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Frontier Development Group v. Caravella Respondent's Brief Dckt. 40581

IN THE SUPREME COURT OF THE STATE OF IDAHO

FRONTIER DEVELOPMENT GROUP, LLC, MICHAEL HORN,

Plaintiffs-Counterdefendants - Respondents,

vs.

LOUIS CARAVELLA and PATRICIA CARAVELLA,

Defendants-Counterclaimants-Appellants,

and

YELLOWSTONE DO IT CENTER, LLC,

Plaintiff-Counterdefendant

Supreme Court Docket No. 40581-2012

Teton County Case No: CV-2009-68

RESPONDENTS' BRIEF

Appeal from the District Court of the Seventh Judicial District for Teton County

Honorable Gregory W. Moeller, presiding

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I. STATEMENT OF THE CASE

a. Scope of Appeal

In their Notice of Appeal, Defendants-Appellants Caravellas set forth as their initial issue on appeal whether the District Court erred in failing to find that Respondents-Counterdefendants Frontier Development Group, LLC (FDG) & Michael Horn (Horn) were liable to Appellants for fraud. (Tr. Vol. II, p. 391).

Plaintiffs-Respondents FDG/Horn contend that the court properly concluded that the scienter element of fraud was not present, that FDG was not an alter ego of Horn, and that Horn was not personally liable to the Caravellas. They further contend that the Caravellas did not meet their burden of proof as to the other elements of fraud as the district court analyzed each element under the lower "preponderance of the evidence" standard, rather than the "clear and convincing" standard necessary to prove fraud.

Caravellas attempt to narrow the appeal and claim that Respondent-Plaintiffs cannot challenge the district court's finding on eight of the nine elements of fraud because they did not file a cross-appeal. (Appellants' brief, p. 18, fn. 4). There is no legal support for such a narrow interpretation of the Idaho Appellate Rules or Idaho caselaw.

Idaho Appellate Rule 11(g) instructs that after an appeal has been filed and no affirmative relief is sought by way of reversal, vacation, or modification of the judgment, order, or decree, an issue may be presented by the respondent as an additional issue on appeal under Rule 35(b)(4) without filing a cross-appeal. *See Walker v. Shoshone Cnty.*, 112 Idaho 991, 993, 739 P.2d 290, 292 (1987) (A cross-appeal is required only when the respondent seeks to change or add to the

relief afforded below, but not when it merely seeks to sustain a judgment for reasons presented at trial which were not relied upon by the trial judge but should have been.) The issue on appeal is whether the district court properly found that Plaintiffs were not liable for fraud, and FDG/Horn should be allowed to argue every element regarding the district court's finding regarding the fraud claim.

b. Statement of the Facts

FDG was organized on September 20, 2005, with Horn as managing partner, in the state of Wyoming. (Plaintiffs' Exhibit 90; Findings #2).[1] FDG is a registered foreign limited liability corporation in the state of Idaho. (*Id.*) FDG is also registered in Idaho as a dba entity Open Range Homes. FDG is registered as a residential contractor in Idaho. (*Id.*)

In 2006, Richard Myers (hereafter "Myers") purchased the property at issue, subject to a deed of trust in favor of First Horizon Home Loans (hereafter "First Horizon"). (Findings #6). FDG was contracted by Myers to build a residential home on July of 2006, and construction began at the end of the summer. (Plaintiffs' Exhibit 2; Findings #6). This was going to be FDG's third construction project. (Tr. Vol. I, p. 375, ll. 6-12). Myers had qualified for and obtained a construction loan in an amount which was less than the original estimates FDG provided to complete the project as per Myers' original plans. To reduce construction costs, Myers requested several modifications and deviated from the original construction plans. (Findings #7).

In early 2007 Myers suffered a severe financial setback and was having difficulty making interest payments on the construction loan to First Horizon. (Findings #7). FDG coordinated

[1] The district court's Findings and Conclusions are found at R. Vol. II, pp. 316-362.

with Myers and First Horizon to make interest payments by donating FDG's contracting fee to these payments and was foregoing any profit in order to keep the construction progressing on Myers' property. Myers also directed FDG to further reduce numerous construction line items and transfer the funds to other areas of the Project, allowing Myers to access funds for purposes of paying interest on the construction loan. These modifications were approved by First Horizon. (Defendants' Exhibit HHHH). Myers did not testify in this case.

Horn testified at trial that changes to the plans included the siding, stone, windows, interior floor plan, and a significant change to the rear elevation in regard to the roof structure. (Tr. Vol. I, p. 243-44). For each draw request on the construction loan, Myers would review the draw, approve, and sign it. A First Horizon representative would then physically inspect the property to verify that materials were present and construction work was completed before construction funds were released. (Tr. Vol. I, p. 391, ll. 17-23; Tr. Vol. II, p. 946, l. 22 – p. 947, l. 4; p. 962, ll. 13-20). There were no findings as to the amount of the funds that were dispersed to FDG which were allocated from one line item to another. There was also no finding as to the amount allocated to FDG which actually went to pay the interest on the construction loan.

In April of 2007, Myers declared bankruptcy and First Horizon rescinded the construction loan. (Findings #8). Myers and First Horizon instructed FDG to immediately vacate the property and halt all expenditures. All of the building materials that had been delivered but not yet installed were left on the property when construction was halted. There was no finding whether Myers, First Horizon, or any of the subcontractors reclaimed and/or sold these items after construction was halted. There was testimony at trial that another contractor

worked on the property to get the house to a saleable stage. (Tr. Vol. I. p. 246, l. 8 – p. 247, l. 16). Neither Myers nor First Horizon has ever alleged that FDG, or Horn personally, was ever fraudulent in their dealings.

The project was approximately 50% completed when construction was halted. (Findings #8). Two foundation inspections by the Teton County Building Officials had been completed on the property. The property passed both inspections, and it was determined that the property was structurally sound. (*Id.*; Plaintiffs' Exhibit 2). Nothing else on the house had been completed to which an inspection could be performed. (*Id.*) The interior and structural framing was incomplete, the roof was not finished and the doors and windows were left exposed for 14 months, which included two Teton County winters where the project filled with water, ice, and snow. (Findings #8).

First Horizon initiated foreclosure proceedings on the property, and the property was listed as a short sale. (Findings #9). Kathleen Horn, the wife of Michael Horn, was hired by Myers as the listing agent with Windermere Real Estate in Driggs, Idaho. (*Id.*) In March of 2008, Louis Caravella contacted Mark Griese (hereinafter "Griese") in the Windermere office inquiring about properties in Teton County. Kathleen Horn never had contact with Dr. or Mrs. Caravella (Caravellas).

