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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1602

Auntie Ruth's Furry Friends' Home Away from Home, Ltd.,
Appellant,

vs.

GCC Property Management, LLC,
Respondent,

Peerless Water Treatment and Pollution Control, Inc., et al.,
Defendants.

Filed September 15, 2009
Affirmed in part, reversed in part, and remanded
Larkin, Judge
Concurring in part, dissenting in part, Ross, Judge

Hennepin County District Court
File No. 27-CV-07-3683

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Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

This appeal involves a dispute over provisions, rights, and remedies in a commercial lease. Appellant, the tenant, challenges the district court's final judgment after a bench trial that followed a partial summary-judgment decision. Appellant argues that the district court erred by (1) concluding that appellant's right of first refusal was not triggered by a 2005 transfer of the leased property and (2) awarding unjust enrichment damages to respondent-landlord for a portion of appellant's estimated electrical usage. Because the 2005 transfer of the leased property triggered appellant's right of first refusal, we reverse in part. But we remand for a determination of whether specific performance is an appropriate remedy. Because the award of equitable relief for unjust enrichment was within the district court's discretion, we affirm the award.

FACTS

Appellant Auntie Ruth's Furry Friends' Home Away from Home, Ltd. (Auntie Ruth) entered into a commercial lease with Peerless Water Treatment and Pollution Control, Inc. (Peerless) in November, 2000. Peerless operated its water-treatment business out of a commercial building located on Minnetonka Boulevard, and it leased extra space in the building to Auntie Ruth. Gary Capone owned 85% of Peerless; the other 15% was owned by Capone's brother and brother-in-law. Peerless's assets included the building on Minnetonka Boulevard.

Paragraph 23 of the lease, entitled "Sale of Property," grants Auntie Ruth a right of first refusal. It states:

> In the event, during the term of this Lease, that Lessor decides to sell all or any part of the property . . . Tenant shall have a first right of refusal, during the term of this Lease, and any extension thereto, to purchase said property. If Lessor receives an offer from a third party to purchase all or any part of the property, Lessor shall notify Tenant in writing of such offer and Tenant shall have seven (7) business days to enter into a contract with Lessor on such terms. If Tenant does not enter into a Contract within [the] seven (7) days then this first [right of] refusal shall terminate.

Auntie Ruth sued seeking to enforce its right of first refusal based on two separate incidents. The first incident occurred in 2005 when Capone sold Peerless's stock to Mark Maiser. Because the sale of stock did not include the sale of the building, Capone created GCC Property Management, LLC (GCC) with himself and his wife, Chris Capone, and transferred the Minnetonka Boulevard building from Peerless to GCC. The Capone's interest in GCC was divided equally. The title transfer was accomplished by means of a "purchase agreement" with a purchase price of $1,350,000. Gary and Chris Capone signed the purchase agreement both for Peerless as the "seller" and for GCC as "buyer." Neither GCC nor Peerless notified Auntie Ruth of the purchase agreement.

The second incident occurred in January 2007 when GCC agreed to sell the building to T-K Holdings-Minnetonka, LLC (T-K Holdings). The terms of the proposed sale included a payment at closing of $2,375,000 and $475,000 upon future resale of the property with an additional payment for 20% of the future purchase price in excess of $2,375,000. Though Auntie Ruth once again did not receive written notice of the proposed sale as required by paragraph 23 of the lease, Auntie Ruth learned of the sale and informed Gary Capone that the right-of-first-refusal provision might apply to the

agreement. In response, GCC and T-K Holdings cancelled the purchase agreement, and GCC refused to sell the building to Auntie Ruth contending that the proposed sale did not trigger the right of first refusal.

Auntie Ruth sued Peerless and GCC in February 2007 seeking to enforce the right of first refusal under paragraph 23 of the lease. Auntie Ruth also sought to compel disclosure of the terms of the 2005 transfer between Peerless and GCC. GCC answered, arguing that Auntie Ruth was not entitled to exercise its right of first refusal. GCC also counterclaimed that Auntie Ruth had breached the lease by failing to pay its share of the electrical costs.

