

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20050175  
Cass County District Court No. 09-03-C-01307

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Curtis Construction Company, Inc.,

Plaintiff/Appellee,

v.

American Steel Span, Inc., dba Mastercraft,  
and Wane Engkjer,

Defendants/Appellants.

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**PLAINTIFF/APPELLEE'S BRIEF**

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**APPEAL FROM THE JUDGMENT ENTERED APRIL 5, 2005,  
IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA,  
THE HONORABLE JOHN C. IRBY, PRESIDING**

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## **ISSUES PRESENTED**

1. Whether the trial court erred in determining that the terms of the contract between Curtis Construction and Mastercraft regarding the work performed at Reile's Transfer did not include a price per square foot charge.

2. Whether the trial court erred in its determination that no oral fixed term agreement existed between the parties on the Rose Creek project, or, in the alternative, whether the trial court erred in determining that Curtis Construction substantially performed the Rose Creek project and failed to reduce the contract price by the diminished value of the driveway.

## **STATEMENT OF THE CASE**

This is an appeal from a East Central Judicial District Court Judgment granted in favor of Curtis Construction Company, Inc. (hereinafter “Curtis Construction”) against American Steel Span, Inc. d/b/a Mastercraft (hereinafter “Mastercraft”) and Wane Engkjer following a bench trial in March of 2005. Curtis Construction urges this Court to affirm the District Court’s Judgment.

Curtis Construction has reviewed Mastercraft and Wane Engkjer’s statement of the case contained on page one and two of its brief dated August 1, 2005, and has one addition to make. The bench trial before East Central Judicial District Court Judge John C. Irby took place on March 3 and 4, 2005. Other than this one addition, Curtis Construction has no objections.

## STATEMENT OF THE FACTS

Curtis Construction is a North Dakota corporation that is a light commercial general contractor specializing in the design and construction of churches. (Transcript (hereinafter “Tr.”) at 23-24). Russell Handegard is the President of Curtis Construction. (Tr. at 23).

Wane Engkjer is the owner of Mastercraft. (Tr. at 339). Mastercraft is a company that sells straight wall buildings and Quonsets throughout the United States. (Tr. at 340).

In late August 2002, Curtis Construction began doing work for Mastercraft at the Wahpeton Canvas Company (hereinafter “WCCO”). (Tr. at 25; 29). Tolly Wangness, an employee of Mastercraft, approached Russell Handegard and asked Curtis Construction to prepare a proposal to do some work for WCCO. (Tr. at 25). Tolly Wangness indicated that Mastercraft needed help from Curtis Construction because they were way behind schedule and were under an enormous amount of pressure on behalf of the owners of WCCO to get the project started and completed. (Tr. at 28). Russell Handegard met with the owners of WCCO and submitted a written proposal regarding that project to Mastercraft. (Tr. at 28-30). The written proposal submitted by Curtis Construction to Mastercraft was ultimately signed by both Russell Handegard as the President of Curtis Construction and by a representative of Mastercraft. (Tr. at 30). Ultimately, the work spelled out in the written proposal was completed, an invoice was sent to Mastercraft regarding that work, and Mastercraft paid that invoice in full. (Tr. at 30-31).

Curtis Construction was then asked by Mastercraft to do a second project at the WCCO property. (Tr. at 31). Tolly Wangsness informed Russell Handegard that there was additional work that needed to be completed at the WCCO property, including a second loading dock facility and a driveway from the loading dock to the street. (Tr. at 31-32). Tolly Wangsness asked Russell Handegard if Curtis Construction could do the work. (Tr. at 32). Russell Handegard inquired of Tolly Wangsness if there were written drawings or specifications regarding the work Mastercraft wanted Curtis Construction to do. (Tr. at 32). Tolly Wangsness indicated that there were not, but that he would get them to Russell Handegard (he never did). (Tr. at 32). Tolly Wangsness then approached Russell Handegard again some time later with his own hand drawn sketches and advised Russell Handegard that those hand drawn sketches represented the second work that Mastercraft wanted Curtis Construction to do at the WCCO property. (Tr. at 32). Russell Handegard informed Tolly Wangsness that if there were not anymore specific drawings or specifications regarding the second project at the WCCO property, Curtis Construction would do the work on a time and material basis. (Tr. at 32). Tolly Wangsness, on behalf of Mastercraft, agreed that the second project at WCCO would be done on a time and materials basis. (Tr. at 33). Curtis Construction completed the work requested by Mastercraft and an invoice was sent regarding that work. (Tr. at 33-34). Mastercraft paid that invoice in full. (Tr. at 34).