Dr. Caravella is an ophthalmologist who owns his own practice. At all times pertinent to this litigation he was living in Ohio. He also has an extensive background in the professional world of real estate. He has had a wide range of experience in managing construction projects and the district court found him to be a sophisticated purchaser. (Findings #47). As such, he has

significant knowledge and experience working with builders and contractors on construction management issues. (*Id.*)

Dr. Caravella stated that when he built his first office, he worked directly with the architect and designed the office to his precise needs. (Plaintiffs' Exhibit 97, p. 45, l. 6-16). Five years later he built his first office building. (*Id.*, ll. 17-25). On that project, he worked extensively with the architect to the point of picking out every single detail. (*Id.*) Dr. Caravella then put out bids for services, awarded bids, and built the office. (*Id.*, p. 46). While the project was being built, Dr. Caravella went to the site every day to check on the progress and to make sure the builders were doing what he wanted them to do. (*Id.*) Dr. Caravella was also intimately involved with the purchase and remodel of four other office buildings with additions to two of the buildings. (*Id.*, p. 47-48).

Dr. Caravella was also extensively involved in building his first house in Cleveland, Ohio from the ground up. He put major additions on another home, a summer home, and two vacation homes. (Plaintiffs' Exhibit 97, p. 218, ll. 10-25; Defendants' Exhibit J). He also oversaw a 250 bed addition to a hospital as the hospital administrator, as well as the addition of a separate medical building. (*Id.*) Dr. Caravella indicated that he understood all aspects of the construction process. (Plaintiffs' Exhibit 97, p. 46, l. 25 – p. 47, l. 3).

In March of 2008, after inquiring about the Myers' property, Griese gave Horn's contact information to Dr. Caravella, and he contacted Horn regarding properties in the Teton County area. (Findings #26-27). Horn informed him about several properties through an exchange of emails. Dr. Caravella was particularly interested in the Myers' property and Griese obtained

incomplete drawings from the drafter of the architectural plans, Guy Robertson. (Defendants' Exhibit A; Plaintiffs' Exhibit 97, p. 21, l. 3-10). Through email, Horn informed Dr. Caravella that the property had formerly been owned by a 26 year old from California and when the house was about 50% complete, he filed bankruptcy and the funds were cut for the construction. (Defendants' Exhibit A). He further stated that between $750,000 and $1,000,000 would be required to finish the project. (*Id.*)

The next day, after several emails back and forth, Horn sent Griese and Dr. Caravella an email with more information on the Myers' property which included the following:

> I operate on a cost plus contract of 15% and I do not build on a fixed price. **Once the owner is firm on hiring Open Range**, I require a $25K deposit which is held in my account until the final draw. At the time of the final draw, all final bills are paid off including any due contract fee and any remainder paid back to the Owner.

(Plaintiffs' Exhibit 16).

On April 14, 2008, Caravellas submitted a cash offer of $749,000.00 on the Myers' property prior to visiting the site. (Findings #34; Plaintiffs' Exhibit 3; Plaintiffs' Exhibit 97, p. 25, ll. 8-10). Myers (through Kathleen Horn) counteroffered for $799,000.00, which was accepted. (Findings #35). The purchase and sale contract specifically states that the purchase was a partially constructed, incomplete structure and that they were purchasing the property "as is." (Plaintiff's Exhibits #3, 4, 5).

After Caravellas accepted the counteroffer, Horn recorded a mechanics lien for $23,000 against the property on behalf of FDG. (Findings #36). This lien was for work that was done prior to the Myers' project being halted and for some clean up and temporary railings on the

stairs so that potential buyers could safely walk through the partially constructed house. (Tr. Vol. II, p. 977, ll. 2-12). Both Myers and First Horizon authorized the work, and did not contest this lien. The pending lien was disclosed to Dr. Caravella on March 21, over one month before Caravellas closed on the property. (Plaintiffs' Exhibit 16). The lien amount was paid by the seller.

A provision in the Purchase and Sale Agreement stated that Caravella had the right to inspect the property and/or had the right to back out of the Agreement at any time for any reason prior to May 10. (Plaintiff's Exhibit #3). Caravellas indicated in the contract that they would inspect the property. (*Id.*) In April of 2008, the Caravellas traveled to Idaho and met with Greise. (Findings #38) They also met with Horn and visited the Myers' property, Horn's personal residence, and another residence (Dr. Burke's). These were all FDG construction projects.

When asked about the quality of workmanship on the different properties, Dr. Caravella stated, "I cannot tell quality unless I start lifting up boards and stuff like that." (*Id.*, p. 49-50). Dr. Caravella spent over four (4) hours the first day and almost an entire second day at the Myers' property for inspection. (Findings #39; Tr. Vol. I, p. 24, l. 10 – p. 25, l. 2). Dr. Caravella testified that he relied on his own expertise in performing this inspection. (Plaintiffs' Exhibit 97, p. 40, ll. 2-5). The project was not completely framed at that time and there was nothing impeding him from seeing the quality of the work that had been performed up to that point.

At the time Caravellas visited Teton County, they had not hired Horn to do any work, they had not discussed FDG/Horn doing any work for them, nor was Horn paid to inspect the

property. (Plaintiff's Exhibit 97, p. 69, ll. 4-5; p. 71, ll. 17-18). Horn was not a party to the purchase of the Myers' property and had zero financial interest in the transaction. Dr. Caravella understood that he had the option to hire an expert to inspect the project structurally or otherwise. (Plaintiffs' Exhibit 97, p. 34, l. 1; p. 62, ll. 6-21). When asked why he did not hire a professional inspector look at the property for him, Dr. Caravella stated that he was in a little bit of a time crunch but could have worked through that. (*Id.*, p. 199, ll. 5-21).

Dr. Caravella contacted Horn on April 23, 2008 and informed him that he was going to be the owner of the Myers' property. (Defendants' Exhibit J; Plaintiffs' Exhibit 18). He offered Horn the job of finishing the house if he wanted it. (*Id.*) The parties agreed to a cost plus arrangement with a 12% fee for Horn's services as a general manager. (Plaintiffs' Exhibit 16; Defendants' Exhibit J). Dr. Caravella instructed that however Horn wanted to phase the project was fine with him, however, he wanted to have the entire exterior finished before the next snow fall. (Defendants' Exhibit L). Horn's understanding was that he was to proceed with the project with the goal of finishing the entire exterior to protect the house from the winter weather. (Tr. Vol. I, p. 287, ll. 8-23).

