

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

WFND, LLC,)	Supreme Court No. : 20060125
)	
Appellant/Cross-Appellee,)	Cass County No.: 09-04-c-03626
)	
-vs-)	
)	
Fargo Marc, LLC,)	
)	
Appellee/Cross-Appellant.)	
)	
)	

BRIEF OF APPELLEE/CROSS-APPELLANT
FARGO MARC, LLC

Appeal from Judgment and Order of the District Court,
East Central Judicial District
Cass County District Court
The Honorable Douglas R. Herman

Mark R. Hanson (ND ID # 04697)
Kirsti B. Hourigan (ND ID # 05759)
NILLES LAW FIRM
1800 Radisson Tower
201 North 5th Street
P. O. Box 2626
Fargo, North Dakota 58108-2626
Phone: (701) 237-5544
Fax: (701) 280-0762
ATTORNEYS FOR APPELLEE/CROSS-APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS3

 I. Documents Provided To WFND During the
 Due Diligence Period3

 II. Old Navy’s Rent for Space at Westgate Commons5

 III. The Sale of the Water Detention Pond to Menards6

 IV. Claims Presented at Trial and the Trial Court’s Decision7

LAW AND ARGUMENT9

 I. The Clearly Erroneous Standard Of Review Applies To
 The Majority Of WFND’s Claims Of Reversible Error10

 II. The District Court Properly Exercised Its Discretion In
 Finding For Fargo Marc on WFND’s Breach of
 Contract Claim11

 A. The Standard of Review for Breach of Contract.....12

 B. WFND Confuses North Dakota Law with Respect
 to the Tort of Deceit and Claims for Breach of Contract.....12

 C. WFND Incorrectly Alleges That Fargo Marc Breached
 an Implied Covenant of Good Faith.....13

 D. WFND Misconstrues The Doctrine of “Frustration of
 Purpose”15

 E. Evidence Presented at Trial Supports the Conclusion
 that Fargo Marc is Not Liable for Breach of Contract.....16

1.	The Trial Court Properly Interpreted Fargo Marc’s Duties Under the Purchase Agreement	16
2.	Substantial Evidence Was Presented at Trial on Fargo Marc’s Compliance with the Terms of the Parties’ Purchase Agreement.....	17
III.	The Trial Court’s Failing to Dismiss WFND’s Claim Against Fargo Marc for Deceit Was an Abuse of Discretion	20
IV.	The District Court Abused its Discretion by Finding Fargo Marc Liable for Deceit	22
V.	If The District Court’s Finding For WFND On The Deceit Claim Is Affirmed, Then The Damages The District Court Awarded Must Also Be Affirmed.....	23
A.	The District Court Properly Applied the Rules of Comparative Fault to WFND’s Deceit Claim.....	23
B.	The Evidence Presented at Trial Supports the Trial Court's Findings of the Applicable Cap Rate	29
VI.	The District Court Did Not Err by Finding For Fargo Marc On Its Counterclaim Seeking Damages For The Sale Of Land To Menards.....	32
VII.	The District Court Did Not Err In Failing To Award Prejudgment Interest	38
VIII.	WFND is Not Entitled to Attorney’s Fees.....	39
IX.	The District Court Erred When it Taxed Costs and Expenses in WFND’s Favor	40
	CONCLUSION.....	41

TABLE OF AUTHORITIES

CASES

<u>Aaland v. Lake Region Grain Coop.</u> , 511 N.W.2d 244 (N.D. 1994)	14
<u>Ag Acceptance Corp. v. Glinz</u> , 2004 ND 154, 684 N.W.2d 632	12
<u>Barnes v. St. Joseph’s Hospital</u> , 1999 ND 204, 601 N.W.2d 587	13,14
<u>Battle v. Municipal Housing Authority for City of Yonkers</u> , 53 F.R.D. 423 (S.D.N.Y. 1971)	21
<u>Bauer v. Graner</u> , 266 N.W.2d 88 (N.D. 1978)	25
<u>Beare v. Wright</u> , 103 N.W. 632 (N.D. 1905)	31
<u>Biteler’s Tower Service, Inc. v. Guderian</u> , 466 N.W.2d 141 (N.D. 1991)	41
<u>Braunberger v. Interstate Engineering, Inc.</u> , 2000 ND 45, 607 N.W.2d 904	41
<u>Buri v. Ramsey</u> , 2005 ND 65, 693 N.W.2d 619	30
<u>Buzzell v. Libi</u> , 340 N.W.2d 36 (N.D. 1983)	10
<u>Champagne v. U.S.</u> , 513 N.W.2d 75 (N.D. 1994)	24
<u>Dakota Grain Co. v. Ehrmantrout</u> , 502 N.W.2d 234 (N.D. 1993)	24,25
<u>Dalan v. Paracelsus Healthcare Corporation of North Dakota, Inc.</u> , 2002 ND 46, 640 N.W.2d 726	13
<u>Dawn Enter. v. Luna</u> , 399 N.W.2d 303 (N.D. 1987)	16

<u>Eckmann v. Northwestern Fed. S&L Ass'n,</u> 436 N.W.2d 258 (N.D. 1989)	29
<u>Fargo Foods, Inc., v. Bernabucci,</u> 1999 ND 120, 596 N.W.2d 38	16
<u>Farmer's Union Oil Company of New England v. Maixner,</u> 376 N.W.2d 43 (N.D. 1985)	39
<u>Fetch v. Quam,</u> 2001 ND 48, 623 N.W.2d 357	13
<u>Fladeland v. Gudbranson,</u> 2004 ND 118, 681 N.W.2d 431	10
<u>Gonzalez v. Tounjian,</u> 2003 ND 121, 665 N.W.2d 705	38
<u>Guild v. More,</u> 155 N.W. 44 (N.D. 1915)	29
<u>Gunderson v. Havan-Clyde Mining Co.,</u> 133 N.W. 554 (N.D. 1911)	29
<u>Hart v. Hanson,</u> 14 ND 570, 105 N.W. 942 (N.D. 1895).....	22
<u>Hellman v. Thiele,</u> 413 N.W.2d 321 (N.D. 1987)	13
<u>Heng v. Rotech Medical Corp.,</u> 2006 ND 176, 720 N.W.2d 54	14,40
<u>Herman Oil, Inc. v. Peterman,</u> 518 N.W.2d 184 (N.D. 1994)	12,36
<u>In re Estate of Dittus,</u> 497 N.W.2d 415 (N.D. 1993)	41
<u>Johnson v. Mineral Estate, Inc.,</u> 343 N.W.2d 778 (N.D. 1984)	16
<u>Jose v. Norwest Bank,</u> 1999 ND 175, 599 N.W.2d 293	14

<u>Keller v. Bolding</u> , 2004 ND 80, 22, 678 N.W.2d 578	30
<u>Landers v. Biwer</u> , 2006 ND 109, 714 N.W.2d 476	30
<u>Liebeltd v. Sabby</u> , 279 N.W.2d 881 (N.D. 1979)	41
<u>Linden Partners v. Wilshire Linden Ass.</u> , 73 Cal. Rptr. 708 (Cal. App. 1998).....	18,19,20
<u>Lire, Inc., v. Bob’s Pizza-n-Rests., Inc.</u> , 541 N.W.2d 432 (N.D. 1995)	16
<u>Lonesome Dove Petroleum, Inc. v. Nelson</u> , 2000 ND 104, 611 N.W.2d 154	12
<u>Lowery v. Texas A&M University System</u> , 117 F.3d 242 (5 th Cir. 1997)	21
<u>Matter of Estate of Zimmerman</u> , 1998 ND 116, 579 N.W.2d 591 (N.D. 1998).....	12
<u>Moen v. Norwest Bank of Minot</u> , 647 F. Supp. 1333 (D.N.D. 1986)	41
<u>Oswalt v. Scripto, Inc.</u> , 616 F.2d 191 (5 th Cir. 1980)	21
<u>Pfeifle v. Tanabe</u> , 2000 ND 219, 620 N.W.2d 167	12
<u>Rodenburg v. Fargo-Moorhead Y.M.C.A.</u> , 2001 N.D. 139, 632 N.W.2d 407	23,24
<u>Rhodes v. Rhodes</u> , 2005 ND 157, 692 N.W.2d 157	10
<u>Sargent County Bank v. Wentworth</u> , 500 N.W.2d 862 (N.D. 1993)	13,22
<u>Sonnesyn v. Akin</u> , 104 N.W.1026 (N.D. 1905)	29

<u>Tallackson Potato Company, Inc. v. MTK Potato Co.,</u> 278 N.W.2d 417 (N.D. 1979)	15
<u>U.S. v. Basin Electric Power Coop.,</u> 248 F.3d 781 (8 th Cir. (N.D.) 2001)	14
<u>Wachter v. Gratech Company, Ltd.,</u> 2000 ND 62, 608 N.W.2d 279	12
<u>Wayne-Juntunen Fertilizer Co. v. Lassonde,</u> 456 N.W.2d 519 (N.D. 1990)	20

STATUTES

N.D.C.C. §1-01-6.....	23
N.D.C.C. §9-05-01	36
N.D.C.C. §9-06-04	36
N.D.C.C. §9-06-07	36
N.D.C.C. §9-07-03.....	16
N.D.C.C. §9-07-04.....	16
N.D.C.C. §9-07-09.....	16
N.D.C.C. §9-10-02.....	22,39
N.D.C.C. §9-10-03	22,29
N.D.C.C. §28-26-02.....	41
N.D.C.C. §28-26-06.....	41
N.D.C.C. §28-26-10.....	41
N.D.C.C. §32-03.2-01.....	8,24
N.D.C.C. §32-03.2-02	8,13,24,25
N.D.C.C. §32-03-04	38
N.D.C.C. §32-03-05	38

N.D.C.C. §47-14-05	38
N.D.R.Civ.P. 15	20
N.D.R.Civ.P. 15(a).....	20
N.D.R.Civ.P. 41	21
N.D.R.Civ.P. 52(a)	10,29,30,37
N.D.R.Civ.P. 52(b)	38
N.D.R.Civ.P. 52(c).....	31
N.D.R.Civ.P. 54(d)	41
 <u>OTHER</u>	
Restatement (Second) of Contracts, § 205 (1981).....	14

STATEMENT OF THE ISSUES

- I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY FINDING FOR DEFENDANT ON PLAINTIFF'S BREACH OF CONTRACT CLAIM.
- II. WHETHER THE DISTRICT COURT ERRED IN FINDING FOR PLAINTIFF ON ITS DECEIT CLAIM.
- III. WHETHER THE DISTRICT COURT ERRED IN APPLYING COMPARATIVE FAULT IN PLAINTIFF'S DECEIT CLAIM.
- IV. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN DETERMINING THE DAMAGES AWARDED TO PLAINTIFF.
- V. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING FOR DEFENDANT ON ITS BREACH OF CONTRACT CLAIM REGARDING THE SALE OF LAND TO MENARDS .
- VI. WHETHER THE DISTRICT COURT ERRED IN NOT AWARDING PREJUDGMENT INTEREST AND ATTORNEY'S FEES.
- VII. WHETHER THE DISTRICT COURT ERRONEOUSLY TAXED COSTS AND EXPENSES.

