

IN THE SUPREME COURT OF NORTH DAKOTA

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|---|---|-------------------------------------|
| In the Matter of the Estate |) | |
| of Donald G. Amundson, Deceased |) | |
| and |) | |
| In the Matter of Donald |) | Supreme Court File No. |
| G. Amundson Trust |) | 20150046 |
| ----- |) | |
| Gladys Gleason, Petitioner and Appellee |) | Grand Forks County Case Nos. |
| vs. |) | 18-2011-PR-00144 |
| |) | |
| Debra Amundson Magers, Personal |) | APPELLANT BRIEF |
| Representative; Andrea Rebman; Colin |) | |
| Leibold; Glen Rebman; Brent Amundson; |) | |
| Jacob Leibold; Carolyn Rebman; Eric |) | |
| Rebman; Charlene Leibold; Scott |) | |
| Amundson Respondents and Appellees |) | |
| and John E. Widdel, Jr. |) | |
| Interested Party and Appellant |) | |

**APPEAL FROM AN ORDER AND JUDGMENT AWARDING
RETURN OF ATTORNEY’S FEES IN A PROBATE ACTION
FROM GRAND FORKS COUNTY DISTRICT COURT,
NORTHEAST JUDICIAL DISTRICT, NORTH DAKOTA. THE
HONORABLE JUDGE DONOVAN FOUGHTY, PRESIDING.**

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QUESTIONS PRESENTED

- I. Whether the court properly ruled in favor of the probate estate in awarding the return of attorney fees.
- II. Whether the District court properly denied an independent hearing as to the issue of attorney fees and whether Law Offices PC’s liability properly extends to Mr. Widdel personally.

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JURISDICTION

[¶ 1] The Defendant, John E. Widdel, Jr. and Law Offices P.C., timely filed for appeal of a civil judgment and order arising out of the Grand Forks County District Court. (App. Appx. p. 73). North Dakota Supreme Court has jurisdiction over the appeal of this matter under N.D.C.C. § 28-27-01 and 28-27-02 as this matter involves a district court order denying post-judgment relief and request for an independent hearing under N.D. R. Civ. P. 60.

STATEMENT OF THE ISSUES

[¶ 2] I. Whether the district court abused its discretion in determining attorney fees were unreasonable and that almost entire amount of the attorney fees were deemed unreasonable.

[¶ 3] II. Whether the district court abused its discretion in denying an evidentiary hearing and ruling that Law Offices PC was liable and that its liability was joint and several against the Attorney Widdel personally.

STATEMENT OF CASE

I. NATURE OF THE CASE

[¶ 4] This is an appeal of an award of the return of unreasonable attorney fees collateral to a probate case from a Northeast Central Judicial District, Grand Forks County.

II. PROCEDURAL HISTORY

[¶ 5] This case was before the Court in In the Estate of Donald Amundson, 18-2011-PR-00144, after an application for informal probate of a will and appointment of personal representative was filed September 27, 2011.

[¶ 6] Originally the appointment consisted of co-personal representatives, those being Gladys Gleason and Debra Magers. (App. Appx. p. 25, ¶6). The last will and testament of Donald Amundson directed that the estate be distributed into the Donald Amundson trust whereupon it was to be distributed partly to four charities and to 10 nieces and nephews of both the Rebman, Leibold and Floyd Amundson families, collectively acquiring approximately 70% of the share of the estate. Id.

[¶ 7] Debra Magers and Gladys Gleason contracted with Law Offices PC for legal representation and services in relation to the administration of the estate. Id. at ¶ 7 Gladys Gleason resigned as personal representative on March 7, 2012 and Debra Magers retained sole personal representative duties after petitioning the court in June of 2012. Debra Magers was also the trustee of the Kenneth Amundson Trust (“KA” trust) and Attorney Widdel the counsel for her capacity in that matter. The administration of that trust was entirely separate from the services rendered Donald Amundson Estate with separate beneficiaries and disbursements.

