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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Eugene E. Taszarek, Marlys J. Taszarek, Trina F. Schilling, Steven E. Taszarek, and Michael E. Taszarek, Plaintiffs/Appellees, vs. Brian Welken, Defendant/Appellant, And Lakeview Excavating, Inc., German Township and Dickey County, Defendants.	Dickey County Civil No.: 11-2013-CV-00088 Supreme Court No. 20180303

BRIEF OF PLAINTIFFS/APPELLEES EUGENE E. TASZAREK, MARLYS J. TASZAREK, TRINA F. SCHILLING, STEVEN E. TASZAREK, AND MICHAEL E. TASZAREK

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

THE HONORABLE DANIEL D. NARUM
STATE OF NORTH DAKOTA, DICKEY COUNTY
SOUTHEAST JUDICIAL DISTRICT

Respectfully submitted,

By: */s/ William C. Black*
William C. Black (ND #07284)
LARSON LATHAM HUETTL LLP
1100 College Drive
PO Box 2056
Bismarck, ND 58502-2056
Telephone: 701.223.5300
wblack@bismarcklaw.com

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INTRODUCTION

[¶1] Courts apply the alter ego doctrine to ensure that an individual does not frustrate creditors or those he has wronged by using corporate entities as a shell game to protect his assets. At the trial on remand, it was discovered that Appellant had played, and was still playing, such a shell game. It was shown that the Appellant had used four corporate entities to move assets around in an attempt to frustrate Appellees as judgment debtor. The district court found that such a unity of interest existed between Appellant and Lakeview Excavating, Inc., that their separate personalities did not exist. The record is replete with evidence supporting the district court's findings. As such, this Court should affirm the district court's Judgment.

STATEMENT OF FACTS

[2] This matter arises out of a tort action whereby Appellees received a jury verdict for trespass and conversion. Analysis of the current question requires familiarity with four individuals who are not parties to this suit (Georgia Welken; Larry Welken; Lisa Amundson; and Sean Cochrane) and the following entities: Lakeview Excavating, Inc. (hereinafter "Excavating"); Lakeview Trucking, Inc. (hereinafter "Trucking"); Lakeview Aviation, Inc. (hereinafter "Aviation"); Southeast Enterprises, Inc. (hereinafter "Southeast"); and Welken Farms. For

purposes of clarity, Excavating, Trucking, and Aviation will, from time to time, be collectively referred to as the "Lakeview Entities." When referenced together, the five entities will collectively be referred to as the "Welken Entities."

[3] Georgia Welken (hereinafter "Georgia") is Appellant's wife. [Transcript of Proceedings, Bench Trial Vol. II ("Tr. Vol. II") at 94:12-13. She has had various levels of involvement with the Lakeview Entities and Southeast. At one time, she was an officer of Excavating and Trucking. (Transcript of Proceedings, Bench Trial Vol. I ("Tr. Vol. I") at 24:17-25:5. She is currently the sole owner of Aviation, although her and Appellant initially owned the business in equal shares. Tr. Vol. II 98:18-99:6. When questioned regarding the consideration paid by her for Appellant's shares in Aviation, she could not recall. Tr. Vol. II. 99:11-17. She is currently the sole owner of Southeast.

[4] Larry Welken (hereinafter "Larry") is Appellant's father. Larry has had various levels of involvement with Excavating, Trucking and Southeast. Larry was, at times, an employee of Excavating and Trucking. Tr. Vol. I 22:19-23. He was also a personal guarantor on the line of credit shared by Excavating and Trucking. Tr. Vol. I 43:16-44:9. Larry also purchased equipment and/or made loans to Excavating. Tr. Vol. I 46:10-24. He was an initial co-owner of Southeast and later became

the sole owner before selling all of his interest to Georgia. Tr. Vol. II 22:22-24:3. When asked what the purchase price for Southeast was, Larry testified that it was "being negotiated … she took over and the price and my promissory – or the 80,000 that was going to be – she was going to help cover that over time." Tr. Vol. II 24: 4-14.

[5] Lisa Amundson (hereinafter "Amundson") is Appellant's sister. Tr. Vol. II 55:4-5. She was employed by Excavating, Trucking and Southeast as a bookkeeper. Tr. Vol. II 55:14-16; 55:20-21; 63:17-20. She also served as an officer for Excavating and Trucking. Tr. Vol. I 24:17-25:5.

[6] Sean Cochrane (hereinafter "Cochrane") was initially an employee of Excavating and Trucking. Tr. Vol. II 55:4-5.29:13-30:4. After Excavating and Trucking began experiencing financial difficulties, he incorporated Southeast. Tr. Vol. II 40:2-3. At Southeast's formation, he was a co-owner of the company. Tr. Vol. II 22:22-23:8. He owned one percent (1%) of Southeast, while Larry owned the remaining 99%, but eventually assigned his interest in Southeast to Larry; making Larry the sole owner of the company. Tr. Vol. II 22:22-24:3.

