

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Eugene E. Taszarek, Marlys J. Taszarek,)	Supreme Court Case No. 20180303
Trina E. Schilling, Steven E. Taszarek,)	
and Michael E. Taszarek)	Dickey County Case No.
Appellees,)	11-2013-CV-00088
)	
vs.)	
)	
Brian Welken,)	
)	
Appellant,)	
)	
and)	
)	
Lakeview Excavating, Inc., German)	
Township and Dickey County,)	
)	
Defendants.)	

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BRIEF OF APPELLANT, BRIAN WELKEN

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**APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
FOR JUDGMENT ENTERED ON MAY 16, 2018, JUDGMENT ENTERED ON
JUNE 1, 2018, AND NOTICE OF ENTRY OF JUDGMENT ENTERED ON JUNE
6, 2018**

**DICKEY COUNTY DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE DANIEL D. NARUM**

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STATEMENT OF THE ISSUES

[1] Whether the trial court erred by piercing the corporate veil of Lakeview Excavating, Inc. and holding Appellant Brian Welken personally liable for the Appellees' judgment against Lakeview Excavating, Inc.

STATEMENT OF THE CASE

[2] Plaintiffs-Appellees Eugene E. Taszarek, Marlys J. Taszarek, Trina E. Schilling, Steven E. Taszarek and Michael E. Taszarek (collectively referred to as "Taszareks") brought an action against Defendant Lakeview Excavating, Inc. ("Lakeview Excavating") and Defendant-Appellant Brian Welken ("Welken"), asserting claims of Intentional Trespass, Conversion and Unjust Enrichment. (Doc ID## 1-2) The claims alleged in the Complaint arose from Lakeview Excavating's work in 2012 on a FEMA road raising project in German Township in Dickey County, North Dakota. (*Id.*) See also *Taszarek v. Welken*, 2016 ND 172, ¶¶ 1-6, 883 N.W.2d 880.

[3] The Taszareks filed an Amended Complaint on April 1, 2014, bringing German Township and Dickey County into the lawsuit. (Doc ID# 23) The Taszareks in their Amended Complaint alleged claims of Intentional Trespass, Conversion and Unjust Enrichment against German Township and Dickey County. (*Id.*) On February 2, 2015, the District Court entered an Order Granting German Township's and Dickey County's motions for summary judgment and dismissed the claims against them. (Doc ID# 73)

[4] Trial for the matter was held on February 15-17, 2015. On February 17, 2015, the jury returned a verdict in favor of the Taszareks and against Lakeview and Welken. (Doc ID# 165) Order for Judgment and Judgment was filed on April 30, 2015.

(Doc ID## 180-181) An Amended Judgment and Notice of Entry of Judgment were also filed on April 30, 2015. (Doc ID## 182-183)

[5] Brian Welken (“Welken”) filed his Notice of Appeal to the North Dakota Supreme Court on June 25, 2015. (Doc ID# 192) Welken filed a Supplement to Notice of Appeal with Statement of Preliminary Issues on July 6, 2015. (Doc ID# 194) Welken argued that the trial court had erred by giving the jury an “alter ego” instruction that allowed it to pierce the corporate veil and impose personal liability on Welken for the Taszareks’ judgment against Lakeview Excavating, Inc.

[6] This Court reversed the trial court and remanded the matter for a determination whether Welken was the alter ego of Lakeview Excavating, Inc., using the Hilzendager-Jablonsky factors. Taszarek v. Welken, 2016 ND 172, ¶ 12.

[7] On remand, the parties tried the case to the trial court without a jury. On May 17, 2018, the trial court entered its Findings of Facts, Conclusions of Law and Order for Judgment. (App. 13; Doc ID# 333) The trial court concluded that Welken was the alter ego of Lakeview Excavating, Inc. and he was personally liable for the Taszareks’ damages. (Id.) Judgment was filed on June 1, 2018; notice of entry of judgment was filed on June 6, 2018. (App. 17-18; Doc ID## 336-337)

[8] Welken filed his Notice of Appeal on August 2, 2018. (App. 19; Doc ID# 343) His preliminary statement of issues asked “[w]hether the District Court erred in piercing the corporate veil of Lakeview Excavating, Inc. and holding Defendant Brian Welken personally liable for the Taszareks’ judgment against Lakeview Excavating, Inc.?” (Id.)