II. ATTORNEY FEES AND COSTS ON APPEAL

Pursuant to Idaho Appellate Rules 35(b)(5), 40, and 41(a), Plaintiffs-Respondents contend that they are entitled to an award of costs and attorney fees incurred on appeal. I.A.R. 40 provides that costs shall be allowed as a matter of course to the prevailing party.

These contentions are supported by Idaho Code §§ 12-120(3), 12-121 and This action arose from a commercial transaction and contract for services and I.A.R. 41 requires a party

seeking attorney fees on appeal to assert such a claim as an issue presented on appeal in the first appellate brief.

I.C. §12-120(3) allows for attorney fees to be awarded to the prevailing party. The Caravellas hired FDG/Horn in a "commercial transaction" to provide construction materials and services. The underlying action arose out of this commercial transaction. Plaintiff Horn filed suit against Caravellas in an attempt to recover on this transaction and the issues on this appeal arise from the transaction. *See Huyett v. Idaho State Univ.*, 140 Idaho 904, 911, 104 P.3d 946, 953 (2004) (Where a party alleges the existence of a contractual relationship of a type embraced by I.C. § 12–120(3), that claim triggers the application of the statute, and on appeal the prevailing party may recover fees even though no liability under a contract was established.) I.C. §12-120(3) has been interpreted by the Idaho Supreme Court to mandate the award of attorney fees on appeal as well as at trial pursuant to I.C. §12-120(3). *Fox v. Mountain W. Elec., Inc.*, 137 Idaho 703, 712, 52 P.3d 848, 857 (2002).

I.C. §12-121 allows for attorney fees to be awarded to Respondents FDG/Horn in this action. This statute allows for attorney fees in a civil action to a prevailing party when the appeal does no more than simply invite an appellate court to second-guess the trial court on conflicting evidence. *Anderson v. Larsen*, 136 Idaho 402, 408, 34 P.3d 1085, 1091 (2001). In *Anderson*, attorney fees were awarded because the Appellants asked the Court to reweigh and reevaluate the evidence, to second-guess the trail court's findings which were based on conflicting evidence, and to arrive at a different conclusion than the district court by reassessing the credibility of the various witnesses. Further, the Appellants did not present any reasonable

legal argument demonstrating that the district court erred, on the facts presented, in its conclusion. (*Id.*)

This appeal brought by the Caravellas is similar in nature and substance to the appeal in *Anderson*. In this appeal, the Caravellas are asking the Court to reweigh the evidence and arrive at a different conclusion than the district court. Further, Caravellas have not presented any legal argument that the district court erred on the facts presented. In fact, Caravellas are aware that the district court analyzed the fraud claim under the lower "preponderance of evidence" standard of evidence. (Appellate brief, p. 16). Despite the fact that the district court held that the elements were not present under the lower standard, Caravellas are asking this Court to reweigh the evidence and find the elements of fraud present under the higher clear and convincing standard of evidence. Respondents FDG/Horn are entitled to attorney fees in this appeal.

III. ARGUMENT

A. STANDARD OF REVIEW

The party alleging intentional misrepresentation or fraud has the burden of proving the elements of fraud by clear and convincing evidence. *Lindberg v. Roseth*, 137 Idaho 222, 225, 46 P.3d 518, 521 (2002). If the district judge's findings of fact are supported by substantial and competent evidence, the appellate court will not disturb those findings. *Id.* The Supreme Court exercises free review over the district judge's conclusions of law. *Id.*

The trial court's determination that a claim has not been proven is entitled to great weight on appeal. *Sowards v. Rathbun*, 134 Idaho at 706, 8 P.3d at 1249 (2000). This Court's review of a trial court's decision is limited to ascertaining whether the evidence supports the findings of

fact and whether the findings of fact support the conclusions of law. *Id.* The Supreme Court may not set aside a trial court's findings of fact unless they are clearly erroneous, that is, unless the challenged finding is not supported by substantial, competent evidence. *Id.*, 134 Idaho 702, 707, 8 P.3d 1245, 1250.

The substantial evidence standard for appellate review requires a greater quantum of evidence in cases where the trial court's finding must be supported by clear and convincing evidence, than in cases where mere preponderance is required. *Id.* When reviewing the trial court's findings of fact in a case in which the facts must be established by clear and convincing evidence, the job of the reviewing court is simply to determine whether there is substantial and competent evidence to sustain the finding. *Id.*

B. THE DISTRICT COURT CORRECTLY HELD THAT FRAUD WAS NOT PRESENT.

Fraud must be pled with particularity. That is, the alleging party must specify what factual circumstances constituted the fraud. I.R.C.P. 9(b); *Glaze v. Deffenbaugh,* 144 Idaho 829, 833, 172 P.3d 1104, 1108 (2007). A party must establish nine elements to prove fraud: 1) a statement or a representation of fact; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity; 5) the speaker's intent that there be reliance; 6) the hearer's ignorance of the falsity of the statement; 7) reliance by the hearer; 8) justifiable reliance; and 9) resultant injury. (*Id.*)

The district court, using a preponderance of the evidence standard, found that the Caravellas established the presence of eight out of nine elements of fraud set forth in *Glaze*, but could not establish by a preponderance of evidence that Horn and/or Norman *knew* their statements were false. (Conclusions #43). Although the district court ultimately came to the

correct result, it did not find that the other eight elements of fraud were present by a clear and convincing standard.

A preponderance of the evidence is such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein. *Cook v. W. Field Seeds, Inc.*, 91 Idaho 675, 681, 429 P.2d 407, 413 (1967). A clear and convincing standard is generally understood to be evidence indicating that the thing to be proved is highly probable or reasonably certain. *In re Adoption of Doe*, 143 Idaho 188, 141 P.3d 1057 (2006) (*citing* BLACK'S LAW DICTIONARY 577 (7th ed.1999). Under the correct standard of clear and convincing, this Court should affirm the district court's holding that fraud is not present.

a. Horn's Statements regarding the Value, Condition, Quality and Workmanship of the Home Prior to Purchase were not fraudulent.

The district court found that the Caravellas had established the presence of eight out of nine elements of fraud by a preponderance of the evidence, but was unable to conclude that Caravellas established that Horn *knew* his statements were false. (Conclusions #43).

The district court erred in its Conclusions by using a lower standard than required to prove the elements of fraud. Nevertheless, the district court could not find Horn liable for fraud. Under the correct evidentiary standard, the court likely would not have found that any of these eight elements were satisfied. Since this Court reviews issues of law *de novo*, it reviews whether there is substantial and competent evidence of each element to a clear and convincing standard. *Id.*

i. Value of the Home

Caravellas entire claim relies on their argument that Horn deceived them and misrepresented the subject property from the very beginning of their discussions. Horn had no purpose to deceive them. Horn had no financial stake in the property and, at most, he was discussing the property with a potential buyer, who may possibly hire FDG to finish the property sometime in the future.

