FILED
09/23/2020
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 20-0157

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 REPLY BRIEF

* *

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

* *

APPEARANCES:

Michelle H. Vanisko
Hinshaw & Vanisko, PLLC
1 N. Last Chance Gulch, Ste. 1
Helena, MT 59601
Telephone: (406) 442-1925
Facsimile: (406) 442-1922
Email: michelle@hinshawlaw.net

Limited Scope Attorneys for Appellant/Respondent Thomas D. Mulgrew

Katherine Donnelley
P.O. Box 1690
111 North Last Chance Gulch, Ste. 2D
Helena, MT 59624
Telephone: (406) 449-2328

Attorney for Appellee/Petitioner Christine L. Mulgrew

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Appellant Thomas D. Mulgrew ("Thomas") files his reply to Appellee Christine L. Mulgrew's ("Christine") Response Brief.

INTRODUCTION

In her response, Christine portrays the entire underlying proceeding as her attempt force Thomas to comply with a February 14, 2017, district court order (the "2017 Order") requiring Thomas to recalculate child support on an annual basis. This assertion does not reflect reality. In fact, while Thomas attempted to comply with the Order, Christine's own filings prevented CSED from recalculating child support for more than one year. The district court was misled by Christine in her attempts to bully and harass Thomas, and through a misapprehension of facts resulting in a misapplication of the law, abused its discretion when it issued its November 26, 2019, order (the "2019 Order") presently on appeal.

ARGUMENT

The parties sought the same relief from the district court in the underlying matter—*i.e.*, force CSED to recalculate the child support order. Had Christine joined in Thomas' motion to have CSED recalculate child support, this matter would not have been protracted for over a year. As it was, however, Christine's own actions delayed CSED's recalculation, and its misapprehension of facts led the district court to abuse its discretion when it issued the 2019 Order.

As discussed herein, the district court's order should be reversed. The parties agree that the standard of review is for an abuse of discretion. As stated in his opening brief, 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. For a decision not to be an abuse of discretion, a court must base its decision on substantial credible evidence. *See Marriage of Guffin*, ¶ 20. In the present case, there was insufficient evidence to support the district court's decision, and by definition, the 2019 Order was an abuse of discretion.

I. CHRISTINE FAILED TO ESTABLISH CONTEMPT.

The district court found Thomas in civil contempt of the 2017 Order by failing: (1) "to have CSED recalculate support on an annual basis" (*see Final Order* (Docket 251.000), COL, ¶ 8); (2) to pay medical expenses[1]; and (3) "to provide Christine and the Court with information regarding his employment status" (*id*., ¶ 9). In order to reach these conclusions, the district court misconstrued the evidence to such an extent that it abused its discretion when it issued the 2019 Order.

[1] The Order does not specifically state that Thomas is in civil contempt for failing to pay medical expenses but it does infer as much when read in its entirety.

a. Contempt Regarding Child Support.

In responding to Thomas's argument concerning the child-support related contempt, Christine relies on the testimony provided by CSED attorney Amy Pfeifer, which stated Thomas did not submit a fully completed application to recalculate child support until January of 2019. While this bare fact may be true, the argument completely ignores the impossibility of completing the application due to the time it took to file outstanding tax returns—tax returns which the court required be filed ***before*** Thomas could request that CSED recalculate child support—which were outside Thomas' control. In fact, Christine does not even attempt to respond to this specific argument in her response brief. This Court should treat Christine's failure to respond as akin to an admission that the argument should be deemed well-taken. *Cf*. Mont. Unif. Dist. Ct. R. 2(b) (regarding failure to file a motion response brief); M.R. App. Proc. 13(3) (regarding failure to file an opening appellate brief).

