

**SUPREME COURT
OF THE
STATE OF NORTH DAKOTA**

No. 20060137

B. J. KADRMAS, INC.

**Plaintiff and
Appellee**

vs.

OXBOW ENERGY, LLC.

**Defendant and
Appellant**

APPELLANT'S BRIEF

**Appeal
From the Judgment
Of District Court
Stark County
Southwest Judicial District
Honorable Allan L. Schmalenberger
Civil Case No. 04C-477**

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STATEMENT OF ISSUES

- I. Did the trial court err in finding that the facts of the case supported the conclusion of an implied contract?
 - A. Standard of Review
 - B. The trial court erred in holding that the facts of the case support the conclusion of an implied contract.
 1. No implied in fact contract existed between B.J. Kadrmas and Oxbow.
 - a. Written Contract Did Not Exist.
 - b. Estimate Was Requested Before Proceeding.
 2. No implied in law contract, or quasi-contract, existed between B.J. Kadrmas and Oxbow.
- II. The trial court erred in finding that Oxbow Energy, LLC was required to pay bills assessed to it before Oxbow Energy, LLC's first contract with B.J. Kadrmas, Inc. on January 10, 2004.
- III. The trial court erred in finding that Oxbow Energy, LLC was required to pay for work performed after Oxbow Energy, LLC told B.J. Kadrmas, Inc. to stop all work it was performing on Oxbow Energy, LLC's behalf.

STATEMENT OF THE CASE

B.J. Kadrmas initiated this action by serving a Summons and Complaint on Oxbow on August 24, 2004. B.J. Kadrmas, in the Complaint, alleged that Oxbow owed approximately \$18,000.00 for petroleum land services which Kadrmas performed. Trial to the Court was held on December 1, 2005, and was concluded the same day. The trial court found the existence of an implied contract, that Oxbow was indebted to B.J. Kadrmas, and that B.J. Kadrmas was entitled to judgment against Oxbow in the amount of \$17,613.38. The trial court issued its formal Findings of Fact, Conclusions of Law, and Order for Judgment on March 6, 2006. Notice of Entry of Judgment was served on March 8, 2006. On May 4, 2006, Oxbow filed its Notice of Appeal. Oxbow appeals from this judgment based upon the trial court's finding the existence of an implied contract for work performed by B.J. Kadrmas from December 1, 2003 until February 27, 2004. Oxbow submits that the trial court's judgment was in error and should be reversed.

STATEMENT OF FACTS

This action is the result of a dispute between B. J. Kadrmas and Oxbow as to whether a contract existed between the parties. On or about December 9, 2003, B.J. Kadrmas was contacted by Robert Angerer of Oil for America regarding the possibility of having B.J. Kadrmas check land titles for Oil for America and potentially performing the same sort of work for two other entities, Petrosearch and Oxbow. Findings of Fact ¶ I (March 6, 2006). The purpose of this work was to explore for oil and gas in Southwestern North Dakota. Id. The title work to be performed was called "pro-splits" which is difficult and costly title work. Tr. 14:23-15:1. Robert Angerer explained a pro split as follows:

“... each party had a number of what you can refer to as pro splits, and a pro split in the industry is a piece of property, you know, if a rancher or farmer originally had 100 percent of the minerals, he may have sold off -- or she may have sold off 50 percent to some guy coming through that offered to give \$10 an acre for their minerals, for half their minerals, and typically these folks would go back to Oklahoma, or Texas, or wherever, and either to their family or their friends that had financed the venture, divide it up, and then over a generation, you might have 20 people who are scattered interests, who were in particular ownership of that 50 percent, or 25 percent, or all of it for that matter, and we refer in the industry to those as pro splits...”

Tr. 10:25-11:13.