The district court found that Horn told the Caravellas that the subject property had been sitting untouched for over a year; that First Horizon would not allow the property to be sold for less than $800,000, and that other prospective buyers had tried unsuccessfully to purchase it for less. (Findings # 27). The district court also found that Horn represented to Caravellas that the value of the property was $1.2 million, with $800,000 worth of construction completed and the lot having a value of $400,000. (Findings # 28). Caravellas argue that Horn misrepresented the value of the property. Lacking from their argument is any evidence of the actual value of the property. Caravella have inferred that the value of the property is equal to the cost of the materials expended on the project, plus the value of the lot. However, there is no clear and convincing evidence to support a finding of the actual value, misrepresentation of the actual value of the subject property, or the difference alleged from Horn's estimates. Horn had no relationship with Carvellas at that time.

Caravellas claim that it is impossible for Horn not to have known that the items of work he certified as complete to Myers and First Horizon were never in fact incorporated into the project's construction, and thus the amount used in the project was less than what FDG was paid.

(Appellants' brief, p. 19). Caravellas further claim that Horn "misrepresented" to them numerous times that $800,000 worth of construction had been completed which is nearly one and one-half (1½) times the amount he knew had actually been completed.[2] (*Id.*)

The district court did not reach a conclusion that these were representations of fact (first element of fraud) regarding the value of the property by a clear and convincing standard. These representations were Horn's opinion regarding an incomplete project FDG had worked on 14 months prior. When Caravella first inquired about the property, Horn stated:

> The River Rim house was/is owned by a 26 year old kid from California who was given a zero down payment loan by the bank. He hired me to build the house after he had gone through design with a local draftsman. About 50% complete, the kid filed personal bankruptcy and the bank cut-off the construction funds. The house has sat in the current state for about 1-year. The bank won't accept anything less than $800K, many have tried and all have been rejected. With the $400K lot included, approximately $1.2M was expended on the project. Given the potential $800K purchase price, the $400K lot is free so to speak. We need between $750K and $1M to finish the project to high-end standards similar to my Teton Springs house. If you're looking for a second or primary home, the house is a very good deal if you like River Rim Ranch. But if it is for spec/flip purposes, I would not recommend a spec house anywhere right now.

(Defendants' Exhibit A). These financial representations and values are actually fairly meaningless in the context of Horn's representations to Caravella. The general representations were given to Caravella more than a month and a half prior to any agreement between Caravella

[2] Caravella also claims that Horn had a personal financial interest in the sale because his wife was the selling real estate agent and that Horn intended to record his untimely, unfounded lien for $23,000 which was paid out of the closing funds. These claims carry little evidentiary weight; throughout the email conversations between Horn and Caravella, they discussed numerous properties that Horn owned where Horn had an actual financial interest. (Plaintiff's Exhibit 10). There is absolutely zero evidence that Horn had any financial interest through his wife's representation of Myers. Further, Horn had disclosed the lien to Caravella during these initial email conversations. (Plaintiff's Exhibit 16).

and Horn to finish the Myers' property. Horn had not reviewed the documentation for the expenditures on the project prior to his emails with Caravella, as he no longer had any of the documents. (Findings #23).

The district court did not find by a clear and convincing standard that this representation was false (second element of fraud). This representation accurately depicts the project as 50% complete. (Findings #8) The total expected build cost for the Project was $1,248,000.00. (Defendant Exhibit HHHH). Therefore, if the actual amount of expenditures on the project (minus the cost of the lot) was $570,000, as claimed by Caravella, Horn accurately represented that the home was 50% complete. Horn also accurately depicted that the bank would not accept anything less than $800,000. There had been several offers under $800,000 on the property, including Caravella's first offer, which were declined. Lastly, Horn described the amount he believed was required to finish the project at up to $1,000,000.

Further, Caravellas provided nothing for the record regarding an assessed value of the home by an expert who is qualified to make such an assessment. Horn was a building contractor, not a real estate agent. Horn had some knowledge as to the amount expended on the project and the value at that time FDG was on the project, but Horn was not qualified to assess the value of the property at the time Caravellas purchased the property, and the district court was no finding as to the actual value of the property.

The district court did not find by a clear and convincing standard that this representation was material (third element of fraud). The district court generally found that the Caravellas relied on Horn's representations regarding the home in order to prepare an offer to purchase the

property from Myers. (Findings #33). There was no finding that the Caravellas relied on representations after they personally inspected the property, and there is no evidence to support such an assertion.

Dr. Caravella, as a knowledgeable buyer, personally inspected the property. The fact that he knew there were other offers on the property superseded any representation made by Horn. On April 14, 2008, Caravellas submitted a cash offer of $749,000.00 on the project property prior to visiting the site. (Findings #34; Plaintiffs' Exhibit 3; Plaintiffs' Exhibit 97, p. 25, ll. 8-10). Caravellas specifically included a provision in the purchase agreement that they had the right to inspect the property and/or had the right to back out of the Agreement at any time for any reason prior to May 10. (Plaintiffs' Exhibit 10). Dr. Caravella then chose to personally inspect the property for two consecutive days, even though he understood that he could have hired an expert to inspect the project, structurally or otherwise. (Plaintiffs' Exhibit 97, p. 34, l. 1; p. 62, ll. 6-21). He testified that he relied on his own expertise in performing this inspection. (*Id.*, p. 40, ll. 2-5). At the time of the inspection, Caravellas had not decided to purchase the property, nor had they hired Horn to inspect the property or finish the construction (*Id.*, p. 71, ll. 15-18). There is no clear and convincing evidence that any representations by Horn were material, because Dr. Caravella made his own assessment of the property when he inspected it.

Further, there is no evidence on record that Caravellas would not have purchased the property for the same price, absent any statements of value from Horn. Dr. Caravella was aware that there were other offers on the property and that First Horizon would not accept any offer below $799,000. Caravellas presented no evidence that they would have rescinded their offer

absent Horn's representation of the value of the property, or that they could have purchased the property at a lower price.

The district court did not find, even by the lower preponderance of the evidence standard, that Horn intentionally misrepresented (fourth element of fraud) any issue of fact to Caravellas. (Conclusion #43). There was no evidence of when Horn last reviewed the documentation in order to find that he could have intentionally misrepresented the value of the property. There was no evidence that Horn indicated to Dr. Caravella that an inspection or appraisal was not necessary. (Tr. Vol. I, p. 264, ll. 15-24). These were general representations of his opinion on which a fraud claim cannot be predicated. *Jordan v. Hunter*, 124 Idaho 899, 907, 865 P.2d 990, 998 (Ct. App. 1993). Caravellas' claim is pure speculation that Horn's estimate of the expenditures into the project equate to the actual value of the property, or that Horn was intentionally misrepresenting anything in regard to the project.

