

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.

APPELLANT'S REPLY BRIEF

**APPEAL OF CORRECTED MEMORANDUM OPINION, CONCLUSIONS OF
LAW, ORDER FOR JUDGMENT, AND JUDGMENT ENTERED OCTOBER 12,
2020 IN THE DISTRICT COURT, NORTH CENTRAL JUDICIAL DISTRICT,
MOUNTRAIL COUNTY, NORTH DAKOTA
THE HONORABLE DOUGLAS L. MATTSON**

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I. SUMMARY OF REPLY ARGUMENT

[1] Kruger has pointed to no evidence or testimony to counter the overwhelming evidence that Kruger had agreed profits were to be split 50/50. All K-1s for the four years of NDSP's existence identify Goossen and Kruger as each having a share of profit or ownership of 50%. Kruger personally signed a U.S. Tax Form 2553 in 2014 under oath, that the "stock owned or percentage of ownership" of NDSP was 50/50 as of 08/07/2012.

[2] Even if one disregards the written evidence of the K-1s, the tax returns, and the signed Form 2553 by which Kruger acknowledged 50/50 ownership of NDSP, the facts show Kruger transferred financial rights under section 10-32-31, N.D.C.C., independent of "ownership" rights.

[3] Kruger fails to point to any evidence supporting the district court's conclusory decision that \$72,450 of the 2014, 2015 and 2016 Wyoming Expenses are legitimate business expenses reducing Kruger's Draw/Dividend account. The only evidence on this issue was that the Wyoming office was for Kruger's personal benefit and these were not NDSP business expenses.

II. KRUGER'S MISSTATEMENTS OF FACTS

[4] Kruger makes a number of incorrect and false statements for which he provides no citation or evidence. Goossen will only address those related to relevant issues.

[5] *"Kruger had absolutely no involvement in preparing or maintaining the financial books and records of NDSP. (Trans. 20:10-11.)"*

Appellees' Br. ¶ 5.

The facts show that Kruger had the accountants who set up the books "looking over his [Kruger's] shoulder" at the accounting input done by Goossen the entire time. Tr. 76:15–17. The QuickBooks version NDSP was using was an "online" version. Tr. 177:7–14.

Kruger's *personal* accountant, Patrick Fitzgerald ("Fitzgerald"), had access to the online QuickBooks the whole time, even up to trial. Tr. 233:19–23. It was Kruger who removed Goossen's access in 2016 or 2017. Tr. 220:18–21, 233:19–23.

[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.)"*

Appellees' Br. ¶ 6.

There is no evidence that Kruger's *personal* accountant's involvement in the QuickBooks "ceased," only that, in Kruger's opinion, it was dramatically decreased. Tr. 22:7–9. Kruger's accountant, Fitzgerald, had access to QuickBooks the entire time, even up to trial. Tr. 233:19–23. Goossen would input the day-to-day transactions and then Fitzgerald would do journal entries to allocate draws. Tr. 233:12–234:7. Kruger confirmed there was an independent accountant for NDSP, Richard Diehl, who also "reviewed Goossen's QuickBooks entries and categorizations to make sure that said entries were correct."

Appellees' Br. ¶ 6.

[7] *"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."*

Appellees' Br. ¶ 10 (emphasis added).

The testimony Kruger cited does not support that there was any "error." See Tr. 161:16–162:14. Kruger does not—and cannot—cite any evidence that the 50/50 ownership on the K1s was an "error."

[8] *"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. (Tr. 151:2-7.)"*

Appellees' Br. ¶ 11.

The testimony of tax accountant Diehl that Kruger cited does not support the assertion that Krueger did not review the tax returns. Rather, Diehl testified

Tr. 151

2 Q. So the actual return might not be signed, but the
3 electronic filing authorization is filed?

4 A. The Form 8879, yes.

5 Q. And do you recall if that was signed by Tom or?

6 A. I would have to go back and look. I am sure it probably
7 would have been.

As revealed by his March 23, 2015 e-mail to the tax accountant Diehl, Kruger obviously reviewed the K-1s in detail.

“I would like to visit about the K1 and the tax situation with Sally and myself in relationship with NDSP. Currently I have overdrawn from NDSP for the last fiscal period. What is the best way to even things up for FY2014? I believe the K1 shows equal shares are to be distributed.... I need the K1 figures to complete my returns. ...”

