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STATEMENT OF THE CASE

(1.) In July of 2010, Plaintiffs (Appellees) Randall Bakke and Shannon Bakke (hereinafter "Bakkes") brought this civil action against Defendants D&A Landscaping Company LLC, Rocks and Blocks, Inc., and Andy Thomas, a/k/a Andrew Thomas ("Thomas") seeking damages for defective work relative to the 2008 expansion of an elevated patio with retaining wall on the Bakkes' property located in Bismarck, North Dakota. On August 30, 2010, Bakkes amended their complaint to add Rocks & Blocks Landscaping & Contracting, LLC as a party defendant. (App. 7-16.) Bakkes alleged the defendants were liable for the damages under the theories of fraud, deceit, breach of contract, negligence, and joint venture.

(2.) Default judgment was entered against Rocks and Blocks, Inc. on April 15, 2011 due to its failure to make an appearance in this action.

(3.) The case was tried before a jury from July 19-21, 2011. Only Bakkes' claims of fraud, breach of contract, and negligence were presented to the jury for determination on the verdict form. Defendants made no objection to the Special Verdict Form (Supp. App. 195-198), the Instructions to the Jury (App. 20-35 (partial)), or to the introduction of any trial exhibits, at any time. Argument and evidence was presented at trial Thomas was individually liable to Bakkes as Thomas had not disclosed to Bakkes he was performing the subject work through a limited liability company, namely defendant D&A Landscaping, LLC. Instead, Thomas represented himself as conducting business as D&A Landscaping, without any reference to the limited liability company. Argument and evidence was also presented Thomas committed fraud by, among other things, failing to

disclose his concurrent ownership interest in defendant Rocks & Blocks, Inc. when Bakkes were relying on Thomas to negotiate sizeable material purchases from Rocks and Blocks, Inc. on the Bakkes' behalf. Evidence was also presented establishing Thomas' billed Bakkes for work he did not perform, and Thomas installed more expensive retaining wall block he did not believe was suitable as retaining wall block. No objection to these arguments was made by defendants. The jury rendered a verdict in favor of Bakkes and against Thomas only, on the theories of breach of contract, negligence and fraud.

(4.) The Amended Order for Judgment was issued on August 8, 2011 and the Amended Judgment on August 10, 2011. (App. 36, 38.) Defendants Thomas and D&A Landscaping, LLC timely filed their Notice of Appeal on October 14, 2011 (App. 39.)

STATEMENT OF FACTS

(5.) As a preliminary matter, Appellants contentions of error on appeal are limited to 1) the assertion insufficient evidence was submitted to support piercing the corporate veil of D&A Landscaping, LLC to hold Thomas individually liable, and 2) insufficient evidence was presented to support the jury's finding of fraud relative to Thomas. Appellants have not asserted insufficient evidence was submitted to support the jury's determinations of breach of contract or negligence in the performance of the work on Bakkes' retaining wall.

(6.) In addition, as discussed in the argument at paragraph II of the Argument below, the legal theory of piercing the corporate veil has no application to this case. The jury determined Thomas was individually liable not as a result of piercing the corporate veil of D&A Landscaping, LLC, but as a result of Thomas' transacting business with Bakkes' in

his individual capacity – no disclosure of any limited liability entity was made to Bakkes' at the time of contracting, or prior thereto. Therefore, the only evidence presented at trial which is pertinent to this appeal is evidence supporting the jury's determination Thomas was transacting business in his individual capacity, and evidence supporting the jury's determination Thomas committed fraud.

