

NO.20160313

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STATE OF NORTH DAKOTA  
  
IN SUPREME COURT

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SNAPS Holding Company,  
a North Dakota corporation,

Plaintiff and Appellee  
and Cross-Appellant

v.

Jim Leach and Elizabeth Leach,  
and

Defendants, Appellants,  
and Cross-Appellees

Darlene Leach, Steve Leach, Frank A. Barber,  
Sherry Barber, Dennis J. Meyer, Jerry Nelson,  
Marjo Nelson, Kathy Hegland, Michael Hegland,  
Rebecca Soloway, William Ockert, Delores Reznechek,  
John Bergstrom, Janice Scott, John W. Scott,  
and all other shareholders of IDA of Moorhead Corporation,  
as listed on Exhibit A, attached hereto and made a  
part hereof by reference

Defendants and Appellees

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Appeal from Judgment of Cass County District Court, East Central Judicial  
District, Judge Steven L. Marquart, entered on August 15, 2016

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Reply Brief of Appellant and Cross-Appellee Elizabeth Leach

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## INTRODUCTION

[1] This Reply Brief is submitted on behalf of Appellant and Cross-Appellee, Elizabeth Leach. Elizabeth Leach stands behind all assertions in her original brief. Elizabeth Leach submits this Reply Brief in response to the new arguments submitted on behalf of SNAPS in its cross-appeal.

**I. THE DISTRICT COURT ERRED IN FINDING THAT ELIZABETH LEACH CONSENTED TO THE STOCK PURCHASE AGREEMENT, AS WRITTEN.**

**A. There is No Evidence to Support The District Court's Finding of Authority.**

[2] While there is evidence to support the district court's finding that Jim had actual authority to enter into the Stock Purchase Agreement on Elizabeth's behalf, there was absolutely no evidence to indicate that Jim Leach had any authority to sign a specific Stock Purchase Agreement which included an indemnification clause with virtually unlimited liabilities, certainly far more than Elizabeth Leach obtained.

[3] In this case, it is clear that Jim Leach had authority to sell Elizabeth Leach's stock. He did not have, however, authority to subject Elizabeth Leach to any liability or indemnification.

[4] Under N.D.C.C. §3-03-02, the agent's principal is bound by the agent's authorized acts only so far as they can be plainly separated from those which are authorized. An agent who exceeds his powers in making an unauthorized contract with a third person does not bind the principal either by contract as

made or by the contract as it would have been made had he acted in accordance with his authority. *Restatement of Agency Second*, § 164.

[5] Here, SNAPS has not presented any admissible evidence that Elizabeth gave Jim authority to do anything other than sell his IDA stock. None of the meeting minutes or Certificate of Resolution (Doc. ID. #80 and 81) make any reference to indemnification provisions. Neither do the letters that Elizabeth Leach received from Attorney Turman. (Doc. ID. # 115).

[6] Elizabeth Leach agreed that Jim Leach had her authority to sign a Purchase Agreement, as it was contemplated at the time she provided her signature in June, 2011. There was absolutely no liberty given to the agent to deviate significantly from the terms of Purchase Agreement, at any time afterwards.

[7] The assertion that Elizabeth Leach is somehow bound by the pleadings of her counsel (which do not even indicate that she agreed to the indemnification agreement), is incorrect. Legal conclusions contained in a complaint do not bind a court. See, for example, *Kelly v. Ellefson*, 712 N.W.2d 759, 768 (Minn. 2006). *Gallagher v. Haffner*, 77 ND 570, 44 N.W.2d 491, 495 (1950).

[8] The argument that the drafting process supports the district court's finding is curious. Plaintiff points to none. There was never any draft indicating that the individual sellers would be responsible for the Danuser liability when the document authorizing Jim Leach to sign on behalf of the

shareholders was consummated. Plaintiff's contentions on this point are unsubstantiated.

[9] A settlement agreement is unconscionable if it is one that no rational, undiluted person would make, and no honest and fair person would accept, or is blatantly one-sided and rankly unfair. *Eberle v. Eberle*, 2009 ND 107, ¶ 18, 766 N.W.2d 477.

[10] The fact that Joseph Turman, the attorney for the Leaches throughout the underlying transaction, testified that he understood that Jim Leach was signing on behalf of his family members, including Elizabeth Leach, is more an indictment of Turman's ethics than a justification for the court's decision. See, SNAPS Memo., p. 20.

**B. Agreement to Indemnify for Another's Debt Needs to Be in Writing.**

[11] The argument that the agency authorization did not need to be in writing similarly fails. SNAPS cites *Johnson v. Haugland*, 303 N.W.2d 533, 543 (N.D. 1981), for the proposition that, under North Dakota law, an indemnity agreement need not be in writing, but may be either express or implied. That argument fails as an analogy. In *Johnson v. Haugland*, the indemnification was direct. Here, SNAPS seeks to hold Elizabeth Leach personally liable for the debt of another, that is the debt of IDA of Moorhead Corporation. This is a promise that had to be in writing, subscribed by Elizabeth Leach. It was not. Since Elizabeth Leach provided no written

document in which she promised to indemnify SNAPS, she cannot be held liable to such an unsigned promise. In this case, it goes without saying that there is no evidence that Elizabeth Leach ever consented to the indemnification terms. It would have been foolish. Nobody really thought about the indemnification agreement, not Elizabeth, not Jim, and not even the owner of SNAPS.

