

ORIGINAL
IN THE
SUPREME COURT OF NORTH DAKOTA

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SUPREME COURT

MAY 16 '00

Supreme Court No. 990216
Cass County Civil No. 96-88

State of North Dakota ex rel.
Heidi Heitkamp, Attorney General,

990216

Plaintiff-Appellee,

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 15 2000
STATE OF NORTH DAKOTA

-vs-

Family Life Services, Inc., d/b/a
Family Life Credit Services, et al.

Defendants-Appellants.

ON APPEAL FROM THE JUDGMENT
OF THE CASS COUNTY DISTRICT COURT,
THE HONORABLE DONOVAN FOUGHTY, PRESIDING

REPLY BRIEF OF APPELLANT DENNIS UCHTMAN

Dennis Uchtman
P.O. Box 403
Carthage, MO 64836
(417) 359-9001

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Despite requesting and receiving a 50% enlargement in word limits for the purpose of addressing the briefs of the different appellants, the State failed to address my brief at all, limiting its own brief almost exclusively to a discussion of the arguments raised by appellant Family Life Services (“FLS”). The State mentions me by name only once in its brief, *viz.*: “Similar conflicts afflicted directors Dennis Uchtman” The State cites to the Findings of Fact, ¶ 9, 106, and 133-134 in support of this statement. I am not mentioned in FF ¶ 9. I J.A. 465. Neither am I mentioned in FF ¶ 106. I J.A. 483. FF ¶¶ 133-134 read as follows:

133. HCM board member Dennis Uchtman learned about Larson’s use of client trust funds in September and understood that it was improper.

134. Dennis Uchtman gave his total allegiance to Darold Larson to the exclusion of HCM. Uchtman did not address the misapplication of funds with the board of directors in a timely manner.

I J.A. 487-88. Whatever else these statements may mean, they are not evidence for a conflict of interest, as the State argues in its passing mention of me in its brief. The import of these statements and the corrective action I took in response to learning of the commingling was discussed at length in my opening brief. Brief of Dennis Uchtman at 11-16. The State has simply ignored my arguments and chosen not to respond to them. Indeed, as set out in my brief with citation to the record, both the HCM and FLS boards extensively discussed the disclosure of the commingling activities and took steps immediately to assure themselves that they would not occur again, including installing

me as administrator to replace Mr. Larson and opening a new trust account on which he was not a signatory. Thus, in reality, though convincing this court to grant an extension of word limits because of the many briefs to address, the State chose not to address my brief at all, but simply to launch into its own selective and misleading portrayal of the record. “[R]elevant evidence cannot be ignored, because the rejection of relevant evidence without a reason is action contrary to the evidence.” *In the Interest of S.J.F. v. R.C.W.*, 1998 ND APP 4, ¶ 3, 582 N.W.2d 382

The State not only failed to address the record evidence I cited to demonstrate that I did not violate my fiduciary duty to Help and Caring Ministries (“HCM”), but also completely ignored my detailed analysis on the application of the law of fiduciary duty of nonprofit directors to these facts. Brief of Dennis Uchtman at 29-36. *See also* Brief of Lyn Sahr at 14-36, incorporated herein (setting out in detail the law of fiduciary duty of nonprofit directors and applying it to the facts of this case). Having failed to address either the facts or the law I raised in my brief, the State in reality is conceding that it has no answer. Thus, I am entitled to a reversal of the trial court’s conclusions of law that I breached my fiduciary duty to HCM.

My brief also demonstrated that the trial court refused to allow me to put on a case and erroneously ruled that I was represented by HCM counsel, when in fact, as the court obviously knew, I represented myself *pro se* throughout the case. Brief of Dennis Uchtman at 16-26.

Furthermore, the court misled me as to the consequences of its proffered dismissal without prejudice, causing me to stay in the case and be subject to its findings of fact and conclusions of law. *Id.* at 26-29. Thus, apart from a lack of evidence to support a conclusion of breach of fiduciary duty, the court denied me elementary due process in refusing to allow me to present a defense. The State also passed over this argument in silence in its brief. Thus, at a minimum I am entitled to a new trial on the question of breach of fiduciary duty. However, the record is so clear — and the State offered no rebuttal to it — that I believe the findings of the court and its legal conclusions in regard to a breach of duty to HCM on my part should be reversed as contrary to law. Because the State employed these conclusions to change the board of directors of FLS, and to order changes to the HCM board, both of which are part of an integrated Christian pro-life ministry, I believe the First Amendment requires de novo review. See Reply Brief of Gary Chaffin at 1-3 (de novo review of “constitutional facts,” citing *Bose v. Consumers Union, Inc.*, 466 U.S. 485, 499 (1984)).