App. 143 (emphasis added). In this e-mail Kruger had no objection to, nor did he assert, the “equal” distribution was incorrect.

III. STATEMENT OF PERTINENT FACTS

[9] Goossen refers this Court to her main brief for a full recitation of the facts, but for ease of reference, she sets out facts pertinent to the argument below. Goossen was part of NDSP from the very beginning in 2012. Tr. 182:23–183:13. Goossen and Kruger discussed that Goossen should have 50% ownership in NDSP for her efforts related to NDSP. Tr. 184:13–186:16. After this discussion, profits were distributed on a 50/50 basis and there was never any further discussion that Goossen would not have a 50% ownership interest or a draw less than 50-50. Tr. 186:18–3.

[10] In 2013 and 2014, NDSP issued K-1s to Kruger and Goossen, showing each having a “share of profit, loss, and capital” of 50% for the entire year. App. 114–31 (2013 – App. 120, 121 and 130); App. 96–111 (2014 – App. 103 and 104).

[11] In 2014, Kruger and Goossen decided to utilize a sub-S corp election for NDSP. Tr.

184:6–13. On December 11, 2014, they each signed a U.S. Tax Form 2553, under penalty of perjury, acknowledging that the “stock owned or percentage of ownership” of NDSP was 50/50 and those interests were acquired as of 08/07/2012. App. 92–95.

[12] In 2015 and 2016, NDSP issued K-1s showing their “percentage of stock ownership” as 50% each. App. 74–91 (2015 – 50% to Kruger on App. 79 and 90 and 50% to Goossen on App. 80 and 91); App. 50–73 (2016 – 50% to Kruger on App. 56 and 72 and 50% to Goossen on App. 57 and 73).

[13] **Significantly, Kruger testified at trial that he knew Goossen was getting an equal distribution and did not object to Goossen getting “50 percent of the income” “during the whole life of [NDSP].”** Tr. 85:13– 25.

[14] Goossen did the day-to-day bookkeeping in Quickbooks for NDSP; however, Kruger provided Fitzgerald—an employee of another business of Kruger’s and Kruger’s *personal* accountant—access to the Quickbooks to be “looking over [Kruger’s] shoulder” for Kruger. Tr. 34:22–35:19, 62:24–63:8, 76:15–17. Both Goossen and Kruger testified that they each would use money from NDSP for personal expenses. Tr. 37:19–22, 198:1–6. Goossen would track those personal expenses in the books of NDSP by creating expense accounts in Quickbooks separate from the expense accounts for NDSP, expecting that Fitzgerald would attribute those separate expenses to either Kruger or Goossen’s respective draw account through a journal entry in Quickbooks at the end of the year as he had always done. Tr. 195:5–196:15, 197:2–6, 233:15–235:21.

[15] By 2015, Kruger had purchased a home in Wyoming, moved there, and set up a new business called Wyoming Equipment Rental Services Inc. (“WERS”). Tr. 32:4–10, 88:14–25, 194:19–24; App. 143. WERS was an equipment rental business Kruger

personally owned. Tr. 32:7–10. NDSP had no need for a Wyoming office as it was undisputed that NDSP did no safety training in Wyoming. Tr. 196:16–18.

[16] In an e-mail dated January 17, 2016, Goossen confirmed for Kruger that the Wyoming Expenses were being tracked on NDSP’s books as part of Kruger’s draw. App. 140. There is no evidence Kruger ever objected. Kruger incurred expenses of \$70,178.87 for “Tom Training Materials” for his Wyoming office, \$2,563.44 for “Office Supplies WY,” and \$48,900.34 for “Wyoming Office Set Up.” App. 23–25; App. 112–13. These expenses were unnecessary for NDSP, which is why—like she had done for her personal expenses and other personal expenses of Kruger in the past—Goossen had NDSP pay the expenses, but she tracked them in separate expense accounts because she thought that the amounts would go into Kruger’s draw and be offset as a distribution to him in a journal entry by Fitzgerald. Tr. 195:17–20, 196:19–197:6; App. 139–40.