[¶ 8] In August of 2013 a petition for reasonableness of attorney fees, personal representative (“PR”) fees and for settlement and distribution of the estate was filed by the Rebman and Leibold families and essentially alleged that the fees that both the PR and the PR’s Attorney, the Appellant John E. Widdel Jr., were excessive. (App. Appx. p. 16) An evidentiary hearing was scheduled to determine the merits of the claim initially presided over by the Honorable Judge Karen Braaten and later decided by the Honorable Judge Donovan Foughty. The evidentiary hearings regarding the petition were first held in November of 2013 (Judge Braaten) with later hearings and evidence presented in February (Judge Braaten) and July of 2014 (Judge Foughty).

III. DISPOSITION BELOW

[¶ 9] A determination on the petition was made in September of 2014 decided by the Honorable Judge Foughty. (App. Appx p. 24) The judgment essentially held that attorney fees charged in the matter were unreasonable under the state's probate code and an award of approximately \$95,000 was entered on behalf of the petitioners against Attorney Widdel. (App. Appx. p. 42). The Appellant later moved the court to amend the judgment arguing that the attorney fee award not extend to Jack E. Widdel in his personal capacity but be limited to Law Offices PC as a corporate liability essentially because there had been no evidentiary showing that the award should attach personally to Mr. Widdel through the PC. (Docket Id. #262).

STATEMENT OF FACTS

[¶ 10] Regarding the petition and the issue on appeal, Debra Magers hired John E. Widdel, Jr. as attorney and representative for the purpose of the administration of the estate. Fees were charges to the estate for the PR and collected by Attorney Widdel for services rendered. A claim by Charlene Leibold and other family members essentially argued that the fees sought and collected by both the PR and Mr. Widdel were excessive and that the PR had breached her fiduciary duty as to the estate administration.

LAW AND ARGUMENT

- I. The District Court abused its discretion when it determined that the amount of attorney fess collected in the matter were unreasonable.**

Standard of Review

[¶ 11] As a fiduciary acting on behalf of persons interested in an estate, a personal representative may use estate funds to pay reasonable compensation to persons employed to advise or assist him in the administration of an estate. See §§ 30.1-18-03(1) [UPC § 3-703(a)], 30.1-18-11 [UPC § 3-711], 30.1-18-15(21) [UPC § 3-715(21)], and 30.1-18-20 [UPC § 3-720], N.D.C.C. The reasonableness of the compensation of any person employed by a personal representative may be reviewed by the court. Section 30.1-18-21 [UPC § 3-721], N.D.C.C. We have recognized a number of factors to be considered in determining the reasonableness of attorney fees. See, e.g., First Trust Co. of North Dakota v. Conway, 345 N.W.2d 838 (N.D. 1984); Matter of Estates of Kjørvestad, 287 N.W.2d 465 (N.D. 1980); Conway v. Parker, 250 N.W.2d 266 (N.D. 1977); Hughes v. North Dakota Crime Victims Reparations Bd., 246 N.W.2d 774 (N.D. 1976). Implicit in those decisions is a requirement that the attorney have rendered some necessary or beneficial legal services and that there be some evidence that such services were rendered and that the compensation therefore is reasonable.

We will not overturn a decision on reasonable attorney fees "absent a clear abuse of discretion." Matter of Estates of Kjørvestad, supra, 287 N.W.2d at 470. An abuse of discretion, which is "'an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court' . . . never is assumed and must be affirmatively established." Nygaard v. Robinson, 341 N.W.2d 349, 360 (N.D. 1983).

In re the Estate of Vertin, 381 N.W.2d ND 199, 200 (N.D. 1986).

