

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20200287
Case No. 31-2017-CV-00213

Thomas M. Kruger and North Dakota
Safety Professionals, LLC,

Plaintiffs and Appellees,

v.

Sally V. Goossen,

Defendant and Appellant.

ON APPEAL FROM JUDGMENT DATED OCTOBER 12, 2020
STATE OF NORTH DAKOTA
MOUNTRAIL COUNTY
THE HONORABLE JUDGE DOUGLAS L. MATTSO, PRESIDING

**APPELLEES THOMAS M. KRUGER AND
NORTH DAKOTA SAFETY PROFESSIONALS, LLC'S BRIEF**

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JURISDICTIONAL STATEMENT

[¶1] The district court had jurisdiction to hear and try this case under Article VI, section 8 of the North Dakota Constitution and section 27-05-06 of the North Dakota Century Code. This Court has jurisdiction to hear this appeal under Article VI, sections 2 and 6, of the North Dakota Constitution and section 28-27-01 of the North Dakota Century Code.

STATEMENT OF THE ISSUES

[¶2] The issues on appeal are:

I. Whether the District Court Erred in Concluding that Thomas Kruger Owns 55% of NDSP, LLC and Sally Goossen Owns 45% of NDSP, LLC and then Calculating Distributions from NDSP, LLC based on 55/45 Ownership.

A. Whether the District Court Required A Certificated Document for Goossen to be entitled to 50% distributions from NDSP.

B. Whether the District Court Erred by Citing To a Virginia Case in Deciding that Goossen Did Not Hold a 50% Interest in NDSP.

C. Whether Kruger is Estopped, as a Matter of Law, from Claiming that the Income Allocation was Anything but 50/50.

II. Whether the District Court Did Erred in Determining \$72,450 of the 2014, 2015 and 2016 Expenses Labeled “Tom Training Materials,” “Office Supplies WY,” and “WY Office Set Up” are Chargeable Business Expenses Reducing Kruger’s Draw/Dividend Account.

STATEMENT OF THE FACTS

[¶3] North Dakota Safety Professionals, LLC (“NDSP”) was created by Thomas Kruger (“Kruger”) on April 24, 2012 as a North Dakota limited liability company to provide safety training to individuals and entities. (Trans. 9:8-22.) At the time of its creation, the sole member of NDSP was Kruger. (Trans. 10:11-14.) The only capital contributed for either the creation of NDSP or at any time during the existence of NDSP was contributed by Kruger. (Trans. 10:4-10.)

[¶4] Prior to and during his ownership of NDSP, Kruger was involved in a variety of other businesses. One such business was Eagle Biofuels whose primary customer was Green Friendly Pellets, owned by Sally Goossen (“Goossen”). (Trans. 182: 4-22.) Kruger was starting NDSP at about the same time as Goossen’s pellet business failed resulting in Goossen joining NDSP in 2012 as contract labor.

[¶5] The roles and responsibilities of Kruger and Goossen at NDSP remained relatively consistent throughout the life of NDSP. Kruger’s primary role was that as front person and presenter for NDSP. (Trans. 15:25; 16:1-5.) Kruger lead 99.9% of the safety training classes presented by NDSP. (Trans. 16:3-5.) Goossen’s responsibilities centered around the preparation of training materials, advertising, setting up training sessions and maintaining NDSP’s books. (Trans. 18:14-20; 20:7-9.) Kruger had absolutely no involvement in preparing or maintaining the financial books and records of NDSP. (Trans. 20:10-11.)

[¶6] From its inception, NDSP utilized QuickBooks to maintain its financial records. (Trans. 20:12-14.) Initially, Kruger had Patrick Fitzgerald, an employee of one of Kruger’s

unrelated companies, involved with entering and/or checking over the QuickBooks records of NDSP. (Trans. 21:17-25; 22:1-6.) Mr. Fitzgerald's involvement with QuickBooks ceased upon Goossen taking over all aspects of the NDSP QuickBooks. (Trans. 22:7-13; 203:3-17.) Thereafter, Richard Diehl, NDSP's accountant, reviewed Goossen's QuickBooks entries and categorizations to make sure that said entries were correct.

[¶7] Based on the involvement of Goossen in the business of NDSP, Kruger decided that he would gift a 45% interest in NDSP to Goossen. To that end, on August 13, 2013 Kruger and Goossen executed a Written Action in Lieu of Initial Meeting of Members and Governors of North Dakota Safety Professionals. (Appendix at pp. 21-22.) Pursuant to the August 13, 2013 Written Action, Kruger was the owner of a 55% interest in NDSP and Goossen the owner of a 45% interest in NDSP. *Id.* At no time did Goossen pay either Kruger or NDSP for her 45% interest. (Trans. 15:8-10.)

[¶8] Other than the August 13, 2013 Written Action, there is no document or form establishing a sale or transfer to Goossen resulting in her possessing a greater than 45% interest in NDSP. During his trial testimony, Richard Diehl, NDSP's accountant, testified that he never saw anything in terms of a sale of NDSP interests from Kruger to Goossen. (Trans. 172:6-10.) Likewise, Kruger testified at trial as follows:

Q And based on your understanding of Exhibit 3 what was the percentage ownership of the two owners?

A 45 and 55. 45 Sally and myself at 55.

Q Why was it set up with you at 55 and Sally at 45?

A Because I was the primary establisher of the company.

Q Did Sally contribute any capital or did she purchase her 45 percent interest in North Dakota Safety Professionals?

A No, sir.

Q Is there any other written action, whether handwritten, typed out, of North Dakota Safety Professionals that creates an ownership interest different than 55/45?

A None.

Q Are there any meeting minutes between the owners of or the members of North Dakota Safety Professionals that set out any different ownership than 55/45?

