

ORIGINAL

**IN THE
SUPREME COURT OF NORTH DAKOTA**

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**SUPREME COURT NO. 990215
DISTRICT COURT NO. CV-96-00088**

MAY 15 2000

STATE OF NORTH DAKOTA

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

**Plaintiff,
Appellee,**

vs.

**Family Life Services, Inc., dba 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 CHARLENE UCHTMAN

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ARGUMENT

In Charlene's initial brief, she set forth two arguments: (1) the district court's judgment against Charlene is void for lack of both personal and subject-matter jurisdiction because the State's action against her had previously been dismissed without prejudice and (2) the district court's jurisdiction over FLS did not give it jurisdiction over Charlene, as an FLS corporate director, for the purposes of finding that she breached fiduciary duties owed to FLS and removing her from the FLS board on that basis.

The State does not contest the fact that the district court lacked personal jurisdiction over her. Instead, the State argues that the exercise of personal jurisdiction over Charlene was not a prerequisite to the district court rendering judgment against her because personal jurisdiction over FLS was sufficient to give the district court jurisdiction over Charlene.

The State, without providing any legal authority, proposes several "theories" for its argument that personal jurisdiction over Charlene was not required: (1) the principles of corporate law, cited by Charlene in her brief, involved business corporations, and are not applicable to this case involving a nonprofit corporation and its directors; (2) Charlene was not subject to "personal liability"; (3) Charlene did not have a proprietary interest in her position as a director of FLS; and (4) action was taken against Charlene only in her "representative capacity." These "theories" are without merit.

As an initial matter, the State cites no case law or other legal authority to support its position that personal jurisdiction over FLS gave the district court jurisdiction over Charlene. This Court should decline to consider the

State's argument. Aaland v. Lake Region Grain Co-op, 511 N.W.2d 244, 247 (N.D. 1997) (a party's "failure to cite any supporting authority results in inadequate briefing of the issue" and this Court declined to consider the issue). See also Roise v. Kurtz, 1998 ND 228, ¶ 8, 587 N.W.2d 573.

The State's argument that general principles of corporate law do not apply to FLS and Charlene, as one of its directors, can be easily disposed of. This Court has traditionally applied general principles of corporate law to nonprofit corporations in dealing with both substantive issues and procedural issues. See, e.g., Strom-Sell v. Council for Concerned Citizens, Inc., 1999 ND 132, ¶¶ 2, 17-18, 597 N.W.2d 414 (liability of corporate director and employee for corporate debt); In the Matter of Sickles, 518 N.W.2d 673, 680-81 (N.D. 1994) (business judgment rule); City of Grand Forks v. Mik-Lan Recreation Assoc., Inc., 421 N.W.2d 806, 810 (N.D. 1988) (service of process on corporation); Fargo Women's Health Organization, Inc. v. Larson, 391 N.W.2d 627, 633 (N.D. 1986) (distinguishing between corporation's and director's liability for contempt); Ashbury Hosp. v. Cass County, 7 N.W.2d 438, 449-451 (N.D. 1943) (corporate organization and structure).

In addition, North Dakota's procedural rules regarding jurisdiction and service of process make no distinction between business corporations and nonprofit corporations. See N.D.R. Civ. P. 4(a) (1999) (defining a "person" subject to jurisdiction and service of process to include "a corporation"); N.D.R. Civ. P. 4(b)(2)(G) (allowing a court to exercise personal jurisdiction over a person "acting as a director, manager, trustee, or officer of a corporation organized under the laws of, or having its principal place of business within,

this state.”); N.D.R. Civ. P. 4(d)(2)(D) (prescribing the manner in which “[p]ersonal service of process within the state” may be made “upon a domestic or foreign corporation”) (emphasis added).

Moreover, the State’s own cited legal authority, Howard L. Oleck, Nonprofit Corporations, Organizations, and Associations (4th ed. 1982) [hereafter “Oleck on Nonprofits”], recognizes the application of general principles of corporate law to nonprofit corporations. Id. § 318, p. 932, 934 (“Whether the corporation is a profit or nonprofit corporation makes little difference, as far as procedure is concerned. * * * Most of the rules of practice that apply to nonprofit corporations are those that apply to all corporations.”). That same authority recognizes that “the general authority and status” of directors of nonprofit corporations “are similar to those of directors of other corporations, except that they are somewhat limited in their power to deal with the corporation’s property.” Id. § 213, p. 591. Therefore, contrary to the State’s argument, general principles of corporate law do apply to this case. Accordingly, based on the previously cited authorities, the district court’s jurisdiction over FLS did not give it personal jurisdiction over Charlene or subject-matter jurisdiction over the State’s claims against Charlene. Consequently, the district court’s judgment as to Charlene is void for lack of jurisdiction.

The State argues alternatively that personal jurisdiction over Charlene was not a prerequisite to its judgment because Charlene was not “personally liable for anything” under the judgment.

