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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Larry Pavlicek, Plaintiff and Appellee, vs. JRC Construction, LLC, Defendant and Appellant.	)	Sup. Ct. No.: 20180168 Civil No.: 45-2015-CV-00541

APPELLEE LARRY PAVLICEK'S BRIEF

APPEAL FROM ORDER DENYING DEFENDANT JRC CONSTRUCTION, LLC'S MOTION FOR JUDGMENT AS A MATTER OF LAW
IN THE DISTRICT COURT, SOUTHWEST JUDICIAL DISTRICT,
STARK COUNTY, NORTH DAKOTA,
THE HONORABLE WILLIAM HERAUF

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STATEMENT OF THE ISSUES

I. Whether the district court erred in denying Appellant's Motion for Judgment as a Matter of Law.

II. Whether Section 32-03-36 of the Century Code would act to prohibit the jury's award of damages to Pavlicek.

STATEMENT OF THE CASE

[¶1] Although Pavlicek is generally satisfied with JRC Construction, LLC's ("JRC") procedural statement of the case, he offers the following paragraph which, contrary to Appellant's Statement of the Case, contains no factual implications or assertions:

[¶2] Pavlicek's breach of contract claim against JRC was tried to a jury on December 5-7, 2017. Following the close of Pavlicek's case in chief, JRC moved the district court to enter judgment as a matter of law, arguing that Pavlicek had not presented evidence supporting the existence of a contract between he and JRC. Arguments were made in chambers. The district court denied JRC's motion, and JRC proceeded with its case. No additional evidence was presented by JRC regarding the existence of a contract between it and anyone other than Pavlicek. Following the jury's verdict in favor of Pavlicek, JRC renewed its motion for judgment as a matter of law. Following a hearing wherein both parties made oral arguments, the district court denied JRC's renewed motion. This appeal follows.

STATEMENT OF FACTS

[¶3] This matter indeed arises from the purchase, construction, and erection of a steel building on Pavlicek's property in 2013.

[¶4] Pavlicek testified at trial that he had thought about having such a building erected on his property for quite some time, but ultimately decided to do so in 2013. *See* Pavlicek Direct Transcript (hereafter referred to as "Direct"), December 5, 2017 (Docket Entry #261), at 6. He spoke to multiple contractors about the building. Direct, at 6-7. He wanted to go with local contractors, but due to the boom with the oilfield, none of the local

contractors seemed to have time for his project. Direct, at 6. Pavlicek ultimately expanded his search for contractors to the Fargo area. Direct, at 6-7. He spoke to Robin Samuelson of American Steel Systems, Inc. (hereafter referred to as "American Steel"), and a representative of Premier Buildings. Direct, at 7. Both companies submitted a bid proposal. Direct, at 7. Pavlicek's understanding was that American Steel's bid was for the building itself, while the bid from Premier Buildings included everything except electrical and plumbing. Direct, at 8. Pavlicek testified that when he asked American Steel about the total cost of the project, he was told that they could give him a roundabout figure, but that he would "need to definitely talk to the contractor [himself]..." Direct, at 8.

[¶5] Pavlicek ultimately entered into agreement with American Steel on March 2, 2013 whereby he agreed to purchase a steel building for $203,000 - $50,000 of which was paid as a deposit in March, and the remaining $153,000 was paid upon delivery of the building on June 27, 2013. Direct, at 11; *referring* to Appellee's Appendix, p. 1 (Plaintiff's Exhibit 1). American Steel did not hire any contractors to erect the building, rather they recommended contractors for Pavlicek to hire. Direct, at 11-12. American Steel did not order or pour the concrete for the building, nor did they hire anyone to do so. Direct, at 11-12.

[¶6] Pavlicek met with Joey Naylor, owner of JRC, prior to the commencement of construction. Direct, at 16-17. Pavlicek discussed with Mr. Naylor what type of footings he wanted to use, that he wanted floor heat with insulation, specific dimensions and depth/thickness of the floor, that Pavlicek wanted a very smooth floor surface, as well as specific materials of the floor, insulation, and tubing to be used. Direct, at 16-17, 25-26.

