

In the Supreme Court State of North Dakota

No. 20090170

FILED
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CLERK OF SUPREME COURT

Jeff Ubl, Petitioner

JUN 19 2009

v.

STATE OF NORTH DAKOTA

The Honorable Bruce Romanick, Judge of the District Court, Respondent

PETITIONER'S PETITION FOR SUPERVISORY WRIT
DIRECTED TO DISTRICT COURT, BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. 08-09-0849
THE HONORABLE BRUCE ROMANICK, PRESIDING

**BRIEF OF TVENGE ASSOCIATES ARCHITECTS & PLANNERS,
P.C./RESPONDENT ON BEHALF OF THE HONORABLE JUDGE BRUCE
ROMANICK, JUDGE OF THE DISTRICT COURT**

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I. STATEMENT OF THE ISSUES

[¶1] Jeff Ubl's request for Supervisory Writ requesting the North Dakota Supreme Court to disqualify attorney Brad A. Sinclair and the Serkland Law Firm from representing Tvenge Associates Architects & Planners, P.C.. in the present litigation should be denied.

II. BRIEF STATEMENT OF THE CASE

[¶2] R.L. Engebretson, P.C., is the majority shareholder of Tvenge Associates Architects & Planners, P.C., ("Tvenge Associates"). Rick Engebretson is the secretary/treasurer of Tvenge Associates. Jeff Ubl is a 49% minority shareholder in Tvenge Associates and is the president of Tvenge Associates.

[¶3] R.L. Engebretson, P.C., purchased 51% of the majority ownership interest in Tvenge Associates on or about September 30, 2006. At the same time, Jeff Ubl acquired additional shares of stock to obtain a 49% minority interest in Tvenge Associates. On or about September 30, 2006, Rick Engebretson and Jeff Ubl executed and delivered Buy-Sell Agreement between the parties.

[¶4] Neither the Serkland Law Firm or attorney Brad A. Sinclair has had any involvement whatsoever in either party, R.L. Engebretson, P.C., Rick Engebretson, or Jeff Ubl purchase of Tvenge Associates' stock from the previous owner, Warren Tvenge, nor any involvement in drafting any corporate buy-sell agreements. corporate minutes. or reviewing or negotiating the purchase of the stock from the previous owner, Warren Tvenge. R.L. Engebretson, P.C.. and Rick Engebretson were represented in the transaction by attorney Rodger Mohagen. Jeff Ubl was represented by a local Bismarck attorney.

[¶5] In April, 2009, R.L. Engebretson, P.C./Rick Engebretson exercised its option to acquire Jeff Ubl's shares of stock in Tvenge Associates. R.L. Engebretson exercised its option to acquire the shares of stock in Tvenge Associates pursuant to the parties Buy-Sell Agreement. Simultaneously upon the exercising their option to purchase Jeff Ubl's entire shares of stock in Tvenge Associates, attorney Brad A. Sinclair and the Serkland Law Firm commenced the present litigation on behalf of Tvenge Associates and against Jeff Ubl for misuse of the Tvenge Associates' corporate credit card.

[¶6] Since commencement of the action, Jeff Ubl sought to disqualify Brad A. Sinclair and the Serkland Law Firm from representing Tvenge Associates in the above entitled matter. Jeff Ubl and his legal counsel believe that only an attorney that has never represented Rick Engebretson, R.L. Engebretson, P.C., Jeff Ubl and Tvenge Associates can represent Tvenge Associates in this matter.

[¶7] In the present cause of action, Jeff Ubl has admitted that he is indebted to Tvenge Associates in the amount of \$20,414.02 for unauthorized use of corporate credit card and that the sum of \$20,414.02 is justly owing to the corporation. However, Ubl asserts that the indebtedness can be paid at any time and in any manner. Such is contrary to Tvenge Associates' corporate policy. The corporate policy provides if one should utilize the corporate credit card for personal uses, the amount charged for personal use must be paid to Tvenge Associates before the next corporate credit card billing cycle.

[¶8] The Serkland Law Firm and attorney Brad A. Sinclair should not be disqualified from representing Tvenge Associates in the present matter. Brad A. Sinclair has not been involved in any conversations with Jeff Ubl. Brad A. Sinclair has never met Jeff Ubl nor communicated with Jeff Ubl, until after the litigation commenced. Brad A. Sinclair has

not received any secrets or confidences from Jeff Ubl. Neither Brad A. Sinclair or the Serkland Law Firm has ever represented Tvenge Associates prior to the commencement of the present collection action Jeff Ubl nor has Brad A. Sinclair or the Serkland Law Firm ever represented Jeff Ubl individually.

[¶9] The District Court has entertained Jeff Ubl's motion to disqualify Brad A. Sinclair and the Serkland Law Firm from representing Tvenge Associates in the present cause of action. The District Court entered an order denying Jeff Ubl's motion to disqualify attorney Brad A. Sinclair and the Serkland Law Firm on June 2, 2009.

[¶10] Jeff Ubl's motion for supervisory writ to disqualify Brad A. Sinclair and the Serkland Law Firm from representing Tvenge Associates in the above entitled matter should be denied.

III. FACTUAL SUMMARY

[¶11] Tvenge Associates Architects & Planners, P.C. is a corporation organized under the laws of the State of North Dakota with its principal place of business located in Bismarck, North Dakota. (Ubl App. p. 4, ¶1).

