

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Steven Mark Orwig,

Plaintiff, Appellee and
Cross-Appellant

vs.

Mary Caroline Orwig,

Defendant, Appellant, and
Cross Appellee

Supreme Court No. 2020123

Civil No. 11-2016-DM-00026
(Dickey County District Court)

Orwig's Livestock Supplements, Inc.;
Orwigs Tubs International Inc.; and MVP Transport, Inc.

Plaintiffs, Appellees

vs.

Mary C. "Marcy" Orwig,

Defendant, Third-Party Plaintiff,
Appellant and Cross-Appellee

vs.

Steven Orwig,

Third Party Defendant,
Appellee and Cross-Appellant

Supreme Court No. 2020124

Civil No. 11-2016-CV-00068
(Dickey County District Court)

**BRIEF OF DEFENDANT, APPELLANT, AND CROSS-APPELLEE
MARY CAROLINE ORWIG, ALSO KNOWN AS MARY C. "MARCY" ORWIG
"ORAL ARGUMENT REQUESTED"**

APPEAL FROM JUDGMENT

DICKIE COUNTY DISTRICT COURT, SOUTHEAST JUDICIAL DISTRICT
HONORABLE CHERIE LaVONNE CLARK

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[¶1]

ISSUES ON APPEAL

- [¶2] A. Are the District Court’s property valuations and property distributions clearly erroneous, and requiring the judgment to be reversed, when the lower court failed to include, in its property valuations and distributions, 6.8 acres of industrial real property [a warehouse], individually owned by both Steven Orwig and Mary C. Orwig, that has an appraised value of at least \$495,000.00?
- [¶3] B. Did the District Court err in accepting an appraisal of corporate stock, based upon an income approach, of \$287,000 when the corporation’s manufacturing equipment, combined with the warehouse owned by Steven Orwig and Mary C. Orwig, have a combined appraised value, based upon an income approach, of \$1,630,000.00?
- [¶4] C. Did the Court err in determining the value of property and debt, some not even in existence, and also in attempting to distribute the same?
- [¶5] D. Did the Court err in determining the date for which property and debt was to be valued, and then using different valuation dates for different properties?
- [¶6] E. Did the Court err when considering court proceedings previously dismissed?
- [¶7] F. Did the Court err in accepting deposition testimony, over objection of Mary C. “Marcy” Orwig?
- [¶8] H. Did the Court err in determining the Corporations suffered financially without evidentiary proof, and when North Dakota law does not allow actions by profitable corporations against shareholders, directors, or officers for

merely allowing the shareholders to take the corporate profit due them?

[¶9] I. Did the Court err when taking away vested property rights in the nature of corporate compensation and/or real property rents and/or corporate shares of stock?

[¶10] J. Did the Court err in determining the amount of spousal support to be paid to Mary C. “Marcy” Orwig?

[¶11] K. Did the Court err in determining the spousal support was to be “rehabilitative” instead of “permanent”?

[¶12] L. Did the actions of the District Judge deprive Mary C. “Marcy” Orwig a fair trial?

[¶13] **STATEMENT OF THE CASE**

[¶14] Mary C. Orwig (hereafter, “Marcy”) timely appeals from a final judgment, entered on February 26, 2020, involved in two (2) consolidated actions. Appendix, pages 33-34; 618-626, and 627-629. One of the consolidated actions is an action of divorce initiated by Steven Orwig [“Steven”] on September 5, 2016. App., ps. 46-58. The other consolidated action was initiated by Orwigs Livestock Supplements, Inc., Orwigs Tubs International, Inc., and MVP Transport Inc. [“Corporations”], in late August, 2016, seeking relief from claimed unlawful expenditures and/or claimed deleterious corporate actions made by Marcy as a director or officer of the corporations. App., ps. 27-29. This is the second time that aspects of the two (2) consolidated actions have been before this Court. In a prior appeal to this Court, Marcy sought to vacate contempt orders issued against her by the District Court. See, Orwig v. Orwig, 2019 ND 78, ¶ 1, 924 N.W.2d 421. In this appeal, Marcy does not revisit

the orders that led to this Court's prior decision, except possibly in a peripheral manner. Rather, Marcy's present appeal focuses upon the unjust and inequitable judgment entered in the divorce action, and the overstepping of the lower court's powers and inequitable remedy imposed against Marcy in the Corporations' action.

[¶15] Following three (3) days of trial, the lower court issued Findings of Fact, Conclusions of Law, and Order for Judgment [App., p. 584] which resulted in a Judgment dated February 26, 2020. App., p. 618. Marcy timely appealed on April 23, 2020. App., p. 627.

[¶16] In this appeal concerning the divorce action, Marcy asserts that the lower court's property valuations and distributions are clearly erroneous. For example, a warehouse, appraised by Steven's own appraiser as having a value of least \$495,000.00 was omitted by the lower court in its determinations, without any meaningful explanation. App., ps. 183, 221. As another example, Marcy asserts the lower's valuations of only \$287,000.00 for the parties' shares of stock in Orwigs Livestock Supplements, Inc, and Orwigs Tubs International, Inc., is clearly erroneous. App., p. 622. Under the "income approach" appraisal, accepted by the lower court by its valuation of the corporate stock, Steven's appraiser treated the corporations' real estate investment [real estate fixtures] as a nonoperating asset, and thus excluded approximately \$1,000,000.00 of "income" value for the parties' corporate shares. App., ps. 57, 84 [paragraph 2a], 183, and 187. If using an income approach method to value corporate stock, Marcy asserts the parties' corporate stock should be valued in the amount of at least \$1,287,000.00 [$\$287,000 + \$1,000,000.00 = \$1,287,000.00$], but certainly never less than \$1,000,000.00 [appraised \$1,630,000.00 income value of manufacturing facility, reduced to \$1,500,000.00, less \$500,000.00 for value of

warehouse and land owned by individuals Marcy and Steven, equals \$1,000,000]. App., ps. 220-221. Marcy asserts the lower court's valuation of the corporate stock, without full recognition of the warehouse and land *not owned* by the corporations, is clearly erroneous no matter what appraisal method is used - income approach, cost approach of assets, or market value of assets.

