

**IN THE SUPREME COURT**  
**STATE OF NORTH DAKOTA**

SolarBee, Inc.,	)	
	)	Supreme Court No. 20120125
Appellee,	)	Stark County Civil No. 45-10-C-518-1
	)	
vs.	)	
	)	
Sandra Walker and Joseph Eilers,	)	
	)	
Appellants.	)	

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ON APPEAL FROM THE  
 SOUTHWEST JUDICIAL DISTRICT  
 STARK COUNTY, NORTH DAKOTA  
 THE HONORABLE ZANE ANDERSON

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**BRIEF OF APPELLANTS**  
**SANDRA WALKER AND JOSEPH EILERS**

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## STATEMENT OF THE ISSUES

- I. The District Court Erred in Awarding Damages under a Cause of Action that was not Pled By Plaintiff.
  - A. Standard of Review and Applicable Law
  - B. Plaintiff did not Plead Breach of Employment Contract as a Cause of Action, Defendants Lacked Notice of Such a Claim, and the Court's Damage Award Based Thereon Was Improper.
  - C. Defendants Gave Neither Express nor Implied Consent to Amend the Pleadings to allege Breach of Employment Contract Either During or After Trial.
  
- II. The Court's Findings that Appellants Breached Their Proprietary Agreement and Conspired to Tortiously Interfere With Business Relationships and Expectancies Do Not Comply With Civil Rule of Procedure 52(a).
  - A. The Trial Court's Findings are Inadequate Under Rule 52(a) Because They Fail To Identify Factual Findings Which Support Necessary Elements of the Causes of Action
    1. Walker's Liability for Breach of Proprietary Agreement
    2. Liability for Tortious Interference with Business Relationship
  
- III. The Damages Granted to Plaintiffs by the Trial Court were Impermissibly Speculative, Vague as to Basis for the Award, and Not Tied to Any Properly Pled Cause of Action
  - A. Standard of Review and Applicable Law
  - B. No Evidence Was Presented to Support the Percentage of Losses Attributed to Defendants

## **STATEMENT OF THE CASE**

[¶ 1] Plaintiff, SolarBee, Inc. (“SolarBee”), initiated this action by summons and complaint filed on July 27, 2010, in Stark County, North Dakota. Plaintiff alleged in its complaint that Defendants Sandra Walker (“Walker”) and Joseph Eilers (“Eilers”) intentionally engaged in a course of conduct that violated a proprietary information agreement with SolarBee, disseminated trade secrets, and breached fiduciary duties.

[¶ 2] Defendants specially appeared before the court on August 18, 2010 and filed a motion to dismiss for lack of personal jurisdiction. Plaintiff filed an opposing brief on August 26, 2010. Defendants replied on September 9, 2012. The court denied Defendants’ motion on September 28, 2010. Plaintiff then filed a motion for default judgment on November 2, 2010. Defendants filed a reply brief on November 12, 2010. The court denied Plaintiff’s motion for default judgment on November 30, 2010.

[¶ 3] Trial was held over three days, beginning November 1, 2011, before the Honorable Zane Anderson at the Stark County Courthouse. Plaintiff was represented by Michael J. Maus and Patrick D. Hope of Maus & Nordsven, P.C., Dickinson, North Dakota and Defendants were presented by Jon Sanstead of Pearce & Durick, Bismarck, North Dakota. Both parties submitted pre-trial briefs on October 24, 2011, and post-trial briefs on November 30, 2011. The Memorandum Opinion, and Findings of Fact, Conclusions of Law, and Order for Judgment were entered on December 14, 2011. Judgment was entered on January 9, 2012, in Plaintiff’s favor, awarding damages in the amount of \$541,690.38 against Walker and \$81,690.38 against Eilers.

[¶ 4] Defendants filed a notice of appeal to the North Dakota Supreme Court on February 22, 2012.

## STATEMENT OF FACTS

[¶ 5] SolarBee, Inc., the Appellee in this action, is a North Dakota Corporation with its primary offices in Dickinson, North Dakota. SolarBee manufactures and markets solar-powered water circulators that are used to clean up bodies of water, and operates primarily in the wastewater, lake and potable tank markets. (Tr. 11-12).

[¶ 6] Defendant Sandy Walker is a California resident and was employed as a regional manager with SolarBee between November 2003 and April 2010. (Tr. 242). One aspect of her position as regional manager was to promote and sell SolarBees in her sales territory, California. Defendant Joe Eilers is an Oregon resident and was employed as a regional manager with SolarBee between July of 2007 and July of 2010. (Tr. 409, 450). Eilers' position also included promoting and selling SolarBees in his region, the Pacific Northwest, including Washington, Oregon, Idaho and eventually Hawaii. Walker executed an Employment Contract with SolarBee, then known as Pump Systems, Inc., on November 1, 2003. She also executed a Proprietary Information Agreement. However, this agreement was not executed until January 11, 2010. (App. 52-55, 60-65). Eilers executed an Employment Contract on July 16, 2007 and a Proprietary Information Agreement on August 8, 2008. (App. 56-59, 66-70).

[¶ 7] Joel Bleth ("Bleth") was a founder of SolarBee and was the Manager during the time when Walker and Eilers were employed by the company. (Tr. 6). Bleth had an email exchange, which was copied to Walker, in August of 2008 with Dana Wregglesworth from Applied Process Technology, Inc. ("APT"). (App. 37-42). In this email, Bleth discussed working with Wregglesworth on mutual product development, and

the parties executed mutual non-disclosure agreement (“NDA”). In particular, he discussed pursuing joint opportunities with APT and Dana Wregglesworth.