(7.) Plaintiffs/Appellees Randall and Shannon Bakke, husband and wife, reside in Bismarck, North Dakota. (Supp. App. 97.) In 2006, Bakkes decided to expand their existing backyard elevated patio and replace an existing boulder retaining wall thereto. (Supp. App. 98-99.) Bakkes had experienced problems with sand and other materials passing through the boulder retaining wall, and wanted a more permanent and less porous wall. (Supp. App. 98-99.) While considering their options at a store located in Bismarck and owned and operated by defendant/appellant Rocks and Blocks, Inc., ("R&B, Inc.") a corporation organized under the laws of the state of North Dakota (dissolved December 31, 2008), a salesperson encouraged Bakkes to use a Rockwood brand retaining wall, as R&B, Inc. was an authorized supplier of Rockwood products. (Supp. App. 99, 164.) The salesperson also highly recommended and referred Bakkes to defendant/appellant Andrew Thomas ("Thomas") as someone knowledgeable regarding the installation of Rockwood products and being the person most qualified to do the job. (Supp. App. 100-01.) The salesperson gave Bakkes a business card which identified the business as "D&A Landscaping" and provided the name "Andy Thomas" along with his telephone number and email address. (Supp. App. 18, 54-55, 100, 164-65.) No reference to defendant/appellant D&A Landscaping, LLC ("D&A, LLC")(dissolved December of 2008), or any other limited liability entity was made on the business card, or otherwise

made to Bakkes at that time. (Supp. App. 101, 164-65.) Thomas concedes his business card did not reference any corporation, limited liability company, or other limited liability entity. (Supp. App. 54-55.)

(8.) On August 24, 2006, Thomas provided Bakkes with an initial estimate and drawing for work in expanding the elevated patio, labor and specified materials included, for a total price of $7,673. (Supp. App. 2-3, 51-52.) Said proposal was "[r]espectfully submitted D&A Landscaping 426-4982 Per Andy Thomas", without any reference to any limited liability entity. Although Bakkes made a conditional acceptance of the August 24, 2006 Proposal, work pursuant thereto was not actually commenced. (Supp. App. 51-52.)

(9.) A revised "Proposal" dated March 22, 2008 relative to the subject work was submitted to Bakkes by "D&A Landscaping Per Andy Thomas", again without any reference to any limited liability entity. (Supp. App. 1, 51-52.) Thomas concedes he marketed his business in 2008 as an individual owner business. (Supp. App. 55.) The March 26, 2008 Proposal included all labor and materials for the delivery, installation and hauling away of extra material relative to the expansion of the elevated patio, as described in the proposal and depicted in a drawing provided with the proposal, for a total price of $11,759.86. (Supp. App. 1, 5, 87-91.) Thomas represented in the proposal the work to be performed would be "completed in a substantial workmanlike manner." (Supp. App. 1, 90-91).) At the recommendation or R&B, Inc. and Thomas, Bakkes selected the Rockwood brand retaining wall blocks. (Supp. App. 1-2-03.) Bakkes accepted the March 22, 2008 Proposal on March 26, 2008. (Supp. App. 1, 51-52, 90-91.)

(10.) Following subsequent discussions with Thomas, Bakkes later changed the style of

the Rockwood block from Classic to Vintage. (Supp. App. 88, 105.) This change added between $2,000 and $2500 to the total contract price. (Supp. App. 105.) Although Thomas did not raise any concerns to the attention of Bakkes, even before the Vintage blocks were purchased Thomas had concerns regarding their suitability for the subject retaining wall due to their design. (Supp. App. 57-60.) Thomas had concerns water would percolate through the infill behind the retaining wall resulting in fill sand being washed through the Vintage blocks comprising the retaining wall. (Supp. App. 57-59.) This is precisely what ultimately occurred. (Supp. App. 116-25, 128, 172.) Thomas expressed his concern in this regard to the other owners of R&B, Inc. and the manufacturer of the Vintage blocks, prior to installing said blocks in the retaining wall. (Supp. App. 58-60, 162-63.) It is Thomas' opinion the reason why sand later washed through the retaining wall he constructed was due to Vintage style blocks being utilized. (Supp. App. 166-67.) At no time did Thomas, or anyone at R&B, Inc. advise Bakkes of concerns regarding the suitability of the Vintage blocks. (Supp. App. 58-60, 173.) Thomas did not tell Bakkes the Vintage blocks couldn't be used on the retaining wall. (Supp. App. Tr. 59-60; 173.) Thomas concedes the Bakkes' retaining wall was the first retaining wall project Thomas had utilized the Vintage blocks on. (Supp. App. 58-59.) The Vintage style blocks cost nearly double what the Classic style blocks originally selected by Bakkes cost. (Supp. App. 170-01.)