Mr. Angerer informed Ms. Kadrmas that he acted on behalf of Oil for America, but that she would have to make separate arrangements with the other parties (Petrosearch and Oxbow). Tr. 21:12-16. Because there was the possibility that there would be common interests, Mr. Angerer asked Ms. Kadrmas to coordinate the work to reduce overall costs. Tr. 21:10-16. Both Oil for America and Petrosearch signed written contracts with B.J. Kadrmas, Inc. Tr. 23:6-8; Tr. 110:10-13. Tony Martin, on behalf of Oxbow, first contacted Bev Kadrmas on or about January 10, 2004. Tr. 65:16-23. In this conversation they discussed the venture, the fact that both parties wanted a written contract, and the need for an estimate before work was commenced. Tr. 65:25-66:7; Tr. 155:19-156:6. After this conversation, B.J. Kadrmas sent Oxbow a letter which enclosed a proposed “Contract for Petroleum Land Services.” Tr. 69:16-22. Oxbow never signed the contract sent by B.J. Kadrmas. Tr. 74:15-17. Tony Martin reviewed B.J. Kadrmas’ proposed contract but found it unacceptable due to lack of detail setting forth each parties’ rights and obligations. Tr. 158:13-20. No written contract was ever entered into between the parties. Tr. 75:1-4; Tr. 167:13-15. During the January 10, 2004 conversation, Mr. Martin also requested that a budget and cost projection estimate be performed before any work was begun on Oxbow’s portion of the project. Tr. 155:19-156:6. Oxbow

received a cost estimate on February 7, 2004, nearly a month after it was requested. Plaintiff's Exhibit 6, Appendix p. 34. This budget and cost projection estimate was received after a substantial portion of the work was already done on behalf of Oxbow. Plaintiff's Exhibits 30-34, Appendix pp. 35-52. As soon as Oxbow became aware that B.J. Kadrmas was proceeding without its consent, Oxbow told B.J. Kadrmas to stop working on any projects related with Oxbow. Tr. 88:2-8. When Mr. Martin told B.J. Kadrmas to stop working on the project, B.J. Kadrmas finished tracts that it had started title work on and billed Oxbow for mislabeled tracts which were completed after February 9, 2004. Plaintiff's Exhibit 35, Appendix p. 53.

On February 25, 2004, Ms. Kadrmas sent Mr. Martin a letter which enclosed the completed titles. Findings of Fact ¶ X (March 6, 2006). However, Mr. Martin never opened this package and never used this title work in any way. Tr. 192:18-20.

B.J. Kadrmas attempted to collect the amount it billed Oxbow, and Oxbow disputed that it owed any amount to B.J. Kadrmas. Complaint ¶ IX (August 24, 2004).

B.J. Kadrmas commenced this action by filing suit against Oxbow for amounts it alleged were due and owing by Oxbow under contract and unjust enrichment theories. Complaint ¶ V. After trial, the court issued its Findings of Fact which stated that the facts would at least support the conclusion of an implied contract if not an express contract. Findings of Fact ¶ XVIII (March 6, 2006). While the trial court stated that an express contract may have existed, it issued no Conclusion of Law to that effect.

LAW AND ARGUMENT

I. Did the trial court err in finding that the facts supported the conclusion of an implied contract if not an expressed contract?

The trial court found that B.J. Kadrmas proved the existence of the implied

contract by a preponderance of the evidence and entered judgment to that effect. Oxbow submits that the trial court's judgment is in error and should be reversed.

A. Standard of review

Findings of Fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard should be given to the opportunity of the trial court to judge the creditability of the witnesses. N.D.R.Civ.P. 52(a). The existence of an oral contract and the extent of its terms are questions of fact, subject to the clearly erroneous standard of review under N.D.R.Civ.P. 52(a). Edward H. Schwartz Construction, Inc. v. Driessen, 2006 ND 15, 709 N.W.2d 733. A Finding of Fact is clearly erroneous when, although there is some evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. Three Affiliated Tribes v. World Engineering, 419 N.W.2d 920 (ND 1988); Koch v. Williams, 456 N.W.2d 299 (ND 1990). A choice between two permissible views of the weight of the evidence is not clearly erroneous. Id.

B. The trial court erred in holding that the facts of the case support the finding of an implied contract.

Implied contracts are divisible into two classes: contracts implied in fact and contracts implied in law, which are more properly designated as quasi or constructive contracts. N.D.C.C. § 9-06-01; Gate City Savings and Loan Assn v. International Business Machines Corp., 213 N.W.2d 888 (ND 1973). In its Findings of Fact, the trial court did not identify whether it was basing its judgment upon a finding of an implied in fact contract or an implied in law contract. Therefore, both are addressed below.

