

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME CASE NO. 20200087
DICKEY COUNTY CASE NO. 2012-PR-00011

In the Matter of the Estate of Delbert G.)
Moore, Deceased)
-----)
Charles Minard, individually and as)
Personal Representative of the Estate of)
Delbert G. Moore, deceased,)
)
Petitioner and Appellee,)
)
v.)
)
Donald B. Moore and Scott Moore,)
)
Respondents and Appellants,)
)
Glenn W. Moore & Sons,)
)
Claimant and Appellant, and)
)
Candice Eberhart and Terry Minard,)
)
Respondents and Appellees.)

REPLY BRIEF OF APPELLANTS
DONALD B. MOORE, SCOTT
MOORE, AND GLENN W. MOORE
& SONS

APPEAL FROM THE JUNE 27, 2019 ORDER, THE DECEMBER 19, 2019 ORDER
FOR JUDGMENT, AND THE FEBRUARY 25, 2020 AMENDED JUDGMENT BY
THE DICKEY COUNTY DISTRICT COURT, SOUTHEAST JUDICIAL DISTRICT,
THE HONORABLE CHERIE L. CLARK, PRESIDING

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I.

LAW AND ARGUMENT

A. The district court erred in excluding Scott Moore’s labor charge as agreed by the partners in the accounting conducted at the instruction of this Court.

[¶1] In his responsive brief, Appellee Charles Minard, individually and as Personal Representative of the Estate of Delbert G. Moore (“Minard”), offers this Court misleading arguments regarding the inclusion of Scott Moore’s labor expense as it relates to the accounting the profits and losses of the Glenn W. Moore & Sons Partnership (“the Partnership”). Specifically, Minard asserts that “[t]o permit the deduction for wage expenses would be contrary to, among other things, the tax returns and financial reports previously prepared on behalf of the partnership, generally accepted accounting principles, the partnership agreement and the law.” See Appellee’s Brief at ¶ 17. As indicated by the principal brief of Appellants Scott Moore, Donald Moore, and the Partnership, as well as by the testimony of the Moore’s expert witness, Thomas Ault, the mandate from this Court did not include specific procedures for how the accounting of partnership profits and losses was to be compiled. (See Appellant’s Brief at ¶ 29, App. 45-46, Matter of Estate of Moore, 2018 ND 221, ¶ 15, 918 N.W.2d 69, 74).

[¶2] In order to produce an accounting of Partnership profits and losses for the specified time period, the experts utilized the only information that was available to them. The tax returns served as a jumping off point. (App. 50-53). Those tax returns were prepared before this Court’s determination that the Estate of Delbert Moore (“the Estate”) remained a partner in the Partnership for a period of time after his death. The returns were prepared as if the Estate was no longer a partner in the Partnership. Mr. Ault

testified that wages on behalf of a partner are not included in partnership tax returns; however, the labor expense on behalf of Scott Moore reflected the economic reality of the Partnership, which is why Mr. Ault was comfortable with the modification to the tax basis of accounting. (App. 48-49). Shortly after the death of Delbert Moore, Donald Moore advised the Estate that Scott Moore would be charging for his labor.

[¶3] Similarly, the financial statements were prepared without the inclusion of the wage charge because for tax reporting purposes, the parties did not consider the Estate a partner at that time. The information from the tax returns and the financial statements were the best available information to begin the accounting, but they are not by themselves determinative of the profits or losses of the Partnership. Simply put, like the tax returns, the financial statements do not equate to the accounting.

[¶4] The same argument applies to generally accepted accounting principles (“GAAP”) and the partnership agreement. The Partnership utilized a tax basis of accounting, and did not strictly comply with GAAP from the outset. To argue that the inclusion of the wage expenses runs contrary to GAAP simply ignores that the tax returns and financial records utilized by the parties’ experts, as well as the methodologies employed by both experts in compiling the reports, also do not comply with GAAP. Any suggestion by Minard that his accounting was prepared in accordance with GAAP, and that the Moores’ accounting was not, is simply false. As further indicated above, there was no directive from this Court or the district court that the Partnership accounting comply with GAAP.

[¶5] Similarly, the written partnership agreement is silent on the issue of the wage expense and was drafted in 1990 before Scott Moore became a partner. Nor does the

partnership agreement contain information or instruction for accounting methods. (Id.) The inclusion of the wage expense does not run contrary to the written partnership agreement. Following Delbert Moore's death, however, it was agreed by the surviving partners that Scott Moore would be charging labor to the Estate. Notably, this Court recognized that the Estate was unable to make business decisions for the Partnership without approval of the surviving partners per the written partnership agreement. See In the Matter of the Estate of Delbert G. Moore, Deceased, 2018 ND 221, ¶14, 918 N.W.2d 69; See also "Addition and Clarification of Partnership Agreement" dated January 1, 1990 at App. 16 ("This partnership is not automatically dissolved on death of a partner; however, the estate of a deceased partner cannot make business decisions for the partnership without the approval of the surviving partner.").

[¶6] Although not traditionally deductible on a tax return, a partner may be compensated for his labor if the partners agree to it. See First Nat. Bank of Belfield v. Candee, 488 N.W.2d 391, 397 (N.D. 1992) ("The partnership agreement thus controls whether or not the partners are entitled to compensation for services provided to the partnership."). That was precisely the case here. When Delbert Moore died, his estate only acquired a right to partnership profits and losses, and did not receive any voting rights in the Partnership. Thus, when Delbert Moore died, Donald and Scott Moore possessed the authority to make Partnership decisions on profits and losses and directed the partnership accounting to include a labor expense for Scott's work. To evidence this agreement, on May 11, 2012, Donald Moore wrote a letter to the Estate, which stated that Scott Moore would be charging the partnership for labor. The labor expense should have been taken into consideration during the Partnership accounting mandated by this Court,

and the district court erred by not including the wage expense, which stemmed from a decision of the managing partners.