[7] Excavating is the co-defendant in this case and is a North Dakota corporation solely owned by Appellant. Tr. Vol. I 132:20:22. Excavating was the second Lakeview Entity to be created. Tr. Vol. I 18:17-18. Trucking was a North Dakota corporation incorporated and owned by

Appellant. Tr. Vol. I 17:7-9. It was a transportation and trucking business and was the first Lakeview Entity created. Tr. Vol. I 17:2-3. Aviation is the final Lakeview entity. Aviation is a North Dakota corporation which was owned in equal shares by Appellant and Georgia Welken, but is now solely owned by Georgia Welken. Tr. Vol. II 98:18-99:6. It engaged in crop-dusting activities and was the last of the Lakeview Entities to be incorporated. Tr. Vol. I 77:7-10.

[8] Southeast has a convoluted history. It was incorporated in January of 2014, after the collapse of Excavating. Doc. ID# 60, Exhibit 60. Cochrane was the sole incorporator of Southeast. *Id.* He only owned 1% of Southeast; the other 99% was owned by Larry, but Cochrane later assigned his interest to Larry. Tr. Vol. II 22:22-24:3. Eventually, Larry sold Southeast, and his entire interest therein, to Georgia. Southeast purchased many of the assets of Excavating and Trucking. Doc. ID## 301-303, 305-309, 311-317, 318, 304; Exhibits 39-41, 42-46, 48-54, 57, 82.

[9] Welken Farms was essentially a "doing business as" (d/b/a) for Appellant when he was farming his land. Tr. Vol. I 78:4-14. Welken Farms' involvement in this matter was through multiple loans made to Aviation and receiving a $105,171.88 loan jointly with Appellant from Trucking. Doc ID## 284, 288, 285, 289-291, Exhibits 63, 64, 74, 77-79.

[10] At the trial on remand, testimony and evidence revealed that after

the trespass and conversion of Appellees' property, and after the commencement of this lawsuit, Appellant, Excavating, Trucking, and their accomplices concocted a scheme whereby substantial assets of Excavating and Trucking's were transferred to Southeast; a business owned by insiders. Subsequent to the transfer, Appellant maintained complete and total control of the assets and benefitted from the same.

[11] At the 2018 trial, Appellees called Appellant, Georgia, Larry, Amundson, Cochrane, and Anthony Ernst Sr. as witnesses. Tr. Vol. I and II. Appellant's attorney cross-examined each witness, but declined to call any witnesses or submit any evidence on Appellant's behalf. *Id.*

[12] Appellant was heavily involved in the day to day operations of the Lakeview Entities. Excavating and Trucking shared a $375,000.00 line of credit with Bank Forward Bank. Tr. Vol. I. 14:16-3. Appellant acknowledged that Excavating and Trucking shared employees. Tr. Vol. I. 105: 3-6. He was able to identify several who worked for both entities, and could not remember if other employees had been employed by Trucking, Excavating or both. Tr. Vol. I. 111: 9-12.

[13] Testimony showed that Trucking performed work on Excavating's jobs; including the German Township Project. Tr. Vol. I 28:21-23. Appellant, who was the sole owner of both Excavating and Trucking, could not recall if Excavating even owned any of its own trucks. Tr. Vol.

I 42:10-11. In addition, Trucking employees sometimes operated Excavating's equipment, and vice versa. Tr. Vol. I 51:18-21. It was shown that Excavating and Trucking employees used Excavating and Trucking timesheets interchangeably "all the time." Tr. Vol. II 58:16-59:6; Doc ID## 293, 294, 295, Exhibits 3, 7, 8. Excavating employees also used credit cards which were issued in Trucking's name for Excavating's purposes. Tr. Vol. II. 136:22-137:10. At one point, Appellant testified that he shared ownership of an airplane with Aviation. Tr. Vol. II 11:7-9.

[14] In addition to sharing employees, jobs, equipment, and credit cards, testimony revealed that the Lakeview Entities were also located in the same building owned by Appellant and Georgia. Tr. Vol. I 23:18-20; 63:25-64:5. Amundson testified that rent was paid for use of the building and that there was a lease. Tr. Vol. II 92:14-93:5. However, no lease was produced and no one could remember which entity signed the alleged lease or paid rent. Tr. Vol. II 92:14-93:4; 111:20-112:4. Appellant testified that the Lakeview Entities held annual meetings, but couldn't remember when or where those meetings were held, if they were present at those meetings, or if there were even separate annual meetings for the entities. Tr. Vol. I 59:25-60:9; 138:20-139:12 Georgia couldn't remember if she ever voted on anything at meetings. Tr. Vol. II 100:10-101:17.