The next work Curtis Construction did for Mastercraft took place at the Reile's Transfer property. (Tr. at 35). Tolly Wangsness telephoned Russell Handegard and indicated that Mastercraft was having serious conflicts with Reile's Transfer regarding a building that Mastercraft had erected that Reile's Transfer was not accepting and

Mastercraft needed to get somebody in there to help Mastercraft mitigate the problem. (Tr. at 35). Russell Handegard then met with Tolly Wangsness and Ken Reile at the Reile's Transfer property. (Tr. at 35-36). During that meeting, Russell Handegard discussed the problems that the Reile's had with respect to the work that Mastercraft had done, and made recommendations on how those problems could be fixed. (Tr. at 36-40). The Reile's agreed with the advice and recommendations that Russell Handegard made concerning remedying the problems and Mastercraft told Curtis Construction to go ahead and do the work. (Tr. at 40-41). The work that Curtis Construction did for Mastercraft at the Reile's Transfer property was done on a time and materials basis, which Mastercraft agreed to. (Tr. at 41). Following completion of the work, Curtis Construction prepared an invoice and sent that to Mastercraft. (Tr. at 41). Mastercraft made two payments totaling \$14,000.00 with respect to Curtis Construction's November 27, 2002 invoice on the Reile's Transfer work (total amount due \$19,345.00). (Tr. at 41-42).

The last work Curtis Construction did was for Wane Engkjer on the driveway at his personal residence. (Tr. at 45). Curtis Construction's work on Wane Engkjer's driveway was done during the same period of time as Curtis Construction's work at the Reile's Transfer property. (Tr. at 46). Russell Handegard learned about this project from Kent Moritz, who was Curtis Construction's concrete foreman during the summer of 2002 who ultimately left Curtis Construction and went to work for Wane Engkjer following the driveway project. (Tr. at 46; 64). Shortly thereafter, Wane Engkjer wanted to meet with Russell Handegard at Wane Engkjer's residence to talk about the driveway. (Tr. at 48). Wane Engkjer and Russell Handegard met in Wane Engkjer's front yard along with Tolly Wangsness and Kent Moritz, and discussed the project. (Tr. at 48-49).

Wane Engkjer wanted Curtis Construction to do the driveway on a set square foot price. (Tr. at 49). Russell Handegard refused to agree to do the driveway on a set square foot price for a number of reasons, including but not limited to, the poor condition of the driveway prior to being poured, and the fact that there were no written plans or specifications concerning what Wane Engkjer wanted done with his driveway. (Tr. at 49). Wane Engkjer and Russell Handegard finally agreed that the work would be done on a time and material basis and Curtis Construction would try to do it as economically as they could. (Tr. at 51; App. at 55, Finding of Fact 19). The driveway was then poured by Curtis Construction at Wane Engkjer's personal residence and an invoice was sent out by Curtis Construction. (Tr. at 53; 56). Mastercraft and/or Wane Engkjer made one payment of \$5,000.00 on February 10, 2003 with respect to the total driveway invoice (total amount due \$31,674.00 in invoice dated November 27, 2002). (Tr. at 56; Exhibit 4).

After the invoices were sent out by Curtis Construction on both the Reile's Transfer project and the Wane Engkjer driveway project in late November 2002, Russell Handegard had a number of conversations with representatives of Mastercraft and/or Wane Engkjer, due to the fact that the two invoices were not being paid in full. (Tr. at 60). The first conversation was with Tolly Wangsness in November or December of 2002. (Tr. at 60). Tolly Wangsness' response regarding Russell Handegard's concerns over the complete payments on the Reile's Transfer project and the Wane Engkjer driveway project was that Mastercraft had a cash flow problem, but to not worry and that Curtis Construction would get paid. (Tr. at 61).

Following Russell Handegard's initial conversations with Tolly Wangsness, the Reile's Transfer project and the Wane Engkjer driveway project invoices still were not paid in full and Russell Handegard then went to speak to Wane Engkjer in early February of 2003. (Tr. at 62). During Russell Handegard's meeting with Wane Engkjer, Wane Engkjer told Russell Handegard not to worry, that he would get paid, and then asked Russell Handegard to sit down and talk to Tolly Wangsness about the bills. (Tr. at 63). During that conversation with Wane Engkjer, Wane Engkjer did not question the driveway project invoice or the Reile's Transfer project invoice. (Tr. at 63). No further payments ultimately came as a result of that meeting between Russell Handegard and Wane Engkjer. (Tr. at 67).

Russell Handegard continued to attempt to contact Wane Engkjer, via phone and at his office with no success. (Tr. at 67-68). Ultimately, Russell Handegard spoke to Wane Engkjer at his offices in early March of 2003 and inquired as to when the two invoices were going to be paid. (Tr. at 68-69). Wane Engkjer indicated for the first time he was not going to pay Curtis Construction. (Tr. at 69).

