20100076

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20100076
MORTON COUNTY CIVIL NO. 30-09-C-0112

Markwed Excavating, Inc.,

Plaintiff/Appellant,

-vs-

The City of Mandan and
Swenson, Hagen & Co.,

Defendants/Appellees.

Appeal from Opinion Dated October 2, 2009,
Opinion Dated November 30, 2009 and
Order on Motions for Summary Judgment Dated December 11, 2009,
Issued by the Honorable Gail Hagerty, South Central Judicial District,
Morton County, North Dakota

BRIEF OF APPELLEE SWENSON, HAGEN & CO.

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STATEMENT OF ISSUES

Swenson, Hagen & Co. ("Swenson") believes that the issues, as to Swenson, presented for appeal are as follows:

1. Did the District Court correctly determine that the no damages for delay clause in the contract (the "Contract") between the City of Mandan ("Mandan') and Markwed Excavating, Inc. ("Markwed") is binding upon Markwed, thereby barring any claim from Markwed for damages in this matter, unless Markwed is allowed to proceed with a claim for negligent misrepresentation.

2. Was the District Court correct in determining that the elements for a claim for negligent misrepresentation do not exist.

3. Was the District Court correct in determining that the Contract is not unconscionable.

4. Does the economic loss doctrine, in any event, bar a tort action against Swenson.

STATEMENT OF THE CASE

A Statement of the Case has been presented by both the Appellant, Markwed, and by Appellee, Mandan. Swenson will not restate all of the items contained in the Statement of Case in Markwed's and Mandan's briefs. However, Swenson will note that, as to Markwed's discussion regarding the course of proceedings and disposition, there are two incorrect statements, although they have no significance in this appeal. Markwed indicated that Swenson filed a Motion for Leave to Serve a Counterclaim. This is not correct. Additionally, Swenson did not request an extension of time to respond to Markwed's Motion for Partial Summary Judgment. Swenson never objected to Markwed's Motion for Partial Summary Judgment. The extension of time requested by Swenson, which was granted on June 17, 2009, was for the time required to file a reply to Plaintiff's Response to Swenson's Motion for Summary Judgment, and to file a response to Plaintiff's Motion to Amend Complaint. These briefs were filed by Swenson on June 30, 2009.

Also, Markwed's Statement of the Case does not discuss the District Court's denial of Markwed's Motion to Amend the Complaint; and Mandan's Statement of the Case addresses the denial of this motion only in regards to Markwed's attempt to assert a claim for negligent misrepresentation against Mandan. With respect to the request of Markwed to amend its Complaint against Swenson, the District Court found that the assertions made by Swenson regarding the staging area were tentative, and not part of the original contract; that in addition, Swenson, as an independent contractor, was not a party to the

Contract between Markwed and Mandan; and because Markwed did not satisfy the elements for an unintentional misrepresentation claim against Mandan, Markwed did not satisfy the elements for the unintentional misrepresentation claim against Swenson. However, the Court went on to find that, in addition, any statement made by Swenson relating to Markwed's access to the area north of the permanent easement were warranted by the permission for the use of that property given by the owner of that property. The Court further found that because Swenson had discussed the possibility of a contractor's need for an additional temporary easement with the owner of that property, and the owner had agreed that the additional area would be granted if needed, Swenson had every reason to believe the information was true.

Finally, with regard to the course of proceedings and disposition, set forth in Markwed's brief, Markwed correctly notes that it appealed from the District Court's opinions dated October 2, 2009, and November 30, 2009, and the Order dated December 11, 2009. This appeal was filed on March 4, 2010, or 85 days after the issuance of the Order. However, while the Notice of Appeal does not appeal from them, the Orders did result in a Judgment in favor of Swenson, with Notice of Entry being given January 6, 2010, and a Judgment in favor of Mandan, with Notice of Entry being given January 15, 2010. Accordingly, the Notice of Appeal, while it did not actually appeal from the Judgments, was within 60 days of the date of the Notice of Entry of the Judgments.

STATEMENT OF THE FACTS

As noted by Mandan and Markwed in their briefs, Mandan contracted with Markwed to do work on a project known as the Storm Sewer Improvement District 28 Project 2006-11 Lakewood Commercial Park First Addition (the "Project"). Swenson was the engineer on the Project, and as such, prepared the Contract Specifications. The contract between Mandan and Markwed (the "Contract") incorporated a number of Contract Documents, including the Specifications and the General Conditions. (App. P. 45). The General Conditions are standard general conditions for contracts entered into with Mandan.

The Contract was executed on behalf of Markwed by David Markwed, who is the owner of Markwed Excavating, Inc. (Swenson Supp. App. p. 2, David Markwed Depo. p. 6). Markwed has admitted that he was familiar with all of the Contract Documents, and further admitted that he was familiar with, and had read, both the specifications for the Project, and the General Conditions for contracts on Mandan construction projects. (Swenson Supp. App. pp. 4 & 5, David Markwed Depo. pp. 160 & 161). Approximately 90 percent of Markwed's work is for public entities, and each public entity has their own standard contract specifications. (Swenson Supp. App. p. 5, David Markwed Depo. p. 161).

The Contract required, in part, that Markwed bore a pipe under certain highways, and also excavate and place pipe within a 75 foot strip of land that was a permanent easement. The permanent easement included part of the land located within the Raging Rivers Water Park, and additional land in the lot

located immediately north of the Raging Rivers Water Park. The lot located immediately north of the Raging River Water Park was owned by a company that was in turn owned by Steve McCormick ("McCormick"). (Swenson Supp. App. p 19, McCormick Affidavit p. 1).

Contained within the Contract Specifications was specification section 100-39, which read, in part, as follows:

> Section 100-39 Availability of Lands for Work. During the performance of the work of this Contract, the Contractor shall have the authority to access across private property and to store materials on private property where located at the time of construction. . . . (App. P. 53)

Markwed claims that this section was intended to mean that Markwed would have a temporary construction easement for the staging of the Project (i.e. the storage of equipment, construction shacks, etc.) on the property to the immediate north of the Project. The District Court, after considering arguments of the parties, and all of the factual materials provided by the Plaintiff, disagreed with this contention, and found that the private property referred to in the specifications was an existing 75 foot permanent easement. (App. p. 216).

