

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No.: 20190106

Mercer Co. Case No.: 29-2018-DM-00006

Jason P. Stevenson,)
)
Plaintiff/Appellant,)
)
v.)
)
Rhonda S. Biffert,)
)
Defendant/Appellee.)

APPELLANT’S REPLY BRIEF

APPEAL FROM THE MERCER COUNTY DISTRICT COURT MEMORANDUM
DECISION AND ORDER DATED OCTOBER 12, 2018 AND JUDGMENT DATED
FEBRUARY 1, 2019

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I. INTRODUCTION

[1] Defendant/Appellee (hereinafter “Rhonda”) has submitted a brief in response to the Plaintiff/Appellant’s (hereinafter “Jason”) brief. In Appellee’s Brief, Rhonda convolutes Appellant’s arguments, fails to provide proper authority to support her arguments, and is unable to establish that the district court did not clearly err. Jason maintains this case should be reversed and remanded for the reasons more fully set forth in Appellant’s Brief, and further explained below.

II. THE DISTRICT COURT CLEARLY ERRED, WHICH WARRANTS REVERSAL

[2] Jason does not agree with Rhonda’s analysis or arguments supporting her position, and will address each issue, as Rhonda set forth in her Appellee Brief, below.

A. **The district court did not properly analyze and apply the best interest factors, and the evidence does not support the district court’s finding of residential responsibility.**

i. There was no burden for Jason to overcome.

[3] Rhonda asserts that “Jason is unable to articulate...how the legal standard was improperly applied.” Appellee’s Brief at ¶ 24. As demonstrated in Appellant’s Brief (¶¶ 29-34), the improper application is that the district court imposed a burden on Jason that does not exist. It is blatantly clear that the district court was under the assumption Jason had a burden to overcome when it states, “[Jason] works without credible evidence to attempt to create reasons to shift primary residential responsibility. The [district court] concludes he has failed to do so based upon the greater weight of the evidence.” App. 258 at ¶ 38. Although the district court analyzed the best interest factors, it analyzed

these factors under the assumption that Jason had a special evidentiary burden not shared by Rhonda. *Id.*

[4] Rhonda incorrectly cites to the district court's Memorandum when she included quotation marks around the word, "shift." Appellee's Brief at ¶ 24. The district court **did not** include quotation marks in its original document. Rhonda attempts to imply that the district court's use of the word "shift" was inconsequential. If the district court intended for the word "shift" to have no meaning, it is irrational why it would further find that Jason presented insufficient evidence to shift primary residential responsibility. App. 258 at ¶ 38. Rhonda is correct that the district court did not specifically state why it believed Jason had a burden, but it was clear from the language used that the burden existed in the district court's mind. Appellee's Brief at ¶ 24; App. 258 at ¶ 38.

[5] Although Jason argues that the analysis of the best interest factors was erroneous, his primary argument is that the district court erred as a matter of law when imposing a burden on Jason that doesn't exist. In regard to the analysis of the best interest factors, Rhonda states that "Jason quotes portions of the record, sometimes out of context, to support his argument..." however, she fails to state what specifically was allegedly out of context. Appellee's Brief at ¶ 25. Jason's argument as it relates to the best interest factors is clearly stated in his Appellant's Brief, which is fully set out therein. Appellant's Brief at ¶¶ 56-73.

ii. Jason does not argue that the district court erred in disregarding the parenting investigator report.

[6] Jason's argument is not that the district court erred in disregarding the parenting investigator's report, but rather that the district court's dissatisfaction with the report

played into the district court's ability to afford Jason a fair opportunity to present evidence. Appellant's Brief at ¶¶ 36-38. This was part of Jason's argument as it relates to the lack of due process, and was not intended as a standalone argument.

iii. The district court did not make findings consistent with the evidence presented, and wholly disregarded evidence favorable to Jason.