After their discussion, Mr. Naylor gave Pavlicek his proposal, and Pavlicek asked if JRC had handled floors "on this magnitude." Direct, at 17. Mr. Naylor represented that he did, that he had significant experience, that he had previously worked for a contractor in Fargo and that he had since opened his own business. Direct, at 17. Pavlicek testified that based upon these assertions, "after he gave me the proposal we agreed on it, verbally, nothing signed, and he went to work immediately." Direct, at 17 (underline added). A few days after their verbal agreement, but before concrete was poured, Pavlicek was provided with JRC's written bid, Plaintiff's Exhibit 2. Direct, at 21. Pavlicek acknowledged that he did not believe he was not bound or forced to hire JRC, but, as he indicated at trial, "I asked him a few questions and he said he was qualified." Direct, at 24.

[¶7] Pavlicek hired other contractors for, among other things, excavating and leveling, plumbing, heat tubing, installing a shop drain, and doors. Direct, at 22-24, 27-28. In total, Pavlicek paid approximately $650,000 to erect the building on his property. Direct, at 32.

[¶8] Pavlicek testified in great detail about the circumstances surrounding JRC pouring his concrete floor, the problems he experienced almost immediately, that even without training or experience in pouring concrete, he could tell it was not done properly. Direct, at 33-45. Specifically, Pavlicek testified that "after the second pour there was a corner in the southwest corner that he couldn't even trowel, it kept on peeling up on him. That's when we noticed there was a problem." Direct, at 39. When JRC returned approximately a week later to attempt to repair the problem, both Pavlicek and JRC noticed additional problems. Direct, at 39-40. This was the case primarily due to the bubbling, cracking, peeling, and "delaminating" of the floor itself. In addition, the 6 to 8 inch floor that

Pavlicek had discussed with JRC and requested ended up being a 3.5 to 5 inch floor. Direct, at 53.

[¶9] Pavlicek testified that JRC returned to the site weeks later to try to repair the damage by grinding down the concrete, but were unsuccessful in doing so, in fact, the concrete kept breaking deeper and deeper until Mr. Naylor acknowledged that grinding the surface would not fix the problem. Direct, at 41-42. Not only that, but JRC damaged and plugged the floor drain during its grinding process. Direct, at 44-45.

[¶10] Upon cross examination, Pavlicek testified that he did not enter into a written contract with JRC. *See* Pavlicek Cross Examination Transcript (hereafter referred to as "Cross"), December 5, 2017 (Docket Entry #251), at 11. Pavlicek said it was his understanding that American Steel recommended contractors, and Pavlicek selected them. Cross, at 12-13. Pavlicek later testified that he did not have a contract with JRC. Cross, at 42.

[¶11] Upon redirect, Pavlicek clarified that he did in fact enter into a contract with JRC, and thought he had a contract with them to do his work. Direct, at 56.

[¶12] Upon re-cross, Pavlicek testified as follows:

> Q. Okay. So you agree with me the contract for JRC's work in this case was contracted with American Steel; correct?
>
> A. Well, they were acting as an agent. I appeared for me, but I didn't have to hire them. I could have went outside, but I was, you know – he was a reputable person.
>
> ...
>
> Q. Okay. You agree American Steel sold you the building and they hired all of the subcontractors; correct?

A. Correct.

Cross, at 43.

[¶13] Upon further redirect examination, Pavlicek was asked as follows:

Q. So, American Steel found Plumbers Inc. for you?

A. No, they didn't.

Q. So that was a misstatement what you answered when you said American Steel hired all subcontractors?

A. Well, it's getting to be a long day. I don't' quite understand everything.

Q. Denny's Electric, did American Steel hire that contractor?

A. No, I hired them.

Q. So, what you are saying is it was not accurate to Mr. Sanderson's –

A. Yeah, I guess it wasn't accurate. My mistake.

Q. And you entered into a separate contract with, specifically, JRC, as evidenced by the fact that it's even different than the one proposed by American Steel?

A. Yes.

Q. As far as your understanding, JRC was working for you?

A. Yes.

Direct, at 59-60.