However, while Swenson agrees with the Court's determination of this point, Dave Patience, an employee of Swenson, has testified that he told some bidders, including Dave Markwed, prior to the bid, that they would have access to McCormick's property for a construction easement. (App. p. 195, Patience Depo. p. 23). Dave Patience's testimony is that this statement was based upon a discussion he had with McCormick and Leroy Mitzel (the developer for whom the Project was being completed by Mandan) in the second week of June, 2006; that

he explained the Project to McCormick, and that McCormick told Mitzel and Swenson that the land north of the Project could be used as a temporary construction easement. (App. 194, Patience Depo. p. 19). Patience also testified there was no discussion about any particular footage that could be used for a temporary easement; (App. 197, Patience Depo. p. 28) and that the reason there was no written easement entered into at that time, was because there was no knowledge as to exactly how large an easement the contractor would need since the Project had not yet been bid, and the contractor was not known. (App. 201, Patience Depo. p. 67). Markwed presented no evidence to contradict the testimony of Patience; and in addition Patience's testimony was consistent with an affidavit of McCormick. (Swenson Supplemental Appendix p. 20, McCormick Affidavit p. 2).

The Contract was entered into August 16, 2006, with a completion date of May 1, 2007. (App. p. 43). On September 25, 2006, Markwed went onto the construction site, and was told by Randy Christianson ("Christianson'), who owned the company that owned Raging River Water Park, to stop placing equipment on the properties immediately to the north of the permanent easement for the Project. Christianson claimed he had an ownership interest in the property and had not agreed to a temporary construction easement. Christianson told Markwed to leave and it did so. (Swenson Supp. App. p. 3, David Markwed Depo. p. 90).

As explained by McCormick in his affidavit, Christianson held an option to purchase the property to the north of the Project that was going to be used as a

temporary construction easement. McCormick never discussed this option with Dave Patience, or Leroy Mitzel, because McCormick believed that he had the ability to grant the temporary construction easement. The option to purchase held by Christianson was never exercised. (Swenson Supp. App. p. 20, McCormick Affidavit p. 2).

After Christianson told Markwed to leave, Markwed contacted Swenson, who contacted McCormick. McCormick advised Dave Patience that he should try to resolve the concerns and objections of Christianson. (App. p. 196, Patience Depo. p. 24; Swenson Supp. App., p. 20, McCormick Affidavit p. 2). On November 8, 2006, Patience advised McCormick that Christianson would not agree to the easement; McCormick then signed a temporary construction easement. (Swenson Supp. App. p. 21, McCormick Affidavit p. 3). This temporary construction easement was for 100 feet. (App. p. 66). On November 22, 2006, McCormick executed a second temporary construction easement for an additional 300 feet. (App. p. 68). These easements, executed by McCormick, were the actual easements utilized by Markwed in its performance of its Contract work.[1]

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[1] In its brief, Markwed states the second easement for an additional 300 feet was not obtained until November 27, 2006. In fact, Dave Patience has testified that Markwed did not ask for the larger easement until November 22, 2006, and that within hours of the request, McCormick agreed to sign the easement for the additional space. (App. p. 197, Patience Depo. pp. 30-31). David Markwed could not recall if the second easement was delivered to him within a day or two of the time he complained that he needed additional space. (App. p. 34, David Markwed Depo. p. 143). However, for purposes of this appeal, this difference between the deposition testimony and Markwed's claim in its Statement of Facts is not relevant since, for the purposes of this appeal, it is assumed that Markwed was delayed until the 2007 construction season,

Markwed did not perform any work on the Project between September 25, 2006, and November 22, 2006.[2] A change order was subsequently executed extending the completion date of the Project from May 1, 2007 to December 31, 2007 without providing for any additional consideration. (App. p. 69) Markwed's work on the Project was completed in 2007.[3]

In this lawsuit, and in its Statement of Facts, Markwed claims that the completion of the work in 2007 resulted in extra time, efforts, and costs resulting from delay, because the costs of dewatering were substantially increased, and the manpower required for the work was significantly longer. In fact, there is dispute as to whether the work in the fall of 2007 resulted in any damages, or added expenses to Markwed. David Markwed testified that Markwed did not experience dewatering requirements different in 2007 than what he had

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notwithstanding that this would be an issue of dispute if the District Court decision was reversed.

[2] Mandan, in its brief, correctly notes that Markwed was told by Swenson and Mandan that there was sufficient area within the permanent easement to perform the work and that alternative land west of the easement was available as a staging area; and that Markwed disputed this position. This dispute is not relevant for purposes of this appeal since it must be assumed, for purposes of this appeal, that Markwed was unable to perform the work until the easement from McCormick was obtained.

[3] In its Statement of Facts, Markwed references a request to Markwed to prepare a bid to modify the Project. This possible modification, however, did not come up until December, 2006, at a time when Markwed was not working on the Project; and the proposed modification was rejected by the end of December, 2006. Consideration of a possible modification of the Project had nothing to do with Markwed delaying its work on the Project, because Markwed had already delayed its work on the Project, and was not working on the Project during the one month, December, 2006, when the modification was considered. Consideration of this modification has nothing to do with this appeal, or even this case.

anticipated (Swenson Supp. App. p. 11, David Markwed Depo. p. 41). In fact, he further testified that he did not run into any conditions that were different in 2007 than what he had anticipated in 2006 (Swenson Supp. App. p. 13, David Markwed Depo. p. 99). Yet at the end of 2007, before the Project had even been started by Markwed, Markwed was already asserting substantial damages of $250,000 because of the delay. (App. p. 157). For the purpose of this appeal it must be assumed that Markwed did have additional costs; but the existence of this dispute is relevant when it comes to addressing Markwed's argument that the no damage for delay clause (hereinafter discussed) is absurd.