Auntie Ruth moved for summary judgment in May 2007 seeking: (1) a declaration that the lease gives Auntie Ruth a valid right of first refusal to purchase the property; (2) a determination that the right was triggered by the 2005 transfer of the property from Peerless to GCC; and (3) a determination that the right was again triggered in 2007 by the signing of the purchase agreement between GCC and T-K Holdings. Auntie Ruth also sought specific performance of the right of first refusal "as to the 2005 sale or, alternatively, the 2007 sale." GCC also moved for summary judgment, seeking a finding that Auntie Ruth was not entitled to specific performance as to either transaction.

The district court originally granted summary judgment in favor of Auntie Ruth, concluding that Auntie Ruth "held a valid right of first refusal." It concluded that paragraph 23 of the lease provided that "Auntie Ruth's right of first refusal was triggered upon the occurrence of two conditions: (1) the landlord shows a desire to sell; and (2) a third party makes an offer to buy the property, or a portion thereof." It further concluded

that Auntie Ruth's right of first refusal was triggered by both the 2005 and 2007 transactions. Regarding the 2005 transaction between Peerless and GCC, the district court reasoned that GCC was a "third party" because it was not a party to the lease agreement between Peerless and Auntie Ruth, and that "Peerless and GCC are recognized by the Minnesota Secretary of State as two separate and distinct legal entities." It concluded: "The fact that Peerless and GCC have similar owners is immaterial."

But the district court declined to order summary judgment on the issue of specific performance concluding that "material fact[s] exist as to the financial outcome and details of the 2005 sale of the Property from Peerless to GCC, the extent of [Auntie Ruth's] default . . . , if any, and [Auntie Ruth's] ability, willingness, and readiness to match the terms of the 2005 and 2007 purchase agreements." It noted that "specific performance of the right of first refusal as to the 2005 purchase agreement may [simply be] too inequitable, when applied to the specific facts of the transaction." It therefore set the matter for trial as to remedies only.

Prior to trial, GCC asked the district court to reconsider its conclusion regarding the 2005 transfer of the property, but the district court denied GCC's motion for reconsideration. After a four-day bench trial, the district court filed its findings of fact, conclusions of law, and order for judgment. The district court concluded that its earlier summary-judgment decision that the 2005 transaction triggered Auntie Ruth's right of first refusal was incorrect and rescinded that portion of its order. But the district court again concluded that the 2007 transaction between GCC and T-K Holdings triggered Auntie Ruth's right of first refusal. The district court denied GCC's claim for contract

damages but granted its claim for unjust enrichment damages, ordering Auntie Ruth to pay GCC $37,213.87 for Auntie Ruth's estimated share of the electrical costs from December 2000 through April 2008. Auntie Ruth appeals the district court's decision regarding the 2005 transaction and its award of unjust enrichment damages to GCC. By notice of review, GCC challenges the district court's calculation of the unjust-enrichment award, arguing that it is entitled to a larger award.

D E C I S I O N

I. The 2005 transfer triggered the right-of-first-refusal provision.

Asserting that Peerless, the seller of the property, is a distinct entity from GCC, the buyer of the property, Auntie Ruth challenges the district court's determination that the 2005 transaction did not trigger its right of first refusal. The right of first refusal is contained in the parties' lease contract. "The construction and effect of an unambiguous contract present questions of law, which we review de novo." *Dorsey & Whitney LLP v. Grossman*, 749 N.W.2d 409, 417-18 (Minn. App. 2008) (citing *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003)). If a contract is ambiguous, however, a district court may interpret its language to discern and effectuate the intent of the parties to the contract. *See Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004); *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). A district court's determination of the meaning of an ambiguous contractual provision is a finding of fact which we review for clear error. *Trondson v. Janikula*, 458 N.W.2d 679, 682 (Minn. 1990). "Whether a contract is ambiguous is a question of law, on which the reviewing court owes no deference to the district court's

determination." *Murray v. Puls*, 690 N.W.2d 337, 343 (Minn. App. 2004), *review denied* (Minn. Mar. 15, 2005). "A contract is ambiguous if it is reasonably susceptible to more than one construction." *Blackburn, Nickels & Smith, Inc. v. Erickson*, 366 N.W.2d 640, 644 (Minn. App. 1985), *review denied* (Minn. June 24, 1985).