(11.) Bakkes were first advised of the existence of a "D&A Landscaping, Inc." (not defendant D&A Landscaping, LLC) upon their receipt of Invoice # 12252 dated July 15, 2008 relative to the work at issue. (Supp. App. 6-8..) Said invoice was for the amount of

$15,615.14.[1] (Supp. App. 6-7.) This was the first notification to Bakkes of the existence of any limited liability entity associated with Thomas. (Supp. App. 108.) Although the project was supposed to be completed in four to five weeks, due to Thomas' employees not showing up for work and other delays by Thomas, the work was not purportedly completed until September of 2008. (Supp. App. 107, 113.) Bakkes performed portions of the work themselves out of frustration with Thomas' delays in returning to finish the project. (Supp. App. 112.) Bakkes were not apprised Thomas was working through any limited liability entity until after Thomas' work was for the most part completed.

(12.) Bakkes also believed Thomas was conducting business in his individual capacity – Thomas never mentioned any limited liability entity. (Supp. App. 105-06.) This understanding was material to Bakkes inducement to accept the March 22, 2008 Proposal. (Supp. App. 105-07.) Randall Bakke is an attorney. (Supp. App. 106.) Randall Bakke is aware that when dealing with a limited liability entity, if a problem with the work later arises, it can be difficult if not impossible to get warranty work done or to otherwise obtain a remedy as sometimes businesses just change their format and start up again under a different name. (Supp. App. 106.) Whether someone he is conducting business with is operating under a limited liability entity is something Randall Bakke looks for. (Supp. App. 106.) Bakkes' belief Thomas was conducting business in his own name reassured Bakkes they could obtain a remedy against him personally should a problem with his work later arise. (Supp. App. 106.)

(13.) At all relevant times during Thomas' work at the Bakkes' residence in 2008,

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[1] Thomas' May 22, 2008 Proposal accepted by Bakkes obligated Thomas to complete the project for $11,759.86, but Thomas continually increased the price as the work

Thomas owned an undisclosed 14.82% interest in R&B, Inc. (Supp. App. 49-51, 161, 164.) Thomas was the only landscape installer who had an ownership interest in R&B, Inc. (Supp. App. 53.) Thomas concedes R&B, Inc. was motivated to hand out his business cards as Thomas was a part owner of R&B, Inc. (Supp. App. 54.) From 2005 to December 31, 2008, Thomas also owned an undisclosed 100 percent member interest in D&A, LLC. (Supp. App. 47-48.)

(14.) Bakkes did not learn of Thomas' ownership interest in R&B, Inc. until 2010 when this lawsuit was commenced. (Supp. App. 101.) Knowledge of Thomas' ownership interest in R&B, Inc. would have affected Bakkes' decision to hire Thomas. (Supp. App. 101.) Had Bakkes been aware Thomas was an owner of R&B, Inc. at or prior to the time of contracting in 2008, Bakkes would have done further investigation. (Supp. App. 101-02.) Bakkes believed Thomas was negotiating on behalf of Bakkes for better prices on materials with R&B, Inc. as a contractor – materials which were expensive. (Supp. App. 101-02.) Bakkes now believe Thomas, as an owner of R&B, Inc. and D&A, LLC, was negotiating for himself as he was making money on both ends of the deal. (Supp. App. 101-02.)

(15.) Thomas was in fact profiting on both sides of these purchase transactions, once in the form of his share of profits as an owner of R&B, Inc., and again relative to his markup on materials purchased for use in constructing the retaining wall for Bakkes. (Supp. App. 49-50.) Thomas acquired nearly all materials for the project from R&B, Inc. (Supp. App. 6-7, 9-17).) As an owner of R&B, Inc., Thomas benefited a second time from the Bakkes purchase of these materials.

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progressed.

