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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0367**

Andrew J. Bloomquist, et al.,  
Respondents,

vs.

Wisdom Development Group, LLC,  
a/k/a Acquisition Services, et al.,  
Defendants,

Teena G. Pham, et al.,  
Appellants.

**Filed January 13, 2009  
Affirmed; motion granted  
Hudson, Judge**

Ramsey County District Court  
File No. 62-CV-07-2294

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Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and Harten,  
Judge.\*

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to  
Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**HUDSON**, Judge

This is an appeal from default judgment and summary judgment in favor of respondents in their tort claims against appellants. We affirm and grant respondents' motion to strike.

### FACTS

Respondents invested in a private project investor plan in which respondent Andrew Bloomquist, a recent college graduate, purchased real property on which one of the defendants was to construct and then sell a single-family home. Pursuant to this plan, he also signed a construction loan agreement consisting of two mortgages; respondent Gloria Bloomquist, his mother, co-signed the underlying notes. Respondents later asserted that the house had not been constructed and that the work, for which \$164,589.77 in funds had been released, had not been performed. They brought various claims against the entities and individuals involved in this investment plan, including a breach-of-fiduciary-duty claim and a negligent-misrepresentation claim against appellant Teena Pham, and an unjust-enrichment claim against appellants Pham and David Wagner. Appellants did not serve an answer, and respondents moved for default judgment, filing the requisite affidavits. Appellants also failed to respond to requests for admissions and made no motion to amend. Respondents also moved for summary judgment against appellants, asserting that respondents' requests for admissions from appellants should be deemed admitted for failure to answer. After the time for serving an

answer had expired, appellants moved to dismiss for failure to state a claim and for summary judgment.

The district court granted default judgment based on appellants' failure to answer the complaint and granted summary judgment after deeming the requests for admissions admitted. The court awarded damages of \$164,589.77. It deemed appellant Pham and other defendants jointly liable for the entire amount and appellant Wagner jointly and severally liable for only \$10,750. The court denied appellants' request for reconsideration, and this appeal follows. Respondents moved to strike portions of the appendix to appellants' brief.

## **D E C I S I O N**

### **I**

We first address respondents' motion to strike the portion of appellants' appendix containing appellants' amended answer and second amended answer, both of which were filed in the district court after judgment was entered and were included in the record transmitted to this court on appeal. The record on appeal includes: "The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. But because the answers were filed after judgment was entered, the district court did not consider them in making its decision. Therefore, we also do not consider them, and we grant the motion to strike them from the appellants' appendix. *See Urban v. Am. Legion Post 184*, 695 N.W.2d 153, 158 n.1 (Minn. App. 2005) (striking depositions from the appendix to a party's brief to this court where the depositions were submitted to the district court after the summary judgment hearing and where there was

no indication that the district court considered the depositions in granting summary judgment), *aff'd*, 723 N.W.2d 1 (Minn. 2006).

## II

Appellants first argue that the district court erred in holding them liable as individual employees because there was no basis for piercing the corporate veil. Appellants raised this argument in their motion to dismiss for failure to state a claim under Minn. R. Civ. P. 12.02(e), which the district court denied. When an appellate court reviews a district court's decision on a motion to dismiss under Minn. R. Civ. P. 12.02(e), it must examine whether the complaint sets forth a legally sufficient claim for relief. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). Using a *de novo* standard of review, the appellate court must accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party. *Id.*

Respondents sued appellant Pham individually for breach of fiduciary duty and negligent misrepresentation and sued appellants Pham and Wagner individually for unjust enrichment. Appellants argue that they cannot be held individually liable for these torts because all of the challenged acts were performed in the course of their employment and because there was no basis for piercing the corporate veil.

