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IN THE
SUPREME COURT OF NORTH DAKOTA

Supreme Court No. 990220
Cass County Civil No. 96-88

990220

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

Plaintiff-Appellee,

-vs-

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

Defendants-Appellants.

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

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

REPLY BRIEF OF APPELLANT PATRICIA LARSON

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I. The State's brief falsified the factual record and ignored the arguments I raised in my brief.

A. Falsification of the record

In its brief the State speaks indistinguishably of the board of directors of FLS, claiming that all are responsible for what it calls "a widespread pattern of systematic and substantial financial misconduct by Darold Larson[.]" St.Brief at 2. The State refers at the beginning of its brief to "the complicit facilitation of that misconduct by his handpicked directors," *id.*, and at the end repeats the same theme: "[E]ach of the deposed directors of FLS was complicit in the misconduct that precipitated this action." *Id.* at 51. The State monotonously assumes as fact throughout its brief the collective culpability of all FLS directors. *See, e.g.*, St.Brief at 23 ("disloyalty of the HCM and FLS directors, whose first and only interest was to serve Darold Larson"); *id.* ("their corrupt administration"); *id.* at 24 ("the tainted board"); *id.* ("the corrupt board of directors"); *id.* at 35 ("defendants' misconduct"; "a corrupt board"; "the corrupt board").

I was elected to the Family Life Services ("FLS") board of directors on September 13, 1998, I J.A. 469, ¶ 29, and was removed from the board along with the other directors in the Judgment dated May 7, 1999. I J.A. 521, ¶ 2. Since this case was tried on the basis of an amended complaint dated August 1, 1996, I J.A. 125-141, I plainly could not in my position as an FLS director have been "complicit in the misconduct that

precipitated this action." Although originally a defendant in this case, I was dismissed with prejudice at the close of the State's case. I J.A. 359-361; II J.A. 342-346.

> MRS. LARSON: . . . it's been difficult to know how to defend myself because I haven't known what the charges have been against me.
>
> THE COURT: Okay. Well, Mrs. Larson, I think I'm going to grant your motion. You're dismissed from the action.

II J.A. 346, lines 17-22. Once the court dismissed me from the case, it lost personal jurisdiction over me. *Albrecht v. Metro Area Ambulance*, 1998 ND 132, ¶ 15, 580 N.W.2d 583.

B. Failure to address brief

These obvious jurisdictional facts, clear in the record and in my opening brief, were ignored by the State in its brief, except for a page and a half at the end where it argued incorrectly that nonprofit directors, in contrast to for-profit directors, have no personal interest in their positions, and therefore can be removed from office without being parties to the case. A for-profit director, however, has no personal interest in his position either. 2 Fletcher, Cyclopedia of Corporations § 358 ("Directors have no personal interest in their office"). Both for-profit and nonprofit directors possess a common fiduciary duty towards the corporations on whose boards they sit. Therefore, the authority cited in my opening brief that jurisdiction over a corporation does not equate to jurisdiction over a director stands unrebutted. Brief of Patricia Larson at 21, incorporating Brief of Charlene Uchtman, pp. 13-19, and Brief of Lyn Sahr, pp. 13-14.

Because the State, despite receiving a 50% increase in the word limit, did not address my brief exceptly irrelevantly in passing, I believe the arguments in my opening brief should be briefly noted — with supplementation in support, where appropriate, from the Oleck treatise cited by the State.

II. Jurisdiction over a corporation does not equate to jurisdiction over a director of that corporation

Jurisdiction over FLS as a corporation does not as a matter of law carry with it jurisdiction over its officers and directors. *Carlson v. Frederikson & Byron*, 475 N.W.2d 882, 890-91 (Minn.App. 1991). A corporate officer is not a party to a suit naming only the corporation, *Weinberg v. G.S.W. Realty Corp.*, 455 N.Y.S.2d 978 (N.Y. 1982), nor is an officer a party when named in the suit along with the corporation, but not served individually with process. *West Stuart Acreage, Inc. v. Hannett*, 427 So.2d 323 (Fla.App.Dist.4 1983). When a federal district judge read a lecture to corporate officers who were present in court for an action against the corporation, the appellate court expunged the lecture from the record, recognizing that the officers were not parties to the case. *Gardiner v. A.H. Robins Company, Inc.*, 747 F.2d 1180 (8th Cir. 1984).