Here, we conclude that the right of first refusal in the parties' lease is clear and unambiguous and therefore that we need not construe it. The lease does not preclude Auntie Ruth from exercising its right of first refusal if an offer to purchase is made by an entity owned partially by Gary Capone. Nor does it contain an exception for a non-arm's length transaction or sale to a separate Gary-Capone-controlled entity or to Gary Capone's family members. Because the right-of-first-refusal provision is clear and unambiguous, we cannot rewrite or limit the effect of the provision by reading such exceptions into the contract. *See Travertine*, 683 N.W.2d at 271.

GCC argues that the 2005 transaction did not constitute a sale for purposes of the right-of-first-refusal provision because the transfer from Peerless to GCC was a "cash-neutral event between two companies owned and controlled by the same person—Gary Capone." We reject this idea for two reasons. First, generally, there is a distinction between a corporate entity and its shareholders. *See Blohm v. Kelly*, 765 N.W.2d 147, 153 (Minn. App. 2009) (stating that "[c]orporate assets 'do not belong to the stockholders, but to the corporation'") (quoting *Seitz v. Michel*, 148 Minn. 80, 87, 181 N.W. 102, 105 (1921)). GCC's argument that the 2005 transfer was essentially a transfer from Gary Capone to Gary Capone ignores this distinction.

Second, GCC's argument is largely based on foreign caselaw in which a partial transfer or reorganization of the form of ownership of the entity owning an asset was held not to be a sale for the purposes of a right of first refusal. Foreign caselaw is not binding on Minnesota courts. *Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856, 861 (Minn. 1984). Moreover, the foreign cases GCC cites do not appear to require the result GCC urges.

In *Prince v. Elm Inv. Co.*, 649 P.2d 820, 822-23 (Utah 1982), the Utah Supreme Court reviewed and summarized the pivotal cases addressing transfers that do and do not constitute sales for right-of-first-refusal purposes. *Prince* identified the following common characteristics in cases involving transfers that were deemed to not trigger a right of first refusal: the transfer or reorganization achieved no change in the substance of the previous owner's control over the leased property; an adjustment of interest among multiple lessors without introducing any new lessor; or, no change in lessor at all. *Id.* While *Prince*'s summary of these cases is consistent with our reading of them, we cannot say that applying *Prince* would require GCC to prevail here: Peerless was an entity largely owned and controlled by Gary Capone; Chris Capone had no direct ownership interest in Peerless. But Chris Capone has a 50% interest in GCC. Therefore, even ignoring the fact that the 2005 transfer was from one corporate entity to a separate and distinct business entity, it is not apparent that the result of the 2005 sale is that there was no change in the substance of the previous owner's control over the leased property.

More fundamentally, the cases GCC cites do not provide clear guidance on why or under what circumstances they partially or completely disregard the business entities involved in those transactions, as GCC is essentially asking this court to do here.

Because this court is merely an error-correcting court, “the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court.” *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (error-correcting court); *Terault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) (extending existing law), *review denied* (Minn. Dec. 18, 1987). Therefore, we decline to adopt a foreign analysis that is at odds with the aspects of Minnesota law distinguishing corporations from their shareholders and limited liability companies from their members.

Finally, we note that *Prince* summarizes the sales aspect of the cases it addresses by stating that “for the purposes of a right of first refusal, a ‘sale’ occurs upon the transfer (a) for value (b) of a significant interest in the subject property (c) to a stranger to the lease, (d) who thereby gains substantial control over the leased property.” 649 P.2d at 823. This aspect of *Prince* appears satisfied here. The 2005 transfer of Peerless’s interest in the leased property to GCC was for value—a purchase price of $1,350,000. Because the interest conveyed was the property itself, the interest conveyed was significant. Further, GCC, having not existed when the lease was entered, is not only a stranger to the lease, but has different owners and a different organizational structure than Peerless. Finally, it is undisputed that the land is now owned by a different entity. This change in the substance of control over the leased property distinguishes the instant case from the cases relied on by GCC. *See id.* at 822.

We hold that the 2005 transfer constituted a sale to a third party that triggered Auntie Ruth’s right of first refusal, and we reverse the district court’s decision to the contrary. Because our decision on Auntie Ruth’s substantive challenge is dispositive, we

need not address its procedural argument that the district court erred by reversing its summary-judgment decision regarding the 2005 transaction "without having received any new facts at trial."

