20160386
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 26, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Gary Kramlich and Glory Kramlich, Plaintiffs, Appellants and Cross-Appellees, -vs- Robert Hale and Susan Hale, individually, and Somerset Court Partnership, LP, Somerset-Minot, LLC, Vision Management Services, LLC, and Bullwinkle Builders, LLC, Defendants, Appellees and Cross-Appellants.	)	Supreme Court No. 20160386 District Court No. 51-2014-CV-00478

REPLY BRIEF OF APPELLANT-CROSS APPELLEES

Appeal from the District Court Order Dated November 8, 2016

In and for the County of Ward, State of North Dakota

North Central Judicial District

Honorable Douglas L Mattson, Judge of the District Court, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Treatises and publications:

Close Corporations, O'Neil, § 9.02 (2d ed. 1971)	¶4
Corporate Behavior and the Minority Shareholder: Contrasting Interpretations of Section 10-19.1-115 of the North Dakota Century Code, D. MacDonald, 62 N.D.L.Rev. at 164-165 (1986)	¶5, ¶6
Freezing Out Minority Shareholders, 74 Harv.L.Rev. 1630 (1961)	¶6
What Amounts to "Oppressive" Conduct under Statute Authorizing Dissolution of Corporation at Suit of Minority Stockholders, 56 A.L.R.3d 358 (1974)	¶6

ARGUMENT AND AUTHORITIES

[¶1] 1. The lower court did not err in denying the Hales' motion to dismiss the case as moot or unfounded.

[¶2] The sole issue on the Appellees' cross appeal before the Court is bereft of any cited authority in support of their position, containing solely the arguments of counsel which boil down to one focal point—"this case should have been dismissed because I say so". The crux of this case rests in the oppression of a minority business interest by the controlling majority interest, which is not a case of first impression in North Dakota.

[¶3] In the case of **Balvik v. Sylvester**, 411 N.W.2d 383 (N.D. 1987), in addressing a comparable situation with majority control in a closely held corporation, this Court stated that:

> [¶4] The limited market for stock in a close corporation and the natural reluctance of potential investors to purchase a noncontrolling interest **in a close corporation that has been marked by dissension can result in a minority shareholder's interest being held "hostage" by the controlling interest, and can lead to situations where the majority "freeze out" minority shareholders by the use of oppressive tactics.** See McCauley, supra; 2 F. O'Neil, Close Corporations § 9.02 (2d ed. 1971). (Emphasis added).
>
> [¶5] "Freeze-outs are actions taken by the controlling shareholders to **deprive a minority shareholder of her interest in the business or a fair return on her investment**. A variety of freeze-out techniques exist, with the withholding of dividends being by far the most commonly applied technique. This technique is often combined with the discharge of the minority shareholder from employment and removal of the minority shareholder from the board of directors. If the minority shareholder is employed by the corporation full time, as is typical, and if she relies on her salary as her primary means of obtaining a return on her investment, as is typical, she is suddenly left with little or no income and little or no return on her investment. **The controlling shareholders may effectively deprive the minority shareholder of every economic benefit that she derives from the corporation**. Meanwhile, the controlling shareholders may continue to receive a substantial return based on their continuing employment with the corporation. **The minority shareholder's investment serves only to ensure the success of the corporation for the benefit of the controlling shareholders."** D. MacDonald, supra, 62 N.D.L.Rev. at 164-165 (Footnotes omitted); see also,

> Note, Freezing Out Minority Shareholders, 74 Harv.L.Rev. 1630 (1961). (Emphasis added).

[¶6] Because of the predicament in which minority shareholders in a close corporation are placed by a "freeze out" situation, **courts have analyzed alleged "oppressive" conduct by those in control in terms of "fiduciary duties" owed by the majority shareholders to the minority and the "reasonable expectations" held by the minority shareholders** in committing their capital and labor to the particular enterprise. See generally Annot., What Amounts to "Oppressive" Conduct under Statute Authorizing Dissolution of Corporation at Suit of Minority Stockholders, 56 A.L.R.3d 358 (1974); D. MacDonald, supra. (Emphasis added).

[¶7] The Appellees made a "take it or leave it" offer which the Appellants contended and still maintain was an inadequate and inaccurate reflection of the value of the business and their interest in the same. Now the Appellees claim the withdrawal of the offer somehow serves to obviate that fact and argue that the lower court should have just ignored all the other issues that remained in the instant case based upon an argument that is **bereft of any cited authority**. "Just move along folks—there's nothing to see here".

[¶8] This is the essence of majority oppression and having the Appellants' interest held hostage. Is it not a "reasonable expectation" of a minority interest to have the value of the business determined in order to assess just what that interest is worth? Further, how is that assessment to be made when the majority interest has exclusive access to and control of the financial records of the business and unfettered authority to take profits and transfer money in and out of said business and amongst the other entities named in this action, to the tune of an approximate one million dollars ($1,000,000.00)? Finally, *quis custodiet ipsos custodies*—who monitors the actions and deeds of the majority interest?

