

IN THE SUPREME COURT OF THE STATE OF MONTANA

THOMAS D. MULGREW,

Appellant/Defendant or
Respondent,

vs.

CHRISTINE L. MULGREW,

Appellee/Plaintiff or Petitioner.

Appellate Cause No.: DA 20-0157

District Court Case No.: ADR-2012-
632

APPELLANT'S OPENING BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, the Honorable Mike Menahan, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES	4
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	6
STANDARD OF REVIEW	8
SUMMARY OF ARGUMENT	9
ARGUMENT	11
CONCLUSION	15
CERTIFICATE OF COMPLIANCE	18

TABLE OF AUTHORITIES

Cases

<i>Hallenberg v. Gen. Mills Operations, Inc.</i> , 2006 MT 191, ¶ 16, 333 Mont. 143, 146, 141 P.3d 1216, 1219.....	8
<i>In re Marriage of Drake</i> , 2002 MT 127, ¶ 18, 310 Mont. 114, 49 P.3d 38.....	8
<i>Marriage of Guffin v. Plaisted-Harman</i> , 2010 MT 100, ¶ 20, 356 Mont. 218, 232 P.3d 888..	8, 11
<i>Marriage of Guffin</i> , ¶ 20	11

Rules

Mont. R. C. Proc., 26 (2019).....	15
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Comes now Appellant Thomas D. Mulgrew (“Thomas”), by and through counsel of record, and provides this Opening Brief on Appeal.

STATEMENT OF ISSUES

Thomas presents the following issues on appeal:

1. Did the District Court abuse its discretion when it found Thomas in Contempt?
2. Did the District Court abuse its discretion in granting the Motion to Compel?
3. Did the District Court abuse its discretion when it granted Appellee’s last-minute request for sanctions?

STATEMENT OF THE CASE

On February 14, 2017, the district court issued its Order on Motions to Modify Child Support and Maintenance wherein the district court directed Thomas to have the Child Support Enforcement Division (“CSED”) calculate his child support for years 2014 through 2017. (the “2017 Child Support Order”). (See *Order on Motions to Modify Child Support and Maintenance*, Docket No. 170.00). The 2017 Child Support Order did not provide Thomas any ability to ensure that CSED actually modify child support if the new calculation did not meet CSED’s 30% minimum change requirement. In September of 2019, Appellee Christine Mulgrew (“Christine”) filed Petitioner’s Motion for Order to Show Cause –

Contempt of Court (Docket No. 208.000) which was followed by Petitioner's Motion for Order to Show Cause- Contempt of Court for Failure to Reimburse Medical Expenses (Docket No. 239.00.) Thomas filed timely responses to both motions. Thomas also filed his own motions related to similar enforcement-type issues. (See Docket Nos. 213.00, 224.00, and 226.00.) Christine filed timely responses to Thomas's motions. Both parties filed several procedural motions, including Christine's Motion to Compel Discovery Responses filed on October 15, 2019, only 23 days before trial (Docket No. 246.00), and an Ex Parte Motion for Sanctions Following Hearing on November 6, 2019, only one day before the trial (Docket No. 249.00). The district court issued its Order on Motions on November 15, 2019. Docket No. 151.00, a copy of which is attached as Appendix A ("Final Order"). Notice of Entry of Judgment was filed on November 27, 2019. Docket No. 252.00. On December 24, 2019, Thomas filed a timely Motion to Amend Judgment (Docket No. 256.00), which was opposed by Christine on or about January 10, 2020. Docket No. 258.00. Thomas filed his reply on January 21, 2020. Docket No. 259.00. No Order was ever issued regarding the post-hearing

motion to amend, and it was deemed denied on February 22, 2020. Thomas timely filed his appeal on March 16, 2020.