A couple of days following that meeting, Wane Engkjer sent a letter to Russell Handegard dated March 6, 2003. (Tr. at 69; Exhibit 6 (App. at 15)). In the letter, Wane Engkjer raised a number of allegations and issues for the first time regarding the driveway project, including an allegation that the driveway had been agreed on at \$2.65 a square foot. (Tr. at 70-71). The letter dated March 6, 2003 did not complain or question the Reile's Transfer invoice in any manner. (Tr. at 70). Russell Handegard responded in writing to Wane Engkjer's letter in correspondence dated March 10, 2003. (Tr. at 71; Exhibit 7 (App. at 16)). Russell Handegard responded to allegations made by Wane

Engkjer in his March 6, 2003 letter, including the fact that there was no agreement to a square foot cost on the driveway due to lack of subgrade preparation, fill not being placed or graded, winter charges for concrete being in effect, concrete requiring accelerator and frost protection, Wane Engkjer's request for thicker than normal concrete and Wane Engkjer's request for higher strength cement. (Tr. at 72; Exhibit 7).

Wane Engkjer did not respond to Russell Handegard's March 10, 2003 letter and shortly thereafter Curtis Construction's lawsuit was initiated against Mastercraft and Wane Engkjer. (Tr. at 74).

## ARGUMENT

**I. The Trial Court did not err in determining that the terms of the contract between Curtis Construction and Mastercraft regarding the work performed at Reile's Transfer did not include a price per square foot charge.**

A trial court's findings of fact will not be reversed on appeal unless they are clearly erroneous. Moen v. Thomas, 2001 ND 95, ¶ 19, 627 N.W.2d 146, 152 (N.D. 2001) (citing Tishmack v. Tishmack, 2000 ND 103, ¶ 7, 611 N.W.2d 204, 206 (N.D. 2000)). A finding of fact is clearly erroneous under N.D.R.Civ.P. 52(a) if there is no evidence to support it, if it is clear to the reviewing court that a mistake has been made, or if the finding is induced by an erroneous view of the law. Akerlind v. Buck, 2003 ND 169, ¶ 7, 671 N.W.2d 256, 259 (N.D. 2003) (citing In Re K.M.G., 2000 ND 50, ¶ 4, 607 N.W.2d 248, 250 (N.D. 2000)). A trial court's findings of fact on appeal are presumed to be correct, and the complaining party bears the burden of demonstrating a finding is clearly erroneous. Id. (citing Piatz v. Austin Mut. Ins. Co., 2002 ND 115, ¶ 24, 646 N.W.2d 681, 688 (N.D. 2002)).

In Moen, the North Dakota Supreme Court held, among other things, that:

“In a bench trial, the trial court is the determiner of credibility issues and we do not second guess the trial court on its credibility determinations. We do not reweigh evidence or reassess credibility, nor do we reexamine findings of fact made upon conflicting testimony. We give no regard to the trial court's opportunity to assess the credibility of the witnesses, and the court's choice between two permissible views of the evidence is not clearly erroneous.”

Moen v. Thomas, 2001 ND 95, ¶ 20, 627 N.W.2d at 152.

In the present case, Mastercraft and/or Wane Engkjer contend that the trial court erred in determining that Exhibit 3 (App. at 12) did not constitute a contract between the parties, and that Kent Moritz had authority to enter into contracts on behalf of Curtis

Construction. To the contrary, Exhibit 3 is not a contract between Curtis Construction and Mastercraft, and Kent Moritz did not have any authority to contract for Curtis Construction.

To begin, Judge Irby's findings of fact following the two day bench trial in March of 2005, which are supported by the record, specifically indicated that there wasn't a written contract entered into by the parties regarding the Reile's Transfer project, that Exhibit 3 (App. at 12) as proffered by Mastercraft did not constitute a contract between the parties, and that the agreement for the Reile's Transfer project was for time and materials. (App. at 53-54, Findings of Fact 7 and 10). Russell Handegard testified during the trial that no one from Curtis Construction signed Exhibit 3. (Tr. at 44). Additionally, Russell Handegard testified that the Reile's Transfer project came about when Tolly Wangsness approached Russell Handegard and asked Curtis Construction to assist Mastercraft with problems that Mastercraft was having regarding work at the Reile's Transfer project, including drainage and slope issues. (Tr. at 35-41). Also, Russell Handegard testified that regarding the Reile's Transfer project there were no plans, specifications or written parameters similar to the second project done at the WCCO property. (Tr. at 41). Further, Russell Handegard testified that after meeting with Tolly Wangsness and the owners at the Reile's Transfer property, that he and Tolly discussed that Curtis Construction's work for Mastercraft at the Reile's Transfer property was going to be on a time and materials basis, and that Tolly Wangsness specifically agreed to that. (Tr. at 41). Lastly, Russell Handegard testified that neither Wane Engkjer nor anyone on behalf of Mastercraft ever claimed that the Reile's Transfer work was not time and materials, and that after the invoice regarding the Reile's Transfer

project was sent to Mastercraft, neither Wane Engkjer nor Tolly Wangsness, nor anyone from Mastercraft contacted Russell Handegard or anyone from Curtis Construction to indicate that there was a written contract with respect to that work. (Tr. at 43; 126).