STATEMENT OF THE CASE

This suit arises out of a number of disputes relating to the purchase by Appellant WFND, LLC (“WFND”) of the Westgate Commons Shopping Center (“Westgate Commons”) in West Fargo, North Dakota from Appellee Fargo Marc, LLC (“Fargo Marc”). WFND’s amended complaint, in essence, claims that Fargo Marc failed to supply accurate information regarding the amount of rent to be paid by Old Navy, a tenant in Westgate Commons (hereinafter “Old Navy Claim”). WFND claims that if it had known of the correct rent it would not have paid as much for Westgate Commons. WFND abandoned a number of other claims alleged in the amended complaint.

Fargo Marc’s counter claim alleges that WFND breach an agreement to share in the proceeds of a water retention/holding pond sold by WFND to Menard, Inc./Menards (hereinafter “Menards Claim”). The holding pond was part of the Westgate Commons property sold to WFND.

After a six-day bench trial held on July 25 – August 1, 2005, the Honorable Douglas R. Herman issued detailed Findings of Fact, Conclusions of Law, and an Order for Judgment finding that Fargo Marc was liable to WFND for deceit, but not for breach of contract, with respect to the Old Navy Claim. Judge Herman further found that WFND was liable to Fargo Marc on the Menard’s Claim.

WFND appealed the final judgment. WFND claims that the trial court erred in the following respects: (1) finding that Fargo Marc did not breach the Purchase Agreement; (2) apportioning fault in the deceit claim; (3) awarding an improper amount of damages; (4) failing to award prejudgment interest and attorney’s fees; and (5) finding for Fargo Marc on the counterclaim.

Fargo Marc cross-appealed the final judgment. Fargo Marc claims that the trial court erred in: (1) finding for WFND on its deceit claim; and, (2) in taxing “net costs” in favor of WFND.

This brief is submitted in opposition to WFND’s appeal and in support of Fargo Marc’s cross-appeal.

STATEMENT OF FACTS

Before addressing the facts shown in the record, Fargo Marc would be remiss if it did not address the improper and argumentative nature of WFND’s brief. WFND’s brief continuously argues that Fargo Marc and its representatives are “deceitful”, or words to that effect. WFND and its counsel should be aware that “deceit” is a legal term of art and that the trial court did not make any findings and conclusions that any representative of Fargo Marc was deceitful. Rather, the trial court simply awarded damages against Fargo Marc under North Dakota’s statutory law on deceit. WFND’s argumentative and misleading allegations are improper and must end.

I. Documents Provided To WFND During the Due Diligence Period.

On November 19, 2002, Fargo Marc and JMC entered into a Real Estate Purchase Agreement (hereinafter “PA”) whereby Fargo Marc agreed to sell Westgate Commons to JMC or its nominee or designee. (App.¹ 174). WFND became JMC’s designee prior to closing of the sale. (Tr.² 18). The PA contemplated a closing date of January 15, 2003, and provides in section 14.2 for a “holdback” of \$1,350,000.00 of the \$12,700,000.00 purchase price pending completion of the second phase construction and the renting of that additional space. (App. 188).

¹ “App.” refers to the Appendix filed by WFND.

² “Tr.” refers to the transcript of the District Court proceedings, July 25-August 1, 2005.

The PA provides in section 4.7 that WFND had the right to inspect, at reasonable hours, any and all books, records, tenant files, contracts or other documents and data of Fargo Marc pertaining to Westgate Commons. (App. 178). Section 5.1 of the PA provided WFND a 30 day due diligence period, labeled an "Inspection Period." (App. 179).

On January 6, 2003, Fargo Marc and JMC entered into a First Amendment to Real Estate Purchase Agreement ("Amendment to PA"), which amended the original PA by, among other things: (1) extending WFND's Inspection Period under the Agreement to January 9, 2003; (2) increasing the holdback to \$1,500,000.00 of the purchase price; and (3) altering the terms and conditions required for Fargo Marc to receive payment of the holdback amount. (App. 206-208). (See also Sep. App.³ 70-73).

Fargo Marc provided WFND a plethora of documents and information. WFND admits that Fargo Marc never failed to provide WFND any requested documents or that Fargo Marc was anything but forthcoming in providing information. (Tr. 428 – 429). Fargo Marc often had to re-send documents and information to WFND. (Tr. 669). The documents that WFND had in its possession prior to closing included information on the rent paid by Old Navy. That information included: a Rent Roll attached as Ex. B to the PA (App. 207); the lease between IBT, Fargo Marc's predecessor in interest (Tr. 16), and Old Navy dated February 16, 2001 (App. 65); the First Amendment to the Old Navy Lease dated May 30, 2001 (App. 161); the Rent Roll [Lease Abstract] as of August 28, 2001 (App. 163); a Term Commencement and Expiration Agreement [TCEA] dated October 17, 2001 (App. 171); an Old Navy Rent check dated July 25, 2002 (App. 173); a

³ "Sep. App." refers to the Separate Appendix filed by Fargo Marc.

Tenant Estoppel Certificate prepared by Old Navy dated January 22, 2003 (App. 213); and a Certified Rent Roll as of January 30, 2003 (App. 215).

II. Old Navy's Rent for Space at Westgate Commons.

The February 16, 2001 lease between IBT and Old Navy required Old Navy to pay rent on approximately 22,000 square feet of gross leasable area (App. 69) at \$11.90 per square foot for an annual minimum rent of \$261,800.00, payable in twelve equal monthly installments. (App. 81; Sec. 6.1(A)(1)). Pursuant to the First Amendment to the Old Navy Lease ("Lease Amendment"), Old Navy's rent was to decrease from \$11.90 per square foot to \$10.90 per square foot from July 1, 2002 through August 31, 2006, a difference of \$21,950.54 per month. (App. 161). Unfortunately, Old Navy did not commence paying the \$1.00 per square foot rent reduction on July 1, 2002. WFND claims it was not until approximately seven months after the January 31, 2003 closing of the sale to WFND that Old Navy realized its error. (Tr. 72; App. 275). WFND claims that because it was confused as to the amount of Old Navy's rent, even though WFND's representatives had all of the governing lease documents, including the Lease Amendment, Fargo Marc breached the representation provisions of the Purchase Agreement and/or committed fraud/deceit. (See Amended Complaint, App. 13 – 14).

It appears that the source of WFND's claimed confusion with regard to the rent to be paid by Old Navy is the fact the Lease Amendment was incorrectly dated May 30, 2001 rather than May 30, 2002. It is undisputed that the Lease Amendment had a typographical error – it should have been dated 2002 rather than 2001. (App. 282; See Sep. App. 67). WFND claims that because of that typographical error, it was misled into believing that the Old Navy rent was not to be decreased effective July 1, 2002. Also

apparently adding to WFND's confusion is the fact the Tenant Estoppel Certificate prepared by Old Navy showed the amount Old Navy was paying, i.e., the \$11.90 sq foot rate rather than the reduced \$10.90 rate it should have been paying under the Lease Amendment. (App. 213).

The documents provided to WFND during the due diligence period contained inconsistencies which would have put a reasonable and prudent person on notice that something was amiss regarding the amount of rent to be paid by Old Navy. Simply following up on those inconsistencies would have revealed that Old Navy failed to decrease its rent payment as required under the Lease Amendment.

III. The Sale of the Water Detention Pond to Menards.

Paragraph 19.15 of the PA provides that Fargo Marc has the right to convey to Menards a water detention pond located on the Westgate Commons property that was being sold. (App. 194). Paragraph 19.15 further provides that any consideration paid by Menards in purchasing the holding pond will be shared equally between Fargo Marc and WFND. (App 194). Prior to the closing of the sale of Westgate Commons, Fargo Marc had a deal in place to sell the holding pond to WFND. (App. 263) Fargo Marc, however, did not deliver the fully signed purchase agreement to Menards because WFND wanted to see if it could negotiate a higher sales price. (App. 511, ¶¶8, 9; Tr. 938 – 939). Fargo Marc agreed that WFND could try to obtain a higher sales price, with the understanding that the sale proceeds would still be spit equally. (Tr. 939). WFND was able to sell the land to WFND at a higher price, but WFND failed to pay Fargo Marc 50% of the net sales proceeds. The purchase price negotiated by WFND was \$117,240.00. (Sep. App.

76, ¶(6). The net proceeds after closing costs were paid was \$114,749.83. (Sep. App. 94). Fargo Marc was therefore entitled to one-half of \$144,749.83, i.e., \$57,374.91.

IV. Claims Presented at Trial and the Trial Court's Decision.

In addition to damages arising from the Old Navy Claim, the Amended Complaint sought:

- a. Damages as a result of alleged overpayments by Famous Footwear for CAM [common area maintenance]charges; and,
- b. Reimbursement for “construction loan interest” Fargo Marc allegedly owes under the Amendment to PA.