[¶ 8] This spirit of pursuing joint opportunities was pursued by Walker and Eilers, who, throughout 2009 and 2010, engaged in email correspondence with various parties with whom they could collaborate and supply SolarBees as part of a comprehensive package offered to clients with complex water pollution or oxygenation issues. (App. 43-44) (Tr. 275-403).

[¶ 9] Despite his earlier authorization for collaborative projects, Bleth later claimed that in his opinion, based upon his review of emails that were retrieved from Walker’s smartphone after her departure, Walker and Eilers were conspiring against SolarBee to supply client information and alleged proprietary data to outside parties with the intention of creating a new business venture. (Tr. 52-53, 62-65, 68). Bleth claimed that he was kept in the dark as to the communication and collaboration done by Walker and Eilers. (Tr. 68).

[¶ 10] Based upon these allegations, the underlying civil action was filed against the Appellants. In the complaint, only the following causes of action were alleged: 1) Breach of Proprietary Information Agreement; 2) Misappropriation of Trade Secrets in Violation of N.D.C.C. Ch. 47-25.1; 3) Breach of Fiduciary Duty in Violation of N.D.C.C. § 59-01-09 and N.D.C.C. § 59-01-11; 4) Civil Conspiracy; and 5) Unlawful Interference With Business. (App. 7-31).

[¶ 11] The primary evidence offered at trial were a collection of emails (and testimony concerning the context of those emails) circulated between Walker, Eilers and various other parties while they were attempting to secure collaborative water treatment



projects that involved the use of SolarBees in conjunction with other technologies, namely oxygenation.

[¶ 12] It was established at trial that the process of oxygenation involves injecting and/or dissolving pure oxygen into bodies of water. (Tr. 177). It was undisputed at trial that SolarBees are water circulators, and could not produce oxygen to mix into the water. (Tr. 176). As such, it was also undisputed that the application of SolarBees to certain projects was limited, and Bleth acknowledged that pairing SolarBees with oxygenation equipment could open up additional projects to the company. (Tr. 78-79, 85, 176-77).

[¶ 13] Walker testified at trial that she regularly posted updates on various client files to the “Notes” program utilized by SolarBee, thus apprising the company of the work she was doing in California. (Tr. 318, 327, 330, 347, 385-86). Walker testified that she decreased her direct communications with Bleth because she and Bleth had had a personal relationship which terminated and soured during very the period in which Walker and Eilers’ misconduct is alleged. (Tr. 352). Walker testified at trial that her working relationship with Bleth had, as a result, become strained, and she therefore avoided direct contact with Bleth when possible. (Tr. 383).

[¶ 14] As to her productivity as a sales person for SolarBee, Walker’s testimony was that she submitted 254 proposals during the relevant time period, and only 5 of those involved collaborative projects with oxygenation companies was uncontested. (Tr. 387).

[¶ 15] At trial, the employment contracts and proprietary information agreements were offered without objection as exhibits. Limited references were made to the employment contract. Bleth was asked about paragraphs C and M of the agreement, as

was Walker. Eilers was never questioned about the employment contract. (Tr. 44-46, 355-59).

[¶ 16] The court, in its Memorandum Opinion, and Findings of Fact, Conclusions of Law and Order for Judgment, found Walker and Eilers liable for breaching their employment contracts, even though such a cause of action was never pled. (App. 84-114). Furthermore, the court made a general finding that Walker had violated her Proprietary Information Agreement through her actions between February 2009 and April 2010, even though that agreement was not executed by Walker until January of 2010. (App. 92-94, 112). The court also generally found that the Defendants had conspired to unlawfully interfere with SolarBee's business relationship or expectancies. (App. 113). The court found that SolarBee had failed to prove a misappropriation of trade secrets. (App. 113). The court made no finding as to a breach of fiduciary duties. When examining the causes of action, the court made general findings of the breaches, and did not examine the elements of any of the offenses.

[¶ 17] There was no information provided through testimony or reasoning provided in the court's Memorandum Opinion, and Findings of Fact, Conclusions of Law and Order for Judgment that substantiated the trial court's ultimate determination that 35% of the gross profit loss was attributable to Walker and 20% was attributable to Eilers. The court accepted unsupported figures of the gross profit loss offered by plaintiffs, and tied the award primarily to Walker and Eilers' alleged breach of their employment agreement. The court acknowledged that the economic recession, high profile project failures of SolarBees, and failure to supervise employees were major causes of the economic loss suffered by SolarBee. (App. 87).

## **LAW AND ARGUMENT**

### **I. The District Court Erred in Awarding Damages under a Cause of Action that was not Pled by Plaintiff.**

#### **A. Standard of Review and Applicable Law**

[¶ 18] Under the Fourteenth Amendment of the U.S. Constitution, no state may deprive a person of life, liberty, or property without due process of law. U.S. Const. amend. XIV § 1. The North Dakota Constitution provides the same protection. N.D. Const. art. I, § 12. Notice and an opportunity to be heard are fundamental requirements of due process. Cnty. Homes of Bismarck, Inc. v. Main, 2011 ND 27, ¶ 12, 794 N.W.2d 204, 210 (citing State v. Sorenson, 2009 ND 147, ¶ 38, 770 N.W.2d 701 (quoting State v. Ehli, 2003 ND 133, ¶ 10, 667 N.W.2d 635)). A person is denied due process when defects in the procedure employed might lead to a denial of justice. Id. A claimed violation of a constitutional right is reviewed de novo. Rodenbiker v. L.T. (In the Interest of L.T.), 2011 ND 120, ¶ 8, 798 N.W.2d 657, 659 (citing State v. Sorenson, 2009 ND 147, ¶ 16, 770 N.W.2d 701).