1. No implied in fact contract existed between B.J. Kadrmas and Oxbow.

An implied contract is one in which its existence is manifested by conduct rather

than words. N.D.C.C. § 9-06-01. Contracts implied in fact are based upon the mutual intentions of the parties. Beck v. Lind, 235 N.W.2d 239 (ND 1975). It must be determined from the surrounding facts and circumstances whether the parties actually intended to enter into a contract. Id. The main difference between an express contract and an implied contract in fact is that in the former the parties arrive at their agreement by words, either oral or written, while in latter their agreement is arrived at by consideration of their acts and conduct. Bismarck Hospital Assn v. Burleigh County, 146 N.W.2d 887, 892 (ND 1966). To constitute either an express contract or an implied contract in fact, the parties must occupy toward each other a contract status, and there must be that connection, mutuality of will, and interaction of the parties. Id. The distinction between an express and an implied contract, therefore, is of little importance, if it can be said to exist at all. Id. The matter that is of importance is the degree of effectiveness of the expression used. Id. Clarity of expression determines the reasonableness of understanding and eases the court's problem in case of dispute. Id.

a. Written Contract Did Not Exist.

The testimony at trial shows that the parties discussed contracting for title work. However, it is clear that both parties wanted a written contract. Bev Kadrmas and Tony Martin both testified that B.J. Kadrmas required written contracts in order to be retained by Oil for America, Petrosearch and Oxbow. Bev Kadrmas testified as follows:

Q But in this case you wanted written contracts with all three entities, is that correct?

A Yes, I did, because it was also with this billing situation of keeping everyone separate, it was just a little bit more complicated than my normal one client, one area.

Tr. 111:4-8.

A No, that's -- I sent the Contract because I wanted to send a contract to each of these entities because of the nature of the particular job.

Q Because it's more complicated than the normal job?

A Correct.

Q And you wanted to document in writing what you were going to do, what they were going to do, and what your responsibilities were?

A Correct.

Tr. 140:21-141:4.

Tony Martin testified that he insists on a contract in such a situation and the contract must define the responsibilities of the people involved, what he is going to get for his money, and what it will cost him.

Q Do you have a practice for how you do that, what you require, and so forth?

A Absolutely. One of the things I insist on, is I insist on a contract, and the contract has to define the responsibilities of the people involved, the parties involved, what I'm going to get for my money, and what it's going to cost me, or at least some sort of a concept of what it's going to cost me because, otherwise, you're just basically saying you have carte blanche with my checkbook, do whatever you want to do, and that's -- I learned long ago in this business that that is not the way to proceed or to do business.

Q You mentioned a contract and a cost estimate are two things you do before you authorize --

A I don't move forward without either one.

Q Is that what you usually do, always do?

A Always.

Q Can you think of an instance where you haven't done that with title work?

A No.

Tr. 151:13-142:6. It is clear from the testimony that all parties anticipated that there would be a written contract. This is also supported by the testimony of Robert Angerer from Oil for America, who testified that Bev Kadrmas told him that she wanted a signed contract. Tr. 23:4-8.

The parties had their initial contact on January 10, 2004 by way of a telephone conversation. Bev Kadrmas's testimony regarding this conversation is that Tony Martin told her to proceed and that she was authorized to do so. Tony Martin testified that they spoke about the written contract, and about an estimate or budget. Tr. 155:19-156:6. The evidence presented and the other testimony given does not support Ms. Kadrmas' testimony regarding the conversation. This conversation is critical because it is Bev Kadrmas' contention that the Contract was made during this conversation. Prior to January 10, 2004, they did not have a contract. Tr. 112:16-22. Ms. Kadrmas could not recall specifically what was said during that conversation.

Q But it sounds like you're not quite sure of the exact words that were used in that conversation of January 10th, would that be accurate?

A He said something to the effect that we could start working on his project -- or his part of the project.