Second, Curtis Construction contends that the record establishes that Kent Moritz never had authority in any manner to contract on behalf of Curtis Construction. See Tr. at 43-45. As indicated previously, all dealings on both the first and second projects done at the WCCO property, as well as the Reile's Transfer project were projects specifically negotiated and entered into by Russell Handegard. (See Tr. at 25-42). Also, Russell Handegard testified that Exhibit 3 represented nothing more than field notes made by either Kent Moritz or Tolly Wangsness regarding the Reile's Transfer project. (Tr. at 43). Further, Russell Handegard testified that he was not present when the document was made and that none of the information contained on Exhibit 3 was discussed with him prior to it being prepared. (Tr. at 43-44). Russell Handegard also testified that at the point in time the Reile's Transfer project came about (September/October 2002), Kent Moritz's position with Curtis Construction was a concrete foreman. (Tr. at 44). Lastly, Russell Handegard testified that Kent Moritz did not have authority to bind Curtis Construction to any agreements, that he had never been given that authority up to that point, that he never had that authority later, that as of October 10, 2002 (date on Exhibit 3) he had negotiated zero agreements on behalf of Curtis Construction, that after October 10, 2002 he negotiated zero contracts on behalf of Curtis Construction, and that Russell Handegard was the sole person responsible for negotiating contracts on behalf of Curtis Construction. (Tr. at 44-45; see also Tr. at 156-57).

Third, and contrary to the contention made by Mastercraft and/or Wane Engkjer, Exhibit 3 was not a form used by Curtis Construction in the regular course of business. (See Mastercraft/Wane Engkjer's brief at page 12). Russell Handegard specifically testified that Exhibit 3 was a form that was irregularly maintained and was simply used as an attempt to keep track of what was going on at a site. (Tr. at 87, lines 1-7).

Fourth, Russell Handegard did not have Kent Moritz fill out Exhibit 3, contrary to the assertion made by Mastercraft and/or Wane Engkjer in its brief. (See Mastercraft/Wane Engkjer's brief at 12-13). Russell Handegard specifically testified that he did not have Kent Moritz fill out Exhibit 3, that he did not tell Kent Moritz that Curtis Construction was going to charge Mastercraft \$3.00 a square foot for new concrete placed at Reile's Transfer, and that he did not tell Kent Moritz that Curtis Construction would charge Mastercraft \$4.50 a square foot to tear out a certain part of the concrete at Reile's Transfer. (Tr. at 84-87). Further, Russell Handegard testified that the contents of Exhibit 3 did not come close to describing the scope of the work performed by Curtis Construction at the Reile's Transfer property. (Tr. at 84, lines 23-25; 85, line 1).

Fifth, Curtis Construction contends that Mastercraft's assertion that Russell Handegard's testimony that he hand wrote "the only written work order for the three projects" on Exhibit 3 represents an attempt by Mastercraft to take those words out of context. (See Mastercraft/Wane Engkjer's brief at 15). Russell Handegard testified regarding this issue that he hand wrote those words on Exhibit 3 prior to giving it to his attorney to merely illustrate that it was the only written piece of paper regarding the projects after the first WCCO project. (See Tr. at 92-94). Further, Russell Handegard testified that he was not trying to make a legal statement or infer anything by writing

only written work order on Exhibit 3. (Tr. at 93). As such, Curtis Construction contends that Mastercraft's attempt to infer that Exhibit 3 is a work order merely represents Mastercraft's attempt to read those words out of context.

Sixth, Curtis Construction contends that the Weinreis case cited by Mastercraft/Wane Engkjer in its argument on this issue is misplaced and is clearly distinguishable from the facts of this matter. Weinreis v. Hill, 2005 ND 127, \_\_\_\_\_ N.W.2d \_\_\_\_\_ (N.D. 2005). As opposed to the factual situation in Weinreis, Russell Handegard, not Kent Moritz, is the President of Curtis Construction, Kent Moritz did not control the checkbook for Curtis Construction, and Kent Moritz never had authority to negotiate contracts at any time while he worked at Curtis Construction. (Tr. at 23; 25-42; 44-45; 156-57). Additionally, and as discussed in the Weinreis case, the burden was on Mastercraft during the trial in this matter to prove the existence of an agency based upon ostensible authority by clear and convincing evidence. (See Weinreis v. Hill, 2005 ND 127, ¶ 10). In the present case, the trial record establishes no such evidence by Mastercraft, and in fact the record establishes that all agreements/contracts on all work Curtis Construction did for Mastercraft and/or Wane Engkjer at WCCO, Reile's Transfer, or Wane Engkjer's driveway were all negotiated specifically by Russell Handegard on behalf of Curtis Construction. (See Tr. at 25-51).