Contained with the General Conditions, is Section 100-12, which reads, in part, as follows:

> **100-12 Delays**. The Contractor will not be entitled to any compensation for causes resulting in delays or hindrances to the work. Extensions of time will be granted for unavoidable delays, which in the opinion of the Engineer are clearly beyond the control of the Contractor; resulting from causes such as Acts of Providence, fortuitous events, and the like. . . . (App. p. 60)

As noted above, David Markwed testified that 90 percent of Markwed's work is for public entities, and that each public entity has their own standard contract specifications. He further testified that he had previously bid projects for Mandan and had read the General Conditions for contracts on Mandan construction projects. David Markwed has further admitted that he did not believe there was any part of the Contract Documents that he did not understand (Swenson Supp. App. p. 6, David Markwed Depo. pp. 181 & 182). David Markwed further agrees that his position is that Markwed was delayed, or hindered, from doing the work; although he claims he should be able to recover

because the delay was beyond his control. He also has claimed that there was some provision in the Special Conditions, or Contract overriding General Condition 100-12 (Swenson Supp. App. pp. 7 - 8, David Markwed Depo. pp. 225-232). Of course, no overriding provision has ever been identified by Markwed because none exists.

ARGUMENT

A. The District Court Correctly Determined that the No Damages for Delay Clause in the Contract is Binding upon Markwed, Thereby Barring Any Claim from Markwed for Damages in this Matter, Unless Markwed is Allowed to Proceed with a Claim for Negligent Misrepresentation.

The District Court held that Section 100-12 of the General Conditions (the "no damages for delay clause") is binding upon Markwed, so as to bar Markwed from any claim for damages in this matter, unless Markwed has a factual basis for a claim of negligent misrepresentation. (As hereafter discussed, the District Court also determined that no factual basis existed for such a claim.) Markwed seeks to overturn this determination.

As discussed in the Statement of Facts, David Markwed was the only person involved in the negotiation and execution of the Contract on behalf of Markwed. David Markwed has admitted that he was familiar with the General Conditions of the City of Mandan. The entire claim of Markwed is for compensation for alleged delays or hindrances to Markwed's work. The first sentence of Section 100-12 provides "The Contractor shall not be entitled to any compensation for causes resulting in delays or hindrances to the work". If Markwed could assert a claim for these delays or hindrances it would be directly contrary to this contract provision. Moreover, when David Markwed was questioned about this at his deposition, he admitted that what he was seeking was damages for delays or hindrance in his work; but he claimed that he should be able to recover because the delay was beyond his control. At his deposition,

he claimed that there was overriding provision in the Special Conditions, or Contract, overriding General Condition 100-12. That, however, is not correct.

It is undisputed that Change Order No. 1 extended the Completion Date for the Project from May 1, 2007, to December 31, 2007, without providing for any additional compensation. Accordingly, Markwed received the relief for any delay that was allowed by the Contract.

The enforceability of a no damage for delay clause in a construction contract has never been specifically addressed by this Court. However, it has been addressed by many other courts. The District Court discussed the fact that there are three approaches that other courts have used in considering no damage for delay clauses (App. p. 175).

The "New York approach" is that the no damage for delay clause controls, except when the delay is not contemplated by the parties. As hereinafter discussed, this position has the practical effect of virtually voiding the clause.

The "literal approach" is that the no damage for delay clause controls; and there are no exceptions.

The middle ground is the "Maryland approach". Courts applying this approach hold that the no damage for delay clause controls, and the language is enforceable, unless there is intentional wrongdoing or gross negligence, or fraud or misrepresentation. The District Court determined that North Dakota contract law most closely resembles the Maryland approach.

The District Court correctly noted that North Dakota contract law focuses on mutual assent, and that parties may enter into contracts, and in doing so

include within the contract, whatever language they choose to control their agreement. This Court in Alerus Financial, N.A. v. Western State Bank, 2008 ND 104, ¶19, 750 N.W.2d 412, recently enunciated the rules of contract construction, in quoting from as follows:

> [This Court] construe[s] contractual agreements to give effect to the parties' intent, which if possible must be ascertained from the writing as a whole. A contract's clear and explicit language governs its interpretation and its "words are construed in their ordinary sense." When the parties' intent "can be ascertained from the agreement alone, interpretation of the contract is a question of law." (citations omitted)

The provision in General Condition 100-12 providing that Markwed is not entitled to compensation for causes resulting in hindrances or delays to the work could not be more clear and explicit. David Markwed has admitted reading the General Conditions, being aware of the General Condition provisions, not having any questions about any of the General Conditions, and that Markwed's claim is directly contrary to this provision.

Markwed urges this Court to adopt the New York approach arguing that because the delay was not contemplated by the parties at the time they executed the Contract, General Condition 100-12 should not apply. This interpretation, however, would render the no damage for delay clause meaningless. If the parties contemplated the delay at the time they entered into the Contract, they would, presumably, have addressed the contemplated delay in the Contract Documents. Many courts have addressed this argument; one such court was the Utah Court in Western Engineers, Inc. v. State Road Commission, 20 Utah 2d 294; 437 P.2d 216 (Utah 1968). In that case, the plaintiffs were to complete a

road construction project within nine months; but the project was not actually completely for three and one-half years. The delays were the cumulative delays caused by the State's failure to process various preliminary designs, plans and drawings within a reasonable time, and the State's slowness in determining clearance for structures over railroad right-of-ways, and the State's inability to come to decisions. The Court applied the no damage for delay clause after finding that it was not ambiguous, and specifically held that the plaintiffs were not entitled to introduce parol evidence concerning whether the delay was unreasonable, or not contemplated by the parties. In doing so, the Court concluded "[i]t was for the unforeseen delays that the clause was included to protect the state and compensate the plaintiffs for such delays" (by providing an extension of time to complete). Id. at 297. The Utah Court, its decision further quoted from the Rhode Island Supreme Court decision of Psaty & Fuhrman v. Housing Authority, 68 A.2d 32 (R.I. 1949) which had held:

> The no damage clause in this contract expressly states that the contractor shall not recover damages because of hindrance or delay from any cause in the progress of the work "whether such delays be avoidable or unavoidable". The language of this provision, though broad in scope, is not ambiguous. As the contract provides for an extension of time if requested by the contractor, it is obvious that the object of the clause was to protect the Authority in the undertaking of such magnitude against the vexatious question, in perhaps innumerable instances, whether any particular delay could have been reasonably avoided by the Authority. . . .
>
> The contractor in effect argues that the clause under consideration means that the Authority is excusable for reasonable delay only. This construction of the no damage clause would subject the Authority to the inquiry in all instances of delay whether a reasonable person would have acted differently, thus raising the very question that the clause intended to avoid. In the absence of

> concealment, misrepresentation or fraud, the contractor by such construction of the no damage clause can render meaningless an express condition of the contract which it knowingly and freely accepted. . . .