STATEMENT OF FACTS

The parties dissolved their marriage on December 27, 2013. Docket 76.00. As evidenced by the more than 250 filings in district court, these proceedings have been highly litigious, and this has not gotten any better since the divorce was finalized. The order from which Thomas appeals addresses nearly a dozen post-dissolution motions filed in the two years proceeding the Order. These motions were generally aimed at ensuring the parties complied with the existing orders. At the time the parties dissolved their marriage, Thomas was working as a neurosurgeon at St. Peter's Hospital in Helena, Montana. At some point afterward, though, Thomas lost his job with the hospital. He attempted to maintain a private practice, but was unable to do and filed bankruptcy in 2017. *Transcript*, 61:4-62:20. After his practice closed, he opened a sleep clinic in Helena. The sleep clinic does some contract work for a firm out of Alaska, but Thomas at all times has resided in Helena and managed his business out of Helena. At the time the district court issued the 2017 Child Support Order, Thomas had not filed tax returns for the preceding few years. *Transcript*, 65:14-24. Thus, in order to comply with the Court's order, he needed to catch up on his filings. Thomas's most recent accountant had retired and given Thomas' file to an associate at the

accounting firm, and that associate failed to take any action. *Transcript*, 62:20-25. Thomas was forced to hire a new accountant, who had to recreate tax returns from payroll reports and documents reported income payments to the IRS as being made to Thomas, or his company. *Transcript*, page 62. Needless to say, this took some time. Despite the time it took, Thomas was paying child support each month pursuant to the then-existing child support order. To make matters worse, when Thomas did ask CSED to modify the child support, they refused to do so because they did not have jurisdiction. *Transcript*, 73: 16-21. Unfortunately, Christine was not interested in working with Thomas regarding the child support issue. She was “mad” because Thomas failed to tell her when he lost his job, or what he was doing instead. They were no longer married, Thomas was not making as much as he had been when the support order was issued, and Thomas had not requested a change based on those life changes. Thomas made the request because the Court issued an Order in 2017 that told Thomas to go to CSED and have them issue a new child support order for 2014, 2015, 2016, and 2017, based on Thomas’s income for each year. Docket No. 170.00. Nevertheless, she asked the court to impute income to Thomas based on income levels for a full-time Alaska resident, despite the fact that Thomas resided and worked in Montana. The amount she sought to impute was more than twice the amount of Thomas’s highest earning year in the years from 2014 through 2018. See Docket 251.00, FOF ¶ 6; *Transcript*, 70:13-19. Thus, in

filing her first motion in 2017, she started the most recent round of vexatious litigation.

Additional facts will be relayed as appropriate in the argument.

STANDARD OF REVIEW

Each issue brought in this appeal is reviewed for an abuse of discretion. A district court abuses its discretion if it acts arbitrarily, without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *Marriage of Guffin v. Plaisted-Harman*, 2010 MT 100, ¶ 20, 356 Mont. 218, 232 P.3d 888. Usually, this means that a district court must base its decision on substantial credible evidence. *Marriage of Guffin*, ¶ 20. Generally, this Court will not disturb findings that are based on witness credibility because credibility is a matter for the finder of fact to determine. *In re Marriage of Drake*, 2002 MT 127, ¶ 18, 310 Mont. 114, 49 P.3d 38.

Finally, the Court reviews the findings of fact underlying a district court's decision to determine whether those findings were clearly erroneous. *Hallenberg v. Gen. Mills Operations, Inc.*, 2006 MT 191, ¶ 16, 333 Mont. 143, 146, 141 P.3d 1216, 1219 (citations omitted). "A finding is clearly erroneous if it is not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or if [the Court's] review of the record convinces [them] that a mistake has been committed. *Id.*

SUMMARY OF ARGUMENT

Thomas's argument may be summarized as follows:

Issue 1: Order for Contempt. In determining that Thomas was in contempt for his failure to comply with the district court's order to get CSED to recalculate child support on an annual basis, the district court completely ignored the testimony of the CSED case worker, and further ignored the fact that Thomas actually sought the district court's assistance so that he could comply with the Order. Based on CSED's actual testimony, it did not have jurisdiction to recalculate child support, and Thomas had no ability to force them do so without the district court's assistance.