[¶17] Marcy further asserts the lower court's determination of the amount and duration of the alimony due her is clearly erroneous. Marcy asserts she should have been awarded permanent alimony, and the amount due her should not have not be reduced by either (a) imputed income or (b) nonexistent ranch income. The lower court's finding imputing income to Marcy to determine spousal support is contrary to North Dakota law. The lower court's finding that Marcy has ability to obtain a portion of her court-determined financial needs, through horse business income, has no evidentiary support, and is a factual finding that is clearly erroneous. App., p. 603.

[¶18] As to the corporate lawsuit against her, Marcy asserts that the lawsuit should have been dismissed against her. Just prior to initiating the divorce action, Steven, without any attempt to resolve any dispute with Marcy through any form of a corporate meeting [no shareholder's or directors' meeting], authorized the corporations [owned by both of them] to sue Marcy for matters that were within her powers as a corporate officer and director, for the apparent reason to portray Marcy in a bad light for corporate decisions made by either the two (2) of them acting together, or by Steven alone. Steven's goal, in allowing the parties' corporations to sue Marcy, was to keep her away from any corporate information and/or authority while he pursued his divorce action against her. The lower court, itself, determined

that adjudicating the separate claims in two (2) actions initiated by Steven, individually or through his corporate authority, was a “waste of judicial, and parties’ resources...”, and the claims in the consolidated lawsuits should “be resolved in the context of the pending divorce action.” App., p. 598. In resolving the Corporations’ claims against Marcy, the lower court did not heed its own statement/determination, and gave the Corporations relief not authorized by either corporate law or divorce law. Marcy asserts the remedy provided by the lower court to the corporations – forfeiture of her ownership corporate stocks and/or the failure to recognize vested salary and rental income due her – was a “penalty”, and beyond the statutorily limited equitable powers of the lower court when acting in either form of action. Further, Marcy’s acts, determined by the lower court to be a breach of a fiduciary duty on Marcy’s part, caused no monetary damage to the corporations. Marcy asserts, without both a specific pleading and finding of specific monetary damage to the corporations, Marcy’s acts were not actionable as a breach of any fiduciary duty to the closely held corporations. The Corporations’ lawsuit against Marcy should have been dismissed without a forfeiture of Marcy’s corporate stock, and the lower court should have properly determined the amount due both Steven and Marcy from the Corporations for their vested right to unpaid rents and salaries.

[¶19]

STATEMENT OF FACTS

[¶20] Steven, born in 1962, and Marcy, born in 1966, were 58 and 54 years of age, respectfully, at the time the divorce judgment was entered between them on the grounds of irreconcilable differences. App., p. 586. The two had been married in Fayette, Missouri, on April 1, 1985, so the duration of their marriage was just two months shy of thirty-five (35)

years – a long duration marriage. App., ps. 586, 600. At the time the February, 2020, divorce judgment was entered, all of the parties’ children were adults.

[¶21] During their marriage, Marcy and Steven formed three (3) corporations for the business of manufacturing and distributing livestock nutritional supplements. The three (3) corporations are Orwig’s Livestock Supplements, Inc., the parent company, which manufactures the livestock supplements. The parent company sells the finished product to its wholly-owned subsidiary, Orwigs Tubs International Inc., which in-turn sells the product to its network of distributors in the United States and Canada. The third corporation, MVP Transport, Inc., transports the product to the distributors. App., p. 60. Steven and Marcy are the sole shareholders of the parent company Orwig’s Livestock Supplements, Inc. Steven and Marcy are the sole officers and directors of both Orwig’s Livestock Supplements, Inc., and Orwigs Tubs International Inc. App., p. 60. Steven and Marcy were two-thirds (2/3rds) owners of MVP Transport, Inc., with the other one-third interest owned by a son.

[¶22] Marcy and Steven were also owners, as individuals, of certain real property [6.8 acres of land and manufacturing facility building erected thereon], equipment [identified by the appraiser as rolling stock equipment], buildings on their 8.5 acre farmstead that were leased to the corporate businesses by the two of them, and other farmland. App., ps. 128, 132, 135, and 187. On the joint 2016 income tax return, Steven and Marcy reported rental income of \$124,955.00 [$\$72,084.00 + \$52,871.00 = \$124,955.00$] from their real estate and equipment leases involving the corporations. App., ps. 514, 517.¹

¹ Marcy has not filed a tax return with Steven since 2015. The 2016 return was prepared by Mitchell Merkel of Merkel CPA, acting on behalf of Steven. The exhibit was received into evidence and it reflects Steven’s known available income from corporate

[¶23] Steven's appraiser determined warehouse and equipment rental equipment values ranged from between \$234,000 and \$334,000.00 for the six (6) years prior to the July 31, 2017, corporate valuation date accepted by the lower court. App., p. 187. According to the corporation's general manager, Kathryn Petersen, Marcy and Steven's monthly equipment rentals totaled \$11,550.00 [$\$4,150.00 + \$4,400.00 + \$3,000.00 = \$11,550.00$] and monthly rental for land rent and warehouse was about \$7,800.00. Deposition of Katherine Petersen of July 31, 2019, [Index # 189], p. 220.

[¶24] In addition to real estate and equipment rentals, Steven and Marcy received wage income from the Corporations, together with their health insurance. The Corporations did not provide a pension plan to either Steven or Marcy. Neither Steven nor Marcy identified a financial asset for a retirement account [such as a 401K plan or IRA] that would provide for either of their needs during their respective retirement. It is clear that both parties' needs, during their retirement, would only be met through the continuation of their corporate rentals or salaries – or the sale of their assets.