[¶9] The answer to these not-so-rhetorical questions lies in the discovery process and the lower court's broad authority in setting the boundaries and compelling answers, even from the most recalcitrant of litigants. The scope of the lower court's authority has been

most clearly set out in the case of **Nastrom v. Nastrom**, 1998 ND 142, 581 N.W.2d 919, wherein this Court stated:

[¶10] [¶7] A district court has broad discretion in setting the scope of discovery, and discovery orders will not be reversed unless there is an abuse of discretion. Matter of Estate of Schmidt, 1997 ND 244, ¶ 7, 572 N.W.2d 430. **A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner or when its decision is not the product of a rational mental process**. Braaten v. Deere & Co., Inc., 1997 ND 202, ¶ 9, 569 N.W.2d 563. A review of our prior decisions reveals we do not reverse a trial court when a rational reason for entering a protective order exists. See, e.g., Smith v. State, 389 N.W.2d 808, 812 (N.D. 1986) (concluding deposition would constitute "fishing expedition"); Gowin v. Hazen Memorial Hosp. Ass'n, 349 N.W.2d 4, 8 (N.D. 1984) (limiting discovery and limiting time for discovery). On the other hand, we have rejected claims of abuse of discovery proceedings where the complainant has not sought a protective order. See, e.g., Lang v. Bank of North Dakota, 530 N.W.2d 352 (N.D. 1995); Vorachek v. Citizens State Bank of Lankin, 421 N.W.2d 45 (N.D. 1988). We conclude the district court did not abuse its discretion by granting the protective order in this case. (Emphasis added).

[¶11] The withdrawal of the "offer" does nothing to obviate the core matters of valuation and the Appellees' use—or alleged misuse—of their control over the funds of the Somerset Court Partnership and the other LLC's captioned-above, engaging in unilateral transfer of funds amongst the various business entities—again, literally a shell game with shell corporations. The discovery sought by the Appellants is neither duplicative nor cumulative—how can it be when the discovery sought has never been forthcoming from the Appellees? Likewise—where is the ample opportunity to obtain the requested discovery in this action with the constant flow of objections and the continuous construction of legal roadblocks engaged in by the Appellees and their counsel? The burden or expense of the discovery sought—a complete picture of the various income tax returns of the Appellees and the business entities involved determining cash flow, exchanges amongst the shell corporations, and an actual worth of Somerset Court Partnership for purposes of this action—hardly much more than

photocopying expense on behalf of the Appellees. None of this can be characterized as irrelevant, let alone irrational, for purposes of the analysis of the appropriateness of the lower court exercising its authority to finally get to the bottom of the various financial maneuverings of the Appellees, done to the detriment and in oppression of the Appellants' minority interest.

[¶12] It is those same core matters—valuation and the Appellees' use—or alleged misuse—of their control over the funds of the Somerset Court Partnership and the other LLC's captioned-above—that fueled the fire of the remaining issues in the underlying Complaint. Counsel for the Appellees had taken the position that if one issue in the Complaint—just one—is resolved that the entire proceeding collapses like a house of cards or a cut-rate Jenga game. Again, what authority is offered to support this proposition? The answer—none.

[¶13] Counsel for the Appellees attempts to base an argument before this Court in support of dismissal upon a ruling issued in a separate case, by another district judge, in an action to which the Appellants were not even parties. Counsel may well have entered into a stipulation for the lower court to consider these matters as reflected in the Register of Actions herein, but the original motion to dismiss did not reference or rely upon such submissions, which now form the bulk of the Cross-Appellants Appendix in this matter. In the case of Paulson v. Paulson, 2011 ND 159, 801 N.W.2d 746, 801 N.W.2d 746, this Court noted that:

[¶14] [¶9] **It is well-settled that issues not raised in the district court may not be raised for the first time on appeal**: "'The purpose of an appeal is to review the actions of the trial court, not to grant the appellant an opportunity to develop and expound upon new strategies or theories.'" Beeter v. Sawyer Disposal LLC, 2009 ND 153, ¶ 20, 771 N.W.2d 282 (quoting Heng v. Rotech Med. Corp., 2006 ND 176, ¶ 9, 720 N.W.2d 54). "The requirement that a party 'first present an issue to

> the trial court, as a precondition to raising it on appeal, gives that court a meaningful opportunity to make a correct decision, contributes valuable input to the process, and develops the record for effective review of the decision.'" Beeter, at ¶ 20 (quoting State v. Smestad, 2004 ND 140, ¶ 18, 681 N.W.2d 811). "'It is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.'" Davis v. Enget, 2010 ND 34, ¶ 10, 779 N.W.2d 126 (quoting Messer v. Bender, 1997 ND 103, ¶ 10, 564 N.W.2d 291). Accordingly, "issues or contentions not raised . . . in the district court cannot be raised for the first time on appeal." Beeter, at ¶ 20. (Emphasis added).

[¶15] To the extent that counsel for the Cross-Appellants is determined to be making any argument in support of reversal of the lower court's decision vis-à-vis its refusal to dismiss this matter for the first time on this appeal, it should be disallowed under the well-established line of authority above.

CONCLUSION

[¶16] The lower court did not err in refusing to dismiss this matter outright as moot or unfounded. The lower court was provided zero authority at the time of Counsel for Appellees' motion below—and has been repeatedly noted by the Court ""judges are not ferrets who engage in unassisted searches of the record for evidence to support a litigant's position." (Citations omitted). How much more so does counsel before the lower court—or this Court—bear an onus of providing a scintilla of legal authority, be it by case, statute or rule—to support an argument? No matter how light or heavy the burden—Counsel for the Cross-Appellants has not made the most minimal attempt to meet the same.

[¶17] Respectfully submitted this 26th day of May, 2017.

[¶18]

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CERTIFICATE OF SERVICE

[¶19] The undersigned hereby certifies that true and correct copies of the above and foregoing document were, on the 26th day of May, 2017, emailed to:

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