The evidence clearly presented to—but ignored by—the district court could only support a finding that Thomas acted diligently and complied with the 2017 Order. A party may only be found in contempt if that party "*disobeys* a lawful order of the court." *Christie v. Haynes*, 377 Mont. 437, 348 P.3d 172 (2014) (emphasis added). The 2017 Order with which Thomas allegedly failed to comply states that, "Thomas shall have CSED recalculate his child support obligation upon

completion of his 2014 and 2015 tax returns and on an annual basis thereafter." Docket, 170.00, *Order on Motions to Modify Child Support and Maintenance*, Pg. 12, ¶ 2. Thomas testified, without any controverting evidence, that it took him quite some time to get the necessary information to file past tax returns because he had issues with his accountant's office outside of his control—to the point that he actually changed accounting firms. *Transcript*, 61-63:22-8. This delay, in turn, caused a delay in his ability to file the returns with the district court, which delayed his ability to request a modification from CSED. *Id*. There was no testimony or evidence disputing the difficulties Thomas had in filing his outstanding taxes, and Ms. Pfeiffer even acknowledged this fact during her own testimony. *Transcript*, 82:17-22. Indeed, no evidence before the district court showed an intentional failure to timely comply with the 2017 Order given the circumstances.

The 2017 Order furthermore did not provide a time frame in which Thomas needed to accomplish its mandates. Thomas agrees that he needed to act reasonably and diligently, but the only evidence before the district court shows he did so. While Christine argues that, in her opinion, there should some arbitrary time limitation on Thomas' actions, she provided no testimony, evidence, or legal basis to show that the timeframe it took Thomas to file his outstanding taxes was unreasonable under the circumstances. Without that necessary evidence, the district was without any factual or legal basis to find Thomas violated the 2017

Order. To the contrary, the evidence shows Thomas did exactly what the district court ordered, and nothing in the record shows he was unreasonable or lacked diligence in his actions, or that any delay was the result of any voluntary actions on his part. Accordingly, the district court lacked any substantial credible evidence to support its finding of contempt and abused its discretion when it issued the 2019 Order.

b. Contempt Regarding Medical Expenses.

Christine completely failed to respond to this part of Thomas opening brief. As such, reiterates his assertion that this Court should deem the arguments in his opening brief well-taken. *Cf*. Mont. Unif. Dist. Ct. R. 2(b); M.R. App. Proc. 13(3). To reassert his argument in this regard, however, Thomas never contended he should not pay one-half of the children's medical expenses. Rather, he was of the understanding that additional out-of-pocket expenses he paid for the children's activities—which, under the controlling parenting plan at the time, were to be shared equally—and the medical expenses he paid in full could be used to offset Christine's additional claims for expenses. If anything, it was Christine who was in breach in this regard, and Thomas again requests that this Court find the district court's 2019 Order was not based on substantial credible evidence and was an abuse of discretion.

/ / /

c. Contempt regarding Failure to Provide Updated Employment Information.

Thomas agrees that all past parenting plans have required him to provide updated employment information to both CSED and Christine. Thomas did not, however, fail to comply with the 2017 Order by failing to update his employment information. At paragraph 7 of the current parenting plan, the district court requires both parents to, "update each other and the court with written notice of changes of the following information: . . . c. changes in names and address of employers." (Docket 207.000, *Third Amended Parenting Plan*, ¶ 7 (the "Plan").) Christine's sole argument regarding Thomas's employment, which is only stated in the Summary of Argument section of her response brief, is that the sanctions were appropriate because Thomas, "shuttered his Helena neurology practice and began, he said, working as a *locum tenens* for a practice in Alaska, spending two weeks per month in Alaska." (*Appellee's Response Brief*, p. 3.) Contrary to her assertions, nothing in the record supports a violation of the 2017 Order regarding employment information.

Since Thomas left his work at St. Peter's Hospital in 2014, he was and still is formally employed by Montana Neurology and Sleep Medicine ("Montana Neurology")—Thomas' corporate entity. (*Transcript*, 9:11-12; 71:11-14.) Montana Neurology is a single-shareholder corporation, and Thomas is the sole shareholder. While his company may, from time-to-time, provide physician

services for different entities, Thomas's employer does not change. Thomas presumes the district court's misapprehension of his employment relationship was caused by his use of the word "I," rather than "Montana Neurology," to describe his business relationship with the Alaska Neurology Center ("Alaska Neurology"). (Transcript, 129-130:9-20.) Thomas' inability to provide specific, detailed information about Alaska Neurology and its employees, etc., stemmed from the fact that he did not directly work for Alaska Neurology, but rather only contracted with them through Montana Neurology. Thomas never changed employers since 2014. Since 2014, Thomas has worked for Montana Neurology, and thus did not fail to comply with the 2017 Order. Once again, nothing in the record supports the district court's findings. Based on the foregoing, the district court's 2019 Order was not based on substantial credible evidence and was an abuse of discretion.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT INAPPROPORIATELY ISSUED A CONTEMPT CITATION AND ASSOCIATED SANCTIONS.