The district court did not find by a clear and convincing standard that Horn's intent was that there be reliance (fifth element of fraud). Horn had not been hired by Caravellas when he gave Dr. Caravella his opinion regarding the property. Dr. Caravella had not even made up his mind to hire Horn at this time. (Plaintiff's Exhibit 97, p. 69, ll. 4-5; p. 71, ll. 17-18).

The district court did not find by a clear and convincing standard that the Caravellas were ignorant of the falsity of the representation (sixth element) of value or that they actually relied (seventh element of fraud) on such representations. Caravella is attempting to represent to this Court that a sophisticated buyer such as himself, who personally spent two days inspecting the property, disregarded his own due diligence of assessing documents of the previous construction

contract (such as First Horizon's draw sheet) and relied solely on this representation by Horn as to the value of a property that had been sitting dormant for 14 months for a cash purchase of $799,000.00.

Dr. Caravella relied on his own inspection of the property and was satisfied that another inspection was unnecessary because of his substantial background and experience. The district court found that Caravellas relied on Horn's representations when they made the revocable offer; Caravellas decided to purchase the property only after Dr. Caravella's own inspection.

The district court did not find by a clear and convincing standard that the Caravellas justifiably relied (eighth element of fraud) on the representation. In fact, the district court's findings are contrary. The district court found that Caravellas relied on Horn's representations to put in an offer on the property. (Findings #33). This offer was revocable, and the Caravellas could rescind the contract for any reason prior to May 10. (Plaintiffs' Exhibit 3). Dr. Caravella subsequently inspected the property two consecutive days, finding several construction issues, and then proceeded with the purchase the property.

When a purchaser is given the opportunity to conduct an independent investigation *and does so,* it is generally held that he is not entitled to rely on alleged misrepresentations of the seller.[3] *Snow's Auto Supply, Inc., v. Dormaier*, 108 Idaho 73, 78, 696 P.2d 924, 929 (Ct. App. 1985); *Nelson v. Hoff*, 70 Idaho 354, 360, 218 P.2d 345, 349 (1950) (A party is not entitled to relief on the ground of false representations where he does not rely upon them but relies on his

[3] It is important that there was no privity between these parties. Caravella had no right to rely on Horn for any representation at that point. These representations do not later merge into the agreement when Caravella hired FDG/Horn to perform subsequent work. If Caravella would have hired someone else to complete the construction there would be no merit to a claim for these representations, and the Court should find no right to rely in this situation.

own judgment or investigations or his own examination of the property involved); *Walker v. Nunnenkamp*, 84 Idaho 485, 490-91, 373 P.2d 559, 562 (1962) (Where a party relies upon his own investigation or judgment as to the value of property, he is not entitled to relief upon the ground of false representations).[4]

At the time of the initial discussions with Horn, Caravellas had not hired FDG/Horn to inspect the property, assess the value, or finish the construction on the project. Horn was not a party to the purchase agreement. At best, Horn was hoping to represent his ability in a way so that he would be hired in the future by Caravellas to build a home, or finish the construction on the Myers' project. A sophisticated purchaser such as Dr. Caravella cannot claim that he justifiably relied on a representation by a person that had zero interest in the alleged representation and is not in the business of assessing the value of real estate in the first place.

The district court also did not find by a clear and convincing standard that the Caravellas were injured (ninth element of fraud) by Horn's estimate of value. Dr. Caravella was aware of other bidders on the property. In fact, there was a backup offer for the same price that Caravellas had agreed to. Further, Caravellas was aware that First Horizon would not accept any offer below $800,000.[5] (Findings #27) There is no evidence on record that Caravellas would not have purchased the property for the same price regardless of whether Horn made any statements

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[4] Caravellas may claim that the representations were fraudulent because of a failure to disclose latent defects. However, there were no latent defects in the construction when the Caravellas purchased the property. Latent defects are those that are not discoverable by a reasonable inspection. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 50, 740 P.2d 1022, 1035 (1987). Every alleged defect in construction when the property was purchased by Caravellas was found when Jared Kay was hired to inspect the property. These defects were those that would have been found by any proper inspection at the time of purchase; none of the defects were latent.

[5] It would be purely semantics to argue that the bank accepted $799,000.00 and, therefore, accepted less than $800,000.00.

to him regarding the value of the property and therefore, there is no evidence of injury.

ii. Condition & Quality of the Home, and Workmanship of Construction.

The district court found that Horn advised the Caravellas that certain structural, framing and leaking issues needed to be remedied as soon as possible. Mrs. Caravella testified that while she had concerns about the water intrusion into the house, Horn minimized the problems and told the Caravellas the home was "in good shape," "structurally sound" and a "great house." (Findings #42). The district court erred in concluding that Caravellas relied upon the builder who would be completing the home to confirm its condition. (Conclusions #37). There is no clear and convincing evidence to support this conclusion.

Caravellas claim that the district court erred because it found that Horn was merely incompetent rather than intentionally deceiving Caravellas. (Appellants' brief, p. 22). However, Caravellas' entire argument is that Horn was incompetent, and that he knew he was incompetent, or was ignorant of his incompetence. (*Id.*, pp. 21-24). Caravellas claim, "It is obvious from the nearly innumerable construction defects later found in the Home that Horn knew almost nothing about the workmanship, condition or quality of the construction." (*Id.*, p. 21)

Caravellas were not relying on the builder who was going to complete the house for such representations, because Caravella had not decided to hire Horn at this time. (Plaintiffs' Exhibit 97, p. 71, ll. 15-18; p. 72, ll. 18-20) ("[W]e had not decided that we were going to have Mr. Horn build it;" "[W]e did not tell him to do anything at that visit because I had not decided I was going to hire him yet.")

First, these statements were not representations of fact or material. These were Horn's

opinions on the project. He believed that the construction, at that point, was "in good shape," "structurally sound" and a "great house." The construction had stopped abruptly due to foreclosure and an assessment of where each stage and/or project of construction was at the time of stoppage was not performed. It would be difficult, even for a very experienced builder, to assess exactly where the project had stopped and what remained for every single part of construction on a 6,700 square foot house with 1,525 square foot attached garage after this lapse of time. (Plaintiffs' Exhibit 6). Each of the alleged defects that Caravellas claim as evidence of that the condition, quality, and workmanship had been fraudulently represented would have been found by the building code inspector and corrected by Horn prior to completion of the project, just as they were found by Jared Kay, the person Carvellas later hired to inspect and complete the project. (*See* Plaintiffs' Exhibit 2, p. 2).