A No.

Q Did you ever sell Sally any of your interest in North Dakota Safety Professionals?

A No.

Q And based on your knowledge did the ownership percentages in North Dakota Safety Professionals ever change from what's set forth in Exhibit 3?

A No.

Q And Exhibit 3 is dated August 13, 2013, correct?

A Correct.

(Trans. 14:17-25; 15:1-16.)

[¶9] Shortly after being granted her 45% interest in NDSP on August 13, 2013, Goossen sent an email to Kruger dated November 13, 2013 demanding that NDSP no longer be operated as a single-member limited liability company with Kruger doing as he pleased with the money but instead demanded that both she and Kruger approve certain transactions. (Appendix 179-180.) In particular, the November 13, 2013 e-mail from Goossen stated, in relevant part, as follows:

1. ASSET LISTING NDSP – ALL HOME, TRAILER, TRUCK – CLEARLY SPELLED OUT
2. WHAT AMOUNTS HAVE BEEN MADE TRANSFERRED & FOR WHAT
3. DETAIL BREAKDOWN OF WHO IS ABLE TO DO WHAT
4. FROM NOW ON ALL TRANSFERS MUST BE APPROVED BY BOTH OF US – ALL REPAYMENTS MUST BE APPROVED BY BOTH OF US
5. ALL CREDIT CARDS BEFORE PAID MUST BE APPROVED BY BOTH OF US
6. NO MORE JOURNAL ENTRIES WILL BE MADE
- ...
9. ITEMS PURCHASED – ARE TO BE DISCUSSED BEFORE PURCHASE

Id.

[¶10] Despite the NDSP records clearly setting forth Goossen holding a 45% interest and Kruger holding a 55% interest, the tax returns prepared by Richard Diehl, including the K-1s, identified the ownership as 50/50. (Trans. 72:12-21; 73:8-10; Appendix at pp. 56, 57, 71, 72, 79, 80, 103, 104, 119.) During Mr. Diehl's trial testimony, it was discovered that the use of a 50/50 ownership split was based on an error by the prior accounting firm which Mr. Diehl simply copied without investigation. During the trial, Mr. Diehl offered the following testimony regarding the 50/50 ownership split:

THE COURT: How did you understand that they were 50/50 at that time?

THE WITNESS: The 50/50 -- I got the origination for the 50/50 when I first started doing the corporate tax returns I got a, I think it was a fax -- I brought it up here with me. I got a fax from Whitewater Tax and Consulting, Inc, dated February --

THE COURT: Are you not Whitewater?

THE WITNESS: Excuse me?

THE COURT: Are you not Whitewater?

THE WITNESS: No. I am Diehl's Accounting Service. Whitewater Tax and Consulting is Plainview, Minnesota. And I think Sally sent me this, I think. No. It was sent by Tim Scanlon the accountant and he sent me a copy of the K-1's.

THE COURT: What was the date of that?

THE WITNESS: February 27, '14.

THE COURT: '14, okay.

THE WITNESS: And he sent me a copy of the K-1's for the year ending 2013. And the allocation was 50/50 in there and --

THE COURT: In '13?

THE WITNESS: At the end of the 13. He did, Whitewater used 50/50 when they did the 2013 tax return.

(Trans. 161:16-25; 162:1-14.)

[¶11] Given that Goossen had only acquired her 45% NDSP interest on August 13, 2013, there was no doubt that the 50/50 ownership split set forth in the 2013 tax returns was incorrect. Unfortunately, Richard Diehl blindly adopted the ownership percentages set forth in the 2013 tax returns for subsequent years tax returns. *Id.* Believing that Mr. Diehl

had properly prepared the tax returns, when Kruger was asked to sign the electronic filing authorization for the NDSP tax returns he simply signed the authorization and never reviewed the actual tax returns. (Trans. 151:2-7.)

[¶12] After finally becoming aware in 2015 or 2016 of the incorrect ownership percentages being set forth in the tax returns, Kruger elected not to go back and have the tax documents corrected. (Trans 73:11-17.) According to Kruger, he did not believe that an incorrect tax document established ownership in NDSP. (Trans. 86:1-6.) Instead, Kruger believed that the August 13, 2013 Written Action signed by he and Goossen established the ownership in NDSP. Further, Kruger was well aware that no subsequent document or agreement had ever been entered into between himself and Goossen gifting her an interest greater than the 45% gifted on August 13, 2013.

[¶13] From and after its creation in 2012, the business of NDSP continued to expand resulting in significant profits being generated. Throughout its existence, NDSP generated gross profits of over \$2.4 Million. (Trans. 45:2-4.) Having no employees other than Kruger and Goossen and minimal overhead expenses, contentions would arise between Kruger and Goossen regarding the fair distribution of NDSP's profits. Instead of each owner being allocated a set draw or agreeing upon distributions, it was a free-for-all with both Goossen and Kruger using NDSP monies for personal purposes. (Trans. 37:23-25.)

[¶14] The funds generated through NDSP were used to pay either business expenses of NDSP or personal expenses of Goossen and Kruger. The expenses would be paid through a Cabelas credit card or a company check. Goossen would then allocate the expenses to various categories she created within NDSP's QuickBooks. (Trans. 21:8-10.) Kruger

maintained a Cabelas credit card in his name that was used by both Goossen and Kruger to pay business and personal expenses. (Trans. 23:16-24.) The Cabelas credit card statement would be paid by NDSP and Goossen would then allocate the credit card charges to various categories within NDSP's QuickBooks including, but not limited to, "international travel", "office supplies-Wyoming", "Tom training materials", "Wyoming office set up", "Tom draws", and "Sally draws." Goossen would decide on her own prerogative how each expense would be categorized within QuickBooks. (Trans. 167:11-15.)