STATEMENT OF FACTS

[9] At the times relevant to this action, Lakeview Excavating was a corporation primarily involved in flood control projects. Welken filed the Articles of Incorporation for Lakeview Excavating Inc. on May 21, 2010. (Doc ID# 277; Exhibit 20) Lakeview Excavating was formed for “general business purposes,” which was described more fully as follows: “The Company is engaged primarily in excavating services construction in the regional area of Valley City, North Dakota. The work is performed for both public and private sector customers and consists primarily of roadwork, water and sewer lines, ditching, hauling and demolition. The work is performed under both fixed-price and time and material contracts. The lengths of the Company’s contracts vary, but are typically completed within one year.” (Doc ID# 280; Exhibit 62)

[10] Lakeview Excavating held its organizational meeting on June 3, 2010. Brian Welken was installed as President and Chairperson of the Board of Directors, Georgia Welken as Vice-President and Lisa Amundson as Secretary/Treasurer. The Board of Directors was authorized to issue 500 shares of stock. Brian Welken was the sole shareholder in the company, owning three of the 500 shares. The Board established 10621 34th St. SE, Sanborn, North Dakota as the company’s principal place of business. (Doc ID# 277; Exhibit 20)

[11] The first meeting of shareholders was also held on June 3, 2010. In that meeting, the shareholders resolved that the company had elected to be taxed for federal income purposes as an “S Corporation” under the provisions of the Internal Revenue Code. (Id.)

[12] Lakeview Excavating was capitalized with a line of credit from Bank Forward in the amount of \$375,000. The company shared this line of credit with Lakeview Trucking, Inc., which was also owned by Brian Welken. Lakeview Trucking was formed before Lakeview Excavating, and the business of Lakeview Trucking is described as over-the-road transportation of construction related materials and equipment, asphalt oil, aggregate and clay, and operates in 48 states and 6 Canadian provinces. (Doc ID# 289; Exhibit 77)

[13] The line of credit with Bank Forward was secured by the assets of Lakeview Excavating and Lakeview Trucking, a personal guaranty from Brian Welken and an assignment of a life insurance policy for Brian, a personal guaranty from Larry Welken and a guarantee from the Bank of North Dakota, which in turn was guaranteed by Brian Welken. (Doc ID#275; Exhibit 18)

[14] Lakeview Excavating did perform work as an excavation contractor. It owned and leased the equipment necessary to perform the work of an excavation contractor; it also employed a number of employees. The company performed its work pursuant to contracts with private and public customers or on a time and material basis. (Id.)

[15] Lakeview Excavating's first full year in operation was 2011. The company had gross receipts of \$894,612, ordinary income of \$86,789 and net operating income of \$46,533. The company had retained earnings of \$77,167 going into 2012 for reinvestment in the company or to pay debt. (Id.)

[16] In 2012, the second full year of operation, Lakeview Excavating had gross receipts of \$2,447,003, ordinary income of \$189,386 and net operating income of

\$36,253.94. The company had retained earnings of \$93,421 going into the 2013 operating year. (Id.)

[17] For the 2013 construction season, Lakeview Excavating had \$2,531,244 in total revenue and a gross profit of \$1,074,232. However, the company also had operating expenses of \$2,279,647, which included \$1,192,457 in payroll expenses. The company ended the 2013 construction season with an operating income loss of \$1,243,591.13. (Doc ID# 282; Exhibit 72)

[18] The financial turnaround was primarily the result of problems Lakeview Excavating encountered in connection with its work on the German Township project, which involved raising the level of several roads due to on-going flooding. Most of the funding for the German Township project was provided through FEMA. FEMA also designed the project and provided the specifications in the bid package, which Lakeview Excavating used for its bid. (Transcript of Proceedings, Bench Trial Vol. I (“Tr. Vol I”) at 147-150)

[19] Lakeview Excavating was the successful bidder and was awarded the contract. During the construction, Lakeview Excavating discovered that the FEMA’s specifications were incomplete in that only half of the quantities of materials for the project were listed. Welken advised the FEMA coordinator for Dickey County that the project was going to require twice the materials and labor, but the FEMA coordinator directed Lakeview Excavating to continue moving forward with the project. Lakeview Excavating was required to purchase substantial quantities of additional materials and provide and pay for additional labor and equipment. (Tr. Vol. I at 147-150)

[20] Because this was a FEMA-sponsored project, the contract price per the original bid could not be adjusted through a change order. Instead, FEMA had to obtain the funding to cover the additional costs by finding extra or left-over funding in other ongoing projects once they were finished. This FEMA rule meant significant delay to Lakeview Excavating getting its pay requests on the German Township project processed. Lakeview Excavating had outgoing expenses such as wages and the cost to purchase quantities to finish the project, but FEMA was not paying the company and did not until the project had been finished. (Tr. Vol. I at 147-151)