(16.) Pursuant to the July 15, 2008 Invoice (Supp. App. 6-7) in the amount of $15,615.14, and Thomas' final billing Invoice #12263 dated September 11, 2008 (Supp. App. 4)) in the amount of $6,860.43, Thomas ultimately billed Bakkes a total of $22,475.57. This was for work fully encompassed within the March 22, 2008 Proposal of $11,759 plus the additional cost for upgrading the Rockford block from Classic to Vintage style of between $2,000 and $2,5000. (Supp. App. 104-05.) In other words, Thomas billed Bakkes nearly twice as much as was agreed upon. (Supp. App. 111.) Despite the dramatic price increase, Bakkes paid Thomas $21,067.14 relative to the elevated patio expansion project as they just wanted to get the project done. (Supp. App. 19-20, 91-95, 111.) Thomas never explained to the Bakkes' satisfaction the reason for the dramatic price increase – almost double the original contract price. (Supp. App. 104-05.) Although Thomas contended more materials than originally envisioned were required to complete the job, the total square footage of the elevated patio expansion did not change from the square footage encompassed within the March 22, 2008 Proposal. (Supp. App. 104-05.) Despite Bakkes' requests for measurements, invoices from R&B, Inc. as to what was ordered and used on the project, and other information to establish the additional materials allegedly required, no such information was provided by Thomas. (Supp. App. 104.) The proposal required any add-on work would be in writing. (Supp. App. 1).) Thomas also billed the Bakkes for his mistakes, including steps that had to be re-built during the project. (Supp. App. 96.)

(17.) Thomas also charged Bakkes for work he did not do, including for the removal of the original big and heavy patio steps. (Supp. App. 109-10.) A contractor Bakkes hired to correct Thomas' work discovered Thomas never removed the original steps, and

instead installed the new steps over the top of the original steps. (Supp. App. 109.) Thomas also billed for materials never used, according to Bakkes' expert. (Supp. App. 85-86.) Bakkes consider billing for work that is not performed fraudulent. (Supp. App. 110.) Thomas also billed Bakke's twice for the removal of a hot tub from the patio when such work was actually performed by another contractor who was performing separate work on a pergola for Bakkes. (Supp. App. 109.)

(18.) Bakkes first noticed problems with Thomas' work on the patio expansion in the spring of 2009 with the snow melt. (Supp. App. 113, 116.) Significant buckling and settlement of significant areas of the brick pavers, as well as separation of pavers, was noticed, alerting Bakkes something was wrong. (Supp. App. 113.) Photographs taken by Bakkes in the Spring of 2009 were presented to the jury demonstrating empty voids of roughly one foot in depth behind the retaining wall blocks had developed. (Supp. App. 118-19.) The jury was presented with the testimony of two landscaping experts, namely Tyson J. Austin of Cutting Edge Lawn Art of Bismarck, and Brandon Bailey of Integrity Landscapes of Bismarck. Both experts testified Thomas' work on Bakkes' elevated patio expansion project was not in accordance with industry standards and was negligently performed. (Supp. App. 155-56, 159-60; Supp. App. 21-43 (generally), 28-29 at pp. 22-27, 33-35 at pp. 40-49, 36 at pp. 52-54).) The experts opined Thomas work was inadequate and below industry standards in the following respects:

- Thomas failed to adequately compact the fill material behind the retaining wall
- Thomas inappropriately built the retaining wall on clay rather than native soil
- Thomas failed to use adequate Class 5 material for the elevated patio base
- Thomas failed to use or follow the Rockwood retaining wall installation

instructions

- Thomas failed to install drain tile for the elevated patio
- Thomas failed to fill the core for the elevated patio
- Thomas used inadequate sand for the elevated patio
- Thomas failed to use enough blocks for the elevated patio
- the retaining wall was built past vertical and was leaning forward making collapse likely in the near term
- Thomas failed to install or properly install geotextile fabric for the elevated patio base
- brick pavers surrounding a fountain base in the elevated patio were improperly installed
- Thomas was not present during significant portions of work and did not properly supervise his employees

(Supp. App. 129-56, 159-60.) According to the experts, Thomas' work was clearly negligently performed - not even a close call in terms of Thomas' failure to meet industry standards. (Supp. App. 129-56, 159-60.) Both experts also opined the work performed by Thomas had to be completely redone. (Supp. App. 33 at pp. 40-43, 36 at pp. 52-54, 144-45).) Thomas was offered the opportunity to correct his deficient work but refused to do so. (Supp. App. 84.) Bakkes ultimately paid $24,427.50 to redo the work Thomas performed. (Supp. App. 83, 126-27, 157.) According to one of the experts, future work may or will be required to correct the mistakes by Thomas on the patio project, which will cost an additional $6,000. (Supp. App. 158-59.)