[¶15] Being the individual who input, categorized and prepared the books for NDSP, Goossen was also the individual who prepared whatever information was required to prepare NDSP's taxes and dealt with NDSP's account, Richard Diehl. (Trans. 22:14-24.) During his trial testimony, Richard Diehl confirmed that information pertaining to NDSP which was contained in NDSP's tax returns was obtained through Goossen. In particular, Mr. Diehl testified as follows:

Q When you were doing the tax returns and doing the business deductions, were you informed of what they considered to be the business deductions, expenses?
A I would have a profit and loss statement from QuickBooks. And I normally, I know I discussed it with Sally. And I am not sure if I ever discussed with Tom every year. I know I did with Sally.

(Trans. 165:16-22.)

[¶16] Given that Kruger was entirely detached from NDSP's QuickBooks, his barometer as to the success of the business was the balance in NDSP's checking account. (Trans. 34:16-19.) Periodically Kruger would request information from Goossen regarding NDSP's profitability and expenses. (Trans. 37:9-15.) At the end of each year, Goossen would provide Kruger with a balance sheet showing expenses, owners' draw and equity.

(Trans. 38:21-25; 39:1-7.) In the later part of 2016, Kruger became concerned with NDSP's finances when he saw that Goossen was making only minimal payments on the credit card. (Trans. 39:15-18.) Prior to this time, the credit card had been paid in full each and every month. (Trans. 40:4-5.) When Kruger approached Goossen regarding the credit card payments, Goossen indicated that Kruger was being paid more than her and she needed to receive more money. (Trans. 40:7-16.)

[¶17] In response to Goossen's contention that she was not being paid enough, Kruger put together a listing of draws and who was responsible for what was to be received. (Trans. 40:17-22.) Goossen tore up the document and threw it in Kruger's room. *Id.* Thereafter, Kruger retained the services of an independent third-party accountant, Doug Tracy, to review NDSP's books and determine whether draws had been properly allocated between he and Goossen. The review by Doug Tracy clearly revealed that Goossen had been playing games with the QuickBooks to benefit herself and harm Kruger.

[¶18] Doug Tracy went through all of the QuickBooks transactions, listed them all out, and put to the side those transactions that he was uncertain about. Based on Mr. Tracy's examination of the QuickBooks records prepared by Goossen, he determined that the following draws had been received by each individual from 2013 through 2017:

	<u>Kruger Draws</u>	<u>Goossen Draws</u>
2013	\$ 46,098	\$ 44,359
2014	\$186,802	\$153,455
2015	\$168,212	\$239,364
2016	\$ 88,605	\$137,831
2017	\$ 14,000	\$ 87,737

(Appendix at 28.)

[¶19] After adding in various wire transfer fees to the correct draw account, Mr. Tracy determined that based on Goossen's allocations within NDSP's QuickBooks, Kruger had received 35.30% of the total draws and Goossen received 64.70% of the total draws. *Id.* Thus, despite Goossen's complaints to Kruger that she needed to be paid more, an analysis of her records revealed that she received nearly double the draws received by Kruger yet she only owned a 45% interest in the company.

[¶20] Further, Mr. Tracy examined each of the expenses placed within the individual draw accounts by Goossen and was surprised to find that several of the expenses placed into Kruger's draw account had also been included as an NDSP business expense on the NDSP tax returns. (Trans. 115:19-25; 116:1-7; Appendix at p. 29.) According to Mr. Tracy, Goossen had deducted on the NDSP tax return as a business expense those expenses set forth in the "Int'l Travel & Mktg", "Tom Training Materials", "Office Supplies WY", and "WY Office Set Up" categories. (Appendix at pp. 29, 32-49.) After submitting the information to Richard Diehl for purposes of preparing the NDSP tax returns, Goossen created a journal entry in QuickBooks recording the expenses as a draw to Kruger. (Trans. 115:21-24).

[¶21] When questioned at trial about Goossen's efforts to turn business expenses into Kruger draws, Richard Diehl testified that such double entries were inappropriate and said expenses should not have been added to Kruger's draws. In particular, Richard Diehl offered the following testimony:

Q Now, you agree that an expense cannot be both an expense of a business and an expense allocated to Tom's draws?

A Could you rephrase that a little bit?

Q Sure.

A Are you talking about the 146,000? Is that what where you're headed?

Q Let's take Wyoming Office Supplies. If that's included on the tax return as a business expense --

A That's correct.

Q -- am I understanding correct that it shouldn't also be included as an expense against Tom's draw?

A It should not be an increase in his draw. And I alluded to that in my preface.

Q And the various Wyoming expenses, office set up, Tom's training materials, so on and so forth, did you ever question Sally about those expenses?

A I am sure I would have.

Q And I am assuming since you put the tax return together, and if you would have questioned her about it, you were comfortable including them as business expenses?

A Yes. If I wouldn't -- I will keep my mouth shut.

Q Well, if you wouldn't have been comfortable with them you wouldn't have included them? Is that a fair statement?

A If I wouldn't have been comfortable with it I would have continued asking until I got the right answer or the proper answer.

Q So following that logic, if these various Wyoming expenses, which were categorized as legitimate business expenses of North Dakota Safety Professionals on the tax returns, and you have already testified that those expenses should not be allocated then to Tom's draws as well, correct?

A Correct.

(Trans. 167:16-25; 168:1-23.)

[¶22] Despite Goossen including “International Travel and Marketing” as a business expense of NDSP, Kruger testified at trial that such expense had absolutely nothing to do with the safety training business and should have never been included as a business expense. (Trans. 25:14-25.) According to Kruger, the “International Travel and Marketing” related to vacations for he and Goossen and should be allocated evenly between the two of their draw accounts. *Id.* With respect to the expenses for “Tom Training Materials”, “Office Supplies WY”, and “WY Office Set Up”, the trial testimony unequivocally established that such expenses were legitimate expenses of NDSP and should not have been included as part of Kruger’s draws.

