20180420
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 22, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

RONALD SMITHBERG,	)	
Appellant,	)	**Supreme Court No. 2018-0420**
	)	
vs.	)	**District Court No.**
	)	**12-2016-CV-00042**
GARY SMITHBERG, JAMES	)	
SMITHBERG AND SMITHBERG	)	
BROTHERS, INC.	)	
Appellees.	)	

BRIEF OF APPELLANT RONALD SMITHBERG

APPEAL FROM THE DIVIDE COUNTY DISTRICT COURT'S OCTOBER 2, 2018 FINAL JUDGMENT, FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT ORDER DATED OCTOBER 1, 2018, FROM THE ORDER ON MOTION FOR SUMMARY JUDGMENT DATED JANUARY 25, 2018 AND FROM THE ORDERS DENYING RECONSIDERATION DATED APRIL 13, 2018 AND OCTOBER 1, 2018.

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[¶1] The overriding issue in this case is whether a minority shareholder, who has received no benefit of his ownership and who has been deprived of hundreds of thousands of dollars received by his fellow shareholders, should be limited to a forced buyout at a reduced price, which buyout may further be manipulated by such shareholders with the result that each shareholder may ultimately be awarded only a pro rata share of what, if anything is left, after the other shareholders have otherwise looted and stripped all value from the corporation. In this regard, the issues are:

[¶2] 1. Whether the District Court erred in granting Jim and Gary's Motion for Summary Judgment dismissing Ron's statutory, tort, contract, and equitable claims?

[¶3] 2. Whether the District Court erred in denying Ron's Motions to Reconsider its Order on Summary Judgment?

[¶4] 3. Whether the District Court erred in requiring Ron to proceed to trial on a legal theory he didn't raise?

[¶5] 4. Whether the District Court erred determining the valuation date and amount to be paid to Ron?

STATEMENT OF THE CASE

[¶6] In May 2016, after four years of receiving no benefits from his ownership of Smithberg Brothers, Inc. (the "Corporation"), and watching his brothers stop and loot the Corporation, Ronald Smithberg ("Ron") brought suit against his brothers and fellow shareholders, James ("Jim") and Gary. (Appx.9;Doc.1). Ron raised 13 claims under the Business Corporation Act, Ch. 10-19.1, tort, contract, and equity, including: Breach of Fiduciary Duties, Oppression, Accounting, Removal of Directors, Illegal Distributions,

Corporate Dissolution, Dissenting Shareholder Rights, Unjust Enrichment, Breach of Contract, Conversion, and Deceit/Fraud. Ron sought, among other things, damages, specific performance, fair compensation, "and/or purchase of his shares at fair value." (Appx.9,Doc.1,¶¶78-81). Ron didn't bring a claim for a buyout under Section 10-06.1-26, which limits a buyout to a value determined by federal gift tax principles.

[¶7] Jim and Gary answered, but didn't raise Section 10-06.1-26. (Appx.20,Doc.6). Some 528 days later, they moved for summary judgment and first raised 10-06.1-26. (Doc.49). In opposition, Ron identified 130 paragraphs of facts supported by hundreds of citations to voluminous depositions and numerous documents. (Docs.69-75). Nevertheless, the District Court granted summary judgment, dismissed Ron's claims, and ordered Ron to proceed to trial where his sole remedy would be one he had never sought. (Appx.27,Doc.93). Ron appealed, but this Court dismissed.

[¶8] Trial was held April 19-20, 2018. On September 24, 2018, the undersigned filed a Demand for Change of Judge to remove Judge Jacobson from the unrelated case of Erickson v. Oberbeck, 53-2018-CV-01517 (Doc.23). Days later, Judge Jacobson adopted Jim and Gary's proposed findings, conclusions, and order. (Appx.39,Doc.252). Judge Jacobson ordered the Corporation would have twelve months to purchase Ron's interest, and that if such wasn't done, the Corporation would then be dissolved, with the assets first used to pay the Corporation's liabilities, and the remaining assets distributed pro rata to the shareholders. (Id.)

[¶9] On December 21, 2018, counsel for Jim and Gary notified the undersigned they were not going to farm in 2019 and were unilaterally going to sell the Corporation's equipment. (Doc.270). Thus, not only have Jim and Gary solely gotten the benefits of the

Corporation since 2012, they have now made clear they are not even trying to buy out Ron per the Judgment.

STATEMENT OF FACTS

[¶10] Because the underlying facts, both pretrial and through trial, were extensively briefed below, (Docs.69,130,225), only the essential facts will be repeated here, while the facts necessary to support Ron's claims will be detailed below.

[¶11] The original owners of the Corporation were brothers Craig, Gary, Ron, and Jim Smithberg ("the Smithberg brothers"). (Doc.72,Depo.Ex.27). At formation, Craig and Gary were given 26% interests and Ron and Jim 24% interests. (Id.) Until Craig died in 2010, ownership percentages, voting, and non-wage compensation had no relation to the amount each worked. (Doc.56,19:20-20:7;94:15-20;190:20-22).[1]

[¶12] Craig, while alive, was the only full time employee and received a $40,000 salary. (Doc.54,26:21-22;27:2-3). If and when the others assisted, they were paid $12.50/hr. (Id. 25:24-25; 27:13-15). After Craig died in 2010, the Corporation farmed fewer acres, but Jim and Gary made themselves full time salaried employees and also employed various of their family members. (Doc.56, 25:18-23;Doc.55,16:13-15). Jim and Gary also unilaterally raised their pay and paid themselves in new ways, including:

- Quarterly wage checks. (Doc.55,22:2-7; 27:16-20).
- "Commodities for wages." (Doc.72,Depo.Ex.32; Doc.55,22:13-20).
- Receiving vehicles, ice houses, gun safes, hotel stays, and purchases from dozens of retailers, hotels, and restaurants.

[1] Because Summary Judgment against Ron was granted prior to trial, most citations herein will be to the record including depositions and documents that existed at such time. However, as detailed in Ron's Post-Trial Brief (Doc.225), the trial testimony further supports Ron's position and will be cited herein as necessary and where not redundant.

[¶13] Ultimately, Jim and Gary, despite a 2010 motion to pay $15.00/hr, went from $12.50/hr to in excess of $120,000 per year, while they stopped paying Ron. (Doc.55,165:9-13,189-90;Doc.72).

[¶14] In 2010, the Corporation paid "rent bonuses" to Craig, Jim, Gary, and Ron of $40,000 each; Jim, Gary and Ron, got $67,000 each for 2011. (Doc.55,121:2-5). For 2012 and 2013, the Corporation paid rent bonuses to Jim and Gary of $125,000 each, but Ron, though still President, got nothing. (Doc.72,Depo.Ex. 32).