The district court also found Thomas in contempt for failing to notify Christine that he changed his employment status, thus preventing her from seeking modification of child support if necessary. However, at all times relevant to the employment status change, he was self employed working in his chosen field of neurology. Although, technically Thomas may have failed to report his changed employment status to Christine, he contends that the failure is understandable since he continued to work as a neurologist in a form of private practice.

Issue 2: Motion to Compel. The Court exceeded the bounds of reason in granting the motion to compel because the motion to compel was never going to provide Christine an opportunity to see the documents sought prior to a hearing

without a request to continue trial and no such request was ever made. The only legitimate reason to file a motion to compel discovery responses (i.e., to actually receive the information requested through discovery in time to use at a hearing) was never a possibility because Christine waited until the eve of trial before moving to compel. Docket No. 256.00. Thomas contends that Christine's motion should have been denied because she failed to timely make the request. Additionally, the district court misconstrued the evidence when it stated that the motion to compel was filed in May of 2019 instead of its actual filing date of October 15, 2019.

Issue 3. Order for Sanctions. The district court found that Thomas should be sanctioned, by way of paying Christine's attorney's fees because Christine never should have needed to file her motions. The reality, she never needed to file the motion that started the most recent round of litigation. Thomas was never actually in contempt for failing to get CSED to amend its order because CSED received an application from Thomas and refused to take any action. Additionally, while Thomas acknowledges that he should have paid the medical expenses; he also contends that Christine also should have paid the child-related expenses she was obligated to pay. The parties' mutual failures to pay their individual obligations makes the district court's decision to issue sanctions against only one party an abuse of discretion.

ARGUMENT

The district court abused its discretion when it found Thomas in contempt, granted Christine's motion to compel, and granted sanctions to Christine for the alleged contempt acts. A district court abuses its discretion if it acts arbitrarily, without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice. *Marriage of Guffin v. Plaisted-Harman*, 2010 MT 100, ¶ 20, 356 Mont. 218, 232 P.3d 888. Generally, this means that a district court must base its decision on substantial credible evidence. *Marriage of Guffin*, ¶ 20. As shown below, the district court's Final Order should be overturned, and the matter should be remanded for further proceedings.

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING THOMAS IN CONTEMPT.

The district court found Thomas in contempt for "Thomas is in civil contempt for his failure to have CSED recalculate support on an annual basis." See, *Final Order* (Docket 251.000), COL, ¶ 8. The district court also found Thomas in contempt "for his failure to provide Christine and the Court with information regarding his employment status." *Id.*, ¶ 9. However, in order to reach these conclusions, the district court misconstrued the evidence in such a way that the end result should not be upheld.

a. Contempt Regarding Child Support.

The district court concluded that Thomas was in contempt for not requesting

CSED recalculate child support because he only made the request when it would reduce his child support. This completely ignores the evidence before the Court. First, in 2017, when the Court issued its order requiring Thomas to have child support recalculated each year, Thomas was several years behind on his taxes. Not only is this not disputed, Christine acknowledged this fact on the record. Any child support recalculation would have required him to get those caught up. *Transcript*, page 74-76. Thomas testified, without contradiction, that it took some time to get his taxes caught up because he had some issues with the accountant he was using in 2017. *Transcript*, 62:15-63:8. Thus, the district court's conclusion that he only filed a request to recalculate because his support would decrease is not supported by the evidence. In fact, the district court completely ignored the CSED employee's testimony regarding its internal policies and procedures, and more importantly, the fact that Thomas did ask for a modification but that they would not do it because at the time it was filed, they did not have jurisdiction, the district court did. *Transcript*, 73:1-24. The fact that the child support was not recalculated by CSED was completely outside of Thomas's control. There was not credible evidence to support a contempt citation for the first motion.

b. Contempt Regarding Medical Expenses.