[12] The attempt by SNAPS to state that the alleged agreement of Elizabeth Leach to indemnify another is not a “promise to answer for another’s debt” but “merely the allocation of a contingent liability,” is simple word play, at best. At worst, the argument of SNAPS is simply false.

## **II. THE INDEMNIFICATION AGREEMENT, AS IT APPLIES TO ELIZABETH LEACH, IS CLEARLY UNCONSCIONABLE.**

[13] The Stock Purchase Agreement as it applies to Elizabeth Leach is clearly unconscionable as it basically attempts to make her destitute for a debt that was never hers. Elizabeth Leach could have and should have walked away from this situation by not agreeing to the onerous terms. She never agreed to them, never signed for the terms, and is therefore unconscionable.

[14] To assert that the Stock Purchase Agreement was carefully negotiated by Leach, who was elderly at the time, and as far from an astute businessman at the time of the sale, as evidenced in the transcript, is simply laughable. It may have been true that the sellers were selling their interests

in a multi-million dollar company. However, they sold it for \$1.18 Million and also promised to provide unlimited indemnification. Particularly as this would apply to Elizabeth Leach, who had only a 94,633 shares of stock (worth about \$9,000.00) and had no knowledge as to the existence of the Danuser claim, is unconscionable.

### **III. SNAPS WAIVED ITS RIGHTS TO INDEMNIFICATION BY DISMISSING ITS CLAIMS AGAINST OTHER SHAREHOLDERS.**

[15] SNAPS admitted that it dismissed its claims against one seller, Delores Reznechek, with prejudice. (Document #385). One of the other Defendants, John Scott, represented by Attorney Weiss, also showed for trial, and after discussions with opposing counsel, made no further appearance. See, Tr. 396. (Doc. Id. #378). One can only assume that counsel received some indication of release or dismissal, as did Reznechek.

[16] This does affect Elizabeth Leach's claim to contribution. Her ability to pursue claims against the other alleged joint debtors (who also did not provide any authorization to bind them to indemnification), has been seriously harmed.

[17] The settlement between SNAPS and Reznechek and as it appears, others, operates as an extinguishment pursuant to N.D.C.C., Ch. 19-3.

[18] The allegation that N.D.C.C. §9-13-03 protects Elizabeth Leach is not true. The statute states that "a release of two or more joint debtors does not extinguish the obligation of any of the others *unless they are mere*

*guarantors.*” The debt was not originally that of Elizabeth Leach. She and the others were “mere guarantors.” They were certainly not the original debtors. The debt was that of IDA of Moorhead, Inc., not Elizabeth Leach.

#### **IV. SNAPS HAS NO RIGHT TO REQUEST INDEMNIFICATION FROM ELIZABETH LEACH.**

[19] Elizabeth Leach agrees with the brief submitted on behalf of her son, Steve Leach, that the standard of review should be *de novo*, as opposed to abuse of discretion. See, *Ziegelmann v. Daimler Chrysler Corp.*, 2002 ND 134, ¶ 5, 649 N.W.2d 556. Elizabeth Leach also agrees with Steve Leach that the use of the word, “responsible” was intended to allocate payment responsibility, not to provide a right of indemnification.

[20] In the agreement, the word “responsible” was intended to allocate a payment responsibility post-judgment in the Danuser litigation – not to provide a right of indemnification – and the two other sections of the agreement state “The Buyer agrees to indemnify and pay all expenses and judgments associated with [the Danuser lawsuit]” and the “Buyer shall hold and indemnify Sellers harmless from [the Danuser lawsuit]” establishes under the plain language of the agreement that the shareholders, including Elizabeth, have no obligation to indemnify SNAPS. See also, *Specialized Contracting, Inc. v. St. Paul Fire & Marine Ins. Co.*, 2012 ND 259, ¶15, 825 N.W.2d 872 (“Ambiguities in non-insurance indemnity provisions are strictly construed against the entity receiving indemnity”).

[21] There should be no obligation by Elizabeth Leach to SNAPS.

### **CONCLUSION**

[22] Elizabeth Leach agrees with and incorporates herein all arguments made by Jim Leach, as well as her son, Steve Leach.

[23] For the reasons set forth above, Elizabeth Leach asks that the district court's judgment be reversed, and that SNAPS has no claim against Elizabeth Leach.

Dated this 3<sup>rd</sup> day of February, 2017.

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**s/ Paul A. Sortland**

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## **CERTIFICATE OF COMPLIANCE**

[24] The undersigned hereby certifies that said brief complies with N.D. R. App. P. 32 in that the brief was prepared with Century Schoolbook, size 12-point font, proportional typeface and that the total number of words is 1,443 from the portion of the brief entitled "Introduction" through the signature block. The word count was calculated using "Corel WordPerfect X8" word processing software, which also counts abbreviations as words.

Dated this 3<sup>rd</sup> day of February, 2017.

**SORTLAND LAW OFFICE, PLLC**

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