[¶15] In January 2012, Ron, whose primary profession is to work with farmers and do financial analysis, circulated the Corporation's January 1, 2012, financials. (Doc.72,Depo.Ex.25). The value of the Corporation was $1,836,261, which when divided by three, consistent with the agreement reached between Jim, Gary, and Ron (and discussed further below) that Ron owned 1/3 of the shares and as such would receive 1/3 of this amount, equaled $612,087. (Id.) Ron's brothers agreed these financials were substantially correct. (Id.;Depo.Ex.21)

[¶16] On May 4, 2012, Ron sent his brothers an email expressing concerns with "money being taken out of the farm account," unaccounted for draws, secret meetings, lack of communication, and lack of compensation to Ron. (Doc.72,Depo.Ex.12). Because of these actions, Ron outlined terms for him to be bought out effective after Craig's wife Kim was bought out by the Corporation, including that the value would be based on his "1/3 share as of 1-1-12" and that he would receive an "interest rate of 4.5% same as [Kim] is getting." (Id.).

[¶17] On June 9, 2012, the Corporation held a meeting and the Corporation's buyouts of Craig and Ron were discussed favorably. (Doc.72;Depo.Exs.5,18;Doc.55,21-25).

Multiple drafts of a buyout agreement were subsequently exchanged. (Doc.72,Depo.Exs.19,20).

[¶18] After January 1, 2012, Ron didn't get compensation from, was not consulted by, and was unilaterally removed as an officer of, the Corporation. (Tr.v1,240:21-22;Doc.72,Depo.Ex. 27;Doc.56,41-43;Doc.55,41:22-23). Efforts to get Ron's buyout effectuated continued, during which times, Jim and Gary continued to strip massive compensation and benefits out of the Corporation, while Ron received nothing. This suit followed.

JURISDICTIONAL STATEMENT

[¶19] The District Court had jurisdiction under N.D.Const. Art. VI, §8, and N.D.C.C. §27-05-06. This Court has jurisdiction under N.D.Const. Art. VI, §§2, 6, and N.D.C.C. §28-27-02.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT AND DENYING RON'S MOTIONS FOR RECONSIDERATION.

A. THE DISTRICT COURT ERRED IN DETERMINING RON'S CLAIMS WERE BARRED BY N.D.C.C. CH. 10-06.1.

[¶20] The District Court ruled all of Ron's claims were barred by N.D.C.C. §10-19.1-26. Statutory interpretation is a question of law, fully reviewable on appeal. Tangedal v. Mertens, 2016 ND 170, ¶8, 883 N.W.2d 871.

1. Ron's Claims under Ch. 10-19.1 Are Not Barred.

[¶21] Ron pled multiple claims under the Business Corporation Act, Chapter 10-19.1. Section 10-06.1-13, which addresses corporate farming, provides Chapter 10-19.1 is applicable, except "when inconsistent with" Chapter 10-19.1. Because Ron's claims are

not inconsistent with Chapter 10-06.1, summary judgment must be reversed. Shafer v. Job Service, 464 N.W.2d 390 (N.D. 1990) ("If there is no conflict, we will apply both…."). Pub. Serv. Comm'n v. Grand Forks Bean, 2017 ND 201, 900 N.W.2d 255 ("Statutory provisions … 'are to be construed liberally, with a view to effecting its objects and to promoting justice.'"); State v. Hirschkorn, 2016 ND 117, 881 N.W.2d 244 (construing "related statutes as consistent with one another … to effectuate both….").

[¶22] Section 10-06.1-26 solely provides a buyout mechanism for a shareholder who "desires to withdraw . . . ." Such is intended for a voluntary buyout such as retirement. Ron never invoked Section 10-6.1-26 or "desired" to "withdraw." Rather, as recognized by Judge Jacobson, Ron alleged "misconduct by [Jim and Gary] in the operation of [the Corporation] and the treatment of Ron in his capacity as a shareholder, director, and officer…." (Doc.252,¶5). In his Complaint, Ron sought, among other things damages, specific performance, and to be paid reasonable compensation. (Appx.9,Doc.1,¶¶78-81).

[¶23] Section 10-06.1-26 does not define "withdraw" but withdraw is used in Chapter 10-19.1. Under 10-19.1-31(1)(d), a corporation's bylaws may provide "The manner of admission, withdrawal, suspension, and expulsion of shareholders." Such illustrates a distinction between voluntary "withdrawal" versus a force or other withdrawal.

[¶24] Judge Jacobson recognized "Chapter 10-19.1 provides significantly more protections to minority shareholders than Chapter 10-06.1 . . . ." (Appx.27,Doc.93,¶10). Chapter 10-06.1 does not, among others, in address:

> Fiduciary obligations. §10-19.1-50,-51,-60.
> Supervised accounting. §10-19.1-85.1.
> Dissenting shareholder rights. §10-19.1-87.
> Illegal distributions. §10-19.1-95.
> Removal of Directors. §10-19.1-41.1.
> Equitable relief. 10-19.1-115(2)

Because Section 10-06.1-26 does not address the foregoing, Chapter 10-19.1 must be read to supplement Chapter 10-06.1.

[¶25] Chapter 10-19.1 "gives significant protection to minority shareholders." Fisher v. Fisher, 1997 ND 176, ¶20, 568 N.W.2d 728. In the face of Jim and Gary's misconduct, it is absurd to force Ron to be bought out at a discounted price, deprive Ron of the above protections, and deprive Ron of appropriate damages. United Bank v. Glatt, 420 N.W.2d 743 (N.D. 1988). Absent such rights, such as the right to an accounting, a buyout under 10-06.1-26 is subject to manipulation. Such encourages destructive behavior in family farming operations where unfair shareholders can force out fair shareholders at a reduced price. Hirschkorn, 2016 ND 117, ¶11 (explaining must construe "statutes to avoid absurd or illogical results."). If the legislature intended to take away all protections and remedies of farm shareholders it could have said it was doing such, but it didn't, and neither should this Court. Anderson v. N. & Dakota Trust Co., 261 N.W. 759 (N.D. 1935).

