*, 2006 ND 185, ¶ 10, 721 N.W.2d 16) ("The doctrine of res judicata bar[s] courts from relitigating claims and issues in order to promote finality of judgments, which increases certainty, avoids multiple litigation, wasteful delay and expense, and ultimately conserves judicial resources."); *Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc.*, 2007 ND 36, ¶ 13, 729 N.W.2d 101 (quoting Ungar, ¶¶ 10-11 ("Res judicata, or claim preclusion, prevents relitigation of claims that were raised, or could have been raised, in prior actions between same parties or their privies.")); *Riemers v. Omdahl*, 2004 ND 188, ¶ 21, 687 N.W.2d 445 (failure to raise issue in district court precludes party from raising issue for first time on appeal); *Lynch v. Williston City Com'n*, 460 N.W.2d 136, 138 (N.D. 1990); *Wenzel v. Wenzel*, 469 N.W.2d 156, 158 (N.D. 1991) (We have repeatedly held that issues not raised in trial court cannot be raised for first time on appeal.).

**F. Only Reasonable Interpretation of North Dakota Child Support Guidelines on Self-employment Income Supports Steve's arguments, not the State's Argument**

[¶ 14] As explained in the *Appellant's Brief* and above, the State's argument are not supported by any reasonable interpretation of the *Guidelines* or prior caselaw on the issues, and are therefore frivolous.

**G. Steve's Request to Remove Judge Hill on remand was First Raised on Appeal does not Render Request Invalid**

[¶ 15] Any removal of Judge Hill is dependent on this Court conclusions regarding whether State's arguments in opposition to Steve's motion to modify his child support payment at trial court level were frivolous. Without such a ruling by this Court, Steve's request for removal of Judge Hill must be denied. See *State ex Rel. Heitkamp v. Family Life*, 2000 N.D. 166, ¶¶ 51-55, 616 N.W.2d 843 (Avoiding appearance of judicial impropriety is of upmost importance to integrity of judicial system.).

**II. Conclusion and Prayer for Relief**

[¶ 16] For reasons set forth in *Appellant's Brief* and this brief, it is again respectfully requested this Court grant relief requested in ¶ 36 of *Appellant's Brief*.

[¶ 17] Respectfully submitted this 4<sup>th</sup> day of February, 2019.

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**

[¶ 18] I hereby certify that on the 4<sup>th</sup> day of February, 2019, the foregoing Appellant's Reply Brief was 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 an electronic

draft of Appellant's Reply Brief to bismarckse@nd.gov and by mailing by first class mail a copy of the brief 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 the brief:

Kathy Wolt  
4909 E Roughrider Circle  
Mandan, ND 58554

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