We next address the proper remedy. A right of first refusal entitles a party to purchase the property on the exact terms of the option offer. *Minar v. Skoog*, 235 Minn. 262, 265-66, 50 N.W.2d 300, 302 (1951) (holding that a lessee had forfeited its right of first refusal because its acceptance did not match the option offer with "exactitude"). The right-of-first-refusal provision at issue here specifically states: "If Lessor receives an offer from a third party to purchase all or any part of the property, Lessor shall notify Tenant in writing of such offer and Tenant shall have seven (7) business days to enter into a contract with the Lessor *on such terms*." (Emphasis added.) Auntie Ruth contends that because her right of first refusal was triggered by the 2005 transaction, this court should order specific performance thereby enabling Auntie Ruth to purchase the Minnetonka Boulevard building for $1,350,000 consistent with the terms of the 2005 purchase agreement.

Specific performance is an equitable remedy within the sound discretion of the district court. *Lilyard v. Carlson*, 499 N.W.2d 803, 811 (Minn. 1993). "Specific performance of a contract to convey real estate is not a matter of absolute right, and if enforcement would be unconscionable or inequitable, performance will not be decreed." *Hilton v. Nelsen*, 283 N.W.2d 877, 881 (Minn. 1979) (quotation omitted). The district court recognized its discretion in this area and stated: "Even if the Court were to find that the 2005 transaction triggered the right of first refusal, the Court would not conclude that

the $1,350,000 price under the Peerless-GCC purchase agreement constituted the actual value of the property for purposes of specific performance. Rather, the Court would hold that the appraised value of $2,020,000 would control."

While the district court commented regarding whether an award of specific performance would be appropriate if the 2005 transaction did in fact trigger Auntie Ruth's right of first refusal, the district court did not rule on this issue. Because the district court concluded that the 2005 transaction did not trigger the right of first refusal, there was no need for the district court to consider and determine Auntie Ruth's request for specific performance related to the 2005 transaction. Auntie Ruth urges us to order specific performance on appeal. But a determination of whether specific performance is appropriate is entrusted to the district court's discretion and should be made in the first instance by the district court. "The function of the court of appeals is limited to identifying errors and then correcting them." *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). We therefore remand for a determination of whether specific performance is an appropriate remedy.

On remand, the district court has discretion to order specific performance. But if the district court determines that specific performance is appropriate, such an award must be consistent with the terms of the right-of-first-refusal provision; in other words, Auntie Ruth must be allowed to purchase the property "on such terms" as were contained in the 2005 purchase offer. *See Minar*, 235 Minn. at 265-66, 50 N.W.2d at 302. Specific performance must be based on the purchase-offer price, not the fair market value of the property or some other amount.

II. The district court did not err by awarding equitable relief based on unjust enrichment.

The district court ordered Auntie Ruth to pay $37,213.87 for its share of electricity costs from December 2000 through April 2008. The district court reasoned that even though the lease called for Auntie Ruth's electrical usage to be separately metered and that GCC's failure to provide separately metered electricity prevented Auntie Ruth from "knowing the precise amount owed for its electricity use," the lease "did contemplate [Auntie Ruth] paying its share of the electricity costs." The district court reasoned that an unjust-enrichment award was appropriate because "the parties were laboring under a mutual mistake of fact regarding the cost of separation [of the electricity] at the time of executing the Lease," and because "it would be unjust for [Auntie Ruth] to retain the benefit of electrical service without some form of compensation."

An award of equitable relief is within the sound discretion of the district court; only a clear abuse of that discretion will result in reversal. *Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979).

The lease contains two provisions that address electricity. The first provision states that "[l]essor agrees to furnish water and electricity to the common areas," and "air conditioning . . . and heat . . . for all common areas and the leased premises which shall be separately metered." The second provision establishes that "[t]enant shall pay their own heat, electric, and water, all of which shall be separately metered." GCC began the process of separately metering the electricity in 2007. By February 2008, GCC's efforts achieved substantial separation. Auntie Ruth paid only $3,000 for its electric use

between the lease's inception in 2000 and May 2001, refusing to pay subsequent invoices because the electricity was not yet separately metered. Auntie Ruth began paying its electric bills in 2007, after GCC took steps to separately meter the electricity.

GCC argues that the district court properly ordered Auntie Ruth to pay its share of electrical costs because to forgive seven years of electricity use would unjustly enrich Auntie Ruth. We agree.