[¶25] On the joint 2016 income tax return, Steven and Marcy reported rental income of \$124,955.00 [$\$72,084.00 + \$52,871.00 = \$124,955.00$] from their real estate and equipment from the corporations. App., ps. 514, 517. Steven testified that until Marcy removed the Corporations' offices from their home on September 5, 2016, it was the parties' intentions to treat both he and Marcy the same as it relates to the financial benefits of corporate ownership. App., p. 581. Steven testified that Marcy was relieved of most of her corporate

compensation and equipment rentals – thus the return is illustrative of available income from their assets.

duties in 2009 -2010 when the corporations hired a bookkeeper. App., p. 578. Marcy and he continued to receive equal salaries and rentals until Marcy removed the corporate office from the parties' home. App., ps. 578-579. As of September, 2016, Steven estimates his take home pay, from his corporate salary and corporate rentals, were in excess of \$11,000.00 per month (\$132,000 annually). Steven testified that Marcy's take home pay, from corporate salary and corporate rentals, would be in excess of \$9,200.00 monthly after September 5, 2016 (\$110,400 annually). App., p. 581.

[¶26] At the time of trial, the Corporations had not paid Steven and Marcy about eighteen (18) months of their \$5,400.00 per month salary and eighteen (18) months of the corporate rentals due them. Deposition of Katherine Petersen, ps. 176, 195, and 260. Marcy was owed \$97,200 for compensation. Deposition Transcript, pages 195-197. In addition, eighteen months of rental payments were due Marcy [\$4,150/monthly calculates to be an additional \$74,700.00]. Deposition Transcript, page 260. Marcy was entitled to \$171,900.00 [$\$97,200.00 + \$74,700 = \$171,900.00$]. Without fixing the amount owed to either Marcy or Steven, the lower court determined both Marcy and Steven are owed back salary and rent. App., p. 597. Without any pleading complying with N.D.R.Civ.P. 9(g) concerning special damages, the lower court then offset Marcy's unpaid salary and rentals with the *corporations's un-plead claim for specific damages*. It is to be mentioned that all of Marcy or Steven's expenditures from corporate funds [corporate cash flow not related to rentals or salary] for either their personal purchases/investments or for their personal investments in real estate or equipment made to enhance the parties' corporate rentals due them, were reconciled by the corporations' accountants as "Loans to shareholders". App.,

ps. 375, 537-565, and 589. Since Marcy's move to Arizona in 2012, none of the corporations' financial decisions were made by Marcy, but rather, were only under Marcy's control. App., ps. 571-572.

[¶27] The pre-trial stance of Steven and Corporations as to Marcy's corporate shenanigans was proved wrong by their own witnesses testifying that Marcy had no economic control over the companies' financial affairs after 2012 or 2013 (when she moved to Arizona), and that she had been removed from all positions of authority, including director and officer, and denied further access to financial accounts/corporate activities. CPA Toni Ptacek testified none of Marcy's unsubstantiated deductions were ever allowed, she never met with Marcy, and the shareholder's loans were the result of conversations with Kathryn Petersen or Steven (Tr. of 9/5/19, Volume 1, ps. 76-81; 87-88, 93-94; 99-101). CPA Mitchell Merkel testified that he knew of no shareholder indebtedness signed by Marcy, and that Kathryn Petersen and Amanda Thorpe were his corporate information sources. Tr. of 9/5/19, Volume 1, ps. 213, 251-253. Banker Ryan Schimke testified Marcy was subject to court orders around 2012 to 2014 preventing corporate action, later changed in his testimony to 2014, and Marcy was primarily located in Arizona. Tr. of 9/5/19, Volume 1, ps. 261-262; 271; 278-281. Son Chris Orwig, also regional sales manager, testified that Marcy stopped working around 2012 or 2013 when she diagnosed with rheumatoid arthritis and moved to Arizona, and not in the office running the money. Tr. of 9/5/19, Volume 1, ps. 299-300. Steven testified that Marcy was enjoined from the business in 2014, and again in 2016; "Marcy hadn't worked at the business for at least ten years", and "Marcy had nothing to do with the companies but she still had check signing rights". Tr. of 9/6/19, Volume 2, ps. 30-31; 120; 134-135; 138-139;

175-176; 181-182.

[¶28] Even Kathryn Petersen testified that Mary C. “Marcy” Orwig, from 2009 through 2012 performed minimal corporate financial activities such as signing paychecks if placed in front of her, or directing transfers of funds between accounts. Deposition Transcript, page 46; Doc ID #189. And, after moving to Arizona, Mary C. “Marcy” Orwig performed no work for the companies, it getting harder to get her assistance transferring monies between accounts. Deposition Transcript, page 47; 175; Doc ID #189. Kathryn Petersen ultimately testified that Marcy Orwig had not worked on behalf of the Orwig Corporations between 2012 and the date of the deposition, July 31, 2019. Deposition Transcript, page 159; 208 “Little to no involvement since (Kathryn Petersen) started in 2009 .. Absolutely zero involvement after 2012.” Doc ID #189. Marcy cannot be blamed for any corporate irregularities after 2012 if she has no control.

[¶29] As of the date Steven initiated the divorce action – the valuation date for most assets – Steven also owned a 5% interest in an Orwig family business known as R&J, Incorporated. App., p. 604. The lower court awarded this asset to Steven at a value of \$0.00 despite this business paying Steven in excess of \$8,000.00 in 2016. App., ps. 516; 518-519; and 611. Steven testified that he receives from \$5,000.00 to \$9,000.00 per year from said family corporation, yet the lower court still determined it of no value. Tr. of 9/6/19, Volume 2, p. 200.

[¶30] The lower court properly determined Steven has a much higher earning capacity than Marcy, and is in reasonably good health. The lower court, utilizing Stumph’s appraisal [App., p. 56], determined Steven has an earning capacity from his corporations of at least

\$187,060.00 per year. App., p. 604; 89. Marcy, on the other hand, has arthritis and Steven, himself, recognizes the seriousness of her illness and her need to have his support for the duration of her life. Tr. of 9/6/19, Volume 2, ps. 13-14; 115-116. The lower court determined Marcy had a monthly need of \$8,957.68 together with need for a policy of health insurance to be provided by Steven. App., ps. 603; 605. The lower court determined Marcy was entitled to spousal support only for ten (10) years at the rate of \$5,500.00 per month, together with health insurance. App., p. 607. The lower court concluded that Marcy's monthly needs of \$8,957.68 could be reached with the \$5,500.00 spousal support payment together, with an imputed monthly earning capacity of \$3,330.00, and horse business income. App., p. 603. There is no evidence in the record that Marcy's horse business ever had a profit, nor was there any evidence that it could ever act with a profit. Steven, not Marcy, was awarded all ranch land and ranch buildings that were in existence in 2020. The parties' 2016 income tax return shows Marcy's livestock business had a loss that year – a *negative* \$82,570.00. App., ps. 514, 520-521.