(19.) Appellants made no objection to the Instructions to the Jury, Special Verdict

Form, or any trial exhibit presented to the jury. (Supp. App. 174-90.) In fact, Appellants submitted no jury instructions or special verdict form of their own. Appellants stipulated to all of Bakkes' trial exhibits offered to the jury. (Supp. App. 46.)

(20.) During closing arguments at trial, Bakkes argued, in part, Thomas was conducting business in his individual capacity, doing business as D&A Landscaping. (Supp. App. 191-92.) Appellants argued Thomas was not conducting business in his individual capacity, and was conducting business as D&A Landscaping Company, LLC. (Supp. App. 192.) The jury, through its verdict, determined Andrew Thomas was operating his business in his individual capacity, doing business as D&A Landscaping.

LAW AND ARGUMENT

I. STANDARD OF REVIEW

(21.) Appellants essentially assert the jury's verdict relative to two alleged issues was not supported by substantial evidence. This Court "review[s] questions of fact tried to the jury in the light most favorable to the verdict, and [will] affirm the jury's decision if there is substantial evidence to support the verdict." *In re Estate of Dion*, 2001 ND 53, ¶ 40, 623 N.W.2d 720, citing *Fode v. Capital RV Ctr., Inc.,* 1998 ND 65, ¶ 26, 575 N.W.2d 682. "When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." *Weiss v. Anderson*, 341 N.W.2d 367, 371 (N.D. 1983).

II. APPELLANTS' MISTATE THE BASIS UPON WHICH THE JURY FOUND THOMAS INDIVIDUALLY LIABLE TO BAKKES

(22.) Appellants list as their first issue "[w]hether sufficient facts exist to pierce the corporate veil of D&A Landscaping Company LLC, and hold Andrew Thomas personally

liable." Appellants completely misconstrue the jury's basis for finding Thomas personally liable to Bakkes. The theory of piercing the corporate veil only has application where a factual determination of liability is first established on the part of the limited liability entity. Once such liability has been established, the theory of piercing the corporate veil may have relevance in determining whether the individual officers, directors, owners of said limited liability entity should be held personally responsible for the limited liability entity's obligations. Such theory played no role in the jury's verdict in this case, as is established by the verdict itself.

(23.) A copy of the jury's Special Verdict Form is provided in the Supplemental Appendix, filed herewith. (Supp. App. 195-198.) Relative to Bakkes' claim of breach of contract, the jury specifically determined D&A LLC did not breach its contract with Bakkes at Question 2. Instead, the jury determined Thomas breached his contract with Bakkes in Question 1. In other words, the jury determined Thomas breached a contract he individually entered into with Bakkes. Similarly with respect to Bakkes' claim of negligence, the jury determined D&A LLC was not at fault at Question 4. Instead, the jury determined Thomas was at fault in Question 3. Further, the jury determined at Question 8 one of the defendants committed fraud as to Bakkes. The jury was polled by the judge to clarify the defendant who committed the fraud was Thomas, as indicated on the last page of the Special Verdict Form. (Supp. App. 193-94.) The jury's verdict leaves no doubt no liability was being imposed upon D&A LLC as the jury concluded Thomas was acting, relative to Bakkes claims, in his individual capacity. As a result, a corporate veil piercing theory had no application.

(24.) Note Appellants have not asserted the jury's factual determinations of breach of

contract and negligence on the part of Thomas were unsupported by the evidence. Instead, Appellant's only argue Thomas should not have been held responsible for any such breach of contract or negligence as he was allegedly conducting business though D&A, LLC – an argument the jury clearly rejected.