A representation which is expressed and understood as nothing more than a statement of opinion cannot constitute fraud, and this is especially true where the opinion expressed is honestly entertained. *Smith v. Johnson*, 47 Idaho 468, 276 P. 320, 321 (1929). To be actionable, a false representation must be one of fact as distinguished from an expression of opinion which ordinarily is not presumed to deceive or mislead, or to influence the judgment of the hearer, and upon which he has no right to rely. *Id. See also Country Cove Dev., Inc. v. May*, 143 Idaho 595, 601, 150 P.3d 288, 294 (2006) (Opinions cannot form the basis of a fraud claim because they do not speak to matters of fact. An exception to the general rule exists where a false prediction or opinion is given with the intent to mislead.)

The district court concluded by a preponderance of the evidence that Horn did not know

that these representations were false. (Conclusions #43). Further, the district court concluded that there is no evidence in the record that Horn was actually aware of the poor workmanship on the framing, flashing and other places in the home. (Conclusions #44). Caravellas successfully painted Horn as one who was not a "hands-on" general contractor/builder. (*Id.*)

Caravellas have not shown, through clear and convincing evidence, that the district court erred in concluding that Horn did not know these representations were false. They have not shown that Horn had knowledge and intent to deceive regarding his representations that the house was "in good shape," "structurally sound" and a "great house."

Consistently, there is no clear and convincing evidence that these representations were intended to be relied on, that Caravellas justifiably relied on them, or that there was any injury from the representations for the same reasons as stated above regarding the representations of value. In fact, the district court, using the lower preponderance of the evidence standard, concluded that sophisticated purchasers like the Caravellas would not likely have relied solely on statements regarding Horn's building skills, reputation, and self-promotion.[6] (Conclusion #44).

b. Horn's Statements regarding the Progress and Quality of the Work performed pursuant to the Contract with the Caravellas were not fraudulent.

Caravellas claim that the district court expressly found that Horn (FDG) represented to

[6] Self-promotion is not actionable representations. *See Cook, Perkiss & Liehe, Inc. v. N. California Collection Serv. Inc.*, 911 F.2d 242, 246 (9th Cir. 1990) (The common theme that seems to run through cases considering puffery in a variety of contexts is that consumer reliance will be induced by specific rather than general assertions. Advertising which merely states in general terms that one product is superior is not actionable); *Stearns v. Select Comfort Retail Corp.*, 08-2746 JF, 2009 WL 1635931 (N.D. Cal. June 5, 2009) (Unverifiable or generalized statements are not actionable, for as with claims of intentional misrepresentation, such statements are not actionable because no reasonable consumer relies on puffery); *See also Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1140 (C.D. Cal. 2005) (Assertion of "quality," "reliability," and "performance" are mere puffery and not actionable.)

the Caravellas that major, critical portions of the work had been completed according to the plans when, in fact, such work was neither completed nor did it conform to the plans. (Appellants' brief, p. 25). There is no clear and convincing evidence that Horn intentionally misrepresented the progress and quality of work performed pursuant to the parties' agreement.

Caravellas have accused Horn of knowingly presenting fraudulent representations, when the evidence demonstrates that there was a major communication problem regarding the construction project from the beginning of the process, and there was never a meeting of the minds as to the tasks at hand. (*See* Defendants' Exhibit L; Plaintiffs' Exhibit 72, 84). This was the fault of both parties. After continual miscommunication between the parties on construction issues, Horn gave Dr. Caravella the option of performing work by written contract. (Defendants' Exhibit HH). Caravella declined, acknowledging the difficulty with communicating solely through email. (*Id.*)

The district court concluded that there was no evidence that Horn was actually aware of the alleged defects in workmanship on the framing, flashing and other places in the home. (Conclusions #44). The district court found that Horn had represented that the exterior stonework had been completed. (Findings #66). FDG had completed the stonework according to the changes that Myers had made to the plans. (Findings #67). FDG also completed the flashing and ridge vents although, once leaks were discovered, additional flashing was needed in a few areas. (Findings #71). FDG also completed the siding on the project although, again, it was completed according to the changes that Myers had made to the plans (which Dr. Caravella did not agree with). This miscommunication caused the district court to find the siding was not

completed according to the plans. (Findings #73).

The district court found that FDG billed Caravellas for installed garage and barn doors, but the barn doors had not been installed. (Findings #82). This was not entirely disputed by Horn. All three garage doors had been installed. The barn doors were in the process of being installed by Yellowstone and it had been represented to Horn that the installation had been complete. Horn relayed the same to Dr. Caravella in an email, but later found that Yellowstone was waiting to have some trim finished around the doors before installation. Once Dr. Caravella refused to pay the delinquent Yellowstone invoice, the Yellowstone crew did not finish the installation of the barn doors.

Horn described the work being done to Caravellas in a manner consistent with what the parties had done in the past, by email. This may have led to a breakdown in communication for this significant construction project. Horn believed that the goal was to have the entire exterior finished before the next snow fall. (Defendant Exhibit L). Caravellas claim that FDG was supposed to complete phase one of the project for $50,000, which included shoring up the structural framing, finishing the ridge vents, and finishing the stonework. (Tr. Vol I, p. 123, ll. 19-25). The district court, however, concluded that Caravellas originally agreed to have FDG perform that work and other additional tasks for a total contract price of $88,500. The district court further found that due to Dr. Caravella continually adding to and/or adjusting the authorized work by email, he had increased the contract price to $124,646.79. (Findings #64, 131).

c. The Billing for the Work performed on the Caravella's property was not fraudulent.

The district court concluded that Yellowstone misrepresented the amount and value of materials used in the construction of the home, although it did not find such misrepresentation as intentional. (Conclusions #44). It further found that it was just as likely that Horn's inexperience as a general contractor/builder was the chief reason for the poor management of materials on the project and that Yellowstone's failure to clearly account for the materials actually supplied and used on the Caravella project was concerning. (Conclusions #47).

The district court had no evidence to conclude that FDG/Horn fraudulently overbilled Caravellas, because FDG was not the entity determining the amount of materials needed for each project nor was FDG the entity creating the invoices for the materials. FDG was receiving invoices from Yellowstone, and then forwarding these on to Dr. Caravella. (*See* Defendants' Exhibits XXX, YYY). Yellowstone would determine the amount of materials needed to complete a job, order the materials, and then send an invoice to FDG. FDG was not a part of this process other than forwarding the invoice and billing Caravellas for the materials and labor.