Even if this Court affirmed the foregoing contempt findings Thomas argues against, the contempt citation itself still must be reversed because it is, in effect, a criminal citation. "A contempt is civil if the sanction imposed seeks to force the contemnor's compliance with a court order. . . If the penalty imposed is incarceration, a fine, or both, the contempt is civil if the contemnor can end the incarceration or avoid the fine by complying with a court order. . . ." Mont. Code

Ann. § 3-1-501(3) (2019). In this case, except for the reimbursement of medical expenses, the monetary awards to Christine cannot be avoided through compliance. Accordingly, they must be reversed as an inappropriate criminal sanction for issues that were directly cited as civil contempt.

III. CHRISTINE FAILED TO DEMONSTRATE THAT HER MOTION TO COMPEL WAS PROPER.

Christine failed to address Thomas' arguments regarding discovery sanctions directly, and instead addressed it through her argument regarding whether the district court correctly granted her motion to compel. Christine contends that the district court properly understood the timing of the discovery motion and thus properly granted the motion. Christine did not address Thomas' argument that he never could have complied with the order before the trial since she did not also file a motion to continue the trial date—making the motion moot the day it was filed—nor did she address the argument that the motion was filed for an improper purpose. Instead, she simply claims the district court had a proper understanding of the motion's timing. This argument is incorrect. As seen by the transcript, not only did the district court fail to properly understand the timing of the motion, but Christine failed to ensure it did:

> THE COURT: I've given Thomas ample time to respond to the motion. In your brief, you clearly set forth that there's a sanction for failing to comply with

> the discovery. This hearing has been continued at least once but I think possibly twice. And you filed, as you said, this motion back in May. So it is well taken, and I think that the Rule 37 sanctions should -- are warranted here. So if you want to put on evidence today and ask me to impute income, you can do so.
>
> MS. DONNELLEY: Thank you, Your Honor.

(*Transcript*, 8:2-11.)

This passage demonstrates that, when the district court made its decision (during the hearing), it was under the misapprehension that the motion was filed in May, and the district court believed Thomas had, "ample time to respond to the motion." Of particular concern is that the Christine did nothing to clarify the timeline at the hearing. Had she done so, the Court may also have been alerted to the fact that a positive result on the motion for Christine was never going to reasonably help because the requested documents would never have been provided before trial. In fact, when specifically asked by the Court if she wanted time to continue the hearing so he could issue rulings on the discovery motions and she could review the documents, Christine declined to do so. (*Transcript*, 13-14: 16-12.)

Filing a motion to compel discovery responses without any reasonable chance for the other party to comply or to actually receive the information being requested is not a proper use of discovery motions or sanctions, and the district court should not have granted the request without continuing the trial. When Christine failed to agree to a continuance the discovery issue became moot and the motion should have been denied and attorney's fees not awarded. The district court's grant of the motion was a clear abuse of discretion, and the discovery sanction must be reversed.

CONCLUSION

Thomas has clearly demonstrated that he was not in contempt and that the motion to compel was filed for an improper purpose and thus should not have been granted. As such all of the sanctions should be reversed.

Dated: September 23, 2020.

HINSHAW & VANISKO, PLLC

By: /S/
Michelle H. Vanisko
Attorneys for Appellant Thomas D. Mulgrew

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 2658 words, excluding the Certificate of Service and Certificate of Compliance.

Dated: September 23, 2020.

HINSHAW & VANISKO, PLLC

By: /S/
Michelle H. Vanisko
Attorneys for Appellant/Respondent
Thomas D. Mulgrew

CERTIFICATE OF SERVICE

I, Michelle H. Vanisko, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 09-23-2020:

Katharine Siobhan Donnelley (Attorney)
Box 1690
Helena MT 59624
Representing: Christine L. Mulgrew
Service Method: eService

Electronically Signed By: Michelle H. Vanisko
Dated: 09-23-2020