Thomas presented bills for activities and medical expenses that he paid on behalf of the kids as an offset for the medical expenses Christine claimed Thomas

owed. Christine argued (in her post-order briefing) that there was not credible evidence to support those expenses. What she did not argue is that she paid her fair share of those expenses. If those invoices were submitted into evidence, then Christine's argument is without merit because it simply cannot be true. More importantly, the non-payment of child-related expenses went both ways.

Christine's defense to not paying travel expenses was that she did not think it was fair that she pay travelling expenses if Thomas did not pay medical expenses.

Final Order, Docket No, 251.00, FOF ¶ 26. The district court accepted this excuse without applying the same logic to Christine's failure to pay child-related activity expenses. Unfortunately, in this case, both parties failed to follow the parenting plan as it related to their respective obligations to pay child-related expenses.

More unfortunate was the district court's decision not to treat the parties equally and issue a contempt citation against only one party. Thomas believes that the district court's decision may simply encourage Christine to continue refusing to pay child-related expenses. As such, the district court's order should be overturned.

II. THE DISTRICT COURT ERRED SANCTIONING THOMAS AND AWARDING CHRISTINE HER ATTORNEY'S FEES.

The district court found that Thomas should be sanctioned for two apparent failures—Thomas's failure to notify Christine and the court of his employment change and his failure to respond to discovery. In the first instance, the contempt

citation which prompted the sanctions, as discussed above, should not have been issued. Without the contempt citation, the sanction become inappropriate.

In the second case, sanctions for the alleged discovery failure is an abuse of discretion. As noted by the district court, someone who successfully files a motion to compel may be granted their attorney's fees. Mont. R. C. Proc. 37 (2019).

However, in this case, the motion itself was an abuse of the discovery process since complying with any subsequent order was an impossibility.

Instead of filing timely motion after the responses were late, Christine chose to play a game of "discovery chicken" wherein she waited until the eve of trial to file a motion that, if granted, Thomas never could have complied with before the hearing. Had Christine been legitimately seeking the information which she was attempting to compel, she would have filed a motion to continue on the basis that she needed the responses requested. She did not.

III. THE DISTRICT COURT ERRED IN GRANTING CHRISTINE'S MOTION TO COMPEL DISCOVERY.

When the district court discussed the motion to compel at the hearing, it specifically stated the motion was filed in May, and thus it would be deemed well taken. *Transcript*, 8:2-7. In the Court's mind, it gave Thomas "ample time" to respond to the motion. *Id.* This is not accurate, and unfortunately, Christine did not correct the record. While the discovery was served in May of 2019, the motion was not filed until October 15, 2019—only 23 days before the hearing. Docket

No. 246.000. The Court exceeded the bounds of reason in granting the motion to compel because Thomas could not have complied with an order to compel discovery responses issued at or after Trial. Presumably, Christine's discovery request sought information intended to be used at trial, or at least intended to find evidence that can be used at trial, since that is the appropriate use for discovery. Mont. R. C. Proc., 26 (2019). Yet, more than three months after Thomas's responses were due, Christine finally filed her motion. Moreover, she filed the motion to compel without any request to continue the hearing. Docket No. 246.00. Based on the timing of her motion, it was never reasonable to expect that the district court would issue an Order early enough that Thomas could have reasonably provided responses prior to the hearing. Had the Court been accurate in its assumption that the motion was filed in May of 2019, granting the motion would have been appropriate. Under the true circumstances of the case, granting the motion was an abuse of discretion. It seems that the only reason for filing the motion was to increase the attorneys' fees involved, or potentially, to prejudice the Court against Thomas. Neither purpose is an appropriate use of the judicial process.

CONCLUSION

Based on the above, the district court erred when it issued its Final Decision. The district court's decision should be reversed, and the matter remanded back to

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2020, I served a true and accurate copy of the foregoing APPELLANT'S OPENING BRIEF on each or their attorney of record as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing Appellant's Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Word Office 365 for Windows is 3,274 words, excluding the Certificate of Service and Certificate of Compliance.

Dated: June 26, 2020.

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I, Michelle H. Vanisko, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-26-2020:

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