Likewise, the mere existence of an attorney-client relationship between a FLS and attorney Peter Crary does not itself create an attorney-client relationship between Mr. Crary and myself as a corporate director. Indeed, the presumption runs the other way. "Ordinarily, an

attorney representing a corporation or other organization has no conflict of interest in representing the corporation *against* an officer or employee on a corporate matter. The attorney's allegiance is to the organization." *Humphrey v. McLaren*, 402 N.W.2d 535 (Minn. 1987) (en banc) (emphasis added). If dual representation of the organization and its directors were automatic, the North Dakota Rules of Professional Conduct would not have a provision permitting joint representation of both an organization and one of its constituents only if Rule 1.7 relating to conflicts of interest is satisfied. Rule 1.13(c) N.D.R.Prof.Conduct. The Comment to Rule 1.13 states that even though a constituent's communication to the organization's attorney is protected by Rule 1.6 (confidentiality), "[t]his does not mean, however, that constituents of an organizational client are the clients of the lawyer." The Comment states further that "a lawyer for an organization *may* also represent a principal officer . . ." (emphasis added). The use of the generic term "organization" in the rule obviously includes both for-profit and nonprofit organizations.

The "mere representation of the corporation," therefore, does not translate into imputed representation of its directors. *Lee v. Mitchell*, 953 P.2d 414, 425 (Or.App. 1998). *See also Security Bank v. Klicker*, 418 N.W.2d 27 (Wis.App. 1987) (attorney representing a general partnership does not as a matter of law represent each of the individual general partners). In fact, I represented myself pro se in this case from April 30, 1996 forward. Prior to that time I was represented, not by FLS counsel,

Peter Crary, but by Mr. Richard Varriano. Opening Brief at 3. I cross-examined the State's witnesses, *id.* at 3-14, and then presented and argued my own motion for dismissal. *Id.* at 14-16. After the court granted my motion to dismiss, it stated: "We've lost a defendant." T18:4013. Accordingly, the trial court's judgment removing me from the FLS board is void for lack of personal jurisdiction. "Any judgment entered without the requisite jurisdiction over the parties is void." *State of North Dakota v. Red Arrow Towbar Sales Co.*, 298 N.W.2d 514, 516 (N.D. 1980).

III. Associational interest of nonprofit director

Oleck quotes extensively from the "celebrated" case of *Berrien v. Pollitzer*, 165 F.2d 21 (D.C.Cir. 1947). In that case the court recognized that members of nonprofit corporations have a legal interest in their positions and associational affiliation wholly distinct from any property interest. The members of FLS are its directors. T26:5642.

> A plaintiff expelled from a corporation or association not organized for profit need not show that he has even a nominal property interest to protect. Fifty years ago, this court recognized that if a member of an unincorporated club were expelled without a "regularly conducted" trial, on due notice, by "constituted corporate authorities," and a "judgment arrived at . . . in good faith," specific relief could be granted.

Id., quoted in H. Oleck, *Nonprofit Corporations, Organizations, and Associations* § 267 (4th ed. 1982). Membership in a nonprofit organization, being a personal right or interest, as distinguished from a pecuniary interest, may not be arbitrarily dissolved. "The members'

relation to the association is the true subject matter of protection." *Id.* "That a member of an incorporated club may not be expelled except in conformity with its rules is well established, and one wrongfully expelled may seek relief in equity. *Angland v. Doe,* 263 F.2d 266, 267 (D.C.Cir. 1958). Since membership in a nonprofit organization is a protected associational right, a court may not remove a member from the FLS board of directors without affording due process rights to defend against such removal. Such rights obviously include the opportunity to be heard to defend the member's own associational right wholly apart from any interest of the corporation, and is not subsumed therein. Indeed, current North Dakota law contemplates situations in which the corporation itself may seek legal relief against its own members. NDCC 10-33-37. In such a situation, the corporation obviously does not represent the interest of the member it seeks to expel or remove.