[¶ 12] Additionally,

A trial court's decisions regarding management of a protected person's estate will not be reversed on appeal unless there has been an abuse of discretion. Matter of Guardianship of Renz, 507 N.W.2d 76, 78 (N.D. 1993); Matter of Conservatorship of Kinney, 495 N.W.2d 69, 71 (N.D. 1993). A trial court abuses its discretion when its decision is not "'the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.'" Matter of Conservatorship of Kinney [quoting Matter of Altshuler, 171 Wis.2d 1, 490 N.W.2d 1, 3 (1992)].

Oliver v. Braaten (In re Sickles), 518 N.W.2d 673, 678 (N.D. 1994).

[¶ 13] In Hughes v. North Dakota Crime Reparations Board, 246 N.W.2d 774 (N.D.1976), this court listed several factors to be considered in determining the reasonableness of an attorney's fees. In Hughes, supra 246 N.W.2d at 777, we adopted the following guidelines for cases involving

court-awarded attorney fees:

"Because we believe them to be more readily applicable, we adopt the following guidelines from Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974): (1) time and labor required (distinguishing between legal work in the strict sense, and investigation, clerical work, and compilation of facts and statistics); (2) the novelty and difficulty of the questions (he should not be penalized for accepting a challenge which may result in making new law); (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the result obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases."

Although the instant case is distinguishable in that it does not involve court-awarded attorney fees, we believe that the same factors should apply here in addition to the factors set forth in Disciplinary Rule (DR) 2-106 and in Ethical Consideration (EC) 2-18 of the North Dakota Code of Professional Responsibility.

We have held on previous occasions that "the trial court is [an] expert on [the] value of legal services and may consider its own knowledge and experience in making an appraisal of the reasonable value of legal services rendered". Schollmeyer v. Saxowsky, 211 N.W.2d 377, 388 (N.D.1973); Municipal Airport Auth. of City of Fargo v. Stockman, 198 N.W.2d 212, 215 (N.D.1972); Morton County Board of Park Commissioners v. Wetsch, 142 N.W.2d 751 (N.D.1966). When a trial court finds that an attorney's fees are reasonable, after a consideration of the various factors listed above, we will not overturn that decision absent a clear abuse of discretion.

In re Estates of Kjorvestad, 287 N.W.2d 465, at 470 (N.D. 1980).

[¶ 14] The trial court based its decision regarding the excessive attorney fees upon N.D.C.C. § 30.1-18-21 (App. Appx. p. 36). Essentially the court held that N.D.C.C. § 30.1-18-21 gave rise to the remedy of the return of excessive fees under the Uniform Probate Code and based upon the evidence present at the trial court, made the determination that \$95,000 in fees must be returned by Attorney Widdel. *Id.* In addition,

in regards to the post-judgment motion to sever Attorney Widdel’s personal liability, the court relied upon N.D.C.C. § 10-31-09(2) to hold that liability for the return of the attorney fees by Attorney Widdel is joint and several against Law Offices P.C.

[¶ 15] N.D.C.C. § 30.1-18-21, reads,

After notice to all interested persons, or on petition of an interested person, or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative, including any attorney, auditor, investment adviser, or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for that person's own services, including services rendered as attorney, may be reviewed by the court. If the amount of attorney's fees is based upon the value of the decedent's estate, the fee agreement must be in writing and mailed to all parties who are heirs of the estate pursuant to the last will and testament of the decedent. If the decedent died intestate, notice must be provided to all heirs of the estate in accordance with chapter 30.1-03. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

[¶ 16] This statute generally gives authority for a court to review the reasonableness of the compensation and whether a person, “has received excessive compensation from an estate for services rendered.”

[¶ 17] The District Court made the following factual findings: First that Debra Magers and Attorney Widdel were each paid over \$22,203.93 for the administration of the Kenneth Amundson Trust. (App. Appx. p. 29). The administration of that estate dealt with separate beneficiaries and separate trust established. In addition this amount was also sought to be collected from the Donald Amundson Trust administration, that Magers and Attorney Widdel had entered into a contract for the administration of the estate for 3% of the total gross estate or \$200-250 per hour and finally that Attorney Widdel had been paid roughly \$103,000 out of the Donald Amundson Trust. (App. Appx. p. 23 &).