[¶12] Prior to September 30, 2006, Warren Tvenge owned the majority interest in Tvenge Associates. (Ubl App. p. 13, ¶21).

[¶13] That on September 30, 2006, with Jeff Ubl's consent, Warren Tvenge sold his majority ownership interest in Tvenge Association to R.L. Engebretson, P.C., a corporation owned primarily by Rick Engebretson. (Ubl App. p. 13, ¶5, 25-26).

[¶14] That prior to Warren Tvenge's sale of his stock in Tvenge Associates, Tvenge Associates had a corporate policy that Tvenge Associates corporate credit card could be used only for business use and if any personal use was inadvertently charged on the

corporate credit card, the corporation had to be reimbursed for the personal expenses charged on the corporate credit card before the next billing cycle. (Ubl App. p. 5, ¶7, 8).

[¶15] Subsequent to R.L. Engebretson, P.C., acquiring Warren Tvenge's interest in Tvenge Associates on September 30, 2006, the corporate policy never changed. (Ubl App. p. 5, ¶7, 13).

[¶16] Rick Engebretson is the secretary/treasurer of the corporation and a board of director. (Tvenge App. pp. 1-19).

[¶17] Jeff Ubl is a 49% owner of Tvenge Associates, the president of Tvenge Associates, and the only other director of Tvenge Associates. Id.

[¶18] Tvenge Associates provided Ubl with a corporate credit card. Id.

[¶19] Tvenge Associates authorizes its owners, including Ubl, to utilize a corporate credit card for corporate purposes. If any personal charging occurs on the corporate credit card, all personal charges must be paid off in full on the next billing date. Id.

[¶20] Ubl has used Tvenge Associates' credit card for personal use and failed to pay the personal charges resulting in Tvenge Associates having a present credit card balance of \$13,149.90, solely related to Ubl's personal misuse of Tvenge Associates' credit card. (Ubl App. p. 5, ¶8).

[¶21] Tvenge Associates has paid \$5,115.38 of Ubl's personal charges on the Tvenge Associates' credit card because Ubl could not pay the minimum corporate credit card monthly payment. (Tvenge App. pp. 10-19).

[¶22] Ubl has charged a total of \$28,119.60 on the Tvenge Associates' corporate credit card for personal purchases not related to Tvenge Associates corporate business in which

Jeff Ubl has failed to pay the balance of \$20,414.02 which consists of unpaid of personal expenses incurred by Jeff Ubl (Ubl App. pp. 5-6). (Tvenge App. pp. 10-19).

[¶23] Tvenge Associates has had to pay finance charges on the credit card related solely to Ubl's use of the credit card. late fee charges because Ubl has failed to pay his personal charges on the credit card, and monthly payments on the credit card related solely to Jeff Ubl's personal charges on the corporate credit card. Id.

[¶24] Ubl used the Tvenge Associates corporate credit card to date for the following expenses not related to the corporate business which remains unpaid:

| | | |
|----|--|---------------------|
| a. | Reconstructive plastic/cosmetic surgery for wife | \$8,425.10 |
| b. | Fantasy football expense | \$102.85 |
| c. | Personal vacations and trips to Las Vegas, NV and Hawaii | \$5,079.62 |
| d. | Clothing | \$1,336.90 |
| e. | Restaurants | \$1,138.18 |
| f. | Grocery store purchases | \$1,895.17 |
| g. | Liquor | \$253.95 |
| h. | Limo ride | \$485.00 |
| i. | Furniture | \$459.70 |
| j. | Scheels | \$748.32 |
| k. | Miscellaneous purchases | \$3,079.43 |
| l. | Finance charges. late fees | \$5,115.38 |
| J. | Less payments tendered by Jeff Ubl. | <u>(\$7,705.58)</u> |
| | TOTAL AMOUNT OF PERSONAL CHARGES | <u>\$20,414.02</u> |

Id.

[¶25] Ubl does not deny that he used Tvenge Associates' corporate credit card for personal expenses. (Answer¶ 6, Ubl App. p. 11, Jeff Ubl Aff. ¶ 23, p. 55).

[¶26] Ubl admits that he is indebted to Tvenge Associates for the personal charges as itemized in paragraph 14 above. Id.

[¶27] Ubl admits in his Answer that he had used the corporate credit card for personal use. See Ubl Answer, ¶ 6. (Ubl App. p. 11). Ubl admits in his Answer that he was allowed to use the corporate credit card as long as he reimbursed Tvenge Associates for the personal charges he made. See Ubl Answer, ¶ 6. Id.

[¶28] Ubl admits that he is indebted to Tvenge Associates in the sum of \$20,414.02. See Ubl Answer to Complaint. ¶ 8. (Ubl App. p. 11 ¶8).

[¶29] Ubl admits in his Third Party Complaint, ¶ 49 that he is in fact indebted to Tvenge Associates in the amount of \$20,414.02. (Ubl App. p. 18).

[¶30] In Ubl's Affidavit dated April 22, 2009, ¶ 23, Ubl admits that owes Tvenge Associates \$20,414.02. There is no genuine issue of material fact that Ubl is indebted to Tvenge Associates in the amount of \$20,414.02. (Ubl App. p. 55).