[¶23] NDSP maintained offices in Parshall, North Dakota and Sundance, Wyoming. Goossen worked from the Parshall office and beginning in 2015 Kruger worked from the Sundance office. (Trans. 27:12-14). One hundred percent of the expenses for the Parshall office and the Sundance office were included as NDSP business expenses. (Trans. 27:22-25.) However, Goossen only reallocated the Sundance office expenses to Kruger draws. Clearly, the reallocation of “Office Supplies WY”, and “WY Office Set Up” to Kruger draws was unquestionably inappropriate and the Wyoming expenses needed to be removed from Kruger draws.

[¶24] Similarly, Goossen’s reallocation of “Tom Training Materials” from a business expense to Kruger draws was entirely inappropriate and undertaken for the sole purpose of artificially inflating Kruger’s draws so Goossen could justify taking more money. Kruger never provided safety training on behalf of any other entity other than NDSP. (Trans. 29:9-13.) Thus, training materials acquired by Kruger were for the sole and exclusive benefit of NDSP and, therefore, were a legitimate business expense of NDSP and should not have been reallocated to Kruger draws.

[¶25] At or near the end of 2016, Kruger and Goossen elected to cease doing business together and dissolve NDSP. To that end, the parties met with Richard Diehl and agreed to a division of certain NDSP assets. Although NDSP was dissolved or in the process of winding up its affairs, Goossen continued doing business as NDSP throughout 2017. (Trans. 112:20-25; 113:1-4.) The 2017 QuickBooks records for NDSP revealed that Goossen paid herself \$87,737 in draws while Kruger only received \$14,000 in draws. (Appendix at p. 28.)

[¶26] As a result of the inequitable draws and the questionable actions of Goossen, Kruger and NDSP commenced the present action against Goossen setting forth claims for conversion and dissolution. (Appendix at pp.10-12.) In an answer and counterclaim dated July 31, 2017, Goossen denied Kruger and NDSP's claims (Appendix at pp. 13-17.)

[¶27] On or about April 12, 2019, Kruger, NDSP and Goossen entered into a Factual Stipulation and Issues for Trial. (Appendix at pp. 18-19.) Pursuant to the April 12, 2019 Stipulation, there were three specific issues for the district court's determination:

ISSUE ONE: Determine the ownership percentage by each of the two parties as partners in North Dakota Safety Professionals, LLC.

ISSUE TWO: Determine the equality of the draws from the entity by the parties and, if unequal, determine if there is any sum owed by one of the two partners to the other.

ISSUE THREE: Determine the date of valuation and the value of the following major assets which the parties agree shall be allocated as shown.

The Mobile Suites Trailer – Thomas Kruger

The 2013 Chevrolet Suburban – Thomas Kruger

The 2009 Liberty Mobile home trailer Value – Salley Goossen

The two residential lots in City of Parshall, ND – Sally Goossen

Id.

LAW AND ARGUMENT

I. Standard of Review

[¶28] In *KLE Constr., LLC v. Twalker Dev., LLC*, 2016 ND 229, ¶ 5, 887 N.W.2d 536 (quoting *Border Res., LLC v. Irish Oil & Gas, Inc.*, 2015 ND 238, ¶ 14, 869 N.W.2d 758), the North Dakota Supreme Court explained the standard of review for an appeal from a bench trial:

[T]he trial court's findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a) and its conclusions of law are fully reviewable. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is

no evidence to support it, or if, after reviewing all the evidence, we are left with a definite and firm conviction a mistake has been made. In a bench trial, the trial court is the determiner of credibility issues and we do not second-guess the trial court on its credibility determinations.

This Court will not reverse a judgment supported by findings of fact which are not clearly erroneous and which are not induced by an erroneous view of the law. *Lincoln Land Dev., LLP v. City of Lincoln*, 2019 ND 81, ¶ 13, 924 N.W.2d 426, 431.

II. District Court Did Not Err in Concluding that Thomas Kruger Owns 55% of NDSP, LLC and Sally Goossen Owns 45% of NDSP, LLC and then Calculating Distributions from NDSP, LLC based on 55/45 Ownership.

[¶29] Pursuant to the April 12, 2019 stipulation entered into by and between Kruger’s prior counsel and Goossen’s counsel, the district court was asked, based on the evidence introduced at the time of trial, to “[d]etermine the ownership percentage by each of the two parties as partners in North Dakota Safety Professionals, LLC.” (Appendix at p. 18.) A review of the evidence conclusively establishes that the district court was not clearly erroneous in finding that at all relevant times Kruger held a 55% ownership interest in NDSP and Goossen held a 45% ownership interest in NDSP.

[¶30] The only piece of uncontroverted evidence introduced at the trial establishing the ownership of NDSP was the August 13, 2013 Written Action signed by both Kruger and Goossen. The August 13, 2013 Written Action unambiguously set forth the following ownership of NDSP:

Thomas M. Kruger	550 units/55% membership interest
Sally v. Goossen	450 units/45% membership interest

(Appendix at pp. 21-22.)

[¶31] Other than the August 13, 2013 Written Action, there was no other instrument signed by the parties transferring or otherwise vesting NDSP ownership in either Kruger or Goossen that created something other than a 55/45 ownership breakdown. When asked about Goossen obtaining any ownership interest beyond the 45% set forth in the August 13, 2013 Written Action, Kruger unequivocally testified that Goossen never purchased or received a single ownership interest beyond the 45% gifted to her on August 13, 2013. (Trans. 14:1; 15:1-16.)