[15] The finances of the Lakeview Entities and Welken Farms are even

more convoluted. During the course of the trial, it was shown that the Lakeview Entities made numerous loans between one another. Doc. ID## 273-276, 281, 283, Exhibits 16-19, 71, 73. No evidence was presented to show that the loans were ever repaid.

[16] In addition to the Lakeview Entities exchanging loans between one another, it was shown that Larry had made a loan to Excavating for a bulldozer. Doc. IDE 276, Exhibit 19. Evidence and testimony showed that Appellant, Welken Farms, and Georgia had made loans to one or more of the Lakeview Entities. Doc. ID## 284-287, Exhibits 63, 74-76. Loans also flowed from the Lakeview Entities to Appellant and Georgia; including a $151,171.88 "shareholder loan" to Appellant. Doc. ID## 288, 289-291, Exhibits 64, 77-79. Again, no evidence was presented that this loan was repaid. Georgia testified that Aviation had made a $35,000.00 loan to Appellant so he could satisfy personal debt, and that the loan was still active. Tr. Vol. II 108:11-109:5.

[17] Appellant could not remember if Excavating had resources on hand to pay for the Project. The Project caused substantial financial hardship to the Lakeview Entities. Tr. Vol. I 149:25-151:3; Doc. ID## 272-275, 298, 290, 291, Exhibits 15-18, 28, 78, 79. Due to the problems with the Project, Excavating lost $1,242,904.00 in 2013. Doc ID# 298, Exhibit 28. Despite this loss, Appellant still took a distribution of

$18,117.00 and a salary of $35,512.50. Doc. ID## 272, 298, Exhibits 15, 28.

[18] In response to a question as to whether the shared line of credit was secured by substantially all of Excavating's assets, Appellant testified that "[e]verything was tied together. Tr. Vol. I 44:4-6. When asked why Trucking ceased to exist, Appellant stated "[w]hen [Excavating] was forced to dissolve [Trucking] was still a guarantor of the operating line of credit and my personal guarantee was tied to both companies." Tr. Vol. I 31: 8-11. He also testified that "[Trucking] could not survive because of [Excavating]." Tr. Vol. I 31: 14-15. This sentiment was echoed by Amundson. When asked if "Excavating's financial situation had a direct impact on [Trucking's" ability to conduct its business," she simply stated "[c]orrect." Tr. Vol. II 62: 25 – 63:9.

[19] To secure Excavating and Trucking's line of credit, Larry was a personal guarantor up to $100,000.00. Tr. Vol. I 21:18-22. When Excavating and Trucking failed, Larry paid Bank Forward $78,898.03 on the personal guaranty. Tr. Vol. I 97: 19-24; Doc. ID## 291, Exhibit 79. When asked if he currently worked for Southeast, Appellant testified that he volunteered there "working off my debt to [Larry]" even though the company was then owned by Georgia. Tr. Vol. I 102: 7-25. He then stated "[Georgia] lost $200,000 and [Larry] lost [$100,000] when the [sic]

Excavating went under, so there's debt that goes all the way around." Tr. Vol. I 103: 1-3. Larry testified that when he owned Southeast, he had no duties with the company. Tr. Vol. II 26: 11-14. Larry further stated that he "helped to get it set up because I'm helping my son." Tr. Vol. II 26: 14-20. Larry and Amundson also noted that Appellant managed the day-to-day operations. Tr. Vol. II 26: 14-20; 64:13-16.

[20] Cochrane testified that he worked for both Excavating and Trucking, and that he held a supervisory position with Excavating. Tr. Vol. II 29: 19 – 30:4; 31:1-4. Although he worked for both companies, and was a supervisor for Excavating, Cochrane was "not sure where the differentiation between companies went. I don't know what trucks or equipment was owned by each company." Tr. Vol. II 32:18-20. With regard to the employees, Cochrane stated that guys would work between Excavating and Trucking, but that he didn't know "where the line was drawn or where they were positioned at that time." Tr. Vol. II 34:7-13.

[21] Georgia Welken was questioned regarding her duties as an officer and vice president of both Excavating and Trucking. Tr. Vol. II 100:1-101:3. When asked about what she did as Trucking's vice president, Georgia answered "I did not have any direct involvement with the company." *Id.* When asked if she had any involvement as a director, she simply answered "no." *Id.* She noted that she did nothing for Trucking

other than serving as vice president and director. *Id.* She could not recall if she had ever voted on anything at an annual meeting. *Id.* She also confirmed that she had no direct role or duties as a director and vice-president of Excavating. *Id.* Georgia admitted that she did not perform any tasks for Excavating. *Id.* She was unable to recall how many annual meetings she attended for Excavation or Trucking. Tr. Vol. II 110:3-8.