The State omits any mention of the significant change in control mechanisms that took place both prior to and subsequent to the filing of this case. The State avers that “Larson maintained his absolute control over FLS by means of two control mechanisms: control of the composition of the board of directors through the Christian Caring Ministries Trust (“CCMT”) and directly managing FLS via a management

agreement with Help and Caring Ministries (“HCM”). At the December, 19, 1995 board meeting of FLS, a motion was made and carried “that Help and Caring continue in a consulting capacity rather than an administrative role as in previous years.” J.A. at I:379. Thus, prior to the filing of this lawsuit on January 9, 1996, and without the directors of HCM or FLS having any knowledge of its imminence, both boards acted to sever daily administrative control of FLS by HCM. As the newly-installed FLS administrator, therefore, I had a free hand to manage the agency, answerable only to the FLS board. Furthermore, CCMT relinquished its power of consent to changes in the FLS by-laws in February, 1996, and “[t]he FLS bylaws were amended in July, 1996 to remove all reference to the Christian Caring Ministries Trust.” FF 31. Thus, the FLS directors abrogated both external administrative control of FLS by HCM and control of the composition of the FLS board through CCMT. The State in its brief simply ignores these facts.

Equally as significant in undercutting the State’s attempt to justify the drastic remedy imposed by the trial court and its finding that I breached my fiduciary duty to HCM, are the significant remedial measures taken by both the HCM and FLS boards in mid-November, 1995 to accept Darold Larson’s resignation as FLS administrator, to appoint me as his successor, and to reform FLS’ financial practices. These changes are detailed both in my opening brief (pp. 11-14) and the opening brief of HCM director Lyn Sahr (pp. 8-10). The State not only

fails to acknowledge these facts, which are amply set out in the record by both testimony and exhibits, but flatly denies their existence. "Moreover, the record is devoid of any evidence to suggest that the boards of these two corporations ever took any steps to oversee Larson's actions or to rein them in within any reasonable boundaries or even to find out what they were." St. Brief at 15-16. These "somnambulant¹ boards," *id.* at 16, certainly were wakeful enough to accept Darold Larson's resignation as FLS administrator two days after the NACCC meeting which challenged his financial practices, and to install me as his successor. The record reveals that in the two months I was administrator of FLS, there were no "advances" of FLS commissions from the ZZ account. The commingling came to a halt. Indeed, Mr. Larson himself had abandoned the practice in September, 1995 and took active steps to restore the trust funds when challenged at that time by FLS staff. The State's selective portrait of the facts omits these salient realities, which the findings of fact it drafted for the court also neglect. See Opening Brief of Darold Larson at 12-13 (last transfer of funds from ZZ account to FLS administrative account outside of a regular check run occurred on August 29, 1995). I also opened a new ZZ account on which I was a signatory, but Mr. Larson was not. Uchtman brief at 12.

The unwillingness of the State to consult with FLS about its concerns

¹ "Somnambulant" means "walking while asleep." Webster's New Collegiate Dictionary (1974 ed.). The State probably meant to say "somnolent," namely "heavy with sleep."

prior to filing this lawsuit contributed to its failure to uncover the remedial actions already undertaken and produced the embarrassing necessity of trying to airbrush them away in its brief and deny they ever occurred. My letter offering to work with the State to satisfy its concerns was likewise ignored. I J.A. 371-373. See Addendum: “[W]e do not consider that we work or volunteer for Darold Larson, Inc. but rather Family Life Services, Inc.” The State in short, did not seek in good faith a remedy to the situation — which was already in place prior to the filing of this case — but instead embarked on a campaign for a total state takeover of this pro-life ministry.

Because the State has failed to meet the law and argument in my brief, I believe I am entitled to the relief requested, namely reversal of the Judgment in all respects as it relates to me, including the underlying Findings of Fact and Conclusions of Law.

Respectfully submitted this 15th day of May, 2000.

A handwritten signature in black ink, appearing to read "Dennis Uchtman", written in a cursive style. The signature is positioned above a horizontal line.

Dennis Uchtman
P.O. Box 403
Carthage, MO 64836
(417) 359-9001



FAMILY LIFE CREDIT SERVICES

16 BROADWAY, SUITE 304
P.O. Box 2467
FARGO, ND 58108-2467
(701) 237-9247 • FAX (701) 234-9557

January 21, 1996

Mr. David Huey
Assistant Attorney General
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Huey:

I realize this letter is not an official document, nor is it intended to be. I just felt like I needed in some way to communicate to you some of my concerns over the last few weeks.