[¶32] Likewise, Richard Diehl, the accountant for NDSP, testified that there was no sale of NDSP's interests between Kruger and Goossen. (Trans. 172:6-10.) Despite the August 13, 2013 Written Action signed by Goossen establishing that she held a 45% interest, Goossen contended at trial and now contends on appeal that she actually had a 50% interest. The exclusive basis for Goossen contending that she had a 50% interest are NDSP's state and federal tax returns which mistakenly state that Kruger and Goossen each possessed a 50% interest. A review of the evidence relating to said tax returns unquestionably shows that no ownership interest beyond the 45% was ever gifted to Goossen.

[¶33] The evidence introduced at trial revealed that the 50/50 ownership reference was as a result of Whitewater Tax and Consulting incorrectly stating on the 2013 NDSP tax return a 50/50 ownership split between Kruger and Goossen. (Trans. 161:16-22.) When Richard Diehl was retained to prepare NDSP's 2014 taxes he simply copied the incorrect ownership percentages set forth in the 2013 taxes without ever inquiring about the correct ownership as set forth in the August 13, 2013 Written Action. Richard Diehl provided the following testimony at trial:

THE COURT: How did you understand that they were 50/50 at that time?

THE WITNESS: The 50/50 -- I got the origination for the 50/50 when I first started doing the corporate tax returns I got a, I think it was a fax -- I brought it up here with me. I got a fax from Whitewater Tax and Consulting, Inc, dated February --

THE COURT: Are you not Whitewater?

THE WITNESS: Excuse me?

THE COURT: Are you not Whitewater?

THE WITNESS: No. I am Diehl's Accounting Service. Whitewater Tax and Consulting is Plainview, Minnesota. And I think Sally sent me this, I think. No. It was sent by Tim Scanlon the accountant and he sent me a copy of the K-1's.

THE COURT: What was the date of that?

THE WITNESS: February 27, '14.

THE COURT: '14, okay.

THE WITNESS: And he sent me a copy of the K-1's for the year ending 2013. And the allocation was 50/50 in there and --

THE COURT: In '13?

(Trans. 161:16-25; 162:1-12.)

[¶34] In preparing NDSP's tax returns, Richard Diehl testified that he normally discussed any tax issues with Goossen and could not recall discussing the taxes with Kruger. (Trans. 165:16-22.) Furthermore, when it came to signing the actual tax returns which set forth the incorrect ownership interests, Diehl testified that Kruger did not sign the actual return but instead signed Form 8879, the electronic filing authorization. (Trans. 151:1-7.)

[¶35] While Goossen testified at trial that the 50/50 ownership split set forth in the tax returns was correct, she was unable to point to any piece of evidence establishing that Kruger knowingly and intentionally gifted to her any interest greater than 45%. In fact, the trial testimony of Goossen herself was entirely contradictory as to when she allegedly received the 50% interest set forth in the tax returns. Initially, Goossen testified that the August 13, 2013 Written Action was incorrect and was actually intended to set forth ownership of 50/50. In particular, Ms. Goossen testified:

Q And the one that was signed in August of 2013 says 45/55. Did you have discussion later with him later about that changing, the percentage?

A To be honest with you, if I would have realized it said 45/55 I probably would have disputed it at that time. I didn't read through it. I assumed it was 50/50 because that's what we were looking at as far as taxes and everything else. It was my fault I didn't look at that more closely.

(Trans. 185:5-13.)

[¶36] After testifying that she held a 50% ownership interest at the time of the August 13, 2013 Written Action, the district court asked some questions of Goossen regarding her ownership interest in NDSP. In response to the district court's questioning, Goossen contended that she received an additional 5% interest after receiving the 45% interest on August 13, 2013:

THE COURT: When the change came 45/55 to the 50/50, was there a discussion between the two of you?

THE WITNESS: I believe, unlike the, I don't know the actual name of the documents. It's in our exhibits. That it was originally made as a Minnesota limited liability company. And that's on that document. And it says that it's good for one year. And I believe in like the first paragraph it says that it's a --

THE COURT: That's nice. But coming back to my question. I am so sorry.

THE WITNESS: Yeah. So since it expired in one year we didn't feel that we had to redo that.

THE COURT: So was there a discussion between the two of you --

THE WITNESS: -- yes.

THE COURT: -- on it being 50/50 after it had been 45/55.

THE WITNESS: Correct, yes. Moving forward 2013.

(Trans. 185:23-25; 186:1-16.)

[¶37] As set forth above, the evidence relied upon by Goossen to support her contention that she was a 50% owner was a house of cards that quickly collapsed. First, the ownership percentages set forth in the 2014, 2015 and 2016 tax documents resulted from Mr. Diehl simply copying the error created by the accountant in 2013. (Trans. 161:16-25; 162:1-11.)

Second, the uncontroverted evidence clearly established that the 2013 tax returns were incorrect in that Goossen was a 45% owner of NDSP for only a portion of the year, not the full year. (Appendix at 114-131.) Finally, Goossen herself could not provide consistent testimony as to when Kruger allegedly gifted the alleged 50% interest in NDSP to her. (Trans. 185:5-13; 185:23-25; 186:1-16.)

[¶38] In comparison to the house of cards offered by Goossen, the evidence offered by Kruger provided the district court with a solid, logical and consistent basis for concluding that Kruger intentionally gifted no more than a 45% interest in NDSP to Goossen. The only document setting for the parties intentions and signatures regarding the gift of any ownership interest is the August 13, 2013 Written Action. (Appendix at pp. 21-22.) Richard Diehl testified that as the accountant for NDSP he never saw “anything in terms of a sale from one party to another . . .” (Trans. 172:6-10.) The Written Action unquestionably sets forth the only intent of Kruger to gift, assign or transfer any NDSP interest to Goossen and Goossen’s acceptance of said gift. *Id.* Moreover, Kruger consistently testified that he never intended to gift more than a 45% interest to Goossen. (Trans. 14:17-25; 15:1-16.)