[22] When questioned about Appellant's role in Southeast, Georgia stated that he was an employee, but that he did not receive compensation for his work. Tr. Vol. II 116:21-117:7. Georgia went on to testify that Appellant was "working off debt" owed to her and Larry. *Id.* She also noted that Appellant ran the day to day operations of Southeast. Tr. Vol. II 118:19-21. Georgia testified that Appellant was not receiving a paycheck from anyone. Tr.Vol. II 119:14-18. She did testify that both Aviation and Southeast were organized as S-Corporations and that the income passed through the entities to her personal income taxes. Tr. Vol. II 105:14-106:6; 119:8-10. She testified that she and Appellant filed their income taxes as a married couple and acknowledged that the income from Aviation and Southeast was attributable to both of them. Tr. Vol. II 106:7-13.

[23] When Bank Forward was in the process of foreclosing on Excavating and Trucking's assets, Appellant was negotiating with the

bank to purchase some of those assets. Doc. ID# 292, Exhibit 1; Tr. Vol. I 100:20 – 101:7. Those assets were not purchased by Appellant. Tr. Vol. I. 100:20-101:7. However, Southeast did end up purchasing a large number of Excavating and Trucking's assets. Tr. Vol. I 103:14-21; Tr. Vol. II 113:18-25; ID## 301-303, 305-309, 311-317, 318, 304; Exhibits 39-41, 42-46, 48-54, 57, 82. That equipment was paid for by Larry. Tr. Vol. II 43: 7-12.

STANDARD OF REVIEW

[24] "The court's findings of fact are presumed to be correct, and will be reversed on appeal only if they are clearly erroneous." *Intercept Corp. v. Calima Fin., LLC*, 2007 ND 180, ¶ 15, 741 N.W.2d 2099 (citing *Habeck v. MacDonald,* 520 N.W.2d 808, 813 (N.D.1994)). "Merely because a reviewing court may have viewed the facts differently if it had been the initial trier of fact does not entitle the reviewing court to reverse the district court's findings of fact." *Axtmann v. Chillemi*, 2007 ND 179, ¶ 15, 740 N.W.2d 838 (citing *Jablonsky v. Klemm*, 377 N.W.2d 560, 567 (N.D. 1985)). "Although this Court may have given different weight to the evidence …, we will not reweigh the testimony and we defer to the district court's opportunity to observe and assess witness credibility. *Wolt v. Wolt*, 2010 ND 26, ¶ 29, 778 N.W.2d 786 (citation omitted).

LAW AND ARGUMENT

[25] "This Court has … recognized that the attitude toward piercing the corporate veil is more flexible in tort than in contract, because the creditor has an element of choice inherent in a voluntary contractual relationship whereas the ordinary tort case forces the debtor-creditor relationship upon the creditor by the occurrence of an unexpected tort." *Axtmann*, *supra* at ¶ 14 (citing *Jablonsky, supra* at 565–66 n. 1).

[26] When contemplating whether to pierce the corporate veil, the court is to consider the *Hilzendager-Jablonsky* factors. *Coughlin Const. Co., v. Nu-Tec Industries, Inc.*, 2008 ND 163, ¶20, 755 N.W.2d 867. Those factors are: "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 facade for individual dealings." *Id.*

[27] While the court was required to consider the Hilzendager-Jablonsky factors in determining whether Excavating was Appellant's alter ego, it was not required to give equal weight to each factor. Furthermore, not all factors are required to be present in order to pierce

the corporate veil. In *Axtmann*, this Court affirmed the lower court's ruling, noting "the district court found three factors existed to warrant piercing the corporate veil. The court found Main Realty was undercapitalized, it was insolvent and could not pay its debts at the time of the Axtmanns' judgment and for several years before that judgment…." *Axtmann*, *supra* at ¶ 16.

A. The trial judge properly found that Lakeview Excavating was not adequately capitalized.

[28] The trial judge ruled that Excavating was not adequately capitalized. This decision should be upheld.

[29] "In tort cases, particular significance is placed on whether a corporation is undercapitalized, which involves an added public policy consideration of whether individuals may transfer a risk of loss to the public in the name of a corporation that is marginally financed." *Id.*

[30] In his Brief, Appellant makes an erroneous statement of North Dakota law by stating that "[w]hether a corporation is sufficiently capitalized for its corporate undertaking is measured at the time of its formation." BRIEF at ¶ 37 (citing JR Grain Co. v. FAC, Inc., 627 F.2d 129, 135 (8th Cir. 1980)).