Q But you don't recall the exact wording that he used?

A No.

Tr. 115:2-8. Tony Martin recalled specifically that he did not give her authority to proceed during that conversation.

Q I think she testified also that you gave her authority to proceed during the January 10 conversation.

A Absolutely not. Proceed with what? I understand what land work is, but there was nothing to proceed with as far as I was concerned until we had the basis intact and how this was going to function, what we were getting

for our money, and primarily what it was going to cost.

Tr. 156:9-15. On January 10, 2004, B.J. Kadrmas sent a letter with a contract attached to Tony Martin. Plaintiff's Exhibit 1, Appendix p. 26. She testified that this was to confirm her telephone conversation with Mr. Martin. The language of the letter supports Mr. Martin's version of what was discussed in their January 10 telephone conversation. The letter, which was sent to both Oxbow and Petrosearch, reads more like a proposal to enter into a contract than a letter confirming a conversation in which an agreement was made. The letter states, "We are now ready to start running title on the pro splits" and "My plan is to hire a landman for each of you..." Plaintiff's Exhibit 1, Appendix p.26. No language is present in this letter which references any agreement made between the parties on January 10. Moreover, if an agreement was already entered into between the parties in their telephone conversation, there would be no need to send out a written contract.

Even if the Contract for Petroleum Land Services had been signed, it still did not give authorization for B.J. Kadrmas to proceed. The Contract set forth the framework for the relationship between the parties. The Contract provided:

"1. Contractor Service. Contractor agrees to use its best efforts to secure for Client leases for oil, gas and other minerals and to perform such other petroleum land work as Client may from time to time request in areas under terms to be specified by Client ("Contract Area"). The Contract Area, terms and other information will be furnished to Contractor as a work assignment form similar to the form attached as Exhibit "A".

Contract for Petroleum Land Services, Plaintiff's Exhibit 1, Appendix p. 27. Exhibit A is a Broker Work Assignment which specifies the specific work to be done. That document is completed to give Kadrmas specific instructions on proceeding. Tr. 135:18-136:4. Since the parties contemplated a written contract, the fact that it was not completed,

signed or agreed to is compelling evidence that a contract did not exist.

b. Estimate Was Requested Before Proceeding.

Tony Martin was concerned with the cost of the project, and requested an estimate from Ms. Kadrmas. He testified that he never proceeds with a project such as this unless he has a cost estimate. Tr. 151:13-23. This request was made on at least two occasions, January 10, 2004 and on or about January 23, 2004. Ms. Kadrmas denies that an estimate was discussed in the January 10, 2004 conversation. However, she agrees that a cost estimate was requested.

Q So pretty clearly prior to February 7th --

A Yes.

Q -- Mr. Martin had asked you for an estimate as to what this was going to cost?

A And I recall that to be on, you know, January 22nd, 23rd.

Tr. 124:25-125:3. Mr. Martin testified that he specifically asked for a budget before work was done so he could know how much B.J. Kadrmas's services would cost before he would consider retaining those B.J. Kadrmas to perform said services. Tr. 155:19-156:6. It is undisputed that an estimate was requested. It does not make sense that an estimate would be requested or received after most of the work is done.

Robert Angerer also recalled a conversation with Bev Kadrmas in late January.

Q Okay. Did Bev ever tell you that she had gotten into contact with Mr. Tony Martin of Oxbow?

A The only thing that I know is that Bev told me that sometime in the last half of January, that she was having difficulty reaching Tony, and so I sent an email to Tony saying that, that she was trying to get ahold of you to discuss the 20 prospects, and I said, she needs some instruction on how you want to proceed and have a discussion with you. Could you please call her, and I gave the telephone number so I remember her saying she was

having difficulty getting up with Tony, but that's not unusual. Tony's had some, like I said, medical problems and also he traveled to Africa on trips.

Tr. 26:22-27:9. This testimony supports Oxbow's position that, although there were discussions, Kadrmas did not have Oxbow's authority to proceed.