Id. at 297.

Markwed cites to California cases, which adopted the New York approach. This simply demonstrates that California has adopted the New York approach because, apparently, the California Court felt the New York approach was in line with that Court's interpretation of contract law. However, as Mandan has pointed out in its brief, Markwed ignores the fact that the legislature in California has, by legislative act, adopted the New York approach, while this has not occurred in North Dakota. As noted in Mandan's brief, California statutes have a specific provision that contract provisions in construction contracts of public agencies, and subcontracts, which limit a contractee's liability to an extension of time for delay, for which the contractee is responsible, in which delay is unreasonable under the circumstances involved, and not within the contemplation of the parties, shall not be construed to preclude the recovery of damages by the contractor, or subcontractor. This California statute is contrary to the principles of contract law adopted by the North Dakota legislature. Markwed wants this Court to adopt by judicial decision the provision adopted by the California legislature even though no similar legislative provision has been adopted in North Dakota.

Because there are three different approaches, cases can be cited from other jurisdictions applying each of the three approaches. Some of those courts have applied the Maryland approach for no damage for delay clauses to fact

situations which are very close to this case. Swenson has already discussed the Utah decision in Western Engineers. Another example of the application of the no damage for delay clause in a court applying the Maryland approach was Christhilf v. City of Baltimore, 136 A. 527 (App. Md. 1927). In that case, the contractor sued the city claiming delays caused by the failure and refusal of the city to exercise reasonable effort and diligence to secure rights-of-way for the highway. The right-of-way was obtained, the highway was built, and the contractor was paid; but the contractor claimed compensation for more money beyond the agreed compensation. The lawsuit contained a no damage for delay clause. The Court found the no damage for delay clause was reasonable, and that the contractor was protected by the clause because it granted an extension of time to the contract in the event of delay. Id. at 528.

Other examples are W.C. James, Inc. v. Phillips Petroleum Co., 485 F.2d 22 (10th Cir. 1973) [the Court enforced a no damage for delay clause against a pipeline contractor who sued for additional compensation for delays in furnishing a right-of-way]; Unicon Management Corp. v. City of Chicago, 404 F.2d 627 (7th Cir. 1968) [the Court enforced a no damage for delay clause against a contractor claiming the city had caused delays in completing site work and grading and had procrastinated in approval of certain work]; and Ragan Enterprises, Inc. v. L&B Construction Company, Inc., 492 S.E.2d 671 (Ga. App. 1997), [the Court enforced a no damage for delay clause against a plaintiff alleging delay in providing access to worksite, and in coordinating the work, and in resolving discrepancies and deficiencies in the plan in a timely manner; the Court noted

that the acts complained of were not bad faith, in that they were not caused by "willful and wonton acts or malicious intent or interested or sinister motive"].

In reality, Markwed wants to avoid the no damage for delay clause for what is alleged to be simple negligence on the part of Swenson. Courts have rejected an argument that mere negligence by an owner or engineer is enough to avoid a no damage for delay clause. In John E. Green Plumbing & Heating Company, Inc. v. Turner Construction Co., 500 F.Supp. 910, (E.D. Mich. 1980) a plumbing contractor sued the construction manager for delayed damages based, in part, on theories of negligence. The Court concluded that "mere negligence is not sufficient to avoid the consequences of the "no damage for delay" clause. Id. at 913. "The plaintiff cannot accomplish under a negligence theory what could not be accomplished in contract." Id.

Similarly, in Anthony P. Miller, Inc. v. Wilmington Housing Authority, 165 F.Supp. 275 (D. Del. 1958), the Court concluded, in a case brought by a general contractor against a municipal housing authority for damages caused by delay that mere negligence was not sufficient to create an exception to the no damage for delay clause because "at best the allegations of negligence are bottomed upon action which may be characterized as inaction, lack of diligence, or lack of effort, something akin to simple negligence or carelessness".
Id. at 282.

In an attempt to avoid the District Court's ruling, Markwed contends that even though the District Court stated that it was applying the "unambiguous language of the contract" (App. p. 178), it failed to include a further discussion of

whether the clause was ambiguous. There were several reasons for this. The first is that Markwed never claimed General Condition 100-12 was ambiguous before this appeal. The transcript in this matter includes the hearing on the motions for summary judgment held on August 28, 2009. At page 23 of the transcript, Swenson clearly stated its position that the clause was unambiguous. Markwed's argument starts in the middle of page 25, and goes to the middle of page 36. Markwed's argument on the delay clause starts at line 19 of page 32. Markwed does make an argument about the intent of the contract, primarily with regard to conscionability, but at no place does Markwed make the claim that General Condition 100-12 is ambiguous.

Indeed, Markwed's attorney's original argument, during the depositions, was that General Condition 100-12 was not applicable if the breach of Contract was caused by the City, or engineers. (Swenson Supp. App. p. 9, David Markwed deposition p. 309).

Secondly, the applicable portion of General Condition 100-12 is simply not ambiguous. It could not be more unambiguous when it states that the contractor "will not be entitled to any compensation for causes resulting in delays or hindrances to the work". It is not necessary for this sentence to discuss all the delays or hindrances that could be included, because it includes all delays, or hindrances. Markwed attempts to make this clear, unambiguous sentence ambiguous by referencing the second sentence of General Condition 100-12, which discusses those delays for which an extension of time will be granted. However, the issue of which delay will allow an extension of time is completely

separate from the first sentence. Mandan's Brief addresses this point, and Swenson adopts the arguments made by Mandan on this point.

Moreover, as already discussed, David Markwed testified that he understands that the items for which he is seeking damages are included within the delays, or hindrances, addressed by the first sentence of General Condition 100-12. Even when a contract is ambiguous, it is interpreted so as to give effect to the understandings of the parties.