[¶ 18] The court then relied on Attorney Nick Vogel’s testimony suggesting that 3% of the total gross estate was inappropriate and should have been at most 1-1.5% of the estate. The Court found the estate valued at 2.1 million, resulting between \$20,000 and \$30,000, using the 1-1.5% figure. Attorney Nick Vogel suggested a total figure of \$50,000 for all attorney fees would “not be out of line.” (App. Appx. 30, ¶ 36).

[¶ 19] The problem with the Court’s legal conclusion in regards to its factual findings is that the calculation for the amount of attorney fees is erroneous in its calculation or is not based up a proper application of law to the evidence presented. The legal conclusion fails to take into consideration that Attorney Widdel presented evidence of hourly expense reports. These reports appear to be completely ignored by the court as they are mentioned nowhere in the findings of fact. It is not the case that Attorney Widdel’s hourly statement evidence was disbelieved or discounted by the Court. Rather the Court simply relied upon the statements made by the witnesses suggesting what a typical probate case should or would have cost. The court further disregarded the schedule of retainer payments showing initially relatively small retainers that increased as the litigation intensified. (App. Appx. p. 70). The retainer payments indicate that the percentage-based analysis is improper because the retainers were broken up and the court even found that she had made the payments without question. (App. Appx. p. 35, ¶ 52 of court findings of fact).

[¶ 20] The court determined that Attorney Widdel was required to return \$95,000 of attorney fees. However the Court does not explain how the determination was made. The Court found that Attorney Widdel had received \$103,000 in fees (App. Appx. 29-30, ¶ 35.) But the Court referenced three potentially “reasonable” fee amounts, those being;

1% of the estate at \$20,000 and 1.5% of the estate at \$30,000 and finally that a total figure, as suggested by Attorney Vogel, at \$50,000. (App. Appx. 30, ¶ 36.)

[¶ 21] The Court however is silent on which of the three potential reasonable fee amounts were appropriate as to Attorney Widdel fees. The Court did make a conclusion that there were a reasonable amount of hours that Debra Magers had expended at \$50 an hour for a total of roughly \$13,500 but that the breach of her fiduciary duties exceeded this amount and thus she was ineligible for compensation although the Court did not ascertain the amount of damages created by the breach of duty. (App. Appx. 37, ¶ 56.)

[¶ 22] The Court then concluded that Attorney Widdel must turn over \$95,000 of “unreasonable” attorney fees. However under his calculation the court considered almost none of the attorney fees reasonable.

[¶ 23] It is unclear from the Court’s findings and application of the law how it came up with the \$95,000 figure. Further in doing so the Court appears to have opted to rely on the “percentage share” of the estate as a basis for reasonable attorney fees as the court ignored the evidence presented showing the amount of hours that Attorney Widdel had actually expended on the case and the court later used an hourly analysis to determine the reasonableness of the PR fees as to Debra Magers.

[¶ 24] While the court does allude to certain costs, i.e. tax preparation and “document charges” or administrative fees being unreasonable, there is otherwise no explanation of how the Court arrived at the \$95,000 figure. It appears as though the court merely adopted the petitioners proposed findings of fact, which are nearly identical to the court’s findings and are similarly defective in explaining the amount of the award.

[¶ 25] An Alternative position offered by Attorney Widdel is that the percentage based analysis is contrary to the evidence and testimony establishing a \$250 and later \$285 hourly fee amount. The Appellant emphasizes that the percentage based amount was merely an alternative to the hourly billing option. The record does not contain evidence nor testimony indicating that the party's opted to forgo the hourly rate and utilize the percentage based approach.