[¶14] The jury heard fact witnesses testify, as well as multiple expert opinions, regarding the cause and extent of the problems Pavlicek experienced with his concrete floor. Cory Birrenkott, operations manager at Dickinson Ready Mix at the time of the project, testified that he was on the project site on July 11, 2013 the first day in which concrete was being poured. Transcript of Proceedings filed August 2, 2018 (hereafter referred to as "Tr.") at

191-92. Mr. Birrenkott testified that he had received a call from one of his dispatchers that several of their drivers were having problems out on the jobsite because the trucks were not being unloaded fast enough. Tr., at 192. Mr. Birrenkott observed JRC spraying water on top of the poured concrete because the top of the slab was starting to dry out. Tr., at 193. Mr. Birrenkott discussed with JRC's project manager that he felt it was a bad idea for anyone to be spraying water on the concrete slab after it was poured. Tr., at 192. Mr. Birrenkott further observed that the poured concrete was "very wavy". Tr., at 193. "I mean, visually you could tell. It was not a good situation." Tr., at 193.

[¶15] Dr. Kevin MacDonald testified that the cracks, bubbling, and peeling that Pavlicek had experienced in his concrete floor were the "culmination of things that leads to improper finishing techniques. The air entrained concrete in and of itself could have been finished but not in the method that it was used, so you really have the wrong equipment, at the wrong time, on the wrong material." Tr., at 111. "The cracking, it's likely due – certainly due to bending; and it's likely due to lack of subgrade support. It's a compaction issue, and that would occur independent of the type of concrete that was used. But really it's the wrong finishing equipment, at the wrong time, on the wrong material." Tr., at 111.

[¶16] The jury also heard considerable evidence regarding the scope and cost of repairing the damage which was caused by JRC. Among other things, professional contractor Willis Winn testified that the "best fix" to repair Plaintiff's floor would require the removal and re-pouring of the floor. Tr., at 148. Mr. Winn's estimate in 2015 was $183,887. Tr., at 148. Mr. Winn testified that his bid was based primarily on the size and dimensions of the floor project. Tr., at 148. Mr. Winn's bid did not include floor heat pipes, winter

excavation costs, embeds, anchor bolts, testing, dewatering, mud removal, floor heat, or the drain that was damaged by JRC. Tr., at 147-150. Mr. Winn's bid did not contemplate the fact that the price of concrete had recently gone up. Tr., at 149.

[¶17] Giovanni Construction quoted Pavlicek $217,244.55 to replace the floor. Direct, at 52; *see also* Appellee's Appendix, p. 11 (Plaintiff's Exhibit 7)

ARGUMENT

[¶18] Pavlicek is satisfied with JRC's statement regarding the appropriate standard of review.

I. Whether the district court erred in denying Appellant's Motion for Judgment as a Matter of Law.

[¶19] Rule 50 of the North Dakota Rules of Civil Procedure provides, in relevant part, as follows:

> **(a) Judgment as a Matter of Law.**
>
> (1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> (A) resolve the issue against the party; and
>
> (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.
>
> ...
>
> **(b) Renewing the Motion After Trial; Alternative Motion for a New Trial.** If the court does not grant a motion for judgment as a matter of law made under subdivision (a), the court may later decide the legal questions raised by the motion. The moving party may renew its request for judgment as a matter of law by serving and filing a motion no later than 28 days after notice of entry of judgment... .

N.D.R.Civ.P. 50. This Court has identified the appropriate standard for a trial court to use regarding a 50(b) motion as follows:

> The trial court's decision on a motion brought under N.D.R.Civ.P. 50 to deny or grant judgment as a matter of law is based upon whether the evidence, when viewed in the light most favorable to the party against whom the motion is made, leads to but one conclusion as to the verdict about which there can be no reasonable difference of opinion. In considering this motion, the trial court must apply a rigorous standard with a view toward preserving a jury verdict, and so must we in our review on appeal. In determining if the evidence is sufficient to create an issue of fact, the trial court must view the evidence in the light most favorable to the non-moving party, and must accept the truth of the evidence presented by the non-moving party and the truth of all reasonable inferences from that evidence which support the verdict.