[¶31] Due to Jeff Ubl's refusal to repay Tvenge Associates in excess of \$20,414.00 for the unauthorized personal expenses incurred on the Tvenge corporate credit card, Rick Engbretson retained the services of attorney Brad A. Sinclair and the Serkland Law Firm to commence litigation to collect said balance outstanding. (Tvenge App. pp. 10-19).

[¶32] Brad A. Sinclair and the Serkland Law firm have not represented Tvenge Associates on any previous occasion, nor has Attorney Brad A. Sinclair and the Serkland Law Firm represented any shareholder regarding the purchase of Warren Tvenge's shares of stock in

Tvenge Associates to R.L. Engebretson, P.C., nor negotiated or involved in any buy-sell agreement and any other corporate documentation of Tvenge Associates. Id.

[¶33] This present litigation is a simple collection action. Id.

[¶34] Because of Jeff Ubl's refusal to repay Tvenge Associates \$20,414.00 which Jeff Ubl does admit is due and owing Tvenge Associates for Jeff Ubl's misuse of the corporate credit card/misuse of corporate funds, the secretary/treasurer/Rick Engebretson, requested that the present litigation be commenced against Jeff Ubl for the benefit of Tvenge Associates. Id.

[¶35] Subsequent to the commencement of this litigation by the Serkland Law Firm on behalf of Tvenge Associates, Jeff Ubl filed an Answer, Counterclaim, and Third Party Complaint (Ubl App. pp. 10-27). Jeff Ubl also sought an ex parte restraining order/injunction prohibiting Engebretson from restraining Ubl from being on the premises. (Ubl App., pp. 116-118, 121-122). Prior to Engebretson filing a response to the temporary restraining order, the Court granted temporary restraining order with a final hearing on May 18, 2009 (Ubl App. pp. 116-118). Shortly after Ubl filing an Answer, Counterclaim and Third Party Complaint, Ubl's motioned the District Court to disqualify attorney Brad A. Sinclair and the Serkland Law Firm from representing Tvenge Associates. In response, the Serkland Law Firm by and through attorney Brad A. Sinclair filed an objection to the Court entering a restraining order, a motion for dismissal of the third party complaint filed by Ubl, and an objection to Ubl's motion to disqualify the Serkland Law Firm and attorney Brad A. Sinclair from representing Tvenge Associates.

[¶36] On May 18, 2009, the Court entertained Ubl's motion for permanent injunction, Ubl's motion to disqualify the Serkland Law Firm/Attorney Brad A. Sinclair from

representing Tvenge Associates, and R.L. Engebretson, P.C., and Rick Engebretson's motion to dismiss Ubl's third party complaint. (Ubl App. pp. 116-126).

[¶37] On May 18, 2009, the Court dismissed Jeff Ubl's third party complaint finding that Ubl's third party complaint violated N.D.R.Civ. P. Rule 14. (Ubl App. 116-118, 123-124). The Court also dismissed the temporary restraining order granted in favor of Ubl and against R.L. Engebretson, P.C., and Rick Engebretson. (Ubl App. pp 116-118, 121-122). The Court found that the two parties cannot work together. Id. The Court subsequently entered an order denying Ubl's motion to disqualify the Serkland Law Firm and Brad Sinclair from representing Tvenge Associates. (Ubl App. pp. 116-118-, 125-126). The District Court's order provides that the Court was of the opinion that the action that remains is a simple collection action filed by Tvenge Associates against Jeff Ubl for amounts allegedly to have been taken by Jeff Ubl, that there been no conflict of interest or secrets or confidences have been bestowed upon the Serkland Law Firm or attorney Brad Sinclair since the Serkland Law Firm and attorney Brad A. Sinclair have not previously represented Tvenge Associates. Id. The Court further found that the interests of the majority shareholder R.L. Engebretson, P.C., and Rick Engebretson are identical to the interests of Tvenge Associates in the present matter seeking the collection of personal credit card charges made by Jeff Ubl upon Tvenge Associates' corporate credit card and not repaying the same to the corporation. Id.

[¶38] That subsequent to the Court's dismissal of Ubl's third party complaint. Ubl has commenced a shareholder derivative lawsuit pursuant to a Complaint dated May 19, 2009. (Tvenge App. pp. 20-35).

[¶39] In the subsequent shareholder derivative action commenced by Ubl, Ubl now seeks to disqualify Attorney Dan Dunn from representing Tvenge Associates. (Tvenge App. pp. 36-37). Dan Dunn and the Maring Law Firm have never represented Tvenge Associates, have not been involved in any of the negotiation, formation, or drafting of any corporate buy-sell agreements, or involved in the consummation of the sale of the Warren Tvenge's stock to R.L. Engebretson and Rick Engebretson. Ubl seeks to disqualify Dan Dunn from representing Tvenge Associates in the above entitled matter simply because Rick Engebretson selected and appointed Dan Dunn to represent Tvenge Associate in the recently commenced shareholder derivative lawsuit dated May 19, 2009.

[¶40] Jeff Ubl apparently believes that any party representing Tvenge Associates must be a party not selected by Rick Engebretson, majority shareholder and must be an attorney selected by Jeff Ubl, minority shareholder. (Id.)

[¶41] For the reasons cited herewithin, Jeff Ubl's motion for supervisory writ usurp the District Court's Order of June 2, 2009, decreeing that Ubl's motion to disqualify the Serkland Law Firm and attorney Brad Sinclair from representing Tvenge Associates in the present cause of action should be denied.