[21] Because it had to deploy extra personnel to the German Township project, Lakeview Excavating fell behind on other projects, including a North Dakota Department of Transportation (“NDDOT”) project in Benson County. As a result, the NDDOT assessed liquidated damages to Lakeview Excavating, and the company’s financial statement for the year ending December 31, 2013, shows an operating expense for “liquidated damages” in the amount of \$165,000. (Tr. Vol. I at 147-151)

[22] By the end of 2014, the company had basically ceased operations. It had revenues of \$163,683.31, but operating expenses of \$216,874.99. There was “other income” of \$336,140.53 from the sale of the company’s equipment. Lakeview Excavating had a net loss of 9,469.46 for the year ending on December 31, 2014, and the company has been insolvent since then. (Doc ID# 283; Exhibit 73)

[23] It was during the 2012 construction season, while working on the German Township project, that Lakeview Excavating mistakenly entered the Taszareks’ property and removed field stones, which was the subject matter of the original lawsuit and judgment against Brian Welken and Lakeview Excavating. (Doc. ID # 1) As noted

above, in the 2012 construction season, Lakeview Excavating had gross receipts of \$2,447,003, ordinary income of \$189,386 and net operating income of \$ 36,253.94, along with retained earnings of \$93,421. The company also had procured liability insurance for each operating year for any potential liability to third-parties. (Tr. Vol. I at 156-158)

[24] Lakeview Excavating observed corporate formalities and maintained corporate records. The company filed with the Secretary of State the required articles of incorporation, installed officers and directors and kept corporate minutes. The company also filed separate tax returns. (Doc. ID# 277; Exhibits 20 and Doc. ID## 296-298; Exhibits 26-28)

[25] Georgia Welken was installed as Vice-President of Lakeview Excavating and Lisa Amundson was installed as Secretary/Treasurer. (Doc. ID#277) Georgia Welken is Brian Welken's wife and Lisa Amundson is his sister. (Tr. Vol. II at 55 and 94) Georgia Welken along with Lisa Amundson functioned as corporate officers by attending meetings and participating in decisions involving the corporation. Lisa Amundson filed documents on behalf of the corporation and prepared minutes of the meetings and as treasurer managed the finances. (Doc. ID# 277; Exhibit 20) Georgia Welken and Lisa Amundson were functioning as corporate officers even though neither was involved in the actual day-to-day operations of company. (Tr. Vol. II at 25) Brian Welken, the sole shareholder and owner of Lakeview Excavation, was in charge of the company's operations.

[26] Brian Welken personally guaranteed the Bank Forward line of credit shared by Lakeview Excavating and Lakeview Trucking, Inc. Furthermore, because of the line of credit, Bank Forward required financial statements from Brian and Georgia,

Lakeview Excavating, Lakeview Trucking, Inc. and Lakeview Aviation, Inc., prepared by an independent accountant.

[27] Southeast Enterprises, Inc. was formed as a trucking company on July 25, 2015. (Doc. ID# 299; Exhibit 60) Sean Cochran, who worked for both Lakeview Excavating and Lakeview Trucking, was the incorporator and President. Larry Welken was Vice-President, Lisa Amundson was Secretary/Treasurer and Georgia Welken was “director.” (Doc ID# 300; Exhibit 81) Southeast Enterprises issues 100 shares of stock. Sean Cochran had one share, and Larry Welken had the remaining 99 shares. Brian Welken was the operations manager for Southeast Enterprises, but was not an officer, director or shareholder. (Id.)

[28] After Lakeview Excavating ceased operations, the company sold its equipment and the equipment of Lakeview Trucking at auction. (Tr. Vol. I at 99-100) Southeast Enterprises purchased some of Lakeview Trucking’s trucks and equipment. For those trucks and equipment purchased by Southeast Enterprises, Welken signed the applications for transfer of certificates of title as the owner of Lakeview Trucking, while Lisa Amundson signed on behalf of Southeast Enterprises.