An infliction of punishment without any evidence of guilt is wholly arbitrary and capricious and thus, at a minimum, an abuse of equitable discretion. The due process clause of the North Dakota Constitution "secures the individual from arbitrary exercise of the powers of government." *State of North Dakota v. Cromwell,* 9 N.W.2d 914, 919 (N.D. 1943). Article I of the North Dakota Constitution, the Declaration of Rights, protects generically "the opportunity to do those things which are ordinarily done by free men." *Id.* at 918. Surely serving on the board of a

nonprofit religious corporation would thus be protected from arbitrary government action.

IV. Even with jurisdiction, a court may not remove a corporate director from office without proof of wrongdoing.

Even on the Attorney General's theory that jurisdiction over the corporation gave the court without more jurisdiction over the directors, a finding of wrongdoing is still necessary to remove a board member. There is no finding that I engaged in any wrongdoing as a director of FLS. "Of course, a director is not responsible for acts of other directors committed before he took office." Oleck, *Nonprofit Corporations* § 224. Where such statutory authority to remove directors in a judicial proceeding does exist, a serious finding of personal wrongdoing by the director is required. Opening Brief § 5(B) at 23-24.

V. Lack of due process

To try a case against a person and enter judgment against her after dismissal from the case violates due process for lack of notice that the party still has to defend in the case. Due process requires that a director be provided with notice and an opportunity to defend against any allegations.

> An accused director must always be given an opportunity to defend himself.
> . . .
> Notice of the charges, and a reasonable opportunity to prepare and to speak and cross-examine in his own defense, always must be given.

Oleck, *Nonprofit Corporations,* § 222a. See Opening Brief § 4 at 21-22.

VI. Lack of Statutory Authority

Although the State seems to assume that the North Dakota nonprofit statute under which this action was brought permits judicial removal of nonprofit directors, there is no such provision in the statute. NDCC chs. 10-24 - 10-28. The current nonprofit corporation law of the State of Washington is the same as that under which this case was tried, both being derived from the ABA Model Nonprofit Corporation Act, circa 1960. Washington courts do not read into their statute an unwritten power for judicial removal of directors. "Absent statutory authority, we decline the invitation to extend the equitable jurisdiction of courts to include removal of nonprofit corporation officers and directors." *Lyzanchuk v. Yakima Ranch Owners Assoc.*, 866 P.2d 695 (Wash. 1994). See Opening Brief § V(A) at 22-23.

VII. A court, even with statutory authority, may not remove a director in a "representative capacity" action, namely when the director is not individually a party to the case.

The State claims that the directors were in the case "only in their representative capacity." Pl.Brief at 60. Such a claim means that they were not in the case at all. An official-capacity action is simply an action against the entity itself, nominally naming an agent of the principal. For an application of this principle, *see, Monell v. Department of Social Services*, 436 U.S. 658, 690 n.55 (1978) (official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent"). In their "representative" capacities the

FLS directors are bound to obey any injunction or other remedy levied against the corporation. They are not liable, however, in that capacity individually to be removed from office, which is a remedy directed at them personally, not at the behavior of the corporation.

VIII. Statement of Incorporation of Argument

Appellant Patricia Larson in addition to the arguments incorporated in her opening brief, § VI at 26, also incorporates herein the arguments in the reply brief of appellant Charlene Uchtman (Supreme Court No. 990215) on the capacity of a court to remove a director from office without personal jurisdiction over that director, and the further arguments in the other reply briefs on religious freedom questions and state law authority to remove corporate directors from office.

IX. Conclusion

For the above-stated reasons, I, Patricia Larson, request the court to grant the relief sought in my opening brief.

1. Vacate the judgment of the district court insofar as it adjudicates any claims or issues against me, except for entry of the judgment of dismissal dated July 20, 1998. I J.A. 360.

2. Vacate the district court's judgment directing that I be removed from my position as a director of Family Life Services, Inc.

3. Reinstate me to my position on the FLS board under the FLS bylaws as amended in July, 1996. I J.A. 384-388.

Respectfully submitted this 15 day of May, 2000.

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