2. Ron's Non-Statutory Claims are Not Barred.

[¶26] Ron also pled non-statutory claims, including breach of fiduciary duty, breach of contract, unjust enrichment, conversion, and fraud/deceit. Olson v. Alerus, 2015 ND 209, ¶22, 868 N.W.2d 851 (holding breach of fiduciary duty is a tort claim). Chapter 10-06.1 only "take['s] precedence" if there is conflict with Chapter 10-19.1. Because Chapter 10-06.1 does not address non-statutory claims, and does not prohibit recovery of damages, summary judgment must be reversed.

3. Jim and Gary Waived Ch. 10-06.1 and are Estopped From It Applying.

[¶27] Jim and Gary didn't raise Chapter 10-06 until 528 days after the Complaint. Ron raised this issue, but the District Court didn't address it. (Doc.69, ¶133). Because Jim and

Gary waived 10-06.1, summary judgment must be reversed. N.D.R.Civ.P. 12(b); Northwestern Fed. Sav. & Loan v. Biby, 418 N.W.2d 786 (N.D. 1988).

[¶28] Ron also raised, but the District Court ignored, that Jim and Gary were estopped from applying 10-06.1-26. (Doc.69,¶134). Craig's buyout was based upon fair value as of the date of Craig's death. (Doc.55, 151:7-24;165:22-24). At no time, did anyone seek to apply 10-06.1-26 to Kim. Thus, there is a question of fact regarding estoppel. N.D.C.C. §31-11-06, -05(2) ("When the reason is the same the rule should be the same."); Peterson Mechanical, Inc. v. Nereson, 466 N.W.2d 568 (N.D. 1991).

4. The District Court Erred In Unilaterally Forcing Ron To Be Bought Out.

[¶29] "It is well-settled that a party cannot be awarded relief that is not framed by the pleadings." Turgman v. Boca Woods, 198 So.2d 1125, 1126 (Fla. Ct. App. 2016). Ron never invoked, 10-06.1-26.[2] Because a buyout under 10-06.1-26 isn't at "fair value," Jim and Gary didn't make a counterclaim, and the District Court dismissed all of Ron's claims with prejudice, Ron shouldn't have been subjected to a forced buyout and summary judgment must be reversed.

B. THE DISTRICT COURT ERRED WHEN IT GRANTED JIM AND GARY'S MOTION FOR SUMMARY JUDGMENT AND DENIED RON'S MOTIONS TO RECONSIDER BECAUSE RON RAISED GENUINE QUESTIONS OF MATERIAL FACT.

[¶30] The party moving for summary judgment has the burden of establishing that there are no genuine issues of material fact. . . . [T]his Court views the evidence in the light most favorable to the party opposing the motion, and the opposing party will be given the benefit of all favorable inferences that can reasonably be drawn from the record.

[2] The District Court forced 10-06.1-26 on Ron and used the fact he didn't pursue 10-01.26 as a basis for refusing Ron's valuation date. (Appx.39,Doc.252,¶12)

Schleuter v. Northern Plains Ins., 2009 ND 171, ¶6, 772 N.W.2d 879. Whether the District Court properly granted summary judgment is reviewed de novo. Id.

[¶31] Although Ron's initial brief in opposition to Jim and Gary's Motion for Summary Judgment laid out some 130 paragraphs of specific facts thoroughly supported by citations to the record, the District Court concluded:

> [Ron] relies merely upon the allegations of his complaint and cites no specific, competent evidence to support the essential elements of his claims as identified above. The Court has been left with the chore of scouring the record in search of competent evidence in support of [Ron's] claims, to no avail.

(Appx.27,Doc.93,¶18).

[¶32] Ron vigorously disputed this stunning error, but nevertheless moved for reconsideration to address the District Court's apparent misunderstanding and misapprehension. (Docs.128-30). Ellingson v. Knudson, 498 N.W.2d 814 (N.D. 1993) (approving Motion to Reconsider). The District Court denied Ron's motion without explanation. (Appx.38,Doc.140).

[¶33] Ron renewed his motion for reconsideration in his Post-Trial Brief. (Doc. 225-226). As Ron noted, "Although the Court limited the evidence Ron was able to introduce at trial … this evidence … illustrates … summary judgment was in error and that a new trial on all issues is necessary." Dinger v. Strata Corp., 2000 ND 41, ¶11, 607 N.W.2d 886, in which this Court reversed the denial of a motion for summary judgment after trial, supports the granting of Ron's Motion for Reconsideration.

[¶34] This Court has frequently reversed summary judgments ruling against breach of fiduciary duty and similar claims. See Olson, 2015 ND 209; Farmers Ins. v. Schirado, 2006 ND 141, 717 N.W.2d 576, Alerus v. Western St. Bank, 2008 ND 104, 750 N.W.2d 412; Production Credit v. Davidson, 444 N.W.2d 339 (N.D. 1989). Also instructive are

cases where a trial court has been reversed after concluding there had been no breach of fiduciary duty. Kortum v. Johnson, 2008 ND 154, 755 N.W.2d 432; Red River Wings, Inc. v. Hoot, Inc., 2008 ND 117, 751 N.W.2d 206 (affirming breach of fiduciary duty finding).

[¶35] Because of word limitations, what follows is an attempt to group various of Ron's claims with supporting facts. For an even more specific and detailed illustration of specific facts tied to specific claims, the Court is referred to Docs. 130 and 225.

1. Law Regarding Fiduciary Duty, Oppression, Involuntary Dissolution, Supervised Accounting, Removal of Directors, and Illegal Distributions.

a. Fiduciary Duty.

[¶36] Fiduciary duties arise "because of the nature and characteristics of close corporations and the potential for 'freeze outs' of non-controlling close corporation shareholders" and exist to protect a shareholder's investment. Kortum, 2008 ND 154, ¶28. Whether Ron's "reasonable expectations" were frustrated is a fact issue. Id. at ¶29.

[¶37] Chapter 10-19.1 "provides significant protection for minority shareholders." Brandt v. Somerville, 2005 ND 35, 692 N.W.2d 144. These protections include imposing "a duty … to act in good faith," and the provision of "remedies to minority shareholders if those in control act fraudulently, illegally, or in a manner unfairly prejudicial toward any shareholder." Id.; N.D.C.C. §§10-19.1-50,-51,-60. Shareholders owe each other duties of loyalty, candor, and to not withhold dividends or use corporate assets preferentially. Kortum, ¶28.

b. Oppression.