(25.) Substantial evidence supporting the jury's verdict was also presented at trial. As discussed in the facts above, Thomas represented himself to Bakkes, before and at the time of contracting, as doing business as D&A Landscaping, without any reference to any limited liability entity. Thomas' 2006 and 2008 proposals to Bakkes made no reference to any limited liability entity. Thomas' business card made no reference to any limited liability entity and Thomas concedes he marketed his business in 2008 as an individual owner business.

(26.) Bakkes were first advised of the purported existence of a "D&A Landscaping, Inc."[2] (not defendant D&A Landscaping, LLC) upon their receipt of Thomas' first invoice dated July 15, 2008 relative to the work at issue. By that time, Thomas' work was for the most part completed, with Thomas having already billed Bakkes $15,615.14 of the total $22,475.57 he ultimately billed for the project. Bakkes were not apprised Thomas was working through any limited liability entity until four months after the contract had been entered into and after Thomas' work was for the most part completed. Bakkes were not advised of the existence of D&A, LLC at any time while Thomas performed work on the project.

> The managing officer of a corporation is liable as principal, even though acting for the corporation, when he deals with one ignorant of the existence of the

[2] No evidence was presented to establish D&A Landscaping, Inc. ever actually existed as a legal entity.

> corporation and of the relation between the officer and the corporation, and when such officer fails to inform the other party to the contract he is acting for and on behalf of the corporation.

Weiss v. Anderson, 341 N.W.2d at 370 (quoting *Gray v. Elder*, 61 N.D. 672, 240 N.W. 477 (1932)(upholding trial court's imposition of personal liability upon officer of corporation for breach of lease on basis officer failed to disclose he was acting on behalf of the corporation at the time the contract was entered). Disclosure of the limited liability entity as a party to a contract must be made at the time of contracting. *Id.* at 371. Where no disclosure is made at or before the time of contracting, a post-contracting disclosure will not shield the corporate agent from personal liability on the contract. *See id.* (holding corporate officer personally liable on contract where disclosure of corporation's existence did not occur until after the contract was entered into).

(27.) Appellants' veil piercing theory simply has no application to this case. The jury's factual determination Thomas conducted the work at issue in his individual capacity, and is thus personally liable to Bakkes, whether under a breach of contract, negligence, or fraud theory, is supported by substantial evidence.

III. APPELLANTS RAISE THE ISSUES BEFORE THIS COURT FOR THE FIRST TIME ON APPEAL – APPELLANTS FAILED TO OBJECT TO THE DISTRICT COURT'S ALLEGED ERRORS OR OTHERWISE PRESERVE THE ISSUES BEFORE THIS COURT

(28.) This Court has long held it will not consider issues raised for the first time on appeal.

> For an effective appeal on any proper issue, the matter must have been raised in the trial court, so the trial court could rule on it, and a failure to object to any irregularity at trial is a waiver of the issue. Thus, issues not raised in the trial court cannot be raised for the first time on appeal. The purpose of this rule is to prevent a party from inviting error upon the trial court and then seeking to prevail upon appellate review of the invited error.

Kautzman v. Kautzman, 2003 N.D. 140, ¶ 10, 668 N.W.2d 59 (citations and quotations omitted). In addition, this Court will not review on appeal alleged errors in jury instructions not timely objected to unless the error in the instruction was fundamental and highly prejudicial, and the Court's failure to consider the error would result in a gross miscarriage of justice. *Rau v. Kirschenman*, 208 N.W.2d 1, 8-9 (N.D. 1973)(on petition for rehearing). An instruction not objected to becomes the law of the case. *Erickson v. Schwan*, 453 N.W.2d 765, 768 (N.D. 1990).

(29.) All of the issues raised by Appellants' as error are being raised for the first time on appeal. The trial court was never afforded an opportunity to address any of the alleged errors now claimed by Appellants.

(30.) The theory of piercing the corporate veil was never raised by any party, whether in pleadings, during argument, briefing, requested jury instructions, or requested verdict form. In fact, Appellants did not even submit requested jury instructions or a requested special verdict form to the trial court. Appellants also never objected to the trial court's Instructions to the Jury, Special Verdict Form, or any of the exhibits introduced into evidence at trial. In fact, Appellants stipulated to the admissibility of all exhibits introduced at trial. (Supp. App. 46.) Appellants never contended during the trial veil piercing was an issue the jury should consider and did not request a jury instruction on the issue. *See* N.D. R. Civ. P. 51(c)(1) ("a party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection").