(App. 9–12; Tr. 6, 22). Shortly before trial, WFND abandoned those claims. (App. 496-497, ¶(24).

The parties stipulated that the amount remaining from the \$1,500,000.00 holdback owed Fargo Marc was \$345,633.18 (App. 499, ¶(33), and that the remaining amount could be further reduced by the following: \$11,395.32 for the amount Old Navy overpaid rent for the period of time Fargo Marc owned the property; \$89,482.38 for the CAP rate decrease allowed under the Amendment to PA because the Dress Barn lease was not at \$14.00 sq. ft; and, \$81,250.00 for tenant improvements WFND should pay Dress Barn. (App. 497-99). The amount remaining from the holdback WFND owes Fargo Marc, without taking into account damages for the claims to be tried to the court, was \$163,505.48. (App. 499, ¶(34).

While the Amended Complaint alleged breach of contract, misrepresentation and fraud, WFND advised the Court prior to trial that WFND wanted to limit its claim to breach of contract. During the July 21, 2005 pretrial conference, WFND advised the Court that WFND had abandoned its claim for misrepresentation based on tort and was

proceeding to try the case solely on the breach of contract claim. (Sep. App. 36). WFND further also advised the Court, at the following times, that WFND did not want to proceed under the deceit claim: a pretrial memorandum dated July 22, 2005; in WFND's Reply to Fargo Marc's Trial Memorandum; and in WFND's "Corrected" Reply to Fargo Marc's Trial Memorandum. (See App. 498, ¶26). During trial WFND's counsel again objected to any evidence that was not related to the breach of contract claim. (Tr. 104). Even though Fargo Marc did not object to WFND voluntarily dismissing its tort claims, the trial court advised the parties that it desired to hear evidence on both the breach of contract and tort issues. (Tr. 103-104; Sep. App. 42-43).

The trial court issued Findings of Fact and Conclusions of Law on October 19, 2005. (App. 493). In its findings the trial court determined that Fargo Marc did not breach the contract with regard to any representations required under the Old Navy lease, (App. 507, ¶69), but that Fargo Marc was liable to WFND under the deceit statute (App. 508, ¶70). The trial court found that WFND's damages should be calculated by taking the reduction of the Old Navy rent per year divided by the 9.08% CAP rate, resulting in an award of damages to WFND in the Old Navy Claim in the amount of \$243,777.53. (App. 507, ¶68).

The trial court found that comparative fault, N.D.C.C. §§ 32-03.2-01 and 32-03.2-02, should apply to WFND's deceit claim, and apportioned fault as follows: 15% to WFND; 70% to Fargo Marc; and 15% to Old Navy. (App. 508-509). Fargo Marc's liability for the damages pursuant to the trial court's comparative fault findings was 70% of \$243,777.53, or \$170,644.27. (App. 509, ¶76). Because WFND owed Fargo Marc

\$163,505.48 of the original holdback, Fargo Marc's total liability to WFND equaled \$7,138.79.

The trial court also found that WFND breached the parties' agreement when it failed to pay Fargo Marc for fifty percent of the net proceeds of the sale of the holding pond to Menards. (App. 513 -514, ¶5). WFND was adjudged liable to Fargo Marc for one-half of the net proceed, which equals \$57,347.91. (App. 514). Thus, the trial court awarded Fargo Marc the net amount of \$50,236.12 (\$57,347.91 less \$7,138.79).

The trial court ordered judgment on October 19, 2005, for \$50,236.12 in Fargo Marc's favor, and allowed the parties to present post-trial motions with respect to attorney's fees and costs. (App. 515-516). Both parties submitted motions, on costs only, and on April 13, 2006, the Trial Court ordered that WFND be awarded "net costs" in the amount of \$13,307.00. (App. 518-519). The result is a final judgment in Fargo Marc's favor for \$38,700.12. (App. 519).

LAW AND ARGUMENT

In essence, on appeal WFND requests that this Court reverse the trial court's judgment on all issues and findings that are adverse to WFND. It appears WFND believes that this Court should make its own findings of fact and rule in WFND's favor on all the issues WFND believes it should have won at trial. (E.g., WFND's Brf. 45-46). The only issue WFND believes should be remanded is the issue of attorney's fees. (Id. 46). WFND's position is without merit.

In addition to disagreeing with WFND's issues on appeal, Fargo Marc appealed two orders that made up the Court's final judgment. Fargo Marc claims that: (1) the trial court erred in awarding WFND damages on its deceit claim; and, (2) the trial court erred

in taxing net costs in WFND's favor. The trial court's determination with respect to those issues should be reversed.

I. The Clearly Erroneous Standard Of Review Applies To The Majority Of WFND's Claims Of Reversible Error.

WFND spends most of its brief providing its spin on the facts and picking and choosing parts of the record it believes supports its belief that it should have won each and every issue at trial. That approach is unhelpful and erroneous. Moreover, WFND has taken some liberties with how it views the evidence.

For example, WFND argues, with no citation to the record, that Fargo Marc "knew Old Navy was mistakenly over paying its rent." (WFND Brf. 8). No such finding was made by the trial court and no evidence supports such an allegation. To the contrary, the evidence showed that Fargo Marc was not aware that Old Navy failed to reduce its rent payments. (E.g., Tr. 594–595). Therefore, WFND's rendition of the facts is less than complete. More important, this Court must defer to the trial court's findings.

Rule 52(a), N.D.R. Civ. P. (2006), provides that a trial court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." 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, although there is some evidence to support it, on the entire record there is a definite and firm conviction a mistake has been made. E.g., Rhodes v. Rhodes, 2005 ND 157, ¶3, 692 N.W.2d 157; Fladeland v. Gudbranson, 2004 ND 118, ¶7, 681 N.W.2d 431. Assessing the credibility of witnesses, including expert witnesses, is a factual finding. Buzzell v. Libi, 340 N.W.2d 36, 39 (N.D. 1983).

WFND repeatedly states that Fargo Marc's witnesses were "impeached" and/or lacked credibility. (E.g, WFND's Brf. 23, 38, 42). No such finding was made by the trial court. Moreover, the evidence shows that Robert DiMucci, WFND's representative, was repeatedly impeached and/or that his testimony often lacked credibility. (E.g., Tr. 118 - 121, 119). For example, DiMucci testified that Lisa DiGiacomo was CFO of WFND and, more important, that DiGiacomo reviewed and "ascertained" information regarding the Old Navy rent off the rent roll attached as Exhibit B to the PA. (Tr. 74, 163 – 164). DiGiacomo testified that she is not the CFO of WFND and, more important, that she never saw the rent roll attached as Exhibit B. (Sep. App. 55-57, 60-61). In other words, a document that WFND claims "mislead" it regarding Old Navy's rent, the rent roll attached to the PA, was not, contrary to DiMucci's testimony, ever reviewed.

WFND's brief cites DiMucci's testimony to support the argument that "WFND contacted Old Navy to obtain financial information to no avail." (WFND's Brf. 16, citing Tr. 121). DiMucci testified that DiGiacomo contacted Old Navy to obtain financial information, but Old Navy would not provide it. (Tr. 121). DiGiacomo testified that she did not contact Old Navy about her conclusions on the Old Navy rent; that she doesn't contact any tenants prior to closing; and, that "gathering additional information is not my job." (Sep. App. 58-59). Thus, the "impeached" witness was DiMucci. Regardless, it was for the trial court to weight the credibility of witnesses.

II. The District Court Properly Exercised Its Discretion In Finding For Fargo Marc on WFND's Breach of Contract Claim.

WFND's first assignment of error is that the trial court abused its discretion by finding that Fargo Marc did not breach the PA. WFND claims that the trial court "ignored the implied terms, object, frustration of purpose and duty of contracting parties

to deal with each other fairly and openly.” (WFND Br. 31.) WFND’s argument is without merit, and the trial court’s findings on WFND’s breach of contract claim must affirmed.

A. The Standard of Review for Breach of Contract.

The determination of whether a contract was breached is a question of fact, reviewed under the clearly erroneous standard. E.g., Wachter v. Gratech Company, Ltd., 2000 ND 62, ¶ 17, 608 N.W.2d 279; Pfeifle v. Tanabe, 2000 ND 219, ¶7, 620 N.W.2d 167. The interpretation of a contract is a question of law. Ag Acceptance Corp. v. Glinz, 2004 ND 154, ¶ 12, 684 N.W.2d 632. However, the trial court’s determination of whether an agreement is intended to be a complete, final, and binding agreement is a finding of fact which will not be reversed unless clearly erroneous. Lonesome Dove Petroleum, Inc. v. Nelson, 2000 ND 104, ¶15, 611 N.W.2d 154. A trial court’s resolution of an ambiguity in a contract by extrinsic evidence is similarly a question of fact, Matter of Estate of Zimmerman, 1998 ND 116, ¶13, 579 N.W.2d 591, 595 (N.D. 1998), as is the trial court’s determination of the parties’ intent for purposes of the parol evidence rule. Herman Oil, Inc. v. Peterman, 518 N.W.2d 184, 189 (N.D. 1994).

B. WFND Confuses North Dakota Law with Respect to the Tort of Deceit and Claims for Breach of Contract.

WFND argues that the trial court erred by not finding Fargo Marc's alleged “deceit” to constitute breach of contract. (WFND Brf. 35). The contractual obligations of Fargo Marc were defined in the PA. The trial court correctly found that WFND’s breach of contract claim for “misrepresentation” is governed by the obligations required under the PA. (App. 507). WFND cannot look to misrepresentations outside of the contract. In other words, in order to prove breach of contract, WFND had the burden of proving that

representations identified in the contract were not provided. Any representations not required under the contract were outside of the contract, kicking in, at best, a tort claim of deceit. WFND, however, wants it both ways by arguing that representations not required under the contract are relevant to the breach of contract claim.. WFND's argument is illogical and is an attempt to confuse the law of deceit, a tort, with breach of contract. This Court must maintain the distinction between claims for deceit and claims for breach of contract.