Minto Grain, LLC v. Tibert, 2009 ND 213, ¶ 7, 776 N.W.2d 549, 553 (citing *Amyotte ex rel. Amyotte v. Rolette County Hous. Auth.*, 2003 ND 48, ¶ 15, 658 N.W.2d 324; *Symington v. Mayo*, 1999 ND 48, ¶ 4, 590 N.W.2d 450; and *Anderson v. Kroh*, 301 N.W.2d 359, 362 (N.D.1980)).

[¶20] In this case, the trial court instructed the jury that, among other things, "[a] contract may be express or implied-in-fact. An express contract is one in which the terms are stated orally or in writing. An implied-in-fact contract is one in which its existence and terms are manifested by conduct." *See* Appellee's Appendix, p. 13 (Final Jury Instructions – Docket Entry #242). JRC did not and does not dispute that these instructions accurately reflect the applicable law in North Dakota.

[¶21] Evidence regarding the existence of such a contract was offered at trial in the form of Pavlicek's testimony and several exhibits. Appellee's Appendix, pp. 1-2 (Plaintiff's Exhibit 1 – Docket Entry #185), the written contract Pavlicek entered into with American

Steel Systems, Inc., specified that American Steel would neither contract with, nor be responsible for the workmanship of, other vendors hired by Pavlicek:

> 16. ... Seller and Buyer hereby agree that Seller shall have no responsibility whatsoever for the erection of the structure or structures which are the subject of this Contract even if Buyer utilizes the services of a Seller recommended company to do the erection and that Seller shall be under no liability to Buyer for any loss or damages sustained by Buyer as a result of or in connection with the erection of the said structure or structures... .
>
> ...
>
> 18. Upon request, Seller may supply the name(s) of potential vendors to supply additional components and contractors to install concrete and erect the building components or perform other work pertaining to the installation and erection of building components. Seller has not investigated such vendors or contractors, and the provision of name(s) does not constitute a recommendation of their skill or competence. It is important that the Buyer rely solely on its own investigation when selecting a vendor or contractor. Buyer acknowledges that Seller is not an agent, employee, or representative of and not responsible of the actions of manufacturer, erectors or vendors.

Appellant's Appendix, p. 18. The above paragraphs are not ambiguous; it could not be more clear that JRC was not working for American Steel. In fact, JRC stipulated as such. *See* Appellee Appendix, p. 13, ln. 22 – p. 14, ln. 6 (Partial Transcript of Proceedings, December 7, 2018 – Docket Entry #262). In addition, JRC offered no evidence to support its contention at trial that it was working for American Steel and not Pavlicek.

[¶22] Trial Exhibit 2 (Docket #186), containing bids and invoices to Pavlicek from JRC, specified the work JRC would perform, and did perform, for Pavlicek, and included payment terms. *See* Appellee's Appendix, pp. 3-5. Trial Exhibit 2 further included warranties from JRC directed to Pavlicek. Appellee's Appendix, pp. 3-5. Pavlicek testified that he paid JRC for their work directly. Cross, at 15-21. Evidence was also presented that

Pavlicek hired and directly paid other contractors who worked on the construction of his building. *See* Appellee's Appendix, p. 6 (Trial Exhibit 3 – Docket Entry #187). Trial Exhibits 4 and 5 (Docket #189, 190) demonstrated that JRC ordered the concrete for the job. Trial Exhibit 13 (Docket #197), among others, showed, and JRC does not dispute, that JRC finished the concrete.

[¶23] Pavlicek's testimony regarding a contractual relationship between he and JRC were summarized in Paragraphs 4-13 above. The same can be fairly summarized as follows. On or about March 2, 2013, Pavlicek agreed to purchase a steel building from American Steel. Direct, at 11. American Steel's bid for the building included estimates of the erection and construction of the building. Cross, at 7. American Steel's estimated total cost was $474,000. Appellant's Appendix, p. 17. American Steel recommended various contractors to erect the building, including but not limited to JRC. Direct, at 11, 16. When Pavlicek asked about the cost of the project, including erection and construction, American Steel told Pavlicek he would "need to definitely talk to the contractor [himself]." Direct, at 8. Pavlicek met with Joey Naylor, owner of JRC:

> Q. What discussions did you have with Mr. Naylor [of JRC]?
>
> A. I asked him what it would cost and he wanted to know exactly, you know, if I want to go with the 4 foot footings. And I said, "Well, I want a good constructed building, solid." And I asked him about Styrofoam under the heat to rebar... So, he said that he normally puts insulation, two inch insulation, and then, you know, the floor heat, and then the rebar on top of that. We discussed all of that and he gave me his proposal, what it's going to cost, and I just asked him if he did floors on this magnitude. Face it, it's a large floor. He told me he did, and he's got lots of experience in it, that he used to work for a contractor in Fargo prior to this and then he opened his own business... So, after he gave me the proposal and we agreed on it, verbally, nothing signed, and he went to work immediately.

Direct, at 16-17 (underline added). Based upon JRC's proposal, Pavlicek hired them in June. Direct, at 20. Pavlicek's understanding was that he could have hired whomever he wanted. Direct, at 24. JRC billed Pavlicek and Pavlicek paid JRC for its materials, supplies, and labor. Pavlicek hired other contractors for different construction tasks and paid them directly. Direct, at 22-24; 27-28. In total, Pavlicek paid approximately $650,000 to erect the building on his property. Direct, at 32.

[¶24] Upon cross examination, Pavlicek testified that he did not enter into a written contract with JRC. Cross, at 11. Pavlicek said it was his understanding that American Steel recommended contractors, and Pavlicek selected them. Cross, at 12-13. Pavlicek later testified that he did not contract with JRC. Cross, at 42.

[¶25] On redirect examination, Pavlicek testified, in relevant part, as follows:

> Q. You entered into a contract with JRC to do your work, didn't you?
>
> A. Yes.
>
> Q. You thought you had a contract with them to do your work?
>
> A. Yes.

Direct, at 56.

> Q. So, American Steel found Plumbers Inc. for you?
>
> A. No, they didn't.
>
> Q. So, that was a misstatement what you answered when you said American Steel hired all the subcontractors?
>
> A. Well, it's getting to be a long day. I don't quite understand everything.
>
> Q. Denny's Electric, did American Steel hire that contractor?

A. No, I hired them.

Q. So, what you are saying is it was not accurate to Mr. Sanderson's –

A. Yea, I guess it wasn't accurate. My mistake.

Direct at 59.

Q. And you entered into a separate contact with, specifically, JRC, as evidenced by the fact that it's even different than the one proposed by American Steel?

A. Yes.

Q. As far as your understanding, JRC was working for you?

A. Yes.

Direct, at 60.

[¶26] It was uncontradicted that Pavlicek discussed what he was looking for with JRC directly, that JRC represented that it was experienced, knowledgeable, and capable of the work Pavlicek wanted, and that JRC submitted a bid proposal which Pavlicek accepted. JRC procured materials and provided labor for the job, and Pavlicek agreed to pay and in fact paid JRC for both based upon its bid.

[¶27] The above evidence, particularly when viewed in the light most favorable to Pavlicek, supports the conclusion that the jury ultimately reached in this case that, by the greater weight of the evidence, JRC had a contractual relationship with Pavlicek, regardless of whether that contract was express (written or verbal) or implied (based on the parties' conduct). The evidence very clearly established that Pavlicek and JRC discussed construction of a concrete floor that Pavlicek wanted for his shop, that the parties ultimately agreed that JRC would construct the floor, and Pavlicek agreed to payment terms for the

same. That agreement may not have been explicitly memorialized in a writing, at least immediately, but as is evidenced by the trial court's jury instruction regarding express and implied contracts, the law contains no such requirement.