[29] Southeast Enterprises purchased the trucks and equipment for fair value. Because Lakeview Trucking’s line of credit was secured by the equipment, Bank Forward had the first lien. Bank Forward released its lien on each piece of equipment Southeast Enterprises purchased from Lakeview Trucking. (Doc ID## 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318; Exhibits 39, 40, 41, 82, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 and 57)

LAW AND ARGUMENT

I. The Trial Court Erred in Finding that Welken was the Alter Ego of Lakeview Excavating, Inc. and Piercing the Corporate Veil and Holding Welken Personally Liable for the Taszareks' Judgment Against Lakeview Excavating, Inc.

A. Standard of Review:

[30] This Court's review of the district court's findings of fact is governed by the "clearly erroneous" standard of Rule 52(a), N.D.R.Civ.P. E.g., Enterprises v. Dog N'Cat Pet Ctrs. 447 N.W.2d 639, 644 (N.D. 1989). As this Court has explained:

In applying the 'clearly erroneous' standard of review, we will not substitute our judgment for that of the district court. In order to hold that the district court's findings were clearly erroneous, we must determine that the findings have no support in the evidence, or, although some evidence exists to support the findings, we are left with a definite and firm conviction that a mistake has been made. We will not determine that the district court's findings are clearly erroneous merely because we may have viewed the facts differently had we been the trier of fact.

Giese v. Morton County, 464 N.W.2d 202 (N.D. 1990) (citations omitted).

[31] In its decision remanding this matter back to the district court, the North Dakota Supreme Court stated that, "[t]o the extent that our case law may be unclear, we require an examination of the Hilzendager-Jablonsky factors as part of the analysis for deciding whether to pierce the corporate veil under the alter ego doctrine." Taszarek, supra at ¶ 12.

[32] The burden of establishing the necessary elements for piercing the corporate veil rests upon the party asserting the claim and includes producing evidence on the following factors:

- Insufficient capitalization for the purposes of the corporate undertaking;
- Failure to observe corporate formalities;

- Nonpayment of dividends;
- Insolvency of the debtor corporation at the time of the transaction in question;
- Siphoning of funds by the dominant shareholder;
- Nonfunctioning of other officers and directors;
- Absence of corporate records; and
- The existence of the corporation as merely a façade for individual dealings.

Taszarek, supra at ¶ 34 (quoting Intercept Corp. v. Calima Fin., LLC., 2007 ND 180, ¶ 15, 741 N.W.2d 209 (citations omitted)).

[33] Additionally, an element of injustice, inequity or fundamental unfairness must be present before a court may properly pierce a corporation’s corporate veil. Coughlin Constr. Co. v. Nu-Tec Indus., Inc., 2008 ND 163, ¶ 20, 755 N.W.2d 867. “Courts generally apply the alter ego rule with great caution and reluctance.” Taszarek, supra at ¶ 12 (citing 1 Fletcher Cyc. Corp. § 41.10, at 188).

[34] In its decision, the District Court found that “Defendant Lakeview Excavating, Inc. was insufficiently capitalized for the purpose of its corporate undertaking, failed to observe corporate formalities, was insolvent at the time of the transaction in question, had its funds siphoned by its dominant shareholder, its other officers and directors were nonfunctioning, and existed as merely a façade for Defendant Brian Welken’s individual dealing. (App. 13; Doc. ID# 333) The District Court went on to conclude that Lakeview Excavating was the alter ego of Welken who could be held personally liable for the Taszareks’ judgment against Lakeview Excavating. (Id.)

[35] As explained below, there is insufficient evidence under the Hilzendager-Jablonsky factors to support the District Court's decision to disregard the corporate entity of Lakeview Excavating and hold Welken personally liable.

1. Lakeview Excavating was Adequately Capitalized for the Corporate Undertaking.

[36] The District Court found that "Defendant Lakeview Excavating was undercapitalized for the purposes of its corporate undertaking." However, it is unclear where in the corporate existence of Lakeview Excavating the District Court took measure of its capitalization.

[37] Whether a corporation is sufficiently capitalized for its corporate undertaking is measured at the time of its formation. JR Grain Co. v. FAC, Inc., 627 F.2d 129, 135 (8th Cir. 1980) (capitalization measured at formation; losses suffered during operation do not make a corporation undercapitalized). Lakeview Excavating was incorporated in May 21, 2010, and its "corporate undertaking" was providing excavation services, i.e., roadwork, water and sewer lines, ditching, hauling and demolition, for both private and public sector customers, under both fixed-price and time and material contracts. (Doc. ID# 275; Exhibit 18) Lakeview Excavating performed work for those private and public customers from 2010 until 2014, before the company encountered financial difficulties arising from the German Township project.