[¶38] Oppression is "an expansive term … used to cover a multitude of situations dealing with improper conduct which is neither 'illegal' nor 'fraudulent.'" Balvik v. Sylvester, 411 N.W.2d 383, 386 (N.D. 1987); Danuser v. Ida Mktng., 2013 ND 196, 838 N.W.2d 488 (explaining breach of fiduciary duties includes "other forms of oppression"). Ron pled "Gary and Jim have continuously and systematically engaged in a pattern of conduct that was wrongful and to the detriment of Ron . . . ." (Appx.9,Doc.1,¶44). This language addressed claims under 10-19.1-115(2)(b)(3) that Jim and Gary's conduct was unfairly prejudicial and claims under 10-19.1-115(2)(b)(2) (actions fraudulently and illegally) and 10-19.1-115(2)(b)(5) (wasting or misapplication of corporate assets).

c. Involuntary Dissolution.

[¶39] Section 10-19.1-115(2) outlines a number of situations under which dissolution may be ordered. In this case such includes: when directors have "acted fraudulently or illegally", "have acted in a manner unfairly prejudicial", or "corporate assets are being misapplied or wasted." Under 10-19.1, a court has "broad equitable powers" and there is a "wide range of discretion to fashion remedies for a breach of fiduciary, up to and including dissolution of a closely held corporation . . . ." Danuser, 2013 ND ¶34.

d. Supervised Accounting.

[¶40] A supervised accounting is available under 10-19.1-85.1. In addition, 10-19.1-115(2) allows a court to "grant any equitable relief if deems just and reasonable in the circumstances...." Grinaker v. Grinaker, 553 N.W.2d 200 (N.D. 1996) (affirming appointment of receiver and accounting based upon allegations of oppressive conduct).

e. Removal of Directors.

[¶41] Section 10-19.1-41.1 provides for removal upon finding "fraudulent or dishonest conduct or gross abuse of authority or discretion," a director's failure to discharge one's duties in good faith, or when removal is in the best interests of the corporation.

f. Illegal Distributions.

[¶42] Under 10-19.1-92 directors may make distributions only if authorized. Id.

2. Ron Raised Questions of Fact Regarding Breach of Fiduciary Duty, Oppression, Involuntary Dissolution, Supervised Accounting, Removal of Directors, and Illegal Distributions.

[¶43] The record, including trial and deposition testimony and exhibits overwhelmingly support Ron's claims.

[¶44] Jim and Gary acted with unfair prejudice towards Ron, their fellow shareholder, in the manner in which they handled dividends and compensation. Jim and Gary were at $12.50/hr, (Doc.55,118:13-14), but under Jim and Gary's watch, Jim was paid wages in excess of $100,000.00, while never leaving any funds available for shareholder distribution, and Gary went to over $120,000.00. (Id. 165:9-13). This was despite a motion to pay Gary $15.00 per hour. (Id. 189). Jim and Gary refused to treat Ron similarly and he was only offered hourly pay. (Doc.55,167:17;186:18-187:10).

[¶45] In 2010, the Corporation paid "rent bonuses" to Craig, Jim, Gary, and Ron of approximately $40,000 each and in 2011 to Jim, Gary, and Ron of $67,000 each. (Doc.56,22-24;Doc.55,121:2-5). In 2012 and 2013, after Ron expressed his desire to be bought out, Jim and Gary unilaterally paid themselves rent bonuses of $125,000 each. (Doc.72,Depo.Ex.32). Ron, despite still being an officer and director, received nothing. (Id. Depo.Ex.27).

[¶46] Jim and Gary also paid themselves, but not Ron, with commodities as an additional form of wages in the amount of more than $100,000.00 before 2017. (Doc.72). Jim and Gary couldn't identify when such was approved, Ron's approval was never sought, this was not something done while Craig was alive, and this only started after Ron sought to be bought out. (Doc.55,22:13-20,130:3-5,133:8-23;Doc.56,127:13-18;128:9-13;Doc.55, 130:3-5). Jim's explanation was they didn't believe Ron would care. (Doc.56,128:12-14).

[¶47] Commodities as wages was arbitrary as the value of depended on when such were sold. (Doc.55,132:11-19). When asked how one would know the total value, Gary indicated it would show on their taxes, but they refused to provide the same. (Id. 133:2-3; Doc.7(Response 14)). Gary admitted he didn't know the value of commodities he received. (Doc.55,135:1-3). He tried to deemphasize the commodities, asserting Ron "wouldn't notice it in the checking account. (Id. 164:14-17).

[¶48] When asked about what benefits Ron was getting from being a shareholder, Gary admitted: "None that I know of"; this was despite Gary asserting "there's always money there" that could be used to pay dividends. (Doc.55, 191:22-192:6). Jim, however, didn't deny their compensation was set so there was no money left to pay dividends to Ron. (Doc.56,147:20-25).

[¶49] Jim and Gary's spending and inability to account for the same also raises questions of fact. At a December 2014 meeting, Jim gave a "treasurer's report" which showed net income had gone from $488,122.12 in 2013 to a negative $164,720.84 in 2014. (Docs.55,70). When Ron was actively involved in the farm prior to 2012, the Corporation generally had zero operating or machinery debt, (Doc.55,103:4-7;Doc.54,93:24-25), but by November 2016, this ballooned to nearly $400,000. (Doc.56,88:20-89:13;Doc. 55,102:

21-25). Given the newly announced plan to cease farming and avoid buying out Ron, such cannot be ignored. (Doc.270).

[¶50] The record is also replete with instances of tens of thousands of dollars of inappropriate and unauthorized spending by Jim and Gary to themselves and their family members. They admitted purchasing machinery, equipment, and personal vehicles using corporate assets without input from Ron. (Doc.56,64:14-19,74:19-22;Doc.55,87:22-24,92:6-10). Jim and Gary also could not explain charges for Scheels, Cabela's and Sportsman's Loft, among many others, (Id. 140:15-24,145:21-22), by Jim's wife on Amazon.com, (Id. 143:8-16), by Jim's wife at Sam's Club in Fargo or Walmart in Arizona, (Id. 144:1-18), or on hotel stays. (Id. 144:19-21;145:19-21). Gary, who had a cabin near Devils Lake, could not explain numerous charges to businesses in the area. (Doc.55, 146-51). (See Docs.200-03,-06 (credit card statements)).

[¶51] Jim and Gary, without Ron's approval, both got $2,200 Winchester gun safes using farm funds. (Doc.56,146:11-15;154:6-11;Doc.55,141:14-142:4). Gary got a $26,773 pickup, (Doc.56,151:1-18;Doc.71), a $3,900 truck $3,900, (Id. 151:19-152:4), and a $2,277 icehouse. (Doc.55,104:5-105:23). Jim received a $19,924 Ranger. (Doc.56,153:21-25). While both alleged the costs were to be taken from their wages, Gary admitted such had not been done. (Doc.55, 107:12-15). Jim's son Jacob and wife Karen were also paid tens of thousands for work that couldn't be explained and despite the apparent lack of any work to do. (Tr.v1, 88:6-18; Tr.v2, 129:23-25; 130:25-31;Doc.199). The Corporation also paid for Jim and Gary's legal expenses, but not Ron's. (Doc.199).