In order to establish a claim for unjust enrichment, the claimant must show that another party knowingly received something of value to which he or she was not entitled and that the circumstances are such that it would be unjust for that party to retain the benefit. *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996). "Fraud and mistake are not the only grounds for recovery under the theory of unjust enrichment. An action for unjust enrichment may be based on failure of consideration, fraud, mistake, and situations where it would be *morally wrong* for one party to enrich himself at the expense of another." *Anderson v. DeLisle*, 352 N.W.2d 794, 796 (Minn. App. 1984) (emphasis added), *review denied* (Minn. Nov. 8, 1984).

Here, the district court reasoned that because Auntie Ruth "received and knowingly accepted a benefit in the form of electrical service," and because "it was understood by the parties [that] at the time they executed the Lease that [Auntie Ruth] would not be entitled to electrical service free of charge[,] . . . it would be unjust for [Auntie Ruth] to retain the benefit of electrical service without some form of compensation." The district court's decision is not an abuse of discretion.

Auntie Ruth argues that the unjust-enrichment award was improper because equitable relief cannot be granted where the rights of the parties are governed by a valid contract. Although recovery for unjust enrichment is generally inappropriate when the rights of the parties are governed by a valid contract, *U.S. Fire Ins. Co. v. Minn. State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981), if there "is not a 'full agreement concerning the details of compensation,'" a party may recover on an unjust-enrichment claim. *Midwest Sports Marketing, Inc. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 268 (Minn. App. 1996) (quoting *Holman v. CPT Corp.*, 457 N.W.2d 740, 745 (Minn. App. 1990)), *review denied* (Minn. Sept. 20, 1996). Thus, the existence of a contract or availability of contractual damages does not necessarily prevent an award of equitable relief.

Although the parties' rights regarding payment of electrical costs are governed by a valid contract, the contract does not contain a full agreement concerning the details of which party was responsible for separately metering the electrical service. The lease, the parties' testimony, and the parties' actions reflect the lack of agreement in this regard. Under these circumstances, the district court did not abuse its discretion by awarding GCC equitable relief despite the existence of a contract.

Auntie Ruth next argues that an unjust-enrichment award is inappropriate because GCC failed to mitigate its damages when it elected not to separately meter the electricity until 2007, despite its knowledge that Auntie Ruth refused to pay for electrical use until the electricity was separately metered. The district court ultimately concluded that GCC was responsible for the metering, but during the litigation, GCC maintained that Auntie

Ruth was responsible for separately metering the electrical services under the terms of the lease. We do not fault GCC for failing to mitigate its damages by separately metering the electrical services sooner when the contract does not clearly state which party was responsible for metering and GCC contended that it was Auntie Ruth's responsibility.

Auntie Ruth also asserts that the district court's finding that there was a mutual mistake of fact regarding the cost of separately metering the electricity is clearly erroneous, arguing that neither side presented any evidence that it was under a mutual mistake of fact when they negotiated the terms of the lease. We will uphold the district court's findings of fact unless they are clearly erroneous. Minn. R. Civ. P. 52.01. Even if the district court's finding as to a mutual mistake of fact is unsupported by the record and therefore clearly erroneous, the award of equitable relief is sustainable on other grounds: "it would be unjust for [Auntie Ruth] to retain the benefit of electrical service without some form of compensation." *See Anderson*, 352 N.W.2d at 796 (stating that an action for equitable relief may be based on situations in which it would be morally wrong for one person to enrich himself at the expense of another). Thus, the allegedly erroneous finding is not a basis for reversal. *See* Minn. R. Civ. P. 61 (stating that the court must disregard errors that do not affect the parties' substantial rights at every stage of the proceeding).

Finally, Auntie Ruth claims that the conduct of Peerless and GCC shows that they waived their claim for electrical usage charges from 2000 through 2005. The district court rejected this claim, and its findings on this issue are supported by the record. While the evidence regarding the alleged waiver was conflicting, the district court's decision is

based on an implicit credibility determination to which we defer. *See Sefkow*, 427 N.W.2d at 210 (reviewing courts defer to district court credibility determinations). Moreover, the district court based its decision on a provision in the lease that states that the lease cannot be modified orally and that all modifications must be in writing. The district court found that there was no written agreement to amend the lease to forgive Auntie Ruth's share of the electrical costs from 2000 to 2005, and this finding is not clearly erroneous.