[31] While the obligation to provide sufficient risk capital begins with incorporation, it does not end there and the obligation continues

throughout the corporation's operations. *Axtmann*, *supra* at ¶ 14 (quoting Gillespie, *The Thin Corporate Line: Loss of Limited Liability Protection,* 45 N.D.L. Rev. 363, 387–388 (1968)). This Court has noted that:

> ' "If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors is an abuse of the separate entity and will be ineffectual to exempt the shareholders from corporate debts. It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities. If capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege." ' "

Axtmann, *supra* at ¶ 14 (quoting *Briggs Transp. Co. v. Starr Sales Co.,* 262 N.W.2d 805, 810 (Iowa 1978)),

[32] In its decision in *Coughlin*, this Court reviewed a district court's decision to pierce the corporate veil. *Coughlin*, 2008 ND 163, 755 N.W.2d 867. This Court analyzed the district court's finding that there was insufficient capitalization for the purposes of the corporate undertaking. *Id.* at ¶ 22. In *Coughlin*, the district court found:

> While it appears to the Court that Nu–Tec was adequately capitalized at the time it entered into the Standard Sub–Contract Agreement with Coughlin, the evidence indicates that its capital position declined significantly in each of the three (3) years following Nu–Tec's ill-fated attempt to install the 24" water line on the 16th St. Project—and **Nu–Tec's most recent financial statements indicate that it will be wholly unable to satisfy the judgment which will be entered against it in this case.**
>
> The numbers presented to the Court indicate that while Nu–Tec had capital in excess of $345,000.00 at the end of 2002 (the year the Standard Sub–Contract was entered into), that figure had declined to less than $166,000.00 at the end of 2004 (the last year for which financial data was available for Nu–Tec). These numbers also show that while Nu–Tec had cash on hand of over $230,000.00 at the beginning of 2002, by the end of 2004 that amount had dropped to a rather paltry $9,690.00. The Court finds that this financial downturn of the corporation is largely attributable not to operating losses sustained by the corporation since the end of the 16th St. Project, but, rather, to the shareholders' actions of withdrawing almost $165,000.00 in cash from the company after becoming aware of Coughlin's claim.
>
> **The Court also notes that the capital position of the company, as reflected in its financial statements, does not take into account its potential liability to Coughlin on this claim**, or, as a corollary, its potential inability to collect a disputed receivable from Coughlin for work performed on the 16th St. Project.

Coughlin, *supra* at ¶ 22 (Emphasis added). These findings were upheld

and the Court reaffirmed the continuing obligation to provide adequate capital from incorporation throughout the existence of the corporation. *Id.*at ¶ 28 (citing *Axtmann*, *supra* at ¶ 14; *Jablonsky*, *supra* at 566).

[33] As shown above, the district court in *Coughlin Const.* found that while Nu-Tech may have been adequately capitalized at the time it entered into a transaction, it was not adequately capitalized at the time it became a judgment debtor. The district court found Nu-Tech's financials did not take into account its potential liability to its judgment creditor. In essence, the district court found that an entity's financial decline over time, as well as judgments against it, can lead to an entity being inadequately capitalized at the time of the corporate undertaking.

[34] In *Jablonsky*, the trial court found that the project in question was built entirely with borrowed money. *Jablonsky*, *supra* at 566. While the corporation in question had some capital, "[t]he [d]istrict] court characterized the capital as 'trifling compared with the business to be done and the risks of loss.'" *Id.*

[35] In his sworn testimony, Appellant noted on multiple occasions that Excavating and Trucking were dependent on the financial well-being of one another. Tr. Vol. I. 30:10-25; 31:12-15. He further testified that he didn't know if Excavating had the cash on hand when it took the Project, and that the company was in debt at the time. Tr. Vol. I. 29:2-12.

Excavating relied on timely payment in order to be able to perform its jobs, but untimely payments from just one job, the Project, caused it to collapse financially, even though it was eventually paid in full. Tr. Vol. I. 31:19-32:18.

[36] During the course of 2011-2012, when the Project was to be performed, Excavating was the recipient of multiple loans from Trucking. Larry took out a loan to purchase equipment for Excavating. This occurred even though Excavating shared a $375,000.00 line of credit with Trucking.

[37] The instant case was filed on September 16, 2013. [Doc ID## 1-2] *See also Taszarek v. Welken*, 2016 ND 172, ¶¶ 1-6, 883 N.W.2d 880. Judgment was ultimately entered on April 30, 2015. [Doc ID## 182]. The Project and Excavating's wrongful conduct occurred during the summer of 2012. Doc ID# 1. As in *Coughlin*, it is clear that Excavating did not account for its potential liability to the Appellees. None of their financial statements, before or after the wrongful conduct, accounted for this liability, even after the suit had been filed. Doc. ID## 272-275, 280-283, Exhibits 15-18, 62, 71-73.