[7] Jason is not asking the Court to reweigh evidence. In part, Jason is requesting the case be reversed and remanded so the district court can properly analyze the best interest factors in consideration of all evidence presented. The evidence that was ignored and misstated is set out in Appellant's Brief. *Id.* at ¶¶ 46-55. Additional, non-exhaustive, examples are also provided within Appellant's Brief (¶¶ 56-74). Jason is asking this Court review the transcript and evidence as a whole, and not just "bits and pieces" as Rhonda claims. Appellee's Brief at ¶ 31.

iv. The district court improperly inserted itself in the proceedings.

[8] Although parties submit proposed witnesses and exhibits prior to trial, they are under no obligation to call the individuals listed. The district court did compel the parties to call the parenting investigator. Tr. 3:13-16. Per N.D.R.Ev. 614, courts can call witnesses on their own but must allow the parties an opportunity to cross-examine those witnesses. The distinction here is that the district court directed that either Jason or Rhonda must call the parenting investigator rather than calling her as the court's own witness.

[9] Regarding the interjections during trial, district courts are allowed to ferret out elusive facts and clarify testimony so long as it is done **in an impartial manner**. *State v. Yodsnukis*, 281 N.W.2d 255, 260 (N.D. 1979). When determining the impact of the

district court's questioning, this Court may consider the following: "whether the witnesses' testimony needed clarification, whether the witnesses were unusually hesitant and in need of assurance, whether the court used leading questions, whether the court interfered with cross-examination, whether the court's interruptions favored one side exclusively...whether the parties were being adequately represented, and whether an objection to the questioning was made." *Id.* at 260-261; (Internal citations omitted).

[10] In the case at hand, the district court's questioning was often premature, prior to clarification being needed, at times was in the form of cross-examination, and favored Rhonda exclusively. Tr. 30:2-12; 104:11-16; 174-196. It's important to note that Jason called Heather Mattheis, even though the district court later classified her as Rhonda's witness in its Memorandum. App. 250 at ¶ 7. During trial, the district court interjected often during Ms. Mattheis' testimony, which was in line with the district court's treatment of Jason and the parenting investigator, and contrary to the district court's treatment of Rhonda and her witnesses.

[11] No objection regarding the inappropriateness of the district court's questioning of Jason's witnesses could have been reasonably made at the time of the trial. As Rhonda aptly points out, the district court has broad discretion in its control of the presentation of evidence and clear authority to interrogate witnesses. Appellee's Brief at ¶ 33. It was not until Rhonda presented her witnesses that it became apparent the district court was not questioning witnesses in the same manner, or at all, as it did Jason's witnesses.

[12] Although Jason did not object to every error, he did object to collateral issues and hearsay evidence, among other objections. *See, e.g.*, Appellant's Brief at ¶¶ 41, 42, 44. However, it is not each individual error that creates a due process issue, rather, it is the

multiple errors, interjections, and overall tenor of the trial Jason is asking this Court to contemplate. After consideration of the record as a whole, it is apparent that the district court failed to afford Jason due process, which impacted the outcome. Appellant's Brief at ¶¶ 35-45.

B. Jason's arguments related to real property and additional offsets are not moot.

[13] Jason's position regarding the real property and offset issues is that the district court did not have subject-matter jurisdiction to hear these issues. This is more fully discussed within Appellant's Brief (¶¶ 42-43) and in Subsection (C) below. Even if this Court believes the district court had subject-matter jurisdiction to receive evidence and rule on the issues of real property, personal property, and debts, Jason's arguments are not moot as Jason did not waive the arguments by entering into a stipulation, nor did Rhonda properly satisfy the Judgment.