Deceit is a tort promulgated at N.D.C.C. § 9-10-02. Hellman v. Thiele, 413 N.W.2d 321, 326 (N.D. 1987). Deceit, unlike breach of contract, must be proven by clear and convincing evidence. Sargent County Bank v. Wentworth, 500 N.W.2d 862, 875 (N.D. 1993). Unlike breach of contract, an award of damages for torts such as deceit are subject to the rules of comparative fault delineated in N.D.C.C. § 32-03.2-02.

WFND asked the trial court to find that Fargo Marc was liable for breach of contract in order to avoid the higher burden of proof required to prove deceit and to avoid comparative fault. Regardless, the trial court correctly found that Fargo Marc did not breach the PA.

C. WFND Incorrectly Alleges That Fargo Marc Breached an Implied Covenant of Good Faith.

WFND incorrectly argues that Fargo Marc breached the PA because of WFND's belief that some type of implied covenant of good faith was breached. In North Dakota the doctrine of implied covenant of good faith and fair dealing has only been applied to insurance contracts. Dalan v. Paracelsus Healthcare Corporation of North Dakota, Inc., 2002 ND 46, ¶ 11, 640 N.W.2d 726; see also Fetch v. Quam, 2001 ND 48, ¶12, 623 N.W.2d 357 (covenant applies in context of insurance policy); Barnes v. St. Joseph's

Hospital, 1999 ND 204, ¶ 10, 601 N.W.2d 587; Jose v. Norwest Bank, 1999 ND 175, ¶ 14, 599 N.W.2d 293; Aaland v. Lake Region Grain Coop., 511 N.W.2d 244, 247 (N.D. 1994). WFND's argument that Fargo Marc breached an implied covenant of good faith and fair dealing must be dismissed as an insurance policy is not at issue in this case. Even if, however, the doctrine were to be adopted by this Court for the first time outside the context of insurance, it is still inapplicable.

WFND did not plead a claim for breach of an implied covenant of good faith. (See Amended Complaint, App. 7). Thus, evidence on the claim was never presented to the Court. This Court will not address issues not raised before the trial court. Heng v. Rotech Medical Corp., 2006 ND 176, ¶10, 720 N.W.2d 54.

Additionally, the duty to act in good faith "does not imply an ever flowing cornucopia of wished-for legal duties." U.S. v. Basin Electric Power Coop., 248 F.3d 781, 796 (8th Cir. (N.D.) 2001) (citing Restatement (Second) of Contracts, § 205 (1981)). The duty to act in good faith "does not obligate a party to accept a material change in the terms of the contract or to assume obligations that vary or contradict the contract's express provisions," nor does the duty of good faith "inject substantive terms into the parties' contract." Barnes, ¶ 14. The purpose of the covenant of good faith is to act as a "gap filler" to address circumstances not contemplated by the parties when the contract was made. Basin Electric, 248 F.3d at 796. WFND is not asking this Court to fill any "gap", but rather is asking this Court to find that the PA was breached. The covenant of good faith has no bearing in the claims alleged by WFND.

D. WFND Misconstrues The Doctrine of “Frustration of Purpose.”

WFND also incorrectly argues that Fargo Marc should be held liable for breach of contract based upon "frustration of purpose." (WFND's Brf. at 35-36).

WFND never raised the frustration of purpose doctrine before the trial court. WFND cannot raise that claim for the first time on appeal. Heng, supra. The doctrine is also inapplicable in this matter.

Frustration of purpose occurs when “after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made.” Tallackson Potato Company, Inc. v. MTK Potato Co., 278 N.W.2d 417, 424 (N.D. 1979).

The decrease in Old Navy's rent obligation was not an event that occurred after the PA was entered into. Thus, "frustration of purpose" cannot apply. Moreover, the principal purpose of the PA was for WFND to purchase Westgate Commons and earn a return on an investment, which it did, albeit not in the amount it now claims it desired. While WFND believes its purpose may have been “diminished” to the extent that its rents were not as desired, its principal purpose was in no way thwarted. WFND was able to purchase Westgate Commons and even to this day does not seek to rescind the sale (Tr. 80-81; ¶45 of Amended Complaint, App. 14).

Finally, the "frustration of purpose” doctrine does not apply when the party invoking the doctrine is at fault. Tallackson, supra. As the trial court correctly determined, WFND was at fault for its own misunderstanding of the amount of rent being paid by Old Navy. (App. 508, ¶71). Therefore, WFND’s argument that Fargo Marc

should be held liable for breach of contract based upon the theory of “frustration of purpose” is without merit.

E. Evidence Presented at Trial Supports the Conclusion that Fargo Marc is Not Liable for Breach of Contract.

1. The Trial Court Properly Interpreted Fargo Marc’s Duties Under the Purchase Agreement.

The proper interpretation of a contract involves a determination of whether or not a contract is ambiguous, and, if it is ambiguous extrinsic evidence may be introduced to determine the parties’ intent, thereby necessitating a resolution of factual issues. Lire, Inc., v. Bob’s Pizza-n-Rests., Inc., 541 N.W.2d 432, 434 (N.D. 1995). Dawn Enter. v. Luna, 399 N.W.2d 303, 306 (N.D. 1987) (citing Johnson v. Mineral Estate, Inc., 343 N.W.2d 778 (N.D. 1984)). Whether a contract is ambiguous is a question of law. Lire, at 434. An ambiguity exists when rational arguments can be made in support of contrary provisions as to the meaning of the language in question. Id.

“The object of interpreting and construing a contract is to ascertain and give effect to the parties’ mutual intention at the time of contracting.” N.D. Cent. Code § 9-07-03; Fargo Foods, Inc., v. Bernabucci, 1999 ND 120, ¶ 13, 596 N.W.2d 38. The parties’ intention must be ascertained from the writing alone, if possible. N.D. Cent. Code § 9-07-04; Bernabucci, at ¶13. Words in a contract must be construed in their ordinary and popular sense. N.D. Cent. Code § 9-07-09; Bernabucci, at ¶13.

The terms of the PA are clear and unambiguous. Fargo Marc’s obligation to WFND was merely to provide copies of documents, such as financial statements and leases (App. 177, 180 – 182); obtain documents from third parties, such as tenant estoppel certificates (App. 183); and provide historical data and information regarding

the rent. (App. 182). The trial court correctly found that Fargo Marc did not breach any of the representation or warranty provisions in the PA, including those set out in Section 7.1 of the Agreement. (App. 508, ¶70). The trial court's legal interpretation of these terms was not erroneous, is supported by the evidence, and must be affirmed.

2. **Substantial Evidence Was Presented at Trial on Fargo Marc's Compliance with the Terms of the Parties' Purchase Agreement.**

The trial court found that none of the representations and warranties required under the PA were breached by Fargo Marc. (App. 507-508). The trial court's Findings addressed all of the documents and representations provided by Fargo Marc and compared them to each provision under the PA that WFND claimed was breached. (E.g., App. 505 – 506). The trial court's findings that none of the PA's provisions were breached is supported by the record:

- (1) Fargo Marc attached a rent roll showing the rent that had been paid as required under the specific language of the PA (See App. 201; Tr. 276-77, 402-403).
- (2) Fargo Marc provided true, accurate and complete copies of Old Navy leases, including the Lease Amendment as required under sections 4.2 and 7.1(b) of the PA. (See leases at App. 65, 161; Tr. 50).
- (3) The Old Navy lease was in full force and effect and to the best of Fargo Marc's knowledge was not subject to an offset for the benefit of Old Navy except as set forth in the Lease and, therefore, paragraph 7.1(b) was not breached (See Tr. 169-70).
- (4) All of the representations and warranties by Fargo Marc contained in section 7.1 of the PA were true and correct as of the date of the PA and the date of closing. Section 7.1 limits its representations to those contained in that section. (App. 181; Tr. 171). Again, no evidence was presented that those specific representations and warranties were not provided.
- (5) Fargo Marc did not fail to promptly notify WFND of any event or circumstance of which Fargo Marc became aware which would make any

representation or warranty by Fargo Marc required under Section 7.1 untrue or misleading if made on the Closing Date. (Tr. 170 - 72).

- (6) Fargo Marc provided, at the time of closing, a certified rent roll, prepared by Fargo Marc's attorney as required under Section 8.1(h) of the PA. (App. 215; Tr. 175-176). The certified rent roll required under Section 8.1(h) is not a representation or warranty identified under 7.1. The certified rent roll which was approved by WFND's attorneys accurately identified the rent Old Navy had paid. (Tr. 685). The rent roll does not have any representation as to what Old Navy's obligation was with regard to rents. (See App. 215-216; Tr. 682.) WFND never asked that any other certification be provided. (Tr. 685, 688).
- (7) Each of the Tenants provided WFND and/or WFND's banker an Estoppel Certificate in a form satisfactory to Buyer's lender or in a form required by an existing Lease as required under Section 9.1(c) of the Lease. (Tr. 178).

The trial court's finding on WFND's breach of contract claim must, therefore, be affirmed.

WFND argues that Linden Partners v. Wilshire Linden Ass., 73 Cal. Rptr. 708 (Cal. App. 1998) supports the argument that the trial court erred in not considering representations outside of the PA when determining if a breach of contract occurred. (WFND's Brf. at 33-34). WFND's reliance on Linden is misplaced.

In Linden, the plaintiffs purchased a medical office building from the defendants. 73 Cal. Rptr. at 710. While the building had a number of tenants and, therefore, leases, there was only one subtenant. Id. The subtenant and the sublandlord refused to sign tenant estoppel certificates attesting to, among other things, the amount of the rent. Id. at 711. The plaintiffs thereafter specifically asked defendants how to calculate the subtenant's rent. Id. The defendants answered that direct inquiry by providing an erroneous calculation and, therefore, a rental amount that was incorrectly too high. Id. On or about the day escrow was to close, the defendants themselves, and not the

subtenant, placed an estoppel certificate into escrow again showing the incorrect amount that the subtenant was to pay in rent. Id. After the sale closed and the subtenant made its first rental payment the plaintiffs learned of defendants false representations and sued defendants for breach of contract and warranty, intentional and negligent misrepresentation, and money had and received. Linden at 710. At trial the jury found for the defendants on the fraud and money claims and for plaintiffs on breach of contract. Id.