[38] There is ample evidence in the record to uphold the district court's finding that Lakeview Excavating, Inc. was not adequately capitalized. As such, the district court should be affirmed.

B. The trial judge properly found that Lakeview Excavating was insolvent at the time of the transaction in question.

[39] Appellant erroneously states that the "'transaction in question' was Lakeview Excavating's removal of the field stones from the Taszareks' property, which occurred during the summer of 2012." BRIEF at ¶ 47. This court's precedent establishes that a judgment serves as a "transaction in question" for purposes of determining insolvency.

[40] In its *Axtmann* opinion, this Court affirmed piercing the corporate veil when the district court noted that the corporation in question "failed to make any provisions for assets to cover foreseeable liabilities, and … was insolvent at the time of the … judgment and for years because it was unable to pay its normal debts and relied upon [shareholder's] personal credit to operate." *Axtmann*, *supra* at ¶ 18 (emphasis added).

[41] Likewise, this Court's decision in *Coughlin* upheld piercing the veil when the district court found that "that Nu–Tec 'is essentially insolvent and unable to pay the judgment which will be entered against it in this case' because "Nu–Tec currently owns no real estate, very little equipment and few 'hard' assets—and its cash position is only a shadow of what it was before this situation (i.e., the saga of the 'stuck' pipe) came about.'" *Coughlin, supra* at ¶ 24.

[42] This Court's precedent is clear that, for purposes of piercing the

corporate veil, insolvency can be measured at the time a corporation becomes a judgment debtor. Excavating became a judgment debtor in February of 2015. The record is also clear that, by the time it had become a judgment debtor, Excavating had basically stopped operating and was unable to pay its debts in full. Tr. Vol. I. 74:25-75:2; 151:22-152:7; Index 273, 298.

[43] Even if the Court finds that the transaction in question occurred when the trespass and conversion initially took place, it is clear that Excavating failed to make provisions for assets to cover potential liabilities and was using loans from stockholders, family members and the other Lakeview Entities to operate. As such, the district court's ruling should be affirmed.

C. The trial judge properly found Lakeview Excavating failed to observe corporate formalities.

[44] "When the business and assets of a corporation are confused with those of its shareholders, corporate creditors may reach all the assets, and the limitation of liability is lost." § 7:9.*Lack of formality and confusion of affairs as bases for piercing the corporate veil*, 1 Treatise on the Law of Corporations § 7:9 (3d). "If the shareholders themselves disregard the separateness of the corporation, the courts also will disregard it so far as necessary to protect individual and corporate

creditors." *Id.* "[A] court may disregard separate entities when related corporations under common control fail to observe the formal barriers between them." *Id.* (emphasis added).

[45] "Other lapses in corporate formalities that are emphasized in veil-piercing cases are: failing to hold stockholders' or directors' meetings; …using a single endorsement stamp for all affiliated companies; … and the parent company's providing interest-free loans to its subsidiary without documenting those loans with promissory notes." *Id.* "A related consideration is whether there has been mingling of business or assets of the controlling stockholder and the corporation or among affiliated corporations." *Id.* "Cases that have pierced the veil because of mingling of assets and affairs customarily involve facts suggesting there has been such control exercised over the corporation's assets by its dominant stockholder that the stockholder has essentially ignored the corporation as a distinct entity." *Id.*

[46] Appellant attempts to set forth a definition of "corporate formalities" that is far more restrictive than this Court's precedent. In its *Hilzendager* decision, this Court noted that "[t]he record is replete with examples of the defendants' disregard for corporate formalities.… The record … indicates that several of the defendants were unaware of and unconcerned about their various duties as directors and officers.

Funds and assets of both corporations were commingled and disbursed haphazardly.... [T]he other officers and directors failed to take any action to recover the asset or make other provisions for Hilzendager's matured claim...." *Hilzendager v. Skwarok*, 335 N.W.2d 768, 774–75 (N.D. 1983).

[47] The record shows that Excavating and Trucking shared equipment, employees, jobs, timesheets, credit cards, offices, and a line of credit. Furthermore, it shows that Georgia had no duties as an officer. Appellant was the sole owner of both Excavating and Trucking. Appellant failed to produce any promissory notes for the "Shareholder Loans" to himself and Georgia. The record is devoid of evidence showing that there were even contracts between Excavating and Trucking. In short, Appellant failed to observe the barriers between entities that were under his common control. There is more than enough evidence in the record to support the district court's findings that Appellant failed to observe corporate formalities. As such, the district court's ruling should be affirmed.