“Negligence cannot be imputed to a corporate officer unless he participated in, directed, or was negligent in failing to learn of and prevent the tort.” *Stelling v. Hanson Silo Co.*, 563 N.W.2d 286, 290 n.4 (Minn. App. 1997) (quotation omitted). When seeking to hold an individual corporate officer personally liable, it is not necessary to

“pierce the corporate veil” when there was no attempt to hold the person liable solely based on the person’s status as a stockholder or officer of a corporation. *In re Dougherty*, 482 N.W.2d 485, 490–91 (Minn. App. 1992), *review denied* (Minn. June 10, 1992). Here, respondents sought to hold appellants individually liable for the tortious conduct that respondents asserted appellants personally engaged in, and they did not seek to pierce the corporate veil. Appellants’ first argument has no merit.

### III

Next, appellant Wagner argues that he was not served with process because he was not residing at the address where the summons and complaint were served. He contends that the district court therefore lacks jurisdiction over him, requiring that the judgment against him be reversed. “The determination of whether a summons and complaint is properly served is a jurisdictional question of law.” *Amdahl v. Stonewall Ins. Co.*, 484 N.W.2d 811, 814 (Minn. App. 1992), *review denied* (Minn. July 16, 1992). But “[t]he location of a person’s usual place of abode is a question of fact.” *Peterson v. Eishen*, 495 N.W.2d 223, 225 (Minn. App. 1993), *aff’d*, 512 N.W.2d 338 (Minn. 1994). A district court’s finding as to a person’s usual place of abode will not be reversed unless clearly erroneous. *Id.*

Service is made “[u]pon an individual by delivering a copy to the individual personally or by leaving a copy at the individual’s usual place of abode with some person of suitable age and discretion then residing therein.” Minn. R. Civ. P. 4.03(a). A defense of insufficient service of process is waived if not included in an answer or in a rule 12 motion to dismiss. Minn. R. Civ. P. 12.08(a). “A party may waive a jurisdictional

defense, including insufficient service of process, by submitting itself to the court's jurisdiction and affirmatively invoking the court's power." *Shamrock Dev., Inc. v. Smith*, 754 N.W.2d 377, 381 (Minn. 2008) (citation omitted).

Although appellant Wagner argues that he did not reside at the address where service occurred, he did not make a motion to dismiss to the district court, but merely filed an affidavit making this bare assertion. Wagner submitted to the court's jurisdiction by filing motions to dismiss on other grounds and for summary judgment, without asserting lack of jurisdiction. Accordingly, the district court correctly ruled that Wagner waived the defense of insufficient service of process. Further, Wagner disputes the factual assertion in the process server's affidavit that he resided at the address where service occurred, but the district court was never asked to make a finding. *See Peterson*, 495 N.W.2d at 225 (stating that location of person's usual place of abode is a question of fact). This court thus has no findings to review and certainly cannot make a finding as to disputed facts for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that appellate court should not address issue not decided by the district court, especially when the facts are in dispute); *Kucera v. Kucera*, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966) (stating that "[i]t is not within the province of [appellate courts] to determine issues of fact on appeal").

#### IV

Appellants next challenge the amount of damages awarded to respondents. Appellants appealed directly from the default judgment, without, as is usually the case, first moving the district court to vacate the default judgment under Minn. R. Civ. P.

60.02. The decision of whether to grant or deny a default judgment is within the discretion of the district court, which will not be reversed absent an abuse of discretion. *Black v. Rimmer*, 700 N.W.2d 521, 525 (Minn. App. 2005), *review dismissed* (Minn. Sept. 28, 2005). When a party appeals directly from a default judgment, rather than from an order denying a motion to vacate the default judgment, only a limited number of issues may be raised. *Thorp Loans & Thrift Co. v. Morse*, 451 N.W.2d 361, 363 (Minn. App. 1990), *review denied* (Minn. Apr. 13, 1990). These include whether the complaint stated a cause of action and whether the relief granted was justified by the complaint. *Id.*

Appellants contend that the award grants extra-contractual damages to respondents, asserting that the district court apparently ignored the value to respondents of the land and the structure on the land. “In general, extra-contractual damages . . . are not recoverable for breach of contract except in those rare cases where the breach is accompanied by an independent tort.” *Lickteig v. Alderson, Ondov, Leonard & Sween, P.A.*, 556 N.W.2d 557, 561 (Minn. 1996). But here appellants are liable in tort, not contract, and their argument is misplaced.