The appellate court in Linden summarized the relevant language from the purchase agreement as follows:

Section 8(d) of the agreement provides that the defendants have delivered (or inferentially that they will promptly deliver) to plaintiffs true, accurate and complete copies of all leases and other contracts and related documents, and that in all such documents **there shall be no ‘untrue statement of material fact or (failure) to state any fact which would be necessary in light of the circumstances, to render the documents supplied not misleading.’**

Id. at 717. (Emphasis added). The appellate court found that the following evidence supported the jury’s finding of a breach of that section: (1) defendants’ provided the incorrect rental formula in response to a specific question asking for the rent amount from the subtenant; and, (2) defendants provided an estoppel certificate on behalf of the subtenant containing an incorrect rental amount when the contract required that the tenants provide and attest to the information contained in the estoppel certificates. Id. at 719.

In this case, there was no finding or evidence that Fargo Marc advised WFND of an incorrect rental amount to be paid by Old Navy in response to a specific inquiry from WFND. To the contrary, the undisputed evidence shows that WFND never asked Fargo Marc about the rent Old Navy was paying. (Sep. App. at 63, 64; Tr. 127, 157-58). There was also no finding or evidence in this case that Fargo Marc provided a tenant estoppel

certificate that was to be provided by Old Navy. To the contrary, the evidence shows that Old Navy prepared and provided the estoppel certificate addressing the amount of rent it paid. (App. 213).

More important, the relevant contract provisions in Linden contained specific language, unlike the PA in this case, that the seller was representing that there shall be no “untrue statement of material fact or (failure) to state any fact which would be necessary, in light of the circumstances to render the documents supplied not misleading.” Linden, supra, at 718. No such provision exists in the PA in this case. If WFND wanted such a broad and encompassing warranty provision it could have included it in the PA. DiMucci admitted during trial that all of the provisions in the PA were negotiated (Tr. 33 - 34). WFND’s attorney was involved in drafting the PA. (Tr. 914). Regardless, Linden shows that courts must look to the language of the agreement in determining whether there is a breach of contract in failing to provide certain information. Linden also shows that WFND's failure to use "due diligence" was important to show reliance, which is a relevant issue in a breach of contract claim. Id. at 720.

Because the record supports the trial court’s findings that Fargo Marc did not breach the PA, that finding must be affirmed.

III. The Trial Court’s Failing to Dismiss WFND’s Claim Against Fargo Marc for Deceit Was an Abuse of Discretion.

Rule 15, N.D.R. Civ. P. (2006) allows for the amendment of pleadings. This rule is identical to Rule 15 of the Federal Rules of Civil Procedure with the exception of stylistic differences. N.D.R. Civ. P. 15, Explanatory Note. As such, interpretations by federal courts are highly persuasive. Wayne-Juntunen Fertilizer Co. v. Lassonde, 456 N.W.2d 519, 525 (N.D. 1990). It can be an abuse of discretion for the trial court to refuse

to allow a plaintiff to voluntarily dismiss a claim under Rule 15(a) when the other party does not object to the dismissal. Lowery v. Texas A&M University System, 117 F.3d 242, 246 (5th Cir. 1997).

A specific written agreement stipulating to the dismissal of a claim is also not required under Rule 41 of the Rules of Civil Procedure if representations are made by the parties in open court of an agreement to the dismissal. Oswalt v. Scripto, Inc., 616 F.2d 191, 195 (5th Cir. 1980). A dismissal need not be of an entire lawsuit; the parties may stipulate to the voluntary dismissal of some of many causes of action at issue in the suit. Battle v. Municipal Housing Authority for City of Yonkers, 53 F.R.D. 423, 424, n.1 (S.D.N.Y. 1971).

In this case, WFND advised the trial court during the pretrial conference that it did not wish to present the deceit claim at trial. (Sep. App. 36). Fargo Marc did not object to WFND removing all tort claims from its pleadings, and thus from the trial, as long as WFND was, in fact, limiting its case to breach of contract. Fargo Marc's position was that under the breach of contract claim the trial court had to limit its analysis to the representations required under the PA – the trial court could not base its decision on breach of contract by considering representations not identified in the PA. (Sep. App. 28-29). Fargo Marc's position was that if the trial court considered representations not part of the PA, then in that event WFND's claim was for deceit, requiring application of comparative fault. (Sep. App. 22, 23, 28-29). In other words, the trial court should have granted WFND's request to limit the case to breach of contract, further holding that the non-contractual representations would not be considered. If the trial court had correctly applied the law to the claims only the breach of contract representations would have

been tried. The result is that under the trial court's findings WFND's Old Navy claim would have failed.

IV. The District Court Abused its Discretion by Finding Fargo Marc Liable for Deceit.

Deceit is a statutory tort promulgated at N.D.C.C. § 9-10-02 (2006). "One who willfully deceives another with intent to induce that person to alter that person's position to that person's injury is liable for any damage which that person thereby suffers." N.D. Cent. Code § 9-10-03 (2006). Accordingly, WFND was required to prove that Fargo Marc intended to commit "deceit." Two of the essential elements of actionable deceit under 9-10-02 are a willful misrepresentation and an intent thereby to induce another to alter his position. Hart v. Hanson, 14 ND 570, 105 N.W. 942 (N.D. 1895). Deceit carries with it a higher burden of proof – proof by clear and convincing evidence. E.g., Sargent County Bank. V. Wentworth, 500 N.W.2d 862, 875 (N.D. 1993). A determination of deceit is a question of fact, and a trial court's determination on whether deceit occurred will not be reversed unless it is clearly erroneous. Id. at 874.

In its Findings, the trial court simply states that "Fargo Marc committed the tort of deceit, as promulgated at N.D.C.C. section 9-10-02." (App. 508, ¶70). The trial court does not specify which form(s) of deceit stated in section 9-10-02 it found applicable to this case.

The only finding even remotely related to a claim for deceit is finding no. 63, which states "Fargo Marc's representatives should have known as of the date of closing, that the Old Navy rent had been reduced by \$1 per sq. ft. beginning on July 1, 2002." (App. 506, ¶63). Yet this finding does not establish a successful claim for deceit under 9-10-02. In fact, Fargo Marc gave WFND accurate information and documentation

regarding the amount of rent Old Navy had been paying Westgate Commons. WFND's own "preeminent expert", as WFND likes to call him, admitted during trial that he was not aware of any evidence that Gary Pachucki or Fargo Marc intentionally misrepresented to WFND the Old Navy rent that was being paid. (Tr. 434). A finding that Fargo Marc should have known that Old Navy had been paying more rent than it was legally obligated to pay, or that Fargo Marc was "fundamentally forgetful," does not establish deceit.

Therefore, because no evidence was presented at trial supporting a claim for deceit, and the trial court failed to make any findings of fact supporting a legal claim for deceit, the trial court's conclusion of law that Fargo Marc is liable to WFND for deceit is clearly erroneous, and must be reversed.

V. If The District Court's Finding For WFND On The Deceit Claim Is Affirmed, Then The Damages The District Court Awarded Must Also Be Affirmed.

While the trial court erred by considering a claim for deceit against Fargo Marc when WFND specifically abandoned it, and by finding that Fargo Marc was liable for deceit under the evidence presented, the trial court did not commit clear error in its determination of damages under the deceit claim.

A. The District Court Properly Applied the Rules of Comparative Fault to WFND's Deceit Claim.

The trial court did not err in concluding that the comparative fault act applied to the finding of deceit. Fargo Marc pled Comparative Fault in its Answer. (App. 59, ¶¶ 33 and 34). The enactments of the Comparative Fault Act in North Dakota "shifted the focus from traditional tort doctrines to the singular inclusive concept of 'fault'." N.D.C.C. §1-01-6; Rodenburg v. Fargo-Moorhead Y.M.C.A., 2001 N.D. 139 ¶25, 632

N.W.2d 407, 417 (negligence compared with intentional shooting). See also, Champagne v. U.S., 513 N.W.2d 75, 79 (N.D. 1994); Dakota Grain Co. v. Ehrmantrout, 502 N.W.2d 234, 238 (N.D. 1993). “Fault” is defined in §32-03.2-01 to include “product liability” and all other “acts or omissions that are in any measure negligent or reckless towards the person or property of the actor or others, **or that subject a person to tort liability**,” and includes [and therefore is not limited to] “negligence,” “assumption of risk,” and “failure to exercise reasonable care to avoid an injury.” N.D. Cent. Code §32-03.2-01. (Emphasis added). Since 1987, the “fault” compared in tort cases has included “negligence,” “reckless or willful conduct” and “intentional acts.” Rodenburg at ¶25.

WFND claims that comparative fault does not apply in a commercial setting unless the plaintiff in the litigation makes an error and elects that remedy (WFND’s Brf. at 39). Contrary to WFND’s contentions, in Ehrmantrout, supra, this Court held that comparative fault applied in a **commercial action** seeking consequential damages arising out of the sale of grain. 502 N.W.2d at 238. Moreover, by seeking to obtain damages for representations not contained in the PA, WFND elected to have its claim for misrepresentation decided under the tort of deceit. Therefore, all “fault”, whether negligence, deceit, or failure to mitigate damages, must be compared.

The trial court was correct to apportion the fault of WFND as well as non-parties, such as Old Navy. N.D. Cent. Code §32-03.2-01 (1996) (trier of fact must apportion any fault among parties and non-parties). Under North Dakota’s Comparative Fault Act, Fargo Marc is liable only for its apportioned share of the fault, if any. Id. § 32-03.2-02. A determination on comparative negligence [fault] is reviewed under the clearly erroneous

standard. Bauer v. Graner, 266 N.W.2d 88, 92 (N.D. 1978). The trial court's application of comparative fault to this case was not erroneous.