[38] Financial Statements show that Lakeview Excavating was capitalized with a line of credit from Bank Forward in Valley City, North Dakota, in the amount of \$375,000 which it shared with Lakeview Trucking, Inc. The line of credit was secured with the assets of Lakeview Excavating and Lakeview Trucking, an assignment of a life insurance policy on Brian Welken, a personal guaranty from Larry Welken (Brian

Welken's father) and a guarantee of \$187,500 by the Bank of North Dakota, which was guaranteed by Brian Welken. (Id.)

[39] Furthermore, Lakeview Excavation owned or leased its equipment, had several employees, which it deployed to perform the work it secured from both private and public customers, and paid wages to those employees. The company also purchased and had in place general liability insurance and workers compensation coverage for its employees for every year it was in operation.

[40] There is evidence in the record that Lakeview Excavation not only performed work pursuant to contracts with its customers, the company initially did so at a profit. In 2011, its first full year of operation, Lakeview Excavating had gross receipts of \$894,612, a net income of \$86,789, and the company went into 2012 with retained earnings of \$77,167 for reinvestment in the company or to pay debt. (Doc. ID# 296; Exhibit 26)

[41] In 2012, the second full year of operation, Lakeview Excavating had gross receipts of \$2,447,003, a net income of \$189,386, and went into 2013 with retained earnings of \$93,421. (Doc. ID#297; Exhibit 27) It should be noted that in 2012 Lakeview Excavating paid "salaries and wages" in the amount of \$476,946. (Id.)

[42] Lakeview Excavating's tax returns for 2013 show a loss of business income in the amount of \$1,241,594. (Doc. ID# 298; Exhibit 28) Welken explained that the financial turnaround of the company was the result of problems Lakeview Excavating encountered on the German Township project, which involved raising the grades of a number of township roads because on ongoing problems with flooding. Most of the funding for the German Township project was provided through FEMA. Welken

explained that FEMA provided the project specifications on which Lakeview Excavating based its bid, but those specifications were incomplete in that they called out only half the quantities of materials required.

[43] Welken testified that he brought to the FEMA coordinator's attention the fact that the project was going to require twice the materials and labor, but the FEMA coordinator's response was to continue with the project. Welken explained that, because this was a FEMA-sponsored project, the contract amount could not be adjusted during construction. Instead, FEMA had to obtain the funding to cover the additional costs by finding it in other ongoing projects, which delayed significantly Lakeview Excavating getting its pay requests processed. Lakeview had outgoing expenses such as wages and the cost to purchase quantities to finish the project, but it was not being paid by FEMA.

[44] Welken further testified that Lakeview Excavating was also working on other projects in addition to the German Township job. On one of these projects, Lakeview Excavating was under contract with the North Dakota Department of Transportation ("NDDOT"). Welken explained that the German Township project as built was approximately twice the size as bid and took approximately twice as long to complete. As a result, Lakeview Excavating had to deploy additional crews to this project, and the company fell behind on other projects including the NDDOT project. Under its contract with NDDOT, Lakeview Excavating was subject to liquidated damages if the project was not completed by a certain date, and NDDOT did assess liquidated damages. In fact, the financial statement for Lakeview Excavating for the year ending December 31, 2013, shows an operating expense for "liquidated damages" in the amount of \$165,000. (Doc. ID# 282; Exhibit 72)

[45] By the end of 2014, the company had basically ceased operations. It had revenues of \$163,683.31, but operating expenses of \$216,874.99. There was “other income” of \$336,140.53 but that was from the sale of the company’s equipment. The company had a net loss of 9,469.46. (Doc. ID# 282; Exhibit 73)

[46] The evidence shows that Lakeview Excavating was adequately capitalized and fully-engaged as an excavating contractor through 2013 and part of 2014. Lakeview Excavating was profitable in its first full year of operation and had more than twice the revenues in 2012. The company’s financial problems presented later in 2013 and 2014 were the result of the FEMA-sponsored project in German Township. Lakeview Excavating’s insolvency was caused by operating losses beyond its control, not by undercapitalization.