[¶31] The court's finding there was a viable action against Marcy for a breach of a fiduciary duty to the corporations is based upon the lower court's belief that "marital waste is corporate waste and vice versa". App., p. 589. The lower court determinations of "waste" include periods of time that Steven could not find a corporate recreational vehicle (motorhome) or a corporate airplane (there is no "jet" as determined by the lower court). There is no finding of financial damage to the corporations with respect to either piece of equipment. There is no evidence in the record that the corporations suffered any financial damage because of any delay in Steven locating either item. The Corporations actually

reported a capital gain on each of these items when they were sold. App., ps. 366 (motorhome); 428 (airplane). Corporate funds, used by Steven and Marcy to improve their Arizona property, reconciled as “Loans to shareholders” on corporate books, inexplicably became “Marcy’s waste” or “undocumented conversion” or “waste of corporate funds.” App., ps. 591-592.

[¶32] Incredibly, Corporations’ Complaint dated August 22, 2016 [App., p. 14], while alluding to an earlier dismissed action, only plead deleterious action by Marcy at ¶7 of the Complaint:

[¶7] To the contrary, since the dismissal of the prior action, defendant’s (Marcy) deleterious actions towards the plaintiff (Corporations), in breach of her fiduciary and statutory duties, has begun anew, to wit:

- Defendant ordered credit cards under the names of plaintiffs with huge credit limits, and has begun transaction with those credit cards for personal use;
- Defendant has attempted to access plaintiff’s bank accounts and lines of credit;
- Defendant transferred from plaintiffs’ accounts to her personal account some \$4,150.00 for personal use;
- On those occasions when defendant is on plaintiffs’ premises, she is disruptive of their businesses and verbally abusive to their employees.

Corporations presented no evidence of damages with respect to any of the identified acts complained of, nor did they plead (or prove) any special damages with respect to the airplane or motorhome as required by law. See Point 1(B)(4), ¶ 52.

[¶33] Witnesses for Steven and Corporations further established:

[¶34] A. Steven Mark Orwig had individually contracted, initially by handshake with seller Gary Haydon, for the purchase of the Arizona real property at a contract price of One Million Three Hundred Thousand (\$1,300,000.00) Dollars while Mary C. “Marcy” Orwig

was elsewhere. Tr. of 9/6/19; Volume 2, ps. 16-18; 174.

[¶35] B. The Corporations approved the purchase of the airplane and the recreation vehicle, and no financial harm arose out of either transaction with each being sold by the Corporations for either wash or gain: (i) as to the airplane, it was sold for \$680,000. App., p. 428; and (ii) as to the recreational vehicle (motorhome), it was sold for \$383,651. App., p. 366; “\$137,700 gain” - CPA Ptacek at Tr. of 9/5/19, Volume 1, p. 128.

[¶36] **LAW AND ARGUMENT**

[¶37] **Standard of Review & Oral Argument Request**

[¶38] Questions of law are reviewed by the North Dakota Supreme Court *de novo*, while a clearly erroneous standard exists for factual findings. Wilkens v. Westby, 2019 ND 186, ¶4, 931 N.W.2d 229. Oral argument would be helpful in discussing the ramifications of both law and fact.

[¶39] **POINT 1. The trial must comply with due process of law always requiring an unbiased judge and a decision supported by legally admissible evidence.**

[¶40] A. **The trial court tainted the proceeding by pre-trial actions, and by her subsequent judicial actions.**

[¶41] The lower court self-tainted these proceedings, announcing on August 19, 2019, “Before we get into this matter any further, I can tell the parties I have spent no less than 20 hours reading this file, reading the other files, reading the file that was dismissed, as well as – I haven’t read the trial notebook that is on my desk. I have read the filings, the transcript, the case in its entirety.” Tr. of 8/19/19, ps. 6-7. First, how can a judge take judicial notice of dismissed actions, except the act of dismissal? App., p. 475. Moreover, what happened

to the concept of waiting for the actual trial in “open court” – justice is supposed to be blind until the scales of justice tip only based on legally-admissible evidence presented in open court.

[¶42] **B. The lower court made multiple due process violations during the trial.**

[¶43] 1. Improper use of deposition. Asserting office manager Kathryn Petersen would be unavailable for trial, her deposition was so noticed, and inconsistent with N.D.R.Civ.P. 30(f)(1) requiring attorney storage until trial, the transcript was filed with the Clerk of Court on August 13, 2019. Doc. ID #189. Most likely, such was done by corporate counsel as part of his perverted legal concept relying upon N.D.R.Ev. 201 allowing for “judicial notice”, apparently believing and arguing, trials are superfluous. Doc ID #187. The trial did not occur on August 19, 2019, nor was the deposition of Kathryn Petersen offered in evidence on that date (only a suggestion by attorney Andrews that the “Court simply review the deposition at its convenience so as not to take up precious court time”). Tr. of 8/19/19, specifically p. 11. The Court improperly announced, “We will not be reading the deposition into the record.” *Id.*, p. 6.

[¶44] At time of trial on September 5, 2019, Attorney Liebl *first offered* the deposition of witness Kathryn Petersen, who had been sitting in the courtroom immediately before the Judge entered, and thus, she was “available”. Tr. of 9/5/19, ps. 15-19; 22-23.

[¶45] N.D.R.Civ.P. 77(b) provides:

(b) Place for Trial and other acts. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding must be done or conducted by a judge elsewhere, without the attendance of the clerk or other court officials.