STANDARD OF REVIEW

THE DISTRICT COURT'S DENIAL OF UBL'S MOTION TO DISQUALIFY THE SERKLAND LAW FIRM AND ATTORNEY BRAD A. SINCLAIR FROM REPRESENTING TVENGE ASSOCIATES SUBJECT TO THIS COURT'S CLEARLY ERRONEOUS REVIEW UPON APPEAL.

[¶42] A finding of fact is clearly erroneous under N.D.R.Civ.P. Rule 52(a) if it is induced by:

- (1) An erroneous view of the law;

- (2) No evidence exists to support the findings; or
- (3) If an entire record, this court is left with a firm and definite conviction that a mistake has been made.

Intercept Corporation v. Calima Financial, LLC, 741 N.W.2d 209, 2007 N.D. 180; see also N.D.R.Civ.P. Rule 52(a), Center Mutual Insurance Company v. Thompson, 618 N.W.2d 505, 2000 N.D. 192; Habeck v. MacDonald, 520 N.W.2d 808 (N.D. 1994).

[¶43] The Supreme Court reviews the trial court's findings of fact under the clearly erroneous standard. Fargo Foods v. Bernabucci, 1999 ND 120, ¶10, 596 N.W.2d 38, 41 and N.D.R.Civ.P. Rule 52(a).

[¶44] A finding of fact is clearly erroneous if it is induced by an erroneous conception of the law, if there is no evidence to support it, or if, although there is some evidence to support it, on the entire record, a reviewing court is left with a definite and firm conviction a mistake has been made. Schmitz v. Schmitz, 1998 ND 203, ¶5, 586 N.W.2d 490. The mere fact that a reviewing court may have viewed the facts differently if it had been the initial trier of the case does not enable it to reverse the lower court. Byron v. Gerring Industries, 328 N.W.2d 819, 821 (N.D. 1982).

[¶45] This Court has recognized that the district court is in the best position to decide factual issues. Fargo Foods, Inc. v. Bernabucci, 1999 N.D. 120, ¶ 19, 596 N.W.2d 38. A trial court abuses its discretion when the decision is not the product of a rational mental process leading to a reasoned determination, or when it acts unconscionably, arbitrarily or unreasonably. Id.

Supervisory Writ Standard

[¶46] The Supreme Court's authority to issue supervisory writ is derived from North Dakota Constitutional Article VI, ¶2 and N.D.C.C. § 27-02-04; Rowe v. Rothe-Seeger, 2000 N.D. 608 N.W.2d 289; Diamond v. State Board of Higher Education, 1999 N.D. 228, 603 N.W.2d 66. The Supreme Court's ability to issue a supervisory writ is discretionary; it cannot be invoked as a matter of right. Trinity Medical Center v. Holum, 544 N.W.2d 148, 151 (N.D. 1996); Odden v. O'Keefe, 450 N.W.2d 707, 708 (N.D. 1990).

[¶47] The Supreme Court determines on a case by case basis whether to exercise its original jurisdiction to issue remedial writs. Heartview Foundation v. Glaser, 361 N.W.2d 232, 234 (N.D. 1985); Marmon v. Hodny, 287 N.W.2d 470, 474 (N.D. 1980). Generally, the Supreme Court will not exercise supervisory jurisdiction "if the proper remedy is an appeal" merely because the appeal may involve an increase of expenses or an inconvenient delay. Fibelstad v. Glaser, 497 N.W.2d 425, 429 (N.D. 1993). The Supreme Court rarely and cautiously exercises its authority to issue supervisory writs and only to rectify errors and prevent injustice in extraordinary cases in which there is no adequate alternative remedy. State ex. al. re v. Haggerty, 1998 N.D. 122, ¶6, 580 N.W.2d 139. In Rowe v. Rothe-Seeger, this Court denied a supervisory writ in which the petitioner sought to vacate the district court's order authorizing an insurer to intervene in a malpractice action. In the case of Molony v. Cass County Court Increase Jurisdiction, 301 N.W.2d 112 (N.D. 1980), this Court denied a supervisory writ seeking to reverse a court order requiring petitioners to be deposed as witnesses in a criminal case. The petitioners obtained immunity but asserted that they would still plead the Fifth

Amendment in the criminal case. The Molony court found that a supervisory writ was not the only remedy available to prevent any alleged injustice in the case. In the case of Stormon v. District Court, 38 N.W.2d 785 (N.D. 1949), the court held that where no emergency exists and no injuries apparent other than inconvenience and expense of another trial, the court will not issue a supervisory writ. In the case of Ingalls v. Bakken, 167 N.W.2d 516 (N.D. 1969), this Court held that an application for supervisory writ will be denied unless trial court's action is such that will result in a grave or serious prejudice to the petitioner for which the petitioner has no adequate remedy. In Ingalls, the court refused to issue a supervisory writ asserting petitioner had an adequate remedy at law – raising the issue on appeal to the district court.

[¶48] In the present cause of action, grounds do not exist for this Court to issue a supervisory writ reversing the district court's determination that no conflict of interest exists for attorney Brad A. Sinclair and the Serkland Law Firm in representing Tvenge Associates in the present litigation.