[¶52] There are also fact questions as to whether Jim and Gary improperly "froze out" Ron or failed to provide him with "adequate information about the corporation." Brandt,

2005 ND 35, ¶9. Ron was unilaterally removed as president in 2013. Gary didn't "know what the bylaws say" and hadn't read them since the Corporation's formation. (Doc.55, 26:17-20). He simply ran meetings "the way I wanted to at the time." (Id. 73:22-25).

[¶53] At the December 22, 2014, meeting, "Gary moved that board of directors meet on adjourmnent [sic.] of annual meeting. Motion passed." No minutes for this board of directors meeting have been provided. According to Jim, when the board of directors met it never prepared minutes. (Doc.56,55:12-14). When Gary was asked if there had ever been a separate shareholder meeting and board of directors meeting in the history of the Corporation, he didn't recall. (Doc.55,68:21-24).

[¶54] Another meeting was held on January 6, 2016. (Doc.72;Depo.Ex.10). When Jim was asked if he, the Secretary, sent Ron a notice, he wasn't sure, he didn't have any proof of sending Ron notice, but "Gary maybe called him." (Doc.56,66:24-68:2). When asked if they could have shareholder meetings in secret without Ron, Jim responded "I'm not sure if Gary didn't call him." (Id. 70:7-10). When Gary was asked if Ron got notice of this meeting, Gary said: "I don't - - wouldn't think so," but agreed Ron could not attend a meeting Ron didn't know about. (Doc.55, 77:2-4,79:5-7). Gary also agreed directors were to be elected at the meeting and if Ron wasn't there, he couldn't nominate himself to be a director. (Id. 79:8-12,86:13-14).

[¶55] Gary and Jim were the sole attendees at the January meeting. (Doc.72,Depo.Ex.10). The January minutes indicated "Reviewed previous minutes & approved," but no such minutes were attached. The January minutes also indicated "Reviewed treasure [sic.] report & approved," but again nothing was attached. (Id.)

[¶56] As of August 2017, there had been no 2016 annual meeting. (Doc.56,44:18-22). When Gary was asked if Ron should be invited to future annual meetings, Gary indicated that was up to Jim, and that if Jim doesn't invite Ron that it was "perfectly fine" with Gary. (Doc.55,82:17-83:1).

[¶57] These facts, and others facts briefed at greater length below and to the District Court clearly illustrate questions of fact regarding breach of fiduciary duties, oppression, involuntary dissolution, supervised accounting, removal of directors, and illegal distributions such that summary judgment must be reversed.

3. Ron Raised Questions of Fact Regarding Unjust Enrichment and Conversion.

[¶58] Unjust enrichment is an equitable claim that arises out of an absence of an express or implied contract. D.C. Trautman v. Fargo Excavating Co., Inc., 380 N.W.2d 644, 645 (N.D. 1986). Unjust enrichment prevents a person from unjustly enriching oneself at the expense of another. Id. The elements of unjust enrichment are: an enrichment; an impoverishment; a connection between the same; absence of justification for the same; and, absence of a remedy. Id. Although the ultimate determination of unjust enrichment is a question of law, such requires factual determinations regarding each of the elements. Schroeder v. Buchholz, 2001 ND 36, ¶¶16-18, 622 N.W.2d 202.

[¶59] Conversion is the wrongful taking, destruction, or detention of personal property form the owner or person entitled to its possession, or the exercise of dominion over the property inconsistent with or in defiance of the rights of that person. See N.D. Civil JIG 7.10. Any act that impairs the possessory rights of another person or any wrongful exercise or assumption of authority over the persons goods which deprives the person of possession,

permanently or for an indefinite time, is a conversion. Id. Conversion is a question of fact. Hildenbrand v. Capital RV Ctr, 2011 ND 37, ¶17, 794 N.W.2d 733.

[¶60] Ron has raised numerous facts in support of unjust enrichment and conversion. Perhaps the most significant relate to the bonus rent and commodities payments taken by Gary and Jim, but not given to Ron. As discussed in detail above, (¶¶14,45), in relation to Ron's minority shareholder claims, Jim and Gary refused to pay Ron his rent bonus while themselves unilaterally taking rent bonuses of some $250,000. (Doc.72,Depo.Ex.32). Thereafter, as also discussed above, (¶¶12,46-47), Jim and Gary also unilaterally began paying themselves with large amounts of commodities, having a value in excess of $100,000, while paying nothing to Ron. (Id.)

[¶61] In addition to these two major forms of enrichment from the Corporation, as also discussed above, (¶¶50-52), Jim and Gary also got many other forms of enrichment, not given to Ron, including vehicles, gun safes, a Ranger, a fish house and thousands of dollars of additional unaccounted for personal spending. Such raise questions of unjust enrichment, as when three people are shareholders of a corporation, there was no requirement for all to provide equal labor, but two receive monies or commodities that one didn't, there is an enrichment, an impoverishment, and it cannot be disputed that the enrichment and impoverishment are related and there is no justification of the same.

[¶62] These same facts regarding compensation and property that Ron didn't get, but that Jim and Gary exercised dominion over and gave only to themselves, also support Ron's claim for conversion.

4. Ron Raised Questions of Fact Regarding Breach of Contract.

[¶63] The elements of breach of contract are the existence of a contract; breach of the contract; and, damages which flow from the breach. Good Bird v. Twin Buttes School Dist., 2007 ND 103 ¶9, 733 N.W.2d 601.

[¶64] A contract is an agreement to do or not to do a certain thing. N.D.C.C. §9-01-01(1). Contracts may be oral except those required by statue to be written. N.D.C.C. §9-06-02. Contracts are express or implied. Express contracts are stated in words whereas the terms of an implied contract are manifested by conduct. Id. §9-06-01. "When dealing with contracts implied in fact the court is required to determine from the surrounding circumstances what the parties actually intended." Jerry Harmon Motors, Inc. v. Heth, 316 N.W.2d 324, 327 (N.D. 1982). The existence and breach of a contract are questions of fact. Lamb v. Riemers, 2003 ND 148, ¶8, 669 N.W.2d 113. Numerous facts support the existence of an express or implied contract by Jim and Gary to buy out Ron and the breach thereof.