#### **B. Plaintiff did not Plead Breach of Employment Contract as a Cause of Action, Defendants Lacked Notice of Such a Claim, and the Court's Damage Award Based Thereon Was Improper.**

[¶ 19] The complaint in this action alleged five counts: 1) Breach of Proprietary Information Agreement; 2) Misappropriation of Trade Secrets in Violation of N.D.C.C. Ch. 47-25.1; 3) Breach of Fiduciary Duty in Violation of N.D.C.C. § 59-01-09 and N.D.C.C. § 59-01-11; 4) Civil Conspiracy; and 5) Unlawful Interference With Business. (App. 7-31). The complaint was never amended. No cause of action for Breach of Employment Contract was ever pled by the Plaintiff. Despite this fact, in the court's Memorandum Opinion, the court held as follows: "The decision of the Court is to find the

Defendants Walker and Eilers in breach of their employment contracts and their fiduciary duty as employees of SolarBee.” (App. 85). The court further found that Walker and Eilers conspired together and unlawfully interfered with SolarBee’s business relationship or expectancies. Id. However, when setting forth the amount of damages to be awarded, the court specifically referred to “[D]efendants’ breach of contract and misdeeds.” Id. The court held that the email evidence offered in this case “clearly establishe[d] that [the defendants] did not devote their entire time and best efforts in selling the company’s products in accordance with the company’s directions and policies.” (App. 86). The court expressly found that the language in paragraph C, which read: “The salesperson shall devote [his/her] entire time and best efforts to selling the company’s products in accordance with the company’s directions and policies in [his/her] territory . . . [He/She] shall also assist the company in its resolution of any problems with customers in [his/her] territory” was breached, and that this was proven through email evidence. (App. 52, 86).

[¶ 20] The court reiterated its findings as to bases for liability again in the Memorandum Opinion at pages 8-9, noting that it found Defendants liable, “due to their breach of their employment contracts . . . and their Proprietary Information Agreements . . . and for conspiring to unlawfully interfere with SolarBee’s business relationships and expectancies.” (App. 91-92). The Court again referred to Defendants’ failure “to devote their entire time and best efforts to selling the company’s products in accordance with the company’s directions and policies in their territory and, specifically, they engaged in other activities and unauthorized collaboration with oxygenation and oxygenation entities that were in conflict with their obligation to SolarBee.” Id.

[¶ 21] The court stated that it would “award SolarBee 35% of its gross profit loss during the 15 month period when Defendant Walker was violating her employment contracts and conspiring against Solarbee,” and would “award SolarBee 20% of its gross profit loss during the 15 month period when Defendant Eilers was violating his employment agreements and conspiring against SolarBee.” However, the court expressly rejected SolarBee’s trade secret claim against the Defendants. (App. 113). The court also noted that while it found that the Defendants did engage in unauthorized collaboration, SolarBee had failed to prove that the unauthorized collaboration caused a loss of sales to the extent claimed by SolarBee. The court further found that (a) SolarBee did not “establish definitely why and how it lost sales,” (b) the court acknowledged that the loss was caused in part by the economic recession, (c) the change in sales also corresponded with SolarBee’s shift from a commission-based system of compensation to one that paid a set salary regardless of the number of sales, and (d) bad publicity from high profile failures in 2008, 2009 and 2010 played a role in the drop in sales. The court also found that SolarBee had failed to properly mitigate damages by failing to more closely supervise its employees and investigate the drop in sales. (App. 87-88, 91). The court ultimately settled upon an award against Walker of \$541,800.00 and an award of \$80,800 against Eilers. (App. 93).

[¶ 22] The Supreme Court of Utah held, in Plumb v. State, that “All parties to a legal action are entitled to notice that a particular issue is being considered by a court and to an opportunity to present evidence and argument on that issue before decision.” 809 P.2d 734, 743 (Utah 1990). It held that the failure to give adequate notice and opportunity can constitute a denial of due process under the state’s due process clause of

the constitution. Id. Like the North Dakota Supreme Court, Utah’s court noted that an opportunity to be heard in a meaningful way and timely and adequate notice are at the very heart of procedural fairness. Id. It noted that “[m]any cases have held that where notice is ambiguous or inadequate to inform a party of the nature of the proceeding against him [or her] or not give sufficiently in advance of the proceeding to permit preparation, a party is deprived of due process.” Id. (citing Cornish Town v. Koller, 798 P.2d 753, 756 (Utah 1990) (citations omitted)).

[¶ 23] The North Dakota Supreme Court has similarly expressed concern over the lack of notice to a party occasioned by raising a theory of recovery for the first time in a post-trial brief. This Court held that, “[amendment] of the pleadings . . . is not simply a technical requirement; its purpose is to provide notice to the opposing party and the trial court that the theory of the case is being changed or expanded.” Ruud v. Frandson, 2005 ND 174, ¶11, 704 N.W.2d 852, 856. The court in Ruud denied recovery to a party based upon a theory that was not expressly set forth in the pleadings, was brought forth for the first time (like the present case) in the post-trial brief, where there was no motion to amend the pleadings, and where evidence of the theory was not sufficient to notify the opposing party of the expansion of the theory of the case. Id. at ¶ 13-14.