No agreement was entered into between the parties. No evidence was submitted at trial which demonstrated that Oxbow and B.J. Kadrmas agreed on any provisions regarding the pro splits, such as the amounts B.J. Kadrmas was authorized to expend to complete the task and what time frame it would have to complete the task. Bev Kadrmas agreed that there is nothing in writing which gave her authority to proceed on behalf of Oxbow. Tr. 127:16-128:3. The parties' acts and conduct solidify Oxbow's argument that no implied in fact contract existed, as no agreement was made between the parties through their actions or their conduct. Further, there was no connection or mutuality of will between the parties. The interactions between the parties only further Oxbow's assertion that there was no agreement, and certainly no mutuality of will.

The trial court's finding of an implied contract was in error. The trial court's order granting B.J. Kadrmas judgment against Oxbow in the amount of \$17,613.38 should be reversed.

2. No implied in law contract, or quasi contract, existed between B.J. Kadrmas and Oxbow.

The concepts of quasi contract and unjust enrichment are interrelated. Johnson v. Estate of Zent, 459 N.W.2d 795, 798 (ND 1990); Gate City Savings and Loan Assn, 213 N.W.2d 888. A quasi contract is not a contract at all, because there is not agreement. Id. Rather, a quasi contract is an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended. Id.

The essential elements of a quasi contract are a benefit conferred on the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof.

Gate City Savings and Loan Assn, 213 N.W.2d at 893, *quoting* 17 C.J.S. *Contracts* § 6.

No action can lie in quasi contract against one not shown to have been enriched wrongfully at the plaintiff's expense, and the mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefore. Beck, 235 N.W.2d 239. Courts are required to employ the fiction of a quasi contract with caution. Gate City Savings and Loan Assn, 213 N.W.2d at 893.

Here, no quasi contract exists, because Oxbow was not enriched wrongfully at B.J. Kadrmas's expense. Oxbow never realized any benefit from this work. Tony Martin testified that title work performed by B.J. Kadrmas had no value to him. Tr. 173:3-5. In fact, Mr. Martin never opened the envelope he received from Ms. Kadrmas which contained the title information. Instead, he forwarded the packed on to his attorney, because by the time he received the information he realized that the dispute with B.J. Kadrmas was likely to result in litigation. Mr. Martin had no intention of developing this property or using this information. Mr. Angerer also testified that the work he had B.J. Kadrmas do on behalf of Oil for America was wasted. Tr. 37:17-20. Mr. Angerer also testified that title information or property you are not intending to develop is of no value to him as a landman. Tr. 43:23-44:4.

As stated previously, the trial court's finding of an implied contract was in error. The trial court's order granting B.J. Kadrmas judgment against Oxbow in the amount of \$17,613.38 should be reversed.

II. The trial court erred in finding that Oxbow was required to pay bills assessed to it before Oxbow's first contract with B. J. Kadrmas, Inc. on January 10, 2004.

The trial court found that Oxbow was indebted to B.J. Kadrmas, Inc. in the amount of \$17,613.38. Part of this indebtedness was for work performed prior to January 10, 2004. Oxbow submits that the trial court's judgment is in error and should be reversed.

A contract is an agreement to do or not to do a certain thing. N.D.C.C. § 9-01-01. In order for a contract to exist, certain requirements must be met, and they are set forth in N.D.C.C. § 9-01-02:

It is essential to the existence of a contract that there should be:

1. Parties capable of contracting;
2. The consent of the parties;
3. A lawful object; and
4. Sufficient cause or consideration.

Consideration is defined as:

Any benefit conferred or agreed to be conferred upon the promisor by any other person to which the promisor is not entitled lawfully, or any prejudice suffered or agreed to be suffered by such person, other than such as he, at the time of consent, is lawfully bound to suffer as an inducement to the promisor, is a good consideration for a promise.

N.D.C.C. § 9-05-01.

In its Findings of Fact, the trial court stated:

IV.

"Bev Kadrmas testified that Tony Martin called her on January 10, 2004. They discussed the venture, talked about the title work, and what B. J. Kadrmas, Inc. had done to date. She informed him that her rate was \$325 a day plus expenses. She testified that Tony Martin told her to go ahead and do Oxbow's 20 tracts."