(31.) In addition, Appellants never objected to the standard of proof presented to the

jury on the issue of fraud. Although it is true fraud must generally be proven by clear and convincing evidence, and the only standard of proof referenced in the Instructions to the Jury was the lesser "greater weight of the evidence" burden of proof (C-1.40), Appellants never made objection thereto to afford the trial court an opportunity to correct the error. Appellants did not request a jury instruction on the clear and convincing burden of proof. In addition, as explained in paragraph IV below, clear and convincing evidence of fraud on the part of Thomas was presented to the jury.

(32.) Appellants' appeal should be denied, in its entirety, on the basis Appellants' allegations of error are being raised for the first time on appeal.

IV. THE JURY'S FINDING OF FRAUD BY THOMAS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

(33.) Appellants assert insufficient evidence was presented to the jury to support the jury's finding Thomas committed fraud. As a practical matter, if the Court rejects Appellants' veil piercing argument and affirms the jury's verdict on either the issue of breach of contract or negligence, the monetary judgment against Thomas in favor of Bakkes would necessarily stand in full. As a result, even assuming, arguendo, insufficient evidence was presented at trial to support the jury's determination Thomas committed fraud, any such error would be moot as it would not change the result of the trial. Therefore, in the event the Court affirms the jury's verdict on either the issue of breach of contract or negligence, the Court need not address the jury's finding of fraud.

(34.) In any event, the jury's finding Thomas committed fraud was supported by substantial, as well as clear and convincing, evidence. As indicated in Question No. 8 of the Special Verdict Form, the jury answered yes to the question "[d]id any defendant

commit fraud, actual or constructive, or otherwise conspire to do so, as to Randall Bakke and Shannon Bakke?"

(35.) North Dakota Pattern Jury Instruction on constructive fraud (C-50.34) was provided to the jury, which provides as follows:

> Constructive fraud consists:
>
> 1) of a breach of duty which, without actual fraudulent intent, gains an advantage to the person at fault or anyone claiming under that person, by misleading another to that person's prejudice or to the prejudice of anyone claiming under that person; or
>
> 2) of an act or omission which the law specifically declares to be fraudulent without respect to actual fraud.
>
> Constructive fraud arises from a breach of a duty which is owed because of a fiduciary, confidential, or other special relationship between the parties. A fiduciary or confidential relationship is one which induces the trusting party to relax the care and vigilance the party would ordinarily exercise. Constructive fraud is based on a relationship between the parties which gives rise to a duty of disclosure. Silence may be as misleading as a positive misrepresentation of fact. The suppression of a material fact which a party is bound in good faith to disclose, is equivalent to a false representation. One's implicit faith in another's honesty and integrity is insufficient to establish a fiduciary relationship as regarding constructive fraud.

(App. 35.) Although Bakkes also requested the pattern jury instruction relative to deceit, the trial court denied the request on the basis deceit only has application in the absence of a contractual agreement – the trial court concluded based on the evidence presented at trial a contractual agreement was involved in this case.

(36.) A special relationship existed between Bakkes and Thomas establishing a duty on the part of Thomas to disclose his actual business and ownership interests in R&B, Inc. As discussed in the facts above, Bakkes were relying upon Thomas to negotiate lower prices, in Bakkes' best interest, relative to substantial material purchases from R&B, Inc.

for use in constructing the subject retaining wall. Throughout Thomas' work on the subject retaining wall and acquisition of materials for the retaining wall from R&B, Inc. in 2008, Thomas owned 14.82% of R&B, Inc. – a material interest. Thomas was the only landscape installer who had an ownership interest in R&B, Inc. out of three landscapers R&B, Inc. had business cards for. R&B, Inc. would hand out Thomas' business card to R&B, Inc. customers for landscape installation work. Thomas concedes R&B, Inc. was motivated to do so as Thomas was a part owner of R&B, Inc. At no time was this business and ownership relationship disclosed to Bakkes. Thomas was in fact profiting on both sides of these purchase transactions, once in the form of his share of profits as an owner of R&B, Inc., and again relative to his markup on materials purchased for use in constructing the retaining wall for Bakkes. Thomas' failure to disclose this fact constituted fraud.