N.D.R.Civ.P. 43(a) requires testimony in open court, and not what a judge may read in preparation for trial – “(a)t trial, the witnesses’ testimony must be taken in open court unless a statute, the Rules of Evidence, these rules, or other court rules provide otherwise.”

N.D.R.Civ.P. 43(a) was discussed in Miller v. Mees, 2011 ND 166, ¶ 8, 802 N.W.2d 153:

[¶ 8] Rule 43(a), N.D.R.Civ.P., provides the general rule that witnesses' testimony must be taken in open court and expresses a preference for oral testimony unless otherwise provided by statute or procedural rules. See *Lawrence v. Delkamp*, 2008 ND 111, ¶ 12, 750 N.W.2d 452 (plurality opinion discussing pre-2011 rule); *In Interest of Gust*, 345 N.W.2d 42, 44–45 (N.D.1984) (decided under pre-1999 rule providing that testimony of witnesses shall be taken orally in open court unless otherwise provided by statute or rules). See generally 9A Charles Alan Wright and Arthur J. Miller, *Federal Practice and Procedure: Civil* § 2414 (3rd ed.2008) (discussing similar provisions of parallel federal rule and identifying preference for oral testimony).

[¶46] N.D.R.Civ.P. 32(a)(1) only allows use of a deposition if “it would be admissible under the Rules of Evidence if the deponent were present and testifying” **AND** there exists a reason under Rule 32(a)(2) through (8). On September 5, 2019, Kathryn Petersen was not an “Unavailable Witness” under subsection (4), the deposition was obviously not being presented for “Impeachment and Other Uses” under subsection (2), and subsection (3) does not apply – neither the corporation, nor Steven Orwig can claim to be “(a)n opposing party” using the deposition of the corporate officer, director, managing agent, or designee. Subsections (5) through (8) are inapplicable. The deposition, equivalent to an affidavit, is legally inadmissible; it should not have been considered.

[¶47] Wright, Miller & Marcus, *Federal Practice and Procedure: Civil* 2d § 2146 is especially enlightening. It provides that “(i)f it is desired to use the deposition of a person other than an adverse party for substantive evidence, rather than merely for impeachment,

the conditions of Rule 32(a)(3) [N.D.R.Civ.P. 32(4) are comparable rules] must be satisfied.”

Id. The treatise goes on, “(i)f a witness is available to testify, the deposition cannot be used in lieu of live testimony (although it is available to impeach).” Further, “(t)he existence of the condition is a question to be determined by the trial court at the time the deposition is offered in evidence.” *Id.*

[¶48] The deposition testimony can only be “used to the extent it would be admissible under the Rules of Evidence if the deponent were present and testifying”. N.D.R.Civ.P. 32(a)(1)(B). The original deposition should have been brought to court (N.D.R.Civ.P. 30(f)(1), or possibly filed with the Clerk in a sealed condition), and at time of trial, leave of court should have been sought to unseal the deposition so the testimony can be thereafter presented in open court as required by N.D.R.Civ.P. 77. See also, Van Ornum v. Otter Tail Power Co., 210 N.W.2d 188, 195 (N.D. 1973) recognizing the need to “read the depositions into the record as substantive proof”. Only when read into the record, the content of the deposition is made part of the record as substantive proof [with the Court required to rule on the evidentiary offers as they occurred] – without stipulation (none existed), private judicial review in advance of trial, or even after trial, is prohibited. Almost all of the testimony of Kathryn Petersen violated identified rules of evidence, and due process of law, and the lower court ignored N.D.C.C. § 31-04-04 requiring testimony “from the lips of the witness.” In Interest of Gust, 345 N.W.2d 42, 45 (N.D. 1984). Despite repeated valid objections, Kathryn Petersen testified to irrelevant facts/circumstances beyond the scope of the pleadings [N.D.R.Ev. 401-402], without “personal knowledge of the matter” [N.D.R.Ev. 602], provided testimony predicated upon hearsay [N.D.R.Ev. 801-802; 805], without sufficient

authentication or identification of an item (foundation objections) [N.D.R.Ev. 901] and also, without supplying the underlying documents resulting in any offered summary/compilation. N.D.R.Ev. 1006.

[¶49] The proceedings, already tainted by improper judicial action, were further tainted by opposing legal counsel ignoring due process, and elementary evidentiary and procedural rules – all legal violations were subsequently countenanced by the judicial officer.

[¶50] 2. Allowing illegal imputed evidence. See Point3(A); ¶ 73 (specifically ¶ 76).

[¶51] 3. Ordering disgorgement. The trial court wiped out Marcy’s corporate stock, and also \$171,900.00 of vested compensation/rent, apparently as a penalty for perceived wrongdoing. N.D.C.C. § 10-19.1-85.1 only allows *shareholders* (not corporations, officers, or directors) equitable relief if they bring an appropriate action – the corporation’s lawsuit is baseless. Equitable relief is further tempered by “equitable concepts” never allowing penalties, like the disgorgement now ordered. The United States Supreme Court, in *Liu v. Securities and Exchange Commission*, 591 U.S. ___, 140 S.Ct. 1336 (2020), recently recognized that a disgorgement award that does not exceed a wrongdoer’s net profits, *from the wrongful conduct*, is permissible [“Courts may not enter disgorgement awards that exceed the gains ‘made upon any business or investment, when both the receipts and payments are taken into account.’”; *id.*, p. 1949-1950 “net profits from wrongdoing after deducting legitimate expenses” - *id.*, p. 1946], but no penalty [or punitive sanction] is ever permissible. *Id.*, p. 1944 (“ avoid transforming it into a penalty outside their equitable powers”). The conduct complained in the Corporation’s Complaint [App., p. 16] does not

even mention firing employees during a two (2) week session, the apparent reason for employee dismay – termination of worker employment was within Marcy’s authority to protect/withdraw her investment; neither the shares of stock, nor the \$171,900.00 of vested compensation/rent were generated by any of her alleged wrongful conduct as set forth in the Complaint [nor with respect to the airplane or recreational vehicle (motorhome) for which no evidence of damages exists]. The lower court used disgorgement as a “penalty”, which cannot be accomplished under equitable principles [nor is it allowed in these proceedings in law].