D. The trial judge properly found that Lakeview Excavating Failed to maintain adequate corporate records.

[48] In *Coughlin*, this Court stated that:

> "The [district] court noted there were no corporate records of notices of meetings of

> shareholders, notices of meetings of the board of directors, minutes of meetings of shareholders, minutes of meetings of the board of directors, promissory notes for "so called" shareholder loans, loan agreements for "so called" shareholder loans, board of directors resolutions authorizing shareholder loans, board of directors resolutions authorizing corporate borrowings from shareholders, board of directors resolutions setting the length of term for shareholder loans, board of directors resolutions authorizing the repayment of shareholder loans, loan documents between the corporation as a borrower and the shareholders as lenders…."

Coughlin, *supra* at ¶ 23.

[49] Appellant was given the opportunity to introduce evidence and testimony on his own behalf, but opted not to. Tr. Vol. II 147:6-22. It must be noted that the only corporate records introduced into evidence were for the year 2010. Doc. ID 277, Exhibit 20. No such evidence was introduced for any other Lakeview Entity. No evidence was entered showing promissory notes for shareholder loans made by Trucking to Appellant and Georgia. Excavating operated from 2010 until 2015. Yet, no other meeting minutes, notices of meetings, corporate resolutions or other documentation of corporate records was introduced apart from Exhibit 20.

[50] As there was only evidence that corporate records were kept for a single year, and because there are no loan documents for the shareholder

loans made to Appellant and Georgia, the district court's finding that Excavating failed to maintain corporate records is not clearly erroneous.

E. The trial judge properly found that Georgia Welken and Lisa Amundson were non-functioning corporate officers.

[51] Appellant's contention that "[n]onfunctioning of other officers in a closely held corporation is hardly significant" is misplaced. BRIEF at ¶ 54 (*quoting Jablonsky*, *supra* at 571). This was the dicta of a concurring justice, and not the law of the case.

[52] In *Coughlin*, this Court upheld the district court's findings that "other officers and directors of the corporation were nonfunctioning on the basis of the lack of written documentation, [dominant shareholder's] "uncertain[ty]" who the officers and directors were, and [dominant shareholder's] nearly exclusive control of the corporation." *Coughlin*, *supra* at ¶ 26.

[53] Georgia's own testimony showed that she had no role or duties for Excavating or Trucking. Appellant testified that Georgia was not directly involved with Excavating. Tr. Vol. I. 25:6-9. Appellant was uncertain about who all of the officers and directors were. Tr. Vol. I. 24:17-25:5. Furthermore, outside of Exhibit 20, there is no other written documentation that Georgia or Amundson functioned as officers and directors of Excavating. It is uncontroverted that Appellant had

exclusive control of Excavating, Trucking, and Southeast. The record supports the district court's findings that "[a]part from [Appellant], Defendant Lakeview Excavating, Inc.'s other officers and directors served no appreciable function in the operation of its business." As such, the district court's ruling should be affirmed.

F. The trial judge properly found Brian Welken siphoned funds.

[54] As a preliminary matter, it is noted that Appellant seeks to submit statements of fact that are wholly unsubstantiated in the record. There is absolutely nothing in the record on appeal that supports his contention that "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." BRIEF at ¶ 58. Any inferences or argument flowing from such a contention are improper and should not be considered by this Court.

[55] This Court has stated that "we believe that, under the circumstances here, the fact Klemm 'siphoned' any funds at all is more significant than the amount." *Jablonsky*, *supra* at 567. Trucking loaned Appellant $105,171.88 in 2011. (Exhibit 64, Index 288). As of 2014, that loan had yet to be paid back, and no evidence was submitted to show that it had ever been paid back. (Exhibit 79, Index 291). Appellant took a

distribution of $18,117.00 in 2013 when Excavating suffered losses of $1,242,904.00. (Exhibit 28, Index 298). That same year, Appellant received "officer wages" of $35,512.50. Tr. Vol. I. 134:8-12 (Exhibits 15 & 28) In 2013, Excavating also loaned $20,000.00 to Aviation, a company owned by Appellant and Georgia. (274, Ex. 17)

[56] Additionally, a large number of assets that were under the control of Excavating and Trucking made their way to Southeast; a company owned first by Appellant's father, and subsequently, by Appellant's wife. However, the uncontroverted testimony shows that Appellant maintained control over, and is still benefitting from, those assets.

There is ample evidence to support the district court's finding that Appellant siphoned off funds from the Lakeview Entities. As such, the district court should be affirmed.