Further, respondents contend that appellants did not raise the issue of extra-contractual damages below. While appellants cite a discussion in their memorandum to the district court referring to the value of the land, settlement charges, and taxes, even if these were taken into account, it does not demonstrate that respondents were not entitled to damages based on their tort claims. In any event, the district court did not address extra-contractual damages, and we decline to do so for the first time on appeal. *Thiele*, 425 N.W.2d at 582.

Appellants also contend that the award of damages was arbitrary because there was “no justification” for the amounts awarded by the district court. In a default judgment, “the relief awarded to the plaintiff must be limited in kind and degree to what is specifically demanded in the complaint even if the proof would justify greater relief.” *Thorp*, 451 N.W.2d at 363. The district court is to determine the amount of damages to which the plaintiff is entitled. Minn. R. Civ. P. 55.01(b). The relevant facts are to be set out by affidavit of either the party or the party’s lawyer, and the affidavit may include reliable hearsay. Minn. R. Gen. Practice 117.02. Respondents submitted affidavits to support their claim of damages, while appellants submitted no affidavits.

Damages may be awarded for the torts asserted as follows. In an equitable claim for breach of fiduciary duty, “[e]quity allows recovery of the lost value of an asset, the profit of which a beneficiary was deprived, or any improper financial gains made by the fiduciary. Equity seeks to restore the plaintiff to the position he or she occupied before the breach or to claim the defendant’s ill-gotten profits for the plaintiff.” *R.E.R. v. J.G.*, 552 N.W.2d 27, 30 (Minn. App. 1996). “The fashioning of an equitable remedy is committed to the sound discretion of the [district] court.” *Shepherd of the Valley Lutheran Church of Hastings v. Hope Lutheran Church of Hastings*, 626 N.W.2d 436, 443 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). Generally, damages for misrepresentation are the plaintiff’s out-of-pocket losses as measured by “the difference between the actual value of the property received and the price paid for the property, along with any special damages naturally and proximately caused by the fraud prior to its discovery.” *B.F. Goodrich Co. v. Mesabi Tire Co.*, 430 N.W.2d 180, 182 (Minn. 1988).

Finally, “recovery for unjust enrichment is based upon what the person enriched has received rather than what the opposing party has lost.” *Anderson v. DeLisle*, 352 N.W.2d 794, 796 (Minn. App. 1984), *review denied* (Minn. Nov. 8, 1984). Respondents’ affidavits provided proof of their damages under the above theories, and, on this record, the district court’s award of damages was neither an abuse of discretion nor clearly erroneous.

## V

Next, appellants argue that the district court erred in entering default judgment against them as a sanction for not responding to discovery requests, particularly while their motion to dismiss was pending. But the default judgment was based on appellants’ failure to serve an answer to the complaint. The district court’s decision to grant or deny a default judgment will not be reversed unless the district court abused its discretion. *Black*, 700 N.W.2d at 525.

A defendant must serve its answer within 20 days after service of the summons. Minn. R. Civ. P. 12.01. But a defendant who asserts the defense of failure to state a claim upon which relief can be granted by motion should do so before filing a responsive pleading. Minn. R. Civ. P. 12.02. When a party fails to plead or otherwise defend a claim within the time allowed by the law, default judgment shall be entered. Minn. R. Civ. P. 55.01; *Doe v. Legacy Broad. of Minn., Inc.*, 504 N.W.2d 527, 528 (Minn. App. 1993). While appellants argue that they had a good faith belief that they would be dismissed from the lawsuit based on their motion to dismiss, they also brought their motion outside of the 20-day period in which to serve their answer.

The district court granted respondents' motion for default judgment against appellants. It found no evidence showing they had served an answer and noted that they had offered no reason or excuse for their failure to do so. Appellants have made no showing that the district court abused its discretion.