2. Lakeview Excavating was Solvent at the Time of the Wrongful Conduct.

[47] The District Court found that “Lakeview Trucking was insolvent at the time of its debt to the Plaintiff was incurred.” The relevant Hilzendager-Jablonsky factor requires evidence of the “[i]nsolvency of the debtor corporation at the time of the transaction in question.” Taszarek, supra at ¶ 34. The “transaction in question” was Lakeview Excavating’s removal of the field stones from the Taszareks’ property, which occurred during the summer of 2012. As explained above, in 2011, Lakeview showed a net profit of \$86,789 and reinvested \$77,167 back into the company. In 2012, Lakeview Excavating had gross receipts of \$2,447,003, a net income of \$189,386, and reinvested \$93,421 back into the company. It should be noted that Lakeview Excavating also procured liability insurance for each operating year for any potential liability to third-

parties. The evidence shows that Lakeview was fully solvent and adequately capitalized with the ability to pay its creditors at the time of the complained-of-actions.

[48] The District Court appears to have based its finding of insolvency at the time Lakeview Excavating became a judgment creditor to the Taszareks, which was February of 2015, following the jury's verdict. This is a misinterpretation of the law, as it would require every small business to have sufficient money in reserve to pay a substantial judgment and would hold shareholders of any failing corporation liable for the company's debts.

3. The Evidence Showed that Lakeview Excavating Observed Corporate Formalities.

[49] The District Court made a finding that "Defendants did not observe corporate formalities by failing to hold regular and separate meetings, failing to file bankruptcy and reorganizing by using corporate assets for private purposes." Again, there are no references to specific supporting evidence from the record or any explanation how Lakeview Excavating's failure to file bankruptcy is the equivalent of corporate formalities, and there was no evidence that the "Defendants" used corporate assets for private purposes.

[50] What the District Court overlooked was evidence that Welken as the incorporator for Lakeview Excavating filed Articles of Incorporation on May 21, 2010, with the Secretary of State. The company maintained corporate minutes. (See Doc ID # 277; Exhibit 20) The corporate minutes show that a board of directors was appointed. Brian Welken was installed as President, Georgia Welken vice-president and Lisa Amundson secretary/treasurer. There was testimony that annual meetings were held. The company also filed its own tax returns for each year it was actively engaged as an

excavating contractor. The evidence in the record shows that Lakeview Excavating observed corporate formalities.

4. The Evidence Showed that Lakeview Excavating Maintained Corporate Records.

[51] The record showed that Lakeview Excavating maintained corporate records. Exhibit 20 is evidence of that fact. Furthermore, the company created and maintained records that documented loans to Lakeview Excavating from Larry Welken and Lakeview Trucking, as well as loans from Lakeview Excavating to Lakeview Aviation, Inc. (Doc. ID# 276; Exhibit 19)

5. The Evidence Showed that Georgia Welken and Lisa Amundson Functioned as Corporate Officers of Lakeview Excavating.

[52] The District Court made a finding that “[a]part from Defendant Brian Welken, Defendant Lakeview Excavating, Inc.’s other officers and directors served no appreciable function in the operation of its business.”

[53] As noted above, Georgia Welken was installed as vice-president and Lisa Amundson as secretary/treasurer of Lakeview Excavating. Exhibit 20 is a portion from Lakeview Excavating’s corporate minute book and shows Brian Welken, Georgia Welken and Lisa Amundson functioning as corporate officers. During trial, Taszarek’s counsel questioned Georgia Welken and Lisa Amundson regarding their involvement in the day-to-day operations of Lakeview Excavating. The line of questioning was intended to suggest they were nonfunctioning unless they actually involved substantively in the company’s operations. While Georgia Welken and Lisa Amundson functioned as corporate officers, as evidenced by their attendance at meetings, Brian Welken was the

President and sole shareholder of Lakeview Excavating and directed the day-to-day operations in the field.

[54] The evidence showed that Georgia Welken and Lisa Amundson functioned as officers and directors in a closely held corporation, even though they were not involved directly in the company's field operations. The idea that an officer or director is nonfunctioning unless he or she is also directly involved in the corporation's operations is a mistaken view of the law. See Jablonsky v. Klemm, 377 N.W.2d 560, 571 (N.D. 1985) ("Nonfunctioning of other officers in a closely held corporation is hardly significant.").

6. Lakeview Excavating as an S Corporation.

[55] The District Court did not make a finding on the manner in which the corporation chose to be treated for the purpose of federal taxation, but the Tazarek's counsel did raise this issue during his questioning. As Justice Crothers pointed out in Tazarek, "[t]he evidence showed Lakeview Excavating was a Subchapter S corporation allowing tax treatment as if it was a partnership. That fact is unremarkable and, for a small business operation, often wise. As I noted in another matter, 'it is rare for small closely-held corporations to pay dividends because such payments would in effect be double-taxed The fact that [the corporation] did not pay dividends shows only that its officers were smart, not that [the corporation] was a façade.'" Tazarek, supra at ¶ 35 (quoting Axtmann v. Chillemi, 2007 ND 179, ¶ 39, 740 N.W.2d 838).