[¶7] Next, the Estate’s blanket assertion that the inclusion of the wage expense runs contrary to law is entirely unsupported by Minard’s brief. Instead, Minard pivots to a claim that the labor expense should be barred by the legal principle of res judicata. Res judicata “prohibits relitigation of claims that were raised or could have been raised in a prior proceeding between the same parties or their privies, and which were resolved by a final judgment in a court of competent jurisdiction.” Dunn v. N. Dakota Dep’t of Transp., 2010 ND 41, ¶ 9, 779 N.W.2d 628, 631 (quoting Cridland v. N.D. Workers Comp. Bureau, 1997 ND 223, ¶ 17, 571 N.W.2d 351) (internal citations omitted). Res judicata promotes the “finality of judgments, which increases certainty, avoids multiple litigation, wasteful delay and expense, and ultimately conserves judicial resources.” Ungar v. N. Dakota State Univ., 2006 ND 185, ¶ 10, 721 N.W.2d 16, 20. However, the doctrine of res judicata should not be applied “so rigidly as to defeat the ends of justice.” Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 383 (N.D. 1992).

[¶8] Minard’s reliance upon res judicata as a bar to the wage expense is entirely misplaced. As an initial matter, there is no final judgment in existence with the judgment entered in this case having been previously appealed and remanded for an accounting of Partnership profits and losses. Moreover, the proposed wage expense is not a separate claim, but part and parcel to the accounting of Partnership profits and losses, which was the precise issue on remand and remains an issue on appeal. To follow the Estate’s erroneous logic to its conclusion, if the inclusion of the wage expense deviation is barred by the principles of res judicata, then so too should be the Estate’s depreciation deviation.

[¶9] The Estate’s expert did not follow the same methodology as the Partnership’s expert. He altered the accounting in a manner that he believed reflected the economic reality of the value of the assets and their resulting impact on Partnership profits and losses. The inclusion of the wage expense was done so for the same purpose, albeit from a different perspective. The Partnership’s profits and losses were based on the labor of Scott Moore, who after Delbert’s death, contributed most of the labor for the Partnership. To accurately reflect the economic reality of the Partnership profits and losses, this labor charge was included. The Estate argues this approach was not raised, but should or could have been raised on the prior appeal. Yet the Estate employed the same tactic, for the same goal. The Estate deviated from the depreciation method employed by the Partnership in its tax reporting to reach a result they deemed more accurate and did not raise this argument anywhere prior to this Court’s mandate of an accounting of partnership profits and losses.

B. The district court erred in denying Scott Moore’s claim for interest on distributions improperly withheld by the Estate of Delbert Moore for more than four years

[¶10] Minard, as personal representative of the Estate, withheld a properly owed distribution from Scott Moore creating a legal indebtedness for which statutory interest should have accrued. N.D.C.C § 30.1-20-02 provides that “shares of distributees abate, without any preference or priority as between real and personal property, in the following order: (a) Property not disposed of by the will, (b) Residuary devise, (c) General devise, (d) Specific devise.” N.D. Cent. Code Ann. § 30.1-20-02 (West). “Interest for any legal indebtedness must be at the rate of six percent per annum unless a different rate not to exceed [usury limitations] is contracted for in writing.” N.D.C.C. § 47-14-05. “In an

action for the breach of an obligation not arising from contract and in every case of oppression, fraud, or malice, interest may be given in the discretion of the court or jury.”

N.D. Cent. Code Ann. § 32-03-05 (West)

[¶11] Here, the Estate made distributions to residual beneficiaries, which included the personal representative, all while holding onto funds that were earmarked for Scott as a specific devisee. Over four (4) years passed where the residual beneficiaries had received their distributions while the specific devise to Scott was withheld. A legal indebtedness was owed by the Estate to Scott Moore for which statutory interest should have been awarded. The Estate contends that it was holding onto the funds to pay the Estate’s fees and taxes, however the rules of the North Dakota abatement statute suggest that if there are not enough assets in an estate, the residual devises should be negated before any specific devises. Because Scott is a specific devisee, his distribution should have come before any of the residual devises, and the Estate’s fees and taxes should be deducted from the residual devises first before any deduction from the specific devises. Thus, Scott should be entitled to interest on his withheld distribution, and the trial court was clearly erroneous in not awarding the interest.

II. CONCLUSION

[¶12] For the foregoing reasons, the trial court’s decision was clearly erroneous and the determination of the district court should be reversed and the matter should be remanded for further proceedings consistent with this Court’s decision.

III.

CERTIFICATE OF COMPLIANCE

[¶13] The undersigned, as attorneys for the Appellants in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above reply brief was prepared with proportional type face in 12-point font and equals 10 pages.

[¶14] Dated this 14th day of August, 2020.

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AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
)ss
COUNTY OF BURLEIGH)

[¶1] On the 14th day of August, 2020, I, Rachel DeRung, served the party(s) described below with the document(s) also described below by electronically filing the document(s) with the North Dakota Supreme Court Clerk of Court. The email addresses of each such party served are taken from the North Dakota Supreme Court website or are the last know email address. I am over the age of eighteen and not a party in this matter.

[¶2] **Document(s) Served:**

1. Reply Brief of Appellants Donald B. Moore, Scott Moore, and Glenn W. Moore & Sons.

[¶] **Names & Address of Party(s) Served:**

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Subscribed and sworn to before me
this 14th day of August, 2020.


Rachel DeRung


Notary Public / Burleigh County