IV. LEGAL ARGUMENT

THIS COURT SHOULD DENY DEFENDANT JEFF UBL'S REQUEST FOR SUPERVISORY WRIT TO DISQUALIFY THE SERKLAND LAW FIRM AND ATTORNEY BRAD A. SINCLAIR FROM REPRESENTING TVENGE ASSOCIATES ARCHITECTS & PLANNERS IN THE ABOVE REFERRED TO COLLECTION LITIGATION

[¶49] The present cause of action is a simple collection action. Tvenge Associates seeks repayment from Jeff Ubl of the misappropriation/theft of corporate funds incurred by Jeff Ubl by charging on the Tvenge corporate credit card personal expenses in the amount outstanding of \$20,414.02. Jeff Ubl's Answer to the Complaint admits that he is indebted to

the corporation for his personal charges on the credit card in the amount of \$20,414.02. See Ubl Answer, paragraphs 8 and 9. (Ubl App. pp. 5-6).

[¶50] Ubl now seeks to disqualify the Serkland Law Firm and/or Brad A. Sinclair from representation of Tvenge Associates in this simple collection matter. Jeff Ubl filed an ill-conceived Third Party Complaint alleging shareholder derivative relief. R.L. Engebretson, P.C., and Rick Engebretson filed a motion to dismiss the Third Party Complaint since it is not properly brought under Rule 14 of N.D.R.Civ.P. Rule 14 provides that Jeff Ubl can only commence a third party complaint asserting that if Jeff Ubl is liable to Tvenge Associates for the misuse of the Tvenge corporate credit card, that the Third Party Defendants are liable to Jeff Ubl's misuse of the corporate credit card. Jeff Ubl does not assert in his Third Party Complaint that R.L. Engebretson, P.C., or Rick Engebretson are liable for Jeff Ubl's utilization of the corporate credit card including Jeff Ubl's wife's cosmetic surgery and other personal expenses Jeff Ubl incurred on the corporate credit card.

[¶51] Jeff Ubl's Third Party Complaint has been dismissed by the District Court. Upon dismissal, the only issue before this Court concerns Jeff Ubl's counterclaim filed against Tvenge Associates. Since Jeff Ubl has filed a shareholder derivative lawsuit mirroring his counterclaim and third party complaint as evidenced by a Complaint dated May 29, 2009, Tvenge Associates through legal counsel correspondence has requested that Ubl dismiss his counterclaim against Tvenge Associates since it is identical to the shareholder derivative lawsuit recently filed. (See Tvenge App. Ubl shareholder derivative complaint, pp. 20 -35 and Ubl Counterclaim in the present litigation, Ubl App. pp. 10-50). The Serkland Law Firm has filed a motion for summary judgment seeking judgment against Jeff Ubl in the amount of \$20,414.02. The Serkland Law Firm has also filed a motion to dismiss Ubl's

counterclaim since it is duplicative of the May 19, 2009, shareholder derivative lawsuit. In essence, Ubl's forum shopping seeking to appoint his attorney of his choosing to represent Tvenge Associates in the present litigation.

[¶52] In the case of Field v. Freedman, ex. al., 527 F.Supp. 935 (D. Kan. 1981), the minority shareholder commenced a shareholder derivative lawsuit against the majority shareholders, and the corporation. The minority shareholder asserted that the corporation, Douglas Corporation, was controlled by the Freedmans who owned 54% of the Douglas Corporation. The minority shareholder asserted that the Freedmans wrongfully diverted and converted corporate assets and corporate opportunities and were involved in fraud in the connection with the sale of a corporate asset to another corporate entity. The defendant Douglas Corporation and the majority shareholders, the Freedmans, were represented by one law firm. The minority shareholder sought to disqualify the majority shareholder and the corporation's legal counsel asserting that the legal counsel could not represent both the majority shareholder, the Freedmans, and the Douglas corporation. The minority shareholder asserted that legal counsel must be disqualified because the dual representation would impose an irreconcilable conflict of interest, and that the law firm would use secrets and confidence obtained in the attorney/client relationship to the disadvantage of the former directors and officers of the corporation. The court found that no grounds existed to disqualify the law firm in the shareholder derivative lawsuit from representing both the majority shareholders, the Freedmans, and the Douglas corporation.

[¶53] The Field court recognized that disqualification of attorney chosen by party to represent him in litigation is a serious matter. 527 F.Supp. at 940. Although courts have

inherent power to disqualify counsel where necessary to preserve the integrity of the adversary process, each case must be decided on its own particular facts. Id.

[¶54] Attorneys are not immediately disqualified in litigation unless the attorney sought to be disqualified threatens to taint the underlying trial with serious ethical violation. Id. In Field, the court recognized that should a recovery accrue, the recovery will benefit the corporation owned by the majority shareholders. The Field court found that there was no adverse interest between the corporation and the defendant majority shareholders.

[¶55] In the present cause of action, there is no adverse interest between the majority shareholder, R.L. Engebretson, P.C./Rick Engebretson and the corporation, Tvenge Associates. The corporation is owed funds from Jeff Ubl. Jeff Ubl acknowledges that he owes the corporation funds. Jeff Ubl refuses to immediately repay in full to the corporation funds for his misuse/theft of corporate funds. R.L. Engebretson/Rick Engebretson, the majority shareholder of the corporation, seeks corporate redress and repayment for the benefit of the corporation. The benefit accrues to the majority shareholder. R.L. Engebretson, P.C. and Rick Engebretson's interests in the present collection action is identical to the corporation – corporate redress for employee theft. For the reasons cited in the Field decision, this Court should dismiss Ubl's motion to disqualify the Serkland Law Firm and/or Attorney Brad A. Sinclair from representing Tvenge Associates as a Plaintiff in this simple collection proceeding.