[14] In the Memorandum, the district court found Rhonda's proposal to divide the equity in the property 57% to Rhonda and 43% to Jason "to be sound and concludes that the approach of [Rhonda] is the appropriate and most equitable way to divide the real estate and specifically adopts the proposal." App. 259 at ¶ 42. As to the alleged debt, the district court found that Rhonda "shall recover the amount of \$5,000 from [Jason] for monies she loaned to [Jason]." App. 272 at ¶ 124. After the district court issued its Memorandum, the parties did enter into an agreement to include a specific parenting time schedule for Jason, which the district court failed to include, and also agreed to terms expanding on the very limited ruling on the collateral issues. The only issue not specifically addressed by the district court was how to resolve the issue of the vehicle.

[15] Rhonda indicates that “a party accepting substantial benefits pursuant to a divorce judgment waives the right of appeal.” Appellee’s Brief at ¶ 37. Rhonda’s argument does not address that, while it may be generally true that a party accepting benefits under a judgment waives the right of appeal, this would only apply to a party who receives a benefit **they would not otherwise be entitled to** if Judgment was reversed. *Eberle v. Eberle*, 2009 ND 107, ¶ 24, 766 N.W.2d 477. In *Eberle*, this Court found that although the wife did pay certain debts she was required to pay and took what property she was awarded under the agreement, it did not affect her claim for relief from the judgment. *Id.*

[16] A prerequisite to properly satisfy a judgment, is for the judgment to be properly docketed per N.D.C.C. § 28-20-16, which was not done. Aside from an invalid Satisfaction of Judgment filed Rhonda months after the appeal was commenced, there is no evidence on the record that the Judgment has been properly satisfied. App. 291-292; Supplemental Appendix of Defendant-Appellee at 7-9. Per N.D.C.C. § 28-20-24, a satisfaction of judgment must be signed by the party in whose favor the judgment was obtained. Rhonda is the only one who signed the Satisfaction, and she cannot, per statute, satisfy the Judgment as it relates to the proceeds Jason was to receive, even if it was properly docketed. There is no evidence existing on the record that Jason has unconditionally, voluntarily, or consciously accepted a substantial benefit under the judgment that he would not otherwise be entitled to without the decree, and there is no clear intent on the part of Jason to accept the Judgment and waive the right of appeal—all of which are required for this Court to determine the issues are moot. *Sommers v. Sommers*, 2003 ND 77, ¶ 5, 660 N.W.2d 586.

C. The district court failed to afford Jason due process and addressed issues that were not properly before it.

[17] The district court, off the record, indicated it would receive evidence on “offset issues”, even though the issues of division of personal property and assignment or reimbursement of debt were not properly plead. Tr. 157:7-9; App. 9-15. It is well established that under North Dakota's notice pleading requirements, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." N.D.R.Civ.P. 8(a); *Estate of Hill*, 492 N.W.2d 288, 296 (N.D. 1992). At no point in this case were the issues of debts and personal property properly raised, and Rhonda was not able to cite to any portion of the record that indicated otherwise. Appellee’s Brief at ¶ 39; App. 9-15. Further, neither party at any point during litigation moved to amend the pleadings. Rhonda cites N.D.C.C. § 32-16-01 to support her contention that a district court may partition real and personal property in the same action, which Jason does not dispute. However, that does not negate the requirement to properly plead the issues, which was not done. Not only did the district court permit unplead issues (personal property and debts) to be tried, but it further refused to allow Jason to offer evidence on the alleged debt. Tr. 169:19-171:5.

[18] It is not assumed that issues of real property, personal property, and debts will be dealt with in a residential responsibility action. To allow issues that haven’t been properly plead leads to trial by ambush or surprise. “The purpose of pleading is to allow for proper notice of issues to be tried and eliminate the element of surprise at trial.” *First Nat. Bank of Belfield v. Burich*, 367 N.W.2d 148, 152 (N.D. 1985).