Lastly, Mastercraft and/or Wane Engkjer are asking this Court to substitute its Judgment for Judge Irby's. Mastercraft and/or Wane Engkjer attempted these same arguments during the bench trial before Judge Irby and are now asking this Court to re-litigate this issue. Judge Irby specifically found that there was no written contract between the parties regarding the Reile's Transfer project, that Exhibit 3 did not

constitute a contract between the parties, and that the agreement for Reile's Transfer was solely a time and materials job. (App. at 53-54). Judge Irby issued his findings of fact after seeing and hearing the conflicting testimony from all the witnesses on these issues. Pursuant to this Court's holdings in the Moen case, and the record on this matter, Curtis Construction contends Judge Irby's findings on this issue are not clearly erroneous. See Moen v. Thomas, 2001 ND 95, ¶ 19-20, 627 N.W.2d at 152.

**II. The trial court did not err in determining that no oral fixed term agreement existed between the parties on the Rose Creek Project and the trial court did not err in determining that Curtis Construction substantially performed the Rose Creek Project or in failing to reduce the contract price by the alleged diminished value of the driveway.**

**A. The trial court did not err in determining that no oral fixed term agreement existed between the parties on the Rose Creek project.**

As indicated in the previous issue, a trial court's findings of fact will not be reversed on appeal unless they are clearly erroneous. Moen v. Thomas, 2001 ND 95, ¶ 19, 627 N.W.2d at 152. A finding of fact is clearly erroneous under N.D.R.Civ.P. 52(a) if there is no evidence to support it, if it is clear to the reviewing court that a mistake has been made, or if the finding is induced by an erroneous view of the law. Akerlind v. Buck, 2003 ND 169, ¶ 7, 671 N.W.2d at 259. A trial court's findings of fact on appeal are presumed to be correct and in a bench trial this Court does not reweigh evidence or reassess credibility, and does not re-examine findings of fact made upon conflicting testimony. Id.

In the present case, Wane Engkjer contends that the trial court erred in determining that no oral fixed term agreement existed on the Rose Creek driveway

project. To the contrary, the trial court did not err in determining that the agreement regarding the driveway project was for time and materials.

To begin, Judge Irby's findings of fact regarding this issue, which are supported by the record, were that Wane Engkjer agreed to Curtis Construction's offer to do the driveway project for time and materials and as economically as possible. (App. at 54-55, Findings of Fact 17-19). During the trial, Russell Handegard testified at length regarding the meeting that took place between Wane Engkjer and Russell Handegard concerning the driveway project. (Tr. at 49-54). Russell Handegard testified that there were no written plans or specifications regarding what Wane Engkjer wanted, and the condition of the driveway was poor. (Tr. at 49). Russell Handegard testified that the agreement regarding the driveway project was that Curtis Construction would do the work on a time and materials basis and as economically as it could. (Tr. at 51-53). Further, Russell Handegard testified that the driveway was not in a condition that Curtis Construction would have agreed to do it for a set price. (Tr. at 51). Lastly, Russell Handegard testified that if at any point in time during the course of the meeting Wane Engkjer had said the driveway project had to be done at \$2.65 a square foot completely finished, Curtis Construction would not have agreed to that and Russell Handegard would have had Curtis Construction leave the site and not do the work. (Tr. at 53).

Additionally, Kent Moritz testified regarding the driveway project issue and price that he specifically heard Wane Engkjer say during the meeting at issue with Russell Handegard that you give me the best deal that you can and I will give you a bunch of concrete work. (Tr. at 174). Kent Moritz also testified that he heard Russell Handegard say to Wane Engkjer that he would do it as economically as he could. (Tr. at 303). Kent

Moritz further testified that Russell Handegard is not the type of person that likes to leave things open-ended when he does work and that he wants to know what he is doing. (Tr. at 304).

Lastly, Tolly Wangsness' testimony regarding this issue is very informative.

Tolly Wangsness testified that:

“Q. (By Mr. Hamm) Do you recall me asking you if Mr. Engkjer was looking for someone to get his driveway done?

A. Yes.

Q. Do you recall telling me that, yes, he wanted it done right now, that's the way Wane Engkjer is, everything has to be done right now without much forethought; do you recall telling me that?

A. Yes.

Q. Do you recall then telling me that he wanted it done and that as a part of that he doesn't properly document things? Do you recall telling me that?