The evidence supports the trial court's finding that fault must be apportioned to WFND and Old Navy. WFND had a duty to use reasonable care when purchasing the commercial shopping center. E.g., N.D. Cent. Code §32-03.2-02 (1996). WFND's failure to properly review the documents was also a failure to mitigate or reduce the damages claimed. See Ehrmantrout, 502 N.W. at 239 (failure of elevator to test wheat to confirm that it was appropriate to sell as seed was a failure to mitigate losses that eventually resulted). WFND also agreed under Section 5.1 of the PA to use due diligence and otherwise act reasonably when reviewing the documents and information provided. (App. 179). Section 4.7 of the PA provided WFND the right to inspect documents, including the right to go to Fargo Marc's office to review documents in its file. (App. 178). WFND never exercised that right. (E.g., Tr. 124).

The evidence showed that WFND requested, and received, an extension of the "due diligence period" for a number of weeks. (App. 206; Sep. App. 70-73). Thus, WFND had more than ample opportunity to determine the true and accurate amount of rent to be paid Old Navy.

There was substantial evidence supporting the trial court's finding that WFND failed to exercise reasonable care and/or use proper due diligence, resulting in a finding that WFND was at "fault" under NDCC section 32-03.2-02. The essence of WFND's claim that Fargo Marc committed deceit was that WFND was not aware of the decrease in rent Old Navy should have paid beginning on July 1, 2002. The Term Commencement and Expiration Agreement ("TCEA") dated October 17, 2001 identified the Old Navy

rent at \$11.90 per square foot (App. 171). The May 30, 2001 Lease Amendment placed the rent at \$10.90 sq. ft. (App. 161). WFND assumed the TCEA controlled because the TCEA is dated after the Lease Amendment. (Tr. 141). A review of the TCEA and the Lease Amendment, however, shows that the Lease Amendment had to have been entered into after the TCEA. WFND therefore knew, or should have known, that the \$10.90 per sq. ft rental amount identified in the Lease Amendment controlled over the \$11.90 rate identified in the TCEA.

The trial court reviewed those and other documents, along with the testimony of the witnesses, including Gary Pachucki and Fargo Marc's expert Alton Nitschke. The trial court found that WFND should have engaged in further inquiry as to whether the Old Navy rent was defined by the TCEA, and that WFND was at fault for failing to do so. (App. 508, ¶71). The documents and the witness testimony established the following inconsistencies:

1. The TCEA does not refer in any way to the Lease Amendment. (See TCEA, App. 171 – 72; DiMucci testimony Tr. 133 - 34).
2. The TCEA does not specifically state that it was intended to amend The Lease Amendment. Id.
3. The TCEA does not reference the payment amounts from the Lease Agreement, and does not explain the reason for amending the rental amount required under the Lease Agreement. (Compare TCEA, App. 171 – 72 with Lease Amendment App. 161-162).
4. The date that Old Navy's second lease options ends is different in the TCEA than in the Lease Agreement. (Compare TCEA, App. 171 – 72 with Lease Amendment App. 161 – 62; E.g. DiMucci Testimony Tr. 149).
5. The TCEA was a document anticipated in the original lease, which provides that the lease term would not begin until the building was completed and Old Navy took possession. (Pachucki testimony Tr. 625 – 627).

6. The effective date of the Lease Amendment should be questioned because it was dated prior to when Old Navy took possession of the premises and would have to start paying rent. (Pachucki testimony Tr. 638).
7. A TCEA usually just provides notice when a requirement under a lease, such as payment of rent, commences and is not used to amend a lease. A formal lease amendment, rather than a TCEA, is used if terms, such as the amount of rent, are to be amended. (Pachucki testimony Tr. 625 – 26).
8. The TCEA specified that the gross leasable area of the Old Navy premises was not verified, while the Lease Amendment specifically confirmed the gross leasable area. (Compare TCEA, App. 171 – 72, with Lease Amendment, App. 161 – 62; Pachucki testimony Tr. 629 - 631).

As Pachucki explained, the gross leasable area (GLA) is always defined after a building is completed because that is when one can accurately calculate the actual square footage to be leased. (Tr. 632). Establishing the GLA is critical because the GLA determines the exact rent to be paid as well as the tenant's pro rata share of common area maintenance charges and insurance. (Tr. 630). The TCEA's leaving open the GLA when it was defined by the Lease Amendment would raise red flags and require further inquiry if one were to assume that the TCEA controlled. Therefore, the evidence showed that the TCEA contained so many inconsistencies that a reasonable purchaser would followed up to confirm the assumption that the TCEA governed the amount of rent to be paid. Other documents also show that WFND should have known that Old Navy was not paying the correct rent.

The August 18, 2001 Old Navy Lease Abstract/Rent Roll, dated after the Lease Amendment, but before the TCEA, identifies Old Navy's rent at \$11.90 per square foot and does not make mention of the rent change to take effect July 1, 2002. (App. 163). Because the TCEA had not yet been entered into at the time the Lease Abstract was prepared, a red flag should have arisen with WFND as to why the Abstract did not

contain the rent changes required under the Lease Amendment. The Old Navy Lease Abstract does not identify or reference the Lease Amendment. (App. 170). The Lease Abstract states that Fargo Marc's co-tenancy requirements were still open (App. 165), while the Lease Amendment stated that Fargo Marc fulfilled its co-tenancy obligations (App. 161). In fact, as Pachucki explained, Fargo Marc's fulfilling the co-tenancy requirement was the major reason the Lease Amendment was entered into. (Tr. 630). Therefore, using WFND's approach that it is the dates, rather than the substance, of documents that should be looked at in determining the amount of rent to pay, then the inconsistencies in the Lease Abstract vs. the TCEA and Lease Amendment should have raised red flags, requiring WFND to inquire as to Old Navy's actual rent obligations. The trial court made reference to each and every one of the inconsistencies in its Findings of Fact and Order for Judgment. (App. 502-503.)

It would have been easy for WFND to follow up on the inconsistencies. As explained by Fargo Marc's expert, Alton Nitschke of Eide Bailly, if one finds inconsistencies when performing due diligence regarding the amount of rent to be paid, the person can do several things, including contacting the seller to confirm an understanding on the rent to be paid. (Tr. 1037). WFND never did that. (E.g., Tr. 127). Pachucki advised that if inquiries had been made, any and all additional information would have been provided. (See Tr. 670-671). If further inquiry had been made, or if WFND had exercised its right to look at WFND's files, it would have learned that Old Navy failed to decrease its rent payments. The cover letter forwarding the signed Lease Amendment from Pachucki to Old Navy, which is dated May 29, 2002, (Sep. App. 67),

would have been reviewed, showing that the Lease Amendment was executed in May of 2002 and, therefore, controlled over the TCEA.

The trial court found that Old Navy was negligent in failing to decrease its rent beginning on July 1, 2002, as required under the Lease Amendment. (App. 509, ¶72). The trial court found that Old Navy was also negligent in preparing and signing a tenant estoppel certificate (App. 213) stating that “the monthly fixed minimum rent under the Lease is currently \$21,950.24,” which was not correct. (App. 509, ¶72). Because the trial court’s finding that WFND and Old Navy were at fault is supported by the record, the trial court’s finding is not clearly erroneous.

While Fargo Marc does agree with the trial court's apportionment of fault, Fargo Marc understands that under Rule 52(a) a trial court’s apportionment will be given great deference. Therefore, Fargo Marc is not requesting a new trial for a re-apportionment of fault.

B. The Evidence Presented at Trial Supports the Trial Court’s Findings of the Applicable CAP Rate.

The measure of damages for deceit under § 9-10-03 is the difference in value between what was received or parted with, and what would have been received or parted with had the representations been true. Eckmann v. Northwestern Fed. S&L Ass’n, 436 N.W.2d 258, 261 (N.D. 1989); Guild v. More, 155 N.W. 44, 49 (N.D. 1915); Gunderson v. Havan-Clyde Mining Co., 133 N.W. 554, syl. 2, 555 – 56 (N.D. 1911); Sonnesyn v. Akin, 104 N.W. 1026, 1029 (N.D. 1905). The trial court awarded damages by determining what it believed to be the value of Westgate Commons based on the Old Navy rent being at the higher \$11.90 sq. ft. amount. In so doing the trial court applied a

CAP rate to the reduced Old Navy rent of \$22,135.0 per year [the difference in the yearly rental at \$1.00 sq. ft]. (App. 507).

The amount of damages a party has suffered is a question of fact. Landers v. Biwer, 2006 ND 109, ¶ 13, 714 N.W.2d 476. As such, “[t]he appropriate standard of review in an appeal challenging a trial court’s award of damages in a bench trial is whether the trial court’s findings of fact on damages are clearly erroneous.” Buri v. Ramsey, 2005 ND 65, ¶ 17, 693 N.W.2d 619; N.D.R. Civ. P. 52(a). This Court will sustain an award of damages by a trial court if it is within the range of the evidence presented at trial. Landers, at ¶ 14. These rules apply to damages awarded for breach of contract. Keller v. Bolding, 2004 ND 80, ¶ 22, 678 N.W.2d 578. The trial court’s findings are clearly supported by the evidence presented at trial.

WFND does not raise any issue with the trial court’s methodology. Rather, WFND contends that the CAP rate utilized by the trial court was clearly erroneous. The trial court found that the appropriate CAP rate was 9.08%. (App. 507, ¶68). WFND appeals this determination, arguing that the trial court committed clear error by not adopting the 8.00% CAP rate it proposed at trial. WFND argues that the trial court erred by not adopting the testimony from its hired expert. (WFND Brf. 36). This argument is unpersuasive.

The 9.08% CAP rate is the rate that applied to WFND’s purchase of Westgate Commons. (Tr. 189, 191 – 92). The Amended PA between the parties specifically provided, in the context of future leases, for a CAP rate of 9.08%. (App. 207). That is also the CAP rate WFND represented in the Amended Complaint to be appropriate. (App. 9, ¶¶11, 12).