Markwed's statement that General Condition 100-12 involves an absurdity because it would effectively deny any compensation to Markwed for delays, or hindrances, caused by Mandan, is a completely circular argument. The argument requires a belief that Markwed is entitled to such compensation as a matter of right, and therefore, any contract provision baring such compensation is absurd. The argument assumes the outcome of the very issue in dispute has to be in Markwed's favor. Markwed specifically accepted General Condition 100-12, and in so doing, specifically accepted a Contract provision that it would not be entitled to any compensation for causes resulting in delays or hindrances to the work. If Markwed had not wished to accept this provision, Markwed could have elected to have not bid this Project; or Markwed could have submitted a nonconforming bid, by which it rejected this provision, and attempted to negotiate the Contract without the provision. Markwed, however, elected to bid this Project, and then enter into the Contract without any objection to General Condition 100-12. Moreover, it was not absurd for Mandan to include the provision. An obvious purpose of the clause is to avoid a questionable claim for

damages if there is a delay of any kind on the Project, which claim would then have to be litigated. The reasonableness of this clause is underscored by the facts in this case.

Markwed argues that General Condition 100-12 is repugnant with the time is of the essence provision in the Contract. Contracts include time is of the essence provisions to avoid an argument that a reasonable delay in performance does not constitute a breach of contract. See Keller v. Hummel, 334 N.W.2d 200, 203 (N.D. 1983). Without this provision, the required completion date would not be firm. A contract provision allowing an extension of that completion date in certain circumstances is not repugnant with the time is of the essence clause. In fact, without a time is of the essence clause, a contract extension would not even be required.

B. The District Court Correctly Determined That the Elements For a Claim For Negligent Misrepresentation Do Not Exist.

As noted, the Maryland approach recognizes an exception to a no damages for delay clause if there is intentional wrongdoing or gross negligence, or fraud or misrepresentation, on the part of the person asserting the clause. Swenson and Mandan filed their Motions for Summary Judgment after extensive discovery, which was in reality complete discovery on the issue of liability (as opposed to damages).[4] There was, at that time, no allegations of fraud, misrepresentation or gross negligence. However, after both Swenson and Mandan had filed Motions for Summary Judgment, Markwed filed a Motion to

[4] The depositions of David Markwed, Mike Markwed (the supervisor for Markwed on the Project), four Swenson employees, the Mandan City Engineer (Tom Little), and Christianson had all been taken.

Amend its Complaint to include a claim of negligent misrepresentation. This is, apparently, the closest Markwed could come to one of the exceptions allowed by the Maryland approach.

Both Mandan and Swenson opposed allowing an Amended Complaint. This Court has held that a trial court has wide discretion in deciding whether to grant or deny a motion to amend; and that a district court properly denies an amendment if the amendment would be futile as the purported amendment could not have survived summary judgment. Darby v. Swenson, 2009 ND 103, 767 N.W.2d 147. Darby, like this case, was a case in which a plaintiff resisted a motion for summary judgment, but then also filed a motion to amend his complaint in an attempt to add a new claim that would survive the summary judgment motion. Like this case, the trial court granted the summary judgment motion, and denied the leave to amend. The position of Swenson (and Mandan) was that Markwed's requested amendment could not survive a motion for summary judgment.

The Motion to Amend had been briefed by the parties prior to oral argument on the Motions for Summary Judgment of Mandan and Swenson. However, because the Court recognized that it might be viewing the issues surrounding the no damage for delay clause different from the parties, the Court requested further briefing on the purported claim of unintentional misrepresentation. If Markwed had been able to present a factual basis by which it could, at trial, establish the elements of this claim it would have been allowed to proceed to trial on this claim. After review of the additional briefing, the Court

denied the Motion to Amend, because the Court found Markwed could not establish the elements of a claim for unintentional misrepresentation (App. p. 215).

This Court recognized the claim of unintentional misrepresentation (also referred to as negligent misrepresentation) in Bourgois v. Montana-Dakota Utilities Co., 466 N.W.2d 813 (N.D. 1991). The holding in Bourgois is the basis for North Dakota Pattern Jury Instruction 50.32. Swenson was acting as an independent contractor, and accordingly was not a party to the Contract. However, Swenson will address the elements of unintentional misrepresentation as set forth in this pattern jury instruction as they would apply Swenson, if Swenson was a party to the Contract.

The first element of unintentional misrepresentation is that a party has induced another to enter into a contract by making a positive assertion. Markwed claims that a relevant positive assertion was the statement in Specification Section 100-39, that "[d]uring the performance of the work of this Contract, the Contractor shall have the authority to access across private property and to store materials on private property where located at the time of construction" along with construction notes stating that "Contractor may stockpile backfill north of existing trees" with said construction notes showing a permanent 75 foot easement. Markwed claims these positive assertions were false because Markwed was not allowed, for a period of approximately six weeks, to use the McCormick land north of the permanent easement as a staging area. The District Court rejected Markwed's claim in this regard, and Swenson agrees with

the Court's determination on this point. However, as Swenson has stated in the Statement of Facts, Swenson has admitted that Dave Patience told bidders, including David Markwed, prior to the bid, that they would have access to McCormick's property immediately north of the permanent easement for a construction easement because Dave Patience had discussed the issue with Steve McCormick, and he advised the land would be available. (App. p. 195-196, Dave Patience Depo. p. 23 & 24). As applied to Swenson in considering the elements of the tort of unintentional misrepresentation, this would be the positive assertion made by Swenson which purportedly induced Markwed to enter into the Contract.

However, the next prong for a claim of unintentional misrepresentation, is whether the statement was not true; and last prong is, if the statement was untrue, whether it was warranted by the information of the person making it. The undisputed testimony is that Dave Patience, in June, 2006, met with Leroy Mitzel and McCormick on the site, explained the Project to McCormick, and McCormick told Patience that the land owned by him and north of the permanent easement could be used as a temporary construction easement. This is supported by the testimony of Dave Patience previously referenced, as well as the Affidavit of McCormick, previously referenced.

The Affidavit of McCormick, further confirms that a company owned by McCormick owned this property; that Christianson had an option to purchase the lot, which option was not, and has never been, exercised; that, accordingly, McCormick viewed himself as the person having the ability to grant a temporary

easement; that after Christianson objected to the Project, McCormick did direct Dave Patience to try to satisfy Christianson's concerns; and that when Dave Patience was unable to satisfy Christianson after approximately 6 weeks, McCormick executed temporary construction easements without the approval of the Christianson, which easements provided the temporary easement desired by Markwed.