Findings of Fact ¶ IV (March 6, 2006). In paragraph XVIII of the trial court's Findings of Fact, the trial court states that, "the facts would at least support the conclusion of an implied contract if not an express contract." Findings of Fact ¶ XVIII (March 6, 2006). In its Conclusions of Law, the trial court required Oxbow to pay B.J. Kadrmas for all work B.J. Kadrmas performed for Oxbow, in the amount of \$17,613.38. Conclusions of Law ¶ II (March 6, 2006). However, the trial court failed to consider that a substantial portion of Oxbow's bill was incurred before the date of the parties' first contact on January 10, 2004. Oxbow was billed for work performed by B. J. Kadrmas from December 1, 2003 through January 10, 2004 totaling \$3,327.38. Plaintiff's Exhibits 30, 31, and 32, Appendix pp. 35-44. Regarding this work, Bev Kadrmas testified as follows:

Q Did you discuss with Mr. Martin during that conversation what he planned to do as far as handling the title work?

A Yes.

Q What did you tell him in that regard?

A I explained to him that we had done thus far as, you know, the organizational part of getting this ready. I told him that I had planned to try and have one land man for them, just for each company, because it would be easier to bill, and I believe we talked a little bit about the complexity of the pro split type of title.

Tr. 67:4-13.

Q Did you in any way inform Mr. Martin that you expected Oxbow to pay for part of that work?

MR. PRIEBE: You're talking the preliminary work before January 10th?

MR. RAMSEY: Yes.

THE WITNESS: I can't recall if that was in that conversation.

Tr. 68:10-16.

Q My understanding from your testimony, the first time you ever spoke or contracted Mr. Martin was January 10th of 2004, does that sound accurate?

A That is correct.

Q So prior to that time, clearly , you didn't have an agreement or contract?

A I did not.

Tr. 112:16-22.

Even from Ms. Kadrmas's testimony as to what transpired between her and Tony Martin, she admits that she had not agreement with Oxbow before January 10, 2004, and indeed had no contact at all with him before that point. Further, there was no agreement that Oxbow would assume payment for expenses incurred prior to B. J. Kadrmas's contacts with Oxbow.

The trial court's failure to consider that part of the judgment it assessed against Oxbow included invoiced billed prior to Oxbow's contact with B.J. Kadrmas was in error. Therefore, the Court's order requiring Oxbow to pay B.J. Kadrmas for bills prior to January 10, 2004 in the amount of \$3,327.38 must be reversed.

III. The trial court erred in finding that Oxbow Energy, LLC was required to pay for work performed after Oxbow Energy, LLC told B.J. Kadrmas, Inc. to stop all work is was performing on Oxbow Energy LLC's behalf.

The trial court found that Oxbow was indebted to B.J. Kadrmas, Inc. in the amount of \$17,613.38. Part of this indebtedness was for work performed after February 9, 2004, the date on which Oxbow instructed B.J. Kadrmas not to proceed. Oxbow submits that the trial court's judgment is in err and should be reversed.

Assuming, for the sake of argument, that an agreement of some sort existed between B.J. Kadrmas and Oxbow, N.D.C.C. § 9-09-01 states:

A contract may be extinguished in like manner with any other obligation

and also by rescission, alteration, or cancellation to the extent and in the manner provided by this title.

After receiving Ms. Kadrmas's February 7, 2004 email regarding an estimate of costs which Ms. Kadrmas based upon work already performed by B.J. Kadrmas for Oxbow for January 16, 2004 through January 31, 2004, Tony Martin of Oxbow called Ms. Kadrmas of B.J. Kadrmas on the next business day and told her not to proceed. Tony Martin testified the conversation was as follows:

Q And, then, when did you call Miss Kadrmas in response to the February 7th email?

A On Monday, the 9th, in the morning, first thing.

Q What do you recall regarding that conversation?

A I basically told her I had received her cost estimate, and she was not to proceed with any work for Oxbow Energy, LLC. Period. Period. "Do not proceed. Do not do any work for Oxbow Energy." No, you know, industry standards and you can keep doing what's ever our there, or anything else. No. Do not do anything – any work for Oxbow Energy, LLC.