A. District Court Did Not Require A Certificated Document But Required Proof of Kruger’s Intent to Gift 50% to Goossen

[¶39] Goossen erroneously asserts on appeal that the district court improperly required her to produce a certificated document establishing her ownership of a 50% interest in NDSP. Such an assertion appears to be little more than an effort to distract from Goossen’s

actual burden at trial to show that Kruger intended to transfer Goossen a 50% interest in NDSP which the district court concluded Goossen failed to satisfy.

[¶40] A transferable membership interest in a North Dakota limited liability is personal property. N.D.C.C. § 10-32.1-43. The evidence introduced at trial established that Goossen never paid Kruger or NDSP for any interest in NDSP. Goossen claims that Kruger gifted her, depending on which of Goossen's testimony is followed, either a 50% interest in August 2013 or a 45% interest in August 2013 and an additional 5% interest at some point thereafter. (Trans. 185:5-13; 185:23-25; 186:1-16.) The transfer of personal property by gift is subject to Chapter 47-11, N.D.C.C.

[¶41] In *Doeden v. Stubstad*, 2008 ND 165, 755 NW2d 859, this Court held that “a valid gift requires an intention by the donor to give property to the donee, coupled with an actual or constructive delivery of the property to the donee and acceptance of the property by the donee.” *Doeden v. Stubstad*, 2008 ND 165, ¶ 12. The facts in *Doeden v. Stubstad* reveal that Knecht was the owner of a portable sign company who decided to get out of the business but informed his son's girlfriend, the plaintiff, that she could continue to rent signs to customers and keep the income provided the rentals were properly serviced. Knecht also gave the plaintiff a document in which he “HEREBY TRANSFER[ED] OWNERSHIP OF HIGH IMPACT SIGN COMPANY TO KAREN DOEDON [sic] DATED THIS FRIST [sic] DAY OF OCTOMBER [sic] 2004.” Knecht subsequently received complaints about the plaintiff resulting in Knecht removing the sign materials from the plaintiff's possession and selling the business to the defendant. The plaintiff sued the defendant alleging that the business had been gifted to her by Knecht. The district court found in

favor of the defendant and the plaintiff appealed. On appeal, this Court affirmed the district court's ruling finding, among other things, that Knecht never intended to gift the business to the plaintiff. In particular, this Court stated, in relevant part, as follows:

Under both the interpretation of an ambiguous contract and a gift analysis, the determination of intent is a question of fact. 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, we are left with a definite and firm conviction the court made a mistake. A district court's choice between two permissible views of the weight of the evidence is not clearly erroneous, and simply because we may have viewed the evidence differently does not entitle us to reverse the court's findings of fact.

Although Doeden claims the district court erred in accepting "the singular, self-serving, and contradictory testimony of Knecht," we do not reweigh the evidence and we give due regard to the court's opportunity to judge the witnesses' credibility. There is evidence in this record to support the court's findings that Knecht did not give the signs and letters to Doeden and that the extrinsic evidence established the transfer document was not intended to give Doeden an ownership interest in the signs and letters. We are not left with a definite and firm conviction the court made a mistake in finding Knecht did not give the property to Doeden and the transfer document was not intended to transfer Knecht's interest in the signs and letters to Doeden. We conclude those findings are not clearly erroneous, and under those findings, Doeden did not have an ownership interest in the disputed property.

Id. at 2008 ND 165, ¶¶ 19, 20 (citations omitted).

[¶42] As in *Doeden v. Stubstad*, the evidence introduced in this matter established that Kruger had absolutely no intention of transferring a 50% interest in NDSP to Goossen. As set forth above, the August 13, 2013 Written Action established Kruger's intent to transfer only a 45% interest to Goossen. Further, Kruger consistently testified that he never transferred more than a 45% interest to Goossen and never intended for Goossen to have a greater than 45% interest in NDSP.

[¶43] In contrast to the direct evidence of Kruger's intent not to transfer Goossen more than the 45% interest transferred on August 13, 2013, Goossen presented tax documents prepared by third-parties. The evidence indicated that Kruger was not involved in preparing the tax documents and, in most instances, did not even review the tax returns but simply signed the form to have the tax returns electronically filed. Such evidence does not establish any intent on the part of Kruger to transfer a 50% interest in NDSP to Goossen.

B. District Court Referred to *Knop v. Knop*, 830 SE2d 723 (Va. 2019) Supporting Its Conclusion that Tax Documents Did Not Establish Intent to Transfer 50% Interest to Goossen

[¶44] As further support to its conclusion that the tax returns did not satisfactorily establish an intent to transfer on the part of Kruger, the district court cited to the decision in *Knop v. Knop*, 830 SE2d 723 (Va. 2019). In *Knop v. Knop*, 830 S.E.2d 723, 728 (2019), the children of a shareholder asserted that their father had gifted them certain stock ownership. The only evidence produced by the children to establish the existence of the alleged gifts were the father's tax returns. The court held that tax returns were wholly insufficient to establish an intent to relinquish control of the father's interests to his children. In particular the court stated, in relevant part, as follows:

The children contend that Father's statements on various tax documents reflecting a larger share of ownership by the children constitute a constructive delivery of certificated shares of stock. However, a statement on a tax return reflecting a gift of shares does not constitute a relinquishment of control of certificated shares by the donor. Statements on tax returns are made for purposes of assessing taxes. False or misleading statements may subject the person who makes them to civil or criminal penalties. Such statements, however, do not relinquish control of property. Statements made on a tax return do not, therefore, satisfy the element of delivery.