Dave Patience's statements to Markwed were that the owner of the lot north of the Project, Steve McCormick, had agreed the lot could be used as a temporary construction easement, and that the land would therefore be available for a temporary construction easement. There is no evidence that any of the oral statements made to Markwed by Dave Patience were untrue.

However, even if it is assumed that the statement of Patience was untrue, because a written easement had not been obtained, the statements actually made, when considered in light of the available evidence, were warranted by the information available to Swenson (i.e. Dave Patience). The mere fact that Christianson held an option to purchase the real estate, which option was never exercised, did not require his approval, or execution, of the temporary construction easement. McCormick was the owner of the land. McCormick had the right to grant an easement. McCormick agreed to grant an easement. Although he delayed signing a written easement, McCormick did eventually sign a written easement after Christianson could not be pacified. Christianson never did approve, or execute, a temporary construction easement, and the Project was able to be completed relying only upon the temporary construction easement

signed by McCormick. Under these facts, the actual statements made by Swenson were certainly warranted, as a matter of law, by the information available to Swenson.

Bourgois is the basis for civil instruction number 50.32. In Bourgois, the contractor (Bourgois) had contacted with Montana-Dakota Utilities ("MDU") to tear down a closed steam plant. Bourgois encountered large blocks of buried concrete during the work. This Court allowed the negligent misrepresentation theory to be presented to a finder of fact because an employee of MDU had made the statement to Bourgois that the buried concrete could have been observed through an access hole in a service tunnel at the plant. This raised a fact question as to whether the concrete was discoverable by MDU, and whether describing the project without disclosing the buried concrete was warranted by the information available to MDU. Swenson's assertion that the land north of the permanent easement would be available for a temporary construction easement, which was made based upon the owner of the land telling Swenson that the land would be available for a permanent easement, with the owner having the ability to grant such an easement, and eventually granting the easement (notwithstanding that there was six week delay because the owner of the property wanted Swenson to try to assuage concerns of an individual who held an unexercised option to purchase on the property) does not compare to the an employee having observed large blocks of concrete through an access hole, and simply failing to disclose this concrete on the plans and specifications.

In an obvious grasp at straws, Markwed asserts in its brief, for the first time, an alternate argument that if Markwed does not have an unintentional misrepresentation claim against Swenson, it has a cause of action for deceit. This alternative theory was never presented to the District Court; Markwed never sought to amend its complaint to assert this claimed cause of action.

Furthermore, the claimed deceit is that Swenson made an assertion of fact which was not true without reasonable ground for believing it to be true. As already discussed, the actual relevant statements made by Swenson were true. Moreover, even if it is accepted, for purposes of argument, that the statements turned out to be untrue, Swenson had reasonable grounds for believing the statements it made were true.

The real complaint of Markwed is not that there was any misrepresentation to Markwed; rather, the real complaint is that Markwed believes Swenson was negligent in failing to get a written, signed easement earlier than November, 2006. Dave Patience's testimony is that he did not intend to get a written easement until he knew the area of land needed by the contractor. However, even assuming that this delay was negligence, this does not mean that any statement made by Swenson was a misrepresentation, not warranted by the information available to Swenson. Markwed is simply attempting to convert a claim for negligence (which it does have as a matter of law) or contract breach (based on the alleged failure to comply with contract documents) into a claim for unintentional misrepresentation.

C. The District Court was Correct in Determining that the Contract is Not Unconscionable.

Markwed argues that the no damage for delay clause is unconscionable. To establish unconscionability, this Court has held that a party "must demonstrate some quantum of both procedural and substantive unconscionability, and the courts are to balance the various factors, viewed in totality, to determine whether the particular contractual provision is 'so one-sided as to be unconscionable'". Strand v. U.S. Bank National Association ND, 2005 ND 68, ¶12, 693 N.W.2d 918, 924.

Of the three cases cited by Markwed, the only case in which a contract provision was actually found to be unconscionable was Construction Associates, Inc. v. Fargo Water Equipment Co., 446 N.W.2d 237 (N.D. 1989). In Construction Associates, the plaintiff had purchased pipe from a third party (Fargo Water Equipment). The pipe was provided by Johns-Manville ("J-M"). J-M had provided, with the pipe, a standard limitation of liability provision within a pre-printed installation guide. The buyer was not aware of the provision. This Court concluded that there was a procedural unconscionability because the following factors had all been established (1) there was substantial inequality of bargaining power, (2) there was no room for bargaining or negotiation of the contract provisions, (3) there was an actual lack of negotiation of contract terms, and (4) there was unfair surprise. Id. at 242.

In this case, the parties did not have a substantial inequality of bargaining power, unless every governmental subdivision is considered to have an unequal

bargaining power with every company that chooses to submit a bid on a public contract.

In Construction Associates, there was no direct dealing between the buyer of the pipe, and J-M. The pipe had to be obtained from J-M. Markwed, however, was free to elect to not bid the contract in this case.

Moreover, as David Markwed point out, the General Conditions can be overridden by contract specifications. If Markwed had submitted a bid in a non-standard form, the bid would have been non-conforming; however, Mandan could have elected to negotiate with Markwed as to whether or not to accept a contract modification. If Mandan would not do so, Markwed could have walked away from the Project.

As previously discussed, Markwed has admitted through David Markwed, that it was familiar with the General conditions of Mandan. There was absolutely no element of unfair surprise.

None of the factors required to show procedural unconscionability exist in this case.

In addition, Markwed also cannot demonstrate substantive unconscionability. In Construction Associates, substantive unconscionability was found because the contract limitation left the harmed party with **no** remedy. (This Court did not find procedural unconscionability in either Strand or Rutherford v. BNSF Railway Co., 2009 ND 88, ¶20, 765 N.W.2d 705). Markwed submits that because it was deprived of a claim for compensation there is substantive unconscionability. However, if this were true, **any** no damage for delay clause

would always be substantive unconscionable under **any** circumstances. Markwed had an alternate remedy, which it exercised; specifically, the remedy was to request an extension of the completion date.

In order to show unconscionability, Markwed would have to show both procedural and substantive unconscionability. In this case, Markwed can show neither.