[¶ 26] \$95,000 taken from the \$103,000 in documented fees leaves only \$8,000 of "reasonable" fees left over. Evidence was presented to the court showing an hourly expenditure of approximately 270 hours. (App. Appx. p. 70). Using even the lowest hourly rate in the contract of \$250/hr against the \$8,000 left over leaves only 32 hours of "reasonable" time spent on the case. However the court failed to address the remaining 238 hours as to whether there were actually spent or that the time he did spend on the case (238 hours) was of such little value that it provided absolutely no benefit towards the administration of the estate. The court would have had to explain in detail why all the remaining hours were not properly charged and did not do so.

[¶ 27] While the above-analysis shows a defect in the calculation only using the estate percentage-based fees or \$50,000 flat-fee based approach, there is still a lack of explanation by the court regarding the hours that Attorney Widdel spent on the case. The court made no finding that the hours were not expended or that they were falsely represented.

[¶ 28] The court's reasoning is simply a mystery. It could appear as though the court is extending de facto liability for the personal representative's breach of fiduciary duty to Attorney Widdel via a finding of unreasonableness of fees. Yet the court did not

find the \$22,000 fee for the Kenneth Amundson Trust unreasonable and finds that *at least* 1% of the total estate would have been a reasonable fee. In the findings, Appellant appendix p. 31, ¶ 38, the court notes a reduction of the Donald Amundson fee by the amount Attorney Widdel had received in the Kenneth Amundson trust. This is an unusual finding as the court notes that \$22,000 was already received from the Kenneth Amundson estate. That total would be \$41,000 of “reasonable” fees. While Attorney Widdel does not concede that fees were unreasonable or that the percentage based analysis is correct, if Attorney Widdel then received \$103,000 and only \$41,000 was reasonable the Court would be limited under the N.D.C.C. § 30.1-27-18 in ordering, at most, \$62,000 to be returned. The statute contains no punitive remedy and no remedy authorizing the court to pass along personal representative breach of duty damages to the attorney who represented the PR during the administration of the estate. The court did not explain why the above calculation factored in reducing the Donald Amundson fee by the amount received from the Kenneth Amundson trust.

[¶ 29] The record shows that evidence about the hours spent on case were presented to the court. (App. Appx. p. 52 Exhibit #73) Testimony was given regarding these fee statements. (Hr’g Tran. July 1, 2014 p. 135) and the capacity for which they were charges. (Id. p. 147). The problem with the court not explaining why these amounts were ignored is that it leaves baseless the grounds for the court opting to utilize the “percentage-based” attorney fee analysis. It also muddles three separate claims; the statutory reasonableness of attorney fee claim (N.D.C.C. § 30.1-18-21) with a breach of fiduciary claim and an attorney malpractice claim, which neither were not the basis of the

petition. Inherent in the court's conclusion is inferential equitable remedies allotted for claims and cross claims not part of the probate statute asserted.

[¶ 30] A more reasoned approach to this case would have first been bringing an action for breach of fiduciary duty in order to determine the damage amount for the breach. Then the court should have looked at the hourly statement for attorney fees presented and either discounted them entirely or made a determination that the hours spent on the case yielded futile results. Or made a definitive finding that the hourly basis was not used and that the alternative "percentage-fee" was agreed to. Basically, did the PR breach her fiduciary duty and how much were the damages? Then, is there a viable cross claim against Law Offices P.C. for malpractice? Just because the PR breached a fiduciary duty does not necessarily prove that Law Offices PC committed malpractice. Because of the complex nature of the potential claims a more compartmentalized and order analysis is required. The court did not do that. The Appellant argues that in a situation in a case with facts such as these N.D.C.C. § 30.1-18-21 does authorize the court to equitably give remedy a parties' claim rather it is limited to simply calculating fees charged to the estate that are excessive. But in order to do so one would have to be able to assert that Attorney Widdel charged the estate more than the amount of hours he spent on the case. That was not however the finding of the court.