A simple analogy illustrates the point. A father may tell his child that he is donating his car and transferring the car title to the child. In reliance on this assertion, the

child submits documentation to the taxing authority reflecting the gift. The father may likewise submit tax records reflecting the gift. At all times, however, the father retains control of both the car and the title. The father never relinquishes control of the car and, in fact, continues to drive it. In that situation, the father may have made a false or misleading statement to both the child and the taxing authority, but it is readily apparent that those statements neither surrendered dominion and control of the vehicle nor vested dominion and control of the car in the child. Without that relinquishment, there is no delivery in the eyes of the law.

Knop v. Knop, 830 S.E.2d 723, 728 (2019).

[¶45] Similar to *Knop v. Knop*, the only evidence produced by Ms. Goossen of her acquisition of a 50% interest in NDSP were NDSP's tax returns. Tax returns, however, do not establish an intent or a delivery of any membership interests by Kruger. In fact, Kruger clearly and conclusively testified that he never transferred or otherwise relinquished control of any membership interests to Goossen beyond the 45% interest. Accordingly, the district court found "Kruger's testimony credible that he never transferred or relinquished control of any membership interest to Goossen after August 13, 2013. So this Court finds there is sufficient credible evidence showing Kruger has a 55% ownership interest of NDSP, LLC while Goossen has a 45% ownership interest." (Appendix at pp. 167-168.)

C. Kruger is Not Estopped, as a Matter of Law, from Claiming that the Income Allocation was Anything but 50/50

[¶46] For the first time on appeal, Goossen argues that Kruger should be estopped from claiming that Goossen was not entitled to a 50/50 income allocation. It is well-settled that issues not raised in the district court may not be raised for the first time on appeal. In

Paulson v. Paulson, 2011 ND 159, 801 N.W.2d 746 this Court stated:

"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.

Paulson v. Paulson, 2011 ND 159, ¶ 9, 801 N.W.2d 746, 750–51.

[¶47] At no time prior to the filing of her Appellant’s Brief did Goossen ever raise with the district court that Kruger was somehow estopped from claiming that Goossen was not entitled to a 50% economic or other interest in NDSP. Accordingly, Goossen’s arguments regarding estoppel should be disregarded by this Court.

[¶48] Even if this Court ignores the fact that Goossen failed to raise her current estoppel argument with the district court, the facts in this matter conclusively establish that estoppel does not apply in this matter. While Goossen argues that Kruger’s conduct made it apparent to her that the ownership would be 50/50, Goossen failed to bring forth such evidence either at the time of trial or in her Appellant’s Brief. Once again, the only evidence Goossen can point to are the tax returns which she, not Kruger, was involved in preparing and which Kruger did not even review. Goossen failed to introduce any evidence at trial which constituted a clear intention by Kruger to have Goossen possess a 50% ownership interest in NDSP.

[¶49] The district court weighed the evidence and testimony introduced at trial and concluded that Kruger held a 55% interest in NDSP and Goossen held a 45% interest in

NDSP. (Appendix at pp. 167-168.) A district court's choice between two permissible views of the weight of the evidence is not clearly erroneous, and simply because this Court may have viewed the evidence differently does not entitle it to reverse the court's findings of fact. *Edward H. Schwartz Constr., Inc. v. Driessen*, 2006 ND 15, ¶ 6, 709 N.W.2d 733. Accordingly, Kruger respectfully requests that the district court's finding that he holds a 55% interest in NDSP and Goossen holds a 45% interest in NDSP be affirmed.

III. The District Court Did Not Err in Determining \$72,450 of the 2014, 2015 and 2016 Expenses Labeled "Tom Training Materials," "Office Supplies WY," and "WY Office Set Up" are Chargeable Business Expenses Reducing Kruger's Draw/Dividend Account.

[¶50] Goossen's final issue on appeal is that the district court's finding that expenses categorized as "Tom Training Materials," "Office Supplies WY," and "WY Office Set Up" should not be considered business expenses of NDSP and should instead be considered as part of Kruger's draws. Such an argument by Goossen is, at best, contradictory given that Goossen initially categorized the expenses as NDSP business expenses, presented the expenses to NDSP's accountant for inclusion on NDSP's tax returns and then benefitted from the reduced taxes.

[¶51] As set forth above, it was by mere chance that Kruger discovered that his draw account was being charged for NDSP business expenses that had already been included on NDSP's tax returns. Due to disputes between Kruger and Goossen, Kruger retained the services of Doug Tracy, a certified public accountant, to review the financial records of NDSP. Upon Mr. Tracy's examination, he discovered that several of the expenses placed into Kruger's draw account had also been included as NDSP business expenses in the

NDSP tax returns. (Trans. 115:19-25; 116:1-7.) According to Mr. Tracy, Goossen had deducted on the NDSP tax return as a business expense “Tom Training Materials”, “Office Supplies WY”, and “WY Office Set Up”. (Appendix at p. 29.) After submitting the information to Richard Diehl for purposes of preparing the NDSP tax returns, Goossen created a journal entry in QuickBooks recording the expenses as a draw to Kruger. (Trans. 115:21-24).

[¶52] When questioned at trial about Goossen’s efforts to turn business expenses into Kruger draws, Richard Diehl testified that such double entries were inappropriate and said expenses should not have been added to Kruger’s draws. In particular, Richard Diehl offered the following testimony:

Q Now, you agree that an expense cannot be both an expense of a business and an expense allocated to Tom's draws?

A Could you rephrase that a little bit?

Q Sure.

A Are you talking about the 146,000? Is that what where you're headed?