A. I believe I alluded to that, yes.

Q. Do you recall me asking what your reactions were, the discussions, that specifically took place that you overheard?

A. I know you asked me what I thought I heard, yes.

Q. Do you recall telling me that you believe that there was kind of a here's what we're shooting for as far as a dollar for square foot on laying out the concrete, and the driveway was so low it needed a tremendous amount of sand and compaction to be brought up to concrete grade. Do you recall telling me that?

A. Yes.

Q. Do you recall telling me that Wane kept asking for a specific number and that Russell wouldn't commit to a specific number?

A. Yes, I agree, yes.

Q. Do you recall telling me that that conversation that you were part of took the better part of a half hour or 40 minutes?

A. I'd say that's reasonable.

Q. Do you recall in our continuing to talk about that discussion that you overheard with respect to the agreement that was ultimately made that you said to me, "I don't know if you know, I'm not – I don't know if he was okay with it or not. I think so because, you know, he went ahead and told him to do it. So – so Wane is Wane. He understands everything his own way and he doesn't understand it the way things really happen." Do you recall saying that to me?

A. Yeah.

Q. Do you recall me then asking you now when you say Wane said go ahead and do it, were you there when he said that or are you just assuming that because the driveway ultimately got poured and your response: “No, he said go ahead and he just, you know, get it done, get it done.” Do you recall saying that to me?

A. Yeah.”

(Tr. at 391-93).

Second, Wane Engkjer contends that the Rose Creek project was already contracted for prior to the meeting between Wane Engkjer and Russell Handegard and/or that Kent Moritz had authority to contract on behalf of Curtis Construction. Curtis Construction contends that these arguments are without merit. What Curtis Construction employees were doing at the Wane Engkjer residence prior to the specific meeting between Wane Engkjer and Russell Handegard at Wane Engkjer’s residence which led to the agreement to pour the driveway on a time and materials basis was at most preparatory in nature. Russell Handegard testified that at the point he was informed that Wane Engkjer wanted Curtis Construction to pour the driveway at his residence he found employees of Curtis Construction at the Wane Engkjer residence setting up and that there had been very little done with regards to the driveway in terms of preparation. (Tr. at 46-47). Additionally, Kent Moritz testified that the meeting that he was at with Russell Handegard, Wane Engkjer and Tolly Wangsness at Wane Engkjer’s residence (called by Wane Engkjer) was the first time he had been at the site, and that the condition of the driveway at that point was just black dirt or clay. (Tr. at 161, lines 12-22; 165, lines 19-25; 166, lines 1-9; 48, lines 2-9). The testimony offered in the trial established that there was no contract between Curtis Construction and Wane Engkjer regarding the driveway

until the actual meeting took place at Wane Engkjer's residence between Wane Engkjer and Russell Handegard that Kent Moritz and Tolly Wangsness were present for.

Additionally, and as indicated in the previous issue, Kent Moritz had no authority whatsoever to contract on behalf of Curtis Construction. (See Tr. at 43-45; 156-57). The fact that Wane Engkjer specifically requested to meet with Russell Handegard at his residence regarding the driveway project illustrates that Kent Moritz had no authority to contract on behalf of Curtis Construction. (See Tr. at 48).

Lastly, and as discussed in the previous issue, Judge Irby saw and heard all of the conflicting testimony and exhibits regarding this issue during the two day bench trial in March 2005. Based upon this Court's holding in the Akerlind case, and the record in this matter, Curtis Construction contends that Judge Irby's findings of fact are not clearly erroneous. See Akerlind v. Buck, 2003 ND 169, ¶ 7, 671 N.W.2d at 259.

**B. The trial court did not err in determining that Curtis Construction substantially performed the Rose Creek project or in failing to reduce the contract price by the alleged diminished value of the driveway.**

Whether a contract has been substantially performed and whether a party has breached a contract are findings of fact which will not be reversed on appeal unless they are clearly erroneous. Wachter v. Gratech Co., Ltd., 2000 ND 62, ¶ 17, 608 N.W.2d 279, 284 (N.D. 2000). In Wachter, the North Dakota Supreme Court held, among other things, that they do not re-examine findings of fact made by the trial court upon conflicting evidence, that they give due regard to the trial court's opportunity to assess the credibility of the witnesses, and that the court's choice between two permissible views of the weight of the evidence is not clearly erroneous. Id.

In the present case, Wane Engkjer contends that Curtis Construction did not substantially perform the driveway project. To the contrary, Curtis Construction did substantially perform the Rose Creek driveway project.