[¶56] The Field court also found that there was no record that adverse interests are present or likely to become present in the shareholder derivative action. The Field minority shareholder then asserted because the defendant lawyer represented the Douglas corporation in 1973 to the present in a variety of capacities, the law firm acquired secrets and

confidences in which it might use against the corporation or the minority shareholders for the benefit of the majority shareholders. The Field court held otherwise. The Field court held that there was no evidence to indicate that the corporate law firm was in possession of any secrets and confidences which were not imparted to that firm by the very directors and officers of the corporation which the law firm seeks to defend in the Field litigation. Moreover, the Field court found that there is nothing in the record to show that any secrets or confidences, if such existed, would be used or might be used against the corporation or the minority shareholder.

[¶57] In the present cause of action, neither the Serkland Law Firm nor Brad A. Sinclair have previously represented Tvenge Associates. Neither the Serkland Law Firm nor Attorney Brad A. Sinclair were involved in drafting, negotiating or reviewing Tvenge Associates' Buy-Sell Agreement between the parties, the purchase of Warren Tvenge's shares of stock in Tvenge Associates for R.L. Engebretson, P.C./Rick Engebretson, nor involved in any corporate matter, affair until the Serkland Law Firm/Attorney Brad A. Sinclair was retained to commence the present litigation against Jeff Ubl for misappropriation/theft of corporate property. There has been no secrets or confidences given the Serkland Law Firm or Brad A. Sinclair by a minority shareholder, Jeff Ubl. Moreover, Jeff Ubl has admitted his misappropriation and theft of corporate funds. The present litigation only concerns Tvenge Associates obtaining a judgment against Jeff Ubl for the sum of \$20,414.02 and dismissal of Ubl's counterclaim. Jeff Ubl's Third Party Complaint filed in the above entitled matter has been dismissed by the Court. Jeff Ubl has now commenced a shareholder derivative lawsuit in a separate action against R.L. Engebretson, R.L. Engebretson, P.C., Warren Tvenge and Tvenge Associates. (Tvenge

App. pp. 20-35). Separate legal counsel for Tvenge Associates and R.L. Engebretson and Rick Engebretson have in fact has been procured for the recently filed shareholder derivative lawsuit. (Tvenge App. 36-37).

[¶58] The Field court recognized that rules of lawyer ethical conduct requires a lawyer to preserve the secrets and confidences of his client and instruct a lawyer never to accept employment against a former client where the matter in controversy is substantially related to the subject matter of the attorneys earlier representation. A court must find that there must be facts in the record to enable the court to make a finding that an ethical violation has or will occur. The Field court recognized that a lawyer need not disqualify himself when he undertakes a suit adverse to the interests of a former client. In Field, the court found no basis in all to make a finding that the corporate law firm in its previous representation of the corporation was involved in an action substantially related to the previous representation of the corporation for the benefit of the minority shareholders. The Field court further found that there was no basis by which to assess the possibility of secrets and confidences reposed by the corporation to the law firm now representing both the corporation and the majority shareholders.

[¶59] In the present cause of action, neither the Serkland Law Firm or Attorney Brad A. Sinclair have been involved whatsoever in Tvenge Associates' corporate affairs, or the majority shareholder R.L. Engebretson, P.C., and Rick Engebretson's acquisition of its interests in Tvenge Associates, or the drafting, negotiation, or execution of any and all corporate documents between R.L. Engebretson, P.C./Rick Engebretson and Warren Tvenge or Jeff Ubl or documents in which Jeff Ubl has consented to R.L. Engebretson, P.C./Rick Engebretson purchase of Warren Tvenge's interests in Tvenge Associates. Pursuant to the

Field decision, since Jeff Ubl has failed to produce evidence to support Jeff Ubl's assertions, Jeff Ubl's motion to disqualify the Serkland Law Firm and Attorney Brad A. Sinclair should be dismissed.

[¶60] The same result was reached in the case of Stapleton v. Bottoms, 706 N.W.2d 411 (Iowa 2005). In Stapleton, minority shareholder brought a shareholder derivative litigation against a limited liability corporation and its majority shareholder seeking damages for breach of fiduciary duty, conversion, dissolution, accounting, and an appointment of a receiver. The minority shareholder filed with the court a motion to disqualify the defendants' legal counsel. The Stapleton district court disqualified the legal counsel from representing the corporation but allowed the legal counsel to continue to represent the majority shareholder. The Stapleton Supreme Court granted the defendant's application for interlocutory appeal. The Supreme Court found that although potential for conflict of interest exists, the record did not establish there was any significant risk that the defense attorney's representation of the defendant corporation would materially interfere with the zealous representation of the majority shareholders. The Supreme Court of Iowa reversed the district court's order and remanded the case for further proceedings. The Iowa Supreme Court reviewed the trial court's disqualification of the attorney from representing both the corporate entity and the majority shareholder pursuant to the abuse of discretion standard. The Stapleton court found that the evidence did not support a finding there was significant potential for divergent interests and thus the district court improperly disqualified the law firm from representing both the majority shareholder and the corporation.