[¶ 24] In this case, the court expressly rejected SolarBee’s trade secret claim, stating that it was relying on Defendants’ breach of their employment contracts, their fiduciary duties as employees, and their interference with SolarBee’s business relationships or expectancies as a basis for their liability. However, when the court clarified the basis for liability, it relied upon specific language from the parties’ employment contracts, the violations of which were never alleged as a cause of action.

Defendants had no notice that they should be presenting evidence as to whether or not Walker and Eilers were devoting “their entire time and best efforts to selling the company’s products in accordance with the company’s directions and policies,” because they had no notice that they may be held liable for a breach of the employment contract document. Therefore, it was improper for the court to hold the Defendants liable based upon a cause of action which was not presented at the outset of the case, was not subject to the discovery and trial preparation process, and was not called to their attention during trial.

**C. Defendants Gave Neither Express nor Implied Consent to Amend the Pleadings to Allege Breach of Employment Contract Either During or After Trial.**

[¶ 25] In the event that this Court does not find that the lack of notice on the Breach of Employment Contract claim violated the Defendants’ right to notice and procedural due process, this Court should find that the trial court abused its discretion in constructively (though with no mention, acknowledgment or explanation of doing so) amending the pleadings to include a claim for Breach of Employment Contract. Generally, whether an issue was tried by the express or implied consent of the parties is a matter within the sound discretion of the district court and will not be reversed on appeal unless an abuse of discretion is shown. Thompson v. Schmitz, 2009 ND 183, ¶ 19, 774 N.W.2d 263, 270 (citing Mann v. Zabolotny, 2000 ND 160, ¶ 11, 615 N.W.2d 526). A district court abuses its discretion if it acts in an arbitrary, capricious, or unreasonable manner, or if it misinterprets or misapplies the law. Id. (citing Gustafson v. Poitra, 2008 ND 159, ¶ 20, 755 N.W.2d 479).

[¶ 26] North Dakota Rule of Civil Procedure 15(b) provides, in relevant part, “[w]hen an issue not raised by the pleadings is tried by the parties’ express or implied consent, it must be treated in all respects as if raised in the pleadings.” Pleadings may be amended so that they conform with evidence introduced at trial. Ruud, at ¶ 10. However, while a pleading may be impliedly amended under Rule 15 by introduction of evidence which varies or expands the theory of the case and is not objected to as not within the issues in the pleadings, consent to try an issue outside the pleadings cannot be implied from evidence which is relevant to the pleadings but which also bears on an unpleaded issue. Thompson, at ¶ 20 (citing Ruud, at ¶ 10; Mann, at ¶ 12; Fleck v. Jacques Seed Co., 445 N.W.2d 649, 652 (N.D. 1989)).

When evidence that is claimed to show that an issue was tried by consent is relevant to an issue already in the case, as well as to the one that is the subject matter of the amendment, and there was no indication at trial that the party who introduced the evidence was seeking to raise a new issue, the pleadings will not be deemed amended under the first portion of *Rule 15*. The reasoning behind this view is sound since if evidence is introduced to support basic issues that already have been pleaded, the opposing party may not be conscious of its relevance to issues not raised by the pleadings unless that fact is specifically brought to his attention.

Ruud, ¶ 10 (quoting Mann, ¶ 12).

[¶ 27] Copies of the employment contracts executed by Defendants were offered as trial exhibits and were referred to during the course of trial. (Tr. 44). Joel Bleth referred to the employment contract briefly during direct examination to show what Defendants’ effective date of employment and salary were, pointed out the requirements to devote their best efforts to selling the company’s products and called attention to paragraph M in the agreement which forbade the employee from interfering with the company’s customers or disclosing propriety information. Bleth stated that those



paragraphs had been violated by Walker. (Tr. 44-45). Plaintiff's counsel referred to Eilers' employment contract at trial by asking Bleth if it evidenced that Eilers was winding down Max Depth when he came on board at SolarBee, and by referring to the same paragraph M that was referenced with respect to Walker. (Tr. 50-51). Notably, Plaintiff's counsel also referred to the proprietary information agreement to provide evidence that Eilers claimed he was winding down Max Depth in 2008. No other explicit references to the employment contract were made during the testimony of Joel Bleth. The employment contract was referred to in Walker's cross-examination to call attention to paragraphs C and M, as Plaintiff's counsel did in his examination of Joel Bleth. (Tr. 355-56). No explicit mention of an employment contract was made at all during the direct or cross examination of Eilers.

[¶ 28] Plaintiff's limited references to and evidence given of the employment contracts during trial were relevant to the other causes of action pled in the complaint. The court's ruling evidences the relationship of the employment contract to the various causes of action, as it refers to the same actions of the defendants as breaching both the employment and proprietary information agreements, and constituting the conspiracy to interfere with SolarBee's business relationships. (App. 91-94).

[¶ 29] This Court, in Ruud, declined to allow appellant recovery on a theory that was raised for the first time in a post-trial brief, just as SolarBee did in this case. In Ruud, claims of waiver and estoppel had been raised for the first time in appellant's post-trial brief. The court found that appellant made no motion to amend the pleadings to expand the theory of his case. Id. at ¶ 11. The court found that counsel's questions at trial were tucked away in unrelated lines of questioning that pertained to other causes of

action that had been pled. Id. at ¶ 12. The court found that the question relating to the new cause of action were relevant to and consistent with existing theories in the case, and noted the placement, structure and tone of the questions in holding that the questions asked were not enough to put appellee on notice that appellant was expanding the theory of his case. The court further noted that the questions related to the new theory were immediately followed by questions related to other existing theories. Id. Based upon these findings, the court could not conclude that appellee had impliedly consented to trial on the new theory presented by appellant. Id.

