

RECORDED BY
SUPREME COURT

ORIGINAL

980004

SUPREME COURT OF THE STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

NOV 12 1998

STATE OF NORTH DAKOTA

Rachel M. Kautzman,)
)
 Appellee and)
 Cross-Appellant,)
)
 v.)
)
 Robert A. Kautzman,)
)
 Appellant and)
 Cross-Appellee,)
 _____)

Supreme Court No. 980004

PETITION FOR REHEARING

APPEAL FROM JUDGMENT OF THE DISTRICT COURT,
 CASE NO. CV-95-00115 COUNTY OF CASS
 EAST-CENTRAL JUDICIAL DISTRICT
 HONORABLE LAWRENCE A. LECLERC

Douglas W. Nesheim
 Mark R. Fraase
 Attorneys at Law
 WEGNER, FRAASE, NORDENG,
 JOHNSON & RAMSTAD, PLLP.
 15 South 9th Street
 Fargo, North Dakota 58103
 (701) 235-7501

Pamela J. Hermes
 Attorney at Law
 502 First Avenue North
 P.O. Box 1389
 Fargo, North Dakota 58107
 (701) 282-3732
 Attorney for
 Plaintiff/Appellee/
 Cross-Appellant

-and-

Wayne T. Anderson
 Attorney at Law
 808 Third Avenue South, STE 205
 P.O. Box 2771
 Fargo, North Dakota 58108-2771
 (701) 293-3400
 Attorneys for
 Defendant/Appellant/
 Cross-Appellee

In accordance with rule 40, NDR App P, Robert A. Kautzman, Defendant, Appellant, and Cross-Appellee, respectfully requests rehearing based on the following particulars:

1. The Court remanded for reconsideration of the property division in light of its finding that Kautzman Construction Company was undervalued by the trial court. The Court apparently overlooked its precedent which requires the trial court to consider the distribution of property when deciding the appropriate amount of spousal support. E.g., Wiege v. Wiege, 518 N.W.2d 708, 711 (N.D. 1994). The remand should require the trial court to decrease the award of spousal support to correspond with any increase in Plaintiff's property award.

2. In Finding of Fact number 48, the trial court recognized that the success or failure of the company rests with Robert. This Court's decision on the issues of property division and spousal support overlooks this finding and precedence which holds that a party's entrepreneurial skills cannot be awarded as marital property. Nastrom v. Nastrom, 262 N.W.2d 487, 493 (N.D. 1978); Volk v. Volk, 404 N.W.2d 495, 499 (N.D. 1987). The trial court used the liquidation value of the business because it understood that there was no other value in the business that it could count as divisible marital

property. Outside of the liquidation value, the only other value of the business is Robert's entrepreneurial skill.

3. Because the Findings of Fact relating to the value of marital property are merely the result of guesswork by Plaintiff's counsel and the trial court, e.g., see findings of fact numbers 27 and 29 (App. 389), the Plaintiff was awarded so much property that it is impossible for Defendant to comply with the judgment and still keep the business operating.

Respectfully submitted this 11th day of November, 1998.

BY 

Wayne T. Anderson ID #03022
Attorney At Law
WDAY Tower
808 3rd Ave. S., Ste. 205
P.O. Box 2771
Fargo, ND 58108
Tele. (701) 293-3400
Fax (701) 293-1569

ATTORNEY FOR DEFENDANT/APPELLANT/
CROSS-APPELLEE ROBERT A. KAUTZMAN