Tr. 165:11-20. However, through not fault of Oxbow, B.J. Kadrmas billed Oxbow for work performed after that date because of an error made by Ms. Kadrmas in identifying which pro-splits belonged to Oxbow as opposed to Oil for America and Petrosearch.

Further, B.J. Kadrmas did not stop doing title work on February 9, 2004, as instructed. Instead, Ms. Kadrmas had her land men continue on the tracts they were working until they were completed. B.J. Kadrmas then charged Oxbow for this work which was clearly performed after the date Mr. Martin told Ms. Kadrmas in no uncertain terms to stop all work. Mr. Martin testified that he told Ms. Kadrmas in not uncertain terms, "Do not proceed. Do not do any work for Oxbow Energy" on February 9, 2004, after he received the February 7, 2004 email from Ms. Kadrmas. Tr. 165: 17-18.

However, Ms. Kadrmas was unsure in her testimony and contradicted herself:

Q Back to the 9th, Mr. Martin's called you and told you to put Oxbow's part of the project on hold, correct?

A Yes, he did.

Q And did you tell him anything in reply?

A I told him that I could do that. I believe we briefly discussed, you know, if a land person is in the courthouse, and they're almost finished with a tract, put it on hold.

Tr. 88:2-8. However, later in her testimony, Ms. Kadrmas changed her story and stated:

A ...we did finish some tracts that were in progress because most of the land people will also pull books during the week, and they don't type them until the weekend, or, you know, like I said, most of them don't type at night, so they spend the courthouse time as best they can, pulling as many books as they can –

THE COURT: Did you ask him what you should do with those?

MR. RAMSEY: Yea. Did you ask him –

THE WITNESS: Yes, I believe that I did.

THE COURT: And what did he tell you?

THE WITNESS: He said that we should finish those tracts, is what I recollect.

Tr. 88:12-24.

Allowing B.J. Kadrmas to recover for work performed after it was told to cease all work and which was mislabeled through no fault of Oxbow was inequitable, clearly erroneous and should be reversed. The amount billed after February 9, 2006 is \$380 as is shown on Plaintiff's Exhibit 35, Appendix p. 53.

CONCLUSION

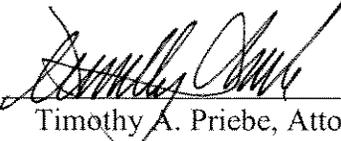
Based upon the entire evidence, the trial court's decision to find that the facts

would at least support the conclusion of an implied contract if not an express contract, finding that B.J. Kadrmas had nothing to gain by fabricating the transaction and that it would have been very difficult to give an estimate until substantial work was performed, was in error and contrary to law.

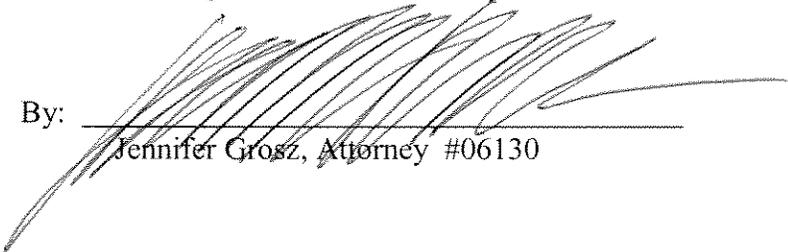
For the reasons set forth above, Defendant and Appellant Oxbow Energy, LLC respectfully required that the trial court's judgment be reversed.

Dated this 1st day of September, 2006.

MACKOFF KELLOGG LAW FIRM
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By: 

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CERTIFICATE OF SERVICE

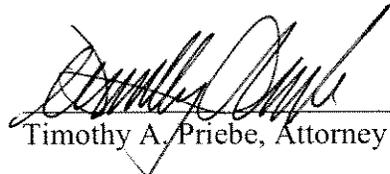
I hereby certify that I caused a true and correct copy of the foregoing **APPELLANT'S BRIEF** to be sent electronically and mailed, by first class mail with postage duly prepaid, on the 1st day of September, 2006, to the following persons:

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