[¶52] 4. Ignoring pleading rules. Maragos v. Union Oil Co. of California, 1998 ND 180, ¶6, 584 N.W.2d 850, makes clear that special damages must be both pled and proved – neither of which occurred herein with respect to Corporations’ Complaint:

[¶ 6] Special damages must be specifically pled, and must be “proved to a reasonable degree of certainty” and “are not recoverable if deemed to be too remote.” *Johnson v. Monsanto Co.*, 303 N.W.2d 86, 93 (N.D.1981); see also N.D.R.Civ.P. 9(g); *Bumann v. Maurer*, 203 N.W.2d 434, 440–41 (N.D.1972). In slander of title cases, “[t]he chief characteristic of special damages is a realized loss.” W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 128, at 971 n. 3 (5th ed.1984). Thus, “the trier of fact must be furnished data sufficient to determine damages without resort to mere speculation or conjecture.” *Johnson*, 303 N.W.2d at 95.

Corporations’ Complaint should have been dismissed for failure to plead and prove special damages.

[¶53] **POINT 2. The lower court committed clear error in its property valuations and distributions.**

[¶54] **A. The lower court should have determined the value and distributed the manufacturing building and 6.8 acres of land upon which it sits.**

[¶55] The lower court determined that Jeffrey Berg, an accredited appraiser, “was the only credible, qualified witness testifying to the value of the parties’ real property and vehicles held in Northern D’Lights Ranch, LLC.” App., p. 593. The lower court also recognized, “Berg appraised the farmland, industrial site (consisting of a manufacturing building and processing equipment) and the residential site/pasture (consisting of a house, stable, storage buildings, and a garage). *Id.* When determining either the values for property to be distributed and distributing the same, the lower court failed to include the portion of the industrial site that is individually owned by Steven and Marcy. App., ps. 622-626. The farmland, appraised by Berg at \$380,000.00, was awarded to Steven at the appraised amount. App., ps. 221, 622. The 8.5 acre residential site and buildings, appraised by Berg at \$560,000.00, was awarded to Steven at the appraised value. *Id.*

[¶56] The 6.8 acre industrial site [land, building and processing equipment] was appraised by Berg at \$1,500,000.00. App., p. 221. As to the appraised industrial site, Steven and Marcy owned the land and the warehouse building, collectively appraised under the cost approach for the market value of \$495,000.00 [\$30,000.00 value of land and \$465,000 value of building]. App., p. 183. The processing equipment, which appears to be tenant fixtures by Berg’s description, had a market value of \$1,080,000.00 under the cost approach. App., p. 136-137, 183.

[¶57] The lower court failed to include the 6.8 acres of land and warehouse in her valuations, or in property distribution. In other words, the lower court missed \$495,000.00 of income producing property in its valuations and distributions, rendering both Marcy and Steven’s vested real estate interests unclear, and subject to further litigation. To have a fair

and equitable distribution of property between Marcy and Steven, the 6.8 acres of land, which includes the warehouse, should been included in the valuations and properly distributed. The 6.8 acres of land, and warehouse building, were not owned by the corporations, but rather by Marcy and Steven personally – such property is not distributed by the assignment of the corporate stock, nor by the court’s judgment.

[¶58] B. The lower court’s valuation of shares of Orwig’s Livestock Supplements, Inc., and Orwigs Tubs International, Inc. [OLS/OTI], is clearly erroneous.

[¶59] Marcy asserts the \$287,000.00 valuation for her and Steven ‘s ownership interests in OLS/OTI is clearly erroneous. App., p. 622. The court’s \$287,000 valuation stems from an income approach appraisal of the combined OLS/OTI business made by appraiser Shawn Stumphf. App., p. 594. In his income approach appraisal, Stumphf excluded the corporations’s real estate investments [tenant fixtures] by classifying the assets as “nonoperating”, thus wiping away over \$1,000,000.00 of value in his income approach appraisal. App., p. 57, 84 [paragraph 2a], 183 and 187. It is clear court error to accept a \$287,000.00 valuation, based upon the restructured cash flow for the continuing business, when Steven and Marcy’s warehouse building, land and tenant fixtures have the combined income value of at least \$1,630,000.00 [potentially \$55,000.00 more if adding the value of OLS/OTI’s rolling stock (\$50,000 and \$5,000.00)]. App., p. 197. It is respectfully submitted, under an income approach to appraise corporate stock, the income value of the corporate assets need to be included, not just the “business concept” as an ongoing concern. OLS/OTI’s valuation should never have been less than Berg’s income approach valuation

of \$1,630,000.00, less the \$495,000 value of the warehouse and land owned by Steve and Marcy noted above in ¶s 55-57. No sane person would accept a price for a business, as a going concern, when the assets used by corporations would have a far greater value than the business itself.

[¶60] The court's acceptance of Stumph's appraisal is clearly erroneous for another reason, too. Appraiser Stumph was of the belief that an income approach to valuation would produce a greater valuation than an asset approach to valuation. Tr. of 9/5/19, Volume 1, ps. 150-151. Stumph was wrong. In the asset approach to valuation, Stumph only included, as fixed assets, the \$1,055,000.00 of property appraised by Berg. App., ps. 83, 84. Since Berg had appraised only the manufacturing equipment and the rolling stock, not all assets owned by the companies were included in Stumph's determinations. If one had just added OLS/OTI's interest in the \$680,000.00 airplane, sold days after the July 31, 2017, valuation, one readily sees that the asset value of the corporation exceeds the income approach. Adding \$680,000 to the (negative \$160,712.00) of shareholder equity increases the shareholders' equity to a positive \$519,288.00. If one includes, the market value of depreciated/expensed property of the Corporations, the shareholders' equity would be even greater. See, Appendix pages 336-349 for the expansive list of properties subject to depreciation.

[¶61] Under Stumph's approach, any corporate "Loans to shareholders" are not considered an asset of the corporation, but rather an unpaid dividend. App., p. 84. When the lower court offsets Marcy's unpaid salary and rentals [\$171,900.00] with what she claims is owed the corporation, the court rejects Stumph's methodology, requiring the the amount of "Loans to shareholder" to be added as an asset of the corporation. If the lower court is allowed to

reinvent the corporate books, the lower court should have been consistent, but she was not, requiring reversal.