7. The Evidence Failed to Show that Welken was Siphoning of Funds from Lakeview Excavating.

[56] The District Court made a finding that "Defendant Brian Welken did siphon off funds from his various entities by taking a salary while Lakeview Trucking,

Inc. was failing and taking loans. No evidence was presented that the loans were ever paid back.”

[57] It should first be noted that the issue on remand was whether Welken was the alter ego of Lakeview Excavating, Inc. and not Lakeview Trucking, Inc. Second, Welken was the sole shareholder of Lakeview Excavating and personally guaranteed the line of credit shared by Lakeview Excavating and Lakeview Trucking, Inc. There is no evidence that he siphoned off any of Lakeview Excavating’s income or assets for his own personal use. Furthermore, it would make no sense for him to do that since funds misappropriated from Lakeview Excavating would come back to him as a personal liability under the guaranty to Bank Forward.

[58] Also, because of the line of credit, Bank Forward required financial statements from Lakeview Excavating, Lakeview Trucking, Inc. and Lakeview Aviation, Inc., as well as Brian Welken and Georgia Welken, prepared by an independent accountant. Many of those financial statements were admitted into evidence and documented all transactions between the companies and Brian and Georgia Welken. Assuming for the sake of argument that Welken considered siphoning assets from Lakeview Excavating, it would have been impossible to conceal. There was simply no credible evidence presented at the trial on remand that Welken was siphoning funds from Lakeview Excavating for his own personal benefit.

[59] The District Court also made a finding that “Defendant Brian Welken did cause assets of Lakeview Trucking, Inc. to be transferred to Southeast Enterprises, Inc. while this litigation was pending. Southeast Enterprises, Inc. was owned by an insider, Larry Welken, and has since been transferred to another insider, Georgia Welken.”

[60] There was evidence that a new corporation was formed on July 25, 2015, called Southeast Enterprises, Inc. (Doc ID# 300; Exhibit 81) Southeast Enterprises was formed as an over-the-road trucking company to provide employment to some key employees were displaced when Lakeview Excavating and Lakeview Trucking became insolvent. Sean Cochran, who worked for both Lakeview Excavating and Lakeview Trucking, was the incorporator and President. Larry Welken was Vice-President, Lisa Amundson was Secretary/Treasurer and Georgia Welken was “director.” (Id.) Southeast Enterprises issues 100 shares of stock. Sean Cochran had one share, and Larry Welken had the remaining 99 shares. Brian Welken was the operations manager for Southeast Enterprises, but was not an officer, director or shareholder.

[61] Several of the Taszareks’ exhibits are transfers of certificates of title to trucks and equipment from Lakeview Trucking to Southeast Enterprises. Brian Welken signed the application on behalf of Lakeview Trucking (a company he owned) and Lisa Amundson on behalf of Southeast Enterprises. If the intent of these exhibits is to show siphoning off assets to a new corporation to avoid liability for the Taszareks’ judgment they do not.

[62] First, Lakeview Trucking was the owner of the trucks and equipment, not Lakeview Excavating. Second, Southeast Enterprises purchased the trucks and equipment for fair value. (Tr. Vol. II at 90) Third, the Bank Forward line of credit was secured by the assets of Lakeview Trucking and Lakeview Excavating. Thus, Bank Forward had the first lien on the trucks and equipment, and the certificates of title would not have transferred without the bank releasing its lien, which would have required payment to the bank. (Exhibits 39, 40, 41, 82, 42, 43, 45, 46, 47, 48, 50, 51, 52, 53, 54, 57 and 83)

[63] The District Court found that “Defendant Welkens’ [sic] various corporations, as well as Southeast Enterprises, Inc. are merely a façade for his individual dealings.” The District Court made this finding without reference to any supporting evidence in the record and in direct contradiction to undisputed evidence that Lakeview Excavating kept corporate records and observed corporate formalities. The company and Welken filed separate tax returns. An independent auditor prepared financial statements for Lakeview Excavating, Lakeview Trucking and Brian and Georgia Welken in connection with Bank Forward’s line of credit. There was no evidence that Welken’s personal funds were co-mingled with corporate funds, or that assets of Lakeview Excavating were transferred to Welken or that Welken’s personal liabilities were transferred to Lakeview Excavating when insolvency became a reality.