“Liability” under the law has a broad meaning. Black’s Law Dictionary

p. 473 (5th ed. 1983). It includes not only the payment of a money obligation but also “an obligation one is bound in law or justice to perform; . . . condition of being responsible for a possible or actual . . . burden; condition which creates a duty to perform an act immediately or in the future; the state of being bound or obliged in law or justice to do . . . ; the state of one who is bound in law and justice to do something which may be enforced by action.” Id. In exercising jurisdiction over Charlene, though improper, the district court clearly intended Charlene personally to obey its decision, and to be bound by it. It was Charlene personally who was found to have breached fiduciary duties of ordinary care and loyalty owed to FLS. In addition, it was Charlene personally who was removed from the FLS board. As a result, Charlene is now personally precluded from participating in the management of FLS, a right and privilege she held pursuant to state law and the FLS bylaws before being removed. See N.D.C.C. § 10-24-17 (1995) (“The affairs of a corporation shall be managed by a board of directors. * * * ”); J.A. 386, FLS Bylaws, Art. IV, § 1 (“The Board of Directors shall have General management and control of the property and affairs of the Corporation.”). Thus, Charlene *is* personally liable under the district court’s judgment.

The State further argues that personal jurisdiction over Charlene was not a prerequisite to the district court’s judgment because she did not have a “proprietary interest” in her position as a director of FLS.

Having a proprietary interest is not the touchstone in determining whether personal jurisdiction must be acquired over a party to render a valid and enforceable judgment against that party. Rather, the U.S. Supreme Court

has held that to challenge a judgment on personal jurisdiction grounds, a defendant need only be “affected by the court's judgment.” Hanson v. Denckla, 357 U.S. 235, 245 (1958). According to the U.S. Supreme Court, being “affected by” the judgment gives a defendant the “direct and substantial personal interest in the outcome” needed to challenge the exercise of a court’s jurisdiction. Id. See also Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) (noting that, in exercising personal jurisdiction over an individual, the court “could force the defendant to defend himself in the forum, upon pain of default, and could bind him to a judgment”).

In this case, there is no doubt that Charlene is a defendant affected by the district court’s judgment, or bound by it. As set forth in Charlene’s initial brief, the district court made numerous conclusions that Charlene breached fiduciary duties in her position as an FLS corporate director, and then removed her from the FLS board on that basis. The district court’s judgment determining Charlene’s status with regard to FLS “is equally conclusive as a decision on a right of property.” 50 C.J.S. Judgment § 825, p. 388 (1997). Because Charlene is affected by the judgment, and bound thereby, she has that “direct and substantial personal interest in the outcome” necessary to warrant that personal jurisdiction over her be established.

In addition, the issue of personal jurisdiction stems from the Due Process Clause found in the 14th Amendment to the U.S. constitution. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 & n. 10 (1982). That clause says that no State “shall . . . deprive any person of life, liberty, or property, without due process of the law” U.S.

Const., amend. XIV. Thus, not only are “proprietary interests” protected by the due process requirement of personal jurisdiction, but also liberty interests and life. In that regard, the U.S. Supreme Court has held that the exercise of personal jurisdiction is itself a protection of a “personal liberty interest.” Phillips Petroleum, 472 U.S. at 807; Insurance Corp., 456 U.S. 694 at 702. According to the Court, a nonresident who is forced “to respond in damages or to comply with some other form of remedy imposed by the court” faces a “burden” which is “substantial” and requires the proper exercise of personal jurisdiction. Phillips Petroleum, 472 U.S. at 807 (emphasis added). In this case, Charlene was a nonresident director at the time she was served with process at her home in Birmingham, Alabama. (See Docket # 478, Aff., ¶¶ 22, 27, 29; Docket # 479, Aff., ¶ 6 & Exhibit C, p. 3). As a nonresident director, Charlene has a personal liberty interest in not being burdened by being forced to comply with the district court’s judgment without the requisite personal jurisdiction.

Furthermore, Charlene had a legally recognized interest in her position as a corporate director under state law and the FLS bylaws. Under North Dakota law, “each director shall hold office for the term for which that director is elected or appointed and until a successor shall have been elected or appointed and qualified.” N.D.C.C. § 10-24-18 (1995). By necessary implication, a director holds his or her position until a successor is lawfully elected or appointed and qualified. General principles of corporate law dictate that a corporate director retains her or his position as director until lawfully removed, and only upon proper notice to the director and opportunity to be

heard, unless a statute, the articles of incorporation, or the bylaws provide otherwise. Oleck on Nonprofits § 222a, p. 605; 2 Fletcher Cyclopedia of the Law of Private Corporations § 360, p. 209 (1998); 19 C.J.S. Corporations § 454, p. 53 (1990); 18B Am.Jur.2d Corporations § 1438, p. 327 (1985).