## VI

Next, appellants ask this court to open the default judgment and allow trial on the merits. They argue that there is significant evidence to support opening the default judgment and allowing for a trial on the merits under Minn. R. Civ. P. 60.02. It is within the district court's discretion to open a default judgment if the party establishes the proper grounds for doing so. *Roehrdanz v. Brill*, 682 N.W.2d 626, 631–32 (Minn. 2004). Appellants, however, did not move the district court to vacate the default judgment. Instead, they appealed directly from the default judgment and are asking this court to vacate for the first time on appeal. This court cannot address an issue raised for the first time on appeal. *Thiele*, 425 N.W.2d at 582.

## VII

Next, appellants argue that the district court's entry of judgment in favor of respondents on their claims of breach of fiduciary duty, negligent misrepresentation, and unjust enrichment should be vacated because none of the claims are supported by the pleadings. As addressed above, in an appeal from a default judgment, appellants may challenge whether, in relevant part, the complaint stated a cause of action. *Thorp*, 451 N.W.2d at 363.

A fiduciary relationship exists “when confidence is reposed on one side and there is resulting superiority and influence on the other; and the relation and duties involved in it need not be legal, but may be moral, social, domestic, or merely personal.” *Toombs v. Daniels*, 361 N.W.2d 801, 809 (Minn. 1985) (quoting *Stark v. Equitable Life Assur. Soc’y*, 205 Minn. 138, 145, 285 N.W. 466, 470 (1939)). “Disparity of business experience and invited confidence could be a legally sufficient basis for finding a fiduciary relationship . . . .” *Id.* (quoting *Murphy v. Country House, Inc.*, 307 Minn. 344, 352, 240 N.W.2d 507, 512 (1976)).

Appellants contend that this claim has no merit because courts have been reluctant to extend the fiduciary relationship to a business relationship. *See Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 331 (Minn. App. 2007) (holding that absent binding authority to the contrary, the relationship of architect and client is not a fiduciary one), *review denied* (Minn. Aug. 21, 2007). But in *Carlson*, the court went on to state that “while a relationship may not be fiduciary per se, the facts of the case might create such a relationship.” *Id.* Thus, respondents’ assertions of facts here—specifically, that respondent Andrew Bloomquist was a recent college graduate with no experience in real estate investment, and that appellant Pham held herself out as an expert in this field and encouraged respondents’ reliance on her as such—are sufficient to plead a cause of action for breach of fiduciary duty.

Negligent misrepresentation is defined as follows:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance

of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

*Florenzano v. Olson*, 387 N.W.2d 168, 174 n.3 (Minn. 1986) (citations omitted).

Appellants challenged respondents' negligent misrepresentation claim because it did not specifically state what information provided to respondents was false and gave rise to the claim for negligent misrepresentation, as required by Minn. R. Civ. P. 9.02. But in their complaint, respondents asserted that respondent Andrew Bloomquist received a construction draw request from Pham for funds to be released from the construction loan to vendors for work already completed, but that the vendors failed to provide the labor and/or services alleged. Dismissal for failure to specify the misrepresentation was not warranted.

“To establish an unjust enrichment claim it must be shown that a party has knowingly received something of value, not being entitled to the benefit, and under circumstances that would make it unjust to permit its retention.” *Southtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc.*, 493 N.W.2d 137, 140 (Minn. App. 1992). Appellants argue that this claim should be dismissed based on their denial and/or dispute of the facts. Not having served an answer, appellants cannot argue on this basis for the first time on appeal. *Thiele*, 425 N.W.2d at 582. They also contend that the pleadings are insufficient to pierce the corporate veil but, as we have already discussed, this argument has no merit.

## VIII

Finally, even if appellants' arguments are construed to be challenging the summary judgment, when reviewing summary judgment we will examine whether there are any genuine issues of material fact and whether the district court erred as a matter of law. *McIntosh County Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 544–45 (Minn. 2008). The court may consider the pleadings, admissions, and affidavits. Minn. R. Civ. P. 56.03. On this record, there were no genuine issues of material fact and the district court properly granted summary judgment against appellants as a matter of law.

**Affirmed; motion granted.**