[17] Kruger’s accountant expert Douglas Tracy testified he had no opinion if the “training materials” for Kruger’s Wyoming operations were legitimate business expenses of NDSP. Tr. 130:2–18.

IV. ARGUMENT

A. The district court erred in determining that “Plaintiff Thomas Kruger owns 55% of NDSP, LLC and Defendant Sally Goossen owns 45%” and then requiring the distributions from NDSP to be made on a 55-45 basis.

[18] The district court was apparently under the mistaken impression that Kruger could only agree to Goossen having a 50% interest through some specific document conveying or transferring that interest to Goossen. There is no requirement in the ND limited liability company statutes in effect up to 2015 or after requiring a transfer of a membership interest or a limited transfer of a financial interest (i.e. a share of distributions from the company)

to be in writing. Section 9-06-02, N.D.C.C., provides that any contract may be oral except as specifically required to be in writing by statute. As personal property not subject to the UCC, there is no statute requiring a transfer of membership or financial interest in an LLC to be in writing. See N.D.C.C. §§ 9-06-04; 41-02-08; 42-02-05.

[19] Under section 10-32-31, N.D.C.C., an owner may freely transfer his financial rights, in whole or in part. Under that section, as well as section 10-32-02(27), N.D.C.C., a financial right or financial interest is the owner's right to share in profits/losses and distributions and is separate from the owner's governing rights. All that was needed for a transfer of the additional 5% financial interest from Kruger to Goossen, was an agreement between them to do so, which did not have to be in writing and did not need to be effectuated by any resolution or action of NDSP. Id.

[20] North Dakota even allows this agreement to be implied. See N.D.C.C. § 9-06-01. "The law recognizes two classes of implied contracts: contracts implied in fact and contracts implied in law . . ." Lund v. Lund, 2014 ND 133, ¶ 12, 848 N.W.2d 266 (citation omitted). An implied-in-fact contract is one in which the existence and terms of the contract are manifested by conduct. Id.

[21] Goossen does not contend that the tax returns were the "transfer" of Kruger's ownership or financial right(s) to her; rather, the transfer was effectuated by Kruger's agreement to the 50-50 split of profits. Goossen's testimony, the documentary evidence (including the tax returns), and Kruger's trial testimony, admitting that the interest was to be equal, are overwhelming evidence of the agreement to effectuate Goossen's right to 50-50 distributions.

- i. **Kruger is estopped, as a matter of law, from claiming that the income allocation was anything but 50-50.**

[22] Goossen alleged Kruger should be estopped from claiming the distributions from NDSP should be anything but 50-50. See § N.D.C.C. 31-11-06. Section 31-11-06 states

When a party, by that party's own declaration, act, or omission, intentionally and deliberately has led another to believe a particular thing true and to act upon such belief, that party shall not be permitted to falsify it in any litigation arising out of such declaration, act, or omission.

N.D.C.C. § 31-11-06.

[23] Kruger asserts the Estoppel issue was not adequately raised below. Appellees' Br. ¶ 46. However, while not specifically using the word "Estoppel," Goossen, in her Answer to the Complaint, generally asserted the defenses under N.D.R.Civ.P. 8, which include Estoppel. App. 15 at ¶ 17. The issues addressed at trial and in the simultaneous briefing to the district court revolved around Kruger's claim that the distributions were not to be 50-50 despite his actions as well as his testimony at trial. While the issue could have been more clearly identified as "estoppel" below, Kruger had fair notice of Goossen's position as related to the estoppel defense. See generally Rutherford v. BNSF Ry. Co. 2009 ND 88, ¶ 14, 765 N.W.2d 705. Kruger should not be able to now claim that the distributions were not 50-50 when he *expressly testified* that he had no objection to Goossen getting 50% of the distributions (thereby paying taxes on a 50% distribution) on top of the fact that he signed off on the tax returns with K-1s and the Tax Form 2553 showing a 50-50 allocation.

B. The district court erred in determining \$72,450 of the 2014, 2015 and 2016 expenses labeled "Tom Training Materials," "Office Supplies WY," and "WY Office Set Up" ("Wyoming expenses") are chargeable business expenses reducing Kruger's Draw/Dividend account.