[¶ 30] Likewise, in this case, the questions asked that pertained to Defendants' breach of their employment contracts were presented and phrased in such a way that negated their ability to notify the Defendants that SolarBee was asserting an additional theory of recovery. In the instances where the employment contracts were brought up during the direct examination of Bleth, counsel asked two questions regarding specific provisions of the contract: one pertaining to using best efforts to sell the company's products and the other directed at the prohibition in the contract from interfering with the company's customers and from disclosing proprietary information. (Tr. 44-45). Counsel then immediately began questioning Bleth about Defendants' salaries, employment statuses (full or part time) and then asked questions about the proprietary information agreement. Id. Significantly, there was overlap between the employment and proprietary information agreements offered as exhibits in this case in that they both prohibited employees from interfering with existing customer relationships. Furthermore, the questions regarding Defendants' devoting their best efforts to sell SolarBee products were relevant to the existing Breach of Fiduciary Duty claim. The question relating to

disclosing proprietary information was relevant not only as previously stated, but also to the Misappropriation of Trade Secrets cause of action. The facts in this case are analogous to those in Ruud, as appellants in both cases were not sufficiently notified of the expanded theory of their respective cases to have been deemed to have consented to trial on the new causes of action.

[¶ 31] In Thompson, this Court also reversed and remanded the district court's amendment of the pleadings to conform to the evidence, simply based upon the finding that any evidence presented in that case concerning an implied in fact contract was also relevant to a determination of whether certain funds constituted a capital contribution. Thompson v. Schmitz, at ¶ 20. The evidence presented as to the employment contract in this case was also relevant to the Breach of Fiduciary Duties, Misappropriation of Trade Secrets, and Interference with Business. As in Thompson, it was an abuse of discretion by the trial court to grant relief to Plaintiff based upon a theory of the case to which defendants did not impliedly or expressly consent.

**II. The Court's Findings that Appellants Breached Their Proprietary Agreement and Conspired to Tortiously Interfere With Business Relationships and Expectancies Do Not Comply With Civil Rule of Procedure 52(a).**

**A. The Trial Court's Findings are Inadequate Under Rule 52(a) Because They Fail To Identify Factual Findings Which Support Necessary Elements of the Causes of Action.**

[¶ 32] "In an action tried on the facts without a jury[,] . . . the court must find the facts specially and state its conclusions of law separately." N.D.R.Civ.P. 52(a)(1); Erickson v. Brown, 2012 ND 43, ¶ 7, 813 N.W.2d 531. The rule expressly permits making findings of fact and conclusions of law "in an opinion or memorandum of decision filed by the court." Id. "Findings of fact are adequate under N.D.R.Civ.P. 52(a)

if they provide this Court with an understanding of the district court's factual basis used in reaching its decision." City of Fargo v. Salsman, 2009 ND 15, ¶ 9, 760 N.W.2d 123.

[¶ 33] The court must specifically state the facts upon which its ultimate conclusion is based. The purpose of the rule is to "provide the appellate court with an understanding of the factual issues and the basis of the district court's decision." Cass County State's Attorney v. R.A.S. (In re R.A.S.), 2008 ND 185, ¶ 9, 756 N.W.2d 771 (citing Clark v. Clark, 2005 ND 176, ¶ 8, 704 N.W.2d 847). Because the Supreme Court defers to a district court's choice between two permissible views of the evidence and the district court decides issues of credibility, detailed findings are particularly important when there is conflicting or disputed evidence. The Supreme Court cannot review a district court's decision when the court does not provide any indication of the evidentiary and theoretical basis for its decision because it is left to speculate what evidence was considered and whether the law was properly applied. Id.; (citing Clark, at ¶¶ 9 and 13). The court errs as a matter of law when it does not make the required findings. L.C.V. v. D.E.G., 2005 ND 180, ¶ 11, 705 N.W.2d 257.

### **1. Walker's Liability for Breach of Proprietary Agreement**

[¶ 34] A party alleging a breach of contract has the burden of proving (1) the existence of a contract, (2) a breach of the contract, and (3) damages which flow from the breach. Martin v. Trinity Hospital, 2008 ND 176, ¶ 29, 755 N.W.2d 900, 909. The trial court's Memorandum Opinion, and Findings of Fact, Conclusions of Law and Order for Judgment failed to examine the individual elements of the cause of action for breach of contract. (App. 84-114). In this case, had the trial court examined the actual elements of the cause of action, rather than setting forth a general, unsupported finding of liability,

the fact that a Proprietary Agreement was not executed by Sandra Walker until January 11, 2010 would have become apparent. The dates of the alleged breaches in this case spanned from February 2009 to April 2010. However, the first element of proving a breach of contract could not have been proven against Walker until at least January 11, 2010. The court's general finding that Walker "violated the Proprietary Information Agreement and Invention Assignment by diverting customers, engaging in conflicting activities and consulting and rendering services to persons or entities marketing products to or in competition with systems or services offered by SolarBee," does not identify which specific actions allegedly breached the Proprietary Information Agreement and at what date they occurred. (App. 112). The court's Finding of Facts span the entire timeframe from February 2009 to April 2010, and the Conclusions of Law make no finding that most of those Findings of Fact are inapplicable to any alleged breach of the Proprietary Information Agreement as it did not exist for most of that timeframe. (App. 95-114).