To begin, Judge Irby specifically found after seeing and hearing all of the testimony and exhibits regarding the driveway project that while Wane Engkjer raised issues regarding the quality of the finished product, Wane Engkjer presented no credible evidence that would allow the court to calculate the alleged diminished value of the finished product and that Wane Engkjer's witnesses only offered a suggestion that the driveway was substandard and some speculation as to the amount by which the value of the finished product was diminished. (See App. at 56, Finding of Fact 31). Curtis Construction contends the driveway project was substantially performed. The testimony and exhibits offered regarding this issue established that Wane Engkjer's driveway was poured, including the ordering of colored concrete for diamonds, it was poured the way Wane Engkjer wanted it, and that Wane Engkjer has continued to use the driveway since it was poured in November 2002. (Tr. at 192, lines 16 through 20; 116, lines 21-25; 117, lines 1-3; 360, lines 3 through 5). Kent Moritz testified that the driveway was poured the way Wane Engkjer wanted it, including the shape he wanted, the radius cuts he wanted, the diamond placements, the control joint locations regarding the diamonds and the thickness of the concrete. (See Tr. at 179).

Second, regarding Wane Engkjer's contention concerning cracking in the driveway, Wane Engkjer offered no expert opinions regarding cracking or alleged control joint issue. Wane Engkjer and/or his witnesses merely offered speculative testimony concerning these alleged issues. The testimony and exhibits offered during the

trial established that concrete in North Dakota cracks and that there was not excessive cracking or heaving. Russell Handegard testified that concrete cracks in North Dakota due to the type of soils present in our state, as well as the large temperature variances. (Tr. at 57-58). Russell Handegard also testified that the purpose of control joints is not to prevent cracking, but to hopefully have concrete merely crack where you want it to crack. (Tr. at 58-59). Russell Handegard also testified that the photographs of Wane Engkjer's driveway established that control joints do not always control where cracks in concrete ultimately develop. (Tr. at 59; Exhibit 24 (App. at 35)). Lastly, Russell Handegard testified that North Dakota's freezing and thawing cycle impacts concrete's tendency to crack. (Tr. at 59).

Kent Moritz also testified that in this part of the world concrete cracks and that there is nothing you can do to make sure that it will never crack. (Tr. at 184). Kent Moritz further testified that he is not a concrete engineer, and that other potential causes for cracking in Wane Engkjer's driveway could be freezing and thawing, the time that the driveway has existed (2½ years), and the placement of diamonds in the driveway which created more stress points for cracks to develop. (Tr. at 288, lines 17 through 25; 289, lines 1 through 16).

Third, concerning Wane Engkjer's contentions regarding the driveway diamonds, Curtis Construction contends those diamonds merely reflected a decorative element of the driveway at best, and do not establish in any manner that the driveway was not substantially performed by Curtis Construction. (See Tr. at 117, lines 8-10 (counsel for Wane Engkjer also referring to diamonds as decorative pieces). The driveway at issue poured by Curtis Construction for Wane Engkjer was over 7,800 total square feet. (Tr. at

129-132). Additionally, it is important to remember that Wane Engkjer had no written specifications or plans regarding this driveway when Curtis Construction poured it. (Tr. at 52). Russell Handegard's testimony on this issue is illustrative:

“Q. Did he indicate during the course of that discussion how he wanted the driveway done?

A. Different things were discussed but I think one thing I recall is he said, you know, “This driveway is – needs to be unique in some way. I don't want it to look like my neighbors. I want the concrete thicker than normal.”

These were all things in my mind you are against doing it cheaply.

Q. Did he indicate during the course of that discussion that he wanted anything put in the driveway.

A. Well, just what I just said and that's he wanted it unique in some way. “What does that mean?” And he said, “well, I'm still thinking about it. I got some ideas but I want it to be unique.”

Q. Was there any discussion during that meeting about putting diamonds in the driveway?

A. I can't recall specifically the idea of diamonds was brought up or not. But I do remember the desire to do something unique.”

(Tr. at 52).

Fourth, the allegations Wane Engkjer raised during the trial about the alleged faulty nature of the driveway construction did not specifically appear in his March 6, 2003 letter to Russell Handegard (App. at 15), and all depend on the word of Wane Engkjer and his witnesses whose speculative testimony, credibility, motives and intentions the trial court had an opportunity to weigh and assess. See Tr. at 401-403 for some specific quotes of what Wane Engkjer said to Kent Moritz during a meeting on February 25, 2005 that Kent Moritz taped (Exhibit 102). Additionally, it is important to note on this issue that Wane Engkjer and/or Mastercraft hired a substantial amount of the individuals who actually poured his driveway that he now contends was not substantially performed. (Tr. at 192-195). Kent Moritz testified that in addition to himself, Curtis

Construction employees Jason Reinke, Bryce Moritz, Jamie Moritz, Marcus Montgomery, and Josh Hernandez all went to work for Wane Engkjer and/or Mastercraft following the work on Wane Engkjer's personal driveway. (Tr. at 194-195).