(37.) The jury was also presented evidence establishing Thomas had concerns regarding the suitability of using Vintage style concrete blocks in constructing the subject retaining wall due to their design and did not express those concerns to Bakkes. Thomas had concerns water would percolate through the infill behind the retaining wall with water and sand being washed through the Vintage blocks comprising the retaining wall. This is precisely what ultimately occurred. Thomas expressed his concern in this regard to R&B, Inc. and the manufacturer of the Vintage blocks, prior to installing said blocks in the retaining wall. At no time did Thomas, or anyone at R&B, Inc. advise Bakkes of his concerns regarding the suitability of the Vintage blocks. Thomas did not tell Bakkes the Vintage blocks couldn't be used on the retaining wall. Thomas concedes the Bakkes' retaining wall was the first project Thomas had utilized the Vintage blocks on. Thomas'

failure to disclose his concerns regarding the Vintage block resulted in a benefit to Thomas as the Vintage blocks were more expensive than the Classic block originally planned under the accepted March 22, 2008 Proposal. This additional cost, as well as the consequences of utilizing the Vintage block of having to redo all of Thomas' work was to the detriment of Bakkes. Thomas owed a duty to Bakkes to disclose his concerns regarding use of the Vintage blocks as they were relying upon his purported expertise on the subject. Such failure to disclose constituted fraud.

(38.) The jury also considered evidence Thomas billed Bakkes for work he did not perform, including for the removal of the original big and heavy patio steps. A contractor Bakkes hired to correct Thomas' work discovered Thomas never removed the original steps, and instead installed the new steps over the top of the original steps. The expert testimony of Tyson Austin establishes the installation of new steps over the old steps was not appropriate. Austin also testified Thomas billed for materials never used. Thomas also billed Bakkes almost double the amount he agreed to charge for work specified in his proposal, and provided no back up support for the doubling of his charges, which also constituted fraud. Billing for work that is not performed is fraudulent. Thomas also billed Bakke's twice for the removal of a hot tub from the patio when such work was actually performed by another contractor who was performing separate work on a pergola for Bakkes.

(39.) The jury's finding Thomas committed fraud was supported by substantial and clear and convincing evidence and should be affirmed.

V. CONCLUSION

(40.) For the foregoing reasons, Appellees Randall Bakke and Shannon Bakke

respectfully request the Court affirm the jury's verdict, in its entirety.

Dated this 24th day of April, 2012.

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CERTIFICATE OF COMPLIANCE

(41.) The undersigned, as attorneys for the Plaintiffs/Appellees Randall Bakke and Shannon Bakke 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 typeface 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 5,589.

Dated this 24th day of April, 2012.

SMITH BAKKE PORSBORG
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CERTIFICATE OF SERVICE

(42.) I hereby certify that true and correct copies of the foregoing **APPELLEE'S BRIEF** and **SUPPLEMENTAL APPENDIX** were on the 24th day of April, 2012, emailed and mailed to the following:

ATTORNEYS FOR DEFENDANTS/APPELLANTS D&A LANDSCAPING AND ANDY THOMAS:

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By *s/Shawn A. Grinolds*
Shawn A. Grinolds

SUPPLEMENTAL CERTIFICATE OF SERVICE

(43.) I further certify that true and correct copies of the foregoing **APPELLEE'S BRIEF** (corrected) and **SUPPLEMENTAL APPENDIX** (corrected) were on the 25th day of April, 2012, emailed to the following :

ATTORNEYS FOR DEFENDANTS/APPELLANTS D&A LANDSCAPING AND ANDY THOMAS:

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and hard copies of the foregoing **APPELLEE'S BRIEF** (corrected) and **SUPPLEMENTAL APPENDIX** (corrected pages only – Index and pp. 195-199) were on the 25th day of April, 2012, mailed to the following:

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By *s/Shawn A. Grinolds*
Shawn A. Grinolds