[¶ 35] Similar to the court's determination of liability, the court's damage award is not specifically allocated to any particular cause of action. There is no explanation in the court's order that would allow this court to understand how much of the award was improperly granted based upon the erroneous finding of a Breach of Proprietary Information Agreement claim between February 2009 and January 2010. Furthermore, as argued in further detail below, the court did not support its finding of Walker's liability for 35% of the lost gross profits. The rule regarding measurement of damages for breach of contract says that compensation is recoverable for "all detriment proximately and naturally caused by the breach." Hayes v. Cooley, 13 N.D. 204, ¶ 2, 100 N.W. 250 (N.D.

1904). The Court's rough calculations assume that Walker was bound by the proprietary information agreement she was alleged to have breached from February 2009 to April 2010. However, Walker did not execute the agreement until January 11, 2010. Walker was thus not bound by the agreement for fifteen months, and her alleged breach of the proprietary information agreement could not have proximately and naturally caused any detriment during the period in which she was not bound by the agreement. Therefore, the court failed to find an additional element of a breach of contract claim, as its finding of facts as to damages flowing from the alleged breach was erroneous and a mistake of fact.

## **2. Liability for Tortious Interference with Business Relationship**

[¶ 36] In addition to failing to consider the elements of a breach of contract claim, the court also made insufficient findings under N.D.R.Civ.P. 52(a) as to the requisite elements of tortious interference with a business relationship. A claim for tortious interference with an existing or prospective business relationship lies where: (1) a valid business relationship or expectancy exists; (2) the interferer knows of the relationship or expectancy; (3) the interferer commits an independently tortious or otherwise unlawful act of interference; (4) proof exists showing that the interference caused the harm sustained; and (5) the party whose relationship or expectancy was disrupted suffered actual damages. Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc., 2001 ND 116, ¶ 36, 628 N.W.2d 707. An act is independently tortious or otherwise unlawful if it is unjustified. Hilton v. N.D. Educ. Ass'n, 2002 ND 209, ¶ 24, 655 N.W.2d 60; Bismarck Realty Co. v. Folden, 354 N.W.2d 636, 642 (N.D. 1984).

[¶ 37] Appellants do not dispute that valid business relationships existed in this case, nor do they deny that they knew of the business relationships. However, Appellants

argue that evidence presented to the trial court showed they did not commit an independently tortious act of interference. Appellants argue that the court failed to explain what, if any, proof existed that the interference caused the harm sustained and failed to find that SolarBee suffered actual damages on account of the alleged interference. Appellants also maintain that the trial court's failure to include references to any specific findings of fact, or to provide any reasoning at all in paragraph 7 of its Findings of Fact, Conclusions of Law as to what facts in particular the court found proved the elements of the tortious interference with business relationships, failed to "specifically state the facts upon which its ultimate conclusion is based on," as required by Rule 52(a). Cass County State's Attorney, at ¶ 9.

[¶ 38] Documentary evidence was presented to the district court that on at least three occasions, Bleth authorized employees to participate in collaborative projects. Bleth exchanged email correspondence with Dana Wregglesworth between August 11, 2008 and September 9, 2008, and executed a mutual non-disclosure agreement, in which he agreed that the parties were proceeding with the agreement "for the purpose of evaluating the potential to form a mutually beneficial business relationship with each other." (App. 37-42). Walker was copied on the correspondence. In addition, Bleth approved Walker to participate in an open house hosted by PCI, an oxygenation equipment producer and distributor, upon Walker's request. (App. 72-75). Furthermore, Bleth expressed his affinity of combining SolarBees with PCI's technologies in an email dated April 23, 2009, that was addressed to both Dana Wregglesworth and Sandy Walker. (App. 76-82). Bleth's approval of such ventures, aimed at professional collaboration with entities engaged in the oxygenation process, justified Walker and Eilers in

continuing to pursue such ventures in an effort to open additional markets and projects to SolarBee. As such, their conduct in continuing in that course of marketing would not constitute an independently tortious act of interference, the existence of which is required to substantiate a finding that the tort had been committed. Walker and Eilers testified before the trial court that throughout their employment, their projects were uploaded to the “Notes” server, accessible by the home office. (Tr. 318, 327, 330, 347, 385-86). Bleth had available to him the information regarding Walker and Eilers’ continued pursuit of collaborative ventures, and either did not take the initiative to review the work of his employees, or knew of the work and did nothing to express SolarBee’s alleged disapproval. Again, this shows that Walker and Eilers’ activities in collaborating with Dana Wregglesworth and others were justified by Bleth’s lack of objection.

[¶ 39] As to the required fourth and fifth elements (proof that the interference caused the harm suffered and the existence of actual damages) the argument below regarding the vague nature of the trial court’s determination and valuation of damages, and its failure to assign the damages to any specific cause of action in this case illustrates that the court failed to make the requisite specific factual findings that damages in this case were caused by any alleged interference with business relationships by the Appellants. Therefore, because adequate findings as to actual damages were not proven or found by the trial court, the required element of proof of actual damages has not been established, and a finding of tortious interference with business relationships cannot be sustained.