Fifth, Curtis Construction contends that the trial court did not err in finding that Wane Engkjer failed to establish his claim concerning alleged diminution in value of the driveway. Wane Engkjer and/or his witnesses offered no credible expert testimony with respect to the alleged diminished value of the driveway. Kent Moritz testified during the trial that he was not a concrete engineer. (Tr. at 288). Additionally, Kent Moritz's testimony that he thought the life expectancy of the driveway had been diminished by 30% to 40% was extremely speculative in nature. (Tr. at 283-285). Specifically, Kent Moritz testified that:

“Q. If you're not able to answer just say you're not able to answer.

A. I would think maybe 30, 40 percent maybe. The driveway is deficient already. If you're – that would be a round number.

I'm basing on what I looked at out in the driveway from what you seen before and what has happened to this day.

Q. The life expectancy as I understand it has been diminished by 30 to 40 percent?

A. I would think in that neighborhood.”

(Tr. at 285, lines 1 through 11).

This speculative testimony of Kent Moritz regarding the alleged diminution in value of the driveway was not based on any written reports or process which Kent Moritz could explain to the Court to justify the number he testified to at trial. Curtis Construction contends that based on his entire testimony regarding his speculation on the alleged diminution value of the driveway, that Judge Irby's finding on this matter was not clearly erroneous.

Sixth, the Storebo case cited by Wane Engkjer in his brief regarding this alleged diminution in value issue is distinguishable from this case. See Storebo v. Foss, 325 N.W.2d 223 (N.D. 1982). In Storebo, the trial court record included expert testimony regarding costs and procedures necessary for repair of a defective basement floor at issue in that case. Id. at 226. An expert witness testified in that case regarding repairs that could be done and a specific approximate cost concerning those repairs. Id. In the present case, Wane Engkjer and/or his witnesses offered no qualified expert testimony, and the speculative testimony Wane Engkjer and/or his witnesses did offer did not specify repairs necessary to be done and/or what the specific cost could be. See Tr. at 283-285. Additionally, and as indicated previously, Kent Moritz testified that he was not a concrete engineer and he provided no written report or analysis attempting to justify how he arrived at his speculative number of 30% to 40% alleged diminution in the life expectancy of the driveway. (Tr. at 283-85; 288). Also, as indicated previously, Judge Irby after hearing all of the testimony from Wane Engkjer and/or his witnesses (a number of whom went to work for him following pouring of his driveway), and assessing their credibility specifically found that Wane Engkjer presented no credible evidence that would allow Judge Irby to calculate any alleged diminution in value of the driveway, and that Wane Engkjer and/or his witnesses only offered a suggestion that the driveway was substandard and/or speculation as to the amount by which the value of the finished product was allegedly diminished. (App. at 56; Tr. at 192-95). Curtis Construction contends that based on the record, Judge Irby's findings on these issues are not clearly erroneous.

Lastly, and as indicated in the previous issue, Judge Irby actually heard and saw all the witnesses testimony with respect to these issues, weighed their credibility, motives and intentions and ultimately ruled. Wane Engkjer is asking this Court to substitute its Judgment for Judge Irby's. Pursuant to this Court's holdings in the Wachter case, and the record in this matter, Curtis Construction respectfully contends that it is something this Court should not do. See Wachter v. Gratech Co., Ltd., 2000 ND 62, ¶ 17, 608 N.W.2d at 284-85.

## CONCLUSION

Based on the above and foregoing, Curtis Construction respectfully requests this Court to affirm the District Court's Judgment. Curtis Construction contends that the trial court did not err in determining that the contract between Curtis Construction and Mastercraft on the Reile's Transfer project did not include a price per square foot charge. Additionally, Curtis Construction contends that the trial court did not err in determining that there was no oral fixed term agreement between the parties on the Rose Creek driveway project. Lastly, Curtis Construction contends that the trial court did not err in determining that Curtis Construction substantially performed the Rose Creek driveway project or in failing to reduce the contract price for the alleged diminished value of the driveway.

Dated this 31<sup>st</sup> day of August, 2005.

/s/ Adam W. Hamm  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY, on August 31, 2005, that a true and correct copy of the foregoing **PLAINTIFF/APPELLEE'S BRIEF** have been served upon the following individual by placing a true and correct copy thereof by e-mail addressed to the following:

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E-mail: [jeffb@ndjustice.com](mailto:jeffb@ndjustice.com)

Dated this 31<sup>st</sup> day of August, 2005.

/s/ Teresa G. Sorby  
Teresa G. Sorby

Subscribed and sworn to before me this 31<sup>st</sup> day of August, 2005.

(SEAL)

/s/ Jennifer A. Ernst  
Jennifer A. Ernst, Notary Public  
My commission expires: 8/19/09