[¶28] Counsel for JRC represents within its Statement of Facts that "Pavlicek's own counsel conceded Pavlicek admitted during trial that there was no contract between Pavlicek and JRC," but this representation provides no context. *See* Appellant's Brief, at ¶19. The discussion between counsel and the trial court to which JRC cites in its Brief was regarding the issue of whether the district court's instructions to the jury should include law regarding third party beneficiaries of contracts:

> MR. JOHNSON: I mean, clearly, the plaintiff had a contract with JRC.
>
> THE COURT: Based on this?
>
> MR. JOHNSON: That and his testimony that JRC was recommended to him, and that they came into the yard...
>
> He also testified that – that American Steel was the general contractor and that American Steel hired JRC. And he admitted that repeatedly in response to Mr. Sanderson's cross-examination.
>
> THE COURT: All right.
>
> MR. JOHNSON: And so if that's what the jury believes, then there definitely is a contract that Mr. Sanderson himself proved up between American Steel and JRC, and unlike what Mr. Sanderson says is he cannot be a third-party beneficiary of a non-existent contract. Well, you can't have it both ways. Either there was no contract with American Steel and the contract was with Larry Pavlicek, or the contract was with American Steel and Larry Pavlicek is the third-party beneficiary. He can't have it both ways. I mean, [JRC] didn't go out there –

Tr., at 208-09 (underlined portion cited by JRC).

[¶29] The point Pavlicek's counsel was making to the trial court in the context of Appellant's citation is that the evidence presented at trial supported the conclusion that Pavlicek contracted with JRC, *but even if* the trial court were to disagree, then the only reasonable inference to draw from the evidence was that JRC had instead contracted with American Steel, and that Plaintiff was an intended third-party beneficiary of that contract.

[¶30] Regarding this issue, the district court ultimately concluded that the evidence supported Plaintiff's theory of a contractual relationship between he and JRC. Its reasoning can be found at Appellee's Appendix, p. 14, ln. 7 – p. 16, ln. 6. This specific determination by the district court is not one which JRC raised in its Motion for Judgment as a Matter of Law or raised within its appeal.

[¶31] JRC further argues that certain lines of Pavlicek's testimony should be considered a judicial admission, thereby (presumably) barring him from arguing the existence of a contract as a matter of law. But this legal assertion misses multiple marks.

[¶32] First, as JRC itself points out, "[t]he majority rule, adopted in North Dakota, states the trier of fact has the responsibility of deciding the issue based on all the evidence, even when a party gives testimony that conflicts with her position." *Ingebretson v. Ingebretson*, 2005 ND 41, ¶ 19, 693. N.W.2d 1. The jury in this case did exactly that - they decided, among other things, whether a contract, express or implied, existed between Pavlicek and JRC in this case based on all the evidence. The district court would have misapplied North Dakota law if it determined that Pavlicek was barred as a matter of law from arguing the

existence of a contractual relationship between Pavlicek and JRC based solely on specific lines of Pavlicek's testimony cherry-picked by JRC post trial.

[¶33] North Dakota caselaw provides that "testimony unfavorable to one's own contention can be a judicial admission if it is deliberate, clear and unequivocal." *Ingebretson*, ¶ 19. Webster's Dictionary defines "unequivocal" as "leaving no doubt." As was illustrated above, certain lines of Pavlicek's testimony on cross examination, which form the basis for JRC's appeal, was not the only evidence presented to the jury regarding the existence of a contractual relationship, whether express or implied, between Pavlicek and JRC. It cannot reasonably be argued that based on all of the evidence presented regarding the existence of a contract, that Pavlicek's testimony on cross examination "left no doubt" as to the existence of a contractual relationship.

[¶34] Although, as this Court has pointed out, "a party may have a persuasion problem when he attempts to contradict his own words, the resolution of a disputed fact should rest with the trier of fact based upon all available relevant evidence." *South v. Nat'l R. R. Passenger Corp. (AMTRAK)*, 290 N.W.2d 819, 833, n.5 (N.D. 1980) (emphasis added) (*citing Coldiron v. Mattick*, 488 S.W.2d 362 (Ky. 1972); *Vaeth v. Gegg*, 486 S.W.2d 625 (Mo. 1972); *Starks v. City of Houston*, 448 S.W.2d 698 (Tex.Civ.App. 1969); *Hanson v. Darby*, 100 Ill.App.2d 339, 241 N.E.2d 110 (1968); *Hilburn v. Brodhead*, 79 N.M. 460, 444 P.2d 971 (1968); *and Saunders v. Bulluck*, 208 Va. 551, 159 S.E.2d 820 (1968). That is precisely what the jury did in this case.