[¶ 31] Finally, and in relation to the second issue, the Court despite recognizing that the contract for legal services was between the PR and Law Offices PC, made the award against Attorney Widdel personally and not first against Law Offices, PC. Regarding this error the Court made no determination in the findings of fact that the

petitioner had properly pierced the corporate veil or that Attorney Widdel was acting outside the protection of the corporate entity.

II. The court abused its discretion in not allowing a hearing on the issue of severance of Attorney Widdel's personally liability from Law Office PC's.

Standard of Review

The function of this court in reviewing a trial court's denial of a motion to vacate or amend a judgment is not to determine whether or not the trial court was substantially correct in entering its judgment, but to decide whether or not the trial court abused its discretion in refusing to disturb its judgment. Small v. Burleigh County, 239 N.W.2d 823 (N.D. 1976); NDR CivP Rule 60(b).

State Bank v. Rauh, 288 N.W.2d 299, 310 (N.D. 1980).

[¶ 32] After the Judgment as to attorney fees in the case Attorney Widdel moved the court for a motion to amend the judgment essentially arguing that the award of the return of unreasonable attorney fees entered against Law Offices PC should not extend to him personally. As part of the motion a request was made to the court for an independent hearing on this issue as authorized by N.D. R. Civ. P .60 (d)(1). (Hr'g Trans. p. 5, ln. 10 December 3, 2014).

[¶ 33] The Court neither granted relief under the motion nor granted an independent hearing to allow Attorney Widdel to argue the issue of limiting the award liability to Law Offices PC. (App. Appx. p. 43).

[¶ 34] In the court's order disposing of the motion it held essentially that under the Professional Organizations Act, N.D.C.C. § 10-31-09(2) the corporate structure does not modify any law that is applicable to the relationship between a person furnishing professional services and thus Attorney Widdel is personally liable. Id.

[¶ 35] N.D.C.C. § 10-31-09 (2013) reads,

1. This chapter does not modify any law applicable to the relationship between a person furnishing professional service and a person receiving professional service, including liability arising out of the professional service, and including the confidential relationship between the person rendering the professional service and the person receiving the professional service, if any, and all confidential relationships previously enjoyed under the laws of this state or hereinafter enacted must remain inviolate.

2. Subject to subsection 1, nothing contained in this section renders an executive, owner, or employee of a professional organization personally liable in tort for any act in which that individual has not personally participated or in contract for any contract which that individual executes on behalf of a professional organization within the limits of that individual's authority.

3. Nothing in this chapter restricts or limits in any manner the authority and duty of the regulating boards for the licensing of an individual rendering professional services.

4. No professional organization may do any act that is prohibited to be done by any individual licensed to practice the profession which the professional organization is created to render.

[¶ 36] The court held that a corporate structure does not relieve the professional, a lawyer in this case, from being held personally liable. (App. Appx. p. 43). The court however, misapplies the law to the facts in this case and does not properly compartmentalize the legal analysis regarding this issue.

[¶ 37] While it is true that N.D.C.C. § 10-31-09, does not render an individual personally liable for a tort act in which they did not personally participate it does not address the first portion of the analysis required with an issue such as this. Namely, the pass through liability to individual s acting under the protection of a corporation or “piercing the corporate veil.”

[¶ 38] The officers and directors of a corporation generally are not liable for the ordinary debts of a corporation. Jablonsky v. Klemm, 377 N.W.2d 560, 563 (N.D. 1985); Hilzendager v. Skwarok, 335 N.W.2d 768, 774 (N.D. 1983). Organizing a corporation to avoid personal liability is a legitimate goal and is one of the primary advantages of doing business in the corporate form. Hanewald v. Bryan's Inc., 429 N.W.2d 414, 415 (N.D. 1988). In Jablonsky, at 563, however, this Court also said that when the

notion of a corporate entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law regards the corporation as an association of persons.