**III. The Damages Granted to Plaintiffs by the Trial Court were Impermissibly Speculative, Vague as to Basis for the Award, and Not Tied to Any Properly Pled Cause of Action.**

**A. Standard of Review and Applicable Law**

[¶ 40] A trial court's determination of the amount of damages caused by a breach of contract is a finding of fact subject to the clearly erroneous standard of review. Cavendish Farms, Inc. v. Mathiason Farms, Inc., 2010 ND 236, ¶ 20, 792 N.W.2d 500. "A finding of fact is clearly erroneous if there is no evidence to support it, if the reviewing court is left with a definite and firm conviction that a mistake has been made, or if the finding was induced by an erroneous view of the law." State v. T.S. (In re T.S.), 2011 ND 118, ¶ 8, 798 N.W.2d 649, (citing Interest of A.R., 2010 ND 84, ¶ 5, 781 N.W.2d 644). An award of damages will be sustained when it is within the range of evidence presented. Westby v. Schmidt, 2010 ND 44, ¶ 18, 779 N.W.2d 681. The district court's findings of fact must reflect the basis of its decision and must enable the Supreme Court to understand its reasoning. Carlson v. Carlson, 2011 ND 168, ¶ 19, 802 N.W.2d 436 (citing American Bank Center v. Wiest, 2010 ND 251, ¶ 32, 793 N.W.2d 172; Tulintseff v. Jacobsen, 2000 ND 147, ¶ 12, 615 N.W.2d 129). The court will remand for clarification of the findings of fact when the findings are inconsistent or we are unable to discern the rationale for the result reached by the district court. Id.; Hagel v. Hagel, 2006 ND 181, ¶ 14, 721 N.W.2d 1; Tulintseff, at ¶ 12; Holtz v. Holtz, 1999 ND 105, ¶ 18, 595 N.W.2d 1.

**B. No Evidence was Presented to Support the Percentage of Losses  
Attributed to Defendants.**

[¶ 41] The trial court awarded damages against Walker in the amount of \$541,800, which the court found was 35% of the gross profit loss during the 15 month period when the court determined Walker was “violating her employment contracts and conspiring against SolarBee.” (App. 86, 92-93). The court awarded damages against Eilers in the amount of \$80,800, which the court found was 20% of the gross profit loss during the 15 month period when the court determined Eilers “was violating his employment agreements and conspiring against SolarBee.” (App. 87, 92-93).

[¶ 42] Joel Bleth prepared a document which was offered as Exhibit 93 at trial, and was the source of the gross profit loss upon which the court based its damages award. Bleth testified regarding the document at the trial. (Tr. 160-68). As to Eilers, the exhibit contained losses of \$73,500 in overpayment of salary (based upon 70% of his time alleged to have been spent on personal projects), \$22,500 of loss in sales expenses, \$212,100 in lost gross profits, and \$240,000 in costs to repair relations and build back sales momentum, for a total loss of \$547,650. (App. 83). The exhibit as to Walker, contained losses of \$112,500 in overpayment of salary (based upon 50% of her time alleged to have been spent on personal projects), \$33,750 of loss in sales expenses, \$482,661 in lost gross profits, and \$500,000 in costs to repair relations and build back sales momentum, for a total loss of \$1,729,250. (App. 83).

[¶ 43] The court, in its damage award, accepted the testimony of Bleth, rather than the calculations on Exhibit 93, as to the gross profit losses incurred by the company for Walker, allegedly between February 2009 and April 2010. As Bleth testified at trial regarding Exhibit 93, it became clear that the amounts he was testifying to did not match

the calculations provided. Bleth alleged that he had come to a revised figure of \$2,064,000 as follows:

[¶ 44] “So I averaged [2009] and [2010] and I averaged [2007] and [2008], and I subtracted the two, divided it by fifteen months, and the average monthly loss was 137,000 in sales. And so for this 15-month period in question from February through April was \$2 million – 2,064,000.” (Tr. 164). The arrival at this amount through the method of calculation was specious at best. It is unclear what Bleth meant by “subtracting the two.” (Tr. 164). The only explanation that Bleth offered for the discrepancy between the calculations on the worksheet and those he presented through testimony was that he thought, apparently upon reflection, that the \$482,000 in sales damages on the worksheet was “too low,” and therefore he presented a different method of calculation at trial. Yet, the trial court accepted this figure in its Memorandum Opinion with no explanation or specific finding of fact as to why that was an acceptable calculation or better than the calculation provided in the exhibit. Thus, the court accepted the lost gross profit figure of \$2,064,000 for Walker and of \$404,000 for Eilers.

[¶ 45] The court denied any recovery upon SolarBee’s damages claim for lost sales expenses or costs to repair relations, stating that it failed to adequately explain its claims or provide proof that it would in fact incur expenses to build back damaged relations. (App. 92). Rather, it provided damages solely upon the lost profit calculations discussed above.

[¶ 46] As previously noted, Bleth submitted that 70% of the lost gross profit was attributable to the Defendants, allocating 30% of the cause to the recession. The court declined to accept these figures, instead attributing 35% of the sales loss to Walker, and

20% to Eilers. In decreasing the amount of loss attributable to the Defendants, the court stated:

“There may be, as Defendants argue, and as the Court noted above, many reasons including the economic recession, bad publicity, and other factors that can explain the loss in sales. However, the Court finds that the loss in sales when considered with SolarBee’s email evidence and other testimony are certainly circumstantial evidence that tends to support SolarBee’s allegation of wrong doing by Defendants Walker and Eilers during the time in question. The Court further finds that *some of the sales loss* is properly attributed to Defendants Walker and Eilers’ wrongdoing.

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“Because of concerns mentioned above in regard to the amount of damages and what amount of damages is reasonable under the circumstances, the Court took a very conservative approach in assessing and awarding damages.”

(App. 91-92) (emphasis added).

[¶ 47] The court later simply stated that it rejected Bleth’s contention that 70% of the loss was attributable to Walker, but found rather that 35% was attributable. (App. 92) The court made a similar statement as to Eilers’ attributing 20% of the fault to Eilers, and rejected Bleth’s argument of 70%. (App. 93).