The district court's Findings #113-123 are in regard to the overbilling for materials. Each of these findings indicates that the billing originated from Yellowstone Lumber to FDG or to FDG and the Caravellas. There is no evidence on record that FDG manipulated the billing in order to increase its own profits.

Caravellas do not dispute the above findings and conclusions but instead claim that Horn should have known he was overcharging based upon an alleged agreed upon price of $88,500, but the Caravellas were billed, and paid, $138,097.24. (Appellants' brief, p. 27.) Caravellas,

however, admit that FDG was actually owed at least $126,646.79 for the work performed. (*Id.*) These statements are based on the district courts' finding, by a preponderance of the evidence, that the parties had a contract for $88,500. However, there is no clear and convincing evidence that a contract was formed for this amount.

The evidence proves that the agreement was actually a cost plus contract wherein the immediate goal was to finish the entire exterior before the next snow fall. (Plaintiffs' Exhibit 16; Defendants' Exhibit L). On May 13, Dr. Caravella informed Horn, "However you want to phase the project is fine with me. I would just like to have the entire exterior finished before the next snowfall." (Plaintiffs' Exhibit 22; Defendants' Exhibit L).

On May 16, Dr. Caravella asked Horn to estimate what certain projects would cost including the rough in electric; the installation of the HVAC duct work; insulation; and the roof and ridges. (*Id.*) Horn emailed Dr. Caravella back, stating, "I will round off the numbers for you but in general this is what you're looking at in our desired order of accomplishment..." Horn set forth the following:

> $50k for exterior stone, framing materials and labor;
> $70k for plumbing, electrical rough, and HVAC;
> $35k for exterior wrap, siding, pre-stain;
> $15k for insulation;
> $45k for drywall.

(*Id.*) He stated that it would cost Caravellas approximately $150k-$200k to seal up the house and complete the rough in mechanicals before winter. (*Id.*)

At trial, Dr. Caravella admitted that the general estimates given by Horn were not actual bids but that Horn was supposed to provide him with some updated worksheets with firm

estimates in the following weeks. (Tr. Vol. I, p. 124, ll. 10-20). Dr. Caravella stated that since FDG was not supposed to start any work until he had a bid price and these were the only estimates he received, he assumed that these were the actual bid prices. (*Id.*)

The evidence in the record shows that there was never a meeting of the minds as to a contract for work in the amount of $88,500.[7] The goal of phase one was to have the entire exterior finished before the next snowfall and Horn informed Dr. Caravella it would cost approximately $150k-$200k. Further, the general estimates for the work mentioned above did not include everything that would be necessary to finish the entire exterior. There was a misunderstanding as to the work to be performed and there is absolutely no evidence that proves Horn knew Caravellas were being overcharged.

Caravellas also cites to *Parker v. Herron*, 30 Idaho 327, 164 P. 1013 (1917) an Idaho case from 1917 for an assertion that, "Circumstances inconsistent with an honest, reasonable belief in the truth of the statements, or *indicating a reckless disregard for the truth*" are sufficient to establish the scienter element of fraud. However, this is not the law in Idaho. It is clear that for a finding of fraud a person must establish nine elements, one being "the speaker's knowledge of its falsity." *Glaze v. Deffenbaugh,* 144 Idaho 829, 833. Modern Idaho case law does not include recklessness as an element of fraud.

Caravellas also claim that Horn's prior conduct with Myers and First Horizon is evidence of motive and intent because the district court found a "pattern of billing for materials that were

[7] The "meeting of the minds" must occur on all material terms to the contract. *Barry v. Pac. W. Const., Inc.*, 140 Idaho 827, 831-32, 103 P.3d 440, 444-45 (2004).

never used in constructing the home." (Findings #137). However, neither Myers, First Horizon, nor the district court in this case accused or found that Horn had done anything improper in regard to his dealings with Myers or First Horizon. It is unknown what happened to any materials that were left on the property during the 14 months from when construction stopped and resumed on the property and there is absolutely no evidence that Horn was responsible for any materials not accounted for during this time.

C. THE DISTRICT COURT CORRECTLY HELD THAT MIKE HORN WAS NOT PERSONALLY LIABLE AS AN AGENT FOR FDG.

Caravellas claim that Horn entered into the contract with them as an agent for an undisclosed principal. (Appellants' brief, p. 28). Their entire argument on this issue is that the principal, Frontier Development Group, LLC dba Open Range Homes was never disclosed to Caravellas prior to the time the contract was entered into. (*Id.* 28-36).

The district court concluded that there was no evidence in the record that Horn attempted to conceal the LLC from Caravellas. (Conclusions #59). There is substantial and competent evidence to support this conclusion. In an email communication with Greise and Caravella, Horn disclosed that the construction work is done by Open Range Homes. He stated:

> I operate on a cost plus contract of 15% and I don not build on a fixed price. **Once the owner is firm on hiring <u>Open Range</u>**, I require a $25K deposit which is held in my account until the final draw. At the time of the final draw, all final bills are paid off including any due contract fee and any remainder paid back to the Owner.

(Plaintiffs' Exhibit 16). Consistently, all of the email communications from Horn, prior to and after any agreement, were from his address, builder@openrangehomes.com, and there was

signage for Open Range Homes at the Project site from the time the Myers project began until FDG stopped construction on the Project which the district court found that Caravellas should have seen. (Tr. Vol. I, p. 235-237; Findings #163). This signage was in place when Caravellas visited the project prior to their purchase of the property. Frontier Development Group, LLC was registered to do business in Idaho, and had declared a dba for Open Range Homes. It was a registered contractor in Idaho. (Findings #155).

Further, the district court found it important that Dr. Caravella was a sophisticated buyer. (*Id.*) The district court found that Dr. Caravella must have known he was dealing with FDG because all of the bills paid by Caravellas were made payable to Frontier Development Group, LLC or Open Range Homes (Defendants' Exhibits #Q, BB, NN, UU). Supporting this finding is the absence in the record of any communication from Dr. Caravella inquiring as to who the checks should be made out to – indicating that he was already aware of the entity. Also, the invoices were sent on FDG letterhead (Defendants' Exhibits #V, W). There is substantial evidence in the record which supports the district court's finding that Caravellas were on notice they were dealing with a business entity. (*Id.*)

D. THE DISTRICT COURT CORRECTLY HELD THAT FDG WAS NOT AN "ALTER EGO" OF MIKE HORN.

The district court concluded that, although Horn was not overly attentive to the formalities of entity ownership, Caravellas failed to prove by a preponderance of the evidence that there was a complete unity of interest and ownership. (Conclusions #59). There is substantial and competent evidence to support the district court's findings.