In Jablonsky, 377 N.W.2d at 563 (quoting Victoria Elevator Co. v. Meriden Grain Co., Inc., 283 N.W.2d 509, 512 (Minn. 1979)), we applied the following factors to determine whether to disregard a corporate entity and pierce the corporate veil:

insufficient capitalization for the purposes of the corporate undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of the debtor corporation at the time of the transaction in question, siphoning of funds by the dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and the existence of the corporation as merely a facade for individual dealings.

Proof of fraud is not a necessary prerequisite for disregarding the corporate entity, but an element of injustice, inequity, or fundamental unfairness must be present before a court may properly pierce the corporate veil and that element of unfairness may be established by the showing of a number of the requisite factors for piercing the corporate veil. Jablonsky, at 563-64.

The essence of the requirement for fairness is that an individual cannot hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell. Id. at 567 (quoting Labadie Coal Co. v. Black, 217 U.S. App. D.C. 239, 672 F.2d 92, 100 (D.C. Cir. 1982)).

This Court has also recognized that the attitude toward piercing the corporate veil is more flexible in tort than in contract, because the creditor has an element of choice inherent in a voluntary contractual relationship whereas the ordinary tort case forces the debtor-creditor relationship upon the creditor by the occurrence of an unexpected tort. Jablonsky, 377 N.W.2d at 565-66 n.1. In tort cases, particular significance is placed on whether a corporation is undercapitalized, which involves an added public policy consideration of whether individuals may transfer a risk of loss to the public in the name of a corporation that is marginally financed. Id. In Jablonsky, 377 N.W.2d at 566, this Court explained the obligation for adequate capitalization:

""[t]he obligation to provide adequate [risk] capital begins with incorporation and is a continuing obligation thereafter * * * during the corporation's operations."" [quoting Gillespie, The Thin Corporate Line: Loss of Limited Liability Protection, 45 N.D.L. Rev. 363, 387-388 (1968)]. In Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805, 810 (Iowa 1978), the court stated:

"If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient

assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors is an abuse of the separate entity and will be ineffectual to exempt the shareholders from corporate debts. It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities. If capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege."

The burden of establishing a basis for piercing the corporate veil rests on the party making the claim, and the resolution of the issue is "heavily fact-specific" and "peculiarly within the province of the trial court." Jablonsky, 377 N.W.2d at 565 (quoting United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 694 (5th Cir. 1985)). We review a district court's resolution of the corporate veil issue under the clearly erroneous standard of N.D.R.Civ.P. 52(a). Jablonsky, at 565. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, a reviewing court is left with a definite and firm conviction a mistake has been made. E.g., Mountrail Bethel Home v. Lovdahl, 2006 ND 180, P11, 720 N.W.2d 630. Merely because a reviewing court may have viewed the facts differently if it had been the initial trier of fact does not entitle the reviewing court to reverse the district court's findings of fact. Jablonsky, at 567.

Axtmann v. Chillemi, 2007 ND 179, ¶ 12-15. Further,

The burden of proving the requirements for piercing the corporate veil is on the party asserting the claim. Coughlin Constr. (v. Nu-Tec Indus.), 2008 ND 163, ¶ 21, 755 N.W.2d 867. "Resolving the issue is heavily fact-specific and, therefore, is within the sound discretion of the district court. The court's findings of fact are presumed to be correct, and will be reversed on appeal only if they are clearly erroneous." *Id.* (quoting Intercept Corp. v. Calima Fin., LLC, 2007 ND 180, ¶ 15, 741 N.W.2d 209) (emphasis added). A district court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law. Choice Fin. Grp. v. Schellpfeffer, 2006 ND 87, ¶ 9, 712 N.W.2d 855; (State es rel. Bd. Of Univ. & Sch. Lands v.) Alexander, 2006 ND 144, ¶ 7, 718 N.W.2d 2.

Watts v. Magic 2 x 52 Mgnt., Inc., 2012 ND 99, ¶13. (full case citations added).