[¶65] After Craig's death, and as part of the buyout done through his wife Kim, even before there was ever a formal written agreement between the Corporation and Kim, Kim was no longer included in the various Corporate affairs nor did she get rent bonuses. (Doc.56:22-24;Doc.55,121:2-5;151:7-24;165:22-24;Doc.54,84:3-8). The same was true as to what happened with Ron. Gary admitted that by the time the 2011 rent bonus was paid out, there had been discussions about using 2010 as the buyout date for Kim. (Doc.55,151:7-24). In a seemingly isolated moment of truth as to both Kim and Ron, Gary during his deposition acknowledged that "when Kim was going to sell out, she didn't get a [2011] rent bonus; and here Ron was going to sell out, so he won't qualify for a rent

bonus." (Doc. 55,165:22-24). Kim didn't get a 2011 rent bonus, even though she was still technically a shareholder, because: "She had established her buyout date as of Craig's death . . . and in all our eyes, including Kim's, she was no longer -- she had not been bought out, but she was – that was her buyout date. Just like later on my buyout date was 1/1/ of '12. (Doc.54,84:3-8).

[¶66] As detailed above, (¶¶12-14,18,44-56), since 2012, Ron has not received wages, rent bonuses, commodities wages, or any other benefits of being a shareholder of the Corporation and instead Jim and Gary have not treated Ron as a shareholder while unilaterally giving themselves benefits worth hundreds of thousands. When asked about what benefits Ron was currently getting from being a shareholder, Gary admitted: "None that I know of." (Doc.55,191:22-192:6).

[¶67] As detailed above, (¶15), in January 2012, Ron sent out a balance sheet for the farm as of January 1, 2012, which when divided by three, based upon the agreement reached by Jim, Gary, and Ron to buyout Ron, equaled $612,087. (Doc.72,Depo.Ex.25). Jim does not recall ever objecting to Ron's calculations and when Jim was asked if at any time prior to December 22, 2014, Ron was told the Corporation would not pay him one-third of this amount as his buyout, he could not say. (Doc.56,173:4-7,196).

[¶68] The evidence shows there was an agreement to buyout a 33% interest from Ron, and not just a 24% interest. As Ron testified during his deposition:

> We had an agreement. To me, someone's word in emails is worth something. As of 1/1/12 we had a corporate agreement on the dollar amount that the corporation was going to pay Kim for the shares. And at that point in time, which is what a balance sheet is, what happens after that, prices to go up, prices go down; buy, sell, trade machinery.
>
> (Doc.54,42:17-23). As Ron also explained:

> Q You have alleged different claims in here, for example, breach of fiduciary duties, oppression, account. I understand those things, but are you asking the judge to say they have to go and honor your $612,000 agreement?
>
> . . .
>
> A Yeah, to, I guess, honor the buyout at basically the time that it was agreed upon verbally, email.

(Doc.54,53:24-54:9). As Ron later explained: "I treat promises as verbal and emails." (Doc.54,66:14).

[¶69] That there was an agreement to buy 33% from Ron, is further supported by the 2016 and 2017 tax returns for the Corporation both of which identified Jim and Gary as 33% owners of the Corporation, leaving the remaining 33% for Ron. (Docs.197,217,Tr.v1, 70:10-11). The tax returns were signed by Jim as President under penalty of perjury. (Docs.197,217). Information contained in tax returns are considered to be admissions against interest. Shenson v. Shenson, 269 P.2d 170 (Cal. Ct. App. 1954); Roche v. Comm'r, 63 F.2d 623 (5th Cir. 1933); Sirrine Building No. 1 v. Comm'r, 69 T.C.M. 2476 (U.S.T.C. 1995).

[¶70] Part of the buyout agreement was for Ron to receive interest. In one email to Gary, Ron closed with: "The annual interest amount is $29,074.13." (Doc.72,Depo.Ex.23). This interest comment related to Ron having been paid buyout interest the year prior. When asked if he had any contemporaneous proof to deny that the payment was for buyout interest, Gary admitted he didn't, and couldn't explain why Ron would have lied back in 2014. (Doc.55,208:6-25). Ron reported this interest on his 2013 taxes. (Doc.54,19:14-16;Doc.198) Gary admitted interest was to be paid from when Ron made his 2012 proposal to be bought out. (Doc.72,Depo.Ex.25). Jim and Gary used this to excuse, among other things, the fact Ron hadn't gotten a rent bonus in 2012. (Id.)

[¶71] Further evidence of an agreement is that Jim completed the 2013 Annual Report and unilaterally removed Ron as President. (Doc.56,41:5-6,Doc.72,Depo.Ex.27). When asked about this, Gary stated "But if [Ron] sold his shares in the company, why would he think he'd be an officer and a director?" (Doc.55, 54:15-23).

[¶72] Given the above facts there is evidence of an agreement, express or implied, that Ron was to be bought out as a 33% owner, was to receive $612,087, was to receive interest on these amounts, had gotten an interest payment on this amount, had been deprived of compensation the other remaining owners received, was removed as an officer and director, but never got the rest of the buyout price. Under such circumstances sufficient genuine questions of fact have been raised relating to both the existence of a contract to buy Ron out as well as the breach of such contract. Albers v. NoDak Racing Club, Inc., 256 N.W.2d 355, 359 (N.D. 1977) (reversing summary judgment on basis that the facts "necessary to establish an implied contract . . . . were disputed and remained as genuine issues.")

[¶73] Simply put, Jim and Gary cannot be allowed to have it both ways, i.e. to not pay Ron anything if he is a shareholder, while also claiming there was no agreement to buy Ron out. This alone establishes an inference against summary judgment. They either agreed to buy him out and then failed to follow through on such agreement thus entitling Ron to damages or they needed to accord Ron his rights as a shareholder, which they failed to do, thus entitling Ron to be given the opportunity to pursue damages or other remedies for Jim and Gary's breaches of fiduciary duties, oppressive, and otherwise tortious and unfair conduct.

5. Ron Raised Questions of Fact Regarding Fraud/Deceit.

[¶74] Fraud and deceit is the suggestion as a fact of that which is not true by one who does not believe it to be true; the assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true; the suppression of a fact by one who is bound to disclose it, or who gives information of other facts that are likely to mislead for want to communication of that fact; or a promise made without any intention of performing. E.g., N.D.C.C §9-10-02; §9-03-08. Fraud and deceit are "always a question of fact." N.D.C.C. §9-03-10.