[¶62] **C. The lower court clearly erred when it gave no value to R & J Orwig Incorporated.**

[¶63] Marcy respectfully submits that Steven's ownership interest in R & J Orwig Incorporated must have a value for such asset produces \$5,000.00 to \$9,000.00 in income to Steven each year. Tr. of 9/6/19, Volume 2, p. 210. It is clear error to distribute to Steve an income producing asset with a valuation of zero dollars.

[¶64] **D. The lower court should have included, in its valuations and distributions, both Marcy and Steven's unpaid salary and income.**

[¶65] Neither Steven nor Marcy's accrued, but unpaid, rentals and salaries from the corporations were in the nature of temporary support. The two of them, as directors of the corporations, have the right to set their own compensation. N.D.C.C. § 10-19.1-40. As directors and officers of the corporations, the two had authority to contract with the corporations thereby setting the rentals due them from the corporations' use of either their real property, or their personal property. N.D.C.C. § 10-19.1-57. Marcy and Steven's right to unpaid salaries and rental stems from contract under rights preceding any action against Marcy. Their right to their unpaid salaries and rentals cannot be equated with temporary spousal support. The lower court's order, requiring the corporations to maintain Steven and Marcy's salary and income was issued in the corporate action – not the divorce action. App., p. 32C.

[¶66] Neither Steven nor Marcy's vested property rights, consisting of accrued and unpaid

income and rentals, can be taken from them by judicial action without violating their right to due process of law, guaranteed under the Fourteenth Amendment to the Constitution of the United States and Article I, § 12 of the Constitution of North Dakota. As stated in Commissioners of Sinking Fund of City of Philadelphia v. City of Philadelphia, 324 Pa. 129, 133-34, 188 A. 314, 317 (1936):

The due process clause (Const.U.S. Amend. 14, § 1) differs, however, from the impairment clause. It reads: ‘Nor shall any State deprive any person of life, liberty, or property, without due process of law.’ Under the due process clause the word ‘State’ is broad enough to include the decision of courts. That which constitutes an impairment of the obligation of the contract may also constitute a deprivation of due process. In both property rights may suffer. Therefore no order can be made by a court in the enforcement of a judgment which would, in violation of ‘due process,’ take from a litigant substantive property rights -- rights which may likewise be secured for him from legislative interference by the impairment of obligations clause of the Constitution.

The lower court, acting under its statutory powers in divorce or under its equitable powers over corporate acts, cannot extinguish substantive property rights without denying Marcy her due process of law. The amount of unpaid salaries and rentals due to both Marcy and Steven approach \$400,000.00 at the time judgment was entered. The lower court should have determined the amount owed to each, and then distributed the amount equitably, taking into consideration other property distributed by the lower court.

[¶67] **POINT 3. Spousal support should have been permanent.**

[¶68] Steven and Marcy had developed a long-time marital scheme based upon (a) financial equality, (b) dual households, (c) and without want by either (until Marcy was frozen out in 2013 or 2014) – and all the time, without creation of any retirement accounts or savings under both parties’ presumption that the acquired assets would be more than sufficient to

take care of both, along with the actual knowledge that Marcy had considerable health constraints always requiring current and future dedication of financial assets. Steven testified that alimony to Marcy should be absolutely, “Forever. Till she passes”, even if she remarries. Tr. of 9/6/19, Volume 2, ps. 105; 115-116. With respect to spousal support, the Court erred when reducing Steven’s monthly obligation using non-existent income, and secondly, by limiting its duration to ten (10) years.

[¶69] As succinctly put in Krueger v. Krueger, 2008 ND 90, 748 N.W.2d 671:

[¶ 8] Section 14–05–24.1, N.D.C.C., authorizes a district court to award spousal support and provides, “[t]aking into consideration the circumstances of the parties, the court may require one party to pay spousal support to the other party for any period of time. The court may modify its spousal support orders.” A court must apply the *Ruff–Fischer* guidelines when deciding the amount and duration of a spousal support award. *Sommer v. Sommer*, 2001 ND 191, ¶ 9, 636 N.W.2d 423; *see Ruff v. Ruff*, 78 N.D. 775, 52 N.W.2d 107 (1952); *Fischer v. Fischer*, 139 N.W.2d 845 (N.D.1966). Factors to consider under those guidelines include:

the respective ages of the parties, their earning ability, the duration of the marriage and conduct of the parties during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, their financial circumstances as shown by the property owned at the time, its value at the time, its income-producing capacity, if any, whether accumulated before or after the marriage, and such other matters as may be material.

Sommer, at ¶ 9 (quoting *Riehl v. Riehl*, 1999 ND 107, ¶ 8, 595 N.W.2d 10).

[¶70] While frequently recognizing a preference for rehabilitative spousal support, rather than permanent spousal support, the Supreme Court has acknowledged, (a) when there is substantial disparity between the spouse’s incomes that cannot be readily adjusted by property division or rehabilitative support, it may be appropriate for the court to award

indefinite permanent support to maintain the disadvantaged spouse, and (b) spousal support and property distribution are interrelated and intertwined and must be considered together.

Id., ¶9. See also, Mertz v. Mertz, 2015 ND 13, ¶ 27, 858 N.W.2d 292.²

[¶71] Marcy’s circumstances are now life-long; a decision to terminate spousal support in ten (10) years is baseless, and implies judicial bias – why would it terminate when Marcy is only aged 64, long before the advent of her normal social security retirement at age 67? Why would Marcy’s health insurance terminate if Steven is no longer affiliated with the corporations, or no longer than ten (10) years from the date of the judgment? App., ps. 605; 619. To do such judicially, (a) forever places Marcy’s health insurance coverages in daily jeopardy, (b) whispers the existence of a key to whatever padlock is created, and (c) merely postpones for ten (10) years Marcy’s almost instantaneous financial destruction in complete disregard of the *Ruff-Fischer Guidelines* dictating life-long needs.