[¶ 39] In the fourth paragraph of the court’s order disposing of the motion the court recognizes that between October 11, 2011 and March 12, 2014 the Corporation represented the personal representative, Debra Magers. (App. Appx. p. 43). The court found that the two retainer agreements signed by Debra Magers were with the Corporation. Id. And that Attorney Widdel provided legal services through the Corporation. Id. These agreements clearly indicate an hourly rate basis. The court makes no analysis regarding the piercing of the corporate veil rather it utilizes a statutory interpretation of the Professional Organizations Act to pass through liability to Attorney Widdel personally and without any hearing on the matter. It is noted that neither at the trial stage nor the post-judgment motion hearing stage did the court address the moving party as to their burden of proving the piercing of the corporate veil. Additionally when Attorney Widdel, as an interested party, was denied the ability to make further comments outside of the scope of examination. (Hr’g Tran. P. 148, ln 14). The Court should have allowed Attorney Widdel an opportunity to respond to the allegations and it did not. The Court refers to the problem in the post-judgment motion for a separate evidentiary hearing. “In one sense, I don’t think Mr. Widdel necessarily got a full-blown opportunity to argue why he’s entitled to the compensation that he was asking for. (Hr’g Trans. p. 6, ln. 19 December 10, 2014).

[¶ 40] The Appellant argues here that the court abused its discretion by ignoring the burden of proof requirement as to the petitioner “moving party” in piercing the corporate veil, denying the motion to present evidence to counter the court’s summary judgment as to the piercing issue and by not providing a record showing the court’s analysis as to how it made this determination.

[¶ 41] The Appellant argues that N.D.C.C. § 10-31-09(2) is not a vehicle for bypassing a “piercing” analysis but merely prohibits a professional corporation from obfuscating any other binding professional or legal obligations the law provides and refines the limits of liability to only those actions which an officer or employee was directly involved. Very simply N.D.C.C. § 10-31-09 bars a corporation from ignoring professional rules despite the protections afforded for corporate entities. It is not however, the controlling statute as to the issue of whether corporate liability in this case extends to Attorney Widdel personally.

[¶ 42] The Appellant argues that, if that is the case, the court abused its discretion by not taking into consideration the proper controlling statute or case law as to the issue of piercing the corporate veil and denying the opportunity to be heard on the issue.

CONCLUSION

[¶ 43] The Appellant requests a reversal of the judgment as to the award of attorney fees because the court did not make a finding that the hours presented were unreasonable or alternatively for the case to be remanded for an evidentiary proceeding on both the issue of the reasonableness of attorney fees based on an hourly basis and the issue of liability as to Attorney Widdel in his personal capacity.

/S/ Clint D. Morgenstern
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IN THE SUPREME COURT OF NORTH DAKOTA

In the Matter of the Estate)
of Donald G. Amundson, Deceased)
and)
In the Matter of Donald)
G. Amundson Trust)
-----)
Gladys Gleason, Petitioner and Appellee)
vs.)
Debra Amundson Magers, Personal)
Representative; Andrea Rebman; Colin)
Leibold; Glen Rebman; Brent Amundson;)
Jacob Leibold; Carolyn Rebman; Eric)
Rebman; Charlene Leibold; Scott)
Amundson Respondents and Appellees)
and John E. Widdel, Jr.)
Interested Party and Appellant)

Supreme Court File No.
20150046

Grand Forks County Case Nos.
18-2011-PR-00144

Affidavit of E-Service (e-mail)

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)


The undersigned, being of legal age, being first duly sworn deposes and says that on May 22, 2015, served electronically to all interested parties a true copy of the following document:

Appellant Brief (.doc)

Appellant Appendix (.pdf)

Electronically (e-mail) to:

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Clint D. Morgenstern

Subscribed and sworn to before me
this 22nd day of May, 2015.


Notary Public