[¶75] Jim and Gary had knowledge of facts regarding their own ill-gotten gains from the Corporation after Craig's death. As detailed above, (¶¶44-56), it cannot be disputed that, among other things, Jim and Gary "knew" of the following facts:

- Rent bonuses and commodities as wages to them, but not to Ron, were paid without Ron's knowledge.
- They, and their family members, used corporate funds for vehicles, a Ranger, an icehouse, gun safes, and other purchases, hoping Ron "wouldn't notice it in the checking account" (Doc.55,164:14-17).
- They made decisions and held secret meetings without Ron. (Doc.56,70:7-10;Doc. 55,77:2-4).

[¶76] That Jim and Gary didn't disclose such to Ron may be inferred from nature of the facts concealed as well as the deposition testimony. For example, Gary admitted he and Jim didn't tell Ron about their rent bonuses, (Doc.55,164:18-165:1), and hid their use of corporate funds. (Doc. 56,146:1-15;151:11-18;153:21-25;154:6-11;Doc.55,104:5-105:23; 112:22-113:3,141-142). Accordingly, genuine issues of material fact are present that, when construed in the light most favorable to the non-moving party, should prevent summary judgment from being entered on the fraud/deceit count. N.D.C.C. §9-03-10; Zuraff v. Empire Fire & Marine Ins., 252 N.W.2d 302 (N.D. 1977).

III. THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS ARE UNSUPPORTED AND IN ERROR.

A. THE DISTRICT COURT ERRED IN DETERMINING "FAIR PRICE."

[¶77] Section 10-06.1-26 requires a "fair price" be determined "as though the shares were being valued for federal gift tax purposes under the Internal Revenue Code." Section 10-06.1-26 does not explain what this means nor does it provide a specific date of valuation. Ron argued such gives the District Court discretion to determine a fair valuation amount and date. It was Jim and Gary's position, as accepted by the District Court, that any number that can be justified on a gift estate tax return is what the court must accept as the price and that the valuation date is the date the Complaint was served. Under these circumstances, 10-06.1-26 is ambiguous.

[¶78] Section 10-06.1-26 was adopted to protect the interests of minority shareholders. Under Jim and Gary's interpretation, it matters not whether a minority shareholder is retiring or has been treated unfairly. Such a result is absurd. Mertz v. City of Elgin, 2011 ND 148, 800 N.W.2d 710.

[¶79] IRS Revenue Ruling 59-60, 1959-1 C.B. 237 (Doc. 156) is widely considered the seminal authority on gift tax valuation. Devitt and Sannicandro, Qualified Appraisal and Qualified Appraisers: Expert Tax Valuation Reports, Testimony, Procedure, Law, and Perspective; Kaler v. Charles, Bankr. No. 10-31028, Ad. No. 11-7008 (D.N.D. Bankr. Ct 2012) (citing factors and other cases)

[¶80] As explained in Revenue Ruling 59-60:

> In valuing … closely held corporations ... all relevant factors affecting the fair market value must be considered for … gift tax purposes. No general formula may be given ….
> …

> sound valuation will be based upon all the relevant facts, but the elements of common sense, informed judgment and reasonableness must enter into the process of weighing those facts and determining their aggregate significance.

(Doc.156). Compare Clapp v. Cass County, 236 N.W.2d 850 (N.D. 1975) (looking to various resources, including tax regulations, and noting that legislative intent was to create a "general standard which itself encompasses consideration of all relevant facts and elements of value.")

[¶81] In addition to Revenue Ruling 59-60, IRS gift tax principals also require appraisers be "qualified" and that any appraisal be "qualified." (Doc.156, 26 C.F.R. 2053-4(b)(1)(iv); 26 U.S.C. 170(f)(11)(E);Doc.74). For an appraisal to be qualified, it must be done by a qualified appraiser. The Internal Revenue Service defines a qualified appraiser as follows:

> a. The individual either:
> 1. Has earned an appraisal designation from a recognized professional appraiser organization for demonstrated competency in valuing the type of property being appraised, or
> 2. Has met certain minimum education and experience requirements.…For property other than real property, the appraiser must have successfully completed college or professional-level coursework relevant to the property being valued, must have at least 2 years of experience in the trade or business of buying, selling, or valuing the type of property being valued, and must fully describe in the appraisal his or her qualifying education and experience.
>
> ii. The individual regularly prepares appraisals for which he or she is paid.
>
> iii. The individual demonstrates verifiable education and experience in valuing the type of property being appraised. To do this, the appraiser can make a declaration in the appraisal that, because of his or her background, experience, education, and membership in professional associations, he or she is qualified to make appraisals of the type of property being valued.

26 U.S.C. 170(f)(11)(E);I.R.S. Bulletin: 2006-46; Notice 2006-96;Doc.74,¶9).

[¶82] Ron made a motion to exclude Jim and Gary's experts, (Docs.148-50), Mr. Ault, and Mr. Haugland, but Judge Jacobson denied the same and ultimately and entirely rejected Ron's expert, Shawn Stumphf, even though it was undisputed that neither Mr. Ault nor Mr. Haugland had an appraisal designation from a recognized appraisal organization for demonstrated competency or had completed the necessary college or professional level course work relevant to the property being valued. (Tr.v2,5:22-23,26:10-14). It should have also been disqualifying that Mr. Ault had not done a valuation as required by 10-06.1-26, but only a "computation of discounted value." (Tr.v2,37:17-25; 39:23-40:9;45:7-9). As noted by Ron's valuation expert, Shawn Stumphf, such did "not conform to business valuation standards" and was "missing source information" and explanations that left it "neither appropriate nor reliable." (Doc.211). Mr. Ault himself admitted he had no valuation credentials or business valuation classes, his report didn't describe his methodology, he was wholly unaware of Revenue Ruling 59-60, he had not done a qualified appraisal, and while he had done some gift tax returns, he had never previously been retained to do a valuation under 10-06.1-26, nor could he even identify the last time he had submitted a valuation with a gift tax return. (Tr.v2,26:15-17,27:19-24,28:8-12,31:1-3,33:18-20).

[¶83] All told, Mr. Ault assessed a discount of some 47.8% to Ron's interest. (Doc.211). Among the most apparent failings of Mr. Ault's report was his application of a 25% discount for lack of marketability and control. (Id.) There is no legal requirement for such a discount to be applied and this Court has affirmed fair value determinations without a discount. (Doc. 74,¶¶ 5-6); Zokoych v. Spalding, 463 N.E.2d 943 n.4 (Ill. Ct. App. 1984); Fisher v. Fisher, 1997 ND 176, ¶¶ 21-23, 568 N.W.2d 728.