[24] This issue is addressed in detail in Goossen's main brief. In response, Kruger argues that the evidence "unequivocally established" that the Wyoming Expenses were legitimate business expenses, but he fails to point out any evidence supporting such a conclusion.

Appellees' Br. ¶ 53. In its memorandum decision the district court merely cited to paragraph 13 of Kruger's post trial brief. App. 149 at ¶ 13. At paragraph 13 of that brief, there is no breakdown of what items Kruger considered legitimate business expenses for the Wyoming office and he did not direct the district court to any such expenses; rather, Kruger simply referred to Exhibit 508a and 508b. App. 149 at ¶ 13. These exhibits contain thousands of transactions. See App. 7 the Docket (Doc. No. 113 electronic jump drive and Doc. No. 114 hard copy. Note: not in Appendix due to the size of the documents.)

[25] The accountants testified that if an amount set out in the NDSP Quickbooks' records is a legitimate business expense of NDSP, it should not be included as "draw" to Kruger. Following this logic, the district court correctly concluded that the hunting trips Kruger took to Africa and Scotland (identified as "Int'l Travel & Mktg") as well as sums paid by NDSP for personal charges of Kruger's son, Mitchell Kruger, were not legitimate NDSP business expenses and properly included them in Kruger's draw. App. 168–69 at ¶ 21. This was done even though such sums had been used as business expense deductions when the tax accountant did the taxes.

[26] The district court then inexplicably, without referring to any evidence, concluded that \$72,450 of the Wyoming Expenses were chargeable business expenses. App. 168–69 at ¶ 21. Kruger referred neither the district court nor this Court to any evidence that the Wyoming Expenses were legitimate business expenses of NDSP nor did he explain how the sum of over \$72,000 was reached. While these may have been legitimate expenses for Kruger's WERS Wyoming rental business, they were not necessary, legitimate expenses for NDSP and were properly included in Kruger's draws in NDSP.

[27] Goossen coded these expenses separately on the books of NDSP because she knew

at the time that they came in they were not expenses of NDSP. Kruger’s “office” in Wyoming was not needed or used for NDSP. Rather, Wyoming was simply where Kruger wanted and decided to live and conduct a business that was separate from and unrelated to NDSP. Even Kruger’s expert, Tracy, testified he had no opinion if the “training materials” for Kruger’s Wyoming operations were legitimate business expenses of NDSP. Tr. 130:2–18. Kruger cites no testimony or evidence that the expenses for Kruger’s Wyoming office were legitimate NDSP expenses.

[28] Where the district court did not provide findings that enable this Court to understand the reasoning behind its decision and merely adopted a party’s arguments without completing its own analysis in calculating sums due a party, the findings are inadequate. See Appellant’s Br. ¶ 49 (citations omitted).

V. CONCLUSION

[29] Because the district court incorrectly applied the law and reached a conclusion, which, when the entire evidence is reviewed, is unsupported, Goossen respectfully requests this Court (a) reverse the district court’s decision and find, as a matter of law, that Goossen is entitled to 50% of the distributions from NDSP, and (b) remand to the district court to apply the correct 50-50 ownership allocation. Goossen respectfully requests this Court reverse the district court’s decision and find, as a matter of law, that the \$72,450 of the Wyoming Expenses are not legitimate NDSP business expenses and shall not be deducted from Kruger’s draw.

[30] DATED this 6th day of April, 2021.

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VI. CERTIFICATE OF COMPLIANCE

[31] I, Kent Reierson, one of the attorneys of the law firm of CROWLEY FLECK PLLP, hereby certify that the foregoing brief complies with the page limitation in Rule 32, N.D.R.App.P., as it is a total of 12 pages (from the cover page through the signature line after the Conclusion).

/s/ Kent Reierson
KENT REIERSON (ND Bar ID #03685)

VII. CERTIFICATE OF SERVICE

[32] I, Kent Reierson, one of the attorneys of the law firm of CROWLEY FLECK PLLP, hereby certifies that on this 5th day of April, 2021, a true and correct copy of the **APPELLANT'S REPLY BRIEF** were served via **E-Mail** as follows:

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/s/ Kent Reierson
KENT REIERSON (ND Bar ID #03685)

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/s/ Kent Reierson
KENT REIERSON (ND Bar ID #03685)

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