Q Let's take Wyoming Office Supplies. If that's included on the tax return as a business expense --

A That's correct.

Q -- am I understanding correct that it shouldn't also be included as an expense against Tom's draw?

A It should not be an increase in his draw. And I alluded to that in my preface.

Q And the various Wyoming expenses, office set up, Tom's training materials, so on and so forth, did you ever question Sally about those expenses?

A I am sure I would have.

Q And I am assuming since you put the tax return together, and if you would have questioned her about it, you were comfortable including them as business expenses?

A Yes. If I wouldn't -- I will keep my mouth shut.

Q Well, if you wouldn't have been comfortable with them you wouldn't have included them? Is that a fair statement?

A If I wouldn't have been comfortable with it I would have continued asking until I got the right answer or the proper answer.

Q So following that logic, if these various Wyoming expenses, which were categorized as legitimate business expenses of North Dakota Safety Professionals

on the tax returns, and you have already testified that those expenses should not be allocated then to Tom's draws as well, correct?

A Correct.

(Trans. 167:16-25; 168:1-23.)

[¶53] With respect to the expenses for “Tom Training Materials”, “Office Supplies WY”, and “WY Office Set Up”, the trial testimony unequivocally established that such expenses were legitimate expenses of NDSP and should not have been included as part of Kruger’s draws. NDSP maintained offices in Parshall, North Dakota and Sundance, Wyoming. Goossen worked from the Parshall office and beginning in 2015 Kruger worked from the Sundance office. (Trans. 27:12-14). One hundred percent of the expenses for the Parshall office and the Sundance office were included as NDSP business expenses. (Trans. 27:22-25.) However, Goossen only reallocated the Sundance office expenses to Kruger draws in an obvious attempt to inflate Kruger’s draws and justify more money to herself. Clearly, the reallocation of “Office Supplies WY”, and “WY Office Set Up” to Kruger draws was inappropriate and the district court properly removed the Wyoming expenses from Kruger draws. (Appendix at pp. 168-170.)

[¶54] Similarly, Goossen’s reallocation of “Tom Training Materials” from a business expense to Kruger draws was entirely inappropriate and undertaken for the sole purpose of artificially inflating Kruger’s draws so Goossen could justify taking more money. Kruger never provided safety training on behalf of any other entity other than NDSP. (Trans. 29:9-13.) Thus, training materials acquired by Kruger were for the sole and exclusive benefit of NDSP and, therefore, are a legitimate business expense of NDSP and should not have

been reallocated to Kruger draws. Accordingly, the district court properly removed “Tom Training Materials” from Kruger draws. (Appendix at pp. 168-170.)

[¶55] Based on such evidence, the district court reached the following findings and conclusions:

From page 4 of Tracy's report, this Court agrees with Goossen that Kruger should be 100% responsible for the 2014 and 2015 international travel and marketing charges, along with all charges related to Mitchell Kruger. Goossen's testimony concerning the two trips abroad was more credible than Kruger. So this Court will leave the two trips are charges against Kruger's Draw/Div'd account. Further, this Court agrees that \$72,450 of the 2014, 2015, and 2016 expenses labeled 11Tom Training Materials", "Office Supplies WY," and "WY Office Set Up11 are chargeable business expenses and so Kruger's Draw/Div'd account should be reduced by \$72ASO. Index #139, ¶13.

(Appendix at pp.168-169.)

[¶56] Despite Goossen’s assertions to the contrary, the district court did make specific findings relating to the expenses that should and should not be included within Kruger’s draws. In reaching such findings, the district court relied upon the investigation and report of Doug Tracy. The credibility of expert witnesses, and the weight to be given their testimony, are matters to be determined by the trier of facts. *Gardebring v. Rizzo*, 269 N.W.2d 104, 109 (N.D.1978). Included within the report of Doug Tracy is an itemization of the Wyoming and “Tom Training Materials” expenses allocated to Kruger draws which Doug Tracy questioned. (Appendix at pp. 29, 32-49.) These same itemized expenses were found by the district court to be appropriate NDSP business expenses and not properly included within Kruger’s draw account.

[¶57] The district court's reliance on the report and testimony of Doug Tracy, along with related evidence introduced regarding the Wyoming expenses and “Tom Training

Materials”, does not result in the district court’s findings being clearly erroneous. “[A] finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, on the entire record, we are left with a definite and firm conviction a mistake has been made.” *Ctr. Mut. Ins. Co. v. Thompson*, 2000 ND 192, ¶ 20, 618 N.W.2d 505, 511. There was substantial evidence introduced at trial supporting the district court’s findings regarding the Wyoming and “Tom Training Materials” expenses. Accordingly, the district court’s finding that Kruger’s draw account should be credited \$72,450 is not clearly erroneous and should be affirmed.

CONCLUSION

[¶58] For the reasons stated above, this Court should affirm the district court’s order and judgment.

Respectfully submitted this 22nd day of March, 2021.

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CERTIFICATE OF COMPLIANCE

[¶60] The undersigned hereby certifies, in compliance with N.D.R.App.P. 32(e), that the Brief of Appellees Thomas M. Kruger and North Dakota Safety Professionals, LLC was prepared with Times New Roman proportional typeface, 13 pt. font, and complies with the page limitation and consists of 31 pages.

Dated this 22nd day of March, 2021.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20200287
Case No. 31-2017-CV-00213

Thomas M. Kruger and North Dakota
Safety Professionals, LLC,

Plaintiffs and Appellees,

v.

Sally V. Goossen,

Defendant and Appellant.

CERTIFICATE OF SERVICE

[¶1] I hereby certify that, on today's date, I served the Appellees Thomas M. Kruger and North Dakota Safety Professionals, LLC's Brief and this certificate of service on the following persons by electronic mail:

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