[¶84] In applying a 25% discount, Mr. Ault explained: "You know, over the time that I've worked with gift tax, in general, I've seen people try to put 40, 50 percent, 65 percent discounts or less. In my experience, the IRS accepts 25 percent without arguing and that sounds like a good number because of that." (Tr.v2,53:11-12). Mr. Ault didn't do any actual analysis as to what might be appropriate, instead it was simply that in his experience "the IRS accepts a 25 percent discount for minority ownership." (Id. 53:22-23). He admitted he applies the same discount to all types of businesses simply because it will be accepted by the IRS. (Id. 55:1-5).

[¶85] When asked if the IRS would have objected at 26%, he refused to specifically answer, asserting instead the IRS will "accept 25 percent without arguing." (Id. 54:12-14). Thus, Mr. Ault included the highest possible discount he believed could be gotten away with. When asked if the IRS would have accepted a lower discount, such as 0% without the IRS arguing, he admitted such was "Probably true." (Id. 54:17-19). Mr. Ault also admitted the IRS has sought to eliminate minority discounts. (Id. 56:16-19). Mr. Ault's analysis was not designed to result in a fair price to an abused minority shareholder, but instead provided for the price to be discounted to the lowest amount possible, which then only benefits bad actors. Such a rule must be rejected as contrary to protecting unfairly treated minority shareholders.

[¶86] As opposed to Mr. Ault who admitted to being an advocate and sought to hang his hat on any number that had a "basis in reality," (Id. 36:21-22;37:4-5), Ron's expert, Mr. Stumphf, undertook an impartial valuation, (Tr.v1, 208:1-2), subject to strict guidelines, and for which he had extensive qualifications, including as a qualified appraiser according to IRS guidelines, Accredited Senior Appraiser in business valuation by the American

Society of Appraisers, Accredited in Business Valuation by the American Society of Certified Public Accountants, and a certified machinery and equipment appraiser. (Id. 184:3-5,12-22;185:4-5,14-16;187:14-24;215:22-24;Docs.212-14). Despite this, Judge Jacobson entirely rejected Mr. Stumphf's opinions. (Doc.252,¶10).

[¶87] On remand, the District Court must be instructed to consider Revenue Ruling 59-60 and all evidence, including that from Mr. Stumphf or others, that is relevant to a fair price and to reject or otherwise give only appropriate weight to evidence that is not in accordance with North Dakota law and Revenue Ruling 59-60.

B. THE DISTRICT COURT INCORRECTLY DETERMINED THERE WAS NO EQUITABLE BASIS TO CONSIDER A VALUATION DATE OF JANUARY 1, 2012.

[¶88] As recognized by the District Court, 10-06.1-26 is silent as to the date of valuation to be used. (Doc. 252,¶11). Ron requested January 1, 2012 be used to reflect he had not had any benefits from the Corporation since that date. Not until April 2018, however, did Jim and Gary suggest the District Court use the date of the Complaint being served as the valuation date and it was not until the final day of trial, over objection, that Defendants disclosed an expert opinion that purported to value Ron's shares as of that date. (Docs.150,223). Ironically, while dismissing Ron's claims under Chapter 10-19.1, Jim and Gary and the District Court looked to 10-19.1-115(4)(a) which allows for the valuation date to be the date of the commencement of the action, or, "as of another date found equitable by the court." In this case, on remand, the appropriate date is January 1, 2012 as advocated by Ron, whether because this Court applies gift tax principles under 10-06.1-26, or under principles of equity.

[¶89] Under gift tax law, the valuation date is to be the date of the gift. E.g., 26 U.S.C. 1014. Obviously, there has not been a true gift in this case, but it is undisputed that Ron first sought to be bought out on May 4, 2012, and that substantially all discussions and valuations were based upon Ron's January 1, 2012 financial calculations. (Docs.169,175,188). There were discussions on using a July 2012 date, but ultimately Jim and Gary refused to give Ron any of the 2012 rent bonus. (Doc.179). Jim and Gary also admitted that after Ron made his buyout request, they didn't consult him and could do whatever they wanted: "Well, it didn't matter because his value wasn't going to change." (Tr.v1,240:24-25). As such, given that Ron has had no benefit from the Corporation since January 1, 2012, such is appropriately considered the gift and in turn valuation date. Such a date is also appropriate as otherwise the valuation process is going to be subject to such things as the amount of time negotiations take or the amount of time litigation takes. In addition, such would allow the majority owners and buying parties to manipulate the purchase price and value of the entity as is now being seen with Jim and Gary's unilateral decision to stop farming and liquidate the farm's assets. (Doc.270).

CONCLUSION

[¶90] For the reasons set forth above, this Court must reverse the District Court's grant of summary judgment to Jim and Gary and remand for a jury trial before a different judge on all issues with the District Court instructed to properly apply 10-06.1-26.

Dated: January 22, 2019.

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CERTIFICATE OF COMPLIANCE

[¶91] The undersigned hereby certifies that said brief complies with N.D.R.App.P. 32 in that the brief was prepared with Times New Roman, size 12-point font, proportional typeface and that the total number of words does not exceed 8000 from the portion of the brief entitled "Statement of Issues" through the signature block. The word count was calculated using "Microsoft Word" word processing software, which also counts abbreviations as words.

Dated: January 22, 2019.

/s/ Joel M. Fremstad
Joel M. Fremstad (ND # 05541)

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

RONALD SMITHBERG,	)	
Appellant,	)	**Supreme Court No. 2018-0420**
	)	
vs.	)	**District Court No.**
	)	**12-2016-CV-00042**
GARY SMITHBERG, JAMES	)	
SMITHBERG AND SMITHBERG	)	**AFFIDAVIT OF SERVICE**
BROTHERS, INC.	)	
Appellees.	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

Maggie Burlingame, being first duly sworn, deposes and says that she is of legal age and that on January 22, 2019, she served the following:

- **BRIEF OF APPELLANT RONALD SMITHBERG**
- **RONALD SMITHBERG'S APPENDIX**

were served electronically with the Clerk of the Supreme Court. A true and correct copy of the documents were electronically served on the following:

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Tyler J. Malm	tmalm@smithporsborg.com

M. Burlingame
Maggie A. Burlingame

Subscribed and sworn to me this 22nd day of January, 2019.

Marlene Schumacher
Notary Public

MARLENE SCHUMACHER
Notary Public
State of North Dakota
My Commission Expires April 24, 2020