D. The Economic Loss Doctrine, in Any Event, Bars a Tort Action Against Swenson.

The District Court held that the economic loss doctrine bars tort action against Swenson. An argument can be made that this issue does not need to be reached if this Court affirms the District Court as to the enforcement of the no damage for delay clause. Swenson has denied any direct liability to Markwed on Markwed's claims against Swenson, but Swenson has agreed to indemnify Mandan for any liability to Markwed, if any, of Mandan that resulted from the actions, or inactions, of Swenson. It is therefore correct that if Markwed can recover on the Contract from Mandan, it would recover indirectly from Swenson; but Markwed's remedy is at contract, not tort. An argument can be made that the question of damages to Markwed should be controlled by the Contract between Markwed and Mandan regardless of the theory of recovery.

To have a direct claim against Swenson, Markwed would have to have a tort claim against Swenson, since Markwed had no contract relationship with Swenson. The general rule prohibits tort recovery in negligence or products liability for purely economic loss (i.e. losses that do not include personal injury or property damage). This rule originated with the U.S. Supreme Court case of

Robin's Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). In that case, the Court barred the plaintiff's negligence action for loss of use of her chartered boat caused by defendant's negligent repairs because "a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other." Id. at 309.

The United States Supreme Court discussed the purpose of the economic loss rule more recently in East River Steamship Corp. v. Transamerica Delaval, Inc. 476 U.S. 858 (1986). The Court rejected a claim that a company that leased ships with faulty turbines filed against the turbine builder for lost profits for the time the ship could not be used. The Court held contract law provides the more appropriate remedy for alleged design errors. In East River, as in the claim Markwed alleges against Swenson, no person or property was damaged, and the harm is "essentially the failure of the purchaser to receive the benefit of the bargain – traditionally the core concern of contract law." Id. at 870.

The United States Supreme Court further elaborated on this important distinction between tort and contract law:

> Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their agreements. The manufacturer can restrict its liability . . . . In exchange, the purchaser pays less for the product. Since a commercial situation generally does not involve large disparities in bargaining power, we see no reason to intrude into the parties' allocation of the risk.

Id. at 872-73 (citations omitted).

In products liability cases, the North Dakota Supreme Court has adopted the economic loss doctrine, relying on the United States Supreme Court decision

in East River. Cooperative Power Ass'n v. Westinghouse Electric Corp., 493 N.W.2d 661 (N.D. 1992). This Court, in Clarys v. Ford Motor Co., 1999 ND 72, ¶9, 592 N.W.2d 573, held that the economic loss doctrine applies to both consumer purchases and commercial transactions. In Steiner v. Ford Motor Co., 2000 ND 31, ¶7, 606 N.W.2d 881, this Court held that economic loss resulting from damage to a defective product is distinguished from damage to property or other persons.

This Court has not specifically addressed the economic loss rule in construction cases; however, construction disputes, such as Markwed's claim are "commercial controversies" to which contract law is well suited. Applying the economic loss rule to this case is consistent with this Court's holdings that have not allowed the infusion of tort arguments into contract cases. In Dakota Grain Co., Inc. v. Ehrmantrout, 502 N.W.2d 234, 236-37 (N.D. 1993), this Court held:

> A mere breach of contract does not, by itself, furnish a basis for liability in tort for negligence. Seifert v. Farmers Union Mutual Insurance Company, 497 N.W.2d 694 (N.D.1993). Conduct that constitutes a breach of contract does not subject the actor to an action in tort for negligence, unless the conduct also constitutes a breach of an independent duty that did not arise from the contract. Pioneer Fuels, Inc. v. Montana-Dakota Utilities, 474 N.W.2d 706 (N.D.1991). See also Cooperative Power v. Westinghouse Electric Corporation, 493 N.W.2d 661 (N.D.1992) (to hold a manufacturer liable in tort for economic loss for damage to a machine sold in a commercial transaction, would eliminate the distinction between tort and warranty actions).

The Court concluded in Dakota Grain Co. that the plaintiff did not establish that the defendant breached any duty, apart from the obligation under the contract, upon which to base liability in tort for negligence. Id.

Other courts have rejected lawsuits brought by contractors against an

engineer, or other design professorial not in privity with the contractor, that are based on tort because of the general prohibition against recovery in negligence for purely economic loss. See e.g. Williams & Sons Erectors, Inc. v. South Carolina Steel Corp., 983 F.2d 1176 (2nd Cir. 1993); Widett v. United States Fid. & Guar. Co., 815 F.2d 885 (2nd Cir. 1987); Bryant Elec. Co. v. Fredericksburg, 762 F.2d 1192 (4th Cir. 1985); Nat'l Steel Erection, Inc. v. J. A. Jones Constr. Co., 899 F.Supp. 268 (N.D. W. Va. 1995); Fireman's Fund Ins. Co. v. SEC Donohue, Inc., 679 N.E.2d 1197 (Ill. 1997); Floor Craft Floor Covering, Inc. v. Parma Cmty. Gen'l Hosp. Ass'n, 560 N.E.2d 206 (Ohio 1990); Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 881 P.2d 986 (Wash. 1994); Blake Constr. Co., Inc. v. Alley, 353 S.E.2d 724 (Va. 1987); Bates & Rogers Constr. Corp. v. North Shore Sanitary Dist., 471 N.E.2d 915, 916 (App. Ill. 1984).

In Berschauer/Phillips, the court dismissed all tort claims the contractor brought against the architect, engineer and inspector for construction delays, because the Court found the economic loss rule prevented the general contractor from recovering purely economic damages in tort. The court explained:

> The economic loss rule marks the fundamental boundary between the law of contracts, which is designed to enforce expectations created by agreement, and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care on others. The economic loss rule was developed to prevent disproportionate liability and allow parties to allocate risk by contract. Economic loss is a conceptual device used to classify damages for which a remedy in tort or contract is deemed permissible, but are more properly remediable only in contract. Moreover, "economic loss describes those damages falling on the contract side of 'the line between tort and contract'." (Citations omitted.)

Id. at 989-90. The court limited the recovery of economic loss due to

construction delays to the remedies provided by contract, "to ensure that the allocation of risk and the determination of potential future liability is based on what the parties bargained for in the contract." Id. at 992. The court went on to explain if tort and contract remedies were allowed to overlap, certainty and predictability in the allocation of risk by the parties, would impede future business activity. Id. Especially in the construction industry, it is important to preserve the precise allocation of risk secured by contract. Id.