[¶61] The Stapleton court reviewed various rules of professional conduct regarding attorney disqualification. The Stapleton court believed a party's right to choose his or her

own attorney versus the need to maintain the highest ethical standard that will preserve the public's trust in the legal profession and the integrity of the court's system. In balancing the party's interest, a court must be vigilant to thwart any misuse of a motion to disqualify for strategic reasons. The policy regulating conflicts of interest have to take into account the opportunities for manipulation and tactical infighting. An examination for a conflict of interest should be limited to whether there is a significant risk that counsel's representation of one client, the corporation, will be materially limited by his or her responsibilities to another client, the majority shareholder which was previously referred to as the "appearance of impropriety test". Id. The modern approach focuses on the degree of risk that a lawyer will be unable to fulfill his or her duty to both clients. A conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities. Id. 706 N.W.2d at 416. A mere possibility of a subsequent harm does not itself require disclosure and consent. The critical question is whether a likelihood that a difference in interest will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

[*62] The representation of multiple clients is improper if it is unlikely that impartiality can be maintained caused by substantial discrepancy in the represented party's testimony, or incompatibility in positions. The Stapleton court held that the interests the majority shareholder, and the majority shareholders' corporation were not directly adverse. The Stapleton court held that the minority shareholder failed to articulate why a joint defense of the claims would be inconsistent. The Stapleton court held that the record did not reveal

substantial evidence of adverse interests between the defendant corporation and the majority shareholder owning the controlling interest in the defendant corporation.

[¶63] The present cause of action, the claims of the majority shareholder, R.L. Engebretson, P.C./Rick Engebretson and the corporation, Tvenge Associates, are identical. Both parties seek repayment from the minority shareholder, the president/the board of director/Jeff Ubl of his corporate misuse/theft of corporation property – using the corporate credit card for personal use and not repaying the same immediately upon receipt of the corporate credit card billing. Jeff Ubl admits he had misused and abused the corporate credit card and he owes Tvenge Associates \$20,414.02. Jeff Ubl admits he has not repaid the same. The claims of R.L. Engebretson, P.C./Rick Engebretson and Tvenge Associates are identical – collection of unauthorized use of the corporate credit card by Jeff Ubl. Such claims are not inconsistent to one another.

[¶64] In Phillips Medical Systems International B.V. vs. Bruetman, 8 F.3d 600, 606 (7th Cir. 1993), the court refused to disqualify legal counsel from jointly representing the individual majority shareholder and several corporations controlled by the majority shareholder. The court held the corporations had no interest separate from the individual majority shareholder and there was no determination of actual conflict of interest between the majority shareholders and the corporation. The Phillips court ordered that counsel would not be disqualified simply because opposing party alleges possibility differing interests. 706 N.W.2d at 419. See also National Childcare, Inc. v. Dickinson, 446 N.W.2d 810, 812 (Iowa 1989). In Childcare, the court held that moving party's allegation of conflict of interest was insufficient to require disqualification absent actual proof that attorney's representation would be adverse to both the corporation and majority shareholders interests.

[¶65] In the present cause of action, there is no adverse interests between the majority shareholder, R.L. Engebretson, P.C./Rick Engebretson and Tvenge Associates. The majority shareholder/Tvenge Associates seeks repayment from Jeff Ubl of misappropriation of corporate funds/misuse of the corporate credit card in the amount of \$20,414.02. Jeff Ubl admits that he has misused and abused the corporate credit card and admits that he is indebted to Tvenge Associates for the amount of \$20,414.02. (Ubl App. pp. 5 – 7). Jeff Ubl simply refuses to immediately pay in full the amount that is justly due and owing to Tvenge Associates. The Serkland Law Firm's representation of the majority shareholder and Tvenge Associates in this simple collection action does not result in a conflict of interest. The Serkland Law Firm has not represented Tvenge Associates in the past and has not obtained any confidences or secrets from Jeff Ubl. The Serkland Law Firm's representation of the corporation is consistent with the majority shareholder's interest and the duties of the majority shareholder/Rick Engebretson/secretary/treasurer of the corporation which is to obtain collection of monies due and owing the corporation. Pursuant to case law cited herewithin, the motion of Jeff Ubl to obtain a supervisory writ from this Court to reverse the District Court's decision not to disqualify the Serkland Law Firm and Attorney Brad A. Sinclair should be dismissed/should be denied by this Court.

[¶66] In the case of Settelmeier & Sons, Inc. v. Smith & Harmer, Ltd., 197 P.3d 1051 (Nev. 2008), the court recognized that a law firm representing both the corporation and its majority shareholder in dissolution and receivership action did not violate any Rule of Professional Conduct prohibiting dual representation without client consent. No conflict of interest existed with respect to corporation and majority shareholder. The interests were the same.