[19] Further, the partition of real property was not properly plead by Rhonda. Rhonda claims that because the property is located in the state, the district court automatically had

subject-matter jurisdiction. Appellee's Brief at ¶ 50. There are substantive requirements when requesting a partition, and Rhonda failed to meet these requirements. For example, notice was not filed under N.D.C.C. § 32-16-04 and the summons was not directed to the lender under N.D.C.C. § 32-16-05. Overall, a partition action was not properly brought under N.D.C.C. ch. 32-16. Failure to follow the statutory requirements in pleading a case can result in lack of subject-matter jurisdiction, even if the court might otherwise have had subject-matter jurisdiction. *See, e.g., Garaas v. Cass Cnty. Joint Water Res. Dist.*, 2016 ND 148, ¶ 5, 883 N.W.2d 436. For subject-matter jurisdiction to attach, "the particular issue to be determined must be properly brought before the court in the particular proceeding." *Albrecht v. Metro Area Ambulance*, 1998 ND 132, ¶ 10, 580 N.W.2d 583.

[20] Finally, for Rhonda to claim that the district court's admission of the comparative market analysis is "harmless error, because there was no other evidence the [trial] court had before it regarding the value," is not a straight-faced argument. Appellee's Brief at ¶ 43. The evidence, which was blatantly hearsay, was relied on and referred to by the district court. App. 259 at ¶ 40. Without this evidence, the district court would be unable to justify the division of equity that it adopted, which amounts to reversible error.

State v. Acker, 2015 ND 278, ¶ 12, 871 N.W.2d 603.

D. Rhonda should not be awarded attorney's fees as Jason's arguments are not frivolous.

[21] Attorney's fees are not warranted. Rhonda mentions that the affiants were not available for cross examination. Appellee's Brief at ¶ 52. Although the affiants were listed as potential witnesses on Jason's Witness and Exhibit list, they were not listed on

Rhonda's, nor did she attempt to call them. Appellant's Supp. Appendix at 3-7. In addition, the affidavits are part of the record and were properly cited to. Her remaining arguments regarding attorney's fees are addressed above, or within the Appellant's Brief.

[22] This appeal is not flagrantly groundless, meritless, nor does it manifest persistence in the course of litigation which could be seen as evidence of bad faith.

Bertsch v. Bertsch, 2007 ND 168, ¶ 16, 740 N.W.2d 388. Jason thoroughly sets out his arguments within his Appellant's Brief, and further expands upon the same herein with specificity. The fact that Rhonda disagrees with these arguments does not make them frivolous. Jason is asking the Court to remand because of the district court's mistakes of law, lack of sufficient findings, evidentiary errors, and failure to afford due process.

III. CONCLUSION

[23] To the extent any question existed on the relief requested, Jason is requesting that the case be reversed and remanded so the district court can conduct an analysis of the best interest factors using the proper legal standard, and in consideration of all evidence presented. Further, he requests that Paragraphs 47, 49, and 50 be struck for lack of subject-matter jurisdiction. If this Court determines the district court had subject-matter jurisdiction, additional findings are needed as it relates the district court's decision on real property as it is not clear how the equity division was calculated, especially in light of the clear inadmissibility of the comparative market analysis. As such, Jason requests this case be reversed and remanded.

Respectfully submitted this 27th day of September, 2019.

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CERTIFICATE OF SERVICE

[24] I hereby certify that a true and correct copy of the foregoing Appellant’s Reply Brief and Appellant’s Supplemental Appendix were served on the 27th day of September, 2019, on the following:

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[25] Service was accomplished by filing through the North Dakota Supreme Court E-Filing Portal.

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CERTIFICATE OF COMPLIANCE

[26] The undersigned, as attorney for the Plaintiff/Appellant, Jason Stevenson, in the above-captioned matter, and as the author of the Appellant's Reply Brief, hereby certifies, in compliance with N.D.R.App.P. 28 and 32, that Appellant's Reply Brief is 12 pages, not including the Certificate of Service, nor the Certificate of Compliance.

Appellant's Reply Brief was created using Microsoft Word for Office 365.

Dated this 27th day of September, 2019.

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