The district court found that Horn created FDG for the purpose of operating a business as

a building contractor and registered the assumed business name of Open Range Homes for FDG with the Idaho Secretary of State. (Findings #155; Plaintiffs' Exhibit 90). It further found that FDG owned construction related assets including two telescopic forklifts. (Findings #157; *See* Tr. Vol II, p. 910, ll. 24 – p. 211, l. 10). There is no evidence that Horn and FDG comingled funds; Horn testified that he did not receive a salary or take away draws until a project was complete. (Tr. Vol II, p. 910, ll. 12-23). In other words, he did not pay himself or pay personal debts with FDG's funds.

As stated above, Horn disclosed his LLC to Caravella prior to entering into any agreements with Caravella (Plaintiffs' Exhibit 16), all of the email communications from Horn, prior to and after any agreement were from his work email address, builder@openrangehomes.com, and there was signage for Open Range Homes at the Project site from the time the Myers project began until FDG stopped construction on the Project (Tr. Vol. I, p. 235-237).

Caravellas argue that the only facts relied on by the district court in support of its conclusion that Horn should not be held personally liable were Horn's unsupported testimony. However, this is the only evidence on record, and therefore, the only evidence that the district court could have relied on.

Piercing the corporate veil is an equitable remedy to be exercised with caution. *Jordan*, 124 Idaho 899, 905, 865 P.2d 990, 996. The Court should not disregard the separate identity of the corporation unless doing so is necessary to avoid unjust consequences inconsistent with the corporate concept. *Barlow's, Inc. v. Bannock Cleaning Corp.*, 130 Idaho 310, 315, 647 P.2d

766, 771 (Ct. App. 1982). This view is shared and supported by numerous other jurisdictions as well. *See State ex rel. v. Superior National Ins. Co.*, 144 P.3d 103, 1040 (Ore. 2006) (Piercing the corporate veil is an extraordinary remedy which exists as a last resort.)

To warrant casting aside the legal fiction of distinct corporate existence it must be shown that there is such a unity of interest and ownership that the individuality of such corporation and such person has ceased; and it must further appear from the facts that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice. *Maroun v. Wyreless Sys., Inc.*, 141 Idaho 604, 613, 114 P.3d 974, 983 (2005). Both elements of the two-prong test must be satisfied in order for the court to proceed with piercing the corporate veil. *Davidson v. Beco Corp.*, 122 Idaho 560, 569-70, 733 P.2d 781, 789-90 (Ct. App. 1986), *overruled on other grounds by Pierson v. Brooks*, 115 Idaho 529, 768 P.2d 792 (Ct. App. 1989). Therefore, even when the plaintiff can clear the high hurdle of demonstrating a clear unity of interest between the individual and the corporation, the plaintiff must also demonstrate that a fraud or injustice would occur should the corporate shield remain intact. *Id.*

An LLC is specifically relieved of the requirement of observing any particular formalities relating to the exercise of its powers or management of its activities. I.C. §30-6-304. In the comments to this section, it states that "In the realm of LLC's this factor is inappropriate, because informality of organization and operation is both common and desired." Caravellas point to the example set forth in this section:

> EXAMPLE: The sole owner of a limited liability company uses a car titled in the company's name for personal purposes and writes checks on the company's account to pay for personal expenses. These facts are relevant to a piercing claim; they pertain to

economic separateness...

There is no evidence that Horn used a vehicle titled in FDG's name for personal purposes or that he wrote checks on FDG's account to pay for personal expenses. Nor is there evidence that any funds were comingled. *See Vanderford Co., Inc. v. Knudson*, 144 Idaho 547, 556-57, 165 P.3d 261, 270-71 (2007) (the LLC's checking account was so confusing that the accountant could not be sure whose money was in the account at what times.) The evidence proves that FDG's funds were kept separate and that Horn only took the funds out of the LLC once a project was complete. Their personalities and economic separateness were maintained.

Caravellas also claim that under-capitalization is another influencing factor in the "piercing" analysis. (Appellants' brief, p. 40). It has been held that undercapitalization is one factor to be considered in determining whether or not to pierce the corporate veil. *Pierson v. Jones*, 102 Idaho 82, 84, 625 P.2d 1085, 1087 (1981). However, financial inadequacy is measured by the nature and magnitude of the corporate undertaking or the reasonableness of the cushion for creditors at the time of the inception of the corporation.

This factor has not been and should not be used as part of the analysis in Idaho of whether to pierce the veil of an LLC. The LLC at issue, FDG, was created for the purpose of operating as a building contractor. FDG was operated by the managing partner who hired out all of the hands-on work to subcontractors and had built three homes prior to working on Myers/Caravellas project. The nature of this LLC was very focused and it was not possible, nor necessary to have substantial capital invested into such an operation. Prior to its dealing with Caravellas this LLC had only been in operation for approximately two years. (Findings #3).

Regardless, there is no evidence that the LLC was undercapitalized, because there is no evidence of the extent of capitalization of the LLC at its inception. Horn testified that FDG owned two forklifts, but the value and date of purchase of such forklifts is not on record. There is no basis for a finding that the LLC was undercapitalized for its size and function.

Caravellas also claim that an inequitable result, which would "sanction a fraud or promote injustice," will follow if Horn is allowed to engage in such damaging behavior and be allowed to hide behind such a thin corporate veil. (Appellants' brief, p. 41) The district court did not find that an inequitable result has occurred; it found that "there were inequitable concerns." (Conclusions #60). There were no findings by the district court that there were any serious inequitable results. It is not a proper basis to pierce the corporate veil where there exists a risk that the corporation may file for bankruptcy or become insolvent, even when such action impairs a plaintiffs ability to recover damages. *Morgan v. Burks*, 93 Wash.2d 580, 583, 611 P.2d 751, 760 (1980); *Jackson v. Odell*, 851 S.W.2d 535 (Mo. 1993).

IV. CONCLUSION

FDG/Horn respectfully request the Court affirm the district court's decision, finding that they were not liable for fraud to Caravellas. FDG/Horn further request that Court affirm the district court's determination that Horn is not personally liable under theories of undisclosed agency or alter ego. FDG/Horn also request an award of their attorneys fees and costs incurred on appeal.

DATED this 30th day of July, 2013.

MOORE & ELIA, LLP

Michael J. Elia

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of July, 2013, I served a true and correct copy of the attached RESPONDENTS' BRIEF, by the method indicated below, and addressed to the following:

Fredrick J. Hahn III, Esq.
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✓ U.S. Mail, postage prepaid
____ Hand Delivered
____ Overnight Mail
____ Fax Transmission

MOORE & ELIA, LLP

Michael J. Elia