III. The district court did not abuse its discretion in its determination of the amount of equitable damages.

GCC contends that the district court's calculation of the unjust-enrichment award is "contrary to the evidence" and this court should remand the issue to the district court for re-calculation. The district court awarded $37,213.87 to GCC because "[b]ased upon the evidence presented, the Court is confident that [Auntie Ruth's] electrical usage was at least 16% of the total usage" and "[a]ny figure higher than 16% would run the risk of overestimation." We review the district court's equitable award for an abuse of discretion. *Pooley v. Mankato Iron & Metal, Inc.*, 513 N.W.2d 834, 838 (Minn. App. 1994), *review denied* (Minn. May 17, 1994).

GCC incorrectly asserts that "the Trial Court offered no factual basis for deviating from the amounts claimed." The district court found that "GCC began separating the electrical service and providing separate metering of the electric service . . . in March 2007" and "[s]ubstantial completion of the electric service separation was completed in February 2008." The district court also found that "[s]ince electrical service separation

began, [Auntie Ruth's] highest monthly percentage of overall electricity usage was 40% . . . [and its] lowest percentage of overall electricity usage was 16%," and "[t]he total electric use for the Property from December 2000 through April 2008 is $229,003.86 . . . [and o]f that amount, [Auntie Ruth] has already paid $12,594.04." GCC does not assign error to the district court's findings, but instead asserts that the district court should have used an average of Auntie Ruth's percentage of overall use from the three months on record after its electrical-usage separation was substantially complete.

The district court's decision to use the lowest percentage of Auntie Ruth's overall usage is reasonable, considering that the unjust-enrichment award sought to estimate Auntie Ruth's electrical usage from the past seven years without evidence of Auntie Ruth's actual electrical usage for that period. An award of equitable relief is not the same as an award of contractual damages. The district court has discretion to "fashion equitable remedies based on the exigencies and facts of each case so as to accomplish justice." *Id.* at 837. It follows that the district court is not bound by any formula. And this court will not reverse the district court's decision absent a clear abuse of discretion. *Id*. at 838. The district court's calculation of equitable damages was well within its discretion, and we affirm the award.

Affirmed in part, reversed in part, and remanded.

Dated: ____________

____
Judge Michelle A. Larkin

ROSS, Judge (concurring in part, dissenting in part)

In light of the district court's fact finding and a solid line of reasoning established by most courts that have considered the question of a conveyance like the 2005 transfer of title in this case, I disagree with the majority's holding that the 2005 transfer triggered Auntie Ruth's right of first refusal. I therefore dissent with that part of the court's opinion.

The underlying facts as found by the district court support its legal conclusion that the 2005 transfer was not the sort of transaction that constitutes a third-party sale contemplated by the lease's right-of-first-refusal provision. The district court found that Gary Capone and his wife, Chris Capone, owned and controlled both the "seller" and the "buyer" companies—Peerless and GCC. It concluded that the 2005 property "sale" transaction was not designed to be an exchange of the property for fair market value, but was, instead, designed only to facilitate the sale of Peerless stock to Mark Maiser. In other words, the sale was not designed to transfer control of the real property subject to the lease provision; it was intended to sever the Peerless-owned real property from the Peerless stock.

This is evident. The property exchange between Peerless and GCC was at a "cost" of $1,350,000, which is at least $670,000 less than the appraised value of the property at the time, and approximately a million and a half dollars less than the Capones actually agreed to sell the property for just 17 months later. Gary and Chris Capone certainly *thought* they were merely transferring the property to themselves for organizational and

tax purposes; they alone are named and they alone signed as the "sellers" and as the "buyers" on the 2005 purchase agreement between Peerless and GCC. And the district court found that the purpose of the conveyance was for the Capones to retain ownership and control of Peerless's real property despite the sale of Peerless's stock, while at the same time taking advantage of a more favorable arrangement under estate-planning and taxation laws.

But the majority has decided that this sort of self-to-self estate-planning and tax-sheltering arrangement exposes the Capone landlords potentially to a $1.5 million property loss to their tenants because the lease uses the word "sale" and the shell transaction meets the formal requirements of a "sale." I agree that the language of the contract plainly regards a "sale," but this conclusion certainly does not answer the disputed issue in this case, which is whether the 2005 exchange was in fact a "sale" as contemplated by the lease.