[¶67] In the case of Agster v. Barnada, 1999 W.L. 1577979 (Common Pleas Penn. 1999), (a copy of the decision is attached, Tvenge App. pp. 36-44). The issue before the court concerned the plaintiff's motion to compel production of corporate legal counsel's documents in a shareholder suit against the corporation and whether the corporation could assert attorney/client privilege to protect its communications with corporate counsel. The Agster court acknowledged in closely held corporations, the majority shareholders run the business, the majority shareholder share very little information with other shareholders, and all communications between the corporation and the corporate counsel are usually between the majority shareholders and the corporate counsel. Corporate counsel had little if any communications with other shareholders. The Agster court recognized that it is a reasonable expectation of the majority shareholder and corporate counsel that communications between corporate counsel and majority shareholder which the majority shareholder desires to be confidential will not be furnished to any other shareholders. The Agster court acknowledged that in closely held corporations, the primary concern of a corporate law is that controlling shareholder operates the corporation in a manner that advances only what the law recognizes as a legitimate interest of the controlling shareholder. The Agster court recognizes that while the law may refer to the controlling shareholder as having a fiduciary duty to serve the best interests of the corporation, the law, in fact, recognizes that a majority interest entitles the majority shareholder to exercise his or her own control as long as its exercise in a manner that not considered to be overreaching. The Agster court held that its make no sense to apply fiduciary law because majority shareholder is not required to place the interests of the minority shareholder ahead of the majority shareholder interests. The Agster court mandated that the law only requires the majority shareholder not to engage in

overreaching acts. The Agster court further recognized the purpose of attorney/client privilege is served by protecting confidential communications between corporate counsel and the controlling shareholders. Without legal advice, controlling shareholders are not in a position to give appropriate consideration to the interests of minority shareholders. The Agster court recognized that corporate counsel's only relationship with the corporation is his or her relationship with dominant shareholder and minority shareholder must retain their separate counsel to protect their personal interests if they have concerns about the operation of the corporation. The Agster court opined that in closely held corporations, corporate counsel does not represent all shareholders but in fact represents only the majority shareholders. The Agster court recognized there is no reason why majority shareholder rather than the corporation should be required to pay counsel fees for legal services incurred in connection with the majority shareholder's management of the corporation.

[¶68] In the present cause of action, the Serkland Law Firm is representing the majority shareholder of Tvenge Associates in seeking payment from the minority shareholder/president of the corporation/Jeff Ubl who has acknowledged misappropriation and theft of corporate funds and inability to immediately repay the same. Pursuant to the Agster decision, grounds do not exist to disqualify the Serkland Law Firm from representing Tvenge Associates in the present collection litigation.

[¶69] In the case of Stanley v. Brassfield, Cowan & Howard, 504 N.E.2d 542 (Ill. App. 1987), the court held unless a shareholder derivative lawsuit is pending, the court generally finds no conflict of interest to disqualify a law firm from representing both defendant corporation and majority shareholders and/or corporate directors.

[¶70] Pursuant to the decision rendered in Gong v. RFG Oil, Inc., 82 Cal. Rptr. 3d 416 (Cal. App. 4th 2008), the Serkland Law Firm and Attorney Brad A. Sinclair may represent the majority shareholder, R.L. Engebretson P.C./Rick Engebretson in the shareholder derivative lawsuit commenced by Ubl in addition to representing Tvenge Associates in the present simple collection action. In Gong, the minority shareholder commenced a shareholder derivative lawsuit against the majority shareholder and the corporation. One law firm represented both the majority shareholder and the corporation. The Gong court conducted a mini trial and determined that the buy-sell agreement required the majority shareholder to purchase the minority shareholder's shares in the corporation at fair value. After the mini trial, the law firm that represented both the majority shareholder and the corporation represented only the majority shareholder and a new law firm represented the corporation. The minority shareholder sought to disqualify the law firm that previously represented both the corporation and the majority shareholder who chose to now represent solely the majority shareholder. The Gong court held that a potential conflict does not warrant automatic disqualification of joint counsel. The Gong court recognized that the functions of a corporation is so intertwined with the majority shareholder that the distinction between them is fictional and it makes no sense for legal counsel representing both the corporation and the majority shareholder to be entirely removed from a shareholder derivative lawsuit barring the lawyer from representing the majority shareholder. The Gong decision asserts that because of the intertwined nature of closely held corporation, the corporate counsel for the corporation is always allowed to represent the majority shareholder in a shareholder derivative lawsuit.

CONCLUSION

[¶71] For the reasons cited herewithin, this Court must deny Ubl's motion for supervisory writ disqualify the Serkland Law Firm and Brad Sinclair from representing Tvenge Associates in the present litigation.

Respectfully submitted,

Dated: June 19, 2009

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Respondent in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface using Microsoft word and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 6,804.

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AFFIDAVIT OF SERVICE BY EMAIL

STATE OF NORTH DAKOTA)
) SS
COUNTY OF CASS)

Sherry Michelson, being duly sworn, deposes and says that she is a resident of the City of Moorhead, State of Minnesota. is of legal age; and that she served the within

**BRIEF OF TVENGE ASSOCIATES ARCHITECTS & PLANNERS,
P.C./RESPONDENT ON BEHALF OF THE HONORABLE JUDGE BRUCE
ROMANICK, JUDGE OF THE DISTRICT COURT ; and**

**APPENDIX OF TVENGE ASSOCIATES ARCHITECTS & PLANNERS,
P.C./RESPONDENT ON BEHALF OF THE HONORABLE JUDGE BRUCE
ROMANICK, JUDGE OF THE DISTRICT COURT**

On June 19, 2009, by attaching a true and correct copy to an email addressed as follows, to-wit:

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/s/ Sherry Michelson
Sherry Michelson

Subscribed and sworn to before me this 19th day of June, 2009.

/s/ Brad Sinclair

Notary Public

RE: Jeff Ubl, Petitioner v. The Honorable Bruce Romanick, Judge of the District Court –
08-09-C-849
Supreme Court No. 20090170