[¶ 48] A party alleging a breach of contract has the burden of proving damages which flow from the breach. Martin v. Trinity Hospital, 2008 ND 176, ¶ 29, 755 N.W.2d 900, 909. Under N.D.C.C. § 32-03-09, “[n]o damages can be recovered for a breach of contract if they are not clearly ascertainable in both their nature and origin.” Id. This Court has held that parties are not entitled to recover for lost profits resulting from breach if those lost profits are speculative. Leingang v. City of Mandan Weed Bd., 468 N.W.2d 397, 398. In Leingang, this Court held that the trial court was not precise enough in its

calculation for determining damages. The trial court adopted a “modified net profit” approach, deriving

“a profit margin of 20% by subtracting four categories of expenses reported on Leingang’s Schedule C, and attributed to (his) business, from (his) income reported to the IRS. The trial court selected insurance, repairs, supplies, and car and truck expenses as costs attributed to the weed-cutting business. Applying the profit margin of 20% to the contract price, the trial court deducted 80% from the contract price as expenses.”

Id. This Court held this to be an inadequate method of calculating damages. Id. at 399. The holding conflicts with the trial court’s assertion in this case that “the uncertainty which prevents recovery is the uncertainty of the fact of damages, not the uncertainty of the amount.” (App. 89). This Court has expressed that a precise measurement of the amount of damages is necessary to grant relief. Leingang, 468 N.W.2d at 399.

[¶ 49] The court in this case gave insufficient evidence or reasoning to support its award. There is a complete lack of any evidence in the record supporting the court’s percentage of fault attributed to the Defendants. The court simply made no statements in its Memorandum Opinion, or in its Findings of Fact, Conclusions of Law, and Order for Judgment, as to why 35% and 20% respectively, represented an accurate assessment of loss attributable to Walker and Eilers. Both of the Defendants were working in sales territories that were experiencing a historic recession. No questions were asked of Walker or Eilers regarding the estimated amount of time they spent, or when they spent it, on the various projects that SolarBee alleged were outside of the scope of their duties as employees of the company, yet SolarBee provided an estimate with no testimonial support that Walker spent 50% of her time over that 15 month period on personal projects and that Eilers spent 70% of his time over that same period on personal projects. The court made no finding discrediting Walker’s testimony that she submitted 254 SolarBee

proposals during that time period and only 5 of them involved oxygenation projects. The exhibit produced by Bleth based a reduction in salary on these percentages, and claimed that loss amount as damages. While the court declined to grant a double recovery to SolarBee by awarding lost profit and overpayment of salary, the court did rely on Walker and Eilers' failure "to devote their entire time and best efforts to selling the company's products" as the stated basis for the damages award. However, no evidence exists in the record as to how much of Appellants' work days were spent on the activities that the court alleged were outside of the scope of their employment. Both the Plaintiff and the court took a total shot in the dark at providing a reasonable estimate as to a damage calculation.

[¶ 50] As previously state, the court in this case provided various sources that it acknowledged had contributed to the gross profit losses sustained by SolarBee during 2009 and 2010. The court rejected the percentage of fault allocations offered by SolarBee, and reduced those figures, but offered not one shred of evidence or explanation as to how or why the percentages arrived at by the court represented an accurate assessment of fault on behalf of the Defendants. Such an award of damages cannot be sustained as it is not within the range of evidence presented. Westby v. Schmidt, 2010 ND 44, ¶ 18, 779 N.W.2d 681 (citations omitted). Because the district court's findings of fact do not reflect the basis of its decision, this Court does not have before it a basis to understand its reasoning. Carlson v. Carlson, 2011 ND 168, ¶ 19 (citations omitted). The findings of fact as to the damage award in this case are clearly erroneous, as they are not supported by any competent evidence on the record. State v. T.S. (In re T.S.), at ¶ 8 (citations omitted).

[¶ 51] The court acknowledged that it was awarding damages, based in part, upon Defendant's alleged breach of their employment contracts. As argued above, the inclusion of this cause of action was a reversible error because it was not pled, nor added through implied amendments to the pleadings. Furthermore, awarding any damages to SolarBee based upon the alleged breach of Proprietary Information Agreement must be reversed, as Appellants' previous argument makes clear. As such, this court should vacate the trial court's award of damages as it was impermissibly speculative, based upon a cause of action that was not pled, and lacked reasoning and sufficient proof that any damages resulting from the alleged breach of Property Information Agreement and tortious interference with business relationships.

### **CONCLUSION**

[¶ 52] The trial court in this case awarded impermissibly speculative damages against Defendants based in part upon an alleged breach of their Employment Contract, breach of the Proprietary Information Agreement and upon an alleged tortuous interference with business relationships and expectancies. As a breach of employment agreement was not plead in the complaint, and the pleadings were never expressly or impliedly amended by the parties or the court, a finding of liability and an award of damages on that basis is reversible error. As to the breaches of the Proprietary Information Agreement and tortuous interference, the court failed to set forth the requisite specific factual findings to comply with N.D. Rule of Civil Procedure 52(a), and failed to make factual findings to sustain a finding of liability upon those causes of action. The court denied recovery on the dissemination of trade secrets and breach of fiduciary duty actions. Therefore, the parties request that the judgment in this case be

vacated, as the trial court's Memorandum Opinion, and Findings of Fact, Conclusions of Law and Order for Judgment failed to establish that damages flowed from breaches of any of SolarBee's properly alleged causes of action.

Dated this 27<sup>th</sup> day of July, 2012.

Respectfully submitted,

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