In Bryant, the general contractor had been hired by the city to construct an aqueduct for the city. The general contractor tried to sue the engineering firm hired by the city for economic damages caused by the firm which resulted in significant delay and additional expense. Id. at 1193. While recognizing that lack of privity is not a defense to certain cases for public policy reasons in which there is injury to a person or property, the court concluded in the absence of physical injury, there is no viable action in tort. Id. at 1196.

As the court stated in Blake:

> The architect's duties both to owner and contractor arise from and are governed by the contracts related to the construction project. While such a duty may be imposed by contract, no common-law duty requires an architect to protect the contractor from purely economic loss. There can be no actionable negligence where there is no breach of a duty "'to take care for the safety of the person or property of another.' "
>
> . . .
>
> The parties involved in a construction project resort to contracts and contract law to protect their economic expectations. Their respective rights and duties are defined by the various contracts they enter. Protection against economic losses caused by another's failure properly to is but one provision the contractor may require in striking his bargain. Any duty on an architect in this regard is purely a creature of contract. (citations omitted)

Id. at 726 & 727.

In Fireman's Fund, the subrogee to the subcontractor brought a tort action against an engineering firm for economic damages, caused by the engineering firm erroneously locating the site for digging and boring the spot for underground water service 73 yards south of the correct location. The result was the construction company damaged the shoulder of a tollway and incurred additional costs in constructing the underground water service. Id. at 1198. The court determined, in answer to a certified question, that the economic loss doctrine bars recovery in tort against engineers for purely economic losses. Also, despite the recognition of a negligent misrepresentation exception to the economic loss rule, the court held that exception did not apply in that case against an engineer because the object of the contract was the tangible result, (the underground water service) which was readily ascertainable and can be "memorialized in a contract and studied by the parties." Id. at 1206.

In Bates, the contractors and subcontractors sued the engineers in tort, alleging they were negligent in design of equipment and negligent in supervision of a sewage treatment plant project. The contract between the sanitary district and the contractor included a no-damages-for-delay clause. The contractors did not engage the engineers and the economic losses suffered by the contractor "related strictly to their disappointed expectation interest in receiving the benefit of their contract." Id. at 924-5. The engineers moved for summary judgment based on the no damage for delay clause, and won. The court recognized tort law was appropriate if there had been personal injury or property damage

resulting from dangerous occurrence, or if a contractor directly contracts with a professional, such as an engineer. Id. at 924. The appellate court affirmed the dismissal of the case against the engineers, recalling prior cases that held "purely economic loss arising from disappointed commercial expectations is limited to recovery in contract, not tort." Id. at 918. The appellate court held that the contractor could not recover damages in tort against the engineers, even if proved, because the remedy of the contractor was in contract, not in tort. Id. at 925.

The District Court in this case held that the economic loss doctrine bars a tort action against Swenson. The Court so stated in the heading to section V of the District Court's opinion dated October 2, 2009 (App. p. 182); and it again stated this holding at the end of this section (App. p. 183). However, one of the arguments Markwed had made in it briefing to the District Court as to why the Court should not so hold was that the economic loss doctrine should not apply to service contracts; and that the Contract was a service contract. Swenson had responded in its briefing that there was a split of authority on the question of whether the economic loss doctrine applied to service contracts; and that in any event the Contract was for construction, and not for services between Markwed and Swenson. Although the District Court held that the economic loss doctrine bars a tort action against Swenson, the District Court did include a statement in its opinion that the economic loss doctrine was inappropriate in this case because neither a consumer purchase nor a commercial transaction took place.

Markwed's sole argument on appeal of the ruling that the economic loss

doctrine bars a tort action against Swenson is to seize on this apparent inconsistency. However, it is clear that the District Court determined that the economic loss doctrine bars a tort action against Swenson; and in making the statement Markwed contends is inconsistent with this holding, the District Court did not intend to change its holding. In fact, Markwed argued to the District Court, in Markwed's Supplemental Brief in Response to Motion for Summary Judgment for the City of Mandan and Motion for Summary Judgment for Swenson, Hagen Co. that the District Court should reverse its ruling because of this statement in its opinion (Swenson Supp. App. p. 40 & 41). The District Court did not do so in its Opinion dated November 30, 2009 (App. pp. 215-220). The determination that the economic loss doctrine bars a tort action against Swenson was correct; Markwed's continued reference to this one arguably inconsistent sentence in the District Court's opinion adds nothing to the validity of its attempt to keep the economic loss doctrine from barring Markwed's purported direct claim against Swenson.

Moreover, even if the economic loss rule did not bar a direct claim against Swenson, this Court's holding in Dakota Grain Co. would still bar such a claim in view of the fact that Markwed's purported negligence claim is based on nothing more than an alleged breach of contract for the alleged failure to provide a temporary construction easement before November 6, 2006.

CONCLUSION

In conclusion, this Court should affirm the District Court's determination that the no damages for delay clause in the Contract between Mandan and Markwed is binding upon Markwed, thereby barring any claim for Markwed for damages in this matter. Enforcing the no damages for delay clause is consistent with North Dakota contract law.

The only reason to not enforce the no damages for delay clause would be if Markwed could establish the elements for a claim of negligent (a/k/a unintentional) misrepresentation against either Mandan, or Swenson. The District Court's determination that Markwed could not establish the elements of such a claim was correct; and accordingly, the District Court's denial of the Motion to Amend should be affirmed. Such a claim could not survive a summary judgment motion.

The Contract, and specifically the no damage for delay clause, is not unconscionable. For the no damage for delay clause to be unconscionable, Markwed would have to show both procedural unconscionability, and substantive unconscionability. Markwed can show neither.

Finally, if this Court feels that it even needs to reach the issue, the District Court's holding that the economic loss doctrine bars a tort action against Swenson in this matter should be affirmed.

Dated this 6th day of May, 2010.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for defendant/appellee Swenson, Hagen & Co. in the above matter, and as the authors of the above brief, hereby certify in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, and certificate of compliance totals 9,871.

Dated this 6th day of May, 2010.

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