[64] Furthermore, the financial statements of Brian and Georgia Welken do not show a commingling of assets, liabilities or funds with Lakeview Excavating, and vice versa. There was testimony that the Lakeview Excavating had its own separate checking account, and Lisa Amundson testified that she kept the company’s books. (Tr. Vol. II at 55-56, 60) There was no evidence that assets identified as belonging to the company were also listed on the financial statements of Brian Welken. Also, Lakeview Excavation paid rent to Brian Welken and Georgia Welken for use of the office and shop located on the Welken’s property. (Tr. Vol. II at 92-93)

[65] The District Court made a finding that “[v]arious loans were made by and between Defendant Lakeview Excavating, Inc., Lakeview Trucking, Inc. and Lakeview Aviation, Inc.” The financial statements of these companies do show that short-term loans were made, and the testimony was this was done to cover operating expenses.

There was no evidence presented that any of the loans were not intended to cover operating expenses as represented in the financial statements or that any of those funds were somehow diverted to Welken in some other form.

[66] The District Court also made the finding that Lakeview Excavating shared a line of credit with Lakeview Trucking and the two companies “were intertwined in such a way that one could not survive the economic hardships of the other.” It is unclear which of the Hilzendager-Jablonsky factors this “finding” tends to establish. However, that the two companies shared a line of credit was a condition of Bank Forward and not some scheme implemented by Welken to avoid personal liability. In fact, the line of credit locked in Welken’s personal liability to the operating debts of those two corporations.

[67] Furthermore, Lakeview Excavating was formed and incorporated to perform as an excavation contractor. The company owned and leased its own equipment, employed and paid workers and obtained contracts, including from NDDOT. The evidence showed that Lakeview Excavating was fully-engaged in its corporate purpose for more than three years and was anything but a “shell” corporation.

8. Taszareks Failed to Prove an Element of Injustice, Inequity or Fundamental Unfairness that would Justify Corporate Veil Piercing.

[68] The Taszareks are seeking to pierce the corporate veil of Lakeview Excavating and impose personal liability upon Brian Welken because they believe they cannot collect its judgment from the company. However, that reason does not justify veil piercing. “A corporate entity may not be disregarded simply because it stands as a bar to a litigants’ recovery of property[.]” Axtman v. Chillemi, supra at ¶ 29 (citing 18 Am. Jur. 2d Corporations § 47 (2004))

CONCLUSION

[69] The admonition delivered in Taszarek that courts generally apply the alter ego rule with great caution and reluctance “appears to have become empty noise.” See Axtmann v. Chillemi, 2007 ND 179, ¶ 36, 740 N.W.2d 838. The District Court’s findings that applied the alter ego rule are clearly erroneous in that they have no support in the evidence, or, even though some evidence might exist to support the findings, there is a definite and firm conviction that the District Court made a mistake.

[70] Based on the above, Appellant Brian Welken respectfully requests that this Court reverse the District Court’s decision and judgment in favor the Taszareks that imposes personal liability for the judgment against Lakeview Excavating.

Dated this 5th day of December, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellant in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 5770 words.

DATED this 5th day of December, 2018.

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

Eugene E. Taszarek, Marlys J. Taszarek,
Trina F. Schilling, Steven E. Taszarek,
and Michael E. Taszarek,

Appellees,

vs.

Brian Welken,

Appellant,

and

Lakeview Excavating, Inc., German
Township and Dickey County,

Defendants

SUPREME COURT CASE NO.: 20180303

Dickey County Civil No.:
11-2013-CV-00088

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)

) ss.

COUNTY OF CASS)

DeAnne D. Beavers, Being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Clay County, Minnesota, not a party to nor interested in the action; that she served the attached:

**Brief of Appellant Brian Welken;
and Appendix of Appellant Brian Welken**

on the following persons by electronic mail on December 5, 2018:

William C. Black

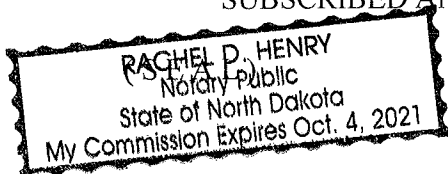
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To the best of Affiant's knowledge, the e-mail addresses above given are the actual electronic mail addresses of the parties intended to be so served. The above documents are e-mailed in accordance with the provisions of the North Dakota Rules of Appellate Procedure.



DeAnne D. Beavers

SUBSCRIBED AND SWORN TO before me on December 5, 2018.




Notary Public