G. The trial judge properly found an element of injustice, inequity, or fundamental unfairness was present.

[57] While "an element of injustice, inequity, or fundamental unfairness must be present before a court may properly pierce the corporate veil," this Court has noted that the "element of unfairness may be established by the showing of a number of the requisite factors for piercing the corporate veil." *Axtmann*, *supra* at ¶ 13 (citing *Jablonsky, supra* at 563–64)(emphasis added).

[58] The Court has also directed that while "an element of unfairness must exist in addition to a number of the factors adopted in *Hilzendager,* we do not imply that the facts upon which the unfairness is found to exist must be mutually exclusive of the facts supporting findings on the *Hilzendager* factors." *Jablonsky*, *supra* at 564.

[59] At paragraph 68 of his brief, Appellant again incorrectly cites dicta from a concurring opinion as controlling precedent. ("A corporate entity may not be disregarded simply because it stands as a bar to a litigants' recovery of property[.]")(*citing Axtmann supra* at ¶ 29). Appellees carried their burden to show that an element of injustice, inequity, or fundamental unfairness existed.

[60] In this instance, a jury decided that Excavating committed the torts of trespass and conversion against Appellees. Excavating employees, at Appellant's direction, converted Appellees' property for its own benefit. Benefits that Appellant also reaped. Appellant has landed on his feet, virtually unscathed. He still operates a trucking business using the assets of the defunct prior entity. He and his wife make money from the same. He has failed to compensate Appellees for their property.

[61] In its *Hilzendager* decision, this Court concluded that "[t]he record in the instant case convinces us that to allow the individual defendants to escape liability because they were doing business under a corporate

form would result in allowing them an advantage they do not deserve." *Hilzendager*, *supra* at 768. Likewise, Appellant does not deserve such an advantage. Appellees did not have a contract with Appellant covering the trespass and conversion of their property. This matter was foisted upon them unwillingly. It would be fundamentally unfair to allow Appellant to escape liability simply because he did business as a corporate entity.

[62] The record contains more than enough evidence to support the district court's finding that "[a]n inequitable result would occur if the acts in question were to be treated as those of Defendant Lakeview Excavating, Inc. alone." App. Pg. 18, ¶ 26. Based on the foregoing, the district court should be affirmed.

H. The S-Corporation testimony shows an element of injustice inequity, and fundamental unfairness.

[63] Appellant is correct that no findings were made regarding the status of Excavating as an S-Corporation. However, the testimony that Excavating and Southeast were S-Corporations, and that the income from Southeast passed through to Georgia and was attributable to both her and Appellant is significant. This shows that Appellant is still benefitting from property transferred to Southeast. This is evidence of injustice, inequity, and fundamental unfairness.

CONCLUSION

[64] Appellant Brian Welken played fast and loose with the Lakeview Entities. The record supports each and every finding of fact and conclusion of law made by the district court. Appellees are innocent parties in this matter. Allowing Brian Welken to escape liability simply because he operated as a corporate entity in name only would force the Appellants to bear the full force of his carelessness and victimize them yet again.

[65] Based on the foregoing, Appellees respectfully request that this Court AFFIRM the District Court's decision and judgment finding Appellant Brian Welken personally liable for the judgment against Lakeview Excavating.

Respectfully submitted this 29th day of January, 2019.

LARSON LATHAM HUETTL LLP

By: */s/ William C. Black*_____
William C. Black (#07284)
1100 College Drive
PO Box 2056
Bismarck, ND 58502-2056
Telephone: 701.233.5300
wblack@bismarcklaw.com

CERTIFICATE OF COMPLIANCE

[¶] The undersigned, as attorney for the Plaintiff/Appellee in the above matter, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportionally spaced, 13 point font typeface, and the total number of words in the above Brief, including footnotes, but excluding words in the table of contents, table of authorities, signature block, certificate of service, and this certificate of compliance, totals 6848 words.

Respectfully submitted this 29 day of January, 2019.

LARSON LATHAM HUETTL LLP

By: */s/ William C. Black*
William C. Black (#07284)
1100 College Drive
PO Box 2056
Bismarck, ND 58502-2056
Telephone: 701.233.5300
wblack@bismarcklaw.com

CERTIFICATE OF SERVICE

[¶] I hereby certify that on January 29, 2019, I filed and served the foregoing document on the following by electronic mail transmission, pursuant to Rules 25 and 31 of the N.D.R.App.P.:

Clerk of the Supreme Court
supclerkofcourt@ndcourts.gov

Douglas W. Gigler
dgigler@nilleslaw.com

Respectfully submitted this 29th day of January, 2019.

By: */s/ William C. Black*
William C. Black (#07284)
LARSON LATHAM HUETTL LLP
1100 College Drive
PO Box 2056
Bismarck, ND 58502-2056
Telephone: 701.233.5300
wblack@bismarcklaw.com