To start with, let me apologize for any hostile feelings you may have sensed when you came into our office on Jan. 9th. The only basis for such was the possible threat that I felt from your unannounced visit. I had been expecting the Attorney General's office and even yourself to return and look over our operation since your last visit with us several months ago, when you disclosed that you would be back as time allowed. Again let me apologize for my and any other staff's negative reaction. I hope that since that time you have found a friendly atmosphere and a willingness on our part to work with you and your office.

I understand your position as a consumer advocate and the situation that has brought us together. I'm persuaded much of the staff with FLS, Inc would join with me in saying, we live for this ministry, it's not just a job. We believe in the people that become our clients and are committed to serving them and their needs to the absolute best of our ability. None of us have ever expressed a know-it-all mentality concerning how to effectively minister or conduct the business of the ministry, but we have on many occasions expressed a willingness to learn. It's with my heart for this ministry that I write to you now.

We are no strangers to state regulatory agencies coming in and looking over our books or in providing documents upon their request. These agencies include states that we are currently licensed in and those that we are attempting licensure with. We have not disputed the state's right to come in and exercise their authority as our licensing agent. My concern is the way that this investigation and the publicity of it has effected our staff, the clients and the relationships we have established with creditors, branch managers and others locally and nationally.

DEFENDANT'S
EXHIBIT
Hcm #178
5-5-98 DH

96-88
CLERK OF DISTRICT COURT

OCT 01 1998

CASS COUNTY, ND

DH "A Non-profit Agency"

EXHIBIT

178

371

1578

Without taking a lot of your time, may I speak of some of the happenings of the last year. At the close you may say that it is too little too late, but please hear me out. Within this little history, I'm not going to try to convince you of anyone's guilt or innocence, I just want to bring clarity to the subject matter. Darold Larson has realized for some time that FLS had become bigger than any of us had ever imagined it could, from a little part-time agency to an organization employing 20 people locally and ministering to hundreds nationally. That prompted him in January 1995 to publicly resign and commission the Board of FLS to seek a new administrator. Those that are close to him have all spoken to him quite openly about some weaknesses in administrative ability and that past decisions might reflect upon FLS someday.

In March 1995 Gary Chaffin asked me in the presence of Darold and my wife, Charlene, if I would consider moving back up to Fargo, ND from the Cities after completing my degree program and help Darold out for a few months. In so doing I would be groomed for the administrative position he would be vacating. I had no prior thought whatsoever of coming back to Fargo at the time, As a matter of fact, my intention was to use my new degree to get back into some area of ministry. After prayerful consideration I consented and took the position of Branch Relations Director/Chaplain on April 17, 1995. With the expectancy of making the transition to Administrator complete on January 1, 1996. That's one of the reasons that it seems almost comical that certain other staff, that are no longer with us, felt threatened that I was after their jobs.

After some of the happenings of the last four months, we felt it best to step up the transition a couple of months. Since that time we have implemented many changes to avoid some of the situations that are in question in your complaint. We have taken these steps to make FLS a viable community servant well into the next century. They can be documented by either minutes of the board or sworn affidavits from it's members. Some of these changes, in fact, would not have taken place without the new administration. I say this just to let you know that we do not consider that we work or volunteer for Darold Larson, Inc. but rather Family Life Services, Inc.

In conclusion and to finally state the purpose of this correspondence, I am asking if we might get together in a mutually cooperative fashion rather than an adversarial one. I do not believe that FLS can withstand many more hits of the nature of the last two weeks. Employee morale is low, appointments are canceling, and calls are coming in from clients, creditors and representatives. We have not been able to pay wages at a level that other, more established organizations might afford; the added payroll of custodian and receiver could be the death blow to FLS.

My question is simply could our relationship proceed in a regulatory fashion with you and any of your designees having access to all information and receiving full disclosure for any questions or concerns? Would not this be better and more cost effective for all concerned, FLS (including clients, creditors and representatives) and the State of North Dakota? I'm not asking for complete forgiveness at this time, or for the removal of the Temporary Restraining Order. We can operate under the court's order until such time as your office determines that it is no longer necessary for control sake.

My concern is the ability of FLS to survive the process before us simply from an economical as well as a psychological point of view. Through the regulatory process we would concede to certain violations of the North Dakota Century Code, primarily because we were unaware of them. Fines levied against us for such violations would be considered normal operating expenses, but we could continue to operate. This appeals to me because it is a win/win situation, both for your office, representing the consumer and for FLS and our relationship with the consumer.

On another note I thought I should communicate my inability to attend any meetings or hearings scheduled for this week because of a prior commitment.

I will eagerly await your response to my request. A positive reply would definitely allow me the opportunity to continue positively to sell the services of FLS in the market place. Thank you for your attention and your consideration in this matter.

Sincerely,

/s/

Dennis W. Uchtman
Administrator

cc. Peter Crary, FLS Attorney