Surely every formal "sale" is not a right-of-first-refusal-invoking *sale*, as the majority reasons. What if, for example, a landlord transfers property to his son in a "sale" at such an obviously reduced price that everyone involved recognizes that the transaction is intended as a gift rather than a sale? What if a landlord is the sole owner of a property that she transfers for some below-market cash "price" in a "sale" to a corporation that she solely owns, intending the transfer only to put her in an advantageous position under soon-expiring capital-gains laws? These and many other formal "sales" are the types of transactions that courts consistently refuse to recognize as a "sale" under right-of-first-refusal language materially identical to the language of the

provision in this case. *See Creque v. Texaco Antilles Ltd.*, 409 F. 3d 150, 154 (3rd Cir. 2005) (holding that although "the conveyance took the form of a sale . . . and was reported as a sale on [the parties'] tax returns," it did not function as a "sale" for the purposes of a right of first refusal because "look[ing] beyond formalities and accounting entries to the true nature of the conveyance" showed that the conveyance was not an arms-length transaction and was simply for business convenience); *see also McGuire v. Lowery*, 2 P.3d 527, 532 (Wyo. 2000) (holding that conveyance of real property from individual owners to their wholly-owned corporation was not a "sale" that triggered the right of first refusal); *Belliveau v. O'Coin*, 557 A.2d 75, 78–79 (R.I. 1989) (holding that a conveyance of real property owned individually by wife to a corporation she owned with her husband did not trigger right of first refusal); *Isaacson v. First Sec. Bank of Utah*, 511 P.2d 269, 272 (Idaho 1973) (holding that the conveyance of land subject to a right of first refusal from father to son for less than half of its fair market value did not constitute a "sale" for the purposes of the first-refusal right because in reality, "the transfer was more of a gift than a sale"); *Kroehnke v. Zimmerman*, 467 P.2d 265, 266–67 (Colo. 1970) (holding that a right of first refusal was not triggered when real property owned by individuals was conveyed to a corporation wholly owned by the same individuals); *Sand v. London & Co.*, 121 A.2d 559, 561–62 (N.J. 1956) (holding that when a corporation owned by two individuals conveyed a parcel of land subject to a right of first refusal to another corporation owned by the same two individuals, the conveyance did not invoke the right of first refusal).

The majority instead chooses a stilted approach to the lease language such that a formalistic "sale" means "sale" even if the "price" is ridiculously below market value and it is clear that the "seller" and the "buyer" are either identical or are effectively the same as it regards practical control of the property. As far as I can tell from the authority cited by both parties and found by the court, of those federal and state appellate courts that have considered this issue, Minnesota today becomes the very first to hold meaningless the substance and intent of the "sale" transaction to create a sort of tenant nirvana—the real chance to acquire the landlord's multimillion-dollar property at a fraction of the price. At least the Capones' sale to themselves included a modest cash exchange; that may assuage the sense of injustice on remembering that their penalty for rearranging their property ownership interest to save a few dollars in estate planning is their obligation to fully fund their tenant's $1.5 million stimulus package.

The majority is correct that the lease does not expressly state "an exception for a non-arm's length transaction." But until now, caselaw never required that caveat. I agree that this appears to be an issue of first impression in Minnesota. We therefore should explain why we do not follow the guiding wisdom of those courts that have considered this question. Seeing no reason to follow a different course, I believe strongly that we should hold that a "sale" to "third parties" as generally contemplated in right-of-first-refusal provisions may invite the district court to construe the true nature of a "sales" transaction to determine whether it is the kind of sale that is meant by "sale" to a "third-party" in the provision. That is what the district court did in this case when it refused to construe the 2005 Capone-to-Capone below-market "sale" to be a basis for Auntie Ruth

to evict the Capones from their property for a bargain far below the fair market value. In my view, the analysis and reasoning described in the historic summary of the United States Third Circuit Court of Appeals in *Creque* is unassailable, and represents what has developed into a uniform standard that holds the parties to what they bargained for, but no more. *See* 409 F.3d at 152–55 (surveying prevailing authority and summarizing with general principles to evaluate whether a formal "sale" is a "sale" under right-of-first-refusal provisions).