It was within the trial court's discretion to give the opinion testimony of WFND's expert the appropriate weight. (See N.D.R.Civ.P. 52(c) (2006).) Contrary to WFND's argument (WFND Brf. 38), the opinion of its expert was contradicted by the evidence. The premise upon which WFND's expert opined that the 8.0% CAP rate should apply was in error. WFND's expert argued that the 8.0% rate should apply because Old Navy was the shopping center's "anchor tenant." (Tr. 265-66). That is not correct.

Pachucki of Fargo Marc testified that Old Navy was not the anchor tenant. (Tr. 699). Rather, Pachucki explained that anchor tenants usually have 10 to 20 year leases. Id. Old Navy had a 5 year fix term lease. Id. Pachucki testified that Linens N' Things was the anchor tenant. Id. Pachucki testified that Linens N' Things had the long lease; was the anchor that got Famous Footwear and Old Navy into the center; and without Linens N' Things the center would not have been built. Id. Thus, the assumption upon which WFND's expert based his opinion, that Old Navy was the anchor tenant, was not correct.

WFND incorrectly argues that Pachucki's reference to market CAP rates at the time of trial required application of the 8% CAP rate. (WFND Brf. 23-24). Damages for deceit must be determined by the difference in value at the time of the sale in question, not some later time. See Beare v. Wright 103 N.W. 632, 633-34 (N.D. 1905) (in deceit claim damages are not determined by the value of the property at the time of trial). More important, it was for the trial court to weigh all the evidence and decide on the applicable measure of damages.

The trial court could have awarded a lower amount of damages. The evidence showed that damages could have been awarded based on the \$1.00 per square foot decrease in Old Navy rent from the date of WFND closing until the end of the first 5-year

term. (See Dimucci Test. Tr. at 81-83). That calculates to damages of \$93,229.16. (Id. 82). The evidence showed that the \$1.00 per square foot decrease in the Old Navy rent was only for the 5-year initial period of the lease. (Pachucki Test. Tr. 633). That decrease was not to continue after the first 5-year term. (Id.) Therefore, the evidence at trial showed that the "CAP rate methodology" should not apply because the decrease in the Old Navy rent was not for the term of the lease. The evidence also showed that Old Navy was unlikely to exercise the renewal option because national tenants almost always seek to renegotiate lease terms after an initial period as expired. (Tr. 633). Therefore, the evidence supported a finding that the damages awarded for the "deceit" claim should have been limited to \$92,229.16, before discounting to present value.

When providing its findings at the close of the case, the trial court explained on the record that: when negotiating the Amended PA the parties "went back and specifically acknowledged the .0908 capitalization rate as the reference point"; that Mr. Pachucki clarified that Mr. Kirby's [WFND's expert's] conclusion that Old Navy was the anchor tenant was in error; and, that the court found Mr. Kirby was "overstating and overreaching as to damages" when he attempted to apply a CAP rate of 8.00%. (App. 478-479). While Fargo Marc believes the evidence showed that, if awarded, a lesser amount of damages was appropriate, the damages awarded by the trial court for "deceit" was within the range of evidence and, therefore, not clearly erroneous.

VI. The District Court Did Not Err by Finding For Fargo Marc On Its Counterclaim Seeking Damages For The Sale Of Land To Menards.

WFND appeals the trial court's determination that WFND breached the PA when it refused to pay Fargo Marc fifty-percent of the proceeds from its sale of the retaining pond to Menards. (WFND Brf. 40-43). The trial court specifically found that the PA

clearly and unambiguously required that the proceeds from the sale to Menards be split evenly between the parties. (App. 513, ¶3).

The trial court's finding that the PA is clear and unambiguous is not erroneous. The trial court applied the rules of contract interpretation required under North Dakota law. (App. 513). The trial court concluded that the plain and unambiguous meaning of paragraph 19.15 of the PA is that Fargo Marc was entitled to one-half of the proceeds from the sale of the holding pond, regardless of whether the sale occurred before or after the closing of WFND's purchase of Westgate Commons. (App. 513, ¶3). The trial court concluded that the condition precedent in the first two sentences of ¶19.15 apply only if the sale of the holding pond occurred prior to the closing of the sale to WFND. *Id.* The trial court found that the last clause/sentence of ¶19.15, requiring a sharing in the sale proceeds, applies regardless of when the sale of the holding pond occurs, i.e., whether before or after the sale of the shopping center to WFND. *Id.* Because the sale of the holding pond to Menards occurred after the sale of Westgate Commons to WFND, the trial court correctly concluded that the first two sentences of ¶19.15 were not applicable and that the last sentence required WFND to pay Fargo Marc one-half of the sale proceeds. (App. 514, ¶4).

The trial court's interpretation of ¶19.15 was correct. The first sentence in ¶19.15 states that "seller [Fargo Marc] shall have the right" to sell the property to Menards. (App. 194). Therefore, the two condition precedents in that first sentence can only apply to a sale to Menards by the "seller" -- Fargo Marc.

The last sentence in ¶19.15 refers to the "conveyance," meaning a sale to Menards. The last sentence does not indicate that the conveyance must be completed by

the closing date and/or that WFND must provide its approval to the conveyance. If that was the intent, the last sentence should have included such language. It does not, showing that the condition precedents in the first sentence are not applicable.

The trial court further found that even if the language in ¶19.15 is ambiguous, the extrinsic evidence showed that the intent of the parties was that Fargo Marc would receive ½ of the proceeds from the sale of the land to Menards even if the sale occurred after the closing of the sale of the shopping center to WFND. (App. 514, ¶6). For example, the trial court found that the testimony of William Biederman, the attorney who represented Fargo Marc in negotiating the PA and Amended PA, shows that the intent of the parties was to evenly split the sale proceeds even if the sale occurred post-closing. *Id.* That is what Biederman testified to at trial. (App. 923).

The trial court's findings of fact provide, and the evidence at trial showed, that while the negotiations for the sale of Westgate Commons to WFND were occurring Fargo Marc was negotiating to sell the holding pond to Menards. (App. 510; Tr. 916, 930, 931, 933). Prior to the closing of the sale of Westgate Commons, Fargo Marc shared with WFND draft purchase agreements (App. 224, 239 faxed to JMC – WFND's predecessor). Other documents regarding a potential sale to Menards were also shared with WFND or its attorney. (Sep. App. 68, 74; Tr. 930–934).

On August 12, 2003, WFND and Menards entered into a Purchase and Sale Agreement for the sale of the holding pond. (Sep. App. 75). The terms and conditions of the sale, with the exception of the sale price, were nearly identical to the provision of the draft agreement for Menards' purchase of the water detention pond from Fargo Marc eight months earlier. (Compare Sep. App. 75 with App. 224, 240).

The evidence showed that Fargo Marc could have sold the land prior to the closing of the sale of Westgate Commons to WFND. Trial Ex. 32 is a fully signed and executed purchase agreement between Menards and Fargo Marc. (App. 263). Fargo Marc, however, did not deliver that signed agreement to Menards because WFND wanted to see if it could negotiate a higher sales price. (App. 511, ¶8; Tr. 938 – 939).

The trial court correctly found that if WFND and Fargo Marc had not understood that they would be splitting the sales proceeds, there would have been no reason for Fargo Marc not to go through with the sale to Menards. (App. 511, ¶9). As the trial court found, and as shown in the evidence, by allowing WFND to attempt to negotiate a higher price, WFND and Fargo Marc both stood to benefit. (Id.; Tr. 939). However, WFND had to wait until it owned the land before it could negotiate a deal with Menards. (App. 512, ¶10). Thus, the sale to Menards had to occur after the closing of the sale to WFND.

If section 19.15 of the PA required the sale to Menards to occur pre-closing, as argued by WFND, then the trial court found that there was an executed oral agreement subsequent to the PA and Amended PA between WFND and Fargo Marc that the sales proceeds would be split equally. (App. 514, ¶6). As shown above, there is substantial evidence establishing that subsequent agreement and showing that it was executed/performed. Therefore, the trial court's findings that WFND breached an agreement to split equally the sales proceeds from the sale of the land to Menards is supported by the evidence and was not clearly erroneous.

WFND argues that the trial court's award of damages to Fargo Marc on the counterclaim regarding the Menards sale was erroneous because the claim: was barred by the parol evidence rule; was barred by the Statute of Frauds; the agreement lacked

consideration; or, Fargo Marc's witnesses lacked credibility. (WFND Brf. 42). Those arguments are without merit.

Parol evidence was admissible to show the parties' intent and/or to show that the parties had a new agreement subsequent to the Amendment to PA with regard to splitting the proceeds from the sale of the holding pond. See N.D. Cent. Code §9-06-07; Herman Oil, Inc. v. Peterman, 518 N.W.2d 184, 189 (N.D. 1994).

The statute of frauds, promulgated at N.D.C.C. §9-06-04, has no application to the agreement between WFND and Fargo Marc to split the proceeds from the Menard's sale, whether in the PA or as part of a subsequent agreement. The parties' agreement was not for the sale of real property, which 9-06-04 requires be in writing, but rather was an agreement on how money from a sale to a third party would be split.

WFND incorrectly argues that any agreement to share in the proceeds of the sale to Menards should have been included in the January 6, 2003 Amendment to PA. (WFND Brf. 4, 41). Fargo Marc's agreement to sell the land to Menards, that was held back to let WFND negotiate a higher price, was signed by Fargo Marc on January 8, 2003 (App. 273), two days after the Amendment to PA (App. 206). Therefore, the agreement to allow WFND to negotiate a higher sales price could not have occurred before the Amendment to the PA.

By allowing WFND to enter into negotiations, Fargo Marc gave up the "for sure" sale at the lower amount. Fargo Marc also was to receive 50% of the re-negotiated price obtained by WFND. Therefore, there was sufficient consideration to support a "subsequent agreement" for WFND to negotiate a higher price. See N.D. Cent. Code §9-05-01 (consideration is any benefit conferred or detriment suffered).