[¶72] In this case, due to Steven’s presentation, substantial assets were not known, ignored, or not addressed by the District Court; Marcy recognizes any re-distribution of property and debt may impact Marcy’s spousal support award. The District Court erred in two (2) significant ways:

[¶73] **A. Marcy cannot be credited with non-existent income.**

[¶74] Despite judicially determining Marcy’s monthly financial need being \$8,957.68 [App., p. 603], the District Court reduces said amount by an imputed “\$3,333 gross monthly earnings potential” [App., p. 601] and a totally unsubstantiated judicial claim - “(t)he horse

² The abrogation of the “disadvantaged spouse doctrine” is recognized at ¶9. Marcy’s disadvantages are primarily medical and physical, not the doctrine’s usual foregone opportunities or lost advantages along with increased earning capacity of the other spouse.

business will also be income producing.” App., p. 603-604.

[¶75] As to the latter, unfortunately, there is no horse income from Marcy’s Rancho Dos Bar O, LLC [App., p. 521]— past, present, or future. Horses never resulted in any income made part of this record. The record is devoid of any evidence supporting the Court’s determination that any future monies can be attributed to horse income, so the Court’s error is clear. There is no ranch, nor are there any horses; the Court’s error is clear.

[¶76] Likewise, the Court’s pronouncement, “(w)ith a college degree, Mary has the capacity to earn \$40,000 a year, or \$3,333 gross, a month” [App., p. 601] is without legal foundation. No North Dakota statutory or case law provides for the imputation of income in spousal support cases. Christianson v. Christianson, 2003 ND 186, ¶ 18 (¶ 21 - “district court improperly imputed income”), 671 N.W.2d 801.³ The District Judge’s intemperance is further displayed by using the gross amount of \$3,333 as credit against financial need, instead of net numbers – foreshadowing or hoping for Marcy’s confinement for non-payment of taxes?

[¶77] **B. The duration of the spousal support should be life.**

[¶78] Marcy’s circumstances are never going to change, and Steven got it right when he testified that alimony to Marcy should be absolutely, “Forever. Till she passes”, even if she remarries. Tr. of 9/6/19, Volume 2, ps. 105; 115-116. Permanent spousal support would be appropriate, for the very reason advanced by the District Judge when reciting a litany of cases in her Conclusions of Law at ¶s 59-60. App., ps. 599-600. The District Judge has actually

³ There are no minor children. There is no “underemployed” parent – N.D.A.C. § 75-02-04.1-07 allows imputing income as part of the Department of Human Services child support guidelines authorized by N.D.C.C. § 14-09-09.7.

created a solution which dictates permanent spousal support for Marcy's judicially determined monthly "need" of \$8,957.68, as noted by the lower court citing Pearson v. Pearson, 2009 ND 154, ¶ 7, 771 N.W.2d 288, in her Conclusions of Law, ¶ 61:

"Permanent spousal support may be appropriate 'when there is substantial disparity between the spouse's incomes that cannot be readily adjusted by property division or rehabilitative support.'"

The lower court distributed virtually all property producing income to Steven – assets which had provided almost \$400,000 of combined income for years, including the last five (5) years when Marcy was frozen out by corporate and judicial actions – the disparity results from the District Judge's distribution of assets. The District Judge's attempt at property division favoring Marcy was hilarious – Marcy got property the judge knew no longer existed. Having to value property at time of service of a summons [N.D.C.C. § 14-05-24(1)] creates havoc, if that property no longer exists at time of judgment, but is disingenuously awarded. There are no horses, and there was no income from outside employment. Predicated upon the Pearson decision claimed to be relied upon by the lower court, all spousal support should have been permanent; and never limited to a term of ten (10) years.

[¶79]

CONCLUSION

[¶80] The trial court's errors are enormous, and the judgment should be reversed, with the divorce matter remanded for determination and distribution of all marital property, along with a proper determination of spousal support with respect to duration and amount. The corporate action should be dismissed in its entirety.

[¶81] Respectfully submitted this 3rd day of August , 2020 .

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The above-signed attorney certifies, pursuant to N.D.R.App.P. 32(e), that the Appellant’s Brief consisting of thirty-four (34) pages complies with the thirty-eight (38) page limitation imposed by N.D.R.App.P. 32(a)(8) for principal briefs.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Orwig's Livestock Supplements, Inc.;
Orwigs Tubs International Inc.; and MVP Transport, Inc.

Plaintiffs

vs.

Supreme Court No. 20200123

Mary C. "Marcy" Orwig,

Defendant/Third Party
Plaintiff,

**Affidavit Of Service By
Electronic Means (E-Mail)**

vs.

Civil No. 11-2016-CV-00068
(Dickey County District Court)

Steven Orwig,

Third Party Defendant.

Steven Mark Orwig,

Plaintiff,

vs.

Civil No. 11-2016-DM-00026
(Dickey County District Court)

Mary Caroline Orwig,

Defendant.

State of North Dakota
County of Cass

[¶1] Jonathan T. Garaas, being first duly sworn on oath, deposes and says that Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above

entitled matter.

[¶2] On the 3rd day of August, 2020, Affiant electronically served a true and correct copy of the following document(s) in the above entitled action: BRIEF OF DEFENDANT, APPELLANT, AND CROSS-APPELLEE MARY CAROLINE ORWIG, ALSO KNOWN AS MARY C. “MARCY” ORWIG “ORAL ARGUMENT REQUESTED” and Appendix.

[¶3] The electronically attached documents were served upon the identified lawyer as follows:

[¶4] Greg W. Liebl at greg.liebl@swlattorneys.com
Michael Andrews at mandrews@andersonbottrell.com

[¶5] To the best of Affiant’s knowledge, the electronic address above given was the actual electronic mailing address of the party intended to be so served. The above documents were duly e-mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure, as revised by other rules.

/s/ Jonathan T. Garaas

Jonathan T. Garaas

Subscribed and sworn to before me this the 3rd day of August, 2020.

/s/ David Garaas & Seal

Notary Public