Several courts have addressed cases involving allegations of a breach of fiduciary duty or a violation of the law by corporate directors. Those courts have recognized that, before deciding the merits of a claim that a corporate director breach his or her duty or violated the law, the court must first decide whether it has personal jurisdiction over the director. See, e.g., International Mariculture Resources v. Grant, 520 S.E.2d 160 (S.C. App. 1999) (dismissing claims against nonresident directors of "S" corporation for breach of fiduciary duty, fraud, and civil conspiracy for lack of personal jurisdiction over directors); Schlatter v. M-Comm Futures, Ltd., 662 P.2d 553 (Kan. 1983) (no personal jurisdiction over nonresident corporate directors in suit alleging violation of state securities law). See also Mandaly Associates v. Hoffman, 491 N.E.2d 39 (Ill. App. 1986) (personal jurisdiction established); State v. Continental Forms, Inc., 356 N.W.2d 442 (Minn. App. 1984) (the same).

Even in cases, similar to the present case, involving charges of a breach of duty or mismanagement by directors of *nonprofit* corporations and seeking removal of the directors, the fact that the corporate directors sought to be removed were parties to the case separate from the corporation is inherent in the decision. See, e.g., State of Tennessee v. Sundquist, 884 S.W.2d 438, 440 (Tenn. 1994) (action by attorney general, corporation as involuntary plaintiff, and others, against corporate directors); Lynch v. John M. Redfield Foundation,

9 Cal.App.3d 293, 88 Cal.Rptr. 86, 87 (1970) (action by attorney general, pursuant to nonprofit corporation statutes, against nonprofit corporation and its three directors); State v. Clevenger, 364 P.2d 128, 129 (N.M. 1961) (action by attorney general and others against corporation and its directors). See also Smaha v. Landy, 638 A.2d 392 (Pa. Commw. 1994) (action by directors against directors); Lyzanchuk v. Yakima Ranches Owners Assoc., 866 P.2d 695, 697-98 (Wash. App. 1994) (action by shareholders of nonprofit corporation against directors).

It is also generally accepted that corporate directors may not be removed without complying with the corporation's own internal policies, including its articles of incorporation and bylaws. 19 C.J.S. Corporations §§ 454-55, p. 53-54. In this case, the original and amended bylaws for FLS both required a director's removal be for "reasonable cause" and upon "notice" to the director. (J.A. 386, 470).

Based on the foregoing, it must be concluded that Charlene had a right or claim to her position as and FLS director, and that that right could not be taken from her without complying with the due process requirements of personal jurisdiction.

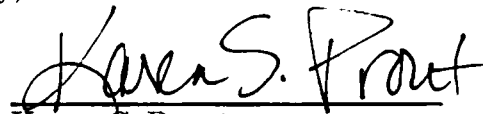
The State further argues that personal jurisdiction over Charlene was not a prerequisite to the district court's judgment because, according to the State, action was taken against Charlene only in her "representative capacity." However, the determination that Charlene breached her fiduciary duties and her removal from her position as a director for FLS are actions against Charlene, not the corporation. Cf. N.D.C.C. § 10-26-10 (1995)

(emphasis added) (in an action brought against a corporation to liquidate the assets and affairs of a corporation, “[i]t shall not be necessary to make directors . . . parties to any such action or proceedings unless relief is sought against them personally.”); John v. John, 450 N.W.2d 795 802-03 (Wis. App. 1989) (a suit brought by two corporate directors in their “capacities as representatives” of the corporation to remove a third director “was not brought by [the corporation], and therefore, does not constitute a corporate act.”); Oleck on Nonprofits § 318, p. 934 (“The organization, and not an individual member, ordinarily must be the party to enforce corporate rights.”). Furthermore, in her “representative” capacity as an FLS director, Charlene is bound to obey any injunction or other remedy levied against the corporation. She is not liable, however, in that capacity individually to be removed from office, which is a remedy directed at her personally, not at the behavior of FLS.

CONCLUSION

For the foregoing reasons, the Appellant Charlene Uchtman respectfully requests that this Court grant the relief was requested in her initial brief.

Dated this 15th day of May, 2000.



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**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

State of North Dakota, ex rel.)	
Heidi Heitkamp,)	
Attorney General,)	Dist. Court No. CV-96-00088
)	
Plaintiff-Appellee,)	Supreme Court No. 990215
)	
vs.)	
)	
Family Life Services, Inc., dba Family Life)	
Credit Services, et al.,)	
)	
Defendants-Appellants.)	

ATTORNEY'S CERTIFICATE OF SERVICE BY MAIL

Karen S. Prout, being duly sworn, on oath, deposes and says: She is of legal age, a citizen of the United States and is not a party to, nor has she an interest in the above-entitled action;

On the 15th day of May, 2000, she deposited in the United States mails in the City of Wahpeton, North Dakota, a true and correct copy of the following document filed in the above-entitled action:

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