Contrary to the unsubstantiated “belief” of DiMucci, the objective evidence shows that the same property WFND sold to Menards is the same property Fargo Marc was negotiating to sell to Menards. Like the withheld purchase agreement between Fargo Marc and Menards (App. 263), the sales documents between WFND and Menards included the entire holding pond. (Biderman Test., Tr. 940). In fact, the purchase agreement between Fargo Marc and Menards and then agreement between WFND and Menards contain essentially the same legal description. (Test. Tr. 942, 949; Compare App. 263 with Sep. App. 75, 94, 96).

WFND also misconstrues the issues when it argues that sections 19.15 and 13.1 of the PA prohibits a sale by Fargo Marc to Menards without WFND’s consent. (WFND’s Brf. 27). The sale in question is by WFND to Menards, not Fargo Marc to Menards. Thus, the “consent” language in 19.15 is inapplicable.

Finally, WFND’s argument that Fargo Marc’s witnesses lacked credibility is unpersuasive. Rule 52(a) provides that the credibility of the witnesses was for the trial court, which properly weighed the testimony and made its decision.

The purchase price negotiated by WFND was \$117,240.00 (Sep. App. 76, ¶6) and the net proceeds after closing costs was \$114,749.83. (Sep App. 94). The trial court’s awarding Fargo Marc damages in the amount of \$57,374.91 for WFND’s breach of the agreement to share the proceeds of the sale to Menards was therefore not clearly erroneous and must be affirmed.

VII. The District Court Did Not Err In Failing To Award Prejudgment Interest.

WFND did not prevail on its breach of contract claim. Therefore, WFND cannot obtain prejudgment interest under NDCC § 32-03-04 (1996) (allowing interest on damages that can be made “certain”). Also, contrary to WFND’s argument (WFND Brf. 43), section 19.3 of the PA does not specifically provide for prejudgment interest. (App. 192).

The award of prejudgment interest in tort cases is governed by N.D.C.C. § 32-03-05 (1996). Gonzalez v. Tounjian, 2003 ND 121, ¶ 37, 665 N.W.2d 705. Section 32-03-05 states that “[i]n an action for the breach of an obligation not arising from contract and in every case of oppression, fraud, or malice, interest **may be given** in the discretion of the court or jury.” N.D. Cent. Code § 32-03-05 (2006) (emphasis added). Thus, the trial court had broad discretion to determine whether to award prejudgment interest. Gonzalez, at ¶37.

WFND’s reliance on NDCC §47-14-05 (1996) to support its claim for prejudgment interest is misplaced. Section 47-14-05 applies to interest for “any legal indebtedness,” not to prejudgment interest for a tort claim.

WFND’s argument that the trial court “promised” to address interest and never made findings on prejudgment interest (WFND Brf. 43) is incorrect. An accurate review of the transcript shows that no such promise was made. (See App. 482, 492, cited by WFND). WFND never moved, pursuant to N.D.R. Civ. P. 52(b), for the trial court to amend its findings or conclusions so as to include interest.

Finally, the trial court did not award prejudgment interest on the amount of the holdback retained by WFND pending resolution of this lawsuit and/or on the damages

Fargo Marc received on its counterclaim. Therefore, if this Court finds that the trial court abused its discretion in failing to award prejudgment interest, then interest must be awarded to Fargo Marc on the amounts it is owed.

VIII. WFND is Not Entitled to Attorney's Fees.

The general rule in North Dakota is that attorney's fees are not an element of recoverable damages absent statutory authority or a contractual provision. Farmer's Union Oil Company of New England v. Maixner, 376 N.W.2d 43, 48 (N.D. 1985). WFND did not prevail on its breach of contract claim; it only prevailed on its cause of action for deceit in violation of §9-10-02. Therefore, an award of attorney's fees cannot be based upon any contractual provision. Moreover, the PA does not contain language allowing WFND to recover its attorney's fees.

Section 19.3 of the Purchase Agreement provides in relevant part as follows:

Notwithstanding any other limitation on rights or remedies of the parties contained in this Agreement, in the event either party hereto shall employ legal counsel or bring an action at law or other proceeding against the other party to enforce any of the terms, covenants or conditions hereof, the party **substantially prevailing** in any such action or other proceeding shall be paid all reasonable attorneys' fees and costs . . .

(App. 192) (emphasis added). Neither party "substantially prevailed" in this litigation. WFND prevailed, in part, on its claim arising from the Old Navy Lease issues. Fargo Marc prevailed on its counterclaim. Fargo Marc also prevailed when WFND, before trial, abandoned other claims. (App. 9–12; Tr. 6, 22). In fact, the trial court found that both parties are "prevailing parties for purposes of taxation of costs." (App. 157). Therefore, neither party "substantially prevailed", precluding an award of attorney's fees under section 19.3.

Finally, WFND waived any right it has to seek attorney's fees. The Court's October 19, 2005 Order provides claims for attorney's fees were to be presented in the form of post-trial motions and that the trial court would, if necessary, amend the Order for Judgment. (App. 516). The trial court's Order also provides that "However, the Court notes that WFND 'prevailed' on much of its claim and that Fargo Marc 'prevailed' on its counterclaim, so that a 'just, speedy and inexpensive determination' of this matter might suggest that each side should bear its own attorney's fees." Id. (emphasis in original). Regardless of the trial court's hint as to how it may rule, the fact is that WFND did not thereafter present its request for attorney's fees to the trial court and, therefore, WFND waived its right to seek attorney's fees. Heng at ¶10 (holding that this Court will not address issues that were not properly raised before the trial court).

IX. The District Court Erred When it Taxed Costs and Expenses in WFND's Favor.

The trial court determined during post-trial proceedings that both parties were "prevailing parties" for the purposes of taxing costs. (App. 517, ¶1). The trial court then concluded that Fargo Marc would not be allowed to tax the costs of its expert witness, Alton Nitschke of Eide Bailly. (App. 517-518). Rather, the trial court concluded that it would reduce the total costs sought to be taxed by WFND by 30%, representing the degree of fault the trial court attributed to WFND and Old Navy. (App. 518). After making some further adjustments to the costs sought to be taxed by the parties, the net result was taxable costs being awarded to WFND in the amount of \$13,307.00. Id. The trial court reduced Fargo Marc's \$50,2336.12 judgment by the \$13,307.00, resulting in entry of a net judgment, before an award of interest, of \$36,929.12. (App. 518-519). The trial court's legal determination on the taxation of costs is erroneous.

“Costs and disbursements must be allowed as provided by statute.” N.D.R. Civ. P. 54(d). The statutes addressing taxation of costs include N.D.C.C. §§ 28-26-02, 06, and 10. Taxation of costs and expenses lies within the sound discretion of the trial court. In re Estate of Dittus, 497 N.W.2d 415, 420 (N.D. 1993). The determination of which party is a “prevailing party”, however, is a question of law reviewed de novo. E.g. Braunberger v. Interstate Engineering, Inc., 2000 ND 45, ¶13 , 607 N.W.2d 904.

In this case, the trial court correctly found that both parties were “prevailing parties”. (App. 517). This Court, however, has held that when both parties prevail, costs are not to be awarded to either party. Biteler’s Tower Service, Inc. v. Guderian, 466 N.W.2d 141, 147 (N.D. 1991); See also Liebeltd v. Sabby 279 N.W.2d 881 (N.D. 1979); see also Moen v. Norwest Bank of Minot, 647 F. Supp. 1333, 1344 (D.N.D. 1986) (applying North Dakota law). Since both WFND and Fargo Marc prevailed, the trial court committed reversible error in taxing costs to either party.

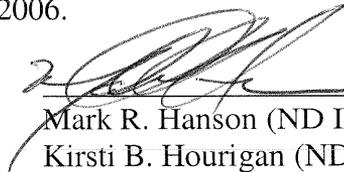
CONCLUSION

For the foregoing reasons, Fargo Marc, LLC respectfully requests that this Court Order as follows:

1. Affirm the District Court’s Judgment finding that WFND did not breach the Purchase Agreement with respect to the Old Navy claim;
2. Reverse the District Court’s Judgment with respect to the award of damages in favor of WFND’s on WFND’s deceit claim;
3. Affirm the District Court’s Judgment awarding Fargo Marc damages in the amount of \$57,374.91 on Fargo Marc’s counterclaim;
4. Reverse the District Court’s Judgment awarding costs and disbursements; and;

5. Remand this matter to the District Court for entry of judgment against WFND and in favor of Fargo Marc in the amount of \$220,880.39 (calculated as follows: stipulated holdback owed Fargo Marc of \$163,505.48 plus damages on counterclaim of \$57,374.91), with statutory interest being added to that amount from October 19, 2005, the date of the Court's Order for Judgment (App. 516) to entry of judgment upon remand.

Dated this 17th day of November, 2006.


Mark R. Hanson (ND ID # 04697)
Kirsti B. Hourigan (ND ID # 05759)
NILLES LAW FIRM
1800 Radisson Tower
201 North 5th Street
P.O. Box 2626
Fargo, North Dakota 58108-2626
Phone: (701) 237-5544
Fax: (701) 280-0762
Attorneys for Fargo Marc, LLC, Defendant/
Appellee and Cross-Appellant

STATE OF NORTH DAKOTA)

)ss.

AFFIDAVIT OF SERVICE

COUNTY OF CASS)

BRENDA JO BRUNELLE, being first duly sworn on oath, deposes and says that she is of legal age, is a resident of Fargo, North Dakota, not a party to nor interested in the action, and that she served the attached:

BRIEF OF APPELLEE/CROSS-APPELLANT FARGO MARC, LLC

SEPARATE APPENDIX OF APPELLEE/CROSS-APPELLANT FARGO MARC, LLC

on:

**Roger J. Minch
Attorney at Law
10 Roberts Street
P.O. Box 6017
Fargo, ND 58108-6017**

rminch@serklandlaw.com

Via E-mail on November 17, 2006, a true and correct copy thereof, addressed to each person above named at above address.

That the undersigned knows the person served to be the person named in the papers served and the person intended to be served.


BRENDA JO BRUNELLE

SUBSCRIBED AND SWORN to before me on November 17, 2006.


Notary Public