[¶35] Based upon all of the evidence presented to the jury, which with respect to JRC's Motion for Judgment as a Matter of Law must be viewed in the light most favorable to

Pavlicek, it cannot be said that no reasonable mind could determine by the greater weight of the evidence that a contractual relationship existed. *See Minto Grain, LLC v. Tibert*, 2009 ND 213, ¶ 7, 776 N.W.2d 549, 553 (legal standard regarding Rule 50(b) motion). Further, the trial court "must apply a rigorous standard with a view toward preserving a jury verdict." *Id.*

II. Whether Section 32-03-36 of the Century Code would act to prohibit the jury's award of damages to Pavlicek.

[¶36] JRC argues that allowing the district court's Judgment to stand would result in an impermissible double recovery for Pavlicek. For support, JRC cites to Section 32-03-36 of the Century Code, which provides, in relevant part, that "... [n]o person can recover a greater amount in damages for the breach of an obligation than the person could have gained by the full performance thereof on both sides[.]" This Court has further explained this rule as follows:

> For a breach of contract, the injured party is entitled to compensation for the loss suffered, but can recover no more than would have been gained by full performance. NDCC §§ 32-03-09, 32-03-36. Our law thus incorporates the notion that contract damages should give the non-breaching party the benefit of the bargain by awarding a sum of money that will put that person in as good a position as if the contract had been performed.

Wachter v. Gratech Co., 2000 ND 62, ¶ 27, 608 N.W.2d 279, 286 (*citing* 22 Am.Jur.2d Damages § 45 (1988)); *see also Leingang v. City of Mandan Weed Bd.*, 468 N.W.2d 397, 398 (N.D. 1991).

[¶37] The simple response to JRC's assertion that this Section should act to prohibit or void Pavlicek's judgment against JRC would be that the Default Judgment that was entered against American Steel was based upon a breach of obligations separate from the obligations

of JRC. Again, referring to the testimony and evidence, American Steel sold Pavlicek a steel building, for which Pavlicek hired JRC to pour and finish the foundation upon which the steel building would sit. The Default Judgment was entered based upon the fact that American Steel did not respond to Pavlicek's Complaint, and supported by the facts as they were understood by Pavlicek at the time of its entry. Throughout years of investigation, testing, and discovery procedures in this action, further facts were learned and developed that made it apparent to Pavlicek, and inevitably the jury in this case, that JRC had a contract with Pavlicek to, among other things, pour and finish the concrete floor, and that was *not* something that American Steel was contractually bound to do. A review of Paragraphs 16 and 18 of Plaintiff's Exhibit 1 illustrates this fact. *See* Appellee's Appendix, pp. 1-2; Appellant's Appendix, pp. 17-18. In any event, JRC cites no case, and Pavlicek can find none, that would support setting aside a verdict for breach of contract simply because another party may have also breached their obligation to the plaintiff.

[¶38] Further, Pavlicek has realized no such recovery from any party. In the event that Pavlicek were to recover from American Steel, based upon the jury's determination of facts at trial, it would be American Steel that would have a claim for contribution against JRC. There is no law that would allow JRC to avoid liability based upon this hypothetical fact.

CONCLUSION

[¶39] For the foregoing reasons, Pavlicek requests that this Court affirm the district court's Order Denying JRC's Motion for Judgment as a Matter of Law.

Dated this 10th day of October, 2018.

JOHNSON, MOTTINGER & GREENWOOD, PLLP

By_____

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AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

Pamela J. Johnson, being first duly sworn, deposes and states that she is over the age of eighteen years and not a party to the above-entitled matter. That on October 10, 2018, she filed the following document(s):

1. **APPELLEE LARRY PAVLICEK'S BRIEF; and**
2. **APPELLEE LARRY PAVLICEK'S APPENDIX**

electronically with the Clerk of the Supreme Court and electronically served them on Paul R. Sanderson at psanderson@esatorneys.com

Pamela J. Johnson

Subscribed and sworn to before me this 10th day of October, 2018.

(SEAL) JARED HINES
Notary Public
State of North Dakota
My Commission Expires April 13, 2021

Notary Public